UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior - - - - - - Bruce Babbitt

Office of Hearings and Appeals - - - - - Barry E. Hill, Director

Office of the Solicitor - - - - - John D. Leshy, 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 to December 31, 1994. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during this period.

The Honorable Bruce Babbitt served as Secretary of the Interior; Ms. Bonnie Cohen, Ms. Ada Deer, Ms. Elizabeth Ann Rieke, and Messrs. Bob Armstrong, George T. Frampton, and Leslie M. Turner, as Assistant Secretaries of the Interior; Mr. John D. Leshy served as Solicitor; and Mr. Paul Smyth served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "101 I.D."

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Opinion of Solicitor, M-36241 (Sept. 22, 1954); overruled to extent inconsistent, 85 I.D. 433.

Opinion of Solicitor, M-36345 (May 4, 1956); overruled, 84 I.D. 905.

Opinion of Solicitor, M-36378 (Jan. 9, 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.

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

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Opinion of Solicitor, M-36531 (Oct. 27, 1958); (Supp.) (July 20, 1959); overruled, 69 I.D. 110.

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

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

Phillips, Vance W., 14 IBLA 70; modified, 19 IBLA 211.

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

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

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

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Simpson, Robert E., A-4167 (June 22, 1970); overruled to extent inconsistent, 31 IBLA 72, 84 I.D. 309.

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

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Southern Utah Wilderness Alliance, 100 IBLA 63; overruled, Utah Chapter of the Sierra Club, 121 IBLA 1, 98 I.D. 267.

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

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U.S. *v.* Melluzzo, 76 I.D. 181; reconsideration, 1 IBLA 37, 77 I.D. 172.

U.S. *v.* Mineco, 127 IBLA 181 (1994); recon. dismissed, 130 IBLA 314 (1994).

U.S. *v.* Mouat, 60 I.D. 473; modified, 61 L.D. 289.

U.S. *v.* O'Leary, 63 I.D. 341; distinguished, 64 I.D. 210.

U.S. *v.* Swanson, 34 IBLA 25; modified, 93 IBLA 1, 93 I.D. 288.

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

Utah Wilderness Ass'n (I), 72 IBLA 125; affirmed in part, *rev'd* in part, 86 IBLA 89.

Utah Wilderness Assn, 91 IBLA 124; overruled, Utah Chapter of the Sierra Club, 121 IBLA 1, 98 I.D. 267.

Veach, 46 L.D. 496; overruled so far as in conflict, 49 L.D. 461 (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.

Virginia Fuels, Inc., 4 IBSMA 185, 89 I.D. 604; modified to extent inconsistent, 74 IBLA 170.

Vradenburg, Heirs of *v.* Orr, 25 L.D. 323; overruled, 38 L.D. 253.

Wagoner *v.* Hanson, 50 L.D. 355; overruled, 56 I.D. 325.

Wahe, John, 41 L.D. 127; modified, 41 L.D. 636.

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.

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

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

Welch *v.* Minneapolis Area Director, 16 IBLA 180; *rev'd*, 17 IBIA 56.

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; recon. denied, 48 IBLA 259; overruled in pertinent part, 87 I.D. 27.

Wexpro Co., 90 IBLA 394; overruled, Celsius Energy Co., 99 IBLA 54, 94 I.D. 394.

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

Wheeler, William D., 30 L.D. 355; distinguished & overruled, 56 I.D. 73.

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

White, Sarah V., 40 L.D. 630; overruled in part, 46 L.D. 55.

Whitten *v.* Read, 40 L.D. 253; 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 I.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.

Williamette 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.* Smith's Heirs, 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, 70 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, 1875 edition, 1 volume; 1882 edition, 2 volumes; 1890 edition, 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; and "I.D." to Decisions of the Department of the Interior, Vols. 53 to current volume.—Editor.

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

APPEAL OF BLACKWELL ENGINEERING

IBCA–2620 Decided: *January 14, 1994*

Contract No. EC68–CT8–13651

Office of Surface Mining Reclamation and Enforcement; Sustained

1. Contracts: Performance or Default: Release and Settlement

When, under a contract to provide inspection, site survey, and other services to the Government in connection with the Government's contract with another contractor, appellant, by separate cover letter, excepted its claim for extra survey work from a final modification containing a release of claims, and the Government did not dispute the exception, appellant did not waive its claim by signing the modification.

2. Contracts: Construction and Operation: Contract Clauses—Contracts: Disputes and Remedies: Equitable Adjustments

Under the relevant part of the Responsibility of the Architect-Engineer Contractor clause in appellant's contract, it was responsible only for errors or deficiencies in its services or for damages caused by its negligent performance. The Board found that appellant was entitled to recover its additional cost for re-establishing a vandalized survey line because the vandalism was not an error or deficiency in its work; the Government had not met its burden to prove negligence, of which there was no evidence; and the COTR had requested and approved of the work, which was an administrative matter within his purview.

APPEARANCES: W. W. Blackwell, P.E., *pro se*, Blackwell Engineering, Lexington, Kentucky, for Appellant; Tara D. Campbell, Department Counsel, Pittsburgh, Pennsylvania, for the Government.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

Appellant Blackwell Engineering, which performed inspection and survey services for the Office of Surface Mining Reclamation and Enforcement (OSM) under a professional services architect-engineer-type contract, has timely appealed under the Contract Disputes Act (CDA), 41 U.S.C. § 601, *et seq.*, from the contracting officer's decision denying its $400 claim for the cost of replacing stakes removed by vandals and of re-establishing a survey line.

By order dated November 15, 1993, the Board reminded the parties of the benefits of settlement or alternative dispute resolution of an appeal such as this. However, the parties have determined to submit the appeal for decision on the record. Appellant has filed a detailed complaint, with exhibits, and a submission in the nature of a brief. The Government rests upon its answer (largely denials of the complaint's allegations) and upon the appeal file.

Based upon the nature of appellant's contract and the record, the appeal is sustained.

Findings of Fact

1. Although the *pro se* appellant's statements of fact are not contained in an affidavit or declaration, most are documented in the appeal file. Further, its owner and representative, Mr. Blackwell, has applied his registered professional engineer's seal to each of his submissions and the Board has found nothing in the record to lead it to doubt Mr. Blackwell's credibility. Although, in its answer, it denied certain of appellant's allegations and stated that it lacked knowledge sufficient to form a belief as to alleged vandalism, the Government has not submitted any affidavits or declarations or other evidence to controvert appellant's representations. Thus, the Board makes the specific finding that the record supports that Mr. Blackwell is credible and all issues of credibility are resolved in appellant's favor.

2. Effective August 31, 1988, OSM and appellant entered into the above competitive, negotiated, total small business set aside contract. Before signature, the proposed contract was at a "not-to-exceed total estimated cost" of $14,252.40. This was changed to $12,572.40 upon signature and increased by modifications due to additional work to $19,272.70. As the contract was modified, work was to be completed by December 23, 1988. (The contract is contained at Appeal File (AF)–2A)).

3. Appellant was to provide inspection, site survey and photographic documentation services to ensure accuracy of quantities, dimensions and grades under an OSM construction contract with another contractor on a $300,000 (or more) project to reclaim an abandoned coal refuse pile and demolish coal mine structures at the Gage 10 site in Tuscola County, Michigan. Appellant's contract amount was determined by type and quantity of services provided and unit price for each (AF–1; AF–2A; AF–2E).

4. Under "Inspector" activities, appellant was to perform construction engineering, inspection and monitoring services in connection with the construction contract, as requested or designated by the Contracting Officer's Technical Representative (COTR), Mr. Rolland Maits.

5. Under "Site Survey" activities, the contract required appellant to perform "[o]ne complete site survey, as requested by the COTR." The work included establishing "an initial baseline" and cross sections and/or utilizing existing baseline data to provide subsequent cross sections and quantity estimates. Payment was to be made for the establishment

of the initial baseline and cross section development as a lump sum. The price for the agreed-upon one site survey was $3,000. Payment for each subsequent survey was to be made on the basis of each one performed and accepted.

6. Contract Section E–Inspection and Acceptance, provided that "[i]nspection and final acceptance of all items shall be accomplished by the Contracting Officer or his duly authorized representative."

7. Under Section G–Contract Administration, ¶ 2, the COTR was responsible for administering the contract work; nothing deviating from the contract's terms was to be binding upon the Government unless formalized in writing by the contracting officer; and, on all matters pertaining to the contract's terms, appellant was to communicate with the contracting officer. Section G, ¶ 3, Modification Authority, provided that the contracting officer was the only one authorized to modify the contract.

8. Under Section B–Prices/Costs and Payment, payment was to be made after acceptance and approval by the contracting officer of invoices for services rendered.

9. The contract incorporated miscellaneous Federal Acquisition Regulation (FAR) clauses by reference, including the Disputes clause, FAR 52.233–1 (Alternate I) (APR 1984) (48 CFR 52.233–1). With regard to claims under $50,000, that clause provided in pertinent part that:

> (c) "Claim," * * * [an] * * * invoice * * * that is not in dispute when submitted is not a claim under the [CDA]. The submission may be converted to a claim * * * by complying with the submission * * * requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.
>
> (d) (1) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision.

The contract did not include or incorporate a Permits and Responsibilities Clause, FAR § 52.236–7 (48 CFR 52.236–7).[1]

10. Under Section H–Special Contract Requirements, the contract provided at ¶ 4, Contract Clauses (General Provisions) that "[t]he applicable Contract Clauses contained in *General Provisions for Fixed Price Architect-Engineer Contracts* are hereby incorporated into this contract." One of those clauses was FAR § 52.236–23 (48 CFR 52.236–23), Responsibility of the Architect-Engineer Contractor (APR 1984), which provided in part:

> (a) The Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the Contractor under this contract. The Contractor shall, without additional compensation, correct or revise any errors or deficiencies in its designs, drawings, specifications, and other services.

---

[1] The Permits and Responsibilities clause (APR 1984) applicable at the time of the contract provided in part:

"The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence * * *. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

(b) Neither the Government's review, approval or acceptance of, nor payment for, the services required under this contract shall be construed to operate as a waiver of any rights under this contract or of any cause of action arising out of the performance of this contract, and the Contractor shall be and remain liable to the Government in accordance with applicable law for all damages to the Government caused by the Contractor's negligent performance of any of the services furnished under this contract.

11. On September 14, 1988, appellant established the west baseline. The west boundary stakes subsequently were vandalized by locals who wanted souvenirs. On September 26, 1988, Mr. Blackwell telephoned the COTR to inform him of the vandalism, and stated that the cost to re-establish the west line would be $400. The COTR agreed that $400 was a reasonable fee and arrangements were made to notify the contracting officer. On September 27, 1988, the contracting officer was notified (AF–1; AF–2B; AF–2C; see also notice of appeal; complaint; appellant's letter to Board dated Nov. 8, 1993, deemed to be its brief).

12. On September 27, 1988, the COTR telephoned Mr. Blackwell to inform him that the contracting officer had not approved payment of $400 to have the west boundary line re-established. Mr. Blackwell informed the COTR that he had assumed authorization would ensue and that he had 75 percent of the line in place. Mr. Blackwell recorded in his log of the call that the COTR was not pleased with the contracting officer's refusal to pay and that they would talk about it on September 28, 1988. On September 28, 1988, as recorded in Mr. Blackwell's daily report, the COTR reviewed the site (AF–2B; complaint ¶ 4).

13. On October 2, 1988, Mr. Blackwell submitted a weekly report to the contracting officer noting, among problems for the week ending October 1, 1988, that "[l]ocals removed west boundry [sic] line—OSM notified; contracting refuses to pay to have line re-established. COTR DISAGREED." *Id.* (capitals in original).

14. On October 9, 1988, Blackwell submitted to the contracting officer, Invoice No. 3788, which among other charges, contained a demand for the $400 re-survey fee. The $400 portion of this invoice was not a routine request for payment, but constituted a disputed claim.[2]

15. On October 14, 1988, the COTR advised Mr. Blackwell to invoice separately for the $400 west baseline work. On October 15, the contracting officer approved the earlier October 9 invoice, except for the $400 charge; and by invoice No. 3988 dated October 17, 1988, Mr. Blackwell billed separately for that charge, as instructed (AF–2B; complaint, ¶ 3).

16. All work was completed and accepted by OSM as satisfactory on December 10, 1988 (AF–2A).

17. On December 16, 1988, the COTR executed AML Project Status Sheet #12, recording: "Based upon my review of the attached invoice [No. 3988], I recommend payment of $400" (AF–2B).

[2] No explicit demand for a final contracting officer's decision is necessary. *Transamerica Insurance Corp.* v. *United States*, 973 F.2d 1572 (Fed. Cir. 1992).

18. In an undated memorandum to the file concerning contract closeout, which noted that the COTR had accepted "all services" as of December 10, 1988, the contracting officer wrote that the COTR had not accepted the original staking because he had not been on site to inspect stake placement, and that it was "not known by [OSM] whether the stakes were actually placed and stolen." He added that the contracting officer had not authorized the $400, that "[i]n view of the above, the request should be denied," and that he had discussed the matter with legal counsel, who had concurred (AF–2E).

19. By letter dated January 6, 1989, the contracting officer informed Mr. Blackwell that his request for $400 for re-establishing the west baseline was denied because the original stakes had not been accepted by the COTR, because he had not been on site, and because legal counsel contended that the inspector was responsible for maintaining the stakes throughout the project performance period. The letter enclosed a final contract modification depicting accepted work quantities. Mr. Blackwell was instructed to sign and return the modification to the contracting officer for execution so that outstanding invoices could be processed for payment. The modification contained a release of claims "arising out of or relating to the above additional work." The re-establishment of the west baseline was not specifically, or clearly, included in the referenced "additional work." Based upon the contracting officer's undated closeout memorandum, the additional work mentioned appears to have been extra inspection days necessary beyond those originally estimated by OSM and additional photographic work (AF–2A; AF–2D; AF–2E).

20. On January 17, 1989, Mr. Blackwell telephoned the COTR. Mr. Blackwell's notes of the call record the COTR's reaction:

1) Thought Payment Processed
2) Not Aware—Shocked
3) Lawyers Did Not Talk To Him W/R Baseline Charges
4) Should Get The Money Cuz He OK'ed Invoice

Complaint, Exhs. 4/5).

21. By letter dated January 17, 1989, to the contracting officer, Mr. Blackwell memorialized his telephone conversation with the contracting officer of that day wherein he had noted that he was signing the final modification, excepting from the release of claims appellant's claim for $400 (AF–2B). The contracting officer signed the modification on January 19, 1989. There is no evidence in the record of any question or dispute by him as to the effectiveness of appellant's exception to the release of claims.

22. On January 18, 1989, the contracting officer issued his final decision denying appellant's claim. The decision was essentially the same as his January 6 letter, with the addition of CDA appeal rights (AF–2D). This appeal ensued (AF–2F).

Discussion

In appellant's notice of appeal, Mr. Blackwell stated that "[t]here is nothing in the contract inferring that I 'babysit' any survey stakes" and in the complaint he summarized his contentions:

There is no statement in my contract concerning the contension [sic] [of] * * * legal counsel * * * [that] a company would be respondsible [sic] for survey points throughout the project time.

* * * I completed the work. It was accepted and approved by the COTR; therefore, I am asking for the $400.00 and interest since [the 10/9/88 invoice date] * * *.

Mr. Blackwell has identified the issue in this appeal: whether, under the contract, appellant should be charged with the loss of the survey stakes, or whether OSM should compensate appellant for the extra work performed. We find in favor of appellant for the following reasons.

[1] Preliminarily, even if the release of claims contained in the final contract modification had been intended to cover appellant's $400 claim (and we do not so interpret it), OSM has not disputed appellant's exception from the release, recorded in a separate cover letter (FF 21), and appellant did not waive its claim by signing the modification. *Sermor, Inc.*, ASBCA No. 32824, *et al.*, —— BCA ¶ —— , slip op. at 7–8 (Aug. 16, 1993); *Farnsworth & Chambers Co.*, ASBCA No. 7130, 1962 BCA ¶ 3499.

[2] The Government would hold appellant responsible for its survey staking until completion of the contract. However, the contract did not contain a Permits and Responsibilities clause, which provides in part that the contractor is responsible for all work performed until completion and acceptance of the entire work, except for any completed, accepted unit of work (see FF 9, note 1).

Rather, the contract incorporated the Responsibility of the Architect-Engineer Contractor (APR 1984) clause, FAR § 52.236–23 (48 CFR 52.236–23), which provided in part:

(a) * * * The Contractor shall, without additional compensation, correct or revise *any errors or deficiencies in* its designs, drawings, specifications, and other services.

(b) Neither the Government's review, approval or acceptance of, nor payment for, the services required under this contract shall be construed to operate as a waiver of any rights under this contract or of any cause of action arising out of the performance of this contract, and the Contractor shall be and remain liable to the Government in accordance with applicable law for all damages to the Government *caused by the Contractor's negligent performance of any of the services furnished under this contract*. [Italics added.]

(FF 10).

Based upon our overall finding that the record supports appellant's credibility, we have found that the survey stakes were vandalized, as alleged by appellant (FF 1, 11). Moreover, although not entirely clear, it appears that the staking might have had to have been redone anyway, at least in part, due to a design error chargeable to the Government (FF 11).

In any event, the vandalism cannot be deemed an "error" or a "deficiency" in appellant's services under the Responsibility of the

Architect-Engineer Contractor clause, nor is there any evidence in the record of negligence by appellant. The Government bears the burden to prove any such negligence and it has failed entirely to do so. *See*, by analogy, *J.A.K. Construction Co.*, ASBCA No. 43099, —— BCA ¶ ——, slip op. at 6 (Nov. 30, 1993) (Government bears burden to show that damaged work occurred because of "appellant's failure to fulfill a contractual responsibility or because of appellant's negligence"; further, case involved Permits and Responsibilities clause and other contractor responsibility clauses more narrow than the Responsibility of the Architect-Engineer clause here).

Although, unlike under the Permits and Responsibilities clause, we need not find that a unit of work was accepted by the Government in order to hold it responsible for loss or damage to it, we have found as fact that the original stakes were placed (FF 1, 11). Under Section E of the contract, Inspection and Acceptance, inspection and final acceptance of all items was to be done by the contracting officer or his duly authorized representative (FF 6). The record reflects that the COTR was the contracting officer's authorized representative concerning acceptance of the work (see, *e.g.*, FF 18). There is no evidence of record from the COTR that he had not accepted the work and no affidavit from the contracting officer on this issue.

Furthermore, the fact that the COTR recommended approval of appellant's $400 invoice is strong evidence that the COTR believed that the original work had been accomplished; that OSM should pay for the re-work; and that the price was fair (FF 17; see also FF 11–16, 20).

The record establishes that the contract's unit work quantities were estimates and that the Government intended to pay for additional work required (see FF 19). The contract called for only one detailed survey, as requested by the COTR, and was so priced (FF 5). Payment for any subsequent surveys was to be made upon the basis of each one performed and accepted. In this case, the COTR can be deemed to have requested and authorized the re-survey work, at least part of which appears to have been required due to Government design error, and none of which was due to appellant's fault (FF 11). This was not a deviation from contract terms, or a contract modification requiring contracting officer approval; it was an administrative matter within the purview of the COTR.Therefore, appellant is entitled to the equitable adjustment sought.

Decision

The appeal is sustained in the amount of $400, plus interest, computed from October 9, 1988, in accordance with the Contract Disputes Act of 1978.

CHERYL SCOTT ROME
Acting Chief Administrative Judge

I CONCUR:

BERNARD V. PARRETTE
Administrative Judge

MESA OPERATING LIMITED PARTNERSHIP (ON RECONSIDERATION)

128 IBLA 174 Decided: *February 3, 1994*

Petition for reconsideration of a Board decision reversing a decision by the Deputy to the Assistant Secretary—Indian Affairs (Operations) denying an appeal requiring payment of underpaid royalties and recalculation of royalties due.

Petition granted; Board decision modified in part.

1. Administrative Practice—Administrative Procedure: Generally—Rules of Practice: Appeals: Extensions of Time—Rules of Practice: Appeals: Reconsideration

An extension of time for filing a petition for reconsideration may be granted in accordance with 43 CFR 4.22(f).

2. Federal Oil and Gas Royalty Management Act of 1982: Generally—Federal Oil and Gas Royalty Management Act of 1982: Royalties—Indians: Leases and Permits: Assignments—Indians: Mineral Resources: Oil and Gas: Allotted Lands—Oil and Gas Leases: Assignments and Transfers—Oil and Gas Leases: Royalties: Payments—Rules of Practice: Evidence

In the absence of a regulation and a PIF explicitly stating that filing the form constitutes the assumption of the lessee's obligation to pay royalty by the person filing it, a document evidencing the person's agreement to accept this responsibility is necessary.

3.Federal Oil and Gas Royalty Management Act of 1982: Generally—Federal Oil and Gas Royalty Management Act of 1982: Royalties—Indians: Leases and Permits: Assignments—Indians: Mineral Resources: Oil and Gas: Allotted Lands—Oil and Gas Leases: Assignments and Transfers—Oil and Gas Leases: Royalties: Payments—Rules of Practice: Evidence

A division order may constitute evidence that the obligation to pay royalty has been assigned.

4. Administrative Procedure: Administrative Record—Administrative Procedure: Administrative Review—Appeals: Generally—Rules of Practice: Appeals: Generally

An administrative decision is properly set aside and remanded if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for decision.

APPEARANCES: Peter Schaumberg, Esq., Howard W. Chalker, Esq., and Geoffrey Heath, Esq., Office of tbe Solicitor, Washington, D.C., for the Minerals Management Service;

Jerry E. Rothrock, Esq., and Michael S. Ray, Esq., Washington, D.C., for Mesa Operating Limited Partnership.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

The Minerals Management Service (MMS) has filed a petition for reconsideration of our decision in *Mesa Operating Limited Partnership*, 125 IBLA 28, 99 I.D. 274 (1992) (*Mesa*).

MMS initially requested an extension of time to file its petition. MMS' request stated:

> This decision upset a longstanding practice of requiring a payor, who pays royalties due on a lease on behalf of other payors, to pay underpaid royalties found to be due for those payors' interests, when the payor has identified itself to the MMS (on the Payor Information Form) as the payor for those interests. Counsel for MMS has been required to contact various MMS offices in an effort to determine the impact of this decision on MMS's royalty collections, to determine what MMS's response to the * * * decision will be, and to locate additional documents to support a Petition for Reconsideration.

(Request for Extension of Time to File a Petition for Reconsideration at 1).

[1] The regulation governing reconsideration, 43 CFR 4.403, provides that a petition for reconsideration "shall be filed within 60 days after the date of the decision. The petition shall, at the time of filing, state with particularity the error claimed and include all arguments and supporting documents." Because of this language, we are as a matter of practice reluctant to grant an extension of time for filing a petition for reconsideration. We are authorized to do so under 43 CFR 4.22(f), however, and did so in this case.[1] Because we were not persuaded that the 30-day extension MMS requested was warranted, we granted an extension of only 2 weeks.

In our decision we held that the filing of a Payor Information Form (PIF) by a person who holds no interest in a lease does not evidence the designation of the person filing it as responsible for paying the royalty and as a "lessee" within the meaning of 30 U.S.C. § 1702(7) (1988) and 30 CFR 206.101.

> There must be a document assigning the obligation to make royalty payments, or a contract or agreement stating this obligation as there was in *Forest Oil Corp.*, [113 IBLA 30, 39 n.8, 41, 97 I.D. 11, 17 n.8, 18 (1990)]. MMS may specify the "time and manner" for a lessee to notify it of such an assignment or agreement. 30 U.S.C. § 1712(a)(2) [(1988)].

125 IBLA at 43, 99 I.D. at 282. We also held that filing PIFs and making royalty payments did not indicate that Mesa or its predecessor intended to be bound as agents by the lessees' obligation to pay royalties. 125 IBLA at 47–48, 99 I.D. at 284.

[1] 43 CFR 4.22(f)(1) provides: "The time for filing or serving any document may be extended by the Appeals Board * * * before whom the proceeding is pending, except for the time for filing a notice of appeal and except where such extension is contrary to law or regulation." 43 CFR 4.403 does not provide that an extension may not be granted for filing a petition for reconsideration. *Cf.* 43 CFR 4.411(c); 43 CFR 4.1162, 4.1302(a).

MMS argues that, when it adopted regulations implementing the Federal Oil and Gas Royalty Management Act (FOGRMA) in September 1984, it implemented the provisions of 30 U.S.C. § 1712(a) (1988), that a lessee (1) must make royalty payments in the time and manner prescribed by the Secretary and (2) must notify the Secretary of any assignment of a payment obligation under a lease in the time and manner the Secretary prescribes:

Clearly, the PIF requirement in [30 CFR] § 210.51, as explained in the preamble, and its connection with the notification of assignment of paying responsibility in § 218.52, establishes the PIF as the means for implementing the FOGRMA section 102(a) [§ 1712(a)] requirement that the Secretary be notified "of any assignment the lessee may have made of the obligation to make any royalty or other payment under a lease * * *." Therefore, the Board's holding in *Mesa* that the PIF does not constitute notice of an assignment is contrary to the regulations and published procedures. [2]

(Request for Reconsideration at 4–5).

After describing the PIF, we stated in our decision: "With these contents, the PIF cannot constitute an assignment of the obligation to pay royalty, nor is it either evidence of or notice of an assignment." 125 IBLA at 41, 99 I.D. at 281. MMS disagrees, arguing that the lease terms state the lessee's duty to pay royalties, and that, if a person other than the lessee pays royalties, it must be doing so pursuant to an agreement between the parties.

It is simply illogical to assume that a purchaser would fulfill a lessee of record's royalty obligation, or that the lessee would file nothing and pay nothing at the same time, absent some agreement from the purchaser to do so—*i.e.*, an assignment.

* * * Neither FOGRMA nor the regulations require that such an assignment be in writing. An oral agreement between the parties may be just as binding. Mesa could not assume the lessees' royalty payment responsibility unless the lessees assigned that responsibility to Mesa. Therefore, pursuant to [30 U.S.C. § 1702(7), which defines lessee as including a person who has been assigned responsibility to make royalty payment], Mesa was a lessee and responsible for complying with MMS's order to pay the additional royalties.

(Request for Reconsideration at 5.)

Finally, MMS said it

[2] MMS refers to two responses in the preamble to comments on the proposed rules. The first responds to a general comment objecting "to the burden that the rules will place on small nonoperating lessees and royalty payors, particularly the reporting and paying requirements." MMS' response states:

"Lessees and royalty payors may elect to have the operator or purchaser submit the required payments and reports to MMS. However, as required by the Act, those assuming paying and reporting obligations must comply with MMS reporting and paying requirements. Further, the lessee will remain ultimately responsible for all payments and reports from the lease. 49 FR 37336, 37337–38 (Sept. 21, 1984)."

The second response noted that five people had commented that the 60-day period under proposed sec. 218.52 for the lessee to notify MMS of its assignment of paying responsibility or of any change in paying responsibility (if anyone other than the lessee is to be responsible for paying) conflicted with the 30-day period in proposed sec. 210.51 for filing a PIF "no later than 30 days after issuance of a new lease or a change to an existing lease which changes the paying responsibility of the lease." 48 FR 42904 (Sept. 20, 1983). MMS responded that sec. 218.52 "has been amended to 30 days to conform to § 210.51 requirements. For an explanation of the 30-day requirement, see the discussion of comments on § 210.51 given above." 49 FR 37336, 37340 (Sept. 21, 1984). The discussion of comments on sec. 210.51 that MMS referred to states in part:

"The MMS's new computerized Auditing and Financial Systems (AFS) cannot properly track payment responsibilities without current and accurate Form MMS–4025 [PIF] data. Consequently, the MMS must receive these forms within 30 days as required at § 210.51. The MMS understands that all the data required on Form MMS–4025 cannot always be provided within 30 days, especially in the case of newly issued leases. Nevertheless, the MMS will require the submittal of that form with the best data available at the time of submittal (at a minimum, MMS must be told who is to be the interim designated payor). An amended resubmittal should be made at a later date when lessee/payor responsibilities are changed." 49 FR 37336, 37338 (Sept. 21, 1984).

made a further search of its files and found [two] division orders signed by the leasehold owner directing Pioneer Gas Products Company (Mesa's predecessor), pursuant to the gas sales contract, "to disburse the payments due under said Gas Contract to the payees shown below * * *." The designated payees include the royalty interests, including specifically the United States as trustee for the various Indian allottee lessors.

(Request for Reconsideration at 6). MMS also submitted a third division order dated August 22, 1986, directing Mesa to make payment for gas produced from a well on one of the leases. These division orders establish that Mesa was assigned the royalty payment responsibility by the lessee, MMS argues.

Mesa responds that MMS' petition for reconsideration should be denied because MMS has presented no extraordinary circumstances that warrant reconsideration: "The MMS, in requesting reconsideration, does little more than reiterate the same arguments that were rejected by this Board the first time around" (Opposition of Mesa Operating Limited Partnership to Request for Reconsideration of the Minerals Management Service at 3). Alternatively, Mesa argues MMS may not rely on the division orders it submitted with its petition because it does not explain why they were not produced in response to the Board's August 29, 1991, order that MMS file the lease files for the leases involved. In any event, Mesa argues, the division orders do not constitute an assignment of the obligation to pay royalties:

A division order is, in essence, a "hold harmless" agreement whereby the operator or royalty owners of a lease agree to "hold harmless" the purchaser of the oil or gas for payments made by the purchaser in the proportions set out in the division order.
8 Williams and Meyers, *Oil and Gas Law* at 334–35 (1992). These division orders are not filed with, or approved by, the Secretary as required by FOGRMA for notices of assignment, nor are they intended by the parties to be an assignment of the lessees' royalty obligation.[3] Indeed, they are not even signed by Pioneer.

[3] In any event, the division orders submitted by MMS are dated in 1982, several months before the January 12, 1983 effective date of FOGRMA. Therefore, the division orders could not possibly have been meant as assignments of royalty obligation pursuant to the requirements of that statute.

(Opposition of Mesa Operating Limited Partnership to Request for Reconsideration of the Minerals Management Service at 6).

We remain unpersuaded that 30 CFR 210.51 and 218.52 establish the PIF as notice of an assignment of the obligation to pay royalty. As proposed in 1983, 30 CFR 218.52 provided that "[t]he lessee shall notify MMS within 60 days of its assignment of paying responsibility or of any change in payment responsibility if any individual or company, other than the lessee, is to be responsible for paying the rentals or royalties * * *." 48 FR 42905 (Sept. 20, 1983). As adopted, section 218.52(a) provides: "When the lessee or revenue payor assigns any paying responsibility to any other entity, MMS must be notified within 30 days of the assignment." 30 CFR 210.51 provides:

The completed [PIF] must be filed by the party who is making the rent or royalty payment (payor) for each royalty source. [The PIF] must be filed no later than 30 days after issuance of a new lease or a modification to an existing lease which changes the paying responsibility on the lease.

It did so in substance when it was proposed. 48 FR 42904 (Sept. 20, 1983).

Although the changes in section 218.52 conformed the 60-day period to the 30-day period in section 210.51, and this was explained in the second response in the preamble to the final regulations, *supra* note 2, those changes also required a "revenue payor" as well as "a lessee" to give notice of an assignment and expanded the scope of assignments for which notice is required from rentals and royalties to "any paying responsibility." The combined effect of these changes in section 218.52 was to make the PIF serve so many purposes that its function as the means for a lessee to give notice of any assignment the lessee may have made of the obligation to make any royalty or other payment under a lease in accordance with 30 U.S.C. § 1712(a) (1988), was no longer clear, especially in view of the fact that such an assignment would not likely entail either issuance of a new lease or a modification to an existing lease, the only events that call for filing a PIF under section 210.51. MMS acknowledged this in its October 1990 statement that it planned to revise 30 CFR Part 218:

Responsibilities of Minerals Management Service include the collection of royalties, bonuses, rentals, and related revenues from Federal and Indian mineral leases. These monies are, for the most part, collected from the current designated payor on the lease. However, if MMS is unable to collect from the current payor, it must pursue collections from a prior payor(s), the lessee, or an assignee of the lease. Existing regulations are unclear as to the responsibilities and liabilities of the parties involved. Therefore, MMS is proposing to amend its regulations to clarify payor, lessee, and assignee requirements and responsibilities.

55 FR 44622 (Oct. 29, 1990).

The first response in the preamble to the 1984 regulations that MMS refers to in its Request for Reconsideration, *supra* note 2, points out it is permissible for a lessee or royalty payor to shift the burden of paying and reporting to MMS to a purchaser or operator, so long as the purchaser or payor complies with the paying and reporting regulations and the lessee remains ultimately responsible. This response helps explain why the "responsibilities and liabilities of parties involved" are unclear under the existing regulations. It does not make clear that a purchaser such as Mesa becomes liable under these regulations for a lessee's royalties if it files a PIF for the lease. Indeed, the statement in this response that the lessee will remain ultimately responsible implies the contrary.

[2] Our concern remains that neither the language of the regulations nor the PIF itself makes clear that a person who has no interest in the lease but makes royalty payments has been assigned or has agreed to assume the lessee's legal obligation to pay. We are unwilling to hold a person who has no interest in the lease responsible for such an important obligation on the basis of an oral agreement and the filing of a PIF, as MMS suggests. In the absence of a regulation and a PIF explicitly stating that filing a PIF constitutes the assumption of the

lessee's obligation to pay royalty by the person filing it, a document evidencing the person's agreement to accept this responsibility is necessary. *Phillips Petroleum Co.*, 121 IBLA 278, 284–85 (1991); *Forest Oil Co.*, 113 IBLA 30, 39, 97 I.D. 11, 17 (1990), *rev'd in part on other grounds*, 9 OHA 68, 98 I.D. 248 (1991). For that reason, we twice asked the parties to this appeal whether there were any documents in the record indicating that responsibility for paying the royalties had been assigned to or assumed by Pioneer or Mesa. 125 IBLA at 45–46, 99 I.D. at 283.

[3] We agree with Mesa that MMS submitted the division orders belatedly. We do not agree that the division orders do not indicate that the responsibility for making royalty payments was assigned to Pioneer and Mesa. A division order is "a direction and an authorization to a person who has (or will have) a fund for distribution [of proceeds of oil and gas leases] among persons entitled thereto as to the manner of distribution. A transfer order is a direction and authorization to change the distribution provided for in a division order." 4 Williams *Oil and Gas Law* § 701 (1992). As Mesa says, a division order is a means for the person responsible for distribution to protect himself against liability in the event of an improper distribution. *Id.* Usually division orders are prepared by the purchaser or other person responsible for distribution. *Id.*

MMS submitted three division orders, of which two are entitled "Directions to Pioneer Gas Products Company for Disbursement of Payments under Gas Contract." One of these applies to gas production from four wells producing from the Chester Formation, two of which are located on lands in which two of the three leases in this case are located, effective on first production. The second applies to gas production from a fifth well located on lands in which the third of the leases is located, effective October 15, 1982. The division orders are signed by the leasehold owners and state: "[P]ursuant to the provisions of the above mentioned Gas Contract, Pioneer Gas Products Company is hereby directed, until further notice, to disburse the payments due under said Gas Contract to the payees shown below in accordance with the designated fractional interest of each payee." The first division order specifies the division of interest for (1) royalty interest and excess royalty interest payees, including the United States of America in trust for several people; (2) overriding royalty interest payees; and (3) working interest payees. The second division order specifies the division of interest for two payees, a 0.833333 WI (working interest) and a 0.166667 RI (royalty interest) to the "United States of America in Trust for Willard Betrand Guy and Willdena Frances Buy Beck[,] Minerals Management Service." The third division order submitted by MMS is directed to Mesa and applies to gas deliveries beginning July 3, 1986, from a sixth well located on the same lands as the fifth well is located. It names the same payee for the royalty interest as the second division order. These documents make clear that Pioneer and Mesa are to pay the royalty and we accept them as evidence that they were assigned responsibility for paying the royalty even though they did not sign them.

[4] The decision Mesa has appealed from required Mesa to pay the amount of Pioneer's January and April 1986 underpayments and to recalculate the royalties for all other months from March 1981 to November 1988 and report any additional royalty due. However, we cannot be sure these division orders apply to the leases involved in this case, and we do not have division orders or other documents indicating that Pioneer and Mesa assumed responsibility for payment of royalties for all production from these three leases for this time period. The first division order was executed May 30, 1984, and refers to first production from four wells in the Chester Formation. We do not know when first production from these wells occurred, whether these wells are actually on the leases involved in this case, or whether there are other producing wells on these leases. The second division order refers to a single well and indicates this well is on Federal Lease #14–20–206–32354 in the SE′ of sec. 3, T. 9 N., R. 11 W., rather than Indian lease No. 607–032354, so we cannot be sure it applies to the third lease in this case. *See* 125 IBLA at 30 n.1, 99 I.D. at 275 n.1.

As a general rule, an administrative decision is properly set aside and remanded if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for decision. *Shell Offshore, Inc.*, 113 IBLA 226, 233, 97 I.D. 73, 77–78 (1990). *See also Kanawha & Hocking Coal & Coke Co.*, 112 IBLA 365, 368 (1990); *Wayne D. Klump*, 104 IBLA 164, 166 (1988); *Soderberg Rawhide Ranch Co.*, 63 IBLA 260, 261–62 (1982). We therefore set aside the September 20, 1990, decision of the Deputy to the Assistant Secretary—Indian Affairs (Operations) and remand the case for readjudication based on any documentation that is not available to us. [3]

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[3] We noted in our decision in *Mesa*, 125 IBLA at 42–43 n.16, 99 I.D. at 281–82 n.16, that MMS moved for reconsideration of our decision in *Phillips Petroleum Co.*, *supra*, setting aside the portion of MMS' decision requiring Phillips to recalculate royalties for its co-lessees because there were no PIFs or other indication in the record that Phillips was assigned or had assumed legal responsibility for its co-lessees' royalties. *See* 121 IBLA at 284–85. With its motion for reconsideration MMS filed copies of the PIFs that Phillips had submitted. After our decision in *Mesa*, MMS requested that we suspend consideration of its motion for reconsideration of *Phillips* so that it could locate documents that would indicate an assignment, and we did so. Later MMS submitted a copy of its Request for Reconsideration in *Mesa* and copies of division orders to Phillips for the leases involved. MMS observed:

"[T]he division orders expressly assign Phillips the responsibility to make royalty payments. The first page of each division order * * * states that 'Phillips shall give credit for said oil as per directions below.' Following this statement is a list of who gets credit and the division of interest. Included in each list is the royalty interest. Thus, the division order indicates that Phillips was assigned and accepted the royalty payment responsibility." (Supplemental Brief at 2).

In *Phillips*, too, where Phillips filed PIFs on behalf of its co-lessees, we hold the view that in the absence of a regulation and a PIF explicitly stating that filing a PIF constitutes the assumption of the lessee's obligation to pay royalty by the person filing it, a document evidencing the person's agreement to accept this responsibility is necessary. In *Phillips*, the division orders, on Phillips letterhead, credit the royalty interest to the Bureau of Indian Affairs for the credit of various Indian allotments effective with the first production or first run of the leases and were approved by the Area Oil and Gas Supervisor, Geological Survey, in 1975 and 1976. Because we agree these division orders assign responsibility for payment of royalties to Phillips, by order issued today we vacated the portion of our decision holding it was not apparent from the record that Phillips was assigned or had assumed legal responsibility for payment of its co-lessees' royalties. Because we did not know from the record before us whether all of these division orders remained in effect for all of the January 1979–June 1987 period MMS required Phillips to recalculate royalties on those leases, however, we remanded the case for readjudication by MMS based on its determination of those facts.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, MMS' petition for reconsideration is granted, our decision in *Mesa Operating Limited Partnership*, 125 IBLA 28, 99 I.D. 274 (1992), is modified in part so that the September 20, 1990, decision of the Deputy to the Assistant Secretary—Indian Affairs (Operations) is set aside, rather than reversed, and remanded for action consistent with this opinion.

WILL A. IRWIN
Administrative Judge

I CONCUR:

DAVID L. HUGHES
Administrative Judge

APPEALS OF MARSHALL ASSOCIATED CONTRACTORS, INC., AND COLUMBIA EXCAVATING, INC. (J.V.)

IBCA-1901, -2088 Decided: *February 15, 1994*

Contract No. 2-07-40-C0809; Contract No. 3-CC-40-01040.

Motions for Reconsideration Granted; Bureau of Reclamation.

1. Contracts: Rules of Practice: Generally—Contracts: Rules of Practice: Motions

Upon appellant's demonstration of good cause, the Board granted reconsideration of orders dismissing appeals with prejudice for failure to prosecute. The appeals previously had been dismissed without prejudice. No show cause orders had issued prior to the dismissals with prejudice; there was no reinstatement deadline for one of the appeals; the parties had agreed to delay the prosecution of the other appeal pending resolution of the first one and the Board had acquiesced; appellant had been actively pursuing its claims, albeit in other fora; and the Government had not established any specific prejudice.

2. Contracts: Rules of Practice: Generally—Contracts: Rules of Practice: Motions

The Board's Rule 4.127(a), calling for the dismissal with prejudice of certain appeals, if not reinstated within 3 years after their dismissal without prejudice, did not apply. That rule pertained to appeals, unlike those at issue, with which the Board was unable to proceed and which it was required to dismiss without prejudice for reasons beyond its control.

3. Contracts: Rules of Practice: Generally—Contracts: Rules of Practice: Motions

The Board noted that involuntary dismissals with prejudice prior to any resolution on the merits constituted a severe sanction, which was unwarranted when appellant had not acted willfully or in bad faith and had not refused to comply with any Board order.

APPEARANCES: Richard A. Franzke, Stoel, Rives, Boley, Jones, & Grey, Portland, Oregon, for Appellant; Elaine England, Department Counsel, Office of the Regional Solicitor,U.S. Department of the Interior, Salt Lake City, Utah, for the Government.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

Appellant joint venture Marshall Associated Contractors, Inc., and Columbia Excavating, Inc. (hereafter sometimes "Marshall"), has moved for reconsideration of the Board's orders of October 21 and October 27, 1993, which dismissed IBCA-1901 and IBCA-2088, respectively, for failure to prosecute. The Board's rules allow for reconsideration if, in the judgment of the Board, sufficient reason appears to grant it. Rule 4.126 (43 CFR 4.126). As yet, there has been no decision on the merits and we are not concerned with attendant substantial evidence, or newly discovered evidence, considerations. Because appellant has demonstrated good cause for reconsideration, as follows, the motions are granted and these appeals are reinstated.

The facts addressed below are based upon the current Board record or are as alleged by Marshall and uncontroverted by the Bureau of Reclamation (BOR). They are presented in the context of Marshall's motions only and do not constitute findings of fact on the merits. For purposes of this decision, we have consolidated the appeals for consideration.

I. BACKGROUND

A. IBCA-1901

This appeal was filed on December 26, 1984, from the contracting officer's December 6, 1984, final decision terminating Marshall's contract with BOR No. 2-07-40-C0809 for default. The contracting officer did not issue a final decision on Marshall's September 28, 1984, certified claim for differing site conditions, defective specifications, and time extensions.

In January 1985, Marshall and its surety negotiated what they believed to be a settlement agreement with the contracting officer which would have converted the default termination to one for convenience and paid Marshall $3.3 million. Marshall notified the Board on February 28, 1985, that its appeal had been settled and, by order dated March 6, 1985, the Board dismissed the appeal without prejudice to reinstatement "in the event the terms and conditions of the settlement are not carried out."

Marshall alleges that, in accordance with the settlement agreement, it sold its equipment by auction at the site; BOR revised its specifications for a reprocurement contract; the surety did not protest the reprocurement, in reliance upon the settlement agreement; the reprocurement contract was issued in April 1985; the contracting officer who had agreed to the settlement retired; and BOR revoked the settlement in May 1985.

BOR agrees that a "proposed" settlement was reached on the stated terms, but disputes that it was final or enforceable, alleging that the contracting officer did not have authority to enter into it.

On June 11, 1985, Marshall notified the Board that BOR had revoked the settlement and Marshall filed a complaint, which it amended on July 10, 1986, to focus on the issue of whether a settlement agreement had been reached.

The parties engaged in discovery and hearing preparation. Marshall has alleged, including by affidavit of involved counsel, that discovery and the hearing were to be on the issue of the validity of the settlement. BOR, by current counsel, who did not become counsel of record until November 22, 1993, disputes that characterization. BOR has not submitted any affidavits, however, and the record appears to support Marshall's contention.

By order dated June 1, 1987, Judge Packwood, to whom these appeals were assigned, and who is now retired, scheduled a hearing for September 14, 1987. In a September 10, 1987, telephone conference, Judge Packwood notified the parties, *sua sponte*, that, based upon his review of a letter in the appeal file, there was no valid settlement agreement; that he would not permit litigation over the issue of whether a settlement agreement had been reached; and that he would not receive any evidence concerning the issue. He agreed to allow Marshall to file an offer of proof, however, and the hearing was cancelled.

On October 23, 1987, BOR filed a Motion for Partial Summary Judgment concerning the alleged settlement. In January and February 1988, Marshall filed its offer of proof and supporting legal memorandum. Through November 1988, the parties continued to file related materials.

By order dated June 30, 1989, Judge Packwood, with the concurrence of another Board member, found that the contracting officer did not have authority to convert the termination for default to a termination for convenience. He also denied BOR's motion for partial summary judgment on the settlement agreement issue. Judge Packwood concluded:

> Although the Board will not receive or consider evidence regarding the previous settlement negotiations, if a settlement was a good idea then, it is an even better idea now. Accordingly, *the Board elects to remove this appeal from the active docket to allow the parties to explore further the possibility of settlement.* The Board does not maintain a suspense docket, so the removal is accomplished by dismissing the appeal without prejudice to reinstatement in the event that the negotiations are unsuccessful. If the parties do not agree to a settlement, any further discovery needed should be completed before reinstatement is requested, since *the appeal will be restored to the active docket only when appellant is prepared to schedule an immediate hearing on the merits of its appeal.* [Italics added.]

On October 17, 1989, Marshall filed with the Board an unopposed motion asking Judge Packwood to enter a judgment and certify for appeal the question of the contracting officer's authority to convert the default termination to one for convenience. It filed additional materials in support through December 21, 1989.

The appeal was reinstated on February 26, 1990, and by order dated April 24, 1990, Judge Packwood, with the concurrence of another Board member, rejected the procedural relief sought by appellant. He concluded:

> Accordingly, the motion to certify that a controlling question of law was involved in the Board's order of June 30, 1989, is hereby denied. This appeal, having been restored to the active docket for the purpose of this Order, is hereby returned to the inactive docket by dismissing the appeal *without prejudice to reinstatement at such time as appellant is prepared to schedule an immediate hearing on the merits of its case.* [Italics added.]

Thereafter, Marshall conferred for several months with the Department of the Interior to attempt to resolve the settlement issue. It alleges that, due to work under the reprocurement contract, the physical evidence related to its differing site condition and defective specification claims was destroyed. Especially, it judged that the time and expense of litigation on the merits was not warranted due to what it believed to have been a valid settlement. On September 19, 1991, BOR's Commissioner proposed an administrative (not a Board) hearing on the settlement question, and one was scheduled for December 18, 1991. The Commissioner later postponed the hearing and, on February 12, 1992, Marshall was informed that it would not be rescheduled and that BOR would not consider the matter further.

On November 1, 1992, BOR issued a claim for excess reprocurement costs against Marshall and its surety for over $3.3 million. On December 21, 1992, Marshall's counsel suffered a stroke and had to suspend his law practice for several months. In the meantime, in January 1993, the surety, not a party to the Board proceedings, sought a ruling in the United States District Court in Oregon against Marshall and BOR on the ground that the January 1985, alleged settlement was dispositive. It disputed BOR's reprocurement cost demand.

On August 13, 1993, the District Court ruled that it lacked subject matter jurisdiction. On August 26, 1993, Marshall and the surety appealed to the Ninth Circuit Court of Appeals from that decision. Appellant advises that those appeals have not yet been decided.

On October 29, 1993, Marshall filed a complaint in the United States Court of Federal Claims challenging BOR's reprocurement cost demand. In the meantime, on October 21, 1993, the Board, *sua sponte*, had issued its order dismissing IBCA-1901 for failure to prosecute, without a prior order to show cause. On November 17, 1993, Marshall filed a motion for reconsideration. BOR has objected and Marshall has replied.

B. IBCA-2088

Marshall filed this appeal on October 7, 1985, from the contracting officer's failure to render a decision its July 1984, certified claims for defective specifications and differing site conditions under its contract with BOR No. 3-CC-40-01040. IBCA-1901 was pending at the time, although IBCA-2088 was assigned to Judge Doane, who, like Judge Packwood, is now retired.

By order dated March 28, 1986, Judge Doane, with the concurrence of another Board member, *sua sponte* dismissed IBCA-2088 without prejudice to reinstatement because Marshall had advised that the parties would not be ready to try it before the Fall and that it had no objection to the removal of the appeal from the Board's active docket. The dismissal was without prejudice to reinstatement by either party prior to October 15, 1986. The order noted that, if neither party requested reinstatement, the appeal would be subject to dismissal with prejudice for lack of prosecution.

On October 13, 1986, Marshall requested a 90-day extension of the reinstatement period, noting that it had limited resources and that it wished to concentrate first on IBCA-1901, which involved considerably more money and with respect to which it expected to seek a dispositive ruling on entitlement. Marshall reports that it elected to pursue IBCA-1901 first because it was unable financially to pursue more than one active appeal at a time and that BOR concurred with this manner of proceeding. BOR has affirmed this agreement.

By order dated October 15, 1986, the Board extended the reinstatement period to January 15, 1987, and upon the parties' stipulation, by order dated January 12, 1987, extended the period to July 15, 1987. By order dated July 14, 1987, the Board extended the reinstatement period to January 15, 1988, noting that: "Counsel for appellant represent that the parties have agreed to prosecute and complete another appeal of appellant pending before this Board, (IBCA-1901), arising from the same project but under a different contract, prior to addressing this appeal * * *."

After its initial dismissal order, none of the Board's orders contained any reference to the potential for a dismissal with prejudice for failure to prosecute.

By order dated October 27, 1993, the Board, *sua sponte*, dismissed IBCA-2088 for failure to prosecute, with no prior show cause order. On November 23, 1993, Marshall moved for reconsideration. On December 14, 1993, it submitted a revised motion. BOR has objected and Marshall has replied.

DISCUSSION

[1] Under appropriate circumstances, the Board has inherent power to rescind a dismissal with prejudice to rectify an error or to provide an appellant with the opportunity to adjudicate its appeal on the

merits. *Cosmic Construction Co.*, ASBCA Nos. 24014, *et al.*, 84-1 BCA ¶ 17,028.

These appeals were dismissed for failure to prosecute without advance orders to show cause. The Board's pertinent Rule 4.127(b) (43 CFR 4.127(b)) provides:

> (b) *Dismissal for failure to prosecute or defend*. Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be either dismissed or granted, as appropriate. If no cause is shown, the Board may take appropriate action.

Here, the Board's orders in IBCA-1901 did not set any reinstatement deadline. Indeed, appellant was not to seek reinstatement until it was ready for a hearing on the merits. Appellant has demonstrated that it was not ready. At the same time, it has explained the reasons for its inactivity before this Board. It has been pursuing matters pertinent to the prosecution of its appeals actively for the past several years, albeit in other fora.

In the case of IBCA-2088, while the Board does not condone appellant's failure to seek another extension of the reinstatement deadline, extensions were granted to appellant routinely; BOR did not oppose the extensions; and the parties had agreed that IBCA-1901 would be completed before they and the Board undertook IBCA-2088—an agreement acknowledged by the Board in its July 14, 1987, order. Thus, appellant's error in failing to seek an extension of the reinstatement deadline was merely procedural and did not prejudice BOR.

BOR has cited general prejudice due to the passage of time and the retirement of certain of its personnel, but, according to appellant, the contracting officer involved in the alleged settlement retired years ago, before BOR determined not to settle. BOR has not alleged that it cannot locate him or any other knowledgeable witnesses nor established any other specific prejudice to it.

This Board previously has declined to dismiss appeals for failure to prosecute when, as here, there was no reinstatement deadline; or the parties agreed to a particular course of action that delayed the prosecution of the appeals, and the Board acquiesced; and the Government did not prove prejudice. *Whitesell-Green, Inc.*, IBCA Nos. 1927-40, 85-3 BCA ¶ 18,173. Based upon appellant's current showing, dismissal for failure to prosecute is not warranted.

[2] Regardless of the application of Rule 4.127(b), BOR alleges that our Rule 4.127(a) (43 CFR 4.127(a)) mandates dismissal of these appeals with prejudice. That rule provides:

> (a) *Dismissal without prejudice*. In certain cases, appeals docketed before the Board *are required to be placed in a suspense status* and *the Board is unable to proceed with the disposition thereof for reasons not within the control of the Board*. Where the suspension has continued, or may continue, for an inordinate length of time, the board may, in its discretion, dismiss such an appeal from the docket without prejudice to its reinstatement

when the cause of suspension has been removed. Unless either party or the Board acts within 3 years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed to have been made with prejudice. [Italics added.]

The Board's orders dismissing these appeals without prejudice were issued *sua sponte* and were within its control. Had the Board elected to proceed with the disposition of the appeals, it could have done so. As noted, the Board's orders in IBCA-1901 did not set any reinstatement deadline and, in IBCA-2088, BOR and the Board had concurred in appellant's request that it be allowed to refrain from prosecuting that appeal until IBCA-1901 was resolved.

Therefore, Rule 4.127(a) does not apply. Even if it were deemed potentially applicable, our rules are procedural only, and it is within our discretion to modify them in the interests of justice. *J.C. Equipment Corp.*, IBCA Nos. 2885-89, 91-3 BCA ¶ 24,322. *Accord Cosmic, supra.*

In *Cosmic*, unlike here, appellant itself had requested that the Armed Services Board of Contract Appeals (ASBCA) place its appeals in a suspense status and dismiss them without prejudice pursuant to ASBCA Rule 30, which provided for their automatic dismissal with prejudice if appellant did not move to reinstate them within 3 years. Appellant was not timely in requesting reinstatement and the Government moved for dismissal with prejudice, citing the passage of the 3-year deadline; failure to prosecute; and general prejudice to it due to difficulties in providing witnesses and documents. The ASBCA nevertheless found that the Government had not demonstrated specific prejudice and declined to dismiss the appeals with prejudice, modifying prior orders to that effect:

[A]ppellant here did not request dismissal with prejudice. It only sought a suspension of proceedings but dismissal with prejudice followed as a matter of course by the self-executing terms of Rule 30.

Also, there is nothing in the appellant's conduct that could be termed contumacious or contemptuous towards the Board.

* * * no show cause order was issued to which appellant should have responded and [there was not reason] to consider the dismissals of these appeals as constituting adjudication on the merits. * * *.

*   *   *   *   *   *   *

Although appellant may have been less than diligent by not adhering to the Rule 30 three-year limitation for reinstatement, in these circumstances this may not be a sufficient reason for denying appellant the opportunity to present and argue the merits of its case and obtain a resolution based on the merits.

It is therefore fair and appropriate for the Board to modify the effect of its orders * * * and to vacate the dismissal of the appeals with prejudice that resulted from the orders and the passage of the three-year period under Rule 30. * * *.

The record does not support dismissal of the appeals with prejudice for lack of prosecution as the Government has requested. * * *.

84-1 BCA at 84,798-99.

[3] Finally, involuntary dismissals with prejudice prior to any resolution on the merits of Marshall's appeals would constitute a

severe sanction, undeserved here, when Marshall has not acted willfully or in bad faith and has not refused to comply with any Board order. *See Societe Internationale* v. *Rogers*, 357 U.S. 197, 212 (1958); *Kropp* v. *Ziebarth*, 557 F.2d 142, 146 (8th Cir. 1977); *Willie Wood Mechanical Systems, Inc.*, VABCA No. 2808R, 89-3 BCA ¶ 22,039; *Cosmic, supra*.

In *Willie Wood Mechanical Systems*, the Board stressed that dismissal of an appeal with prejudice is the most drastic of sanctions. The Board had dismissed appellant's appeal with prejudice for failure to prosecute after it had not received any response to its second order to show cause. Although appellant's conduct was far from responsible, it demonstrated what the Board deemed to be excusable error and a desire to pursue the appeal, and the Board granted its motion for reconsideration. The circumstances and equities weigh much more heavily in appellant's favor here and thus warrant reconsideration of the Board's orders dismissing appellant's appeals with prejudice.

DECISION

Appellant's motions for reconsideration are granted; the Board's orders of October 21 and October 27, 1993, are vacated; and IBCA-1901 and IBCA-2088 hereby are reinstated. Counsel for the parties are to confer and to arrange for a conference call with the Board on or before March 1, 1994.

CHERYL SCOTT ROME
Acting Chief Administrative Judge

I CONCUR:

BERNARD V. PARRETTE
Administrative Judge

APPEALS OF TECOM, INC.

IBCA-2970 a-1, *et al.* Decided: *March 11, 1994*

Contract No. 14-08-0001-23460; Geological Survey.

Motion to Dismiss Denied.

1. Contracts: Contract Disputes Act of 1978: Jurisdiction—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Jurisdiction—Rules of Practice: Appeals: Motions

In denying the Government's motion to dismiss, the Board held that, when the Government disputed any liability for wage increases during a contract's base year, appellant's quantified claims for such increases satisfied Contract Disputes Act requirements.

2. Contracts: Contract Disputes Act of 1978: Jurisdiction—Contracts: Disputes and Remedies: Jurisdiction—Rules of

March 11, 1994

Practice: Appeals: Dismissal—Rules of Practice: Appeals: Jurisdiction—Rules of Practice: Appeals: Motions

The Board found that appellant's claim for increased wages paid after the contract's base year properly was subsumed into appellant's certified, quantified, disputed claim that the Government's option exercise was defective and that, therefore, appellant was entitled to all of its costs on a "cost-plus" basis.

APPEARANCES: Theodore M. Bailey, Bailey, Shaw & Deadman, P.C., San Antonio, Texas, for the Appellant; James L. Weiner, Branch of Procurement and Patents, Division of General Law, Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

Tecom filed several appeals pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601, which have been consolidated. We previously denied the Government's motion to dismiss for alleged improper certification under the CDA, 41 U.S.C. § 605(c)(1). *Tecom, Inc.*, IBCA No. 2970, 93-2 BCA ¶ 25,739. The Government has issued additional challenges to the Board's jurisdiction to entertain Tecom's appeals, which we have treated as another motion to dismiss.

Tecom contracted with the Geological Survey (GS) for the operation, maintenance and repair of mechanical systems and equipment and for ice and snow removal services. The fixed-price contract provided for a base year and for extensions, exercisable at GS' option. Tecom's piecemeal submission of the claims at issue, and/or GS' treatment of them, have engendered overlapping appeals, creating a highly confusing record, as will become apparent immediately.

IBCA-2970 a-1 involves Tecom's claims, exceeding $50,000, that GS improperly exercised its option to renew and that the contract converted to a cost-plus contract after its base year. The costs claimed include increased engineers' and electricians' wages, exceeding $50,000, paid during the option years. IBCA-3113 and 3114 involve Tecom's claims, under $50,000 each, for electricians' and engineers' wage rate increases, respectively, during the contract's base year; IBCA-3116 involves what the contracting officer deemed to be a claim, also under $50,000, for increased electricians' and engineers' wages for June 1992; and IBCA-3273 and 3274 involve what the contracting officer deemed to be Tecom's claims—over $50,000 for engineers and under $50,000 for electricians—for the option years, through May 31, 1992. IBCA-3199, filed as a protective measure, involves Tecom's consolidated, certified, claim for both categories of wage increases, exceeding $50,000, from contract start through June 30, 1992.

Relying upon *Dawco Construction, Inc.* v. *United States*, 930 F.2d 872, 877-78 (Fed. Cir. 1991), and its progeny, the Government alleges that the Board lacks jurisdiction to consider the IBCA-3113 and 3114 base-year wage rate increase claims, and the claims for post base-year wage increases, because no CDA "dispute" existed at the time Tecom filed its claims. The Government contends that there could be no dispute because Tecom did not submit proposals for wage increases to GS prior to filing its claims, an alleged regulatory pre-requisite.

The Government also asserts that Tecom's claims for post base-year wage increases exceed $50,000 in total and were not subsumed properly into its certified defective option exercise claims in IBCA-2970 a-1. In effect, GS seeks dismissal of IBCA-3113 and 3114 for lack of a dispute; of that portion of IBCA-2970 a-1 that includes post base-year wage increase costs for both lack of a dispute and lack of separate certification as to those costs; and of IBCA-3116, 3273, and 3274 also for lack of a dispute and lack of separate certification.

Because the properly certified IBCA-3199, which clearly involves a dispute, now is before us, there is no question that we have jurisdiction to entertain all of Tecom's wage increase claims. The issue remains, however, as to whether the earlier appeals, or the stated portions thereof, should be dismissed. Resolution of this question will determine at what point wage claims cognizable under the CDA were filed, for purposes of calculating interest due under 41 U.S.C. § 611, should Tecom prevail.

FACTS[1]

I. The Solicitation and Contract

On February 8, 1990, GS awarded Tecom the above contract in the not-to-exceed amount of $717,729.26 (the contract is included in the General Appeal File (GAF) Tab A). The contract was a follow-on contract to one that the General Services Administration had awarded to another contractor and had transferred by delegation to GS (*see* supplement (Supp.) to consolidated appeal file (CAF) for IBCA-3113, 3114, and 3116 at Tab B-2). The contract's base year was from March 1, 1990, through February 28, 1991, with 4 additional option years, extending through February 28, 1995 (contract § F911 at 63). The contracting officer was Ronald L. Sage. At least five contracting officers succeeded him (GAF at Tabs A and B).

The contract incorporated by reference Federal Acquisition Regulation (FAR) § 52.222-41, Service Contract Act of 1965 (SCA), *as amended*, 41 U.S.C. § 351. That FAR provided in part:

> (f) *Successor Contracts.* If this contract succeeds a contract subject to the [SCA] under which substantially the same services were furnished in the same locality and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement [CBA], in the absence of the minimum wage attachment for this contract setting forth such collectively bargained wage rates and fringe benefits, neither the Contractor nor any subcontractor * * * shall pay any service employee performing any of the contract work (regardless of whether or not such employee was employed under

[1] We address only the facts pertinent to the above appeals in the context of GS' motion to dismiss, based upon the pre-hearing record, and do not yet make any findings on the merits.

the predecessor contract), less than the wages and fringe benefits provided for in such [CBA] * * *.

* * * * * * *

(m) *[CBA's] Applicable to Service Employees.* If wages to be paid or fringe benefits to be furnished any service employees employed by the Government Prime Contractor or any subcontractor * * * are provided for in a [CBA] which is or will be effective during any period in which the contract is being performed, the Government Prime Contractor shall report such fact to the Contracting Officer, together with full information as to the application and accrual of such wages and fringe benefits, including any prospective increase, to service employees engaged in work on the contract, and a copy of the [CBA]. Such report shall be made upon commencing performance of the contract, in the case of [CBA's] effective at such time, and in the case of such agreements or provisions or amendments thereof effective at a later time during the period of contract performance such agreements shall be reported promptly after negotiation thereof.

The contract also incorporated by reference FAR § 52.222-43, Fair Labor Standards Act and [SCA] - Price Adjustment (Multiple Year and Option Contracts). That FAR provided in part:

(a) This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to [CBA's].

* * * * * * *

(c) The wage determination, issued under the [SCA] * * *, *current on the anniversary date of a multiple year contract or the beginning of each renewal option period,* shall apply to this contract * * *.

(d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase * * * in applicable wages and fringe benefits to the extent that the increase is made to comply with * * *:

(1) The Department of Labor [DOL] wage determination *applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period.* * * *

(2) An increased * * * wage determination otherwise applied to the contract by operation of law * * *.

* * * * * * *

(f) The Contractor shall notify the Contracting Officer of any increase claimed under this clause within 30 days after receiving a new wage determination unless this notification period is extended in writing by the Contracting Officer. * * * The notice shall contain a statement of the amount claimed and any relevant supporting data, including payroll records, that the Contracting Officer may reasonably require. Upon agreement of the parties, the contract price or contract unit price labor rates shall be modified in writing. The Contractor shall continue performance pending agreement on or determination of any such adjustment and its effective date. [Italics added.]

Section H1440 of the December 1, 1989, solicitation (at page 76) provided that the contractor was to comply with certain DOL wage determinations, including No. 76-843 (Rev. 14), dated July 13, 1989, covering electricians, and 86-1253 (Rev. 9), dated August 8, 1989, covering building operation and maintenance employees, including maintenance mechanics.[2] Copies of the wage determinations were included in the solicitation. They listed the base rate for electricians

[2] Appellant's IBCA-3114 claim pertains to engineering wages, including mechanical maintenance wages. It is not entirely clear whether the employees covered by this CBA are in the same category as the "engineer" employees to whom appellant refers, but they appear to be. In this opinion, we, like appellant, use the term "engineer" inclusively, to cover all non-electrician employees at issue.

at $18.70 per hour and for maintenance mechanics at $14.47 per hour. Each wage determination noted that the wage rates and fringe benefits set forth in this wage determination are based on a [CBA](s) under which the incumbent contractor is operating. The wage determination sets forth the wage rates and fringe benefits provided by the [CBA] and applicable to performance on the service contract. However, failure to include any job classification, wage rate or fringe benefit encompassed in the [CBA] does not relieve the successor contractor of the statutory requirements to comply as [sic] a minimum with the terms of the [CBA] insofar as wages and fringe benefits are concerned.

GS issued solicitation amendment No. 2, effective January 5, 1990, prior to contract award, to "clarify and change areas mentioned during the pre-bid conference on December 19, 1989" (Jan. 8, 1990, memorandum to file from contracting officer contained in Supp.). The amendment changed contract § H1440, "Wage Determination Applicable," to provide that:

2) Electrical employees stationed on site shall be subject to the International Brotherhood of Electrical Workers, Local 26 Regional Union Agreement of the DOL, incorporated herein by reference; and 3) Mechanical Engineer employees shall be subject to International Union of Operating Engineers, Local 99-99A Union Agreement, incorporated herein as Attachment E of Section J to the solicitation. (GAF and Supp.).

GS also provided prospective bidders with a typed copy of "Questions and Answers" pertaining to the solicitation, which had been discussed at the pre-bid conference. GS' responses to questions 8 and 48 had identified wage determination No. 76-843 (Rev. 14) as applicable to off-site electrical workers and the CBA to on-site electrical workers and had noted that a copy of the CBA could be obtained from DOL (Supp.).

Then, for reasons not clear, by amendment No. 3, effective January 8, 1990, § H1440 reverted to its original language and did not mention the CBA's (AF and Supp.). Thereafter, though, amendment No. 4, effective January 22, 1990, again identified and made applicable the CBA's (GAF and Supp.). Tecom's representative signed all of the amendments.

The electricians' CBA referred to in amendments Nos. 2 and 4, and incorporated by reference, was dated May 4, 1987, and provided for a rate of $19.10 per hour for journeyman wiremen, effective November 6, 1989, about a month before the solicitation issued (CAF, Tab A-1).

Tecom alleges that it bid the electricians' wages based upon the rates in the wage determination mentioned in the original solicitation; that the solicitation failed to mention the existence of a CBA; and that Tecom did not learn about the applicable CBA, and the higher electricians' wage rate which had come into effect pre-contract, until after contract award (Res. Exhs. 1 and 2; amended complaint (AC) at ¶ 2-4).

The engineers' CBA referred to in amendments Nos. 2 and 4, included in the solicitation, contained three sets of wage rates for various categories of engineering employees, effective on May 1, 1988, May 1, 1989, and May 1, 1990, respectively. The rates effective May 1, 1989, were highlighted, although the May 1, 1990, effective date was only 2 months after contract start (*see* Supp. at amendment No. 2 to solicitation, CBA at 8).

Appellant has submitted the affidavit of Mr. James Miller, a Senior Cost Analyst at Tecom, who was involved in the pricing of its bid. Mr. Miller states that GS, including contracting officer's representative (COR) Bob Sapp (*see* CAF, Tab C-1), and the contracting officer, advised him in pricing Tecom's bid to use the highlighted engineers' wages rates for the entire base year of the contract and that "[i]t was indicated that if we had to pay more the contract would be adjusted" (Appellant's Response to Government's Motion to Dismiss for Lack of Jurisdiction (Res., Miller Aff., Exh. 1). The record reflects that the contracting officer referred to as Mr. Sage and that the advice allegedly occurred on or about January 10, 1990 (Res. Exh. 3). GS has not submitted any affidavits or evidence to the contrary.

The Government's motion to dismiss relies upon FAR § 52.233-1 "Disputes—Alternate I (APR 1984)," incorporated by reference into the contract. In addition to making the contract subject to the CDA, that clause provided in pertinent part:

> (c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. * * * [A] written demand or written assertion by the Contractor seeking the payment of money exceeding $50,000 is not a claim under the [CDA] until certified * * *. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the [CDA]. The submission may be converted to a claim under the [CDA], by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.
>
> (d)(1) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision. * * *
>
> (2) For Contractor claims exceeding $50,000, the Contractor shall submit with the claim a [CDA] certification * * *.

II. Post-Award Communications

A. Background to Dispute

Mr. Miller states in his affidavit that, during the first week of the contract, GS personnel had several meetings with Tecom personnel; during one of them they discussed employees' wages based on the engineers' CBA; and Mr. Donald W. Cooper, the contracting officer who signed solicitation amendment No. 1 (AF, Tab A-1), advised Tecom that it could not "recoup" the increased engineers' wages "until the anniversary date of the contract" (Res., Miller Aff., Exh. 1).

Mr. William E. Lutze, Tecom's Operations Vice President in charge of contract start-up and of managing the contract from Tecom's Austin, Texas, office, also submitted an affidavit. He states that, although engineers were due a raise under their CBA shortly after the contract start date and every 6 months thereafter, contracting officer Cooper informed him during contract start-up that GS would request only one wage determination per year from DOL, on the anniversary date of the contract. Mr. Lutze disagreed with Mr. Cooper's position because Tecom would be "in arrears most of the time." Mr. Lutze notes that this dispute was never resolved (Dec. 1, 1993, Affidavit Supplementing Res.). GS has not submitted any affidavits or evidence to the contrary.

Regarding electricians' wages, Mr. Miller and Mr. Lutze state in their affidavits that, at one of the meetings, contracting officer Cooper agreed to pay Tecom the electricians' wage rate contained in their CBA, which came into effect prior to contract start, because the CBA had not been included in the solicitation and it called for higher wages than in the wage determination that was included (Res., Miller and Lutze Affs., Exhs. 1 and 2 and Lutze Dec. 1, 1993, Aff.). GS has not submitted any affidavits or evidence to the contrary.

On April 19, 1990, Mr. Will H. Rose, Tecom's Senior Vice President and Chief Operations Officer, wrote to contracting officer Cooper as follows:

> TECOM would like to express our sincere concern regarding the absence of Wage Determinations reflecting those rates and fringe benefits outlined in the respective [CBA's].
>
> As you know, the CBA's provide for wage increases on May 1, 1990. On January 10, 1990, Mr. Jim Miller * * * asked Mr. Sage for clarification on the proper rates TECOM should bid for the periods after Many [sic] 1, 1990. Mr. Sage answered that TECOM should use the 1989 wage rates. Accordingly, in the absence of Wage Determinations for the two (2) CBA's, TECOM bid the 1989 rates contained in the CBA's.
>
> Since the solicitation did not contain Wage Determinations reflecting the rates set forth in the CBA's, TECOM contends the Government did not follow the procedures outlined in 29 [CFR] Subtitle A, Part 4.
>
> Specifically, the procedures set forth in 4.4(a)(1), (2)(i) and 2(c), wherein the contracting agency shall file with the Wage and Hour Division, Employment Standards Administration, and [DOL] its notice of intention to make a service contract. Furthermore, the CFR is specific in that applicable wage determinations must be obtained and incorporated in the resultant contract documents and shall be applicable to all work performed thereunder.
>
> Finally, if the services through [sic] the use of service employees whose rage rates and fringe benefits are the subject of one (1) or more CBA's, the contracting agency is required to file with its Notice of Intention to Make a Service Contract (SF-98) a copy of each such CBA and other related documents specifying the wage rates and fringe benefits currently or prospectively payable under such agreement.
>
> Accordingly, *TECOM respectfully requests the Government make the appropriate modification to the contract wherein TECOM can be reimbursed for the rates which become effective on May 1, 1990.*
>
> I am available to discuss this matter in detail in an effort to reach an early resolution concerning this matter. [Italics added.]

(Res. Exh. 3).

On June 1, 1990, a new CBA for electrical workers issued which increased wages effective at various periodic dates from 1990-92, commencing on June 4, 1990 (CAF, Tab A-3).

Over 6 months after Tecom's April 19 letter, by letter dated October 23, 1990, Mr. Lutze wrote to contracting officer Cooper in relevant part as follows:

March 11, 1994

TECOM would like to express our sincere concern over the Government['] approach regarding contract requirements and the lack of cooperative response to contractor needs.

A letter was mailed to Mr. Donald W. Cooper on April 19, 1990. The subject had to do with wage increases and *as of this date we have not received a response*. [Italics added.]

(Supp. to Res. at 4).

By letter dated November 27, 1990, Administrative Contracting Officer (ACO) Brenda J. Donnelly sent Tecom a preliminary notice that GS intended to exercise its contract extension option, effective March 1, 1991, stating that the notice did not commit GS to renew (GAF, Tab B-1 at 12).

Over 10 months after its April 19 letter concerning wage increases, on February 6, 1991, Tecom wrote to ACO Donnelly as follows:

As you are aware, TECOM began performing services under the subject contract on March 1, 1990. As with any new contract, some operational problems were encountered during contract start up and during the first months of operation. Most of these have been resolved and cooperative relationships have developed between Government and TECOM personnel.

However, there are some areas in the contract that require attention and negotiation if this contract is to be profitable for both the Government and TECOM over the remaining option periods. Attached are summaries of the problem areas and TECOM'S proposed solutions. We hope to have the opportunity to discuss these issues with you and your technical representatives in detail. Our goal is to reach amicable solutions for all parties.

(Res. Exh. 4). The attachment identified various problems and proposed solutions.

The copy of the attachment contained in the record includes, beneath each proposed solution, handwritten notations which appear to report the results of a February 7, 1991, meeting between Tecom and GS personnel (*see* GAF, Tab B-6 at 13). The attachment identifies the following as one problem and proposed solution:

PROBLEM:

Our employees which are covered by [CBA's] have received increases in their pay rates since the contract began on March 1, 1990. *TECOM has paid the new rates, but has not been afforded the opportunity to recoup the additional monies from the Government through wage determination increase proposals as outlined in 29 CFR Part 4.*

PROPOSED SOLUTION:

We understand the new union agreements have been sent to [DOL] with a request for new wage determinations. Request the new wage determinations be incorporated into our contract as soon as possible so that TECOM can provide the Government with a cost proposal for the increased wages. [Italics added.]

Under the proposed solution is the handwritten notation "OK." However, as delineated below, there is nothing in the record to suggest that GS ever intended to reimburse Tecom for wage increases paid during the contract's *base year*. The evidence is to the contrary.

Commencing on or about February 25, 1991, and extending through March 4, 1991, GS purported to exercise its contract extension option (GAF, Tab B-6-9).

B. Disputed Option Exercise Claim, Including Claims for Post Base-Year Wage Increases

On July 17, 1991, Tecom submitted a certified claim to ACO Donnelly alleging that GS' option exercise was not timely and that it was entitled to equitable adjustments based upon cost billing, commencing as of March 1, 1991, and extending through May 1991, in the amount of $139,079.23.[3] The claim contained cost documentation for the months of March through May, including the wages paid to electricians and engineers (GAF, Tab B-11).

Tecom also claimed entitlement to "complete cost plus billing" for each succeeding month covered by the option exercise and notified the contracting officer that it would bill for those costs every month, after they were incurred and assembled. Tecom thereafter submitted successive certified claims for its alleged actual costs incurred on a monthly basis, including the electricians' and engineers' wages (GS Brief at 9).

The Government has not alleged that the defective option exercise claim was not in dispute at the time of filing and we find that it was.

Contracting officer Donald A. Palmquist denied Tecom's defective option exercise claim by decision dated October 3, 1991 (GAF, Tab B-13). In addition to rejecting the option exercise claim, Mr. Donnelly stated that there were other issues concerning the contract "that have been matters of dispute between the parties for some time." He noted that the issues had been raised in Tecom's February 6, 1991, letter and in a subsequent letter from Tecom dated February 27, 1991 (GAF, Tab B-7), and that they had been discussed by the parties many times without resolution or agreement. The contracting officer elected to include his determination on several of those issues in his October 3, 1991, decision. He did not mention specifically the question of wage increases, which had been mentioned in Tecom's February 6 letter, but not raised again in its February 27 letter.

On November 19, 1991, Tecom appealed from the contracting officer's decision denying its "improper option exercise" claim. Whether the option exercise was timely is the subject of IBCA-2970 a-1 and is not at issue here, although the fact of the purported exercise is key to GS' view of its obligation to pay any wage increases whatsoever, as discussed below.

C. Disputed Claims for Electricians' and Engineers' Wages During Contract's Base Year

About 20 months after its April 19, 1990, letter seeking wage increases, and over 8 months after its February 6, 1991, letter, and

[3] The amount stated on the claim certification was slightly less, but we find this discrepancy to be immaterial.

February 7 meeting, in which Tecom had continued, without success, to seek wage increases, Tecom, by letter dated October 14, 1991, to contracting officer Sherri Ly Newman, submitted an $8,026.40 claim, with supporting documentation, for unreimbursed increased wages paid to electricians through the end of the contract's base year and requested a contracting officer's decision (CAF, Tab B-1). Tecom alleged that GS had not advised it that the CBA "was incorporated into the contract, nor did the Government ask for our proposal for increased costs for higher wages." Tecom added that when the June 1, 1990, CBA went into effect, and electricians' wages were increased, GS "did not act on the new [CBA]." The contractor stated that *increases after the end of the contract's base year had been "billed to the Government as a portion of the cost-plus billing which started on 1 Mar 91 due to an improper exercise of the contract option."* (Italics added.)

By letter dated October 15, 1991, to contracting officer Newman, Tecom submitted a $30,904.12 claim for unreimbursed wage increases "paid to maintenance employees" under the engineers' CBA and requested a contracting officer's decision. Tecom stated that, although it had a copy of the CBA in force at contract start, COR Sapp had informed it that, for bid evaluation purposes, it should bid using only the CBA's May 1, 1989, wage rates and that GS would provide additional funds for the wage increases effective on May 1, 1990; that Tecom had bid accordingly; and that GS had not requested a cost proposal nor reimbursed Tecom for the increased wages.

Again, Tecom's claim amount covered only wage increases during the contract's base year, as did its attached documentation, and Tecom noted that its additional costs for wage increases after the base year had been billed to GS as part of the "cost-plus" billing Tecom had commenced in connection with its assertion that GS had improperly exercised its option to continue the contract (CAF, Tab B-1).

We find that Tecom's October 14 and 15, 1991, claims for increased wages paid to electricians and engineers during the contract's base year clearly were disputed by GS at the time of submission because, as noted, and developed further below, GS never acknowledged liability for increased wages during the contract's base year, and never intended to compensate Tecom for them.

By separate letters dated February 13, 1992, signed by ACO Donnelly for contracting officer Newman, GS responded to Tecom's October 14 and 15 claims. Regarding the electricians' wage claim, the contracting officer alleged: "As set forth in FAR 33.201 'a request for payment that is not in dispute is not a claim.' There is no indication that the Contracting Officer has ever been presented a proposal for an increase in the monthly rate for the services performed" (CAF, Tab B-2).

Among other things, the contracting officer stated that GS had forwarded documentation to DOL and requested a revised Wage

Determination *in connection with the exercise of GS' option to continue the contract from March 1, 1991, through February 29, 1992,* and that:

> There is no indication in the file that we have ever received a proposal from Tecom as the successor contractor for an increase in the monthly charge. The Wage Determination in the contract at the time of award was the basis for the bid submission for the monthly charge. *This is the first effort that Tecom has provided that the rates as set forth in the contract have been affected in any manner.* The FAR Clause 52.222-43 is precise that "the Contractor shall notify the Contracting officer [sic] of any increase claimed under this clause within 30 days after receiving a new wage determination." The responsibility does not rest with the Government to request a proposal from the contractor, the FAR clauses are precise that the impetus is upon the contractor to come forward when necessary with an appropriate proposal for increase or decrease. That proposal must be documented and show how the new monthly rates are derived. This is a fixed price contract, and as such the increased wages to be paid must be associated with the only fixed charge in the contract which is the monthly rate. For that reason it is necessary for your firm to show how your monthly rates were affected for the time frame from date of award through the present for the electrician rates as set forth in the wage determination.
>
> * * * * * * *
>
> If and when the documentation required for the request for equitable adjustment is provided in the proper format we will review the matter and reimburse your firm the all [sic] amounts due. [Italics added.] (CAF, Tab B-2). The contracting officer did not identify her letter as a final decision under the CDA and did not include appeal rights.

Regarding Tecom's October 15 engineers' wage claim, the contracting officer again asserted that a request for payment that was not in dispute was not a claim and that there was "no indication that any Government representative has denied or has ever received a proposal for an increase in the monthly rate for the services performed" (CAF, Tab C-2). She repeated GS' contention that FAR § 52.222-43 provided that it was the contractor's responsibility to provide a proposal for any increased costs and stated:

> *As cited in the FAR the proposal is received as a result of the incorporation of a revised wage determination at the time of an option exercise.*
>
> * * * * * * *
>
> When the supplemental documentation required for the proposal for adjustment is provided in format acceptable to the Government, we will issue a modification to the contract to incorporate the revised rates and obligate money for the payment of the services. At that time we will need an invoice from your firm for the amount determined to be proper for payment. [Italics added.]

Id.

As to Tecom's claim that the COR had advised it to base its bid upon engineering wage rates that did not take into account an increase occurring shortly after contract start, the contracting officer responded that the contract provided that no contract interpretation was binding upon the Government unless provided in writing by the contracting officer and that it appeared that Tecom had "erroneously relied upon advice solicited from an individual not authorized to speak in regard to contractual terms and conditions." *Id.*

At the same time, by letter dated February 13, 1992, apparently crossing in the mail with the contracting officer's letters of February 13, Tecom filed a notice of appeal with this Board based upon the lack of a final decision on its October 14 and 15, 1991, claims. By order dated February 28, 1992, the Board remanded the appeals to the contracting officer to obtain decisions on the alleged claims (CAF, Tab C-3).

In the meantime, after Tecom had received the contracting officer's February 13 letter, Tecom, by letter dated February 25, 1992, which it did not denominate a "claim" and did not certify, submitted what it described as "proposals" to the contracting officer, stating:

> The attached proposals concerning wage increases specified in the [CBA's] for electricians and mechanical service employees are provided as you requested. These proposals are submitted *for the entire period of performance* and *include* the amounts of our *claims* dated 14 Oct and 15 Oct 91. TECOM will credit the amounts paid by the Government against the *previously submitted claims*. [Italics added.] (CAF, Tab D-1).
> The "proposals" did not include calculations for the contract's base year, but only for subsequent periods, through January 31, 1992, with additional estimated amounts through October 1992. The total claimed for the post base-year period exceeded $50,000.

Thus, the "proposals" essentially covered Tecom's post base-year costs; the prior claims and documentation pertaining to the base year were incorporated by reference; and Tecom was not abandoning its position that its October 14 and 15 letters, and material included with them, were CDA claims.

On May 29, 1992, contracting officer Newman issued what she termed a "final decision" in response to Tecom's February 25, 1992, "proposals for wage increases" and included a notice of appeal rights (CAF, Tab D-2). She said that Tecom still had not provided the data previously requested but that, nevertheless, GS had computed amounts owing, "In an effort to bring this matter to a close and provide funds that we have determined your firm is entitled to in accordance with revised wage determinations and [CBA's]."

The contracting officer asserted that, in accordance with FAR § 52.222-43 (*supra*), *no wage increases were relevant during the first year of the contract*, but only as in effect on the contract's anniversary date, and that GS' "analysis of the rates effective during the Contract from March 1, 1990 through May 31, 1992 indicate[d] that Tecom should receive an equitable adjustment of $77,087.30" for electricians' and mechanics' wage increases. GS stated that it would pay Tecom that amount upon contract modification and Tecom's submission of a proper invoice.

Tecom then invoiced GS in the amount of $77,087.30 (CAF, Tab D-3). Contracting officer Newman responded by letter of July 2, 1992, inquiring whether Tecom considered the issue resolved (CAF, Tab D-4). Also by letter dated July 2, 1992, apparently crossing in the mail, Tecom stated that it had billed the Government for the amount GS had agreed it owed; *that GS also owed the amounts for the contract's base year that Tecom had claimed on October 14 and 15, 1991*; that Tecom intended to apply the $37,976.78 amount of those claims against the $77,087.30, when paid; that the remaining balance was due for the period March 1, 1991, through May 31, 1992, and that GS would owe additional funds for increased wages paid from June 1 through June 30, 1992 (CAF, Tab D-5).

On or about July 23, 1992, Tecom received payment in the amount of $77,087.30 (GS Jan. 14, 1993, Answer in IBCA-3113 at 3, ¶ 1 and Attachment).

On August 19, 1992, appellant filed one notice of appeal from the contracting officer's May 29, 1992, decision on its October 14 and 15, 1991, claims for electricians' and engineers' wages. No docket number was assigned to that appeal because, by the time it was received on August 24, 1992, the Board also had received two additional, separate notices of appeal, dated August 21, 1992, from the same decision. The one referring to the claim for electricians' wages had been docketed as IBCA-3113 and the one referring to engineers' wages, as IBCA-3114. The other notice of appeal appeared duplicative.

Nevertheless, in its brief opposing GS' motion to dismiss, Tecom noted that the contracting officer had elected to include in her May 29, 1992, decision a discussion concerning that portion of Tecom's "improper option exercise" claim pertaining to its request for an equitable adjustment for electricians' and engineers' wage increases for the option year, which, by that time, already had been included in Tecom's appeal from the contracting officer's October 3, 1991, decision on Tecom's "improper option exercise" claim. Tecom requested that the Board assign separate docket numbers to those parts of its appeal from the May 29, 1992, decision pertaining to post base-year wage adjustments.

Accordingly, although we were loathe to add to the procedural morass, solely to confirm that all aspects of the May 29, 1992, decision were on appeal to the Board, the separate parts identified by Tecom were docketed as IBCA-3273 (engineers' post base-year wage increases) and IBCA-3274 (electricians' post base-year wage increases) and consolidated with Tecom's other appeals.

By "final decision" dated September 1, 1992, the contracting officer issued a self-described "follow-up" to her May 29, 1992, decision. She addressed what she termed Tecom's "claim" for increased wages for electricians and engineers for the post base-year period June 1 through June 30, 1992. (Although Tecom had mentioned in its July 2, 1992, letter that those amounts would be due, it had not described its statement as a "claim").

The contracting officer awarded an equitable adjustment in the amount of $8,263.37, subject to receipt of an invoice. Tecom submitted an invoice in that amount dated September 3, 1992, and, on September 8, 1992, it appealed from the decision. The appeal was docketed as IBCA-3116. On or about October 7, 1992, Tecom received payment in the amount awarded.

In withdrawing an accord and satisfaction affirmative defense made in GS' answers to Tecom's complaints in IBCA-3113 and 3114, Government counsel evaluated the matter as follows:

> Tecom's July 2, 1992, letter apparently contained language withdrawing its wage adjustment claims for the base year (as articulated at [the October 14 and 15, 1991 letters]) in consideration of payment by USGS of $77,087.30. Upon further review, this does not constitute an accord and satisfaction because, *while Tecom may have believed that the $77,087.30 was intended, in part, to compensate for the $39,110.52 ($30,904.12 + $8,206.40) claimed for the base year, that was not USGS' intent when paying that amount* [quoting that portion of the May 29, 1992 final decision which states that under "FAR 52.222-43, *no wage increases are applicable during the first year of the contract*, but rather take effect on the anniversary date of the contract"]. * * * *In the case at bar, there was no meeting of the minds*. Further, as a practical matter, even if * * * Tecom's claims with respect to the base year were considered paid, the matter would arise again when calculating * * * the amount that Tecom has been paid with respect to its post-base year claims. Tecom would contend that only $37,976.78 had been paid with respect to post-base year wage increases ($77,087.30 - $39,110.52), whereas USGS would contend that the entire $77,087.30 should be so credited. *This would merely return the parties to an unresolved dispute concerning base year wage adjustments*. [Italics added.]

(GS' Brief at 2-3).

Tecom's counsel agrees that the $77,087.30 awarded by the contracting officer's May 29, 1992, final decision covered only part of the option year wage increase amounts sought by Tecom, and nothing for the contract's base year. He also asserts that the "whole issue of entitlement to any amount of money" for the contract's base year, for which claims had been submitted for sums certain, was in dispute from the beginning of contract performance (Res. at 8-9, 12-13). We agree.

DISCUSSION

I. IBCA-3113 and IBCA-3114—Base Year Wage Increases—The Existence of a Dispute

The court of appeals has held that a valid CDA claim "must seek payment of a sum certain as to which a dispute exists at the time of submission," *Dawco*, 930 F.2d at 878; *accord Heyl & Patterson, Inc.* v. *O'Keefe*, 986 F.2d 480, 485 (Fed. Cir. 1993); but that "[t]here is no necessary inconsistency between the existence of a valid CDA claim and an expressed desire to continue to mutually work toward a claim's resolution." *Transamerica Insurance Corp.* v. *United States*, 973 F.2d 1572, 1579 (Fed. Cir. 1992).

If the Government has denied liability as to the subject matter of a claim, a dispute over the amount arises at the time the claim is quantified. *Hughes Aircraft Co.*, ASBCA No. 43877, 93-3 BCA ¶ 26,133 at 129,902-03. That is the case here.

The language of the contracting officer's February 13, 1992, letters and of her May 29, 1992, final decision is far from clear. Upon review of the record, and with the guidance of counsel for the parties, we have deduced that, although Tecom and GS may have misunderstood each other's positions at one point, GS never intended to award Tecom any amount of increased electricians' or engineers' wages for the *base year* of the contract (with the possible exception of contracting officer Cooper, who was overruled early in the process).

Tecom's February 6, 1991, letter had requested that new wage determinations be incorporated into its contract as soon as possible so that it could provide GS with a cost proposal for the increased wages. GS apparently had responded "O.K." In any event, it is very clear from the record that, rightly or wrongly, Tecom was waiting for GS to incorporate the new rates into the contract, which Tecom thought was a prerequisite to its submission of a cost proposal.

The contracting officer's statements in her February 25, 1992, letter (nearly 2 years after Tecom's April 19, 1990, written notice about its unresolved increased wage demands) that there was no pre-existing dispute and that Tecom's October 14 and October 15, 1991, claims were the first "proposal[s]" from Tecom that the wage rates in the contract had changed as the result of increased costs due to a CBA was disingenuous.

In fact, regardless of the receipt of any "proposal" from Tecom, and whether it was GS' responsibility first to incorporate a revised wage determination into the contract and then to request a proposal, or whether it was Tecom's responsibility to initiate the proposal process, GS disputed any liability for base-year increases virtually from contract commencement. Indeed, GS specifically linked the alleged requirement for a proposal to the contract's *option year* periods.

Thus, a dispute clearly existed as of the time Tecom submitted its claims to the contracting officer on October 14 and 15, 1991, in the amounts of $8,026.40 and $30,904.12, for unreimbursed increased wages paid to electricians and to engineers, respectively, during the contract's base year and we have jurisdiction to entertain IBCA-3113 and IBCA-3114.

II. Post-Base Year Wage Increases—The Existence of a Dispute and Proper Certification—IBCA-2970 a-1

As noted above, GS has not alleged that Tecom's July 17, 1991, claim of defective option exercise was not in dispute and the record reflects that it was. We have concluded that GS is alleging that:

(1) Due to the alleged lack of a prior cost proposal, Tecom's claim for post base-year wages for electricians and engineers was not in dispute as of February 25, 1992, at the time it submitted its proposals for payment in response to the contracting officer's February 13, 1992, letter requesting proposals; and

(2) Apart from the alleged lack of dispute, and despite the contracting officer's issuance of a final decision on May 29, 1992, in response to Tecom's February 25 letter, the letter was not certified; the prior certification of Tecom's July 17, 1991, claim alleging that GS' option exercise was not timely and that Tecom was entitled to equitable adjustments based upon cost billing, including stated costs for electricians' and engineers' wages, was insufficient; and the wage costs should have been certified separately.

GS is correct that the fact that a contracting officer may have issued a final decision does not render acceptable a claim that does not meet

CDA requirements. *Paul E. Lehman, Inc.* v. *United States*, 673 F.2d 352, 356 (Ct. Cl. 1982). However, Tecom's February 25, 1992, letter did not purport to be a claim. Tecom merely was responding to the contracting officer's request for a proposal in an attempt to resolve one portion of the disputed option exercise costs, previously certified and quantified in its July 17, 1991, and subsequent, certified claims.

Tecom's July 17, 1991, claim clearly sought its contract costs, on a "cost-plus" basis, and included support documentation quantifying the wages paid to electricians and engineers. Tecom twice advised the contracting officer that those electricians' and engineers' wage costs were included in its claim. While GS may have been willing to pay some claimed costs, including some labor costs, it only was willing to do so under the limitations of the prior contract. It never accepted Tecom's claim that the contract no longer applied and that, after the allegedly defective option exercise, it was performing entirely on a "cost-plus" basis.

If Tecom proves correct that the option exercise was defective, it may be entitled to an equitable adjustment under the Changes clause taking into account all of its costs incurred, plus a reasonable profit. *Chemical Technology, Inc.*, ASBCA No. 21863, 80-2 BCA ¶ 14,728 at 72,641-42. *Accord Western States Management Services, Inc.*, ASBCA Nos. 37490, 38237, 92-2 BCA ¶ 24,921 at 124,260. The fact that Tecom's post base year wage claims could have been asserted as individual claims under a different theory does not preclude them from being one of the many elements of the disputed, properly certified, defective option exercise claim. *See Gaffney Corp.*, ASBCA Nos. 37639, —— BCA —— (Nov. 22, 1993, slip op. at 18).

Accordingly, Tecom's July 17, 1991, claims for option year wage costs are properly before us as part of IBCA-2970 a-1 and we have jurisdiction under the CDA to consider them. Therefore, we may not need to continue to number some of Tecom's appeals pertaining to option year wages separately. We will resolve that procedural issue after consultation with the parties, however, and do not yet dismiss any of the appeals.

DECISION

The Government's motion to dismiss is denied in all respects because appellant's claims were in dispute at the time of submission, as to liability and amount, and were certified properly under the CDA.

CHERYL SCOTT ROME
Acting Chief Administrative Judge

I CONCUR:

BERNARD V. PARRETTE
Administrative Judge

April 4, 1994

AMOCO PRODUCTION CO.

129 IBLA 186 Decided: *April 28, 1994*

Appeal from decision of the Montana State Office, Bureau of Land Management, affirming assessment of compensatory royalty. NDM-76202 Acq.; Drainage Case No. 517.

Reversed.

1. Oil and Gas Leases: Compensatory Royalty—Oil and Gas Leases: Drainage

It is the responsibility of all Federal oil and gas lessees to drill and produce all wells necessary to offset or protect the lease lands from drainage, or, to compensate the Federal Government for the loss of royalties through drainage. Royalties lost by a lessee's failure to drill an offset well do not commence on completion of the offending well, but upon the lessee's failure to drill a protective offset well within a reasonable time after notice of drainage. BLM may recover compensatory royalties even if it has not notified a lessee of drainage, where it can establish that the lessee knew or should have known that drainage was occurring.

2. Administrative Procedure: Burden of Proof—Oil and Gas Leases: Compensatory Royalty—Oil and Gas Leases: Drainage

The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where BLM has extensively researched the question of drainage of oil and gas beneath lands covered by a Federal oil and gas lease and has produced a significant body of evidence showing that a well was draining a Federal lease and in what amount, its conclusion that drainage is occurring and its establishment of a drainage factor will be affirmed, where appellant fails to demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusions.

3. Administrative Procedure: Burden of Proof—Oil and Gas Leases: Compensatory Royalty—Oil and Gas Leases: Drainage

The duty to drill an offset well to prevent drainage arises when the lessee knew or should have known that drainage was occurring, unless the lessee can show that oil or gas could not be found on the lease at that time under conditions adequate to allow it to be economically developed. The burden of proving that a lessee's predecessor in interest knew or should have known that drainage was occurring rests with BLM. BLM has not met its burden of showing that compensatory royalty was due from 1980, where it did not inform the lessee that there was drainage until 1985, and where it shows on appeal only that lessee's predecessor had access to certain well data in 1979 from the offending well could have been reasonably interpreted to show that no drainage was occurring.

4. Oil and Gas Leases: Compensatory Royalty—Oil and Gas Leases: Drainage

BLM's decision requiring payment of compensatory royalty from 1979 is properly reversed where it fails to establish that the lessee knew or should have known that drainage was occurring prior to 1985, and where BLM conceded that a well drilled a reasonable time after receipt of such notice would not be economic.

APPEARANCES: Robert G. Leo, Jr., Esq., Charles L. Kaiser, Esq., and Scott W. Hardt, Esq., Denver, Colorado, for appellant;

M. Dennis Daugherty, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

INTERIOR BOARD OF LAND APPEALS

Amoco Production Company (Amoco) has appealed from the March 6, 1990, decision of the Montana State Office, Bureau of Land Management (BLM), affirming the decision of the Dickinson, North Dakota, District Office (DDO), BLM, to assess compensatory royalty.

Amoco is the lessee of record for Federal oil and gas lease NDM–76202 Acq., covering approximately 80 acres in the E½ NE¼ sec. 6, T. 142 N., R. 100 W., fifth principal meridian, in Billings County, North Dakota. [1] The leased lands are in the vicinity of the Four Eyes oil field, which lies north and east of the tract, and the Big Stick field, which is located south and west of the tract.

The offending well, the Kordon #4–5 well, is situated in the NW¼ NW¼ sec. 5 of the same township, on privately owned lands adjacent to those covered by the lease in question, approximately 600 feet from the eastern boundary of Amoco's lease. That well, operated by Koch Exploration (Koch) was completed for production in the Fryburg Zone of the Mission Canyon Formation on June 27, 1979. [2] The issue presented in Amoco's appeal is whether Amoco may properly be assessed compensatory royalty on oil from the Federal lease that has been drained by the Kordon #4–5 well.

The record before the Board commences with a letter dated September 13, 1985, from the DDO to Tenneco Oil Company, Amoco's predecessor in interest in lease NDM–76202 Acq. That letter states, *in toto*:

> According to our records you are the lessee of oil and gas lease no. M–35712 (ND) Acq. [3] All or portions of this lease currently are being reviewed for drainage based on the proximity of the Kordon 4–5 well located at NW¼NW¼ Section 5, T.142N., R.100W., Billings County, North Dakota.
>
> This letter is for notification purposes to alert you of this drainage review. If it is determined from data available that drainage may be occurring, you will be notified of your obligation to protect the lease by drilling, paying compensatory royalty, and/or to provide additional information.

The record contains nothing more until BLM's Geologic Study of the Drainage Potential of the Kordon #4–5 well, evidently prepared on March 8, 1988. [4] That study found (1) that there is little, if any, structural difference between the tract covered by that well and the

[1] As the section is irregular, the exact land description is lot 1, SE¼ NE¼, sec. 6, T. 142 N., R. 100 W., Billings County, North Dakota.

Amoco pointed out in a letter filed with the DDO on Feb. 2, 1989, that the lands in question were segregated out of lease NDM–35712 Acq. into lease NDM–76202 Acq. by BLM decision dated Mar. 17, 1988, presumably by the Montana State Office, BLM. No copy of that decision is in the record. We shall presume that the correct serial number for the lease covering the lands in question is the latter.

[2] The well was perforated at 9,640–9,648 feet.

[3] At that time, the lands in sec. 6 had not yet been segregated out into lease NDM–76202 Acq. *See* note 1, *supra*.

[4] The document was not dated. The date of preparation was subsequently set forth in a document entitled "Introduction for the Geologic Reports on Drainage Case No. 517," dated Dec. 20, 1988.

Federal tract; (2) that there seemed to be no geologic conditions that would preclude drainage; and (3) that the Kordon #4–5 well had obtained "prolific production" from a relatively thin but extensive porosity zone.[5] The study indicated that it seemed highly likely that a large amount of drainage had taken place.

On May 17, 1988, the DDO completed its Preliminary Reservoir Engineering Report (Report), analyzing production from the Kordon #4–5 well.[6] That Report assumed a drive mechanism of solution gas, noting that the reservoir appears to have some natural water drive, and used decline curve volumetrics as its preliminary method of analysis. The maximum potentially drained area was calculated at 391.5 acres, assuming radial drainage. It was noted that "production history seems to show the drainage radius is skewed to the west-southwest," toward the Federal lease. The Report found that the outer configuration boundary crossed the boundary of the lease, thus indicating drainage. Noting that "it is evident that economics would be favorable," the Report concluded that "Tenneco should be notified of drainage and their responsibilities."

On May 20, 1988, the DDO wrote to Tenneco, expressly notifying it that its Federal lease was subject to possible drainage by Koch's Kordon #4–5 well, and that, as a Federal lessee, Tenneco was required to protect the leased lands from drainage by drilling a protective well and/or paying compensatory royalty, unless it could demonstrate that drainage could not occur through geologic, engineering, and economic data. BLM allowed 60 days for Tenneco either to advise of its plans for protecting the lease from drainage or submit sufficient information demonstrating that a protective well would have little or no chance of encountering oil and gas in paying quantities and/or that no drainage is occurring. Tenneco was advised that it would be assessed compensatory royalty if it failed to do so.

On June 24, 1988, Tenneco filed its response, offering its conclusion that the leased area was "below critical oil saturation" and "outside of the productive limits of both Big Stick and Four Eyes fields." Tenneco stated that it did not feel "that a well drilled [on the lease lands] would ever have encountered sufficient oil reserves to justify a well." Tenneco indicated that the Kordon #4–5 well was inside the "area of closure of Four Eyes field and the lease in question is largely outside." Nor did Tenneco regard the lease as being within the Big Stick field to the South of the Four Eyes field: the "lease sets over a structural low point or saddle separating the Big Stick and Four Eyes fields." In reaching that conclusion, Tenneco relied on the fact that two "Mission Canyon tests [had] been drilled which tested for oil in this saddle, and both

[5] The zone of production was described generally as "the Fryburg interval of the Mission Canyon Formation," and, more specifically, a 10–foot zone "from the first well-developed porosity zone beneath the anhydrites at the top of the Mission Canyon."

[6] This report appears in the record as an attachment to BLM's answer on appeal.

were completed as dry holes," [7] as well as its analysis of initial and current reservoir pressure, fluid saturations, gravities, formation volume factors, gas analysis, etc., and an economic valuation of the lease.

On July 13, 1988, BLM completed its Secondary Geological Review of this drainage case, assessing Tenneco's response. The review states that there were two wells clearly located on the "saddle": the BN 2–31B, a dry hole, and the Kordon #4–5 well, which had (as of that time) produced over 400,000 barrels of oil. [8] BLM noted that the high production of the latter strongly suggested that parts of that "saddle" were highly productive. BLM also noted that, in plotting production histories of the Kordon #4–5 well and nearby wells, its petroleum engineer found that production increased in the Kordon #4–5 well when production ceased in the #6–10A and #6–15A wells in the Big Stick field, and that placing the #1–5 well on production in the Four Eyes field did not seem to affect production in the #4–5 well. Those facts, according to BLM, showed that "there seems to be communication between the Big Stick and Four Eyes fields, and, if so, a large amount of drainage has probably occurred."

On November 1, 1988, BLM completed its Final Geologic Analysis, summarizing its past analysis of the geological aspects of the drainage case. That document alluded to a presentation made by Tenneco in August 1988 to the American Association of Petroleum Geologists noting that "the Big Stick and Four Eyes fields are part of one large reservoir" and referring to the "Big Stick/Four Eyes" field. BLM's analysis concluded that "there is enough evidence to show beyond a reasonable doubt that a large amount of drainage has taken place." BLM recommended that the drainage factor be determined by its engineers, and that the lessee take steps to protect the Federal Government from such drainage.

On December 12, 1988, BLM's petroleum engineers placed their Secondary (Final) Engineering Review in the drainage case file. [9] That review noted that the lease "is located in a narrow strip of reservoir which connects the Four Eyes and Big Stick fields." It also considered Tenneco's June 24, 1988, response, including the reservoir data it provided. BLM concluded that one of the wells relied on by Tenneco to show lack of producibility in the lease area was a bypassed location that actually had favorable hydrocarbon pore volume in the pay zone, but which was improperly perforated. BLM also concluded that well interference made it impossible for the Kordon #4–5 well to drain its hydrocarbons from the north and east, leaving only the "saddle," including Tenneco's leased lands, as the source for a large part of its production.

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[7] Those two wells were the Amoco #3–5 Kordon (in the SW¼ sec. 5 of the same township as the Kordon #4–5 well), and the Apache #2–31 BN (in the SE¼ sec. 31, T. 143 N., R. 101 W.).

[8] BLM noted that the Amoco #3–5 Kordon well was not located on the saddle, as Amoco stated, but "on the structural high located to the south of this saddle (i.e., on the Big Stick structure)."

[9] The case file also contains a typewritten copy of the Final Review signed on Jan. 10, 1989.

BLM noted that some of the values used by Tenneco appeared to be "field averages" instead of values based on "log interpretations for the #4–5 well." BLM also questioned the accuracy of other values, noting that they varied from "actual pressure data," "State reports," and "actual production" data. Accepting some changes, BLM recalculated the area of drainage at 229.3 acres. It then completed a log analysis for each well in the Four Eyes field and for the well in the Big Stick field in sec. 6, in order to determine what effect other wells might have on the Kordon #4–5 well.

Using the log analysis, BLM constructed a hydrocarbon pore volume map and drew a reservoir limit to the inside of wells that tested wet in the main pay zone in the Four Eyes field. Drainage areas were calculated for nearby wells, zones of interference were identified, and areas of drainage were adjusted, using a trial and error method. When the drainage areas were determined, it became "obvious * * * that wells to the north and east of the Kordon #4–5 well will act as a boundary, and that fluids are being drained from" lease NDM–76202 Acq. The drainage area and the lease were planimetered to determine the percentage of hydrocarbons being drained from the lease and the original oil in place under the lease; the calculated drainage factor was 25.006 percent, later rounded to 25 percent.

BLM's Secondary (Final) Engineering Review also rejected Tenneco's use of economic data as of 1988 to determine whether a protective well could have been economically drilled: "The Kordon #4–5 well was completed for production on June 27, 1979. On August 17, 1979, the United States Geological Survey prepared an Individual Well Record from published reports * * *. It is therefore evident that the well became available for public knowledge in August 1979." The review allowed 6 months from the date of public knowledge to completion of a protective well, thus concluding that Tenneco should have been able to protect the Federal lease by drilling a protective well by February 29, 1980. BLM concluded that it would have been economic to drill such well, calculating a discounted net/investment ratio of 4.29. BLM accordingly concluded that Tenneco should be assessed compensatory royalty as of March 1, 1980.

On December 22, 1988, the DDO issued its first decision, addressed both to Tenneco and Amoco, summarizing its geologic and engineering findings and notifying the parties that compensatory royalty would be assessed against 25.006 percent of the production from the Kordon #4–5 well, effective March 1, 1980, and would continue until the date of last production from that well. Tenneco sought review of the DDO's decision by the Montana State Director, BLM. [10]

On March 3, 1989, Amoco, through counsel, presented additional technical arguments and documentation. Amoco argued that BLM's conclusions regarding drainage could not be substantiated by

[10] Serial Number SDR 922–98–01 was assigned to the matter.

supporting technical data, and that its decision was contrary to case law, in that BLM had not proven both that (1) substantial drainage is occurring from the land, and (2) that a prudent operator would drill a protective well on the facts of this case, as required by *Nola Grace Ptasynski*, 63 IBLA 240, 89 I.D. 208 (1982).

On March 30, 1989, the State Office vacated the DDO's decision and remanded the matter for further consideration of whether an offset well should have been drilled in light of this Board's decisions in *Chevron U.S.A., Inc.*, 107 IBLA 126 (1989), and *CSX Oil & Gas Corp.*, 104 IBLA 188, 95 I.D. 148 (1988). The State Office noted that the DDO had not met the burden of proving that Tenneco, or a reasonably prudent operator, should have known that drainage from its lease was occurring in August 1979 (approximately 2 months after the completion of the Kordon #4–5 well), and that the record indicates that the notification date was not until September 13, 1985. The State Office did not rule on whether drainage was occurring or whether a paying well could have been drilled, but directed the DDO to review its decision on those questions in light of the data provided by Amoco on appeal.

On June 12, 1989, the DDO petroleum engineer prepared an additional drainage review report, finding as follows:

> 1. The Kordon #4–5 well was completed for production in the Fryburg formation on June 27, 1979. The IWR reflects this date, and P.I.'s well card also shows this date. However, the exact date of publication of the P.I. card or P.I.'s weekly well edition is not known.
>
> 2. On July 24, 1979, a motion for proper spacing of the Four Eyes-Madison, Duperow, and Red River pools came before the North Dakota Industrial Commission. The Commission found that the case should be continued [to] allow evaluation of new field data, and the case was scheduled for the 23rd day of October, 1979. * * *
>
> 3. Pursuant to legal notice the matter of proper spacing (Four Eyes-Madison, Duperow, and Red River) was brought before the Commission on October 25, 1979. During this hearing geologic and engineering evidence was presented indicating the Four Eyes Madison should be spaced at 160 acres. All of sections 5 and 6 * * * were included in the field.
>
> 4. Tenneco Oil Co. presented geological, engineering, and economic evidence at this hearing[, covering] 25 wells, including the Kordon #4–5 well. Tenneco specifically noted the date the 4–5 well was logged, the well's I.P., the well's producing status and formation, and they included the well in their Fryburg structure map.

The DDO engineer went on to note that Tenneco had presented specific reservoir parameters. Assuming radial drainage and employing BLM's methodology, he used Tenneco's parameters in calculations showing that drainage was occurring.

The DDO engineer noted that his review showed that Tenneco knew about the Kordon #4–5 well before October 23, 1979, as shown by its including the well in its evidence to the State Commission. He considered whether Tenneco knew or a reasonably prudent operator would have known that drainage was occurring:

> 1. Tenneco has built an ownership and [boundary] map for the Four Eyes field. This map showed Tenneco's partial interest in section 6, and it also showed the Kordon #4–5 well (along with producing horizon).

2. Tenneco's structure map (included in the evidence submitted before the [State Commission]) included the Kordon #4–5 well. The map showed the NE' of sec. 6 * * * was/is similar structurally to the Kordon #4–5 well.

3. Tenneco apparently evaluated the production potential for the Kordon #4–5 well. Their [evidence before the State Commission] shows an IP-STBOPD of 722 and a decline rate of 70% per year (based on initial performance). Tenneco also expected the decline to drop off to 20% after two years of production * * *. If these numbers are used to estimate an ultimate recovery we find the well would have produced at least 368,650 STBO (based on 70% decline). * * * It should be noted that this recovery would increase if the hyperbolic decline was used.

4. Tenneco provided typical and actual reservoir parameters. They made calculations which showed production of 226,000 B.O. would drain 160 acres and 113,000 B.O. would drain 80 acres. [Calculations omitted.]

The DDO engineer then used Tenneco's numbers in a volumetrics calculation, concluding that "44,433 B.O. would reach the lease line," and that "368,650 B.O. would drain 260 acres," which, he stated, "would include part of section 6."

The DDO petroleum engineer concluded:

It is evident from the evidence submitted by Tenneco at the October 1979 Hearings that they had evaluated the Kordon #4–5 well. They listed the well's initial potential, the well's decline rate, showed the well's location structurally (with reference to the Fryburg formation), and listed a set of typical or actual reservoir parameters for the Four Eyes field.

It is my estimation that given the above *any* reasonably prudent operator would have known the well would drain the identified lease. It is evident that Tenneco * * * knew about this potential by October 23, 1979. [Italics in original.]

The engineer concluded that Tenneco could have drilled and completed a protective well by April 30, 1980.

In response to Amoco's new information, the DDO petroleum engineer stated:

Amoco doesn't seem to want to recognize the fact that if you plot each Fryburg well's drainage area on a map you will see definite interference to the North and East. Since two wells *can not* drain the same area (same zone) at the same time it is clear the Kordon 4–5 must be draining hydrocarbons from the South and West. We do not argue that substantial drainage came from south of the 4–5 well in sec. 5. However, even with this drainage a substantial amount of oil has been drained from somewhere—and that somewhere was not the north.

The BLM's recovery factor was a calculated average for the field, and it seems reasonable based on the fact that this is a solution gas drive reservoir with an active water drive. [Italics in original.]

The petroleum engineer set the drainage factor at 25 percent.

On June 30, 1989, the DDO issued its second decision setting out much of the discussion in the petroleum engineer's memorandum, quoted above. The DDO also indicated that a new economic analysis, using actual oil prices, an original investment of $1 million, operating costs of $10,000 per month, and a discount factor of 12 percent, showed that a well drilled in 1980 would have "paid out is less than one year." The DDO applied the 25 percent drainage factor and notified Amoco that compensatory royalty would be assessed effective May 1, 1980. Amoco appealed again to the Montana State Director.

Amoco argued before the State Director that Tenneco was not notified that the lease was being drained by the Kordon #4–5 well until September 1985, and was therefore not required to consider drilling a protective well until that time. Amoco argued accordingly that the DDO's economic analysis was improperly predicated upon data, reserves, and values for 1980 instead of 1986. Amoco also attacked the validity of the DDO's conclusions concerning lease drainage, asserting (1) that actual production data and pressures for wells in the field are inconsistent with results predicted by BLM's radial flow model, thus invalidating the radial flow model; and (2) that the oil recovery factor for the Kordon #4–5 well used in the DDO's drainage analysis is substantially too low. Use of the correct factor (44.7 percent), it submitted, would prove that the Kordon #4–5 well is not draining the lease.

Amoco disputed the DDO's conclusion that Amoco knew lease drainage was occurring in October 1979 for four reasons:

> [*F*]*irst*, Amoco's [11] testimony in 1979 before the [State Commission] regarding spacing requirements for the Four Eyes Field, including the Kordon 4–5 Well, shows only that Amoco was aware of the well and the 24 others reported on and made assumptions labeled "average" and "typical" for production across the field with the purpose of defining appropriate spacing blocks on a field-wide basis. * * * Contrary to showing Amoco's knowledge of drainage, however, Amoco's testimony in support of 160–acre spacing evidences its belief that drainage was not occurring because 160 acres was sufficient to protect correlative rights of all mineral owners in the field including those under [lease NDM-76202 Acq.]. *Second*, the [State Commission] approved 160 acre spacing for the field by Order dated November 27, 1979, thereby concurring with Amoco's conclusion that 160–acre spacing was sufficient to prevent drainage of surrounding lands including those within the Lease. Because of this approval, a reasonably prudent operator would also believe no drainage was occurring. *Third*, this belief was corroborated at similar hearings for the Big Stick Unit in 1986 where Amoco and others once again testified, based upon intervening knowledge gained of the field, that the Lease was outside the productive boundaries of the field and the proposed Big Stick Unit. Both the BLM and the [State Commission] agreed with this technical analysis and approved unit boundaries which excluded the Lease. *Fourth*, in 1989 Amoco performed sophisticated modeling tests which once again demonstrate that drainage is not occurring from the lease. [Italics in original.]

(Amoco Request for State Director Review, Sept. 14, 1989, at 3–4). Finally, Amoco refuted the DDO's use of data proffered to the State Commission in 1979 as supporting an economic well:

> Amoco showed average well economics and used typical data values for the field for the purpose of a field-wide spacing analysis. Such data is insufficient to support a site-specific economic analysis, particularly on the Lease, which is located at the extreme southern edge of the field and would perform far below average.

Id. at 4 n.3). Amoco argued that the economic analysis of whether to drill a protective well should be based upon the anticipated recoverable reserves, costs, and prices applicable "a reasonable time after notice in September 1985" (Amoco Submission to State Director at 4).

[11] Although Amoco refers throughout to "Amoco's testimony," it appears that the testimony was actually presented by Tenneco, Amoco's predecessor in interest.

On March 6, 1990, the State Office issued the decision under appeal here, affirming in full the DDO's assessment of compensatory royalty effective May 1, 1980.

[1] It is the responsibility of all Federal oil and gas lessees to drill and produce all wells necessary to offset or protect the leased lands from drainage, or to compensate the Federal Government for the loss of royalties through drainage. 43 CFR 3100.2–2 and 3162.2(a). [12] Although the authority of the United States to assess compensatory royalty is clear, there are significant limits on that authority. The right to compensation for royalties lost by a lessee's failure to drill an offset well ("compensatory royalties") does not arise on completion of the offending well, but upon the lessee's failure to drill a protective offset well within a reasonable time after notice of drainage. *Nola Grace Ptasynski*, 63 IBLA at 253, 89 I.D. at 216, reaffirmed in *Chevron U.S.A. Inc.*, 107 IBLA at 130, and *CSX Oil & Gas Corp.*, 104 IBLA at 195–97, 95 I.D. at 152–53. BLM may recover compensatory royalties even if it has not notified a lessee of drainage, where it can prove that the lessee knew or should have known that drainage was occurring. *CSX Oil & Gas Corp.*, 104 IBLA at 198, 95 I.D. at 154. [13]

[2] Appellant challenges BLM's conclusion that drainage occurred here. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. *Animal Protection Institute of America*, 118 IBLA 63, 76 (1991). Where BLM has extensively researched the question of drainage of oil and gas beneath lands covered by a Federal oil and gas lease, it is not enough that appellant offers a contrary opinion, but it must demonstrate by a preponderance of the evidence that BLM erred when collecting underlying data or in reaching its conclusion. *Jerome P. McHugh*, 113 IBLA 341, 347 (1990); *see Bender* v. *Clark*, 744 F.2d 1424, 1429 (10th Cir. 1984). BLM's decision is properly affirmed where appellant fails to do so.

BLM's interpretation arises from facts that, on their face, strongly suggest that drainage occurred. The offending well has demonstrated large amounts of production. It is only 600 feet from the leased lands. The data reveal no significant geologic difference between the lands beneath the Federal lease and the lands surrounding the well.

The question of what underlies the surface of lands, being a question of interpreting and extrapolating limited empirical data, is a subject on

[12] The history of the drainage regulation is set out in *CSX Oil & Gas Corp.*, 104 IBLA at 194–95, 95 I.D. at 151–52.

[13] The Board has referred in other opinions to the necessity that BLM establish that there has been "substantial drainage." *Chevron, U.S.A., Inc.*, 107 IBLA at 132–33 n.6; *Atlantic Richfield Co.*, 105 IBLA 218, 224, 95 I.D. 235, 238–39 (1988). Even apart from problems arising from that term's imprecision, we find it irrelevant to the fundamental principles of compensatory royalty. Other factors totally unrelated to the amount of drainage (including the amount of production to be found on the Federal lease in one or more horizons, the value of the production, and the cost of drilling) would control whether it would be economic to drill an offset well. Although there may be practical reasons for BLM not to pursue claims of compensatory royalty where the amount of drainage is insubstantial, as a legal matter, compensatory royalty is owned if drainage (even of a comparatively small amount) occurs and royalty is lost becasue of a Federal lessee's impermissible failure to drill a protective well.

which parties may develop differing, if equally reasonable, descriptions. BLM has produced a significant body of evidence showing that the Kordon #4–5 well is capable of draining the Federal lease and in what amount. BLM's interpretation of that data supports its conclusion that drainage is occurring and its establishment of a drainage factor. Appellant's contrary assessment of the data relied on by BLM is not adequate to demonstrate that BLM's conclusions were inaccurate, and, therefore, we must affirm BLM's determination that drainage did occur.

[3] BLM assessed compensatory royalty from 1980, long before it provided appellant's predecessor in interest notice that drainage was occurring. Thus, under *Ptasynski* and *CSX Oil & Gas Corp.*, we must also consider when it was known, or reasonably could have been known, that drainage was occurring. The burden of proving that a lessee knew or should have known of drainage at a particular time rests with BLM. *CSX Oil & Gas Corp.*, 104 IBLA at 199, 95 I.D. at 154.

BLM takes the position that Tenneco, Amoco's predecessor in interest, should have known that drainage was occurring in 1980 and should have drilled an offset well within a reasonable time thereafter. BLM points to facts known to Tenneco in 1979, as demonstrated by its presentation to the State Commission in a well spacing case. That evidence contains several references to the Kordon #4–5 Well (then called the "Koch #4–5 well"): (1) a brief "well history" of that well, included along with 24 other well histories, [14] (2) a listing of Fryburg production data for wells in the Four Eyes field; (3) a portion of the Fryburg structure map, depicting the Kordon #4–5 well situated on the saddle between the Four Eyes and Big Stick Fields; and (4) a portion of a Tenneco "field boundary and ownership" map showing the Kordon #4–5 well adjacent to sec. 6, and noting Tenneco's "part interest" of sec. 6.

BLM found the Fryburg production data the most important, holding that it showed that "Tenneco apparently evaluated the production potential for the Kordon #4–5 well." Also, the ownership map showed that Tenneco was aware of the close proximity of the Kordon #4–5 well, and the structure map showed the absence of any fault or other geologic structure separating the lease property from the offending well.

BLM's conclusion that Tenneco should have known of drainage in 1979 hinges on the fact that the data known at that time, when subjected to BLM's present analysis using radial drainage and BLM's oil recovery factor, showed both that drainage was occurring and that it would be economical to drill an offset well. BLM thus effectively presumes that its analysis was so clear that a reasonable operator would have applied it and concluded that drainage was occurring, even

[14] The history provides as follows: "*Koch* 4–5 5–142–100 Logged 6/6/79[;] the 4–5 was a Mine test drilled to a TD of 9753'[.] The well IP'd pumping from the Mine Fryburg at 520 BOPD."

though BLM failed to give notice that it believed drainage was occurring.

We are not willing to rule in this case, in the absence of actual notice from BLM expressly advising that it believed drainage was occurring, that a reasonable operator would have so concluded based on what was known in 1980. While we may presume both that well data were available in 1980 and that BLM's present analysis was based on techniques that were available then, it does not follow that it would have been unreasonable for an operator to adopt other techniques leading to a different conclusion. Indeed, reasonable persons could have differed as to what the data showed at that time: Amoco has reviewed the same data and arrived at an oil recovery factor that shows that no drainage occurred. Further, it is significant that the eventual "prolific production" of the offending well, [15] on which BLM's calculations concerning drainage are fundamentally grounded, could not have been anticipated in 1980, only 6 months after it was completed for production. Although we are satisfied that BLM's present analysis does adequately support its conclusion that drainage occurred and in what amount, we cannot conclude that Tenneco should have known that drainage was occurring in 1980.

[4] BLM has declared that it "did not dispute Amoco's economics for a well drilled in 1986, because we did not believe that a well drilled in 1986 would be profitable" (BLM Filing of Dec. 18, 1991). Since Amoco could not have drilled any earlier than 1986, based on BLM's notice dated September 13, 1985, [16] BLM effectively concedes that a prudent operator would not have drilled a protective well here when it became aware that drainage was occurring. Accordingly, there is no basis for BLM to assess compensatory royalty here.

Appellant's request for hearing is denied. To the extent not expressly addressed herein, the parties' arguments have been considered and rejected.

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

David L. Hughes
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in general agreement both with the result and animating rationale of the lead opinion, I wish to briefly address what I perceive to be inconsistencies and misstatements in the Board's past

[15] BLM alluded to the production from the Kordon #4–5 well in this manner in March 1986.

[16] We offer no opinion on whether BLM's Sept. 13, 1985, notice was adequate, in view of the tentative nature of the notice and the lack of supporting technical data. Rather, we shall assume, *arguendo*, that Tenneco received notice at that time.

pronouncements relating to the application of the prudent operator rule.

At least since its decision in *Nola Grace Ptasynski*, 63 IBLA 240, 89 I.D. 208 (1982), this Board has consistently recognized that a lessee's obligation to either drill to protect a Federal lease from drainage or pay compensatory royalty for failing to do so is limited by the extent to which the lessee can show that, based on subsisting economic and geologic factors, a prudent operator would not drill a well in the circumstances. But, while all of the Board's subsequent drainage decisions have faithfully adhered to the applicability of the prudent operator exception to the obligation to protect against drainage, there has been far less consistency in approaching the question of which side has the burden of proof with respect to the exception. In other words, must BLM negate the exception (*i.e.*, establish that a prudent operator would drill) as part of its initial burden of proof or does the lessee have the obligation to establish that the prudent operator exception applies as an affirmative defense to the assessment of compensatory royalties? Recent Board decisions have seemingly embraced both approaches even though they are mutually exclusive. *Compare Kerr-McGee Corp.*, 118 IBLA 119, 126, (1991) (holding that "[i]f there was not enough petroleum resource to support a profitable offset well on the Federal leases, the operator was obliged to show that was the case") *with Benson-Montin-Greer Drilling Corp.*, 123 IBLA 341, 350, 99 I.D. 115, 120 (1992), (holding that "[i]f BLM concludes that a prudent operator would have drilled a well, it should calculate the amount owed as compensatory royalty"). While a certain amount of this confusion might be ascribed to a simple lack of linguistic precision, I think that the root cause of the decisional inconsistencies resides in the fact that, by and large, the Board's approach to allocation of the burden of proof in drainage determinations was largely formulated in cases arising in a common lessee context which, at least in my view, has served to somewhat distort the basis upon which this determination should be made.

Initially, it should be noted that, in addition to determining that the prudent operator standard applied to Federal leases, the *Ptasynski* decision also held that the obligation to remit compensatory royalty did not arise upon completion of the offending well but only upon the passage of a reasonable time following notification by the lessor that an adjoining well was draining the leasehold. *Nola Grace Ptasynski*, *supra* at 256, 89 I.D. at 217. This latter holding, however, was expressly subject to the caveat that "where the lessee is responsible for the draining well, the requirement of notice may be dispensed with." *Id.* at 256 n.13, 89 I.D. at 217 n.13. Thus, commencing with the very first decision expressly embracing the applicability of the prudent operator rule to Federal leases, the Board differentiated (at least in the notice requirement) between the treatment of a common lessee who had completed the draining well and a lessee who had no leasehold interest in the land on which an offending well was located. [1]

In *Atlantic Richfield Co.*, 105 IBLA 218, 95 I.D. 235 (1988), the Board examined the question of allocation of the burden of proof with respect to the prudent operator rule in the common lessee situation. Therein, the Board declared that:

> When BLM seeks to recover compensatory royalties from a common lessee, it must establish that a leased Federal tract is being drained by a well operated by the common lessee. However, BLM deed not prove as a part of its cause of action that a protective well would be economic, *i.e.*, profitable. Both the burden of going forward and the ultimate burden of persuasion on this issue must rest with the common lessee * * * because of the possibility of unfair dealing and because the common lessee possesses the evidence necessary to prove that an economic well cannot be drilled.

Id. at 225, 95 I.D. at 239. What is important to note is that, while the Board clearly held that the common lessee bore the burden of establishing that a prudent operator would *not* have drilled a well, the theoretical basis for doing so was not tied into the nature of the prudent operator rule but rather was premised on concerns which would strictly relate to common lessee status, *viz.*, the danger of unfair dealings by a common lessee and the common lessee's access to knowledge of the results of drilling on the adjacent lease. To the extent that allocation of the burden of proof is grounded in these considerations, the decision necessarily implied that, in the non-common lessee context, the Government bore the burden of negating the prudent operator exception.

While the considerations recounted in *Atlantic Richfield* provide ample support for differentiating between the common and non-common lessee insofar as the notice requirement is concerned, I fail to see how they have or should have any relevancy to questions relating to allocation of the burden of proof with respect to the prudent operator rule. Thus, the very real danger of unfair dealings which arises when a common lessee has control of both the draining and the drained tracts [2] does not have any real bearing on whether or not a prudent operator would drill, so long as that determination is being made on an objective basis. And, while common lessee status clearly results in a situation wherein the lessee has sufficient data upon which to premise an argument that a prudent operator would not drill, such would also necessarily be the case in any non-common lessee situation where the Government has established that a non-common lessee has

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[1] Subsequently, in *Petroleum, Inc.*, 115 IBLA 188 (1990), the common lessee standard was held to be applicable to situations in which a common operator was involved.

[2] First of all, since well-spacing determinations are based not on the limits of drainage but on considerations of maximum economic recovery of subsurface hydrocarbons, a common lessee might find it in his economic self-interest to avoid the additional expense of drilling a second well if he determined that the offset well would be marginally economic and that it was likely that substantial amounts of oil and gas originally underlying the offset parcel could be ultimately produced from the offending well. Similarly, if the two leases had differing royalty rates or if the lessee had additional non-working interests in one of the leases, the lessee could have economic incentives to produce from one lease to the detriment of another. In these situations, the economic interests of the lessee and those of the lessor of the offset parcel no longer coincide and there exists a very real possibility of unfair dealings on the part of the lessee.

knowledge that drainage is occurring, [3] be it by notice from the Government, actualknowledge of the drilling of the draining well, or imputed knowledge of that well. Where the Government presents data sufficient to establish that drainage is occurring, *any* lessee is required to drill an offset well *unless* a prudent operator would not drill in those circumstances.

The ultimate vice of the *Atlantic Richfield* decision insofar as this issue is concerned lies not in its conclusion that a common lessee bears the burden of establishing that a prudent man would not drill, but in its assumption that a differing approach is or should be applicable in the non-common lessee situation. Both a common lessee and a non-common lessee have an affirmative obligation to protect Federally-leased premises from drainage. Assuming that drainage can be shown to exist, either may discharge their obligations by drilling the protective well, tendering compensatory royalty for failing to do so, or establishing that a prudent operator would not drill a protective well. The prudent operator rule is, thus, an affirmative defense to a generally applicable requirement. As such, any party who wishes to avail itself of the rule's protection is properly required both to plead and prove the applicability of the rule. *See, e.g., Harry Smith Construction Co.* v. *OSM,* 78 IBLA 27 (1983). This should be the case, regardless of whether or not a common lessee situation is involved. [4] The language in decisions such as *Atlantic Richfield* and *Benson-Montin-Greer Drilling Corp.*, which either impliedly or expressly hold to the contrary, do not, in my view, correctly reflect the requirements of the law.

Since it is my view that the lead opinion herein correctly allocates this burden and also because I concur in its analysis of what BLM is required to establish where it seeks to retroactively show that a lessee "knew or should have known" that drainage was occurring, I concur in the disposition of the instant appeal.

JAMES L. BURSKI
Administrative Judge

RED THUNDER, INC.

129 IBLA 219 Decided: *April 29, 1994*

[3] Of course, any lessee may, as in the instant case, challenge the fact of drainage.

[4] I am not unaware that the general rule in state proceedings is that the lessor must establish that a protective well would produce in paying quantities as an element of its cause of action. *See generally* 5 Williams and Meyers, *Oil and Gas Law* § 822.2 (1981). To the extent that lease cancellation is sought, allocation of the burden of proof to the lessor may be seen as a logical outgrowth of the reluctance of courts to order the drastic remedy of cancellation for violation of the implied covenant to protect against drainage. Where, however, the lessor merely seeks compensations for royalties allegedly lost by the failure of the lessee to drill a protective well, it seems to me that, to the extent that a lessee has hes premised his refusal to drill an outset well on an assertion that a prudent operator would not drill a well in the circumstances, the lessee should be required to both plead the prudent operator rule and establish facts sufficient to justify his failure to drill a well. This should not be a particularly onerous task since, after all, this is the same analysis which the lessee presumably undertook in originally deciding not to drill in the first instance.

April 29, 1994

Appeal of two decisions by the Montana State Office, Bureau of Land Management, requiring significant modifications to approved plans of operations. MTM-77778, MTM-77779.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Surface Management

The authority granted by FLPMA sec. 302(b), 43 U.S.C. § 1732(b) (1988), to prevent unnecessary or undue degradation of public lands authorizes BLM to order a cessation of mining operations if that action is necessary. BLM's authority entails not only acting to avert unnecessary or undue degradation before it occurs but also acting to abate degradation if it develops after a plan has been approved.

2. Environmental Quality: Generally—Environmental Policy Act—Federal Land Policy and Management Act of 1976: Surface Management—National Environmental Policy Act of 1969: Generally

Regulations promulgated under NEPA provide an exception when compliance would be inconsistent with other statutory requirements. NEPA does not apply when there is a clear and fundamental conflict of statutory duty. The time required to prepare an EA to review remedial measures to abate acid rock drainage prior to ordering them implemented would be fundamentally at odds with the need to abate damage to the environment and would be inconsistent with the duty to prevent unnecessary or undue degradation in 43 U.S.C. § 1732(b) (1988).

3. Federal Land Policy and Management Act of 1976: Plan of Operations—Federal Land Policy and Management Act of 1976: Surface Management—Mining Claims: Plan of Operations

When the record supports the State Director's determination under 43 CFR 3809.1–7(c)(2) and (c)(3) that a proposed modification of a mine plan of operations must be submitted and his determination under 43 CFR 3809.1–7(c)(4) that measures are needed to avoid unnecessary or undue degradation, the decision will be affirmed on appeal.

APPEARANCES: Donald R. Marble, Esq., Chester, Montana, Donald A. Carr, Esq., and LynDee Wells, Esq., Washington, D.C., for Red Thunder, Inc.; Patrick J. Garver, Esq., Jim Butler, Esq., Salt Lake City, Utah, Alan L. Joscelyn, Helena, Montana, for Zortman Mining, Inc.; Tommy H. Butler, Esq., Helena, Montana, for the Montana Department of State Lands; Karan L. Dunnigan, Esq., Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

Red Thunder, Inc., a non-profit Montana corporation composed of traditional Native Americans at the southern end of the Fort Belknap Indian Reservation, has appealed two April 13, 1993, decisions by the Director of the Montana State Office, Bureau of Land Management (BLM), requiring Zortman Mining, Inc. (ZMI) and its parent, Pegasus

Gold Corp., to submit significant modifications to the approved plans of operation for the Zortman Mine and the Landusky Mine in the Little Rocky Mountains, Phillips County, Montana. These are heap leaching operations designed to recover silver and gold. The Zortman Mine covers more than 900 acres, approximately 40 percent of which are permitted for disturbance. Leaching but no mining operations are occurring while a proposal for expanding it is under review. It includes the 83/84 leach pad, the 85/86 leach pad, the Alder Gulch rock dump, and the OK Pit facilities referred to in this opinion. The Landusky Mine is located to the west of the Zortman Mine. It covers more than 1,200 acres (two-thirds of which are permitted for disturbance) and consists of seven heap leach pads, four waste rock dumps, three open pit mining areas, and a processing plant. It includes the Mill Gulch waste rock dump, the Gold Bug Pit, the Montana Gulch leach pad and waste rock dump, and the Sullivan Park (or 91) leach pad facilities referred to in this opinion. [1]

The decisions were issued because BLM found effluent containing "elevated metals and sulfates in association with lowered pH readings as well as other indicators of acid rock drainage [ARD]" downgradient from facilities at each mine (Decisions at 1). The decisions determined that significant modifications of the approved plan of operations for each mine were required and directed the Lewistown District Office, BLM, to prepare a supplemental environmental assessment (EA) "on the modification to determine the adequacy of the proposed mitigation and reclamation procedures, and to determine if the action is 'significant' as contemplated in NEPA [the National Environmental Policy Act of 1969] Sec. 102.2.c [42 U.S.C. § 4332(2)(C) (1988)]" (Decisions at 2). The State Director allowed operations at both mines to continue under the approved plans, subject to "[a]ny immediate steps that the Lewistown District Manager determines are needed to prevent unnecessary or undue degradation." *Id.* Additionally, the State Director ordered changes in operations at the Landusky Mine.

Section 302 of the Federal Land Policy and Management Act of 1976 (FLPMA) requires that "[i]n managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b) (1988). The surface management regulations at 43 CFR Subpart 3809, under which the State Director issued his decisions, were promulgated based on this and other statutory authority. *See* 43 CFR 3809.0–3(b). They define "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 and taking into consideration the effects of operations on other resources and land uses, including

[1] References are provided to the volume or binder of the appropriate mine file. Thus, the description of the Zortman Mine is from Zortman Mine, MTM 77779, Zortman Reclamation Plan and Post-Mine Topography, February 1989, at page 2. The description of the Landusky Mine, however, is from the Supplemental Environmental Assessment, Landusky Mine Operating and Reclamation Plan Modifications, Acid Rock Drainage Control and Remediation, November 1993, at i, 1, a copy of which was submitted by BLM during the pendency of the appeal.

those resources and uses outside the area of operations." 43 CFR 3809.0–5(k).

The regulations allow an authorized officer, *i.e.*, the BLM District Manager (*see* 43 CFR 3809.0–5(a), 45 FR 78904, Nov. 26, 1980), to request an operator to submit proposed modifications to an approved plan of operations. 43 CFR 3809.1–7(a). If the operator does not do so within a reasonable time, the authorized officer may recommend to the State Director that the operator be required to do so. The recommendation is to be accompanied by a statement setting forth the facts and reasons for the recommendation. 43 CFR 3809.1–7(c)(1). The State Director may order the operator to submit a proposed modification if he determines, among other things, that "disturbance from the operations of the plan as approved or from unforeseen circumstances is or may become of such significance that modification of the plan is essential in order to prevent unnecessary or undue degradation * * *." 43 CFR 3809.1–7(c)(2)(ii). If the State Director determines a modified plan is required, the operator must submit it to the authorized officer for review and approval. 43 CFR 3809.1–7(c)(3). Meanwhile:

> Operations may continue in accordance with the approved plan until a modified plan is approved, unless the State Director determines that the operations are causing unnecessary or undue degradation to the land. The State Director shall advise the operator of those reasonable measures needed to avoid such degradation and the operation shall immediately take all necessary steps to implement those measures within a reasonable period established by the State Director.

43 CFR 3809.1–7(c)(4). [2]

Sulfide ores were known to be present when the Zortman and Landusky Mines were first permitted but were of little concern. The draft environmental impact statement (Draft EIS) issued in 1979 reported they had been found at both minesites (Draft EIS at 3, 43), but stated: "The proposed mine pits would not mine into the sulfide ore body, but rather the oxide ore body which is not conducive to the formation of acid mine drainage. Acid drainage is therefore not considered a potential threat from the proposed projects." *Id.* at 75–76. Other indications that ore and waste rock were expected to have minimal, if any, acid generating potential appear throughout the record, including ZMI's 1985 application to amend the Landusky Mine permit to open new ore pits (Landusky Mine, MTM 777779, Vol. 2, Application at 81), the Montana Department of State Lands (DSL) review of ZMI's proposal to create the Mill Gulch waste dump (Landusky Mine, MTM 77779, Vol. 3, 1988 Preliminary Environmental Review at 12), and ZMI's 1989 Life of Mine Amendment application for the Landusky Mine proposing to construct the Sullivan Park heap leach pad and expand the 85–86 Montana Gulch leach pad (Landusky

[2] These provisions for "an appeal procedure * * * to the appropriate State Director" were added "to provide a greater degree of assurance that approved operations already in progress will not be unreasonably interfered with because of a proposed modification of the plan of operations." 45 FR 13956, 13957 (Mar. 3, 1980).

Life of Mine Amendment Binder at III–5 to 6; *see also* Statement of Reasons (SOR) Exh. U).

The May 1990 EA prepared by BLM and DSL to review the Life of Mine Amendment noted that "ZMI is now in the process of developing the baseline information for a sulfide reserves application" and that because there was not an application, "[n]o part of the potential sulfide action is addressed in this EA" (Landusky Mine, MTM 77779, Vols. 7, 9, EA at 5–6; *see also* Vols. 15 & 16, January 1991 Supplemental EA at 5–7). Nevertheless, several portions of the EA addressed possible mining of acid generating materials. Discussing the cumulative impacts of water quality due to mine pits, the EA reported that "some sulfide material is exposed in the walls of the pits" and that analyses of rock samples from the Queen Rose and Gold Bug pits "indicate some types of rock have the net potential for acid generation and other rock types have a net neutralization potential." *Id.* at 44. The discussion of the cumulative impacts of water quality from waste rock dumps similarly noted the presence of rock types with "significant acid generation potential" as well as others with "a high potential for acid neutralization" and concluded:

> Based on projections, any acid generated by waste rock should be neutralized by other waste rock within the deposit. The potential does exist for acid-generation in small, isolated areas of waste rock. Potential for acid-generation would be reduced by the placement of a soil cover and revegetation of the depository during reclamation. Establishment of a soil and vegetative cover would reduce the amount of water infiltration and oxygen supply to waste rock and limit acid-generation. The acid-generation potential in isolated areas of waste rock would be mitigated through mixing of acid-generating and neutralizing waste rock or addition of limestone.

Id. at 59–60; *see also* Landusky Mine, MTM 77779, Vol. 9, June 1990 Addendum to EA at 22.

Apparently because ore and waste rock were expected to have minimal acid generating potential, the plans of operations for the mines did not call for testing to identify oxidized and sulfide materials prior to mining and moving ore and waste rock (Zortman Response at 12 and n.12). Based on a review of the February 1989 Reclamation Plan for the Zortman Mine, BLM asked about the potential for ARD from waste rock dumps (Zortman Mine, MTM 77778, Vol. 6, BLM Comments on Zortman Reclamation Plan, March 21, 1989). ZMI responded that since no previous acid-base data had been generated, it would collect rock samples from active and inactive sites for acid-base balance testing and provide the results to DSL, stating (as it also did in the May 1989 Life of Mine Amendment application for the Landusky Mine) that: "Due to low-grade mineralization of Zortman and Landusky ore and waste rock, the acid generating potential of these materials at waste rock sites is expected to be minimal" (Zortman Mine, MTM 77778, Zortman Reclamation Plan and Post-Mine Topography binder at 4–a). Although sampling reports are not part of the record, apparently ZMI at some time did begin to classify material according to its degree of oxidation (*see* Zortman Mine, MTM

77778, Vol. 7, DSL memorandum re Zortman/Landusky AMD Accounting, Feb. 13, 1991).

It appears that by 1990 ZMI was aware that a limited amount of oxide ores remained. It conducted drilling for sulfide ores in November 1989 and, beginning about July 1990, it conducted test leaching of a mixture of oxide and sulfide ores (Zortman Mine, MTM 77778, Inspection & Enforcement File #1, BLM Compliance Inspection Reports Nov. 6, 1989, Oct. 18, 1990; DSL Field Inspection Reports July 26, 1990, Feb. 11, 1991). In August 1990, ZMI presented a mine expansion study plan for an additional 20 years of mining that included a discussion of the potential for acid mine drainage (Zortman Mine, MTM 77778, Vol. 6, Mine Expansion Study Plan, on pages 42–44). In response, BLM and DSL again raised the need to evaluate both ore bodies and waste rock for ARD (Zortman Mine, MTM 77778, Vol. 7, DSL letter of Nov. 19, 1990, at 1, BLM letter of Nov. 21, 1990, at 4).

Water quality samples taken during site inspections in the summer and fall of 1992 indicated low pH and elevated cyanide readings at several facilities. By October 1992, ZMI began to recover drainage from the 1991 (Sullivan Park) leach pad and Mill Gulch waste rock dump at the Landusky Mine and the 83/84 leach pad and Alder Gulch waste rock dump at the Zortman Mine (Landusky Mine, MTM 77779, Inspection and Enforcement Vol. 3, BLM Compliance Inspection Report Aug. 14, 1992, Oct. 19, 1992; DSL Field Inspection Report Aug. 14, 1992; SOR, Exh. E; ZMI Response at 2 n.1). BLM's October 19, 1992, inspection report concluded: "BLM should consider requesting a Plan Modification under 3809.1–7 to correct the problems; especially with regard to continued construction of the Mill Gulch waste rock dump."

On November 5, 1992, the Lewistown District Manager wrote to ZMI's general manager by certified mail:

> I wish to confirm the discussion you had with Scott Haight of my staff on November 3, 1992.
>
> As previously noted by BLM, DSL and ZMI personnel there is concern over development of low pH effluent from several facilities at the Zortman and Landusky Mines. Specific locations include the Zortman 85/86 leach pad underdrain in Ruby Gulch, the Alder Gulch waste rock dump underdrain, the Zortman 83/84 leach pad underdrain, the Landusky 91 pad underdrain, and the Mill Gulch waste rock dump underdrain. Partial capture of the effluent has been effected by ZMI; however, as was discussed, this is not recognized as a long-term solution by either yourselves or the involved agencies.
>
> On Tuesday you stated to Scott that by not later than December 1, 1992, ZMI would be submitting to the agencies proposals for correcting the problem areas. I look forward to receiving that material and will decide upon receipt whether it constitutes a significant modification under 43 CFR 3809.1–7.

(SOR, Exh. C). [3]

In a November 19, 1992, response, ZMI proposed removing 80 percent of the buttress of the Zortman 85/86 leach pad at the Zortman Mine by June 1993 and noted that it had resloped and reseeded the

[3] Apparently the District Manager regarded this letter as a request to ZMI for plan modifications in accordance with 43 CFR 3809.1–7(a).

dike faces of the Zortman 83/84 leach pads and the Alder Gulch waste dump and diverted drainage away from the dump at that mine. At the Landusky Mine, ZMI stated it had diverted drainage around the Landusky 1991 leach pad and completed dike face reclamation, and was constructing a segregated underdrain for the lower portion of the Mill Gulch waste dump and would intercept water from the upper portion of the dump. ZMI also stated that changes in construction procedures for the Mill Gulch waste dump (*e.g.*, "construction of the lower portions of the dump in 50 foot lifts * * * and positioning of the most reactive waste in the center cells of the dump where they will be hydrologically isolated") "are expected to preclude further development of the subject problems" (Zortman Mine, MTM 77778, Vol. 9, ZMI letter of Nov. 19, 1992; Landusky Mine, MTM 77779, Vol. 23; *id.*).

After a series of consultations and a meeting with ZMI during December, the Lewistown District Manager and the Chief of the Hard Rock Bureau, DSL, notified ZMI by letters dated January 15 and February 1, 1993, that several changes were needed in the operating and reclamation procedures at each mine (SOR, Exhs. J, K).

ZMI's initial response to these letters came on February 22, 1993 (SOR, Exh. P). It found three of the proposed actions sensible and agreed to implement them: (1) initiating a program to characterize waste prior to its removal; (2) mapping and characterizing existing pit floors and benches to identify areas of high acid-generating potential; and (3) placing waste rock material as backfill in the Gold Bug pit at the Landusky Mine. Other proposals it found to be "based on what appears to be inaccurate assumptions or incomplete data, or to be ineffective to address the environmental concerns outlined in the letters," and proposed a meeting "to develop a complete and accurate understanding of the underlying data and to discuss the range of options available for action by Zortman." *Id.*

ZMI then commmented that

> the letters do not conform to existing processes for modification of a reclamation plan or mine plan of operations under either state or federal law. Under existing law, modifications of an existing plan cannot simply be imposed upon Zortman. Rather, Zortman is entitled to notice and an opportunity to a hearing prior to a revision of its reclamation plan by the state and is entitled to propose appropriate modifications to its operating plan before any action may be taken by BLM through its State Director. * * * [W]e assume, in view of the limitations imposed by law, that the various items in the letters are suggestions for further discussions concerning modifications, except insofar as Zortman has agreed (as described above) to incorporate certain modifications into its existing plans.

Id.

ZMI met with BLM and DSL on February 24. On March 16, 1993, it submitted a "schedule for attainment of objectives which were agreed upon," plans to reslope and reclaim the Mill Gulch waste dump and the Sullivan Park dike, and plans for construction of the Gold Bug waste dump and for waste characterization (SOR, Exh. R). The schedule included other steps for these facilities as well as for the submission of plans for reclamation of material removed from the buttress of the Zortman 85/86 leach pad and placed in the OK Pit.

In his April 13, 1993, decisions the State Director stated:

> The ZMI responded on March 16, 1993, to the Lewistown District Manager's recommendations [of January 15 and February 1] by sending "Reclamation Plan Revisions" to the DSL and the BLM. The Lewistown District has asked for our determination as to whether a significant modification is to be required for the Landusky [and Zortman] Mine Plan of Operations.

(SOR, Apps. 1 and 2 at 1).

In accordance with 43 CFR 3809.1–7(c)(2), the State Director determined, for each mine, that:

> (1) all reasonable measures were taken by the Lewistown District Manager at the time the Plan of Operations was approved to ensure unnecessary or undue degradation would not occur.
>
> (2) the current ARD situation represents circumstances that require modifications to the existing Plan of Operations that are essential in order to prevent unnecessary or undue degradation.
>
> (3) the current ARD situation can be minimized using reasonable means.

Id. at 2.

As the rationale for item 1 for the Landusky Mine, the State Director stated:

> The most recent environmental assessment (EA) for operating and reclamation plan approval (Amendment No. 10 to MTM–77779), analyzed various rock types and concluded that, although certain mine material is known to have acid generating potential, the neutralizing capacity of rock would be significantly greater than its acid-generating capacity. The EA also discusses general guidance for mitigating ARD that "may occur" in isolated areas within waste-rock dumps (EA of 5/11/90, Pages 59–60). This constitutes due consideration of the matter by the District Manager during the plan approval process.

The State Director's rationale for item 1 for the Zortman Mine states:

> ARD concerns were reviewed during approval of the last amendment (Zortman Reclamation Plan and Post-Mine Topography) to the Zortman Plan of Operations. At that time (1989) mine monitoring data supported the prevailing opinion of technical reclamation specialists who felt it to be unlikely that mining of syenite porphory within the naturally occurring oxide zone would create a source of acid-producing material.

As the rationale for item 2 for both mines, the State Director stated: "New information indicates an ARD potential that is more widespread and demands more specificity than what is covered in the existing approved Plan of Operations."

The State Director's rationale for item 3 for both mines was: "A variety of technical solutions are available within the means of the operator to address the ARD problems. Several have already been applied. Additional mitigating measures would not be unreasonable."

The State Director determined, based on "review of the ZMI proposed revisions of March 16, * * * recent site information and the above criteria," that significant modifications to each plan were required in accordance with 43 CFR 3809.1–7(c)(3). He directed the Lewistown

District Office to prepare supplemental Environmental Assessments on the proposed modifications to determine their adequacy and whether they were significant within the meaning of section 102(2)(C) of NEPA. *See* 43 CFR 3809.1–7(b); 3809.2–1(a). In the decision on the Zortman Mine the State Director gave the District Manager discretion to combine the supplemental EA concerning that mine with "the significant modifications that have already been submitted by ZMI for the Zortman Mine Expansion Project."

Citing 43 CFR 3809.1–7(c)(4), the State Director determined that at the Zortman Mine, where ore is not being mined pending review of the Zortman Mine Expansion Project, leaching operations could continue in accordance with the existing plan until the modified plan is approved, subject to ZMI's compliance with any immediate steps required by the Lewistown District Manager to prevent unnecessary or undue degradation (SOR, App. 2 at 2). At the Landusky Mine, the State Director also allowed operations to continue in accordance with the existing plan, but ordered ZMI to "discontinue waste rock disposal in the Mill Gulch waste rock dump" (allowing it "to place waste rock as engineered backfill into the Gold Bug pit" as an interim measure) as well as to comply with any immediate steps required by the Lewistown District Manager (SOR, App. 1 at 2).

Since the State Director's April 13, 1993, decisions ZMI has supplemented its March 16 submission for the Landusky Mine with Revisions to the Reclamation Plan for Portions of the Landusky Mining Area, submitted July 23, and a Mine Products Characterization Program, submitted July 30. BLM and DSL issued a supplemental EA on ZMI's proposed modifications for this mine in November 1993 (EA MT065–063–93), and held a hearing on it in December. On January 25, 1994, ZMI submitted an addendum to its July 23 submission. On March 4, 1994, BLM and DSL decided to require eight further immediate operating, control, and interim reclamation modifications to the plan of operations for the Landusky Mine and to defer approving final designs for ARD prevention, control and treatment until they "have undergone additional environmental analysis in an environmental impact statement." Several specific items relating to reclamation and closure at the Landusky Mine are to be covered in an environmental impact statement (EIS), and the agencies decided "to combine this analysis with the EIS for the Zortman Mine Expansion Project" (Decision Record, Landusky Mine Operating and Reclamation Plan Modifications, Acid Rock Drainage Control and Remediation, March 4, 1994, at 1, 4). On April 8, 1994, Red Thunder appealed Part 1, Item 2 of the March 4, 1994, decision (IBLA 94–390).

In October 1993, ZMI submitted a list of reclamation activities for the Zortman Mine and its plans for the material removed from the buttress below the 85/86 leach pad. In December, BLM informed ZMI that it intended to analyze the proposed expansion of the Zortman Mine and the corrective measures for the ARD problem called for by the State Director's April 13, 1993, decision in a single EIS and requested ZMI to provide a detailed proposal for those corrective measures. On February 2, 1994, ZMI submitted Alternative Reclamation Plans for the Zortman Mine. BLM and DSL completed their initial review of these plans on March 4, 1994.

The Montana Department of Health and Environmental Sciences, Water Quality Bureau, investigated possible water quality violations at the mines (SOR at 13, Exh. S). With its reply brief Red Thunder provided a copy of a suit filed by that agency against ZMI (Red Thunder Reply, Exh. C). The suit was dismissed and refiled in a different county (ZMI Reply at 4 n.4, Exh. 1). Red Thunder has also provided a copy of a notice of violation the U.S. Environmental Protection Agency sent to ZMI for each mine (Red Thunder Reply, Exh. B). On Aug. 9, 1993, BLM issued a notice of noncompliance for each mine, citing 43 CFR 3809.2–2. [4] They were affirmed by the Montana State Director in a decision dated Nov. 24, 1993. ZMI has appealed that decision to this Board (IBLA 94–260). Briefing of that appeal was stayed by our order of February 1, 1994.

Red Thunder argues BLM failed to comply with FLPMA and NEPA. First, it asserts that the State Director, knowing acid mine drainage was occurring at both mines, failed to carry out his duty under section 302(b), 43 U.S.C. § 1732(b) (1988), to prevent unnecessary and undue degradation by allowing ZMI to continue operations (SOR at 1). Red Thunder "submits that the State Director was required by the authority and policies embodied in the Federal Land Policy and Management Act and the agenc[y's] own regulations at 43 C.F.R. [Subpart] 3809 to find that the operations currently are causing unnecessary and undue degradation. The State Director, therefore, should have ordered the mining operations to discontinue to prevent further deterioration" (SOR at 13–14).

Second, Red Thunder argues that, because the acid-generating potential of ores and waste rock has not been addressed in an EIS, the decision to approve remedial measures and allow operations to continue prior to preparing an EIS violated NEPA (SOR at 2, 14, 18). In support, Red Thunder contends that BLM's actions are environmentally significant, that the changes BLM approved are substantial, that ARD and sulfide ore mining constitute significant new circumstances or information, and that allowing operations to continue prior to environmental review constitutes *post hoc* compliance with NEPA (SOR at 17–25). [5] Red Thunder also asserts that interim remedial measures will have an adverse effect on the environment and

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[4] *See also* 43 CFR 3809.0–5(k): "Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation."

[5] Red Thunder frames these arguments in terms of the need to prepare a supplemental EIS, apparently because an EIS was prepared by DSL in 1979 to examine the "broad cumulative environmental impacts" of the two mines (Zortman Vol. 1, EIS at i). Red Thunder states that the draft was "apparently never made final" (SOR at 2). The record is ambiguous. The copy of the EIS included with the Zortman Mine file identifies it as a draft (Zortman Mine, MTM 77778, Vol. 1); however the copy of the front page included in the Landusky Mine file bears a handwritten note that there was a final EIS (Landusky Mine, MTM 77779, Vol. 1).

limit the choice of reasonable alternatives (SOR at 14, 17). For these reasons Red Thunder sought to have us direct BLM to order ZMI to halt operations at the mines pending completion of a supplemental EIS (SEIS) (SOR at 25). Red Thunder withdrew its motion for a stay of operations at the mines pending disposition of this appeal, which incorporated the arguments in its SOR by reference. In its Reply, however, Red Thunder requests us to issue an order staying any expanded operations including, but not limited to (1) continued loading of the Sullivan leach pad, (2) expansion of the 1986 Montana Gulch leach pad, and (3) loading of the Gold Bug Pit until full NEPA studies have been completed. Red Thunder also requests us to order a full SEIS for the modifications (Reply at 3, 14–15).

[1] The requirement of section 302(b), 43 U.S.C. § 1732(b) (1988), that in managing the public lands the Secretary shall take any action necessary to prevent unnecessary or undue degradation of the lands authorizes BLM to order a cessation of mining operations if that action is necessary. This statutory language "includes expansive powers" and the nondegradation duty is mandatory. *Cf. Sierra Club* v. *Hodel*, 848 F.2d 1068, 1078, 1091 (10th Cir. 1988) (concerning the parallel language in section 603(c), 43 U.S.C. § 1782(c) (1988)). Management of the public lands is an ongoing responsibility, and the Secretary's authority "to provide that prospecting and mining under the Mining Law will not result in unnecessary or undue degradation of the public lands" [6] entails not only acting to avert unnecessary or undue degradation before it occurs (*i.e.*, at the plan approval stage, 43 CFR 3809.1–6(a)) but also acting to abate degradation if it develops after a plan has been approved, *e.g.*, from unforeseen circumstances.

We do not, however, agree with Red Thunder that the automatic result of the State Director's determining that mining operations are causing undue or unnecessary degradation is that he must order a cessation of those operations. 43 CFR 3809.1–7(c)(4) provides that operations may continue in accordance with the approved plan until a modified plan is approved "unless the State Director determines that the operations are causing unnecessary or undue degradation to the land." If the State Director makes that determination, he "shall advise the operator of those reasonable measures needed to avoid such degradation and the operator shall immediately take all necessary steps to implement those measures." Read in relation to 43 CFR 3809.1–7(c)(2), it is clear that the State Director may order an operator to submit a proposed modification of a plan even if he does not determine that the disturbance is causing unnecessary or undue degradation. In such a case, operations may continue under the approved plan until the proposed modification is approved. If, however, the State Director determines the operations are causing unnecessary or undue degradation, he must order reasonable measures that differ

[6] "[T]he Secretary of the Interior is given specific authority, by regulation or otherwise, to provide that prospecting and mining under the Mining Law will not result in unnecessary or undue degradation of the public lands. The Secretary is granted general authority to prevent such degradation." Report No. 94–1163, House of Representatives, 94th Cong., 2d Sess., at 6.

from the approved plan, *i.e.*, measures needed to reduce the degradation so that it is no longer unnecessary or undue. If the nature or degree of the degradation were such that the only effective way to prevent it were a complete cessation of mining operations, then under section 302(b) the State Director would be authorized and obligated to order a complete cessation. A complete cessation would be one of the "reasonable measures needed to avoid such degradation" under 43 CFR 3809.1–7(c)(4), perhaps in conjunction with reasonable reclamation measures. [7] *A fortiori*, if the nature or degree of the unnecessary or undue degradation were such that reasonable measures short of a complete cessation of operations would be effective to prevent it, the State Director would be authorized to direct those measures. In this case, for example, the State Director in effect ordered a partial cessation of operations in ordering ZMI to discontinue waste rock disposal in the Mill Gulch waste rock dump, and was well within his authority to do so.

Thus, the FLPMA issues in this case are whether the record supports the State Director's determination under 43 CFR 3809.1–7(c)(2) and (c)(3) that a proposed modification must be submitted and whether, if the State Director determines under section 3809.1–7(c)(4) that the operations are causing unnecessary or undue degradation, the measures he directs the operator to implement are needed to avoid it.

Ultimately, Red Thunder's NEPA issues depend on a factual inquiry. NEPA requires BLM to prepare an EIS if approval of a proposed action constitutes a major Federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1988). In most cases the determination whether to prepare an EIS is made by preparing an EA. *See* 40 CFR 1501.4. The surface management regulations require an EA to be prepared for a plan of operations or a significant modification in order "to identify the impacts of the proposed operations on the lands and to determine whether an environmental impact statement is required." 43 CFR 3809.2–1(a). They further require that the EA be used "to determine the adequacy of mitigating measures and reclamation procedures included in the plan to insure the prevention of unnecessary or undue degradation of the land." 43

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[7] Unnecessary or undue degradation includes "[f]ailure to initiate or complete reasonable mitigation measures, including reclamation of disturbed areas." 43 CFR 3809.0–5(k). Reclamation means "reasonable measures as will prevent unnecessary or undue degradation of the Federal lands." 43 CFR 3809.0–5(j); 3809.0–6. Reclamation includes measures to isolate, remove, or control toxic materials. 43 CFR 3809.1–3(d)(4)(iii); 43 CFR 3809.1–5(c)(5); *see United States* v. *Peterson*, 125 IBLA 72, 90–91 (1993).

"[N]umerous comments stated that authority to require reclamation, like bonding, was taken out of the Federal Land Policy and Management Act by the Conference Committee and, therefore, should not be required by this rulemaking. Reclamation is an integral part of any effort to prevent unnecessary or undue degradation of the lands. Failure to require reclamation of disturbed areas may lead to scars on the lands that may remain for years. Likewise, failure to revegetate the surface of the lands may cause increased erosion of watersheds and lead to siltation and pollution of streams and other water resources. The failure to use reasonable means to reclaim the lands and eliminate these disturbances may constitute unnecessary or undue degradation and, thus, constitute a direct violation of section 302(b) of the Federal Land Policy and Management Act. In addition, the Bureau of Land Management is also responsible for implementing the Mining and Minerals Policy Act which requires reclamation of mined areas." 45 FR 78907 (Nov. 26, 1980).

CFR 3809.2–1(b). [8] In addition, "[a] significant modification of an approved plan must be reviewed and approved by the authorized officer in the same manner as the initial plan." 43 CFR 3809.1–7(b). Thus, the significant modifications required by the decisions on appeal must be reviewed under NEPA. The State Director's decisions recognize this by requiring the Lewistown District to prepare supplemental EAs, allowing the option of combining review for the Zortman Mine with review of the Zortman Mine Expansion Project for which BLM had previously published notice of intent to prepare an EIS. 57 FR 56588–89 (Nov. 30, 1992).

To the extent Red Thunder argues that NEPA requires BLM to prepare an EIS rather than an EA to review the significant modifications to the operation and reclamation plans prior to approving them, we agree with BLM, DSL, and ZMI that the argument is premature (BLM Answer at 2, 7; DSL Answer at 3, 10; ZMI Response at 18–19). Those modifications are not before us. Nor are the Zortman Mine Expansion Project and the EIS being prepared for it before us. Rather, our review is concerned with the remedial measures accepted and directed in the State Director's decisions.

[2] To the extent Red Thunder argues that NEPA required BLM to undertake environmental review prior to the State Director's decisions requiring remedial measures, we conclude that NEPA does not impose such a requirement. The NEPA regulations promulgated by the Council on Environmental Quality state they are "applicable to and binding on all Federal agencies for implementing the procedural provisions of [NEPA] * * * except where compliance would be inconsistent with other statutory requirements." 40 CFR 1500.3. The Supreme Court has held that NEPA does not apply when there is "a clear and unavoidable conflict in statutory authority" or a "clear and fundamental conflict of statutory duty." *Flint Ridge Development Co.* v. *Scenic Rivers Association*, 426 U.S. 776, 788, 791, *reh'g denied*, 429 U.S. 875 (1976). Although such a conflict has been found in relatively few circumstances, [9] in this case the time required to prepare an EA, and perhaps an EIS, to review remedial measures prior to ordering ZMI to undertake them would be fundamentally at odds with the need for action to abate damage to the environment and would thus be inconsistent with the Secretary's duty to prevent

[8] The relation between BLM's duty to review for significant impacts and its responsibility to prevent unnecessary and undue degradation was addressed in *Nez Perce Tribal Executive Committee*, 120 IBLA 34, 36 (1991).

[9] 9/ *See Merrell* v. *Thomas*, 807 F.2d 776, 778 (9th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *Cities of Lakeland & Tallahassee & Gainesville Regional Utilities* v. *Federal Energy Regulatory Commission*, 702 F.2d 1302, 1314 (11th Cir. 1983); *Pacific Legal Foundation* v. *Andrus*, 657 F.2d 829, 835 (6th Cir. 1981) (NEPA conflicts with Endangered Species Act "and thus an impact statement is not required when a species is listed as endangered or threatened"); *Natural Resources Defense Council* v. *Berklund*, 609 F.2d 553, 558 (D.C. Cir. 1979) (NEPA does not apply when the Secretary lacks discretion to deny a lease to a qualified applicant); *American Smelting & Refining Co.* v. *Federal Power Commission*, 494 F.2d 925, 947–48 (D.C. Cir. 1974) (prompt action required by duty to prevent discriminatory practices in times of gas shortage in conflict with NEPA), *cert. denied sub nom. Southern California Gas Co.* v. *Federal Power Commission*, 419 U.S. 882 (1974); *Hovsons, Inc.* v. *Secretary of the Interior*, 519 F. Supp. 434, 445 (D. N.J. 1981), *aff'd*, 711 F.2d 1208, 1214 (3rd Cir. 1983); *National Association of Property Owners* v. *United States*, 499 F. Supp. 1223, 1266–68 (D. Minn. 1980) (preparation of EIS inconsistent with Boundary Waters Canoe Area Wilderness Act), *aff'd sub nom. Minnesota* v. *Block*, 660 F.2d 1240, 1259 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *State of Alaska* v. *Carter*, 462 F. Supp. 1155, 1161 (D. Alaska 1978) (NEPA does not apply to emergency withdrawal under 43 U.S.C. § 1714(e) (1988)).

unnecessary or undue degradation in section 302(b). It would, of course, be contrary to NEPA to allow this exception to be used as a pretext for avoiding environmental review or to excuse from NEPA review actions which are not necessary to abate degradation. *Cf. Pacific Legal Foundation* v. *Andrus*, 657 F.2d 829, 833 (6th Cir. 1981) (NEPA's "to the fullest extent possible" language is "not intended to be a loophole"). Accordingly, the factual issue raised by Red Thunder's NEPA arguments is whether the remedial measures accepted or directed by BLM were designed to abate the ARD occurring at the mines. Measures not designed to have immediate effect are not within the exception and may be implemented only after BLM has conducted the environmental review mandated by NEPA. An interim action implemented without NEPA review would be subject to NEPA review if its continuation were included in a proposed modification.

Many of the actions required by BLM or taken by ZMI are only indirectly related to abating the ARD which developed at the mines. Additional groundwater and surface water monitoring can provide greater information about fluids produced at the mines and should allow BLM and ZMI to respond more quickly to ARD, heavy metal contamination, and escaped cyanide. Monitoring sites, however, do not change the effluents monitored or abate ARD, although wells may be used to remove contaminated water for processing. Similarly, the requirements to map and characterize mine pits for acid producing potential and to propose a program to identify the acid producing potential of material to be mined will provide information but will have consequence only when the information is used to make operational changes which either stop ARD or prevent ARD from occurring. In relation to the issues on appeal, these actions do not raise any significant question. They are needed to provide information necessary to prevent unnecessary or undue degradation.

Other measures, such as drainage diversions to prevent surface water from reaching sulfide materials and capturing effluent for return for processing, are of immediate benefit in abating ARD. For this reason they are exempt from review under NEPA.

In addition to these matters, BLM's decisions accepted or directed three specific actions—removal of the buttress to the 85/86 leach pad at the Zortman Mine, cessation of use of the Mill Gulch waste rock dump and placement of future wastes into the Gold Bug Pit at the Landusky Mine. In its reply brief Red Thunder expresses particular concern with the conditions in Ruby Gulch at the Zortman Mine and, although it does not object to the order to cease using the Mill Gulch waste rock dump at the Landusky Mine, argues that the Gold Bug Pit should not be used as a waste repository and objects to continued loading of the Sullivan leach pad.

The Zortman Mine

Ruby Gulch is the primary drainage for the mine pits at the Zortman Mine and the 85/86 and 89 leach pads as well as potential drainage for portions of the 79 through 83 pads (SOR, Exh. L, Zortman Mine Situation Report at 5). Problems with the 85/86 leach pad were first noted in the latter half of 1987 when cyanide was found to be leaking from its underdrain in Ruby Gulch (*see* generally Zortman Mine, MTM 77778, Vols. 4, 5). Later, leakage at the dike face was discovered to have a pH of approximately 3.5, possibly because "water may be picking up acidity from the sulfides in the mine pit, above the leach pad, and passing into the underdrain" (Zortman Mine, MTM 77778, Inspection & Enforcement File #1, Compliance Inspection Report Oct. 22, 1987; *see also* SOR, Exh. L, Zortman Mine Situation Report at 4). The solution level within the pad was lowered to limit further drainage but the record is not clear as to the result. In May 1990 drainage at the toe of the dike was reported to have a pH of approximately 3 (Zortman Mine, MTM 77778, Inspection & Enforcement File #1, Compliance Inspection Report May 24, 1990), and on June 26, 1991, surface water at monitoring site Z–1 had a pH of 2.5 along with high concentration of sulfate and elevated levels of metals (*see* SOR, Exhs. A, B). A report written following a subsequent inspection listed the adit of the old Ruby Gulch Mine, Ruby Pit, and old tailings as possible contributors (SOR, Exh. A). The Zortman Mine Situation Report identified possible causes of deterioration as "increased disturbance in the pit area and seepage of precipitation into the pit floor, construction of the 85–86 pad and dike, or placement of the 85–86 butress" (SOR, Exh. L at 4).

During 1992 consistently low pH readings were reported for site Z–1 as well as Z–15, an additional surface site in Ruby Gulch (1992 General Water Resources Annual Monitoring Report, Appx. 1 at 125–31, 159–64). Water resource monitoring reports for both sites for January through May showed pH levels in the 3 range (Zortman Mine, MTM 77778, Vols. 7, 8). In June pH readings at site Z–1 varied from 2.4 to 4, while those for site Z–15 ranged from 2.6 to 5 (Zortman Mine, MTM 77778, Vol. 8). During July reports for both sites declined to the 2.5 to 2.9 range, rising again to the low 3s in the latter part of August (Zortman Mine, MTM 77778, Vol. 8). The same levels continued to be reported through the remainder of the year (Zortman Mine, MTM 77778, Vols. 9–11). In January 1993 readings rose to the 4 range but declined again to approximately 3.2 in February (Zortman Mine, MTM 77778, Vol. 12). A groundwater monitoring site in Ruby Gulch, RG–109, also showed pH levels of 3.5 throughout 1992 and the first 2 months of 1993 and was one of four groundwater monitoring sites showing detectable levels of cyanide during 1992 (Zortman Mine, MTM 77778, Vols. 7–12; Zortman Mining Inc. 1992 General Water Resources Annual Monitoring Report at 15, 17 & Appx. 1 at 12, 14). Groundwater monitoring site RG–99 also showed consistently low pH levels (Zortman Mining Inc. 1992 General Water Resources Annual Monitoring Report, Appx. 1 at 9).

ZMI reports that it has removed 200,000 tons of material from the buttress to the 85/86 leach pad; has constructed temporary diversion structures to prevent water from contacting acid generating material; and has installed a capture and pumpback system to remove low pH water from the drainage and return it to the process circuit (ZMI Response at 8; Exh. B at 5). ZMI has also initiated studies to determine sources of effluents in the drainage and asserts that water samples show water quality to have returned to normal levels (ZMI Response, Exhs. B at 6, D).

Removal of the buttress to the Zortman 85/86 leach pad was not specifically required by BLM. Work had been begun by Zortman toward the end of 1992 in response to earlier discussions concerning problems at the mine (Zortman Mine, MTM 77778, Vol. 9, ZMI letter of Nov. 19, 1992). The buttress, however, was identified by BLM as a clear contributor to ARD because it had been constructed of sulfide materials and placed atop springs without an underdrain (SOR, Exh. K at 2; Exh. L, Zortman Mine Situation Report at 4). It appears that removal of the buttress was completed sometime in April 1993 with the material placed into the OK pit (Zortman Mine, MTM 77778, Inspection & Enforcement File #1, BLM Compliance Inspection Report Apr. 14, 1993).

Because removal of the buttress was undertaken in response to BLM's prior actions and was directly related to abating ARD in Ruby Gulch, it is properly regarded as a remedial measure which did not require prior NEPA review.

The Landusky Mine

The Landusky Mine was addressed in two prior appeals brought by Red Thunder. *Red Thunder, Inc.*, 117 IBLA 167, 97 I.D. 263 (1990), concerned amendment No. 10 to construct the Sullivan Park leach pad which BLM had approved with 11 stipulations. BLM's decision to allow Zortman to begin loading ore onto the Sullivan Park pad and initiate leaching operations was the subject of *Red Thunder, Inc.*, 124 IBLA 267 (1992). These decisions were predicated on the understanding that sulfide ore was not being mined. *See Red Thunder, Inc.*, 117 IBLA at 179, 97 I.D. at 270.

The Sullivan Park leach pad was constructed on the uppermost portion of Sullivan Gulch which is part of the headwaters of Rock Creek. Water quality deteriorated significantly during construction of the pad with monitoring sites showing dramatically lower pH readings, increased sulfates, nitrates and cyanide, and problems with arsenic and cadmium (SOR, Exh. L, Landusky Mine Situation Report at 6–7; Landusky Mine, MTM 77779, Inspection & Enforcecement Vol. 3, Dec. 29, 1992, L–28 sample; 1992 General Water Resources Annual Monitoring Report, Appx. 1 at 40–43, 119–22). BLM found that:

> Potential sources of acid drainage in Rock Creek include the leach pad dike (which was constructed with waste rock) and the bedrock beneath the leach pad (which was exposed by excavation of surficial deposits during pad site preparation). The lack of cyanide contamination at [monitoring site] L–28 indicates that the source of the acid water is not from within the pad itself. The leach pad certainly contains sulfide bearing ore, which may become acid generating after the leach pad is rinsed and decommissioned.

(SOR, Exh. L, Landusky Mine Situation Report at 7). ZMI has constructed drainage diversions around the pad, begun directing effluent into a contingency pond for return to the process circuit, installed a capture system below the pond, and proposed changes in the reclamation plan (ZMI Response Exh. A at 9–10, Exh. B at 4–5; Red Thunder Reply Exh. B at 10).

Red Thunder contends that the pad is leaking and that continued loading with ore will make correcting leaks impossible (Red Thunder Reply at 4–5, 7). The deficiency in this argument is that the reports found in the record do not support it. As in the instance quoted above, the reports indicate that the ARD originates from beneath the pad, and possibly from its dike, rather than from within the pad (*see* SOR, Exh. D; Landusky Mine, MTM 77779, Inspection & Enforcement Vol. 3, Compliance Inspection Report Aug. 14, 1992, Vol. 4, Inspection Summaries April 15 & 16, May 11 & 12, 1993 at 4–5). Also as quoted above, monitoring does not show elevated cyanide readings, as might be expected if the sulfates originated from within the pad. Because information about the actual source of ARD associated with the pad is limited, it is not possible to say that Red Thunder is wrong; however, at present there is no basis for granting its request to halt further loading of the pad.

Nevertheless, BLM correctly determined that operations at the Landusky Mine had encountered significant quantities of unoxidized sulfide material and some amount had been placed onto the Sullivan pad. The material was the source of ARD in the drainages at the mine and the basis of BLM's directive to cease using the Mill Gulch waste rock dump and to put waste material into the Gold Bug pit. The mining of unoxidized sulfide material is also shown by the exposed sulfide bearing pit walls, benches, and floors left behind from mining sulfide material as well as by use of material removed from the pits to construct facilities which are now acid producing (*see* ZMI Response Exh. B at 2 item 4). As stated in the District Manager's January 15, 1993, letter, greater quantities of unoxidized sulfides were mined than anticipated in the permit application and the mine facilities were not designed in anticipation that ARD might develop. Indeed, ZMI acknowledges that it is mining material which is potentially acid generating, although it describes such materials as waste and asserts that it is not mining sulfide ore (ZMI Response at 10 n.9, 11; *see* ZMI Reply at 11–12). The type of ore being put on the Sullivan pad, however, is not determinative. The matter of concern is that ARD has resulted from sulfide material present in both ore and waste rock.

Because considerable quantities of sulfide material were mined and transported to leach pads and the Mill Gulch waste rock dump, because the plan of operations and EA for the mine anticipated that only minimal amounts of sulfide materials would be put onto leach pads and that rock placed into the waste dump would have a net neutralization effect, and because facilities at the mine were not designed to prevent ARD, BLM correctly required ZMI to submit significant modifications to its plan of operations. For the same reasons, BLM correctly ordered ZMI to cease placing waste material into the Mill Gulch waste rock dump. We additionally conclude that, contrary to Red Thunder's arguments, BLM properly designated the Gold Bug Pit as an alternative waste disposal site without prior NEPA review, due to the need not to place additional waste into the Mill Gulch waste rock dump.

[3] The record in this case supports the State Director's decisions under 43 CFR 3809.1–7(c)(2) and (c)(3) to require ZMI to submit proposed modifications to the Landusky and Zortman plans of operation. Red Thunder has not demonstrated that the measures he accepted and directed were ineffective measures to abate ARD, however. We conclude that the measures he accepted and directed under 43 CFR 3809.1–7(c)(4) were needed to avoid unnecessary or undue degradation.

In addition, the interim measures accepted and directed by the State Director under 43 CFR 3809.1–7(c)(4) were exempt from review under NEPA, as discussed above.

To the extent appellant's arguments have not been expressly addressed in this opinion, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 13, 1993, decisions by the State Director, Montana State Office, BLM, are affirmed.

WILL A. IRWIN
Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

July 6, 1994

APPEAL OF ELES BROS. READY MIX CO.

IBCA-2952 Decided: *July 6, 1994*

Contract No. K5150021, Office of Surface Mining.

Sustained in Part; Denied in Part.

Contracts: Construction and Operation: Generally—Contracts: Construction and Operation: Contract Clauses—Contracts: Construction and Operation: Disputes and Remedies—Contracts: Disputes and Remedies: Equitable Adjustments

In a contract to drill and grout-fill underground mine voids, a contractor is entitled to an equitable adjustment to the extent that it can show that it incurred additional costs solely as a result of a variation in actual quantities of grout placed from the quantities estimated. Where the contractor satisfies the Board that it has incurred some additional costs because of the variation in estimated quantities but cannot prove the amount of the costs, the Board, in its discretion, may make an award on the basis of a jury verdict.

APPEARANCES: William P. Bresnahan, Esq., Andrea Geraghty, Esq., Hollinshead, Mendelson, et al., P.C., Pittsburgh, Pennsylvania, for Appellant; Alton E. Woods, Esq., Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

Background

On November 19, 1984, Eles Brothers Ready Mix Co. (Eles) entered into Contract No. K5150021, in the amount of $790,900, with the Office of Surface Mining Reclamation and Enforcement (OSM) under OSM's mine stabilization program, to drill and grout-fill the voids in an abandoned underground mine under St. Benedict's Church and the Bell Telephone Central Station in Peters Township, Washington County, Pennsylvania. OSM issued its Notice to Proceed on November 21, 1984, effective November 27. The work was to continue during the winter and to be completed within 150 days.

The contractor encountered weather, site, and equipment problems almost immediately, some as a result of its inexperience with deep drilling and some that apparently are inherent in the nature of the work, such as the fact that the mine voids were neither as precisely located nor as extensive as OSM's engineering study had indicated. Thus, although the contract called for the placement of 16,000 tons of grout, and a number of holes had be redrilled or recleaned before grouting, the job actually required only 3,970 tons.

OSM twice threatened termination of the contract for default, once actually doing so, only 6 weeks after the contractor had begun performance, and then reinstating it some 3 weeks later in reliance on an elaborate and more costly work plan unilaterally proposed by the contractor to cure the default, and involving the immediate assistance of two, more experienced, subcontractors.

After the underground work was complete, Eles concluded that it had incurred substantial additional costs through no fault of its own; and on November 18, 1985, during the extended restoration phase of the project, it submitted a detailed certified claim to the OSM contracting officer (CO) in the amount of $351,463.17. The largest claim, $290,604, was based upon the 75–percent variation in the quantities of grout actually placed, in comparison with the quantities estimated, under the Variation in Estimated Quantities (VEQ) provisions of the contract.

On December 20, the CO requested additional VEQ documentation; but after meeting with the contractor on March 26, 1986—apparently with no minutes of the meeting being kept—the CO on March 27 denied the entire VEQ claim, as well as all but $8,705 of the remaining claims, in a brief and somewhat perfunctory denial letter.

The contractor then apparently appealed the CO's decision to this Board. Its letter was received and receipted for by the Department's Office of Hearings and Appeals on July 7, 1986; but either the Board never received the letter or the appeal was never docketed. It was not until September 10, 1991, after a belated inquiry by Eles, then acting *pro se*, that the appeal was resubmitted to and docketed by the Board. Subsequent delays occurred while the Government attempted to locate its project records; but by October 18 an appeal (Rule 4) file had been compiled. During a telephone conference call on October 1, the Board informed the parties that it was willing to treat the appeal as an expedited case, tentatively scheduling an oral hearing for the week of January 27, 1992.

On November 13, 1991, however, after Department counsel sought additional information from Eles under an informal discovery procedure that the Board and the parties had agreed to, appellant decided to retain counsel, who entered an appearance on January 16, 1992, and then asked for time to become familiar with the case and to consider settlement. The hearing was rescheduled for October 20, 1992, but was again cancelled because as of the end of September the Government had never received any of the information it had requested and because the parties still hoped to negotiate a settlement.

Despite the parties' subsequent negotiations, little progress toward settlement was made; and on September 17, 1993, the Board issued an Order to Show Cause why the appeal should not be dismissed because of appellant's failure to prosecute it. Appellant responded that it was ready for a hearing and asked that one be scheduled. By order dated October 28, a hearing was scheduled for January 18, 1994. That hearing was postponed because of inordinately bad weather and was rescheduled for April 19. But during a prehearing conference call on April 12, the parties decided once more to cancel the hearing, electing instead to submit the case to the Board for decision on the record.

July 6, 1994

This decision relies on the materials submitted in connection with Eles' 1991 appeal, which the Board has decided to treat as timely filed despite the Government's last-minute objection that it may not have been.

For the reasons set forth below, we sustain the appeal in part and deny it in part.

Findings of Fact

A. Stipulations of Fact by Counsel

S–1. On October 30, 1984, the Office of Surface Mining (OSM) issued IFB No. K5150021, for mine stabilization at the St. Benedict's Church and the Bell Telephone Central Station in Peters Township, Washington County, Pennsylvania, by its Contracting Officer (CO) Al Owens, Jr. (Tab A of Appeal File (AF)).

S–2. Bids were due and received by OSM at 2:00 P.M. on November 16, 1984.

S–3. The purpose of the Mine Stabilization Program, as set forth in Section 1.2 of the Statement of Work Specifications, was to grout the subsiding underground abandoned mine, with the bottom of the mine located at a depth of between 210 and 260 ft. below ground surface at the St. Benedict's site and 268 ft. at the Bell Telephone Central Station site, in order to reduce further subsidence movement of the ground surface and adverse effects on the structures. Additionally, the purpose of the program was "to grout fractured and broken zones above the subsiding underground abandoned coal mine * * *"

S–4. On November 19, 1984, the award was made to the successful bidder, Eles Bros. Ready Mix Co. (Eles) at a bid price of $790,900.00. The contract required that Eles "begin performance within 7 calendar days and complete performance within 150 calendar days after receiving the Notice to Proceed." (See, Tab A of AF)

S–5. On November 21, 1984, the Notice to Proceed was issued to Eles indicating that the Contractor should be available at the designated site ready to commence operations at 8:00 A.M. on November 27, 1984. Also in this Notice to Proceed, Lois J. Uranowski was designated the Technical Project Officer (TPO) for purposes of this contract. (Tab A of AF)

S–6. On January 8, 1985, a handwritten letter was sent to the CO in which the TPO recommended that Eles be notified of deficiencies and be given 10 calendar days to complete the following at each work site:

–ten bore holes drilled and accepted;

–five holes with placed grout.

The TPO further recommended that if Eles failed to complete these items and/or failed to present a reasonable work plan and schedule, the contract be terminated for default for failure to comply with the contract requirements. (Tab B of AF)

S–7. On January 8, 1985, a meeting was held at OSM-ETC, Pittsburgh, between representatives of OSM and of the Contractor. At the meeting, it was agreed that OSM would not terminate for default for 10 days to January 18, 1985, pending completion of the following work at the two sites:

–drilling ten bore holes at each site, and

–drilling of five bore holes with grout placed at each site.

(Tab B of AF)

S–8. On January 9, 1985, the CO issued a cure letter to Eles confirming the meeting on January 8, 1985.

S–9. On Friday, January 18, 1985, the TPO was directed by telephone to notify Eles not to proceed with any further work on the subject contract on Monday, January 21, 1985, if in the technical opinion of the TPO they had not completed the work requirements as set forth with Eles in the meeting of January 8, 1985, and the CO's subsequent letter of January 9, 1985. A letter from the CO dated January 18, 1985, documented this telephone directive. (Tab C of AF)

S–10. On January 22, 1985, the TPO sent a letter to the CO through George C. Miller, Chief, Division of Federal Reclamation Programs, recommending that the contract with Eles be terminated for default. (Tab D of AF)

S–11. On January 23, 1985, a telegram from the CO was sent to Eles indicating that the contract was terminated for default immediately. Eles was directed to stop all work on the job, terminate all subcontracts, and place no further orders. The telegram indicated that detailed instructions would follow. (Tab E of AF)

S–12. On January 24, 1985, the CO (Schultz) received a letter from Eles requesting that he withhold a final decision on the termination until a meeting could be held with all interested parties. The letter also indicated that letters from Geo-Con, Inc., and Ground Improvements Techniques of Pittsburgh would be forthcoming, expressing their willingness to use their knowledge and expertise to assist Eles in increasing the pace of the contract. (Tab F of AF)

S–13. On February 4, 1985, a letter was sent to Eles by the CO giving the detailed instructions relative to the contract termination. (Tab E of AF)

S–14. On February 5, 1985, a meeting was held between representatives of OSM and representatives of Eles as a result of the request made. This meeting was also attended by two subcontractors proposed by Eles, Geo-Con, Inc., and Marts Drilling Co. (Marts). During this meeting, Eles requested that OSM rescind the termination for default and consider allowing Marts and Geo-Con to subcontract with Eles to complete the contract. The CO requested that Eles provide to him, within the next few days, subcontract agreements with Marts and Geo-Con, a detailed work schedule for the balance of the project, and a resume for the proposed superintendent for the remainder of the project. The CO also requested that Eles provide an outline on how he proposed to supply the grouting material for the remainder of the contract. (Tab G of AF)

S–15. By letter dated February 7, 1985, Eles provided the following information to the CO:

- A subcontract agreement between Eles and Geo-Con, and Marts Drilling.
- A detailed work schedule for the remainder of the project.
- A resume of experience for the proposed superintendent (Gilbert R. Eles, Sr.). (Tab G of AF)

S–16. After the meeting with Eles on February 5, 1985, Gil Eles, Sr., was informed that he would not be approved as the new project superintendent for the contract.

S–17. In a letter to the CO dated February 11, 1985, Eles provided an outline to the CO on the method that it intended to use in supplying the grouting material to the job site. Also included with this letter was a resume of Richard L. Bruce, who served as the superintendent for the remainder of the project.

S–18. In a letter dated February 11, 1985, the CO rescinded the termination for default, based on Eles's submittal of an acceptable business and management plan.

S–19. On March 21, 1985, Eles sent a letter to the CO requesting a 52-day extension of time, to June 1, 1985, to complete the contract, due to the suspension, holidays, and inclement weather. (Tab K of AF)

S–20. On April 22, 1985, the CO issued contract Modification No. 001, which extended contract performance through April 30, 1985.

S–21. According to the April 22, 1985, letter from the CO that transmitted Modification No. 001, no action was being taken on the request for extension due to the suspension, but Eles was directed to complete contract work requirements after April 30, 1985, and was advised that an additional modification would be issued. (Tab M of AF)

S–22. On August 8, 1985, Modification No. 002 was issued which extended the contract, at no cost, to May 31, 1985, to allow for the payment of work performed. (AF Tab N)

S–23. On October 23, 1985, the CO issued a 10-day cure notice to Eles for failure to complete the restoration work on the contract. (AF Tab Q)

S–24. On November 1, 1985, Eles sent a letter to the CO acknowledging the letter of October 23, 1985. (Tab Q of AF) In the letter Eles outlined a listing of items remaining to be completed on the restoration related to the contract.

S–25. On October 29, 1985, a meeting was held between representatives of OSM and of Eles to discuss the completion of the site restoration work. (Tab U of AF)

S–26. On October 31, 1985, a site meeting to review the work was held between the TPO and the project superintendent, Richard Bruce. (Tab V of AF)

S–27. In a letter dated November 18, 1985, Eles submitted claims totalling $351,463.17 for recovery of costs arising under the contract. (Tab S of AF)

S–28. Also on November 18, 1985, Eles submitted Invoice No. 6 in the sum of $50,040.00, later modified to $50,138.00. This invoice was not processed by OSM until September 16, 1986.

S–29. On December 20, 1985, the CO issued a letter to Eles denying portions of the claim and requesting additional information. (Tab U of AF)

S–30. On February 12, 1986, the TPO sent a letter to the CO addressing the $351,436.17 in claims filed by Eles on November 18, 1985.

S–31. On March 27, 1986, the CO issued his decision on the Eles claims as follows:

Item	Eles Brothers Claim	OSMRE Decision
Cleaning out holes	$ 18,338.77	–0–
Rejected grout	1,115.00	579.00
Redrilled holes	14,460.00	8,126.00
Fouled holes	20,338.00	–0–
Variation in quantity	290,604.00	–0–
Excessive silhol costs	6,564.80	–0–

(Tab W of AF)

S–32. No contract modification has been issued to date for the items approved by the CO in his March 27, 1986, decision.

S–33. On or about June 24, 1986, an appeal of the March 27, 1986, decision was filed by Eles. This appeal was received by the Office of Hearings and Appeals Department of the Interior, on July 7, 1986.

S–34. Restoration work continued throughout the summer and fall of 1986.

S–35. On October 1, 1986, Contract Modification No. 3 was issued extending the period of performance from May 31, 1985, to October 31, 1986. (Tab W of AF).

B. Board Findings

F–1. Because subsidence was occurring at the project site and major damage to the church and the switching station was potentially imminent, timely completion of the contract was considered by the parties to be a high priority.

F–2. Eles was substantially behind schedule on January 9, 1985, when OSM issued its 10-day cure letter threatening contract termination, and most of the delay was not excusable. Therefore, OSM's subsequent decision to terminate the contract for default was reasonable.

F–3. Eles' work plan, submitted to the CO on February 11, 1985, to overturn the default termination (S–17), proved adequate, and the drilling and grout-filling portion of the project was thereafter timely and successfully completed.

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F–4. Eles incurred substantial costs in excess of its bid in carrying out the drilling and grouting portion of the new work plan. Its stated total cost for placing the 3,970 tons of grouting material, as set forth in its claim, was $438,303.91, as compared with a total projected cost of $595,241.18 for placing the entire 16,000 tons contemplated in its bid.

F–5. The basis for Eles' VEQ claim against the Government, as set forth in its November 18, 1985, letter remains unchanged. It is as follows:

> Eles Bros. had available on-site the labor, material, equipment capacity and supervision required to place 16,000 tons of material in the scheduled 60 days. The Government had reviewed the manning and equipment on-site and, by acceptance, had conceded it was adequate to meet the proposed schedule. *The 16,000 tons of material could have been place in scheduled time.* Unfortunately, Government restrictions and in-site mine conditions precluded the placement of materials and resulted in the placement of 3970 tons of grout material in 70 working days.
>
> This drastic under-run of the material items had a severe financial impact on Eles Bros. The cost of placing each ton of material increased by a factor of three times what the costs would have been should 16,000 tons of material been used.
>
> The F.A.R. 52.212–11 regulation continues to state that; "The equitable adjustment shall be based on any increase or decrease in costs due solely to the variation * * *" The additional costs experienced by Eles Bros. *due solely to the under-run of materials* from the 16,000 tons in the contract to the 3970 tons actually used was $290,604.00. [Italics added.]

F–6. Eles' calculation of its VEQ claim is as follows:

ACTUAL COST

Actual Cost From Appendix "A". . . .$438,303.91
Total Quantity Used . . . . .3970 tons

Actual Cost Per Ton. $110.40/Ton

PROJECTED COST

Actual Cost To Place 3970 Tons (Appendix A). $438,303.91

Less Actual Cost of 3970 Tons Material (Table 1). . . . 51,980.88

Actual Total Cost Without Material. $386,323.03

Plus Total Material Cost of 16000 Tons (Table 1). 208,918.15
Total Projected Cost To Place 16000 Tons of Material. . $595,241.18

Cost Per Ton To Place 16000 Tons. . . . . $ 37.20/Ton

RECOVERABLE COST INCREASE

Actual Cost Per Ton To Place 3970 Tons. $110.00

Projected Cost Per Ton To Place 16000 Tons. 37.20
Actual Increase In Cost To Place Only 3970 Tons. . . $73.20/Ton

Recoverable Cost: $73.20/Ton X 3970 Tons = $290,604.00

F–7. The CO's December 20, 1985, response to the VEQ claim, prior to his March 27, 1986, final decision rejecting the claim, was as follows:

> *Variations in estimated Quantities*–The Government recognizes that there were underruns in several of the items set forth in the bid schedule. Your claim has been reviewed but it is unclear to OSM exactly what, if any, additional costs your firm *may* be entitled to recover with respect to fixed costs which were included in your original bid but you did not recover because of the underrun. You *may* be entitled to additional funds of this nature in the cost of those unexpended quantities up to 85% of the amounts set forth in the contract. From the data presented OSM is unable to ascertain just what this amount may be. You are therefore requested to review the information you have already submitted in the reference letter and to gather any other data which you may have to support your claim for these funds. In order to give you sufficient time to prepare this data it is recommended that we meet in Pittsburgh the last week in January for a final meeting of all parties on this claim. The exact time and place shall be established during the week of January 20, 1985.

F–8. Eles never satisfactorily explained or justified its contention that it could have placed 16,000 tons of material in the same time and at the same cost as was required for it to place only 3,970 tons (F–5); and such a projection is contrary to common experience. Therefore, the calculations in Eles' claim submittal as to the cost per ton of placing 16,000 tons of material (F–6) appear to be unreliable because they are based on unproven premises.

F–9. The record, however, contains no indication that the Government ever audited Eles' costs or otherwise challenged the total costs that Eles asserted.

F–10. Despite Eles' failure to prove its contention that all of its increased grouting costs resulted *solely* from the variation in estimated quantities (F–5), the Board finds, on the basis of both common experience and the entire record, that at least *some* of Eles' increased grouting costs resulted solely from that variation.

F–11. In her final brief to the Board, appellant's counsel suggested the following alternative calculation of Eles' additional grouting costs, based on an interpretation of the Board's decision in *Manis Drilling*, IBCA-2658, 93–3 BCA ¶ 25,931:

MATERIAL	ESTIMATED QUANTITY (BID)	UNIT PRICE (BID)	TOTAL
Cement	3,000 tons	$ 60.00	$180,000.00
Fly Ash	7,000 tons	14.20	99,400.00
Type "A" Gravel	500 tons	9.00	4,500.00
Type "B" Gravel	5,500 tons	9.00	49,500.00

TOTAL PROPOSED ESTIMATED COST OF GROUT: $333,400.00
(estimated quantity x price)

ACTUAL COST OF GROUT: – 88,409.56
(actual quantity x price)

TOTAL COST OF DELETED GROUT: 244,990.40

COST OF DELETED MATERIALS: – 156,937.63
(from claim–Table I) Total cost of materials as estimated less cost actually incurred ($208,918.51–$51,980.18)

LOST PROFIT AND OVERHEAD: $ 88,052.81

F–12. In appellant's initial brief, Eles agreed to withdraw its claims for additional amounts in excess of the amount awarded by the CO under the headings "rejected grout" ($579 awarded) and "redrilled holes" ($8,126 awarded), leaving only the claims for cleaning out holes ($18,338.37), fouled holes ($20,338), and excessive silhol costs ($6,564.80), plus the VEQ claim, for the Board's consideration.

F–13. Each of these remaining claims (other than the VEQ claim), however, suffers from a lack of proof. Although appellant has submitted formal statements in affidavit form from Gilbert and Carl Eles, both attributing responsibility for the extra costs to unreasonable actions by Government's two on-site inspectors and its TPO, the Government, in turn, has submitted considerably more detailed, and at least equally persuasive, affidavits from the CO, the TPO, and one of the two on-site inspectors (the other inspector now being deceased), all contending that the contractor's losses were caused by its own inexperience and inefficiency.

Discussion

Claims involving factual complexity and extreme differences of opinion are hard enough to deal with when they are fresh; they are almost impossible to deal with, with any assurance of accuracy, more than 8 years later, when memories have faded and records have been lost.

However, Gilbert Eles' current affidavit sets forth essentially the same information that was submitted to the CO in November 1985; the CO's and the TPO's memories concerning the events that transpired do not seem to have greatly diminished; and the surviving project inspector even managed to find his actual project log, which is included in the record and sets out on a daily basis his views of the problems that continued to beset the contractor.

Although the affidavits of the Government's witnesses contradict virtually everything the contractor alleges about their responsibility for the errors and inefficiencies that plagued the project, they do not attempt to analyze in detail the VEQ provisions of the contract. As to the other claims, one cannot accept both versions of what happened, and since the contractor clearly has the burden of proving Government fault, the Board cannot conclude that the burden has been met (F–13). Accordingly, the claims pertaining to cleaning out holes, fouled holes, and excessive silhol costs must be denied. A detailed discussion of the parties' views would add nothing but greater length to this decision.

Neither can we accept appellant's final effort to calculate its VEQ losses on the basis of our decision in *Manis, supra*. In that case, which also involved the filling of mine voids, virtually the entire project had to be cancelled because of the contractor, despite having done a "very good job" of trying, was unable to find any mine voids on the project site; and the contracting officer elected to partially terminate the contract (except for clean-up operations) for the convenience of the Government. Thus, the contractor in *Manis* was entitled to its overhead costs and to a profit on the work actually done, based on the CO's decision.

In the case before us, however, the project went more or less as planned, and the only difference between the anticipated project and the actual project was that the voids were structured in such a way that less grouting was needed. Only about 25 percent of the grouting projected was actually required. Thus, both the contractor and the CO properly treated the former's principal claim as a VEQ claim, rather than as a partial termination.

As the contractor's original claim notes (F–5), the essential issue is simply the extent to which its losses were "due solely to the variation above 115 percent or below 85 percent of the estimated quantity," since that is the only basis for any equitable adjustment to which the contractor may be entitled on the basis of reduced quantities. *See Foley* v. *United States*, 11 F. 2d 1032 (Fed. Cir. 1993); *Victory Construction Co.* v. *United States*, 510 F. 2d 1379 (Ct. Cl. 1975); and *Clement-Mtarri Cos.*, ASBCA 38170, 92–3 BCA ¶ 25,192.

Therefore, we must reject appellant's effort to make its facts fit the mold of *Manis*, just as the Armed Services Board thought it necessary to reject the appellant's calculations in the analogous appeal of *Henry Angelo & Co.*, ASBCA 43669, 94–1 BCA ¶ 26,484. Here, as in *Angelo*, we have nevertheless concluded that at least some award is proper; and it appears that the appropriate basis for such an award is a jury verdict.

In deciding to make a partial award, we are partly influenced by what we construe to be the TPO's misconception of the VEQ clause in her February 12, 1986, memorandum to the CO on the subject, which logically would have influenced the CO's final decision to reject the claim. In that memorandum, the TPO said, in part, "The statement that Government restrictions and in-site mine conditions precluded placement of the estimated material does not entitle Eles Brothers for [sic] full payment of their anticipated total costs for placing the estimated 16,000 tons of material. *In summary, the contractor cannot be paid for work never accomplished.*" (Italics added.) Yet that is precisely the purpose that the VEQ clause was intended to achieve. When the amount of the variation from a contract's estimate of the quantity of given work necessary to complete the project has been established in the case of an underrun, the VEQ clause contemplates paying the contractor a portion of its actual costs for the work that it was ready to accomplish but could not perform because the quantity of work needed was less than had been anticipated.

Since the Board has found that appellant indeed suffered some loss because of the reduction in quantities, the question that remains is what proportion of its total losses was due *solely* to the variation between the 3,970 tons of grout actually placed and (85 percent of) the 16,000 tons originally estimated. For lack of a better approach, our starting point will be roughly the same as that chosen by the Armed Services Board in *Angelo*.

Appellant's allegation that its total grouting activity costs amounted to $438,304 has not been seriously disputed. Of that amount, it was paid $51,981 for material under the contract, leaving an actual-cost balance of $386,323. If we multiply the 16,000 tons of the contract by 85 percent, we derive the quantity subject to evaluation under the VEQ clause; namely, 13,600 tons. Dividing the 3970 tons actually placed by 13,600, we arrive at 29.2 as the percentage of grout actually placed as compared with what was anticipated. Therefore, 70.8 percent of the quantity estimated was not placed. Multiplying the $386,323 in unpaid costs by that 70.8 percentage gives us $273,517 as the maximum amount that could have been incurred solely by reason of the variation in estimated quantities.

However, the Government has made a convincing case that most of the costs incurred by appellant were not the result of the variation in quantities but, rather, the result of the contractor's inexperience and inefficiency. Therefore, we can compensate Eles only for the portion of its costs that *was* solely the result of the variation, which we estimate by jury verdict to be approximately 20 percent of its costs, or $54,703.

Decision

Accordingly, we conclude that appellant is entitled to the $579 awarded by the CO for rejected grout; the $8,126 awarded by the CO for redrilled holes; and to $54,703 for the variation in estimated quantities, for a total of $63,408, plus interest from the date the CO received appellant's November 18, 1985, certified claim, in accordance with the provisions of the Contract Disputes Act. All other claims are hereby denied.

It is so ordered.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

CHERYL SCOTT ROME
Administrative Judge

APPEAL OF J. A. JONES CONSTRUCTION CO.

IBCA-3280 Decided: *August 16, 1994*

Contract No. 1-CC-32-01480, Bureau of Reclamation.

Appellant's Motion for Summary Judgment Sustained; Government's Motion Denied.

Contracts: Construction and Operation: Generally—Contracts: Construction and Operation: Contract Clauses—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Termination for Convenience

The Government is not permitted to substitute the Termination for Convenience clause for the Changes clause to delete a relatively minor portion of the total contract more than 2 years after it issued a deductive change order, which was relied on by the contractor in submitting a proposed credit to the Government for the deleted work. In determining the amount of the credit, the primary consideration is the cost impact on the contractor. Thus, the contractor was entitled to rely upon the cost estimate of the subcontractor that was to have done the work.

APPEARANCES: C. M. Burdette, Esq., VP & Gen. Counsel, J. A. Jones Construction Co., Charlotte, North Carolina, for Appellant; Daniel L. Jackson, Esq., Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal by the contractor, J. A. Jones Construction Company (Jones), from a November 4, 1993, decision (unilateral Modification 357) by a Bureau of Reclamation (BOR) contracting officer (CO) denying Jones' earlier proposal, submitted on December 6, 1991, for a Government credit in the amount of $89,512 in connection with the deletion, under the Changes clause, of 3,060 rock bolts from a major dam reconstruction project pursuant to Modification 043, dated September 30, 1991. The CO's decision had substituted a partial Termination for Convenience determination for the original change order and found the proper credit due the Government to be $361,064.28.

Both parties moved for summary judgment. We find no material facts to be in dispute, and the motions otherwise appear to be appropriate. For the reasons set forth below, we deny the Government's motion, find the credit due the Government to be $89,512, as proposed by the contractor, and render summary judgment for appellant.

I. *Facts*

1. On February 21, 1991, BOR awarded Jones a firm fixed-price contract, No. 1-CC-32-01480, in the amount of $103,300,979.10, for a major modification of the Theodore Roosevelt dam, located on the Salt River approximately 76 miles northeast of Phoenix, Arizona, in

August 16, 1994

Maricopa and Gila Counties. The alterations were extensive, including the addition of a concrete overlay to raise the dam's crest approximately 77 feet, the removal and reconstruction of the left and right spillways, and major power plant and related improvements. Jones received the Notice to Proceed (NTP) on September 28, 1991, and the work was scheduled to be completed on May 28, 1996 (AF 81).

2. The scope of work under the contract was described in Schedules 1 and 2 of the Solicitation. Schedule 1, which involved Government-funded work, covered all modifications except for the power plant control room expansion, which was covered by Schedule 2 and would be paid for by Salt River Project funds. The award was to be made to the responsive, responsible bidder offering the lowest evaluated price for Schedule 1 (AF 1; AF 3,at 13) There were seven bidders, and Jones' bid was the lowest bid overall (AF 81).

3. Schedule 1 included various estimated quantity, unit price items, as well as lump sum items. However, subsection F.1(c), under the heading "Bidding Schedules," stated: "The quantities in the schedules are estimated quantities for comparison of bids only, and except as provided in the contract clauses entitled 'Variation in Estimated Quantity' (see subsection I.4), no claim shall be made against the Government for overruns or underruns" (AF 3 at 13). Thus, responsive bids included estimated quantity items as well as lump sum items.

4. Bid item 51, one of 358 contract items and the subject of this appeal, called for the furnishing and installation of 5,400 linear feet (LF) of 150,000–pound design tension (kip) rock bolts. Jones' bid for item 51 was $130 per LF for a total of $702,000 (AF 3 at 19).

5. Effective September 30, 1991 (2 days after Jones had received the NTP), the CO issued Modification 043, pursuant to the Changes clause of the contract, Paragraph I.4.11 (FAR 52.243–4, Aug. 1987), making changes in the bolting requirements for Apache Trail Walls 1, 2, and 3. The change order involved only bid Item 51. All rock bolts were deleted for Wall 1; placement of rock bolts was changed for Wall 2; and some rock bolts were deleted for Wall 3; resulting in a reduction in estimated quantity from 5,400 LF to 2,340 LF. 3,060 LF of rock bolts were thus eliminated (AF 53; Complaint, I at ¶E).

6. Paragraph D of Modification 043 provided that "any proposal for an equitable adjustment in the contract terms and conditions resulting from the above change shall be submitted in writing to the Contracting Officer within 30 days of receipt hereof." However, the Changes clause provided the 30-day period could be extended by the Government (AF 1 at I–45–I–46) and BOR's letter to Jones transmitting Modification 043, dated October 4, 1991, merely said: "Please submit your credit proposal [*i.e.*, the proposed credit to the Government for the reduction of work] as soon as possible" (AF 53 at 266, 264).

7. On December 6, 1991, Jones submitted its request for an equitable contract price adjustment under the Changes clause, offering a $88,438

credit to the Government for the reduction in the quantity of rock bolts. The proposed credit was equal to the cost that Jones said it would have incurred had it furnished and installed the eliminated rock bolts, less the increased cost to its subcontractor for furnishing and installing the remaining quantity of partially relocated rock bolts (AF 57 at 275). The amount of the proposed credit was later revised to $89,512 (Complaint, I at ¶ G).

8. Subsequently, several letters were exchanged among BOR, Jones, and its subcontractor—BOR seeking more information, Jones providing its spread sheets to verify the costs it would have incurred, and the subcontractor (Gibbons and Reed Co.) providing specific information on what it would have charged Jones for the deleted work (AF 59, 61, 63).

9. But BOR remained dissatisfied, and on September 14, 1992, its cost analyst submitted a recommendation that "the value of the contract should be decreased by $388,573.97 due to the termination of the 3,060 linear feet of rockbolt." His recommendation was based on Jones' bid price of $130 per LF, rather than on Jones' cost to perform the deleted work. He described Jones' credit proposal as "totally inadequate" (AF 66).

10. On November 4, 1992, the subcontractor submitted a certified claim to Jones, stating that its proposal "was developed using accepted government procedures. The deduct was based on what would have been the cost to us to perform the deleted work." The letter noted that the proposal had initially been submitted over a year ago and that, despite its numerous requests, the subcontractor had been unable to get all of the parties to the table to seriously negotiate a settlement of the matter (AF 69).

11. Negotiations between BOR and Jones continued for several months without either side substantially modifying its position. Finally, on May 7, 1993, Jones submitted its certified claim to BOR, together with 220 pages of documentation, for $308,288, which it arrived at by multiplying the 3,060 LF of deleted rock bolts by its bid price of $130 per LF ($397,800), and then subtracting the subcontractor's performance price of $89,512 from that total (AF 78). BOR acknowledged receipt of the certified claim as of May 10 and promised a CO's decision by May 30, 1993 (AF 79). But on September 21, BOR notified Jones that its decision would not be issued until October 15 (AF 80).

12. On September 21, 1993, BOR's Major Claims and Modifications Branch had released a lengthy Technical Analysis of the rock bolt deletion claim. Its Executive Summary noted that a definitive technical recommendation on the claim was not possible because other, nontechnical, factors were involved in the claim. The analysis urged in five places that the CO consult with the Solicitor in order to ascertain whether the rock bolt deletion could be considered "major," noting that the method of calculating the equitable adjustment would be more favorable to the Government under a Termination for Convenience determination (AF 81).

13. BOR's technical analysis also asserted that: "Even though the [CO] did not issue a formal Termination for Convenience notice and used the Changes clause as the authority for Modification 043, it has been ruled that he may proceed under the Termination clause." However, the analysis also stated that if the deletion were determined to be minor, the Changes clause would be applicable, and then either of two alternative calculations would be possible, the first of which was as follows (AF 81 at 8):

> Method a. Follow the method Jones asserts leaving Jones in the same position it would have been had there not been a deletion by allowing it to recover the portion of its bid for Item 51 that exceeded costs. The entire deleted quantity would be paid at the price per unit bid minus the amount it would have cost to furnish and install the deleted units. *This method would follow the customary pricing equations of equitable adjustments for changes*. [Italics added.]

14. It is not clear from the record whether the CO did, in fact, ever consult the Solicitor. In any event, the CO's final decision, issued on November 4, 1993, argues that BOR "is not responsible for compensating Jones for a loss that results from an unbalanced bid; and the resultant loss that is derived from a subcontract that is formed with the unbalanced bid as an element of economic offset in the formation of the subcontract."

15. The CO's decision admitted that the subcontractor's price to Jones for furnishing and installing the rock bolts would be a fair estimate of the cost Jones would have incurred had there been no deletion. However, the decision concluded that the Termination for Convenience clause, rather than the Changes clause, was the appropriate method for pricing the amount recoverable by Jones for the deletion of the rock bolts; and it decreased the contract by $397,800 (3,060 X $130), and increased it by an allowed cost of $36,735.72, for a net decrease in cost to BOR of $361,064.28 (AF 82). On November 22, 1993, Jones appealed the decision to the Board.

II. *Contentions of the Government*

In its motion for summary judgment, the Government makes much of the fact that Jones' proposal for equitable adjustment was not properly submitted within 30 days after its receipt of Modification 043, alleging that it is therefore time-barred, citing *Do-Well Machine Shop, Inc.* v. *United States*, 870 F.2d 637 (Fed. Cir. 1989), and *Bataco Industries, Inc.* v. *United States*, 29 Fed. Cl. 318 (1993).

Do-Well involved what have been described as the time-bar provisions of the Termination for Convenience clause, and *Bataco*, an Economic Price Adjustment clause that warned that "[t]he contractor's entitlement to price increases shall be waived" unless its request for adjustment were received within the specified time period. 29 Fed. Cl. at 319 and n. 1. Here, the Changes clause provided for Government extensions of the 30-day proposal period, as noted.

Moreover, one authority has recently stressed that the Court in *Do-Well* "did not hold that the concepts of prejudice and waiver associated with time-bar provisions should be jettisoned." *The Nash & Cibinic Report*, Vol. 8, No. 5, at 71 (May 1994).

The Government has not established any prejudice to it by appellant's submission of its proposal only 2 months after Modification 043 issued under the Changes clause and, accordingly, there is no practical reason for precluding any recovery by appellant. *See Chimera Corp.*, ASBCA 18690, 76–1 BCA 11,901 at 57,030–31.

Further, as to waiver, this Board has held, as have the courts, that where the CO considers a claim for an equitable adjustment despite a delay by the contractor in submitting it, any alleged failure to comply with the notice requirement is waived. *See Jack Wilson*, IBCA 7, 62 I.D. 225, 228 (1955); *J. D. Armstrong Co.*, IBCA 40, 56–2 BCA 1043 at 2408; and *Robertson-Henry Co.*, IBCA 221, 61–2 BCA 3156 at 16,399, and cases cited. *Cf. Morris-Knutsen Co.* v. *United States*, 184 Ct. Cl. 661, 697 (1968). We therefore find the Government's contention to be without merit.

The Government next asserts that BOR's termination for convenience (T/C) was proper under the Board's 1993 decision in *Manis Drilling*, IBCA-2658, 93–3 BCA 25,931, because in that case the Board affirmed the CO's use of a partial T/C where the Office of Surface Mining Reclamation and Enforcement had "deleted major portions (91% of the cement requirements and 100% of sand and exploratory drilling requirements) of the contract after the contractor sought compensation under the Variation in Estimated Quantities clause of the contract." Counsel then cites large portions of the dicta in that case in support of his position in the instant case.

Manis, however, not only involved no new law but is easily distinguishable on its facts. As we said in *Eles Bros. Ready Mix Co.*, IBCA 2952, 94–3 BCA   (July 6, 1994), concerning *Manis*:

> In that case, virtually the entire project had to be cancelled because the contractor, despite having done a 'very good job' of trying, was unable to find any mine voids on the project site; and the contracting officer elected to partially terminate the contract (except for clean-up operations) for the convenience of the Government.

Thus, in *Manis*, the work contemplated by the parties was non-existent, and termination of the contract was the only reasonable solution. That is not the case here.

The Government nevertheless contends that BOR's CO had broad discretion to determine to utilize the T/C clause in this case and that the Board should defer to his decision, citing *Ideker, Inc.*, ENG BCA 4389, 87–3 BCA 20,145 at 101,974–75, and *Salsbury Industries* v. *United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991). While *Ideker* addresses the discretion of contracting officers, it confirms that whether deleted work should be considered "major" or "minor" is determined on a case-by-case basis. Counsel admits that *Salsbury* is a total rather than a partial termination case. However, counsel quotes *Salsbury* to the effect that:

> It is not the providence [sic] of the courts to decide *de novo* whether termination was the best course. "In the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive." *John Reiner & Co. v. United States*, 163 Ct. Cl. 381, 325 F.2d 438, 442 (1963) [*cert. denied*, 377 U.S. 931 (1964)].

We do not believe that total termination cases have any relevance to the case before us, but we will discuss further the issue of the propriety of the Government's attempt at partial termination, below.

The Government's third major contention is that Jones' claim for relief should be denied because of its general failure to comply with contract requirements—not only by reason of its failure to comply with the 30-day notice provision, but also because of an alleged failure to submit evidence of "what its reasonable costs would have been if the deleted quantity had been furnished and installed *by Jones*." (Italics added.) The premise here appears to be that Jones somehow should be required to show what costs it would have incurred if it did the work itself rather than through its subcontractor. No cases were cited in support of this proposition, but we nevertheless address the substance of the contention in our discussion, below.

In the Government's memorandum in opposition to Jones' motion for summary judgment, after attempting to distinguish appellant's cases, counsel continues to rely primarily on *Manis* and *Salsbury*. But he also cites *Ideker*, 87–3 BCA 20,145 at 101,979, for the proposition that where there are work deletions in any type of contract, "Approximately the same result should be obtained whether the work is deleted under the T/C or 'Changes' clause." We are inclined to agree with this view.

III. *General Discussion*

Having carefully considered all of the Government's arguments and citations, we are not persuaded as to the merits of its position. The Government bears the burden to prove that the amount of its downward price adjustment for the deleted work is reasonable. *Nager Electric Co.* v. *United States*, 442 F.2d 936, 946 (Ct. Cl. 1971). In Professors Nash and Cibinic's *Administration of Government Contracts*, 2d ed. 1985, Chapter 7, Pricing of Adjustments, the subchapter entitled "Basic Principles" begins: "The *overriding basic principle* applicable to price adjustments under contract clauses is that they are almost always measured by the cost impact on the contractor." (Italics added.)

Under the subsequent section on "Basic Pricing Formula," the authors quote from *Celesco Industries, Inc.*, ASBCA 22251, 79–1 BCA 13,604, to the effect that: "The measure of the equitable price adjustment is the difference between the reasonable cost of performing without the change or deletion and the reasonable cost of performing with the change or deletion." They go on to say, "The technique that is used to attain this result is to attempt to limit the repricing to the effect of the change alone without altering the basic profit or loss position of the contractor before the change occurred."

Then, under the subsection entitled, "Pricing the Deleted Work," they explain that,

> Under the basic rule, deleted work is priced at the amount it would have cost the contractor had it not been deleted. It is often argued that this amount should be based upon the contractor's original cost estimates at the time the parties established the contract price. * * * However, the boards and courts with rare exceptions, reject this argument when one of the parties presents better evidence of the cost the contractor would have actually incurred had the work not been altered,

citing *Skinner & Garrett, Inc.*, GSBCA 1150, 65–1 BCA 4521.

The Interior Board recently followed *Nager Electric* and *Celesco* in analyzing the Government's burden concerning price adjustments for deleted work and the cost differential to the contractor of performing with and without the work. *Michael Mark Ltd.*, IBCA-2697, *et al.*, 94–1 BCA 26,453 at 131,634. *Nager Electric*, *Celesco*, *Skinner* and *Michael Mark* are not the first, nor the last, of many cases that make clear that the Government has the burden of proof in challenging the contractor's estimate of what it would cost to perform the deleted work. *See, e.g.*, *Bruce Construction Corp.*, 163 Ct. Cl. 97 (1963), in which the court cites *James McFerran* v. *United States*, 39 Ct. Cl. 441 (1904), as authority for the proposition that "the measure of damages cannot be the value received by the Government, but must be more closely related to and contingent upon the altered position in which the contractor finds himself by reason of the modification." 163 Ct.Cl. at 100. The *Bruce* decision was by the same author and the same five-judge panel that decided *Reiner* (quoted in *Salsbury*, *supra*) less than a month later. It seems highly unlikely that these five judges would have decided to alter this long-standing view in *Reiner* without expressly saying so.

See also Griffin Services, Inc., GSBCA 10841, 92–2 BCA 24,945 at 124,333: "The termination for convenience clause does not dictate how the unterminated portion of the partially terminated contract is to be priced"; *Mit-Con, Inc.*, ASBCA 43021, 92–1 BCA 24,632 at 122,917: "The Government admits it has the burden of proving the amount which it has taken as a credit"; *Santa Fe Engineers, Inc.*, ASBCA 31686, 89–3 BCA 22,207 at 111,706: "In the case of deleted work, the Government bears the burden of proving how much downward adjustment it is entitled"; *Andrews & Parish Co.*, ASBCA 30689, 88–3 BCA 20,976 at 105,991–92: "The Government bears the burden to establish the amount of the reduction due it. * * * [T]he Government is entitled to an amount based upon what it would reasonably have cost the contractor to have performed the work."

As to the use of the T/C clause versus the Changes clause, the Board in *Manis*, 93–3 BCA at 128,980, said:

> Both the Changes and the Termination for Convenience clauses provide a mechanism for the deletion of contract work. However, when major portions of the contract work are deleted, the Termination for Convenience clause is more appropriate where no additional work is substituted in its place. *Similarly, deletion of a minor item of work is considered to be within the ordinary coverage of the Changes clause* [citing *Industrial Consultants, Inc.*, VABCA 3249, 91–3 BCA 24326 at 121,551]. [Italics added.]

We were perhaps remiss in *Manis* in not pointing out a subtle but important difference in our view from that of the VA Board in *Industrial*. In the latter case, the Board opined that if major portions of the work are not deleted, "either clause may be used"; whereas, we expressed a preference for the Changes clause. We continue to believe that a relatively minor alteration in the scheduled work normally does not constitute a "termination" of the contract in any sense.

Which brings us to the merits of the present case. The 3,060 LF of rock bolts deleted from the contract in the case before us, according to the Government's analysis, constituted 95 percent of the originally specified 3,210 LF of 150 kip rock bolts in the Apache Trail Wall replacements (2,190 LF of the 5,400 LF of rock bolts were to be installed in other locations). If item 51 were considered as a unit, a deletion of 3,060 LF out of 5,400 LF is 57 percent, slightly over half. But if a comparison is made of the contract value of the deleted bolts to the total amount of the contract—*i.e.*, $397,800 out of $103,300,979—the original modification deleted less than 4 percent of the total amount of the contract (AF 81).

IV. *Discussion of Specific Issues*

In essence, this appeal raises three specific issues: First, could BOR properly have invoked the T/C clause on September 30, 1991, when it chose to delete 3,060 of rock bolts from Jones' contract? Second, if so, did it therefore also act properly in invoking the T/C clause, rather than the Changes clause, for the first time when the CO issued his final decision on November 4, 1993? And finally, assuming the answer to the second question is negative, was it proper for Jones to rely on the cost estimate of its subcontractor in determining the amount of credit due BOR?

Fortunately, in view of our conclusion with respect to the second question, we need not, and do not, venture into the labyrinth presented by the first question. We find that, whether or not an initial CO decision to delete the 3,060 LF of rock bolts by a T/C might have been proper in September 1991, it was highly improper in November 1993.

As the Engineers' Board said in *Lionsgate Corp.*, ENG BCA 5425 *et al.*, 90–2 BCA 22,730, a case where the appellant tried unsuccessfully to convert a change order into a T/C:

> Appellant's allegations, that the various deletions here involved constituted some species (either total or partial) of termination for the Government's convenience, are three years late and short on analysis. The deletions occurred in September, 1986. The work was deleted pursuant to the contract's "Changes" clause. Whether the Government earlier may also have considered deleting the work under the convenience termination clause is largely irrelevant in this case. Had the remainder of the contract work been deleted in July, 1986, when the Government estimated that the remaining work constituted 50% of the total contract work, a different question would have been presented. It was not so deleted * * *

* * * * * * *

> We consider that the parties' pre-June, 1989 treatment was right and Appellant's current contention is wrong. Use of the "Changes" clause was proper. This conclusion is supported by the contemporaneous actions of the parties, and our evaluation of the relative significance, discreteness and dollar value of the work eliminated.

90–2 BCA at 114,106.

The Armed Services Board in *Kinetic Engineering & Construction, Inc.*, 89–1 BCA 21,397 at 107,871–72, took a similar view when it was the Government that wanted to revise its deletion retroactively. It said:

> Whether work should be deleted under the Changes clause or the Termination for Convenience clause is best left to the circumstances of each case. *American Construction and Energy, Inc.*, ASBCA 34934, 88–1 BCA 20361; *Celesco Industries, Inc.*, ASBCA 22251, 79–1 BCA 13604. In view of the parties' agreement to close out the contract via deductive change, we find no compelling reason to treat it otherwise. Indeed, Appellant does not challenge that action; it is now the Government that protests. We refuse to allow the Government to retroactively nullify its own decision, which appellant agreed to and relied upon, in the hopes of obtaining some perceived advantage on quantum on this appeal.

Accord Goetz Demolition Co., ASBCA 39129, 90–3 BCA 23,241 at 116,617–18 *aff'd on recon.*, 91–1 BCA 23,397 (contemporaneous actions of parties rendered Changes clause not, Termination for Convenience clause, applicable).

The Board's comments in *Celesco, supra,* are also worth noting (79–1 BCA at 66,683):

> The parties also have proceeded as if this were a change rather than a partial termination. The TCO, although purportedly acting under the authority of the "Termination for Convenience of the Government" clause, made the reduction in the contract price as an equitable adjustment. Appellant consistently disputed that any portion of the work had been terminated, never filed a termination settlement claim either for the terminated or continued portion of the work, as prescribed by the convenience termination clause, except the belated claim for settlement expenses, and requested the issuance of a no-cost change order. * * *
>
> "There is no reason for us to take a different approach. Since we are not bound by the contracting officer's label of partial termination" notice, we will treat this notice as a deductive change order. * * *
>
> *   *   *   *   *   *   *
>
> The measure of the equitable price adjustment is the difference between the reasonable cost of performing without the change or deletion and the reasonable cost of performing with the change or deletion.

There is also no need for this Board to reinvent the wheel with respect to this issue. We reject the CO's belated attempt to rewrite the contract's history, and we will treat the deletion of the rock bolts in September 1991 as having been properly made under the Changes clause of the contract. Thus, the remaining question is simply whether it was reasonable for Jones to have relied on the cost estimate of its subcontractor in proposing the credit to which the Government was entitled. We think it was.

First, there was no attempt to be clever or devious in Jones' use of the estimates provided by its subcontractor. The subcontractor was to have done the entire work on the Apache Trail Walls; and, in fact, it was chosen by Jones for the work precisely because it had done other similar work in the same area previously, and thus was already mobilized and ready to begin work. There is no indication that anyone, including the Government, had any better idea of what it might cost to insert 30–foot bolts into the trail walls than this experienced subcontractor did.

Moreover, the use of this particular subcontractor was a compromise for Jones, one on which it said it lost money, since once mobilized, Jones apparently had hoped to do the Apache Trail work for less money. In its April 3, 1992, letter to BOR's Construction Engineer (AF 61), Jones stated:

> At the start of the project, we elected to subcontract this work, as Gibbons & Reed was ready to start after having done the Apache Trail Contract Modification No. 10 work, and the impact of the Apache Trail work on all concurrent and preceding work activities below Apache Trail. We weighed the cost of subcontracting against the timeliness of starting and completing the work and considered the loss in the best interest of the job.
>
> As you will notice from our spreadsheet, the rock bolts were a major contributor to the revenue generated on the plus side versus the numerous cost[s] greater than revenue amounts * * *.
>
> Deleting the rock bolts at any other cost than as submitted would be inequitable in the light of the overall package. We request that you advise us of your position.

BOR never responded to this letter and, and as we have noted, 7 months later Jones was forced to submit its certified claim to BOR.

The Government, which has the burden of proof, has not presented us with any evidence that the subcontractor's estimate was in any way faulty; rather, it appears almost self-evident that the source that would have the best and most current information on the probable costs of installing the deleted rock bolts would be the subcontractor that was already engaged in performing similar work in the same location.

Thus, we regard the subcontractor's estimate, as adjusted, of $89,512 to be the best evidence of the reasonable cost to Jones of the rock bolt deletion, and we conclude that that is the credit to which the Government is entitled. *Bruce, supra*; *Hensel Phelps Construction Co.*, ASBCA 15142, 71–1 BCA 8796.

Decision

Accordingly, we find the credit due the Government for the deletion to be $89,512 and sustain Jones' claim in the amount of $308,288, plus interest from May 10, 1993, in accordance with the provisions of the Contract Disputes Act.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

CHERYL SCOTT ROME
Administrative Judge

APPEAL OF NATIONAL PARK CONCESSIONS, INC.

IBCA–2995 Decided: *August 18, 1994*

Contract No. 14–10–0100–1043 (1961) and Contract No. CC-WAS001–82 (formerly No. CC–0680–2–0001 (1982)).

National Park Service, Denied.

1. Contracts: Contract Disputes Act of 1978: Jurisdiction—Contracts: Disputes and Remedies: Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Jurisdiction

The Board held that it possessed jurisdiction under the CDA, 41 U.S.C. § 601, to entertain appellant concessionaire's claim for costs incurred due to allegedly defective specifications provided by the NPS pursuant to an agreement which had settled appellant's prior claims against NPS under its 1961 concession contract. Noting that the Interior Board has held previously that concession contracts are procurement contracts subject to the CDA, the Board found that the settlement agreement modified appellant's successor 1982 concession contract to make NPS responsible for providing the specifications.

2. Contracts: Contract Disputes Act of 1978: Jurisdiction—Contracts: Disputes and Remedies: Damages: Generally—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Jurisdiction

Although it did not dispute the amount of appellant's alleged damages, NPS contended that they were consequential and, therefore, the Board lacked jurisdiction over the appeal. The Board noted that whether damages were consequential did not affect jurisdiction and, due to its determination denying liability, it did not address the question.

3. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Drawings and Specifications—Contracts: Disputes and Remedies: Equitable Adjustments

The Board found that appellant did not meet its burden to prove that NPS was responsible for appellant's costs of bathroom tile repair and replacement. Appellant did not comply with NPS' specifications; it knowingly proceeded to install bathroom flooring contrary to trade practice; it did not inquire specifically and timely about the bathroom floor installation; and it did not prove that it properly used and installed requisite materials in the bathrooms.

APPEARANCES: Howard J. Feldman, Peter D. Dickson, Joseph B. Nelson, Van Ness, Feldman & Curtis, P.C., Washington, D.C., for Appellant; William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

Appellant National Park Concessions, Inc. (NPCI), a party to the above 1961 and 1982 concessions contracts, and to a 1982 settlement agreement, with the National Park Service (NPS), has appealed from the NPS Director's December 10, 1991, decision (Appeal File (AF) 51), denying NPCI's March 14, 1991, $36,271.48 claim (AF 48). That claim had been asserted under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601, for costs incurred due to allegedly defective specifications supplied by NPS, pursuant to the settlement agreement, for improvements at Big Bend National Park (Big Bend). NPS first alleged that the Board did not have jurisdiction to consider the appeal under the CDA, because a concession contract was at issue. When the Board referred NPS to a prior decision by the Interior Board to the contrary, *R&R Enterprises* (*R&R*), IBCA-2417, 89–2 BCA ¶ 21,708, *aff'd on recon.*, 89–3 BCA ¶ 22,043, the Government withdrew that jurisdictional objection.

The parties then submitted the appeal on the record pursuant to Rule 4.112 (43 CFR 4.112). NPS did not raise any further jurisdictional objection, per se, but asserted that its role, in connection with the dispute in question, was as architect/engineer for NPCI and that it was not a party to NPCI's construction contract for the Big Bend improvements.

By order dated November 12, 1993, the Board directed NPCI to show cause why its appeal should not be dismissed for lack of jurisdiction. NPCI responded that the Board has jurisdiction over this appeal under both the CDA and our Charter. Because we conclude that the CDA vests us with jurisdiction, we do not reach the question of our Charter jurisdiction. However, we deny the appeal, as follows.

FINDINGS OF FACT

I. 1961 Concession Contract

1. NPCI and NPS entered into concession contract No. 14–10–0100–1043, dated September 20, 1961, covering the period January 1, 1962, through December 31, 1981. By letter extension dated December 31, 1981, the period was extended to September 21, 1982, the effective date of NPCI's 1982 concession contract, discussed below. Under the concession contracts NPCI has served as principal concessionaire (referred to in the contracts and hereafter as "Concessioner") at Big Bend and elsewhere. Its services at Big Bend include construction, improvement, maintenance, and operation of concession facilities (AF 53–55; Stipulation (Stip.) 3).

2. The introductory paragraphs to the 1961 contract noted that the United States had only partially provided facilities and services for the public in the national park system and desired the Concessioner to establish additional facilities and to operate them at reasonable rates under the supervision of the Secretary of the Interior (Secretary). In consideration, the Concessioner was to be given assurance of the security of its substantial capital investment and of a reasonable profit opportunity (AF 53 at 1).

3. The 20-year contract term was "conditioned upon the Concessioner undertaking [about a $3 million] improvement and building program." The first phase was to be completed within the first 10 years and the remainder when the parties agreed it was economically feasible (Contract § 1(b), AF 53 at 2).

4. The Concessioner was to maintain and operate accommodations, facilities, and services; to provide the necessary plant, personnel, equipment, goods, and commodities; and to charge rates subject to the Secretary's regulation and approval, consistent with a profit opportunity (Contract § 3, AF 53 at 3).[1]

5. Contract section 4(b) provided: "The Concessioner may construct or install upon [lands assigned by the Secretary] such buildings, structures, and other improvements as are necessary or desirable for the operations authorized hereunder, subject to the prior approval by the Secretary of the locations, plans, and specifications thereof * * *" (AF 53 at 4). Section 5 gave the Concessioner a possessory interest in all of its improvements (AF 53 at 5) and, under section 9 (AF 53 at 7–8), the Concessioner was to pay an annual franchise fee to the Government, based in part upon gross receipts.

6. The concession contract contemplated that the Concessioner could award contracts, sometimes referred to as "subcontracts," to others to perform requisite construction and repair work (see Contract §§ 20(a)(7), 20(b), 22(a)(7) at Amend. No. 1, AF 53 at 16 and Amend. 1 at 5).

7. The contract did not contain a disputes clause and did not refer to Federal procurement regulations. It provided that the Secretary might relieve the Concessioner from its obligations (Contract § 1(a), AF 53 at 2) or terminate the contract for default or unsatisfactory performance, after granting the Concessioner an opportunity to be heard (Contract § 11, AF 53 at 9–10). The term "Secretary" included the Secretary's duly authorized representative (Contract § 20(d), AF 53 at 17). The contract did not specify hearing venue or procedures. It contained an arbitration-like procedure for resolving differences as to the value of the Concessioner's possessory interest (see, *e.g.*, Contract § 12(a), AF 53 at 10–11), but no procedures pertaining to any other sort of claim resolution.

II. 1982 Settlement Agreement

8. Prior to entering into the 1982 concession contract, NPCI had filed a claim in the then United States Court of Claims relating to its possessory interest and salvage for certain property. The exact nature of this claim is not clear; there is no assertion that it was a CDA claim (see AF 69–70).

9. Also, pursuant to the 1961 contract and, ultimately, section 1(b) and Designation No. 1 of the 1982 contract, NPCI had agreed to

[1] Under NPS' Concessions Management Guidelines (July 18, 1994, Supplement to AF and AF 65), concessioners often are responsible for the development of drawings and specifications for NPS-approved construction and renovation projects. Building and landscaping plans and specifications are to be prepared at the concessioner's expense and are subject to NPS' standards and approval.

construct new facilities and to refurbish existing ones at Big Bend (the Project) (Stip. 5). NPS had determined that requirements had to be clarified in the 1982 contract before plans NPCI had submitted during the 1961 contract for Big Bend improvements were finalized. By letter dated May 22, 1981, to the Regional Director of NPS' Southwest Region, NPCI's president sought reimbursement for $131,000.92 NPCI had expended for studies, tests, and the plans, which he alleged had become useless. The letter was not denominated CDA claim and was not certified (AF 67).

10. By letter dated September 17, 1982, from NPS' Director, concurred in by NPCI's president, the parties settled NPCI's two claims, as follows:

> 1. *Contemporaneous with full execution of a new concession contract for NPCI* and remittance to NPCI by NPS of a check in the amount of $99,477.21, NPCI will dismiss with prejudice [its Court of Claims action] and otherwise relinquish all claims it may have with respect to possessory interest and other compensation for [certain property at Big Bend and elsewhere].
> 2. NPCI hereby withdraws its May 22, 1981, claim of $131,000.92 for architectural and related expenses at [Big Bend]. NPCI will not be obliged to pay for any additional costs of new plans or related expenses for proposed Big Bend construction, and NPS, unless otherwise agreed by NPS and NPCI, will provide any necessary plans and related studies or reimburse NPCI for additional costs incurred for such plans and related studies. [talics added].

(AF 1).

11. NPS has stipulated that the settlement was a condition of NPCI's execution of the 1982 contract (Stip. 8). Appellant's record of negotiations, uncontroverted by NPS, so reflects ("NPCI will execute the contract only with the understanding that its execution is conditioned on the satisfactory resolution of its [two claims]" (AF 69, Feb. 3, 1982, Letter at 2); ("Over the past few months we have had discussions on all three issues [new contract and two claims] with a goal of resolving all of the items in one package. We have now reached a point where it is conceivable that such a result, desired by both NPCI and NPS, can be achieved" (*id.* at 1); (NPCI's claims would be resolved "[c]ontemporaneous with full execution of a new contract" (AF 70 at 1)). Consistently, NPS' record reflects intended settlement with NPCI in conjunction with the execution of a new concession contract (AF 71 at 17).

III. 1982 Concession Contract

12. Under section 1(b) of the 1982 concession contract, the Concessioner was to undertake and complete designated improvement and building programs, at the approximate cost of $2,300,000. "After approval of plans and specifications," the Concessioner was to supply the Secretary with evidence that the construction program was proceeding (Contract § 1(c), AF 55 at 2). The contract did not refer to the September 17 settlement agreement.

13. The contract granted the Concessioner a right of first refusal to provide such additional accommodations, facilities, and services as NPS' Director might designate to benefit the public, consistent with the Concessioner's ability to generate sufficient revenue to fulfill its capital improvement and other obligations under the contract. If the Concessioner questioned any additional work, it could appeal to the Secretary, whose decision was to be final (Contract § 2(c) and (d), AF 55 at 3). Appeal procedures were not specified and there was no disputes clause.

14. Section 9 provided that "[d]ue to the special provisions of this contract regarding the Concessioner's investment, and obligations assumed, no franchise fees * * * shall be charged the Concessioner" (AF 55 at 9). Instead, Section 9A created a Special Account, funded by the Concessioner from a percentage of its gross receipts. It was to expend account monies only at the Secretary's direction, for improvements to or construction of NPS-owned facilities or for the assumption and management of additional concession operations. *Id.*; Stip. 6. If a dispute arose as to Special Account deposits, the Concessioner could request an advisory arbitration panel, but the Secretary's determination was to be final (Contract § 9A(c), AF 55 at 10). The contract also contained arbitration procedures pertaining to the determination of the fair value of the Concessioner's property or interests in the event of contract termination (see, *e.g.*, Contract § 12(a)(1), AF 55 at 12–13; Contract § 12(a)(3), AF 55 at 15).

15. The Secretary could terminate the contract for default at any time, or to protect visitors or resources (Contract § 11, AF 55 at 11–12).

16. The General Provisions of the contract provided, at section 17(e), that it could not be "amended in any respect except when agreed to in writing by the Secretary and the Concessioner" (AF 55 at 20).

17. As in the 1961 contract, the term "Secretary" included the Secretary's duly authorized representative (Contract § 17(a), *id*).

18. Designation No. 1, appended to the contract, pertaining to Big Bend, "required and authorized" NPCI to provide stated accommodations, facilities, and services, including the specified improvement and building program. Phase I had scheduled start dates; Phase II was to be commenced when both parties determined that it was economically feasible (AF 55, Designation No. 1 at 1–3).

19. By letter dated December 16, 1987, NPS authorized NPCI to use $385,025 of the Special Account for the construction of an employees' dormitory and duplex at Big Bend (AF 6; Stip. 12).

IV. NPS Provides Bid Forms, Plans, Specifications, Drawings, And Inspection Services

20. NPCI issued a Project Manual for building replacements at Big Bend, including an invitation for bids and contract provisions, in early 1987. NPS provided bid forms and bid bond forms, a geotechnical

report and plans, specifications, and drawings for the Project, prepared by its Denver Service Center (DSC)[2] (AF 2, 3, 3A, 48, 57; Stip. 11).

21. When NPCI had requested that NPS provide it with plans and specifications for certain facilities at Big Bend, NPS, by letter dated January 12, 1987, had acknowledged its continuing obligation to do so:

> We acknowledge that you are entitled to these plans in order to complete the claim settlement for architectural fees as mutually agreed by joint letter of September 17, 1982. * * *.
>
> * * * * * * *
>
> At such time as NPCI and NPS agree to proceed with the construction of the buildings, we will make the necessary arrangements to provide you with plans and specifications for the agreed construction in accordance with our September 17, 1982, agreement.

(AF 57; Stip. 10).

22. NPCI and NPS agreed that NPCI would pay NPS to provide inspection services for the Big Bend project. NPS was eager to provide inspection services "as an appropriate follow-up function to our design work" (AF 2).

23. NPS offered that: (1) NPS and NPCI would share the cost of a project supervisor and NPS would conduct in-progress inspections and shop drawing reviews or (2) NPS would periodically inspect the work and review shop drawings, as required. In either case, NPCI was to provide the contracting officer. *Id.* NPCI ultimately selected the second option, stating that "[DSC's] expertise will be considered as advisory services provided the Owner." NPCI paid NPS $22,180 for its inspection services (AF 7, 8; Stip. 18).

24. The "General" provisions of the Summary of Work for the Project noted that the work "consists of the general construction, under a single lump sum contract, of buildings for [NPCI], a concessionaire for [NPS]" (AF 3A, Part I, § 1–1 A at 01010–1.) The contract referred to NPCI as the "Owner" (*see, e.g.*, § 1–4 at 01010–2–3), and NPCI awarded the contract (see AF 6, 59).

25. NPS supplied plans, specifications, and drawings for a motel, pantry, storage facilities, camper store, a three-bedroom residence, duplex, and employee dormitories. The structures contained numerous bathroom facilities (Stip. 11).

26. Section 06100 of NPS's plans covered "Rough Carpentry," with Part 2–2 pertaining to "Plywood and Underlayment." Part 2–2A covered "Floor Sheathing." Two types of floor sheathing were specified: (1) "Subfloor," described as ⅝–inch APA rated sheathing; and (2) "Underlayment," described as ½–inch particle board. Particle board is a manufactured wood product made from a mixture of wood chips, sawdust, and an adhesive bonding agent, formed into sheets. The particle board specified in section 06100 will absorb moisture and expand (Stip. 16). Part 3–10 of section 06100, "Underlayment," stated

[2] For convenience, we generally will use the broader designation "NPS" even when referring to its "DSC" offices.

"Install underlayment just prior to laying finish floor and protect against damage until finish floor is installed" (AF 58). "Finish floor" includes ceramic tile flooring (Stip. 14).

27. NPS' plans required tile floors in all bathrooms (Stip. 13). Section 09300 covered "Ceramic Tile," with Part 3 pertaining to "Execution." Subpart 3–1, "Inspection," provided: "Determine that surfaces to which tile is to be installed are even, smooth, free from defects affecting proper application, and clean and dry. Correct defective surfaces or notify the Owner" (AF 58).

28. Subpart 3–2 of section 09300, "Placement Methods," stated: "Install tile in accordance with [Tile Council of America (TCA)] Handbook for Ceramic Tile Installation, Method F142 for floors * * *. Follow adhesive and grout manufacturer's recommendation." *Id.*

29. The 1986 TCA Handbook has been provided by the parties, apparently as that used by NPCI and its contractor, Croom Construction Co. (Croom) (below). Part 9.18d/Ti, "Floors, Interior," of the Handbook states that: "All specifications for ceramic tile installations must conform to local building codes, ordinances, trade practices and climatic conditions" (AF 63). The Appeal File also contains portions of the 1988 TCA Handbook, an attachment to NPCI's eventual contract with Desert States Construction, Inc. (Desert States) (see below and AF 48), which includes the same provision concerning the need to conform to trade practices (AF 66).[3]

30. The TCA Handbook describes Method 142 for tile flooring installation as "organic adhesive on wood, ceramic mosaic or quarry tile" (AF 64 at 11). One of the Handbook's stated "Requirements" for Method F142 is "double wood floor." The accompanying photograph depicts double wood flooring, not particle board underlayment, under the adhesive and ceramic tile (AF 63). The subfloor is to be "⅝" plywood or 1" nominal boards" (AF 63 at 17). Under "Comments on Use" for Method 142, the Handbook lists: "Residential, low cost, bathroom, foyer." *Id.* The "Floors, Interior," "Wood Subfloor," and "Organic Adhesive" section of the Handbook notes under "Recommended Uses" for Method F142: "[O]ver wood floors exposed to residential traffic only. For heavier service select Methods F141, F143 or F144" (AF 63 at 17). It warns under "Limitations": "[N]ot recommended in wet areas." *Id.* The Handbook's "Recommended Performance-Level Rating" defines residential toilets and bathrooms as "Residential," commercial ones as "Light or Moderate," and institutional ones as "Moderate or Heavy" (AF 64 at 10). The Handbook describes toilet rooms as having "[d]ry or limited water exposure." It defines "wet areas" in residential and light construction as "tub enclosures and showers" (AF 64 at 9). Method F142 is the only method the Handbook mentions in connection with bathrooms (AF 64 at 11).

31. The Government describes the bathrooms at issue as "residential." Appellant identifies them as part of motels and

[3] Unless otherwise indicated, our references to the TCA Handbook are to the 1986 version.

dormitories and, thus, "light commercial" facilities, purportedly requiring the use of Methods F143 or F144 (water resistant installations), such that NPS' specification of Method F142 allegedly was defective (see, *e.g.*, Appellant's June 7, 1993, Reply Brief at 12 and note 3). In view of our resolution of this appeal, we make no finding as to the proper categorization of the bathroom facilities or as to the appropriateness of Method F142.

V. NPCI's Contract With Croom

32. On December 18, 1987, NPCI executed a construction contract with Croom to perform work specified in the NPS plans for building replacements at Big Bend. The contract, in part an American Institute of Architects form, named NPCI as the "Owner" and Croom as the "Contractor." The invitation for bids, Project Manual, and NPS drawings were part of the contract. NPS was not a party to it (AF 59; Stip. 17; see also AF 12H; AF 23).

33. Contract section 1.2.3 stated that the intent of the contract documents was to include all items necessary for the proper execution and completion of the work; that the documents were complementary and that what was required by one was to be as binding as if required by all; and that performance by the contractor was to be required only to the extent consistent with the contract documents and "reasonably inferable from them as being necessary to produce the intended results" (AF 23).

34. Section 3.2.1 required bidders carefully to examine the contract documents and "at once report to the Architect errors, inconsistencies or ambiguities discovered." Under section 3.2.2, requests for clarification or interpretation were to be made in writing prior to bidding. Per Section 3.2.3, any interpretations of, or corrections or changes to, the contract would be made in writing and, if not, could not be relied upon (AF 23).

35. Section 4.3.7 required that, if the contractor claimed a price increase, it was to provide written notice prior to proceeding with the work in question (AF 23, Attach. 1).

36. Sections 4.4 and 4.5 called for the arbitration of unresolved disputes (AF 23, Attach. 6).

VI. Underlayment and Other Disputes with Croom

37. By letter dated February 5, 1988, Croom notified NPCI that, in its view, NPS' plans did not require wood base or vinyl base in certain buildings, underlayment on wood floors, or building paper. It also questioned door frame size. It did not inquire about underlayment under tile bathroom flooring. NPCI asked NPS to recommend a response (AF 12F, 60).

38. On February 18, 1988, NPS responded to NPCI. Regarding the underlayment query, NPS stated:

2. Underlayment is specified at Section 06100 paragraph 3–10 to be installed "just prior to laying finish floor." *This requirement indicates that the location of underlayment is to be at all finish flooring. Paragraphs 3–10A and B indicate joints and nailing to wood floors; therefore, the intent is not to place underlayment over concrete floors. This specification is clear and directs the contractor where to place underlayment.* Therefore, we interpret the contract documents to require the contractor to furnish and install underlayment. *In addition, it is common industry practice to place underlayment over plywood sheathing used for subfloors.* [Italics added.]

(AF 10).

39. On February 26, 1988, NPCI transmitted its position on the base, building paper and underlayment issues to Croom, using virtually the same wording NPS had used (AF 12E).

40. Croom replied to NPCI on March 2, 1988, that it did not believe the contract documents required it to install "the base and underlayment" and requested arbitration (AF 12D).

41. On March 15, 1988, Croom wrote to NPCI that it was proceeding to install one-half-inch particle board underlayment in certain buildings, a dormitory and duplex, under protest. On March 23, 1988, Croom reiterated to NPCI that it was seeking arbitration on the base and underlayment issues; that it had ordered underlayment and that it would install underlayment and base under protest (AF 12A). Croom enclosed a letter dated March 21, 1988, from Mr. Robert Fishkin, of Fishkin Engineering (Fishkin), a consulting engineering company, containing his comments "regarding the usage of *any particle board underlayment* in conjunction with the finish floor covering (AF 12B (italics added)). He noted that the contract's product list did not mention underlayment board and stated that:

9) * * * The single sentence "Install underlayment just prior to laying *finish* floor" * * * would tend to suggest that this material should also be under all finish flooring such as carpeting, resilient flooring, ceramic tile and exposed concrete.

It is my opinion that the usage of a wood-product underlayment has not been adequately defined nor located on the contract documents and hence should only be provided if paid for as an extra to the contract. [Italics in original.]

(AF 12B).

42. On March 29, 1988, NPCI notified NPS of Croom's request for arbitration, included the correspondence from Croom and its consultant, and requested a position statement (AF 12). NPS replied by letter dated April 6, 1988, that its February 18 letter contained its position. Regarding underlayment, it added:

If the contractor had made a careful take-off for his bid * * * he would have, or should have, encountered the underlayment specification. *Any experienced contractor knows where particleboard underlayment is used.* This is not an unusual or obscure use of materials and while the material could have been noted, scheduled, and even detailed on the drawings, all of this would not have added much, if any, to the contractor's understanding of what is required or where underlayment is used.

On the negative side, we have to admit to a sketchy indication of locations for both base and underlayment. Also, in reviewing [Fishkin's letter to Croom], the only relevant comment was [that referring to the contract's List of Products]. Checking out this list of products, we find that the underlayment is missing. Usually we do not provide a list of products but for this project one was included. Unfortunately, there is no disclaimer that the list may not be complete. So presented it can be argued that the list was intended to be exhaustive and the contractor relied upon the list to bid all important items. The counter argument is that other items are not included in the list that are being provided by the contractor without an extra claim. [Italics added.]

(AF 13).

43. Croom identified the particle board underlayment issue as a "disagreement concerning * * * particle board underlayment *at any location*" (italics added)" in the Project and persisted in its pursuit of arbitration (AF 23 at May 23, 1988, Croom Letter to NPCI (italics added)).

44. In the meantime, construction proceeded. NPS inspected the Project on April 19 and 20, May 18–20, June 22, and October 17–19, 1988 (Stips. 18, 21).

45. In June 1988, Croom began ceramic tile installation at the Project (Stip. 22). The NPS inspector's June 29, 1988, report of his June 22 trip to the Project states that, among other things, the contractor was installing ceramic tile. There is no indication of whether the tile was wall or floor tile and no mention of particle board underlayment (AF 16). Tile installation was completed before a July 26, 1988, NPS inspection (Stip. 22).

46. In September 1988, for the arbitration proceeding, NPCI presented a position statement on underlayment essentially as presented in NPS' February 18, 1988, letter to it and in its February 26, 1988, letter to Croom, with the addition that the underlayment would provide a smooth surface *for carpeting* (AF 23).

47. By decision dated October 13, 1988, an arbitrator, without discussion, denied Croom's monetary and delay claims for furnishing and installing underlayment (AF 24).

48. By October 17, 1988, ceramic tile installation had been completed, but there were grouting and other problems. NPCI contended that the problems possibly were caused by improper installation or grouting materials. Mr. William R. Albert, Croom's representative, countered that "*ceramic tile should not be installed on particle board*" (AF 25 (italics added)).

49. On October 18, 1988, NPCI advised Mr. Albert to regrout and patch loose tile. He then communicated with the tile supplier, Dal-Tile Corp. (Dal-Tile). It reported that there was "*'NO' acceptable application of tile on a particle board surface*" (AF 25 (italics added)). Dal-Tile's letter to Mr. Albert dated October 18, 1988, refers to the TCA Handbook and notes that Method F142 shows tile adhered to plywood floor and is marked as a "questionable installation";[4] that plywood is the only recommended wood surface; and that "*Partical [sic] or chip pressed board is not to be used. No manufacture [sic] will stand behind*

[4] The pages from the TCA Handbook appended to Dal-Tile's letter pertaining to Methods F142 and F143 are stamped "Questioned Installations Bonding to Wood." The source of the markings is not clear. The same markings do not appear in the selections from the TCA Handbooks contained elsewhere in the Appeal File.

the use of partical [sic] or similar chip pressed board wood installation when adhering tile to them. Id. (italics added).

50. On October 17–19, 1988, NPS inspected the Project, stating that the grout used in the tile was softer than normal and that specifications had called for a Latex additive. Several floor tile areas had grout cracking and chipping. The joints had to be cleaned and regrouted with the Latex. There was no mention of particle board underlayment (AF 28).

51. On November 5, 1988, NPCI summarized its position to Croom concerning the quality of bathroom tile installation, particularly grout workmanship. On August 15, 1988, in its first inspection following completion of tile installation, covering motels and a residence, it had noted soft grouting on floors and walls with voids between tiles where grout had been applied improperly. The October 19 and 20, 1988, inspections noted the same conditions in dormitory tile work. NPCI asked Croom to repair and regrout where necessary (AF 26).

52. Croom performed tile repair work in bathrooms and elsewhere. On December 18, 1988, NPCI reported to Croom that there were continuing problems with tile work, including "at soap dishes, toilet paper holders, along ceilings, at floors, behind doors etc." NPCI stated that the only work that had not cracked so far was the corrective work done to the bathroom floors (AF 31).

53. On January 13, 1989, NPCI sought liquidated damages against Croom in the amount of $36,000 due to Croom's failure timely to complete the Project (AF 61).

54. Croom contended that the delay was due to tile installation problems caused by particle board underlayment and requested arbitration (AF 32, 33; Stip. 29).

55. NPCI consulted Mr. Mike Simpson of Laticrete Corp. He inspected tile installation on March 7, 1989, concluding that there were problems in *both wall and floor* areas "*because standard industry installation procedures were not followed.*" (Italics added.) He attributed the floor tile problems to improper particle board substrate, stating that: "Industry standards specifically state that all wood floor installations be on exterior, or marine grade plywood. *Industry standards also state that wood shall not be used as a substrate for ceramic tile in any areas exposed to water or high humidity*" (AF 62 (italics added)).

56. Croom's Mr. Albert wrote to NPCI on March 27, 1989, contending that the tile problems contributed to the Project completion delay; tile had been installed per specifications; cracking was to be expected; and "no matter how we corrected the floor tile, *particle board subfloor is not an acceptable substrate underlayment for ceramic tile–per my personal experience, especially at a bathroom condition.*" (Italics added.) Mr. Albert asserted that he had informed NPCI's representative, Mr. Milburn, that loose tile likely had occurred due to the expansion of wet particle board; Mr. Milburn had consulted with NPS; NPS had stated that the application was correct; and Mr. Milburn had

instructed Croom to re-grout and repair. Mr. Albert stated that this had resulted in his consultation with, and October 18, 1988, letter from, Dal-Tile; Mr. Milburn had refused to accept this explanation; and it had taken 2 montbs for NPCI to consult Laticrete to resolve tbe problem (AF 32).

57. In the liquidated damages arbitration proceeding, NPCI and Croom did not seek damages for repairing tile and underlayment. On March 27, 1989, Croom submitted a separate $10,248 claim for regrouting and tile repair (AF 48; Stips. 31, 35).

58. On June 1, 1989, NPCI sought NPS' review of Croom's contention that its tile problems were caused by defective specifications (AF 34). On June 27, 1989, NPS responded to NPCI that tile installation bad been substandard: "The tile job as a whole is suspect; the misalignment of tiles, nonconformance with specifications in regards to grouting material, poor grouting in general, and the inappropriate submission of wall tile for use on floors * * * (AF 35). NPS opined that the subfloor was not the cause of adhesion problems and added:

> Section 09300 Part 3–1 of the contract documents * * * require[s] that the surfaces to receive tile be inspected by the contractor and found "free from defects affecting proper application." If a problem was identified, the owner should have been notified. Proceeding with the tile work implied acceptance by the contractor of the sub-floor surface and its suitability for receiving the tile.
>
> The specifications called for the tile to be installed in accordance to the [TCA] method F142 and to follow the adhesive and grout manufacturers' recommendations. The installer should have been well aware of standard installation methods and materials. Had the substrait [sic] been unsuitable, contract documents specify the contractor either rectify the situation or bring it to the attention of the owner. To our knowledge, neither of these were done.

Id. NPS added that, based upon Mr. Albert's March 27, 1989, letter, Croom knew that tile should not be installed on particle board substrate but proceeded to do so anyway, precluding the owner from making an informed decision. *Id.*

59. On November 20, 1989, an arbitrator awarded NPCI $10,600 in liquidated damages for Croom's delay (AF 36; Stip. 37).

60. On January 23, 1990, Croom submitted a revised claim against NPCI, including $24,412.60 for delay[5] and reasserted its $10,248 claim for tile regrouting costs (AF 39; Stip. 38).

61. By settlement agreement dated July 26, 1990, NPCI agreed to pay Croom $8,000 for the tile problem (AF 47B; Stip. 39).

VII. NPCI's Contract with Desert States

62. On March 24, 1990, NPCI contracted with Desert States for removal and reinstallation of ceramic tile and underlayment. NPCI paid Desert States $28,271.48 from its own funds and $8,251.72 from the Special Account (AF 48; Stips. 41–43).

[5] The project was delayed by a greater period of time than that for which the arbitrator had held Croom responsible.

VIII. NPCI's Claim Against NPS

63. On March 14, 1991, NPCI's attorneys wrote to NPS's Director in part as follows:

> This letter represents a claim by [NPCI] against [NPS] for expenses incurred by NPCI due to material defects in architectural plans supplied by NPS for certain improvements at [Big Bend], and should be considered a formal submission in accordance with [the CDA], if it is deemed that such Act is applicable to the instant claim.

(AF 48). The claim, under $50,000, included the $8,000 NPCI had paid to settle Croom's claims, and the $28,271.48 it had paid to Desert States. NPCI also sought NPS' acknowledgment that it had properly charged the Special Account for the additional $8,251.72 and stated that "[b]ecause of the settlement with the NPS on prior litigation, NPCI was placed in the unusual position of having the DSC act as its architect." *Id.*

64. NPS' Director responded on December 10, 1991, that NPS did not believe the claim to be "legally cognizable, at least in its present form" but that, if it were, it would be denied. He noted that NPCI had retained responsibility for day-to-day on-site project inspection; had negotiated the $8,000 settlement with Croom; and had entered into the Desert States contract on its own. However, NPS would allow the $8,251.72 charged to the Special Account, if NPCI withdrew its claim (AF 51).

65. Although the parties have not established the NPS' Director's status, we conclude that he had full contracting officer authority because a prior Director signed the 1961 concession contract on behalf of NPS and an Assistant Director signed the 1982 concession contract (AF 55, 53). The Director's letter did not purport to be a contracting officer's final CDA decision and did not mention appeal rights (AF 51).

66. On February 11, 1992, NPCI responded that it had a proper claim under its 1961 and 1982 concession contracts and under its September 21, 1982, settlement agreement with NPS. It deemed the Director's letter to be a final CDA decision, reserved appeal rights, but sought first to settle (AF 52). Settlement efforts failed and this appeal ensued.

DISCUSSION

[1] In response to the Board's order to show cause, the Government now alleges that we do not possess jurisdiction to entertain this appeal because appellant's claim does not arise from a procurement contract to which the United States is a party; rather it derives from NPCI's separate contracts with Croom and Desert States.

Principally, appellant urges that its claim originates with its 1982 concession contract, a CDA contract which the contemporaneous settlement agreement modified. NPS was obligated to provide drawings, plans, and specifications under that amended contract; NPCI was required to perform the work and its separate contracts with others to accomplish it were akin to subcontracting arrangements;

NPS' materials were defective; and NPCI is entitled to recover its costs incurred due to the defects.

Alternatively, appellant asserts that the Board's Charter grants us jurisdiction over claims related to a contract with an Interior Department agency, notwithstanding the CDA.

As noted, the Interior Board has held that concession contracts are subject to the CDA. *R&R*, *supra*. Although the parties have not mentioned it, subsequent to *R&R*, and to the dates of the concession contracts and settlement agreement here, the Interior Department published a regulation that concession contracts "are not federal procurement contracts * * * within the meaning of statutory or regulatory requirements applicable to federal procurement actions." 36 CFR 51.1 (1993).

Also, the United States Court of Federal Claims, in denying an injunction request by an unsuccessful applicant for a concession contract, and in considering the Competition in Contracting Act (CICA), 41 U.S.C. § 251 *et seq.*, determined that the concessioner selection process was not subject to the Federal Acquisition Regulation. *YRT Services Corp.* v. *United States*, 28 Fed. Cl. 366, 392, 393 (1993).

We do not address any import of Interior's 1992 regulation as it post-dated appellant's contracts. As to *YRT Services*, in a footnote (n. 23), the court referred to *R&R*'s conclusion that concession contracts are procurement contracts subject to the CDA and mentioned and noted that *R&R* had been decided prior to a Comptroller General's decision, *Stephen Sloan Marine Corp.*, Dec. Comp. Gen. B–234219 (May 9, 1989), 89–1 CPD ¶ 435, which, in turn, had stated in a footnote (n. 1), that CICA did not apply to the procurement there—a transportation concession contract under which the Government received a franchise fee and did not pay for the services. The court also cited *Crystal Cruises, Inc.*, Dec. Comp. Gen. B–238347.2 (June 14, 1990), 90–1 CPD ¶ 560, in which the Comptroller General had affirmed its prior decision that a permit to a cruise line granting a right of access to Government property in exchange for a franchise fee was not subject to CICA.

Although we are not bound by Court of Federal Claims' decisions, *American Transport Line, Ltd.*, ASBCA No. 44510, 93–3 BCA ¶ 26,156; *Clement-Mtarri Cos.*, ASBCA No. 38170, 93–2 BCA ¶ 25,567, we will address *YRT* because NPS initially questioned the board's jurisdiction over concession contract disputes.

YRT, and the Comptroller General cases upon which it relied, involved CICA, and not CDA, analysis. Even so, we note that the court in *YRT* did not cite *Alpine Camping Services*, Dec. Comp. Gen. B–238625.2 (June 22, 1990), 90–1 CPD ¶ 580. There, the Comptroller General held that CICA was applicable to the concessioner special use permits in question. They required the concessioner, at its expense, to recondition and maintain recreation facilities and to perform tasks to protect the land, maintain campsites and preserve structures in accordance with Government specifications and requirements. The Comptroller General stressed that the tasks were intended to benefit the Government and distinguished *Crystal Cruises*.

Similarly, in *Yosemite Park & Curry Co.* v. *United States*, 217 Ct. Cl. 360 (1978), acknowledged in *YRT*, the Interior Department had entered into a concession contract under which the plaintiff established lodging, food, beverage, and transportation services at Yosemite National Park. The Government argued that addenda to transportation portions of the agreement were not in accord with procurement regulations. The plaintiff asserted that the contracts were awarded under the Secretary's broad concession authority and not subject to general procurement law. The Government itself urged that procurement regulations and statutory requirements were applicable to concession contracts "if they, in effect, serve to purchase goods or services." 217 Ct. Cl. at 367.

Although it ultimately found for the plaintiff on *quantum meruit* grounds, the Court of Claims stated in *Yosemite* that it agreed with the Government "that the admittedly broad concession granting authority of the [Secretary] did not relieve the NPS of the duty of complying with generally applicable procurement statutes and implementing regulations * * *." 217 Ct. Cl. at 370.

The CDA applies to claims "relating to a contract" by a "contractor" against the Government. *See* 41 U.S.C. §§ 605(a), 609(a)(1). The Act defines "contractor" as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4). The "contract" is restricted to specified types of Government procurement contracts:

> (a) * * *
>
> Unless otherwise specifically provided herein, this chapter applies to any express or implied contract * * * entered into by an executive agency for—
>
> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,
>
> (4) the disposal of personal property.

41 U.S.C. § 602(a).

It is apparent from NPCI's contractual responsibilities and from the introductory language of its concession contracts, which acknowledges that it is performing services for the benefit of the Government and the public (and, in the 1982 contract NPCI is not required to pay a franchise fee), that NPS has procured from NPCI services, and construction, alteration, repair, and maintenance of real property, within the ambit of the CDA.

Further, we concur, as follows, with NPCI's contention that the 1982 settlement agreement modified the 1982 concession contract to make NPS responsible for providing the contract plans, drawings, and specifications and, therefore, our CDA jurisdiction arises from that contract. Accordingly, we do not reach the variants on that theme raised by appellant or any applicability of our Charter jurisdiction.

August 18, 1994

This appeal involves only that portion of the parties' September 17, 1982, settlement agreement pertaining to the resolution of appellant's claim for costs for architectural plans and related studies. That claim was not in litigation before any tribunal at the time of settlement.[6] It had been asserted under the 1961 concession contract, but its settlement converted appellant's obligation—to provide plans, drawings, and specifications for Big Bend under the successor 1982 contract—to that of NPS.

Under certain circumstances, as are present in this appeal, a written agreement settling a claim pertaining to contract performance can serve to modify a contract even if it is not expressed as, or in the form of, a formal contract modification and even if the modified contract does not contain language reflecting the settlement agreement. *Federal Electric Corp.*, ASBCA No. 24002, 82–2 BCA ¶ 15,862 at 78,656, *aff'd*, CAFC No. 83–571, July 19, 1983 (unpub.), 2 FPD ¶ 9.

As the Armed Services Board of Contract Appeals (ASBCA) stated in *Federal Electric*:

> [T]he Settlement Agreement must be considered as a part of the contractual understandings and agreements the parties are bound by. It must be construed and interpreted in consonance with its own terms, and in proper relationship with all other terms and provisions of the contract between the parties so as to give the parties the benefit of their bargain as it fits the facts. [Citation omitted.]

82–2 BCA at 78,657.[7]

The fact that the 1982 concession contract, largely standard boilerplate, does not mention the settlement agreement executed a few days earlier is not dispositive. As appellant has urged, discussing the parol evidence rule and its exceptions, the concession contract was not the integrated expression of the parties' entire agreement. As we said in *Busby School Board of the Northern Cheyenne Tribe*, IBCA-3007, 94–1 BCA ¶ 26,327 at 130,968:

> [T]he [parol evidence] rule operates generally to disallow prior or contemporaneous extrinsic evidence, oral or written, when the parties have reduced their agreement to a final, integrated (complete) writing and the evidence offered would contradict or vary the unambiguous terms of the writing. * * *

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[6] *Cf. Montgomery Ross Fisher, Inc.*, VABCA No. 3696, 94–1 BCA ¶ 26,527 at 132,043 (An oral agreement to settle litigation within the jurisdiction of a board is not a contract modification within the meaning of Government procurement regulations requiring a specified format. See also Discussion *infra*).

[7] *Federal Electric*, affirmed by the Federal Circuit, was decided after *SCM Corp.* v. *U.S.*, 595 F.2d 595, 598 (Ct. Cl. 1979), in which the Court of Claims did not uphold a purported oral settlement, deciding that the underlying contract was subject to procurement regulations requiring the bilateral execution of a Standard Form (SF) 30 in order to effect a contract modification. *Accord Mil-Spec Contractors, Inc.* v. *U.S.*, 835 F.2d 865, 869 (Fed. Cir. 1987). Here, NPS has not suggested that the SF 30 regulations apply to the 1982 concession contract and the contract it did not specify any format for a contract modification. The contract provided only that it could not be amended "except when agreed to in writing by the Secretary and the Concessioner" (FF 16). The term "Secretary" included his or her authorized representative (FF 17). The settlement agreement was written, bilateral, and executed by senior, authorized, representatives of the parties. *See also Folk Construction Co.*, ENG BCA Nos. 5893, *et al.*, 93–3 BCA ¶ 26,094 at 129,730 (contemporaneously executed documents constituted a re-pricing, close-out, agreement despite lack of an executed SF 30); *Pan American Optical Co.*, ASBCA Nos. 17383, *et al.*, 74–1 BCA ¶ 10,566 at 50,058 (regardless of clause in concession contract requiring modifications to be in formal written amendment format, the ASBCA found the contract modified by informal agreement); *accord Computer Valley Internat'l, Ltd.*, ASBCA Nos. 39658, *et al.*, 94–1 BCA ¶ 26,528 (applying District of Columbia law to the same effect).

> Despite the parol evidence rule * * *, extrinsic evidence is admissible to establish that a writing is, or is not, a completely integrated agreement. [Citation omitted.]

See also Sylvania Electric Products, Inc. v. *United States*, 458 F.2d 994, 1006 (Ct. Cl. 1972): "'[A]ny relevant evidence' is admissible on whether the parties intended their written agreement to be a complete and exclusive statement of all the terms of their agreement." (Citations omitted.)

We are not constrained by any parol evidence strictures applicable to alleged oral modifications to written agreements. The settlement agreement was in writing; NPS again acknowledged in writing—post-settlement agreement and post–1982 concession contract—that it was obligated to provide the plans, specifications and drawings for Big Bend (FF 21), and it proceeded to do so.

Appellant is correct that, under appropriate circumstances, when the parties so intend, and the same transaction is involved, separate written instruments can be read together to form one contractual agreement, even if there is no formal incorporation of one into the other and no merger clause. *See Helvering* v. *Le Gierse*, 312 U.S. 531, 540 (1941); *Sierra Diesel Injection Service, Inc.* v. *Burroughs Corp.*, 890 F.2d 108, 112 (9th Cir. 1989); *Leach* v. *Crucible Center Co.*, 388 F.2d 176 (1st Cir. 1968); *Comsat General Corp.*, DOT CAB No. 1226, 83–2 BCA ¶ 16,870 at 83,900 (although the board found no combined agreement under the facts); *Restatement (Second) Contracts* § 202(2) (1981).

Here, the substantial evidence of record is that the parties intended that the 1982 concession contract be read in conjunction with the settlement agreement, which they executed contemporaneously.[8] Thus, the 1982 concession contract, as amended by the settlement agreement, forms the basis for our CDA jurisdiction over this appeal.[9]

[2] The Government also appears to suggest that we do not have jurisdiction over this appeal because, in its view, NPCI is seeking consequential damages. The question of whether alleged damages are consequential does not have jurisdictional import; it pertains to a tribunal's ability to award particular relief and, thus, to a party's statement of a claim for which relief can be granted. *See Northern Helex Co.* v. *United States*, 524 F.2d 707, 720–21 (Ct. Cl. 1975), *cert. denied*, 429 U.S. 866 (1976) (collecting pre-CDA cases); *Prudential Insurance Co. of America* v. *United States*, 801 F.2d 1295 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Land Movers, Inc.*, ENG BCA No. 5656, 91–1 BCA ¶ 23,317 at 116,931; and *CCM Corp.* v. *United*

[8] *See also TDC Management Corp.*, DOT BCA No. 1802, 90–3 BCA ¶ 23,099 at 115,985 n.10, where the Department of Transportation Board of Contract Appeals considered the settlement of a claim arising out of a procurement contract to be a modification to the contract, over which a board has CDA jurisdiction. At least in the instant case, we concur because we have found that the bilateral written settlement agreement evidenced the parties' intent to modify the provisions of the 1982 concession contract.

[9] We note that, although the NPS Director's decision denying appellant's claim was not denominated a CDA final decision and did not cite CDA appeal rights (FF 64), it was, in effect, a contracting officer's final decision on appellant's claim, which had been submitted on a matter in dispute. Notice of CDA appeal rights is for the contractor's benefit. The contracting officer's failure to mention them does not deprive the contractor of its ability to appeal. *Cedar Construction*, ASBCA No. 42178, 94–2 BCA ¶ 26,838.

States, 15 Cl. Ct. 670, 671–72 (1988) (collecting pre-and post-CDA cases).

Because of our determination denying liability, we do not decide whether appellant's claimed damages are consequential; nor do we address appellant's assertion that the Government waived the issue by failing to raise it in its answer to the complaint.

[3] Turning to the merits, it is established that the Government impliedly warrants the correctness and adequacy for the job of its design specifications. When a contractor proves that defective design specifications have caused it extra costs, it is entitled to recover. *United States* v. *Spearin*, 248 U.S. 132, 136–37 (1918). The provision of defective specifications may be considered a constructive contract change under contracts which contain, or are deemed to contain, a Changes clause, or it may be a viewed as a breach of contract. *Hardrives, Inc.*, IBCA-2319, *et al.*, 94–1 BCA ¶ 26,267 at 130,676, 130,678.

To recover on a defective specifications claim, a contractor has the initial burden to prove that it substantially complied with the specifications, and properly used and installed requisite materials, but that an unsatisfactory product or performance resulted. If the contractor carries its burden, the burden then shifts to the Government to prove that defective materials, workmanship, or other cause produced the unacceptable outcome. *Ball, Ball, & Brosamer*, IBCA-2103–N, 93–1 BCA ¶ 25,287 at 125,982.

As a threshold matter, NPCI has failed to meet its burden to prove that Croom complied with NPS' bathroom flooring specifications. NPCI (now advocating Croom's position) claims that the specifications required particle board underlayment for all flooring, including tile flooring in bathrooms. NPS asserts that they called for particle board underlayment in general but, concerning ceramic tile installation in bathroom flooring, they specifically directed the contractor to follow Method F142, which required double wood flooring.

A contract is ambiguous if it is reasonably susceptible of more than one interpretation. *Hardrives*, *supra*, 94–1 BCA ¶ 26,267 at 130,687. NPCI's (Croom's) interpretation of the specifications was not reasonable, particularly when trade practice is taken into account.

Part 3–10 of specifications section 06100, "Underlayment," stated "[i]nstall underlayment just prior to laying finish floor" (FF 26). The parties have stipulated that "[f]inish floor" includes ceramic tile flooring, which was required in all of the bathrooms (FF 26, 27). However, under section 09300, Subpart 3–2, the contractor was to install the tile in accordance with the TCA Handbook, Method F142 for floors, and to follow adhesive and grout manufacturer's recommendations (FF 28). The Handbook also stated, and depicted, that Method F142 required double wood flooring, not particle board underlayment, under the ceramic tile. Further, the Handbook alerted that specifications for ceramic tile floor installations were to conform to trade practices (FF 29, 30). Finally, Croom's contract stressed that all provisions were to be read in harmony, to achieve the intended results (FF 33).

Trade practice can be an aid in contract interpretation. *Riley Stoker Corp.*, ASBCA No. 37019, 92–3 BCA ¶ 25,143 at 125,328; *Restatement (Second) Contracts* § 222. "[E]vidence of trade usage and custom may always *explain* or *define*, as distinguished from *vary* or *contradict*, contract language (italics in original)." *W. G. Cornell Co.* v. *United States*, 376 F.2d 299, 311 (Ct. Cl. 1967). "[A] contractor is charged with knowledge of trade practices which have a 'regularity of observance' in the trade." *Northwest Marine, Inc.*, ASBCA No. 43502, 94–1 BCA ¶ 26,521 at 131,999 (citation omitted).

Croom's representative, Mr. Albert, acknowledged that he knew, based upon his own experience in the trade, that particle board was not a suitable underlayment for ceramic tile, particularly in bathroom facilities (FF 48, 56). The record is devoid of any supporting material—declaration, affidavit, or other documentation or corroboration—for Mr. Albert's hearsay statement that NPCI told him that NPS had told it that the use of particle board under ceramic tile in bathrooms was correct. (See FF 56.) NPCI asserts that NPS inspectors observed the installation of particle board underlayment in bathroom facilities and made no objection. However, by agreement, the inspectors inspected only periodically, on a limited basis (FF 23), and we find no clear evidence in the record that they observed the installation of particle board underlayment in bathrooms (See FF 45). are not authorized, on their own, to change contract requirements. *See, e.g.*, *Hardrives*, 94–1 BCA at 130,688.

In any case, whether we consider the alleged oral advice from NPS concerning particle board underlayment or the purported actions of its inspectors, Croom's contract with NPCI provided that any interpretations, corrections, or changes to it that were not in writing could not be relied upon (FF 34).

Dal-Tile Corp., the tile manufacturer, reported that there was no acceptable application of tile on a particle board surface; that Method F142, as depicted in the TCA Handbook, shows tile adhered to plywood floor; that plywood is the only recommended wood surface; and that no manufacturer would support the use of particle board for tile adhesion (FF 49). NPCI's consultant, Mr. Simpson, from Laticrete Corp., concluded that there were problems in tile floor installations, *and in wall tile installations*, because standard industry installation procedures had not been followed (FF 55).

The specifications required the contractor to determine that surfaces to which tile was to be installed were free from defects affecting proper application. The contractor was to correct defective surfaces or to notify the owner (FF 27). Further, Croom's contract with NPCI required bidders carefully to examine the contract documents and promptly to report errors, inconsistencies, or ambiguities. Requests for clarification or interpretation were to be made in writing prior to bidding (FF 34).

In fact, despite the established trade practice that particle board underlayment was not proper for ceramic tile bathroom flooring, we have found no evidence in the record that, *prior to* bathroom tile installation and the onset of problems, Croom ever questioned NPCI *specifically about the use of particle board underlayment in the bathroom facilities* or that NPCI questioned NPS about it. It was Croom's general contention that the specifications did not require particle board underlayment at *any location* on the Project which was arbitrated, and to which NPS and NPCI were responding in the correspondence contained in the record.

For example, in connection with supporting Croom's arbitration position concerning the particle board underlayment specification, its consultant, Fishkin, stated: "The single sentence 'Install underlayment just prior to laying *finish* floor' * * * would tend to suggest that this material should also be under all finish flooring such as carpeting, resilient flooring, ceramic tile and exposed concrete" (FF 41 (italics in original)). Croom gave NPCI a copy of Fishkin's letter, and NPCI passed it on to NPS, but the focus was upon whether particle board underlayment was required at all, and whether Croom should be paid extra for providing it, not upon whether underlayment should be installed under ceramic tile bathroom flooring. In context and when viewed in connection with other material in the record, Fishkin's phraseology suggests that it would be apparent to those knowledgeable in the industry that underlayment would not be placed under exposed concrete, or ceramic tile, for instance.

Indeed, in responding to NPCI's report of Croom's general assertion that the specifications did not require underlayment, NPS suggested the need to examine specific specifications and trade practices and emphasized that "[a]ny experienced contractor knows where particleboard underlayment is used" (FF 38, 42).

Even if the specifications were deemed to be unclear, the cited conflict between the provision calling for the installation of particle board underlayment prior to laying finish flooring and that calling for the use of Method F142, with double wood flooring, in ceramic tile flooring installations was significant. Therefore, Croom should have inquired *before* it performed the bathroom tile floor work.

Because of our finding that Croom did not did not follow Method F142, we need not reach the question, raised by appellant, of whether the method was appropriate for the bathroom flooring installations.

Finally, even apart from the particle board issue, NPCI has not met its burden to prove that Croom properly used and installed requisite materials, because tile grouting and cracking problems occurred in walls, ceilings, soap dish areas, and elsewhere other than in flooring alone (FF 48, 50–52, 55, 58).

In sum, the fact that Croom did not follow NPS' Method F142 double wood flooring specifications; Croom's admission, through Mr. Albert, that it knew that particle board underlayment was not suitable for bathroom tile flooring installation and that, regardless, it proceeded contrary to trade practice; NPCI's and Croom's failure to inquire specifically and timely about the use of particle board underlayment in bathrooms; and the lack of proof that Croom properly used and installed requisite materials, lead to our conclusion that NPCI has failed to meet its burden to prove that NPS is liable for any extra costs incurred due to the need to replace or repair bathroom flooring.

DECISION

The appeal is denied.

CHERYL SCOTT ROME
Administrative Judge

I CONCUR:

BERNARD V. PARRETTE
Administrative Judge

September 15, 1994

UNITED STATES *v.* JOHN J. HERR *ET AL.*

130 IBLA 349 Decided: *September 15, 1994*

Appeal from a decision by Administrative Law Judge John R. Rampton, Jr., declaring 64 oil shale placer claims invalid for failure to perform annual assessment work. Colorado 747, CMC–133269 through CMC–133332.

Affirmed as modified.

1. Mining Claims: Assessment Work

30 U.S.C. § 28 (1988) calls for the expenditure of $100 in assessment work on or for the benefit of a mining claim each year until patent. Before patent can be obtained the claimant must have made improvements valued at $500 or more (30 U.S.C. § 29 (1988)), but the expenditure of $500 does not terminate the ongoing requirement in 30 U.S.C. § 28 (1988), for expenditure of $100 each assessment year.

2. Mining Claims: Assessment Work—Mining Claims: Determination of Validity

The United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1988), and the Department has jurisdiction to challenge the validity of a mining claim for failure to substantially comply with the assessment work requirement. The forfeiture of a mining claim for failure to do annual labor must be established by clear and convincing proof that the owner has failed to have performed the required work or made the necessary improvements.

3. Mining Claims: Assessment Work—Mining Claims: Determination of Validity

The purposes of the assessment work requirement are to assure that a claimant undertakes a diligent good faith effort to develop the mining claim, and to prevent the location of mining claims for speculative purposes. The requirement that the claimant expend $100 in annual labor each assessment year is not absolute in the same sense as the requirement that a claimant file a notice of intent to hold or affidavit of assessment work pursuant to 43 U.S.C. § 1744 (1988), but the claimant's compliance with the assessment work requirement must be sufficiently substantial to demonstrate a diligent good faith effort to develop the mining claim.

4. Mining Claims: Assessment Work

Assessment work may be performed by a party other than the claimant, and when there is privity between the party doing the assessment work and the claimant, the assessment work will inure to the benefit of the claims.

5. Mining Claims: Assessment Work—Mining Claims: Determination of Validity

The cost of road construction can qualify as assessment work. If the construction of an access road qualifies as assessment work, improvement of the access road will as well. In turn, a road improvement which reduces the frequency or cost of maintenance is as legitimate as an improvement making the road more accessible.

6. Mining Claims: Assessment Work—Mining Claims: Determination of Validity

Evidence of a bona fide intent to develop a claim and use the mineral resources is paramount when determining whether the claimant has made a good faith attempt to comply with 30 U.S.C. § 28 (1988). Evidence that the claimant had no knowledge of the nature or amount of the assessment work allegedly performed; testimony that the claimant relied on representations made by third parties; admissions that the claimant did nothing to confirm those representations for a period of several years; and the absence of any testimony or other evidence from the parties filing affidavits on behalf of the claimant regarding the work allegedly performed will support a conclusion that the claimant was attempting to assert a continuous right to a mining claim for speculative purposes. There is no evidence of a diligent good faith effort to develop the claims.

7. Mining Claims: Assessment Work—Mining Claims: Determination of Validity

If a claimant fails to do necessary annual labor, but resumes work before the rights of a third party intervene, nothing is lost by allowing the claimant to revive the claim with his labor rather than by relocating the claim. However, if a third party right attaches during the period of inactivity, the third party intervention deprives the claimant of the ability to regain the claim by resuming work. The United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1988), and the resumption doctrine is no longer applicable to oil shale claims.

APPEARANCES: John K. York, Esq., Orange, California, for appellants; Lowell L. Madsen, Department Counsel, Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

John J. Herr (d.b.a. Aguila Energy Co.), James M. Larson, Jean M. Larson, Neil S. Mincer, and John K. York have appealed an April 30, 1992, decision by Administrative Law Judge John R. Rampton, Jr., declaring 64 oil shale mining claims located in Garfield County, Colorado, invalid for failure to perform $100 worth of assessment work per year on each of the claims during the years 1981 and 1983 through 1989. [1]

In July and August 1989, Bureau of Land Management (BLM) geologist and supervisory mineral specialist Rodney C. Herrick conducted a 12-day field examination to verify the performance of assessment work (Tr. 33). [2] During his field examination Herrick observed old cuts and pits which had slumped and filled with vegetation, but saw nothing indicating physical work on the claims more recently than 1979 (Tr. 38–39).

Ed Ginouves, who is also a BLM employee, inspected the claim area, both alone and with Herrick. [3] Ginouves testified that the manner in which he and Herrick examined the claims allowed them to see each claim, and they observed no cuts, pits, or other excavations that could have been dug more recently than 1979 (Tr. 79–80). A photographic

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[1] The claims are the Black Prince Nos. 6, 7, 8, 10 through 19, Black King Nos. 3, 4, 5, 7 through 20, Black Diamond Nos. 10 through 27, Yule, Zoan, Aurora, Dado, Merlin, Thelma, Sirius, Cameo, Baron, Mariner, Archeus, Micon, Canopees, Capella, Aura, and Argosy, as amended, oil shale placer mining claims. The claims have been assigned serial numbers CMC–133269 through CMC–133332.

[2] Herrick marked the inspection route he traveled on the claims in green on Exh. G–1.

[3] His inspection routes are depicted in purple on Exh. G–1.

record of the Herricks/Ginouves 1989 claim examination (Exh. G–11) includes summary remarks regarding their findings.

Dave Trappett, of BLM's minerals staff, testified that he was on the claims once a year every year since 1980 and had never seen any evidence of assessment work such as core holes, cuts, or pits (Tr. 324, 326).

BLM's evaluation of the observations and other findings is contained in a December 13, 1989, memorandum from the Grand Junction District Manager to the Colorado State Director. The District Manager noted that affidavits of assessment work had been filed for every year since 1979. The affidavit for the 1978–79 assessment year, describing the work as geologic field work and resource estimates, was documented by a report by George Pipiringas. The 1979–80 assessment work, verified in the field by BLM, consisted of road construction and the core drilling. Referring to the other affidavits the District Manager stated that "the work performed is unspecified for every year except 1987, and no evidence, in the record or found in the field, leads us to believe this work was ever done" (Exh. A).

The Colorado State Office, BLM, initiated contest No. 747 by issuing a complaint dated March 1, 1990, alleging the claims to be invalid because they had "not been maintained by the annual expenditure of $100 per claim in labor or improvements upon or for the benefit of each claim for the purpose of developing valuable mines." In a January 8, 1991, prehearing conference, BLM stipulated that the allegation was for failure to do assessment work during the assessment years 1974 through 1991. [4]

In July 1991, Ginouves participated in a joint examination of the claims with Herr, Neil, and Lawrence Mincer, counsel John K. York, and Department counsel Lowell L. Madsen. The claimants had been asked to attend and present evidence of mining-related activities, but the requested information was not tendered and no improvements or other signs of mining-related activities were observed (Tr. 80–81).

On September 10 and 11, 1991, a hearing was held before Judge Rampton in Glenwood Springs, Colorado. In his decision Judge Rampton noted that the Government had carried its burden of proving by clear and convincing evidence that the required assessment work had not been done in the assessment year 1981 and the assessment years 1983 through 1989. [5] He based this conclusion on failure to find any evidence of any work having been performed during the 1989 BLM examination of the claims and other supporting testimony.

After noting the provision of Colorado law (Colo. Rev. Stat. § 34–43–114 (Supp. 1988)) that assessment affidavits are prima facie evidence that assessment work was performed, Judge Rampton held that there was no reliable evidence that the claimants had performed annual

[4] Prehearing Conference Order, Jan. 22, 1991.

[5] Judge Rampton stated that, for the purpose of his decision, he assumed but did not decide that the claimants had met the assessment work requirements for the years 1974 through 1980 and 1982.

assessment work in 1981 or the years 1983 through 1988, and noted that none of the witnesses called by the claimants could describe the work allegedly performed or offer any other supporting evidence that it had been done. After citing the evidence that the parties filing the assessment work affidavits had contracts with the claimants for the development of the claims, Judge Rampton stated that in almost all cases the claimants were unable to identify or describe any of the work they had allegedly performed and apparently had no idea of the nature of the work that might have been performed. [6] Referring to those times that the claimants' witnesses described the work as surveying, mapping, sampling, and other geological services, Judge Rampton noted that, for this work to qualify a claimant must file detailed reports describing the work with the county. 30 U.S.C. §§ 28–1 and 28–2 (1988); 43 CFR 3851.2. He then held that "[g]iven the strength of [BLM's] case and the failings of the [claimants'] case, I must conclude that [BLM] has shown by clear and convincing evidence that [the claimants] failed to perform qualifying assessment work for the year 1981 and 1983 through 1988" (Decision at 6).

Judge Rampton found that roadwork done in the assessment year 1989 did not reasonably facilitate access to the claims and could not qualify as assessment work. He further held that even if it were assumed that the pipeline work qualified as assessment work, the claims were still invalid because no annual assessment work was performed "for 6 consecutive years and for 7 out of the last 9 years." Thus, the "resumption" of assessment work by virtue of the pipeline right-of-way project could not negate the absence of assessment work in the previous years to preserve the claims (Decision at 9–10).

Finally, Judge Rampton held that the one time performance of $500 worth of assessment work did not forever preclude a Government challenge and that under governing statute and case law, $100 worth of assessment work was an annual requirement.

On appeal appellants argue that Judge Rampton erred by failing to find that they had substantially complied with the annual assessment work requirement, and refer to core drilling, the core analysis, geologic survey work, roadwork, and the "operation of the oil shale retort" between 1979 and 1988 as evidence of substantial compliance (Statement of Reasons (SOR) at 19). Appellants further contend that when they expended a total of $500 doing assessment work they substantially satisfied the statutory assessment work requirements.

Appellants also take issue with Judge Rampton's finding that roadwork in connection with the pipeline right-of-way project did not qualify as assessment work. Citing *Standard Shales Products Co.*, 52 L.D. 522 (1928), appellants contend that Judge Rampton impermissibly substituted the judgment of the Department for that of the claimants, and the roadwork associated with the pipeline project constituted maintenance and improvement of the claims sufficient to withstand a

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[6] Judge Rampton voiced concern regarding the repute and veracity of the parties filing the assessment affidavits. Other documents prepared by those parties clearly support the conclusion that his concern was very well founded.

contest (SOR at 16). They argue at length that the roadwork in connection with the pipeline right-of-way in 1989 was "resumption" of assessment work capable of overcoming any previous failure to perform assessment work (SOR at 20–24).

BLM responds by urging a finding that Judge Rampton's decision is supported by the preponderance of the evidence.

[1] The governing statutory provision, 30 U.S.C. § 28 (1988), calls for the expenditure of $100 in assessment work on or for the benefit of a mining claim each year until patent. Before patent can be obtained a claimant must have made improvements valued at $500 or more (30 U.S.C. § 29 (1988)), but the expenditure of $500 does not terminate the ongoing requirement for expenditure of $100 each assessment year specified in 30 U.S.C. § 28 (1988). *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 658 n.1 (1980). In *United States* v. *Energy Resources Technology Land, Inc.*, 74 IBLA 117 (1983), we observed that the requirements of 30 U.S.C. § 29 (1988) (performance of $500 worth of assessment work as a prerequisite to the issuance of patent) and 30 U.S.C. § 28 (1988) (yearly performance of $100 worth of assessment work) are only tangentially related. We stated at page 122:

> [W]hile it is true that the requirement of section 29 can be satisfied by the performance of annual labor pursuant to section 28, the reverse is not possible. If it were, a claimant could do $500 worth of improvement on his claim during the first year of location—before the obligation to perform assessment work had even accrued—and then hold the unpatented claim for the next 50 years without ever performing any of the annual assessment work required by section 28. Clearly the 1872 Act did not contemplate that once a claimant had accomplished $500 worth of work he would thereafter be excused from any further work. The Congress must have been aware that many claims would not be patented within 5 or 6 years after their location, and yet it required in section 28 that the annual labor be performed on each claim, "until a patent has been issued therefore * * * during each year." Nothing could be more plainly stated.

Id. at 122. Appellants' contention that $500 worth of assessment work on the claims in the 1920's constitutes substantial compliance with 30 U.S.C. § 28 (1988), was correctly rejected.

[2] In *Hickel* v. *Oil Shale Corp.*, 400 U.S. 48 (1970), the Supreme Court recognized that the United States is the beneficiary of oil shale mining claims invalidated for failure to "substantially satisfy the requirements of 30 U.S.C. § 28 [1988]." *Id.* at 57. The Department has jurisdiction to challenge the validity of a mining claim for failure to substantially comply with the assessment work requirement. As noted in Judge Rampton's opinion, forfeiture of a mining claim for failure to do annual labor must be established by clear and convincing proof that the former owner has failed to have performed the required work or made the necessary improvements. *Hammer* v. *Garfield Mining & Milling Co.*, 130 U.S. 291 (1889); *Featherston* v. *Howse*, 151 F. Supp. 353 (W.D. Ark. 1957).

[3] The purposes of the assessment work requirement are to assure that a claimant undertakes a diligent good faith effort to develop the mining claim, and to prevent the location of mining claims for

speculative purposes. *See Chambers* v. *Harrington*, 111 U.S. 350, 353 (1884). The requirement that the claimant expend $100 in annual labor each assessment year is not absolute in the same sense as the requirement that a claimant file a notice of intent to hold or affidavit of assessment work pursuant to 43 U.S.C. § 1744 (1988), but the claimant's compliance with the assessment work requirement must be sufficiently substantial to demonstrate a diligent good faith effort to develop the mining claim. [7] With this in mind, we will outline the evidence presented at the hearing, commencing with the year 1979.

A company called Envirotechnics, Inc., had leased the claims in 1979, and apparently core drilled a test hole through the oil shale structures, recovered the core, and conducted bench scale retort tests (Exh. N). The location of that hole could not be identified with any certainty, but the drilling was believed to be "somewhere around the Black Prince 16 [claim]" (Tr. 181). Herr, the principal owner of the claims and the person who had acted on behalf of the owners during the entire period in question, had no knowledge of any other hole having been drilled since the 1920's (Tr. 262).

The affidavit filed for the 1979–80 assessment year states that $29,000 had been spent between June 1 and August 30, 1980, building an access road and drilling a core hole (Exh. EE). Herr testified that a core sample he believed to have come from the 1979–80 drill hole was later retrieved from a storage yard and shipped to the Colorado School of Mines for analysis (Tr. 196–97). [8] In 1980, the Department of Energy sent an assay result to Envirotechnics (Exh. O). This assay was allegedly of a sample taken from the Black Prince 13 claim, but does not appear to be a section of core. Herr testified that he was not present when the sample was taken, and could not state its source (*see* Tr. 187–88).

Herr stated that he did not know what work was done on the claims between 1981 and 1986 (Tr. 247). During the assessment years 1983 through 1986 Envirotechnics submitted affidavits of assessment work for the claims (Tr. 200). There is no evidence that Envirotechnics ever submitted any report or other document indicating the nature or extent of any work that may have been conducted by it to the claimants, and there is no evidence that anyone with Envirotechnics was ever in the area of the claims during that period or that Envirotechnics did anything other than file the affidavits. In each of 5 assessment years 1980–81 through 1984–85 the affidavits state that "$6,500 worth of work or improvements were performed or made upon" the claims, but they do not state how or where the work was performed (Exh. EE).

[7] For example, if a claimant who was diligently working on the claims at the end of the assessment year had not expended the full $100 required by the Act, but continued to work until the required amount is expended, the claim would not be deemed forfeited. *Anderson* v. *Robinson*, 126 Pac. 988 (Ore. 1912); *Emerson* v. *McWhirter*, 65 Pac. 1036 (Cal. 1901). Similarly, wrongful adverse possession of the claim has been found to be sufficient grounds to excuse the rightful owner from the assessment work requirement during the period of adverse possession. *Mills* v. *Fletcher*, 34 Pac. 637 (Cal. 1893).

[8] Exhibit T is a sample analysis report by the Colorado School of Mines Research Institute, dated Sept. 24, 1982. Ginouves testified that there had been sufficient study of drill cores from the plateau and basin to predict the oil content of various strata within the Greenriver formation, but that the result of the assay was very low and that it "does not seem to match up with the geologic section which you would anticipate for that section of core" (Tr. 374).

Herr testified that for the years 1981 through 1986 "we relied on [Martin] saying that the assessment work had continued." Herr had no idea of what kind of work Martin might have performed (Tr. 247). Herr testified that he had never attempted to verify that any work was actually done or determined the nature of that work (Tr. 201–02). Martin could not be located and was not available to testify. Herr stated that by 1987 Martin appeared to have become another "oil shale casualty" (Tr. 203, 261).

A man named Berridge filed the affidavit for the assessment year 1986–87, stating that $6,500 worth of geochemical sampling, aerial geologic mapping, and surface geologic mapping was conducted between August 14 and 24, 1987. Berridge was apparently hired by Burton (Tr. 208) who was alleged to have a retorting process for oil shale and was extended an opportunity to lease the claims. Herr never met Berridge and did not know if he actually did anything or even went on the claims (Tr. 208–09). Berridge submitted a $6,975 bill, dated October 23, 1987, for geological services (Exh. W). The bill charges an hourly fee and gives a number of hours spent, but there is absolutely no other indication in the record of what work was performed or where it was performed. No report was submitted, and neither Herr nor Burton had any other document or evidence that Berridge actually performed any work (Tr. 208–11).

Berridge also submitted an affidavit asserting that $6,500 worth of assessment work was done between September 1, 1987, and August 31, 1988. Herr testified that he thought the assessment work for that period consisted of "roadwork" (Tr. 226–27). However, he admitted that he could not state the nature or location of any work that was actually conducted in 1988 (Tr. 211).

A large portion of the testimony at the hearing involved the question of performance of assessment work in 1989. BLM employee, Trappett, testified that in either December 1988 or January 1989, Resources Natural Gas, Inc. (Resources), approached BLM, seeking a right-of-way for a natural gas pipeline along a route that would cross the claims (Tr. 313). During negotiations, Resources was advised any right-of-way grant would contain a stipulation that Resources was responsible for making whatever arrangements it deemed necessary with the mining claimants regarding the portion of the right-of-way crossing the mining claims (Exh. 12).

Resources notified the claimants that it was contemplating laying a pipeline across the claims in the spring of 1989. In response, Herr's counsel advised Resources that the "improvements which you contemplate performing on the subject property qualifies as assessment work" and asking Resources' representative to execute an enclosed affidavit of assessment work. Resources agreed to sign the affidavit of assessment work in exchange for a right-of-way across the claims (Exh.

GG; Tr. 213, 268–69). The terms of this agreement were not disclosed to BLM.

On July 5, 1989, BLM granted a right-of-way. Stipulations regarding mining claims and reclamation of the access road and pipeline route were attached to the right-of-way grant (Exh. 12). Exhibit FF depicts the pipeline route and the configuration of the claims is depicted on Exh. R. The pipeline follows, with minor deviations, the route of an existing two-track access trail for a distance of approximately 11 miles (Tr. 51, 93–94, 318–19).

Trappett, who completed the initial field work for the right-of-way and compiled stipulations for surface reclamation and rehabilitation following construction, periodically inspected the construction process during the summer of 1989. He stated that by the end of August, backfilling had been completed along the pipeline route from Black King No. 5 to Black King No. 13 and ended in the Black Diamond No. 23 claim (Tr. 318–19). He explained that it was intended that any improvements to the existing road or trail would be temporary to facilitate the construction of the pipeline, and the pipeline route was to be reclaimed and the road was to be restored to its original condition after construction. He also testified that if the road had been intended for work in connection with the mining claims, BLM would have included other design criteria affecting grades, alignment, erosion, and amenability to travel (Tr. 322–23). He did admit, however, that Resources had installed a large number of water bars along the road on the claims, and that these water bars would aid in the prevention of road deterioration (Tr. 341–43).

It was Herrick's opinion that the road work could not be considered to be assessment work because it did not lead to further development of the claims, and did not materially change accessibility of the claims (Tr. 347). He also admitted that Resources had installed water bars for erosion control on the access road across the claims.

In August 1991 the claimants' representatives transported an experimental retort (distillation device for oil shale) using existing (reclaimed) roads near the pipeline right-of-way. The retort was operated for a period of 8 hours with 2 litres of product being recovered (Tr. 219–39; Exhs. BB, CC, DD). Herrick stated that appellants could have transported and unloaded their retort over the two-track road as it existed prior to pipeline right-of-way work (Tr. 359, 363).

None of the individuals who filed the affidavits appeared to present testimony at the hearing or submitted affidavits stating the nature or extent of the work allegedly performed.

We will consider the assessment year 1988–89 first. As a preliminary reminder, the Government must establish by clear and convincing proof that the former owner failed to have work performed or improvements made to the amount required by law.

[4] The assessment work may be performed by a party other than the claimant. It may be done by a lessor or a lessee. *See New Mercer Mining Co.* v. *South Mercur Mining Co.*, 128 P.2d 269 (Utah 1942). It

may be done by a shareholder. *See Wailes* v. *Davies*, 158 F. 667 (CC Nev. 1907), *aff'd*, 164 F. 397 (9th Cir. 1908). It can even be performed by the Federal Government. *See Simmons* v. *Muir*, 291 P.2d 810 (Wyo. 1955). Resources agreed to perform the assessment work in exchange for a right-of-way across the claims. There can be little doubt that there was privity between Resources and the claimants, or that the work it performed will inure to the benefit of the claims if it otherwise qualifies.

[5] The construction of an access road to the claims will qualify as assessment work, even though the road is not on the claims. *See United States* v. *9,947.71 Acres of Land*, 220 F. Supp. 328 (D.C. Nev. 1963); *Pinkerton* v. *Moore*, 340 P.2d 844 (N.M. 1959). There is no doubt that the road in question provides access to the claims, as it was used by the mineral examiners when making their inspections. If the construction of a road providing access qualifies, improvement of a road affording access to a claim will as well. In turn a road improvement which reduces road maintenance frequency or cost is as legitimate as an improvement that makes the road more accessible. We find the cost of installation of water bars on an existing road to prevent erosion and reduce the need to rehabilitate or maintain the road is sufficient improvement of the road to qualify as assessment work. The Government has failed to establish by clear and convincing proof that the claimants failed to have work performed or improvements made to the amount required by law during the assessment year 1988–89.

Ed Ginouves testified that if appellants had intended the pipeline right-of-way as a road for mining development, it would have been necessary to seek approval of a plan of operations under 43 CFR Subpart 3809, the surface management regulations applicable to mining operations (Tr. 54). We do not take this testimony to be an indication that BLM is of erroneous opinion that labor or improvements on a claim could not satisfy the assessment work requirements if the work had been undertaken without an approved mining plan of operations. There is nothing in either the Act or regulations that would support that conclusion.

[6] There is no doubt, however, that the Government has established by clear and convincing proof that the claimants failed to have work performed or improvements made to the amount required by law for the assessment years 1981 through 1988. The most telling thing in the transcript and other evidence in the record is the claimants' total lack of knowledge regarding the nature or amount of work that was supposed to have been performed. They testified that they relied upon representations allegedly made by third parties, but admitted that they did nothing to confirm the alleged representations for a period of several years. Not one of the parties filing affidavits on behalf of the claimants was available to testify about the work performed. Some of

the work allegedly undertaken was surveying and mapping, yet the claimants produced no maps or other evidence of a survey.

Evidence of a bona fide intent to develop the claim and use the mineral resources is paramount when assessing whether a claimant has made a good faith attempt to comply with 30 U.S.C. §28 (1988). *Chamberlain* v. *Montgomery*, 261 P.2d 942 (Utah 1953). An attempt to assert a continuous right to a mining claim cannot be based upon a mere pretense of work so plainly a sham that it must be disregarded. *McCormick* v. *Baldwin*, 37 P. 903 (Cal. 1894). We do not wish to speculate regarding whether a pretense was carried out by the claimants or by those they relied upon. However, there is nothing in the record that would support a finding that in the assessment years 1981 through 1988, the claimants did anything other than attempt to hold the land for speculative purposes.

[7] As articulated in *Wilbur* v. *Krushnic*, 280 U.S. 306, 317 (1930), the "resumption doctrine" held that failure to perform annual labor rendered a claim subject to loss through relocation by another claimant. The basis for this doctrine is both logical and simple. If a claimant does not do the necessary annual labor for a period of time, but resumes before another party's rights attach, nothing is lost by allowing the claimant to revive the claim with his labor, rather than formally relocating the claim. However, during the period that the claim has been abandoned and the land is subject to appropriation, and if another party's rights attach, the intervention of those rights deprives the claimant of the ability to reactivate the claim by resumption of work.

The claimants' arguments on appeal that the resumption doctrine applies in this case must fail because valid rights have attached. Those rights were recognized in *Hickel* v. *Oil Shale Corp.*, *supra*, when the Supreme Court recognized that the United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. §28 (1988).

The intervening rights were created when the 1872 Mining Law was effectively amended in 1920 by making oil shale a leasable, rather than a locatable mineral. For a period following this event the courts and the Department stated that a failure to do assessment work would not inure to the benefit of the Government. [9] This interpretation was abandoned after the Supreme Court handed down *Hickel* v. *Oil Shale Corp.*, *supra*, and, following that decision, the resumption doctrine was no longer applicable to oil shale claims.

Having concluded that Judge Rampton properly found the claims void for failure to perform assessment work we need not, and will not consider whether the claims were invalid for other reasons. The Board does not render advisory opinions. *Edgar W. White*, 85 IBLA 161 (1985).

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[9] *See* 30 *Rocky Mt. Min. L. Inst.* § 10.02[2] (1984), for a discussion of pre-*Oil Shale Corp.* decisions and regulations.

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 by this opinion.

R. W. MULLEN
Administrative Judge

I CONCUR:

C. RANDALL GRANT, JR.
Administrative Judge

UNITED STATES v. RICH KNOBLOCK *ET AL.*

131 IBLA 48 Decided: *October 18, 1994*

Appeal from a decision of Administrative Law Judge Ramon M. Child dismissing a contest complaint against 11 placer mining claims. I-25389.

Appeal reviewed de novo; decision below reversed.

1. Mining Claims: Contests—Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Res Judicata

Unless and until patent issues, paramount title to lands embraced by mining claims remains in the United States, and it may inquire into the extent and validity of rights claimed against it. The doctrine of res judicata has no application to a mining claim contest where the previous determinations upon which invocation of the doctrine is premised did not purport to either determine the existence of a valuable mineral deposit or otherwise adjudicate the validity of the mining claims in question.

2. Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability

A discovery within the meaning of the mining laws exists where the evidence is such that a person of ordinary prudence would be justified in the further expenditure of labor and means, with a reasonable prospect of success in developing a paying mine. Determining that a prudent individual would be justified in attempting to develop a paying mine necessarily involves consideration of whether or not a mineral deposit has been exposed within the limits of a claim and, if so, whether the evidence is such that an individual would be justified in concluding that the exposed mineral exists in sufficient quantity and quality so as to make expectations of its profitable extraction reasonable under the facts of record.

3. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally

There is a clear distinction between the quantum of evidence which would be sufficient to justify a prudent individual in the continuation of an active search for a mineral deposit of sufficient quantity and value to warrant development and that evidence which is, itself, adequate to justify the commencement of actual development of a productive mine with a reasonable prospect of success. Only the latter showing is sufficient to warrant a finding that a discovery under the mining laws exists.

4. Administrative Procedure: Burden of Proof—Rules of Practice: Government Contests

The determination of whether or not the Government has presented a prima facie case of invalidity in the contest of a mining claim is made solely on the basis of the evidence introduced in the Government's case-in-chief, which includes testimony elicited in cross-examination. If, upon the completion of the Government's presentation, the evidence is such that, were it to remain unrebutted, a finding of invalidity would properly issue, a prima facie case has been presented and the burden devolves on the claimant to overcome this showing by a preponderance of the evidence.

5. Administrative Procedure: Burden of Proof—Rules of Practice: Government Contests

Since it may generally be assumed that, given the varying economic conditions present over a period of years, a mining claim will usually be developed unless it is not commercially feasible to profitably do so, a Government showing that there has been an absence of production from a mining claim for an extended period of time is sufficient, without more, to establish a prima facie case of invalidity.

6. Mining Claims: Discovery: Geologic Inference

While recourse to geologic inference to show the continuation of values beyond the area of a physical exposure of a mineral deposit may be made upon a showing that the demonstrated values have been relatively consistent and are likely to continue given the geologic nature of the deposition, geologic inference alone will be deemed insufficient to project high values into areas containing exposures which, themselves, fail to exhibit similar high values.

7. Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability

Where the evidence submitted with respect to certain claims indicates the lack of any exposure of a mineral deposit on some of the claims and that, while an exposure of mineral deposit might be deemed to exist on the other claims, the values disclosed are insufficient to establish that the mineral deposit is valuable within the meaning of the mining laws, the claims are properly deemed to be null and void as lacking a discovery of a valuable mineral deposit.

8. Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability

The fact that a market existed for euxenite in the 1950's does not preclude a finding that no market existed for euxenite in 1972, where it can be shown that the earlier production of euxenite was pursuant to a Government contract which paid for the contained columbium/tantalum pentoxides at rates far in excess of the existing market price, that all production of euxenite ceased upon completion of the Government contract and the termination of its stockpiling program, and that there has been no market for euxenite since 1959.

9. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally

The standard for determining whether a discovery of a valuable mineral deposit has been made is not whether expenditures for further exploration or for further analysis might be justified. Rather, a finding of discovery requires that the evidence be sufficient to justify, as a present matter, the expenditures necessary to develop a paying mine with a reasonable prospect of success.

APPEARANCES: Erol R. Benson, Esq., Office of the General Counsel, United States Department of Agriculture, Ogden,

Utah, for the United States Forest Service; Richard K. Linville, Esq., Emmett, Idaho, for appellees.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

The United States Forest Service (Forest Service), United States Department of Agriculture, has appealed from a decision of Administrative Law Judge Ramon M. Child, dated February 12, 1990, dismissing a contest complaint against the Goat Creek No. 1, Baron Creek Nos. 1 and 2, and Good Luck Nos. 1, 2, 3, 4, 5, 000, 00, and 0 placer mining claims. The subject group of claims, collectively referred to as the Payette placer claims, were located in 1957 and 1958 and are situated in unsurveyed secs. 1 and 12, T. 8 N., R. 11 E., secs. 6 and 7, T. 8 N., R. 12 E., secs. 2, 3, 10, 11, 13, 14, 22, 23, 26, 35, and 36, T. 9 N., R. 11 E., and secs. 34 and 35, T. 10 N., R. 11 E., Boise Meridian, Boise County, Idaho, along the South Fork Payette River. Subject to valid existing rights, all of these lands were withdrawn from location or disposition under the mining laws by the Sawtooth National Recreation Area (SNRA) Act, 16 U.S.C. §§460aa, 460aa–9 (1988), effective August 22, 1972, as well as by the Wilderness Act of 1964, 16 U.S.C. §1133 (1988), effective January 1, 1984.

The instant controversy was initiated on April 14, 1988, by the filing of a contest complaint by the Bureau of Land Management (BLM), on behalf of the Forest Service, seeking a declaration of invalidity with respect to the subject claims. The complaint, which was served upon, *inter alia*, Rich Knoblock and Nampa Christian Schools Foundation, Inc., appellees herein, alleged that minerals had not been found within the limits of any of the mining claims of sufficient quantity and quality as to constitute a discovery of a valuable mineral deposit, within the meaning of the mining laws, either at the present time or as of August 22, 1972, the date the land was withdrawn from mineral entry by the SNRA Act. The named contestees duly denied these charges.

Additionally, contestees affirmatively asserted that, pursuant to the terms of a Departmental decision and order styled *United States* v. *Davis*, dated May 12, 1958, *as amended*, January 20, 1959, the subject claims were "allowed and validated, and the Contestant is estopped to contest the validity of said claims and the right of Contestees to proceed with development of the claims." Contestees stated that the Government was further estopped from interfering with their prospecting and operation of the claims in conformance with a logical and sequential operating plan as specifically allowed by the United States District Court for the District of Idaho in *United States* v. *Knoblock*, Civ. No. 77–1127 (D. Idaho, Aug. 3, 1979).

A 2-day hearing was held in Boise, Idaho, on October 16 and 17, 1989, before Judge Child. The Government commenced its case-in-chief by calling Rich Knoblock, co-owner of the claims, as an adverse witness

(Tr. 13). Knoblock testified that he had acquired the claims in 1963, but had not produced any minerals from the claims (Tr. 15). Knoblock asserted that he lacked sufficient financial resources to personally mine the property and had tried to sell it (Tr. 16, 19, 26). The most recent sales agreement had been with David Sim, who terminated the agreement in a letter to Knoblock asserting that an examination had failed to disclose a verifiable mineral discovery which would provide minerals in sufficient quality and quantity to develop a paying mine (Tr. 24–25).

Following testimony from Daniel Vern Shrum, Supervisory Forestry Technician with the SNRA, establishing that the claims were located within the SNRA and, in whole or in part, within the Sawtooth Wilderness Area (Exh. G–5; Tr. 40), the main portion of the Government's case was presented by James Jeff Jones (Jeff Jones), a mineral examiner for the Forest Service. Jeff Jones testified that, prior to an examination of the claims, he had reviewed Geological Survey Bulletin 1319–D, "Mineral Resources of the Sawtooth Primitive Area," published in 1970, which contained a section on the Payette placer claims and which reported the results of various churn drill holes. He also consulted a 1957 report by E. S. Rugg of Goldfield Consolidated Mines Co. (Tr. 49).

Jeff Jones conducted his examination of the claims on September 28, 29, and 30, 1983, and subsequently prepared a report of his examination. *See* Exh. G–7. Accompanying Jeff Jones on his initial visit were Jeffrey Gabardi, Forest Service mining engineer from the Boise, Idaho, office, David Sim, who then held an option on the claims, Gene Stonehocker, a consulting geologist, and Sim's sampling crew of five men. Knoblock was present for part of the examination (Tr. 51–52). Because the land had been withdrawn in 1972, the examination was particularly directed to ascertaining whether a discovery had existed prior to the withdrawal, based on the excavations made and sampling undertaken at that time.

Sim and Stonehocker chose all sites for sampling (Tr. 54). For the sampling process, Sim and Stonehocker would identify a sample site and direct their backhoe operator to dig a hole. Jeff Jones would go down in the hole, take a sample down the wall of the hole, bag the sample, identify it with a sample log, photograph the sample site, and identify the spot on the map or air photograph (Tr. 57). He took a total of 16 samples, at least one of which was located within each claim. Six of the samples were vertical channels taken down the walls of backhoe pits. It was necessary to take the remaining 10 samples as random samples from the gravel piles of the backhoe pits because these pits had rapidly filled with water (Tr. 59–67). The samples were tagged for identification and taken to the Forest Service warehouse, where they were put through a sluice box and then hand-panned to obtain a black sand concentrate. These concentrates were sent to the Reno Research Center, U.S. Bureau of Mines, for assaying (Tr. 67).

Although Jeff Jones had instructed the lab to determine the gold values by amalgamation, the lab failed to do so (Tr. 68). [1] Having consulted with a number of people, he decided to send the remaining sample (which consisted of 98.54 percent of the original sample) to Metallurgical Laboratories Inc. (Metlabs) in San Francisco whose chief assayer recommended a complete fire assay (Tr. 72). Unfortunately, the lab combined all 16 samples into a single sample, so that the amount reported was total gold from all of the sample sites (Tr. 74). Jeff Jones ultimately decided to add this value to the sample showing the greatest value for other minerals. *See* Exh. G–9.

Based on the assay reports, Jeff Jones proceeded to determine the respective values of the samples which he had taken. To do so, however, he made a number of assumptions as a predicate for determining value. Initially, he noted that it had not been possible to determine the percentage of monazite, euxenite, columbite, and ilmenorutile because of the very low concentrations in the samples. [2] This was important since, in 1972, there was no market for either euxenite or ilmenorutile. In assigning values for various minerals, therefore, he assumed: (1) that all columbium [3] was present as columbite, even though he suggested that 47 percent of the columbium would not be in the form of columbite (*see* Exh. G–7 at 10; Tr. 86); (2) that all tantalum was present as columbite [4] (*see* Exh. G–7 at 11); (3) that all of the uranium was extractable, even though there was no indication that uranium was present in any form other than euxenite (*see* Exh. G–7 at 12); and (4) that all of the rare earths, yttrium, and thorium [5] were present as monazite (*see* Exh. G–7 at 13).

Based on the foregoing assumptions, Jeff Jones computed values for each of his samples based on 1972 prices. These ranged from a low of \$0.008 per cubic yard for sample No. 2044 to a high of \$0.091 per cubic yard for sample No. 2042. *See* Exh. G–7 at 15. He then added the gold value as derived from the inductively coupled plasma analysis (0.333 troy ounces per ton for sample No. 2042), to arrive at a total value of

[1] In addition to determining the amount of gold by amalgamation, the lab was instructed to assay for platinum, palladium, niobium (columbium), tantalum, rare earth oxides (and, if possible, to determine the presence of individual rare earths), yttrium, tin, tungsten, thorium, and U_3O_8 uranium (Tr. 68). The assay report is found at page 20 of the appendix to Exh. G–7.

[2] Rugg, in his analysis, had obtained an assay which showed euxenite at 2.6 percent, ilmenorutile at 3.4 percent, columbite at 1.9 percent, and monazite at 0.8 percent. *See* Rugg Report at 5.

[3] Columbium (Cb) is the name used by the metallurgical industry for the chemical element with atomic number 41 and an atomic weight 92.91. However, this element is referred to as niobium (Nb) in chemistry and most other sciences. *See United States Mineral Resources*, "Niobium (Columbium) and Tantalum," R. Parker and J. Adams, U.S. Geological Survey Professional Paper 820 (1973) at 443 n.1. While individuals testifying at the hearing generally referred to the element as columbium and reported values for columbium pentoxide (Cb_2O_5), there were references to both niobium and niobium pentoxide (Nb_2O_5). These designations will, therefore, be used interchangeably.

[4] Jeff Jones further testified that, while he had assigned values to his samples for tantalum ranging from \$0.001 to \$0.021, none of the tantalum would have been marketable since the tantalum-columbium ratio was too low (Tr. 87).

[5] The rare earth elements, which are also called lanthanides, consist of a group of 15 chemically similar elements with atomic numbers 57 through 71, inclusive. Yttrium, although not a lanthanide, is normally grouped with the rare earth elements since it often occurs with them in nature, having similar chemical properties. *See Mineral Facts and Problems, 1985*, "Rare-Earth Elements and Yttrium," J. Hedrick, Bureau of Mines Bulletin 675 at 647. Thorium is recovered as a byproduct of processing monazite for the lanthanides and yttrium. *See Mineral Facts and Problems, 1985*, "Thorium," J. Hedrick, Bureau of Mines Bulletin 675 at 842.

$0.013 per cubic yard for that sample, which was the highest value derived for any of his samples. Subsequently, having obtained the fire assay of total gold from Metlabs, he added an additional gold and palladium [6] value of $0.025 per cubic yard to sample No. 2042, arriving at a total value of $0.155 per cubic yard for that sample. [7] *See* Exh. G–9.

Jeff Jones also computed the values disclosed in the churn drill holes as reported in Geological Survey Bulletin 1319–D. Twelve of these holes (Nos. 1 to 12) had been drilled by Rare Metals Corp. of America in 1958, two more (Nos. 13 and 15 [8]) were drilled either in 1964 or 1965 by the claimants, and the last two (Nos. 16 and 17) were drilled by the claimants in 1967. In making his computations, Jeff Jones assumed that all of the Nb_2O_5 shown on the assays was present as columbite and that all of the uranium was recoverable. The combined columbium and uranium values for the 16 churn holes ranged from a low of $0.006 per cubic yard for churn hole No. 11, to a high of $0.293 per cubic yard for churn hole No. 15. Since assays for gold values had been made for churn holes Nos. 13 and 15, he added the gold values to the columbium and uranium totals for those two holes. The total cubic yard value for holes Nos. 13 and 15 was $0.216 and $0.341, respectively. [9] By way of contrast, the highest value for any of the other churn holes was $0.099 for hole No. 17, though, admittedly, none of the samples from the other holes had been assayed for gold and some had not been assayed for uranium. *See* Exh. G–7 at 17.

In calculating the anticipated costs of mining, Jeff Jones anticipated that mining would occur utilizing a large bucket line dredge that could dig 110 feet, a method which, he asserted, would be the cheapest given the nature of the deposit (Tr. 79–81). Jones took information available through the Bureau of Mines on the mining costs and capital costs associated with the dredge and adjusted it to reflect 1972 costs. The capital cost figure which he derived was $11,891,250, based on 1967 capital costs of $7,875,000 for a comparable dredge. Noting that the best values had been obtained in churn hole No. 15, which was located on the Good Luck No. 4, he computed the total cubic yardage on that claim (37,592,593) and determined that each cubic yard would have to bear $0.3163 merely to amortize capital costs. *See* Exh. G–7 at 20. To this figure, he added direct operating costs of $0.1027 per cubic yard, for a total cost of $0.419 per cubic yard, which would merely account for direct and capital costs of mining. [10] His report noted that this cost exceeded the value of the deposit by nearly $0.08 per cubic yard even

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[6] The total palladium value was computed as $0.0008 per cubic yard. Thus, virtually all the additional value represented values derived from gold.

[7] It is unclear whether this, in effect, double-counted the gold, since the sample value to which $0.025 was added already included a gold value determined from the inductively coupled plasma analysis.

[8] Churn drill hole No. 14 was abandoned at a shallow depth because of a surface boulder.

[9] Subsequently, however, Jeff Jones noted that if the gross-weighted average value of the unmarketable columbium (that found in ilmenorutile and euxenite) was subtracted from the results for churn hole No. 15, the value would decline to $0.221 per cubic yard (Exh. G–7 at 21).

[10] Jeff Jones also noted that other costs such as general overhead, interest on capital investment, development drilling, development work such as surface stripping, reclamation, and the capital costs which would be incurred to modify the dredge so it could dig to 145 feet, were not included in this figure (Tr. 81). *See* Exh. G–7 at 20–21.

before any milling and transportation costs were added. Milling costs alone he estimated to be $0.127 per cubic yard. Based on this analysis, he concluded that the deposit could not have been marketed at a profit in 1972 and was not, therefore, supported by a discovery as of the critical date (Tr. 87).

Under cross-examination, Jeff Jones was questioned concerning two prior analyses of the claims, one prepared in 1978 for the SNRA by Russell Wood, a professional engineer, and the other prepared in 1980 by Guy V. Jones, who was then employed as a mining geologist by the SNRA. *See* Exhs. C–4 and C–1. [11] Insofar as the Wood report was concerned, Jeff Jones noted that he had read the report prior to writing his own analysis. He recognized that the Wood report's estimate of value was significantly higher than his, but he attributed this to the fact that the report did not use the 1972 values for gold, Cb_2O_5, tantalum pentoxide (Ta_2O_5), and uranium U_3O_8. [12]

Jeff Jones was questioned extensively concerning the differences between the conclusions reached in his report and those appearing in the Guy Jones report. [13] The Guy Jones report had concluded that the "best placer ground" on the claims would contain 88 million cubic yards of dredgible material with an average value of $0.342 per cubic yard. [14] Total costs were estimated to be $0.2201 per cubic yard, and the net value of production was estimated at $10,753,758. Additionally, the report noted that "[i]f methods were available in 1972 to extract the Cb_2O_5 values contained in the ilmenorutile, the profit margin could go up by 11¢/yd.^{3} or $9,700,625 less reduction costs" (Exh. C-1 at 11).

In explaining the differences between his analysis and that contained in the Guy Jones report, Jeff Jones noted that the Guy Jones report both included values for minerals which he had not included in his computations and assumed costs (particularly capital costs for the dredge) significantly lower than those utilized in his analysis.

Thus, Jeff Jones pointed out that, while the Guy Jones report had allocated a value of $0.036 per cubic yard for platinum, he had accorded no value to platinum. Jeff Jones noted that his own assays had failed to detect any platinum. While admitting that platinum values had been reported in Geological Survey Bulletin 1319–D with

[11] Jeff Jones was also questioned about a report apparently prepared by Kershner and Mashburn, premised on the use of a suction dredge, which, according to Jeff Jones, would not be practical considering the large boulders on the claims. While this report was marked as Exh. C–3 (*see* Tr. 98), only the drilling records of the report were ultimately admitted into evidence. *See* Tr. 153.

[12] Another difference lay in the fact that Wood had ascribed significant thorium values to drill holes Nos. 13 and 15 (and a lesser thorium value to drill hole No. 16), whereas Jeff Jones had excluded any thorium values in his calculations.

[13] The Guy Jones report actually consists of two separate documents, one designated the "SNRA Position Document on the South Fork Payette Placer Claims," which is two pages long, and another far more extensive analysis entitled "Evaluation of the South Fork Payette River Placer Deposit." Both documents are found in Exhibit C–1. While the first document draws on conclusions developed in the second document, it is the second document which contains virtually all of Guy Jones' substantive appraisal. References in the text to the "Guy Jones report" will be to this latter analysis unless otherwise expressly noted.

[14] While the weighted average value was originally determined to be $0.354 per cubic yard (*see* Exh. C–1, at 10), Guy Jones subsequently calculated that transportation costs for the ilmenite would aggregate $5,349,498, far in excess of its value. Accordingly, the value which he had originally attributed to the ilmenite ($0.012 per cubic yard) was subtracted. *See* Exh. C–1 at 11; Tr. 243.

respect to churn holes Nos. 13 and 15, Jeff Jones pointed out that the Bulletin had also noted that "[a]ssays on several samples by the Bureau of Mines and Geological Survey laboratories did not find detectable quantities of platinum" (Exh. G–7, App. at 56). Accordingly, he did not feel that the presence of platinum in the deposit had been established.

Other differences between Jeff Jones' analysis and the Guy Jones report occurred in the treatment of yttrium and thorium. The Guy Jones report had indicated that some of the yttrium was present in euxenite. Jeff Jones assumed that all of the yttrium was in the form of monazite which, given the fact that he also believed there was no market for euxenite, was an assumption which favored the claimants. Arguing that no additional price is paid for the yttrium content of monazite, Jeff Jones merely computed the market value of the monazite. Moreover, noting that large surplus stocks of yttrium existed, he concluded that there was no demand for the yttrium oxide present, regardless of whether or not it was in the form of monazite or euxenite. *See* Exh. G–7 at 19. Jeff Jones similarly concluded that there was no market for thorium from the claim, pointing out that "[t]here are large industry and government stocks of ThO_2 as a result of monazite processing." Accordingly, he ascribed no value for thorium content. *Id.*

The Guy Jones report, on the other hand, took the opposite approach with respect to yttrium and, rather than valuing the monazite at *its* going rate ($0.085 per pound) utilized a figure which represented the value of the contained yttrium at $9.00 a pound. This had the effect of increasing the ascribed value for the monazite from $0.01 per cubic yard to $0.06 per cubic yard. The yttrium content of the euxenite was similarly valued resulting in an additional $0.001. Thus, the Guy Jones report assumed that all of the yttrium would be recovered. Insofar as the thorium was concerned, apparently recognizing that thorium oxide was, indeed, in oversupply, the Guy Jones report assumed that only 20 percent of the thorium would be marketable with a net value of $0.014 per cubic yard. *See* Exh. C–1 at 10. Elimination of the values attributed to platinum, yttrium, and thorium in the Guy Jones report results in a weighted value per cubic yard of $0.253 for churn holes Nos. 13 and 15, which is actually below the average value per cubic yard which Jeff Jones developed in his analysis of these two drill holes ($0.277 per cubic yard). Of course, this latter figure assumed 100–percent recovery of Cb_2O_5.

The differences in valuation of the deposit were relatively minor compared to the variance in presumed development costs. This divergence was the result of two separate factors: (1) the cost of a dredge and the associated costs of transporting it to the site and assembling it; and (2) the amount of reserves over which this cost would be apportioned. The Guy Jones report assumed total dredge costs of $2,195,600 which would be spread out over 88,187,500 cubic yards of material. *See* Exh. C–1 at 10. Jeff Jones, in his report, assumed that the dredge would cost $11,891,250 spread over 37,592,593 cubic yards. *See* Exh. C–7 at 20. Thus, the Guy Jones report projected capital costs aggregating $0.0249 per cubic yard while, under Jeff Jones' analysis, capital costs would be $0.3163 per cubic yard.

Jeff Jones noted that he had derived his estimate of the costs of a dredge from a 1967 Bureau of Mines report on dredging (Information Circular 8462) which he upgraded to 1972 based on commodity price data also obtained from the Bureau of Mines (Tr. 104–06). *See also* Exh. G–7 at 20. He admitted that the dredge which he referenced was the largest available dredge at that time, but justified its use on the theory that its increased capacity might make it more economic than using a smaller dredge. *See also* Tr. 180. He recognized, however, that a different approach might also be justified. Thus, the following exchange occurred between Jeff Jones and claimants' attorney:

> Q. [BY MR. LINVILLE] I think we were talking about the cost of dredges Mr. Jones. Is it—would it be possible to dredge, particularly on a selective basis, in the Payette River Placer Claims using a smaller dredge than the one that you utilized in your cost calculations?
>
> A. Yes.
>
> Q. Would it be prudent for a miner to go out and buy the biggest dredge in the world to dredge this area on a selective basis?
>
> A. Yes.
>
> Q. Might it be equally prudent to do more testing and dredge on a more selective basis with a smaller dredge?
>
> A. It might be more prudent.
>
> Q. So the cost figures regarding cost of the dredge, it could be prudent to use a dredge that would have cost, at that time, perhaps what Mr. Jones indicated in his report, two million rather than eleven million?
>
> A. Perhaps.
>
> Q. A cost saving of nine million dollars; is that correct?
>
> A. That's correct.

(Tr. 109).

The yardage calculation which Jeff Jones used was based on the fact that the hole which had showed the highest values (churn hole No. 15) had been drilled to a depth of 145 feet and he arrived at his estimate of yardage by multiplying the length and width of that claim, the Good Luck No. 4, by that depth and then dividing by 27 to obtain the cubic yardage on the claim (Tr. 170). The Guy Jones report had used all of the Good Luck No. 3 and portions of the Good Luck Nos. 2 and 4 in determining the surface acreage and had used a depth figure of 170 feet in arriving at its estimate of 88,000,000+ cubic yards.

Subsequently, on redirect examination, Jeff Jones noted that he had recomputed his cost analysis utilizing the estimate of $2,195,600 for the cost of a dredge found in the Guy Jones report. Employing his estimate of 37,592,593 cubic yards of material, this would result in capital costs of approximately $0.06 per cubic yard. [15] He argued that, even utilizing this figure, the cost of mining would still exceed the

[15] Actually, the capital costs per cubic yard would be $0.058 under the assumptions made in the text.

anticipated return since only 53 percent of the columbium was recoverable because there was no market for either euxenite or ilmenorutile (Tr. 177–78). [16] He later noted that even if he utilized that yardage figure presented in the Guy Jones report, the result would still be that the deposit could not be economically mined (Tr. 187–90). He further explained that he did not believe the Guy Jones report was justified in its acreage assumptions since much of the acreage was on claims which, according to assays, contained low values (Tr. 194). [17]

Jeff Jones also briefly discussed the history of the Bear Valley deposit which had been mined for euxenite by Porter Brothers in the mid to late 1950's. He noted that this deposit was located approximately 30 miles southwest of the Payette placers (Tr. 182). He explained that Porter Brothers had obtained a Government contract at roughly $3.50 per pound of columbium oxide under which they sold and processed a substantial amount of euxenite which was then shipped to St. Louis for extraction of the Cb_2O_5. *Id.*; *see also* Exh. G–7 at 18–20. Upon termination of the Government contract, however, operations at Bear Valley were shut down and have not reopened since that time. In response to an inquiry as to how that deposit compared with the Payette placers, Jeff Jones responded that the Bear Valley deposit was "much better," noting that "euxenite averaged a pound per cubic yard, and the best hole in any of the drilling results here that we're dealing with is two-tenths a pound" (Tr. 183). With the completion of Jeff Jones' testimony, the Government rested.

At this point, contestees presented a number of motions seeking to have the complaint dismissed. Thus, contestees renewed the argument originally presented in their answer that the complaint was barred by the doctrine of res judicata, asserting that the claims in issue had been subject to two previous litigations and that, therefore, the Government should be estopped to challenge the claims' validity at the present time. [18] Contestees also sought to have the complaint dismissed on the basis that, since the Guy Jones report had been generated by the Forest Service, its conclusions that a discovery existed on the Good Luck Nos. 2, 3, and 4 were binding on the Government as to those

[16] In his report, Jeff Jones had aggregated the capital costs of the dredge ($0.3163 per cubic yard), direct mining costs ($0.1027 per cubic yard), and milling costs ($0.127 per cubic yard) to arrive at a cost figure of $0.546 per cubic yard. He noted that even this figure understated actual costs since numerous other expenditures including reclamation and transportation were not included. Lowering the capital costs of the dredge to $0.058 per cubic yard would result in decreasing Jeff Jones' total to $0.288 per cubic yard. While Jeff Jones had originally valued the minerals at $0.340 per cubic yard, he had noted in his report that elimination of the unmarketable columbium would decrease the average weighted value (assuming 100-percent recovery) to $0.221 per cubic yard. Thus, under these figures, mining the deposit would lose $0.068 per cubic yard.

[17] In point of fact, the only drill holes on the Good Luck No. 3 were drill holes Nos. 11 and 12. The weighted average of drill hole No. 11 was under 0.008 pounds Cb_2O_5 per cubic yard, while the weighted average of drill hole No. 12 was 0.092 pounds Cb_2O_5 per cubic yard. In assuming continuity of values between churn holes Nos. 13 and 15, the Guy Jones report essentially discounted drill hole No. 11 and assumed that drill hole No. 12 fairly measured only the nonmagnetic fraction of the hole. *See* Exh. C–1 at 7–8.

[18] As noted earlier in the text, the litigation cited involved both a suit for injunctive relief filed by the Government, styled *United States* v. *Rich Knoblock*, Civ. No. 77–1127 (D. Idaho, order issued Aug. 9, 1979), in which the Forest Service obtained a permanent injunction barring the claimants from conducting any mining and mining related activities on the claims without a current operating plan approved by the Secretary of Agriculture and further requiring that all activities be in conformity with such an approved plan (*see* Exh. C–10), as well as an order permitting placer mining under sec. 2(b) of the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621(b) (1988), entered by then Hearing Examiner Rampton on May 12, 1958, in *United States* v. *Joe J. Davis*, Idaho Mineral Locations Nos. 166 through 173 (*see* Exhs. C–11 and C–12).

claims because that document had basically admitted that a discovery existed on them. Finally, with respect to the remaining claims, contestees moved to have the contest dismissed on the ground that the Government had failed to present a prima facie case of invalidity. *See generally* Tr. 200–206.

Judge Child took the first two motions under advisement, desiring to await any further testimony as well as briefing by the parties. Insofar as the motion to dismiss for failure of the Government to present a prima facie case, he denied it as to all claims other than the Good Luck Nos. 2, 3, and 4, as to which claims he took the motion under advisement. Because of the ultimate relevancy of this question in reviewing Judge Child's decision, we set forth his discussion of the issues, as he perceived them, surrounding claimants' motion to dismiss for failure to present a prima facie case:

> As to the failure to make a prima facie case. I think a prima facie case has been made as to all claims, with exception to 2, 3 and 4, and based upon the evidence that has been presented, I would have to rule between the weight to be given Mr. James Jones' testimony as to 2, 3 and 4 and the weight to be given the testimony on 2, 3 and 4 by Mr. Guy Jones, who I have yet to hear from, and I probably will hear. And if there were no adverse testimony there would be a prima facie case. I'm therefore going to deny that motion because I'm going to have to weigh that testimony.
>
> If it weren't for that adverse report, I would have denied your motion, but I'm going to take it under advisement as to those three claims.

(Tr. at 208–09).

The chief witness for the contestees was Guy Jones. He noted that, in 1980, while employed as a mineral examiner in the Sawtooth National Forest, he had been directed to review all available printed information, write a report on the Payette placers, and draft a position paper based on the conclusions which he reached in the report. His report, together with his proposed position paper, was submitted in August 1980 (Tr. 211–14). The report concluded that, within an area commencing at the Mink Creek Trail crossing and continuing approximately 2.1 miles upstream, [19] a deposit of 88 million cubic yards of dredgible material existed with an average gross value of \$0.342 per cubic yard. The total gross value of this deposit was \$30,160,125 which, after subtracting \$19,400,367 in capital and operating costs, netted out at \$10,753,758. The report noted that "the values recovered from the total black sand concentrate recovered from churn drill holes Nos. 13 and 15 show mineral in sufficient quantity and quality to justify a prudent person to spend time and money in an effort to develop a valuable mine" (Exh. C–1 at 11).

While the \$10,753,758 figure had been characterized in the Guy Jones report as the "net value of the products produced," the position paper which Guy Jones subsequently drafted noted that the net value of the deposit was actually "\$10,753,758 *less the reduction costs for*

[19] The area described in the Guy Jones report included approximately 43 acres of the Good Luck No. 2, all of the Good Luck No. 3, and approximately 136 acres of the Good Luck No. 4.

processing euxenite" (Exh. C–1 (italics added)). Nevertheless, the position paper also concluded that the discovery requirements had been met with respect to the three claims embracing the described deposit. *Id.* The position paper also asserted that, until on-the-ground mineral examinations were conducted, it would not be possible to determine which of the other claims, if any, were contestable. *Id.*

At the hearing, in explaining the basis for his conclusion that a discovery of a valuable mineral deposit had been shown to exist on the Good Luck Nos. 2, 3, and 4, Guy Jones reiterated his reliance on the values recovered from the total black sand concentrate for drill holes Nos. 13 and 15 as fairly representing the value of those three claims. In doing so, he repeated and, in some instances, expanded upon points made in his report and position paper. Thus, he noted that, by their nature, the churn drill holes, which penetrated the deposit up to 166 feet in depth, were more likely to fairly sample the deposit than the limited backhoe sampling conducted by Jeff Jones which could only go down a maximum of 9 feet (Tr. 218–19).

In his report, Guy Jones had discussed the possibility that the samples from drill holes Nos. 13 and 15 might have been salted since they showed significantly higher Cb_2O_5 values than those obtained from the other drill holes. *See* Exh. C–1 at 6–7. He had discounted this possibility in his report because, based on his calculations, it would have required one-quarter pound of pure euxenite to elevate the Cb_2O_5 levels from that obtained in the other drill holes. This, he suggested, would have been very difficult to accomplish since, given the columbium-uranium ratio of the deposit, it would have required the processing of 7 cubic yards of gravel and the subsequent extraction of the euxenite from 103 pounds of black sand. *Id.* He reiterated this conclusion at the hearing (Tr. 220–21).

The Guy Jones report had further justified its reliance on the assay results obtained from drill holes Nos. 13 and 15, which indicated significantly higher levels of columbium than those obtained from the other drill holes, [20] by noting that, except for certain intervals of drill hole No. 1, only the nonmagnetic portions of the other drill holes were assayed for Cb_2O_5 and Ta_2O_5. Given the fact that ilmenorutile is weakly magnetic, the assay results for these drill holes could be expected to understate the total Cb and Ta content of the samples. [21]

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[20] Drill hole No. 15 had assayed at 0.258 pounds of Cb_2O_5 per cubic yard, while drill hole No. 13 had shown 0.156 pounds of Cb_2O_5 per cubic yard. By way of comparison, the other churn drill holes had ranged from 0.008 pounds per cubic yard (drill hole No. 11) to 0.092 pounds per cubic yard (drill hole No. 12). The weighted average of all of the drill holes was 0.0804 pounds of Cb_2O_5 per cubic yard. By way of comparison, the values posited in the Guy Jones report (*i.e.*, the weighted averages of drill holes Nos. 13 and 15) were 0.200 pounds of Cb_2O_5 per cubic yard of material. *See* Exh. C–1 at 8.

[21] Thus, the Wood report had expressly noted that "[i]t is believed that half of the contained columbium lies in ilmenite and as most ilmenite is magnetic to the hand magnet that part of the columbium was discarded before assay and the actual total sample content should be twice that which is shown for the non-magnetic portion" (Exh. C–4 at 6). Wood went on to note his view that "[t]he statement that columbium is not recoverable from ilmenite is not considered serious because if the presence of enough columbium thusly occurring is proven then the incentive to develop a process is great." *Id.*

Paradoxically, both Jeff Jones and Guy Jones were in agreement that no method existed for the economic processing of ilmenorutile. Thus, it could be argued that the failure of the other drill holes to account for the Cb and Ta content of ilmenorutile was irrelevant since there was no known process for extracting it. To the extent, however, that one relied on the Rugg Report's analysis of the relative occurrence of mineralization within the deposit (*see* note 2, *supra*), The report, therefore, concluded that it was justified in relying on the assay results for drill holes Nos. 13 and 15 since these were the only assays to test total black sands. Indeed, in his testimony Guy Jones admitted that, in computing the value of the deposit as it existed between drill holes Nos. 13 and 15, he had completely disregarded the assay results from drill holes Nos. 11 and 12, even though they were located on the Good Luck No. 3 mining claim between the other two samples, because of his view that Rare Metals Corp. had done inadequate testing of the deposit. *See* Tr. 256–57.

Based on various calculations, Guy Jones concluded that the deposit on the claim averaged 0.156 pounds euxenite per cubic yard, a figure which he asserted was 0.026 pounds per cubic yard higher than that contained in the Bear Valley deposit which had been mined between 1956 and 1959. [22] *See* Tr. 223; Exh. C–1 at 8. In the absence of any existing market for euxenite, he calculated its value by determining the value of various component elements. Thus, he ascribed a value of \$0.086 per cubic yard for the contained Cb_2O_5, \$0.06 per cubic yard for the contained U_3O_8, \$0.014 per cubic yard for 20 percent of the contained ThO_2, and \$0.001 per cubic yard for the contained yttrium. *See* Exh. C–1 at 10. The following exchange, however, occurred during cross-examination:

Q. [By Mr. Benson] Was the euxenite marketable as of August, 1972?
A. No, sir, it was not.
Q. Then euxenite itself not being marketable, will you tell me whether or not the columbium components of it could have been economically removed and marketed separately, if you know?
A. I don't know, sir, but I suspect it could be.
Q. And the thorium dioxide, was that removable and marketable separately at a profit in 1972?
A. I don't know, sir.
Q. Was the yttrium content removable and separately marketable as a component in 1972?
A. I don't know, sir.
Q. Nevertheless, you have assigned a value, have you not?
A. Yes, sir.

(Tr. 248–49.)

Insofar as mining costs were concerned, the Guy Jones report had calculated dredging costs based on a dredge used by Yuba Goldfield, known as the Lisa, which had a digging depth, below water, of 170 feet. This dredge had an original cost, in 1952, of \$1,109,733. Updating this cost to 1972, the report assumed a cost of \$1,409,360. *See* Exh. C–

application of those results to *only* the nonmagnetic fraction would result in understating the amount of euxenite and columbite in the deposit. While Guy Jones dealt with the problem by essentially rejecting the results from the other drill holes and relying exclusively on the assay results from drill holes Nos. 13 and 15, it is also possible to account for the exclusion of ilmenorutile from the assaying results of the other holes by assuming that all of the Cb and Ta found in those holes was either in the form of columbite or euxenite.

[22] In this regard, Guy Jones' testimony was in direct conflict with the testimony of Jeff Jones. Thus, while Guy Jones claimed that the amount of euxenite in the deposit was 0.026 pounds per cubic yard greater then that mined at Bear Valley, Jeff Jones had earlier testified the Bear Valley deposit contained five times the amount of euxenite occurring on the Payette placers as computed from the best assay (drill hole No. 15). *Compare* Tr. 223 *with* Tr. 183. This question is more fully explored subsequently in the text of this opinion.

1 at 10, Exh. C–14. When the costs of disassembling, transporting the dredge to the site, and reassembling were added, total capital dredging costs were estimated at $2,195,600, approximately $9,695,650 less than the capital costs of the dredge as estimated by Jeff Jones. When questioned about this divergence at the hearing, Guy Jones reiterated his view that the Lisa would be adequate for contestees' purposes. He also asserted that the updated costs which he utilized for the dredge had been provided to him by Jeff Jones, though he acknowledged that he did not know whether the Lisa had been modified to increase its dredging depth to 170 feet after its initial construction (Tr. 249–50). He admitted, however, that the projected increase in cost of only 27 percent, over a period of 20 years, did not seem reasonable (Tr. 250).

In one important matter Guy Jones' testimony went beyond the conclusions espoused in his report and position paper. At the hearing, he was examined as to the existence of a discovery on the various claims. He reiterated his original conclusion that a discovery existed with respect to the 88 million cubic yard deposit covering the Good Luck No. 3 and parts of the Good Luck Nos. 2 and 4. He was then asked whether he had an opinion as to whether a prudent person would be justified in the further expenditure of time and money in the continued development of the placer claims other than the Good Luck Nos. 2, 3, and 4. He responded that "a prudent person would be justified in spending time and money and effort to develop a valuable mine" (Tr. 245). *See also* Tr. 238–39. This conclusion, however, was at odds with his prior declaration in the position paper that "[u]ntil on-the-ground mineral examinations are conducted on the claims, it is nearly impossible to speculate as to which claims might be contestable." Guy Jones did not attempt to identify which assays, beyond those obtained of churn drill holes Nos. 13 and 15, he relied upon for his assessment that the other claims were supported by a discovery, nor how his recognition that "the values recovered from the nonmagnetic fraction of the black sand concentrate recovered from churn drill holes 16 and 17 indicate an impoverishment of columbium-uranium-thorium placer mineralization from the area from Mink Creek Trail crossing northward to Trail Creek" (Exh. C–1 at 11) was brought to bear on this determination.

Knoblock was recalled as the final witness for the contestees. He noted that he had, in recent years, placed advertisements nationwide in an attempt to interest other parties in purchasing the claims, but had been unsuccessful, he believed, because of the restrictions placed on the claims because they were within the SNRA (Tr. 272).

At the conclusion of the testimony, contestees renewed their motion to dismiss the contest both on the ground that contestant had failed to present a prima facie case and on the basis that they had submitted superior evidence. Judge Child denied both motions (Tr. 289). Judge Child noted, however, that he was taking under advisement contestees' argument that the complaint was barred by the principle of res judicata since the claims had been subject to two previous litigations

(Tr. 290). Further, he stated that while his present inclination was to give the position paper prepared by Guy Jones little weight, he would address contestees' motion to dismiss based on the Guy Jones' analysis in his decision. *Id.*

Following receipt of post-hearing briefs from the parties, Judge Child entered his decision on February 12, 1990. Initially, Judge Child dealt with the motion to dismiss the complaint on the ground that the Government should be estopped either because of an earlier proceeding conducted before BLM under the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. § 621(b) (1988), or because of prior litigation in which the Forest Service sought injunctive relief to prevent Knoblock from conducting mining activities without a current operating plan approved by the Secretary of Agriculture. As noted above, these were questions which Judge Child had expressly reserved ruling on at the hearing.

In rejecting the motion to dismiss on the ground of res judicata, Judge Child noted that in neither proceeding had the validity of the claims been at issue. Thus, in the absence of any adjudication of the validity of the mining claims, there was nothing to which the doctrine of res judicata could attach. Moreover, Judge Child went on to note that, in any event:

> [V]alidity is not a static issue to be established once, and forever after considered to be etched in stone. The conditions which make a mining claim valid may change. * * * There may be mineral bearing soil exposed at one point of time and it may have been mined out or washed out at another. Thus a claim, though valid at one time, may be invalid at another.

(Decision at 6).

Having disposed of this issue, however, Judge Child then revisited the issue of whether or not the Government had presented sufficient evidence to establish a prima facie case of the claims' invalidity. Though he had already expressly ruled at the hearing that a prima facie case existed with respect to all of the claims (*see* Tr. 208–09, 289), Judge Child reversed his prior pronouncements and held that the Government had failed to present a prima facie case of invalidity on *any* of the claims. In arriving at this conclusion, Judge Child first adverted to "three government generated documents, each of which established a basis for viewing these claims as containing valuable mineral deposits in satisfactory quantities," asserting that "each of these documents applied reasonable geological inference to support estimates that immense quantities of workable placer gravels were present on the claims" (Decision at 8). [23]

While noting that Jeff Jones had conducted a mineral examination of the claims, Judge Child discounted the value of the samples which Jeff Jones took. Thus, Judge Child asserted that, although Wood had

[23] The documents to which Judge Child referred were Geological Survey Bulletin 1319–D (which can be found in Exhibit G–7), the Wood report (Exh. C–4), and the Guy Jones report (Exh. C–1).

advised contestant of the "unsuitability" of using bulldozer trenches to test deep placer deposits, Jeff Jones had taken his samples using a backhoe. Further, Judge Child noted that, what he termed, "[t]hose unsatisfactorily obtained samples" were then submitted to a Bureau of Mines laboratory which failed to assay the samples for gold or platinum and that the San Francisco laboratory to which the samples were then sent failed to "maintain the integrity of the samples and came up with a single assay for the entire mass." From this, Judge Child concluded that "[t]he mineral value opinions of J.J. Jones were therefore speculative and afforded little credibility" (Decision at 8).

Additionally, Judge Child asserted that Jeff Jones had assumed the existence of "far too little material," thereby inflating the cost per cubic yard for mining and, further, that Jeff Jones had erred in assuming no value for euxenite. *Id.* With respect to this latter point, Judge Child affirmatively found that "there was a market for [euxenite] prior to 1972 and there has been since" (Decision at 9). Judge Child concluded his analysis on the prima facie case issue by opining:

> [W]here the government has self generated documents in its possession which indicate a strong likelihood of a valid discovery [24] existing on the claims in question, it must, at a minimum, overcome the basis of those documents by discrediting them or producing equal and contrary data in order to meet its burden of making a prima facie case of no valid discovery.

(Decision at 9).

Even though Judge Child viewed his ruling on the failure of the Government to provide a prima face case of invalidity as dispositive of the contest, he nevertheless examined whether contestees had met their burden of establishing the existence of a discovery within the limits of each claim so as to obviate the need for a remand if his determination on the lack of a prima facie case were reversed on appeal. In this regard, he noted that Knoblock had testified that, because of the nature of the deposits, he did not possess the necessary financial resources to personally develop them though he had advertised the claims in an attempt to interest other parties. Judge Child also referenced Guy Jones' testimony that the deposit on the Payette placers contained more euxenite than that found on the Bear Valley claims which had been successfully mined until 1959. Noting that Guy Jones had asserted that all of the claims were supported by a discovery, Judge Child declared that he gave this testimony "considerable credence." Based on the foregoing, he concluded that contestees had affirmatively shown that each of the subject claims were supported by a discovery of a valuable mineral deposit.

On appeal to this Board, the Forest Service generally assails the entire analysis below. [25] Thus, it notes that, contrary to Judge Child's

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[24] The term "valid discovery," which was used not only in Judge Child's decision but in the contest complaint, itself, is a misnomer. The existence of a discovery will determine whether or not a claim is valid. In this sense, any "discovery" is "valid."

[25] We must observe that some of appellant's statements in its appellate brief border on the intemperate. While we can understand that counsel has strong feelings in this matter, we wish to expressly caution against the use of language which might be construed as personally denigrating to opposing parties, the Administrative Law Judge, or this Board.

assertion, the Wood report did *not* find that a discovery existed on any of the claims but only that "[i]t is an especially attractive prospective source of some important metals which could make an important contribution to the protection and development of our nation as well as contribute to its economy" (Exh. C–4 at 6). Indeed, Wood had expressly advised that "[f]urther testing of the ground should be done," noting that "at the present time [its] value is prospective." *Id.* Further, appellant asserts that, at best, the Guy Jones report only weakly supports the validity of the Good Luck Nos. 2, 3, and 4, and that there is absolutely nothing in that report or in the associated position paper which purports to find that a discovery exists on any of the other claims. Contestees, for their part, generally support Judge Child's decision, though they once again argue that the proceeding should be barred by the doctrine of res judicata.

[1] As an initial matter, we must agree with Judge Child that there simply exists no basis for dismissing the contest under the doctrine of res judicata. In this regard, we note that, until patent issues, paramount title to the land embraced within mining claims remains in the United States, and it may inquire into the extent and validity of rights claimed against it. *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Cameron* v. *United States*, 252 U.S. 450 (1920); *Ideal Basic Industries, Inc.* v. *Morton*, 542 F.2d 1364, 1367–68 (9th Cir. 1976); *United States* v. *White*, 118 IBLA 266, 308–10, 98 I.D. 129, 151–52 (1991). Thus, even had the United States formally determined in the course of an earlier contest proceeding that a specific claim was supported by the existence of a discovery of a valuable mineral deposit, this determination would not bar a subsequent inquiry as to whether the claim continued to be supported by a discovery or whether some other deficiency existed which would justify a declaration of invalidity.

In point of fact, however, neither of the earlier proceedings even purported to examine the validity of the claims at issue. A prerequisite for the invocation of res judicata is, of course, the prior determination of a matter under dispute. Herein, there is absolutely no basis for recourse to this doctrine as there has been *no* prior determination that the claims were valid.

Thus, the Department's adjudication in *United States* v. *Davis*, *supra*, did not involve an inquiry into the existence of a discovery of a valuable mineral deposit but was limited to a determination under 30 U.S.C. § 621(b) (1988), whether or not placer mining operations would substantially interfere with other uses of the land included within the claims. *See Jack T. Kelly*, 113 IBLA 280, 295–96 (1990); *see generally United States Forest Service* v. *Milender*, 104 IBLA 207, 95 I.D. 155 (1988). And even this limited inquiry did not occur, since the parties to that proceeding entered into a stipulation permitting placer operations under specified conditions. *See* Exhs. C–11 and C–12. Similarly, nothing in the decision of the United States District Court in *United States* v. *Knoblock*, *supra*, purported to examine the existence of a discovery. Rather, that decision merely required contestees to limit their activities to such actions as were specifically approved by the Secretary of Agriculture or his delegate. *See* Exh. C–10. There is, in short, simply no foundation, whatsoever, for invocation of the doctrine of res judicata herein to bar examination of the question of whether the claims are supported by a discovery either now or in 1972.

[2] We turn now to the substantive issues presented by this appeal. Before embarking upon our analysis of these questions, we believe it is useful to set forth a brief outline of the legal principles which guide Departmental adjudications of mining claims.

As has been noted innumerable times, the *sine qua non* of a valid mining claim is the exposure of a valuable mineral deposit within the limits of the claim, *i.e.*, a discovery. *See*, *e.g.*, *United States* v. *Feezor*, 130 IBLA 146, 190 (1994); *United States* v. *Copple*, 81 IBLA 109, 118 (1984). The basic standard of discovery under the mining laws was set forth a century ago in the seminal decision, *Castle* v. *Womble*, 19 L.D. 455 (1894). Therein, it was declared that a discovery could be said to exist "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." *Id.* at 457. This standard, known as the "prudent man" test has, over the years, been refined to encompass a showing that the mineral disclosed is "presently marketable at a profit," which simply means that the mining claimant "must show as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed." *In re Pacific Coast Molybdenum*, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983). *See also United States* v. *White*, *supra* at 311, 98 I.D. at 152–53; *United States* v. *New York Mines, Inc.*, 105 IBLA 171, 182, 95 I.D. 223, 229 (1988).

[3] There is, moreover, a distinction between the quantum of evidence which would be sufficient to justify a prudent individual in the continuation of an active search for a mineral deposit of sufficient quantity and value to warrant development and that evidence which is, itself, adequate to justify the commencement of actual development of a productive mine with a reasonable prospect of success. Only the latter showing is sufficient to warrant a finding that a discovery under the mining laws exists. *See generally Converse* v. *Udall*, 399 F.2d 616, 620–21 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969); *Multiple Use, Inc.* v. *Morton*, 353 F. Supp. 184, 193 (D. Ariz. 1972), *aff'd*, 504 F.2d 448 (9th Cir. 1974); *United States* v. *Feezor*, *supra* at 208–10; *United States* v. *White*, *supra* at 319–21, 98 I.D. at 157–58.

[4] Since a valid mining claim is "property in the fullest sense of the word" (*Forbes* v. *Gracey*, 94 U.S. 762, 767 (1876)), due process requires that a claimant receive notice and an opportunity for a hearing prior to any determination that a claim is not supported by a discovery. *See*

Bruce W. Crawford, 86 IBLA 350, 376, 92 I.D. 208, 222 (1985). In such proceedings, however, while the United States has assumed the burden of going forward with sufficient evidence to establish a prima facie case of invalidity, it is the claimant who is the actual proponent of the rule that the claim is valid and it is the claimant who ultimately must bear the burden of persuasion. *See Lara* v. *Secretary of the Interior*, 820 F.2d 1535, 1540 (9th Cir. 1987); *Southern Utah Wilderness Alliance*, 125 IBLA 175, 188 n.7, 100 I.D. 15, 22 n.7 (1993). Thus, once it has been determined that the Government has presented a prima facie case that a claim is invalid, the burden of overcoming this showing by a preponderance of the evidence "irrevocably shifts to the claimant." *United States* v. *Aiken Builders Products (On Reconsideration)*, 102 IBLA 70, 80 (1988) (concurring opinion). *See also United States* v. *Springer*, 491 F.2d 239, 242 (9th Cir. 1974), *cert. denied*, 419 U.S. 834 (1974); *Foster* v. *Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959).

A finding that the Government has presented a prima facie case merely means that evidence provided by the Government in its case-in-chief "is completely adequate to support the Government's contest of the claim and that no further proof is needed to nullify the claim." *United States* v. *Bunkowski*, 5 IBLA 102, 119, 79 I.D. 43, 51 (1972). If the evidence presented by the Government provides a sufficient basis upon which to invalidate a mining claim on *any* ground, the burden devolves to the mining claimant to overcome that showing by a preponderance of the evidence.

It is, of course, axiomatic that the determination of whether or not the Government has presented a prima facie case is necessarily limited to the evidence presented by the Government in its case-in-chief. *See United States* v. *Aiken Builders Products (On Reconsideration)*, *supra*; *United States* v. *Copple*, *supra* at 120. In other words, if, upon the completion of the Government's presentation, the evidence is such that, were it to remain unrebutted, a finding of invalidity would properly issue, a prima facie case has been established and the burden of proof devolves upon the claimant to overcome this showing. Where a claimant subsequently submits compelling and probative evidence which negates the conclusion of invalidity which arose from the Government's evidentiary submissions, the effect of this evidence is not to vitiate the existence of the prima facie case but rather to overcome the prima facie case. The result, of course, may well be the same, *i.e.*, dismissal of the contest, but the distinction between the failure of the Government to present a prima facie case and the success of a claimant in overcoming such a showing is nonetheless critical to the proper adjudication of mining contests. Indeed, our analysis of the instant appeal convinces us that it was precisely this distinction which was lost below and which directly led to Judge Child's determination that the Government had failed to present a prima facie case.

In our summary of the hearing record, we set forth Judge Child's original ruling, entered when the Government had completed its case-in-chief, on contestees' motion to dismiss the contest for failure to establish a prima facie case. Therein, with reference to the Good Luck Nos. 2, 3, and 4 mining claims, Judge Child declared:

I would have to rule between the weight to be given Mr. James Jones' testimony as to 2, 3 and 4 and the weight to be given the testimony on 2, 3 and 4 by Mr. Guy Jones, who I have yet to hear from, and I probably will hear * * * [a]nd if there were no adverse testimony there would be a prima facie case.

Judge Child continued: "I'm therefore going to deny that motion because I'm going to have to weigh that testimony" (Tr. 208–09). It is clear that, at least during the hearing, Judge Child erroneously viewed the question of the existence of a prima facie case as one dependent upon the review of the totality of the evidence adduced rather than, as we have explained above, an issue which must be determined solely on the basis of the testimony rendered and submissions made during the Government's case-in-chief. Indeed, considering his declaration that "if there were no adverse testimony there would be a prima facie case," no other interpretation is possible.

It is true that, at the hearing, Judge Child ruled that a prima facie case had, in fact, been presented and, therefore, it might be argued that the misapprehension as to the requirements of the law manifested in the above-quoted passage from the transcript did not fatally compromise his written analysis. It is, however, apparent from his written decision that Judge Child based both his rejection of Jeff Jones' volumetric estimates as well as his criticism of Jeff Jones' failure to accord any value for euxenite, critical elements in his ultimate denigration of Jeff Jones' testimony, on the testimonial evidence provided by Guy Jones. Since Guy Jones' testimony was elicited by contestees in the course of presenting their case, consideration of this testimony in the confines of a determination as to the existence of a prima facie case was clear error.

Moreover, not only did Judge Child rely on evidence not properly considered in adjudicating the existence of a prima facie case, he also seemingly devised a heightened standard for establishing it. Thus, he declared that "where the government has self generated documents in its possession which indicate a strong likelihood of a valid discovery existing on the claims in question, it must, at a minimum, overcome the basis of those documents by discrediting them or producing equal and contrary data in order to meet its burden of making a prima facie case of no valid discovery" (Decision at 9). This reformulation of the standard for determining the existence of a prima facie case must be rejected for a number of reasons.

As we have stressed above, determination of the existence of a prima facie case is necessarily limited to the confines of the Government's case-in-chief. This includes, of course, testimony elicited in cross-examination. Where a contestee, as in the instant case, cross-examines a Government witness as to contrary conclusions reached in prior

Government examinations of a claim, both the witness' response and the substance of the prior report, *if admitted into evidence*, are properly weighed in adjudicating whether or not a prima facie case has been established. To the extent that the factfinder determines that the effect of cross-examination has been to effectively undermine any weight which might have been accorded the witness' direct testimony, the factfinder could properly conclude that the Government has failed in its obligation to establish a prima facie case.

This is not the same thing, however, as positing an affirmative obligation on the part of the Government, based simply on the existence of an arguably contrary Government analysis, to rebut this analysis as a precondition of establishing a prima facie case. While we have, in the past, suggested that such reports *ought* to be provided to a claimant (*see United States* v. *Copple, supra* at 121), we have never intimated that the Government was required to introduce these documents in its case-in-chief. And, absent such a positive obligation, there can be no requirement that the Government affirmatively negate such reports since, as has been noted, "a mineral report, just like any other internal BLM report, has no independent evidentiary weight nor is it probative as to any issue of law or fact 'until such time as the pertinent facts are admitted by the applicant or the report is admitted as evidence at a hearing initiated by a contest complaint.'" *United States* v. *Aiken Builders Products (On Reconsideration), supra* at 83 (concurring opinion), *citing John B. Coghill*, 29 IBLA 177, 181 (1977), and *Don E. Jonz*, 5 IBLA 204, 207 (1972). As that opinion continued, "[U]nless the report is subsequently admitted into evidence, it has no relevancy whatsoever to the contest proceedings, and, indeed, is not even part of the record upon which the determination of the claim's validity will be made." *Id.* This being the case, there can simply be no affirmative obligation that the Government rebut other Government reports as a *precondition* to the establishment of a prima facie case.

In any event, it is almost impossible to ascertain how Judge Child could support a finding that the Government failed to establish a prima facie case of invalidity with respect to the claims other than the Good Luck Nos. 2, 3, and 4. Certainly nothing in the Wood report or the Guy Jones report or position paper undermined Jeff Jones' assertion that the claims located downstream [26] were not supported by a discovery. On the contrary, the Guy Jones report had expressly noted that the values recovered indicated "an impoverishment of columbium-uranium-thorium placer mineralization" as one proceeded northward (Exh. C–1 at 11), while the position paper observed that "[u]ntil on-the-

[26] The northernmost claim is the Good Luck No. 000. From its southern endline, the claims continue upstream along the South Fork Payette River in the following general order, though there is some overlapping: Good Luck 00, Baron Creek No. 1, Good Luck No. 0 (generally adjacent to the Baron Creek No. 1), Baron Creek No. 2, Good Luck No. 1 (generally adjacent to the Baron Creek No. 2), Goat Creek No. 1, Good Luck No. 2, Good Luck No. 3, Good Luck No. 4, and Good Luck No. 5. While the Good Luck No. 5 is actually located upstream from the Good Luck Nos. 2, 3, and 4, no churn drill holes were located within the limits of that claim.

ground mineral examinations are conducted on the claims, it is nearly impossible to speculate as to which claims might be contestable."

In fact, examination of Table II attached to the Guy Jones report shows that the values which Guy Jones calculated based on the results of the churn drill holes other than Nos. 13 and 15, were, in every instance but one, below his calculated cost of production, *i.e.*, $0.2201 per cubic yard. [27] The sole exception was drill hole No. 17, located on the Good Luck No. 1, to which he ascribed a value of $0.227 per cubic yard. However, $0.12 of this value was premised on ThO_2, which, as we noted above, Guy Jones subsequently devalued by 80 percent with respect to the values obtained from drill holes Nos. 13 and 15, because of the lack of a market for the thorium. [28] A similar deduction for the value from drill hole No. 17, would lower its value far below the costs of production. Thus, the calculations contained in the Guy Jones' report, itself, support the Government's assertion that no discovery existed on any of these claims.

[5] Finally, even ignoring the manifest problems we have already delineated with Judge Child's prima facie case analysis, there is an additional infirmity with his finding that no prima facie case had been presented. This Board has held, on numerous occasions, that uncontradicted evidence of the absence of production from a mining claim for an extended period of time is sufficient, without more, to establish a prima facie case of invalidity. *See, e.g.*, *United States* v. *Zweifel*, 508 F.2d 1150, 1156 n.5 (10th Cir. 1975); *United States* v. *Hooker*, 48 IBLA 22, 31 (1980); *United States* v. *Hess*, 46 IBLA 1, 7–9 (1980). This rule reflects the principle that, given the varying economic conditions present over a period of many years, a mining claim will usually be developed unless it is not commercially feasible to do so profitably. *United States* v. *Alaska Limestone Corp.*, 66 IBLA 316, 320 (1982). In other words, the best evidence of what a prudent man would do is what a prudent man has done.

Herein, Knoblock, called as an adverse witness by the Government, testified that he acquired the claims around 1963 and that, since that time, there has been no production from the claims (Tr. 15). Claimants' failure to market any minerals from the claim since 1963 raises the presumption that they were not marketable at a profit during this time, and this presumption was buttressed by Knoblock's additional testimony that plans to develop the claims by Sim had been abandoned because Sim had asserted that he was unable to verify the existence of a discovery. Knoblock's testimony, while clearly not preclusive of an ultimate finding that the claims were supported by a discovery, was

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[27] The values computed by Guy Jones ranged from $0.014 per cubic yard for drill hole No. 11 up to $0.227 for drill hole No. 17. Only two of the drill holes, Nos. 16 and 17, had values above $0.11 per cubic yard. *See* Exh. C–1, Table II.

[28] The problem with the thorium market was described in *Mineral Facts and Problems, 1985*, "Thorium," J. Hedrick, Bureau of Mines Bulletin 675 at page 842:

"Thorium is recovered as a byproduct of processing monazite for the lanthanides and yttrium (rare earths), and monazite is recovered as a byproduct of minerals sands mined for titanium and zirconium and from tin mining. Therefore, monazite production does not reflect world demand for thorium. As a result of the large demand for rare earths, a large overcapacity exits for thorium, although its content in the ore is about one-tenth that of the rare earths."

nevertheless sufficient in itself to establish a prima facie case of invalidity and to put claimants to their proof.

In light of all of the foregoing reasons, our de novo review of the record convinces us that the Government clearly established a prima facie case of invalidity with respect to all of the claims. Judge Child's conclusion to the contrary is hereby reversed.

Ultimately, however, the question to be resolved in this appeal is whether contestees have preponderated in showing that all or any of the claims at issue were supported by a discovery of a valuable mineral deposit as of the date of withdrawal. [29] Judge Child concluded that contestees had preponderated with respect to every claim. We turn now to this question.

Just as we have indicated in our analysis of the prima facie case question, we believe it advantageous to bifurcate the claims into two separate groups for purposes of analyzing the record as it relates to the question of discovery. The first group consists of the Good Luck Nos. 2, 3, and 4 placer mining claims. The deposit delineated on these three claims by Guy Jones was the focal point of much of the analysis submitted below and the assays from churn drill holes Nos. 13 and 15 located therein were qualitatively superior to those obtained from the other drill holes. Clearly, if contestees are to be deemed to have preponderated on the question of discovery with respect to any of the claims, it will be with these three claims. The second group consists of the remaining claims, *viz.*, the Goat Creek No. 1, the Baron Creek Nos. 1 and 2, and the Good Luck Nos. 0, 00, 000, 1, and 5 placer mining claims. For these claims, there is simply no gainsaying the fact that the evidence to sustain a finding of validity is substantially weaker. Indeed, as we shall show, it is virtually nonexistent.

What, then, does the record show? Jeff Jones testified that he took various backhoe samples, none of which showed any significant values. These samples were totally discounted by Judge Child who asserted that Wood had discussed the "unsuitability" of such sampling techniques for testing deep placer deposits. In fact, however, Wood did not suggest that such samples were irrelevant; rather, he noted that they have "limited value in testing a deep placer deposit" (Exh. C–3 at 7). Guy Jones, while agreeing that the churn drill holes provided an opportunity to study the mineralogy of the deposit to a greater depth than would be possible from the backhoe samples, actually testified that "[b]ased on my experience, large bulk samples taken from backhoe trenches give *better* results than churn drill hole tests" (Tr. 218 (italics supplied)), though he did not believe that the samples taken by Jeff

[29] While the complaint had charged both a lack of a present discovery as well as the lack of a discovery as of the date of the withdrawal for the SNRA, virtually no evidence was submitted concerning the existence of a present market. Thus, we agree with Judge Child that the only question fairly joined was whether or not a discovery existed in 1972, when the land was withdrawn from mineral entry. *See, e.g.*, *Cameron* v. *United States*, 252 U.S. 450, 456 (1920); *Clear Gravel Enterprises, Inc.* v. *Keil*, 505 F.2d 180, 181 (9th Cir. 1974).

Jones from the backhoe pits were sufficiently large to qualify as "large bulk samples." *Id.*

The point of the foregoing is not that we believe that the backhoe samples were more probative of the real value of the claims than the churn drill hole results. We do not so believe. Its relevance, however, lies in the fact that, to the extent that Judge Child sought to utilize the backhoe samples to discredit Jeff Jones' analysis of the evidence bearing on the discovery question, [30] the record simply fails to support Judge Child's conclusions. Moreover, we expressly reject any suggestion in Judge Child's decision that the values obtained have no probative impact on the issues under consideration. At a minimum, the results obtained from the backhoe sampling are clearly corroborative of the similar results shown in the assays of the churn drill holes other than Nos. 13 and 15.

Insofar as the claims other than the Good Luck Nos. 2, 3, and 4, are concerned, the *only* evidence that a discovery existed on any of these claims was the declaration by Guy Jones at the hearing that a prudent individual would be justified in the development of the other eight claims. *See* Tr. 238–39, 245. Guy Jones' conclusion, however, was not premised on an analysis of the assay results from churn drill holes drilled on those claims but rather arose *despite* those results. Thus, Guy Jones testified that "Rare Metals drilled those first 12 [holes] and they did find material, but I find that there were, especially regarding gold, and/or platinum, was not professional enough and further development would be justified" (Tr. 239). In point of fact, however, even if one added the platinum and gold values which Guy Jones ascribed to the deposit on the Good Luck Nos. 2, 3, and 4, to each of the 12 churn drill holes drilled by Rare Metals Corp., not one of those drill holes would show values greater than Guy Jones' production costs. [31]

[6] Guy Jones, in effect, rejected all of the samples other than those obtained from churn drill holes Nos. 13 and 15 and proceeded to base his expert opinion as to whether a discovery existed on all 11 of the claims solely on the showings of these two drill holes. This conclusion, however, is clearly based on an impermissible use of geologic inference.

This Board has had numerous opportunities in the past to explore the proper uses of geologic inference. Thus, we have held that "where

[30] That Judge Child utilized the taking of the backhoe samples to discount all of Jeff Jones' analysis is obvious. Thus, in a single paragraph in his decision, he first assailed the utility of the backhoe samples, then adverted to the problem with the assaying as it related to gold and platinum, and finally concluded that "[t]he mineral value *opinions* of J. J. Jones were therefore speculative and afforded little credibility" (Decision at 8 (italics supplied)). Even assuming that Judge Child's characterization of the efficacy of backhoe sampling was correct, this would merely justify ignoring the results of that sampling. It would not, ipso facto, justify discounting Jeff Jones' independent analysis of the results of the churn hole drilling. *See United States* v. *Hooker*, *supra* at 31 ("While the mineral examiner's ultimate conclusion of invalidity may have been rendered fatally defective because of the application of improper standards, this in no way tainted the other testimonial evidence which he gave.").

[31] Thus, in his report, Guy Jones valued gold at $0.03 per cubic yard and platinum at $0.036 per cubic yard. *See* Exh. C–1 at 10. If one adds these amounts to the values which Guy Jones computed for drill holes Nos. 1 through 12 (*see* Exh. C–1, Table II), the values range from $0.169 for churn drill hole No. 1 to $0.083 for churn drill hole No. 11, all of which were well below Guy Jones' production costs of $0.2201 per cubic yard. Indeed, even if one assumed, as Guy Jones suggested, that all of the costs of the dredge would be amortized by the production from the Good Luck Nos. 2, 3, and 4 (*but see United States* v. *Collord*, 128 IBLA 266 (1994)), production costs would only decline to $0.1962 per cubic yard, still in excess of the best showing.

values have been high and relatively consistent, geologic inference can be used to infer sufficient quantity of similar quality mineralization beyond the actual exposed areas, such that a prudent man would be justified in expending labor and means with a reasonable prospect of success in developing a paying mine." *United States* v. *Feezor*, 74 IBLA 56, 79, 90 I.D. 262, 274–75 (1983). What contestees seek to do herein is not to project high values beyond the area actually exposed, rather they seek to project high values into areas which are exposed but which exposures fail to exhibit those high values. We are unaware of any prior Board precedent which has sanctioned the use of geologic inference in derogation of actual sampling results, nor can we permit such use herein.

[7] Of equal importance, to the extent that contestees seek to challenge the reliability of the other churn drill hole assays as well as Jeff Jones' backhoe sampling, we are, in essence, left with eight claims which have *no* indications of value. Indeed, these eight claims would not even possess an *exposure* of a valuable mineral deposit since, absent the churn drill holes, there is no evidence that a mineral deposit exists within the limits of any of these claims, much less one of any value. [32] Contestees, as proponents of their claims' validity, are required to show an exposure of a mineral deposit within the boundaries of each of the claims challenged. *See, e.g.*, *United States* v. *Feezor*, 130 IBLA at 214–15; *United States* v. *Whittaker*, 95 IBLA 271, 282 (1987). In order to do so, given the facts of record herein, they must rely either on the churn drill holes or the backhoe samples located on each individual claim. To attack the efficacy of both is to simultaneously establish the invalidity of all of these claims.

Whether one utilizes the backhoe sampling or the results of the churn drill holes, it is readily apparent that contestees have failed to establish the existence of a valuable mineral deposit within the limits of any of the claims in this first grouping. As an initial matter, we note that no churn drill holes were drilled on the Good Luck Nos. 000, 00, and 5. The *only* assays available from these claims were those taken by Jeff Jones. Those results clearly failed to establish the existence of a valuable mineral deposit within the limits of those three claims, and, to the extent that those samples are discredited, there is simply no evidence of the existence of a mineral deposit within the limits of those claims. Accordingly, those claims are hereby declared null and void for want of a discovery.

The chart below provides a comparison of the estimated values by claim computed by Guy Jones (Exh. C–1, Table II) on the basis of the

[32] The mere presence of gravels within the claim boundaries is insufficient, without more, to establish the existence of any locatable mineral deposit. While it might, of course, be argued that the gravel is, itself, a mineral deposit, common varieties of gravel were removed from location by sec. 3 of the Surface Resources Act, 69 Stat. 368, 30 U.S.C. §611 (1988), and, in any event, there is no evidence, whatsoever, that the gravel could be mined and marketed at a profit.

assays from the churn drill holes and by Jeff Jones (Exh. G–7 at 17) using the same churn drill hole results.

CLAIM NAME	*CHURN DRILL #*	*VALUE PER CUBIC YARD**	
		Guy Jones	*Jeff Jones*
Good Luck No. 0	1, 16	$0.179	$0.051
Baron Creek No. 1	8	0.019	0.010
Baron Creek No. 2	2	0.053	0.041
Goat Creek No. 1	9	0.038	0.026
Good Luck No. 1	3 to 7, 17	0.115	0.065

* For those claims with multiple drill holes (Good Luck Nos. 0 and 1), the value is the weighted average value.

Inasmuch as Guy Jones calculated a cost of production of $0.1952 per cubic yard, without consideration of any capital costs for a dredge, the above chart makes it graphically clear that there is simply no evidentiary basis upon which to premise a finding that the Baron Creek Nos. 1 and 2 and the Goat Creek No. 1 placer mining claims were supported by a discovery of a valuable mineral deposit. Using the weighted average of the churn drill holes, a similar finding with respect to the Good Luck Nos. 0 and 1 placer mining claims would be warranted.

Admittedly, if one totally discards the results obtained from the holes drilled by Rare Metals Corp., the situation with respect to the Good Luck Nos. 0 and 1 becomes less clear. Guy Jones calculated the values shown in drill hole No. 16 (located on the Good Luck No. 0) at $0.217 per cubic yard and computed the values shown in drill hole No. 17 (located on the Good Luck No. 1) at $0.227 per cubic yard. [33] Assuming, *arguendo*, no capital costs for the dredge, these values would be above his average production costs ($0.1952 per cubic yard). However, as discussed above with respect to drill hole No. 17 in the context of the prima facie case issue, merely adjusting the thorium values because of its limited marketability, as the Guy Jones report did with respect to results from drill holes Nos. 13 and 15, results in a decrease of the total value for drill hole No. 17 to $0.131 per cubic yard, far below the most optimum production cost estimate. A similar reduction for ThO_2 content with respect to drill hole No. 16 lowers its value to $0.187 per cubic yard, which, while closer to Guy Jones' minimum production costs, is also negative. [34] Moreover, two-thirds of the remaining value attributed to this drill hole is based on its yttrium

[33] We note that Jeff Jones had calculated the values from the assays of these two drill holes as $0.044 per cubic yard for drill hole No. 16 and $0.099 per cubic yard for drill hole No. 17. These figures are far below the lowest estimate of production costs. The discrepancy between the evaluations by Jeff Jones and by Guy Jones are primarily related to the values which Guy Jones ascribed to drill hole No. 16 for thorium and to drill hole No. 17 for thorium and yttrium.

[34] While the loss of $0.0082 per cubic yard may seem small, it must be remembered that, spread over a deposit similar in size (88 million cubic feet) to that projected on the Good Luck Nos. 2, 3, and 4, the total loss would aggregate $721,600. And this is a loss which occurs even assuming *no* capital expenditures for a dredge must be recovered from production.

content and there is substantial question whether any of the value attributed to the yttrium ($9.00 per pound) could be realized.[35]

What the above analysis establishes is that, even accepting the validity of all of the assumptions contained in the Guy Jones report, there is simply no basis for concluding that a prudent individual would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing any of the above claims, given the information known either in 1972 or today. A prudent individual most assuredly would not proceed to *develop* claims where the only evidence as to their value indicates that the cost of production exceeds the ultimate returns. And if, as alleged herein, it is assumed that the evidence as to value is faulty, a prudent individual would not simply ignore the assay results and proceed to put huge amounts of capital at risk. Rather, such an individual would first conduct or commission further testing of the deposit to ascertain whether his assumptions as to value are correct.[36] Only after some objective indicia has been obtained that the value of the deposit exceeds the likely cost of production can the commencement of production be characterized as an act of prudence. No such evidence was developed prior to 1972 and none has been generated since that time. We therefore reverse the decision of Judge Child and declare the Baron Creek Nos. 1 and 2, the Goat Creek No. 1, and the Good Luck Nos. 0 and 1 placer mining claims null and void for lack of a discovery of a valuable mineral deposit.

We now turn to the second grouping of claims, the Good Luck Nos. 2, 3, and 4. As noted above, Guy Jones premised the existence of an 88-million-ton deposit on the results obtained from two churn drill holes, drill hole No. 13, located near the north endline of the Good Luck No. 2, and drill hole No. 15 located in the south half of the Good Luck No. 4. In determining the value of this deposit, he weighted the averages derived from the assays for these two drill holes and projected them throughout the deposit. Not only, however, are these two drill holes located approximately 6,000 feet apart, but two other drill holes (Nos. 11 and 12) are located between them on the Good Luck No. 3, and a third drill hole (No. 10) is located approximately 750 feet northwest of drill hole No. 13. *See* Exh. G–8. The values which Guy Jones computed for these three holes were $0.017 per cubic yard for No. 10, $0.014 per cubic yard for No. 11, and $0.096 per cubic yard for No. 12. *See* Exh. C–1, Table II.

As noted earlier, Guy Jones chose to disregard these results both because of the failure to have the concentrates assayed for gold or

[35] The problems related to recovery of the yttrium values presupposed in the Guy Jones' report are discussed *infra* in relationship to the Good Luck Nos. 2, 3, and 4 mining claims.

[36] In this regard, we note that Knoblock, himself, was aware of the necessity for further exploration of these claims. Thus, he noted, with reference to these claims:

"[I]f I was interested in proceeding, as I said, anybody would proceed, they're going to do a lot of testing on their own. The test holes that in there, you know, [are] just an indication that they're there. But [there] has to be a lot of testing done to go ahead" (Tr. 278).

platinum as well as the failure to have the magnetic fraction assayed at all, a failure which, as we indicated above, could negatively affect total Cb_2O_5 readings because of the possible exclusion of ilmenorutile. *See* discussion *supra* at note 21 and accompanying text. One obvious problem with Guy Jones' approach, however, is that by dismissing the results from churn drill holes Nos. 11 and 12, we are left with *no* assay results, at all, from the Good Luck No. 3. Since, as we have already discussed at length, any claim must, as a precondition to validity, contain an *exposure* of a mineral deposit, the total exclusion of the assay results from drill holes Nos. 11 and 12 would preclude a finding of validity for the Good Luck No. 3, regardless of the showings obtained from drill holes Nos. 13 and 15. Needless to say, this would effectively invalidate Guy Jones' entire analysis since the premise upon which he examined marketability was the existence of an 88–million-ton-deposit which was primarily located on the Good Luck No. 3.

Alternatively, it is possible, even assuming the correctness of Guy Jones' criticism of the assaying of drill holes Nos. 11 and 12, to adjust the values derived to account for the failure to assay for gold and platinum [37] as well as the possible undervaluation of Cb_2O_5. Thus, one could simply add the weighted average value per cubic yard which the Guy Jones report derived from drill holes Nos. 13 and 15 ($0.03 for gold and $0.036 for platinum) to the total values derived from the assays of drill holes Nos. 11 and 12. Thus, merely increasing the derived value for those two holes by $0.066 would rectify any possible discrepancy occasioned by the failure to assay for gold and platinum.

Similarly, one could adjust the totals reported for Cb_2O_5 to account for the failure to assay the magnetic fraction of the concentrate. Based on Rupp's X-ray diffraction analysis, the total Cb_2O_5 content is composed of 33–percent euxenite, 43–percent ilmenorutile, and 24–percent columbite. In essence, therefore, assuming that the assay of the nonmagnetic fraction recovered none of the Cb_2O_5 in the form of ilmenorutile, the totals reported represented only 57 percent of the total Cb_2O_5 in the concentrate. Adjusting the reported values to reflect 100 percent of the Cb_2O_5 content results in an increase of $0.006 for drill hole No. 11 and $0.062 for drill hole No. 12.

Making both adjustments results in an attributed value per cubic yard of $0.086 for drill hole No. 11 and $0.224 for drill hole No. 12. While the latter figure is slightly above Guy Jones' costs per cubic yard of $0.2201, [38] the total for drill hole No. 12 clearly overstates recoverable Cb_2O_5 since it now includes not only the Cb_2O_5 content of euxenite, which the Government contends is not marketable, but also includes the Cb_2O_5 content of ilmenorutile which even Guy Jones admitted was not marketable. Moreover, the average weighted value of these two drill holes, the only ones located on the Good Luck No. 3, is only $0.171 per cubic yard. Even making yet one more adjustment,

[37] Whether or not platinum values are properly considered even in the context of analyzing the results from drill holes Nos. 13 and 15 is a matter more fully explored subsequently in this decision.

[38] When considering the validity of the Good Luck Nos. 2, 3, and 4 mining claims, the capital costs of the dredge must be accounted for.

this time to account for the failure to assay the concentrates for U_3O_8, results in a total value of $0.231 per cubic yard, a figure which, while marginally above the projected development costs, still overstates the value of the contained Cb_2O_5. Thus, any analysis which is limited to determining whether or not the evidence establishes the existence of a valuable mineral deposit solely on the Good Luck No. 3 placer mining claim must conclude that this question can only be answered in the negative.

Ultimately, of course, contestees argue that a single deposit has been delineated which encompasses both the southern portion of the Good Luck No. 2 and the northern portion of the Good Luck No. 4, as well as all of the Good Luck No. 3 mining claim. Therefore, it could be argued that the proper approach for determining value would be to derive a weighted average of all of the drill holes (using the adjusted values for drill holes Nos. 11 and 12 computed above). The weighted average for Cb_2O_5 per cubic yard is 0.1495 pounds. This total is approximately 25 percent lower than the 0.20 pounds per cubic yard Cb_2O_5 upon which Guy Jones premised his value analysis. This has the result of lowering the columbite value from $0.055 to $0.041. [39] Making a similar adjustment for the Cb_2O_5 content of the euxenite, would reduce its value from $0.086 to $0.064. The above adjustments, which we believe to be absolutely required under any analysis, lowers the total value, as computed by Guy Jones, from $0.342 per cubic yard to $0.306 per cubic yard. Were this a value fairly supportable in the record, and if the projected development costs ($0.2201 per cubic yard) were also supported therein, the decision of Judge Child with respect to these three claims would be sustainable. The problem, however, is that the projected value is based on assumptions which we do not believe are supportable and, further, the projected costs clearly understate the costs which would occur.

[8] The key assumption relating to value is that the mineral values contained in the euxenite can be realized. In his decision, Judge Child rejected Jeff Jones' exclusion of euxenite values arguing that "there was a market for [euxenite] prior to 1972 and there has been since" (Decision at 9). While there is absolutely no question that euxenite was marketed by Porter Brothers until 1959, there is nothing in the record, nor has research been able to disclose anything else, which could support Judge Child's assertion that there has been a market for euxenite since 1972. On the contrary, it seems clear that the market for euxenite which existed in the late 1950's was a Government-generated market, designed to bolster domestic production of minerals, which collapsed when Government purchasing subsidies terminated.

[39] Guy Jones had computed the amount of columbite by determining that the columbite in the Payette placer deposit contained 74.37 percent Cb_3O_5. Since the amount of Cb_2O_5 in the form of columbite had been determined to be 0.036 pounds per cubic yard, the amount of columbite would be 0.048 pounds per cubic yard.

Precisely because the Porter Brothers production of euxenite at Bear Valley was unique, it has received considerable attention in standard minerals publications. These treatises make it clear that the production at Bear Valley in the late 1950's was not the result of market forces but of Government intervention. Thus, the *1957 Minerals Yearbook*, Vol. 1, published by the Bureau of Mines, noted that domestic production of columbium-tantalum had increased 71 percent over the previous year, due principally to the higher production by Porter Brothers at its Bear Valley operation, [40] which was purchased by the Government under a special contract. [41] *Id.* at 403–04. It was further noted that the market price for foreign columbite varied between $1.40 and $1.15 per pound of contained pentoxides (assuming a Cb:Ta ratio of 10:1), whereas the Government purchase price for domestic columbium was $3.40 per pound of contained pentoxides. *Id.* at 406. Thus, the Government purchase price was, at a minimum, almost 150 percent above the then-existing market rate.

In 1958, new Government purchases of domestic columbium for stockpiling purposes were discontinued. As has been noted above, upon fulfillment of its existing Government contract in 1959, the Bear Valley operation shut down. By 1970, it was noted that "[t]he U.S. columbium industry has depended on imports and Government stockpile releases for all of its columbium since 1959." *Mineral Facts and Problems, 1970*, "Columbium," R. Griffith, Bureau of Mines Bulletin 650 at 276. This publication also observed that while a small production of columbium-mineral concentrate was reported from South Dakota and New Mexico from 1966 through 1968, no shipments were made. *Id.* With reference to domestic production, the report noted that "[e]ven the most promising domestic supplies, those in Colorado and Idaho, would require that the price of columbium double to about $2.75 per pound of contained columbium before production would be economically attractive." *Id.* at 287.

Fifteen years later, this outlook had not changed. Thus, in *Mineral Facts and Problems, 1985*, "Columbium," L. Cunningham, Bureau of Mines Bulletin 675, it was noted that "[t]he United States has not produced any significant quantities of columbium raw materials for years." *Id.* at 186. In explanation of this fact, the report noted that "[d]omestic columbium deposits are low in grade and considered uneconomic to mine." *Id.* at 185. Table 6 of the report disclosed virtually no domestic production of columbium minerals in any form from 1973 to 1983. [42] While the United States continued to be a major

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[40] All domestic production of columbium other than at Bear Valley was as a byproduct of pegmatite deposits mined for other minerals. *Id.*

[41] Sec. 303 of the Defense Production Act of 1950, 64 Stat. 798, 801, had originally authorized the purchase of critical and strategic minerals and metals at prices above currently prevailing market prices. This was expressly extended to columbium and tantalum by the Domestic Minerals Program Extension Act of 1953, 67 Stat. 417. Finally, sec. 2(d) of the Domestic Tungsten, Asbestos, Fluorspar and Columbium-Tantalum Production and Purchase Act of 1956, 70 Stat. 579 (often referred to as Public Law 733), authorized the purchase of up to 250,000 pounds of contained pentoxides.

[42] The table indicated that for the years 1980, 1981, and 1982, a small unreported quantity of columbium minerals was produced. As noted in the text, there is absolutely no evidence that such minor production as did occur was in the form of euxenite. Indeed, since there is no question that the Bear Valley deposit has never been reactivated, it is a virtual certainty that even this limited production of Cb_2O_5 was not from euxenite. No domestic production of

processor of columbium feedstock into columbium end products, the raw materials processed were pyrochlore and columbite. *Id.* at 187. There was no indication that euxenite was being marketed anyplace in the United States.

In short, we can find nothing which supports Judge Child's assertion that a market for euxenite has existed since 1972. Instead, what is disclosed is the existence of a Government-spawned market for euxenite in the late 1950's, which market evaporated when the Government ceased to pay a premium price for Cb_2O_5. In our decision in *In re Pacific Coast Molybdenum*, *supra*, which Judge Child cited in support of his determination that the absence of a market for euxenite in 1972 was not preclusive of a determination that euxenite was marketable, we differentiated between normal market fluctuations and fundamental structural changes which "invalidate historical conditions as a guide to present marketability." *Id.* at 30, 90 I.D. at 360. With respect to the latter, we adverted to the situation adjudicated in *United States* v. *Denison*, 76 I.D. 233 (1969), where "cessation of a Government stockpiling program which had greatly elevated manganese prices, served to render these past prices irrelevant to the question of present marketability." *Id.* While the Board recognized that "[i]t was, of course, not beyond the realm of possibility that a future stockpiling program might some day be initiated," we noted that "[s]uch a possibility * * * was essentially speculative and could not serve as a predicate upon which a *prudent* man would have proceeded to expend time and money with a reasonable hope of success." *Id.* (italics in original).

The concerns to which we had reference in *In re Pacific Coast Molybdenum* clearly resonate in the facts surrounding production of euxenite in 1959. Production at Bear Valley commenced under a Government contract which provided for payments far in excess of market values. Production continued only until the Government buying program ended and the Government contract was filled. At that point, production ceased and has never been resumed, despite the fact, as has been noted, that a 30-year supply remained at the Bear Valley site. Contestees' implicit suggestion that, because Porter Brothers was able to find a market for the euxenite produced from Bear Valley in the late 1950's, it should be presumed that they could find a market for the euxenite from the Payette placers in 1972 or today is only valid to the extent that one assumes that a Government buying program, similar to that in existence in the late 1950's, would come into existence and result in an offer to purchase the Cb_2O_5 content of the euxenite from the Payette placers at a price far above the market rate. This is precisely the type of speculative possibility that, we cautioned, would not induce a *prudent* individual to expend further time and money with a *reasonable* prospect of developing a paying mine.

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columbium or tantalum was reported for 1987 or 1988. *See 1987 Minerals Yearbook*, Vol. 1 at 281; *1988 Minerals Yearbook*, Vol. 1 at 301.

We recognize that Guy Jones testified that the amount of euxenite per cubic yard found on the Payette placers (0.156 pounds per cubic yard) was greater than that which was successfully mined at Bear Valley (0.130 pounds per cubic yard). *See* Tr. 222–23; Exh. C–1 at 8. Judge Child alluded to this testimony in his decision. *See* Decision at 10. If this were true, it might be argued that the fact that Porter Brothers ceased operations at Bear Valley after the completion of the Government contract in 1959 did not necessarily establish that the richer deposit found on the Payette placers could not be successfully exploited. The fact of the matter, however, is that Guy Jones was in error.

Guy Jones provided no basis for his assertion that the Bear Valley deposit contained 0.130 pounds of euxenite per cubic yard. Jeff Jones, in his report, had asserted that "[a]t the Bear Valley property euxenite averaged 1 pound per cu. yd." (Exh. G–7 at 18). Jeff Jones also failed to provide any source for his information. Published sources, however, corroborate Jeff Jones' contentions on this point. Thus, *United States Mineral Resources*, Geological Survey Professional Paper 820 (1973), contains a detailed discussion of the Bear Valley deposit in its chapter entitled "Niobium (Columbium) and Tantalum," which we set forth here:

> The most important placer deposit of niobium and tantalum known in the United States is at Bear Valley, Valley County, Idaho. The placer was mined from 1955 through 1959 by two dredges with a combined capacity of 8,000 cubic yards per day, and during the period of operation 1,050,000 pounds of combined niobium and tantalum oxide was produced from the euxenite and subordinate columbite recovered from the deposit. It has been estimated that there is sufficient unmined ground to permit 30 years' mining at the same rate of operation.
>
> The placer area is in a glaciated valley in the granitic rocks of the Idaho batholith; the richest placers, which have been partially mined, are in the upper part of the valley where the source of the valuable minerals is thought to be a 6-square-mile area of quartz diorite and associated pegmatites. The euxenite content of the quartz diorite is very irregular and may range from a trace to 0.05 pound per cubic yard; *this has been enriched to about 1 pound per cubic yard in the placers*, where the euxenite is accompanied by a large suite of other heavy minerals, some of which, with their estimated tenor in pounds per cubic yard, are as follows: Columbite (0.2), ilmenite (20), magnetite (5), zircon (0.05), garnet (5), and monazite (0.5).

United States Mineral Resources (1973), "Niobium (Columbium) and Tantalum," R. Parker and J. Adams, Geological Survey Professional Paper 820 at 449 (italics supplied, citations omitted). [43]

From the foregoing it can be seen that Jeff Jones was correct in his assertion that the euxenite content of the Bear Valley deposit was approximately six times higher than that indicated by churn drill holes Nos. 13 and 15 for the Payette placer deposit. Moreover, both the monazite and the columbite content were more than four times greater in the Bear Valley deposit than the Payette placers. [44] Guy Jones'

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[43] This publication, as well as the various editions of *Mineral Facts and Problems*, are standard reference works of which official notice may be taken pursuant to 43 CFR 4.24(b). *See United States* v. *Aiken Builders Products (On Reconsideration)*, *supra* at 78–79 & n.3 (concurring opinion).

[44] Guy Jones had computed the columbite content of the Payette placer deposit at 0.048 pounds per cubic yard and the monazite content at 0.1176 pounds per cubic yard. *See* Exh. C–1 at 8, 9.

contention that the instant deposit was of higher quality than that mined at Bear Valley is simply unsupportable.

We find, therefore, no realistic expectation either in 1972 or at the time of the hearing that a market would soon exist for domestic euxenite deposits, particularly the deposit at issue herein. It follows that Jeff Jones was correct in disregarding that part of the Cb_2O_5 content which was contained in the euxenite since there was no indication that it could profitably be recovered and, indeed, the absence of an existing market for euxenite, given the history of the Bear Valley deposit, was affirmative evidence that it could not be recovered at a profit.

Guy Jones had also allocated $0.061 in value to the yttrium content of the deposit. Of this, $0.001 was for the yttrium content of the euxenite. In the absence of a market for euxenite, however, there is no reasonable expectation that the yttrium contained therein could be economically processed. More critically, to the extent that Guy Jones ascribed a value of $0.06 for yttrium contained in monazite, we must agree with Jeff Jones that there is minimal evidence of record that a prudent individual would reasonably believe that *any* of this value could be realized from this deposit.

As an initial matter, we must point out that the *only* churn drill hole which was assayed for yttrium was No. 16, which was not located on any of the three claims being analyzed. Thus, all assumptions as to yttrium values are based on projections from outside the area being analyzed. This factor, in and of itself, substantially undermines the reliability of Guy Jones' calculations as to the yttrium values which might be derived from processing the deposit on the Good Luck Nos. 2, 3, and 4 mining claims. This, however, is not the only problem with the values ascribed to the yttrium content in the Guy Jones report.

In his mineral report, Jeff Jones, after quoting from Bureau of Mines publications that "[b]ecause of relatively large surplus stocks held by rare earth processors, domestic production of yttrium compounds and metal continued to be less than 50% of estimated capacity," suggested that there was probably no demand for the Y_2O_3 present in either the euxenite or monazite found in the Payette placers. Various professional publications bear this out.

The essential problem is that, as was noted in *Mineral Facts and Problems, 1970*, "Yttrium," J. Stamper and E. Chin, Bureau of Mines Bulletin 650, "Yttrium is always produced as a byproduct or coproduct in the mining and processing of other elements." *Id.* at 798–99. While monazite was at one time the principle domestic source for rare earths and yttrium, since the discovery of bastnasite deposits in California, rare earth production from domestic monazite has declined. [45] Though

[45] Part of this decline was attributable to the fact that the market for thorium, which was produced as a byproduct of monazite processing, itself declined when the Atomic Energy Commission ceased thorium purchases in the 1960's. Large surpluses of thorium now exist in both domestic and foreign markets. *See Mineral Facts and Problems, 1985*,

Continued

monazite recovered from beach sand deposits in the southeastern United States remains the principal source of domestic yttrium, this monazite is processed as a byproduct of titanium and zirconium minerals, which renders "monazite's additional separation costs * * * minimal relative to the entire operation." *Mineral Facts and Problems, 1985*, "Rare-Earth Elements and Yttrium," J. Hedrick, Bureau of Mines Bulletin 675 at 659. Since, as shown above, there has been no market for euxenite since 1959, the cost savings which result from monazite's byproduct status would not be available with respect to the instant claims. Given that the Bear Valley deposit contained almost four times more monazite and already had, in place, the infrastructure which contestees would be required to build to successfully mine their deposit, yet all production at Bear Valley ceased when the demand for euxenite disappeared, there seems little, if any, likelihood that the Payette placer claims could be successfully mined for monazite. [46]

Exclusion of the values ascribed to yttrium and to the Cb_2O_5 content of euxenite results in costs of mining exceeding the value of production, even assuming total recovery of gold, platinum, columbite, and uranium, and the marketability of 20 percent of the ThO_2. And, as we have noted, there are significant questions as to the marketability of any of the thorium and whether or not the uranium could be economically extracted from the euxenite in the absence of a market for that mineral. Additionally, we note that there is also a very real question as to the reliability of the assays of churn drill holes Nos. 13 and 15, as they relate to platinum, since independent analysis of the concentrate by the Bureau of Mines and Geological Survey failed to disclose the presence of platinum. There appears little question that, even assuming the presence of minerals in the percentages projected by Guy Jones, the values which could reasonably be expected to be realized therefrom have been substantially overstated.

And, not only have contestees overstated the value of production, they have also, in at least one important area, understated the costs of production. Contestees premised their dredging costs on the 1952 price of the Lisa dredge [47] adjusted for inflation. In computing the increase in costs from 1952 to 1972, the inflation factor used was 27 percent. When his attention was drawn to this, Guy Jones agreed that it did not seem reasonable (Tr. 250). In fact, it was clearly too low.

"Thorium," J. Hedrick, Bureau of Mines Bulletin 675 at 840. Indeed, today, the presence of thorium in monazite deposits is viewed as a negative factor since the storage and disposal costs of the byproduct thorium has resulted in increased costs in recovering rare earths from monazite. *See Mineral Facts and Problems, 1985*, "Rare-Earth Elements and Yttrium," J. Hedrick, Bureau of Mines Bulletin 675 at 661. Thus, the assumption that the thorium content of the Payette placers will provide *any* positive benefits is certainly open to serious question. *See also* note 28, *supra*.

[46] The fact that a reputed million dollars in yttrium was recovered from the euxenite residues on the Bear Valley claims (*see* Exh. C-1 at 8) is, thus, beside the point. As noted in the text, the fact that yttrium could be recovered economically *after* the euxenite has been mined and processed (and the cost of mining has been accounted for) scarcely establishes that yttrium could be mined and processed economically for its own value.

[47] On the issue of dredging costs, we find ourselves in general agreement with Judge Child that the Jeff Jones report appears to have overstated the costs of an appropriate dredge. Moreover, to the extent that a single mineral deposit embraces more than one claim, recovery of capital costs may properly be prorated to all of the claims (and all of the mineral tonnage). *See United States* v. *Collord, supra* at 301–305 (concurring opinion); *United States* v. *New York Mines, Inc., supra* at 191, 95 I.D. at 234–35 (1988). It was error for Jeff Jones to limit the recovery of capital costs to only that part of the mineral deposit located within the Good Luck No. 3.

Figures from the Bureau of Labor Statistics indicate that between 1960 and 1972, the costs for equipment and repair parts increased approximately 47 percent. [48] Merely assuming that inflation averaged only 1 percent a year for the preceding 8 years results in a total inflation rate of 55 percent, more than double the rate that what was actually used. This results in a total increase in cost of $310,000, or $0.0035 per cubic yard, assuming an 88-million-ton deposit. While the amount per cubic yard is admittedly small, it represents yet a further decrease in the likelihood of profitability.

[9] The foregoing analysis has focussed on the substantial problems in contestees' valuation of the subject deposit. This analysis has generally *assumed* that specified minerals (*e.g.*, columbium, gold, yttrium, etc.) were present throughout the 88-million-cubic-yard deposit in the percentages generally indicated in the Guy Jones report and concentrated on exploring the question whether it was reasonably likely that these mineral values could be realized. What we wish to focus on now is the inadequacy of the existing data to support any projections of mineral content with sufficient reliability to justify a determination that a discovery under the mining laws exists.

The essence of contestees' case is that the results from churn drill holes Nos. 13 and 15 (supplemented, on a selective basis, from results obtained from other drill holes) are sufficient to establish the existence of an 88-million-cubic-yard mineral deposit of such value that an individual of ordinary prudence would be justified in proceeding to commence development of a mine with a reasonable likelihood of success. Indeed, to the extent that contestees rely solely on these two holes as validating all of their locations, they contend that these two drill holes are enough to establish the existence of a valuable mineral deposit containing in excess of 200-million-cubic yards, extending over 5 miles in length. Yet, the fact of the matter is that contestees' own evidence, far from establishing the existence of a discovery as that expression is understood in the mining laws, actually clearly shows that contestees, at best, are still in the early stages of exploration to determine *if* sufficient mineralization exists within any of these claims to warrant the substantial expenditures which development would entail.

The Wood report explored, in some detail, the status of exploration activities on the Payette placers. The Wood report noted that random location of drill holes is normally as good a method as any for "initial drilling" since, if any of those holes show value, they indicate the areas where systematic sampling should be conducted. With respect to the Payette placers, Wood noted that, since there seemed to be a great disparity in values among the holes already drilled, "serious

[48] We have obtained these figures from the "Capital and Operating Cost Estimating System Handbook," prepared by Straam Engineers, Inc., for the Bureau of Mines in 1977. The relevant indices are set out at page 10 of this publication.

consideration has to be given to determining if some indicated values exist or if they do not exist" (Exh. C–4 at 7). Accordingly, he recommended the drilling of two holes offsetting drill holes Nos. 13 and 15 to determine which set of results were accurate, "the good or the bad." *Id.* at 8. He noted that "[t]he drilling of these two holes would be the minimum needed to confirm the presence of values in those areas." *Id.* No such drilling ever occurred.

Knoblock, himself, was well aware of the need for more testing of the claims. Thus, in his testimony, he observed that

> if I was interested in proceeding, as I said, anybody would proceed, they're going to do a lot of testing on their own. The test holes that are in there, you know, just an indication that they're there. But [there] has to be a lot of testing done to go ahead

(Tr. 278).

As this Board has often noted, there is a fundamental difference between evidence which would justify a prudent individual in the continued exploration of a prospect and that which would justify the commencement of work to develop that prospect into a paying mine. *See, e.g.*, *United States* v. *Feezor*, *supra* at 208; *United States* v. *White*, *supra* at 319–20, 98 I.D. at 157–58. Certainly, the assays from drill holes Nos. 13 and 15 provide indications of possible values which might be deemed sufficient to justify the expense and effort of drilling additional holes in an effort to corroborate the existence of a valuable mineral deposit. But that is a long way from suggesting that the evidence from these two drill holes would be sufficient to convince a person of ordinary prudence that literally millions of dollars could reasonably be committed to developing these claims, particularly where, as here, other drill holes have disclosed only a fraction of the values obtained from drill holes Nos. 13 and 15.

It may be, as the Guy Jones and Wood reports suggest, that the Rare Metals sampling program was flawed in important aspects. But certainly, any prudent individual would want a stronger foundation than a mere supposition before committing substantial amounts of capital to the development of a mine on this property. What such an individual would require is hard evidence that the values obtained from drill holes Nos. 13 and 15 are, indeed, values fairly representative of the entire deposit. Only then would such an individual even bother to examine the marketplace to determine whether these values might be economically recovered. Such evidence, however, neither existed in 1972, when the Government withdrew the land from further appropriation, nor in 1989, when the hearing below was conducted.

It is a truism long recognized that, despite the mandates of the law, individuals often locate mining claims at the first indication of value, long before evidence has been collected which might justify the development of the claims. So long as a discovery ultimately occurs while the land remains open to mineral entry, the Government will not concern itself with the order in which the acts of location and discovery have transpired. *See Cole* v. *Ralph*, 252 U.S. 286 (1920). But, where the Government has determined to withdraw land from the operation of the mining laws, only such claims already containing a discovery are excepted from the force of this action, since only such claims possess rights as against the United States. Any individual who locates a claim prior to making a discovery runs the risk that the Government will withdraw the land before a discovery can be completed and put all his efforts to naught. But this is a risk no different than that assumed by those who, mindful of the statutory requirement that discovery precede location, refrain from staking a claim until such time as a discovery has been shown to exist.

In the instant case, the subject claims were located in 1957 and 1958. It was not until 14 years later that Congress saw fit to remove these lands from the operation of the mining laws. During the period between location of the claims and the withdrawal of the land from mineral entry, various drill holes were drilled on the claims. Many of these showed minimal values while a few showed values which might have justified further sampling of specific claims. Yet, in the 22 years following the drilling of holes Nos. 16 and 17 in 1967, no further drilling occurred. We recognize that there are significant costs associated with any drilling program. But those who seek to obtain rights to public lands must either find it in their own means to finance all necessary exploration activities, obtain the aid of those financially better equipped to do so, or run the risk that the Government will determine to withdraw the land from mineral entry and prevent the acquisition of adverse rights. In the instant case, it seems clear to us that the drilling which had occurred prior to 1972 was inadequate to delineate a valuable mineral deposit within the meaning of the mining laws. That being the case, the land within the claims was not excepted from the force of the withdrawal. Since the claims were not supported by a discovery as of 1972, and the withdrawal for the SNRA prevented the acquisition of any new rights to these lands, the conclusion is inescapable that the claims must be declared null and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the Goat Creek No. 1, the Baron Creek Nos. 1 and 2, and the Good Luck Nos. 1, 2, 3, 4, 5, 000, 00, and 0 placer mining claims are declared null and void for lack of a discovery of a valuable mineral deposit as of August 22, 1972.

JAMES L. BURSKI
Administrative Judge

I CONCUR IN THE RESULT:

JOHN H. KELLY
Administrative Judge

APPEAL OF NATIONAL PARK CONCESSIONS, INC.

IBCA-2995 Decided: *November 29, 1994*

Contract No. 14-10-0100-1043 (1961) & Contract No. CC-WAS001-82 (formerly No. CC-0680-2-0001 (1982)) National Park Service.

Motion for Reconsideration Denied.

Rules of Practice: Appeal: Reconsideration

The Board denied appellant's motion for reconsideration because it did not contain any arguments or facts not previously considered by the Board and did not persuade the Board that its decision was erroneous as a matter of law or unsupported by the evidence of record.

APPEARANCES: Howard J. Feldman, Peter D. Dickson, Joseph B. Nelson, Van Ness, Feldman & Curtis, P.C., Washington, D.C., for Appellant; William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE ROME

INTERIOR BOARD OF CONTRACT APPEALS

Appellant National Park Concessions, Inc., has moved for reconsideration of the Board's August 18, 1994, decision denying its appeal. The Government has opposed on the ground that appellant merely is rearguing the import of law and evidence already considered by the Board.

The Board has articulated its standard for granting reconsideration: "([U]nless newly discovered evidence is alleged) reconsideration is normally available only where the decision contains an asserted error of law (which could be broadened to include within its ambit an assertion of a lack of substantial evidence to support the decision's findings of fact)." *Harvey C. Jones*, IBCA-2070, 91-1 BCA ¶ 23,388 at 117,366 (citations omitted). The Armed Services Board of Contract Appeals recently noted that "[t]he boards of contract appeals have repeatedly denied motions for reconsideration where a party has presented no new evidence or arguments which were not considered in the initial decision." *Essex Electro Engineers*, ASBCA Nos. 45663 and 45664 (Nov. 18, 1994; slip. op. at 1-2 (citations omitted)).

We have reviewed appellant's motion and our decision and find no basis for granting reconsideration. The motion did not contain any arguments or facts not previously considered by the Board and did not persuade us that our decision was erroneous as a matter of law or unsupported by the evidence of record.

Accordingly, appellant's motion is denied.

CHERYL SCOTT ROME
Administrative Judge

I CONCUR:

BERNARD V. PARRETTE
Administrative Judge

RIFE OIL PROPERTIES, INC.

131 IBLA 357 Decided: *December 30, 1994*

Appeal from a decision of the Deputy State Director, New Mexico State Office, Bureau of Land Management, denying application to vent gas used to produce oil from the Jicarilla 126 No. 1 oil and gas well. NM SDR 91–03.

Reversed.

1. Oil and Gas Leases: Generally—Oil and Gas Leases: Royalties: Generally

The exception from royalty for gas used on a lease in producing operations does not serve to automatically exempt gas used to lift and, thus, produce oil from a well, which gas is subsequently vented without authorization, without regard to whether marketing the gas would have been economic.

2. Oil and Gas Leases: Generally—Oil and Gas Leases: Royalties: Generally

The regulations require an operator to market all oil and gas production if economically feasible and to conduct operations in a manner to prevent avoidable loss of oil and gas. In adjudicating an application to vent gas used to produce oil from a well when gas production was formerly sold into a pipeline until disconnected as uneconomic, the issue is whether the vented gas was unavoidably lost in that the expenditures necessary to market such gas were not economically justified and that conservation of the gas, if required, would lead to the premature abandonment of recoverable oil reserves.

3. Oil and Gas Leases: Generally—Oil and Gas Leases: Royalties: Generally

A decision to deny an application to vent gas used in the production of oil from an oil and gas lease will be reversed where a preponderance of the evidence shows that the gas was unavoidably lost in that recovery of the gas was not economically feasible.

APPEARANCES: Karen Aubrey, Esq., and W. Thomas Kellahin, Esq., Santa Fe, New Mexico, for appellant; Gilbert O. Lockwood, Deputy State Director Mineral Resources, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Rife Oil Properties, Inc., appeals from a February 12, 1991, decision of the Deputy State Director Mineral Resources, Bureau of Land Management (BLM), Santa Fe, New Mexico, on State Director Review (SDR 91–03) denying Rife's application to vent gas filed pursuant to

Notice to Lessees and Operators No. 4A (NTL–4A). The decision further declared that gas vented from the Jicarilla 126 No. 1 well situated in the SW¼SW¼ of sec. 1, T. 24 N., R. 4 W., Rio Arriba County, New Mexico, was "avoidably lost" justifying an assessment of royalty.

An understanding of the issues in this case is aided by reference to the history of the well. A BLM memorandum in the case file dated May 4, 1989, discloses that this well was the Dakota discovery well in the West Lindrith Gallup-Dakota oil field. [1] Following the initial completion of the well in March 1959, the well produced an average of 7.6 barrels of oil per day and 88 thousand cubic feet of gas per day (MCFPD) until 1966 (Statement of Reasons (SOR) at 10–11). All produced gas was sold into a gas-gathering system operated by El Paso Natural Gas Co. (EPNG) until the well was disconnected from the pipeline on September 23, 1969. During the period from May 1966 through September 1969, gas production delivered into the pipeline averaged approximately 1.8 MCFPD (SOR at 11). On or about January 1, 1966, in an attempt to maintain production from the well, the operator installed an intermitter, described as a combination of a clock and an automatic valve which can be opened and closed periodically to flow the well at intermittent intervals. *See* Exh. X. [2] Subsequently, by letters dated December 22, 1966, and January 23, 1967, EPNG gave notice to Brooks Hall (appellant's predecessor operator) that it planned to disconnect the well unless the negligible volumes of gas then being produced into the pipeline from the well were increased (Exhs. A and B).

Thereafter, by Notice of Disconnect dated October 7, 1969, EPNG notified the New Mexico Oil Conservation Commission (NMOCC) that it had disconnected the subject well from EPNG's system on September 23, 1969, because the gas production was noncommercial (Exh. C). By Sundry Notice filed with Geological Survey (GS) [3] on May 27, 1983, the operator indicated that the well was being produced with an intermitter, the well was shut in 21 hours each day to allow pressure to build up sufficiently to lift oil to the surface, and the gas used to produce the oil was being vented (Exh. E). The intermitter was used to continue producing oil from the well until it was shut in during April 1988 pursuant to BLM's Notice to Shut Down Operation dated April 11, 1988 (Exh. D; SOR at 5; Roe Affidavit at 10). The well is still shut-in at this time.

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[1] The Gallup formation does not produce in this well. *See* Sundry Notice filed Oct. 20, 1960 ("Gallup zone abandoned").

[2] Appellant's SOR for appeal included several attached documents bearing exhibit numbers. One of those numbered exhibits is the affidavit of John D. Roe, Jr., a petroleum engineer employed by appellant's contractor, Dugan Production Corp. Since 1982 Roe has been employed by Dugan as Engineering Manager. Dugan has "managed the well" and been the "contract pumper" for the well since January 1966 (Roe Affidavit at 5).

The Roe affidavit included several attached exhibits identified by letters of the alphabet. All exhibits referred to in this opinion are identified by their respective number or letter.

[3] Responsibility for regulation of oil and gas operations on onshore leases was subsequently transferred within the Department of the Interior from GS to BLM. Secretarial Order No. 3071, 47 FR 4751 (Feb. 2, 1982); Secretarial Order No. 3087, 48 FR 8983 (Mar. 3, 1983). Responsibility for collection of royalties on oil and gas leases was transferred from GS to the Minerals Management Service (MMS). *Id.*

Prior to shut down of well operations, BLM confirmed with Rife by letter dated April 6, 1988, that it required a test of gas flow from the well in the form of a daily 3–hour test commencing April 1 (Exh. I). It appears from the record that the well was tested by BLM over the period from March 1 through April 8, 1988, by flowing the well for a brief but variable period of time (always less than 2 hours) on many of the days overthat span and measuring the production. *See* Handwritten report of Ed Wyatt (filed with Farmington Area Office, BLM, on Sept. 13, 1989).

Subsequent to the testing, BLM advised Rife by letter of May 16, 1989, that it had no record of approving an application to vent gas for this well. Rife was further advised that an application for retroactive approval could be filed pursuant to NTL–4A addressing the economics of capturing the gas over the time from April 1, 1980, [4] to the date the application is filed. Application for approval of venting the gas in support of production of oil from the well was filed with BLM by Dugan as agent for Rife on July 17, 1989.

The application included a graph of the production history of the well reflecting a rate of decline of about 17 percent through the first 8½ years of production through 1967 at which time the rate leveled off at 3 percent (Application Letter of July 17, 1989, at 3 and Attachment 4). With respect to the economics of marketing gas produced from the well, the application asserts that the pipeline pressure in the area ranges between 175 and 250 pounds per sqare inch (psi), three to six times higher than the wellhead pressure required to produce with the intermitter (Application at 5). Appellant contends the well will not produce against this pipeline pressure. *Id.* The application states that in order to sell produced gas, it will be necessary to install rod pumping equipment. Cost data is provided to support the assertion that the expense of producing in this manner would exceed the return from sale of oil and gas, both in 1980 and at the time of the application (Application at 7 and Attachments 6 and 7).

By decision dated November 30, 1989, BLM rejected the Rife application on the ground that, after evaluating the application, BLM had conducted its own analysis and concluded that it was economic to sell gas which had been vented, both in 1980 and at the present. The analysis apparently relied upon is found in the handwritten Wyatt report. This analysis was based on the gas production reported by the operator from 1959 through 1969 and gas/oil ratio (GOR) test results reported for the years 1970–1971, 1983–1987, and 1988. [5] *See* Wyatt Report at 2–3. This data was used to project estimated gas production based on the number of barrels of oil produced for the period from

[4] Although the effective date of NTL–4A was Jan. 1, 1980, a period of 90 days was allowed for filing an application for approval of venting for a well completed prior to the effective date of NTL–4A. 44 FR 76600–01 (Dec. 27, 1979).

[5] Over the period from 1972 through 1982, the volume of gas from the well was reported by the operator as too small to measure. The Wyatt report rejected this estimate in view of the number of barrels of oil produced over the interval and endeavored to estimate the volume of gas produced and vented.

April 1, 1980, to 1988 when the well was shut in. *See* Wyatt Report at 6–7. The report analyzed the economics of capturing gas vented from April 1, 1980, through the 1988 shut-in of the well by comparing the costs with projected revenues if the gas had been sold. Two scenarios were studied, one using only the intermitter and another which included costs of installing pumping equipment. *See* Wyatt Report at 9. The net returns were calculated on a spread sheet. For recovery using pumping equipment, the calculated return discounted to 1980 value reflects a loss for the first 3 years of production and a total discounted profit for operations through the 1988 shut-in date of $17,020. *See* Wyatt Report, spread sheet B. Thus, the report concluded that even if a pumping unit were required to market the gas, it would have been economic to do so beginning in 1980. *See* Wyatt Report at introductory notes. Having found that sale of the vented gas would have been economic, the BLM decision further held that royalty would be assessed by MMS on the vented gas.

Rife sought review of this decision, reasserting that sale of gas from the well was uneconomic. Specifically, Rife asserted that:

> [T]he productivity of the well (a function of reservoir pay development) will not permit the shut-in pressure to build up much more than 250 to 300 psi following 21 to 22 hours of shut-in. This is not sufficient pressure to efficiently produce the well against a pipeline back pressure of 150–250 psi.

(Letter of Dec. 28, 1989, at 3). Further, Rife noted that "pipeline companies view wells of this nature as creating an operational problem for them" and have taken such measures as installing pipeline baffles to minimize the surging that occurs within their lines and metering facilities." *Id.* Rife related that these measures act as a back pressure regulator and reduce the efficiency of an intermitter or plunger lift system. Acknowledging that certain offset wells to the Jicarilla 126 No. 1 well do produce with an intermitter or plunger and do sell gas into the EPNG pipeline (as did Rife well until September 1969), Rife points out that these wells have not declined in productivity to the extent of the Jicarilla 126 No. 1 well which has produced for many more years. Thus, Rife states that four of the five closest offset wells (located within a radius of 3,100 feet) have been completed since 1978; the one well with a similar producing life, the Jicarilla 126–S No. 15, has not produced significant volumes since June of 1983; and the latter well was proposed for abandonment in the Gallup-Dakota formations under Sundry Notice filed in January 1989. *See* Letter of December 28, 1989, at 3–4 and Attachment C. [6] Further, Rife pointed out that during 1987–1988, production from the four immediate offset wells (two produced by rod pump and two by intermitter and/or piston) averaged oil rates 3 to 12 times higher than actual or potential production from the Jicarilla 126 No. 1 well and gas rates were 2 to 6 times higher. *See* Letter of December 28, 1989, at 4 and Attachment C.

[6] While attachment C does not appear with the original letter of July 1989 in the BLM district office case file, a photocopy of the exhibit is included as an attachment with a photocopy of the letter of Dec. 28, 1989, that appears in the SDR file.

In a decision by the BLM State Director (SDR 90–4) dated January 30, 1990, the decision of the Farmington Resource Area Office, BLM, denying Rife's application to vent gas was remanded for a determination of the economics of producing the gas using a gas compression system at the well or, alternatively, the feasibility of producing the well into the pipeline using a plunger lift system. The decision cited a BLM analysis in the file indicating that "it would be economic to utilize a plunger lift system at the well which would produce gas intermittently at pressures sufficient to conduct sales against the pipeline pressure" (SDR 90–4 at 2). [7] Noting Dugan's contention that pipeline surges might cause delivery problems, the remand directed evaluation of the "deleterious effects that the plunger lift system may have on the prodnceability of the well into the pipeline." *Id.*

Dugan responded to the remand on behalf of Rife in a letter to BLM dated February 16, 1990. Based on its experience with low volume wells, Dugan reiterated its belief that this well will not produce into the pipeline with a plunger lift system but would require a rod pump which would not be economic. Further, Dugan explained that, when the gas consumed to operate the required rod pump is subtracted from production, the total production is less than the pipeline's minimum acceptable volume beneath which the pipeline is authorized to disconnect the well. Dugan also expressed strong disagreement with BLM estimates of the volume of gas vented since April 1, 1980, noting that BLM volume estimates have not been produced from the well since 1967 before the well was disconnected from the pipeline (Letter of Feb. 16, 1990, at 6 and Attachment C). This is asserted to be unrealistic in view of the actual production performance of this well and the fact that oil was produced over the interval from 1967 to 1980. In addition, Rife superimposed the production rates projected by BLM on the graph developed from the actual production history of the well showing that the projections were inconsistent with that history (Letter of Feb. 16, 1990, at 6 and Attachment 3).

Further analysis was undertaken by BLM in response to the remand. In again reviewing the economics of marketing gas from the well, BLM considered criteria set forth in the GS Conservation Division Manual (CDM). Specifically, BLM found that installing a pump and compressor in 1980 does not meet the requirements of the CDM in that the combined net income from oil and gas operations does not provide a payout within 6 months and the payout from gas operations alone takes more than 5 years (Supplemental Engineering Report (undated) at 1; *see* GS, CDM, § 655.5.3F, Exh. 2 at 1–2. Further, in considering

[7] Although the decision does not specify the report relied upon, the decision apparently refers to the Dec. 15, 1989, "Engineering Report" prepared by Ken Howell of BLM. The report concluded on the basis of tests conducted in March 1988 that flowing tubing pressure appears sufficient to produce into a 200 psi pipeline (Engineering Report at 2). Although the supporting calculations do not appear as an attachment with the case file copy, the report concludes regarding gas sales commencing in 1980 that, at a "12% discount rate, the cost of installing a plunger system and selling gas would pay out in less [than] 2 years." *Id.*

use of a plunger lift system, BLM reported that although the economics using a discounted cash-flow analysis are positive, they do not meet the CDM criteria regarding length of time until payout. Nonetheless, the report concluded that the guidelines should be disregarded in view of the positive discounted cash-flow analysis.

The record also contains a brief analysis dated June 14, 1990, by a BLM petroleum engineer indicating that, based on gas oil ratios from yearly tests since 1980, the energy value of gas measured exceeds the energy value of oil measured. Accordingly, the engineer concluded that the well qualified as a gas well under the definition in NTL–4A. Subsequently, the BLM Area Manager, Farmington Resource Area, issued a decision dated September 28, 1990, readjudicating the application for permission to vent gas. The decision found that the energy equivalent of the gas produced has always far exceeded the energy equivalent of the oil produced and therefore, under the terms of NTL–4A, the well has always been defined as a gas well. Further, the decision held that NTL–4A makes no provision for approval of venting of gas produced from a gas well subject to certain exceptions not relevant in this case. Hence, the Area Manager concluded: "[T]he gas vented from this well from April 1, 1980 (the effective date of NTL–4A) through the present must be classified as avoidably lost."

The Deputy State Director sustained the September 28, 1990, Farmington Resource Area decision on February 12, 1991 (SDR 91–03), on the ground that BLM properly determined the well to be a gas well as distinguished from an oil well and that venting of gas is not permitted from a gas well. Essentially BLM determined that inquiry into the economics of marketing gas from the well was only relevant in the case of venting of an oil well as venting of gas wells is prohibited save the narrow exceptions identified in NTL–4A for which Rife did not qualify (Deputy State Director Decision at 2–3).

Appellant contends in its SOR for appeal that the issue posed by BLM's rejection of the application to vent gas is whether royalty may be assessed on gas used in producing operations when the gas is used in connection with an intermitter. Rife contends that assessment of royalty on gas used in producing operations is contrary to the express terms of the lease contract which must control over any inconsistent regulatory provisions. Appellant notes that NTL–4A provides that no royalty shall accrue on gas produced from a lease which is used for operating or producing purposes. Rife disputes the authority of BLM to reclassify this oil well as a gas well and, on that basis, to assess royalty on the ground that all gas vented from a gas well is avoidably lost. Rife also contends that relevant statutes and regulations require payment of royalty on production "removed or sold" from the lease which has been construed in court cases involving both onshore and offshore production to exclude royalty on gas used in on-lease production activities, vented, or flared. Further, appellant argues that the waste resulting from premature plugging of this well because of BLM's prohibition of use of gas for purposes of production is contrary to statutory intent. Rife asserts that the prudent operator should provide the guiding principal in this case and that use of the gas with an intermitter to produce oil is the only economic means of operating the well. Additionally, appellant contends that BLM reclassification of the well as a gas well in a manner inconsistent with the NMOCC's well-spacing determination (which necessarily entails a gas versus oil classification) will generate problems which should be avoided in the absence of a congressional intent to preempt State regulation.

In its answer, BLM asserts that the intermitter is a simple valve operated by a timing mechanism and, hence, does not "use" gas. BLM argues that gas vented from the lease does not qualify as lease-use gas. Further, BLM contends that this is a gas well under the terms of NTL–4A because the energy equivalent of the gas produced exceeds the energy equivalent of the oil produced and venting of gas from a gas well is not authorized. Prevention of the waste of the more valuable natural resource is asserted to be the intent of NTL–4A. Additionally, BLM argues that sale of gas would have been profitable using the plunger lift system.

As a threshold matter, we note that certain procedural questions have been raised by the briefs and pleadings filed in this case. Counsel for appellant has filed a motion to strike the supplemental answer to appellant's reply brief filed by BLM. Appellant asserts that it has the right to both open and close the briefing in this appeal since it bears the burden of proof. Further, appellant has moved for imposition of sanctions including attorney's fees and costs against BLM for misstating the facts in the BLM brief.

In considering appellant's request, it is noted that the regulations governing appeal procedures before the Board provide a timeframe for filing an SOR in support of an appeal (30 days subject to extension). 43 CFR 4.412(a); 43 CFR 4.22(f). Further, an adverse party is entitled to 30 days (subject to extension) from service of the notice of appeal or SOR in which to file an answer. 43 CFR 4.414; 43 CFR 4.22(f).

The regulations governing appeals before the Board are silent regarding the right to file a reply brief in response to an answer to appellant's SOR. In the exercise of its discretion, this Board has on occasion granted leave to file a reply brief where it appears that such a brief might be of substantial assistance in resolving the issues before the Board and the interests of the public, and the parties would not be prejudiced by any consequent delay. In the present case, in the interest of a full development of the issues before the Board, we have accepted and have reviewed appellant's reply brief, the supplemental answer of BLM, and appellant's subsequent reply brief accompanying the motion to strike. Accordingly, the motion to strike the BLM brief is denied. As appellant has shown no authority for granting sanctions including attorney's fees and costs against BLM based on asserted errors in its brief, the motion for sanctions is also denied. [8]

A motion to remand this case for reconsideration in light of the Board's decision in *Mobil Exploration & Producing U.S., Inc.*, 119 IBLA 76, 98 I.D. 207 (1991), and BLM Instruction Memorandum (I.M.) No. 92–91 has been filed by BLM. Appellant opposes the remand request, arguing that the *Mobil* case does not require a remand. Appellant notes that the key issue before the Board is whether the gas involved was avoidably lost rather than the amount to be assessed (*i.e.*, full value of the gas or royalty value), which was the issue in *Mobil*. Appellant contends that remand will result only in further delay in resolving the key issue in this appeal. We find that appellant's objection is well taken and deny the motion for remand.

In dealing with the substantive questions of this appeal, we find that two major issues are raised by this case. The first question is whether gas used to provide pressure to produce oil by lifting it to the surface constitutes gas used in production for which no royalty is due. Specifically, this case raises the question whether the exception for gas applies to gas which is vented and not consumed. The second issue is whether it was economic to produce the gas that was vented in operation of the intermitter.

[1] Appellant's oil and gas lease obligates the lessee to pay a royalty of 12½ percent of the value or amount of all oil and gas "produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be royalty free" (Exh. 1 at 2). While not identical, this language is very similar to the terms production "removed or sold" from the lease on which royalty is due pursuant to section 17 of the Mineral Leasing Act (MLA), *as amended by* Act of August 8, 1946, ch. 916. § 3, 60 Stat. 950, 951 (codified at 30 U.S.C. § 226 (1988)). Several court cases interpreting the words "produced and sold" or similar terms as applied to the royalty obligation on oil and gas production held that Congress intended to ensure that royalty would be paid only on oil and gas removed from the leasehold and not on oil and gas used for production purposes on the leasehold where they were initially produced. *Gulf Oil Corp.* v. *Andrus*, 460 F. Supp. 15, 17 (C.D. Cal. 1978) (onshore oil and gas production under section 17 of MLA); [9] *see Amoco Production Co.* v. *Andrus*, 527 F. Supp. 790 (E.D. La. 1981) (interpreting "production saved, removed, or sold" under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1337 (1988); *Marathon Oil Co.* v. *Andrus*, 452 F. Supp. 548 (D. Wyo. 1978) (onshore oil and gas production); *Petro-Lewis Corp.*, 108 IBLA 20, 28–32, 96 I.D. 127, 131–133, (1989). Thus, under these cases, gas which is consumed on the lease in the process of producing leased hydrocarbon substances would

[8] Adjudication of any request for attorney's fees in this case is governed by our prior ruling on a similar petition filed by appellant in an earlier stage of these proceedings, cited as *Rife Oil Properties, Inc.*, 116 IBLA 18 (1990). Thus, the request for attorney's fees is denied.

[9] In the *Gulf* case the court invalidated NTL–4, a notice in which the Department for the first time required payment of royalty on all production including that used on the lease for production purposes.

not be subject to royalty. [10] However, this does not authorize the venting of produced gas simply because it was utilized to lift produced oil to the surface.

The provisions of NTL–4A were promulgated by the Department to rectify the problems with NTL–4 disclosed on judicial review. *See* 44 FR 76600 (Dec. 27, 1979) (introductory comments); *Petro-Lewis Corp.*, 108 IBLA at 32, 96 I.D. at 133. It is recognized in NTL–4A that no royalty accrues on gas used on the lease for "beneficial" purposes. NTL–4A at Para. I, 44 FR at 76600. Beneficial purposes are defined to include gas used on the lease as "fuel" for operating or producing purposes or gas which is "consumed" in drilling, producing, or processing operations. NTL–4A at Para. II.B, 44 FR 76600. We find that the gas which is used to provide the lift for oil produced simultaneously therewith is not automatically exempt from royalty solely on the basis that it is lease-use gas when the gas is subsequently vented without regard to whether the gas could be economically produced.

[2] The venting or flaring of gas from oil wells may be approved pursuant to an application if it is shown that

> the expenditures necessary to market or beneficially use such gas are not economically justified and that conservation of the gas, if required, would lead to the premature abandonment of recoverable oil reserves and ultimately to a greater loss of equivalent energy than would be recovered if the venting or flaring were permitted * * *.

NTL–4A at Para. IV.B, 44 FR 76601. Further, "unavoidably lost" production is defined to include gas which is lost *except* where it is found that the lessee/operator failed to "take all reasonable measures to prevent and/or control the loss." NTL–4A at Para. II.C, 44 FR at 76601. Despite the remand on the question of economics of marketing the vented gas from this well which had been previously disconnected from the gas pipeline as uneconomic, the BLM decision under appeal as well as the decision it affirmed found this issue irrelevant because the well qualified as a gas well and venting of gas from a gas well is only permitted during very limited circumstances involving emergencies and well testing operations. *See* NTL–4A at Para. III, 44 FR at 76601. [11]

The relevant regulations provide that the operator shall put into marketable condition "if economically feasible" all oil, gas, and other hydrocarbon substances produced from the lease. 43 CFR 3162.7–1(a). Further, the operator is required to conduct operations in such a manner as to prevent "avoidable loss of oil and gas." 43 CFR 3162.7–1(d). The Board has upheld provisions of NTL–4A to the extent they "require the lessee to market oil and gas produced from the lease if economically feasible and to conduct operations in such a manner as

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[10] In the *Gulf* case, produced oil was used as fuel to power steam injection equipment in order to promote production. 460 F. Supp. at 16.

[11] A gas well is defined for purposes of NTL–4A as a well from which the energy equivalent of the gas produced exceeds the energy equivalent of the oil produced. NTL–4A at Para. IV.A, 44 FR 76601.

to prevent avoidable loss of oil and gas." *Ladd Petroleum Corp.*, 107 IBLA 5, 7 (1989); *see Mallon Oil Co.*, 107 IBLA 150, 156 (1989) (economically recoverable oil and gas may not be vented or flared without approval); *Maxus Exploration Co.*, 122 IBLA 190, 198 n.1 (1992) (ultimate issue is whether economic reasons required venting of gas beyond generally allowed limits imposed by BLM). The classification of a well as an oil well or a gas well is not necessarily useful in making the determination whether recovery of the gas was economic. To the extent that BLM read NTL–4A as barring the venting of gas from a producing oil well without regard to whether it was avoidably lost, *i.e.*, whether it was economic to market the gas, we find that BLM misread NTL–4A. [12] Any doubt as to this was resolved by publication of I.M. No. 87–652. *See Ladd Petroleum Corp., supra* at 8.

[3] Thus, the ultimate issue in this case is whether it would have been economic to market the gas from the well at issue over the interval from April 1, 1980, to the time the well was shut in by order of BLM. On an evidentiary question such as this, the relevant inquiry is whether the record supports a finding on the preponderance of the evidence that it would have been economic to market gas from the well. *See Bender* v. *Clark*, 744 F. 2d 1424 (10th Cir. 1984); *Eason* v. *BLM*, 127 IBLA 259 (1993). The Wyatt analysis on which BLM initially relied contained certain explicit caveats. The report acknowledged that it was predicated on a "number of assumptions, which if erroneous, would affect the overall results" (Wyatt Report, introductory comments at unnumbered page 2). Specifically, the report warned the user to review the analysis "critically" by substituting actual data for projections and by "making more valid assumptions based on * * * operating conditions and practices in the area." *Id.* Further, the report noted that "other nearby wells completed for production in the same formation which are produced on an intermitter and by pumping unit could provide comparative data as to the GOR and the amount of gas used as fuel, particularly if completed about the same time" (Wyatt Report, introductory comments at unnumbered page 3).

In its letter of December 28, 1989, appealing the initial BLM decision, Rife addressed the assumptions to be drawn regarding the production capability of the Jicarilla 126 No. 1 well by comparison with the other wells producing from the field in the immediate area. As noted above, Rife pointed out that four of the five closest offset wells (located within a radius of 3,100 feet) have been completed since 1978; the one well with a similar producing life, the Jicarilla 126–S No. 15, has not produced significant volumes since June of 1983; and the latter well was proposed for abandonment in the Gallup-Dakota formations under Sundry Notice filed in January 1989. *See* Letter of December 28, 1989, at 3–4 and Attachment C. Further, Rife noted that during 1987–1988, production from the four immediate offset wells (two produced by

[12] Indeed, a contrary finding would lead to potential waste of oil where production of oil was marginally economic but production of gas was not economic and the requirement to market the gas caused a premature abandonment of the well.

rod pump and two by intermitter and/or piston) averaged oil rates 3 to 12 times higher than actual or potential production from Jicarilla 126 No. 1 well and gas rates were 2 to 6 times higher. *See* Letter of December 28, 1989, at 4 and Attachment C.

On SDR, BLM did not respond to this data. Rather, BLM held that the economics of gas recovery using a plunger lift system had been established and remanded the matter for a finding regarding the economics of producing the gas with the aid of a compressor and/or the feasibility of producing gas into a pipeline using the plunger lift method.

Dugan responded to the remand on behalf of Rife in a letter to BLM dated February 16, 1990. Based on its experience with low-volume wells, Dugan reiterated its belief that this well will not produce into the pipeline with a plunger lift system but would require a rod pump which would not be economic. Further, Dugan explained that when the gas consumed to operate the required rod pump is subtracted from production, the total production is less than the pipeline's minimum acceptable volume beneath which the pipeline is authorized to disconnect the well. Dugan also expressed strong disagreement with BLM estimates of the volume of gas vented since April 1, 1980, noting that such volumes have not been produced from the well since 1967 before the well was disconnected from the pipeline (Letter of Feb. 16, 1990, at 6 and Attachment C). This is asserted to be unrealistic in view of the actual production performance of this well and the fact that oil was produced over the interval from 1967 to 1980. Further, Rife explained that the BLM volume projections were inconsistent with the actual production history of the well. Rife has reiterated this position on appeal. Thus, Roe observes in his affidavit that the rate of decline for production from this well, graphed in Exhibit M, is "similar to the decline curves which I have observed in many other wells within the West Lindrith Gallup-Dakota Oil Pool from which the subject well produces" (Affidavit at 13).

The BLM decision on remand did not address Rife's evidence that production was substantially less than projected by BLM and that producing pressures would not permit delivery into the pipeline without installation of a rod pump which would make production uneconomic. Rather, the decision on remand and on subsequent SDR relied upon a finding that this well was a gas well under the terms of NTL–4A and, hence, venting of gas was prohibited. Upon review of the extensive record in this case, we find that appellant has shown by a preponderance of the evidence that it was not economic to produce gas from the well either in 1980 or at the time the application was filed. [13]

[13] Appellant requested an evidentiary hearing before an Administrative Law Judge in this case. A hearing may properly be ordered where the record discloses unresolved material issues of fact. *Stickelman* v. *U.S.*, 563 F.2d 413, 417 (9th Cir. 1977); *see* 43 CFR 4.415. In the present case, however, we find that the necessary evidence is in the record and we are in a position to resolve the legal issues and decide this case on the record. Hence, the request for a hearing is denied.

Accordingly, the decision denying the application to vent gas and authorizing assessment of royalty is reversed.

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

C. RANDALL GRANT, JR.
Administrative Judge

I CONCUR:

JOHN H. KELLY
Administrative Judge

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