

UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior - - - - - William P. Clark

Office of Hearing and Appeals - - - Paul T. Baird, Director

Office of the Solicitor - - - Frank K. Richardson, Solicitor

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

EDITED BY

RACHAEL CUBBAGE

BETTY H. PERRY



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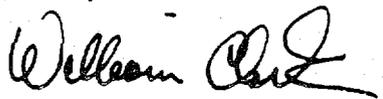
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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1984, to December 31, 1984. It includes the most important administrative decisions and legal opinions rendered by officials of the Department during that period.

The Honorable William P. Clark served as Secretary of the Interior during the period covered by this volume; Ms. Ann Dore McLaughlin served as Under Secretary; Messrs. G. Ray Arnett, Robert N. Broadbent, Garrey E. Carruthers, Richard R. Hite, Richard Montoya, Kenneth L. Smith, served as Assistant Secretaries of the Interior; Mr. Frank K. Richardson served as Solicitor. Mr. Paul T. Baird served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "91 I.D."

A handwritten signature in black ink, appearing to read "William Clark". The signature is written in a cursive style with a large initial "W" and a long, sweeping underline.

Secretary of the Interior

IN MEMORIAM

DANIEL STEWART BOOS

1927-1985

This volume of Decisions of the Department of the Interior is dedicated to the memory of Daniel Stewart Boos, Administrative Law Judge (Indian Probate), Billings, Montana. Judge Boos began his career with the Department of the Interior in 1957 in the Solicitor's Office. In 1970 he transferred from the position of Minneapolis Field Solicitor to become an Indian probate Hearing Examiner in the newly formed Office of Hearings and Appeals. In his fourteen years of presiding over Indian probate proceedings for the Office of Hearings and Appeals, Judge Boos decided more than 3,400 cases, and was reversed on appeal only once. His erudition, legal ability, and collegiality will be sorely missed by all who worked with him.

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

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

AUTHORIZATION FOR OIL AND GAS LEASING ON THE NATIONAL PETROLEUM RESERVE--ALASKA*

M-36940

October 15, 1981

Alaska: Oil and Gas Leases--Mineral Leasing Act: Applicability

The DOI Fiscal 1981 Appropriations Act authority to lease oil and gas in the National Petroleum Reserve--Alaska (NPR-A) is authority independent of the Mineral Lands Leasing Act of 1920 and applicable to all lands within the boundaries of the NPR-A. The Department sought such authority and the two Appropriations Committees worked to establish such independent authority.

Mineral Leasing Act: Applicability--Naval Petroleum Reserves-- Statutory Construction: Implied Repeals

The conclusion that the Appropriations Act is independent leasing authority is not an implied repeal, *pro tanto*, of the Mineral Leasing Act of 1920 because the Naval Petroleum Reserves Production Act of 1976 explicitly precluded the operation of the MLA on the NPR-A, and the Appropriations Act modified that withdrawal *only* for the purpose of the oil and gas leasing program authorized in the Appropriations Act.

OPINION BY DEPUTY SOLICITOR TIDWELL

OFFICE OF THE SOLICITOR

Memorandum

TO: DIRECTOR, BUREAU OF LAND MANAGEMENT
DIRECTOR, GEOLOGICAL SURVEY

FROM: DEPUTY SOLICITOR

SUBJECT: AUTHORIZATION FOR OIL AND GAS LEASING ON THE NATIONAL
PETROLEUM RESERVE--ALASKA

On May 22, 1981, I wrote the Deputy Under Secretary that I had concluded that the Fiscal Year 1981 Department of the Interior Appropriations Act constituted new and independent oil and gas leasing authority for the National Petroleum Reserve in Alaska, and that the Mineral Lands Leasing Act of 1920 is not applicable to the Reserve. This memorandum details the reasons for that conclusion.

* Not in chronological order.

Issue

Do the provisions of the Interior and Other Related Agencies Appropriation Act for 1981, Pub. L. 96-514, 94 Stat. 2957, which authorize oil and gas leasing on the National Petroleum Reserve in Alaska (NPR-A) constitute new leasing authority for the Reserve or do the provisions of the Mineral Lands Leasing Act of 1920 (the Mineral Leasing Act or MLA), 30 U.S.C. § 181 *et seq.*, apply as amended by the Appropriations Act?

The Appropriation Act of 1981 provided in relevant part:

For necessary expenses of carrying out the provisions of section 104 of Public Law 94-258, and for conducting hereafter and with funds appropriated by this Act and by subsequent appropriation Acts, notwithstanding any other provision of law and pursuant to such rules and regulations as the Secretary may prescribe, an expeditious program of competitive leasing of oil and gas in the National Petroleum Reserve in Alaska, \$107,001,000, to remain available until expended: *Provided*, . . .¹

Section 1 of the MLA Act provides that "Deposits of . . . oil . . . or gas, and lands containing such deposits owned by the United States . . . , but excluding . . . lands within the naval petroleum and oil-shale reserves . . . , shall be subject to disposition in the form and manner provided by this Act . . ." 30 U.S.C. § 181, as amended. Section 37 of the MLA goes on to provide that "The deposits of . . . oil . . . and gas, herein referred to, in lands valuable for such minerals, such shall be subject to disposition only in the form and manner provided in this Act . . ." 30 U.S.C. § 193, as amended.

The provisions of the Appropriations Act create terms for oil and gas leasing different from the oil and gas leasing provisions of the MLA. See 30 U.S.C. § 226. The question is whether all provisions of the MLA not superseded or nullified by direct conflict with a provision of the Appropriations Act remain in effect, and the MLA is the underlying law applicable to oil and gas leasing on the NPR-A.

The leading case for determining whether legislation is new authority or an amendment of earlier statutory authority is *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958). The Supreme Court established the following criteria: (1) does the title of the new statute purport to amend the earlier statute; (2) does the new statute on its face purport to amend the earlier statute, *i.e.*, is the earlier statute set out in quotations; and (3) did the Congress express the intent during the legislative process to amend the earlier statute.

The answers to the first two questions in the case of the NPR-A plainly are no. We have concluded that the answer to the third question is also no.

Background

The Naval Petroleum Reserve No. 4 (the Reserve) was created by Executive Order No. 3797-A on February 27, 1923, at the joint request of the Department of the Navy and the Department of the Interior. As indicated above, the MLA by its own terms does not apply to naval

¹ There follow nine numbered provisos governing the procedures for and scope of the oil and gas leasing program. The critical fourth proviso is quoted and discussed below.

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petroleum reserves. The act of creating the Reserve thus removed it from the operation of the MLA by its own terms. 30 U.S.C. § 181. The Department of the Navy originally oversaw the exploration and development of the Reserve, which was relatively modest until the first half of the 1970's. Then, commencing in 1971, exploration expenditures and activities rose each year through 1980.

In 1976, however, in Title I of the Naval Petroleum Reserves Production Act (NPRPA), 42 U.S.C. § 6501 *et seq.*, Congress ordered the transfer of the Reserve to the Department of the Interior, effective June 1, 1977, and gave it its current name. In the absence of further Congressional action in the NPRPA, the MLA would have become applicable, as the Reserve was no longer a "naval petroleum reserve." In section 104 of the NPRPA however, Congress prohibited production of petroleum from the Reserve and further mandated that there would be no production until authorized by Congress, and in section 102 of the NPRPA Congress withdrew the land from, among other things, the operation of the mineral leasing laws. Section 105(b) of the NPRPA mandated a study under the direction of the President and in conjunction with the State of Alaska and Alaskan Natives to determine the best method of development of petroleum on the Reserve. The final report was to be filed with Congress on January 1, 1980.

The 105(b) Report² was filed on December 15, 1979. From the transcripts of the House and Senate Hearings on the Appropriations Act, it is clear that the 105(b) Report was examined and considered by both Houses. The face of the Appropriations Act itself alludes to the 105(b) Report when it states:

The detailed environmental studies and assessments that have been conducted on the explorations program and the comprehensive land-use studies carried out in response to sections 105(b) and (c) of [the NPRPA] shall be deemed to have fulfilled the requirements of section 102(2)(c) of the National Environmental Policy Act (Public Law 91-190), with regard to the first two oil and gas lease sales in the [NPR-A] . . .³

Therefore, it is relevant to this discussion to examine this 105(b) Report.

The 105(b) Report recommended five comprehensive management approaches to the NPR-A:

1. Accelerated petroleum development by the Federal Government.
2. Traditional Outer Continental Shelf-type leasing and development procedures (this is also called the "base case").
3. Public sector exploration, development, and production.
4. Major attention to environmental values.

² "Final Report of the 105(b) Economic and Policy Analysis"--Alternative Overall Procedures for the Exploration, Development, Production, Transportation, and Distribution of the Petroleum Resources of the National Petroleum Reserve in Alaska (NPR-A)--Prepared by the U.S. Department of the Interior, Office of Minerals Policy and Research Analysis--Under Section 105(b) of the Naval Petroleum Reserves Production Act of 1976--December 15, 1979.

³ Public Law 96-514, 94 Stat. 2957, 2964-2965.

5. Accelerated development with major attention to environmental values.

The 105(b) Report at page 12 analyzed nine alternative resource transfer systems:

1. Bonus bid with fixed royalty.
2. Bonus bid with sliding scale royalty.
3. Bonus bid with fixed profit share.
4. Work commitment with acreage relinquishment.
5. Two stage system with profit share bid for exploration and bonus bid for development and production.
6. Bonus bid for development following public exploration.
7. Price bid for produced resources following public exploration and development.
8. Negotiated concession agreement.
9. Multimineral lease.

Only the first of these systems is currently available for oil and gas leasing under the MLA, but the MLA was never discussed as a method of carrying out that system.

In fact, in discussing the leasing system to be used in opening the Reserve to private development, the 105(b) Report strongly indicates in several ways that the Mineral Leasing Act would not be appropriate. The report answered the questions as to what lease terms should apply to the NPRA when it stated:

The National Petroleum Reserve in Alaska is not currently subject to any of the mineral leasing laws applicable to the Federal lands in the rest of the United States. If and when the Federal Government were to decide to lease NPRA to the private sector, the Congress and the Secretary of the Interior would need to specify lease terms in addition to a resource bidding system or systems to be used.⁴

The 105(b) Report is consistent throughout that the Mineral Leasing Act should not apply:

"... since new authorities are being sought to develop the NPRA, the revenue sharing provisions of the Mineral Leasing Act or the Refuge Administration Act would not apply. Emphasis would be placed on providing technical and planning assistance and information to impacted areas as well as on financial assistance."⁵

In a discussion of revenue distribution to the State of Alaska from development of the NPR-A, the 105(b) Report never mentioned redistribution under section 35 of the MLA, 30 U.S.C. § 191. The Report stated:

[R]evenues would accrue to the State primarily from the State Severance tax, the corporate petroleum income tax, the State property tax, and from personnel income tax. Taxable property includes equipment, surface facilities and transportation systems. In 1978, the State of Alaska derived 58 percent of its total revenues from the petroleum industry and a \$760 million surplus accrued in the State General Fund.⁶

⁴ 105(b) Report at 52.

⁵ 105(b) Report at 113.

⁶ 105(b) Report at 110.

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Legislative History

This background is important in analyzing the Appropriations Act because the Appropriations Committees obviously followed the recommendations of the 105(b) Report. In the provisos to the oil and gas leasing authority in the law, the recommendations of the 105(b) Report were clearly incorporated. An examination of other legislative consideration during the 96th Congress of authorization for the production of oil and gas from the Reserve also supports the conclusion that Congress sought and enacted independent leasing authority.

On May 13, 1979, the House of Representatives passed H.R. 39. After numerous amendments, this became the Alaska National Interest Lands Conservation Act (Public Law 96-487, 94 Stat. 2371, 16 U.S.C. § 3101 *et seq.*) on December 2, 1980. H.R. 39, as originally passed by the House in 1979, converted the Reserve to a wildlife refuge under Title III, but Title XII opened portions of it to leasing under the Mineral Leasing Act. Section 1205 only permitted leasing on a competitive basis.

In 1980, four additional bills were introduced in the 96th Congress concerning the opening of the Reserve to leasing. Two of these bills were introduced at the request of the Administration and were entitled: "To establish the Western Arctic Management Area in Alaska, and for other purposes." These were H.R. 6630 introduced by Mr. Udall and S. 2524 introduced by Mr. Jackson. Consistent with the 105(b) Report, these bills sought a system different from the MLA, and made no mention of the MLA in their provisions. They were both designed to establish new leasing authority in the Secretary of the Interior. S. 2525 ("To establish the Arctic North Slope National Conservation Area") also introduced by Mr. Jackson similarly vested the Secretary with new leasing authority. H.R. 7064 ("To establish the Western Arctic Management Area in Alaska") introduced by Mr. Young, would have opened the Reserve to leasing under the MLA.

The House Committee on Interior and Insular Affairs did not hold hearings on either of the two leasing bills (H.R. 6630 and H.R. 7064) pending before it, but on July 2, 1980, the House Appropriations Committee published a report on H.R. 7724, the proposed Fiscal Year 1981 Appropriations Act. The Committee had included language in the Appropriations bill to authorize leasing on the NPR-A. It stated in part:

Because the Committee agrees that it is better to have the varied exploration strategy that would be provided by industry, and because no imminent action on legislation is apparent, the Committee is providing authority in its bill for the Secretary of Interior to carry out a leasing program on the Reserve. The Committee believes that this authority and the continuation of the government program in the interim period is a balanced and responsible program.⁷

⁷H.R. Rep. No. 1147, 96th Cong., 2d Sess. 33 (1980).

On July 30, 1980, the floor debate was held for the particular portion of the Appropriations Act now before us for interpretation. Several points were in strong contention. Congressmen Seiberling and Udall each attempted to dissuade the Congress from incorporating leasing legislation into H.R. 7724. At one point, Mr. Seiberling pointed out that leasing authority had been incorporated in H.R. 39 and passed in 1979 in the House and was then pending before the Senate.⁸ He characterized the leasing authority in H.R. 39 as being similar to the proposal before the House. Congressman McDade, Ranking Minority Leader of the Committee on Appropriations, Subcommittee on Interior, rebutted by stating:

Mr. MCDADE: Let me say, under the existing law, under that House-passed--and there are not many of us who know that--we ought to understand what happened.

This province was transferred to the Fish and Wildlife Service. It was no longer a petroleum reserve. It was transferred to the Fish and Wildlife Service as a refuge. The manager of this petroleum reserve, our most promising in the United States of America, would be the Fish and Wildlife Service. All leasing would have to be conducted under the Mineral Leasing Act of 1920. One could not lease in sizes over 640 acres.

* * * * *

Mr. MCDADE: If the gentleman will continue to yield, the size of the tracts would be limited to 640 acres. What we need and do in our statute is to move those sizes up to 50,000 and 60,000 acres. This is an enormous tract, and as I said, in a highly hostile environment. It limits the bidding system, the old Mineral Act. The statute that we are passing today, if this body votes with us, gives the administration total authority to pick any type of leasing arrangement that they choose.

The statute, by the way, also says that when the Secretary of the Interior conducts these operations, he must do so in a manner that treats this petroleum reserve with the greatest possible reverence, with the greatest possible environmental concern, if you will; but it permits him the flexibility to do what he has asked us to do, to do what he has asked the Committee on Interior and Insular Affairs to do, but to do what he cannot do today. He does not have the statutory authority to do any of those things. We are giving him that statutory authority.⁹

From these remarks fair inference can be drawn that Mr. McDade viewed his Committee's proposal as being authority other than the Mineral Leasing Act, and as authority similar to that requested by the Administration, which was itself new and separate authority and not merely an amendment of the Mineral Leasing Act. Mr. McDade certainly emphasized the Appropriations Committee's desire to respond favorably to the request of the Administration.

On the Senate side, when Senator Stevens conducted hearings on H.R. 7724, the following exchange took place:

SENATOR STEVENS: . . . Why don't we just write leasing legislation into this bill? What kind of legislation would you have to have in order to get this thing into position where you could lease it within 1 year?

[DEPUTY ASSISTANT SECRETARY OF THE INTERIOR] EDDY: We have, of course, proposed a fairly detailed bill because we wanted to deal specifically with a number of

⁸ 126 Cong. Rec. H 6779-6780 (daily ed., July 30, 1979). (Remarks of Rep. Seiberling.)

⁹ 126 Cong. Rec. H 6780 (daily ed., July 30, 1980). (Remarks of Rep. McDade.)

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potention problems in the land management area to avoid what could be delays awaiting wilderness reviews, potential land planning delays, and so forth.

We could certainly deal with leasing with a general grant to authority that allowed us to proceed and also allowed us or directed us to waive or provide certain strict time limits on some of the mandatory planning processes under FLPMA, the Federal Land Policy Management Act.¹⁰

Two more areas of contention both in the House and in the Senate were whether to continue the active drilling program of the Federal Government and whether the entire reserve should be open to private leasing. Senator Stevens stated:

SENATOR STEVENS: Let me emphasize again the NPRA in terms of its impact on this bill. You're either going to face a demand on the one hand to put the money back in and continue the Husky program at its current level or we're going to have to demonstrate that we can, through some special authority given you under this bill, bring about private development activities that would be of lower intensity, without dropping the ball.

I think that can be done. I urge you to think about it and to respond to our additional questions. Senator Jackson and I have already discussed it. The chairman has a feeling against increasing the amount here during this tight budget year, but he also wants to see the activity continue, at least at the existing rate of exploration.

It could be done without getting into an argument over what should be given to HCRS or anything else if we just specifically detail the areas *where this special authority could be used and give you the authority*. I think the industry will jump at the chance to get in there next year if you do it properly . . .¹¹ (Italics added.)

He continued to refer to "special authority" for the leasing authorization in the National Petroleum Reserve--Alaska and never indicated that he viewed the proposed legislation as an amendment to the Mineral Leasing Act.

Later, a series of questions was submitted to Interior by the Senate Appropriations Committee. The Department's answers to some of these questions were particularly pertinent:

Question. What are the specific barriers to opening the NPRA to competitive leasing immediately? First, what act of Congress is required to permit leasing?

Answer. The principal barrier to opening NPRA to competitive leasing is the prohibition clause contained in Section 104(a) of the Naval Petroleum Reserves Production Act of 1976 which states:

"No development leading to production of petroleum from the reserve shall be undertaken until authorization by an Act of Congress."

Congress would have to pass legislation to authorize the Secretary to lease lands within NPRA for exploration, development, and production of oil and gas resources. Our preferred option is the enactment of the Administration proposal, H.R. 6630.¹²

* * * * *

¹⁰ Department of the Interior and Related Agencies Appropriations for Fiscal Year 1981, Hearings held before a Subcommittee of Committee on Appropriations, United States Senate, H.R. 7724, Part 4, 96th Cong., 2d Sess. 370 (1980). (Statements of Senator Stevens and Deputy Assistant Secretary Charles Eddy.)

¹¹ *Id.* at 381.

¹² *Id.* at 399.

Question. What particular problems, if any, would be associated with language that would make the provisions of the Mineral Leasing Act applicable to NPRA?

Answer. The major problems resulting from applying the Mineral Leasing Act (MLA) provisions to NPRA operations would be:

- limitation placed on competitive leasing. Competitive leasing would be limited to areas of known geological structure of a *producing* oil and gas field. The Barrow gas field is the only producing field in NPRA.
- limitation on lease size. Under the MLA, the maximum lease size is 640 acres. High risk, cost and uncertainty involved in the Arctic justify larger tracts. Moreover, the structures are very large in this area.
- limitation of the lease term. Under the MLA, the primary term of competitive leases is limited to 5 years. The long leadtime and limited operating period will justify up to 10-year leases.
- limitation on leasing system. The MLA limits leasing to a royalty plus bonus bid system. The high risk, cost, and uncertainty justify use of other systems.
- reduction in competition. A 300,000-acre limitation is placed on the number of acres that any one individual or corporation may hold in north Alaska.¹³

The history of the Appropriations Act shows that both Houses, in debating the appropriations bills, sought to avoid the application of the Mineral Leasing Act, because of the perceived inapplicability of its oil and gas leasing procedures to conditions in the NPR-A. In addition, both Houses sought to provide the Department with the type of new leasing authority it had sought, designed specifically for the NPR-A without incorporation or use of any provisions of the Mineral Leasing Act.

The Conference Report on H.R. 7724 was issued on Nov. 20, 1980. The Conferees reported:

Amendment No. 37: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which rescinds withdrawals established by Section 102 of Public Law 94-258 *only* for the purposes of the oil and gas leasing program authorized in this appropriation. (Italics added.)¹⁴

Amendment No. 37 explains the important proviso of the Appropriations Act, "(4) the withdrawals established by section 102 of [the NPRPA] are rescinded for the purposes of the oil and leasing program authorized herein." The withdrawals are not rescinded for any other purpose, such as making the general provisions of the Mineral Leasing Act applicable in the NPR-A.

The face of the enacted legislation gives rise to the clear inference that the leasing program is an amendment to section 104 of the NPRPA, which is expressly cited as the provision of law the appropriation and the leasing authorization implement. Both the language in the Act and that quoted from the Conference Report indicate that the leasing is authorized solely by this Appropriations Act, and that the Appropriations Act did not otherwise amend the NPRPA.

¹³ *Id.* at 416-417.

¹⁴ H.R. Rep. No. 1470, 96th Cong., 2d Sess. 16 (1980).

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The National Petroleum Reserve in Alaska was excluded from the operation of the Mineral Leasing Act by the withdrawals in section 102 of NPRPA. In 1976, the Conference Report on the Naval Petroleum Reserves Production Act stated:

It is the specific intent of this provision that all lands be explicitly excluded from the provision of the Mineral Leasing Act of 1920.¹⁵

Proviso (4) of the Appropriations Act makes it clear that the withdrawals in the NPRPA otherwise remain in effect, and thus the NPR-A remains excluded from the operation of the Minerals Leasing Act. There is thus no issue of implied repeal of the Mineral Leasing Act presented. The NPRPA expressly closed the NPR-A to the operation of the Mineral Leasing Act, and the Appropriations Act did not undo that; it only opened the NPR-A to the operation of this specific, new, independent leasing authority.

Furthermore, the Appropriations Act refers especially to four statutes by name, section, and subsection. If the Congress wished to amend the Mineral Leasing Act by the Appropriations Act it could have and would have referred to the specific sections of the Mineral Leasing Act to be amended.

Conclusion

For the foregoing reasons, we have concluded that the Appropriations Act is independent leasing authority and that the Secretary has the power to promulgate all needful rules and regulations to formulate a complete leasing program on the entire National Petroleum Reserve in Alaska, regardless of whether the lands were originally public lands or acquired lands, uplands, or submerged lands.

Both the withdrawal in section 102 of NPRPA and the new leasing authority extend to all lands within the boundary of NPRA. Neither the withdrawal nor the new authorization was confined to public domain lands. Therefore, we conclude that all lands within the Reserve were intended to be included within the new authority.

MOODY R. TIDWELL
Deputy Solicitor

GIAN R. CASSARINO

78 IBLA 242

Decided January 10, 1984

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting oil and gas lease offer AA-48576.

Affirmed as modified.

¹⁵ H.R. Rep. No. 94-258, 94th Cong., 2d Sess. 20 (1976).

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

An oil and gas lease offer is properly rejected under provision of 43 CFR 3111.1-1(a) where the offeror signs only two copies of five submitted lease offer forms.

2. Oil and Gas Leases: Noncompetitive Leases

A defect in a noncompetitive oil and gas lease offer may, in the case of over-the-counter offers to lease, be curable. If the defect in the offer is cured, the offer obtains priority on the date it is correctly completed. However, while this rule has been applied in the past to permit offerors to rectify disqualifying errors and omissions after BLM has properly rejected them, the Board now finds that practice to be inappropriate and contrary to public policy and efficient administration. Henceforth, no "curative" submissions will be received by the Board of Land Appeals to reinstate lease offers which have correctly been rejected by BLM because of the deficiency.

APPEARANCES: Gian R. Cassarino, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

Gian R. Cassarino appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 28, 1983, rejecting his noncompetitive oil and gas lease offer AA-48576 for failure to comply with requirements of 43 CFR 3111.1-1(a) by filing only two signed copies of the Departmental lease offer form. The record on appeal contains five copies of Departmental Form 3110-1, dated March 3, 1983, only two of which are signed by appellant. In his statement of reasons, filed with five signed copies of Form 3110-1, dated March 7, 1983, appellant contends his lease offer was filed "in quintuplicate," and argues that if any copies of the document are missing, they were lost by BLM clerks.

[1] Departmental regulation 43 CFR 3111.1-1(a) provides, pertinently:

[T]o obtain a noncompetitive lease an offer to accept such lease must be made on a form approved by the Director * * *.

A lease offer must be submitted on five signed copies of the form approved by the Department. *Duncan Miller*, 10 IBLA 208, 211 (1973). Since appellant did not sign three of the five forms included in his offer as submitted, his offer was defective, and was properly rejected by BLM.

The argument advanced by appellant, that he submitted his offer in quintuplicate, does not directly address the defect in his submission. It was not sufficient, under provision of 43 CFR 3111.1-1(a), to merely submit five copies of the Departmental form. To be entitled to consideration as a valid offer, appellant was required to submit five *signed* copies of the form. The record on appeal indicates affirmatively that he failed to do so.

Similarly, appellant's argument that any defect in his application was attributable to BLM mishandling of his offer is without apparent basis. The appearance in the record on appeal of five copies of appellant's March 3, 1983, submission, only two of which are signed,

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indicates that BLM correctly adjudged appellant's offer to be deficient for the reason stated in the decision rejecting his offer. This circumstantial evidence of record is supported by appellant's argument on appeal, which does not deny that he failed to sign three of the five copies submitted, but merely contends that five copies of the Departmental form were submitted. That fact is not an issue, since quite clearly five copies were received by BLM. The fact that only two of them were signed, however, is the reason the offer was rejected. As stated previously, this fact is not directly denied by appellant.

[2] Appellant, however, also filed five signed copies of his offer, dated March 7, 1983, with his notice of appeal on April 8, 1983, with the declared intention of correcting the deficiency.

Where a regular noncompetitive lease offer is filed "over-the-counter," 43 CFR 3111.1-1(e) (1982) provides that it will be approved notwithstanding certain deficiencies which are specifically listed in the regulation. In cases where the offer is deficient for reasons other than those listed in the regulation, the Board has long followed the practice of permitting the offeror to "cure" such deficiencies so that the offer can earn priority from the date the filing is perfected in conformity with Departmental requirements. *See, e.g., Ballard E. Spencer Trust, Inc. v. Morton*, 544 F.2d 1067 (10th Cir. 1976), *aff'g Ballard E. Spencer Trust, Inc.*, 18 IBLA 25 (1974); *Bear Creek Corp.*, 5 IBLA 202 (1972). Therefore, appellant's offer could hold priority of consideration from April 8, 1983. In the event there are no prior filings for the same lands, his offer should be considered for award of the lease. *See also Richard F. Carroll (On Reconsideration)*, 76 IBLA 151, 90 I.D. 432 (1983).

The Board now perceives that the practice of allowing such defective offers to be "cured" and restored to efficacy by the submission of new material *after* BLM has adjudicated and rightly rejected them is improper, contrary to efficient administration, and contrary to the public interest. This finding rests on several bases.

First, the *only* advantage that accrues to the offeror by filing "amendments" or other curative material or information after his offer has been rejected is that he avoids paying the \$75 filing fee which he would owe if he simply refiled a correct offer with BLM. There is no justification to permit him to thus avoid payment of another filing fee. BLM has received the offer as initially filed, posted its records, handled the accounting, adjudicated the case, issued the decision, received the notice of appeal, shipped the case file to this Board, where it is processed, docketed, reviewed by a panel of judges, and another decision is rendered, printed, and distributed, and the record returned to BLM. By this point, the Government has spent the initial \$75 filing fee many times over. Why should the same offer have to be processed again, at taxpayer expense, simply because the offeror is

allowed to "correct" his offer rather than file a new one which is acceptable?

Second, as an appellate tribunal, this Board's primary function is to review BLM's decisions to determine if they reach a proper result in accordance with the law, regulations, and Departmental policies. If such decisions were properly rendered, BLM deserves, in most cases, to have them affirmed.¹

Third, it is *not* the function of this Board to receive filings of that sort or to decide the effect of materials which BLM has not had the opportunity to review and adjudicate initially. In its receipt of over-the-counter lease offers, BLM uses a *time* and *date* stamp, some of which are calibrated in *tenths of minutes*, because the time is more critical than the date in fixing the respective priorities of conflicting offers. This Board is not equipped to do that, and it is not our function. Hypothetically, we might set an appellant's new priority on April 6, 1983, only to discover that another acceptable offer had been filed with BLM at 2:37.6 p.m. on that same day. How could the conflict be equitably resolved?²

Fourth, if no appeal is filed, the BLM decision becomes final for the Department. The filing of an appeal should not create a new opportunity for an offeror to correct all the original deficiencies.

In the case at hand, appellant did not send some curative document or information to this Board; he filed a notice of appeal with BLM and accompanied it with a resubmission of the offer in five new copies, properly executed. Had he simply foregone the appeal and paid the new filing fee with his new submission of lease forms, the cost to the Government of the entire appellate review could have been avoided, and the lease issued much more expeditiously. Instead, he saved paying a second filing fee and the cost of this unnecessary appeal and the reprocessing of the offer by BLM was imposed on the Government.

Henceforth, the Board will no longer permit defective regular, "over-the-counter" noncompetitive oil and gas lease offers to be resuscitated with new priority by the submission of "curative" material *after* those offers have been properly rejected by BLM. Such defective offers may still be cured *before* their rejection by BLM, with priority as of the date and time of their perfection. Prior Departmental decisions holding to the contrary will no longer be followed.

However, in the case at bar, it is the sense of the Board that in view of the long history of allowing such lease offers to be cured after rejection, and the abundant precedent upon which appellant is entitled to rely, the rule announced above should be implemented with prospective effect only.

¹ The Board, of course, will continue to consider new information generated after issuance of a BLM decision, and reverse, remand or modify even those decisions which were correctly made, where considerations of equity, new statutes, regulations, precedent, policy, or factual revelations make such action appropriate.

² That hypothetical problem could not arise in this case because the second set of appellant's offer forms passed through the BLM office before being sent to the Board, and were given the BLM stamp indicating the date *and* the time of receipt. However, in other cases the curative materials have been filed directly with this Board, and have only a date stamp to fix their priority.

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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 this opinion. BLM is instructed to consider whether, under the circumstances, appellant's offer may be deemed, as of April 8, 1983, to be a perfected lease offer, and entitled to priority as of that date.

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

JAMES L. BURSKI
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

WILL A. IRWIN
Administrative Judge

R. W. MULLEN
Administrative Judge

ADMINISTRATIVE JUDGE ARNESS CONCURRING IN THE RESULT:

Although I agree with the result of the decision in this case, I am concerned that the Board today overrules a pattern of decisionmaking which has its apparent basis in prior Departmental precedent extending as far back as 1961. See *William B. Collins*, 4 IBLA 9 (1971); *Raymond W. Russ*, A-29294 (Mar. 18, 1963). Until now, this Board has consistently applied the rule that, in the case of over-the-counter offers only, an applicant might, following rejection by BLM, cure the defect in his offer which had caused its rejection. See discussion of this rule and its limitations in *Richard F. Carroll (On Reconsideration)*, 76 IBLA 151, 160-63, 90 I.D. 432 (1983). The reason for the reversal now, in dicta to this decision, of a rule followed consistently for 20 years, is not apparent in the record of this appeal nor in previously reported decisions which developed and apply the rule. BLM, the Bureau of the agency most directly concerned with application of the rule, has not complained that the rule is administratively burdensome in the manner described by the majority opinion.

Indeed, the only appearance in this appeal is made by appellant, who has not directly raised the issue. Although the Board speculates that the rule might have become administratively inconvenient and could result in an ambiguous situation where two offers conflict because of a filing of successive over-the-counter offers on the same day, that situation has not been presented in this case, nor, apparently, in any other case in the 20 years in which this practice permitting curative action during appeal has been followed. The imagined advantages to be obtained by a change in the rule do not appear to justify the probable disadvantage to those offerors who, in continued reliance upon prior practice may continue to attempt to perfect defective over-the-counter offers during appeal.

In the absence of agency objection, this apparently workable rule should not be changed. The Board should limit its decision to the case before it.

FRANKLIN D. ARNESS

Administrative Judge, Alternate Member

WE CONCUR:

DOUGLAS E. HENRIQUES

Administrative Judge

ANNE POINDEXTER LEWIS

Administrative Judge

STATE OF OREGON *ET AL.*, I

78 IBLA 255

Decided *January 10, 1984*

Appeals from a decision of the Oregon State Office, Bureau of Land Management, rejecting applications for school indemnity lands. OR 3162, OR 3163, OR 3164, and OR 3737.

Affirmed in part, reversed in part, and remanded.

1. Act of June 4, 1897--Exchanges of Land: Forest Exchanges--State Exchanges: Generally

Where a deed embracing certain base lands is tendered to the United States in an application for an exchange under the Forest Lieu Exchange Act, Act of June 4, 1897, 30 Stat. 31, which title is based on a deed issued for state school lands to a fictitious individual, such deed vests no title in the United States. Where, however, the state deed is issued to a real person, even though it may have been fraudulently obtained from the state, acceptance by the United States of the exchange application is sufficient to vest title in the United States to the base property, even though that title might be subject to defeasance in a proper proceeding.

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2. Act of June 4, 1897--Exchanges of Land: Forest Exchanges--State Exchanges: Generally

Where the United States had accepted an application for a forest lieu exchange under the provisions of the Act of June 4, 1897, 30 Stat. 31, title to the base property vested in the United States. Such title was not divested by either the subsequent refusal of the United States to complete the exchange or by the acquisition of the selection rights emanating from the acceptance of the application by a third-party which had been defrauded of the base lands through the actions of the original applicant.

3. Act of June 4, 1897--Exchanges of Land: Forest Exchanges--State Exchanges: Generally

Where the United States had accepted an application for a forest lieu exchange under the provisions of the Act of June 4, 1897, 30 Stat. 31, which application was based on base lands fraudulently secured from a state, and the state subsequently obtained a quitclaim from the applicant of all his interest in the lands, the state did not regain title to the base lands but rather was vested with all selection rights which had properly appertained to the exchange application.

4. Act of June 4, 1897--Estoppel--Exchanges of Land: Forest Exchanges--State Exchanges: Generally

Where the record establishes that, but for the actions of the Department in improperly approving an exchange, a state would have properly exercised its exchange rights pursuant to applicable law, the Department will be estopped from subsequently asserting the exchange was improper where, as here, it would no longer be possible for the state to exercise its exchange rights.

5. Act of June 4, 1897--Exchanges of Land: Forest Exchanges--State Exchanges: Generally

Under the United States Supreme Court's decision in *Wyoming v. United States*, 255 U.S. 489 (1921), an application for a forest lieu exchange was accepted by the filing of a proper exchange and the acceptability of an exchange was to be judged with reference to the facts existing at the time of filing. The actual acceptance of an exchange application, however, even if based on a misapprehension of the facts, vested title to the offered lands in the United States.

6. Act of June 4, 1897--Exchanges of Land: Forest Exchanges--Res Judicata--State Exchanges: Generally

The classification of land as Supplement A, B, or C, by the Oregon Supreme Court in *State v. Hyde*, 88 Or. 1, 169 P. 757 (1918), is not binding on the United States as to the factual predicates thereof, particularly as the United States was not a party to the case.

7. Act of June 4, 1897--Exchanges of Land: Forest Exchanges--State Exchanges: Generally

When a state obtained a quitclaim deed from a forest lieu applicant whose application had been accepted by the United States, the state merely acquired the same rights to complete the selection which were possessed by the original applicant. Where the state failed to record this forest lieu selection right under the Act of Aug. 5, 1955, 69 Stat. 534, or tender such right for payment under the Act of July 6, 1960, 74 Stat. 334, all rights flowing from the forest lieu selection right to either complete an exchange or have the base property reconveyed terminated.

8. Act of June 4, 1897--Exchanges of Land: Forest Exchanges--State Exchanges: Generally--Title: Generally

While it is a general rule that adverse possession does not run against a state, this rule does not apply as against the United States. Where the United States has maintained

open and notorious possession of certain parcels of land for over 80 years, the United States has acquired title to those parcels through adverse possession even though the record title holder was a state.

APPEARANCES: Michael Reynolds, Esq., and Peter S. Herman, Esq., Department of Justice, State of Oregon, Salem, Oregon; Robert H. Memovich, Esq., Joseph B. Brooks, Esq., and Eugene A. Briggs, Esq., Office of the Solicitor, U.S. Department of the Interior, Portland, Oregon; Donald H. Coulter, Esq., Grants Pass, Oregon, for Crater Title Insurance Co. and Transamerica Title Insurance Co. of Oregon; Alfred H. Hampson, Esq., Portland, Oregon, for Karl P. Baldwin and Barbara S. Baldwin, executrix.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES
INTERIOR BOARD OF LAND APPEALS

The State of Oregon has appealed from a decision of the State Director, Oregon State Office, Bureau of Land Management (BLM), dated April 12, 1973, rejecting applications for school indemnity lands OR 3162, OR 3163, OR 3164, and OR 3737.¹ The basis for the rejection of the applications was the State Director's finding that the State of Oregon had exceeded its entitlement to make any further selections of land as indemnity for school lands lost to the State.

The State Director specifically found that the base lands offered by the State in OR 3164 were defective because the State admitted selling the land at a time when title to the State to the land in place could not have vested. The decision alludes to an extensive audit disclosing that indemnity selection lists had been previously approved containing base lands improper for use therein. Three principal examples of improper base are set forth: (1) Lands sold by the State prior to the date when title could have vested; (2) school lands in place, title to which had vested in the State, subsequently sold by the State through error or inadvertence, and title to which was eventually transferred to the United States as base for forest lieu selections under the Act of June 4, 1897, 30 Stat. 11, 36, *as amended*; and (3) lands described by township designations shown on existing surveys but previously described by different township designations on prior statutory protractations.

A notice of appeal was timely filed by the State of Oregon on April 30, 1973. Thereafter, the State questioned the adequacy of the

¹ A timely notice of appeal was also filed by Crater Title Insurance Co. and by Transamerica Title Insurance Co. of Oregon. This notice was directed to BLM's rejection of State indemnity application OR 3163, filed by the State on behalf of the aforementioned organizations. A timely notice of appeal was also filed by Karl P. Baldwin and Barbara S. Baldwin, executrix of the Estate of George N. Baldwin, deceased. This document was directed to the rejection of State indemnity application OR 3164, which application was submitted by the State of Oregon for the benefit of Karl P. Baldwin and Barbara S. Baldwin, executrix. BLM's decision rejecting applications OR 3163-64 was based upon numerous transactions involving the State of Oregon dating back to its admission to the Union. Our resolution of the issues posed by the State is intended to be dispositive of the issues posed by these subsidiary appeals.

On Apr. 4, 1968, the State filed applications OR 3162, OR 3163, and OR 3164 entitled Indemnity School Land Selections. (State list numbers 1791, 1786, and 1787 respectively.) Application OR 3737 (State list number 1792A) was filed on September 20, 1968. For administrative convenience, serial number OR 7274 has been assigned by BLM to this final adjustment of school indemnity lands.

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1973 audit which formed the basis for the State Director's decision. In June 1974, the State requested and was granted a reopening of the audit to redetermine the amount of valid base lands the State has offered or may offer to the Federal Government. As a result, a revised audit was prepared in 1976. The briefs and stipulations are based upon the January 1976 audit revision. The record transmitted to the Board included, however, yet another audit revision, this most recent revision prepared by BLM in December 1978.

The State subsequently filed objections to our consideration of the 1978 revision on the grounds that it was violative of the stipulation executed by it and BLM on August 23, 1976, and that it would needlessly confuse the issues. BLM responded that the revision was necessary, because the 1976 audit failed to adequately address the indemnity claims of the State by acreage, situs, and other categories of identification, such as withdrawals, state sales, patented lands, etc. In addition, BLM asserted that all matters appearing in the 1978 revision had been fully considered, briefed, and argued.

By order dated October 12, 1979, this Board ruled that it was constrained by relevant precedent to "consider and pass on all the evidence upon which BLM relied in rendering its decision and which bears on the question of the State's indemnity entitlement as authorized by law." The State was granted 30 days in which to review the recent revision and to delineate with specificity its objections to the inclusion of new or different data of which it had no prior knowledge. Subsequently, by Order of September 22, 1981, oral argument before the Board was granted. Following various postponements at the request of the parties, the oral argument was heard at Portland, Oregon, on September 13, 1983.

Oregon was admitted to the Union by Act of Congress approved February 14, 1859, ch. 33, 11 Stat. 383. Section 4 of the Admission Act provided in material part as follows:

That the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, *That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools.* [Italics added.]

Recognizing that secs. 16 and 36 might be unavailable or lost to a state for a number of reasons, Congress enacted several statutes providing for selections of other public lands in lieu of those lost to the state. The Act of February 26, 1859, ch. 58, 11 Stat. 385, provided for the appropriation of lands of like quantity where secs. 16 or 36 may be patented by preemptors. The Act, codified in substantial part as Revised Statute 2275, 43 U.S.C. § 851 (1976), further provided for appropriations "to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or

both are wanting by reason of the township being fractional, or from any natural cause whatever.”

Revised Statute 2276 provided certain arithmetic principles of adjustment to compute the quantity of land which the State could select as compensation for the deficiencies mentioned in section 2275.²

In 1891 and 1958, Revised Statute 2275 was amended³ to read as presently codified at 43 U.S.C. § 851 (1976):

And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, prior to survey, included within any Indian, military, or other reservation, or are, prior to survey, otherwise disposed of by the United States: *Provided*, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

The Secretary of the Interior’s duty to determine by protraction or otherwise the number of townships affected by a reservation was made clear:

And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: *Provided, however*, That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

43 U.S.C. § 851 (1976).

The principles of adjustment set forth in Revised Statute 2276 were carried over in material part by the amendments of 1891 and 1958. Revised Statute 2276, *as amended*, 43 U.S.C. § 852(b) (1976), now provides:

Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township; containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than

² This statute provides:

“The lands appropriated by the preceding section shall be selected * * * in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township, containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one quarter-section of land.”

³ Act of February 28, 1891, ch. 384, 26 Stat. 796. Act of August 27, 1958, P.L. 85-771, 72 Stat. 928.

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one entire section, and not more than one-quarter of a township, one-quarter section of land: *Provided*, That the States which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

Oregon's appeal from the State Director's rejection of its indemnity applications may be divided into two discrete subjects: Protractions, and forest lieu selections.⁴ Because of the complexity of the issues presented, the Board has determined to issue separate decisions on these two issues. Therefore, this decision shall discuss only those questions arising under transactions involving forest lieu selections. A subsequent decision shall deal with the protraction issues.

Forest lieu transactions were authorized by the Forest Lieu Exchange Act of June 4, 1897 (Forest Lieu Act), ch. 2, 30 Stat. 11, 36. The relevant portions of this Act provided as follows:

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent.

In the instant case, certain school sections (16 and 36) which had vested in a state had subsequently been included in a public forest reservation. These lands, if sold by a state would, therefore, be subject to the provisions of the Forest Lieu Act.

A number of sales were made by the State of Oregon to one F. A. Hyde and others in concert with Hyde. Hyde's plan was to purchase school lands from the State through dummy applicants and then exchange these lands within forest reserves for valuable public domain lands pursuant to the Act of June 4, 1897, *supra*. Section 3618 of *Hill's Annotated Laws* authorized citizens of the State of Oregon to purchase State lands but limited each citizen to purchasing 320 acres for his own use and not for the purpose of speculation. Hyde sought to avoid this limitation by the use of dummy applicants or fictitious entities, and managed to defraud the State of some 47,000 acres of school lands which he acquired at a price of \$1.25 per acre (Stipulation at 39). Prior to 1903, Federal patents were issued to members of Hyde's conspiracy, the so-called Hyde Fraud Combine, in exchange for lands acquired from the State in the amount of 27,000 acres. This land was then sold by the patentees at a substantial profit. *Id.* at 40.

On November 21, 1902, the Secretary of the Interior, having been apprised of the fraud, issued an order suspending all applications for forest lieu selections bearing Hyde's name as applicant or as attorney for another applicant. Further orders in 1903 and 1904 suspended all

⁴ The State had originally appealed from a finding of the BLM State Director that the State was not entitled to indemnity for 3,680 acres of land which had been included in a national forest prior to survey on the grounds that the United States had patented lands under the 1897 Act to private parties who had offered base lands, deeded from the State, to which the State had no title. At oral argument, however, the State waived its appeal as to this issue (Tr. at 5).

applications for forest lieu selections involving Oregon school lands as base. Shortly thereafter on March 3, 1905, Congress repealed the Act of June 4, 1897, subject to a grandfather clause permitting selections, theretofore made, to be perfected and patented, and reselections to be made if a pending selection were held invalid for any reason not the fault of the selector.

In 1908, Hyde was tried and found guilty of criminal fraud, which conviction was eventually affirmed by the United States Supreme Court. *Hyde v. United States*, 225 U.S. 347 (1912). In 1910, the Department of the Interior commenced adverse proceedings against selections made by Hyde, but suspended these proceedings in 1912 to permit the State of Oregon to proceed with suits to cancel State deeds to the school lands used as base. The State began these suits in 1913 limiting its efforts to State deeds of base lands which had not been exchanged with the United States for patented, selected land. Final decisions of the Oregon Supreme Court were handed down in 1918. *State v. Hyde*, 88 Or. 1, 169 P. 757 (1918); *State v. Hyde*, 88 Or. 61, 169 P. 774 (1918); *State v. Hyde*, 88 Or. 66, 169 P. 775 (1918); *State v. Hyde*, 88 Or. 73, 169 P. 777 (1918); *State v. Hyde*, 88 Or. 81, 169 P. 778 (1918); *State v. Hyde*, 88 Or. 81, 169 P. 779 (1918).

In these decisions, the Supreme Court of Oregon divided the lands at issue into three categories which the parties have found convenient to refer to in their pleadings. Supplement A lands were base lands offered to the United States whose accompanying selection applications were approved by the General Land Office (GLO) but later caught in the Secretary's suspension order of 1902. No selected lands were ever patented pursuant to these forest exchange applications. Supplement B lands consisted of those lands offered as base in selection applications which were never approved by GLO. Supplement C lands were those lands which were never offered as base by Hyde for lieu selections (Stipulation at 43; see *State v. Hyde*, 169 P. at 762).

The Supreme Court of Oregon differentiated between lands in Supplement A and those in Supplements B and C. Because Supplement A lands had been offered as part of a selection application approved by GLO, the Oregon Supreme Court found that deeds to these lands had been accepted by the United States and, accordingly, held that title to Supplement A lands had passed to the United States. *State v. Hyde*, 169 P. at 763. This title in the United States, Judge McCamant reasoned, made the United States a necessary party to any State cancellation proceedings. Inasmuch as the United States refused to enter an appearance as a party in these suits, a decision to dismiss cancellation proceedings of Supplement A lands was entered. *State v. Hyde*, 169 P. at 765. Insofar as Supplement B and C lands were concerned, Judge McCamant reasoned that since GLO had never accepted the application in which they were offered, no title had ever vested in the United States and, therefore, the United States was not a

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necessary party to the case. Accordingly, the court affirmed cancellation of State deeds to the base land.

Following this decision, GLO resumed adverse proceedings against the Hyde selections. The State of Oregon made an appearance in these proceedings, filing answers alleging fraudulent procurement of title. In 1920, the State, with the cooperation of the Department of the Interior, reached a compromise agreement with the transferees of selections whose base lands were within Supplement A. In consideration of \$7.50 per acre from the transferees, the State would issue quitclaim deeds to the United States for the base lands involved in order to perfect title to the base and allow the selections to proceed to patent. The compromise was extended to all transferees of Hyde who were innocent of the fraud committed by him. As a result of this compromise, GLO halted its adverse proceedings relating to Supplement A lands, and the State quitclaimed 5,440 acres to the United States having received the preordained rate. In addition, the Hyde Fraud Combine quitclaimed to the State 2,600 acres of land for which it was not able to complete its selections (Stipulation at 46).

Remaining adverse proceedings involving Supplement A lands were heard by GLO in 1922. In *State of Oregon v. Hyde*, 50 L.D. 420 (1924), the Department rejected a State protest to the approval of a lieu exchange to innocent third parties even though the exchange had been initiated by Hyde. The Department held that the State's failure to institute recovery proceedings in the 5 years since the decision of the Oregon Supreme Court had made its claims subject to the defense of laches, a defense available in this instance, to the innocent third party. With this finding, the State evidently decided to take no further action. Pending charges against various selections were dismissed, and thereafter the United States issued patents for 6,816.62 acres accepting Supplement A lands as base (Stipulation at 50).

From 1929 to 1932, 1,800 acres of Supplement A lands were offered by the State as base in exchange for selected lands. The State had acquired quitclaim deeds for these base lands from the Hyde Fraud Combine. This exchange, approved by GLO, was made pursuant to Presidential Proclamation of April 28, 1927, which carved a block of lands from the Siuslaw National Forest to provide lands for selection by the State in general satisfaction of its right to indemnity for lost school lands. The proclamation made no specific reference to the Hyde fraud lands. Later, under the Act of April 28, 1930, 46 Stat. 257, the United States quitclaimed 1,000 acres of Supplement A base lands to applicants during 1940, 1944, and 1945 (Stipulation at 54).

While the above actions were occurring with reference to the Supplement A lands, during the period from 1919 to 1923 GLO canceled forest lieu selections based on lands included within Supplement B. This was done by notices informing selectors of the recent *Hyde* cases and stating that the lands offered in exchange were

not the property of the selectors but of the State of Oregon (Stipulation at 46).

GLO approved State clearlists during the period 1929-32 and transferred title to the State to 68,666.01 acres of land pursuant to the aforementioned Presidential Proclamation of April 28, 1927. Of this amount 9,385.17 acres were selected by the State using Supplement B and C lands as base (Stipulation at 59).

Thus, of 11,185.17 acres at issue for which the State received land in exchange, 9,385.17 acres involved land for which the deeds had been cancelled by the Oregon State Supreme Court, *i.e.*, Supplement B and C lands. As noted above, the State also received 1,800 acres in exchange for Supplement A lands. For the sake of convenience, we shall refer to these lands as Category I lands. The Government contends that these exchanges were improper because the State had no title to the lands which were offered as base for the selected lands, since legal title had already vested in the United States upon receipt of deeds from the State's grantees pursuant to the 1897 Act. Thus, the State should be required to substitute good base for that which had served as a basis of the exchange.

An additional 2,662.42 acres at issue represent lands covered by deeds not cancelled by the State Supreme Court (Supplement A lands) totaling 1,342.62 acres, 680 acres of Supplement B and C lands, and 640 acres of land which were not subject to the *Hyde* suit. In contradistinction to the first group of lands, the State of Oregon received nothing for this land, and it is the State's contention that this constitutes valid unused base which BLM has refused to recognize. We shall refer to this group of claims as Category II lands.

The State makes alternate arguments with reference to these transactions. Insofar as the land which it successfully tendered as base for past exchanges is concerned, it contends that the Government has already determined that its title was good and sufficient when it approved the exchange and such a determination should not now, years after the fact, be open to collateral attack. Its main argument, however, as clearly presented at oral argument, is that regardless of whether or not BLM may reopen the question of the sufficiency of the base tendered in exchanges approved more than 40 years ago, the fact is that the State did have good title to the land offered. Because this argument is critical in determining not only the status of Category I lands, but those involved in Category II as well, we will examine the State's position in some detail.

[1] The State contends that there are two critical facets in a forest lieu selection: (1) relinquishment of base land and the selection of land in lieu of the relinquished lands; and (2) the determination by the United States that the proposed exchange is in compliance with the statute and regulations. Only *after* the occurrence of these two events, the State argues citing *Roughton v. Knight*, 219 U.S. 537 (1911), does the United States obtain an equitable interest in the offered lands. While the State does suggest in passing, that the United States never

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determined that the proposed exchanges were in compliance with the statute, its primary thrust is that there never was a valid relinquishment of base lands and thus there is no way that the United States could obtain title to the lands offered. In making this argument, the State relies heavily on the decision of the United States Supreme Court in *Hyde v. Shine*, 199 U.S. 62 (1905). Before examining the nature of the State's argument, it is useful to briefly review that decision.

As noted earlier, F. A. Hyde was convicted of criminal conspiracy to fraudulently obtain land from the States of Oregon and California, exchange these lands for public lands of the United States, and then sell those lands so obtained. This conviction was ultimately affirmed by the Supreme Court. See *Hyde v. United States*, *supra*. The indictment, however, had been returned by a grand jury of the Supreme Court of the District of Columbia. Hyde was, at that time, a resident of San Francisco, California. Upon the return of the indictment, therefore, a complaint was made in the Northern District of California seeking removal of the defendant to the District of Columbia for trial pursuant to Revised Statute 1014. Hyde was thereupon arrested and an order for removal was subsequently entered. *United States v. Hyde*, 132 F. 545 (N.D. Cal. 1904). Hyde pursued a writ of habeas corpus to the circuit court, which was denied, and then sought review in the United States Supreme Court.

In his petition for a writ of habeas corpus, Hyde argued, inter alia, that the indictment charged no crime against the United States. While admitting that the facts as alleged might show a crime against California or Oregon, Hyde contended that the United States was not defrauded as no injury had resulted to the United States. Intrinsic to this argument was the subsidiary contention that "[t]he patents of the State surrendered to the United States conveyed a legal title which, until attacked directly by the State of California, was good, and so long as the patents remained unassailed the State had no equitable title in the land and the United States got good title to the land surrendered and was not defrauded." *Hyde v. Shine*, *supra* at 67.

In affirming the denial of the petition for a writ of habeas corpus, the Supreme Court directly addressed this contention. The Court recounted Hyde's contention but noted that it "assumes that the title acquired by the defendants from the States in question was such a title as, upon conveyance to the United States, would vest in the latter a title good as against all the world." *Id.* at 80. The Court then proceeded to consider this assumption. We will quote the Court's language *in extenso*.

While it is doubtless true that, by means of these corrupt and fraudulent practices, Hyde and Benson may have obtained title to these lands, it does not follow that the States might not have disaffirmed such titles and recovered the lands. * * * Nor does it follow that, when subsequent conveyances were made to the United States of these lands

under the act of June 4, 1897, a good title was vested in the grantee. In [*Moffat v. United States*, 112 U.S. 24 (1884)] it was held that *a patent issued to a fictitious person conveys no title which can be transferred to a person subsequently purchasing in good faith from a supposed owner*. In delivering the opinion of the court, Mr. Justice Field observed: "The patents being issued to fictitious parties could not transfer the title, and no one could derive any right under a conveyance in the name of the supposed patentees. A patent to a fictitious person is, in legal effect, no more than a declaration that the Government thereby conveys the property to no one. There is, in such case, no room for the application of the doctrine that a subsequent *bona fide* purchaser is protected. * * * To the application of this doctrine * * * *there must be a genuine instrument, having a legal existence, as well as one appearing on its face to pass the title. It cannot arise on a forged instrument or one executed to fictitious parties, that is, to no parties at all, however much deceived thereby the purchaser may be.*" [Italics supplied.]

Id. at 80-81.

The State, in effect, argues that this language clearly shows that the United States never obtained title to any of the base lands offered by Hyde and, therefore, not only was the subsequent exchange in the Siuslaw National Forest proper, but the State also still has outstanding lieu rights which have never been exercised. There are, however, certain problems with the State's argument.

In the first place, insofar as the Supreme Court of Oregon refused to cancel the State patents issued for Supplement A lands in *State v. Hyde*, 169 P. 757 (1918), such action must be viewed as inconsistent with the United States Supreme Court decision in *Hyde v. Shine*, *supra*, as now interpreted by the State of Oregon. The premise for the Oregon Supreme Court's refusal to cancel the patents was that inasmuch as the United States had accepted the deeds and approved the selection, title to the offered lands had passed to the United States. Thus, after reviewing certain United States Supreme Court decisions, the Oregon Supreme Court, per Judge McCamant, stated:

The title so acquired may be voidable for fraud or mistake; the General Land Office may have power for good cause to rescind its approval and withhold patent to the selected land. It is enough for present purposes that, under the construction given this federal statute by the federal Supreme Court, title to the base lands passes to the United States on the acceptance of the deed and the approval of the selection by the General Land Office.

Id. at 762. Subsequently, the court opined:

When the deeds to the base lands were accepted, the United States acquired a title. It may have been a bad title, subject to be divested by a court of competent jurisdiction; but the title cannot be adjudicated in a cause to which the United States is not a party.

Id. at 764. If, as the State of Oregon now contends, the United States Supreme Court had determined that the United States acquired *no* title from Hyde, there would have been no reason to refrain from cancelling the deeds issued for Supplement A lands. Obviously, the decision of the Oregon Supreme Court proceeds on a different premise from that which appellant asserts the United States Supreme Court had declared the law to be.

An additional difficulty in crediting the State's present interpretation of *Hyde v. Shine*, *supra*, arises upon a review of numerous decisions rendered by the United States Supreme Court

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subsequent to that decision. Thus, the next year, the Court held in *United States v. Detroit Lumber Co.*, 200 U.S. 321 (1906), that bona fide purchaser protection was available to an innocent purchaser of timber land, even if it could be shown that the timber lands were procured by fraudulent misrepresentation.

There is a key distinction implicit in the decision in *Hyde v. Shine*, *supra*, which the State has overlooked. This is the distinction between a patent issued to a fictitious person and a patent fraudulently procured by a real person. The language of the Court in *Hyde v. Shine*, which we set forth in the text, is clearly directed *only* to the former situation. Indeed, the decision which is quoted therein, *Moffat v. United States*, *supra*, involved precisely that, patents issued to nonexistent individuals through the collusion of GLO employees. A patent issued to a fictitious person is void, per se. See *Sky Pilots of Alaska, Inc.*, 40 IBLA 355, 367 (1979) and cases cited. A patent fraudulently procured, however, is merely voidable.

That the Court which decided the *Hyde v. Shine* case was aware of this distinction is made clear when other parts of its decision are examined. Thus, the Court had noted that there were two mechanisms by which Hyde and his confederates had attempted to acquire State lands in California and Oregon "(1) in the names of fictitious persons, and (2) in the names of persons not qualified to purchase the same." 199 U.S. at 78. The discussion of the Court as to fictitious persons upon which the State of Oregon places so much reliance is but the first half of a bifurcated treatment of the issues. Subsequently, the Court declared:

The indictment under section 5440 charges a conspiracy to defraud the United States out of the possession, use of and title thereto of divers large tracts of the public lands, and if the title to these lands were obtained by fraudulent practices and in pursuance of a fraudulent design, it is none the less within the statute, though the United States might succeed in defeating a recovery of the state lands by setting up the rights of a *bona fide* purchaser.

Id. at 83.

We are of the view that, to the extent that the base lands were patented to fictitious persons, the State of Oregon is correct in its assertion that no title passed to the United States and that those deeds were void. On the other hand, to the extent that the State of Oregon deeded such base lands to real individuals, even though they be dummies or nominees in collusion with the Hyde Combine, such deeds were merely voidable, and could be nullified only pursuant to proper legal action.

Such, indeed, was the holding of the Department as far back as 1910, when First Assistant Secretary Pierce so held in *Thomas B. Walker*, 39 L.D. 426, another case growing out of the Hyde fraud. Thus, the First Assistant Secretary noted that where the base lands had been patented by a state to a fictitious person "the United States could in no

event secure a good title to the base land." *Id.* at 431. The distinction between this situation and that which occurred when a patent was obtained through fraudulent means by a real person was further explored in *Peter M. Collins*, 44 L.D. 495 (1915). We adhere to the views expressed in those cases.

We think it clear that the great bulk of the fraud perpetrated by the Hyde Fraud Combine involved nominees rather than fictitious persons. See *State v. Hyde*, *supra* at 766-67. Thus, the application of the void deed doctrine delineated by the United States Supreme Court in *Hyde v. Shine*, *supra*, will necessarily be quite limited. It is not the purpose of this decision to determine with finality the exact acreage figures involved in various aspects of this decision. Rather, as stated in our Order of October 12, 1979, this decision will merely decide the issues of law and fact as framed in the stipulation. On remand, the parties shall review the specific audit computations in conformity with our determinations. To the extent that the State of Oregon can show that State deeds were issued to fictitious individuals, the State is properly credited with ownership of the original base. But, to the extent that State deeds were issued to real individuals, it becomes necessary to examine the various contentions of the parties as presented in the stipulation.

We shall examine the Category I acreage first. It is important to note that the following discussion will assume, *arguendo*, that all lands involved had been deeded by the State to real individuals who were participants in the Hyde fraud. As noted above, Category I acreage consists of Supplement A, B, and C lands for which the State eventually received lands in exchange between 1929 and 1932. We will examine the Supplement A lands first.

[2] After the decision of the Oregon Supreme Court in *State v. Hyde*, *supra*, the State of Oregon obtained a number of quitclaim deeds from the Hyde Fraud Combine of Supplement A lands. Of the acreage quitclaimed to the State, a total of 1,800 acres was eventually tendered as base for the purposes of blocking out Federal and State ownership of tracts in the area of the Siuslaw National Forest. BLM now contends that GLO erred in approving this exchange. BLM's argument proceeds as follows. The Oregon Supreme Court had held that the United States held title, whether defeasible or not, to the lands in Supplement A because the GLO had accepted the deeds to the base lands tendered by Hyde and his associates. The fact that Oregon had subsequently acquired the rights of Hyde did not change the status of the base lands. Title to these lands remained in the United States. It may be that by acquiring a quitclaim from Hyde the State also acquired the right to complete the forest lieu exchange initiated by Hyde. But such an exchange could only be completed under the auspices of the 1897 Act. The Presidential Proclamation of April 28, 1927, which authorized the subsequent exchange of lands under the 1891 Act, however, applied, by its own terms, only to an exchange of State school lands within various national forests, title to which was in the State, for lands in the

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Siuslaw National Forest.⁵ Consistent with the decision of the Oregon Supreme Court, as the State of Oregon no longer had *title* to the school lands involved in Supplement A these lands could not properly serve as base for the exchange. Thus, the action of the GLO in approving the exchange with these lands as base was *ultra vires*, and the State should be required to substitute unused school base.

The State, for its part, repeats its assertion that BLM is attempting a collateral attack on the validity of a federal patent (in this case, a clear list) and that such an attack is invalid because the 6-year statute of limitations for setting aside a patent has long since expired, and there is no allegation of fraud in its obtention. Suffice it to say at this point that the State's title to any of the selected lands is not in jeopardy. See *Reid v. Mississippi*, 30 L.D. 230 (1900). BLM's audit seeks to determine only whether adequate base has been exchanged for selected lands, and, even if the net result of the audit is that Oregon has exceeded its entitlement, BLM eschews any claim that such excess must be reconveyed to the United States. Thus, there is no attempt to defease the State of title to any lands which have already been clear listed. The argument of the State on this point must be rejected.

The State also attacks the position of BLM as somewhat disingenuous. It notes, that while BLM implies that the State could have consummated a forest lieu exchange after having acquired the quitclaims from Hyde and his associates, the fact of the matter is that authority to make a selection under the Forest Lieu Act terminated on March 3, 1905, when the Forest Lieu Act was repealed. The United States would be unjustly enriched, argues the State, if it were allowed to maintain title to the base lands tendered by Hyde and at the same time prohibit the State from using that base as exchange lands, particularly where the State had acquired all rights relating to the forest lieu selection from Hyde. Finally, the State argues that the United States is in laches on this issue, seeking to reopen matters which had long since been determined with finality.

Before analyzing these arguments, it is useful to review the relevant Acts relating to forest lieu selections. As noted above, the Forest Lieu Act of 1897 had provided that the settler or the owner of a bona fide claim or patent within the confines of a forest reserve could relinquish that tract to the Federal Government and select in lieu thereof a tract of vacant Federal land open to settlement. Owing in no small part to the Hyde fraud, this Act was repealed by the Act of March 3, 1905, 33 Stat. 1264.⁶ The 1905 Act contained the following proviso:

⁵ The Act of Feb. 28, 1891, 26 Stat. 796, authorized any state, in the event that any of the in place school lands granted the state should, after the vesting of title in the state, be included within a public reservation, to waive its right thereto and to select in lieu thereof other lands of equal acreage from unappropriated nonmineral public lands outside the limits of the reservation, but within the state.

⁶ As the Department noted in *J. A. Allison*, 58 I.D. 227, 232 (1943):

"The forest lieu legislation under which the right here in question originated was repealed in 1905 because it had not operated in the public interest. It had been designed to relieve actual settlers, entrymen and patentees whose

Continued

That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issue therefor the same as though this Act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof.

While this permitted the completion of the patenting process for forest lieu selections which had been filed in accordance with the applicable procedures, and to make new selections where the selected lands were not available *through no fault of the selector*, there was no provision which would permit the Department to reconvey the base lands tendered. This deficiency was remedied by the Act of September 22, 1922, 42 Stat. 1017. That Act provided, in relevant part:

That where any person or persons in good faith relinquished to the United States lands in a national forest as a basis for a lieu selection * * * and failed to get their lieu selections of record prior to the passage of the Act of March 3, 1905 * * * or whose lieu selections, though duly filed, are finally rejected, the Secretary of the Interior * * * is authorized to accept title to such of the base lands as are desirable for national-forest purposes; which lands shall thereupon become parts of the nearest national forest, and, in exchange therefor, may issue patent for not to exceed an equal value of national-forest land * * *. Where an exchange can not be agreed upon the Commissioner of the General Land Office is hereby authorized to relinquish and quitclaim to such person or persons, their heirs or assigns, all title to such lands which the respective relinquishments of such person or persons may have vested in the United States.

Section 2 of this Act provided that where the Government had already committed the base lands to a governmental use, other than that for which the forest reserve had been set aside, such lands could not be relinquished without the approval of the head of the Department having jurisdiction over the land. If such approval was withheld, or if the land selected had otherwise been disposed, other nonmineral public lands of approximately equal area and value could be selected. Two different time limits were provided for in this Act. All persons desiring to benefit from the provisions of the Act were given 5 years in which to provide the United States with satisfactory proof of relinquishment to the United States. In addition, under section 2 of the Act, applications to make lieu selections were required to be filed within 3 years of the effective date of the Act. It should also be noted that the Act was carefully drafted so as not to declare exactly what type of title the United States had originally received.⁷

lands had become or in future might become included within forest reserves by permitting such persons to exchange their imprisoned lands for tracts outside the reserves. But, as it transpired, the principal beneficiaries of the legislation were not those persons but were the owners of railroad and State school lands, who in most cases had purchased such lands for use as base in lieu selections. In practice therefore the lieu acts opened the door to wholesale exchanges of reserved lands which had been denuded of their timber and were therefore of comparatively little worth for the most heavily timbered and valuable Government lands situate anywhere outside the reserves. They also led to the notorious California and Oregon timberland frauds, which culminated in numerous convictions of both high and low." [Footnotes omitted.]

⁷ This becomes important since in light of *Roughton v. Knight, supra*, it was certainly open to question whether the Government obtained any title in those situations where the applicant had failed to make a selection with the purported relinquishment of title. Thus, the Supreme Court had held that the regulations requiring that the deed of relinquishment to be accompanied by a selection was not unreasonable. The Court quoted from the decision rejecting the application involved in that case:

"[U]nder the act of June 4, 1897, it is the filing of the deed in the local land office and the selection of land in lieu of that relinquished which initiates the exchange. Until that time the exchange is not initiated and is merely a purpose in the private owner's mind."

219 U.S. at 548.

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By the Act of April 28, 1930, 46 Stat. 256, general provision was made to allow the United States to issue quitclaim deeds for lands which had been conveyed to the United States pursuant to a proposed exchange of land where the application for an exchange was either withdrawn or rejected. While this Act was not specifically directed to lands tendered under the Forest Lieu Act, its general terms clearly covered such lands.

The Act of August 5, 1955, 69 Stat. 534, (quoted in the note to 43 U.S.C. § 274 (1976)) required various owners of scrip or lieu rights, including "a forest lieu selection right, assertable under the Act of March 3, 1905" to record their holdings with the Department of the Interior within 2 years of the Act. Section 4 of that Act provided that if claims were not presented within the time established by that Act, they would "not thereafter be accepted * * * for recordation or as a basis for the acquisition of lands."

By the Act of July 6, 1960, 74 Stat. 334, Congress sought to end the increasing practice of reconveying base lands to forest lieu applicants under the 1930 Act. This Act is commonly referred to as the Sisk Act. Section 1 of that Act, provided, in relevant part:

The Secretary of the Interior shall certify to the General Accounting Office for audit the claim of any person who relinquished or conveyed lands to the United States as a basis for a lieu selection in accordance with the provisions of the fifteenth paragraph under the heading "Surveying the Public Lands" in the Act of June 4, 1897 (30 Stat. 11, 36), as amended and supplemented by the Acts of June 6, 1900 (31 Stat. 588, 614), March 3, 1901 (31 Stat. 1010, 1037), March 3, 1905 (33 Stat. 1264) and the Act of September 22, 1922 (42 Stat. 1017, 16 U.S.C. 483), and who has not heretofore received his lieu selection, a reconveyance of his lands, or authority to cut and remove timber, as provided by law, and there shall be paid to each such person whose claim is found to be valid the sum of \$1.25 per acre for the lands conveyed by him to the United States with interest thereon at the rate of 4 per centum per annum, from the date on which the application was last made by said person for a lieu selection, for reconveyance, or for authority to cut and remove timber or, if no such application has been made, from the date of this Act. Said payment shall be made from moneys appropriated under the heading "Claims for Damages, Audited Claims, and Judgments," and acceptance thereof shall constitute a full and complete satisfaction of all claims which the person to whom payment is made may have against the United States arising from the transaction in connection with which the payment is made. No person shall receive, or be entitled to receive, payment under this Act except upon demand therefor made in writing to the Secretary, or any officer of the Department of the Interior to whom the Secretary delegates authority to receive such demand, within one year from the date of this Act.

As noted by Congress, the purpose of this Act was:

(1) to provide compensation for land conveyed or relinquished to the United States during the years 1897-1905 under the act of June 4, 1897 (30 Stat. 11, 36), in cases in which the lieu lands or other rights which the owners were entitled to receive under this 1897 act and supplementary legislation have not already been given them; (2) to make inapplicable to the owners, their heirs and assigns a later provision of law directing the Secretary of the Interior, upon request, to return the original lands; and (3) thus to correct defects in the law under which such parties are now laying claim to valuable lands within the national forests and parks and taking them out of Federal ownership.

S. Rep. No. 1639, as cited in 1960 U.S. Code Cong. & Ad. News 2743. In order to effectuate the legislative intent, section 3 of the Act repealed the Act of September 22, 1922, 42 Stat. 1017, and prohibited the reconveyance of any land to which section 1 applied. In addition, section 4 of the Act provided:

Any land for which the United States makes payment under section 1 of this Act, or any land for which it might make payment thereunder upon application by the proper party, but for which no demand is made, shall (unless it has heretofore been disposed of by the United States) be a part of the national forest, national park, or other areas within the boundaries of which it is embraced * * *.

It is important to note that while the Sisk Act did remove all authority for the reconveyance of lands tendered under the Forest Lieu Act, and did constitute a complete satisfaction of all claims presented for payment under its terms, it did not terminate all selection rights emanating from forest lieu transactions. As we noted above, the 1955 Recordation Act had only applied to those claims "assertable under the Act of March 3, 1905." The Sisk Act did not purport to terminate the selection rights of these claims, unless payment was accepted pursuant to section 1 of the Act. Congress specifically noted this facet of the Act:

Question was raised in the committee hearings and discussion whether there still is, and whether there ought to continue to be, a right to select lieu lands for those conveyed in 1897-1905. The committee has not attempted to resolve these questions since they do not affect the principal problem with which H.R. 9142 is concerned.

S. Rep. No. 1639, as cited in the 1960 U.S. Code Cong. & Ad. News 2743, 2746. Thus, under the Sisk Act, if a forest lieu claim had been assertable under the 1905 Act, and had been recorded under the 1955 Act, and the claimant had received no payment under the 1960 Act, the right to select lands was still outstanding.⁸

Finally, by the Act of August 31, 1964, 78 Stat. 751, Congress attempted to write the last chapter in the tangled history of the Forest Lieu Act. This Act dealt with all rights of scrip and lieu recorded pursuant to the 1955 Act. Sections 2 and 3 provided for the classification of lands for conveyance to satisfy such claims. Section 6 allowed for a claimant to elect to receive cash instead of public land in satisfaction of his claim. Section 1 provided, in the case of forest lieu claims, that any claim not satisfied under these sections by January 1, 1970, "shall become null and void." It is, therefore, clear that any outstanding forest lieu selection right which has not been terminated by either the provisions of the Sisk Act or the 1964 Act is, nonetheless, a nullity, and cannot serve as the basis for any present land acquisition.

[3] We note that in oral argument counsel for the State expressly disclaimed any subrogation to the selection rights arguably flowing from the original Hyde applications (Tr. 31-32). At that time, of course,

⁸ The Ninth Circuit Court of Appeals noted this fact in *Udall v. Battle Mountain Co.*, 385 F.2d 90, 96 (1967), pointing out that the 1964 Act, discussed *infra* in the text, provided compensation on a different basis as an alternative to selection. See also *Masonic Homes of California*, 4 IBLA 23, 28-29 (1971).

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the primary thrust of the State's argument was based on its analysis of *Hyde v. Shine, supra*, to the effect that the deeds tendered by Hyde to the United States were void. We have already rejected this analysis to the extent that the original State deeds were issued to real individuals, regardless of whether they were participants in the Hyde scheme. Therefore, despite the State's disclaimer, we will consider the subrogation question.

It is our view that the relevant case law cited above clearly shows that, insofar as Supplement A lands were concerned, the United States acquired title to the base lands offered. We noted above that the State, with respect to the 1,800 acres of Supplement A lands in Category I, obtained quitclaim deeds of the base land from Hyde. What, then, did these quitclaim deeds vest in the State?

Consistent with both *State v. Hyde, supra*, and *Roughton v. Knight, supra*, these deeds could not, in and of themselves, serve to vest title to the base lands in the State as the United States was not a party to these transactions. The State, however, suggests that the acquisition of these quitclaim deeds, when conjoined with the rejection of the selection applications, served to revest title in the State, and thus, made the land proper base for an exchange under the 1891 Act (Stipulation at 61). We do not agree.

As the United States Supreme Court implicitly held, upon acceptance of the application for exchange under the Forest Lieu Act, title to the base lands vested in the United States. All lands in Supplement A involved applications which were originally accepted by the GLO. Thus, at that time, the base lands came into Federal ownership. The applicant, however, did not simultaneously receive title to the selected lands. On the contrary, a substantial number of applications involved selected lands which had not been surveyed, and, thus, title to the selected lands could not have vested until they were surveyed. What the applicant acquired upon the vesting of the base lands in the United States was a contractual right to lands equal in area to those offered and a preference right to the lands selected in the application. See *Work v. Read*, 10 F.2d 637, 638-39 (D.C. Cir. 1925).

Subsequent rejection of an application already accepted could not result in an automatic reconveyance of the base lands under the Forest Lieu Act, since the original acceptance created a contractual right in the applicant which could not be defeated by unilateral action on the part of the Government. It may be that upon the ultimate rejection of an application which had already been accepted the applicant might have a cause of action for breach of contract (including the possible remedy of either rescission or specific performance). This question, however, is not before us. It is sufficient for our purposes to note that, in the absence of such a suit, title to the base lands did not revert to the applicant, or his successor-in-interest upon rejection of the application. Nor could the United States, until 1922, voluntarily

reconvey the land since until that time it lacked any authority to reconvey lands the title to which it had obtained under the Forest Lieu Act.

We think it clear, therefore, that the quitclaims received by the State from Hyde did, in fact, subrogate the State to Hyde's selection rights under the Forest Lieu Act, and that title to the base did not revert in the State. This being the case, BLM is technically correct in its assertion that the State tendered improper base under the 1927 Presidential Proclamation as that order obviously envisaged the offering of lands then owned by the State as base. The lands involved herein were already under Federal ownership pursuant to the 1897 Act, at the time the State tendered them.

[4] That being said, however, we agree with the State that it would be a great injustice to now make the State substitute unused school land base for the forest lieu Supplement A base tendered between 1929-32. Having acquired the interest of Hyde, and being free of the taint of fraud which led the United States to reject the original selections made by Hyde, the State could have selected lands under the 1905 Act or have acquired the selections actually made by Hyde, if available.⁹ It is true that under the 1927 Proclamation only school lands, title to which was then in the State, could be used as a basis for exchange. Had the State been properly informed at that time that the Supplement A lands could not be used as base it could have, at that time, substituted proper base for that exchange *and* still have exercised the forest lieu selection rights it acquired from Hyde to obtain title to other land, or, under the 1930 Act, a reconveyance of the base lands. The United States, in fact, accepted the proffered base. Now, when all possibility of obtaining anything for the rights the State had acquired from Hyde is at an end, the United States seeks a substitution of school land base for the forest lieu base it had formerly accepted.

We think it almost a certainty that the State has obtained far more than 1,800 acres in exchanges under the 1891 Act for land which would have been equally available for selection under the 1897 Act. Indeed, it is likely that the State would have expressly exercised its 1897 Act rights long ago had it not believed it had already done so under the Presidential Proclamation of 1927. We think, given the unusual facts of this case, the United States is properly estopped from asserting that the State did not do precisely that. We hold, therefore, that the State will not be required to substitute unused school land base for the 1,800 acres of Supplement A lands involved in Category I.

[5] BLM also attacks the use of Supplement B and C lands as base for the Siuslaw National Forest exchange. Here, however, rather than basing its argument on the decision of the Oregon Supreme Court as it

⁹ It is clear that the bad faith of Hyde did not work to defeat a selection made by Hyde when an innocent third party had succeeded to his interests. Thus, the whole train of Departmental decisions following *State of Oregon v. Hyde, supra*, was premised on the theory that a forest lieu exchange could be completed so long as the real party in interest at that time was an innocent third party. It is, therefore, clear that the State, an equally innocent third party, could have completed any exchanges initiated by Hyde.

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did for the Supplement A lands, it contends that the decision was wrong as to the Supplement B and C lands and ineffective to divest the United States of title to those lands. The lynchpin of BLM's position is its interpretation of the United States Supreme Court decision in *Wyoming v. United States*, 255 U.S.489 (1921). Because of the emphasis which BLM places on Justice Van Devanter's decision therein, we will examine its parameters in some detail.

In 1912, the State of Wyoming filed a lieu selection for a parcel of land pursuant to the 1891 Act, offering as base a parcel of land which had passed into State ownership in 1897, but which had since been included within the Big Horn National Forest. As the Supreme Court noted in its decision, at the time the State made its selection "the State had a perfect title to the tract in the reserve and the land selected in lieu thereof was vacant, unappropriated, and neither known nor believed to be mineral." *Id.* at 494. Notice of the proposed exchange was published and, in due course, the papers were transmitted by the local officers to the GLO with a certificate stating that no objections had been filed and that no adverse claim existed as to the selected lands according to the records in their offices.

No action was taken by the Commissioner, GLO, for nearly 3 years. On May 16, 1914, however, while the papers were pending before the Commissioner, a total of 88,000 acres of land, including the selected land, were withdrawn as possible oil land under the Pickett Act, Act of June 25, 1910, 36 Stat. 847. Subsequently, when the Commissioner considered the application of the State of Wyoming, he refused to approve it unless the State would either accept a certificate limited to the surface of the selected land or show that the land was still not known or believed to be mineral. The State declined to accept either option, instead arguing that its rights under the selection could only be determined with reference to the time at which it submitted its waiver and application. Thereupon, the Commissioner ordered the selection canceled, which decision was subsequently affirmed by the Secretary of the Interior. The State pursued legal review in the Federal courts, and, from an adverse ruling of the Court of Appeals for the Eighth Circuit, took an appeal to the United States Supreme Court.

In reversing the circuit court, the Supreme Court, per Justice Van Devanter, posed the issue before it as follows:

[T]he question is whether it was admissible for those officers to test the validity of the selection by the changed conditions when they came to examine it, instead of by the conditions existing when the State relinquished the tract in the forest reserve and selected the other in its stead.

Id. at 496. Justice Van Devanter reviewed various pronouncements of the Court on similar questions and concluded:

[T]he Commissioner and the Secretary in acting thereon are required to give effect to the conditions existing when it was made, that if it was valid then they are not at liberty to disapprove or cancel it by reason of a subsequent change in conditions and that in this

regard the statute under which the selection was made does not differ from other land laws offering a conveyance of the title to those who accept and fully comply with their terms.

Id. at 500.

The thrust of the argument posed by BLM is that this decision makes clear that the Oregon Supreme Court erred in its holding that title to lands offered as base in a forest lieu exchange vested in the United States only upon an act which could be deemed an acceptance. Rather, BLM contends, since it has been generally agreed that title to the base property tendered in a lieu selection would certainly have vested in the United States no later than the vesting of title to the selected property in the applicant, and the United States Supreme Court had determined that vesting of title to the selected property in an applicant is not controlled by the actual date in which the Department examines the proposed exchange, the vesting of title to the offered lands in the United States is, itself, not dependent upon actual review of the application by the duly authorized officers. Therefore, BLM concludes, to the extent that the Oregon Supreme Court purported to cancel the deeds issued to Hyde for Supplement B and C lands on the theory that the United States had acquired no rights because the officers had not "accepted" the applications, such action was clearly premised upon a mistake of law.

The basic problem with BLM's analysis is that, given the facts of this case, its ultimate conclusion does not flow from its premise. The Supreme Court did not state that the mere filing of an application for exchange accompanied by a selection vests title in the applicant. Rather, the Supreme Court held that the filing of a *proper* exchange so acts. It is clear from the Court's decision in *Wyoming v. United States, supra*, that the acceptability of the proposed exchange is to be judged by advertence to the conditions occurring at the time of the filing of the application. What BLM overlooks, however, is that the attempted transfer of the base property to the United States was the result of fraudulent activities.

It is true, of course, that as of the time the United States came to examine the exchange applications for Supplement A lands, this fraud had not yet come to light. But BLM errs in assuming that the test of the validity of the application is dependent upon what the specific officers of the Department *knew* at the time the application was filed as opposed to what the facts *were* at that time. Such is not the case.

The fallacy in BLM's position becomes clear if one remembers that prior to the adoption of the Taylor Grazing Act, 43 U.S.C. § 315 (1976), it was possible to initiate a homestead entry through settling on the lands sought without informing GLO before commencing settlement. As the Department noted in Circular No. 541, 48 L.D. 389 (1922), so long as a settler on surveyed lands made entry in the local land office within 3 months of settlement, a preference right to make the entry arose upon occupancy of the lands. *Id.* at 391. Such right was good against all but the United States. *See Rice v. Simmons*, 43 L.D. 343

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(1914). Thus, it was clearly possible that during the 3-month period between settlement and entry a State might file an exchange application for the land so settled. The fact that no official of the GLO knew of the settlement as of the date of the filing of the exchange application would not serve to vest title in the State to the selected lands in derogation of the rights acquired by the settler. On the contrary, so long as the settler filed an application to enter the lands within the period afforded by the applicable rules, the application of the State was properly rejected as the lands were not available when the selection was filed.

It may be that BLM was misled by the fact that the precise issue involved in *Wyoming v. United States, supra*, was the mineral character of the selected land. Such a determination, *i.e.*, whether the land is known or believed to be mineral in character, necessarily involves consideration of a specific time frame. But it is clear that even this question is dependent not upon the facts actually known by the deciding officers or the subjective beliefs which they may have formed, but rather on the facts then available. With reference to *Wyoming v. United States*, under the facts available in 1912, *no one* would know or have an adequate basis upon which to found a credible belief that the selected lands were valuable for minerals. In contradistinction, insofar as the instant matter is concerned, at the time the Hyde applications were tendered to the Department, the knowledge of the fraud was clearly held by the applicants, even if by no one else.

It is true that as of the time that the Department acted to approve the applications involved in Supplement A the authorized officers were still personally unaware of the fraudulent nature of the applications. The act of approval, however, effectively vested title in the offered lands in the United States, notwithstanding the fact that these same officers could have, had they been properly informed, rejected the applications. Approval of such applications was, as the United States Supreme Court noted in *Wyoming v. United States, supra*, in the nature of a judicial act. *Id.* at 497. Approval of the applications involved in Supplement A was effective, even though based on false assumptions, to the same extent that an erroneous judicial decision is effective upon rendition. Unless set aside on a direct appeal or subjected to successful attack in a collateral proceeding, such a decision, even though wrong, binds the parties. As noted above, no direct appeal was ever undertaken nor did the State ever attempt to reacquire title to the offered lands in a collateral proceeding involving the United States. Thus, while it can be seen from the vantage of hindsight that the Department erroneously approved the applications, this recognition does not nullify the effectiveness of the approval to vest title to the offered land in the United States.

This analysis, however, clearly does not apply to Supplement B and C lands since the Department never exercised its judicial function to

approve the applications. As it is clear that, under the facts attendant to the filing of the applications for these lands, they would have been properly rejected and, thus, the applicants never obtained any vested rights in the selected lands, we find nothing to undermine the analysis of the Oregon Supreme Court in *State v. Hyde, supra*, that the United States did not acquire title to Supplement B and C lands by the mere receipt of the applications involved therein.

In light of our finding, it is obvious that BLM's contention that the State must substitute unused school base for the Supplement B and C base used with respect to the Siuslaw National Forest exchange cannot be sustained, since the State did, in fact, have title to these lands sufficient to support an exchange under the 1891 Act.

[6] However, the 1978 audit has raised a subsidiary issue with respect to Supplement B and C lands in both Category I and Category II. BLM now contends that some of these lands were improperly treated as Supplement B or C lands when they should have been classified as Supplement A lands. BLM supports its contention by pointing out that some of the parcels of land offered as base were included in deeds embracing a number of different parcels. In numerous instances under both Categories I and II, GLO subsequently issued forest lieu patents in exchange for those other lands which had been included in the deeds. See 1978 Audit, Part 4 at 164-67, 168. BLM argues that obviously GLO could not accept only part of a deed and, therefore, regardless of the fact that GLO never patented exchange lands which used the instant lands as base, GLO must have, in fact, "accepted" the deeds involving the lands at issue. Such an acceptance would, therefore, transfer such offered lands from Supplement B status to Supplement A status. There is a compelling logic to BLM's assertions.

While we agree with the legal principles enunciated by the Oregon Supreme Court in *State v. Hyde, supra*, this does not mean that its factual findings are immune from independent review. To the extent that the record can establish that GLO accepted an application, the base tendered in such an application is properly treated as Supplement A lands, regardless of whether or not the Oregon Supreme Court purported to cancel the State deeds issued to Hyde. As Supplement A lands, the State could acquire no rights unless it had succeeded to the rights of the forest lieu applicant as noted above. There is no indication in the record that the State ever acquired any subrogation rights as to these lands which may have been erroneously classified by the Oregon Supreme Court as Supplement B or C lands.

We are aware that the State has strenuously objected to consideration of the 1978 audit within the confines of this appeal. While we feel that, for the reasons set forth in our Order of October 12, 1979, we cannot ignore the information presented in this audit, we also believe that it would be improper to direct any specific action in regard to the questioned Supplement B and C acreage without first affording the State an opportunity to respond to these allegations before BLM. Therefore, on remand, BLM is directed to

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inform the State of exactly which transactions it believes show that GLO had "accepted" any of the forest lieu applications under Category I, presently classified as Supplement B or C, and permit the State the opportunity to show either that the portion of the deed referenced under the Category I claim was not accepted, or that it subsequently acquired all interest the offeror may have had prior to the initiation of the Siuslaw National Forest exchange. To the extent that the State is unable to make either of these showings, the base tendered must be deemed to have been improper and the State will be required to substitute valid unused school base for the same.

We turn now to the Category II lands. As noted earlier, these lands involved Supplement A, B, and C lands for which the State never received anything in exchange. In addition, there are 640 acres which were not the subject of the Hyde suit brought by the State. While there are some variations in the arguments of the parties with respect to these lands, much of the controlling law has already been set forth above. We will first examine the Supplement A lands.

[7] The Supplement A lands under Category II involve both lands for which the State subsequently received quitclaim deeds from Hyde as well as those for which it did not. For the purposes of our review, however, this distinction is of no moment. As we noted above, title to the base properties offered in Supplement A vested in the United States and all that the State received from any quitclaim which it obtained from Hyde was the right to either have the selection completed or, after passage of the 1930 Act, to obtain a relinquishment from the United States of the base property. There are no allegations that the State sought to do either. Nor is there any indication that these lieu rights were recorded under the 1955 Act or tendered for payment of the original purchase price, with interest, under the Sisk Act. Thus, any rights which the State may have obtained from Hyde were lost through its inaction. The Department can recognize no present selection rights emanating from these Supplement A lands. The decision of the State Director rejecting this claim must be affirmed.

The matter of the Supplement B and C lands is somewhat more complex. As we noted above, we are in agreement with the decision of the Oregon Supreme Court in *State v. Hyde, supra*, that the United States did not receive title to the base lands properly classified as either Supplement B or C. Thus, the State would have been viewed as the legal owner of the land so tendered. However, it seems clear, even assuming that these lands were properly classified, that the United States has treated the 680 acres at issue here as properly part of the public domain for at least 80 years.

We note that here, too, there is considerable doubt over whether this land was properly considered Supplement B or C rather than Supplement A land, the decision of the Oregon Supreme Court

notwithstanding. The 1978 audit revision indicated that forest lieu patents issued in response to deeds tendered involving all three relinquishments which make up the 680 acres included within this category. See 1978 Audit, Part 4 at 169. BLM suggests that, to the extent that GLO authorized issuance of patents in response to the applications, GLO must have "accepted" the forest lieu application. Such an acceptance would, necessarily, require that this acreage be treated as Supplement A land rather than Supplement B or C lands.

[8] We need not consider this question further, however, since it is our view that, regardless of whether or not such land is properly considered Supplement A or Supplement B or C lands, the United States has acquired title to such lands through adverse possession. While it is true that adverse possession will not normally arise against a state, the Court of Claims has recognized an exception insofar as the United States is concerned. In *California v. United States*, 132 F. Supp. 208 (1955), the Court first noted the general principle that a state is not affected by adverse possession even though it be open and notorious. The Court continued:

We think this is perhaps a correct statement of the law, but it does not apply as against the United States. The United States may go into possession of the property of a State and may successfully resist an action by the State to eject it. Therefore, if the occupation is by the Federal Government, the State is obliged to take notice of it, and, hence, it follows that if the State learned that any one is occupying its property, it must ascertain, at its peril, whether or not they occupy it for and on behalf of the United States, or under a claim of right acquired from the United States.

Id. at 211.

We think it clear that the United States has openly and notoriously possessed the base lands involved in Supplement B and C of Category II far longer than would be required to vest the Federal Government's title under adverse possession, which in Oregon requires continuous possession for only 10 years. Thus, the title which the United States now possesses is derived not from any exchange proposed by the State or its predecessors-in-interest but by its possession of the base property adversely to the State. There is no statutory authority that would authorize BLM to permit an exchange of land where the offered base is already owned by the United States. Thus, regardless of whether this land properly be considered Supplement B and C land or Supplement A land there is no possible way that BLM could recognize any selection rights in the State. The decision of BLM as to Supplement B and C land in Category II is affirmed.

The final 640 acres involved in this appeal concern lands which, while part of the Hyde fraud, were not part of the Hyde case before the Oregon Supreme Court. Thus, there has been no determination as to whether this acreage should be classified as Supplement A or B. We note, however, that the United States subsequently issued a patent for 200 acres using part of the tendered land as base. The patent was later cancelled. Insofar as that 200 acres of land is concerned, it is obvious

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that the United States accepted the deed. Therefore, this acreage is also properly classified as Supplement A, and, for the reasons stated above, no selection rights remain to be exercised. Insofar as the remaining 440 acres is concerned, we think it almost a certainty that GLO accepted the deed for all of the 640 acres, thus placing all of the land in Supplement A. But even were the the State able to show that this land was properly considered Supplement B or C, the same considerations relating to adverse possession, just discussed, would compel the rejection of the State's argument concerning this acreage. BLM's decision on this point must likewise be affirmed.

In conclusion, 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 Oregon State Office is reversed as to the Supplement A land in Category I, reversed as to that land properly considered Supplement B or C in Category I, affirmed as to the Supplement A land in Category II, affirmed as to the Supplement B or C land in Category II, and the State Office is directed to conduct further proceedings to determine the status of certain lands presently classified as Supplement B or C in Category I to determine whether such lands are, in fact, correctly classified, in conformity to the principles delineated herein.

DOUGLAS E. HENRIQUES
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

JAMES L. BURSKI
Administrative Judge

IN RE ATTORNEY FEES REQUEST OF GOSTA E. DAGG

12 IBIA 132

Decided *January 23, 1984*

Petition for attorney fees filed by counsel for prevailing party in *Estate of Helen Ward Willey*, 11 IBIA 43 (1983).

Petition granted.

1. Indian Probate: Attorneys at Law: Fees

Under 43 CFR 4.281, an Administrative Law Judge or the Board of Indian Appeals is an authorized representative of the Secretary within the meaning of 25 CFR 115.9 to approve the disbursement of trust funds from an Individual Indian Money account for the payment of attorney fees arising from representation of an Indian client in a Departmental probate proceeding.

APPEARANCES: Gosta E. Dagg, Esq., Everett, Washington, *pro se*; Tim Vollman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Indian Affairs. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

On February 22, 1983, the Board of Indian Appeals (Board) received a petition for attorney fees from Gosta E. Dagg, Esq. (petitioner), Everett, Washington. Petitioner seeks an award of fees and allowable costs for his successful representation of Charles Williams in *Estate of Helen Ward Willey*, 11 IBIA 43 (1983).¹

In support of his petition, petitioner presents a contingency fee agreement between himself and Charles Williams, dated February 1, 1980. In general, the contract provides for payment of a contingent fee of 33-1/3 percent of the value of property which Williams might receive as a result of litigation of the above estate. This fee was to be paid directly from decedent Willey's Individual Indian Money (IIM) account. The BIA did not approve the contract in advance of petitioner's representation of Charles Williams or of the filing of the present petition.

Petitioner seeks to enforce this fee agreement "as a cost of administration [of Helen Ward Willey's estate] or * * * [as a charge against] the interest of Charles Williams" (Petition at 1). Petitioner therefore asks that this fee "be paid directly from the IIM account of the Estate of Helen Ward Willey at the Olympic Peninsula Agency of the B.I.A." *Id.* Alternatively, as outlined in an April 26, 1983, amendment to the petition, petitioner seeks payment for services rendered on the basis of an itemized schedule.

Under 43 CFR 4.281, attorney fees may be allowed in Indian probate cases either against the interest of the person represented or as a cost of administering the estate. In this case, the difference is perhaps academic because the person represented received the entire estate. However, an attorney should look first to the client for payment. The Board will, therefore, consider whether the present contingency fee agreement is properly chargeable against IIM account funds held for or due to Charles Williams.²

¹ In *Willey*, Charles Williams was found to be entitled to receive all property held by the Bureau of Indian Affairs (BIA) in trust for decedent Willey.

² The Board considered the question of payment of general creditors' claims from trust funds of an estate in *Estate of John Joseph Kipp*, 8 IBIA 30, 87 I.D. 98, *reconsideration denied*, 8 IBIA 67 (1980). The dissent in *Kipp* reviews the development of the Departmental regulations allowing creditors' claims against decedents' estates, and suggests that the only allowable claims are ones that were approved by the Secretary during the decedent's lifetime. In responding to this dissent, the majority noted that payment of such claims had been permitted by Departmental regulation for many years, and "[t]o the extent that Indians exist daily on lines of credit furnished them by grocers, doctors, and other life-blood creditors, it is difficult to perceive the good of a rule which would either deny them this lifestyle or seriously impair it through some form of 'Departmental approval' requirement." 8 IBIA at 39 n.8, 87 I.D. at 103 n.8.

Because the Board has determined that any award of fees should be made from the interests inherited by Charles Williams, the propriety of an award against the estate is not raised. Here, the specific question is whether payment for services rendered to a person still living, in connection with the probate of an estate, should be made from funds held in trust for his benefit.

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Departmental regulations concerning IIM accounts are set forth in 25 CFR Part 115. Specifically, section 115.9 provides that BIA may disburse funds from an IIM account to cover "contractual arrangements approved in advance by the Secretary or his authorized representative." Petitioner argues, and BIA agrees, that this regulation should not be construed to require, in all instances, Secretarial approval of a contract when it is executed. Instead, the parties maintain that approval can be given at any time before payment from trust funds is made under the contract. Cf. *Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 70 (1983) (retroactively approving a deed of Indian trust land). The Board agrees.

[1] Petitioner further argues that 43 CFR 4.281 makes Administrative Law Judges and the Board authorized representatives of the Secretary for the purpose of considering and awarding, if appropriate, attorney fees for representation of Indians in Indian probate proceedings. The Board again agrees. Therefore, the approval of an attorney fee agreement by an Administrative Law Judge or the Board constitutes the requisite approval required by 25 CFR 115.9 for disbursement of trust funds from an IIM account.³

Section 4.281 states: "In determining attorney fees, consideration shall be given to the fact that the property of the decedent is restricted or held in trust and that it is the duty of the Department to protect the rights of all parties in interest." In this case, the contingency fee agreement, at paragraph 2, provides for the payment of

33 1/3% of all monies in trust or otherwise at the time the funds are legally able to be distributed to Client [Charles Williams] and 1/3 of any funds recovered from Reginald Willey and Georgianna Straight. [4] The 1/3 fee shall be limited to those amounts then in the trust fund except for the funds realized or to be realized from (1) Reginald Willey and Georgianna Straight and from (2) Quinault allotment No. 101 (Walter Major); i.e. the 1/3 shall specifically, also, apply to the funds whenever received from the Walter Major allotment from the sale of currently standing timber.

Giving due consideration to its trust responsibilities, the Board cannot approve this contract in its entirety. First, representation of Charles Williams in an attempt to recover funds disbursed by BIA to Reginald Willey and Georgianna Straight under the original probate decision goes beyond representation of Williams in a probate proceeding under the jurisdiction of the Department of the Interior. In addition, the provision for a payment to petitioner of one-third of the

³ This finding does not prevent an attorney from seeking approval of an attorney fee contract by BIA before representing an Indian client. In fact, the Board encourages such prior approval. In *Estate of Howard Good Elk or Pacer*, 9 IBIA 38 (1981), cited by petitioner as precedent for the Board's allowing an award of attorney fees in an Indian probate case, counsel submitted such an attorney fee agreement approved by the Agency Superintendent for the Secretary when the contract was executed.

⁴ The original probate decision had disapproved decedent Willey's will and had found that her heirs at law were Reginald Willey and Georgianna Straight. Petitioner states that approximately \$62,000 had been distributed to these individuals before the filing of Charles Williams' petition for reopening.

value of standing timber on the Walter Major allotment is potentially excessive, and incalculable at this time.⁵

The Board finds reasonable the portion of the contingency fee agreement which provides for an award based upon the funds in the estate's IIM account "at the time the funds are legally able to be distributed to" Williams. Petitioner took an apparently hopeless case and brought it to a successful conclusion for his client on a contingency fee basis, taking a full share of the risk that he might be unsuccessful. The estate accruing to Charles Williams is estimated to be in excess of \$200,000 (see Brief at 3) although only about \$32,000 was in the IIM account at the time of the Board's decision. Considering the time required, the complexity of the case, and the size of the estate involved,⁶ the Board finds that an attorney fee of one-third of the amount in decedent's IIM account is reasonable.⁷ The amount to be used in calculating petitioner's fee shall include only those funds that were in the estate's IIM account on January 31, 1983, the date of the Board's decision finding Williams entitled to the estate, and shall not include any funds accruing to the estate since January 31, 1983, but held in the account under the Board's March 25, 1983, order staying distribution. In addition to this attorney fee, costs in the amount of \$227.55 are to be allowed.⁸

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board approves that part of the contingency fee agreement between petitioner and Williams that has been described. This matter is referred to BIA for a determination of the amount of the fee in accordance with this decision. This fee should be paid to petitioner from the IIM account of the estate of Helen Ward Willey. Upon payment of this claim, the March 25, 1983, stay on distribution of the

⁵ In a Dec. 8, 1983, letter to the Board, received on Dec. 19, 1983, petitioner abandoned that part of his petition seeking any award based on the value of trust real property.

⁶ For a list of other factors to be considered in determining the reasonableness of attorney fees, see "Model Rules of Professional Conduct," Rule 1.5(a), as adopted by the House of Delegates of the American Bar Association on Aug. 3, 1983.

⁷ The Board's willingness to accept a 33-1/3 percent award in this case should not be construed by the bar as setting a standard for such awards in future cases. The Board has a greater responsibility to the Indian community than to accept any predetermined percentage of the ultimate award as appropriate without very careful scrutiny. In particular, when the attorney-client contract has not received prior BIA approval, the amount requested as compensation in each contingent fee case must be weighed against the appropriate hourly rate for the type of work being undertaken, determined partly in light of the prevailing scale in the particular community, and with due consideration to whatever minimum amount may appear appropriate because of the contingent nature of the compensation. Therefore, each request for attorney fees that comes before this Board must be justified on its own merits.

⁸ Petitioner alternatively sought recovery of \$10,615 based on an itemized schedule of time expended on this case from Feb. 1, 1980, through Feb. 15, 1983. This amount appears to represent a fee of \$110 per hour. Notwithstanding the possibility that the fee so arrived at may be less than that allowed by this opinion, petitioner presents no evidence that this rate was agreed to by Williams, that it is the customary rate in the community, or that it is otherwise reasonable. There is also no explanation for a flat rate rather than a varying rate depending upon the nature of the work involved; for example, different rates for time spent in the office and before the Administrative Law Judge. In order to approve an award based upon such an itemized schedule, the petition should be presented first to the Administrative Law Judge who heard the case for a determination of the reasonableness of the fee in relation to the observed performance.

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estate of Helen Ward Willey is lifted, and the remainder of the estate may be distributed in accordance with customary BIA procedures.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

JERRY MUSKRAT
Administrative Judge

BERNARD V. PARRETTE
Chief Administrative Judge

CLAYTON J. WRAY

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS
(OPERATIONS)

12 IBIA 146

Decided *January 27, 1984*

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) affirming a denial of a request for refund of prepaid rents under leases of Indian trust lands.

Affirmed.

1. Administrative Procedure: Administrative Review--Appeals--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally

The Board of Indian Appeals has jurisdiction under 25 CFR 2.19(c)(2) to review decisions of the Deputy Assistant Secretary--Indian Affairs (Operations) rendered under the administrative appeal regulations of 25 CFR Part 2 that are not based solely on the exercise of discretion. A decision that requires the application of general legal principles to a specific fact situation involves an interpretation of law and is not solely discretionary. Therefore, it can be reviewed by the Board.

2. Administrative Procedure: Administrative Review--Appeals--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally

The characterization of a decision rendered by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 as discretionary is a legal conclusion subject to review by the Board of Indian Appeals.

3. Administrative Procedure: Administrative Review--Appeals--Board of Indian Appeals: Jurisdiction--Rules of Practice: Appeals: Generally

A decision by the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 that is not timely appealed to the Board of Indian Appeals is final for the Department.

**4. Administrative Authority: Generally--Bureau of Indian Affairs:
Administrative Appeals: Leases--Indian Lands: Leases and Permits:
Revocation or Cancellation**

A decision of the Bureau of Indian Affairs that cancels a lease of Indian trust lands generally involves an interpretation of the lease provisions, relevant Federal regulations governing cancellation procedures, and applicable Federal, state, and tribal case and statutory law. Such a decision cannot properly be characterized under 25 CFR 2.19 as solely discretionary.

**5. Administrative Procedure: Administrative Review--Administrative Procedure: Decisions--Appeals--Bureau of Indian Affairs:
Administrative Appeals: Generally**

25 CFR 2.19 contemplates that, within 30 days after an appeal taken to the Deputy Assistant Secretary--Indian Affairs (Operations) under 25 CFR Part 2 becomes ripe for decision, the appeal will either be decided by a written decision or referred to the Board of Indian Appeals for decision.

**6. Administrative Procedure: Administrative Review--Appeals--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs:
Administrative Appeals: Generally**

Upon the expiration of the 30-day time period for decision established by 25 CFR 2.19(b), the Board of Indian Appeals has jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). However, the Board will not act in the matter unless the appellant invokes the Board's jurisdiction by filing with the Board a separate notice of appeal, motion to assume jurisdiction, or other document alleging Board jurisdiction. The original filing under 25 CFR 2.11(a) is insufficient to invoke the Board's jurisdiction automatically after the expiration of the time period.

7. Indian Lands: Leases and Permits: Generally

The Board of Indian Appeals will apply the law of the state in which real property held in trust for an Indian lessor is located in determining whether prepaid rent may be retained by the lessor when a lease was canceled because of the lessee's violations.

**APPEARANCES: Clayton J. Wray, *pro se*. Counsel to the Board:
Kathryn A. Lynn.**

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

On January 24, 1983, the Board of Indian Appeals (Board) received a notice of appeal from Clayton J. Wray (appellant), seeking review of a December 22, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant Secretary, appellee). That decision affirmed the denial of appellant's request for a refund of advance rent paid pursuant to leases 6836, 6837, and 6697 on the Tulalip Indian Reservation in the State of Washington. For the following reasons, the Board affirms the decision.

Background

On January 27, 1981, appellant's leases of lands on the Tulalip Indian Reservation were canceled by the Superintendent of the Puget Sound Agency (Superintendent), Bureau of Indian Affairs (BIA). These

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cancellations were upheld by the Deputy Assistant Secretary on July 15, 1981. No appeal was taken from this decision.

In a September 1, 1982, letter to the Superintendent, appellant demanded either that advance rents paid to the lessor under the terms of the canceled leases be refunded, or that the amount of the requested refund be applied against the balance remaining on a promissory note given to the lessor by appellant for damages to the leasehold committed during the term of the lease. The amount appellant sought in either case was the difference between what he then owed on the note and the greater amount the lessor allegedly owed him as a refund of prepaid rent.¹ Appellant also indicated his intention to stop further payments on the note.

On September 2, 1982, the Superintendent informed appellant that he was not entitled to a refund of prepaid rent because the leases had been canceled as a result of his violations of their terms. Furthermore, the Superintendent concluded that the balance on the installment note was still owed.

Appellant appealed the Superintendent's denial on September 4, 1982. On September 29, 1982, the Acting Area Director, Portland Area Office, BIA, denied appellant's appeal. Citing legal precedents, the Acting Area Director held that rent paid in advance became the property of the lessor and, absent special provisions in the lease, could not be recovered by the lessee unless the lessor wrongfully terminated the lease. Because he found the leases here had been canceled through appellant's fault, the Acting Area Director determined that a refund was not appropriate and that appellant continued to owe the balance of the promissory note.

On October 29, 1982, appellant appealed the Acting Area Director's decision to the Deputy Assistant Secretary, who affirmed it on December 22, 1982. Appellant's subsequent notice of appeal to the Board, received on January 24, 1983, requested the Board to take jurisdiction over his appeal to the Deputy Assistant Secretary under 25 CFR 2.19(b). Appellant alleged that the Deputy Assistant Secretary had failed to decide the appeal within 30 days from the date all pleadings were filed. On January 25, 1983, the Board docketed the appeal and requested information on the status of the matter from the Deputy Assistant Secretary.

The Deputy Assistant Secretary responded on March 15, 1983. He asserted that appellant had exhausted all administrative remedies because the December 22, 1982, decision denying the appeal was based on the exercise of discretionary authority and was therefore final for the Department.

¹ Appellant issued a promissory note in the amount of \$3,749.59 to the lessor on Oct. 12, 1981, for timber trespass resulting from his having cut trees on the leasehold without permission. According to appellant's calculations, the lessor owed him a refund of \$822.05 for prepaid rent, and he owed the lessor \$612.71 on the promissory note. Appellant seeks the difference of \$209.34. See appellant's letter to the Board dated Feb. 2, 1983.

After reviewing the information provided by appellant and the Deputy Assistant Secretary, the Board found it did not have jurisdiction over the appeal under 25 CFR 2.19(b), but did under 25 CFR 2.19(c)(2). It therefore issued a preliminary jurisdictional determination on March 25, 1983, finding that the December 22, 1982, decision appealed from was based on an interpretation of law and was not solely discretionary. Consequently, the decision could be reviewed.

On April 22, 1983, after receipt of the administrative record, the Board established a briefing schedule. Appellant filed an opening brief on May 14, 1983. No briefs in opposition were submitted.

Jurisdiction

The parties were given an opportunity during the briefing period to dispute the March 25, 1983, preliminary determination that appellee's decision was based on an interpretation of law. No briefs alleging error were filed.

[1] The Board took jurisdiction over this appeal under 25 CFR 2.19(c)(2). Section 2.19 states in pertinent part:

(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [?] shall:

(1) Render a written decision on the appeal, or

(2) Refer the appeal to the Board of Indian Appeals for decision.

(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision.

(c) When the Commissioner renders a written decision on an appeal, he shall include one of the following statements in the written decision:

(1) If the decision is based on the exercise of discretionary authority, it shall so state; and a statement shall be included that the decision is final for the Department.

(2) If the decision is based on interpretation of law, a statement shall be included that the decision will become final 60 days from receipt thereof unless an appeal is filed with the Board of Indian Appeals * * *.

Under section 2.19(c)(2), the Board has jurisdiction to review decisions based on interpretations of law. The decision in this case involved a determination of whether appellant was entitled to a refund of prepaid rent under the circumstances presented. The decision required the application of general legal principles to a particular fact situation. Such a process is the essence of legal decisionmaking. In contrast, discretion, as referred to in section 2.19(c)(1), involves the exercise of individual judgment, unhampered by legal rules. See *Black's Law Dictionary* 553 (Rev. 4th ed. 1968).

[2] The Board has held that BIA's characterization of a decision as discretionary constitutes a legal conclusion, subject to Board review. *Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 184, 90 I.D. 243 (1983); *Billings American Indian Council v. Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 142, 144 (1983). A decision properly characterized

² The administrative review functions of the Commissioner of Indian Affairs were assigned to the Deputy Assistant Secretary--Indian Affairs (Operations) by memorandum dated May 15, 1981, and signed by the Assistant Secretary for Indian Affairs.

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as discretionary will, absent extraordinary circumstances,³ not be reviewed. See 43 CFR 4.330(b)(2); *Billings American Indian Council, supra*; *Face v. Acting Assistant Secretary--Indian Affairs*, 11 IBIA 35 (1983). A decision improperly characterized as discretionary, however, will be reviewed to the extent of the legal conclusions reached. *Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 21, 89 I.D. 655 (1982). In this case, the Board affirms its preliminary determination that the entire decision is based on an interpretation of law and is reviewable.

Discussion and Conclusions

The specific question before the Board is whether a lessee of Indian trust lands is entitled to a refund for prepaid rentals when the lease was canceled due to the lessee's violations of its terms. Appellant, however, raises several additional issues that should be considered before this question is reached.

[3] Appellant first argues that the July 15, 1981, decision canceling his leases was incorrect. Appellant did not appeal this decision to the Board when it was issued. Consequently, the decision is final for the Department. *Estate of Ralph James (Elmer) Hail*, 12 IBIA 62, 65 (1983); *Walch Logging Co. v. Portland Assistant Area Director*, 11 IBIA 85, 90 I.D. 88, 92 (1983). The Board will not permit a collateral attack on that decision in the context of this appeal. *Seattle Indian Center v. Acting Deputy Assistant Secretary--Indian Affairs (Operations)*, 12 IBIA 67, 78 n.9, 90 I.D. 515, 521 n.9 (1983); *Hamlin v. Portland Area Director*, 9 IBIA 16 (1981). Furthermore, to the extent that the present appeal might be construed as also constituting an appeal of the 1981 cancellation decision, the Board does not have jurisdiction to consider an untimely appeal (*Hail, supra*, and cases cited therein) and will not consider on appeal issues not raised below (*Burns v. Anadarko Area Director*, 11 IBIA 133 (1983)).

Appellant's argument concerning the 1981 decision, however, raises two related issues that the Board believes should be addressed. In attempting to overturn that decision, appellant first attacks the characterization of it as discretionary and final for the Department. Appellant alleges at page 2 of his brief:

[T]he original cancellation of my lease, that caused me a loss of over \$75,000, was not a discretionary matter, but a legal question. A review of my cancellation letter (dated 15 July 1981) from the Deputy [Assistant Secretary] will clearly show that he stated, "because no colorable legal question has been raised with regards to such action, this decision is based exclusively on discretionary authority and is final for the Department."

[4] As discussed under the "Jurisdiction" section, *supra*, the characterization of a decision as discretionary is a legal conclusion

³ An example of extraordinary circumstances would be a referral of a matter to the Board by the Secretary of the Interior without limitation on the Board's scope of review. See 43 CFR 4.330(a)(2); *Pueblo of Laguna v. Assistant Secretary for Indian Affairs*, 12 IBIA 80, 90 I.D. 521 (1983).

based on legal analysis and is reviewable by the Board. In most cases, the cancellation of a lease, which potentially involves an interpretation of a contract, Federal regulations, and Federal, state, and tribal case and statutory law, will require an interpretation of law.⁴

In appellant's case, the record reveals that the cancellation decision was based on an analysis of appellant's conduct measured against the lease terms and a tribal ordinance. Because this analysis was made in accordance with general legal principles, it involved an interpretation of law, and the characterization of the determination as discretionary was therefore incorrect.

Appellant now argues that he did not appeal the decision because it was improperly characterized as final for the Department. Under appropriate circumstances, the Board might be receptive to such an argument.⁵ Here, however, appellant admits committing the zoning and subleasing violations and timber trespass that were the basis for the cancellation of his leases. Had the Board reviewed the matter, it would have been required to affirm the decision based on appellant's admissions. Therefore, although BIA did improperly characterize the 1981 decision as discretionary and final for the Department, that mistake constitutes harmless error under the circumstances of this case.

Appellant next argues that BIA failed to comport with section 2.19(a) when it did not take action within 30 days after the appeal became ripe for decision:

[T]he Deputy [Assistant Secretary] acknowledged that I filed the appeal in a timely manner; however, it was 75 days after I filed my appeal before the Deputy responded. (May 6th until 20 July 1981). Upon receipt of the cancellation, I telephoned * * * officials of the BIA in Washington D.C. * * * I was told that the 30 day time limit had been met since they had "acted" by reading my appeal and talking about it. They told me that my case would not be referred to The Board. Since I am one to believe that federal officials do not lie and since I am not an attorney I thought that they had indeed acted in a timely manner. Today, I know that this is not the case and that The Board seems to have automatic jurisdiction in the matter of the cancellation of my lease. During the process of filing an appeal of May 6th 1981, I mailed a copy of my appeal to The Board, and I have documentation that The Board received this copy on May 12. I assumed that The Board would have automatic authority if the Deputy [Assistant Secretary] did not act within 30 days. Thus I request The Board to order making a

⁴The provisions of 25 CFR 2.19(c) have been the source of apparent confusion for some time. See, e.g., *Racquet Drive Estates, Inc. v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 184, 90 I.D. 243 (1983); *Allen v. Navajo Area Director*, 10 IBIA 146, 89 I.D. 508 (1982); *St. Pierre v. Commissioner of Indian Affairs*, 9 IBIA 203, 89 I.D. 132 (1982), *disapproved in part*, *Burnette v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 10 IBIA 464, 89 I.D. 609 (1982); *Hamlin, supra*. It seems possible that because the decision to issue a lease is often a discretionary act, some BIA employees may have assumed that the subsequent administration of the lease is also discretionary. This is an erroneous assumption, for once a lease has been issued, the lessee acquires legal rights under the lease agreement and Departmental regulations. In administering the lease, the interpretation of the agreement, of regulations governing leasing activity, and of applicable statutes and tribal law, involves legal analysis. Section 2.19(c)(2) makes such legal determinations reviewable by the Board to insure the correct application of law in individual cases. Thus, the characterization of a lease cancellation as discretionary is always suspect. The refusal to issue a lease, however, is more likely than not properly characterized as discretionary. An erroneous BIA decision based upon an assumption that contractual rights under leases of Indian trust lands exist only at the discretion of Departmental officials would certainly be found to be arbitrary and capricious if it came under judicial review.

⁵Although it is difficult to prove estoppel against the Government, the remedy is available if the elements are met. See *Native Americans for Community Action v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 214, 219 (1983).

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preliminary determination of the cancellation of my lease by the Deputy [Assistant Secretary] in a letter dated July 15, 1981.

[5] Contrary to the position reportedly taken by BIA, "action," as referred to in section 2.19(b), contemplates that within 30 days after an appeal becomes ripe for decision, the Deputy Assistant Secretary will either issue a written decision on the appeal or else refer the appeal to the Board for decision. If neither of these actions is taken within 30 days, the Board has the right to review the appeal and to render a decision in the matter. See *Rose v. Anadarko Area Director*, 12 IBIA 130 (1984).

[6] Appellant is thus correct that the Board acquires jurisdiction under section 2.19 immediately after the expiration of the 30-day time period. However, the fact that the Board then has jurisdiction to hear the appeal does not mean that the appeal automatically comes to the Board without further action. In *Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 146, 153 (1983), the Board discussed the status of an appeal after expiration of the 30-day time period in declining to hold that a decision issued by the Deputy Assistant Secretary after that time was void:

Under 25 CFR 2.11(a) a notice of appeal filed with the [Deputy Assistant Secretary] must also be served on the Board. Service on the Board of subsequent documents is not required. Therefore, the Board does not have independent knowledge that the 30-day limitation established in section 2.19 has expired. When an appellant informs the Board of the expiration of this period through the filing either of a notice of appeal giving evidence of the expiration or of a motion for the Board to assume jurisdiction over the appeal, the Board will act to ensure that the time limitation is properly observed by docketing the case and requesting transmittal of the administrative record from the office of the Deputy Assistant Secretary.

In the absence of a proper decision or referral by BIA, it is incumbent upon an appellant to provide the Board with information alleging and invoking its jurisdiction. As discussed in *Urban Indian Council*, a separate notice separate of appeal or motion to assume jurisdiction filed with the Board is sufficient to accomplish that purpose.

Appellant argues that the Board should have assumed jurisdiction over his appeal on its own motion because, following the requirements of 25 CFR 2.11(a), he filed a copy of his appeal to the Deputy Assistant Secretary with the Board. This argument was anticipated in *Urban Indian Council*. The fact that an appeal has been filed with the Deputy Assistant Secretary means only that the matter might later come before the Board. The Board declines to exercise its jurisdiction without knowledge that the 30-day period has expired and that the appellant does not wish to wait for a decision from BIA. Therefore, filing a copy of an appeal to the Deputy Assistant Secretary with the Board under 25 CFR 2.11(a) is not sufficient in itself to cause the case to be transferred automatically to the Board upon the expiration of the 30-day period established in 25 CFR 2.19(a).

Appellant permitted the 30-day time limit for decision by the Deputy Assistant Secretary to expire. Although the Board had jurisdiction at that time, appellant failed to file with the Board a separate notice of appeal, a motion for it to assume jurisdiction, or any other document alleging Board jurisdiction. Consequently, appellant failed to invoke the Board's jurisdiction.

[7] The Board thus reaches the specific question noted at the beginning of this discussion: whether appellant is entitled to a refund of prepaid rent following cancellation of his leases. The general rule of law is that advance rents paid by a defaulting lessee may be retained by the lessor. *See, e.g., Zaconick v. McKee*, 310 F.2d 12 (5th Cir. 1962); *Slone Properties, Inc. v. Colvin*, 190 F.2d 401 (4th Cir. 1951); *State Highway Commission v. Demarest*, 503 P.2d 682 (Or. 1972); *Sinclair v. Burke*, 287 P. 686 (Or. 1930). The rule and its underlying rationale are succinctly explained in *Annotation*, 27 A.L.R.2d 656, 658, 659 (1953):

It is well settled that where a lease requires payment of rent in advance the lessor may retain the payment, upon default of the lessee * * * constituting a breach of the lease, in the absence of a provision for its refund, because the right and title thereto passed upon the execution of the lease or the payment required, and prevention of its application to the part of the term for which it was paid arose from the lessee's own conduct.

* * * * *

A provision in a lease for payment in advance of the rent is not a provision merely to secure the lessor for the performance of the undertakings of the lessee expressed in the lease, but simply a provision requiring certain rents to be paid in advance, and a payment made in accordance therewith may be retained by the lessor where, pursuant to the terms of the lease, he terminates it for the default of the lessee * * * even in the absence of an agreement to that effect. [Citations and footnotes omitted.]

This rule has been adopted by the courts of the State of Washington where the land at issue is located. *See Lundsten v. Largent*, 298 P.2d 488, 491 (Wash. 1956), and cases cited therein. In the absence of superseding Federal law, the Board normally follows the law of the state in which real property is located in resolving disputes relating to that land. *See Walch Logging Co. v. Portland Assistant Area Director*, 11 IBIA 85, 98 n.8, 90 I.D. 88, 95 n.8 (1983); *Estate of Richard Doyle Two Bulls*, 11 IBIA 77 (1983).

The July 15, 1981, decision of the Deputy Assistant Secretary canceling appellant's leases, which was not appealed, found appellant to be a defaulting lessee. Appellant therefore comes within the rule denying recovery of advance rents by a defaulting lessee. Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the December 22, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) denying appellant's request for a refund of prepaid rent is affirmed.

JERRY MUSKRAT
Administrative Judge

January 27, 1984

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

BERNARD V. PARRETTE
Chief Administrative Judge

APPEAL OF WYLIE BROTHERS CONTRACTING CO.

IBCA-1175-11-77

Decided January 27, 1984

Contract No. N00-C-1420-4889, Bureau of Indian Affairs.

Sustained in Part.

**1. Contracts: Construction and Operation: Changes and Extras--
Contracts: Disputes and Remedies: Equitable Adjustments**

Upon finding that the contractor's continuous performance in the early stages of a road construction project was substantially disrupted by the Government because of grade and slope revisions resulting in delayed delivery of a final structures list, the Board holds that a constructive change occurred entitling appellant to an equitable adjustment for resulting extra costs.

**2. Contracts: Construction and Operation: Differing Site Conditions
(Changed Conditions)--Contracts: Disputes and Remedies: Equitable
Adjustments**

Where it was found: That the Government designated in the contract documents a specific site as the source of aggregate for use in a road construction project; that the contractor relied on the contract data indicating that such source contained sufficient conforming material to satisfy the contract requirements; and that the actual subsurface conditions differed materially from the conditions indicated by the contract drawings and from the expectations of persons familiar with the source, the Board concludes that the contractor is entitled to an equitable adjustment under a Category I Differing Site Condition theory.

**3. Contracts: Construction and Operation: Allowable Costs--Contracts:
Disputes and Remedies: Equitable Adjustments**

In its quantum consideration, after finding entitlement to equitable adjustments, the Board allowed amounts claimed by the contractor for depreciation, and improperly withheld by the Government for liquidated damages. It approved the claimed rate of profit disallowed by the Government auditor and the bulk of the audited total costs. However, the Board disallowed a claim for the increased price of asphalt upon finding a failure of proof that either the contractor or its supplier paid or incurred increased costs for asphalt, and, disallowed a claim for costs attributed to a winter shutdown upon finding that the contractor had agreed that such shutdown would be at no additional cost to the Government. Upon finding some fault with the Government audit upon which the contractor based its total cost theory of recovery, and dissatisfaction with the accuracy or specificity available for a precise calculation of certain other costs claimed, as well as with the contractor's proposed formula for calculating costs per day for days of delay, the Board determines that application of the jury verdict approach is both practicable and reasonable in arriving at the equitable adjustment award to the contractor.

APPEARANCES: L. Graeme Bell III, Joseph D. West, Attorneys at Law, Crowell & Moring, Washington, D.C., for Appellant; Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

On May 24, 1972, the United States Department of the Interior, through the Navajo Area Office of the Bureau of Indian Affairs (hereinafter "BIA" or "Government") issued an invitation for bids on Specification No. NA-0600-4889. The contract to be let called for completion of the N64 project, which consisted of furnishing all labor, equipment, materials, and incidentals necessary for the construction of 29.724 miles of roadway, including 5.314 miles of spur roads and parking areas, on the Navajo Indian Reservation and Canyon De Chelly National Monument, Apache County, Arizona.

Prospective bidders on the project were advised of the availability of aggregate in the vicinity by information presented with the invitation for bids (Stipulation 29). Finding an appropriate aggregate source for a construction project was a difficult problem in the Navajo Reservation area because the nature of the available aggregate was such that it usually did not meet the hardness, sodium sulfate soundness, and retained strength requirements (Stipulation 39; Tr. 157).¹ Sheet 56 of the contract drawings contained information concerning the Tsaille Peak South Slope as an aggregate source for the N64 project (AF-A).

Bids on the N64 project were opened on July 6, 1972, and Wylie Brothers Contracting Co. (hereinafter "appellant" or "contractor") was determined to be the low responsive and responsible bidder. On August 15, 1972, BIA awarded appellant Contract No. N00-C-1420-4889 in the amount of \$5,344,476.05.

Appellant received the notice to proceed on August 24, 1972, 50 days subsequent to the bid opening, thereby establishing August 25, 1972, as the first day of the contract for computation of time for completion of the job. The contract provided that appellant had 540 calendar days to complete the project (AF-A). This established February 15, 1974, as the completion date. On August 25, 1972, BIA held a preconstruction conference, wherein appellant submitted for BIA's approval its initial progress chart (AF-76).

After appellant's initial aggregate production efforts were underway, it was determined that the Tsaille Peak South Slope source was not an adequate source of aggregate for the N64 project. Appellant's investigation into and the subsequent failure of alternative sources resulted in BIA approving on August 3, 1973, the Greasewood and

¹ References to the record throughout this opinion will be abbreviated typically as follows: Appeal File, Exhibit 24 (AF-24); Appellant's Exhibit 25 (AX-25); Government's Exhibit A (GX-A); Transcript, p. 39 (Tr. 39).

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Tanner sources for use on the N64 project. Asphalt mixing and paving operations thereafter commenced on November 1, 1973.

Effective December 13, 1973, BIA issued a prospective Cessation of Work Order covering asphalt-related work for the winter of 1973 and 1974. In March 1974, appellant was notified that its supplier of asphalt could fulfill only a portion of appellant's asphalt requirements due to mandatory Federal allocation regulations. Because of appellant's inability to obtain liquid asphalt, it shutdown the project from April until September 1974, when it was supplied with sufficient quantities of asphalt to permit normal paving operations. After a second BIA shutdown for the winter for 1974 and 1975, appellant resumed paving effective May 12, 1975. Paving operations continued until August 22, 1975, when appellant substantially completed the project.

By a series of change orders issued (AF-5 through 23), the original contract price was decreased to \$4,953,027, and the original completion date was extended through August 13, 1975.

This appeal was timely filed on August 4, 1977, from the final decision of the contracting officer dated July 29, 1977. The contracting officer denied entitlement to contract adjustments for claims in the amount of \$2,559,613.41.

On May 8, 1980, the Board issued an order dismissing the appeal without prejudice to reinstatement because appellant could not be ready for the scheduled hearing June 3, 1980, and was not certain when it would be ready. Pursuant to timely application, the Board, by order dated November 7, 1980, reinstated the appeal. An evidentiary hearing was held in Phoenix, Arizona, on February 9 through 11, 1981. Both parties filed posthearing briefs.

Discussion

Appellant advances two claims for equitable adjustments to its contract. The first is based on the impact to appellant's planned method of work caused by grade changes and staking revisions to the east end of the project, and by BIA's failure to timely issue a structures list for the west end of the project. The second is founded on the failure of the Tsaile Peak South Slope aggregate source to yield a sufficient quantity of aggregate materials that would meet contract specifications. Appellant asserts three alternative theories in support of its second claim: (1) That the subsurface conditions at the Tsaile Peak South Slope source constituted a Category I Differing Site Condition; (2) that said conditions being of an unknown and unusual nature constituted a Category II Differing Site Condition; and (3) that the specification requirements for aggregate and asphalt mixes were defective entitling appellant to an equitable adjustment under the changes clause of the general provisions (Appellant's Brief at 1, 2, 3, 77, 78).

A. Entitlement

Claim No. 1--Delays Caused by Grade and Slope Revisions

Appellant's first claim alleges that as a result of the grading and staking changes to the east end of the N64 project, it was forced to alter its planned method of grading and pipelaying operations thereby entitling it to an equitable adjustment for its increased costs of performance.

The evidence of record leaves no doubt that appellant intended to proceed with work on the east end of the project and perform its grading and pipelaying operations in a planned and sequential fashion.² At the preconstruction meeting of August 25, 1972, appellant advised BIA that it would begin construction on the east end at Station 629 + 00 and proceed through Station 1281 + 06.85 (Stipulation 70).

On September 26, 1972, appellant was informed that numerous grade changes had to be made to the east end of the project necessitating a revision to the slope stakes (Stipulation 74). Because such revisions normally require changes to the structures list, the east end structures list could not be finalized until the revisions were made (Tr. 51, 52). Project records show that grade changes and slope staking continued on the east end through November 25, 1972 (Tr. 304-10; AX-102 through AX-107). At the time the grade changes were made to the east end of the project, appellant had not been provided with the structures list for the west side of the project (Tr. 301; AF-25; Stipulation 76).³

Because of the grade changes in the east end of the project and the impact this had upon the ability of appellant to obtain the necessary structures, it alleges it had to bypass certain aspects of the planned sequence of operation. The evidence indicates that in certain areas of the east end, appellant completed a section of the work, then moved its equipment a half a mile away to perform other operations (Tr. 49, 302). Moreover, while these grade changes were being made on the east end, appellant could not reasonably redirect its forces to the west end of the project. First, appellant did not receive the final structures list for the west end until October 14, 1972.⁴ Second, the record shows there was very little clearing and grubbing work on the west end, precluding any productive work that appellant could do without having structures on hand (Tr. 54, 55). The effect of the slope revisions was to vitiate appellant's planned concept of smooth operations.

This case is analogous to the factual situation presented to the Board in *L. O. Brayton & Co., IBCA-641-5-67* (Oct. 16, 1970), 77 I.D. 187, 70-

² For purposes of this dispute, the N64 project is divided into two sections: (1) the west end, from Station 4 + 72.3 to Station 629 + 00; and (2) the east end, from Station 629 + 00 to Station 1281 + 06.85 (Stipulation 69).

³ The first partial revised structure list relative to the east end of the project was made to appellant at the time it received the notice to proceed. The structures list purported to show the size, length, and precise location of all structures to be placed in the east end of the project (Tr. 51-52). Two partial revised structures lists for the west end of the project were provided to appellant on Oct. 3 and Oct. 14, 1972 (Stipulation 73).

⁴ After receiving the complete structures list for the west end, appellant ordered the structures (AX-108 at 19). After delivery of the structures on Nov. 15, 1972, appellant committed its resources to achieving normal progress on the west end (AX-108 at 19-20; AX-109, Tab 36).

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2 BCA par. 8510. There, the contract was for the construction of a power transmission line, and at the time of issuance of the notice to proceed, various parcels of land had not been released for construction. We held that the Government's release of a right-of-way in a discontinuous fashion disrupted the contractor's work and constituted a constructive change to the contract for which the contractor was entitled to an equitable adjustment.

The impact to appellant's operations caused by the disruptive effect of the grade changes is best demonstrated by comparing appellant's planned progress for excavation and structures for December 31, 1972, with its actual progress shown by the December 25, 1972, Request for Partial Payment (AX-109, Tab 41). Appellant completed less than 50 percent of its excavation work and less than 35 percent of its structures work (AF-76, Tab 41, to AX-109). Based on the foregoing, Donald J. Cummings, a claims litigation consultant, testified that as a result of the method that appellant had to utilize to work the project from September 26 through November 15, 1972—a period of 50 days—appellant was working at approximately 50 percent of its planned efficiency rate (Tr. 390-91, 396, 442).

Accordingly, we find:

1. That appellant established that it intended to perform its grading and pipelaying operations pursuant to a specific, continuous, and sequential plan beginning at the east end of the project and that BIA was fully aware of this plan of operation;

2. That from September 26 through November 15, 1972, grade and slope revisions precluded finalization of the structures list for the east end. Without a finalized structures list, appellant could not procure the structures and commence its east end operations according to its plan; and

3. That by being forced to skip certain aspects of the planned sequence of operations at the east end until it could redirect its work force to the west end in mid-November 1972, appellant's continuous performance on the project was substantially disrupted.

[1] For these reasons, and because BIA has failed to rebut either the reasonableness of appellant's planned sequence of operations, or the effect that the grading and staking changes had on those operations, we hold appellant entitled to an equitable adjustment for this claim, based upon a constructive change theory.

Claim No. 2--Failure of the Tsaile Peak South Slope

Aggregate Source

The first theory advanced by appellant in support of its second claim for an equitable adjustment is that the subsurface conditions at the Tsaile Peak South Slope source differed materially from those indicated in the contract, thus constituting a Category I Differing Site

Condition. See *Fluor Utah, Inc.*, IBCA-1068-4-75 (Jan. 15, 1981), 88 I.D. 41, 81-1 BCA par. 14,876.

BIA's position is that the central issue for resolution of the entitlement portion of this claim narrows down to the effect of the inclusion of the information contained on Sheet 56 of the contract drawings and whether there was actually reliance thereon by the contractor. It specifically charges that the Tsaile Peak South Slope was not a designated source. The record, however, refutes this contention. The contract documents indicated that the Tsaile Peak South Slope was a viable source for conforming aggregate material.

Sheet 56 of the contract drawings depicts the Tsaile Peak South Slope source and provides certain information as to the talus slope and the basalt ledge adjoining the slope. It states that the talus slope contained 400,000 cubic yards of basaltic talus and that the "in place ledge rock" abutting the talus slope "constitutes a possible source of a large additional quantity of material" (AF-A).

Paragraph 106.02(a) of the General Provisions is entitled "Designated Sources" and states that *possible* sources of local materials "may be designated on the plans and described in the Special Provisions." That BIA intended the Tsaile Peak South Slope be comprised of both the talus slope and basalt ledge as the designated source for aggregate is further reflected in the minutes of the August 25, 1972, preconstruction conference wherein appellant was asked by BIA personnel if it proposed to use the "designated pit sites" (AF-24 at 3).

The BIA's road engineer, Mr. Helfinstine, visited the Tsaile Peak South Slope several times prior to the award of the contract and as a result of his visits believed that the Tsaile Peak South Slope source would produce a sufficient amount of conforming materials to perform the N64 project. This belief was primarily based on the in place basalt ledge which he felt appeared to contain a greater amount of material than the slope itself (Stipulation 55). Finally, BIA's admission in its answer and stipulation that the Tsaile Peak South Slope source, which we find included the basalt ledge, *was* designated as an aggregate source for the project (Respondent's Answer at par. 13; Stipulation 60) precludes a disposition favorable to it on this issue.

In order for appellant to recover under a Category I Differing Site Condition claim, however, it must demonstrate that it relied on representations in the contract that the designated source would produce an adequate amount of conforming aggregate material. Contrary to the allegations of BIA, the record provides sufficient evidence of appellant's reliance on the designated source to support its entitlement on this portion of its claim.

The evidence shows that appellant based its bid on obtaining all the necessary aggregate for the project from the basalt ledge described on Sheet 56 of the project drawings (Tr. 121, 327). Both appellant's president, Mr. Wylie, and Chief Estimator, Mr. White, testified that had they believed that the basalt ledge would not have produced the large quantity of aggregate necessary to satisfy the contract

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requirements, appellant would not have bid the project (Tr. 36-37, 274, 325). Nor was appellant aware of any other source of aggregate within 25 miles of the project that could satisfy the contract requirements (Tr. 31-32, 275-76). Furthermore, BIA's decision to classify the south slope of the Tsaile Peak as a designated source for aggregate was based on the fact that laboratory tests on surface samples taken from that source indicated compliance with pavement mix specifications (Stipulation 61).

Victor Means, a geologist who investigated material sources for the BIA, testified that the quality of materials within the basalt ledge was very good and that it alone would have provided a sufficient quantity of aggregate for the project (Tr. 215-16).

Based on the information contained in Sheet 56 of the contract drawings, Mr. White and Mr. Wylie concluded, subsequent to their site investigations of the Tsaile Peak South Slope, that the basalt ledge would produce a sufficient amount of conforming aggregate for the project (Tr. 30, 32-33, 274, 275, and 330). Mr. Wylie's conclusion was based on the representation on Sheet 56 that the basalt ledge constituted a source of aggregate material (Tr. 126). Mr. White was further aware that prior to 1972 other contractors had successfully quarried basalt ledges on the Navajo Reservation (Tr. 275).

In October 1972, appellant began its aggregate production efforts on the talus slope at which time it was concluded it would not produce nearly the amount of conforming aggregate required for the job (Tr. 58; Stipulation 78). Appellant then moved to the basalt ledge and drilled approximately 20 holes at a depth of 20 feet. The results of the drilling indicated that the basalt ledge resembled a shell surrounding a considerable deposit of clay or silt (Tr. 59). Mr. Wylie testified the subsurface conditions were "radically different from what [appellant] had expected to find" based on its investigation of the ledge (Tr. 62). Mr. Means testified that the subsurface conditions of the ledge surprised him, and differed from his professional opinion as to the condition of the ledge (Tr. 245).

Based on these results, appellant concluded that it could not obtain the necessary quantity of aggregate from the basalt ledge (Tr. 62). The results of appellant's efforts showed that neither the Tsaile Peak South Slope talus deposit, nor the adjoining basalt ledge contained quantities of aggregate which would produce a satisfactory asphalt mix (Stipulation 81). A review of the record indicates BIA concedes that the basalt ledge proved to be part of a peculiar geological condition which reasonably could not have been ascertained prior to bidding (Respondent's Answer at par. 25).

Therefore, we find:

1. That the Tsaile Peak South Slope, including the basalt ledge portion of the slope was the designated source of aggregate for use in this contract;

2. That appellant relied on contract data indicating that it could obtain a sufficient amount of conforming material from the Tsaille Peak South Slope source to satisfy all the contract requirements; and

3. That the actual subsurface conditions encountered by the contractor differed materially from the conditions indicated by the contract drawings and specifications and the expectations of persons familiar with the source.

[2] Accordingly, we conclude that under these circumstances, appellant is entitled to an equitable adjustment under a Category I Differing Site Condition theory. Such conclusion negates the necessity for consideration of appellant's alternative theories of recovery for Claim No. 2.

B. Quantum

Appellant's claim as submitted to the Contracting Officer was in the amount of \$2,559,614 and was based on a total cost approach (AF-1; AF-2; Tr. 427). For its original claim, appellant computed all costs it believed to be attributable to the N64 project, subtracted out the dollar value of the final contract amount, and sought the difference from BIA as follows:

Total Contract Costs.....	\$7,522,900
- Final Contract Amount	<u>4,963,286</u>
Total Claim	\$2,559,614

The BIA conducted an audit of appellant's claim. The auditor questioned \$1,534,231 of appellant's claim. The two largest items questioned were equipment depreciation in the amount of \$911,865 and profit in the amount of \$383,273, totaling \$1,295,138 (AF-64).

The breakdown of the auditor's findings and conclusions (AF-64, Exh. 1) is as follows:

WYLIE BROTHERS CONTRACTING COMPANY
SCHEDULE OF COSTS CLAIMED ON CONTRACT N00C 1420 4889

Direct costs	Claimed cost	Audit adjustments	Audited costs
Subcontracted items	\$225,927	\$1,361	\$227,288
Materials.....	1,381,030	(271)	1,380,759
Labor.....	1,655,178		1,655,178
Bonds.....	20,579	(1,284)	19,295
Dues.....	6,929		6,929
Safety.....	6,993		6,993
Gas and oil.....	227,087		227,087
Employee fringe benefits	175,783		175,783
		1,428	
Insurance	109,283	(18,665)	92,046
Moving.....	160,625	(66,018)	94,607
Professional	18,103	(10,400)	7,703

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WYLIE BROTHERS CONTRACTING COMPANY—Continued
 SCHEDULE OF COSTS CLAIMED ON CONTRACT N00C 1420 4889

	Claimed cost	Audit adjustments	Audited costs
Truck rent	402,845		402,845
Repairs	625,093		625,093
Equipment rent—other	185,733		185,733
Supplies	296,733	(500)	296,233
Telephone	16,524	(11,888)	4,636
Payroll taxes	99,166		99,166
Travel	34,775		34,775
Shop	173,198	15,695	188,893
Property taxes	3,681	(3,681)	
Arizona sales tax	94,639	(5,000)	89,639
Depreciation	911,865	(911,865)	
Total direct costs.....	\$6,831,769	(\$1,011,088)	\$5,820,681
General and administrative expenses	174,297	(6,309)	167,988
Profit	383,273	(383,273)	
Loss on idle equipment	128,971	(128,971)	
Liquidated damages.....	4,590	(4,590)	
Total alleged contract costs	\$7,522,900	(\$1,534,231)	\$5,988,669
Less: final contract amount	4,963,286	(\$258)	4,963,028
	<u>\$2,559,614</u>		<u>\$1,025,641</u>

Appellant's quantum claim, as presented at the hearing, was prepared by Mr. Donald J. Cummings on a modified total cost basis. He was duly qualified as appellant's expert witness. At the time of the hearing, he was vice president, in charge of the Eastern Regional Office in the claims and litigation area, of a consulting firm specializing in Critical Path Method (CPM) scheduling, construction and claims litigation support services, and construction management. Mr. Cummings' firm was employed by appellant to examine the record and determine what caused the delays in completion of the project; if appellant caused the delays or was the victim; and if the victim, what excess costs could be attributed to any delays caused by the Government (Tr. 381-83). The information reviewed for the analysis consisted of the contract documents, the schedules prepared by appellant for the project, project documents in possession of both appellant and the Government, and detailed discussions with both Mr. Fletcher for appellant's cost and financial information, and Mr. Wylie, for an overall view of what occurred during the contract

performance (Tr. 383-84). The technique employed by Mr. Cummings in performing his analysis was called CPM scheduling (Tr. 384).⁵

The report of the analysis was identified as AX-108 and consisted of 48 pages together with a five-page index to a separate exhibit, AX-109, which contained 100 tabbed documents in support of the report but somewhat duplicative of the appeal file.

As a result of the analysis, appellant adopted the total costs as adjusted by the Government audit in the amount of \$5,988,669, with the exception of three items: Depreciation, profit, and liquidated damages. Those three items were not allowed by the audit (AF-64, Exh. 1). Depreciation in the amount of \$911,865, profit in the amount of \$383,273, and liquidated damages in the amount of \$4,590 were deducted as audit adjustments from the original claimed costs.

Recapitulation of Appellant's Claim at Trial

The appellant's claim, as presented at the trial and incorporated in its posthearing brief at page 75, may be summarized as follows:

	Auditor's Costs.....	\$5,988,669
+	Depreciation.....	403,226
+	Liquidated Damages [withheld].....	4,590
		\$6,396,485
+	Profit at 5.467%.....	349,696
	Total Cost.....	\$6,746,181
Less:	Contract Amount.....	4,963,028
	Claim.....	\$1,783,153

In its posthearing brief at pages 127-31, appellant submitted an analysis to establish a "degree of relativity between and among its claims." This analysis consisted of relating total costs to major items of alleged Government-caused delays by factoring out 105 days from a total of 686 days of delay claimed, subtracting \$414,818 designated as an item of direct cost attributable to the increased cost of asphalt and dividing by 581 days, the claimed adjusted days of delay, in order to calculate the costs per day. The conclusion was \$2,355.14 costs per day which was then assigned to the breakdown of days of delay relating to specific claim items, shown in the brief by the following table:

⁵ Witness Cummings described the CPM as a technique developed in the late 1950's or early 1960's to enable a contractor to better schedule his work, and generally to determine what impact the delay of particular construction activities has on the total project. The CPM includes a list of all construction activities required to complete the project and an analysis to determine what activity must precede another for orderly and timely completion. Typically a CPM network is computerized to give easy calculation of starts and finishes of the various activities. He stated that generally the critical path schedule is updated once a month so that the contractor knows where the critical activities are and what must be done to keep the project on schedule (Tr. 399-407). On cross-examination (Tr. 446, 447), Mr. Cummings testified that a CPM is normally prospective, but in this case, appellant did not have a CPM during the project, but that the CPM developed by him for purposes of this litigation was based on Mr. White's original bar chart and that the CPM here is a refinement of the bar chart after the fact.

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<i>Claim</i>	<i>Days of Delay</i>	<i>Cost per Day</i>	<i>Direct Costs</i>	<i>Total</i>
a. Grade changes and stake revisions	21	\$2,355.14	0	\$49,458
b. Unavailability of aggregate	176	2,355.14	0	414,504
*Unavailability of asphalt	249	2,355.14	\$414,818	1,001,247
*Government ordered shut-down	135	2,355.14	0	317,944
Total costs				<u>\$1,783,153</u>

Depreciation and/or Rental of Equipment

It is obvious that considerable equipment was used on the project and that appellant should be allowed something for that item. However, we note that the auditor, despite the disallowance for depreciation, did not state in his report that appellant was not entitled to some allowance for that item. But he pointed out various reasons why the amount claimed was not substantiated to his satisfaction: (1) Failure to show when and how long certain equipment was used on the job; (2) failure to reconcile months of depreciation summarized from payroll classification by equipment type with the number of months claimed by equipment type; (3) apparent overclaiming of blade usage and loaders for full months when a daily usage analysis indicated the equipment was used less than half of that time; (4) possible overstatement of equipment hours prepared from the payroll classification without accounting for idle time for which the operator was paid but the equipment not utilized; and (5) a claim of \$170,201 was made on fully depreciated equipment, when appellant failed to seek an advance agreement with Government regarding a reasonable charge for use of its fully depreciated assets in compliance with FPR 1-15.205-9(g).

The appellant recalculated its equipment depreciation downward by reducing the depreciation on long term leased equipment from \$411,986 to \$253,955 (Tr. 431, 432),⁶ by reducing the allocated depreciation on other equipment from \$299,678 to \$149,271 (Tr. 433), and by eliminating entirely any claim on fully depreciated equipment (Tr. 436). Thus, the final total claim for depreciation was \$403,226. We find this amount as explained by Mr. Cummings to be reasonable.

Liquidated Damages

The auditor's denial of a claim for \$4,590 for liquidated damages withheld was explained simply on the basis that appellant had been

⁶ Normally monthly rental rates are allowed as a cost for long-term leased equipment rather than depreciation. However, the method employed by appellant's CPA, Mr. Fletcher, to calculate the depreciation claimed for this time is less than the monthly rates actually paid. The Government has no basis for complaint and has not objected to this item as recalculated (Tr. 338-44; AX-109, Tab 99; Appellant's Brief at 123-24).

assessed for 9 days of liquidated damages by BIA at \$510 per day (AF-64 at 13). Appellant, however, argues that the winter shutdowns for 1973/1974 and 1974/1975 should have permitted an addition of 54 days to the completion date of August 13, 1975, so that the actual completion date should have been established as October 6, 1975 (Appellant's Brief at 70; Tr. 398, 422). This argument, unrefuted by the Government, more than accounts for the 9 days for which the liquidated damages were assessed and appears to be reasonable. Therefore, we find that claim, for the \$4,590 withheld, allowable.

Profit

The auditor did not allow any profit in appellant's original claim (AF-64, Exh. 1). He did not state that appellant was not entitled to profit but stated that the profit rate (5.467 percent) applied to the total costs "is a negotiable amount, and therefore should be fixed by agreement between the Contractor and the Bureau" (AF-64 at 11). Although we have found no disclosure in the record of any attempt by the parties to fix a profit rate by agreement, neither have we found any contention by the Government that the rate of 5.467 percent is unreasonable nor that appellant is not entitled to profit. It is fundamental that to stay in business, a construction contractor must realize some profit on its construction projects. We find the rate of 5.467 percent of allowable total incurred costs to be a reasonable rate of profit to which appellant is entitled.

The Increased Price of Asphalt Item

Included among appellant's claimed increased costs is the item for the increased price of asphalt allegedly resulting from the Federal Government's fuel allocation program during the spring and summer of 1974 (AF-1 at 5, 6). This item was specified as \$417,281.54 and part of the total cost of raw material in the amount of \$1,381,030.28 and stated in a detailed breakdown of Wylie's claim submitted to the Government on July 2, 1976 (AF-2 at 1-3). The second item in the breakdown of the auditor's findings and conclusions (AF-64, Exh. 1), set forth above, pertains to "materials" and shows an audit adjustment of \$271 resulting in a final audited cost figure of \$1,380,759 for materials. The latter amount of \$1,380,759 was included in the total cost figure, as adjusted by the Government audit, in the amount of \$5,988,669 and adopted by appellant as a base for establishing the total cost claim.

The audit report (AF-64 at 2) states that the objective of the audit was to "verify the contractor's total contract costs." It further states on page 2 that the contractor's *alleged* price increased in asphalt from \$34.60 per ton to \$77.05 per ton. On page 13 of the report, treating the disallowed claim for loss on idle equipment in the amount of \$128,971, appears a reference to the actual price of \$77.05 per ton *invoiced* to the contract for asphalt used on this job. There is no other reference in the

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audit report to the increased price of asphalt and nowhere therein can we find a *verification* that the contractor *paid* or *incurred* a cost for this claimed item. Therefore, we find the audit report to be misleading because apparently, it improperly included the increased price of asphalt (only an invoiced item) in the audited cost figure of \$1,380,759 for materials.

The foregoing finding is further supported by Government's Exhibit 110 (GX-110), which is an agreement dated April 29, 1975, between Wylie, the prime contractor, and its supplier or subcontractor, Arizona Refining Co. The agreement, among others, contains in substance the following pertinent recitals:

That on or about the 29th day of August 1972, the contractor issued Purchase Order No. 1712 to supplier confirming and accepting an offer of the supplier made July 7, 1972, to furnish certain asphalt materials for the subject project, thereby creating a contract between the parties;

that the parties estimate that an additional 8,500 to 10,000 tons of asphalt materials will be required to finish the project;

that the contractor is willing to pay the supplier the original contract price for the balance of the asphalt materials required and contends that it is entitled to receive such materials at such price from the supplier;

that the supplier contends that its inability to furnish the materials during 1974 was due to the failure of the contractor to complete the project in 1973 and due to the inability of the supplier to obtain materials meeting the specifications in the quantity required because of the Mandatory Allocation Program of the United States Government promulgated in January of 1974.

The pertinent covenants and agreements between the parties, contained in the agreement, provided in substance that:

Nothing in the agreement will be used to impair, limit, or modify the the legal rights of the parties;

the supplier will furnish the additional asphalt materials required to complete the project, according to specifications as to quantity and quality, but the quantity is not to exceed 10,000 tons;

the contractor will pay the contract price for the materials pursuant to the terms of the 1972 contract, and the supplier shall invoice the materials at the current market price therefor at the time of delivery, with neither party waiving the rights as against the other by virtue of the payments or the billings and with each party reserving the right to have determined by litigation the obligations that each may have unto the other;

upon the completion of the project, with the assistance and cooperation of the supplier, the contractor will file a claim with the Contracting Officer of BIA, and, thereafter, shall diligently pursue the claim with appeals to the Board of Contract Appeals and the courts, such claim to include the billed or invoice price for asphalt materials

furnished by the supplier and used on the project in 1974 and 1975; and

all sums received by the contractor in any award attributable to the invoiced price of the asphalt for the years 1974 and 1975 will be paid to supplier, less supplier's prorated share of contractor's fees and costs related to the prosecution of such claim.

The effect of the second subcontract, in other words, is simply that Wylie agreed to pay the supplier, Arizona Refining Co., for the *alleged* increased and invoiced price of the asphalt *only* if Wylie successfully recovers from the Government. We note, that the record contains no documentary evidence which establishes what price the supplier paid for the asphalt furnished pursuant to the second subcontract. Furthermore, no official, accountant, or employee of the supplier was called to testify with respect to supplier's cost of the asphalt so furnished. Mr. Cummings, in his testimony, refers to \$414,808 as direct cost of asphalt (Tr. 443). Throughout the record there are general references to an increase in the price of asphalt, but our search has been in vain for some probative evidence in the record that the supplier incurred monetary loss or damage resulting from furnishing the asphalt to appellant pursuant to the agreement of April 29, 1975. If such proof were available, we assume it would have been presented. It is quite possible, therefore, that despite the general market price increase, the actual cost to the supplier for the asphalt furnished was no greater than its cost for the asphalt originally agreed to be furnished pursuant to the first subcontract.

In stating that there is a dearth of probative record evidence for this item, we are not unmindful of Tab 100 of appellant's exhibit 109, entitled "Asphalt Increase." However, that one page sheet of paper is undated and unsigned. It is nothing more than a calculation or restatement of an allegation. It merely shows the original quoted price of the asphalt subtracted from the *audited* cost of asphalt resulting in the difference of \$414,818. As we have already discussed above, the audited costs included only invoiced costs and not incurred or paid costs for the asphalt. Therefore, we find that the document under Tab 100 has no probative value.⁷

The Government, in its brief at pages 12-14, points out that the supplier chose to sell asphalt to other contractors rather than to retain the amount needed to honor its original obligation to supply Wylie's needs and that there was no provision in the contract to cover price escalation. Its primary contention is, however, that the Government was acting in its sovereign capacity when the Federal Energy Office imposed allocations of crude oil resulting in the asphalt shortage, and, therefore, the Doctrine of Sovereign Immunity should apply to this

⁷ It is fundamental that to prove a claim, a contractor has the burden of not only establishing entitlement by a preponderance of substantial evidence, but also of supporting the quantum aspects of the claim by substantial, probative, and reliable evidence. Mere allegations or restatements of the amount claimed does not sustain that burden. See, e.g., our opinion in *E. H. White & Co.*, IBCA-1216-9-78 (July 19, 1982), 82-2 BCA par. 15,920, and the cases cited therein.

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claimed item.⁸ We do not reach that question, however, because our conclusion rests upon failure of proof of a claimed cost.

Having found no probative evidence to support the claimed cost for the increased price of asphalt, paid or incurred by either the appellant or its subcontractor, we hold that such item must be disallowed.

Claimed Cost Related to Winter Shutdown of 1974/1975

Under Modification No. 11, having the effective date of December 4, 1974 (AF-15), duly signed by Marshall J. Wylie, president of appellant, on December 20, 1974, and by M. E. Craven, Contracting Officer, on December 23, 1974, a cessation of asphalt-related work items occurred. The last paragraph of that modification provided as follows: "It is understood and agreed that cessation of work ordered herein *will not result in additional cost to the Government* and that no work thereunder be performed until ordered, in writing, by the Contracting Officer." (Italics supplied.)

The cessation of work was lifted by Modification No. 12 (AF-16) also signed by Mr. Wylie and Mr. Craven on May 6, 1975, and May 8, 1975, respectively. The effective date of Modification No. 12 was May 2, 1975. It directed the contractor to proceed with the work, effective May 12, 1975, granted a time extension of 133 calendar days, and extended the contractor's completion date from March 16, through July 26, 1975.

Neither party in the posthearing briefs, discussed the effect of the above-quoted agreement on appellant's quantum claim. However, in the analysis, presented by Mr. Cummings in his report (AF-108 at 37-38) the no cost agreement is mentioned. Without reference to any supporting legal authority, he contends in substance, that: But for the delay caused by the failure of a suitable aggregate source, the contractor would not have been on the job during this period of adverse weather conditions and is entitled to an equitable adjustment for the entire 159 calendar day period, as well as all costs involved.

We do not agree. At the time of executing the agreement contained in the shutdown modification order, Mr. Wylie was aware that the asphalt shortage was over. In fact, he continued actual aggregate crushing operations through the winter of 1974/1975. They were completed on March 22, 1975 (Tr. 420). There is nothing in the record to show that he was in any way coerced by the Government into signing the order or that he did not intend to waive any cost claim against the Government for this shutdown. We find no ambiguity in the language quoted, and hold: (1) That appellant must be bound by its

⁸ In his brief at page 14, Government Counsel cited *Horowitz v. United States*, 267 U.S. 458 (1952), and *Martin K. Eby Construction Co.*, IBCA-1389-9-80 (Apr. 8, 1981), 88 I.D. 431, 81-1 BCA par. 15,062, in support of his contention that the Doctrine of Sovereign Immunity should apply. Counsel for appellant argue in their reply brief, pages 20-26, that those cases are readily distinguishable from the facts here, because appellant's theory of recovery relies upon contract clause remedies resulting from an act of the Government in its contractual capacity occurring before the sovereign act took place, to wit: the failure of the designated pit.

own agreement; (2) that such agreement constitutes a waiver of any monetary claim arising out of the 1974/1975 winter shutdown order; and (3) therefore, the Government is relieved from liability for payment of any claimed cost or damage attributable thereto.

Recapitulation and Jury Verdict Approach

[3] By way of summary, we have allowed the items claimed by appellant for depreciation, liquidated damages withheld, and rate of profit. Although we have expressed some dissatisfaction with the Government audit report in our discussion above, regarding the unproved claim for the increased price of asphalt, in general, we are willing to allow the bulk of the total audited costs stated in that report and adopted by appellant as the base for its total cost theory of recovery.

However, as acknowledged by counsel for appellant in their posthearing brief at page 114, "the computation of an equitable adjustment on a total cost theory is not encouraged." This is so, of course, because, among other factors, that theory is based upon the questionable assumption that the actual costs incurred are the proper costs totally and directly attributable to Government caused delays and that the contractor's planned costs for the bid were fairly and properly calculated in the first place. See *Burn Construction Co.*, IBCA-1042-9-74 (Aug. 30, 1978), 85 I.D. 353, 78-2 BCA par. 13,405 and *Environment Consultants, Inc.*, IBCA-1192-5-78 (June 29, 1979), 86 I.D. 349, 79-2 BCA par. 13,937.

Here, not only is the audit report suspect to some degree, but the 50 percent efficiency applied by Mr. Cummings as a result of the Government's disruption caused by the grade and slope revisions and late delivery of the structures list must be deemed to be at least partially arbitrary and speculative. Also, Mr. Cummings' analysis using the CPM was based on Mr. White's bar chart which may or may not have been entirely accurate. Finally, we are reluctant to accept appellant's formula of \$2,355.14 per day for the allowance of cost for days of delay found to be the Government's responsibility, or for calculating the reduction attributable to the disallowance of the 1974/1975 winter shutdown. To do so would require the unacceptable assumption that all days of delay throughout the project would have the same dollar impact on the contractor's costs, regardless of whether the delay was during a period of maximum performance or during a period when weather or other factors would limit progress and the presence of a full complement of equipment.

For the foregoing reasons, we conclude that a jury verdict approach is both practicable and reasonable in this quantum consideration.

August 22, 1984

Decision

Accordingly, by application of the jury verdict approach we find that the appellant is entitled to an equitable adjustment in the total amount of \$1,250,000.

DAVID DOANE
Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

RUSSELL C. LYNCH
Administrative Judge

**STATE SELECTIONS OF ONSHORE LANDS UNDERLYING
NAVIGABLE WATERS IN THE GEOGRAPHIC AREA OF
REVOKED PUBLIC LAND ORDER 82***

M-36949

August 22, 1983

Public Lands: Generally

The term "public lands," often used synonymously with "public domain," generally refers to lands which are open and available for various forms of disposition or disposal to the general public and state or local governments.

Public Lands: Alaska

Under sec. 6(b) of the Alaska Statehood Act, the term "public lands" means those lands in Federal ownership that are not withdrawn or otherwise reserved.

Withdrawals and Reservations: Effect of

The subsequent revocation of a withdrawal of onshore submerged lands by necessity returns withdrawn lands to status they enjoyed before withdrawal, *i.e.*, "public lands."

OPINION BY SOLICITOR COLDIRON

OFFICE OF THE SOLICITOR

MEMORANDUM

TO: SECRETARY

FROM: SOLICITOR

SUBJECT: STATE SELECTIONS OF ONSHORE LANDS UNDERLYING
NAVIGABLE WATERS IN THE GEOGRAPHIC AREA OF REVOKED PUBLIC
LAND ORDER 82

Section 6(b) of the Alaska Statehood Act of July 7, 1958 ("Statehood Act"), entitled the State of Alaska to select up to "one hundred

* Not in chronological order.

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." 72 Stat. 339, 342, *as amended*, 73 Stat. 141; 48 U.S.C. prec. note 21 (1976). You have asked whether onshore lands underlying navigable waters that were withdrawn before statehood by Public Land Order 82 (January 22, 1943), *reprinted in* 8 Fed. Reg. 1,599 (February 4, 1943) ("PLO 82"), which has since been revoked by Public Land Order 2215 (December 6, 1960), *reprinted in* 25 Fed. Reg. 12,599 (December 9, 1960), are public lands subject to selection by the State of Alaska.¹ I conclude that these lands are public lands within the scope of Alaska's entitlement under section 6(b) of the Statehood Act.

I. Construction of Section 6(b) of the Statehood Act

The Statehood Act is silent on what is meant by "public lands of the United States;" however, the term "public lands," as used in acts of Congress, has a well-accepted definition. As I have previously stated:

[T]he term "public lands," often used synonymously with "public domain," generally refers to lands which are open and available for various forms of disposition or disposal to the general public and state or local governments. . . . This use of "public lands" has been embraced by many courts including the United States Supreme Court:

" 'Public domain' is equivalent to 'public lands,' and these words have acquired a settled meaning in the legislation of this country. The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' *Newhall v. Sanger*, 92 U.S. 761, 763, 23 L. Ed. 769. "The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws.' (cited cases omitted)

* * * * *

"The true rule respecting the term 'public lands' was stated by Judge Van Devanter, sitting in the Court of Appeals, in *Northern Lumber Co. v. O'Brien*, 139 F. 614-616, 71 C.C.A. 598, 600, in the following language: "The words "public lands" have long had a settled meaning in the legislation of Congress and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made." (cited cases omitted) These decisions do not conflict with the settled doctrine that, where it clearly appears from the statute that the term 'public lands' is intended to include lands which have theretofore been reserved by Congress for a specific purpose, such intention will prevail, as it is a fundamental rule of construction that a legislative act is to be interpreted according to the plain intention of the legislative body. *Union Pac. Ry. Co. v. Karges et al.*, 169 F. 459, 462 (1909)."

* * * * *

This passage is representative of courts' understanding the application of the "public land" terminology.

Solicitor's Opinion M-36944, "Proposed Paiute Restoration Plan," at 2-3 (May 7, 1982), *quoting Federal Power Commission v. State of Oregon*, 349 U.S. 435, 443 (1955).

¹ This question was raised but not decided in Solicitor's Opinion M-36911, "The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska." 86 I.D. 151, 174, n. 33 (Dec. 12, 1978).

August 22, 1984

There is nothing in the Statehood Act or its legislative history to suggest that the words "public lands" as used in section 6(b) of the Statehood Act should not be construed according to this precedent. Any other construction would effectively read out of the statute the qualifying language that the public lands must be "unreserved at the time of selection." As is well-known, the statute must be read so that all words are given meaning. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1978); Sutherland, *Statutes and Statutory Construction*, § 46.04 (Sands 4th ed. 1975). Thus, even if "public lands" in section 6(b) meant all federal holdings, the qualifying language in the provision makes clear that Congress did not intend for this meaning to attach. In summary then, the term "public lands" under section 6(b) means those lands in federal ownership that are not withdrawn or otherwise reserved.

II. *Applicability of Section 6(b) to Onshore Lands Underlying Navigable Water in Revoked PLO 82 Geographic Area*

Before statehood, submerged lands in Alaska were consistently held to be "public lands" under the traditional definition of those words. See, e.g., *Hynes v. Grimer Packing Company*, 337 U.S. 86 (1949); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). By definition, however, PLO 82's withdrawal of these lands removed them from the status of public lands.

In 1960, the PLO 82 withdrawal was revoked by PLO 2215. Specifically, PLO 2215 stated that "the lands described in paragraph 1 hereto . . . [the lands subject to PLO 82, exclusive of those lands in Naval Petroleum Reserve No. 4 and the Arctic National Wildlife Range] . . . are hereby opened to settlement and to the filing of applications, selections, and locations . . ." PLO 2215, at paragraph 4. Consequently, the onshore lands underlying navigable waters in that geographic area necessarily returned to the status they enjoyed before PLO 82 issued, i.e., "public lands."

III. *Conclusion*

No act of Congress nor any administrative action by the Department of the Interior has resulted in the subsequent reservation of those onshore lands underlying navigable waters returned to their former status by PLO 2215. Accordingly, to the extent they remain unappropriated and vacant,² these lands are subject to selection by the State of Alaska under section 6(b) of the Statehood Act.

WILLIAM H. COLDIRON
Solicitor

² "Appropriation" is a term of art having its origin in early public land law. The term means "nothing more nor less than setting apart the thing for some particular use." *Wilcox v. Jackson*, 38 U.S. 498, 512 (1839). Thus, lands are unappropriated if they have not been set aside for a certain use.

In contrast, "vacant" refers to the physical act of making use of the lands. Vacant lands are absolutely free, unclaimed and unoccupied. *Accord Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979).

February 9, 1984

APPEAL OF CLARK & HIRT

IBCA-1508-8-81

Decided February 9, 1984

Contract No. 14-16-0004-79-073, Fish & Wildlife Service.

Sustained in Part.

1. Contracts: Construction and Operation: Changes and Extras-- Contracts: Construction and Operation: Conflicting Clauses-- Contracts: Construction and Operation: Construction Against Drafter--Contracts: Construction and Operation: Drawings and Specifications

The Board concludes that the specifications under a Government construction contract for the rental of draglines with operators are defective where it finds (i) that the terms of the solicitation respecting supervision were ambiguous; (ii) that the interpretation the contractor placed upon the ambiguous provisions was reasonable, as evidenced by the Government's concurrence in such interpretation prior to the time a dispute arose; (iii) that the bifurcation of authority between the COR at the jobsite and the refuge manager some 35 miles away continued for at least several months after the issuance of the notice to proceed; and (iv) that confusion over who was responsible for supervision and the manner in which it was exercised seriously delayed the contractor and resulted in the partnership incurring substantial additional expenses.

2. Contracts: Construction and Operation: Estimated Quantities-- Contracts: Construction and Operation: Intent of Parties--Contracts: Disputes and Remedies: Substantial Evidence

Rejected by the Board is an appellant's argument that the Government had in effect guaranteed to the contractor that he would be paid any specified number of hours per week where the Board found (i) that the requirement that the contractor work a 40-hour week was qualified by the language "weather and ground conditions permitting"; (ii) that the Government consent to the contractor working 50 hours a week was subject to the same limiting language; and (iii) that the evidence showed that some of the delays experienced by the contractor in proceeding with the contract work were attributable to rain (i.e., weather and ground conditions) for which the Government was not responsible.

3. Contracts: Disputes and Remedies: Equitable Adjustment

In a case involving a claim for equipment idled as a result of delays attributed to the Government, the Board found that the rates for idle equipment used in the claim were in excess of the rate derived from applying the regularly invoked rule that the reasonable value of standby equipment is 50 percent of operating equipment rates.

4. Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Termination for Convenience

Although the Contract Disputes Act gives the Board jurisdiction over breach of contract claims, the Board finds that claims presented subsequent to a direction by the Government to cease all work under a contract are not redressable as breach of contract claims where (i) the contract includes a termination for the convenience of the Government clause; (ii) the lack of funds to pay the contractor for further work constituted an adequate cause for directing performance under the contract to cease; (iii) that the failure of the contracting officer to invoke the termination for convenience clause as the basis for his action does not affect the right to rely upon that clause in determining the rights and obligations of the parties; (iv) that the presence in the contract of a termination for convenience clause precludes actions of the Government

from being considered breaches of contract (assuming they might otherwise be); and (v) that the inclusion of a termination for convenience clause makes the recovery of anticipated profits unallowable.

5. Contracts: Disputes and Remedies: Equitable Adjustments-- Contracts: Disputes and Remedies: Jurisdiction

A claim involving idle equipment, which the Board finds not to be cognizable as a breach of contract claim is found to constitute a claim falling within the purview of the standard Changes clause and reimbursable thereunder. In this connection it is noted that the Board is not limited by the appellant's choice of remedies or by the Government's assignment of defense.

6. Contracts: Construction and Operation: Notices

The 20-day notice provision of the Changes clause is inapplicable where the Board finds the specification to be defective, thereby bringing the case within the defective specification exceptions to the notice requirement of the Changes clause.

7. Contracts: Construction and Operation: Actions of Parties-- Contracts: Disputes and Remedies: Burden of Proof--Contracts: Performance or Default: Release and Settlement

Where three of four extra work orders covering drilling and blasting work performed by a subcontractor provided for no reimbursement to the contractor and where the fourth extra work order was used as a vehicle to reimburse the contractor for the rental of its pumps at agreed upon rates without any evidence having been offered at the hearing to show that any amount was included therein for costs resulting from delays to the contractor's work, the Government's contention that the contractor's acceptance of the four extra work orders constituted an accord and satisfaction is rejected by the Board since it is well settled that an agreement does not operate as an accord as to matters not covered by the agreement.

8. Contracts: Construction and Operation: Drawings and Specifications--Contracts: Disputes and Remedies: Equitable Adjustments

Where under a construction contract for the rental of draglines with operators the responsibility of the Government for delays to the contract work was clearly established but as a result of the contractor's foreman having failed to record in his diary some of the significant events affecting the time and effect of Government actions causing delay and the contractor having failed to segregate costs applicable to the constructive change, it was not possible to determine with reasonable certainty the extent to which the Government's actions increased the costs of contract performance, the amount of the equitable adjustment to which the contractor is entitled was determined by resort to what has been characterized as the jury verdict approach.

9. Contracts: Disputes and Remedies: Damages: Generally

In a case involving a denial of a claim for impaired bonding capacity damages, the board noted that it considered (i) that damages of this nature were precluded by a termination for convenience article being included in the contract and (ii) that appellant had failed to show that the loss of profit claimed on other contracts was the inevitable result of the Government having delayed performance of the contract work by approximately 4 months, after which the Board found that appellant was not entitled to prevail in any event since the record contained no evidence showing particular contracts not bid upon or successfully bid upon but denied because of inability to obtain a bond.

10. Contracts: Construction and Operation: Subcontractors and Suppliers--Contracts: Disputes and Remedies: Jurisdiction

A Government defense that the Board is without jurisdiction over a subcontractor's claim is rejected where it is found that the subcontractor's claim was included in the

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appellant's initial claim submission and that at the hearing appellant actively prosecuted the claim on behalf of the subcontractor by eliciting testimony not only from a representative of the subcontractor but from appellant's foreman as well.

APPEARANCES: J. Rex Farris, Jr., Attorney at Law, Shackelford, Farris, Stallings & Evans, Tampa, Florida, John H. Rains III, Attorney at Law, Annis, Mitchell, Cockey & Edwards, Tampa, Florida, for Appellant; Donald M. Spillman, Department Counsel, Atlanta, Georgia, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The contractor has timely appealed from the contracting officer's denial¹ of its claims for excess equipment costs, blasting holes drilled by subcontractor, and loss of profit on other projects in the aggregate amount of \$250,859.

Findings of Fact

1. Contract No. 14-16-0004-79-073, in the amount of \$446,400, was awarded to the contractor on June 8, 1979, under a total Small Business Set Aside. The contract called for "[r]ental with operators of four (4) Standard Model, Factory-Rated, two (2) cubic yard Draglines for clearing, excavation, construction of new dikes and levees; wasting materials to be wasted; and various allied items." The work required by the contract was to be performed at "Compartment 'D' Impoundment Area, Loxahatchee National Wildlife Refuge, Boynton Beach, Florida."²

2. Prepared on standard forms for construction contracts, the contract includes the General Provision set forth in Standard Form 23-A (Rev. 4-75).³ The contract also includes Supplemental Provisions containing changes to and substitutions for some of the General Provisions, as well as numerous Technical Specifications. Quoted below in whole or in part are provisions considered to be especially germane to the resolution of questions presented by the instant appeal.

GENERAL PROVISIONS

(Construction Contract)

11. SUPERINTENDENCE BY CONTRACTOR

The Contractor, at all times during performance and until the work is completed and accepted, shall give his personal superintendence to the work or have on the work a

¹ Appeal File 14 (Findings of Fact and Decision of the contracting officer dated May 28, 1981) and Appeal File 16 (Supplemental Findings of Fact and Decision of the contracting officer dated Oct. 5, 1981).

² Appeal File 1. Hereafter AF followed by reference to the number of the particular exhibit being cited. Other abbreviations used in referring to the record upon which our decision is based consist of the following: Appellant's Exhibit (AX); transcript of hearing (Tr.); Appellant's Opening Brief (AOB); Government's Posthearing Brief (GPHB); and Appellant's Reply Brief (ARB).

³ Clause 3 (Changes), Clause 4 (Differing Site Conditions) and Clause 17 (Suspension of Work) are as set forth in the April 1975 Edition of Standard Form 23-A.

competent superintendent, satisfactory to the Contracting Officer and with authority to act for the Contractor.[⁴]

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FPR 1-8.700-2(a)(6)) [⁵]

(a) The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the interest of the Government. If this contract is terminated, the Contractor shall be compensated in accordance with Part 1-8 of the Federal Procurement Regulations (41 CFR 1-8), in effect on this contract date.

(b) If this contract exceeds \$100,000, the clause in § 1-8.703 of the Federal Procurement Regulations (41 CFR 1-8.703) [⁶] in effect on the date of this contract shall apply in lieu of the provisions set forth in (a) above, such clause being hereby incorporated by reference as fully as if set forth at length herein.

TECHNICAL SPECIFICATIONS

1-01. SCOPE OF WORK

1-01.1 WORK

1-01.1b **CONSTRUCTION OF IMPOUNDING (PERIMETER) DIKE** shall consist of Clearing Dike and Borrow Areas; Excavation from adjacent Borrow Canals and Ditches; Placement of excavated Borrow Materials for fill for new Dike; Finish Shaping and Dressing of Dike Top and Slopes; and Placement of Waste Materials and Debris in Spoil (Waste) Areas.

1-01.2 SPECIFICATIONS FOR THE WORK

1-01.2a **SPECIFICATIONS FOR THE WORK WILL BE ESTABLISHED IN THE FIELD BY THE REFUGE MANAGER OF THE LOXAHATCHEE NATIONAL WILDLIFE REFUGE.**

1-01.3 SUPERVISION AND DIRECTION OF THE WORK

⁴This provision was amended by adding Supplemental Provision S-1(d) reading as follows:

"Said superintendent shall be an employee of the Contractor, who shall give his personal supervision to the work, including coordination, directing and expediting of all subcontracted work, until completion of all work under the contract. All direction given to him shall be considered as having been given to the Contractor and shall be binding on the Contractor."

⁵The termination clause contained in the Board's copy of the Appeal File is incomplete. This is true also of the Government's copy of the Appeal File. The clause quoted in the text corresponds to the clause contained in the instant contract, as evidenced by appellant's response of Nov. 23, 1983, to the Board's order of Nov. 14, 1983.

⁶In especially pertinent part, the clause set forth in § 1-8.703 reads as follows:

"18. TERMINATION FOR CONVENIENCE OF THE GOVERNMENT

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

"(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall, subject to any review required by the contracting agency's procedures in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

"(1) With respect to all contract work performed prior to the effective date of the Notice of Termination, the total (without duplication of any items) of-

"(i) The cost of such work;

"(ii) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders * * * ;

"(iii) A sum, as profit on (i), above, determined by the contracting officer pursuant to § 1-8.303 of the Federal Procurement Regulations (41 CFR 1-8.303), in effect as of the date of execution of this contract, to be fair and reasonable * * * [.]"

In pertinent part the cited regulation reads as follows:

"§ 1-8.303 Allowance for profit

"General. Profit shall be allowed only on preparations made and work done by the contractor for the terminated portion of the contract but may not be allowed on the contractor's settlement expenses. Anticipatory profits and consequential damages shall not be allowed (but see § 1-8.208.5) * * * ."

§ 1-8.208-5 specifies the conditions under which a final judgment obtained by a subcontractor against a prime contractor may be treated as the cost of settling with the subcontractor in a termination settlement with the prime contractor.

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1-01.3a ALL WORK WILL BE UNDER THE SUPERVISION OF AND AS DIRECTED BY THE REFUGE MANAGER OF THE LOXAHATCHEE NATIONAL WILDLIFE REFUGE.

1-01.3b THE NUMBER OF HOURS OF OPERATING TIME OF EACH MACHINE WILL BE LOGGED AND KEPT BY THE REFUGE MANAGER AND/OR HIS AUTHORIZED REPRESENTATIVE.

1-01.4 CONTRACTOR'S RESPONSIBILITY

1-01.4a IT SHALL BE THE CONTRACTOR'S RESPONSIBILITY TO Furnish, Move, and Maintain in good operating condition the Machines, Mats, and other Allied Items of Equipment; Move the Machines from one Work Area to another Work Area; Furnish all Fuel and Operations and Repair Costs; Furnish all Transportation for Men, Machines, and Equipment; and Furnish all Wages for Operators, Drivers, Oilers, and other Workmen necessary to Transportation, Operation, and Maintenance.

1-01.4b OPERATORS SHALL BE FURNISHED WITH EACH MACHINE.

* * * * *

1-03. DRAWINGS

1-03.1 THE FOLLOWING DRAWING IS ATTACHED AND HEREBY MADE A PART OF THIS INVITATION BY REFERENCE:

DRAWING NUMBER	TITLE
4R-FLA-435-36.0	EQUIPMENT WORK SITES COMPARTMENT "D" IMPOUNDMENT

* * * * *

1-04.1 ESTIMATED EQUIPMENT WORKING TIME SHALL BE AS SET OUT BELOW:

DRAGLINES, TWO (2) CUBIC YARD:	ONE THOUSAND AND TWO HUNDRED AND FORTY (1,240) HOURS PER DRAGLINE
--------------------------------	---

1.04.2 THE GOVERNMENT RESERVES THE RIGHT TO INCREASE OR DECREASE THE WORKING TIME OF EITHER OR ALL MACHINES BY AN AMOUNT NOT TO EXCEED TWENTY-FIVE (25) PERCENT OF THE ESTIMATED HOURS OF EACH AFFECTED MACHINE.

* * * * *

2.01. EQUIPMENT

2-01.1 EQUIPMENT FURNISHED UNDER THIS CONTRACT SHALL BE IN COMPLIANCE WITH ALL FEDERAL, STATE, AND LOCAL SAFETY RULES AND REGULATIONS AND SHALL BE IN SUCH CONDITION THAT IT WILL NOT BE SUBJECT TO UNDUE BREAKDOWNS AND DOWN-TIME EXCEPT FOR NORMAL MAINTENANCE AND SERVICING.

2-01.2 OPERATORS, OILERS, OTHER NECESSARY WORKMEN, FUEL, GREASE, OIL, ALLIED, EQUIPMENT AND MATERIALS, MATS, SERVICING, AND MAINTENANCE SHALL BE FURNISHED BY THE CONTRACTOR(S) FOR EACH MACHINE.

* * * * *

2-02.5 NUMBER OF DRAGLINES required:

2-02.5a DRAGLINES: 4 EACH

2-03. WORK TIMES

2-03.1 MINIMUM WORK (OPERATING) TIMES PER WEEK

2-03.1a DRAGLINES

(1) CONTRACTOR(S) WILL BE REQUIRED TO WORK (OPERATE) EACH DRAGLINE A MINIMUM OF FORTY (40) HOURS PER WEEK ONCE WORK HAS COMMENCED, WEATHER AND GROUND CONDITIONS PERMITTING.

2.03.2 WORK TIMES FOR PAYMENT PURPOSES WILL BE DETERMINED ON THE BASIS OF THE ACTUAL NUMBER OF HOURS WORKED PER EACH DRAGLINE.

2.03.2a NO WORK TIME FOR PAYMENT PURPOSES WILL BE ALLOWED FOR FUELING, OILING, GREASING, SERVICING, MAINTENANCE, AND REPAIR TIME.

* * * * *

3-01. THE ONLY COSTS TO THE GOVERNMENT SHALL BE THE HOURLY RATES AS QUOTED IN BID ITEMS 1, 2, 3, and 4.

* * * * *

3.03.1 PAYMENT

3-03.1a PAYMENT for TWO (2) CUBIC YARD DRAGLINES will be made at the HOURLY RATE per EACH MACHINE as Bid therefor for STANDARD MODEL, FACTORY RATED, TWO (2) CUBIC YARD DRAGLINES, WITH OPERATOR, which Price shall cover all Costs for Move-on and Move-off; Moving from one Work Area to another Work Area on the Refuge; Mats; Operation; Operators; Fuel; Servicing; Maintenance; Repairs; Transportation for Operators and Laborers; and other Incidental Costs. [Italics in original.]

3. The Notice to Proceed was issued on June 19, 1979. At the preconstruction conference on July 31, 1979, the contractor representatives present raised questions concerning the possibility of encountering rock and the need for dewatering the site of the work. Mr. Tom Martin (the Refuge Manager and at that time the contracting officer's representative (hereafter COR) stated that the work could be done without blasting and that no provision had been made for dewatering the site with pumps, as the material could be dug wet.⁷ In August of 1979, the contractor was involved in bringing the draglines to the site and assembling them close to the pumping station. By August 20, 1979, the draglines were on the site and operational. The first dragline work was performed on the following day. Rock was encountered almost immediately and John Rath (then construction representative at the site) stopped the work in order to determine what should be done about the problem (AX-5; AX-10(A); Tr. 63-65, 86-88, 93-94).

Work was resumed on some portions of the project and continued sporadically until it was stopped again by the issuance of Work Suspension Order No. 1 on August 28, 1979 (AF-3). Representatives from the regional office in Atlanta came down to the site of the work in order to determine what should be done about the presence of rock in substantial quantities on the project. The Government representatives concluded that the rock had to be drilled and shot with

⁷ In his testimony, the contracting officer acknowledged (i) that there was no provision in the contract for either drilling and blasting or pumping; (ii) that the ditch could not be dug with the dragline unless the rock was removed; (iii) that this required drilling and blasting; (iv) that he recalled coming down to Florida on one occasion in response to one of contractor's telephone calls about the rock problems and the water problems causing the draglines to be down; and (v) that a dike had been built earlier near the Loxahatchee refuge headquarters without having to blast rock and without encountering water problems (Tr. 7-8, 15, 30-37).

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dynamite to break the rock so that the contractor could dig the ditch. The contracting officer (Mr. Paul W. Conner) requested the contractor to get some prices for drilling and shooting the rock (Tr. 69-70).

No work was performed from August 28, 1979, until September 7, 1979, when the contractor was orally directed to resume work (AF-4). On that date Extra Work Order No. 1, was issued directing the contractor to furnish all labor, materials, equipment, plant and transportation for blasting of borrow-ditches within the "Compartment 'D' Construction Area" (AF-5). Even after the order to resume work was given on September 7, 1979, virtually no dragline work appears to have been performed until October 1979.⁸

4. The contractor placed a subcontract with Oren Construction Co. (hereafter called Oren) for the drilling and blasting work. Oren commenced performance under its subcontract on September 19, 1979. It continued with the required drilling and blasting work until the contractor was directed to cease work as of June 20, 1980. According to AX-4 this resulted in a total of 9,391 holes having been shot on the Loxahatchee Game Reserve (i.e., the project). The specifications upon which Oren's bid was based called for drilling 10-foot holes. Apparently after the drilling work commenced, however, the contractor was told that it would be necessary for the canal being dug to have a continuous depth of 14 feet (4 feet of rock plus muck). The change was necessary because an adjacent property owner objected to having the canal so close to its property line and insisted upon the canal having a continuous bottom to accommodate its pumping irrigation requirements. As a result the canal was moved back about 200 feet inside the refuge and the 14-foot continuous bottom requirement was imposed. The rock consisted of a continuous 4-foot layer of limestone down about 12 feet from the top surface with the result that Oren had to use a longer bar to get the extra depth (Tr. 67-69, 127-28).

5. Shortly after Oren commenced drilling and blasting, the site was inundated by water to such an extent that the work could not proceed at all or only intermittently.⁹ A meeting was held in the refuge headquarters on October 1, 1979,¹⁰ to discuss what should be done about the water problem. At the meeting it was decided that the Fish and Wildlife Service (FWS) would (i) take immediate action to dewater the construction site (entailing the use of station equipment, rental of

⁸The entry for Sept. 24, 1979, in the diary of Mr. J. C. Carpenter (contractor's foreman) reads: "No more dragline work until 10/2/79, waiting on drilling and pumps. Digging muck, trying to dig rock without blasting useless" (AX-10(A)).

⁹Commenting upon the difficulties encountered in proceeding with the drilling and blasting work, Mr. Oren states: "[T]he Court only has to look at this picture to see the conditions we were faced with on this job, conditions, that when I looked at the job, were not as bad as they turned (out) to be. They even got worse, steadily worse, because we were in considerable wet season; dike seepage, and what have you, so, so when I observed the job, even this particular area when I observed the job, was fairly dry but it changed over night. All you needed was one small rain." (Tr. 130).

¹⁰Listed as in attendance were Billy Horton (regional engineer-Atlanta), Dutch Thumb, Paul Conner (contracting officer, Atlanta), Tom Martin (refuge manager), Phil Morgan (Atlanta), John Rath (Con. Rep.), and contractor representatives (AX-2).

a pump unit, purchase of pipe and other needed supplies, as well as getting permission for certain features of the pumping operation from the South Florida Water Management District which was obtained on October 1); (ii) secure one or two additional pumps (24-inch low lift with power unit) from other stations, if possible, or, if not possible, continue renting one or more pumps from the contractor; and (iii) immediately reset survey stakes as required.

A memorandum of October 4, 1979, pertaining to the October 1 meeting states: "With the pumping operation underway the rented draglines will excavate the exterior canal to design configuration with a single pass around the perimeter. Excavated material will be placed as close to the established dike centerline as possible."¹¹

6. Very serious problems attributable to the presence of water continued to interfere with the efficient use of all of the four draglines for several months. Entries in the diary of the contractor's foreman for 18-working days between November 12 through December 5, 1979, show Dragline 44 not to be working during that period because the water was too high and there were no pumps. The same source shows that for 34 working days from November 12 to December 28, 1979, there was no work for Dragline 66 because of high water and no pumps (AX-10(A)).

7. The severe water problem encountered in performing the contract work were attributable to various causes including (i) overflow from the nearby Hillsboro Canal, (ii) seepage, and (iii) rain. The Hillsboro Canal was on property in the vicinity of the worksite. It was under the control of the South Florida Water Management District (SFWMD), which used the water stored in the canal for irrigation. When the water in the Hillsboro Canal was high, it would back up through an adjoining canal and flood areas the contractor was working in. As the SFWMD was shutdown on weekends, the water level in the Hillsboro Canal would generally rise on Saturday and Sunday and flood the worksite with the result that the available pumps were not able to reduce the amount of water present on the project so that work could proceed effectively until about noon on Tuesday following the weekend shutdown. Until the latter part of February of 1980,¹² the periodic flooding of the site by overflows from the Hillsboro Canal constituted a serious problem which greatly impeded the progress of the contract work. In his testimony the contracting officer acknowledged that there was nothing in the contract which required the contractor to coordinate the water level in the Hillsboro Canal with the SFWMD and that the Government's efforts at such coordination had been unsuccessful. The situation was not brought under control until after

¹¹ Immediately thereafter the memorandum stated:

"If machine time is available under the existing contract after the single pass is made, dike material will be moved to final alignment and shaped. Funds in the contract may not be adequate to complete this action. If not, alternatives such as EWO station force account or additional contract will be considered."

(AX-2)

¹² An entry in Mr. Carpenter's diary under the date of Dec. 31, 1979 states: "Pump broke down #33 can't dig because of high water, #66 can't dig because of high water 12/31 thru 2/8/80."

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Mr. Owens became the COR in February of 1980 when a temporary dike was built inside the main dike in order to keep water from the Hillsboro Canal coming over and flooding the worksite. Even this expedient did not stop water seepage from the Hillsboro Canal impeding prosecution of the contract work to some extent (AX-10(A); Tr. 80-81, 99, 130, 153-59).

8. Excessive water on the worksite interfered with prosecution of the contract work in two respects.¹³ First, the drilling and blasting subcontractor had difficulty getting his drill lines out so that the rock strata underlying the muck could be blasted. In the working conditions frequently present it was necessary to take the water off the top of the muck and to put pads on the drilling rig so that the rig could walk on the surface of the muck. After the requirement of a continuous bottom was established, it was not possible for the prime contractor to use its draglines to perform the necessary excavation of the canal until the rock had been removed. The draglines could excavate muck wet but with water on top of the muck it turned to soup.

In the circumstances prevailing on the job for several months, the prosecution of the contract work in a timely manner was largely (although not entirely) dependent upon the presence of sufficient pumps to handle the excess water at the worksite. Providing the pumps required to handle the excess water was recognized by the Government as its responsibility, but it failed to supply pumps in sufficient number to the contractor in a timely fashion.¹⁴ The record indicates that the Government rarely got enough pumps on the job to permit the contractor to operate four draglines simultaneously as contemplated by the instant contract. (Tr. 72-76, 88, 94, 99-104).

9. Although the contract was prepared on construction contract forms, witnesses for both parties agreed that essentially the contract called for the contractor to furnish four draglines with operators and a foreman (Tr. 8, 117-18, 123). Under paragraph 1-104.1 of the Technical Specifications,¹⁵ the estimated equipment working time for each dragline is shown as 1,240 hours.¹⁶ The Technical Specifications also provide (i) that the Government reserved the right to increase or decrease the working time of any or all machines by an amount not to exceed 25 percent of the estimated hours of each affected machine

¹³ Responding to a question on direct examination as to how the water and rock affected the job, appellant's foreman on the project stated:

"[I]t made it impossible for us to dig, to make any progress to build a dike; the water was, being on top of the muck, made it soft and boggy, the drill couldn't travel over it to operate to drill the holes. Therefore, the draglines couldn't work without the drill drilling the holes and blasting the rock."

(Tr. 98).

¹⁴ The following colloquy ensued between appellant's counsel and the appellant's foreman on the job. "Q. Would you relate to the court how long it would take the Department of Interior to get their pumps there? A. Sometimes two weeks. Sometimes we waited five, six weeks after being notified that we would get pumps before we ever got them" (Tr. 99).

¹⁵ All of the provisions from the Technical Specifications referred to in finding 9 are quoted in the text, *supra*.

¹⁶ The contractor had expected to be on the job about 6 months to get the 1,240 hours in for each dragline (Tr. 61).

(Par. 1.04.2);¹⁷ (ii) that the contractor was required to operate each dragline a minimum of 40 hours per week once work had commenced, weather and ground conditions permitting (Par. 2-03.1a);¹⁸ and (iii) that work time for payment purposes would be determined by the actual number of hours worked¹⁹ per each machine (Par. 2.03.2).

At a meeting apparently held around Christmas of 1979, Mr. Hirt called the contracting officer's attention to the serious consequences to the contractor of being unable to work. Apropos of that meeting, Mr. Hirt states:

I said, "Mr. Connor, [sic] we have been here two to three months now and I haven't made enough to pay my payroll." I said that I have got to have some relief. He said well no provisions in our contract, you know, for no work. Well, I said the machines are available. We are here to work. The men are here and we can't work.

(Tr. 75-76).

10. As the jobsite was in a relatively remote area, both the contractor's employees and those of the Government assigned to the project spent a considerable amount of time traveling to and from the site of the work. The contractor's foreman testified (i) that it took his operators approximately 1 hour to get from their motel to the jobsite; (ii) that they had to travel over 15 miles of paved roads and then 15 miles of rough, rock roads down through the Everglades; (iii) that the equipment operators go to the job at 7 a.m.; and (iv) that they worked a 10-hour day²⁰ with a half hour off for lunch.

Mr. Carpenter also testified (i) that except for the contracting officer's representative, the other Government employees would usually arrive on the job at about 9 a.m., and leave the job at about 2:30 to 3 p.m.; (ii) that they had to report to the refuge headquarters to start work; (iii) that getting from the refuge headquarters to the jobsite entailed about 35 miles of travel over a rough road which took about 1-1/2 hours of travel time; and (iv) that the Government employees had to traverse the same road to get back at the refuge at the end of their 8-hour work day (Tr. 95-97).

11. Throughout most of contract performance there were serious problems concerning supervision of the contract work. Virtually all of such problems could be traced to one or more of the following factors: (i) Contradictory contract provisions as to who had responsibility for

¹⁷ Upon cross-examination Mr. Hirt acknowledged that the 1,240 hours of work for each dragline was an estimated figure and that under the cited specification provision it could vary 25 percent one way or the other (Tr. 86).

¹⁸ Mr. Hirt testified (i) that the contract called for the contractor working each dragline a minimum of 40 hours per week; (ii) that the contractor expected to work each dragline 50 hours per week; (iii) that normally the contractor works 10 hours a day, 5 days a week; and (iv) that at the preconstruction conference the Government indicated (a) that the contractor working its normal hours would not present a problem, and (b) that the contractor could work on Saturdays or holidays if necessary by making arrangements through the contracting officer's representative on the job (Tr. 61).

¹⁹ At the hearing Mr. Hirt acknowledged that as the contract provides for payment on an hourly basis, the contractor is only to be paid for whatever hours were actually worked with the draglines (Tr. 58-59).

²⁰ In response to a question on direct examination as to what was the consequence to the contractor of delayed performance, Mr. Hirt stated: (i) That four draglines were tied up on the job; (ii) that except for fuel, the costs were basically the same whether the draglines worked or not; (iii) that the contractor had to pay the operators for 10 hours each work day without regard to whether or not the draglines were able to do any work; (iv) that the contractor had to pay for the operators' motel bills and for their food as long as the job continued; and (v) that the cost of transporting the operators to and from the jobsite had also to be borne by the contractor (Tr. 61-62).

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supervising the contract work; (ii) the designation of the refuge manager as the contracting officer's representative during the early days of contract performance, even though the refuge was located approximately 35 miles from the jobsite; (iii) the bifurcation of authority between the COR at the jobsite and the refuge manager with the COR having responsibility to direct the drilling, blasting, and digging and with the refuge manager being in charge of directing all the work related to the pumps; and (iv) the frequent changes in the designation of the COR.²¹

Clause 11 of the General Provisions (text, *supra*) requires the contractor to give his personal superintendence to the contract work or have on the work a competent superintendent satisfactory to the contracting officer. Paragraph 1-01.3 of the Technical Specifications (text, *supra*) provides, however, that all work will be under the supervision of and as directed by the refuge manager at the Loxahatchee National Wildlife Refuge. At the hearing the contracting officer acknowledged that ordinarily the general contractor is the one who supervises and directs the progress of the work and the owner pays him for that. Offered as an explanation for making the refuge manager responsible for supervising and directing the work on the instant contract was the fact that Mr. Tom Martin (the refuge manager) was a very strong character and that the supervision clause in the Technical Specifications²² had been included as a sort of sop to his personality. In this connection, the contracting officer noted that while Mr. Martin had been so designated, Mr. Rath was in fact out on the job and he had been directed to supervise.

A review of the record discloses that Mr. Thomas W. Martin was designated as the contracting officer's representative in the notice to proceed letter of June 19, 1979 (AF 2); that by letter dated September 11, 1979, the contractor was informed that Mr. John Rath would replace Mr. Martin (AX 6). Mr. Rath appears to never have been vested with full authority to direct all phases of the work related to the project. At a meeting in the headquarters of the refuge on October 1, 1979,²³ Government personnel who had attended the

²¹ Mr. Thomas W. Martin was COR from June 19, 1979, until Sept. 11, 1979, being replaced by Mr. John Rath on the latter date. Mr. Rath served as COR until late November of 1979, when he was succeeded by Mr. Dutch Thumb who was COR until February of 1980. Mr. Thumb was succeeded by Mr. Henry Owens who was COR from Feb. 18, 1980, until the contract work was terminated on June 20, 1980 (AF 2; AX-3; AX-6; AX-10(A); Tr. 20, 28-30).

²² Despite the unambiguous nature of the language employed in technical specification 1-01.3 (text, *supra*), the contracting officer testified that it was the intention that the contractor supervise his own work and that the Government is not supposed to supervise the work (Tr. 16-17).

²³ In a memorandum concerning that meeting prepared by Mr. Phillip S. Morgan as a memorandum to files under date of Oct. 4, 1979, Mr. Morgan states:

"Messrs. Morgan and Horton held a separate discussion with Refuge Manager Martin and Construction Representative Rath. This was intended to correct communication problems of the past by setting forth specific instructions concerning problem resolution in the future. Mr. Rath as construction representative will have occasion to recommend changes in the pumping operation and/or the way the rental equipment is utilized. Such recommendations will be discussed with Project Leader Martin. Should there be disagreement concerning proposed changes, these will be reviewed and decided upon by telephone with Mr. Horton and Mr. Morgan (if necessary)." (AX-2 at 2).

meeting undertook to establish procedures designed to resolve differences which had arisen or which were anticipated between Mr. Martin and Mr. Rath with respect to the contract work. According to the testimony given by Mr. Hirt, the division of authority recognized by Mr. Rath and Mr. Martin was that the former should be in charge of supervising the contractor's work²⁴ and the latter would be in charge of the pumping operation. (Tr. 15-20, 74-78).²⁵

12. A short time after the Government concluded that it would be necessary to drill and blast the rock if the dike was to be built, the contractor placed a subcontract with Oren Construction Co., under which Oren was to be paid \$18 per hole drilled and blasted upon the understanding that the blasting powder required would be furnished by the Government. Under the arrangement finally made, Mr. Oren would order the powder, the powder company would bill the contractor, the Government would pay the contractor the exact amount of the invoice (*i.e.*, no extra allowance to the contractor) and then the contractor would pay the powder company. Extra Work Order No. 1 dated September 7, 1979, provides that payment for blasting powder would be made on the basis of actual material used per hole varying in price between \$2 and \$5 per hole (AF 5; Tr. 70-71).

13. A principal reason assigned for denial of the claim asserted was the finding by the contracting officer that during the period covered by the contract one or more draglines were unable to perform for various reasons. The contracting officer's decision gives the hours of nonperformance for each dragline by date and shows that in the aggregate the draglines were unable to perform for a total of 427.5 hours (AF 14). The contracting officer acknowledged in his testimony, however, (i) that in determining the hours when the draglines were unavailable he had relied entirely upon the entries made in the daily logs of the COR; (ii) that his decision of May 28, 1981, simply summarized information from the remarks column of the daily logs; (iii) that he had no personal knowledge as to whether on any particular day there was sufficient work to be done on the jobsite so that the draglines could be kept busy; and (iv) that the reason an operator was not present on a given day for the dragline assigned to him may have been due to the fact that there was no work for the dragline in question to do on that day.

AX-9 is an extract of the contracting officer's findings dealing with idle time for the draglines on which opposite particular items appellant has entered its comments. In the exhibit appellant contests 32 hours of idle time attributed to no operator being present on the ground that an operator was present on each of those days. Also contested in the exhibit are other items involving 80 hours of idle time

²⁴ Extra Work Order No. 1, dated Sept. 7, 1979, provides for the contractor to furnish all labor, materials, equipment, plant, and transportation for blasting of borrow ditches within the construction area. The order specifically provided, however, that supervision and direction of the work would be by the Government's construction representative. Supervision and direction of the blasting work was performed by the COR (AF 5; Tr. 100).

²⁵ Because of the hours worked by Government employees (Finding 10), sometimes when it was necessary to await the setting up of the pumps, the contractor could only work a 4-hour day (Tr. 77).

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attributed to "no operator" on the ground that the reason the operators were not present was because they had been given their vacations as there was no work available for their draglines.

At the hearing appellant's foreman stated (i) that there were no operators for Dragline 66 from March 17, 1980, through March 28, 1980, because the dragline could not work by reason of high water (72 hours); (ii) that there were no operators for Dragline 66 for 32 hours (May 12, May 23, May 26, and May 27, 1980) or for Dragline 55 for 8 hours (May 14, 1980) because the draglines couldn't work by reason of high water; and (iii) that between May 29, 1980, and June 16, 1980, Draglines 33, 44, and 66 could not work for a total of 52 hours because they were waiting on drilling and blasting.²⁶

From the record it is not entirely clear whether appellant is contesting the propriety of the contracting officer treating as idle time the 8 hours shown for Dragline 66 on February 15, 1980, or the 8 hours shown for Dragline 44 on April 7, 1980, for which under the column labeled "Remarks" in the contracting officer's decision appears the words "no operator."²⁷ In only three instances did appellant contest the contracting officer's findings that a dragline was idle on a particular date due to mechanical failure. Accepting the appellant's figures as to the number of hours worked on the three dates in question (except to the extent that the hours shown as worked exceeded the hours charged as idle time), it appears that a total of 119.5 hours of idle time may properly be attributed to mechanical failure. In the aggregate the three figures given in this paragraph total 135.5 hours of idle time²⁸ attributable to causes for which appellant is considered to be responsible. (AF 14; AX-9; Tr. 140-42, 154).

14. For performing the contract work the contractor has been paid the sum of \$643,052.54.²⁹ This amount is comprised of the following items: 4,021.5 hours for draglines employed on the job at \$90 per hour—\$361,935;³⁰ drilling and blasting (9,073 holes at \$18 per hole)—

²⁶ The foreman (Mr. J. C. Carpenter) testified that AX-9 included a summary of notes from his logs and time sheets. The other testimony offered by Mr. Carpenter with respect to idle time was also based upon his logs and time sheets and reflected the fact that he was at the jobsite every day the draglines were working (Tr. 92, 112-17, 121-23).

²⁷ Neither on AX-9 nor in Mr. Carpenter's testimony was the absence of an operator on Feb. 15, 1980, or Apr. 7, 1980, attributed to the draglines involved being unable to work by reason of high water or because it was necessary to await drilling and blasting; nor did appellant offer any other explanation as to why no operator was available on these two dates (AX-9; Tr. 121).

²⁸ According to appellant there are 117.5 hours of actual down time which are said to be well within industry standards and far less than the allowance made by appellant in computing its damages (AOB 24). The 18-hour difference between the above figures and 135.5 hours shown in the text for idle time is not considered to be of any practical significance, since the latter figure is found to be well within industry standard for down time.

²⁹ Payments covered by the construction project reports 1 through 8 total \$589,283.74. Construction project report 9 involved a payment of \$53,768.80. In consideration of these payments totaling \$643,052.54, the contractor released the Government from all claims under or by virtue of the contract except: "Amounts due for delay and work stoppage (including wages, loss of profit and overhead) interest, rental value on equipment, shutdown and termination costs and costs of unreimbursed blasting expenses" (AF 11, 12).

³⁰ The contract as awarded was in the estimated amount of \$446,400. This figure was based upon four draglines working an estimated 4,960 hours (4 x 1,240 hours) multiplied by the contract rate of \$90 per hour. Modification No. 1, dated Oct. 20, 1980, reduced the estimated hours by 938.5 hours and the estimated contract price by \$84,465. The 4,021.5 hours worked by the draglines multiplied by the contract rate of \$90 per hour results in the figure shown in the text of \$361,935 (AF-1, 9, 12).

\$163,314; blasting powder--\$75,053.54; and rental of pumps (extra work order No. 4)--\$42,750. The amounts shown for drilling and blasting of \$163,314 and for blasting powder of \$75,053.54 were paid by the contractor respectively to its subcontractor (Oren Construction Co.) and to the powder company involved. The contract, as amended, provided no payment to the contractor for the additional responsibilities it had assumed in these areas subsequent to the award of the contract. Although the Government was responsible for supervising the drilling and blasting and the pumps, there were times when (apparently due to the absence of any Government employees on the project) the contractor undertook to provide supervision³¹ in both of the specified areas for limited periods of time (AF-5-9, 12, 14; Tr. 7-8, 17, 60, 69, 77, 100, 116).

15. Some time between August 21, 1979, and September 7, 1979, representatives of the Government and the contractor attended a conference on the jobsite for the purpose of determining the course of action to be followed with respect to the removal of rock encountered which was impeding contract performance. At that conference, the contracting officer requested the contractor to obtain prices for drilling and blasting rock. Such prices were apparently obtained prior to the issuance of Extra Work Order No. 1 on September 7, 1979 (AF-5). Under the terms of that order, the contractor was required to furnish all labor, materials, equipment, plant, and transportation relating to borrow ditches within the construction area for which reimbursement was to be provided at the rate of \$18 per hole for drilling and blasting and at prices varying between \$2 to \$5 per hole for the actual quantities of blasting powder used in performing the work.

The amount of rock encountered by the contractor was greatly increased when the Government imposed the requirement for a continuous 14-foot bottom for the ditch being dug from which the materials for the dike being constructed were obtained.

Shortly after drilling and blasting commenced on September 19, 1979, it appears that prosecution of the contract work was brought to a virtual standstill by the presence on the construction site of excessive quantities of water. At the conference held at the refuge's headquarters on October 1, 1979, the Government representatives present ordered the dewatering of the construction site using pumps to be furnished by the Government either directly or by renting them from the contractor. There were protracted delays in furnishing pumps of sufficient size or in sufficient numbers to dewater the construction site sufficiently, however, so that all four draglines could be used for any significant amount of time.

Apparently as a result of a complaint filed by the contractor, Mr. Billy Horton (Regional Engineer--Atlanta) came to Florida at about Christmastime in 1979 to confer with Mr. Hirt. In that

³¹ Interrogated upon cross-examination, Mr. Carpenter gave the following testimony: "Q. And you just proceeded to work the drag lines? Is that correct? A. Yes sir, and whatever else was going on. We were taking care of the pumps, the drilling" (Tr. 120).

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conference Mr. Horton assured Mr. Hirt that the pumps required would be furnished promptly. After a considerable period of delay, more pumps were furnished. While performance problems traceable to excessive water on the construction site were greatly alleviated by the measures adopted by Mr. Owens when he was assigned to the project as COR on or about February 18, 1980, they continued to plague the contractor as late as May 27, 1980 (Finding 13). This was less than a month before the Government ordered the cessation of all work on the project.

The contractor verbally protested the lack of sufficient work for its draglines as a result of problems caused by (i) the encountering of a significant amount of rock, (ii) the presence of excessive water on the construction site, and (iii) inadequate supervision.³² In varying degrees, all of these problems interfered with the progress of the work up until the time the contracting officer exercised the Government's right to reduce the working time estimated in the contract. Oral protests appear to have been made concerning these problems on a number of occasions including those made in late August or early September of 1979, on October 1, 1979, and about Christmastime of 1979.

No written claim for delay costs attributable to the presence of rock and water in unanticipated quantities or for inadequate supervision³³ appears to have been presented to the contracting officer, however, until the letter from appellant's counsel dated March 23, 1981 (AF-12), was received by the Government on March 26, 1981.

16. Three claims totaling \$250,859 were presented to the contracting officer in a letter from appellant's counsel under date of March 23, 1981 (AF 12). In the claim letter appellant states: (i) That the contractor had an agreement with the Fish & Wildlife Service (hereafter FWS) for the rental of four draglines with operators; (ii) that these draglines were used on the project covered by the instant contract from late August of 1979 until June of 1980; (iii) that the original agreement contemplated that the contractor would supply draglines with operators for approximately 6 months but that due to problems which developed there was approximately a 4-month overrun; (iv) that as a result of such problems FWS required the contractor to perform work clearly beyond the scope of the original agreement; (v) that under the original agreement each dragline was to work a total of 1,240 hours with a minimum of 40 hours per week; (vi) that instead of being completed within the originally contemplated

³² Between May 29 and June 16, 1980, the draglines used on the project were unable to work for a total of 52 hours because they were waiting on drilling and blasting (Finding 13). Supervision over drilling and blasting was vested in the Government by the express terms of the extra work orders (note 24, supra; AF 5-7).

³³ While the delay claims were excepted from the terms of the release executed by the contractor in early November 1980 (AF 11), no claim was presented to the contracting officer for decision for over 3 months thereafter. Measured from the date all work on the contract ceased (June 20, 1980), the delay in presenting a written claim for the items in question amounted to 9 months. Appellant has offered no explanation for the 9-month delay in presenting its written claims. For a discussion of the possibly serious consequence to a contractor from a protracted delay in submitting its claims in writing to the contracting officer for decision, see *Central Colorado Contractors, Inc.*, IBCA-1203-8-78 (Mar. 25, 1983), 90 LD. 109, 138-39, 83-1 BCA par. 16,405 at 81,569-570.

6 months, the work on the project dragged on until June 20, 1980; and (vii) that as of that date, FWS terminated the contract with only approximately 75 percent³⁴ of the work completed.

According to the claim letter the conduct of FWS caused the contractor substantial injury. This was attributed to the continuous turnover of contracting officers, defective specifications, misinterpretation of specifications, defective or a total absence of testing of site conditions, direct and constructive changes to the scope of the work, poor coordination with other Government units, failure to make timely payments to other suppliers which caused delay, and numerous other problems. As a result of all of these problems, the contractor's draglines and operators were said to have been underutilized and in many instances for long periods of time. Attached to the claim was a cost overrun and loss of profit statement pertaining to the claims, together with exhibits which were said to demonstrate that the contractor was owed \$250,859³⁵ from the Government.

17. Attached to the claim letter of March 23, 1981 (AF 12), is a summary statement of the claim from which the following is quoted:

1. Excess equipment cost (schedule attached)		\$173,368	
2. Blasting holes drilled by subcontractor (list attached):.....	9,391		
Paid by Department of Interior	9,073		
Not paid.....	318		
Unit price per hole.....	\$18		5,724
3. Loss of profit on the projects because the surety bond line was encumbered by this project. Average month- ly billing for 1980	\$179,417		
Four months overrun.....	×4		
Gross income lost.....	\$717,668		
Net profit (before taxes) 10%			71,767
			<u>\$250,859</u> [36]

18. A schedule showing how the excess equipment cost was determined is attached to the claim letter of March 23, 1981 (AF 12).

³⁴ At the time of termination of the work on June 20, 1980 (AF 10), the work was 81.08 percent complete. This calculation is based upon the fact (i) that it was estimated each of the four draglines would work 1,240 hours or for a total of 4,960 estimated hours; and (ii) that the contractor worked and was paid for 4,021.5 hours (note 30, *supra*); and that the latter figure is 81.08 percent of the former figure.

³⁵ The \$250,859 figure has been characterized by appellant as probably overly conservative. Cited as an example of such conservatism is the fact that the excess equipment costs are only based on a 9-hour work day with a 10 percent maintenance allowance even though the original agreement required a minimum of 40 hours per week per machine (AF 12).

³⁶ The schedule included the following additional information:

"Note:

- A. No amount is included for additional operators' wages or supervision.
- B. Interest on the working capital encumbered by this project is not included.
- C. Professional fees for preparing and pursuing the claim are not included."

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The information contained therein is quoted below and in the accompanying footnote: ³⁷

<i>Net Hours Available</i>	<i>Hours Paid For</i>	<i>Hours Not Paid For</i>	<i>Hourly [38] Rates [B]</i>	<i>Excess Costs</i>
1,717.2	469.5	1,247.7	\$53.92	\$67,275.98
648.0	425.5	222.5	53.92	11,997.20
615.6	242.0	373.6	53.92	20,144.51
712.8	217.0	495.8	53.92	26,733.54
680.4	556.0	124.4	53.92	6,707.65
715.0	715.0	- 0 -	53.92	- 0 -
712.8	570.5	142.3	53.92	7,672.82
534.6	522.0	12.6	53.92	679.39
364.5	304.0	60.5	53.92	3,262.16
6,700.9	4,021.5	2,679.4		\$144,473.25
	Overhead and profit (20%)			28,894.65
	Total excess cost.....			<u>\$173,367.90</u>

19. Except for the testimony offered by Mr. Oren in support of the subcontractor's claim, the only witness called by appellant to testify as to quantum was Mr. Bill Stanaland, a certified public accountant with 19 years experience in construction accounting. Mr. Stanaland (the certified public accountant for the contractor) had prepared the schedules attached to the claim letter of March 23, 1981 (AF 12), and

³⁷ Quoted below is the information shown in the first six columns of the machine hours schedule predicated upon a 9-hour workday:

<i>"Estimate Nos.</i>	<i>From</i>	<i>To</i>	<i>Workdays</i>	<i>No. of Machines</i>	<i>Total Hours Available</i>	<i>Allowance</i>
1	8-20-79	11-1-79	53(A)	4	1908	190.8
2	11-1-79	12-1-79	20	4	720	72.0
3	12-1-79	1-1-80	19	4	684	68.4
4	1-1-80	2-1-80	22	4	792	79.2
5	2-1-80	3-1-80	21	4	756	75.6
6	3-1-80	4-1-80	21	4	756	41.0
7	4-1-80	5-1-80	22	4	792	79.2
8	5-1-80	6-1-80	22	3	594	59.4
9	6-1-80	6-20-80	15	3	405	40.5
					7407	706.1
			(A) Worked on Labor Day"			

³⁸ The schedule offers the following explanation for the rate used:

"B Source: 1979 Rental rates for construction equipment published by Associated Equipment Distributors, page 24, 60-Ton Dragline. Note, 60-ton dragline is not listed. The number used is for a 60-ton excavator which is less than a dragline.

Monthly rate	\$9,075	
Hourly per month.....	176	
Hourly rate (without bucket).....		\$51.56
2-Yard Bucket (Page 26, Monthly rate).....		415
Hours per month.....		176
Hourly rate.....		2.36
Machine with Bucket		<u>\$53.92'</u>

most of his testimony related to them. It was Mr. Stanaland's testimony (i) that the schedules (Findings 17 and 18) had been prepared according to generally accepted accounting standards; (ii) that in preparing the schedule of excess equipment costs, he had relied upon the COR's daily logs and the contractor's calendar and payroll records; (iii) that in preparing that schedule he had started with the number of machines on the job, as shown in the COR's daily logs; (iv) that he had gone to the contractor's calendar and payroll records to see if their men were there or could have been there; and (v) that basing his calculations on a 9-hour day,³⁹ he had determined the total available hours⁴⁰ from the use of these figures.

As is reflected in Mr. Stanaland's testimony, other calculations had to be made in order to determine the excess equipment costs for each of the nine periods of time specified in the schedule. From the net available hours shown for each of such time periods, it was necessary to deduct the hours paid for according to the COR's daily logs to arrive at the hours not paid for. This figure multiplied by the rate selected of \$53.92 per hour⁴¹ gives the excess equipment cost for each of the time periods involved. Totaling the excess equipment costs for each of the nine periods covered by the payment estimates produces a sum total of \$144,473.25. To this is added the 20 percent claimed for overhead and profit of \$28,894.65, resulting in a total claim for excess equipment costs of \$173,367.90. (AF 12; Tr. 139-45).

20. The sole issue in the claim submitted for blasting holes drilled by the subcontractor is whether the number of holes drilled and blasted was 9,391 as contended by the subcontractor (Oren Construction Co.) or 9,073 as found by the contracting officer (AF 16). The claim for this item of \$5,724 represents the 318 holes in dispute multiplied by the subcontract price of \$18 per hole.

Called as a witness by appellant in support of the claim for 318 holes drilled and blasted for which no payments had been received, Mr. Paul Oren stated (i) that AX-4 is a sheet prepared by him showing 9,391 holes to have been drilled on the job; (ii) that the information shown on AX-4 was taken off Oren's records; (iii) that on the job were two certified drillers who were licensed; (iv) that they were required to keep an accurate record of the number of holes they put down on any given day showing the amount of explosives used that day; and (v) that

³⁹ In explaining the use of a 9-hour day, Mr. Stanaland stated: (i) That the contractor was required to work a 10-hour day; (ii) that he had assumed 1 hour a day would be required for routine maintenance; and (iii) that the total hours shown as available on the schedule were net of routine maintenance (Tr. 140-41).

⁴⁰ The available machine hours were determined by multiplying the number of workdays by 9 (9-hour workday) times the number of machines on the job and in operating condition during the period specified. For example, the first entry on the schedule of excess equipment costs (note 37, *supra*, and accompanying text) shows (i) that during the period from Aug. 20, 1979, to Nov. 1, 1979, there were 53 workdays; (ii) that a 9-hour workday is involved; (iii) that four machines were available to work; and (iv) that during that period the total available machine hours were 1,908. From this figure is deducted a 10 percent extraordinary maintenance allowance of 190.8 hours to arrive at the net hours available figure during the period in question of 1,717.2 hours (Tr. 140-42).

⁴¹ The \$53.92 rate selected is based upon "Nationally Averaged 1979 Rental Rates for Construction Equipment" as published by Associated Equipment Distributors (AF 12). The \$53.92 figure is exclusive of the operator's wages and fuel, as well as of overhead and profit. The latter two items were included in the claim, however, as separate items (Tr. 142-44).

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there were numerous times when he was on the job and he had verified the number of holes drilled on those days.

The appellant's foreman, Mr. Carpenter, also gave testimony with respect to the blasting holes drilled. It was Mr. Carpenter's testimony (i) that there were times when Oren's people worked on Saturdays and holidays when representatives of neither the contractor nor the contracting officer were there; (ii) that he knew that to be the case because he always knew where the job stopped every evening and where it started every morning and consequently knew when Oren had drilled or not drilled; and (iii) that in signing the COR's daily logs, he was signing as a representative of the contractor and not on behalf of the subcontractor. Upon cross-examination, Mr. Carpenter stated that he knew that the Government's representative had not been on the job sometimes when the blasting subcontractor's people were there because the Government's people had told him that they would not be there. Mr. Carpenter also stated that the Government's representative had told him that the contractor could occasionally drill on Saturdays;⁴² that he would take care in his report for Monday to include the holes that were drilled on Saturday; and that the Government representative could not have gone out on Monday and counted the holes drilled before the contractor started work because to Mr. Carpenter's knowledge the Government representative never got to the job before Mr. Carpenter arrived at 7 a.m.

The contracting officer stated that his findings that 9,073 holes had been drilled was based upon what was shown in the daily logs and the fact that the daily logs show no work being performed on some of the days involved in the drilling and blasting claim. He acknowledged upon cross-examination, however, that he had no personal knowledge as to whether drilling and blasting had proceeded on Saturdays when no Government representative was present. (AF 16; AX-4; Tr. 44-48, 100-01, 118-20, 156).

21. Testifying in support of the claim for lost profit on other projects because the surety bond line was encumbered by the instant project, Mr. Stanaland stated: (i) That to his personal knowledge the contractor could not get a bond while the instant job was dragging on;⁴³ (ii) that he had figured the overrun on the project at 4 months; (iii) that the average monthly billing for 1980 was determined by dividing the gross billing by 12 resulting in the figure of \$179,417; (iv) that he had multiplied the \$179,417 figure by 4 obtaining a product of \$717,668; and (v) that as the normal profit of the company before taxes but after G&A expense was a minimum of 10 percent, he had used that percentage to obtain the \$71,767 claimed for loss of

⁴² At the preconstruction meeting the contractor had been told that if Saturday or holiday work was needed, the necessary arrangements should be made with the man on the job (Tr. 61).

⁴³ In his testimony, Mr. Hirt stated that most substantial construction projects in Florida require performance bonds and that his bonding company would not give the contractor a bond while there was outstanding work on the project (Tr. 84).

profit on other projects (Finding 17), *i.e.*, the estimated profit that would have been made on other projects if the surety bond line had not been encumbered by the delay in completing the instant contract.

Upon cross-examination the following exchange took place between Mr. Stanaland and Government counsel:

Q. You've computed a loss of profit on other projects because of the surety bond being encumbered. You made a computation of \$71,767 loss. Wouldn't you characterize that as speculative?

A. Yes. To be honest with you, I would. We could look at it from this point of view. He missed jobs. There's no question about it, okay? Supposed he missed a bad job. He's lucky that he missed it. However, supposed he missed a windfall? Okay? But any loss of profit computation is speculative.

(Finding 17; Tr. 145-46, 150-52).

Claim 1 - \$173,367.90

Excess Equipment

Discussion

The record made in this proceeding shows that from the commencement of the dragline work on August 21, 1979, until October 2, 1979, little or no such work was accomplished on the project due to rock and high water. Major problems developed early and seriously interfered with progress on the project for over 4 months. The magnitude of the problems besetting the project decreased dramatically after January but some of the same problems (high water and the failure of the Government to insure that the drilling and blasting was done in advance of the dragline work) continued to interfere with the prosecution of the work to some extent as late as June 16, 1980 (Findings 13 and 15).⁴⁴

When the dragline work was commenced on August 21, 1979, rock was encountered almost immediately. Following a conference on the jobsite, the Government directed the contractor to arrange for drilling and blasting the rock. The contractor did so in order to permit the dragline work to proceed. This resulted in the placement of a subcontract for drilling and blasting with Oren Construction Co. This

⁴⁴The percentages utilized of the net time available from the four draglines for the nine periods in which contract performance has been divided (Finding 18) are shown below:

<i>Estimate No.</i>	<i>Period</i>	<i>Net Hours Available</i>	<i>Hours Paid for</i>	<i>Percent of Net Time Available Utilized</i>
1	8-20-79-11- 1-79	1717.2	469.5	27.34
2	11- 1-79-12- 1-79	648.0	425.5	65.66
3	12- 1-79- 1- 1-80	615.6	242.0	39.31
4	1- 1-80- 2- 1-80	712.8	217.0	30.44
5	2- 1-80- 3- 1-80	680.4	556.0	81.72
6	3- 1-80- 4- 1-80	715.0	715.0	100.00
7	4- 1-80- 5- 1-80	712.8	570.5	80.03
8	5- 1-80- 6- 1-80	534.6	522.0	97.46
9	6- 1-80- 6-20-80	364.5	304.0	83.40

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work was commenced on September 19, 1979. A short time after the drilling and blasting work began, the amount of water on the jobsite seriously impeded contract performance. A conference was held at the refuge headquarters on October 1, 1979, at which it was agreed that the Government would furnish sufficient pumps to handle the excess water on the project and thereby permit the drilling and blasting and ultimately the dragline work to proceed effectively.⁴⁵

Some time after the award of the drilling and blasting subcontract and apparently as a result of a complaint lodged by a landowner adjacent to the jobsite, the Government imposed the requirement of a 14-foot continuous bottom for the canals and ditches being excavated. While appellant asserts that the 14-foot continuous bottom requirement was the cause of the need for drilling, blasting, and pumping (ARB 18), it appears that the Government's decision to drill and blast was reached on the basis of rock having been encountered on August 21, 1979 (this was the first day of dragline work and prior to the imposition of the 14-foot continuous bottom requirement). In this connection the Board notes that the conference on the jobsite at which the contractor was requested to obtain prices for drilling and blasting occurred after the initial encounter with rock by the draglines and that the specifications upon which Oren's bid for the drilling and blasting was based called for drilling 10-foot holes (Findings 3 and 4).

Even after some of the draglines were in a position to commence work in early October 1979, there were still formidable obstacles to be overcome. The pumps to be provided by the Government to handle the excess water on the project were delivered late or were not furnished in sufficient numbers or of a sufficient capacity to permit the effective use of all four draglines. High water attributable to rain could not be avoided. Little, if anything, could be done about water seepage into the project from adjacent properties; and the Government was unsuccessful in its attempts to work out an arrangement with the South Florida Water Management District to prevent the jobsite from being periodically flooded when the Hillsboro Canal discontinued pumping for its irrigation projects each weekend (Findings 5-8).

Defective specifications.

[1] According to appellant the contract work was also seriously delayed by the Government's failure to properly supervise the contract work. Responsibility for supervision was clearly vested in the

⁴⁵ In its opening brief, appellant states:

"The drills could only be moved over the surface of the muck with great difficulty because the water on top of the muck made it too soft and boggy (TR. 98). Even comparatively dry areas became unmanageable with a slight rain. This water problem got steadily worse with the coming of the rainy season (TR. 130). The drilling and blasting, in light of the Government's new fourteen (14) foot continuous bottom requirement for the canals and ditches, became the critical factor in the work sequence. Until Oren drilled and blasted the rock, Clark & Hirt could not operate the draglines (TR. 73). The Government continued its attempts to supervise the job and to directly instruct Oren on where and when to drill and blast (TR. 100)."

(AOB 8).

Government by the Technical Specifications and by the extra work orders providing for drilling and blasting. Appellant asserts with appropriate citation to the record that as a result of the provisions as to supervision included in the original contract and in the extra work orders, it did not include in its bid any allowance for costs associated with job supervision; nor did appellant receive any extra payments under the extra work orders for supervising the drilling and blasting (AOB 4, 7, 10, 19-21).

To support its position appellant relies principally upon Paragraph 1-01.3a of the Technical Specifications. This paragraph provides that "[a]ll work will be under the supervision of and as directed by the refuge manager of the Loxahatchee National Wildlife Refuge." The Board notes that Extra Work Order No. 1, dated September 7, 1979 (note 24, *supra*), provides that supervision and direction of blasting would be by the Government construction representative, as do Extra Work Order No. 2 dated February 20, 1980 (AF 6), and Extra Work Order No. 3 dated March 6, 1980 (AF 7).

In its posthearing brief, the Government asserts (i) that responsibility for supervision of the work under the contract and the extra work orders rested with appellant as a matter of law; (ii) that General Provision No. 11, as modified by Supplemental Provision S-5, clearly places responsibility for supervision and direction of the work on the contractor; and (iii) that any delay in contract performance was not due to inadequate supervision and direction of the work by the Government (GPHB 1-2, 5). Nowhere in its posthearing brief does the Government even allude to the provisions of Paragraph 1-01.3a of the Technical Specifications or to the provisions contained in the extra work orders relating to drilling and blasting, all of which clearly vest responsibility for supervision in the Government.

In its reply brief appellant notes the absence of any reference in the Government brief to Technical Specification (T.S.) 1-01.3a after which it states: (i) that it is well established that specific contract provisions, such as T.S. 1-01.3a, govern over a more general provision of the contract (citing *Morrison-Knudsen Co. v. United States*, 184 Ct. Cl. 661, 696, 397 F.2d 826, 848 (1968), and (ii) that the Board gives great weight in interpreting contracts to the parties conduct (citing *Rocky Mountain Construction Co.*, IBCA-1091-12-75 (Aug. 17, 1977), 84 I.D. 829, 77-2 BCA par. 12,692. Thereafter, appellant states: "In the instant case the parties recognized that the Government had the burden of supervising the work (TR. 60, 100) (Ex. #2). Consequently, it is clear that the Technical Specification [⁴⁶] placed the burden of supervision directly on the Government and that the parties through their conduct recognized that fact" (ARB 16-17).⁴⁷

⁴⁶ Paragraph 1-01.2a of the Technical Specifications states: "Specifications for the work will be established in the field by the refuge manager of the Loxahatchee National Wildlife Refuge" (Finding 2).

⁴⁷ In the notice to proceed letter of June 19, 1979, the then contracting officer states: "Mr. Thomas W. Martin, Refuge Manager, is designated as the Contracting Officer's Representative on the site under whose supervision the work will be performed" (AF 2).

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Testifying at the hearing the contracting officer failed to explain how specification for the work could be established in the field by a refuge manager who was 35 miles from the jobsite (note 46, *supra*), and whose visits to the site of the work were very infrequent. The statement by the contracting officer that Paragraph 1-01.3 of the Technical Specifications (Finding 2) had been included as a sop to the personality of the then refuge manager is regarded as the equivalent of an admission by him that he had abdicated a significant portion of his authority over a procurement action for which he was responsible. It was his responsibility as contracting officer to make every effort to insure that the requirements of the Government were stated with as much clarity as possible with the view to securing the lowest price for the Government at the least risk to the contractor. The lack of effective direction from the contracting officer continued throughout the early months of contract performance and for a considerable time thereafter. This resulted in a bifurcation of authority between the contracting officer's representative at the site (vested with authority to supervise the dragline work and the drilling and blasting) and the refuge manager some 35 miles away (recognized as responsible for directing the pumping crew). The bifurcation of authority resulted in the contractor's draglines and their operators sometimes being able to work only 4-hour days. Not only did such bifurcation delay the contractor in the manner indicated but it occasionally resulted in the contractor having to assume responsibility for supervision over all phases of the work, even though based on its interpretation of the terms of the solicitation no allowance for supervision had been included in the bid submitted (Findings 11 and 14).

Based upon the foregoing, the Board finds (i) that the terms of the solicitation respecting supervision were ambiguous; (ii) that the interpretation the contractor placed upon the ambiguous provisions was reasonable,⁴⁸ as is evidenced by the Government's concurrence in such interpretation prior to the time a dispute arose; (iii) that the bifurcation of authority between the COR at the jobsite and the refuge manager continued for at least several months after the issuance of the notice to proceed; and (iv) that this division of authority seriously delayed the contractor and resulted in the partnership incurring substantial additional expense. So finding, the Board further finds that the specifications with which we are here concerned were defective.

Minimum hours for each dragline.

[2] In a number of places in its posthearing brief appellant asserts (i) that, by the terms of Paragraph 2-03.1a of the Technical

⁴⁸ Cf. *WPC Enterprises, Inc. v. United States*, 163 Ct. Cl. 1, 6, 7 (1963), from which the following is quoted:

"The Government, as the author, has to shoulder the major task of seeing that within the zone of reasonableness the words of the agreement communicate the proper notions—as well as the main risk of a failure to carry that responsibility. If the defendant chafes under the continued application of this check, it can obtain a looser rein by a more meticulous writing of its contracts and especially of the specifications." (Footnote omitted.)

Specifications, the contractor was required to work each dragline a minimum of 40 hours per week once work had started and (ii) that at the preconstruction conference the Government indicated that there was no objection to the contractor operating the draglines at its typical daily work rate of 10 hours per machine (AOB 4-5, 9, 12, 20-21, 26). The machine hour schedule prepared by Mr. Stanaland (Finding 18) is based on the contractor's daily work rate of 10 hours per dragline (AOB 21).

The requirement in Paragraph 2-03.1a of the Technical Specifications that the contractor operate each dragline a minimum of 40 hours per week once work had commenced is qualified by the language of the paragraph reading "weather and ground conditions permitting" (Finding 2). Immediately after referring to the requirement of working a minimum of 40 hours per week, the notice to proceed states "weather and ground conditions permitting" (AF 2). In his testimony the contracting officer noted that the requirement the contractor work a minimum of 40 hours per week once the work had commenced was subject to the condition stated in the same paragraph of the specifications: "[W]eather and ground conditions permitting" (Tr. 32).

While many of the delays encountered in performing the contract work can be attributed to the Government in its contractual capacity, the record shows that an unspecified and apparently unapportionable part of the delay was caused by rain. The adverse impact of rain upon contract performance was testified to by appellant's witness Oren (note 9, *supra*), and was acknowledged by appellant in its brief (note 45, *supra*).

From the language of Paragraph 2-03.1a, it is clear that the obligation of the contractor to operate each dragline 40 hours per week was not absolute but was qualified by the weather and ground conditions prevailing on the project. There is nothing in the terms of the contract nor in the evidence which shows or purports to show that the Government agreed to pay the contractor on the basis of a 40-hour week for each dragline, even though the draglines were unable to work that number of hours each week because of weather and ground conditions on the jobsite. The fact that at the preconstruction conference the Government agreed that the contractor could work a 50-hour week (10 hours a day for 5 days) was clearly not a guarantee that the contractor would be able to do so. In these circumstances, the Board finds that there is no substantial foundation in the evidence for the claim involving the machine hour schedule (Finding 18) having been prepared on the basis of the contractor's daily work rate of 10 hours per dragline.⁴⁹

⁴⁹The assumption of a daily work rate of 10 hours per dragline was used in determining the total hours available from the draglines. This figure is reflected in the ensuing calculations upon which the claim involving the machine hours schedule is based (note 37, *supra*, and accompanying text).

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Idle Equipment Rate.

[3] In computing the claim based upon the machine hours schedule (Finding 18), appellant used an hourly rate of \$53.92 for the idle equipment for which claim has been made. The rate employed is derived from rental rates for construction equipment published by the Associated Equipment Distributors (note 38, *supra*). The operating rate for the draglines forming the basis of the claim is \$90 per hour. In *Gill Construction Co.*, IBCA-588-9-66 and IBCA-626-2-67 (Aug. 30, 1968), 68-2 BCA par. 7205, the Board considered the question of the proper allowance for idle equipment under a contract containing a suspension of work clause. In that case the Board stated that under the regularly invoked rule, "the reasonable value of standby equipment is 50 percent of operating equipment rates" (68-2 BCA at 33,455).

Very recently in the case of *Capital Electric Co.*, GSBICA No. 5316, *et al.* (Feb. 17, 1983), 83-2 BCA par. 16,548, the General Service Board had occasion to consider the allowance to be made for idle equipment in a case where the appellant's claim was based upon a schedule published by the National Electrical Contractors Association rather than from the schedule published by the Associated General Contractors of America. Rejecting the appellant's contention that the customary reduction of one-half of equipment ownership costs claimed should not be applied in the case presented, the Board stated:

[T]he reason for that reduction is not any peculiarity in the method of computation of equipment ownership expense in those schedules. Rather, that reduction, now institutionalized in the Defense Acquisition Regulation, represents costs saved due to the absence of wear and tear resulting from actual use. *W. G. Cornell*, 626 F.2d at 994; *Brand*, 102 Ct. Cl. at 45, 58 F. Supp. at 751. To the extent *T. C. Bateson* holds to the contrary, we decline to follow it.

83-2 BCA at 82,315.

Bases of claims submitted.

Asserting that its delays damages are direct in nature and thus compensable under both the Change clause⁵⁰ and the Differing Site Conditions clause,⁵¹ appellant appears to rely principally upon the

⁵⁰ In 1967 the standard Changes clause was revised to read as shown in General Provision 3 of the instant contract from which the following is quoted:

"(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."

Accompanying the revised Changes clause and published at the same time was an Appendix in which it was stated: "[E]xcept for defective specifications, the Changes clause as revised will continue to have no application to any delay prior to the issuance of a change order. An adjustment for such type of delay, if appropriate, will be for consideration under the provisions of the Suspension of Work clause. * * * Under this revision, a contractor who seeks relief in a constructive change situation not involving defective specifications cannot recover for any costs arising more than 20 days prior to his furnishing an appraisal notice as prescribed under paragraph (b) * * * the 20-day limitation is not waivable and costs may not be recovered contrary to this limitation." 32 FR 16269 (Nov. 29, 1967).

⁵¹ In the circumstances involved in the instant appeal, it appears that the recovery permissible under the Changes clause would be greater than that available under the Differing Site Condition clause.

Suspension of Work clause,⁵² insofar as the claim is for consideration under the contract. Appellant also asserts, however, that the Government's action not only provides a basis for recovery under the Suspension of Work clause, but such actions also entitle appellant to recover for breach of contract (AOB 14-21).

[4] Cited in support of the breach of contract theory as a basis for recovery of the delay damages claimed are the decisions of this Board in *Murdock Construction Co.*, IBCA-1050-12-74 (Aug. 29, 1977), 77-2 BCA par. 12,728, and in *Evergreen Helicopters, Inc.*, IBCA-1388-8-80 (Aug. 28, 1981), 88 I.D. 803, 81-2 BCA par. 15,286. In *Murdock*, the award made to the contractor was not based upon a finding of breach of contract. The decision in the case was rendered prior to the date the Board acquired jurisdiction over breach of contract claims, as a result of the passage of the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613). The award made in *Murdock* was on the theory of constructive change. In *Evergreen*, appellant sought and was awarded damages for breach of contract. In that case there was no finding by the Board that the specifications were defective, however, which would have permitted an equitable adjustment to be made under the Changes clause rather than relying upon the more restrictive Suspension of Work clause⁵³ upon which the Government's defense in *Evergreen* was based.

In any event the claim as presented is not considered to be cognizable as a breach of contract claim. Although appellant refers in passing to the Government having invoked Technical Specification 1-04.2 (allowing an increase or decrease in the contract hours by 25 percent) to limit the hours worked by the contractor to 4,021.5 hours (AOB 14), the contractor's claims are premised upon the position that prior to the exercise of that reserved right by the Government, the contractor had not been able to work each of its draglines 9 hours a day (net of routine maintenance) as planned by the contractor with the concurrence of the Government (Findings 9, 19).

In presenting the excess equipment claim as a claim for breach of contract,⁵⁴ however, appellant appears to have overlooked the significance of the inclusion in the instant contract of a termination for the convenience of the Government clause. By the terms of that clause and the regulations cited therein anticipatory profits are not recoverable (note 6, *supra*). Assuming, *arguendo*, that the Government's actions could be said to constitute a breach of its contract, the breach would be subsumed or transformed into a convenience termination. See *Nolan Bros., Inc. v. United States*, 186 Ct. Cl. 602 (1969); *G. C. Casebolt Co. v. United States*, 190 Ct. Cl.

⁵² No profit is allowable under the standard Suspension of Work clause. *Excavation-Construction, Inc.*, ENG BCA No. 3858 (Apr. 30, 1982), 82-1 BCA par. 15,770.

⁵³ See notes 50 through 52, *supra*.

⁵⁴ Among the items excluded from the release executed by the contractor was a claim for loss of profit (note 29, *supra*; AOB 2). The excess equipment claim (Finding 18) includes a claim for loss of profit. Concerning this element of the claim, appellant states: "Under the breach of contract theory, Clark & Hirt would also be entitled to lost profits and overhead. See *e.g. Metal Exports Inc. v. U.S.*, 146 F. Supp. 951 (Ct. Cl. 1957) (Awarding damages for lost profits in breach of contract actions against the Government)" (AOB 22-23).

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783 (1970); *Nesbitt v. United States*, 170 Ct. Cl. 666 (1965), *cert. denied*, 383 U.S. 926 (1966).

In this case, the contracting officer failed to invoke the termination for convenience clause in directing the contractor to end performance under the contract by reason of the exhaustion of funds available for payment.⁵⁵ This failure does not affect the damage limitations of the termination for convenience clause.⁵⁶ Commenting upon this question in *G. C. Casebolt Co. v. United States*, *supra*, the Court of Claims stated at pages 786-87:

The rule we have followed is that, where the contract embodies a convenience-termination provision as this one would, a Government directive to end performance of the work will not be considered a breach but rather a convenience termination—if it could lawfully come under that clause—even though the contracting officer wrongly calls it a cancellation, mistakenly deems the contract illegal, or erroneously thinks that he can terminate the work on some other ground. * * * The principle underlying these decisions is that a party to a contract may “justify an asserted termination, rescission, or repudiation, of a contract [which turns out not to be well grounded] by proving that there was, at the time, an adequate cause, although it did not become known to him until later.” *College Point Boat Corp. v. United States*, 267 U.S. 12, 16 (1925). In the case before us, the Government may have erred (we are assuming) in putting its refusal to let plaintiff proceed on the basis that no contract had been effected, but, if so, an adequate justification for the Government’s action still existed in the termination article.

In the circumstances of this case the Board finds (i) that the instant contract included a termination for the convenience of the Government clause; (ii) that the lack of funds to pay the contractor for further work constituted an adequate cause for directing the contractor to discontinue performance under the contract; (iii) that the failure of the contracting officer to invoke the termination for convenience clause as the basis for his action does not affect the right to rely upon that clause in determining the rights and obligations of the parties; (iv) that the presence in the contract of a termination for convenience clause precludes actions of the Government from being considered breaches of contract (assuming that they might otherwise be); and (v) that the inclusion of such clause in the contract makes the recovery of anticipated profits unallowable.

[5] The failure of appellant to establish a breach of contract claim does not mean that it is without any remedy⁵⁷ for costs associated with the excess equipment claim. In fact, under the revised Changes clause included in the instant contract and by reason of the Board’s finding that the specifications were defective, the contractor may recover by

⁵⁵ AF-10, letter of June 18, 1980; Tr. 82.

⁵⁶ *John Reiner & Co. v. United States*, 163 Ct. Cl. 381, 393 (1963).

⁵⁷ See *John A. Johnson Contracting Corp. v. United States*, 132 Ct. Cl. 645, 656 (1955), in which the Court of Claims stated: “[T]he plaintiff’s failure to analyze with greater nicety the appropriate theory for its claim should not have the effect of a forfeiture of its rights * * *.” The *Johnson* case was cited with approval in *K Square Corp.*, IBCA-959-3-72 (Nov. 29, 1973), 80 I.D. 769, 773 n.22, 73-2 BCA par. 10,363 at 43,945 n.22. See also *Bateson-Cheeves Construction Co.*, IBCA-670-9-67 (Aug. 12, 1968), 68-2 BCA par. 7167 at 33,259 n.18, in which it is stated, “The Board, however, ‘is not limited by appellant’s choice of remedy nor by the Government’s assignment of defense.’ * * * Therefore, in reviewing the appellant’s allegations, we have kept in mind all provisions of the contract under which equitable adjustments may be made.”

way of an equitable adjustment all delay costs involved in attempting to perform under the defective specifications prior to the issuance of any change order and any delay costs incurred thereafter attributable to any change order.

[6] One of the principal defenses asserted by the Government is the failure of appellant to give timely written notice of its claims (GPHB 1, 4-5). No written notice of the claims now before us was given until March 26, 1981, when the contracting officer received the letter from appellant's counsel dated March 23, 1981. This was some 9 months after all work on the contract had ceased (Finding 15). Clause 3, Changes, of the instant contract includes an exception for defective specifications which makes the 20-day notice provision inapplicable to such cases. The Board has previously found the specifications with which we are here concerned to be defective (text, *supra*). The 20-day written notice provision of the Changes clause is therefor not a bar to recovery of the costs involved in this appeal. *H. M. Byars Construction Co.*, IBCA-1098-2-76 (June 7, 1977), 84 I.D. 260, 77-2 BCA par. 12,568.

[7] Accord and satisfaction is another principal defense offered by the Government to the claims asserted. This defense is based upon the acceptance by appellant of four extra work orders (AF 5-8). The Government brief correctly points out that all of such orders contain the following language: "The changes specified herein and all conditions relating thereto are hereby accepted as a part of the contractor's obligations under the cited contract." Citing authority, Government counsel states, "[T]he contractor is not entitled to be paid additional compensation solely for the delay incident to such changes beyond that allowed in the change orders which were accepted by the contractor as being satisfactory" (GPHB 3).

The evidence of record in this case clearly shows, however, that there was nothing allowed in Extra Work Order Nos. 5, 6, and 7 for delays to the contractor's work. Such orders provided that the contractor was to be paid at the rate of \$18 per hole blasted and that the powder required for such work was to be paid for at the rate specified in the orders for the actual material used. While the three extra work orders in question were issued to the contractor and were executed on behalf of the partnership, none of them provided for any reimbursement to the contractor (Finding 12). Extra Work Order No. 4 (AF 8) was used as a vehicle to reimburse the contractor for the rental of its pumps at agreed upon rates. Nothing in the order or in the evidence offered at the hearing indicates that any amount was included in that order (formalizing the rental of pump arrangement between the parties) for costs resulting from delays to the contractor's work.

One of the cases cited by the Government in support of its position is the decision of this Board in *Hensel Phelps Construction Co.*, IBCA-1010-11-73 (May 8, 1975), 82 I.D. 199, 75-1 BCA par. 11,232. Addressing the accord and satisfaction defense advanced by the Government in

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that case with respect to one of the claims involved in the appeal, the Board stated that "it is well settled that an agreement will not operate as an accord as to matters not contemplated by the agreement." 82 I.D. at 210, 75-1 BCA at 53,458 (footnote omitted). The rule stated in *Hensel Phelps* is considered to be dispositive of the question presented. Appellant's testimony at the hearing that it received no reimbursement as a result of the issuance of extra work orders calling for drilling and blasting is uncontested. No testimony was offered at the hearing to indicate that the extra work order providing for reimbursement for the rental of appellant's pumps included any allowance for delay costs experienced by appellant in performing the contract work. The Board therefore finds that the Government has failed to prove its defense of accord and satisfaction with respect to the delay claims involved in this appeal.

[8] We now turn to the formidable task of determining the amount of the equitable adjustment to which appellant is entitled in the circumstances present in this appeal. The problem involved in arriving at a fair figure for the adjustment are traceable principally to the absence of adequate recordkeeping by appellant in the areas of (i) contract performance and (ii) cost.

While the appellant's foreman did keep a diary (AX 10(A) and AX 10(B)) in which were recorded events related to contract performance, the diary is demonstrably deficient in that significant events which unquestionably affected the cost of contract performance are not recorded therein. Illustrative is the failure of the foreman's diary to even mention the imposition by the Government of the 14-foot continuous bottom requirement for the excavation work. The date when the Government imposed this requirement and by whom it was imposed are nowhere disclosed in the record before us. The Government concedes, however, that it did impose such a requirement. As the 14-foot continuous bottom requirement is not contained in the contract specifications, the Board has had to estimate an approximate time when this event occurred by inferences from other evidence of record. Another important item omitted from the foreman's diary are the days when the progress of the contract work was seriously impeded by the necessity for pumping before any work could start. This item is considered to be of considerable importance since to the extent operators were present and could not work, the equitable adjustment should not only include an allowance for idle equipment but for operator's wages as well.

The record is even less complete with respect to the cost records maintained by appellant.⁵⁸ As the Court of Claims has indicated, the

⁵⁸ See *H. R. Henderson & Co.*, ASBCA No. 5146 (Sept. 28, 1961), 61-2 BCA par. 3166 at 16,446, in which the Armed Services Board stated: "Whether there existed a formal change order or not, appellant, acting as a prudent contractor and aware of its potential claim, should have kept records reflecting the extra costs attributable to the de facto change."

costs as recorded in the contractor's books of account are the best evidence of the costs attributable to contract performance. See *Meva Corp. v. United States*, 206 Ct. Cl. 203, 221 n.10a (1975). In this case appellant has made no effort to show on the basis of recorded costs the amount of equitable adjustment to which it considers itself entitled. Instead, it has presented its claim for excess equipment costs as if the Government had guaranteed that its draglines would be able to work a 10-hour day irrespective of the weather and ground conditions prevailing on the project and without regard to showing that the Government was responsible for the entire amount of the delays experienced. The claim as presented has also been predicated upon the use of a rate of \$53.92 per hour for idle equipment. In our previous discussions we have rejected both of these assumptions underlying the claim presentation. (See discussion in text immediately preceding and following note 49, *supra*.) The determination by the Board of an appropriate equitable adjustment does not reflect acceptance of the approach followed in preparing the machine hours schedule which accompanied the letter to the contracting officer of March 23, 1981 (Finding 18).

Another factor for consideration in assessing the impact of delays to the project work is the action of the Government in issuing a resumption of work order effective September 7, 1979 (AF 4), even though the evidence of record shows (i) that the Government knew that the dragline work could not proceed until drilling and blasting had occurred; (ii) drilling and blasting did not commence until September 19, 1979; and (iii) that due to the presence of excessive quantities of water on the project site, the draglines did not commence to work until October 2, 1979. The Board therefore finds that the contract work was totally suspended for a period of 35 days (August 28 to October 2, 1979) and that the absence of a formal suspension of work order for much of this period does not diminish the amount of the equitable adjustment to which the contractor is entitled for such suspension and delay.

The amount of the equitable adjustment determined herein reflects an appropriate allowance for idle equipment⁵⁹ attributable to the Government's failure to adequately discharge its responsibilities under the contract including those relating to supervision over the dragline work and the drilling and blasting. It also includes appropriate allowances for the Government's failure over a protracted period to provide a sufficient number of pumps or pumps of an adequate capacity to handle the excess water on the project site, as well as an allowance for the Government's unsuccessful efforts with the South Florida Management District to prevent the periodic flooding of the jobsite as a result of overflows from the Hillsboro Canal. In addition, the award made includes an allowance for the wages of operators who

⁵⁹ Idle facility capacity costs are properly included in an equitable adjustment for a Government suspension or delay of the work. *Brand Investment Co. v. United States*, 102 Ct. Cl. 40 (1945), *cert. denied*, 324 U.S. 850 (1945). *Laburnum Construction Corp. v. United States*, 163 Ct. Cl. 339 (1963).

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were present on the jobsite but could not work because Government personnel responsible for manning the pumps did not arrive until long after the contractor's work day had begun (Findings 5-11, 15). The Board finds that all of such failures by the Government substantially increased the contractor's cost of performing the contract work. Lastly, since the equitable adjustment is being provided under the Changes clause, the Board has also included appropriate amounts for overhead and profit. In the absence of precise figures, it has been necessary for the Board to arrive at the amount of the equitable adjustment by resorting to what has been characterized as the jury verdict approach. See *A & J Construction Co.*, IBCA-1142-2-77 (Dec. 28, 1978), 85 I.D. 468, 480-92, 79-1 BCA par. 13,621 at 66,788-95.

Decision

For the reasons stated and on the basis of the authorities cited, the Board finds that all of the failures of the Government narrated above substantially increased the contractor's cost of performing the contract work for which it is entitled to an equitable adjustment under the Changes clause in the amount of \$135,000.

Claim 2 - \$71,767

Impaired Bonding Capacity Damages

Discussion

In support of its claim for impaired bonding capacity damages, appellant asserts (i) that during 1979 and 1980 there was a great deal of bonded construction work let in Florida; (ii) that due to the Government's conduct there was a substantial delay in the progress of work on the project; (iii) that as a result the contractor's bonding agent would not write any additional bonds for the contractor until the project was completed; (iv) that the impaired bonding capacity computations in the "cost overrun and loss of profit" schedule were based on a 4-month delay (Finding 17); and (v) that the appellant's normal profit is a minimum of 10 percent. The loss of profit to which appellant considers itself to be entitled as damages was obtained by multiplying the appellant's average monthly billing in 1980 by 4 (representing the 4 months of delay claimed) and then taking 10 percent of the figure so obtained (\$717,668) to arrive at the loss of profit claimed as damages of \$71,767 (AOB 27-28).

Confronting the question of whether the appellant's claim for loss of profit should be considered to be speculative (Finding 21), appellant characterizes the claim of impaired bonding capacity damages as a clearly foreseeable consequence of the Government's delay, particularly where, as here, the Government itself required the bond for this project. Cited in support of the appellant's position is a decision

of the Court of Claims in *Metal Exports, Inc. v. United States*, 137 Ct. Cl. 258, 146 F. Supp. 951 (1957),⁶⁰ and a decision of the Montana Supreme Court in *Laas v. Montana State Highway Commission*, 157 Mt. 121, 483 P.2d 699 (1971),⁶¹ (AOB 28; ARB 20).

[9] Based upon the arguments advanced by appellant in support of its impaired bonding capacity damages claim and the defense offered by the Government that the damages claimed are speculative and therefore not recoverable either as an equitable adjustment or as a breach of contract claim (GPHB 7), it appears that three questions need to be addressed. These questions may be summarized as follows:

1. What law governs disputes arising under or relating to Government contracts?
2. What authoritative definitions of consequential (speculative) damages have been offered by the Federal courts⁶² for resolving the type of question presented in the instant appeal?
3. What standard of proof must be met by a claimant in order to establish its right to recover lost profits on other contracts under an impaired bonding capacity damages claim, assuming there are no contract provisions prohibiting their recovery in the circumstances present here.⁶³

Addressing the first question in *Reeves, Soundcraft Corp.*, ASBCA Nos. 9030, 9130 (June 30, 1964), 1964 BCA par. 4317 at 20,876, the Armed Services Board stated: "[T]he validity and construction of contracts of the United States and their consequences on the rights and obligations of the parties present questions of federal law not controlled by the laws of any state (citing cases)." The same conclusion was reached by this Board in *Federal Pacific Electric Co.*, IBCA-334 (Oct. 23, 1964), 71 I.D. 384, 389-90, 1964 BCA par. 4494 at 21,585. Addressing this question very recently in the case of *Capital Electric*

⁶⁰ *Metal Exports* involved a contract for the sale of surplus property which the Government admitted it had breached by failing to deliver the property as agreed upon. Damages were awarded to the plaintiff for the estimated profit it would have made if the contract had been performed in accordance with its terms. Diminution of bonding capacity was not involved in the case.

⁶¹ In *Laas v. Montana State Highway Commission*, the Montana Supreme Court found (i) that the evidence was sufficient to submit to the jury the question of whether a contractor had sustained losses of future profits over a 3-year period by reason of a loss of bonding capacity attributed to the State's breach of its contract with the plaintiff, and (ii) that the jury's award of \$78,000 to the plaintiff road contractor as lost profits was not excessive.

⁶² In *Ramsey v. United States*, 121 Ct. Cl. 426, 434 n.1 (1951), the Court of Claims states:

"Plaintiffs cite cases which hold that where as a result of a breach of a contract, which contract involves only a portion of a business, an established business is wrongfully injured or destroyed, the owner of the business can recover the damages occasioned by the breach including prospective profits of the entire business if such profits can be established with reasonable certainty. *Wellington v. Spencer*, 37 Okl. 461; 132 Pac. 675, 677, and cases cited therein. This view has been followed in numerous State courts, but we are not inclined to follow this rule in the circumstances and under the terms of the contract involved in this case."

⁶³ Finding that the termination for convenience article provided a sufficient remedy in a case where a breach of contract was alleged, the Court of Claims stated in *William Green Construction Co. v. United States*, 201 Ct. Cl. 616, 626-27 (1973):

"The only substantial difference between the sum calculated under 'equitable adjustment or convenience-termination standards' and the amount recoverable in a common law action for contract breach is the non-inclusion in the former of anticipated but unearned profits.' * * * This exclusion from relief of unearned profits is a settled policy which has long been accepted and enforced. * * * And even in a common-law suit there would be no recovery for general loss of business, the claimed loss of the entire Green net worth, and losses on the non-federal work—such damages are all deemed too remote and consequential. See *Ramsey v. United States*, 121 Ct. Cl. 426, 433-35, 101 F. Supp. 353, 357-58 (1951), cert. denied, 343 U.S. 977 (1952) * * *. The conclusion must be that the administrative remedy is, as we have already said, a full and permissible substitute for the award of damages under the former 'breach' claim."

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Co., GSBGA Nos. 5316, *et al.* (Feb. 17, 1983), 83-2 BCA par. 16,548 at 82,315, the General Services Board states:

The matters that we adjudicate, claims arising under federal contracts, are governed by federal law. *Keydata Corp. v. United States*, 205 Ct. Cl. 467, 482-83, 504 F.2d 1115, 1123 (1974). Our rule of decision has as one of its sources the common law. *Doench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447, 471-72 (1942) (Jackson J. concurring). Our analysis thus far convinces us that the common law of construction contracts permits the recovery of underabsorbed home office overhead and precludes the recovery of extended home office overhead * * *.

In *Ramsey v. United States*, 121 Ct. Cl. 426 (1951), the Court of Claims had occasion to consider somewhat extensively the question of what distinguishes damages which are direct from those that are consequential (*i.e.*, speculative). The contractor involved in the case had entered into two contracts with the War Department on May 18, 1946, to supply a total of 4,000 metal caskets with shipping cases to the Quartermaster Corps of the Army. Both contracts included a price redetermination clause. By September 27, 1947, all 4,000 of the caskets had been delivered and accepted by the Government. At that time, the company presented a claim under the price redetermination clause to the contracting officer for an upward revision of the contract price. Upon denial of the claim, an appeal was taken to the Army Board of Contract Appeals (later the Armed Services Board of Contract Appeals). While the appeal was pending the company, on April 6, 1948, was forced to file a petition in bankruptcy.

A determination of the final price was not rendered by the Armed Services Board until February 21, 1950. In the decision the contractor was granted more than a 100 percent increase over the contract amounts. The sum involved in the award was paid to the company in installments during the period from March 30 to September 26, 1950.

The trustees in bankruptcy filed suit on behalf of the company to recover damages for breach of contract by the Government, on the ground that the contract contained an implied condition which required the Government to pay fully for the 4,000 caskets and cases within a reasonable time after their delivery and acceptance. The plaintiffs alleged that a reasonable time for making final payment, including amounts due the company under the price redetermination clause, on caskets delivered and accepted by September 27, 1947, was January 2, 1948, whereas the Government did not make final payment until September 26, 1950.

After analyzing the nature of the claims asserted and the Government's defense to such claims, the Court of Claims stated:

Plaintiffs allege that the Government's failure to pay the money promptly was the immediate cause of the corporation's financial difficulties which resulted in a reorganization under the Bankruptcy Act. In actions for breach of contract the damages are ordinarily limited to the natural and probable consequences of the breach complained of, and the damages remotely or consequently resulting from the breach are not allowed. That the nonpayment of the contract price of the two contracts would put

the corporation on the brink of bankruptcy could not have been reasonably foreseen by the Government. "For a damage to be direct there must appear no intervening incident * * *; the cause must produce the effect inevitably and naturally, not possibly nor even probably." *Myerle v. United States, supra*, p. 27. The nonpayment by the Government of the contract price does not naturally and inevitably produce bankruptcy. Even if the Government had paid the corporation promptly, there is no assurance that the funds would have diverted financial difficulties. Accordingly, we conclude that plaintiffs' claim for reorganization expenses should not be allowed.

121 Ct. Cl. at 433.

The standard of proof required to be met in claim for damages involving impaired bonding capacity was addressed in *Capital Electric Co., supra*, in which the General Services Board stated:

We do have some evidence here that the possibility of appellant's obtaining other work was precluded by the effect of the Fort Lauderdale job on appellant's overall bonding capacity. However, the response of appellant's president to the question posed by the hearing judge, finding 24, compels us to find as fact that appellant could have obtained additional bond coverage in 1978, which in fact is the period of unreasonable delay. We have addressed just that same sort of contention quite recently. In *Zinco General Contractor, Inc.*, GSBCA No. 6182, 82-2 BCA ¶ 15,917, at 78,894, we rejected a claim for underabsorbed indirect costs (general and administrative overhead) premised on a diminution of bonding capacity, there holding that such a claim, even if foreseeable, could not be permitted in the absence of proof of a particular contract or contracts not bid upon, or successfully bid upon and denied because of inability to obtain a bond. There is, of course, no such evidence here; that evidence we do have compels us to conclude that additional bonding capacity was, indeed, available.

83-2 BCA at 82,314-15).

In the case at hand, the only testimony offered by appellant in support of the loss of profit attributed to impaired bonding capacity is of a general nature. According to appellant's witness Stanaland, the Government delayed performance of the contract by 4 months. It was Mr. Stanaland's testimony that as a result of such delay the appellant's bonding agent refused to write additional bonds covering available bonded contract work which appellant could otherwise have obtained and that if it had done so, a minimum profit of 10 percent on the additional work would have been realized. Appellant asserts that the impairment of the appellant's bonding capacity was a foreseeable consequence of the Government delaying the contract work by over 4 months and that the damages claimed as lost profit on the other contracts were therefore not speculative but directly caused by the Government's actions.

In this case appellant has at least three apparently insurmountable obstacles to overcome if it is to recover on its impaired bonding capacity damages claim. The presence of a termination clause in the contract is considered to convert what would otherwise be a breach of contract claim into a claim under the contract and, as a consequence, to limit recovery thereunder--by reason of the Government direction to cease all work--to the costs incurred prior to the direction to cease work and a reasonable profit thereon (notes 6 and 63, *supra*). It is also considered that appellant has failed to show that the loss of profit on other contracts claimed here was the inevitable result of the

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Government having delayed performance of the contract work by approximately 4 months, as is required for the recovery of damages of this nature under the rule espoused in *Ramsey v. United States, supra*. Even if the Board were to decide both of these questions in appellant's favor, however, it would still not be entitled to prevail. This is so because the record is entirely devoid of any evidence showing "a particular contract or contracts not bid upon, or successfully bid upon and denied because of inability to obtain a bond." *Capital Electric Co., supra*.⁶⁴

Decision

For the reason stated and on the basis of the authorities cited, Claim 2 in the amount of \$71,767 is denied.

Claim 3 - \$5,724

Subcontractor's Claim for Unreimbursed Blasting Expenses

Discussion

In this case the dispute is over 318 holes drilled and blasted with the subcontractor and appellant contending that the aggregate total was 9,391 holes and the Government asserting that the correct figure is 9,073 holes. The amount claimed of \$5,724 is the product derived from multiplying the 318 holes by the unit price specified in the extra work orders of \$18 per hole.

[10] The Government questions our jurisdiction over this claim on the ground that there is nothing in the record or in Mr. Hirt's testimony to indicate that appellant has authorized the use of its name in taking the appeal or has ratified its prosecution. Consequently, the Government says the subcontractor is without standing to invoke the jurisdiction of the Board. Cited in support of this position is our decision in *Divide Constructors, Inc., Subcontractor to Granite Construction Co.*, IBCA-1134-12-76 (Mar. 29, 1977), 84 I.D. 119, 77-1 BCA par. 12,430 (GPHB 7).

The statements made by the Government in support of the jurisdiction question presented are entirely without support in the record.⁶⁵ The subcontractor's claim was included as one of three claims in the initial claim submission of appellant (AF 12). The claim was actively prosecuted at the hearing with appellant offering testimony from not only Mr. Oren representing the subcontractor but also from

⁶⁴ Appellant has also failed to offer any evidence to show what efforts, if any, were made to have additional bonding capacity made available to reflect progress under the contract. In this connection the Board notes that by Mar. 1, 1980, a total of \$171,900 had either been paid to appellant or had been included in approved payment estimates (AF 12).

⁶⁵ See *Corway, Inc.*, ASBCA No. 20794 (Jan. 8, 1976), 76-1 BCA par. 11,685 at 55,751, in which in the course of denying a Government motion to dismiss the appeal, the Armed Services Board stated: "The Government's motion is so lacking in substance as to warrant being considered frivolous. From even a casual reading of the appeal record, it appears clearly that the appeal is brought on behalf of a subcontractor by a consenting prime contractor."

its foreman, Mr. Carpenter. The Board's decision in *Divide Constructors* is inapposite since in that case the appeal was taken in the subcontractors own name with the prime contractor not only failing to present a claim on behalf of the subcontractor but also asserting that it would do nothing to further the subcontractor's appeal. Consequently, the Board finds that it has jurisdiction over the instant claim.

In the supplemental finding relating to this claim, the contracting officer stated that in the absence of any Government record for holes drilled during the period from the initiation of the drilling on September 19, 1979, through November 21, 1979, the Government had accepted the appellant's count for this period except for days when the daily logs showed no work had been performed (AF 16). With respect to the disputed holes during this period, the appellant's evidence shows that 10 holes were drilled on September 22, 1979 (a Saturday), and 68 holes were drilled on October 13, 1979 (a Saturday). Not addressed by the contracting officer is the question of why if the daily logs did not record holes drilled during this period for the normal work week, it should be expected that they would record such information for the weekend. Since the 78 holes in question are supported by the testimony of Mr. Oren as well as by AX-4, the Board finds that appellant is entitled to be reimbursed for the 78 holes drilled by the subcontractor on September 22 and October 13, 1979.

The remaining 240 holes in dispute were drilled during the period November 22, 1979, through the last day of work, June 20, 1980. During the course of his testimony in support of his finding that appellant had drilled and blasted 9,073 holes for which it had been paid in full, the contracting officer acknowledged that the number of holes was based upon the daily logs maintained by the COR and that he had no personal knowledge with respect to the matter.

The testimony offered by appellant shows (i) that there were times when the subcontractor worked on the weekends when representatives of neither the contractor nor the Government were on the jobsite; (ii) that when appellant's foreman arrived at the jobsite on Monday morning at 7 a.m., he could see the amount of drilling that had been done over the weekend; (iii) that by the time the contracting officer's representative arrived on the site on Monday morning, the dredging would have started in areas blasted over the weekend; and (iv) that while Mr. Thumb was COR, he had failed to come to the job on several occasions. In these circumstances, it appears that the COR may have failed to count the disputed holes because the excavation work had commenced before he arrived. This would certainly be the case on normal workdays when drilling and blasting occurred when the COR was absent from the project.

The principal Government defense to the claim here asserted is that the appellant's foreman had concurred with the Government's count of the holes blasted, as is said to be evidenced by his signing the daily logs which included such count (GPHB 6, 7). The basic weakness in

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this argument is the fact that by the express terms of the extra work orders responsibility for supervision and direction of blasting was vested in the Government's construction representative (note 24, *supra*). As a corollary of such provisions it follows that the Government was responsible for counting the holes drilled and blasted, and that the signature of appellant's foreman on the Government's daily logs did not have the effect of endorsing the accuracy of a count the foreman had no responsibility for either making or verifying.

The Board finds that the appellant's claim is based on the entries made daily by two certified drillers who were required to keep an accurate count of the number of holes drilled and blasted on the job. Mr. Oren testified that he visited the jobsite quite frequently and that he was personally familiar with the number of holes drilled and blasted on such days. Both Mr. Oren and the appellant's foreman had a much closer association with the drilling and blasting work than did the contracting officer who was wholly dependent for his information upon the entries made in the daily logs. The Board finds that the testimony offered by Messrs. Oren and Carpenter was more persuasive than that of the contracting officer. So finding, the Board further finds (i) that the number of holes drilled and blasted by the subcontractor, Oren Construction Co., was 9,391; (ii) that appellant has been paid for 9,073 holes; and (iii) that appellant is entitled to be paid for an additional 318 holes at the agreed upon rate of \$18 per hole.

Decision

For the reasons stated and on the basis of the authorities cited, Claim 3 is granted in the amount of \$5,724.

Summary [66]

Claim No.	Description of Claim	Claimed Amount	Amount Allowed
1	Excess Equipment Cost	\$173,368	\$135,000
2	Impaired Bonding Capacity Damages	71,767	0
3	Unreimbursed Blasting Expenses	5,724	5,724
	Total	<u>\$250,859</u>	<u>\$140,724</u>

In addition to the equitable adjustment of \$140,724 found to be due appellant herein, appellant shall also be paid interest thereon

⁶⁶The claims numbering in the text and in the summary follows the order in which the claims were listed and treated in appellant's initial posthearing brief.

computed in accordance with the provisions of the Contract Disputes Act of 1978 from March 26, 1981.

WILLIAM F. MCGRAW
Chief Administrative Judge

WE CONCUR

DAVID DOANE
Administrative Judge

RUSSELL C. LYNCH
Administrative Judge

ANN LORENTZ COAL CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND
ENFORCEMENT

79 IBLA 34

Decided *February 9, 1984*

Petition for discretionary review by the Office of Surface Mining Reclamation and Enforcement from a decision by Administrative Judge Tom M. Allen vacating Notice of Violation No. 79-I-37-2 for lack of jurisdiction over a tipple facility. CH 0-85-P.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite--Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"*Surface coal mining operations.*" Decisions of the Interior Board of Surface Mining and Reclamation Appeals established a two-part test for determining whether an offsite facility was conducting surface coal mining operations, as defined in the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations, by requiring that the facility be operated in connection with a surface coal mine *and* that it be located at or near the minesite. However, court decisions and revised Departmental regulations have made it clear that in order to be conducting surface coal mining operations, an offsite facility which is involved in certain listed activities need only be operated in connection with a surface coal mine, while a facility involved only in the loading of coal for interstate commerce must be operated in connection with a surface coal mine, *and* that facility must be located at or near the minesite.

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"*At or near a minesite.*" A coal loading facility is "at or near a minesite" within the meaning of surface coal mining operations in 30 CFR 700.5 where it operates on the same permit area as the minesite or it is physically integrated with the minesite to the extent that any potential or actual environment damage associated with the mining

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operation cannot be effectively addressed by OSM without regard to the loading operation.

APPEARANCES: William F. Larkin, Esq., Susan A. Shands, Esq., and Marcus P. McGraw, Esq., for the Office of Surface Mining Reclamation and Enforcement; David Rexroad, Esq., Buckhannon, West Virginia, Henry McC. Ingram, Esq., R. Henry Moore, Esq., Pittsburgh, Pennsylvania, for Ann Lorentz Coal Co., Inc.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

On October 23, 1980, the Office of Surface Mining Reclamation and Enforcement (OSM) filed a petition for discretionary review of the September 24, 1980, decision of Administrative Law Judge Tom M. Allen vacating Notice of Violation No. 79-I-37-2, and holding that OSM had no jurisdiction over the tipple facility of Ann Lorentz Coal Co., Inc. (Lorentz). The Board of Surface Mining and Reclamation Appeals (IBSMA) granted the petition on November 13, 1980.¹

On October 3, 1979, an OSM inspector visited the Lorentz tipple facility in Upshur County, West Virginia. Pursuant to the authority of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. §§ 1201-1328 (Supp. V 1981), he issued a notice of violation charging Lorentz with two violations of the interim performance standards set forth in 30 CFR Part 700. Violation 1 charged a failure to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds in violation of 30 CFR 715.17(a). Violation 2 cited a failure to meet the numerical effluent limitations for total suspended solids as set by 30 CFR 715.17(a).

Following an assessment conference, OSM determined that no civil penalty should be imposed. Nevertheless, Lorentz filed a petition for review, principally challenging OSM's jurisdiction over its facility. Following the presentation of evidence at a hearing, the Administrative Law Judge vacated the notice, ruling that OSM had no jurisdiction over the Lorentz tipple facility.

[1] The initial issue raised by this appeal is whether the activities conducted at the tipple constituted "surface coal mining operations" as defined by the Act and regulations. Surface coal mining operations were defined in the regulations at 30 CFR 700.5 (1979) in part as follows:²

(a) *Activities conducted on the surface of lands in connection with a surface coal mine*
* * *. *Such activities include excavation for the purpose of obtaining coal, * * * in situ*

¹ On Apr. 26, 1983, the Secretary issued Secretarial Order No. 3092 abolishing IBSMA and transferred and consolidated the functions of that Board with the Interior Board of Land Appeals. 48 FR 22370 (May 18, 1983).

² On May 5, 1983, the Department published final rules, effective June 6, 1983, changing the regulatory definition of "surface coal mining operations." 48 FR 20392 (May 5, 1983). See discussion, *infra*.

distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine-site * * *. [³ Italics added.]

In its decisions IBSMA developed a two-part test to determine whether or not an offsite coal processing or loading facility was a "surface coal mining operation" within the definition. IBSMA held that an offsite facility must be operated "in connection with" a surface coal mine *and* must be located "at or near" the minesite.⁴ However, the Department, by regulation, has concluded that the phrase "at or near the minesite" modifies only "loading of coal for interstate commerce."

In the development of the regulations for the permanent regulatory program, OSM attempted to clarify its interpretation that the phrase "at or near the minesite" used in the statutory definition of "surface coal mining operations" modifies only "loading of coal." It was stated in the preamble to those regulations: "The Office interprets the Act as setting no territorial limit on its jurisdiction over other facilities identified in the statutory definition preceding 'loading of coal.'" 44 FR 14901, 14915 (Mar. 13, 1979). Subsequently, this interpretation was upheld in *In re: Permanent Surface Mining Regulation Litigation*, No. 79-1144 (D.D.C. May 16, 1980) (Slip Op. at 51-53). See also *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1094 (6th Cir. 1981).

Since the OSM interpretation was contained only in the preamble to the permanent program regulations and no change was made in the actual regulatory definition relating to the interim program, IBSMA continued to apply the two-part test. However, in *Debord v. Watt*, No. 82-99 (E.D. Ky. Sept. 29, 1982), the court reversed IBSMA's decision in *Dinco Coal Sales, Inc.*, 4 IBSMA 35, 89 I.D. 113 (1982), that an offsite processing facility must be "at or near a minesite" for OSM to have regulatory authority over its activities.⁵

On May 5, 1983, the Department adopted a final rule, *inter alia*, revising the definition for "surface coal mining operations." 30 CFR 700.5 now provides in pertinent part:

Surface coal mining operations means—

(a) Activities conducted on the surface of lands in connection with a surface coal mine * * *. Such activities include excavation for the purpose of obtaining coal * * *; in-situ distillation, retorting, leaching, or other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal. *Such activities also include the loading of coal for interstate commerce at or near the mine site.* [Italics added.]

48 FR 20392, 20400 (May 5, 1983).

³ The quoted regulatory definition is with only minor changes the same definition as set forth in the Act at section 701(28), 30 U.S.C. § 1291(28) (Supp. V 1981).

⁴ See, e.g., *Reitz Coal Co.*, 3 IBSMA 260, 88 I.D. 745 (1981); *Roberts Brothers Coal Co.*, 2 IBSMA 284, 87 I.D. 439 (1980); *Virginia Iron, Coal and Coke Co.*, 2 IBSMA 165, 87 I.D. 327 (1980).

⁵ The Federal court suit in *Debord* was brought by 16 individuals who lived near the Dinco Coal Sales, Inc., facility. Both the Secretary of the Interior and Dinco Coal were named defendants. Dinco Coal filed an appeal from the district court decision. *Dinco Coal Sales, Inc. v. Debord*, No. 82-5617 (6th Cir. filed Oct. 12, 1982). We note that the district court decision in *Debord* appears to be based on its conclusion that the Dinco facility was operated in connection with "mines"; however, the Administrative Law Judge's decision in *Dinco* specifically found that the facility was not operated in connection with a surface coal mine. The IBSMA majority opinion made no finding on that issue.

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For purposes of resolving the initial issue in this case, we find that the test of whether a facility is a surface coal mining operation does not always involve two parts. The test now requires that the activities be scrutinized. If a facility engages in excavation for the purpose of obtaining coal, in situ distillation, retorting, leaching, or other chemical or physical processing or the cleaning, concentrating, or other processing or preparation of coal, and those activities are conducted in connection with a surface coal mine, that facility is involved in surface coal mining operations regardless of its physical distance from the surface coal mine. On the other hand, if a facility engages only in the loading of coal for interstate commerce, it is a surface coal mining operation only if loading is conducted on the surface of lands in connection with a surface coal mine, *and* the facility is located at or near the minesite.⁶

Thus, in order to be conducting surface coal mining operations, offsite processing facilities need only be operated in connection with a surface coal mine, while loading facilities must be operated in connection with a surface coal mine *and* be located at or near the minesite.

We must examine the facts in this case to determine if Lorentz was conducting surface coal mining operations. Lorentz operates a tipple which receives coal by truck from several mines. Coal is crushed and loaded at the tipple into railroad cars that enter interstate commerce (Tr. 60). The facility is a "dry" tipple where no washing or other processing of the coal occurs (Tr. 7). It covers approximately 2 to 3 acres (Tr. 7).

Dale Riggs is a 50 percent owner of Lorentz (Tr. 57) and serves as its president (Tr. 59). He receives no salary, but he does receive dividends on his stock when the company makes a profit (Tr. 58). Riggs is also a 50 percent owner of Galloway Co., which owns and operates the nearest mine, the Galloway surface mine. Riggs is a salaried employee of Galloway and serves as its secretary/treasurer (Tr. 57-58). He testified that he is "generally in charge" of Galloway's operations (Tr. 38), and that he is the overseer for both the Galloway mine and the Lorentz tipple (Tr. 66).

It is approximately 600 yards from the Galloway permit area to the Lorentz tipple facility (OSM's Exh. A; Tr. 10, 21). Riggs testified that "a while back he measured the distance from the Galloway pit" to the Lorentz "coal bin" as approximately 2-1/2 miles (Tr. 42). The mine and the tipple are not connected by any conveyor belts or private roads

⁶ Under the regulations published May 5, 1983, 48 FR 20392, 20400-401, OSM provided new permanent program definitions for "coal processing" and "coal preparation plant." In the preamble to those regulations, it was stated: "Coal preparation" or "coal processing" has been defined to mean the cleaning, concentrating, or other processing or preparation of coal in order to separate coal from its impurities. *Under this definition, coal loading, crushing, sizing and other such activities do not constitute coal processing or preparation unless they result in the separation of coal from its impurities.*"

48 FR 20394 (May 5, 1983; italics added).

We note that no attempt to distinguish between a coal preparation or processing facility and a coal loading facility was made by the district court in *Debord v. Watt, supra*. It described the operation as "a coal processing facility * * * which crushes and loads coal produced from coal mines in the surrounding area."

(Tr. 32, 41-42, 45). Coal is delivered to the tipple over public roads (Tr. 45).

Since 1974 all Galloway coal has passed through the Lorentz tipple (Tr. 61, 62). In 1978, 48 percent of the coal tipped at the Lorentz facility came from the Galloway surface mine. For 1979 that figure was 34 percent. Riggs estimated that for 1980 the amount was approximately 40 percent (Tr. 51, 61). Galloway owns and maintains a truck garage and an office trailer on the Lorentz tipple site (Tr. 15, 54). Galloway's permits and authorizations to mine are kept in the trailer at the tipple site (Tr. 66-67). There is occasional sharing of equipment and manpower between the companies but, in such cases, the company using the other company's equipment or personnel is charged for that use (Tr. 54-55, 62-65).

The evidence in this case shows that the Lorentz tipple operates in connection with the Galloway surface coal mine. Riggs, the president of Lorentz, is a 50-percent owner of both Lorentz and Galloway. He is a salaried employee of Galloway and is generally in charge of its operations.

The following testimony was given by Riggs with respect to his capacity at the two operations:

Q And you just kind of overall, you run the Galloway job?

A They handle the details. I have been - they handle the details. I try to oversee as best I can.

Q Do you oversee any of the employees on the Ann Lorentz tipple?

A I don't, this is the same way. They handle the details, but I oversee Ann Lorentz tipple.

Q Okay, so you are kind of, I guess, for lack of a better term, the overseer for both the Galloway surface mine job and the Ann Lorentz tipple?

A I try to keep my eye on both. There is no money involved.

(Tr. 65, 66).

The record clearly demonstrates that the operations at both the surface mine and the tipple were under the control of Riggs. Operating decisions by him with respect to one were binding upon the other. The operating connection between the mine and the tipple was the management by Riggs. The evidence also reveals that the Lorentz tipple crushes and loads coal for interstate commerce. Accordingly, we cannot sustain Judge Allen's finding that the tipple is not operated in connection with the Galloway mine.

We now turn to the question of whether the Lorentz tipple is "at or near the mine site." Since the tipple is not "at" the minesite, we will focus on whether it is "near" the Galloway mine. We conclude that it is not.

As countless judicial opinions have proclaimed (rather unnecessarily), "near" is a relative term. See cases collected in 28 Words and Phrases 141 (1955). It may fairly be said that Japan is "near" China, while a marksman's bullet which misses the bullseye of a target by 10 feet cannot be regarded as "near" the intended point of aim. "Near," being a relative term, the proper import of the word is dependent upon the sense and connection in which it is used,

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considered together with the purpose to be accomplished. *J. W. Kelly & Co. v. State*, 132 S.W. 193, 201 (Tenn. 1910); *Kilgore v. Jackson*, 118 S.W. 819, 821 (Tex. Civ. App. 1909).

It is obvious that in the surface mining context not *all* facilities for the loading of coal were intended to fall within the definition of surface coal mining operations presumably because such a facility, operated independently and in isolation from a mine, cannot rationally be said to be a "surface coal mining operation." Therefore, a series of words of limitation were used in an effort to identify the narrow category of loading operations which would be included in the definition of surface coal mining operations. First, the loading has to be of surface-mined coal. Second, the loading facility has to be operated "in connection with" a surface coal mine. Third, the loading must be for the purpose of shipment in interstate commerce. Fourth, the loading facility must be "at or near" the site of the mine with which it is connected.

Thus, these limitations reveal a concern for geographic proximity between the surface coal mine and the loading facility. However, this concern raises the question of what possible difference would it make if a loading facility was "at or near" the minesite or remote from it? We must conclude that the intention of limiting the scope of the definition to those loading facilities which operate in connection with a surface mine and at or near the minesite was based upon a recognition that some surface coal mines are integrated operations in which the mine operator not only extracts the coal, but processes and loads it for interstate commerce. All these activities might be conducted at the minesite, or it might be necessary or convenient to load the coal from another site on adjacent land or in close proximity to the mine. Because the entire process in such instances constitutes a single, integrated operation under the same supervision, it would be difficult to define what functions were not part of the "surface coal mining operations" addressed by the Act and what functions were, and to try to apportion any resultant environmental degradation between the regulated and unregulated activities "at or near" the minesite. It also would be extremely difficult, and perhaps futile, to impose the regulatory requirements on only part of such an operation.

But if the loading operation were far removed from the minesite, there would be no difficulty in identifying the regulated "surface coal mining operations" as distinguished from simple loading operations which are not "surface coal mining operations" and, therefore, beyond the purview of the regulations, because they are segregated by significant distance even though the mine and the tippie might be "connected" by common ownership or management.

[2] "At or near the mine site," then, should be construed to include a loading facility which operates on the same permit area as the minesite or a loading facility which is physically integrated with the

minesite to the extent that any potential or actual environmental damage associated with the mining operation cannot be effectively addressed by OSM without regard to the loading operation. In other words, the loading facility would be perceived as part and parcel of the minesite operations. See *Reitz Coal Co.*, 3 IBSMA at 269, 88 I.D. at 749 (concurring opinion).⁷

In this case there is testimony from the OSM inspector that the Galloway permit area is approximately 600 yards from the Lorentz tippie facility. However, the most critical evidence bearing on the "at or near" question is found in Exhibit A in the case record and in the testimony that the road distance from the extraction activities to the tippie itself is approximately 2½ miles. Exhibit A is an aerial photograph depicting a rather broad valley. The valley floor, running east and west, is traversed by a watercourse and a four-lane public highway. The Galloway mine itself is not in the picture, but in the foreground, in the heights of the south side of the valley, is shown the Galloway mine sedimentation pond and a state road which leads down the slope, crosses the watercourse, and connects with the highway. Upon entering the highway, one would turn left (west) and proceed for some distance (undisclosed) to the intersection on the right with another public road. This road leads up the north side of the valley to—and apparently around—the site of the Lorentz tippie, which appears in the photograph.

Thus, even though the mine permit area may be 600 yards from the tippie area, the reality is that the mine and the tippie are not physically integrated. There is no link, such as a private haul road, a tramway, or a conveyor system, between the mining activity and loading site.⁸ Instead, coal from the Galloway mine must be trucked down the south slope of the valley, along the valley floor highway, then up the road ascending the valley's north slope, a distance of 2½ miles, much of it over public roads.

⁷ We find support for this approach in the permanent program regulations published May 5, 1983, 48 FR 20392. Therein, the Department defined "support facilities" as "those facilities resulting from, or incident to, an activity in Paragraph (a) of the definition of 'surface coal mining operations' identified in § 700.5 of this chapter and the areas upon which such facilities are located. Support facilities may consist of, but need not be limited to, the following facilities: * * * coal loading facilities; * * *." 48 FR 20401.

The following relevant commentary appears in the preamble to the regulations to explain the rationale for including coal loading facilities within the definition of support facilities:

"Some commenters were confused by OSM's treatment of coal loading facilities. They observed that coal loading facilities were specifically listed as regulated activities under the Act, but that OSM had included coal loading as an activity in the proposed definitions of coal processing plant and support facilities. OSM's regulation of these facilities is neither unintentional nor duplicative. When a loading plant is operated at or near a coal mine, it will be regulated under the permit for that mine. Statutory authority for this situation is provided in Sections 701(28)(A) and 701(28)(B) of the Act. In that context, it will be subject to the same performance standards as other support facilities. When not at or near a mine, a coal loading facility will only be regulated if it is part of or results from or is incident to a regulated coal preparation plant or other regulated activity under Section 701(28)(A). * * *

"Commenters suggested that phrase 'coal loading facilities,' in the definition of support facilities should be modified by the addition of the phrase 'at or near the mine site' to reinforce the fact that coal loading has a geographical limitation. This comment has been rejected. Although Section 701(28)(A) of the Act provides an independent basis for regulating loading facilities at or near the mine site, Section 701(28)(B) also provides authority for regulating such facilities. However, to be regulated under Section 701(28)(B) a facility must result from or be incident to an activity regulated under Section 701(28)(A). Thus, regulated support facilities will naturally occur in proximity to the site of a Section 701(28)(A) operation."

48 FR 20396.

⁸ We do not mean to imply that one of the examples given in the text must be found before a facility may be considered to be "at or near the mine site." However, such a link would be persuasive evidence of physical integration.

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The separation of the two facilities on opposite sides of the valley by such a distance is a sufficient basis to determine that their respective operations are not physically integrated. It is clear that the mine and the tippie are not part of the same operation, to the extent that effective regulation of the mine would require regulation of the tippie. We find that the Lorentz tippie is not at or near the site of the Galloway surface mine and conclude that Lorentz was not conducting "surface coal mining operations" within the meaning of the regulations.⁹

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, and 48 FR 22370 (May 18, 1983), the decision of Administrative Law Judge Allen is affirmed as modified herein.

BRUCE R. HARRIS
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

R. W. MULLEN
Administrative Judge

ANIMAL PROTECTION INSTITUTE OF AMERICA
SIERRA CLUB
COLORADO OPEN SPACE COUNCIL

79 IBLA 94

Decided *February 17, 1984*

Motion to dismiss appeals of decision of the Grand Junction District, Bureau of Land Management, to allow drilling of oil and gas wells in the Little Book Cliffs Wilderness Study Area and Wild Horse Range. CO-070-066.

Denied.

**1. Administrative Procedure: Administrative Review--Appeals--
Environmental Policy Act--Environmental Quality: Environmental
Statements**

Where the Bureau of Land Management assesses the cumulative impacts of approving multiple permits to drill for oil and gas in a wilderness study area and wild horse range and makes an area-wide determination to permit such oil and gas development because it would have no significant effect on the area, an appeal of that determination

⁹ We note that under the permanent program regulations published May 5, 1983, 48 FR 20392, the Lorentz tippie would be regulatable as a "support facility." See note 7, *supra*.

challenging the adequacy of the environmental assessment of the cumulative impacts is not premature.

APPEARANCES: Joyce S. A. Tischler, Esq., San Anselmo, California, for the Animal Protection Institute of America; William S. Curtiss, Esq., Denver, Colorado, for Sierra Club and Colorado Open Space Council; Marla E. Mansfield, Esq., Office of the Regional Solicitor, Department of the Interior, Denver, Colorado, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

On September 29, 1983, the District Manager, Grand Junction District, Bureau of Land Management (BLM), signed a "Decision Record" to accompany the revised final environmental assessment (EA) on oil and gas development in the Little Book Cliffs Wilderness Study Area (WSA) and Wild Horse Range (WHR). The District Manager stated that he had decided to accept the proposed action as shown in the July 1983 EA. That action consists of allowing the drilling of 16 oil and gas wells within the project area and construction of approximately 18 miles of associated roads and pipelines. Each well will be subject to specific approval after further field analysis. The District Manager also concluded that no significant impacts would result from the proposed action and therefore found that an environmental impact statement was not required.

The Animal Protection Institute of America, the Sierra Club, and the Colorado Open Space Council have separately appealed the decisions of the District Manager as presented by the decision record. In response, counsel for BLM has moved to consolidate the appeals; that motion is hereby granted with the concurrence of appellants. Counsel for BLM has also requested the Board's expedited consideration and issuance of an interlocutory order informing appellants that their appeals are untimely and dismissing the appeals. If the Board declines to dismiss the appeals, counsel requests that the Board put BLM's decision in full force and effect. Appellants oppose dismissal, arguing that their appeals are proper.

Appellants generally challenge BLM's decision to approve drilling permits in the WSA and WHR, the finding of no significant impact (FONSI), and the adequacy of the final EA supporting those decisions.

In its motion to dismiss, BLM argues that the decision record only summarizes and accepts the July 1983 EA which analyzes various levels of proposed development on existing leases and makes a FONSI. BLM argues that a FONSI or an EA itself is not appealable as these documents represent compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1976), a prerequisite to a decision to act but not an action itself. BLM admits that by analyzing a proposed action, the documents do provide a prediction of a future course of action, but asserts that they do not represent grant of

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approval; they merely indicate an intention to act. BLM urges that when each application for permit to drill (APD) is approved, appellants will have an appropriate opportunity to appeal and challenge the adequacy of BLM's environmental review. BLM contends that this Board only reviews "final decisions" of an authorized BLM official; if additional actions are necessary to enable a proposed action to proceed, the Board does not have before it an appealable decision. BLM suggests that it could not act in an orderly fashion if interlocutory appeals from each step in the decisionmaking process were heard.

The EA was initiated apparently as a result of the receipt of numerous APD's from several oil and gas companies. A public notice was published in the newspaper on December 2, 1982, stating that the Minerals Management Service (MMS) planned to prepare an EA "of the potential effects of oil and gas activity on an area 8 miles northeast of Grand Junction, Colorado, that is comprised of the Little Bookcliffs Wildhorse Area and the Little Bookcliffs Wildhorse Wilderness Study Area" and inviting public comment.¹ Appellant Colorado Open Space Council submitted initial comments.

On March 31, 1983, BLM made a FONSI and a decision to proceed with development based on its prepared EA. Review of its initial findings is useful to understanding the nature of the decision now being challenged. It reads:

[BLM] proposes to continue to approve or disapprove Applications for Permit to Drill (APD's), and associated development activities in the Little Bookcliffs Wilderness Study Area and Little Bookcliffs Wildhorse Area as provided for by applicable laws, regulations and in accordance with accepted standard industry practices. It is anticipated that 68 to 220 well sites and 68 to 100 miles of roads and pipelines would be constructed in the Environmental Assessment (EA) area. The construction of roads, pipelines, and drillsites would result in 640 to 1100 acres of surface disturbance.

* * * * *

Considerable impairment would occur to the wilderness values * * * and to the objectives identified in the Little Bookcliffs Wildhorse Management Plan. Development in the EA area has been a point of contention between wilderness groups * * *, other special interests * * * and the mineral industry * * *. This controversy will likely continue * * *, although at an insignificant level. Alternatives to development; no action, and delayed action were considered and analyzed in the EA. The potential environmental impacts which may result from the proposed development have also been analyzed. Mitigation and monitoring stipulations would become part of the operating plan and conditions of approval of site specific proposals to ensure that development complies with the requirement for preventing unnecessary and undue degradation.

It has been determined that the proposed development be allowed as described in the EA. This is not a major Federal action that would significantly affect the quality of the

¹ On Dec. 3, 1982, the Secretary of the Interior assigned all functions relating to minerals management of Federal and Indian lands, including the approval of drilling permits and production plans, and inspection and enforcement, to BLM. Secretarial Order No. 3087, as amended, Feb. 7, 1983 (48 FR 8983) (Mar. 2, 1983). Although there is no background material in the file explaining the genesis of the MMS action, it is consistent with the Supreme Court's holding that when various actions that will have cumulative or synergistic environmental impact upon a region are pending currently before an agency, their environmental consequences must be considered together. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). The circumstances under which segmentation of projects for purposes of environmental analysis is permissible are limited. Cf. *Citizens for Glenwood Canyon*, 64 IBLA 346, 351 (1982).

human environment; therefore, an environmental impact statement is not necessary. This determination was made after consideration of context and intensity as required by National Environmental Policy Act (NEPA), 40 CFR 1508.27, and included the following factors:

1. Cumulative impacts expected from the development are not shown to be significant; however, considerable impairment to the wilderness characteristics of the LBWSA and to the management objectives of the WHA would occur. The significance of the impacts were considered in relation to the valid existing rights of oil and gas lease holders involved, and the relatively small geographic area of consideration.
2. This project is not precedence [sic] setting. Projects of a similar nature have been previously approved elsewhere within the Bureau of Land Management wilderness study areas.
3. There are no floodplains or wetlands as defined by E.O. 11988 and 11990, nor [are] threatened or endangered species habitat or cultural resources expected to be impacted.
4. The action is in conformance with regulations, objectives and guidelines for the management of resources on public lands, and the policy for treatment of wilderness study areas.

The version of the EA approved March 31 identified the primary issues to be addressed as:

What are the potential cumulative impacts of oil and gas development on 1) the wilderness study area with respect to future decisions on suitability for recommendation for wilderness designation, 2) on the wild horses and their designated range, and 3) on the deer that concentrate on the winter range in the EA area.

Thus, BLM's concern was the impact of development in the WSA and WHR and the degree to which development should be allowed.

Appellants Sierra Club and Colorado Open Space Council were provided copies of BLM findings on April 5, 1983. On April 25, 1983, they filed a notice of appeal challenging BLM's finding of no significant impact and asserting that they had been advised by the Deputy Minerals Manager that the FONSI constituted a final decision, despite the creation of a public review period. On May 6, 1983, the Colorado State Director, BLM, advised them that their appeal was premature, since no actions (such as granting permits to drill or rights-of-way) had yet been approved on the basis of the environmental assessment. He indicated that he regarded the notice of appeal as a formal protest which he would review and weigh at the time any such action was contemplated.

On or after May 18, 1983, appellants filed a second notice of appeal, attacking the propriety of the State Director's decision of May 6, 1983, to consider their first "appeal" as a protest, rather than forward it to this Board. BLM, through counsel, filed a motion to dismiss both notices of appeal, arguing that this Board lacks jurisdiction since BLM had issued no appealable decisions.

By order dated June 10, 1983, this Board dismissed the appeal, concluding that appellants' first appeal was premature because the FONSI was not a final decision in that it was issued with provisions for a 20-day comment period. We said that the allowance of a comment period clearly contemplated the possibility that BLM would modify the FONSI based on comments received; thus, it was not final. We noted

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particularly that our reasoning in finding the appeals premature was different from that of the Colorado State Director.

In July 1983 the revised final EA was distributed to interested parties for comment. In this EA, the proposed action and alternatives considered were significantly different from the initial EA. The proposed action had been changed to the drilling of 16 oil and gas wells over the next 3 years within six oil and gas units. The medium and high level alternatives considered would allow drilling of 68 or 220 wells, respectively. BLM also considered a no action alternative. Following an extended comment period, BLM sent the decision record previously described and at issue here, responses to comments received, and the changes made to the EA as a result of the comments to interested parties.

Preliminarily, we note that this Board has been delegated the authority to decide "finally for the Department appeals * * * from decisions rendered by Departmental officials" relating to various identified subject matters. 43 CFR 4.1(3) (italics added). The regulations provide that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right to appeal to the Board." 43 CFR 4.410 (italics added). In neither case is the phrase "final decision" used. While we agree with BLM that the Department would not be well served by permitting appeals at any point in the decisionmaking process, the right to appeal does not turn on what BLM considers to be its final act in a given matter or circumstance. Rather it turns on whether the appellant is a party to the case and whether the appellant has been adversely affected by a BLM decision which is sufficiently ripe for administrative review. Determination of those issues turns on the nature of the decision being appealed.

We agree with BLM that a FONSI or EA document in and of itself is not appealable because it represents analysis of a contemplated action as required by NEPA and does not constitute an action, separate from the action analyzed, that could adversely affect a party. Neither is a decision to proceed with or take the action addressed. See 40 CFR 1508.9, 1508.13. It is the contemplated action that may adversely affect a party and, until a decision is made to take such action, an appeal is premature. *Utah Wilderness Association*, 65 IBLA 219 (1982).

Thus, most of the cases that have been presented to this Board challenging the adequacy of BLM's environmental review have been protests or appeals of the approval of a specific application or project. See, e.g., *Colorado Open Space Council*, 73 IBLA 226 (1983) (protest against approval of APD on lease C-12826); *Southwest Resource Council, Inc.*, 73 IBLA 39 (1983) (appeal of approval of proposed plan of operation to explore for uranium in WSA); *Citizens for Glenwood Canyon*, 64 IBLA 346 (1982) (protest against issuance of a right-of-way); *Sierra Club*, 57 IBLA 79 (1981) (protest against issuance of

special recreation permit). In each case the EA was site-specific, addressing the particular impacts of the contemplated action as proposed and identifying alternatives. In such cases, a party could not be adversely affected until the contemplated project was approved. The Board has also reviewed the adequacy of environmental review in connection with decisions to implement regional management programs. *SOCATS (On Reconsideration)*, 72 IBLA 9 (1983), *Dolores M. Lisman*, 67 IBLA 72 (1982) (protests against adoption of vegetative management program). In these cases, however, the parties were adversely affected when BLM denied the protests and approved the programs. The parties did not have to wait and appeal the specific actions implementing the program.

[1] In moving to dismiss this appeal BLM urges that because no APD's have been approved, no action has been taken and, thus, appellants are not adversely affected and their appeal is premature.² Review of the decision record and EA reveal, however, that the action at issue is not the individual approval of 16 separate APD's. Although couched in terms of the approval of the 16 APD's, the action contemplated by the EA and FONSI and *approved* in the decision record is the overall approval of drilling in the Little Bookcliffs WSA and WHR. The question analyzed in the EA is whether and to what degree drilling should be permitted at all. The EA focuses on the *cumulative* impacts of various levels of drilling; not on the site-specific impacts of particular APD's. Indeed, the EA presents no discussion of the individual sites of the 16 wells at all, states that only seven even have a proposed location, and would support a decision to approve one of the 16 APD's only in the most general sense. Thus, we conclude that the appeals are not premature; they dispute BLM's decision to allow oil and gas drilling and development in the WSA and WHR, not the approval of particular APD's.

Moreover, we conclude that were we to fail to hear appellants' arguments now, the issues identified above would not be addressed timely, if at all, and then only with difficulty.³ Individual appeals of the approvals of the 16 APD's would not provide the appropriate opportunity to address the cumulative impacts of the drilling development on the WSA and WHR unless all decisions were issued simultaneously and all the appeals consolidated. We have been given no indication that BLM intends to process and approve all the APD's jointly. It would seem to serve no useful purpose to do as BLM seems to suggest: evaluate this EA in the context of an individual APD approval which the EA does not specifically address. Furthermore, dealing with the APD's sequentially on the question of the cumulative

² Since appellants had participated in the development of the EA and their views were known to and responded to by BLM, appellants are properly parties to the case with a right of appeal, not protestants. *California Association of Four Wheel Drive Clubs*, 30 IBLA 383 (1977). Since the BLM decision adversely affected their interests, they have standing to appeal. *Elaine Mikels*, 41 IBLA 305, 307 n.1 (1979); see *In re Pacific Coast Molybdenum Co.*, 68 IBLA 325 (1982).

³ Decisions of BLM concerning rights-of-way and applications for permits to drill are not stayed pending appeal. See 43 CFR 2804.1(b); 43 CFR 3165.4, 48 FR 36586 (Aug. 12, 1983) (formerly 30 CFR 221.66). Such decisions are final for purposes of the Administrative Procedure Act and, thus, subject to direct judicial review. See 43 CFR 4.21(b).

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impacts of drilling would place an unfair burden on the operators or lessees whose permits were approved later to rebut the cumulative impacts arguments.

The Council on Environmental Quality regulations recognize that there are various types of actions for which environmental analysis must be done—from the implementation of programs and policies to site-specific projects; that the effects of an action may be localized or regional; that connected, cumulative, or similar actions may require discussion in a single environmental document. See 40 CFR 1508.25, 1508.27, and 1508.28. In addition, the regulation on tiering (the coverage of the general matters in a broad environmental impact statement (EIS) with narrower EIS's or EA's incorporating the general discussion by reference and concentrating on specific issues) concludes with the statement that "[t]iering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe." 40 CFR 1508.28(b).

Similarly, we find that it is clearly appropriate to address the area-wide decision to allow oil and gas development in the WSA and WHR now, before the individual APD's are considered. Furthermore, we observe that it is more efficient in this case to resolve the challenge to the decision to proceed with development as a whole before BLM expends time and money to process the individual APD's. Accordingly, BLM's request that its decision be put into effect is denied. The case will receive the requested expedited treatment, however.

BLM will have 30 days from receipt of this decision to file an answer to appellants' statements of reasons. In keeping with the sense of urgency expressed by BLM's request for expedited treatment of these appeals, no extensions of time will be granted unless extraordinary circumstances are presented.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to dismiss these appeals is denied.

WILL A. IRWIN
Administrative Judge

WE CONCUR:

GAIL M. FRAZIER
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

SHAW RESOURCES, INC.

79 IBLA 153

Decided *February 24, 1984*

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting simultaneously filed oil and gas lease applications NM 56000 and NM 56003. Separate appeal from a decision of the Wyoming State Office, Bureau of Land Management, denying a request for return of filing fees. W 1840/3112.

New Mexico State Office decision affirmed as modified; Wyoming State Office decision affirmed as modified in part, reversed in part, and remanded for return of filing fees.

1. Oil and Gas Leases: Applications: Generally--Words and Phrases

"Prevents automated processing." As used in 43 CFR 3112.3(a)(2), 49 FR 2113 (Jan. 18, 1984), an application form is prepared in a manner that "prevents automated processing" where a mistake or omission prevents the computer from fully completing the automated program. An application containing such a deficiency is properly held to be "unacceptable."

2. Oil and Gas Leases: Applications: Generally

Where an application form is deemed unacceptable under the automated simultaneous oil and gas leasing system, all filing fees submitted with such form are returned, after assessment of a \$75 processing fee, even if the deficiency which rendered the form unacceptable is not discovered until after selection of successful applications.

3. Oil and Gas Leases: Applications: Generally

An application is properly rejected where the applicant has failed to disclose all parties in interest, has failed to identify any party who gave assistance in preparing the application, has interests in another filing for the same parcel, has failed to disclose all individuals in an association or partnership which has filed an application, or has utilized the address of a person or entity in the business of providing assistance for the filing of applications. An application is also properly rejected where the application is signed by a person other than the applicant and the signatory has failed to disclose the relationship between them. Where an application is properly rejected, the Department lacks authority to authorize the refund of any filing fees tendered with the application.

4. Oil and Gas Leases: Applications: Generally

Where a deficiency on an application form filed in the automated simultaneous leasing program neither prevents automated processing nor involves a failure to provide information necessary to police the system to prevent fraud or abuse, such deficiency shall be deemed de minimis, and will not render the application either unacceptable or rejectable.

5. Oil and Gas Leases: Applications: Generally--Rules of Practice: Appeals: Effect of

Rejection of an application to lease filed under the automated simultaneous system necessarily encompasses retention of filing fees submitted therewith. Where an application to lease is "rejected" because of a deficiency on the application form, an applicant must either appeal or seek a return of any filing fees within 30 days of rejection. Where an applicant fails to do either, he will be barred from subsequently seeking a return of filing fees on the grounds that the deficiency should properly have been treated as rendering the application "unacceptable."

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Shaw Resources, Inc., 73 IBLA 291 (1983), *reconsidered and modified*;
Nancy McMurtrie, 73 IBLA 247 (1983), *overruled to extent inconsistent*.

APPEARANCES: R. Hugo C. Cotter, Esq., Albuquerque, New Mexico,
for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

This decision involves two separate appeals by the same appellant. In the first, docketed as IBLA 83-586, Shaw Resources, Inc., has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated April 5, 1983, rejecting two simultaneous oil and gas lease applications which had been drawn with first priority for parcels NM 303 and NM 306, in the December 1982 drawing. The decision held that appellant's applications were defective because the Part B filed in that drawing, which encompassed applications to lease for 71 parcels, showed identification number 884087730, whereas the Part A on file for Shaw Resources showed identification number 840857730. Accordingly, BLM held that the applications were properly rejected pursuant to 43 CFR 3112.2-1(g) and 43 CFR 3112.6-1(c). A timely notice of appeal was thereafter filed.

The second appeal, docketed as IBLA 84-81, arises from the denial by the Wyoming State Office, of a request filed on August 16, 1983, for the return of certain filing fees, aggregating \$16,200. These fees had been tendered in conjunction with four separate application forms filed for parcels located in New Mexico, Colorado, Montana, and Wyoming in the December 1982 drawing. Each of the application forms had the same mismatch of identification numbers set forth above. The New Mexico application form, involving 71 parcels, is the subject of review in IBLA 83-586. The Wyoming form, which had contained separate applications to lease for 95 parcels, had been the subject of a prior Board decision, styled *Shaw Resources, Inc.*, 73 IBLA 291 (1983).

The other two application forms were filed for parcels in Montana and Colorado, respectively. A total of 29 parcels were sought in the Montana application form, while 25 parcels were embraced in the Colorado form. While an application to lease parcel CO-118 was drawn with first priority under the Colorado application form, and a number of applications to lease were drawn with second and third priority under the Montana form, there is no evidence before the Board that appellant either pursued an appeal from a rejection of the application for parcel CO-118, or otherwise initiated a request for a return of any filing fees tendered with these two forms prior to August 16, 1983.

A number of Board decisions have examined appeals arising out of the automated simultaneous system. In *Shaw Resources, Inc.*, *supra*, we affirmed the decision of the Wyoming State Office, which had

“rejected” the application for the above-described deficiency. We also held that the applicant’s filing fees were properly retained, citing 43 CFR 3112.6-1 (1982). This decision was essentially reaffirmed in *Deborah B. Moncrief*, 76 IBLA 287 (1983). Appellant’s appeal in IBLA 84-81 is essentially a request that we reconsider this earlier decision. For reasons given below, we hereby grant that request.

In *George Dolezal, Jr.*, 75 IBLA 298 (1983), we held that BLM properly “rejected” applications where the identification number entered on Part B was mismatched with that placed on Part A. In that case, the mismatch was discovered prior to selection, and we held that BLM properly retained only \$75 per application form, citing 43 CFR 3112.3(b), *as amended* at 48 FR 33648, 33679 (July 22, 1983), which stated that “[f]or each Part B application form returned as *unacceptable*, of the fees remitted, a \$75 processing fee shall be retained and the balance of the fees, if any, shall be returned to the remitter.” (Italics added.)

In *D. M. Olson*, 76 IBLA 344 (1983), we held that BLM properly “rejected” an application which not only had a mismatched identification number, but which was undated and unsigned as well. The Board, however, also directed return of all filing fees, except for a \$75 processing fee, relying on the procedures for handling “unacceptable” applications.

As a result of these decisions, and others in a similar vein, it became apparent that the Board’s approach to adjudications under the new automated simultaneous systems had resulted in inconsistent decisions which failed to differentiate between an “unacceptable” application and one which was properly “rejected” and, as a result, had developed no consistent rationale for the retention or return of filing fees. It is our intention in this decision to exhaustively review procedures under the automated simultaneous system as they have evolved and to clearly delineate the situations in which an application should be deemed “unacceptable,” when an application is properly “rejected,” and when the return of filing fees is properly authorized.

The genesis of recent problems resides in the new automated simultaneous system and the regulations and procedures adopted to regulate it. The need for new procedures for handling filings under the simultaneous system was increasingly apparent as the number of applications filed each month, particularly in Wyoming and New Mexico, mounted relentlessly. It was obvious that the capacities of the Bureau to administer the program in a timely manner and, at the same time, to police it against possible abuses, were being taxed to the breaking point. With literally hundreds of thousands of filings being made *each month* in just the Wyoming State Office, it was impossible, as a practical matter, to manually review all of the individual filings flooding the BLM State Offices. Such review as the Bureau was able to provide was necessarily limited to drawing entry cards (DEC’s) drawn with priority. One corollary side-effect was that an individual would be informed as to the existence of a recurring deficiency in his or her

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application only when it resulted in the loss of priority. Because of these both administrative and adjudicatory problems, the Department determined to take advantage of new computer capabilities and embarked upon phased introduction of what has become known as the "automated" system.

This automated system marked a major departure from prior BLM practices. In the past, because DEC's were drawn manually for each parcel, applicants filing on multiple parcels were required to complete multiple DEC's. But, as is true with any repetitious task, as the number of cards which an individual was required to complete increased, so, too, did the chance for an unintentional error. A not insignificant amount of litigation before this Board involved precisely those types of situations where, through inadvertence or misunderstanding, critical requirements were either left undone or were improperly performed. See *Nancy Y. Otani*, 58 IBLA 38 (1981); *H. L. McCarroll*, 55 IBLA 215 (1981).

The automated system, by its very nature, permitted an applicant to file applications for numerous parcels in one document. Indeed, up to 600 separate parcels available for leasing might be applied for on one application form. However, one possibly unforeseen and certainly underestimated drawback was that any individual error was now capable of invalidating a vast number of separate applications. To put this problem in perspective, it is helpful to describe the application forms used in the automated system.

Two separate forms are involved: Part A and Part B. Part A provides base data on any applicant. It consists of a single piece of paper containing spaces in which a prospective applicant is directed to fill in his or her name and address. In addition to filling in the boxes found for this purpose, the applicant is directed to fill in circles corresponding with the letters placed in the boxes. These circles, often referred to as "bubbles," are designed to be read by the Optical Mark Reader (OMR), and, therefore, for the purposes of the automated system, are actually more important than the letters printed in the boxes. In addition to the name and address, however, space is provided for an applicant to fill in his or her social security number (SSN). While the front of Part A merely refers to SSN's, the instructions printed on the reverse side note that corporations and other entities should fill in their employer identification number (EIN). However, it is not mandatory for an individual or corporation to use either an SSN or EIN. Rather, if one wishes not to disclose this number, or if an individual does not have a SSN, the instructions advise the applicant to leave this space blank. BLM then assigns a Bureau applicant number (BAN), which must be used in all future filings. Part A need be filed only once, since the computer thereafter retains the information.

Part B is, in effect, the actual application. It can be divided into two separate halves. The left half is machine readable, while the right half is not. The machine-readable left half consists of various elements or fields. First, it contains 600 circles, numbered from 100 to 699 inclusive, which correspond to various parcels announced every other month as available for leasing. In addition, since the Wyoming State Office now conducts the actual drawing for all BLM State Offices, circles are provided by which an applicant must indicate which State Office prefix should apply.¹ Since more than one State Office will have parcels with the same parcel number, filling in the information as to the State prefix is absolutely essential. Without it, there is no way of ascertaining exactly which parcel an applicant seeks to file on. There are also boxes and bubbles for filling in the amount of the filing fee accompanying the application. Finally, there are boxes and bubbles for the insertion of the SSN, EIN, or BAN. The applicant is instructed to use the number used on Part A in completing this item. If an applicant has filed Parts A and B together and elected not to submit either an SSN or EIN, BLM will fill in these blocks with the BAN assigned to Part A.

The right-hand side of Part B has spaces in which the applicant is directed to print in his name, address and zip code. The applicant is also directed to supply a qualification serial number (if applicable), the full name of any other parties in interest, and the name and address of any filing service which assisted the applicant in the completion of the application. Below these spaces is a printed certification that the applicant is a citizen authorized to file, that he or she is within the statutory acreage limitations, that all parties in interest have been disclosed, that no undisclosed agreement or understanding to assign any lease exists, and that the applicant has no interest in any other application filed for the parcels for which the applicant has applied. The applicant signifies his certification of these statements by signing the application on the lower right-hand corner. Space is also provided for dating his signature. None of this information is machine readable.

When the application is received by the Wyoming State Office specified procedures are followed.² The Office attempts to process all applications on the date they are received. Applications are divided into batches. Where individual applications are filed there is a limit of 50 applications to each batch. Where a filing service is involved, there is only one filing service per batch, regardless of the number of applications involved. The BLM employees involved in processing the application, generally called conveyance examiners, open at least two sides of every envelope. It is noted that an envelope can contain a Part A only, a Part B only, or a Part A and Part B, as well as a

¹ While the Wyoming State Office conducts the actual drawing for each of the BLM State Offices, adjudication of the applications' acceptability and ultimate issuance of leases are handled by each State Office for the lands under its jurisdiction.

² The information relating to the actual processing of the applications is taken from a draft manual of instructions, dated July 28, 1983. While we recognize that this is merely a draft, it is indicative of the actual procedures being followed in the Wyoming State Office at the time most of the cases on appeal before the Board were being processed.

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remittance. Where both a Part A and Part B are received without any information in the SSN fields, a BAN will be assigned. Assignment of a BAN is made by a senior conveyance examiner who enters the applicant's name in the BAN log. The draft manual is quite clear that "[i]n no event will we complete or correct a SSN field that is not blank."

The next step in the processing requires examination of the remittances. Any application without a remittance is immediately culled. Where a remittance is included, it is examined to verify that it is signed, has been dated within the last 90 days, is payable to BLM, is in proper form, and contains numerical and written amounts that are in agreement. Applications accompanied by unsigned or stale-dated remittances as well as remittances which are either nonnegotiable or made out to someone other than BLM are not processed. Rather, they are set aside for return to the applicant after the close of the filing period. Where the written and numerical amounts on the check differ, the remittance is referred to the Accounts Unit for a determination as to whether the remittance should be processed for deposit, with controlling reference made to the written amount.

Assuming that the remittance is acceptable, the dollar amount of the remittance is then compared with the amount bubbled in the filing fee block. If these two disagree, the examiner will change the entry on the filing fee block to correspond with the amount of the remittance. If there is no entry in the filing fee field, the examiner will enter the amount of the remittance.

Next, all application forms are serialized. The number assigned to the specific application form is also placed on the accompanying remittance and on any other documents which were filed in conjunction with the application form. Part B is then scrutinized to ascertain whether the applicant has indicated that there are other parties in interest, with particular attention being paid to whether or not there is an attached statement listing other parties in interest.

After this process has been completed for 50 applications, thereby constituting one batch, a batch number is then obtained from the senior examiner. After the batch has been assembled, a photocopy of all the remittances is made. The batch box is then picked up by the senior examiner who transmits the checks to the Accounts Unit and places the applications in the vault.

One other point should be made. Specific procedures are applied to application forms which are received in a damaged condition or which are damaged in opening or batching. These are placed at the beginning of the batch with a note directing the attention of a Certified Officer to the problem and describing what had happened. The Certified Officer subsequently makes a decision as to whether the application should be

processed. If he decides it should be,³ a duplicate original application will be manually prepared. The Certified Officer makes a similar determination if the OMR refuses to process an application.

At first, no specific regulations were adopted concerning treatment of deficiencies as they related specifically to the automated simultaneous system. The automated system was first introduced in the Wyoming State Office. By notice, published on November 12, 1981, prospective applicants were apprised that applications for parcels in Wyoming could only be made on form 3112-6 (Part A) and form 3112-6(a) (Part B). See 46 FR 55783. The notice stated:

[A]pplications filed on the automated form received in a condition that the authorized officer determines would prevent automated processing, will not be accepted. The authorized officer will be guided in the decision of whether an application form is acceptable or unacceptable by criteria furnished in the manuals of the Bureau of Land Management and in instruction memoranda. *Applications determined to be unacceptable will be returned to the applicant along with the filing fee.* [Italics added.]

Id. at 55784.

Despite the express declaration that determinations of unacceptability would be made by recourse to the BLM Manual and Instruction Memoranda, the law is clear that such documents, while providing guidance to BLM, are generally binding neither on the public nor on this Board. See *Morton v. Ruiz*, 415 U.S. 199 (1974); *Bryner Wood*, 52 IBLA 156, 161-62 n.2, 88 I.D. 232, 235 n.2 (1981). Board adjudication, therefore, was initially controlled by general regulations and rules of adjudication adopted for the manual simultaneous system. See, e.g., *Shaw Resources Inc.*, *supra*. The first attempt by the Bureau to specifically address possible problems in the operation of the automated simultaneous system came in a *Federal Register* publication on November 26, 1982. Because this notice is the starting point of so much of the confusion concerning the automated system, we shall set the relevant portions out in detail:

By notice in the *Federal Register* on November 12, 1981 (46 FR 55783 et seq.), the Bureau of Land Management (BLM) established a requirement that all applications filed on BLM Form 3112-6 and 3112-6(a) (OMB No. 1004-0065) for noncompetitive oil and gas leases issued by the automated simultaneous drawing system must be completed and received in a condition that the authorized officer determines would permit automated processing.

This notice is hereby published to draw direct emphasis to this requirement. Automated simultaneous oil and gas lease application forms 3112-6 and 3112-6a which are folded, spindled, or otherwise mutilated, which are incorrectly completed in any manner, which indicate an improper or incomplete Social Security Number, Employer Identification Number, BLM Applicant Number or other identification number, which contain information on Part B (Form 3112-6a) that does not correctly correspond to information on Part A (Form 3112-6), which contain entries that are obscured by incomplete erasure, stray marks, tape or other foreign substances, or which in any other way prevent fully automated processing will be considered *unacceptable*. The public is hereby notified that effective immediately *applications shall be rejected without right of*

³ While the manual does not expressly specify the basis upon which the Certified Officer is to make this determination, we think that the distinction properly drawn is between those situations in which the application form arrived in a damaged condition and those in which the damage occurred during processing.

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appeal or protest⁴] and the nonrefundable filing fee shall be retained to cover processing costs. [Italics added.]

47 FR 53508 (Nov. 26, 1982).

This notice had two unfortunate effects. First of all, it described a vast array of deficiencies as rendering an application "unacceptable." It then held that such "unacceptable" filings must be "rejected." As we shall show, the distinction between what is "unacceptable" and what must be "rejected" is critical to any attempts to rationally apply the regulations as they presently exist. Second, while purportedly reaffirming the earlier notice, the second notice held that the filing fees would not be refunded, despite the fact that the first notice had said exactly the opposite.

On June 30, 1982, proposed rules had been published generally revising the regulations governing oil and gas leases on public lands. See 47 FR 28550. As proposed, the changes made only scant reference to the new system. Thus, the proposed regulations provided:

§ 3112.5 Unacceptable filings.

(a) Applications shall be examined prior to selection and the application or written notice, together with the filing fee, shall be returned to the applicant or remitter for any filing which is:

* * * * *

(7) Received in a condition which the authorized officer determines will prevent automated processing * * *

* * * * *

(b) Failure to identify a filing as unacceptable prior to selection does not bar rejection after selection for the reasons listed in this section or any reason set forth in §§ 3112.6-1 through 3112.6-3 of this title.

47 FR 28569 (June 30, 1982). The proposed language for section 3112.6-1 provided: "(a) Rejection is an adjudication process which follows selection. Filing fees for rejected filings are the property of the United States and shall not be returned." *Id.*

The proposed language quoted above is important for our purposes since it clearly established a dichotomy between finding an application "unacceptable" and determining that the application should be "rejected." Where the former occurred, the application was not "processed" and the applicant received a refund of the filing fees tendered. Where the latter situation obtained, the application was "processed" through the simultaneous system and then rejected. No refund was given when a rejection occurred.

On July 22, 1983, final rules were published relating to oil and gas leasing. An entirely new subsection, 3112.3, entitled "Unacceptable and rejected applications" was promulgated. Since much of the recent

⁴The authority by which the Acting Associate Director, BLM, purported to deny applicants the right to appeal granted by the Secretary of the Interior pursuant to duly promulgated regulations is nonexistent.

confusion in adjudication under the automated system has directly resulted from attempts to derive some coherent approach from this regulation, we shall discuss the various provisions seriatim.

Subpart 3112.3(a) described applications which were deemed to be unacceptable. Thus, it provided:

(a) Any Part B application form which, in the opinion of the authorized officer:

- (1) Is not timely filed in the Wyoming State Office; or
- (2) Is received in an incomplete state or prepared in an improper manner; or
- (3) Is received in a condition that prevents its automated processing; or
- (4) Is received with an insufficient fee: shall be returned to the remitter as

unacceptable.

48 FR 33679 (July 22, 1983).

Two points should be made about this subsection. First, while on initial reading it does not seem of particular importance, the phrase "in the opinion of the authorized officer" is a matter of some note. As shall become clear upon analysis of other provisions of this subsection, BLM sought to vest the authorized officer with unencumbered discretion in determining when an application was "unacceptable" as opposed to when it might be "rejected." Secondly, while subsections 3112.3(a)(1), (3), and (4) concern relatively well-defined problems, subsection 3112.3(a)(2) is extremely broad in scope and could arguably embrace a full panoply of deficiencies varying from a nonbubbled SSN field to an undisclosed party-in-interest.

The next subsections, 3112.3(b) and (c), describe the consequences which result when a filing is deemed "unacceptable." Thus, it is provided:

(b) For each Part B application form returned as unacceptable, of the fees remitted, a \$75 processing fee shall be retained and the balance of the fees, if any, shall be returned to the remitter.

(c) Any Part B application form received without any fee or accompanied by an unacceptable remittance shall be considered unacceptable and shall not be returned.

Id. In effect, these subsections provide that where an application is deemed "unacceptable," a \$75 processing fee will be assessed per application form, unless the remitter's mistake has been to fail to include a check, in which case the application form is not returned, nor is there any assessment of a processing fee.⁵

Subsection 3112.3(d) is self-explanatory and provides that where a parcel is removed from the parcel list by BLM any fees tendered for such parcel shall be returned to the remitter.⁶

Subsections 3112.3(e) and (f) are major provisions, relating to the "rejection" of applications. They provide:

⁵ This failure to assess a processing fee where no check has been submitted must be premised on the rather unusual theory that the processing fee is earned by the return of the application rather than by the application's initial processing since any application must be opened to determine whether there is or is not an accompanying check.

⁶ The most common reason for deletion of a parcel from the list of available lands is the subsequent discovery that the land is in a known geologic structure (KGS) of a producing oil or gas field, though it is not unknown that a parcel is listed which is presently under lease.

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(e) An application which is accepted for selection but which does not fully comply with subpart 3112 of this title shall, if selected for priority, be rejected and the filing fee retained.

(f) Failure to reject or to identify a filing as unacceptable prior to selection shall not prevent rejection after selection for the reasons listed in this section or for any reason set forth in §§ 3112.5-1 through 3112.5-3 of this title.

Id. Thus, under subsection 3112.3(e), where an application is selected for priority but ultimately "rejected" because it does not comply with subpart 3112, the full filing fee is retained. Subsection 3112.3(f) makes it clear that an application may be "rejected" for a deficiency which would have rendered it "unacceptable." Conceptual problems with this approach have become apparent as the Board has attempted to apply the regulations to specific fact situations.

These problems become obvious in the following example. Assume two applicants, Smith and Jones, have each filed on 100 separate parcels, each filing a single application form. Both have failed to sign their applications. Smith's deficiency is discovered by the authorized officer and is deemed "unacceptable" under subsection 3112.3(a)(2). Jones' application, however, is processed under the automated system and is fortunate enough to be drawn first on three separate parcels. The absence of a signature on the application form, however, is a fatal defect which cannot be cured. *See* 43 CFR 3112.2-1(c) (48 FR 33678 (July 22, 1983)). Thus, Jones' applications are rejected. Smith is assessed a total of \$75 for his error. Jones, on the other hand, has lost his total filing fee of \$7,500, even though his error is exactly the same as that of Smith. The only difference is that the authorized officer caught Smith's mistake in processing while he or she missed Jones' similar mistake. The error by the authorized officer in failing to note that the application was unsigned costs Jones \$7,425, for which Jones receives absolutely nothing, since even though he was included in the automated drawing he had no chance of actually acquiring a lease.

Indeed, the regulations clearly attempted to authorize this disparate result by expressly noting that failure to identify a filing as "unacceptable" did not bar subsequent "rejection." This terminological distinction is of crucial import because of language used in section 1401(d)(1) of the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 748. This section provided that:

Notwithstanding any other provision of law, effective October 1, 1981, all applications for noncompetitive oil and gas leases shall be accompanied by a filing fee of not less than \$25 for each such application: *Provided*, That any increase in the filing fee above \$25 shall be established by regulation and subject to the provisions of the Act of August 31, 1951 (65 Stat. 290), the Act of October 20, 1976 (90 Stat. 2765) but not limited to actual costs. *Such fees shall be retained as a service charge even though the application or offer may be rejected or withdrawn in whole or in part.* [Italics supplied.]

Pursuant to the provisions of section 1401(d)(1), once the Department determines that an application is "rejected," the Department loses all authority to authorize issuance of refunds. Thus, ultimate "rejection"

of an application for a deficiency that might, in the first instance, be deemed to render it "unacceptable" necessitates retention of the entire application fee. A declaration that an application is "rejected" has far different legal consequences from a declaration that the application is "unacceptable." Accordingly, it is of critical importance that uniformity be established in determining what deficiencies render an application form unacceptable; since this categorization will be dispositive of the possibility of returning filing fees. However, before exploring that question, it is necessary to make passing note of the remainder of subsection 3112.3.

Subsection 3112.3(g) initially states that rejection of an application or return of an application as unacceptable shall be considered a final Departmental action, and then proceeds to declare that any appeal from such action will not delay issuance of the lease. The obvious intent of this regulation, gleaned from the preamble, was not to make rejection or return of an application as unacceptable "final" for the Department, but was rather to permit lease issuance during the pendency of an appeal, which would normally not be possible because of the application of 43 CFR 4.21(a). See 48 FR 33657 (July 22, 1983). Subsection 3112.3(h) requires the resubmission of the filing fees as a precondition to any appeal (a traditional requirement for invoking review within the Department) but adds the startling caveat that "the filing fee shall be retained regardless of the outcome of the appeal." Inasmuch as a number of appeals have been brought challenging the retention of the filing fee on the grounds that the application should have been excluded from the drawing as "unacceptable" rather than ultimately rejected, the regulation could, if applied literally, result in a Board ruling that an appellant was correct in his contention that his filing fees should have been returned, but has forfeited them by pursuing his appeal. In actual practice, the Board has ignored this language in making its determinations. See, e.g., *D. M. Olson, supra*.

By memorandum of August 8, 1983, the Director, BLM, advised the State Director, Wyoming, that "the procedures cited in the November 26, 1982, *Federal Register* Notice (47 FR 53508) and Instruction Memorandum No. 83-114, dated November 18, 1982, are rescinded."⁷ New procedures were implemented to handle "necessary and appropriate" refunding of filing fees for the January, March, May, and July 1983 filings. The following criteria were established:

Refunding is to [be] made based on the following criteria with a \$75 processing fee retained and the balance of the filing fees, if any, returned to the applicant:

1. When the condition or manner of completion of the Part B application form prevents acceptance by the automated equipment, thereby preventing inclusion of applications in the automated random selection drawing process.
2. When automated processing reflects that an error is contained on the Part B application form.

⁷ The propriety of rescinding a notice published in the *Federal Register* by way of an internal memorandum is open to question. However, inasmuch as the rescission was primarily of benefit to the applicants, problems associated with the application of 5 U.S.C. § 552(b) (1976) are not involved.

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It must be noted that this instruction memorandum, instituted after publication of the July 22, 1983, regulation changes but before their effective date, is at some variance with the actual language of the regulation. It is indicative, however, of the type of situations the Director, BLM, intended the regulations to cover.

Five months after these regulations become effective, they were amended again.⁸ The following changes are of relevance to this appeal. First of all, 43 CFR 3112.2-1, which had provided that an application would be deemed "unacceptable" if not completed in accordance with the instructions on the application form in a manner that permits automated processing or in accordance with the other requirements of subpart 3112, was amended by adding the phrase "or rejectable" after "unacceptable" and deleting the phrase "in a manner that permits automated processing." The relevant sentence now reads:

An application shall be unacceptable or rejectable if it has not been completed: (1) In accordance with the instructions on the applications form; and (2) in accordance with the other requirements of subpart 3112 of this title.

49 FR 2113 (Jan. 18, 1984). The supplementary information suggests that the purpose of adding the phrase "or rejectable" was to clarify the intent of this paragraph "to include applications that are rejectable because of their failure to meet the instructions and filing requirements set out on the application form in subpart 3112." 49 FR 2111 (Jan. 18, 1984). The effect of this change, however, was to further confuse the distinction between an "unacceptable" application (or filing) and one which is "rejected."

Substantial changes were also made in subsection 3112.3. While the supplementary information suggests that the changes merely clarified the intent of the original language, there can be no gainsaying that the effect of these changes was to considerably alter the original regulations. Subsection 3112.3(a) was amended to read as follows:

- (a) Any Part B application form shall be deemed unacceptable and a copy returned if, in the opinion of the authorized officer, it:
- (1) Is not timely filed in the Wyoming State Office; or
 - (2) Is received in an incomplete state or prepared in an improper manner *that prevents automated processing*; or
 - (3) Is received in a condition that prevents automated processing; or
 - (4) Is received with an insufficient fee. [Italics supplied.]

The underlined change cannot be read as a mere "clarification" of the earlier language. In fact, the addition of the phrase "that prevents automated processing" might be read to substantially limit the instances in which subsection 3112.3(a)(2) would be applicable. The key

⁸ While we can understand the desire of BLM to clarify ambiguous regulations, the simple fact of the matter is that the constant revision of regulations has become a major cause, in itself, for adjudicatory confusion. Entire sections of regulations have been proposed, adopted, and removed in the course of a single calendar year, with the result that some regulations which were actually in effect were never codified in the *Code of Federal Regulations*. By the time the CFR is published, it is now invariably out-of-date as to crucial provisions.

question is the proper interpretation of the phrase "that prevents automated processing."

[1] This phrase could refer to specific omissions which would actually prohibit computer processing of the application. An example of this would be the lack of a State prefix (which would make it impossible for the computer to attach the application to a specific parcel). Additionally, stray lines on the application form can make it physically impossible for the computer to read the application. Thus, it could be argued that so long as the computer can actually read the application and process it through the selection process, such an application is "acceptable" though it might be subject to rejection for other errors on the form which did not "prevent automated processing." While such an interpretation would be plausible, we think it must be rejected for a number of reasons.

First, it is inconsistent with subsection 3112.3(a)(4) which deems an application submitted with insufficient rentals to be "unacceptable." We have detailed at length the actual processing steps taken in the Wyoming State Office in handling the automated applications prior to computer insertion. It is clear that these steps do *not* include the counting of the number of parcels applied for in order to ascertain whether sufficient rentals have been tendered. On the contrary, it is the computer which correlates the number of parcels to the amount of the check which has been tendered. Any error on this point, however, would *not* prevent automated processing. There is no theoretical basis for treating this problem differently from a mismatched SSN field since the computer could simultaneously check both whether sufficient funds had been tendered and whether a Part A matching the Part B being scanned was on file.

Secondly, an interpretation that limited the applicability of the "unacceptable" designation to only those deficiencies which prevent the computer from reading the application would clearly contradict the August 8, 1983, memorandum from the Director, BLM, to the Wyoming State Director, concerning refund procedures. As noted above, the Omnibus Budget Reconciliation Act of 1981 does not permit the refund of filing fees for "rejected" applications, and a number of instances for which the Director authorized refunds involved improperly completed application forms where the error would not have prevented automated processing (for example, a mismatched Part A and Part B). Thus, under a restrictive reading of the phrase "that prevents automated processing" these would not properly be deemed as "unacceptable" filings. Under such an interpretation, BLM would have directed the issuance of refunds for "rejected" applications in contravention of an Act of Congress.

It is clear, therefore, that the phrase "prevents automated processing" should have an expansive rather than a restrictive ambit. It includes any deficiency which prohibits the computer from fully completing the automated program, including not only the selection of applications for specific parcels, but the matching of Part B with

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Part A. We hold that a mismatched Part A and Part B renders an application "unacceptable" under the regulations. Such applications should be screened out before the selection in the same manner that applications with insufficient filing fees are screened.

[2] We are cognizant that in a number of cases appealed to this Board the lack of a matching Part A and Part B was not discovered by BLM until after an application had been selected with priority. BLM deemed such cases to involve "rejection" of an application. This is not the case. Such applications were, in fact, unacceptable at the time they were filed, and their subsequent erroneous inclusion in the selection process did not alter their status. Upon discovery of the deficiencies in these cases, BLM should have declared the applications "unacceptable," canceled any priority which these applications might have received, and refunded the filing fees, save for the processing costs.⁹ The regulation at 43 CFR 3112.3(a) as promulgated in both the July 22, 1983, revision at 48 FR 33679 and the January 18, 1984, revision at 49 FR 2113 provides that any application with the enumerated deficiencies "shall" be deemed "unacceptable" and returned. Under the terms of this mandatory provision what is properly deemed "unacceptable" does not become "rejectable" by the failure of BLM to detect the deficiency prior to actual selection of priority applicants. Reading the regulation otherwise would render it arbitrary and capricious by hinging the fate of thousands of dollars in filing fees on the degree of screening performed by BLM before the drawing. Where possible, a regulation must be read in such a manner that it will not be arbitrary and capricious in its application.

[3] We think that the term "rejected" is properly reserved to a limited number of situations. Thus, where an applicant has failed to disclose all parties in interest, has failed to identify any party who gave assistance in preparing the application, has interests in another filing for the same parcel, has failed to disclose all individuals in an association or partnership which has filed an application (*see* 48 FR 37656 (Aug. 19, 1983)), or has utilized the address of a person or entity in the business of providing assistance for the filing of applications, such applications are properly "rejected," priority is denied to any successful applications, and the filing fees are retained. Similarly, where an application is signed by a person other than the applicant and the signatory fails to reveal the relationship between them, such

⁹ We are well aware of a problem in dealing with applications filed for simultaneous drawings conducted prior to August 1983 relating to the propriety of the assessment of the \$75 processing fee. It is our view, however, that the fee is properly assessed in all situations which are deemed unacceptable under the present regulations but which were not deemed unacceptable under 43 CFR 3112.5. To the extent that applicants can be given the advantage of an amended regulation which increases the range of circumstances in which an application will be deemed "unacceptable" and thereby permit the return of the filing fees, they are required to come within its scope, which in this instance necessitates payment of \$75 for each application form deemed "unacceptable," as a precondition to the return of any filing fees.

an application is properly "rejected."¹⁰ All of these requirements are directly related to the Department's ability to police the simultaneous system to prevent fraud or abuse and those who fail to observe them properly suffer the consequences of their failure to comply.

[4] There are, however, two omissions which will not render an application either "unacceptable" or "rejectable." First, while the regulations are quite clear in requiring that the signature be dated (*see* 43 CFR 3112.2-1(c) (48 FR 33678 (July 22, 1983)), the Board has noted in recent cases that the Tenth Circuit Court's decision in *Conway v. Watt*, 717 F.2d 512 (1983), prohibits rejection of an application for an undated signature. *See Amberex Corp.*, 78 IBLA 152 (1983). The *Conway* court held that such an omission was a "nonsubstantive" error and served as an "inappropriate" grounds for finding a simultaneous application defective.¹¹

Similarly, we are of the view that the failure of the applicant to print out his name and address on the Part B application must also be viewed as a *de minimis* error if the identification number is properly completed on Part B. As we noted above, the applicant's name and address are submitted as Part A. Where an applicant has properly bubbled in his or her identification number on Part B, his name or address is immediately accessible by the computer from Part A.¹² Indeed, since the only information on Part A is the name and address, there seems little justification in most cases for declaring a Part B defective for a failure to repeat this information thereon.¹³ Thus, where the only error on Part B is the omission of the name and address, the application cannot be deemed either "unacceptable" or "rejectable." To

¹⁰ Where, however, the signature space is left blank, the proper action by BLM is to treat the application as "unacceptable." The signature is a necessary prerequisite to the filing of any application, since without it the applicant has failed to seek the right to submit a lease for any parcel of land. In view of the extensive review of application forms which the Wyoming State Office already performs in its preprocessing, virtually no time need be expended to call out those applications where the signature blank is unfilled. Since such a document does not, in law, constitute an application (*see Superior Oil Co. v. Udall*, 409 F.2d 1115 (D.C. Cir. 1969)), it must be deemed "unacceptable."

We note that Instruction Memorandum No. 84-269 (Feb. 10, 1984), indicated that BLM State Offices should consider *unsigned* applications as being rejectable. Since, however, we have held that an unsigned application is not, as a matter of law, an application for anything, the State Office may not reject such an application but, rather, must treat it as unacceptable.

¹¹ We recognize that Instruction Memorandum No. 84-269 (Feb. 10, 1984), directed that undated offers be rejected. As indicated in the text, such action would be in direct contravention of applicable judicial and Departmental precedents. Failure to date the application form does *not* render an application either "unacceptable" or "rejectable." To the extent that it indicated otherwise, Instruction Memorandum No. 84-269 is contrary to law.

¹² We would note that the Board has already held that it is the filling in of the bubbles rather than the numerical transcription which controls on the question of whether an application is properly completed in those portions of Part B which are machine readable. *See Satellite Energy Corp.*, 77 IBLA 167, 90 I.D. 487 (1983). Thus, an omission of numbers or letters from the boxes in either Part A or Part B does not render the application either "unacceptable" or "rejectable." In addition, we would suggest that the Wyoming State Office reconsider its refusal to bubble in information in the SSN field where it has been left blank in these situations where numbers have been provided in the boxes. As submitted, such an application is clearly incomplete but no more so than one in which the remittance amount has been left blank. We do not think that assumption of this responsibility would place a particularly onerous burden on the State Office, since it has already assumed the same for remittance completion. Under such an approach, however, the State Office should not change a bubbled entry, even where it disagrees with the written one, since it could be the written one which is in error, and the bubbled in number would control. Rather, such a procedure would only apply where the boxes were filled in but the bubbles were left blank.

¹³ One possible problem might arise where the applicant's name is particularly long since Part A has only 16 spaces for entry of a name. This problem is most likely to arise for corporate applicants. *See Charles Fox and George H. Keith, Partnership*, 77 IBLA 199, 203-04 (1983). In such a situation it might be impossible for BLM to identify the successful applicant. This problem, however, is best examined in the context of specific fact situations as they occur.

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the extent that prior decisions of the Board indicate otherwise (*see, e.g., Nancy McMurtrie*, 73 IBLA 247 (1983)), they are hereby overruled.

In light of these principles, it is clear that the application form of Shaw Resources filed for parcels in New Mexico was "unacceptable." As such, any priority for parcels NM 303 and NM 306 was properly denied. However, its filing fees tendered with this application form should have been remitted to the applicant after a processing fee of \$75 for the application form had been assessed.

As we noted earlier, insofar as the application form filed for parcels in Wyoming is concerned, we have deemed it proper to reconsider our decision in *Shaw Resources, Inc., supra*. While we affirm the rejection of priorities afforded to any application under that application form, we overrule the earlier decision to the extent that it indicated that all filing fees were properly retained. Here, too, the filing fees should be returned after assessing a \$75 processing charge per application form.

However, insofar as the application forms filed for parcels in Colorado and Montana are concerned, it is our view that no filing fees may be returned. In contradistinction to the situation involved in both the Wyoming and New Mexico filings, appellant made no attempt either to appeal from a rejection of priorities or to seek a return of the filing fees prior to August 16, 1983, for applications to lease filed for lands in Colorado or Montana.

[5] So long as any application under a specific application form remains unrejected, an applicant's right to seek return of fees tendered therewith continues. Where, however, all applications filed under a single form are rejected, either because of a deficiency in the application form or because of a failure of the applicant to be drawn with priority, an applicant has a 30-day period to appeal. *See* 43 CFR 4.411(a). Action by BLM *rejecting* all applications filed under a single form necessarily includes retention of filing fees. Thus, where an applicant fails to appeal or independently fails to seek a return of filing fees within the ensuing 30-day period, the applicant has lost all rights not only to contest rejection, but also to seek a return of any fees tendered with such application forms. Since the record before us contains no evidence that appellant either timely appealed from rejections of its applications under either the Colorado or Montana application forms, or, alternatively, timely sought return of those filing fees, it is now barred from attempting to recover any filing fees connected therewith. Therefore, no return of the filing fees can be authorized for either the Colorado or Montana filings.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the New Mexico State Office is affirmed as modified as to the denial of any priority as to parcels NM 303 and NM 306, the decision of the Wyoming State Office is affirmed in part and reversed in part and the

case files are remanded to the Wyoming State Office for a return of the filing fees tendered in accordance with the views expressed herein.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

WILL A. IRWIN
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

BRUCE R. HARRIS
Administrative Judge

FRANKLIN D. ARNESS
Administrative Judge, Alternate Member

ANNE POINDEXTER LEWIS
Administrative Judge

R. W. MULLEN
Administrative Judge

EDWARD W. STUEBING
Administrative Judge

KAYCEE BENTONITE CORP.

79 IBLA 182

Decided *February 28, 1984*

Appeal of decision by Administrative Law Judge Robert W. Mesch, denying application for award of attorney's fees under the Equal Access to Justice Act.

Affirmed and modified.

1. Equal Access to Justice Act: Generally--Statutory Construction: Generally

Although the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), may be characterized as a remedial statute, this does not support the proposition that it should be construed liberally. Every waiver of sovereign immunity is remedial, and statutes waiving sovereign immunity such as the Equal Access to Justice Act must be strictly construed.

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2. Administrative Procedure: Adjudication--Administrative Procedure: Administrative Procedure Act--Contests and Protests: Generally--Equal Access to Justice Act: Adversary Adjudication--Mining Claims: Contests

Under 5 U.S.C. § 504 (1982) and 43 CFR 4.603, 48 FR 17596 (Apr. 25, 1983), an adversary adjudication is one required by statute to be conducted by the Secretary under 5 U.S.C. § 554 (1982). Because there is no statutory requirement that a mining claim contest be conducted under 5 U.S.C. § 554 (1982), mining claim contests are not proceedings covered by Equal Access to Justice Act.

3. Equal Access to Justice Act: Generally

An award of attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), is properly denied when the applicant is a corporation which fails to demonstrate that its net worth combined with that of its affiliates is not more than \$5 million.

4. Equal Access to Justice Act: Generally

An application for an award of attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), is properly denied when special circumstances make an award unjust. An award is unjust when 49 percent of the applicant corporation's stock is held by one of the nation's largest companies which shares the production and operating costs with the majority shareholder in proportion to its percentage share of ownership.

5. Equal Access to Justice Act: Generally

Even though a party may have prevailed in an adversary proceeding, an award of attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504 (1982), is properly denied where the position of the agency was substantially justified. In order to establish that its action was substantially justified, the Government is not required to establish that its decision to proceed was based on a substantial probability of prevailing. The standard was intended to ensure that the Government is not deterred from advancing in good faith a novel but credible interpretation of the law.

APPEARANCES: Bonnie S. Mandell-Rice, Esq., Denver, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

Kaycee Bentonite Corp. (Kaycee) has appealed from the September 14, 1983, decision of Administrative Law Judge Robert W. Mesch denying its application for award of attorney's fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1982), which provides in part as follows:

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

The proceedings giving rise to Kaycee's application began when Kaycee filed applications for patents conveying certain bentonite mining claims. In 1973, BLM filed contest complaints against the

validity of those claims. These contests were consolidated with other contests against bentonite claims held by other claimants, and during the 5-year period between the filing of the complaints and the hearing before an Administrative Law Judge, the parties engaged in a protracted discovery process in connection with the administrative contest as well as related judicial proceedings. Judge Mesch conducted a hearing in January and February 1978. In 1979, he issued a decision holding 125 claims held by Kaycee to be valid. On May 27, 1982, the Board affirmed Judge Mesch's decision. *United States v. Kaycee Bentonite Corp.*, 64 IBLA 183, 89 I.D. 262 (1982). As the prevailing party under the Board's decision, Kaycee filed an application for attorney's fees and expenses under the EAJA, aggregating in excess of \$79,000.

In denying Kaycee's application, Judge Mesch determined that under the Department's regulations, a mining claim contest is not an "adversary adjudication" within the meaning of the above provision. Kaycee appealed. On appeal, the Solicitor argues that an award should be denied because the agency's position was substantially justified and that special circumstances make an award unjust.

[1] The merits of appellant's arguments depend to some extent on the principle of construction to be applied to the above-quoted statutory provision. Although the provision may be characterized as remedial, such characterization does not automatically support liberal construction in favor of appellant. *Monark Boat Co. v. National Labor Relations Board*, 708 F.2d 1322, 1327 (8th Cir. 1983). In *Ruckelshaus v. Sierra Club*, _____ U.S. _____, 103 S.Ct. 3274, 3277 (1983), the Supreme Court reiterated the following principles as governing the construction of any statute authorizing an award of attorney's fees by the Government:

Except to the extent it has waived its immunity, the Government is immune from claims for attorney's fees, *Alyeska [Pipeline Co. v. Wilderness Society]* 421 U.S. 240,] 267-268, and n. 42, 95 S.Ct. at 1626, and n. 42. Waivers of immunity must be "construed strictly in favor of the sovereign," *McMahon v. United States*, 342 U.S. 25, 27, 72 S.Ct. 17, 19, 96 L.Ed. 268 (1951), and not "enlarge[d] . . . beyond what the language requires" *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686, 47 S.Ct. 289, 291, 71 L.Ed. 472 (1927).

Thus, we are required to reject any application for an award of attorney's fees that would require us to depart from a strict construction of the language of the statute. Bearing this in mind, we turn now to appellant's contention that mining claim contests should be deemed adversary adjudications within the meaning of the statute.

[2] The Act provides the following definition of the proceedings it covers:

"[A]dversary adjudication" means an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license[.] [Italics added.]

5 U.S.C. § 504(b)(1)(C) (1982). By its own terms, section 554 "applies, according to the provisions thereof, in every case of adjudication

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required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a) (1982) (italics added). Although mining claim contests are conducted in accordance with the procedural requirements of this provision of the Administrative Procedure Act (APA) in order to satisfy due process requirements, see *United States v. O'Leary*, 63 I.D. 341 (1956), no statute requires such hearings.

In its regulations implementing the EAJA, the Department defines adversary adjudication in the same language as the statute. 43 CFR 4.602(b), 48 FR 17596 (Apr. 25, 1983). Even though appellant contends that the regulations were not intended to exclude mining claim contests, the following provision of 43 CFR 4.603(a) makes it clear that appellant's contention is incorrect: "These rules do not apply where adjudications on the record are not required by statute even though hearings are conducted using procedures comparable to those set forth in 5 U.S.C. 554." The Department clearly intended to exclude from the coverage of the Act all proceedings except those required by a statute to be conducted under 5 U.S.C. § 554 (1982). *In re Attorney's Fees Request of DNA--People's Legal Services, Inc.*, 11 IBIA 285, 90 I.D. 389 (1983).

We do not take issue with appellant's observation that the courts and this Department have extended the applicability of section 554 to adjudications beyond those described by the exact language of that section. See, e.g., *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *United States v. O'Leary*, *supra*. Such opinions inferred that in enacting the APA, Congress intended to make section 554 applicable in cases where there was a due process right to a hearing, notwithstanding the absence of a statutory requirement for a hearing on the record.¹ When the issue is solely one of the procedure needed to protect a constitutional right, there is no inhibition on adopting so liberal a construction of the applicability of the APA. See *Wong Yang Sung v. McGrath*, *supra*. That statute did not involve a waiver of sovereign immunity, so no principle of construction required courts to narrowly construe its scope. In the instant appeal, the language of section 554 must be analyzed in a totally different context. We are not concerned here with extending its application to protect a constitutional right because there is no constitutional right to an award of attorney's fees in a case such as this. Because section 554 is incorporated by reference in a statute that constitutes a waiver of sovereign immunity, its language is subject to the same rules of construction that pertain to the legislation in which it is referenced in

¹ We note that some courts are no longer automatically applying APA requirements to hearings required by due process or even by statute. Instead, courts first examine the legislative intent underlying the particular substantive statutory provision under which the agency is proceeding before concluding that the APA applies. See generally *United States Steel Corp. v. Train*, 556 F.2d 822, 833 (7th Cir. 1977); *Phillips Petroleum Co. v. FPC*, 475 F.2d 842, 851 (10th Cir. 1973), cert. denied, 414 U.S. 1146 (1974). In *United States v. Independent Bulk Transport, Inc.*, 480 F. Supp. 474 (S.D.N.Y. 1979), the court concluded that section 554 did not apply to hearings for civil penalties arising from oil spills, notwithstanding a statutory requirement for a hearing. The court further held that the Coast Guard's non-APA procedures satisfied due process requirements.

the absence of specific evidence of contrary legislative intent. Although courts may have enlarged the scope of section 554 beyond what its language required in cases involving procedural due process, such an approach cannot be used to establish the liability of the United States for attorney's fees. Indeed, the House report on the legislation supports narrow construction of the provision to avoid exposing the United States to greater financial liability than necessary: "In part, the decision to award fees only in adversary adjudications reflects a desire to narrow the scope of the bill in order to make its costs acceptable." H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 14, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4993.

Prior to 1976 this Board had consistently held that notice and an opportunity for a hearing were not prerequisite to the rejection of an application for an allotment of land pursuant to the Alaska Native Allotment Act of May 17, 1906 (34 Stat. 197; repealed 1970), because the issuance of the allotment was considered to be a matter of Secretarial discretion rather than a matter of right or entitlement enjoyed by the applicant. ("[T]he Secretary * * * is hereby authorized and empowered, *in his discretion* * * * to allot * * * land * * * to any Indian or Eskimo * * *." *Id.*) Nevertheless, in *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), the Court held that such Native applicants have a sufficient property interest in the government benefit denied by the agency to warrant due process protection. In discussing "what process is due," the Court stated:

[T]he Alaska Native applicants whose applications the Secretary intends to reject must be given *some* kind of notice and *some* kind of hearing before the rejection occurs. [Italics by the Court.]

* * * * *

[A]t a minimum, applicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment. Beyond this bare minimum, it is difficult to determine exactly what procedures would best meet the requirements of due process. * * * It is up to the Secretary, in the first instance, to develop regulations which provide for the required procedures, subject to review by the district court and, if necessary, by this court.

Pence v. Kleppe, *supra* at 142, 143.

The Court obviously did not regard its recognition of a property interest sufficient to command the protection of due process as requiring an adjudication pursuant to section 554. Nevertheless, in a subsequent case, this Board held that the Native's entitlement to due process could best be satisfied by proceedings held in accordance with the Department's existing regulations relating to Government contest procedures, under which adjudications arising under section 554 are also conducted. The Board noted in that decision that the same procedures had been utilized to provide due process in other types of cases where protectable property interests had been discerned,

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specifically referring to cases involving homesteads, desert lands entries, trade and manufacturing sites, and mining claims. *Donald Peters*, 26 IBLA 235, 83 I.D. 308 (1976), *sustained*, *Donald Peters (On Reconsideration)*, 28 IBLA 153, 83 I.D. 564 (1976). On review of our *Peters* decisions, the Court of Appeals held that the Department's utilization of such procedures complies, at least facially, with the due process requirements set forth in *Pence v. Kleppe, supra. Pence v. Andrus*, 586 F.2d 733 (9th Cir. 1978).

The foregoing serves to illustrate that not every case involving a protectable right to due process must be treated as one arising under section 554, and the mere fact that the Department affords due process by utilizing the same procedures does not convert such a case to a section 554 adjudication. Just as the Department opted to utilize these procedures for Alaska Native allotment cases in *Peters*, it had earlier determined to conform mining claim contests to these procedures "even though there is no statute requiring that the matter be determined on the record after opportunity for an agency hearing." *United States v. O'Leary, supra*, at 63 I.D. 345.

We conclude that mining claim contests are not adjudications arising under section 554.

[3] Even if mining claim contests constituted adversary adjudications within the meaning of the Act, further inquiry would be necessary to determine whether Kaycee qualifies as a "party" under the definition set forth at 5 U.S.C. § 504(b)(1)(B) (1982) which excludes any corporation whose net worth exceeds \$5 million at the time the adversary adjudication was initiated. Although Kaycee's statement of net worth includes inventories of bentonite, it does not appear that reserves were included.² Furthermore, under the Department's regulations, not only would Kaycee's reserves have to be included, but also those of Black Hills Bentonite (Black Hills), which owns 51 percent of Kaycee's voting stock. Departmental regulation 43 CFR 4.605(f) provides in pertinent part:

Any individual or group of individuals, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares of another business, or controls in any manner the election of a majority of that business' board of directors, trustees, or other persons exercising similar functions shall be considered an affiliate of that business for purposes of this part. In addition, the adjudicative officer may

² Although the hearing was not held until 5 years after the contest was initiated, Kaycee's president testified to holding bentonite reserves other than those at issue in the contest proceeding, and that those reserves on other claims covered several times the acreage at issue in the contest proceeding. We note that Kaycee must assign those reserves a value greater than that which could be assigned to reserves of common clay, because if the reserves have no greater value than reserves of common clay, then the comparable bentonite reserves in the contest proceeding would not have been subject to location and Kaycee could never have prevailed in the administrative proceeding. This is because Kaycee prevailed only by showing that its bentonite was not a common clay, i.e., that it was presently marketable for uses which common clay would not serve. The fact that bentonite could be marketed at a price significantly higher than common clay was a critical element in our conclusion that the clay was uncommon and therefore locatable. 64 IBLA at 196, 89 I.D. at 269. While the propriety of using the value of ore reserves as a component of corporate net worth may be open to question, in any case the other factors discussed below would be sufficient to disqualify Kaycee on financial grounds.

determine that financial relationships of the applicant other than those described in the paragraph constitute special circumstances that would make an award unjust.

Because Kaycee has failed to include the value of its reserves in calculating its net worth, Kaycee has not demonstrated that its net worth combined with its affiliates is less than \$5 million.

[4] The last sentence of the above-quoted regulation requires us to consider another element. The remaining 49 percent of Kaycee's stock is owned by Bethlehem Steel Corp. (Bethlehem), one of America's largest enterprises. Kaycee contends that we may not look beyond the corporation to the wealth of its shareholders as a means of disqualifying an applicant. However, according to the notes to Kaycee's financial statements submitted with Kaycee's application, Bethlehem's role is not that of a mere shareholder who shares in the monetary profits of a business of which it owns a part and whose obligations are limited to capital already contributed. Those notes state that the percentage of the stock ownership of Black Hills and Bethlehem is the basis for the transfer of the bentonite processed by Kaycee to those two shareholders, for *advances to Kaycee by the shareholders for operating costs incurred*, and for the application of operating costs to Black Hills and Bethlehem for Federal income tax purposes. Thus, Bethlehem would share directly and substantially in the benefits provided by an award in this appeal. To allow an application in these circumstances would create in the legislation a loophole so large as to be in flagrant disregard of Congress express intention to establish "financial criteria which limit the bill's applications to those persons and small businesses for whom costs may be a deterrent to vindicating their rights." H.R. Rep. No. 96-1418, *supra* at 15, *reprinted in* 1980 U.S. Code Cong. & Ad. News, at 4994. In view of this evident intent, we cannot turn a blind eye to the extent of Bethlehem's participation, and must find that the arrangement between Kaycee and Bethlehem constitutes a special circumstance that would make an award unjust.

[5] Furthermore, Kaycee's application must be denied because we find that the Government was substantially justified in contesting Kaycee's claims. Although Kaycee in its application refers to our disparaging characterizations of the Government's legal argument, resolution of the issue before us now does not merely depend on whether the Government's legal argument was correct. Instead, we must determine whether BLM was substantially justified in contesting Kaycee's claims. Because locatability of a clay claim is often determined by the use for which the clay is marketed, there might be a lack of substantial justification for the Government's position if there were clear precedent on the precise issue of locatability of bentonite marketable for pelletizing taconite. As we noted in our decision, however, no such precedent existed. 64 IBLA at 197, 89 I.D. at 269. Moreover, there was no substantial evidence that more than a small amount of the bentonite on Kaycee's claims could be marketed for such a use directly; instead, it would have to be blended with a higher grade

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of clay from claims not in issue.³ Thus, Kaycee's patent application confronted BLM with two legal issues of first impression: (1) Whether bentonite marketable for pelletizing taconite was locatable, and (2) whether bentonite which could not be marketed for such use by itself but which must be blended with other bentonite to become marketable for such use was also locatable. Although the Board rejected the general legal theory offered by the Government to establish criteria by which locatability of any bentonite deposit could be determined, it is quite clear when one reads that portion of our opinion specifically concerning Kaycee's claims that Kaycee only prevailed because of our favorable resolution of these particular narrow and novel legal questions.

Moreover, we find that BLM was substantially justified in contesting Kaycee's claims on the basis of the evidence in the record, notwithstanding the error in BLM's legal theory. Although Kaycee prevailed by a preponderance of the evidence, the following paragraphs of our decision make it clear that Kaycee's preponderance was narrow:

The contestant then cites the lack of evidence that bentonite found on the contested claims will in fact satisfactorily serve as a binder in the taconite processing industry. Contestant cites the testimony of some of the witnesses of the contestees and intervenors that the critical test to be used for determining the ability of a deposit of bentonite to serve as a binder is the "balling test" (Tr. 997), the "dry ball test" (Tr. 1171, 1174), and the "batch ball" test (Tr. 1661). Appellants note that Mr. Auer, the vice president of Wyo-Ben Products, Inc., testified that he would require some "batch ball tests" before he would purchase the contested Kaycee claims (Tr. 1669).

Clearly the absence of these tests raises some doubt about whether the material on these claims can be marketed as the testimony of Kaycee's witnesses would have us believe. We note that a mining claimant need only establish the validity of his claim by a preponderance of the evidence; he does not have to establish their validity beyond a reasonable doubt. See Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); see also United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). A reversal of Judge Mesch's decision would be warranted only if the inference to be drawn from the absence of these tests negates the positive testimony concerning the marketability of the material on these claims for pelletizing taconite, or if it renders that testimony so insubstantial that it cannot be given any weight in determining which evidence preponderates. [Italics added.]

64 IBLA at 229, 89 I.D. at 287. The fact that Kaycee merely preponderated does not mean that BLM's position was substantially unjustified.

Indeed, BLM's decision to contest Kaycee's claims provides a precise illustration of what Congress meant by action that was substantially justified:

The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. *Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.* Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good

³ We expressly overruled Judge Mesch's contrary finding as unsupported by the evidence. 64 IBLA 229-30, 89 I.D. at 287.

faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made. [Italics added.]

H.R. Rep. No. 96-1418 *supra* at 11, *reprinted in* U.S. Code Cong. & Ad. News at 4990.⁴

The same standard also appears in the statutory provision for award of attorney's fees connected with court litigation. In applying that standard, some courts have noted that the Act should not be interpreted to provide for an award whenever a governmental decision is reversed. Even if the Government loses under the narrow standards of judicial review set forth at 5 U.S.C. § 706 (1976), one cannot automatically conclude its position was not substantially justified. *See Grand Boulevard Improvement Ass'n v. City of Chicago*, 553 F. Supp. 1154, 1163 (N.D. Ill. 1982); *see also Kirkland v. Railroad Retirement Board*, 706 F.2d 99 (2d Cir. 1983).⁵ Otherwise, the EAJA would be no different from an automatic fee-shifting statute, which Congress clearly did not intend it to be.

We find that the statutory standard goes beyond what is necessary to shield the Government from liability in the instant case. While the Government's general legal theory for the locatability of bentonite was perceived by the Board to be contrary to a century of precedent relating to the locatability of clay, the precise legal questions relating to the locatability of Kaycee's deposits were not clearly controlled by Departmental precedent. BLM's action in contesting these claims was not in direct defiance of any controlling law. As to the factual issues, the Board recognized some doubt that Kaycee's deposits could be marketed for their claimed uses; Kaycee prevailed only by a preponderance of the evidence, which did not resolve our doubts arising from the fact that Kaycee had not performed the tests that the testimony of one of its own witnesses established as necessary to determine the marketability of the deposits. In short, we consider the action taken by BLM in this case to be precisely the type of governmental action that Congress wished to protect by the "substantially justified" standard, and Kaycee's application is properly denied for this reason.⁶

⁴ This item of legislative history was cited as an explanation of the statutory standard in *S & H Riggers & Erectors, Inc. v. O.S.H.R.C.*, 672 F.2d 426, 430-31 (5th Cir. 1982).

⁵ In *Kirkland, supra*, the Court found that the agency's findings in the case "appear to be based upon little more than conjecture and surmise." *Id.* at 104. The Court concluded that the agency's findings were not supported by substantial evidence and rejected them. The Court further chastised the agency for failure to apply a Circuit Court decision which was directly on point, so affirmation of the agency's decision would have required the Court to overrule its own established precedent. *Id.* at 104. Notwithstanding the Court's determination that the agency's factual findings were based on little more than conjecture or surmise and that it failed to apply the controlling legal case precedent, the Court rejected an application for an award of attorney's fees under the EAJA. The Court stated: "On the facts of this case, we believe the [agency] has sustained its burden of showing that its position, although erroneous, was not so devoid of legal or factual support that a fee award is appropriate." *Id.* at 105.

⁶ We further note that some of Kaycee's fees appear to be based on charges in excess of the statutory limit of \$75 per hour. 5 U.S.C. § 504(b)(1)(A)(ii) (1982).

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Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

March 9, 1984

APPEAL OF GAY AIRWAYS, INC.

IBCA-1429-2-81

Decided March 9, 1984

Contract No. NA79RAC00075, Department of Commerce (National Oceanic and Atmospheric Administration).

Appeal Denied.

1. Contracts: Disputes and Remedies: Jurisdiction

Upon finding no statute or contractual agreement between the parties providing for the same, the Board denied appellant's claims for interest, attorney fees and costs.

**2. Contracts: Construction and Operation: Contract Clauses--
Contracts: Disputes and Remedies: Damages: Generally--Contracts:
Performance or Default: Generally**

Where a contractor leased a helicopter to the Government, but before the end of the lease period, the helicopter was destroyed, the Board found that the inability or unwillingness of the contractor upon demand to furnish a replacement helicopter for the remainder of lease period constituted nonperformance of a contractual obligation on the part of the contractor and held that such nonperformance relieved the Government from payment for any contractually guaranteed minimum use of the aircraft.

**3. Contracts: Construction and Operation: Contract Clauses--
Contracts: Disputes and Remedies: Damages: Generally--Contracts:
Performance or Default: Generally**

Where a contract for the lease of a helicopter by the Government contained a Loss or Damage to Leased Aircraft clause whereby the Government assumed the risk of loss and agreed to pay and did pay the fair market value of the helicopter which was totally destroyed in a crash, the Board held that payment by the Government was performance and not a breach on its part and that the contractor was not entitled to loss of profits on a breach of contract theory.

APPEARANCES: Lance Wells, Attorney at Law, Anchorage, Alaska, for Appellant; Jerry A. Walz, Government Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

The above-numbered contract was awarded to contractor/appellant, Gay Airways, Inc., on April 2, 1979, by the Government through the National Oceanic and Atmospheric Administration (NOAA), an agency within the United States Department of Commerce. The contract was a fixed price, supply-type contract, published on Standard Form 33, and provided for a lease by NOAA from the contractor of a Bell 206 helicopter. The helicopter was to be operated from the NOAA ship, *Surveyor*, in conjunction with NOAA's mission to survey and collect various marine mammals and to transport them to the *Surveyor* for processing.

As originally awarded, the contract provided for two lease periods: The first, from April 9 through May 4, 1979; the second, from June 26 through July 15, 1979. The bid schedule contained estimated daily rates for the helicopter and the contractor's mechanic together with rates per flight hour showing a total cost of \$44,138 for both lease periods. It also contained the following provision: "The estimated days and hours have been established for evaluation purposes only. The contractor is guaranteed a minimum of 50 flight hours per lease period; however, payment will be made on actual flight hours" (AF-9 at 7).¹

Appellant provided a Bell Model 206B helicopter, serial No. N49734 (hereinafter, N734) to NOAA and the first lease period was successfully completed and paid. There is no issue in this appeal pertaining to the first lease period (Tr. 11-12). After completion of the first lease period, the contract was modified by mutual agreement to change the second lease period beginning date from June 26 to June 12, 1979. The modification also adjusted the estimated flight hours, changed the pickup from Kodiak to Anchorage by NOAA pilot Lt. William Harrigan and the termination point from Kodiak to Juneau, Alaska, and also deleted the requirement for a contractor-supplied mechanic for the period of June 12 through June 24. No changes were made in the guaranteed provision (AF-8).

NOAA's employee, Lt. William J. Harrigan, a NOAA Corps Officer, picked up N734 from appellant on June 12, 1979, in Anchorage and began a ferry flight to meet the *Surveyor* in Seattle, Washington. Before leaving Anchorage, Lt. Harrigan was given a check ride, or orientation flight, by Larry Moeller, one of appellant's pilots, as required by the contract (AF-9 at 8), and was found by appellant to be qualified to fly the aircraft (Tr. 94). On June 13, 1979, he was making a final approach in N734 for a landing at Port Hardy, British Columbia, Canada, when at an altitude of 400 feet the helicopter engine failed. N734 crashed approximately one-half mile from the airport seriously injuring Lt. Harrigan and the NOAA mechanic/passenger, Gary Mitchell.

Since the accident occurred in Canada, the Canadian Department of Transport conducted an investigation and determined in its report (GX-A) that the accident was caused by fuel exhaustion. The contracting officer's technical representative (COTR), George Lapiene, contacted appellant within a few days after the accident, on or about June 18, 1979, with regard to providing another aircraft to complete the contract, but contended that appellant was unable to purchase one at that time and was unwilling to lease a helicopter from another company (AF-3; Tr. 194). As a result, NOAA contacted several other companies and negotiated a contract with Trans-Alaska, the next low bidder, for a replacement helicopter to complete the project (AF-3).

¹ Various references to the record in this opinion will be typically abbreviated as follows: Appeal File, Tab 9, page 7 (AF-9 at 7); Appellant's Exhibit 4 (AX-4); Government's Exhibit A (GX-A); Transcript, page 132 (Tr. 132); Appellant's Brief, page 20 (AP Brief at 20); Government's Brief, page 7 (Govt. Brief at 7).

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The contract contained a clause on pages 14 and 15, entitled, "Loss or Damage to Leased Aircraft," and the pertinent paragraphs thereof provided as follows:

a. The Government assumes all risk of loss of or damage (except normal wear and tear) to the leased aircraft during the term of this lease while the aircraft is in the possession of the Government.

* * * * *

c. In the event the aircraft is lost or damaged beyond repair, the Government shall pay to the Contractor a sum equal to the fair market value of the aircraft at the time of such loss or damage less the salvage value of the aircraft. However, the Government may retain the damaged aircraft or dispose of it as it wishes. In that event the Contractor will be paid the fair market value of the aircraft.

* * * * *

f. Any failure to agree as to the responsibility of the Government under the clause shall, after a final finding and determination by the Contracting Officer, be considered a dispute within the meaning of the "Disputes" clause of this contract.

g. The Contractor's rights under this clause are in addition to, and not in lieu of, any rights it may have under the Federal Tort Claims Act as amended (28 U.S.C. 2571, et. seq.). However, any sum for which the Government may be liable under this clause shall be reduced by the amount of any award, compromise, or settlement for loss of, or damage to, the leased aircraft, obtained by or on behalf of the Contractor under said Act as amended.

On November 19, 1979, appellant submitted a claim to the contracting officer (CO) in the amount of \$127,785 (AF-2). This claim was subsequently certified by Mr. Alfred E. Gay, president, Gay Airways, Inc., on or about March 19, 1980 (AF-5). The claim submitted on November 19, 1979, was detailed substantially as follows:

1. Guaranteed use of helicopter for lease period: 20 days at \$649/day and 50 flight hours at \$150/hour less \$3,353 paid by the Government for 13.7 hours and 2 days.

	\$17,127
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2. Bluebook market value of Bell 206B helicopter at time of loss agreed by Government to be responsible for under Loss or Damage to Leased Aircraft clause, pages 14 and 15 of contract.

	\$248,000
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3. Loss of net profits resulting from unavailability of aircraft by purchase or lease during summer months based on 112 hours per month for July, August and September, average summer month useage [sic] by appellant of 206B helicopters.

	\$52,380
--	----------
4. Administrative and contract clean-up expenses including (a) Engineer expenses for inspection, partial dismantling and preparation for shipping - \$1,000; (b) travel, investigation and inspection, and hauling wreckage \$4,780; and (c) attorney fees - \$1,500.

	\$9,778
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The computation in arriving at the total claim was as follows:

Total damages	\$327,285
Less amount received from Insurance Co.	<u>\$199,500</u>
Total Claim	\$127,785

Settlement negotiations took place between the parties after receipt of appellant's claim by the CO until June 24, 1980, when modification No. 1 became effective and which settled items 2 and 4 of appellant's claim. Modification No. 1 as signed by A. E. Gay, president of appellant, on June 16, 1980, and by Merle V. Gibson, the CO, on June 24, 1980, and provided as follows:

By mutual agreement of the parties hereto, this modification provides total payment in settlement of Items 2 and 4 of the claim dated November 19, 1979 for loss of helicopter and administrative and clean-up expenses.

Payment will be made as follows:

- a) One check for \$199,500.00 will be issued to Gay Airways and Rosemurgy & Co., Inc. to cover the amount of insurance paid by Rosemurgy & Co., Inc. to Gay Airways.
- b) One check in the amount of \$48,500.00 will be issued to Gay Airways.

On October 29, 1980, the CO rendered his findings of fact and decision with respect to appellant's remaining claim items 1 and 3. He denied both claims. The contractor appealed from that decision to this Board. A hearing was held in Anchorage, Alaska, and both parties submitted posthearing briefs. In its posthearing brief, appellant, despite the settlement accomplished by modification No. 1, not only asserts entitlement to the previous claim items 1 and 3 (with claim item 3 for loss of profits reduced from \$52,380 to \$38,419.52), but also to interest in the sum of \$1,331.73 for 16 days (June 24 to July 10, 1980) on the \$248,000 paid by the Government on July 10, 1980, and also for interest "on all of Gay's claims from their inception until paid and attorneys fees and costs."

Discussion

Claims for Interest, Attorneys' Fees and Costs

[1] It is sufficient to state at the outset that this Board is without jurisdiction to award attorney's fees and costs in the absence of a statute or an agreement between the parties providing for the same. *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1386, 1387 (1983). Appellant has cited neither such a statute nor any agreement here, and we know of none. Therefore, its claims for attorney's fees and costs are denied.

Appellant's claims for interest must likewise be denied as a matter of law. It has been a long established rule among the Federal courts and the executive departments of the Federal Government, under the rationale that the sovereign is immune from claim or suit without its consent, that interest on a claim against the United States shall not be allowed except under a contract or statute expressly providing therefor, and adjudicative tribunals are not empowered to award interest against the United States on the ground that such an award is just and equitable. See 28 U.S.C.A. § 2516, and the cases annotated thereunder; *S. W. Aircraft, Inc. v. United States*, 213 Ct. Cl. 206, 215 (1977), 551 F.2d 1208; and the decisions of this Board in *Mann Construction Co.*, IBCA-1280-7-79 (Dec. 10, 1981), 88 I.D. 1065, 82-1 BCA par. 15,481 and *Armstrong and Armstrong, Inc.*, IBCA-1311-10-79 (Jan. 29, 1982), 89 I.D. 30, 48, 82-1 BCA par. 15,622 at 77,129. We find no Act of Congress nor a contract provision in the record before us which provides for interest in this case, and none has been cited to us by appellant.

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Claim 1 for Guaranteed Minimum Use of Aircraft

In denying appellant's claim 1, the CO decided that because appellant on demand was either unwilling or unable to meet its contractual obligation to furnish another helicopter after the crash, a default occurred under the default clause of the contract. He determined, however, that since the loss of the aircraft was without the fault or negligence of appellant, the reprourement by the Government of another helicopter constituted a termination for the convenience of the Government. He then concluded that the termination for convenience clause expressly limits the liability of the Government to services rendered prior to termination, and therefore, any guaranteed minimum is unallowable under the express provisions of the contract (AF-1.0).

It is undisputed that NOAA reprocured another helicopter from Trans-Alaska after the crash in order to complete the project for which the contract with appellant was made. Appellant, however, denies any inability or unwillingness to meet its contractual obligations to furnish a helicopter, and asserts that it in fact tendered another helicopter to replace N734 and was never notified until the CO's decision that NOAA intended to terminate the contract for any reason, default or otherwise (AP Brief at 5-6).

In its posthearing brief (page 24), the Government admits that the CO "did not terminate the contract for default" at the time that appellant failed to deliver another aircraft but instead simply went elsewhere to obtain the necessary services. Government counsel then states: "Respondent admits that its actions preclude it from assessing appellant with extra reprourement costs and that [it] is only fair to construe the termination as a constructive termination for the convenience of the Government." On page 23 of his brief, Government counsel argues that the evidence of record, and primarily the testimony of appellant's own witness, refute the assertion of appellant that it tendered a replacement helicopter to the Government after the loss of N734.

It is apparent that the Board must resolve the key issue of fact, whether appellant was unwilling or unable to furnish a replacement helicopter after the destruction of N734, in order to determine the merit of appellant's claim for guaranteed minimum use. The record contains the testimony of four witnesses on this subject.

Mr. Ross Scott was chief pilot, vice president, and general manager for appellant. He testified substantially that after the crash, he was contacted by the Government; that he did not remember with whom he talked about a replacement helicopter, but that he had to defer to Al (Al Gay, president of appellant, also known as A. E. Gay) who was trying to buy one, or get one somewhere (Tr. 78). When asked if he were able to get another helicopter, he replied: "To my knowledge,

there is none available from Bell, and we probably could have leased one from somebody, but we probably would have taken a real cleaning on that deal" (Tr. 79). The following colloquy then took place under cross-examination:

Q. Do you recall telling anyone at the government that one wasn't available or one wasn't available at some sort of a price that

A. I think I

Q. . . . you could afford?

A. I think I told somebody that my - my chopper that I'd had that I could get them was up at Deadhorse. You see, I only had two birds at the time.

Q. Uh-huh. Both 206-Bs?

A. Uh-huh. (Yes)

Q. Well, did you say that the chopper was available or it was busy? I'm just trying to clarify that.

A. I think I said it was busy, and I - I don't really - Let me think about this. It seems to me the call that I got was from Denver. I don't recall.

(Tr. 79).

Mr. Al Gay, president of appellant, testified substantially, with regard to a replacement helicopter; that after he heard about the accident, he called the CO in Denver and had a conversation in which a replacement helicopter was discussed (Tr. 114); that at a meeting on June 21, 1979, at which he, Mr. Scott, and a representative of NOAA were present (Tr. 117-19), he was asked, "can we give them another helicopter, and I answered the question with a question is when are we going to get paid for it; you know, we need some money so we can start getting something going. And that was the end of the conversation" (Tr. 122). Mr. Gay also testified that no helicopter was available to buy and none were available to lease at that time (Tr. 123). Under direct examination, Mr. Gay then testified as follows:

Q. Okay, Was - were there any available to lease at that time?

A. Probably, but I didn't - I didn't pursue that too much, because most companies don't like to lease them, and then if you do lease it usually could cost you more money than you make. And you also may be leasing something that's going to cause a lot of problems. You, know, if it's not your own and if you don't do the maintenance, you don't want to get a dog somebody else has got.

Q. What was your third alternative?

A. Pull the one that was going to charter out of Deadhorse.

Q. Was it available?

A. Yes.

Q. You were prepared then to continue the contract you had with the Government?

A. Right.

(Tr. 124).

Later on, under cross-examination, Mr. Gay testified as follows:

Q. I believe you testified that you had three options, to buy, lease or make one available that you had in Deadhorse, was that correct?

A. Right.

Q. Did the one at Deadhorse meet the specifications of this contract?

A. I - I doubt it. It would probably have to have some modification.

Q. Did you unequivocally offer that one to the government without your pilot as a replacement?

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A. I - as I recall, I said, I may have one available, but I would suggest that you use my pilot on it. And - and they said they would get back to me, and nobody ever got back to me.

(Tr. 138).

Appellant also adduced testimony from Robert Gay, brother of Al Gay. Robert Gay, at the time of the hearing, was the owner of a company called Airport and Aircraft Services which had contracted with appellant to provide sales management services, to investigate the accident, and assist in the cleanup and recovery of the helicopter (Tr. 146-48). He testified in general that he participated in the effort to locate additional helicopters or replacement helicopters after the accident and on and after July 15, 1979 (Tr. 172); that they were available but for not just a couple of weeks (Tr. 173); that he contacted several companies, but none would lease for the time wanted--its impossible to get one for 2 weeks or 3 weeks pretty near--particularly in the middle of the season when they are already committed (Tr. 181).

Mr. George Lapiene, Jr., employed by NOAA as the Logistics Manager for the Outer Continental Shelf Environmental Assessment Program, was the COTR for the subject contract. His duties included maintaining a liaison with the contractor and developing and scheduling operations under the contract. In the course of performing his duties he had occasion to contact appellant on different matters and his primary contact with appellant was Mr. Ross Scott (Tr. 189-93). He testified that on June 18, 1979, he had a telephone conversation with Mr. Scott, the substance of which was: That Mr. Scott could not provide another replacement aircraft because he did not have one; that the possibility of leasing one and subleasing to NOAA was discussed, but Mr. Scott told him there was no money in it; and then several other companies were contacted and the contracting office initiated a contract with another company (Tr. 194-95). Under cross-examination, Mr. Lapiene explained: That on June 22, 1979, he contacted three companies who had aircraft available and that ultimately Trans-Alaska was awarded a contract; that he did not have a face-to-face meeting with Mr. Scott and Mr. Al Gay on June 21, 1979; that the first time he ever saw those men was at the hearing; and Mr. Robert La Bonty was the one from NOAA who attended that meeting (Tr. 197-99).

[2] On the basis of the foregoing testimony, we find that appellant was either unable or unwilling to provide a replacement helicopter to NOAA after the destruction of N734. We conclude that this constituted nonperformance on the part of appellant of its contractual obligation to furnish a helicopter for the full term of the second lease period under the contract. We also find, contrary to its assertion, that appellant did not tender a replacement aircraft after the loss of the original furnished under the contract. It is clear that NOAA stood ready and willing to honor the minimum guaranteed use provision of

the contract had appellant completed performance of its part of the bargain. The contract did not call for furnishing a specific aircraft, but only a helicopter which met certain specifications. We hold, therefore, that appellant's nonperformance relieved the Government from payment for any contractually guaranteed minimum use of the aircraft.

The pertinent legal principle applicable to the facts of this claim is succinctly stated at pages 302 and 303 in section 1175, Volume 5A, *Corbin on Contracts*, as follows:

The plaintiff's material breach or his prospective inability operate to discharge the other party from his reciprocal duty to the plaintiff. The duty of the defendant in such cases is a dependent and conditioned duty, substantial performance by the plaintiff and his continuing prospective ability to render substantial performance in the future being constructive conditions upon which the defendant's duty depends. That the defendant's duty is discharged is shown by the fact that in such cases *the law affords no remedy for non-performance*; damages will not be awarded and specific performance will not be decreed. [Italics supplied.]

Accordingly, appellant's claim 1, for payment of the guaranteed minimum use of its helicopter, must be denied.

Claim 3 for Loss of Profits

Appellant contends that NOAA is liable for profits that appellant's helicopter would have earned during the period July 15 through September 30, 1979, "had NOAA operated the helicopter in a nonnegligent manner and returned it on July 15, 1979, as called for in the contract" (AP Brief at 7). By its complaint, paragraph IV, appellant alleges: "Pursuant to the express and implied terms of the contract, NOAA was to operate the helicopter in a safe and reasonable manner, using procedures and flight operations generally accepted throughout the aviation industry, so as to avoid damage to Gay Airway's helicopter." In paragraph VII of the complaint, appellant alleges as follows: "NOAA's failure to operate Gay Airway's helicopter in accordance with the express and implied terms of the contract as described in Paragraph IV amounted to a breach of NOAA's contractual duties owed to Gay Airways." In the prayer for relief, appellant claimed \$52,380 in lost profits from loss of use of the helicopter until the end of September 1979. However, this claim was reduced to \$38,419.52 (AP Brief at 7; AX-4).

For its defense, among other things, the Government contends: (1) that the Board has no jurisdiction over that part of appellant's claim which sounds in tort; (2) that NOAA was not negligent in its operation of appellant's helicopter; and, (3) that the loss of N734, whatever the cause, was not a breach of the contract by the Government.

Appellant has never expressly stated, in this proceeding, that its claim for loss of profits was based on a tort theory. However, its allegations charging Lt. Harrigan with negligent acts and its proffers of testimony throughout the hearing attempting to show that

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Lt. Harrigan's operation of the helicopter in a negligent manner was the cause of the fuel exhaustion certainly sound in tort. And further, loss of use and lost profits are traditionally claimed in tort actions as items of consequential damage. In this case, the Government denied that its pilot was negligent and adduced evidence to the effect that his conduct in piloting the aircraft was reasonable and his performance competent and professional, but argues that the Board has no jurisdiction over that part of appellant's claim which sounds in tort.

We agree that we have no jurisdiction to determine tort claims.² Therefore, since negligence is generally considered an essential element of proof for a claim founded in tort, we deem it unnecessary to reach the issue of whether Lt. Harrigan was negligent, and make no finding of fact in that respect.³

That appellant might maintain an action in tort, but in the proper forum, in the event of loss or damage to the leased aircraft while in possession of the Government, was contemplated by the parties in paragraph g of the Loss or Damage to Leased Aircraft clause of the contract set forth above.

[3] We must now address appellant's claim for loss of profits insofar as it is based on a breach of contract theory. The claimed contract breach, without consideration of the negligence factor, just discussed, is apparently that the Government had a contractual obligation to return the helicopter at the end of the lease period in the same condition as received (reasonable wear and tear excepted). Undoubtedly, this would be true had the aircraft not been damaged or destroyed. But the parties spelled out the specific contractual obligation of the Government, in paragraphs a and c of the Loss or Damage to Leased Aircraft clause, in the event of loss or damage to the aircraft beyond repair. The obligation was that the Government would pay the contractor a sum equal to the fair market value of the aircraft at the time of such loss or damage. The parties stipulated that the Government paid appellant \$248,000 "for a fair market value and some termination expenses" (Tr. 3-4). We find, therefore, that the payment by the Government constituted performance of its contractual obligation and that there was no breach. The Loss or Damage to Leased Aircraft clause did not provide for loss of profits, and we construe that clause to operate as a limitation of the Government's contractual obligation to the payment of the fair market value when the aircraft is destroyed beyond repair. *See Irvin Pickett & Sons, Inc.,*

² As suggested by Government counsel (Govt. Brief at 89), the Board's jurisdiction arises from the Contract Disputes Act of 1978, 41 U.S.C. § 601. Sec. 8 of that Act, 41 U.S.C. § 607(d), provides that an agency board of contract appeals is authorized "to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims." But that court did not have and its successor, the United States Claims Court, does not have jurisdiction to render judgment upon any claim against the United States sounding in tort. 28 U.S.C. § 1491.

³ The Court of Claims did not, and we are of the opinion that the Court of Appeals for the Federal Circuit would not, look with favor upon the Board making findings of fact pertaining to a matter over which it had no jurisdiction, or for that matter, upon our making incidental and gratuitous findings not relevant to a dispute over which we had jurisdiction since they "would have no finality whatsoever." *See Cosmo Construction Co. v. United States*, 194 Ct. Cl. 559, at 578 (1971).

IBCA No. 203 (Sept. 23, 1960), 60-2 BCA par. 2747, in which this Board held that where the "Extra Work" clause of the contract listed cost items to be considered in determining the amount of equitable adjustment to be paid the contractor for change orders requiring extra work, the contractor was limited by the terms of the contract to an award of the cost items listed, and could not recover amounts in excess thereof. The holding in *Pickett* was cited with approval in *Samkal Mines, Inc.*, IBCA-582-8-66 (Dec. 12, 1966), 66-2 BCA par. 6010; *Ball State University*, ASBCA No. 16344 (Dec. 27, 1971), 72-1 BCA par. 9246; and in *Perry & Wallis, Inc.*, IBCA-167-1-67 (July 16, 1968), 68-2 BCA par. 7116.

In addition, we believe that the rule applied to deny appellant's claim 1 is also applicable to appellant's claim 3 for loss of profits. That is: That nonperformance by one party discharges the other party to a contract from his reciprocal duty to the nonperforming party and the nonperforming party cannot expect from the law an award or other legal remedy for his nonperformance. Furthermore, as pointed out by Government counsel (Govt. Brief at 20), appellant failed to mitigate its damages for lost profits by not subleasing a replacement helicopter for N734 which, according to the testimony of Robert Gay (Tr. 173), was available from Don Ward of Trans-Alaska or ERA Helicopters, not for a short period of 2 weeks, but on the basis of a 90-day lease. Since appellant's claim for loss or profits was calculated on the basis of the period from July 15, 1979, to September 30, 1979 (AX-4), it is apparent that at least some of the claimed lost profits could have been reduced had appellant discharged its mitigation responsibility. See *Willston on Contracts*, 3d ed. section 1353.⁴

We note that appellant, neither in its posthearing brief, nor elsewhere in the record, cited any legal authority whatsoever in support of its claim.

Accordingly, we hold that appellant has failed to sustain its burden of proof to establish entitlement to any of its claims involved in this appeal.

DAVID DOANE
Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

RUSSELL C. LYNCH
Administrative Judge

⁴ See also, *Vec-Tor, Inc.*, ASBCA Nos. 25897, 26128 (Jan. 31, 1984), 41 FCR 415, for a recent discussion on the defense of the termination for convenience clause against lost profits.

March 22, 1984

S & M COAL CO. & JEWELL SMOKELESS COAL CO. v. OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT

79 IBLA 350

Decided March 22, 1984

Appeal from the decision of Administrative Law Judge Tom M. Allen affirming the issuance of Notice of Violation No. 81-I-73-15.

CH 2-31-R.

Reversed.

1. Evidence: Prima Facie Case--Hearings--Rules of Practice: Evidence--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

A prima facie case is made where sufficient evidence is presented to establish the essential facts. Prima facie evidence is that evidence that will justify a finding in favor of the one presenting the evidence. It is not necessary to present evidence that is compelling, and the determination must be made on a case-by-case basis. An important factor in making a determination regarding the amount of evidence required for a prima facie case is the availability of the evidence and the difficulty which may reasonably be encountered in obtaining the evidence.

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

One claiming an exemption from regulation under the Surface Mining Control and Reclamation Act of 1977 bears the burden of affirmatively demonstrating entitlement to the exemption.

3. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees

Under the initial regulatory program one who conducts a surface coal mining operation regulated by a state under state law is a permittee whether or not required to hold a permit under state law. The permittee is responsible for compliance with the performance standards applicable to the operation. If there is question as to who is responsible for compliance with those standards, it is proper for the inspector issuing the notice of violation to cite all of the parties who may be responsible. If a cited party can submit sufficient proof that it is not responsible for compliance, the violation will not be considered a violation by that party.

4. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees

Under the initial regulatory program, if there is no valid permit in existence with respect to a coal mining operation and the coal is being mined pursuant to an oral lease, both the party extracting the coal and the lessor can be considered to be permittees, as both have the ability to exercise control over the operations.

5. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally--Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

A coal mine which disturbs less than 2 acres of surface land is exempt from the application of the Surface Mining Control and Reclamation Act of 1977. However, an operation which is less than 2 acres in size can be under the purview of the Act if it is

one of a number of operations which are collectively disturbing in excess of 2 acres and which can logically be considered to be one mine. The party claiming that an operation is, in fact, one of a number of sites which make up a single mine disturbing in excess of 2 acres carries the burden of establishing that fact.

APPEARANCES: Dennis E. Jones, Esq., Lebanon, Virginia, for appellants; P. Jeffrey North, Esq., Field Attorney, Office of the Field Solicitor, U.S. Department of the Interior, Glenda R. Hudson, Esq., Branch of Litigation and Enforcement, Division of Surface Mining, Office of the Solicitor, U.S. Department of the Interior, and Walton D. Morris, Esq., Assistant Solicitor, Branch of Litigation and Enforcement, Division of Surface Mining, Office of the Solicitor, U.S. Department of the Interior, for the respondent.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

This is an appeal from a decision of Administrative Law Judge Tom M. Allen rendered on March 25, 1982, subsequent to a hearing held on February 5, 1982, pursuant to appellants' application for review of Notice of Violation (NOV) No. 81-I-73-15. In his decision, Judge Allen determined that: (1) The NOV had been properly issued; (2) the Office of Surface Mining Reclamation and Enforcement (OSM) had presented a prima facie case that Jewell Smokeless Coal Co. (Jewell) is the principal "permittee" and primarily responsible for the NOV; and (3) appellants did not overcome the case presented.

Confusion apparently caused by instructions given by Judge Allen resulted in his not timely receiving certain requested documents. These documents were to have been collected by appellants and given to OSM for delivery by OSM to Judge Allen. The record indicates that these documents were not delivered to Judge Allen until after his decision was issued. As a result, certain conclusions drawn by Judge Allen about the contents of the documents and the credibility of the testimony of appellants' witnesses concerning the documents appear to have been based upon the failure to receive the documents and may have been improperly based. Therefore, we will review the record de novo. The authority for such review is afforded by 5 U.S.C. § 557 (1976) and 43 CFR 4.1101.

On November 4, 1981, OSM conducted an inspection of Mine No. 4, Splashdam, an underground mine located in Buchanan County, Virginia. As a result of this inspection, OSM issued an NOV to S & M Coal Co. (S & M) and Jewell. The NOV charged S & M and Jewell with two violations of the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act), 30 U.S.C. §§ 1201-1328 (Supp. II 1978 and Supp. IV 1980), and the corresponding provisions of 30 CFR Part 717. The first cited violation was appellants' alleged failure to pass all surface drainage from the disturbed area through a sedimentation pond prior to leaving the disturbed area, in violation of 30 CFR 717.17(a). The second violation cited was appellants' alleged

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failure to display identifying signs at all points of access to the mine, in violation of 30 CFR 717.12(b). The signs required must show the name, business address, and telephone number of the permittee and identification numbers of current mining and reclamation permits or other authorizations to operate.

Following the March 25, 1982, decision of Judge Allen, an appeal was taken to the Board of Surface Mining and Reclamation Appeals. Both appellants and OSM filed briefs. On April 26, 1983, the functions of the Board of Surface Mining and Reclamation Appeals were transferred to this Board. 48 FR 22370 (May 18, 1983).

On appeal, appellants present three questions:

(1) Whether OSM made a prima facie case in proving that appellants, Jewell and S & M, were subject to the Surface Mining Act.

(2) Whether the Administrative Law Judge's factual determination in holding Jewell as the recognized permittee was supported by the evidence.

(3) Whether the Administrative Law Judge's factual determination that S & M and Jewell were economically integrated to meet the definition of a person within the Surface Mining Act is supported by the evidence.

We address each issue in turn.

Prima Facie Case

[1] A prima facie case is made where sufficient evidence is presented to establish the essential facts. *E.g., Rhonda Coal Co.*, 4 IBSMA 124, 89 I.D. 460 (1982). Prima facie evidence is that evidence that will justify a finding in favor of the one presenting the evidence. *Id.* It is not necessary to present evidence that is compelling, and the determination as to whether a prima facie case has been made must be made on a case-by-case basis. An important factor in making a determination regarding the amount of evidence required for a prima facie case is the availability of the evidence. *Id.*

[2] The inspector who issued the citation described the physical conditions he observed at the minesite that caused him to issue the NOV. On cross-examination, appellants did not take issue with the existence of these conditions or the fact that the conditions constituted violations of the cited standards. Thus, OSM clearly presented a prima facie case that there were, in fact, violations of the underground mining general performance standards set forth in 30 CFR Part 717. An examination of appellants' statement of reasons indicates that they do not deny the existence of these conditions.

Appellants' assertion that no prima facie case was presented is based only upon appellants' brief that OSM must make an initial showing that appellants come within the purview of the Surface Mining Act. This challenge is misguided. One claiming an exemption from regulation under the Surface Mining Act bears the burden of affirmatively demonstrating entitlement to that exemption. If an

appellant contests the jurisdiction of OSM, the appellant must plead and prove the basis for its claim as an affirmative defense. *Harry Smith Construction Co. v. OSM*, 78 IBLA 27 (1983). When, as in this case, OSM presents a prima facie case that a violation of the Surface Mining Act or the regulations promulgated pursuant thereto has occurred, OSM has established the requisite prima facie case.

Is there Sufficient Evidence to Support the Conclusion that Jewell is a Permittee Under the Act?

[3] Under the initial regulatory program one who conducts a surface coal mining operation regulated by a state under state law is a "permittee" whether or not required to hold a permit under state law. *Jewell Smokeless Coal Corp.*, 4 IBSMA 211, 217, 89 I.D. 624, 627 (1982). The "permittee" is responsible for compliance with the performance standards applicable to the operation. If there is a question as to who is responsible for compliance with the standards, it is proper for the inspector issuing the NOV to cite all of the parties who may be responsible. If a party cited can submit sufficient proof that it is not responsible for compliance, the violation will not be considered as a violation by that party. It is unreasonable to expect the inspector to ascertain the identity of the responsible party with the degree of certainty necessary to name only those responsible at the time of issuance of the NOV. Therefore, if a party who could be designated as an operator is cited, such citation is proper.¹

Three undisputed facts are important to our determination regarding the question of Jewell's responsibility for the operations at Mine No. 4, Splashdam. These undisputed facts are: (1) The coal being mined was owned by Jewell; (2) the coal was being mined by S & M pursuant to an oral lease; and (3) there was no currently valid permit with respect to the operation at the time of the inspection.²

Jewell contends that it was not the permittee or operator of the mine. In doing so, it relies in part on the fact that the coal was being extracted by S & M. The NOV cited both Jewell and S & M for failure to post necessary signs disclosing the name of the permittee. Therefore, there is no question that neither S & M nor Jewell openly declared that it alone was to be considered to be the permittee.

The OSM exhibits submitted at the time of the hearing included copies of an application for a permit and a permit to operate Mine No. 4, Splashdam. The named permittee was Jewell. While the record also discloses that the permit was released because of the limited area of land disturbed, there is no evidence that the permit was not issued to the proper party. No subsequent application was filed with the

¹ The issuance of a permit raises the presumption that the party obtaining the permit is conducting the coal mining operation and thus is the party responsible for compliance with the standards. See *Wilson Farms Coal Co.*, 2 IBSMA 118, 87 I.D. 245 (1980). In this case there was no permit, and the parties can be found to be jointly and severally liable for compliance with any applicable performance standards unless and until it can be demonstrated that one party is solely responsible for such compliance.

² For the purpose of our analysis of Jewell's involvement in the mining operation we disregard, temporarily, the ultimate question of whether the operation is subject to OSM's regulatory authority.

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Commonwealth of Virginia by any other party. S & M was on the property and removing coal. The evidence is sufficient to warrant naming both Jewell and S & M in the NOV. As named parties they can be considered jointly and severally liable for compliance with applicable performance standards, unless evidence is tendered demonstrating that one of the parties is solely responsible for such compliance.

Appellants presented testimony that the operation was conducted by S & M pursuant to an oral lease. Further testimony was given that S & M sold coal to the buyer offering the best price, and that coal had been sold S & M to parties other than Jewell. On the other hand, there is evidence that Jewell's employees took an active part in the planning and engineering functions in support of the mining operations by furnishing engineering and surveying support to S & M. Employees of Jewell testified that the company did not exercise any control over S & M other than requiring an accounting of the coal removed for the purpose of verifying the royalty payments.

It is our opinion that, while the amount of control actually exercised is indicative of the relationship between the owner of the coal and the company or individual extracting the coal, the determination regarding exercise of control should not solely be base on past exercise of control. It is more important to determine the extend that a party can exercise control.

Control can be passive as well as active. If a party can commence exercising control over an operation without notice or a negotiated change in the contractual relationship between the parties, the ability to exercise control is tantamount to the actual exercise. Under these circumstances, the operator is fully aware that, if the owner desires to change the mining or sales practices, the operator must comply. When this happens, control is exercised simply by reason of the fact that the operator will conduct his operations in anticipation of the desires of the owner. Therefore, it is our opinion that, when a coal mining operation is conducted pursuant to an oral lease, the parties have chosen to exercise joint control over the operation. The lessee who is actually removing the coal from the ground exercises control over the operations on a day-to-day basis. The lessor maintains the right to exercise control over the operations by virtue of the ability to terminate the lease without cause if the lessor, for any reason, no longer desires to have the lessee do the actual mining of the coal. For example, appellants have referred to the sale of coal to third parties as evidence of S & M's independent status. However, if Jewell determined it to be in Jewell's best interest that it receive all of the coal, it could force S & M to deliver coal to the Jewell tipple by giving notice that, if S & M did not, the lease would be terminated.

[4] Since either party could be considered to be capable of the exercise of control over the operations, both parties are to be

considered "permittees" under the Surface Mining Act, assuming that the mine operation is subject to regulation. Therefore, it is proper to determine that they are jointly and severally liable for compliance with any applicable performance standards.

Jurisdiction of the Office of Surface Mining

The burden of establishing a prima facie case regarding jurisdiction has been discussed previously. Appellants contend that the facts as presented do not support a determination that OSM has jurisdiction. There is no question that appellants sought to have the NOV dismissed because the operation had disturbed less than 2 acres of surface land, and thus properly raised this issue below.

The inspector stated that it was his belief that the total acreage disturbed was about 1.1 acres (Tr. 20). The permit application submitted states that the total acreage disturbed was 1.9 acres (OSM Exh. 2; Tr. 8). The inspector stated that during a conversation with an employee of Jewell he was told that the disturbed area was surveyed and found to be 1.1 acres (Tr. 8). The only documentary evidence introduced showing the ownership, use, maintenance, length, or acreage of the haul road leading to the minesite was the Jewell permit, which was introduced by OSM. The permit shows the road to contain 0.36 acre. The witness for S & M testified that he did not know who owned the road and that he had hauled and placed gravel on the road for the county (Tr. 42-48). Testimony indicates that the surface of the property in question was owned by a party other than S & M or Jewell (Tr. 55). Appellants raised the issue of the acreage exemption and based their case on documentary evidence presented by OSM and the testimony of its inspector that no more than 1.9 acres had been disturbed.

OSM's rebuttal case was based on the integration of operations owned or controlled by Jewell. However, the evidence with respect to operations in the immediate vicinity of Mine No. 4, Splashdam, indicates that these mines are not integrated with Mine No. 4, Splashdam (Tr. 17-19). Nor was any evidence presented that would give this Board any idea of the distance from the Mine No. 4, Splashdam, operation to the nearest operation over which Jewell has or can exercise control, or of the affected area above the underground mine workings.

[5] If the issue of exemption from the Surface Mining Act is raised by a permittee or operator and the evidence presented shows that the operation has disturbed less than 2 acres, OSM can rebut this showing by demonstrating, *inter alia*, that the operation is one of a number of integrated operations collectively disturbing more than 2 acres. *Cf. Harry Smith Construction Co. v. OSM, supra* at 30. The evidence must demonstrate that there is some physical relationship between the operations or that the management and actual mining operation is so

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interrelated that it can be logically concluded that the person has treated the operation as one. 30 CFR 700.11(b).³

In this case, OSM has presented no evidence which would cause this Board to conclude that the S & M operation was physically related to any of Jewell's other operations. The preponderance of the evidence is on the side of a determination that the operation was segregated from other Jewell operations by distance and by separation of operating functions. We conclude that the operation was, in fact, a separate mine.

Based upon the evidence presented, we find that at the time of issuance of the citation, Mine No. 4, Splashdam, was exempt from the application of the Surface Mining Act by reason of the fact that the operation had disturbed less than 2 acres of the surface land.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 (as revised at 49 FR 7564 (Mar. 1, 1984)), the decision of Administrative Law Judge Allen is reversed and Notice of Violation No. 81-I-73-15 is vacated.

R. W. MULLEN
Administrative Judge

WE CONCUR:

WILL A. IRWIN
Administrative Judge

JAMES L. BURSKI
Administrative Judge

UTAH WILDERNESS ASSOCIATION

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Appeal from decision of the Moab, Utah, District Office, Bureau of Land Management, dismissing protest against issuance of a right-of-

³ The language of 30 CFR 700.11(b) (1982) at the time that the NOV was issued stated:

"(b) The extraction of coal for commercial purposes where the surface coal mining and reclamation operation affects two acres or less, but not any such operation conducted by a person who affects or intends to affect more than two acres at physically related sites, or any such operation conducted by a person who affects or intends to affect more than two acres at physically unrelated sites within one year * * *"

However, the provision "any such operation conducted by a person who affects or intends to affect more than two acres at physically unrelated sites within one year," had been suspended. 44 FR 67942 (Nov. 27, 1979). The suspended language was revised when 30 CFR 700.11(b) was amended in 1982. See 30 CFR 700.11(b)(2), 47 FR 33432 (Aug. 2, 1982).

In promulgating regulations pertaining to the application of the exemption for disturbance of less than 2 acres, OSM has been concerned that the limited exemption provided by Congress not be abused by operators seeking to evade the permitting and environmental performance standards of the Surface Mining Act. OSM's primary concern is directed to situations where an operator tries to claim the exemption by dividing what is essentially one mine into numerous sites of 2 acres or less, 47 FR 33426 (Aug. 2, 1982), or where a group of small operators is hired by one person to mine a particular site with each such small operator mining less than 2 acres, 47 FR 50 (Jan. 4, 1982).

way grant to Shell Oil Co., U-50162, through the Road Canyon Wilderness Study Area.

Affirmed as modified.

1. Administrative Authority: Generally--Administrative Procedure: Administrative Review--Appeals--Federal Employees and Officers: Generally--Federal Employees and Officers: Authority to Bind Government--Rules of Practice: Appeals: Generally--Secretary of the Interior

A decision by an officer of the BLM which does not fall within any of the enumerated exceptions in 43 CFR 4.410 is subject to appeal to the Board of Land Appeals and a BLM officer is without authority to state otherwise.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally--Wilderness Act

An appellant seeking reversal of a decision denying a protest against issuance of a right-of-way across land in a wilderness study area to state owned land must show that the decision was premised either on a clear error of law or a demonstrable error of fact.

Where state land is encircled by Federal land within a wilderness study area, the state's lessee has a right of access across Federal land pursuant to 16 U.S.C. § 3210(b) (Supp. V 1981) adequate to secure the reasonable use and enjoyment of the leasehold. Because the BLM may not deny such access by requiring the lessee to use helicopters, BLM need not examine the feasibility of helicopter access in its consideration of a right-of-way application.

3. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

A determination that a proposed action will not have a significant impact on the environment will be affirmed on appeal where the record establishes environmental problems have been considered, relevant areas of environmental concern have been identified, and the determination is reasonable.

APPEARANCES: Gary MacFarlane, staff member, Utah Wilderness Association, for appellant; David K. Grayson, Esq., Assistant Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

Utah Wilderness Association appeals from the decision of the Moab, Utah, District Office, Bureau of Land Management (BLM), dismissing appellant's protest against the issuance of a road right-of-way to Shell Oil Co. (U-50162) across land in the Road Canyon Wilderness Study Area (WSA) to land leased by Shell from the State of Utah. Access to the state lands is possible only through the Federal lands included in the WSA. Appellant contends the Shell project, involving the drilling of an oil exploration well, will impair the wilderness characteristics of the WSA, that BLM did not adequately evaluate alternatives to the

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proposed action, and that an environmental impact statement must be prepared.

[1] At the outset, we must correct the District Manager's unauthorized statement that his denial of appellant's protest was not subject to appeal. This Board, not the District Manager, is the arbiter of its jurisdiction, pursuant to provision of 43 CFR 4.410. The Moab District Manager is bound by law to conduct adjudications in accordance with this regulation. Since his decision does not fall within any of the exceptions enumerated in 43 CFR 4.410, it is subject to appeal and the District Manager is without authority to state otherwise. Nevertheless, we will discuss the reasons given by the District Manager in his decision for denying its appealability:

The decision to allow access is not a discretionary action on the part of the Department because the discretion has been removed by the Federal Court in the Cotter decision. *Utah v. Andrus*, 486 F. Supp. 995 (D. Utah 1979). Further, the Board is an administrative body and cannot supersede or overrule a Federal Court decision.

(Decision dated Dec. 23, 1982, at 3).

The *Cotter* decision (*Utah v. Andrus, supra*), did not order the District Manager to issue the present right-of-way to Shell, nor does it appear Shell was a party to that case. The court in *Utah v. Andrus, supra*, held that where state land is encircled by Federal land within a WSA, the activity of the state's lessee may be regulated so as to prevent wilderness impairment, but such regulation cannot be so restrictive as to constitute a taking. The decision does not require the Department to issue a right-of-way for a road across a WSA unless the applicant has shown that no feasible alternative exists. Under 43 CFR 4.410, a BLM determination that no feasible alternative exists is subject to review by this Board. Nothing in *Utah v. Andrus, supra*, suggests otherwise.

The fact that an action may be described as "nondiscretionary" provides no basis for denying a right of appeal to this Board. For example, the owner of a valid mining claim is entitled to a patent upon proper application, and the Department has no authority to deny it. See *Cameron v. United States*, 252 U.S. 450, 454 (1920); *Roberts v. United States*, 176 U.S. 221, 231 (1900); *United States v. Kosanke Sand Corp.*, 12 IBLA 282, 290-91, 80 I.D. 538, 542 (1973); *United States v. O'Leary*, 63 I.D. 341 (1956). Indeed, issuance of a mineral patent is arguably more "nondiscretionary" than the issuance of this right-of-way to Shell, because the Department has authority to impose terms and conditions to mitigate the adverse environmental effects of a right-of-way. See *Utah v. Andrus, supra*. The Department has no authority, however, to subject a mining claim patent to such conditions. See *United States v. Pittsburgh Pacific Co.*, 30 IBLA 388, 84 I.D. 282 (1977), *aff'd*, *South Dakota v. Andrus*, 462 F. Supp. 905 (D.S.D. 1978), *aff'd*, 614 F.2d 1190 (8th Cir.), *cert. denied*, 449 U.S. 822 (1980). If the Moab District Manager were correct in his view that there can be no appeal

from a decision involving such a "nondiscretionary" matter, BLM would be unable to appeal a decision by an Administrative Law Judge directing the issuance of a patent for a mining claim. However, just as this Board has authority to review a determination of the validity of a mining claim for which a patent application has been filed, the Board has the authority to review the Moab District Manager's decision in this case. The plenary power of this Board to review such "nondiscretionary" matters has been judicially recognized. *Ideal Basic Industries Corp. v. Morton*, 542 F.2d 1364, 1367-68 (9th Cir. 1976).

Although the Board cannot supersede or overrule a court's decision, a single decision by a district court does not always constitute a precedent the Department considers itself obliged to follow. See generally 21 C.J.S *Courts* § 186(f) (1940). In *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 383 (D.C. Cir. 1983), the court acknowledged that an agency "is not required to conform its rulings to every decision by a court of appeals." The concurring opinions expressly agreed with this statement. *Id.* at 384-85. Thus, the fact that the Department does not appeal an adverse district court decision does not necessarily mean that the Department has acquiesced in the court's ruling as precedent, although that decision does become the law of the specific case and the Department may be collaterally estopped from litigating the issue in other cases involving the same party. See *United States v. Stauffer Chemical Co.*, _____ U.S. _____, 104 S. Ct. 575 (1984). For example, in *Gretchen Capital, Ltd.*, 37 IBLA 392 (1978), the Board expressly declined to follow as precedent one unappealed district court ruling. Moreover, for reasons explained below, the *Cotter* decision is not the principal authority governing disposition of this appeal.

[2] An appellant seeking reversal of a decision involving lands in a WSA must show the decision was premised either on a clear error of law or a demonstrable error of fact. *Southwest Resource Council, Inc.*, 73 IBLA 39 (1983); see *John W. Black*, 63 IBLA 165 (1982); *Union Oil Co. (On Reconsideration)*, 58 IBLA 166 (1981). Appellant contends that BLM failed to give adequate consideration to helicopter access as an alternative to issuance of a right-of-way. The Board agrees that no consideration of helicopter access is necessary because the State of Utah and its lessee have a right of land access to the inholding. This Board, however, is not unanimous concerning the legal authority upon which this right is based.¹

¹ The concurring opinion accepts the *Cotter* decision as the authority which governs the disposition of this appeal and construes it as recognizing a right of land access to state inholdings, regardless of the feasibility of helicopter access, although requiring consideration of feasibility of helicopter access in determining the access rights of other inholders. The majority do not construe *Cotter* as precluding consideration of the feasibility of helicopter access for any inholder and find that BLM was required to consider that question if *Cotter* governed this appeal. However, we find that BLM's analysis provided a sufficient basis for denial of appellant's protest.

Because the *Cotter* decision compared such access rights to easements by way of necessity, *id.* at 1009, one may reasonably contend that BLM would not be required to allow land access if helicopters would provide access sufficient to negate the necessity for land access. Although we are aware of no reported judicial decisions which directly hold that the availability of aerial access is sufficient to negate the necessity giving rise to the easement, this Board once noted that even if an inholder could assert the doctrine of easement by way of necessity, the feasibility of the inholder's use of helicopters prevented such an easement from arising. *Sun Studs, Inc.*, 27 IBLA 278, 293-94, 83 I.D.

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In 1980, Congress enacted the following provision as section 1323(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3210(b) (Supp. V 1981):

(b) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Interior may prescribe, the *Secretary shall provide such access to nonfederally owned land surrounded by public lands* managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems *adequate to secure to the owner the reasonable use and enjoyment thereof*; *Provided*, That such owner comply with rules and regulations applicable to access across public lands. [Italics added.]

Subsection (a) of this same statute makes similar provision for land "within the boundaries of the National Forest System." In view of the definition of "public lands" as "land situated in Alaska, which * * * are Federal lands," 16 U.S.C. § 3102(3) (Supp. V 1981), it would initially appear that this provision has no applicability to land in Utah. On the other hand, the subsection itself defines the term "public lands" as land "managed by the Secretary under the Federal Land Policy and Management Act of 1976," and this definition, which would give the term nationwide scope, arguably may be given priority over the definition appearing at 16 U.S.C. § 3102(3) (Supp. V 1981). This ambiguity at least is sufficient to warrant consideration of legislative history in order to ascertain legislative intent as to the scope of the provision.

In *Montana Wilderness Association v. U.S. Forest Service*, 655 F.2d 951 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), the court made an exhaustive analysis of the legislative history of section 1323 and concluded it had nationwide applicability with respect to land in the national forest system. The court, however, began its analysis by presuming that the provision was limited to Alaska:

As the parties agreed at oral argument, however, § 1323(b) is *in pari materia* with § 1323(a). The two subsections are placed together in the same section, and use not only a parallel structure but many of the same words and phrases. The natural interpretation is that they were meant to have the same effect, one on lands controlled by the Secretary of Agriculture, the other on lands controlled by the Secretary of the Interior.

518, 525 (1976). In *Tourea v. Trails End Improvement Ass'n*, 130 Ariz. 108, 634 P.2d 396 (Ariz. App. 1981), the court affirmed a trial court's determination that the private developers of a communications site could not construct the road without violating the provisions of a county ordinance, and the fact that they were exercising the power of eminent domain did not excuse them from having to comply with the ordinance which denied them land access to the site. The court also stated:

"We note that appellants are not precluded from using the peak as a radio and television facility. The trial court found that it could be erected by the use of helicopters. The record also reflects that helicopters have been used for building such facilities in other cases. In view of our disposition, we need not decide the reasonableness of this finding, nor the trial court's conclusion that any road built by the appellants would be open for public use."

Id. at 397, n.2.

Were we to apply the *Cotter* decision, we would treat the feasibility of helicopter access as an issue of fact in each case. In light of the *Tourea* and *Sun Studs* decisions, however, we would not find that helicopters would provide reasonable access unless evidence established that helicopters had been successfully used for the purpose proposed by the inholder. Under the *Cotter* decision, BLM's responsibility to consider helicopter access ended when it found helicopters had not been used for oil drilling in the region and would have to be imported. Appellant has provided no evidence that helicopter access would be feasible. Indeed, Congressional recognition of the limitations that could be imposed on inholders' access rights under the *Cotter* decision prompted the enactment of legislation that supersedes *Cotter* as authority governing the disposition of this appeal. Such legislative concern points to the correctness of our narrower interpretation of the *Cotter* decision.

Since we assume that § 1323(b), by definition of public lands in § 102(3), applies only to Alaskan land, we face a presumption that § 1323(a) was meant to apply to Alaska as well.

That interpretation is supported by a review of the entire Act which discloses no other provision having nation-wide application. We therefore conclude that the language of the Act provides tentative support for the view that § 1323(a) applies only to national forests in Alaska. Bearing in mind that "[a]bsent a clearly expressed legislative intent to the contrary, [the statutory] language must ordinarily be regarded as conclusive," *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980), we turn to the legislative history. [Footnote omitted.]

Id. at 954-55. The court described the legislative history as "surprisingly sparse," *id.* at 955, and most of it is summarized or quoted verbatim in the margin of the court's opinion. After reviewing the history, the court concluded that it "gives only slight support at best to the appellees' interpretation that § 1323 applies nation-wide." *Id.* at 957. Then the court considered one additional item:

The appellees, however, have uncovered subsequent legislative history that, given the closeness of the issue, is decisive. Three weeks after Congress passed the Alaska Lands Act, a House-Senate Conference Committee considering the Colorado Wilderness Act interpreted § 1323 of the Alaska Lands Act as applying nationwide:

"Section 7 of the Senate amendment contains a provision pertaining to access to non-Federally owned lands within national forest wilderness areas in Colorado. The House bill has no such provision.

"The conferees agreed to delete the section because similar language has already passed Congress in Section 1323 of the Alaska National Interest Lands Conservation Act.

"H.R.Rep.No.1521, 96th Cong., 2d Sess., 126 Cong.Rec. H11687 (daily ed. Dec. 3, 1980) (italics supplied)."

This action was explained to both Houses during discussion of the Conference Report. See 126 Cong.Rec. S15571 (daily ed. Dec. 4, 1980) (remarks of Sen. Hart); *Id.* at S15573 (remarks of Sen. Armstrong); *Id.* at H11705 (daily ed. Dec. 3, 1980) (remarks of Rep. Johnson). Both houses then passed the Colorado Wilderness bill as it was reported by the Conference Committee.

Although a subsequent conference report is not entitled to the great weight given subsequent legislation, *Consumer Product Safety Commission v. GTE Sylvania*, 477 U.S. 102, 118 n.13, 100 S.Ct. 2051, 2061 n.13, 64 L.Ed.2d 766 (1980), it is still entitled to significant weight, *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 100 S.Ct. 800, 814, 63 L.Ed.2d 36 (1980), particularly where it is clear that the conferees had carefully considered the issue. See *Consumer Product Safety Commission*, *supra*, at 120, 100 S.Ct. at 2062; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944). The conferees, including Representatives Udall and Sieberling and Senator Melcher, had an intimate knowledge of the Alaska Lands Act.¹¹ Moreover, the Conference Committee's interpretation of § 1323 was the basis for their decision to leave out an access provision passed by one house. In these circumstances, the Conference Committee's interpretation is very persuasive. We conclude that it tips the balance decidedly in favor of the broader interpretation of § 1323. * * * We therefore hold that Burlington Northern has an assured right of access to its land pursuant to the nation-wide grant of access in § 1323. [Footnote 12 omitted.]

¹¹ The participation of Representative Udall is particularly noteworthy since he was the one congressman to proclaim in the legislative history of the Alaska Lands Act that § 1323 applied only to Alaska. [126 Cong. Rec. H 10549 (daily ed. Nov. 12, 1980).]

The concurring opinion accepts the court's holding that subsection (a) applies nationwide but rejects a similar holding as to subsection (b)

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because the term "public lands" is considered to be limited to Alaska by the definition appearing at 16 U.S.C. § 3102(3) (Supp. V 1981). Indeed, such a definition is controlling except where obvious incongruities in the statute are created, or where one of the major purposes of the legislation would be defeated or destroyed. See *Lawson v. Suwannee Fruit and Steamship Co.*, 336 U.S. 198, 201 (1949); 1A Sutherland, *Statutory Construction* § 27.02 (C. Sands 4th ed. 1972); 82 C.J.S. *Statutes* § 315 (1953). However, giving subsections (a) and (b) of section 1323 different scope is precisely the sort of incongruity that warrants close examination of the legislative history for clear evidence that such a result was in fact intended.

Another consideration militates against automatic application of the statutory definition. The fact that section 1323 inexplicably overlaps with more precisely drafted provisions for easements in other sections of ANILCA suggests that it may have been tacked onto ANILCA with little conscious attention as to how it would affect or be affected by other portions of that Act.² In such a circumstance, it is far more likely that Congress intended subsections (a) and (b) to have similar scope, and one should resist any other determination in the absence of clear evidence that Congress consciously chose otherwise. Courts are not unfamiliar with the difficulty in construing legislation that is assembled piecemeal. When confronted with such legislation, one court observed:

[R]ather than showing a conscious choice on the part of Congress, it seems more likely that the final product was a result of the two bills being tacked together without any thought being given to this small difference in their wording. Allowance must sometimes be made for human error and inadvertence in drafting legislation. *Citizens to Save Spencer County v. United States Environmental Protection Agency*, 600 F.2d [844, 871-72 (D.C. Cir. 1979)].

United States v. Stauffer Chemical Co., 684 F.2d 1174, 1186 (6th Cir. 1982), *aff'd on other grounds* _____ U.S. _____, 104 S. Ct. 575 (1984); *accord*, *Stauffer Chemical Co. v. EPA*, 647 F.2d 1075 (10th Cir. 1981);³ *see also*, *Cass v. United States*, 417 U.S. 72, 83 (1974).⁴

² The addition of section 1323 to ANILCA and its relationship to other access provisions is discussed in *Montana Wilderness Ass'n v. U.S. Forest Serv.*, *supra* at 954-55, nn.4-5.

³ The *Stauffer* cases concerned a statutory provision that inspection of stationary sources of air pollution could be conducted by an "authorized representative" of the administrator of the Environmental Protection Agency. Provisions of the same statute specified that other inspections could be conducted only by officers or employees of the agency, and the agency believed that because of the difference in wording, the term "authorized representative" could include employees of private contractors. The courts rejected the agency's argument, attributing the difference in wording to inadvertence. The Supreme Court affirmed the 6th Circuit's decision only on the basis of collateral estoppel, holding that EPA was bound by the result of its litigation against the same party which had culminated in the 10th Circuit Court's opinion.

⁴ In *Cass v. United States*, *supra*, a nearly unanimous Court (one justice dissented) held that a reservist must serve a minimum of 5 full years of continuous active duty before his involuntary release in order to qualify for readjustment of benefits. The court rejected the argument that a reservist who served more than 4-1/2 but less than 5 years could qualify, despite the fact that the subsection of the law establishing the 5-year eligibility requirement was expressly made subject to a provision by which more than 6 months of service would be counted as a whole year. On the basis of its examination of the legislative history, the court determined that this "rounding" provision applied only to determining the amount of pay and was inapplicable to the determination of eligibility.

Our review of the legislative history persuades us to reject the view that subsection (a) applies nationwide but subsection (b) is limited to Alaska. We find no basis for concluding that these parallel provisions in fact diverge. While the court in *Montana Wilderness Association* found that the legislative history of section 1323 itself (as distinguished from that of subsequent legislation) did not provide much help in resolving the issue of whether the section has nationwide scope or is limited to Alaska, we note that that legislative history clearly supports the conclusion that these two subsections have the same scope, whatever that scope might be. The Senate report makes it unarguably clear that inholders are to have the same rights of access without regard to whether their inholdings are surrounded by public land or national forest:

This section is designed to remove the uncertainties surrounding the status of the rights of the owners of non-Federal lands to gain access to such lands across Federal lands. It has been the Committee's understanding that such owners had the right of access to their lands subject to reasonable regulation by either, the Secretary of Agriculture in the case of national forests, or by the Secretary of the Interior in the case of public lands managed by the Bureau of Land Management under the Federal Land Policy and Management Act of 1976. However, a recent District Court decision in Utah (*Utah v. Andrus et al.*, C79-0037, October 1, 1979, D.C. Utah) has cast some doubt over the status of these rights. Furthermore, the Attorney General is currently reviewing the issue because of differing interpretations of the law by the Departments of Agriculture and the Interior.

The Agriculture Department believes that non-Federal land owners have the right of access to national forest lands subject to reasonable rules and regulations. They find nothing in the Organic Act of 1897 (16 U.S.C. 473-478, 479-482, 551) or the Wilderness Act which precludes such access. In fact, they interpret Section 5(a) of the Wilderness Act (16 U.S.C. 1131-1136) as mandating access to non-Federal inholdings within national forest wilderness.

The Interior Department on the other hand, interprets Section 5(c) of the Wilderness Act as expressly authorizing denial of access to such inholders in wilderness areas. Based on that interpretation, Interior then concludes that the provisions for wilderness review of public lands organized by BLM in section 603(c) of the Federal Land Policy and Management Act also authorized denial of access across public lands subject to wilderness review.

The Committee amendment is designed to resolve any lingering legal questions by making it clear that non-Federal landowners have a right of access [across] National Forest and public land, subject, of course, to reasonable rules and regulations.

S. Rep. No. 96-413, 96th Cong., 2d Sess. 310, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5254.

Moreover, the above-quoted portion of the report shows that the legislation should be construed as confirming existing rights of access rather than as creating new ones. It is quite plain that by enacting the provision, Congress intended to correct perceived errors in judicial and administrative decisions that "cast some doubt over the status of these rights" or "authorized denial of access across public lands subject to wilderness review." The Senate had no difficulty with the Agriculture Department's views which accord needed access rights to forest inholders. The decisions Congress targeted for correction involved

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public lands outside of Alaska, and specifically included the decision relied upon by the concurring opinion.⁵

Consequently, Shell has a right of access to the state land in section 36 by virtue of section 1323(b) of ANILCA. Because BLM may not deny Shell access by requiring use of helicopters, BLM was not required to examine the feasibility of helicopter access in its consideration of Shell's right-of-way application.

Appellant contends that BLM failed to consider "alternative access roads, the combination of helicopters and low-standard non-bladed 4 wheel drive route, or * * * the feasibility of using balloons as is done in logging operations in the Pacific-northwest." Appellant has failed to demonstrate that further consideration of these alternatives would require reversal of the decision. Any alternative involving a road would cause similar impairment of the WSA. Although not shown in the environmental analysis, the record on appeal shows BLM did consider various routes. BLM did not select the route proposed by Shell in its application, but required Shell to use a route which "would least impair the wilderness suitability of Road Canyon. It also avoids an archaeological site in the middle of the county road which would have been impacted if a route along the ridge or east side were selected" (Memorandum by Brian Wood, BLM Natural Resource Specialist, dated July 1, 1982).

Appellant correctly contends the proposed action would violate wilderness impairment criteria, as BLM acknowledged in its decision. However, in *Utah v. Andrus, supra* at 1009, the court expressly rejected the argument that violation of wilderness impairment criteria would be a valid basis for denying necessary access. Furthermore, Congress itself has made it clear that wilderness management criteria provide no basis for denying an inholder reasonable access across public land.

[3] This Board also rejects appellant's contention that an environmental impact statement is required. Generally, a determination that a proposed action will not have a significant impact on the environment will be affirmed on appeal where the record

⁵ Thus, one can agree with the concurring opinion's view of the scope of subsection (b) only if one accepts the proposition that this provision was ineffective to accomplish its primary purpose. Furthermore, this approach does nothing to "resolve any lingering questions about the status of access rights." On the contrary, it compounds those questions. Although the legislation was intended to confirm existing access rights so that the rights of forest inholders would not differ from those of public land inholders, the analysis proposed by the concurrence would retain this distinction with respect to inholders outside of Alaska. The concurrence also contends that application of the FLPMA definition of "public lands" raises more questions than it answers. It notes that:

"FLPMA only applies to lands managed by BLM. Thus, any lands managed by either the National Park Service or the Fish and Wildlife Service would not be included within the scope of section 1323(b). ANILCA, however, has no language in its definition of 'public lands' which would limit its applicability dependent upon which entity was the administering agency." *Infra* at 176. This overlooks the fact that section 1323(b) affects "public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976." Therefore, this particular subsection does not extend to land managed by any agency other than BLM.

Similarly, the objection is raised by the concurrence that the definition of "public lands" in ANILCA contains certain exceptions which would not pertain if the FLPMA definition were substituted. The significance of these exceptions diminishes, however, when one recognizes that Congress intended to confirm existing rights of access which it presumed had already arisen without regard to the exceptions stated in ANILCA's definition of public lands.

establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. *Southwest Resource Council, Inc., supra*. The decision on review meets those standards. Appellant has fallen short of its burden of establishing a demonstrable error of fact in the decision below.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

FRANKLIN D. ARNESS
Administrative Judge

I CONCUR:

GAIL M. FRAZIER
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

While I agree with the majority that the dismissal of the protest should be sustained, I reach this conclusion through an analysis substantially different from that presented in the lead opinion. The lead opinion concludes on the basis of the Ninth Circuit Court's opinion in *Montana Wilderness Ass'n v. U.S. Forest Service*, 655 F.2d 951 (1981), that Shell Oil Company's right of access is protected by section 1323(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3210(b) (Supp. V 1981). Proceeding from this assumption, the majority then concludes, based on an analysis of the legislative history of this provision, that it was intended to overrule the decision of the Utah District Court in the *Cotter* case (*Utah v. Andrus*, 486 F. Supp. 995 (1979)), to the extent that the Court held that provision of helicopter access might fulfill the Government's obligation to provide access to both State and private inholdings. I remain unconvinced that either the premise or the conclusion is correct.

First of all, it is clear that the Ninth Circuit did not *hold* in *Montana Wilderness Ass'n v. U.S. Forest Service, supra*, that section 1323(b) of ANILCA was nationwide in scope. Indeed, it expressly noted that "[s]ubsection (b), therefore, is arguably limited by its terms to Alaska, *though we do not find it necessary to settle that issue here.*" *Id.* at 954 (italics supplied). Thus, while the majority's holding on this point is assertedly premised on the court's analysis, it is clear that the court, itself, expressly chose not to rule on the question herein decided, and, in fact, intimated that the opposite conclusion might obtain.

The majority reaches its conclusion based on two separate points. First, it heavily relies on the statement of the court that the parties to the appeal were in agreement that section 1323(a) was to be read *in*

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pari materia with section 1323(b). Pointing out that the court ultimately concluded that section 1323(a) was, in fact, applicable on a nationwide basis, the majority then reasons that since the two provisions are to be construed *in pari materia*, section 1323(b) must likewise apply nationwide. The obvious problem with this approach is that the court which decided *Montana Wilderness* was well aware of its ultimate conclusion as to section 1323(a), yet it not only explicitly eschewed arriving at the conclusion of the lead opinion herein, it indicated that, in fact, the scope of section 1323(b) might well be limited solely to Alaska. The reason for its reluctance to extend the scope of section 1323(b) lay in the exact wording of the section. Thus, section 1323(b) provided:

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Interior may prescribe, the Secretary shall provide such access to non-federally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof. *Provided*, That such owner comply with rules and regulations applicable to access across public lands.

The key phrase in the court's analysis is the requirement that the Secretary provide access to non-Federally owned land surrounded by *public lands*. As the court noted, section 102(3) of ANILCA provided that as used in the Act "public lands" means "land situated in Alaska which, after the date of enactment of this Act, are Federal lands * * *"¹ One difference between section 1323(a) and section 1323(b) is that the former does *not* use the phrase "public lands" while the latter does. Thus, regardless of whether or not the two sections should be read *in pari materia*, it is still possible to apply section 1323(a) nationwide and limit section 1323(b) to Alaska.

The majority attempts to avoid this problem by focusing on the phrase immediately following "public lands," to wit, "managed by the Secretary under the Federal Land Policy and Management Act of 1976 [FLPMA]." Thus, the majority argues that despite section 102(3) of ANILCA, public lands as used in section 1323(b) is defined by reference to the public lands definition employed in section 103(e) of FLPMA, 43 U.S.C. § 1702(e) (1976), which defines "public lands" as

any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior *through the Bureau of Land Management*, without regard to how the United States acquired ownership, except-

- (1) lands located on the Outer Continental Shelf; and
- (2) lands held for the benefit of Indians, Aleuts, and Eskimos. [Italics supplied.]

¹ It is useful to point out that Congress expressly provided that the definitions found in section 102 would not apply to Titles IX and XIV of ANILCA, instead providing that the terms defined in section 102 would have the same meaning as in the Alaska Native Claims Settlement Act and the Alaska Statehood Act when employed in those two titles. If Congress had intended to apply the definition of "public lands" used in FLPMA in the context of section 1323(b) it could easily have made similar provision for that eventuality in this section.

Applying the FLPMA definition, however, raises more questions than it answers. Indeed, as I shall show, utilization of the FLPMA definition of "public lands" might actually serve to restrict the applicability of section 1323(b) insofar as Alaska is concerned, while at the same time expanding it with regard to the rest of the country.

First of all, FLPMA only applies to lands managed by BLM. Thus, any lands managed by either the National Park Service or the Fish and Wildlife Service would not be included within the scope of section 1323(b). ANILCA, however, has no language in its definition of "public lands" which would limit its applicability dependent upon which entity was the administering agency. The effect of applying the FLPMA definition of "public lands" rather than the ANILCA definition might be to actually constrict the applicability of this provision in Alaska.²

Second, the ANILCA definition of "public lands" itself had certain exceptions, excluding therefrom, *inter alia*, lands selected by the State which had been either tentatively approved or validly selected. No such exclusion exists in section 103(e) of FLPMA. Thus, use of the FLPMA definition might well make certain lands selected by the State subject to section 1323(b) which would not be subject under the ANILCA definition of "public lands."

There is no justification in either the language of section 1323(b) or in its legislative history for suddenly applying a different definition for "public lands" when used in that section than that applied elsewhere throughout the Act. Indeed, as the court noted, "The legislative history concerning § 1323 is surprisingly sparse" and such that does exist "gives only slight support at best to the appellee's interpretation that § 1323 applies nationwide." *Id.* at 955, 957. It is important to keep in mind that the evidence which led the court to its conclusion that section 1323(a) was to be applied nationwide involved a conference report on the Colorado Wilderness Act, which was passed 3 weeks after ANILCA. The court cited the relevant portion of the House Report:

Section 7 of the Senate amendment contains a provision pertaining to access to non-Federally owned lands within national forest wilderness areas in Colorado. The House bill has no such provision.

The conferees agreed to delete the section because similar language has already passed Congress in Section 1323 of the Alaska National Interest Lands Conservation Act. [Italics supplied by the court.]

Id. at 957 (citing H.R. Rep. No. 1521, 96th Cong., 2d Sess., 126 Cong. Rec. H11687 (daily ed. Dec. 3, 1980)).

It was on the basis of this subsequent legislative history that the court decided that section 1323(a) was to be applied nationwide. What is important to point out, however, is that this legislative history deals

² Admittedly, the applicability of section 1323(b) to national parks, even in Alaska, would be dependent upon an interpretation of the phrase "managed by the Secretary under [FLPMA]" since this might limit the scope of section 1323(b) only to BLM lands in Alaska. This, however, is a question more properly explored when it is directly presented by an appeal.

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only with national forest lands and does not really address the problem before the Board as to whether section 1323(b), which relates to public lands, is similarly nationwide in scope.

It may be that a court will one day determine that section 1323(b) does apply nationwide. I think, however, that this Board should be reluctant to so interpret the section as an initial matter, particularly where such an interpretation requires that we ignore the plain meaning of the language used.

The majority also suggests that the effect of this provision, assuming that it is nationwide in scope, is to overrule the decision of the Utah District Court in the *Cotter* case. Since it is my view that this provision should be limited in applicability to Alaska until such time as a court might decide to expand its scope, it necessarily follows that the *Cotter* decision has not been overruled insofar as "public lands" in the lower 48 states is concerned. Nevertheless, it is also my view that when the *Cotter* decision is correctly analyzed, it holds that, insofar as lands clearlisted to a State are concerned, provision of helicopter access does not meet the United States' obligation to provide access to state inholdings.

One of the problems which arises in analyzing the *Cotter* decision is that it involved two separate issues: (1) the authority of BLM to regulate or prohibit access to State school lands, and (2) the authority of BLM to regulate or prohibit access to mining claims located on Federal lands. The court developed two discrete lines of analysis. First of all, with reference to State lands, it noted that contrary to the general rules of interpretation relating to Government grants, school land grants were construed liberally in favor of the grantee. Relying on the nature of the compact between the States and the Federal Government, which included a waiver of all other claims to Federal domain, it held that:

The State must be allowed access to the state school trust lands so that those lands can be developed in a manner that will provide funds for the common schools. Further, because it was the intent of Congress to provide these lands to the state so that the state could use them to raise revenue, * * * the access rights of the state cannot be so restricted as to destroy the lands' economic value. That is, the state must be allowed access which is not so narrowly restrictive as to render the lands incapable of their *full economic development*. [Italics supplied; citation omitted.]

486 F. Supp. at 1009.

This must be contrasted with the rights of those who had mining claims on the Federal lands. While the court agreed that *Cotter* had a right of access to its claims on Federal lands, it held that such a right could be more strictly regulated than access to state lands. In the course of this discussion, however, the court at one point commingled consideration of state and Federal lands. Thus, it stated:

To further complicate the case, it is not clear that the entire proposed road is necessary for *Cotter* to gain access to section 36. [F.N. 22] This is important because different

criteria may be applied to judge the propriety of regulation of state, as opposed to federal, access rights. *It may be that requiring helicopter access to section 36 would be sufficiently expensive so as to render minerals on that section incapable of economic development. Therefore, requiring such access and denying land access would violate the intent of the school trust grant.* It may be, however, that requiring such access to federal claims would not be so expensive as to constitute a taking under 701(h). If the entire road is not necessary to gain access to section 36, then it could be that substantial parts of it could be prohibited while other parts could not. Unfortunately, on the record as it now stands, this matter is far from clear. [Footnote 22 quoted *infra*; Italics supplied.]

Id. at 1010-11.

There is no question that the portion of the decision underlined above lends arguable support to the assumption that consideration of helicopter access is relevant insofar as access to state lands is concerned. The problem is that two other sections of the court's decision contradict this conclusion. Thus, footnote 22 states:

Cotter has asserted that because of the section's terrain it cannot cut across the section. Rather, it must enter from two points: one on the north, the other on the south. * * * This is, however, a mere conclusory allegation. Without further information it is impossible to know whether it would be more expensive to cut through section 36 from north to south, prohibitively expensive, or physically impossible to do so. *Even if it would be physically impossible, there still remains the question of whether access to one portion of the section is sufficient to prevent an abrogation of Utah's access rights.*

It is also true that the parties stipulated that the proposed road was the only feasible route to the federal claims and section 36. *It is not clear from this stipulation, however, that the United States agreed that the entire road was necessary to gain access to section 36 alone.* [Italics supplied.]

Id. at 1010 n.22.

I think that the thrust of this footnote was that, the discussion in the text notwithstanding, the State had to be given some land access to its land in section 36. This conclusion is strengthened by the court's ultimate order in the case:

IT IS HEREBY ORDERED, ADJUDGED, DECREED AND DECLARED that the State of Utah, and Cotter Corporation as its lessee, have a right of access to state school section 36 * * *. That right is subject to reasonable regulation by the United States Department of the Interior to prevent impairment of wilderness characteristics, but without damaging the competitive economic development of it. *The United States may not, in carrying out such regulation, prohibit access.* But the United States may, within the limits of the state school land grants and the Due Process Clause of the Fifth Amendment, review and regulate the proposed nature and location of *access roads.* [Italics supplied.]

Id. at 1011.

This must be contrasted with the next section of the court's decree which dealt with access by Cotter to its mining claims on Federal lands. At the end of its judgment, the court stated: "But the United States may, within the limits of the Due Process Clause of the Fifth Amendment, prescribe the mode of access and the location of *access roads, if any.*" *Id.*

Reading the court's decision in its totality, I think the conclusion is inescapable that the discussion in the text relating to helicopter use was relevant not to imply that access to state lands could be limited to helicopter use, but that different standards of review were necessary in

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distinguishing between permissible regulation of access to state lands vis-a-vis mining claims located on Federal lands. Conceptually, it is even hard to see how BLM *provides* a right of access to state school sections by permitting helicopter use. Unlike mining claims located on Federal lands, where use of a helicopter would necessarily require use of Federal lands for landing and takeoff, the state could land helicopters on its own land without obtaining any permission from BLM. This may well constitute an alternate form of access, but it is not one granted by BLM.

Based on this analysis, the relative incompleteness of BLM's helicopter study is a matter of no moment. It is clear that section 36 is landlocked by Federal land. BLM has chosen a route designed to minimize the impairment that will occur. I believe that under the dictates of *Utah v. Andrus, supra*, BLM has no authority to refuse land access, regardless of whether or not helicopter access is feasible. Accordingly, I concur in the disposition of the instant appeal.

JAMES L. BURSKI
Administrative Judge

April 11, 1984

CONOCO, INC.

80 IBLA 161

Decided April 11, 1984

Appeal from decision of Wyoming State Office, Bureau of Land Management, denying request for consolidation of oil and gas leases W-30220 and W-80322.

Affirmed.

**1. Oil and Gas Leases: Extensions--Oil and Gas Leases: Termination--
Oil and Gas Leases: Unit and Cooperative Agreements**

The partial commitment of lands within an oil and gas lease to a unit agreement segregates the lands in the lease into separate leases embracing those lands committed to the unit and those lands not unitized. The lease committed to the unit continues in effect for as long as committed provided that production is obtained within the unit prior to expiration of the term of the lease. Upon commitment and segregation of the nonproducing portion of a producing oil and gas lease prior to expiration of its primary term or its extended term (other than by production), production on the nonunitized portion of the lease will not serve to extend the unitized portion.

2. Oil and Gas Leases: Generally

Departmental regulation 43 CFR 3105.6 provides that consolidation of leases may be approved if it is determined that there is sufficient justification. Where appellant has not shown that consolidation would be beneficial to the United States and has not offered any evidence to show that BLM abused its discretion in denying the consolidation, the denial of such request will be affirmed.

APPEARANCES: Ardith E. Rieke, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Conoco, Inc. (Conoco), appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated September 13, 1982, denying its request for consolidation of leases W-30220 and W-80322. BLM based its decision on the advice of the Minerals Management Service which objected to consolidation of the leases because Conoco had not shown that such consolidation would be advantageous to the United States.

Lease W-30220, containing 1,554.59 acres in Campbell County, Wyoming, was issued effective September 1, 1971, for a term of 10 years.¹ By letter of October 19, 1981, BLM informed appellant that,

¹ The leased lands are described as follows:
"Township 44 North, Range 72 West, 6th Prin. Mer., WY
Sec 1: Lots 1, 2, 3, 4, S 1/2 N 1/2
Sec 2: Lot 1
Sec 11: NE 1/4 NE 1/4, SW 1/4 NE 1/4, NE 1/4 SE 1/4, W 1/2 SE 1/4
Sec 12: NW 1/4
Sec 13: E 1/2, E 1/2 W 1/2, W 1/2 NW 1/4, SW 1/4 SW 1/4
Sec 14: W 1/2 NE 1/4, SE 1/4 NE 1/4
Sec 25: N 1/2 NE 1/4, SE 1/4 NE 1/4"

The lease was originally issued to Kenneth S. Isaacs who assigned the lease to Conoco. BLM approved the assignment effective Dec. 1, 1971.

based on information that actual drilling operations were in progress at the end of the primary term on lease W-30220, the lease was extended to August 31, 1983, pursuant to 43 CFR 3107.2-3.

On July 29, 1982, BLM issued a decision recognizing that part of the land in appellant's lease had been committed to the Dakota Wells Unit on March 29, 1982, and was therefore segregated. The unitized land, consisting of 120 acres, is located in the N 1/2 NE 1/4, SE 1/4 NE 1/4, sec. 25, T. 44 N., R. 72 W., sixth principal meridian, Wyoming. BLM stated that the unitized portion of the lease retained serial number W-30220 while the segregated nonunitized portion received serial number W-80322. In its decision, BLM further stated that:

The unitized lease is extended by production; therefore, the non-unitized lease is extended for so long as oil or gas is produced in paying quantities under the unitized lease, or through March 29, 1984, if production ceases prior to that date on the unitized lease.

* * * * *

Lease W 30220 is in a producing status and the lease account has been transferred to the Geological Survey, Casper, Wyoming. You will be notified at a later date regarding the rental and/or minimum royalty status of Lease W-80322.

By letter of August 16, 1982, appellant requested consolidation of leases W-30220 and W-80322. Appellant advised BLM that the parent lease, W-80322, is held by production from the Flocchini #33-11 well located on said lease and completed September 30, 1981. Therefore, appellant asserted that the segregated unitized portion of the lease (W-30220) is also held by such production and not by virtue of being in the unit. Appellant further noted that the well drilled on the Dakota Wells Unit is dry and that consequently the unit will terminate. Appellant asserted that because both leases are held by production and the unit is being terminated, the leases should be consolidated.

By decision of September 13, 1982, BLM denied appellant's request for consolidation pursuant to 43 CFR 3105.6. BLM explained that it had incorrectly stated in its segregation decision of July 29, 1982, that lease W-30220 was extended by production, thereby extending W-80322 for so long as W-30220 was held by production. BLM held that W-30220 was not extended by production, but by drilling through August 31, 1983, prior to production being obtained. The decision further held that the termination date of the segregated unitized lease (W-30220) is thus August 31, 1983, subject to further 2-year extension upon termination of the Dakota Wells Unit prior to that date. Simultaneously, BLM issued a corrected segregation decision dated September 13, 1982, in which it held that lease W-80322 would continue in effect, unless relinquished, until March 29, 1984, and so long thereafter as oil or gas is produced in paying quantities. 43 CFR 3107.4-3.

On appeal, Conoco asserts that the Flocchini #33-11 well drilled in the NW 1/4 SE 1/4 of sec. 11 was spudded May 31, 1981, and completed September 10, 1981, as a producer on lease W-30220. Appellant argues that since production was obtained on the leasehold prior to segregation of the unitized portion of the lease on March 29,

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1982, the unitized portion of the lease is held by production notwithstanding the segregation of the lease. On this ground, appellant contends consolidation would simplify lease administration and, consequently, be in the public interest.

Accordingly, this case involves the completion of a producing well on a lease in its extended term due to drilling over the termination date of the lease. The issue presented is whether the segregated lease committed to the unit, which lease is in its extended term by reason of drilling over the end of the primary term of the lease prior to unitization, is subject to further extension by reason of production on the segregated lease not committed to the unit.

[1] Section 17(j) of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 226(j) (1976), dealing with unit agreements, provides in pertinent part as follows:

Any other lease issued under any section of this chapter which has heretofore or may hereafter be committed to any such plan that contains a general provision for allocation of oil or gas shall continue in force and effect as to the land committed so long as the lease remains subject to the plan: *Provided*, That production is had in paying quantities under the plan prior to the expiration date of the term of such lease. Any lease heretofore or hereafter committed to any such plan embracing lands that are in part within and in part outside of the area covered by any such plan shall be segregated into separate leases as to the lands committed and the lands not committed as of the effective date of unitization: *Provided, however*, That any such lease as to the nonunitized portion shall continue in force and effect for the term thereof but for not less than two years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities. [Italics in original.]

The clear language of this section mandates that a commitment of a portion of a lease to a unit effects segregation and there remains only the ministerial action by BLM to assign a new serial number to designate the segregated lease. *Marathon Oil Co.*, 78 IBLA 102 (1983); *American Resources Management Corp.*, 36 IBLA 157 (1978); 43 CFR 3107.4-3. The statute provides that the segregated lease embracing the lands committed to the unit remains in effect so long as the lease is committed to the unit *provided* that production is had prior to the expiration date of the lease. The expiration date of lease W-30220 at the time of its partial commitment to the unit (March 29, 1982) was August 31, 1983, which date was the end of the statutory 2-year extension created by drilling over the end of the primary term of the lease. 30 U.S.C. § 226(e); 43 CFR 3107.2. Although the lease was subject to further extension by reason of the producing well thereon, August 31, 1983, was the termination date subject to further extension by production in paying quantities at that time. Where production has been obtained on a lease which is in its primary or extended term (other than by reason of production) at the time of commitment of the nonproducing portion of the lease to the unit, the lease is still a lease for a term of years and not a lease for an indefinite term governed by

the life of production at the time of segregation by partial commitment. *Solicitor's Opinion*, M-36592 (Jan. 21, 1960).

Segregation means separating the original lease into distinct and different leases with one portion of the lease committed to a unit agreement and the other portion not committed. Since the portion of a lease inside the unitized area is segregated and is thus considered a separate lease, production outside the unit area will no longer be attributed to the unitized portion of the lease. Therefore, to maintain the unitized portion of a segregated lease past its extended term, the lessee must demonstrate adequate production on the lease or within the unit, independent of the production on the nonunitized portion. The theory behind this practice is that applying separate production requirements to each portion will encourage prompt development of the lease area in its entirety. See *Solicitor's Opinion*, 87 I.D. 616 (1980). Thus, the segregated lease committed to the unit was no longer subject to extension by production from the well in the segregated nonunitized portion of the lease. *Solicitor's Opinion*, M-36592 (Jan. 21, 1960); Cf. *Husky Oil Co. of Delaware*, 5 IBLA 7, 79 I.D. 17 (1972) (partial commitment of leased lands embracing a producing well to a unit plan required payment of annual rental for lands in segregated nonunitized lease no longer held by payment of royalty on production).

[2] 43 CFR 3105.6 provides that consolidation of leases *may* be approved if it is determined that there is sufficient justification. Therefore, it is within BLM's discretion as to whether or not leases should be consolidated. Minerals Management Service advised that the leases should not be consolidated because appellant has not shown that such consolidation would be beneficial to the United States. Conoco has offered no evidence to show that BLM abused its discretion in denying its request for consolidation.

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.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

EDWARD W. STUEBING
Administrative Judge

April 12, 1984

ESTATE OF JAMES LARGO

12 IBIA 224

Decided *April 12, 1984*

Interlocutory appeal certified by Administrative Law Judge Patricia McDonald in IP GA 180G 83.

Interlocutory appeal decided; case remanded.

1. Indian Probate: Interlocutory Appeals

Administrative Law Judges (Indian Probate) have authority under 43 CFR 4.28 to certify interlocutory questions to the Board of Indian Appeals.

2. Indian Probate: Inheriting: Generally

It is manifest error to include in the chain of title to Indian trust land the name of an individual who was not alive to inherit.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF INDIAN APPEALS

On April 9, 1984, the Board of Indian Appeals (Board) received an interlocutory question referred to it by Administrative Law Judge (Indian Probate) Patricia McDonald concerning the estates of Limbert Largo, unallotted Navajo C#33,898, and of James Largo, unallotted Navajo C#424,825. According to documentary evidence submitted by Judge McDonald, Limbert Largo died on April 29, 1976, and a hearing to determine his heirs was held on April 22, 1980. By order in Indian Probate No. IP GA 207GX 76, Judge McDonald found that Limbert Largo's heirs were his eight children, including the above-named James Largo.

In 1983, Judge McDonald received the probate file of James Largo, which was assigned Indian Probate No. IP GA 180G 83. The file shows that James Largo was born on March 9, 1975, and died on March 13, 1975, at the age of 4 days. Thus, James Largo was not alive at the time of his father's death on April 29, 1976. Probate of the estate of James Largo has not been concluded.

[1] The Board has determined that Judge McDonald's referral of this interlocutory appeal in the *Estate of James Largo* is appropriate under the provisions of 43 CFR 4.28, which states:

There shall be no interlocutory appeal from a ruling of an administrative law judge unless permission is first obtained from an Appeals Board and an administrative law judge has certified the interlocutory ruling or abused his discretion in refusing a request to so certify. Permission will not be granted except upon a showing that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision. An interlocutory appeal shall not operate to suspend the hearing unless otherwise ordered by the Board.

Section 4.28, part of the general regulations in 43 CFR Part 4, Subpart B, augments the authority given to the Administrative Law Judges

(Indian Probate) under 43 CFR 4.202. Although Indian probate judges do not make interlocutory "rulings," they may be faced with questions of an interlocutory nature. Such questions may, under appropriate circumstances, be referred to the Board.

[2] In this case, the interlocutory question is whether the Judge should enter an order in the *Estate of James Largo* that finds that his heirs are his brothers and sisters when all of James Largo's Indian trust land was originally inherited from his father, Limbert Largo, and when the record demonstrates that James Largo predeceased his father and so was not eligible to inherit from him. Although an order determining James Largo's heirs to be his brothers and sisters might yield the same result as if he had never inherited--i.e., all of Limbert Largo's Indian trust interests would thereby vest in his seven living children--to include the name of a deceased person as an heir in the chain of title to Indian trust land would be manifest error.

In order to prevent this manifest error, the May 12, 1980, order determining the heirs of Limbert Largo must be corrected. The Board has authority to correct such errors under 43 CFR 4.320. Judge McDonald is therefore directed to reopen the *Estate of Limbert Largo* for this purpose.

This case is remanded to Administrative Law Judge Patricia McDonald for further action consistent with this decision.

BERNARD V. PARRETTE
Chief Administrative Judge

WE CONCUR:

JERRY MUSKRAT
Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

APPEAL OF W. HICKEY CO., INC.

IBCA-1574-4-82

Decided April 20, 1984

Contract No. 14-16-0005-80-082, Fish and Wildlife Service.

Appeal Denied and Counterclaim Sustained.

1. Contracts: Disputes and Remedies: Burden of Proof--Contracts: Disputes and Remedies: Termination for Default: Generally

In an appeal from a termination for default where the contractor's theory of the case is defective specifications, it is the contractor's burden to show not only that the specifications were faulty but that the faulty specifications caused the condition from which termination resulted. Upon finding that although the contractor showed that a Government well was incapable of producing the precise flow by total dynamic head set out in the contract specifications under which a particular pump was supplied, but finding that the Government established that the pump should have operated adequately

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under the actual flow conditions the well was capable of producing, the Board holds that the Government effectively controverted the contractor's case, that the contractor failed to sustain its burden of proof, and that the termination for default was justified entitling the Government to prevail.

APPEARANCES: Robert M. Bush, Law Offices of Harvey B. Heafitz, Newton Corner, Massachusetts, for Appellant; James Epstein, Department Counsel, Newton Corner, Massachusetts, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Appellant W. Hickey Co., Inc. (Hickey), has appealed from the decision of the Fish and Wildlife Service (FWS) contracting officer (CO), dated January 29, 1982. Hickey's complaint asserted that the CO's decision to terminate the contract was erroneous and claimed entitlement to \$12,276.36, consisting of \$7,735.36 in additional expenses incurred in attempting to remedy defects of performance caused by the Government plus \$4,541 in contract payments withheld. FWS answered denying liability for Hickey's additional expenses and counterclaimed for \$9,100, representing \$8,100 for the expense of reletting the contract and \$1,000 for the expense of contract work unperformed at the time of termination. FWS also advanced its claim for entitlement to liquidated damages at \$25 per day from the date of expected completion to the date of termination being 244 days and amounting to \$6,100.

Background

On September 29, 1980, FWS awarded to Hickey a contract for the construction of a pumphouse at the North Attleboro National Fish Hatchery in North Attleboro, Massachusetts. The contract completion date, as amended, was May 30, 1981, and the contract price, as awarded, was \$21,130¹ (AF Tabs 1, 10, 16).

The principal component of the contract work and the center of the present dispute was the installation of a vertical turbine pump designed to provide a flow of water from a new gravel pack well on the site to the Hatchery's raceways. The first noteworthy factor about the installation is that when Hickey began situating the pump it discovered that the shaft was too short and thus was forced to remedy that deficiency by taking the shaft to a machine shop where the shaft was lengthened by 1-1/2 inches (Tr. 132). Then a problem developed after installation which took place in May 1981 (Tr. 131-32). After a few hours operation, the pump began making noises so unusual and

¹ There was additional work beyond that mentioned, treated as a modification but in form performed under a separate contract. The amount of this second contract was \$1,367.20, but because FWS has paid this contract in full and there is no dispute about performance or payment, we will no longer account for it in this decision even though Hickey treated it as part of the original contract in its complaint. See Answer of FWS, dated June 10, 1982.

disturbing that FWS felt compelled to call Hickey to the Hatchery to evaluate the situation (Tr. 212). Ultimately, the pump was shut off and removed from the well. Upon dismantling and inspecting the pump, Hickey and FWS discovered that the pump's lower bearing was missing (Tr. 212). The representative of the pump's manufacturer, Crane-Deming, arranged to ship the damaged parts to its factory for reassembly (Tr. 14). When the reassembled pump was returned to the Hatchery, it was reinstalled and when after a few hours it developed the same noises, it again was pulled from the well and disassembled (Tr. 213). Upon inspection of the "new" pump, the parties found similar substantial damage (Tr. 17).

Thereafter, the dispute between the parties as to the cause of the pump failure colored all events. Hickey installed first one, then two, temporary pumps to provide necessary flow to the raceways while the parties attempted to work out a suitable resolution to the problem. For Hickey's part these efforts largely went to trying to ascertain, from Crane-Deming, the reason for the pump failure. At the outset FWS was also interested in Crane-Deming's input but as time went on became increasingly less interested in a technical explanation and increasingly interested in the practical resolution of the problem, that is, completion of the contract by installation of a functioning permanent pump.

Responding to expressions of concern by FWS, particularly that the hatchery's operational requirements made installation of a satisfactory pump by September 15, 1981, critical, Hickey, by letter dated September 8, 1981, presented to FWS a proposal for solving the problem which would cost FWS an additional \$4,295.25. The proposal assumed the supply of some new parts and the use of most of the existing pump parts (AF Tab 32). Hickey also, by letter dated September 18, 1981, presented a request for reimbursement for additional costs of \$4,957.99 incurred as a result of having to pull the pump twice and replace it once and of rental charges for the temporary pumps (AF Tab 34). Both the proposal for correcting the problem and the request for additional compensation were predicated upon Hickey's conclusion that the cause of the pump failure was FWS's faulty design and specifications. At that time FWS was not sufficiently informed about the technical aspects of the situation to be able responsibly to accede to Hickey's conclusion, at least partly because Crane-Deming had failed to give FWS sufficient technical information upon which the latter could draw a conclusion despite Crane-Deming's promises to do so. (Crane-Deming did make a presentation consisting of logical analysis in a letter to Hickey dated August 28, 1981, but it submitted no data to support the conclusions set out therein (AF Tab 32). Ultimately, Crane-Deming conducted a test on a prototype pump at its factory, and the test indicated that the pump installed at North Attleboro should have functioned in that system; this test was conducted after appellant had been terminated for default (Exh. GX-B).) Apparently because of the need for quick

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resolution, there was an internal proposal to refer the problem to outside consultants for evaluation (AF Tab 33), and after receipt of Hickey's September 18 letter, FWS indeed engaged the services of the consulting firm of Hayden, Harden & Buchanan, Inc. (HHB) (AF Tab 36). HHB prepared a report on the situation, and, based on that report, the CO wrote Hickey on October 30, 1981, and indicated FWS's disinclination to accept Hickey's version of the reason for the failure, because the evidence submitted to support Hickey's position was unconvincing. The letter also enclosed the HHB report and directed Hickey to complete the required work under threat of default termination (AF Tab 37).

Hickey's response was to request a meeting amongst all of the interested parties to discuss HHB's conclusions and resolution of the problem (AF Tab 38). The record provides evidence that FWS was receptive to the idea, postponing any further talk of default termination while apparently contemplating several scheduled and rescheduled meetings. Part of the reason for delay was Crane-Deming's schedule for a prototype test, which finally took place on November 24 and 25, 1981. Shortly after FWS became apprised that the test had been conducted, Crane-Deming advised that the test results were inconclusive because the test pump utilized some used parts. Crane-Deming suggested another delay while it tried to assemble a suitable prototype for the testing (AF Tabs 39, 40, 41). As time passed, the Hatchery's pump flow and reliability needs became more critical. In mid-January 1982, one of the temporary pumps failed meaning that only 200 gallons of water per minute were being provided to the raceways instead of the desired 500 gpm (AF Tab 43). Ultimately, the Hatchery director sent a memorandum to the CO (dated Jan. 20, 1982) requesting immediate emergency action to provide a permanent solution to prevent fish loss and damage to eggs, both of which the writer apparently felt were either imminent or had already occurred (AF Tab 45). As a result, the CO terminated the contract for default, communicated to Hickey in a wire and letter both dated January 29, 1982, and relet the contract to another supplier (AF Tabs 46, 47). Hickey appealed that decision making the claims detailed above, and FWS counterclaimed, as mentioned. The Board conducted an evidentiary hearing in the matter at Newton Corner, Massachusetts, on October 7, 1982.

Contentions and Issues

As may be appreciated from the foregoing, the principal dispute in this case is over the cause for the pump failure. Hickey contends that the pump failed because the contract specifications were faulty. FWS contends that the pump failed because it was defective and that Hickey's position is unsupported by the evidence. For the reasons

hereinafter set forth, we conclude that the FWS position is the correct one and deny Hickey's claim.

The parties concede that the claims and counterclaims with respect to entitlement depend upon the outcome of the foregoing issue, that is, if Hickey's position is correct, then the FWS claims should fail, and vice versa. We agree. However, there remains a dispute over the quantum, centering around the correct construction of a purported stipulation. FWS contends that the stipulation resolved all quantum issues while Hickey contends that the stipulation merely set out parameters beyond which damages were not allowable and that the stipulation therefore did not affect the parties' respective burdens of proof as to quantum. Our analysis of the record leads us to favor the FWS position on this dispute, and the details of that analysis follow.

Discussion

As mentioned, the principal dispute we must decide is whether Hickey is correct that the pump failure resulted from faulty specifications. FWS believes the failure to have resulted from a defective pump, but it is unnecessary for us to decide the validity of that belief, because FWS has effectively controverted Hickey's case; since the burden is on the contractor to prove its case when assertedly faulty specifications are at issue, that controversion prevented Hickey from carrying its burden and its claim is therefore denied.

Westinghouse Electric Corp., IBCA-182, 67 I.D. 100 (Mar. 16), 60-1 BCA par. 2550, *aff'd on reconsideration* 67 I.D. 148 (Apr. 20, 1960), 60-1 BCA par. 2604.

The dispute devolved at the hearing to a contest between experts. To appreciate the differences of opinion it is necessary to have a basic understanding of the technical aspects of the installation called for in the contract. The specifications required a pump that would provide a flow of 500 gpm against a total discharge head (TDH) of 35 feet (Tech. Specs. section 15.03, AF Tab 1). TDH is a measure of pressure or resistance against the force of the pump and is a function of the static head (or distance the liquid is to be pumped), friction loss, specific gravity of the particular liquid to be pumped, etc.; it is a dynamic concept, that is in a given system with all other factors the same, the value for TDH decreases as the flow (in gpm) increases (Fr. 24-25). Pump manufacturers print and distribute what are called "published performance curves" for each of their pump models. The principal purpose of these performance curves is to assist the user in selecting the proper pump, and they depict the full range of operational possibilities as a function of flow by TDH for particular pump models. (Remembering that the flow value changes with the TDH value and vice versa, it should be understood that a particular model will operate at a number of flow/TDH points. The curve plots all of those points on a graph.) The curves are not to be taken as totally accurate for a particular model unit, but they do provide a reasonably accurate means of evaluating the performance capabilities of a model line, and

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the manufacturer in publishing them intends for users to rely on them as indicative of how its pump will perform (Tr. 95-114). In published performance curves, there are beginning points and end points. In the Crane-Deming performance curve for the pump model at issue the beginning point is plotted just above zero gpm and somewhere between 54 and 60 feet TDH (depending on the diameter of the impeller employed). The end point is plotted right around 20 feet TDH and between about 940 and 1100 gpm (again depending on impeller diameter) (Exh. GX-A). Although it may be possible for a pump to operate beyond this end point ("to the right"), the manufacturer does not plot any points beyond there because it would be beyond the safe range in terms of pump damage and acceptable efficiency. All of the points that are represented on the published curve, however, are supposed to be within the pump's safe capability in terms of those two operational characteristics.

The system at the site (that is the well and its characteristics, the depth of submersion for the pump, the static head, friction loss, etc.) would not provide anything near 35 feet of TDH at a flow of 500 gpm (Tr. 27, Exh. GX-A). The HHB report and its accompanying calculations led to the plotting of a "system curve" superimposed on the graph depicting the performance curve (Exh. GX-A). The system curve is a graphic representation of what TDH value there would be in the site's system if a pump were delivering any of many flows in gallons per minute. The system curve intersects with the performance curve for the pump model in question.

There are two other technical concepts which provide at least a modicum of interest in the context of this case. They are net positive suction head (NPSH) and cavitation. NPSH is a measure of flow available against flow produced, or the amount of fluid the well system can deliver to the pump against the amount the pump can deliver in that system. When the NPSH required by the pump in the system exceeds the NPSH available in the well, cavitation can occur (Tr. 77). Cavitation is that condition where the level of fluid in the well has gone below the pump impeller eye and the pump has begun "sucking air." When cavitation occurs, significant damage to the pump can and probably will result (Tr. 68-69). HHB plotted a curve for NPSH required on the same graph with the other curves mentioned (Exh. GX-A).

With that as background, we move to consideration of the experts' testimony with better understanding. Hickey's expert was Richard Stacy, an employee of Crane-Deming. Mr. Stacy's opinion was that the proper pump was not specified (Tr. 65), that the pump was too large for the system application (Tr. 75), that the pump was selected because of the specification which was faulty and that the excessive capability of the pump for the system was the cause of failure (Tr. 86). He testified that the "pump was specified to operate at 500 gpm in 35 feet

of head" and the fact that that capacity was unobtainable in that system provided a "good possibility" for an explanation of the pump's failure (Tr. 75). It is clear from the foregoing and one other piece of testimony that Mr. Stacy's opinion and Hickey's argument are that the pump failed because it was designed to operate at the level expressed in the specification, that level was not achievable in the FWS system and the pump failed for that reason. The other piece of testimony just mentioned appears at Tr. 67-68 where Mr. Stacy opined that, using the HHB conclusion announced in the report that the pump should have operated at 800 gpm at 30 feet TDH, in such a situation the pump would "move to the right of [its] curve" to a point beyond its safe operating limits, a point at which cavitation would occur.

There are a number of other passages in Mr. Stacy's testimony, however, which have proved important to our consideration. He acknowledged that the calculations in the HHB report were arithmetically correct (Tr. 65) and that the system curve transposed onto exhibit GX-A was an accurate plotting of the points set out in the HHB report (Tr. 72). Although there was an implication from the acknowledgement and directly from testimony (Tr. 65) that there was trouble with the data HHB used as a basis for its calculations, Mr. Stacy admitted that Crane-Deming had provided no inconsistent data (Tr. 90) and that the only data available to him was that used by HHB (Tr. 90, 106). (Indeed, Hickey's counsel at one point effectively admitted that there was no direct challenge to the data HHB used (Tr. 95)). Also, Mr. Stacy testified that the FWS as a customer should be able to rely upon the published performance curve (Tr. 95), that if the NPSH (in feet) available were not overcome by the NPSH required, cavitation would not result (Tr. 102-03) and that if cavitation occurred, the imposition of the system curve on the performance curve would yield no intersection of the two (Tr. 120). Finally, Mr. Stacy testified that he would have recommended the subject pump if the specification required 800 gpm at 35 feet TDH (Tr. 118).

FWS's expert was John Reis, an engineer with HHB and author of the HHB report. Mr. Reis provided his opinion on the cause of the pump failure, but we are more concerned here with that portion of his testimony which was responsive to the Hickey theory.² First, Mr. Reis testified that the data used in the HHB report were extracted from known facts, since the pumphouse was in existence and the elevations, discharge points, etc., as part of the existing installation were given (Tr. 175). Next, he testified that in the system NPSH could not be a

² It is clear from his testimony that Mr. Reis believed the cause for the failure was that the pump was defective, in particular that it was initially installed without a lower bearing. Also, he believed that the lengthening of the shaft could have been important if done improperly and that the possible trauma caused by the first failure to some parts reused in the second installation could have caused defects which were not even present the first time around. Although the testimony he delivered in support of that position sometimes overlapped into the subject matter discussed in the text and although it certainly was probative of his conclusion, we do not discuss that evidence in the context of the reason advanced; it is unnecessary to discuss it because it is unnecessary to reach that issue because the burden is Hickey's to prove that defective specifications were the cause of the failure, not FWS's to prove that defects in the pump were the cause.

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problem because at the point of expectable flow from the pump in the system (800 gpm), the NPSH required would be under 20 feet while the NPSH available was over 50 feet (Tr. 178).³ Also, cavitation could not be a problem because in use at 600 gpm, the pump drew down the well only 12 feet to a net submergence of 24 feet, and cavitation cannot occur unless there is no pump submergence (Tr. 178).

The most important parts of Mr. Reis's testimony, as graphically represented by the system curve superimposed on the performance curve, are that although the pump could not operate at the specification point (500 gpm at 35 feet TDH), the system would allow the pump to operate at one of the points on its performance curve, namely the one where the system curve intersected the performance curve, about 800 gpm at somewhere around 30 feet TDH (Tr. 179-80). The only question at this point, according to Mr. Reis, was whether cavitation could have occurred, because the 800 gpm of flow the pump would deliver was greater than the 725 gpm that the well could provide (see footnote 3). The 725 gpm figure was the one provided by David Washburn, who wrote the contract specifications. Mr. Washburn testified that that was a conservative assessment of the safe yield of the well at all times around the calendar (Tr. 129-30). Mr. Reis expanded on that theme by explaining that the 725 gpm was merely a rating, indicating that at any time of the year the bare minimum that the well would produce was 725 gpm, even in the summer months or other drought periods. Since the installation took place in the spring, there could be no "viable concern" that the well would not provide 800 gpm at the time of the installation (Tr. 177-78). By taking that information and coupling it with his calculations on well draw-down, Mr. Reis concluded that cavitation could not have occurred (Tr. 184). Moreover, the pump never provided a flow as great as 800 gpm, nor even as great as 725 gpm, in any event. The records available to Mr. Reis indicated that peak flow was about 600 gpm when, according to the performance curve and the characteristics of the system, it should have been 800 gpm (Tr. 179-80). This was corroborated by the testimony of Mr. Washburn about his recollection (never over

³ There has not been any serious, logically consistent challenge to the report's conclusion that NPSH available was over 50 feet. Even Mr. Stacy inferentially admitted that the NPSH available was 55 feet (Tr. 103). Although Mr. Stacy mentioned at several points that NPSH is not a static concept, he failed to explain that except in a general, theoretical way. He said that NPSH available and NPSH required both increase with an increase in the depth of pump submergence, albeit the latter at a much more rapid pace (*i.e.*, Tr. 104), but he failed to tie that into the situation of this case. So far as we are informed, the pump submergence here, about 36 feet, never changed. On the basis of the information before us, we put questions of well draw-down aside, because we gather from what the parties have told us that NPSH available is measured before operation and that the extent of draw-down can be predicted by knowing the NPSH available even though NPSH required increases with the increase in flow. The most we can tell from Mr. Stacy's testimony on the dynamic nature of NPSH is that in this system, all other things being equal, if the submergence depth were considerably increased, the resulting greater increase in NPSH required than in NPSH available might eventuate in the former's eclipsing the latter, but that tells us nothing about a static depth of submergence (draw-down questions aside). Mr. Stacy did, however, indicate that cavitation could be a problem regardless of the NPSH measurements in the HHB theoretical model, because the model called for an 800 gpm flow when the well was capable of providing only 725 gpm (Tr. 104-05). We deal with this issue further along in the text.

650 gpm) (Tr. 134) and by the testimony of Mr. Mullane, the Hatchery manager (640 gpm) (Tr. 218).

[1] It is appellant Hickey's burden to prove, in this case, not only that the specifications were faulty but that that defect led to the failure of the pump installed. Hickey has failed to carry that burden and therefore cannot prevail.

Hickey proved that the contract specification factors for the pump could not be met in the system, but to prevail it had to show that that fault (to the limited extent that it is a "fault") led to the failure of the pump. Inferentially, Hickey's position is that the pump would operate at 500 gpm in 35 feet TDH, but since the pump could not operate at that point in that system, there could be no other question to answer because the pump would operate at that point and no other. That position is, of course, belied by Crane-Deming's publication of performance curves. There would be no *curve* to publish if a pump were not capable of operating at a number of different points. For that matter, the expert, Mr. Stacy, said he would recommend the subject pump if the specification called for 800 gpm at 35 feet TDH, which happens to be a point on or very nearly on the system curve, meaning that the pump Mr. Stacy would recommend, namely the subject one, would be fine, in the system represented on the exhibit G-X-A system curve, namely the one the pump was placed in, the well at the North Attleboro National Fish Hatchery. In other words, if the logically consistent testimony from both experts on the various curves in the record and on other matters is to be believed, then the contract specifications indeed "misled" Hickey but only to the extent that it induced the contractor into providing a pump that should have worked in the well but at a performance level different from that of the specifications and incidentally of greater benefit to FWS. That brings us to the question of what logically consistent testimony on those subjects we should believe. We have already determined that the existence of a published performance curve belies Hickey's inferred position that the pump provided would operate only at the contract specifications' point. Moreover, Hickey's witness essentially admitted that if a proper system curve intersected the performance curve, then the pump represented by the performance curve should work in the system represented by that system curve. We also know that the system curve developed by HHB crossed Crane-Deming's performance curve. (As noted, Mr. Stacy testified that if the pump were operated where the HHB report suggested it would, *i.e.*, 800 gpm at 30 feet TDH, then that point would be far to the right on, or perhaps off, the performance curve, beyond the safe operating point. Not only is that conclusion unreliable according to the Crane-Deming performance curve, but indeed the pump efficiency at that point would be much greater than if the pump were operating at the contract specifications' point, assuming the system or any system allowed it. Also, that position, that such an operation point would be beyond the safe operating limits of the pump strictly as a function of flow by TDH, is

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further belied by Mr. Stacy's opinion that he would recommend the pump if the contract called for 800 gpm at 35 feet of head.) Since Hickey admits that the arithmetical and graphic functions of the HHB report were accurate, the only remaining question is whether the data base employed by HHB was reasonably faithful to the factual situation. Mr. Reis's testimony about the source of the data provides a sufficiently sure basis for concluding that the data was accurate, and Hickey's attempts to discredit that testimony were limited (1) to speculation about its accuracy and (2) to cross-examination which was ineffective in shaking Mr. Reis's conviction or his credibility in the totality of the circumstances. The persuasiveness of the FWS position thus established is, if anything, less than undermined by the fact that Hickey, the pumphouse contractor, either alone or in concert with Crane-Deming, the pump manufacturer, failed to provide any independent data contradictory to that relied upon by HHB. Thus, we confront data which is accurate on its face, unaffected by attempts to discredit it and unopposed by contradictory data from persons expected to have it if it existed. Therefore, we find that the data HHB used was sufficiently accurate, so that the various computations it performed and curves it plotted were accurate; that the pump therefore should have performed adequately in the system despite the "misleading" nature of the contract specifications; and, that therefore, the contract specifications, "faulty" or not, were not the cause of the pump failure. Since Hickey must prove that defective specifications were the cause of the pump failure in order to prevail, and we have concluded that it failed to do so, we hold that Hickey's claim is unsubstantiated and must be denied.

Quantum

At the hearing, the parties purported to enter into a stipulation about damages (Tr. 223-25). After the hearing, however, a dispute developed over the meaning of the stipulation. In its brief, Hickey asserted entitlement to "\$4,541.00 as the *stipulated* contract balance" plus "the *stipulated* amount of \$7,5000.00 [sic, should be \$7,500.]" for additional costs expended because of the faulty specifications (Appellant's Brief at 8 (italics supplied)). Hickey also argued, however, that if FWS prevailed on the merits, it should recover less than what it claimed, because its claim is "grossly inflated," both as to reprourement and liquidated damages (Appellant's Brief at 9). As might be expected, FWS objected strenuously to any interpretation of the agreement on damages that would not give effect to what it believes is a stipulation, especially where the appellant claims its entitlement as a matter of the stipulation but wants to put FWS to its proof on similar subject matter (Govt. Brief at 23-31). Subsequently, Hickey filed a reply brief, in which it asserted that any stipulation was intended to express parameters of possible recovery amounts, "to put a

cap on the potential recovery of both sides" (Appellant's Reply Brief at 2). FWS responded in a letter dated February 4, 1983, that there had been no mention of a "cap" or "maximum" anywhere in the record.

Our review of the hearing passages leads us to the conclusion that there was a stipulation as to the total amount of recovery depending on which party prevailed and that the intent was to obviate the necessity of producing evidence at the hearing on quantum by either side. It is obvious that that was FWS's understanding, and the language employed at the hearing cannot fairly be read any other way. (After Hickey's counsel first detailed the essence of the FWS concession, he expressed the details of the Hickey concession by indicating that "we are stipulating that the total damages that we're seeking are \$7,500.00 under" the stipulation; when the judge then asked, "And that you would be entitled to that if you prevail on entitlement," counsel responded, "That's correct." It is clear from the circumstances that the Judge's question was concerned with both concessions.) Another factor supporting our conclusion is that both figures to which the parties stipulated were lower than their original claims. Hickey originally claimed \$7,735 in additional expenses, while the stipulation was for \$7,500, and FWS originally counterclaimed for a total of \$9,100, while the stipulation was for \$8,100. It is obvious that the parties reached a bargain which involved stipulating to an amount of damages with which the other felt comfortable in exchange for foregoing mutually the trouble of putting on a case on quantum. It strikes us as unreasonable that parties would enter into an agreement using specific dollar figures only as a cap while expecting the Board to quantify damages at or under those figures, unless the parties made perfectly clear that that was their expectation. That was not FWS's expectation in any event, and Hickey certainly failed to make that expectation clear. Because of this analysis, we conclude that the stipulation was for an amount certain to which the prevailing party would be entitled. Even if we were convinced that Hickey's version of the stipulation were correct, there is nevertheless sufficient evidence in the record that FWS's expenses were at least \$8,100 (FWS letter of February 4, 1983, Enclosure 2). We, therefore, hold FWS entitled to \$3,559, being a net of \$8,100 less \$4,541 outstanding on the contract, plus \$6,100 in liquidated damages for a total of \$9,659. We also note that there is evidence that FWS agreed to pay Hickey the reasonable rental of the temporary pumps for the period after termination until installation of the pump under the procurement. There was no mention of that amount in the briefs, but if the matter has not heretofore been addressed, the Board expects the parties to attend to it without further Board involvement.

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Accordingly, the claim of appellant Hickey is denied, and the FWS counterclaim is sustained in the net amount of \$9,659 less the reasonable rental of the temporary pumps if not heretofore paid.

DAVID DOANE
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

JAMES E. LEBER

v.

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL
RESOURCES

80 IBLA 200

Decided *April 24, 1984*

Interlocutory appeal from ruling of Administrative Law Judge Joseph E. McGuire denying motion to dismiss application for review of alleged discriminatory action. CH 3-2-D.

Reversed and remanded to the Hearings Division.

**1. Surface Mining Control and Reclamation Act of 1977:
Discrimination: Generally--Surface Mining Control and Reclamation
Act of 1977: Employee Protection: Generally**

Sec. 703 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293 (1982), prohibits any "person" from discriminating against any employee by reason of his involvement in any proceeding under the Act. An aggrieved employee may file an application for review of any such discrimination with the Department of the Interior. For purposes of sec. 703 employee protection proceedings, the state agency charged with enforcement of the Act is not deemed a person within the meaning of the statute where review of alleged discriminatory action is sought by one of its employees.

APPEARANCES: John W. Carroll, Esq., Assistant Chief Counsel, Harrisburg, Pennsylvania, and William F. Larkin, Esq., Pittsburgh, Pennsylvania, for Pennsylvania Department of Environmental Resources; Robert P. Ging, Jr., Esq., Pittsburgh, Pennsylvania, for James E. Leber; Ronald J. Rademacher, Esq., and Anna M. Norton, Esq., Office of the Solicitor, Pittsburgh, Pennsylvania, for amicus curiae.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

This proceeding was initiated by James E. Leber (Leber) through the filing of an application for review of alleged discriminatory actions

committed against him by his employer, the Pennsylvania Department of Environmental Resources (PDER). The application was filed pursuant to section 703 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA, Act), 30 U.S.C. § 1293 (1982), and the regulations at 30 CFR Part 865. Leber represented in his application that he had been subjected to disciplinary action in his job as a result of his aggressive enforcement of the surface mining law. Specifically mentioned was a suspension without pay resulting from an incident involving his work as a mine inspector.¹ Also mentioned were "punitive transfers." These actions were alleged to be discriminatory in that they were in retaliation for his aggressive investigation and enforcement activities, as well as for his report of alleged illegal activity by one of his supervisors. Leber's application for temporary relief, filed May 23, 1983, alleged discriminatory actions by his employer including, *inter alia*, increased work hours in excess of state regulations, changes in work assignments, downgraded performance evaluations, and overtime assignments.

Pursuant to the application for review, a hearing was held before Administrative Law Judge Joseph E. McGuire from July 19 through July 22, 1983, in Pittsburgh, Pennsylvania. Counsel for PDER made a motion before the Administrative Law Judge to dismiss the application on the ground that PDER was not a "person" within the meaning of the applicable statute, section 701(19) of SMCRA, 30 U.S.C. § 1291(19) (1982), and that it was, therefore, not subject to the jurisdiction of the administrative agency for purposes of a section 703 proceeding. The motion to dismiss was denied by Judge McGuire. Subsequently, at the close of the hearing, counsel moved that the issue of whether PDER came within the statutory definition of a person be certified to the Board as an interlocutory appeal. This motion was also denied by the Administrative Law Judge. Thereafter, counsel petitioned the Board, pursuant to 43 CFR 4.1272, for permission to pursue an appeal of the interlocutory ruling of the Administrative Law Judge that PDER is a person for purposes of section 703 of SMCRA and 30 CFR Part 865, relating to protection against discriminatory action by employers. The petition was granted by order of this Board dated September 9, 1983.

Counsel for appellant, PDER, asserts in the statement of reasons for appeal that the Commonwealth of Pennsylvania and its agencies are not within the scope of the definition of a "person" under section 701(19) of SMCRA and, hence, that PDER is not a proper party respondent in an employee protection proceeding under section 703 of SMCRA. Counsel further contends that interpreting section 703 of SMCRA to regulate PDER would be violative of the Tenth Amendment to the United States Constitution.²

¹ This disciplinary suspension of Leber without pay was the subject of an appeal by Leber to the Pennsylvania Civil Service Commission. After hearing, the commission upheld the suspension in an opinion from which one commissioner dissented (Exhibit B, brief of amicus curiae). On July 19, 1983, counsel for Leber and counsel for PDER stipulated that the suspension of Leber would no longer be part of Leber's application for review.

² "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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Counsel for Leber contends in his brief that PDER is a person for purposes of employee protection proceedings under section 703 of the Act. Counsel cites the regulation at 30 CFR 700.5 which includes state agencies within the definition of a person under SMCRA. Further, counsel for Leber argues that employee protection proceedings under section 703 are not violative of the Tenth Amendment, where PDER is the employer, since the Commonwealth has voluntarily decided to participate in the regulation of surface mining operations in Pennsylvania under the Act, which the Federal Government would otherwise regulate independently.

The Office of the Solicitor has filed an amicus curiae brief in this proceeding. The Solicitor argues that a section 703 employee protection proceeding does not arise against the Commonwealth of Pennsylvania where the alleged discrimination arises from disciplinary action.³ This result is compelled, the Solicitor asserts, by the statutory and regulatory definition of a "person" under the Act.

[1] Section 703(a) of SMCRA provides protection for employees against discrimination resulting from involvement in proceedings under the Act:

Sec. 703.(a) No person shall discharge, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

30 U.S.C. § 1293(a) (1982). Section 703(b) provides that any employee who believes that he has been discriminated against by any person in violation of section 703(a) may apply to the Secretary of the Interior for a review of such alleged discrimination. For purposes of SMCRA, the term "person" is defined at section 701(19) as follows: "(19) 'person' means an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization." 30 U.S.C. § 1291(19) (1982). Thus, the statutory definition of a "person" does not embrace a governmental agency.

Reference to the regulations promulgated pursuant to the Act discloses the following definition:

Person means an individual, Indian tribe when conducting surface coal mining and reclamation operations on non-Indian lands, partnership, association, society, joint venture, joint stock company, firm, company, corporation, cooperative or other business organization and any agency, unit, or instrumentality of Federal, State or local government including any publicly owned utility or publicly owned corporation of Federal [,] State or local government.

³ We note that this is contrary to the position initially taken by the Solicitor prior to the hearing before Judge McGuire, viz., that PDER constitutes a "person" subject to an employee protection proceeding under section 703. This position was detailed in an attachment to an Apr. 7, 1983, letter to counsel for Leber and Douglas R. Blazey, Chief Counsel, PDER.

30 CFR 700.5. Although the original regulatory definition of "person" embodied the same language as the statutory definition,⁴ the definition was expanded in 1979 to include governmental agencies. 44 FR 15314 (Mar. 13, 1979). One reason given for the expanded definition is that governmental agencies are subject to regulation under the Act pursuant to section 524, 30 U.S.C. § 1274 (1982), when engaged in surface coal mining and reclamation operations. 44 FR 14912 (Mar. 13, 1979). The preamble to the regulatory revision relates a further reason for expanding the definition of a "person":

The Act mandates the involvement of and close coordination among many different agencies. Various agencies play important roles in the abandoned land's [sic] program in Title IV of the Act, in the regulatory process in terms of providing data, permit application reviews, performance standards compliance, and in designation of lands unsuitable for all or certain types of surface coal mining operation. * * *

OSM [Office of Surface Mining] believes the involvement of other State and local agencies, which the Act specifies, establishes an interest on the part of those agencies in actions taken by the regulatory authority under State programs, particularly actions relating to permits and designations. Therefore, OSM believes that inclusion of the government agencies in the definition of "person" is justified. OSM does not intend by this to expand upon an agency's capacity to sue or be sued where the Act does not clearly indicate that the agency has an interest in the actions being taken. In such situations, existing principles of State or Federal law would govern.

44 FR 14912 (Mar. 13, 1979). Thus, a further reason for the expanded definition is to allow the participation of interested State and local governmental agencies in proceedings before the regulatory authority.

Leber argues that the extension of the regulatory definition of person to include any agency of state government encompasses PDER for purposes of an employee protection action under the Act. Leber finds no constraints on the definition of person. Both PDER and the Solicitor point to the explanation provided by the Department in the preamble, quoted above, as supporting a construction that the definition of person was expanded for only limited purposes.

We agree with PDER and the Solicitor and find that in this case PDER is not a person for purposes of an employee protection proceeding under 30 U.S.C. § 1293 (1982). Clearly, the intent of the regulations was to consider an agency, such as PDER, a "person" to the extent it might be conducting surface coal mining operations under the Act or to the extent it might be involved in those functions highlighted in the preamble, *i.e.*, abandoned lands program, the regulatory process in terms of providing data, permit application review, performance standards compliance, and designation of lands unsuitable for all or certain types of surface coal mining operations. 44 FR 14912 (Mar. 13, 1979).

There is no indication that the Department intended to create a new forum whereby state employees could seek review of actions taken by the state with regard to state employment practices.⁵ It appears that

⁴ 30 CFR 700.5, 42 FR 62676 (Dec. 13, 1977).

⁵ A state employee may pursue alleged discriminatory acts in existing forums, *i.e.*, state civil service commissions and state courts, as well as through remedies afforded by other Federal laws for the redress of discrimination. *See, e.g.*, 42 U.S.C. § 1983 (1976).

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the intent of Congress in enacting 30 U.S.C. § 1293 (1982) was to encourage employees of those persons involved in surface coal mining operations to come forward to report violations of the Act while at the same time offering protection to the employee.

The regulations in 30 CFR support the conclusion that PDER is not a "person" subject to the provisions of 30 U.S.C. § 1293 (1982). Section 865.11(b) of 30 CFR requires that "[e]ach employer conducting operations which are regulated under this Act shall within 30 days from the effective day of these regulations, provide a copy of this part to all current employees and to all new employees at the time of their hiring." (Italics added.) The key phrase is that italicized. The Department was concerned that all employees guaranteed protection under the Act should be aware of their rights. Thus, employers "conducting operations which are regulated under this Act" are required to provide the regulations to their employees. Regulated operations under the Act are surface coal mining operations. 30 U.S.C. § 1291(28); 30 CFR 700.5. The inescapable conclusion is that a "person" under 30 U.S.C. § 1293(a) is an employer who conducts surface coal mining operations. PDER is not such a person.⁶ For the reasons stated above, the Board concludes that the motion to dismiss filed by PDER should have been granted.

In light of this holding, we find it unnecessary to consider arguments raised concerning the effect of the Tenth Amendment on the statutory language.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the interlocutory ruling appealed from denying appellant's motion to dismiss is reversed. The case is remanded to the Hearings Division for action consistent with this decision.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

WM. PHILIP HORTON
Chief Administrative Judge

⁶ Only when a state itself is engaged in surface coal mining operations is it subject to regulation under the Act. 30 U.S.C. § 1274 (1982).

May 4, 1984

BRUCE ANDERSON

80 IBLA 286

Decided May 4, 1984

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, denying a petition for reinstatement and determining that oil and gas lease NM 15072 (Okla.) expired by operation of law:

Affirmed as modified.

1. Oil and Gas Leases: Communitization Agreements--Oil and Gas Leases: Expiration--Oil and Gas Leases: Extensions

Under recent amendments to 43 CFR 3105.2-3 (published at 48 FR 33670 (July 22, 1983)), a communitization agreement affecting a Federal oil and gas lease may be approved retroactively and serve to extend a Federal lease, even when the agreement is not submitted to the Department until after the expiration date of the Federal lease, so long as the communitization agreement has been executed prior to the expiration date.

2. Oil and Gas Leases: Compensatory Royalty--Oil and Gas Leases: Expiration--Oil and Gas Leases: Extensions

A lease may be extended beyond its primary term under 43 CFR 3107.9-1 (1982) only where the lessee has been notified that the Department has made an initial determination that drainage is occurring and the lessee has informed the Department, prior to the lease expiration date, of his willingness to tender compensatory royalty in accordance with its determination or has actually tendered such royalty in response to an assessment before the lease expiration date.

APPEARANCES: C. M. Peterson, Esq., Denver, Colorado, for appellant; Robert J. Uram, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

By decision dated July 19, 1982, the New Mexico State Office, Bureau of Land Management (BLM), rejected a petition for reinstatement of oil and gas lease NM 15072 (Okla.), and held that the lease expired by operation of law upon the running of its primary term. Bruce Anderson, the lessee of record, has timely pursued this appeal.

Noncompetitive oil and gas lease NM 15072 (Okla.) issued on January 13, 1972, with a primary term of 10 years, in response to a simultaneous oil and gas lease offer drawn with first priority in a drawing held by the New Mexico State Office. The lease bore an effective date of February 1, 1972, and embraced a 40-acre parcel described as NE 1/4 SW 1/4 sec. 17, T. 18 N., R. 25 W., Indian meridian. Thus, under the terms of the lease, the lease would expire at midnight on January 31, 1982, unless it was eligible for an extension as provided by law. As of January 31, 1982, the records of BLM

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disclosed neither production under the lease nor actual drilling operations on the lease such as would serve to extend the lease under 43 CFR Subpart 3107.

On June 30, 1982, Anderson filed a petition with BLM seeking to "reinstate" the lease. In his petition, he noted that "through clerical error" a communitization agreement involving the Federal lease and the owners of other working interests in sec. 17 had not been timely submitted to the Minerals Management Service (MMS). Anderson alleged, however, that he had paid in excess of \$100,000 as his share of the cost of drilling a well within the 640-acre spacing unit, which well had been successfully completed as a producing gas well. He argued, in effect, that it would be inequitable for him to lose this lease solely because of a clerical oversight in failing to timely submit the communitization agreement to the Department.

In its July 19, 1982, decision, the New Mexico State Office denied the petition to reinstate the lease on the grounds that the communitization agreement had not been filed with MMS until after the expiration date of the subject lease, and, thus, could not be retroactively approved so as to extend his lease. Accordingly, it held that the lease expired by operation of law on January 31, 1982, at the end of its primary term.

On appeal, counsel for appellant admits that the decision of the State Office denying reinstatement was correct so far as it went, there being no provision for reinstatement of an expired lease except where the lease has expired because of a failure to pay the annual rental for the 11th year of an extended term.¹ Rather, counsel suggests that the initial predicate of the State Office was in error; namely, that the lease did not, in fact, expire. In order to examine counsel's contention it will be necessary to explore, in some detail, the factual background concerning the communitization agreement involved in this case.

Appellant alleges that in December 1980, Mustang Production Co. (Mustang) proposed the drilling of a well to test the Morrow formation in the NE 1/4 of sec. 17, T. 18 N., R. 25 W., Indian meridian. Subsequently, on April 2, 1981, the Corporation Commission of Oklahoma, pursuant to the application of Mustang, approved the establishment of a 640-acre drilling and spacing unit for sec. 17 for the production of gas and gas condensate (Order No. 187383). While this order effectively pooled all non-Federal royalty interests, it did not, under Oklahoma law, result in a pooling of any of the working interests.

Prior to the entry of the spacing order, however, Mustang had completed a well, Dishen #1-17, in the center of the NE 1/4 of sec. 17. This well was completed as a gas well in the Morrow formation on June 24, 1981. Appellant asserts that he paid his proportionate share of the cost of the well, his share being \$115,000, presumably pursuant to an informal agreement. First production from the well began on November 17, 1981.

¹ Technically, such a lease would terminate, not expire. See *Getty Oil Co.*, 72 IBLA 39 (1983).

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On January 29, 1982, appellant received a letter from the District Oil and Gas Supervisor, MMS, informing him that a well had been completed in the Upper Morrow formation in the NE 1/4 of sec. 17, and noting that all of sec. 17 was included in a drilling unit pursuant to the Corporation Commission's order. He was, therefore, informed that he was required to submit an approved communitization agreement effective prior to the initial production from the well. The letter continued:

If an agreement is not submitted for approval, compensatory royalty will be assessed in the amount of the royalty rate for lease NM-15072 times the ratio of the acreage of lease NM-15072 within the spacing unit to the total acreage within the spacing unit times the total value of the production from the spacing unit well, on a monthly basis, effective the first of the month during which first production is established.

As noted above, no communitization agreement was submitted prior to lease expiration on January 31, 1982. Counsel suggests that this was because appellant "failed * * * to appreciate the inclusion of a Federal oil and gas lease within the pooled area and the need to file a formal communitization agreement with the Minerals Management Service" (Statement of Reasons at 3). Counsel contended that the Department itself had recognized the equities involved in similar situations by publishing proposed regulations which would permit retroactive approval of communitization plans filed with MMS after expiration of a Federal lease. See 47 FR 25252 (June 10, 1982) and 47 FR 28550 (June 30, 1982).

Counsel, however, did not premise the appeal on the applicability of these proposed regulations, but rather focused attention on that part of the letter from the District Oil and Gas Supervisor which adverted to the payment of compensatory royalties. Noting that under the applicable regulation, 43 CFR 3107.9-1 (1982), payment of compensatory royalties serves to extend the primary term of the lease, counsel argued that appellant was willing to pay compensatory royalties for the period extending from initial production to approval of the communitization agreement, and that this should have independently served to extend the lease.

Counsel pointed out that after the communitization agreement had been submitted to MMS in April 1982, it was returned to Mustang with instructions to add the following statement: "All proceeds attributed to unleased Federal land included within the communitized area, *i.e.*, the full 8/8ths, are to be placed in an interest earning escrow trust account until the land is leased or the ownership is established." Additionally, MMS required a substitute exhibit A showing tract 4 (NE 1/4 SW 1/4) as "unleased." A resubmitted communitization agreement containing these changes was approved on July 15, 1982, with an effective date of November 9, 1981, as Contract No. SCR 314.

Counsel argues that, in effect, MMS is contending that appellant's lease expired on January 31, 1982, because no production could

properly be attributed to it, while at the same time it is asserting that a claim for pro rata production arose on November 9, 1981, which could only occur if, in fact, production was attributable to the leased lands.

Counsel contends that the assertion by MMS of its claim for pro rata production for the period from November 9, 1981, to January 31, 1982, necessarily constitutes a determination that compensatory royalty was due for that period. Counsel argues that if this is the case, lease NM 15072 (Okla.) did not expire on the running of its primary term because it was extended pursuant to 43 CFR 3107.9-1 (1982).

An answer was filed on behalf of BLM. In its answer, BLM, while noting that the facts were not in dispute, generally denied appellant's legal assertions. First, it argued that, in the absence of an approved communitization agreement, production from fee land within a State spacing unit cannot be attributed pro rata to Federal leases within the unit, citing *Kirkpatrick Oil Co.*, 32 IBLA 329, 331 (1977). Thus, BLM asserted that since there was no approved communitization agreement, the production from the Dishen #1-17 well could not serve to extend appellant's lease under 43 CFR 3105.2-3.

BLM suggested that the proposed regulations were not relevant for two different reasons. First, BLM pointed out that since they were merely proposed regulations, they could not be applied. Second, BLM argued that even if they had been in effect on February 1, 1982, they would not aid appellant since the regulation, as proposed, expressly provided that "[n]o retroactive approval of a communitization agreement may be made where the lease expired prior to execution of the agreement." 47 FR 28561 (June 30, 1982). BLM pointed out that in actual fact, appellant had not executed the communitization agreement until after the subject lease had expired.

Insofar as appellant's compensatory royalty argument was concerned, BLM noted that, while the regulations did provide that payment of compensatory royalty would extend the term of any lease for the period of time during which compensatory royalty is being paid (43 CFR 3107.9-1), not only was compensatory royalty not *paid*, it had not even been assessed. BLM noted that in *Inexco Oil Co.*, 45 IBLA 377 (1980), this Board had held that the obligation to pay compensatory royalty does not arise until the lessee has had an opportunity either to drill or to show why compensatory royalty is not due. Inferentially, BLM was arguing that since neither situation had transpired, there was no obligation to pay compensatory royalty prior to the expiration date of the lease, and, thus, the lease could not be extended by 43 CFR 3107.9-1 (1982).

In response, counsel for appellant noted that the relevant MMS manual provision, section 641.2.3G, provides that where a prescribed spacing program, acceptable to the area supervisor, is in effect and communitization would be a logical method of protecting against drainage "the Federal lessees holding interests in the leases or tracts being drained will be notified accordingly. Compensatory royalty will

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be assessed and made effective as of the date of first production from the offending well, even though the date is prior to the date of notification." This provision, counsel contends, providing, as it does, for retroactive assessment of compensatory royalty, supports its view that the lease was extended by assessment of compensatory royalty.

Before analyzing the specific questions raised in this appeal, it is helpful to briefly review the applicable statutes. Noncompetitive oil and gas leases are issued with a primary term of 10 years. See 30 U.S.C. § 226(e) (1982). There are various avenues by which a lease may be extended beyond its primary term. Thus, any lease will continue beyond its primary term so long as oil or gas is produced in paying quantities. Additionally, actual drilling operations, which are conducted over the anniversary date of the lease, will extend the lease for a period of 2 years and so long thereafter as oil or gas is produced in paying quantities.

Additional provisions relating to extensions apply where the lease has been committed to a unit plan or pooling agreement. See 30 U.S.C. § 226(j) (1982). Thus, under an approved communitization plan, production or operations pursuant to the agreement anywhere in the communitized area are treated as production or operations on each lease committed thereto and will serve to extend the lease to the same extent as would production or operations which were actually located on the leased lands.

Yet another provision, 30 U.S.C. § 226(g) (1982), provides for the payment of compensatory royalty where Federal lands are being drained by wells drilled on adjacent lands. This section provides that where such an agreement has been entered into, the primary term shall be extended "for the period during which such compensatory royalty is paid" and for 1 year after discontinuance of such payments and so long thereafter as oil or gas is produced in paying quantities.²

Appellant admits that there was no production from or actual drilling operations on the lands within its lease. Thus, this lease could only be extended by either constructive production under an approved communitization plan (there being no unit plan involved in the instant case) or by payment of compensatory royalty. While appellant does not expressly argue that his lease is eligible for extension because of constructive production, we will, nevertheless, treat this possibility first.

It is well established that, absent Departmental approval, issuance of a compulsory pooling or spacing order by a state regulatory agency is not effective as to Federal land within the area. See *Kirkpatrick Oil & Gas Co. v. United States*, 675 F.2d 1122 (10th Cir. 1982). While the actual order entered by the Oklahoma Corporation Commission, by its own terms, pooled only the royalty interests, without Departmental

² Admittedly, there are additional mechanisms by which a lease may be extended. See, e.g., 43 CFR 3107.6-1 (1982). None of these other provisions is even arguably applicable and, therefore, will not be discussed.

approval it was ineffective to pool the Federal royalty interest. By the same token, the fact that Mustang, Anderson, and other owners of working interests may have voluntarily agreed to pool their interests is insufficient to pool any Federal interests, absent Federal approval of a communitization agreement.

[1] It is admitted that the communitization plan was not submitted for approval until after the expiration date of the Federal lease. Under the rules and decisional authority in effect on the lease expiration date, no extension was possible where the communitization agreement had not been submitted for approval prior to lease expiration. See *Devon Corp.*, 57 IBLA 131 (1981); *Harry D. Owen*, 13 IBLA 33 (1973).³ Under this approach, it is clear that appellant's lease could not be retroactively communitized so as to extend it.

Recent amendments to the regulations, however, have altered the requirement that the unit plan or communitization agreement be submitted prior to lease expiration in order to effectuate retroactive unitization or communitization if and when such plan or agreement is finally approved by the Department. Both parties had adverted to these changes while they were in a proposed state. It would, of course, be improper for this Board to render a decision based on a regulation which had not been finally adopted. *Arizona Public Service Co.*, 20 IBLA 120 (1975). But, while this appeal has been pending, the proposed regulations were promulgated as final rulemaking. Under longstanding Departmental practice, in the absence of third-party rights or countervailing considerations of public policy, amended regulations may be applied to matters pending before the Board where such amended regulations will benefit an appellant. See *James E. Strong*, 45 IBLA 386 (1980); *Henry Offe*, 64 I.D. 52 (1957). In the context of the present appeal, since no third-party rights are involved, we think the amended regulation is properly analyzed to ascertain whether it may afford appellant any relief.

Unfortunately, it is clear that the amended regulation, by its express terms, cannot be used to aid appellant. The amended regulation, 43 CFR 3105.2-3 (48 FR 33670 (July 22, 1983)), provides, in relevant part:

Approved communitization agreements are considered effective from the date of the agreement or from the date of the onset of production from the communitized parcels, whichever is earlier. Execution by, or on behalf of, all necessary parties to a communitization agreement covering a Federal lease shall precede the expiration of that lease in order to confer the benefits of the agreement upon it.

Effectively, this regulation has amended past practice so that it is now possible to retroactively approve a communitization agreement to a date prior to the expiration of a Federal lease, even where the agreement is not filed with the Department until after the expiration

³ It is impossible to ascertain from the text of the decision in *Integrity Oil & Gas Co.*, 42 IBLA 222 (1979), since the date of submission of the communitization agreement to Geological Survey (predecessor of MMS) is not provided, whether that decision was consistent with general Board authority or aberrational. As is explained, *infra*, in the text, however, any such inconsistency is no longer of particular importance.

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date of the lease, so long as the communitization agreement is actually executed prior to lease issuance.⁴ The problem, however, adverted to by counsel for BLM, is that appellant did not execute the communitization agreement until after the lease expiration date. Indeed, the record establishes that appellant signed the agreement on March 29, 1982, almost 2 months after lease NM 15072 (Okla.) had expired. Thus, this amended provision is not of assistance to appellant.

[2] It is, therefore, necessary to examine the central argument presented by counsel for appellant, viz., whether the lease was extended by the "demand" for compensatory royalty. BLM contends first, that the letter of the area supervisor, which appellant received on January 29, 1982, did not constitute an assessment of compensatory royalties, and second, even if it did, a lease is subject to extension only where the compensatory royalties have been *paid*, which they were not, during the primary term of the lease, citing 43 CFR 3107.9-1 (1982). That regulation provided:

The payment of compensatory royalty shall extend the primary or extended term of any lease for the period during which such compensatory royalty is paid, and for a period of 1 year from the discontinuance of such payments, and for so long thereafter as oil or gas is produced in paying quantities.

This regulatory provision closely tracks the statutory language.⁵

Appellant counters this argument by pointing to the MMS manual provision cited earlier as supportive of its interpretation. Appellant notes that not only did the letter of January 27, 1982, assert that compensatory royalties would be assessed if a communitization agreement were not submitted, but, in fact, such royalties, commencing upon production, were effectively assessed as a precondition to MMS' eventual approval of the communitization agreement submitted by Mustang and the other holders of working interests.

The difficulty which arises in analyzing the contentions of the parties in this appeal results from the fact that both sides are partially correct. As we shall explain, a lease is extended not by the mere assessment of compensatory royalties, but by the agreement of the lessee prior to lease expiration to pay such royalties as a precondition to maintaining the lease. On the other hand, we agree that, since BLM never approved a communitization agreement which included lease NM 15072 (Okla.), and, in the absence of an expressed agreement by appellant to pay compensatory royalties, no such royalties may be assessed for the period from production to lease expiration and, therefore, the Department's demand for the same was error.

The applicable statute provides:

⁴ It should be pointed out, however, that such a communitization agreement may not be retroactively approved if the Federal lands have been subsequently leased to a different party.

⁵ The recent amendments to the oil and gas leasing regulations have changed the language without altering the substance of this provision. Thus, the regulation now provides: "The payment of compensatory royalty shall extend the term of any lease for the period during which such compensatory royalty is paid and for a period of 1 year from the discontinuance of such payments." 48 FR 33673 (July 22, 1983).

Whenever it appears to the Secretary that lands owned by the United States are being drained of oil or gas by wells drilled on adjacent lands, he may negotiate agreements whereby the United States, or the United States and its lessees, shall be compensated for such drainage. Such agreements shall be made with the consent of the lessees, if any, affected thereby. If such agreement is entered into, the primary term of any lease for which compensatory royalty is being paid, or any extension of such primary term, shall be extended for the period during which such compensatory royalty is paid and for a period of one year from discontinuance of such payment and so long thereafter as oil or gas is produced in paying quantities.

30 U.S.C. § 226(g) (1982). It is to be noted that the statute, by its terms, relates to agreements between the owner of the offending well and the United States, with the Federal lessee as merely an interested third party. In actual practice, however, compensatory royalty payments are made the obligation of the Federal lessee pursuant to 30 CFR 221.21 (1982), as part of the lessee's express obligation to protect the United States from drainage under section 2(c)(1) of the standard lease terms. Thus, section 2(c)(1) provides:

The lessee agrees:

* * * * *

* * * To drill and produce all wells necessary to protect the leased land from drainage by wells on lands not the property of the lessor, or lands of the United States leased at a lower royalty rate, or as to which the royalties and rentals are paid into different funds than are those of this lease; or in lieu of any part of such drilling and production, with the consent of the Director of the Geological Survey, to compensate the lessor in full each month for the estimated loss of royalty through drainage in the amount determined by said Director * * * .

While the lease form and the regulations expressly provide two options, *i.e.*, drilling (or, as here, where drilling is not feasible, submission of a communitization agreement) or payment of compensatory royalty, there is, in fact, a third option: surrender of the lease. Indeed, this option is expressly recognized in the MMS manual:

Although we should have reasonable justification before demanding drilling and assessing compensatory royalty, certain situations may be questionable. However, since the lessee has the right of appeal and may also relinquish all or part of his lease should he disagree with the Supervisor's determination, these questionable situations should be resolved in favor of assessing compensatory royalty and requiring offset protection.

(MMS Manual 641.2.3B).

Inasmuch as a lessee does, in fact, have the option of surrendering the lease, a lessee can only become subject to the payment of compensatory royalties when he has signified his willingness to pay the same. A lessee's silence on this point is, thus, not tantamount to assent. In the instant case, no acquiescence in the assessment of compensatory royalties was manifested during the life of the lease. By such time as the lessee had expressed a willingness to tender compensatory royalties, the lease had expired by its own terms and was no longer subject to extension by payment of compensatory royalty.⁶

⁶ We wish to make it clear, however, that we do not agree that compensatory royalties must actually have been paid prior to the lease expiration date in order to extend the lease. As a practical matter, assessment of compensatory

Continued

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Moreover, absent the affirmative assent of lessee, lease NM 15072 (Okla.) would not even have been liable for compensatory royalty assessment as of the lease expiration date. In *Nola Grace Ptasyński*, 63 IBLA 240, 89 I.D. 208 (1982), this Board analyzed section 2(c)(1) of the standard lease form specifically on the question of when the requirement to pay compensatory royalty arises. Therein, we noted that the purpose of compensatory royalty is to compensate the Government "for production royalties estimated to be lost as a result of a failure to drill offset wells." *Id.* at 258, 89 I.D. at 218-19, quoting *Pan American Corp.*, IA-1578 (Feb. 29, 1968). Since the obligation to drill an offset well arises only after the passage of a reasonable time following notification of the offending well, we held that, under the regulations, compensatory royalties are properly assessed only at that point in time, not retroactively to the date of the completion of the offending well.⁷

Normally, in the situation presented by the instant case, where the offending well and the Federal lease are both within the same State authorized spacing unit, there is no problem with this limitation on assessment of compensatory royalties, as the Department will insist on submission of a communitization agreement with an effective date coterminous with the commencement of production. In the present case, however, the unfortunate convergence of the failure of appellant to execute a communitization agreement prior to the lease expiration date, the fact that production commenced immediately before the expiration date, and the fact that appellant failed to agree to the assessment of compensatory royalty prior to lease expiration, have all combined to create a truly bizarre (and, hopefully, unique) situation. In the absence of an approved communitization agreement, the Federal Government has no claim to its pro rata royalty from production of the Dishen # 1-17 well, since the State's pooling order is ineffective as to the Federal royalty interest absent the expressed consent of the United States. Nor could the United States sustain a claim for compensatory royalty for the royalties earned prior to lease expiration since, as we have explained, the lessee would not be liable for any such royalties at the time the lease expired, absent his expressed commitment to tender

royalty is made on a monthly basis, after the fact. In order to properly assess such royalty MMS must know the monthly production from the offending well. Thus, a rigid requirement that compensatory royalty must be *paid* prior to lease issuance would effectively preclude extension for any lease where the offending well began production in the last month of the lease term. We reject this view. Rather, we hold that such leases may be extended *provided* the lessee informs the Department of his willingness to tender compensatory royalty prior to the lease expiration date.

In this regard, the distinguishing factor between the instant case and the decisions in *Chaparral Resources, Inc.*, 39 IBLA 269 (1979), and *Webb Resources, Inc.*, 38 IBLA 330 (1978), is that in both of those cases, while appellants had expressed a willingness to pay compensatory royalties, there had been no initial determination by the Department that drainage was, in fact, occurring prior to lease expiration. In the absence of such a determination, mere willingness to pay compensatory royalties may not serve to extend a lease.

⁷ In *Ptasyński*, we expressly noted that the Secretary could issue regulations which would authorize the assessment of compensatory royalties from the date of completion of the offending well as an additional incentive to the drilling of offset wells. We merely held that such assessment was not presently authorized by existing Departmental regulations. The MMS Manual provisions which purport to direct such assessments (sec. 641.2.3C) are not in accord with the present regulation and the Departmental interpretations thereof.

the same. Thus, it would seem that the United States has lost any claim to royalties earned by production from the Dishen #1-17 well.

MMS attempted to avoid this result by approving a communitization agreement on July 15, 1982, with an effective date of November 9, 1981. The problem, however, is that the agreement, as approved, described the subject parcel as "unleased." Contrary to this statement, however, it is clear that, as of the effective date of the agreement, appellant was the lessee of that parcel. While we recognize that communitization agreements are often approved with an effective date which coincides with first production, such agreements cannot retroactively change the underlying facts. The only possible way that the communitization agreement could be approved with an effective date of November 9, 1981, would be if appellant's lease was eligible for an extension under 43 CFR 3105.2-3 (48 FR 33670 (July 22, 1983)) or 43 CFR 3107.9-1. Inasmuch as it was the view of both MMS and BLM that such an extension was not possible, MMS is, indeed, as appellant contends, trying to have it both ways. It is attempting to retain pro rata production for this period while at the same time arguing that appellant's lease expired because no production was allocable to the lease at that time.

We hold that under the facts of this case, the effective date of the approved communitization agreement can be no earlier than the first day that the land was, in fact, unleased, February 1, 1982. It must follow, therefore, that the United States has no claim for royalties from production occurring prior to February 1. We also hold, however, that, contrary to appellant's claim, the lease did expire by its own terms at midnight January 31, 1982.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

BRUCE R. HARRIS
Administrative Judge

WILL A. IRWIN
Administrative Judge

STATE OF OREGON *ET AL.*, II

80 IBLA 354

Decided *May 10, 1984*

Appeals from a decision of the Oregon State Office, Bureau of Land Management, rejecting applications for school indemnity lands.
OR 3162, OR 3163, OR 3164, and OR 3737. .

May 10, 1984

Affirmed in part; reversed in part and remanded.

1. Act of February 14, 1859--Act of February 28, 1891--Lieu Selections--School Lands: Indemnity Selections--State Grants--State Lands--State Selections--Surveys of Public Lands: Generally

Where the State of Oregon has selected indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed township in the Siskiyou National Forest and thereafter a reprotraction or survey is run revealing new fractional townships within the area originally protracted, the State is entitled to indemnity lands for those new townships in accordance with the compact it entered with the United States by Act of Feb. 14, 1859.

2. Act of February 28, 1891--Lieu Selections--School Lands: Indemnity Selections--State Selections--Surveys of the Public Lands: Generally

A state selecting indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for unsurveyed school sections within a national forest shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of secs. 16 and 36 therein. Where a protraction on which the state relies to make its indemnity selections reveals that a fractional township is present, the state's entitlement to indemnity lands is calculated according to the pro rata rule set forth at 43 U.S.C. § 852 (1976).

Where a survey on which the state relies to make its indemnity selections pursuant to the Act of Feb. 28, 1891, reveals a fractional township with a school section in place, the state's entitlement should be in an amount equal to the acreage shown by the surveyed school section or in an amount determined by the pro rata rule at the election of the state.

3. Act of February 28, 1891--Lieu Selections--School Lands: Indemnity Selections--State Selections--Surveys of Public Lands: Generally

Until a survey of public lands has been run and approved, the designated sections of a township are undefined and the lands are unidentified.

4. Act of February 28, 1891--Lieu Selections--School Lands: Indemnity Selections--State Selections

Where the State of Oregon makes an initial selection of indemnity lands pursuant to the Act of Feb. 28, 1891, ch. 384, 26 Stat. 796, for school sections within an unsurveyed fractional township in a national forest, it is not entitled to additional indemnity lands should a subsequent reprotraction or survey be made of the township.

APPEARANCES: Michael D. Reynolds, Esq., and Peter S. Herman, Esq., Department of Justice, State of Oregon, Salem, Oregon; Robert H. Memovich, Esq., Joseph B. Brooks, Esq., Donald P. Lawton, Esq., and Eugene A. Briggs, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon; Donald H. Coulter, Esq., Grants Pass, Oregon, for Crater Title Insurance Co. and Transamerica Title Insurance Co. of Oregon; Alfred H. Hampson, Esq., Portland, Oregon, for Karl P. Baldwin and Barbara S. Baldwin, executrix.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

In *State of Oregon I*, 78 IBLA 255, 91 I.D. 14 (1984), this Board determined to bifurcate the State's appeal of a decision by the Oregon State Director, Bureau of Land Management (BLM), dated April 12, 1973, and in this way address in separate decisions two highly complex issues. These issues, succinctly stated, involve protractions of public land surveys and forest lieu selections. *State of Oregon I* addressed the question of forest lieu selections. This decision will address the remaining issue, protractions.

The State Director's decision of April 12, 1973, held that for a number of reasons the State of Oregon had exceeded its entitlement to make any further selections of land as indemnity for school lands which had been lost to the State. Three principal categories of improper base lands used by the State in its past indemnity transactions were set out in the decision, only one of which need concern us in this portion of the appeal: lands described by certain township designations shown on existing surveys but previously described by different township designations on prior protractions.

In order to understand why BLM held that the State had exceeded its entitlement to make further selections of land as indemnity for school sections lost to the State, it is necessary to set forth the relevant statutes. Oregon was admitted to the Union by Act of Congress approved February 14, 1859, ch. 33, 11 Stat. 383. Section 4 of the Admission Act provided, in material part, as follows:

That the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, *That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools.* [Italics added.]

Recognizing that secs. 16 and 36 might be unavailable or lost to a state for a number of reasons, Congress enacted several statutes providing for selections of other public lands in lieu of those lost to the state. The Act of February 26, 1859, ch. 58, 11 Stat. 385, provided for the appropriation of lands of like quantity where secs. 16 or 36 may have been patented by preemptors. That Act, codified in substantial part as Revised Statute 2275, 2d ed. (1878), further provided for appropriations "to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever." In 1891, 1958, and 1966, Revised Statute 2275 was amended¹ to read as presently codified at 43 U.S.C. § 851 (1976):

¹ Act of Feb. 28, 1891, ch. 384, 26 Stat. 796. Act of Aug. 27, 1958, P.L. 85-771, § 1, 72 Stat. 928. Act of June 24, 1966, P.L. 89-470, § 1, 80 Stat. 220.

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And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: *Provided*, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

The Secretary of the Interior's duty to determine by protraction or otherwise the number of townships affected by a reservation was made clear:

And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: *Provided, however*, That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

43 U.S.C. § 851 (1976).

The Act of February 26, 1859, *supra*, also alluded to certain arithmetic principles of adjustment set forth in the Act of May 20, 1826, ch. 83, 4 Stat. 179, to compute the quantity of land which the State could select as compensation for fractional or wanting secs. 16 or 36.² These principles of adjustment were codified in Revised Statute 2276³ and are referred to as the "pro rata rule" by the parties. The principles of adjustment set forth in Revised Statute 2276 were carried over in material part by the amendments of 1891, 1958, and 1966. Revised Statute 2276, *as amended*, 43 U.S.C. § 852(b) (1976), now provides:

Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional

² The legislative history for the Act of May 20, 1826, indicates that the purpose of the Act was to compensate townships situated on navigable rivers where sec. 16 was cut off by a bend or turn in the river. A second purpose of the Act was to compensate those townships in which Congress had failed to reserve a school section. Among these was a township of land granted to General Lafayette, the inhabitants of which were without any provision for the support of schools. Register of Debates in Congress at p. 2575 (1826).

³ Revised Statute 2276 provided:

"The lands appropriated by the preceding section shall be selected * * * in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half, of a township, one-half section; and for a fractional township, containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one quarter-section of land."

township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land: *Provided*, That the States which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

A. Siskiyou National Forest

A protraction is an extension of a cadastral survey for the purpose of describing unsurveyed land. In the Siskiyou National Forest, established by Theodore Roosevelt in 1906, 34 Stat. 3239, protractions were made by the United States in mapping the area within forest boundaries. Because these lands had been reserved by Presidential proclamation prior to their vesting in the State,⁴ the State of Oregon took indemnity lands for the school sections lost to it. The State's entitlement was determined by Government protractions. In 1927, some years after Oregon received its entitlement, the United States surveyed part of the forest and later reprotracted other parts.⁵ This survey and reprotraction resulted in the General Land Office (GLO) recognizing "new" (*i.e.*, additional) fractional townships, each greater than one section, but less than one-quarter township, in size.⁶ In 1961, BLM granted to the State 320 acres as indemnity for each of two new fractional townships revealed by the 1927 survey. No indemnity lands were received for other new fractional townships which were shown by the reprotraction.

The State of Oregon maintains that it is entitled to indemnity lands for the school sections (16 and 36) lost to it in these new fractional townships in the Siskiyou National Forest. Oregon further maintains that the amount of its entitlement is equal to the acreage of the school sections in place, if that amount exceeds the amount established by the so-called "pro rata rule," quoted above as Revised Statute 2276, 43 U.S.C. § 852 (1976).

In response, BLM maintains that Oregon waived its rights to indemnity for secs. 16 and 36 in the new townships by selecting lands in lieu thereof prior to the 1927 survey. BLM calls our attention to 43 U.S.C. § 851 (1976) in support of its argument in favor of waiver. The relevant portion of this statute states:

⁴ Vesting is explained by the United States Supreme Court in this way:

"After reviewing the cases, Secretary Lamar concluded (December 6, 1887; to *Stockslager, Commissioner*, 6 L.D. 412, 417) that the school grant 'does not take effect until after survey, and if at the date the specific sections are in a condition to pass by the grant, the absolute fee to said sections immediately vests in the State, and if at that date said sections have been sold or disposed of, the State takes indemnity therefor.'"

United States v. Morrison, 240 U.S. 192, 207 (1916). The reservation of a school section for forest purposes is considered a disposal of the school section in this context. See 43 U.S.C. § 851 (1976).

⁵ Tps. 34 and 35 S., Rs. 10 and 11 W., Willamette meridian, as shown on the original Government protraction, were surveyed by the General Land Office in 1927. In 1942, the Forest Service reprotracted the land previously identified as Tps. 37 and 38 S., Rs. 11 and 12 W. BLM in 1966 reprotracted lands previously identified as Tps. 36 and 37 S., R. 12 W.

⁶ Although it is convenient to use the phrase "new townships," we do so with the understanding that the lands therein are in no way new lands. These lands were always within the forest boundaries and were included in the original Government protraction, albeit under a different township designation.

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And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: *Provided, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections.* [Italics added.]

Oregon rests its claim for indemnity upon the Act of February 14, 1859, quoted above in part, admitting Oregon to the Union. The key language in this Act, the State contends, is the phrase granting to the State secs. 16 and 36 *in every township or other lands equivalent thereto* if such sections have been sold or otherwise disposed of. Oregon refers to this statute as its compact with the United States and, accordingly, bases much of its argument in contract.

Although the parties have not cited any case law directly on point, this Department has decided a similar issue in at least three instances. In *State of Wyoming*, 9 IBLA 22, 80 I.D. 1 (1973), Wyoming took indemnity lands using as base certain surveyed and unsurveyed sections. Thereafter, these sections were either resurveyed, initially surveyed, or re-platted by projection diagram and found to contain more than 640 acres each. Wyoming then made application to select additional lieu lands using the overage as base. BLM rejected the State's application and this Board affirmed.

Our decision in *State of Wyoming*, *supra*, relied upon two prior cases, each involving lands in New Mexico. These decisions, we said, established the rule that the extent of a state's right to receive a school indemnity grant is limited to the acreage shown by the official surveys (or protraction diagrams for unsurveyed lands), and where indemnity lands have been granted by the United States in lieu thereof, subsequent discovery of deficiencies in acreage caused by inaccuracies in the surveys will not afford a new basis for adjustment of the grant. Therein, we quoted from *State of New Mexico*, 51 L.D. 409 (1926), a case involving a selection based upon an erroneous original survey:

In denying the State's claim for credit on account of the alleged deficiency, the Commissioner held that Section 2396, Revised Statutes, contemplated that in the disposal of public lands the official surveys are to govern, and that each section or sectional subdivision, the contents whereof have been returned by the surveyor general shall be held as containing the exact quantity expressed in the return that the design and purpose of this statute was to establish beyond dispute all lines and monuments of accepted official surveys; to obviate inquiry and contention with respect to survey inaccuracies and place a statutory bar against attempts to alter the same or to set up complaints of deficiency of areas as a basis for resurvey. The Commissioner observed that aside from this statutory limitation, administrative reasons precluded the granting of the State's claim; that the stability of surveys and the title to lands described by reference thereto should be unassailable by parties finding differences in measurements and areas from those returned, and if transactions involving the disposition of public lands were not made final, and the Government was obliged to open up for readjudication the question as to the area of a particular tract or tracts granted and

patented, controversies would be constantly arising and resurveys and readjudications would be interminable. (*Ibid.* at 411).

* * * * *

The Department has carefully considered the matter and finds no reason to differ with the conclusion reached by the Commissioner. The provisions of section 2396, Revised Statutes, recognize the fact taught by experience that measurements of lands can not be performed with precise accuracy and that the work of no two surveyors would exactly agree. True, the alleged shortage in this case looms to a figure of impressive proportions, but the very purpose of the declaration of law above referred to was to obviate inquiry and contention in regard to survey inaccuracies. Moreover, the recognition of right to an adjustment in this instance would establish a far-reaching precedent and afford a basis for similar claims by other States, and a multitude of claims by individuals who had purchased Government lands and found the area short of that expressed on the plat of survey. Also, the rule works both ways, in favor of and against the United States. Manifestly the Government has no basis for claim to readjustment of boundaries or for further payment, or for restitution in those cases of certified or patented lands where there was an excess of acreage over that paid for or taken in harmony with the survey returns at the time of disposal. And if the returns are conclusive against the Government they must also be conclusive in its favor. Take the present case; the Government can not inquire into the contents of the school sections and subdivisions assigned by the State as basis for its indemnity selections, but accepts them as containing the exact quantity expressed in the return. Examination might disclose a deficiency in the area of these sections; frequently, no doubt, exchanges have been made of unequal areas, the discrepancy being in favor of the State, but the law gives these transactions repose and they can not be disturbed. Otherwise endless confusion would ensue. (*Ibid.* at 412).

The same principle was applied in the 1930 decision, *State of New Mexico*, 53 I.D. 222, where it was held:

Where a State submits as base for an indemnity school selection an unsurveyed section within a national forest the area of which was estimated by protraction, the adjudication of its claim for indemnity on that basis is final and the State will be estopped from asserting a claim for further indemnity on the ground that the section when surveyed was shown to contain a greater area than that estimated by the protraction. (Syllabus).

In the instant appeal, we note that there exists a factor not present in *State of Wyoming* or the two *State of New Mexico* cases. After Oregon received its indemnity based on original Government protractions, *new* townships were recognized by the 1927 Government survey and by the Government reprotractions of 1942 and 1966. Recognition of these new townships was caused by GLO's finding that oversized townships existed in Ranges 11 and 12 West (Stipulation at 11, Aug. 23, 1976).⁷ Although we are mindful of the practical difficulties that recognition of new entitlement occasions to BLM, we hold that the State is entitled to indemnity for school sections lost to it within these new townships.⁸

⁷ The current *Manual of Surveying Instructions* (1973 ed.) addresses the question of when BLM should create half-township or half-range numbers. At page 84, the *Manual* states:

"3-83. When the length or width of a township exceeds 480 chains to such an extent as to require two or more tiers of lots adjoining the north or west boundary, the usual past practice has been to lot all of the area beyond the regular legal subdivisions. * * * In modern practice, sections in excess of 120 chains are avoided by the creation of half-townships of half-range numbers."

⁸ These new townships are: Tps. 34 and 35 S., R. 10-1/2 W.; T. 37-1/2 S., Rs. 11 and 12 W.; and Tps. 36 and 37 S., R. 12-1/2 W.

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[1] Our holding in this respect is based upon the Act of February 14, 1859, quoted above in part, wherein the United States offered to the people of Oregon various propositions, the first of which provided that secs. 16 and 36 *in every township* of public lands in the State, or other lands equivalent thereto where either of said sections, or any part thereof, has been sold or otherwise disposed of, shall be granted to the State for the use of schools. This Act further provided that the grant of school lands is offered on the condition, *inter alia*, that the people of Oregon shall provide by ordinance that the State will never interfere with the primary disposal of the soil within the State by the United States. A sixth proposition in the Act provided that the State shall never tax the lands or property of the United States in the State. The propositions of this Enabling Act were accepted by the legislative assembly of the State of Oregon on June 3, 1859. 1 Lord's Oregon Laws, at 28, 29; *United States v. Morrison*, *supra*.

Case law supports the contention of counsel for the State that this Enabling Act represents a compact between two sovereigns. In *Andrus v. Utah*, 446 U.S. 500, 507 (1980), the Supreme Court agreed with the State of Utah that its school land grant was a "solemn agreement" that in some ways may be analogized to a contract between private parties. The United States agreed to cede some of its land to the State, Mr. Justice Stevens explained, in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry. The dissent in *Andrus v. Utah* refers to the school land grant as a compact that Congress has respected and enforced throughout the Nation's history. 446 U.S. at 520-21. *See also Beecher v. Wetherby*, 95 U.S. 517, 523 (1877); and *Cooper v. Roberts*, 59 U.S. (18 How.) 173 (1855).

When new townships were recognized by the 1927 survey and the reprotractions of 1942 and 1966, the State was entitled to receive indemnity for the school sections therein, notwithstanding the waiver provisions of 43 U.S.C. § 851 (1976). By that provision, a state selecting indemnity for school lands lost to it within a particular township waives its right to the school lands in that particular township. If a township is oversized to such an extent that GLO, following selection, recognizes a new township, *in addition to* earlier protracted townships, occupying land formerly within the perimeter of such earlier townships, we hold that no waiver has occurred as to those school lands within the new township.

We acknowledge that the issue of waiver in this case poses a difficult question. Our resolution of this issue, however, is guided by a well-established policy of the Supreme Court that the legislation of Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively. *Wyoming v. United States*, 255 U.S. 489, 508 (1921), and cases cited therein.

In holding that the State is entitled to receive indemnity for the school sections lost to it in these newly recognized townships, we must distinguish prior Departmental precedents such as *State of Wyoming* and the two *State of New Mexico* cases, discussed above. GLO's error in the instant appeal was its failure to carry out that provision of the Act of February 28, 1891, *supra*, requiring the Secretary, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the *number* of townships that were included within the Siskiyou National Forest. 43 U.S.C § 851 (1976). GLO underestimated this number to the State's detriment. No such error occurred in any prior Departmental case cited to this Board.

[2] Although we agree with the State that it is entitled to indemnity for school lands lost to it within the newly recognized townships, we disagree with the State's method of calculating the amount of this indemnity. The State contends that it is entitled to the acreage shown on Government reprotraction diagrams of reserved school sections or, in the alternative, to the acreage determined by the pro rata rule, 43 U.S.C. § 852 (1976). Under well-established principles, until a survey is run and approved, the designated sections of a township are undefined and the lands are unidentified. *United States v. Morrison, supra*. A survey of public lands does not ascertain boundaries; it creates them. *Cox v. Hart*, 260 U.S. 427, 436 (1922). Absent a survey, any argument by the State calling for indemnity lands equal in acreage to a protracted school section must overcome these well-settled principles.

There is no denying that GLO frequently inserted acreage estimates on school sections within a protracted township. These acreage figures, however, have no legal significance for entitlement purposes in the absence of a survey of the township. The Act of February 28, 1891, *supra*, carefully limits the purpose for which a protraction diagram may be used. Therein, a protraction is first authorized to enable the Secretary to ascertain and determine the number of townships that will be included within a reservation. Prior to the Act, no indemnity could be selected for unsurveyed lands within a reservation. *State of California*, 6 L.D. 824 (1888).

The purpose of the Act and the Department's concern for the accuracy of a protraction are set forth in a letter from Commissioner Groff forming part of the legislative history of the Act of February 28, 1891:

Under the law as construed by the Department the State or Territory is entitled in such case to indemnity for lands granted for schools in sections 16 and 36, embraced in permanent reservations and the purpose of the proposed legislation is to enable the proper selection of indemnity to be made at once, while good lands can be found for selections before the time, more or less distant, when actual surveys of the reservations will be made, and when it is a matter of course that the good lands will be generally appropriated for other purposes under existing laws.

I am of opinion that the amount due to the schools as indemnity under the general principles of the bill may be ascertained with sufficient accuracy in the way

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contemplated in the proposed amendment, and I see no good reason why it should not be adopted.

22 Cong. Rec. 3466 (1891).

It is important to emphasize that the 1891 amendments to Revised Statute 2275, by their express terms, authorized protraction only for the purpose of ascertaining the *number of townships* in reserved lands. Only after the number of townships was initially determined would it be possible for a state to seek indemnity on a "section for section" basis as provided in the Act.⁹ The implicit presumption animating the Act was that, having determined the existence of a full township by protraction, each section therein would necessarily consist of 640 acres, and, thus, the right of a state to indemnity for such a protracted township would total 640, 1,280, or 2,560 acres depending upon the number of school sections granted to the state in its Admission Act. Indeed, no other approach is logically consistent with established principles of survey.

Since, as noted above, a survey of public lands actually *creates* rather than merely *identifies* each section within a township, the actual acreage of any section of a protracted township is, in law and in fact, indeterminate until an actual survey has been completed, as the section does not exist until such time. Thus, no acreage figures can be ascribed to specific sections of that township which might serve as an independent basis for state selection.¹⁰ It similarly follows that where a protraction reveals the existence of a fractional township within a reserved area, the state's right to indemnity is ascertainable only by reference to the procedures enunciated in Revised Statute 2276.

Candor requires us to admit that these principles have not always been clearly delineated in past Departmental decisions. Thus, in *State of Wyoming, supra*, we noted that in certain situations the area offered as base "was one unsurveyed section, presumably 640 acres." *Id.* at 23, 80 I.D. at 1. Technically, we should have stated that the section was "presumptively" 640 acres. Subsequently, while the principle of law was correctly stated, we implied that a state was bound by the acreage totals estimated to exist within a state school section by the protracted survey in effect at the time the state offered the land as base for an indemnity selection. While it is true, as we reaffirm herein, that a state is bound by the acreage "presumptively" deemed to exist as the

⁹The term "section for section" was added to 43 U.S.C. § 851 by the 1958 amendments. As originally enacted, the language provided that the state or territory would be entitled to "select indemnity lands to the extent of two sections for each of said townships." To the extent that this statutory language could be seen as constituting an upwards limit on a state's entitlement, *i.e.*, two sections or 1,280 acres, the original language can be seen as reinforcing our interpretation of the intent of Congress herein.

¹⁰The Department does, of course, use estimated acreage in sections of protracted townships as a means for estimating rentals for oil and gas and other mineral leases. This, however, is done merely as a convenient tool which benefits both parties, and it must be noted that such leases in no way qualify the United States' ownership of the underlying fee. Where, however, any party seeks to acquire title to land in a protracted township, such title can only be based on an actual survey. Clearly, the grant of indemnity on the basis of such a section in a protracted township is more akin to the patenting of the land than the mere issuance of an oil and gas lease.

result of a protraction of a township,¹¹ this statement could be misread as implying that specific acreage estimates of sections which are often inserted in a protraction diagram may serve as the basis for acquiring indemnity on an acre for acre basis. This is not the case.¹²

Admittedly, the effect of the presumption that every section in an unsurveyed protracted full township contains 640 acres is to limit a state's right to indemnity when taken on the basis of a protracted township to a maximum of 640 acres per school section, and, thus, in certain circumstances a state may not obtain the greater acreage which a survey on the ground would disclose. Certain observations, however, are in order.

First, a state is not required to base its selection on a protraction, but can, if it chooses, decide to await actual survey of the land and, should the survey disclose an excess of 640 acres within a state school section, obtain indemnity based on the actual acreage in place.

Second, while the limitation of 640 acres per section for every protracted full township may, at times, work to the state's detriment, application of the pro rata rule for fractional townships set forth in Revised Statute 2276 will always work to the state's benefit. Where the fractional township is surveyed, the state has the option of taking its in place grant or taking according to the pro rata rule, whichever avenue benefits the state more. And while we hold that the state must, as a matter of law, use the principles of adjustment where the fractional township is unsurveyed, these principles generally work to the state's benefit, since the pro rata rule rounds up, and normally serve to increase the state's grant.

Finally, it must be noted that there will be situations in which a subsequent survey will disclose that, contrary to the protraction under which a state took indemnity, less land was actually in existence in the granted section than had been presumed on the basis of the protraction diagram. Where this occurs, however, the state is not required to make good on the base which it tendered. Rather, it receives the benefit of the Department's error without need to make recompense. There is, in short, a mutuality of benefit and risk in this procedure which justifies the invocation of repose for any transactions predicated thereon.

These considerations animated not only the two decisions in *State of New Mexico, supra*, but were also the predicate of the Departmental

¹¹ While in a protracted full township each section would presumptively be deemed 640 acres, where a fractional township existed school section acreage which would be presumed to be present would be ascertained by reference to Revised Statute 2276.

¹² Similarly, in *State of New Mexico*, 53 I.D. 222 (1930), the decision noted that sec. 2 was shown by protraction "as having an estimated area of 640 acres." While this statement also raises the spectre that an acreage total is ascertainable for specific sections, we think this case is more properly seen as following the general rule enunciated in the text. Indeed, inasmuch as sec. 2 is a northern tier section, it is highly unlikely that a survey would return the section as embracing exactly 640 acres, since survey excesses and deficiencies are generally offset on the northern and western boundaries of a township. Rather, the use of the phrase "having an estimated area of 640 acres" is more consistent with our stated holding that where a protraction indicates that a full township exists, each section within that township is *presumptively* 640 acres.

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decisions in *State of New Mexico*, 54 I.D. 159 (1933)¹³ and *State of California*, 20 L.D. 103 (1895), which considered the practice of using a protraction to determine the number of townships to the nearest quarter township, within a reservation. While there may have been isolated instances in which these principles seem to have been ignored, such aberrations would not justify this Board's failure to follow the general rule as delineated in this decision.

In the instant case, the new townships recognized by the 1927 survey and the reprotractions of 1942 and 1966 are fractional townships, each greater than one section, but less than one-quarter township, in size. If, as the record shows (Stipulation at 12), the State is unwilling to await the extinguishment of the reservation currently affecting the new, unsurveyed, fractional T. 37-1/2 S., Rs. 11 and 12 W., and Tps. 36 and 37 S., R. 12-1/2 W., an option expressly offered to the State by 43 U.S.C. § 851 (1976), the measure of its indemnity, *i.e.*, section for section, is calculated in accordance with the pro rata rule of 43 U.S.C. § 852 (1976). *See State of New Mexico*, 54 I.D. 159 (1933). For each new, unsurveyed, fractional township within the reservation, the State is entitled to a total of 320 acres of indemnity lands.

For Tps. 34 and 35 S., R. 10-1/2 W., each a new, surveyed, fractional township showing school sections in place within the reservation, the State's entitlement should be in an amount equal to the acreage shown by the surveyed school section(s) or in an amount determined by the pro rata rule at the election of the State. The State's receipt of 320 acres in 1961 for each of these surveyed, fractional townships shall not preclude it from receiving its full entitlement. Any future indemnity granted according to the provisions of this paragraph shall, however, reflect the State's receipt of 640 acres in 1961.

B. Umpqua National Forest

Lands within the Umpqua National Forest appear on a diagram forming part of the Presidential proclamation of January 25, 1907, 34 Stat. 3270, enlarging the boundaries of the Cascade Range Forest Reserve. Prior to 1920 and at a time when the lands were unsurveyed, the State of Oregon took indemnity for 28 sections contained in Tps. 25 and 26 S., Rs. 1 through 6, 6-1/2 E., Willamette meridian. Subsequent surveys (1929-33) and reprotractions (1942, 1966) revealed the existence of additional fractional townships, each greater than one section, but less than one-quarter township, in size. In 1961, the State selected and received 320 acres for each of three new, surveyed,

¹³ In this case, BLM estimated the acreage of a fractional township, most of which was unsurveyed land within the Lincoln National Forest. Township acreage was said to be in excess of 17,280 acres, *i.e.*, greater than three-quarters of a township in size. BLM granted to the State four sections of indemnity lands, consistent with the State's school grant of secs. 2, 16, 32, and 36 in every township. Act of June 20, 1910, ch. 310, 36 Stat. 557, 561.

This case also expressly overruled a case, *State of New Mexico*, 49 L.D. 314 (1922), relied upon by the State of Oregon for its position that "protractions are the appropriate means of determining the quantity of school lands within withdrawn townships in order that the State may select 'lands of equal acreage' to those lost in place" (State's Reply Brief at 11 (May 1, 1973)).

fractional townships in T. 25-1/2 S., Rs. 1 through 3 E. No indemnity was received for other new, fractional townships.¹⁴

Principles similar to those set forth in our discussion of the Siskiyou National Forest apply. Because the grant of school lands set forth in the Oregon Enabling Act is in the nature of a compact and has historically been given a liberal, rather than restrictive construction, we hold that the State is entitled to indemnity lands for those new fractional townships first recognized in the surveys of 1929-33 and the reprotractions of 1942 and 1966. As before, though we agree with the State that it is entitled to indemnity, we disagree with its computation of the amount of that entitlement.

If, as appears from the record (Stipulation at 20), the State is not interested in awaiting the extinguishment of the reservation affecting those unsurveyed, fractional townships revealed by the reprotractions of 1942 and 1966, the measure of the State's indemnity is set by 43 U.S.C. § 851 (1976), *i.e.*, section for section. Where, as in the instant case, a fractional township is revealed, this measure is calculated in accordance with the pro rata rule of 43 U.S.C. § 852 (1976). *State of New Mexico*, 54 IBLA 159 (1933). For each new, unsurveyed, fractional township within the reservation, the State is entitled to a total of 320 acres of indemnity lands.

The State's argument calling for indemnity in an amount based upon estimated acreage figures of school sections shown on protraction diagrams is expressly rejected. As noted above, in the absence of a survey of a township, a school section is undefined and its lands are unidentified. *United States v. Morrison, supra*. For this same reason, the State's argument that each unsurveyed school section 36 in T. 25-1/2 S., Rs. 4 through 5 E., would have contained 594 acres had BLM performed its 1966 reprotraction properly must fail. Even assuming, *arguendo*, that the State is right in contending that the fifth standard parallel should have been prolonged in performing this reprotraction, the acreage of a school section cannot be determined absent a survey of the township.

With respect to those new, surveyed, fractional townships within the reservation, *i.e.*, T. 25-1/2 S., Rs. 1 through 3 E., the State's entitlement should be in an amount equal to the acreage shown by the surveyed school section(s) or in an amount determined by the pro rata rule at the election of the State. The State's receipt of 320 acres in 1961 for each of these three surveyed, fractional townships shall not preclude it from receiving its full entitlement. Any future indemnity granted according to the provisions of this paragraph shall reflect the State's receipt of 960 acres in 1961.

¹⁴ These other new fractional townships are described in the stipulation at pages 19-20: T. 25-1/2 S., Rs. 4 and 5 E.; and T. 25-1/2 S., Rs. 6 and 6-1/2 E.

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C. Cascade National Forest

The map forming part of the Presidential proclamation of January 25, 1907, *supra*, is a 1906 Forest Service diagram compiled from GLO plats and showing the Forest Service protraction of all unsurveyed areas in the Cascade Range Forest Reserve. This 1906 protraction revealed fractional townships, Tps. 18 through 23 S., R. 5-1/2 E., each of which was greater than one-half township, and less than three-quarters township, in size. The Government numbered the sections therein in a way to show sec. 16, but not sec. 36, in place.

By Exec. Order No. 863 of June 30, 1908, the Cascade Range Forest Reserve was divided into four new forests, one of which was the Cascade National Forest. The Forest Service mapped the boundaries of the forest and reprotracted the area within the forest. Thereafter, by Presidential proclamation of June 7, 1911, 37 Stat. 1684, the boundaries of the forest were again revised. As part of the revision, the numbering of sections was changed to show both secs. 16 and 36 in place in fractional townships Tps. 18 through 23 S., R. 5-1/2 E.

The State took indemnity for school sections lost to it in Tps. 21 through 22 S., R. 5-1/2 E., in 1910. Selections for school sections in Tps. 17 through 20, and 23 S., R. 5-1/2 E., were made in 1927. The State now seeks indemnity based on the corrected section numbering and subsequent protractions.

[3] Principles set forth above in our discussions of the Siskiyou and Umpqua National Forests are contrary to the State's contentions. For unsurveyed, fractional townships within the forest, the measure of the State's indemnity entitlement is properly calculated by the pro rata rule. *State of New Mexico*, 54 I.D. 159 (1933). The fact that the 1911 renumbering of sections within the forest showed secs. 16 and 36 in place does not advance the State's cause. Until a *survey* has been run and approved, the sections are undefined and the lands are unidentified. *United States v. Morrison, supra*. Furthermore, the State's argument, that having selected its indemnity, it is entitled to the benefit of a later protraction of the identically numbered township in calculating its entitlement is contrary to the principles set forth in *State of Wyoming, supra*. This same result would obtain even if an actual survey were conducted after the State had received its indemnity. Where, as here, the issue is not BLM's recognition of new fractional townships first revealed after a State selection, we do not find support for the State's position in its compact with the United States. In fact, the compact is silent as to fractional townships and what, if any, method should be used in computing a state's grant in such a circumstance. The principles set forth in *State of Wyoming, supra*, in favor of the finality of an initial land selection are expressly affirmed.

[4] The stipulation reveals that in the course of assigning township numbers to certain fractional townships, various Federal agencies changed the assigned numbers and location of protracted fractional townships. In the process of reassigning township numbers, some of the previously protracted townships were eliminated (Stipulation at 26). The result of such changes in several instances was the State's receipt of indemnity lands for the newly numbered townships *and* for the since-eliminated townships. An overdraw was in this way created which BLM correctly seeks to rectify in this final adjustment. Although the factual situations differ, the principles set forth in *State of Wyoming, supra*, are again applicable. The State's entitlement to indemnity lands for unsurveyed, fractional townships lost to it within the forest is determined by the protraction diagram in existence at the time of selection. This protraction, not subsequent ones, should be used to determine the State's entitlement. The amount of the State's overdraw is the difference between the acreage received and its entitlement as calculated according to the pro rata rule.

D. Whitman and Umatilla National Forests

The Whitman National Forest was created from the Blue Mountain Forest Reserve between 1906 and 1916. Prior to 1916, the State received indemnity lands based on GLO determinations of lands lost to the State in the forest. A similar pattern is present in the creation of the Umatilla National Forest. The Umatilla National Forest was carved from the Wenaha Forest Reserve. Indemnity lands were received by the State prior to 1916 based on GLO determinations of lands lost to the State in the forest.

In 1916, GLO conducted an audit of school indemnity transactions. In the course of this audit, a protraction was run of unsurveyed townships, disclosing three fractional townships in both the Whitman and Umatilla National Forests. These fractional townships were larger than one-half township, but did not exceed three-quarters township, in size. Using this protraction, the State's entitlement was adjusted by GLO. On the basis of its revised audit,¹⁵ BLM now claims that the 1916 audit was in error and that the State's entitlement must be determined by the pro rata rule.

The parties' use of the phrase "GLO determinations" at pages 30-31 of the Stipulation in describing the basis for the State's earlier selections suggests that the 1916 protraction of the Whitman and Umatilla National Forests was the first protraction thereof. Use of "GLO determinations" is not expressly contrary to 43 U.S.C. § 851 (1976), wherein the Secretary is assigned the duty to determine "by protraction or otherwise" the number of townships within a reservation. When in 1916, GLO's protraction of the forests revealed three, presumably new, fractional townships in each, it correctly

¹⁵ See *State of Oregon I, supra* at 259, 91 I.D. at 17 (1984).

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concluded that the State was entitled to indemnity lands for these unsurveyed, fractional townships.

The stipulation offers little help in determining how GLO calculated the State's entitlement in 1916. What is clear, however, is that GLO ignored the pro rata rule in calculating this figure. The stipulation is silent as to the existence of any surveys in the six fractional townships at issue at the time that Oregon offered them as base. If the 1916 protraction showed estimated acreage in the school section(s), such acreage, like the school section itself, is illusory until a survey is run. As set forth above in discussing the Siskiyou, Umpqua, and Cascade National Forests, the amount of indemnity due the State for an unsurveyed, fractional township within a reservation can only be calculated according to the pro rata rule. For each protracted township greater than one-half, but less than three-quarters of a township, in size, the State is entitled to a total of 960 acres. The amount of the State's overdraw is the difference between the acreage received and its entitlement as calculated according to the pro rata rule.

GLO's grant of indemnity in 1916 in excess of that authorized by the pro rata rule may be corrected by BLM's revised audit. In accordance with the principles set forth in *Reid v. Mississippi*, 30 L.D. 230 (1900), legal title to the aforementioned overdrawn lands passed to the State. BLM does not seek the return of these lands, but instead asks the State to substitute valid base. If the State does not do so, BLM states that further indemnity lands will not be transferred to the State. We perceive no unfairness in BLM's position. The identical position was taken in *Reid v. Mississippi, supra* at 237:

In the opinion of this Department, therefore, the State ought to be required to designate a new basis for the lands erroneously certified, within a time to be fixed by your office, and in default thereof account should be taken of the excess of land so erroneously certified to the State and the government protected against any loss by reason thereof in the further adjustment of the State's school grant. *Delaney v. Watts et al.* and *Miller v. Silva* (8 L.D., 480; *Butler v. State of California* (29 L.D., 610).

E. Tabular Summary

Part F of the stipulation contains a tabular summary of indemnity transactions involving some 19 townships. In one category of transactions are those cases in which Oregon received indemnity *equal to* school section acreage shown to be "in place" by the original protractions or surveys. In the second category are those cases in which Oregon received indemnity *based on* the acreage shown to be "in place" by the original protractions (Stipulation at 36). BLM has determined that the State has overdrawn its entitlement by 323.64 acres in the first category and by 699.17 acres in the second category.

The current acreage of secs. 16 or 36 in each of the 19 townships at issue is greater than that shown on a prior survey or protraction upon

which indemnity was previously taken. The tabular summary lists no school sections whose current acreage is less than that shown on the prior survey or protraction upon which indemnity selections were based. The BLM audit determined that in the latter situation substitution of base is not required for the deficiency in acreage.

At the risk of belaboring these issues, we repeat the following points. Prior to a survey, the acreage of any section is necessarily undetermined because the section itself is undefined and the lands are unidentified. *United States v. Morrison, supra*. An indemnity selection in an amount equal to the acreage shown on a protracted school section is in error, and an adjustment by BLM is in order. By statute, a state selecting indemnity lands prior to the survey of a township whose school lands have been reserved for a forest is entitled to select indemnity lands to the extent of section for section, *i.e.*, two sections for each full township. 43 U.S.C. § 851 (1976). Where, in such a case, the protraction on which the state relies indicates that a fractional township is present, the measure of a state's entitlement, *i.e.*, section for section, is calculated according to the pro rata rule. 43 U.S.C. § 852 (1976).

Where a fractional township has been reserved prior to the school sections therein having vested in the state and thereafter the township is surveyed before the state has selected in lieu of the school sections reserved, the state may elect to take indemnity in an amount equal to the acreage of the surveyed school sections or in an amount determined by the pro rata rule based on the acreage of the fractional township.

If the state, relying on a protraction, selects indemnity lands for reserved school sections lost to it within an unsurveyed township, any subsequent reprotraction showing acreage estimates can neither add to nor subtract from the state's entitlement. A similar result obtains when a subsequent survey indicates actual acreage figures for the school sections higher or lower than the amount originally tendered as base. Insofar as the tabular summary is concerned, where the State received acreage as indemnity for an unsurveyed fractional township in excess of the amount provided by Revised Statute 2276 for fractional townships, such excess constitutes an overdraw for which valid base must be substituted. Where, however, school sections in fractional townships offered by the State had been surveyed prior to their tender as base, the State could properly offer the acreage in the surveyed sections and its indemnity would not be limited by the pro rata formula.

On remand, BLM should make appropriate adjustments in conformity with the views expressed herein and in *State of Oregon I, supra*, to determine whether the State is entitled to further indemnity selections.

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

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the State Office is affirmed in part and reversed in part and remanded for action consistent herewith.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

BRUCE R. HARRIS
Administrative Judge

CHEYENNE & ARAPAHO TRIBES OF WESTERN OKLAHOMA

v.

**DEPUTY ASS'T SECRETARY--INDIAN AFFAIRS (OPERATIONS),
READING & BATES PETROLEUM CO., & WOODS PETROLEUM
CORP. (ON RECONSIDERATION)**

12 IBIA 241

Decided May 18, 1984

Petition for reconsideration of *Cheyenne and Arapaho Tribes of Western Oklahoma v. Deputy Assistant Secretary--Indian Affairs (Operations), Reading & Bates Petroleum Co., and Woods Petroleum Corp.*, 11 IBIA 54, 90 I.D. 61 (1983), filed by appellant tribes.

Board's previous decision affirmed as modified.

1. Administrative Procedure: Administrative Record--Administrative Procedure: Administrative Review

When new procedural requirements are imposed during the pendency of an appeal which render the administrative record previously prepared by the Bureau of Indian Affairs insufficient for full administrative review, the Board of Indian Appeals will give the Bureau an opportunity to supplement the record and to demonstrate, if possible, that all substantive requirements were met.

2. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

The Board of Indian Appeals does not have jurisdiction to review a decision of the Bureau of Indian Affairs that is based on the exercise of discretion.

APPEARANCES: Yvonne T. Knight, Esq., Native American Rights Fund, Boulder, Colorado, for appellants; Kent L. Jones, Esq., Tulsa, Oklahoma, for appellee companies. Counsel to the Board: Kathryn A. Lynn.

*OPINION BY ADMINISTRATIVE JUDGE MUSKRAT**INTERIOR BOARD OF INDIAN APPEALS*

The Cheyenne and Arapaho Tribes of Western Oklahoma (appellants) have filed a petition for review of the February 10, 1983, decision of the Board of Indian Appeals (Board) in *Cheyenne and Arapaho Tribes of Western Oklahoma v. Deputy Assistant Secretary-Indian Affairs (Operations), Reading & Bates Petroleum Co., and Woods Petroleum Corp.*, 11 IBIA 54, 90 I.D. 61 (1983). For the reasons discussed below, the Board affirms that decision as modified in this opinion.

Background

The background of this case is fully set forth in the Board's original decision, 11 IBIA at 55-57, 90 I.D. at 61-62. That discussion is hereby incorporated by reference.

In summary, Reading & Bates Petroleum Co. and Woods Petroleum Corp. (companies) entered into 5-year oil and gas leases in 1976 with appellants. The leases covered restricted Indian lands in Custer County, Oklahoma, owned by appellants. In July 1980, the companies received pooling orders covering these leases from the Oklahoma Corporation Commission (Commission). When the oldest of the leases was nearing its expiration date, the companies requested the Bureau of Indian Affairs (BIA) to approve a communitization agreement. The agreement would put into effect the pooling order received from the State agency. Over appellants' objections that the agreement was not sufficiently lucrative, the companies, on May 5, 1981, presented the proposed agreement to the Geological Survey for approval, pursuant to Departmental regulations. The Geological Survey recommended approval of the agreement the same day. The agreement was subsequently approved by the Concho Agency, BIA, on May 6, 1981; by the Anadarko Area Office on May 8, 1981;¹ and by the Deputy Assistant Secretary-Indian Affairs (Operations) (Deputy Assistant Secretary) on February 9, 1982. The Board affirmed approval on February 10, 1983.

Appellants sought reconsideration of the Board's decision. Initial briefs on whether reconsideration should be granted were filed by appellants and the companies. By order dated September 2, 1983, the Board granted reconsideration and requested additional information from BIA on the factors that were considered before the communitization agreement was approved. An additional briefing period followed BIA's response.

¹ Appellants argue that the speed with which the agreement was approved proves that it was not fully and carefully considered. The record, however, shows that the proposed agreement had been under discussion for a considerable time before it was actually submitted to the Department.

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Discussion and Conclusions

The issue before the Board in this reconsideration is whether BIA improperly approved the present communitization agreement without considering the economic impact of approval on the tribe.² The BIA's right and obligation to consider the economic best interests of an Indian lessor before approving communitization agreements was addressed by the Tenth Circuit Court of Appeals in *Kenai Oil & Gas, Inc. v. Department of the Interior*, 671 F.2d 383 (10th Cir. 1982). In *Kenai*, a BIA decision not to approve a communitization agreement that it believed was not in the Indians' best economic interest was challenged on the grounds that this was not a permissible reason for disapproval. The court upheld BIA, holding that its fiduciary obligation as trustee included the responsibility to determine whether such agreements were in the Indians' best economic interest. *Kenai, supra* at 387.

Following the decision in *Kenai*, the Department published guidelines for assisting BIA area directors in considering proposed communitization agreements and in ensuring adequate documentation of their analysis of all relevant factors. Memorandum of April 23, 1982 (Guidelines), adopted in 47 FR 26920 (June 22, 1982). In general, the guidelines require BIA to demonstrate that the agreement is "based on logical engineering and economic facts" (Guidelines, § 2). Section 2(a), which relates to the analysis of economic effects, states: "The long term economic effects of the agreement must be in the best interest of the Indian lessor and we must be able to document these effects."

The posture of this case, therefore, is that the decision in question was made by BIA in accordance with the requirements in effect at the time. During the pendency of an appeal of that decision, the requirements were elaborated and made stricter. Although a record had been developed in the initial decisionmaking process, it was not sufficient to permit full review of the decisionmaking process as contemplated under the new requirements.

This situation is very similar to that before the Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), in which statutory and regulatory changes were made during the lengthy process of deciding on the location for a Federal-aid highway. New regulations, promulgated after the location decision was made, required the Secretary of Transportation to make "formal findings" when he approved the use of parklands for highway construction. The adequacy of the administrative record was challenged on the grounds that this regulation required the Secretary to hold hearings on the proposed location, which he had not done.

² The companies initially opposed the petition for reconsideration on the grounds that it was not timely filed. The Board addressed this argument in its Sept. 2, 1983, order granting reconsideration. The return receipt card for appellants' copy of the Board's decision and the postmark on their petition for reconsideration show that the petition was timely under 43 CFR 4.315 and 4.310(a).

The Court agreed that it should apply the new regulation because it was "the law in effect at the time of [its] decision," 401 U.S. at 419, but refused to remand the case to the agency for a hearing to develop formal findings. The Court distinguished *Thorpe v. Housing Authority*, 393 U.S. 268 (1969), cited by appellants as requiring remand to the deciding agency, on the grounds that in *Overton Park* there had been a change in circumstances and an administrative record was available, although that record might not present a sufficient basis for full review of the agency decision.³ The Court stated:

But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.

401 U.S. at 420. The Court discouraged probing the mental processes of deciding officials if the information necessary for review could be obtained in another way, recognizing that any such explanation would "to some extent, be a 'post hoc rationalization' [which] must be viewed critically." *Id.* The procedure of requiring supplementation of the record was, however, sanctioned.⁴

Similarly, in *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973), the Court remanded a decision of the Comptroller of the Currency for further explanation, stating:

If, as the Court of Appeals held and as the Comptroller does not now contest, there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was not to hold a *de novo* hearing but, as contemplated by *Overton Park*, to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.

The Court further noted that a reason for the agency action had been given at the time of the decision and that further elaboration must support that original reason.

[1] In accordance with these precedents, when the Board determined that reconsideration of this appeal was appropriate and found that the administrative record provided some indication that the economic effects of approval of the proposed communitization agreement had been considered, but that the record was insufficient for full review of that issue, it requested additional information from BIA. This supplementation was provided on October 25, 1983.⁵

³ In *Thorpe*, the housing authority had refused to give a tenant any reason for her eviction.

⁴ In his concurrence in *Overton Park*, Mr. Justice Blackmun noted that the new requirements "cut across former methods and * * * imposed new standards and conditions upon a situation that already was largely developed. This undoubtedly is why the record is sketchy and less than one would expect if the project were one which had been instituted after" the new requirements were announced. 401 U.S. at 423 (Blackmun, J., concurring).

⁵ The Board takes official notice that the Deputy Assistant Secretary has followed a similar procedure on at least one occasion. A Nov. 3, 1983, letter to the Board from the Deputy Assistant Secretary in *Rose v. Anadarko Area Director*, Docket No. IBIA 83-45-A, dismissed because of Secretarial assumption of jurisdiction, 12 IBIA 130 (1984), stated:

"This is in response to an order of the Board, dated October 19, 1983, requesting the Bureau to submit a report on the status of an administrative appeal to the Deputy Assistant Secretary-Indian Affairs (Operations) seeking review of a February 11, 1982 decision by the Anadarko Area Director, BIA, which approved a communitization agreement involving the Appellants' property.

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In order to comply with the present guidelines, the administrative record as supplemented must show that BIA determined that the "long term economic effects of the [communitization] agreement [were] in the best interest of" appellants (Guidelines, § 2). The original record shows that BIA expended considerable effort in 1981 to revise its standard communitization agreement form in order to provide more favorable terms for Indian lessors. Among other things, the revised form was designed to provide in general what BIA believed to be the most favorable economic terms for Indian lessors. The agreement here was submitted using the revised form.

The BIA's supplementation further shows that the long-term economic effects of the proposed agreement were considered. The BIA states that it was primarily concerned with the possibility that if communitization was not approved, the Commission would de-space the Indian allotments from its pooling order. The BIA believed that de-spacing would substantially hinder the issuance of new leases on the tracts when the existing leases expired because of production from the remaining portions of the pooled area and probable litigation or other controversy concerning the tracts. The BIA states:

The assertions of the appeal are that new leases *might* have been negotiated if the agreements had not been signed. There is also a possibility that the three (3) leases that would have expired, absent the communitization approvals, could not have been leased again.

A consideration given by the Area Office which was not contemplated in the appeal was the authority of the Oklahoma Corporation Commission to de-space lands from spacing units established by them. De-spacing essentially allows an operator, in an area spaced by the Commission, to produce and *not* distribute revenues to de-spaced interest owners in the spaced area. [6] [*Italics in original.*]

The Acting Anadarko Area Director (Acting Area Director) further elaborates on the potential effect of disapproval of communitization agreements:

Experience with other Indian mineral ownerships wishing to be removed from CAs [communitization agreements] until another bonus might be obtained, result in cases where the oil companies have petitioned the State Corporation Commission to remove the tracts from the spacing unit, or by total abandonment by the oil companies of development of the Section. There are instances where an oil company and/or investor within the spacing area is willing to proceed with development and carry an unleased Indian tract, providing it is very small. Most, however, are reluctant to carry an unleased tract of any size because of the costs involved drilling the spacing pattern,

"By way of background, on May 2, 1983, I remanded this matter to the Anadarko Area Director and directed him to prepare and submit an analysis showing whether approval or disapproval of the unit agreement was in the best economic interest of the Indian allottees. This action was taken because of the holding in *Kenai Oil and Gas v. Dept. of the Interior*, [671] F.2d 383 (10th Cir., February 17, 1982), which appears to require that such an analysis should be made before a communitization agreement is approved."

In *Rose*, as in the present case, the Area Director had approved the communitization agreement before the Tenth Circuit issued its decision in *Kenai*. The Deputy Assistant Secretary remanded *Rose* for supplementation of the administrative record on May 2, 1983. In *Cheyenne and Arapaho*, the decision of the Deputy Assistant Secretary upholding the Area Director's initial decision without further elaboration had been issued on Feb. 9, 1982, before the new guidelines were published in the *Federal Register* on June 22, 1982.

⁶Memorandum from Program Officer, Division of Energy & Mineral Resources, Golden, Colorado, to Solicitor's Office, May 5, 1983 (May memorandum), at 4. The memorandum then describes the effect of such de-spacing upon another Oklahoma Indian tract.

whether voluntarily or involuntarily, it is not likely that an oil company would be interested in drilling the second well, when it has been determined that the common source of supply may be drained by one well. [7]

Furthermore,

If proper reservoir spacing were not followed, the reservoir would be developed under the simple rule of capture. This has a long-term result of lower ultimate recovery of oil and/or gas (to the detriment of all interests). There may be times when spacing is not in the best interests of a particular individual in the short-term; but, the determination to communitize must be based upon the long-term overall conditions of the reservoir. [8]

In contrasting the short-term versus long-term economic effects of approval of this communitization agreement, the Acting Area Director notes:

Approval or disapproval of CAs has always been the subject of a thorough review. Most objections or concerns posed by Indian mineral owners were prompted by the short-lived astronomical bonuses received for leases within the Anadarko Basin, and the hope that they might avail themselves of such a bonus. In general, objection to communitization, per se, is not the prevailing concern, but rather, that where the end of the primary term is in sight, that expiration thereof may occur, and a new lease may result in another (and substantially large) bonus. Therefore, the official having the responsibility of approving proposed CAs must weigh all factors in reaching a decision which will benefit the Indian mineral ownership. The purpose of communitization is not to extend lease terms, but to achieve orderly development and to encourage timely development. [9]

After analyzing potential economic effects of approval, BIA concludes:

We are of the opinion that a uniform policy of refusing to approve communitization agreements in logically spaced areas solely for the reasons that the mineral owners *might* receive additional revenues will eventually diminish the sale of Indian land leases and will not be in the best long term interests of the Indians. [10] [Italics in original.]

Appellants contend that this analysis is legally incorrect because a state has no jurisdiction over the communitization of Indian tracts. *Samedan Oil Corp. v. Cotton Petroleum Corp.*, 466 F. Supp. 521, 526 (W.D. Okla. 1978). The BIA's submissions agree that states have no jurisdiction over Indian tracts. *See, e.g.*, October memorandum at 2: "Since the State Commission cannot pool Indian Lands into an established spacing unit, joinder of the Indian tract(s) is achieved by a CA approved by the Secretary under terms of the lease."

Appellants attempt to take this legal principle further by apparently alleging that because the State does not have authority to join Indian tracts, it also does not have authority to de-space such tracts. The question here is not the possible effect of a state order attempting to de-space Indian tracts from a pooling order put into effect by the Secretary through approval of a communitization agreement. Rather, the question is whether a state has the authority to de-space tracts when the Secretary has refused to approve communitization. De-

⁷ Memorandum from Acting Area Director, Anadarko Area Office, BIA, to Solicitor's Office, Oct. 3, 1983 (October memorandum), at 4.

⁸ October memorandum at 2-3.

⁹ October memorandum at 4.

¹⁰ May memorandum at 4.

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spacing under such circumstances is the ultimate recognition by the state that it does not have the authority to force the inclusion of Indian tracts in a pooling order without Secretarial approval. Because none of the cases cited by appellants requires a different conclusion, the Board finds that BIA's assertion that failure to approve a communitization agreement might result in the de-spacing of an Indian tract is not without foundation.

[2] Through its supplementation of the record, BIA has shown that it considered the long-term economic best interests of appellants in approving the communitization agreement at issue. Although appellants disagree with BIA's analysis and with particular provisions of the agreement, and believe that a more immediately lucrative agreement might have been reached, it was within BIA's discretion to approve an agreement as long as it considered the relevant factors, including the Indian lessor's long-term economic best interests. The Board has jurisdiction only to determine whether BIA considered the relevant factors in approving the communitization agreement. Because BIA has shown that it did consider appellants' long-term economic best interests, the only factor contested by appellants, the Board has no further jurisdiction in this case and cannot second-guess BIA's exercise of discretion to approve the communitization agreement.¹¹

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's February 10, 1983, decision is affirmed as modified in this opinion.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

ESTATE OF EDWARD (AGOPETAH) BERT

12 IBIA 253

Decided May 22, 1984

Appeal from an order denying reopening issued by Administrative Law Judge Sam E. Taylor in IP OK 183 P 83, H-239-66.

Vacated and remanded.

¹¹*Cf. Overton Park, supra* at 416: "The court is not empowered to substitute its judgment for that of the agency."

1. Indian Probate: Reopening: Generally--Indian Tribes: Membership

When reopening of a closed Indian estate is sought for the sole purpose of determining the appellant's nationality or Indian status, and no alteration in the distribution of the decedent's estate is sought, reopening will be allowed under 43 CFR 4.206 without regard to the restrictions set forth in 43 CFR 4.242 and in previous decisions of the Board of Indian Appeals interpreting that regulation.

APPEARANCES: Pat Cockrill, Esq., Yakima, Washington, for appellant; Mary Alice Bert Agopetah Washington, *pro se*. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF INDIAN APPEALS

On January 27, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Eddie L. Tahsequah (appellant). Appellant sought review of a November 21, 1983, order issued by Administrative Law Judge Sam E. Taylor denying reopening of the estate of Edward (Agopetah) Bert (decedent). Probate of decedent's Indian trust estate was concluded on November 30, 1966, with the issuance of an order determining his heirs. Appellant was not found to be an heir of decedent.

Appellant seeks to reopen the estate in order to show that decedent was his father. Appellant does not seek to alter the distribution of decedent's estate, but only to establish his own correct blood quantum.

Reopening was denied on the grounds that appellant had failed to show due diligence in pursuing this matter. The due diligence requirement derives from the Board's interpretation of the reopening regulations set forth in 43 CFR 4.242. *See, e.g., Estate of Joseph Wyatt*, 11 IBIA 244 (1983).

Judge Taylor properly denied reopening on the basis of the precedents before him. However, the Judge was not aware that the Board had considered a related question in another case. In that case, reopening of a closed probate estate was sought in order to redetermine appellants' nationality. In the course of probating the estates of four of the appellants' relatives, the Department had found that appellants were Canadian nationals and, therefore, not persons to whom the United States owed a trust responsibility. The appellants sought reopening for the limited purpose of establishing their nationality, and did not want to alter the distribution of any estate. After preliminary briefing, the Board decided that nationality was a fundamental right, ordered reopening of the estate under the provisions of 43 CFR 4.206 for the limited purpose of redetermining appellants' nationality, and remanded the case to an Administrative Law Judge for an evidentiary hearing and recommended decision solely on the question of nationality. *In re Status of Gladys Rose Charles Whims*, Docket No. IBIA 83-22-A, orders of June 20 and November 9, 1983.

Section 4.206 states:

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In cases where the right and duty of the Government to hold property in trust depends thereon, administrative law judges shall determine the nationality or citizenship, or the Indian or non-Indian status, of heirs or devisees, or whether Indian heirs or devisees of United States citizenship are of a class as to whose property the Government's supervision and trusteeship have been terminated (a) in current probate proceedings or (b) in completed estates after reopening such estates under, but without regard to the 3-year limit set forth in § 4.242.

[1] The Government's right and duty to hold property in trust for an individual may depend upon whether that individual has Indian status under the enrollment rules adopted by his or her tribe. Such status may, in turn, depend upon the individual's Indian blood quantum, often as determined as a result of probate proceedings. Like nationality, Indian status is a fundamental right. When reopening of a closed Indian estate is sought for the sole purpose of determining nationality or Indian status, and not for the purpose of altering the distribution of the decedent's estate, the Board holds that reopening should be permitted under 43 CFR 4.206 without regard to the restrictions set forth in 43 CFR 4.242 and in previous Board decisions interpreting that regulation. Those restrictions are intended to permit the finality of administrative determinations of the status of property, not to foreclose consideration of fundamental issues relating to personal status.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 21, 1983, order denying reopening of decedent's estate is vacated. Reopening of decedent's estate is ordered for the sole purpose of considering whether appellant can establish that decedent was his father, and for no other purpose. The case is remanded to the Administrative Law Judge for this determination. The decision of the Administrative Law Judge shall be final unless it is properly appealed under the provisions of 43 CFR 4.241 and 4.320.

BERNARD V. PARRETTE
Chief Administrative Judge

WE CONCUR:

JERRY MUSKRAT
Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

UNION TEXAS EXPLORATION CO.

81 IBLA 153

Decided *May 31, 1984*

Appeal from decision of Utah State Office, Bureau of Land Management, holding competitive geothermal resources lease for cancellation. U-32258.

Affirmed as modified.

1. Geothermal Leases: Cancellation--Geothermal Leases: Competitive Leases--Geothermal Leases: Termination

BLM may properly hold for cancellation a competitive geothermal resources lease, issued pursuant to sec. 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982), for failure to engage in exploration operations meeting minimum per acre expenditure requirements or to pay an additional rental after the fifth year of the primary lease term, in accordance with 43 CFR 3203.5. The lessee must pay the increased rental in arrears and will have 30 days following receipt of notice of cancellation either to correct the violation or, if the lessee elects to engage in exploration operations and is unable to meet the expenditure requirements within 30 days, to commence such operations in good faith within that time period and thereafter to proceed diligently to meet such requirements, or may elect to continue payment of the rental at the increased rate.

APPEARANCES: Edward B. Dunn, Division Landman, Union Texas Petroleum, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

Union Texas Exploration Co. (Union Texas) has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated July 30, 1982, holding its competitive geothermal resources lease, U-32258, for cancellation.

Effective May 1, 1976, BLM issued a geothermal resources lease to Southern Union Production Co. (Southern) for 1,924.58 acres of land in Iron County, Utah, pursuant to section 3 of the Geothermal Steam Act of 1970, 30 U.S.C. § 1002 (1982). By decision dated August 1, 1977, BLM recognized a change in the name of the lessee from Southern to Supron Energy Corp. (Supron). In a memorandum to the State Director, BLM, dated October 13, 1978, the Area Geothermal Supervisor, Conservation Division, Geological Survey (Survey), stated that Southern had reported no diligent exploration expenditures from May 1, 1976, to April 30, 1977, pursuant to 30 CFR 270.77 (1982). In a letter to Hydro-Search, Inc. (Hydro-Search), Supron's agent, dated November 9, 1978, the Area Geothermal Supervisor stated that Hydro-Search had reported no expenditures for the period May 1, 1977, to April 30, 1978. The record also contains the annual reports submitted by Supron for the lease years 1979, 1980, and 1981, which uniformly state: "There were no field operations on the above leases [including U-32258] during this reporting period." Finally, in a reply to a BLM request, dated June 10, 1982, the Acting Deputy Conservation

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Manager, Minerals Management Service (MMS) (formerly the Conservation Division, Survey), stated that no diligent exploration expenditures had been reported "to date" for lease U-32258.

In its July 1982 decision, BLM, relying on the MMS report, held geothermal resources lease U-32258 for cancellation because "no qualifying expenditures had been made on this lease," in accordance with 43 CFR 3203.5. BLM, in accordance with 43 CFR 3244.3, allowed appellant 30 days from receipt of the decision "to comply with the diligent exploration expenditure requirements or to appeal." If no action was taken, BLM stated, "the case will be closed on the records of this office."

In its statement of reasons for appeal, appellant states it is the successor in interest of lease U-32258 through "acquisition" of all Supron's leasehold interests¹ and that it was "in the process of sorting through leases for special requirements" at the time it received notice of termination of the lease. Appellant also states that it "discovered that a Farmout request from Amax Exploration Inc., was in the process of being formalized for the exploration and development of the above and other leases." Appellant requests a 6-month extension of time to comply with diligent exploration expenditure requirements.²

[1] The applicable regulation, 43 CFR 3203.5 (1982), provided, at the time appellant's lease was issued, that: "Each geothermal lease will include provisions for the diligent exploration [3] of the leased resources until there is production in commercial quantities applicable to the lands subject to the lease, and failure to perform such exploration may subject the lease to termination." In addition, 43 CFR 3203.5 (1982) set certain minimum annual expenditures which "must" be spent "after the fifth year of the primary lease term," in order for exploration operations "to qualify as diligent exploration for a year."⁴

Section 13 of the "Geothermal Resources Lease" (Form 3200-21 (May 1974)) issued to appellant, provides that:

In the manner required by the regulations, the Lessee shall diligently explore the leased lands for geothermal resources until there is production in commercial quantities applicable to this lease. After the fifth year of the primary term the Lessee shall make at least the minimum expenditures required to qualify the operations on the leased lands as diligent exploration under the regulations.

Moreover, 43 CFR 3244.3 (1982) provides, in relevant part, that:

¹ The record contains a copy of an affidavit by the Assistant Secretary, Union Texas, dated Apr. 28, 1982, which states that "[o]n April 28, 1982, Supron merged with Union Texas."

² On May 11, 1982, appellant filed an assignment of 50 percent of its record title interest in lease U-32258 to Florida Exploration Co., dated Apr. 29, 1982.

³ "Diligent exploration" was defined as "exploration operations (subsequent to the issuance of the lease) on, or related to the leased lands, including, but not limited to, operations such as geochemical surveys, heat flow measurements, core drilling, or drilling of a test well." 43 CFR 3203.5 (1982). Such operations must also be "approved by the Supervisor." *Id.*

⁴ Such annual expenditures must be "equal to at least two times the sum of (a) the minimum annual rental required by statute, and (b) the amount of rental for that year in excess of the fifth year's rental, but in no event shall the required expenditures exceed twice the rental for the 10th year." 43 CFR 3203.5 (1982).

A lease may be canceled by the authorized officer for any violation of these regulations, the regulations in 30 CFR Part 270, or the lease terms, 30 days after receipt by the lessee of notice from the authorized officer of the violation, unless (a) the violation has been corrected, or (b) the violation is one that cannot be corrected within the notice period and the lessee has in good faith commenced within the notice period to correct the violation and thereafter proceeds diligently to complete the correction.

Appellant does not assert that it, or its predecessor in interest, Supron, was not required to make certain minimum annual expenditures after the fifth year of the primary lease term, *i.e.*, after April 30, 1981, or that expenditures were actually made for the lease year, running from May 1, 1981, to April 30, 1982. Rather, appellant requests a 6-month extension of time to comply with diligent exploration expenditure requirements.

43 CFR 3244.3 does not provide for mandatory cancellation of a geothermal resources lease for a violation of the regulations in 43 CFR Part 3200 or the lease terms. Rather, the regulation provides that a lease "may" be canceled for such a violation. 43 CFR 3244.3. Effective May 20, 1983, 43 CFR 3203.5 was amended in certain respects by notice published in the *Federal Register*. See 48 FR 17042 (Apr. 20, 1983). The amended rule, 43 CFR 3203.5, preserves the requirement of minimum annual expenditures after the fifth year of the primary lease term, set at per acre figures. In addition, the regulation now provides that a lessee may opt to pay an additional rental in lieu of performing the minimum required diligent exploration. Finally, the regulation states: "Failure to either pay the additional rental or complete the minimum required diligent exploration by the end of a lease year *shall subject the lease to cancellation.*" (Italics added.) 43 CFR 3203.5 (48 FR 17045 (Apr. 20, 1983)). BLM may therefore hold a geothermal resources lease for cancellation where the minimum qualifying expenditures are not made after the fifth year of the primary lease term. Accordingly, we find that BLM properly held appellant's lease for cancellation for that reason.

Ordinarily, where BLM has made a final adverse adjudication based upon a finding of a statutory or regulatory violation, but provides a period of time for the correction of such violation, the filing of an appeal will not serve to extend the period for compliance. See *Carl Gerard*, 70 IBLA 343 (1983). Were it otherwise, the adversely affected party would be encouraged without risk of loss to appeal rather than to comply within the period allowed. However, this case is governed by 30 U.S.C. § 1011 (1982), which provides:

Leases may be terminated by the Secretary for any violation of the regulations or lease terms after thirty days notice provided that such violation is not corrected within the notice period, or in the event the violation is such that it cannot be corrected within the notice period then provided that lessee has not commenced in good faith within said period to correct such violation and thereafter to proceed diligently to correct such violation. *Lessee shall be entitled to a hearing on the matter of such claimed violation or proposed termination of lease if request for a hearing is made to the Secretary within the thirty-day period after notice. The period for correction of violation or commencement to correct such violation of regulations or of lease terms, as aforesaid, shall be extended to*

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thirty days after the Secretary's decision after such hearing if the Secretary shall find that a violation exists. [Italics added.]

Since the fact a violation has occurred is undisputed, no evidentiary hearing is needed. However, the statute provides the lessee may request a hearing either "on the matter of such claimed violation or proposed termination of lease if request for a hearing is made to the Secretary within the thirty-day period after notice." Although the lessee did not expressly request a "hearing" within that period on the issue of the lease termination, it did file this appeal, with explanations and arguments why the lease should not be terminated. The Board finds this amounts to a request for hearing within the purpose and intent of the statute in the circumstances of this case.

Therefore, while we conclude that BLM properly held appellant's lease for cancellation, we find the statute requires the period for correction of the violation be extended for 30 days after the date of this decision. Moreover, we hold that by and since the amendment of 43 CFR 3203.5 on April 20, 1983, appellant has incurred a liability for increased rental by reason of election not to correct the violation or to acquiesce in the cancellation.

Accordingly, appellant will have 30 days from the date of this decision within which to pay the increased rental, with interest, from April 20, 1983, and either to engage in exploration operations meeting the minimum per acre expenditure requirements of the current version of 43 CFR 3203.5 or, alternatively, to make a declared determination to continue to pay the increased rental.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

C. RANDALL GRANT, JR.
Administrative Judge

EDWARD W. STUEBING
Administrative Judge

June 6, 1984

TIMOTHY TARABOCHIA

v.

**DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS
(OPERATIONS)**

12 IBIA 269

Decided June 6, 1984

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) denying the issuance of a fishing identification card.

Affirmed.

1. Indian Tribes: Hunting and Fishing: Off Reservation

Under 25 CFR 249.3 an applicant for a Bureau of Indian Affairs fishing identification card must be a member of a tribe with Federally recognized treaty fishing rights.

2. Regulations: Binding on the Secretary--Regulations: Force and Effect as Law

Duly promulgated regulations have the force and effect of law and are binding upon the Department.

3. Regulations: Validity

The Board of Indian Appeals does not have the authority to declare a duly promulgated regulation of the Department to be invalid.

APPEARANCES: Timothy Tarabochia, pro se; Vernon Peterson, Jr., Esq., Office of the Field Solicitor, U.S. Department of the Interior, Portland, Oregon, for appellee; Richard Reich, Esq., Taholah, Washington, for amicus curiae the Quinault Indian Nation. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

On January 6, 1984, the Board of Indian Appeals (Board) received a notice of appeal and brief from Timothy Tarabochia (appellant). Appellant sought review of a November 3, 1983, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) affirming the Acting Portland Area Director's refusal to issue appellant a fishing identification card (I.D. card) under 25 CFR Part 249. Appellant argues that he was entitled to such an I.D. card so that he could fish in the usual and accustomed areas of the Quinault, Quileute, and Hoh Tribes. The Quinault Indian Nation (Quinault Nation, amicus) sought and was granted amicus curiae status in this case.¹ For the reasons discussed below, the Board affirms appellee's decision.

¹ See Order Granting Amicus Curiae Status and Extension of Time, Apr. 3, 1984.

Background

On June 2, 1983, appellant, a member of the Wahkiakum Band of Chinook Indians (Wahkiakum), wrote to the Solicitor's Office of the Department of the Interior (Department) requesting that the Bureau of Indian Affairs (BIA) issue him an I.D. card that would be valid against regulation by the State of Washington.² Such cards are authorized under 25 CFR Part 249. Appellant's letter was referred to the Portland Area Office, BIA. By letter dated July 6, 1983, the Acting Area Director refused to issue appellant an I.D. card on the grounds that BIA had no authority to issue I.D. cards to members of the Wahkiakum. This decision was based on 25 CFR 249.3(b), which provides that "[n]o such card shall be issued to any Indian who is not on the official membership roll of the tribe which has been approved by the Secretary of the Interior." The Acting Area Director concluded at page 1 of his decision letter:

The Wahkiakum Band of Chinook Indians is not a signatory to any treaty with the United States and is not a Federally-recognized Tribe with a government-to-government relationship with the United States. A list of such recognized Tribes is published in the Federal Register. See 47 F.R. 53130 (November 24, 1982). [?] Furthermore, the Wahkiakum Band of Chinook Indians does not have an official membership roll which has been approved by the Secretary of the Interior.

Additionally, the Acting Area Director noted:

[T]he Ninth Circuit Court of Appeals ruled in *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir. 1981), that the Wahkiakum Band has neither a treaty protected right nor an aboriginal fishing right to fish in the band's claimed usual and accustomed fishing areas in the Columbia River. The Wahkiakum Band's broader claim that it possesses Federally protected fishing rights which may be exercised throughout the usual and accustomed areas of the Quinault, Quileute, and Hoh Tribes has not been established and is presently before the District Court in *Wahkiakum Band v. Schmitt*, Civil No. C-81-630T (W.D. Wash.).

(Letter at page 2).

Pursuant to information contained in the Acting Area Director's decision, appellant appealed this decision to the Commissioner of Indian Affairs on July 15, 1983.⁴ On November 3, 1983, appellee affirmed the Acting Area Director's decision. Appellee first noted that appellant did not challenge the finding that BIA lacked authority to

² On Oct. 7, 1981, appellant was charged with illegal gillnet fishing by the State of Washington. According to the memorandum opinion and order in *Washington v. Tarabochia*, Case No. K-2469, Grays Harbor District Court, Dept. No. One, Grays Harbor County, State of Washington, issued on Nov. 24, 1981, appellant was

"fishing with gillnet gear in the Chehalis River in Grays Harbor County, Washington, at a time and place where the Quinault Indian Tribe members were conducting off-reservation salmon fishing on their usual and accustomed fishing grounds. There was no closure by the State for conservation purposes, insofar as Quinault Indian fishing was concerned, but other than for Indian fishing the season was closed. * * * [Appellant] was not * * * carrying a [BIA] identification card and none had been issued to him * * *; had [appellant] been a Quinault Indian with proper Quinault I.D. card, he wouldn't have been arrested for unlawful gillnet fishing - he would have been lawful insofar as the state is concerned."

Order at 1. The State Judge granted appellant's motion to dismiss the case, concluding that "Mr. Tarabochia had a right to fish, and had done everything he could have done to secure that right." Order at 6.

³ The Department's list of Federally recognized Indian tribes is published annually in the *Federal Register*. For the most current list, see 48 FR 56862 (Dec. 23, 1983). The Wahkiakum is still not a Federally recognized tribe.

⁴ The administrative review functions of the vacant office of Commissioner of Indian Affairs were assigned to the Deputy Assistant Secretary-Indian Affairs (Operations) by memorandum of May 15, 1981, signed by the Assistant Secretary for Indian Affairs.

June 6, 1984

issue an I.D. card under its regulations. He concluded that the appeal lacked merit under *Bateman, supra*, and because of the pending litigation in *Schmittten, supra*.

The Board received appellant's notice of appeal from this decision on January 6, 1984. Appellant submitted a brief with his notice of appeal. The Board docketed the case on February 16, 1984, after receiving the administrative record from BIA. On March 26, 1984, the Board received a brief from appellee, and a motion for leave to appear as amicus curiae together with a brief from the Quinault Nation. Amicus status was granted by Board order dated April 3, 1984. Further briefs and motions were filed by appellant and amicus.⁵

Discussion and Conclusions

Appellant's request for a fishing I.D. card is not an isolated incident. The treaties granting special fishing rights to certain Pacific Northwest Indian tribes⁶ have been under judicial review for more than a decade. The most recent Supreme Court decision on this subject is *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979). In that decision, Mr. Justice Stevens recounted in detail the historical relationship of the Indians of this area with its anadromous fish population, the treaties and preceding negotiations guaranteeing fishing rights to those Indians, and the conflicts and resulting litigation that have arisen because of the present need to impose conservation restrictions on fishing and to reach an accommodation between the interests of treaty Indians and others exploiting this resource.⁷

[1] This history, although informative, is not necessary to the disposition of the present case. The BIA found that appellant was not entitled to an I.D. card under Departmental regulations set forth in 25 CFR 249.3. That regulation states in pertinent part:

(a) The Commissioner of Indian Affairs shall arrange for the issuance of an appropriate identification card to any Indian entitled thereto as prima facie evidence that the authorized holder thereof is entitled to exercise the fishing rights secured by the treaty designated thereon. The Commissioner may cause a federal card to be issued for this purpose or may authorize the issuance of cards by proper tribal authorities: *Provided*, That any such tribal cards shall be countersigned by an authorized officer of the Bureau of Indian Affairs certifying that the person named on the card is a member of the tribe issuing such card and that said tribe is recognized by the Bureau of Indian Affairs as having fishing rights under the treaty specified on such card. * * *

(b) No such card shall be issued to any Indian who is not on the official membership roll of the tribe which has been approved by the Secretary of the Interior. *Provided*, That until further notice, a temporary card may be issued to any member of a tribe not having an approved current membership roll who submits evidence of his/her

⁵ See note 8, *infra*.

⁶ Treaty of Medicine Creek (10 Stat. 1132); Treaty of Point Elliott (12 Stat. 927); Treaty of Point no Point (12 Stat. 933); Treaty of Neah Bay (12 Stat. 939); Treaty with the Yakama (12 Stat. 951); and Treaty of Olympia (12 Stat. 971).

⁷ See *Halbert v. United States*, 283 U.S. 753 (1981), for a discussion of the affiliation of the small, autonomous Indian groups residing in northwestern Washington into what is now the Quinault Nation.

entitlement thereto satisfactory to the issuing officer and, in the case of a tribally issued card, to the countersigning officer.

Accordingly, in order to be eligible for an I.D. card the applicant must be a member of a tribe with Federally recognized treaty fishing rights.

The Quinault Nation of the Quinault Reservation is, by virtue of the Treaty of Olympia, 12 Stat. 971, an Indian tribe with Federally recognized treaty fishing rights. See, e.g., *Bateman*, *supra* at 178-79. Because of the composite nature of the Quinault Nation, amicus states that membership is open to anyone having 1/4 degree or more Quinault, Queet, Quileute, Hoh, Chehalis, Cowlitz, or Chinook blood. Appellant does not dispute this assertion or the fact that he has less than 1/4 degree Chinook blood and is, therefore, not eligible for membership in the Quinault Nation. Neither has appellant been adopted into the Quinault Nation.⁸ Appellant is, therefore, not eligible for an I.D. card as a member of the Quinault Nation.

Furthermore, appellant is not entitled to either a permanent or a temporary I.D. card on the basis of his membership in the Wahkiakum Band. The Wahkiakum membership roll has not been approved by the Department, nor does the Department recognize that the band has treaty fishing rights as a result of its affiliation with treaty signatory tribes. The question of the Wahkiakum's claimed treaty fishing rights is currently in litigation. See *Schmitt*, *supra*.⁹

[2, 3] Therefore, appellant is not entitled to either a temporary or a permanent fishing I.D. card under Departmental regulations. Duly promulgated Departmental regulations have the force and effect of law and are binding upon the Secretary. The Board is without authority to declare such regulations invalid.

In his brief, however, appellant does not directly attack the regulations in 25 CFR Part 249. Instead he argues that the Wahkiakum have treaty fishing rights arising from the band's affiliation with the Quinault and other treaty tribes. Appellant's arguments apparently seek a Board determination that the mere claim of treaty rights supersedes the regulations. As mentioned previously, the validity of the Wahkiakum's claimed treaty fishing rights is presently in litigation in the United States District Court for the District of Washington in *Schmitt*, *supra*. The Board will not permit a collateral attack on the regulations and on the pending court case. Under the present circumstances, the Wahkiakum are not recognized as having treaty fishing rights arising by virtue of their affiliation with

⁸ Appellant's attempts to be adopted into the Quinault Nation formed the basis for a dispute between appellant and amicus. Two motions concerning this subject are pending before the Board. A motion from amicus seeks the admission of a brief in response to appellant's reply brief on the grounds that appellant raised new factual material in his brief. Appellant moved for suppression of this brief and filed additional material relating to his attempted adoption. The statements of both appellant and amicus relating to circumstances surrounding appellant's attempts to be adopted will be admitted. Accordingly, amicus' motion to file a responsive brief is granted, and appellant's motion to quash that brief is denied.

⁹ As noted in the earlier BIA decisions in this case, it was determined in *Bateman* that the Wahkiakum have neither treaty nor aboriginal fishing rights in the Columbia River. The *Bateman* court, in dicta, indicated that the Wahkiakum were "entitled to share such rights as are granted to the original signatories by the treaty." *Bateman*, *supra* at 179-80. The Department disagrees with this interpretation of rights acquired through affiliation. The extent of the Wahkiakum's fishing rights as an affiliated Indian group is the precise issue raised in *Schmitt*.

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the Quinaults. Until the Wahkiakum are judicially determined to have treaty fishing rights, or until 25 CFR 249.3 is found improper through judicial review or is otherwise changed by the Department, that regulation sets forth the law governing the issuance of both permanent and temporary fishing I.D. cards and is dispositive of this appeal.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Deputy Assistant Secretary's decision of November 3, 1983, is affirmed.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

VIRGINIA CITIZENS FOR BETTER RECLAMATION
VIRGINIA D. HILL

82 IBLA 37

Decided *July 10, 1984*

Appeal from the decision of the Director of the Virginia Field Office, Office of Surface Mining Reclamation and Enforcement, denying a citizen's complaint for enforcement action against Moose Coal Co. VA-BS6-5-83.

Reversed; issuance of cessation order directed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Permit Application: Generally

OSM properly takes enforcement action against the owner of a surface coal mining operation who fails to submit a timely and complete application for a permanent program permit and who continues to operate under an interim permit after 8 months following approval of a state's permanent program.

APPEARANCES: Mark Squillace, Esq., Washington, D.C., for appellants; Courtney W. Shea, Esq., Office of the Field Solicitor, Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON
INTERIOR BOARD OF LAND APPEALS

Virginia Citizens for Better Reclamation (VCBR) and Virginia D. Hill have appealed the decision of the Director of the Virginia Field Office, Office of Surface Mining Reclamation and Enforcement (OSM), dated May 17, 1983, denying their request for enforcement action against the Moose Coal Co. (Moose Coal).

On March 16, 1983, VCBR filed a citizen's complaint on behalf of Virginia D. Hill pursuant to 30 CFR 842.12.¹ VCBR alleged that Moose Coal was conducting surface coal mining and reclamation operations in violation of section V771.13(b)(1) of the Commonwealth of Virginia's permanent program regulations because it had not filed a complete application for a permanent program permit by August 15, 1982, and thus was unlawfully mining under its interim permit more than 8 months after approval of Virginia's permanent program.²

The circumstance of mining without a valid permit constitutes "a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources," 30 CFR 843.11(a)(2), unless such mining is "an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations." *Id.* at (i).³ Presented with the allegation of such a "condition or practice" in a citizen complaint, OSM is required to conduct an immediate inspection of the subject mining operation if the citizen complaint contains

¹ There is no copy of the citizen complaint in the record. The allegations it contains are mentioned in OSM's Complaint Investigation Report (VCBR's Statement, Exh. 2), issued in response to the complaint.

² Virginia's regulatory program was approved on December 15, 1981. The Virginia regulations pertinent to this appeal read as follows:

Section V771.11:

"Except as provided for in Section V771.13(b), on and after 8 months from the date on which a regulatory program is approved by the Secretary, no person shall engage in or carry out surface coal mining and reclamation operations on non-Federal or non-Indian land within Virginia unless that person has first obtained a valid permit issued by the Division under the approved regulatory program."

Section V771.13(b):

"(b) A person conducting surface coal mining operations, under a permit issued or amended by the Division in accordance with the requirements of Section 502 of the Federal Act, may conduct these operations beyond the period prescribed in Section V771.11 if -

"(1) Timely and complete application for a permit under the permanent regulatory program has been made to the Division in accordance with the provisions of the Act, this Subchapter, and the regulatory program;

"(2) The Division has not yet rendered an initial decision with respect to such application; and

"(3) The operations are conducted in compliance with all terms and conditions of the interim permit, and the requirements of the Act, and initial program regulations."

Section V771.21:

"(a) Initial implementation of permanent regulatory programs.

"(1) Not later than 2 months following the initial approval by the Secretary of the regulatory program regardless of litigation contesting that approval, each person who conducts or expects to conduct surface coal mining and reclamation operations after the expiration of 8 months from that approval shall file an application for a permit for those operations.

"(2) Applications for those operations which are not filed within the time required by Paragraph (a)(1) of this Section shall be deemed applications filed under Paragraph (b)(1) of this Section.

"(b) Filing deadlines after initial implementation of permanent regulatory program.

"(1) General. Each person who conducts or expects to conduct new surface coal mining and reclamation operations shall file a complete application for a permit for those operations sufficiently in advance of the expected commencement date of operations to allow for review of the application."

These State regulations repeat the language of the corresponding Federal regulations in 30 CFR Part 771.

³ There is a second exception that does not pertain to the allegations in the citizen complaint in this case.

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"adequate proof" that the State regulatory authority has failed to take "appropriate action," or, in the absence of such proof, if OSM has notified the State regulatory authority of the alleged "condition or practice" and, within 10 days after such notification, the State regulatory authority has failed to take appropriate action. 30 CFR 842.11(b)(1)(ii)(B) and (C).

Upon receipt of VCBR's complaint, OSM investigated the circumstances of Moose Coal's mining operations in cooperation with the State regulatory authority, the Virginia Department of Mined Land Reclamation (DMLR), and learned that the company had not submitted a timely and complete permit application under Virginia's permanent regulatory program.⁴ OSM's complaint investigation report, dated March 29, 1983, reflects that OSM's action resulted in DMLR's further review and denial of Moose Coal's permit application, and an order that the company discontinue its coal excavation activity and begin to reclaim all disturbed areas. On April 8, 1983, however, a State hearing officer granted Moose Coal temporary relief from DMLR's enforcement action, finding that the company was entitled to a third review of its permit application and thereby allowing it to continue coal excavation activities pending DMLR's review of the application.

On April 11, 1983, VCBR requested informal review of OSM's initial action on its citizen complaint, pursuant to 30 CFR 842.15, characterizing OSM's investigation report of March 29 as a "decision not to take enforcement action in this matter." VCBR submitted that the appropriate enforcement action would be to order Moose Coal to cease mining until it received approval of a permanent program permit application. By decision dated May 17, 1983, OSM's Field Officer disagreed, deferring to the State hearing officer's ruling.

On June 15, 1983, Moose Coal withdrew its permit application because it had completed the coal excavation portion of its mining operations. In a letter dated June 16, 1983, DMLR notified VCBR that Moose Coal was being allowed to conclude its reclamation activities under the terms of its interim permit.

In its statement of reasons, VCBR argues that the conditions set forth in section V771.13(b) of the Virginia regulations were not met because Moose Coal did not submit a timely and materially complete application for a permanent program permit. As to the timeliness of Moose Coal's application, VCBR asserts that the company's initial submission was not made until July 15, 1982, when under the terms of V771.21 the application was due on February 15, 1982. VCBR acknowledges that an application submitted on July 15, 1982, is

⁴ Pursuant to the regulations set forth in note 2, *supra*, Virginia's DMLR implemented a phased submission procedure for permit applications under which an applicant was allowed to make three successive application filings, due on Feb. 15, Apr. 15, and July 15 of 1982 (VCBR's Statement, Exh. 5). The phased submission procedure was "designed to allow the industry time to collect the required data while complying with application deadlines established by law." *Id.* The final deadline of July 15, 1982 (not Aug. 15, as mentioned in the investigation report), was calculated to provide adequate time (30 days) for DMLR's review of a "technically complete" application before the expiration of the 8-month deadline set in section V771.11. *Id.*

arguably timely under Virginia's phased submission policy, but argues that the policy is contrary to State and Federal law. As for the completeness of Moose Coal's application, VCBR notes that the State twice determined that the company's application was deficient in numerous respects, and argues that a "complete" application must "evidence a good faith effort to address and comply with all requirements of the approved program."

OSM's answer to VCBR's statement of reasons does not address the statement in any detail. The answer provides the information that Moose Coal submitted its initial phase 1 permit application to DMLR on February 15, 1982, in accordance with the State's phased submittal policy; that DMLR returned the application for corrections on March 16, 1982; that Moose Coal resubmitted phase 1 with phase 2 documents on May 12, 1982; and that Moose Coal filed phase 3 materials on July 15, 1982, without the blasting information subsequently submitted to DMLR on September 17, 1982.⁵ Following this recitation, OSM concludes:

3. OSM properly determined that under the circumstances of this case, and considering the criteria set forth in 30 U.S.C. § 1271(a), no further enforcement action by the Secretary of the Interior was necessary. The regulatory authority took appropriate action concerning the alleged violation and demonstrated a valid reason for its failure to take further action.

The "demonstration" to which OSM refers in its answer presumably is meant to be that described in the decision of the Field Office Director responding to VCBR's request for informal review. That decision turned on the determination of a State hearing officer that Moose Coal was entitled to a third review of its permit application. The Field Office Director stated:

In my judgment, OSM enforcement action against Moose Coal Company would be inappropriate. It would appear from the hearing officer's decision that the due process arguments offered by Moose Coal Company (specifically through Finding of Fact (t), i.e., "that by its past policies, procedures, and publications, the DMLR has led the public to expect three reviews of permanent program permit applications") are entitled to deference by OSM. The issue as to whether a permanent program permit application is entitled to three reviews as a matter of discretion or as a matter of right is a concern that should be addressed by the DMLR as soon as possible. In any event, OSM does not view it as appropriate to take enforcement action against the coal company in this instance while no final administrative decision has been rendered by the regulatory authority.

(Letter to VCBR from Ralph H. Cox, dated May 17, 1983). To the Field Office Director's statement, VCBR has responded:

Whether or not Moose Coal was entitled to a third chance to submit a complete permit application, it plainly failed to submit such an application in a timely fashion, even allowing for the submission of such an application by July 15, 1982 under the state's phased submission policy. Having failed to submit a timely application, Moose was barred by law from continuing its mining activities after August 15, 1982.

⁵ OSM submitted no documentation supporting these assertions and the material is not otherwise in the record.

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(VCBR Statement of Reasons at 5). VCBR has further argued that the fact that Moose Coal has concluded its coal extraction activities does not end the matter because the company's continuing reclamation operations are "surface coal mining and reclamation operations" within the meaning of the Virginia program, and, thus, the company must obtain a permanent program permit for these operations.

The primary issue to be resolved in this appeal is whether OSM properly deferred to the State administrative actions in responding to VCBR's allegation that Moose Coal conducted surface coal mining and reclamation operations without a valid permit in violation of section V771.11 of the Virginia regulations. If OSM's response to the citizen complaint was not proper, the Board must also consider whether any Federal enforcement action is appropriate now.

[1] Under sections V771.11 and V771.13(b) of Virginia's regulations, a person's authority to continue surface coal mining and reclamation operations under an interim permit on and after August 15, 1982, was conditioned on the filing of a timely and complete application for a permanent program permit. It is undisputed that Moose Coal's application submission on July 15, 1982, did not contain blasting information, and that the company did not submit blasting information until September 17, 1982 (OSM's Answer at Item 2). Moreover, on December 30, 1982, Moose Coal's application was returned by DMLR "due to numerous deficiencies as identified by the field inspector's review" (VCBR's Statement of Reasons, Exh. 1). Accordingly, we conclude that Moose Coal had not filed a materially *complete* application for a permanent program permit with DMLR on August 15, 1982, and, therefore, that its mining operations after that date were conducted without a valid permit.⁶

In determining that Moose Coal was entitled to a third review of its permit application, the State hearing officer appears to have ignored the plain requirements for timely and complete permit applications imposed under sections V771.11, V771.13(b), and V771.21 of Virginia's permanent program regulations. OSM's acquiescence in the hearing officer's determination was contrary to its oversight enforcement responsibilities under 30 CFR Parts 842 and 843, discussed, *supra*, because the State regulatory action was not "appropriate" under the circumstances.

That Moose Coal may now have completed the coal extraction and even the reclamation phases of its mining operations does not render OSM's error moot. OSM shall issue a cessation order to Moose Coal on the basis of the company's having mined without a permit, in accordance with 30 CFR 842.11, and assess a civil penalty in

⁶ Cf. *Citizens for the Preservation of Knox County*, 81 IBLA 209 (1984). In that case the Board affirmed OSM in its determination that a mining company that conducted *only reclamation operations* on and after 8 months from the date of the Secretary's approval of the relevant permanent regulatory program was not required to obtain a permanent program permit for those operations.

accordance with the provisions of 30 CFR Part 845. Further, if OSM determines that Moose Coal is continuing in its surface coal mining and/or reclamation operations at the subject site, OSM shall order the company to reapply to DMLR for a permanent program permit covering such operations. In any event, OSM shall ensure that Moose Coal's reclamation operations have satisfied the performance standards of Virginia's permanent program regulations and that the operations are covered by a bond amount calculated in accordance with Virginia's applicable permanent program regulations.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Virginia Field Office Director is reversed, and OSM is directed to take enforcement action as directed in this opinion.

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

WILL A. IRWIN
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

May 17, 1984

APPEAL OF ALLAN D. BARWISE*

IBCA-1690-6-83

Decided May 17, 1984

Contract No. CX 4860-2-0001, National Park Service.

Government Motion to Dismiss or, Alternatively, for Partial Summary Judgment Denied.

Contracts: Disputes and Remedies: Termination for Convenience-- Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Motions

A Government motion to dismiss a claim for lost profits and an alternative motion for partial summary judgment on the lost profit claim are both denied in a case where appellant implies that the actions of the contracting officer were in bad faith and asserts that the actions of the contracting officer during the administration of the contract were arbitrary, capricious, and unreasonable. In denying both motions, the Board notes that there are some limited circumstances in which the damages recoverable have not been restricted to those specified in the termination for convenience clause and that at the requested oral hearing, appellant will be afforded the opportunity to prove bad faith or abuse of discretion on the part of the contracting officer such as might avoid the recovery limitations of the convenience-termination clause.

APPEARANCES: Francis J. Robinson, Attorney at Law, Newton Square, Pennsylvania, for Appellant; Mark Barash, Department Counsel, Newton Corner, Massachusetts, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss appellant's claim for loss of prospective profits, or, alternatively, to grant partial summary judgment in favor of the Government with respect to the lost profits claim. Appellant has filed a response in opposition to the Government's motions.

Background

The invitation for bids under which the instant contract was awarded is dated April 2, 1982.¹ Among its provisions were the following: "**CONTRACT EXECUTION:** Successful bidder will be required to execute a Construction Contract (Standard Form 23), and a Performance Bond (Standard Form 25) in the amount of \$1,500.00 which will be returned to the Contractor upon completion of the work. **TIME FOR COMPLETION:** 198 calendar days (See Specifications)."²

* Not in chronological order.

¹ Appeal File, Tab A at 10. Hereafter AF followed by reference to the particular tab and page being cited.

² AF, Tab A at 16. A news release issued by the contracting officer on the same date as the invitation states that two cuttings of hay would be required, one in May or June and one in September (AF, Tab A at 14).

Contract No. CX 4860-2-0001 was awarded to the contractor on April 20, 1982,³ in accordance with the contractor's bid of \$0.31 per bale of hay. The contract specifications include the following provisions:

SCOPE OF WORK: Cut, rake, bale, pick up and purchase hay twice off of approximately 550 acres of land designated by Valley Forge National Historical Park (see attached map); and pick up, haul, and store 1,000 bales of hay selected by park staff, in a park barn.

DESCRIPTION OF WORK: The work consists of furnishing all labor, tools, tractors, mowers, rakes, balers, trucks, wagons, etc. to cut, rake, bale and remove from the grounds all designated hay except 1,000 bales required for our use. The 1,000 bales will be selected by our staff and you agree to put the hay in the barn at Knox's Farm.

* * * * *

TIME FOR CUTTINGS: The first cutting will take place between May 1 and/or when the orchard grass is in full bloom. The "first cutting" must be accomplished no later than the full blooming of the orchard grass or the Government will have grass cut at Contractor's expense. The second cutting shall be done sometime around the middle of September, depending on the weather and season.

Any light growth of foliage may be left on the ground with a written request and the Contracting Officer's approval.

TIME FOR COMPLETION: 198 calendar days (May 1 thru November 14) will be allowed for completion of the work. Contractor will furnish Contracting Officer with daily number of bales bailed taken from tabulator on Contractor's bailer.

(AF, Tab A at 18).

The contract was prepared on Standard Form 23 (Construction Contract) which incorporated the General Provisions of Standard Form 23-A (April 1975 Rev.) including Clause 5, "Termination for Default-Damages for Delay -- Time Extensions," and Clause 18, "Termination for Convenience of the Government" (AF, Tab A at 3).⁴

By letter dated June 7, 1982, the contracting officer notified the contractor to proceed with the contract work. The notice to proceed was received by the contractor on June 8, 1982. In his letter to the contractor of June 9, 1982, the contracting officer advised that June 12, 1982, had been recorded as the first calendar day of the 198-calendar day period which, unless extensions were granted, would expire on December 26, 1982. The contractor began cutting hay on June 12, 1982, and continued such work and other work involved in haying (raking, baling, and removing) up to and including September 20, 1982, when the last hay from the first cutting was removed (AF, Tab A at 1-2; Tab B at 1, 11-12; Tab D at 13).

During the second week in July, the Government expressed concern to the contractor with respect to his progress on the haying contract.

³ The notice of award letter of Apr. 20, 1982, notified the contractor that he would be expected to execute Standard Form 25 (Performance Bond) in the amount of \$1,500 as soon as possible. The letter noted that the performance bond could be posted in cash, bank check, certified check, or money order made payable to the National Park Service.

A cashier's check, dated June 4, 1982, in the amount of \$1,500 and payable to the National Park Service, was furnished by the contractor. The cashier's check was acknowledged as received and as satisfying the requirements for a performance bond by the contracting officer's notice to proceed letter of June 7, 1982 (AF, Tab A at 2-5, 7).

⁴ The termination for the convenience of the Government clause incorporated into the instant contract by reference is that set out in FPR 1-8.703.

May 17, 1984

The parties met on July 13,⁵ and again on July 16, 1982.⁶ Participating in the July 16 meeting were Mr. Barwise (hay contractor), Mr. Russ Koch (National Park Service employee in charge of horse operations), and Mr. Arthur J. Abell (the contracting officer). The purpose of the meeting was to determine whether any hay remained in the fields suitable for horse feed which the contractor could mow, bale, and put in the Knox Farm barn. The decision reached was that Mr. Barwise would meet with Mr. Koch on Sunday, July 18, 1982, for the purpose of surveying the designated fields to determine if suitable hay was available. The record shows that Mr. Barwise did not meet with Mr. Koch on the specified date. Mr. Koch proceeded to survey the designated fields anyway on the basis of which he concluded that none of the fields were suitable for producing hay of horse feed quality (AF, Tab C at 8-10).⁷

Not having heard anything from Mr. Barwise by July 28, 1982, the contracting officer contacted Mr. Koch who stated that he had not received any communication from the contractor either. In response to a question asked by the contracting officer, Mr. Koch stated that the field on Wilson Road could not possibly be used as the contractor had waited too long to mow this field, also. In a letter to the contractor dated July 28, 1982, the contracting officer noted that on July 21, 1982, Mr. Koch had submitted documentation to the effect that no suitable hay for the park's use remained in the fields at that time, after which the contracting officer stated:

I am, therefore, directing you to furnish the park with the required 1,000 bales of hay to be put in the Knox Barn for use as feed for the horse operation. You may produce this hay in any way best suited to your interests in fulfilling the obligations of your contract. As also discussed, the hay is expected to be in place at the Knox Barn no later than September 15, 1982.
(AF, Tab C at 6-7).

In a memorandum to the contracting officer, dated September 26, 1982, Mr. Koch states: (i) That he had checked the field on Wilson Road on September 25, 1982, to see if the park could use the hay; (ii) that he had concluded half of the field could be used for bedding if it were cut and baled properly; (iii) that the park would be willing to accept 500 bales but no more than that amount; (iv) that he had been unable to get in touch with the contractor on the preceeding Saturday; (v) that he would like to be present when the contractor cuts and bales

⁵ Quoted below is an excerpt from an entry in the Government's daily logs for July 13, 1982:

"Meeting called at 1:00 PM at AO's office to discuss progress of mowing and baling [sic] contract. Superintendent is not satisfied with progress, as fire hazards exist in fields. Farmer given 3 days by AO to decide on course of action to beef up his operation to make more headway. Also - farmer *possibly* offered hay on fields not on contract to offset costs of beefing up operation. Farmer states he will reply in three days on course of action."

(AF, Tab B at 4 (italics in original)).

⁶ The contractor acknowledges that at the meeting on July 16, 1982, the parties discussed furnishing the park with 1,000 bales of hay from either the first or second cutting. He states that in the same meeting he requested the designation of a field suitable for horse hay (AF, Tab B at 13).

⁷ Reporting to the contracting officer on the results of that survey, Mr. Koch states: "All fields are burned out and the way it is being cut we can't use roll (bales) in our horse operation. The field on Wilson Road will be suitable for the second cutting if cut properly" (AF, Tab C at 8).

the hay; and (vi) that he would like to be present when the contractor brings in the 500 bales of timothy hay for feed (AF, Tab C at 5).

In a letter to the contractor under date of November 10, 1982, the contracting officer referenced his letter of July 28, 1982, in which he had directed the contractor to furnish the park with 1,000 bales of hay as required by the contract and to have the hay so furnished in place at the Knox barn no later than September 15, 1982. Thereafter, the letter states:

Since my letter, you have made several requests for additional time to accomplish this part of your contract. To date, the hay has not been furnished by you.

Therefore, this is to inform you that I am purchasing the required hay for the park with the performance bond you posted in the amount of one-thousand five hundred dollars (\$1,500.00).

The cost of the hay will totally liquidate the bond amount.

(AF, Tab C at 2).

On November 22, 1982, the National Park Service placed an order with John Carmichael calling for the delivery to the Valley Forge National Historical Park Stables of (i) 790 bales of hay at \$1.90 per bale for a total amount of \$1,501 and (ii) 300 bales of straw-wheat at \$1.60 bale for a total amount of \$480. The record shows that by December 13, 1982, all of the hay and straw ordered from Carmichael had been received (AF, Tab C at 1).

There is no evidence of record indicating that the contractor made any written response to the contracting officer's letters of July 28 and November 10, 1982, until the contractor's letter of December 21, 1982. In that letter the contractor charges (i) that from the time the notice to proceed was given on June 9, 1982, until July 28, when he received the contracting officer's letter of that date stating that there was no suitable horse hay remaining, no field was designated even after the contractor's request to designate a field on July 16, 1982; (ii) that on July 16, 1982, he had presented plans to finish the designated acreage and to cut an additional 300 acres of nondesignated ground beyond the contract, as well as furnishing the park with 1,000 bales of hay from either the first or second cuttings; (iii) that during late August and early September there was second cutting grass of horse quality available as verified by Russ Koch, park technician, as well as two professional horse people consulted by the contractor; (iv) that the contracting officer was notified of the availability of such hay but he would not allow a second cutting from selected fields for the contractor's purposes or for the Government's 1,000 bales; and, (v) that the reference in the contracting officer's letter to the contractor having made several requests for additional time had not been understood since each time the contractor requested to cut the contracting officer would not authorize a second cutting as provided by the contract. Following these assertions, the contractor states:

May 17, 1984

As a result of your actions on July 16, July 28 and November 10, and conversations in between, I seriously question whether you as the Contracting Officer entered into a haying contract in good faith [8] based on the following conditions:

1. No field was ever designated for horse hay from the notice to proceed [9] till November 10.
2. Directed me to furnish horse hay within 12 days [10] after I accepted your request to cut approximately 300 additional acres within the park.
3. Would not allow a second cutting [11] as provided within the contract even though there was horse quality hay through mid-October.
4. Took the performance bond when you failed to designate a horse quality field and failed to allow me to perform a second cut [12] when there was horse quality hay within selected park fields.

(AF, Tab B at 13, 14).

Mr. Barwise and the contracting officer met on December 27, 1982. In his letter to the contracting officer of December 31, 1982, Mr. Barwise states that the specific issues raised in the contractor's letter of December 21, 1982, were not addressed at the meeting. These issues were: 1. Why was not a field selected for park horse hay during either the first or second cutting. 2. On what provision did the contracting officer rely for preventing a second cutting, since the contract itself authorizes a second cutting (AF, Tab D at 23).

In the decision from which the instant appeal was taken, the contracting officer found that the contractor was indebted to the United States in the amount claimed by the Government of \$2,394.75. This figure represents the 7,725 bales removed from the park by the contractor multiplied by the contractor's bid price of \$0.31 per bale. Denied by the contracting officer were the contractor's claim for damages attributed to not being allowed to make a second cutting in the net amount of \$10,160 and the claim for the return of the contractor's performance bond in the amount of \$1,500 (AF, Tab D at 10-13, 17).

⁸ Elsewhere appellant makes the following statement:

"Appellant performed all services required under the contract, plus cutting additional areas not designated in the contract, up to the time he was prevented from completing contract requirements by the Contracting Officer's actions or lack thereof. The actions of the Contracting Officer in refusing to designate the 1,000 bale areas for cutting and to permit the Appellant to complete the contract work were totally arbitrary, capricious, unreasonable and should be set aside."

(Complaint, Par. 17).

⁹ In the complaint, appellant states: "4. Prior to beginning the first cutting, appellant requested the Contracting Officer to select the areas from which the 1,000 bales of horse feed hay were to be cut. The Contracting Officer did not make the selection. Appellant thereupon commenced a cutting in the designated fields."

The Government denies that the contractor requested designation of areas to be cut for horse feed hay at anytime prior to the commencement of the first cutting (Answer, Par. 4).

¹⁰ The 12 days referred to in the quoted statement apparently relate to the period between the time the contractor agreed to cut approximately 300 additional acres for hay on July 16 and the contracting officer's letter of July 28, 1982. The Board notes that the direction in the letter was for the contractor to furnish 1,000 bales of horse hay by Sept. 15, 1982, or within 7 weeks of the July 28 letter.

¹¹ The specification quoted in the text refers to the second cutting being done around the middle of September. Although the contractor had removed the last of the hay from the first cutting on Sept. 20, 1982, the record is devoid of any evidence indicating that the contractor made a request to proceed with the second cutting on or after that date.

¹² Undisputed is the fact that the contractor was told he would not be permitted to make a second cutting of fields within the park until such a time as the "first" cutting was complete. The reasons for this decision by the contracting officer include the following: (i) hay left in the fields during the first cutting was curtailing visitor activities, and (ii) the delay by the contractor in removing round hay bales from the first cutting in July and August enhanced the possibility of fire from vandalism and from natural causes (AF, Tab D at 12).

Discussion

In support of the motion to dismiss the claim for lost profit and the alternative motion for partial summary judgment on this claim item, the Government cites the case of *Inland Container, Inc. v. United States*, 206 Ct. Cl. 478, 490 (1975), from which the following is quoted:

There is no valid defense to the claim of breach.

For the breach, plaintiff claims damages composed of estimated lost profits under all three contracts, at 10 percent of the dollar volume of business diverted from it to GSA, and an operating loss of \$34,831.72 at the Clearfield branch plant for the year of the 1969-70 contract.

Lost profits may not be recovered, by reason of the termination-for-convenience clause, present in all three contracts. Though the contracts were breached without reference to or reliance upon the termination-for-convenience clauses, it is settled that the clause nevertheless restricts the damages recoverable for the breach to those which would have been allowable under the convenience-termination clause, had it been invoked. *Nesbitt v. United States*, 170 Ct. Cl. 666, 345 F.2d 583 (1965), *cert. denied* 383 U.S. 926 (1966); *G. C. Casebolt Co. v. United States*, 190 Ct. Cl. 783, 421 F.2d 710 (1970); *John Reiner & Co. v. United States*, 163 Ct. Cl. 381, 325 F.2d 438 (1963), *cert. denied*, 377 U.S. 931 (1964).

In opposing the granting of the Government's motion to dismiss or its alternative motion for partial summary judgment, appellant advances a number of arguments including principally the following: (i) The motions ignore the fact that the appeal is based on the Contract Disputes Act of 1978 which expands the jurisdiction of the various boards of contract appeals to include the granting of relief for breach of contract claims;¹³ (ii) the admission by the Government in its motion that appellant has been refused permission to perform certain work under the contract would appear to preclude consideration of any question but the amount of damages to appellant;¹⁴ (iii) the Government's argument that the construction contract terms and conditions control the case totally ignores the fact that there is nothing in the contract remotely resembling construction;¹⁵ (iv) there was a flatout breach of contract for which appellant is entitled to recover damages including loss of profits; and, (v) the Board has jurisdiction over the claim asserted since the claim in question was presented to and decided by the contracting officer. *Cf. Drain-A-Way Systems*, GSBGA No. 6473 (Dec. 22, 1982), 83-1 BCA par. 16,202.

Central to appellant's position is the assumption that if the Board were to conclude that the Government had breached its contract (i) by failing to designate a field or fields from which 1,000 bales of hay for horse feed could be obtained and, (ii) by refusing to let the contractor

¹³ See 41 U.S.C. § 607(d)(1982).

¹⁴ The Government's motions refer only to the claim for prospective profits. Appellant's claim, however, is for breach of contract damages including a claim for loss of profits. In this regard the Board notes that for appellant to recover any damages for breach of contract including loss of profits, it will be necessary for him to show that the recovery limitations of the termination-for-convenience clause do not apply to his claims.

¹⁵ The objection to the use of the construction contract forms was raised for the first time by appellant in the response filed to the Government's motions with which we are here concerned. Appellant has not shown or undertaken to show any injury as a result of the use of such forms. Insofar as the presence of the termination for the convenience of the Government clause may ultimately be determinative of the issue raised by the Government motions, the Board notes that a termination for the convenience of the Government clause is included in Standard Form 32 (Supply Contract) and that the Service Contract involved in the one case cited by appellant, "Drain-A-Way Systems" (text, *infra*) includes a termination for the convenience of the Government clause.

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proceed with the second cutting of grass for hay until the first cutting had been completed, it would necessarily follow that appellant is entitled to recover any damages shown to be caused by the breach including lost profits.

In advancing this position, appellant appears to have overlooked or chosen to ignore the consequences attendant upon the inclusion in the instant contract of a termination-for-convenience clause and the fact that only in extraordinary circumstances have the courts refused to apply the provisions of the clause to limit the damages recoverable to those specified in the clause. This has been true even in cases where the clause has not been invoked by the contracting officer in taking action to end performance under the contract.

As the above-quoted language from the opinion in *Inland Container, Inc. v. United States* shows, the Court of Claims there specifically found that there was no valid defense to the claim of breach, but then went on to find that lost profits were not recoverable by reason of the presence in all three contracts of a termination-for-convenience clause. That result was reached even though the contract had been breached without reference to or reliance upon the termination-for-convenience clause. Based upon the authorities cited,¹⁶ the courts found it to be settled that the clause restricted the damages recoverable for breach to those which would have been allowable under the termination-for-convenience clause had it been invoked.

The Government's motion to dismiss the claim for lost profits and the alternative motion for partial summary judgment are both predicated upon the assumption that the mere presence of the termination-for-convenience clause in a contract insures against the Government ever having to pay common law damages including those represented by claims for anticipated but unearned profits. In fact, however, this is not always the case, as is shown by the decision of the Court of Claims in *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982).¹⁷

Addressing the question of when common law damages including lost profits might be recoverable despite the presence in the contract of a termination-for-convenience clause, the Armed Services Board recently

¹⁶ In the cited case of *John Reiner & Co. v. United States*, 163 Ct. Cl. 381, 393 (1963), the Court of Claims stated: "Just as the failure to invoke the termination article leaves untouched the defendant's right to rely on the damage limitation of that clause, so the failure to follow the termination procedures of the Armed Services Procurement Regulations (ASPR) is ineffective to broaden plaintiff's rights of recovery. Those regulatory provisions have the force of law * * *, but a departure from their requirements does not convert a termination into a common-law breach subjecting the United States to liability for unearned anticipated profits any more than would a deviation from the procedures set forth in a statutory provision for termination. Unless the contractor can show that he has been injured by the failure to pursue the ASPR procedures, such a lapse is immaterial to his recovery. Cf. *J. W. Bateson Co., Inc. v. United States*, 308 F.2d 510, 514 (C.A. 5, 1962)." (Citation omitted.)

¹⁷ In *Torncello* there were three separate opinions concurring in the result reached by the court. In his concurring opinion, Chief Judge Friedman states:

"As I understand the court's opinion, the court holds only that when the government enters into a requirements contract, knowing that it can obtain an item the contract covers for less than the contract price and intending to do so, there cannot be a constructive termination for convenience of the government when the government follows that course. On that basis, I join in the opinion."

(681 F.2d at 773).

stated in the case of *Vec-Tor, Inc.*, ASBCA Nos. 25807, 26128 (Jan. 31, 1984), 84-1 BCA par. 17,145 at 85,440:

We find no bad faith or abuse of discretion [¹⁸] in the termination of the three-year contract such as might avoid the recovery limitations of the convenience-termination clause. The reasons for terminating the contract—lack of need for the work and doubtful authority for the sole source purchase—were lawful reasons within the Government's broad discretionary right under the clause to terminate in its "best interest". See *John Reiner & Co. v. United States*, [9 CCF ¶ 72,358], 163 Ct. Cl. 381, 390, 325 F.2d 438, 442 (1963), cert. denied 377 U.S. 931 (1964). These reasons had some basis in fact, and the Government did not immediately reprocure the same work from a competing source. Thus, the situation in *Torncello v. United States* [30 CCF ¶ 70,005], 681 F.2d 756 (Ct. Cl. 1982) was not present here.

In the case at hand, appellant has raised an issue as to the good faith of the contracting officer in proceeding as he did and has asserted that the action of the contracting officer in refusing to designate the areas from which the 1,000 bales of hay required for park use could be obtained and in refusing to permit appellant to complete the contract work were arbitrary, capricious, and unreasonable (note 8 *supra*, and accompanying text). The Board notes appellant has requested a hearing and that there appears to be disputes between the parties as to facts which may be material to the proper resolution of the appeal. (E.g., whether prior to the beginning of the first cutting the contractor requested the contracting officer to select the acres from which the 1,000 bales of horse feed hay were to be obtained; whether at a meeting on July 16, 1982, Mr. Barwise agreed to meet with Mr. Koch on Sunday, July 18, 1982, for the purpose of surveying the fields to determine if hay suitable for horse feed was available; and whether if Mr. Barwise did so agree, he failed to attend the July 18 meeting with Mr. Koch as scheduled.)

Other questions raised by the record before us which a hearing may answer include (i) whether the failure of the contracting officer to issue the notice to proceed until June 7, 1982,¹⁹ was attributable to the contractor not having submitted the required performance bond until June 4, 1982; (ii) whether during late August and early September, Russ Koch, park technician, verified that there was second cutting grass of horse quality available, as has been alleged by Mr. Barwise; and (iii) whether following the removal of all cut and baled hay from the first cutting by September 20, 1982, appellant made any request to the Government to proceed with the second cutting.

¹⁸The concepts of bad faith and abuse of discretion, together with the type of evidence required to establish them, were treated at some length in *Kaluar Corp. v. United States*, 211 Ct. Cl. 192, 197-201 (1976). After noting in note 1 to the opinion that many of its prior decisions seem implicitly to accept the equivalence of bad faith, abuse of discretion, and gross error, the Court of Claims stated:

"Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act 'conscientiously in the discharge of their duties.' *Librach v. United States*, 147 Ct. Cl. 605, 612 (1959). The court has always been 'loath to find to the contrary,' and it requires 'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing. *Knotts v. United States*, 128 Ct. Cl. 489, 492, 121 F. Supp. 630, 631 (1954)." (211 Ct. Cl. at 198).

¹⁹Approximately 7 weeks elapsed between the award of contract on Apr. 20, 1982, and the issuance of the notice to proceed on June 7, 1982 (AF, Tab A at 2-3, 5).

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Decision

In this case the Government has moved to dismiss appellant's claim for lost profits or alternatively to grant the Government's motion for partial summary judgment with respect to the lost profits claim. Both the motion to dismiss and the alternative motion appear to be premised upon the view that the presence of a termination-for-convenience clause in the instant contract is a bar to the Board finding for appellant on the lost profit claim, even if it were to conclude that the Government had breached the contract in the manner alleged by appellant.²⁰

As the above discussion shows, there are at least some circumstances when the presence of a termination-for-convenience clause in a Government contract has been held not to preclude the award of common law damages (including claims for anticipated but unearned profits). *Torncello v. United States, supra*. The position of the Armed Services Board (as enunciated very recently in *Vec-Tor, Inc., supra*) appears to be that absent a showing of bad faith or abuse of discretion in the termination, the recovery limitations of the termination-for-convenience clause included in the contract are for application to any claim submitted. In *Vec-Tor*, however, the Armed Services Board found no bad faith or abuse of discretion²¹ such as might avoid the recovery limitation of the termination-for-convenience clause.

Here appellant has implied that the contracting officer may have acted in bad faith and has alleged that his actions were arbitrary, capricious, and unreasonable and should be set aside. At the present time, these are, of course, mere allegations requiring proof by the submission of probative evidence. While a litigant having the burden of proving bad faith or abuse of discretion carries a heavy burden (note 18 *supra*), it is considered that appellant should be afforded the opportunity to prove his case at the hearing that he has requested.

For the reasons stated and on the basis of the authorities cited, the Government's motion to dismiss appellant's claim for lost profits and its alternative motion for partial summary judgment on the lost profits claim are both denied.

An oral hearing on all items involved in the appeal will be scheduled at an early date.

WILLIAM F. MCGRAW
Chief Administrative Judge

²⁰ It does not appear that the Government is questioning the Board's jurisdiction over breach of contract claims. See note 13, *supra*, and accompanying text. Rather, the Government's position appears to be that assuming, *arguendo*, the Government's action could be said to constitute a breach of its contract, the breach has been subsumed or transformed into a convenience termination where, as here, the contract includes a termination-for-convenience clause. See discussion of concept in *Clark & Hirt*, IBCA-1508-8-81 (Feb. 9, 1984), 91 I.D. 71, 96-97, 84-1 BCA par. 17,134 at 85,348-49.

²¹ In his opinion concurring in the result reached in *Torncello v. United States* (text, *supra*), Judge Davis found the circumstances present in the case were such as to warrant a finding of abuse of discretion or even a finding of bad faith. 681 F.2d at 773-74.

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

TERESE L. GARRETT

v.

ASSISTANT SECRETARY FOR INDIAN AFFAIRS

13 IBIA 8

Decided *August 21, 1984*

Appeal from a decision of the Assistant Secretary for Indian Affairs refusing to issue a fee patent or to confirm title to the mineral interests in certain lands held in Indian trust status.

Affirmed; referred to Bureau of Indian Affairs.

1. Board of Indian Appeals: Jurisdiction

Although the Board of Indian Appeals does not have general review jurisdiction over decisions of the Assistant Secretary for Indian Affairs, 43 CFR 4.330 permits the Assistant Secretary to refer any matter concerning Indians to the Board.

2. Indians: Citizenship

American Indians born in Canada have an aboriginal right to pass the boundary between Canada and the United States and to remain in the United States without compliance with any immigration law that would apply to any other alien.

3. Indian Lands: Allotments: Alienation--Indian Lands: Restricted Allotment

The Secretary or his delegate has the authority to approve a conveyance of Indian trust or restricted land after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance was adequate; the grantor received the consideration; and there was no fraud, overreaching, or other illegality in the procurement of the conveyance.

4. Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

The Board of Indian Appeals will refer a case to the Bureau of Indian Affairs in accordance with 43 CFR 4.337(b) when the decision involves the exercise of discretion committed to the Secretary.

APPEARANCES: Terese L. Garrett, Esq., pro se; Michael D. Cox, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

On February 13, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Terese L. Garrett (appellant), seeking review of a December 16, 1983, decision of the Assistant Secretary for Indian Affairs (Assistant Secretary) (appellee). Appellee refused either to issue

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a fee patent to appellant or to confirm her claimed title to the mineral interests in certain lands held in Indian trust status. For the reasons discussed below, the Board affirms that decision, and refers this case to the Bureau of Indian Affairs (BIA) for a determination of whether the deed upon which appellant bases her claim should be retroactively approved.

Background

On March 30, 1954, Thomas Bokas, Sr. (Thomas Bokas), now deceased Fort Peck 206-No. 8667, executed a deed of the oil, gas, and other mineral rights in four tracts of Indian trust land on the Fort Peck Reservation in Montana to John F. Bayuk and Terese Lowney.¹ There is apparently no dispute that Terese Lowney and appellant, Terese Garrett, are the same person, or that she is non-Indian. The deed was allegedly intended as payment for legal services rendered to Thomas Bokas, Jr. Although this deed was recorded in the official records of Roosevelt County, Montana, it was not presented to the Secretary of the Interior (Secretary) for approval as required by 25 CFR 152.17 and the statutes cited in that regulation.²

Thomas Bokas died on June 7, 1974. Probate of his estate was concluded by the Department of the Interior (Department) on November 17, 1975. Thomas Bokas left a will under which his Indian trust property was devised to Helen Iron Bear Brown; his son, Thomas Bokas, Jr.; and his grandson, Marvin Dean Taylor. The mineral interests purportedly conveyed to appellant were not excepted from the inventory of trust real property filed in the estate.

On December 15, 1982, appellant filed a petition with the Superintendent, Fort Peck Agency, BIA, in which she sought approval of the 1954 mineral deed or the issuance of a fee patent for the mineral interests. An amended petition and brief of points and authorities were filed on January 26, 1983. The Superintendent denied the petition on April 6, 1983. Appellant's subsequent appeals of this decision were denied by the Billings Area Director, BIA, on July 7, 1983, and by appellee on December 16, 1983. Pursuant to instructions contained in appellee's decision, appellant filed a notice of appeal with the Board. Briefs on appeal have been filed by both parties and Marvin Dean Taylor submitted a letter on his own behalf.

¹The tracts involved in this transaction and the interest in each tract are: One-third interest in sec. 35, T. 29 N., R. 50 E., Principal Meridian, Montana; one-fifth interest in W 1/2 NW 1/4 sec. 3, T. 30 N., R. 50 E., Principal Meridian, Montana; one-fifth interest in SW 1/4 sec. 3, T. 30 N., R. 50 E., Principal Meridian, Montana; and seven-eighths interest in S 1/2 sec. 16, T. 31 N., R. 49 E., Principal Meridian, Montana, containing a total of 1,200 acres more or less, Roosevelt County, Montana.

²It appears that on Apr. 29, 1954, John F. Bayuk and his wife and Terese Lowney executed a deed to Mary E. Hughes covering all of these mineral interests, except that the deed on S 1/2 sec. 16, T. 31 N., R. 49 E., Principal Meridian, Montana, was limited to one-third of their seven-eighths interest.

Jurisdiction

[1] The Board does not have general review authority over decisions of the Assistant Secretary. See 43 CFR 4.330(a)(1); *Ute Mountain Ute Tribe v. Acting Assistant Secretary for Indian Affairs*, 11 IBIA 168, 90 I.D. 169 (1983); *Willie v. Commissioner of Indian Affairs*, 10 IBIA 135 (1982). It can, however, review those decisions that are specifically referred to it by the Secretary or the Assistant Secretary,³ or in which a right of appeal to the Board is given in the decision itself.⁴ In this case, appellee's decision letter concludes with the following paragraph: "This affirmation of the Billings Area Director's decision, having been based on interpretation of law, will become final 60 days from receipt hereof unless an appeal is filed with the Board of Indian Appeals pursuant to 43 CFR Part 4, Subpart D." Board jurisdiction in this case is, therefore, based upon the right of appeal given to appellant in appellee's decision.

Discussion and Conclusions

Appellant seeks a determination that Thomas Bokas was a Canadian national who never acquired United States citizenship. Because she believes that Thomas Bokas was not a citizen of the United States, appellant argues that he was not an Indian for whom the United States could hold land in trust and that, therefore, the trust status of any Indian trust property he inherited in the United States terminated upon transfer to him. Consequently, appellant argues that Thomas Bokas could make this conveyance to her without approval by the Secretary, and that the mineral interests covered by the deed constitute a dry and passive trust as described in *Bailess v. Paukune*, 344 U.S. 171 (1952), and *Chemah v. Fodder*, 259 F. Supp. 910 (W.D. Okla. 1966). Appellant thus contends that the only duty remaining in BIA is to issue her a fee patent.

The citizenship of Thomas Bokas and his father, William Bokas, was specifically addressed by the Department in 1955. On January 5, 1955, an Assistant Secretary of the Interior ordered the reopening of the estate of William Bokas to determine whether he was a Canadian national. The estate was reopened by a Departmental Examiner of Inheritance who found:

The decedent, William Bokas, was born in the vicinity of the Fort Peck Dam in May, 1874. His father, Bokas and his mother, Good Road, were Sioux Indians and members of the Sitting Bull Band. Some time during the period 1875-1877, his parents, as well as many other Sioux Indians, fled with him across the Canadian border to Wood Mountain, Saskatchewan, due to serious difficulties with U.S. Army troops, commonly referred to as the Northwest Rebellion. Bokas married Brown Cloud (also known as Bear Woman) about the year 1902, there being two sons and three daughters born of this union; Thomas Bokas is the oldest of these children. Following the death of his Canadian wife, the decedent returned to the Fort Peck Reservation, Montana, with his son Thomas, either in 1915 or 1916. They both remained in the United States from that day

³ See 43 CFR 4.330(a)(2); *Pueblo of Laguna v. Assistant Secretary for Indian Affairs*, 12 IBIA 80, 90 I.D. 521 (1983).

⁴ See *Melshheimer v. Assistant Secretary for Indian Affairs*, 11 IBIA 155, 90 I.D. 165 (1983).

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and neither has been enrolled or allotted on any Indian reservation in the United States. There is indication that William Bokas made an application at the Fort Peck Agency which was denied.

In 1921, William married Emma Afraid of the Bear Chotowiza, a Fort Peck allottee. Upon her death on October 10, 1937, he inherited several interests in trust lands from her. This property is located on the Fort Peck Reservation, Montana and the Crow Creek Reservation, South Dakota. It is these interests which constituted his entire estate upon his own death, November 18, 1951, and his son Thomas was determined to be his sole heir.

(Order Determining Jurisdiction, June 30, 1955, at 1).

The Examiner found that William Bokas became a United States citizen pursuant to the Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253, 8 U.S.C. § 3 (1934).⁵ Appellant does not dispute that William Bokas was a United States citizen.

The Examiner also found that Thomas Bokas acquired United States citizenship by virtue of section 5 of the Act of March 2, 1907, ch. 2534, 34 Stat. 1228, 1229, which provides:

That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided*, That such naturalization or resumption takes place during the minority of such child: *And provided further*, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

Appellee admits that this finding was in error to the extent that the 1907 Act has been judicially determined to apply only to children who were residing outside the United States when their parent was naturalized and who subsequently legally moved to the United States during their minority. *See United States ex rel. Patton v. Tod*, 297 F. 385 (2d Cir. 1924); *see also* 38 Op. Att'y. Gen. 217 (1935); 38 Op. Att'y. Gen. 397 (1936). Appellee argues, however, that this constitutes harmless error, because Thomas Bokas acquired United States citizenship under the Act of April 14, 1802, ch. 28, 2 Stat. 153, 155, which provides at section 4:

That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States * * *

Section 5 of the 1907 Act and section 4 of the 1802 Act were held in *Tod*, *supra* at 393, to be complementary:

Giving to the two statutes under consideration this interpretation, we have a simple system under which each statute confers rights in two different situations. Under R.S.

⁵ This Act states:

"That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."

This provision has been carried over into 8 U.S.C. § 1401(b) (1982).

U.S. § 2172 [section 4 of the 1802 Act], a foreign-born minor child dwelling in the United States at the time of the naturalization of the parent *automatically* becomes an American citizen. Under section 5 of the Act of March 2, 1907, a foreign-born child, not in the United States when the parent is naturalized, becomes a citizen only from such time as, while still a minor, it begins to reside permanently in the United States. [Italics added.]

Appellant admits the operation of these statutes, but argues that *Tod* requires that a minor child must be residing in the United States legally in order to receive United States citizenship through the naturalization of a parent. She contends that there has been no showing that Thomas Bokas was legally in the United States because neither he nor his father on his behalf ever complied with the applicable rules governing the obtaining of immigrant status. Appellant argues that immigrant status is a necessary prerequisite to an alien's legal residence in the United States.

Whether or not Thomas Bokas was legally residing in the United States in 1924 when his father acquired United States citizenship may be determined by reference to the Jay Treaty of 1794, 8 Stat. 116, and subsequent historical events. The Jay Treaty, among other things, established the boundary between the United States and Canada. The boundary line passed through the territories of several Indian tribes; e.g., the Micmac, Maliseet, Penobscot, and Passamaquoddy Indian Tribes of Maine and New Brunswick (*Akins v. Saxbe*, 380 F. Supp. 1210 (D. Me. 1974)), the Iroquois Nation of New York and Ontario (*United States ex rel. Diabo v. McCandless*, 18 F.2d 282 (E.D. Pa. 1927), *aff'd*, 25 F.2d 71 (3d Cir. 1928)), and the Sioux of Montana and Saskatchewan (the present case). Article III of the Jay Treaty states:

It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America * * *

Apparently, United States immigration officials allowed Canadian-born Indians to cross the international boundary and to remain in the United States without the restrictions applicable to other aliens until 1924, when the Immigration Act of 1924, ch. 190, 43 Stat. 153, was passed. Immigration officials then began deporting Canadian-born Indians. This practice was challenged in *Diabo, supra*. The Immigration Service argued that the Jay Treaty had been abrogated by the War of 1812, and that the right of free passage guaranteed there to Indians no longer existed. Without deciding whether the Jay Treaty had been abrogated, the district court held that the treaty had not created a right of passage, but had merely recognized the aboriginal right of American Indians to reside in a territory spanning the boundary line. The appellate court affirmed the district court's decision, but held specifically that the Jay Treaty had not been abrogated by the War of 1812.

In 1928, Congress enacted the predecessor to the present 8 U.S.C. § 1359 (1982). That Act stated: "That the Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in

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Canada to pass the borders of the United States: *Provided*, That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption." Ch. 308, 45 Stat. 401. The legislative history of this section indicates that it was intended to correct the Immigration Service's interpretation of the immigration laws. See 69 Cong. Rec. 5581-82, 70th Cong., 1st Sess. (Mar. 29, 1928). This section was amended so that it presently reads: "Nothing in this subchapter [dealing with immigration] shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race."

This section was construed in *Akins*, *supra*. As does appellant here, the Attorney General argued in *Akins* that the right guaranteed to American Indians was only to "pass" the border, but did not extend to the right to remain in the United States without complying with other immigration procedures. Thus, the Attorney General contended that American Indians could not be required to obtain immigration visas as a precondition to entry into the United States, but that they could be required to comply with alien registration requirements.

The *Akins* court concluded, however, at pages 1219 and 1221:

[T]he intent of Congress in enacting Section 1359 was to preserve the aboriginal right of American Indians to move freely throughout the territories originally occupied by them on either side of the American and Canadian border, and, thus, to exempt Canadian-born Indians from *all* immigration restrictions imposed on aliens by the Immigration and Nationality Act.

* * * * *

* * * [A]ny consistent and coherent construction of the language of Section 1359 compels the conclusion that the words "to pass" are not to be given either a literal or a technical construction and that Section 1359 exempts these Indians from the restrictions imposed on aliens by the immigration laws. [*Italics in original.*]

[2] The citizenship of Thomas Bokas must be determined in conjunction with this background. The Departmental Examiner of Inheritance found that Thomas Bokas was born in Canada and moved to the United States with his father in 1915 or 1916. This move was before the passage of the Immigration Act of 1924, and at a time when immigration officials apparently recognized the right of American Indians to cross the international border and to remain in this country without immigration restriction. There was, therefore, no doubt that Thomas Bokas and his father were both legally residing in the United States in 1915 or 1916. Assuming, *arguendo*, that the Immigration Act applied retroactively to aliens residing in the United States at the time of its passage, both the courts and Congress have recognized that American Indians born in Canada have an aboriginal right to pass the international border and to remain in this county without compliance

with any immigration law that would apply to any other alien.⁶ Based upon these precedents, we conclude that the legality of Thomas Bokas' residence in the United States was not affected by the 1924 Immigration Act.

It is, therefore, clear that Thomas Bokas legally resided in the United States from the time he first entered with his father until the date of his death. When William Bokas became a citizen of the United States on June 2, 1924, by virtue of the Indian Citizenship Act of 1924, Thomas Bokas, his Canadian-born minor child residing in the United States, automatically became a citizen through section 4 of the Act of April 14, 1802. Because Thomas Bokas was a citizen of the United States and an American Indian, he was a person for whom the United States could hold land in Indian trust status.⁷ Therefore, appellant's argument that Thomas Bokas was a person who could alienate the lands inherited from his father without the approval of the Secretary is without merit.

[3] The finding that Thomas Bokas was a citizen of the United States and an American Indian, however, does not end this controversy. That finding merely leads us to conclude that Thomas Bokas was an Indian for whom the United States held land in trust and that, accordingly, he was not competent without the approval of the Secretary to enter into the deed under which appellant seeks relief. As noted in appellee's decision letter and addressed in appellant's filings, the Secretary has the authority to approve a deed of Indian trust land retroactively. The Board discussed this authority in *Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 21, 32, 89 I.D. 655, 661 (1982). The Board there concluded:

[T]he Secretary or his delegate has the authority to approve a conveyance of Indian trust lands after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance was adequate; the grantor received the full consideration bargained for; and there is no evidence of fraud, overreaching, or other illegality in the procurement of the conveyance. Such approval will be applied retroactively to the date of the attempted conveyance and will extinguish third-party rights arising after the date of the conveyance, including rights acquired through inheritance or devise.

[4] The Secretary, through his delegates in BIA, has not had an opportunity to consider the question of whether this deed should be retroactively approved. Accordingly, because the approval of such a deed is discretionary with the Secretary, the Board will refer this case to BIA under 43 CFR 4.337(b) for such a determination. *See Prieto v. Acting Sacramento Area Director*, 11 IBIA 124 (1983); *Wishkeno, supra*. Appellant is reminded that she bears the burden of proving that the

⁶ The record contains an undated, but apparently recent, newspaper article indicating that it may still be the position of the Immigration Service that Canadian-born American Indians must comply with post-entry immigration requirements.

⁷ See Appellee's Answer Brief at 11.

"It is the Department's long-standing policy to continue the trust or restricted status of inherited property so long as the heir or devisee is of Indian descent, even though such person may not be entitled to membership in any Indian tribe nor be eligible for federal services provided by the Bureau of Indian Affairs."

The Federal trust responsibility runs to Indians, not merely to members of Indian tribes.

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transaction was such as would permit retroactive approval. Appellant's burden in this matter is increased by the fact that, as Thomas Bokas' attorney, she was in a confidential relationship with him.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Assistant Secretary for Indian Affairs is affirmed, and this case is referred to the Bureau of Indian Affairs for consideration of whether the March 30, 1954, deed executed by Thomas Bokas, Sr., should be retroactively approved. The BIA decision on this matter shall be final for the Department unless properly appealed as a violation of law in accordance with the provisions of 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

September 12, 1984

UNITED STATES

v.

ALBERT F. PARKER *ET AL.*

82 IBLA 344

Decided *September 12, 1984*

Appeal from decision of Administrative Law Judge E. Kendall Clarke declaring mining claims null and void and dismissing contest complaint in part. AA-23113, AA-23115, and AA-24659.

Affirmed in part, reversed in part.

1. Evidence: Burden of Proof--Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

In a mining claim contest, the Government establishes a prima facie case of invalidity sufficient to shift the burden of proving otherwise to the claimant where the Government mineral examiner testifies that he has examined the claim and can find no evidence of mineralization or where he cannot examine the claim because it is covered with snow and ice.

2. Evidence: Weight--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

Assay reports have limited probative value concerning the existence of a valuable mineral deposit on a mining claim when they are not supported by sufficient evidence to show how and where the samples were taken.

3. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

In a placer mining claim contest, a claimant overcomes the Government's prima facie case of invalidity based on the absence of significant visible gold in pan samples where he submits evidence of samples with gold values above the cutoff identified by the Government mineral examiner for a successful placer mining operation.

4. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

In a mining claim contest, where a mineral claimant presents more persuasive evidence than the Government with respect to the location of a mining claim on the ground by testimony with respect to the location of certain monuments placed on the ground by the locators of the claim such that the claim encompasses significant mineralization, he overcomes the Government's prima facie case of invalidity based on the absence of mineralization.

5. Mining Claims: Tunnel Sites

A validly located and maintained tunnel-site claim vests a right in the claimant to subsequently locate a mining claim based upon a discovery by the tunnel-site claimant in the course of driving the tunnel. The date of location of the mining claim so located will relate back to the date of location of the tunnel site.

6. Mining Claims: Tunnel Sites

The Department, which is entrusted with the administration of the public lands, is authorized to determine, for its own purposes, the validity of tunnel-site claims in the same way it determines the validity of lode or placer claims. The Department may make

a factual determination that the claimant has or has not located the tunnel-site claim in the manner required by the statute. Since this determination is one of fact, it can be considered in a mining contest, if the issue is properly presented.

7. Mining Claims: Tunnel Sites

The provisions of 30 U.S.C. § 27 (1982) provide that a person who locates a tunnel-site claim must mark the claim from the portal of the tunnel. Therefore, the location of a tunnel-site claim without the prerequisite commencement of a tunnel will not be in compliance with the spirit or intent of the statute, resulting in the claim being void unless and until there is actual commencement of the tunnel. If the facts disclose that a tunnel-site location was made using a portal of an adit not driven for the purpose of establishing the tunnel-site claim, the tunnel site will be considered to be null and void unless there is a showing that this adit had been extended with the intent of using the adit as a part of a tunnel contemplated under the statutory provision.

United States v. Livingston Silver, Inc., 43 IBLA 84 (1979), overruled to the extent it is inconsistent.

APPEARANCES: W. Dean Fitzwater, Esq., Portland, Oregon, for appellants; Robert C. Babson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

Albert F. Parker, Jennie M. Parker, and Jeanne E. Trump have appealed from a decision of Administrative Law Judge E. Kendall Clarke, dated September 12, 1983, declaring 14 lode and placer mining claims null and void and dismissing in part the contest complaint with respect to 4 tunnel-site claims.¹

On April 9, 1979, the Bureau of Land Management (BLM), on behalf of NPS, filed a contest complaint against the Challenger Nos. 1 and 2 lode mining claims, charging that "[t]here are not presently disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery." On April 19, 1979, BLM filed a similar contest complaint against the Leroy No. 2 lode mining claim. In addition, BLM charged that the Tunnel Site Nos. 1 through 4 tunnel-site claims "do not comply with applicable law (30 U.S. Code Section 27)." On April 16, 1979, BLM filed a contest complaint against the Joe's Dream Nos. 1 through 6 lode mining claims and the Mt. Parker Mining Nos. 1 through 5 placer mining claims, charging that "[v]aluable

¹This case involves an appeal from Judge Clarke's decision with respect to three contests--AA-23113, AA-23115, and AA-24659. Contest AA-23113 involves the Challenger Nos. 1 and 2 lode mining claims. Contest AA-23115 involves the Leroy No. 2 lode mining claim and the Tunnel Site Nos. 1 through 4. Contest AA-24659 involves Joe's Dream Nos. 1 through 6 lode mining claims and the Mt. Parker Mining Nos. 1 through 5 placer mining claims. All of the claims are situated between Reid Inlet and the Lamplugh Glacier within the Glacier Bay National Monument (now Park), Alaska, administered by the National Park Service (NPS), U.S. Department of the Interior. The Joe's Dream Nos. 1 through 6 and the Mt. Parker Mining Nos. 1 through 5 placer mining claims and the Tunnel Site Nos. 1 through 4 tunnel-site claims were located Sept. 12, 1976. The Challenger Nos. 1 and 2 mining claims were located Sept. 7, 1976. The Leroy No. 2 lode mining claim was located Aug. 21, 1944. All of the claims were recorded with NPS prior to Sept. 28, 1977, in accordance with section 8 of the Act of Sept. 28, 1976, 16 U.S.C. § 1907 (1982). See *Elden A. LeRoy*, 49 IBLA 320 (1980).

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minerals have not been found within the limits of the claims * * * of sufficient quality and/or in sufficient quantity to constitute a discovery under the mining law." In addition, BLM charged that the land within the Mt. Parker Mining Nos. 1 through 5 placer mining claims is "non-mineral in character."

A hearing into the validity of appellants' mining and tunnel-site claims was held in Juneau, Alaska, before Judge Clarke between October 27 and 29, 1980. After the hearing, Judge Clarke informed the parties that the transcript of the proceedings did not include any testimony after the noon recess on October 29 and notified them that they could request a further proceeding in the event they felt it was necessary. On November 9, 1981, appellants filed a motion to dismiss BLM's contest complaints either with or without prejudice to BLM's right to contest the validity of appellants' claims, because of the unreasonable delays in the adjudication of appellants' claims and the partial loss of the transcript. By order dated December 15, 1981, Judge Clarke denied appellants' motion to dismiss and scheduled an additional hearing. On September 15, 1982, an additional hearing was held in Juneau, Alaska, before Judge Clarke. By order dated October 25, 1982, Judge Clarke closed the record and set the time for further briefing. Both parties subsequently filed briefs.

In order to become entitled to a mining claim, a claimant must establish the presence of a valuable mineral deposit. 30 U.S.C. § 22 (1982). A valuable mineral deposit exists where the mineral found is of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. *Castle v. Womble*, 19 L.D. 455 (1894). This is the "prudent man test," approved by the U.S. Supreme Court in *Chrisman v. Miller*, 197 U.S. 313 (1905). It has been refined to require a showing of marketability, *i.e.*, that the mineral can be presently extracted, removed, and marketed at a profit. *United States v. Coleman*, 390 U.S. 599 (1968).

Appellants' claims are situated within the Glacier Bay National Monument which was closed to mineral entry on September 28, 1976, pursuant to section 3(e) of the Act of September 28, 1976, 90 Stat. 1342 (1982), subject to valid existing rights. *See United States v. Peterson*, 47 IBLA 92 (1980). In such circumstances, where a mining claim is located on land subsequently withdrawn from appropriation under the mining laws, the claim must be supported by a discovery at the time of withdrawal, as well as the date of the hearing into its validity. *Cameron v. United States*, 252 U.S. 450 (1920). Accordingly, appellants' mining claims must be supported by a discovery at the time of withdrawal, *i.e.*, September 28, 1976, as well as the dates of the hearing. We note that the Government, in its contest complaints, did not charge that the Challenger Nos. 1 and 2 and the Leroy No. 2 claims were not supported by a discovery on September 28, 1976.

However, that charge was raised at the hearing without objection by appellants. See *United States v. McElwaine*, 26 IBLA 20, 26-27 (1976).

With respect to allocation of the burden of proof in the case of mining claim contests, it is well established that the Government bears only the burden of going forward with sufficient evidence to establish a prima facie case, whereupon the burden shifts to the claimant to overcome the Government's case by a preponderance of the evidence. *Hallenbeck v. Kleppe*, 590 F.2d 852 (10th Cir. 1979); *Foster v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959).

For the sake of clarity, we will consider each set of appellants' claim groups seriatim.

The Joe's Dream Nos. 1 through 6 Lode Mining Claims

The Joe's Dream Nos. 1 through 6 lode mining claims consist of a "string" of claims one claim in width and 1.6 miles long located near the ridge between Reid Inlet and the Lamplugh Glacier. These claims, which were located by appellants on September 12, 1976, were, in fact, a relocation of a group of claims known as the "Highlander" claims. The Highlander claims, which were owned by parties other than appellants, had apparently been abandoned by their owners. The Government's case, presented by the testimony of Steve Zentner, a Government mineral examiner, is summarized in Judge Clarke's decision at pages 4-5:

Mr. Zentner testified that in July 1977, he along with the claimants, made an aerial reconnaissance of the contested claims. During this flight the location and discovery points on the Joe's Dream claims were pointed out to Mr. Zentner by claimant Jeanne Trump (Tr. 100). Mr. Zentner returned in September, 1977, accompanied by Mr. Glenn Reed, a mining engineer with the National Park Service, and examined the claims on foot. The information provided by Mrs. Trump, along with location notices found on the claims, gave Mr. Zentner an indication of where the claim boundaries and discovery points were (Tr. 94).

Mr. Dale Henkins, a representative of the claimants, accompanied the two Park Service mineral inspectors on their inspection in September 1977, and pointed out relevant features on the claims (Tr. 150).

A total of five to seven pounds of chip samples from mineralization occurring on Joe's Dream's claims Nos. 1 and 2 were taken by Zentner and Reed during their examination of the claims. These samples were taken from excavations present on the claims. These pits had been pointed out during the aerial inspection by Mrs. Trump and by Dale Henkins during the terrestrial examination. Of the several pits pointed out by Mr. Henkins, the pits on the lower end of the claim were not sampled (Tr. 150).

One of the pits occurring on claim No. 1 contained a nine-inch quartz vein from which a three to four pound chip sample was taken [(Tr. 95, 100-01, 104)]. Another two to three pound chip sample was obtained from a one to two inch wide vein evident in an excavation on claim No. 2. This latter vein was apparent for 15-20 feet on the surface [(Tr. 96, 101)]. Additional pits were found on claim No. 3, but no samples were taken due to absence of mineralization [(Tr. 105)]. Claim Nos. 4 through 6 were covered with snow and ice to a degree which made sampling impracticable [(Tr. 96-97)].

Mr. Zentner returned the following year, in September, 1978, to re-examine the claims. No additional samples were taken as snow and ice persisted on claim Nos. 4 through 6.

The assay results of the samples taken during the examination appear in government Exhibit 11. The values for the two chip samples taken were .1 ounces of gold per ton and .04 ounces of silver per ton for the sample from claim No. 1 (Sample marked LR-20)

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and .23 ounces of gold per ton and .10 ounces of silver per ton for the sample from claim No. 2 (Sample marked LR-24).^[2]

In the witness' opinion, it would not be reasonable to expend further time and money developing these claims, as there is not a reasonable probability of developing a successful mine on them [(Tr. 112)]. Mr. Zentner based his opinion on the fact that the gold values reflected in the samples are low, and not indicative of terrain worthy of development. This conclusion is buttressed by Zentner's finding that there is little material, especially on claim No. 2 worthy of extraction at any value. Further, claim No. 3 is devoid of mineralization and partially covered with snow and ice. Because claim Nos. 4, 5 and 6 were covered by a glacier, and therefore could not be sampled, it cannot be contemplated that they could support a successful mine (Tr. 110-112). This last opinion is corroborated by government Exhibit 6, a United States Geologic Survey (USGS) Map of the area which shows "Ptarmigan Glacier" covering much of claim Nos. 3 through 6. ^[3]

Upon cross-examination, Mr. Zentner identified and read from three USGS reports on the geology of the Reid Inlet area. Two of these reports, Professional Paper #632 and Report #78494 by Hope and Carr spoke favorably of the prospect of gold existing on the claims in quantities which would justify mining development thereon. Mr. Zentner felt, however, that the high values reported were misleading, as there is little high grade material to mine on the claims. He reiterated the fact that neither he nor Mr. Reed observed any of the large veins referred to in the publications and, in any event, it would be difficult to predict, and expensive to ascertain, the nature of the subsurface veins (Tr. 151-153, 159).

At the hearing, appellants made a motion to dismiss the complaint as to the Joe's Dream claims, arguing that the Government had failed to properly examine the claims. *See* Tr. 203-04. The motion was essentially denied by Judge Clarke. *See* Tr. 206. In his September 1983 decision, Judge Clarke concluded that the Government had established a prima facie case through the testimony of its mineral examiner. On appeal, appellants dispute this finding, contending that a prima facie case cannot be based on two samples with respect to the Joe's Dream Nos. 1 and 2 claims and no samples with respect to the four remaining claims.

We conclude that the Government did establish a prima facie case with respect to the Joe's Dream Nos. 1 and 2 claims. The mineral examiner identified the exposed veins within the claims and took samples of the veins he believed most likely to contain gold. The assay results he obtained from these samples indicated the presence of very little gold and his testimony with respect to the nature and extent of the vein material were sufficient to establish a prima facie case of invalidity.

[1] The case is somewhat different with respect to the Joe's Dream Nos. 3 through 6 claims. The record indicates that the mineral examiner examined the Joe's Dream No. 3 claim and could find no

² Zentner further testified that these gold values per ton equated to \$12 per ton (LR-20) and \$30 per ton (LR-24), using a September 1976 gold price of between \$115 and \$120 (Tr. 110). Zentner stated that these values were not high enough to make mining practical and that: "You would have to hope that somewhere along this vein there was an old ore shoot that would be significantly higher, thirty times this high" (Tr. 111). In effect, Zentner testified that gold values would have to be on the order of 3 ounces per ton.

³ The map, however, was compiled in 1954 and does not take into account any diminution in the size of the glacier which may have taken place between 1954 and 1977.

evidence of mineralization. Observation of an absence of mineralization is sufficient to establish a prima facie case of invalidity. However, the mineral examiner never examined the Joe's Dream Nos. 4 through 6 claims. See Tr. 144. Zentner stated that this failure was due to the fact that at the time of his examination the claims were completely covered with snow and ice. See Tr. 96.

On appeal, appellants challenge the presence of snow and ice on two of the three claims, referring to testimony by Phil Holdsworth, a mining engineer who is familiar with and has examined appellants' claims. Holdsworth testified that the Joe's Dream No. 4 claim is completely covered with ice, but that the Joe's Dream Nos. 5 and 6 claims are only partially covered with ice (Tr. 261-62, 266). However, Holdsworth testified that the Joe's Dream Nos. 5 and 6 were covered by snow and ice except on rare occasions when there is low snowfall. See Tr. 262. Thus, this testimony does not dispute the fact that at the time the mineral examiner attempted to examine the Joe's Dream Nos. 4 through 6 claims, they were not subject to visible examination because of the presence of snow and ice.

These facts are similar to those in *United States v. Rukke*, 32 IBLA 155 (1977), *aff'd*, *Rukke v. United States*, Civ. No. 77-206T (W.D. Wash. June 23, 1981). In the *Rukke* case the mineral examiner testified that he was unable to examine 7 of the 40 claims because they were inaccessible due to snow and glacial thawing causing rock slides. The mineral examiner also testified that he had observed these claims from a helicopter and when doing so observed no evidence of mining activity. *Id.* at 163. The Board found that there was sufficient basis for forming an opinion that no discovery had been made on the inaccessible mining claims. *Id.* at 164. In the case now before us, we find the same to be true. There is sufficient basis for the opinion stated and a prima facie case has been established. We recognize that this case is weak and can be overcome with minimal evidence of the existence of mineral on the claims. See also *United States v. Cook*, 71 IBLA 268 (1983); *United States v. Long Beach Salt Co.*, 23 IBLA 41 (1975). We conclude that the Government established a prima facie case that the Joe's Dream Nos. 1 through 6 claims were not supported by a discovery on the date the land was closed to mineral entry, *i.e.*, September 28, 1976.

We turn, therefore, to the question whether appellants have overcome the Government's prima facie case. Appellants' evidence is summarized in Judge Clarke's decision at pages 6-7:

Mr. William Affleck, a former mineral sampler for the U.S. Bureau of Mines testified on behalf of claimants. In 1977 while engaged in geologic sampling in conjunction with a wilderness study of the Reid Inlet area, Mr. Affleck picked up a rock which he testified came from the vicinity of Joe's Dream No. 2 or 3. This sample was not marked or otherwise identified by Mr. Affleck when it was taken, nor later assayed by the Bureau of Mines, and remained in Mr. Affleck's possession until he learned of the claimant's pending litigation over the claims. Mr. Affleck then gave the sample to claimant Jeanne Trump (Tr. 267). This sample is labeled contestee's Exhibit M.

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Mr. Affleck returned, during the summer of 1979, to point out to the claimants where he took the sample. Accompanying claimants was Mr. Phil Holdsworth, a registered mining engineer and former Commissioner of Mines for the Territory of Alaska. Mr. Holdsworth testified that he, along with Affleck and the others, tried to find the source of the sample, as it was loose on the ground, or "float", when taken. Although not precisely located, Mr. Holdsworth felt the source of the sample was on claim No. 3 and marked this location on contestees' Exhibit L [(Tr. 260)]. [¶] He also testified that upon this inspection, the southern one-quarter of claim No. 3 was free of snow and that the eastern portions of claim Nos. 5 and 6 were free of snow and ice (Tr. 259-261).

Mrs. Trump had this sample fire assayed and the results of which appear in contestees' Exhibit CCC. This assay report shows values of .488 ounces of gold per ton and 4.8 ounces of silver per ton.

Additional assay reports were submitted by the contestees in an attempt to overcome the government's case. These reports are labeled contestees' Exhibits DDD, EEE and HHH, and were obtained by claimants from Dr. Vernon Scheid, a business partner of Walter Duff, who staked along with his son Lawrence, the Highlander claims. The Highlander claims were located on land now known as the Joe's Dream claims and this fact is supported by contestees' Exhibits FFF, GGG and III, Location Notices for the Highlander group.

These assay reports show high values of gold on the claims. Specifically, Exhibit DDD gives values from 35.292 ounces of gold per ton to .018 ounces of gold per ton. Exhibit EEE shows values of 4.66 ounces of gold per ton, and Exhibit HHH shows a chemical analysis report of 5.04 ounces of gold per ton. Mrs. Trump testified as to the origins of these assay reports, as well as how she determined, using field notes taken by Duff, that the samples were taken from the area encompassed by the Joe's Dream claim. Mrs. Trump testified that the discovery post on the Highlander corresponded with the corner post of Joe's Dream No. 2 and that the samples labeled 74 H-1 through 74 H-6 were from the Highlander, hence Joe's Dream, because the "H" stood for Highlander in Exhibit DDD. Mrs. Trump could not be certain from which of the six Joe's Dream claims each of these samples were taken [(Tr. 390-97)]. [¶]

The record also contains a report prepared by David A. Brew and others of the Geological Survey and Bureau of Mines (GS and USBM), dated 1978 (Brew Report) (Exh. 14), evaluating the mineral resources within the Glacier Bay National Monument. The report, at page C-197, states that the Reid Inlet area contains gold "in relatively small, discontinuous quartz veins and associated shear zones in metasedimentary and altered dioritic and granodioritic rocks." Gold was produced from mines in the area between 1938 and 1950, principally from the Leroy mine, which averaged \$100 per ton at \$35 per ounce (about 2.85 ounces per ton). "Virtually all veins sampled (1954, 1966, and during the present study) were found to be goldbearing," but "[m]ost veins were small in dimension, both in thickness and exposure length, although an occasional vein was up to four feet thick and some appeared to persist along strike for as much as several hundred feet." *Id.* With respect to the "Highland Chief (Joe's Dream) prospect," the report indicated the results of sampling

⁴ The placement of the believed source of the sample on appellants' exhibit L indicates that the "float" sample actually came from the Joe's Dream No. 2 claim. See Exh. 6. This was confirmed by Jeanne E. Trump, one of the appellants and locator of the Joe's Dream claims. See Tr. 383.

⁵ The transcript, however, indicates that Trump was able to determine that the location from which sample 74 H-2 was taken was within the Joe's Dream No. 2 claim, using the description in the notes attached to the assay report in exhibit DDD (Tr. 393). This particular sample assayed at 33.834 ounces per ton of gold and 20.27 ounces per ton of silver.

conducted in the claim area. The report also noted that Rossman (1959) had reported that the original locator of the Highland Chief claims had found a vein up to 6 feet thick and containing a considerable amount of free gold but that it was not found during later surveys. The report also noted that Reed (1938) had reported finding four or five parallel quartz veinlets typically yielding 0.26 ounce per ton of gold. Exhibit 14, at page C-228, stated that, based on 40 samples taken by the GS-USBM team in 1977, gold values ranging from nil to 3.49 ounces per ton were obtained. The width of the sample containing 3.49 ounces per ton was 0.2 foot. The report contains a map of the GS-USBM sample locations within the Highland Chief (Joe's Dream) prospect (figure C-52), which, from its location on another map of the Reid Inlet area (figure C-45), appears to be situated within the Joe's Dream No. 2 claim.

[2] Appellants submitted assay reports purportedly reflecting values of samples taken from the Joe's Dream claims. These assay reports were made prior to appellants' location of the claims and the samples assayed were not taken by appellants (Exhs. CCC, DDD, HHH). In his September 1983 decision, Judge Clarke concluded that appellants did not overcome the Government's prima facie case because the assay reports submitted by appellants "can be given little probative value * * * because the persons who took the samples were not present to testify regarding the methods used in extracting and treating the samples" (Decision at 25). Judge Clarke cited the cases of *United States v. Smith*, 54 IBLA 12 (1981), and *United States v. Downs*, 61 IBLA 251 (1982), for the latter proposition. The proposition cited by Judge Clarke, however, does not appear in either *Smith* or *Downs*. Indeed, we have not required the person who has taken samples from certain mining claims to testify at a hearing into the validity of those claims. See *United States v. Arbo*, 70 IBLA 244, 250 (1983). Rather, *Smith* and *Downs* and other similar cases stand for the proposition that assay reports will have limited probative value where there is no evidence as to how and where the samples were taken. See *United States v. Jones*, 72 IBLA 52, 57 (1983). The crucial flaw in appellants' reliance on these assay reports is the fact that there is no clear evidence of either the location from which the samples were taken or the nature of the structure sampled. Without this evidence there is no way to determine if the samples were, in fact, taken from a point within the boundaries of the claims, the claim from which the samples were taken or what the assays are to represent in the way of ore in place. See *United States v. Dresselhaus*, 81 IBLA 252 (1984); *Cactus Mines Limited*, 79 IBLA 20 (1984). Appellant Trump testified that the assay report introduced as exhibit CCC (dated October 8, 1980) was an assay of a piece of float and that she could not identify the source of the sample for the assay report marked as exhibit HHH (dated December 26, 1974). Exhibit DDD (dated May 16, 1975) was a series of assay reports and a narrative description of the sampling conducted on the Highlander claims written in 1974. While the report describes the

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samples, it does not give any information regarding the size of the samples or the material represented. It appears from the report that these samples are merely grab samples taken of material found during a reconnaissance of the claims and do not represent any attempt to delineate a mineralized zone or ore body. For example, one of the samples (74-H1) was of a "2 [inch] piece of oily-vitreous vuggy quartz."

As previously noted, the Joe's Dream claims were located by appellants shortly prior to the withdrawal of the lands from mineral entry. Appellants presented no evidence of any activity by them at the time of locating the claims. The mineral examiner found no evidence of recent activity on the claims. Having made the location such a short time prior to the withdrawal and subsequent hearing, it would seem reasonable to expect that the claimants would have knowledge and a clear recollection of the location of the mineral in place. The testimony related an attempt to find the source of a piece of "float" rather than the location of mineral in place supporting discovery. A location of a lode claim is not supported by the finding of "float" ore. *Waterloo Mining Co. v. Doe*, 56 F. 685 (S.D. Calif. 1893). Having allegedly made the discovery only a short time prior to the hearing, the inability to identify the discovery points raises the presumption that appellants had not yet established a discovery.

We further find that, considering the nature of the mineralization found by the GS-USBM team and the mineral examiner, the mineralization exposed on Joe's Dream claims was not of sufficient quantity and quality to warrant *development* of a mine. While the values may well justify further exploration, the values were too erratic and the veins too discontinuous to commence these operations without further exploration. A valuable mineral deposit has not been discovered because a search for such deposit might be indicated. *Henault Mining Co. v. Tysk*, 419 F.2d 766 (9th Cir. 1969), *cert. denied*, 398 U.S. 950 (1970); *Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969). Therefore, we must conclude that appellants did not overcome the prima facie case.

Mt. Parker Mining Nos. 1 through 5 Placer Mining Claims

The Mt. Parker Mining Nos. 1 through 5 placer claims are located north and east of Mt. Parker, along the Ptarmigan Creek. The Government's case presented by the testimony of Steve Zentner, is summarized in Judge Clarke's decision at pages 8-9:

Mr. Steve Zentner, a mining engineer with the National Park Service testified on behalf of the government that he took samples from the claims on two occasions. Mr. Zentner, who has considerable experience in sampling as assessment work involving placer claims (Tr. 121), sampled claim Nos. 1 and 2 in July, 1977. Mr. Dale Henkins, a representative of contestee Jeanne Trump, accompanied Mr. Zentner on this examination after Mr. Zentner had made a reconnaissance of the claims on his own (Tr. 113).

The results of this sampling, as well as the results of a second sampling performed by Mr. Zentner on August 14, 1978, are included in government's Exhibit 12 titled "Mineral Report for the Mt. Parker Group of Placer Mining Claims in Glacier Bay National Monument, Alaska."

In Mr. Zentner's opinion, the sampling performed in 1977 yielded only miniscule amounts of gold and nothing of economic value. These samples consisted of four surface pan samples taken and panned on placer claim Nos. 1 and 2 by Zentner and Henkins. [7] These samples were not kept nor assayed (Tr. 113). In August, 1978, Mr. Zentner returned to the claims and took a second set of samples from the area. These consisted of several pan samples from along Ptarmigan Creek and on claim Nos. 2, 3, 4 and 5. Mr. Zentner stated that no significant gold coloration was found in the 20 or so pans he took. No samples were taken on claim No. 1 on this occasion as no gravel suitable for sampling was encountered [(Tr. 115)].

The second set of samples were taken from an area below the old mining cabin on the property (which can be seen in photo No. 13 of contestees' Exhibit Y), to a spot approximately one-quarter of a mile above the LeRoy lode mining claim (Tr. 114, 118). Mr. Zentner is not certain which claim he was on when he took individual samples, as not all boundary markers were observed during the sampling. The witness is certain that he was sampling on placer claim Nos. 2, 3, 4 and 5, however, as the claims are staked, according to location notices and contestees' descriptions, along Ptarmigan Creek on the area from whence the samples came. Also, the witness felt that it was not crucial to ascertain exact sample locations as the terrain sampled was uniform in terms of structure, geomorphosis, and gold content, consisting entirely of glacial till (Tr. 118-120, 163).

The samples were all from the surface and according to Mr. Zentner, contained very little black sand, pyrite or gold, being composed mostly of fine sand. A chemical assay was not performed on the samples, as Mr. Zentner felt that the level of visible gold was too low to warrant undertaking such tests (Tr. 170).

Upon cross-examination, Mr. Zentner agreed with counsel for contestee that a statement in the "Mineral Report", government Exhibit 12, that, "no gold was recovered" in the samples was misleading. A more accurate statement would be, "no gold of economic importance was found" (Tr. 166).

In Mr. Zentner's opinion, a reasonable man would not be justified in spending additional effort and money with a reasonable prospect of developing a paying mine on any of the placer claims (Tr. 122). This opinion is based upon three considerations. It is based primarily on the fact that the gold values observed in the samples are low, secondly, that glacial till is very difficult material to process, despite the accessibility of the claims and an abundance of water in Ptarmigan Creek for sluicing the gravel, and thirdly that there is no evidence of previous mining activity on the claims (Tr. 123, 172.[7])

In his September 1983 decision, Judge Clarke concluded that the Government established a prima facie case of invalidity. On appeal, appellants argue that the Government's case is undercut largely by the fact that Zentner stated that he did not know from which claim each of his second set of samples were taken. See Tr. 163. However, Zentner's determination was not made on the basis of the samples alone. He had physically been on each of the claims, even though there is a question as to whether he took samples from each. The samples taken and his observations verified the uniformity of the gravel

⁶ Zentner actually testified that these pan samples were taken on the Mt. Parker Mining No. 3 claim (Tr. 114). However, in his mineral report at page 3 (Exh. 12), Zentner stated that the claims sampled were the Mt. Parker Mining Nos. 1 and 2 claims.

⁷ Zentner testified that mining could take place within the placer claims if the gold values were \$2 per cubic yard (Tr. 171). Dale Henkins, appellants' representative, agreed with this conclusion (Tr. 437-38). However, Zentner did not specify whether this figure was at 1976 or 1980 gold prices. However, using one ton per cubic yard and a price of gold of \$120 per ounce, in August or September 1976, Zentner's cutoff for successful mining is 0.017 ounce per ton of gold. At the higher gold prices recorded in 1980, the cutoff only decreases.

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deposited and having found no gold considered by him to be of commercial quantity, he concluded that there had been no discovery on any of the placer claims. Likewise, Judge Clarke concluded that the samples were relevant to each of these claims because of the similarity of the glacial placer deposit. Indeed, the Brew report (Exh. 14) at C-196, which characterized the surface deposits in the basin of Ptarmigan Creek generally as glacial moraines, alluvium, and colluvium reinforced this determination. The Government samples were intended to be determinative of the quantity of gold which could reasonably be expected on the claims. We conclude that the Government did establish a prima facie case based on the results of pan samples generally within the area of the claims and the observation with respect to the nature of the gravel on the claims. See *United States v. Long Beach Salt Co.*, *supra*. With respect to the Mt. Parker Mining No. 1 claim, it was conclusively determined that this claim had been sampled and the Government's prima facie case was clearly established by the results of specific pan samples.

Judge Clarke also based his finding of a prima facie case on the lack of production. We have held that a presumption that a mining claim is not supported by a discovery arises where there has been little or no development or operations on the claims over a long term. *United States v. Kaycee Bentonite Corp.*, 64 IBLA 183, 220, 89 I.D. 262, 282 (1982); see also *United States v. Zweifel*, 508 F.2d 1150 (10th Cir. 1975). However, we will not apply this presumption where appellants located the claims on September 12, 1976, and claimants had been precluded from conducting mining operations since September 28, 1976.

We, therefore, turn to the question of whether appellants have overcome the Government's prima facie case of invalidity. Appellants' evidence consists largely of general statements regarding the existence of gold on the claims and assay reports. Holdsworth testified that in 1954 he took a sample (PRH 54-36) from a spot which was near what is now the boundary between the Mt. Parker Mining Nos. 4 and 5 claims. He stated that in taking this sample the gravel was screened, panned and concentrated. The concentrate was assayed (Tr. 236). This sample assayed at 0.02 ounce per ton of gold and nil of silver. See Tr. 238-39; Exhs. 6 and H. Exhibit 6 indicates that the sample came from what is now the Mt. Parker Mining No. 4 claim. Jennie M. Parker, one of the appellants and co-locator of the Mt. Parker placer claims, testified that a sample reported in an assay report, dated August 17, 1953 (Exh. T, sample #10), was taken from the Mt. Parker Mining No. 3 claim (Tr. 291). The assay, which appears to be a fire assay, indicates values of 0.04 ounce per ton of gold and a trace of silver. Parker also testified that an employee of a potential lessee of the Leroy claims had reported a surface sample of \$26 per ton (Tr. 294). Jeanne E. Trump also testified that she had been told that a sample taken from the Mt. Parker Mining No. 4 claim in August or September 1974 assayed at

0.223 ounce per ton of gold (\$29 per ton with gold at \$130 per ounce) (Tr. 302-04). Trump also testified that another sample, taken by a previous claimant from what she believed to now be the Mt. Parker Mining No. 1 claim, assayed at 0.08 ounce per ton of gold and 0.1 ounce per ton of silver (Tr. 399; Exh. EEE). Finally, Henkins testified that a two pound grab sample of gravel taken from either the Mt. Parker Mining Nos. 1 or 2 claims was fire assayed and that the average value of gold was 0.019 ounce per ton (Tr. 428-29; Exh. RRR). Henkins then testified that he made a cost analysis of mining the placer material, calculating the return at \$2.28 per ton using gold values of from 0.019 to 0.02 ounce per ton and the August or September 1976 price of gold at \$120 per ounce (Tr. 435). Figuring a 10-hour day and the processing of 300 cubic yards of material per day, Henkins testified that the return would be \$1,067.04 per day (Tr. 436). Henkins concluded that he could make a "reasonable profit" based on a small operation. *Id.*

[3] Judge Clarke concluded that appellants did not overcome the Government's prima facie case. When considering the testimony and the weight that can be given to each of the assays submitted, we must conclude that the samples either support the Government's case or are of such nature that they can be given little weight. A close examination of the assay report for the Holdsworth sample discloses that the assay was of the sample sent to the assay lab. This sample had been concentrated by Holdsworth prior to delivery and the assay shown cannot be equated to the gold content of the placer material prior to concentration. The assay shown on exhibit T was apparently a fire assay and there is no indication whether this assay was of the gravel or black sands after concentration. There is no support for the \$26 per ton sample or the 0.223 ounce per ton sample reportedly taken. The 0.08 ounce per ton sample described by Trump was not substantiated. The Henkins' assay was a fire assay of the gravels and can be given little weight, as a fire assay is not representative of the values that could be recovered from a placer operation. See 2 Tr. 42-43, 54-55; *Placer Examination Principles and Practice*, BLM Technical Bulletin 4, at 91.⁸ Appellants introduced no other evidence specifically identifying the presence of gold on any of the other placer claims. See *United States v. Rosenberger*, 71 IBLA 195, appeal filed, *Rosenberger v. United States*, Civ. No. 83-842 PHX-CLH (D. Ariz. May 6, 1983). Therefore, we conclude that appellants did not overcome the Government's prima facie case with respect to the Mt. Parker Mining Nos. 1, 2, 3, 4, and 5 claims.

Challenger Nos. 1 and 2 Lode Mining Claims

The Challenger Nos. 1 and 2 lode mining claims are situated on the southwestern flank of Mt. Parker, adjacent to the Lamplugh Glacier.

⁸ The transcript of testimony taken Sept. 15, 1982, is referred to as 2 Tr. This testimony was taken in order to compensate for the lost portion of the original transcript. Each transcript is separately paginated.

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The Government's case was presented by the testimony of Fred Spicker, a geologist, which is summarized in Judge Clarke's decision at pages 13-15:

Mr. Spicker, along with fellow Park Service employee, Don Chase, examined the Challenger claims on August 16, 1979. Mr. Spicker had consulted literature on the geology of the area prior to his visit to the claims and had been pointed out from the air the general vicinity of the claims by Mr. Glen Reed, a mining engineer with the Park Service. Mr. Reed had been shown the claims by claimant Jeanne Trump on a prior aerial examination of the claims (Tr. 10-12). Mr. Spicker had also been shown the claims from the air by Mr. Steve Zentner of the Park Service on August 15, 1979 and he carried an aerial photo of the claims with him during the examination (Tr. 11, 25).

Mr. Spicker, with the aid of Mr. Chase, took five samples from the vein structure occurring on the claims [(Tr. 25)].^[9] The results of an assay of these samples, as well as Mr. Spicker's conclusions regarding the validity of the claims, are found in government's Exhibit 3, titled "Mining Report on the Challenger No. 1 and No. 2 Unpatented Lode Mining Claims in Glacier Bay National Monument, Alaska."

Mr. Spicker testified about the method of extraction and origins of the five samples [(Tr. 28-33)]. He stated that, as no discovery points had been pointed out to him, and none observed during the examination, he sampled in areas where he felt the strongest mineralization occurred (Tr. 26). The samples taken, labeled C-3 through C-7, were three to six pound chip samples taken in or near vein material on the claims. Although no boundary markers were seen delineating the Challenger No. 1 from the No. 2, Mr. Spicker is fairly certain that samples C-3 through C-6 were taken from claim No. 1 and sample C-7 came from claim No. 2 (Tr. 26).^[10] The locations and characteristics of the rock from which the samples came can be seen in figures 4-10 in the mineral report.

* * * * *

The gold values shown in the assay report vary from 0.010 ounces of gold per ton for sample C-4 to 4.420 ounces of gold per ton for sample C-6. Sample C-5 shows 0.060 ounces of gold per ton, C-3 shows 0.160 ounces of gold per ton and C-7 gave a value of 0.220 ounces of gold per ton.^[11]

Mr. Spicker found no workings on the claims, nor discovery points. The only evidence he saw of prior workings on the claims was a rock which had faded orange paint on it. Mr. Spicker thought this may have indicated where a sample was taken by a previous claimant (Tr. 20).

⁹ Spicker described the vein system as follows:

"It is an interlacing quartz vein system, strikes from about North 65 East to due East. And there is very steep dipping, virtually vertical as a system. The thing is kind of hard to describe. It would be as if you looked at a plane of the vein, it appears as if you were looking at a piece of lace. The thing pinches and swells very rapidly and has numerous branches, which at times split apart with non-quartz vein material between them and in other places coalesced to form a single thicker vein. For the most part the individual branches on the westerly portion of the vein system tend to be about one foot thick to two feet thick, and in places coalesced to the thickest portion I observed was 5.3 feet thick. Then toward the easterly or uphill direction on the claims it starts to peter out pretty fast. For the most part in the uphill section it is a vein system that has little splits, and still pinches. For the most part it is in the area of only about one foot thick, pinches down to about two or three inches very frequently."

(Tr. 19-20). The vein system is "intermittently exposed for about 450 feet of strike length in about 260 vertical feet" (Exh. 3 at 4).

¹⁰ Spicker admitted that he could not determine the exact boundaries of the Challenger Nos. 1 and 2 claims, but located the claims generally on the ground using the vein system as the center line of the lode claims and judging the relative distances involved in order to set the end lines of the claims (Tr. 26, 55, 84). The claims were plotted on a map of the Reid Inlet area (Tr. 93; Exh. 6). That location generally corresponds with the location of the claims on appellants' map (Exh. E).

¹¹ Sample C-3 was a continuous chip sample taken from the widest portion of the vein system, *i.e.* 5.3 feet thick (Tr. 28). The vein at this point is from 4 to 5.3 feet thick and "persists for only 15 feet along dip and for an unknown strike length" (Exh. 3 at 2). Sample C-6, showing the highest gold value, was a continuous chip sample taken from a "small lens or pod that occurs along the vein that is exposed for three to four feet along the outcrop," which vein then splits into two separate veins, one of which is 1 foot thick and the other 4 inches thick (Tr. 31).

In his opinion, Mr. Spicker felt that the Challenger claims do not contain within their boundary minerals of such quantity and quality to justify a prudent person's further expenditure with a reasonable prospect of developing a profitable mine (Tr. 38). This opinion is based partly upon the fact that, although there are isolated pods and veins high in gold content on the claims as shown by sample C-6, these sources are highly unpredictable in nature, and not indicative of the claim as a whole. This fact, coupled with the rugged topography and inaccessibility of the area, led to Mr. Spicker's conclusion that the minerals present do not warrant the further development of the Challenger claims (Tr. 36, 58, 72).

According to Mr. Spicker the erratic nature of these zones of rock high in gold content is supported by previous studies of the geology and mining potential of the area (Tr. 10-11, 64).^[12]

Spicker further testified that the lowest gold value at which a mine could be successful was 0.01 ounce per ton, but that this value related to certain large open pit gold mines in Nevada where the mode of occurrence of the gold was "entirely different" (Tr. 79). With respect to the two locations of high grade gold-bearing vein material identified by Spicker and the 1978 Brew report, Spicker concluded that there was at most two tons of visible material and stated that it was "not worthwhile going in with all that man power and equipment to extract only a very, very small tonnage" (Tr. 72).

In his September 1983 decision, Judge Clarke concluded that the Government had established a prima facie case of invalidity. We agree. Appellants' principal objection on appeal is that a prima facie case cannot be established where the Government mineral examiner has made no estimation of the cost of extracting and removing the gold from the claims. We note that Spicker admitted that he made no estimate of that cost (Tr. 68, 85). Nevertheless, we conclude that a prima facie case is established where a Government mineral examiner testifies, based on his observations and expertise, that gold is not present on a mining claim in such quality and quantity to warrant the expenditure of time and means in the development of a mine. That is the situation herein.

We turn, therefore, to the question of whether appellants have overcome the Government's prima facie case of invalidity. The evidence presented by appellants is summarized in Judge Clarke's decision at pages 15-16 and consists largely of the reports of assay results:

Mrs. Trump identified Exhibit JJJ as an assay certificate and report which she received from Dr. Vernon Scheid. Dr. Scheid was a business partner of Walter Duff, who was previous holder of the land now staked as the Challenger (Tr. 400).^[13] The certificate shows results from an assay performed on six samples, labeled AL-12 through AL-17. Attached to the certificate are pages which describe the origins of the samples assayed.

¹² In particular, Spicker referred to the report entitled "Mineral Resources of Glacier Bay National Monument, Alaska," dated 1971, by E. M. Mackevett, Jr., and others, which took six samples with respect to the Rambler prospect (now the Challenger Nos. 1 and 2 claims) with a high gold value of 0.263 ounce per ton and averaging 0.11 ounce per ton of gold (Exh. 3 at 5). The report stated that "[a]ll our samples from the veins yielded low gold values." *Id.* In addition, Spicker referred to the 1978 Brew report which took seven samples with gold values between nil and 0.16 ounce per ton. *Id.* However, the Brew report also states that two other samples from a 1-foot wide vein with a vertical exposure of 30 feet, assayed at 1.785 ounces per ton and 6.45 ounces per ton of gold. *Id.* at 6.

¹³ The reference to "Challenger" appears to include both the Challenger Nos. 1 and 2 claims. *See* Tr. 401.

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Mrs. Trump feels certain the samples reported in Exhibit JJJ came from the area now staked as the Challenger, and are thus germane to these proceedings. She bases this statement on the fact that she staked the Challenger claim using a location notice written by Duff for the Rambler claim, coupled with her intent at the time to restake the Rambler as the Challenger (Tr. 401). A copy of said [Rambler] location notice was introduced as contestees' Exhibit LLL. The values reported in this assay certificate for the six samples are .04, .20, 3.80, .04, .20 and .09 ounces of gold per ton.

Mrs. Trump next testified about Exhibit KKK, also an assay report. This report was prepared for Walter Duff, and contains the results of assays performed on three samples taken from the Rambler claims. This too, was obtained from Dr. Scheid (Tr. 403). The values contained in this report are 0.20, 0.01 and 2.42 ounces of gold per ton.

Exhibits MMM and NNN were shown to Mrs. Trump. She described Exhibit MMM as another assay report done for Walter Duff for a sample obtained from the Rambler claims (Tr. 403). The values given in the report are 0.78 ounces of gold per ton and .7 ounces of silver per ton. The results were obtained through chemical analysis. Exhibit NNN was described by Mrs. Trump as being a letter to her from Lawrence Duff, who had staked the Rambler in 1963. The letter, after describing the Rambler/Challenger vein, states that the Duffs consolidated 160 pounds of samples from the vein and had them assayed. The assay results figured out to 1.657 ounces of gold per ton, and this figure was written in on Exhibit NNN by Mrs. Trump (Tr. 404).^[14]

Exhibit OOO was next shown to Mrs. Trump. She identified it as the Newmont Report of [1937], a report written by Mr. Benedict of the Newmont Mining Company, a company which had leased the Rambler properties from Duff for a time. The report contains a paragraph describing, among other claims, the upper and lower Rambler claims, which are now the Challenger Nos. 2 and 1, respectively (Tr. 405). The report states that on the upper Rambler, five samples were taken, with assay results of 1.10 ounces of gold per ton and 0.6 ounces of silver per ton obtained, and on the lower Rambler, six samples were taken, with assay results of 0.79 ounces of gold per ton and 0.6 ounces of silver per ton obtained.^[15]

Appellants also submitted exhibit DDD, dated May 16, 1975, which reported the assay results of five samples (74R-1 through 74R-5) taken from the Challenger claims (Tr. 390). These results were 0.079, 0.009, 0.140, 3.85 and 0.026 ounces per ton of gold. Exhibit DDD also generally described where the samples were taken.

In his September 1983 decision, Judge Clarke concluded that appellants had not overcome the Government's *prima facie* case. We agree. With the exception of Exhibit OOO, none of the assay results have been identified as coming from either the Challenger No. 1 or the Challenger No. 2 claim. Moreover, with the exception of Exhibit JJJ, none of the reports of assay results includes a description of the manner in which the samples were taken. In any case, appellants' evidence essentially reinforces the Government mineral examiner's conclusion that the area of the claims is characterized by generally low gold values, with certain "erratic highs." Isolated showings of high gold values are not sufficient to establish a discovery where there is no evidence that such showings are part of a continuous mineralization

¹⁴ The letter also described a sample from a small vein which purportedly assayed at 5.11 ounces per ton of gold (Exh. NNN).

¹⁵ The report stated that the five samples from the Upper Rambler claim were taken from a "short ore shoot about 80 feet in length, average width 2.7 feet, averaging 1.10 oz. gold and 0.6 oz. silver" (Exh. OOO). The six samples from the Lower Rambler claim were taken from an ore shoot having a "maximum possible length" of "about 90 feet," an average width of 4.1 feet, and averaging 0.79 ounce gold and 0.6 ounce silver. *Id.*

along the course of a vein or lode such that the quantity of ore can reasonably be determined by standard geologic means. *United States v. Wells*, 69 IBLA 363 (1983); *United States v. Melluzzo*, 38 IBLA 214, 85 I.D. 441 (1978), *aff'd*, *Melluzzo v. Watt*, Civ. No. 81-607 (D. Ariz. Mar. 31), *aff'd*, Civ. No. 83-2056 (9th Cir. Oct. 3, 1983). Finally, even though further exploration may be warranted, appellants have presented no evidence that gold is present in sufficient quantity to justify a prudent man spending his time and means in the development of a mine, especially in light of the anticipated high cost of extraction. It would have been sufficient for appellants to have made some showing as to the minimum acceptable quality and quantity of gold-bearing vein material, considering the obvious cost of development and extraction, in order to have overcome the Government's admittedly weak prima facie case. However, appellants made no such showing.

Leroy No. 2 Lode Mining Claim

[4] The Leroy No. 2 lode mining claim is situated on the northwestern flank of Mt. Parker, about three-quarters of a mile south of Glacier Bay. The claim is southwest and uphill from the Leroy No. 1 lode mining claim and shares a common endline. The Leroy No. 1 claim was not contested because it was the opinion of the mineral examiner that "the tonnage and grade of the material available to extraction therefrom satisfy the 'prudent man rule' for a valid discovery." See Exh. 5 at 1. The Leroy lode mining claim was originally located in 1938.¹⁶ The Leroy claim was amended as the Leroy No. 1, and the Leroy No. 2 claim was located in 1944. As stated by Judge Clarke, in his September 1983 decision at page 18: "The main issue involved in determining the validity of the discovery on the Leroy No. 2 claim is the proper placement of the boundary between the Leroy No. 1 and Leroy No. 2 claims. Contestees' placement differs from the government's placement by about 1,000 feet." The testimony of Steve Zentner with respect to the Government's location of the Leroy No. 2 claim is summarized by Judge Clarke in his decision at pages 18-19:

Because no discovery points on the Leroy No. 2 were identified by the claimants, Mr. Zentner utilized location notices filed for the original Leroy, the Leroy No. 2 and the Leroy No. 1 amended [Exh. D at 1, 2, 4] to plan his inspection (Tr. 126). It is Mr. Zentner's contention that upon a reading of all of these location notices, the following discovery/boundary locations become apparent, the northern endline of the Leroy No. 1 is 500 feet to the north of the discovery point, which is assumed to be near the existing adits on the claim (Tr. 196) [17], the southern endline, which would also be the northern boundary of Leroy No. 2 is 1,000 feet to the south of the adits. From this point it is 1,450 feet south to the discovery point on the Leroy No. 2 and from this point, a final 50 feet to the southern boundary of the Leroy No. 2. After plotting the foregoing

¹⁶The location notice for the Leroy claim was described as extending 1,500 linear feet, which clearly did not encompass both the Leroy Nos. 1 and 2 claims. See Exh. D at 2.

¹⁷The location notice for the Leroy No. 1 claim states that the claim "extends 500 feet Northerly and 1000 feet Southerly from the discovery monument on which this notice is posted, along the course of said center line of said claim" (Exh. D at 1 (italics added)).

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data on a map [(Exh. 6)], Mr. Zentner concluded that the discovery point on the Leroy No. 2 had to be near the summit of Mt. Parker (Tr. 127-128).

Zentner also testified that he did not attempt to find any monuments or corner posts which might delineate the endline between the Leroy Nos. 1 and 2 claims or ask the claimants to show him the monuments (Tr. 180). His determination of the location of the Leroy No. 2 claim was made on the assumption that the workings represented the discovery point for the Leroy No. 1 and projecting the boundaries from that point using the discovery notices (Tr. 128). He found no workings on the Leroy No. 2 claim during a helicopter reconnaissance of that claim as it would be located, according to his projection (Tr. 131).

Having thus determined the location of the Leroy No. 2 claim, Zentner examined what he believed to be the southern end of this claim, finding neither workings nor visible veins (Tr. 125, 131). Zentner took no samples because he could find no quartz veins or any structure where he believed there might be significant mineralization (Tr. 132, 185). Zentner concluded that no discovery was present within the Leroy No. 2 claim because of the absence of vein systems within the claim and because the valuable vein which exists within the Leroy No. 1 claim and continues toward the Leroy No. 2 claim is faulted before it reaches that claim (Tr. 136, 178-79, 185-86).

Appellants, however, dispute the Government's placement of the Leroy No. 1 and No. 2 claims. Jeanne E. Trump testified regarding her understanding of the location of the discovery point within the Leroy No. 1 claim. Trump placed that point to the north of the point identified by the Government mineral examiner, *i.e.*, between the existing adits and the millsite (Tr. 411, 417). However, Trump admitted limited familiarity with the claim (Tr. 410). More persuasive testimony was given by Phil Holdsworth. This testimony was summarized in Judge Clarke's decision at pages 20-21:

Mr. Holdsworth testified that he visited the Leroy properties in 1954 in his duties as Commissioner of Mines for the Territory of Alaska and took samples from the claim. The results of assays of these samples and their origins appear on contestees' Exhibit G, a detailed map of the Leroy mine created in 1950 by the Territorial Department of Mines. This map has been incorporated into figure C-47 of government's Exhibit 14, a joint U.S.G.S. - U.S. Bureau of Mines Open-file Report 78-494, published in 1978. Mr. Holdsworth testified that the samples so taken [were] from the sill of the mine (Tr. 234). Assay results from Holdsworth's samples also appear in contestees' Exhibit H, an assay report performed in 1954 by the Territory of Alaska Department of Mines Assay Office.

The witness testified that on August 27, 1980, he returned to the Leroy properties to re-examine them (Tr. 239). Upon this re-examination, a large, angular rock with red paint on it was pointed out to him by the contestees as being the western boundary marker for the common endline between the Leroy No. 1 and Leroy No. 2 mines (Tr. 240). Mr. Holdsworth testified that, following the identification of the rock, he surveyed the endline by running a bearing at south 60 degrees east from the rock. This bearing was chosen as the proper direction of the boundary because it is 90 degrees from the established bearing of the centerline of the Leroy claim (Tr. 255). Holdsworth next stated that he drew a line with this bearing on Exhibit G for the contestees, which

resulted in the boundary between the Leroy No. 1 and Leroy No. 2 occurring near the center of the adits existing on the Leroy mine. He then described which of the samples taken in 1954 and reported on Exhibit G fall on Leroy No. 2 based upon his placement of the boundary. These samples are labeled 54-33, 54-34, 54-35, 54-29, 54-28, 54-30, 54-31 and 54-32 and have corresponding values, in ounces of gold per ton, of 1.56, 0.42, 0.73, 2.63, 0.38, 0.25, 0.10, and 0.46, respectively (Tr. 243). [(Exh. H).]

Mr. Holdsworth then marked on Exhibit G the approximate location of the large boundary rock, and on government's Exhibit 6, the location of the Leroy claims using the rock as datum (Tr. 249).

The witness further testified that, in any event, a reading of all the location notices pertaining to the Leroy claims, leads to the conclusion that the true boundary location is very near that obtained using the rock as the initial reference point (Tr. 245).

* * * * *

Upon his cross-examination, Mr. Holdsworth stated that he did not observe, nor was he shown, the large rock during his visit to the claims in 1954 and that he never observed, nor was shown, the discovery point for either of the Leroy Claims (Tr. 252, 254). He did, however, observe a post during his 1954 visit which claimant Albert Parker told him was a boundary marker delineating the Leroy No. 1 from the Leroy No. 2. This post had been knocked out of place by an avalanche, and he helped Mr. Parker replace it. The post was placed on the eastern edge of the claim, 300 feet from its center. Although he did not observe the rock at this time, Mr. Holdsworth stated that the post was replaced in an area opposite the rock (Tr. 296).

In his September 1983 decision, Judge Clarke concluded that the Government mineral examiner properly determined the location of the Leroy No. 2 claim based on the description in the location notice for the Leroy No. 1 claim by reference to a discovery monument, which the examiner assumed was in the area of the existing adits.

Judge Clarke held that the latter assumption was reasonable because the adits had "produced large amounts of valuable ore over a 40-year period" (Decision at 27). Judge Clarke stated that a Government mineral examiner is entitled to make a reasonable determination of the location of a discovery point in the absence of any identification by the claimant, citing *United States v. Smith, supra*, and *United States v. Ubehebe Lead Mines Co.*, 49 IBLA 1 (1980). However, those cases relate to the risk which a claimant assumes, by failing to identify points of discovery, that a mineral examiner will be unable to verify a discovery, and do not relate to the location of discovery points for purposes of determining the situs of a claim.

Federal and state laws require that the boundaries of a lode claim be marked on the ground to show the extent of the appropriation and to give notice of the ground claimed. See 30 U.S.C. § 28 (1982); Alaska Stat. 27.10.030(2). Once a location is marked on the ground so that its boundaries may readily be traced, the claimant has complied with the law, and unless state law requires that he do so, he need not maintain or restore the monuments if they are removed or obliterated without his fault. See 1 American Law of Mining § 5.68 (1983), and cases cited.

Where the monuments are found on the ground, or their position or location can be determined with reasonable certainty, the monuments control over the description in the location notice. *Dye v. Duncan, Dieckman & Duncan Mining Co.*, 164 F. Supp. 747 (W.D. Ark. 1958); *Book v. Justice Mining Co.*, 58 F. 106 (D. Nev. 1893); *Grey v.*

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Coykendall, 6 P.2d 442 (1931); *Price v. McIntosh*, 1 Alaska 286 (1901). If no monuments are present, their position can be established by testimony of a witness who saw them standing after being placed. *Daggett v. Yreka Mining & Milling Co.*, 86 P. 968 (1906).

In the present case, we are partially persuaded by the fact that the Government's evidence rests solely on the assumption that the existing adits (commenced prior to the amendment of the location notices) constitute the discovery point described in the location notice for the amended Leroy No. 1 claim. It would thus appear that the existing adits which were collared prior to the amendment of the Leroy claim were at or near the discovery point for that claim. See Exh. I. When examining only the location notices, this monument would seem to be the same as that described in the amended Leroy No. 1 claim. See Exh. D at 1. However, the Government's placement of the Leroy No. 1 claim shifts that claim southerly of the original Leroy claim. In any case, the Government's case with respect to the location of the Leroy Nos. 1 and 2 claims is largely based on speculation.¹⁸ See Tr. 181-83, 197. Having failed to ask the claim owners to identify the claim corners on the ground, the mineral examiner ran the risk that the actual location of the claim was not as it had been projected.

In contrast, appellants offered testimony by Holdsworth regarding observations made by him in 1954 when he was an employee of the Territory of Alaska. Although the identification of the claim boundaries was not the purpose of the 1954 examination, during the course of the examination a post which had marked the easterly corner common to the two claims was found by Holdsworth and Albert Parker, the brother of the locator of the two claims and one of the operators of the property. This post had been displaced by a snowslide, an occurrence common to the area, and was then replaced by Parker in what Parker stated to be the proper location. Holdsworth further testified that he was shown what was represented to be the westerly common corner during a subsequent examination in 1980. Holdsworth then established the location of the two claims based on the physical location of these two corners and the bearing of the claim from the claim description which corresponded with the strike of the apex of the vein (Tr. 239, 295-96; Exh. G). We conclude that appellants' evidence regarding the location of the Leroy Nos. 1 and 2 claims is more persuasive.¹⁹

¹⁸ Judge Clarke stated that the Government's case is supported by the fact that the location notices for the Leroy and Leroy No. 1 claims indicate a one-half mile southern shift in the location of the Leroy No. 1 claim with respect to the location of the original Leroy claim. He concluded that the Government's placement of the Leroy No. 1 claim, unlike appellants', supports such a shift. However, the magnitude of the shift is about 500 feet. We conclude that the disparity between what the location notices appear to state and what the Government's case purports, reflects a gross calculation of distances which can equally support a 500-foot northern shift of the Leroy No. 1 claim.

¹⁹ In addition, while not persuasive standing alone, the description of the assessment work on the Leroy No. 2 claim in 1944 and 1945 describes mining as having been conducted on the Leroy No. 2 claim. This statement supports the location of the claims described by appellants, especially in light of the finding by the mineral examiner that there had been no evidence of any work on the Leroy No. 2 claim as placed by his projection.

While it can be argued that the 1980 statement by the claimants that the rock was a boundary marker may have been made in contemplation of the mining claim contest, the statement is supported by the 1954 observations by Holdsworth and statement by Parker that the post was a corresponding boundary marker. Moreover, the location of the claims as described by appellants places the existing adits near the dividing line between the claims, rather than in the center of the Leroy No. 1 claim, as the Government's evidence indicates. See Exh. K (map of Leroy mine).²⁰ It is likely that in 1944 the claimants located the two Leroy claims as described by appellants so as to take advantage of location of mineral in place in order to support both claims and claim as much of the strike of the vein as possible. It is equally likely that, when locating the two claims, the claimants, who appear to have been knowledgeable prospectors and miners, would have recognized the same change in rock type that was noticed by the mineral examiner. There was no evidence that the locators of the Leroy Nos. 1 and 2 claims attempted to blanket the area with mining claims. On the contrary, it appears that they made a careful attempt to locate the apex of the vein being mined. The location of the claims as described by appellants and their witnesses more closely encompasses the actual location of the apex than does the location as projected by the mineral examiner. Thus, we accept appellants' placement of the Leroy Nos. 1 and 2 claims.

In his September 1983 decision at page 27, Judge Clarke stated that if appellants' placement of the Leroy No. 2 claim is accepted, "sufficient evidence exists to show a valid discovery on the Leroy No. 2, and this contest must be dismissed." We conclude, after reviewing the evidence, that appellants' evidence is sufficient to overcome the Government's prima facie case which was based on the absence of mineralization within the Leroy No. 2 claim as it was positioned on the ground by the mineral examiner. In particular, we rely on the assay results from sampling done in 1954 (Exh. H), which Holdsworth placed within the Leroy No. 2 claim (Tr. 243) and which he states have continuing applicability (Tr. 244).

Tunnel Site Nos. 1 through 4 Tunnel-Site Claims

[5] Tunnel-site claims constitute a means of exploration or discovery, and provide the owner with the right of possession of all veins or lodes within 3,000 feet from the face of the tunnel on the line thereof, not previously known to exist and discovered in such tunnel, the same as if discovered from the surface. 30 U.S.C. § 27 (1982); *Creede and Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation*

²⁰ In his report of the reexamination of the Leroy mine and vicinity, dated Aug. 27, 1980 (Exh. K), Holdsworth states at page 2:

"The Leroy vein system has an average strike of N 30° E-S 30° W and dips steeply to the northwest. The Leroy No. 1 and No. 2 claims were staked along this strike with the outcrop of the Leroy vein as the centerline. It should be noted here that more than half of the ore mined in the past came from the Leroy No. 2 claim, and that the recorded ore reserves remaining below the lower tunnel level appear to be on the Leroy No. 2 claim."

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Co., 196 U.S. 337 (1905); *Enterprise Mining Co. v. Rico-Aspen Consolidated Mine Co.*, 167 U.S. 108 (1897).

The record indicates disagreement as to the location of the tunnel sites. See Exh. D at 12-17; Exh. E. Zentner, the Government mineral examiner, was only able to locate one tunnel, i.e., the west adit of the Leroy mine (Tr. 134, 201). However, the location notices for the tunnel sites indicate that the Tunnel Site Nos. 1 and 2 claims were supported by one tunnel and the Tunnel Site Nos. 3 and 4 claims were supported by another. See Exh. D at 14-17. The west adit which was driven in the Leroy lode mining claim in the 1930's and early 1940's appears to be the face of the former tunnel site. See 2 Tr. 9, 17. With respect to the latter tunnel site, appellants present evidence that the tunnel face is an adit known as the A. F. Parker prospect, located northwest of the west adit and was used to support the location of the Tunnel Site Nos. 3 and 4 claims (Tr. 370-72, 413). See Exh. BBB. Jeanne Trump admitted that no work had been done on the A. F. Parker adit since about 1940 (Tr. 414). The lines of the tunnels were drawn on Exhibit 6, a map of the Reid Inlet area, by Zentner (Tr. 93, 132-34).

In his September 1983 decision, Judge Clarke held that "declaration of nullity would be superfluous and there is no need for any further administrative remedy." The basis for this determination was the finding of this Board in *United States v. Livingston Silver, Inc.*, 43 IBLA 84 (1979). In that case, which also involved a tunnel-site claim, the Board agreed with the Administrative Law Judge that:

If no veins or lodes were discovered in the tunnel prior to the withdrawal or if a discovery was made, but the vein or lode was not appropriated by the location of a lode mining claim prior to the withdrawal, it would appear that the tunnel site location is now meaningless and of no effect. The withdrawal, and any conclusion that the tunnel site is no longer effective, would not, however, affect any rights the contestees might otherwise have to run the tunnel for the purpose of removing ore from patented or valid mining claims.

43 IBLA at 86.

In effect, we held that the tunnel-site claims remained outstanding as valid existing rights, but, as such, they were without effect as to the acquisition of undiscovered veins or lodes along the line of the tunnel for 3,000 feet from its face, except as encompassed in patented or valid unpatented mining claims which were in existence on the date of withdrawal.

In *Enterprise Mining Co. v. Rico-Aspen Consolidated Mine Co.*, supra, the court concluded that a discovery of a vein or lode within a tunnel under a tunnel-site claim relates back to the date of location of that claim. Therefore, once a discovery is made, it would relate back in time to a date prior to the intervening withdrawal. See *R. Gail Tibbetts*, 43 IBLA 210, 86 I.D. 538 (1979) (doctrine of relation back). This conclusion merely accords with the statute which intended to give the tunnel-site claimant priority over subsequent surface locators of the

discovered vein or lode. See *Creede & Cripple Creek Mining & Milling Co.*, *supra*. Moreover, the "right of possession" accorded by the statute is defined as the "right to appropriate" 1,500 feet in length on the course of any discovered vein or lode on either side of the tunnel bore. 1 American Law of Mining § 5.38, at 798.1 (1983). This inchoate right vests upon the subsequent discovery of a vein or lode, and necessarily includes the right to then locate a lode mining claim with respect to the discovered vein or lode. See 1 American Law of Mining § 5.42 at 806 (1983). That lode claim would predate any intervening withdrawal because it would be based on a right of appropriation which related back to the date of location of the tunnel-site claim. Therefore, we conclude that the Board erred in *Livingston Silver* when adopting the conclusion by the Judge that an intervening withdrawal would foreclose whatever rights a tunnel-site claimant has to possess qualifying veins or lodes pursuant to a valid tunnel-site location unless the claimant has also either discovered a vein or lode or made a valid surface location of that lode prior to the withdrawal. To that extent, *United States v. Livingston Silver, Inc.*, *supra*, is overruled.

In his decision Judge Clarke made the following determination:

Accordingly, it is recognized that although the contestees have lost their right to possession of undiscovered veins within 3,000 feet of the face of each tunnel site, the government's complaint alleging that tunnel sites No. 1 through No. 4 do not comply with applicable law, 30 U.S.C. § 27, [is] hereby dismissed.

(Decision at 30). This determination was based on the following finding:

While the body of law on tunnel sites is not extensive, the language quoted at the outset of this discussion which states simply that a tunnel site is not a mining claim is plain and persuasive. When a tunnel site is not properly located, the potential locator has lost only a secured means of exploration, not a mining claim. Because no veins or lodes were discovered in the tunnel prior to the withdrawal of the lands from mineral entry, it would appear that the tunnel site location is now meaningless and of no effect. Hence, in the words of the Board in *United States v. Livingston Silver, Inc.*, *supra*, a declaration of nullity would be without substance and there is no need for any further administrative remedy.

(Decision at 29).

[6] We conclude that it was improper for Judge Clarke to dismiss the complaint in this case on the basis that a declaration of nullity would be without substance and there is no need for any further administrative remedy. To the extent that *United States v. Livingston Silver, Inc.*, *supra*, can be relied upon to support a dismissal of a complaint charging that a tunnel-site claimant has failed to locate the claim in compliance with 30 U.S.C. § 27 (1982), that case is overruled. The statute impliedly gives the owner of the tunnel site an inchoate right in any "blind" veins or lodes which may be found in the course of driving the tunnel.²¹ As noted previously, the claimant would have the right to locate a lode mining claim based on this discovery.

²¹ The Federal tunnel site law is unclear as to whether the tunnel locator is entitled only to blind veins cut by the tunnel, *i.e.*, those which do not outcrop on the surface, or to both blind veins and previously unknown outcropping veins. See 1 American Law of Mining § 5.38 (1983).

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The Department, which is entrusted with the administration of the public land, is authorized to determine the validity of claims which encumber that land. Thus, it is entitled to determine, for its own purposes, the validity of tunnel-site claims with respect to undiscovered veins in the same way it determines the validity of lode and placer claims. See *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Cameron v. United States*, 252 U.S. 450 (1920). It is, therefore, appropriate for the Department to make a finding concerning whether a tunnel-site claim has or has not been properly located, especially in those cases where the land has subsequently been withdrawn from mineral entry.

[7] The key fact in the determination of validity of appellants' tunnel-site claims is appellants' reliance on preexisting adits and related failure to actually *commence* a tunnel upon a location of each of their tunnel-site claims. The commencement of a tunnel is a prerequisite to the location of a tunnel-site claim. 1 American Law of Mining § 5.38 at 800 (1983). In *Calhoun Gold Mining Co. v. Ajax Gold Mining Co.*, 182 U.S. 499, 508 (1901), the Court stated that the statute did not intend that surface locations of any discovered veins or lodes would be displaced "before the commencement of the tunnel." The importance of commencing the tunnel, evident from 30 U.S.C. § 27 (1982), is that it serves to define the starting point of the line of the tunnel, and, thus, any possible veins or lodes, intersecting that line, which the tunnel-site claimant would in the future have a right to appropriate. See 43 CFR 3843.2. In effect, it places surface locators on notice of these facts. Until the tunnel is begun, the claimant has not established conclusively the direction in which the tunnel is to be run. Existing adits simply do not serve that purpose because a claimant can then continue in any of several directions. The record clearly discloses that the purpose of a tunnel site (exposure of previously unknown veins) is not at all consistent with the original intention of the operators when the initial adits were driven in the late 1930's or early 1940's. In the present case, the record indicates that appellants did not *commence a tunnel* on any of their tunnel-site claims at or near the time they located the tunnel-site claims. For this reason, the claims must be considered void. They were not properly located in accordance with 30 U.S.C. § 27 (1982).

It is also evident that appellants have attempted to locate four tunnel-site claims based upon the openings at two preexisting adits. These preexisting adits commence in the Tunnel Site Nos. 1 and 4 claims (Exh. 6; Tr. 413). Thus, the Tunnel Site Nos. 2 and 3 claims are not supported by any underground openings, regardless of when the underground openings were driven.

Access to Claims After Withdrawal

On appeal, appellants generally contend that they were denied access to their claims after September 28, 1976, by NPS and thus, did not have an opportunity to fully develop their case that each of the mining claims is supported by the discovery of a valuable mineral deposit which predates closure of the land to mineral entry. We have held that mining claims are not properly declared null and void for lack of discovery where the mineral claimants are effectively foreclosed from proving that a discovery exists. *United States v. Foresyth*, 15 IBLA 43 (1974). We have further recognized that while, in cases of withdrawal of the land, such withdrawal entitles the Government to restrict the development of a claim, restrictions must be reasonable "in order to permit a claimant a fair opportunity to make [its] case." *United States v. Niece*, 77 IBLA 205, 207-08 n.3 (1983).

In the present case, we conclude that appellants were not precluded from gathering evidence to support their case. Appellants refer first to a letter (Exh. CC) to the Superintendent, Glacier Bay National Monument, NPS, dated May 31, 1977, submitting a proposed exploration plan involving an underground drilling program for the Leroy mine, situated in the Leroy No. 1 claim. See Exh. G. By letter dated August 8, 1977 (Exh. CC), the Superintendent, NPS, notified appellants that: "Public Law 94-429 and related regulations require completion of a validity determination and approval of a plan of operation before any mineral exploration or mining activity can be conducted." See also Tr. 351, 378. Appellants next refer to a letter (Exh. EE), from the Superintendent, NPS, dated July 8, 1977, informing them that annual assessment work was no longer required. Appellants next refer to a letter (Exh. SS) to the Superintendent, NPS, dated July 17, 1980, requesting permission to do assessment work on the Leroy Nos. 1 and 2 claims. That request was denied by letter dated August 1, 1980 (Exh. TT). Finally, appellants refer to various statements in the transcript which they claim support their contention. For instance, Fred Spicker stated that the claimants had been refused permission to do additional exploration or development work (Tr. 74). It is evident that appellants interpreted these denials of permission to do additional work on the Leroy Nos. 1 and 2 claims as denying them any access to any of the claims. See Tr. 324; 2 Tr. 226. We conclude, however, that there is no evidence that appellants were denied access to the claims after September 28, 1976, in order to collect evidence of a *preexisting* discovery; rather, appellants were denied permission to do additional discovery or development work. A discovery must be judged by what has been exposed on a mining claim at the time of a withdrawal, and a claimant is not entitled to go onto a claim thereafter for the purpose of exposing new veins or lodes. See *United States v. Chappell*, 72 IBLA 88 (1983); *United States v. Montapert*, 63 IBLA 35 (1982). We note that, in contrast to appellants' contention, they were granted permission by NPS to open portal No. 1

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within the Leroy No. 1 claim, which was blocked by debris, in order to permit examination of workings developed prior to withdrawal. See Exhs. GG and II. That permission was consistent with the duty of NPS to permit access to a claim in order to verify a preexisting discovery. Moreover, the record indicates that appellants were aware at the time of the first set of hearing dates in October 1980 that they could gain access to the mining claims for purposes of proving a discovery, and that they had until September 1982 to gather that evidence (2 Tr. 27-28).

Appellants also assert that they were denied a continuance in order to present testimony by Dale Henkins, whose testimony regarding the Challenger claims took up much of the lost portion of the transcript, and John Graham, whose purported testimony would also concern the Challenger claims. See 2 Tr. 51. Neither Henkins nor Graham was available on the September 15, 1982, hearing date. An Administrative Law Judge may properly grant a reasonable continuance in a hearing or, alternatively leave the record open in order to permit the introduction of additional testimony. Judge Clarke chose the second course of action. See 2 Tr. 51. In addition, Judge Clarke offered the alternative of submitting an affidavit. See 2 Tr. 92. Accordingly, we conclude that appellants have not been prejudiced by the manner in which Judge Clarke conducted the hearing. Indeed, at any time between the closing of the hearing and the time the record was closed on October 25, 1982, appellants could have submitted additional evidence, including affidavits. Appellants request a rehearing, but have presented no evidence to justify granting such a request. See *United States v. Edeline*, 24 IBLA 34 (1976). In particular, appellants have made no proffer of proof indicating that a rehearing might be productive of a different result. The request is denied.²²

Accordingly, we hereby affirm Judge Clarke's September 1983 decision to the extent that it declares the Joe's Dream Nos. 1 through 6 lode mining claims, the Mt. Parker Mining Nos. 1 through 5 placer mining claims, and the Challenger Nos. 1 and 2 lode mining claims null and void for lack of a discovery. In addition, we reverse Judge Clarke's decision to the extent it dismisses the contest against the Tunnel Site Nos. 1 through 4 claims and find those claims to be null and void ab initio. We reverse Judge Clarke's decision declaring the Leroy No. 2 lode mining claim null and void, and dismiss the contest against the Leroy No. 2 claim.

²² Appellants also contend that the transcript, which contains numerous unintelligible portions, should not form the basis for an adverse decision. Having carefully read the transcript and changes thereto submitted by appellants, we can discern no unintelligible portions which, in context, appear significant to the resolution of this case. These deficiencies, while regrettable, do not entitle appellants to a dismissal.

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 in part and reversed in part.

R. W. MULLEN
Administrative Judge

WE CONCUR:

GAIL M. FRAZIER
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

APPEAL OF MTL SYSTEMS, INC.

IBCA-1648-1-83

Decided *September 19, 1984*

Contract No. 68-02-3288, Environmental Protection Agency.

Denied

Contracts: Construction and Operation: Contracting Officer

An appeal for recovery of overrun costs in a cost reimbursement/sharing contract is denied where the contractor failed to provide sufficient, reliable information on the status of expenditures for the contracting officer reasonably to conclude that there was an overrun and though the contracting officer urged further performance, that urging was not an inducement to overrun, because it invariably applied to performance only up to the point of exhaustion of funds and was consistently accompanied by an admonition to the contractor to be guided by the contract's limitation of costs clause.

APPEARANCES: Eugene S. Cavallucci, Nabors, Potter, McClelland, Griffith & Jones, P.A., Melbourne, Florida, for Appellant; Anthony G. Beyer, Government Counsel, Research Triangle Park, North Carolina, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from the November 2, 1982, decision by the contracting officer (CO) which decision denied appellant MTL System, Inc.'s (MTL) request for additional funding to cover a cost overrun in a cost reimbursement contract which called for no fee to the contractor and for the contractor to share in the cost.

Background

Respondent Environmental Protection Agency (EPA) awarded the contract out of which the current dispute grew to MTL on September 28, 1979. The contract's overall scope called for MTL to set up and operate three field sites for the purpose of monitoring levels of

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air quality in the Ohio River basin area with the view toward establishing baseline data and ultimately toward measuring the impact on air quality of increased use of coal in energy generation in that area. The term of the contract was to be 3 years with an option in the Government to renew the contract for up to two successive 1-year periods (Appeal File (AF), Tab 1(c)). The contract called for MTL to acquire or EPA to furnish certain property for use during performance and for forwarding or return of that Government property (GP) at the completion of performance. There were due a variety of reports on progress as part of performance at various times during the term (Schedule, Article III, and Attachment B). It also included a limitation of funds clause (Schedule, Article VIII) and a standard limitation of costs clause (LOCC) (General Provision No. 2; AF, Tab 1(c)).

MTL had competed aggressively for the contract in the expectation of creating a favorable climate for the award of future contracts, bidding in an amount significantly below the other qualified bidders, and agreeing to share in the costs to the extent of \$55,394 of the total \$728,267 expected cost of performance (Appeal File Supplement (AFS) 10; AF, Tab 1).

After the setup period, MTL was able to begin data gathering operations at all three field sites by May 15, 1980 (AF, Tab 5(e)). By August 1981, more than a year before the projected completion date, the cost history of the program presented a doubtful outlook for completion of the tasks within the limitations. EPA was unable to provide additional funds and the project was allowed to lapse. Ultimately, MTL incurred costs of \$27,584 in excess of the limitation, as determined by a Defense Contract Audit Agency audit report dated May 27, 1982 (AF, Tab 10, Attachment 2). MTL claimed that the excess costs were caused by and were the responsibility of the CO and EPA and requested reimbursement therefor. It was the CO's denial of that request from which this appeal was taken. Relevant details of the history summarized above appear in the next opinion section.

Findings of Fact

The parties submitted the case on the record. Our findings are therefore based on impressions given in file documents, particularly letters between the parties during 1981.

In mid-January 1981, EPA's Project Officer, relying on independently developed information, wrote MTL noting what appeared to be a prospective overrun over the full performance period and asking for an estimate of costs savings that could be accomplished through a partial termination of contract tasks (AF, Tab 5(d)). In a letter dated February 16, 1981, MTL replied to that letter with the requested estimate but also asserted that it was "on target" in terms of funding through the entire projected performance period (AF, Tab 5(e)). It was not until MTL sent the CO a letter dated May 7, 1981,

that the former admitted that there may have been a cost problem. ("We have reviewed our cost incurrence on this program to date and a cursory analysis against monthly spending rate indicates the program is in an overrun condition.") Although the letter attributed as factors contributing to the overrun "the invoicing of actual and audited 1980 burden rate adjustments and unplanned direct charges over the life of the program to date," it developed that a major reason for the ultimate overrun was the prolonged illness of MTL's Program Manager Tom Royal, described as "Key Personnel" in Article XIV of the contract (AF, Tab 1(c)). The letter mentioned Mr. Royal's sickness and identified it as beginning on March 9, 1981; the illness lasted 4-1/2 months. The illness had the effect of lessening direct charges and greatly increasing overhead rates for 1981, by taking Mr. Royal's salary out of the category of direct labor and putting it into sick pay which is a burden item. The letter also promised to "provide a more detailed analysis and estimate of costs to complete the study" (AF, Tab 5(i)).

Having not received the promised estimate, the CO wrote MTL on July 20, 1981, noting that failure and requesting a detailed summary of anticipated expenses by some 3 weeks from date. The CO noted that based on certain assumptions and information available to him, the contract funds would run out by the following November and the requested summary was necessary for EPA to "determine whether sufficient funds can be found to fund the overrun." He went on to advise that "[i]n the event no funds are available to fund the overrun, the amount necessary to accomplish an orderly stations shutdown including completion of data analysis and reporting must be held in reserve," while also requesting a separate estimate of costs on items consistent with a premature shutdown plus the date unaugmented funding would run out (AF, Tab 5(j)).

The next MTL communication was a letter dated August 19, 1981, informing EPA that MTL had been sold to a Florida-based company engaged in Government contracting (AF, Tab 5(k)). This was followed the next day by a letter advising EPA of an impending stop work order. MTL asserted that if it stopped collecting data on August 28, performed no further processing of data, and neither returned GP to EPA nor restored its field lease sites, it would encounter an overrun of \$2,100. It arrived at that figure by using an actual costs figure of \$612,226 through July 31 and then adding to that all of its obligation figures, including a number which are listed in the letter, and then promised by August 25, 1981, a summary of estimated costs to complete assuming there would be more funds available (AF, Tab 5(l)).

The next communication was a letter dated August 27, 1981, and telefaxed so that EPA received it at 4:35 p.m. on that date. This letter enclosed a number of schedules which disclosed the following estimates: Excess cost to complete through September 30, 1982, including a phase down period through December 31, 1982: \$439,000 + (not including field site restoration costs of over \$38,000,

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assuming a 1982 close-out); operating costs for August 1981: \$38,443; excess costs assuming an August 28, 1981, stop work, and assuming a phase down period through November 30, 1981, just under \$30,000 (not including field site restoration costs of over \$35,000, assuming a 1981 close-out) (AF, Tab 5(m)). Following within hours was a "STOP WORK NOTICE" dated August 28, 1981. It recited the CO's telephoned advice on August 27 that no more funds were available and outlined MTL's plans to ship GP to its home facility in Dayton and to forward to EPA accumulated data in its current condition (AF, Tab 5(n)).

The CO sent a letter to MTL dated August 28, 1981. It recounted the history of contract performance essentially as reflected in the foregoing recitation, with two important differences, documented in the record. First, it noted the number of EPA expressions of concern that MTL was not supporting the performance effort with the corporate resources expected and, second, it brought up the disparity between the expenditure amounts through July 31, 1981, as expressed in MTL's August 10 voucher No. 24 (\$588,097) and in MTL's other correspondence in August (\$612,226). The letter went on to advise that EPA could not provide additional funding and that MTL should thus care for its interests and obligations by looking to the LOCC. It also indicated EPA's view that stopping work on August 28 with over \$116,000 (or over \$140,000, depending on which figure was correct) of funds available as of July 31, was a "possible anticipatory breach of contract." The support for this view came from the CO's analysis of the cost items contained in MTL's August 20 letter, mentioned above. Of those items, the CO indicated that one was clearly allowable, while the others were at least questionable for, in the CO's view, reasons of allocability, reasonableness, etc. The CO then reminded MTL that its obligation was to use the remaining funds to gather data for as long as possible, to analyze and forward the data and return the GP. The letter concludes with this paragraph: "Before stoping [sic] work on this contract, I urge you to be sure you have not improperly overestimated the required reserve. You should consider both your rights and your obligations with care; we will do the same" (AF, Tab 5(o)).

The last was written before the CO had received MTL's stop work notice of the same date. After receiving that notice late on Friday, August 28, and conducting some phone conversations with MTL on Monday, August 31, the CO sent a letter on August 31 responding to the stop work notice. In that letter, the CO expressed his agreement with the MTL position, apparently developed during the phone conversations, that GP should be returned directly from the field sites to EPA in North Carolina, rather than shipping it first to Dayton. Noting that he should defer comment on the other proposed actions described in the stop work notice, the CO, nevertheless, expressed his understanding that MTL would take the actions it deemed "appropriate to wind up the contract in an orderly manner and to

avoid unnecessary losses." The CO finished this letter by suggesting his preferred priority for wrap-up tasks. He proposed that return of GP, settlement of existing contract obligations, and analysis of data should be the first three tasks undertaken--followed by allowable costs for MTL's "dissolution" (including severance pay, possibly). He allowed that abbreviating some tasks, *i.e.*, doing less than all required data analysis, would be permissible so as to have enough funds to pay all allowable expenses but warned that discontinuing work to create an excessive reserve for wrap-up would be improper and, finally, suggested that if MTL had already reached the point where there were insufficient funds to accomplish a full orderly wrap-up then "the impact costs on [MTL] should be the last to be paid" because of MTL's "failure to provide appropriate notice under the" LOCC (AF, Tab 5(p)).

With one rather inconsequential exception, there was no documentary communication between the parties until October. (That exception was a September 9, 1981, letter from the CO to MTL, meant as a backup to the August 31 letter. In the September letter, the CO reiterated that the highest priorities were return of the GP and data analysis. Regarding the latter, the CO estimated 3 days would be sufficient time to accomplish it, and he requested that MTL let him know if it had problems with those priorities (AFS 1).) On October 1, MTL wrote to the CO enclosing its summary of costs incident to wrapping up the contract. The total, which assumed "worst case proportions," translated into something over \$807,000 total, or an overrun of approximately \$80,000. The letter also summarized the actions MTL had taken or was taking in pursuit of closing out the contract, and its description of those activities indicates that MTL had gone a considerable distance toward accomplishing that end result. Two other features of the letter are notable. First, the letter mentions for the first time MTL's position that the contract required neither return of the field site buildings nor physical restoration of the site (despite the fact that the cost estimates concurrently provided included figures for accomplishing those items). Second, appearing in the same letter with the recitation of an apparently advanced state of contract wrap-up and the estimate of an \$80,000 overrun are these statements:

Our cost growth posture on this program dictates a decision on our part when the total contract amount of \$728,267 is exceeded. Unless you can clearly indicate the availability [sic] of additional funding to provide coverage for all the phase down/close out activities, MTL Systems has no alternative but to stop all work when the contract value is exceeded.

(AF, Tab 3).

It appears that sometime after the CO received that October 1 letter, the parties engaged in some phone conversations about the existence of a contract obligation on MTL's part to return the Government-furnished buildings used by MTL at the field sites, conversations presumably prompted by the MTL indication in that letter that there was no such obligation. Those conversations culminated in a letter apparently prepared sometime late in the business hours of

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October 13, 1981, but ultimately dated October 14. During the evening of October 13, MTL verbally communicated to the CO certain information which obviated the need for transmitting part of the October 14 letter and which also prompted the CO to write another letter, dated October 15, 1981, to which he attached the October 14 letter.

The earlier letter, amongst other things, responded to the MTL October 1 letter. The CO noted that because the estimate figures of that letter were in "rough, bottom-line" terms, they were of limited use to him, but some of them seemed excessive on their face and others, while appearing reasonable, may encounter problems of duplication and allocability. The letter fleshed out some of the CO's thinking on these items by providing relevant details. In particular, the CO questioned a \$10,000 item mentioned in the October 1 letter as representing "settlement charges," complaining that the letter provided nothing to identify them. He wrote, "[s]ince this contract will lapse under the LOC clause, rather than undergo a termination, and in view of the other charges described, the justification for such settlement charges is unclear." The letter also spoke of the return of the buildings in terms that became irrelevant by the time the letter was ready to be sent, as mentioned above. Finally, the letter redelivered the CO's position on wrap-up in this fashion:

Since we cannot fund the overrun, it is your obligation to wrap the *contract* up within the estimated cost, including the [MTL] cost-sharing amount. I feel that the orderly conclusion of the contract is your first obligation. Dissolution of portions of the company may or may not be allowable as charged to the contract, but they clearly should not take priority over wrap-up of the contract. [*Italics in original.*]

and

[It remains your responsibility to manage the funds and carry out the work. I cannot tell you when to stop or how to do the job. I can only give you our priorities and advise you that your decisions will have to meet the standards of the contract and the FPR (reasonable, allowable, allocable, etc.)

The October 15 letter to which the foregoing was attached directed itself almost entirely to the buildings return and site restoration issue. After reviewing the events causing the attachment, the letter detailed the CO's reasons for asserting that these tasks were MTL's contractual obligation. Then acknowledging MTL's verbal expression on October 13 that it intended not to perform either of those tasks, the CO related that he considered that the MTL position constituted an anticipatory breach for which he planned to issue a termination for default "relating to the duty to return the [buildings] and restore the sites." He went on to ask for written confirmation of MTL's verbal decision and a reply to this letter which the CO characterized as a "cure notice." The CO then employed this language:

While we have obviously had our differences over the past months, I appreciate that you are now working to resolve these problems. Please understand that this letter, and the

Termination for Default, if it becomes necessary, are not intended to be punitive. My goal is to have our differences framed as clearly and quickly as possible, and to see to the protection of our property. While I prefer to see these things done by you under the Contract, and I believe that it can and should be done this way, I am prepared to intervene via termination, if necessary.

(AF, Tab 5(q)).

MTL's response was prompt. In a letter dated October 15, 1981, MTL confirmed its decision regarding responsibility for the buildings and the sites and outlined its reasons therefor (AF, Tab 5(r)).

By letter dated October 28, 1981, the CO cancelled the threat of default termination, because although he believed that it would ultimately be found that the contract's estimated cost would be adequate for wrap-up, "there is not enough factual material [then] available * * * to prove that [MTL's] refusal to perform constitutes default." The CO also reported that EPA was attempting to find a nonprofit donee to accept the buildings and assume the responsibility for their removal and restoration of the sites. Before that report, however, the CO announced, once again, his views on costs and MTL's part in wrap-up. He wrote:

I have decided not to issue a termination * * * however, we will not be able to add funds to the contract. Therefore, consistent with my earlier letter to you, you are hereby reminded that the contract will lapse pursuant to the Limitation of Cost Clause. You should take all possible steps to deliver all data collected and return all GFP to us, subject, however, to your right to cease to incur costs when the actual expenses reach the total amount of \$728,267. Beyond that amount, there shall be no obligation for you to perform or otherwise incur costs, nor for us to pay.

When you reach a point where all performance has stopped, please provide us with a list of any wrap-up tasks which are left incomplete (such as removal of the [buildings])

(AF, Tab 5(s)).

Ultimately, EPA was able to place the buildings with the Tennessee Valley Authority, apparently without cost charged to MTL for shipping or site restoration (AFS 21, answer to interrogatory No. 6).

By later letters, one dated December 3, 1981, and covering the final increment of processed data (AFS 3), and the other dated February 22, 1982, and summarizing its contract close-out activities (AFS 8), MTL made no mention that its expenditures exceeded the \$728,267 limit.

Decision

MTL advances two theories supporting its recovery. We see that there is a third, somewhat related to the first of those, which also bears discussion.

The first MTL argument is that the CO repeatedly demanded contract performance after learning of the overrun status and thereby induced MTL into expending funds beyond the contract amount. Acknowledging that the CO's "directives" urged compliance with the LOCC, MTL characterizes those efforts as paying "lip service" to the notions expressed in that clause. MTL cites *Thiokol Chemical Corp.*, ASBCA No. 5726, 60-2 BCA par. 2852 (1960), as support for its position

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that such " 'forked tongue' directives" are viewed harshly by the Boards of Contract Appeals and backs up that position with citations to two other cases, *Emerson Electric Manufacturing Co.*, ASBCA No. 8788, 1964 BCA par. 4070, and *Clevite Ordnance, Division of Clevite Corp.*, ASBCA No. 5859, 1962 BCA par. 3330.¹ According to MTL, the ASBCA in *Thiokol*, held a contractor entitled to reimbursement for an overrun despite a lack of notice and the presence of an LOCC because of "Government conduct akin to that present here" (MTL Brief at 10). While there are some similarities of an expectable, general nature, it would be stretching the meaning of language to characterize the Government conduct as "akin" to the EPA conduct here. To begin with, although cast as a cost-plus-fixed-fee (CPFF) contract, the object was the manufacture and delivery of 48 rocket engines as part of a complex, integrated, urgent program involving several Government agencies. The contractor gave notice of an overrun shortly after becoming aware of it; by the time it was able to deliver detailed information on the overrun, which was reasonably quickly after discovery, the contractor had already overspent the contract and estimated that there were yet additional expenses to be incurred to complete performance. The Government ultimately funded this overrun, but before it did so, the contractor discovered that it needed about \$8,600 more to meet its recalculated costs. The ASBCA refused to apply the LOCC in the case, because the situation in which it was normally applicable, that is "where the contractor unquestionably could have exercised its contractual right to discontinue the incurrence of costs in excess of the contractual cost estimate," simply was not present there. According to the Board, the literal language of the LOCC "must be deemed a mere shadow of formality in the situation" of that case, namely because, amongst other things, (1) it was uncontroverted that the Government would not allow the contractor to discontinue performance; (2) if the contractor had given the Government more timely notice of the overrun, the record showed that the Government would not have allowed the contract to expire for lack of additional funds; and (3) when the Government was told of the overrun, it "did not abate in its unrelenting insistence" that all of the rocket engines be delivered. The Board characterized the Government's conduct as foreclosing the contractor from its right to discontinue performance at any time prior to completion of work. *Thiokol*, 60-2 BCA par. 2852 at 14,849-50.

By contrast, in this case, EPA's conduct can hardly be characterized as foreclosing MTL from any right. Far from denying leave to

¹ Although the three cases cited on this and the previous page have been treated in this decision in the interest of according to MTL a full exposition of its arguments, we note that in each of them the contract's LOCC was different from the one in this case. The current version of the LOCC is much more strict in limiting the Government's obligation to fund overruns in cost reimbursement contracts than was the LOCC in the cases cited by MTL. Thus, there is more than a little doubt of the applicability of those precedents to this case. The discussion of the *Hughes Aircraft* case later in the text should give some better idea of the state of the law on Government liability for overruns under the current version of the LOCC.

discontinue before full performance was achieved, the CO's conduct clearly contemplated that full performance would not be accomplished. Urging performance up to the dollar limitations while consistently denying the availability of additional funds does not equate with countenancing nothing other than full performance while funding at least the lion's share of the full overrun, as occurred in *Thiokol*. The literal language of the LOCC was invoked by reference by the CO, but the circumstances which led the ASBCA to declare that invocation in *Thiokol* to be "a mere shadow of formality" were not present here. Whether the CO's conduct indeed so strongly urged compliance that we may ignore the literal language of the LOCC is discussed below, but if the threshold standard for finding EPA liability for funding the overrun is the Government conduct in *Thiokol*, we would have to conclude that EPA is not so liable.

The Government conduct in the *Emerson* and *Clevite Ordnance* cases was similar to that in *Thiokol* and thus dissimilar to that in this case. In both cases, the Government made clear that it did not want the contractor to stop work before completion of performance, it granted after-the-fact increases in the costs limitation and it accepted all of the products of the contract. Moreover, in the *Clevite Ordnance* case, the Board found that the contractor's performance beyond the limitation "was prosecuted in obedience to explicit instructions of authorized and cognizant Government personnel who were alert to the fiscal status of the contract on current and projected bases." *Clevite Ordnance*, 62 BCA par. 3330 at 17,155.

MTL asserts that this Board has accepted the *Thiokol* rationale and cites *Booz, Allen & Hamilton, Inc.*, IBCA-1027-3-74 (Mar. 24, 1976), 83 I.D. 95, 76-1 BCA par. 11,787, in support. It cannot be denied that this Board has accepted that principle, nor that as a general matter the *Booz, Allen* case announces that acceptance. Accepting that principle has no bearing, however, on whether it is applicable to a particular state of facts. Indeed, in *Booz, Allen*, the case appellant cites as evidence of this Board's acceptance of the principle, the Board denied the Government's liability for the overrun because the facts did not establish the kind of Government conduct which would allow the Board to ignore the literal language of the LOCC. In that case, the Board noted that "the cases finding the Government obligated to fund an overrun are dependent on actions of responsible Government officials, e.g., urging continued performance or demanding and accepting the benefits of performance, with knowledge of the overrun." Later, the Board expanded on the theme, stating, "Even the [CO's] knowledge of the overrun could not impose on the Government the Hobson's choice of surrendering title to Government-owned property or paying for nonseverable increments thereto which the contractor had added with full knowledge that it had incurred a cost overrun." *Booz, Allen*, 76-1 BCA par. 11,787 at 56,260. To understand more clearly the meaning of these pronouncements, we can look to a case cited later by appellant in another context (Reply Brief at 3). In *Hughes Aircraft*

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Corp., ASBCA No. 24601, 83-1 BCA par. 16,396 (1983), the ASBCA provided some guidelines for discovering in a particular set of facts a waiver by the Government of the LOCC and estoppel from denying reimbursement as a substitute for formal written approval and revision of the estimated cost as generally required by the LOCC. The ASBCA announced four elements all of which must be present to establish an equitable estoppel:

(1) * * * [T]he Government must know of the overrun; (2) the Government must intend that the conduct alleged to have induced continued performance will be acted on, or the contractor has the right to believe that the conduct in question was intended to induce continued performance; (3) the contractor must not be aware * * * that no implied funding of the overrun was intended by the conduct in question; (4) the contractor must rely on the Government's conduct to its detriment.

(*Id.* par. 16,396 at 81,516). As the ASBCA noted, "[W]aiver and estoppel may be substituted for formal and written approval and revision * * * only in very limited circumstances" (*Id.* par. 16,396 at 81,516). Judging by the description of the four elements, one would guess that the cases in which waiver and estoppel could be established would be rare indeed. The present case is not one of them. The only issue that arguably can be resolved favorably to MTL's position is the last, that it relied detrimentally on some conduct, but even that begs the question and needs qualification. The fact that MTL overspent by some \$27,000 is prima facie evidence of detrimental reliance, but to satisfy the element, that reliance must be on a certain kind of Government conduct already established independently, a question discussed further below.

We resolve the other issues against MTL. Regarding Government knowledge of the overrun, it must be emphasized that that knowledge must be defined precisely. The knowledge we spoke of in *Booz, Allen* is the same, we believe, as that the ASBCA meant in *Hughes Aircraft* and is not established by the CO's knowledge that the contractor alleges that the contract is overrun. It cannot be denied that the CO here was aware that MTL alleged on August 20, 1981, that it would be overrun by August 28 nor that he was aware of the probability of a project overrun before complete performance even earlier than that. That awareness, however, does not establish the kind of knowledge critical to this discussion. That knowledge must be that the contract actually is overrun. We decline to impute knowledge of an overrun based only on the allegation of the contractor when the CO has other, presumably reliable information indicating the contrary. Here, the CO knew from MTL communications that there was \$116,000 (or perhaps \$140,000) of funds remaining on July 31, 1981, and obviously found it incomprehensible that there would be an overrun by August 28 given the extremely limited version of contract tasks which would be performed to that point as expressed in MTL's August 20 letter. It appears that ultimately the CO was correct, because MTL continued to

perform contract tasks after August 28 and, as appears from MTL communications, still had funds unspent much later on so that expenses overrunning the limitation surely could not have been incurred in August. Thus, there apparently was no actual overrun for the CO to have knowledge of, but even if there were it would be difficult for us to conclude that the CO had knowledge of it, because MTL failed to provide support for its allegation that there was an existing overrun. Not until its letter of October 1 did MTL even provide detailed figures supportive of its overrun projection and then they were, in the CO's words, "in rough, bottom line projection form" (AF, Tab 5(o)), which provided little help in reaching a conclusion about overrun status and in any event presented a number of allowability problems on their face. That same October 1 letter contained MTL's suggestion that the limit had still not been reached, as mentioned in the findings section above. Whether or not there was an overrun when the CO began his consistent pattern of urging *some* kind of performance in August, it is apparent that he did not believe there was one, with, it turns out from later information, good reason. Regardless of MTL's allegation that the contract is overrun, if the CO honestly and reasonably believed there was none, we cannot see how we could charge him with knowledge that there was one.

Looking to the second element, we note that the conduct complained of must have induced continued performance or otherwise have given the contractor the right to believe it was intended to induce continued performance. The crucial term here is "*continued* performance." What has been urged or demanded by the Government in those cases allowing reimbursement for an overrun is performance to complete a contract as originally contemplated after the original funding had been exhausted. What the CO did here was to urge substantive and wrap-up performance up to the point of funds limitation, which he reasonably believed had not yet been reached, but always with the admonition that, assuming his beliefs were wrong, MTL should exercise its right to stop all performance when the limitation was reached.

The final element, that the contractor should be unaware that no implied funding was intended by the CO's conduct, also cannot be found present. It would be unreasonable for MTL to be unaware of the lack of implied funding when the CO explicitly spoke early of the unlikelihood of finding funding and later emphatically denied that any would be found.

Using the *Hughes Aircraft* schedule of elements for finding waiver and estoppel, we are unable to find anything in the CO's conduct which would support MTL's position. There is one aspect of that conduct which is bothersome though raised by MTL only tangentially on another issue. That aspect is the threatened termination for default contained in the CO's October 15, 1981, letter and rescinded in his October 28 letter.

The threatened termination becomes important because of the nature of a cost-type or cost-sharing contract and the consequent

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change in the CO's role as compared to that in a fixed-price contract. The difference was well-explained in an early ASBCA case, *J. A. Ross & Co.*, ASBCA Nos. 2326, 2334, 2447, and 2482, 6 CCF par. 61,801 (Dec. 12, 1955), where the Board said:

Where the Government enters into a cost-plus-a-fixed-fee contract with a contractor, the Government engages the knowledge, the skill, the judgment and the capabilities of the contractor to perform the contract. It is the contractor's right, as well as his duty, to use all of those qualifications to employ men and women who will comprise his "team" to perform the contract, to buy materials and to use *his* discretion, not that of the contracting officer, in carrying out all of the factors involved in the performance of the contract. The contracting officer's function is not that of a boss over the contractor, telling him what he can and cannot buy, whom he shall employ and how much he is allowed to pay employees. True, the contract bestows upon the contracting officer the authority to disapprove for reimbursement the costs involved in the contractor's performance, but unless he is able to demonstrate that the contractor's acts, or the costs he incurs, violate the contract or [the regulations], it is the contracting officer's duty to approve the contractor's acts and to approve the costs thereof for reimbursement. [Italics in original; citations and footnote omitted.]

J. A. Ross & Co., *supra* at 34-35, 6 CCF par. 61,801 at 52,497. From this we have a picture of a contract being performed under a CO with fewer "liberties" to interfere with performance than when administering a fixed price contract. Although there may also be a price tag attached to the fixed price CO's exercise of his authority, in a particular situation the model administration of a cost-type contract has the CO in a much less active role, relying on the contractor's qualifications which provided the reason for his selection in the first place and then allowing or disallowing reimbursement for costs essentially after the fact of their expenditure, according to the law. In this model, any action beyond the bounds just described may induce performance leading to an overrun for which the Government would be responsible. Presumably, a threat of default termination inducing continued performance or any performance of contract tasks beyond the contractor's rights under the LOCC could, in the proper circumstances, be such an action in such a model. In this case, however, the CO was concerned that there was more money available than represented by MTL for the completion of some contract tasks and for wrap-up. We have determined that the belief was a reasonable one. Despite our attention to the *J. A. Ross & Co.* principle, we are cognizant that in factual situations there should be a balancing between the conduct of a CO in pursuit of the model and the natural concern that the Government get as much product from the contract as it can up to the cost limitation. It is small comfort to realize that when all performance and auditing is completed the CO can disapprove for reimbursement after the fact certain expenditures which disapproval has the effect of discounting the cost to the Government for the amount of product it did receive when the Government would have been satisfied to spend up to the limitation the money "saved" in order to get *more* of the product. Obviously, in such a situation the

temptation to urge performance beyond what the contractor says it can perform within the limitations when the CO believes there is adequate funding for more performance is great and understandable. We are unprepared to conclude that in such a situation the CO must remain silent. However, his belief that there are more funds than reported by the contractor must be reasonable and he must make it clear that the contractor has the right to rely on the provisions of the LOCC. In this case, the CO did just that. With every pronouncement of his belief that MTL could do more and still stay within the limitation, there was an accompanying admonition that conveyed the message that if the CO were wrong in that belief, MTL should keep the limitation provision paramount in its corporate mind. This was not like one of those cases where the LOCC was honored more in the breach than in the observance. Those cases usually involved repeated after-the-fact funding increases and insistence on full performance. Here, there was no such insistence and the LOCC was consistently treated with the respect it is due despite the CO's urging of further performance beyond what MTL represented it could accomplish. (Indeed, the CO paid homage to the *J. A. Ross* model of CO conduct in a cost-type contract when, in his October 14 letter, he stated, "I cannot tell you when to stop or how to do the job.") Therefore, we conclude that, with the possible exception of the termination threat, the CO's conduct was not such as would induce MTL's excess spending. On the facts, however, even that threat did not induce any of the excess spending, because the threatened termination was only for the asserted duty to return the EPA buildings and restore the sites, it was rescinded 2 weeks later, and the record discloses that MTL never spent anything on those tasks. Based on this analysis we deny the appeal on the first of MTL's theories of recovery.

The second MTL theory is that EPA is estopped to deny funding, because the CO failed timely to inform MTL of his decision to allow the contract to lapse under the terms of the LOCC (MTL's Brief at 13-15). According to the MTL version of the facts, the CO did not inform MTL of that decision until October 28, 1981, which was 2 months after MTL's August 28 stop work notice. This alleged untimely notice is important, in the MTL view, because of two ASBCA cases in which, MTL asserts, the Board held that failure to deliver such a notice promptly results in a termination for convenience meaning that termination settlement costs beyond cost limitation would be recoverable. *North American Rockwell Corp.*, ASBCA No. 14329, 72-1 BCA par. 9207 (1971), and *T.M.C. Systems & Power Corp.*, ASBCA No. 15211, 72-1 BCA par. 9209 (1971). The only thing the Board said in the *North American Rockwell* case that even remotely related to the principle for which it was cited is that the Board, having held that the Government was not liable for funding an overrun because of its prompt denial of requests for such funding, also noted that even declaring a constructive termination for convenience would not improve the contractor's rights of reimbursement, because the LOCC

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continues full effectiveness even in a terminated contract; the LOCC still applies to costs incurred in performance of the contract and is unaffected by the termination. This case does not appear to stand for the principle for which it is cited.

The *T.M.C.* case, on the other hand, stands for the proposition that a CPFF contract *may* be permitted to expire under the LOCC but only if the Government gives "reasonably prompt notice" of its intention to do so. The Board held that in that case the CO failed to give reasonably prompt notice and, having so failed, in fact terminated the contract for convenience as to any remaining contract work and therefore became liable for termination settlement costs exceeding the cost limitation. The facts the Board relied on to determine that there was no reasonably prompt notice were these: (1) The contractor gave notice in accord with the LOCC provisions of an impending overrun (60 day/75 percent) followed by a request for additional funding coupled with a notice of impending stop work; (2) the Government's only response until a year later was a wire 4 days after the stop work notice, and the wire denied authority to overspend and requested information on the cost of resuming work after a work stoppage; (3) while the contractor made four more requests for funding during the ensuing year, the Government failed to respond to any promptly and while leaving extant the request for information on the cost of resuming work, the Government waited until the cost ceiling had been reached before issuing its expiration notice nearly a year after the stop work notice. Even if MTL's version of the facts is accurate, there are striking contrasts between the facts in that case and the facts here. There had been no prior notice of impending overrun (the 60-day/75-percent notice required by the LOCC), and although EPA was aware from its own sources that the funding would be inadequate for the full 3-year period of performance, it could not reasonably have known on August 20, 1981, that funding would expire by August 28 as MTL alleged in its letter of the former date. MTL consistently throughout the performance period failed to provide reliable cost information such as would constitute adequate notice under the contract. Indeed, we have already concluded that the CO's belief that there were more funds available than alleged in the August 20 letter was reasonable and correct. EPA did not hold out the hope that additional funding might be found as the Government did in *T.M.C.*, for instance, by requesting re-start cost information; to the contrary, the CO consistently expressed pessimism about that possibility or emphatically denied that any such possibility might exist. Under MTL's version of the facts, 2 months expired between the stop work notice and the expiration notice, not 12 months. Using *T.M.C.* as a guide, we cannot say that the CO did not give reasonably prompt notice under this set of facts.

Another problem is that MTL's version is not the correct one in any event. The first mention of expiration of the contract under the LOCC actually came in the CO's October 14 letter where in expressing bewilderment over the inclusion of a \$10,000 item for "settlement costs" in MTL's October estimate of costs to complete, he wrote, "Since this contract will lapse under the LOC clause, rather than undergo a termination, * * * the justification for such settlement charges is unclear." Thus, the CO expressed contemplated expiration, *in terms*, 2 weeks earlier than MTL says he did. Moreover, we are unaware of any requirement that the expiration notice must be in the form MTL suggests. Here, the CO communicated the absence of additional funds orally on August 27; he wrote the same in his August 28 letter; he reiterated the lack of funding in the October 14 letter. Also, the CO's communications from the end of August on cannot be read as importing anything other than the CO's contemplation that normal performance was over and that only wrap-up remained. MTL's conduct communicated that it clearly contemplated exactly the same result. Its letters and other communications were concerned solely with wrap-up tasks and disputes, except for its various estimates of costs to complete and requests for additional funding to accomplish completion, which requests were uniformly denied. We cannot say that these facts present a failure to inform reasonably promptly of an expiration decision such as would support a conclusion of convenience termination as in *T.M.C.*

Even if the facts allowed the conclusion of a termination for convenience in the *T.M.C.* fashion, there is some question whether the law would allow it. As EPA points out, the LOCC in the *T.M.C.* case was different from the LOCC in this case in that the latter makes the limitation provisions applicable to "actions under the termination clause," while the former does not, the implication being that even if the facts allowed a termination for convenience to be found because of a lack of reasonably prompt notice of LOCC expiration, MTL would be no better off because the LOCC limits termination costs as well as performance costs (EPA Brief at 20). MTL attempts to counter this argument by noting that a Court of Claims case which reversed in part an ASBCA case (cited by EPA for another proposition) stands for the proposition that the presence of an LOCC essentially identical to the instant one does not prevent recovery of excess costs. *Breed Corp. v. United States*, 223 Ct. Cl. 702, 27 CCF par. 80,333 (1980). What the case actually says is somewhat different—it stands for the proposition that the termination costs in excess of the LOCC amount are recoverable if the Government has engaged in the same kind of conduct inducing or demanding termination-type performance as the conduct held to have induced regular contract performance in cases like *Thiokol*. We see no basis in this case upon which to allow recovery of excess costs as resulting from a termination for these reasons: (1) The LOCC applies to termination costs, generally; (2) we have already determined that EPA did not engage in any urging- or demanding-type activity such as would induce MTL to engage in any

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kind of contract performance beyond limitations of cost much less termination activity; and (3) although MTL advanced the termination theory, it has failed to show how the "performance" which led to excess costs could properly be characterized as related to any purported termination.

For the foregoing reasons, this appeal is hereby denied.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

APPEAL OF OHBAYASHI-GUMI, LTD.

IBCA-1785-3-84

Decided *September 25, 1984*

Contract No. 2-07-4D-C7496, Bureau of Reclamation.

Sustained in Part.

1. Contracts: Construction and Operation: Notices--Contracts: Construction and Operation: Privity of Contract--Contracts: Construction and Operation: Subcontractors and Suppliers--Contracts: Disputes and Remedies: Jurisdiction--Rules of Practice: Appeals: Standing to Appeal

A Government motion to dismiss an appeal is denied where the Board determines that it has jurisdiction over an appeal being actively prosecuted by a subcontractor where it finds the prime contractor's sponsorship of the subcontractor's claim is established by the following: (1) The decision from which the appeal was taken was addressed to the prime contractor; (2) the notice of appeal was signed by a representative of the contractor; and (3) the contractor is claiming overhead and profit on the subcontractor's claim.

2. Contracts: Disputes and Remedies: Burden of Proof--Contracts: Disputes and Remedies: Equitable Adjustments

In a case where the parties differ as to the amount of equitable adjustment to be provided for a constructive change, the Board finds the appellant to have shown by a preponderance of the evidence that it is entitled to the amount of the equitable adjustment sought.

3. Contracts: Contract Disputes Act of 1978: Interest

In an equitable adjustment case, the Board finds that an appellant is entitled to simple interest on the amount found to be due and that under the provisions of the Contract Disputes Act the amount of interest is to be determined on the basis of applying variable rates for the period over which interest is payable with interest not to commence until the contractor has submitted its claim to the contracting officer for decision.

APPEARANCES: Mr. A. B. McCutchen, Ohbayashi-Gumi, Ltd., Fort Collins, Colorado, for Appellant; G. Kevin Jones, Department Counsel, Salt Lake City, Utah, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCGRAW
INTERIOR BOARD OF CONTRACT APPEALS

The contractor has timely appealed the final decision of the contracting officer under the above-captioned contract in which the contractor was found to be entitled to an equitable adjustment pursuant to the Changes clause in the amount of \$7,400. This was based on a finding of constructive change as a result of the Government having directed the contractor to paint the interior of steel air vent pipes, Dolores Tunnel, Gateway Chamber, including the additional flanges, couplings, and associated material required for the painting of the pipes (Appeal File, Exhibit No. 2).¹

Resolution of the questions presented by the instant appeal will involve determining (1) the standing of Osberg Construction Company, as subcontractor, to prosecute the appeal in the name of the contractor; (2) the amount of the equitable adjustment to which the contractor is entitled by reason of the directions received from the Bureau of Reclamation (BOR) to paint the interior of the steel air vent pipes here in question, as well as performing other work required for the accomplishment of the directed painting, and (3) determination of the interest payable to the appellant under the Contract Disputes Act on any amount found due.²

The standing of Osberg Construction Company, as subcontractor, to prosecute the instant appeal was raised by the Government for the first time in the brief filed with the Board on August 10, 1984. It is clear that the subcontractor is not now and never has been a party to the instant contract. Consequently, it would be without any standing to bring this appeal in its own name by reason of it having no contractual relationship with the Government. *Divide Constructors, Inc.*, IBCA-1134-12-76 (Mar. 29, 1977), 84 I.D. 119, 77-1 BCA par. 12,430. In *Divide Constructors*, the Board dismissed the appeal for lack of jurisdiction in circumstances where the prime contractor had stated that it would do nothing to further an appeal taken by a subcontractor in its own name and the Board found that the actions of the prime contractor in giving the Government written notice of a potential claim of changed conditions by the subcontractor and any statement made by the prime contractor endorsing the potential claim at the time such notice was given were not a sufficient basis upon which to ground jurisdiction over the appeal.³

¹ Hereafter AF followed by reference to the particular exhibit being cited.

² In a letter to the Board under date of Aug. 13, 1984, appellant seeks an award of attorney's fees in at least the amount of \$2,500. Agency boards of contract appeals have no authority to grant attorney's fees and costs to a prevailing party on appeal. See *Central Colorado Contractors, Inc.*, IBCA-1672-4-83 (Aug. 17, 1983), 90 I.D. 379, 84-1 BCA par. 17,096. Accordingly, the claim for attorney's fees is dismissed as beyond the purview of our jurisdiction.

³ In *Divide Constructors* (text, *supra*) the Board stated:

Continued

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Since it is clear that the subcontractor is prosecuting the appeal in the name of the prime contractor, the Government—in questioning the right of the subcontractor to proceed—relies upon the alleged lack of any showing of sponsorship by the contractor of the claim here asserted (Government Brief at 3-5). There are many cases, however, where Boards of Contract Appeals have entertained claims submitted by a subcontractor in the name of a prime contractor in which (as is the case here), the active prosecution of the appeal was conducted by a subcontractor. See, e.g., *M. W. Agnew Construction Co.*, GSBCA No. 4178 (Feb. 10, 1975), 75-1 BCA par. 11,086 at 52,782; *Continental Consolidated Corp.*, ASBCA No. 14372 (Feb. 22, 1971), 71-1 BCA par. 8742 at 40,592; and *Farnsworth & Chambers Co.*, ASBCA No. 5483 (Jan. 19, 1960), 60-1 BCA par. 2510. In the case last cited, the Armed Services Board denied the Government's motion to dismiss the appeal, stating at page 11,967:

The motion alleges that appellant has no interest of "any kind at all, financial or otherwise in this appeal"; that appellant has merely allowed its subcontractor to use appellant's name in prosecuting the appeal; that appellant has not and will not acknowledge any liability to its subcontractor "for any of the matters set forth in its complaint"; and that the subcontractor (characterized as "the actual appellant in this case") is not privy to the instant contract. It is noted, however, that the decision from which the appeal was taken was addressed to the appellant; that the notice of appeal filed thereafter was signed by the appellant; and that appellant has not in any way relinquished its pecuniary interest in the appeal.

[1] In the case before us the contracting officer's decision from which the instant appeal was taken was addressed to the contractor; the notice of appeal was signed by the contractor;⁴ and the contractor is claiming overhead and profit on the subcontractor's claim. Based upon these considerations, the Board finds that the prime contractor is sponsoring the subcontractor's claim and that, consequently, the claim is subject to the jurisdiction of the Board.

Claim for Equitable Adjustment

Background

The parties are also apart on the question of the amount of the equitable adjustment to which the contractor is entitled by reason of the Government's direction to paint the interior surfaces of the steel air vent pipes involved in this appeal, including the performance of other work required for the accomplishment of the directed painting.

⁴Even 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 Co.*, IBCA-151 (June 18, 1958), 65 I.D. 274, 58-1 BCA par. 1803 makes clear * * * (84 I.D. at 123, 77-1 BCA at 60,134.)"

⁴In its brief, the Government notes the absence of any power of attorney or other authorization permitting the subcontractor to prosecute the appeal on behalf of the prime contractor. The record is devoid of any evidence showing that the Government requested a power of attorney from the contractor at any time prior to the contracting officer's decision or for over 7 months thereafter; nor is there any evidence that at any time during that period the Government ever questioned the authority of appellant's project managers to represent the contractor in taking the appeal or to designate the subcontractor to prosecute any appeal so taken.

At the time the contracting officer's decision was rendered on November 28, 1983 (AF 2), the equitable adjustment sought by the contractor was in the amount of \$10,849 (Complaint, Tab F).⁵ At page 7 of the Complaint dated March 29, 1984, the amount claimed was increased to \$11,991 to correct what is described as several minor errors in quantity take-offs.⁶ Deducting the \$7,400 paid to the appellant on January 10, 1984, leaves a balance claimed by the appellant of \$4,591 exclusive of its claim for interest.

In his decision (AF 2), the contracting officer acknowledged that the direction to paint the entire interior surface area of the air vent pipes had constituted a change. The decision failed to show any basis, however, for the determination that the contractor was entitled to an equitable adjustment in the amount of \$7,400.

Citing the Freedom of Information Act in a letter addressed to the contractor under date of January 16, 1984, the subcontractor asked the contractor to "request of the Bureau their calculations as to how they arrived at the modification of contract amount of \$7,400." This request was transmitted to BOR by the contractor's letter of January 23, 1984 (AF 3c). In his response of March 7, 1984, the contracting officer forwarded the contractor the documents from the files maintained on the claim including a copy of a worksheet prepared by the Engineering and Research Center (E&R) of BOR showing E&R's estimate of the price to paint the inside of the 6-inch and 16-inch steel air vent pipes and other work required to be performed in connection therewith (AF 3a, 3d).

After noting that the subcontractor's letter to the contractor of January 11, 1983, had given an estimated cost breakdown for the flanges, the contracting officer's letter of March 7, 1984, stated that the cost data was considered to have no merit because of the following:

(a) Contractors estimate shows a 16 Class B Flange. The specifications call for a 16-inch AWWA Class D Flange which supplier Titan Steel, provided and painted. Hajoca Company, a supplier, quoted us a price of \$92.40 for a 16-inch Class D flange. Why claim a fabrication cost of \$132? Titan Steel fabricated the flanges.

* * * * *

(c) Titan Steel quoted us a price of \$0.10/lb. for the paint system (sandblasting, 2-coats coal-tar epoxy) which converted to a square foot basis would be \$1.40 per square foot. Means 1982 Estimating Guide lists a price of \$1.38 per square foot. Our estimate of October 18, 1983, was \$2 per square foot which included an additional overhead and profit. We feel this is a fair and reasonable price. Cannon and Lee Painting applied the

⁵ The claim as presented to the contracting office for decision by the contractor's letter of Aug. 23, 1983, included only the claim of the subcontractor in the amount of \$9,840 (AF 3g). On two previous claim submissions, however, the contractor had increased the claim submitted by the subcontractor by adding the contractor's claims for overhead of 5 percent and profit of 5 percent (AF 3j, 3m). When the same percentages of add-ons are included for the contractor in reference to the Aug. 23, 1983, submission, the claim is in the amount shown of \$10,849, i.e., the amount shown for that submission in Tab F of the Complaint.

⁶ The fact that the amount of the claim is increased after the contracting officer's decision does not preclude the Board from entertaining the claim in the larger amount where, as here, the claim is the same with only the amount having changed. Cf. *VTN Colorado, Inc.*, IBCA-1073-8-75 (Oct. 29, 1975), 82 I.D. 527, 75-2 BCA par. 11,542, granting the Government's motion to dismiss where claims of constructive change were first presented in the notice of appeal, and *Wakon Redbird & Associates*, IBCA-1682-6-83 (Sept. 30, 1983), 90 I.D. 441, 84-1 BCA par. 16,924, in which the Government's motion to dismiss an appeal and remand it to the contracting officer was granted where the Board found it was without jurisdiction over a claim for mutual mistakes first presented in the Complaint.

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paint system for Titan Steel. They could not be reached for a quote on doing this type of work. Osberg estimated amount in claim was \$3.25 per square foot * * *. [7]

(AF 3a).

In the "Contractor's Documentation of Claim" furnished as part of the Complaint, appellant outlined in considerable detail the basis for the amount of the equitable adjustment sought for the Government directed changes. The "Comparison of Estimates" prepared by appellant and furnished as Tab F to the Complaint shows the claim for equitable adjustment submitted to BOR on August 23, 1983, appellant's corrected estimate of February 28, 1984, and the BOR's estimate of October 18, 1983.⁸

One of the major differences between the costs claimed by appellant and those allowed by the Government concerns the estimated direct costs to the subcontractor for painting the inside of the 16-inch and 6-inch pipes. For this the contractor estimate of August 23, 1983, and its corrected estimate of February 28, 1984, show the amount involved to be \$2,065 as contrasted with the BOR's estimate for this item of \$1,050.⁹

The direct cost claimed by the subcontractor for painting the inside of the air vent pipes was determined by multiplying the 635.25 square feet of pipe required to be painted by the subcontractor's price of \$3.25. Commenting in the Complaint upon the subcontractor's estimate of \$3.25 for performing this work and the \$2.00 estimate used by the Government, the appellant states:

Tab H * * * includes records of a telephone quote received from the pipe supplier (Titan) who states that the flanges cost \$180 each * * * and a telephone memo establishing that the pipe supplier's painting subcontractor charged \$2.55 per square foot (not \$1.40 used by the Government in its estimate). With the addition of the pipe supplier's markups the painting costs to the subcontractor (Osberg) would be \$3.09. Since other quotes by reputable industrial painters were \$3.60 per square foot, we believe our subcontractor's * * * painting estimate (Tab F, Exhibit 1, line item 1), of \$3.25 per square foot is reasonable. The Government's estimate of \$2.00 per square foot is clearly inadequate. (Incidentally, the government used the wrong pounds to square feet conversion factor for the vent pipe).¹⁰

⁷ The contracting officer's letter of Mar. 7, 1984, also states: "In regards to the subcontractor's questions on interest, please refer to Clause No. 19 of the General Provisions - Payment of Interest on Contractor's Claims. * * * The contract amount of \$7,400 in the Contracting Officer's Final Decision did not include the interest" (AF 3a at 2). Clause No. 19 of the General Provisions was deleted from the contract in its entirety by paragraph c of Additional Supplement to General Provisions. Therefore, Clause No. 19 has no bearing on the question of the interest to which appellant may be entitled on the amount determined to be due as an equitable adjustment.

⁸ The estimate used by the Government was in the amount of \$7,351, but was rounded off to \$7,400 (AF 3d). Referring to the cost comparisons shown in Tab F, the Complaint states at page 8: "This comparison shows that the Government's estimate of direct costs was \$6,075, only \$129 less than our original estimate and \$781 less than the revised costs."

⁹ The amount actually shown for this item in the Government's estimate is \$1,271. This figure includes an allowance for overhead and profit (AF 3d). The \$1,050 figure in the text is the \$1,271 shown in the Government's estimate adjusted to reflect the elimination of the amount allowed by the Government for overhead and profit. In his affidavit of July 30, 1984, Mr. A. B. McCutchen states: "5. Our price estimate comparison at Tab F took the government estimate of \$7,351 (included in Tab E) and reversed out mark-ups so as to permit a comparison of the cost items."

¹⁰ Amplifying upon this position in a later communication to the Board, the appellant states:

"In the Contracting Officer's decision March 7, 1984 * * * Paragraph c states that our supplier quoted us a price of \$0.10/lb. for the paint system. * * * [T]his is an erroneous price for painting the inside of a 16' pipe. The price quoted is a general estimating price for painting exterior surfaces which are readily available. Further, the conversion to

Continued

(Complaint 8).

Another major difference between the amount of the equitable adjustment sought by the appellant and that allowed by the Government involves the disallowance by the contracting officer of the amounts claimed by the subcontractor for field overhead and home office overhead. Addressing the failure of the Government to allow such claims for overhead, appellant states:

[T]he Contracting Officer simply refused to allow the subcontractor's Field Overhead of 18.1% and Home Office Overhead of 20.3%--both of which had previously been negotiated and agreed upon in change orders. We enclose as Exhibit "T" the following package establishing that these rates were previously negotiated and agreed upon in prior modifications:

(1) Osberg's letter and Cost Proposal of March 27, 1983 (Serial No. 68) proposing costs of \$1,461, Field Office Overhead at 18.1%, Home Office Overhead at 20.3% which with profit made a subcontractor's claim of \$2,317.

(2) The Contractor's claim letter of March 28, 1982 [sic], adding 5% OH and 5% Profit for a total claim of \$2,554.

(3) Modification No. 5 dated 4/15/82 [sic] adding \$2,554 to the contract.

(Complaint 9).

Discussion

In the Complaint and in the representations made to the Board subsequently in an affidavit and in various letters, the appellant made out a strong case for accepting the amount of the equitable adjustment sought. Faced with appellant's specific allegations and supporting exhibits, the Government has been content for the most part to enter general denials or to simply assert that the information supplied in a memorandum from E&R to the Regional Director, Salt Lake City, dated October 18, 1983, in a memorandum from the Regional Engineer to the contracting officer dated February 22, 1984, and in a letter from the contracting officer to appellant dated March 7, 1984, "explain and justify the Contracting Officer's Decision" (Government Brief at 10). The Government has not undertaken to address the specific allegations made in the "Contractor's Documentation of Claim" portion of the Complaint, however, even though such allegations are substantiated by memorandums purporting to show quotations from lower tier subcontractors or suppliers supporting the costs claimed by appellant for performing the changed work (*see*, for example, Complaint, Tab H).

Even more surprising is the Government's failure to address the question of why modification No. 07 (the contracting officer's decision) failed to provide for the amounts claimed by the subcontractor for field overhead and for home office overhead when modification No. 5 to the instant contract included an allowance for the subcontractor involved

\$1.40 per square foot is inaccurate. * * * One-quarter inch steel material weighs 10.2 pounds per square foot and at \$0.10/lb. converts to \$1.02 per square foot. \$1.02 per square foot would cover sandblasting of the interior pipe adequately prior to painting, but is not adequate to cover the cost of the material and the installation of the paint material. * * * The discrepancy in the Government's estimate and calculations and in the \$2.00 used for the price allowed Ohbayashi is totally inadequate. Titan Steel has mark-ups on the painting subcontractor's work quoted to them at \$.25/lb as does Ohbayashi's subcontractor, Osberg Construction Company and Ohbayashi itself."

(Letter to Board, June 8, 1984, at 1-2).

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in this appeal of 18.1 percent for field overhead and 20.3 percent for home office overhead (i.e., precisely the overhead rates claimed by the subcontractor in the instant appeal) (Complaint, Tabs F, I).

While the language employed in the E&R's memorandum of October 18, 1983 (AF 3d), is susceptible to the interpretation that it is the contractor's responsibility to paint the lower portions of the steel air vent pipes in question, it is evident that this is not the interpretation intended to be conveyed since the E&R worksheet which accompanied the memorandum shows that appellant is entitled to an equitable adjustment on 635.25 square feet of pipe which is the quantity of pipe claimed for in this appeal (Complaint, Tab F).

Perhaps as a corollary to its position that the only equitable adjustment to which appellant is entitled is the \$7,400 found to be due by the contracting officer, the Government has not directly addressed the increase in the amount of appellant's claim in the Complaint to \$11,991 (from \$10,849) as a result of the correction of several minor errors in quantity take-offs (Complaint, Tab F). The direct costs involved in this correction total \$781 (note 8 *supra*).

Decision

[2] Based upon the evidence submitted in this on-the-record case, the Board finds that appellant has shown by a preponderance of the evidence that the equitable adjustment to which it is entitled is the amount requested of \$11,991.

Interest Payable Under the Contract Disputes Act

By letter to the Board under date of April 13, 1984, appellant transmitted a revised page 10 to the Complaint which it requested be substituted for page 10 of the Complaint dated March 29, 1984. Review of the revised and substituted page 10 of the Complaint shows (1) that appellant is seeking interest at variable rates on the amount claimed commencing on January 15, 1983, and continuing at the lawful rate until the date of payment; (2) that deducting the \$7,400 paid to appellant on January 10, 1984, from the \$11,991 claimed in the Complaint dated March 29, 1984, leaves a balance due of \$4,591; (3) that to this figure appellant proposes to add \$1,217¹¹ representing interest calculated at variable rates from January 15, 1983, to January 10, 1984, for a total of \$5,808; and (4) that the latter figure is to be used for computing interest from April 1, 1984, until the date of payment.

¹¹ The basis for the \$1,217 claimed as interest and proposed as an addition to principal as of Apr. 1, 1984, is set forth on page 10 of the amended complaint from which the following is quoted:

"Contracting Officer's decision revised claim as of January 10, 1983 — \$10,849.

Interest at 11¼% 1/15/83 to 6/30/83=166 days @ 3.34.....	\$554.44
Interest at 11½% 7/1/83 to 12/31/83=183 days @ 3.42.....	625.86
Interest at 12% 1/1/84 to 1/15/84=10 days @ 3.68.....	36.80
Paid 1/10/84 — \$7,400.00.....	\$1,217.10"

Discussion

[3] Appellant is correct in seeking to have any interest to which it is entitled computed on the basis of using variable interest rates. This is clear from the decision of the Court of Claims in *Brookfield Construction Co. v. United States*, 228 Ct. Cl. 551, 567 (1981), from which the following is quoted:

Although for renegotiation cases the interest rate in effect when the Board made its decision applied until excess profits were eliminated, there is no reason to think that Congress intended that result in the Contract Disputes Act. We read the language of section 12 as requiring, rather, that the rate of interest to be applied initially will be the Treasury rate then in effect, and that this rate will rise and fall in concert with any changes in effect for subsequent six month periods.

Appellant is incorrect in assuming that it is entitled to obtain compound interest on any portion of its claim. This question was raised and authoritatively answered in *Brookfield Construction, supra*, in which at page 568 the Court of Claims stated that interest on the plaintiff's claims would be based on "simple, not compound, interest." The basis for the holding is explained in an accompanying footnote from which we quote:

27. There is no support for the award of compound, rather than simple, interest under the Disputes Act. The general rule is that even where, as here, a statute requires the payment of interest, "only simple interest is intended and compound interest cannot be awarded against the Government." *United States v. Mescalero Apache Tribe, supra*, 207 Ct. Cl. 369, 406-07, 518 F.2d 1309, 1331-32 (1975), *cert. denied* 425 U.S. 911 (1976).

Remaining for consideration is the question of when appellant's claim was presented to the contracting officer for decision so as to commence the period for which interest on the amount ultimately found due is payable. The applicable provisions of the Contract Disputes Act as they pertain to interest are:

Sec. 12. Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 6(a) from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board. [41 U.S.C. § 611.]

Sec. 6. (a) All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. [41 U.S.C. § 605.]

Appellant alleges that the claim was submitted to the contracting officer for decision on January 15, 1983,¹² and that interest is payable

¹² This is the date used for the calculation of interest at page 10 of the complaint dated Mar. 29, 1984, and in the revised and substituted page 10 of the complaint which accompanied the appellant's letter to the Board of Apr. 13, 1984.

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on the claim from that date. The Government contends, however, that it was only after the contracting officer's decision of November 28, 1983, was issued that appellant's request for an equitable adjustment was converted into a claim because it was only at that point that the Government expressly disputed the amount owed to appellant. Alternatively, the Government suggests that in the event the Board were to find that the issues were in dispute before November 28, 1983, then the claim should not be considered as submitted for decision until the contractor completed the revisions to the claim and furnished the necessary supporting data which did not occur until at the time of the contractor's letter of August 23, 1983 (Government Brief at 5-9).

The record shows that Osberg Construction Company, as subcontractor, requested a contracting officer's decision in a letter to the contractor dated January 11, 1983 (AF 3m) and did so again in the subcontractor's letter to the contractor of April 11, 1983 (AF 3j). In neither its January 13, 1983, letter (transmitting the subcontractor's claim letter of January 11, 1983),¹³ nor in its May 6, 1983, letter (transmitting the subcontractor's claim letter of April 11, 1983),¹⁴ did the contractor request a contracting officer's decision. It was not until after receipt of the BOR's letter of July 20, 1983, stating that the claim appeared to be without merit (AF 3h) that by its letter of August 23, 1983 (AF 3g), the contractor requested a contracting officer's decision on the claim submitted.

The Contracts Disputes Act clearly vests a contractor (but not a subcontractor) with the discretion to determine when a contracting officer's decision will be requested.¹⁵ In the case with which we are here concerned, the Board finds that the contractor did not exercise its discretion to request a contracting officer's decision until it submitted its letter to BOR of August 23, 1983 (AF 3g). Accordingly, pursuant to the above-quoted provisions of the Act, the Board finds that appellant is entitled to interest on the amount found due from date upon which the contractor's letter of August 23, 1983, was received by the contracting officer.

Summary

The Board finds that appellant is entitled to an equitable adjustment under the Changes clause in the amount of \$11,991, together with simple interest thereon computed in accordance with the provisions of

¹³ The contractor's letter to the BOR of Jan. 13, 1983, refers to "their request for a contracting officer's decision" (AF 3m).

¹⁴ The last sentence of the contractor's letter to the Bureau of May 6, 1983, states: "They again request a contracting officer's decision" (AF 3j).

¹⁵ Commenting upon the significance of submitting a claim to the contracting officer for decision as a predicate for claiming interest thereon, the Board stated in *Mann Construction Co.*, IBCA-1280-7-79 (Dec. 10, 1981), 88 I.D. 1065, 1082, 82-1 BCA par. 15,481 at 76,722-76,723:

"[S]ec. 12 of the Contract Disputes Act of 1978 specifically conditions the allowance of interest to claims received by the contracting officer pursuant to sec. 6(a) and that sec. 6(a) refers to claims submitted to the contracting officer for a decision. There is no evidence in this record indicating that the contractor had ever requested a final decision on any of the three payments on which interest is now being claimed * * *"

the Contract Disputes Act of 1978, from the date the contractor's letter of August 23, 1983, was received by the Government, subject to the necessary adjustments being made in the interest calculations to reflect the payment to appellant of \$7,400 on January 10, 1984, and the increase in the amount of the claim of which the Government received notice on or about April 1, 1984, when it was furnished with a copy of the Complaint dated March 29, 1984.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

September 20, 1984

APPEAL OF ONTARIO FLIGHT SERVICE, INC.*

IBCA-1812 (A-76)

Decided *September 20, 1984*

Contract No. 80-0827, Office of Aircraft Services.

Order Dismissing A-76 Appeal for Lack of Jurisdiction.

OMB Circular A-76

An appeal claiming that the Government failed to conduct a new cost comparison study before changing from a leased aircraft to a Government aircraft for transportation services is dismissed for lack of jurisdiction because the appeals process does not provide for the deciding official to order new cost-comparison studies.

APPEARANCES: Frederick V. Shoemaker, Attorney at Law, Clemons, Cosho & Humphrey, P.A., Counselors and Attorneys at Law, Boise, Idaho, for Appellant; William D. Back, Department Counsel, Portland, Oregon, for the Government.

ORDER BY JUDGE RUSSELL C. LYNCH

A-76 APPEALS OFFICIAL

By order dated August 15, 1984, the undersigned Interior Department A-76 Appeals Official issued an Order to Show Cause why the above-captioned appeal should not be dismissed for lack of jurisdiction. Appellant responded by letter dated September 4, 1984. In order to embody the factual situation in this decision, a large part of the Order to Show Cause is repeated below.

Appellant was awarded a contract on January 4, 1983, to provide the Bureau of Reclamation with one Piper Cheyenne II aircraft for a period of 1 year, renewable at the option of the Government. The renewed contract would contain this option provision, but the total duration of the contract was limited by its terms to 5 years. The contract was renewed in 1984 to November 30, 1984. Prior to the award of the initial contract, the Bureau of Reclamation (Bureau) prepared an OMB Circular No. A-76 study from September 1982 to finalization on December 15, 1982. After November 30, 1984, the Government proposes to discontinue leasing appellant's aircraft and to commence using a Government-owned Aero Commander 690A. The 1982 A-76 cost comparison study analyzed the costs of using a leased aircraft with a pilot (contracting out) and the costs of using a leased aircraft without a pilot (in-house performance with a Government pilot). The result was to perform the work in-house with a Government pilot.

This appeal contends (1) that an A-76 study was required, but not performed prior to the Government's decision to utilize a Government-owned aircraft in lieu of the private aircraft provided by appellant, and (2) that the Government's decision to change to a Government-owned aircraft violates the OMB Circular Part I-Policy Implementation, Chapter 2-Common Ground Rules, Paragraph B-1, providing in pertinent part: "Both Government and commercial cost estimates must be based on the same scope of work and standards of performance."

* Not in chronological order.

The gist of the second contention is that the Government aircraft does not meet the specification requirements of appellant in furnishing an aircraft manufactured and certificated subsequent to October 1, 1979, and/or be a 1980 model or new aircraft. Appellant states that the Piper aircraft was procured at a capital cost of \$1,200,000 to meet the 1980 or newer aircraft requirement, and that the Government-owned aircraft is 8 years old with a capital cost of approximately \$450,000 which fails to meet the standards set by the Government for this contract. Appellant also cites alleged failures of the Bureau to follow its own Departmental regulations in determining to change from the leased aircraft to a Government-owned aircraft.

The Government appeal file has not been received at this time. However, correspondence furnished by appellant reveals the Government position to be that the change to a Government-owned aircraft does not represent a change from contracting-out versus in-house performance. Inasmuch as the 1982 cost comparison study resulted in a determination to do the work in-house with a leased aircraft, the decision to change to a Government-owned aircraft merely continues the work in-house with a different aircraft.

The OMB Circular No. A-76 provides for limited rights of appeal. Part 1, chapter 2, paragraph I, provides for appeals of cost-comparison decisions in the following pertinent parts:

1. Each agency shall establish an administrative appeals procedure to resolve questions from directly affected parties relating to (1) determinations resulting from cost comparisons performed in compliance with this Circular and Part IV of the Supplement and (2) justifications to convert to contract without a cost comparison in accordance with the criteria in Part 1, Chapter 2, paragraph A. The appeal procedure will *not* apply to questions concerning:

- a. Award to one contractor in preference to another; or
- b. Government management decisions

* * * * *

6. To be considered eligible for review under the agency appeals procedures, appeals must:

- a. * * * [Omitted as irrelevant to this appeal.]
- b. Address specific line items on the Cost Comparison Form * * * and set forth the rationale for questioning those items; and
- c. Demonstrate that the result of the appeal may change the cost comparison decision. [Italics in original.]

In this appeal, Ontario Flight Service, Inc. (Ontario), contends that a new A-76 cost study was required to precede the Government decision to use its own aircraft rather than Ontario's leased aircraft. This appeals official can find no authority in the limited procedures authorized by the OMB Circular No. A-76 to make determinations as to whether the Bureau was required to make a new A-76 cost-comparison study. The only exception is expressly stated in the above-quoted language to permit administrative review of justifications to convert to contract without a cost-comparison study. Here, appellant does not complain that the Government is converting to contract, but rather is planning to discontinue the contract for Ontario to provide an aircraft.

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Appellant's second contention that the Government and commercial-cost estimates were not based on the same scope of work and standards of performance relates to the standards contained in the 1982 A-76 cost-comparison study. The appeal period for contesting determinations resulting from that study has long since expired.

Appellant's contentions that the Bureau did not follow Departmental regulations in deciding to use a Government-owned aircraft fall outside the limited jurisdiction of the appeals official to review questions relating to determinations resulting from a cost-comparison study or justifications to convert to contract without a cost-comparison study.

This appeal appears to request the review of management decisions of the Bureau and a determination of whether the Bureau complied with Departmental regulations in deciding to use a Government-owned aircraft; which are questions which appear to be beyond the authority of the appeals official under the A-76 appeals procedures.

Discussion and Decision

Appellant's response contends that Ontario does have an absolute right for an appeal in these circumstances both under the A-76 appeals procedures and avenues exterior to Department review. The primary basis for the claim for appeal rights is that, regardless of the Government's claim that the 1982 A-76 study resulted in a decision to provide the service in-house, the actual decision was to contract-out to Ontario in excess of 65 percent of the cost of the operation. The significant costs paid to Ontario for the contract and option period elected by the Government were for the lease and maintenance of an aircraft. However, the purpose of the 1982 A-76 study was not for the lease and maintenance of an aircraft. The purpose was to compare the cost of providing transportation services to various offices of the Bureau through the use of Government pilots and a leased aircraft or through contracting for both pilots and aircraft. The use of a contractor-owned aircraft was a given on both sides of the comparison because there was no Government aircraft available. That the Government decided not to exercise future options to lease the aircraft and to use a Government-owned aircraft, albeit not fulfilling the 1982 contract specifications required of Ontario, does not represent a change from contracting out to an in-house operation of the transportation service. Appellant was never awarded the contract to operate the transportation service, but merely to provide equipment for it. The later availability of a Government-owned aircraft enabled the Bureau to make the management decision to make the transportation service more cost effective by not continuing the aircraft lease from Ontario into later option periods. The situation can be likened to a cost-comparison study that determines that surface transportation services can be more cost effective with the use of Government employee drivers of leased automobiles than with

contractor chauffeurs provided with the leased vehicles. Should surplus GSA vehicles become available to negate most of the leasing costs, the management decision to use the surplus vehicles (that may be older than those required to be provided by lease) is not subject to review by the A-76 appeals official.

It is true that the basic policy enunciated by the OMB Circular A-76 is that the Government should not compete with its citizens and will rely on commercial sources to supply the products and services the Government needs. However, the circular provides that the determinations will be made pursuant to a comparison of the cost of contracting and the cost of in-house performance. The limited rights of appeal provided for in the circular permit specific challenges of the cost comparison to assure that Government estimates of cost are truly comparable with contractor bids and include all the costs of in-house operation. The scope of the circular provides in paragraph 7.c(8) that it shall not:

Establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in Part I, Chapter 2, paragraph 1 of the Supplement, "Appeals of Cost Comparison Decisions."

This language expressly limits the agency appeals procedures, and consequently the role of the appeals official. Otherwise, all of the many management decisions necessary for the implementation of the policy of the circular could be said to be subject to the A-76 appeals procedure review. Such authority over the widespread procurement activities subject to the A-76 policy pronouncement could not have been intended to vest in the appeals official. Similarly, this applies to the agency review process of all its commercial activities. Appellant contends that the change in actual circumstances since the 1982 A-76 study warrants a new A-76 cost-comparison study before the Government undertakes to provide the transportation service with an aircraft older than the one required to be provided by appellant. No authority can be found for the A-76 appeals official to order a new cost-comparison review, and none is cited by appellant. The OMB Circular A-76 provides for the Department to review its commercial functions and to schedule cost-comparison studies under guidance and reporting requirements to the Office of Federal Procurement Policy in the Office of Management and Budget. There is no role for the appeals official in this process.

Lastly, appellant specifically requests that my decision expressly state the position that the OMB Circular A-76 does not permit an appeal for conversion from contractor to in-house provided services, if that is my judgment. It is inherent in this decision that the Government did not contract with Ontario for the "services" of transportation that were the subject of the 1982 cost-comparison study. The Government leased an aircraft from Ontario to permit the services to be performed in-house with Government employee pilots. When the

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aircraft lease became unnecessary for the continuance of the in-house performance, no authority can be found for the appeals official to require the lease to be continued or to order another A-76 cost-comparison study to be conducted.

There appearing to be no question presented by the appeal that falls within the OMB Circular A-76 appeals authority, it is determined that the appeals official has no jurisdiction over the issues presented in the appeal. Therefore, the appeal is hereby dismissed for lack of jurisdiction.

RUSSELL C. LYNCH
A-76 Appeals Official

APPEAL OF D-K ASSOCIATES, INC.

IBCA-1811(A-76)

Decided October 5, 1984

Contract No. IFB 4-0018, National Park Service.

Denied.

OMB Circular A-76

A contractor's appeal is denied where his challenge of the Government's cost estimate claimed significant differences between the work scope of the estimate and the performance work statement of the bid, and the Government provided a correlation between the two showing the work scope to be identical in both documents.

APPEARANCES: Thomas H. Dinwiddie, President, D-K Associates, Inc., Rockville, Maryland, for Appellant; William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY JUDGE RUSSELL C. LYNCH

A-76 APPEALS OFFICIAL

The Denver Service Center (DSC) conducted a cost-comparison study pursuant to OMB Circular A-76 of the Branch of Micrographics, which is responsible for providing reproduction services and products for the DSC and the National Park Service. The end products are the drawings, maps, technical reports, and other visual information used to communicate planning and design decisions. The services are provided by using in-house equipment and processes for photographic and limited-run printing work and by contracting with the U.S. Government Printing Office and private firms to meet large or complex printing or reprographic requests. A management study of the Branch of Micrographics (BOM) concludes that despite fluctuations in the workload, it has remained relatively constant over the last 10 years.

Utilizing the workload data from fiscal year 1983 for in-house work and purchased services, the Government estimate of the total cost of products produced by the BOM was prepared. Additionally, bids were solicited to perform the work on the basis of a listing of 218 work or product items to be individually priced by the bidder. Appellant, D-K Associates, Inc. (D-K), was the only bidder.

The cost-comparison form prepared and approved by the appropriate Government personnel reveals that the contractor's cost of performance of the functions of the BOM over the projected 3-year period would exceed the in-house costs by \$802,286.44. The total in-house costs were estimated at \$1,467,324. Contractor costs, including conversion differential (10 percent of the in-house personnel costs), totaled \$2,269,610.44. D-K challenges many of the items in the Government estimate, projecting that appropriate changes would show a total advantage over the 3-year period of \$363,344 to convert to contractor performance. Each of the challenged items will be dealt with below.

Line Item 1 - *Personnel Cost*

D-K claims that the failure of the Government to price out each of the items on the performance work statement (PWS) as was required by the bidding documents results in a massive difference in the quantities required by PWS over the in-house estimated workload quantities. In a chart of PWS line items 38 to 55, D-K purports to show that the PWS quantities total 492,852, while the BOM workload quantities total only 245,832 for these items. Claiming this represents the omission of the units of work in the in-house estimate for microfilm services, it is D-K's position that added personnel costing \$123,966 over 3 years would be required by the Government to do the increased microfilm workload. Additionally, D-K points to the significant impact this alleged understatement of the workload would have on the material costs.

On the face of it, the summing of the PWS required quantities appears to confirm this contention. However, a closer examination reveals that D-K is comparing the total PWS work quantities (including labor items) with BOM workload quantities representing only end-product items and purchased-labor items. The claimed difference of 247,020 items represents those items of finishing, such as collating, placing in envelopes, binding, and inserting frames in jackets, which are included in the labor costs in the Government estimate, and are not charged separately as would be required if those items were required of appellant on a requirements contract. The BOM uses a project accounting system (as a project funded office) in which all costs for an in-house or contracted service/product are charged to the authorized account by work order at a billing rate accounting for labor costs, supplies and material, equipment costs and overhead costs. While this system may not readily provide the unit pricing required of D-K, the years of relatively stable output of product and services at the

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same staffing level, and recovery of operating costs through monthly billings to the ordering activity belies the need for added staff to accomplish the same work required to be bid by D-K.

D-K takes issue with the adequacy of the billing and production reporting procedures of the BOM unit. It contends that the work order tags stored in some 16 boxes for the past 5 years are prepared by product type, rather than by PWS line item number and are inadequate for the monthly billing purposes for which they are used. It contends that no production report has ever been prepared from the boxes of work order tags, despite a similar requirement placed on D-K under the bidding documents. D-K would add one-half a full-time employee to prepare the work order tags and prepare monthly production reports and billings for an additional cost of \$27,699 in the Government estimate. The fact that the existing staff has been able to function effectively using the rudimentary accounting and billing system of product-type work order tags is persuasive that a contractor-type billing and production reporting system is not required. The preparation of the workload data for fiscal year 1983 including all the product/purchase service items on the PWS indicates the efficiency of the work order tag system for the extraction of essential data without the expense of added personnel or computerized reports. In this connection, we note that D-K did not include a charge for the monthly billings required of it by PWS item 215.

D-K would also increase the Government estimate for the two stay-in-school employees to price them at the step 5 level for a total increase of \$16,740 for the 3-year period. The A-76 Handbook, IV-9, paragraph 3-d does provide for GS positions to be priced at step 5, but provides further, to use: "if available and deemed accurate, an organizationally determined average step within each grade." The two positions were priced at the step 1 level because these employees are intermittent and start at the GS-1 grade level. By the time they qualify for a step increase, they also qualify for promotion to a GS-2 grade. Historically, the BOM has not retained one of these employees long enough to go above a GS-2, step 1 pay level. This explanation indicates an available and accurate basis to price these positions at historic rather than the standard step 5 levels.

A review of the nonlabor items on the PWS does not reveal any increase in quantities over the production quantities reported by the BOM for 1983. The labor items are included in the BOM personnel costs; whereas, appellant's labor costs are reported by PWS line item. Inasmuch as the production of end products remains the same as for 1983, there appears to be no material difference between the work scope used for the in-house estimate and the PWS requirements. Appellant's suggestion that 2-1/2 persons should be added to the BOM personnel cost estimate because of the alleged variance in the workload is not substantiated.

Line Item 2 - Material and Supply Costs

The BOM in-house estimate for this line item is \$84,265 per year for a total of \$252,795 for the 3-year period. D-K computes a should-cost figure for material in the Government estimate of \$836,036 for the 3-year period. Supply costs represented by the BOM to be contained in purchase orders kept in a three-ring binder are challenged as to pricing accuracy and completeness. BOM responds that the supply costs for BOM were extracted from this book and cautioned D-K that some purchase orders combined purchases by other activities of the DSC that were not part of the cost-comparison scope. Of the examples given, a purchase order from the 3M Co. ordered aperture cards, diazo duplicate cards, paper, and chemicals. Of these items, only the diazo duplicate cards are part of the cost-comparison work scope. The aperture cards were to be furnished the contractor by the Government according to the bidding documents, and the paper and chemicals were for use with the microfilm-reader that was not part of the cost-comparison scope. D-K fails to address these specific items properly excluded from combined orders by comparison with the PWS line items. Absent their doing so, this reviewer feels that an exhaustive comparison is not warranted by their general allegation of excessive material costs included in the BOM backup records. This record system for material costs is the one used by the BOM and it is apparently sufficient for the purpose of showing a fairly consistent annual material cost. This record was available to appellant whose specialized knowledge of the work requirements should have permitted a comparison to reveal obvious discrepancies in the in-house material estimates. The failure to do so indicates that the discrepancies do not exist.

D-K also contests the material costs because there is no provision for escalation beyond the contract starting date, but rather the material costs are included as a constant for each of the 3 years of the contract period. BOM responds that the bidding documents provided for the inclusion by reference of the escalation clause from the Federal Acquisition Regulations (FAR) in any resulting contract. D-K insists that the FAR escalation clause is for negotiated procurements only, and could not be included in this advertised procurement. I can find no support for the contention that the escalation clause is prohibited in an advertised procurement. However, it is clear that the bid documents did include provisions for material and labor increases in the event such increases were experienced in the option years of the contract. Therefore, the bidder was requested to bid on the same basis as the in-house cost estimate was prepared, *i.e.*, without provision for increased material and personnel costs. It is not clear whether D-K provided for increases in its bid for failure to note these provisions or by reason of a conviction that such provisions would be invalid. Having promised escalation in the bid documents, it strains credibility that a bidder would raise this question only after bidding, and consider that the

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Government would not be bound by the promised escalation in the event of an award.

D-K challenges the 5 percent markup used by BOM for Nonstores Direct Delivery and Competitive Federal Supply Schedules and suggests that 21 percent is more realistic to accommodate the outside ranges provided in the A-76 Handbook for Nonstores Direct Delivery and the Retail Program. This argument is predicated on a suspicion, in the absence of data to the contrary. This is hardly enough of a basis for presuming that any appreciable quantity of material is obtained by the BOM on any basis other than that included in the in-house estimate.

D-K argues that the cost of savings claimed by the BOM through the use of reduced size negatives are insignificant in the perspective of the total requirement. It claims that the number of units possible for the use of this method is 8,858. D-K predicated its bid on the use of full-size negatives, printing on a 1-to-1 size ratio, contending that using reduced-sized negatives can no longer be considered an efficient method because it is a labor-intensive process. The bid documents do not require the use of one method over another. Neither party provides sufficient detail to precisely determine the number of units permitting the use of the reduced-size negative technique. However, it is noted that there are large quantities of oversized units required in the items from 56 to 192, with the majority of the work accomplished in-house versus farming out the work. Obviously, a relative small negative will require significantly less film for items requiring 2 to 6 square feet for a 1-to-1 contract print. This apparently accounts for a large part of the difference between the Government estimate and that suggested by appellant as the "should-cost" amount for Government material. The argument that the reduced negative process is labor intensive ignores the fact that the BOM facility using this process has operated with the same size staff of nine full-time employees and three less than full-time employees to fulfill a relatively constant workload for the past 5 years. Appellant's pricing out of materials, even at its supplier costs, is not persuasive that the BOM estimate should be higher because such pricing is based on the use of contact printing with the attendant higher material costs.

Line Item 3 - Other Costs

Rent was included in the Government estimate at \$39,642 per year for three copiers. No rent was included for the 3,800 square feet of space occupied by the BOM. A response dated August 30, 1984, computes the total space costs including common usage space at \$46,553.91. The latter figure includes common usage space such as restrooms, snack bar, and meeting room for which rental would continue in the event of contractor performance. D-K claims to have obtained a rental cost of \$83,623 from an unnamed official during a visit to the DSC. This amount is claimed to be the cost for the first

year of operation and D-K suggests it be added to the BOM estimate. D-K's last submittal dated September 5, 1984, proposes \$160,000 for the 3-year rental costs for BOM to allow for utilities and capital improvements. BOM excluded the space rental costs on the basis that the A-76 Handbook, page IV-23, requires inclusion of rental costs not expected to continue if a contract is awarded, and inasmuch as other functions would use the BOM space, the rental costs to the Government would not change. Although there is merit to the BOM position, in that rental costs of an entire building rarely will fluctuate when a small segment is vacated or turned over for the use of another function, the cost of rent for the 3-year period is less than \$150,000 and would not have the effect of overcoming the \$802,286 advantage of in-house performance. In view of the results of the other aspects of this review, the question of whether space rental should have been included is not crucial to this decision.

The last major item contested by D-K is that of purchased services, costed by BOM at \$37,081, and to which D-K would add \$249,512 over the 3-year period. D-K's position is based on the statement that no definitization has been made as to which work will be done in-house and which will be purchased. Then, after sampling the purchased supply data in the three-ring binder kept for this purpose and examining two folders of Mr. Fair, D-K concludes that some purchase orders and some invoices exceed amounts shown in purchased services in the BOM estimate. From this data, D-K extrapolates that the purchased services are understated by \$249,512. As previously stated, the BOM admittedly engaged in quantity purchases in concert with other activities of the DSC resulting in purchase orders of greater value than attributable to the BOM functions. Additionally, the basis for D-K's position is not correct. On page 24 of BOM's response of August 30, 1984, the fiscal year 1983 quantities of purchased services is clearly shown and related to the PWS line item numbers. It shows the actual quantities of items 1 through 8 to be purchased in small quantities in relation to the end products produced in-house. Over half of item 12-2 is shown to be purchased. Almost half of items 49 through 51 are purchased. A lesser proportion of items 56 through 192 and item 218 are purchased. Of items 193 through 214, all or a large proportion of each item is shown to be purchased. Appellant has made no attempt to price out all or a portion of these items in summary form to show that the cost of purchased services would exceed the amount shown by BOM to be its experienced costs. This reviewer has compared some of the quantities shown in the BOM product summary with appellant's bid and found that the total quantities claimed for in-house production and for purchased services do equal the exact quantities that D-K was requested to price. Appellant's choice to rely on general allegations of higher purchased costs based on lack of knowledge of quantities to be purchased for in-house operation must fail in view of the specific data provided.

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In summary, appellant has challenged virtually every cost in the Government estimate on the grounds that BOM could not possibly perform the entire PWS quantities within the Government estimated costs, and that the BOM has inadequate records or refused to provide adequate data to substantiate the Government estimate. By comparing the Government estimate to its own pricing of each line item, it errs by insisting on pricing on the basis of its plan for doing the work. D-K cannot insist that the Government abandon the reduced negative practice and price the large-size film that it plans to use, or to add personnel to the in-house estimate to accomplish the work in the same manner D-K would plan to do it. The Government has shown that it has been able to produce the same product quantities as required by the PWS on which D-K's bid was based with its existing staff and techniques for reduced-size negative reproduction and billing. D-K has not shown that any significant portion of the savings of in-house performance is in error or that the cost-comparison decision for in-house performance should be overturned.

The appeal is denied.

RUSSELL C. LYNCH
A-76 Appeals Official

**STATE OF ALASKA *v.* MARCIA K. THORSON, STATE OF
ALASKA *v.* PHYLLIS WESTCOAST (ON RECONSIDERATION)**

83 IBLA 237

Decided October 22, 1984

Reconsideration of the decision of the Board of Land Appeals appearing at 76 IBLA 264 (1983) and styled as above (IBLA Docket No. 83-191, BLM Docket Nos. AL 81-5-P, AA-7208; AL 81-6-P, AA-7307) by the Director, Office of Hearings and Appeals.

Reversed.

**1. Alaska: Native Allotments--Alaska National Interest Lands
Conservation Act: Valid Existing Rights**

An applicant for a Native allotment who has satisfied the requirements of the Alaska Native Allotment Act of 1906 possesses a valid existing right.

**2. Alaska: Native Allotments--Alaska National Interest Lands
Conservation Act: Generally--Alaska Native Claims Settlement Act:
Native Land Selections: State-Selected Lands**

The Department of the Interior does not retain jurisdiction to hear a contest brought by the State of Alaska against an applicant for a Native allotment where the lands sought by the Native were tentatively approved to the State following commencement of the Native's use and occupancy. Subsec. 906(c)(1) of the Alaska National Interest Lands Conservation Act, confirming all tentative approvals of State land selections subject to

valid existing rights, conveyed the lands in dispute out of Federal ownership so as to remove the contest from the Department's jurisdiction.

3. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Duty of Department of the Interior to Native Allotment Applicants

Where title to lands tentatively approved to the State of Alaska is conveyed to the State pursuant to the Alaska National Interest Lands Conservation Act, the Department of the Interior, although it loses jurisdiction over said lands, has a duty to Native allotment applicants whose claims lie within such tentatively approved lands to make a preliminary validity determination as to such applications and to pursue recovery of such lands where appropriate.

APPEARANCES: Craig J. Tillery, Esq., Trey Eyerly, Esq., David Fleurant, Esq., Geoffrey T. Comfort, Esq., and Joel Bolger, Esq., Alaska Legal Services Corp., Anchorage, Alaska, for contestees; Claire Steffens, Esq., M. Francis Neville, Esq., Office of the Attorney General, Anchorage, Alaska, for the State of Alaska; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; James Q. Mery, Esq., Fairbanks, Alaska, for Doyon, Ltd.

OPINION BY PAUL T. BAIRD, DIRECTOR

OFFICE OF HEARINGS AND APPEALS

On October 18, 1983, the Interior Board of Land Appeals (IBLA) ruled upon an interlocutory appeal of an order of Administrative Law Judge E. Kendall Clarke denying a motion of the Bureau of Land Management (BLM), joined by the State of Alaska (State), to dismiss for lack of jurisdiction private contests brought by the State against two Native allotment applicants. The Board held in *State of Alaska v. Thorson*, 76 IBLA 264 (1983), that the Department of the Interior (Department) retains jurisdiction to adjudicate a contest brought by the State against applicants for Native allotments pursuant to the Alaska Native Allotment Act (1906 Act), Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed subject to pending applications, 43 U.S.C. § 1617 (1982)), where the lands sought by the Natives were tentatively approved to the State following commencement of the Natives' use and occupancy. It was held that subsection 906(c)(1) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1635(c)(1) (1982), providing for confirmation of all tentative approvals of State land selections subject to valid existing rights, does not convey the lands in dispute out of Federal ownership so as to remove the contest from the Department's jurisdiction.

On December 5, 1983, the State requested the Director, Office of Hearings and Appeals (OHA), to reconsider the Board's decision. The State was supported by BLM in a pleading submitted February 21, 1984. Marcia K. Thorson and Phyllis Westcoast (contestees) responded to the State and BLM in pleadings submitted January 19 and March 12, 1984, respectively, opposing the requests for reconsideration

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and supporting IBLA's decision. Contestees were in turn supported by Doyon, Ltd., amicus curiae herein, by a letter submitted February 27, 1984. By order of April 2, 1984, the Director, OHA, assumed jurisdiction over the cases pursuant to 43 CFR 4.5(b) and granted the request for reconsideration.

As pointed out by the Board, there is no dispute about the facts:

On November 15, 1970, Phyllis Westcoat applied for a Native allotment (AA 7307) in two parcels of land under the Act of May 17, 1906, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed subject to pending applications, 43 U.S.C. § 1617 (1976)). She alleged use and occupancy of the lands since August 1960. On May 2, 1961, the State filed a general purpose grant selection covering the land claimed by Westcoat. Because Westcoat's application was not of record until 1972, the United States on September 3, 1963, tentatively approved a State selection of land covering Westcoat's parcel B. On May 18, 1976, BLM approved Westcoat's application in its entirety and rescinded its tentative approval of lands covering parcel B. [BLM's actions were subsequently set aside by IBLA in *State of Alaska*, 41 IBLA 315, 86 I.D. 361 (1979), thereby returning the parties to the status quo ante.] On March 20, 1980, pursuant to options set forth in *State of Alaska*, 41 IBLA 315 (1979), the State filed the above-captioned private contest against Westcoat for parcel B. No contest has been brought against lands forming parcel A of Westcoat's application.

In 1971 Marcia K. Thorson applied for a Native allotment (AA 7208) in one parcel of 160 acres, alleging use and occupancy since May 1960. On May 19, 1961, the State filed a general purpose grant selection covering the land claimed by Thorson. Again, because the Native allotment application was not of record until 1972, the State selection was tentatively approved on September 3, 1963. On May 5, 1976, BLM approved Thorson's application and rescinded the State's tentative approval as to that land. [As above, BLM's actions were set aside in *State of Alaska*, 41 IBLA 315 (1979).] The State's contest against Thorson was filed on March 20, 1980. [Footnotes omitted.]

State of Alaska v. Thorson, 76 IBLA at 265-66 (1983).

This case turns on the meaning of the phrase "subject only to valid existing rights" in subsection 906(c)(1) of ANILCA. The subsection provides:

(c) Prior Tentative Approvals—(1) All tentative approvals of State of Alaska land selections pursuant to the Alaska Statehood Act are hereby confirmed, *subject only to valid existing rights and Native selection rights under the Alaska Native Claims Settlement Act*, and the United States hereby confirms that all right, title, and interest of the United States in and to such lands is deemed to have vested in the State of Alaska as of the date of tentative approval; except that this subsection shall not apply to tentative approvals which, prior to the date of enactment of this Act [Dec. 2, 1980], have been relinquished by the State, or have been finally revoked by the United States under authority other than authority under section 11(a)(2), 12(a), or 12(b) of the Alaska Native Claims Settlement Act. [Italics added.]

In support of their motions to dismiss, their appeals to the Board, and their petitions for reconsideration, the State and BLM argue that (1) subsection 906(c)(1) operated as an immediate legislative conveyance of legal title to lands tentatively approved (TA'd) to the State pursuant to the Alaska Statehood Act; (2) "subject only to valid

¹ Thus, the tentative approvals were restored and the Native allotment applications were "held for approval" by BLM, subject to private contest, among other options, by the State. See *State of Alaska*, 41 IBLA 309 (1979).

existing rights" are traditionally, and were intended by Congress to be, words of qualification or limitation, *i.e.*, words which do not diminish the quantum of the estate that passes, but subject it, or make it subservient, to superior claims of others; (3) title to lands claimed by Native allotment applicants and TA'd to the State was thus conveyed to the State; and (4) the Department thereupon lost jurisdiction to determine title to such claims. The Board agreed with contestees, however, holding that "subject only to valid existing rights" in subsection 906(c)(1) are words of exception, thereby excepting lands claimed in Native allotment applications from conveyance to the State, and thus, preserving title and jurisdiction in the Department.

The Board based its decision upon (1) the treatment of the "subject to valid existing rights" phrase in withdrawal orders, where such rights or claims have consistently been held to have survived such orders, and (2) the continuing exercise of jurisdiction by BLM over Native selection rights under the Alaska Native Claims Settlement Act (ANCSA), also the object of the "subject only to" language in subsection 906(c)(1) of ANILCA, wherein BLM has continued to rescind tentative approvals that conflict with such selections after passage of ANILCA. The Board also relies upon the legislative history of ANILCA, pointing out that its purpose, to resolve Alaska's uncertain land ownership status, would not be furthered by conveyance to the State of Native allotment application claims within the boundaries of TA'd lands.

For the reasons set forth below I agree with the positions set forth by the State and BLM and hold that the Department has no jurisdiction to hear or adjudicate the contests at issue.

[1] At the outset it should be pointed out that there is no essential disagreement among the parties, Administrative Law Judge Clarke, or the Board that the Native allotment claims at issue are "valid existing rights" as contemplated in subsection 906(c)(1). I agree. Pursuant to *Solicitor's Opinion*, M-36910 (Supp.), 88 I.D. 909, 912 (1981), "valid existing rights" as used in public land law are described as follows:

"Valid existing rights" are distinguished from "vested rights" by degree: they become vested rights when all of the statutory requirements required to pass equitable or legal title have been satisfied. Compare *Stockley v. United States*, 260 U.S. 532, 544 (1923) with *Wyoming v. United States*, 255 U.S. 489, 501-02 (1921) and *Wirth v. Branson*, 98 U.S. 118, 121 (1878). Thus, "valid existing rights" are those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion.

Valid existing rights may arise in two situations. First, a statute may prescribe a series of requirements which, if satisfied, create rights in the claimant by the claimant's actions under the statute without an intervening discretionary act. The most obvious example is the 1872 Mining Law: a claimant who has made a discovery and properly located a claim has a valid existing right by his actions under the statute; the Secretary has no discretion in processing any subsequent patent application. [Footnote omitted.]

The Solicitor continues by pointing out that "[v]alid existing rights are not, however, absolute," but are defined by the statute creating them.

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Id. Thus, "the right preserved is to an adjudication and, if the adjudication is favorable, to [fee title]." ²*Id.*, 88 I.D. at 912 n.5.

The status of a Native claim allotment applicant is similar to that of a mining claimant. A Native applicant who has satisfied the requirements of the 1906 Act "has a valid existing right by his actions under the statute." *Id.* As held by the court in *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), Congress did not intend to give the Secretary unfettered discretion under the 1906 Act, but intended "the Act as a means of granting to the Alaska Natives land to which, on compliance of certain conditions, they would become entitled." *Id.* at 140. "An Alaska Native who meets the statutory requirements on land statutorily permitted to be allotted is entitled to an allotment of that land * * *." *Id.* at 142. To the same effect is *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979).

[2] The words "subject to" in conveyances have ordinarily been interpreted to mean "subordinate to," "subservient to," "limited by," or "charged with." They do not connote a reservation or retention of property rights in the grantor. Thus, they are terms of limitation or qualification, putting the grantee on notice that he may be receiving less than a fee simple. *Hendrickson v. Freericks*, 620 P.2d 205 (Alaska 1981); *Bradshaw v. Lower Colorado River Authority*, 573 S.W.2d 880 (Tex. 1978); *Hedin v. Roberts*, 16 Wash. App. 740, 559 P.2d 1001 (1977); *Renner v. Crisman*, 80 S.D. 532, 127 N.W.2d 717 (1964); *Moore v. Gillingham*, 22 Wash. 2d 655, 157 P.2d 598 (1945); see *Texaco, Inc. v. Pigott*, 235 F. Supp. 458, 463 (S.D. Miss. 1964); *State v. Willburn*, 49 Hawaii 651, 426 P.2d 626, 630 (1967). As the Alaska court points out in *Hendrickson, supra* at 209, there are a few cases interpreting this phrase as reserving an interest in the grantor, but they are exceptions to the general rule and usually involve facts which indicate that the intent of the grantor was to exclude the interest in property from the conveyance. See, e.g., *Lutz v. McLain*, 538 P.2d 472 (Colo. 1975). Ultimately, it is the intent of the parties that controls.

The language of subsection 906(c)(1) leaves little doubt that it was intended to constitute an immediate legislative conveyance of all previously TA'd lands. The "such lands" to which all right, title, and interest of the United States are deemed to have vested in the State of Alaska are "[a]ll tentative approvals." (Italics added.)

Examination of the legislative history of section 906 of ANILCA supports the conclusion that Congress intended that legal title to lands claimed under the 1906 Act and included within previously TA'd lands pass to the State immediately:

² The term used in the quotation is "a lease." The language also applies to a claim or application which may ripen into fee title. In the latter case the claimant usually has a continuing right to possession, at least until the claim is extinguished upon adjudication.

Section 906: State Selections and Conveyances

This section provides for: certain amendments to the Alaska Statehood Act, * * * confirmation and vesting of title of prior tentatively approved (TA'd) lands, * * * [and] impression of valid existing rights and Native selection rights under the ANCSA on lands conveyed to the State * * *

S. Rep. No. 413, 96th Cong., 1st Sess. 287, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5231. The language of subsection 906(c)(1) was approved by the Senate Committee on Energy and Natural Resources over the objections of two Senators that it would provide congressional confirmation of "illegal State selections," *id.* at 430, and would "give the State the upper hand in dealing with the Department of the Interior on conveyances of existing State selections * * *." *Id.* at 426. Similar objections were voiced by dissenting members of the House Interior and Insular Affairs Committee. H.R. Rep. No. 97, 96th Cong., 1st Sess. 557. While dissenters sometimes tend to draw exaggerated inferences, it is clear that subsection 906(c)(1) was intended by its proponents and seen by its opponents as an immediate conveyance of legal title to all TA'd land to the State.

This conclusion is also supported by subsection 906(l) of ANILCA, 43 U.S.C. § 1635(l) (1982), entitled "Existing Rights," which provides, in material part:

(1) All conveyances to the State under section 6 of the Alaska Statehood Act, this Act, or any other law, shall be subject to valid existing rights * * *

(2) * * * Upon issuance of tentative approval, the State shall succeed and become entitled to any and all interests of the United States as contractor, lessor, licensor, permittor, or grantor, in any * * * contracts, leases, licenses, permits, rights-of-way, or easements, except those reserved to the United States in the tentative approval.[³]

As to the interests (*i.e.*, valid existing rights) enumerated in subsection 906(l) and embraced by a tentative approval, Congress clearly intended to transfer all of the underlying right, title, and interest of the United States to the State. Moreover, it demonstrated that it intended a difference between "subject to valid existing rights" and "except those reserved." Congress clearly distinguished between the Federal Government's interests in those rights to which TA'd lands were subject and those interests "reserved to the United States." Legal title to the former was conveyed to the State; legal title to the latter remained in the United States.

As in subsection 906(c)(1), Native allotment claims are not mentioned in subsection 906(l). The question is whether Congress intended the same treatment to apply to such "valid existing rights." The answer, according to past Departmental practice, is yes. In implementing the statutory language of subsection 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1982),⁴ which is similar to that of subsection 906(l) of ANILCA, the

³ The less-than-fee interests enumerated by Congress in subsection 906(l) as "existing rights" comport with the Solicitor's definition of "valid existing rights." "[A]lthough the Secretary is not required to approve an application for a right-of-way, if an application is approved [or a lease is issued] the applicant has a valid existing right to the extent of the rights granted." *Solicitor's Opinion*, M-36910 (Supp.), 88 I.D. at 912.

⁴ Subsection 14(g) reads in relevant part as follows:

"All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent,

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Department distinguished between entries leading to acquisition of title, such as claims under the 1906 Act, and those of a temporary or limited nature, such as those enumerated in subsection 906(l). Pursuant to 43 CFR 2650.3-1(a)⁵ the former are to be excluded from conveyances to Native corporations, the latter included. Nevertheless, BLM has not treated interests leading to acquisition of title as excluded automatically by "subject to" language in the instrument of conveyance. To the extent such interests were not expressly identified and excluded in patents or interim conveyances issued pursuant to subsection 14(g) of ANCSA, BLM has treated legal title to the affected land as having been conveyed and has sought reconveyance from the patentee.⁶

This is precisely what the State and BLM propose here regarding subsection 906(c)(1) conveyances of TA'd land to the State. Because the claims at issue here and indeed most, if not all, of the pending Native allotment claims were not applied for until well after BLM approved State applications for tentative approval, they were not known and thus not identified or excluded from the TA'd lands. Upon congressional confirmation and conveyance of those TA'd lands to the State in subsection 906(c)(1), title passed and now reconveyance must be obtained in order that the Department might adjudicate claims leading to acquisition of title.

As pointed out by the State and BLM, all conveyances to the State under ANILCA and to Native corporations under ANCSA are expressly "subject to valid existing rights" (State of Alaska's Memorandum in Support of the Request for Reconsideration at 3-7; Response of BLM to the State of Alaska's Request for Reconsideration at 7-9). Similarly, subsection 6(b) of the Alaska Statehood Act, 72 Stat. 339, 340 (1958), provides: "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." Moreover all patents issued by BLM contain and have contained similar language. In part 1862.11 of the BLM Manual,

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 section 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State."

⁵ "Pursuant to section 14(g) * * * of the act, all conveyances issued under the act shall exclude 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 * * *, contracts, permits, rights-of-way, or easements."

⁶ This is also the effect of Secretarial Order No. 3029, 43 FR 55,287 (Nov. 27, 1978), which approves the distinction in 43 CFR 2650.3-1(a), identifies open-to-entry leases as entries leading to acquisition of title, and concludes that they "should be excluded from Native conveyances." *Id.* at 55,288. Here again, to the extent such entries are specifically identified and expressly excluded in the interim conveyance, legal title remains in the United States. If, however, they are not so identified and excluded, title passes and reconveyance must be sought.

entitled *Patent Preparation and Issuance*, Illustrations 1 and 2 are of sample patents. Both contain "subject to" language. At page 2 of Illustration 1 it is instructed: " 'Subject to any vested and accrued rights therein' is a standard clause."

It has been consistently held by the Department that patents subject to valid or vested rights convey legal title to the land described except for lands expressly identified and excluded. In *Harry J. Pike*, 67 IBLA 100 (1982), the Board affirmed BLM's refusal to accept a mining claim for recordation on lands patented to the State under the Alaska Statehood Act. In *Clarence March*, 3 IBLA 261 (1971), and *Peter Andrews, Sr.*, 77 IBLA 316 (1983), the Board held that the Department retained no jurisdiction to adjudicate Native allotment claims to lands patented to the State of Alaska and lands conveyed to a Native corporation by interim conveyance, respectively. Thus, the Board's distinguishing of *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979), in its decision below is in error. In *Ethel Aguilar*, 15 IBLA 30 (1974), the Board affirmed BLM's rejection of Native allotment applications on the ground that the Department had no further jurisdiction to adjudicate such applications where the lands applied for were patented to the State under the Alaska Statehood Act. The patent contained language protecting valid existing claims. The court did not dispute the Board's holding that title had passed, but held, relying upon *Pence v. Kleppe, supra*, that the Department's deciding not to recover the land without first holding a fact-finding hearing was arbitrary and capricious and remanded the case to the Department.⁷ The Board distinguished *Aguilar* from the instant case on the ground that

the land sought by the Native allotment applicants [in *Aguilar*] had been given to the State of Alaska and under the rules of the Department of the Interior, the land was no longer in Federal ownership and the Department had no jurisdiction to make further disposition of the land. * * * In * * * *Thorson-Westcoast*, however, patent to the land sought by the Native allotment applicants has not passed to the State * * *.

76 IBLA at 272 n.7. The effect of subsection 906(c)(1) of ANILCA on legal title is the same as the effect of a conveyance by patent. If patent subject to valid existing rights conveyed legal title to lands impressed with those rights in *Aguilar*, the legislative conveyance in subsection 906(c)(1) of ANILCA, subject to the same rights, did so here.

The Board relied heavily on the interpretation of "subject to valid existing rights" in withdrawal cases. 76 IBLA at 269-72. Its reliance is misplaced. These cases involve Executive orders withdrawing public lands from entry under the public land laws. The Board correctly cited authority for the proposition that where land is withdrawn subject to valid existing rights or claims, the right or claim is not extinguished, and the withdrawal takes effect as to lands covered by such entries only upon their termination. *Stockley v. United States*, 260 U.S. 532 (1923); *James F. Rapp*, 60 I.D. 217 (1948); *Solicitor's Opinion*, 55 I.D.

⁷ Some 3-1/2 years later the court approved stipulated procedures providing for informal hearings before BLM and, if BLM approved the applications, recovery of the land from the State.

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205 (1935); *Emma H. Pike*, 32 L.D. 395 (1902). Neither the State nor BLM disagrees. The issue before us is not survival of Native allotment claims within TA'd lands, upon which all parties agree, but who owns the subservient legal title to such lands. In withdrawal cases legal title to lands covered by valid entries remains in the Department. Thus, there is no issue as to its jurisdiction to adjudicate the validity of such claims, and the authorities cited are inapposite to the jurisdictional question here.

An analogous jurisdictional question was presented to the court in *Arnold v. Morton*, 529 F.2d 1101 (9th Cir. 1976). There a conflict arose as to the Department of the Interior's continued jurisdiction over Federal land vis-a-vis that of another Federal agency. The question was whether Exec. Order No. 3797-A, establishing Naval Petroleum Reserve No. 4 in 1923 and transferring jurisdiction from the Department of the Interior to the Department of the Navy, "created certain islands of land within the exterior perimeter of the Reserve [which] were excluded from the withdrawal." *Id.* at 1103. The order "set apart as a Naval Petroleum Reserve all of the public lands within the following described area *not now covered by valid entry, lease or application * * **" *Id.* (italics in original). Contrasting the emphasized language above with the withdrawal of "all lands * * * subject to valid existing rights" in the orders of withdrawal creating Naval Petroleum Reserves Nos. 1 and 2 in 1912, the court held that the "not now covered" language connoted an intent that the property involved was excluded from the withdrawal, *i.e.*, never became part of it, while the "subject to" language was appropriate where there was an intent to withdraw all of the land within the exterior boundary of the designated area. *Id.* (italics in original). The court stated:

From these authorities the conclusion is inescapable that within the Department of Interior there has existed since at least 1879 an awareness of the distinction between withdrawals which included all tracts within designated exterior lines and those which excluded one or more islands within such exterior lines. Moreover, these sources indicate that, *while withdrawals without regard to their language could not extinguish existing rights derived from previous appropriations, total inclusion generally was achieved by use of a description of the exterior lines accompanied by language expressing the thought in one way or another that the withdrawal was subject to valid existing rights. On the other hand, the exclusion of tracts within exterior lines was evidenced by reasonably explicit language.* While the language of Exec. Order No. 3797-A is not as explicit * * * as it might be, it is plainly unlike that used in the Orders creating Reserves No. 1 and No. 2 as well as that generally used to indicate total inclusiveness. We must presume that this difference was intended to serve a purpose and we believe the purpose was to exclude from Pet. 4 those tracts "not now covered by valid entry, lease or application."

We, therefore, conclude that the Secretary of the Interior did have jurisdiction over the ["not now covered"] lands in question. [Italics added; footnotes omitted.]

Id. at 1105.

The Board also based its decision upon BLM's continuing exercise of jurisdiction after ANILCA over Native selection rights, also the object of "subject only to" in subsection 906(c)(1), wherein BLM rescinded

tentative approvals in favor of conflicting village selections. Those actions by BLM are not on appeal and need not be addressed. I am persuaded, nevertheless, that there is justification for treating Native allotment claims differently from Native selection rights under ANCSA. There is no preexisting legislation relating to the former which would lead one to conclude that "subject only to" was intended to have any meaning other than its ordinary meaning in relation to such claims. The same cannot be said, however, with respect to the latter. An express purpose of ANILCA was to implement ANCSA. Subsection 11(a)(2) of ANCSA, 43 U.S.C. § 1610(a)(2) (1982), withdrew certain State-selected and tentatively approved lands surrounding Native villages for selection by such villages pursuant to subsection 12(a)(1) of ANCSA, 43 U.S.C. § 1611(a)(1) (1982). The two statutes should be construed harmoniously, if possible. To construe the "subject only to" language in subsection 906(c)(1) of ANILCA as conveying lands which had been withdrawn by ANCSA would constitute an implied repeal of the ANCSA provisions. Such repeal by implication is not favored by the law. As pointed out in *Kenai Peninsula Borough v. State of Alaska*, 612 F.2d 1210, 1213-14 (9th Cir. 1980), *aff'd sub nom. Watt v. Alaska*, 451 U.S. 259 (1981):

However, when a plain meaning reading of a statute brings that statute into conflict with another statute and disrupts a preexisting network of statutory provisions, it is appropriate to look to the legislative history for help in ascertaining congressional intent. [Citations omitted.] * * * This is especially true when the face of the statute gives no indication of a congressional intent to repeal existing legislation or of a purpose, the accomplishment of which might require superseding prior statutes.

* * * * *

* * * Repeal by implication, however, is not favored; if possible, statutes should be read so as to give effect to each of them. [Citations omitted.] This is the preferred course especially when, as here, the purpose and legislative history of the later act gives no clear foundation for an implied repeal. [Footnote omitted.]

Considering the two statutes in this manner, BLM's practice of rescinding tentative approvals on lands covered by ANCSA withdrawals on an ongoing, ad hoc basis in connection with the continuing village selection process under ANCSA after ANILCA seems to be appropriate.

For the reasons given above, I conclude that subsection 906(c)(1) of ANILCA was intended to, and did, convey legal title to Native allotment claims within TA'd lands from the United States to the State of Alaska. Thus, the Department no longer possesses jurisdiction over such lands and has no authority on its own to affect title thereto. *West v. Standard Oil Co.*, 278 U.S. 200, 211 (1929); *Germania Iron Co. v. United States*, 165 U.S. 379 (1897); *Moore v. Robbins*, 96 U.S. 530 (1877); *United States v. Stone*, 69 U.S. 525, 535 (1864); *Peter Andrews, Sr., supra*; *Harry J. Pike, supra*; *Clarence March, supra*; *State of Alaska*, 45 IBLA 318 (1980); *Everett Elvin Tibbets*, 61 I.D. 397 (1954); *Heirs of C. H. Creciat*, 40 L.D. 623 (1912); *Mary E. Coffin*, 34 L.D. 298 (1905).

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The Department's loss of jurisdiction is implicitly recognized in subsection 906(i) of ANILCA, 43 U.S.C. § 1635(i) (1982), which reaffirms the duty of the Secretary to adjudicate conflicting claims to lands selected under authority of the Alaska Statehood Act "*prior* to the issuance of tentative approval." (Italics added.)

[3] This does not mean that Native allotment claimants are without a remedy or that the Department has no duty toward them. The Department does have a duty based on its special relationship to Alaskan Natives and its responsibility under the 1906 Act to make a preliminary determination as to the validity of Native allotment applications and to pursue recovery of land where appropriate through negotiation with the State or litigation. This duty is recognized in subsection 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), which provides that allotment applications to TA'd lands "shall be adjudicated pursuant to the requirements of the Act of May 17, 1906."

The situation here is in many respects similar to that which existed in *Aguilar v. United States, supra*, and the procedures which were stipulated to in that case might be appropriate in this type of case as well.⁸ Since BLM has already approved the allotment applications at issue here, it may be most expeditious for BLM, upon dismissal of the contests, to refer the cases to the Solicitor for appropriate action.

Accordingly, the decision of the Board is reversed. The cases are remanded to Administrative Law Judge Clarke with instructions to dismiss the contests for lack of jurisdiction and to return the records to BLM for action consistent with this opinion.

PAUL T. BAIRD
Director

⁸ I do not necessarily endorse the implementation procedures stipulated to by the parties in *Aguilar* as the best procedures for dealing with this type of claim. Both the *Aguilar* decision and *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), permit some flexibility in meeting due process requirements.

October 28, 1983

APPEAL OF FERGUSON CONSTRUCTION CO.*

IBCA-1681-6-83

Decided October 28, 1983

Contract No. CX-9000-0-9005, National Park Service.

Appellant's Motion for Summary Judgment denied; Government's Cross Motion for Summary Judgment granted.

1. Contracts: Construction and Operation: Allowable Costs--Contracts: Construction and Operation: Contract Clauses--Contracts: Disputes and Remedies: Equitable Adjustments--Contracts: Federal Procurement Regulations--Rules of Practice: Appeals: Motions

In a case in which the appellant's motion for summary judgment is denied and the Government's cross motion for summary judgment is granted, the allowance of interest on borrowings (however represented) as part of an equitable adjustment is found to be prohibited by a provision of the Federal Procurement Regulations incorporated into the contract by reference.

2. Contracts: Contracts Disputes Act of 1978: Interest--Rules of Practice: Appeals: Motions

In a case in which the appellant's motion for summary judgment is denied and the Government's cross motion for summary judgment is granted, the failure of a contractor to certify its claims in excess of \$50,000 when submitting them to the contracting officer, as required by sec. 6(c) of the Contract Disputes Act of 1978, is found to preclude the allowance of interest provided for by sec. 12 of the Act.

APPEARANCES: Mr. James L. McCormack, T. Ferguson Construction Co., Anchorage, Alaska, for Appellant; Gerald D. O'Nan, Department Counsel, Denver, Colorado, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The appellant has requested a waiver of a hearing and has moved for summary judgment. The Government has filed a brief in opposition to appellant's motion for summary judgment and has filed a cross motion for summary judgment.

Background

Contract No. CX-9000-0-9005 was awarded to the Small Business Administration on September 30, 1980. A subcontract (SB 022-8(a)-80-C-0079) for the entire work covered by the contract was awarded to the Ferguson Construction Co. (hereafter contractor or appellant).¹ Under

* Not in chronological order.

¹ Appeal File Exhibits 3 and 4. Hereafter exhibits included in the appeal file will be identified by the letters AF followed by reference to the particular exhibit number being cited.

the notice to proceed, work was to commence on November 12, 1980, thereby establishing May 5, 1982, as the date for completion of the contract work (AF-6). Work was started on November 11, 1980, and was stopped on December 10, 1980. Contract work was restarted on February 3, 1981, and essentially completed by November 25, 1981. The contract was accepted as substantially complete on December 14, 1981 (AF-29). Except for a claim for interest,² all funds under the contract, as modified, were released for payment to the contractor by August 20, 1982 (AF-39).

In a letter written to the contracting officer under date of February 21, 1981, the contractor notified the contracting officer that it had encountered differing site conditions. In especially pertinent part, the letter states:

This letter is to advise you that we have encountered differing site conditions in excavating and placing our 2-1/2 inch PVC sewer pipe. The existance [sic] of several live electrical wires within the trench required changing of alignment of the new sewer.[³] Also the flow line of the new 2-1/2 inch PVC was changed without our knowledge requiring us to excavate deeper than original plans showed. The borrow site, originally pointed out to me at our pre-construction meeting, was taken from me after work was started and no other source made available at this time.

* * * * *

I see no relief in the future from this continuous changing of plans and specifications which are delaying the completion of the contract and increasing my costs by leaps and bounds, not counting the Roloids.

* * * * *

* * * [We] can no longer accept the financial responsibility for these unwritten change orders, personal interpretations of the plans and specifications by different people.

We will be submitting our claim for additional equipment and labor time and extra material costs for these unwritten changes.[⁴]

(AF-8).

On October 30, 1981, the contractor wrote to say that it did not concur with the dollar amount for the deduction of Bid Items No. 32

² Change Order No. 2, dated July 2, 1982, includes the following provision:

"The foregoing Change Order No. 2 is satisfactory and is hereby accepted. In accepting this Change Order No. 2, the Contractor acknowledges that he has no unsatisfied claim against the Government arising out of or resulting from this contract, and the Contractor hereby releases and discharges the Government from any and all claims or demands whatsoever arising out of or resulting from this contract, excepting that the matter of the claim for interest cost remains disputed." (AF-36 at 4).

³ Commenting upon the amount to be paid the contractor for the relocation of the sewer line and wet well under Change Order No. 2 (note 2, *supra*), a Government official states:

"Ferguson Construction and the Government agreed to settle claims for \$125,000 and Change Order No. 2 was issued July 2, 1982. The \$104,648 of the \$125,000 specifically paid for relocation of the sewer line and wet well from planned locations to new locations as located and constructed in the field in 1981. The contractor claimed \$19,478 for interest. Interest was, of course, not paid. The contractor is now claiming \$18,196.44 for interest based on interest paid from February 17, 1981 through July 23, 1982." (AF-45, memorandum to files (Feb. 28, 1983 at 1)).

⁴ The following is quoted from the contracting officer's response of May 18, 1981:

"This office has no knowledge of unwritten change orders. Only one change order has been written, and to date a signed copy has not been received. If you do not concur with Change Order No. 1, as written, please return it unsigned with a letter of explanation.

"If you feel that you have a basis for any claims, please provide this office with the information, in writing, together with substantiating documentation." (AF-9).

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and No. 33 proposed in Change Order No. 1 and that the contractor would submit its credit amounts for these items⁵ with its additional claim as soon as the contractor had finalized them. The contractor submitted five claims totaling \$217,952 by letters under date of January 12, 1982.⁶ Representatives of the parties met at the Denver Service Center on January 28, 1982, at which time the contractor was requested to furnish additional documentation in support of its five claims. By letters under date of March 22, 1982, the contractor furnished some of the documentation previously requested by the Government and submitted an impact cost claim⁷ totaling \$204,224.⁸

In a four-page letter to the contractor on May 3, 1982,⁹ the contracting officer reviewed the claims previously submitted. The letter states that the Government should be in a position to discuss the claims by the first of June and that any additional information or documentation should be furnished by mid-May.¹⁰ The parties did meet in the office of the contractor's attorney in Anchorage, Alaska, on June 3 and 4, 1982, and discussed settlement. Except for the interest claim, the parties had resolved their differences by June 15, 1982. On that date a telegram was sent to the contractor specifying the terms of the agreement reached and noting that a change order would follow. The agreement was formalized in Change Order No. 2 dated July 2, 1982,¹¹ which was transmitted to the contractor by letter of that date (AF-29, 32-33, 35-36).

Except for a retainage amount of \$10,000, the amount due under Change Order No. 2 had been paid to the contractor by August 9, 1982. On or before August 20, 1982, the contracting officer had directed

⁵ The amount claimed by the contractor as a credit for the deletion of the two bid items was not submitted to the contracting officer until Jan. 12, 1982. The total credit claimed of \$20,362 was allowed in Change Order No. 2 dated July 2, 1982 (AF-14, 36).

⁶ One of the five claims was in the amount of \$100,175. It was for the added cost in excavating and placing the pipe due to a change from the alignment originally contemplated. Another claim in the amount of \$21,859 was for the added cost associated with the change in the location of the wet well from the design location in the plans and specifications. The two claims totaled \$122,034 (AF-12, 15).

⁷ The letter of Mar. 22, 1982, containing the impact cost claim was accompanied by what was described as a tabulation of actual costs which included a claim for interest in the amount of \$19,477.89 (AF-22).

⁸ Giving effect to a \$12,669.03 reduction in the original claim submission on Jan. 12, 1982, totaling \$217,952 and adding the impact cost claim submitted on Mar. 22, 1982, in the amount of \$204,224, the contractor's claim as submitted totaled \$409,506.97 (AF-12-16, 22-23).

⁹ In a letter written 4 days later to Senator Murkowski concerning the status of the contractor's claims, Mr. Denis P. Galvin, Manager, Denver Service Center states:

"At this time the matters referred to in Mr. Ferguson's letters are in dispute. We have, at this time, not recognized any liability for work referred to by Mr. Ferguson as change orders.

"We have been trying to resolve matters with Mr. Ferguson since last fall, and we will continue to meet with him. However, significant differences exist, and Mr. Ferguson should not necessarily expect an early resolution." (AF-30, letter of May 7, 1982).

¹⁰ In a letter written to Senator Murkowski on Apr. 15, 1982, the contractor had indicated that it wished to reach an agreeable settlement with the Park Service (AF-25 at 3).

¹¹ The change order included the following provisions:

"The negotiated cost for General Conditions lost through deletion of Bid Item Nos. 32 and 33 is \$20,362.00.

"Relocate sewer line and wet well from planned location to new location as located and constructed in the field in 1981. The negotiated cost for all work as completed, plus extended General Conditions and overhead, is \$104,648.00. Add \$125,000." (AF-36).

the bank to release all funds in the escrow account, thereby closing out the contract (AF-38, 39).

In letters to the contracting officer dated October 19, 1982, and February 7, 1983, the contractor described its claim of \$18,196.44 as a claim for interest expense accrued as a direct result of the cost of borrowing funds to complete change orders on the instant contract (AF-40, 44). In the letter of March 1, 1983, by which the claim for interest was denied,¹² the contracting officer states:

General Provision 20^[13] of the contract (Standard Form 23-A) incorporates by reference the cost principles of Part 1-15 of the Federal Procurement Regulations (41 CFR 1-15). Section 1-15.205-17 provides: "Interest on borrowings (however represented), bond discounts, cost of financing operations . . . are unallowable except for interest assessed by State and local taxing authorities . . ." Based on this provision,^[14] I have determined that the claim for interest on borrowings to accomplish change order work is without merit and is hereby denied.

(AF-45).

In the notice of appeal appellant appears to have largely abandoned the claim for interest on borrowings, as is considered to be shown by the language used in the appeal letter of May 12, 1983, from which the following is quoted:

Quoting a portion of the Federal Procurement Regulations (41 CFR 1-15) in support of the Park Service's refusal to grant our interest request, appears to be a direct contradiction of Clause 6 of 9140-80A, SBA-SP-2, paragraph d) of the supplementary provisions of the contract. This clause entirely replaces the standard clause 6, that Mr. Laubenheim quotes, in the contract and states that interest at rates fixed by the Secretary of the Treasury under the Renegotiation Act-Public Law 92-41, shall be paid on the amount found due on claims submitted under clause 6 (disputes clause) from the date the contracting officer receives [sic] the claim until the government makes payment. A claim, by definition in the clause, is a written request submitted to the contracting officer; for payment of money, adjustment of contract terms, or other relief; which is in dispute or remains unresolved after a reasonable time for its review and disposition by the government; and for which a contracting officer's decision is demanded.^[15] Our claim to the contracting officer, for the work performed that would eventually constitute change order # 2, was originally submitted in writing in February 1981^[16] (the letter is

¹² Immediately following the basis for the denial given in the text, *supra*, the contracting officer states: "In addition, I find through my review of contract documents and files that the contractor has not demonstrated that money was borrowed solely to accomplish change order work."

¹³ The General Provision cited reads as follows:

"20. Pricing of Adjustments

"When costs are a factor in any determination of a contract price adjustment pursuant to the Changes clause or any other provision of this contract, such costs shall be in accordance with the contract cost principles and procedures in Part 1-15 of the Federal Procurement Regulations (41 CFR 1-15) or Section XV of the Armed Services Procurement Regulation, as applicable, which are in effect on the date of this contract." (AF-1).

¹⁴ The provision currently in effect reads as follows:

"1-15.205-17 (Interest and other financial costs) Interest on borrowings (however represented), bond discounts, cost of financing and refinancing capital (net worth plus long-term liabilities), legal and professional fees paid in connection with the preparation of prospectuses, costs of preparation and issuance of stock rights, and directly associated costs are unallowable except for interest assessed by State or local taxing authorities * * *"

¹⁵ There is no indication in the record before us that a contracting officer's decision was demanded or even requested at any time prior to the execution of Change Order No. 2 dated July 2, 1982.

¹⁶ While in the letter of Feb. 21, 1981, the contractor protests what it described as unwritten change orders, the letter presented no monetary claim and contained no request for change orders. The letter stated that the contractor would be submitting claims for the unwritten changes (AF-8). No monetary claims were presented for over 10 months and the impact cost claim was not submitted until Mar. 22, 1982 (AF-12-16, 22).

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enclosed) and a recognition of the change order was not given to our company until after the letter of August 6, 1982 from our bonding company to the Park Service giving permission for that payment. In a letter written to Senator Murkowski on May 7, 1982, the Park Service clearly indicates that the work was eventually settled as change order # 2 was recognized by them as a dispute.

* * * [U]pon reading the clause again, we feel it is necessary only to demonstrate that we had an unsettled claim for over a reasonable period of time. We feel that change order # 2 for \$125,000.00 was in dispute for 18 months--well over anyone's conception of a reasonable period of time.

(AF-46).

The supplementary provision cited by appellant in its notice of appeal and relied upon principally for recovery in this case reads in pertinent part as follows:

6. DISPUTES

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601, et seq.). If a dispute arises relating to the contract, the Contractor may submit a claim to the Contracting Officer who shall issue a written decision on the dispute in the manner specified in FPR 1-1.318.

(b) "Claim" means:

- (1) a written request submitted to the Contracting Officer;
- (2) for payment of money, adjustment of contract terms, or other relief;
- (3) which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and
- (4) for which a Contracting Officer's decision is demanded.

(c) In the case of disputed requests or amendments to such requests for payment exceeding \$50,000, or with any amendment causing the total request in dispute to exceed \$50,000, the Contractor shall certify, at the time of submission as a claim, as follows:

I certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief; and that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable.

(Contractor's Name).....
(Title).....

- (d) The Government shall pay the Contractor interest;
 - (1) on the amount found due on claims submitted under this clause;
 - (2) at the rates fixed by the Secretary of the Treasury under the Renegotiation Act, Public Law 92-41;
 - (3) from the date the Contracting Officer receives the claim, until the Government makes payment.

(AF-1).

Discussion

In resolving the issue raised by this appeal, we shall first consider the question of the sum, if any, to which the appellant may be entitled for interest on borrowings as part of an equitable adjustment for constructive changes (reimbursement of costs paid to a bank as interest on sums represented to have been borrowed to finance contract changes). Then we shall address the question of the interest, if any, to which appellant may be entitled under the Contract Disputes Act of

1978 (41 U.S.C. §§ 601-613) as implemented by the Disputes Clause relied upon by appellant (text, *supra*).

[1] Cited by appellant as authorities supporting its interest on borrowings claim are the cases of *Algernon-Blair, Inc.*, GSBICA No. 4072 (Aug. 20, 1976), 76-2 BCA par. 12,073; *Keco Industries, Inc.*, ASBCA No. 15131 (Dec. 23, 1971), 72-1 BCA par. 9262; *Sun Electric Corp.*, ASBCA No. 13031 (June 30, 1970), 70-2 BCA par. 8371; and *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 17717 (Apr. 16, 1976), 76-1 BCA par. 11,851. The Government has cited our decision in *Cen-Vi-Ro of Texas, Inc.*, IBCA-718-5-68 and IBCA-755-12-68 (June 27, 1980), 87 I.D. 230, 244-45, 80-2 BCA par. 14,536 at 71,659-60 in connection with its assertion that appellant has failed to show that the money borrowed on which the claim for interest is based was related to this contract or to the change order (Govt. Brief at 4).

In none of the cases cited, however, did the contracts under which the claims were asserted include a contract provision similar to Clause 20 of the General Provisions (note 13, *supra*). One of the cost principles incorporated into the contract by Clause 20 is that "[i]nterest on borrowings (however represented) * * * are unallowable" (note 14, *supra*, and accompanying text). Commenting upon the significance of the prohibition against the allowance of interest as a cost, a standard reference work in the field of Government procurement states:

The Aerojet^[17] and Ingalls^[18] exceptions to the general rule disallowing interest on claims for nonpayment are narrowly framed. In no subsequent case has a contractor brought himself within their confines. See, e.g., LTV Electro-Systems, Inc., ASBCA 14832, 75-1 BCA par. 11,310 (1975); Systems Consultants, Inc., ASBCA 18487, 75-2 BCA par. 11,402 (1975); Entwistle Co., ASBCA 41918, 76-2 BCA par. 12,108 (1976).

It should be noted that DAR 15-205.17, which prohibits interest as a cost, was not incorporated into contracts in which interest recovery was permitted as a cost * * * .^[19]

The parties are apart on the question of whether appellant has shown that interest on borrowings for which claim has been made represents interest paid to finance the change orders with which we are here concerned. While the disparate position of the parties does involve a disputed question of fact, it does not involve a dispute over a material fact in the context of this appeal. This is so because under FPR 1-15.205-17 (incorporated into the instant contract by reference) interest on borrowings (however represented) is an unallowable cost.²⁰

[2] We now turn to the question of whether the interest claimed in the amount of \$18,196.44 is recoverable under the Contract Disputes Act of 1978, as implemented by Clause 6, *Disputes* (text, *supra*). In support of its position that the interest claimed is recoverable under the clause, appellant advances the argument that the work which was

¹⁷ *Aerojet-General Corp.*, ASBCA No. 17171 (Sept. 11, 1974), 74-2 BCA par. 10,863.

¹⁸ *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 17717 (Apr. 16, 1976), 76-1 BCA par. 11,851.

¹⁹ See Nash & Cibinic, *Federal Procurement Law* (1980), at 1948.

²⁰ See *Creative Electric, Inc.*, ASBCA No. 26368 (Feb. 24, 1983), 83-1 BCA par. 16,363, *aff'd on reconsideration*, 83-2 BCA par. 16,680.

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eventually settled as Change Order No. 2 was recognized by the Park Service as a dispute. Another argument made by appellant is that in order to recover, it is only necessary for it to show that the contractor had an unsettled claim for over a reasonable period of time.

Both of appellant's arguments founder upon that fact that the contract provision upon which appellant relies clearly requires that disputed requests in excess of \$50,000 be certified by the contractor at the time of submission as a claim²¹ and that the record before us indicates that the contractor's claims were not certified (*see* affidavit of contracting officer attached to the Government's Brief). Commenting upon the certification requirement in *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1384 (1983), the United States Court of Appeals for the Federal Circuit states:

Moreover, the statutory mandate that all claims over \$50,000 must be certified is one of the most significant provisions of the CDA. The importance Congress ascribed to the certification requirement as a mechanism to discourage the submission of unwarranted claims and encourage prompt settlements was fully discussed in *Lehman v. United States*, 673 F.2d 352 (Ct. Cl. 1982) and need not be repeated here. Suffice to say that certification is not a mere technicality to be disregarded at the whim of the contractor, but is an unequivocal prerequisite for a post-CDA claim being considered under the statute. The CDA "requires that to be valid a claim must be properly certified." *Folk Construction Co. v. United States*, Ct. Cl. No. 99-80C (order entered January 16, 1981). Unless that requirement is met, there is simply no claim on which a contracting officer can issue a decision. *Skelly & Loy v. United States*, 685 F.2d 414 (Ct. Cl. 1982). The submission of an uncertified claim, for purposes of the CDA, is, in effect, a legal nullity and therefore no interest can accrue.

The allowance of interest from the date of the filing of an uncertified claim would be inconsistent with the Congressional purpose because it would eliminate an important incentive for contractors to certify claims. The fact that a contractor cannot obtain interest upon an allowed claim unless it is certified is a compelling reason for contractors to certify all claims before filing them.

Based upon the record made in these proceedings, the Board finds that appellant failed to certify its claims in excess of \$50,000 to the contracting officer, as required by section 6(c) of the Contract Disputes Act of 1978 (note 21, *supra*), and that is therefore not entitled to payment of the interest provided for in section 12 thereof (41 U.S.C. § 611).

Decision

For the reasons stated and on the basis of the authorities cited, appellant's motion for summary judgment is denied; the Government's

²¹ The certification required by the clause is based on the provision of sec. 6(c) of the Contract Disputes Act of 1978, reading in pertinent part, as follows:

" * * * [F]or claims of more than \$50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable." (41 U.S.C. § 605(c)).

cross motion for summary judgment is granted; and the appeal is denied.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

APPEAL OF BECO CORP.

IBCA-1795

Decided *November 16, 1984*

Contract No. H50C14202845, Bureau of Indian Affairs.

Denied.

**Contracts: Construction and Operation: Contracting Officer--
Contracts: Construction and Operation: Labor Laws--Contracts:
Contract Disputes Act of 1978: Interest**

A claim for interest under the Contracts Disputes Act of 1978 is denied where the Board finds justifiable the contracting officer's action in withholding funds otherwise due the contractor in order to insure payment to the contractor's employees of fringe benefits included in wage determinations set forth in the contract under the authority of the David-Bacon Act.

APPEARANCES: Doyle H. Beck, President, BECO Corp., Idaho Falls, Idaho, for Appellant; Fritz L. Goreham, Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCGRAW INTERIOR BOARD OF CONTRACT APPEALS

The principal question presented by this appeal is whether the Government had a justifiable basis for withholding \$5,000¹ from sums otherwise due the contractor in order to insure payment to the contractor's employees of the fringe benefits provided for in the wage determinations included in the contract under the authority of the Davis-Bacon Act (40 U.S.C. § 276a-7 (1982)).

Background

Contract No. H50C14202845, in the amount of \$149,282.40, was awarded to appellant by the Phoenix Area Office, Bureau of Indian Affairs (BIA), Department of the Interior, on August 27, 1982, calling for certain roadwork to be performed on the Fort McDermitt Indian

¹ In the absence of a justifiable basis for the withholding being found, appellant would be entitled to interest under the Contract Disputes Act of 1978 on the amount withheld since a claim for the withheld amount was presented to the contracting officer for decision. See, *Fortec Constructors*, ASBCA No. 27601 (Mar. 18, 1983), 83-1 BCA par. 16,402 at 81,551.

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Reservation. The contract work was substantially completed on June 14, 1983, and was finally accepted on June 29, 1983.

Prepared on standard forms for construction contracts, the contracts included the general provisions set forth in standard form 23-A (rev. 4/75) and the labor standards provisions contained in standard form 19-A (rev. 1-79) from which the following is quoted:

1. DAVIS-BACON ACT (40 U.S.C. 276a-276a-7)

(a) All mechanics and laborers employed or working directly upon the site of the work shall be paid * * * the full amounts due at time of payment computed at wage rates not less than the aggregate of the basic hourly rates and the rates of payments, contributions, or costs for any fringe benefits contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof * * *

(b) The Contractor may discharge his obligation under this clause to workers in any classification for which the wage determination decision contains:

* * * * *

(2) Both a basic hourly rate of pay and fringe benefits payments,² by making payment in cash, by irrevocably making contributions pursuant to a fund, plan, or program for, and/or by assuming an enforceable commitment to bear the cost of, bona fide fringe benefits contemplated by the Davis-Bacon Act, or by any combination thereof.³ * * * In the event of disagreement between or among the interested parties as to an equivalent of any fringe benefit, the Contracting Officer shall submit the question, together with his recommendation, to the Secretary of Labor for final determination.

* * * * *

6. WITHHOLDING OF FUNDS

(a) The Contracting Officer may withhold or cause to be withheld from the Government Prime Contractor so much of the accrued payments or advances as may be considered necessary (1) to pay laborers and mechanics, including apprentices, trainees, watchmen, and guards employed by the Contractor or any subcontractor on the work the full amount of wages required by the contract, and (2) to satisfy any liability of the Contractor and any subcontractor for liquidated damages under paragraph (b) of the clause entitled "Contract Work Hours and Safety Standards Act-Overtime Compensation."

(b) If the Contractor or any subcontractor fails to pay any laborer, mechanic, apprentice, trainee, watchman, or guard employed or working on the site of work, all or part of the wages required by the contract, the Contracting Officer may, after written

² The wage determinations set forth in the instant contract include basic hourly rates of pay and specific amounts of fringe benefits payments under the captions "H&W, Pensions, Vacation and Education and/or Appr. Tr." (Appeal File 23). Hereafter, appeal file exhibits will be identified by AF followed by a reference to the particular exhibit being cited.

³ The applicable regulations provide in pertinent part:
"Subpart B-Interpretation of the Fringe Benefits Provisions of the Davis-Bacon Act

* * * * *

"§ 5.29 Specific fringe benefits.

* * * * *

"(e) Where the plan is not of the conventional type described in the preceding paragraph, it will be necessary for the Secretary to examine the facts and circumstances to determine whether they are 'bona fide' in accordance with requirements of the act. This is particularly true with respect to unfunded plans. Contractors or subcontractors seeking credit under the act for costs incurred for such plans must request specific permission from the Secretary under § 5.5(a)(1)(iv)." (AF 1-3).

notice to the Government Prime Contractor, take such action as may be necessary to cause suspension of any further payments or advances until such violations have ceased.

* * * * *

9. DISPUTES CONCERNING LABOR STANDARDS

Disputes arising out of the labor standards provisions of this contract shall be subject to the Disputes clause except to the extent such disputes involve the meaning of classifications or wage rates contained in the wage determination decisions of the Secretary of Labor or the applicability of the labor provisions of this contract which questions shall be referred to the Secretary of Labor in accordance with the procedures of the Department of Labor.

(AF 28).

In the brief submitted appellant asserts (i) that on May 12, 1983, the project COR (F. E. Scissons) contacted the contractor and advised them of their obligations under the contract with particular reference to the Indian preference programs and (ii) that just prior to construction the COR's son (Kenneth E. Scissons) was hired as a qualified Indian construction worker. Apropos of this appellant's brief states at page 2: "UPON EMPLOYMENT MR. SESSIONS [sic] EXECUTED A W-4 FORM PROVIDED BY BECO CORP [4] AGREEING THAT HE WOULD VOLUNTARILY ACCEPT MEMBERSHIP IN BECO'S HOURLY EMPLOYEE ASSN. AND WAS NOTIFIED THAT ALL HIS BENEFIT FUNDS WERE ATTRIBUTED TO A FEDERALLY APPROVED FUNDED PROGRAM AND THAT HE WAS 100% VESTED. (SEE AF 31)." On June 11, 1983, the project engineer (COR) states: "[F]ringe benefits not paid to employee or into approved plan." The certification of payroll for June 22, 1983, by the same official states: "[F]ringe benefits paid into unapproved plan" (AF 27-1, 27). By letter dated July 6, 1983 (AF 26), the contracting officer informed the contractor that the "Fringe Benefits Information Reports" and the statement from the First Interstate Bank⁵ furnished to the BIA were not adequate for the office to determine the validity of the contractor's unfunded plan⁶ for employees' fringe benefits. After stating what it would be necessary for the contractor to show before its fringe benefits plan or program could be approved, the letter directed the contractor to pay its employees in cash the fringe benefits due them until the plan could be reviewed and approved.

⁴ In pertinent part the cited exhibit reads as follows:

"Your Benefits Funds earned are contributed to a federally approved funded program in your name and you are 100% vested.

"I hereby voluntarily accept membership in the Beco Hourly Employees Association, and authorize my employer to discharge any wages and other benefits I may now or may hereafter be entitled to directly to the Association by deposit in the Association Trust Account.

"I have read and agree with the above terms." (AF 31).

⁵ Addressed to the Beco Employees Benefit Trust under date of July 20, 1982, the bank's "To Whom It May Concern" statement reads as follows: "In reference to Savings Account #04-3-2460738 which was put into effect December 1, 1982 is a trustee account. The authorized signatures acting as trustees are Lance G. Peterson and Lawrence J. Newell" (AF 24).

⁶ In its letter to the contracting officer of July 14, 1983, the contractor states: "Beco's plan or program is funded and therefore actuarially sound and is considered bona fide thru investigation by the Department of Labor in 1980" (AF 25-1).

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The contractor's response of July 14, 1983 (AF 25), advanced a number of arguments designed to show that its fringe benefits plan should be accepted by the Government. By letter under date of July 27, 1983 (AF 23), the contracting officer transmitted to the Phoenix office of the Department of Labor (DOL) all of the information⁷ provided by the contractor related to the subject together with copies of the correspondence between the parties. DOL was requested to review the information so furnished and to provide its comments as to the validity of the plan. Having been informally advised by DOL that the information previously furnished was inadequate to determine the acceptability of the contractor's fringe benefits plan, the contracting officer wrote the contractor on August 3, 1983 (AF 22), to request a copy of the plan and to inquire as to who controls the plan (giving the name of the bank, insurance, mutual funds, or broker handling the pension plan). In a letter dated August 11, 1983 (AF 21), the contracting officer notified the contractor that the amount of \$5,000 was being withheld pending approval and acceptance of the contractor's plan for fringe benefits and settlement of Idaho State taxes improperly withheld from wages of Nevada residents.

By its letter of August 22, 1983 (AF 20), the contractor submitted a copy of BECO Corp.'s (BECO's) Hourly Employees Ass'n constitution and a copy of the by-laws of the association, together with a copy of a letter from First Interstate Bank. In such letter the contractor states that the purpose of the plan was to provide the contractor's employees with their benefits in strict accordance with the Davis-Bacon Act and that the "funded" plan was controlled by all BECO hourly employees. After noting that it was unaware of any complaints against it having been filed and that there was no order from DOL requiring retention of any money, the contractor demanded the immediate payment of all contract amounts due. The information furnished with the contractor's letter of August 22, 1983, was transmitted to DOL's Phoenix Office by the contracting officer's letter of September 14, 1983.⁸

In a telephone conversation on October 5, 1983, BIA learned that all documents mailed up until that time including the last letter had been forwarded to DOL's Regional Office in San Francisco for their determination (AF 16). On or about November 18, 1983, the contracting officer learned that the documents in question had been mailed to DOL's national region in Washington, D.C. (AF 14).

In a letter to the contracting officer under date of May 11, 1984 (AF 1), DOL's Washington, D.C., Office stated that its letter was in response to BIA's letter to its Phoenix Area Office requesting DOL's

⁷ The letter stated: "This office cannot determine from the information furnished by the contractor that the amount of contributions for fringe benefits were made to a trustee or to a third person irrevocably" (AF 23).

⁸ The penultimate paragraph of the letter states: "Please inform this office whether Beco Corporation's pension plan is considered an acceptable plan for his employee fringe benefits" (AF 18).

review of BECO's pension plan for the purpose of determining whether contributions made thereto would be creditable towards the firm's prevailing wage obligations under the Davis-Bacon Act. Addressing this question, the letter states: "[S]ince the material you submitted did not contain a copy of the firm's pension plan and you do not have a copy of the plan, we cannot comment on the acceptability of Beco's fringe benefit plan at this time."

Meanwhile, on November 1, 1973 (AF 15), the members of BECO's Hourly Employees Ass'n had been notified that the annual meeting of the association would be held in Idaho Falls, Idaho, on December 1, 1983, and that the major issue on the agenda would be the disposition of benefit funds. At the December 1, 1983, meeting, all the attending members of the association voted unanimously "that all monies accumulated by each individual shall be refunded directly to that individual." On the same date the association wrote Kenneth Scissons to inform him of the results of the meeting. The final paragraph of the letter states: "Please sign and return the enclosed release form and upon receipt of said form, Beco Hourly Empl. Assn. will forward your refund check in the amount of \$372.87" (AF 10).⁹ In a visit to the office of the Field Solicitor in Phoenix on February 10, 1984, Mr. Doyle Beck, president of appellant corporation, advised the Field Solicitor (i) that except for Kenneth Scissons all employees on the contract had been paid in cash the full value of the withheld fringe benefits and (ii) that payment had been made by BECO's Hourly Employees Ass'n pursuant to the vote at its annual meeting on December 1, 1983 (AF 5). Subsequently, by letter dated March 30, 1984, the contractor transmitted to the contracting officer copies of the authorization for representation form executed by all the employees utilized in performing the contract. In a letter to the contractor dated April 6, 1984, the contracting officer acknowledged receipt of the "Authorization for Representation" forms signed and dated by each laborer and equipment operator after which he stated:

[I]t is assumed that all fringe benefits withheld under this contract have now been released in full to each employee. Based thereon, our paying office has been authorized to process your final payment.

There are no provisions set forth in the Davis-Bacon Act for payment of interest on funds withheld from the Prime Contractor for the protection of laborers and mechanics. (AF 2).

Discussion

In its brief appellant advances a number of arguments and in some instances cites exhibits contained in the appeal file in support of its assertions.¹⁰ One of the contentions made is that at the time Kenneth

⁹ The \$372.87 figure in the text is the total amount shown as owed to Kenneth E. Scissons for fringe benefits in the "Fringe Benefits Information Report" of June 22, 1983 (AF 23-1).

¹⁰ The contractor requested a contracting officer's decision in its letter of Aug. 22, 1983, and requested the immediate payment of all monies due along with the applicable interest in its letter of Nov. 8, 1983 (AF 14, 20). In the

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Scissions (the COR's son) was employed, he executed a W-4 form provided by BECO in which he agreed to accept membership in BECO's Hourly Employees Ass'n upon the understanding that all his benefit funds were attributed to a federally approved funded program and that he was 100 percent vested. Although appellant cites AF 31 in support of these statements, that exhibit is a form (transmitted with appellant's brief) which has not been executed by Kenneth Scissions or by anyone else.

Another contention is that in 1980 the DOL investigated and reviewed BECO's plan and program and noted certain deficiencies which were immediately corrected at that time. Except for appellant's allegations, the record is entirely devoid of any evidence showing that DOL had approved a fringe benefit plan of the contractor in 1980. In this regard, the Board notes that the evidence of record shows that the trustee account at the First Interstate Bank of Idaho was established in December 1981¹¹ and that the constitution and by-laws of BECO's Hourly Employees Ass'n were not adopted until early January 1983.

Appellant also contends that the Government arbitrarily and capriciously elected to retain \$5,000 of appellant's monies and that the arbitrariness of the action is shown by the fact that the Government initially demanded strict payment immediately by cash, then stated that it would release the funds upon proof of payment by cancelled check for both alleged tax deductions and benefit deductions and then paid BECO with the mere statement that it was assumed that all the benefits had been paid based on the authorization of representation. The change in the Government position occurred, however, only after some very significant events had taken place including (i) a meeting of BECO's Hourly Employees Ass'n in which all members present voted unanimously that all monies accumulated by each individual should be refunded directly to that individual; (ii) that at a considerably later time the president of the appellant corporation represented to the Field Solicitor in Phoenix that except for the COR's son, all employees on the contract had been paid in cash the full value of the withheld benefits; and, (iii) that at a still later date evidence was submitted showing that all employees on the contract (including the COR's son) had signed authorization for representation forms authorizing BECO's Hourly Employees Ass'n to represent each of them in bargaining with the contractor on all matters pertaining to wages, hours, and other conditions of employment.

Lastly, appellant asserts that the Government has no rights other than through DOL to make the determination of whether there is a

Complaint, appellant seeks what is described as an equitable adjustment in the amount of \$369.31 plus interest and claim costs. Appellant's brief makes clear that the claim is for interest on the \$5,000 withheld for the period involved in the withholding and for claim costs for the continued harassment of the Government in this matter (Appellant's Brief at 5-6).

¹¹ Because of the tense employed in the bank's statement of July 20, 1982, it has been assumed that the trust account was put into effect on Dec. 1, 1981, rather than on Dec. 1, 1982, as shown in the statement (note 5).

violation of the Davis-Bacon Act or whether a plan is bona fide. There is nothing in the files of this on-the-record case to show that the contracting officer determined that the contractor was in violation of the Davis-Bacon Act; nor is there any evidence to show that the contracting officer accepted at face value the project engineer's assessment that the fringe benefits payments were being made into an unapproved plan.¹² Instead, the contracting officer submitted the information initially furnished by the contractor to DOL with the request that it review and provide comments as to the validity of the contractor's fringe benefits plan or program (AF 23). Additional information provided by the contractor was also submitted to DOL (AF 18). Thereafter DOL's Washington, D.C., office stated that from the information submitted it was unable to comment on the acceptability of BECO's fringe benefits plan (AF 1). There is no reason to fault the contracting officer for being unable to find the contractor's fringe benefits plan acceptable when based upon having the same information before it, DOL was unable to do so.

Upon the basis of the record made in these proceedings, the Board finds (i) that clause 6 of the standard labor provisions (text, *supra*) authorizes the contracting officer to withhold from the contractor the funds necessary to pay employees of the contractor the full amount of wages required by the contract (including in such wages the fringe benefits provided for in the wages determinations set forth in the contract as required by the Davis-Bacon Act); (ii) that acting apparently under the authority contained in clause 6, the contracting officer withheld \$5,000 from sums otherwise due the contractor to insure that its employees were paid the fringe benefits due them; and (iii) that that sum continued to be withheld until the contracting officer was satisfied that the arrangements made insured the payment to the concerned employees of all of the fringe benefits to which they were entitled. So finding, the Board further finds that the withholding of the \$5,000 for the period involved was justifiable and that, consequently, no interest is payable thereon.

Decision

For the reasons stated and on the basis of the authorities cited, the appeal is denied.

WILLIAM F. MCGRAW
Chief Administrative Judge

¹² The conclusory statements of the project engineer that the fringe benefits were paid into an unapproved plan were made in June 1983 (AF 27, 27-1). The contracting officer's action of withholding \$5,000 did not occur until Aug. 11, 1983 (AF 21), which was after DOL had advised the contracting officer that the information initially furnished by the contractor was inadequate to determine the acceptability of the contractor's fringe benefits plan (AF 22).

November 16, 1984

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

*December 10, 1984***JOE J. PINSON *ET AL.***

84 IBLA 96

Decided *December 10, 1984*

Appeals from decisions of the Nevada State Office, Bureau of Land Management, rejecting desert land entry applications N 24679, N 24680, and N 28223 through N 28227.

Affirmed.**1. Desert Land Entry: Applications--Desert Land Entry: Water Right**

A desert land entry application is properly rejected where the applicant proposes to irrigate the entry from underground water sources but fails to show at the time of filing the application that a right to appropriate underground water has been acquired or that appropriate steps have been taken, as far as then possible, toward the acquisition of such a right.

APPEARANCES: Gary R. Christiansen, Esq., Kalispell, Montana, for appellants.

*OPINION BY ADMINISTRATIVE JUDGE GRANT**INTERIOR BOARD OF LAND APPEALS*

Joe J. Pinson and Jada J. Parrish appeal from March 20, 1984, decisions of the Nevada State Office, Bureau of Land Management (BLM), rejecting desert land entry applications N 24679 and N 24680. Sandra Pinson, Judd J. Pinson, Janice J. Pinson, Isabel H. Reyes, and Floyd D. Pinson appeal from March 21, 1984, decisions of the Nevada State Office, BLM, rejecting desert land entry applications N 28223 through N 28227. BLM separately rejected these applications because each appellant had not "proceeded as far as possible in acquiring a right to water for irrigation of [his or her] entry." BLM explained that information submitted with each application indicated a proposal to irrigate the entry from a well, but that the applicants failed to provide evidence that they had applied to the Nevada State Water Engineer for appropriation of underground water for irrigation purposes.

Each of these desert land entry applications was filed for 317- to 320-acre tracts situated in close proximity in Elko County, Nevada.¹ All except application N 28225 (Janice J. Pinson) proposed to obtain water from common wells in a joint irrigation system. An explanation of the "community system" was attached to the application of each participating applicant. Application N 28225 included a proposal for a separate well.

These appeals have been consolidated by the Board because of the common factual context and the common issue presented. The

¹ N 24679 and N 24680 were originally filed on May 29, 1979. Amended applications for N 24679 and N 24680 and original applications for N 28223 through N 28227 were received by BLM on Jan. 11, 1980, under a cover letter from Joe Pinson.

statements of reasons in support of the appeals are virtually identical. Each appellant asserts:

That the Appellant[s], acting by and through Joe J. Pinson and Janice J. Pinson, have in fact complied with the provisions and intent of 43 CFR 2521.2(d) to the best of their knowledge and abilities and to the extent they were informed they needed to comply and, in fact, could comply.[²]

An affidavit of Joe J. Pinson and Janice J. Pinson accompanied each statement of reasons. They recited facts of several meetings and discussions with BLM officials and jointly testified that: "To the best of our knowledge, and relying upon our conferences with [BLM representatives], we felt that we could not proceed further either with our water development or application." They state that they were never informed that they could "complete and file any water rights papers until after approval of our Desert Land Applications." Accompanying the appeals was a copy of an "Application for Permit to Appropriate the Public Waters of the State of Nevada" executed by Joe J. Pinson on behalf of an association of the seven appellants named here, including Janice J. Pinson.³ Although the copy of the application does not disclose the date it was executed or the date it was filed with the Nevada State Water Engineer, it appears that the water permit application was not filed with the State until after issuance of the decisions under appeal.⁴

[1] The Desert Land Act, 43 U.S.C. § 321 (1982), provides for the entry of desert lands for the purpose of reclaiming them "by conducting water upon the same * * * *Provided, however,* That the right to the use of water by the person so conducting the same * * * shall depend upon bona fide prior appropriation." (Italics in original.) The pertinent regulation, 43 CFR 2521.2(d), provides that no desert land entry application will be allowed unless accompanied by evidence satisfactorily showing that the prospective entryman has acquired the right to permanent use of sufficient water to irrigate and reclaim all of the irrigable portion of the land sought, or that he has initiated and prosecuted, so far as then possible, appropriate steps leading to the acquisition of such a water right. Question 12b of the application form, Form 2520-1 (August 1977), asks whether the applicant has complied with this requirement and adds that if the answer is "yes," the applicant "must present as evidence and make a part of this

² An applicant is not precluded from obtaining the assistance of a family member in making an application before the Department. See 43 CFR 1.2, 1.3. Further, persons making desert land entry applications may associate together in the construction of canals and ditches for irrigating and reclaiming the tracts for which they have applied. 43 U.S.C. § 327 (1982).

However, it should be noted that the aggregate acreage which one person may obtain by desert land entry application is 320 acres. 43 U.S.C. § 321 (1982). No assignment may be made of an entry to an association or corporation and no assignment may be made to an individual except to the extent that individual is eligible to apply for the tract of land assigned. 43 U.S.C. § 324 (1982). Assignments or agreements to assign in contravention of this restriction made before patent may result in rejection of applications or even cancellation of patents. See *Reed v. Morton*, 480 F.2d 634 (9th Cir.), cert. denied, 414 U.S. 1064 (1973).

³ The explanatory map presents a proposal to irrigate Janice J. Pinson's entry, N 28225, with water from the community system channeled to the subject lands through a ditch.

⁴ A telephone report in the case file discloses that as of Apr. 18, 1984, the water permit application had not been received by the Office of the State Water Engineer and that further discussion with that office indicated that all available irrigation water in the general area of the proposed desert land entries was allocated.

December 10, 1984

application copies of any commitments [sic] you may have, which show the legal source of your proposed water supply." All seven appellants answered "yes" but failed to submit any evidence of water rights or applications therefor.

The Department has consistently held that a desert land entry application *not accompanied* by evidence showing both that the applicant has obtained a water right and that the right would provide a permanent and feasible source of sufficient water for irrigation is properly rejected. *Elmer A. Kubler*, 80 IBLA 283 (1984); *Janice Pearson*, 73 IBLA 220 (1983); *Patricia K. Scher*, 59 IBLA 276 (1981). Further, this Board has held that an application in Nevada is properly rejected where the applicant who proposes to irrigate the land by means of a well makes no showing that, at the time of filing of his application, he had taken any action necessary to initiate the right to appropriate underground water. *Elmer A. Kubler, supra*; *James Neil Fletcher*, 78 IBLA 330 (1984); *James R. Hardcastle*, 69 IBLA 341 (1982), and cases cited therein.

Appellants allege that they were unaware of the need to comply with this requirement and were misled by BLM regarding whether the submitted applications were complete. However, persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); 44 U.S.C. §§ 1507, 1510 (1982). It is expected that a party anticipating a benefit should be familiar with the relevant authority under which such benefit is to be conferred and with which he or she must comply. Further, reliance on erroneous opinion or information provided by BLM employees cannot relieve an applicant of a statutory or regulatory obligation, or of the consequences for failure to comply. See *Harriet C. Shaftel*, 79 IBLA 228 (1984); *John L. Grassmeier*, 77 IBLA 156, 159 (1983); 43 CFR 1810.3(c).

Since these desert land entry applications were not accompanied by the required evidence of a sufficient water right or appropriate efforts to acquire such right, they were properly rejected by BLM. Evidence tendered on appeal tending to show that an application for water rights was filed *after* rejection of the application does not justify reversal of the decision. However, BLM's rejection is without prejudice to appellants' right to file another complete application with the evidence of his or her newly initiated efforts to obtain a sufficient water right. *James Neil Fletcher, supra*.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

WM. PHILIP HORTON
Chief Administrative Judge

**APPEAL OF ONTARIO FLIGHT SERVICE, INC. (ON
RECONSIDERATION)**

IBCA-1812 (A-76)

Decided *December 12, 1984*

Contract No. 80-0827, Office of Aircraft Services.

Dismissed for Lack of Jurisdiction.

OMB Circular A-76

On reconsideration, an order of dismissal for lack of jurisdiction is affirmed where the circular does not provide for the appeal.

APPEARANCES: Frederick V. Shoemaker, Clemons, Cosho & Humphrey, P.A., Attorneys at Law, Boise, Idaho, for Appellant; William Douglas Back, Department Counsel, Portland, Oregon, for the Government.

OPINION BY JUDGE RUSSELL C. LYNCH

A-76 APPEALS OFFICIAL

In an order dated September 20, 1984, this A-76 appeal was dismissed for lack of jurisdiction. Subsequently, by letter dated November 1, 1984, appellant requested reconsideration of the dismissal based on a letter of October 22, 1984, from the Administrator of the Office of Federal Procurement Policy (OFPP). That letter concluded that the "Appeals of Cost Comparison Decisions" policy in Part 1, Chapter 3, paragraph 1 of the supplement to OMB Circular A-76 applies to this case, and that a full cost comparison must be accomplished to bring a contracted activity back in-house.

The gist of the dismissal order was that the decision to allow appellant's aircraft lease to expire at the end of its present option period and to use a less expensive Government-owned aircraft was not a conversion to contract for which an appeal will lie under the limited appeal rights given by the circular. More particularly, this narrow view of the appeal rights was based on paragraph 7.c(8) of the scope of the circular stating that it shall not:

Establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in Part 1, Chapter 2, paragraph 1 of the Supplement, "Appeals of Cost Comparison Decisions."

December 12, 1984

If meaning is to be given the above section, appellant's right to appeal must be found in the "appeal rights" part of the circular. An appeal is provided for justifications to convert to contract without a cost comparison; however, none is provided for the conversion of contract work to in-house performance without a cost comparison. Appellant claims that the agency action to allow his lease to expire without a new cost comparison is not in accordance with the circular because it is a conversion of an A-76 activity to in-house performance. This argument is founded on Part 1, Chapter 1, C. 3. entitled "Existing Contracts" providing that contracted commercial activities should be continually monitored to ensure performance is satisfactory and cost effective. The section further provides that when contract costs become unreasonable or performance becomes unsatisfactory, a cost comparison shall be performed.

A rationale for considering that a new cost comparison is mandatory under these circumstances, and that an appeal will lie for failure to perform the cost comparison prior to undertaking in-house performance was determined in discussions with OFPP. The policy underlying the circular is to require reliance on the private sector for commercial activities when such reliance is shown to be more cost effective. The methodology for determining which is more cost effective is to inventory those agency activities which may be classed as commercial and to perform cost comparisons of in-house performance and bids from the private sector. This was done in 1982 resulting in a determination to provide the pilot services with in-house personnel and to lease an aircraft from appellant. Therefore, the determination of the most cost-effective manner to secure the transportation services in 1982 was a hybrid decision involving both in-house services and reliance on the private sector. The apparent intent under the circular is that once a determination is made pursuant to an A-76 cost comparison, both the Government and the private sector secure a bias in favor of continuing their portion of the activity until unsatisfactory performance or unreasonable costs is shown by a new cost comparison to warrant a change.

In the instant case, the Government conducted an in-house study to conclude that significant savings would result by replacement of the leased aircraft with a Government-owned aircraft that had become available. The latter aircraft did not meet the requirements of the specification appellant had bid against in 1982, and new bids were not solicited from appellant and others to provide an older aircraft to compare with the cost of using the Government-owned aircraft. Therefore, the in-house cost study did not constitute a new cost comparison of in-house and private sector performance of the furnishing of comparable aircraft.

Whether the above circumstances constitute a violation of the A-76 circular is not the function of this Appeals Official to decide. The

circular provides detailed policy guidance for the agencies to identify, inventory, and make cost-comparison studies of commercial activities. The circular also provides for limited appeal procedures which relate primarily to questions of whether the cost comparisons properly account for all the costs of bidders or Government employees performing the exact same functions. The many other considerations and decisions involved in the agency's compliance with the policy statement are specifically excluded both substantively and procedurally from the appeal procedures by paragraph 7.c(8). Any other interpretation of this paragraph would make meaningless the 15-day appeal period provided in the circular, and extend the appeal procedures into an extensive oversight of all A-76 determinations and subsequent alleged violations, regardless of when they occur.

By letter dated November 21, 1984, the Bureau of Reclamation reaffirmed to appellant that the Bureau of Reclamation does not intend to exercise its option to renew the existing lease of appellant's aircraft at the end of the current term which expires January 3, 1985. Additionally, the Bureau of Reclamation advises that it is undertaking an A-76 cost comparison, without conceding the necessity to do so, to permit a cost comparison of using the Government aircraft and the cost of procuring by lease a similar aircraft from appellant or other bidders.

In the interim period after appellant's lease has expired and a determination is made on the cost comparison, the Government-owned aircraft will be used. Appellant contends that the Government is obliged to continue on with the existing contract because the determination under the 1982 cost comparison to lease for 1 year with options to renew annually for 5 years created a circular-derived bias in favor of continuing the lease unless and until appellant's performance was shown to be unsatisfactory. In short, appellant considers that the Government's inherent contractual right to renew or not to renew the aircraft lease, *at its option*, is vitiated by the policy requirements of the circular. A second letter from the Administrator, OFPP, of December 3, 1984, addressed to appellant's counsel is supportive of this view, indicating that "in order to convert the contract portion of the operation to a Government operation, the Bureau of Reclamation must follow the policies of A-76." These policies are indicated to require a new cost-comparison study with recompetition based on the Government surplus aircraft specifications before a determination is made to convert to use of the Government-owned aircraft.

The OFPP letters to appellant construing the intent of the circular's statements of policy are not helpful to the disposition of this case. Both the originator of the policy and this Appeals Official are bound by the policy as written. The circular, as issued under date of August 4, 1983, includes an express determination on the question of whether the policy was to create new contractual obligations for the parties to contracts resulting from cost-comparison decisions thereunder. That expression was included in the statement that it shall not establish

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and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction--except as specifically set forth in the section entitled "Appeals of Cost Comparison Decisions." No appeal is provided in the appeals section for a decision to terminate a contracted service resulting from a cost-comparison study. Therefore, it appears clear that an action or inaction of the Department respecting compliance with the policy was expressly determined not to alter existing contractual rights and obligations.

The delegation of authority to receive and decide finally for the Department those appeals arising from the Department's A-76 cost-comparison determinations is limited to appeals allowed under the circular. The circular does not currently allow this appeal from a decision not to renew appellant's contract for the lease of an aircraft.

Therefore, the order of dismissal for lack of jurisdiction is affirmed, and reconsideration is denied.

RUSSELL C. LYNCH
A-76 Appeals Official

APPEAL OF APPLICATORS, INC.

IBCA-1797 (A-76)

Decided *December 31, 1984*

Contract No. IFB 3-4-51, National Park Service.

Dismissed.

OMB Circular A-76

An appeal arising out of a cost comparison by the National Park Service under OMB Circular A-76 is dismissed as moot where a newly enacted statute prohibits the National Park Service from awarding any contracts pursuant to the Circular absent specific appropriations therefor, and no specific appropriations are provided for the purpose of the contract.

APPEARANCES: Michael J. Silverman, Estimator, Applicators, Inc., Laurel, Maryland for Appellant; Alton Woods, Department Counsel, Washington, D.C., for the Government.

OPINION BY JUDGE RUSSELL C. LYNCH

A-76 APPEALS OFFICIAL

The National Park Service (NPS) conducted a cost-comparison study under the OMB Circular A-76 to determine whether it would be more cost effective to continue certain maintenance work with Government employees or to contract for the work with the lowest bidder. The work consists of maintenance of roads, bridges, parking areas, and walks on the George Washington Memorial Parkway over a 3-year period. The Government estimate for performance of the work was \$528,325. Of the bids received, appellant's bid of \$787,323 was the lowest. Appellant challenged the Government estimate because of the failure to include

phase-in costs, understated supervisory and clerical costs, failure to include costs for all of the performance work statement requirements, and other alleged discrepancies.

An oral presentation by the parties was held on November 7, 1984, with appellant demonstrating that some of the Government costs were, in fact, understated or omitted from the estimate. However, the Government contended that the errors and omissions in the estimate were not sufficient to overcome the lower cost of continuing the work with Government employees. Additionally, the Government counsel argued that even if appellant succeeded in showing that the award of a contract for the work would be less costly, the contracting officer lacked the authority to award a contract because of enactment of P.L. 98-540 (October 24, 1984). This statute prohibits the NPS from awarding any contracts pursuant to OMB Circular A-76 during fiscal years 1985 through 1988 absent specific appropriations therefor. Government counsel affirmed that there were no specific appropriations provided for this contract work in the current fiscal year.

It is clearly established law that the authority of the contracting officer is limited by the lack of availability of appropriations for the purpose of awarding a contract. By withholding appropriations for the NPS to award contracts pursuant to cost comparisons under OMB Circular A-76, the Congress prevents the contracting officer from having the authority to award a contract to appellant.

Therefore, the issues in this appeal have been made moot by the statute and the appeal is hereby dismissed.

RUSSELL C. LYNCH
A-76 Appeals Official

APPEAL OF CRIMSON ENTERPRISES, INC.

IBCA-1876 (A-76)

Decided *December 31, 1984*

Solicitation No. 1200-84-016, National Park Service.

Dismissed.

OMB Circular A-76

An appeal arising out of a cost comparison by the National Park Service under OMB Circular A-76 is dismissed as moot where a newly enacted statute prohibits the National Park Service from awarding any contracts pursuant to the Circular absent specific appropriations therefor, and no specific appropriations are provided for the purpose of the contract.

APPEARANCES: S. Gregory Joy, Attorney at Law, Smith, Currie & Hancock, Atlanta, Georgia, for Appellant; William A. Perry, Department Counsel, Denver, Colorado, for the Government.

December 31, 1984

OPINION BY JUDGE RUSSELL C. LYNCH

A-76 APPEALS OFFICIAL

The National Park Service (NPS) conducted a cost-comparison study under the OMB Circular A-76 to determine whether it would be more cost effective to continue certain operational and maintenance work with Government employees or to contract for the work with the lowest bidder. The work consists of the operation and maintenance of buildings and utilities at the Big Horn Canyon National Recreation Area. Competitive bids for the contract were opened on August 23, 1984, with appellant the apparent low bidder. Appellant filed this protest on November 19, 1984, alleging that there were significant differences between the performance work statement included in the bid documents and that used by the Government in the preparation of the estimate to do the work with Government employees.

The Government contends that appellant's protest is untimely because it was filed more than 45 days after the cost-comparison data was available upon request to appellant. Additionally, the Government argues that the protest is made moot by the recent enactment of P.L. 98-540 (October 24, 1984), which prohibits the NPS from awarding any contracts pursuant to OMB Circular A-76 during fiscal years 1985 through 1988 absent specific appropriations therefor. Government counsel affirms that the NPS has received no appropriations to award a contract for the above-referenced services.

It is clearly established law that the authority of the contracting officer is limited by the lack of availability of appropriations for the purpose of awarding a contract. By withholding appropriations for the NPS to award contracts pursuant to cost comparisons under OMB Circular A-76, the Congress prevents the contracting officer from having the authority to award a contract to appellant.

Therefore, the issues in this appeal have been made moot by the statute and the appeal is hereby dismissed.

RUSSELL C. LYNCH
A-76 Appeals Official