

UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior - - - - - Donald P. Hodel

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

Office of the Solicitor - - - Ralph W. Tarr, Solicitor

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

EDITED BY

RACHAEL CUBBAGE



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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1985, to December 31, 1985. It includes the most important administrative decisions and legal opinions rendered by officials of the Department during that period.

The Honorable Donald P. Hodel served as Secretary of the Interior during the period covered by this volume; Ms. Ann Dore McLaughlin served as Under Secretary; Messrs. Robert N. Broadbent, J. Steven Griles, William P. Horn, Richard Montoya, Gerald R. Riso, 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 "92 I.D."

II

A handwritten signature in cursive script that reads "Donald Paul Hodel". The signature is written in dark ink and is positioned above the printed name of the Secretary of the Interior.

Secretary of the Interior

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ERRATA:

Page 383—Heading lines incorrectly set for Tommy Carpenter *et al.*

Page 493—Fn. 49, 4th line, 2nd paragraph, change to *supra* n.45.

Page 505—"Two federal cases" starts 2nd paragraph of fn. 151 from p. 504; fn. 158, 3rd line, change to *supra* n.45.

Pages 505-506—Fn. 161, last line, change to *supra* n.45.

Page 506—Fn. 162, 4th and 7th lines, change to *supra* n.45; 9th line change to *supra* n.41.

Page 506—Fn. 163, last line, change to *supra* n.45.

Page 506—Fn. 165, last line, change to *supra* n.45.

Page 506—Fn. 167, 5th and 9th lines, change to *supra* n.45.

Page 506—Fn. 168, 1st and 8th lines, change to *supra* n.45.

Page 539—No. 10, line 3, should read "Secretary has."

Page 540—Line 2 should read "listed above *seriatim.*"

Page 577—Line 15, change to *Supra* at 574.

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- Burdick, Charles W. (34 L.D. 345); modified, 42 L.D. 472.
- Burgess, Allen L. (24 L.D. 11); overruled so far as in conflict, 42 L.D. 321.
- Burkholder *v.* Skagen (4 L.D. 166); overruled, 9 L.D. 153.
- Burnham Chemical Co. *v.* U.S. Borax Co. (54 I.D. 183); overruled in substance, 58 I.D. 426, 429.
- Burns, David A., 30 IBLA 359 (1977); *rev'd*, Exxon Pipeline Co., *et al.* *v.* Burns, Civ. No. A82-454 (D. Ala., Oct. 22, 1985).
- Burns, Frank (10 L.D. 365); overruled so far as in conflict, 51 L.D. 454.
- Burns *v.* Bergh's Heirs (37 L.D. 161); vacated, 51 L.D. 268.
- Buttery *v.* Sprout (2 L.D. 293); overruled, 5 L.D. 591.
- Cagle *v.* Mendenhall (20 L.D. 447); overruled, 23 L.D. 533.
- Cain *v.* Addenda Mining Co. (24 L.D. 18); vacated, 29 L.D. 62.
- California & Oregon Land Co. (21 L.D. 344); overruled, 26 L.D. 453.
- California, State of (14 L.D. 253); vacated, 23 L.D. 230; overruled, 31 L.D. 335.
- California, State of (15 L.D. 10); overruled, 23 L.D. 423.
- California, State of (19 L.D. 585); vacated, 28 L.D. 57.
- California, State of (22 L.D. 428); overruled, 32 L.D. 34.
- California, State of (32 L.D. 346); vacated, 50 L.D. 628 (See 37 L.D. 499; 46 L.D. 396).
- California, State of (44 L.D. 118; 468); overruled, 48 L.D. 97, 98.
- California, State of *v.* Moccettini (19 L.D. 359); overruled, 31 L.D. 335.
- California, State of *v.* Pierce (9 C.L.O. 118); modified, 2 L.D. 854.
- California *v.* Smith (5 L.D. 543); overruled so far as in conflict, 18 L.D. 343.

- California Energy Co., 63 IBLA 159 (1982); *rev'd*, 85 IBLA 254, 92 I.D. 125.
- Call v. Swain (3 L.D. 46); overruled, 18 L.D. 373.
- Cameron Lode (13 L.D. 369); overruled so far as in conflict, 25 L.D. 518.
- Camplan v. Northern Pacific R.R. (28 L.D. 118); overruled so far as in conflict, 29 L.D. 550.
- Case v. Church (17 L.D. 578); overruled, 26 L.D. 453.
- Case v. Kupferschmidt (30 L.D. 9); overruled so far as in conflict, 47 L.D. 406.
- Castello v. Bonnie (20 L.D. 311); overruled, 22 L.D. 174.
- Cate v. Northern Pacific Ry. (41 L.D. 316); overruled so far as in conflict, 43 L.D. 60.
- Cawood v. Dumas (22 L.D. 585); vacated, 25 L.D. 526.
- Centerville Mining & Milling Co. (39 L.D. 80); no longer controlling, 48 L.D. 17.
- Central Pacific R.R. (29 L.D. 589); modified, 48 L.D. 58.
- Central Pacific R.R. v. Orr (2 L.D. 525); overruled, 11 L.D. 445.
- Chapman v. Willamette Valley & Cascade Mountain Wagon Road Co. (13 L.D. 61); overruled, 20 L.D. 259.
- Chappell v. Clark (27 L.D. 334); modified, 27 L.D. 532.
- Chicago Placer Mining Claim (34 L.D. 9); overruled, 42 L.D. 453.
- Childress v. Smith (15 L.D. 89); overruled, 26 L.D. 453.
- Christofferson, Peter (3 L.D. 329); modified, 6 L.D. 284, 624.
- Claffin v. Thompson (28 L.D. 279); overruled, 29 L.D. 693.
- Claney v. Ragland (38 L.D. 550) (See 43 L.D. 485).
- Clark, Yulu S., A-22852, Feb. 20, 1941; overruled so far as in conflict, 59 I.D. 258, 260.
- Clarke, C. W. (32 L.D. 233); overruled so far as in conflict, 51 L.D. 51.
- Cline v. Urban (29 L.D. 96); overruled, 46 L.D. 492.
- Clipper Mining Co. (22 L.D. 527); no longer followed in part, 67 I.D. 417.
- Clipper Mining Co. v. Eli Mining & Land Co. (33 L.D. 660); no longer followed in part, 67 I.D. 417.
- Cochran v. Dwyer (9 L.D. 478) (See 39 L.D. 162, 225).
- Coffin, Edgar A. (33 L.D. 245); overruled so far as in conflict, 52 L.D. 153.
- Coffin, Mary E. (34 L.D. 564); overruled so far as in conflict, 51 L.D. 51.
- Colorado, State of (7 L.D. 490); overruled, 9 L.D. 408.
- Computation of Royalty Under Sec. 15, 51 L.D. 283; overruled, 84 I.D. 54.
- Condict, W. C., A-23366 (June 24, 1942); overruled so far as in conflict, 59 I.D. 258-260.
- Conger (Ford), Francis Ingeborg, 13 IBIA 296 (1985); modified (On Review), 13 IBIA 361, 92 I.D. 634.
- Continental Oil Co., 68 I.D. 186; overruled in pertinent part, 87 I.D. 291.
- Continental Oil Co., 74 I.D. 229; distinguished, 87 I.D. 616.
- Cook, Thomas C. (10 L.D. 324) (See 39 L.D. 162, 227).
- Cooke v. Villa (17 L.D. 210); vacated, 19 L.D. 442.
- Cooper, John W. (15 L.D. 285); overruled, 25 L.D. 113.
- Copper Bullion & Morning Star Lode Mining Claims (35 L.D. 27); distinguished insofar as it applies to *ex parte* cases, 39 L.D. 574.
- Copper Gance Lode (29 L.D. 542); modified so far as in conflict, 55 I.D. 348.
- Corlis v. Northern Pacific R.R. (23 L.D. 265); vacated, 26 L.D. 652.
- Cornell v. Chilton (1 L.D. 153); overruled, 6 L.D. 483.
- Cowles v. Huff (24 L.D. 81); modified, 28 L.D. 515.
- Cox, Allen H. (30 L.D. 90, 468); vacated, 31 L.D. 114.
- Crowston v. Seal (5 L.D. 213); overruled, 18 L.D. 586.
- Culligan v. Minnesota (34 L.D. 22); modified, 34 L.D. 151.
- Cummings, Kenneth F., 62 IBLA 206 (1982); overruled to extent inconsistent, 86 IBLA 135, 92 I.D. 153.
- Cunningham, John (32 L.D. 207); modified, 32 L.D. 456.
- Dailey Clay Products Co. (48 L.D. 429, 431); overruled so far as in conflict, 50 L.D. 656.
- Dakota Central R.R. v. Downey (8 L.D. 115); modified, 20 L.D. 131.

- Davidson, Robert A., 13 IBLA 368 (1973); overruled to the extent inconsistent, 49 IBLA 278, 87 I.D. 350.
- Davis, E. W., A-29889 (Mar. 25, 1964); no longer followed in part, 80 I.D. 698.
- Davis, Heirs of (40 L.D. 573); overruled, 46 L.D. 110.
- Debord, Wayne E., 50 IBLA 216, 87 I.D. 465; modified, 54 IBLA 61 (1981).
- DeLong v. Clarke (41 L.D. 278); modified so far as in conflict, 45 L.D. 54.
- Dempsey, Charles H. (42 L.D. 215); modified, 43 L.D. 300.
- Dennison & Willits (11 C.L.O. 261); overruled so far as in conflict, 26 L.D. 122.
- Deseret Irrigation Co. v. Sevier River Land & Water Co. (40 L.D. 463); overruled, 51 L.D. 27.
- Devoe, Lizzie A. (5 L.D. 4); modified, 5 L.D. 429.
- Dierks, Herbert (36 L.D. 367); overruled by unreported case of Thomas J. Guigham, Mar. 11, 1909.
- Dixon v. Dry Gulch Irrigation Co. (45 L.D. 4); overruled, 51 L.D. 27.
- Douglas & Other Lodes (34 L.D. 556); modified, 43 L.D. 128.
- Dowman v. Moss (19 L.D. 526); overruled, 25 L.D. 82.
- Dudymott v. Kansas Pacific R.R. (5 C.L.O. 69); overruled so far as in conflict, 1 L.D. 345.
- Dunphy, Elijah M. (8 L.D. 102); overruled so far as in conflict, 36 L.D. 561.
- Dyche v. Beleele (24 L.D. 494); modified, 43 L.D. 56.
- Dysart, Francis J. (23 L.D. 232); modified, 25 L.D. 188.
- Eastern Associated Coal Corp., 3 IBMA 331, 81 I.D. 567, 1974-75 OSHD par. 18,706; overruled in part, 7 IBMA 85, 83 I.D. 574; overruled in part, 7 IBMA 280, 84 I.D. 127.
- Eastern Associated Coal Corp., 5 IBMA 185, 82 I.D. 506, 1975-76 OSHD par. 20,041; set aside in part, 7 IBMA 14, 83 I.D. 425.
- Easton, Francis E. (27 L.D. 600); overruled, 30 L.D. 355.
- East Tintic Consolidated Mining Co. (41 L.D. 255); vacated, 43 L.D. 80.
- Elliot v. Ryan (7 L.D. 322); overruled, 8 L.D. 10 (See 9 L.D. 360).
- El Paso Brick Co. (37 L.D. 155); overruled so far as in conflict, 40 L.D. 199.
- Elson, William C. (6 L.D. 797); overruled, 37 L.D. 330.
- Eklutna, Appeal of, 1 ANCAB 190, 83 I.D. 619; modified, 85 I.D. 1.
- Emblen v. Weed (16 L.D. 28); modified, 17 L.D. 220.
- Engelhardt, Daniel A., 61 IBLA 65 (1981); set aside, 62 IBLA 93, 89 I.D. 82.
- Epley v. Trick (8 L.D. 110); overruled, 9 L.D. 360.
- Erhardt, Finsans (36 L.D. 154); overruled, 38 L.D. 406.
- Esping v. Johnson (37 L.D. 709); overruled, 41 L.D. 289.
- Esplin, Lee J. (56 I.D. 325); overruled to extent it applies to 1926 Executive Order, 86 I.D. 553.
- Ewing v. Rickard (1 L.D. 146); overruled, 6 L.D. 483.
- Falconer v. Price (19 L.D. 167); overruled, 24 L.D. 264.
- Fargo No. 2 Lode Claims (37 L.D. 404); modified, 43 L.D. 128; overruled so far as in conflict, 55 I.D. 348.
- Farrill, John W. (13 L.D. 713); overruled so far as in conflict, 52 L.D. 472, 473.
- Febes, James H. (37 L.D. 210); overruled, 43 L.D. 183.
- Federal Shale Oil Co. (53 I.D. 213); overruled so far as in conflict, 55 I.D. 287, 290.
- Ferrell v. Hoge (18 L.D. 81); overruled, 25 L.D. 351.
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- Field, William C. (1 L.D. 68); overruled so far as in conflict, 52 L.D. 472, 473.
- Filtrol Co. v. Brittan & Echart (51 L.D. 649); distinguished, 55 I.D. 605.
- Fish, Mary (10 L.D. 606); modified, 13 L.D. 511.
- Fisher v. Heirs of Rule (42 L.D. 62, 64); vacated, 43 L.D. 217.
- Fitch v. Sioux City & Pacific R.R. (216 L. & R. 184); overruled, 17 L.D. 43.
- Fleming v. Bowe (13 L.D. 78); overruled, 23 L.D. 175.
- Florida Mesa Ditch Co. (14 L.D. 265); overruled, 27 L.D. 421.
- Florida Railway & Navigation Co. v. Miller (3 L.D. 324); modified, 6 L.D. 716; overruled, 9 L.D. 237.

- Florida, State of (17 L.D. 355); *rev'd*, 19 L.D. 76.
- Florida, State of (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291.
- Forgeot, Margaret (7 L.D. 280); overruled, 10 L.D. 629.
- Fort Boise Hay Reservation (6 L.D. 16); overruled, 27 L.D. 505.
- Franco Western Oil Co., 65 I.D. 316; modified, 65 I.D. 427.
- Freeman Coal Mining Co., 3 IBMA 434, 81 I.D. 723, 1974-75 OSHD par. 19,177; overruled in part, 7 IBMA 280, 84 I.D. 127.
- Freeman, Flossie (40 L.D. 106); overruled, 41 L.D. 63.
- Freeman *v.* Summers (52 L.D. 201); overruled, 16 IBLA 112, 81 I.D. 370; reinstated, 51 IBLA 97, 87 I.D. 535.
- Freeman *v.* Texas & Pacific Ry. (2 L.D. 550); overruled, 7 L.D. 13, 18.
- Fry, Silas A. (45 L.D. 20); modified, 51 L.D. 581.
- Fults, Bill (61 I.D. 437); overruled, 69 I.D. 181.
- Galliher, Maria (8 C.L.O. 137); overruled, 1 L.D. 57.
- Gallup *v.* Northern Pacific Ry. (unpublished); overruled so far as in conflict, 47 L.D. 303, 304.
- Gariss *v.* Borin (21 L.D. 542) (See 39 L.D. 162, 225).
- Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158.
- Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229.
- Gates *v.* California & Oregon R.R. (5 C.L.O. 150); overruled, 1 L.D. 336, 342.
- Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81.
- Glassford, A. W. (56 I.D. 88); overruled to extent inconsistent, 70 I.D. 159.
- Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422.
- Gohrman *v.* Ford (8 C.L.O. 6); overruled, 4 L.D. 580.
- Goldbelt, Inc., 74 IBLA 308 (1983); affirmed in part, vacated in part, & remanded for evidentiary hearing, 85 IBLA 273, 92 I.D. 134.
- Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250.
- Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88.
- Goodale *v.* Olney (12 L.D. 324); distinguished, 55 I.D. 580.
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- Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240.
- Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453.
- Gowdy *v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191.
- Grampian Lode (1 L.D. 544); overruled, 25 L.D. 459.
- Gregg *v.* Colorado (15 L.D. 151); vacated, 30 L.D. 310.
- Grinnel *v.* Southern Pacific R.R. (22 L.D. 438); vacated, 23 L.D. 489.
- Ground Hog Lode *v.* Parole & Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568 (See 47 L.D. 590).
- Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399.
- Gulf Ship Island R.R. (16 L.D. 236); modified, 19 L.D. 534.
- Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442.
- Gwyn, James R., A-26806 (Dec. 17, 1953); distinguished, 66 I.D. 275.
- Hagood, L.N., 65 I.D. 405; overruled, 1 IBLA 42, 77 I.D. 166.
- Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505.
- Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59.
- Hardee, D.C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698.
- Hardee *v.* U.S. (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 698.
- Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233.
- Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93.
- Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539.
- Hart *v.* Cox (42 L.D. 592); vacated, 260 U.S. 427 (See 49 L.D. 413).
- Hastings & Dakota Ry. *v.* Christenson (22 L.D. 257); overruled, 28 L.D. 572.
- Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629.

- Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373.
- Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150.
- Heilman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119.
- Heinzman *v.* Letroadec's Heirs (28 L.D. 497); overruled, 38 L.D. 253.
- Heirs of (see case name).
- Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472.
- Helphrey *v.* Coil (49 L.D. 624); overruled, A-20899 (July 24, 1937).
- Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106 (See 44 L.D. 112; 49 L.D. 484).
- Hennig, Nellie J. (38 L.D. 443, 445); recalled & vacated, 39 L.D. 211.
- Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 L.D. 275.
- Herman *v.* Chase (37 L.D. 590); overruled, 43 L.D. 246.
- Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113.
- Hickey, M. A. (3 L.D. 83); modified, 5 L.D. 256.
- Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17.
- Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191.
- Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538.
- Holbeck, Halvor F., A-30376 (Dec. 2, 1965); overruled, 79 I.D. 416.
- Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166.
- Holland, G.W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 433, 436.
- Holland, William C., M-27696 (Apr. 26, 1934); overruled in part, 55 I.D. 215, 221.
- Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260.
- Holman *v.* Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590.
- Hon *v.* Martinas (41 L.D. 119); modified, 43 L.D. 196, 197.
- Hooper, Henry (6 L.D. 624); modified, 9 L.D. 86, 284.
- Howard *v.* Northern Pacific R.R. (23 L.D. 6); overruled, 28 L.D. 126.
- Howard, Thomas (3 L.D. 409) (See 39 L.D. 162, 225).
- Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204.
- Howell, L. C. (39 L.D. 92); in effect overruled (See 39 L.D. 411).
- Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287.
- Hughes *v.* Greathead (43 L.D. 497); overruled, 49 L.D. 413 (See 260 U.S. 427).
- Hull *v.* Ingle (24 L.D. 214); overruled, 30 L.D. 258.
- Huls, Clara (9 L.D. 401); modified, 21 L.D. 377.
- Hulsman, Lorinda L., 32 IBLA 280 (1977) & Curtis Peters, 13 IBLA 4, 80 I.D. 595 (1973); overruled, 85 IBLA 343, 92 I.D. 140.
- Humble Oil & Refining Co. (64 I.D. 5); distinguished, 65 I.D. 316.
- Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65.
- Hurley, Bertha C., (TA-66 (Ir.), (Mar. 21, 1952); overruled, 62 I.D. 12.
- Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284.
- Hyde, F. A. (40 L.D. 284); overruled, 43 L.D. 381.
- Hyde *v.* Warren (14 L.D. 576; 15 L.D. 415) (See 19 L.D. 64).
- Ingram, John D. (37 L.D. 475) (See 43 L.D. 544).
- Inman *v.* Northern Pacific R.R. (24 L.D. 318); overruled, 28 L.D. 95.
- Instructions (4 L.D. 297); modified, 24 L.D. 45.
- Instructions (32 L.D. 604); overruled so far as in conflict, 50 L.D. 628; 53 I.D. 365; A-20411 (Aug. 5, 1937) (See 59 I.D. 282, 286).
- Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36.
- Interstate Oil Corp. (50 L.D. 262); overruled so far as in conflict, 53 I.D. 288.
- Iowa Railroad Land Co. (23 L.D. 79); 24 L.D. 125; vacated, 29 L.D. 79.
- Jacks *v.* Belard (29 L.D. 369); vacated, 30 L.D. 345.
- Johnson *v.* South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 21, 22.
- Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448.
- Jones, Sam P., 74 IBLA 242 (1983); affirmed in part, as modified, & vacated in part, 84 IBLA 331 (1985).
- Jones *v.* Kennett (6 L.D. 688); overruled, 14 L.D. 429.

- Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 463, 464.
- Kanawha Oil & Gas Co. (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371.
- Keating Gold Mining Co. (52 L.D. 671); overruled in part, 5 IBLA 137, 79 I.D. 67.
- Keller, Herman A., 14 IBLA 188, 81 I.D. 26; distinguished, 55 IBLA 200 (1981).
- Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419.
- Kemper v. St. Paul & Pacific R.R. (2 C.L.L. 805); overruled, 18 L.D. 101.
- Kilner, Harold E., A-21845 (Feb. 1, 1939); overruled so far as in conflict, 59 I.D. 258, 260.
- King v. Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19.
- Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228.
- Kinsinger v. Peck (11 L.D. 202) (See 39 L.D. 162, 225).
- Kiser v. Keech (7 L.D. 25); overruled, 23 L.D. 119.
- Knight, Albert B. (30 L.D. 227); overruled, 31 L.D. 64.
- Knight v. Heirs of Knight (39 L.D. 362, 491); 40 L.D. 461; overruled, 43 L.D. 242.
- Kniskern v. Hastings & Dakota R.R. (6 C.L.O. 50); overruled, 1 L.D. 362.
- Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181.
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- Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45 (See 280 U.S. 306).
- Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.
- La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422.
- Lamb v. Ullery (10 L.D. 528); overruled, 32 L.D. 331.
- L. A. Melka Marine Construction & Diving Co. (90 I.D. 322); vacated & dismissed, 90 I.D. 491.
- Largent, Edward B. (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.
- Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.
- Lasselle v. Missouri, Kansas & Texas Ry. (3 C.L.O. 10); overruled, 14 L.D. 278.
- Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683.
- Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.
- Laughlin v. Martin (18 L.D. 112); modified, 21 L.D. 40.
- Law v. Utah (29 L.D. 623); overruled, 47 L.D. 359.
- Layne & Bowler Export Corp. (68 I.D. 33); overruled insofar as in conflict, with Schweigert, Inc. v. U.S. Court of Claims, No. 26-66 (Dec. 15, 1967) & Galland-Henning Manufacturing Co., IBCA-534-12-65 (Mar. 29, 1968).
- Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 389.
- Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 463, 464.
- Liability of Indian Tribes for State Taxes Imposed on Royalty Received from Oil & Gas Leases (58 I.D. 535); superseded to extent inconsistent, 84 I.D. 905.
- Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.
- Linderman v. Wait (6 L.D. 689); overruled, 13 L.D. 459.
- Linhart v. Santa Fe Pacific R.R. (36 L.D. 41); overruled, 41 L.D. 284 (See 43 L.D. 536).
- Liss, Merwin E. (67 I.D. 385); overruled, 80 I.D. 395.
- Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550.
- Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123.
- Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200.
- Loneragan v. Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.
- Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.
- Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5.
- Louisiana, State of (47 L.D. 366; 48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.
- Luse, Jeanette L. (61 I.D. 103); distinguished, 71 I.D. 243.
- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.
- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.
- Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713.

- Mable Lode (26 L.D. 675); distinguished, 57 I.D. 63.
- Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.
- Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.
- Maginnis, John S. (32 L.D. 14); modified, 42 L.D. 472.
- Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.
- Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.
- Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.
- Makemson v. Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650.
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- McCord, W. E. (23 L.D. 137); overruled to extent of any inconsistency, 56 I.D. 73.
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- McNamara v. California (17 L.D. 296); overruled, 22 L.D. 666.
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- Mee v. Hughart (23 L.D. 455); vacated, 28 L.D. 209; in effect reinstated, 44 L.D. 414, 487; 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 659, 660.
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- Miller, D. (60 I.D. 161); overruled in part, 62 I.D. 210.
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- Miller, Duncan, 6 IBLA 283 (1972); overruled to extent inconsistent, 85 I.D. 89.
- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.
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- Milner & North Side R.R. (36 L.D. 488); overruled, 40 L.D. 187.
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- Milwaukee, Lake Shore & Western Ry. (12 L.D. 79); overruled, 29 L.D. 112.
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- Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348.
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- New York Lode & Mill Site (5 L.D. 513); overruled, 27 L.D. 373.
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- Northern Pacific R.R. (20 L.D. 191); modified, 22 L.D. 234; overruled so far as in conflict, 29 L.D. 550.
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- Northern Pacific R.R. v. Bowman (7 L.D. 238); modified, 18 L.D. 224.
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- Opinion of Ass't. Attorney General (35 L.D. 277); vacated, 36 L.D. 342.
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333.
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- Opinion of Associate Solicitor, M-34999 (Oct. 22, 1947), distinguished, 68 I.D. 433.
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- Opinion of Solicitor, D-40462 (Oct. 31, 1917); overruled so far as inconsistent, 58 I.D. 85, 92, 96.
- Opinion of Solicitor, D-44083 (Feb. 7, 1919); overruled, M-6397 (Nov. 4, 1921). (See 58 I.D. 158, 160).
- Opinion of Solicitor, M-27499 (Aug. 8, 1933); overruled so far as on conflict, 54 I.D. 402.
- Opinion of Solicitor (54 I.D. 517); overruled in part, M-36410 (Feb. 11, 1957).
- Opinion of Solicitor, M-27690 (June 15, 1934); overruled to extent of conflict, 88 I.D. 586.
- Opinion of Solicitor (55 I.D. 14); overruled so far as inconsistent, 77 I.D. 49.
- Opinion of Solicitor (55 I.D. 466); overruled to extent it applies to 1926 Executive Order, 86 I.D. 553.
- Opinion of Solicitor, M-28198 (Jan. 8, 1936); finding, *inter alia*, that Indian title to certain lands within the Fort Yuma Reservation has been extinguished, is well founded, & is affirmed, 84 I.D. 1; overruled, 86 I.D. 3.
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- Opinion of Solicitor, M-33183 (Aug. 31, 1943); distinguished, 58 I.D. 726, 729.
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- Opinion of Solicitor, M-35093 (Mar. 28, 1949); overruled in part, 64 I.D. 70.
- Opinion of Solicitor (60 I.D. 436); will not be followed to extent it conflicts with these views, 72 I.D. 92.
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- Opinion of Solicitor, M-36241 (Sept. 22, 1954); overruled as far as inconsistent, 85 I.D. 433.
- Opinion of Solicitor, M-36345 (May 4, 1956); overruled, 84 I.D. 905.
- Opinion of Solicitor, M-36378 (Jan. 19, 1956); overruled to extent inconsistent, 64 I.D. 57.
- Opinion of Solicitor, M-36410 (Feb. 11, 1957); overruled to extent of conflict, 88 I.D. 586.
- Opinion of Solicitor, M-36434 (Sept. 12, 1958); overruled to extent inconsistent, 66 IBLA 1, 89 I.D. 386.
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- Opinion of Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159.
- Opinion of Solicitor, M-36531 (Oct. 27, 1958); overruled, 69 I.D. 110.
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- Phillips, Alonzo (2 L.D. 321); overruled, 15 L.D. 424.
- Phillips v. Breazeale's Heirs (19 L.D. 573); overruled, 39 L.D. 93.
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- Phillips, Vance W., 14 IBLA 79 (Dec. 11, 1973); modified, 19 IBLA 211 (Mar. 21, 1975).
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- Southern Pacific R.R. (28 L.D. 281); recalled, 32 L.D. 51.
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- Standard Oil Co. of Calif. (76 I.D. 271); no longer followed, 5 IBLA 26, 79 I.D. 23.
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- Stevenson, Heirs of v. Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Stewart v. Rees (21 L.D. 446); overruled so far as in conflict, 29 L.D. 401.
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- Strain, A. G. (40 L.D. 108); overruled so far as in conflict, 51 L.D. 51.
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- Taggart, William M. (41 L.D. 282); overruled, 47 L.D. 370.
- Talkington's Heirs v. Hempfling (2 L.D. 46); overruled, 14 L.D. 200.
- Tate, Sarah J. (10 L.D. 469); overruled, 21 L.D. 209, 211.
- Taylor, Josephine, A-21994 (June 27, 1939); overruled so far as in conflict, 59 I.D. 258, 260.
- Taylor v. Yates (8 L.D. 279); *rev'd*, 10 L.D. 242.
- Teller, John C. (26 L.D. 484); overruled, 36 L.D. 36 (See 37 L.D. 715).
- T.E.T. Partnership, 84 IBLA 10 (1984); prior Board decision vacated, state office decisions *rev'd*, 88 IBLA 13 (1985).
- Thorstenson, Even (45 L.D. 96); overruled, 36 L.D. 36 (See 37 L.D. 258).
- Tibbetts, R. Gail, 43 IBLA 210, 86 I.D. 538 (1979); overruled in part, 86 IBLA 215 (1985).
- Tieck v. McNeil (48 L.D. 158); modified, 49 L.D. 260.
- Toles v. Northern Pacific Ry. (39 L.D. 371); overruled so far as in conflict, 45 L.D. 92, 93.

- Tonkins, H. H. (41 L.D. 516); overruled, 51 L.D. 27.
- Towl v. Kelly (54 I.D. 455); overruled, 66 IBLA 374, 89 I.D. 415.
- Traganza, Mertie C. (40 L.D. 300); overruled, 42 L.D. 611, 612.
- Traugh v. Ernst (2 L.D. 212); overruled, 3 L.D. 98, 248.
- Tripp v. Dunphy (28 L.D. 14); modified, 40 L.D. 128.
- Tripp v. Stewart (7 C.L.O. 39); modified, 6 L.D. 795.
- Tucker v. Florida Ry. & Nav. Co. (19 L.D. 414); overruled, 25 L.D. 233.
- Tupper v. Schwarz (2 L.D. 623); overruled, 6 L.D. 624.
- Turner v. Cartwright (17 L.D. 414); modified, 21 L.D. 40.
- Turner v. Lang (1 C.L.O. 51); modified, 5 L.D. 256.
- Tyler, Charles (26 L.D. 699); overruled, 35 L.D. 411.
- Ulin v. Colby (24 L.D. 311); overruled, 35 L.D. 549.
- Union Oil Co. of California (Supp.), 72 I.D. 313; overruled & rescinded in part, 74 IBLA 117 (1983).
- Union Pacific R.R. (33 L.D. 89); recalled, 33 L.D. 528.
- United Indians of All Tribes Foundation v. Acting Deputy Ass't Secretary—Indian Affairs, 11 IBIA 226 (1983); vacated in part, 11 IBIA 276, 90 I.D. 376.
- U.S. v. Barngrover, 57 I.D. 533; overruled in part, 21 IBLA 363, 82 I.D. 414.
- U.S. v. Bush (13 L.D. 529); overruled, 18 L.D. 441.
- U.S. v. Central Pacific Ry. (52 L.D. 81); modified, 52 L.D. 235.
- U.S. v. Cohan, 70 I.D. 178 (1973); overruled in part, U.S. Forest Service v. Milender, 86 IBLA 181, 92 I.D. 175.
- U.S. v. Dana (18 L.D. 161); modified, 23 L.D. 45.
- U.S. v. Edeline, 39 IBLA 236 (1979); overruled to extent inconsistent, 74 IBLA 56, 90 I.D. 262.
- U.S. v. Feezor, 74 IBLA 56, 90 I.D. 262; vacated in part & remanded, 81 IBLA 94 (1984).
- U.S. v. Kosanke Sand Corp., 3 IBLA 189, 78 I.D. 285; set aside & remanded, 12 IBLA 282, 80 I.D. 538.
- U.S. v. Livingston Silver, Inc., 43 IBLA 84 (1979); overruled to extent inconsistent, 82 IBLA 344, 91 I.D. 271.
- U.S. v. McClarty, 71 I.D. 331; vacated & remanded, 76 I.D. 193.
- U.S. v. Melluzzo (76 I.D. 181); 1 IBLA 37, 77 I.D. 172.
- U.S. v. Mouat (60 I.D. 473); modified 61 I.D. 289.
- U.S. v. O'Leary (63 I.D. 341); distinguished, 64 I.D. 210, 369.
- Utah, State of (45 L.D. 551); overruled, 48 L.D. 97.
- Utah Wilderness Ass'n (I), 72 IBLA 125 (1982); affirmed in part, *rev'd* in part, 86 IBLA 89 (1985).
- Veach, Heir of Natter (46 L.D. 496); overruled so far as in conflict, 49 L.D. 461, 464 (See 49 L.D. 492).
- Vine, James (14 L.D. 527); modified, 14 L.D. 622.
- Virginia-Colorado Development Corp. (53 I.D. 666); overruled so far as in conflict, 55 I.D. 287, 289.
- Virginia Fuels, Inc., 4 IBSMA 185, 89 I.D. 604; modified to extent inconsistent, 74 IBLA 170 (1983).
- Vradenburg's Heir v. Orr (25 L.D. 323); overruled, 38 L.D. 253.
- Wagoner v. Hanson (50 L.D. 355); overruled, 56 I.D. 325, 328.
- Wahe, John (41 L.D. 127); modified, 41 L.D. 636, 637.
- Walker v. Prosser (17 L.D. 85); *rev'd*, 18 L.D. 425.
- Walker v. Southern Pacific R.R. (24 L.D. 172); overruled, 28 L.D. 174.
- Wallis, Floyd A. (65 I.D. 369); overruled to extent inconsistent, 71 I.D. 22.
- Walters, David (15 L.D. 136); revoked, 24 L.D. 58.
- Warren v. Northern Pacific R.R. (22 L.D. 568); overruled so far as in conflict, 49 L.D. 391.
- Wasmund v. Northern Pacific R.R. (23 L.D. 445); vacated, 29 L.D. 224.
- Wass v. Milward (5 L.D. 349); no longer followed (See 44 L.D. 72 & Ebersold v. Dickson, D-36502 (Sept. 25, 1918).
- Wasserman, Jacob N., A-30275 (Sept. 22, 1964); overruled, 79 I.D. 416.

- Waterhouse, William W. (9 L.D. 131); overruled, 18 L.D. 586.
- Watson, Thomas E. (4 L.D. 169); recalled, 6 L.D. 71.
- Weathers, Allen E., A-25128 (May 27, 1949); overruled in part, 62 I.D. 62.
- Weaver, Francis D. (53 I.D. 179); overruled so far as in conflict, 55 I.D. 287, 290.
- Weber, Peter (7 L.D. 476); overruled, 9 L.D. 150.
- Weisenborn, Ernest (42 L.D. 533); overruled, 43 L.D. 395.
- Werden *v.* Schlecht (20 L.D. 523); overruled so far as in conflict, 24 L.D. 45.
- Western Pacific Ry. (40 L.D. 411; 41 L.D. 599); overruled, 43 L.D. 410.
- Western Slope Gas Co., 40 IBLA 280 (1979); recon. denied, 48 IBLA 259 (1979); overruled in pertinent part, 87 I.D. 27.
- Wheaton *v.* Wallace (24 L.D. 100); modified, 34 L.D. 383.
- Wheeler, William D. (30 L.D. 355); distinguished &, to extent of possible inconsistency, overruled, 56 I.D. 73.
- White, Anderson (Probate 13570-35); overruled, 58 I.D. 149, 157.
- White, Sarah V. (40 L.D. 630); overruled in part, 46 L.D. 55, 56.
- Whitten *v.* Read (49 L.D. 253, 260; 50 L.D. 10); vacated, 53 I.D. 447.
- Wickstrom *v.* Calkins (20 L.D. 459); modified, 21 L.D. 533; overruled, 22 L.D. 392.
- Wiley, George P. (36 L.D. 305); modified so far as in conflict, 36 L.D. 417.
- Wilkerson, Jasper N. (41 L.D. 138); overruled, 50 L.D. 614 (See 42 L.D. 313).
- Wilkens, Benjamin C. (2 L.D. 129); modified, 6 L.D. 797.
- Willamette Valley & Cascade Mountain Wagon Road Co. *v.* Bruner (22 L.D. 654); vacated, 26 L.D. 357.
- Williams, John B. (61 I.D. 31); overruled so far as in conflict, 61 I.D. 185.
- Willingbeck, Christian P. (3 L.D. 383); modified, 5 L.D. 409.
- Willis, Cornelius (47 L.D. 135); overruled, 49 L.D. 461.
- Willis, Eliza (22 L.D. 426); overruled, 26 L.D. 436.
- Wilson *v.* Heirs of Smith (37 L.D. 519); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Winchester Land & Cattle Co. (65 I.D. 148); no longer followed in part, 80 I.D. 698.
- Witbeck *v.* Hardeman (50 L.D. 413); overruled so far as in conflict, 51 L.D. 36.
- Wolf Joint Ventures (75 I.D. 137); distinguished, 31 IBLA 72, 84 I.D. 309.
- Wostenberg, William, A-26450 (Sept. 5, 1952); distinguished in dictum, 6 IBLA 318, 79 I.D. 439.
- Wright *v.* Smith (44 L.D. 226); overruled, 49 L.D. 374.
- Young Bear, Victor, Estate of, 8 IBIA 130, 87 I.D. 311; *rev'd*, 8 IBIA 254, 88 I.D. 410.
- Zeigler Coal Co., 4 IBMA 139, 82 I.D. 221, 1974-75 OSHD par. 19,638; overruled in part, 7 IBMA 85, 83 I.D. 574.
- Zimmerman *v.* Brunson (39 L.D. 310); overruled, 52 L.D. 714.

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

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

DONALD ST. CLAIR *ET AL.*

84 IBLA 236

Decided *January 2, 1985*

Petition for payment of costs and expenses including attorney's fees under provision of 43 CFR 4.1290 and 4.1294.

Denied.

1. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

Appellants' failure to obtain any part of the benefit sought by their claims for relief prevents payment of their claim for reimbursement of costs, expenses, and attorney's fees pursuant to provision of 43 CFR 4.1290 and 4.1294.

2. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

Appellants' failure to make a substantial contribution to the resolution of pending claims for relief and to achieve some degree of success in prosecuting their claims before the Department bars award of attorney's fees under Departmental regulations and applicable law.

APPEARANCES: Mark Squillace, Esq., Washington, D.C., for petitioners; Glenda R. Hudson, Esq., Office of the Solicitor, Washington, D.C., for Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

Following this Board's decision in *Donald St. Clair*, 77 IBLA 283, 90 I.D. 496 (1983), in which a divided panel affirmed a decision of the Director of the Office of Surface Mining Reclamation and Enforcement (OSM), a petition for award of costs, expenses, and attorney's fees under provision of 43 CFR 4.1290(a)(2) and 4.1294(b) was filed on January 17, 1984. Petitioners are appellants who earlier, by way of citizen's complaint, sought relief in the form of a Federal inspection and enforcement action against Island Creek Coal Facility #25, and an investigation by OSM into the administration of the West Virginia surface mining program as conducted by the State. The relevant facts

concerning the appeal are set out in the Board decision in *St. Clair, supra* at 285-93, 497-501. The three Board members empaneled to decide the appeal failed to agree concerning the reasons for the Board's decision, but affirmed the OSM decision without modification, in effect denying all appellants' claims. *Id.* at 301, 304, 315, 506, 507-08, 513.

Despite their apparent lack of success petitioners now seek payment of their attorney's fees and other costs and expenses in the amount of \$12,765.79. Citing *Council of Southern Mountains v. OSM*, 3 IBSMA 44, 88 I.D. 394 (1981),¹ petitioners offer documentation to support the reasonableness of the amount claimed in conformity to the court's decision in *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980). (In *Copeland*, a gender discrimination class action, the claimant was conceded to be entitled to an award of attorney's fees: The central question was the *amount* of the award. *Id.* at 889.)

The administrative appeal from which this request for award of attorney's fees arises began as a citizen's complaint brought by petitioners under 30 CFR 842.12. Petitioners now contend they made a substantial contribution to the outcome of the appeal before the Department so as to be entitled to an award of their costs. See 43 CFR 4.1290-4.1294. Thus, they point to the fact that the Board issued a decision on the merits of their appeal as proof that they have, in fact, obtained some of the relief sought by them, and characterize the decision as a procedural victory (Petition at 5). Further, they contend their participation in the administrative process accomplished a salutary result by precipitating development of a new water system for the area in which petitioners live, and encouraging a more careful administration of Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201-1328 (1982), by both OSM and the State of West Virginia (Petition at 6).

The petition for award of costs and expenses is opposed by the Departmental Solicitor who has filed a brief in opposition to the claim, relying principally upon the Supreme Court decision in *Ruckelshaus v. Sierra Club*, 463 U.S. _____, 103 S. Ct. 3274 (1983), for the proposition that petitioners may not receive their costs at Government expense because they failed to exhibit "some degree of success on the merits" in their appeal before the Department (Solicitor's Brief at 3). The Solicitor also relies upon a proposed revision of Departmental rules published at 49 FR 4403 (Feb. 6, 1984) which purports to adopt the *Ruckelshaus* holding into a revision of 43 CFR 4.1290 and 4.1294. Since, as petitioners point out, the proposed revision was later withdrawn upon reconsideration of the matter by the Office of

¹ *Council*, like this Board's prior decision in *St. Clair*, boasted three separate opinions, and was vacated and remanded for further action by memorandum opinion in *Council of the Southern Mountains, Inc. v. Watt*, No. 82-45 (E.D. Ky. Oct. 18, 1972). On Jan. 26, 1984, Under Secretary Simmons reversed so much of the *Council* decision as authorized award of attorney's fees, finding the Interior Board of Surface Mining and Reclamation Appeals had exceeded its authority by its award of attorney's fees. On Feb. 1, 1984, this Board, on remand, ordered the case to Hearings Division for fact finding and other action as required by the order of remand from the district court. *Council of the Southern Mountains, Inc. v. OSM*, IBLA 83-612 Order dated Feb. 1, 1984. This order contains a detailed history of the *Council* decision and an analysis of the probable effect of subsequent review actions. The matter is now pending before the Hearings Division.

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Hearings and Appeals, 49 FR 17043 (Apr. 23, 1984), this argument must be rejected.² The primary issue framed by the opposing contentions now before the Board is, therefore, whether petitioners' success in the *St. Clair* appeal was sufficient to entitle them to an award of attorney's fees as claimed, in whole or in part, under provisions of SMCRA and implementing Departmental regulations. This threshold question concerning the nature of the standard to be applied in award of attorney's fees under provision of section 525(e) of SMCRA and 43 CFR 4.1290-4.1294 must first be determined before consideration is given to the reasonableness of the amounts claimed.

The relevant statute, section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1982), provides for award of costs by the Secretary:

Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper. [?]

² The withdrawn rule sought to apply the rationale of the *Ruckelshaus* opinion to sec. 525(e) of SMCRA by embodying it in 43 CFR 4.1290 and 4.1294. The amended rule was to have provided:

"§ 1290 Who may file.

"Any person who prevails in whole or in part, achieving at least some degree of success on the merits, may file a petition for award of costs and expenses including attorneys' fees reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in- * * *

"(a) A final order being issued by administrative law judge; or

"(b) A final order being issued by the Board.

"2. The introductory language of § 4.1294 is revised to read as follows:

"§ 4.1294 Who may receive an award.

"Subject to the condition that the awardee shall have prevailed in whole or in part, achieving at least some degree of success on the merits, appropriate costs and expenses including attorney's fees may be awarded--" 49 FR 4403 (Feb. 6, 1984)."

The rule was proposed to be given both past and future effect, thus, the explanatory text provided by the Department stated this conclusion:

"Because the proposed rules are based on the unambiguous decision of the Court in *Ruckelshaus*, OHA intends to make the final rules effective as of the date this Proposed Rule is published in the Federal Register, and applicable to both pending and future proceedings. For this reason, petitioners under 43 CFR 4.1290-4.1296 are advised to review carefully, and to conform with, the decision of the Court in *Ruckelshaus* in any petition filed for an award of attorneys' fees under section 525(e) of SMCRA." 49 FR 4402 (Feb. 6, 1984) (italics in original).

³ This provision originated in the House of Representatives' version of the bill which later became SMCRA. Commenting upon this provision of the law, the House Report observes:

"Section 525(e) provides for the award of costs, including attorneys' and expert witness fees, in the discretion of the Secretary. This section gives the Secretary authority to award attorneys' fees to compensate participants in the administrative process. The subsection does not require that the proceedings result in the finding of a violation nor does the fact that the Government was a party in an adjudicatory proceeding, or had caused the proceeding to be initiated, prevent an award under the terms of the subsection. It is the committee's intention that this subsection not be interpreted or applied in a manner that would discourage good faith actions on the part of interested citizens."

(H.R. Rep. No. 218, 95th Cong., 1st Sess. 131 (1977).

"Good faith," however, is not a controlling factor in determining whether a claimant for attorney's fees merits an award. *Nadeau v. Helgemoe*, 581 F.2d 275, 280 (1st Cir. 1978). As the court observed in *Nadeau* at page 280:

"Attorney's fees are not designed merely to penalize defendants, see *Robinson v. Lorillard Corp.*, 444 F.2d 791, 804 (4th Cir. 1971), but to encourage injured individuals to seek judicial relief, *Newman v. Piggee Park Enterprises, Inc.*, *supra*, 390 U.S. at 402, 88 S.Ct. 964. From this latter policy perspective it makes no difference whether plaintiff's suit yields favorable out of court results because a good faith defendant is brought to understand the illegality of his conduct and alters his behavior or because an unrepentant defendant grudgingly signs a consent decree to avoid continued litigation expenses in a lost cause. The key issue is the provocative role of the plaintiff's lawsuit, not the motivations of the defendant."

Section 525(e) is implemented by the regulations codified at 43 CFR 4.1290(a)(2) and 4.1294(b) which provide in pertinent part:

(a) Any person may file a petition for award of costs and expenses including attorneys' fees reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in--

* * * * *

(2) A final order being issued by the Board.

and

Appropriate costs and expenses including attorneys' fees may be awarded--

* * * * *

(b) To any person other than a permittee or his representative from OSM, if the person initiates or participates in any proceeding under the Act upon a finding that the person made a substantial contribution to a full and fair determination of the issues.

In *Ruckelshaus, supra*, the Supreme Court, construing section 307(f) of the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982), providing for judicial review of the administrator's actions, held that "absent some degree of success on the merits by the claimant" an award of attorney's fees under the statutory grant of authority contained in the Act is not permitted. In *Ruckelshaus* the petitioners for attorney's fees had failed to obtain relief upon any of their claims on the merits. Footnote 1 of the Court's opinion, 103 S. Ct. 3275, states that the Court's interpretation of section 307(f) of the Clean Air Act is to be considered equally applicable to provisions of 16 enumerated statutes permitting award of attorney's fees, including SMCRA, section 520(d), which provides for judicial review in citizens' suits. The Court's opinion establishes that to be entitled to an award of attorney's fees under the enumerated statutes, a party must first prevail upon a substantial matter at issue in a controversy brought under the Act. The participation as a principal party or a win on a procedural point are not sufficient under the announced standard to merit any payment. 103 S. Ct. at 3279 n.9.

Although section 520(d) of SMCRA was not directly controlling in *St. Clair* since it provides for attorney's fees awards in cases involving judicial as distinguished from administrative review, it would be disingenuous to attempt to ignore the effect of the *Ruckelshaus* decision upon this application for award. *Ruckelshaus* clearly contemplates the Court's holding should apply in cases involving awards of attorney's fees under the 16 statutes which the Court finds to be "identical" to the Act construed by the opinion. *Id.* at 3275. Additionally, *Ruckelshaus* pointedly observes that another provision of the Clean Air Act, section 304(d) providing for "citizen suits" is to be construed in the same manner as section 307(f) of the Act, which allows costs only in those cases where judicial review of acts of the administrator has been sought.

Section 307(f), construed by *Ruckelshaus*, provides that "[i]n any judicial proceeding under this section, the court may award costs of

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litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." The citizen suit provision of section 304(d) which the Court finds entitled to similar effect, provides that "[t]he court, in issuing any final order * * * may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." In the SMCRA section relevant here, section 525(e), from which the Secretary's authority to award attorney's fees is derived, the word "appropriate" is not used: Instead, the Secretary is directed to make awards which are "proper." No distinction is made, however, by section 525(e) between the exercise of this judgment by the Secretary or the exercise of the same discretion by a reviewing judge. Both court and Secretary are required by section 525(e) to make such awards as each "deems proper." Further, the words "proper" and "appropriate" share equivalent meanings according to the *Ruckelshaus* opinion, which reasons at page 3276:

It is difficult to draw any meaningful guidance from § 307(f)'s use of the word "appropriate," which means only "specially suitable: fit, proper." Webster's Third International Dictionary. Obviously, in order to decide when fees should be awarded under § 307(f), a court first must decide *what* the award should be "specially suitable," "fit," or "proper" *for*. Section 307(f) alone does not begin to answer this question, and application of the provision thus requires reference to other sources, including fee-shifting rules developed in different contexts. As demonstrated below, inquiry into these sources shows that requiring a defendant, completely successful on all issues, to pay the unsuccessful plaintiff's legal fees would be a radical departure from longstanding fee-shifting principles adhered to in a wide range of contexts. [Italics in original; footnote omitted.]

The opinion goes on to conclude that in the absence of a contrary expressed intention by Congress, the statutory authorization for payment of attorney's fees cannot be used as a device "to depart from the long-established rule that complete winners need not pay complete losers for suing them." *Id.* at 3279.

Petitioners take the position that administrative appeals before the Department should, however, be treated differently, especially in view of the Departmental rules which establish that the standard for payment is whether a party has made a "substantial contribution" to a "determination."

Preceding passage of SMCRA, Congressmen Seiberling and Udall engaged in colloquy concerning, among other things, the relationship between the attorney fee award provisions of sections 520(d) and 525(e):

Mr. SEIBERLING. Are there any standards or guidelines for the Secretary to use to determine which persons are to be awarded costs?

Mr. UDALL. The Secretary would have broad discretion. It would normally be appropriate for him to award costs to a person whose participation has contributed substantially to a full and fair consideration of the facts and issues involved in the proceeding, taking into account, where appropriate, the financial resources of the participant. *In general, an award would be governed by the same kinds of considerations*

as would govern a court in a court action, as outlined in the last two paragraphs of page 90 of the committee report. [Italics added.]
123 Cong. Rec. 12,877 (1977).

Page 90 of the report cited by Congressman Udall does not explicitly concern section 525(e); rather it speaks to section 520. H.R. Rep. 218, 95th Cong., 1st Sess. 90 (1977). However, reference to the analysis of section 520 in connection with the interpretation of section 525(e), in the emphasized text, evinces congressional intent that section 525(e) should be interpreted and applied in the same manner as section 520(d).

Other Federal decisions indicate that the rule respecting payment of attorney's fees under statutory grants of authority contained in Acts of Congress should be reasonably consistent of application, because it is the nature of the statutory grant itself, rather than the forum in which the attorney's fees may be incurred, that is controlling. For example, in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983), the Court emphasizes the importance of success in relation to an award of attorney's fees based upon a statutory grant of authority to award fees. In *Hensley*, an opinion dealing with an award under the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 (1982), the Court found that the amount of an award to a partially successful litigant must reasonably reflect the degree of success obtained by him. The *Hensley* Court, while dealing with a different statutory provision than appears in section 525(e) of SMCRA, states the nature of the initial inquiry to be made in cases where awards of fees are sought under statutory authorization at page 1939:

A plaintiff must be a "prevailing party" to recover an attorney's fee under § 1988. The standard for making this threshold determination has been framed in various ways. A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (CA1 1978).⁸ This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable."

⁸ See also *Bushe v. Burkee*, 649 F.2d 509, 521 (CA7 1981), cert. denied, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1982); *Sethy v. Alameda County Water Dist.*, 602 F.2d 894, 897-898 (CA9 1979) (*per curiam*). Cf. *Taylor v. Sterrett*, 640 F.2d 663, 669 (CA5 1981) ("[T]he proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact that he has acquired the primary relief sought"). [Footnote 7 omitted.]

The nature of cases which involve a statutory authorization for attorney's fees is further analyzed in *Hensley* in a separate opinion by Justice Brennan, concurring in part and dissenting in part, which explains the basic purpose of these statutory grants:

In *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 269, 95 S.Ct. 1612, 1627, 44 L.Ed.2d 141 (1975), this Court held that it was beyond the competence of judges to "pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others." Congress, however, has full authority to make such decisions, and it responded to the challenge of *Alyeska* by doing the "picking and choosing" itself. Its legislative solution legitimates the federal common law of attorneys

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fees that had developed in the years before *Alyeska* by specifying when and to whom fees are to be available.²

² Because of this selectivity, statutory attorney's fee remedies such as those created by § 1988 and its analogues bear little resemblance to either common-law attorney's fee rule: the "American Rule," under which the parties bear their own attorney's fees no matter what the outcome of a case, or the "English Rule," under which the losing party, whether plaintiff or defendant, pays the winner's fees. *They are far more like new causes of action tied to specific rights than like background procedural rules governing any and all litigation.* This fundamental distinction has often been ignored. [Italics supplied; footnote 1 omitted.]

103 S. Ct. at 1944-45.

Considering, then, petitioners' claim for award of costs as a "new cause of action tied to specific rights," the threshold inquiry in this case should be whether petitioners have, by the results reached in this Board's decision in *St. Clair*, obtained a right to claim payment of fees from the Department. Phrased in the language of the applicable Departmental regulations, the question is properly stated in terms of whether petitioners have, by achieving a measurable success, made a "substantial contribution" to the resolution of the issues as determined by the decision in *St. Clair*.

As the Court's opinion in *Ruckelshaus* observes, the court decisions have not been uniform in establishing standards for payment of attorney's fees based upon statutory authority. *Ruckelshaus* approaches this problem using the rubric "prevailing party" to consider the basis for awards generally. After considering numerous cases which apply the "prevailing party" standard differently, this conclusion concerning the observed disparity in making awards is reached:

These various interpretations of the "prevailing party" standard provide a ready, and quite sensible, explanation for the Senate Report's discussion of § 307(f). Section 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing parties*—parties achieving *some success*, even if not major success.⁹ Put differently, by enacting § 307(f), Congress intended to eliminate both the restrictive readings of "prevailing party" adopted in some of the cases cited above and the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed "essentially" on "central issues."

⁹ Of course, we do not mean to suggest that trivial success on the merits, or purely procedural victories, would justify an award of fees under statutes setting out the when "appropriate" standard. Rather, Congress meant merely to avoid the necessity for lengthy inquiries into the question whether a particular party's success was "substantial" or occurred on a "central issue."

103 S. Ct. at 3279.

While the *Ruckelshaus* opinion is persuasive in the context of this petition, obviously it does not directly construe section 525(e) or a similar provision of the Clean Air Act. The provision of the Act before the *Ruckelshaus* Court concerned only the award of fees in judicial proceedings. As was observed by Congressman Udall, *supra*, many of the same considerations must be given to awarding fees in administrative proceedings as are material to such awards for the conduct of cases in court. Much, however, that takes place at the

administrative level will involve different work, much of it of an informal nature, to which different standards of judgment must be applied. Quasi-judicial proceedings before the Interior Boards of Appeal will be easier to measure by the standard announced in *Ruckelshaus*, for example, than some work done before the Bureaus and Offices of the Department. Because of the preliminary nature of much that is done before the executive can act, it is difficult to declare as a general proposition that the *Ruckelshaus* rubric requiring "success on the merits" will have any value in establishing standards for costs awards in administrative proceedings.

The sense of the *Ruckelshaus* decision, however, which requires that a party achieve some part of a declared objective by the means of legal action before becoming entitled to an award, is now clearly relevant to decisions by the Secretary in cases arising under 43 CFR 4.1290 and 4.1294. Obviously, as is always true, the facts of each case must be considered before a decision can be formulated concerning the degree of success actually achieved and whether, in each case, an award would be reasonable. For example, in *Council of the Southern Mountains, Inc. v. Watt*, No. 82-45 (E.D. Ky. Oct. 18, 1982), an unreported memorandum decision construing SMCRA section 525(e), the district court found that citizens' complaints by Council had resulted in administrative activity by OSM. The court found that as a result Council's contributions to certain orders issued by OSM were substantial and ordered compensation to be made following necessary fact finding by the Department into the reasonable amount of the costs incurred (District Court Memorandum Opinion at 6). Obviously, the Secretary's task in deciding what constitutes a "substantial contribution" by applicants for relief in administrative proceedings cannot be so easily described or limited, though the manner in which awards of fees under statutory authority are made by the courts is instructive.⁴

[1] In this case, petitioners stated three claims for relief in which they sought Federal inspection, enforcement, and investigation of alleged SMCRA violations by Island Creek Coal Facility #25 causing contamination of their water supply. None of the sought-after relief was obtained from OSM. While a decision on appeal affirming OSM was given on the merits it was, according to a stated complaint at page 4 of their petition, wholly unsatisfactory to petitioners. Despite this circumstance, petitioners now claim to see a procedural victory in the form of an adverse decision on the merits, the rendering of which is characterized by them to be "perhaps the most significant legal issue before the Board" on appeal (Petition at 5). While a decision on the merits of their appeal was undoubtedly a desired feature of the final

⁴The dissenting opinion of the Chief Administrative Judge in *Council of the Southern Mountains, Inc. v. OSM*, 88 I.D. at 399-400, points out that the apparent intent of SMCRA is to permit award of costs and expenses, if reasonable and proper, regardless of the office or bureau of the Department where a party may seek to prosecute an administrative action for relief. See also the supplementary information supplied at the time of publication of 43 CFR 4.1290-4.1294 at 43 FR 34386 (paragraph 4) indicating participation in "any proceeding" may provide a basis for award of costs.

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decision sought by petitioners, it was never, until now, their declared goal.⁵ If any proceeding before this Department which results in a decision may be considered to have been the result of a substantial contribution by a party seeking relief from the Secretary, then the establishment of a regulatory standard that only a "substantial contribution" merits payment of attorney's fees becomes meaningless. Petitioners' argument that the provisions of 43 CFR 4.1290 and 4.1294 are "broader" than the provision of section 307(f) of the Clean Air Act construed by *Ruckelshaus* is probably correct. Quite clearly, however, reviewed in the light of recent court decisions the regulatory provisions of 43 CFR 4.1290-4.1294 require some showing be made that petitioners achieved some degree of success through their official dealings with the Department. It is not unreasonable to require, within the regulatory scheme here applicable, that petitioners show they have achieved some of the benefit they sought in bringing this action before the Department. See, e.g., *Nadeau v. Helgemoe*, *supra*.

Petitioners argue that a water treatment facility is now to be constructed by the State for petitioners' community. There is, however, no apparent connection between their action brought before the Department and this proposed action by the State, though petitioners suggest a connection "must" exist (Petition at 7). Why this is so is simply not explained by them. The record does not establish any connection between petitioner's complaint and current plans for a new water facility.

[2] Petitioners also argue that their complaint and the proceedings had before the Department were in some way instructive to the State and OSM, which are said to have "gained a new appreciation" for citizen complaints as a result of petitioners' appeal (Petition at 6). While this Board would hesitate to deny that the Government agencies concerned were capable of learning from experience, a desire to instruct these two agencies was never a stated objective of the citizen's complaint in this case. The reason for the fragmented decision in *St. Clair* was a confused and partial record which resulted, quite simply, in a failure of petitioners' case. As the Solicitor's brief points out, the contamination of petitioners' water supply and the operation of the Island Creek Coal Facility #25 were never connected. Petitioners were denied all the relief sought in their complaint. No Federal inspection was ordered, no enforcement action was required by OSM, and no investigation by OSM of the West Virginia program was

⁵ It is not unreasonable, so far as proceedings before this Board are concerned, to speak of a decision "on the merits." Proceedings before the Board tend to become formal, and, in this case, the issues on appeal were framed by extensive briefs in addition to the administrative record developed by the agency whose action was under review. The appeal work before this Board, however, is not the only Departmental action for which petitioners seek an award. The bill presented with the petition is also for work done before OSM and the West Virginia administrators, and includes travel to West Virginia and expenses incurred while counsel visited the Island Creek Coal Facility #25 plant and vicinity. The reasonableness of these charges is not addressed by this opinion, because of the result reached. Certainly, however, as the district court decision in *Council* points out, work done prior to appeal to this Board is, in a proper case, compensable. See also note 4.

made. It is apparent from the record of this appeal that whatever success petitioners achieved towards their stated goal of an unpolluted water source was the result of other negotiation by them or other action taken on their behalf. Their citizen's complaint before the Department came to nothing. They did not appeal from the adverse determination of their claim. As a result, the decision against them became final in all respects. Consequently, their participation before the Department cannot be found to be "substantial," in the sense in which that word is used in 43 CFR 4.1294(b). It has not been shown to have operated as a catalyst to effect changes sought in their community water system or to have promoted favorable agency action tending to achieve that result. (See, e.g., *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 429 (8th Cir. 1970), where the court, though refusing a sought-after injunction, found plaintiff's action had prompted action by plaintiff's employer in furtherance of the relief claimed.) Because the Board finds petitioners failed to make a substantial contribution to the determination reached in this case, and failed to achieve substantial success in the prosecution of their claims before the Department, arguments addressed to the reasonable amount of costs and the propriety of the methods of computation are not reached.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals, 43 CFR 4.1, the petition for award of costs and expenses is denied.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

R. W. MULLEN
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

The putatively simple question presented by this appeal is whether appellants have shown their entitlement to an award of attorneys' fees under section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (1982), for work performed in the course of litigating the appeal decided in *Donald St. Clair*, 77 IBLA 283, 90 I.D. 496 (1983). In order to decide this question,

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however, it is, as the majority opinion suggests, first necessary to determine the standard to be applied in determining entitlement. In this regard, it must be noted that the statute simply authorizes assessment of such costs and expenses as the Secretary "deems proper." In adopting procedures to implement this statutory mandate, the Department promulgated a regulation which, *inter alia*, authorized an award upon issuance of a final order by this Board to any person (other than the permittee or his representative) "if the person initiates or participates in any proceeding under the Act upon a finding that the person made a substantial contribution to a full and fair determination of the issues." 43 CFR 4.1294(b) (italics supplied).

It seems reasonably clear from a reading of the existing regulation¹ that there is no requirement that an individual prevail on any issue as a precondition to an award of fees from the Office of Surface Mining Reclamation and Enforcement (OSM). On the contrary, the only regulatory requirement is that the individual must "make a substantial contribution" to the determination of the issues involved in a specific case. Thus, the Board's holding herein that an individual must show some quantum on success on the substantive issues involved must be read as a repudiation of the approach formerly undertaken by the Department in determining entitlement to attorneys' fees, as presently codified in the regulations. The initial question, then, is whether the Board is correct.

In this regard, it is my view that the effect of the United States Supreme Court decision in *Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274 (1983), is to invalidate the instant regulation to the extent it purported to invest the Department with authority to grant attorneys' fee awards in those instances where the applicant had failed to preponderate on any substantive issue. Initially, it must be granted that the *Ruckelshaus* decision, by its own terms, merely determined the scope of section 520(d) of SMCRA.² Thus, it is necessary, in the first instance, to determine whether the interpretation of that provision controls the interpretation of section 525(e) of SMCRA.

Facially, the language of the two provisions is notably similar. Thus, section 520(d) provides, in relevant part, that "[t]he court * * * may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." Section 525(e) of SMCRA provides:

¹ The suggestion by counsel for OSM that we should apply a proposed regulation in derogation of one actually in effect at the time the cause of action arose cannot be credited. Regulations are relevant only when they are in effect, not before they are promulgated or after they have been repealed. See *Smelser v. BLM*, 75 IBLA 44 (1983).

² The dissent's attempt to discount the *Ruckelshaus* holding as merely dictum runs afoul not only of the Court majority's express declaration that its interpretation of sec. 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f) (1982), "controls" the construction of the term "appropriate" in, *inter alia*, sec. 520(d) of SMCRA (*id.* at 3274, 3275-76 n.1), but ignores, as well, the dissenters' criticism of the majority for failing to examine the legislative history of each of the 16 enumerated statutes prior to concluding that all 16 statutes limited fee awards to prevailing parties. *Id.* at 3286 n.13 (Stevens, J., dissenting).

Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.

I think it important to emphasize that, while section 520(d), by its nature, applied *only* to court suits and compensation which might fairly be provided to citizens bringing suit, section 525(e) actually covers *both* administrative and judicial proceedings. There is, however, no distinction in the language of section 525(e) between the standard to be applied by a court and that to be utilized by the Secretary. Both are authorized to award costs where they deem it "proper." Thus, absent a showing that Congress intended different standards to apply to judicial grants of costs vis-a-vis administrative determinations *within the confine of section 525(e)*, the result of a holding that section 525(e) did not require "some degree of success" on the merits for administrative grants of costs and expenses would be to establish a bifurcated rule for awarding costs in judicial proceedings initiated under SMCRA. Thus, a citizen suing under section 520(d) must, consistent with *Ruckelshaus*, show "some degree of success" to obtain costs before the court while an individual proceeding under section 525(e), before the same court, need not make such a showing. Conceptually, it is difficult to see why Congress would make such a distinction. Functionally, I do not believe that it so intended.

First, with respect to the question whether Congress intended differing standards to govern the awards of costs in judicial vis-a-vis administrative contexts under section 525(e), I would suggest that the fact that authorization for the award of costs is contained in a single sentence under the same rubric (as the court or Secretary "deems proper") would seem to foreclose any argument that separate standards were to be invoked depending upon the forum of review. Nor does anything in the legislative history even remotely suggest such an intent. Indeed, the legislative history set forth both in the majority and the dissenting opinions relating to section 525(e) contains not a shred of evidence that Congress thought it was enacting two different tests for the award of costs under section 525(e).

This being the case, the issue then resolves itself into a consideration of whether or not Congress intended to establish a different standard for suits brought under section 520(d) and those appeals brought under section 525(e).

The dissent raises many important considerations which *might* have impelled Congress to obviate the need for an individual to show "some degree of success" on the merits as a precondition for an award of costs. The problem, however, is that these considerations apply equally to actions brought under either section 520 or section 525. The Supreme Court in *Ruckelshaus* clearly held that Congress had *not* dispensed with the requirement that "some degree of success" on the

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merits be achieved insofar as section 520(d) was concerned. To the extent that the dissent is premised on an analysis that Congress did so intend, it becomes necessary to show a Congressional intent to *differentiate* between section 520(d) and section 525(e), since the Supreme Court has definitively established that section 520(d) subsumes a requirement that the party seeking an award of costs show "some degree of success." Not only do I feel that the dissent has not succeeded in establishing such a bifurcated intent, the quoted exchange between Representatives Udall, Bauman, and Seiberling, to my mind, undercuts the existence of such a possible dichotomy.

Thus, as the majority points out, in discussing the scope of section 525(e), Representative Udall expressly referenced part of the legislative history of section 520(d) as indicative of the kinds of considerations which would govern awards. Considering all of the legislative history to this point, I think it clear that Congress intended the same standards to apply in adjudications under either section and thus, the Supreme Court's decision in *Ruckelshaus* on the scope of section 520(d) must be considered equally controlling as to the scope of section 525(e). To the extent that the dissent contends otherwise, I would suggest its real argument is not with this Board but with the Supreme Court.³

Having said this, however, I find it impossible to subscribe to the majority view that the *Ruckelshaus* requirement that there be "some degree of success" as a precondition to an award of attorneys' fees can be engrafted onto the present regulatory language as an added fillip. Judge Irwin's analysis of the regulatory history shows, beyond peradventure, that the drafters of the regulation did not intend the regulation to require "some degree of success" on the merits as a prerequisite for obtaining an award of costs. In eschewing the "some degree of success" standard, the regulation chose *instead* to require the party seeking the award to establish that he or she "made a substantial contribution to a full and fair determination of the issues." 43 CFR 4.1294(b). It seems clear to me that, to the extent that this regulatory scheme rejected the imposition of a requirement that a party show "some degree of success on the merits," the regulations were *contrary* to the statute as they authorized the disbursement of Government funds in excess of the Congressional mandate, as effectively interpreted in *Ruckelshaus*. Such regulations cannot stand.

While it has been long recognized in this Department that a duly promulgated regulation has the force and effect of law and is, therefore, binding even on the Department (*McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955)), the binding effect of the regulation is

³ I do not mean to suggest that the fact that the Supreme Court has decided an issue means, ipso facto, that it has decided the issue correctly. As Justice Jackson noted over a quarter of a century ago: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result). But, regardless whether we view a decision of the Supreme Court as correct or erroneous, we are nonetheless bound to follow it in our adjudications.

operative only where the regulation has been adopted pursuant to statutory authority. Thus, as this Board has recognized, where a regulation lacks any statutory basis it can be accorded no validity whatsoever. See *Garland Coal & Mining Co.*, 52 IBLA 60, 88 I.D. 24 (1981). It is impossible to read *Ruckelshaus* without coming to the conclusion that, to the extent 43 CFR 4.1294(b) authorizes an award of attorneys' fees to a claimant in the absence of any degree of success on the merits, it trespasses beyond the proper scope of SM CRA's statutory mandate. Thus, regardless of the exact language employed in the regulation, this Board may only authorize an award if it determines that appellant had "some degree of success on the merits."⁴

As noted above, however, the majority, ignoring that the present regulation was the product of a knowing rejection of the "some degree of success" standard, and, thus, simply not in accord with the statutory mandate, attempts to "save" the present regulation by emending it to include *in addition to* a requirement that the party show "a substantial contribution" another requirement that the individual show "some degree of success on the merits." This, to my mind, is regulation writing in its most pristine form and, as such, not properly within the scope of this Board's authority.

Can it be contravened that 43 CFR 4.1294(b) as it has now been interpreted bears scant resemblance to the regulation promulgated by those officials of the Department in whom such authority is vested? Did *they* intend to write the regulation the majority now promulgates? Of course not.

It may be that a regulation along the lines fashioned by the majority may, one day, commend itself to those charged with its issuance. I would submit, however, that it is for them to decide this question and not this Board. The regulation, as written, does not comport with the Supreme Court's analysis in *Ruckelshaus*. Thus, that regulation is of no force or effect. It is beyond our power to "save" the regulation by "changing" it.

We are, therefore, faced with a regulatory lacuna as there is no longer a valid regulation occupying the field. In such a situation, it is my view that we have no choice but to determine appellants' entitlement to an award of fees based on the simple standard enunciated in *Ruckelshaus* that they must show "some degree of success on the merits" of their claim.

This having been said, however, it becomes necessary to examine the question whether appellants did achieve "some degree of success on the merits" so as to permit an award of fees. While appellants admit that

⁴The dissent's suggestion that the voiding of the instant regulation runs afoul of the decision in *McKay v. Wahlenmaier*, *supra*, must be rejected out-of-hand. That case dealt with regulations which has been lawfully promulgated pursuant to congressionally delegated authority. Where, as here, a regulation is promulgated beyond the scope of the authority of an agency, such regulation does *not* have the force and effect of law, but rather is a nullity, not only without the Department, but within as well. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979); *United States v. Mississippi*, 578 F. Supp. 348, 352 (S.D. Miss. 1984); *Continental Oil Co.*, 70 I.D. 473 (1963).

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they did not agree with certain aspects of the Board's decision,⁵ they suggest that "having rendered a decision on the merits of appellants' claims the Board necessarily agrees with appellants on their claim that they need not exhaust their state administrative remedies before challenging OSM's failure to act." This, appellants suggest, was the most important legal issue before the Board.

The majority rejects this ground for recovery, noting that any such victory as may have been obtained on this issue was purely procedural in nature. It is difficult to quarrel with the majority on this point. Regardless of the importance which appellants may ascribe to a ruling that it is not necessary to exhaust state administrative remedies as a precondition of obtaining review of the refusal by OSM to conduct a Federal inspection, the simple fact remains that a determination as to the availability of review in a specific forum is intrinsically distinguishable from a finding that appellants have shown "some success on the merits of an appeal." In other words, appellants can scarcely contend that the reason they appealed from the adverse decision of the OSM Director was simply to establish that they *could* appeal. On the contrary, appellants filed their appeal for the express purpose of obtaining a reversal of the decision of the OSM Director not to conduct a Federal inspection. This relief they did not obtain. Appellants should not be heard to argue that they have established their entitlement to an award for attorneys' fees simply because the Board rejected their claim on its merits rather than dismissing their appeal out of hand.

Moreover, regardless of the amount of effort which appellants and counsel for OSM expended in briefing the issue of whether exhaustion of state remedies was a prerequisite to Board review, I feel constrained to suggest that the question was one which was fairly simple to resolve. Indeed, not one of the three opinions entered in the case saw fit to even mention OSM's contention and, in this regard, the unanimous silence is eloquent testimony of how poorly based this Board found OSM's contentions to be.⁶ Our rejection of OSM's position could not fairly serve as a basis for an award of fees under section 525(e) of SMCRA, even were we able to apply the regulatory standard that a participant must show a substantial contribution in the adjudicative process.

Thus, the ambit of our inquiry is properly limited to an analysis of whether appellants achieved some success on the merits of their claim,

⁵ Appellants, however, have not sought reconsideration on any of these points. Thus, whether or not they agree with the Board's resolution of these issues is a matter of no moment. The question is whether the ruling which the Board actually issued vindicated appellants' claim to some extent, not whether the ruling which appellants sought would have done so.

⁶ One can only speculate as to the reason the Interior Board of Surface Mining and Reclamation Appeals (IBSMA) saw fit to grant oral argument on this point. However, the fact that IBSMA may have erred on the side of excessive caution so that all points of view, regardless of how implausible, might be fully explored should not give rise to any independent right of compensation for appellants. See *Council of Southern Mountains v. OSM*, 3 IBSMA 44, 61, 88 I.D. 394, 403 (Frishberg, J., dissenting in part).

i.e., that the OSM State Director should have ordered a Federal inspection of Island Creek Coal Preparation Facility #25. There were two independent elements of this claim. First, appellants suggested that, since the State Director had declared in his March 3, 1982, letter to the West Virginia Department of Natural Resources (DNR), that he had "reason to believe that an imminent danger exists in Ragland," the OSM State Director should have, at that time, ordered a Federal inspection. Second, appellants argued that, notwithstanding the failure of the OSM State Director to initially order a Federal inspection, the inspection conducted by DNR was so fatally defective that a Federal inspection should have been ordered by the State Director under 30 CFR 842.11(b)(1)(ii)(B).

In attempting to determine whether appellants met with some degree of success on the merits of the appeal, it quickly becomes obvious that the absence of a majority opinion confuses an already complex matter. In such circumstances, I think it is necessary to compare the approach of all three opinions to discern what underlying rationale controlled the ultimate disposition of the appeal.

Insofar as the first issue was concerned, the lead opinion, authored by Judge Henriques, found that the language used by the State Director in the March 3 letter was "merely a recitation (albeit, perhaps an ill advised one) of the language presented in the complaint" and did not represent a personal conclusion of the State Director that *he* had reason to believe an imminent danger existed. *Id.* at 297, 90 I.D. at 503. Judge Arness, in his concurring opinion, was critical of the lead opinion's interpretation of the March 3 letter, suggesting that OSM's argument before the Board was based on "the clarity of hindsight." *Id.* at 303, 90 I.D. at 507. This opinion noted, however, that subsequent developments show that any conclusion of the State Director on the existence of an imminent danger was not shown to be founded in fact. *Id.* For myself, I was unconvinced that any error whatsoever occurred when the OSM State Director wrote that he had reason to believe an imminent danger existed, as it was my view that the expression utilized by the State Director was a term of art mandated by the regulations. *Id.* at 306-08, 90 I.D. at 508-09. Thus, two opinions rejected appellants' contention that the terminology used by the OSM State Director was inconsistent with his failure to order an immediate inspection while the third opinion suggested that, even though the language might have been inconsistent with his failure to act, the facts necessary to support a finding by the State Director that an imminent danger existed were not shown to exist in this record. It is clear that appellants did not prevail on the first ground of their complaint.

Concerning the second argument, the crux of contention centered on the question whether appellants' March 23 request for informal review provided sufficient information for OSM to have reversed its earlier decision. The lead opinion expressed the view that the analysis of the OSM Director, which accompanied his refusal to order a Federal

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inspection, showed that OSM had carefully considered all of the factors and that the record supported the conclusion that the water problems at Ragland could not be linked to Island Creek's operations. *Id.* at 301, 90 I.D. at 505. Judge Arness did not directly deal with this issue, beyond noting his disagreement with the lead opinion's assertion that "OSM had done all it reasonably could to resolve the problem." He declined to order a Federal inspection, however, on the grounds that "[s]ince the record indicates the investigation and cooperation between the various agencies is continuing, there seems little point, under the circumstances, to require a Federal inspection now." *Id.* at 304, 90 I.D. at 507-08.

My own review of the record led me to conclude that appellants had established that there were marked deficiencies in the DNR inspection which had been conducted in response to the filing of the citizen's complaint. On the other hand, I, too, concurred in the view, that, considering the on-going activities of both the State and Federal Government, no public benefit would be served by ordering a Federal inspection. It seems clear to me that two of the Judges who decided this matter declined to order a Federal inspection because of the unlikelihood it would be beneficial given the situation then existing concerning Ragland's water problems. In effect, subsequent activities by State and Federal regulatory agencies had basically served to vitiate the utility of appellants' requested relief.

However, I do not believe that the mere fact that appellants were unsuccessful in obtaining the requested relief can be absolutely preclusive on the question whether they have shown entitlement to attorneys' fees, even under the Supreme Court's *Ruckelshaus* decision. As the Court was careful to note, where the action of citizen complainants in pursuing their claim resulted in a "voluntary" abatement of the objected conduct, fees may be awarded even though no final judgment favorable to the complainants was ever entered by a court. *Ruckelshaus v. Sierra Club, supra* at 3278 n.8. The reason for this, of course, is that a citizen complainant should not be deprived of reasonable fees and costs incurred in filing an action which leads to amelioration of a perceived violation merely because an agency chose to correct the condition during the pendency of litigation rather than after the entry of an adverse judgment. To the extent, therefore, that ameliorative action, even though in one sense it be deemed "voluntary," is, in fact, a direct result of allegations raised in a citizen's complaint, such action must be considered within the framework of the complainants' original contentions in order to ascertain whether or not they have achieved some success on the merits of their complaint.

The ultimate question, therefore, is whether the actions of the agencies which were deemed to preclude the relief sought by appellants in our first decision were taken *as a result* of the citizens'

complaint herein. Upon close examination of this question, I have concluded that such actions as were undertaken, while compatible with certain desires of appellants, were substantially the result of independent considerations rather than a result of appellants' complaint.

The real gravamen of appellants' complaint was that Island Creek Coal Co. was responsible for contaminating Ragland's water supply through discharging water containing polyacrylamides into an abandoned underground mine. That Ragland's water supply was contaminated was never in doubt; that Island Creek's activities were, in some way, responsible has yet to be established. Nothing which appellants have submitted has served to establish a linkage between Island Creek's discharge and Ragland's water problems. Our refusal to grant appellants any relief was not occasioned by any action of State and Federal agencies which established such a connection, but rather was the result of independent actions by those agencies attempting to clear up Ragland's water problems, some of which actions had been initiated prior to the filing of appellants' complaint, regardless of the source of the problem.

The record before the Board is as devoid of proof of appellants' basic allegation that Island Creek was responsible for the water contamination now as it was when the petition for review was denied in 1982. While I have expressed my personal view in our earlier decision that DNR did not provide the type of inspection contemplated by the Act, I cannot ignore the reality that not only have appellants failed to show that Island Creek was responsible for Ragland's problems, but they now admit that a Federal inspection (which might establish that fact) would not be beneficial. I do not see how appellants can, consistent with *Ruckelshaus v. Sierra Club, supra*, maintain their petition for an award of fees under the facts of this case.

Accordingly, for the reasons expressed herein, I concur with the denial of the petition for an award of fees.

JAMES L. BURSKI
Administrative Judge

ADMINISTRATIVE JUDGE HARRIS CONCURRING IN THE RESULT:

The key question presented by this case is what is the effect of *Ruckelshaus v. Sierra Club*, 463 U.S. _____, 103 S. Ct. 3274 (1983), on the Board's disposition of the petition for award of costs and expenses. The majority holds that *Ruckelshaus* imposes an additional requirement on petitioners beyond the regulatory requirement of 43 CFR 4.1294(b). On the other hand, Judge Burski finds that the *Ruckelshaus* standard supplants the regulation, while Judge Irwin concludes *Ruckelshaus* has no effect, and the case is controlled by the regulatory standard of substantial contribution.

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My position is that the *Ruckelshaus* case neither adds a requirement nor negates the regulation. Although, as pointed out by Judge Irwin, *Ruckelshaus* interprets a different word in a different statute, I am not willing to dismiss it as having no effect as he has done. Likewise, there is no need to rush to accept it. However, to the extent *Ruckelshaus* represents the recent opinion of the highest Court on the subject of attorneys' fee awards, it must be scrutinized closely to determine if it provides useful guidance.

In section II of his dissenting opinion, Judge Irwin quotes from the legislative history of the Federal Water Pollution Control Act Amendments of 1972 which stated that courts could award fees where it was in the public interest. 1972 U.S. Code Cong. & Ad. News 3747. It was further stated:

The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances, the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

Id. Judge Irwin subsequently concludes, " 'Substantial contribution to full and fair consideration,' like 'in the public interest,' and 'meritorious' implies that something less than 'some success on the merits' is sufficient for an award of fees in an administrative proceeding under the surface mining act." (Italics in original.) Judge Irwin considers substantial contribution to be a different and less stringent standard than the *Ruckelshaus* standard.

In *Ruckelshaus, supra* at 3278 n.8, the Court interpreted language similar to that quoted above¹ and stated:

The approval of fee awards in "legitimate" actions offers respondents little comfort: "legitimate" means "being exactly as proposed: neither spurious nor false," which does not describe respondents' claims in this case. Respondents contend, however, that Congress intended the term "appropriate" to encompass situations beyond those mentioned in the legislative history, and, therefore, that the term reaches even totally unsuccessful actions. This is, of course, possible, but not likely. Congress found it necessary to explicitly state that the term appropriate "extended" to suits that forced defendants to abandon illegal conduct, although without a formal court order; this was no doubt viewed as a somewhat expansive innovation, since, under then-controlling law, see *infra*, some courts awarded fees only to parties formally prevailing in court. We are unpersuaded by the argument that this same Congress was so sure that "appropriate" also would extend to the far more novel, costly and intuitively unsatisfying result of awarding fees to unsuccessful parties that it did not bother to mention the fact. If Congress had intended the far-reaching result urged by respondents, it plainly would

¹ That language was from a 1970 Senate report. The Court quoted from it as follows:

"The Courts should recognize that in bringing *legitimate actions* under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970)." (Italics in original.)

have said so, as is demonstrated by Congress' careful statement that a *less* sweeping innovation *was* adopted. [Italics in original.]

This language indicates that the Court endorsed the concept of allowing the awarding of fees where citizens have commenced a suit, but without any formal judgment, the complained of action or inaction has been successfully corrected.

To the extent *Ruckelshaus* endorses such an award, I believe it is reconcilable in this case with the Department's regulatory standard. In a situation where the objectionable action or inaction has been corrected following the initiation of a citizens' complaint, but without the order of a tribunal, the citizens would not traditionally be considered the "winning" party in the sense that no judgment would have been entered in their favor.²

The question in such a case, as posed by Judge Burski, is whether the corrective action was taken as a result of the citizens' complaint. If the complainants can make such a showing, I propose they have satisfied the regulatory standard of substantial contribution.³ Therefore, *Ruckelshaus*, rather than adding a requirement, or negating the regulatory requirement, or having no effect at all, provides guidance in defining the Departmental standard. I would find that where, after reviewing the record of a citizens' complaint case and subsequent petition for fees, it may be concluded that actions related to the citizens' contentions were taken as a result of the complaint, petitioners have made a substantial contribution to a full and fair determination of the issues, despite the fact they may not have received a formal judgment on the merits of their claim.

In the present case petitioners filed a citizens' complaint with OSM on February 25, 1982, charging (1) Island Creek Coal Co.'s activities had caused and were causing water contamination in the Ragland Public Service District, and (2) the contamination constituted an imminent threat to the health and safety of the public and a significant imminent environmental harm to water resources. Petitioners sought an immediate Federal inspection. *Donald St. Clair*, 77 IBLA 283, 286-87 (1983). OSM responded to petitioners' complaint stating that OSM had been involved in the Ragland water problem since August 1979, that other State and Federal agencies subsequently became involved, and that it was effectively rejecting appellants' complaint. The Board affirmed that decision. Although petitioners received a ruling from the Board affirming the denial of their complaint, the record shows that various actions were taken by certain agencies to address Ragland's water problems. The question presented is whether these actions were taken as a result of the citizens' complaint. If so, then petitioners would be entitled to an award under

² In the preamble to the proposed procedural regulations the Department was clear in stating that it did not consider the award of fees to be limited to the "winning party." 43 FR 15444 (Apr. 13, 1978). In addition, the preamble to the final procedural regulations specifically stated that settlement of a case would not preclude an award. 43 FR 34986 (Aug. 3, 1978).

³ This is clearly not the only situation in which an award may be made on the basis of the substantial contribution standard; however, it is the one which is applicable herein.

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43 CFR 4.1294(b). In that regard I agree with Judge Burski's analysis in which he concludes that petitioners have failed to establish that the actions of the various agencies in addressing Ragland's water problems were undertaken as a result of their complaint, notwithstanding that some of those actions took place after the filing of the complaint.

To the extent the majority decision establishes a new standard for the award of fees based on the necessity of showing some degree of success on the merits *and* a substantial contribution to a full and fair determination of the issues, I dissent from that holding. However, since I agree that the petition for fees should be denied, I must concur in the result.

BRUCE R. HARRIS
Administrative Judge

I CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

I. Introduction

The majority hold that the Supreme Court's decision in *Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274 (1983), requires applicants for attorney fees and costs for their participation in administrative proceedings under the surface mining act must "achieve some part of a declared objective by the means of legal action before becoming entitled to an award." *Donald St. Clair*, 84 IBLA at 248, 92 I.D. at 8 (1984). Judge Burski is bolder and asserts that *Ruckelshaus* means "that, to the extent 43 CFR 4.1294(b) authorizes an award of attorneys' fees to a claimant in the absence of any degree of success on the merits, it trespasses beyond the proper scope of SMCRA's statutory mandate." *Id.* at 259, 92 I.D. at 14. Thus, the majority add a requirement for gaining an award not contained in the regulations while Judge Burski dismisses the regulations as invalid. For their part, Judge Harris and Chief Judge Horton make a valiant attempt to reconcile *Ruckelshaus* and the regulation under the circumstances of this case.

The majority actually make several statements about what applicants must show. While these statements leave no doubt that something more than substantial contribution must be shown, they leave considerable doubt about what it is. First the majority say the primary issue is "whether petitioners' success * * * was *sufficient*." *Id.* at 239-40, 92 I.D. at 3 (italics added). Then they say the question is properly stated in terms of "whether petitioners have, by achieving a *measurable success*, made a 'substantial contribution.'" *Id.* at 246, 92 I.D. at 7 (italics added). Then they acknowledge that "it is difficult to declare as a general proposition that the *Ruckelshaus*

rubric requiring 'success on the merits' will have any value in establishing standards for costs awards in administrative proceedings." *Id.* at 248, 92 I.D. at 8. Then they say it is not unreasonable to require "that petitioners show they have achieved *some of the benefit they sought*" in bringing this action. *Id.* at 250, 92 I.D. at 9 (italics added). Finally the majority conclude that no award is proper because petitioners "failed to make a substantial contribution to the determination reached in this case, and failed to achieve *substantial success* in the prosecution of their claims." *Id.* at 252, 92 I.D. 10 (italics added). This confusing and contradictory set of statements raises more problems than it solves. It certainly seems possible to interpret the majority to mean an applicant must do more than even *Ruckelshaus* demands, *i.e.*, not only achieve substantial success on the merits but also make a substantial contribution. It also appears an applicant not only must be at least partly victorious at the end of the litigation but also must have stated in its initial complaint what the objectives of the litigation were. Apparently success is to be measured against the degree to which these stated objectives were met, in order to determine whether it was "substantial."

While Judge Burski's abandonment of the present standard may be more direct, his authority for doing so is mere *ipse dixit*. After bowing in the direction of the rule of law by citing *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955), he turns his back on it in this case by citing *Garland Coal & Mining Co.*, 52 IBLA 60, 88 I.D. 24 (1981). Whatever one thinks of his theory that we are authorized to declare a regulation invalid, it simply ignores history, set forth below, to suggest the regulation involved in this case "lacks any statutory basis" so that it "can be accorded no validity whatsoever."

In their rush to embrace *Ruckelshaus* however, the majority of my colleagues have evidently forgotten first principles. As long as "substantial contribution" is the standard in our regulations for determining whether an award of attorney fees and other expenses is proper, we are bound by that standard. If some other standard based on *Ruckelshaus* is to be substituted for the "substantial contribution" standard, that must be done by rulemaking. We are not free to amend our present rules by adjudication of this case. "So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." *United States v. Nixon*, 418 U.S. 683, 696 (1974).¹

Not only is the *de facto* amendment of the "substantial contribution" standard improper; it is unnecessary. That standard is clearly based on the history of the Surface Mining Act and regulations and has a different meaning than the *Ruckelshaus* standard. Therefore, *Ruckelshaus* neither governs the result in this case nor requires a

¹ It should not be necessary to point out that this principle, unlike the one in *Ruckelshaus*, has been established for over 30 years. See *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954); *Service v. Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 540, 547 (1959).

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change in the existing standard for awarding fees and expenses in administrative proceedings. This is clear from the history of the Act and the regulations, from an understanding of the term "substantial contribution," and from an analysis of the decision in *Ruckelshaus*. These topics are discussed below.

II. *The History of the Act and the Regulations*

A. The History of the Act.

An appreciation for when it is proper to award fees and expenses in administrative proceedings depends on an understanding of the history of the provisions authorizing such awards. Since this history is not comprehensively set forth elsewhere, it is useful to do so as a basis for demonstrating that it dictates a different approach than does *Ruckelshaus*.

Several versions of a surface mining act failed to win approval before P.L. 95-87 was approved in 1977. Some of those versions contained provisions authorizing attorney fees and costs in citizen suits.² H.R. 2, the House bill that was eventually enacted as P.L. 95-87, did not originally have such a provision, however. Testimony was therefore offered to the House Subcommittee on Energy and the Environment in February and March 1977 advocating inclusion of such authority.³ In addition, the suggestion was made to extend this authority to administrative proceedings.

We further suggest that the Secretary be empowered to award reasonable attorneys fees and costs against the operator in administrative proceedings under H.R. 2 where the operator has violated the law, and a person or his representative who is directly affected by the mining activity of the operator made a substantial contribution to the outcome of the proceeding in the opinion of the Secretary.⁴

² Reasonable attorneys' fees and costs also should be awarded to the person or his representative for judicial proceedings, reviewing agency determinations, under the same standards as awards in the administrative proceedings themselves. [9]

This suggestion was the genesis of the present section 525(e).⁵ In explaining this section of the bill the House committee report on H.R. 2 stated:

Section 525(e) provides for the award of costs, including attorneys' and expert witness fees, in the discretion of the Secretary. This section gives the Secretary authority to award attorneys' fees to compensate participants in the administrative process. The subsection does not require that the proceedings result in the finding of a violation nor

² See, e.g., sec. 223(d), H.R. 11500, 93d Cong., 2d Sess. (1974). See also H.R. Rep. No. 1072, 93d Cong., 2d Sess. 143-44 (1974).

³ See, e.g., Hearings before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs, House of Representatives, 95th Cong., 1st Sess., on H.R. 2, Serial No. 95-1, Part IV, at 111-12 (statement of Edward Weinberg) and 486 (testimony of J. Davitt McAteer and L. Thomas Galloway).

⁴ *Id.* at 486-87.

⁵ Sec. 525(e), 91 Stat. 512, provides:

"(e) Whenever an order is issued under this section, or as a result of any administrative proceeding under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper."

does the fact that the Government was a party in an adjudicatory proceeding, or had caused the proceeding to be initiated prevent an award under the terms of the subsection. It is the committee's intention that this subsection not be interpreted or applied in a manner that would discourage good faith actions on the part of interested citizens.⁶

Three observations about this statement are relevant to the question of when an award of costs should be deemed proper. First, the committee stated that an award does not depend on whether a proceeding results in the finding of a violation. Secondly, neither initiation of nor participation in a proceeding by the Government precludes an award. Both these statements imply that compensation may be made when citizens *participate* in a proceeding, not merely when they vindicate their rights. (As discussed below, not just any participation deserves an award; it must make a substantial contribution to a full and fair consideration of the facts and issues.) Finally, the committee clearly states an intention that the section not be interpreted in a way that would discourage participation by citizens.

In an effort to clarify this new provision, Representative Seiberling engaged Representative Udall in a discussion of it during the House debate on the bill on April 29, 1977. Since portions of this colloquy are discussed by the majority, it is set out in full.

Mr. SEIBERLING: Mr. Chairman, I wish to engage in a colloquy with the chairman of the committee. I wonder if the distinguished chairman of the committee would answer several questions about the Secretary's discretion to award costs of participation under section 525(e). As I understand it, the Secretary is the one to make the determination. Is that correct?

Mr. UDALL: Yes; that is correct. In the initial administrative proceeding, the Secretary would have discretion to make the assessment. If the agency action is reviewed in the courts, then, of course, it would be appropriate for the courts to review the assessment and award, under the usual standards for review of an administrative action. In addition, the courts could assess and award costs for a person's participation in the judicial review.

Mr. SEIBERLING: Are there any standards or guidelines for the Secretary to use to determine which persons are to be awarded costs?

Mr. UDALL: *The Secretary would have broad discretion. It would normally be appropriate for him to award costs to a person whose participation has contributed substantially to a full and fair consideration of the facts and issues involved in the proceeding, taking into account, where appropriate, the financial resources of the participant. In general, an award would be governed by the same kinds of considerations as would govern a court in a court action, as outlined in the last two paragraphs of page 90 of the committee report.*

Mr. BAUMAN: Mr. Chairman, if the gentleman will yield, the gentleman from Arizona has just addressed himself to section 525(e) and I believe the gentleman from Maryland was the one who offered the language which allowed the Court to assess the costs against either party as the Court deemed proper. I am not quite sure, although I listened to the remarks the gentleman made, it was the intention of the offerer of that amendment that either party could receive compensation. That was the intention of the entire committee debate, and that the Court would have the right to determine that. It was never the intention that this section of the bill should expand the scope of the Secretary of the Interior's authority as defined by the Administrative Procedure Act.

Mr. SEIBERLING: Mr. Chairman, if the gentleman will yield, this is entirely consistent with that, and while I did not agree with the gentleman's amendment, I

⁶H.R. Rep. No. 95-218, dated Apr. 22, 1977, at 131.

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obviously have to recognize that the amendment does permit an award to either party, but the same principles of equity should be followed by the Secretary as would govern a court in deciding the extent to which the award should be made.

Mr. BAUMAN: It is my understanding the Administrative Procedure Act would govern the extent to which the Secretary could make an award of costs.

Mr. SEIBERLING: To the extent it does, but it does not go into detail as to the kinds of considerations that would enter into a decision by the Secretary.

Mr. BAUMAN: I am sure though that law provides general equity.

Mr. SEIBERLING: But the Secretary has discretion and there obviously has to be some way he is going to use his discretion and he is going to resort to the Court precedents, I presume, in a particular case to determine whether to award costs, for example, if somebody is bringing an objection purely for vexatious purposes, the Secretary ought to take that into consideration and not give him the award of costs.

Mr. UDALL: Mr. Chairman, if the gentleman will yield, the gentleman believes the intent of the author of the amendment was the same as mine.

Mr. BAUMAN: I have a strong feeling that the gentleman from Arizona's intention governs in all matters pertaining to this bill. [⁷ italics added.]

The majority quote the underlined portion of this colloquy and conclude that "reference to the analysis of section 520 in connection with the interpretation of section 525(e) * * * evinces congressional intent that section 525(e) should be interpreted and applied in the same manner as section 520(d)." *Donald St. Clair, supra* at 244, 92 I.D. at 6. I think a reading of the colloquy as a whole, plus an understanding of the background of the questions raised in it, indicates the majority conclusion is incorrect. First, since fees and costs for administrative proceedings were a new addition to the bill it is logical that Representative Udall would cite to the passage in the committee report on citizen suit attorney fee provisions in other legislation as a frame of reference for his colleagues in responding to Representative Seiberling's second question. Secondly, as both the colloquy and the paragraphs from the committee report indicate, there were several issues that had been discussed in connection with authorizing the award of fees and costs in citizen suits, including how to discourage frivolous or harassing suits and when to authorize awards to various parties. The committee report paragraphs concerning section 520(d) authority to award costs in citizen suits read:

The court in issuing any final order may award litigation costs (including reasonable attorneys and expert witness fees) to any party whenever appropriate. This provision is intended to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who go to court to insure that the act's requirements are being met. The provision will not deter citizens acting as private attorneys general from bringing good faith actions to insure the bill is being enforced by the prospect of having to pay their opponent's counsel fees should they lose. It is the committee's intention that this section be construed consistently with the history of similar Federal statutes providing for awards of attorneys' fees in citizen suit actions. See Senate Report No. 414, 92d Congress, 2d session, 1972 United States Code Congressional and Administration [sic] News 3747 (Water Pollution Control Act Amendments of 1972); Senate Report No. 451, 92d Congress, 2d session, 1972 United States Code Congressional and

⁷ 123 Cong. Rec. 12,877 (1977).

Administration [sic] News 4249-50 (Marine Protection, Research and Sanctuaries Act of 1972).

Thus, it is the Committee's intention that this provision be construed consistently with the general principle that an award may be made to a defendant only if the plaintiff has instituted the action solely "to harass or embarrass" the defendant. *United States Steel Corp. v. United States*, 519 F.2d 354, 364, (3d Cir. 1975). If the plaintiff is "motivated by malice and vindictiveness" then the court may award counsel fees to the prevailing defendant. *Carrion v. Yeshiva University*, 535 F.2d 722 (2d Cir. 1976). Thus, if the action is not brought in bad faith such fees should not be allowed. See *Wright v. Stone Container Corp.*, 524 F.2d 1058 (8th Cir. 1975); see also, *Richardson v. Hotel Corp. of America*, 332 F. Supp. 519 (E.D. La. 1971); affixed [sic] without published opinion, 468 F.2d 951 (5th Cir. 1972). This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes. [8]

As these paragraphs make clear, the committee in this context was concerned in the first paragraph with when an award may be made to a plaintiff and, in the second, when one might be made to a defendant. In the first paragraph the committee refers to the legislative history of two analogous citizen suit attorney fee provisions when indicating how section 520(d) is to be interpreted. The legislative history of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) stated:

Concern was expressed that some lawyers would use section 505 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.

The Courts should recognize that in bringing legitimate actions under this section citizens will be performing a public service and in such instances, the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions. [9 Italics added.]

The legislative history of the Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA) states: "[I]n issuing a final order in any such suit the court may award certain costs of litigation to any party when it concludes, in its discretion, that such an award is appropriate (e.g., if the plaintiff shows that the suit was meritorious, and not filed for the sake of mere harassment)." [10 Italics added.]

In referring to these statutes in its April 1977 report, the Committee might well have had in mind the then-recent (February 1977) decision of the U.S. District Court for the District of Rhode Island awarding fees under these provisions of the FWPCA and the MRPSA (33 U.S.C. §§ 1365(d), 1415(g)(4) (1982)). In *Save Our Sound Fisheries Association v. Callaway*, 429 F. Supp. 1136, 1145-46 (D.R.I. 1977), Chief Judge

⁸ H.R. Rep. No. 95-218, *supra* note 6, at 90.

⁹ S. Rep. No. 414, 92d Cong., 2d Sess. 1972, U.S. Code Cong. & Ad. News 3747.

¹⁰ S. Rep. No. 451, 92d Cong., 2d Sess. 1972, U.S. Code Cong. & Ad. News 4249-50.

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Pettine wrote, concerning whether an award of attorneys' fees was appropriate:

In a similar situation, where Congress passed a remedial program and provided for enforcement in large measure through citizen enforcement, without the possibility of damages, the Supreme Court has ruled that the Congressional intention was that fees were to be awarded unless plaintiffs acted in bad faith, or litigated vexatiously. *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 88 S. Ct. 964, 19 L.Ed.2d 1263 (1968) (per curiam). *Newman* is strong authority for this Court's holding that both the FWPCA and MPRSA contemplate the award of fees absent exceptional circumstances as detailed in *Newman, supra*. * * *

* * * * *

* * * The legislative history of both the FWPCA and MPRSA also amply support this holding. See S. Rep. No. 92-411 [sic], *supra*, 1972 U.S. Code Cong. and Admin. News, p. 3747 (FWPCA); S. Rep. No. 92-451, 92nd Cong., 2nd Sess., 1972 U.S. Code Cong. and Admin. News, pp. 4249-50 (MPRSA). [Footnotes omitted.]

Considering both the statements in the legislative histories of the FWPCA and the MPRSA to which Representative Udall referred and the words with which he referred to them in his response to Representative Seiberling's question about standards for the award of costs under section 525(e), it is evident that Representative Udall intended that "contributed substantially to a full and fair consideration of the facts and issues involved" in an administrative proceeding be a standard similar to the "in the public interest" standard referred to in connection with the FWPCA and the "meritorious" one referred to in connection with the Marine Sanctuaries Act. These are the "same *kinds* of considerations as would govern a court" that Representative Udall indicated would "in general" guide the Secretary's discretion for administrative proceedings under section 525(e). Acknowledging this, however, does not lead to the majority's conclusion that section 525(e) is to be interpreted and applied in the same manner as section 520(d). Representative Udall enunciated a different standard for a different institution of Government to make a similar exercise of discretion. Resorting to "Court precedents," as Representative Seiberling put it in response to Representative Bauman's question regarding when a defendant might receive an award, does not mean the Secretary must do the same under section 525(e) as a court would under section 520(d).

Thus, the legislative history of section 525(e), while related to that of section 520(d), does not support the majority's effort to bind section 525(e) to section 520(d) and, thus, to a standard based on *Ruckelshaus*. Indeed, the history supports a different and less stringent standard. "Substantial *contribution* to full and fair consideration," like "in the public interest," and "meritorious," implies that something less than "some success on the merits" is sufficient for an award of fees in an administrative proceeding under the Surface Mining Act. Reading this phrase as meaning what the *Ruckelshaus* opinion recently interpreted

“appropriate” to mean in a different context is simply an attempt to rewrite the legislative history, not to interpret it.

The Congress recognized that availability of attorney fees and costs for participation in any administrative proceeding under the Surface Mining Act is vital to effective public participation under the Act, thus helping assure compliance with the Act's provisions:

The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. The State regulatory authority or Department of Interior can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing. Moreover, a number of decisions to be made by the regulatory authority in the designation and variance processes under the Act are contingent on the outcome of land use issues which require an analysis of various local and regional considerations. While citizen participation is not, and cannot be a substitute for governmental authority, citizen involvement in all phases of the regulatory scheme will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information. In addition, providing citizen access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the Act.

In many, if not most, cases in both the administrative and judicial forum, the citizen who sues to enforce the law, or participates in administrative proceedings to enforce the law, will have little or no money with which to hire a lawyer. If private citizens are to be able to assert the rights granted them by this bill, and if those who violate this bill's requirements are not to proceed with impunity, then citizens must have the opportunity to recover the attorneys' fees necessary to vindicate their rights. Attorneys' fees may be awarded to the permittee or government when the suit or participation is brought in bad faith. [11 Italics added.]

This general statement about attorney fees, along with the House committee's statement that section 525(e) is “not to be interpreted or applied in a manner that would discourage good faith actions on the part of interested citizens,” are a clear recognition that effective regulation of activities as dispersed, site-specific, and unsuitable to automatic monitoring as surface mining activities are depends to a significant extent on the cooperation and involvement of citizens who are affected by them. Any presumption in favor of the Department's ability to manage effectively without public participation disappears upon reading of its failure to assess and collect civil penalties.¹² But such cooperation and involvement by the public are discouraged by a requirement that to be compensated for participation in an administrative proceeding before a regulatory authority a person must do more than make a substantial contribution to a full and fair consideration of the issues raised in that proceeding.

¹¹ S. Rep. No. 128, 95th Cong., 1st Sess. 59 (1977); see also H.R. Rep. No. 95-218, *supra* note 6, at 88.

¹² See “Breakdowns in the Department of the Interior's Civil Penalty Assessment and Collections Program Have Adversely Affected the Enforcement of the Surface Mining Control and Reclamation Act of 1977, Sixty-Second Report by the Committee on Government Operations[,] 98th Congress, 2d Session, House Report 98-1146, Oct. 5, 1984.”; see also “To Review Assessment and Collection of Civil Penalties by the Department of the Interior Under the Surface Mining Control and Reclamation Act, Hearing Before a Subcommittee of the Committee on Government Operations House of Representatives Ninety-eighth Congress, Second Session, June 13, 1984.”

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B. *The History of the Regulation.*

When the Department proposed rulemaking to implement section 525(e), the preamble recited the substance of the legislative history discussed above and stated explicitly that a citizen "might * * * substantially contribute and be compensated, even if the citizen were not the winning party."

The legislative history of the Act is clear that section 525(e) of the Act is intended to encourage public participation in the administrative process. Such a provision is designed to encourage citizens to bring good faith actions to insure that the Act is being properly enforced. It is the intention of the Office that these proposed rules not be interpreted to discourage good faith actions on the part of interested citizens.

The Office has utilized the legislative history of the Act, Federal statutes, and various court cases concerning the awarding of attorneys' fees in arriving at these proposed rules.

The Surface Mining Act and its legislative history appear to authorize awards of costs and expenses on the basis of two theories. One theory might be characterized as fee shifting, in which the person adjudged to have violated the law might be required to pay the cost and expenses of the party affected by the wrong. For example, if a permittee violated the Act to the detriment of a citizen, costs and expenses might be awarded against the permittee and in favor of the citizen. The second theory might be referred to as a Government compensation theory and would allow for Government payment to citizens for their participation in administrative proceedings where there has been a substantial contribution to a determination of the issues. In this situation, a citizen might intervene in or initiate a proceeding and substantially contribute and be compensated, even if the citizen were not the winning party.

While the proposed regulations do not specifically address these two theories, comments are invited concerning any addition or different language which will assist the Office in implementing section 525(e) of the Act. [13]

The preamble to the regulations, as finally promulgated, indicates that the Department accepted comments suggesting clarification of what showing was necessary to receive an award from a permittee or the Government:

Still other commenters recognized a basic flaw in § 4.1294 in that it did not specify who would pay the fees and what showing was necessary to receive an award. These commenters suggested limited changes to § 4.1294 to rectify the situation. As a result of these comments, § 4.1294 has been revised to reflect who will pay the award and the finding that is necessary in making the award. *Section 4.1294(a) was changed to state that any person may receive an award from the permittee under certain circumstances. There are three circumstances under which such an award may be made—(1) The person initiates a review proceeding and there is a finding of violation of the Act, regulations, permit or a finding that an imminent hazard existed; (2) If such a finding is made and the person participated in an enforcement proceeding, there is a further finding by the administrative law judge or the Board that the person made a substantial contribution to a full and fair determination of the issues; and (3) If a person files an application for review of alleged discriminatory acts, and there is a finding of discriminatory discharge or other acts of discrimination. A new subsection (b) was added to provide that any person, other than the permittee or his representative, may receive payment from OSM if the person initiates or participates in any proceeding under the Act upon a finding that the person made a substantial contribution to a full and fair determination of the issues.* [14 Italics added.]

¹³ 43 FR 15441, 15444 (Apr. 13, 1978). Proposed rule 43 CFR 4.1294(a)(3) provided that appropriate costs and expenses could be awarded to any person "[w]ho participates in an administrative proceeding upon a finding that that person made a substantial contribution to the full and fair determination of the issues." *Id.* at 15456.

¹⁴ 43 FR 34376, 34385-86 (Aug. 3, 1978).

The preamble also stated clearly that "the manner of disposition" of a case, e.g., settlement, would not preclude an award of costs.¹⁵

Thus, these regulations and their history clearly establish the "substantial contribution" standard for an award of costs for participation in an administrative proceeding. These regulations have not been amended, so this standard is the governing one.

III. *The Meaning of "Substantial Contribution to a Full and Fair Determination of the Issues Involved"*

The antecedents of the substantial contribution standard discussed in the legislative history of the Surface Mining Act indicate what it means. In 1975, in part to relieve uncertainty about the Federal Trade Commission's authority to promulgate substantive rules,¹⁶ Congress enacted the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.¹⁷ Section 202(h) of that law authorized the Commission to make rules to

provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a *fair determination of the rulemaking proceeding* taken as a whole. [¹⁸ Italics added.]

The purposes of this provision were set forth as follows:

Compensation for Certain Representation.

In order to provide to the extent possible that all affected interests be represented in rulemaking proceedings *so that rules adopted thereunder best serve the public interest*, the FTC is authorized to provide compensation for reasonable attorneys and expert witness fees and other costs of participating in rulemaking proceedings. The FTC could pay such compensation to any person who has or represents an interest which would not otherwise be adequately represented in such proceeding, and representation of which is necessary for a fair determination of the proceeding taken as a whole and who but for the compensation would be unable effectively to participate in such proceeding because such person would otherwise not be able to afford the cost of such participation.

Not more than 25 percent of the amount paid as such compensation in any fiscal year could be paid to persons who the proposed rule would regulate or who represent the interests of such persons.

No more than \$1 million could be expended for such compensation in any fiscal year. Because the utilization of these funds may be critical to the *full disclosure of material facts in rulemaking proceedings*, the conferees expect the Commission to assign a high priority to their proper expenditure. [¹⁹ Italics added.]

The Federal Trade Commission developed guidelines that set forth the standards applied in reviewing applications in advance of rulemaking for compensation under section 202(h) of the Magnuson-Moss Act that were adopted by the Commission's Bureau of Consumer Protection in May 1977 after extensive comments from consumer groups, industry, congressional committees, and members of the public.²⁰ These guidelines indicate several factors the Commission

¹⁵ *Id.* at 34385.

¹⁶ See *National Petroleum Refiners Ass'n v. FTC*, 340 F. Supp. 1343 (D.D.C. 1972), *rev'd*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 94 S. Ct. 1475 (1974).

¹⁷ P.L. 93-637, 88 Stat. 2183-2203.

¹⁸ 88 Stat. 2197. The Federal Trade Commission's rules are found in 16 CFR 1.17.

¹⁹ 1974 U.S. Code Cong. & Ad. News 7768.

²⁰ 42 FR 30480 (June 14, 1977), corrected in 42 FR 32839 (June 28, 1977).

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considered in evaluating whether an applicant would make a substantial contribution to adequate representation.²¹

In both the sessions following passage of the Magnuson-Moss Act, Congress considered bills authorizing Federal agencies "to award reasonable attorneys' fees, expert witnesses' fees, and other costs of participation incurred by eligible persons in any agency proceeding whenever public participation in the proceeding promotes or can reasonably be expected to *promote a full and fair determination of the issues involved in the proceeding.*" An eligible person was defined as one who "represents an interest the representation of which *contributes or can reasonably be expected to contribute substantially to a fair determination of the proceeding,* taking into account the number and complexity of the issues presented, the importance of public participation, and the need for representation of a fair balance of

²¹ "Third, the statutory requirement that without the particular applicant the interest will not be adequately represented means that the quality of an application is relevant. The Bureau must determine that it is reasonably likely that the applicant can competently represent its interest.

"It is, however, entirely possible that an applicant might make a significant contribution to a proceeding without making representation of an interest completely adequate. The test is not whether a particular applicant will make representation of an interest fully adequate, but whether the representation will make a substantial contribution to the adequacy of the representation.

"For these reasons, the Bureau must evaluate the substance of applications so it can determine that the applicant can reasonably be expected to make a sufficient contribution to the adequacy of the representation of the interest.

"Because of the diverse proceedings involved, the great variation in interests and applicants, and the need to give applicants sufficient flexibility to develop their own theories and approaches, it is impossible to establish mechanistic standards for evaluating the substance of applications. Both applicants and Bureau staff must meet short deadlines. The basic schedule for rulemaking hearings set forth in Part I does not always allow applicants to develop their proposals as thoroughly as they might like and does not allow Commission staff to impose elaborate information requirements on them. Nor does it allow for the extensive negotiations that characterize grant or contract processes.

"To meet the statutory standards while minimizing delays and uncertainty, the Bureau has evolved a set of possible factors to assist its determination. These factors are guides, not arbitrary tests.

"(1) *Point of view.* Key issues in rulemaking proceedings often involve sophisticated questions about the true nature of different consumer interests. Evidence that an applicant has a point of view, not already represented by the FTC staff attorneys or any other party, that would help illuminate these issues can be favorable.

"(2) *Specificity.* The more clearly an applicant sets forth the particular issues in the proceeding it intends to address, the point of view of the interest it represents, the nature of the information it intends to develop or introduce, and the identities and qualifications of the personnel working on the project or serving as experts, the more likely it is to be funded. Without such information, the Bureau cannot make the required findings.

"(3) *Relation between the applicant and the interest.* The statute does not establish any criteria for determining whether an applicant truly represents the interest involved; however, the Bureau must examine the bona fides of the representation in examining adequacy. An industry trade association that claims to represent consumers would be viewed skeptically, and vice versa, for example.

"(4) *Constituency.* It can be a favorable factor if the applicant is a membership organization or is supported by cash contributions from the public or from a particular constituency. The willingness of individuals to support the applicant provides some evidence that the organization is indeed responsive to their interest and raises a presumption that the group will continue to represent its constituency's interest in the future.

"(5) *Experience and expertise in the substantive area.* If an applicant has been involved in the subject area in some fashion and has developed some competence on the issues presented by the rulemaking proceeding because of this involvement, there is better reason to think that its contribution will be valuable than if it has shown no prior interest in the area.

"(6) *Experience in trade regulation matters generally.* If an applicant has not been involved in a substantive area but has been involved in analogous problems and has demonstrated competence in procedure and general approach, its experience should be taken into account.

"(7) *General performance and competence.* If the applicant has not been active in the subject area or in analogous proceedings, demonstrated ability in other activities is relevant, as is evidence that the applicant has technical capability to perform the activities it proposes. An applicant requesting funds to perform survey research should prove its competence in conducting surveys, or in knowing whom to hire for survey work. A request for funds for cross-examination should establish the expertise of the proposed cross-examiner." *Id.* at 30482.

interests.”²² (*Italics added.*) In introducing hearings on this bill, Senator Kennedy stated:

The legislative authority for an agency to support direct public involvement in agency proceedings was first embodied in the Magnuson-Moss “Consumer Product Warranty and Federal Trade Commission Improvement Act,” enacted in the last session of the Congress. That law authorized the FTC directly to reimburse citizens groups involved in rulemaking proceedings for their costs of participation. S.2715 would extend this authority to cover all types of proceedings, before all agencies and departments of the Government. [²³]

The testimony on these bills was voluminous, but some of the most succinct, relevant to this case, was given by the late United States Circuit Judge Harold Leventhal. He said, in response to a question whether the bill would increase his workload:

I view [the bill] as a means of compensating those people who really make a contribution. And the effort involved in determining who makes a contribution is not that great.

* * * * *

I take note in my paper that on 12 applications FTC passed on in the fall of 1975, they denied 7 and granted 5. Some were granted in part and some in whole. And I think it is just a part of our doing our job. You say: “Who is helping me? How much are they helping me?” The agency knows and the court knows. It is not that much of a mystery. [²⁴]

His paper characterizes the nature of “some of our most helpful presentations” by “public interest groups”: “careful development of pertinent statutes, administrative practice, and scientific testimony”; “clear and helpful analysis”; “careful and thorough research, probing and discriminating, presented without overstatement or misstatement * * * items involved were hard to find and comprehend”; “impressive evidentiary submission on the effects.” In the context of discussing adjusting fees for quality of work in another case, Judge Leventhal added:

We acknowledged that considerable time had been spent, and that an award was appropriate because of the farmers benefited and the benefit of stopping unauthorized agency action. But we tempered the award not only because of questions as to amount of time spent, but our own appraisal that counsel had offered a useful general approach but left the court with a considerable research requirement. [²⁵]

Testimony about the contribution of the first citizens group to participate in a rulemaking before the FTC under the Magnuson-Moss

²² See proposed sec. 558(c) and (d)(1) of Title 5, U.S. Code, reprinted in “Public Participation in Federal Agency Proceedings, S. 2715,” Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 94th Congress, Second Session, on S. 2715, pp. 144-45.

By “full and fair determination” the sponsors meant the “general responsibility of agencies, consistent with their organic statutes, to bring enforcement actions, decide disputes, formulate regulations, or take other actions in such a manner as will most fairly and efficiently achieve the agencies’ statutory mandates and best promote the interests of the public.” S. Rep. No. 94-863, 94th Cong., 2d Sess., at 19.

²³ Hearings, *supra* note 22, at 3. In the 95th Congress, when the Surface Mining Act was enacted, S. 270 was the analogous bill in the Senate, which again held hearings. In the House of Representatives, the Subcommittee on Administrative Law and Governmental Relations held several days of hearings on a companion bill, H.R. 3361, and later the full Committee on the Judiciary (of which Representative Seiberling was a member) held hearings on H.R. 8798, which incorporated H.R. 3361.

²⁴ *Id.* at 81-82.

²⁵ *Id.* at 87-89.

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Act illustrates what constituted a substantial contribution from their perspective:

Through the questioning and cross-examination of witnesses, we were able to establish the current plight of consumers. We were able to place on the public record a clear statement of the consumer view of the proposed rule. We documented the inadequacy of current laws and regulations and the ineffectiveness of enforcement of current laws. We raised doubts as to the viability of the counterarguments presented by the opponents to the rule. In that same vein, we believe we performed an important function in grounding the abstract and academic lines of questioning often initiated by both the Commission and industry representatives. Again and again, we returned the discussion to the basic points of actual consumer experience and consumer rights. Through our research and questioning, we presented a complete picture of the industry's consumer protection needs. [26]

Rex E. Lee, Esq., then Assistant Attorney General, Civil Division, Department of Justice, urged a qualification of the substantial contribution standard in his testimony:

We suggest the following language for your consideration in conjunction with administrative fee award provisions:

Any award authorized by an agency in its unreviewable discretion shall be limited to that portion of the fees and costs which were reasonably expended in presenting specific issues, information, or other data which substantially contributed to a fair determination of the proceeding.

While language of this type may place some added burden on the agency concerned to review the particular contribution of the parties appearing before it, it is far preferable to a situation where the public treasury offers a blank check to every participant to develop issues, testimony, and other efforts, regardless of the relevance, merit, or reasonableness thereof. A similar provision should be included in any legislation authorizing awards of fees for judicial review proceedings. [27]

As a final example, Samuel R. Berger, Esq., pointed out several cases in his testimony in which awards had been made to parties who had acted as catalysts or contributed statistical data or theories of a case that have helped the courts resolve the controversies:²⁸

Third, it should be noted that the concept of awarding fees to individuals and groups whose role has been to act as clarifying voices or helpful participants has been recognized by a number of courts in the analogous context of litigation. Although most of the attorneys' fee statutes that pertain to litigation speak of awarding fees to "prevailing parties" or "successful" litigants, some courts have recognized the importance of awarding attorneys' fees where a participant has acted merely as a "catalyst" for change or otherwise advanced the resolution of the controversy. For example, in *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3rd Cir. 1970), cert. denied, 401 U.S. 911 (1971), the Court recognized the importance of awarding attorneys' fees to a committee of coal miners whose activities had helped bring about the institution of various lawsuits by the United Mine Workers Welfare Fund, to recover moneys due the Fund. On remand, the District Court found that the activities of the committee, which was not the plaintiff, contributed to the institution of the legal actions that produced the substantial recovery by the Fund and awarded the committee attorneys' fees. In *Hargrove v. Caddo Parish School Board*, No. 17,630 (W.D. La., June 13, 1972) the court recognized the

²⁶ *Id.* at 10. (Statement of Ms. Elizabeth Lederer, Co-Director, Grievance Department, San Francisco Consumer Action.)

²⁷ *Id.* at 113.

²⁸ *Id.* at 59-60.

appropriateness of awarding fees to plaintiff-intervenors in a school board reapportionment case even though the court did not adopt the plan proposed by those plaintiff-intervenors. The Court stated:

Plaintiff-intervenors . . . by their intervention and diligent efforts throughout these proceedings, have performed a service both to the court and to the people of Caddo Parish. Plaintiff-intervenors, and the court itself, raised the issue of the prohibition against dilution of black voting strength with which any redistricting plan must comply. Further, plaintiff-intervenors through the skill of their counsel and the use of an expert witness raised the level of accuracy of the "one man one vote" mandate by demonstrating the statistical problems of employing voter registration data and made known to the court as well as the Board the availability of block data, without which the court approved plan could not be designed.

In *Citizens Association of Georgetown v. Washington*, 383 F. Supp. 136, 145 (D.D.C. 1974), although the plaintiffs failed to prove that the 1977 air quality standards under the Clean Air Act would be violated by the construction of two buildings on the Georgetown waterfront, the court awarded the plaintiff attorneys' fees because the litigation had demonstrated "to the public a record of inaction and action delayed on the part of the District of Columbia Government in implementing the Clean Air Act."

These courts have recognized the substantial public interest that can be served when the decisionmaking process on issues of broad public interest reflects the input of interested and informed citizens. [29]

Thus, the meaning of the "substantial contribution" standard may be derived from the Magnuson-Moss Act and the guidelines under it, from the language of S. 2715 and similar bills being considered contemporaneously with the proposed Surface Mining Act that were the specific source of the language of the standard, and from the testimony of those familiar with public participation before courts and administrative agencies describing what constituted substantial contributions in their experience.³⁰ Clearly, it is a general standard; a variety of contributions could be considered substantial, depending on the circumstances of different cases. In any case, as Grantland Rice would have said, the question is not whether a participant wins or loses, but how he plays the game.

IV. *Ruckelshaus Does Not Govern the Award of Costs for Participation in Administrative Proceedings Under the Surface Mining Control and Reclamation Act*

The Supreme Court's decision in *Ruckelshaus* concerned the standard for awarding costs in citizen suits under the Clean Air Act based on its interpretation of the legislative history of that Act. The legislative history of those provisions, of course, differs from that of section 525(e) governing awards in administrative proceedings under the Surface Mining Act. The Court's footnote stating that its interpretation of "appropriate" under the Clean Air Act controls the construction of that standard under several other statutory sections, including section 520(d) of the Surface Mining Act, is dictum. Indeed, without any analysis of the legislative histories of those statutes, it is at best hypothesis. The legislative history of section 525(e) is different

²⁹ *Id.* at 63.

³⁰ For a discussion of the rationale for encouraging public interest activity and the role of fee shifting in public interest litigation, see Percival and Miller, "The Role of Attorney Fee Shifting in Public Interest Litigation," 47 *Law and Contemporary Problems* 233 (1984).

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from that of section 520(d), and the term in section 525(e) is different from the one the Court construed in *Ruckelshaus*. The decision in this case is not legitimately governed by a decision interpreting a different word in a different law. Whether the award of costs for participation in an administrative proceeding under the Surface Mining Act is deemed "proper" depends on an assessment of whether there was a substantial contribution to a full and fair determination of the issues involved, as is explained above, not on whether the participant can claim "some degree of success on the merits."³¹

V. Conclusion

In 1976, responding to the question, "What is the cause of the general reluctance within agencies to award these kinds of fees," Benjamin Hooks, then Commissioner of the Federal Communications Commission, answered candidly:

The usual answer would be the reason the agency is opposed to consumer intervention is because they are protective of the industries that they regulate and there is sort of a pal type relationship between the regulator and the regulated. I don't know whether that is quite true * * * the complaints from those we regulate would hardly back up the assumption that we are in bed with them.

On the other hand, I do think this much is a fact. I have been in Government long enough to be almost a bureaucrat, but I do get the impression that the people in Government have the feeling that the folks who represent the consumer interests are somehow wild and outside of the system and that they don't represent the right folks somehow. They don't cut their hair quite right or there is something about them that is not just kosher so it seems that the resistance is more to the idea of an intrusion. It seems to me what the FCC has said is that, if the public is going to be protected, we can do it; we don't need your help really. So I think it is sort of a pride of authorship more than overly protective regulation. But from my own experience, I feel this may be alleviated to a further point.

It may be, finally, a lack of professionalism. Many consumer groups come from the grass roots. Their language, their expressions are not quite keeping with courtroom decorum and dignity. They don't quite measure up to the expected standards. So there is a little suspicion of them and we want to know where they came from and who they are representing. [³²]

Since this is the first time this Board has considered a petition for an award of costs for participating in an administrative proceeding under the Surface Mining Act, it would be premature to conclude that these attitudes will govern its response to such petitions. Rather, I suspect that the result in this case was motivated by a belief that this petition should not be granted based on the record. That may well be right, although that conclusion is at least partially undermined by the unexplained absence of the lengthy oral argument transcript.³³ What is

³¹ For comments on *Ruckelshaus*, see "*Ruckelshaus v. Sierra Club: Muddying the Waters of Fee-Shifting in Federal Environmental Litigation*," 11 *Pepperdine Law Review* 441 (1984); "*Environmental Law—Ruckelshaus v. Sierra Club: Attorneys' Fees Awards to Nonprevailing Litigants are not 'Appropriate' under the Clean Air Act*," 1984 *The Journal of Corporation Law* 965; "*Attorney's Fees and Ruckelshaus v. Sierra Club: Discouraging Citizens from Challenging Administrative Agency Decisions*," 33 *The American University Law Review* 775 (1984); "*Awards of Attorneys' Fees to Nonprevailing Parties under the Clean Air Act—Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274 (1983)," 59 *Washington Law Review* 585 (1984).

³² *Hearings*, *supra* note 22, at 98-99.

³³ *Donald St. Clair*, 77 IBLA 288, 293 n.7, 90 I.D. 496, 501 n.7 (1983).

not right is that the wrong standard was employed in arriving at that conclusion. Rather than attempting to determine whether the petitioner had made a "substantial contribution to a full and fair determination of the issues involved in this proceeding"—the standard of our regulations based on the Surface Mining Act—the majority of the Board have either amended or abandoned the regulation and imposed a higher standard not based on the Act or its legislative history. The analysis should have been directed to the questions suggested in the discussion of the meaning of substantial contribution in section III above, not to whether the petitioner prevailed.³⁴ Because it was not, I dissent.

WILL A. IRWIN
Administrative Judge

APPEAL OF B&W SERVICE INDUSTRIES, INC.

IBCA-1859 (A-76)

Decided *January 2, 1985*

IFB No. 1200-84-10, 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: John Ward, Vice President, B&W Service Industries, Inc., Inglewood, California, for Appellant; William A. Perry, Department Counsel, Denver, Colorado for the Government.

OPINION BY JUDGE RUSSELL C. LYNCH

A-76 APPEALS OFFICIAL

The National Park Service (NPS) conducted a cost-comparison study under OMB Circular A-76 to determine whether it would be more cost effective to continue furnishing custodial services at Yellowstone National Park with Government employees or to contract for the work with the lowest bidder. Appellant filed this protest on October 24, 1984, alleging that its bid and the Government's estimate were based on different specifications and requirements.

The Government argues that the protest is made moot by the recent enactment of P.L. 98-540 (Oct. 24, 1984), which prohibits NPS from

³⁴ While I of course applaud Judge Harris' adherence to the substantial contribution standard, I must point out that determining whether "actions related to the citizens' contentions were taken as a result of the [citizens'] complaint" not only poses nice questions of how such causation is to be demonstrated but, more importantly, constitutes only one possible basis upon which a substantial contribution could be made in this or any case.

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awarding any contracts pursuant to OMB Circular A-76 during fiscal years 1985 through 1988 absent specific appropriations therefor. Government counsel affirms that 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 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

**SIERRA CLUB LEGAL DEFENSE FUND, INC., NATURAL
RESOURCES DEFENSE COUNCIL, INC., CALIFORNIA
WILDERNESS COALITION**

84 IBLA 311

Decided January 7, 1985

Appeal from a decision of the California State Office, Bureau of Land Management, denying a protest to issuance of oil and gas leases in areas of critical environmental concern.

Affirmed as modified.

**1. Oil and Gas Leases: Generally--Rules of Practice: Appeals:
Generally--Rules of Practice: Protests**

A protest within the meaning of 43 CFR 4.450-2 is an objection "to any action proposed to be taken" in any proceeding before the Bureau of Land Management. A protest to the issuance of an oil and gas lease filed after the lease has issued by one not previously a party to the case is not timely, and dismissal of such a protest will be affirmed on appeal.

**2. Environmental Quality: Environmental Statements--National
Environmental Policy Act of 1969: Environmental Statements**

A decision to issue oil and gas leases within an area of critical environmental concern pursuant to a categorical exclusion review will ordinarily be set aside and remanded for preparation of an environmental assessment where the categorical exclusion review discloses potential adverse impacts on threatened and endangered species. This constitutes an exception to the categorical exclusion review process under Departmental procedures, 516 DM 2, Append. 2, § 2.8.

**3. Environmental Quality: Environmental Statements--National
Environmental Policy Act of 1969: Environmental Statements**

Analysis of the impact of a proposed action under the National Environmental Policy Act, *as amended*, 42 U.S.C. § 4332 (1982), is required prior to an irrevocable commitment of resources. A decision deferring preparation of an environmental assessment and/or

environmental impact statement in connection with issuance of a noncompetitive onshore oil and gas lease until such time as a site-specific plan of operations is submitted by the lessee may be affirmed where the lessee's right to surface occupancy is conditioned upon approval of a site-specific plan of operations in light of that environmental analysis.

APPEARANCES: Laurens H. Silver, Esq., for Sierra Club Legal Defense Fund, Inc.; Johanna H. Wald, Esq., for Natural Resources Defense Council, Inc.; Lynn M. Cox, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Sierra Club Legal Defense Fund, Inc., Natural Resources Defense Council, Inc., and the California Wilderness Coalition appeal from a decision of the California State Office, Bureau of Land Management (BLM), dated July 29, 1983, denying their protest against the issuance of 118 noncompetitive oil and gas leases encompassing portions of several areas of critical environmental concern (ACEC's) located within the California Desert Conservation Area (CDCA). The BLM State Director determined that as to 115 of the leases issued before the protest was filed on September 7, 1982, the protest was untimely. Hence, BLM dismissed the protest with respect to these leases. As to the three remaining leases issued after September 7, 1982, the State Director held that these leases were issued in compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1982), and denied appellants' protest on its merits.

The California Desert Conservation Area Plan¹ was developed in response to the legislative mandate in section 601(d) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1781(d) (1982), which states:

The Secretary * * * shall prepare and implement a comprehensive, long-range plan for the management, use, development, and protection of the public lands within the California Desert Conservation Area. Such plan shall take into account the principles of multiple use and sustained yield in providing for resource use and development, including, but not limited to, maintenance of environmental quality, rights-of-way, and mineral development. Such plan shall be completed and implementation thereof initiated on or before September 30, 1980.

Section 103(a) of FLPMA, 43 U.S.C. § 1702(a) (1982), defines an ACEC as an area

within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.

¹ Bureau of Land Management, United States Department of the Interior, *California Desert Conservation Area Plan* (1980).

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From January 1, 1981, through January 4, 1983, the California State Office, BLM, issued 118 noncompetitive oil and gas leases encompassing portions of several ACEC's within the CDCA. On September 7, 1982, appellants filed with BLM an appeal of the approval of all oil and gas lease applications affecting ACEC's. Appellants contended that an environmental impact statement (EIS) should have been prepared before BLM issued oil and gas leases in the ACEC's and that it was improper to issue the oil and gas leases on the basis of a categorical exclusion. Appellants argued that ACEC's are "ecologically significant or critical areas" within the meaning of the exception to the categorical exclusion procedure. 516 DM 2, Append. 2, § 2.2.

BLM treated this appeal as a protest under the regulations at 43 CFR 4.450-2. The State Director denied the protest by decision of July 29, 1983, from which this appeal is brought. In its decision, BLM denied appellants a right to a hearing on the merits with respect to leases approved prior to the filing of the protest because the protest was untimely. With regard to the three leases issued after the filing of the protest,² BLM held that the decision to issue the oil and gas leases in question did not amount to a proposal for major Federal action requiring preparation of an EIS under NEPA. BLM found that the stipulations attached to each lease as a result of the categorical exclusion review (CER) procedure reserved authority enabling BLM to modify or reject any proposed development plans. BLM also found that those stipulations, coupled with its reliance on the environmental review and management prescriptions developed in conjunction with the CDCA Plan and its associated EIS, provided sufficient protection for the unique resource values of each of the ACEC's.

Appellants contend on appeal that BLM acted unlawfully in denying the protest with respect to leases issued prior to the time of filing of their protest. The regulation pertaining to protests, 43 CFR 4.450-2, provides as follows:

Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances.

The main thrust of appellants' argument is that 43 CFR 4.450-2 does not compel the filing of a protest before the decision is made, but simply gives BLM discretion to treat as a protest objections which do not constitute a "contest." Appellants assert that it is unfair to deprive them of their appeal remedies when there was no advance public notice of BLM's intention to issue oil and gas leases. Appellants contend that the Board has in the past reviewed the denial of protests

² The leases issued subsequent to the filing of the protest on Sept. 7, 1982, are: CA 10018, CA 10363, and CA 12959.

by BLM where the protest was filed after BLM had approved a proposed action and issued a permit or other authorization.

Appellants assert that BLM erred in denying them a right to a hearing on the merits with respect to leases approved prior to the filing of the protest. Appellants request that the Board decide the legality of all 118 leases in issue or remand to BLM the cases involving the 115 leases issued prior to the filing of the protest, with instructions for BLM to decide the protest on the merits.

In response, BLM points out that 43 CFR 4.450-2 establishes a mechanism by which interested members of the public may voice their concerns to BLM about actions *proposed* to be taken in proceedings before BLM. BLM contends that, had appellants challenged approval of the lease applications under 43 CFR 4.450-2 by filing a timely protest with BLM, their standing as a "party to the case" under 43 CFR 4.410(a) to appeal issuance of a lease would not be questioned, provided appellants could show that they had been "adversely affected" by the State Director's decision as required by 43 CFR 4.410(a). As for notice of the lease applications, BLM points out that both the master title plats and the serial register books note applications to lease and both are public records available to anyone interested in reviewing leasing activity in a particular location.

Appellants' second argument is that BLM violated NEPA when it issued oil and gas leases in ACEC's without first preparing an EIS. Appellants assert that, because of the highly vulnerable nature of ACEC's, along with the special management attention Congress and BLM have mandated for these areas, any proposed actions affecting them, including issuance of oil and gas leases, constitute major Federal actions within the meaning of NEPA. Therefore, appellants reason that before development activities can take place within an ACEC, an EIS must be prepared.

Appellants cite *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983), for its holding that to comply with NEPA, the Department must either prepare an EIS prior to leasing or retain the authority to preclude *all* surface-disturbing activities until an appropriate environmental analysis is completed. Appellants assert that BLM neither prepared an EIS prior to leasing nor retained the authority to preclude *all* surface-disturbing activities pending an environmental evaluation, thereby failing to comply with NEPA. Appellants request that the Board require BLM to comply with applicable law by preparing EIS's in connection with leasing in the ACEC's and setting aside leases already issued in ACEC's.

In its answer, BLM states that its determination that issuance of leases CA 10018, CA 10363, and CA 12959 is not a major Federal action requiring the preparation of an EIS is rationally based on, and fully supported by, the administrative record; that BLM's use of the CER screening process to reach that decision accords fully with the Council on Environmental Quality's (CEQ) NEPA regulations at 40 CFR Part 1500 and the Department's NEPA guidelines at

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516 DM 6; and that the inclusion of standard and special stipulations in each lease ensures that any unforeseen adverse impacts to the environment can be fully mitigated to the point of insignificance. BLM agrees with appellants that it may not deny *all* development of the leases, but contends it has retained authority to prohibit surface-disturbing activities within the specific portions of the leaseholds included within the ACEC's if environmental analysis of a specific plan of operations indicates significant adverse impact might result.

This appeal presents three major issues. The first is whether a protest of a decision filed after the decision has been implemented, by one who was not previously a party to the case, is properly dismissed as untimely filed. The second question is whether issuance of an oil and gas lease embracing lands within an ACEC pursuant to the CER process is inconsistent with NEPA. Finally, if the answer to the last question is affirmative, the issue is whether the environmental assessment (EA) may be deferred until submission of a plan of operations.

[1] The regulation at 43 CFR 4.450-2 clearly states that a protest is an objection "to any action *proposed* to be taken." (Italics supplied.) Therefore, a protest to issuance of an oil and gas lease filed after the lease has issued is not timely. *Patricia C. Alker*, 79 IBLA 123 (1984); *Goldie Skodras*, 72 IBLA 120 (1983).³ In the absence of a protest or conflicting application filed prior to issuance of the oil and gas leases in question, appellants were not a party to the case and could not assert standing to appeal lease issuance. 43 CFR 4.410; *In Re Pacific Coast Molybdenum Co.*, 68 IBLA 325, 331 (1982). Thus, the BLM decision must be affirmed to the extent it dismissed appellant's protest of the leases already issued.⁴

Although appellants imply that issuance of the oil and gas leases was a surprise, BLM correctly points out that both the master title plats and the serial register books note applications to lease shortly after they are filed. These are public documents which are available for review.

In light of our holding on the first issue, consideration of the second issue will focus on the three leases issued after the filing of the protest, CA 10018, CA 10363, and CA 12959. Small portions of ACEC No. 64 are included in leases CA 12959 and CA 10363. A portion of lease CA 10018 is located within ACEC No. 60.

As a preliminary matter, we note that it was error for BLM to issue these leases prior to adjudication of the protest. This Board has

³ In these cases, the "protests" were filed after lease issuance by conflicting applicants with potential priority in simultaneous oil and gas lease drawings. The Board held that such "protests" were properly regarded as appeals from rejection of the protestants' conflicting applications to lease rather than protests to the issuance of the oil and gas leases.

⁴ Appellants are mistaken in their assertion that the precedent of *California Ass'n of Four Wheel Drive Clubs*, 30 IBLA 383 (1977), compels a different result. The protest/appeal in that case was filed prior to occurrence of the proposed action being protested.

frequently held that the filing of a timely protest suspends the authority of BLM to act on the matter protested prior to adjudication of the protest and during the time in which a party adversely affected may file a notice of appeal. *James W. Smith*, 44 IBLA 275 (1979); *Duncan Miller (On Reconsideration)*, 39 IBLA 312 (1979); *D. E. Pack*, 31 IBLA 283 (1977); *California Association of Four Wheel Drive Clubs*, *supra*.

[2] NEPA requires preparation of an EIS whenever a proposed major Federal action will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C) (1982). To determine the nature of the environmental impact from a proposed action and whether an EIS will be required, Federal agencies prepare an EA. 40 CFR 1501.4(b), (c). If, on the basis of the EA, the agency finds that the proposed action will produce "no significant impact" on the environment, then an EIS need not be prepared. 40 CFR 1501.4(e).

Certain types of action may qualify for a categorical exclusion from preparation of an EA and/or EIS. The significance of such a determination is explained in the regulations at 40 CFR 1508.4 as follows:

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

The Department of the Interior has determined that, subject to certain exceptions, issuance of noncompetitive onshore oil and gas leases qualifies as a categorical exclusion. 516 DM 6, Append. 5, 5.4D(2)a. At the time this categorical exclusion was promulgated, the preamble to the published exclusion (originally codified at 5.4D(4)) explained:

§ 5.4D(4). One commentor questioned our exclusion of individual upland oil and gas leases, because they are discretionary duties. We have revised the language to exclude only noncompetitive leases because over the past ten years we have issued over 100,000 such leases and our tens of thousands of EAs have not even lead [sic] to one EIS. We believe our exceptions to the exclusions listed in 516 DM 2.3A(3) will capture those few noncompetitive leases that may have some impact.

46 FR 7493 (Jan. 23, 1981).

Actions embraced within the scope of a categorical exclusion from preparation of an EIS may under certain circumstances be excepted from the exclusion, *i.e.*, require preparation of an EA and/or an EIS. Thus, a categorical exclusion is not applicable and environmental documents must be prepared for actions which may:

2.2 Have adverse effects on such unique geographic characteristics as historic or cultural resources, park, recreation or refuge lands, wilderness areas, wild or scenic rivers, sole or principal drinking water aquifers, prime farmlands, wetlands, floodplains,

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or ecologically significant or critical areas, including those listed on the Department's National Register of Natural Landmarks.

* * * * *

2.8 Have adverse effects on species listed or proposed to be listed on the List of Endangered or Threatened Species, or have adverse effects on designated Critical Habitat for these species.

516 DM 2, Append. 2.

This Board has, in the past, upheld such actions as approval of an application for drilling permit on an oil and gas lease after completion of a CER where the determination that no EA and/or EIS was required was made in good faith, on the basis of a proper and sufficient record, and is reasonably supported by such record. *Colorado Open Space Council*, 73 IBLA 226 (1983).

With regard to lease CA 10018, the record discloses that the lands under lease are located within the Salt Creek Desert Pupfish/Rail Habitat ACEC (No. 60). The lease offer was submitted to a CER by BLM prior to lease issuance. The worksheet for this review dated March 29, 1982, identified three threatened or endangered species: Yuma Clapper Rail, California Black Rail, and Desert Pupfish. The CER also referenced the Salton Sea Oil and Gas Environmental Assessment concerning the lands involved and noted the need for a "section 7"⁵ consultation on the listed species.

The BLM decision of October 20, 1982, rejecting the lease offer in part was based on the results of that consultation which concluded that oil and gas leasing of a portion of the land applied for would threaten the Yuma Clapper Rail. The same decision also imposed certain stipulations, entitled "Oil and Gas Lease-Surface Disturbance Stipulations" which provide that any drilling, construction, or other operation on the leased lands that will disturb the surface or otherwise affect the environment shall be subject to prior approval by the District Oil and Gas Supervisor and "to such reasonable conditions, not inconsistent with the purposes for which this lease is issued, as the Supervisor may require to protect the surface of the leased lands and the environment." Included among the surface-protection stipulations was the following:

9. The leased lands may be in an area suitable for the habitat of threatened or endangered plant and animal species. All viable habitat of these species will be identified for the lessee by the Authorized Officer of the Bureau of Land Management during the preliminary environmental review of the lessee's proposed surface disturbing activity. This analysis may also include, on Bureau of Land Management initiative, formal consultation with the U.S. Fish and Wildlife Service to determine whether or not the proposed activity would jeopardize the continued existence of these species [see Sec. 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536)]. This process may result in some restrictions to the lessee's plan of development, or even disallow surface disturbance. The

⁵ Sec. 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536 (1982). This section calls for consultation by Government agencies with the Secretary of the Interior (Fish and Wildlife Service) to ensure that actions taken by them are not likely to jeopardize threatened or endangered species.

plant survey must be coordinated with the Authorized Officer, Bureau of Land Management. To assist in this process the lessee may be required to provide a report from a Wildlife Biologist and/or Botanist acceptable to the District Manager, Bureau of Land Management, identifying the anticipated impacts of the proposed plan of development on the endangered species habitat.

However, none of the stipulations, in and of itself, precluded occupancy of all of the surface of the lease by the lessee.

The potential impact on threatened and endangered species disclosed in the CER establishes an exception to the CER procedure and, hence, the need for an EA. Indeed, review of the record reveals an EA was prepared. Reference to the March 1982 Salton Sea Oil and Gas EA # CA-066-2-4 discloses that a finding of no significant impact from oil and gas leasing was predicated in part on a no-surface-occupancy restriction for lands in secs. 1 through 4, 9 through 16, 21 through 29, and 33 through 36 in T. 8 S., R. 11 E., San Bernadino Meridian (EA at 88). Lease CA 10018 included lands within secs. 4, 12, and 24. Accordingly, we find that stipulation 9 quoted above, in the context of this lease, is properly construed as precluding surface occupancy of the identified sections pending submission of a plan of operations and approval thereof based upon a supplemental EA and/or EIS.

With respect to leases CA 10363 and CA 12959, the files contain a document entitled "Oil and Gas Preleasing Environmental Checklist." These project a high impact on sensitive habitat areas from oil and gas exploration and development. Specifically noted is the high impact in ACEC No. 64 on flat-tailed horned lizard habitat. Both leases issued with stipulations similar to those attached to CA 10018, including stipulation 9 quoted above. Like the latter lease, neither included a stipulation explicitly reserving the right to preclude all surface occupancy.

We find that the potential impact on threatened and endangered species within the ACEC brings these leases within the scope of the exceptions to the categorical exclusion review process for actions which may have adverse effects on threatened or endangered species habitat. 516 DM, Append. 2, 2.8. Hence, an EA is required. The question remaining is whether the EA could be deferred until submission of a site-specific plan of operations.

[3] It is the position of BLM that the protective stipulations are sufficient to preclude adverse environmental impacts and, hence, obviate the need to prepare an EA prior to submission of a specific plan for surface-disturbing operations. NEPA requires an agency to evaluate the environmental effects of its action at the point of commitment. The EIS is a decisionmaking tool intended to "insure that * * * environmental amenities and values may be given appropriate consideration in decisionmaking." 42 U.S.C. § 4332(2)(B) (1982). Therefore, the appropriate time for preparing an EA and/or an EIS is *prior* to a decision, when the decisionmaker retains a maximum range of options. See *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 852-53 (9th Cir. 1979). An EIS is required when the "critical agency

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decision" is made which results in "irreversible and irretrievable commitments of resources" to an action which will affect the environment. See *Mobil Oil Corp. v. F.T.C.*, 562 F.2d 170, 173 (2d. Cir. 1977).

In *Sierra Club v. Peterson*, *supra*, the court considered the issue when "irreversible and irretrievable commitments of resources" are made in regard to issuing noncompetitive oil and gas leases. The leases involved in *Peterson* were located in a roadless area in the Targhee and Bridger-Teton National Forests of Idaho and Wyoming, known as the Palisades Further Planning Area. All of the leases for the Palisades contained stipulations which required the lessee to obtain approval from the Department of the Interior before undertaking any surface-disturbing activity on the lease. However, stipulations for some of the leases did not authorize the Department to preclude all surface activities which the lessee might propose. The Department could not deny a permit to drill, but it could only impose "reasonable" conditions designed to mitigate the environmental impacts of the drilling operations. *Sierra Club v. Peterson*, *supra* at 1411.

In addition, the court noted that leases of lands in certain "highly environmentally sensitive" areas were issued to a no-surface-occupancy stipulation which precluded surface occupancy unless and until such activity is specifically approved by the Forest Service. *Id.* The opinion of the district court characterized this as a "conditional" no-surface-occupancy stipulation. *Sierra Club v. Peterson*, 17 ERC 1449, 1453 (D.D.C. Mar. 31, 1982), *rev'd*, 717 F.2d 1409 (D.C. Cir. 1983). On appeal, the circuit court specifically noted that the leased lands covered by this latter stipulation were not a subject of the appeal, appellant having conceded that the Department had retained authority to preclude all surface-disturbing activity until further site-specific environmental studies are made. 717 F.2d 1412.

On the facts of the *Peterson* case, the court determined that the critical agency decision resulting in irreversible and irretrievable commitment of resources, insofar as lands leased without the conditional no-surface-occupancy stipulation were concerned, occurred at the point of leasing. On the other hand, the court held that the Department may delay preparation of an EIS provided that it reserves both the authority to preclude all activities pending submission of site-specific proposals and the authority to prevent proposed activities if the environmental consequences are unacceptable.

Upon careful review of the record we find that the surface-disturbance stipulations attached to these leases, in particular stipulation 9 quoted previously, are effective to condition surface occupancy upon completion of an EA and/or EIS in the context of a site-specific plan of operations and a finding that any impact is either mitigable or acceptable. See *Sierra Club (On Reconsideration)*, 84 IBLA 175, 180 (1984). We recognize that a lessee could argue that the surface-

disturbance stipulations only envision restrictions reasonably consistent with development of the oil and gas resources in the leased lands. However, such an interpretation would clearly be inconsistent with the Department's obligation under NEPA and other statutes, such as section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536 (1982). The surface-disturbance stipulations must be construed in such a manner as will impart to them a lawful effect rather than an unlawful effect.

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.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

WILL A. IRWIN
Administrative Judge

**INTERIM AD HOC COMMITTEE OF THE KAROK TRIBE v.
AREA DIRECTOR, SACRAMENTO AREA OFFICE, BUREAU OF
INDIAN AFFAIRS**

13 IBIA 76

Decided *January 8, 1985*

Appeal from a decision of the Sacramento Area Director, Bureau of Indian Affairs, denying applications for Core Management and Jobs Bill grants.

Docketed; affirmed as modified.

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

Administrative appeals within the Bureau of Indian Affairs are normally decided by the Deputy Assistant Secretary--Indian Affairs (Operations) under authority delegated from the Assistant Secretary for Indian Affairs. If, however, the Assistant Secretary considers an appeal in place of the Deputy Assistant Secretary, he is subject to the 30-day period for decision set forth in 25 CFR 2.19.

2. Board of Indian Appeals: Jurisdiction

The Board will exercise its jurisdiction in a matter appealed to it under 25 CFR 2.19(b) only after an appellant has filed with it a notice of appeal, request for the Board to assume jurisdiction, or other appropriate document advising the Board that the 30-day period has expired without decision. The date of filing the notice of appeal is, under 43 CFR 4.310(a), the date the notice is mailed.

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3. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally

Confusion would obviously result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter. Therefore, one of the two offices must be determined to have priority, in accordance with Departmental policy.

4. Board of Indian Appeals: Jurisdiction--Secretary of the Interior

By informing the Board of Indian Appeals and the parties in writing that he is exercising his reserved authority under 43 CFR 4.5 to take jurisdiction over a case, the Secretary can avoid the potential problems that are likely to result from the simultaneous exercise of jurisdiction by two Departmental offices.

5. Indians: Federal Recognition of Indian Tribes: Recognition

Federal recognition of Indian tribes is governed by 25 CFR Part 83, which places such recognition within the purview of the Assistant Secretary for Indian Affairs, subject to review by the Secretary. Therefore, the Board of Indian Appeals does not have authority to review cases involving recognition of Indian tribes.

APPEARANCES: Mary J. Risling, Esq., Eureka, California, for appellant; Scott Keep, 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 LEWIS

INTERIOR BOARD OF INDIAN APPEALS

On May 14, 1984, the Board of Indian Appeals (Board) received a notice of appeal from the Interim Ad Hoc Committee of the Karok Tribe (interim committee) (appellant), which notice was mailed on May 10, 1984. Appellant sought review of an October 11, 1983, decision of the Sacramento Area Director, Bureau of Indian Affairs (BIA) (appellee), that refused to consider appellant's applications for Fiscal Year 1983 Core Management and Jobs Bill grants. This appeal is hereby docketed under the above case name and number. For the reasons discussed below, the Board holds that the appeal must be dismissed.

Background

From documents submitted by BIA, it appears that the Karok Tribe (tribe) began efforts in 1978 to receive Federal recognition. The BIA determined that the aboriginal subentities of the tribe consisted of three communities located at Happy Camp, Orleans, and Siskiyou (Yreka). On June 15, 1978, after reviewing a BIA report finding that the three Karok communities jointly met the requirements for Federal recognition, the Assistant Secretary for Indian Affairs (Assistant Secretary) advised appellee that there would be a basis on which to deal with the Karoks as a tribe when they provided a clear explanation of their governing process and of the internal relationships between the three subentities. On March 7, 1979, at BIA's request, the three subentities of the tribe met and adopted a resolution creating the

interim committee. The committee was composed of two representatives from each of the subentities. The BIA determined, by letter dated March 26, 1979, that the Karoks would be dealt with through the interim committee while they were formulating their governing documents.

A constitutional drafting committee was subsequently elected, again with representatives from each of the three subentities. The BIA advanced money to this committee for use in drafting a constitution. A representative from the BIA Branch of Tribal Relations met with the committee in June and in August of 1979 to provide technical assistance in drafting a constitution.

A proposed constitution was prepared. On January 29, 1980, the drafting committee submitted the proposal to the Secretary with the request that an election be called on the proposal. On November 15, 1980, the election was authorized. This authorization lapsed without an election having been held. On February 20, 1981, a request for additional time to hold an election was granted, but this time also lapsed. A third authorization was granted on June 18, 1981, but was suspended on August 18, 1981, when BIA learned that the land at Orleans had not been signed over to the tribe.

BIA subsequently learned that the Happy Camp and Orleans subentities proposed to exclude the Siskiyou subentity from participation in the tribe. This action was apparently based on the fact that a small number of individuals who were members of the Siskiyou subentity were not Karoks. This fact had been recognized from the beginning of the negotiations for Federal recognition, and these individuals had been excluded from participating in the selection of representatives to either the interim committee or the constitutional drafting committee. It was also understood from the beginning that they would not be eligible for membership in or services from the Karok Tribe after Federal recognition.

Both appellee and BIA headquarters therefore took the position that the tribe's total exclusion of the Siskiyou community was improper because Federal recognition was in part based on the existence of all three related subentities. The tribe was advised orally and by letter dated May 6, 1983, that BIA would not allow the exclusion of the Siskiyou subentity and would not recognize any action taken by the interim committee until the Siskiyou community was restored.

In 1983 appellant submitted the two fiscal year 1983 grant applications that are the basis for this appeal. On October 11, 1983, appellee refused to consider this appeal on the grounds that the interim committee was not the recognized governing body of the Karok Tribe. An appeal taken from this decision was filed with the Commissioner of Indian Affairs in early January 1984. The appeal was supplemented on February 10, 1984. By letter dated February 22, 1984, the Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant Secretary) confirmed receipt of the appeal and indicated that a decision would be rendered shortly.

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A notice of appeal under 25 CFR 2.19(b) was received by the Board on May 14, 1984. The notice requested review by the Board because no decision had been rendered by BIA within 30 days. In such circumstances, section 2.19(b) authorizes the Board to decide the appeal.

By order dated May 21, 1984, the Board made a preliminary determination that it had jurisdiction in this matter and requested the administrative record. On June 8, 1984, the Board received a letter from appellant stating that on May 25, 1984, it had received a letter decision that was signed by the Assistant Secretary on May 16, 1984. This May 16, 1984, letter is part of the record before the Board. It purports to uphold appellee's decision, but on the grounds that appellant was not the validly constituted representative of the Indian groups that had petitioned for Federal recognition because of appellant's total exclusion of the Siskiyou subentity. Appellant argues that the May 16, 1984, decision should not be given effect because its appeal was already properly before this Board.

On June 13, 1984, the Board issued an order requesting the Office of the Solicitor to clarify the status of the case; to send the Board a copy of the Assistant Secretary's May 16, 1984, letter; and to brief the Board on the issue of jurisdiction. The Board received a statement from the Deputy Assistant Secretary on July 9, 1984, and a motion to dismiss on jurisdictional grounds from the Office of the Solicitor on July 16, 1984. Appellant requested and was granted an opportunity to respond to the motion to dismiss. Appellant's opposition to the motion was received by the Board on August 31, 1984. On November 13, 1984, appellee filed a reply to appellant's opposition to the motion to dismiss.

Discussion and Conclusions

This appeal raises several significant procedural issues. The first issue is the time at which the Board acquires jurisdiction over a case under 25 CFR 2.19(b), which states: "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."

The administrative review functions of the vacant office of the Commissioner of Indian Affairs were delegated to the Deputy Assistant Secretary by memorandum signed by the Assistant Secretary on May 15, 1981. In an internal BIA memorandum dated May 27, 1981, from the Chief, Division of Management Research and Evaluation, to the Acting Executive Assistant to the Acting Deputy Assistant Secretary, it was stated that, under the delegation memorandum, because the Deputy Assistant Secretary had replaced the Commissioner, his decisions were subject to the review provisions set forth in 25 CFR Part 2. The Board has consistently followed that interpretation of the delegation. See cases cited, *infra*. Normal BIA review procedure is, therefore, that appeals from decisions of BIA Area

Directors are decided by the Deputy Assistant Secretary. In this context, the Board has held that when the Deputy Assistant Secretary fails to issue a decision in a matter appealed to him within the 30-day period established by section 2.19, the Board acquires jurisdiction over the appeal. See *Wray v. Deputy Assistant Secretary--Indian Affairs (Operations)*, 12 IBIA 146, 91 I.D. 43 (1984); *Zarr v. Acting Deputy Director, Office of Indian Education Programs*, 11 IBIA 174, 90 I.D. 172 (1983); *Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations)*, 11 IBIA 146 (1983); *Allen v. Navajo Area Director*, 10 IBIA 146, 89 I.D. 508 (1982).

[1] The Board has upheld the authority of the Assistant Secretary¹ to issue personally the decision in any administrative appeal. See, e.g., dismissal orders in *Chasteen v. Anadarko Area Director*, 11 IBIA 209 (1983); *Siemion v. Assistant Secretary for Indian Affairs*, 11 IBIA 37 (1983). When the Assistant Secretary issues a decision under these circumstances, he is performing the administrative review functions established in 25 CFR Part 2. Under 25 CFR 2.19, an appellant is entitled to a decision in an administrative appeal from an Area Director's decision within 30 days from the time the matter is ripe for decision. Therefore, when the Assistant Secretary, pursuant to 25 CFR Part 2, undertakes consideration of an appeal that would normally have been decided by the Deputy Assistant Secretary, he is subject to the 30-day restriction set forth in section 2.19.

[2] Because the Board does not have independent knowledge of when the 30-day period under section 2.19 expires, and because an appellant may still wish to have its case decided by the Deputy Assistant Secretary, even though the 30-day period has expired, the Board has held that it will not exercise its jurisdiction unless and until it is formally requested to do so by the appellant. *Wray, supra*; *Urban Indian Council, supra*. Under the regulations and in accordance with Board precedent, the Board has jurisdiction to decide the appeal at any time after the expiration of the 30-day period established in section 2.19. The Board will, however, exercise that jurisdiction only after an appellant has filed with it a notice of appeal, a request for the Board to assume jurisdiction, or other appropriate document advising the Board that the 30-day period has expired without decision. The date of filing is the date the notice of appeal is mailed. The exercise of Board jurisdiction in this matter, therefore, dates from May 10, 1984, the date of filing of appellant's notice of appeal to the Board.

[3] The second question thus becomes whether the Assistant Secretary, acting for BIA, had authority to issue a decision in this case after a notice of appeal had been filed with the Board. In its order requesting clarification of the status of this case, the Board asked for discussion of *Apache Mining Co.*, 1 IBSMA 14, 85 I.D. 395 (1978), which

¹ Although the Assistant Secretary's primary responsibility is to supervise BIA, that position is, as appellee notes, not located within BIA.

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was decided by the Interior Board of Surface Mining and Reclamation Appeals. The Surface Mining Board there stated:

For a considerable period of time it has been the declared policy of the Department that when an appeal is taken from the decision of one of its offices, that office loses jurisdiction of the matter until that jurisdiction is restored by disposition of the appeal by the appellate body. *Audrey I. Cutting*, 66 I.D. 348 (1959); *Utah Power & Light Co.*, 14 IBLA 372 (1974).

Considering the obvious chaos that would result if two different offices of the Department were to exercise simultaneous jurisdiction over the same persons and subject matter, this Board sees no reason to deviate from the departmental policy. Consequently, the Board holds that OSM [the program office] was without jurisdiction to act on the matter after the appeal was taken except to advise the Board of why the Board should or should not grant or deny the relief requested. Under this rule the letter of May 23, 1978, denying the application for excess tonnage was a nullity. The other letter of the same date in which OSM admitted error in regard to the denial which is the basis of the appeal herein, will be treated as a confession of error and a motion to grant the appellant relief.

1 IBSMA at 15, 85 I.D. at 395-96.

The problem noted in *Apache Mining*, namely, the confusion that would obviously result if two offices within the Department were to exercise simultaneous jurisdiction over the same persons and subject matter, is present in the instant case.² The Assistant Secretary's May 16, 1984, decision was issued after the section 2.19(b) notice of appeal had been filed with the Board and, according to appellant, after notification to BIA that a notice of appeal was being filed with the Board.

Under the precedent of *Apache Mining*, a decision issued by BIA after a notice of appeal has been filed with the Board is a nullity. The Assistant Secretary would have authority to render a decision in this matter, once an appeal had been properly brought to the Board, only if his decision were made in the exercise of the Secretary's reserved authority under 43 CFR 4.5.³

In order to be better informed on this issue, the Board requested in its June 13, 1984, order that the Office of the Solicitor discuss the Secretary's assumption of jurisdiction in *Rose v. Anadarko Area Director*, 12 IBIA 130 (1984).

[4] In *Rose*, and also in *Indians of the Quinault Reservation v. Commissioner of Indian Affairs*, 9 IBIA 81 (1981), the only two cases of this Board in which the Secretary has assumed jurisdiction, the Secretary specifically informed the Board in writing that he was assuming jurisdiction. Both the Board and the parties were thus

² Neither this Board nor the Surface Mining Board in *Apache Mining* was merely restating the general proposition that the effect of a decision is suspended pending appeal. 43 CFR 4.21. Both Boards were clearly addressing the potential for conflicting exercise of jurisdiction.

³ Section 4.5 states in pertinent part:

"(a) *Secretary*. Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by law. The authority reserved to the Secretary includes, but is not limited to:

"(1) The authority to take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the Office, and render the final decision in the matter after holding such hearing as may be required by law."

apprised of the status of the appeal.⁴ The Board does not hold that this is the only possible procedure through which the Secretary may exercise his reserved authority. The Board notes, however, that this, or a similar procedure designed to give full notice to the Board and to all parties of the status of the matter, avoids the problems noted in *Apache Mining* that might result from the simultaneous exercise of jurisdiction by two offices. Such duplication could cause unnecessary embarrassment to the Department and would not serve the public interest.

In the present case there is no evidence in the record before the Board that the Secretary ever assumed jurisdiction over this appeal under section 4.5. Assuming, *arguendo*, that the Assistant Secretary can exercise the Secretary's reserved authority,⁵ the Assistant Secretary neither discusses nor refers to section 4.5 in his decision. Because there is no evidence that jurisdiction over this matter was ever assumed under section 4.5, the Board was the only office within the Department possessing jurisdiction to decide the appeal at the time the Assistant Secretary issued his decision.⁶

From its review of the record in this appeal,⁷ the Board concludes that appellee's stated reason for declining to contract with appellant cannot stand. The parties agree that BIA had previously dealt with appellant as the governing body of the Karok Tribe and as a contracting authority, and it had actually awarded appellant other contracts. In his May 16, 1984, letter, the Assistant Secretary also recognized that by its course of dealing with appellant, BIA was estopped from asserting this argument.

This conclusion, however, does not resolve the underlying controversy. The Assistant Secretary apparently decided in 1983 that appellant had improperly excluded the Siskiyou subentity from participation in the tribe.⁸ This determination was communicated to appellant orally and in writing on May 6, 1983. Appellant was informed that BIA would not recognize any action it took until the Siskiyou community was restored as a tribal constituent. The Assistant Secretary reaffirmed this decision in his May 16, 1984, letter.

⁴ Similarly, in the *Estate of Orrin John*, Docket No. IBIA 84-22, the parties and Board were informed in writing of the Secretary's decision not to grant a petition requesting him to assume jurisdiction over a case pending before the Board.

⁵ The Board is not aware of any prior holding or other authority to the effect that the general delegation of authority to the Assistant Secretary in 109 DM 8.1 in and of itself permits him to exercise the authority reserved to the Secretary under 43 CFR 4.5.

⁶ Appellee argues that this decision would create a hiatus in jurisdiction, with no office having authority to issue a decision until an appeal was filed with the Board. This contention is clearly incorrect under the Board's holdings, discussed *infra*. Because the Board will not exercise its jurisdiction until the appellant requests it to do so, BIA, or the Assistant Secretary acting for BIA, retains authority to issue a decision until an appellant has filed a request for the Board to exercise its jurisdiction. Although requested to do so, the Board has specifically declined to hold void a BIA decision issued after the expiration of the 30-day period, but before a request was filed for the Board to exercise its jurisdiction. *Wray, supra*.

⁷ Although the Board does not have the official administrative record in this matter, the Deputy Assistant Secretary indicated in a July 3, 1984, letter to the Board that the materials provided to the Board by appellant under 25 CFR 2.11 constituted the essential administrative record. Other enumerated documents in the record were attached to that letter. The Board has reviewed these documents as well as the materials provided in the course of proceedings before it.

⁸ This exclusion appears in Resolution 83-29, approved by the interim committee on June 8, 1983.

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[5] The Assistant Secretary's finding involves a determination of whether appellant is the validly constituted representative of the Indian groups that were found to be eligible for Federal recognition as the Karok Tribe. Federal recognition of Indian tribes is governed by 25 CFR Part 83. Although not cited by the parties, Part 83 places decisions relating to Federal recognition of Indian tribes within the purview of the Assistant Secretary. Final review authority lies with the Secretary. The Board is not part of the recognition process.

The Board therefore takes official notice of the Assistant Secretary's determination that because appellant was not the validly constituted representative of the Indian groups that sought Federal recognition as the Karok Tribe, BIA would not deal with appellant unless and until the Siskiyou community was brought back into the tribe.⁹ Consequently, the Board will apply the Assistant Secretary's determination in this appeal. As presently organized, appellant does not represent all of the Indian groups determined by the Assistant Secretary to be necessary for Federal recognition of the Karok Tribe, and it may not apply for BIA assistance.¹⁰

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified by this opinion.

ANNE POINDEXTER LEWIS
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

JERRY MUSKRAT
Administrative Judge

APPEAL OF WILLIAM CARGILE CONTRACTOR, INC.

IBCA-1787-3-84

Decided *January 8, 1985*

Contract No. 68-03-1819, Environmental Protection Agency.

Dismissed.

⁹ This determination is not, as appellant alleges, an interference with a tribe's rights of self-determination, but rather constitutes a preliminary issue in the decision as to whether a tribe exists.

¹⁰ This decision is without prejudice to whatever rights appellant may have under Part 83 to seek reconsideration of this decision by the Assistant Secretary, or review by the Secretary, or to seek judicial review of this determination. Appellee states that appellant has already filed suit in the United States District Court for the Eastern District of California seeking review of, among other things, the decision at issue here. See *Coyote Valley Band v. United States*, Civs-84-0482-MLS. Appellee states that in that case, appellant alleges exhaustion of administrative remedies based upon the Assistant Secretary's May 16, 1984, decision. Jurisdictional allegations of a party to a lawsuit, of course, neither create jurisdiction in a forum that does not have it, nor destroy it in a forum that does.

Contracts: Contracts Disputes Act of 1978: Jurisdiction--Rules of Practice: Appeals: Timely Filing

An appeal under the Contract Disputes Act filed more than 90 days after a contractor's receipt of a contracting officer's final decision is dismissed as untimely.

APPEARANCES: William Cargile III, President, William Cargile Contractor, Inc., Cincinnati, Ohio, for Appellant; Richard V. Anderson, Government Counsel, Environmental Protection Agency, Cincinnati, Ohio, for the Government.

*OPINION BY ADMINISTRATIVE JUDGE LYNCH**INTERIOR BOARD OF CONTRACT APPEALS*

The question presented by this appeal is whether it was filed within the time prescribed by the Contract Disputes Act of 1978.

The Government has filed a motion to dismiss the appeal on the grounds that the appellant failed to appeal within the 90-day period prescribed by the Contract Disputes Act of 1978, P.L. 95-563, 41 U.S.C. § 601 (1982). The motion is predicated on the appellant's failure to furnish sufficient evidence to explain the 20-day delay in the Board's receipt of the notice of appeal letter.

The notice of appeal letter dated March 6, 1984, was received by the Board on March 26, 1984. The Board failed to retain the envelope transmitting the notice of appeal; and, therefore, there is no evidence of metered postmark or cancellation postmark to aid in establishing the date of mailing.

The contracting officer's final decision letter was received by appellant on December 20, 1983, via certified mail. Accordingly, the 90-day appeal period expired on March 19, 1984.

The Board issued an order on April 3, 1984, directing appellant to file an affidavit attesting to the date of mailing of the notice of appeal. Appellant failed to respond, and a second order dated June 26, 1984, ordered that the complaint and affidavit be filed on or before July 13, 1984, with failure to do so to result possibly in dismissal. By letter dated June 28, 1984, appellant forwarded a copy of the complaint dated April 16, 1984, improperly addressed to the General Counsel of the Environmental Protection Agency, a copy of the Notice of appeal dated March 6, 1984, and the Board's docketing notice dated March 26, 1984. The letter refers to mailing of the complaint and notice of appeal on the date of the documents.

By letter of July 9, 1984, the Board advised that the letter of June 28 was not satisfactory and required a proper affidavit regarding the actual mailing date of the notice of appeal by July 20, 1984. Appellant responded by letter dated July 12, 1984, attesting that the notice of appeal dated March 6, 1984, was mailed on March 6, 1984, and showing an appearance before a notary public on July 17, 1984. The Government objects to the sufficiency of the brief attestation because it lacks any explanation about the usual practices of preparing

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and mailing correspondence, or any basis for the apparent certainty of appellant that the appeal was mailed on March 6, 1984.

Both appellant and the Government counsel are in Cincinnati, Ohio. There are no postmarks on any correspondence from appellant to the Board, but rather a metered postmark from appellant's postage meter. The probative value of a metered mark from a postage meter in appellant's possession is nil compared to the strong presumption of the time of mailing that arises from a post office affixed postmark. See *Chicago Iron Works, Inc.*, GSBICA No. 3169 (Oct. 16, 1970), 70-2 BCA par. 8525. Consequently, it is unlikely that the missing envelope transmitting the notice of appeal would have contained the stronger evidence of a postmark. However, the record contains other examples of the transit time taken for mail between Arlington, Virginia, and Cincinnati, Ohio:

Document	Date	Metered Mark	Rec'd, Cinn., OH by appellant	Rec'd, Cinn., OH by Government	Rec'd, Arl., VA by Board	Time
Notice of Appeal.....	3/6/84	(missing)			3/26/84	20
Docket Notice.....	3/26/84		3/28/84	(missing)		2
Order	4/3/84		4/10/84	4/6/84		7/3
Designation of Gov't Counsel	4/6/84	4/10/84			4/12/84	2
Order	5/26/84		5/28/84	5/28/84		2/2
Appellant's Complaint Letter.....	5/28/84	5/29/84			7/3/84	5
Letter from Board.....	7/9/84		7/12/84	7/11/84		3/2
Appellant's Affidavit	7/12/84	7/17/84			7/19/84	2
Government Motion to Dismiss	8/27/84	8/27/84			8/30/84	3

The above pattern of mailings between Arlington, Virginia, and Cincinnati, Ohio, indicates strongly that the transit time for a mailed document will be from 2 to 7 days. Additionally, it is noted that the mailings from appellant of documents dated May 28 and July 12, 1984, were not mailed on the date of the documents but 1 day and 5 days later respectively. This delay in mailing of other documents militates against accepting appellant's assertion that the notice of appeal was mailed on the date of the notice. There is no showing of a consistent practice of mailing on the date shown on the document. Instead, a probability exists that the notice of appeal was not mailed on the date shown on the document.

Appellant has the burden of showing that the appeal was timely filed. He has not provided a credible basis for his assertion of mailing the notice of appeal on March 6, 1984. The other evidence of record indicates that a mailing on March 6, 1984, would not have taken

20 days in transit. Therefore, we find that appellant has not sustained the burden of proving that his appeal was timely filed.

Conclusion

Under the Contract Disputes Act of 1978 the Board has no jurisdiction over an appeal unless it is taken within 90 days from the date of receipt of the contracting officer's final decision. Appellant has not filed an appeal within the 90-day period specified in the Contract Disputes Act of 1978. The appeal is therefore dismissed as outside the purview of our jurisdiction.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

APPEAL OF C. G. NORTON CO., INC.

IBCA-1823

Decided *January 10, 1985*

Contract No. 14-16-0004-82-029, Fish and Wildlife Service.

Dismissed.

Res Judicata

An appeal contesting appellant's responsibility for repainting doors and jambs under a contract terminated for default is dismissed because the same issues were presented and decided in an earlier decision and affirmed on reconsideration, thereby constituting res judicata.

APPEARANCES: C. G. Norton, President, C. G. Norton Co., Inc., Huntsville, Alabama, for Appellant; Donald M. Spillman, Department Counsel, Atlanta, Georgia, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the instant appeal on the grounds of res judicata.

Appellant's complaint contends that the Government's termination for default of its contract for failure to paint doors and door jambs is erroneous. Appellant claims that all work required by the contract was accomplished in full compliance with the specifications as modified verbally by an authorized official of the Government. Specifically, appellant offers to prove that he did not paint the door jambs, did not agree to paint the door jambs, was not obligated to paint the door jambs, and that he is not liable for painting work purchased by the

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Government to correct the alleged deficiency of inadequately painted door jambs. Additionally, regarding the painting of doors, appellant offers to prove that the refuge manager refused to allow the use of brushes and rollers and insisted on spray painting, that the denial of the use of optional means of painting violated the terms of the contract, and that the onsite Government representative had accepted the door painting as being in compliance with the specifications. Responding to the Motion to Dismiss, appellant contends that the Interior Board of Contract Appeals has not ruled on a disputed set of facts that comprise an argument between the parties. His response to the contracting officer's decision that the painting of the door jambs was deficient is that he did not apply paint to the jambs and was not required by the contract to do so.

In a decision issued on November 14, 1983, the two punch list items concerning painting of doors and door jambs were treated as part of an earlier appeal by appellant at his written request. The Government had withheld funds to assure completion of these two claimed deficiencies, and the contracting officer indicated that they were covered by appellant's original claim and the contracting officer's decision. In the decision of November 14, 1983, we held that since appellant had offered no proof other than its allegation that performance was satisfactory on the doors, appellant had failed to carry its burden on this item. Regarding the door jambs, appellant offered no reason for the assertion that the contract did not require painting and our reading of the contract did not support the assertion. The claims for these two items were denied.

On reconsideration, our opinion dated April 23, 1984, affirmed the principal decision regarding the two painting punch list items after a lengthy discussion. Appellant simply did not prove the allegations in its complaint respecting the Government's demand that the painting of the doors and door jambs be corrected.

Therefore, the painting punch list items have been considered on the complete record before the Board on two occasions. This constitutes *res judicata*, and the items will not be considered again.

By letter dated June 1, 1984, the contracting officer informed appellant that the contract would be terminated for default if the punch list items were not completed by July 1, 1984. By affidavit attached to the Motion to Dismiss, the contracting officer affirms that appellant made no effort to complete the items prior to the termination for default by letter dated July 18, 1984. The failure to complete these items found to be appellant's responsibility in our principal and reconsideration decisions is confirmed by appellant in his complaint.

Conclusion

The only basis for the current appeal is the contention that appellant is not responsible for the two painting punch list items, despite the fact that the items were considered on the complete record before the Board on two occasions. Our previous decisions constitute res judicata to these claims of appellant. There being no other basis offered for contesting the termination for default, the appeal is hereby dismissed.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

William F. McGraw
Chief Administrative Judge

HIGH SUMMIT OIL & GAS, INC.

84 IBLA 359

Decided *January 24, 1985*

Appeal from a decision of the Casper, Wyoming, District Office, Bureau of Land Management, rejecting in part appellant's application for right-of-way W-86254, and rejecting appellant's application for right-of-way W-81556.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

Under the Federal Land Policy and Management Act of 1976, approval of a right-of-way by the Secretary of the Interior is discretionary. A decision of the Bureau of Land Management rejecting an application for a right-of-way will ordinarily be affirmed by this Board when the record shows the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest.

APPEARANCES: Wendall H. Jamison, Evans, Colorado, for appellant; Lyle K. Rising, Department Counsel, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

High Summit Oil and Gas, Inc. (HSOG), has appealed from a decision of the Casper, Wyoming, District Office, Bureau of Land Management (BLM), dated July 26, 1984, rejecting in part its application for right-of-way W-86254, and rejecting its application for right-of-way W-81556.

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HSOG filed right-of-way application W-86254 with the Platte River Resource Area Office, BLM, on April 25, 1984, for an access road to oil and gas lease W-58802 (crossing oil and gas leases C-037009A and C-037009C), located in T. 35 N., R. 85 W., sec. 9, W 1/2 NE 1/4, SE 1/4 NE 1/4, NE 1/4 SE 1/4, and sec. 15, SW 1/4 SW 1/4, SW 1/4 SE 1/4, Sixth Principal Meridian, Natrona County, Wyoming. BLM rejected the new-construction road portions of right-of-way application W-86254. However, BLM found that use of the existing road located in T. 35 N., R. 85 W., sec. 9, W 1/2 NE 1/4, SE 1/4 NE 1/4, NE 1/4 SE 1/4, Sixth Principal Meridian, Natrona County, Wyoming, could be approved subject to execution of certain forms and acceptance of certain stipulations. On August 14, 1984, right-of-way W-86254 was approved for use of the existing access road.

HSOG filed right-of-way amendment application W-81556 with the Platte River Resource Office, BLM, on April 25, 1984, for an access road to oil and gas lease W-58803 (crossing oil and gas lease W-60688 and W-62034) located in T. 35 N., R. 85 W., sec. 9, W 1/2 NE 1/4, SE 1/4 NE 1/4, NE 1/4 SE 1/4, and sec. 15, SW 1/4 SW 1/4, SW 1/4 SE 1/4, Sixth Principal Meridian, Natrona County, Wyoming.

BLM rejected the new-construction road portion of right-of-way application W-86254 and all of amended application W-81556 because they "are in conflict with environmental considerations and with decisions found in the approved Natrona Management Framework Plan relating to right-of-way placement and location, and because the proposals are not in the best public interest." BLM went on to note that:

This decision is without prejudice to continue[d] use of existing roads authorized by rights-of-way and approved Applications for Permit to Drill (APD) which currently provided access via existing upgraded roads to the oil and gas leases and to producing oil and gas wells on those leases. Continued use of rights-of-way W-77745, W-81556, and APD-approved existing access roads can be satisfactorily mitigated and provide for environmentally sound access to and over the oil and gas leases, and is in conformance with the approved Natrona Management Framework Plan decisions relating to rights-of-way and oil and gas lease development.

On July 26, 1984, BLM prepared a thorough land report and environmental assesement (EA) concerning appellant's right-of-way applications (EA No. WY-062-4-062). The report concludes as follows:

There is no need for the proposed action since the applicant now holds rights-of-way and a private land easement which provide access to the oil and gas leases, and wells on the leases, over existing, upgraded roads. Construction of new access roads in lieu of use of existing access roads is not an economic method for obtaining access to the facilities, and would result in unnecessary, additional surface disturbance and impacts to the public lands. Approval of the proposed action is not consistent with BLM planning or policy, and could set adverse precedents relating to rights-of-way alignment, and oil and gas lease development. Construction of new access roads could adversely affect the landowner of private lands over which access roads now cross, as well as potentially placing the general public's health and safety at risk, and would not be in the public interest.

(EA, Decision Record at 1).

The EA provides in part:

The proposal has not been brought to the attention of the general public, however, discussions were conducted with the private landowner, J. B. Eccles. Mr. Eccles expressed surprise that such an application had been made, stating that no new roads should be needed since the easement given to High Summit Oil & Gas, Inc. by himself in May, 1984 provides for the company's perpetual use of the existing roads crossing his private lands, and allows for construction of new facilities, as needed, over those lands. He voluntarily provided this office with a copy of the easement agreement.

Approval of the proposed action would set a precedent adverse to current, long-standing bureau policy regarding promotion of use of existing roads where feasible. In addition to being standard bureau operating procedure, industry has traditionally utilized existing roads, wherever those roads provide adequate access, rather than incur costs for construction and rehabilitation of new roads. Approval of new construction [of] roads [for] the primary purpose of bypassing private lands over which existing roads traverse would open the door for future similar applications, since it may, in some instances, be less time consuming to deal with BLM instead of private landowners.

(EA at 9, paragraph D).

Therefore, as indicated by the EA, appellant already has adequate access and the new rights-of-way are not necessary.

Moreover, BLM found that the proposed rights-of-way would be inconsistent with BLM planning:

The proposed action is not consistent with BLM planning. Natrona Management Framework Plan Objective L-6 states: "Allow use of public land to accommodate rights-of-way considering facility placement adjacent to established routes and maximizing protection of resources or fragile natural systems."; Decision L-6.3 is to "Encourage placement of compatible facilities adjacent to existing facilities adjacent to existing facilities [sic] in outlying areas.", since ". . . placement. . . adjacent to other facilities is proper and lends to quality land use." The Platte River Resource Area Oil and Gas EA identifies, in the Environmental Consequences section (p72), that the amount of overall soil disturbance resulting from road rights-of-way has been greater than necessary, further stating that more than one access road into a facility contributes to the problems associated with accelerated erosion and site reclamation.

(EA at 9, paragraph E).

BLM's analysis thoroughly assessed the environmental consequences of the proposed rights-of-way:

Construction of approximately 1.5 miles of new access road will result in destruction of the native vegetation and disturbance of soils on approximately 5.3 acres of public and state land, on or off the oil and gas leases. By constructing new roads in the area total area disturbed by roads in Sections 4, 9, 15, 16, and 22, including existing roads that are authorized by right-of-way or NTL-6/APD, will be 40.9 acres. Erosion of soils will occur along the new roads for the life of the facilities, although reseeding of ditch areas should reduce the amount of disturbed area by about one-third.

(EA at 3 (Impacts of the Proposed Action)). BLM also found that the rights-of-way would cause unnecessary soil erosion and stream sedimentation in areas requiring a crossing of the South Fork of the Powder River. The plan for a river crossing submitted by the applicant was also found to be inadequate. The culverts necessary to permit full drainage of water at peak flow would have to be four (4) times the size of the proposed conduits (EA at 4). Those conduits would also cause serious flooding of public and private lands, creating an artificial

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barrier at peak runoff. BLM concluded that an expensive concrete bridge would be necessary to prevent flooding. In sum, BLM has presented a cogent and well-documented picture of needless environmental damage in this area if the proposed rights-of-way are granted. It is worth noting that section 302 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1982), provides in part: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."

HSOG asserts on appeal that the grantor of its right-of-way across the private land, J. B. Eccles,¹ had illegally blocked access over his land for several days, thereby disrupting HSOG's operations. HSOG characterizes its relationship with Eccles as "poor," and regards access by the present route as "unreliable." This, apparently, is the principal reason that HSOG has applied for another route and has pressed this appeal.

The Board regards this as an inadequate reason to grant the requested right-of-way. There seems to be no doubt that appellant has a legal right-of-way over the present route, including the Eccles land. It would seem that it is appellant's responsibility to protect its own private legal entitlements rather than to look to the Federal Government to provide relief from what it views as an unhappy relationship with a private citizen. Moreover, there seems to be no present barrier to appellant's use of the existing route, but merely appellant's anticipation that there may be difficulty in the future.

Appellant's right-of-way applications were filed pursuant to section 501 of FLPMA, 43 U.S.C. § 1761 (1982). Under FLPMA, approval of a right-of-way by the Secretary of the Interior is a "wholly discretionary matter." *E.g., Lower Valley Power & Light, Inc.*, 82 IBLA 216, 223 (1984); *William A. Sigman*, 66 IBLA 53, 55 (1982); *Nelbro Packing Co.*, 63 IBLA 176, 185 (1982).

In *Anita Robinson*, 71 IBLA 380, 382-83 (1983), we stated: "A BLM decision rejecting an application for a right-of-way will ordinarily be affirmed by the Board when the record shows the decision to be based on a reasoned analysis of the factors involved, made with due regard for the public interest." *William A. Sigman, supra* at 55; *Nelbro Packing Co., supra* at 185. Therefore, the central issue in the instant appeal is whether or not BLM's decision was premised upon a reasoned analysis of the factors involved, made with due regard for the public interest.

The case of *Anita Robinson, supra*, is instructive in this area. In *Robinson*, this Board upheld a BLM decision rejecting the applicant's right-of-way application. Robinson applied for a right-of-way for a road to her home. The road would have had a negative impact on the

¹ Eccles executed the right-of-way easement in his capacity as president of Eccles Land and Livestock.

scenery in an area which was being studied for inclusion in the Wild and Scenic Rivers System. This Board's decision upholding the rejection of Robinson's right-of-way was premised on two primary bases. First, Robinson already had adequate access to her home by an existing road. Second, granting the right-of-way would have conflicted with land use plans adopted pursuant to section 202 of FLPMA, 43 U.S.C. § 1712 (1982). The same two circumstances exist in the instant case.

In another analogous case, *Department of the Army Corps of Engineers*, 51 IBLA 26 (1980), the Board upheld BLM's rejection of the Army's right-of-way application where there was an existing road and the new road would have caused undue erosion and sedimentation of a stream. Under those circumstances, the proposed right-of-way was held not to be in the public interest. *Id.* at 26. In the instant case, the EA indicated that the new road would similarly cause undue soil erosion and many other associated environmental problems. In *Lowell Durham*, 40 IBLA 209 (1979), this Board upheld a BLM decision rejecting a right-of-way application where the proposed right-of-way was found to cause soil erosion and sedimentation with a resulting loss of fish habitat.

In deciding whether to approve appellant's proposed rights-of-way, BLM was effectively required to balance the competing interests. We cannot conclude that BLM failed to adequately weigh these interests or that it failed to take relevant factors into account. The Land Report and EA upon which BLM premised its decision was thorough in its treatment of the various considerations. The record clearly reflects that BLM conducted a reasoned analysis with due regard for the public interest. *E.g., Anita Robinson, supra* at 382-83. Accordingly, we conclude that BLM properly denied appellant's right-of-way applications for the foregoing reasons, and because appellant has not shown a "sufficient reason" to disturb BLM's decision. *See Anita Robinson, supra; Stanley S. Leach*, 35 IBLA 53, 55 (1978); *Jack M. Vaughn*, 25 IBLA 303, 304 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

FRANKLIN D. ARNESS
Administrative Judge

January 28, 1985

APPEAL OF MALHEUR LAKE FARMS, INC.

IBCA-1808

Decided January 28, 1985

Contract No. OR910-CT4-58, Bureau of Land Management.

Denied.

**Contracts: Performance or Default: Acceptance of Performance--
Contracts: Performance or Default: Inspection--Rules of Practice:
Appeals: Burden of Proof**

An appeal from a termination for default and an assessment of excess costs is denied where the Board finds (i) that a preliminary inspection of hay incident to a preaward survey did not preclude the Government from rejecting a substantial portion of the same hay when delivered to the destination specified in the solicitation; (ii) that the contract was properly terminated for default when the contractor failed to deliver the required quantity of acceptable hay within the time specified; and (iii) that the amount of excess costs involved in reprocurring the hay from another source was reasonable.

APPEARANCES: James O. Green, General Manager, Malheur Lake Farms, Inc., Lawen, Oregon, for Appellant; William Douglas Back, Department Counsel, Portland, Oregon, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

In this on-the-record case, appellant contests the propriety of a termination for default, stating in the notice of appeal that "[t]he Contractor should not be penalized for the inconsistency of inspection and extreme weather conditions which the Contractor contends are causes beyond control and without fault or negligence as provided for under paragraph (c), page L(7), in the General Provisions section of the Contract."¹

Solicitation No. OR910-IFB4-57, issued under date of February 10, 1984, called for the prospective contractor to supply and deliver 260 tons of hay (alfalfa) in accordance with the specifications, terms, and conditions of the solicitation, f.o.b. Bureau of Land Management, Burns District, Wild Horse Corrals, 8 miles west of Burns, Oregon.

On March 1, 1984, the terms of the solicitation were amended by deletion of the last sentence² of a provision pertaining to preliminary inspection of the hay to be supplied under the contract to be awarded. The provision included in Section E, Schedule of Items, page D-11, as modified by the amendment (page D-35), reads as follows:

¹The contract is Appeal File Exhibit D. (Hereafter all appeal file exhibits will be identified by AF followed by reference to the particular lettered exhibit being cited). The General Provisions in the contract are those adopted for use in connection with Standard Form 33 (Solicitation, Offer and Award).

²The deleted sentence reads as follows: "Hay not meeting contract specifications will be rejected and the bid will be rejected as nonresponsive" (AF D-35).

The Government reserves the right during a preaward survey to make a preliminary inspection of the hay, at the location designated above, for the purpose of determining compliance with contract specifications. (See Section I, Inspection and Acceptance and Clause 5 Inspection, Section L for final inspection).

(AF D-11, D-35).

In pertinent part the inspection provisions cited in the above-quoted reservation read as follows:

SECTION I

INSPECTION/ACCEPTANCE/PAYMENT

A 100 percent inspection of the hay will be made at the Burns Wild Horse Corrals at the time of delivery. Bales of hay rejected for not meeting contract specifications shall be replaced by the Contractor at no expense to the Government. This may require reweighing the rejected hay to determine the actual quantity to be replaced.

Acceptance will be made after final inspection of the hay at the Burns Wild Horse Corrals.

Measurement for payment will be based on actual weight from scale tickets. Official weighing scales are available in Burns, Oregon. Payment will be at the unit bid price for actual quantities delivered and accepted.

* * * * *

SECTION L

GENERAL PROVISIONS SUPPLY

* * * * *

5. INSPECTION

(a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture and in any event prior to acceptance.

(b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or, if permitted or required by the Contracting Officer, corrected in place by and at the expense of the Contractor promptly after notice, and shall not thereafter be tendered for acceptance unless the former rejection or requirement of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies which are required to be removed, or promptly to replace or correct such supplies or lots of supplies, the Government either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default." Unless the Contractor corrects or replaces such supplies within the delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(AF D-12, D-16).

The instant contract, as awarded to appellant on March 23, 1984, called for the delivery of 260 tons of hay at a unit price of \$82 per ton resulting in a total contract price of \$21,320. The hay covered by the contract was required to be delivered within 15 calendar days from

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receipt of the awarded contract. As the executed contract was received by the contractor on March 28, 1984, the contractor was required to deliver the specified quantity of hay by April 13, 1984.

Three truckloads of hay were delivered by the contractor to the BLM Wild Horse Corrals in April 1984. The hay delivered on April 3 was inspected and accepted on that date by the contracting officer's authorized representative (COAR), Stan Woodworth. A second load of hay delivered on April 4 was found upon inspection to have up to 3 inches of surface mold in the hay. When informed of the inspection results by the COAR on the same date, the contractor stated that he had some other hay of a better quality which he would deliver. Inspection of the third load of hay delivered on April 6 disclosed that the hay did not meet specifications. The hay involved in such delivery was rejected on April 10.³ On April 16, 1984, the contractor informed COAR Woodworth that he did not have enough quality hay to meet the requirements of the contract.

The total amount of hay delivered by appellant and accepted by the Government was 86.525 tons. For the 86.525 tons of hay so delivered, the contractor was entitled to be paid at the contract price of \$82 per ton or the total sum of \$7,095.05.

On April 20, 1984, the contract was terminated for default by a telegram in which, after noting that as of April 13, 1984, the contractor had only delivered 86.525 tons of hay meeting contract specifications, the contracting officer states: "Based on your failure to deliver acceptable hay within the available contract time and in accordance with Clause 14, Default of the General Provisions of your contract, your right to proceed is hereby terminated and your contract is terminated for default effective today" (AF B).

In BLM's effort to procure the balance of the hay elsewhere, the second low bidder on the solicitation was contacted on April 23, 1984, but he had sold his hay following the award to appellant. According to the findings, COAR Woodworth made a preliminary inspection of hay owned by the third low bidder, G&K Scotts Farms, on April 26, 1984, which revealed that the hay was too moldy to meet the specifications.⁴ On April 30, 1984, a purchase order was issued to Ken Wright for an estimated quantity of 173 tons of hay at \$119 per ton. The week of May 7, Mr. Wright delivered 173.485 tons of hay. The hay was accepted by BLM and payment was made under Purchase Order No. OR910-PH4-445 in the amount of \$20,644.72. Appellant was found liable for excess procurement costs in the amount of \$6,419.77, the

³ Included in the appeal file is a record of telephone conversations made by the contracting officer from which the following is quoted:

"4-16-84 Load of hay delivered 4-13 rejected - Hay delivered on Monday 4-16 was also rejected. Contractor advised COR no other hay was available. 4-20-84 Stan said Contractor doesn't want to buy hay from someone else * * *"
(AF C).

⁴ In a joint affidavit dated Dec. 5, 1984, Mr. Stan Woodworth (Civil Engineering Technician) and Mr. Ron Harding (Wild Horse Management Specialist) state: "3. The G&K Scotts Farms hay was not rejected because of mold, but because of a high percentage of bleaching."

difference between his contract price of \$21,320 and the actual cost to the Government reflecting reprocurement (\$27,739.77).

In response to the Order Settling Record, the Government submitted two affidavits in support of its position. In an affidavit executed under date of December 5, 1984 (note 4, *supra*), Messrs. Woodworth and Harding state:

1. We participated in a preliminary inspection of some of Malheur Lake Farm's hay on March 23, 1984 during preaward survey. The hay did appear to be of good quality on March 23 but the stacks were not "opened up" for extensive inspection at that time. The appellant was told on March 23 that acceptance could only be made at the time of delivery to the corrals.

2. The rejected hay did not meet the contract specifications at the time of delivery to the corrals. [5]

Discussion

Appellant has made only a perfunctory attempt to relate extreme weather conditions to the failure to deliver sufficient quantities of acceptable hay. No effort has been made to explain how an abnormal amount of precipitation from November 1983 to March 6, 1984, could affect the contractual obligations assumed by reason of the bid submitted on March 6, 1984, under which appellant offered to supply and deliver hay meeting the requirements of the specifications, terms, and conditions contained in the solicitation. By its answer, the Government denies that the weather was unusually severe during the period in question. Appellant asserts that available records support its position but has failed to submit them for inclusion in the record.

Appellant also argues that the hay of G&K Scotts Farms (third low bidder on the solicitation) should not have been rejected because of mold when inspected by Mr. Woodworth on April 26, 1984. According to appellant, witnesses would verify that the reason stated for the rejection was not valid because the hay in question had been stored in a hay barn. Appellant also states that certified laboratory tests verify this particular hay to be of quality and high nutritional value. In a sworn statement (note 4, *supra*), Mr. Woodworth states that the basis for the rejection of the G&K Scotts Farms hay was not mold, but "because of a high percentage of bleaching." Here also appellant has failed to offer any proof in support of its assertions.⁶ The testimony of the witnesses to whom appellant refers has not been obtained even by way of affidavits, and a copy of the laboratory report containing the results of the tests mentioned has not been furnished to the Board.

The principal ground for appellant's appeal, however, is that a large quantity of hay which was inspected by Messrs. Woodworth and Harding at the Malheur Lake Farms stackyard on March 23, 1984, and

⁵ In an affidavit executed under date of Dec. 6, 1984, Lester T. Duke (Livestock Handler) and Lloyd Mulholland (Wild Horse Health Technician) state: (i) that they had observed the hay delivered by Malheur Lake Farms to the Burns Wild Horse Corral in April 1984, and (ii) that a large portion of the hay contained mold, had a loss of color, and was wet.

⁶ Mere allegations unsupported by any evidence of record are not acceptable as proof of the matters alleged. *Sunset Construction, Inc.*, IBCA 454-9-64, (Oct. 29, 1965), 72 I.D. 440, 443, 65-2 BCA ¶ 5188 at 24,394.

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apparently found acceptable was rejected when delivered to BLM's Wild Horse Corrals in April 1984. More succinctly stated appellant's position appears to be that hay found acceptable by the BLM inspectors in late March could not be found unacceptable when delivered in April. Neither the contract terms nor the sworn statement of Messrs. Woodworth and Harding support appellant's position.

The contract schedule provides for the delivery of the hay in question f.o.b., Bureau of Land Management, Burns District, Wild Horse Corrals. Elsewhere on the same page, the schedule refers to the inspection to be made of the hay on the contractor's premises as preliminary and cites other provisions relating to inspection and acceptance (AF D-11). The clause included in the contract as Section I (text, *supra*), makes reference to a 100 percent inspection being made at the time of delivery after which it states: "Bales of hay rejected for not meeting contract specifications shall be replaced by the Contractor at no expense to the Government" (text, *supra*). General Provision 5. Inspection (Section L) states that all supplies shall be subject to inspection and test by the Government prior to acceptance and that in case any supplies or lots of supplies are not in conformity with the requirements of the contract, the Government shall have the right to reject them (text, *supra*).

In a sworn statement (text, *supra*), Messrs. Woodworth and Harding state that at the time of the preliminary inspection on March 23, 1984, appellant was told that acceptance could only be made at the time of delivery to the corrals. While the Board has no reason to question the accuracy of this sworn statement, it notes that even if Messrs. Woodworth and Harding did make the statements attributed to them by appellant, this would not be an adequate basis for finding in favor of the latter. This is because there is nothing in the record to indicate that either of them had the authority to modify the contract provisions or to waive them. Absent the showing of such authority, the clear and unambiguous provisions of the contract relating to inspection and acceptance must prevail.⁷

Decision

Based upon the contract provisions from which we have quoted and the record before us in this proceeding, the Board finds (i) that BLM had the right to reject nonconforming hay when delivered to its Wild Horse Corrals in April 1984; (ii) that appellant has failed to show by preponderance of the evidence that any of the hay rejected by BLM met the requirements of the contract; (iii) that the right of the contractor to complete performance of the contract was properly terminated for default by reason of the contractor's failure to deliver

⁷ See *R & R Construction Co., IBCA-413 and IBCA-458-9-64* (Sept. 27, 1965), 72 I.D. 385, 388-90, 65-2 BCA ¶ 5109 at 24,061-062.

the required quantity of acceptable hay within the time specified; (iv) that the quantity of hay remaining to be delivered under appellant's contract was procured from other sources at a reasonable price; and (v) that appellant was properly charged with the excess costs involved in the procurement in the amount of \$6,419.77.

For the reasons stated and on the basis of the authorities cited, the appeal is denied.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

**RACE FORK COAL CORP. v. OFFICE OF SURFACE MINING
RECLAMATION & ENFORCEMENT**

84 IBLA 383

Decided *January 28, 1985*

Appeal from a decision of Administrative Law Judge David Torbett, vacating Notices of Violation Nos. 80-I-25-2 and 80-I-84-4 for lack of jurisdiction. CH O-115-R and CH O-116-R.

Reversed and remanded.

**1. Surface Mining Control and Reclamation Act of 1977:
Administrative Procedure: Burden of Proof--Surface Mining Control
and Reclamation Act of 1977: Applicability: Generally**

In an application for review proceeding, a person contesting the jurisdiction of the Office of Surface Mining must plead and prove the basis for its claim as an affirmative defense.

**2. Surface Mining Control and Reclamation Act of 1977: Tipples and
Processing Plants: In Connection With**

Offsite processing facilities are operated "in connection with" surface mines where the owner and operator of the facility is also the permittee and/or operator of a group of supplying mines.

APPEARANCES: E. K. Street, Esq., Grundy, Virginia, for Race Fork Coal Corp.; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, John C. Martin, Esq., Walton D. Morris, Esq., and Harold P. Quinn, Jr., Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

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OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

On March 25, 1982, the Office of Surface Mining Reclamation and Enforcement (OSM) appealed from a March 8, 1982, decision of Administrative Law Judge David Torbett. This decision vacated Notices of Violation (NOV) Nos. 80-I-25-2 and 80-I-84-4 and held that OSM had no jurisdiction over the coal preparation facility of Race Fork Coal Corp. (Race Fork).

On January 16, 1980, OSM inspectors visited the Woodman-Luke preparation plant and a coal refuse site operated by a permit holder, Race Fork, in Buchanan County, Virginia. Pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. §§ 1201-1328 (1982), they issued the NOV's for violations of the interim performance standards outlined in 30 CFR Part 700. NOV No. 80-I-25-2 charged Race Fork with six violations; NOV No. 80-I-84-4 listed two violations, one of which was vacated.¹

After a hearing on November 19, 1980, in Abingdon, Virginia, Judge Torbett found the following facts:

33. According to Mr. Lewis's testimony, mines permitted to the Applicant [Race Fork] or operated by the Applicant delivered from 165,000 to 200,000 tons of coal to the preparation plant during its first year of operation (Tr. 70, 71, 73, 74, 75, 76, 83, 85, 86, 87, 96, 97, 98, 100, 101).

34. The preparation plant received and processed 800,000 tons of coal during its first year of operation (Tr. 60).

35. According to Mr. Lewis, if the operation conducted by Hackney Fuels was to shut down, the deep mine would continue to operate "with our coal going to other operations in the area" (Tr. 66). The Applicant plans to purchase "any or all" of the coal mined until the mine ceases operating (Tr. 66).

36. Approximately 600,000 or 635,000 tons of coal were delivered to the preparation plant from mines permitted to South Atlantic Coal Corporation (Tr. 76).

37. The Applicant is a partnership between Crown Central Petroleum and John McCall Coal Company (Tr. 77).

38. John McCall Coal Company is "associated" with South Atlantic Coal Corporation (Tr. 78). Mr. Lewis did not know any details about the association other than to say that "some sort of business arrangements" existed between the two companies (Tr. 78).

39. J. M. McCall, Jr. is connected with John McCall Coal Company and is a member of the board of directors for the Applicant (Tr. 94, 95).

40. According to Mr. Lewis, South Atlantic holds permits for 6-10 mines. These mines delivered "close to 80 percent" of the coal received by the preparation plant in January, 1980 (Tr. 78).

41. According to Mr. Lewis, mines permitted to the Applicant delivered from 10 to 75 percent of the total production of an individual mine to the preparation plant (Tr. 83).

¹ Seven violations were charged, but two were merged later. NOV No. 80-I-25-2 specified the preparation plant failed to pass all surface drainage through a sedimentation pond, in violation of 30 CFR 717.17(a); conducting operations on areas not covered by a permit, in violation of 30 CFR 710.11(a)(2); improper spoil disposal, in violation of 30 CFR 715.15(a) and 717.14(a); placing material on the downslope, in violation of 30 CFR 717.14(c); failure to submit for approval a surface water monitoring program, in violation of 30 CFR 717.17(b)(1); and failure to monitor groundwater, in violation of 30 CFR 717.17(h). (Decision at 3; Exh. R 11).

The remaining violation from NOV No. 80-I-84-4 cited the failure to report surface water monitoring with respect to the separately permitted disposal site adjacent to the preparation plant, in violation of 30 CFR 717.17(b)(v). (Decision at 5; Exh. R 21).

42. South Atlantic Coal Company has a processing plant of its own (Tr. 101). Some of the coal mined by South Atlantic cannot be processed through its preparation plant; this coal is sold to the Applicant for processing through the preparation plant owned by the Applicant (Tr. 101).

(Decision at 8-9).

On the issue of whether OSM had jurisdiction over the facility, Judge Torbett concluded:

Under the present state of the law, in order for the Respondent to have jurisdiction over a coal preparation plant, the plant must be operated in conjunction with, and at or near a surface mine. The closest mine belonging to the Applicant to the preparation plant is only 2 1/2 miles away, and thus, the undersigned is of the opinion that the at or near test is met. [2]

The facts as found by the undersigned show that approximately one-fourth of the coal processed by the Applicant's preparation plant comes from mines that are owned, operated, or permitted by the Applicant. The undersigned is of the opinion that this is an insufficient percentage of coal, when considered with the other evidence, to prove that the Applicant's preparation plant is operated in conjunction with surface mines which are owned, operated, or permitted by the Applicant.

The proven facts do not show that the Applicant and South Atlantic Coal Corporation are one and the same business. Nor do the facts show them to be inter-related in such a manner that they should be considered as one. The coal supplies [sic] the Applicant's processing plant by South Atlantic cannot be considered as proof of the "operated in conjunction with" test. [3]

(Decision at 10).

Judge Torbett then vacated the notices of violation on the basis of OSM's lack of jurisdiction. OSM appealed.⁴

This appeal raises the issue whether or not OSM had regulatory authority over the Race Fork processing facility, *i.e.*, whether the activities conducted there constituted "surface coal mining operations" as defined by the Act and the implementing regulations.

Section 701(28) of the Act, 91 Stat. 518 (1977), codified at 30 U.S.C. § 1291(28) (1982), contains the following definition:

(28) "surface coal mining operations" means--

(A) activities conducted on the surface of lands *in connection with* a surface coal mine or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and *in situ* 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. [Italics added.]

² As to the holding on the "at or near" issue, we point out that it is no longer the law that a coal preparation plant that does more than load coal must be both at or near a minesite and operated in connection with a mine in order to be deemed a surface coal mining operation. *Reitz Coal Co. v. OSM*, 83 IBLA 198 (1984); *Ann Lorentz Coal Co. v. OSM*, 79 IBLA 34, 91 I.D. 108 (1984). For the current interpretation of "at or near the mine site," see *Ann Lorentz Coal Co. v. OSM*, *supra* at 44.

³ Decision of Mar. 8, 1982, at 10. We assume the Administrative Law Judge's use of the phrase "in conjunction with," as opposed to the statutory and regulatory language "in connection with," intended no different standard.

⁴ The Interior Board of Surface Mining and Reclamation Appeals (IBSMA) received this appeal. However, IBSMA was abolished by Secretarial Order No. 3092 on Apr. 26, 1983. Its caseload was transferred and its functions consolidated with the Interior Board of Land Appeals. 48 FR 22370 (May 18, 1983).

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This definition appeared in the regulations at 30 CFR 700.5.⁵

[1] In administrative review proceedings under the Act, this Department has held consistently that one who contests OSM jurisdiction must state and prove as an affirmative defense the grounds upon which the claim is based. *Sam Blankenship*, 5 IBSMA 32, 39, 90 I.D. 174, 178 (1983); *Jewell Smokeless Coal Corp.*, 4 IBSMA 211, 217, 89 I.D. 624, 627 (1982); *Daniel Brothers Coal Co.*, 2 IBSMA 45, 51, 87 I.D. 138, 141 (1980). OSM carries the initial burden of establishing a prima facie case as to the validity of a notice or order. 43 CFR 4.1171(a). OSM has established a prima facie case where evidence sufficient to establish essential facts will remain sufficient if uncontradicted. Sufficient evidence justifies but does not compel a finding in favor of the one presenting it. *Belva Coal Co.*, 3 IBSMA 83, 88 I.D. 448 (1981); *James Moore*, 1 IBSMA 216, 223 n.7, 86 I.D. 369, 373 n.7 (1979). OSM's initial burden is limited to a prima facie showing that the one named in the NOV or cessation order was "engaged in a surface coal mining operation and failed to meet Federal performance standards." *Rhonda Coal Co.*, 4 IBSMA 124, 134, 89 I.D. 460, 465 (1982). Such a showing would establish an activity that falls within the definition of surface coal mining operations in 30 U.S.C. § 1291(28) (1982), which caused a violation of one or more of the regulations governing surface coal mining. Such a showing by OSM as to the validity of the notice or order under 43 CFR 4.1171(a) shifts to the applicant for review, under 43 CFR 4.1171(b), the burden of going forward and the ultimate burden of persuasion as to (1) whether he was conducting surface coal mining operations and whether the alleged violations actually occurred or (2) whether his activity is excepted from the coverage of the Act or regulations and therefore not subject to OSM jurisdiction.

If a person challenges OSM's jurisdiction because he believes his surface coal mining operation is not covered by the Act, he must not only come forward with supporting evidence but also carry the ultimate burden of persuasion if OSM attempts to rebut the evidence. 43 CFR 4.1171(b); *Rhonda Coal Co.*, *supra*; *Virginia Fuels, Inc.*, 4 IBSMA 185, 190, 89 I.D. 604, 606; *James Moore*, *supra*. Merely voicing an opinion is not sufficient to establish an affirmative defense. *Sam Blankenship*, *supra* at 39, 90 I.D. at 178. If the burden is carried, OSM's jurisdiction is defeated and its enforcement action must be vacated. *Harry Smith Construction Co. v. OSM*, 78 IBLA 27, 30 (1983).

[2] The IBSMA decisions which discuss the definition of a surface coal mining operation address the meaning of the phrase "in connection with" a mine. In *Western Engineering, Inc.*, 1 IBSMA 202, 86 I.D. 336 (1979), the Board found no connection of a river terminal with a mine where the company used the river terminal exclusively for

⁵ 30 CFR 700.5 was later amended. See 48 FR 20392, 20400 (May 5, 1983).

the preparation and loading of coal shipments on contract and neither purchased coal nor owned, operated, or leased any coal mines.

IBSMA found common ownership and use to be adequate bases for a finding that an activity is conducted "in connection with a surface coal mine" in *Drummond Coal Co.*, 2 IBSMA 96, 87 I.D. 196 (1980). There the owner of a coal processing facility supplied it completely from its own mines. Cf. *Drummond Coal Co.*, 2 IBSMA 189, 87 I.D. 347 (1980). On review of the first *Drummond* decision the court agreed there was an "economic integration" between the plant and the mines and therefore a connection. *Drummond Coal Co. v. Andrus*, CV 80-M-0829 (N.D. Ala., Apr. 20, 1981). In *Wolverine Coal Corp.*, 2 IBSMA 325, 87 I.D. 554 (1980), a connection was found between a tippie and two mines that supplied 69 percent of the coal it loaded where the company owned, operated, and held permits for the tippie and the mines.

In *Virginia Iron, Coal and Coke Co.*, 2 IBSMA 165, 87 I.D. 327 (1980), the Board found that a preparation plant was operated in connection with a deep mine where both the plant and mine were permitted to the same company and the mine was opened to provide coal to the plant. Where the company owned, operated, and held the permit for a tippie as well as owned at least some of the coal it crushed and loaded, but contractors or lessees mined the coal under their own permits, the Board said whether a connection existed depended on the nature of the arrangement between the plant and the mines. In *Bethlehem Mines Corp.*, 2 IBSMA 215, 87 I.D. 380 (1980), IBSMA found such a connection between a rail loading facility and a Bethlehem mine where Bethlehem leased the land the facility was located on and the terms of the contract between the facility operator and Bethlehem clearly indicated the plant operations depended on the mine superintendent's requirements. These two cases were followed in *Falcon Coal Co.*, 2 IBSMA 406, 87 I.D. 669 (1980), where a loading facility was operated and controlled (but not owned) by the company that owned and operated the mines that supplied all its coal.

In *Roberts Brothers Coal Co.*, 2 IBSMA 284, 87 I.D. 439 (1980), the owners of the coal facility also owned the land and the coal on which a coal mine under permit to another entity was located. Although the mine operator was not required to sell the coal to the facility, he did so. Even though only 2 percent of the facility's coal came from this mine, that 2 percent constituted the mine's entire output. In view of the "symbiotic" and close financial relationship between the facility owners and their lessee, the Board found a connection, specifically rejecting the argument that a facility must depend on a mine in order to be found connected with it.

In *Thoroughfare Coal Co.*, 3 IBSMA 72, 88 I.D. 406 (1981), a connection was found between a tippie and a mine where the tippie owner was also part owner of the mine and the tippie received 46.5 percent of its coal from the mine. In *Reitz Coal Co.*, 3 IBSMA 260, 88 I.D. 745 (1981), a connection was found between a coal preparation

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facility and a mine where 16.6 percent of the coal it processed came from two mines owned by the same company.⁶

Finally, relying in part on some of these cases, the U.S. Court of Appeals for the Sixth Circuit rejected the argument that an offsite tipple was not a surface coal mining operation because it was not operated in connection with a mine owned by the same company (even though the mining, but not reclamation, had ceased). *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1094 (6th Cir. 1981).

Given the facts he found, we cannot agree with the Administrative Law Judge's conclusion that, under "the state of the law" at the time of his decision, Race Fork did not operate its processing facility "in connection with" a surface coal mine or surface operations or impacts of an underground mine. Race Fork was either the permittee or operator for eight surface mines and three deep mines in Virginia and Kentucky that delivered up to three-fourths of their production to the facility for processing and supplied up to one-fourth of the coal it processed. See Findings 32-33, Decision at 5-8. These facts are sufficient to find that the Race Fork facility was operated "in connection with" a surface coal mine, even assuming a connection with South Atlantic mines could not be established.⁷

This conclusion is consistent with this Board's decisions. In *Ann Lorentz Coal Co. v. OSM*, 79 IBLA 34, 91 I.D. 108 (1984), we found a connection between a tipple and a mine where the same individual was half owner of both tipple and mine, president of the tipple company, salaried supervisor and secretary-treasurer of the mine, and overseer of both. In *Reitz Coal Co. v. OSM*, 83 IBLA 198 (1984), a coal preparation plant was found to operate in connection with a number of surface coal mines where it was part of a wholly owned subsidiary of a holding company from whose property and mineral rights the coal it processed came.

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 Administrative Law Judge Torbett vacating the notices of violation is reversed and the case is remanded to the Hearings Division for further proceedings.⁸

WILL A. IRWIN
Administrative Judge

⁶ In the *Reitz* decision IBMSA altered its approach to analyzing whether a facility was located "at or near" a mine. Subsequent IBMSA decisions concerning the definition of surface coal mining operations focused on this issue and therefore did not contain holdings on the question of whether a facility was operated in connection with a mine, but do contain discussions of this issue. See *Ross Tipple Co.*, 3 IBMSA 322, 88 I.D. 851 (1981); *Westbury Coal Mining Partnership*, 3 IBMSA 402 (1981); *Dinco Coal Sales, Inc.*, 4 IBMSA 35, 89 I.D. 113 (1982), *rev'd*, *Debord v. Watt*, No. 82-99 (E.D. Ky. Sept. 29, 1982).

⁷ Without more information than is in the record about the relationship between the John McCall Coal Co., a partner of Race Fork, and South Atlantic Coal Corp., or about the arrangements for the sale of coal by South Atlantic to Race Fork's facility, we will not determine whether there was a connection with South Atlantic mines. Race Fork and South Atlantic would not have to be "one and the same" or so interrelated that they "should be considered as one" to establish a connection, however, as the Administrative Law Judge's decision implied.

⁸ OSM's motion for oral argument and Race Fork's motion for summary dismissal are denied.

WE CONCUR:

C. RANDALL GRANT, JR.
Administrative Judge

EDWARD W. STUEBING
Administrative Judge

BEARTOOTH OIL & GAS CO.

85 IBLA 11

Decided *January 30, 1985*

Appeal from the decision of the Colorado State Office, Bureau of Land Management, adopting a determination of the Craig, Colorado, District Office, requiring mitigation of damages to archaeological site 5RB1463 located on land subject to Federal oil and gas lease C 15230.

Affirmed.

1. Oil and Gas Leases: Stipulations

Where an oil and gas lessee does not protest or appeal a special stipulation added by BLM to a permit to drill within 30 days after notice thereof, the lessee cannot be heard to complain about the stipulation as long as BLM's interpretation of the stipulation is reasonable.

2. Oil and Gas Leases: Stipulations

Where the Board determines that the plain language of a stipulation in a permit to drill is clear and unambiguous in its imposition of liability on the operator if a specified archaeological site is altered, BLM must be affirmed in its enforcement of the stipulation.

APPEARANCES: Gary G. Broeder, Esq., Billings, Montana, and Edward J. McGrath, Esq., Denver, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF LAND APPEALS

Beartooth Oil and Gas Co. (Beartooth) appeals from the decision of the Colorado State Office, Bureau of Land Management (BLM), dated May 16, 1984, adopting a decision by the Craig, Colorado, District Office, BLM, dated April 26, 1984, requiring Beartooth to mitigate damages to an archaeological site.

The archaeological site in question is a prehistoric rock-shelter in Rio Blanco County, Colorado. Its existence was recorded on April 21, 1980, in the Office of the State Archaeologist, State of Colorado. The site was assigned identification number 5RB1463.¹

¹ Initially, the rock-shelter was given two identification numbers, 5RB1463 and 5RB2246. On Feb. 25, 1983, the Colorado Historical Society requested that BLM use the first listed number only. We do so here.

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The lands on which site 5RB1463 is situated are subject to Federal oil and gas lease C 15230. On May 7, 1982, Beartooth, the designated operator for this lease, notified the Grand Junction, Colorado, District Office, Minerals Management Service (MMS),² that it wished to stake a wellsite for its Federal Well No. 20-3 at a location near the rock-shelter site. On July 12, 1982, Beartooth filed its formal application for a permit to drill (APD), including a surface use plan, with the Grand Junction District Office.

On August 31, 1982, a "Cultural Resources Inventory Report" was filed with the Craig, Colorado, District Office, BLM, by Grand River Institute (GRI), following a cultural resources survey of the area surrounding proposed Federal Well No. 20-3, conducted for Beartooth. The cover summary of the report stated:

A cultural resources survey of the re-location of proposed gas well Federal #20-3 and its associated access road in Rio Blanco County, Colorado, was conducted for Beartooth Oil & Gas Company, P.O. Box 2564, Billings, Montana 59103 at the request of the Craig District Office of the Bureau of Land Management (BLM). The survey was undertaken in compliance with Executive Order 11593, the National Historic Preservation Act of 1966, and the National Environmental Policy Act of 1969. A prefield check-in with the White River Area Office was conducted on 11 August, and fieldwork was performed on 12 August 1982 under Antiquities Permit No. 82-CO-347 by Carl E. Conner and Sally M. Crum of Grand River Institute, Grand Junction. A rockshelter site (5RB1463) was found 100 feet northwest of the northern boundary of the proposed well pad--and a flake was observed on the well pad itself. A drainage and rock ledge prohibit encroachment of well pad construction near 5RB1463 so the site will be avoided; however, monitoring is recommended during well pad construction due to the pad's proximity to cultural resources. An isolated pictograph (5RB2371) was identified north of the proposed access road, but it will not be affected by construction activities.

[SIGNATURE]

8/13/82

Carl E. Conner
Project Archaeologist

Date

The above report was referred to BLM's White River Area Office for review. On September 22, 1982, following a field survey, an archaeologist from the area office, Penny McPherson, reported that the rock-shelter was a significant aboriginal habitation site. She stated that it was doubtful that any cultural resources would be found during the construction of the pad, and that any such resources that were found would not be "in-situ."³ She added that "[i]t would be wise, however, to have a monitor, particularly if the weather is nice, to prevent vandalism to the rockshelter, if further investigation is planned for it."

² At this time, oil and gas operations matters were under the aegis of MMS. Subsequent Departmental reorganization transferred supervision of these matters to BLM. 48 FR 8982 (Mar. 2, 1983).

³ The BLM report seems to state that soil conditions at the well pad site were such that any artifacts found there might have been washed away from the area where they were used in antiquity. Cultural resources that are found away from their original locations, that is, not "in situ," are presumably of less archaeological value.

On September 24, 1982, the White River Area Manager notified the GRI project archaeologist, Mr. Conner, that BLM's archaeologist had conducted a compliance check "to ascertain the necessity of a monitor during the construction of the * * * proposed well pad and access." The letter advised, "[I]n lieu of the monitoring recommendations," BLM will recommend "that [the rockshelter] be completely photo documented prior to the beginning of the construction process." The letter continued, "[t]he BLM will then recommend that the construction company be held responsible for the condition of [the site] through the construction and rehabilitation phases of the access and well pad." In conclusion, the letter advised the project archaeologist to contact BLM's archaeologist if he had any questions.

On September 28, 1982, the Area Manager, White River Resource Area, BLM, advised MMS that it concurred with the surface use plan for well No. 20-3, subject, among other things, to the following condition of approval:

17. Prior to the initiation of construction of the well pad, the BLM will photo document the condition of sites [5RB1463] and 5RB2371. Following rehabilitation of the well pad, BLM will check the condition of the above sites against the preconstruction condition. Should the condition of the sites prove to be altered during this period, the sites will be mitigated and the cost of mitigation will be borne by the operator. The operator shall notify the White River Resources Area archaeologist five working days prior to start of construction.

On October 19, 1982, MMS approved Beartooth's APD. The condition of approval quoted above was included as Stipulation No. 17 to MMS's approval.

In the first week of June 1983, Beartooth commenced construction on the well pad and access road. On June 9, 1983, the rock-shelter and pictograph were photo documented by BLM. On July 22, 1983, Federal Well No. 20-3 was spudded; it was completed for natural gas on August 20, 1983.

On November 15, 1983, an employee of Beartooth discovered that the rock-shelter site had been vandalized by unauthorized excavation. Beartooth notified GRI, which, in turn, notified BLM. A field examination of the site revealed that four pits had been excavated on 5RB1463, the rock-shelter area.

On November 17, 1983, BLM's Area Manager wrote Beartooth that the rock-shelter had been "severely impacted by vandalism, destroying approximately 50% of the estimated site area." The Area Manager further notified Beartooth that it was required under Stipulation No. 17 "to contact a professional archaeologist to perform appropriate mitigation of site 5RB1463 as approved by BLM," and to bear the cost of "this mitigation and subsequent report." Beartooth was given 30 days to notify BLM whom it had chosen to perform this work, so that the "mitigation plan" could be approved by BLM.

By letter dated November 30, 1983, Beartooth requested that the Colorado State Director, BLM, provide technical and procedural review of the Area Manager's November 17 letter, pursuant to the provisions

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of 43 CFR 3165.3. Beartooth stated, "In our opinion, Beartooth cannot be held responsible for acts of vandalism done by outside parties in no way related to or working for us." Beartooth then asserted, "Nowhere in the approved APD does it state that Beartooth is liable for any damages done by outside parties." The State Office referred Beartooth's request for review to the Craig District Office, the administrative office next above the Area Office in the BLM organizational hierarchy.

On January 4, 1984, the District Office issued a decision holding Stipulation No. 17 valid and concluding that, since damage to archaeological resources occurred during the time period that Beartooth was active in the area, it was responsible for mitigating this damage. The decision then noted:

These conclusions should not be taken as an accusation that your company's employees or your subcontractors were involved with the vandalism of the cultural resources. Neither the stipulation nor the subsequent correspondence makes reference to whom [sic] may be at fault. We are only recognizing that damage occurred to the resource and that, in accordance with the original agreement (i.e., Stipulation Number 17 of the APD), it is Beartooth Oil and Gas Company's responsibility to mitigate that action.

The stipulation (#17) was used to mitigate a potential impact that, had we not had such a stipulation available to use, would have required (1) relocation of your road and pad, (2) a detailed survey of the cultural site prior to construction, or (3) denial of your APD. We believe Stipulation No. 17 is useful, both to ourselves and industry, in any similar situation.

On January 24, 1984, Beartooth petitioned the District Office to clarify what it meant by "mitigation" and to determine whether BLM regarded it as having "some sort of obligation to protect this archaeological site for the indefinite future." On March 5, 1984, the District Office responded, advising that "mitigation" is defined in the BLM Manual at 8100 as "the alleviation or lessening of possible adverse effects of an action upon a cultural resource by application of appropriate protective measures or adequate scientific study." The response gave extensive guidelines on specific appropriate protective measures; advised Beartooth that its obligation to mitigate lasted only through rehabilitation of the wellsite; and requested that it submit three limited test excavation proposals no later than March 30. Finally, BLM advised Beartooth that it would review the proposals and road conditions in the area and that Beartooth was to begin work no later than 10 days after it received notification from BLM that work could proceed.

In a letter dated March 16, 1984, Beartooth inquired whether BLM's letter of March 5 was a decision formally requiring Beartooth to mitigate the damages. On April 26, 1984, the District Manager issued a decision requiring Beartooth to bear all costs of the mitigation of damages by vandalism to archaeological site 5RB1463; to submit three proposals by approved archaeological consulting firms within 30 days

of Beartooth's receipt of the decision; and to commence the required actions within 60 days thereof. The District Office further held that, should Beartooth fail to begin the archaeological survey by May 15, 1984, an assessment of \$250 per day would be issued beginning May 16 for failure to comply, pursuant to the provisions of 43 CFR 3163.3(a).

On May 7, 1984, Beartooth filed a request with the Colorado State Director, BLM, for technical and procedural review of the April 26 decision. On May 16, 1984, the State Office ruled that it had delegated its review authority to the District Office, and that the latter's consideration culminating in the April 26 decision had provided Beartooth the review to which it was entitled under the regulations. The State Office letter explained the provisions of the District Office's decision, but declined to alter them. On May 17, 1984, Beartooth filed a notice of appeal of the State Office decision to this Board.

On June 15, 1984, in response to a request by Beartooth, this Board vacated BLM's decision insofar as it imposed monetary penalties for Beartooth's failure to take the action specified by BLM, due to the questions presented by the appeal. We also ruled that the effect of BLM's decision was temporarily suspended under 43 CFR 3165.4, since Beartooth had offered to submit a bond which was apparently adequate to indemnify the United States. We held that this temporary suspension would ripen into a full suspension pending final resolution of the appeal unless BLM notified the Board that Beartooth had failed to post the bond. Subsequently, the Board received notice that Beartooth had established an irrevocable letter of credit in favor of BLM.

Beartooth in its statement of reasons argues that (1) the language of Stipulation No. 17 in the drilling permit is unclear and patently ambiguous; (2) BLM's interpretation of the stipulation violates the intent of the parties; and (3) BLM is attempting to enforce the stipulation in an arbitrary and capricious manner.

[1] The Secretary of the Interior, through BLM, has the authority to issue an APD subject to protective stipulations. See *Udall v. Tallman*, 380 U.S. 1, 4, *rehearing denied*, 380 U.S. 989 (1965); *Copper Valley Machine Works, Inc. v. Andrus*, 474 F. Supp. 189 (D.D.C. 1979), *vacated on other grounds*, 653 F.2d 595 (D.C. Cir. 1981). Beartooth does not question the authority of BLM to insert in an APD a stipulation designed to protect an archaeological site on public lands. Rather, Beartooth asserts that Stipulation No. 17 is unenforceable because it is unclear and ambiguous and that the present BLM interpretation of Stipulation No. 17 violates the intent of the parties.

In oil and gas cases generally, this Board has found that where leases were issued with additional special stipulations without notice to the offeror, this, in essence, amounted to a counteroffer by BLM which the original offeror was free to accept or reject. *Frances Kunkel*, 75 IBLA 199 (1983); *Emery Energy, Inc. (On Reconsideration)*, 67 IBLA 260 (1982). However, it has been held that the lessees must have objected within 30 days of receipt of the counteroffer where leases

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have validly issued, or otherwise they are considered as having accepted the counteroffer. *Frances Kunkel, supra* at 200; *Emery Energy, Inc. (On Reconsideration), supra* at 264.

In this case, Beartooth submitted an APD to the MMS District Office in Grand Junction, Colorado, on July 12, 1982. The APD was approved October 19, 1982, with stipulations attached as conditions of approval. Beartooth did not object to any of the stipulations. Rather, Beartooth developed the leased lands pursuant to the approved APD, beginning June 13, 1983, some 8 months after approval of its APD. BLM maintains in its answer at page 5 that "Beartooth's failure to object and its commencement of operations pursuant to the APD gave the BLM every reason to believe Beartooth fully understood Stipulation 17 and agreed to be bound by its terms." We agree.

[2] Further, from our review of the provisions of Stipulation No. 17, we find the language therein to be clear and unambiguous. Appellant has made no argument that persuades us otherwise. The terms in question provide that Beartooth must bear the cost of mitigating damages to the site if it is altered at any time from commencement of construction of the well pad through rehabilitation thereof. Appellant says this is ambiguous because, among other things, "the stipulation fails to specify whether it applies *only* to damage done to the sites by Beartooth or also encompasses damage done by the world at large." Statement of Reasons at 5 (*italics in original*).

The plain language of the stipulation does not limit Beartooth's responsibility to damages to the site caused by Beartooth personnel but not others. Appellant attempts to create an ambiguity where none exists. In addition, the administrative record fully supports a finding that Beartooth knew of the cultural resources significance of the area and by acceptance of the stipulation assumed responsibility for damage to the site.

The potential for vandalism to the rock-shelter area, whether perpetrated by Beartooth employees or others, was of obvious concern to Beartooth and BLM. At the request of BLM, a cultural resources inventory report was prepared concerning Beartooth's proposed wellsite and access road. The report recommended monitoring of the well pad, stating: "Proximity of proposed well pad (Federal #20-3) may encourage vandalism" (Inventory Report at 8). BLM's compliance check field report recommended: "[I]t would be wise * * * to have a monitor * * * to prevent vandalism to the rockshelter * * *." The BLM Area Manager then wrote the GRI project archaeologist, stating, among other things:

In lieu of the monitoring recommendations, the BLM will recommend that both 5RB1463 and 5RB2371 be completely photo documented prior to the beginning of the construction process.

The BLM will then recommend that the construction company be held responsible for the condition of both sites through the construction and rehabilitation phases of the access and well pad.

(Letter dated September 24, 1982, from White River Resources Area Manager to Carl Conner).

The foregoing position was subsequently adopted by BLM with no question, objection, or protest heard from Beartooth until the necessity for enforcement of the provisions of Stipulation No. 17 arose.

The basis for BLM's decision to require Beartooth to assume full responsibility for archaeological site 5RBI463, and one other site, is summarized in its Answer Brief as follows:

The reason for not limiting the Stipulation is obvious. The archaeological study conducted by Beartooth had discovered a significant site. It was likely that news of the discovery would spread. Beartooth intended to construct a road that would make the site readily accessible. This, plus the presence of workers who had legitimate reasons for being in the area, would make it difficult to monitor activities near the site and increase the possibility of site vandalism not only by employees of Beartooth, but by others. The BLM had choices to make. Among other things, it could have required Beartooth to study the site, including a recovery of any artifacts, prior to construction. It could have required Beartooth to drill in some other location. It could have made Beartooth responsible for the security of the site. It chose the last listed option.

(Answer at 7).

It is not necessary to examine whether Stipulation No. 17 is unclear or ambiguous in ways that are not germane to this case. At issue here are damages indisputably man-made in the immediate rock-shelter area, described at page 2 of the Cultural Resources Inventory Report as "100 feet northwest of the northern boundary of the proposed well pad." The dimensions of the site were found to be "20m x 20m" or "0.1 acres" (*Id.* at 8), followed by a detailed map depicting the site's location (*Id.* at 9). Finally, the record contains clear photographic evidence of the rock-shelter area before and after the unauthorized excavations, revealing a discrete location which all parties obviously understood as constituting the heart of archaeological site 5RB1463.

In summary, it is clear that Beartooth assumed responsibility under Stipulation No. 17 to mitigate damages to the very area in question, the rock-shelter site, regardless of whether vandalism was caused by Beartooth employees or other persons. These circumstances having occurred, it was proper for BLM to require remedial action by Beartooth.⁴

Appellant has requested a hearing in this case. In the absence of a showing of a material issue of fact, we exercise our discretion to deny the request for an evidentiary hearing. 43 CFR 4.415.

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 Colorado State Director, BLM, dated May 16, 1984, is affirmed.

WM. PHILIP HORTON
Chief Administrative Judge

⁴It is not appropriate for the Board to delineate what it may regard as appropriate mitigation measures. As noted by BLM: "It is premature for Beartooth to complain about the reasonableness of the costs involved as those costs remain to be determined" (Answer at 8).

January 30, 1985

WE CONCUR:

C. RANDALL GRANT, JR.
Administrative Judge

BRUCE R. HARRIS
Administrative Judge

GEORGE R. SCHULTZ ET AL.

85 IBLA 77

Decided *February 14, 1985*

Appeal from decisions of the Utah State Office, Bureau of Land Management, declaring 359 mining claims to be void ab initio. UMC-253294-344 et al.

Affirmed.

1. Federal Employees and Officers: Interest in Lands--Mining Claims: Location

Location of a mining claim is a purchase of public land within the meaning of 43 U.S.C. § 11 (1982) and the claim may be declared void where it is shown that the locator's spouse who is an employee of the Bureau of Land Management (BLM) has a direct or indirect interest in the claim because "an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer."

2. Federal Employees and Officers: Interest in Lands--Mining Claims: Location

A mining claim is properly declared to be void ab initio, in accordance with 43 CFR 20.735-24, where the locator is the spouse of a BLM employee and the mining claim is located on land administered or controlled by the U.S. Department of the Interior.

3. Federal Employees and Officers: Interest in Lands--Mining Claims: Location

Because the Department of the Interior retains control over the validity of mining claims on U.S. Forest Service lands administered by the Department of Agriculture, location of mining claims by the spouse of a BLM employee on such lands is prohibited by 43 CFR 20.735-24.

4. Administrative Procedure: Standing--Intervention--Mining Claims: Generally

A mining claimant may be allowed to file a brief in the appeal of a conflicting claimant.

5. Conveyances: Generally--Conveyances: Interest Conveyed--Mining Claims: Title

A quitclaim deed conveys only the interest held by the grantor. Conveyance by quitclaim deed of an interest in a mining claim which is properly held to have been void ab initio conveys no interest to the grantee.

APPEARANCES: George R. Schultz, W. William Howard, James L. Schultz, pro sese; Joseph Coleman, Esq., and Amanda D. Bailey, Esq., Grand Junction, Colorado, for Jay Coates and Larry Lahusen.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

George R. Schultz, W. William Howard, and James L. Schultz appeal from decisions of the Utah State Office, Bureau of Land Management (BLM), that declared a total of 359 unpatented lode mining claims to

be void ab initio because "the attempted mining locations by a spouse of a Bureau of Land Management employee is a violation of the Statute at 43 United States Code § 11 (1976) and the regulation at 43 Code of Federal Regulations § 20.735-24 (1982)."¹ Larry Lahusen and Jay Coates petitioned to intervene, representing that several of Schultz's claims overstaked theirs. By order dated February 14, 1984, they were allowed to file a brief on the grounds that they had "alleged an interest in the mining claims which, if true, entitles them to intervene."

George Schultz married Diana Webb on February 16, 1979. At the time Diana Webb was employed by the Moab District Office, BLM. George Schultz states that in 1982, and until December 1, 1983, Diana Webb was the Moab District Wilderness and Environmental Coordinator, and that from December 1, 1983, to the present time she has been the Moab District Environmental and Planning Coordinator. Schultz states that Diana Webb's jobs have not involved her with the management of mining claims nor with mining claim records. All of the claims at issue were located in 1982 or 1983. All but two are located on public lands administered by BLM; two are on national forest lands administered by the U.S. Forest Service, Department of Agriculture (Statement of Reasons of George Schultz at 7).

Appellants raise several arguments against the BLM decisions which we will discuss seriatim.

[1] George Schultz argues that as a citizen of the United States he is entitled to locate mining claims on public lands open to mineral entry under the authority of the general mining act of 1872, 30 U.S.C. § 22 (1982). The provisions of 43 U.S.C. § 11 (1982) do not apply to him, he argues, because he is not an employee of BLM, and do not apply to his wife because she "is neither an owner, co-owner, nor locator" of any of his claims, and because a mining claim does not involve a "purchase" of public land within the meaning of that law.² Even if there is a violation of 43 U.S.C. § 11 (1982), he argues, the statute provides that the proper sanction is to dismiss his wife from BLM's employ, not to declare his mining claims void.

43 U.S.C. § 11 (1982) provides that the "officers, clerks, and employees in the Bureau of Land Management are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office." The original of this provision was enacted in 1812. Act of April 25, 1812, ch. 68, § 10, 2 Stat. 717. The provision was not repealed by the general mining act

¹ BLM's Dec. 21, 1983, decision concerned 356 claims, its Jan. 10, 1984, decision another 3 claims. George Schultz appeals both decisions. W. William Howard and James L. Schultz appeal the Dec. 21 decision because they received deeds dated July 18, 1983, from George R. and Mary Schultz, "husband and wife," quitclaiming undivided fractional interests in several of the claims to them. George Schultz filed notice of these transfers in accordance with 43 CFR 3833.5 on Sept. 12, 1983. For a list of the claims (and interests involved) affected by the two BLM decisions, see Appendix I.

² However, 30 U.S.C. § 22 (1982) provides that "mineral deposits in lands belonging to the United States * * * shall be free and open to * * * purchase." (Italics added.)

February 14, 1985

of 1872. *Lavagnino v. Uhlig*, 71 P. 1046 (Utah 1903), *aff'd*, 198 U.S. 443 (1905).

The leading case construing 43 U.S.C. § 11 (1982) is *Waskey v. Hammer*, 170 F. 31 (9th Cir. 1909), *aff'd*, 223 U.S. 85 (1912). In that case the U.S. Supreme Court held the readjusted location of a mining claim by a U.S. mineral surveyor void. The purpose of the prohibition, wrote Mr. Justice Van Devanter, "is to guard against the temptations and partiality likely to attend efforts to acquire public lands, or interests therein, by persons [holding positions under the General Land Office, predecessor to BLM, and participating in the work assigned to it], and thereby to prevent abuse and inspire confidence in the administration of the public land laws." 223 U.S. at 93.³ To the argument, also made by Schultz, that a mining claim is not a "purchase," the Court responded "we think * * * that the term 'purchase' is inclusive of the various modes of securing title to or rights in public lands under the general laws regulating their disposal." *Id.* To the argument that the statute provides the sanction of dismissal the Court answered that there was in the language of the statute "nothing indicating that its scope is to be confined to the exaction of that penalty," and that nothing in the nature of the statute militated against the application of the "general rule of law * * * that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer." *Id.* at 94-95. *Waskey v. Hammer* was followed by the Supreme Court of Montana in holding that a deputy mineral surveyor could not become interested in a mining claim by purchasing it from a qualified locator. *Montana Manganese Co. v. Ringeling*, 211 P. 333 (Mont. 1922).

Schultz states that Utah is not a community property state and that Diana Webb is not an owner, co-owner, or locator of his claims and therefore has no legal interest in his claims. This is not conclusive, however, of whether Diana Webb is "indirectly purchasing or becoming interested in the purchase of any of the public land." There are, of course, numerous legal or business arrangements under which Webb could be or become indirectly interested in the lands involved. We do not know, for example, whether any will or trust of Schultz's creates in her any legal interests in the claims or any eventual patents emanating from them.⁴ Nor do we know about her role, if any, in

³ Elaborating on the section in a later case, the Supreme Court stated: "Section 452 affects a class of persons having superior opportunities and power to perpetrate frauds and secure undue advantage over the general public in the acquisition of public lands." After quoting the passage from *Waskey v. Hammer* contained in the text, the Court continued:

"The provision is to be so applied and enforced as to effectuate its purpose. And it is evident, that to deny an officer, clerk or employee of the land office the right to make an entry while occupying that relationship, but to validate such an entry upon his retirement from the service, would thwart the statutory policy, since the result would be to allow the entryman still to reap the fruit of his undue advantage, superior knowledge and opportunities, and, perhaps, of his fraud, which it is the aim of the statute to forestall." *Lowe v. Dickson*, 274 U.S. 23, 26-27 (1927).

⁴ Under some circumstances Webb could request a waiver for interests acquired by a trust. See 43 CFR 20.735-24(e)(1)(iv).

Chinle Associates, of which Schultz is president, which is named as "operator" of the claims. Either of these routes could bring her within the ambit of the statutory prohibition.⁵

[2] The Department's regulations and Board decisions applying them, however, clearly proscribe Schultz's holding of mining claims while his wife is employed by BLM. 43 CFR 20.735-24(b)(1) prohibits a "member" of BLM from "voluntarily acquiring a direct or indirect interest in federal lands." "Indirect interest" is defined to include "[h]oldings in land, mineral rights, grazing rights or livestock which in any manner is connected with or involves the substantial use of the resources or facilities of the federal lands" and specifically includes "[s]ubstantial holdings of a spouse." 43 CFR 20.735-24(a)(4).⁶ The term "Federal lands" is defined to mean "lands or resources or an interest in lands or resources administered or controlled by the Department of the Interior," a definition designed to avoid confusion with the terms "public lands" and "acquired lands." 43 CFR 20.735-24(a)(1); 45 FR 66372 (Oct. 6, 1980).

These regulations were adopted in December 1981. They were amended in September 1982. 47 FR 42359, 42361 (Sept. 27, 1982). At the time of their adoption, the preamble contained the following comment:

Several comments were received regarding the proposed rules on Interests in Federal Lands--§ 20.735-24. Two commenters stated that prohibiting all Department employees from acquiring or retaining personal rights to Federal lands was too restrictive. This rule is already contained in 43 CFR Part 7 [7] and it was incorporated into proposed § 20.735-24 in an effort to consolidate into one section, all regulations dealing with interests in Federal lands. The prohibition dates back to the early 1900's and is based on the facts that (1) a primary mission of the Department of the Interior is the administration of the Federal lands, (2) particular rights to use federal lands for personal needs are granted by the Bureau of Land Management (BLM) and (3) there is often competition to obtain BLM permits or other rights. Given these facts, the rule was adopted to avoid allegations that Department employees received preferential treatment in the awarding of BLM rights because of their employment in the Department. Accordingly, the prohibition is not changed in the final rule.

46 FR 58423 (Dec. 1, 1981).

The rule referred to in 43 CFR Part 7, 43 CFR 7.3(a)(1) (1980), was applied by the Board in affirming BLM's rejecting of an application for

⁵ Schultz argues that our decision in *Joseph T. Kurkowski*, 24 IBLA 58 (1976), acquiescing in an interpretation of the Department of Justice that similar "directly or indirectly" language in 18 U.S.C. § 431 (1982) would not preclude Congressman Melcher's spouse from holding a grazing lease under certain circumstances, should guide the Department's interpretation of 43 U.S.C. § 11 (1982). Not only are the peculiar circumstances of that case not present here, we expressly stated in that decision that a contrary result could be required for the spouse of a Federal employee. 24 IBLA at 67, n.5.

⁶ A note at 43 CFR 20.735-21 provides examples of types of interests not covered by this definition of indirect interest:

"NOTE: Examples, not all-inclusive, of the types of interests that are *not* covered by the terms 'direct interest' or 'indirect interest' are: diversified mutual funds, vested pension plans, life insurance investments, state and municipal bonds, U.S. Savings bonds and bank, credit union or loan association savings certificates. Financial interests in other investment clubs may be approved by the appropriate ethics counselor if the club's portfolio is well diversified and independently managed by a licensed investment broker. These examples also apply to the definitions of direct and indirect interests contained in §§ 20.735-24--Interests in federal lands, * * *"

⁷ The former regulations at 43 CFR Part 7 (1980) expressly prohibited an "employee and the spouse of an employee" from "[v]oluntarily acquiring an interest in the lands or resources administered by the Bureau of Land Management." 43 CFR 7.3(a)(1). The statutory authority cited for promulgation of this regulation was 5 U.S.C. § 22 (1964) (now codified at 5 U.S.C. § 301 (1982)) and 43 U.S.C. § 11 (1982). 27 FR 3812 (Apr. 20, 1962).

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a desert land entry filed in April 1980 by a person who became a BLM employee in May 1980 and married a BLM employee in June 1980. *Karen (Johnson) Bradshaw*, 75 IBLA 342 (1983).⁸ In *Donald E. and Nancy P. Janson (On Reconsideration)*, 23 IBLA 374 (1976), a Bureau of Indian Affairs employee's 50 percent ownership of a corporation, the other 50 percent of which was owned by his brother, disqualified the brother as a preference right applicant for a grazing lease. In response to the brother's argument "that 43 CFR Part 7 cannot be applied to deny him the lease because he is not an employee of the Department, and he meets the only regulations governing qualifications for holding a grazing lease," the Board held:

Regulation 43 CFR 4121.1-1 prescribes the minimum qualifications, but not the only qualifications, for holding a grazing lease. Petitioner's brother might well be qualified to hold a lease if reference is not made to Part 7. The regulations in 43 CFR Part 7 must be construed in conjunction with Part 4120 to determine qualification to hold a lease. The regulations in Part 7 are not explicitly addressed to petitioner, but they do prohibit the lease from issuing in such a way as to allow petitioner's brother, a Departmental employee, to obtain the albeit indirect benefit accruing to his 50 percent interest in Cumming Land and Livestock Corp. Persons who engage in business ventures with employees of the Department of the Interior assume thereby the burden that the regulations of the Department may have adverse impact on such a business.

23 IBLA at 375. See also *Donald E. and Nancy P. Janson (On Reconsideration)*, 19 IBLA 154, 82 I.D. 93 (1975).⁹

In *Carmen M. Luna*, 6 IBLA 176 (1972), the Board held, on the basis of 43 CFR 7.3(a)(1), that BLM properly rejected an oil and gas lease offer filed jointly by Luna and Josephine Block, an employee of the Department, stating:

It does not appear that the appellant is in any way disqualified individually. But in the filing of this offer the two individuals engaged in a joint venture, a relationship in which the appellant's interest became inseparable from Mrs. Block's interest. Because of this community of interest, the bar raised by the regulation against the acquisition of an interest by Mrs. Block could not be surmounted separately by the appellant in her individual capacity, and necessitated the rejection of the offer, as presented, in its entirety.

⁸ Schultz's attempt to distinguish *Bradshaw* on the grounds that, unlike his right to locate a mining claim, Bradshaw's application for a desert land entry involved the exercise of Secretarial discretion, is unavailing. Then as now the definition of interest in the regulations makes no such distinction. At the time the definition of "interest" in 43 CFR 7.2(b) and (c) (1980) read:

"(b) The term 'interest' means any direct or indirect ownership in whole or in part of the lands or resources in question, or any participation in the earnings therefrom, or the right to occupy or use the property or to take any benefits therefrom based upon a lease or rental agreement, or upon any formal or informal contract with a person who has such an interest. It includes membership in a firm, or ownership of stock or other securities in a corporation which has such an interest: *Provided*, That stock or securities traded on the open market may be purchased by an employee if the acquisition thereof will not tend to interfere with the proper and impartial performance of the duties of the employee or bring discredit upon the Department.

"(c) The prohibition in § 7.3 includes but is not limited to the buying, selling, or locating of any warrant, script, lieu land selection, soldier's additional right, or any other right or claim under which an interest in the public lands may be asserted. The prohibition also extends to any interest in land, water right, or livestock, which in any manner is connected with or involves the use of the grazing resources or facilities of the lands or resources administered by the Bureau of Land Management."

⁹ Schultz points out that in *Janson* the Board indicated that BLM could reconsider the brother's application if the employee later obtained favorable action by the Secretary on his request under 43 CFR 7.4(b)(3) (1980) to retain his interest. 23 IBLA at 376. Similar provisions for a waiver exist in the present regulations, but it is apparent that under the facts of this case none of the four conditions for approval can be met. See 43 CFR 20.735-24(e)(1)(i)-(iv).

6 IBLA at 178.

Schultz complains the regulation is "presumptuous, insulting, beyond statutory authority, and in violation of the non-employee's rights to own property, pursue a living, and speak freely, as guaranteed by the United States Constitution and by law" (Statement of Reasons at 23). To this we must respond that we are not constituted to review arguments that the Department's regulations are illegal or unconstitutional. As long as they are in force we are bound by them. *United States v. Nixon*, 418 U.S. 683, 696 (1974); *Steve D. Mayberry*, 82 IBLA 339, 343 (1984); *Donald E. and Nancy P. Janson (On Reconsideration)*, 23 IBLA 374, 375 (1976).

Thus, we conclude that under the regulation Diana Webb has acquired an indirect interest in Federal lands via her spouse's locating a substantial number of mining claims. Even if George Schultz is otherwise qualified to locate mining claims, 43 CFR 20.735-24 prohibits him from doing so, so long as he is married to an employee of BLM. As it may the prohibition in 43 U.S.C. § 11 (1982), the Department may enforce this prohibition by declaring any claims located by him void if they were located during his marriage to a BLM employee. Further, it may undertake remedial action with Diana Webb in accordance with 43 CFR 20.735-40. Schultz's argument that 43 CFR 20.735-40 deprives BLM of authority to declare his claims void is in error. Remedial or disciplinary action for violations of the regulations in 43 CFR Part 20 "may be in addition to any criminal or civil penalty provided by law." 43 CFR 20.735-4. *Waskey v. Hammer, supra*, clearly provides another penalty.¹⁰

[3] Schultz argues that the two mining claims located within the Manti-La Sal National Forest are not void because those lands are administered by the U.S. Forest Service, Department of Agriculture, and are therefore not "federal lands" within the meaning of 43 CFR 20.735-24(a)(1). Although national forest lands are indeed administered by the Department of Agriculture, 36 CFR 200.1(c)(2) (1983), the Department of the Interior retains control over the validity of mining claims as well as over the disposition of minerals under the mining laws in national forests. Section 2(b), (c), Pub. L. No. 86-509, 74 Stat. 206 (1960). See *United States v. Diven*, 32 IBLA 361, 364-66 (1977);

¹⁰ Although position descriptions for Diana Webb's present and former positions with BLM have not been made a part of the record, we note that the titles of these positions are given by George Schultz in his statement of reasons. These titles indicate that her activities are connected in some way with mining activities, as that term is defined in 43 CFR 20.735-27(a)(3), and thus she would be prohibited from holding a direct or indirect interest (ownership) in mining activities by 43 CFR 20.735-27(b)(4). ("Indirect interest in mining activities" includes substantial holdings of a spouse. 43 CFR 20.735-27(a)(2)(ii).) George Schultz states that neither her job as Moab District Wilderness and Environmental Coordinator (when the claims were located) nor her present position as District Environmental and Planning Coordinator "intrinsically involves management of mining claims or BLM mining claim records." Given the definition of the term "mining activities," that interpretation is too narrow. Her duties would logically include investigation leading to and preparation of planning and wilderness-related documents which would affect Departmental programs, policies, research, or other actions relating to mining operations. Since the impact of past or future mining operations and imposition of constraints on later mining operations are likely to be the subject of evaluations by her pursuant to the National Environmental Policy Act, we find it difficult to conceive how she could avoid the appearance of having a conflict. The question is not whether there is a substantial conflict because of the specific claims involved in this case, but whether there is an apparent substantial conflict between her ownership of any indirect interest in mining operations and the performance of her duties. The titles of her positions alone give rise to an affirmative response to the question.

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United States v. Bergdal, 74 I.D. 245, 249-52 (1967). Therefore, Schultz's mining claims in the national forest are "holdings in * * * mineral rights" for "resources * * * controlled by the Department of the Interior" within the meaning of 43 CFR 20.735-24(a)(4)(i) and BLM may determine their validity.

Various other bases suggested by Schultz for overturning BLM's decisions may be disposed of briefly. Since this is not a contest proceeding, BLM need not make a prima facie case to support these decisions. Since we have rejected Schultz's view of the law, we likewise reject his argument that BLM should be equitably estopped from its decisions on the grounds it misrepresented the law and misapplied the penalty.¹¹ Finally, Schultz complains that he has been unfairly treated because several other spouses of BLM employees who hold mining claims in Utah have not had them voided. However, the fact that BLM may not have carried out its obligations in the past does not justify a holding that it cannot do so in this case. *T.E.T. Partnership*, 84 IBLA 10, 15 (1984); *George Brennan, Jr.*, 1 IBLA 4, 6 (1970). Cf. *United States v. Rice*, 73 IBLA 128, 132 (1983).

[4] Schultz has also moved to have briefs filed on behalf of Larry Lahusen and Jay Coates stricken from the record of this appeal on the grounds that, as a result of the Board's decision in *Coates-Lahusen*, 69 IBLA 137 (1982), these persons have no conflicting interest in any of the lands covered by his claims that would entitle them to intervene. Counsel for Coates and Lahusen dispute Schultz's assertions. The relative rights of these parties to their claims are currently before a Utah state court and we have no role in the adjudication of these rights. *W. W. Allstead*, 58 IBLA 46 (1981). Although we have permitted intervention under circumstances similar to this case, *N. L. Baroid Petroleum Services*, 60 IBLA 90 (1981), the February 14, 1984, order issued by this Board simply allowed the filing of a brief, and did not grant intervention as a party. We are not precluded from allowing this degree of participation. See *United States v. United States Pumice Co.*, 37 IBLA 153, 160-61 (1978). Schultz's motion to strike the briefs is denied.

[5] James Schultz, George Schultz's brother, and W. William Howard also appeal BLM's December 21, 1983, decision. In addition to the arguments discussed above they contend that they were not served with copies of the decisions and that BLM cannot void their fractional interests in some of the claims because they are bona fide purchasers.

On July 18, 1983, George and Mary Schultz conveyed undivided interests to James Schultz and Howard by quitclaim deed. See note 1,

¹¹ Even had Schultz established BLM's affirmative misconduct, which he did not, another element necessary for the invocation of estoppel against the Government is missing: Schultz "must be ignorant of the true facts." *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978). Since he is presumed to know regulations published in the *Federal Register*, *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), he cannot be deemed ignorant of the 1981 provisions prohibiting his wife's indirect interests in Federal lands at the time he located his mining claims in 1982 and 1983. *Harriet C. Shaftel*, 79 IBLA 228, 232 (1984).

supra. A quitclaim deed to an unpatented mining claim "passes the vendor's right to possession and inchoate right to a patent and puts the purchaser in the same relationship to the government as the vendor theretofore enjoyed." 3 *American Law of Mining* §15.13 (1982). A quitclaim deed given at a time when the conveying party has no interest conveys nothing. *Sorensen v. Bills*, 261 P. 450 (Utah 1927). Thus, even if James Schultz and Howard were entitled to the protections afforded to bona fide purchasers, see generally 8A *Thompson on Real Property* § 4344 (1963), they acquired no interest in George Schultz's claims by reason of the conveyance because the claims were void ab initio. George Schultz had no interests to convey. Since they had actual notice of the decision, have joined in the appeal, and have alleged no prejudice from BLM's failure to serve them, they cannot complain of lack of notice under 43 CFR 3833.5(d).¹² See *Nabesna Native Corp.*, 83 IBLA 82 (1984); *Defenders of Wildlife*, 79 IBLA 62 (1984).

Therefore, 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.

WILL A. IRWIN
Administrative Judge

WE CONCUR:

R. W. MULLEN
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

APPENDIX I

UNPATENTED MINING CLAIMS VOIDED BY THE DECISIONS OF DECEMBER 21, 1983, AND JANUARY 10, 1984

Claim Name, No.	UMC Numbers	Location Date	County, Utah	Surface Administering Agency	George Schultz' Undivided Interest after Execution of Quitclaim Deeds to James L. Schultz and W. William Howard
<i>Decision of December 21, 1983</i>					
Mary 1-3	253294-253296	02/82	San Juan	BLM	100%
Mary 4	256030	04/82	San Juan	BLM	100%
Diana 1-38	253297-253334	02/82	San Juan	BLM	100%
Diana 39-47	256021-256029	04/82	San Juan	BLM	100%
Bob 1-8	254910-254917	02/82	Grand	BLM	100%
Naomi 1-10	254918-254927	02/82	Grand	BLM	100%

¹² Better practice would be for BLM to serve copies of such decisions on owners of fractional interests of whom it has received notice in accordance with 43 CFR 3833.3, in case its determination of void ab initio is not upheld or it makes a different kind of determination.

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APPENDIX I—Continued

UNPATENTED MINING CLAIMS VOIDED BY THE DECISIONS OF DECEMBER 21, 1983, AND JANUARY 10, 1984

Claim Name, No.	UMC Numbers	Location Date	County, Utah	Surface Administering Agency	George Schultz' Undivided Interest after Execution of Quitclaim Deeds to James L. Schultz and W. William Howard
Breccia 1-215	259818-260032	09&11/82	San Juan	BLM	100%
Green Rock 1-2	260038-260039	10/82	San Juan	BLM	100%
Lake 1-16	260040-260055	09&10/82	San Juan	BLM	85%
Lake 17	265410	03/83	San Juan	BLM	85%
Mail Trail 1-19	260056-260074	11/82	Grand	BLM	100%
Dixie 1-3	262128-262130	12/82	Emery	BLM	66-2/3%
Kevin D 1-3	262131-262133	11/82	Emery	BLM	66-2/3%
Arrowhead 1-3	262134-262136	11/82	Emery	BLM	66-2/3%
Red Arrowhead 1	264509	02/83	Emery	BLM	100%
Pipe Dream 1-3	264510-264512	02/83	Emery	BLM	100%
Metate 1-9	264513-264521	02/83	Emery	BLM	100%
Tony 1-8	264522-264529	04/83	Emery	BLM	66-2/3%
Tony 10-12	264531-264533	04/83	Emery	BLM	66-2/3%
Mancos Pipe	264685	02/83	San Juan	USFS	100%
Mancos Molly Pipe	272472	09/83	San Juan	USFS	100%
<i>Decision of January 10, 1984</i>					
DOE	272860	10/83	San Juan	BLM	100%
ONWI	272858	10/83	San Juan	BLM	100%
NDUMP	272859	10/83	San Juan	BLM	100%

APPEALS OF HUSKY OIL NPR OPERATIONS, INC.

IBCA-1871 *et al.*

Decided: February 15, 1985

Contract No. 14-08-0001-16474, Geological Survey.

Dismissed and Remanded.

Contracts: Construction and Operation: Contracting Officer--

Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts:

Disputes and Remedies: Appeals--Contracts: Disputes and Remedies: Jurisdiction

A number of appeals arising from the Government's claim of a contractor's indebtedness to the Government under a purported final decision of the contracting officer are dismissed for want of jurisdiction because the decision of the contracting officer is found to lack finality where the contractor was denied resources to respond to audit questions; the contracting officer failed to schedule audit responses as promised; the purported decision prevented discussions of the parties to reach an impasse; and the decision falls short of the required standard of the impartiality and quasi-judicial attitude of a contracting officer.

APPEARANCES: Frances M. Gaffney, J. Michael Cooper, and Glen E. Monroe, Attorneys at Law, Bryan, Cave, McPheeters, and McRoberts, Washington, D.C., for Appellant; Ross W. Dembling, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

The appellant in the above-captioned appeals is Husky Oil NPR Operations, Inc. (NPR or Husky), a subsidiary of Husky Oil Co. Under a completed cost-reimbursement contract in the process of being closed out, NPR has appealed the disallowance of \$66,041,882 of costs expended in the performance of the contract. By a Motion for Declaration of Rights and to Dismiss Appeal of December 21, 1984, NPR moves the Board for an order (1) declaring that the contracting officer's Decision (hereinafter Decision) dated October 1, 1984, is null and void; (2) declaring that NPR is entitled to all funds withheld or otherwise not paid pursuant to properly submitted vouchers; and (3) dismissing the appeal docketed as IBCA-1871. Appeal IBCA-1871 challenges the validity of the contracting officer's Decision of October 1, 1984, and the motion asks for dismissal of that appeal and a number of additional appeals on behalf of subcontractors affected by the disallowed costs.

Pursuant to a contract dated July 1, 1975, with the Department of the Navy, NPR agreed to provide certain services related to the exploration, conservation, development, and production of hydrocarbons on Alaska's North Slope. On June 1, 1977, the Government management responsibility for the contract was transferred to the Department of the Interior, to be carried out by Geological Survey (GS). The contract performance continued from year to year under a cost reimbursement contract, with most of the performance effort completed by early 1983. The actual costs and fees paid under the contract have totaled approximately \$709 million. The contract was adequately funded on an ongoing basis, with sufficient balances to avoid overruns of expenditures beyond funded obligations. The auditing of appellant's contract and those of vendors and subcontractors and closeout activities have resulted in a number of adverse decisions by which the Government claims appellant has been

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overpaid or is indebted to the Government. A number of appeals have been filed with this Board and with the Claims Court on behalf of NPR and its subcontractors.

Appellant's motion is supported by a Memorandum in Support thereof, with exhibits A through E, and a deposition of the contracting officer of December 12, 1984 (hereinafter D-CO), with exhibits 1 through 21. The grounds for the motion are:

1. The Decision is not final for the purpose of appeal to the Board.
2. The Decision is not the personal and independent decision of the contracting officer.
3. The Decision does not comply with the requirements of the Contract Disputes Act of 1978 (CDA) because it fails to fully and accurately advise NPR of its appeal rights and does not include a statement of the areas of factual agreement and disagreement.
4. The contracting officer improperly placed the burden of proof on NPR to demonstrate the allowability of incurred costs under the contract. The Government's response to appellant's memorandum contends that the Decision is of sufficient finality to accord with the CDA and that it represented the personal and independent judgment of the contracting officer.

In order to place in perspective the importance of the issue of finality of the Decision, some background information is necessary. On August 3, 1983 (Exh. 3), the contracting officer issued a final decision and unilateral contract modification (Exh. 4) pursuant to the "Disputes" clause relating to the manner in which the contract would be closed out. NPR had proposed to perform audits, with professional assistance, of its vendors and subcontractors at an estimated cost for closeout activities of \$18,176,545. The Government determined in this decision to have the audits performed by the Defense Contract Audit Agency (DCAA), and to limit the cost for NPR's completion activities to \$5,120,541. The August 3 decision specifically detailed the costs allocated for various functions and specified by position and type of services the reductions in labor that NPR must implement. This decision and the implementing unilateral Modification 46 provided that NPR shall conclude closeout activities on or before April 30, 1984. This decision was amended on February 3, 1984, to allow some extensions of employment for some positions and to extend to August 31, 1984, the date by which all closeout activity should be completed (Exh. 5). Appeals from the August 3, 1983, and February 3, 1984, decisions have been filed with this Board and with the United States Claims Court and are pending.

For various reasons, including denial of access by subcontractors to cost records, the DCAA audit completion schedule of January 1984 was not met. A letter of the contracting officer dated July 13, 1984, deals with some of the problems of delay (Exh. 6). Regarding access to subcontractor records, agreement for access had been reached with

certain subcontractors and subpoenas for access were planned for others. Regarding NPR's responses to completed audits, the contracting officer advises that she intends to establish new dates for the receipt of such responses. She refers to NPR arranging meetings with DCAA to acquire the data needed to complete some audit responses. By letter dated July 23, 1984, the contracting officer establishes August 10, 1984, as the due date for responses to certain audit reports listed in an attachment, and advises she will be establishing new dates in the near future for those reports for which NPR indicates it requires meetings with DCAA (Exh. 8).

By letter dated August 31, 1984 (Exh. 9), the contracting officer reminded NPR that the completion date of August 31, 1984, for closeout activity remained in effect except for one employee responsible for the Government property and one contracts manager needed for support of the DCAA audit of the unassigned costs run. Appellant's response (Exh. 11), of September 7, 1984, questions the contracting officer's meaning regarding the August 31, 1984, closeout date, contending that the closeout activity could not be completed by that date for reasons beyond NPR's control, and concluding that continuing closeout efforts will be billed to the Government. This letter notes that most of the approximately 60 DCAA audit reports, questioning over \$50 million in costs, were not received by NPR until well after the initial January 31, 1984, closeout date, with reports questioning \$36 million being received between April 9 and April 30, 1984. NPR also notes that the Government failed to respond to NPR's requests for data concerning the audits or to provide any information until July 5, 1984.

The Government does not contest the factual presentation presented in support of appellant's Motion. Additionally, the parties are in agreement that the \$709 million of claimed costs and fees were the actual recorded costs on NPR's books. Further, it is noted that the Decision disallowed \$7,208,731, amounting to the total sums paid by NPR to five subcontractors or vendors under audited subcontracts or purchase orders.

Under date of April 30, 1982, the parties entered into a Deferment Agreement under which NPR agreed to establish an Irrevocable Standby Letter of Credit naming the Department of the Interior as beneficiary. The Government agreed to discontinue withholding from current invoices amounts claimed to be owing the Government, and to repay amounts previously withheld. NPR appealed these Government claims of indebtedness to this Board, and such appeals remain pending. Commencing in June 1984, the Government again began withholding payments of current invoices of NPR. Shortly after the Decision of October 1, 1984, the Government took action to draw on the Letter of Credit the entire amount of \$6 million on the ground that the Decision established NPR's indebtedness to the Government far in excess of that amount. The action of the Government to draw on the Letter of Credit has also been appealed to this Board.

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The Decision states, that "Prior to issuing this final decision, the Contracting Officer has carefully considered the amount of time and manpower Husky has had to respond to these audits." The Decision recounts the assistance asked of Husky to locate missing or incomplete data; the exit conferences held with DCAA; the consideration of the audit reports by the contracting officer of additional data resolving audit qualifications on more than one occasion; and that the reports were then forwarded to Husky and responses requested within 30 to 45 days. She concluded that Husky has been afforded more than a reasonable time to respond to the DCAA audits and failed to do so. Therefore, she concluded that for the reasons set forth in the audit reports and herein, the costs are disallowed because Husky has failed to establish the allowability of these costs.

Appellant argues that in her deposition, the contracting officer agreed that the audit process was a massive effort by the Government. The first phase from August through December 1983, had 8 full-time and about 10 part-time auditors on the project, with 5 auditors within the Department, plus 2 procurement officers, and 1 cost analyst. This work force comprised about 25 people with audit-type functions. At the same time, NPR was working with the reduced staff mandated by the final decision of August 3, 1983, with a staff of 13 people, only two of whom were qualified to perform audit-type work. The affidavit of Larry Vest, the General Manager of NPR, details the handicaps of working with the reduced staff required by the Government; the brief exit conferences sometimes held by telephone; and the prompt transmittal of the audit report by DCAA without the opportunity of NPR to review it in draft form. With only two people contemplated by the Government as necessary to support the closeout activity and respond to the hundreds of action requests, the three DCAA auditors grew to six by the end of August and nine by the end of September. In addition, there were six other DCAA auditors working at other subcontractor locations. In November, NPR requested added staff which was refused. Nonetheless, in December 1983, NPR retained four contracts specialists from Arthur Anderson to assist in responding to DCAA's requests for audit data. In effect, Mr. Vest concludes that there were no effective exit interviews allowing an NPR response and that NPR never saw a draft audit report as had been promised. He states that prior to the October 1, 1984, decision, the contracting officer had discussed the audit reports prior to issuing a final decision, but that no such discussions were held prior to the October 1 Decision.

Inasmuch as this extensive project was performed over a number of years under the adverse conditions obtaining in Alaska, it was undertaken on a cost-reimbursable contract basis by NPR as the only task of that operating division of Husky. Consequently, there was not the usual separation of direct costs and normal overhead expenses, but rather most of the costs were classified as direct costs. NPR was

engaged to manage the massive project from the initial organizational efforts to carry out the exploration efforts, and to account for the costs of doing so. After the substantive work had been completed over a period of 6 to 7 years at a cost of approximately \$709 million, the Government took the unusual measure on August 3, 1983, of denying NPR the resources of its own staff to effect the closeout of the contract. In effect, the Government's order to reduce the NPR staff to a minimum stated that the audits performed by DCAA would be the basis for determining the final allowable costs of the project, and that NPR would be allowed only a minimum staff to assist in those audits and to respond to audit questions. With a many-fold increase of the estimated Government staff from 3 auditors to over 25 engaged in this task, the Government found it necessary to extend the auditing effort from the January 1984 completion date to August 31, 1984. Apparently, the Government considers that the closeout activity was complete and the contract effort ended on that date, despite the fact that NPR had been unable to secure needed audit data from DCAA and had not completed its audit responses. The contracting officer did not establish new dates for NPR to submit audit responses as promised.

Instead, by the Decision of October 1, 1984, the contracting officer called an end to the audit discussions, considering that NPR had had sufficient opportunity to respond to the audits and prove the allowability of the qualified costs, questioned costs, and costs on the which DCAA did not comment. The Decision disallowed virtually all of each category of costs that were the subject of audit questions and additional costs because of alleged failures of NPR or its subcontractor/vendors to comply with cost accounting standards. The impact of the Decision to disallow \$66,041,882 is stated in the last paragraph thereof, which cites the regulation which would disallow legal, accounting, and consulting costs incurred in any appeals taken from the Decision. Prior to that time, the exchanges of the parties to resolve audit questions could be considered proper closeout activity, the cost of which would be reimbursable under the contract.

The Decision of October 1, 1984, cannot stand as a final decision of the contracting officer. By ordering the drastic reduction of NPR's staff at the beginning of the audit effort, the knowledgeable accounting, auditing, and purchasing staff needed to support the massive audit activity was lost to NPR. The meager staff remaining could not productively address itself to justifying its right to full reimbursement for its incurred costs because of the diversion of efforts to support the audits. Nor could audit responses be prepared before the audit reports were made available to NPR. The fact that the responses took longer than desired by the Government was necessarily the direct result of the action to deny NPR the resources to respond in a timely manner. The affidavit of Larry Vest and the deposition of the contracting officer support the finding that the contracting officer was mistaken as to the occurrence of exit conferences, their value to inform NPR, and

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the amount of data provided by DCAA to NPR to assist in their audit responses.

Instead of allowing a more reasonable time to address the major audit questions necessitated by the mandated reduced NPR staff, or to address the clear burden of the Government to show that incurred costs were not allowable,¹ or to negotiate with NPR to determine allowable costs in the face of the Government's burden, the Decision was issued citing reasons given in the audit reports. Presumably, this was done on the assumption that NPR's indebtedness to the Government by reason of overpayments, indicated by the audits, greatly exceeded the amounts withheld by the Government from invoices and the amount of the Letter of Credit.

However, even now the conduct of audits and reaudits is continuing. NPR has submitted a number of audit responses after the Decision. The parties do not conduct themselves as if an impasse has been reached on the amount to which NPR is entitled. Neither party is prepared to move forward to a hearing of the merits of the Government's claims against NPR. None of the audits containing the basis for the Decision are in the record. The amounts claimed continue to be examined by the parties by interrogatories and other discovery procedures. The appeals process is not designed to substitute for the bargaining process between the parties to examine the countless issues on which reimbursement of incurred costs may depend. Here, it is abundantly clear that the parties have not had the opportunity to consider together all of the issues. The appeals are prematurely before the Board. There are no clearly defined disputed issues between the parties that they can agree are ready to be submitted to the Board for decision.

Whether the Government can show that a substantial amount of the incurred costs should be disallowed is a question more appropriate for consideration after a hearing on the merits than in the consideration of the finality of the Decision. However, the disallowance of entire contract amounts paid by NPR to subcontractors, amounting to millions of dollars, indicates a basic misconception of cost reimbursement contracts. The primary purpose to be achieved by the Government in the contract with NPR was management of the project to discover and provide access to reserves of oil deposits, not to establish and maintain the most perfect set of records and cost accounting standards achievable. For example, under a subcontract with Dowell, Division of Dow Chemical, NPR paid Dowell \$3,319,750, the total of which was disallowed by the Decision. DCAA was unable to express an opinion relating to the overall allowability of the payments because NPR was unable to provide evidence of ACO/PCO consent (except for two blanket orders), a copy of the IFB showing propriety of

¹ *Bruce Construction Corp. v. United States*, 324 F.2d 516 (Ct. Cl. 1963).

the award to Dowell, a record of a sales analysis, and price lists for certain items. The bulk of the disallowance is attributed to the failure of NPR to adhere to required procurement rules and practices to produce documentation to establish price reasonability. There is no suggestion in the Decision that Dowell did not accomplish all of the work required by its subcontract in a satisfactory manner. Without ruling on the appropriate action to be taken against a cost-reimbursement contractor for either lapse in recordkeeping or a pattern of such failures, the purported final Decision declares, in effect, that Dowell's contribution to the project becomes a gift to the Government. Such a decision by the contracting officer falls far short of the standard of impartiality and quasi-judicial attitude required of the contracting officer.² There exists no suggestion of wrongdoing on behalf of NPR that \$3,319,750 would have been paid to Dowell without some evidence of a subcontract under which work was performed. The courts and boards regularly have to deal with missing or inadequate records, and upon a finding of clear liability have not hesitated to award appropriate monetary relief.³ This discussion of the Dowell subcontract is not to be construed as a ruling on that subcontract, but rather an illustration of the basic failure of the contracting officer impartially to consider all the evidence available to her to arrive at a decision. Ignoring the primary evidence that Dowell was a subcontractor that contributed to the project and was paid by NPR destroys the impartiality and finality of the Decision. That evidence required a conclusion that some reimbursement was proper, if even for the two blanket orders admittedly approved by the ACO/PCO.

We do not rule on the propriety of the August 3, 1983, decision to require NPR to reduce staff available to provide for an orderly closeout of this lengthy and costly contract effort. That matter is currently before the United States Claims Court, with an appeal to this Board stayed until action is taken by the court. However, we do find that the result of that action deprived NPR of the resources to adequately confront closeout issues raised by audits, and that the action of the contracting officer to abandon the established practice for resolving entitlement questions resulted in a premature decision that cannot be accorded finality. The jurisdiction of this Board rests on appeals from final decisions of the contracting officer. Having found the Decision of October 1, 1984, to lack finality, the Board is without jurisdiction. Accordingly, the appeals are hereby dismissed and remanded to the contracting officer for a final decision.

RUSSELL C. LYNCH
Administrative Judge

² *Space Age Engineering, Inc.*, ASBCA No. 26028, (Apr. 22, 1982), 82 BCA 15,766.

³ See *JB & C Co.*, IBCA Nos. 1020-2-74, 1033-4-74 (Sept. 28, 1977), 77-2 BCA 12,782. By reason of appellant's records having been taken by a surety and never fully recovered, appellant's own records prevented the proper presentation of a claim. In the face of clear liability, this deficiency was overcome by the combination of various records of the Government, combined with the reconstructed records of appellant.

February 19, 1985

I CONCUR:

G. HERBERT PACKWOOD
*Administrative Judge***NATIVE AMERICAN MANAGEMENT SERVICES, INC. v. ACTING
DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS
(OPERATIONS)**

13 IBIA 99

Decided *February 19, 1985***Appeal from a June 1, 1983, decision of the Acting Deputy Assistant
Secretary--Indian Affairs (Operations) suspending appellant's Buy
Indian Act status.****Recommended decision adopted.****1. Indians: Economic Enterprises: Buy Indian Act**

The meaning of "100 percent Indian control" of a business as used under the Buy Indian Act, 25 U.S.C. § 47 (1982), includes not only apparent control, but also actual control as evidenced by some measure of active participation in the business that would tend to increase Indian self-sufficiency.

APPEARANCES: Jeffrey L. Willis, Esq., and Ellen L. Canacakos, Esq., Phoenix, Arizona, for appellant; Daniel L. Jackson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, and Percy Squire, 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 CHIEF ADMINISTRATIVE JUDGE PARRETTE**INTERIOR BOARD OF INDIAN APPEALS*

On August 15, 1983, the Board of Indian Appeals (Board) received a notice of appeal from Native American Management Services, Inc. (appellant). Appellant sought review of a June 1, 1983, decision issued by the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) suspending its certification as a "Buy Indian" contractor pending further investigation. The suspension was based on a May 25, 1983, memorandum from the Inspector General of the Department of the Interior. The memorandum questioned appellant's qualifications under the Buy Indian Act, 25 U.S.C. § 47 (1982). By order dated September 7, 1983, the Board referred this case to the Hearings Division of the Office of Hearings and Appeals for an evidentiary hearing and recommended decision in accordance with regulations in 43 CFR 4.337. On September 14, 1983, the suspension was vacated pending the decision of this Board.

The case was assigned to Administrative Law Judge Harvey C. Sweitzer, who held a hearing and, on December 4, 1984, issued a recommended decision. Although that decision informed the parties that under 43 CFR 4.338 and 4.339 they had 30 days in which to file exceptions to the recommended decision, no exceptions were filed.

The Board has reviewed the record created before Judge Sweitzer and his recommended decision. The recommended decision, which is attached to this opinion and incorporated by this reference, is adopted in total as the Board's opinion.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 1, 1983, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) to suspend the "Buy Indian" certification of Native American Management Services, Inc., is affirmed.

BERNARD V. PARRETTE
Chief Administrative Judge

WE CONCUR:

JERRY MUSKRAT
Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

* * * * *

**NATIVE AMERICAN MANAGEMENT SERVICES, INC., Appellant
v. ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS
(OPERATIONS), Respondent**

Docket No. IBIA 83-44-A

Decided December 4, 1984

**Order Referring Appeal to Hearings Division for Evidentiary
Hearing and Recommended Decision.**

APPEARANCES: Jeffrey L. Willis and Ellen L. Canacakos, of the law firm Streich, Lang, Weeks and Cardon, Phoenix, Arizona, for appellant; Daniel L. Jackson, Office of the Field Solicitor, Department of the Interior, Phoenix, Arizona (Percy Squire, Office of the Solicitor, Washington, D.C., on prehearing briefs), for respondent. Before: Administrative Law Judge Sweitzer.

RECOMMENDED DECISION

By order dated September 7, 1983 the Interior Board of Indian Appeals referred this matter to the Hearings Division for a hearing and a

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recommended decision, and it was thereafter assigned to me. By my order of October 6, 1983, the hearing was scheduled for December 2, 1983. Based on stipulated request of the parties, that hearing date was converted to a prehearing conference, and the hearing was postponed to March 30, 1984, on which date it was held at Phoenix, Arizona.

Introduction

Appellant Native American Management Services, Inc. (NAMS), is an Arizona corporation organized for the purpose of providing "management consulting services to the Bureau of Indian Affairs." NAMS 1982 Financial Statement. NAMS was certified by the Bureau of Indian Affairs (BIA) as qualifying for preference in contracting with BIA under the "Buy Indian Act," 25 U.S.C. §47 (1982). BIA suspended this certification on June 1, 1983 pending further investigation, alleging NAMS did not meet the BIA's requirement that "Buy Indian" firms be "100 per cent Indian owned and controlled." 20 BIA Manual 2.1. NAMS appealed this action and requested an evidentiary hearing (which was granted by the order of September 7, 1983).

NAMS subsequently moved for summary adjudication, claiming it met the applicable requirements as a matter of law, since the corporation's sole shareholder and both members of the board of directors were Indian. Respondent BIA argued actual control of NAMS was not in the board of directors, but in the general manager, a non-Indian. Briefs were filed in support of the parties' respective positions. By order of March 2, 1984, I ruled that the question of control of NAMS presented an issue of fact and denied the motion for summary adjudication.

Following the evidentiary hearing briefs were filed as follows: Appellant's opening, June 18, 1984; respondent's answering, July 3, 1984; and appellant's reply, July 30, 1984. In all instances where the findings and conclusions set out in this recommended decision are inconsistent with proposed findings of fact and conclusion of law submitted by counsel, such proposed findings and conclusions are rejected either because they are not supported by the evidence or because they are immaterial.

Issues, Applicable Law and Contentions

The sole issue in this case is whether NAMS is 100 per cent Indian controlled as required by 20 BIA Manual 2.1. If it is not, NAMS does not qualify for the "Buy Indian" preference when dealing with BIA.

The Buy Indian Act provides that "[s]o far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior." 25 U.S.C. §47 (1982). In carrying out the requirements of this statute, BIA has determined that firms must be

100 per cent Indian owned and controlled in order to qualify for this preference. 20 BIA Manual 2.1.

Appellant claims it is in fact 100 per cent Indian owned and controlled. Its sole stockholder is Elbert Vawter, a certified member of the Choctaw Indian Nation. Mr. Vawter is also president of NAMS and is the only person empowered to sign contracts. Mr. Vawter and his brother Silas, also a member of the Choctaw Indian Nation, are presently the only members of the NAMS Board of Directors. Appellant argues these facts show that NAMS is Indian controlled.

Respondent argues that Mr. Vawter is in fact a "straw man" and that his step-son Vaughn Autrey, NAMS' general manager, actually controls NAMS. Mr. Autrey is not a member of any Indian tribe. Respondent claims Mr. Vawter does not participate in, nor exercise control over the functions of the corporation other than signing contracts, change orders, and proposals; therefore NAMS is not Indian controlled and does not qualify for the "Buy Indian" contracting preference.

Summary of the Evidence

At the evidentiary hearing in this case, Vaughn Autrey was the sole witness for appellant; L. Thomas Weaver, Harry McClain, and Walter Michno were witnesses for respondent.

Testimony of Vaughn M. Autrey

Vaughn M. Autrey is presently the general manager of NAMS and is responsible for the day-to-day operations of the company. Tr. 10-11. Mr. Autrey is the step-son of Elbert Vawter, who is president, board member, and sole stockholder of NAMS. Tr. 15.

NAMS, an automated data processing (ADP) consulting firm, was incorporated in the State of Arizona in March 1979, Tr. 15. Vaughn Autrey and his wife (now ex-wife) Karen were the original incorporators of NAMS, Tr. 27; at the time of incorporation, Mr. Vawter contributed ten dollars, which constitutes the only capital put into NAMS. Tr. 33-34. The reason NAMS, with Mr. Vawter participating, was formed was to qualify for the preferences available under the Buy Indian Act. Tr. 31.

Mr. Autrey is also involved in Vaughn Autrey, Incorporated, an ADP firm in which he is the only person involved. Vaughn Autrey, Inc., is a consultant to private enterprise and state and local government; NAMS deals with the federal government. Tr. 36-38.

Mr. Autrey has been general manager of NAMS since its incorporation, except for the period from November 1982 to November 1983. Tr. 10-11. He is experienced in the ADP field and is responsible for the day-to-day operation of the company. Tr. 11-14. Mr. Autrey, along with his ex-wife Karen, were on the NAMS board of directors from incorporation until approximately March 1981, when they both resigned from the board so NAMS could regain its "Buy Indian"

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certification. This certification had been suspended on the ground that NAMS was not Indian controlled, and was restored after the Autreys resigned from the board of directors. Tr. 25-28. Mr. Autrey now has, and has had since NAMS' incorporation, signatory power over company checking accounts and the power to commit funds of the corporation. He regularly commits such funds. Tr. 36.

Mr. Elbert Vawter is not experienced in either the ADP or the accounting fields; no such expertise is expected of him. Tr. 24, *see also* Tr. 53-55. He has not participated in writing proposals for work and is not qualified to review the technical portions of such proposals. Tr. 55-56. He does not have the background to evaluate NAMS' proposals and generally relies on the person presenting the proposal to him to determine if the proposal is acceptable. Tr. 55-58, *see also* Tr. 68-69. A similar procedure is followed in evaluating contract change orders. When problems of a managerial, personnel, or legal nature arise, they are presented to Mr. Vawter and discussed with him. Tr. 59-60. Mr. Autrey could recall only one occasion when Mr. Vawter actually made a business decision contrary to his (Mr. Autrey's) advice, that involving settlement of a lawsuit by an ex-employee. Tr. 23-24. Mr. Vawter did, however, meet with Mr. Autrey early in NAMS' existence to determine how much they each could be paid. Tr. 43, 68. This function is now performed by the board of directors, of which Mr. Vawter is a member. Tr. 43.

Mr. Vawter is the only person with authority to legally bind NAMS in a contract. Tr. 17. Mr. Autrey testified that Mr. Vawter's responsibilities include "reviewing all of the documents and overseeing the company, in effect, but he doesn't do it on a day-to-day basis." Tr. 21. Mr. Vawter does not maintain an office at the company's headquarters in Phoenix, Tr. 16, and lives about 15 miles north of Sierra Vista, Arizona, approximately 200 miles southeast of Phoenix. Tr. 16, *see also* Tr. 130. Mr. Autrey estimated that he communicates with Mr. Vawter concerning company matters "once or twice a month," Tr. 16-17, usually by telephone or personally, seldom by letter. These communications include solicitations and proposals. Tr. 17. Mr. Vawter is provided with company records "as a matter of course." Tr. 17.

Mr. Autrey stated that Mr. Vawter plays little part in the day-to-day operation of NAMS. Tr. 16. Mr. Autrey did say that, following his resignation from the board of directors in March, 1981, he began involving Mr. Vawter "more than he had been prior" to that time. Tr. 30.

Mr. Autrey testified that Mr. Vawter's annual salary from NAMS is \$25,000 plus bonuses. Tr. 41-42. *But see* testimony of Harry T. McClain, *infra*, Tr. 131, where Mr. Vawter's salary is given as \$172.74

per month. Mr. Vawter does not keep a separate time log. Tr. 21. Mr. Autrey's annual salary from NAMS for the current year was \$48,000 plus a \$5,000 bonus. Tr. 42.

Mr. Autrey was the only witness for appellant. Tr. 71. Mr. Vawter has recently suffered a stroke, and although mentally alert was unable to attend the hearing. Tr. 9.

Testimony of L. Thomas Weaver

L. Thomas Weaver is a criminal investigator presently with the United States Department of Agriculture and formally with the Department of the Interior. While with the Department of Interior's Inspector General's office, Mr. Weaver was assigned between September 1982 and February 1983 to investigate NAMS. This investigation was started as a result of a "hot line" call regarding NAMS contracts. Tr. 72.

While investigating NAMS, Mr. Weaver interviewed Vaughn Autrey several times. Mr. Weaver testified that Mr. Autrey had stated that he (Mr. Autrey) basically was in charge of NAMS. Tr. 77. Mr. Weaver visited NAMS' offices two or three times but never saw Mr. Vawter there. He was told that Mr. Vawter had no office there. Tr. 79.

Mr. Weaver then testified as to an interview he had with Karen Autrey, Vaughn Autrey's ex-wife, on November 3, 1982, concerning the formation and operation of NAMS. This testimony was accepted over appellant's objections of hearsay with the objections to be considered with regard to the weight to be given the testimony. Tr. 94, *see also* Tr. 80-94 for arguments regarding admissibility. Mr. Weaver testified Ms. Autrey stated that:

- . Vaughn Autrey "ran, operated, and controlled NAMS." Tr. 95.
- . "Vawter was used as a figurehead to enable Mr. Autrey to gain BIA contracts." *Id.*
- . Mr. Vawter had "no connection [with NAMS], other than being the Indian." *Id.*
- . Mr. Vawter had no operation or function with regard to the daily operation of the company. *Id.*
- . Mr. Autrey "controlled and wrote" all the contracts and proposals to BIA. Tr. 99.

Mr. Weaver further testified that Ms. Autrey stated that she had written checks to "Cash" on NAMS accounts at Mr. Autrey's direction on at least one occasion. Tr. 99. Mr. Weaver inspected checking account signature cards for two NAMS accounts and found only the signatures of Vaughn Autrey and Karen Autrey. Tr. 100-05.¹

Cross-examination noted that the exact word "control" does not appear in Mr. Weaver's interview notes. Tr. 115-16. Mr. Weaver did not personally interview Mr. Vawter. Tr. 126.

¹ *But see* Appendix, Appellant's Post Hearing Reply Memorandum, where signature cards for other NAMS accounts, which include Elbert Vawter's signature, are submitted.

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Testimony of Harry T. McClain

Mr. Harry T. McClain is a special agent for the Office of the Inspector General, United States Department of the Interior. He was assigned, along with Mr. Weaver, to investigate allegations concerning NAMS' contracts with BIA. Tr. 128-29.

Mr. McClain stated that he interviewed Mr. Elbert Vawter on November 2, 1982. Tr. 129. He testified Mr. Vawter related that:

- . the purpose of his (Mr. Vawter's) participation in NAMS was to help obtain "Buy Indian" contracts;
- . he (Mr. Vawter) has no expertise in ADP programming or management functions;
- . his (Mr. Vawter's) sole participation in the corporation was to sign contracts and change orders. Tr. 131.

Mr. McClain testified that Mr. Vawter had stated he received \$172.74 per month from NAMS for signing papers and that he had received bonuses up to the time of the November 2, 1982 interview, totalling approximately \$12,700.00. Tr. 131. Mr. Vawter further stated to him that he had completed two years of high school and sixteen and one half years working for a plastics manufacturing firm, rising to the position of foreman before he left. Tr. 133. Mr. Vawter stated that his total participation in NAMS was the original contribution of ten dollars and the signing of contracts and change orders. Tr. 133. He also stated that all other funds necessary for the corporation's formation came from Karen and Vaughn Autrey. Tr. 134.

Mr. McClain interviewed Mr. Chris Pinson, at that time NAMS' general manager, in February 1983. Mr. McClain testified that Mr. Pinson indicated Mr. Vawter "may have been to the [NAMS] office once" and that other than that he did not know Mr. Vawter; and that Mr. Vawter was kept informed of NAMS' activities. Mr. Pinson also commented that Mr. Vawter did not have any technical expertise. Tr. 150-51. Mr. McClain did not himself see Mr. Vawter during the two to four visits he made to NAMS' offices. Tr. 153.

Testimony of Walter Michno

Mr. Walter Michno is an auditor with the Office of the Inspector General, United States Department of the Interior. Mr. Michno was assigned to assist in the NAMS investigation and to audit NAMS' contracts for compliance with contract terms and applicable Federal regulations. Tr. 165-66. The contract Mr. Michno audited was not a "Buy Indian" contract but was awarded to NAMS on a "sole source" basis because NAMS had previously performed a related "Buy Indian" pilot project. Tr. 176. Mr. Michno never saw Mr. Vawter in the NAMS offices during the approximately four weeks in which he was performing the audit in those offices. Tr. 218.

Mr. Michno did not recall seeing any NAMS checks signed by Mr. Vawter, Tr. 212, nor any payroll checks signed by Mr. Autrey, Tr. 218, but stated it was "quite possible" the "bulk or majority" of the checks were signed by Karen Autrey or Judy Cochran, the company's treasurer. Tr. 215.

Findings of Fact and Conclusions of Law

As stated previously, the resolution of this case turns on whether NAMS is 100 per cent Indian owned and controlled. It is not disputed that Mr. Vawter's ownership of all outstanding NAMS stock constitutes 100 per cent Indian ownership of NAMS. However, the question of control is more difficult to resolve. To determine if Mr. Vawter controls NAMS, two issues must be analyzed: Mr. Vawter's actual role in NAMS; and, what is meant by "control" under the Buy Indian Act.

A. Inquiry into Elbert Vawter's Role in the Operation of NAMS

Appellant argues that "control of a corporation is vested in its Board of Directors and/or majority stockholders."

Appellant's opening brief, captioned its "Post-Hearing Memorandum" (hereinafter "Memo") at 3, citing *Mims v. Valley National Bank*, 14 Ariz. App. 190, 481 P.2d 876 (1971). Appellant further argues that day-to-day operation of the company may be delegated to others without losing this control. App. Memo at 4-5, citing 2 Fletcher, Corporations. Appellant concludes that, as a result of Mr. Vawter's sole ownership and position on the board of directors, he, along with his brother Silas, controls NAMS. However, the Arizona court in *Mims* also stated that "this general legal principle [that control of a corporation is in its board] does not eliminate the possibility of *actual control by another*, as for example, a majority stockholder," 481 P.2d at 878. (italics added). The fact of board membership is not *per se* evidence of control.

Appellant argues that any further inquiry into Mr. Vawter's role in the corporation is impermissible as "piercing the corporate veil."

Appellant claims that under Arizona law, before a corporation's veil may be pierced, the opposing party must prove that:

1. There is such a unity of interest and ownership between the corporation and its owners that the separate personalities of the two no longer exist; and
2. Failure to disregard the corporate fiction would result in fraud or injustice.

App. Memo at 1-2, citing *Home Builders & Suppliers v. Timberman*, 75 Ariz. 337, 256 P.2d 716 (1953); *Honeywell, Inc. v. Arnold Const. Co., Inc.*, 134 Ariz. 153, 654 P.2d 301 (1982); *Dietel v. Day*, 16 Ariz. App. 206, 492 P.2d 455 (1972).

The instant case may be distinguished from the three cases cited. *Timberman*, *Honeywell*, and *Dietel* each sought to place personal liability for a corporation's debts on a corporate officer. In each case,

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the court considered the above factors in deciding whether the corporate form, insofar as it protects an officer from personal liability, should be disregarded. In the instant case, individuals within the corporation are being considered not as to personal liability, but only as to their role within the corporation.

The Supreme Court of the United States has stated "the interposition of a corporation will not be allowed to defeat a legislative policy * * *." *Anderson v. Kirkpatrick*, 321 U.S. 349, 363 (1944). It is alleged in the present case that appellant is a corporation with an Indian "straw man" in nominal control, placed there for the purpose of obtaining for the corporation contracts which it could not otherwise obtain, in opposition to a stated legislative policy. Therefore, an inquiry into the actual roles of Mr. Vawter and Mr. Autrey in the NAMS corporate structure is justified.

B. Does Elbert Vawter's Role in NAMS Constitute "Control"?

[1] The resolution of this question turns on the word "control". The definition of "control" varies with subject and context: both parties have cited authority supporting each's preferred definition. App. Memo. at 3-5, Resp. Brief at 11-13.

The requirement for Indian control must be construed with Congress' legislative policy in mind. The Buy Indian preference was "designed to promote Indian economic development and self-sufficiency." *Glover Construction Company v. Andrus*, 591 F.2d 554, 566 (10th Cir. 1979), *aff'd* 446 U.S. 608 (1980), (McKay, Cir. J., dissenting). "The purpose of these preferences [25 U.S.C. §§ 44, 45, 46, 47, and 274], as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government * * *." *Morton v. Mancari*, 417 U.S. 535, 591 (1974). The policy of the United States is and should be "to teach * * * Indians to manage their own business * * *," *Id.* at 542, n. 9, quoting Sen. John Wheeler's comments at hearings on the Indian Reorganization Act of 1934.

The foregoing conspicuously use such terms as "self-sufficiency", "participation" and "manage". This language strongly indicates Congress intended for Indians to become more involved with enterprises such as NAMS.

The language used further implies that such involvement was intended to be active, and should contribute to the growth of Indians and the Indian community by decreasing dependence on non-Indians. I therefore conclude that "100 per cent Indian control" includes not only apparent control, but also actual control as evidenced by some measure of active participation in the corporation.

This active participation need not be to the extent, implied by respondent, that NAMS be "operated" solely by Indians. However,

control should include activities which would tend to increase Indian self-sufficiency. Such activities may include participation in creation of the company's work product; direction of the company, such as deciding what work to pursue and how to accomplish it; planning policy and goals of the company; or other active involvement with the company. As appellant points out, Indians may require some non-Indian assistance and expertise in developing Indian enterprises. This definition of control should not be construed to prohibit such involvement by non-Indians in Buy Indian firms. However, "Indian control" should result, over a period of time, in a firm that could function without non-Indian assistance.

Appellant had the burden of proof in this case. See my order of October 6, 1983. I find that appellant did not carry its burden of establishing that Mr. Vawter's role met the above standard. Evidence presented depicted Mr. Vawter's role in NAMS as essentially reactive, not active: he signs documents as they are presented to him. Mr. Autrey testified to one occasion where Mr. Vawter made a decision contrary to the advice given to him by Mr. Autrey; this concerned settlement of an ex-employee's lawsuit against NAMS, not a technical or usual business decision. Mr. Vawter has no ADP or financial (business) experience and makes no contribution to the firm's operations in those areas. Mr. Vawter did meet with Mr. Autrey to decide what each of their salaries should be; he still does this (or at least approves of salaries) as a member of the board of directors. However, no evidence of any additional participation by Mr. Vawter in NAMS' business was offered.

The circumstances surrounding NAMS' incorporation also raise doubts concerning Mr. Vawter's actual role. Mr. Autrey was precluded from obtaining BIA contracts for his consulting firm, and formed NAMS, with Mr. Vawter as president, for the purpose of contracting under the Buy Indian Act. NAMS contracts principally with the BIA. It is a reasonable presumption that Mr. Vawter was brought in solely as a "straw man" to qualify for Buy Indian preference. This presumption is strengthened by the fact that, other than his Indian ancestry and ten dollars, Mr. Vawter brought nothing to NAMS essential to its success. Mr. Autrey's testimony, Tr. 31, and Mr. Vawter's statements as testified to by Mr. McClain, Tr. 131, summarized *supra*, reinforce this view. Appellant did not present evidence sufficient to establish otherwise.

There is also the question raised by Mr. Vawter's benefits from NAMS. Testimony varied as to the salary actually paid, from approximately \$2,000 to \$25,000 per year. The latter figure is approximately half of what Mr. Autrey earned as general manager of NAMS. No evidence was offered as to whether NAMS has paid a dividend to Mr. Vawter, the sole shareholder. This benefit structure is not consistent with the notion that a corporation is formed for the benefit of its shareholders,

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and contributes to the impression that NAMS actually exists for the benefit of Vaughn Autrey.

Final Conclusion

As discussed, the issue in this case is whether NAMS is "100 per cent Indian controlled." I conclude that, in order to establish such control, appellant must show some active Indian participation in the corporation, and that such participation contribute to the stated legislative intention to further Indian self-sufficiency. Evidence presented by appellant did not prove, by even a preponderance of the evidence, that Elbert Vawter's participation in NAMS contributes to such a goal. Therefore, I recommend respondent's decision suspending appellant's "Buy Indian" status be affirmed.

HARVEY C. SWEITZER
Administrative Law Judge

TERRY L. WILSON

85 IBLA 206.

Decided February 28, 1985

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, denying a petition to reinstate homestead entry F-429 and to issue confirming patent.

Affirmed.

1. Alaska: Homesteads--Contests and Protests: Generally--Homesteads (Ordinary): Contests--Rules of Practice: Appeals: Notice of Appeal--Rules of Practice: Government Contests

Neither actual nor constructive notice of a Departmental decision is accomplished by an attempted service using certified mail where the delivering post office returns the decision to the Department after 7 days and it affirmatively appears that the addressee had not moved nor refused delivery, and the address used was his address of record.

2. Alaska: Homesteads--Contests and Protests: Generally--Homesteads (Ordinary): Contests--Rules of Practice: Appeals: Notice of Appeal--Rules of Practice: Government Contests

While 43 U.S.C. § 1165 (1982) provides for issuance of a patent to an entryman upon a 2-year lapse following issuance of "receipt" when no contest is then pending, the statutory 2-year period does not begin to run at the time the entryman files his final proof, but begins only upon payment for the land. Where appellant had not paid for the land sought to be patented, but had only paid fees associated with filing his homestead entry, he was not entitled to patent.

3. Alaska: Homesteads--Rules of Practice: Government Contests

Failure by the Government to deliver a notice of contest action brought against a homestead entry within 30 days of commencement of action does not affect the validity

of the complaint where notice of the action is given to the entryman in a reasonably timely manner.

4. Alaska: Homesteads--Alaska National Interest Lands Conservation Act: Generally--Alaska National Interest Lands Conservation Act: Valid Existing Rights

The Department of the Interior does not retain jurisdiction to adjudicate the merits of a homestead entryman's claim that he has a valid existing right which is prior to that asserted by Alaska where the land sought by the entryman was tentatively approved for conveyance to the State of Alaska since sec. 906(c)(1) of the Alaska National Interest Lands Conservation Act legislatively confirmed all tentative approvals of state land selections, subject to valid existing rights, and conveyed the land in dispute out of Federal control.

5. Alaska: Homesteads--Alaska National Interest Lands Conservation Act: Generally--Patents of Public Lands: Suits to Cancel

The Department is barred by the provisions of 43 U.S.C. § 1166 (1982) from challenging the conveyance of land to the State of Alaska by sec. 906 of the Alaska National Interest Lands Conservation Act, confirming tentative approvals of State land selections subject to valid rights, where more than 6 years have passed since the conveyance. Since the lands here conveyed legislatively to the State were tentatively approved for conveyance in 1976, and since the Act makes such conveyance effective as of the date of tentative approval, provision of 43 U.S.C. § 1166 (1982) bars any possibility of Departmental intervention on behalf of the entryman in this case.

APPEARANCES: Terry L. Wilson, *pro se*; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; M. Francis Neville, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

This appeal arises from the conflict between an Alaska homesteader's application and a land selection by the State of Alaska made pursuant to the Alaska Statehood Act for the same tract of land. On October 22, 1981, the Fairbanks District Office, Bureau of Land Management (BLM), denied a petition filed by Terry L. Wilson to reinstate and issue a confirming patent to homestead entry claim F-429 for land located near Chena Hot Springs, Alaska, in T. 3 N., R. 9 E., Fairbanks Meridian. This action by BLM was predicated upon an earlier adjudication canceling homestead entry F-429 made on October 2, 1974, pursuant to 43 CFR 4.450-7(a), because of Wilson's failure to respond to a contest complaint brought by BLM against Wilson's homestead claim. Since no appeal was taken from this decision, the homestead entry was canceled on BLM's records on November 18, 1974. On June 3, 1976, the State of Alaska received tentative approval of its application F-15151 for lands selected pursuant to the Alaska Statehood Act including T. 3 N., R. 9 E., Fairbanks Meridian, Alaska, embracing, among others, all the land claimed by Wilson in entry claim F-429. On December 2, 1980, sections 906 and 1328 of the Alaska National Interest Lands

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Conservation Act (ANILCA), 43 U.S.C. § 1635 and 16 U.S.C. § 3215 (1982), legislatively approving certain pending Alaskan land claims, were enacted into law. On May 27, 1981, Wilson filed a petition for reinstatement of his canceled homestead entry claiming that he had only recently discovered that it had been canceled and that such cancellation was improper and the entry should be reinstated on BLM records, and, further that his claim was legislatively approved by section 1328 of ANILCA.

Contending he had received neither the 1974 contest complaint nor the BLM decision of October 2, 1974, Wilson now seeks recognition by the Department that his homestead entry remained pending before the Department because of the alleged failure by BLM to effectively prosecute the 1974 contest action. According to Wilson, during the nearly 7 years which elapsed between the decision canceling his homestead entry and the filing of his petition for reinstatement, he knew nothing of the BLM action to cancel his claim until he "recently made inquiry at the land office as to the status of land surveys and title to the homestead" (Petition at 2).

While the initial attempt to serve a copy of the contest complaint was unsuccessful, the BLM case file reveals, however, that BLM's second attempt to serve a contest complaint upon Wilson was received and signed for by Belle Wilson on August 20, 1974. This complaint was sent by certified mail to appellant's address of record at Chena Hot Springs, Alaska 99700. Under 43 CFR 4.422(c) service of a document may be made by personal delivery or by registered or certified mail, return receipt requested, to the individual's address of record with BLM. See 43 CFR 4.450-5. Service by registered or certified mail may be proved by a post office return receipt showing the document was delivered at his record address or showing that the document could not be delivered to his record address because he had moved without leaving a forwarding address or because delivery was refused at that address or because no such address exists. 43 CFR 4.422(c)(2). A document is considered served at the time of personal service, of delivery of a registered or certified letter, or of the return by the post office of an undelivered registered or certified letter. 43 CFR 4.422(c)(3). Therefore, in this case, BLM properly served the second contest complaint on Wilson. Since he failed to answer the complaint, BLM also properly found the allegations of the complaint were admitted. See 43 CFR 4.450-7(a). These allegations, that Wilson failed to establish and maintain residence upon the homestead as required by law, were sufficient to invalidate appellant's application, and BLM properly canceled the entry. *United States v. Niece*, 33 IBLA 290 (1978).

BLM's October 2, 1974, decision canceling the entry was, however, never properly served on appellant. BLM also chose to serve the

decision document by certified mail. What happened when the post office received the decision document is described by Wilson:

[T]he Post Office returned the Decision as unclaimed after only a single attempt at notification of the undersigned. The Post Office's statement on the envelope did not show that it was, in fact, delivered or attempted to be delivered to the record address at Chena Hot Springs, Alaska, nor did it show that it could not be delivered because the addressee had moved without leaving a forwarding address, or that delivery was refused, or that such address does not exist. In any event, the undersigned did not receive the decision, and neither actual or constructive service was accomplished. Nondelivery due merely to the document being "unclaimed" is insufficient grounds for proving service under BLM regulations. See 43 CFR 4.422(c)(2).

(Petition at 5).

[1] The record on appeal supports appellant's statement of the facts. BLM memoranda to the file establish that Wilson's mail addressed to Chena Hot Springs was not delivered to Chena Hot Springs, which had no post office, but was held at the post office in Fairbanks for pickup, usually by Wilson's father. The BLM decision of October 2, 1974, was delivered by BLM to the post office for certified delivery on October 2, 1974. The returned envelope in which the decision was mailed bears the entry "first notice 10/3" and shows that it was returned to BLM on October 10, 1974. A comment by the Fairbanks postmaster upon this form of attempted delivery appears in the record on appeal; he observes, concerning the October 2, 1974, mailing:

The letter appears to have been mishandled in that there is no indication that a second attempt to deliver was made and the letter was returned after seven days.

* * * * *

The present policy is that delivery is attempted three times before returning. Certified mail is then held 15 days before it is returned.

(Letter dated May 10, 1983, from Postmaster Hayes).

Past decisions of this Board establish that where, as here, BLM selects the post office as its agent for the purpose of transmitting an official document, it must bear the consequences of a failure by the post office to make adequate attempts at delivery. See, e.g., *Joan L. Harris*, 37 IBLA 96 (1978). Here the record demonstrates that the October 2 decision was held by the post office for only 7 days before it was returned to BLM. The decision was not delivered to the addressee. Moreover, as appellant points out, delivery was not refused, the addressee had not moved, and the address was a real address. Under these circumstances the constructive notice provision of 43 CFR 1810.2 cannot be invoked. See *L. Lee Horschman*, 74 IBLA 360 (1983); *Joan L. Harris, supra*; *Jack R. Coombs*, 28 IBLA 53 (1976). As a result, until Wilson received notice of the October 2, 1974, decision, his appeal rights were preserved. Therefore, nothing in the record contradicts his assertion that his petition, which must also be considered to be an appeal from the October 2, 1974, decision, was timely made. His petition, and the arguments he advances in support of his contention that he is entitled to patent, must therefore be considered in this light.

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[2] Appellant argues that he is entitled to a patent under provisions of 43 U.S.C. § 1165 (1982) and 43 CFR 1862.6 because, due to lost mail, he was not served with BLM's contest complaint within 30 days of its filing in the land office and, as a consequence, no contest was pending 2 years after "filing of the final Proof" (Statement of Reasons at 7-11). The statute, 43 U.S.C. § 1165 (1982), provides in part:

[A]fter the lapse of two years from the date of the issuance of the receipt of such officer as the Secretary of the Interior may designate upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under [the Act of March 3, 1891], and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him. * * *

Wilson assumes that the 2-year limitation imposed by the statute was triggered by his "filing of final proof" (Statement of Reasons at 7). This, however, is not the law. It is, rather, the issuance of receipt for final payment for the homestead that begins the running of the 2-year period. See *United States v. Bunch*, 64 IBLA 318 (1982). The decision in *Bunch*, after discussing the history of the statute and analyzing cases construing the Act, summarizes the correct rule:

[T]here can be no doubt that the 2-year period [provided by 43 U.S.C. § 1165] does not commence until issuance of the *final* receipt of the receiver, or, in the modern context, the final receipt "of such officer as the Secretary * * * may designate." The "final receipt" evinces the full and final payment of the entryman of all monies due the United States, so that "no subsequent receipt [is] contemplated or required." [Italics in original; citation omitted.]

Id. at 64 IBLA 324. See also *United States v. Braniff (On Reconsideration)*, 65 IBLA 94 (1982).

The record on appeal establishes that Wilson has paid two filing fees totaling \$50; the first payment of \$25 was made for filing the notice of homestead location; the second payment of \$25 was made with appellant's filing of final proof of homestead. He has confused his receipt for the second \$25 payment with the payment required for the entire tract to which he seeks patent. Quite clearly, however, appellant has not paid for the homestead, was never issued a receipt for such payment, and is not entitled to claim the benefit of the provisions of 43 U.S.C. § 1165 (1982).

[3] This leaves for consideration his claim that there was no contest action pending 30 days after commencement of the contest action in the absence of service upon him of the complaint. Regulation 43 CFR 4.450-3 provides that a person desiring to initiate a contest must file a complaint in the proper land office. It further requires a contestant to serve a copy of the contest complaint on the contestee not later than 30 days after filing the complaint. The failure of BLM to serve its complaint in accordance with this regulation, appellant argues, caused the contest to terminate. Appellant claims that issuance of a receipt occurred on January 18, 1972; the record shows BLM filed its complaint on January 14, 1974, and delivered it to the post office on

January 15, 1974, for mailing by certified mail. Service was first obtained on August 20, 1974. A copy of the complaint was posted in the land office on January 15, 1974, and removed on October 2, 1974.

In *Jacob A. Harris*, 42 L.D. 611 (1913), First Assistant Secretary Jones, construing what is now 43 U.S.C. § 1165 (1982), quoted above, concluded

that a contest or protest, to defeat the confirmatory effect of the proviso [of section 1165], must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof; and, in conformity with the well established practice of the Department, such a proceeding will be considered as pending from the moment at which the affidavit is filed, in the case of a private contest or protest, or upon which the Commissioner of the General Land Office, on behalf of the Government, requires something to be done by the entryman or directs a hearing upon a specific charge. The date of the issuance and service of notice is immaterial, if without undue delay and pursuant to the orderly course of business under the regulations.

Id. at 614.

At no time does it appear that the Department withdrew its contest complaint following its first attempt at service. Indeed, the identical complaint, except for a notary's statement, was served on Wilson in the second attempt. A copy of this complaint was posted in the land office at all relevant times. No case cited by appellant supports his argument that a failure to serve the complaint within 30 days causes the complaint to become defective. Nor has appellant shown how the tardy delivery of the complaint adversely affected him in any way. Consequently, it is concluded the Government's contest of homestead application F-429 was pending upon the filing of the contest complaint in the land office on January 14, 1974. *Cf.* Rule 3 of the Federal Rules of Civil Procedure, which provides that "[a] civil action is commenced by filing a complaint with the court." In any event, however, as already established, the provisions of section 1165 were never operative here, since no receipt was ever issued to Wilson, and, therefore, the 2-year period of limitation relied upon by Wilson's argument concerning the contest complaint never began to run.

[4] The BLM decision of October 22, 1981, which rejected Wilson's petition, was based, in part, upon a finding that the provisions of ANILCA section 906(c)(1) operated instantaneously to transfer the land in T. 3 N., R. 9 E., including the land embraced by Wilson's homestead entry, to the State because the lands had earlier been tentatively approved for conveyance to the State (Decision at 3). This determination has been recently confirmed to be the law. *See State of Alaska v. Thorson (On Reconsideration)*, 83 IBLA 237, 249, 91 I.D. 331, 338 (1984), *rev'g State of Alaska v. Thorson*, 76 IBLA 264 (1983), which holds that "[t]he effect of subsection 906(c)(1) of ANILCA on legal title is the same as the effect of a conveyance [to the State of Alaska] by patent." *Thorson* further holds that, despite the subsequent discovery of a conflicting entry or application, such as Wilson's, for an interest in public lands tentatively approved for conveyance to the State of Alaska, "ANILCA was intended to, and did, convey legal title to [other

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pending] claims within [tentatively approved] 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." *Id.* at 253, 91 I.D. at 340. The apparent intent of this language is that the Department shall not, following "tentative approval," make any substantive determinations concerning claims to the lands conveyed by ANILCA to the State. With a single exception, which is later considered, therefore, a determination concerning the merits of any pending conflicting claim to a State selection conveyed by ANILCA can no longer be made by the Department.

Section 906(c)(1) of ANILCA, 43 U.S.C. § 1635(c)(1) (1982) provides, pertinently: "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 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." The *Thorson* decision, which concerned later-filed Native allotment selections in conflict with State selections, rejected the argument that the phrase used by the statute "subject only to valid existing rights" operates to retain conflicting claims for adjudication by the Department. Finding that Congress intended section 906(c)(1) of ANILCA to immediately convey all land tentatively approved for conveyance to the State, even though the land might be subject to "valid existing rights" such as the claim asserted by Wilson, the decision observes at 83 IBLA 246, 91 I.D. 336: "As to the interests (*i.e.*, valid existing rights) * * * 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."

Section 1328 of ANILCA also purports to give legislative approval to homestead claims pending on the date of the Act. Section 1328(a)(1) provides:

Subject to valid existing rights, all applications made pursuant to the Acts of June 1, 1938 (52 Stat. 609), May 3, 1927 (44 Stat. 1364), May 14, 1898 (30 Stat. 413), and March 3, 1891 (26 Stat. 1097), which were filed with the Department of the Interior within the time provided by applicable law, and which describe land in Alaska that was available for entry under the aforementioned statutes when such entry occurred, are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise by paragraph (3) or (4) of this subsection, or where the land description of the entry must be adjusted pursuant to subsection (b) of this section.

Other provisions of section 1328, at subsection (b), provide that the State and "all interested parties" are entitled to notice of the existence of claims such as Wilson's, and are to be accorded 180 days in which to contest these homestead entry claims. In this case, of course, no such notice was given since Wilson's homestead claim was shown on Departmental records to have been extinguished in 1974, and was not, therefore, *pending* on agency records at the time of the tentative

approval to the State. In such circumstances, we conclude that appellant's entry was not subject to legislative approval under section 1328.

On the other hand, it seems clear that a *valid* homestead entry would, independent of legislative ratification, constitute a "valid existing right" within the contemplation of section 906(c)(1) of ANILCA. The *Thorson* opinion establishes that the "rights" referred to are "those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion." *State of Alaska v. Thorson, supra* at 242, 91 I.D. at 334, citing *Solicitor's Opinion*, 88 I.D. 909, 912 (1981). Contrary to his assertion that he is now entitled to patent under provision of ANILCA, therefore, the most that can be said for Wilson's claim is that he might have a claim to a hearing to demonstrate that he has, in fact, a valid claim of homestead, despite his failure to timely answer the contest complaint in 1974.

[5] Past decisions by the Department establish the rule that issuance of patent operates "to transfer the legal title and remove from the jurisdiction of the land department the inquiry into and consideration of * * * disputed questions of fact" in such a case. See *Germania Iron Co. v. United States*, 165 U.S. 379, 383 (1897); *Harry J. Pike*, 67 IBLA 100 (1982); *Dorothy H. Marsh*, 9 IBLA 113 (1973). The consequences of this rule have not always been clear, however. See *State of Alaska*, 45 IBLA 318 (1980), where a divided panel of this Board discusses in three separate opinions the effect of patent upon the subsequent resolution of conflicting claims pending before the Department at the time of patent. See also *Berthlyn Jane Baker*, 41 IBLA 239 (1979), for an earlier discussion of the same issue. These cases indicate that even the fact of patent, though it terminates the Department's "jurisdiction" over the land, may not finally end Departmental action concerning the land. The use of the word "jurisdiction," therefore, may lead to some confusion when it is used to describe the authority of the Department to proceed in dealing with conflicting claims which are not resolved by patent, such as were presented in *Thorson*. What the word means in this context is that power to take direct, substantive action to affect title is withdrawn. See *State of Alaska, supra* at 330.

It now appears clear following the decision in *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979), that where title to land which a Native allotment applicant seeks has passed out of the control of the Department, which therefore lacks the authority to directly adjudicate the claim, the Department nonetheless has a continuing duty to the Native allotment claimant to evaluate the claim of a prior valid right, and to determine whether the land was erroneously conveyed so as equitably to require the Government to seek a reconveyance of the land. See *Aguilar v. United States, supra*; *Thorson, supra* at 254, 91 I.D. at 341. The sole purpose of the *Aguilar* proceeding is to determine whether the United States should sue to recover title to the patented land.

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In *Thorson*, 83 IBLA at 254, 91 I.D. at 341, referring to the Native allotment applications which were there under consideration, the observation is made that "[t]he 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." In *Aguilar*, the court, quoting from a decision of this Board, laid out this general guidance:

This court agrees with Administrative Law Judge Burski who dissented in a recent decision of the Interior Board of Land Appeals dealing with the same issue. He said:

* * * * *

If this Department has erroneously issued the patent to the State in derogation of the appellant's rights, it seems only elementary justice that the Department should bear the economic burdens attendant to a suit to cancel the patent. A hearing is essential before the Department can make an informed judgment as to the merits of the appellant's application.

474 F. Supp. at 847. Clearly, therefore, in a proper case, some continuing Departmental action may be warranted to determine whether to bring suit to compel reconveyance, despite the fact that patent has issued to the lands in dispute.

The analogy between Native allotment claimants rights, which are the subject of *Thorson*, and those asserted by homestead claimants such as Wilson, is not, however, perfect. As Wilson points out in his statement of reasons, section 1328 received scant attention from Congress when it considered ANILCA. Thus, Wilson comments, after discussing the similarity between the Native allotment section of ANILCA, section 905, and the provisions of the Act at section 1328 providing for approval of public land entries in Alaska, that "Section 1328 was added during the final hours of ANILCA's legislative consideration * * *" (Statement of Reasons at 3). From this circumstance, and the surface similarity between sections 905 and 1328, Wilson draws the conclusion that these two provisions must therefore accord equal rights to Natives and non-Natives in a "racially non-discriminatory manner" (Statement of Reasons at 3). In fact, section 1328 was added by House Concurrent Resolution 453, which directed the Clerk of the House of Representatives to make corrections in the enrollment of H.R. 39. H.R. 39, *as amended*, had been previously passed in the Senate and the House as ANILCA. H.R. Con. Res. 453 was submitted, considered, and agreed to in the House of Representatives on November 21, 1980. H.R. Con. Res. 453, 96th Cong., 2d Sess., 126 Cong. Rec. 11183-84. The Resolution was received in the Senate on November 21 (legislative day, November 20), 1980, held at the desk by unanimous consent, and agreed to on December 1, 1980. 126 Cong. Rec. at 15129-32. *See* 94 Stat. 3696 (1980). On December 1, 1980, Senator Stevens of Alaska asked that the following statement be printed in the Congressional Record as legislative history for H.R. 39:

The provision added by this resolution [H.R. Con. Res. 453] is similar to section 905(a) of the bill. That provision approves certain native allotment applications under the Act of May 6, 1906. A number of specific requirements are included in section 905(a) to require adjudication. This concept is being applied to nonnative public land entries in Alaska including but not limited to *pending* homesteads, trades and manufacturing sites, homesite and headquarter sites. [Italics supplied.]

(Cong. Rec. S 15131-32 (Dec. 1, 1980).

Wilson's conclusion concerning the significance of the legislative history of section 1328, thus, ignores two relevant factors: First, there is the fact that his entry application was not pending on agency records at the time of ANILCA's passage. BLM records at the time showed his entry to have been invalidated. Secondly, Wilson fails to consider the effect upon his claim of the lapse now of more than 6 years since the State selection was tentatively approved by BLM. This circumstance brings into play the limitation against the United States provided by 43 U.S.C. § 1166 (1982), and bars further Departmental involvement at any level regardless of the possible merits of Wilson's appeal. *See State of Alaska, supra*.

Section 906 of ANILCA is explicit concerning the time when the legislative approval of State selections takes effect. Section 906(c)(1) provides that such selections are confirmed to the State and "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 the tentative approval.*" (Italics supplied.) The legislative history of the Act reinforces the statutory language on this point. The Senate report of the bill comments, concerning section 906(c)(1):

Subsection (c) confirms all prior selections that had been tentatively approved subject to valid existing rights and Native selection rights under the ANCSA. Title is deemed to have vested with the State as of the date of TA [tentative approval]. As future TA's are given to lands selected by the State, title shall vest on the date of such TA.

S. Rep. No. 413, 96th Cong. 2d Sess. 1980, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5231. Beyond doubt Congress intended the date of tentative approval to be the date of conveyance to the State for all purposes. *See Thorson, supra* at 83 IBLA 249, 91 I.D. 338.

In this case the tentative approval of the State selection which included Wilson's claim of homestead occurred on June 3, 1976. As declared by the decision in *Thorson*, it is now the position of the Department that the legislative conveyance by ANILCA of tentatively approved State selections has the operative effect of a patent. *Thorson*, 83 IBLA at 246, 91 I.D. at 336. As a consequence, all of the right, title, and interest of the United States in the land sought by appellant was transferred to the State of Alaska by ANILCA effective June 3, 1976. *See* section 906(c)(1) of ANILCA; *Thorson, supra*.

Since the conveyance held by Alaska is now more than 6 years old, the provisions of 43 U.S.C. § 1166 (1982) bar any further effort by the United States to inquire on its own behalf into the validity of the patent to the State or to recover back the land which Wilson claims. 43 U.S.C. § 1166 (1982); *State of Alaska, supra*. Section 1166 provides

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pertinently that "[s]uits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." This statutory language has been construed to foreclose any attack upon a patent by the United States more than 6 years after patent issuance. See *United States v. Eaton Shale Co.*, 433 F. Supp. 1256 (D. Colo. 1977), and cases cited. The effects of fraudulent procurement of a patent are considered in the *Eaton Shale Co.* opinion, 433 F. Supp. at 1270, 1271; such considerations are clearly not a factor in this case because the patent was bestowed upon the State by Congress. Moreover, since appellant does not stand in some special legal relationship to the Federal Government, the United States is clearly not authorized to proceed on his behalf, as it might be, for example, were there in this case a trust responsibility owed by the Government to a Native allottee. See, e.g., *Cramer v. United States*, 261 U.S. 219, 233 (1923), where, despite the fact that more than 6 years had passed since issuance of patent, the court held it had jurisdiction "to remove a cloud upon the possessory rights of its [Indian] wards." Because of this relation of trustee and ward, the court found that the action on behalf of Indian allotment claimants could be maintained despite the 6-year statute of limitations "because the relation of the Government to them is such as to justify or require its affirmative intervention." *Id.* at 234. No similar relationship exists here. See also *State of Alaska, supra* at 326, 329, 334.

As other decisions point out, this circumstance does not prevent Wilson from bringing his own action for relief before an appropriate tribunal; the statute limits actions by the United States only. See, e.g., *Capron v. Van Horn*, 258 P. 77 (Cal. 1927). Wilson may, if he considers such a course feasible, pursue a remedy in the courts. This pending appeal must, however, be rejected. *Alaska v. Thorson, supra*.

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.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

**CLARIFICATION OF SECRETARIAL AUTHORITY TO RESTRICT
THE SIZE OF OIL AND GAS LEASE ASSIGNMENTS***

M-36778 (Supp.)

August 13, 1984

Oil and Gas Leases: Assignments or Transfers

Sec. 30a of the Mineral Leasing Act, 30 U.S.C. § 187a, limits the Secretary's discretionary authority to disapprove assignments generally, but preserves it with respect to certain assignments, including those containing a part of a legal subdivision.

Oil and Gas Leases: Assignments or Transfers

The Secretary may disapprove partial assignments of oil and gas leases that are not made on a legal subdivision basis, i.e., not containing 40 acres or multiples thereof. Congress, however, took away the Secretary's authority to disapprove for any reason related to size, partial assignments that do conform to the public land survey.

Mineral Leasing Act: Generally--Oil and Gas Leases: Assignments or Transfers--Oil and Gas Leases: Stipulations

When Congress speaks on a specific matter in the administration of Federal mineral leasing, it thereby defines the public interest and accordingly limits the Secretary's discretion with respect to that matter. A lease stipulation purporting to require a lessee to waive the right of assignment is inconsistent with sec. 30a of the Mineral Leasing Act.

Solicitor's Opinion, M-36778 (June 23, 1969), clarified and affirmed.

OPINION BY SOLICITOR RICHARDSON

OFFICE OF THE SOLICITOR

Memorandum

TO: DIRECTOR, BUREAU OF LAND MANAGEMENT.

**THROUGH: ASSISTANT SECRETARY FOR LAND AND MINERALS
MANAGEMENT**

FROM: SOLICITOR

**SUBJECT: SECRETARIAL AUTHORITY TO RESTRICT THE SIZE OF OIL AND GAS
LEASE ASSIGNMENTS**

You have requested that I reexamine Solicitor's Opinion M-36778, 76 I.D. 108 (1969), on the captioned subject. Lessees' subdivision of larger leases, by assignment, into 40-acre parcels is frustrating assembly of exploration and drilling units, and is the focus of criticism that unsuspecting investors are buying "drilling sites" from lease speculators at inflated prices. You have asked if you have the discretion to disapprove speculative subdivisions of larger leases by partial assignments of less than 640 acres, or of less than 2,560 acres in Alaska.

Solicitor's Opinion, M-36778, *supra*, construed section 30a of the Mineral Leasing Act of 1920, 30 U.S.C. § 187a, to prohibit you from doing so unless the assignment were for other than 40 acres--the

* Not in chronological order.

"smallest legal subdivision" of the public land survey--or a multiple thereof. In doing so, the opinion construed the proviso in section 30a, "the Secretary may, in his discretion, disapprove an assignment . . . of a *part of a legal subdivision.*" 30 U.S.C. § 187a (italics added.)

Our analysis indicates that while the Solicitor's Opinion failed to discuss some important legislative history of section 30a, its conclusion is correct. The "legal subdivision" for purposes of section 30a is 40 acres or multiples thereof. Some of the opinion's discussion may have been misread to imply that irregular subdivisions in assignments larger than 40 acres (e.g., 60 acres) could not be disapproved, but the opinion does not so state, and that implication is erroneous.

LEGISLATIVE HISTORY OF 30 U.S.C. § 187a

Section 30 of the Mineral Leasing Act of 1920, 30 U.S.C. § 187, provided, "no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior." The authority was implemented by a standard form oil and gas lease clause in which the lessee promised, "Not to assign this lease or any interest therein . . . except with the consent in writing of the Secretary . . . first had and obtained." Sec. 2(1), 47 L.D. 449 (1920). In the early 1940's, the requirement for Departmental approval prior to assignment was removed from the regulations and the lease form, although discretionary approval after assignment was still in force. Circular 1504, 7 Fed. Reg. 2246 (1942), adding 43 C.F.R. 192.42d, and amending section 2(p) of the lease form, 43 C.F.R. 192.28 (1942). Aside from standard adjudication of assignees' qualifications, the rules only contained one clear basis for disapproving an assignment--excess overriding royalties. 43 C.F.R. 192.42d (1942). Still the assignment was not effective, and was subject to discretionary disapproval, until approved by BLM.

Congress passed the Act of August 8, 1946 (the 1946 Amendments), 60 Stat. 954, to amend the Mineral Leasing Act of 1920 in order to "promote the development of oil and gas on the public domain." S. Rep. No. 1392, 79th Cong., 2d Sess 1. Section 7 of the 1946 Amendments added a new section 30a to the Mineral Leasing Act of 1920. The new provision, codified at 30 U.S.C. § 187a, addressed Congress' concern in 1946 about the delay in the approval process for assignments of Federal oil and gas leases. As Congress noted, in the 1940's this procedure regularly took 6 to 12 months. See "Development of Oil and Gas on the Public Domain," Hearings on H.R. 3711 before the Comm. on the Public Lands, 79th Cong., 2d Sess. 24 (1946) [hereinafter referred to as *House Hearings*] (statement of J. Wolfsohn, Assistant Commissioner of the General Land Office). Section 30a took oil and gas lease assignments outside of section 30 and established separate standards governing their approval, and new limits on their disapproval. The amendment "was intended to facilitate the assignment of leases in order to relieve the bottleneck in the Department of the Interior . . ." 92 Cong. Rec. 10,222 (1946).

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The Senate bill, S. 1236, spoke to the problem of delay by allowing assignments to take effect immediately pending Secretarial approval. The House bill, H.R. 3711, contained no provision for Secretarial approval of any type. It would have made oil and gas leases freely alienable by lessees. House Hearings at 3, 17. The Department of the Interior, in its draft bill, suggested allowing the Secretary to disapprove an assignment "for cause." *House Hearings* at 44-45. "For cause" included, without specification, noncompliance with citizenship, bond, or acreage limitation requirements, or regulatory requirements such as the limitation on overriding royalties.

To the Department, "for cause" also meant the right to reject an assignment of "less than a legal subdivision." *Id.* at 46. The General Land Office frowned upon odd lot land transactions, and advocated that Congress agree that assignments "be on a legal subdivision" basis. When asked, Assistant Commissioner Wolfsohn agreed that meant "not less than 40 acres . . . or multiples of that." *Id.* This policy reflected the Land Office's judgment that "the whole history of the administration of the [Mineral Leasing] Act is based on the legal subdivisions of the [Public Land] Survey." *Id.*

The House Committee on Public Lands refused to endorse the Department's "for cause" assignment disapproval clause. It did, however, agree that the Secretary should be able to reject an assignment if it contained only part of a legal subdivision. There is no implication in the legislative history other than that the Committee, and then the House, took the Assistant Commissioner at his word, and sought to codify the 40 acres-or-multiples-thereof standard he expressed in the hearing. Thus, the House Committee inserted such a provision into section 7 of S. 1236 that ultimately became section 30a:

Provided, however, That the Secretary may, in his discretion, disapprove an assignment of a separate zone or deposit under any lease, or part of a legal subdivision.

H.R. Rep. No. 2446, 79th Cong., 2d Sess. 2 (1946) (italics added). In other words, the present section 30a was substituted for the Senate and House proposals following the hearing discussion recounted above. On a voice vote, the House approved the Senate bill with the amended section 7 and other Committee amendments. 92 Cong. Rec. 9099-102 (1946). Without debate on this issue, the Senate agreed to the House revision, including the amended section 7, and passed the bill on July 26. 92 Cong. Rec. 10221-22 (1946).

Section 30a thus limits the Secretary's discretionary authority to disapprove assignments generally, but preserves it with respect to certain assignments, including those containing parts of legal subdivisions. As interpreted by the General Land Office in the House Hearings, the Secretary has since exercised this authority to approve assignments containing 40 acres or multiples of that sum but to disapprove "odd lot" assignment requests. Such a policy has simplified

the administrative burden on the approving officials and conformed lease sizes to traditional land survey practices.

SOLICITOR'S OPINION M-36778

Although Solicitor's Opinion M-36778 reaches the same conclusion as this memorandum, it did not mention the hearing record discussed above. As a consequence, there is one sentence in the opinion which has been misread. After concluding Congress used the phrase, "legal subdivision" as a term of art, the opinion states,

Congress . . . only authorized [the Secretary] to disapprove an assignment when the assigned tract is of such a small size that it cannot be considered a "legal subdivision," i.e., when the assigned tract is less than the smallest legal subdivision.

76 I.D. at 111. This sentence in the Solicitor's Opinion appears to conflict with the General Land Office's position in the House hearings, which is the operative legislative history of the adopted section 30a on this point. This sentence has been read to mean that a 60-acre assignment could not be disapproved, as it is larger "than the smallest possible legal subdivision." 76 I.D. at 111. A 60-acre assignment may be disapproved, however. The House Committee, in our view, adopted the Assistant Commissioner's 40 acres or *multiples thereof*. The Solicitor's Opinion expressly recognized this principle in its conclusion, although the opinion did not note that testimony. 76 I.D. at 112.

A POSSIBLE ALTERNATIVE

Your staff has suggested an alternative means by which the Secretary might prohibit small assignments. Under this proposal, the Secretary would place stipulations in future leases in which the lessee would waive the right to assign any fractional portions of his lease less than 640 acres (or less than 2,560 acres in Alaska). The stipulation would reserve to the Secretary the discretionary power to disapprove such an assignment. We do not believe this is permissible.

Generally, the Secretary may validly impose stipulations in a lease which prevent a lessee from exercising rights under a lease which the lessee would have in the absence of the stipulation. In other words, stipulations consistent with the statute may modify the grant of rights in the standard form of lease. For example, where a lease contains a "No Surface Occupancy" stipulation, the Secretary can preclude any and all exploration and development activities on the leasehold surface. *See Sierra Club v. Peterson*, 17 E.R.C. 1449, 1453 (D.D.C. March 31, 1982), *rev'd on other grounds*, 717 F.2d 1409 (D.C. Cir. 1983). Such a stipulation modifying the standard lease can be properly imposed upon a lessee because the Act does not prescribe the form of lease or the nature or extent of the rights to be granted in lease issuance. In section 30 (lease terms to "safeguard the public welfare"), section 32 ("do any and all things necessary") and section 33 (forms for leases), Congress granted the Secretary substantial discretion in formulating the terms and conditions of leases issued, in order to serve the purposes of the Mineral Leasing Act of 1920. 30 U.S.C. §§ 187, 189,

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190. We take these purposes to be to "promote the prospecting and development of the mineral deposits of the public domain *with due protection to the public interest.*" (Italics added.) H.R. Rep. 398, 66th Cong., 2d Sess. 18 (1919). On matters arising under the Act to which Congress has not spoken, or on which Congress vested discretion in the Secretary, the Secretary determines what measures serve the purposes of the Act. *E.g., United States ex rel. McLennan v. Wilbur*, 283 U.S. 414 (1931); *Krueger v. Morton*, 539 F.2d 235 (D.C. Cir. 1976); *California Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961); *United States v. Southwest Potash Corp.*, 352 F.2d 113, 117-18 (10th Cir. 1965).

When Congress speaks on a specific matter in the administration of Federal mineral leasing, it thereby defines the public interest and accordingly limits the Secretary's discretion with respect to that matter. In section 30a, Congress intended to make oil and gas leases freely assignable, subject to listed exceptions. A lease stipulation purporting to require a lessee to waive this right of assignment as a condition of lease issuance is inconsistent with the terms Congress has provided to govern oil and gas leases. A lease offeror or bidder, by objecting to lease issuance under those terms or to executing that stipulation, could successfully prevent the Secretary from requiring the execution of a stipulation inconsistent with section 30a of the Act as a condition of lease issuance.

CONCLUSION

The Secretary may disapprove partial assignments of oil and gas leases that are for acreages other than 40 acres of multiples thereof. Congress, however, took away the Secretary's authority, for any reason related to size, to disapprove partial assignments that do conform to these public land survey principles. With this supplemental discussion of the legislative history of the 1946 Amendments in mind, I reaffirm Solicitor's Opinion M-36778.

FRANK K. RICHARDSON
Solicitor

CALIFORNIA ENERGY CO. (ON RECONSIDERATION)

85 IBLA 254

Decided March 6, 1985

Appeal from a decision of the California State Office, Bureau of Land Management, rejecting a high bid for a competitive geothermal resources lease. CA 11402.

Reversed.

**1. Act of December 24, 1970--Geothermal Leases: Competitive Leases--
Geothermal Leases: Discretion to Lease--Rules of Practice: Appeals:
Burden of Proof**

Where the Board has referred a high bid rejection dispute under a geothermal resources lease sale to the Hearings Division for an evidentiary hearing and decision by an Administrative Law Judge, the appropriate standard of proof is that appellant show by a preponderance of the evidence that BLM's action was improper.

**2. Act of December 24, 1970--Geothermal Leases: Competitive Leases--
Geothermal Leases: Discretion to Lease**

It was error for MMS to regard costs associated with the Coso Geothermal Exploratory Hole No. 1, drilled under the auspices of the Department of Energy, as not comparable to estimated costs for the drilling of a geothermal resources exploration well in another area of the Coso Known Geothermal Resources Area, for purposes of establishing the minimum acceptable bid in a competitive sale.

**3. Act of December 24, 1970--Geothermal Leases: Competitive Leases--
Geothermal Leases: Discretion to Lease**

It was error for MMS to estimate drilling costs for a geothermal well on the basis of costs experienced in oil and gas drilling. The two types of exploration are so dissimilar that meaningful cost comparisons cannot be made.

APPEARANCES: Kenneth Press Nemzer, Esq., Santa Rosa, California, and L. Charles Johnson, Esq., Pocatella, Idaho, for appellant; Lynn M. Cox, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF LAND APPEALS

Background

This matter is before the Board on review of a recommended decision issued by Administrative Law Judge E. Kendall Clarke, issued December 15, 1983, following an evidentiary hearing held December 1 to 3, 1982, pursuant to Board order issued September 8, 1982. The foregoing order set aside a previous decision in the case, issued April 6, 1982, reversing a decision of the California State Office, Bureau of Land Management (BLM, appellee), rejecting the high bid of California Energy Co. (appellant) for parcel 20 in the Coso Hot Springs competitive geothermal resources lease sale held September 15, 1981. *California Energy Co.*, 63 IBLA 159 (1982).

In setting aside its previous decision (in response to a petition for reconsideration by BLM), the Board's September 8 order stated, "the allegations set out in the affidavits of two employees of the Minerals Management Service [MMS] raise substantial questions as to the actual costs of drilling a geothermal well." The Board's first decision in this case accepted appellant's arguments that its high bid for parcel 20 of \$52.20 per acre was not spurious or unreasonable and that such figure was more representative of the actual value of the parcel than

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BLM's presale minimum acceptable bid evaluation of \$267 per acre. The recommended decision of Judge Clarke holds for appellant and directs that BLM issue a lease for parcel 20 to California Energy Co.

The record before the Board is full and complete. In addition to the prehearing record and the recommended decision, it includes 3 days of hearing transcripts, exhibits, posthearing briefs, exceptions to the recommended decision and appellant's response thereto.

Statement of the Issue

The issue on which a hearing was directed and which is dispositive of this appeal is whether the Government's estimate of costs for the drilling of a geothermal exploratory well in the Coso Known Geothermal Resource Area (CKGRA) that was factored into its computation of a minimum acceptable bid for parcel 20 was reasonable.

Discussion, Findings, and Conclusions

[1] Under the Geothermal Steam Act of 1970, 30 U.S.C. §§ 1001-1025 (1982), the Secretary of the Interior may issue leases within a known geothermal resource area (KGRA) after competitive bidding. *Id.* §§ 1002-1003. The Board has affirmed the reserved authority of the Secretary to reject any bid received, as published in Departmental regulations at 43 CFR 3220.5(c), wherever the record discloses a rational basis for the conclusion that the amount of the bid is inadequate. *Union Oil Co.*, 38 IBLA 373 (1978); *Getty Oil Co.*, 27 IBLA 269 (1976).

Heretofore, the Board has stated that the burden of proof in a proceeding contesting BLM's rejection of a high bid for a geothermal resources lease lies with appellant to show that rejection of its bid as too low was arbitrary and capricious and that BLM had no rational basis for its action. *Union Oil Co.*, *supra*. But, where the Board has referred a high bid rejection case to the Hearings Division for an evidentiary hearing and decision by an Administrative Law Judge, the appropriate standard of proof is that appellant show by a preponderance of the evidence that BLM's action was improper. See *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984), holding that where the Department elects to conduct an informal hearing to consider all the evidence in determining whether a known geological structure exists for purposes of oil and gas leasing, the opposing party need overcome the Geological Survey's finding only by a preponderance of the evidence, not by "clear and definite evidence" as IBLA had required.

From our review of the record and the recommended decision, we find that California Energy Co. has established by a preponderance of the evidence that its high bid should not have been rejected. The recommended decision, which primarily consists of reference to

testimony, appears to set forth two major findings. These may be summarized as follows:

1. Although the exact valuation of the resource, if any, that may lie in parcel 20 presents an almost impossible task, the cost of obtaining the resource may be determined from evaluation of actual data derived from geothermal drilling operations similarly situated. Such evidence was shown in this case through records and testimony regarding the drilling by the Department of Energy (DOE) of Coso Geothermal Exploratory Hole No. 1 (CGEH-1 or DOE well), among other operations. This data from actual geothermal drilling activity provides a more reliable estimate of drilling costs expected on parcel 20 than subjective judgments of BLM or MMS¹ based on exploration costs in oil and gas drilling.

2. If MMS had estimated drilling costs for parcel 20 on the basis of available geothermal drilling data, it would have arrived at a per acre value for the parcel that would render appellant's bid acceptable.

BLM filed the following exceptions to the recommended decision:

1. Judge Clarke overlooked significant testimony from both MMS experts and appellant's own expert witnesses that demonstrates that the costs associated with the DOE well are substantially higher than the normal costs to be expected in drilling an exploratory borehole by private industry.

2. Contrary to the conclusion stated in the recommended decision, if the figure of \$1.5 million is accepted as the cost of drilling an exploratory borehole, appellant's bid is still significantly less than the minimum acceptable bid that would be recommended by MMS and would, therefore, still be rejected by the Bureau.

We find no merit in the above-stated exceptions.

Exception No. 1:

In supporting this exception, BLM points to considerable testimony of Government witnesses regarding the DOE well project which was not discussed in the recommended decision. It is, however, a *non sequitur* to submit that this evidence was "overlooked" by Judge Clarke. It is not the task of the factfinder to regurgitate in a written opinion all the testimony adduced at hearing. Rather, the Administrative Law Judge is expected to sort out the relevant facts based on all evidence received and issue a reasoned decision concerning the material issues.

The recommended decision quotes at length from testimony provided by appellant's expert witness, James Combs, who, among other things, had firsthand knowledge of the DOE well project. Combs characterized the DOE well "as a typical exploratory hole as the private industry drills."²

¹The formal evaluation of parcel 20 was undertaken by the Geological Survey before such functions were absorbed by MMS. The report of the Geothermal Lease Sale Evaluation Committee for the subject sale, dated Sept. 14, 1981, appears as Government exhibit 1 to the hearing record.

²Tr. 291-92.

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[2] The Board's de novo review of all evidence presented leads it to favor Combs' opinion on this score. One need not have been present at the hearing to find Combs' testimony credible.³

As is evident from appellant's exhibit H, a 7-page resume regarding Combs' experience in geothermal resource studies and operations, he has a vast background in geothermal drilling. Of particular significance, he has considerable knowledge of the CKGRA,⁴ including the DOE well project, with which he was closely involved.⁵ Appellant's posthearing brief described the importance of this expert witness to this case as follows:

The only witness involved in the planning and on the site for the actual DOE drilling (and a premier and acknowledged authority (Exhibit H) in the field, being the author of one of the two articles (Exhibit 10) on which the committee report was chiefly concerned) provided at the hearing a factual description of the purpose, drilling, and actualities of the DOE well. Such witness [who] was actually involved in the drilling and preliminary study of CGEH-1, as well as in earlier research wells in the Coso area, was Dr. James Combs. Fortunately, he was available at the hearing to explain the actualities in the situation at Coso. [Appellant's emphasis; footnote omitted.]

(Posthearing Brief at 21-22).

Combs, who is not professionally associated with appellant,⁶ emphatically denied BLM's premise that the DOE well was not representative of a commercial exploratory well because it was drilled as a "government research project."⁷ He noted the similarities in detail.⁸

The similarity of costs between the DOE well and, prospectively, parcel 20, was also explained by Joseph Lefleur, a geothermal exploration geologist for appellant.⁹

The testimony by BLM's witnesses to the effect that the DOE well project is not a valid gauge for determining exploration costs for parcel 20 is not entitled to the same weight as that adduced by appellant, particularly through Combs. Michelson, Deputy Minerals Manager, Resource Evaluation, Western Region, MMS, stated he had no actual drilling experience of any kind.¹⁰ Isherwood acknowledged that he had

³ In large measure, the hearing in this case entailed conflicting opinions offered by witnesses with varying degrees of experience in geothermal resource matters. The general rule that administrative tribunals will defer to the factfinder's determination of witnesses' credibility, see, e.g., *Sam Day IV v. Navajo Area Director*, 12 IBIA 9 (1983), is of lesser importance in cases of this type because, the Board, like the trier-of-fact, can compare expert opinions against the record as a whole to discern what makes the most sense.

⁴ "I would have targeted [parcel 20] at an 8,000 foot hole in this particular environment. And that's basically knowing all of the things I know from having worked in the area for the last ten years or so" (Tr. 348 quoting Combs).

⁵ Tr. 287.

⁶ He is presently Vice President-Exploration, for Geothermal Resources International, Inc., Menlo Park, California, and President, GRI Operator Corp., a wholly-owned subsidiary of Geothermal Resources International.

⁷ See testimony of William F. Isherwood, Acting Deputy Minerals Manager for Geothermal, MMS, at 118; testimony of Marshall Reed, MMS, at 215.

⁸ Such as, much of the hole was drilled with mud in conventional fashion (Tr. 294); rig capability was twice that required for target depth (Tr. 296); geophysical logs were run at every casing point (Tr. 297); and overhead and management costs, but for delayed decisionmaking in the last 30 days of operations on the DOE project, were within the norm (Tr. 297-98).

⁹ Tr. 471.

¹⁰ Tr. 100. As supervisor of the evaluation committee for the September 1981 sale, Mr. Michelson's testimony was probative for other relevant purposes, however.

not participated in the planning or testing of the DOE well.¹¹ This would possibly explain his misunderstanding that the DOE well was drilled with air instead of mud¹² at concomitant higher cost. Marshall Reed, a Government geologist who was detailed to DOE in November 1977 to work on the DOE well project,¹³ was BLM's only witness who had firsthand experience with that operation. Nonetheless, he was not involved with the planning of the project and did not participate in onsite operations.¹⁴ While Reed's testimony, along with the other Government witnesses, was valuable for various insights, the Board is persuaded by the testimony of Combs that the DOE well was not untypical of a geothermal drilling operation as carried out by private industry in a frontier environment.¹⁵

Exception No. 2:

BLM's second exception is founded on a false supposition. It presumes that the recommended decision determined the cost of an exploratory borehole on parcel 20 to be \$1.5 million. From this premise, which the recommended decision does not in fact set forth, BLM seeks to demonstrate that including this figure in MMS' formula for presale evaluation of parcel 20 still renders appellant's bid unacceptable.

The recommended decision stops short of determining actual drilling costs for a geothermal well on parcel 20. With respect to appellant's evidence concerning drilling costs, two separate summaries were provided. Thus, at page 4 it is stated:

The appellant and its scientists relied on information which they had concerning the DOE or CGEH-1 well which they believed to have encountered the same type of problems and costs which would be expected in an industry effort to drill a similar hole and came to an estimated probable cost of a million and a half dollars. If the cost estimate by the appellant for the drilling of the well is substituted into the formula used by the MMS to obtain the minimum value of the parcel using MMS' figure for the value of the resource, the bid of the appellant is within the range of the minimum bid established by the MMS and the BLM and therefore the rejection by BLM of California Energy Company's bid should be reversed and the bid awarded to the appellant.

It is the above language from the recommended decision which BLM uses to posit that accepting \$1.5 million as the cost of an exploratory borehole on parcel 20 still establishes appellant's bid as "significantly less" than the minimum acceptable bid required by BLM.¹⁶

At page 14 of the recommended decision (as corrected by "errata" dated March 19, 1984), Judge Clarke, presumably continuing his review of testimony presented by Combs, states: "Two million dollars is not an unreasonable budget for a 6,000 foot well in a frontier

¹¹ Tr. 188.

¹² Tr. 118, 165. That mud and air were used was made clear by Combs, who participated in the drilling (Tr. 294). In addition, the *Operations Plan, Coso Geothermal Exploratory Hole No. 1*, dated June 1977 (Appellant's Exh. B), a public document available to the evaluation committee, identified the planned use of mud and air. *Id.* at 13-17.

¹³ Tr. 222.

¹⁴ Tr. 222, 237.

¹⁵ A frontier environment refers to an area where there has been no prior commercial activity, even though the area may lie in a KGRA and has undergone research. *See* Tr. 27-28.

¹⁶ As computed by BLM, the per acre value for parcel 20 based on an exploration cost of \$1,500,000 rounds off to \$64 (or \$12 higher than appellant's bid). Exceptions to Recommended Decision, Appendix A.

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environment such as the Coso well and as a quick way of looking at the costs of drilling a well sometimes there is assigned a dollar value per foot."

Neither of the above excerpts from the recommended decision, each of which is cited to the Board by the parties in the manner most favorable to their case, is read by the Board as constituting a determination by the Administrative Law Judge of drilling costs for parcel 20. The passage quoted from page 4 is an apparent reference to evidence presented by appellant regarding cost estimates projected by the company in September 1981 for another project in the Coso area, viz., the Coso No. 1 Geothermal Well, based in part on the company's knowledge of the DOE well experience. See Appellant's Exh. D, entitled *Assumption Sheet for Coso #1 Well*, dated September 17, 1981, itemizing estimated drilling costs for a 5,000-foot well at \$1,334,858.¹⁷ Appellant's vice president for exploration, James L. Moore, testified that exhibit D reflects "direct drilling costs only" and that other costs for "exploration," "overhead," "roads and pads," and "supervision" are not included.¹⁸

Appellant states in its response to BLM's exceptions that "Exploration costs of \$1.5 million were neither advanced by California Energy Company nor accepted by Judge Clarke" (Response at 7). This is borne out by the record.

The quoted passage from page 14 of the recommended decision, on the other hand, stems from several statements made by Combs:

[Counsel for appellant:] You mentioned, for example, a well that costs around \$4 million in the Villes Caldera. Does that happen with some frequency these days?

[Combs:] That is more the typical example in a frontier environment. These same types of very large expenditures have been found from drilling in Nevada and Utah -- the first exploratory wells in an environment. I think some of it is caused by a lack of understanding of what the geothermal environment will be. And some people are just hard-headed enough they won't stop once they get in trouble, they continue to drill. But, in an environment which is what we would call a frontier environment -- the drilling of the first well in that environment -- the budgeting of that well for less than \$2 million is an unreasonable budget for a 6,000 foot well in a frontier environment -- such as the Coso well and this first well in this area.

(Tr. 305-06).

[Counsel for BLM:] You mentioned that in your view, or maybe it's your knowledge, that geothermal wells cost in excess of -- I don't know whether you said two million or a million and a half -- but in excess of two million, let's say.

[Combs:] Yes. I very specifically said that for a 6,000 foot well in a frontier environment, that I would anticipate an expenditure of some \$2 million to complete that well in that particular circumstance.

(Tr. 341).

¹⁷ The Authorization for Expenditure appended to the Assumption sheet cites total costs of \$1,300,296.

¹⁸ Tr. 144. See also testimony of Robert Pryde, appellant's drilling operations manager (Tr. 397-98); Appellant's Response to Appellee's Posthearing Brief at 45-46.

Since the recommended decision cites two sets of costs for geothermal drilling in an area similar to that found on parcel 20 (\$1.5 million, purportedly but not actually arrived at by appellant's scientists,¹⁹ and \$2 million, as set forth by Combs), the "actual cost of drilling a geothermal well" for this parcel, which the Board ordered a hearing to resolve, does not clearly emerge from the recommended decision.

However, Judge Clarke unmistakably found, and we agree, that BLM's estimate of drilling costs (\$850,000), using adjusted oil and gas well drilling costs as the determinant, was error. After highlighting relevant evidence from both parties, Judge Clarke concluded:

It is clear from the foregoing testimony that MMS erred in attempting to use adjusted gas and oil well drilling costs as the basis for the determination of the cost of drilling a geothermal well. Had the proper inquiries been made, and the proper studies been examined a much higher cost for the exploration hole forecast to be drilled to 6,000 feet in parcel 20 would have been obtained. If these costs were then subtracted from the value of the resource as estimated by MMS, the minimum bid value for parcel 20 would have been within the range per acre that was bid by the appellant herein and the bid would not have been rejected.

I therefore find that California Energy Company's bid is not spurious or unreasonable but rather is more likely to correctly reflect the actual value of the parcel. The BLM decision rejecting the high bid is hereby reversed and the matter is remanded with the direction that the lease be issued to the high bidder all else being regular.

(Recommended Decision at 14-15).

If, as the above language suggests, appellant's bid of \$52.20 per acre fairly represents the value of parcel 20, it would entail drilling costs being factored into the MMS valuation formula in the neighborhood of \$1,537,500.²⁰ From the record made in this case, the Board has no difficulty finding that the foregoing figure is a minimum possible cost for geothermal drilling on parcel 20. We further find, however, that the most probable cost is more on the order of \$1,600,000. This figure approximates the cost of the DOE well (\$1,613,000),²¹ which represents a valid indicator of private industry costs for similar exploration. In addition, as best we can determine, \$1,600,000 approximates appellant's anticipated total costs for the Coso No. 1 Geothermal Well, a project planned by appellant contemporaneously with its bid for parcel 20.²²

¹⁹ See note 18, *supra*. Appellant summarized its position regarding the costs of an exploratory geothermal well on parcel 20 in the following way in its posthearing brief:

"California Energy Company knew in 1981, and knows now, that the actual costs and expenses of exploration of the first exploratory well on parcels, such as 20, in the Coso area, direct and indirect, approach three million dollars. The problem is how to prove such known conviction. The Judge is aware of the methods chosen by California Energy at the hearing. It is submitted the evidence clearly and convincingly demonstrates such exploration costs and expenses to be in the area of 1,600,000 dollars to \$3,000,000."

²⁰ Substituting MMS' well cost of \$850,000 in the formula set forth at Table 3, Sale Evaluation Report, with a cost of \$1,537,500 appears as:

$$\begin{aligned} \text{PV Risk} &= 6.815 \times 109 \times 1/1000 \times (1-0.8) - (0.8 \times \$1,537,500) \\ &= 1,863,000 - 1,230,000 \\ &= 133,000 \\ 133,000 - 2554 \text{ ac.} &= \$52.075/\text{ac.} \end{aligned}$$

²¹ See Government Exh. 8. We do not include in this figure *indirect* drilling costs which industry, as a matter of practice, assesses against the first well in any wildcat area, but which BLM does not include in its computations. See Tr. 496-97.

²² Moreover, Michelson testified that MMS and BLM had employed an AEOT (Average Tract Value) analysis to the various high bids (Tr. 97-99). Without addressing the efficacy of this method of high bid analysis (*but see* Combs' criticism of this approach (Tr. 333-34)), lowering the MMS presale estimate to \$64 per acre and applying the AEOT would make appellant's bid acceptable.

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[2] In rejecting \$850,000 as a reasonable cost, we are in full agreement with appellant that the Government's reliance on oil and gas drilling data to calculate geothermal resource exploration costs was error. In its prehearing brief, appellant summarized the major distinctions in the two types of drilling, and the Board finds its summary supported by the record:

If not much can be said about overall statistical comparison, a great deal may be said, and was said in testimony, about specific items of comparison between costs of drilling geothermal as opposed to oil and gas. Significant points include the following:

a. Sandstone and shale are typical environments for oil and gas. Geothermal resources tend to be found in significantly different subsurface environments than oil and gas. Such geothermal environments are much more difficult to drill. As Dr. Isherwood acknowledged, fractured granite is typical of geothermal environments, and is in fact what has been found at Coso KGRA. Uncontradicted testimony by drilling experts Pryde and Combs clearly demonstrated that drilling through hard granite rock is far more difficult, time consuming, and therefore costly.

b. In the nature of fractured rock, such as that at Coso KGRA and other geothermal areas, drilling fluids as a matter of course escape into the open cracks, causing "lost circulation" leading to interruption of drilling and costly delays. Such lost circulation conditions should be expected at all wells drilled into reservoir rock at Coso. Again, there was no significant disagreement between Dr. Isherwood, Dr. Combs, and Mr. Pryde.

c. Mr. Pryde and Dr. Combs testified, and Dr. Isherwood did not refute, that more expensive (insert) drilling bits are customary for geothermal drilling in a Coso type environment as opposed to standard (mill tooth) oil field bits.

d. Both the heat of geothermal drilling and the harder rock combine to wear out drilling tools much more quickly. This means not only replacement of expensive bits and associated down hole tools, but also requires additional "trips": the withdrawing of the entire drill string which is necessary in order to replace the worn and down hole tools. This additional "trip time" results in substantial additional expense, as detailed by both Dr. Combs and Mr. Pryde.

(Appellant's Posthearing Brief at 50-51).

It was established at the hearing that oil and gas drilling is sufficiently unlike geothermal resource exploration that meaningful cost comparisons cannot be made.²³

Based on the record as a whole, the Board therefore finds that it was error for MMS to estimate drilling costs for a geothermal well on parcel 20 based on oil and gas well drilling data and without deference to drilling costs incurred in the DOE well project. Rather than estimating drilling costs at \$850,000, a reasonable estimate would have been \$1,600,000.²⁴ Substituting \$1,600,000 into MMS' formula for per acre valuation (see footnote 20) produces a value of \$32.50 per acre. Appellant's high bid of \$52.20 per acre was therefore reasonable and should not have been rejected. A lease for the parcel should be issued to appellant, all else being regular.²⁵

²³ See Tr. 301, 306, 316, 317.

²⁴ Though BLM would not go this far, its posthearing brief states, "Based upon the testimony of the appellant's expert witnesses MMS could very well concede that the cost for drilling a 6,000 foot exploration well was *somewhat* underestimated" (Posthearing Brief at 26; italics in original).

²⁵ We do not discuss or decide other alleged inadequacies in the MMS sale evaluation formula or the evaluation committee's decisionmaking process, though such matters were the focus of considerable testimony at the hearing and

Continued

Accordingly, pursuant to the authority delegated the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the California State Office, BLM, is reversed.

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

JAMES L. BURSKI
Administrative Judge

GOLDBELT, INC.

85 IBLA 273

Decided *March 12, 1985*

Remand from United States District Court, District of Alaska, requiring further fact-finding and reconsideration of alternative easements offered in place of easement across Native corporation selection approved by *Goldbelt, Inc.*, 74 IBLA 308 (1983).

Goldbelt, Inc., 74 IBLA 308 (1983), affirmed in part, vacated in part and remanded for evidentiary hearing.

1. Alaska Native Claims Settlement Act: Easements: Generally

When considering whether to reserve an easement across a Native land selection made pursuant to the Alaska Native Claims Settlement Act, the Department must consider, in addition to matters relating to the utility of the easement for the use sought, the impact of the reservation upon the Native corporation. The practicability of the use of other, non-Native lands as alternative easement sites must be considered. Such consideration should include the evaluation of alternative means to obtain the easement sought, including possible licensing arrangements proposed by the Native corporation.

2. Alaska Native Claims Settlement Act: Easements: Generally

In considering whether to reserve a transportation easement across a Native corporation's land selection made under the Alaska Native Claims Settlement Act, the Department must not restrict consideration of alternate access to sites which have existing actual road access.

3. Alaska Native Claims Settlement Act: Easements: Generally

An evidentiary hearing is properly ordered to receive further evidence concerning suitable alternative sites for a transportation easement where the record is inadequate to support a finding that there are no suitable alternative easement sites providing similar access.

APPEARANCES: Steven J. Pearson, Esq., Juneau, Alaska, for appellant; Dennis J. Hopewell, Esq., Deputy Regional Solicitor,

in written argument. Appellant has established that on the basis of the formula in use, its high bid was not unreasonable if proper estimates of geothermal drilling costs for parcel 20 had been made. The limited question for which a hearing was ordered has therefore been answered.

March 12, 1985

Alaska Regional Solicitor's Office, Anchorage, Alaska, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

In *Goldbelt, Inc.*, 74 IBLA 308 (1983), this Board affirmed a determination by the Alaska State Office, Bureau of Land Management (BLM), which had reserved transportation and site easements over land at Echo Cove near Juneau, Alaska, selected by Goldbelt, Inc. (Goldbelt), pursuant to section 17(b) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1616(b) (1976). Goldbelt, an Alaska Native urban corporation, had appealed from the BLM decision contending that other locations were available for use as transportation easements to provide public access into Berner's Bay which made reservation of the easements across the Goldbelt selection at Echo Cove unnecessary.

[1] Goldbelt appealed this Board's decision to the United States District Court, District of Alaska, which, in an order granting Goldbelt's motion for summary judgment on the record, reversed this Board's decision affirming the reservation of the Echo Cove easement. The district court declared standards to be used to determine whether an easement may properly be reserved across the Echo Cove location for transportation purposes. In his memorandum opinion, filed with the order for summary judgment, District Judge von der Heydt held that, although this Board had adequately reviewed the record and established proper standards for evaluation of the evidence concerning the alternative easement sites, the Board erred by giving too much weight to the lack of road access to the various sites proposed by appellant as alternatives to the Echo Cove site. The court found that this Board had so emphasized road access that it had virtually made it a "threshold criterion" without which no alternative would be considered (Memorandum Opinion at 21). Judge von der Heydt also found that insufficient attention had been paid to the economic effect that reservation of the Echo Cove easement might have upon Goldbelt. *Id.* at 19, 20. In this regard, the memorandum opinion also requires that consideration must be given to the suitability of the Goldbelt proposal to license the Echo Cove site, pending development of alternative sites. *Id.* at 22.

[2] The district court affirmed this Board's finding that, in any case such as this, the burden lies upon the Native corporation to show the reasonableness of alternative sites offered in place of the reservation proposed by BLM. *Id.* at 9. Judge von der Heydt approved the standard of review as stated and applied by the Board's opinion in *Goldbelt, Inc.*, *supra* at 313. *Id.* at 11. Judge von der Heydt also approved this Board's substantive rulings concerning evidence of prior

use of the Echo Cove easement (*Id.* at 12), and the nature of the use reserved (*Id.* at 13). However, because of the emphasis placed upon usable road access to the Echo Cove site in *Goldbelt, Inc., supra* at 315, the district court determined that there should be further factfinding concerning at least one of the alternative sites suggested, *i.e.*, the proposed location at Sawmill Creek. *Id.* at 20.

While acknowledging the rule established by *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), admonishing the Federal courts to avoid intrusion into agency decisionmaking when reviewing discretionary decisions for abusive practices, the district judge found that the Department was not entitled to the usual deference paid to administrative agencies by the judicial branch because the Department of the Interior was not, in fact, qualified as an expert in handling easement adjudications of the nature involved in this appeal (Memorandum Opinion at 17). Thus, the court found the emphasis placed upon existing access ("real access"), by the Board in *Goldbelt, Inc.*, was not based upon long-standing practice, nor upon agency "technical expertise." *Id.* at 17. Reviewing this Board's action to determine the correct application of the Department's regulations, the court found that the interpretation given by the Board to 43 CFR 2650.4-7(b)(1)(i), regulating reservation of transportation easements, was too narrow, and that additionally, too little attention was paid to the economic effect of easement reservations at Echo Cove upon the Native corporation. *Id.* at 17, 19, 20. The court concluded that, even were the emphasis placed upon "real access" not an erroneous approach, the policy of ANCSA which requires maximum Native participation in these cases would require that this matter be reopened to permit consideration of Goldbelt's offer to license use of Echo Cove under certain conditions. *Id.* at 15, 22. It is true, as the district court observed, that there have been very few Departmental precedents in this area.

The Department has established the rule that a decision reserving an easement supported by a rational basis is entitled to be sustained upon review. *See, e.g., State of Alaska*, 71 IBLA 256 (1983). In considering whether to sustain the reservation of an easement across Native lands a primary concern, *so far as the easement itself is concerned*, is whether there has been present existing use. *See* 43 CFR 2650.4-7(a)(3); *Northway Natives, Inc.*, 69 IBLA 219, 89 I.D. 642 (1982), *overruled in part, United States Fish & Wildlife Service*, 72 IBLA 218 (1983). However, this requirement may not be applied to an evaluation of alternative sites proposed by a Native corporation in an effort to lessen an existing servitude upon selected lands. Such is the situation in this case. Sufficient facts concerning the Cowee Creek and Sawmill Creek locations should therefore be developed to permit the application of the balancing test required by Judge von der Heydt's opinion.

Judge von der Heydt's opinion also required, however, that this Board first reconsider "whether differences in the suitabilities of Bridget Cove and Cowee Creek sites for access to Berner's Bay render

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these proposed alternatives unreasonable." *Id.* at 20. Accordingly, the suitability of either of these two locations as a substitute for the Echo Cove site is now reconsidered by this decision.

At a hearing held from November 2 through 4, 1981, for the purpose of preparing a transcript and record for decisionmaking, evidence was received concerning the use of the Echo Cove site by the public. The possibility of the use of several alternative sites as substitutes for the site at Echo Cove were considered. Testimony concerning those alternative sites at Bridget Cove, Cowee Creek, and Sawmill Creek focused, however, almost exclusively upon Bridget Cove. It was clearly this location which Goldbelt proposed as the preferred alternative to the Echo Cove location (Tr. 41).

This Board reached its decision in *Goldbelt, Inc.* based upon the record developed at the evidentiary hearing. In doing so, the Board refused to permit Goldbelt to reopen the evidentiary hearing to submit further proof concerning the practicability of the use of Sawmill Cove as an alternative site. The Sawmill Cove site, it should be mentioned, is also located within the Goldbelt selection, and would, therefore, involve the reservation of an easement across Goldbelt land. In March 1983 Goldbelt sought permission to show that a pending timber sale would extend the existing road from Echo Cove to Sawmill Creek and make Sawmill Creek a feasible substitute for Echo Cove (*Id.* at 311). Goldbelt also restated an offer to enter into licensing agreements providing for the use of Echo Cove pending development of the Sawmill Cove site. Since, however, the Board found that none of the three alternatives offered was a feasible substitute for the Echo Cove easement site, the question of the practicability of the offered licensing arrangement was not reached. *Id.* at 315.

The testimony at the 1981 evidentiary hearing was almost entirely devoted to a comparison of Bridget and Echo Coves. Ignoring, for the moment, the question of actual, present access to the Bridget Cove site, it is apparent that location does not provide small boats alternative access to Berner's Bay and the state tidelands at Echo Cove. Unlike the other two alternative sites, Bridget Cove is not located upon, or adjacent to, Berner's Bay, but is situated on Lynn Canal (Tr. 39, 40, 60, 129). Maps and testimony admitted at the Administrative Law Judge's hearing establish that, while small boats can travel from Lynn Canal to Berner's Bay, when doing so they must navigate a channel bounded by rock walls which afford no haven in changeable weather (Tr. 169-171). As a result, the use of Bridget Cove to obtain access to Berner's Bay may pose a threat of danger to small boats without motors which is present in none of the other possible access sites (Tr. 306-61, 339-43, 411-15, 425; 449-92; 508-28). There is also indication that Bridget Cove may be too rocky to permit construction of a boat launching ramp (Tr. 119). There is, however, some conflicting testimony which indicates that Bridget Cove and Echo Cove are substantially similar,

and that both are usable by small boats. *See, e.g.,* Tr. 53, 104, 131, 150. Since the other two alternatives, Cowee Creek and Sawmill Creek, were not examined in detail at the 1981 Administrative Law Judge's hearing, it is difficult to say on the basis of the record, whether Cowee Creek may be superior to Bridget Cove for boat transportation purposes.

However, wholly aside from any problem in launching a boat caused by the Bridget Cove site, the testimony of boaters using both sites and boating in the vicinity of Berner's Bay establishes that Echo Cove is a far superior site for small boat access to Berner's Bay. This Board now finds, as a fact, that safety considerations rule out Bridget Cove as a satisfactory alternative to Echo Cove for small boats.

[3] The record now before us does not permit a realistic comparison of Cowee Creek to either Bridget Cove or Echo Cove. The Cowee Creek site was apparently blocked in some way in 1981, and, like the Sawmill site, there was little testimony concerning Cowee Creek. In fact, there is more information in the record concerning the access, suitability, and comparability of Sawmill Creek, than there is with respect to the Cowee Creek site. Since additional factfinding is required concerning the Sawmill site, perforce more evidence is also required before a reasoned comparison of Cowee Creek and Echo Cove can be made.

Both Cowee Creek and Sawmill Creek provide direct access to Berner's Bay. Since a hearing concerning the Sawmill site is required by the district court opinion (Memorandum Opinion at 20, 21), that hearing should also include an inquiry into the possible use of Cowee Creek as an alternate site. This is consistent with the court's observation that the Cowee Creek site should be reconsidered (Memorandum Opinion at 20).

While the remanding judgment forbids the Department to make the existence of present road access to any proposed alternative site a "threshold requirement," it must be emphasized that *access* must nonetheless be a factor, and an important one, in evaluating the suitability of any site. What the memorandum opinion apparently requires is a stated finding as to each alternative site of the economic effect any easement reservation will have upon Goldbelt; the district court opinion requires that adjudication of this matter consider how the "economic potential" of the land selected by the Native Corporation can best be preserved to Goldbelt, consistent with the right of the public to retain access to Berner's Bay (Memorandum Opinion at 18, 19, 20). This balancing test must be applied when judging the merits of Sawmill Creek and Cowee Creek, as alternative sites.

It appears that other alternate sites may also exist, although not mentioned in any part of the record so far developed. Appellant has suggested that, prior to hearing, the parties conduct a conference with a view towards settlement of all the principal issues on appeal, at which time (if agreement is not possible), a schedule could be established for disclosure of witnesses and other arrangements could be

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made for a hearing. Since at any hearing Goldbelt must first establish proof to show that a suitable alternative easement site exists and second, present evidence concerning the economic effect of the continued use of Echo Cove upon Goldbelt, it would clearly be appropriate in this case for the Administrative Law Judge to determine that there should be a conference between the parties prior to hearing in order to establish procedures for the required factfinding. At any such conference scheduled by the Administrative Law Judge, Goldbelt should be prepared to disclose which site or sites it believes to be reasonably suitable alternatives to Echo Cove. If other sites, in addition to Cowee Creek and Sawmill Creek, are proposed, they should also be considered at the subsequent hearing; the expected proof concerning those sites also should be outlined at the conference.

Accordingly, this matter is referred to the Hearings Division for assignment of an Administrative Law Judge who will conduct an evidentiary hearing to permit Goldbelt to supplement the record made in 1981 concerning alternatives to use of the Echo Cove transportation easements reserved by BLM. Goldbelt objects to the designation of Administrative Law Judge Clarke, who has also expressed a reluctance to conduct further hearings on this matter. *See* Tr. 315. Another Administrative Law Judge should therefore be appointed to conduct the required factfinding.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, this matter is referred for hearing to determine whether Cowee Creek or Sawmill Creek provide alternative access to Berner's Bay instead of the Echo Cove site. The Administrative Law Judge's prehearing order shall include a provision requiring that Goldbelt's alternative proposals for licensing public use of Echo Cove be submitted in writing prior to hearing, for incorporation into the record; a provision that alternative proposed transportation sites to be considered at hearing shall also be identified prior to hearing; and that lists of witnesses shall be exchanged. Following hearing, the Administrative Law Judge shall issue findings of fact, conclusions, and a decision. The findings of fact shall include findings concerning (1) the existence of an alternative site to Echo Cove, and (2) the economic effect of this finding, if any, upon Goldbelt. In determining the existence of reasonable alternatives, any licensing proposal offered by Goldbelt shall be considered. The decision by the Administrative Law Judge shall, absent appeal to this Board, be final for the Department.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

R. W. MULLEN
Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

JAMES R. HENSHER *ET AL.*

85 IBLA 343

Decided *March 22, 1985*

Appeals from various decisions of the California State Office, Bureau of Land Management, rejecting Indian allotment applications CA-14478, CA-14479, and CA-15252.

Appeals dismissed.

1. Indians: Lands: Allotments on Public Domain: Generally--Indians: Lands: Allotments on Public Domain: Classification--Rules of Practice: Appeals: Dismissal

Where the Forest Service, U.S. Department of Agriculture, determines that national forest lands applied for as an Indian allotment under 25 U.S.C. § 337 (1982) are more valuable for the timber found thereon than for agricultural or grazing purposes and accordingly rejects the allotment, the allotment applicant has no right of appeal to the Interior Board of Land Appeals but rather must appeal such a determination within the Department of Agriculture.

Lorinda L. Hulsman, 32 IBLA 280 (1977), and *Curtis D. Peters*, 13 IBLA 4, 80 I.D. 595 (1973), are overruled.

APPEARANCES: James R. Hensher, pro se; Lucille G. Hibpshman, pro se; Marilyn B. Miles, Esq., Eureka, California, for appellant Wilverna S. Reece.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

James R. Hensher, Wilverna S. Reece, and Lucille G. Hibpshman have appealed from separate decisions of the California State Office, Bureau of Land Management (BLM), rejecting their Indian allotment applications. For reasons explicated below, we dismiss these appeals.

On March 22, 1976, Hensher filed an Indian allotment application with the Forest Service, U.S. Department of Agriculture, pursuant to section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1982). Hensher sought 40 acres of land situated in the SW 1/4 SE 1/4 sec. 30 and the NW 1/4 NE 1/4 sec. 31, T. 39 N., R. 12 W., Mount Diablo Meridian, California, along the south fork of the Salmon River within the Klamath National Forest. In late 1979, Hensher amended his application to increase the acreage sought to approximately 160 acres, including the land described in the original application.

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On January 15, 1982, Reece filed an Indian allotment application for 20 acres of land situated in the SE 1/4 sec. 30, T. 39 N., R. 12 W., Mount Diablo Meridian, California. This tract sought by Reece was also described in Hensher's application. On June 16, 1983, the Forest Service prepared a report regarding the eligibility of appellants Hensher and Reece to receive Indian allotments, which was approved by the Regional Forester, California Region, Forest Service, on August 10, 1983.

By decision of February 21, 1984, BLM "rejected" Hensher's application, relying on the Forest Service report, because the land had either been appropriated for other uses or was more valuable for timber purposes than for agricultural or grazing purposes. By decision of that same date, BLM "rejected" Reece's application, also relying on the Forest Service report, concluding that the land was not available for disposal and was more valuable for timber than for agricultural or grazing purposes. Both Hensher and Reece have appealed these determinations.

On September 14, 1982, appellant Hibpshman filed an Indian allotment application with the Forest Service, U.S. Department of Agriculture, for 160 acres of land situated in the SE 1/4 sec. 25, T. 7 S., R. 21 E., Mount Diablo Meridian, California, within the Sierra National Forest, pursuant to section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1982). By decision dated March 1, 1984, BLM "rejected" appellant Hibpshman's application, based on an October 31, 1983, Forest Service report, because the Forest Service had determined that the land was chiefly valuable for timber, and thus not available for allotment. Appellant Hibpshman has also appealed to this Board.

All three appellants present various arguments which relate to the substantive conclusions of both the Forest Service reports and BLM's decisions. But, for reasons which we will explore in some detail, we are obliged to dismiss all three appeals. Our action is occasioned not by any specific deficiency in any of appellants' submissions but rather is necessitated by the application of the regulatory provisions relating to Indian allotment applications within units of the national forest system. Since we recognize that our action herein may be seen as inconsistent with numerous prior BLM decisions,¹ we will explain the reasons therefor.

As an initial matter, it is necessary to set out the statutory and regulatory framework which the Department has established for adjudications of Indian allotment applications in the national forests. Section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1982), provides as follows:

¹ Among such decisions are *Lorinda L. Hulsman*, 32 IBLA 280 (1977), and *Curtis D. Peters*, 13 IBLA 4, 80 I.D. 595 (1973). Indeed, because such decisions are so numerous, no attempt will be made to list all cases effectively overruled by our instant decision.

The Secretary of the Interior is authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

The applicable regulations are now found at Subpart 2533 of Title 43. Initially, it should be noted that application is *not* made to BLM, but rather to the Forest Service. Thus, 43 CFR 2533.1 states:

An Indian who desires to apply for an allotment within a national forest under this act must submit the application to the supervisor of the particular forest affected, by whom it will be forwarded with appropriate report, through the district forester and Chief, Forest Service, to the Secretary of Agriculture, in order that he may determine whether the land applied for is more valuable for agriculture or grazing than for the timber found thereon.

Assuming that the Secretary of Agriculture determines that the land is more valuable for agriculture or grazing, the regulation then provides that "the Secretary of Agriculture will note that fact on the application and forward it to the *Commissioner of Indian Affairs.*" 43 CFR 2533.2(b) (italics supplied). The regulations then provide that "[i]f the Commissioner of Indian Affairs approves the application, he will transmit it to the Bureau of Land Management for issuance of a trust patent." 43 CFR 2533.2(c).

On the other hand, should the Secretary of Agriculture determine that the land is not more valuable for agriculture or grazing than the timber found thereon, "he will transmit the application to the Secretary of the Interior and inform him of *his* decision in the matter. The Secretary of the Interior will cause the applicant to be informed of *the action of the Secretary of Agriculture.*" 43 CFR 2533.2(a) (italics supplied).

As can be seen, under this regulatory scheme, BLM has no *adjudicatory* functions relating to Indian allotments within national forests. To the extent that the Secretary of Agriculture has determined the land is more valuable for agriculture, any adjudicatory functions of the Department seem clearly to be vested in the Bureau of Indian Affairs (BIA), with BLM having the mere ministerial function of issuing a trust patent in the event that BIA approves the allotment. And, where the Secretary of Agriculture has determined that the land is more valuable for the timber found thereon, the Department merely *informs* the applicant of the decision of the Secretary of Agriculture. Thus, on the one hand, the actions of BLM are purely ministerial, while, on the other hand, they are simply informational.

This Board has recognized part of the informational nature of BLM's role in informing an applicant of a decision of the Secretary of Agriculture that the land is not valuable for agriculture by constantly

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reiterating its view that such a decision of the Secretary of Agriculture is immune from review within the Department of the Interior. *See, e.g., Benjamin F. Sanderson, Sr.*, 16 IBLA 229, 230-31 (1974); *Junior Walter Daugherty*, 7 IBLA 291, 294-95 (1972). To this extent, the Board has given determinations of the Secretary of Agriculture, that the land is not more valuable for agricultural or grazing purposes than for the timber found thereon, the same controlling weight which it accords similar recommendations concerning leasing on acquired lands under Forest Service jurisdiction.

In this regard, however, it seems relatively clear that this Board and its predecessors have been lulled into error by treating the determination of the Secretary of Agriculture under Subpart 2533 in the same manner as they have treated the refusal of the surface managing agency to assent to issuance of an oil and gas lease for acquired lands. The one critical distinction, which has never been properly considered, is that an application for an acquired lands lease is properly filed in BLM. Thus, the adjudication of the application (even where BLM must follow another agency's recommendation) is properly a function of BLM. In contradistinction, insofar as Indian allotments within national forests are concerned, the application is filed not with BLM but with the Forest Service. There is, thus, no BLM adjudicatory function comparable to that which attends acquired lands leasing applications.

In retrospect, it can also be seen that the error of the Board in purporting to adjudicate such appeals was also occasioned by the prior development of similar case law involving Indian allotments on the public domain. Since we recognize that our instant decision may appear to represent a sharp break with our precedents, an examination of the historical genesis of our error seems warranted.

It is helpful to recall the background of the Indian Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331 (1982). Passed in a period of time during which the thrust of governmental Indian policy was to break up the Indian reservations, the Indian Allotment Act was, in effect, an Indian homestead act. *See generally Opinion* 31 L.D. 417 (1902). The Indian Allotment Act therefore allowed Indians to settle on the public domain, where it was "not otherwise appropriated," and initiate a claim for an Indian allotment. 25 U.S.C. §§ 334, 336 (1982). In this regard, the Indian Allotment Act paralleled the Homestead Act, which also permitted the initiation of an entry by settlement.

Commencing near the turn of the century, various forest reserves (predecessors of the national forests) were established in the Western States.² By their nature, they embraced large amounts of acreage and

² Thus, sec. 24 of the General Revision Act of Mar. 3, 1891, 26 Stat. 1103, authorized the President to set aside public lands for forest reservations. By 1905, a total of 85,627,472 acres of land had been included in the forest reserves. *See P. Gates, History of Public Land Law Development* at 579.

included various parcels of land which were more suitable for agriculture activities than preservation of timber. Since, however, the withdrawal of lands for forest reserves expressly removed the land from appropriation under the public land laws, there was no mechanism by which agricultural entry could be made on such lands.

To rectify this lacuna, Congress adopted the Forest Homestead Act in 1906, 34 Stat. 233, which permitted the Secretary of Agriculture to classify lands as "chiefly valuable for agriculture" and so notify the Secretary of the Interior, who would declare such lands open to homestead settlement. A similar intent animated the adoption of section 31 of the Act of June 25, 1910, 25 U.S.C. § 337 (1982), which authorized the allotment of land within the national forests "in conformity with the general allotment laws" upon a determination of the Secretary of Agriculture that the lands applied for "are more valuable for agricultural or grazing purposes than for the timber found thereon."

As might be expected, given a finite amount of land and a great number of individuals willing to lay claim thereto, over a period of time the land remaining in Federal ownership was less and less amenable to productive use for agriculture purposes. Indeed, the entire emphasis of the Department of the Interior began to shift from land disposal to land management, a shift which was effectively codified in the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2744, 43 U.S.C. § 1701 (1982).

Prior to FLPMA, the first significant legislation aiming towards management of Federal lands rather than their disposal was the Taylor Grazing Act of 1934, 43 U.S.C. § 315 (1982). Pursuant to section 7 of the Act, 43 U.S.C. § 315f (1982), all of the land under the jurisdiction of the Department of the Interior in the contiguous United States was withdrawn for classification. Since that time, as a number of court decisions have affirmed, no Indian settlement on the public lands, leading to the acquisition of an Indian allotment, has been allowable unless the land has first been classified as available for such disposition. See, e.g., *Pallin v. United States*, 496 F.2d 27 (9th Cir. 1974).

Because the availability of any public domain land for entry under the general land laws, including Indian allotments, was dependent upon a classification that the land was suitable for such use³ a considerable body of case law developed concerning classification criteria. While this case law was initially generated in homestead adjudications, the standards developed were carried over to Indian allotment adjudication. Thus, in *John E. Balmer*, 71 I.D. 66 (1964), the Assistant Secretary held that, where it was determined that 160 acres

³ Inasmuch as the Taylor Grazing Act, *supra*, was not applicable to Alaska, the land in Alaska continued to be open to settlement without prior favorable classification. See generally *United States v. Flynn*, 53 IBLA 208, 88 I.D. 373 (1981). Thus, Native allotments in Alaska were never dependent upon prior classification of the land as suitable therefor.

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of grazing land were incapable of supporting a family, an Indian allotment for such land was properly rejected.

Departmental adjudication of classification appeals virtually ceased after 1964, however, as a result of a regulatory revision (28 FR 6079 (June 14, 1963)), which removed all classification appeals from the general appellate procedure and instituted in its place a modified certiorari system direct to the Secretary. See 43 CFR 4.410(a)(1), 2450.5. What is important for our purpose is that when the Board began to adjudicate rejections of Indian allotment applications *on national forest lands*, a body of law already existed which delineated various considerations in ascertaining whether the land sought was amenable to the grant of an Indian allotment. Thus, it is understandable, if regrettable, that these later Board decisions applied adjudicatory concepts developed in cases involving public domain Indian allotments to Indian allotments in national forests. The real error lay not in the principles utilized but in the implicit assumption that it was within the purview of the Board's adjudicatory authority to examine the application of these principles.

We now hold, therefore, that where an Indian allotment application for land in the national forest is rejected based on a finding that the land was more valuable for timber than for agriculture or grazing, the prospective allottee has no administrative recourse within the Department of the Interior, but rather must seek review of such a determination through the appropriate channels of the Forest Service, Department of Agriculture. On the other hand, where the Forest Service has determined that the land is more valuable for agricultural or grazing purposes, further adjudication of the acceptability of the allotment application is, by regulation, committed to BIA, not to BLM. It follows, therefore, that since the instant appeals involve a determination by the Forest Service that the land is more valuable for timber purposes, this Board has no jurisdiction over the subject matter of these appeals.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals are dismissed.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

R. W. MULLEN
Administrative Judge

WM. PHILIP HORTON
Chief Administrative Judge

APPEAL OF INDUSTRIAL CONSTRUCTORS, INC.

IBCA-1831

Decided: *March 26, 1985***Contract No. 1-07-7D-C7469, Bureau of Reclamation.****Denied.**

**Contracts: Construction and Operation: Contractor--Contracts:
Construction and Operation: Drawings and Specifications--Contracts:
Construction and Operation: Subcontractors and Suppliers--
Contracts: Performance or Default: Impossibility of Performance--
Rules of Practice: Appeals: Burden of Proof**

A claim for additional compensation based upon a claim of defective specifications is denied where the subcontractor prosecuting the appeal fails to show (i) that the Government made any attempt to enforce a particular specification provision at the station where the disputed work was performed or (ii) that the difficulties encountered in drilling holes for and installing instrumentation in the foundation of an earth-filled dam were attributable to defective specifications rather than to the failure of the prime contractor to properly coordinate the contract work.

APPEARANCES: Jeffrey W. Meyers, Attorney at Law, Frost & Meyers, Omaha, Nebraska for Appellant; William A. Perry, Department Counsel, Denver, Colorado.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The question to be resolved in this appeal is whether appellant has shown that the difficulties encountered in performing the contract work involved in this dispute were attributable to defective specifications¹ as contended by Nebraska Testing Laboratories, Inc., a subcontractor prosecuting the appeal in the name of the prime contractor with its consent.

Findings of Fact

1. Contract No. 1-07-7D-C7469 was awarded to the contractor on August 20, 1981, in the amount of \$35,395,464. The contract called for the construction of Calamus Dam, Stage 2, North Loup Division, Nebraska, Pick-Sloan Missouri Basin program in Garfield and Loup Counties, Nebraska. It required the construction of the second of three stages of a 7,000-foot long earth-filled dam with a maximum height of 85 feet above the streambed. The contract work included installing instruments in the dam foundation at various locations for the purpose of monitoring certain phenomenon within the dam in order to provide information to the Bureau pertaining to performance of the dam,

¹ The claim was initially presented as a changed condition claim (Appeal File Exhibit 6B; hereafter AF followed by reference to the number of the exhibit being cited). The claim of changed conditions appears to have been abandoned with the subcontractor relying solely upon the claim of defective specifications. See Affidavit of Daniel E. McCarthy, President, Nebraska Testing Laboratories, Inc. (Dec. 20, 1984, at 2).

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foundation, and abutments (AF 1, section 4.1). These instruments were to be installed by drilling holes through the embankment into the foundation to certain specified elevations. The instruments were to be placed in the holes at those elevations. The work of drilling the holes and installing the instruments was performed under a subcontract by Nebraska Testing Laboratories, Inc. (hereinafter sometimes called the subcontractor).

2. Prepared on standard forms for construction contracts, including the General Provisions of Standard Form 23-A (Rev. 4/75), as amended, the contract also includes numerous specification provisions. Among the latter provisions is Section 2.2.1 (Removal of Water from Foundations) which outlines in detail the obligations imposed upon the prime contractor with respect to dewatering. The numerous items in the bidding schedule include the following:

Item	Work or Material	Quantity and Unit	Unit Price	Total
19	Drilling holes for pneumatic instrumentation installations	396 lin. ft.	\$6.00	\$2,376.00
20	Installing pneumatic instrument installations	76 instruments	1,300.00	98,800.00

(AF 1).

3. By letter under date of June 12, 1983, Nebraska Testing Laboratories, Inc., notified the contractor that it had encountered a changed condition in the drilling of holes for pneumatic instrumentation installation in the area of the river outlet works at approximately station 20 + 60 (AF 6B). The claim of a changed condition at station 20 + 60 was confirmed by the subcontractor's letter of July 8, 1983, in which the contractor was advised (i) that the instruments installed at that station were PCF-7, PSS-7, PCF-8, and PSS-8; (ii) that the drilling methods used were as outlined in section 4.1.4 of the job specifications;² and (iii) that the amount claimed of \$5,590.79 represents payment only for the additional efforts required to complete this phase of the work because of differing site conditions (AF 5B). With a 10 percent add-on for the prime contractor, the total claim presented to the Government was in the amount of \$6,149.87 (AF 5A).

A claim hearing meeting held in the Bureau of Reclamation (hereafter BOR or the Bureau) office in Ord, Nebraska, on September 13, 1984,³ did not resolve the dispute. Subsequently, by

² The section cited from the specification includes the following provision:

"Clean water, air, or air foam shall be the only acceptable drilling media for drilling conducted in the foundation portion of the holes for pneumatic instrumentation. The drilling media selected must be approved by the contracting officer. All drill holes shall be pumped or bailed dry immediately prior to installation of pneumatic instrumentation. The Government will log each hole insofar as practicable." (AF 1).

³ Concerning this meeting, the president of Nebraska Testing Laboratories, Inc., states:

Continued

letter dated September 15, 1983, the subcontractor amended its prior claim submissions to include defective specifications as a predicate for its claim (AF 4B).

4. The subcontractor started drilling the hole for the installation of instruments PCF-8 and PSS-8 on June 8, 1983, using drilling methods for foundation material outlined in section 4.1.4 of the job specifications. The methods employed involved the use of 6-inch continuous flight augers down to the water level after which an effort was made to complete the hole by wash boring with clean water. After continuous attempts at wash boring, it was concluded that the hole could not be stabilized without introducing other drilling media. The subcontractor's driller and technician on the site suggested to the Government inspector that either the introduction of bentonite or revert would have to be used to try stabilizing the hole. The representatives of the Bureau advised (i) that the initial boring would have to be grouted from the bottom to the top, (ii) that an additional hole would need to be drilled at an offset location, and (iii) that revert could be used as a stabilizing media.

The initial efforts to use revert as a stabilizing media were unsuccessful since once the water table was encountered, the subcontractor was unable to maintain circulation and the bulk of the revert solution escaped down the hole. The problems involved in completing the installation of the instrumentation were overcome, however, by (i) mixing and using a new heavier concentrated batch of revert; (ii) slightly overdrilling the hole in depth to gain additional time to remove the drill stem; and (iii) installing PVC casing as quickly as possible. Thereafter, the hole was flushed until clear water returned; fast brake was induced into the hole to accelerate the breakdown of any remaining amounts of revert solution; the instruments were lowered into the hole to the desired depth and packed with fine-graded sand; a 5-foot seal of bentonite pellets was added; and the rest of the hole filled with a bentonite-sand mixture. As these materials were added to the hole, the casing was incrementally removed.

Drilling for and installation of the PCF-8 and PSS-8 was successfully completed on Saturday, June 11, 1983, with drilling for the installation of PCF-7 and PSS-7 being accomplished on Monday, June 13, followed by clean-up on the morning of June 14, 1983.

5. Both parties agree that the procedure to be used for the drilling of the holes in the foundation material were left to the discretion of the drilling and installation contractor and that only the drilling media to be used was restricted by the specifications. They differ, however, on the question of whether in fact the Government representatives at the site restricted the subcontractor in the drilling techniques that could

"Bureau representatives and drill crew operators reported they had successfully drilled exploratory holes in the same area and through the same geologic materials using comparable equipment and while using water as the drilling media. This was done, however, prior to any construction and prior to pumping operations that caused significant movement of groundwater." (Affidavit of Daniel E. McCarthy, Dec. 20, 1984, at 3).

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be employed. According to a letter to the prime contractor dated September 15, 1984, the Bureau's on-site inspector and a representative of its Denver office told the subcontractor in the field on June 10, 1983, that it could not use any jetting procedure to accomplish the drilling program (AF 4B). Addressing this question in his affidavit of December 13, 1984, Mr. Dennis Miller (BOR Civil Engineer) states at pages 4-5 (i) that the problems encountered by the subcontractor could have been alleviated by the use of other standard drilling techniques permitted by the specifications such as reverse circulation drilling with clear water, jetting while driving casing, or large-stem diameter hollowstem auger and (ii) that these methods had been suggested to the subcontractor as possible alternatives that met the specifications but, in each case, the subcontractor either did not have the equipment available to use these methods or could not obtain the necessary equipment without considerable cost and delay.

6. Commenting upon the Government's position respecting the use of alternative drilling methods authorized by the specifications to complete the installation of the instruments in question, the president of Nebraska Testing Laboratories, Inc., states:

The obvious method for installation of casing to a prescribed depth in granular materials, would have been to jet the casing into place. Our inspector's field book indicates that, on numerous occasions, it was suggested to the Bureau's on-site inspector to bring in a high pressure jet pump to accomplish the insertion of the casing to the desired depth. In each case, the field representative stated we would not be allowed to do this because of the possibility of the disturbance of the foundation material surrounding the instrumentation. [¶] Yet, it is now being said that any method desired, including jetting, could have been used, with the only restrictions being the type of media or drilling fluid used.

(Affidavit of Daniel E. McCarthy, Dec. 20, 1984, at 3-4).

7. Another difference between the parties concerns the adequacy of the subcontractor's equipment for the performance of the contract work in dispute. The BOR considers the failure of the subcontractor to successfully drill the hole on the first attempt to have been caused by the use of equipment inadequate to perform the work required (Affidavit of Dennis Miller, Dec. 13, 1984, at 6). Apropos of this question, the subcontractor states:

Based on the drilling instructions that were detailed in the specifications, paragraph 4.1.4, "Drilling Holes for Pneumatic Instrumentation Installation," any competent drilling contractor would agree that the equipment which was provided and used on-site by Nebraska Testing Laboratories, Inc., would be adequate to effectively complete this work.

(Affidavit of Daniel E. McCarthy, Dec. 20, 1984, at 3).

⁴The record before us does not include the portions of the field book of the subcontractor's inspector considered pertinent to the resolution of the dispute (Findings 5 and 6). An appellant has the burden of proving both the validity and the quantum of their claims. See *Montgomery-Macri Co.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 263, 63 BCA par. 3819 at 19,015. That burden is not carried by failing to offer documentary evidence in support of disputed allegations.

8. The evidence of record indicates, however, that the subcontractor could have met the requirements of the specifications without the delay and expense involved in resorting to the expedient of using revert as a stabilizing media if the prime contractor had ceased its dewatering operations for a couple of days while the subcontractor proceeded with the installation of the instruments in question. In the initial notice of a changed condition having been encountered, the subcontractor states: "Due to the urgency of completing this work so as not to delay progress of the general contractor, alternate drilling methods have been employed and work has continued under the observation of Mr. Dennis Miller and Mr. Jamie McCartney of the Bureau of Reclamation" (AF 6B). Later, in its letter of July 8, 1983, in which additional details concerning the changed conditions claim were furnished, the subcontractor states:

At this point it became evident that the underground flow of water due to dewatering in the area was causing problems of instability within the confines of the hole. The drilling crew asked if dewatering pumps could be shut off long enough to complete the hole and we were advised that that was an impossibility.

(AF 5B at 2).

The subcontractor does not identify the party who refused to permit the dewatering pumps to be shut off long enough to complete the hole. Noted by the Board, however, is the fact that the specifications (section 2.2.1) make the contractor responsible for dewatering. Also noted is the statement from BOR's civil engineer that when the problems involved in drilling and installing the instruments in question arose, the subcontractor was "under considerable pressure from the prime contractor to complete his work and get out of the way" (Affidavit of Dennis Miller, Dec. 13, 1984, at 4).

9. The claim with which we are here concerned is predicated upon the theory of defective specifications. This ground was advanced as a reason for the claim in the subcontractor's letter of September 15, 1983 (AF 4B). In his sworn statement, the president of the subcontractor corporation states the company's position to be that "the specifications are faulty." In support of this view of the matter, the subcontractor points to the drilling instructions detailed in section 4.1.4 of the specifications (Finding 7) and the fact that the same section of the specifications states "[a]ll drill holes shall be pumped or bailed dry immediately prior to installation of pneumatic instrumentation" (note 2, *supra*). After adverting to the statement quoted from the specifications, the Bureau's civil engineer (who was familiar with the problems encountered at Station 20 + 60) states:

However, this specification requirement never resulted in the subcontractor performing this work, because the requirement was never enforced for the particular hole in question. It was quickly realized by all involved in the drilling of this hole that attempting to pump or bail dry the drill hole would be a fruitless endeavor due to the material type and the presence of ground water.

(Affidavit of Dennis Miller, Dec. 28, 1984, at 1).

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Decision

The present case involves a subcontractor seeking to recover additional compensation on the ground that the specifications-governing drilling and installing instruments in the foundation of an earth-filled dam-were defective. The subcontractor has failed to show, however, that the difficulties experienced in performing the disputed work were attributable to the Government's specifications rather than to the failure of the prime contractor to properly coordinate the contract work. The evidence of record indicates that the work in question could have been performed with the equipment and materials the subcontractor brought to the job if the prime contractor had suspended its dewatering operations for a couple of days while the subcontractor proceeded with the installation of the required instruments, at Station 20 + 60 (Finding 8).

For recovery the subcontractor also relies upon the fact that the specifications require that "[a]ll drill holes shall be pumped or bailed dry immediately prior to installation of the pneumatic instrumentation" (note 2, *supra*). While the Government concedes that this requirement of the specifications could not be met at Station 20 + 60, it categorically denies that any attempt was made to enforce this specification provision at that station in view of the conditions prevailing there. The subcontractor has made no effort to show that the costs for which claim has been made were the result of attempting to comply with this particular requirement of the specifications. Absent such a showing, no basis exists for a finding favorable to the appellant on this aspect of the claim. See *Madsen Construction Co.*, ASBCA 22945 (Nov. 30, 1978), 79-1 BCA par. 13,586 at 66,564, in which the Armed Services Board states: "[T]o sustain a right of recovery under this theory, the contractor must not only establish the existence of defects in the drawings and specifications but must also prove that such defects were the cause of the delay or failure in performance (citations omitted)."

For the reasons stated and on the basis of the authorities cited, the appeal is denied.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

DOUGLAS H. WILLSON, W. G. BOONENBERG

86 IBLA 135

Decided April 22, 1985

Appeal from a decision of the Utah State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offers U-52932, U-52933, and U-53152.

Set aside and remanded.

1. Act of September 19, 1914--Mineral Leasing Act: Lands Subject to--Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: Lands Subject to--Oil and Gas Leases: Offers to Lease

The statutory withdrawal pursuant to the Act of Sept. 19, 1914, 38 Stat. 714, of certain lands from location, entry, or appropriation under the public land and mineral laws does not constitute a per se withdrawal from mineral leasing. Leases issued pursuant to the subsequently enacted Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982), are generally not considered to constitute a location, entry, or appropriation of the public lands embraced therein as these terms refer to acts by which a claim of title to the land is initiated.

***Kenneth F. Cummings*, 62 IBLA 206 (1982), overruled to the extent it is inconsistent.**

APPEARANCES: Laura L. Payne, Esq., Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Douglas H. Willson and W. G. Boonenberg have appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated April 20, 1984, rejecting their noncompetitive oil and gas lease offers, U-52932, U-52933, and U-53152.

On April 12, 1983 (U-52932 and U-52933) and May 11, 1983 (U-53152), appellants filed noncompetitive oil and gas lease offers for 7,666.74 acres of land situated in Salt Lake County, Utah, pursuant to section 17 of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 226 (1982). By the Act of September 19, 1914, ch. 302, 38 Stat. 714, Congress provided that certain public lands, including the lands described in the offers, are "hereby reserved from all forms of location, entry, or appropriation, whether under the mineral or nonmineral land laws of the United States, and set aside as a municipal water supply reserve for the use and benefit of the city of Salt Lake City, a municipal corporation of the State of Utah."

By letter dated May 19, 1983, appellants notified the Forest Service, Department of Agriculture, which administers the land, that they would be willing to accept a no-surface-occupancy stipulation as a condition to leasing. The Regional Forester recommended to BLM, by

letter dated April 10, 1984, that appellants' lease offers be rejected despite appellants' willingness to accept no-surface-occupancy stipulations. The Regional Forester stated that to recommend issuance of leases would be "unfair" to earlier lease offerors whose offers had been rejected on the basis that the land was closed to leasing. In its April 1984 decision, BLM rejected appellants' lease offers because the lands are "within the Salt Lake City Municipal Watershed," which was withdrawn from appropriation under the public land laws, "including the mineral leasing laws," by the Act of September 19, 1914.

In their statement of reasons for appeal, appellants contend that the land involved herein was not withdrawn from mineral leasing by the Act of September 19, 1914, because such leasing does not constitute "location, entry, or appropriation" of the land, citing *Noel Teuscher*, 62 I.D. 210, 213 (1955), and *Solicitor's Opinion*, 48 L.D. 459, 462-63 (1921). Appellants also note that the Act of September 19, 1914, predated the authority for leasing minerals established by the Mineral Leasing Act of 1920, 41 Stat. 436, which was enacted almost 6 years later. Appellants urge the Board to overrule its previous decision in *Kenneth F. Cummings*, 62 IBLA 206 (1982), wherein we affirmed rejection of certain noncompetitive oil and gas lease offers in similar circumstances.

[1] In *Kenneth F. Cummings*, *supra* at 209, we specifically concluded that the Act of September 19, 1914, constitutes a "viable and effective statutory withdrawal of the land from the operation of any of the mineral or nonmineral laws of the United States relating to location, entry or disposition, including the mineral leasing laws." However, we are now persuaded that the Act did not per se withdraw the land from the operation of the mineral leasing laws, and to that extent, the Board's decision in *Kenneth F. Cummings*, *supra*, is overruled.

There is substantial precedent within the Department for distinguishing mineral leasing from location, entry, or selection under the public land laws, which latter terms describe acts which initiate the process of acquiring title to the land. *Solicitor's Opinion*, *supra*. As the Deputy Solicitor stated in *Noel Teuscher*, *supra* at 213: "An oil and gas lease is not an appropriation of the leased land in the sense that it sets the land apart from any other use. Such land is subject to other disposition both as to the surface and as to the other mineral deposits in the land." Thus, unless the withdrawal or reservation specifically provides otherwise, withdrawn or reserved land is presumed to be available for oil and gas leasing. *TXO Production Corp.*, 79 IBLA 81, 83-84 (1984); *Douglas E. Smith*, 69 IBLA 343 (1982); *Esdras K. Hartley*, 54 IBLA 38, 88 I.D. 437 (1981). However, "leases will not be issued where the mineral development of the land might seriously impair or destroy the purpose for which the lands have been dedicated." *Noel Teuscher*, *supra* at 213, and cases cited therein.

In the present case, the Act of September 19, 1914, reserves the land "from all forms of location, entry, or appropriation, whether under the mineral or nonmineral land laws." An oil and gas lease is considered

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neither a "location, entry, or appropriation" under the Act. *Solicitor's Opinion, supra* at 462-63; *Noel Teuscher, supra*. Moreover, the Act does not specifically preclude mineral leasing. Indeed, the Act could not have made such a reference because Congress did not provide for mineral leasing until enactment of the Mineral Leasing Act on February 25, 1920. Therefore, we conclude that oil and gas leasing of land within the Salt Lake City municipal watershed is not precluded by the Act itself. However, this is not to say that leasing is required or that BLM does not have the authority to deny issuance of the oil and gas leases.

Prior to leasing, BLM must determine whether leasing would be inconsistent with or materially interfere with the purposes for which the land is reserved, in accordance with BLM's discretionary authority under section 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1982), in order to decide whether to permit leasing and under what terms and conditions. *Udall v. Tallman*, 380 U.S. 1, 4, *rehearing denied*, 380 U.S. 989 (1965); *Schraier v. Hickel*, 419 F.2d 663, 666 (D.C. Cir. 1969); *Haley v. Seaton*, 281 F.2d 620, 624-25 (D.C. Cir. 1960); *Esdras K. Hartley, supra*. In making this determination, BLM should consider the views of Salt Lake City and the Forest Service.¹ BLM should, especially, consider leasing subject to a no-surface-occupancy stipulation.² The paramount concern, as expressed in section 2 of the Act of September 19, 1914, 38 Stat. 715, is that BLM must do nothing which would materially interfere with the purposes of the reservation, *i.e.*, "storing, conserving, and protecting from pollution the said water supply, and preserving, improving, and increasing the timber growth on said lands to more fully accomplish such purposes," or the city's right to "the use of any and all parts of the lands reserved, for the storage and conveying of water and construction and maintenance thereon of all improvements for such purposes."

We, therefore, conclude that BLM improperly rejected appellants' lease offers solely on the basis that the land was withdrawn from mineral leasing. The April 1984, BLM decision is set aside and the case remanded to BLM to determine whether to permit leasing and, if so, under what terms and conditions.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision

¹ The April 1984 letter from the Regional Forester indicates that the Forest Service might recommend issuance of leases, especially given appellants' willingness to accept a no-surface-occupancy stipulation, but for its concern for fairness to prior offerors. On remand, BLM should afford the Forest Service an opportunity to express its views in light of the present holding that oil and gas leasing is not precluded by the Act of Sept. 19, 1914.

The record also does not contain any expression of the city's current views on the subject of leasing, especially given imposition of a no-surface-occupancy stipulation. We note that the city filed a statement in connection with its intervention in *Cummings*, which argued that mineral development of the land would damage the municipal watershed. However, we also note appellants' evidence that tracts owned by Salt Lake City in close proximity to the withdrawn lands embraced in the lease offers are currently subject to oil and gas leases issued by the City.

² We note that leasing, even with a no-surface-occupancy stipulation, may pose an unacceptable risk of damage to the municipal watershed, either through subsidence, fracturing of the underlying strata, or other means. In such circumstances, BLM could properly refuse to issue an oil and gas lease.

appealed from is set aside and the case is remanded to BLM for further action consistent herewith.

C. RANDALL GRANT, JR.
Administrative Judge

I CONCUR:

JAMES L. BURSKI
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING CONCURRING:

As the author of the Board's opinion in *Kenneth F. Cummings*, 62 IBLA 206 (1982), which we now overrule in part, I wish to add a few words in further analysis of the matter.

In the instant case Judge Grant quite properly cites *Noel Teuscher*, 62 I.D. 210 (1955), and *Solicitor's Opinion*, 48 L.D. 459 (1921), to define "entry," "appropriation," and "location" and to establish that mineral leasing does not fall within the scope of those terms as defined by those authorities. However, neither in *Teuscher* nor *Solicitor's Opinion* did the language of the orders of withdrawal make any reference whatever to the mineral laws of the United States. By contrast, the Act of September 19, 1914 (38 Stat. 714), with which we are here concerned, expressly provides that the lands "are hereby reserved from *all forms* of location, entry, or appropriation, *whether under the mineral or nonmineral land laws of the United States * * **" (Italics added.) There can be no question that at the time of its enactment this statute constituted a total withdrawal of the land, and that Congress so intended. Likewise, there can be no question that the Mineral Leasing Act of 1920, enacted less than six years later, must be considered to be one of the "mineral laws of the United States." Looking again at the language of the 1914 Act, we must wonder whether the prohibition against "*all forms* of * * * entry" was intended to encompass any sort of physical entry or ingress upon the land, as opposed to the more limited definition of "entry" which contemplates only the taking of possession of the land under authority of one of the statutes which provide for eventual alienation of the Federal title. The answer, I believe, lies in the application of the rule of *ejusdem generis*. In the 1914 Act the word "entry" appears in association with the words "location" and "appropriation," both of which, in public lands parlance, connote the lawful taking of possession preliminary to the acquisition of title. Thus, the word "entry" cannot be given its broadest meaning, but must be limited to comport with the meanings of the other words with which it is associated. *Noscitur a sociis*.

Accordingly, I now agree that although the Mineral Leasing Act of 1920 is a mineral law of the United States, the interests which can be created under that statute are not of the type proscribed by the

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1914 Act, and I can only extend my apology to Mr. Cummings for my error in his case.

EDWARD W. STUEBING
Administrative Judge

APPEAL OF INTERSEA RESEARCH CORP.

IBCA-1675

Decided: *April 25, 1985*

Contract No. 14-08-0001-18984, Geological Survey.

Sustained in Part.

**Contracts: Performance Or Default: Acceleration--Contracts:
Performance Or Default: Excusable Delays**

What constitutes an order to accelerate in a case where the contractor's theory of recoverability is constructive acceleration should not be measured against a rigid standard, being a flexible notion to be determined on a case-by-case basis; what must be found before a conclusion of constructive acceleration is proper are circumstances which suggest a reasonable conclusion that the Government wanted the contract work accelerated and pressured the contractor to accelerate in fact. In a case where the contract required the contractor to perform at sea and provided that unusually poor weather constituted an excuse for delay, the Government's (1) insistence that the contractor remain at sea ready to perform whenever the weather provided even short periods of operable time, (2) unreasonable delay in responding to the contractor's request for extension because of bad weather, and (3) issuance of cure notices threatening default termination for allegedly untimely performance when the contract's terms required an extension of the performance period for excusable weather-related delays, taken together, constitute the circumstances necessary to a conclusion of constructive acceleration.

APPEARANCES: Richard D. Gluck, Harold E. Mesirov, Philip D. Schiff, Lillick, McHose & Charles, Washington, D.C., for Appellant; Ross W. Dembling, Government Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

The contract involved in this appeal called for appellant, Intersea Research Corp. (IRC), to perform certain services and to deliver products of those services to the United States Geological Survey (USGS). The subject of the contract, described in greater detail later, involved obtaining technical data to be used by the Department in the sale of oil and gas exploration leases on the Outer Continental Shelf. The Department had scheduled the sale to occur in October 1982, but that scheduling was done before the solicitation of proposals which

were the genesis of the subject contract and before the announcement of the identity of the particular tracts to be offered at the sale (AF, Tab A).

As originally envisioned, the Department was to make the tract identification announcement in April 1980. The intent was to proceed to award of the contract in two phases, first, before the tract announcement, a request for technical and business management proposals for the work without price information, and second, after the announcement, cost proposals, and pricing information. In fact, the procedure followed that general outline, but the Department did not make the announcement as contemplated on April 1, 1980, instead delaying until mid-July. Thus, IRC submitted its technical proposal on April 1, 1980, as contemplated, then the Department announced the tract locations in July, over 3 months late, and called for submission of the price proposals by August 8, 1980, when the original schedule called for contract award by late May. Ultimately, USGS awarded the contract to IRC on September 16, 1980 (AF, Tab A at 46, 90, 102; Tab D).

At first, USGS took account of its failures to comply with the original schedule by shortening the performance period in its request for proposal by 2-1/2 months, as those delays occurred. Although the contract as awarded provided for a performance time commensurate with the 185-day period as originally proposed before delays in the preaward process were encountered, the delays nevertheless provide at least a modicum of interest (1) because there was no rescheduling of the lease sale date to accommodate the later start on this contract, the products of which were essential to carry out the sale, and (2) because of the nature of the work called for by the contract.

The object of the contract was to obtain information about potential hazards to oil and gas exploration on and beneath the ocean floor in the designated areas of the Georges Bank (AF, Tab D at 25). IRC was thus required to sail a research vessel fitted with complex and intricate electronic surveying equipment to the area to obtain precise geophysical and navigation data. The contract also required IRC to deliver that data to USGS along with related navigation maps and a summary report resulting from IRC's limited computer analysis of the data (AF, Tab D at 24-36).

As might be expected from the foregoing description of the contract's purposes, IRC's timely performance of its responsibilities was susceptible to weather-related impediments. In fact, any weather which caused seas to exceed 5 feet in height in the survey area would have a significant impact on the quality of data collected. The contract recognized this, providing for up to 25 reimbursable standby days for which the contractor's negotiated cost figure would be reimbursed if the weather were too severe to allow the collection of data of acceptable quality (Tr. 48-50; AF, Tab D at 22-23).

The reason that the unusual provision of reimbursable standby time (or "lay days") was present is centered around the unusual nature of

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the work necessary to accomplish the contract objectives. The confluence of three factors illustrates this point: (1) The survey area was many hours travel time from the vessel's base port; (2) making the vessel and equipment ready together for collecting data, a process called "mobilization," is a painstaking, time-consuming process which must be gone through each time a vessel begins a surveying job of the nature involved here. (The reason for the latter is that a contractor like IRC typically leases both the vessel and the technical equipment, both of which are expensive items, and they must be mated to each other at the start of a survey job. This mobilization process is accomplished by taking test readings and making corrections with the equipment until the proper set-up is accomplished--in what is apparently an extended trial-and-error process--accounting for the description of the process above as "painstaking and time-consuming"); and (3) the costs of leasing the vessel and technical equipment and of paying the crew and related expenses of conducting a survey are significant, and may not be abated during relatively short time periods when productive surveying is impossible for any reason (Tr. 100-03).

Thus, considering all of these illustrative factors plus the effect of severe weather, the reason for reimbursable standby time becomes clearer. If IRC sailed its vessel to the survey area and encountered severe weather such that collection of acceptable quality data became impossible, it would have little practical choice but to remain in the area waiting for the weather to improve. This is so for a number of reasons. For instance, steaming back to port would consume a number of hours and would put the vessel a number of hours away from the survey area to which IRC would have to return when conditions improved in any event. There would be relatively little cost savings in returning to port, excepting crew costs, because the large vessel and equipment lease expenses would continue, assuming a relatively short break in the collection process. (It would make little sense to save costs by demobilizing for a relatively short period because that would imply an expensive and time-consuming remobilization when conditions again allowed data collection.) Therefore, once a vessel is mobilized for this kind of a project, normal deterioration of weather conditions usually does not warrant a return to port but rather a period of "steaming on station" in the survey area until the conditions improve. Recognizing that the contractor would otherwise have to carry a significant (and probably unreasonable) costs risk in the event of poor weather conditions, the contract provided the mentioned 25 lay days. Since at the time of the issuance of the request for proposal the contemplated beginning date for contract performance was not later than late June, it seems reasonable to conclude that USGS deemed that the stated number of reimbursable lay days would be sufficient to cover any weather delays IRC encountered in the normal course of events during the summer months. That USGS did not increase the

number of lay days because of the delay in contract award (which pushed the performance period into the fall and winter months when poor weather conditions in greater frequency could presumably be expected), when considered with the fact that the lease sale date was unchanged despite the delays, is implicit proof of the urgency which USGS felt about completion of the project. (In fact, the original request for proposal called for up to 50 lay days at a time when the expected award date translated into performance during the summer months. On July 11, 1980, when it had to be clear to USGS that performance could not begin until the fall, USGS issued an amendment to the request, eventually incorporated into the contract, which had the effect of reducing the number of allowable lay days to 25 (AF, Tab A at 27, 29, 91). On its face, this revision reflects a strong determination on USGS' part, engendered apparently by the lack of movement on the lease sale date despite delays which had the dual effect of (1) cutting USGS' lead time between contract completion and lease sale date, and (2) pushing the performance period into a portion of the year where normal weather patterns would presumably call for a greater, not a lesser, number of lay days).

As mentioned, USGS awarded the contract on September 16, 1980, with an expected completion date of March 20, 1981. Because of bad weather, the already lengthy mobilization process was even longer in getting accomplished so that IRC was not ready to begin collecting data until November 6 (Complaint and Answer, par. 24). During the mobilization period, IRC lost nearly 11 days to poor weather conditions. By December 2, 1980, the weather had continued to be so historically adverse that IRC had used up nearly all of the 25 reimbursable lay days, including the mobilization period weather downtime. Recognizing that fact, Intersea on that date contacted USGS proposing a meeting to discuss how to deal with the problems and implications for performance created by the weather conditions.¹ The proposed meeting date was December 6, but USGS was unable to arrange the meeting until December 9. By December 6, all of the 25 lay days had been used, and IRC by the time of the meeting had already been standing by at the survey site during bad weather at its own cost. IRC presented information at the meeting showing that adverse weather conditions had prevailed in the survey area in a

¹ In its brief, IRC contends that in its Dec. 2 proposal, it requested aid from USGS in one of the following alternative forms: (1) suspension of performance until the weather cleared; (2) compensation for mobilization of a second research vessel; (3) an addition to the number of lay days; and (4) an extension of the contract completion date. As support for that contention, IRC refers to three record entries: (1) a statement by IRC's president and an exhibit thereto (Horner Statement, Exh. 10); (2) testimony of the president at the hearing (Tr. 59-60); and (3) a complaint paragraph admitted by USGS in its answer (Complaint and Answer, par. 31). Although it is clear enough from all of these sources that IRC made three of the requests detailed above, only the hearing testimony mentions the request for extension of the performance completion date. The exhibit attached to the sworn statement, one of the purportedly supporting record entries, is a telex confirming the earlier verbal request for the meeting. It would be reasonable to expect mention of the extension there if extension was indeed one of the antecedent verbal request alternatives, but such mention is absent. That absence throws the hearing recollection into doubt, because corroboration of the latter would be expected to appear somewhere. On the other hand, it may be that the parties treated an extension as such an obvious part of the request for relief in these circumstances that they did not feel it necessary to mention it formally, it being understood or even discussed without formal, written mention. The request for extension or something that can be construed as such a request may be an important part of the legal theory of recovery IRC advances.

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frequency far exceeding the historical average and noted that a continuation of that frequency for the period from December 17, 1980, through February 1981 would mean additional weather downtime amounting to 63 days beyond the 25 already used. IRC then asked for USGS' aid in alleviating its anxiety over the costs it would incur were such a bad weather pattern in fact to develop. It reiterated its request for the various modes of relief it requested in its December 2 telex (*See* note 1). Regarding IRC's request for a suspension, USGS informed it that none would be available, adding that IRC must "take advantage of every weather window, no matter how small" (AF, Tabs E and F; Complaint and Answer par. 32).² Regarding the other proposed relief, USGS advised IRC to reduce its request to writing (AF, Tab E). IRC complied with that advice by letter dated December 10, 1980 (AF, Tab F). The letter reiterated the request for a suspension. It went on to propose the alternatives of working through the bad weather in exchange for 60 additional reimbursable lay days or simultaneously employing a second vessel with USGS paying for its cost of mobilization. (IRC also requested a deviation from the contract's survey specifications to accommodate piloting in rough weather. USGS eventually allowed the deviation, but that development is relatively inconsequential, because the record tends to establish that the deviation did not affect the quality of the data collected in any event.) At the meeting, USGS had indicated that it would respond to the suggested written request within a reasonably brief period. While it awaited the reply, IRC, although it had run out of the original allotment of lay days, continued to attempt to collect data in the survey area.

From December 10, 1980, until late in January 1981, the IRC survey party experienced continued severe weather conditions so that surveying was possible less than 20 percent of the time during the period (Tr. 138-141, 146-54). From the latter half of December into January 1981, IRC's agents contacted USGS on several occasions seeking a reply to its request. Although USGS consistently promised a

² The quoted language is from appellant's brief referring to the hearing transcript of IRC's president's testimony (IRC Brief at 36). There is considerable disagreement over USGS' attitude at the meeting on this issue which is an important one to IRC's theory. We resolve the question in IRC's favor.

In footnote 3 of its brief, USGS asserts that it did not order collection of data during "every weather window," noting IRC's characterization of that testimony as being "unrebutted" and objecting strenuously on that point by referring to another transcript citation of testimony by the contracting officer (CO). The contents of that citation are equivocal in any event (Government counsel asked: "Did you tell them to shoot and direct them to shoot at any time there was a window of good weather?" and the CO responded: "We did not specify. We told them we would expect them to be out there in the good weather shooting data" (Tr. 263; USGS' brief, in quoting the response, omits the latter sentence)). In light of that equivocation it is not as easy to quarrel with IRC's characterization of its president's testimony on the subject as being "unrebutted." Moreover, at another point in his testimony the CO stated "we had told them we would assume they would be out there shooting when there was good weather" in the context of the Dec. 9 meeting, and the CO's memorandum of that meeting, signed on Dec. 10, 1980, contains this language: "The Contractor was told that if there was any good weather periods they should be out acquiring seismic data as called for in the contract" (AF, Tab F). On balance, we think the record sufficiently supports IRC's claim and its president's testimony that USGS directed data acquisition during any "weather window" at the Dec. 9 meeting and insufficiently supports USGS' denial of any such direction. Some of the reasons for that conclusion appear in this note. Others have overlapping significance to our conclusions on other elements pertaining to the issue of demand for acceleration and therefore will be discussed therewith later in the text.

prompt response, in fact it did not respond until January 19, 1981, 40 days after the request. In a telex of that date, USGS informed IRC that it would not permit a suspension, that it would not allow for more lay days but that it would allow a 30-day no-cost extension because of the bad weather (AF, Tab G). IRC then sent a telex informing USGS that a 30-day extension was inadequate because it had already experienced 30 weather delay days beyond the reimbursable 25, and it therefore requested that the extension be enlarged to 60, or preferably 90, days (AF, Tab H). USGS responded in a letter dated January 27, 1981, essentially denying IRC's request for the greater extension but informing it that USGS "would be willing to grant" an extension beyond the 30 days granted in its earlier telex in a number commensurate with "any additional verifiable bad weather days" IRC might experience (AF, Tab I). Meanwhile, IRC had determined, on January 26, 1981, that the weather made it futile and inordinately expensive to keep the vessel mobilized and notified the CO's representative to that effect by telephone. On January 28, IRC informed USGS by telex that it had demobilized and that it would monitor long-range forecasts so that it could remobilize in time to perform the contract on schedule (AF, Tab K).

Also on January 28, USGS sent IRC a letter. This letter referred to itself as a "Cure Notice" and contained this language: "[T]he Government considers your suspension of data acquisition a condition which is endangering timely performance" and "[y]our failure to provide * * * information [on how IRC plans to meet the schedule] within the [10 days] specified shall be considered as your company's failure to cure your present situation and the Government may terminate this contract for default" (AF, Tab J).

IRC's reply came in a letter dated February 11, 1981. In that letter, IRC advised that its reasons for demobilizing should have been well known to USGS since it was the CO's representative to whom notice was first given and since he had concurred in IRC's reasoning for demobilizing. It went on to inform USGS that it had experienced, since its December 10 request, an additional 10 days of weather delay above the 30 days of extension granted by USGS on January 19 and made formal request for an extension of that length. It further explained how it could remobilize by March 20 and still complete contract performance by the completion date as augmented by a 40-day extension or even as augmented by a 30-day extension assuming USGS denied the then current request for the additional 10 days. In the latter event, IRC wrote, its "schedule for completion * * * will be accelerated" to meet the earlier date (AF, Tab L).

Thereafter, the parties had a number of meetings on contract issues during February. On March 7, USGS, by telephone, granted IRC's request for the 10-day extension and relaxed the navigation/surveying specifications, completing the action begun with IRC's request of December 10. The written confirmation of those changes was issued on March 25 (AF, Tab D at 78-80).

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Three days after the telephoned extension just referenced, that is on March 10, 1981, USGS mailed IRC a telex having as its subject "Cure Notice." Arguably, this telex merely continued in effect the earlier cure notice but, by threatening default termination in 10 days in the absence of detailed assurances on a variety of issues announced therein, it effectively constituted a separate cure notice on its own merits (AF, Tab O). On the same day, IRC filed a Chapter 11 petition with the United States Bankruptcy Court in San Francisco and 2 days after that obtained a temporary restraining order from that court against USGS' termination of the contract. A week after that at a hearing before the bankruptcy court, the parties agreed informally that IRC would resume performance of the contract (Horror Statement, pars. 64, 65; Complaint and Answer, par. 43).

IRC completed mobilization of a different research vessel and resumed surveying on March 28, 1981. Despite the season, severely inclement weather again interfered substantially with data collection so that collection of all of the data was not completed until May 6 (AF, Tab S at 77-79, 110; Tr. 164). Since USGS had granted the second extension (the 10-day extension) on March 7, the completion date for all performance, including the data analysis and reporting, had been April 30. On April 28, IRC requested a further extension to May 17 based on weather delays experienced from March 27 to that point (AF, Tab Q at 156-57). USGS never responded to that request. IRC completed data acquisition on May 6. All performance, including the reporting and analysis requirements, was completed by early July, although much of the reporting and analysis had been done incrementally corresponding with data acquisition (USGS Br. 4; AF, Tab NN (June 30, 1981, invoice); Tr. 327-28).

IRC filed a claim with the CO in a letter dated November 12, 1982. Among the items presented in the letter were claims for constructive acceleration and delays caused by interference from fishing vessels. The CO denied the entire claim and IRC appealed (AF, Tabs P, R). The major theory for recovery advanced by IRC is constructive acceleration. At the prehearing conference the parties stipulated that IRC had suffered delays (beyond the reimbursable lay days) amounting to 47.63 days because of bad weather (Tr. 13). The monetary claims of IRC consist of the following four items: (1) \$402,759 for 47.63 days delay for bad weather at the contract standby rate per lay day of \$8,456, plus 10 percent profit; (2) \$2,275 for 0.269 days delay caused by fishing boats at the same rate, plus 10 percent profit; (3) \$97,392 for mobilizing and demobilizing the second research vessel, plus 10 percent profit; and (4) interest on the claim total at the statutory rate (IRC Br. 102-05).

Decision

The principal theory of the case is that USGS required IRC to accelerate performance, constituting a constructive change for which IRC claims entitlement to payment for its excess costs plus a reasonable profit. The parties agree on the law controlling constructive acceleration. They concur that a most recent and comprehensive statement of the elements of compensable acceleration and of its adjunct, constructive acceleration, can be found in *Norair Engineering Corp. v. United States*, 229 Ct. Cl. 160, 666 F.2d 546 (1981). The court in that case said:

It is generally recognized that, in order to recover for the increased costs of acceleration under a change clause, plaintiff must establish three things: (1) that any delays giving rise to the order [to accelerate] were excusable, (2) that the contractor was ordered to accelerate, and (3) that the contractor in fact accelerated performance and incurred extra costs.

The proper law to be applied is thus clear. The parties disagree on the result when that law is applied in the factual situation of this case.

Addressing the elements of acceleration individually, we consider first the requirement that there be excusable delays. There is little argument on the point. Both parties agree that there were excusable delay periods.³ The periods of delay which they apparently agree were excusable were those severe weather days occurring throughout the performance period, but exclusive of the reimbursed lay days, at least for purposes of determining recoverability under a theory of

³ There is considerable argument about the effect of allegedly unjustified delays in the award process. IRC devoted a not inconsiderable portion of its brief to pointing out how the delay in award disrupted and delayed performance, citing this Board's decision in *L. O. Brayton & Co., IBCA 641-5-67, 70-2 BCA par. 8510* (1970), for the proposition that when the Government ignored the contractor's warnings, similar to IRC's here, that the delay in issuing the notice to proceed would result in performance disruptions because of severe weather, the Government was liable for damages under the acceleration theory.

USGS disputes that conclusion strenuously relying on the facts (1) that *Brayton* involved a delay in issuance of a notice to proceed *after* award, while any "delay" in this case was in awarding the contract and (2) that this Board relied on the suspension of work clause while the constructive acceleration theory flows from the changes clause. The Government also pointed out that it had no obligation, such as would form the basis for recoverability, to IRC during the preaward period and that, in any event, if it caused delays in award it did so by actions in its sovereign capacity for which it may not be held accountable.

IRC countered in its reply brief that USGS, in analyzing *Brayton*, ignored the Board's decision on the contractor's constructive acceleration claim which was based on the default and changes clauses in that contract. IRC also notes that the default clause in this case's contract (in which the acceleration requirement of excusable delay finds its origin) explicitly equates sovereign with nonsovereign acts of the Government as being legitimate potential causes of excusable delay.

As we view our decision in *Brayton*, we favor more IRC's side of the argument than USGS'. Clearly, one of the bases for granting relief in *Brayton* was acceleration, as IRC contends. *Brayton, supra*, 70-2 BCA par. 8510 at 39,560-61. Although, as USGS notes, the delay there was one of issuance of a notice to proceed, not one of award of the contract in the first place, the language of the decision makes clear that the preperformance delays were important to the Board's view of the acceleration issue. It is, nevertheless, not so clear that the preperformance delays by themselves would support the acceleration theory in that case, because there were in that case also certain denied extensions to which the contractor was entitled. In any event we are fortunately not called upon, in this case, to decide the relative importance of preperformance delays to IRC's recoverability nor whether there is an effect on recoverability to the distinction between preaward delays and delays in the postaward period before issuance of the notice to proceed, both because there are present in this case as in *Brayton* certain entitlements to extensions by IRC that were denied by USGS. Thus, we disagree with USGS' apparent view of the case that there is so little in *Brayton* to support IRC and it is so clearly distinguishable from the current case as practically to be support for USGS' side. To that extent at least, we favor IRC's view. We are saved, however, from the difficult questions raised by the latter view, despite the parties' lengthy argument over *Brayton* and their apparent conviction that it is controlling one way or another, because there are facts in this case which allow us to conclude that there was compensable acceleration based on a more traditional version of that theory.

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constructive acceleration.⁴ One problem, however, is that IRC is claiming 47.63 days of operational downtime for the costs of which it is assertedly entitled, and although the parties stipulated at the hearing that this was the correct number it is not clear from the record that they agreed that if liability were found, the correct measure of damages would be based on this number. Certainly, the number does not reflect agreement on what represents the days on which IRC incurred expenses in "accelerating performance," as IRC appears to claim in its brief. Not only would it be impossible to "stipulate" to such a conclusion of law but it is obvious that USGS certainly did not intend to. It appears that there are some excusable delays in the 47.63-day total for which the other elements of acceleration are present and others for which they are not. Our task is to separate the two in the proper proportion. We have no problem, however, finding that there were *some* excusable delays.

The second element, according to our view as stated by the *Norair* court is that there be an order to accelerate. The analysis necessary to reach a conclusion on this issue is significantly more complicated and requires consideration of several factual aspects. *Norair*, among others, teaches that to find this element it is not necessary to find an announcement "couched in terms of a specific command." Other things, like a mere "request to accelerate, or even an expression of concern about lagging progress" could, in the proper circumstances, have the same effect as an order. *Norair Engineering Corp.*, 666 F.2d at 549. IRC has cited other cases in support of this notion, and an examination of them permits a fuller understanding of the rather broad range of circumstances which would allow a proper conclusion that the element of an "order" to accelerate is present. For instance, in *Norair*, the court relied upon written "requests" in which the CO specifically used the words "accelerate" and "expedite." It also noted that the "pressure applied, even if it were merely implicit * * *, is particularly strong where liquidated damages hover in the background." The contract there contained a liquidated damages provision and the CO there reminded the appellant of its existence on several occasions.

Similarly, the contract in *M.S.I. Corp.*, GSBICA No. 2429, 68-2 BCA par. 7377 (1968), another case cited by IRC, also contained a liquidated damages clause. The Board there referred to a great number of incidents documented in the appeal file as supporting its conclusion that the Government required the contractor to accelerate. Although

⁴ USGS has never, in terms, admitted that there were excusable weather delays in this period, but two things lead us to the conclusion that USGS does not disagree. First, its brief, in discussing the elements of acceleration, does not mention the element of excusable delay but goes right to the issue of whether USGS improperly denied extensions for any excusable delays. Second, in January, USGS granted a 30-day extension for severe weather delays, incurred during the preceding weeks. Although these two items hardly concede liability on the claim, they do imply concession of the first element and form the basis for our conclusion that both parties have agreed on the existence of excusable delays despite USGS' continued description of "alleged" weather delays.

the Government did use the terms "expedite" and "accelerate the progress of the work" in a few of those incidents as well as noting the existence of the liquidated damages clause on a few of those occasions, it is clear from the context that the Board considered the central thread of the communications, and not those operative words or the liquidated damages clause, to be crucial to its conclusion that compensable acceleration was present. That thread was a persistent, insistent expression of concern over allegedly lagging progress at a time when the contractor was entitled to extensions for excusable delay.

In the third case on which IRC relies, this Board declined to grant relief for constructive acceleration because, whatever the proper circumstances would be required for concluding in the contractor's favor, that contractor failed to prove them. *Humphrey Contracting Corp.*, IBCA Nos. 555-4-66 and 579-7-66, 68-1 BCA par. 6820 (1968). The Board, in dicta, did, however, acknowledge a view of the law which is consistent with IRC's view here. It mentioned, without obvious disagreement, two then-recent Armed Services Board cases which held contrary to the previously standard requirements in a constructive acceleration case that the contractor must request an extension for excusable delays encountered and the Government must deny it.

[1] What we take to be IRC's central theme on this element is well supported by the cases cited and others. What constitutes an "order" in a constructive acceleration case is something that should not be measured against a rigid standard. The notion is a flexible one and must be determined on a case-by-case basis. A liquidated damages provision in the contract is not necessary. Neither are communications specifically using the words "accelerate," "expedite," or similar terms, nor are requests for extensions accompanied by Government denials. The authorities teach us that these things are not necessary to be found in some combination of two or more in a particular case and that it is not even necessary to find any one of them in the case in order to conclude that there was an "order" to accelerate. The presence of one or more will bolster the contractor's case, but none is crucial. What *is* necessary are circumstances which suggest a reasonable conclusion that the Government wanted the work accelerated and pressured the contractor to accelerate in fact.

IRC contends that USGS "ordered, indeed demanded, acceleration of performance by refusing to allow any suspension of work, by ignoring Intersea's repeated and urgent request for extensions, and by threatening default termination if the schedule were not met" (IRC Brief at 77). USGS' counterargument is that it provided timely extensions of time for performance and that the cure notices were not issued as a vehicle for threatening default, because the reasons for their issuance was "the actions of Intersea in demobilizing, not for untimely performances as required in *Norair*" (USGS Br. at 31).

We conclude that there was a constructive order to accelerate based principally on three record incidents. They are (1) USGS' order,

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delivered at the December 9 meeting, for IRC to stay in the survey area ready to perform whenever the weather broke despite the historic adverse weather that had already exhausted the allotted lay days, (2) USGS' delay in responding to IRC's request for extension, and (3) the threats of default termination.

Of those, the last has the least direct effect on IRC's accelerated performance, but like the other two it contributed to an atmosphere in which IRC's perception that USGS was requiring it to accelerate was a rational, justifiable, and, we find, correct perception. The cure notices had little direct effect on any accelerated performance because there was no evidence that there was any acceleration *after* the notices. The fact that USGS issued the cure notices when they did and in the circumstances they did is indicative of the urgency and inflexibility which characterized the USGS attitude toward this contract and its objectives going back even to the preaward period. Those issuances are therefore probative of the fact that USGS was motivated, at least, to engage in conduct that would establish the elements of constructive acceleration at an earlier time, for instance from early December to the time of demobilization in late January. The circumstances to which we refer and which make the USGS reaction remarkable are: the ongoing unusually severe weather since award; IRC's extreme efforts at great expense to perform despite conditions warranting extensions; USGS awareness, expressed internally, of IRC's efforts and the fact that no contractor could have done more to further performance in the prevailing conditions; IRC's entitlement to extensions based on the weather; the likelihood, given the season and experience, that more excusable delays giving rise to entitlements to more extensions would arise; and the lack of authority to terminate in the case where the proposed termination rests on delay and the contractor is entitled to extensions. We deem the issuance of a cure notice in these circumstances to be unreasonable. It is clear that the USGS motivation here was its desire for an early completion of performance regardless of IRC's contractual rights because the lease sale date had remained unchanged while weather had delayed collection of the data essential for a timely lease sale.

If the motivation to accomplish an early contract completion was so great as to cause USGS to engage in that unreasonable conduct in late January, that makes it likely that the same or a similar motivation was present at or around the time of the meeting on December 9, 1981. If the USGS personnel felt the urgency and pressure for early completion described, as it appears they did, then that provides support for IRC's case for finding that the thrust of the USGS attitude at the December meeting was to order IRC to collect data at "every weather window." It also provides further support for our finding to that effect (See note 2).

The USGS attitude thus provides a link between the issuance of the cure notices and the admonition to collect at every window. The same factor links those two events with the third critical record incident, the delay of USGS in responding to IRC's request for extension. Our earlier discussion of this issue (*see* note 1) suggested that there was no explicit request for an extension before or at the December 9 meeting. We conclude, however, that the fact of a request may be inferred from the circumstances. IRC was making it very clear that the severe weather was seriously jeopardizing completion of the project, and USGS was very aware of that and of the extraordinary efforts IRC had been making to meet the schedule. USGS had been first aware of IRC's plight no later than December 2 when IRC issued its telex requesting a meeting to discuss the weather problems and a way to proceed in the face of them. Among the requests in the telex were, at the least, one for suspension of performance and one for an addition to the number of lay days. At the December 9, 1980, meeting IRC, at the least, repeated those two requests and made a significant demonstration on the weather experience. In its December 10 letter, IRC again repeated those items and demonstration. The letter recited USGS' position, purportedly presented at the December 9 meeting, that the inflexibility of the lease sale schedule made any delay in performance unacceptable. (That IRC's impression of USGS' position was a correct one is confirmed by USGS' January 27, 1981, letter in which it presented the same position (AF, Tab I).) Moreover, the presentation of weather information, of which USGS was independently aware, put USGS on notice that conditions had arisen such as would entitle IRC to excusable delay extensions under the Default Clause. We find that the circumstances amount to a request for extension even if IRC did not literally use extension request terms in its communications with USGS. There thus was a request for extension first extant no later than December 10, 1980, and no definitive response from USGS until its telex of January 19, 1981, a period of 40 days. Although, as we mentioned above, it is not *necessary* to a case for constructive acceleration to establish a request for extension to which the contractor is entitled followed by either a denial or a response that is so untimely as to be of no or little value, it has long been held that the presence of those two elements certainly does make out such a case. We believe that a response 40 days after the request is so untimely. What is necessary to a case of constructive acceleration is a set of circumstances which suggest a reasonable conclusion that the Government wanted the work accelerated and pressured the contractor to accelerate in fact. We have found such circumstances here.

We conclude that these circumstances comprise a case where the Government wanted an acceleration of performance to accomplish the contract tasks before the time of the completion date, as properly extended, and where the Government pressured the contractor to accomplish that acceleration. Accordingly, we also conclude that IRC is entitled to recovery by reason of constructive acceleration.

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Turning to the issue of the appropriate quantum of recovery, we are able to dispose of two subsidiary quantum issues expeditiously. First, IRC has advanced as a proper measure of quantum the contract standby lay day rate of \$8,456 cost, plus 10 percent profit, for each day of operation by IRC under the USGS constructive order of acceleration. USGS has not argued with that measure and there is nothing about it on its face which leads us to believe that it is unjustified or unreasonable. We therefore accept it as the appropriate standard for measuring constructive acceleration quantum. Second, one of the principal elements of IRC's claim is an item for \$97,392, plus profit of 10 percent, for mobilizing and demobilizing the second research vessel. We deny that portion of the claim as being beyond the damages recoverable by reason of constructive acceleration. Our analysis of the factual situation leads us to believe that IRC assumed the risk of this expense at the time of entering into the contract. IRC knew that the delay in awarding the contract jeopardized the chances of weather trouble-free performance and even warned USGS of that potential problem. It entered the contract at the advanced date, nonetheless, obviously relying on good fortune in the weather and other protections afforded by the contract to save it from fiscal disaster. It obviously knew that there was a considerable chance that bad weather would use up the lay days and then cause additional delays. If the delays were extensive, or promised to be, IRC would either have to incur enormous costs while waiting for weather breaks or exercise its option to demobilize while gambling that the number of bad weather days during its demobilization period would amount to a sufficient period which when tacked to the scheduled completion date would allow timely completion despite the intervening demobilization. But for the constructive acceleration order, we must assume that IRC would have demobilized and waited out the weather to minimize its costs. Therefore we cannot say that USGS' constructive order, which caused IRC's compensable acceleration, also caused the demobilization and remobilization. The continued performance when delay was excusable, *i.e.*, acceleration, on the one hand, and demobilization/remobilization on the other, are such antithetical actions that they cannot be reactions to the same cause. In other words, if there had been no acceleration order, IRC, by everything it has told us, would have demobilized on its own relying on excusable delay extensions to allow a timely performance and would not have continued to attempt to collect data in the prevailing weather conditions. If that had been the case, the costs of suspending and restarting would have been IRC's responsibility, the price of its decision to enter into the contract as originally written even though the delayed start date reduced the likelihood that the original terms would adequately cover the costs of risks of the late start. What actually happened here was that IRC did both: it complied with the acceleration order and then suspended

performance when its fiscal situation practically prohibited further compliance with that order. IRC is to be compensated for its costs of compliance with the acceleration order. That compensation should not include the costs of performing a function it would have taken on its own and at its own responsibility had it not been for the very USGS act which allows compensation for the IRC conduct, accelerated performance, which is antithetical to suspending and remobilizing. We deny that portion of the claim for the costs of demobilization and remobilization.

Turning, finally, to the major part of the quantum issue, we note first that there is a significant series of events which defines the dividing line between the instances of excusable delay for which a case for compensation under the constructive acceleration order has been made and those for which such a case has not been made. Those events begin with IRC's demobilization on January 27, 1981, and conclude with the parties' agreement before the Bankruptcy Court to allow IRC to complete performance of the contract. From the time of the demobilization until resumption of data collection in March, there obviously was no performance by IRC at all and thus none to which the constructive acceleration theory could be applied. There has been no showing of USGS conduct amounting to an order to accelerate from the time of the agreement before the Bankruptcy Court until completion of the contract. (While it is true that USGS did not respond to IRC's April 28, 1981, request for extension because of weather related excusable delays in the post-remobilization period, IRC completed data collection by May 6. We are unprepared to conclude that USGS' failure to respond to the request for extension for an effective period of 8 days amounted to a constructive order to accelerate). IRC's claim, however, in totaling 47.63 days of excusable delay does not differentiate between the amount of delay before and after demobilization. Our task, then, is to review the record to make that differentiation.

Starting with IRC's claim, we note that it presented the CO with an item for the December 7, 1980, to January 27, 1981, period totaling 28.383 days (AF, Tab Q at 8). The date we use for the start of the period, however, is December 2, 1980. It was on that date that IRC first requested relief from the effects of the severe weather. Although IRC requested an urgent meeting to consider the issues because it believed it had consumed or was about to consume the contract lay days, USGS elected to put off the meeting for a week at which time it expressed its position which led to our constructive acceleration conclusion. Later review and calculation disclosed that IRC had actually used its 25 lay days before December 2. Because IRC continued dutifully to attempt data collection during the intervening week while USGS provided no guidance on dealing with the problems despite the latter's being aware of the urgency of the situation, we think it proper to relate back the overt expression of the USGS position on December 9 to the IRC request on December 2. Therefore, the 28.383 day amount of the claim,

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assuming it is accurate to begin with, should be expanded to take account of the longer period starting December 2, rather than the period starting December 7.

We first consider whether the 28-plus days figure of the claim is reasonably accurate. In a letter dated September 22, 1983, counsel for IRC mailed Government counsel a proposed stipulation of fact, detailing periods of weather delay on a daily basis from September 30, 1980, through contract completion in May 1981; we have a copy of that letter and detail in the Appeal File. Although Government counsel failed to join in signing the proposed stipulation, we have reason to believe that it was the basis for the stipulation the parties did enter into at the hearing (discussed above). The principal reason for our belief is the coincidence of the numbers when two separate paths are used to determine the correct delay period. To demonstrate this, we begin with the stipulation at the hearing where, after consultation between counsel, the parties decided to deduct 44.5 hours (or 1.854 days) from the total claimed by IRC and stipulate to the remaining 47.63 days as being the weather-related excusable delay period of the contract. To compare that with the proposed stipulation and detail which was covered by the September 22, 1983, letter, we total all of the daily delay periods listed in the detail. That produces a figure of 75.029 days. We know that IRC is not claiming reimbursement for all of those days, because it received payment for 25 lay days under the contract. Therefore only 50.029 possible days remain to which the acceleration could possibly apply. If we deduct from that the 1.854 days which were the subject of the stipulation at the hearing, we reach 48.175 days which is about half a day more than the 47.63 days total agreed upon at the hearing. From this we conclude that the proposed stipulation and detail covered by the September 1983 letter must have been the antecedent for the hearing stipulation. We know that USGS has no serious quarrel with the accuracy of the detail other than that already considered in the hearing stipulation. Therefore we are satisfied with the workable accuracy of each of the component calendar periods expressed in the detail, so it may be used to determine the amount of delay encountered during the acceleration period as determined by reference to the calendar.

We have already concluded that the only period to which acceleration logically could have applied was the period of December 2, 1980, (to which the "every weather window" order related back) to January 26, 1981 (after which IRC demobilized until March). By referring to the proposed stipulation detail for that period, we find that IRC claims that it encountered excusable delay in this period in the amount of 32.492 days.

Our analysis confirms this calculation and we therefore find that IRC experienced a constructive acceleration of 32.761 days (including .269-day delay because of the fishing boats' interference which occurred

on December 22 and 23, 1980, during the period when the acceleration order was in effect).

In conclusion, we grant IRC's appeal in the amount of \$304,729.71, representing the value of the delay including 10 percent profit as detailed, plus interest in accordance with the Contract Disputes Act of 1978. The appeal in all other particulars not treated as the subject of affirmance herein is denied.

DAVID DOANE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Acting Chief Administrative Judge

**APPEAL OF JAMES L. PATTEN d.b.a. JAMES PATTEN
LOGGING**

IBCA-1873

Decided: *April 29, 1985*

Contract No. OR090-TSO-53, Bureau of Land Management.

Granted.

**Contracts: Construction and Operation: Actions of Parties--
Contracts: Disputes and Remedies: Burden of Proof--Rules of
Practice: Appeals: Burden of Proof**

An appeal under a timber sales contract is granted where the Board finds a contractor to have been relieved of his slash burning obligations by reason of the Government having improperly deferred the burning of the slash generated under appellant's contract until such slash could be burned simultaneously with slash generated under another timber sales contract awarded at a later date to someone else.

**APPEARANCES: Ernest Lundeen, Attorney at Law, Eugene, Oregon,
for Appellant; Roger W. Nesbit, Department Counsel, Portland,
Oregon, for the Government.**

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

In this appeal, appellant contests the propriety of the contracting officer's determination¹ that he had failed to assist in slash burning as required by the terms of his contract with the Bureau of Land Management (hereafter BLM or the Bureau) and that as a result of such failure the Government incurred expenses totaling \$1,145² for

¹ Appeal File Exhibit B (hereafter AF followed by a reference to the particular exhibit being cited).

² The amount of the Government's present claim is \$967.34 as a result of the contractor having paid the Government the sum of \$177.66 for a 1,000-gallon tanker truck which the contractor was required to furnish but was unable to do.

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which appellant is liable. Appellant also seeks his costs and attorney fees to the extent allowable by applicable law.³

On July 11, 1980, the contractor was awarded the instant timber sale contract involving a sale volume of 311 MBF and a purchase price of \$39,265. The contractor began logging in December 1980 and completed the logging work in May 1981. The fire trails were completed and the area was prepared for burning in the summer of 1981. The contractor and his crew were available for burning the slash on October 27, 1981, but no attempt was made because the weather was too windy with gusts of 55 mph in the area. By reason of the fall rains and high fuel moistures, no other attempts were planned in 1981 (AF B; Complaint par. II; Answer 1). No attempt was made to burn the slash in 1982.⁴

By letter under date of March 11, 1983, BLM gave the contractor a 10-day written notice of the earliest date of required performance under Section 41(d)(3)(aa) of the instant contract. The letter includes the following paragraph:

The men and equipment required under this section of the contract shall be available on 12-hour notice and when requested by the BLM they will report to the Burn Boss at the timber sale contract area. Your men will assist in ignition, fire control, mop-up, and patrol as directed by the Burn Boss. The Burn Boss for the units on the attached Exhibit A, [7] will discuss the burning plan with your representative prior to the actual burn.

(AF E-4).

On September 7, 1983, another attempt to burn the slash was planned. The Government acknowledges that on that occasion also the contractor showed up with a crew and the necessary equipment except for a tanker truck. Because of the high fuel moistures on an adjacent unit⁶ no burning was attempted. Commenting upon what transpired on that occasion, appellant states in his claim letter of April 9, 1984 (AF E-16):

(1) The man [7] that talked to Mr. Patten indicated to him he wanted to burn Patten's unit as well as the Cove-Salvage Unit, which were adjacent to one another. Mr. Patten's

³ Complain VII. The Board has no authority to award either costs or attorney fees.

⁴ The contracting officer states that burning could not be accomplished in 1982 "because of scheduling problems, improper weather and smoke dispersion conditions" (AF B). The Government has offered no proof in support of this allegation and it is controverted by appellant. (Complaint par. III).

⁵ The Section Diagram (AF A, Exhibit A) shows Clear Cut Area #1 and Clear Cut Area #2 to be covered by the advertised contract with Exhibit B (AF A) showing Unit 1 and Unit 2 to involve 7 acres (192 MBF) and 3 acres (119 MBF) respectively for a total of 10 acres (311 MBF). These same units are shown on AF H which also shows, however, that a portion of what is described as a Reserve area on AF A is covered by what is referred to as the "Yearous-King Contract."

⁶ In Findings of Fact 4 the contracting officer states: "[D]ue to high fuel moistures on an adjacent unit, no burning was attempted * * *" (AF B). Elsewhere the contracting officer states: "It was always our intention to burn the two units [sales] as a single unit" (AF E-17). There is no evidence in the record indicating that the contractor was informed of the BLM's intention in this matter at any time prior to the submission of his bid on the advertised contract involved in this appeal.

⁷ The man in question is Mr. Thomas E. Jackson, who in a written statement dated Mar. 20, 1985, identified the timber sales units here in issue and notes that he had gone to them as a member of a slash burning crew, after which he offered the following comments:

"I don't know the date. Jim Patten was also there. It was very foggy and vegetation along the upper (south) road was very wet with dew. I did not walk through the units. However, due to the fog and very wet conditions at the road, I believed the entire area was too wet to burn."

Unit was higher on the hill than the other unit. Your man did not run tests on the Patten Unit as to whether the wood was dry enough to burn. He did run tests on the Cove-Salvage Unit and determined that was too wet to burn. He said he wanted to burn them at the same time * * *

The parties are apart on the question of what transpired in the course of one or more telephone conversations between Mr. Patten and Mr. Phillip Dills (a BLM forestry technician) on October 28, 1983. They differ on the question of whether Mr. Patten told Mr. Dills that BLM should utilize the Bureau's personnel and equipment to accomplish the slash burning on the following day and bill Mr. Patten for the costs incurred. In any event, BLM did proceed with the burning of the slash on October 29, 1983, and did bill the contractor for the costs involved in such operation.

Discussion

In the Board's view of the evidence,⁸ the crucial questions to be resolved relate to the actions the parties took or failed to take with respect to the burning of the slash on Clear Cut Area #1 and Clear Cut Area #2 (AF A, Section Diagram) on September 7, 1983. It is undisputed that on that date appellant had the required personnel and equipment (exclusive of a tanker truck being furnished by the Government as an accommodation to the contractor) on the site to discharge his obligations under the contract with respect to slash burnings. According to the contracting officer, the failure to proceed with the burning on that date was "due to high fuel moistures in an adjacent unit." Commenting upon this aspect in his statement dated April 5, 1985, Mr. Patten offers the following assessment: "As to the adjacent unit problem, that unit contained recently cut green wood, whereas my unit contained wood that had been cut for 2 years, which was dry."

The evidence of record indicates that the contract involving the adjacent unit was placed after the instant contract was awarded (note 5, *supra*). While Mr. Jackson's statement implies that the decision not to proceed with the slash burning was not due solely to conditions prevalent on the adjacent unit, the finding of the contracting officer (note 6, *supra*) clearly indicates that was, in fact, the case. As Mr. Jackson's statement is not entitled to the evidentiary weight accorded a contemporaneous document and as the statement does not disclose the extent to which Mr. Jackson's decision not to proceed with the slash burning on September 7, 1983, may have been influenced by the conditions present on the adjacent unit on that date, the Board accepts the contracting officer's finding as determinative of this question.

Remaining for consideration is the question of whether the Government had a right to defer proceeding with the burning of the

⁸ Since the appeal is from a contracting officer's decision upholding a Government Claim, the Government has the burden of proof. See *Emerson Electric Co.*, ASBCA No. 15591 (Apr. 20, 1972), 72-1 BCA par. 9440 at 43,836.

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slash on Clear Cut Area #1 and Clear Cut Area #2 until the conditions prevailing on an adjacent unit were such that slash burning on all units could proceed simultaneously. The Government has not undertaken to show why the obligations assumed by a bidder on an advertised contract should be made more onerous as a result of a contract awarded at a later date to someone else.⁹ In the absence of any such showing, the Board concludes that the Government had no right to defer burning of slash generated under the instant contract until it could be burned with slash generated under a later contract for which the contractor had no responsibility. So concluding, the Board finds that the effect of the Government's action is to relieve the contractor of his obligation to assist in the preparation for slash burning at a later date. Therefore, the Board need not resolve the conflict in the evidence pertaining to the actions of the parties on October 28, 1983.

For the reasons stated and on the basis of the authorities cited, the appeal is granted.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH

U.S. FOREST SERVICE *v.* WALTER D. MILENDER

86 IBLA 181

Decided April 30, 1985

Appeal from the decision of the Administrative Law Judge prohibiting placer mining on five mining claims insofar as they lie within Power Site Classification No. 179.

Set aside and remanded.

1. Act of August 11, 1955--Mining Claims: Powersite Lands--Mining Claims: Special Acts--Powersite Lands

It is error to prohibit placer mining on powersite lands pursuant to the Act of Aug. 11, 1955, merely on the basis that unrestricted and unmitigated mining operations will adversely affect other land uses or values, because (1) there no longer can be unrestricted or unmitigated placer mining on such claims, and (2) all land has some other use or value which would be affected by mining, so that prohibition for that reason would foreclose mining on all powersite lands and effectively nullify the Act. Whether to allow or prohibit mining requires an evaluation of potential detriments and benefits in

⁹ See *Corbetta Construction Inc. v. United States*, 198 Ct. Cl. 712, 723 (1972) in which the Court of Claims states: "A government contractor cannot properly be required to exercise clairvoyance in determining its contractual responsibilities. The crucial question is 'what plaintiff would have understood as a reasonable construction contractor, not what the drafter of the contract terms subjectively intended.'" (Footnote and citations omitted.)

each specific case, bearing in mind that Congress generally intended that powersite lands would be open to placer location and operation.

OVERRULED IN PART: *United States v. Cohan*, 70 I.D. 178 (1963).

APPEARANCES: Wilbur W. Jennings, Esq., Regional Attorney, San Francisco, California, for the Forest Service; Walter D. Milender, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE STUEBING
INTERIOR BOARD OF LAND APPEALS

In June 1982 Walter D. Milender located five placer mining claims in Plumas County, California, within the Plumas National Forest. The claims are each 20 acres, and are named the Agate One, Silver Ridge, Red Rock, Owl Tree, and Lightning Tree. All of the claims except the southeastern portion of the Red Rock are sited within Powersite Classification No. 179, dated May 13, 1927.

Milender filed the location notices with the Bureau of Land Management (BLM), which in turn inquired of the United States Forest Service (FS) if it had objections to the conduct of placer mining operations on these claims pursuant to the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1982); P.L. 84-359 (the Act).

Prior to passage of the Act, lands embraced within powersite withdrawals or reservations were not subject to mineral entry by the location of mining claims. The Act provided, with certain conditions and exceptions, that

(a) All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes: * * *

(b) The locator of a placer claim under this chapter, however, shall conduct no mining operations for a period of sixty days after the filing of a notice of location pursuant to section 623 of this title. If the Secretary of the Interior, within sixty days from the filing of the notice of location, notifies the locator by registered mail or certified mail of the Secretary's intention to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land included within the placer claim, mining operations on that claim shall be further suspended until the Secretary has held the hearing and has issued an appropriate order. The order issued by the Secretary of the Interior shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining. * * *

In response to BLM's inquiry, FS filed objections, asserting that placer mining operations on the subject claims would substantially interfere with other uses of the land. BLM ordered a public hearing, which was conducted before Administrative Law Judge Luoma on July 26, 1983, at Quincy, California. By his decision dated July 25, 1984, Judge Luoma found that placer mining operations would

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substantially interfere with other uses of the land within the placer claims, and held that placer mining should be prohibited on the lands embraced by the claims insofar as they lie within Power Site Classification No. 179. Milender has appealed from that decision.

At the hearing FS presented the testimony of only one witness, Kenneth B. Roby, the resource officer of the Greenville Ranger District, Plumas National Forest. As such, he is responsible for administration of the watershed, wildlife, recreation, mining claims, and special use programs within the district.

Roby testified that the land occupied by the claims is classed by FS as commercial forest land. Trees were selectively harvested from the claim sites in 1975, and another sale of selected trees is scheduled for 1985. The land within the claims varies in its timber-producing capabilities from 10,000 to 20,000 board feet to the acre.

The claims lie to the east of the North Fork of the Feather River. The powersite classification extends for one-half mile from the river. The claims are from one-quarter mile to one-half mile from the river, except for that portion of the Agate One claim which is beyond a half-mile of the river, and hence not within the powersite classification. No portion of any claim is closer to the river than one-quarter mile, and only the western segment of the Lightning Tree claim is that close.

The topography of the claims varies from virtually flat, to gently sloping, to steeply sloping, with substantial areas in each category. There are several intermittent and ephemeral draws which either begin on the claims or cross them, and drain downslope in a westerly direction. Part of the claims are included in the watershed of an unnamed creek which is tributary to the Feather River. Two old logging roads have been constructed across the Lightning Tree and Owl Tree claims, and one through the Red Rock claim. According to Roby, access to the Agate One and Silver Ridge claims is by a series of skid trails connecting to a FS road. He testified that the soils on all five claims have moderate to high erodability, but that past logging activities have produced little erosion because they were "generally" restricted to the gentler slopes of 30 percent or less.

Roby testified regarding four specific land uses or values which he fears would suffer in the event of unrestricted, unmitigated placer mining of these claims; namely (1) timber production and forest management, (2) degradation of the water quality of the Feather River through soil erosion on the claims, with consequent damage to the trout fishery, (3) diminished visual or scenic values which would be observable by tourists and the general public, and (4) potential damage to an archeological site which is outside the claim boundaries, but nearby.

Regarding the timber management objectives, Roby's testimony was essentially the same concerning each of the claims. In effect, he said that "unrestricted" or "unmitigated" placer mining would result in the

loss of the growth of the immature trees now on the site, as these would be removed. He acknowledged that the mature timber would not be lost, as it is going to be harvested in 1985, so that permitted mining would not conflict with FS administration of that sale. He stated:

[T]he timber is to be harvested except we would lose the understory if the area was to be mined.

The other impacts would be that while the area was being mined, we would lose timber production because there wouldn't be any trees there and the third impact is that on the poorer site areas such as depicted in the lower photo in this Government No. 16, I think we would have trouble restoring the site to its current productive capability due to soil loss generally and increasing the harshness of the site. (Tr. 94) [To the same effect, see Tr. 43, 49, 73, 78, 85]

On redirect examination Roby expounded on this testimony, saying:

Q Mr. Roby, when you talk about the timber value to the Forest Service, do you take into consideration only the current value of the standing timber on --

A No. That's a good point. The number that I used would reflect the value of the standing timber there. But if the area was taken out of production, we would not be able to manage timber there in the future and further rotations -- rotation is when the trees come of age to be cut, which is, in this area, about -- I would say -- every 120 to 140 years -- we would miss the opportunity to harvest the timber at that time too.

So at each rotation, we would be losing timber values, yes.

(Tr. 135-36).

Roby expressed concern also for the possibility that after the land had been mined to exhaustion of the mineral resource some portions of the claims could no longer be managed for the production of commercial timber due to removal of the soil. All of the land occupied by the claims is now classed either as "Site 3" or "Site 4" timberland; "Site 1" being the best classification. It is the poorer Site 4 lands which Roby fears will not be susceptible to timber management after completion of mining. However, apparently such site classifications are referable to relatively small areas, as Roby referred to portions of claims which might be so affected in terms of 5 to 10 acres. The total area of the five claims, including that portion which is outside the powersite classification, is 100 acres.

Regarding the potential degradation of the water quality in the North Fork of the Feather River, Roby testified that the present quality of the river is very good because Almanor Dam, about three miles upstream, acts as a sediment trap, so that the water leaving the dam is relatively sediment free (Tr. 72). The river below the dam is a rainbow trout fishery, and the introduction of significant amounts of sediment into the water would produce a deleterious effect on fish mortality and reproduction. Roby opined that "unrestricted" placer mining, particularly on the steeper slopes, would disturb the soil, which would be transported into the drainage system and eventually would migrate into the river over a normal five-to-seven year period (Tr. 89).

However, as noted by Judge Luoma in his decision, the evidence shows that in this area the river goes through a canyon or gorge with sharply rising walls, about 100 to 200 feet high, and all the claims lie

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on a ridge high above the gorge, from one-quarter to one-half mile away. "Mining on the claims," he found, "would not directly cause any disturbance of the river bed or the canyon walls." (Dec. at 9).

Judge Luoma's decision also summarized the rebuttal testimony, as follows:

Robert Milender [the claimant's brother] said County Road 306 lies between the river and the claims and would effectively stop any erosion from the claims from reaching the river. Another Forest Service road running through the lower section of the claims would serve the same purpose. He conceded that in case of a heavy precipitation a wash out could reach the river. However, the swiftness of the stream in the narrow, deep gorge would rapidly move any such sediment downstream. (Dec. at 11).

Robert Milender also testified that "once you've established your pit in there [on the claims], then you have an absolute minimum of erosion." (Tr. 142).

The claimant's testimony on this subject tended strongly to imply that the FS concern for sediment reaching the river focused exclusively on him while ignoring its own practices and those of other permitted users. He alluded to "50 miles" of FS roads in the vicinity which had simply been bulldozed through the hills with the spoiled earth pushed off the down-slope, loggers' skid-trails on steep grades, and logging debris which still litters the area from previous timber sales.

The testimony concerning the potential loss of visual quality was summarized by Judge Luoma as follows:

3. *Visual Quality*

The visual resource management classification document (Ex. 11) was prepared by Mr. Andy Sanchez, a forest landscape architect, employed by the Forest Service in Quincy, California. It is the duty of all Forest Service personnel to give consideration to the objectives of the visual classification in the performance of other management activities.

Mr. Roby explained how the visual classification document shows which parts of the claims would be exposed to the public view if the timber were to be totally removed by strip mining operations and thus conflict with visual value objectives. He played no part in the preparation of the document. He did not know the educational background of Mr. Sanchez, whose work it represents. Inexplicably, Mr. Sanchez was not called as a witness.

By the Respondent

Respondent and his brother, Robert Milender, testified at the hearing, disputing some of the testimony presented by Mr. Roby.

1. *Visual Quality*

Mr. Roby described County Road 306, which borders the Lightning Tree claim, as a "thoroughfare" used by tourists and people mining in the Seneca area, and that mining on the claim would result in visual quality deterioration as observed by those people. Robert Milender said the road was twisty with numerous switchbacks and very steep. It was once black topped but erosion has reduced it to a gravel road. He said it is very lightly traveled, used by local loggers, miners and hunters and a few people who live in the area. It is not a tourist road.

The other two points for viewing mining activities on the claims, according to Mr. Roby, were Highway 89, a heavily traveled major artery, and Lake Almanor, a heavily used recreation area, both approximately three miles to the north. Robert Milender said that from long-standing personal knowledge there is no possible way that either Highway 89 or Lake Almanor can be seen from any part of the claims and,

conversely, there is no possible way that a person traveling on the highway or recreating on Lake Almanor can see any part of the claims. He said if all the timber were removed from all the claims, leaving a totally bare spot, it could not be seen from the highway or from Lake Almanor. Respondent testified similarly, adding that such a bare spot could be seen from some of the local logging roads but no one travels on them. He added that he can spend a week on the claims and never see another person around.

Finally, Roby testified regarding his concern for the preservation of the archeological site located near, but not on, the Agate One claim. The site is described by Roby as a prehistoric chert quarry used by Indians to gather chert for arrowheads. The conceived threat to this site was described by Roby on direct examination, as follows:

Q. Well, how would placer mining on Agate One affect this chert site?

A. Since it doesn't lie within the claim, the mining on the claim wouldn't affect it. The concern would be that the access to the claim might disturb the site.

Q. How?

A. By - if the road or access was improperly placed, it would destroy the site by moving material and running over it basically.

(Tr. 64).

Roby testified that the principal concern of the FS in this case was the potential loss of its ability to manage the land for timber; that the fishery was second in importance, and visual impact was third (Tr. 122). The attorney who presented the case on behalf of FS also advised Judge Luoma, "I think the Forest Service protest is based in large part upon the timber stand. The timber resource, I think, is our primary concern here, managing that" (Tr. 122).

The extent of the importance which the FS attaches to its desire to maintain its timber management function in opposition to mining intrusion was revealed in the following colloquy between Roby and Judge Luoma (Tr. 189-92):

JUDGE LUOMA: I'm just going to give you one question. Now, this is a hypothetical question so do not change any facts on me. Don't assume anything. I'm going to give you all the assumptions.

THE WITNESS: Okay.

JUDGE LUOMA: Now, I own the Agate One mining claim. It is located in the power site withdrawal, whatever its number is, 179. It's located right at the top of the ridge, as far away from the river as you can get. It's absolutely flat. If any activities of soil disturbance took place on it, there's no way that erosion could take place that could possibly reach any stream. There's no problem with access roads in that there's no question of disturbing the archeological sites. It's up there where the - obviously it can be seen from an airplane but no way can anyone of the public see it from anyplace, any observation point on the ground.

Now, it contains a million dollars worth of merchantable timber ready for harvesting. It also contains, it's been determined geologically, that all 20 acres of it is very valuable gold which can be economically mined at a profit of \$5 million.

Now, I go out and I file a mining claim here and then the notices go out and the Forest Service gets its notice in due course. Would the Forest Service file a protest against my filing of that claim?

THE WITNESS: I think if the timber values were such that you described, we would.

JUDGE LUOMA: Okay. That - I hope you understand the import of that because that convinces me that the Forest Service not only is chiefly interested in the timber management but they are totally interested in it.

THE WITNESS: Well, I don't know --

JUDGE LUOMA: I mean, you've answered my hypothetical question very positively.

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THE WITNESS: You eliminated all the other resources.

THE WITNESS [sic; JUDGE LUOMA]: I did. I did.

THE WITNESS: But that doesn't mean that that's always the case. For instance --

JUDGE LUOMA: In my case.

THE WITNESS: In your case, there might always be --

THE WITNESS [sic; JUDGE LUOMA]: You made a very, very strong position for the Forest Service now. By god, we're going to challenge any mining claim, I don't care what it is, if it disturbs our timber management. That's what you're saying, aren't you?

THE WITNESS: Well, it conflicts with other uses, one of them being timber.

JUDGE LUOMA: As I say, that was the only one, just timber.

THE WITNESS: Well, you also mentioned there may be some rare plant there. There may be some --

JUDGE LUOMA: I gave you all the facts.

THE WITNESS: Okay. With the facts given, yeah, timber was the only resource affected.

JUDGE LUOMA: That's right. And you would still challenge that.

THE WITNESS: I think we would.

JUDGE LUOMA: Okay.

Judge Luoma reached the following findings and conclusions in his decision:

In the instant case the position of the Forest Service is that placer mining on the claims would interfere or conflict with (1) the fishery because of erosion carrying sediment off the claims into the nearby river, (2) the visual management objectives, and (3) timber management objectives. The record presented does not support a finding that the first two "other uses" would be substantially interfered with. [No mention was made here of the archeological site.] * * * As to the third "other uses", timber management, the record adequately supports the finding that unrestricted placer mining on the claims will substantially interfere with timber management. In light of the Board's past decisions, recited above, it is questionable that any placer mining operation in any forested area of a national forest could survive a challenge by the Forest Service based upon interference with timber management.

Based upon the foregoing, it is concluded that:

1. Placer mining operations would substantially interfere with other uses of the land included within the placer claims; and
2. Placer mining should be prohibited on the lands embraced by the Agate One, Silver Ridge, Red Rock, Owl Tree and Lightning Tree claims, insofar as they lie within Power Site Classification No. 179.

When this decision becomes final an appropriate order will be issued providing for the prohibition of placer mining operations.

Judge Luoma quite properly based his holding on prior Departmental decisions in "P.L. 359" hearings cases, and the result he reached was not inconsistent with established precedent. Indeed, the line of decisions handed down by this Board, and by its predecessor, the Branch of Land Appeals, Office of the Solicitor, has been founded on two basic concepts of what the Act requires. The first of these we entitle "Limitations On The Secretary's Authority Under The Act," and the second "Interference With Other Uses Of The Land." Our analysis of these concepts follows.

Limitations On The Secretary's Authority Under The Act

Within this Department there long has been a recognition that the Act allows the Secretary only three alternatives; *i.e.*, (1) to prohibit mining, (2) to allow mining, but to require that the locator thereafter "restore the surface of the claim to the condition in which it was immediately prior to these operations," or (3) grant a general permission to engage in placer mining. Alternatives (2) and (3) require the Secretary to allow the claimant to proceed with his mining operations in the same manner that he would otherwise be entitled to do if the claim were not on powersite land. The Act does not empower the Secretary to condition or limit the method or extent of the mining operation. Thus, the Secretary could only allow the claimant to mine "normally" or prohibit mining altogether. As explained in *United States v. Bennewitz*, 72 I.D. 183, 187-88 (1965):

[T]he severity of the damage would vary with the magnitude of the operations; the use of numerous or large dredges could destroy or substantially damage the river bed in the claims as a habitat or spawning area for the brown trout.

This would suggest that carefully controlled placer mining operations restricted to the use of a small dredge or two would not substantially interfere with the use of the claims for recreational, scenic, and sportfishing purposes. The Mining Claims Rights Restoration Act does not, however, permit such a solution. It paints only in broad strokes. * * * The only alternatives left then are complete prohibition or unrestricted permission to mine.

* * * The statute permits the Secretary to act only once. He cannot issue an order now allowing unrestricted mining on the basis of a one or two dredge operation and then, if additional dredges are added or larger ones are substituted or a totally different type of operation is adopted, issue an order prohibiting mining. He can act only once, either to permit or prohibit. Because his course of action is so limited, to avoid defeating the purpose of the act, he should be able to base his decision not only on what the claimant proposes to do but also on what the claimant or his successor may be able to do in the way of placer mining.

* * * * *

In the face of this potential danger to the recreational uses of a substantial portion of the Rio Grande river the only order that may properly be issued is to prohibit placer mining operations on all the six claims. The only other alternative, to permit unrestricted mining, could prove to be a disaster to a valuable natural resource.

This rationale in the *Bennewitz* decision (which we believe reached a correct result) has been reiterated in virtually every subsequent Departmental decision on the subject. *See, e.g., United States v. Evans*, 82 IBLA 155 (1984); *Arthur A. Gotschall*, 78 IBLA 81 (1983); *United States v. Western Minerals & Petroleum, Inc.*, 12 IBLA 328 (1973).

The inability of the Secretary under the Act to limit or condition the claimant's right to mine engendered the term "unrestricted placer mining," in the *Bennewitz* decision and all of its progeny. That term has become the criterion for all decisions heretofore made under the Act. At each hearing pursuant to 30 U.S.C. § 621, a knowledgeable witness is first asked to describe the land's other uses and/or values, and is then asked, "In your opinion, would *unrestricted placer mining* substantially interfere with such use [or value]?" If an affirmative

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answer is elicited, as it invariably is, and the administrative law judge finds that it is supported by a preponderance of the evidence, it would appear that he has no choice but to order a complete prohibition of mining. Indeed, in the instant case that question was preponed to the FS witness, Roby, by FS counsel repeatedly (Tr. 49, 56, 57, 70, 78, 84, 95, 101). There were also several references to "unmitigated" mining operations which might occur, as well as "worst case" mining operations.

We find, however, that reliance on the term "unrestricted placer mining" is unwarranted and conceptually improper. The term does not appear in the statute or its implementing regulations at 43 CFR Subpart 3730.

Moreover, there no longer is any such thing as "unrestricted placer mining" on the public lands of the United States.

Placer mining operations today are restrained or inhibited by an entire body of law comprised of State and Federal statutes and regulations and judicial and administrative precedent. As early as 1893, the State of California had regulated and practically prohibited hydraulic placer mining, or "ground sluicing." See 3 *Lindley on Mining*, Chap. 3 (3rd Ed.). Claims located after July 23, 1955 (as were the subject claims), are, until patented, subject to the right of the United States to manage and dispose of the surface resources, to utilize the surface for necessary access, to provide timber required for mining purposes from off the claim site, and the claimant is prohibited from severing any vegetative or other surface resource managed by the United States except as needed for actual mining operations or to provide clearance for such operations, except to the extent authorized by the United States. 30 U.S.C. § 612 (1982).

Roads and trails constructed and/or maintained by FS with appropriated funds prior to location of the mining claims are effectively withdrawn from such location, and therefore there is no basis for concern that they might be destroyed or damaged by mining. As stated in *United States v. Cohan*, 70 I.D. 178, 181 (1963):

It must be emphasized at this point that this Department is not authorized to permit mining under any conditions by the claimants or by anyone else on or within the roads, the roadbeds, the rights-of-way for roads, or on or within any other improvements created by or under the authority of the Forest Service. Forest lands in the actual use and possession of the United States, on which the United States has made valuable and permanent improvements are withdrawn from entry under the mining laws. *United States v. Schaub*, 103 F. Supp. 873, 875, 876 (D. Alaska 1952), affirmed *United States v. Schaub*, 207 F.2d 325 (9th Cir. 1953). In the *Schaub* case, *supra*, the courts held that land in a national forest which was in actual use and occupation as an access road is withdrawn from mining and that no right under the mining laws could be initiated on land in the Tongass National Forest which was included in an access road. * * * (See Departmental Instructions, 44 L.D. 513 (1916), excepting improvements such as roads in national forests from public land patents).

Moreover, FS has promulgated regulations, currently codified at 36 CFR Part 228, by which the District Rangers and the Regional

Foresters are invested with substantial authority to control and minimize the effect of mining operations on surface resources and environmental values both on and off mining claims located on National Forest Lands. Under these regulations, a mining claimant must file a "notice of intent" with the District Ranger prior to conducting operations "which might cause disturbance of surface resources." If the Ranger determines that such operations will likely cause significant surface disturbances, the operator must then submit a proposed plan of operations for approval. FS may require modification of the plan or the preparation of an environmental impact statement prior to approval. Even after the plan is approved and mining operations are being conducted in accordance therewith, FS can require modification if it is perceived that unforeseen significant disturbance of surface resources is occurring, or that the operations are unnecessarily or unreasonably causing irreparable injury, loss or damage to surface resources. The regulations also impose requirements for environmental protection, specifically including air quality, water quality, solid wastes, scenic values, fisheries, and wildlife habitat. There is a provision for reclamation of areas of surface disturbance following operations for the prevention or control of onsite and offsite damages to the environment and forest surface resources, specifically including, *inter alia*, erosion and landslides, control of water runoff, and rehabilitation of fisheries and wildlife habitat; and FS may, prior to approval of the operating plan, require the operator to post a bond conditioned upon compliance with the requirements for reclamation. Also, the regulations require that prior approval be obtained from FS prior to the construction of any road, trail or other access facility, including the location, construction, and use of such access routes.

This Board is aware that the authority of FS to regulate mining activities under these regulations is not absolute, being conditioned in some instances by words such as "where practicable," "reasonably necessary" etc. Nevertheless, there can be no gainsaying the fact that the regulations invest FS with considerable control over mining operations for the protection of the environment and surface resources. (The Bureau of Land Management has promulgated similar, but not identical, regulations at 43 CFR Subpart 3809.)

The courts have likewise demonstrated a willingness to protect other resource values and FS lands from undue degradation or waste by mining activities, even where it was recognized that the mining operator was proceeding in good faith. *See, e.g., United States v. Goldfield Deep Mines Co. of Nevada*, 644 F.2d 1307 (9th Cir. 1981); *United States v. Richardson*, 599 F.2d 290 (9th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); *Bales v. Ruch*, 522 F. Supp. 150 (E.D. Cal. 1981); *United States v. Curtis Nevada Mines, Inc.*, 415 F. Supp. 1373 (E.D. Cal. 1976).

Finally, there is the broad, comprehensive range of Federal and State environmental laws and regulations which every citizen must observe, including placer miners. These control toxic waste disposal,

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guard endangered species, and preserve air and water quality, to mention only a few of the protections afforded.

With all of the above-described restraints in place, it is error to premise a "P.L. 359" determination on the potential consequences of a hypothetical "unrestricted," "unmitigated," or "worst case" placer mining operation. The proper standard of evaluating the potential effect of placer mining on other land use is the extent to which legal, normal, operations, subject to regulatory restraint, might interfere with such uses.

In this regard the Board finds that one of the holdings in *United States v. Cohan, supra*, is in error, and must be overruled.

The Director's decisions hold also that since highways are amply protected by law, the Forest Service's contention that they would be damaged by placer mining operations on these claims is not supported and consequently the assertion was dismissed. The ruling is incorrect. *The fact that the United States may have remedies under various statutes other than the act of August 11, 1955, in the event of injury to a Forest Service road from placer mining, such as recovering damages therefor, is not a valid reason for allowing placer mining under the act of August 11, 1955, on lands within a mining claim adjoining a Forest Service road if evidence at a hearing shows that such mining would substantially interfere with, obstruct, or injure the road. The act of August 11, 1955, provides a remedy which is different from and additional to other remedies such as that of trying to recover damages after an injury has been committed, and presumably Congress was aware of such other remedies when the act was passed. Moreover, to refuse to prohibit placer mining under the act solely because of the existence of another remedy in the event of injury to public lands from placer mining might make completely inoperative the provision authorizing the Secretary to prohibit placer mining.* Accordingly, the implication in the Director's decisions that the existence of another remedy for injury to or interference with Forest Service roads bars or precludes the prohibition of placer mining under the act of August 11, 1955, is erroneous, and the Director's decisions are set aside to the extent that they so hold.

For the same reasons, the ruling in the Director's decisions to the effect that stream pollution would be an insufficient cause for restricting operations because the police power of the State can effectively control pollution is not correct, and this ruling in the Director's decisions is also set aside.

70 I.D. at 182 [Italics added, footnote omitted.]

This blinding of the fact-finder to the reality that other laws, regulations, case precedent, and police powers exist and operate to constrain and condition placer mining, is probably at fault for raising the wholly illusory specter of "unrestricted" placer mining. We must recognize that the placer miner's operations are constrained by law to some extent, and that they may be further constrained on a case-by-case basis. We must assume that the contemplated operation will proceed lawfully and in accordance with the approved mining plan, and that FS will avail itself of its surface management prerogatives. To regard the mining claimant as one who will conduct his operation in total disregard of all lawful restraints is to prejudice his case beyond any hope of prevailing. To the extent that *United States v. Cohan, supra*, precludes consideration of other laws, regulations, precedent, police powers, and remedies, it is hereby overruled.

Interference With Other Uses Of The Land

The Act provides that, at the Secretary's discretion, he may notify the locator of the claim of his intention "to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land included within the placer claim * * *." The nature of such "other uses" is not identified, nor is there any indicium of Congressional concern for land use outside the claim boundaries.

This Department has heretofore construed and administered the Act as requiring that a finding that placer mining would substantially interfere with any other use of the land necessitated an order prohibiting mining.

The fallacy inherent in this construction (which the author and this Board have been slow to perceive), is that *all* land has some use or value other than for placer mining. It may be only marginal grazing land or wildlife habitat, or that its undeveloped character contributes to the scenic integrity of the area, but the fact is that all land is useful for something other than placer mining. Moreover, we can conceive of no such "other use" of land "included within the placer claim" which would *not* be subject to substantial interference by extensive, but entirely legitimate, placer mining operations.

It follows, then, that as *all* land has some use or value with which extensive, lawful placer mining operations would substantially interfere, placer mining must be prohibited in every instance arising under the Act as it has heretofore been construed and administered. Our previous interpretation of the Act has virtually nullified it, reduced the statutory hearing to a sterile exercise which produces a predictable, preordained result in virtually every case, and effectively closed powersite lands to mining.

This is directly contrary to the intent of the Congress. Powersite lands were already closed to mining, and the Congressional purpose was to open them again to placer location so that the minerals thereon might be extracted. The very title of the Act, "The Mining Claim Rights Restoration Act of 1955," is expressive of its purpose, as is the opening text:

(a) All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes: * * *

The legislative history is reported in *U.S. Code Cong. & Ad. News*, 84th Cong., 1st Sess., Vol. 2, pp. 3006-3014 (1955). Under the caption "Explanation Of The Bill," Senate Report No. 1150 declared that the bill (H.R. 100) "would open an estimated 7 million acres of public lands in the West for mineral development under the general mining laws, subject to conditions and procedures set out in the bill." It is clear beyond question that that intent has been frustrated.

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In a letter to the Chairman, Committee on Interior and Insular Affairs, dated July 18, 1955, Assistant Secretary of the Interior Orme Lewis wrote:

[G]enerally, we fully agree with the need for encouraging mineral development in public-land areas not now subject to mining location, since the discovery of new sources of mineral wealth on the public domain is urgent to the national economy.

The various provisions in the bill which are designed to protect these lands for other uses appear well justified. Powersite lands are often quite valuable for other surface uses. For example, many of the lands withdrawn for power-site purposes are timbered lands situated in national forests. The timber on these lands usually constitutes an integral part of large timber tracts which should be managed on a sustained-yield basis. The bill would reserve the timber within the revested Oregon & California Railroad and reconveyed Coos Bay Wagon Road grant lands by making mineral locations under this act in that area also subject to the act of April 8, 1948 (62 Stat. 162).

Normally, the filing of unpatented mining claims in the United States district land office of the land district in which the claim is situated would seem unnecessary, if S. 1713, a bill "to amend the act of July 31, 1947 (61 Stat. 681) and the mining laws to provide for the multiple use of the surface of the same tracts of the public lands and for other purposes," now under consideration by the Congress, should be enacted. However, it is particularly important that the Secretary of the Interior be advised immediately when placer claims are initiated since the most serious conflict between mining activities and other land uses occurs when placer mining and dredging operations are involved. *The mining of monazite sands by dredging in flat meadow areas has recently caused serious problems in the West because such operations interfere with recreational, grazing, and scenic values of these lands.* The Secretary should have the authority in the case of placer-mining claims to hold public hearings to determine whether placer-mining operations in the areas would be detrimental to other uses of the land. When necessary, he should be able to require the locators of placer-mining claims to execute bonds or undertakings to the United States or to make deposits of money to assure restoration of the lands in their former condition. If the locators or their sureties fail to restore the lands, the deposits or bonds should be forfeited and the receipts obtained made immediately available for restoration of the lands by the Secretary. Any excess funds, of course should be returned. *If these provisions along these lines were added to H.R. 100, we believe that most of the alleged abuses of the existing mining laws, as they may affect lands withdrawn for power-site purposes, would be met.* * * * [Italics added.]

This Board interprets the foregoing as expressive of the Department's full agreement with the declared purpose of the bill to open these lands to mineral development, coupled with a perceived need to protect other land use values from the effects of *abusive mining practices*.

The question which confronts the Board at this juncture is whether the Act was so ineptly conceived and expressed as to be self-defeating of its own purpose, or whether this Department's efforts to administer the Act have focused so intently on its provisions for protecting other land uses as to preclude the very benefit which the bill was enacted to provide.

We can find no praise for the drafters of the bill. As legislation, it is truly a poor piece of work. Nevertheless, we cannot hold that the Congress did a vain and useless thing. As administrators of the law, we must try to give it a reasonable interpretation which will comport favorably with what the Congress intended.

It was the expressed intent of both the Congress and this Department to open to mining those lands which long had been closed. It was declared that to do so would be in the public interest. That was the Act's primary purpose. The protection of other land uses was a secondary purpose, because had that concern been paramount, the bill need not have been enacted at all, as other land uses were already protected. Obviously, it was not the intent of Congress to preserve the status quo.

Our discussion has already established that all land has other uses which will be substantially interfered with if extensive lawful placer mining is conducted, and that the purpose of the Act cannot be effectuated if mining is prohibited in every instance where such an impairment of another use is identified at a hearing.

If every "other use" cannot be protected by a prohibition of mining without doing violence to the Act, then, certainly, *some* uses must be so protected, because the Act expressly so provides. It follows, therefore, that some uses are deserving of protection under the Act while others are not.

The first consideration in determining whether mining is to be preferred over some other use is that Congress generally intended to open powersite lands to mining. Thus, it devolves on the party who seeks an order prohibiting mining to prove by a preponderance of evidence that such an order is necessary, as that party is the proponent of the order.

The second consideration is that it is not enough for such proponent merely to show that the protection of the other use(s) identified would serve the public interest, as the Congress conceived that allowing placer mining on powersite lands is also in the public interest.

The decision in each specific case, then, must reflect a reasoned and objective evaluation of potential detriments and benefits accruing from placer mining operations,¹ with due regard for the extent to which such operations might be controlled, inhibited and/or mitigated by existing law and regulations.

Applying these standards to the instant appeal, the Board finds as follows:

1. The concern of FS that the archeological site located outside the boundaries of the Agate One claim might be damaged or destroyed if the claimant improperly placed an access road to the claim which moved the material and ran over the site is both specious and irrelevant. The claimant is prohibited by regulation from constructing any access facility on national forest land without prior FS approval, which approval "shall specify the location of the access route * * * and

¹ Since *Cohan, supra*, only one Departmental decision has authorized placer mining on powersite land, and that was the only decision which correctly evaluated the value of the "other use" of the land against placer mining and concluded that even though the other use might be substantially impaired, mining could proceed anyway. In *United States v. Mineral Economics Corp.*, 34 IBLA 258 (1978), the Board affirmed the finding of the administrative law judge that the "likely destruction" of a dove nesting and breeding site was insufficient cause to prohibit mining where the number of doves which would be lost was negligible when compared to the annual number harvested annually by hunting.

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other conditions reasonably necessary to protect the environment and forest surface resources * * *." 36 CFR 228.12. Thus, the location of any such road, and the protection of the site from the conceived threat of destruction, is entirely within FS control. Moreover, the site is not, in the language of the statute, on "the land included within the placer claim." 30 U.S.C. § 621.

2. The Board concurs in Judge Luoma's finding that a preponderance of evidence adduced at the hearing indicates that County Road 306 is not a well-traveled "thoroughfare" as it was described by FS, but that it carries little traffic other than local residents, loggers, hunters, and miners. The preponderance of evidence also indicates that the total removal of all vegetation from the claims could not be observed from Highway 89 or Lake Almanor, both approximately three miles from the claims. This is disputed by FS, which insists that small areas of three claims (areas of one, four, five, and twenty acres) would be visible from those points if denuded of vegetation. Even if the FS assertion were proven, the Board would not find that the effect of a motorist driving along Highway 89 and catching a fleeting glimpse of a small "bare spot" in the hills three miles away, or a boater on some portion of the lake experiencing the same view, is sufficiently significant to justify the issuance of an order prohibiting mining. Also, it should be borne in mind that no prudent, responsible miner is going to completely strip all the vegetation off 100 acres unless there are sufficient mineral values to warrant such an effort. Irresponsible or abusive mineral operations which create waste can be punished, enjoined, and the miner made to rehabilitate, as in *United States v. Goldfield Deep Mines Co. of Nevada, supra, United States v. Richardson, supra*, and the other cases cited above. Thus, the prospect of total or expansive removal of trees from the claim is remote, but if that should be necessary, it would likely be worth the loss in terms of its minimal effect on the FS visual resource management objectives.

3. The Board agrees with Judge Luoma's finding that the potential for degradation of the water quality of the river and the consequent impairment of the fishery to the degree hypothesized by FS was not proven. Previous cases in which these concerns have produced orders prohibiting mining operations have all involved placer claims where the mining would be done in the banks or the actual beds of the streams involved by dredging and sluicing, with the residue introduced directly into the stream. By contrast, the subject claims are one-quarter to one-half mile removed from the river, and to the extent that erosion could not be controlled, it would take several years to migrate to the river, given normal precipitation events. Given the barrier effect of the roads between the claims and the river, and the other topographical circumstances, it appears unlikely that there would be any sudden infusion of eroded earth from the claims into the river except in the event of what Roby described as "a major precipitation

event" which would be more likely to produce a flushing and cleansing effect on the river, carrying the sediment all the way to the river's mouth and beyond. Also, although not addressed at the hearing, the Board has taken into account the authority of FS to withhold approval of a mining plan which provides no measures for the mitigation of excessive erosion and surface runoff. Finally, we note that FS does not prohibit other earth-disturbing uses of this land, such as road building and maintenance, and logging activities; yet it apparently has a standing objection to the allowance of any mining. This engenders at least an appearance of use prejudice.

4. The Board concludes that it must set aside Judge Luoma's finding that "unrestricted placer mining on the claims will substantially interfere with timber management." First, the concept of "unrestricted placer mining" is an improper standard. Second, under 30 U.S.C. § 612, FS retains management of the surface of the claims and the timber not actually required to be removed for the purpose of mining. The right to use the surface for access is reserved. FS roads across the claims are protected and reserved from the locations. Therefore, the degree of potential interference with the use of the land for timber management purposes may be substantially less when these factors are considered than was envisioned by Judge Luoma on his application of the standard applied by the Department in previous decisions. "Any placer mining operation in any forested area of a national forest" (within a powersite reserve) cannot be treated as automatically requiring the issuance of an order prohibiting mining. There must be an objective evaluation of the timber management use and the reasonable and realistic potential extent to which such use might be impaired by lawful placer mining operations which are subject to such constraints as may be imposed for the protection of other resource values.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded to the Hearings Division with instructions to reopen the hearing for the limited purpose of determining, by a manner consistent with this opinion, whether the potential interference with the use of the land for timber management is sufficient to warrant issuance of an order prohibiting mining.

EDWARD W. STUEBING
Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

**ADMINISTRATIVE JUDGE IRWIN DISSENTING IN PART AND
 CONCURRING IN PART:**

When construing a statute, one starts, obviously enough, with the language of the statute. What section 2(b) of the Mining Claims Rights Restoration Act of 1955 (69 Stat. 682, 30 U.S.C. § 621(b) (1982)), provides, in words suggested to the Senate by the Department of the Interior itself, is:

If the Secretary of the Interior, within sixty days from the filing of the notice of location, notifies the locator by registered mail of the Secretary's intention to hold a public hearing to determine whether placer mining operations *would substantially interfere with other uses of the land included within the placer claim*, mining operations on that claim shall be further suspended until the Secretary has held the hearing and issued an appropriate order. The order issued by the Secretary of the Interior shall provide for one of the following:

- (1) a complete prohibition of placer mining;
- (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or
- (3) a general permission to engage in placer mining. [Italics added.]

The report of the Senate Committee on Interior and Insular Affairs on the bill makes clear that the opening of all public lands withdrawn or reserved for power development to entry for location and patent of mining claims and for "mining, development, beneficiation, removal, and utilization of the mineral resources of such lands"¹ was "subject to conditions and procedures."² Concerning section 2(b), the report stated:

This section limits the effect of entry in four respects: . . . Fourth, gives to the Secretary of the Interior authority to hold public hearings to determine *whether placer mining operations would be detrimental to other uses of the lands involved*, and to require at his option, locators and operators of placermine operations to restore such lands to their former condition when the mining operation has been completed. [³] [Italics added.]

The statement of the managers of the bill on the part of the House of Representatives in the Conference Report about the amendment that added section 2(b) was similar:

In addition, language has been adopted in the form of a new subsection added to section 2 affecting placer-mining claims which may be located on lands opened to mining entry by H.R. 100. The House managers agree that the Secretary of the Interior should be advised immediately when placer claims are initiated since serious conflict frequently arises between mining activity and other land uses when placer mining and dredging operations are involved, as this amendment provides. The language adopted would give to the Secretary authority in the case of placer-mining claims to hold public hearings to determine whether placer-mining operations in the areas would be detrimental to other uses of the lands. [⁴]

¹ 30 U.S.C. § 621(a) (1982).

² S. Rep. No. 1150, 84th Cong., 1st Sess., (1955), reprinted in 1955 *U.S. Code Congressional and Administrative News* 3006.

³ *Id.* at 3006-07.

⁴ *Id.* at 3013.

It requires no long essay to demonstrate that any entry or mining, development, etc., of the mineral resources on land withdrawn or reserved for power development or powersites must conform to the governing law. Congress specifically provided that it should, in four words in the first sentence of section 2(a): "under applicable Federal statutes."⁵ This fact, however, does not call for overruling *United States v. Cohan*, 70 I.D. 178 (1963), in part. That case does not, as the majority claims, *ante* at 185, "blind the fact-finder to the reality that other laws . . . operate to constrain and condition placer mining" or "preclude consideration of other laws." All it states is the self-evident proposition that the Mining Claims Rights Restoration Act of 1955 provides additional legal authority for the Department to prohibit or condition such mining and that the existence of other laws with similar authority does not preclude invoking that Act to prohibit it. 70 I.D. at 182.⁶

So far as the construction of section 2(b) is concerned, the first observation to make is that whether or not a hearing is held is within BLM's discretion. Secondly, if it does, the issue is "whether placer mining operations would substantially interfere with other uses of the land included *within the placer claims*." Although where "other uses" must be is clear, what they may be is not limited. Whether the placer mining operations will "substantially interfere" with another use is a question of the circumstances of the situation. Although the statutory test can hardly be regarded as oracular, the Congressional reports add that the determination to be made is whether placer mining operations "would be detrimental to other uses of the lands," that is, whether they would cause them damage, harm or loss.

The Department's regulations implementing section 2(b) state simply:

Upon receipt of a notice of location of a placer claim filed in accordance with § 3734.1 for land subject to location under the act, a determination will be made by the authorized officer of the Bureau of Land Management as to whether placer mining operations on the land may substantially interfere with other uses thereof. If it is determined that placer operations may substantially interfere with other uses, a notice of intention to hold a hearing will be sent to each of the locators by registered or certified mail within 60 days from date of filing of the location notice.

43 CFR 3736.1(b). This provision has not changed since the Department first proposed the rule. *See* 43 CFR 185.176, 23 FR 5437 (July 17, 1958); 43 CFR 185.106, 21 FR 8947 (Nov. 16, 1956). As a matter of practice BLM sends notice of the location of the claim to the District Manager or the Regional Forester, if it is located in a national forest, asking that a box be checked indicating whether placer mining operations would or would not substantially interfere. Even if the box for "would"

⁵ 30 U.S.C. § 621(a) (1982).

⁶ In discussing *United States v. Mrs. Reho Wolfe*, a case relied on by the Director of BLM, it is stated in *Cohan* that the statement in *Wolfe* that the Forest Service might protect a trail threatened by mining by legal remedies available to any landowner against destruction of his property by adjoining uses "is not to be read as a ruling that the existence of other legal remedies, in and by itself, precludes the prohibition of placer mining under the act." 70 I.D. 182, note 3.

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is checked, of course, BLM is free to inquire what the other uses are and what the nature of the anticipated interference with them is before deciding whether to hold a hearing. If interference with other uses would not be substantial, then no hearing is required. If this is uncertain, then a hearing is appropriate.

In *United States v. Bennewitz*, 72 I.D. 183 (1965), the Department concluded that, since section 2(b) provides that the order resulting from a hearing shall either prohibit mining or allow it on the condition of subsequent reclamation or grant a "general permission," the Secretary should "be able to base his decision not only on what the claimant proposes to do but also on what the claimant or his successor may be able to do in the way of placer mining." 72 I.D. at 188. Since the Secretary may act only once, reasoned *Bennewitz*, "[i]n the face of this potential danger to the recreational uses * * * the only order that may properly be issued is to prohibit placer mining operations. * * * The only other alternative, to permit unrestricted mining, could prove to be a disaster to a valuable natural resource." *Id.*

As indicated above, however, and elaborated by the majority, there is in fact no such thing as "unrestricted" placer mining. The "general permission" that may be granted for placer mining under section 2(b) would not exempt it from regulation under other provisions of law. The issue at the hearing, therefore, is whether regulated, not unrestricted, placer mining, on the scale proposed or potentially possible, would substantially interfere with other uses.

I agree that the hearing and the Administrative Law Judge's conclusion in this case were based on the incorrect assumption that the issue was whether "unrestricted" placer mining would substantially interfere with other uses of the land included within the claims and that the case must be remanded for a determination whether placer mining as regulated "under applicable Federal statutes" would do so. I do not, however, agree that the determination includes a weighing of the relative merits or value or public interest of placer mining and other uses of the land.⁷ Nothing in the Act or its history imparts this consideration to the hearing. It is appropriate, if at all, in deciding whether to hold the hearing.

WILL A. IRWIN
Administrative Judge

⁷ *United States v. Mineral Economics Corp.*, 34 IBLA 258 (1978), cited by the majority, *ante* at 189, note 1, is not persuasive to the contrary. What that case *holds* is that the Administrative Law Judge's decision that placer mining operations would not substantially interfere with other uses of the land should be affirmed. The dicta in the Administrative Law Judge's decision that placer mining should not be prohibited simply because a small percentage of the doves killed by hunters annually in the state would be lost, and in the Board's decision that no value was ascribed to the land except for dove production, are irrelevant. The issue is whether other uses of the land will be substantially interfered with, not whether they are substantial uses in the opinion of the Administrative Law Judge or the Board.

APPEAL OF PAT WAGNER d.b.a. A-PLUMBING CO.

IBCA-1612-8-82

Decided *May 14, 1985*

Contract No. H50C14202543, Bureau of Indian Affairs.

Sustained.

1. Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)--Contracts: Construction and Operation: Notices

Formal written notice given after completion of the contract work is found to satisfy the requirement of the Differing Site Conditions clause for written notice to the contracting officer, where the evidence shows that the Government had actual knowledge of the operative facts relating to the contractor's claim and no showing was made that any prejudice to the Government had resulted from the belated written notice.

2. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)--Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)--Contracts: Construction and Operation: Changes and Extras--Contracts: Construction and Operation: Estimated Quantities

Where under a construction contract for the installation of water meters, meter boxes, and service lines, the amount of excavation required for performance of the work is substantially greater than indicated in the contract documents, and the contractor encounters different types and lengths of service lines than indicated in the specifications, and which could not have been ascertained by a prebid investigation, the Board finds that such constitutes a first category differing site condition for which the contractor is entitled to an equitable adjustment under the Differing Site Conditions Clause.

3. Contracts: Construction and Operation: Actions of Parties--Contracts: Construction and Operation: Payments

Where under a construction contract for the installation of water meters, meter boxes, and service lines, it is determined by the contemporaneous conduct of the parties during performance of work that the contract specifications did not require the contractor to replace all existing service lines in order to fully perform under the contract, the Government was found to be without justification to invoke the unit price schedule in the bid form to reduce the total contract price for quantities of existing pipe not replaced by the contractor.

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

Where a contractor presented evidence of actual costs incurred for extra work and materials under the contract, such costs were presumed to be reasonable and established a prima facie case of recovery, which the Government failed to rebut.

APPEARANCES: Donald O. Loeb, Attorney at Law, Tempe, Arizona, for Appellant; Daniel L. Jackson, Department Counsel, Phoenix, Arizona, for the Government.

92 I.D. No. 5

*OPINION BY ADMINISTRATIVE JUDGE PACKWOOD**INTERIOR BOARD OF CONTRACT APPEALS*

This appeal is timely filed by appellant, Pat Wagner, d.b.a. A-Plumbing Co., from the decision of the contracting officer, dated May 28, 1982, denying appellant's claim for an equitable adjustment and decreasing the final contract amount by \$7,238. At the request of appellant, an evidentiary hearing in the matter was held in Phoenix, Arizona.

Findings of Fact

1. On August 28, 1981, the contracting officer for the Bureau of Indian Affairs (BIA/Government), United States Department of the Interior, issued an Invitation for Bids under Specification No. H65-991-B-1960-1-32, which called for the furnishing of all labor, materials, equipment, and services necessary to perform all work for installing water meters, meter boxes, and service lines at designated locations at Hopi Agency, Keams Canyon, and Hotevilla on the Hopi Indian Reservation, Navajo County, Arizona (Appeal File, Exh. A).¹

2. Appellant submitted its lump sum bid of \$79,480 to the contracting officer which included on the Addition to SF-21 bid form, appellant's per-foot pipe prices and his per-unit price for the required valves and meter boxes. On September 29, 1981, the bids were opened and appellant was found to be the low bidder of eight bids received (AF-Exh. 1; Findings at 12). The Government estimate for the work was \$88,100 (AF-Exh. 2a).

3. By letter dated September 30, 1981 (Findings, Exh. 2), appellant was requested to verify and confirm its bid price because of the disparity of its bid with that of the Government estimate. By message dated October 2, 1981, appellant verified and confirmed its bid price in the amount of \$79,480 (Findings, Exh. 2A). On October 7, 1981, the contracting officer advised appellant that it had been awarded Contract No. H50C14202543 to perform the above-mentioned work (Findings, Exh. 3). Under the terms of the contract, work was to begin within 10 calendar days after the date of receipt of the Notice to Proceed, with completion 90 days thereafter. The Notice to Proceed was issued on November 13, 1981, with completion of the contract scheduled for February 11, 1982 (Findings, Exh. 5).

4. By Change Order No. 1, dated January 7, 1982 (Findings, Exh. 7), the original contract amount was increased by \$200 for furnishing and installing a locking meter vault at Second Mesa Truck Fill Station, thus, creating a revised contract amount of \$79,680. By Change Order No. 2, dated February 4, 1982 (Findings, Exh. 8), the contract amount

¹ Hereinafter, references to the record will be abbreviated as follows: Appeal File Exhibit A (AF-Exh. A); Official Hearing Transcript, volume I (Sept. 26, 1983), (Tr. I at 10) or volume II (Sept. 27, 1983), (Tr. II at 18); Government's Exhibit 1 (GX-1); Appellant's Exhibit A (AX-A); contracting officer's Findings and Decision, Exhibit 1 (Findings, Exh. 1).

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was increased \$1,892 for the installation of one LP gas meter, which resulted in a further revised contract amount of \$81,572. The contract performance time was extended 21 calendar days to March 4, 1982.

5. Part IV of the specific performance section of the Technical Provisions of the contract set forth the sizes and quantities of meters and pipes to be installed at specifically designated building numbers at the worksite. Section 2.4 of the Technical Provisions further provided that new service lines "shall be schedule 40 galvanized steel, ASTM A-120," as required in Part IV. Although the general provisions portion of the Invitation for Bids is replete with references to the drawings and plans, none were furnished to prospective bidders, except the drawing "Meter Yoke Detail," showing a meter installed in a meter box with the face of the meter set 9 inches below the meter box on a standard length meter yoke (Findings, Exh. A).

6. During the course of performance of the work, appellant discovered that many of the existing buried service lines were made of copper rather than galvanized steel as indicated in the contract documents (Tr. I at 68, 70-71, 109, 121; Tr. II at 164, 177, 270, 363). As a result, the materials originally purchased by appellant for the project were not used, and additional welding was employed by appellant to connect the meters called for in the contract to the existing copper lines. Three trips from the project site to Phoenix, Arizona, were made by appellant in order to purchase additional materials, supplies, and equipment (Tr. I at 83, 89, 122-23, 128-29; Tr. II at 172, 178, 212, 226, 273-75, 283, 296, 308, 311).

7. Appellant interpreted the contract documents to indicate that existing service lines would be metered at depths of 3 feet. However, during performance of the work it was discovered that numerous existing service lines had been laid at depths exceeding 6 feet, and completion of the work called for in the contract was achieved by construction procedures not depicted in the specifications, which appellant alleges resulted in increased difficulty, delay, and expense (Tr. II at 198-99, 223, 266, 271). Similarly, appellant encountered several "service splits" during the course of installation and concluded that both the length and size of the service lines and meters indicated in Part IV of the specifications, were at variance with the existing service lines and meters installed at the worksite (Tr. II at 220, 289-91).

8. Pursuant to section GC-16 of the General Conditions of the specifications, appellant submitted monthly progress payment requests to the contracting officer.² Payments were made based upon the number of meters installed to date up until the time of final inspection. However, upon calling for a final inspection of the worksite,

² Appellant's first progress payment request was submitted Dec. 18, 1981. Payment, however, was not received until Feb. 4, 1982, apparently due to the fact that the request had been lost by Bureau personnel handling payment requests. As a result of the delay, appellant was forced to lay off employees and refinance his house to meet expenses (Tr. II at 286-87).

appellant was informed that BIA was going to measure the linear footage of service lines installed, with the intention of making payment only for footage of pipe actually installed, at the unit prices contained in the addition to Standard Form 21 (See Finding of Fact No. 2) (Tr. II at 292-93). Upon completion of the project a final inspection was conducted on February 24, 1982, where it was determined that the work had been satisfactorily completed in compliance with the contract specifications (Findings, Exh. 9).

9. Following completion of the project, the contracting officer and appellant met on March 16, 1982, to discuss increases and decreases of payment on the contract. The parties substantively agreed as to the actual work performed and the amount and type of materials installed. The parties differed in two major areas: (1) the unit price of substitute materials (copper pipe) used, and (2) appellant's entitlement to payment for materials (galvanized steel pipe) not installed (Tr. II at 298-300; Findings, Exh. 11).³

10. Subsequently, by letter dated March 18, 1982, the contracting officer notified appellant that its unit prices for the copper piping used on the project were considered excessive and that deductions in the total amount of \$7,238 were being made for pipe not installed, in accordance with prices furnished on the Addition to Standard Form SF-21 (Findings, Exh. 11).⁴ As a result, the Government stated its position that the contract amount of \$81,572 established by Change Order No. 2, dated February 4, 1982, should be reduced to a final contract total of \$74,334.

11. By letter dated March 19, 1982, appellant filed claims with the contracting officer in the total amount of \$12,383.63, in excess of the original contract price of \$81,572, for a total payment due of \$93,955.63 (Findings at 4). As grounds for his claims, appellant alleged *inter alia*, defective specifications and drawings, differing site conditions, and changes as a result of over-depth excavation and differing types and sizes of piping materials encountered from those required under the contract.⁵ By letter dated March 25, 1982, appellant provided further support for its claims, including a discussion over the discrepancy of the total number of meters installed (Findings at 1-6).

12. On May 28, 1982, the contracting officer issued a final decision which denied appellant's claims and reduced the total contract amount \$7,238 for deductions made in the March 18, 1982, letter (See Finding of Fact No. 10), for pipe not installed at the project. Contemporaneous with the issuance of the final decision, the contracting officer issued Change Order No. 3, reducing the contract amount by \$7,238 for a

³ The BIA offered to purchase the excess pipe not installed on the project at appellant's invoice cost. Appellant refused the offer, however, because it did not cover the costs of hauling, handling, and storage of the pipe while work on the project was being conducted (Tr. II at 295-96).

⁴ The deduction of \$7,238 was based upon an addition of copper pipe actually installed by appellant, offset by a deduction for the difference between the amount of galvanized steel pipe that was actually installed from that which was called for in the specifications (Tr. II at 297-98).

⁵ The Government acknowledged the above-stated grounds for appellant's claims to the contracting officer, along with other of appellant's allegations in its post-hearing memorandum, page 6.

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revised total of \$74,334 (Findings at 1). Appellant thereafter filed a timely appeal from the contracting officer's decision with the Board.

Discussion

I. Entitlement

Appellant claims entitlement to an equitable adjustment for additional work and costs incurred under the above-stated contract. Although the parties dispute whether certain elements or theories of relief asserted during the appellate stage of this proceeding were presented to the contracting officer for final decision as required by the Contracts Dispute Act of 1978 (41 U.S.C. § 601-613 (Supp. II 1978)), it is clear from the record that appellant's original claim before the contracting officer sought relief under the Differing Site Conditions clause of the contract, and on the basis of the contract's alleged defective specifications (Findings at 1, 14-18). The consideration of these claims being sufficient for the resolution of the appeal, it is unnecessary to address the Government's argument regarding the Board's lack of jurisdiction to consider subsequent claims not presented to the contracting officer.⁶

Appellant's claims are based substantially upon alleged category 1 differing site conditions--that is, subsurface or latent physical conditions at the site differing materially from those indicated in the contract (Findings, Exh. A, General Provisions par. 4, SF 23-A (Rev. 4-75)). Consequently, the issue before us is whether such conditions were actually encountered by appellant in the performance of its contract work. As claimant, appellant bears the burden of proof to establish entitlement to an equitable adjustment. *Saturn Construction Co.*, ASBCA No. 22653 (Mar. 22, 1982), 82-1 BCA par. 15,704. If the actual conditions found during excavation on the project are determined to differ materially from those indicated, the cost of meeting such conditions is borne by the Government. In order to reach such a determination, we consider first the relevant contract provisions.

The contract specifications (as discussed in Finding of Fact No. 5) for the installation of water meters and pipe are found at Part IV of the Technical Provisions which provide in pertinent part:

PART IV - SPECIFIC PERFORMANCE

Hopi Agency

For the basis of this bid, the following quantities and sizes of meters and pipes for service lines shall be furnished and installed.

5/8-Inch Meter	15 Each
3/4-Inch Meter	99 Each
1-Inch Meter	2 Each
1½-Inch Meter	4 Each
2-Inch Meter	2 Each

⁶ Sec. 6(a) of the Contract Disputes Act, 41 U.S.C. § 605(a) (1978), provides that 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 decision.

3-Inch Meter	1 Each
¾-Inch Pipe	1,540 Lineal Feet
1-Inch Pipe	2,885 Lineal Feet
1¼-Inch Pipe	1,490 Lineal Feet
1½-Inch Pipe	140 Lineal Feet
2-Inch Pipe	70 Lineal Feet
2½-Inch Pipe	70 Lineal Feet
Meter Boxes	122 Each
1½-Inch Water Pump Meters/Valves	4 Each

Sizes of new service lines and meters for the various buildings and locations are as follows: Service lines not requiring replacement are noted.

In addition, Part IV of the specifications listed a meter schedule containing meter sizes from 5/8 inch to 3 inches, and service line sizes from 3/4 inch to 3 inches, as well as indicating whether valves were required on individual buildings that were scheduled for service. Accompanying the meter schedule was the notation "* Indicates existing service line to be used." The specifications further provided at section 2.4 of the Technical Provisions: "2.4 Pipe: New service lines shall be schedule 40 galvanized steel, ASTM A-120, as required in the attached meter schedule" (Findings, Exh. A). No drawings accompanied the Invitation for Bids (IFB) except the "Meter Yoke Detail" drawing which included the notation "9 inch" and the phrase "No Scale" (Findings, Exh. A).

Appellant contends that it submitted its bid on this project with the reasonable expectation that: (1) The contract was a lump sum, fixed-price construction contract for the installation of water meters; (2) that, as indicated in the only drawing accompanying the IFB (the meter yoke detail), the water service lines to be metered would be generally located some 36 inches below the surface of the ground; (3) that the footage of lines to be installed/replaced as part of the contract would be in the approximate lengths specified in the Specific Performance section of the bid documents; and (4) that those lines would be made of galvanized steel.

It is the Government's position that appellant's interpretation of the 9-inch figure in the meter yoke detail drawing, as an indication that service lines would be encountered at an approximate depth of 3 feet (36 inches), was unreasonable, as said drawing bears the notation "No Scale," and because there were no other plans or representations in the bid package which made reference to the depth of existing service lines. It further argues that the 9-inch measurement shown on the face of the meter yoke detail drawing constituted a patent ambiguity which imposed a duty upon prospective bidders to request clarification.

For the following reasons, we find the Government's arguments unpersuasive.

First, with respect to the Meter Yoke Detail drawing with the accompanying 9-inch notation, the testimony reveals that the Meter Yoke is a linesetter, and the maximum commercially advertised linesetter available is 36 inches long (Tr. II at 265-66). Appellant testified that the 9-inch notation on the meter yoke drawing indicated

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to him that the service lines would be located at a depth of approximately 3 feet (Tr. II at 266-67). Mr. Stanley K. Swengel, president of a contracting firm which also bid on the project, supported appellant's interpretation by testifying that the 9-inch notation indicated to him that that was the maximum depth that the meter face was allowed to be below the cover of the meter pit, which given his knowledge of the sizes of meters being used, indicated that regardless of the "No Scale" language, the service lines which the meters were being put into would be approximately 36 inches deep (Tr. II at 155-57).

Similarly, the contracting officer's representative (COR) on the contract testified that the specifications called for installation of service lines at 36-inch depths, and in preparing the engineer's estimate for the project, he did not take into account depths greater than 36 inches. Moreover, the COR conceded that at the time of the prebid site inspection there were no stakes or markers to indicate the location of the lines; that there would have been no way, short of digging up said lines that prospective bidders could have determined in advance their depth; and that there was nothing in the contract documents which would have assisted prospective bidders to determine what depth the lines were buried (Tr. II at 199-200).

In light of the evidence, we conclude that appellant's interpretation of the Meter Yoke drawing in estimating the excavation portion of its bid to have been reasonable. As such, we further conclude that the 9-inch notation on the face of the drawing did not constitute a patent ambiguity which imposed a duty upon prospective bidders to request clarification. Not only was appellant's interpretation of the drawing shared by Mr. Swengel, a competitive bidder, there is no evidence that any of the other bidders considered the drawing ambiguous enough to seek clarification from the contracting officer. Given these circumstances, we find that neither the drawing and specifications, which set forth the specific performance requirements of the contract, nor a reasonable site investigation would have forewarned appellant of the actual conditions encountered at the site.

With respect to such actual conditions, we reject the Government's argument that the work called for in the specifications could have been accomplished by appellant in strict accordance with the contract documents. It is undisputed that during performance of the work appellant encountered existing copper lines which were neither described in the specifications nor anticipated by the parties (Tr. I at 68, 109, 121; Tr. II at 158, 164, 197-98, 264, 270; Government's Posthearing Memorandum at 19). The COR testified that had Government personnel been aware of the copper lines, the specifications would not have provided for the use of galvanized steel in the IFB (Tr. II at 200). Moreover, the COR's testimony that appellant should have utilized a dialectic union to prevent electrolysis

in the service lines once copper was discovered is of little merit, given the questionable effectiveness of the procedure⁷ and the fact that no where in the specifications is such a directive provided for.

The evidence shows that instead of installing the various types, sizes, and lengths of pipe specified in the contract documents, it was necessary for appellant to acquire an entirely different inventory of pipes, supplies, tools, and equipment to complete the project. In order to accommodate the existing copper lines, extensive soldering and three trips to Phoenix were required to obtain the necessary lengths of copper pipe, acetylene, welding supplies, and other materials to complete the work (Tr. II at 270-75, 283).

The evidence demonstrates that contrary to the 3-foot excavation depths indicated by the Meter Yoke Detail drawing discussed above, a great number of the service lines actually installed by appellant on the jobsites were installed to depths exceeding 6 feet, thereby requiring a significant amount of over-depth excavation (Tr. II at 266, 271).⁸ Appellant's witness, Mr. Swengel, testified that such additional excavation would require compensation for the extra fittings and costs of bringing the meters to within 9 inches of maximum surface as indicated by the contract drawing (Tr. II at 157). Appellant testified that as a result of the over-depth excavation, and the installation of copper lines for galvanized lines, that those changes alone resulted in an increase in the amount of time to complete the contract of 10 working days based on its Critical Path Schedule (Tr. II at 310-11; AX-C).

The testimony of record further indicates significant deviations in the length and sizes of the service lines described in Part IV, the Specific Performance section of the contract, and the actual lengths of pipe installed by appellant at the site. Although testimony by the BIA facility management officer sought to characterize the lineal footage quantities and sizes of Part IV to be "estimates" to guide prospective bidders (Tr. II at 64-66), given the specificity of the measurements, there exists little support for such an assertion. Swengel testified that he based his bid on the footages contained in Part IV and did not expect to encounter footages different than those provided: "I based my bid on those footages; the price that I bid was to install those footages, and if I'd been successful on the project I'd have bought those footages and taken them to the job expecting to install them" (Tr. II at 158-59).

The amount of pipe actually installed by appellant versus that prescribed by the contract is established by the testimony and by agreement of the parties as follows:

⁷ Mr. Swengel testified that in his professional opinion even though a dialectic union could cut down on the deterioration of pipes caused by an electric flow between dissimilar metals (*i.e.*, galvanized steel to copper), the better installation would be to join copper to copper which has proven superior in preventing electrolysis (Tr. II at 163-64).

⁸ Pat Wagner testified that in several instances he encountered service lines at 7-foot depths, including depths of 7 feet, 6 inches at Second Mesa, and an average depth throughout the project of 6 feet (Tr. II at 271).

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<i>Part IV Requirements</i>		<i>Parties' Calculations</i>
¾" pipe	1,540 lineal feet	1,664 lineal feet installed
1" pipe	2,885 lineal feet	1,656-1,667 lineal feet installed
1¼" pipe	1,490 lineal feet	52-55 lineal feet installed
1½" pipe	140 lineal feet	33 lineal feet installed
2" pipe	70 lineal feet	85 lineal feet installed
2½" pipe	70 lineal feet	12 lineal feet installed

(Tr. I at 103; Tr. II at 161, 277, AX-A).

Equally compelling however, is the testimony of William McConnell, the BIA facility management officer, who sought to establish that the Part IV footages were merely estimates:

Q. Okay, the word "estimate" then, there's nothing in here that indicates that these are merely estimated quantities?

A. I believe there is.

Q. You believe there is?

A. Yes.

Q. Okay, could you show me where that is in the contract documents, please?

A. In the installation portion, part three.

* * * * *

Q. Okay, go ahead.

A. *Existing service lines to be replaced, does not say all shall be replaced, it says the ones to be replaced shall be removed and disposed of.*

The location, it gives the contractor the privilege of locating his meter wherever he wants it, in essence. To me that shows that not all lines were to be installed.

Q. Well, then if that's the case, then why include any lineal footage figures for service lines at all?

A. We have to give the contractor an idea of what he's bidding on. *We can't just say here, bid on installing all our meters.* [Italics added.]

(Tr. II at 64-65).

Such testimony, as will be discussed later in this opinion, lends significant weight to appellant's argument that not only could the work under the contract not be performed in strict accordance with the Part IV specifications,⁹ but that the real purpose of the contract was for the metering of existing water service lines, and not for the total lineal footage of pipe installed, as indicated by the Government's method of payment (Tr. I at 53, 89, 98; Tr. II at 192, 218-20, 246).

The Government next raises the question of notice and would have us dismiss the appeal on the grounds that appellant did not comply with the requirement of the Differing Site Conditions clause with regards to giving timely notice of its claim.¹⁰ Appellant alleges that

⁹ The testimony of Mr. Wagner, which the Government has failed to rebut, indicates that in installing 127 meters on the project, there existed 64 errors from what was depicted on the specific performance section of the contract, and what was actually encountered at the site, thereby resulting in a total percentage discrepancy of 50 percent (Tr. II at 289-90).

¹⁰ Clause 4 of the General Provisions of the Contract provides that:

Continued

such formal written notice was not required in this case as the contracting officer's authorized inspector was promptly notified of the conditions encountered at the site, and that by letter to the contracting officer dated January 18, 1982, appellant specifically advised that he was having difficulty "trying to solder joints in rain and freezing temperatures" (AF-Exh. 4b). Thus, appellant asserts that at an early stage of the construction, the contracting officer was advised in writing that copper service lines (i.e., requiring soldering), had been encountered, and had ample opportunity to mandate use of the dialectic union or to reject the appellant's proposed use of copper but took no such action.

It is the Government's position that neither the alleged knowledge of the Government inspector nor appellant's letter of January 18, 1982, constituted sufficient notice as required by paragraph 4(a) above. It argues that the January 18 letter was merely a request for a time extension, and that appellant did not make its formal notice of the claim until after the work was completed (Tr. II at 360). It further submits that despite the BIA inspector being informed that appellant had installed some copper pipe (Tr. I at 100), appellant did not request a change in the contract, and appellant knew that the inspector was not empowered to make any changes or modifications to the contract (Tr. II at 342).

A review of Board decisions in the area of notice recognizes that written notice may be waived by the Government or may become unnecessary where the Government has in fact knowledge of the conditions and of the difficulties encountered by the contractor. *Appeal of Singleton Contracting Corp.*, IBCA-1413-12-80 (Aug. 12, 1981), 88 I.D. 722, 81-2 BCA par. 15,269, citing *Carson Linebaugh, Inc.*, ASBCA No. 11384 (Oct. 5, 1967), 67-2 BCA par. 6640. Subsequent to the Court of Claims decision in *Hoel-Steffen Construction Co. v. United States*, 197 Ct. Cl. 561 (1972), involving consideration of timeliness of notice under a Suspension of Work clause, the Boards have been loath to deny a claim on the basis of a contractor's failure to comply with the notice provisions of various clauses (e.g., Changes, Differing Site Conditions), where the Government was found to have actual knowledge of the operative facts and no prejudice was shown to have resulted from a belated written notice. See, for example, *Mutual Construction Co.*, DOT CAB No. 1075 (Aug. 18, 1980), 80-2 BCA par. 14,630 at 72, 157-58; *Smith & Pittman Construction Co.*, AGBCA No. 76-131 (Mar. 2, 1977), 77-1 BCA par. 12,381 at 59,929; and *A. Belanger & Sons, Inc.*, ASBCA No. 19187 (Jan. 29, 1975), 75-1 BCA par. 11,073 at 52,714.

"(a) The Contractor shall promptly, and before such conditions are disturbed, notify the contracting officer in writing' of conditions differing materially from those indicated in the contract (category 1), and that [t]he contracting officer shall promptly investigate the conditions' to determine whether 'an equitable adjustment shall be made * * *'. Clause 4 further provides that '(b) No claim of the Contractor under this clause shall be allowed unless the contractor has given the notice required' " (Findings, Exh. A).

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[1] Here, the evidence shows that appellant believed that he would be paid for a lump-sum, fixed-price contract, and set about to complete the project despite the difficulties encountered (Tr. II at 290-92). Appellant submits that for this reason it submitted no immediate written notice of the differing site conditions claim. Moreover, the evidence indicates that: (1) The BIA inspector was informed by appellant as early as January 8, 1982, that it was encountering copper lines underground (Tr. I at 100; Tr. II at 264-65); (2) the inspector notified the COR and the facility management officer during the work that copper was being used (Tr. I at 70, 121, 213); and (3) the facility management officer discussed the matter with the contracting officer's representative (Tr. I at 71). Thus, it is irrefutable that the Government was aware of the facts giving rise to the differing site conditions claim during the construction phase of the contract, yet neither took steps to direct appellant to cease and desist laying copper pipe, nor conducted an investigation as required by clause 4 of the General Provisions (Tr. I at 71). Given the opportunity to verify and determine the extent of the actual subsurface conditions during the progress of the work, it failed to do so. Nor has it been demonstrated how timely written notice would have resulted in any different action on the part of the Government. Under these circumstances, we conclude that there has been no showing of prejudice to the Government by appellant's failure to provide a formal written notice of its claim. We therefore reject the Government's argument that the claim be dismissed for lack of proper notice.

[2] Based upon the foregoing, we therefore find that appellant is entitled to an equitable adjustment under the Differing Site Conditions clause, having encountered conditions during performance of the contract which differed materially from those indicated in the specifications and which required additional work, including:

- (1) the substitution and installation of copper for galvanized steel on numerous locations throughout the project;
- (2) the installation of different sizes and lengths of service lines throughout the project and;
- (3) the performance of a minimum of three feet of over-depth excavation in numerous locations where water meters were installed.

II. Equitable Adjustment

Having concluded that appellant is entitled to an equitable adjustment for additional costs incurred under the contract, we must next determine the extent of appellant's entitlement. In order to make such a determination, however, it is necessary to establish some basic conclusions about the nature of the contract before us, the requirements therein, and the validity of the Government's deductive change order for pipe not installed.

First, we find no support in the record for the Government's assertion that Part IV of the specifications (with exceptions noted), required replacement of all existing pipe on the project. The specifications are vague on the point, merely indicating that the work required "installation of water meters, meter boxes and service lines at designated locations . . ." (Findings, Exh. A). Where a contract is not clear on its face, and its meaning cannot be determined by reference to the document itself, the conduct of the parties and their interpretation of the contract provisions before the dispute arose, is entitled to great, if not controlling, influence. *Moving Services, Ltd.*, IBCA-1540-12-81 (Apr. 9, 1984), 84-2 BCA par. 17,267.

Here, the evidence indicates that the COR, upon being notified by the BIA inspector that appellant was using copper pipe in lieu of galvanized steel as required by the specifications, neither directed appellant to stop installing copper, nor ordered that galvanized steel be installed (Tr. II at 121, 213). Moreover, appellant testified that both Fred Braun, the BIA inspector, and Phil Huck, a BIA official who filled in for Braun during January 1982 (AF-13(b) at 29-41), gave appellant a "free reign" to replace existing pipe as he felt appropriate (Tr. II at 277). Appellant's testimony is confirmed by Braun who with 40 years experience in the field (Tr. I at 122, 129), testified:

Q. What did you say to them, if anything, when you found out they were putting in copper pipe?

A. Well, as far as I was concerned on it, we would just have to take it up and see. I figured that there wouldn't be any problem as far as the copper was concerned. I mean, we usually go along with it. *A lot of it is left up to the judgment of the--the same way with replacing the quantity of pipe that he [appellant] replaced. I left that up to him [appellant] when he first started.*

* * * * *

Q. You're understanding of these contract documents is that he's to replace service lines extending all the way from the main to the house?

A. This is the understanding that I had with Mr. Wagner when we were up there *that he would replace the lines that he felt that needed to be replaced, and I left it up to his option so he could have replaced lines that were brand new. He could have replaced lines that were all rusted out. I don't know, I can't answer that, that was up to his discretion.*

Q. You relied on his experience--

A. That's right.

Q. --to determine how much footage of service line would be installed?

A. Yes sir, and I took his estimate of how much pipe that they put in the ground. [Italics supplied.]

(Tr. II at 100, 125-26.)¹¹

The above-mentioned testimony along with the earlier testimony of Mr. McConnell, substantiates what the record previously established, i.e., that appellant, given the remoteness of the project site (Tr. II at 184), the fact that the inspector only visited the site once a week (Tr. I at 97), and the lack of any guidance during installation (Tr. II at 199), was required to exercise his own judgment as how to best

¹¹ Mr. Braun further testified that appellant's installation of copper pipe into the existing copper service lines was not a mistake in his judgment (Tr. I at 122).

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accomplish the purpose of the contract, the installation of water meters, meter boxes, and service lines. The evidence shows that upon a final inspection on February 24, 1982, the work was found to be satisfactorily completed in compliance with the contract specifications and plans, and was approved by the facility management officer (Findings, Exh. 9).¹²

[3] Given these circumstances, along with the contemporaneous conduct of the parties at the time of performance, we conclude that the contract specifications did not require appellant to replace all existing service lines in order to fully perform under the contract. We therefore further conclude that the Government was without justification to invoke the unit price schedule contained in Addition to SF-21 in the bid form, for the purpose of reducing the contract amount for uninstalled pipe. As such, issuance of Change Order No. 3 on May 28, 1982, was without proper foundation and therefore invalid. Having concluded that the Government wrongfully withheld \$7,238 under Change Order No. 3, we find that appellant is entitled to payment of the full, lump sum contract price of \$81,572.

In addition, appellant's original claim before the contracting officer asserted that it incurred costs of \$12,383.63 in excess of the contract price as a result of the differing site conditions encountered during the course of the work (Findings at 4). At the hearing, appellant presented an explanation as to how he calculated such costs. In essence, appellant determined the quantity of galvanized pipe actually installed, as agreed by the parties, and multiplied them by the unit costs set forth in the Addition to SF-21 in the bid form. For copper pipe installed, and for transitions and service splits encountered, appellant quoted individual prices according to size. Finally, appellant determined over-depth excavation to be 2.5 verticle feet multiplied by 3,881 feet, at the price of \$.25 per verticle foot (Tr. II at 300-03). As a result, appellant's costs were calculated as the net addition to the total contract price of \$12,383.63.

[4] The proper method of computing an equitable adjustment includes the reasonable cost of extra work and materials. *Bregman Construction Corp.*, ASBCA No. 15020 (Apr. 13, 1972), 72-1 BCA par. 94,111 at 43,718. Actual costs incurred by the contractor are presumed to be reasonable and establish a prima facie case for recovery. *Ocean Technology, Inc.*, ASBCA No. 21363 (Apr. 28, 1978), 78-1 BCA par. 13,204. Although the presumption is rebuttable, the Government in this case has not otherwise overcome the presumption. Under the circumstances, we conclude that appellant's excess costs of \$12,383.63 were reasonable, and that the conditions encountered on the project

¹² Although Part IV of the Specific Performance portion of the specifications required the installation of 123 meters at various locations, the evidence indicates that appellant actually installed 127 such meters (Findings, Exh. 11; AX-A).

entitled appellant to an equitable adjustment pursuant to the Differing Site Conditions clause of the contract.

Decision

In consideration of the foregoing discussion, we conclude that appellant is entitled to the full contract price of \$81,572, plus an additional amount of \$12,383.63 as an equitable adjustment, for a total amount of \$93,955.63, less any amounts paid to date. In accordance with the provisions of the Contract Disputes Act of 1978, interest on the balance shall run from March 19, 1982.

G. HERBERT PACKWOOD
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

BRUCE W. CRAWFORD *ET UX.*

86 IBLA 350

Decided *May 17, 1985*

Appeal from a decision of the Oregon State Office, Bureau of Land Management, affirming issuance of a notice of noncompliance with respect to operations on certain placer mining claims. MN-OR110-049-82.

Set aside and remanded.

1. Mining Claims: Generally--Mining Claims: Surface Uses

Where the locator of a mining claim has discovered a valuable mineral deposit within the limits of his claim, the locator is granted, pursuant to 30 U.S.C. § 26 (1982), the exclusive right of possession of the surface of the claim subject to the limitations of sec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), if applicable, and subject to the further limitation that such rights are restricted, until the purchase price is paid, to uses reasonably incident to actual mining.

2. Mining Claims: Generally--Mining Claims: Surface Uses

Nothing in the general mining laws invests a locator with the right to initiate occupancy on a mining claim absent a showing that such occupancy is reasonably incident to mining activities.

3. Mining Claims: Generally--Mining Claims: Surface Uses

Where ongoing mining activities are taking place, a challenge to occupancy as being not reasonably incident to mining requires that the mining claimant be given notice and an opportunity for a hearing at which he might establish that his occupancy is reasonably related to his actual mining operations, prior to issuance of an order directing that occupancy cease.

4. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Surface Uses

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Under the regulations adopted by the Bureau of Land Management, the authorized officer has no authority to approve or disapprove the contents of a notice of intent to commence mining operations filed under 43 CFR 3809.1-3(a). Therefore, where an operator has failed to timely file pursuant to that section, a notice of noncompliance may be issued, but such notice is necessarily limited in scope to requiring the operator to submit a notice.

5. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Surface Uses

Pursuant to 43 CFR 3809.3-2(d), a notice of noncompliance properly issues upon a determination that a use to which a mining claim may properly be put is occurring in such a manner as to result in unnecessary or undue degradation of the land.

6. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Surface Uses

While mining claimants are required to obtain all necessary state permits relating to mining activities, a notice of noncompliance based on the failure to obtain such permits can only be sustained where the authorized officer delineates exactly which permits were required and provides sufficient factual background to support this conclusion.

APPEARANCES: Richard F. Lancefield, Esq., Portland, Oregon, for appellants; Eugene A. Briggs, Esq., Office of the Regional Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Bruce and Lorri Crawford appeal from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated June 29, 1983, affirming the issuance by the Medford District Manager of a notice of noncompliance with respect to activities being conducted on the Valentine and Hard Luck placer mining claims.

The claims in issue were located by appellants on November 20, 1981. On May 18, 1982, appellants filed a notice of intent to conduct mining operations, pursuant to 43 CFR 3809.1-3(a).¹ In addition to generally describing the mining activities planned, appellants noted that they would be placing the following structures on the claim: "3 trailer houses, one chicken house, one smoke house, and tool shed 12' by 20'. All will be temporary." By letter of May 20, 1982, appellants were informed that their mining notice was in order and complete.

On November 19, 1982, a local sheriff's deputy informed BLM that a log cabin had been constructed on the Valentine claim. The next day, two BLM employees visited the claims. According to the written report of this investigation, they found a trailer and a 900-square-foot log cabin, the interior of which had not been completed. Additionally,

¹ Generally, where less than 5 acres is being disturbed in a single calendar year, a claimant is required to file a "notice" with BLM under 43 CFR 3809.1-3. Where either more than 5 acres is being disturbed or the operation involves land in certain designated areas, a "plan of operation" under 43 CFR 3809.1-4 must be filed.

there was a vegetable garden and some chickens present. When asked about the cabin, Lorri Crawford stated that Wally Swanson, a BLM employee, had given them verbal authorization to build the house provided that it had a temporary foundation.

On January 10, 1983, the Medford District Manager issued a notice of noncompliance. This notice recited, *inter alia*, that appellants had constructed a residential frame building used for a primary domicile and had also constructed agricultural plots with associated fences and domestic animal pens. Additionally, the notice stated that appellants had failed to obtain a waste water permit and a fill and removal or mined land reclamation permit as required by the State of Oregon. The notice of noncompliance instructed appellants to begin corrective action within 30 days to remove the residential frame building, the agricultural plots and fences, and the domestic animals and associated holding pens and further required them to obtain all necessary permits.

On January 18, 1983, appellants submitted various documents as their calendar year 1983 notice, essentially amending their earlier notice of intent to mine. In this filing, they specifically referenced a log cabin with dimensions of 24 by 26 feet. In response, the District Manager, by letter of February 2, 1983, reiterated the demand that appellants remove the structures described in the notice of noncompliance, noting that if appellants failed to comply with the notice, the Bureau would, in accordance with 43 CFR 3809.3-2(e), require submission of a plan of operations and a bond to cover reclamation costs. The letter further noted that "under this requirement you would not be allowed to mine until you supplied a bond and the plan of operations was approved. BLM would not approve the plan of operations until you comply with the notice of noncompliance." Appellants in the interim had appealed the notice of noncompliance to the State Director pursuant to 43 CFR 3809.4(a).

Various attempts were then made by BLM to settle the matter, primarily by offering appellants a 1-year residency permit to afford them an opportunity to find another site for the cabin. Of some importance, however, is a memorandum dated February 28, 1983, from the Acting Medford District Manager to the State Director. In this memorandum, the Acting District Manager noted:

We would like to make it clear that at no time did we challenge the right of the Crawfords to mine or interfere with their mining operation. In our opinion, a trailer house currently on the claim was an adequate residence for the amount of mining that was on-going at that time. And further, it was our opinion that the garden plots and raising of chickens were not incidental to the use of a mining claim; therefore, the notice of noncompliance was issued. *Again, we must reiterate that the mining operation or the occupancy in itself was not in question. The method of the occupancy and incidental uses of that occupancy were.* [Italics supplied.]

Appellants ultimately declined to accept the temporary residence permit, and the State Director proceeded to consider their appeal.

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In their appeal to the State Director, appellants had alleged that they had discussed the plans for their cabin with a BLM representative prior to constructing it and argued that it was a temporary structure without utilities that would be removed at the conclusion of mining activities. They argued that if their plans were not detailed enough they should have been told so when they were submitted, not 8 months later. While admitting they had a vegetable garden and nine chickens, they contended that these uses were "necessities if one is to mine as much as possible." Insofar as the State permits were concerned, they argued that a check with the State agencies had shown that none of the permits were required for their present operations and that should any permits become necessary in the future, application would promptly be made.

In his decision affirming issuance of the notice of noncompliance, the State Director discussed the allegations of the claimants in two general categories, *viz.*, compliance with the regulations in Subpart 3809 and nonapplicability of the State permitting requirements. Treating the latter issue first, the State Director reviewed the various factual allegations and concluded that "the weight of documentation tips sharply in favor of BLM's determination that appellants failed to obtain applicable State permits" (Decision at 6).

The State Director then turned to the question whether appellants had failed to comply with the requirements of 43 CFR Subpart 3809. The State Director stated that, in fact, all of appellants' improvements were placed on the land before notice was provided to BLM, since the original notice merely described improvements already in place at that time. The State Director continued:

The failure of appellants to provide a timely and complete notice of mining operations to BLM constitutes a serious infraction which cuts at the very heart of the surface mining management regulations. Neither of appellants' notices were sufficient to provide the kind of notification required to enable BLM to pursue its statutory mandate to manage and protect surface resources on federal lands. The appeal regarding this issue is also denied and the decision appealed from is affirmed in its entirety.

Appellants timely pursued this appeal to the Board.

In their statement of reasons in support of the appeal, appellants argue variously that the decision of the State Director was beyond his authority and that it violated due process safeguards inasmuch as it was issued without notice or an opportunity for hearing. Appellants admit they may have erred in failing to formally notify BLM prior to placing the cabin on their claim. They argue that it is needed to facilitate mining on their claim during the winter.² They state that they had not unduly degraded the land and that the State Director's decision was unreasonable, arbitrary, and capricious.

² Appellants point out that, under Oregon law, placer mining on tributaries of the Rogue River is limited to between Nov. 15 and Apr. 15.

In response, counsel for BLM first argues that the authorized officer has authority to disapprove a notice of intent to mine and issue a notice of noncompliance demanding cessation of an illegal use of public land, even though effective enforcement of such a decision might only be obtained pursuant to Federal court action. Counsel further asserts that the order "is based upon a conclusion that the Crawfords are occupying the mining claims for the purpose of having a residence, rather than for mining purposes" (Answer at 6). Counsel continues:

The BLM investigation shows that the Crawford claims are only 800 feet from Peavine Road, an all-weather road, and only four miles from Galice Creek Road, which has all utilities, is paved, and has many year-round occupants. It is 5.6 miles from the claims to Galice, a small resort community which has a grocery store, cafe and gasoline station, and 15 miles to Merlin (not 25 as stated in Exhibit B.). There is rarely snow in this area, and there is no need to occupy the claim for the purpose of working it in the casual, part-time manner used by the Crawfords. Rather, the only reason to occupy the claims is to avoid having to establish occupancy elsewhere.

These claims can be reached without incident on almost any day of any year. Appellants' complaints of the discomfort of occupancy of a trailer house on the claims apply to any occupancy of such a trailer house in western Oregon during the winter.

* * * * *

Picking bits of gold out of sand, "using tweezers and even a tooth pick," (Exhibit B, page 2) is not the type of mining operation which requires occupancy of the mining claim. Portable equipment which can be moved daily does not justify occupancy of a claim.

Id.

Appellants filed a response to the BLM answer reiterating their original contentions and generally arguing that counsel for BLM was merely adding his conjecture as to why the State Director acted without any basis in the record upon which to support these surmises. Because, as we shall subsequently show, the decision of the District Manager, the decision of the State Director, and the brief filed on BLM's behalf, all embrace differing theories as to the basis for prohibition of occupancy on the claim, some confusion is inevitable in our discussion of the issues involved. At this point in our discussion, it is sufficient to merely advert to the existence of these differing theories. They will be fleshed out in greater detail subsequently in the text.

[1] Before discussing the specific issues raised in this appeal, which will require a lengthy exegesis on the present regulatory scheme, it will be helpful to briefly explore the statutory framework under which the regulations have been promulgated. Under the 1872 Mining Act, the location of a mining claim invested the locator with certain rights. Prior to a discovery of a valuable mineral deposit, and provided that the locator continued in a diligent search for minerals, the locator was possessed of rights generally described as *pedis possessio*. Such a claimant was protected against subsequent intrusions of others while he remained in continuous, exclusive occupancy and diligently attempted to make a discovery. See generally *Union Oil Co. of*

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California v. Smith, 249 U.S. 337 (1919).³ The protections afforded by the doctrine of *pedis possessio*, however, did not apply as against the United States. Thus, should the Government withdraw the land from mineral entry prior to a discovery, all of the claimant's possessory rights were thereby terminated. *Cameron v. United States*, 252 U.S. 450, 456 (1920); *United States v. Williamson*, 45 IBLA 264, 277-78, 87 I.D. 34, 41-42 (1980); *R. Gail Tibbetts*, 43 IBLA 210, 218-19, 86 I.D. 538, 542-43 (1979).

On the other hand, where a discovery was made within the limits of a valid location, the rights of the claimant progressed from a mere right of possession while continuing in a diligent search for minerals to "property in the fullest sense of the word." *Forbes v. Gracey*, 94 U.S. 762, 767 (1877). So long as such a claim is maintained in conformity with the law, it is good as against the United States. *See, e.g., Davis v. Nelson*, 329 F.2d 840, 845 (9th Cir. 1964).

Under the express provisions of the 1872 Mining Law, where a valid location, *i.e.*, one supported by a discovery, has been made, the locator is granted "the exclusive right of possession and enjoyment of all the surface included within the lines of [the] location." 30 U.S.C. § 26 (1982).⁴ It is of some note that in the period of time between the adoption of the 1872 Act until the Surface Resources Act in 1955, 30 U.S.C. §§ 601-612 (1982), only a handful of Federal cases dealt with the scope of this grant. One, *Teller v. United States*, 113 F. 273 (8th Cir. 1901), involved the cutting of timber on an unpatented mining claim. Another, *United States v. Rizzinelli*, 182 F. 675 (D. Idaho 1910), involved the maintenance of a saloon on an unpatented mining claim located within the Coeur d'Alene National Forest. Both courts reached the same conclusion as to the scope of the grant of "exclusive possession" following similar lines of reasoning.

The court in *Teller* reiterated the United States Supreme Court's classification of the titles created by the mining laws of the United States: (1) title by possession, (2) the complete equitable title, and (3) title in fee simple.⁵ Title by possession, flowing from location and discovery, conferred the right to work the claim for its minerals, but, said the court, conferred "no right to take timber, or otherwise make use of the surface of the claim, except so far as it may be reasonably necessary in the legitimate operation of mining." *Id.* at 280. The court continued, noting that while the location of a valid claim afforded the

³ As the Supreme Court noted in *Cole v. Ralph*, 252 U.S. 286 (1920), however, this protection applied only against a "forcible, fraudulent or clandestine intrusion," and a peaceable, open entry by another, if perfected by a discovery, would defeat the original claimant of his possessory title. *Id.* at 295. *See also Belk v. Meagher*, 104 U.S. 279 (1881).

⁴ It is important to distinguish this "exclusive right of possession" from the possessory right afforded by the doctrine of *pedis possessio*. As noted above, the latter right does not apply as against the United States. The former, however, at least insofar as the located mineral estate is concerned, is applicable against the Government. *See generally United States v. Etcheverry*, 230 F.2d 193, 195-96 (10th Cir. 1956); *Teller v. United States*, 113 F. 273, 280-81 (8th Cir. 1901). The extent of this grant of exclusive possession is explored, *infra*, in the text.

⁵ The court was quoting the Supreme Court's decision in *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428 (1892), which, in turn, had cited with approval an earlier decision of the Secretary of the Interior. *Id.* at 430.

claimant the present and exclusive possession for mining purposes, "[i]t did not divest the legal title of the United States, or impair its right to protect the land and its product * * * from trespass or waste." *Id.* at 281.

A major consideration in the court's conclusion that, prior to the vesting of equitable title (which would occur upon the filing of the patent application and the payment of the purchase price), there was no right to denude land within a mining claim of its standing timber for purposes other than those directly related to mining activity, was recognition that while Congress had granted the right to remove minerals from the public domain as a gratuity it had also determined to divest the Government of title to the surface estate *only* upon payment of the purchase price for the land.⁶ Allowing such depredatory actions as clearcutting of timber unassociated with the mining activities prior to the tender of the purchase price would permit a mining claimant to obtain the advantages of full title without ever paying the price Congress had established as a prerequisite to the grant of fee title.

In *United States v. Rizzinelli, supra*, which involved the establishment of saloons on unpatented mining claims, the district court first rejected appellants' contention that the location of a mining claim removed the land within the claim from the administrative jurisdiction of the Secretary of Agriculture such that certain rules which the Secretary had issued were ineffective as to the claims. The court noted that the Act of June 4, 1897, 30 Stat. 36, which had established the Forest Reserves (predecessors of the National Forests) had expressly provided that they were open to the location and development of mining claims, "Provided, That such persons comply with the rules and regulations, covering such forest reservations." See 16 U.S.C. § 478 (1982). Thus, the court held appellants' claim was subject to the administrative jurisdiction of the Secretary of Agriculture.

More important for our purposes, the court also essentially accepted the Government's argument that the holder of an unpatented mining claim was possessed of the exclusive use of the surface of the claim "only for purposes connected with or incident to the exploration and recovery of the mineral therein contained." *Id.* at 681. The court reached its conclusion through reasoning similar to that employed in *Teller*:

At the same time the government confers upon the locator the right to possess and enjoy the surface of a mining claim for mining purposes without the payment of any consideration therefor, it offers for a small consideration to convey to him the entire estate. The government gives the mineral to him who finds it, and, for purposes incident to the extraction thereof, permits him to possess and use the ground in which it is found.

⁶ While the present purchase price for mining claims (\$2.50 an acre for placer claims and \$5 an acre for lode claims) may seem, under modern economics, to be not much more than a gratuitous payment, it must be remembered that, at the time the 1872 Act was adopted, these prices represented the going-rate for Government land. Thus, the 1862 Homestead Act provided for the purchase of agricultural lands upon the payment of \$1.25 or \$2.50 an acre. See 12 Stat. 392.

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It does not give him the ground, but empowers him to purchase it, and that he may do if he desires its permanent and unrestricted use.

Id. at 682-83.

Such was the state of the law at the time that Congress adopted the Surface Resources Act in 1955. See Act of July 23, 1955, 69 Stat. 367, *as amended*, 30 U.S.C. §§ 601-615 (1982). This multifaceted Act found its genesis primarily in the growing recognition that more and more claims were being located merely as a subterfuge to invest the locator with colorable rights to the surface resources, particularly timber. See H. Rep. No. 730, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Code Cong. & Ad. News at 2478. More generally, the locations of claims in forests obstructed access to adjacent tracts of Federal land containing merchantable timber or valuable recreation sites and led to greatly increased administrative costs. Additionally, Congress noted that “[s]ome locators in reality, desire their mining claims for commercial enterprises such as filling stations, curio shops, cafes, or for residence or summer camp purposes.” *Id.* at 2479.⁷

In framing a response to these growing abuses, Congress noted:

There is, however, agreement that any corrective legislation providing for multiple use of the surface of the same tracts of public lands, compatible with unhampered subsurface resource development, must be aimed at—

First, prohibiting location of mining claims for any purpose other than prospecting, mining, processing, and related activities;

Second, providing for conservation and utilization of timber, forage, and other surface resources on mining claims, and on adjacent lands; and

Third, accomplishing these desirable ends without materially changing the basic concepts and principles of the general mining laws.

Id. at 2480. It was with these three considerations in mind that Congress enacted the Surface Resources Act.

Congress attempted to correct the situation by pursuing a variety of different tacks. Thus, Congress removed from location common varieties of sand, stone, gravel, pumice, and cinders, and made them subject to purchase under the Material Sales Act of 1947, 61 Stat. 681, *as amended*, 30 U.S.C. §§ 601-604 (1982). More germane to our purposes was section 4 of the 1955 Act, 30 U.S.C. § 612 (1982).

Section 4(a) of the Act provided that “[a]ny mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.” Section 4(b) of the Act provided that all claims thereafter located would be subject, prior to the issuance of a patent, to

⁷ It should be pointed out that a generalized opposition to occupancy within the National Forests and on public land was *not* the driving force behind congressional concern on this point. Congressional objections actually related to the amount of acreage being embraced in mining claims which were merely a legal guise to establish residency, and not with residency, *per se*. Thus, the Committee Report, after making the statement, quoted in the text, continued:

“If application is made for residence or summer camp purposes under Federal law other than the mining laws, sites usually embrace small tracts, that is, 5-acre tracts; on the other hand, mining locations provide for control and utilization of approximately 20-acre tracts. Fraudulent locators prefer 20 acres to 5 acres.” *Id.*

the right of the United States to manage and dispose of vegetative surface resources and to manage other surface resources (exempting mineral resources subject to location) and granted the United States and its licensees and permittees the right to use so much of the surface as was necessary for such management and disposal purposes as well as for access to adjacent land. These rights were, however, limited by the following express caveat: "[A]ny use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing or uses reasonably incident thereto." Section 4(c) expressly prohibited the severing or removal of vegetative or surface resources on any unpatented mining claim located after the Act "[e]xcept to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto."

It can be seen from the foregoing that sections 4(a) and 4(c), far from altering the surface rights obtained by the location of a mining claim were, in fact, simply declaratory of the law as it existed prior to 1955.⁸ Section 4(b), on the other hand, effected a substantial change in the surface management of claims located subsequent thereto, or made subject thereto pursuant to the procedures provided by section 5.⁹ Thus, while *Teller v. United States*, supra, had established the principle that the owner of an unpatented mining claim had no right to cut timber found on the claim for purposes unrelated to mining, the decision of the Idaho District Court in *United States v. Deasy*, 24 F.2d 108 (1928), had similarly established the rule that the United States had no right to cut such timber and retain the proceeds. Subsequent to this decision, the Forest Service discontinued its practice of selling timber on unpatented mining claims. The Department of the Interior similarly expressed the view that it was without authority to sell such timber.¹⁰ See *Authority of the Bureau of Land Management to Sell Timber on an Unpatented Mining Claim*, M-36265 (Mar. 11, 1955). Effectively, therefore, no one could manage or dispose of such timber so long as it remained within an unpatented mining claim. Section 4(b) remedied this situation by vesting such authority in the United States.

Insofar as access across unpatented mining claims was concerned, the exclusive possession of the surface afforded by 30 U.S.C. § 26 (1982) had been deemed to preclude access rights across an unpatented

⁸ This point was expressly made in the Public Land Law Review Commission Report (PLLRC), *Legal Study of the Nonfuel Mineral Resources*. Thus, the PLLRC Report noted with reference to section 4(a), "[a]lthough some members of Congress appear to have been under the impression that this section was an amendment of the mining laws, it is merely a codification of the judicial and administrative interpretation of those laws." PLLRC Report at 992. See also *United States v. Springer*, 321 F. Supp. 625, 627 (C.D. Cal. 1970). "Prior to 1955 it would seem clear that a mining claimant could not use the claim for any purposes other than mining purposes and uses reasonably incident to mining * * *."

⁹ Section 5 of the Act, 30 U.S.C. § 613 (1982), established a procedure for verifying whether a pre-1955 claim was, at the time the Act was adopted, supported by a discovery of a valuable mineral deposit. Where it was established that a claim was not so supported, that claim was made subject to the surface management provisions of section 4 of the Act.

¹⁰ This rule did not apply to claims in Oregon and California Railroad revested grant lands located after Aug. 28, 1937, where, by statute, no possessory title to the timber was acquired by the location of a mining claim. See Act of April 8, 1948, 62 Stat. 162. Nor did it apply to salvage operations designed to remove diseased or insect-infested timber. See *Bradley-Turner Mines, Inc. v. Branagh*, 187 F. Supp. 665 (N.D. Cal. 1960), *aff'd*, 294 F.2d 954 (9th Cir. 1961); *Lewis v. Garlock*, 168 F. 153 (C.C.S.D. 1909).

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mining claim absent the claimant's consent. See generally *Access Road Construction*, 65 I.D. 200 (1958). Section 4(b) of the Act also altered this principle on claims subject to it.

While there has been some confusion in judicial decisions as to whether section 4(a) worked to limit permissible uses of the surface of mining claims located after 1955 vis-a-vis those rights appurtenant to pre-1955 claims, courts have, in actual practice, generally recognized that the same standard applied. See, e.g., *United States v. Etcheverry*, 230 F.2d 193 (10th Cir. 1956); *United States v. Langley*, 587 F. Supp. 1258 (E.D. Cal. 1984). One notable exception to this general rule is the Ninth Circuit's decision in *United States v. Richardson*, 599 F.2d 290 (1979).

The decision in *Richardson* involved a question not previously addressed in reported decisions, viz., whether the Government had the right to control the *method* of mining on the theory that the method utilized was not reasonable given the facts of the case. The Ninth Circuit drew a sharp dichotomy between claims subject to the Surface Resources Act and those not subject by expressly noting that "[t]he Surface Resources Act * * * must be relied upon to uphold the decree of the District Court in the present case." *Id.* at 293. In interpreting section 4 of the Surface Resources Act, the court, in effect, construed the surface management provisions of section 4(b) as modifying the declaratory language of section 4(a) resulting in the conclusion that post-1955 claims were subject to limitations in the methods of mining not necessarily applicable to pre-1955 claims.

The general approach of the *Richardson* court has been subject to some criticism. Thus, it has been noted: "If applied literally, the *Richardson* case would change the basic purpose of the Multiple Surface Use Act from regulation of activities which are not authorized by the General Mining Law to regulation of activities which are authorized by the General Mining Law, and would permit the United States to substitute its judgment concerning appropriate methods of exploration for the judgment of the prospector." See W. Marsh and D. Sherwood, "Metamorphosis in Mining Law: Federal Legislative and Regulatory Amendment and Supplementation of the General Mining Law Since 1955," 26 Rocky Mtn. Min. L. Inst. 209, 228 (1980).

Implicit in this criticism, however, is both the view that no change was intended by Congress concerning the "exclusive right of possession" afforded a claimant by reason of his valid location¹¹ and the supposition that the authority of the Government to regulate the mode of mining was nonexistent prior to the adoption of the Surface Resources Act. While we consider the former proposition to be

¹¹Quite apart from its questionable assertion that the Surface Resources Act effected a change in the "exclusive possession" afforded valid locations, the *Richardson* court is also subject to the criticism that, since the claim involved was clearly held to be invalid (*Id.* at 295), the issue before the Court was not one concerning the scope of 30 U.S.C. § 26 (1982) but of the rights of *pedis possessio*. See discussion note 4, *supra*; R. Sager, "Exclusive Possession of Unpatented Mining Claims: Fact or Fiction?" 17 Rocky Mtn. Min. L. Inst. 301-23 (1972).

relatively established,¹² the latter premise is essentially based on the absence of cases expressly asserting the authority to regulate mining within a valid claim. We do not believe, however, that the fact there are no cases establishing this authority can be accorded the status of a conclusive holding that such authority did not exist, particularly where there are no cases expressly *denying* the existence of such authority.

Moreover, in a somewhat analogous area of the mining law, two court decisions indicate that the rights appurtenant to a mining claim may not embrace the right to mine howsoever the claimant desires. Under the Stock-Raising Homestead Act of 1916, 39 Stat. 862, *as amended*, 43 U.S.C. §§ 291-302 (1982), all entries and patents were subject to a reservation of coal and other minerals. Locatable minerals remained subject to the mining laws. It was expressly provided in section 9 of the Act that “[a]ny person who has acquired * * * the right to mine and remove the [mineral deposits] may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to * * * mining or removal” provided the individual either first secured the written consent of the entryman or patentee or made payment for the damages to the crops or other tangible improvements thereof (and to the value of the lands for grazing purposes¹³) or, failing in both of the first two options, upon submission of a sufficient bond.

A similar law had been enacted 2 years earlier, in an attempt to permit agricultural entry on lands which had been withdrawn by President Taft because of their value for oil and gas.¹⁴ This Act, commonly referred to as the Agricultural Entry Act of 1914, Act of July 17, 1914, 38 Stat. 509, *as amended*, 30 U.S.C. §§ 121-123 (1982), provided for the location and entry of such lands under the agricultural laws subject to a reservation of the minerals, for which it had been withdrawn by the United States. Section 2 of this Act afforded any person who had acquired from the United States the right to mine and remove the deposits the correlative right to “reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of minerals therefrom.” Here, too, Congress provided for either the payment of damages or the posting of a bond to cover “damages caused thereby.” Practically speaking, the adoption of the Mineral Leasing Act of 1920, which withdrew from location the minerals reserved under the Agricultural Entry Act, served to make such reserved minerals subject only to leasing; but, as will be seen, the principles which can be derived from certain cases construing this Act are equally applicable to

¹² Paradoxically, it must be noted that section 4(a) of the Surface Resources Act, *supra*, directly speaks to “prospecting,” a term generally applicable only prior to a discovery. But, to the same extent that section 4(a) is correctly seen as merely a restatement of the law as it then existed, one cannot read this addition as expanding the ambit of 30 U.S.C. § 26 (1982) to include claims not supported by a discovery. Rather, the inclusion of the term “prospecting” must be read merely to restate the general proposition that a prospector does not possess any right to use the surface of his or her claim for purposes other than those reasonably incident to prospecting activities.

¹³ This provision was added by the Act of June 21, 1949. See 30 U.S.C. § 54 (1982).

¹⁴ See generally L. Mall, “Federal Mineral Reservations,” 10 Land & Water L. Rev. 1-61 (1975).

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the Stock-Raising Homestead Act and, by analogy, to mining claims located on the public domain.

The seminal case interpreting the scope of the protections afforded to the surface patentee was the Supreme Court's decision in *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488 (1928). This case involved a suit brought by Kinney-Coastal Oil Co. (Kinney), the lessee of the United States, against one Michael F. Kieffer, who had obtained a homestead patent under the Agricultural Entry Act. Kinney's lease had originally issued pursuant to competitive bidding in 1921. While Kieffer's application to enter preceded the lease, patent did not issue until October 12, 1923, by which time Kinney had already completed a producing well. Soon thereafter, Kieffer, who, prior to patent, had only constructed a residence and various outbuildings, commenced to plat a townsite and sell individual lots upon which were quickly erected buildings for residential and other purposes. Kinney thereupon brought suit to stop the sale of lots and the platting of additional lands and to enforce its right to use "all of the surface" of the lands in question, which it contended was necessary to remove the leased minerals. While the court of appeals had concurred in the finding that Kinney would, indeed, need all of the surface, it ordered dismissal of the bill as it concluded appellant's remedies were at law rather than in equity and thus Kieffer had a constitutional right to a jury trial which had been abridged.

While the Supreme Court ultimately reversed this holding for reasons which need not detain us, certain discussions of the Court are of relevance to our immediate inquiry. In reviewing the ambit of compensable damages, the Court construed the statutory language as providing for compensation solely for crops and agricultural improvements. *Id.* at 505. Thus, damage to the surface estate itself was not directly compensable. However, the Court continued: "It well may be that, if the operations are negligently conducted and damage is done thereby to the surface estate, there will be liability therefor. But such liability will ensue, not from admissible mining operations and use of the surface, but from the inadmissible negligence causing the damage." *Id.* In *Holbrook v. Continental Oil Co.*, 278 P.2d 798, 804 (Wyo. 1955), which involved both the Agricultural Entry Act and the Stock-Raising Homestead Act, the Supreme Court of Wyoming reiterated this point: "In the absence of proof of negligent mining operations * * * the surface owners * * * can recover only for damages to agricultural improvements or agricultural crops." Determination of what constitutes "negligence," however, of necessity would encompass consideration of what modes of mining were appropriate in the circumstances.

Admittedly, the analogy herein is subject to the criticism that, unlike the situation of a mining claim on the public domain, location of a claim on such patented land did not afford the "exclusive right of

possession" of the surface to the mining claimant. While this is true, it must also be pointed out that in the American legal scheme the mineral estate has generally been denoted as the dominant estate (*see generally* J. Lacy, "Conflicting Surface Interests: Shotgun Diplomacy Revisited," 22 Rocky Mt. Min. Law Inst. 731 (1976)), and those who received patents subject to the mineral reservations were aware that the surface estate was subject to temporary appropriation by the owner of the mineral estate for purposes "reasonably incident" to mining and processing. This "reasonably incident" standard is, of course, the exact standard formulated by the Federal courts in declaiming on the extent of the rights afforded by the grant of "exclusive possession" to the holder of a valid mining claim *prior* to the adoption of the Surface Resources Act.

Moreover, if it were true that the Department possessed no power to control the method of mining prior to 1955, it is difficult to see how the Department could prevent depredations to timber resources where a miner argued that clear cutting the land was merely incident to open pit mining. Yet, the Court in *Teller v. United States, supra*, prohibited the taking of timber, save what was necessary "in the *legitimate* operation of mining." *Id.* at 280 (italics supplied.) Determination of what is a "legitimate" operation necessarily entails consideration of whether the surface uses of the land, including the mode of extraction, are consistent with the recovery of the mineral deposit then shown to exist. Clearly, caution must be exercised in such judgments, lest the Government effectively preclude the valid exercise of the rights it has granted under the mining laws. But, by the same token, the Government need not stand idly by as land is despoiled and other values injured merely because a mining claimant baldly asserts that removal of a mineral deposit necessitates the destruction or use to which the Government objects.

[2] This extended discussion has been necessary because the question presented by this case actually embraces two related but independent considerations. The first issue involves the extent to which the Department can regulate or prohibit surface uses of a valid claim, including, as now alleged here, residential occupancy. Subsumed in this issue is the subsidiary question of the proper procedure to be followed in determining whether a use is permissible under the mining laws. The second issue concerns compliance with the Department's regulations and the appropriate penalty for the failure to comply. Included in this latter issue is the question of the scope of authority granted to BLM officials under the present regulatory scheme. We will deal with these discrete considerations *seriatim*.

As our above discussion indicates, while the Surface Resources Act clearly granted the Government expanded authority to manage surface resources and utilize the surface of an unpatented mining claim to obtain access to other Federal lands, it did not restrict the permissible uses of the surface by a mining claimant beyond those limitations which had theretofore been established by judicial exposition. Thus,

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the initial question is what types of uses are permitted and in what circumstances.

It is obvious that a vast number of uses to which land within a mining claim might be put have never been cognizable under the mining laws. There can be little question that beyond the saloons proscribed in *United States v. Rizzinelli, supra*, a number of the uses expressly referenced in the legislative history of the Surface Resources Act, were, as a matter of law, never countenanced as uses reasonably incident to mining. Among these would be use of the surface for filling stations, curio shops, cafes, and other commercial enterprises.¹⁵ Occupancy of a claim, however, requires careful treatment. For, while it may be that the mining laws never countenanced the location of claims as a subterfuge for acquiring a place to live (see *United States v. Allen*, 578 F.2d 236 (9th Cir. 1978)), it is equally beyond peradventure that occupancy of land incident to mining has never been interdicted.¹⁶

In point of fact, as far back as 1886, the Department recognized that a valid *millsite* claim could embrace land containing houses for the miner's workmen. See *Charles Lennig*, 5 L.D. 190, 192 (1886). More recently, in *Swanson v. Andrus*, Civil No. 78-4145 (June 3, 1982), the United States District Court for Idaho partially reversed a decision of this Board which had held various *millsites* invalid, noting that "no consideration was given to a provision made for living quarters, offices, etc., clearly proper uses for mill site claims" (Opinion at 5). It would stand logic on its head to conclude that occupation of a mining claim is a per se violation of the limitation on pre-patent use of a claim to activities reasonably incident to mining, while at the same time to permit the appropriation of *additional* acreage for the same use.¹⁷

In *United States v. Nogueira*, 403 F.2d 816 (9th Cir. 1968), the court, after referring to section 4(a) of the Surface Resources Act, noted that "[c]ertainly permanent residence of the possessor not reasonably related to prospecting, mining or processing operations is not within the uses described." *Id.* at 825. But, as the district court in *United States v. Langley, supra*, noted, the "necessary corollary" of this holding is that "residence which *is* reasonably related to mining is permissible." *Id.* at 1263 (italics in original). The *fact* of occupancy, absent a showing that the occupancy is not reasonably incident to mining, cannot, *ipso facto*, establish that a prohibited use has occurred.

¹⁵ Some of these clearly improper uses are set forth at 43 CFR 3712.1(b) and include, in addition to the uses set forth in the text, "tourist, or fishing and hunting camps." We note that this section, by its terms, only applies to claims subject to the Surface Resources Act. But, it can scarcely be contravened that all of the uses listed are proscribed on all unpatented mining claims regardless of the date of location. The regulation, thus, misapprehends the nature of section 4(a) of the Surface Resources Act, treating it as a new limitation on claims rather than a statutory codification of decisional law.

¹⁶ For purposes of clarity in the discussion on this issue, the term "residential occupancy" will be used to denote occupancy not reasonably associated with mining activities while the term "occupancy" will be used to describe the situation where a miner is living on the land in conjunction with his or her mining activities.

¹⁷ See *R. Sager, supra*, n.11 at 321.

Thus, in the instant case, the mere fact that appellants reside on their claim cannot, as a matter of law, establish they are in violation of any *statutory* prohibition, though, as a matter of fact, they may be if their occupancy is not reasonably incident to their mining activities. The latter determination, however, necessarily requires that we scrutinize appellants' occupancy in light of their mining operations.

[3] While it can be admitted that situations may arise, such as in the absence of any mining activities,¹⁸ where the determination of whether occupancy of the claim is reasonably incident to mining can be made on a record developed without the benefit of a fact-finding hearing, it is impossible to make such a determination in the instant case. Not only have appellants alleged substantial mining which they insist requires occupancy of the claim, but the record also contains, as we noted above, the statement of the Acting District Manager that "the occupancy in itself was not in question. The method of the occupancy and incidental uses of that occupancy were." Certainly, this statement of the Acting District Manager is not preclusive of a change in position by BLM. But is equally clear that the record gives rise to substantial fact questions concerning the nature of appellants' occupancy.¹⁹

The Department and the judiciary have long recognized that since a mining claim is a claim to property, due process requires that claimants be afforded notice and an opportunity for a hearing before a declaration is made that the claim is null and void for want of a discovery of a valuable mineral deposit. *See Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1958), *United States v. O'Leary*, 63 I.D. 341 (1956). While, in the instant case, the Department eschews any challenge to the validity of appellants' claims, it is clear that, if appellants are correct and occupancy of the claims is necessary in order to develop the mineral deposits allegedly located, the effect of an order requiring appellants to cease occupancy is tantamount to a taking of their right to mine. We find no difficulty in concluding that, to the extent to which BLM's actions may be predicated on the statutory limitation that allowable surface uses of unpatented mining claims are only those reasonably incident to mining, a decision ordering the cessation or limitation of occupancy in the instant case may only be entered after notice and an opportunity for hearing. *Cf. United States v. Nogueira*, *supra* at 825. In the absence of such an opportunity for a hearing, a decision premised on the conclusion that all occupancy should be proscribed could not be sustained.

[4] This, however, does not end the matter. Independent of the statutory limitations of surface uses of mining claims is the question

¹⁸ The exclusive right of possession afforded by 30 U.S.C. § 26 (1982) is limited to uses reasonably incident to actual mining. Thus, where there is no actual mining or related activities occurring there is *no* right to use the surface. Appellants' Reply Brief misses the point when it asserts that it is immaterial how much time they actually mine, that the only requirement is the annual performance of assessment work. These considerations relate to the claim's ultimate validity not to permissible uses under 30 U.S.C. § 26 (1982).

¹⁹ Thus, even if it be granted that some occupancy of the claim is reasonably incident to appellants' mining, this would not establish that they need three trailers or chicken houses. The right to occupy does not necessarily embrace the right to live in the style one might desire if he or she owned the land in fee. This question, however, as we explain *infra*, is properly considered in determining whether there is unnecessary or undue degradation.

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whether appellants have complied with the Department's regulations and, if not, what penalty is properly invoked for their failure. That these considerations are independent of the statutory limitations was clearly established by the district court's decision in *United States v. Langley, supra*. That case involved, *inter alia*, residency on a mining claim situated within the Shasta-Trinity National Forest.

In *Langley*, the court first noted that, insofar as the statutory limitation was concerned, "the government has not produced sufficient evidence in the first instance to meet its burden of showing as a matter of law that [the mining claimant's] residence is not reasonably related to mining or attendant operations." *Id.* at 1263. The court then turned to the question of whether the claimant's occupancy comported with the applicable Forest Service regulations. Because these regulations not only served as the impetus for the adoption of similar regulations by BLM but also because these regulations differ from those ultimately promulgated by BLM in significant ways, it is helpful to briefly describe the Forest Service regulatory scheme.

The Forest Service regulations are now found at 36 CFR Part 228.²⁰ As noted in the regulations, their intended purpose is to minimize adverse environmental impacts on national forest system surface resources by activities expressly authorized under the mining laws. In brief, the Forest Service regulatory scheme works as follows. Either of two separate documents may be required to be filed: (1) a notice of intent to operate or (2) a plan of operations. However, the Forest Service has established five situations in which neither a notice of intent nor a plan of operations need be filed. Thus, the requirement to submit these documents does not apply:

(i) To operations which will be limited to the use of vehicles on existing public roads used and maintained for National Forest purposes, (ii) to individuals desiring to search for and occasionally remove small mineral samples or specimens, (iii) to prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study, (iv) to marking and monumenting a mining claim and (v) to subsurface operations which will not cause significant surface resource disturbance.

36 CFR 228.4(a)(1).²¹ In all other cases, operators must, at a minimum, file a notice of intent to operate.

²⁰ They were originally located at 36 CFR Part 252. They were redesignated as Part 228 on July 14, 1981, 46 FR 36142. While there were no substantial changes, a number of the earlier court decisions necessarily referenced the prior designation numbers in discussing the effect of these regulations.

²¹ It should be noted that an additional exception, at least insofar as the requirement that a notice of intent be filed, is made for operations "which will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes and will not involve the cutting of trees." 36 CFR 228.4(a)(2)(iii). However, unlike the activities listed in the text which are expressly exempted from the filing of a plan of operations as well as a notice of intent to operate, this additional activity is not precluded from the possible contingency that a plan of operations might be required. But since, as is explained *infra* in the text, it is the filing of the notice of intent which will normally trigger a determination by the Forest Service that a plan of operations is required, it is unclear what mechanism other than the issuance of a notice of noncompliance (36 CFR 252.7(b)) would trigger the requirement that a plan of operations be filed.

Under the regulations, a notice of intent to operate must be filed with the District Ranger and must "provide information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations, and the method of transport." 36 CFR 228.4(a)(2). If the District Ranger determines that such operations "will likely cause significant disturbance of surface resources, the operator shall submit a proposed plan of operations." 36 CFR 228.4(a). Under the regulations, the District Manager must notify the operator whether a plan of operations is required within 15 days of receipt of the notice of intent to operate.²²

A plan of operations is a considerably more detailed and formal document. See 36 CFR 228.4(c). An operator may not commence operations prior to receipt of plan approval. While the regulations direct that the District Ranger analyze the plan within 30 days (36 CFR 228.5(a)), various contingencies may occur which would serve to postpone the ultimate determination as to the plan's acceptability. See 36 CFR 228.5(a)(4) and (a)(5). Pending actual approval of the plan, only those activities necessary for timely compliance with Federal and state laws, e.g. performance of assessment work, will be approved by the District Ranger.

As noted earlier, the decision in *United States v. Langley, supra*, involved occupancy of a mining claim in the Shasta-Trinity National Forest. This occupancy was of a long-standing nature for which appellants had filed neither a notice of intent to operate nor a plan of operations. Finally, after repeated requests by the Forest Service, the operator filed a notice of intent to operate. On November 4, 1982, the Forest Service notified the claimant that his present and proposed operations were likely to cause a significant surface disturbance and he was accordingly directed to file a plan of operations. The operator, one Charles R. Gamble,²³ was expressly advised that in order to obtain authorization for his occupancy, he would be required to show that it was reasonably necessary to the proposed mining activities.

On April 1, 1983, Gamble submitted a one-page document asserting that no surface resources would be disturbed and that the condition of his occupancy would be the same as in the past. The Forest Service found this filing inadequate and requested Gamble to supply a substantial amount of additional information. Gamble made no further submissions, though he continued in his occupancy.

In enjoining Gamble from further occupancy of the claim until such time as the Forest Service had approved his plan of operations,²⁴ the court expressly held, as a matter of law, that "the maintenance of a fixed residence by defendant creates a sufficiently significant surface disturbance as to require an approved Plan of Operations pursuant to

²² It should be noted that where an operator believes that a plan of operations would be required, he need not first file a notice of intent, but rather may elect to file a plan of operations as an initial matter.

²³ In *Langley*, litigation had actually commenced in 1975 as a suit in ejectment seeking to oust Gamble's predecessors-in-interest. Gamble acquired the claim in 1977, and was accordingly substituted as the defendant in the action.

²⁴ Accord, *United States v. Smith Christian Mining Enterprises*, 537 F. Supp. 57, 64-65 (D. Ore. 1981).

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36 CFR 228." *Id.* at 1266. It seems clear that, were the same regulations applicable to appellants' claims in this appeal, an order requiring them to vacate the premises would properly issue, since no approved plan of operations covers their activities. The problem, however, is that the BLM regulations are substantially different from those of the Forest Service, and the court precedents applying the Forest Service regulations are, accordingly, not particularly germane.

The Forest Service regulations were originally promulgated in 1974. See 39 FR 31317 (Aug. 28, 1974). At that time, there were no similar regulations applicable on land under the jurisdiction of BLM.²⁵ Eventually, however, doubtless prodded by the Forest Service's success in enforcing its regulations, BLM published proposed rules to control mining activities on BLM lands. Initially, regulations were proposed on December 6, 1976 (41 FR 53428). These proposed regulations tracked, with minor variations, the Forest Service regulations.

Thus, activities defined as "casual use" did not require any notification. Where, however, "significant disturbance" might be caused, an operator was required to file a "notice of intent." See Proposed 43 CFR 3809.1-1(a), 41 FR 53429. After the filing of the notice of intent, the authorized officer had either 15 working days (if BLM were the surface managing agency) or 30 working days (if the surface was managed by another agency²⁶) to notify the operator whether a plan of operations need be submitted. See Proposed 43 CFR 3809.1-3, 41 FR 53430. The proposed regulations expressly noted that "no operator shall construct or place any structure on a mining claim without first obtaining an approved Plan of Operations." See Proposed 43 CFR 3809.2-1(c), 41 FR 53430.

The plan of operations required documentation similar to that required under the Forest Service regulations. Compare 36 CFR 228.4(c) with Proposed 43 CFR 3809.2-3, 41 FR 53430. However, the regulations further provided that the authorized officer could, under certain circumstances, order operations suspended (Proposed 43 CFR 3809.4-1, 41 FR 53432) and expressly stated that:

Mining operations which cause significant disturbance and that are undertaken either before the operator has filed a Notice of Intent and action taken under § 3809.1-3, or if required, without having an approved Plan of Operations or are continued after ordered suspended in accordance with §§ 3809.2-5(b), 3809.2-6(b) and paragraph (d) of this section, will be considered a trespass against the United States. Trespassers will be liable for damages and be subject to prosecution for such unlawful acts. (See 43 CFR Part 9230).

²⁵ Indeed, the only relevant regulation in existence prior to the adoption of 43 CFR Subpart 3809, applied, by its own terms, solely to claims subject to the Surface Resources Act. See note 5, *infra*. This lack of a regulatory framework was noted by the court in *United States v. Richardson*, *supra*, and led it to conclude that "insofar as BLM lands are involved, any activity is permissible which is directly related to mining or prospecting." *Id.* at 294.

²⁶ While it was clear that these regulations did not apply to mining claims located in national parks (see Proposed 43 CFR 3809.0-7(a), 41 FR 53429), it was unclear whether they applied to claims located in the national forests as an additional requirement to the already issued Forest Service regulations. See Proposed 43 CFR 3809.0-7(b), 41 FR 53429. This ambiguity was ultimately alleviated in the final regulations, which expressly excluded lands in the national forest system from their purview. 43 CFR 3809.0-5(e).

Proposed 43 CFR 3809.4-2(a), 41 FR 53432.

These proposed regulations ultimately generated over 5,000 comments. In light of these comments, major revisions were made in the proposed regulations and the regulatory package was repromulgated as proposed rulemaking. *See* 45 FR 13956 (Mar. 3, 1980).

One substantial modification was the elimination of the notice of intent. The preface of the proposed regulations noted that "[t]he original notice of intent/'significant disturbance' concept has been eliminated and replaced with a new procedure which defines more precisely when a plan of operations is required." 45 FR 13958. Thus, rather than focusing on the foreseeable results of mining as triggering the need to file a plan of operations, the Department proposed regulations which mandated the filing of a plan of operations prior to commencing certain specified activities. *See* Proposed 43 CFR 3809.1-1, 45 FR 13960. Of particular relevance to the instant case, among the activities expressly enumerated as requiring a plan of operations was "[t]he construction or placing of any mobile, portable or fixed structures on public lands for more than 30 days." *See* Proposed 43 CFR 3809.1-1(e), 45 FR 13961.

Another important change was proposed with reference to suspension of operations and liability for trespass. Proposed 43 CFR 3809.4-1 and 3809.4-2(a), 41 FR 53432, were deleted in their entirety. As the preface of the 1980 proposed regulations noted "[a]fter further examination of the authority of the Secretary to issue these regulations, it has been decided that the authorized officer will not unilaterally suspend operations without first obtaining a court order enjoining operations which are determined to be in violation of the regulations." 45 FR 13958. Accordingly, 43 CFR 3809.3-2, 45 FR 13964, was proposed to effectuate this intent.

Final regulations were promulgated on November 26, 1980, 45 FR 78902. These regulations, however, differed markedly from both the earlier proposals. Numerous comments generated by the 1980 proposed rulemaking had questioned whether the Department would be able to meet the deadlines imposed on BLM in approving a plan of operations in view of the great number of such plans which would be submitted.²⁷ In light of this concern, the Department sought to revise the regulations so as to greatly reduce the number of plans of operation that need be filed by establishing a threshold concept. *See* 45 FR 78902, 78904. The key element in this threshold was the disturbance of 5 or more acres in any calendar year.

As adopted, the regulations provide that for any activity other than "casual use,"²⁸ which will cause a cumulative surface disturbance of

²⁷ The 1980 proposed regulations had provided a 30-day period for review by the authorized officer with one extension for an additional 60 days available (unless an environmental statement was deemed necessary). In the absence of notification of any deficiency in the plan by the authorized officer, the mining operator could proceed with his or her operations. *See generally* Proposed 43 CFR 3809.1-4, 45 FR 13961.

²⁸ "Casual use" is defined as "activities ordinarily resulting in only negligible disturbance of the federal lands and resources." 43 CFR 3809.0-5(b).

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5 acres or less during any calendar year, an operator must file a notice for each calendar year, 15 days prior to commencing operations.²⁹ See 43 CFR 3809.1-3(a). Unlike the 1976 proposed rules which required BLM approval of a "notice of intent" (see Proposed 43 CFR 3809.1-3, 41 FR 53430), the "notice" provision ultimately adopted expressly provided that "approval of the notice, by the authorized officer, is not required." 43 CFR 3809.1-3(b). See also 45 FR 78904 ("The notice is not subject to approval"). As explained in the preface to the final regulations, the purpose of requiring a "notice" was to

give the authorized officer and his/her staff an opportunity to evaluate the proposed operations to determine whether a particular location contains some special resource value that could be avoided by the operation. If special values are discovered, the authorized officer could bring that to the attention of the operator and discuss possible alternatives with the aim of avoiding resource use conflicts. This is an area where cooperation between the Bureau of Land Management and the mining industry will lead to protection of Federal lands from those mining operations that might otherwise inadvertently cause damage to those lands. The location of a route of access is an example of the type of matters that might be discussed during the 15-day period. The authorized officer might have information as to special resource values in an area the route of access is to cross. If a slight change in the route of access would preserve the special value, the authorized officer and the mining operator could reach an agreement to make such a change.

45 FR 78905-78906.

While certain specified changes were made in the content of and procedures for processing a plan of operations,³⁰ most of these modifications are not of particular relevance herein. Special note, however, should be taken of two specific provisions. Thus, 43 CFR 3809.2-2 expressly provided that all operations "shall be conducted to prevent unnecessary or undue degradation of the Federal lands."³¹ See also section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1982). Of particular importance for the instant appeal, major revisions were also made to 43 CFR 3809.3-2, relating to noncompliance with the applicable regulations.

As adopted, 43 CFR 3809.3-2(a) declares that the "[f]ailure of an operator to file a notice * * * will subject the operator, at the discretion of the authorized officer, to being served a notice of noncompliance or enjoined from the continuation of such operations by a court order until such time as a notice or plan is filed with the authorized officer." It is further provided that "[a]ll operators who

²⁹ It should be noted that for certain classes of land such as areas of critical environmental concern (ACEC's), or where the land had been withdrawn, a plan of operations rather than a "notice" would be required. See 43 CFR 3809.1-4(b). None of these special category lands are involved in the instant appeal.

³⁰ For example, the final regulations specified that the Federal Government would pay for the costs of salvage of cultural resources, 43 CFR 3809.1-6(c).

³¹ "Unnecessary or undue degradation" is defined as any "surface disturbances greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation." 43 CFR 3809.0-5(k).

conduct operations under a notice * * * on federal lands without taking the actions specified in a notice of noncompliance within the time specified therein may be enjoined by an appropriate court order from continuing such operations and be liable for damages for such unlawful acts." 43 CFR 3809.3-2(c). Finally, it is provided that the "[f]ailure of an operator to take necessary actions on a notice of noncompliance, may constitute justification for requiring the submission of a plan of operations * * * and mandatory bonding for subsequent operations which would otherwise be conducted pursuant to a notice." 43 CFR 3809.3-2(e).

One of the obvious deficiencies of the regulations as adopted is the failure to directly address what circumstances, other than the failure to file a notice, justifies issuance of a notice of noncompliance where the operator clearly is not required to submit a plan of operations. Inferentially, however, 43 CFR 3809.3-2(d) does provide some guidance. That regulation states:

A notice of noncompliance shall specify in what respects the operator is failing or has failed to comply with the requirements of applicable regulations, and shall specify the actions which are in violation of the regulations and the actions which shall be taken to correct the noncompliance and the time, not to exceed 30 days, within which corrective action shall be started.

Thus, it would seem that failure to comply with any applicable regulation would support issuance of a notice of noncompliance.

This interpretation finds additional support and, indeed, some clarification, in the prefatory notes to the regulations. Thus, the Department stated that:

The Bureau of Land Management will cooperate with an operator to the extent possible in rectifying situations that are causing unnecessary or undue degradation. In extreme cases, where an operator will not cooperate, injunctive procedures can be initiated and a restraining order requested. Failure to comply with an injunction will make an operator subject to such penalty as a court may impose. An important provision added to this section is that all operations fall under the provisions of the noncompliance section whether the operations are (1) casual use, not requiring any notice, (2) below the threshold level, or (3) under plans of operations because in each case they must not cause unnecessary or undue degradation. One comment feared that there would be no "benchmark" for measuring noncompliance and that such determinations may be arbitrary and capricious. *For all practical purposes, "the benchmark" will be whether there is unnecessary or undue degradation of Federal lands.* All phases of the final rulemaking will be monitored to ensure that all operations are treated equitably. [Italics supplied.]

45 FR 78908. Thus, in the absence of a total failure to file a notice of intent³² or where the notice does not adequately describe the operations which will or have occurred or where the activity violates an express regulatory prohibition, the correctness of the notice of noncompliance must be judged on whether or not the activity which it

³² While the final regulations appear to purposely eschew utilizing the phrase "notice of intent," favoring instead the simple term "notice," the term "notice of intent" will be used in our subsequent discussion to avoid confusion with the "notice of noncompliance."

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seeks to ameliorate properly constitutes an "unnecessary or undue degradation of Federal lands."

Before analyzing the present regulatory framework in light of the facts of the instant case, it might be useful to contrast the proposed regulations with the adopted regulations insofar as occupancy of a mining claim is concerned. Under the 1976 proposals, it would be necessary to obtain approval of a notice of intent, and, thus, BLM could refuse to approve occupancy absent a showing that it was reasonably incident to mining. Moreover, the regulations clearly required that an operator submit a plan of operations prior to placing any structure on the land. See Proposed 43 CFR 3809.2-1(c), 41 FR 53430. Failure to obtain *approval* prior to proceeding to occupy the land subjected the operator to trespass damages. See Proposed 43 CFR 3809.4-2(a), 41 FR 53432. Thus, BLM's prior approval was necessary before a claimant could commence occupancy on the claim.

Similarly, the 1980 proposals also expressly required the filing of a plan of operations prior to placing any structures on public lands for more than 30 days. See Proposed 43 CFR 3809.1-1(e), 45 FR 13961. Thus, under either proposed regulatory scheme the initiation of occupancy prior to approval constituted a per se violation of the regulations.

This is not true, however, under the regulations which were actually adopted. Whereas both sets of proposed regulations had effectively provided that intended occupancy of a claim would trigger the need for filing a plan of operations, the final regulations, as promulgated, contained no such language. Indeed, under the present regulatory scheme there is no necessity that a claimant obtain prior *approval* of occupancy, though it is contemplated that it will be duly "noticed." Occupancy duly "noticed" can be prohibited, if at all, only upon a showing that such occupancy results in an undue or unnecessary degradation.

BLM contends that appellants' occupancy was *not* duly noticed and that this failure is sufficient to justify issuance of the notice of noncompliance under 43 CFR 3809.3-2(a). Examination of this question requires advertence to two separate temporal components. The first is the alleged failure to file a notice prior to the initiation of any occupancy. Thus, BLM suggests that appellants' initial notice was, itself, merely descriptive of actions already occurring and therefore violative of 43 CFR 3809.1-3(a) which requires that a notice be filed at least 15 calendar days prior to the commencement of any operations.

Even assuming this contention to be factually accurate, however, we do not believe that, given the facts of this case, appellants' failure to timely notify BLM would justify the instant notice of noncompliance. The regulation, 43 CFR 3809.3-2(a), provides that failure to file a notice will subject the operator "at the discretion of the authorized officer" to being issued a notice of noncompliance. The record indicates that

appellants may well have commenced occupancy *prior* to their initial notice. The authorized officer, though clearly aware of this problem,³³ apparently chose not to issue the notice of noncompliance at that time. Eventually, at BLM's prodding, appellants submitted their original notice. If BLM desired to issue a notice of noncompliance for the initial occupancy, it should have done so no later than the receipt by the District Manager of appellants' 1982 notice on May 18, 1982. Rather than at that time issuing a notice of noncompliance, the District Manager informed appellants that their notice was "in order and complete." Thus, even assuming there was an initial failure to comply with 43 CFR 3809.1-3(a), which could have subjected appellants to the issuance of a notice of noncompliance, we hold that the authorized officer waived his right to complain of such infraction.³⁴

There is a second element which must be reviewed, however, regarding the applicability of 43 CFR 3809.3-2(a). This relates to the construction of the cabin. Viewing their 1982 notice in the light most favorable to appellants, one could not conclude that they intended to construct a log cabin on the Valentine claim. While they originally asserted that they obtained oral approval to erect the cabin, on appeal they simply argue they did not understand that they needed to file a new notice of intent. Simple ignorance of the law, however, has never excused a failure to comply therewith. *See generally Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). Thus, appellants' failure to file another notice or an amendment of their earlier notice *prior* to placing the cabin on the land would support the issuance of the January 10, 1983, notice of noncompliance under 43 CFR 3809.3-2(a).

An individual who is not required to file a plan of operations violates 43 CFR 3809.3-2(a) only by failing to *file* a notice of intent. This deficiency is properly remedied by the filing of such notice. Upon such a filing, the operator has necessarily remedied the deficiency which gave rise to the notice of noncompliance and met all regulatory requirements under 43 CFR 3809.1-3. While we recognize the regulations provide that failure to comply with a notice of noncompliance may permit BLM to require the filing of a plan of operations (43 CFR 3809.3-2(e)), the question presented is whether BLM may, in a notice of noncompliance based on the failure to file a notice of intent, require removal of structures not properly "noticed." We think not.³⁵

The major error in BLM's position is its assumption that had appellants timely filed a notice of intent BLM could have disapproved it. This is simply not true. The regulations and their preamble quite

³³ See memorandum of Feb. 3, 1983, by Eric Schoblom to file.

³⁴ To hold otherwise would subject all claimants who may have initially violated the regulations, but subsequently attempted to comport themselves thereto, to the possibility that, at some indefinite time in the future, they might be subject to a notice of noncompliance for this initial failure.

³⁵ We wish to emphasize that our discussion on this point is strictly limited to the permissible scope of remedies which can be ordered under subsection (a). BLM's authority to direct actions under 43 CFR 3809.3-2(d) is considerably broader and is discussed later in the text.

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clearly underline the fact that BLM does *not* approve a notice. See 43 CFR 3809.1-3(b); 45 FR 78904 (November 26, 1980). It seems elementary that what BLM cannot approve, neither can it disapprove. Indeed, BLM's assertion of the right to disapprove a notice of intent would undermine the entire theoretical basis for the adoption of the threshold concept as discussed *infra*, since the whole purpose of the threshold approach was to limit the number of plans which would be subject to BLM's prior approval.

Had appellants duly noticed their intent to erect the cabin on their claim, BLM could have advised them of its objections and attempted to reach an agreement. However, if appellants had insisted on constructing their cabin, BLM could not have, consistent with the present regulations, refused its consent and thereby have prevented them from proceeding. On the contrary, the regulations provide that BLM's approval "is not required." See 43 CFR 3809.1-3(b). Appellants could proceed in the face of BLM's objections and not violate any element of the noticing regulations.

[5] BLM is not, however, totally powerless, though its authority under the present regulation scheme is reactive rather than anticipatory. BLM could well assert that the placement of the cabin on the claim constituted "unnecessary or undue degradation" and issue a notice of noncompliance on that ground. BLM's actions, however, would be based not in 43 CFR 3809.3-2(a) for a violation of 43 CFR 3809.1-3(a), but would arise under 43 CFR 3809.2-2 and 43 CFR 3809.3-2(d). We examine BLM's authority under 43 CFR 3809.3-2(d) below. Suffice it at this point to hold that, in the absence of a regulation giving BLM authority to approve or disapprove a notice of intent, a notice of noncompliance issued under 43 CFR 3809.3-2(a) for failure to timely file a notice of intent is remedied by the filing of the notice as required 43 CFR 3809.1-3(a).³⁶

Nothing in the district court's decision in *Bales v. Ruch*, 522 F. Supp. 150 (E.D. Cal. 1981) compels a contrary result. *Bales* involved cross-motions for injunctive relief by certain mining claimants and BLM. The mining claimants in that case occupied a placer claim, fenced off the road leading to the claim, posted "no trespassing" signs, and discharged waste water thereon. Claimants filed no notice of intent whatsoever, asserting that their occupancy was "casual use."

In granting the Government's motion for a preliminary injunction to preclude further occupancy, the court correctly noted that the

³⁶ We do not wish to intimate that the Board views this procedure as the best way to handle placement of structures on BLM lands. Certainly, it would seem to make more sense from the point of view of both BLM and the operator to determine, before the fact, whether or not a specific structure is permissible. Either of the two sets of proposed regulations would have accomplished this result. Whether a hearing would have been needed in order to refuse permission to occupy a claim under either of these proposals we need not now decide. The regulations, as adopted, failed to make similar provision for prior approval.

We are forced to deal with the regulations as we find them, not as we would have written them. If it was BLM's intent to require its approval prior to the establishment of residency on mining claims, BLM need only amend its regulations so that they reflect such an intent.

activities of the claimants could, in no wise, be considered as "casual use." While recognizing that the claimants had attached a "notice" to their Opposition to Defendants' Motion, the court rejected this document since "none of these documents are sufficient to give the kind of notice required to enable the BLM to pursue its mandate to manage and protect surface resources on federally owned lands." *Id.* at 156-57. The court ultimately concluded that "in light of [claimants'] complete failure to even attempt to meet the requirements of the federal government with regard to mining claimants, their adamant refusal to attempt to remedy violations of State and County health laws, and their serious overuse of the surface resources under the guise of mining activity which is, at best, minimal, it is clear that [the United States] has more than a probable chance of success when this matter is finally adjudicated." *Id.*

In the instant case, appellants did, if belatedly, file notices of intent. Moreover, their initial notice, when filed, was more than adequate to alert BLM to the uses intended. Thus, one would logically expect that "a chicken house," which was noticed in appellants' original filing, was for the purpose of housing chickens, and it is therefore hard to credit BLM's surprise that chickens were found on the claim. The original notice also referred to "3 trailer houses," a reference which was, we believe, more than sufficient to convey to BLM appellants' intent to reside on the claim. In fact, the record is abundantly clear that the District Manager did not object to all occupancy on the claim but rather to the form that the occupancy took. *See* Memorandum from Acting District Manager, Medford, to State Director, dated February 28, 1983. The assertion on appeal that the order of noncompliance "is based upon a conclusion that the Crawfords are occupying the mining claims for the purpose of having a residence, rather than for mining purposes," simply cannot be supported on the present record. The adamant refusal of the claimant in *Bales* to attempt to follow the regulations finds no real parallel in the instant case.³⁷

Independent of the question of compliance with 43 CFR 3809.1-3(a), however, is the issue whether appellants' activities in placing the structures on the claims constitute "unnecessary or undue degradation" in violation of 43 CFR 3809.2-2. Initially, we must point out, there is some confusion in the record over whether or not such a finding served as a predicate to the decision below.

The notice of noncompliance issued by the District Manager had alleged that appellants were causing undue and unnecessary degradation. No such conclusion appears in the decision of the State Director, which was totally premised on the failure of appellants to *timely* file the notice of intent and therefore did not examine whether or not the actions of appellants unduly or unnecessarily degraded the Federal lands. This confusion is exacerbated by the brief filed on

³⁷ The issue of compliance with State and local health and environmental protection laws is discussed *infra*.

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behalf of BLM which addresses, at considerable length, the argument that appellants' activities did constitute "unnecessary or undue degradation." See Answer at 2-3, 5-7.³⁸ But, while there is some ambiguity over whether or not the decision of the State Director was premised on a finding of "unnecessary or undue degradation," it clearly served as a predicate for the actions of the District Manager in issuing the notice of noncompliance, and is, thus, properly considered by the Board.

It is important to recognize that while the concept of "unnecessary and undue degradation" is related to the "reasonably incident" standard, it is somewhat broader in scope. As an example, tailings from a mining claim are often deposited in proximity to the mining area. Use of land for this purpose would, of course, be a use "reasonably incident" to mining. But there might be a number of areas where tailing disposal is feasible. A mining claimant might opt to utilize one specific site to the exclusion of others because of its relative ease of access. The selected site, however, may have impacts on other land values which would not occur were alternate sites utilized. In such a case, it might well be determined that the use of the specific area for tailings disposal resulted in "unnecessary or undue degradation" even though the use was "reasonably incident" to mining.

The key distinction to keep in mind is that the "reasonably incident" standard resolves questions as to the permissibility of a *use* by determining whether or not the use is reasonably incident to the mining activities actually occurring. The "unnecessary or undue degradation" standard comes into play only upon a determination that degradation is occurring. Upon such an initial determination, the inquiry then becomes one of determining whether the degradation occurring is unnecessary or undue *assuming the validity of the use* which is causing the impact. For, if the use is, itself, not allowable, it is irrelevant whether or not any adverse impact is occurring since that use may be independently prohibited as not reasonably incident to mining.³⁹

Thus, the allegation that appellants' occupancy was causing unnecessary or undue degradation must be premised on the impacts of

³⁸ While appellants' Statement of Reasons is directed primarily to the "reasonably incident" standard, it, too, briefly discusses the question of degradation. See Statement of Reasons at 11; Exh. A at 3.

³⁹ Nothing in the above discussion undermines our earlier conclusion that the "reasonably incident" standard always subsumed the authority to examine the mode of mining to determine its reasonableness. Thus, the "reasonably incident" standard inquires into the types of activities occurring to determine whether they can be reasonably related to the development of the mineral deposit which has been discovered, whereas the "unnecessary or undue degradation" standard examines the impacts of the mining and associated activities on the other surface values to determine whether possible adverse impacts can be ameliorated, and, if so, whether the failure to ameliorate has resulted in unnecessary or undue degradation. With respect to the instant case it would be possible to conclude that occupancy was reasonably incident to mining but that the form or situs of the occupancy resulted in unnecessary degradation.

that occupancy and not on the legitimacy of all occupancy.⁴⁰ Indeed, the regulatory definition supports this analysis since it defines "unnecessary or undue degradation" as "surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character." 43 CFR 3809.0-5(k). This definition clearly presumes the validity of the activity but asserts that it results in greater impacts than would be necessary if it were prudently accomplished.

Examining the facts of the instant case with this distinction in mind, it is immediately apparent there is a demonstrable conflict between the position of the District Manager and that subsequently taken by BLM in its responsive brief. The District Manager clearly objected to the type of occupancy, rather than occupancy per se, while BLM now asserts that all occupancy should be prohibited. BLM's argument actually goes not to the question of unnecessary or undue degradation but to whether occupancy is reasonably incident to the mining activities actually occurring. We have examined this matter above and will not repeat our discussion here, except to reiterate our view that, where mining is occurring, a BLM determination that occupancy is not reasonably incident to mining activities and must cease cannot be sustained unless the claimant has been first afforded notice and an opportunity for a hearing.

The District Manager, however, did challenge the mode of occupancy, rather than occupancy per se. The problem, however, is that he never focused on how the *impacts* of the log cabin differed from the impacts of the three trailers to which he, apparently, did not object. We note that BLM has suggested that "it is apparent that when public land is used exclusively by an alleged mining claimant or operator the practical effect is to limit the use of that land for other purposes, including recreational use by members of the public" (Answer at 3). While this may be true, we fail to see how it advances resolution of the instant case. As has been noted, "If all the competing demands reflected in FLPMA were focused on one particular piece of public land, in many instances only one set of demands could be satisfied." *Utah v. Andrus*, 486 F. Supp. 995, 1003 (D. Utah 1979).

Multiple use does not mean that every acre of Federal land must be amenable to every possible use at any given moment. Indeed, that is an impossibility.⁴¹ Nor does the fact that one use necessarily prevents use

⁴⁰ Congress, in promulgating section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1982), clearly implied that the grant of authority to the Secretary to prevent unnecessary or undue degradation was an amendment to the mining laws. If this were true, it would raise the ancillary question whether a valid claim in existence on Oct. 21, 1976, was subject to this provision. See, e.g., *California Portland Cement Corp.*, 83 IBLA 11 (1984). Moreover, if this language were treated as an amendment of 30 U.S.C. § 26 (1982), we would be faced with the anomalous result that Congress has amended the mining laws only to the extent they apply to lands administered by the Secretary of the Interior, as section 302 of FLPMA does not apply to Forest Service lands.

However, since the claims in the instant case were located after the passage of FLPMA, they are clearly subject to its provisions. Therefore, we expressly decline to decide whether the last sentence of section 302(b) did, in fact, constitute a change in the mining laws and, if so, to what extent it is applicable to valid claims then in existence.

⁴¹ We note that the synopsis of the case record, prepared by BLM, states that:

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of the same land for other purposes establish that degradation, much less unnecessary or undue degradation, has occurred. Rather, the focus must be on how the specific use impacts on other uses to a degree greater than would result were ordinary prudence and care exercised. The present record is inadequate to show how occupancy in a cabin has an intrinsically greater impact than occupancy in three trailers, or how appellants' specific occupancy has adversely impacted upon the land to an extent greater than would be expected from the occupancy of a "prudent operator."

The record does raise substantial questions, however, as to the necessity for multiple trailers, the need for maintaining chickens and the justification for occupancy on a year-round basis given the fact that mining is limited to a 5-month period. While we recognize situations may occur where a use, arguably ancillary to occupancy, is so egregious as to warrant a declaration that, on its face, its impacts cannot be justified, there exist sufficient questions on the present record to dissuade us from entering such a declaration herein. However, should the authorized officer decide to initiate a contest challenging any occupancy of the claim as not reasonably incident to mining it would, at that time, be proper to examine the nature and extent of appellants' mining activities and prescribe appropriate limits to their occupancy, even if some occupancy could be found justifiable as reasonably incident to their mining.

[6] Occupancy and the failure to timely "notice" it, however, were not the sole bases upon which the State Director affirmed the issuance of the notice of noncompliance. The State Director also concluded that appellants had failed to obtain necessary state permits. We will now examine this question.

There is no question that the failure of an operator to obtain any necessary state permits would serve as an adequate justification for issuance of a notice of noncompliance. The State Director's decision, however, did not determine that various permits *were* necessary but merely held that "one or more permits may be required" (Decision at 4). The State Director then listed four permits embracing various aspects of placer mining operations which might be required. The problem is that the decision never identified which ones were, *in fact*, required.

Indeed, one of the permits cited by the State Director was a "Fill-Removal Permit" which is issued by the State Lands Division where it is anticipated that more than 50 cubic yards of material within the bed of a natural waterway will be moved. Yet, a memorandum to the file, dated April 5, 1983, indicated that 50 cubic yards of material had not

"The existence of the cabin and other items prevents the BLM from managing the surface of the earth that is occupied by the cabin." While this is, of course, factually true, it shows, in our view, a fundamental misconception of multiple use management as explained in the text.

been moved on the claims, and thus it would seem that the BLM case file contradicted the assertion that this permit might be needed.

In any event, the mere recitation of permits that *might* be required is an insufficient basis upon which to support issuance of a notice of noncompliance. Such notice is only properly issued where the authorized officer finds, as a fact, that specific permits are required and have not been obtained.

The present record displays the type of confusion generated when a decision is premised on the possibility of a violation. Thus, appellants asserted in their appeal to the State Director that "a *second* check with the issuing state agencies showed that *none* of these permits were required for our operation to date." Beyond this assertion, however, appellants submitted no proof these permits were not needed. The record is as devoid of *documentation* showing that none of these permits were required as it is lacking in factual allegations that any particular permit was required.

On appeal, appellants assert they have now applied for all of the permits mentioned and "have either received approval or have been told that permits are about to be issued, or that no permit is needed" (Statement of Reasons, Exh. A at 5). While we realize that ultimate compliance need not necessarily vitiate an earlier failure to comply, we also note the State Director concluded that "it is difficult to ascertain from the case record which, if any, state permits were required for appellants' operations on the date at issue, *i.e.*, January 10, 1983" (Dec. at 4). In view of the impossibility of ascertaining whether or not, as of January 10, 1983, appellants were in violation of any state permitting requirements, and in light of their uncontradicted assertions that they have obtained or are in the process of acquiring any that may be needed, we will set aside the notice of noncompliance to the extent it was premised on the failure to timely obtain state permits. In the future, we would expect that a decision alleging lack of compliance with state permitting requirements would clearly delineate the permits needed, and clearly describe the basis for BLM's conclusion that they were required.

In summary, where mining is occurring and the Government seeks to challenge occupancy as not reasonably incident to such mining activities, the Government must provide notice and an opportunity for hearing prior to ordering the cessation of occupancy. Moreover, since BLM can neither approve nor disapprove a notice of intent under the present regulatory scheme, the failure to timely file such a notice with BLM, where this failure is subsequently remedied, does not, without more, support issuance of an order to cease all occupancy. Finally, a BLM challenge that occupancy of the claim is causing unnecessary or undue degradation is premised not on a challenge that all occupancy should be prohibited but rather is based on the conclusion that the impacts of the specific occupancy complained of unnecessarily or unduly affect other surface resources. If, upon consideration of the foregoing, BLM desires to challenge appellants' occupancy as not

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reasonably related to their mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it shall bring a contest alleging such grounds.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case files remanded for further action not inconsistent with the views expressed herein.

JAMES L. BURSKI
Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

WYMAN CONSTRUCTION, INC.

IBCA-1669-4-83

Decided May 31, 1985

Contract No. 0-07-10-C0109, Water and Power Resources Service.

Denied.

1. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)--Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)--Contracts: Construction and Operation: Drawings and Specifications--Contracts: Construction and Operation: General Rules of Construction

A claim for a Category 1 Differing Site Condition was denied where a contractor, engaged in core drilling operations, encountered a layer of "basal gravel" between clay and granitic bedrock, and the drill logs appended to the contract included core boring results and profiles which on their face gave readily discernible, strong, and therefore entirely reasonable indications within the meaning of the Differing Site Conditions clause that such conditions should have been anticipated at various areas of the site.

2. Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)--Contracts: Construction and Operation: Differing Site Conditions (Changed Conditions)--Contracts: Construction and Operation: Drawings and Specifications--Contracts: Construction and Operation: General Rules of Construction

A claim for a Category 1 Differing Site Condition was denied where it was determined that the contractor failed to properly assess the information to which the Invitation For Bids directed him, and the contractor's interpretation of the materials to be encountered during drilling operations was found to be unreasonable.

APPEARANCES: Stuart G. Oles, Oles, Morrison, Rinker, Stanislaw & Ashbaugh, Seattle, Washington, for Appellant; W. N. Dunlop, Department Counsel, Boise, Idaho, for the Government.

*OPINION BY ADMINISTRATIVE JUDGE PACKWOOD**INTERIOR BOARD OF CONTRACT APPEALS*

This appeal is timely filed by appellant, Wyman Construction, Inc., from the decision of the contracting officer, dated March 4, 1983, denying appellant's claim for an equitable adjustment in the amount of \$79,997.84.¹ As grounds for entitlement, appellant alleges that such costs were reasonably incurred as the result of work performed under a differing site condition with respect to the type of materials encountered during bore hole drilling operations. An evidentiary hearing in the matter was held in Seattle, Washington, on July 24, 1984.

Findings of Fact

1. On May 16, 1980, appellant was awarded contract No. 0-07-10-C0109 by the Water and Power Resources Service, United States Department of the Interior (Government), at an estimated contract price of \$389,750 (Appeal File, Exhibit 1).² The contract called for work described as "Core Drilling, Right Bank of Columbia River, River Bank Stabilization Program, Columbia Basin Project, Washington," and required the drilling, logging, sampling, and casing of 40 bore holes, downstream of the Grand Coulee Dam.³

2. Notice to proceed with the work was received by appellant on May 19, 1980 (AF-3). In accordance with the specifications at paragraph 1.2.3, the work was to be accomplished within 180 days, by November 15, 1980. The actual completion of work was December 4, 1980, or 19 days after the original completion date (AF-9; Tr. 26).

3. The Special Conditions portion of the specifications required that the 40 bore holes were to be drilled at locations specified in the drawings, with payment at a unit price per foot drilled and cased (pars. 2.2.2 and 2.2.7). The contractor was responsible for furnishing daily drill reports, describing progress in feet per shift per day, depths and descriptions of the nature and general physical character of the rock and material penetrated in each hole, and the location of any special features encountered, such as mud seams, open cracks, cavities, etc. The contractor was also required to retain all samples and cores obtained from overburden in core boxes as a condition of payment (pars. 2.2.1 and 2.2.2) (AF-1).

4. Among the Special Conditions in the contract were the following relevant provisions:

1.2.2 DESCRIPTION OF THE WORK

¹ In accordance with sec. 6(c)(1) of the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613), appellant's claim was certified to the contracting officer by letter dated July 28, 1982 (Appeal File, Exhibit 16).

² Hereafter, reference to the official record in this proceeding will be abbreviated as follows: Appeal File Exhibit 1 (AF-1), Appellant's Exhibit A (AX-A), Government's Exhibit 1 (GX-1), and Hearing Transcript, page 39 (Tr. 39).

³ The Government had been conducting a drilling program since 1967 to determine the geohydraulic characteristics of the riverbank in order to reduce the hazard of landslides from the operation of the dam by dewatering the clays and underlying gravels (Tr. 136-37).

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Forty (40) holes shall be drilled immediately adjacent to the right bank of the Columbia River in the reach between the highway bridge in the town of Coulee Dam and Peter Dan Creek, about four miles downstream of the bridge. All holes shall be drilled 20 feet into the granitic bedrock and shall be cased to bedrock with new flush-joint NW size casing to be supplied by the contractor.

Materials to be penetrated are:

- (1) Dumped fill. This material ranges in composition from coarse, angular granitic riprap blocks in excess of one cubic yard through and gravel to silt and clay.
- (2) Alluvial deposits. These are principally sand and gravel, but also include beds of cobbles and boulders. A few "haystack rock" boulders of basalt up to 10 or more feet in size may be encountered.
- (3) Clay. The material consists principally of lean to fat clays but includes considerable amount of silt and sand; occasional gravel and cobbles individually or in layers may be encountered.
- (4) Granitic bedrock. Generally hard, fresh, blocky to closely jointed, but various stages of decomposition may be encountered.

The dumped fill is of variable thickness. *The alluvial deposits and clay may range from missing to being the entire thickness of the overburden section.*

* * * * *

2.2.1 Requirements For Drilling, General

* * * * *

The following table showing the total depth of each drill hole, the depth to rock, and the thickness of the different types of materials to be penetrated is intended as a guide for bidding purposes only. The Government does not represent that the information in the table shows the actual conditions that will be encountered in performing the work. [Italics supplied.]

(AF-1).

5. Page 37 of the contract contained the table referred to in paragraph 2.2.1 above, and specified as to each of the 40 bore holes: (1) the elevation of the collar; (2) the elevation of the rock, (3) total depth, (4) fill thickness, (5) alluvium thickness, (6) clay thickness, and (7) rock thickness. The contract also contained five maps indicating proposed drill hole locations, and the location of bore holes previously drilled. In addition, the contract documents included 85 geologic logs of drill holes which were located in the general area of the work to be performed by appellant. Each of these logs contained the classification and physical condition of strata penetrated by the drilling process, the depth and elevation at which each type of material was encountered, an accompanying profile drawing depicting the conditions existing throughout the depth of the bore hole, and various notes describing the character of drilling, water tables, and other general types of information (AF-1).

6. In bidding the project, appellant alleges that it specifically relied on the information contained in the previously quoted sections of the specifications and upon the table contained on page 37 (Tr. 11-12). Appellant also asserts that it believed that it would encounter dumped fill, alluvial deposits, clay and granitic bedrock, in that order, as indicated by paragraph 1.2.2 of the specifications (see, Finding of Fact

No. 4). Moreover, appellant planned to do the work on this project as follows: advance the casing down through the dumped fill and alluvial deposits into the clay layer; begin casing; continue coring through the clay; advance the casing to bedrock as the clay was being cored; and continue coring the rock (Tr. 7, 36).

7. During the course of the drilling, appellant encountered, in 20 of the 40 holes, a layer of "basal gravel" which allegedly varied from 2 feet to 69 feet thick and which was located between the bottom of the clay layer and the top of the bedrock (AF-7). By letter dated October 20, 1980, appellant notified the Government of the existence of a "differing subsurface condition," which it asserted increased the cost and time required to complete the contract (AF-4). On November 7, 1980, appellant requested a 19-day time extension to cover the additional work caused by the alleged differing site condition (AF-5).

8. By letter dated December 8, 1980, appellant submitted a claim for the extra costs incurred and reiterated its request for a time extension of 19 days to allow for the additional working time required (AF-7). In summarizing its claim, appellant asserted that it was required to drill 443 lineal feet of the basal gravel material in the 20 holes in which it was encountered. The damages claimed by appellant were for the difference in the drilling rate for the project in the clay layer versus the slower drilling rate in the basal gravel layer (Tr. 47). Specifically, appellant contended that its average drilling rate for the project in the clay layer was 2.90 feet/hour, whereas the drilling rate for the basal gravel was 0.82 feet/hour. Applying the above rates, appellant calculated the time lost to drilling the basal gravel layer compared to the anticipated clay layer to be 388 hours. Following an itemization of costs incurred to run the drilling operation per hour, appellant submitted a claim in the amount of \$79,997.84, and requested approval of a change order to the contract in that amount, along with the 19-day time extension required to complete the contract (*see also* AF-9).

9. Pursuant to a letter dated June 15, 1981, the Third Power Plant construction engineer advised appellant that the Government considered its claim to be without merit (AF-11). Thereafter, the parties met on February 26, 1982, to discuss the claim. At that meeting appellant presented a summary of technical data on the project prepared by Nancy E. Brown, a geologist retained by appellant as a consultant to assist in the preparation of the claim (Tr. 64-65; AF-14). Following these discussions, the Government reiterated its view that the information provided did not establish a differing site condition. Thereafter, on July 22, 1982, appellant formally requested a final decision on the claim by the contracting officer (AF-15).⁴

⁴ By letter dated June 16, 1981, final payment vouchers for the entire contract amount were presented to appellant for review and execution (AF-13). After placing an exception on the Release of Claims form for the differing site conditions claim, the final payment documents were transmitted to the finance office for certification and payment (AF-17). Appellant was subsequently paid the full amount of \$372,698.80, less amounts offset by the contracting officer's decision (*See* Complaint at 2; AF-18).

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10. By decision issued on March 4, 1983, the contracting officer denied appellant's claim for additional compensation and for the requested time extension (AF-20). Moreover, the Government withheld liquidated damages at the rate of \$100 per day for the 19 days of delay for a total of \$1,900, and retained \$100 pending final adjustment of the claim (AF-18, 20). Thereafter, on March 30, 1983, appellant filed a timely notice of appeal of the contracting officer's decision (AF-21).

Discussion

Appellant's claim in this proceeding is based substantially upon defective specifications, and Category 1 differing site conditions—that is, subsurface or latent physical conditions at the site differing materially from those indicated in the contract (AF-1; General Provisions par. 4; SF 23-A (Rev. 4-75)). Consequently, the issue before the Board is whether, under the circumstances of this case, appellant was justified in its interpretation of the documents contained in the Invitation For Bids (IFB), in preparing its bid and in asserting a claim for extra work done in completing the requirements of the contract. As claimant, appellant bears the burden of proof to establish entitlement to an equitable adjustment. *Saturn Construction Co.*, ASBCA No. 22653 (Mar. 22, 1982), 82-1 BCA par. 15,704. If the actual conditions found during the performance of work on the project are determined to differ materially from those indicated, the cost of meeting such conditions is borne by the Government.

Appellant contends that in bidding the project he specifically relied on the information contained in paragraph 1.2.2 of the specifications and upon the table contained on page 37 of the special conditions, which set forth the quantities and depth of the materials to be encountered (Tr. 11-12). When reading the two sections together, appellant concluded that it would encounter the four previously identified materials in the order set forth and at depths indicated. More importantly, however, appellant asserts that the contract documents did not indicate that it would encounter a layer of basal gravel of varying thickness between the layer of clay and granitic bedrock. Instead, upon encountering basal gravel it alleges that it incurred increased costs and delay in performance time due to reduced production rates (see Finding of Fact No. 8).

It is the Government's position that the boring logs appended to the contract documents indicated the presence of basal gravel deposits beneath the layer of clay, and that appellant was therefore on notice of such conditions, and should have expected drilling operations to be difficult. It argues that no special knowledge or analysis was required to determine the existence of basal gravel and therefore submits that appellant was bound by the information contained in the logs as accurately depicting the conditions to be encountered at the site. We find the Government's argument to be persuasive.

At the outset, appellant's claim, with respect to what was indicated in the contract documents, turns upon an analysis and interpretation of the contract documents, and thus presents a question of law to be decided by the Board. *Foster Construction C. A. and Williams Brothers Co. v. United States*, 193 Ct. Cl. 587, 601 (1970). To be compensable, an asserted subsurface or latent physical condition encountered must not only differ materially from the contract indications but must also be reasonably unforeseeable on the basis of all the information available to the contractor at the time of bidding. *Mojave Enterprises v. United States*, 3 Ct. Cl. 353, 357 (1983).

Here, it is undisputed that when appellant bid the subject contract, 330 holes had been drilled in the project area, and that 400 to 600 logs recorded in a form similar to the logs appended to the contract were made available at the Grand Coulee project office for inspection (Tr. 137-38).⁵ There is little doubt therefore, that the soils investigation work done by the Government in the project area had yielded extensive records and soil evaluations which were available for prospective bidders in order to calculate their cost of completing the work.

The contract itself contained the three previously discussed elements of information bearing on the question of subsurface conditions at the site: (1) the appended boring logs, (2) section 1.2.2 of the specifications, and (3) the table at page 37 of the specifications (Findings of Fact Nos. 4 and 5). In assessing the reasonableness of appellant's reading of the bid documents, the record shows that appellant's president, Mr. Charles Pool, had primary responsibility in bidding the project, with employee David McCrillis delegated a portion of the work of preparing the bid (Tr. 4-5). Mr. Pool testified that he did not look at the 85 attached boring logs prior to bidding because he "didn't have time to do it" (Tr. 13, 14, 41). Rather, Mr. McCrillis, who is no longer with the company, reviewed the logs and advised Mr. Pool that the logs did not vary significantly from what was indicated in section 1.2.2 and table 37 of the specifications (Tr. 4, 41). As a result, appellant's expectations of the type and depth of materials to be encountered were derived specifically from its reliance on the latter two contract provisions (Appellant's Post Hearing Brief at 4).

The boring logs are particularly important, however, as they were expressly included in the bid documents as a specific description of subsurface conditions at the project site. The purpose of the Differing Site Conditions clause is to prevent bidders from adding high contingency factors to protect themselves against unusual conditions discovered while excavating, and is thus expressly designed to take some of the gamble out of subsurface operations. *J. F. Shea Co., IBCA No. 1191-4-78* (Mar. 30, 1982), 89 I.D. 153, 82-1 BCA par. 15,705. Its object is therefore to persuade contractors to calculate bids on the

⁵ Project location map No. 2 contained in the contract documents advised bidders of the availability of the "geologic logs for drill holes on map" (AF-1), and paragraph 8.1.1 admonished the contractor to "check all drawings carefully."

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basis of the descriptions contained in the specifications, plans, and drawings, including test or core borings and profiles. *United Contractors v. United States*, 177 Ct. Cl. 151, 168 (1966). Moreover, the significance of such drawings or profiles of borings is well established, having been recognized to be the "most reliable and the most specific indicator of subsurface conditions." *Foster, supra* at 616; *Woodcrest Construction Co. v. United States*, 187 Ct. Cl. 249, 256 (1969); *United Contractors, supra* at 166-67.

The boring logs appended to the contract documents consisted of profile drawings of the contents of the holes along with accompanying legends (See Findings of Fact No. 5). The descriptions contained within the logs indicated the classification and physical condition of the various types of materials described in section 1.2.2 of the specifications as "materials to be penetrated" (AF-1). Among the materials listed in section 1.2.2 were "Alluvial deposits," which were described as "principally sand and gravel but also include beds of cobbles and boulders;" and "clay," which was described as including a "considerable amount of silt and sand, occasional gravel and cobbles individually or in layers may be encountered."

Appellant relies on the testimony of its two witnesses that the contract documents did not indicate a layer of basal gravel between the clay and granitic bedrock. Nancy Brown, a geologist retained as a consultant to analyze appellant's claim (Tr. 64, 81), prepared a series of correlation estimates of basal gravel contained in the Wyman drill holes and compared them to the tabulated estimates in the specifications along with the appended drill logs of the contract. She testified that a description of the basal gravel was omitted from the summaries made for the purposes of bidding, and that the location of the Wyman holes were essentially along the river bank while the appended borings were from holes further upstream (Tr. 66, 78). In addition, she testified that basal gravel was not indicated in "alluvium" as described in the specifications (Tr. 70-74), based upon her correlation analysis of the material actually encountered and the material represented as "alluvium" in the contract documents (AF-14, Supplement 1, Table 4; Tr. 73, 75-76).

Appellant's other witness, Jon Koloski, a geologist experienced in applied or engineering geology (Tr. 90), likewise testified that although basal gravel is "alluvium" in a generic sense, as used in the contract it did not include the basal gravel layer encountered by appellant (Tr. 113). He further testified that upon a reading of section 1.2.2 or Table 37 of the specifications that he wouldn't expect that basal gravel would occur between bedrock and clay, or that the order of materials to be penetrated would be any different than that portrayed by the specifications (Tr. 114-15, 117, 120).

In rebuttal, the Government offered the testimony of its geologist, Greg Behrens, who had been the main geologist in charge of the

exploration program for the previous 5 years (Tr. 133, 140).

Mr. Behrens' responsibilities on the project included working closely with the drill crews on the project and preparing the topographic and subsurface maps. He was in charge of taking core samples from the site, and classifying materials for final logging (Tr. 140, 143-44). The record indicates that many of the 330 logs were prepared by Behrens prior to the Wyman contract (Tr. 149). Behrens defined "basal gravel" as merely the bottom gravel or lower alluvium, based upon a position description of the alluvial material (Tr. 139, 146). He stated that the only difference between the lower or basal gravel and the upper alluvial material, based upon his examination of the materials from the core boxes, is the former contained fewer silts and clays, and was therefore a cleaner material (Tr. 147, 191).

More significantly, however, Behrens' unrefuted testimony indicates that 44 of the 85 logs appended to the contract show the presence of basal gravel (Tr. 152). A review of these logs, particularly the profile drawings and accompanying descriptions shows materials variously described as "sand," "gravel," "cobbles," or "boulders," situated between the granitic bedrock and layer of clay (AF-1). The very first log appended to the contract, DH 8-RS, shows 63 feet of "sand, gravel, cobbles and boulders" lying below the clay and above the bedrock. Moreover, DH 8-RS included under the notation "character of drilling," the fact that blasting was required at 18 different points during the drilling, which Behrens stated indicated substantial difficulty drilling through the layers of material (AF-1; Tr. 150). Similarly, DH 9-RS and DH 10-RS, the next two appended boring logs, show sand, gravel, cobbles, and boulders between the clay and bedrock layers at depths of 90 feet and 42 feet respectively (AF-1; Tr. 150-51). This is the same material that Mr. Pool conceded in his testimony would be basal gravel, according to his definition (Tr. 59, 150). Finally, the testimony revealed that of the 20 locations where appellant reported encountering basal gravel (Tr. 27), 18 of said holes fell between Wyman drill holes 1 and 23 (Tr. 153). Government Exhibit 1 which consisted of the appended drill logs which fell between drill holes 1 and 23, indicated that out of the 55 appended logs shown in the exhibit, 27 show basal gravel (Tr. 156).

[1] The logs appended to the contract give readily discernible, strong, and therefore entirely reasonable indications, within the meaning of the Differing Site Conditions clause, that a layer of certain materials, herein defined and understood by the parties to be "basal gravel" should have been anticipated as occurring at various locations at the site between the layer of clay and granitic bedrock. This conclusion is well documented; its evidentiary basis established by the record as follows.

First, the evidence shows that the appended boring logs and previous drilling operations were indicative of a complex geological pattern in the vicinity of the project, thereby indicating extreme drilling difficulties (Tr. 82, 85). Appellant's president, Mr. Pool, testified,

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however, that he relied "exclusively" on the table on page 37 of the specifications in preparing his bid for the project (Tr. 39-40). Despite the fact that Mr. Behrens conceded that the term "basal gravel" did not appear at any point in the specifications (Tr. 179), and appellant's witnesses both testified that basal gravel was not included in the term "alluvium" as described in the specifications (Tr. 70, 74, 117), we find nothing in the bid documents, when read as a whole,⁶ that could or did induce reasonable reliance by appellant that subsurface conditions would be more favorable than those encountered.

To the contrary, both of appellant's witnesses acknowledged the existence of "basal gravel," on the upslope side of the river (Tr. 74-75, 107-08), and Koloski stated that the "basal gravel unit [as shown in AX-E (2)] which was well known onshore does in fact extend into the river and it does in many locations" (Tr. 110). In conjunction with this testimony, Koloski further stated that although section 1.2.2 and Table 37 did not indicate basal gravel between the layers of clay and bedrock (Tr. 114, 117, 125):

Q. If you looked at the contract as a whole, not just this table, would your opinion be different?

A. I assume you mean my opinion as related to the inclusion or exclusion of basal gravel?

Q. Yes.

A. I would have to interpret it that there is at least the possibility that basal gravel could occur at some locations and simply because it occurred in some locations, in some of the borings which are appended to the contract document.

* * * * *

Q. So it would be fair to say that if you looked at the logs, as well as the table, that you would anticipate encountering basal gravel?

A. I might as a Geologist anticipate doing that but as I pointed out that some of the borings and in fact almost all the borings from the river did not encounter basal gravel but many of the borings on shore did encounter basal gravel. The conclusion one could draw is that somewhere between those two points there is a borderline that defines where the basal gravel is and where it is not. It is not fair for me to assume as a contractor, when I'm not one, that it would in fact occur along the line of boring. Obviously that - *my interpretation is that was one of the objectives of this boring program, is to find out if it occurred there.*

Q. But wouldn't you agree if one showed basal gravel in the river and the log showed basal gravel on the terraces above the river bank that they could reasonably expect more basal gravel?

A. That's a solid maybe. The reason I say a maybe in that case is that there is many borings in between that indicate that the basal gravel is patchy in its occurrence. *That was quite well documented throughout that literature, the background literature, so you just don't know.* [Italics added.]

(Tr. 126-27).

⁶In *Hol Gar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384, 395 (1965), the Court of Claims stated the well established rule that in construing various provisions of the contract, the intention of the parties must be gathered from the whole instrument. Also, the Court held that an interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, or superfluous, nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible.

Similarly, Ms. Brown testified:

Q. Well, I'm sorry, that was awkwardly put but Table 37 or the table on page 37 of the Specification indicating that bedrock – excuse me, strike that. Indicating rip-rap, alluvium, clay and granite, would you expect as a reasonably prudent geologist that there would be the sequence that would be encountered in view of the complexity of the area?

A. In looking at that table it appeared to me to be the – typical of the area and also matched well with the sequence in the boring logs and that is how I would have to depict it, yes.

Q. Now if you look at the logs as you interpreted it that way –

A. (Interrupting) I would have interpreted those units occur in that order, yes, and *that there was an additional unit, basal gravel between the clay and the bedrock in some places.*

Q. *So if you looked at the logs you said that you would have anticipated basal gravel to occur above the granite?*

A. That's what I expected to occur, yes. [Italics supplied.]

(Tr. 86).

Given the above testimony, the obvious purpose of the contract, and the irrefutable evidentiary fact that basal gravel had been prevalent in numerous areas along the slope of the river, we cannot give either section 1.2.2 or Table 37 of the specifications the necessary weight urged by appellant to offset the indications contained in the contract boring logs. In our opinion, these two provisions did not adequately indicate, in view of the accompanying boring logs which demonstrated varying thicknesses of basal gravel on the slope, that such similar materials should not have been anticipated at the project site along the river. It is now accepted theory that subsurface materials within a "reasonable area" surrounding a boring are likely to possess characteristics similar to those within the confines of the boring. *Giis Corp.*, DOT CAB Nos. 1534, 1587 (Dec. 31, 1984), 85-1 BCA par. 17,810.

Finally, we reject appellant's contention that as a result of earlier specification language which was deleted in the final form, that the Government had superior knowledge of the existence of basal gravel which it failed to disclose. The initial draft of the specifications (AX-D) contained the following sentence: "Alluvial deposits may overlie clay, underlie or both." When the above language was deleted, the following was inserted in its place: "The alluvial deposits and clay may each range from missing to being the entire thickness of the overburden section" (section 1.2.2). By deleting the former sentence, appellant alleges that the Government failed to make all information available to prospective bidders. We find this assertion lacking in merit.

The revised statement for the most part accurately described the conditions which were encountered by appellant. More importantly, however, appellant had the same information represented by the boring logs appended to the contract. Thus, appellant has failed to establish the basic tenet of the superior knowledge doctrine, *i.e.*, that the Government possessed knowledge vital to the successful completion of the contract, and that it was unreasonable to expect the contractor to obtain such vital information from any other accessible source. *See*

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H. N. Bailey & Associates v. United States, 196 Ct. Cl. 166, 177-78 (1971).

[2] Based upon the foregoing discussion, we conclude that appellant was not, or should not have been misled by the contract documents with respect to anticipating basal gravel in its drilling operations, and that any problems that did occur were due to appellant's unreasonable interpretation of the contract specifications and its failure to properly assess the information contained in the boring logs appended to the contract.⁷ Having so concluded, we find no basis in the record for granting appellant's claim of a differing site condition or its claim for release of liquidated damages.

Decision

We conclude that appellant's claim does not constitute a Category 1 changed condition within the meaning of the Differing Site Conditions clause. Accordingly, the appeal is denied.

G. HERBERT PACKWOOD
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

ESTATE OF DOUGLAS LEONARD DUCHENEAX

13 IBIA 169

Decided May 31, 1985

Appeal from an order denying rehearing issued in Indian Probate IP BI 467C 80 on October 3, 1983, by Administrative Law Judge Keith L. Burrowes.

Affirmed.

1. Indian Probate: Claim Against Estate: Generally--Indian Probate: Divorce: State Court Decree: Alimony--Indian Probate: State Law: Generally

Where all relevant facts have arisen within a single jurisdiction, the law of that jurisdiction determines whether alimony or support payments required by a divorce or separate maintenance decree will survive the payor's death.

2. Indian Probate: Inventory: Property Erroneously Excluded or Included

⁷ A contractor may not claim that he has been misled when he assumes the risk of estimating and does so without first consulting all relevant information or sources of information to which the IFB directed him. *P. J. Maffei Building Wrecking Corp.*, GSBGA No. 5031 (Aug. 27, 1980), 80-2 BCA par. 14,647. See also *American Electric Contracting Corp. v. United States*, 217 Ct. Cl. 338 (1978).

Departmental regulations found in 43 CFR Part 4, Subpart D, suffice to allow consideration of alleged legal errors in BIA's inventory of Indian trust assets during the probate of a deceased Indian's estate.

3. Indian Probate: Resulting Trust

Resulting purchase money trusts in Indian trust land may not be claimed by persons to whom the Federal Government owes no trust responsibility.

APPEARANCES: Newell E. Krause, Esq., Mobridge, South Dakota, for appellant; Krista Clark, Esq., Eagle Butte, South Dakota, for appellees; Michael Cox, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., at the request of the Board. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

INTERIOR BOARD OF INDIAN APPEALS

On November 8, 1983, the Board of Indian Appeals (Board) received a notice of appeal from Marie Ducheneaux (appellant), seeking review of an October 3, 1983, order denying rehearing issued in the estate of Douglas Leonard Ducheneaux (decedent) by Administrative Law Judge Keith L. Burrowes. The order denying rehearing let stand an August 4, 1983, order approving decedent's will issued by Administrative Law Judge Garry V. Fisher. For the reasons discussed below, the Board affirms the order denying rehearing.

Background

Decedent, Allottee 3482 of the Cheyenne River Indian Reservation in South Dakota, died April 11, 1980, at the age of 65. A hearing to probate his Indian trust estate was held on July 23 and October 29, 1980, before Judge Fisher. A document executed on January 24, 1980, and alleged to be decedent's last will and testament was introduced at the hearing.

Testimony at the hearing revealed that decedent and appellant, a non-Indian, were married on February 3, 1948. Although the couple separated in 1971 and divorce proceedings were commenced, a divorce was never granted and they remained married until decedent died. The separation, however, was complete. Court orders were entered against decedent in 1972 and 1974, as a result of which he was obligated to pay appellant \$150 per month for appellant's support.

Decedent's will expressly excluded appellant and left his entire estate to June Ellen Ducheneaux Ledbetter, CRU-7357; Lillian Lynn Ducheneaux, CRU-7456; Ria Elaine Ducheneaux Seaboy, CRU-7537; Orville Rolland Ducheneaux, CRU-7573; Larry Douglas Ducheneaux, CRU-7789; Deanna Marie Ducheneaux Mulloy, CRU-8653; and Marlene Kay Ducheneaux, CRU-9391 (appellees). Appellees are the children of decedent's half-brother, Allen Theodore (Ted) Ducheneaux.

Judge Fisher found that there was no evidence that decedent was of unsound mind or was acting under undue influence when his will was

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executed. Accordingly, he approved the will and ordered distribution of decedent's Indian trust estate in accordance with the will's provisions. In reaching this decision, Judge Fisher found that the court orders requiring decedent to make support payments to appellant did not create a claim against decedent's estate for continued payments after his death, and that appellant's claim of an interest in decedent's trust estate on the grounds of a resulting purchase money trust was without merit.

Appellant sought review of this decision. By order dated September 20, 1983, the Board docketed and dismissed the appeal as premature. *Estate of Douglas Leonard Ducheneaux*, 12 IBIA 1 (1983). Appellant thereafter filed a petition for rehearing with the Administrative Law Judge under 43 CFR 4.241. Because Judge Fisher had retired, the petition was considered by Judge Burrowes, who denied rehearing on October 3, 1983.

The present appeal was received by the Board on November 8, 1983. Briefs on appeal were filed by both parties. In addition, the Board requested briefing by the Office of the Solicitor, U.S. Department of the Interior, on the question of recognition of resulting purchase money trusts in Indian trust property. The Solicitor's brief was received on September 28, 1984. Both parties filed responses to the Solicitor's brief.

Discussion and Conclusions

On appeal, appellant raises the same two issues that were raised before Judge Fisher. First, appellant argues that she should have been awarded a monthly support payment of \$150. Second, appellant contends that, except for the quarter section that constituted decedent's original allotment, she is entitled to a one-half interest in all of the trust property in decedent's estate because the property was acquired through their joint efforts.

[1] In order to prevail on her first claim, appellant must show that decedent's obligation to make a monthly support payment to her survived his death. The Board follows the general rule in domestic relations cases that the law of the jurisdiction in which a relationship was created governs the rights and obligations arising from the relationship. *Cf. Estate of Henry Frank Racine*, 13 IBIA 69 (1985); *Estate of Richard Doyle Two Bulls*, 11 IBIA 77 (1983). Thus, if no other jurisdiction is involved, the law of the jurisdiction granting a divorce or separate maintenance determines whether alimony or support payments survive the payor's death. This question then normally will be decided by state or tribal law.

Here, support payments were ordered by the South Dakota courts. In *Tyler v. Tyler*, 233 N.W.2d 804, 805 (S.D. 1975), the South Dakota Supreme Court upheld a lower court decision "granting alimony of \$400 per month for plaintiff's lifetime unless she remarrie[d], which

shall be an obligation or charge against appellant's estate." In a footnote, the Court cited 24 Am.Jur.2d, Divorce and Separation, § 642, in finding that "[n]o issue is raised regarding termination of alimony upon the death of the husband. In other states there is a difference of opinion." No more recent South Dakota case discussing this issue has been found.

In considering the law of the State of South Dakota, the Board notes that if alimony or separate maintenance payments normally survived the death of the payor in that jurisdiction, it would not be necessary for the courts to include a survival of the cause of action clause in the order requiring payments. The Board concludes, therefore, that in South Dakota, alimony or separate maintenance payments will survive the payor's death only when so stated in the decree, as in *Tyler, supra*.

The Board has reviewed the two court orders requiring support payments by decedent in this case. The 1972 order initially establishing payments concerned temporary support pending the completion of the divorce proceedings. The 1974 order dismissed a complaint for nonsupport against decedent on his representation that he would continue the payments. Because there is no evidence in either order that the court intended to make these payments an obligation against decedent's estate, we hold that appellant is not entitled to payment from the estate.

The second question raised in this appeal is whether a portion of decedent's Indian trust estate should be found to constitute the separate property of appellant under a resulting purchase money trust theory. Appellant asserts that decedent would not have acquired this property without her efforts, and that the property was placed in decedent's name for the sole reason that it would thus have the status of Indian trust land. In his August 4, 1983, order, Judge Fisher found that he did not have jurisdiction to determine whether this property was improperly listed by BIA as an asset of decedent's estate. Alternatively, in the event that the Board determined he did have jurisdiction, Judge Fisher found appellant's claim to be without merit.

The Board first considers Judge Fisher's conclusion that he lacked authority to determine appellant's claim. In response to the Board's June 21, 1984, order, the Solicitor filed a brief on the issue of the recognition of resulting purchase money trusts in Indian trust property. That brief notes that although such trusts have not been specifically addressed before,¹ there appears to be no reason why they should not be recognized under appropriate circumstances. The brief further states that Administrative Law Judges are better equipped than BIA officials to consider the mixed questions of fact and law involved in the recognition of such resulting trusts. The Solicitor

¹ In the *Estate of Jack R. Yellow Bird or Steele*, IP BI 600B 80, IP BI 549C 78, Administrative Law Judge Daniel S. Boos found that the decedent's surviving Indian spouse owned a one-half (1/2) interest in lands held in the decedent's name. Although Judge Boos found "that without the money [the surviving spouse deposited] in the personal [bank] account to sustain the day-to-day living of the family there would have been little, if any, money in the ranch account available for land purchase," he characterized the interest of the surviving spouse as a joint tenancy rather than a resulting purchase money trust. *Estate of Yellow Bird*, Order of Aug. 22, 1980, at 2-3.

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believes that 43 CFR 4.273(a)² provides sufficient authority for Administrative Law Judges to consider this type of question in the context of a probate proceeding. At present, section 4.273, dealing with improperly included property, and its related provision, section 4.272, dealing with omitted property, are primarily employed as remedies for administrative errors discovered after the conclusion of a probate proceeding.

Under 43 CFR 4.1(b)(2) and 4.330, the Board has authority to review administrative decisions of BIA officials made under 25 CFR Chapter I. Maintaining title records to Indian trust property is an administrative responsibility assigned to BIA under 25 CFR Part 150. Therefore, questions arising from the maintenance of such records can be reviewed by the Board.

The customary administrative appeal process is set forth in 25 CFR Part 2: The agency Superintendent undertakes an action or issues a decision which is then subject to an appeal to the Area Director, whose decision in turn is subject to an appeal to the Deputy Assistant Secretary—Indian Affairs (Operations),³ whose decision may then be reviewed by the Board of Indian Appeals. If the Board determines that there is a genuine dispute of material fact, under 43 CFR 4.337(a) it can refer the matter to an Administrative Law Judge for an evidentiary hearing and recommended decision. Under 43 CFR 4.202 the Indian Probate Administrative Law Judges have authority to "hold hearings and issue recommended decisions in matters referred to them by the Board in the Board's consideration of appeals from administrative actions of the Bureau of Indian Affairs."

The Board recently followed this procedure in the *Estate of Stella Valandry Williams*, 13 IBIA 35 (1984), *on reconsideration*, 13 IBIA 46 (1984). In *Williams* the Administrative Law Judge held a probate hearing in which the estate inventory was challenged. The Judge held that he had no jurisdiction to consider that challenge. This order was appealed to the Board, which referred the case to BIA for an analysis of the title status by the agency Superintendent. The Board noted that any appeal from the Superintendent's decision was subject to review by the Area Director and Deputy Assistant Secretary under the procedure established in 25 CFR Part 2. Although *Williams* was recently resolved through settlement, it was quite possible that after review by the Deputy Assistant Secretary, the Board might still have been required to refer the matter for an evidentiary hearing. *Estate of Stella Valandry Williams*, 13 IBIA 148 (1985). Obviously, this

² Section 4.273(a) states:

"When subsequent to a decision under § 4.240 or § 4.296, it is found that property has been improperly included in the inventory of an estate, the inventory shall be modified to eliminate such property. A petition for modification may be filed by the Superintendent of the Agency where the property is located, or by any party in interest."

³ The administrative review functions of the vacant office of Commissioner of Indian Affairs were assigned to the Deputy Assistant Secretary by memorandum of May 15, 1981, signed by the Assistant Secretary for Indian Affairs.

procedure results in an extremely protracted, confusing, and convoluted proceeding.

[2] Procedurally, in light of the Solicitor's position that Administrative Law Judges are better equipped than BIA officials to decide this type of issue, the Department's trust responsibility to those Indians who are involved in disputes over a decedent's trust estate, and the general rule encouraging the conservation of judicial resources, the Board holds that the existing regulations suffice to allow consideration of alleged legal errors in BIA's inventory of estate assets during a probate proceeding.⁴ Because it is inconceivable that a challenge to an estate inventory would not involve a genuine question of material fact, the Board hereby issues a standing order under 43 CFR 4.337(a) routinely referring to the Administrative Law Judge handling an Indian probate proceeding any question concerning equitable title to the assets listed in the inventory of a decedent's trust estate prepared by BIA, whenever that issue is raised while the case is pending before the Administrative Law Judge.

In accordance with 43 CFR 4.311(c), BIA is an interested party in any case challenging an estate inventory. The Administrative Law Judge shall inform the appropriate agency Superintendent, Area Director, and the Deputy Assistant Secretary--Indian Affairs (Operations) of the fact that a dispute over an estate inventory has arisen, in order to allow full consideration of the issue and participation in the case by the BIA officials listed in 25 CFR Part 2.⁵ The Administrative Law Judge shall take evidence concerning the trust inventory during the regular hearing or hearings held in the estate and shall include in the order concluding the probate proceeding a recommended decision on the disputed issues raised concerning the inventory.

If any party objects to the recommended decision, in accordance with 43 CFR 4.310(d)(1) the 30-day period for filing exceptions to the recommended decision, set forth in 43 CFR 4.339, and the requirement for the submission of the record to the Board, set forth in 43 CFR 4.338(a), are extended to coincide with the time for filing a notice of appeal with the Board under the procedures established in 43 CFR 4.241 and 4.320. The effect of this extension is that exceptions to the recommended decision will be treated in the same manner as objections to the order determining heirs and approving or disapproving a will. If no party objects to the recommended decision, that decision shall constitute the decision of the Board under 43 CFR 4.340.

⁴ The procedure subsequently established in this opinion is not intended to interfere with the procedures under 25 CFR Part 150 and 43 CFR 4.336 and 4.337 under which modifications to a decedent's estate may be made by BIA and/or the Administrative Law Judges in the event of administrative errors. The procedure established here applies only in those probate cases in which a legal claim is made by a person or persons to trust property titled to another person. The claim may be either that trust property titled to the decedent should have been titled to another, or that trust property titled to another should have been titled to the decedent.

⁵ In order to further ensure that the Deputy Assistant Secretary is aware of this decision and procedure, a copy is being sent to him. Should he have any objection to this procedure, the Board will entertain a petition for reconsideration from the Deputy Assistant Secretary, filed in accordance with the provisions of 43 CFR 4.315.

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[3] Judge Fisher alternatively found appellant's claim to a purchase money resulting trust was without merit. The Board has carefully considered arguments for and against the recognition of resulting purchase money trusts in Indian trust land. Indian trust status is a unique concept in property law, and is intended for the benefit of Native Americans. In some cases, however, such as through marriage, non-Indians may indirectly benefit from the special advantages of this form of property ownership. As Judge Fisher noted in his order approving will, at page 2, appellant "cannot claim a trust relationship with the United States, nor claim an obligation flowing from the United States to administer her claimed interest in the lands * * * [Furthermore,] the United States is not shown by the evidence to be a party to the transaction and there is no evidence of any consent by the government to hold any interest for the benefit of [appellant]." Under the circumstances presented here, the Federal Government owes no trust responsibility to, and cannot hold an interest in land in trust for, appellant. *Bailess v. Paukune*, 344 U.S. 171 (1952); *Chemah v. Fodder*, 259 F. Supp. 910 (W.D. Okla. 1966); *Estate of Louise Amiotte Lajtay*, 12 IBIA 229 (1984); *Estate of Dana A. Knight*, 9 IBIA 82, 88 I.D. 987 (1981). For these reasons, the Board concludes that a resulting purchase money trust in Indian trust land cannot be claimed by persons to whom the Federal Government owes no trust responsibility.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the October 3, 1983, order of Administrative Law Judge Keith L. Burrowes is affirmed.

JERRY MUSKRAT
Administrative Judge

WE CONCUR:

BERNARD V. PARRETTE
Chief Administrative Judge

ANNE POINDEXTER LEWIS
Administrative Judge

*June 7, 1985***APPEALS OF FORT MOJAVE INDIAN TRIBE OF ARIZONA,
CALIFORNIA, & NEVADA**IBCA-1968 *et al.*Decided: *June 7, 1985***Contract & Grant Numbers (See Appendix), Bureau of Indian Affairs.****Appeals Dismissed & Remanded to the Contracting Officer.****Contracts: Construction and Operation: Contracting Officer--
Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts:
Disputes and Remedies: Appeals--Contracts: Disputes and Remedies:
Jurisdiction**

A number of appeals are dismissed and remanded to the contracting officer for a decision following the completion of the auditing process where the Board found that a purportedly final decision of the contracting officer was not a final decision within the meaning of sec. 6(a) of the Contract Disputes Act. The Board noted that neither the contracting officer's decision nor the audit report on which it was based identified the contracts or grants involved in the dispute with the result that no attempt had been made by either the auditor or the contracting officer to allocate disallowed costs to individual contracts or grants. Claims arising under or related to grants were dismissed with prejudice as outside the purview of the Board's jurisdiction.

APPEARANCES: Thomas W. Fredericks, Attorney at Law, Fredericks & Pelcyger, Boulder, Colorado, for Appellant; Robert Moeller, Department Counsel, Phoenix, Arizona, for the Government.

*OPINION BY CHIEF ADMINISTRATIVE JUDGE MCGRAW**INTERIOR BOARD OF CONTRACT APPEALS*

The Fort Mojave Indian Tribe of Arizona, California, and Nevada (hereinafter Tribe) has timely appealed the contracting officer's decision of April 1, 1985, in which the Tribe was found to be indebted to the Government in the amount of \$428,000 upon the basis of an audit report by the Office of Inspector General, Department of the Interior, under date of June 28, 1983.

In the Notice of Appeal of April 17, 1985, appellant characterizes the contracting officer's decision of April 1 as erroneous on the following grounds:

- (1) the sum sought is an "estimate" of funds owed by the Tribe;
- (2) the sought payment is not based on an actual audit for the program years at issue;
- (3) there has been no allowance in the sums due for those monies found properly expended by the Tribe through its independent audit of fiscal years 1981 and 1982; and
- (4) there is as of this date no audit which will substantiate the amount of funds requested to be returned by the Tribe.

Before discussing the audit report on which the contracting officer based his decision, it would perhaps be well to briefly summarize the background for the instant appeals including additional information supplied by the parties to the Board at its request following docketing.

In a document bearing the date of December 17, 1984, and captioned "Determination and Findings in Support of Bill For Collection, Audit Report No. W-FC-PH-BIA-002-83," the contracting officer found (i) that the Bureau of Indian Affairs (hereinafter BIA or Bureau) had awarded contracts and grants to the Tribe for the fiscal years (FY) 1980 through 1982; (ii) that the awards had been made pursuant to the Indian Self-Determination and Education Assistance Act, P.L. 93-638, 88 Stat. 2203; and (iii) that in the audit report cited above, the Office of Inspector General (hereinafter OIG) found (a) a lack of control by the Tribe over Federal and tribal funds; (b) misuse by the Tribe of BIA contract and grant funds received during FY 1980 through 1982; and (c) indications that BIA program funds totaling \$428,000 had been used for nonprogram related purposes. Also noted therein was the recommendation by the OIG that the Bureau recover \$428,000 of contract reimbursements which were not supported by appropriate records of disbursements by the Tribe. Bill for Collection No. 5H50-01BC0074 in the amount of \$428,000 is dated December 18, 1984. According to a letter dated March 26, 1985, from appellant's counsel to John Fritz, Acting Assistant Secretary Indian Affairs, a decision was issued by the contracting officer on December 19, 1984, from which an appeal was taken by letter of January 10, 1985. In the March 26, 1985, letter appellant's counsel also notes that in a letter from the contracting officer dated December 28, 1984, the Tribe was served with a Bureau Bill of Collection No. 5H50-01BC0074 in which the sum sought of \$428,000 represents monies allegedly owed to the Bureau by the Tribe.

The letter to the Acting Assistant Secretary of March 26, 1985, questions the authority of the contracting officer to direct that appeals initiated from his decisions be taken to the Interior Board of Contract Appeals rather than having them processed in accordance with the provisions of 25 CFR §§ 271.81 and 271.82 as apparently had been the case previously. Cited by appellant in support of its questioning of our jurisdiction over the claims here asserted are various provisions from Titles 5 and 25 of the United States Code. At page one of the March 26, 1985, letter, appellant states:

[I]t seems that an in-house decision has been rendered that Pub. L. 93-638 contract appeals are to be heard by the Interior Board of Contract Appeals. This being the case, the Tribe here advises that the Bureau alteration of the recognized appeal format is on its face in conflict with the prohibition against *ad hoc* rulemaking announced in *Morton v. Ruiz*, 415 U.S. 199 (1974), a violation of 5 U.S.C. § 552(a)(1)(E) and not in conformance with 25 U.S.C. § 450k(c). The Tribe respectfully requests that * * * the P.L. 93-638 appeal process be reinstated as is required under existing law. [1]

In his decision of April 1, 1985, the contracting officer did not directly address the jurisdictional questions raised by appellant's counsel in the letter to the Acting Assistant Secretary of March 26,

¹ In a letter to the Board dated Apr. 17, 1985, which accompanied the notice of appeal, appellant's counsel requests that its notice be docketed and that the Board thereafter enter a stay in the proceedings pending a response to the Tribe's Mar. 26, 1985, correspondence.

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1985. The contracting officer did clearly indicate, however, that any appeal from his decision that the Tribe owes the Government the sum of \$428,000 should be taken to this Board. Although the contracting officer did not cite the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 as the authority relied upon for the decision reached, the Board notes that all of the contracts in issue appear to have been entered into after March 1, 1979 (the effective date of the Act).²

Office of Inspector General Audit Report W-FC-PH-BIA-002-83

In September 1982, the Area Director, Phoenix Area Office, BIA requested the OIG to conduct an audit of the contracts and grants administered by the Tribe. The request came about as a result of information having been received by the Phoenix Area Office which indicated that program funds, provided under BIA contracts and grants, had been diverted and used for purposes unrelated to the BIA funded programs. In response to the request, the OIG reviewed the books of the Tribe at its offices in Needles, California, between October and December 1982. The OIG reviewed the Tribe's financial management system and controls over Federal and tribal funds which encompassed review of the Tribe's use of BIA contract and grant funds received during the FY 1980 through 1982 and the adequacy of the Tribe's accounting system and related internal controls. Based upon the review conducted, the OIG auditor concluded that the Tribe's financial management system did not meet the standards set forth in the Code of Federal Regulations (CFR), 25 CFR 276.7, specifically, the requirement that the accounting records be maintained in an accurate and correct manner (Audit Report at 4). Based upon the information available at the time of the 1982 review, the auditor concluded that the Tribe appeared to be indebted to the Government in the amount of \$428,000.

At the time of the audit, the Tribe's accounting system consisted of a handposted, double-entry, centralized accounting system which provided for the approval of vouchers (invoices, payroll) for payment and the recording of the vouchers in accounts payable voucher registers. The system contemplated that when the payments were subsequently made, the registers should be annotated with the payments being recorded in the cash disbursement journals. Under the system, two members of the tribal council were to approve all vouchers for payment and to sign the checks in payment of such vouchers.

The auditor noted that in theory the Tribe's accounting system as described should meet the CFR requirements in terms of providing for the accurate recording and reporting of incurred costs but that the procedures established for maintaining the system had not been

² A note to sec. 601 of Title 41 states that the Act "shall apply to contracts entered into one hundred twenty days after the date of enactment (Nov. 1, 1978)."

consistently followed.³ Also noted by the auditor was the fact that the maintenance of the system had significantly deteriorated since the OIG reviewed the Tribe's accounting system in 1980⁴ when postings or corrections of prior postings to the accounting records were often provided by representatives of a certified public accounting (CPA) firm hired by the Tribe which also provided accounting supervision and training to tribal employees. Apparently, because the Tribe did not pay about \$82,000 owed to the CPA firm, the firm had provided only limited services to the Tribe for sometime prior to the 1982 audit. The OIG auditor concluded that these reduced services, coupled with the Tribe's historic high turnover in its accounting staff, had compounded the problems of maintaining an accurate accounting system.⁵

While the OIG was requested by BIA to conduct an audit of the contracts and grants administered by the Tribe, the conditions of the Tribe's records were such that an actual audit could not be accomplished. This point is made in a number of places in the report furnished to the Bureau and is illustrated by the following passage⁶ therefrom:

[T]he Tribe's accounting records cannot be relied upon for determining what has or should be properly charged to any specific contract or program. What is needed is an extensive analysis and reconstruction of the accounting records. In this regard, the Tribe's accounting department personnel are in the process of reviewing 1981 and 1982 transactions to ensure that all entries are properly recorded as to fund and individual programs. Upon completion of this work, appropriate adjusting and closing entries are to be made with final cost reports being prepared for all 1981 and 1982 contracts and grants

Until the preceding actions are completed, we believe that a comprehensive audit of the financial records would be inappropriate. It is the Tribe's responsibility to maintain accurate accounting records. Until such records are established, audits of individual contracts and grants would be unproductive and/or an inefficient use of audit resources.

(Audit Report at 7).

Near the conclusion of its report, the OIG recommended (i) that the Area Director, Phoenix Area Office, issue a bill-for-collection to recover any portion of the \$428,000 of reimbursable payments which cannot be substantiated by audited records of program disbursements and (ii) the

³ Listed in the audit report at pages 6 and 7 are 12 summary statements illustrating the need for improvements in the Tribe's accounting system.

⁴ The auditor notes that Federal funding provided to the Tribe by BIA and other Federal agencies for farm related activities had been substantially curtailed after 1980, after which he states:

"Nevertheless, the Tribe continued to operate the farm until mid-1982. This has worsened the Tribe's financial condition to where the Tribe owes about \$10.1 million of which at least \$7.5 million is directly farm related. As of September 30, 1982, the Tribe only had about \$650 in its general fund bank account and \$1,332 in its program bank account." (Audit Report at 3).

⁵ Commenting upon a recommendation by the OIG, the Bureau states:

"The Fort Mojave Tribe is presently in the process of updating financial records for audit purposes, and is operating under austere conditions to pay back debts with close monitoring by the Colorado River Agency Superintendent. Also, until the above actions are accomplished, contracting will be continued under the same conditions as in FY 1983, i.e., the tribe will be required to submit copies of paid receipts prior to reimbursement by the Bureau, a monthly personnel cost allocation for salaried personnel, copies of subcontracting documents, and travel and training costs must be in accordance with established personnel policies and procedures." (Audit Report at 9).

⁶ Elsewhere in the report, the auditor states:

"Because of cash management problems attributable to its adverse financial condition, the Tribe has used about \$428,000 of BIA program funds to pay nonprogram debts. We cannot, with certainty, state whether this amount represents a final figure that should be refunded to BIA. The deplorable condition of the Tribe's accounting records precluded us from establishing a firm figure." (Audit Report at 10).

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Tribe be required to establish, for BIA review and approval, annual budgets which will allocate a portion of each year's annual revenues to the payment of debts with the budgets requiring austere operating procedures so as to maximize the reduction of debts.⁷ The BIA response to the first recommendation was that it would not be appropriate to issue a bill-for-collection until it could specifically identify those payments which are not adequately supported by the Tribe.

Commenting upon the BIA position respecting the issuance of a bill-for-collection in the circumstances present, the OIG report states at page 13: "Based on BIA's response to our draft report, we modified our first recommendation to indicate that a bill-for-collection need not be issued until after the tribal accounting records have been audited."

In response to a draft report submitted by the OIG, the Bureau stated: (i) that the Tribe had a grant to hire personnel that would update the accounting records for audit by June 1983; (ii) that the Tribe would be required to certify that the Tribe's accounting system meets the standards in 25 CFR 276.7 by August 31, 1983; (iii) that the Tribe would be requested to submit audited financial statements by August 31, 1983; and (iv) that if this was not feasible, the Tribe would be required to furnish by December 31, 1983, a date by which the audited financial statements would be submitted.

In view of the financial straits in which the Tribe was in at the time the draft report was received (*e.g.*, balance in program bank account of \$1,332 as of September 30, 1982; expiration date of September 30, 1983, for a grant to the Tribe to hire personnel to update the accounting records) and the scope of the action contemplated by the OIG ("an extensive analysis and reconstruction of the accounting records"), the deadlines established by BIA for corrective action appear to have borne little relationship to reality. In any event, at the time of the contracting officer's initial "Determination and Findings," of December 17, 1984, and the Amendment to Determination and Findings of March 11, 1985, the audited financial statements for the BIA contracts and grants for FY 1982, had still not been completed. The audited financial statements for both FY 1981 and 1982 had been submitted to the contracting officer by April 1, 1985. Nevertheless, the contracting officer proceeded with the issuance of his decision of that date, stating at page 1: "Until the statements have been analyzed by OIG and recommendations made, we must maintain that the Tribe still owes the Government \$428,000 as determined by OIG Audit Report No. W-FC-PH-BIA-002-83."

⁷ In its response to the second recommendation, the Bureau stated: "We will request the tribe make definite plans to meet its obligations out of future operational budget funds" (Audit Report at 13).

Discussion

If the Board has jurisdiction over any of the Government's claims involved in the instant appeals⁸, it is to be found in the provisions of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613.⁹ The Act sets forth a comprehensive plan for the resolution of contract disputes, providing, *inter alia* (i) that it applies to express or implied contracts entered into by an executive agency, 41 U.S.C. § 602(a); (ii) that 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 and that all claims by the Government against a contractor relating to a contract shall be the subject of a decision by the contracting officer, 41 U.S.C. § 605(a); (iii) that the contractor has the option of taking an appeal from a contracting officer's decision to the appropriate agency Board of Contract Appeals within 90 days from the date of receipt of the decision, 41 U.S.C. § 606, or in lieu thereof the contractor may bring an action directly on the claim in the United States Claims Court provided such action is filed within 12 months from the date of the receipt by the contractor of the decision of the contracting officer, 41 U.S.C. § 609; (iv) that each agency Board of Contract Appeals has jurisdiction to decide any appeal from a decision of a contracting officer relating to a contract made by its agency and that in exercising the jurisdiction so conferred the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court, 41 U.S.C. § 607(d); (v) that the decision of an agency Board of Contract Appeals shall be final, except that a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within 120 days after the date of receipt of a copy of such decision, 41 U.S.C. § 607(g); and (vi) that the decision of the agency Board of Contract Appeals on any question of law shall not be final or conclusive but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence, 41 U.S.C. § 609(b).

The principal question presented by these appeals in their present posture is whether the decision of the contracting officer can be considered to be a final decision within the meaning of section 6(a) of the Contract Disputes Act.¹⁰ The mere fact that a contracting officer

⁸ Some of the appeals involved are covered by grants. The Board has no jurisdiction over disputes arising under or related to grants. See our decision in the *Confederated Tribes of the Chehalis Reservation*, IBCA-1640-12-82 (May 20, 1983), 90 I.D. 228, 83-1 BCA par. 16,539.

⁹ Since the absence of a final decision by the contracting officer precludes the Board from presently assuming jurisdiction under the Contract Disputes Act in any event, it does not reach the jurisdictional questions raised by appellant (text accompanying note 1). Should these jurisdictional questions again be raised in any subsequent proceeding related to these appeals, they will be addressed and resolved after the parties have been provided an opportunity to fully brief the questions presented.

¹⁰ For a discussion of this question, see *Space Age Engineering, Inc.*, ASBCA No. 26028 (Apr. 22, 1982), 82-1 BCA par. 15,766 at 78,034-038.

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considers his decision to be final or expressly states the decision to be final does not make it so. *Space Age Engineering, Inc.*, note 10, *supra* (purported final decision on a Government counterclaim deprived of any efficacy when the contracting officer failed to provide the contractor with an opportunity to express his views on proposed action before rendering his decision).

Very recently in the case of *Husky Oil NPR Operations, Inc.*, IBCA Nos. 1871, *et al.* (Feb. 15, 1985), 92 I.D. 91, 85-1 BCA par. 17901 a number of appeals involving Government claims of contractor indebtedness under a purported final decision of the contracting officer were dismissed for want of jurisdiction where the decision of the contracting officer was found to lack finality because (i) the contractor had been denied resources to respond to audit questions; (ii) the contracting officer had failed to schedule audit responses as promised; and (iii) the decision fell short of the required standard of impartiality and quasi-judicial attitude of a contracting officer. Commenting upon the nature of the final decision purportedly rendered in *Husky*, the Board states:

Instead of allowing a more reasonable time to address the major audit questions necessitated by the mandated reduced NPR staff, or to address the clear burden of the Government to show that incurred costs were not allowable, or to negotiate with NPR to determine allowable costs in the face of the Government's burden, the Decision was issued citing reasons given in the audit reports * * *.

* * * even now the conduct of audits and readits is continuing. NPR has submitted a number of audit responses after the Decision. The parties do not conduct themselves as if an impasse [sic] has been reached on the amount to which NPR is entitled * * *. The appeals process is not designed to substitute for the bargaining process between the parties to examine the countless issues on which reimbursement of incurred costs may depend. Here, it is abundantly clear that the parties have not had the opportunity to consider together all of the issues. The appeals are prematurely before the Board. There are no clearly defined disputed issues between the parties that they can agree are ready to be submitted to the Board for decision. [Footnote omitted.]

92 I.D. at 97, 85-1 BCA at 89,643.

Turning to the case at hand, the Board notes a number of similarities between the situation with which we are here concerned and that confronting the Board in *Husky*. Here, as there, the Government has the clear burden to show that incurred costs are not allowable; here, as there, some aspects of the auditing process is continuing; and here, as in *Husky*, the parties do not conduct themselves as if an impasse has been reached. In this case, however, there are significant differences from the situation present in *Husky* and which further impugn the acceptance of the contracting officer's decision of April 1, 1985, as a final decision. Nowhere in the Determination and Findings of December 17, 1984, or in the Amendment thereto of March 11, 1985, or in the contracting officer's decision of April 1, 1985, are the contracts and grants identified to which the determination and findings or decision purportedly relate; nor are the contracts and grants identified in the audit report of

June 28, 1983, on which the determination and findings or the decision of April 1, 1985, purport to be based.

In the above circumstances, the Board finds (i) that the Determination and Findings of December 17, 1984, the amendment thereto of March 11, 1985, and the contracting officer's decision of April 1, 1985, were not final decisions within the meaning of section 6(a) of the Contract Disputes Act of 1978, 41 U.S.C. § 605(a), and (ii) that the appeals therefrom are therefor premature. So finding, the above-captioned appeals, insofar as they are based upon contracts, are dismissed without prejudice and remanded to the contracting officer for a decision following the completion of the auditing process. Any decision so rendered shall explicitly identify the contracts involved by number and with respect to each of such contracts shall undertake (i) to allocate the costs properly chargeable thereto, and (b) to identify and show the amount of any disallowances thereunder.

Decision

For the reasons stated and on the basis of the authorities cited, the following actions are taken:

1. The appeals involving grants and docketed as IBCA Nos. 1968, 1969, 1970, and 1971 are dismissed with prejudice to further proceedings before this Board.
2. The balance of the above-listed appeals are dismissed without prejudice and remanded to the contracting officer for further action consistent with this opinion.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

APPENDIX

APPEALS OF FORT MOJAVE INDIAN TRIBES OF ARIZONA, CALIFORNIA,
AND NEVADA

Contract or Grant Number

IBCA-1968—Grant No. H50-G142-00035
IBCA-1969—Grant No. H50-G142-01075
IBCA-1970—Grant No. H50-G142-02044
IBCA-1971—Grant No. H50-G142-01052
IBCA-1972—Contract No. H50-C142-01401
IBCA-1973—Contract No. H50-C142-01645
IBCA-1974—Contract No. H50-C142-02021
IBCA-1975—Contract No. H50-C142-02569
IBCA-1976—Contract No. H50-C142-01670
IBCA-1977—Contract No. H50-C142-02089
IBCA-1978—Contract No. H50-C142-02523
IBCA-1979—Contract No. H50-C142-02027
IBCA-1980—Contract No. H50-C142-02664
IBCA-1981—Contract No. H50-C142-01827

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IBCA-1982—Contract No. H50-C142-02213
 IBCA-1983—Contract No. H50-C142-02715
 IBCA-1984—Contract No. H50-C142-01910
 IBCA-1985—Contract No. H50-C142-02133
 IBCA-1986—Contract No. H50-C142-02584
 IBCA-1987—Contract No. H50-C142-09009
 IBCA-1988—Contract No. H50-C142-01080
 IBCA-2000—Contract No. H50-C142-01779
 IBCA-2001—Contract No. H50-C142-01781
 IBCA-2002—Contract No. H50-C142-01829
 IBCA-2003—Contract No. H50-C142-01845
 IBCA-2004—Contract No. H50-C142-02026
 IBCA-2005—Contract No. H50-C142-02043
 IBCA-2006—Contract No. H50-C142-02640
 IBCA-2007—Contract No. H50-C142-02709

APPEALS OF WHITESELL-GREEN, INC.

IBCA 1927-1940

Decided: June 13, 1985

Contract No. 0-97-10-C0109, Environmental Protection Agency.

Motion to Dismiss Denied in Part and Granted in Part.

1. Contracts: Contract Disputes Act of 1978: Jurisdiction

Where a purported certification included only one of the three assertions required by 41 U.S.C. § 605(c)(1), the Board held the attempted certification to be improper and that it had no jurisdiction to consider the claims involved.

2. Rules of Practice: Appeals: Dismissal

Where the Board found that the Government had failed to show prejudice from delays resulting in part from its own participation in requests and a stipulation for postponement, all in anticipation of amicable settlement of the claims involved, the Government's motion to dismiss for lack of prosecution was denied.

APPEARANCES: A. G. Condon, Jr., Attorney at Law, Emmanuel, Sheppard & Condon, Pensacola, Florida, for Appellant; Richard V. Anderson, Government Counsel, Cincinnati, Ohio, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

Over 30 claims arising out of the above-numbered contract were submitted to the contracting officer (CO) by appellant over a 2-year period, from 1979 to 1981, resulting in denials thereof and subsequent appeals to the Board. As a result of a prehearing conference held before the Board May 31 through June 1, 1983, the parties stipulated and agreed substantially as follows: (1) that the appeals are withdrawn

and may be dismissed; (2) that the dismissal shall be without prejudice to a resubmission of a consolidated claim by appellant to the CO constituting a merger of previous claims submitted over the 2-year period aforesaid, with proper certification as required by the Contracts Disputes Act of 1978 (CDA), and eliminating the redundancy present in the current appeals; and (3) that upon such resubmission, the parties shall attempt to resolve each issue presented amicably, but in failure thereof, any unresolved issues shall be reflected in a CO's final decision which shall be subject to review by the Board upon appeal as provided by law. Pursuant to that stipulation, the Board on June 27, 1983, ordered the docketed appeals dismissed "without prejudice to resubmission as provided by the above-described Stipulation." Neither the Stipulation nor the Board's order contained any time limitations for the resubmission of the claims or attempt at resolution.

Apparently, on or about October 30, 1984, some 16 months after the Board's order of June 27, 1983, appellant resubmitted the claims. The number of claims was reduced to 14 and the amount claimed reduced from about \$890,000 to about \$560,000. No certification accompanied that submission, but on November 30, 1985, a letter was sent to the Environmental Protection Agency (EPA) (attention, CO), signed on behalf of appellant by Campbell West Caldwell, Project Manager. The last sentence thereof was as follows: "This firm certifies that these claims were transmitted in good faith and that the contents thereof are, to our knowledge, correct." In response to that letter, the CO, on December 17, 1984, advised appellant, in substance, that: Amicable negotiations were no longer possible because of the inordinate lapse of time; that EPA issued final decisions on appellant's myriad claims over 3 years prior; and, "we see no benefit of your further pursuing these matters with the CO as we stand firm on our previous final decisions."

Thereafter, on February 11, 1985, appellant filed a Notice of Appeal to which was attached a "Consolidated Complaint." It was apparently the same as the consolidated claim filed with the CO on or about October 30, 1984, and recited that it was an appeal from the "final decision of the Contracting Officer, dated 12/17/84." The Notice of Appeal referred to the docket numbers assigned to the appeals which had been dismissed by the Board's order of June 27, 1983. The Board's docketing notice, therefore, pointed out that the 14 claims contained in the "Consolidated Complaint," would be treated as the 14 newly submitted claims to the CO and his letter of December 17 as a denial thereof, and that for convenience and expedition of disposition, each of the 14 claims would be assigned new and separate docket numbers from IBCA 1927 through 1940.

On February 25, 1985, EPA filed a Motion to Dismiss, arguing in general, that appellant had abandoned its appeals and that they should be dismissed for failure to prosecute and further, that none of the claims exceeding \$50,000 had been certified in accordance with the CDA. Thereupon, on March 19, 1985, the Board issued an Order to Show Cause why the subject appeals should not be dismissed.

June 13, 1985

Appellant was allowed 20 days from the date of receipt of the Board's Order to Show Cause why the pending motion should not be granted, and the Government was allowed 20 days, after receipt of appellant's showing, to file a responsive showing why the motion should be granted.

Issues Presented

I

Whether all or any of the appeals should be dismissed for lack of jurisdiction because of the failure of appellant to properly certify major claims embodied within the subject appeals.

II

Whether the subject appeals should be dismissed with prejudice because of appellant's failure to prosecute its appeals.

The Certification Issue

Only 3 of the 14 claims involve more than \$50,000. They are: Claim 1, Docket No. IBCA-1927; Claim 3, Docket No. IBCA-1929; and Claim 31, Docket No. IBCA-1936. The amounts claimed are, respectively: \$160,780, \$61,485, and \$208,043. Since the CDA provides that only claims of more than \$50,000 need be certified, the other remaining 11 claims for less than that amount are unaffected by this issue.

The CDA, 41 U.S.C. § 605(c)(1), mandates three assertions to be included in a contractor's certification of a claim of more than \$50,000. These are: (1) that the claim is made in good faith, (2) that the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and (3) that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

In *Fidelity Construction Co. v. United States*, 700 F.2d 1379 (1983), at page 1384, the U.S. Court of Appeals for the Federal Circuit discussed certification, and, among other things, stated:

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 and 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 Government, neither at the CO level nor at the Board level, may waive proper certification requirements for claims over \$50,000. To be a proper certification, the contractor's statement *must* simultaneously

include all the assertions required by 41 U.S.C. § 605(c)(1). Also, when the certification is made or written by someone other than the contractor, proper certification is thereby invalidated. See *W. H. Mosely Co. v. United States*, 677 F.2d 850 (Ct. Cl. 1982); *Skelly & Loy v. United States*, supra; and *W. M. Schlosser Co. v. United States*, 705 F.2d 1336 (C.A.F.C. 1983).

In light of these authorities, it is clear that appellant failed to certify properly its three claims which required certification. The primary reason for this conclusion is that the purported certification contained in the last sentence of appellant's letter to the CO, dated November 30, 1984, included only the good faith statutory assertion. In addition, we have doubts about the validity of the purported certification because it was not written or signed by an officer of the corporation. The letter of November 30, 1984, did not enclose a copy of a resolution of the Board of Directors of the appellant corporation stating that the project manager, Mr. Caldwell, was authorized to act on behalf of the corporation with respect to the certification of claims. Neither did the letter show him to be an officer of the corporation.

The CDA requires that the *contractor* certify when certification is necessary. Thus, when the contractor is a corporation, the individual who acts for the corporation by executing the certification should have at least apparent authority to do so. Our holding here is that the certification itself is defective and therefore is not dependent upon the authority, or the the lack thereof, of the certifier. Nevertheless, we believe that a careful and conscientious approach to proper certification by a corporate contractor dictates that a clear showing be made that the individual certifying on its behalf has the authority to so certify as an act of the corporation.

Decision

We have concluded that the claims involved in the appeals docketed as IBCA-1927, IBCA-1929, and IBCA-1936 are invalid because of improper certification. This Board, therefore, has no jurisdiction to consider them.

Accordingly, the Government's Motion to Dismiss, with respect to those three appeals, is granted; and, in accordance with the procedure outlined in *Skelly & Loy v. United States*, supra, IBCA-1927, IBCA-1929, and IBCA-1936 are hereby dismissed for lack of jurisdiction, but without prejudice to resubmission of properly certified claims to the CO.

The Failure of Prosecution Issue

The Government charges that appellant's attempts to negotiate settlement with the EPA were only cursory and its record of delays, over the last several years, involving a myriad of requests for dismissals without prejudice and reinstatement based on representations that more time was needed for negotiated settlement,

June 13, 1985

was, in fact, a purposeful manipulation of the Board and the administrative process by appellant to deliberately avoid the timely prosecution of its claims. In its show cause memorandum, the Government also asserts its belief: That the principal explanation for the on-again, off-again nature of the appeals is due essentially to a dispute between appellant and one of its subcontractors, Porter Mechanical Contractors, Inc. (PMC); that appellant never had a serious intent to prosecute the appeals, its real intent being to do just enough to avoid litigation with PMC in Federal court, but not enough to have to actually present a case on PMC's behalf before either the respondent (EPA) or the Board. The Government argues, with the citation of case authority, that the Board has the authority, under its Rule 4.127(b) to dismiss for failure to prosecute and should exercise such sanction by dismissing the subject pending appeals.

Appellant, on the other hand, strongly denies that its attempts to negotiate were cursory; points out that it has accumulated voluminous correspondence and documents relating to its claims and efforts to negotiate settlements; asserts that two trips were made by its representatives to the EPA offices in Cincinnati, Ohio, and numerous telephone conversations held with the CO and his assistant; and states that at least two efforts to settle have been transmitted to the CO, but to no avail. Appellant acknowledges that it deserves some criticism for not getting started sooner on negotiations for settlement after the Board's order of June 27, 1983. However, it states that it was believed that three of the claims then pending were settled as a result of the conference, and that on claim 31, EPA has had a detailed breakdown of the costs involved for the associated unilateral change order for more than 3 years but has done nothing toward settlement of that claim. In effect, appellant admits that its initial effort after the Board's order was delayed, but once forthcoming, accuses EPA of "doing nothing but to, in a cursory fashion, refuse to negotiate any of the claims toward a settlement."

Appellant cites case authority in support of its argument that the 16 months delay after the Board's order has not prejudiced EPA and is not undue under the circumstances of this case; and, it argues that, given the voluminous record involved, the time interval cannot be interpreted as an intention not to continue the prosecution of the appeals. Appellant contends that EPA's conclusion that appellant has manipulated the disputes resolution process so as to purposefully avoid the timely presentation of its claims is "preposterous," considering the fact that appellant is seeking a monetary award from EPA. Appellant insists that EPA has not been prejudiced by the delays; that there is nothing in the record to support such conclusion nor to support the necessary elements for invoking the application of Rule 4.127 regarding dismissal for lack of prosecution. Finally, in the last

paragraph of his affidavit, attached to appellant's Memorandum in Response to the Order to Show Cause, Campbell West Caldwell avers:

That your Affiant and the Appellant is ready, willing and able and has remained so since the date the first claim was filed involving this contract, ready, willing and able to proceed toward the earliest consideration and conclusion of the now-pending 14 claims on their respective merits before the Interior Board of Contract Appeals since all other efforts to satisfactorily conclude them have failed.

We can understand EPA's frustration because of the long period of time consumed without settlement of the disputed claims. However, it should be borne in mind that appellant's first claims were filed before the contract was completed, and it was the Government who requested the first dismissals without prejudice to reinstatement. In fact, as counsel has admitted, the Government had either joined in, or at least not objected to, nearly all the postponements relating to the subject appeals. It actually stipulated with appellant at the prehearing conference that the then filed appeals could be dismissed without prejudice to resubmission of new claims. The Stipulation could easily have included time constraints on the new submissions, but did not do so.

We agree with appellant that EPA has not shown that it has been prejudiced by the delays, and we hold that the Government is bound by its own Stipulation upon which the Board's order of June 27, 1983, was based. We further hold that by such order the parties were both bound to treat appellant's claims filed in pursuance thereof as entirely new claims and that the parties waived procedural remedies, if any, which existed or arose out of the time period preceding such order. In other words, by their own Stipulation, the parties agreed to begin anew with appellant's claims and proceed toward amicable settlement, if possible, and if not, to pursue again the administrative adjudication of the subject claims in due course. If nothing else, it should be clear to everyone involved in these appeals, that the past 2 years have established that amicable settlement between the parties is virtually impossible, and therefore, that the litigation must proceed.

Decision

We are unable to find from the circumstances surrounding these appeals sufficient justification to rule that the appellant's delays constitute failure to prosecute. Accordingly, it is hereby ordered that the Government's Motion to Dismiss for failure to prosecute is denied; the Government shall have 30 days from the date of receipt of this order within which time to file its answer to appellant's pleading, entitled, "Second Amended Complaint"; and the parties are directed to advise the Board, within the next 30 days, of available times and a suggested place for conducting a hearing on those active appeals for which a hearing has been requested.

DAVID DOANE
Administrative Judge

June 20, 1985

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

APPEAL OF OPTIMAL DATA CORP.

IBCA 1695

Decided June 20, 1985

Contract No. 68-02-1369, Environmental Protection Agency.

Denied.

Contracts: Disputes and Remedies: Burden of Proof--Contracts: Performance or Default: Compensable Delays--Contracts: Performance or Default: Suspension of Work--Contracts: Construction and Operation: Allowable Costs--Contracts: Construction and Operation: Notices--Contracts: Formation and Validity: Generally

In a cost-plus-fixed-fee level of effort contract with task order options held by the Government, the contractor had the burden to prove: (1) that it gave the proper notice and received authorization from the contracting officer, under the Limitation of Costs Clause, before it could recover for any foreseeable overrun; (2) that the Government, in delaying performance of the contract, had breached a contract obligation, which breach caused increased costs, in order to recover increased overhead and general and administrative costs above the contract ceiling for delays as an equitable adjustment for an implied change arising, *de facto*, under the Stop Work Order Clause; (3) that the Government had an obligation to exercise options in order for the contractor to recover any amounts for failure to exercise such options. Where the contractor waited until after performance was complete to invoice for amounts in excess of contract limitations and had earlier agreed to a change accomplishing an increase of costs limitation as covering all performance, it could not and did not carry its burden for compensable overrun; where it waited over 6 years to make a claim, failed to present auditable cost records at any time, relied on the mere existence of delays to establish a Government breach and failed to connect any alleged breach to specific cost increases, it failed to carry its burden of proving delays amounting to a breach such as would allow recovery for an equitable adjustment for expenses in excess of contract ceilings as a *de facto* stop under the Stop Work Order clause; where it presented mere allegations of fraud and malevolence in Government motivation and conduct but failed to present proof of the allegations nor even of what they meant, it failed to carry its burden to show that the Government had some obligation to exercise contract options. The appeal was denied.

APPEARANCES: Donald S. Gresko, Attorney at Law, Vestal, New York, 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 decision of the contracting officer (CO) on a dispute under a subcontract awarded to Optimal Data Corp. (ODC)

June 20, 1985

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

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APPEARANCES: Donald S. Gresko, Attorney at Law, Vestal, New York, 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

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through the Small Business Administration (SBA) under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a).

The contract, awarded June 29, 1973, and calling for a 3-year period of performance, was a task order level-of-effort cost reimbursement arrangement, providing for a fixed fee. The work to be performed has been called "Quick Reaction Engineering and Technical Services" and essentially consisted of research and analysis to determine the technical and economic feasibility of candidate control processes (Appeal File (AF) Tab 1, Schedule, Exh. A). Included as contract work was a final task report (AF Tab 1, Art. VII; at 13-14). When the contract was awarded, the Environmental Protection Agency (EPA) issued the first task order, calling for 1,000 man hours of work (plus or minus 10 percent) (AF Tab 1, Art. VI). There was also a provision for EPA to exercise any number of a series of 30 additional options to require similar services for different "tasks" in similar 1,000 man-hour units during the 3-year performance period (AF Tab 1, Art. XXII). Each of the 1,000-hour units carried with it an obligation for EPA to pay estimated costs and fixed fee of \$21,721, of which \$20,206 was the estimated cost and \$1,515 was the fixed fee (AF Tab 1, Arts. XI and XXII). There were standard Audit and Records, Disputes, Changes, and Limitation of Costs (LOCC) clauses (AF Tab 1, General Provisions clauses 24, 2, 3, and 20, respectively). In addition, there was a standard Negotiated Overhead Rates provision (AF Tab 1, General Provisions, clause 29) and a more specific Indirect Costs provision (AF Tab 1, Art. XIV). The latter provided a ceiling of 80 percent of direct labor costs for overhead costs and a ceiling of 10 percent of total direct costs for general and administrative (G&A) costs, regardless of any negotiation on overhead rates. In other words, the 80 and 10 percent rates were established as the proper operative rates for the first year of performance, and those rates were also the ceiling rates for subsequent years, the actual rate to be established after proposal and agreement under the negotiation clause, with EPA to enjoy both the benefit of negotiated rates falling below the ceilings and the protection afforded by the ceilings.

EPA exercised only one option to require additional work during the 3-year term of the contract. That occurred in June 1974 (AF Tab 3), but the task order actually assigning the work was not issued until February 20, 1975 (Supplemental Appeal File (SAF) Tab 3b). That task order provided a 6-month period of performance but set out a completion date of August 1, 1975.

There were a number of problems with completing task No. 2, caused at least partially by an EPA regional office's failure to furnish ODC with source files and other technical data in a timely fashion (AF Tab 5). One result of the delays was the issuance of a task change order extending the performance period to October 24, 1975 (SAF Tab 3b). Ultimately the task was not completed until early June 1976.

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Although the performance of the first task suffered from like-generated delays, ODC completed the work with little apparent problem (SAF Tab 3a). During the performance of the second task, however, ODC requested additional funding to complete the task, having estimated that 100 hours of effort beyond that provided in the contract would be necessary for that purpose (AF Tab 4). The letter delivering the request, dated February 5, 1976, made prominent mention of the delays as they contributed to the need for additional funding. EPA ultimately increased the contract's funding by \$2,750 in a modification issued in July 1976 (AF Tab 8). This represented 125 hours of added funds at slightly more than the contract rate for costs and fixed fee (based on an assumed 1,000-hour level of effort). The internal documentation justifying the increase requisition cited the delay and EPA's part in it as the primary cause for the increase in funding (AF Tab 5). In the first week of June 1976, EPA received the final report for task No. 2 (and now claims, as it has throughout, that it believed the task to be complete upon that receipt) (AF Tab 6). On June 16, 1976, ODC's chief executive, Dr. Lincoln Teng, had a telephone conversation with EPA personnel in which he agreed to the treatment of the deficiency of funds (about which he first notified EPA in the February 5 request) as an overrun and to the resolution of the problem by the EPA addition of \$2,750 to the contract funds (as detailed above) (AF Tab 7). EPA issued the modification accomplishing the funds addition on July 19, 1976 (AF Tab 9). Meanwhile, ODC had presented a voucher, dated June 28, 1976, and purporting to cover the performance period May 8 to June 26, 1976 (SAF Tab 4r). The amount of this voucher was \$2,193.22. Previously, ODC had submitted vouchers, including two after the February increase request, totaling \$46,163.43, which was \$28.57 below the contract cost limit of \$46,192, as enhanced by the \$2,750 increase. To that time, and currently, EPA had paid \$45,518.24 to ODC for contract work, or \$673.76 less than the enhanced cost limitation (SAF Cover Sheet).

Thereafter, for several years the CO made numerous attempts to gain audit access to ODC's costs records. EPA and its audit agent were essentially unable to make significant contact with ODC. The reasons for that were several. ODC had gone out of business, and Dr. Teng failed to respond to inquiries which, in any event, may not have reached him because he left no easily accessible information about his whereabouts. When contact with Dr. Teng was reestablished, he was unable to provide any real assistance, because he no longer had access to any of ODC's meaningful records. Based on recommendations by EPA's Inspector General's Office and Cost Advisory Branch, the CO assumed authority to make a unilateral decision and close out the contract (AF Tabs 19, 20). Thus, the CO sent Dr. Teng a memorandum dated September 9, 1982, notifying the latter that the inability to conduct an audit had prompted a unilateral decision. The decision was

essentially that EPA would pay the full contract amount (meaning payment of \$673.76 still then being retained) upon ODC's submission of a final invoice and a release of claims (AF Tab 21).

ODC's response to the memorandum was two letters, dated October 14 and November 5, 1982, respectively. The latter enclosed the release, conditioned upon payment of the final invoice, which was also enclosed. The invoice claimed compensation in the amount of \$19,613.62, consisting of three groups of items: (1) the withheld amount of \$673.76; (2) \$2,164.65 for "added effort," apparently referring back to the July 1976 voucher, submitted after delivery of the final report and agreement on the \$2,750 overrun; and (3) \$16,775.62 representing the net amount assertedly due when the "proper" overhead and G&A rates were applied to the appropriate cost amounts for 1973, 1974, and 1975. (Two of the G&A rates used in the final invoice for those years were below that billed when current vouchers were submitted. The reason that the net amount is a positive figure is that the other four rates, one for 1975 G&A and the three overhead rates, were in excess of the rates used in the original billings and in excess of the contract's rate ceilings (AF Tabs 22, 23)).

Another exchange of letters followed. In a January 4, 1983, letter, the EPA CO pointed out that the contract required (1) availability of records for audit and inspection and (2) advance notice by the contractor and CO authorization before EPA became liable for overruns (AF Tab 24). In an April 10, 1983, letter, ODC presented a summary account of "Project Funding, Revenue and Expenditures" but no auditable original records. This letter also expressed a desire for a final decision on the matter (AF Tab 27).

The CO issued his final decision in a letter dated May 20, 1983. He denied the claims (except for the \$673.76 retained portion of the contract amount) for the reasons (1) that the contract's LOCC prevented liability from attaching to EPA (a) on the final 1976 voucher claiming compensation above the contract amount, as enhanced by the overrun modification, and (b) on any adjustments based on changed overhead and G&A rates and (2) that there is a jurisdictional bar to considering costs claimed after the passage of 6 years from the expiration of the contract's terms, a state of events applying to the claim for compensation for the changed indirect cost rates.

ODC appealed (AF Tab 31). The case being submitted on the record, we held no evidentiary hearing, and ODC did not express its election to make applicable the Contract Disputes Act of 1978 (CDA) (41 U.S.C. § 601, note). In its complaint, ODC reiterated the claims for allowable overrun, retained funds, and G&A and overhead rate change consequences, totaling \$19,613.62 and added a new compensation demand for \$181,397, being the product of the G&A rate and the fixed fee rate against the balance of the potential project fund. ODC apparently charged that it was entitled to having EPA exercise the twenty-nine 1,000-hour unit options which were unexercised and that the reason for EPA's failure to do so was founded in some contractual

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misconduct by EPA and SBA. The measure of damages for this misconduct, by ODC's figuring, is lost G&A expense and fixed fee revenue caused by the misconduct (Complaint, Parts 2 and 3). (The figure used by ODC as a basis is \$1.08 million, being the alleged value of the entire 31,000-hour contract potential. From that figure, ODC deducts the contract funds in fact authorized to be expended and reaches the "fund balance" of \$1,036,558. It is against this latter figure that the G&A and fixed fee rates of 10 and 7.5 percent, respectively, are taken to reach the compensation figure of \$181,397. Apart from the fallacies in ODC's methodology in reaching these figures, *i.e.*, G&A and fee are constituent parts of total contract funding and the rates thereof therefore should be taken against lower figures than the full contract amount to reach the proper dollar figures represented thereby, we are also unable to find the source for the \$1.08 million full contract fund allegation. ODC's complaint mentions that amount as the one "announced for award of subject 8(a) minority contract," but the contract speaks only of \$21,721 units. If all of the options had been exercised, then by the contract's terms the total Government expenditure would be 31 times \$21,721, or \$673,351 which is about five-eighths of the alleged \$1.08 million figure).

Decision

We consider the various issues raised in the order set out in ODC's brief. The first issue is the allowability of \$2,164.65 in costs billed in ODC's last voucher. (The figure used in the last voucher was \$2,193.22. Since \$28.57 of authorized funds remained unexpended before the last voucher was received (exclusive of the \$673.76 retained), we believe that the \$2,164.65 figure used was arrived at after the \$28.57 was deducted from the last voucher figure and that that is the reason that ODC, logically enough, uses \$2,164.65 as the overrun amount). ODC's argument is that the last voucher constituted the notice of overrun required by the LOCC and that it represented "unfor[e]seeable added effort due to the massive volume of work which was necessary to complete the project in June, 1976." The work referenced was "documentation, including editing, typing, tabulating, printing and binding of the report of over 400 pages for the 10 states' Government organizations." ODC goes on to note that "these tasks were not stipulated in the contract, and were not contained in the Task II assignment."

Appellant makes a few additional contentions. First, citing *General Time Corp.*, ASBCA No. 18962, 75-2 BCA par. 11,462 (1975), it notes that the various boards have held that a notice of overrun need not represent the amount of an overrun with exactness. Second, noting the well-established principle that the LOCC imposes a duty on the contractor to give timely notice of a known prospective or actual overrun, ODC contends that it met that duty here by virtue of the

submittal of its last voucher which it further represents as "clearly payable" for being "within the 10% constraint of the entire contract cost." Finally, ODC uses the following passage to sum up its position. "Therefore, the overrun costs claimed on Appellant's Voucher #17 [the last voucher, dated June 28, 1976] should be granted, since the estimated sum of \$2,750, later funded, and based upon Appellant's February estimate, was low, and the later Modification only covered costs through May 7, 1976. The Respondent clearly had prior notice of estimated added costs necessary to complete Task No. 2, had timely notice of the actual cost overrun, Voucher #17 being completed within a few weeks of contract completion, and Respondent accepted the benefits of Appellant's continued performance" (Appellant's Brief at 7-8).

We cannot agree with ODC on any of its points and observe that its belief that it is entitled to reimbursement for an overrun is apparently based on an incomplete understanding of the LOCC. The central purpose of the LOCC is to protect both the Government and the contractor in the event that actual costs exceed or threaten to exceed the costs estimated after agreement, as expressed in the terms of the contract. It accomplishes that by relieving the Government from liability to fund overruns unless the contractor notifies it of the overrun and the Government agrees to pay it. It accomplishes the contractor's protection by allowing it to cease performance under the contract in the absence of overrun funding whenever the cost limitation is reached. The clause contemplates that the notice required be prospective, but in certain circumstances, discussed later, there may be some flexibility in the timing of the notice without undermining recoverability. In fact, in the circumstances of this case, we find an instance of the use of the LOCC in what could be termed a model application. In February 1976, ODC notified EPA of a *prospective* overrun resulting from the need for an additional 100 man hours of work above the contract estimate to complete task No. 2. Recognizing its own contribution to the need for additional work, EPA initiated a supplement to funding representing approximately 125 man hours at the contract rate. Although they were not made until August and October 1976, the payments corresponding to the funding supplement completed a rather ordinary overrun procedure, very much in keeping with the requirements of the LOCC.

The contrast between that factual situation and the one forming the basis for the present claim is considerable. To begin with, the notice ODC contends it gave, namely the last voucher, was hardly prospective, having been received on July 1, 1976, more than 3 weeks after EPA's receipt of the final report. The argument that a notice of overrun is timely, "being submitted within a few weeks of contract completion" in ODC's words, is a difficult one to accept. As we noted above and as ODC seems to be aware, there are circumstances in which advance notification is not strictly mandatory. In *General Electric Co. v. United States*, 194 Ct. Cl. 678, 440 F.2d 420 (1971), for

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instance, the Court held that failure to give prior notice may be excusable if the contractor, through no fault of its own, could not foresee the overrun. We are unable to apply that principle to this case, however, because we are unable to find that the overrun was not foreseeable. In the first place, it is the contractor's burden to prove lack of foreseeability, and ODC has not presented cognizable proof tending to establish that fact. Moreover, the circumstances of which we are aware tend to prove the opposite. Because this was a small operation and was labor-intensive (at least in the sense that ODC consistently throughout the contract period and in the last/overrun voucher billed for overhead and G&A costs at the contract ceiling rates), it is inherently unreasonable for ODC to contend that it could not have foreseen that there would be more work to perform resulting in an overrun long before the submission of its last voucher, especially where a large portion of the costs billed in that last voucher related to work allegedly performed after delivery of the final report.

That conclusion brings us to a side issue relating to ODC's citation of the *General Time* case for the proposition that the notice of overruns need not set out the amount thereof with precision. Although that case makes that pronouncement, in dicta, *General Time Corp.*, 75-2 BCA par. 11,462 at 54,589, the holding in the case is harmful to ODC's case. The Board held that a potential overrun, resulting largely from fluctuating burden rates, is still not compensable where the contractor did not give notice merely because it did not and could not know the exact amount of the overrun until the end of its fiscal year when burden rates were adjusted. There the contractor had an accounting system which provided it with monthly burden rate figures which in the early months of the fiscal year portended an overrun over the entire year. That the contractor could not determine the exact amount of the final overrun until all of the year's figures were in did not excuse it from providing notice of a potential overrun based on the monthly figures there. Here, ODC cannot even begin to make *General Time's* argument, which proved unsuccessful anyway, because it consistently billed burden rates at the contract ceiling. In this contract, fluctuating burden rates could benefit only EPA.

That ODC cites *General Time* at all, even for the lack-of-precise-amount proposition, is curious, because what ODC contends was its notice, namely the last voucher, set out a most precise amount. Perhaps the reason for ODC's reliance on that case is that it believes that there was a notice provided other than the last voucher, a notion that appears to find some support in another part of ODC's brief, where it notes that the additional funding requested in February 1976, approved in June and ultimately paid in August and October was enough only to pay for costs billed through the penultimate voucher covering the performance period ending May 7, 1976 (Appellant's Brief at 6). Apparently the argument flowing from this is that EPA was put

on notice of the overrun by virtue of receiving a voucher representing a cumulative total of costs billed almost at the contract limit. Aside from the many cases holding that the LOCC requires a somewhat more formal notice than this argument presents, we take note, again, of the chronology. ODC mailed the voucher (No. 16) covering the period through May 7 on June 1, meaning that EPA received it a day or two later at least; EPA received the final report no later than June 7; on June 16, ODC agreed that the \$2,750 supplement request would be treated as an overrun and would cover the costs of the contract; EPA received the final voucher on July 1. In these circumstances, treating voucher No. 16 as notice of an overrun would charge EPA with precognitive abilities. Also, because EPA received the final report, a presumably reliable indication that the contract was complete, before the agreement on the overrun supplement, we cannot see that EPA knowingly "accepted the benefits of appellant's continued performance" since it clearly believed ODC's performance to have ended and to have been fully compensated.

The remaining points ODC attempts to make in support of reimbursement are similarly unconvincing. It says the amount of the last voucher is payable because it is "within the 10% constraint of the entire cost," but we are unable to find any provision referring to any 10 percent variation in cost which would be payable. The only provision which remotely speaks to a 10 percent variation of any kind is Article VI which estimates the task units to require 1,000-man hours of effort. It contemplates that the actual number of hours spent on a task could be from 900 to 1,100, a variation of 10 percent, but that has nothing to do with pricing. The contract contemplates that the same price will be paid for "1,000 hour tasks" if the actual number of hours is anywhere from 900 to 1,100, and Article VI merely protects EPA from paying the 1,000-hour price for less than 900 hours of effort and protects ODC from receiving only the 1,000-hour price for more than 1,100 hours of effort. In the event that the actual number fell outside of those parameters, then a change would have to be issued to account for it, something that apparently happened in this case, in the amount of 125 hours worth of supplemental funding. In any event, that provision had nothing to do with a contractor's unilaterally raising the price by expending up to 100 hours more effort, because the pricing was not on a per-hour basis, as ODC appears to propose, but was on the basis of *approximately* 1,000-hour units. Finally, in seeking compensation for "added effort due to the massive volume of work * * * necessary to complete the project" after (and presumably before) the submittal of the final report, ODC presented details of what that work was ("documentation * * *, printing and binding of the report * * * for the 10 states' Government organizations"), but we are unable to find any contract requirement for this work. Indeed, ODC allows that this added effort was not "stipulated in the contract, and [was] not contained in the Task II assignment." If ODC in fact did that work, we have little choice but to characterize it as a volunteer in

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doing so, and that by itself would establish EPA's right to refuse payment for it. We deny the appeal in regard to the alleged overrun.

The second item in ODC's appeal is \$16,775.21, calculated by applying ODC's alleged actual overhead and G&A rates to the appropriate direct cost figures for 1973, 1974, and 1975, rather than applying the ceiling rates of 80 and 10 percent, respectively. Anticipating EPA's counterargument, ODC contends that this item is beyond the scope of the contract because it was caused by delays for which EPA is responsible which delays constituted a change for which ODC is entitled to an equitable adjustment; therefore, according to ODC, the contract ceiling on burden rates does not apply. ODC cites a number of cases for the proposition that certain categories of expense are recoverable in the case of Government-caused delays. The categories ODC proposed are: increased overhead and G&A; reasonable equipment ownership expense for idle time and the expenses of storing and maintaining equipment during delays; increases in the prices of materials and of wages; loss of efficiency and increased cost of labor through inability to follow definite plans for the work; all forms of insurance and bond premiums; and overhead which was "unabsorbed" during the period of delay (Appellant's Brief at 8-11).

ODC's argument on this point suffers from a number of inadequacies, any one of which prove fatal to this portion of its appeal. Looking first to the categories of costs assertedly recoverable just mentioned, we note that only the first of these, for increased overhead and G&A, interests us here because all of the others are for items not directly related to delays (*i.e.*, costs incurred by reason of inability to follow definite plans for the work) or are for items not claimed by ODC (*i.e.*, increase in materials and wages prices and insurance premiums), or are subsumed under the operative category of overhead and G&A (*i.e.*, equipment ownership expense, storage and maintenance expense, unabsorbed overhead, etc.). We therefore consider only the authorities cited in support of that category of recoverability and encounter the first impediment to ODC's case. Two of the cases are Court of Claims cases, *J. D. Hedin Construction Co. v. United States*, 171 Ct. Cl. 70, 347 F.2d 235 (1965), and *Ben C. Gerwick, Inc. v. United States*, 152 Ct. Cl. 69 (1961), and both involve delays amounting to breach of contract. Assuming that ODC, relying on these cases, could establish that the alleged delays here constituted a breach and proceeded on that theory, then we would be unable to accord ODC any relief, for this Board has no jurisdiction to decide cases of breach of contract where the contract was entered into (and, here, finished) before the effective date of the CDA and the appellant has not elected for the case to be covered by the provisions thereof. As we noted above, ODC has not exercised its option so to be covered. (In neither of these cases nor the other case cited, discussed below, was G&A expense expressly mentioned as an item of recoverability, but we have assumed that

because of the comparability of overhead and G&A types of expenses, recoverability on the latter would follow from a determination of recoverability on the former.)

The other case cited was a Board case, *Paccon, Inc.*, ASBCA 7890, 63 BCA par. 3659 (1963) (entitlement), 65-2 BCA pars. 4996 (1965) (quantum) and 5227 (1965) (reconsideration), which relied on the Suspension of Work clause for its basis in determining Government liability for an equitable adjustment to reimburse the contractor for overhead expenses caused by delay. The instant contract does not contain a suspension clause but does contain a Stop Work Order clause (clause 6) to which the *Paccon* principles would apply. Like a suspension clause, a stop clause prescribes certain procedures to be followed by the parties in order to invoke its provisions. Amongst these is a requirement that the CO issue a formal order to stop work. The CO in this case issued no such order, but *Paccon* teaches that the lack of such an order will not prevent recovery if the delays are such as amount to a *de facto* suspension (or a *de facto* stop order, here), citing *T. C. Bateson Construction Co.*, ASBCA 5492, 60-1 BCA par. 2552 (1960), as authority for that proposition and as the repository of the tests to be met for a determination of *de facto* suspension. The *Bateson* case states that amongst the elements necessary to prove *de facto* suspension is that the Government conduct complained of, absent a suspension clause, would have been a breach of contract. More fully, the Board stated that where the CO has not issued a suspension order, in order for the contractor to recover under that clause, it has the burden of proving

not only that the Government action caused the work stoppage, that the work stoppage "unreasonably delayed the progress of the work and caused additional expense or loss to the contractor" and that the delay was "for an unreasonable length of time," but also that the delay was the result of a breach of a duty owed by the Government to the Contractor.

Bateson, 60-1 BCA par. 2552 at 12,351. Applying that principle to the present case yields little for ODC, for it has failed to carry its burden in showing what *Bateson* requires. Although there apparently were delays and EPA admits that there were and that it was responsible for them at least in part, the mere existence of Government-caused delays does not establish the proof necessary under *Bateson*. Other than the facts that EPA granted extensions and admitted to having caused delays, ODC's only proof (as reported at Appellant's Brief at 8) is complaint paragraphs and a supplemental appeal file exhibit prepared for the appeal in which appear certain statements about performance progress as related to calendar periods corresponding with voucher periods. The statements are of this nature: "forced idling-waiting"; "chronical [sic] idling-waiting for EPA data to work on"; "chronical [sic] idling-waiting persisted"; "inhumanly cruel waiting-idling"; etc. For the most part these descriptions correspond to periods for which ODC billed and was paid. That is not the only disability of this asserted proof. Being self-serving in nature but affording no opportunity for

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rebuttal or even inspection, these statements amount to nothing more than allegations and may not be taken as the proof necessary to carry ODC's burden under *Bateson*.

Moreover, the *Paccon* case announces the additional logical requirement that the *de facto* suspension be related to the costs claimed. It notes that "[i]n making price adjustments for change orders the more customary practice is to treat overhead as increasing in proportion to direct labor and material costs without regard to whether any additional performance time is involved," but that in a suspension case, some cost items in a contractor's overhead pool do not increase. Therefore, it points out, "Appellant has the burden of showing the specific costs that were increased by the suspensions and the amount of such increases." *Paccon*, 63 BCA par. 3659 at 18,355. The approach, then, of applying the entire overhead (or G&A) rate for a particular year, then, does not satisfy this burden, and given the unavailability of ODC's cost records, it would appear to be impossible to carry the burden in any event.

Other disabilities exist. If this item arises out of a claim under the LOCC for excess costs, it is untimely under that clause, as pointed out in the CO's decision (AF Tab 29). If, as our analysis indicates, the claim, if any, must arise under the Stop Work Order clause, it is similarly untimely, being submitted 6-1/2 years after completion of the contract work and a similar length of time after the 30-day period after close of the alleged stop work period for making an equitable adjustment claim under that clause. Also, as originally presented to the CO, the claim appeared to be for excess overhead and G&A expenses to which ODC asserted entitlement under the terms of the contract as if there were no ceiling on the rates therefor. It was not until ODC filed its brief that any acknowledgement was made that there was such a ceiling but that it was inapplicable because of what we have characterized as a claim for entitlement to an equitable adjustment under the Stop Work Clause. Given the variance in theories at the CO and appellate levels, there has been, arguably at least, no CO's decision on this claim, and we therefore lack jurisdiction to consider it. For each of the foregoing reasons, we deny ODC's claim in respect of excess overhead and G&A expenses.

In a related development, EPA has counterclaimed for \$5,884.07, being the difference between what EPA has paid under the contract and what EPA claims ODC was entitled to under the contract. Noting that ODC's records for the years in question were not available for an EPA-sponsored audit on overhead and G&A rates, EPA proposes that the rates discovered by an NASA-sponsored audit for 1974 be used as the only suitable alternative (Respondent's Brief at 7-9). Applying those rates to the direct cost bases for the years in question and doing some fundamental arithmetic yields the amount of EPA's counterclaim. We note that the CO's decision did not mention this

theory of EPA recoverability and appeared satisfied with closing out the contract by payment of the full contract price. Indeed, the decision prominently mentioned the unavailability of cost records, and it was written at a time when the NASA audit was available, but it can fairly be characterized as contemplating payment of the full contract amount, including the withheld \$673.76, as a, if not the only, satisfactory resolution of the case. Our decision confirming that of the CO and the record does not show that he ever reconsidered that decision and modified it to allow a lesser amount. We therefore deny EPA's counterclaim.¹

The final element of the appeal is ODC's "compensatory claim" for \$181,397, based on the application of the G&A (ceiling) and fee rates to the potential full contract fund. The arithmetical faults with ODC's calculations have already been identified, but we are unable to accord ODC any relief on this item, even to the extent of what the proper figure would be.

The essence of the ODC position is that it was entitled to EPA's exercise of all of the options for additional task units under the contract. ODC contends that it is so entitled for a variety of reasons, all amounting to fraudulent and malevolent motivation and conduct on the parts of EPA and SBA, including: "victimization of [ODC] due to [EPA's] violating the policy of Section 8(a) of the Small Business Act"; the setting up of a "fictitious contract, in that it awarded [ODC] a contract for potentially 31,000 man-hours of work, when, in fact, only 2,000 man-hours were assigned"; the withholding by EPA of "Superior Knowledge when it led, by contract terms, [ODC] to believe it would receive more man-hours-level-of-effort than it * * * in fact received" (Appellant's Brief at 14).

Although ODC has consistently maintained, throughout the long preappeal history of this case, a position consistent with the notions expressed by these reasons and the others contained in its brief, there has been no showing that would prove them and they remain mere allegations as a result. Even if ODC had proved them, however, it has

¹ We are aware of a recent case in which the Board allowed the Government to advance a counterclaim in a pre-CDA situation where the counterclaim was, strictly speaking, not the subject of a CO's final decision. *Beck Associates*, ASBCA No. 24494 (May 22, 1985). There are a number of characteristics of that case that make it rather distinguishable from this, and it therefore does not influence our decision on the Government's counterclaim here. To begin with, the Armed Services Board had a pre-CDA procedural rule which specifically allowed Government counterclaims even in the absence of a final decision thereon. We have no such rule. In the *Beck* case, however, the Armed Services Board, in allowing the counterclaim, relied more heavily on its own off-stated principle that it would take "jurisdiction over appeals where the pleadings adequately define the dispute." *Beck Associates* at 7. We take it that where the Armed Services Board speaks of "pleadings" it includes the CO's final decision. In that case, the Board decided that there was no final decision on what ultimately became the Government's counterclaim, because the decision, there, in effect, only informed appellant that it would be liable for any equitable adjustment the Government would have to pay to a later contractor where the later contractor's differing site conditions claim was proximately connected to the Government's reliance on the accuracy of *Beck Associates'* performance in the earlier (subject) contract. Thus, although the decision was not on a Government claim because any Government claim was only a contingent possibility at the time the decision was issued and there therefore was no "final decision," the decision that was issued and from which the contractor appealed clearly informed the contractor of the nature and the particulars of the Government claim which came into existence in fact during the appellate litigation. To contrast that situation with the instant case, we first note that here there clearly was a final decision. More importantly, although that decision did not treat the theory raised in the Government's counterclaim, it did conclude contract issues in a way that would deny that theory at a time when all components of the eventual counterclaim were known or should have been known to the CO. The various distinctions just identified thus lead us to conclude that the *Beck* case has no applicability to the issue of considering the current counterclaim.

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cited no authority for the proposition that such motivation or conduct is compensable, especially under any theory presented. EPA, on the other hand, has characterized ODC's argument as demanding compensation for EPA's failure to enter into a contract and has cited two cases, one pre- and one post-CDA, for the proposition that contractor recovery for such a failure is not permitted. *James B. Hewette, PSBCA No. 1060, 83-1 BCA par. 16,168 (1983); Maintenance Engineers, ASBCA No. 16985, 74-2 BCA par. 10,912 (1974)*. Although both of these cases involved failures to extend a contract through a new performance period, we see no logical reason to deny the application of the principle announced in them to a contract for options to assign additional tasks over a definite period of time. An option in a contract is just that, an option, which may or may not be exercised by the holder in its discretion, absent proof of the establishment of some obligation to exercise it. Allegations of malice, "Superior Knowledge," and like circumstances, especially where proof of what the allegations mean is absent, do not establish such an obligation. We deny this portion of ODC's appeal.

For the reasons stated in the foregoing opinion, the appeal and the counterclaim are denied.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

FARMERS UNION CENTRAL EXCHANGE, INC.

87 IBLA 332

Decided June 26, 1985

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, imposing assessment for incidents of noncompliance with regulations governing oil and gas lease W-23819.

Vacated in part, affirmed in part.

1. Oil and Gas Leases: Civil Assessments and Penalties

Failure to have more than one valve effectively sealed, as required by 43 CFR 3162.7-4(b)(1), requires an assessment of \$250 for each unsealed valve, in accordance with 43 CFR 3163.3(j), because each failure is a specific instance of noncompliance.

APPEARANCES: Corinne Courtney, Esq., Billings, Montana, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

Farmers Union Central Exchange, Inc. (CENEX) has appealed the January 14, 1985, decision of the Wyoming State Office, Bureau of Land Management (BLM), imposing a \$1,500 assessment for six instances of failure to maintain effective seals as required by 43 CFR 3162.7-4. The decision resulted from a technical and procedural review, in accordance with 43 CFR 3165.3, of a December 18, 1984, letter from the Buffalo Resource Area, BLM, assessing \$250 per violation in accordance with 43 CFR 3163.3(j) for violations detected in a December 13, 1984, inspection of CENEX's oil and gas lease W-23819 facility in Campbell County, Wyoming.

BLM's answer filed May 17, 1985, states that the Board should vacate those portions of the January 14, 1985, decision imposing \$1,000 in assessments for failure to install and maintain sealable valves because the decision itself indicated the valves could have been sealed. We agree. The decision reads: "Regarding the sealability of the equalizer line between tanks, technically, the butterfly valve *could* have been effectively sealed." (Italics in original.) We will therefore vacate that portion of the decision which held assessments were appropriate for the four valves that "should have been sealable."

[1] The Notice of Incidents of Noncompliance Detected states: "There were no seals on * * * sales line on tank #7984." In its request for a technical and procedural review CENEX stated: "The regulations do not allow multiple assessments for unsealed valves." To this objection the January 14, 1985, decision responded:

While the regulations appear to suggest that the assessment for noncompliance would be applied once, regardless of the number of ineffective seals, the regulatory interpretation and procedures written for the assessments are clear. At the time of the subject inspection, the procedures were to apply the assessment for noncompliance for each instance of a violation. The assessment for noncompliance is also to be levied when an "appropriate" valve is found to be unsealable. In other words, if a valve which must be sealed during a particular phase of operation cannot be effectively sealed, a violation exists. Therefore, it is appropriate to assess the \$250 under 43 CFR 3163.3(j) for each seal violation.

On appeal CENEX argues this is contrary to the plain language of the regulation. 43 CFR 3163.3(j) provides: "For failure to maintain effective seals required by the regulations in this part and by applicable orders and notices, or for failure to maintain the integrity of any seal placed upon any property or equipment by the authorized officer, \$250." CENEX maintains this language indicates BLM may assess \$250 for "failure to maintain effective seals," no matter how many seals, or for "failure to maintain the integrity of *any seal*" placed by an authorized officer. (Italics added.) In addition, it argues, the language of the regulation it was cited for violating, 43 CFR 3162.7-4(b)(1), supports this interpretation. That language reads: "All appropriate valves on lines entering or leaving oil storage tanks shall

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be effectively sealed during the production phase and during the sales phase." If it was intended that each unsealed valve was a separate violation, CENEX argues, this language would read "each appropriate valve" rather than "all appropriate valves." CENEX also argues the purpose of 43 CFR 3163.3 to recover liquidated damages for the costs to the Government of noncompliance supports its view. The costs of the inspection and "of processing the paperwork involved in the issuance of an INC [Notice of Incident of Noncompliance] * * * will remain essentially the same no matter how many unsealed valves are discovered as a result of the inspection."

In answer BLM states 43 CFR 3163.3 provides amounts to be assessed "to cover loss or damage to the lessor from specific instances of noncompliance" and argues that because 43 CFR 3162.7-4(b)(1) requires "[a]ll appropriate valves" to be sealed, the failure to seal any valve is a specific instance of noncompliance. Its interpretation of the regulation is more reasonable, BLM argues, because otherwise an operator could have a number of valves unsealed on more than one occasion or at more than one facility and still be assessed only \$250. As for CENEX's argument based on the purpose of the regulation, BLM responds one of the purposes of the liquidated damages is to deter noncompliance and this purpose would not be served "if an operator knows he will be assessed only \$250 regardless of the number of noncomplying valves found during an inspection." The stated purpose of establishing amounts to be assessed where the actual amount of damage to the lessor is difficult or impracticable to ascertain is also served by its interpretation, BLM argues, because an inspector must collect evidence for each violation and others in BLM must review reports and issue notices and bills for each violation, so the costs for several violations would be higher than for one.

In response CENEX argues deterrence is the function of penalties, not liquidated damage assessments, as indicated in the preamble to the regulations, 49 FR 37361 (Sept. 21, 1984), and the costs to be recovered are those associated with noncompliance of a particular kind at each inspection, not at more than one time or place, as argued by BLM. Reading the language of 43 CFR 3163.3(a)-(j), CENEX argues, makes clear each lettered subsection sets forth an "instance" for which a corresponding amount is the appropriate assessment. For 43 CFR 3163.3(a) the instance is "failure to comply with *a* written order"; for 43 CFR 3163.3(j) the instance is "failure to maintain effective *seals*." (Italics added.)

Although CENEX's arguments based on the language of the particular provisions of 43 CFR 3163.3 and 3162.7-4 it cites are plausible, the enforcement system created by the regulations would not be workable under its interpretation. Several provisions of 43 CFR 3163.3 set forth iterative or alternative kinds of activity, e.g., 3163.3(e) (failure to identify a well), 3163.3(f) (failure to install safety equipment),

and 3163.3(g) (failure to exercise due care to prevent damage to surface or subsurface resources or surface improvements). There could, of course, be several instances of each of these failures, just as there could be several unsealed valves. We would not think it reasonable to have only one assessment even though more than one well was not identified, or more than one kind of safety equipment was lacking, or more than one kind of surface or subsurface resource or surface improvement was put at risk because of a failure to exercise due care. Similarly, we do not think it reasonable to regard several unsealed valves as only one instance of noncompliance, especially when each unsealed valve could cause a separate problem. We therefore conclude the portion of the January 14, 1985, decision assessing \$250 for each of the two unsealed valves on the sales phase must be affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 14, 1985, decision of the Wyoming State Office is vacated as to the \$1,000 assessed for unsealable valves and affirmed as to the \$500 for the two unsealed valves.

WILL A. IRWIN
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

EDWARD W. STUEBING
Administrative Judge

APPEALS OF 3A/MAGNOLIA-J.V.

IBCA 1885 & 1886

Decided: *June 28, 1985*

Contract Nos. 14-16-0001-84012, 14-16-0001-84050, U.S. Fish & Wildlife Service.

Granted in Part.

1. Contracts: Construction and Operation: Drawings and Specifications--Contracts: Construction and Operation: General Rules of Construction

A dispute under a construction contract as to whether a waterstop is required for interior walls at expansion joints is resolved in the Government's favor where its interpretation effects a reconciliation between the requirements in the contract drawings for fixed, nonmovable construction joints and those for movable expansion/contraction joints.

2. Contracts: Construction and Operation: Changes and Extras--Contracts: Construction and Operation: Drawings and Specifications

June 28, 1985

The Board finds that a contractor is not entitled to additional compensation for the quality of finishing required on concrete work involved in the construction of raceways (rearing areas) at a fish hatchery where the concrete subcontractor contends (i) that the finishing required was superior to the finish it had anticipated would be sufficient for the project and (ii) that the finish achieved by a specified date was "nicer" than the finish on existing raceways but the Board finds that the quality of concrete finish required by the Government was not in excess of that required to meet the standards clearly set forth in the contract specifications.

3. Contracts: Disputes and Remedies: Equitable Adjustments

A revised claim for slab dowel cuttings is approved in the amount requested where the Board finds the estimated costs submitted by the subcontractor who performed the work to be more persuasive than the estimate submitted by the Government. Noted by the Board was the fact that none of the Government's estimates were based on observing the performance of the work and that an estimating guide employed by the Government only purported to cover one of the two elements necessarily involved in completing the work.

APPEARANCES: James L. Voght, The Far Co., Seattle, Washington, for Appellant; William Douglas Back, Department Counsel, Portland, Oregon, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The appeals under the instant contracts are being prosecuted by The Far Co., a subcontractor, in the name of the prime contractor and with its consent.¹

Background

The two instant appeals are from a decision of the contracting officer (hereafter CO) on a dispute under subcontracts awarded to 3A/Magnolia-J.V. through the Small Business Administration under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a). Both contracts were prepared on standard forms for construction contracts including the General Provisions of Standard Form 23-A (Apr. 1975 Rev.) and together they called for the contractor to furnish all labor, materials, equipment, and supplies required to construct 10 raceways, 8 by 80 feet (rearing areas), with supply and drain piping, at the Quilcene National Fish Hatchery, Quilcene, Washington, for an aggregate contract price in the amount of \$405,000.

Citing both contracts the contractor wrote a letter to the CO on April 20, 1984, in which, after referring to the fact that the on-site inspector had directed the installation of a waterstop at the interior walls, the letter stated: "This waterstop installation should result in a

¹ By letter dated Dec. 19, 1984, counsel for the prime contractor authorized The Far Co. to proceed with the appeals in the name of the contractor on the terms stated in the letter (Appeal File, Exh. 17). Hereafter all appeal file exhibits shall be identified by the letters AF followed by a reference to the number of the particular exhibit being cited. All references to exhibits shall be to those contained in the appeal file for IBCA-1885.

change order to our contract in the amount of \$1,762.15 for Phase I and \$881.08 for Phase II" (AF 11).

By letter written under date of September 14, 1984, and referencing both contracts, the contractor submitted nine claims totaling \$19,450.29 against which a coupling credit in the amount of \$363.40 was offered, resulting in a net claim of \$19,086.89.² In her decision of September 28, 1984, the CO granted five of the claims presented in the amounts requested, denied three claims and allowed \$273.39 of the \$1,093.28 claimed for Item I (slab dowel cutting) (AF 14). In the Notice of Appeal dated December 14, 1984 (AF 16), The Far Co. timely appealed the CO's decision denying its claims on Item H (waterstop at interior walls) and on Item J (concrete sacking) and allowing only \$273.39 of the \$1,093.28 requested on Item I (slab dowel cutting). In the Notice of Appeal The Far Co. increased the amounts claimed on Items H and J to \$3,171.22 and \$11,773.12, respectively, but decreased the amount of its claim on Item I to \$446.56.

Claim for Waterstop at Interior Walls—\$3,171.22

In a letter to the prime contractor dated April 14, 1984, The Far Co. submitted a claim for having been directed to install waterstop for the interior walls at the expansion joint locations (12 locations on Phase I). The letter states that The Far Co. had estimated the cost for this project without any waterstop for the interior walls since a note on plan sheet 9 of 10 makes the statement "Waterstop on Exterior Walls Only" (AF 11 at 218). In the claim letter of September 14, 1984, the contractor advances the contention that the drawings are very definitive in where the waterstop is to be placed and that The Far Co. is therefore correct in claiming an additional \$2,166.59 (AF 12 at 222). Accompanying the September 14, 1984, claim letter was a statement from Eric L. Harrington, President, Lee Construction of Washington, Inc., in which he states that based upon a review of the drawings for the Quilcene Fish Hatchery he would interpret the plans as only calling for a waterstop in the exterior walls (AF 12 at 235). Also accompanying the claim letter was a letter dated August 31, 1984, from Mr. Eric G. P. Glad of the Glad Co. in which he offers the following comment: "The plans clearly state: 'waterstop on exterior walls only.' I have attached a copy of the reinforcing wall detail which stated this. I have not seen any other notation that contradicts this statement"³ (AF 12 at 230).

In his sworn statement of April 24, 1985, John V. Ramsour, Chief, Construction Contract Management of the Denver Engineering Center,

² The \$19,086.89 figure includes add-ons for the prime contractor for overhead (10 percent), profit (10 percent), insurance (1 percent), and bond (1 percent) (AF 12 at 224). The Acting Chief, Denver Engineering Center questioned the add-ons for insurance and bonds, stating: "The work is substantially complete at this time and we do not believe that the contractor has to date, or will in the future, pay for the additional insurance and bond for this project" (AF 13 at 238).

³ In the brief submitted in response to the Order Settling Record, the Government states: "Mr. Glad does not state that he has reviewed the detail for expansion joints. If there were no expansion joints or no details showing waterstop at all expansion joints, Appellant would be correct in its argument" (Brief at 2).

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states (i) that he had designed the Quilcene rearing raceways covered by the instant contracts; (ii) that the drawings called for waterstop at two types of joints, construction joints (not movable) as noted on page 236 of Appeal File IBCA-1886 and expansion/contraction joints (movable) as noted on page 248 of Appeal File IBCA-1886; (iii) that the waterstop on the construction joint that joined the floor slab to the wall slab was to be placed on the exterior walls, as is shown on the typical detail of the floor and wall construction joint by the use of the words "waterstop on exterior walls only"; (iv) that expansion joints are present in exterior walls and interior walls as shown on the drawings and waterstop is shown in all expansion joints, without any exceptions on the drawings; and (v) that it is unreasonable for a contractor to look at the typical wall reinforcing cross-section in the drawings and assume the design applies to an expansion joint,⁴ which is detailed elsewhere in the drawings (Affidavit of Ramsour, pars. 2-5).

Discussion

[1] In presenting its claim for the costs incurred in the installation of waterstop for interior walls at expansion joint locations, appellant has not even addressed the Government's reliance upon the fact that the drawings show "a waterstop is required at all expansion joints" (note 4, *supra*). Instead, appellant predicates its whole case upon the fact that reinforcing details shown on the drawings for nonmovable construction joints contain the notation "waterstop on exterior walls only." In our view the evidence of record clearly warrants resolving the interpretation question in the Government's favor. See *Holgar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384 (1965), in which the Court of Claims states at page 395:

[A]n interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible.

Decision

For the reasons stated, the waterstop claim in the amount of \$3,171.22 is denied.

Claim for Concrete Sacking—\$11,773.12

In its letter to the prime contractor of August 4, 1984, concerning this claim, The Far Co. states (i) that on June 9, 1984, the finishing/

⁴ Addressing the question of what the contracts indicated with respect to waterstops, a civil engineer with the U.S. Fish and Wildlife Service at Portland, Oregon states:

"In July, 1983, I reviewed the Quilcene rearing raceway contract drawings prepared by Mr. Ramsour of the Denver Engineering Center. I find no ambiguity regarding the use of a waterstop at expansion joints. A waterstop is required at all expansion joints. See, typical expansion joint detail (sheet 10 of 10 and sheet 22 of 22). A waterstop is not required at interior, fixed (non-movable) construction joints (sheet 9 of 10 and sheet 21 of 22)" (Affidavit of Wahlin, par. 2).

sacking operations for the walls were superior to the finish that it had anticipated would be supplied for the project; (ii) that the Government inspector wanted a better finish; (iii) that after filing a verbal protest, the subcontractor had sacked the entire structure again, concluding the second sacking operation on June 15, 1984;⁵ (iv) that the finishers were laid off June 20, 1984; (v) that Mr. James L. Voght of The Far Co. had continued the operation personally throughout the entire month of July; and (vi) that since June 9, 1984, the cost impact on the project for the extra wall finishing was in the amount of \$7,773.12 (AF 12 at 233).

Quoted below from section 03300 (Cast-In-Place-Concrete) of the specifications are the following provisions:

I GENERAL

A. Description of Work

* * * * *

5. A dense, smooth finish such as achieved by magnesium trowel (or by solid, smooth forms with a proper concrete mix and vibration for the formed surfaces) will be required on all concrete surfaces that will come in contact with fish. * * *

a. All projections left by form joints or flaws shall be removed and surfaces rubbed. Holes or air pockets shall be filled and trowelled smooth. [6]

* * * * *

III EXECUTION

* * * * *

F. Finish of Formed Surfaces

* * * * *

2. Smooth Form Finish

* * * * *

b. Produce smooth form finish by selecting form materials to impart a smooth, hard, uniform texture and arranging them orderly and symmetrically with a minimum of seams. Repair and patch defective areas with all fins or other projections completely removed and smoothed.

c. All surfaces which may contact fish are to have a smooth, magnesium trowelled finish or equivalent.

(1) All air holes are to be grouted in and rubbed for a smooth finish. All rough edges are to be removed by chipping, grouting, and rubbing as necessary.

3. Smooth Rubbed Finish

a. Provide smooth rubbed finish to all exposed concrete surfaces which have received smooth form finish treatment not later than the day after form removal.

(AF 1 at 168, 174-75). Five of the affidavits submitted by the Government in response to the Order Settling Record include statements pertaining to the finish required on the concrete work

⁵In a statement dated June 25, 1984, Mr. Bob R. McColm of Cement Masons Local #528 offers the following appraisal of the quality of the work performed by The Far Co.:

"[T]he sack and patch work done on this project, has been performed with full consideration for the use intended. The work has been completed, by qualified personnel in that field. I also feel, that in comparison to other on site fish runs, the workmanship on this project is equal or superior to, existing runs in use at this time" (AF 12 at 234).

⁶AF 1 at page 163.

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covered by the instant contracts. Four of such affidavits⁷ refer to defects observed in the concrete work and the additional work required of the subcontractor with respect to the defective work. The project inspector attributed the defects observed to the fact that for the most part The Far Co. failed to comply with the specification (text, *supra*), requiring the contractor to provide a smooth rubbed finish not later than the day after form removal. In the project inspector's opinion, problems with employees or subcontractors to The Far Co. contributed to the delay in working the concrete. In any event the rubbed finish was not timely completed, the concrete hardened, and The Far Co. chose to sack the concrete in an effort to achieve a smooth, dense finish free of air holes. The sacking process chosen by The Far Co. created many problems, however, including opening up new air holes in the finish. The main problem with the finish was air holes.⁸ These were generally pin hole size to 1/2 inch in diameter and 1/8 inch to 1/2 inch in depth. All air holes were detected on routine inspection as they were all clearly visible to the naked eye. Even on the day of final inspection, air holes in significant number were found and corrected.

Discussion

[2] In neither the claim of August 4, 1984 (AF 12), nor in the Notice of Appeal of December 14, 1984 (AF 16), has The Far Co. even adverted to the specification requirements for concrete finishing set forth in the instant contracts. Instead, it has chosen to rely upon the asserted facts that on June 9, 1984, the finish on the walls was superior to the finish it had anticipated would be sufficient for the project and that the finish achieved by that date was "nicer" than the finish on existing raceways.⁹ The Far Co. has not undertaken to state the basis for its anticipation with respect to the finish that would be required for the concrete; nor has the company made any effort to show why the quality of the concrete finish should be judged by the quality of concrete finish achieved by other contractors under different specification requirements rather than by judging the work performed under the instant contracts by the specification requirements specifically set forth therein.

⁷ In her affidavit the CO states that she had attended the site inspection and the prework conference and that in discussing the 3A/Magnolia contracts no references were made - either orally or in writing - to the specifications used on other raceways, the quality of workmanship thereon, or the type of concrete finish achieved with respect to them (Affidavit of Lola F. Gannon, par. 2; see also the affidavit of Peter D. Back (project inspector), par. 5).

⁸ The inspector's daily logs show that attaining the proper finish on the concrete was a continuing problem. See, for example, the entries for 4/30/84, 5/15/84, 5/29/84, 5/31/84, 6/15/84, 6/18/84, 6/19/84, 6/29/84, 7/02/84, 7/09/84, 7/17/84, 7/23/84, and 8/10/84 (AF 18 at 248, 254, 258, 264, 268, 269, 277-78, 280, 287, 289, 298, and 309).

⁹ By the submission of Mr. McColm's statement (note 5, *supra*) appellant also appears to be relying on the argument that the concrete finish achieved on the project by June 15, 1984, was acceptable from the standpoint of the use intended and consequently should have been deemed satisfactory by the Government. This type of argument has been rejected by boards of contract appeals from an early date. *E.g.*, see *Central States Paper & Bag Co.*, ASBCA No. 4565 (Mar. 26, 1958), 58-1 BCA par. 1691 at 6419 ("The specification is clear and unambiguous, and even if the tendered items were as good for the purpose as those defined by the specifications, they were still not what the contract called for").

Citing *Doyle Shirt Manufacturing Corp. v. United States*, 199 Ct. Cl. 150 (1972), and *Southwest Welding & Manufacturing Co.*, ASBCA No. 17379 (Dec. 13, 1972), 73-1 BCA par. 9833, *aff'd* 206 Ct. Cl. 857 (1975), the Government brief states at page 4 that "there is no basis upon which Appellant can rely to incorporate the concrete finish in other raceways as a standard or benchmark upon which to judge this contractor's performance."¹⁰

Based upon the record made in these proceedings, the Board finds that appellant has failed to show or even allege: (i) that its anticipation of the quality of concrete finish that would be required was induced by any oral or written representations made by Government personnel involved in the letting or administration of the instant contracts or (ii) that the specification requirements for the concrete finish were ambiguous. The Board further finds that the quality of concrete finish required by the Government was not in excess of that required to meet the standards set forth in the specifications on which bids were solicited and on the basis of which the instant contracts were awarded.

Decision

On the basis of the findings made and in reliance upon the authorities cited, the claim for concrete sacking in the amount of \$11,773.12 is denied.

Claim For Slab Dowel Cutting—\$540.34

In its letter to the prime contractor of April 14, 1984, The Far Co. estimated the claim for this item to be in the amount of \$893.12 (AF 12 at 225). With the add-ons of the prime contractor for overhead (10 percent), profit (10 percent), insurance (1 percent), and bond (1 percent), the claim as presented to the CO by letter dated September 14, 1984, if properly computed, would be in the amount of \$1,102.39 (AF 12 at 223-24). In her decision the CO shows the claim for the item to be in the amount of \$1,093.28. After noting that The Far Co. had been directed to cut 36 reinforcing dowels that were likely to cause an unnecessary stress at the intersection of the walls and floor slabs, the CO states: "[A]ccording to the on-site inspector, this took one man approximately 4 hours to cut the dowels and another 4 hours to repair the waterstop; not 32 hours as requested in your claim; your request for \$1,093.28 is denied and an adjustment of \$273.39 is granted" (AF 14 at 241).

In the Notice of Appeal of December 14, 1984, The Far Co. reduced the amount of its claim for this item by 50 percent or to \$446.56. Applying add-ons for the prime contractor of 10 percent for overhead and 10 percent for profit to the reduced claim of The Far Co. but excluding any allowance for insurance or bond premiums for the prime

¹⁰ See also *Power City Construction & Equipment, Inc.*, IBCA-490-4-65 (July 17, 1968), 75 I.D. 185, 192 (68-2 BCA par. 7126 at 33,016-017).

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contractor (note 2, *supra*), the claim for this item, as revised to reflect these adjustments, is in the amount of \$540.34.

Discussion

[3] Appellant's claim for this item is in dispute only as to quantum. In her decision the CO relied upon the conclusion apparently expressed by the on-site inspector that it took one man approximately 4 hours to cut the dowels and another 4 hours to repair the waterstop. In his affidavit, however, the on-site inspector states that he did not witness the dowel cuts for this extra work; makes no mention of the work involved in the repair of the waterstop; and appears to relate his estimate of the time involved entirely to the time required to cut the 36 one-inch dowels (Affidavit of Peter D. Back, pars. 3-4); nor is there any indication in the other statements obtained from Government personnel that their time estimates for performing the work in question are based on personal observation (see Affidavit of Wahlin, par 3; Affidavit of Ramsour, par. 7). Also noted in this connection is the fact that the excerpt from the "Building Construction Cost Data 1985" estimating guide which accompanied Mr. Wahlin's statement only purports to show the cost of torch cutting 1-inch diameter steel bars.

The Board finds (i) that accomplishment of the work involved in this claim item necessitated cutting 36 one-inch dowels and repairing the waterstop; (ii) that Government estimates of the time required for the work are not based upon personal observation of the work being performed; and (iii) that the excerpt from the estimating guide in evidence purports to cover only one of the two elements involved in the work. So finding, the Board further finds that The Far Co.'s estimate of the cost involved in performing this extra work is more persuasive than that submitted by the Government.

Decision

For the reasons stated the claim for slab dowel cutting is approved in the amount of \$540.34, together with interest thereon computed in accordance with the provisions of the Contract Disputes Act of 1978 from the date the claim letter of September 14, 1984 (AF 12), was received by the Government, until payment thereof with any necessary adjustment being made to reflect a prior payment to the contractor of the \$273.39 found due on the claim by the contracting officer.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

May 31, 1985

OIL & GAS LEASE SUSPENSION*

M-36953

May 31, 1985

1. Oil and Gas Leases: Suspensions

A suspension of operations and production under sec. 39, which by law extends the term of the lease for the period of suspension, must be a suspension of both operations and production such that the lessee has been denied beneficial use of the lease by the Department in the interest of conservation. Lease activity (operations or production) is beneficial use and may not be allowed to commence or continue while the lease is suspended.

2. Oil and Gas Leases: Suspensions--Oil and Gas Leases: Unit and Cooperative Agreements

Sec. 25 of the standard form unit agreement, 43 CFR 3186.1, only relieves the unit operator from compliance with unit drilling, operating, and producing requirements. In the absence of production or of a well capable of production, the unit operator must still obtain a sec. 39 suspension, and must comply with the requirements of sec. 39, in order to prevent leases from expiring while he is excused from unit requirements.

3. Oil and Gas Leases: Suspensions

Suspensions of operations or of production under sec. 17(f) toll the running of the lease term but do not suspend the payment of rental or minimum royalty.

4. Administrative Practice--Administrative Procedure: Generally--Mineral Leasing Act: Generally--Oil and Gas Leases: Suspensions

Previous oil and gas lease suspensions that were granted, but where the Department allowed lease activity during the period of suspension, were made in the absence of clear legal guidance to the contrary. One was based on the surname of the Solicitor. In such situations, later advice that the action taken is not in accordance with a proper interpretation of the statute should only be given prospective application. However, in the future, suspensions should only be granted or directed in a manner consistent with the law as interpreted in this memorandum.

OPINION OF SOLICITOR RICHARDSON

OFFICE OF THE SOLICITOR

Memorandum

TO: DIRECTOR, BUREAU OF LAND MANAGEMENT
 FROM: FRANK K. RICHARDSON, SOLICITOR
 SUBJECT: OIL AND GAS LEASE SUSPENSIONS

You have requested an interpretation of the lease suspension provisions set out in sections 39 and 17(f) of the Mineral Leasing Act of 1920 (Act), 30 U.S.C. §§ 209 and 226(f). You have also asked what effect, if any, our interpretation may have on leases which were suspended in a manner contrary to this memorandum, particularly cases where lease activity may have been allowed during the period of suspension.

* Not in chronological order.

SUMMARY

We conclude as follows:

- (1) A suspension of operations and production under section 39, which by law extends the term of the lease for the period of suspension, must be a suspension of *both* operations and production such that the lessee has been denied beneficial use of the lease by the Department in the interest of conservation. Lease activity (operations or production) is beneficial use and may not be allowed to commence or continue while the lease is suspended.
- (2) Suspensions of operations *or* of production under section 17(f) toll the running of the lease term but do not suspend the payment of rental or minimum royalty.
- (3) Previous suspensions that were granted, but where the Department allowed lease activity during the period of suspension, were made in the absence of clear legal guidance to the contrary. One was based on the surname of the Solicitor. In such situations, later advice that the action taken is not in accordance with a proper interpretation of the statute should only be given prospective application. However, in the future, suspensions should only be granted or directed in a manner consistent with the law as interpreted in this memorandum.

BACKGROUND

The Act prescribes that oil and gas leases be issued for a primary term (5 years competitive, 10 years noncompetitive) and for so long thereafter as oil or gas is produced in paying quantities. 30 U.S.C. § 226(e). The Act further provides that a lease will not expire for lack of actual production if it contains a well capable of producing oil or gas in paying quantities. 30 U.S.C. § 226(f). In addition, the Act allows various extensions beyond the primary term for specific reasons and specific periods, such as two years if diligent drilling operations are being conducted at the end of the primary term. 30 U.S.C. § 226(e); *also* 30 U.S.C. §§ 187a, 226(g), 226(j). Thus, a lessee seeking to preserve a lease in the absence of one of the statutory extensions referred to in the previous sentence must be producing in paying quantities from the lease at the end of a primary or extended term, or have a well capable of production in paying quantities on the lease at the end of the primary or extended term.

Section 17(j) of the Act, 30 U.S.C. § 226(j), allows leases to be combined under unit, cooperative, or communitization agreements. Leases committed to these agreements are subject to the same requirements as regular leases, that is, the leases expire at the end of the primary term unless they qualify for a statutory extension or unless actual production or a well capable of production in paying quantities exists at the end of the primary or extended term. The difference is that production, or a well capable of production, under the terms of the

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unit, cooperative, or communitization agreement satisfies the requirements for all committed leases regardless on which lease (or non-Federal property) the well is located. 30 U.S.C. § 226(j).

The Act provides two exceptions to the prescribed lease term--section 17(f), 30 U.S.C. § 226(f), and section 39, 30 U.S.C. § 209. Section 17(f) provides in part: "No lease shall be deemed to expire during a suspension of either operations or production." Section 39 of the Act provides in part:

In the event the Secretary of the Interior, in the interest of conservation, shall direct or shall assent to the suspension of operations and production under any lease granted under the terms of this Act, any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operation and production; and the term of such lease shall be extended by adding any such suspension period thereto. The provisions of this section shall apply to all oil and gas leases issued under this Act, including those within an approved or prescribed plan for unit or cooperative development and operation.

In some instances, an applicant for suspension will seek to construct roads on the lease, prepare a well site, or conduct well repair operations during the suspension. This would give the lessee more time to initiate actual drilling or to complete a well before the lease would otherwise expire after the suspension is lifted. Over the past several years, the propriety of allowing such lease activity has been discussed with this office but we have issued no written opinion. Two such cases have generated some controversy. True Oil Co. (True), operator of the Deadman Unit, and Arco Exploration Co. (Arco), operator of the Rock Creek Unit, sought suspensions of operations and production under section 39 for the leases committed to their respective units. The applicants further requested that they be authorized to continue certain repair and drilling activities during the period of the suspensions. A detailed chronology of the facts of each case has been prepared by the Bureau of Land Management (BLM); rather than repeat all the facts, a brief summary is set out below.

Each operator had encountered severe difficulty in drilling a unit well and had spent considerable time attempting to overcome down-hole problems encountered during drilling operations. Both had expended large amounts of money in their drilling activity. Both stated as a basis for the suspension that they wished to preserve the affected leases for the additional period of time necessary to complete the unit wells then being drilled. Both operators had very little time remaining in the extended terms of leases critical to the unit within which to complete wells capable of production in paying quantities. Both, therefore, sought permission to correct the down-hole problems and to finish drilling during the period of suspension. In both cases the suspensions were granted along with authorization to continue lease activity.

True's application was the first received. After several months of discussion with True and within the Department, the BLM prepared a memorandum recommending that the application be granted and lease activity be allowed which was surmised by then Solicitor Coldiron.¹ Subsequently, when BLM processed Arco's application, it did not seek review by the Office of the Solicitor but merely granted the suspension, allowing lease activity to continue on the basis of the precedent set in the True suspension.

DISCUSSION

1. Lease Activity During Suspension of Operations and Production

As described above, the Act specifically establishes the primary term of an oil and gas lease and provides for the extension of the term under specific circumstances. Although section 39 refers to extending the term of a lease, it must be remembered that this "extension" differs from other extensions in two important respects. It is designed to correspond to, or make up for, the suspension period, in recognition that: (1) no time elapsed from the lease term during the suspension; and (2) no rental or minimum royalty was due during the suspension of all operations and production. To avoid confusion and to clarify the difference in types of "extensions," we will refer to section 39 extensions as "tolling the running of the lease term."

Prior to the enactment of section 39 in the Act of February 9, 1933, 47 Stat. 798, the Secretary could use his general supervisory authority over the public lands to order the suspension of operations and production, but he lacked the authority to toll the running of a lease term. Lessees owning suspended leases, although they could not produce from or otherwise use their leases, were forced to continue rental payments. *E.g., Maurice M. Armstrong*, 49 L.D. 445 (1923); *Ralph A. Shugart*, 51 L.D. 274 (1925). Congress recognized this situation as one where the lessee, during the period of suspension, had "but a paper title the legal use of which is suspended." S. Rep. No. 812, 72d Cong., 1st Sess. 3 (1932). Both the House and Senate reports relied heavily upon this inequity--denial of beneficial use to the lessee because no operations or production were allowed--to provide a justification for tolling the running of the term of the lease and suspending rentals.² S. Rep. No. 812, *supra* at 3; H.R. Rep. No. 1737,

¹ True filed a request for a retroactive suspension to give it lease extensions for the period of time spent in recovering a drill pipe lost in the hole. BLM denied the request in Oct. 1982. In Nov. 1982, True reinstated its request. The Office of the Solicitor advised BLM that a retroactive suspension might be permissible: if True had been denied beneficial use of its lease, it might be possible to extend the lease term for the period of time that beneficial use was previously denied. This advice was consistent with prior Departmental decisions. *E.g., Jones-O'Brien, Inc.*, 85 I.D. 89 (1978). However, no conclusion concerning the propriety or the effect of the well repair and drilling operations during the proposed period of suspension was communicated to BLM prior to the surmise by Solicitor Coldiron on the BLM recommendation.

² Suspension of minimum royalty was added in 1946 when annual payment of minimum royalty (one dollar per acre) was added to sec. 17 of the Act. Act of Aug. 8, 1946, 49 Stat. 676.

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72d Cong., 1st Sess. 3 (1932). In 1935, Congress changed the term of oil and gas leases from a fixed period with renewal, under which production was not necessary to continue a lease beyond its initial term, to a fixed period and "for so long thereafter as oil and gas is produced in paying quantities." Thus, after 1935, a suspension which did not toll the lease term had the added adverse consequence of potential lease expiration.

Congress remedied the inequity by giving the Secretary the authority to toll the running of the term of a lease accompanied by a suspension of rental for the period of time that he suspended operations and production, although it phrased the authority as a directive to extend the term of the lease by the period of suspension. The extension would cover the period that the lessee was denied beneficial use of its lease by the Department in the interest of conservation. A lessee who is allowed to continue operations during a "suspension" is not being denied beneficial use of its lease by the Department, even though no rental or minimum royalty would be due, the lease term would be tolled, and the lessee would be given an extension of the lease. Although the Secretary has the authority to issue regulations and to do all things necessary to carry out the purposes of the Act, 30 U.S.C. § 189, this general authority has never been construed to allow alteration of specific statutory requirements. Solicitor's Opinion, M-36778 (Supp.), 92 I.D. 121 (1985) (signed August 13, 1984). Congress has provided specific primary terms and has allowed extensions of those terms for specified reasons. During these periods, the lessee has the right of beneficial use consistent with the terms and conditions of the lease. Section 39 cannot be used to expand the actual period beneficial use granted a lessee beyond that prescribed by Congress, no matter how justified such an expansion appears in a given case. Section 39 can only serve to postpone the period of beneficial use in order to preserve the length of this use specified by the Act.

In behalf of its request for suspension, True submitted to the Department an argument which relied in part on *American Resources Management Corp.*, 40 IBLA 195 (1979),³ to support its request for a *force majeure* extension of the leases under the provisions of section 39 and the unit agreement. In *American Resources*, the unit operator had been unable to complete a well capable of production in paying quantities despite conducting well operations up to the date of lease expiration. The operator subsequently requested suspensions under the unavoidable delay authority set out in section 25 of the standard unit agreement. 43 CFR 3186.1. In discussing this argument, the Board of

³ The suit for judicial review of this administrative decision was remanded to the Board of Land Appeals by stipulation of the parties in *American Resources Management v. U.S. Department of the Interior*, Civil No. 77-0362 (D. Utah Apr. 28, 1982). On remand, it is docketed as IBLA 82-797. A hearing has been held and the Administrative Law Judge has submitted a recommended decision to the Board. Neither the recommended decision nor the exceptions filed by appellant raise the issue discussed above.

Land Appeals misleadingly refers to the regulations implementing section 39 of the Act and to the *Jones-O'Brien, Inc.*, 85 I.D. 89 (1978), decision which interprets section 39 of the Act. Although the Board rejected the operator's argument because the suspension request was not filed prior to lease expiration, these references leave the implication that had the request been timely filed, the nonproducing leases could have been suspended under section 25 of the unit agreement, the terms of the leases could have been extended past the expiration date by the period of suspension, and well operations could have continued during the period of suspension.

This implication is incorrect. A unit agreement requires, among other things, that wells be drilled at specific time intervals until discovery, and mandates contraction of the unit to participating areas five years after the effective date of the initial participating area "unless diligent drilling operations are in progress" on lands not then entitled to be in a participating area. Section 25 of the unit agreement allows suspension of all "*obligations under the agreement* requiring the unit operator to commence or to continue drilling or to operate or to produce unitized substances" (italics added) when the unit operator is prevented from doing so for reasons beyond his control, that is, for unavoidable delay. However, neither section 25 nor other parts of the unit agreement alter the underlying lease term that will expire if the operator is not diligently drilling at the end of the primary term, or has not completed a well capable of production in paying quantities prior to expiration of leases committed to the unit. In fact, the unitization provisions of the Act, 30 U.S.C. § 226(j), require a discovery of oil or gas under the terms of the unit agreement *prior* to lease expiration. Section 25 only relieves the operator from compliance with *unit* drilling, operating, and producing requirements. In the absence of production or of a well capable of production, the operator must still obtain a section 39 suspension, and must comply with the requirements of section 39, to prevent *leases* from expiring while he is excused from *unit* requirements. The Board in *American Resources* partially noted this distinction when it stated "the Secretary may suspend only in the interests of conservation" under the section 39 regulations, despite the much broader suspension authority for unit drilling, operating, and producing requirements in section 25 of the unit agreement. 40 IBLA at 199. Since the Board did not need to address the further question of operations while a lease is under a section 39 suspension, this confusion has resulted.

We conclude that a "suspension of operations and production" under section 39 of the Act means just that--no operations are allowed and no production is allowed.⁴ Section 39 was enacted to provide

⁴ There is the obvious exception of operations necessary to maintain wells capable of production in paying quantities but shut in as a result of the suspension. Such operations do not constitute beneficial use of the lease. To conclude otherwise would be contrary to the statutory purpose of "in the interest of conservation." In addition, activity which

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extraordinary relief when lessees are denied beneficial use of their leases. No Congressional statement or Departmental precedent recognizes section 39 as granting a lessee relief from lease expiration while at the same time allowing the lessee to conduct operations he should have completed during the primary term or the extensions authorized by the Act. Therefore, if a lease is suspended under section 39 of the Act, the lessee may not conduct activity on the leased lands which would otherwise be beneficial use authorized under the terms and conditions of the lease.

2. *Suspensions under Section 17(f)*

You have also asked us to analyze whether there is any difference between suspensions granted under section 39 and suspensions granted under section 17(f). Because the suspension provision contained in the second sentence of section 17(f) is silent as to the effect on the lease of the suspension (other than to prevent expiration), you specifically ask whether a section 17(f) suspension tolls the lease term and extends the lease for the period of suspension and whether a section 17(f) suspension also suspends rental and minimum royalty. Moreover, the question was asked whether section 17(f) may be used to suspend production on a lease while allowing operations to continue.

Section 17(f) was added to the Act in 1954 principally to provide relief for lessees who have a well capable of production but are not actually producing and to expand the then-existing provision for relief from lease expiration when production ceases but drilling operations are being conducted by allowing 60 days for diligent drilling or reworking to commence to reestablish production. Act of July 29, 1954, 68 Stat. 583; S. Rep. No. 1609, 83d Cong., 2d Sess. 2 (1954). Congress also added the suspension provision: "No lease shall be deemed to expire during a suspension of *either operations or production*" (italics supplied). The language of section 17(f) differs from section 39, in addition to the scope of activity suspended, in three important elements: (1) it does not specifically toll the lease term; (2) it does not specifically suspend rental and minimum royalty payments; and (3) it provides no standard under which to grant suspensions. Compare 30 U.S.C. § 226(f) with 30 U.S.C. § 209. To understand what Congress intended, we turn to the history of section 17(f).

This suspension language, along with a similar suspension of rental payments, was originally added to section 17 by the Act of August 21, 1935, 49 Stat. 676:

Provided further, That in the event the Secretary of the Interior shall direct or shall assent to the suspension of operations or of production of oil or gas under any such lease,

may be conducted without the need for a lease, such as seismic exploration, may be conducted during a period of suspension under applicable permit requirements. Similarly, casual use which does not require a permit under the lease, such as survey and staking work, may be conducted during a period of suspension.

any payment of acreage rental as herein provided shall likewise be suspended during the period of suspension of operations or production:

* * * * *

Provided, That no such lease shall be deemed to expire by reasons of suspension of prospecting, drilling, or production pursuant to any order or consent of the said Secretary:

The legislative history of the 1935 law provides no explanation for these provisions nor does it explain their relationship to section 39, which had been added two years earlier. Congress deleted both quoted provisions of the 1935 amendment to section 17 in the Act of August 8, 1946, 49 Stat. 676, as part of a consolidation of various relief provisions in section 39. S. Rep. No. 1392, 79th Cong., 2d Sess. 3 (1946).

The committee reports on the 1954 legislation quote with approval the following BLM analysis of the suspension language:

Under existing law and interpretation by the Department, where operations and production are suspended, that period is added to the term of the lease, but not so if either operations or production is suspended. The proposed change in paragraph 2 of section 17 [now section 17(f)⁵] would remedy this situation and have the same effect if relief is granted for operations alone, or for production alone, as it now has when relief is granted for suspension of both operations and production.

S. Rep. No. 1609, 83d Cong., 2d Sess. 3 (1954); H.R. Rep. No. 2238, 83d Cong., 2d Sess. 3 (1954).

Congress thus thought that the stay of lease expiration contained in section 17(f) would also toll the running of the lease term as in section 39. If the lease term were not tolled, some suspensions would be meaningless. For example, if operations are suspended and the suspension lasts past the end of the primary or extended term of a lease in the absence of a well capable of production, there would be no time left to complete a well when the suspension is lifted. The lease would expire for lack of production. Congress could not have intended this absurd result when it enacted a relief provision. The committee reports clearly reflect Congressional intent that a section 17(f) suspension tolls the running of the lease term and adds the period of suspension to the term of the lease. You should amend 43 CFR 3103.4-2(e) to be consistent with the opinion.

Nothing in the legislative history of section 17(f) suggests that Congress reconsidered the other relief provision (quoted first above) deleted in 1946 which had suspended rental payments. Thus, a suspension under section 17(f) does not relieve the lessee from paying an annual holding cost, either rental or minimum royalty. However, a lessee whose lease is suspended under section 17(f) may also qualify for suspension, waiver, or reduction of rental or minimum royalty if the lessee meets the tests for this relief set out in the first sentence of

⁵ Sec. 17 was subdivided into its current paragraphs by the Mineral Leasing Act Revision of 1960, 74 Stat. 790. Minor wording changes were made to the first and third sentences of sec. 17(f) but the second sentence, containing the suspension provision, was not altered.

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section 39. (Suspension of operations and production is set out in the third sentence). In fact, this rental relief provision was added in 1946 as part of the consolidation of relief provisions referred to above, in which the section 17 rental suspension provision was deleted.

The legislative history of section 17(f) is also silent regarding the standards under which suspensions are ordered or approved. The current regulation, 43 CFR 3103.4-2(a), contains no specific standards for granting section 17(f) suspensions other than the conservation standard set out for section 39 suspensions.⁶ Under the Secretary's general authority to carry out the purposes of the Act, 30 U.S.C. § 189, you are free to adopt the section 39 standard or another appropriate standard for section 17(f). Whatever standard you choose should be adopted through rulemaking. 30 U.S.C. § 189.

A lessee may conduct operations during a suspension of production, but there must be production before such a suspension may be granted. *H. K. Riddle*, 62 I.D. 81, 87 (1955). In the absence of a well capable of production, a suspension of operations that allowed lease activity would be a contradiction in terms. Regardless of our conclusion on the extent of the relief granted by a section 17(f) suspension, Congress clearly thought it was providing relief in a situation where a lessee was prevented from exercising lease rights.

3. Effect of the Suspensions Previously Granted

Under our above conclusions, True and Arco would not have been allowed to conduct down-hole repair and drilling operations while their leases were suspended. We are advised that other lessees have also been allowed to conduct on-lease activity such as road construction and site preparation while their leases were suspended. While this issue has been discussed with the Office of the Solicitor, no written opinion has been given until now on the propriety of this practice. Moreover, the Solicitor approved the BLM document which recommended that True be allowed to conduct these operations while its leases were suspended. We now address the question whether this opinion affects those earlier actions.

The question of retroactive effect has been addressed several times in the past where the Department has concluded that a prior interpretation or practice was inconsistent with the Act. Several decisions and opinions have concluded that the Secretary has the discretion to apply the new, legally correct interpretation prospectively only: *E.g.* Solicitor's Opinion, M-36945, 89 I.D. 610 (1982) (railroad

⁶ In 1959, the Acting Solicitor construed this regulation as applying the sec. 39 standard to sec. 17(f) suspensions. Memorandum from Solicitor to Director, U.S. Geological Survey, Application for Suspension of Operations under Las Cruces 060595 *et al.* (Mar. 24, 1959). Although this opinion is cited in *Texaco, Inc.*, 68 I.D. 194, 197 (1961), as stating that sec. 17(f) suspensions may only be granted in the interest of conservation, the 1959 opinion does not support such a broad interpretation because it only construed the regulation, not the statute.

affiliates may not acquire interests in coal leases--existing interests may remain); Solicitor's Opinion, M-36888 (Supp. II), 84 I.D. 171 (1977) (opinion concluding that certain gas production which is not sold is subject to royalty will not be applied to past production); Solicitor's Opinion, M-36686, 74 I.D. 285 (1967) (noncompetitive oil and gas lease applications must be rejected if lands are within a known geological structure of a producing oil or gas field at the time the lease would be issued regardless of the status of lands at the time the application was filed--no action should be taken against leases issued under the discarded interpretation); *Franco Western Oil Co. (Supp.)*, 65 I.D. 427 (1958) (opinion concluding that partial assignments filed for approval during the last month of the five-year extended term cannot effectuate lease segregation and further extension because the lease expires the day before the assignment would become effective should not be applied to assignments approved under the discarded interpretation); see also, *Extension of Oil and Gas Lease Pursuant to Acts of December 22, 1943, and September 27, 1944, Where Leased Lands are Partly Within A Known Producing Structure*, 58 I.D. 766 (1944); *Rights-of-Way Across Tribal and Allotted Indian Reservation, Montana*, 58 I.D. 319 (1943). One element is common to all of these new or revised interpretations--retroactive application of the current rule would cause hardship to those who acquired and relied on contractual rights created under the discarded interpretation.

The issue of retroactive application of a changed interpretation has been addressed in two court decisions involving oil and gas leases. In *Safarik v. Udall*, 304 F.2d 944 (D.C. Cir.), cert. denied, 371 U.S. 901 (1962), the court affirmed the Department's decision in *Franco Western Oil Co. (Supp.)*, supra, not to apply the corrected interpretation retroactively. The court noted that both interpretations were reasonable and that retroactive application would adversely affect lessees who had relied on the original interpretation. The court then held that the Secretary has much discretion in the administration and management of the public lands, including the authority to apply a changed interpretation prospectively in order to avoid injustice or hardship. In *Enfield v. Kleppe*, 566 F.2d 1143 (10th Cir. 1977), the court upheld application of the Department's new regulation, which limited lessees to one drilling extension under 30 U.S.C. § 226(e), to leases issued before the change. The court held that the repealed regulation, which allowed more than one drilling extension, was void and unenforceable because it was directly contrary to the plain language of 30 U.S.C. § 226(e). The *Enfield* court distinguished the *Safarik* decision because, in *Safarik*, the first interpretation was not void from the beginning and, more importantly, because "the question whether the Secretary could properly apply a new ruling retroactively was not before the trial court in this case." 556 F.2d at 1143.

Neither case clearly settles the issue of retroactive application of this opinion other than to recognize the Department's authority, in a

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proper case, to apply a changed interpretation prospectively only. Retroactive application here would affect two categories of lessees: (1) those who have received suspensions, who have been allowed to conduct lease activity during the suspension, and who continue to hold their leases either by production or by further extension such as unit termination; and (2) those existing lessees who may seek to conduct lease activity under the prior practice. In the first category, lessees have utilized their leases as valid contracts and exercised their rights under those contracts, both during the period of suspension and after the suspension was lifted, but prior to announcement of the correct interpretation. In the second category, lessees are seeking to obtain the benefit of an erroneous interpretation after it has been corrected.

In *Enfield*, the Department applied its new interpretation to a lessee who was seeking a second drilling extension which would have been available under the discarded interpretation. 556 F.2d at 1141. The case did not involve, as the *Safarik* case did, a lessee who had obtained the benefit of the incorrect interpretation *before* it was overruled. A similar distinction was used in the retroactive application of Solicitor's Opinion, M-36686, *supra*, to lease applications pending on the date of the opinion but not to leases actually issued under the discarded interpretation. See *McDade v. Morton*, 353 F. Supp. 1006 (D.D.C.), *aff'd without opinion*, 494 F.2d 1156 (D.C. Cir. 1973). This distinction should be applied here.

We will discuss the True and Arco leases although the same principles should be applied to other leases in similar circumstances. The Deadman Unit resulted in no producing well, but the leases were preserved and were later extended for two years under section 17(j) by unit termination. Another unit was then formed and new exploratory drilling was commenced within five months.

In the Rock Creek Unit, the additional drilling discovered gas in two different formations but of insufficient quality or quantity to warrant completion of the well as a well capable of production for purposes of continuing the leases. Thus, the lessees have utilized their leases as valid contracts and exercised their rights under those contracts. If the suspensions are now considered ineffective, many leases that were in these units would have expired. This would not only cause hardship to True and Arco, but also to other lessees who participated in the units and those who have combined with some of the former Deadman leases in a new unit. In light of the potential hardship to the lessees, the reliance placed by the lessees on the Department's actions in these cases and the lack of guidance from the Office of the Solicitor to BLM on the correct legal interpretation, this opinion should not affect suspensions granted in the past where lease activity was allowed.

CONCLUSION

In the future, a suspension of operations and production should prohibit all beneficial use of the lease. No lessee should be allowed to conduct access road construction on the leased lands, site preparation, well repair, drilling, or similar activity while a lease is suspended as to both operations and production or as to operations. Thus, a suspension ends when lease activity, not just actual drilling, commences. Separate suspensions of operations or production may be approved, under appropriate standards, which toll the running of the lease term but which do not suspend rental or minimum royalty payments. Finally, the interpretations contained in this memorandum should only be applied to suspensions which are directed or approved after this date.

FRANK K. RICHARDSON
Solicitor

ESTATE OF CHARLES WEBSTER HILLS

13 IBIA 188

Decided *July 17, 1985*

Appeal from orders issued by Administrative Law Judge S. N. Willett in IP 1341 83 (REH) and IP PH 531-81 that resulted in the disapproval of decedent's will.

Affirmed.

1. Indian Probate: Administrative Law Judge

Because Administrative Law Judges (Indian Probate) are required to carry out the Federal trust responsibility to Indian tribes and individual Indians in Indian probate proceedings, they must both serve as impartial arbiters and ensure that the trustee's responsibilities to Indian parties are fulfilled.

2. Indian Probate: Wills: Undue Influence

When the evidence shows that the principal beneficiary under an Indian will and the testator were in a special confidential relationship, particularly one involving financial matters, a rebuttable presumption of undue influence is raised, and the burden of rebutting that presumption is borne by the proponent of the will.

APPEARANCES: Waldo W. Israel, Esq., for appellant; Darla Hills Bedel and Owen Hills, appellees, *pro sese*. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

INTERIOR BOARD OF INDIAN APPEALS

On May 17, 1984, the Board of Indian Appeals received a notice of appeal from Millie Romero (appellant) concerning probate of the Indian trust estate of her uncle, Charles Webster Hills (decedent). Appellant sought review of a March 23, 1984, order denying rehearing entered in the estate by Administrative Law Judge S. N. Willett. The

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order let stand Judge Willett's December 6, 1982, order disapproving decedent's will and ordering distribution of his Indian trust estate to his heirs-at-law, who were determined to be his son and daughter, Owen Hills and Darla Hills Bedel (appellees). For the reasons discussed below, the Board affirms Judge Willett's March 23, 1984, order.

Background

Decedent, Quechan Allottee No. 350 under the jurisdiction of the Fort Yuma Agency, Yuma, Arizona, was born October 15, 1909, and died at Winterhaven, California, on October 30, 1980. A hearing to probate decedent's Indian trust estate was held before Judge Willett on May 18, 1981.

Testimony at the hearing primarily concerned decedent's execution of a will on January 19, 1979. Under the will, all of decedent's property was devised to appellant. Testimony revealed that appellant was decedent's "payee" of funds from the Bureau of Indian Affairs (BIA). Under this arrangement funds in decedent's Individual Indian Money (IIM) account were released only to appellant, who was then responsible for paying decedent's bills and for providing him with funds to cover necessary purchases. Decedent apparently agreed to this arrangement, which was not a formal determination of incompetency. Decedent needed assistance in managing his funds because of a severe drinking problem. Appellant's mother, decedent's sister, served as decedent's payee before her death in 1976. Appellant assumed this task when decedent's daughter declined to be his payee because she was moving out of the area and did not believe he needed assistance.

Further testimony revealed that decedent had limited English language skills, although he could communicate in English when he chose, and that appellant served as his interpreter on occasion. The 1979 will was prepared by a lawyer used by both appellant and decedent, and was written in English following decedent's instructions as interpreted to the will scrivener by appellant. The will scrivener and both witnesses testified that they had almost no recollection of the execution of the will. The scrivener did remember meeting with decedent and appellant to discuss the substance of the will.

Based upon the evidence, Judge Willett found that appellant and decedent were in a confidential relationship. She, therefore, required appellant to show that she had not exerted undue influence upon decedent in the preparation of his will. Because Judge Willett further found that appellant had not shown the absence of undue influence, she disapproved the will and ordered distribution of decedent's Indian trust estate to appellees.

Appellant timely sought rehearing of this decision. On March 23, 1984, Judge Willett denied rehearing. Appellant's appeal from this order was received by the Board on May 17, 1984. The probate record

was received from BIA on May 31, 1984. On June 18, 1984, the Board received several additional documents from the Acting Superintendent of the Fort Yuma Agency. The Board distributed copies of these documents to the parties on June 20, 1984.

By motion received on July 2, 1984, appellant sought reopening for limited rehearing based upon the allegation that the distributed documents revealed decedent could write and communicate in English. By order dated July 10, 1984, the Board dismissed appellant's appeal without prejudice and referred her motion to Judge Willett for consideration. *Estate of Charles Webster Hills*, 13 IBIA 1 (1984).

On July 23, 1984, the Board received a motion from appellant in which she sought to have the case assigned to another Administrative Law Judge because Judge Willett had allegedly demonstrated bias against her and her counsel. By order dated July 31, 1984, the Board denied appellant's motion, stating that it did not have the authority to reassign probate cases.

Appellant refiled her request for a change in judges with the Phoenix Office on August 9, 1984. On August 16, 1984, Judge Willett, concluding that appellant had confused bias with the special requirements placed upon an Indian Probate Administrative Law Judge, denied the motion.

On August 20, 1984, Judge Willett denied appellant's request for reopening, finding that the newly discovered evidence appellant sought to present was insufficient to rebut the presumption of undue influence. The Board received appellant's notice of appeal from this order on October 1, 1984. The notice incorporated by reference all previous arguments and objections. Only appellant filed a brief on appeal.

Discussion and Conclusions

Appellant alleges that Judge Willett was biased against her. She contends that Judge Willett "did not function as an impartial trier of fact but demonstrated a clear pattern of partiality toward and advocacy in behalf of" appellees. Appellant's opening brief at page 22. Appellant states that this partiality can be seen in the hearing transcript.

[1] The position of an Indian Probate Administrative Law Judge and the requirements placed upon such judges are, as Judge Willett noted on page 2 of her August 16, 1984, order, "virtually unique in jurisprudence." The Federal trust responsibility requires that every action undertaken by the Department of the Interior in Indian matters be executed in a fiduciary capacity. *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (N.D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975). This trust responsibility extends to the conduct of Indian probate proceedings. *Estate of Wesley Emmett Anton*, 12 IBIA 139 (1984); *Estate of Helen Ward Willey*, 11 IBIA 43 (1983). Because the Indian probate judge is an agent of the trustee, the judge is required not only

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to serve as an impartial arbiter, but also to ensure that the proceeding is conducted with due regard to the trustee's responsibilities to all Indian parties. When Indian parties are not represented by counsel, this Board has required the judges both to ensure the full development of the factual record and to conduct independent investigations into legal issues apparent in the case, even when such issues were not raised by the parties. *See, e.g., Anton, supra; Estate of Joe (Jose) Elvino Juancho*, 7 IBIA 294 (1979).

This dual responsibility of an Indian probate judge to function as an impartial judge while fulfilling the additional duties of a trustee may, on occasion, result in the appearance of bias, especially when one party in an Indian probate proceeding is represented by counsel and another is not. The test of whether an Indian probate judge is biased cannot, therefore, rest solely on the appearance of the hearing, but the propriety and legality of the final decision must also be considered. *Cf. Estate of Eugene Patrick Dupuis*, 11 IBIA 11 (1982).

In the present case, appellant was represented by the attorney who prepared decedent's will. Appellees were not represented by counsel. The transcript shows appellees did not understand what constituted valid grounds for attacking the will and were easily confused by questioning from experienced counsel. Under these circumstances, Judge Willett was required to fulfill the trustee's responsibilities to appellees and thereby ensure that their position was developed. The fact that the Judge fulfilled this responsibility in conducting the hearing does not indicate bias. In order to determine finally whether the Judge was biased, the decision rendered must also be examined. For the reasons set forth in the following discussion of the decision, the Board concludes that the Judge was not biased against appellant.

[2] The December 6, 1982, order disapproving decedent's will placed on appellant the burden of proving she had not exerted undue influence upon decedent. Normally, the will contestants bear the burden of proving undue influence was exerted upon a testator. *See, e.g., Estate of Grace Dion Antelope Horse Ring*, 12 IBIA 232 (1984); *Estate of William Cecil Robedaux*, 1 IBIA 106, 78 I.D. 234 (1971); *Estate of Louis Fronkier*, IA-T-24 (1970). However, the Board has also held that when the facts of a particular case show that the principal beneficiary under an Indian will was in a confidential relationship with the testator and actively participated in the preparation of the will, a rebuttable presumption arises that undue influence was exerted upon the testator, and the burden shifts to the will proponent to show there was no undue influence. *See, e.g., Estate of Julius Benter*, 1 IBIA 24 (1970); *Estate of Lewis Leo Isadore*, IA-P-21 (1970); *Estate of George Green*, IA-T-11 (1968).

The testimony presented at the hearing in this case showed appellant was, and had been for some time, decedent's "payee," the person responsible for taking care of decedent's financial affairs. She

took decedent to the lawyer's office when his will was prepared and executed. The lawyer had represented both appellant and decedent on previous occasions, and he took no special precautions to safeguard decedent's interests. Appellant was present when the will's provisions were discussed and acted as an interpreter for decedent, who did not speak English in the lawyer's presence. Appellant was the sole beneficiary under the will. The two will witnesses did not know the decedent and could remember almost nothing about the execution of the will.

The Board agrees with Judge Willett that the facts of this case are sufficient to show that: a special confidential relationship, here involving financial matters, existed between appellant and decedent; appellant actively participated in the preparation and execution of decedent's will; and appellant was the principal beneficiary under the will. Thus, a presumption of undue influence arises. To rebut this presumption, appellant must show that decedent received independent advice regarding the execution of the will. *Isadore, supra; Green, supra*. There has been no such showing. The fact that decedent probably could read and understand English does not require a contrary result. In order to rebut the presumption, there must be a showing that an objective, independent person discussed the effect of the will with the decedent. Judge Willett properly found that appellant did not sustain her burden of proof.

Appellant raises two other arguments, discussed below, both of which were addressed by Judge Willett in her order denying rehearing. Because the Board finds that Judge Willett ruled correctly on each of these arguments, they are mentioned here only briefly.

Appellant argues that because decedent's will was self-proved, due execution is conclusively presumed under Arizona law. A.R.S. § 14-3406B. However, an Indian will disposing of trust property is controlled by Federal, not state, law. *Estate of William Mason Cultee*, 9 IBIA 43 (1981), *aff'd sub nom., Cultee v. United States*, No. 81-1164 (W.D. Wash. Sept. 14, 1982), *aff'd*, 713 F.2d 1455 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2150 (1984). Under 43 CFR 4.233(a), self-proved wills are not conclusively presumed valid if they are contested.

Appellant further argues that Judge Willett improperly gave no credence to her testimony. Administrative Law Judges, as the triers of fact, are required to make determinations concerning witness credibility. The Board will not normally disturb findings of credibility where the Judge had the opportunity to observe the demeanor of the witnesses as they testified. *See, e.g., Day v. Navajo Area Director*, 12 IBIA 9 (1983). The Board sees no reason in this case to disturb Judge Willett's findings concerning appellant's credibility.

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Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Willett's March 23, 1984, order denying rehearing is affirmed.

ANNE POINDEXTER LEWIS
Administrative Judge

WE CONCUR:

JERRY MUSKRAT
Administrative Judge

BERNARD V. PARRETTE
Chief Administrative Judge

**MUSCOGEE (CREEK) NATION v. ACTING AREA DIRECTOR,
MUSKOGEE AREA OFFICE, BUREAU OF INDIAN AFFAIRS**

13 IBIA 211

Decided July 22, 1985

Appeal from a decision of the Bureau of Indian Affairs denying funding for appellant's courts and law enforcement agency.

Affirmed.

1. Indians: Law and Order: Civil Jurisdiction--Indians: Law and Order: Criminal Jurisdiction

The general civil and criminal judicial authority of the Muscogee (Creek) Nation was abolished by act of Congress, and was not restored by the Oklahoma Indian Welfare Act of 1936.

APPEARANCES: Geoffrey Standing Bear, Esq., Jenks, Oklahoma, for appellant; David C. Etheridge, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee; Susan Work Haney, Esq., Oklahoma City, Oklahoma, for amicus curiae, Tookparfka Tribal Town. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

INTERIOR BOARD OF INDIAN APPEALS

On January 27, 1984, the Board of Indian Appeals (Board) received a request from the Muscogee (Creek) Nation (appellant) to assume jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations). Appellant sought review of a decision issued by the Bureau of Indian Affairs (BIA) denying funding for its courts and law enforcement agency. The stated basis for the denial was an April 20, 1978, memorandum issued by the Associate Solicitor, Division of Indian Affairs, U.S. Department of the Interior, which

concluded that the Curtis Act of 1898, 30 Stat. 495, precluded appellant's exercise of civil and criminal jurisdiction within the former Indian Territory. For the reasons discussed below, the Board affirms the BIA decision.

Background

Prior to 1707, the Creek Nation occupied a large territory in what is now the States of Georgia, Alabama, and Florida. Between 1707 and 1773, tracts of this territory were ceded to Great Britain and the American colonies. Treaty cessions to the newly independent United States began in 1790. Under the Creek Removal Treaty of March 24, 1832, 7 Stat. 366, that portion of the Creek Nation to which appellant belongs was removed to an area in the present State of Oklahoma. Under the 1832 Treaty, appellant was guaranteed the right to perpetual self-government in the new territory. Similarly, the Creek Treaty of August 7, 1856, 11 Stat. 699, provides:

Article IV. The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.

* * * * *

Article XV. So far as may be compatible with the constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; excepting, however, all white persons, or their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe; and all persons not being members of either tribe, found within their limits, shall be considered intruders.

Because of appellant's support of the Confederacy during the American Civil War, it was forced in 1866 to cede the western half of its territory to the United States. The Creek Treaty of June 14, 1866, 14 Stat. 785, however, still protected the integrity of the tribal government:

Article X. The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian territory: *Provided, however,* [That] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs.

In 1867, appellant formed a constitutional government, with defined executive, legislative, and judicial branches.

In 1887, Congress passed the General Allotment Act, Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §§ 331-358 (1982). This Act provided for the allotment of lands within Indian reservations to individual Indians. Section 8 of the General Allotment Act, 25 U.S.C. § 339 (1982), specifically excluded the Creeks, among other tribes, from its provisions:

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The provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in Oklahoma, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by Executive order.

These exclusions show congressional recognition that the named tribes and areas were considered to be different from other Indian tribes and reservations.

In apparent recognition that the "full and free consent" provisions of the treaties with the Five Tribes (*i.e.*, Cherokee, Creek, Chockaw, Chickasaw, and Seminole) required approval from those tribes before allotment of their reservations could be achieved, Congress enacted numerous laws specifically addressed to the allotment of their lands. See Act of March 1, 1889, 25 Stat. 783; Act of May 2, 1890, 26 Stat. 81; Act of March 3, 1893, 27 Stat. 612, 645; Act of March 1, 1895, 28 Stat. 693; Act of June 10, 1896, 29 Stat. 321, 329; Act of June 7, 1897, 30 Stat. 62, 83; Act of June 28, 1898, 30 Stat. 495; Act of June 6, 1900, 31 Stat. 657; Act of February 18, 1901, 31 Stat. 794; Act of January 21, 1903, 32 Stat. 774; Act of February 19, 1903, 32 Stat. 841; Act of April 28, 1904, 33 Stat. 573; Act of April 26, 1906, 34 Stat. 137; Act of June 16, 1906, 34 Stat. 267. In 1893, Congress created the Dawes Commission (Commission) and gave it the responsibility of negotiating allotment agreements with the Five Tribes.

In 1897, Congress passed the Indian Department Appropriations Act for fiscal year 1898, Act of June 7, 1897, 30 Stat. 62. This Act gave Federal courts in Indian Territory original and exclusive jurisdiction to try all civil causes instituted after the passage of the Act and all criminal causes for any offenses committed after January 1, 1898. The jurisdiction of the Federal courts applied to both non-Indians and Indians.

The congressional debates over this bill indicated that the provisions usurping Indian civil and criminal jurisdiction would take effect only if the tribes did not ratify the allotment agreements negotiated with the Commission:

I will state to the Senator, that we do not take away the right or the power to treat, but, on the contrary, we provide that if at any time they make a treaty [*i.e.*, allotment agreement], which is ratified by a tribe, this act [*i.e.*, the provision usurping civil and criminal jurisdiction] shall no longer apply to that tribe.

29 Cong. Rec. 2246 (1897, remarks of Senator Pettigrew).

As I said before, if this provision is retained in regard to the courts, I have no doubt but what within six months or a year treaties will be made in regard to allotments and all the rights of the Indians will be protected; but if this legislation be defeated, the Senator will find that there will be no agreement of any kind with the Dawes Commission. If the Senate desire a suitable settlement of this matter, to which both sides agree, it will keep this provision in the bill in regard to the abolition of the Indian courts.

29 Cong. Rec. 2323-24 (1897, remarks of Senator Berry).

The Seminole Nation ratified an allotment agreement in late 1897. Seminole Agreement, Act of July 1, 1898, 30 Stat. 567. The Commission meanwhile continued to negotiate with the remaining four tribes. Agents of the Creeks, Choctaws, and Chickasaws negotiated agreements. The Cherokee Nation refused to negotiate even a tentative agreement. Consequently, Congress passed the Curtis Act of 1898, 30 Stat. 495. Section 28 of the Curtis Act states:

That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit: *Provided*, That this section shall not be in force as to the Chickasaw, Choctaw, and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight.

Again, the legislative debates concerning this act reveal Congress' intent:

The question of allotment comes up and the bill endorses the action of the Dawes Commission. It takes away from those Indians the courts that they have had under treaties, and every right almost they have of a political and legal character has been denied them. The bill goes on to approve the action in the past in that regard. I think the Senators owe it to themselves to look into it and to see to it, because the course of the Government toward those Indians has certainly been a source of much reprehension, and justly so.

29 Cong. Rec. 5582 (June 7, 1898, remarks of Senator Bates).

Mr. President, the bill, beginning with Section 28, provides for the submission of the agreement which has heretofore been made between the Dawes Commission and the Indian tribes and for a settlement of all of these difficulties. The bill before us * * * looks to a disposition of all of these questions by the government of the United States. The Indians have not ratified this agreement. Their agents made the agreement with the Dawes Commission, and this provision of Section 28 is that in case they do ratify the agreement, then the terms of the agreement shall supersede the others and shall be enforced; but if it is not ratified, then the provisions of the bill before Section 29 shall become the law and be operative in that Territory.

29 Cong. Rec. 5588 (June 7, 1898, remarks of Mr. Jones).

The allotment agreements negotiated with the Choctaws and Chickasaws were ratified prior to the October 1, 1898, deadline established in section 29 of the Curtis Act. The Creek allotment agreement had been rejected by the Creek National Council prior to the passage of the Curtis Act. In rejecting the agreement, the Council had apparently followed the recommendation of Isparhecher, the Creek Principal Chief: "I think it far better for us to stand firm by the treaties we have, and plead the justice of our cause by all lawful and honorable means, than enter into this agreement." Resolution of the Creek National Council, Oct. 18, 1897, S. Doc. No. 34, 55th Cong., 2d Sess. (1897) at 11.

The Creeks continued to negotiate, and entered into a new agreement with the Commission on February 1, 1899, 4 months after the Curtis Act's deadline for the abolition of tribal courts.

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Commissioner Dawes refused to sign this agreement, and it was not ratified by Congress.

Negotiations continued, with the Creeks demanding protection and preservation of their courts and the Commission refusing to include such protections. A new agreement sent to Congress did not protect the tribal courts. The Creeks requested that an amendment protecting their courts be added in committee:

But if this provision [protecting tribal courts] should not be incorporated in the agreement, it might be difficult to secure its ratification, and even if ratification were secured there would still be an element of discontent among the people by reason of the fact that they had been deprived of the limited jurisdiction which had been promised them * * *; and this would be a discrimination against the Creeks as to their capacity for self-government.

S. Doc. No. 324, 56th Cong., 1st Sess. at 13 (1900). The protection sought through amendment was not provided, and the agreement as ratified by Congress specifically retained the abolition of the Creek courts: "47. Nothing contained in this agreement shall be construed to revive or reestablish the Creek courts which have been abolished by former Acts of Congress." Act of March 1, 1901, 31 Stat. 861; ratified by the Creek National Council on May 25, 1901; proclaimed law by President William McKinley on June 25, 1901.

The present controversy essentially began in 1976 with the decision of the United States District Court for the District of Columbia in *Harjo v. Kleppe*, (420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom.*, *Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).¹ After reviewing the history of Federal relations with the Creek Nation, the court held that Congress had not disestablished the tribe, and that it would be allowed to reorganize under a new constitution. In accordance with the Oklahoma Indian Welfare Act (OIWA), Act of June 26, 1936, 49 Stat. 1967, 25 U.S.C. §§ 501-509 (1982), the Creeks held a constitutional election in 1979, and formed a new constitutional government. The Creek constitution, establishing a three-branch form of government, was approved by BIA the same year. The Creek Nation presently operates under this constitution.

In 1982, the Creek Nation began efforts to develop its court system. A judicial code was adopted, and funding was sought from BIA for its courts and law enforcement program. Through a letter dated April 6, 1983, the Department's field representative, Okmulgee Agency, BIA, informed the Nation that its law enforcement program would not be funded. The Nation's appeal of that decision, under 25 CFR Part 2, was transferred to the Board in accordance with 25 CFR 2.19(b). After initial briefing by the parties and by the amicus curiae, Tookparfka Tribal Town, oral argument was held before this Board on November 15, 1984.

¹ *Harjo* specifically considered whether the Creek executive and legislative branches had both survived, and found that they had. Creek judicial authority was not at issue in *Harjo*.

Discussion and Conclusions

The issues raised in this appeal are narrow legal questions: Did Congress deprive the Creek Nation of general civil and criminal judicial authority, and, if so, has such authority been returned to the tribe? The Board has carefully reviewed in depth the extensive statements of history, legislation, precedents, and arguments made by the parties and the amicus curiae. The Board is unable to find convincing legal support for the position of appellant. Therefore, while fully aware that the policies expressed in the Curtis Act and similar legislation have long been abandoned in favor of Indian self-determination, and that this decision will have an adverse and discriminatory effect on the Muscogee (Creek) Nation, the Board is constrained to find, as set forth in detail in the discussion below, that the Nation's civil and criminal judicial authority was abolished by acts of Congress and has not been restored.

[1] From the preceding review of the circumstances and congressional debates surrounding the passage of the fiscal year 1898 Appropriations Act and the later Curtis Act, it appears clear that Congress understood and intended that the acts would destroy both the then-existing and future civil and criminal judicial authority of the Creek Nation, and would abrogate earlier treaties guaranteeing full tribal self-government. Although Congress' goal was to force allotment, not to destroy tribal judicial systems, the Creeks failed to reach an allotment agreement before the deadline established by Congress in the Curtis Act. The general jurisdiction of the Creek Nation over civil and criminal causes was, therefore, abolished in accordance with the 1898 Appropriations Act and the Curtis Act. Congress could have reestablished the Nation's civil and criminal jurisdiction when an allotment agreement was later reached, but, choosing retribution over amnesty, specifically declined to do so in section 47 of the 1901 Act ratifying the Creek allotment agreement. The Board, therefore, holds that the general civil and criminal judicial authority of the Creek Nation was abolished by act of Congress.

The next question is whether that Nation's general judicial authority was ever restored. Appellant first suggests that its full judicial authority, including civil and criminal jurisdiction, was either restored or again recognized through the court's decision in *Harjo, supra*. The issue in *Harjo*, however, was only whether the Creek legislative and executive branches had been destroyed. Therefore, although the court discussed the general effect of the Curtis Act, it did not construe that Act or similar legislation as related to the abolition or modification of judicial authority. *Harjo* did not directly address the issue of Creek judicial authority and therefore cannot be relied upon as binding authority for appellant's proposition.

Appellant also contends that BIA's approval of its 1979 constitution, which included a court system, constitutes recognition of its general judicial authority. Appellee argues that appellant is limited to a court

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system capable of reviewing acts of its legislative and executive branches, but not capable of hearing general civil and criminal cases. Appellee alleges that its approval of appellant's constitution merely recognized the formation of a court system of limited jurisdiction.

The BIA does not have authority administratively to grant powers that Congress has removed. However misguided later generations may believe earlier congressional policy to be, that policy was embodied in specific acts of Congress,² and may be changed only through another act of Congress. The effect of earlier congressional enactments cannot be overcome simply through BIA approval of appellant's constitution.

The question, then, is whether Congress has restored appellant's full judicial authority. Appellant argues that the Curtis Act was repealed by section 9 of the OIWA, 25 U.S.C. § 509 (1982), which states: "The Secretary of the Interior is authorized to prescribe such rules and regulations as may be necessary to carry out the provisions of this subchapter. All Acts or parts of Acts inconsistent with this subchapter are hereby repealed." Appellant argues that the Curtis Act, by abolishing Creek tribal courts, is inconsistent with the OIWA, which allows the reorganization of Indian tribal governments, including court systems. Because tribal government must inherently include judicial authority, appellant contends the inconsistent Curtis Act was repealed by the OIWA.

The Board has carefully considered the arguments and authorities for and against repeal of the Curtis Act by the OIWA, and has concluded that although the two Acts are opposite in theory and practice, they are not legally inconsistent. The OIWA allows Oklahoma tribes to reorganize whatever existing governmental powers they legally possess; it is not a grant of new powers. The Curtis Act limits appellant's governmental powers by depriving it of civil and criminal judicial authority. A government lacking power to adjudicate civil and criminal disputes among its citizens is obviously weakened, but its existence is not thereby rendered impossible. *Cf., Harjo*. Because the Curtis Act is not legally inconsistent with the OIWA, it was not repealed by section 9 of that Act.³

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

ANNE POINDEXTER LEWIS
Administrative Judge

² This Board is not the proper forum in which to question the constitutionality of an act of Congress. *Zarr v. Acting Deputy Director, Office of Indian Education Programs*, 11 IBIA 174, 90 I.D. 172 (1983); *Estate of Stowhy*, 1 IBIA 269, 79 I.D. 428 (1972).

³ Because of these holdings, it is unnecessary to reach the remaining issues raised by the parties.

I CONCUR:

BERNARD V. PARRETTE

Chief Administrative Judge

ADMINISTRATIVE JUDGE MUSKRAT SPECIALLY CONCURRING:

Although I am forced to agree with the majority on the legal issue raised in this case, I do so with serious reservations. The court in *Harjo* recited the contemptible history of Federal dealings with the Creek Nation, noting that the official "attitude, which can only be characterized as bureaucratic imperialism, manifested itself in deliberate attempts to frustrate, debilitate, and generally prevent from functioning" the tribe's legislative and executive branches. *Harjo*, 420 F. Supp. at 1130. The case before us demonstrates the continuation of this bureaucratic imperialism against the tribe's judicial branch. This, in my judgment, constitutes a serious violation of the United States' trust responsibility to the Muscogee (Creek) Nation.

In *Roger St. Pierre and the Original Chippewa Cree of the Rocky Boy's Reservation v. Commissioner of Indian Affairs*, 9 IBIA 203, 89 I.D. 132 (1982); *disapproved, in part, on other grounds, Robert Burnette v. Deputy Assistant Secretary--Indian Affairs (Operations)*, 10 IBIA 464, 89 I.D. 609 (1982), this Board conducted an extensive review of the history, purpose, wording, and structure of the Indian Reorganization Act of 1934 (IRA), and concluded that Congress intended to impose a specific trust responsibility on the Secretary of the Interior and the Bureau of Indian Affairs with respect to tribes organized under the Act. More specifically, the Board found that the government-to-government relationships between the United States and Indian tribes organized under the IRA are governed by the trust responsibility established by the IRA and therefore are "subject to the limitations inhering in * * * a guardianship and to pertinent constitutional restrictions." I believe a similar trust responsibility applies to tribes organized under the Oklahoma Indian Welfare Act.

Consequently, in its relations with the Creek Nation, the actions of the United States as trustee and BIA as its agent must be judged in accordance with general principles of trust law. In an analogous situation, a private trustee has a duty to disclose or provide information to the beneficiary which the trustee knows, or should have known, affects the beneficiary's interests. See Restatement (Second) of Trusts § 173, comment d (1959).

Under the circumstances of the present case, BIA knew or should have known that the policy formulated in the late 1800's toward the Five Tribes and, in particular, the Creek Nation, was intended to subvert tribal government. Whatever the rationale for this strategy at the turn of the century, subsequent Federal policy has been to encourage and foster Indian self-determination and self-government. In the case before us however, the actions of BIA have only served to frustrate that policy. The BIA has known since 1976 that the Creek Nation was attempting to reorganize its government, and since 1979

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that it intended to include its judicial branch in the reorganization. Under the Oklahoma Indian Welfare Act, the BIA has an affirmative duty to aid in this reorganizational effort. Its failure to do so results in a violation of the trust responsibility.

As trustee, the United States is duty bound to enhance and protect the governmental interests of the Creek Nation. In the present case, the trustee should seek an immediate end to the "bureaucratic imperialism" which has stifled the self-determination and self-government of the Nation. Instead of permitting a situation to arise where the BIA finds itself arguing before this Board that the Creek Nation cannot possess full judicial authority over its own people because of an anachronistic law, the trustee was on notice and should have sought a legislative solution to this injustice.

I am fully aware of the probability that the Federal Government now, as in the 1800's, is receiving and responding to political pressure from non-Indians in Oklahoma. As the courts and this Board have stated many times, however, the Federal Government owes no trust responsibility to non-Indians. *See, e.g., Bailess v. Paukune*, 344 U.S. 171 (1952); *Chemah v. Fodder*, 259 F. Supp. 910 (W. D. Okla. 1966); *Estate of Douglas Leonard Ducheneaux*, 13 IBIA 169, 92 I.D. 247 (1985). It, therefore, appears that the Government's responsibility is to deal with non-Indian political pressure without sacrificing the rights of the trust beneficiary.

In my opinion, the United States, through its agents, has and continues to inexcusably violate its trust responsibility to the Muscogee (Creek) Nation. With great reluctance then, of necessity, I concur with the result reached by the Board.

JERRY MUSKRAT
Administrative Judge

B. J. TOOHEY, C. D. TOOHEY & C. W. TOOHEY

88 IBLA 66

Decided July 23, 1985

Appeal from three decisions of the Alaska State Office, Bureau of Land Management, declaring unpatented mining claims null and void ab initio and rejecting location notices filed for recordation. AA-43572 through AA-43608, AA-43609 through AA-43655, and AA-43831 through AA-43850.

Affirmed as modified.

1. Alaska: Statehood Act--Mining Claims: Lands Subject to--Segregation--State Selections

Under 43 CFR 2091.6-4 and 2627.4(b), the filing of a state's application to select lands, where the filing is regular on its face, segregates the lands from all subsequent

appropriation, including location and entry under the mining laws. Where a selection application filed by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, seeks to include national forest lands, the application is not regular on its face because national forest lands cannot be selected under authority of sec. 6(b) of the Act.

2. Mining Claims: Lands Subject to--Segregation--State Selections

Under the so-called "notation" or "tract book" rule, after a state selection application is filed and noted on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection application was void or voidable.

3. Mining Claims: Lands Subject to--Segregation--State Selections

It was not error for the Bureau of Land Management to invoke the "notation rule" on the basis of state selection applications noted on its master title plats, regardless of what other records may have conveyed regarding the validity of the applications. The ordinary citizen contemplating a proposed use of the public lands would quite reasonably look to other than lands embraced in Tps. 10 and 11 N., Rs. 2 E., Seward Meridian, upon discerning from the master title plats for these townships that they were included in State selection applications. Further, there is nothing on the face of the master title plats that would suggest the State selection entries were invalid.

4. Mining Claims: Lands Subject to--Segregation--State Selections

Although the Board has on one occasion undertaken an *in pari materia* consideration of various land status records (*i.e.*, the master title plat, historical index, and serial register sheets for a state selection application) as a further method of determining whether public lands were appropriated at a particular time, this was only done because of a conflict noted between the plat and the index. Here, an *in pari materia* consideration of the historical indices and the serial register sheets in conjunction with the master title plats fails to establish that Chugach National Forest lands (on which appellant's mining claims were located) were excluded from any of the four State selection applications at issue or that such selection applications were rejected in part to the extent national forest lands were included in the applications.

5. Mining Claims: Lands Subject to--Withdrawals and Reservations: Generally

Under regulations in effect before 1976, a withdrawal application segregated all lands affected thereby upon the recording of the application on the master title plat and such segregation remained effective until the application was adjudicated and a notice of determination published in the *Federal Register*. Withdrawal applications filed after enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1982), are governed by distinct statutory and regulatory provisions. Thus, under sec. 204 of the Act (43 U.S.C. § 1714) Congress has required that the segregative effect of a withdrawal application terminates upon the expiration of 2 years from the date of the *Federal Register* notice regarding the filing of the withdrawal application. In view of this clear statutory mandate, it was error for the Bureau of Land Management to extend application of the "notation rule" to Forest Service withdrawal application AA-23139, filed after enactment of the Federal Land Policy and Management Act of 1976, as grounds for rejecting appellants' mining claim locations.

APPEARANCES: R. Eldridge Hicks, Esq., Anchorage, Alaska, for appellants; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

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OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON
INTERIOR BOARD OF LAND APPEALS

Appeal is taken from three June 30, 1982, decisions of the Alaska State Office, Bureau of Land Management (BLM), declaring unpatented placer mining claims of B. J. Toohey, C. D. Toohey, and C. W. Toohey (appellants) null and void ab initio and rejecting location notices filed for recordation. Events surrounding the three groups of claims are set forth below.

Claims AA-43572 through AA-43608

(Golden Claims 101 through 137)

Location notices for the above 37 placer mining claims were filed on June 11, 1981, by Cynthia D. Toohey and her daughter, Camden W. Toohey, with the Alaska State Office, BLM, pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1982). The location notices indicate the claims were all located on March 14, 1981, within an area encompassed by protracted secs. 3, 4, 9, 10, and 11, partially surveyed T. 10 N., R. 2 E., Seward Meridian, Alaska. Appellants submit that these claims lie entirely within the Chugach National Forest, although BLM's decision states that they lie partially within the National Forest.

BLM's June 30, 1982, decision rejected the recordation filings and declared the claims null and void ab initio on the following grounds: (1) State selections A-053727, A-058731, and A-063695 segregated the land pursuant to 43 CFR 2627.4(b); (2) a portion of the claims lie within land patented to the State in 1972 by patent No. 50-73-0028; and (3) the notation on the master title plat (MTP) of Forest Service withdrawal application AA-23139 segregated the land from mineral entry pursuant to the "Notation Rule."

Claims AA-43609 through AA-43655

(Glacier Claims 201 through 247)

Location notices for the above 47 placer mining claims were filed June 11, 1981, by Cynthia and Camden Toohey with the Alaska State Office. The notices reflect that these claims were located on March 14, 1981, within an area encompassed by protracted sec. 2, partially resurveyed T. 10 N., R. 2 E., and protracted secs. 25, 27, 34, 35, and 36, unsurveyed T. 11 N., R. 2 E., Seward Meridian, Alaska. These claims lie entirely within the Chugach National Forest. BLM's final decision regarding the foregoing claims states:

Because all of the mining claims in Tps. 10 N. and 11 N., R. 2 E., Seward Meridian listed on the attached appendix were located in March 1981, after the lands in question had been segregated from mineral entry by Forest Service withdrawal application AA-

6060, and State selection applications A-053727, A-063695, and A-067451, all 47 placer mining claims listed on the attached appendix are declared null and void *ab initio*, and the FLPMA recordation filings are rejected in their entirety.

BLM June 30, 1982, decision at 2.

Claims AA-43831 through AA-43850

(Toohey Claims 1-16, 19-21, 24-26, 31-32)¹

Location notices for the above 20 placer mining claims were filed June 29, 1981, by B. J. Toohey and his wife, Cynthia Toohey, with the Alaska State Office. The notices reflect that these claims were located on April 6, 1981, and April 13, 1981, and lie within an area encompassed by protracted sec. 3, partially surveyed T. 10 N., R. 2 E., and protracted secs. 27 and 34, unsurveyed T. 11 N., R. 2 E., Seward Meridian, Alaska. These lands are situated entirely with the Chugach National Forest. BLM's final decision regarding these claims states:

Because all of the mining claims in Tps. 10 N. and 11 N., R. 2 E., Seward Meridian listed on the attached appendix were located in April 1981, after the lands in question had been segregated from mineral entry by Forest Service withdrawal application AA-6060, and State selection applications A-058731, A-053727, A-063695, and A-067451, all 20 placer mining claims listed on the attached appendix are declared null and void *ab initio*, and the FLPMA recordation filings are rejected in their entirety.

Appellants' Position

Noting that all four State selection applications cited by BLM identify the entirety of T. 10 N., R. 2 E. and/or T. 11 N., R. 2 E., Seward Meridian,² including lands which lie within the Chugach National Forest, appellants submit that such applications are defective because section 6(b) of the Alaska Statehood Act, 72 Stat. 339, does not allow for selections within the Chugach National Forest. As stated by appellants, "The State of Alaska simply has found it expedient to list an entire township in its applications, without initial regard for the legality of selecting that full area" (SOR at 6).

¹ Appellants' statement of reasons (SOR) characterizes this group of claims as "Toohey Claims 1 through 17." The administrative record contains 20 separate location notices as identified in the appendix to BLM's decision for this group of claims. Appellants' notice of appeal, dated July 20, 1982, identified 19 of these claims for review, i.e., Toohey Mining Claim Nos. 1-8; 11-12; 15-16; 19-21; 25-26; 31-32.

² The four State selection applications as per last amendments of record are:

Serial Number	Land Description
A-053727	Entire T. 10 N., R. 2 E., Seward Meridian
A-058731	Entire T. 10 N., R. 2 E., Seward Meridian (Mineral Estate)
A-063695	Entire T. 10 N., R. 2 E., Seward Meridian
A-067451	Entire T. 11 N., R. 2 E., Seward Meridian

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Appellants acknowledge that section 6(a) of the Statehood Act permits State selections from national forest lands,³ but state: "It simply is indisputable that the four State selection files are generically Section 6(b) applications, which, by operation of law, do not apply to national forest lands"⁴ (SOR at 7).

In addition to arguing that the State selections had no actual segregative effect, issue is taken with BLM's position that, valid or not, the mere recording of a State selection on the MTP operates to bar the land from further appropriation. The same position, an embodiment of the "notation rule," discussed *infra*, is set forth in the decisions appealed from concerning the effect of two Forest Service withdrawal applications noted on the MTP prior to the filing of the mining claim location notices here involved.

Discussion

[1] We first examine whether the State selection applications independently bar appellants' claims. Two Departmental regulations are pertinent to this inquiry, each of which attributes a segregative effect to the *filing* of a State selection application.

At 43 CFR 2091.6-4, it is provided:

Lands desired by the State under the regulations Subpart 2600 will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the proper office properly describing the lands as provided in § 2627.3(c). Such segregation will automatically terminate unless the State publishes first notice as provided by § 2627.4(c) within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management.

³ Sec. 6(a) states in part:

"For the purposes of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled to select, within twenty-five years after the date of the admission of the State of Alaska into the Union, from lands within national forests in Alaska which are vacant and unappropriated at the time of their selection not to exceed four hundred thousand acres of land, and from the other public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas. Such lands shall be selected by the State of Alaska with the approval of the Secretary of Agriculture as to national forest lands and with the approval of the Secretary of the Interior as to other public lands: * * *"

⁴ Sec. 6(b) states in part:

"The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: * * *"

With respect to State selections in Alaska, 43 CFR 2627.4(b) provides:

(b) *Segregative effect of applications.* Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the state files its application for selection in the proper office properly describing the lands as provided in § 2627.3(c)(1)(iii), (iv), and (v). Such segregation will automatically terminate unless the State publishes first notice as provided by paragraph (c) of this section within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management.

While the above regulations, in effect since 1971, clearly attribute segregative effect through the filing of State selection applications, appellants submit that the regulations contain important qualifications that the selections at issue fail to meet. Thus, it is noted that section 2627.4(b) allows for segregation only of lands "desired" by the State and that the State could not possibly have desired lands within the Chugach National Forest through the filing of a selection application under section 6(b) of the Statehood Act when that section does not allow for selections within national forests.

There is little doubt that the four State selection applications were filed pursuant to section 6(b) of the Statehood Act. As to three of these, A-053727, A-058731, and A-063695, BLM so labeled the applications in its June 30, 1982, decision rejecting mining claim location notices filed by David Cavanagh and Gary McCarthy, a case also before the Board on appeal⁵ which involves similar issues of fact and law. The other State selection application at issue, A-067451, has also been regarded by BLM as a section 6(b) application, and, in fact, by decision dated June 17, 1980, this application was rejected in part due to its inclusion of Chugach National Forest lands.

In its Answer Brief,⁶ BLM disputes appellants' contention that the State of Alaska did not "desire" lands within the Chugach National Forest:

These regulations [43 CFR 2091.6-4 and 2627.4(b)] cannot be distinguished on the basis of the appellants' assertions that the State did not "desire" the land in dispute since it was actually unavailable to the State. The land is not only clearly described in the three State selections, but letters from the State of Alaska, which are contained in the official BLM record, specifically state that the State wants *all* the land in T. 10 N., R. 2 E. * * * The only exclusion mentioned by the State is for patented (non-federal) land. National forest land is not specifically excluded from the State's explicit application for the entire township. [Italics in original.]

(Answer Brief at 4-5).

The State of Alaska has not appeared in this case. The State's alleged desire for Chugach National Forest lands, as propounded by BLM on appeal, is belied, however, by its failure to appeal BLM's June 17, 1980, decision rejecting in part State selection application A-067451, not to mention its nonparticipation in this proceeding. The foregoing decision states in pertinent part:

⁵ IBLA Docket No. 82-1188.

⁶ BLM's Answer Brief in *Toohy* consists of and incorporates by reference its Answer Brief in *Cavanagh*, *supra*.

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On March 10, 1966, the State of Alaska filed general purposes grant selection applications A-067449, A-067450, and A-067451, for lands in Tps. 12 and 13 N., R. 3 E. and T. 11 N., Rs. 2 and 3 E., Seward Meridian, under the provisions of Sec. 6(b) of the Statehood Act. These lands are located in the Chugach Mountains and the State's selections were valid at the time of filing.

The original application for A-067451 was for all lands outside the Chugach National Forest, however, subsequent amendments were filed which included all the lands within T. 11 N., Rs. 2 and 3 E., Seward Meridian.

* * * * *

The lands described which are within the Chugach National Forest, approximately 18,280 acres in T. 11 N., R. 2 E., Seward Meridian and 21,120 acres in T. 11 N., R. 3 E., Seward Meridian * * * were not, at the time of selection, nor are they now, vacant, unappropriated, or unreserved (43 CFR 2627.3(a) [7] and therefore are not proper for selection and are hereby rejected.

BLM's Answer Brief is noticeably silent regarding the above decision. Appellants' SOR here and in *Cavanagh* takes due note of the significance of this adjudicatory action as far as the segregative effect of the pendency of State selection application A-067451 is concerned.

In *John C. and Martha W. Thomas (On Reconsideration)*, 59 IBLA 364 (1981), the Board agreed that the provisions of 43 CFR 2091.6-4 and 2627.4(b) attribute a segregative effect to the filing of a State selection application. We stated, however:

The only limitation is that the selection must be "regular on its face." *State of New Mexico*, 46 L.D. 217, 222 (1917), *overruled on other grounds*, 48 L.D. 97 (1921). There is no evidence in the present case that State selection application F-43788 was not regular on its face when filed. [Footnote omitted.]

Id. at 367.

Neither BLM nor the Board found the State selection application to be irregular in *Thomas*. This cannot be said here. As to State selection application A-067451, BLM has formally ruled that the State could not select Chugach National Forest lands in its section 6(b) application. Appellants submit that the same decision was made by BLM in 1966 concerning State selection application A-053727.⁸ We agree that a plain reading of the Statehood Act and the Department's implementing regulations conveys that national forest lands are not to be selected under authority of section 6(b) of the Act.⁹

⁷ 43 CFR 2627.3 includes regulations under the heading "Grant for general purposes" and is the regulatory counterpart to sec. 6(b) of the Statehood Act. Cf. 43 CFR 2627.1, Grant for community purposes (corresponding to sec. 6(a) of the Act).

⁸ Appellants' SOR at page 8 observes that by decision dated Aug. 2, 1966, BLM rejected State selection A-053727 to the extent Chugach National Forest lands were described. Exhibit 2 to the SOR, a copy of a State Office decision dated July 27, 1972, re A-053727, states in part:

"When Tract A, T. 10 N., R. 2 E., Seward Meridian, and U.S. Survey 4805, are patented to the State, title to all of the public land in this township will have passed from Federal jurisdiction with the exception of the lands in the Chugach National Forest which were rejected from the selection by the decision of August 2, 1966."

⁹ Even if the State selection applications are claimed to have been filed under sec. 6(a) of the Statehood Act, which allows for selections within national forests, the selection applications would not be regular on their face. At 43 CFR 2627.2(b), it is provided: "In addition to the requirements of § 2627.3(c), where the selected lands are national forest, the application for selection must be accompanied by a statement of the Secretary of Agriculture or his delegate showing that he approves the selection." None of the four State selection applications in this case contains such a statement.

[2] However, it has been held that after a State selection application is filed and *noted* on official land office records, the mere notation or recording of the application has the effect of segregating the land from all subsequent appropriations, including locations under the mining laws, regardless of whether the selection was void or voidable. *Thomas, supra*, at 366. This is the so-called "notation" or "tract book" rule.

The notation or tract book rule is not a creature of regulation,¹⁰ rather, it has evolved through adjudication, dating from the early days of the General Land Office to the present. In 1917, First Assistant Secretary Vogelsang recited:

[T]he orderly administration of the land laws forbids any departure by the Department from the salutary rule that land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.

California and Oregon Land Co. v. Hulen and Hunnicutt 46 L.D. 55, 57 (1917).

The notation rule has been described as an equal protection doctrine, grounded in fairness to the public at large. In *Margaret L. Klatt*, 23 IBLA 59 (1975), we stated:

The notation rule, which insofar as the public is concerned, strives to give to all the public an equal opportunity to file (*Max L. Kreeger*, 65 I.D. 185, 191 (1965)) presupposes that the item noted on the records, *i.e.*, a homestead entry, oil or gas lease, patent, segregates the land from further conflicting appropriations. It assumes that the entry noted is valid and protects a later would-be applicant who does not go behind it. That is, a notation of a patent on the records segregates the land it describes from a later application, even though the patent is invalid. A later applicant, knowing of the invalidity, can gain no right to the land until the patent is canceled and the cancellation noted on the proper records. Anyone else interested in the land, whether he knows of the defect or not, can also rely on the fact that no other person can establish a prior right so long as the entry remains of record. The record itself constitutes a bar to any other filing whatever the situation may be on the land itself. Thus, everyone may rely on the record to give him an equal opportunity to file when the land again becomes available.

23 IBLA at 63-64.

Applying the notation rule to an oil and gas leasing case, the Board said the following in *Paiute Oil & Mining Corp.*, 67 IBLA 17 (1982):

The notation rule was explained in an enclosure to a letter dated April 20, 1964, to the United States Attorney, Salt Lake City, from Attorney General Clark *re Jay P. Nielson v. J. E. Keogh*, Civ. No. C-158-63, as follows:

[I]t was held long ago that when a homestead entry is made, *even though erroneously*, the land is considered as withdrawn from further entry until such time as the entry has been cleared from the records. *Bunker Hill Co. v. United States*, 226 U.S. 548, 550 (1913); *McMichael v. Murphy*, 197 U.S. 304, 310-312 (1905); *Hodges v. Colcord*, 193 U.S. 192, 194-196 (1904); *Hastings etc. Railroad Co. v. Whitney*, 132 U.S. 357, 360-366 (1889); *Putnam v. Iches*, 64 U.S. App. D.C. 339, 342, 78 F.2d 223, 226 (1935); *Germania Iron Co. v. James*, 89 Fed. 811, 814-817 (C.A. 8, 1898), app. *dism.* 195 U.S. 638.

¹⁰ BLM errs in representing that "the general notation rule is set out at 43 CFR 2091.1" (Answer Brief at 4). While no "general notation rule" is found in 43 CFR, it is codified in particular ways. *See, e.g.*, 43 CFR 1825.1(b) (relinquishments).

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Historically, then, no rights can be obtained in that part of the public domain which has been segregated by reason of a pre-existing appropriation—even one subsequently found to be invalid. This same principle has long been applied by the Secretary to oil and gas leases. Within two years of the enactment of the Mineral Leasing Act, it was held in *Martin Judge*, 49 L.D. 171, 172 (1922) that “until an outstanding permit is canceled by the Commissioner and the notation of the cancellation made in the local office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application therefor, or by the posting of notice of intention to apply for such a permit.” None of the numerous amendments of the Act since 1922 has questioned the *Martin Judge* decision which has been uniformly followed by the Department of the Interior. *Joyce A. Cabot*, 63 I.D. 122-123 (1956); *R. B. Witaker*, 63 I.D. 124, 126-128 (1956); *Albert C. Massa*, 63 I.D. 279, 286 (1956). [Italics added.]

67 IBLA at 20.

Among other things, appellants submit that “the concept of a ‘notation rule’ itself was implicitly overruled by the U.S. District Court in *Kalerak v. Udall*, Civil A-35-66 (D. Ark., October 20, 1966)” and that on review by the Ninth Circuit Court of Appeals, “that court refused to reach the issue of whether the lower court ruling was correct. 396 F.2d 748” (SOR at 14).

The above litigation evolved from a Departmental decision in *State of Alaska*, 73 I.D. 1 (1966), applying the notation rule to appropriations of record that were void or voidable. The reversal of this decision by the Federal district court in *Kalerak v. Udall*, *supra*, and the Ninth Circuit’s subsequent review of the district court’s decision was scrutinized by the Board in *State of Alaska*, 6 IBLA 58, 79 I.D. 391 (1972):

As pointed out in *Cabot*, *supra*, at 123, whether the outstanding record appropriation is void or voidable is immaterial. If such appropriation is outstanding on the tract books, the land is not subject to further appropriation, citing *Martin Judge*, 49 L.D. 171 (1922). See *Sarah Ann Christie*, 3 IBLA 7 (July 6, 1971); *George E. Conley*, 1 IBLA 227 (January 13, 1971).

It is true that in *Kalerak v. Udall*, Civil A-35-66, U.S.D.C. Alaska, October 20, 1966, the United States District Court found that the application of the State of Alaska, filed while the lands were withdrawn, “* * * was a nullity * * *” and “* * * [t]he so-called amendments, or additional selections during the 90-day period [restoration preference right period for the State to file selections], which did not embrace the lands selected on January 8, 1963 [at which time the lands were withdrawn], did not serve to validate the prior void selection.”

The district court did not address itself specifically to the *Cabot* doctrine spelled out above, but implicitly it did not regard that doctrine as having any force.

However, the United States Court of Appeals for the 9th Circuit decision in *Kalerak*, at 396 F.2d 748, reversed the district court decision on the issue of the amendments and stated:

We need not decide whether the district court erred in declining to accept the Secretary’s alternative ruling that Alaska’s original application, even if defective, accomplished a segregation of lands which prevented plaintiffs from acquiring rights therein while the segregation remained in effect.

We adhere to the *Cabot* doctrine that an entry outstanding on the proper records of the land office, even though the entry may be void or voidable precludes the appropriation of the land until it is canceled on such records.

73 I.D. at 395-96.

That the judiciary has in fact embraced the notation rule in a long line of cases is chronicled by BLM as follows:

The notation rule is not, however, just a Departmental policy, as the appellants suggest. Rather, the courts have consistently adhered to and enforced the rule. *Hodges v. Colcord*, 193 U.S. 192, 194-195 (1904); *McMichael v. Murphy*, 197 U.S. 304, 310-312 (1905); *Holt v. Murphy*, 207 U.S. 407, 415 (1907); *Germania Iron Co. v. James*, 89 F. 811 (9th Cir. 1898); *Neff v. United States*, 165 F. 273, 281 (8th Cir. 1908); *Wright v. Paine*, 289 F.2d 766, 768 (D.C. Cir. 1961); and *United States v. Central Illinois Public Service Company*, 365 F.2d 121, 122 (7th Cir. 1966), cert. denied, 386 U.S. 308 (1967).

As early as 1898 the Eighth Circuit Court of Appeals found it error to not follow the "settled practice" and "long line of decisions by department officers" that until a notation of cancellation was made the land was not open for entry or disposal. *Germania Iron Co. v. James*, *supra*, 89 F. at 812. The Circuit Court specifically found that the notation rule "was reasonable and just," *Id.*, 814, and ". . . gave equal opportunities to all applicants, brought the necessary information to the local land officers in time to enable all who intended to apply for the land to obtain and act upon it without expense, and was fair, fitting, just, and reasonable." *Id.*, 815. The Eighth Circuit Court later reaffirmed this by holding:

The general rule, repeatedly announced by the Supreme Court and followed by the Land Department, is that an entry of public land under the laws of the United States segregates it from the public domain, brings it within the exceptions of the railroad land grants, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed [citations omitted].

Neff v. United States, *supra*, 165 F. at 281.

* * * * *

More recently, another circuit court decision held:

An entry on public land which is prima facie valid, even though subsequently declared void, segregates the land from the public domain and prevents a second entryman from obtaining any interest in it until the prior entry has been set aside. *McMichael v. Murphy*, 197 U.S. 304, 311, 25 S.Ct. 460, 49 L.Ed. 766 (1905). Since the Walker entry was still a matter of official record, Nikle acquired no interest in the land and his certificate was properly cancelled. *Cornelius v. Kessel*, 128 U.S. 456, 461[,] 9 S.Ct. 122, 32 L.Ed. 482 (1888).

United States v. Central Illinois Public Service Co., *supra*, 365 F.2d at 122. *See also*, *Wright v. Paine*, 289 F.23d at 768.

(Answer Brief at 10-16).

Notwithstanding all the good said about the notation rule, appellants are not alone in their criticism of the doctrine, which they contend is antiquated, arbitrary and capricious, and violative of due process. Most recently, it is even in disfavor with BLM.

On January 12, 1984, the Director, BLM, issued Instruction Memorandum (IM) No. 84-216 to all State Directors, forwarding draft regulations to replace 43 CFR Subpart 2091. The draft regulations evolved from a task force formed in October 1983 "to evaluate the Bureau's use of the so-called 'Tract Book/Notation Rule' and to develop comprehensive instructions concerning how and when lands are opened or closed to operation of the various public land and mining laws."

As background to the draft regulations, enclosure 1 of IM 84-216 states:

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The present regulations, 43 CFR 2091, do not adequately specify the dates when closures occur, and do not explain clearly the effect of the closures. Also, there is almost no mention of when or how lands are opened.

For example, the present regulations on the Recreation and Public Purposes Act state that lands classified for Recreation and Public Purposes are segregated (closed) from all appropriations, including the mining laws for a period of 18 months, after which time the classification will be vacated and the land restored to its former status. This sounds specific upon first reading, but it leaves many unanswered questions for the BLM employees who maintain the public land records and for the public who use the records.

- On what date does the 18 month period start?

- What does "segregated from all appropriations" mean? Is the land open to mineral leasing? Material sales?

- What action, if any, is needed to open the land?

- On what date is the land opened?

These kinds of questions and uncertainties have led to the continued use of the "notation rule" or "tract book rule" as the basis for establishing opening and closing dates on the public land records.

The notation or tract book rule had its origins in the early Land Offices. The clerks would handwrite in the tract books information about an entry or a relinquishment filed in the office on that same day, or an order signed in Washington days, weeks or months earlier. The effective date the land was closed or opened was the date this handwritten entry first gave public notice on these public records that a change of land status had occurred.

Records were noted by any employee who was working with the document and the notation process was usually accomplished promptly. The interested public was the local public and they monitored the daily notations to find out what changes had occurred and what lands were newly available. The notation procedure was appropriate to the circumstances of the time and the mission of the General Land Office.

Times have changed, communications and transportation have improved, and a much wider spectrum of the public is interested in the changing status of the public lands. To further complicate matters, in the early 1960's the Bureau in most offices adopted a new land record system, replacing the tract books with plats and historical indices. No longer could any clerk handnote the records. The new records are updated by drafting and typing processes which delay getting land status changes onto the public land records for days, weeks, or even months, depending upon the workload in the office.

These logistical problems in updating the records, combined with the lack of specific regulatory or other guidelines for opening and closing lands, have perpetuated the use of the notation rule as the one sure way of setting and announcing dates when specific areas of public lands are closed or opened to applications, selections, settlements, entries or locations.

These draft regulations would eliminate the further necessity for the notation rule because they specify when and how the lands become closed and opened. These draft regulations utilize three basic principles:

1. Closures that have a specific time period stated in the closing document *automatically* become open on the date the closure expires. (The public will know the future opening date as soon as the closure is first noted on the records.) [Italics in original.]

2. Closures that do not have a specific time period stated in the closing document will be opened by an order or notice published in the Federal Register that will specify an opening date, usually at least 30 days after the date of publication. (This will give adequate time to get the records properly noted in advance of the opening date.)

3. Lands in an expired or terminated withdrawal will not become open until an opening order is published in the Federal Register which will specify the opening date. This practice will continue to protect the lands while the Secretary or Congress can decide whether or not to extend the withdrawal.

If these regulations are adopted, the regulations and the decision documents will establish the dates of closing and opening and these dates will be identified on the records well in advance of the opening dates. The notation rule will cease to exist because it will no longer govern the dates when public lands are closed or opened. In fairness to existing applications, claims and entries, these will be adjudicated under the principles of the notation rule in accordance with existing practices and case law precedents.

The draft regulations have not been published as final, or even proposed, rules. However, even if they had been published as final rules in their proposed form, they would not be controlling in this case, as they are intended to have prospective application only.¹¹

That BLM is considering and may adopt regulations that emasculate the tract book/notation rule principle is the agency's prerogative. Nevertheless, the present state of the law is that the notation rule may be utilized and that it fulfills an important land management function.

As the Secretary's delegate for providing objective, quasi-judicial review of BLM decisionmaking, the Board's role in a case of this type is to determine if the agency's invocation of the notation rule to reject appellants' mining claims was either legal error or an arbitrary and capricious act. The mere fact that the notation rule has passed muster with the courts does not preclude us from finding the Bureau's application of the doctrine to be wrong in particular circumstances.

Here, the notation rule was invoked under two kinds of appropriations--State selection applications and Forest Service withdrawal applications. We now consider whether BLM erred in applying the notation rule in these specific respects.

The four State selection applications were recorded on the MTP for the entirety of T. 10 N., R. 2 E., and T. 11 N., R. 2 E. Seward Meridian, at the time appellants' mining claims were located in 1981. State selection in July 1972 and the record transmitted to the General Services Administration Federal Records Center 2 years later (Serial Register, A-053727, at 3). The other three State selection files appear to remain open records, though one of these, A-067451, was adjudicated in June 1980. Unlike the other three State selection notations that appear in the right-hand column of the MTP, A-067451 is noted on the plat by lettering within one section only.

Appellants contend that BLM has placed undue reliance on whatever the MTP shows:

[V]irtually all of the various permutations on a "notation rule" embodied in the administrative and judicial decisions cited in the Answer of the BLM are quite different from the statement in the Decision of June 20, 1982. None of those earlier decisions refers to an omnipotent "master title plat." All of those decisions address more generally "the records," "the proper records," "the official records," "the plats and records," etc. Hence, whatever the vague "notation rule" is stated to be, it must include all of the proper BLM records -- including the master title plats, the use plats, the historical index, the serial register, the application files, and the Federal Register, *inter alia*.

¹¹ Draft sec. 2091.0-7(c) reads:

"On the effective date of these regulations, the practice of record notation will no longer govern the availability of public lands except as provided in the regulations. All pending locations, claims, and applications will be subject to adjudication under the tract book rule principle in accordance with existing practice and case law precedents."

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Those same decisions cited in the Answer of the BLM require that this vague "notation rule" applies only to all of the records "*in pari materia.*" E.g., *State of Alaska, Kenneth D. Makepeace*, 79 I.D. 391, 39 [sic] (1972). If the records must be construed together, the Alaska State Office cannot take the narrower position that notations on one official record (the master title plat) define the land status independent of all other legitimate record sources of land status information.

We believe that the proper filing of the homestead application cannot be predicated on a "pick and choose basis," i.e., an assertion by the appellee that he relied upon the plat and historical index to the exclusion of the State selection serial register sheet, particularly where the plat referred to the State selection application. [Citations omitted.]

Id. The Alaska State Office cannot "pick and choose" from among official records to reach a conclusion not supported by the official record as a whole. Indeed, the above quotation from *Makepeace* indicates that no entryman can legally rely upon the plat "to the exclusion of the State selection serial register sheet." If an entryman cannot rely on that plat in isolation, how can the Alaska State Office deny an entry by reference to that plat in isolation?

(Reply Brief at 14-16).

[3] While it is true that the Board's decision in *Makepeace* allows for construing various BLM lands records *in pari materia*, it also acknowledges that the MTP may independently serve as a *prima facie* showing of land status:

Thus, it appears that on February 2, 1967, the plat showed *prima facie* that the lands in issue were embraced in the state selection application. It is true that the historical index shows a homestead entry affecting the lands in issue, but further reference to the serial register sheet of the state selection application, whose number was shown on the plat, would have demonstrated the appropriation of the land.

Either on the basis of the *prima facie* appropriation of the land shown by the plat or on the basis of the plat, historical index, and serial register sheet of the state selection application, the land office records reflected the appropriation of the lands in issue.

79 I.D. at 391, 396. In *Thomas, supra*, the Board again observed that noting a State selection application on the MTP amounts to a "*prima facie* appropriation of the land," quoting *Makepeace* with approval. 59 IBLA at 366. The Board concluded that "even though the State selection may have been void or voidable, the notation rule itself precluded appropriation of the land until canceled on such records." *Id.* This position was recently repeated in *William Mrak*, 86 IBLA 16 (1985):

The segregative effect of a State of Alaska selection application is operative on the land for which the State has applied from the date of filing and remains in effect until the State's application is finally disposed of and duly noted on BLM's public land records.

* * * * *

The records forwarded to the Board for this review do not indicate whether the State's selection applications have been adjudicated by BLM and a final disposition achieved in each case. There is also the possibility that each may have been automatically terminated pursuant to the provisions of 43 CFR 2627.4(b). Final disposition of the applications, however, does not change the result in this case because the notations on the official BLM tract records for the township in question reflecting that the applications were still pending at the time appellants initiated their locations were

sufficient to perpetuate the segregative effect and preclude appellants' appropriation of the land. See *Shiny Rock Mining Corporation (On Reconsideration)*, 77 IBLA 261 (1983).

Id. at 19. The "official BLM tract records for the township in question" referred to in *Mrak* are described earlier in the opinion as the master title plat.

In accordance with *Thomas* and *Mrak, supra*, we do not think it was error in this case for BLM to invoke the notation rule on the basis of State selections noted on the MTP's. While we know by examination of the State selection application files (and BLM's statements concerning these files) that the applications were submitted under the specific authority of section 6(b) of the Statehood Act, and that two of the applications were rejected in part because of their inclusion of national forest lands, these facts are not revealed by the entries made on the MTP's. The ordinary citizen contemplating a proposed use of the public lands for a valid purpose would quite reasonably look to other than lands embraced in townships 10 and 11 N., R. 2 E., Seward Meridian, upon discerning from the MTP for these townships that they were included in State selection applications. Further, there is nothing on the face of the MTP's that would suggest the State selection entries were invalid or conflicting. The notation rule was meant to apply to such circumstances. *Makepeace, supra; Thomas, supra.*

[4] Although the *Makepeace* decision included an *in pari materia* consideration of three land status records, *i.e.*, the MTP, historical index (HI), and serial register sheet for a State selection application, as a further method of determining whether lands were appropriated at a particular time, this was only done because of a conflict noted between the MTP and the HI. The Board has examined copies of the HI for unsurveyed Tps. 10 and 11 N., R. 2 E., Seward Meridian, date-stamped September 4 and January 4, 1984, respectively. For township 10, the HI lists only one of the three State selection applications involved herein, *viz.*, A-053727. The entry reflects that acreage was patented to the State pursuant to this selection application with an "action date" of July 28, 1972. Read in conjunction with the MTP for township 10, it does become evident from the HI that the status of State selection application A-053727 has not been updated on the plat. This isolated record conflict is of no assistance to appellants, however. Since the HI makes no reference to two pending State selection applications which the MTP depicts as affecting the township as a whole, A-058731 (mineral estate only) and A-063695, the presumptive ineligibility of township 10 for other appropriation still holds.¹² Were it the case that the HI showed all the State selection applications recorded on the MTP to be adjudicated (which they were not), it would be reasonable to consider whether, under such

¹² Appellants submit that State selection application A-058731 was filed by the State under authority of sec. 4 of the Act of Sept. 14, 1960, 74 Stat. 1024, whereby the State may select the retained mineral rights of the United States in "lands which have been disposed of." Citing to a BLM State Office decision dated June 21, 1966, appellants contend that the State cannot select land for the reserved mineral interest of the United States until "issuance of a patent with reservation to the United States" (SOR at 9), and that the Chugach National Forest lands where appellants' mining claims lie, do not satisfy this definition of "disposed of" lands. *Id.*

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circumstances, BLM misapplied the notation rule in this case. Similarly, it is noted that the HI for township 11 makes no reference to the State selection application filed therefor, A-067451, which is shown on the MTP to be a pending application (even though it was adjudicated in June 1980).

Nor do the serial register sheets for the subject State selection applications, standing alone or in conjunction with the records discussed above, pose a basis for appellants to have surmised that any of the land within townships 10 and 11 could be appropriated for mining. For State selection application A-053727, characterized by appellants as a "closed file," none of the entries found on the serial register sheets reveals that BLM rejected this application, in part, to the extent it included Chugach National Forest lands. Though this apparently occurred through BLM decision dated August 2, 1966, the entry beside this date on the register merely reads: "Tentative approval given to 18.43 acres." In any event, the serial register goes on to note that on June 16, 1972, selection application A-053727 was amended to include all of T. 10 N., R. 2 E., Seward Meridian, except patented lands. This is followed by entry dated August 23, 1972, noting that patent 50-73-0028 was issued July 28, 1972, for an area aggregating 7,911.11 acres. Even assuming that the foregoing register notations unequivocally signified that State selection application A-053727 did not operate as a bar to mining claim entries as of June 1981, when appellants' location notices were filed, the record still shows two other State selection applications affecting township 10, to wit: A-058731 (for mineral estate only) and A-063695. As already noted, the precise nature and status of State selection application A-058731 is in some doubt (*see note 12*). Assuming, in the light most favorable to appellants, that as a matter of fact and law Chugach National Forest lands could not have been segregated from mineral entry by virtue of this mineral estate selection, such lands (surface and mineral) were nevertheless clearly segregated by virtue of State selection application A-063695. Unlike the other two State selection applications for township 10, A-063695 has been neither partially nor wholly

It is not inconceivable that some of the lands within the Chugach National Forest could have lawfully been "disposed of" by the United States with a retained mineral interest, but is not clear from the record whether or to what extent this has occurred. We do note that mineral estate selection application A-058731 is demonstrated as a sec. 6(b) and 6(h) submission, although the language quoted from sec. 4 of the Act of Sept. 14, 1960, *supra*, was included by Congress as an amendment to sec. 6(a) of the Statehood Act (governing grants for community purposes). It is further noted from the final entry on the serial register sheet for this application that on Nov. 2, 1977, State selection A-058731 was "held for rejection in part," with no further details provided.

In light of the confusion that surrounds this application, the Board is not inclined to rule whether or not this selection stands as a bar to appellants' placer mining claims. Under a notation rule analysis, however, we do not have to. Regardless of whether the selection was void or voidable, its entry on the MTP segregated the mineral estate for all eligible lands within township 10 from other appropriations.

adjudicated; it remains an open application as far as all public land records furnished the Board are concerned. The only challenge appellants make to this selection is the general charge that it "manifests all of the same limitations of the Section 6(b) selections noted above" and that "national forest lands were not 'open' to State selection by virtue of the type of application filed" (SOR at 9-10). This general challenge has already been discussed. It does not dispense with application of the notation rule to bar appellants' claims.

As to the one State selection application affecting T. 11 N., R. 2 E., Seward Meridian (A-067451), neither the HI nor the serial register contradicts what appears from the face of the MTP, *i.e.*, that the lands within this township were segregated from mineral entry by virtue of this selection application. If anything, the evaluation of these three lands records *in pari materia* disposes of the conjecture that since the notation "A-067451 SS" appears on the MTP only in lettering found in one section of the township, rather than in the narrative column on the right-hand side of the plat, less than the full township was affected thereby. *See* Reply Brief at 20. Thus, the serial register for application A-067451 describes the selected lands at the time of filing as:

"T. 11 N., R. 2 and 3 E., S.M., All lands outside of the Chugach National Forest boundary. Approximately 4,260 acres. Subject to prior valid rights, claims, and patented lands." Under date of June 16, 1972, the register records that this selection was amended to include:

"T. 11 N., R. 2 & 3 E., SM." Finally, as of June 17, 1980, the register notes: "Rejected in part. Tentatively approved for 6,309 acres." Without having the decision of June 17, 1980, at hand,¹³ it would not be possible from reviewing the serial register to know that Chugach National Forest lands had in fact been excluded from selection.¹⁴

The Board's findings and conclusions regarding the effect of the State selection applications noted on the MTP's for Tps. 10 and 11, R. 2 E., Seward Meridian, at the time appellants' mining claim location notices were filed may be summarized as follows. The fact that state selection applications A-053727, A-058731, A-063695, and A-067451 were recorded on the MTP's in question resulted in *prima facie* evidence that all lands denominated as selected were thereby segregated from subsequent appropriation. This *prima facie* segregative effect occurred even if the State selections were void or voidable. An *in pari materia* consideration of the HI and the serial register sheets in conjunction with the MTP's fails to establish that Chugach National Forest lands were excluded from any of the above State selections or that such selections were rejected in part to the extent national forest

¹³ BLM adjudicatory decisions are not generally made available to the public at large nor are indices to such decisions maintained for public review as contemplated by 5 U.S.C. 552(a)(2) (1982) for the treatment of "final opinions * * * made in the adjudication of cases." In contrast, decisions of the Board of Land Appeals are considered "final opinions * * * made in the adjudication of cases" and the publication requirements of 5 U.S.C. § 552 (1982) are deemed applicable thereto. *See* 43 CFR 2.2.

¹⁴ Since the original application as filed Mar. 10, 1966, claimed 4,260 acres (comprising lands outside the national forest) and, subsequent to the amendment of this application to include national forest lands, the State's application was approved as to 6,309 acres, a possible deduction from these serial register entries might be that conveyance of some national forest lands was approved.

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lands were included in the applications. Though from the evidence presented in this case, it is known that Chugach National Forest lands were excluded from State selection applications A-053727 and A-067451 in agency adjudications of these selections, these decisions were not reflected on the MTP's or otherwise publicly disseminated. Even if the foregoing partial rejections had been duly noted on the MTP, two other State selection applications, A-058731 and A-063695, remain pending and their pendency independently bars conflicting appropriations of the same land (here, all of township 10).

[5] We turn to the effect of the two Forest Service withdrawal applications at issue. BLM appears to have erred, as a factual matter, in concluding that appellants' Toohey placer mining claims (AA-43831-850) were located on lands segregated by Forest Service withdrawal AA-6060. Appellants submit that before locating these claims, they "carefully consulted the Federal Register legal description of Forest Service withdrawal AA-6060, and described the locations of [their] claims by specific reference and in a manner which prevented any overlap" (Affidavit of Cynthia D. Toohey, dated Oct. 18, 1982). BLM does not dispute appellants' contention that their Toohey placer mining claims lie contiguous to the boundary of the 270-acre area encompassed by AA-6060, as opposed to within such area. From our comparison of the MTP for unsurveyed T. 11 N., R. 2 E., Seward Meridian, depicting the area withdrawn by AA-6060 with the locations depicted by appellants for the Toohey mining claims, we are satisfied that no conflict exists. In the event our map reading is in error and certain of the Toohey claims do lie within Forest Service withdrawal application AA-6060, the notation rule would operate to bar such claims.

Withdrawal application AA-6060 was filed by the Department of Agriculture with BLM on October 22, 1970. In 1970, BLM's regulations governing withdrawals, codified at 43 CFR Subpart 2311, provided in relevant part:

§ 2311.1-2 Segregative effect of applications.

(a) The noting of the receipt of the application in the tract books or on the official plats maintained by the Land Office in which the application was properly filed or in the tract books maintained by the Washington Office of the Bureau of Land Management if there is no Land Office for the State in which the lands are located shall temporarily segregate such lands from settlement location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken. Such temporary segregation shall not affect the administrative jurisdiction over the segregated lands.

§ 2311.1-4 Findings, reviews; publication.

* * * * *

(c) When an application is finally denied in whole or in part by the authorized officer, he will have published in the Federal Register a Notice of Determination which will specify the date and hour that the affected lands will be relieved of the segregative effect of the agency's application.

(d) When an application is finally approved in whole or in part by the authorized officer, he will have published in the Federal Register an appropriate order of withdrawal or reservation.

In 1970, therefore, the notation rule existed in regulation as well as through adjudication. The segregative effect of a Forest Service withdrawal application commenced upon its recording on the MTP and it remained extant until adjudicated and a notice of determination published, as appropriate, in the *Federal Register*.¹⁵ Here, the record reflects that Forest Service withdrawal application AA-6060 remains a pending application.

The other Forest Service withdrawal application, AA-23139, filed after enactment of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784 (1982), is governed by distinct statutory and regulatory provisions that distinguish it from all other selections and withdrawals discussed thus far. Thus, section 204 of FLPMA (43 U.S.C. § 1714 (1982)), provides:

(a) Authorization and limitation; delegation of authority

On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions and limitations of this section * * *

(b) Application and procedures applicable subsequent to submission of application

(1) Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified in the notice. The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) *the expiration of two years from the date of the notice.* [Italics added.]

Apparent from the above is that Congress has mandated specific moments when the segregative effect of withdrawal applications shall terminate by operation of law. Pertinent to this case, that moment would be 2 years from the date of the *Federal Register* notice regarding the filing of Forest Service withdrawal application AA-23139. The required *Federal Register* notice for this withdrawal application was published December 5, 1978, at 43 FR 57134-57137. Hence, in the absence of rejection or approval of the application, its segregative effect automatically terminated on December 5, 1980.¹⁶ The

¹⁵ Pursuant to regulations promulgated on Jan. 19, 1981, 46 FR 5796,

"public lands described in a withdrawal application filed before October 21, 1976, shall remain segregated through October 20, 1991, from settlement, sale, location or entry under the public land laws, including the mining laws, to the extent specified in the Federal Register notice or notices that pertain to the application, unless the segregative effect of the application is terminated sooner in accordance with other provisions of [43 CFR Part 2300]." See 43 CFR 2310.2(b); 43 U.S.C. § 1714(g) (1982).

¹⁶ The Dec. 5, 1978, *Federal Register* notice properly advised:

"For a period of 2 years from the date of publication of this notice in the Federal Register, the above described lands will be segregated from location, selection, and entry to the extent that the withdrawal applied for, if effected, would prevent such forms of disposal, unless the application is rejected or the withdrawal is approved prior to that date. If the withdrawal is approved, it will be for a period of 2 years, unless duly extended."

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Departmental regulations which implement the withdrawal provisions of section 204 of FLPMA are found at 43 CFR Part 2300.¹⁷

Against this backdrop, appellants contend that the Department is in violation of the will of Congress in permitting a continuing MTP notation of Forest Service withdrawal application AA-23139 to preclude other appropriation of the public lands subsequent to December 5, 1980, the date the segregative effect of AA-23139 terminated by statute. We agree. While we have held that the notation rule represents a valid administrative device for managing the status and disposition of public lands, we have also noted that the Department can regulate it out of existence whenever it desires. So, of course, may Congress and it has done this by, *inter alia*, precluding any segregative effect to withdrawal applications filed after October 21, 1976, after 2 years from the date such applications are noted in the *Federal Register*. It was therefore error for BLM to extend application of the notation rule to Forest Service withdrawal application AA-23139 as grounds for rejecting appellants' mining claim locations effected in 1981.

Conclusion

Appellants' mining claims were properly declared null and void ab initio and the location notices rejected in view of the fact that all lands within Tps. 10 and 11 N., R. 2 E., Seward Meridian, were the subject of previously filed State selection applications that were noted on the MTP for these townships, regardless of whether or not the applications were void or voidable. Although BLM erred in holding that Forest Service withdrawal applications AA-6060 and AA-23139 also precluded appellants' mineral entry, this error does not obviate the segregative effect that attaches under the notation rule vis-a-vis the State selection applications noted on the MTP's.

Therefore, 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 as modified.

WM. PHILIP HORTON
Chief Administrative Judge

I CONCUR:

GAIL M. FRAZIER
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

¹⁷ At 43 CFR 2310.2(a), it is provided in relevant part:

"Publication of the notice [of application for withdrawal] in the *Federal Register* shall segregate the lands described in the application or proposal from settlement, sale, location or entry under the public land laws, including the mining laws, to the extent specified in the notice, for 2 years from the date of publication of the notice unless the segregative effect is terminated sooner in accordance with the provisions of this part."

The majority, in effect, rejects appellants' broad attack on the "notation rule" and affirms the BLM's determination that all of the claims which are the subject of this appeal were null and void ab initio. While, as explained *infra*, I am in agreement with the majority's analysis, I wish to more fully explore one crucial aspect of its approach, *viz.*, what are the records which are relevant for purposes of applying the notation rule.

The majority sets forth the historical genesis of the notation rule and I will not belabor that analysis here.¹ However, I think it is important when we discuss the present scope of the notation rule to keep in mind the fact that it arose at a time when tract books were virtually the sole repository of information concerning land status. While withdrawals or other reservations would normally emanate from either the President or Secretary in Washington, D.C., the first knowledge as to their existence would usually occur upon transmittal of the information to the land office and the subsequent entry of the information on the tract books. Thus, anyone interested in making an appropriation of land would naturally resort to the tract books in order to determine whether or not the land was open to such an appropriation, be it by settlement, entry, or the location of a mining claim.

Upon the adoption of the Federal Register Act, Act of July 26, 1935, 49 Stat. 500, *as amended*, 44 U.S.C. §§ 1501-11 (1982), however, an alternate source of information, *i.e.*, the *Federal Register*, available to the public at large, came into existence. This source of information was not, unfortunately, all-inclusive, and therefore, the existence of the *Federal Register* did not obviate the need for recourse to the records of the Department in order to determine the status of public land.

Thus, while under Exec. Order No. 10355, 17 FR 4831 (May 26, 1952), all orders withdrawing lands or revoking a previous withdrawal were required to be published in the *Federal Register*, numerous other actions which might affect the status of the land were not necessarily published in the *Federal Register*.² Included in such latter categories

¹ Appellants' suggestion that the notation rule is invalid *per se*, since it is the creature of practice rather than statute, ignores not only the many Federal Court decisions set out in the text which have upheld the application of the notation rule, but also the fact that Congress implicitly recognized the existence of this rule in the Act of May 14, 1880, 21 Stat. 140, *as amended*, 43 U.S.C. § 202 (1970), in which it was provided that where a homestead entryman filed "a written relinquishment of his claim in the local land-office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office." Thus, while Congress was clearly aware that the general rules of the GLO would require that the tract books be noted before the land would be available for a subsequent entry, it chose to provide for a specific exception to the general rule rather than to abrogate the entire rule.

² Exec. Order No. 10355 was issued to vest in the Secretary of the Interior the authority of the President to withdraw land granted both by the Pickett Act, 36 Stat. 847, 43 U.S.C. § 141 (1970), as well as the authority deemed to be granted the President by congressional acquiescence as delimited by the United States Supreme Court in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). Sec. 704(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2792, repealed not only the Pickett Act but the implied authority to withdraw land arising from congressional acquiescence. Moreover, sec. 204 of FLPMA, 43 U.S.C. § 1714 (1982), granted the Secretary direct authority to withdraw lands and modify or revoke existing withdrawals. Thus, it is questionable whether Exec. Order No. 10355 has any present relevance. Paradoxically, however, the present regulations, adopted after the passage of FLPMA, expressly cross-reference the procedures established by the Executive Order in promulgation of any withdrawal by the Secretary under FLPMA. See 43 CFR 2310.3-3.

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would be the filing of an application under regulations which provide that the filing segregates the land from the initiation of adverse rights under the public land laws, including the mining and mineral leasing statutes, as well as the cancellation of subsisting entries whose existence would preclude others from obtaining rights on the public lands. An additional factor contributing to the confusion in this matter revolves around the retirement of the tract book system as the general method for showing land status, and its replacement with MTP's, HI's, other Use Plats, and the like. The operative question presented by the instant case is whether, and under what circumstances, an individual is justified in relying upon one set of documents or records which would indicate that the land is available where another document or record indicates that it is not open to entry.

The majority expressly holds that the individual case files maintained by BLM are not part of the public records of the Department for the purposes of determining the ambit and scope of the notation rule. Since, as the majority notes, the HI does not actually contradict the MTP, the effect of this holding is to avoid the question whether conflicting land status entries allow an individual to proceed on his or her own peril. This is, indeed, the nub of the present controversy, since a review of the case files for state selections A-053727 and A-067451 clearly shows that, contrary to the evidence of the MTP, these two selections had been rejected as to those lands described which were within the Chugach National Forest. Appellants essentially argue that it is ridiculous to hold that the notation of these two state selections on the MTP served to segregate the land from entry until the notations were removed when, in fact, BLM has long since rejected these selections in formal adjudicatory action.³ While I think there is a some legitimacy to appellants' complaints, I have come to the conclusion that, insofar as the notation rule is concerned, the individual case files of the Department are not part of the public records for the purposes of determining the scope of the rule.

What, then, constitute the records which serve as the basis for the operation of the notation rule? Clearly, the majority agrees that the MTP is such a record. I would go further and rule that, in addition to the MTP, the HI and the other Use Plats are also such records and that where there is a conflict in notations, the notation rule does not apply.

³ It is important to point out that, in reality, only the land in T. 11 N., R. 2 E., would be ultimately affected by a determination that these two notations were ineffective to result in a segregation of the land from entry. Two other state selections, A-058731 (mineral estate only) and A-063695, which have not been rejected, cover T. 10 N., R. 2 E. While appellants make various arguments that these, too, should not be a bar to the initiation of mining claims, their arguments on this issue relate to a different question, *viz.*, whether an application which cannot be allowed and is therefore *subject to* rejection can nevertheless serve to segregate land until it is, in fact, rejected. Numerous cases cited by the majority clearly establish that the notation of an entry or application, regardless whether the application or entry is void or merely voidable, segregates the land until the application is actually rejected. Indeed, this is essential to the workings of any notation rule, and appellants' contrary assertions are properly rejected.

The original tract books operated as a combination master title plat and historical index. Thus, not only did the tract book enable an individual to discern the present status of a specific parcel of land, but it also permitted the searcher to review the chronology of the land office actions affecting the parcel.⁴ It seems to me totally consistent with traditional land office practice to read the MTP in conjunction with the historical indices and other use plats in ascertaining current land status.

If these records should show a conflict, for example where the MTP contained a notation of a pending state selection but the HI showed that it had been finally rejected, I think an individual could justifiably proceed in accordance with the entry on the HI *provided* that this notation was correct. In other words, an individual could proceed at his own peril, knowing that if, in fact, the HI was erroneous, all of his efforts towards appropriating a right to the public land would come to naught. It is, however, important to recognize that where the state selection is, in fact, still pending and the individual is thereby precluded from the initiation of adverse rights, the attempted initiation of such rights would not run afoul of the notation rule, but would rather be defeated by the segregative effect of the state selection which works independently of the notation rule.

This last consideration can best be illustrated by way of example. Let us assume that Congress has enacted legislation withdrawing T. 4 N., R. 1 E., Seward Meridian, Alaska, from all forms of disposition under the public land and mineral laws. In noting this action on the records, a clerical mistake is made and the withdrawal is actually noted on T. 4 N., R. 1 W. Under the notation rule, the notation of this withdrawal would preclude the initiation of new rights in T. 4 N., R. 1 W., until such time as it was properly corrected. But, the land in T. 4 N., R. 1 E., is not open to location merely because the entry was erroneously made on the wrong township plat. On the contrary, that land is withdrawn independent of the notation rule by the action of Congress.

In my view, where there are conflicting notations on the records, I feel that the notation rule cannot be rationally applied. Thus, as we have noted on numerous occasions:

The notation rule is grounded, in part, on recognition that, considering the incredible amount of activity concerning the use and possible acquisition of Federal land, it is inevitable that errors will occur in noting the relevant records. [5] Fairness to all

⁴ Admittedly, notations were also made on township plats returned by cadastral survey, but these were normally made in pencil unless the application was subsequently allowed as an entry or its equivalent. If the application were rejected, the pencil notation would be erased. See Circular No. 375 (Jan. 22, 1915). As a result, the plats were not as useful as the tract book in ascertaining past status of the land. The tract books, however, unlike the present MTP's which *only* show present land status of any Federal land, would provide a permanent record of past actions such as withdrawals, applications, or entries, even after they had been revoked, expired, or rejected, so that it would be possible to ascertain the availability of land at any specific moment in the past.

⁵ It is on this point that the BLM proposal to abolish the notation rule seems most questionable. BLM's justification for its proposal, set out in the majority opinion, is singularly silent about the effect of improper notations, even though such errors were not only part of the original predicate for the notation rule but have also generated the great amount of adjudication on the scope of the rule. Effectively, the abolition of the notation rule would seem to sanction the

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members of the public dictates that, where records are improperly noted so as to appear to effectively foreclose the initiation of rights by individuals in a specific tract of land, the Department should treat the land in question as it is noted on the records, until such time as the records are changed to correctly reflect the true status of the land.

Carmel J. McIntyre (On Judicial Remand), 67 IBLA 317, 327 (1982). If the notations conflict, however, on which notation is an individual justified in relying? Indeed, the situation could develop where the MTP showed no pending state selection whereas the HI had failed to note that an earlier selection had been rejected. An individual, careful enough to inquire as to the status of the land, might only peruse the MTP. Based on such a review, an individual might determine that the land is open. If, in fact, the state selection had been rejected, I do not see how we could justify invoking the notation rule to defeat the individual's entry since the whole animating rationale of the notation rule is that people have a general right to rely on the records of the Department. It is onerous enough that, should the land be withdrawn and the records fail to indicate this fact, an individual will acquire no rights thereto, even though he may have relied on a review of the MTP. It seems clearly excessive if, in addition to this possibility, a prospective appropriator is also required to search *all* records of the Department to make sure that there is no errant notation on any one of them which might defeat his entry even though there is no existing withdrawal or application which would foreclose his attempting appropriation. Fairness to all parties impels the conclusion that the notation rule cannot apply to foreclose entry where the relevant records themselves disagree on the status of the land.

Appellants seek to expand this rule by including in the ambit of relevant records the specific case files relating to individual applications. Such case files, however, do not even purport to establish the status of the land. Indeed, such an expansion would necessarily abrogate the notation rule insofar as all erroneous notations were concerned, since a review of the case file would establish that the notation was erroneous. It is, indeed, an exception that would proceed to eat the rule. Moreover, it is hard to credit a view that all case files are part of the official land status records of which any individual must be knowledgeable since many records would not be readily obtainable in the State Office for a variety of reasons.⁶ Individual case files were maintained even while the tract book system was in use, but this was never deemed to support the view that a notation on a tract book must give way to what was disclosed in an individual case file.

practice of entering lands in apparent trespass in the hope or expectation that the individual would be able to prove that the land was open, even though the records of the Department would indicate that it was closed to adverse appropriation.

⁶ As an example, case file A-053727 which is at issue in the present case was sent to the Federal Records Center in 1974. It was ultimately retrieved from the record center. However, it was apparently misplaced in the State Office which has been unable to locate it. How could someone be expected to rely on such a record?

Appellants' attempt to include such files as part of the land status records of the Department is properly rejected.

Inasmuch as the MTP showed that the land in both T. 10 N., R. 2 E., and T. 11 N., R. 2 E., was not available for appropriation as it was embraced in various state selection applications,⁷ appellants' mining locations were precluded either by the segregative effect which flowed from the filing of the unadjudicated selection applications (43 CFR 2091.6-4) or by the workings of the notation rule for those applications which had been rejected, unless appellants could show that, insofar as this second category was concerned, the relevant records were themselves in conflict. While evidence on an HI that the application had been rejected would establish such a conflict, the failure of the HI to even note the filing of such an application did not rise to such a level. Accordingly, I concur with the majority's conclusion that the Alaska State Office correctly determined the subject claims to be null and void *ab initio*.⁸

JAMES L. BURSKI
Administrative Judge

APPEAL OF TIMBERLAND MANAGEMENT

IBCA-1877

Decided: July 31, 1985

Contract No. OR910-CT4-80, Bureau of Land Management.

Denied.

Contracts: Construction and Operation: Notices--Contracts: Disputes and Remedies: Termination for Default: Generally--Contracts: Performance of Default: Excusable Delays--Rules of Practice: Appeals: Burden of Proof

A termination for default is sustained where the Board finds (i) that neither a written nor an oral request for a time extension was made during the performance of the contract; (ii) that the appellant failed to establish any of the assigned causes of delay as excusable; and (iii) that the contractor repudiated his obligation to proceed with the performance of the contract prior to its completion.

⁷ Appellants' declaration that they question whether the MTP's showed the same status entries on the date of the locations of their claims that they did at the time of the State Office adjudication would have more force if accompanied by an assertion that they had examined the relevant MTP's prior to the location of their claims. Thus, in *James M. Chudnow*, 67 IBLA 143 (1982), appellant positively averred that he had examined the oil and gas plat for a specific township and that, when he did so, it did not show the existence of an outstanding oil and gas lease for a parcel in question. This is a far cry from appellants' complaints herein that the MTP's *might* not have shown the existence of the state selection applications in question at the time the claims were located.

⁸ I also wish to expressly note my agreement with the majority's ruling that a post-FLPMA application to withdraw land is effective to segregate the land only for the period of time expressly provided by sec. 204(b) of FLPMA, 43 U.S.C. § 1714(b) (1982), regardless of whether or not the notation of the application to withdraw has been removed from the records. Just as the Act of May 14, 1880, 21 Stat. 140, as amended, 43 U.S.C. § 202 (1970), established a statutory exception to the notation rule (*see n.1, supra*), so must this provision be read as overriding the notation rule insofar as applications for withdrawal are concerned. This holding, however, does not alter the disposition of the specific claims on appeal as the land in question was independently affected by various state selections.

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APPEARANCES: W. F. Honer, Owner, Timberland Management, Coos Bay, Oregon, for Appellant; William D. Back, Department Counsel, Portland, Oregon, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

By this appeal the contractor seeks to have a termination for default converted into a termination for the convenience of the Government and to have paid to him the sum owed for work performed prior to the termination. As neither party requested an oral hearing, the appeal will be decided on the basis of the written record.

Background

The instant contract was awarded to the contractor on May 22, 1984, in the amount of \$34,203.12. The contract called for the furnishing of all labor, equipment, materials, supervision, transportation, and incidentals necessary to provide specified roadway services in three identified areas of the Coos Bay District in Oregon. The contractor was required to begin work within five calendar days after receipt of the notice to proceed and to complete all work required within 120 calendar days after receipt of such notice.¹ As the notice to proceed was received by the contractor on May 24, 1984, the contract work was scheduled to be completed by September 21, 1984.

The record discloses (i) that a prework conference was held on May 22, 1984 (the date of contract award); (ii) that before the award of the contract appellant had submitted a proposed work schedule showing timely completion of the contract by the use of two three man crews averaging 2 miles a day based on 100 actual working days; (iii) that the previously proposed work schedule was confirmed at the prework conference; (iv) that in an instruction to the contractor on July 3, 1984, it was noted that as of that date the contractor had used up 35 percent of the time to complete only 19 percent of the work; and (v) that in that instruction the contractor was directed to increase his work force as indicated at the prework conference (AF A&E).

On July 23, 1984, a cure notice was issued to the contractor in which it was stated that 47 percent (57 days) of the available contract time had been used up but that only 23 percent (45.8 miles) of the work had been accomplished. After quoting from the Termination For Default - Damages for Delay - Time Extensions clause of the General Provisions, the cure notice gave the contractor 10 calendar days from receipt of the cure notice to increase his production rate to a level that would ensure completion of the work within the remaining contract time

¹ Appeal File, Exhibit C. Hereafter, all appeal file exhibits shall be identified by the letters AF followed by a reference to the letter (and in most instances also the page number) of the particular exhibit being cited.

(AF B). By letter dated August 28, 1984, the contractor's right to proceed under the contract was terminated for default effective that date. The default notice stated that the contractor had failed to cure his performance within the time specified in the cure notice and had failed to present any evidence showing why his right to proceed should not be terminated. The notice of termination also stated that on August 17, 1984, the contracting officer had been advised by his authorized representative (James White) of a conversation in which the contractor (Mr. William F. Honer) had said that he could not finish the contract. In addition, the Notice stated that as of August 20, 1984, 75 percent of the available contract time had been used with only 39 percent of the work having been completed (AF A).

Essential to the resolution of the dispute are the portions of contract specifications and terms² quoted below:

3. *Work Specifications:*

A. Vegetation shall be removed from the road travel surface and from the adjacent roadside area on both sides of the road. The adjacent area on cut (upslope) side of the road is twelve (12) feet slope distance measured parallel to the cutslope from the edge of the travel surface (or shoulder where there is a ditch). * * *

B. All limbs protruding into the plan twelve (12) feet above the travel surface from shoulder to shoulder shall be removed.

* * * * *

H. All State of Oregon fire regulations will be observed by the Contractor. Prior to beginning of the project, permits for all power driven machinery must be obtained from an office of the State Board of Forestry as required by law.

(AF C-19, 20).

Section H

Delivery/Performance

The Contractor shall begin work within 5 calendar days after receipt of notice to proceed. The Contractor shall continue performance of the work under the contract without delay or interruption except by causes beyond his control as defined in the General Provisions of the contract, or by the receipt of a "Stop Work Order" issued by

² In especially pertinent part Clause 5 (Termination For Default - Damages For Delay - Time Extensions) of the General Provisions reads as follows:

"(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in the contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, * * *"

* * * * *

"(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

"(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and (2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay." (AF C-34, 35).

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the Government. Failure to do so may be cause for action under the Termination for Default - Damages for Delay - Time Extensions Clause of the General Provisions. * * *

At the prework conference, the Contractor shall provide to the COAR a written "work progress plan" that details his work force and schedule to provide for orderly completion of the work within the contract performance time. This work schedule must be acceptable to the Government. As a minimum, the schedule should reflect a progress rate of work to be completed equal to the expired amount of contract performance time. The sequence of work will be determined by the COAR at the prework conference and may be subject to some change because of normal variations in weather conditions at no change in contract time or price.

Work shall progress in accordance with the established schedule. If the Contractor's progress falls behind 20 percent of the established work schedule, the Contractor's right to proceed may be terminated for default if satisfactory progress is not attained within three (3) working days after receipt by the Contractor of a written notice of deficient performance.

(AF C-25)

INSPECTION

The Project Inspector will make periodic inspections as a basis for payments and recommendations for adjustments in work quality.

(AF C-26)

10. *PAYMENTS*

* * * * *

(b) The Government will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer.

(AF C-37, 38)

12. *PAYMENT DUE DATE*

(a) Payments under this contract will be due on the 30th calendar day after the date of actual receipt of a proper invoice in the office designated to receive the invoice.

(b) The date of the check issued in payment shall be considered to be the date payment is made.

(AF C-39)

In response to the Order Settling Record both parties submitted additional data. The supplemental information furnished by appellant consisted of his letters to the Board of March 22 and March 31, 1985, together with the documents which accompanied the letter of March 22, 1985. The additional information furnished by the Government consisted of four affidavits from Government personnel involved in the administration of the contract and the information supplied in response to the Call of the Board.

One of the documents submitted in response to the Call of the Board were the logs maintained by the project inspector throughout the life of the contract.³ The inspector's logs show (i) that in various areas of

³ From July 3 to July 17, 1984, the project inspector Mr. George W. Cleveland was on leave. During that time period Mr. Whitney Schmitt served as alternate inspector. In that capacity Mr. Schmitt observed the contractor's performance on one occasion sometime between July 10 and July 12. Concerning the inspection made by Mr. Schmitt, the Government states: (i) that no written report of the inspection visit was made; (ii) that no major problems

Continued

the project the work as initially performed did not meet the requirements of the specifications in one or more respects (e.g., failure to maintain 12 foot width on travel way or on the cut banks; failure to cut overhanging limbs so that they would not protrude into the area 12 feet above the road surface); (ii) that from the time work commenced on May 24, 1984, until June 30, 1984, the crew size on the job averaged about 4 men; (iii) that on June 17, 1984, the project inspector talked to Mr. Honer (owner) about increasing the size of the crew but the crew size was not substantially increased until July 20, 1984, when from 12 to 16 men were employed on the job; (iv) that the great increase in the number of men on the job did not result in a significant increase in production because at the time the increase occurred the contractor was in the worst brush of the contract area; and (v) that effective July 30, 1984, a fire closure order required the contractor to shutdown power equipment at 1 p.m.

The logs also show that by mid-July the project inspector had become concerned with the extent to which the contractor was behind schedule. On July 17, 1984, the inspector inquired of Mr. Honer as to whether he was aware of what would happen if he defaulted on the contract. In a conversation with Mr. Honer 2 days later the inspector went over the portion of the contract dealing with a contractor falling behind the schedule by 20 percent. On August 8, 1984, Mr. James White (COR) and the project inspector discussed with Mr. Honer the cure notice of July 23, 1984. In that conversation it was agreed that Mr. Honer had increased his crew size so that it ranged from 12 to 16 men but due to the thick roadside brush progress had not increased.⁴ On August 14, 1984, Mr. Honer came to the project office and stated that he was not going to finish the contract except for the Smith River area. In the affidavit given by the contracting officer's representative⁵ and in that given by the project inspector⁶ both refer to the statements made by Mr. Honer on this occasion. Work in the Smith River area (and in other areas where work had begun) was completed by August 20, 1984. With rare exceptions,⁷ the quality of the work performed by the contractor was characterized as "very good."⁸

involving the contractor's performance were observed; (iii) that on that occasion Mr. Schmitt talked to the contractor's foreman, a Mr. Jones; (iv) that Mr. Honer was not present or working with the contractor's crew at the time of the Schmitt inspection; and (v) that Mr. Schmitt has inspected brush clearing contracts prior to this contract (Government Response to Call of the Board 2-3).

⁴ An entry in the project inspector's log for Aug. 8, 1984, reads: "Jim White told Honer the decision to pull the contract would hinge upon next week. He will have 20 miles of average brushing to do and we will see if he can complete it."

⁵ In his affidavit of Mar. 18, 1985, Mr. James White states:

"3. On August 14, 1984, Bill Honer informed me, in the presence of others, that he was unable to finish the contract. He said that his production was not picking up, that he was losing money and that he was frustrated and he was not going to do any more work." In Weekly Contract Progress Report No. 11 (Aug. 20, 1984), Mr. White refers to Mr. Honer having visited the office and said "he was not going to complete the contract" (AF F).

⁶ In an affidavit under date of Mar. 27, 1985, Mr. George Cleveland states:

"10. On August 14, 1984 the contractor told me, in the presence of James White, that he could not finish the contract for the price he had bid and that he had pulled his crews off the contract. He stated that he quit at that time." In the entry in the inspector's log for Aug. 14, 1984, Mr. Cleveland states that Mr. Honer had stopped in to say that "he was not going to finish the brushing contract" but that he would "clean up the Smith River Area and call it quits" (Government Response to Call of the Board).

⁷ In the log for Aug. 13, 1984, the project inspector states that the quality of the work was dropping off and there would be areas which would have to be cut again (Response to Call of the Board).

⁸ All 11 of the weekly contract progress reports characterize the quality of the work as "very good."

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Discussion

The appellant has advanced a number of contentions⁹ in support of the position that his right to proceed should not have been terminated for default.¹⁰ *Contention:* the performance of the contract work was impeded by the Government's direction to cut limbs protruding into the travel way. *Response:* the only limbs the appellant was directed to cut were those required to be cut in order to conform to the requirements of the specifications (Affidavit of Cleveland, pars. 3-4). *Contention:* the Government failed to provide any inspection for 2-1/2 weeks with the result that the contractor had to travel considerable distances¹¹ to perform corrective work in areas the contractor had vacated. *Response:* Mr. Cleveland was absent from the project on leave for a period of 2 weeks and during that period one inspection visit was made by Mr. Schmitt (note 3, *supra*). The distances the appellant's crew was required to travel to redo the corrective work did not exceed 7 miles (note 11, *supra*). The contract requires the Government to make periodic inspection (text, *supra*) but fails to specify a time period within which such inspections were to be conducted. *Contention:* the Government's delay in the processing of partial payment requests deprived the contractor of money needed to continue with contract performance. *Response:* all payments were made within 30 days from the date of preparation of a payment voucher thereby satisfying the requirement of the contract provision captioned "Payment Due Date" (text, *supra*).

In support of his cause appellant has made a number of other contentions related to weather. *Contention:* Prosecution of the contract work was delayed by the intense heat. *Response:* appellant has offered no evidence to show that hot weather encountered on the project constituted unusually severe weather within the meaning of the controlling contract provision (note 2, *supra*). In only 7 instances do the inspectors logs refer to the weather as "clear & hot" (5/29/84, 6/25/84, 7/2/84, 7/17/84 (max. temp. 80o)); 7/19/84 (max. temp. 70o+); 8/09/84, 8/13/84 and in one instance as simply "hot" (8/20/84). *Contention:* the summer of 1984 was a record dry year and the fact that appellant could only use its power equipment until 1 p.m. cut his production in half. *Response:* Addressing these contentions the

⁹ On page 1 of his letter to the Board of Mar. 22, 1985, appellant states that the bid submitted by him was 65 percent under the Government's estimate. The Government brief states at page 1 that prior to award appellant was requested to verify his bid and that he did so. The appellant has not submitted a request for relief based upon a claim of mistake in bid; nor is the Board aware of any authority for granting relief in the circumstances of this case.

¹⁰ Issues involved in the assessment of excess procurement costs are not presently before us. Apropos such issues the Board notes (i) that there must be no material variation between the defaulted contract and the relet contract either in the quality or the type of the goods or services or in the contract terms (McBride and Touhey, Section 33.30) and (ii) that in such cases the Government is obligated to mitigate damages to the extent possible (*Associated Food Service*, ASBCA Nos. 6883 and 7678 (July 27, 1962), 62 BCA par. 3443 at 17,657).

¹¹ At page 1 of complaint the appellant states that some of the areas to be reworked were as much as 14 miles from his then location. After the Government in its answer stated that appellant was no more than 6.6 miles from the area requiring corrective work, appellant referred to having to bring a crew over a 7-mile stretch of road to redo the work requiring corrections (Letter of Mar. 22, 1984, at 2).

Government states: (i) fire closure was discussed with the contractor at the prework conference; (ii) the contract refers to the possibility of fire closure (text, *supra*); (iii) under the terms of the contract the contractor was responsible for compliance with state closure (text, *supra*); (iv) while the fire closure required that no power equipment be used after 1 p.m., the contractor was free to work a full 8 hours prior to 1 p.m.; (v) during the fire closure period the contractor could have worked in other areas of the project not covered by the fire closure ordered;¹² and (vi) that the fire closures that occurred were not unusual or unexpected events in the area of the contract work (Affidavit of Cleveland, pars. 8-9; affidavit of Graham, pars. 3-5; affidavit of White, par. 2; and affidavit of Votaw, pars. 3-4).

Still another contention made by appellant¹³ is that at their last meeting the COAR told the contractor that if they could not finish the job, the Government would have to reprocure the job before the end of September or the money appropriated therefor would be lost. Although the Government has made no direct response to this contention, the Board notes that to the extent any funds remain in the appropriation which supported the defaulted contract, the relet contract is chargeable to that appropriation (24 Comp. Gen. 555 (1945)). Also noted is the fact that on the record before us the last meeting between the COAR and Mr. Honer occurred on August 14, 1984, when according to the inspector's log Mr. Honer stated that he was not going to finish the brushing contract.

Assuming, without deciding, that the statements attributed to the COAR were made by him, it has not been shown that his views concerning the funds available from a defaulted contract for expenditure under a relet contract had any impact upon subsequent events. It is clear from the termination for default notice (AF A) that the contractor's right to proceed was terminated for default on the dual ground that the contractor had failed to cure his performance within the time specified in the cure notice and had failed to present any evidence showing why his right to proceed should not be terminated.

From the documents which accompanied the letter to the Board of March 22, 1985, it appears that to establish an excusable cause of delay appellant is relying principally upon the fire closures ordered which became effective on July 30, 1984, and which prohibited the use of power equipment after 1 p.m. in the areas affected. The documents

¹² The specific areas covered by the fire closures ordered are not apparent from the record. The Board notes, however, that the Government has submitted affidavits from personnel involved in the administration of the contract in support of its position that some areas of the project were not covered by the fire closure orders.

¹³ The appellant also charges that right from the start of the job an adversarial relationship was begun by the project inspector who was constantly telling the contractor that they were going to go broke and would default on the contract because he had "broke" several other contractors (Letter of Mar. 22, 1985, at 1). The attitude attributed to the inspector by appellant appears to be inconsistent with the fact that on a number of occasions the inspector commented favorably on the quality of the contractor's work and also with the inspector's apparent concern over the contractor understanding the significance to him of a default. Assuming *arguendo*, however, that the inspector did conduct himself in the manner described, it was incumbent upon the contractor to report the matter to the contracting officer or his authorized representative so that the necessary corrective action could be taken at the time the harassment occurred. There is no evidence that the contractor did so.

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so submitted include annual reports of the Coos Forest Protective Association for a 10-year period (1975-1984). The following table reflects information taken from the annual report of the association for 1984:

Month	District Rainfall*			
	1984	1983	1982	10-year Average
April	6.32	4.48	10.64	6.11
May	3.83	3.24	.14	3.30
June	3.01	1.46	2.34	1.62
July	.08	3.49	.34	.62
Aug	.18	4.72	.15	1.54
Sept	.50	1.03	2.73	2.39
Oct	8.33	2.57	6.93	5.31
	22.20	20.99	23.27	20.89

*Average of 3 stations.

Performance of the contract could not have been affected by weather conditions prevailing after August 20, 1984, since no work was done after that date and only completion of work already begun was done after August 13, 1984. A comparison of total rainfall during the months of April, May, June, and July for the years 1982, 1983, and 1984 shows that rainfall during those years for those months varied by less than an inch with total rainfall for the 4-month period involved in the comparison being 13.46 inches in 1982, 12.67 inches in 1983, and 13.24 inches in 1984. The average rainfall for those months over a 10-year period is 11.65 inches or 1.59 inches less of rain than was received in the same time period in 1984.

Concerning the effect of fire closures ordered, appellant states that "by only being able to work machinery until 1 p.m. our productivity was cut in half" (Mar. 22, 1985, letter at 3). Commenting upon material contained in an affidavit given by the project inspector, Mr. Honer says:

Cleveland states that we were free to use power equipment a full eight hours prior to 1 p.m. Unfortunately we can not work in the dark in this type of work. In order to work something close to this we would of had to leave Coos Bay at 3 a.m. [14] to arrive on the jobsite at daybreak.

(Mar. 31, 1985 letter at 1).

From the original time sheets which accompanied appellant's letter of March 22, 1985, and which cover the period July 28 to August 12, 1984, it appears that various members of the crew were at the jobsite at 6 a.m. and occasionally at 5:30 a.m. (i.e., the men arriving at these times had worked from 7 to 7-1/2 hours by the time use of the power equipment was discontinued at 1 p.m.). No explanation has been offered and there is nothing in the record to indicate why the balance of the crew could not have commenced work at 5:30 a.m. or 6 a.m.

¹⁴ If the jobsite was approximately a 1-1/2 to 2-hour drive from the homes of contractor personnel as stated in the complaint at page 2, it appears that by leaving their homes at 4 or 4:30 a.m. the workmen could be at the jobsite by 6 a.m.

Since according to appellant (complaint at 2) the use of power equipment constituted approximately 75 percent of their effort, it appears that by proper planning the appellant's crew could have been usefully employed during the period of the day when the use of power equipment was prohibited.

Decision

The appellant has advanced a great number of reasons for his delay in proceeding with the contract work which we have detailed above. According to appellant, the Government failed to grant his requests for time extensions even though the delays experienced were due to actions of the Government or were the result of having encountered unusually severe weather. An initial hurdle facing appellant in this area is the fact that he does not even allege that a written request for a time extension was submitted during performance of the contract as is contemplated by the controlling contract provision (note 2, *supra*) and the further fact that the three persons concerned with administering the contract for the Government at the project level have all denied that an oral request for a time extension was ever submitted to them.

Another central contention made by appellant is that he could have completed the instant contract in much less time than was given to the relet contractor and conceivably he could have done so with the grant of only a 2-week time extension. The evidence of record does not support appellant's sanguine assessment of his capabilities at the time of the default. On August 20, 1984, 74.2 percent of the available contract time had been used but only 38.8 percent of the contract work had been accomplished (AF F). At the time the cure notice was issued on July 23, 1984, the contractor had used 47 percent of the available contract time but had only accomplished 23 percent of the work (AF B). During the period of approximately 1 month that elapsed between the issuance of the cure notice on July 23, 1984, and the cessation of contract work on August 20, 1984, the contractor used 27.2 percent of the available contract time to accomplish 15.8 percent of the required contract work.

In the absence of appellant establishing an excusable cause of delay, the contracting officer was warranted in terminating the right of the contractor to proceed with performance of the contract for default, where, as here, the record shows that the contractor had failed to prosecute the work with such diligence as would ensure its completion within the time specified in the contract.

Except where the actions attributed to the Government had no effect upon performance (statements attributed to COAR concerning the availability of appropriations) all of the causes of delay for which the Government is allegedly responsible represent actions taken by the Government under the authority of specific contract provisions (*e.g.*, ordering limbs to be cut, directing generally the areas in which the contractor was to work, processing of payments requested) and for

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which appellant has failed to show any abuse of discretion. While the issuance of fire closure orders no doubt hampered the contractor's operations to some extent, the appellant has failed to show that fire closure was a significant factor in delayed performance of the contract work. Based upon these considerations, the Board finds that appellant has failed to show by a preponderance of the evidence that the delay in performing the contract work was due to any of the excusable causes of delay assigned.

In this case an alternate ground exists for sustaining the termination for default. The parties are apart on the question of whether on August 14, 1984, Mr. Honer stopped in the project office and told Mr. James White (COAR) and Mr. George Cleveland (project inspector) that he was not going to finish the brushing contract. Apparently referring to this conversation, Mr. Honer states: "Realizing that we couldn't finish the job on time, and that no contract extension was to be offered, we said that we could not complete the job in time" (Mar. 22, 1985, letter at 2). Adverting to the same matter in a later letter to the Board, appellant states: "I told Cleveland that I could not finish the contract in time, not because of a bid price" (Mar. 31, 1985, letter at 1).

In evaluating these conflicting versions of the conversation between the parties to which we have referred, the Board has given great weight to the fact that the recollections of the project inspector and of the COAR are corroborated by contemporaneous records maintained by them in the normal course of performing their duties. Based upon these records principally¹⁵ but also upon the affidavits of the COAR and the inspector made a part of this record, the Board finds that on August 14, 1984, Mr. William Honer (owner) did inform Messrs. Cleveland and White that he was not going to finish the instant contract and that except for cleaning up the Smith River area he was going to "call it quits." So finding, the Board further finds that the statements made by Mr. Honer on those occasions were a repudiation of his obligation to continue with performance of the contract and constituted an anticipatory breach of his contract entitling the Government to summarily terminate the right of the appellant to proceed with performance for default.¹⁶

For the reasons stated and on the basis of the authorities cited, the appeal is denied.

WILLIAM F. MCGRAW
Chief Administrative Judge

¹⁵ See *Kean Construction Co.*, IBCA-501-6-65 (Apr. 4, 1967), 74 I.D. 106, 109-110, 67-1 BCA par. 6255 at 28,964.

¹⁶ See *Dan's Janitorial Service, Inc.*, ASBCA No. 27,837 (Jan. 31, 1985), 85-1 BCA par. 17,924 at 89,749-750 in which the Armed Services Board stated: "These actions and words by appellant constituted a repudiation of its obligations under the contract and conferred upon the Government the right to terminate the contract summarily for default (citations omitted)."

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

APPEAL OF PEARSON MACHINE CONTROLS, INC.

IBCA-1959

Decided: *July 31, 1985*

Contract No. 4-CP-10-05840, Bureau of Reclamation.

Government Motion for Summary Judgment Denied.

**Contracts: Construction and Operation: Modification of Contracts:
Duress--Contracts: Disputes and Remedies: Termination for Default:
Generally--Contracts: Performance or Default: Substantial
Performance--Rules of Practice: Appeals: Hearings--Rules of Practice:
Appeals: Motions**

A Government motion for summary judgment is denied where the Board finds that the defense of duress interposed by the appellant to the default termination of its contract will require the resolution of disputed questions of material fact and that the appellant is therefore entitled to the oral hearing it has requested.

APPEARANCES: William F. Pearson, President, Pearson Machine Controls, Inc., Bethesda, Maryland, for Appellant; William N. Dunlop, Department Counsel, Boise, Idaho, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has filed a motion for summary judgment upon the ground that there is no genuine issue as to a material fact necessary to determine the motion and that the Government is entitled to judgment as a matter of law.

The Government's motion was accompanied by a statement of material facts including, inter alia, the statement that the appeal is from a default termination of the portion of the contract calling for the delivery of four microprocessor-based gate controllers under bid item 0001. Also accompanying the motion was an affidavit from Donna M. Whitmire, an employee of the Bureau of Reclamation at Boise, Idaho, who was in charge of the administration of the instant contract. In her affidavit Ms. Whitmire states (i) that the parties agreed on February 5, 1985, as the revised delivery date for the four gate controllers; (ii) that two of the four units were received by the Government on February 5, 1980 (presumably February 5, 1985, is the intended date), which did not meet the requirements of the specification in several respects; (iii) that the two remaining units were never received; (iv) that the contractor provided no excusable reason for his failure to deliver; (v) that a notice of termination was sent to the contractor on February 14, 1985; (vi) that the four gate

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controllers were reprocured at a lower price than appellant's bid; and (vii) that the reprocured units were delivered on April 25, 1985 (Affidavit at 4-5).

In addition, a memorandum of authorities in support of summary judgment was included with the motion. At page 5 the memorandum refers to the decision of the Court of Claims in *Radiation Technology, Inc. v. United States*, 366 F.2d 1003 (1966), as establishing the rule that if the contractor fails to ship material in "substantial compliance" with the specifications, he has failed to deliver and the Government may thereafter summarily terminate the contract for default. After noting the absence of any dispute about the fact appellant had failed to deliver two of the four gate controllers, the memorandum states the question to be "whether a 50 percent shipment constitutes a delivery of substantially complying material." Addressing the question posed, the memorandum states at page 6: "There can be no substantial compliance when less than the required quantity is not received, *Forest Scientific*, ASBCA 17822, 74-1 BCA 10447; *EON Corp.*, AECBCA, 67-2 BCA 6452."

In a letter to the Board under date of July 19, 1985, appellant disputes the statement made by the Government at page 4 of the memorandum of authorities that "[t]he record is clear and undisputed that appellant agreed to meet the reestablished delivery date of February 5, 1985." Commenting later in his letter upon the Government's assertion in this regard, Mr. Pearson states:

We tried to meet this date despite the time allowed being one-half of what we needed and asked for. The alternative was certain and immediate termination. Our choice was made under duress and cannot be characterized as an "agreement" or being "agreed to."

None of the cases cited by the Government referred to above are considered to be dispositive of the question presented. In *Radiation Technology, Inc. v. United States*, 177 Ct. Cl. 227, 229-30 (1966), all of the units delivered were found to be defective with the Court noting that the basic dispute between the parties related to the propriety of terminating the contract without granting the plaintiff an opportunity to repair the defective systems. *Forest Scientific, Inc.*, ASBCA No. 17822 (Jan. 11, 1974), 74-1 BCA par. 10447, involved a case where the termination for default notice was received by the contractor before the units allegedly ready for inspection had been even tendered for delivery. The situation in *EON Corp.*, AECBCA No. 36-9-66 (July 19, 1967) 67-2 BCA par. 6452, was that under a revised delivery schedule agreed to by the parties, 6 scalers were to be delivered on July 22, 1966, and 75 scalers on July 29, 1966. The 6 units available on the premises of EON on July 22, 1966, were found to have substantial defects as was found to be the case with respect to the 35 to 40 units available at EON's premises on July 29, 1966.

In all three of the cited cases the test for substantial compliance was applied to situations involving quality failures found to be present

following a hearing. While the Government is also contesting the quality of the two gate controllers delivered to the Bureau of Reclamation within the specified contract time, it must be assumed for the purpose of ruling upon the Government's motion for summary judgment that the two units delivered met the requirements of the specifications in all respects.

Quoted in the Government's memorandum in support of its motion is an excerpt from Article 11 of Standard Form 32 of the Contract reading as follows:

11. Default

(a) The Government may * * * by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances.

(i) If the Contractor fails to make delivery of the supplies or perform the services within the time specified herein or any extension thereof; * * *

Not addressed by the Government is the question of how under the above-quoted language the Government could be said to have mitigated damages in cases in which excess procurement costs were incurred if it refused to credit against contract quantities supplies delivered within the contract time which met the contract specifications.

The Board need not finally resolve these questions, however, since in its response to the Government's motion for summary judgment, appellant has squarely raised the defense of duress to the termination for default action. It is clear that determination of the duress question will entail resolving material issues of fact related to the circumstances under which appellant "agreed to" the revised delivery schedule on which the Government relied in terminating the contractor's right to proceed for default. For a comparatively recent case discussing the elements which must be present in order to void an agreement by reason of duress, see *Louisiana-Pacific Corp. v. United States*, 228 Ct. Cl. 363, 367 (1981), from which the following is quoted:

Defendant got that written agreement here but now plaintiff says duress upon it renders the modification void. If so, there was no accord and satisfaction or waiver which defendant relies upon. Thus, there is presented a disputed question of fact we cannot resolve on the pending motions. This may be seen clearly when we consider the three tests for identifying duress as set forth in *Fruhauf S.W. Garment Co. v. United States*, 126 Ct. Cl. 51, 111 F.Supp. 945 (1953), and in many subsequent cases, as follows:

- (1) One side involuntarily accepted the terms of another.
- (2) Circumstances permitted no other alternative.
- (3) The circumstances were the result of coercive acts of the opposite party.

In this case appellant has requested an oral hearing and contests the propriety of the Government's action in terminating its contract for default on the ground of duress in the establishment of the revised delivery schedule relied upon in the default action. In determining the validity of the defense of duress, it will be necessary to resolve genuine issues of material fact which the present record indicates are disputed and with respect to which appellant is entitled to an oral hearing as requested. Accordingly, the Government's motion for summary judgment is denied.

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Within 30 days from the date of receipt of this decision, the parties shall furnish the Board with the following:

1. If any discovery is contemplated, a schedule of discovery showing the nature of the discovery anticipated and the dates for its commencement and completion.

2. If no discovery is contemplated, acceptable hearing dates in late October or early November 1985, together with a statement from each party as to estimated time required to present their respective cases-in-chief.

WILLIAM F. MCGRAW
Chief Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Administrative Judge

August 13, 1985

APPEAL OF DEVELOPMENT & TECHNICAL ASSOCIATES, INC.

IBCA 1510-8-81

Decided August 13, 1985

Contract No. TA-79-SAC-01111, U.S. Department of Commerce.

Sustained in part.

**I. Contracts: Construction and Operation: Changes and Extras--
Contracts: Disputes and Remedies: Termination for Convenience**

When the Government properly terminates a contract for its convenience, the contractor is entitled only to proper settlement costs incurred thereafter; a contractor may not recover expenses incurred in continuing performance after receiving the notice of termination where the Government did not desire such continuation and where the contractor, in ignoring the termination notice, relied on a memorandum which: (1) was written by a Government official unconnected with administration of the contract; (2) was addressed to someone other than the contractor; and (3) was dated 2 months before the termination and acquired by the contractor 1 month after the termination.

APPEARANCES: Tyrone E. Medley, Salt Lake City, Utah, for Appellant; Neil D. Friedman, Government Counsel, Boulder, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

In this appeal from the decision of the contracting officer (CO), dated May 18, 1981, we are asked to review the circumstances surrounding a termination for the convenience of the Government and the allowability of contract costs and settlement costs incurred after the termination. For the reasons developed in the following opinion, we sustain a small portion of the appeal and deny the rest.

The contractual arrangement under review had four entities playing significant parts. In the private sector were appellant, Development and Technical Associates, Inc. (DATA), and Mercury-Delta Corp. (Mercury-Delta), a manufacturer of automobile accessory items, located in Compton, California (Appeal File (AF), Tab Y). On the Government side were the Department of Commerce (Commerce) and the Department of Education (Education). In March 1979, the Commerce and the Department of Health, Education, and Welfare (from one division of which the Department of Education was spawned later that year) entered into an arrangement for the purpose of establishing a pilot project in literacy improvement. Under this arrangement, Education was to provide funds for the project, and Commerce was to administer the project by letting and administering the private sector contract contemplated as a part thereof (Supplemental Appeal File (SAF), Tab AA).

In the contract that resulted, Mercury-Delta and DATA were joint venturers, although the former was a more-or-less passive participant.

The arrangement called for DATA to establish a literacy improvement program for low-level employees of Mercury-Delta. Ideally, the result would be for employees whose literacy was improved to be promoted to jobs of higher responsibility allowing the employer to hire unemployed persons to fill the positions thus vacated. DATA had the responsibility for developing the program, then monitoring it, analyzing the data produced by it and reporting on that analysis to the Government (AF, Tab Y). As amended, the performance period was to run slightly more than a year, ending on October 28, 1980. A contract provision made the entire arrangement subject to an agreement between Mercury-Delta and DATA. That agreement contained a section calling for a modification of the program or a termination for convenience in the event that reverses in the automobile industry reduced orders to Mercury-Delta to the point where it reduced its work force to fewer than 25 employees. The contract also contained a standard termination for the convenience of the Government clause (AF, Tab Y, Special Provisions Supplement, Article IX; Joint Agreement, Section VI; General Provisions No. 17).

In a memorandum dated May 12, 1980, the contracting officer's technical representative (COTR), informed the CO that Mercury-Delta had suspended operations indefinitely because of an automobile industry slowdown and recommended a termination for convenience. Therein, the COTR mentioned a meeting with an official of Education, Tom Hill, who concurred in the recommendation (SAF, Tab BB). In a letter to DATA dated June 2, 1980, and a telegram sent June 6, 1980, the CO followed that recommendation and terminated the contract for convenience (AF, Tabs W and X).

There followed a considerable amount of correspondence between Commerce and DATA on the subject of allowable contract and termination settlement costs. During the course of that correspondence, DATA changed its theories and amounts of costs proposed on a few occasions but consistently expressed its perception that it was entitled essentially to the full contract funding (\$99,364). Ultimately, the CO called for an audit of costs claimed (AF, Tabs J, L, M, O, P, Q, S, T, U, and V).

The audit report questioned \$31,439 of the costs claimed total of \$99,364 but expressed no opinion on the profit amount claimed (DATA had claimed the full amount of the contract's profit figure of \$5,180) (AF, Tab J). Responding to the audit report, DATA in a letter dated March 26, 1981, presented its arguments in support of its position on costs claimed and contrary to the audit report. In fact, the letter implicitly accepted some of the audit report's arguments, so that DATA was claiming only \$20,339 of the \$31,439 disallowed (AF, Tab G). The CO, in a letter dated April 16, 1981, expressed an invitation for DATA to ask for a final decision (AF, Tab E). DATA took up that invitation in a letter dated April 21, 1981, adding that a final decision had been its aim throughout the history of the correspondence

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to date, thereby bringing all of its prior points and arguments, to the extent internally consistent, to the CO for decision (AF, Tab D).

The CO issued his final decision in a letter dated May 18, 1981. The decision disallowed all costs claimed. There were a number of particular items in the claim and the decision, but we have categorized them into two areas. The first of these is project costs (that is for contract performance) and the second is for settlement costs. One of the rationales for denying costs in each of the areas overlaps into the other. That rationale has to do with DATA's early and oft-expressed reliance on a memorandum written by Education's Tom Hill for contract work after the termination date. The CO's decision prominently denied the reasonableness of relying on that document, in particular, since Mr. Hill had no official connection with the chain of authority under the contract, being an employee of some Department other than Commerce. The various items of claim also elicited individual reasons for their denials, but only two of them will concern us in the decision which follows. The first is rental cost for DATA's office space in Los Angeles, which concerns us later, because we sustain the appeal in part with respect to this item. The audit questioned the cost because DATA had presented the auditors with no lease agreement, and the CO relied on that reason for denial plus the fact that the lease document later presented to the CO had no date and exhibited no initials near corrections. The other item, profit allowed, concerns us because it is not as directly linked to DATA's reliance on the Hill memorandum as were the other items. The CO's expressed rationale on profit was that since the project was never completed, the correct amount to be awarded should be that which bears the same relationship to the full amount of profit as contemplated in the contract as the amount of costs allowed bears to the full amount of costs contemplated in the contract.

Decision

[1] The principal question to be decided in this case is whether the Government, directly or otherwise, ordered DATA to ignore the CO's termination notice so that it became a nullity and so that DATA is entitled to recover expenses incurred in its continued performance of the contract work. A conclusion that there was no such order means that DATA would be entitled only to those settlement expenses not already accounted for by prior payment.

DATA argues that both the COTR and Education's Mr. Hill represented to DATA that its work under the contract should continue despite the CO's termination notice. DATA has, however, provided no evidence that the COTR made any such representations and we therefore ignore that part of the argument and concentrate on the alleged representations of Mr. Hill.

The thrust of DATA's argument is that in ignoring the termination notice it reasonably relied on Mr. Hill's "request" that it continue performance. This argument follows two alternative courses: (1) that Mr. Hill as an authorized delegate of the CO bound the latter by his direction that performance continue despite the termination notice, and (2) that the facts and circumstances surrounding that direction establish a state of affairs in which the Government is equitably estopped from denying liability.

Regarding the first of these courses, DATA cites one Court of Claims case and two Board cases in support of its position. *Sentor Manufacturing Co. v. United States*, 392 F.2d 229 (Ct. Cl. 1968); *Lillard's*, ASBCA 6630, 61-1 BCA par. 3053 (1961); *Industrial Research Associates*. Although we were unable to find the last of these, DATA's description of it as compared to its description of the other two and our reading of those two cases lead us to believe that its central point is essentially the same as that in the other two cases, and we therefore treat the trio together (App. Br. 10-11).¹ All of the cases involve a claim for a constructive change ordered by a technical representative who was on site, whom the circumstances clothed with the requisite authority, and who ordered something that was integral to the proper and full completion of the project. In each case the Government clearly wanted continued performance.

The distinctions between those cases and this are obvious. Although, as DATA points out, Mr. Hill had a considerable interest in the project, he was not a technical representative of the CO, and he was not on the site of the project making recommendations and troubleshooting as were the representatives in the other cases. Moreover, examining the circumstances on whether or not the Government contemplated completion of the entire project results in a conclusion more heavily favoring the position that it did not, which is vastly different from the clear indication of Government desire for completion present in the other cases.

Perhaps the strongest distinction between those cases and this one is the less obvious one, that emanating from the essential difference between a case of constructive change, of which all of the cases present one of the classic scenarios, and a termination. In the constructive change cases, there is a Government actor who is not the CO but who orders work while the CO remains silent on the subject. In this case there is purportedly such an actor, Mr. Hill, who is alleged by DATA to have delivered such an order, but here the CO, far from being merely silent, in fact delivered his own written order which was directly contrary to the purported order delivered by Mr. Hill. It would be stretching beyond recognition the law on constructive changes to

¹ DATA's citation for the *Industrial Research Associates* case is "68-1 DCA 7079." We took the "D" in the citation to be a typo for "B" and looked for the case in the BCA reporter. There is an *Industrial Researcher Associates* case at par. 7069 of volume 68-1 of the BCA reporter, but that case has nothing to do with the issue DATA was arguing when it cited the case. Par. 7079 appears in volume 68-2 of the BCA reporter but the case appearing there is similar neither in name nor in substance to the case cited or the issue at hand.

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characterize these circumstances as calling for its imposition. This is particularly so on the point just reviewed; to take the most charitable view of DATA's presentation, it has established that an agent of the Government delivered an order which was nevertheless contrary to a CO order on the same subject matter. That is a state of affairs far different from the normal constructive change situation as exemplified in the cited cases. This leaves aside the very doubtful proposition that such an order could qualify as requiring a "change" as that term is used in public contract law. Moreover, there are other, more fundamental reasons pertaining to the timing and the nature of Mr. Hill's "order," for why this course will not lead to recoverability for DATA, but these overlap into the analysis of the other course suggested, equitable estoppel, and will be discussed in our analysis thereof. In any event, we conclude that the constructive change authorities cited do not provide a reason for allowing recovery.

In advancing its argument on equitable estoppel, DATA cites a case which delineates the classic four elements necessary for the application of that doctrine. *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100 (9th Cir. 1960). To some extent the existence of each is dependent on the existence of one or more of the others, and taking that into account, we can say that only the fourth element, DATA's reliance on some Government conduct to its detriment, is even arguably present. Even that statement, qualified as it is, raises the questions of whether that reliance was reasonable and whether the conduct involved was even of the type contemplated under the doctrine of equitable estoppel. In considering these questions in the context of the other three elements, we answer those questions in the negative, discover the other three elements are not present, and therefore conclude the arguable presence of even the fourth element is illusory.

Obviously, the operative Government conduct is the alleged "direction" by Mr. Hill to continue performance despite the CO's termination notice. DATA has also characterized the conduct as Mr. Hill's "request" to continue performance (App. Br., p. 3). "Request" is a noun of significantly less forceful persuasion than is "direction," but we cannot agree that the facts establish that even such a less forceful circumstance in fact occurred, as the following background and analysis makes clear.

What DATA has characterized so as to fit within its formulation of equitable estoppel is a memorandum from Mr. Hill dated April 4, 1980 (AF, Tab 0). That memorandum contains the following passages: "It is our hope that the research design and curriculum development components will continue as scheduled;" "It is our recommendation that the Office of Education * * * assume the programmatic monitoring responsibilities of this contract since the * * * Commerce work cannot be completed;" and "We are currently in contact with our General Counsel regarding our office assuming these responsibilities."

What should be clear from this language is that the memorandum neither states nor even implies a direction to do anything. It is merely an expression of the author's hopes and recommendations and it does not even express any expectations. It would be difficult even to characterize these passages, in a vacuum, as a request, but when we consider the identity of the memorandum's addressee, we find that characterization impossible. The memorandum was addressed to Mr. Jerry Gordon, the COTR at Commerce. Thus, it was not addressed to DATA and, as far as we can tell, was not intended to be a source of information for DATA to say nothing of being the source of a direction or request upon which DATA was intended to rely. Moreover, DATA received a copy of the memorandum on July 3, 1980, nearly a month after its receipt of the termination notice (AF, Tab 0). Its source for the copy was its own request (DATA's Response to Government Interrogatories, p. 3).

Turning now to the first three elements of estoppel we encounter the requirement that, here, the Government must know the facts. In this case, the operative fact would be that the Government ordered or requested continued performance. The Government did not know that fact for the simple reason that it did not exist.

The second element is that the Government must have intended that its conduct would be acted on or must act so that DATA had a right to believe that it so intended. Again, that conduct was the alleged direction or request to continue performance. Even if the memorandum could properly be characterized as a direction or a request, the fact that it was not addressed to DATA and that it was received by DATA only after its own request a month after the termination should answer any questions about the Government's intention. The language of the memorandum and the identity of its addressee make it clear that Mr. Hill did not intend for DATA to rely on it in ignoring the termination notice, and even if its language were stronger in DATA's favor, it is clear that the CO did not intend for DATA to rely on it, for, as far as we can tell, the CO did not even know it existed or was in DATA's possession until he received the latter's letter of August 20, 1980, 2-1/2 months after the notice of termination (AF, Tab 0).²

The third element is that DATA would have to be ignorant of the "true facts." The "true facts" here are that the CO issued a termination notice and that nothing else happened contrary to the intention of that notice. DATA was not ignorant of those facts.

² We have not gotten involved in a lengthy analysis of Mr. Hill's authority vis-a-vis the contract, despite DATA's clear invitation for us to do so, because his authority is irrelevant to our decision of the case. Even if he were authorized, expressly or implicitly, to order continuation of performance, there is no evidence that he issued such an order. Nevertheless, we note that DATA simply has not shown the facts and circumstances necessary for us to conclude that Mr. Hill had such authority. DATA has shown that Mr. Hill and the Department of Education had a considerable interest in the project and that the latter indeed could be viewed as the principal beneficiary of performance, but that interest, with nothing more, cannot justify a contractor's ignoring the formal and essential aspects of a contract and of public contract law.

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If a copy of the April 4 Hill memorandum had been sent to DATA essentially contemporaneously with the termination notice in June, then we might be able to conclude that the Government was giving DATA confusing signals. That, however, would give rise to a duty in DATA to inquire of the CO to clarify the situation. There was no such simultaneous communication, however, and there is no evidence that DATA sought clarifying information from the CO nor even from Mr. Hill. What we have instead, apparently, is a determination on DATA's part to go ahead with the project for its own purposes while trying to get the Government to pay for the continuation, later bootstrapping an argument to that end by acquiring an otherwise irrelevant memorandum which it believed, wrongly, would fit that purpose. DATA's argument that in ignoring the termination notice it relied on a memorandum written 2 months before the termination, addressed to a party other than DATA, and acquired a month after the termination is not only unsupported, but it is disingenuous for DATA to advance it now, especially in light of the record evidence that makes clear (1) that DATA knew that the contract was terminated, and (2) that it was conducting itself in accord with such a situation (*See, i.e.,* correspondence from DATA to the CO, AF, Tabs O, P, Q, and T). We deny that portion of the appeal seeking recovery of performance costs incurred after the termination of the contract.

As noted above, since DATA's argument on performance costs has failed, its only entitlement is to proper settlement costs not previously paid. For the most part, the success of its claim on settlement costs was dependent on the success of one of the reliance arguments it has advanced in support of recoverability of performance costs. DATA has actually mislabeled these costs as settlement costs when they are really performance costs. For instance, of the items labeled as settlement costs in DATA's claim, most are related to contract work done after the termination. One of the claim arguments is that the audit's basis for questioning these, that salary checks and time notices were not recorded, was factually invalid. It is clear, however, that the alleged work was not for the purpose of advancing settlement procedures but was in fact work done in attempting to complete performance and that DATA's principal argument on these items is the same reliance-on-the-Hill-memorandum argument discussed above. Of the four items discussed in DATA's brief, three are covered by this analysis. They are: (1) a payment to a subcontractor for an alleged final report which became unnecessary because of the termination; (2) salaries and fringe benefits, as discussed above; and (3) (by extension) corporate fees, which are payable only in proportion to allowed costs (App. Br., pp. 13-15). All of these are covered by the foregoing portion of the decision and are denied.

This leaves only two more items for disposition, profit and the fourth brief item, office rental. The CO's decision awarded profit based on

that part of profit contemplated in the contract which matched the proportion of contract work completed at the time of the termination as measured by allowable costs. DATA has told us that it is entitled to the full amount of the profit but the only reason advanced in favor of that is that the contract was terminated "at the pleasure of the Government" (AF, Tab G). That is not a sufficient reason to disregard the formula of the Termination Clause for payment of full profit only on completed work. We affirm that portion of the CO's decision which denied additional profit beyond that granted under the CO's formulation.

The final item is rent for DATA's office space in Los Angeles near the Mercury-Delta operation. The audit questioned \$167, representing rent for July 1980 because the contract was terminated in June and DATA had no firm lease agreement (AF, Tab J). Subsequent to the audit, DATA presented to the CO a copy of its lease agreement in support of its claim to reimbursement of office rent for the remainder of the 12-month lease period, that is through October 1980 (AF, Tab G). The CO denied the claim because: (1) the effective date of the termination was in June 1980; (2) the lease was not available at the time of the audit; (3) the signatures are not dated; (4) no initials appear near document corrections. Besides the fact that the requirement of initialing is of questionable validity, our perusal of the document discloses no corrections, initialed or otherwise. Also, the failure to produce all persuasive evidence at the time of an audit does not, by itself, provide a reason for refusing to consider such evidence where presented later. Finally, we are unaware of a requirement that signatures be dated in order for the document to which they are affixed to be binding on the signatories. In short, the only valid reason the CO raised for denying recovery for rent is the effective date of the termination, and that is a limiting factor and not necessarily an absolutely prohibitive factor. In other words, if, here, the lease were for a full year, and DATA were unable in good faith to reach a reasonable accommodation with the lessor to mitigate a full payment, then all rent under the lease would be a proper settlement expense. The lease in question purports to be for a full year, calling itself an "ANNUAL LEASE" and containing a provision that it "shall be in force for the period of one year." It does, however, contain other provisions describing the tenancy created thereby as "month to month" and allowing termination by the lessee by 30 days' written notice. We believe that these latter provisions control, and that DATA could have terminated the lease before the expiration of the 1-year period, but not before the end of July 1980, being the end of the first month period after receipt of the termination notice on June 6. Since the CO's decision did not account for this properly allowable expense, we sustain

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the appeal in the amount of \$167 for the office rental expense of July 1980. We deny the appeal in all other respects.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

JAMES E. LEBER v. GEORGE STERLING *ET AL.*

88 IBLA 224

Decided August 29, 1985

Interlocutory appeal from a ruling of Administrative Law Judge Joseph E. McGuire holding state surface mining regulatory agency to be a proper party respondent in an employee protection proceeding. CH 4-1-D.

Reversed and remanded.

**1. Surface Mining Control and Reclamation Act of 1977:
Discrimination: Generally--Surface Mining Control and Reclamation Act of 1977: Employee Protection: Generally**

A state agency is not a "person" for purposes of an employee protection proceeding initiated by an aggrieved employee pursuant to sec. 703 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293 (1982), and the Department has no jurisdiction to adjudicate an application for review of alleged discriminatory acts by that agency.

***Leber v. Pennsylvania Department of Environmental Resources*, 80 IBLA 200, 91 I.D. 197 (1984), modified to the extent it is inconsistent herewith.**

APPEARANCES: William F. Larkin, Esq., Pittsburgh, Pennsylvania for George Sterling *et al.*, and Pennsylvania Department of Environmental Resources; Robert P. Ging, Jr., Esq., and Lee R. Golden, Esq., Pittsburgh, Pennsylvania, for James E. Leber; Lynne N. Crenney, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

This case constitutes an interlocutory appeal by the Pennsylvania Department of Environmental Resources (PDER) from an order of Administrative Law Judge Joseph E. McGuire, dated December 27,

1984, ruling that PDER is a "person" for purposes of an employee protection proceeding under section 703 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1293 (1982), and, thus, subject to Departmental jurisdiction. The case was initiated on February 3, 1984, when James E. Leber (applicant herein), formerly a Surface Mine Conservation Inspector with PDER, filed an application for review of alleged discriminatory acts by certain "supervisory personnel"¹ pursuant to section 703 of SMCRA, and 30 CFR 865.12.² The case was assigned docket number CH 4-1-D in the Hearings Division.

On April 24, 1984, during the pendency of this case, the Board decided *Leber v. Pennsylvania Department of Environmental Resources* (PDER), 80 IBLA 200, 91 I.D. 197 (1984), *aff'd*, Civ. No. 84-723 (M.D. Pa. Feb. 11, 1985), *appeal filed*, Civ. No. 85-5166 (3rd Cir. Mar. 18, 1985), in a related but separate interlocutory proceeding, involving another application for review of alleged discriminatory acts (CH 3-2-D) filed by applicant against PDER. We concluded in *Leber* that "PDER is not a person for purposes of an employee protection proceeding under 30 U.S.C. § 1293 (1982)." *Id.* at 206, 91 I.D. at 200. However, we also held "the intent of the regulations was to consider an agency, such as PDER, a 'person' to the extent that it might be conducting surface coal mining operations under the Act." *Id.* We concluded, based on the record before us, that PDER was "not such a person." *Id.* at 207, 91 I.D. at 201. Thus, an inference may be drawn from our opinion in *Leber* that PDER would be considered a "person" for purposes of a section 703 proceeding if it were engaged in surface coal mining operations under the Act. Indeed, this was the apparent understanding of the district court in reviewing *Leber*.

By order dated April 26, 1984, the Board lifted a previous stay which had been invoked by order dated April 13, 1984, pending the decision in *Leber v. PDER*, and remanded the case to Judge McGuire for further proceedings in light of our opinion in *Leber*. On May 21, 1984, the Hearings Division, Office of Hearings and Appeals (OHA), received a copy of interrogatories directed to PDER, concerning whether the Commonwealth of Pennsylvania was then engaged in surface coal mining operations. On May 29, 1984, PDER filed a motion to dismiss applicant's application for review, arguing that PDER is not properly subject to Departmental jurisdiction for purposes of a section 703 proceeding. On June 7, 1984, PDER filed a motion for a protective order excusing it from answering the interrogatories. By order dated June 21, 1984, Judge McGuire denied the motion for a protective order

¹ In his application, the applicant named as respondents various supervisory personnel purportedly employed by PDER, viz., George Sterling, Walter Dieterle, John Carroll, John Dunn, Leonard Goins, James Chester, and Dennis Farley. By order dated May 1, 1984, Judge McGuire granted a motion by PDER to intervene as a party respondent pursuant to 43 CFR 4.1110. Both the named individuals and PDER are referred to as respondents herein.

² Applicant stated that the named individuals had engaged in a "pattern of discriminatory practices," including harassment, transfers, personnel actions, and denial of leave, because of applicant's aggressive enforcement of SMCRA and the previous filing of an application for review (CH 3-2-D) under 30 U.S.C. § 1293 (1982). Applicant characterized the alleged discriminatory acts committed by the named individuals as "ultra vires and beyond the scope of their employment as Commonwealth employees."

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and instructed PDER to answer the interrogatories in order that he could rule on PDER's motion to dismiss. On June 29, 1984, PDER filed a motion for certification to the Board of Judge McGuire's June 21, 1984, order as an interlocutory ruling pursuant to 43 CFR 4.1124, because a determination by the Board that PDER is not subject to Departmental jurisdiction for purposes of a section 703 proceeding would "materially advance the ultimate disposition of the [case]." By order dated July 9, 1984, Judge McGuire essentially denied the motion for certification and again ordered PDER to answer the interrogatories propounded by applicant, in order that it could be determined whether PDER is engaged in surface coal mining operations and is, thus, subject to a section 703 proceeding.

On July 26, 1984, PDER filed a petition for permission to appeal from Judge McGuire's July 9, 1984, order refusing to certify his June 21, 1984, order as an interlocutory ruling. This petition was docketed by the Board. By order dated October 11, 1984, the Board declined to grant an interlocutory appeal from denial of a protection order which would have allowed PDER to not answer certain interrogatories concerning whether PDER is engaged in surface coal mining. We stated that in *Leber* the record had not indicated that PDER was engaged in surface coal mining operations and this had been a "material factor in the decision."

On October 25, 1984, PDER submitted answers to applicant's interrogatories, stating it is not engaged, as an operator, in surface coal mining operations as defined in section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (1982). On November 1, 1984, applicant filed with the Hearings Division, OHA, a second set of interrogatories, a request for the production of certain documents and a request for the admission of the authenticity of certain documents. On December 5, 1984, PDER responded to applicant's second set of interrogatories and request for admission, and submitted numerous documents. In its answer to the interrogatories, PDER stated it had engaged in the dredging of the Schuylkill River in order to control flooding, pursuant to State statute and PDER permit no. 5475714, dated April 26, 1976, which expired on December 31, 1978, and that such dredging had recovered a certain amount of "coal fines," which were processed and transported to certain locations. PDER also stated it has contracted for the removal of coal and other materials from "coal waste banks."

By order dated December 27, 1984, Judge McGuire held that: "Based upon those facts which applicant's discovery methods have adduced, it has been demonstrated that [PDER] has engaged in surface coal mining operations and thus is a 'person' for purposes of this section 703 employee protection proceeding." By order dated January 11, 1985, Judge McGuire granted PDER's motion for certification to the Board of his December 27, 1984, order as an interlocutory ruling, pursuant to 43 CFR 4.1124. The Board accepted the certification of the

interlocutory ruling, holding that it is "controlling" because "if it were found to be in error, [PDER.] would not be a proper party respondent in this section 703 employee protection proceeding." By order dated February 5, 1985, the Board granted PDER's request for a stay of further proceedings before Judge McGuire "pending disposition of the interlocutory appeal."

In its brief herein, PDER contends it is not engaged in surface coal mining operations as defined in section 701(28) of SMCRA, where the primary purpose of its dredging operations, undertaken in the Schuylkill River "since the 1940's,"³ is the removal of accumulated wastes, in order to prevent water pollution and flooding. Thus, PDER submits its operations were aimed at the protection of the public's health, safety, and welfare and not the commercial extraction and sale of coal. In the alternative, PDER argues its dredging activities are exempt from the provisions of SMCRA, including the employee protection provisions of 30 U.S.C. § 1293 (1982), pursuant to section 528 of SMCRA, 30 U.S.C. § 1278 (1982), which excludes in part the "extraction of coal as an incidental part of * * * State * * * government-financed * * * construction." PDER states that coal is extracted as an incidental part of its dredging operations, which constitute the "construction or reconstruction of the river channel."⁴ PDER also contends it is not subject to Departmental jurisdiction for purposes of a section 703 proceeding because it is not a "person" under that statutory provision or its implementing regulations. Finally, PDER argues that to subject it to Departmental jurisdiction herein would violate the 10th and 11th amendments to the United States Constitution.

In his brief herein, applicant contends PDER's dredging operations constitute surface coal mining operations under SMCRA and such activities are not exempt from the provisions of SMCRA. Applicant also argues that, as defined by regulations of the Department, PDER is a "person" within the meaning of 30 U.S.C. § 1293 (1982), as well as other provisions of SMCRA. Applicant concludes that PDER is subject to Departmental jurisdiction for purposes of a section 703 proceeding,

³ PDER states the sediment dredged from the river bottom, which contains coal, is placed in various impoundment basins along the river and in some cases an independent contractor removes and processes the sediment, "paying the Commonwealth a royalty on a per ton basis for the coal, sand, and gravel which remains after the material is processed."

⁴ In a brief submitted on behalf of OSM, the Office of the Solicitor argues that PDER is engaged in surface coal mining operations where coal is extracted from the river bottom as a result of its dredging operations, even though this is not the primary purpose of these operations, stating that 545,363.37 tons of coal have been recovered from dredged material "since 1978." The Solicitor cites *United States v. H.G.D. & J. Mining Co.*, 561 F. Supp. 315 (S.D. W.Va. 1983), and *United States v. Devil's Hole, Inc.*, 747 F.2d 895 (3rd Cir. 1984), in support. The Solicitor also cites an opinion, dated Dec. 26, 1978, by Gary L. Martin, Assistant Attorney General, Commonwealth of Pennsylvania, which concluded that PDER's "dredging operation in the Schuylkill River constitutes 'surface mining' under [Pennsylvania's] Surface Mining Act." See also *Marshall v. Stoult's Ferry Preparation Co.*, 602 F.2d 589 (3rd Cir. 1979), cert. denied, 444 U.S. 1015 (1980); *Brentwood, Inc.*, 76 IBLA 73, 90 I.D. 421 (1983). However, the Solicitor argues PDER is exempt from the provisions of SMCRA pursuant to sec. 528 of SMCRA, because the extraction of coal is an incidental part of the dredging operations. PDER has filed a reply brief, in response to the Solicitor's brief, reiterating that it is not engaged in surface coal mining operations. In light of our disposition herein, we do not reach the question of whether PDER is engaged in such operations under SMCRA or whether PDER is exempt under sec. 528 of SMCRA.

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and that there is no violation of the 10th and 11th amendments to the United States Constitution.

[1] Section 703(a) of SMCRA, 30 U.S.C. § 1293(a) (1982), which applicant seeks to invoke, provides that "[n]o person" shall discriminate against any employee by reason of his participation in any proceeding under SMCRA. Any employee who believes he has been illegally discriminated against under that statutory provision may, under the provisions of section 703(b) of SMCRA, 30 U.S.C. § 1293(b) (1982), "apply to the Secretary [of the Interior]" for a review of such alleged discrimination, and the Secretary shall investigate and take certain action as a result of that investigation, including ordering a violating party to engage in "affirmative action to abate the violation." Section 701 of SMCRA, 30 U.S.C. § 1291 (1982), defines the term "person" for "the purposes of the Act." That provision states: "[P]erson' means an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization." 30 U.S.C. § 1291(19) (1982).

We conclude that the term "person" for purposes of SMCRA, including section 703, is clearly defined by the statute. The statutory definition does not specifically include a state or any agency of a state and there is no cited term which arguably encompasses such an entity. As the Court in *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979), stated, quoting from 2A Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978), "[a] definition which declares what a term 'means' * * * excludes any meaning that is not stated." Thus, the term "person" in SMCRA would exclude states or their agencies from its definition. In contrast, the court in *Hustead v. Norwood*, 529 F. Supp. 323 (S.D. Fla. 1981), concluded a state is a "person" under the Freedom of Information Act because the term is specifically defined at 5 U.S.C. § 551(1) and (2) (1982), to include a "public * * * organization" other than a Federal agency. See also 15 U.S.C. § 78c(a)(9) (1982); 42 U.S.C. § 6903(15) (1982).

In *United States v. United Mine Workers of America*, 330 U.S. 258, 275 (1947), the Supreme Court concluded that the term "persons" in the Norris-La Guardia Act did not include the United States, stating that the "absence of any * * * provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them," even though the United States, as an employer, was engaged in activities which could be subject to regulation by the Act. The term "persons" in the Norris-La Guardia Act was interpreted by the Court to include only "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," as the term is defined in 1 U.S.C. § 1 (1982), in the

absence of any contrary provision in the Norris-La Guardia Act.⁵ Similarly, in *In re Equity Funding Corporation of America Securities Litigation*, 416 F. Supp. 161, 198 (C.D. Cal. 1976), *aff'd*, 603 F.2d 1353 (9th Cir. 1979), the court held that Congress "literally excluded states from the class of 'persons' who can be sued under [section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982)]," where the term "person" was then defined as "an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or an unincorporated organization," at 15 U.S.C. § 78c(a)(9) (1970), *amended by*, Act of June 4, 1975, P.L. 94-29, § 3(2), 89 Stat. 97.

In contrast, in *Georgia v. Evans*, 316 U.S. 159, 161 (1942), the Court concluded that, for purposes of the Sherman Anti-Trust Act, the term "person" includes states, stating that "[w]hether the word 'person' * * * includes a State or the United States depends upon its legislative environment," citing *Ohio v. Helvering*, 292 U.S. 360, 370 (1934). See also *Sims v. United States*, 359 U.S. 108, 112 (1959). The Court also quoted from *United States v. Cooper Corp.*, *supra* at 604-05, to the effect that

there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.

The term "person" in the Sherman Anti-Trust Act, as defined by Congress, was held sufficiently broad to encompass states given the factors militating in favor of such a construction.⁶ This is properly distinguished from the term "persons" in the Norris-La Guardia Act, as interpreted by the Court in *United Mine Workers*, applying the definition in 1 U.S.C. § 1 (1982), or the term "person" in SMCRA, given the explicit definition in 30 U.S.C. § 1291(19) (1982). Applying these standards of construction, we find the explicit definition indicates the term "person" in SMCRA should be given a narrow construction, and that states are excluded from its ambit. Accordingly, as we held in *Leber v. PDER*, *supra*, "the statutory definition of a 'person' does not embrace a governmental agency." 80 IBLA at 204, 91 I.D. at 199.

Our conclusion is buttressed by another provision of SMCRA, *i.e.*, section 524, 30 U.S.C. § 1274 (1982), which provides that "[a]ny agency, unit, or instrumentality of Federal, State, or local government * * * which proposes to engage in surface coal mining operations which are subject to the requirements of this Act shall comply with the

⁵ The Act of July 30, 1947, *as amended*, 1 U.S.C. § 1 (1982), provides that the meaning of the term "person" shall be as quoted *supra*, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." The Court in *United States v. United Mine Workers of America*, *supra* at 275, also stated that "[i]n common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so," citing *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941), and *United States v. Fox*, 94 U.S. 315, 321 (1876).

⁶ Sec. 8 of the Sherman Anti-Trust Act, 15 U.S.C. § 7 (1982), merely defines the term "person" * * * to include corporations and associations." As the Court stated in *Sims v. United States*, *supra* at 112, quoting from 26 U.S.C. § 770(b) (1982), the "terms 'includes' and 'including' when used in [the definition of 'person' in 26 U.S.C. § 770(a)(1) (1982)] shall not be deemed to exclude other things otherwise within the meaning of the term defined." The Court in *Sims* concluded that the term "person" in 26 U.S.C. § 6332 (1982) encompasses states, not only because the statutory definition of "person" does not exclude States but also because it is "stated in all-inclusive terms of general application." *Sims v. United States*, *supra* at 112.

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provisions of title V." Title V of SMCRA, 30 U.S.C. §§ 1251-1279 (1982), generally sets forth environmental protection performance standards for surface coal mining operations and the regulatory scheme for achieving compliance with those standards. Thus, section 506(a) of SMCRA, 30 U.S.C. § 1256(a) (1982), provides in general that "no person" shall engage in surface coal mining operations without having obtained a permit and section 515(a) of SMCRA, 30 U.S.C. § 1265(a) (1982), provides that such a permit shall require mining operations to "meet all applicable performance standards of this Act, and such other requirements as the regulatory authority shall promulgate." Other provisions of Title V of SMCRA set forth the duties and obligations of "person[s]" subject to the regulatory provisions of Title V. *See, e.g.*, 30 U.S.C. §§ 1252(a), 1262(a) (1982). In addition, other provisions of Title V of SMCRA set forth the duties and obligations of "permittee[s]," including the maintenance of appropriate records and the reporting of information relative to mining operations to the regulatory authority. *See, e.g.*, 30 U.S.C. § 1267(b) (1982).

In view of the use of the term "person" or appropriate substitutes (e.g., permittee or applicant for permit) in Title V of SMCRA, we must conclude that section 524 of SMCRA would be superfluous if the statutory definition of "person" is already deemed to encompass states or their agencies. However, it is well settled that a statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." 2A Sands, *Sutherland Statutory Construction* § 46.06 (4th ed. 1984). Therefore, in order to give effect to section 524 of SMCRA, we conclude that it was specifically enacted because the term "person," defined in 30 U.S.C. § 1291(19) (1982), does not include states or their agencies and such entities would not otherwise be subject to the provisions of Title V. The resulting conclusion is that states are not "person[s]" for purposes of an employee protection proceeding under section 703 of SMCRA, although a state is subject to Title V of SMCRA.

We also believe this dichotomy between the regulation of surface coal mining operations under Title V of SMCRA and section 703 employee protection proceedings, in terms of the applicability of the statutory provisions to states, was preserved in the Departmental regulations implementing the statute. When originally promulgated, such regulations defined the term "person" to mean "an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization," as the term is defined in 30 U.S.C. § 1291(19) (1982). 30 CFR 700.5 (42 FR 62676 (Dec. 13, 1977)). However, effective April 12, 1979, the Department, amended 30 CFR 700.5 to provide that the term "person" also means "any agency, unit, or instrumentality of Federal, State or local government." 44 FR 15314 (Mar. 13, 1979). The Department explained the expanded definition in part as follows: "[S]pecified government agencies are included because

under Section 524 of the Act, they are subject to regulation when engaged in surface coal mining and reclamation operations and because such agencies have definite interests in actions taken under the Act." 44 FR 14912 (Mar. 13, 1979). The Department also rejected a proposed rule which limited the rule only to governmental agencies proposing to conduct surface coal mining operations and further explained the amendment as follows:

The Act mandates the involvement of and close coordination among many different agencies. Various agencies play important roles in the abandoned [lands] 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. (See Sections 503(a)(6), 504(b), 507(b)(11), 508(a)(9), 510(b)(3), 510(c), 515(b)(2)(8), 515(b)(10)(B), 515(b)(12), 515(c), 515(e) and 522 of the Act. * * *

OSM 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. [Italics added.]

44 FR 14912 (Mar. 13, 1979).

While the definition of "person" in 30 CFR 700.5 currently encompasses states and their agencies, we conclude that the broadening of the statutory definition by regulation had a very limited purpose and, moreover, must be construed to be consistent with the terms of the statute. The preamble to the revision of the regulation, quoted above, indicates that states were included in the definition of "person" because of the obligations imposed upon the states under Title V of SMCRA, by virtue of section 524 of SMCRA. Further, the preamble discloses the intent to allow state agencies to become involved in proceedings where agencies have "definite interests in actions taken under the Act." 44 FR 14912 (Mar. 13, 1979). However, the preamble only identifies two areas where states have an interest in actions taken under the Act, viz., the abandoned mine lands program under Title IV of SMCRA, 30 U.S.C. §§ 1231-1243 (1982), and the control of the environmental impacts of surface coal mining operations under Title V of SMCRA. There is no indication of an intention to subject state agencies to section 703 employee protection proceedings. Moreover, the preamble states that the amended rule is not intended to "expand upon an agency's capacity to * * * be sued." 44 FR 14912 (Mar. 13, 1979).

In addition, the regulations at 30 CFR Part 865 governing employee protection proceedings bear out this conclusion. The prefatory sentence to 30 CFR Part 700.5 states that "[a]s used throughout this chapter, the following terms have the specified meaning *except where otherwise indicated.*" (Italics added.) We conclude that the regulations in 30 CFR Part 865 (Protection of Employees) indicate that the term "person" in that context has a different meaning. 30 CFR 865.11(a) reiterates the

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statutory prohibition that "[n]o person" shall discriminate against any employee who has engaged in certain actions, including "[r]eporting alleged violations or dangers to the Secretary, the State Regulatory Authority, or the employer or his representative" (30 CFR 865.11(a)(1)(i)). This regulation indicates that a state regulatory authority, such as PDER, as well as the Secretary, is distinguished from an employer in a case of employee discrimination.

Finally, it is important to realize that Mr. Leber has other remedies available to him. Indeed, in OSM's brief in *Leber*, quoted by PDER in its brief herein at 30, OSM, which had promulgated 30 CFR 700.5, stated that:

It was not the intent of the Act, nor was it the intent of the Secretary in promulgating regulations to implement the [Act], to create a forum for review of actions taken by states in implementing and enforcing state employment policies, rules, and regulations. Existing forums, including federal and state civil service commissions (i.e., 71 P.S. 741.1 et seq.) and federal antidiscrimination statutes (i.e., 42 U.S.C. § 1983) provide the necessary safeguards and forums to protect the government employee from non-meritorious or discriminatory acts committed by a governmental employer. [Italics in original.]

The Board in *Leber v. PDER*, *supra* at 206, 91 I.D. at 200, essentially concurred in this assessment. Moreover, in *Sterling v. Clark*, Civ. No. 84-0500 (M.D. Pa. Apr. 27, 1984), which was a proceeding initiated April 12, 1984, by the individual respondents herein for a temporary restraining order preventing the Department from conducting a section 703 investigation on behalf of applicant against the plaintiffs (individual respondents herein) or PDER, Judge Rambo quoted from the Board's decision in *Leber* to the effect that any remedy available to applicant must rely on other federal or state law, in holding the Department was precluded from conducting an investigation and, hence, the case was moot.⁷

We, therefore, conclude that PDER is not a "person" for purposes of a section 703 employee protection proceeding and, thus, the Department does not have jurisdiction to adjudicate applicant's claim brought under 30 U.S.C. § 1293 (1982). We expressly modify our decision in *Leber v. PDER*, *supra*, to the extent that it indicated a state agency engaged in surface coal mining operations could be subject to a section 703 employee protection proceeding.

PDER also raises a number of constitutional challenges to the invocation of Departmental jurisdiction in the present context. However, as we have often said, it is not within the jurisdiction of this Board to adjudicate the constitutionality of an act of Congress. *E.g.*, *Andy D. Rutledge*, 82 IBLA 89 (1984).

⁷ However, Judge Rambo stated that our opinion *Leber v. PDER* had "clearly established that * * * so long as PDER's activities remain outside the scope of the expanded definition of 'person' in 30 CFR 700.5, regulation by the [Department] under section 703 is unauthorized and improper." We herein correct the intimation left by our decision in *Leber* that the expanded definition in 30 CFR 700.5 applies to section 703 proceedings. A state agency, regardless of whether it is engaged in surface coal mining operations, is not properly subject to such a proceeding.

Accordingly, 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 is reversed and the case is remanded to Judge McGuire for further proceedings consistent herewith.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

BRUCE R. HARRIS
Administrative Judge

APPEAL OF DECISION SCIENCE CONSORTIUM, INC.

IBCA-1651-2-83

Decided: *September 6, 1985*

Contract No. 14-01-0001-79-C-31, Office of Administrative Service,
Office of the Secretary.

Appellant's claim denied; Government's counterclaim allowed.

1. Contracts: Construction and Operation: Allowable Costs

A claim for overrun costs is denied where an invoice is relied upon as notice to the contracting officer of impending overrun without a showing that the contracting officer had knowledge of and encouraged the added work needed to complete contract performance.

2. Contracts: Construction and Operation: Payments

A payment in excess of the contract value after a decision by the contracting officer not to fund an overrun is found to be an erroneous payment which may be recovered by the Government.

APPEARANCES: William R. Chambers, Attorney at Law, Watt, Tieder, Killian, Toole, & Hoffar, McLean, Virginia, for Appellant; Ross Dembling, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

Appellant was a contractor under a cost-plus-fixed-fee contract, and in this appeal, seeks recovery of overrun costs of \$7,417.23. By counterclaim, the Government seeks recovery of \$7,654 alleged to have been overpaid in error.

On September 28, 1979, appellant Decision Science Consortium, Inc. (DSC), was awarded a cost-plus-fixed-fee contract in the amount of

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\$244,732, including a fixed fee of \$15,500. The contract called for DSC to conduct a study of the future role of central and southern Africa in the supply of nonfuel minerals to the United States, with a performance period ending June 30, 1980. The contract contained the usual "Limitation of Cost" clause (LOCC) limiting the obligation of appellant to continue performance and the Government's obligation to pay for costs exceeding the specified estimated cost, unless and until the contracting officer shall have notified the contractor in writing that such estimated cost has been increased.

By letter dated June 13, 1980, DSC informed the Government that the estimated cost ceiling was not sufficient for completion of performance and that an additional \$35,000 would be required. Apparently, in lieu of a written response, DSC was requested orally to submit a modification proposal. This was provided by DSC by letter dated July 11, 1980, in the amount of \$34,564. The Government forwarded copies of Modification No. 1 on July 15, 1980, to DSC for execution. The modification increased the total contract amount by \$34,564 to \$279,296 and extended the performance time for 2 months to August 31, 1980. A fully executed copy of the modification was forwarded to DSC by letter of July 28, 1980.

Under date of August 28, 1980, DSC transmitted voucher 13 in the amount of \$13,406.72. The status of costs incurred versus the contract cost ceiling analysis on the voucher showed that expended costs were only \$744.85 below the cost ceiling. DSC contends that voucher 13 was sent to the contracting officer and received by him prior to September 4, 1980, constituting notice of an imminent cost overrun on the contract. The address on the voucher is "Office of Minerals Policy and Research Analysis" (Appeal File (AF) 3 at 65), which was the technical project office, rather than the contracting officer's address (AF 16 at 154). By letter dated October 21, 1980 (AF 3 at 79), DSC wrote the contracting officer seeking additional funding for the completion of the project because excess costs were significantly over the estimated cost ceiling. By letter dated November 14, 1980 (AF 11 at 132), DSC furnished the contracting officer a status report on deliverable items and an estimate of the effort and cost to complete the contract. These items had apparently been requested by the contracting officer in a meeting on November 12, 1980. The estimated additional cost to complete was \$29,321.

In response to DSC's November 14 letter, the contracting officer wrote DSC on November 26, 1980, to "submit *all* written products (deliverable items) completed to date, at no additional cost, in final or draft format, to this office by close of business December 1, 1980." (Italics in original.) On December 1, 1980, DSC complied, stating in the transmittal that the written products include products resulting from work performed after the exhaustion of contract funds. The letter requests recovery of additional costs incurred in working toward the

completion of these products (beyond work covered in voucher 13). By letter of January 19, 1981, the contracting officer responded that there were no additional funds available for completing deliverables under the contract and that the remaining products in various stages of completion would be accepted "as is." DSC was advised to discontinue efforts under the contract unless directed by the undersigned.

Regarding the desire of DSC to recover costs expended in excess of the cost ceiling, the contracting officer requested the submission of a final voucher to be supported by a statement of cost for the performance of the contract and claims to constitute allowable cost. He stated further that "Upon receipt of the voucher, we will, as promptly as possible, negotiate a reasonable settlement for contract close-out."

DSC submitted voucher 14 in the amount of \$19,510.64 on January 23, 1981 (AF 8 at 126). This voucher omitted the fixed fee, but showed that costs claimed exceeded the estimated costs in the contract by \$14,700.11. At the request of the Government, DSC submitted a revised voucher 14 on March 16, 1981, in the amount of \$4,810.53, representing the unbilled portion of the funds in the contract (AF 26 at 169). A check was issued to DSC in the amount of \$16,240.60 on June 3, 1981. By letter dated February 9, 1982, the Government fiscal office notified DSC that the amount of the check should have been \$4,810.53 in payment of the revised voucher 14 and requested repayment of the excess of \$11,430.07. DSC responded by letter of February 23, 1982, to the effect that the amount of the check received was considered to be the reasonable settlement referred to in the contracting officer's letter of January 19, 1981, except for adjustments upon establishing final overhead rates. Voucher 15 dated July 28, 1982, was submitted by DSC in the amount of \$7,417.23, representing the remainder of the claimed overrun, which was shown as \$16,522.30.

By letter dated August 10, 1982, the contracting officer advised DSC of the allowance of certain costs based on the audit report and the establishment of final overhead rates in a total amount of \$280,747, including costs and fixed fee. This amount exceeded the contract amount by \$1,451, apparently the amount by which the final overhead rates exceeded the provisional payments. The letter reduced the demand for refund of overpayments to \$7,654. Appellant claims entitlement to the remainder of the overrun, beyond the payments by the Government, in the amount of \$7,417.23.

Discussion

Appellant recognized the necessity to show compliance with the requirements of the LOCC to give the Government advance notice of imminent overruns. DSC claims that such notice was given by the transmittal of voucher 13 dated August 28 showing an imminent overrun. Appellant also argues that the manner of funding the first overrun, the continued acceptance of its performance and items produced with the excess costs, the tardy order to stop work, and the promise of the contracting officer to negotiate a settlement of the costs

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were conduct by the Government indicating that the second overrun would be funded. The Government contends the voucher 13 was not received by the Government until October and was not timely notice of the overrun, and that even had there been timely notice, appellant was not permitted by the LOCC to proceed to incur cost without the written direction of the contracting officer. Regarding the alleged additional work performed, the Government points to the lack of specificity regarding who may have ordered it and the fact that the contracting officer did not direct such added work or ratify any such action by any other Government representative.

In support of its claim of entitlement to funding of the overrun costs, appellant relies primarily on two cases: *Wind Ship Development Corp.*, DOT CAB No. 1215, 83-1 BCA 16,135 (1982); and *Consolidated Electrodynamics Corp.*, ASBCA No. 6732, 63 BCA 3806 (1963). In the *Wind Ship* case, written notice of an expected overrun was provided on September 3, 1980, in a monthly progress report to the contracting officer's technical representative, and this was found to be sufficient to notify the contracting officer of the impending overrun. Thereafter, the contractor continued work in hopes that its request for overrun funds would be granted. Despite awareness that the contractor was continuing work with its own funds, the project office had determined not to make additional funds available. However, a successor contracting officer wrote the contractor on February 3, 1981, responding to the request for funds to complete the work, advising that on claims of this type, decisions were generally deferred until the work was complete and audited. The contractor was requested to submit a claim for the cumulative costs incurred after completion. This letter was found to be a sufficient affirmative decision to fund the overrun on which the contractor could rely to complete the work, and be paid retroactively and prospectively for the overrun.

In *Consolidated*, the contractor had given timely notice of a first overrun and had received contract amendments funding the overrun about 90 days later on a cost reimbursement production contract. Subsequently, the contractor advised of another overrun already incurred. By stipulation, the parties acknowledged that 38 of 84 delivered units were shipped to and accepted by the Government after knowledge that the contract funds had been exhausted. Work was later ordered to be stopped and the contract was terminated for convenience. The second overrun was allowed in the termination settlement upon a finding that the contracting officer's conduct led the contractor to believe that every effort was being made to fund the overrun, and the continued acceptance of shipment was consistent with the intention to fund the overrun.

In the *Wind Ship* and *Consolidated* cases, there was both timely notice of the impending overrun and action by the Government to encourage continued performance with the expectation that the

overrun would be funded. Here, the contract performance period was specified to end on August 31, 1980, and the invoice relied on for notice is dated August 28, 1980. The invoice was addressed to the technical officer on the project. It is not clear when the invoice was received by the Government. Appellant contends that it was received on September 4 or September 8, and the Government claims that it was not received until sometime in October. In any event, the DSC letter of October 21, 1980, to the contracting officer is the first indication that DSC desired that the Government fund the overrun without specifying the amount of the overrun. It was not until the letter of November 14 that DSC provided an estimate of the overrun, together with a status report on the deliverable items. The action of the contracting officer was to advise that all written materials completed to date should be deliverable in their present state at no additional cost.

Appellant's position of relying on voucher 13 for notice of an overrun and alleged encouragement of performance thereafter is dependent on the knowledge imparted by the invoice respecting the status of completion of the contract work. The voucher shows the cumulative costs claimed to date and those claimed for the current period. It does not project the costs to completion of performance, but shows that only \$744.85 remained of the specified estimated costs. The contract completion date was only 3 days after the date of the voucher. Even if the contracting officer could be charged with knowledge of voucher 13 within a few days after its date, the record does not provide a basis for imputing knowledge to the contracting officer that contract completion would require several more months and additional funds. When the contracting officer became aware of the status of the work, he promptly directed that the written materials be furnished at no additional cost in their present form (final or draft format). Appellant has shown only that voucher 13 indicates that the estimated costs specified in the contract were nearly exhausted. He has not shown that the contracting officer knew or had reason to know that this meant that completion of the contract would involve an overrun. Additionally, appellant has failed to show that the contracting officer encouraged or directed added work to be performed after the funds were exhausted. Having failed to show that the contracting officer knowingly encouraged appellant to continue work after the funds were exhausted, the work produced with contractor's funds that was included in the delivered products becomes that of a volunteer. The cases cited by appellant are clearly distinguishable because in both cases, there was knowledge of the overrun, the status of the uncompleted work, and the encouragement to continue performance.

Regarding the contracting officer's letter of January 19, 1981, the reference to a final settlement cannot be given the effect of the letter in *Wind Ship*. There, the contracting officer advised that settlement of the claimed costs would be considered only after contract completion. Here, the contracting officer advised that there were no additional funds and directed DSC to discontinue contract performance.

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Consequently, there was no prospective or retroactive approval of the overrun on which appellant could rely. Therefore, we find there was no express or implied approval of the overrun.

Government Counterclaim

Appellant contends that the Government is estopped from claiming that DSC was overpaid or denying the actions of its agents within the scope of their authority which are relied on by others to their detriment and cites *Dana Corporation v. United States*, 200 Ct. Cl. 200 (1972). DSC's reading of the *Dana* case hardly supports its contention. There, the contracting officer knew the contractor was performing extra work for which it expected to be paid, and after payment for some of the extra work, such payment's were stopped. The holding of the Court that if the contractor could show detrimental reliance it would be entitled to payment for the same extra work after the Government stopped paying. Here, there is no showing that the contracting officer knew that DSC was in an overrun status and continuing to work, and when he received that knowledge, he called for all deliverables "as is." DSC claims detriment in that it relied on the payment as part of the overrun and utilized the funds, and that it became more difficult to pursue its claim because employees left the firm during the 8 months before the Government claimed a refund of the money allegedly paid in error.

The overpayment undoubtedly was caused by the fact that DSC submitted voucher 14 in an amount greater than the contract value and included much of the overrun. A revised voucher was requested and intended to be paid. The submission of a voucher for an overrun rather than a claim addressed to the contracting officer was not a proper method to resolve the overrun claim, which the contracting officer had already advised in writing would not be funded. Having created the situation that resulted in the larger payment, appellant can hardly complain that his spending it was to his detriment. Further, the circumstances of the overrun and the proof of appellant's claim was not dependent on the testimony of employees who may have left the firm. Appellant has not alleged nor proven any actions of the contracting officer, the official with authority to bind the Government, indicating an approval of the overrun. The events involving actions of the contracting officer are clear from the written exchanges between the parties. Appellant does not even suggest how the testimony of departing employees may have helped to prove its overrun claim.

The initial overpayment was in the amount of \$11,430.07, which was asked to be refunded by letter of February 9, 1982. By reason of subsequent allowance of questioned costs and the fixing of final overhead rates, the claimed refund was reduced to \$7,654. Appellant contends that this reduction included a partial funding of the overrun in the amount of \$1,452, the amount by which the final overhead rates

exceeded the provisional payments. This affirmative decision of the contracting officer to allow an increase in overhead rates beyond the contract value cannot be said to extend to a reversal of his written decision to fund the overrun. There is logic to the allowance of the overhead rate differential because the finally determined rates apply to all of the direct labor for the life of the contract, whereas the claimed overrun relates only to the added work done by the contractor without authorized funding.

Erroneous payments by agents of the United States, whether by error of fact or of law, may be recovered by the Government. *See Stone v. United States*, 286 F.2d 56 (1961). The record is devoid of any intent of the contracting officer to fund the overrun and therefore, we find that the payment to appellant was in error.

Conclusion

Having found that the contracting officer did not approve the overrun or direct or authorize appellant to perform added work after funds were exhausted, appellant's claim for the overrun is denied. Having found that the payment to appellant was in error, the Government's counterclaim is allowed in the amount of \$7,654.

RUSSELL C. LYNCH
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

APPEAL OF MAXIMA CORP.

IBCA-1828

Decided: *September 10, 1985*

Contract No. 68-01-6466, Environmental Protection Agency.

Cross Motions for Summary Judgment Denied.

**Contracts: Construction and Operation: Actions of Parties--Contracts:
Construction and Operation: Contracting Officer--Contracts:
Construction and Operation: Intent of Parties--Contracts:
Construction and Operation: Modification of Contracts: Generally--
Contracts: Construction and Operation: Payments--Rules of Practice:
Appeals: Motions**

Cross motions for summary judgment are denied where the Board finds appellant's claim of a new valid and consummated agreement will require the resolution of disputed questions of material fact in a hearing ordered by the Board.

APPEARANCES: Joe R. Reeder, Attorney at Law, Patton, Boggs, & Blow, Washington, D.C., for Appellant; Richard Feldman,