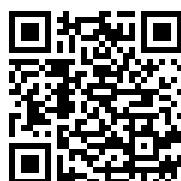

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UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

Secretary of the Interior - - - - - Manuel Lujan, Jr.

Office of Hearings and Appeals - - - - - James L. Byrnes, Director

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

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

EDITED BY

RACHAEL CUBBAGE



VOLUME 96

JANUARY-DECEMBER 1989

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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1 to December 31, 1989. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during this period.

The Honorable Manuel Lujan, Jr., served as Secretary of the Interior during the period covered by this volume; Mr. Frank A. Bracken served as Under Secretary; Ms. Stella A. Guerra, Ms. Constance B. Harriman, Messrs. Eddie F. Brown, Lou Gallegos, David C. O'Neal, and John M. Sayre served as Assistant Secretaries of the Interior; Mr. Ralph W. Tarr served as Solicitor; and Mr. James L. Byrnes served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "96 I.D."

A handwritten signature in black ink, appearing to read "Manuel Lujan Jr." The signature is fluid and cursive, with "Manuel" on the first line and "Lujan Jr." on the second line.

Secretary of the Interior

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ERRATA:

- The word "parcel" should be "proposal" in the 11th paragraph on page 153.
- The word "quests" should be "guests" on line 5 from the bottom of page 162.
- The correct heading is "B. The Water and Sewer Project" on page 163.
- The word should be "leases" on line 6 of page 174.
- The beginning of the second quoted text should read "In any instance *where* the trial tribunal. . ." on page 178.
- The middle of line 8 from the top should read, ". . . resort, the communication was not done in a manner that alerted, or should have alerted, the Roberts . ." on page 179. The word "show" on the line 9 from the bottom should be "whole."
- The word "operations" is misspelled on line 4, page 184.
- The cite reference in the first quoted paragraph should be "AB at 22" on page 185.
- The missing text in line 4 of the third full paragraph on page 188 should read ". . . disruption from June through December 1984; and 50 percent "consequential" disruption during 1985, . . ."
- The word "ownership" is misspelled on line 10 of page 201.
- The phrase should read "introduced to meet" on line 16, page 298.
- The word "hydrocarbons" is misspelled on line 3 of the second quoted paragraph on page 418.

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¹Abbreviations used in this table are explained in the note on page XXXII.

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Note.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, Vols. 1 and 2; "C.L.L." to Copp's Public Land Laws, 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

THE SCOPE OF INDIAN PREFERENCE UNDER THE INDIAN REORGANIZATION ACT*

M-36960

June 10, 1988

Indians: Indian Preference: Generally--Indians: Indian Reorganization Act

Examination of the text, legislative history, purpose, administrative interpretation, and judicial construction of sec. 12 of the IRA, 25 U.S.C. § 472, leads to the conclusion that Indian preference applies to the Bureau of Indian Affairs within the Department of the Interior and to no other agency or position within the Department.

Unreported Solicitor's memorandum of June 13, 1979, overruled.

MEMORANDUM

TO: The Secretary

FROM: Solicitor

SUBJECT: The Scope of Indian Preference under the Indian
Reorganization Act

You have asked for the views of the Office of the Solicitor on whether the Indian preference provisions of the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. § 472, extend beyond the Bureau of Indian Affairs (BIA) to the following offices and positions: 1) Assistant Secretary for Indian Affairs; 2) the Office of the Assistant Secretary for Indian Affairs; 3) the Division of Indian Affairs, Office of the Solicitor; and 4) the Office of Construction Management in the Office of the Assistant Secretary for Policy, Budget and Administration. For the reasons discussed below, we conclude that the preference applies only within the BIA.

A. The Nature of the Indian Preference

1. The 1934 Act Provided For Indian Preference Only Within the Bureau of Indian Affairs.

Congress created Indian preference as a remedy for perceived civil service failures to hire Indians in the "Indian Office." During floor

* Not in chronological order.

debate, IRA co-sponsor, Congressman Howard, emphasized the preference's remedial character within that Office. "Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become, in fact as well as in name, an Indian Service predominantly in the hands of educated and competent Indians" 78 Cong. Rec. 11727. The operative component of the IRA was section 12, 25 U.S.C. § 472, the Indian preference provision. That provision directed the Secretary of the Interior:

to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws to the various positions maintained, now or hereafter by the Indian Office in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Legislative texts since at least 1832, show that when Congress used the term "Indian Office," it used the term coextensively with, and no broader than the term "Bureau of Indian Affairs." Indeed, the terms "Indian Office," "Indian Service," "Indian Bureau," and "Bureau of Indian Affairs" were used interchangeably to refer to that agency of the Federal Government primarily responsible for day-to-day relationships with the Indian Tribes. During the June 12, 1934, floor debate on the IRA, Senator Wheeler, a second co-sponsor of the measure, used several different terms in describing the Department's Indian operations: "Bureau of Indian Affairs," "Federal Indian Service," and "Indian Bureau." 78 Cong. Rec. 11122, 11123, 11126.

Congressional use of these terms as synonyms followed a pattern established 100 years before the IRA. By the Act of July 9, 1832, for example, Congress authorized the President to appoint a Commissioner of Indian Affairs who was to "have the management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2. Similarly, by the Act of June 30, 1834, Congress provided "for the organization of the Department of Indian affairs" within the Department of War without giving the department a specific name such as the "Indian Office" or the "Bureau of Indian Affairs." 4 Stat. 735. Even so, Congress appropriated funds for the unit under the term "Indian Department." (See, e.g., Act of January 27, 1835, 4 Stat. 746). In 1834 legislation, providing for the organization of the Indian department, Congress first enacted an Indian preference provision, 25 U.S.C. § 45. Congress then transferred the Indian Office from the Department of War, upon creating the Department of the Interior—again without referring to the office by name. (Section 5 of the Act of March 3, 1849, 9 Stat. 395, R.S. 4141).

Congress continued to use the terms "Indian Office" and "Bureau of Indian Affairs" interchangeably when it enacted the IRA and related appropriation legislation in the 1930's. The appropriation acts for the period generally appropriated funds under the heading "Bureau of Indian Affairs." Within the text of the statutes, the names "Bureau of

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“Indian Affairs” and “Indian Service” were used interchangeably, frequently in the same sentence. (See e.g., the Act of March 2, 1934, 48 Stat. 362, appropriating funds “for telegraph and telephone toll messages on business pertaining to the Indian Service sent and received by the Bureau of Indian Affairs at Washington, and for other necessary expenses of the Indian Service,” 78 Cong. Rec. 11727. For other examples, see the Act of March 4, 1929, ch. 705, 45 Stat. 1562; Act of July 3, 1930, ch. 846, 46 Stat. 860; Act of April 22, 1932, ch. 125, 47 Stat. 91; Act of August 12, 1935, ch. 508, 49 Stat. 571; Act of June 22, 1936, ch. 691, 49 Stat. 1757.

The persistent legislative use of “Indian Office” and “Bureau of Indian Affairs” as synonyms makes it evident that when Congress used the term “Indian Office” in section 12 of the IRA, it referred to that single organization within the Department of the Interior with responsibility for Indian affairs, which is the Bureau of Indian Affairs.

2. Congress Created the Indian Preference Provision of the 1934 Act to Increase the Indian Preference within the BIA.

In enacting the IRA, Congress desired “to give Indians a greater participation in their own self-government; to further the Government’s trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life,” *Morton v. Mancari*, 417 U.S. 535, 541-42 (1971) (footnotes omitted). In a real sense, the preference’s principal goal was to transform the Bureau of Indian Affairs into a bureau truly having the character of an Indian Office. Thus, despite the somewhat drastic remedial character of the preference—and despite its adverse impact on non-Indian BIA employees—Congress deemed the preference warranted by the singular focus and the directed mission toward the Indians that it had vested in the Indian Office. Thus, Senator Wheeler, a co-sponsor of the IRA, explained the need for a preference to remedy civil service failures which have “worked very poorly as far as the Indian Service is concerned.” Hearings on S. 2755 and S. 3645 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., § 2, p. 256 (1934).

A thorough review of the complete floor debates concerning the preference reveals that the Indian preference was directed exclusively toward the BIA. Co-sponsor Howard’s references are particularly illustrative. During floor debate, he repeatedly characterized the preference as applicable to “the very bureau which manages their affairs.” 78 Cong. Rec. 11727-31. Congressman Howard observed that “Indians have not only been thus deprived of civic rights and powers, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs.” He continued: “[t]oday there are about 2,000 Indians holding permanent civil-service appointments in the Bureau of Indian Affairs, with a total permanent personnel of approximately

6,500," and he complained of "the difficulty which Indians experience in meeting the civil service requirements for entering the Indian Service." (*Id.*) Congressman Howard concluded:

It should be possible for Indians to enter the service of their own people without running the gauntlet of competition with whites for these positions. Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become, in fact as well as in name, an Indian service predominantly in the hands of educated and competent Indians. This does not mean a radical transformation overnight or the ousting of present white employees. It does mean a preference right to qualified Indians for appointments to future vacancies in the local Indian field service and an opportunity to rise to the higher administrative and technical posts.

Consistent with the exclusive BIA focus during floor debates, the IRA House and Senate Committee Reports said only that the preference would apply to the "Indian Service" or the "Federal Indian Service" and gave no indication that a broader application was intended or appropriate. The House Report, H.R. Rep. No. 1804, 73d Cong., 2d Sess. (1934), stated that the preference "liberalizes the present rigid Civil service requirements so as to admit qualified Indians to the Indian Service." The Senate Report, S. Rep. No. 1080, 73d Cong., 2d Sess. (1934), stated that the preference directs the Secretary of the Interior to establish special standards for Indians who may be appointed to the various positions in the "Federal Indian Service." Consequently, neither the statutory text nor the legislative history of the IRA provide any basis for an expansive application of the preference outside the BIA.

3. The Supreme Court Sustained the Indian Preference Against Constitutional Challenge Because Congress had Limited Its Scope to the BIA.

Forty years after Congress enacted the IRA, the Supreme Court first considered the constitutionality of the Indian preference against a challenge by non-Indian BIA employees in *Morton v. Mancari*, 417 U.S. 535 (1974) (*Mancari*). The Supreme Court's reasoning in *Mancari* constitutes a persuasive justification for the application of Indian preference within the BIA while it undermines, in our view, any broader application of the preference outside the BIA. In *Mancari*, a unanimous court upheld the constitutionality of the Indian preference against a reverse discrimination claim by non-Indian employees of the BIA. Justice Blackmun's opinion explained that "the federal policy of according some hiring preference to Indians in the 'Indian Service' dates at least as far back as 1834" 417 U.S. at 541 (footnote omitted), and had given the Indians a voice in the one agency of the Federal Government most intimately concerned with their well-being. By enacting the IRA, "Congress was seeking to modify the then-existing situation whereby the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes." *Mancari*, 417 U.S. at 542.

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The Court rejected the claim that the preference constituted invidious racial discrimination, reasoning that the preference was "directed to participation by the governed in the governing agency" rather than to race. *Mancari*, 417 U.S. at 554. Thus, in the narrow context of the BIA—with its unique political relationship to the tribes—the Court concluded that the preference was "granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Mancari*, 417 U.S. at 554.

In our opinion, a necessary corollary to the Court's justification of the preference within the BIA is that the preference cannot be readily justified for any entity other than the BIA. Any broader application of the preference would involve the threat of an impermissible racial classification and would implicate the constitutional issues Congress—and the Court—effectively avoided by limiting the preference's application to the BIA. Indeed, Justice Blackmun's opinion was explicit on this limitation:

[T]he preference applies *only* to employment in the Indian service. The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

Mancari, 417 U.S. at 554 (italics added).

It is significant to note that at the time *Mancari* was decided, the Court was well aware that the expanding Federal relationship with the tribes—through implementation of statutes, regulations, entitlements, and grants—already involved multiple executive agencies as well as multiple offices and Divisions within the Department of the Interior. Nevertheless, the Court expressly avoided any expansive reading of the preference. In our opinion, the Court avoided such an application because the very breadth of the Government's dealings with Indians requires limitation of the preference to that one entity whose activities are most intimately and pervasively directed towards them. If the preference is extended beyond this unique context, it loses its character as "reasonably and directly related to a legitimate, nonracially based goal" *Mancari*, 417 U.S. at 554. As *Mancari* implicitly suggests, the most logical boundary for the preference's application is the BIA itself because, the more the preference ranges from the BIA, the more it verges on invidious racial discrimination violative of the Constitution's Equal Protection Clause and Federal civil rights statutes.

4. With a High Degree of Consistency, Interior Has Applied the Preference Only Within the Bureau of Indian Affairs.

Although there have been slight differences in the scope the Department has accorded to the preference, the weight of the

Department's practice has been to apply preference only within the BIA. Between 1934 and 1954, there was no application of the preference outside the BIA. In 1954, the Civil Service Commission authorized—but did not require—the Department to apply the excepted service appointment authority to BIA units transferred to another bureau under circumstances in which the unit retained its identity as providing services to Indians. This authorization was not, however, a grant of authority to the Department to apply the Indian preference beyond the scope statutorily authorized by the IRA.

Interestingly, in a subsequent letter of May 14, 1973, the Civil Service Commission cautioned the Department about what appeared to be its tendency to apply the excepted appointment authority too broadly. In that letter to Interior's Director of Personnel, the Commission's Executive Director reminded Interior that it had applied the preference solely to the BIA from 1934 to 1954. Moreover, the Commission emphasized that its 1954 authorization permitted Interior to use the excepted appointment authority outside the BIA "solely to permit its use in those instances in which a BIA function was transferred intact to another bureau and retained its identity there with the Indian preference laws still applicable. No other use of this authority was intended or authorized." The Commission further emphasized that the authority to make the excepted appointments outside the BIA extended to units transferred intact from the BIA only if "the functions retain their identity in the new bureau" and "the Department determines that the Indian preference statutes must still be applied."

In response, Interior's Chief, Division of Program Operations, advised Departmental personnel officers by circular of August 17, 1973 (attached) that "[b]ureaus outside of BIA are permitted to use this authority only in those instances in which a BIA function was transferred intact to another bureau and retained its identity there, with the Indian preference laws still applicable. No other use of this authority was intended or authorized by the Commission.¹

5. The 1979 Civil Service Retirement Law Amendments Did Not Broaden Indian Preference Beyond the 1934 Act.

After the 1974 Supreme Court decision upholding Indian preference within the BIA, it became evident to Congress that non-Indians in BIA could exact limited career advancement. In order to soften the adverse impact of that decision on non-Indians, Congress provided enhanced retirement benefits to these employees in 1979. 5 U.S.C. § 8336, *et seq.* Moreover, forsaking an opportunity to amend or expand the statutory definition of the 1934 IRA beyond the "Indian Office," (25 U.S.C. § 472), Congress instead re-anchored the 1979 retirement benefits to

¹ On Jan. 2, 1977, the Commission dissolved its requirement that Interior obtain prior Commission approval before using the excepted appointment authority outside the BIA, thereby acknowledging complete administrative discretion to determine the preference's application in the Department.

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the 1934 Act. In section 8336(j)(4)(B), Congress once again defined the preference as "section 12 of the Act of June 18, 1934 * * *." Similarly, in section 8336(j)(4)(A), Congress crafted a conjunctive definition of the benefits scope which simply led-back-into the 1934 Act in an almost circular fashion. The benefits would be available only to "other organizational units in the Department of the Interior directly and primarily related to providing services to Indians *and* in which positions are filled in accordance with the Indian preference laws" [i.e., 1934 IRA].² 5 U.S.C. § 8336(j)(4)(A) (italics added).

In identifying which employees would be entitled to these enhanced retirement benefits, Congress concluded that—other than the BIA as then constituted—only the Ft. Simcoe Job Corps Conservation Center or "other units which might [thereafter] be transferred to the Office of the Assistant Secretary" would be entitled to benefits. (H.R. Rep. 360, 96th Cong., 1st Sess. 11, *reprinted in* 1979 U.S. Code Cong. & Admin. News 2068, 2075–76). Since no other units were thereafter transferred to that Office, only BIA and Ft. Simcoe employees ultimately obtained the benefits.

In sum, the legislative history of the 1979 Act reveals that, as of 1979, the Department had never applied Indian preference to units that had never been a part of the BIA. Moreover, only one unit, the Ft. Simcoe Job Corps Conservation Center, qualified as an intact former BIA transfer unit to which preference continued to apply, despite the fact that in 1979 numerous non-BIA positions in the Interior Department (as well as positions in several other executive agencies) were currently "providing services to Indians."

B. Responses to Specific Questions.

1. Assistant Secretary--Indian Affairs.

The Secretary of the Interior established the position of Assistant Secretary--Indian Affairs by Secretarial Order 3010 of September 26, 1977, in order to elevate the importance of Indian issues within the organizational structure of the Department. Between 1884 and 1977, the highest ranking official with direct supervisory authority over the BIA was the Commissioner of Indian Affairs who reported to an

² As discussed more fully at pp. 11-12, *infra*, it is not a proper application of this statute to infer that Congress intended in 1979 to expand Indian preference beyond the BIA or the 1934 IRA by formulating a new and broader statutory test based solely on whether a position was "directly and primarily related to providing services to Indians" under § 8336(j)(4)(A), without regard to whether the position was also located organizationally within the "Indian Office" as required by 25 U.S.C. § 472.

The tendency to apply only this fragment of statutory text to Indian preference questions has led to some distortion regarding preference application outside the BIA. (See e.g., the Dec. 4, 1985, opinion of the Acting Associate Solicitor, Division of General Law, to the Director of Personnel regarding retirement eligibility under 5 U.S.C. § 8336(j) and the May 6, 1986, opinion of the Acting Associate Solicitor, Division of General Law, to the Director, Office of Information Resources Management, regarding the impact of Indian preference and the Buy Indian Act on consolidated administrative services). Furthermore, the 1979 statute's predominant purpose was to cushion the blow to non-Indians displaced by the preference, and not to define the scope of the preference. It would be completely unwarranted to work backward from this purpose to infer that the 1979 statute broadened the scope of Indian preference.

Assistant Secretary. This was the situation in 1934, and the Congress that enacted the IRA left it unchanged. The 1977 secretarial order established the position of Assistant Secretary within the Secretariat of the Department. The Assistant Secretary reports directly to the Secretary of the Interior, is appointed by the President, and is subject to Senate confirmation as an Officer of the United States. (U.S. Const. Article II, Sec. 2, cl. 2).

Since 1977, four individuals have been appointed to the position and each of them has been an Indian. This fact has been the result of Presidential choice rather than the result of a legal requirement. The Indian preference statute, 25 U.S.C. § 472, authorizes the appointment of Indians "without regard to civil service laws." In our view, this language excludes positions outside the career civil service from the coverage of the preference.

Significantly, Congress has not specifically established the position of Assistant Secretary-Indian Affairs and it has not statutorily restrained the President from selecting the appointee of his choice to serve in the position. The statute under which the Secretary established the Assistant Secretary-Indian Affairs position in 1977, 43 U.S.C. § 1453, provides only for the appointment of "two Assistant Secretaries." It establishes neither specific duties for the positions nor a preference requirement. In fact, the Senate resolution granting advice and consent to the appointment of the current Assistant Secretary-Indian Affairs provided only that the individual was "to be an Assistant Secretary of the Interior." Moreover, Congress has not provided specific duties for any of the Assistant Secretaries within the Department with the exception of the position of the Assistant Secretary for Fish and Wildlife mandated in 16 U.S.C. § 742b(a). In contrast with 16 U.S.C. § 742b(a), 43 U.S.C. § 1453a, provides for "an additional Assistant Secretary" as does section 3 of Reorganization Plan No. 3 of 1950, 5 U.S.C. App. and section 2 of Reorganization Plan No. 2 of 1966, 5 U.S.C. App.

Because Congress has not statutorily required the President to appoint an Indian to the position of Assistant Secretary-Indian Affairs, it is unnecessary to consider the possible Appointments Clause and separation of powers issues that might be implicated by a statutory restriction on the President's authority to appoint an Officer of the United States. See *Bowsher v. Synar*, 106 S. Ct. 3181 (1986); *Myers v. United States*, 272 U.S. 52, 118 (1926).

Finally, in the absence of statutory restrictions for Assistant Secretarial positions, the Secretary has the authority to assign, alter, or modify duties among the Assistant Secretaries. Because the duties of the Assistant Secretarial positions may be changed, there is no greater statutory basis for applying the preference to the position of Assistant Secretary-Indian Affairs than exists for the other Assistant Secretary positions within the Department. In an earlier opinion, this Office

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concluded that when, through a reorganization, an Assistant Secretary assumes supervision of bureaus formerly under another Assistant Secretary, there is no need to resubmit the incumbent to the Senate for reconfirmation. This conclusion is buttressed by the Secretary's broad authority under section 2 of Reorganization Plan No. 3 of 1950, 5 U.S.C. App., which authorizes the Secretary to "make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Interior * * *."

2. *Office of the Assistant Secretary-Indian Affairs.*

Although it is a close question whether the preference applies, because the Office of the Assistant Secretary functions on a Departmental level hierarchically above the BIA, the preference Congress established for the BIA in 1934 cannot, without further congressional action, be extended to career appointments in that office. As a factual matter, the Office of the Assistant Secretary was organized as a new unit without transferring to it any functions that had previously been performed by the BIA (see p. 7, *supra*). Thus, we have concluded that the preference does not apply. When it enacted the preference in 1934, Congress knew that the organizational scope of the Indian Office extended only up to the level of the Commissioner. There was no Assistant Secretarial level office directly responsible for the supervision of the BIA until 1977. Congress has never mandated the creation of this Office, rather it has been created in the discretion of the Secretary.

3. *Office of the Solicitor.*

By Act of June 26, 1946, 43 Stat. 1455, Congress provided that "the legal work of the Department of the Interior shall be performed under the supervision and direction of the Solicitor of the Department of the Interior." Because the Office of the Solicitor is responsible for providing Department-wide legal advice to the Secretary of the Interior and the agencies under his supervision, the Office does not stand in an unique political relationship to the Indian tribes discussed in *Mancari*, and is not subject to Indian preference.

The Division of Indian Affairs (DIA) is a component of the Washington, D.C., Office of the Solicitor. It is under the supervision of an Associate Solicitor reporting directly to the Solicitor. The Department has not applied the preference within the DIA; and we conclude that this longstanding practice reflects a correct understanding of the scope of the preference statute.

The Division of Indian Affairs, or its predecessor, was formed in 1954 when some attorneys then within the organizational structure of the BIA became part of an already functional Indian section in the Office of the Solicitor. This consolidation was part of a Department-wide

reorganization under which attorneys stationed in various agencies within the Department were merged into a single office under the exclusive and unitary supervision of the Solicitor.

This reorganization completed a process under which attorneys were shifted away from assignments to individual bureaus and were centralized, under the supervision and direction of the Solicitor, to provide advice to the Secretary and the Department. Within the context of the attorney-client relationship, the Division of Indian Affairs assists the Solicitor in advising the Secretary and Departmental agencies on legal questions involving Indians in which the Department has an interest. This is the same type of responsibility fulfilled by the other components of the Office of the Solicitor with respect to the issues on which they give counsel.

There is no statute that requires the Department to have a Division of Indian Affairs or any other particular division within the Office of the Solicitor. The organization of the office is a matter within the discretion of the Solicitor under the supervision of the Secretary. With limited exceptions, attorneys within the Office of the Solicitor are appointed to generally described positions; and they may be reassigned, in accordance with applicable law, across divisional or regional lines. They are expected to function from the perspective of attorneys for the Secretary and the Department rather than from the parochial view of an individual bureau. The flexibility of the organizational structure of the Office of the Solicitor which allows for the assignment and reassignment of attorneys on an office-wide basis is inconsistent with the application of Indian preference within the Office. Consequently, the preference would not apply to the DIA any more than it would apply to any other component to the Office of the Solicitor.

4. Office of Construction Management.

We have concluded that Indian preference does not apply to the Office of Construction Management (OCM). The OCM was created in 1978, in part in response to congressional concern regarding perceived cost overruns, construction failures, and poor maintenance of Indian school facilities constructed and maintained by the BIA. The OCM is located in the Office of Policy, Budget and Administration (PBA) with the Director of OCM reporting to the Assistant Secretary, PBA.

This organizational autonomy from the BIA was both intentional and specifically calculated to satisfy congressional concerns regarding BIA management of these facilities. In fact, despite the existence of a facilities management program within the BIA, Congress explicitly directed "the Secretary [of the Interior] to engage the General Services Administration to supervise the planning, design, construction and maintenance of school facilities." P.L. 95-74 of July 26, 1977, 91 Stat. 285, 293. *cf.* House Cong. Report 77636, July 12, 1977. Consequently, not only has OCM never been an organizational unit maintained within the BIA, but its genesis derives from a GSA executive agency

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Management Team created outside the Interior Department. In fact, GSA's Management Team issued a report to the Secretary of the Interior on November 1, 1977, concerning GSA's evaluation of the facilities which served as a partial blueprint for OCM's creation. (See "General Services Administration Management Study Report of Bureau of Indian Affairs School Facilities Construction and Management Program").

After receipt of the GSA report providing recommendations for management improvements, the Department continued to rely on GSA to provide leadership in the development and implementation of the Department's plan to adopt the recommended improvements. In May 1978, a master plan to overhaul the BIA's facilities programs was presented to Congress, as required by P.L. 95-74, 91 Stat. 293, and in July 1978, the office was launched under the supervision of the Assistant Secretary. This office ultimately became the OCM. The "departmentwide" character of the OCM was highlighted by P.L. 96-126 of November 27, 1979, which under the heading "Office of the Secretary" appropriated funds "for certain operations that provide departmentwide services, including . . . an Office of Construction Management." 93 Stat. 954, 966.

In addition to the organizational autonomy OCM has always enjoyed as independent of the BIA, we have also concluded that the Departmentwide scope of OCM's organizational mandate makes the IRA inapposite. Despite the OCM tendency to focus on BIA facilities programs, OCM has always been charged with improving any of "the Department's facilities management program[s] which concerns the construction operation and maintenance of buildings intended for human use in carrying out Department programs * * *." 110 DM 16.1 (3/22/82). Unlike the BIA, OCM's role is not one of unique and unitary mission to govern the Indian Tribes. Instead, as recent Departmental Manual revisions have emphasized, OCM serves a Departmentwide function of "oversight" for all Interior Bureaus. These oversight functions extend to each Interior organization devoted to the construction and maintenance of facilities. (See Proposed 110 DM 16.1 (March 21, 1988).

C. Previous Opinions.

The Department has been sparing in its application of Indian preference outside the BIA, largely limiting its application to the Ft. Simcoe Job Conservation Corps prior to 1979. Departmental reorganizations involving the BIA have been infrequent and, when they have occurred, the affected units have not retained their identity as involving a unique and unitary mission towards the Indians which *Mancari* discussed. 417 U.S. at 554. In contrast to the Department's generally consistent application limiting the preference to the BIA, however, certain legal opinions have been issued theorizing that an

expansive application of the preference beyond the BIA might be proper. These opinions include a 1977 Comptroller General Opinion and a 1979 opinion by former Solicitor Krulitz which rejects the Comptroller General's reasoning but expands the claimed reach of the preference. In our view, the rationale applied in both opinions is problematic. To the extent that the Solicitor previously hypothesized that Indian preference could apply outside the BIA, we have concluded that his opinion is inconsistent with the relevant statutory texts and with the Supreme Court's analysis.

1. The Comptroller General's 1977 Opinion Incorrectly Applied Mancari.

On September 10, 1977, the Comptroller General issued an opinion on the scope of Indian preference. The Comptroller General concluded that "the broader construction of Indian preference as applicable to all positions within the Department of the Interior 'directly and primarily related to the providing of services to Indians' adopted by the Civil Service Commission more fully gives effect to the purpose of the Indian preference than does a construction which would limit its application to positions within the Bureau of Indian Affairs." (Op. Comp. Gen at 10).

At the time of the Comptroller General's opinion, however, the Department of the Interior and the Civil Service Commission had said only that Indian preference could as a matter of discretion be applied outside the BIA in those instances in which a BIA unit moved intact, retaining its identity, to another location and in which the Department determined that the Indian preference statutes must still be applied. In actual practice the only unit outside BIA to which preference had been applied by the Department was the Ft. Simcoe Jobs Corps Conservation Center in the State of Washington. (See discussion *supra* at p. 7). Civil Service regulations in effect at the time of the Comptroller General's 1977 opinion were consistent with the application of Indian preference to the Ft. Simcoe unit. Consequently, the Comptroller General's rationale for concluding that the preference extended beyond the BIA was based upon an incorrect understanding of how Indian preference had been applied by the Commission and by the Department.

Recognizing that the legislative history of the 1934 Act as well as *Mancari's* reasoning supported applying section 12 only to the Bureau of Indian Affairs, (Op. at 5-7), the Comptroller General sought to justify his approach by contending that the *policy* underlying section 12 would be better served by a broader application (Op. at 10). The Comptroller General argued that in *Mancari*, the Supreme Court implicitly recognized two situations in which preference applied outside the BIA, even though the Supreme Court expressly limited application of the preference to within the "Indian Service." In so contending, he relied on a footnote, 417 U.S. at 538, n1., in which the Court said that the

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preference "presumably" still applied to the Indian Health Service (IHS).

As the Comptroller General recognized, however, the continued application of Indian preference to the IHS after 1954 was predicated upon an interpretation of the 1954 Act, which provided that the "responsibilities" of the Interior were transferred to the then Department of Health, Education and Welfare. 42 U.S.C. § 2001. Furthermore, in 1977 a Federal district court had ruled in *Tyndall v. United States*, No. 77-0004 (D.D.C., April 22, 1977), that the preference continued to apply to the IHS. The question was definitively resolved when Congress confirmed in 5 U.S.C. § 8336 that Indian preference applied to the IHS (see discussion *supra* at pp. 6-7). Thus, the Comptroller General ignored the distinguishing statutory authority applicable to IHS and was merely speculating that continued application of the preference to the IHS also meant that section 12 applied of its own force in the Interior Department beyond the BIA.

The only other argument the Comptroller General offered (Op. at 10) was predicated on another footnote in *Mancari*, 417 U.S. at 549, n.23, which quoted without comment the Civil Service regulation then in effect for Indian preference within Interior. The Court did not interpret the meaning of the Civil Service regulation, but did limit the scope of the preference to the Indian Service. We have, therefore, concluded that the Comptroller General's opinion that the extension of Indian preference beyond the BIA "has been implicitly sanctioned by the Supreme Court" (Op. at 11) lacks foundation. The proper analysis of the scope of the preference is set forth at pp. 1-6 *supra* of this opinion.

2. *Solicitor Leo Krulitz's Opinion.*

Solicitor Leo Krulitz's opinion of June 13, 1979, addressed two questions. The Krulitz opinion first addressed the applicability of Indian preference beyond the BIA and concluded broadly that it applied to positions outside the BIA "in the administration of functions or services affecting any Indian tribe." The second question it addressed was whether Indian preference applied to both political and career employees in the Office of the Assistant Secretary-Indian Affairs. Solicitor Krulitz concluded that it did. We have discussed our reasons for concluding that Indian preference does not apply to the position of Assistant Secretary or to the Office of the Assistant Secretary at pp. 7-9 *supra* of this opinion. Solicitor Krulitz' opinion to the contrary on this question (Op. at 6-9), is overruled. We now turn to the first question addressed in the Krulitz opinion.

Solicitor Krulitz reviewed the Comptroller General's opinion of September 21, 1977, and concluded it made a "compelling case" (Op. at 2) for its conclusion that Indian preference properly could be applied

outside the BIA. Solicitor Krulitz stopped short, however, of concluding that the Department was required to apply the preference beyond the Bureau. Somewhat obscurely, he said only that this application of the preference was "legally justifiable;" (Op at 2) Solicitor Krulitz also recognized that it was "questionable" (Op. at 4, n.7) whether *Mancari* supported the Comptroller General's reading of the scope of the preference. As we have discussed, the Comptroller General's conclusion was based almost entirely on his reading of *Mancari*. Solicitor Krulitz was unaware that "[t]he interpretation of *Mancari* as implicitly sanctioning the broad interpretation of section 12 is too liberal" (Op. at 4 n.7); but he claimed that the Comptroller General's analysis was not a critical factor in his own approach. *Id.*

Instead of relying upon the Comptroller General's analysis, Solicitor Krulitz argued in a single paragraph of his opinion that a broad scope for the preference was justifiable because "[t]he relationship between the federal government and the Indian tribes addressed in the Indian Reorganization Act is an ongoing relationship, to which current policies and legislation may be applied in its interpretation." (Op. at 4, footnote omitted). Solicitor Krulitz also concluded that under this standard, the preference was broader in scope than was the case under the interpretation of the Comptroller General. The Comptroller General had concluded that the preference applied to all positions within the Department of the Interior "directly and primarily related to the providing of services to Indians." Solicitor Krulitz went even further and determined that the preference could apply to any Departmental position which was "in the administration of functions of services affecting any Indian tribe," (Op. at 2).

Indian preference of the scope set forth in the Krulitz opinion has never been implemented in this Department either before or since. Solicitor Krulitz' approach is inconsistent with the plain wording and intent of the IRA and with all relevant statutory texts. Indeed if one were to apply its logic, the Krulitz opinion stops barely short of potentially subjecting every position in the Department to Indian preference. Moreover, the Krulitz opinion gives no consideration to the serious constitutional problems that would be implicated by the application of a preference of even a more modest scope than the preference his opinion endorses. Finally, to the extent that previous Solicitor's Office memoranda (*see* n.2, *supra*, at p. 7) may count in reasoning or conclusions which are inconsistent with this opinion, they are disapproved.

For the reasons discussed in this opinion, we conclude that Indian preference applies only within the Bureau of Indian Affairs.

RALPH W. TARR
Solicitor

15] SUSPENSIONS OF OPERATIONS & PRODUCTION FOR COAL LEASES UNDER SEC. 15
39 OF THE MLA

July 14, 1988

**SUSPENSIONS OF OPERATIONS & PRODUCTION FOR COAL
LEASES UNDER SECTION 39 OF THE MINERAL LEASING
ACT***

M-36958

July 14, 1988

**Coal Leases and Permits: Suspension of Operations and Production--
Oil and Gas Leases: Suspensions**

When the Secretary directs or consents to a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209, the lessee is denied all beneficial use of the lease, including production. "Beneficial use" refers to all operations under the lease except for those necessary to maintain or preserve the well or mine workings, to conduct reclamation work or to protect the leased lands, natural resources, or public health and safety.

**Coal Leases and Permits: Suspension of Operations and Production--
Oil and Gas Leases: Suspensions**

Congress provided two forms of relief when the Secretary directs or assents to a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209 - extension of the "term" by the period of suspension and elimination of annual rent during the suspension.

**Coal Leases and Permits: Suspension of Operations and Production--
Mineral Leasing Act: Generally--Oil and Gas Leases: Suspensions--
Words and Phrases**

"Term." The term of a lease issued pursuant to the Mineral Leasing Act, when used without limitation as in sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209, includes all periods of time between the effective date and the expiration date and means the entire estate demised by the lease.

**Coal Leases and Permits: Suspension of Operations and Production--
Oil and Gas Leases: Suspensions**

A suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209, is clearly a relief provision and must be liberally construed. By extending the term of the lease by the period of the suspension, Congress intended that the lessee should have exactly the same contract with exactly the same term but with a later maturity date.

**Coal Leases and Permits: Diligence--Coal Leases and Permits:
Suspension of Operations and Production**

The requirement in sec. 7(a) of the Mineral Leasing Act, 30 U.S.C. § 207(a), that a coal lease must be producing coal in commercial quantities by the end of the tenth lease year or else the lease will terminate as part of the "term" of the coal lease that is extended by the period of a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209.

Statutory Construction: Generally

Provisions in an unamended section of a statute which were applicable to a second section of the statute prior to its amendment are applicable to the second section after its amendment in so far as they are consistent. If the consistency is not entirely clear from a plain reading of the amended statute, the legislative history of the amendment

* Not in chronological order.

must be examined to determine if Congress intended to alter the applicability of the unamended section.

Coal Leases and Permits: Diligence--Coal Leases and Permits: Suspension of Operations and Production

Nothing in the legislative history of the Federal Coal Leasing Amendments Act of 1976 suggests that Congress intended to preclude the extension of the 10-year production period added to sec. 7(a) of the Mineral Leasing Act, 30 U.S.C. § 207(a), by the period of a suspension of operations and production in the interest of conservation under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209.

Coal Leases and Permits: Diligence--Coal Leases and Permits: Suspension of Operations and Production--Regulations: Interpretation

The preamble to the 1982 coal lease operations regulations contains no explanation why the Department reached a conclusion concerning the effect of a suspension of operations and production under sec. 39 of the Mineral Leasing Act, 30 U.S.C. § 209, on the 10-year production period in sec. 7(a) of the Act, 30 U.S.C. § 207(a), which is the opposite of the conclusion expressed both in the preamble to the 1979 coal management regulations and the 1981 proposed coal lease operations regulations. An amendment to 43 CFR 3483.3(b)(1) (1987), to restore the original 1979 interpretation is fully supported by the law.

Coal Leases and Permits: Diligence--Coal Leases and Permits: Suspension of Operations and Production

As the Interior Board of Land Appeals held in *Mountain States Resources Corp.*, 92 IBLA 184, 93 I.D. 239 (1986), market conditions neither form the basis for suspension of a coal lease nor will they prevent a lease from termination under sec. 7(a) of the Mineral Leasing Act, 30 U.S.C. § 207(a), for failure to produce coal in commercial quantities.

Regulations: Force and Effect as Law

A duly promulgated regulation has the force and effect of law and is binding on all Department offices, including the Interior Board of Land Appeals.

Memorandum (M-36958)

To: Assistant Secretary, Land and Minerals Management

From: Solicitor

**Subject: Suspensions of Operations and Production for Coal Leases
Under Section 39 of the Mineral Leasing Act of 1920**

The Assistant Secretary, Land and Minerals Management, has requested our advice as to whether the Bureau of Land Management (BLM) may change its regulation to provide that a suspension of operations and production "in the interest of conservation" on a coal lease under section 39 of the Mineral Leasing Act (MLA), 30 U.S.C. § 209 (1982), also extends the 10-year production period set forth in section 7(a) of the MLA, 30 U.S.C. § 207(a) (1982). The BLM currently provides by regulation that a section 39 suspension does not affect this 10-year production period, 43 CFR 3483.3(b)(1) (1987).¹ Prior to the

¹ The Assistant Secretary requested in this opinion in response to a petition for rulemaking filed pursuant to 43 CFR Part 14. The petition requested that this rule be amended to recognize that a sec. 39 suspension extends the

Continued

SUSPENSIONS OF OPERATIONS & PRODUCTION FOR COAL LEASES UNDER SEC. 17

39 OF THE MLA

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adoption of this rule in 1982, the BLM had issued as part of the 1979 coal program a regulation implementing section 39 which, the preamble explained, would suspend the 10-year production period. 43 CFR 3473.4 (1979), 44 FR 42584, 42606-07 (July 19, 1979). The reason for the change in interpretation in 1982 has never been explained.

We conclude that a change by BLM in its regulations to again provide for an extension of the 10-year period within which a lessee must produce coal in commercial quantities under section 7(a) of the MLA by the period of a suspension of operations and production under section 39 of the MLA is fully supported by law. Our conclusion regarding the interpretation of the effect of a section 39 suspension on the 10-year production period does not conflict with the holding in a decision by the Interior Board of Land Appeals in *Mountain States Resources Corp.*, 92 IBLA 184, 93 I.D. 239 (1986), that a lessee may not obtain a suspension of the 10-year production period because of market conditions.

I. STATUTORY AND REGULATORY PROVISIONS

A.

Only two sections of the MLA are construed in this opinion: section 39, 30 U.S.C. § 209 (1982), and section 7, 30 U.S.C. § 207 (1982). These sections are set out below with their enactment history.

Section 39 authorizes various forms of relief for lessees from lease obligations. The relief provision under review in this opinion states:²

In the event the Secretary of the Interior, in the interest of conservation, shall direct or shall assent to the suspension of operations and production under any lease granted under the terms of this Act, any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto.

30 U.S.C. § 209 (1982).

Section 39, which was added to the MLA by the Act of February 9, 1933, 47 Stat. 789, originally authorized suspensions of coal and oil and gas leases but not of other mineral leases issued pursuant to the MLA. The background of the 1933 amendment is explained in Solicitor's

10-year production period. The petitioner is the only coal lessee to have received approval of a request for a suspension of operations and production for leases which are subject to the Federal Coal Leasing Amendments Act of 1976. Two other lessees received sec. 39 suspensions when the U.S. District Court for the District of Montana reconsidered its order to cancel coal leases in *Northern Cheyenne Tribe v. Hodel*, Civil No. 82-116 (D. Mont. October 7, 1986) *appeal pending*. The 10-year production period issue did not arise for the latter two leases because the court directed the Secretary not only to suspend the leases under sec. 39, but also to relieve the lessee of *all* lease obligations.

² References in this opinion to "section 39 suspensions" are to this quoted sentence. Where other provisions of sec. 39 are discussed, they will be clearly identified.

Opinion M-36953, 92 I.D. 293, 296 (1985).³ Section 39 suspensions may be granted or directed only "in the interest of conservation." The Department, with judicial approval, has construed the term "conservation" to include not only maximizing recovery and avoiding or minimizing waste or loss of the leased mineral resource but also avoiding or minimizing damage to other natural resources, such as wildlife, water quality, air quality, and other minerals. *Copper Valley Machine Works, Inc. v. Andrus*, 653 F.2d 595, 600 (D.C. Cir. 1981).

Section 7 of the MLA has always provided various conditions which must be included in all coal leases. Congress revised this section and divided it into three paragraphs in the Federal Coal Leasing Amendments Act of 1976 (FCLAA).

Section 7(a), 30 U.S.C. § 207(a) (1982), states in part:⁴

Any lease which is not producing coal in commercial quantities at the end of ten years shall be terminated.

This was the principal coal lease diligence provision added to the MLA by Congress in FCLAA. H.R. Rep. No. 681, 94th Cong., 1st Sess. 15 (1975), reprinted in U.S. Code Cong. & Admin. News 1943, 1950-51.

Section 7(b), 30 U.S.C. § 207(b) (1982), repeats the requirement from the original section 7 that each lease "shall be subject to the conditions of diligent development and continued operation of the mine or mines."⁵ However, neither in section 7 of the original MLA nor in section 7 as amended by FCLAA did Congress define the lease condition of "diligent development." Since 1976, the Department has defined this condition of "diligent development" as producing coal in commercial quantities within the 10-year production period required by section

³ The suspension provision of sec. 39 was later amended by the Act of Aug. 8, 1946, 60 Stat. 950, to add the words "or minimum royalty" and to extend the suspension authority to all leases issued "under the terms of the Act." These amendments have no effect on our analysis.

⁴ Sec. 7(a) states in the entirety:

A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12-1/2 per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended. [Italics added.]

⁵ Sec. 7(b) states in full:

Each lease shall be subject to the conditions of diligent development and continued operation of the mine or mines, except where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee. The Secretary of the Interior, upon determining that the public interest will be served thereby, may suspend the condition of continued operation upon the payment of advance royalties. Such advance royalties shall be no less than the production royalty which would otherwise be paid and shall be computed on a fixed reserve to production ratio (determined by the Secretary). The aggregate number of years during the period of any lease for which advance royalties may be accepted in lieu of the condition of continued operation shall not exceed ten. The amount of any production royalty paid for any year shall be reduced (but not below 0) by the amount of any advance royalties paid under such lease to the extent that such advance royalties have not been used to reduce production royalties for a prior year. No advance royalty paid during the initial twenty-year term of a lease shall be used to reduce a production royalty after the twentieth year of a lease. The Secretary may, upon six months' notification to the lessee cease to accept advance royalties in lieu of the requirement of continued operation. Nothing in this subsection shall be construed to affect the requirement contained in the second sentence of subsection (a) of this section relating to commencement of production at the end of ten years.

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7(a). 43 CFR 3480.0-5(b)(12) (definition of "diligent development") and (13) (definition of "diligent development period.").⁶

Section 7(c), 30 U.S.C. § 207(c) (1982), sets out the requirement for approval of lease operations by the Secretary. This paragraph is not relevant to the issues discussed in this opinion.

B.

The regulatory provision governing section 39 suspensions which is the subject of this inquiry is set out in 43 CFR 3483.3(b) (1987). The relevant portions of this regulation are subparagraphs (1) and (3) of 43 CFR 3483.3(b) as follows:⁷

(1) . . . Any such suspension [of operations and production in the interest of conservation] of a Federal coal lease or LMU approved by the authorized officer also suspends all other terms and conditions of the Federal coal lease or LMU, except the diligent development period, for the entire period of such a suspension

(3) The term of any Federal lease shall be extended by adding to it any period of suspension in accordance with paragraph (b) of this section, [sic] of operations and production.

These rules were issued as part of the 1982 revision of the coal lease operations regulations. 47 FR 33154 (July 30, 1982).

II. EXTENSION OF THE 10-YEAR PRODUCTION PERIOD

When the Secretary approves or directs, "in the interest of conservation," the suspension of operations and production under a lease pursuant to section 39, "the term of such lease" is extended by the period of the suspension. 30 U.S.C. § 209. The answer to the Assistant Secretary's question requires a two-part inquiry. First, we

⁶ The Department defined the condition of diligent development of sec. 7(b) as meeting the 10-year production requirement of sec. 7(a) when it issued the first regulations to implement FCLAA. 41 FR 56643 (Dec. 29, 1976). This definition was continued in the coal management regulations adopted in 1979 and moved to the coal lease operations regulations in 1982. See discussion of these regulations in Part III, *infra*.

⁷ The full text of 43 CFR 3483.3(b) (1987) states:

(b) In the interest of conservation, the authorized officer is authorized to act on applications for suspension of operations and production filed pursuant to paragraph (b) of this section, direct suspension of operations and production, and terminate such suspensions which have been or may be granted. Applications by an operator/lessee for relief from any operations and production requirements of a Federal lease shall contain justification for the suspension and shall be filed in triplicate in the office of the authorized officer.

(1) A suspension in accordance with paragraph (b) of this section shall take effect as of the time specified by the authorized officer. Any such suspension of a Federal coal lease or LMU approved by the authorized officer also suspends all other terms and conditions of the Federal coal lease or LMU, except the diligent development period, for the entire period of such a suspension. Rental and royalty payments will be suspended during the period of such suspension of all operations and production, beginning with the first day of the Federal lease month on which the suspension of operations and production becomes effective. Rental and royalty payments shall resume on the first day of the Federal lease month in which operations or production is resumed. Where rentals are creditable against royalties and have been paid in advance, proper credit shall be allowed on the next rental or royalty on producing Federal leases due under the Federal lease.

(2) The minimum annual production requirements shall be proportionately reduced for that portion of a Federal lease year for which suspension of operations and production is directed or granted by the authorized officer, in the interest of conservation of recoverable coal reserves and other resources, in accordance with paragraph (b) of this section.

(3) The term of any Federal lease shall be extended by adding to it any period of suspension in accordance with paragraph (b) of this section, of operations and production.

(4) A suspension in accordance with paragraph (b) of this section does not suspend the permit and the operator/lessee's reclamation obligation under the permit.

will consider whether the 10-year production period of section 7(a) is within the meaning of the "term of such lease" which Congress intended to be extended when it enacted section 39. Our consideration includes a review of the legislative history of section 39. We conclude that the 10-year production period is properly construed to be within the scope of the "term" which is extended. Then, we will examine the legislative history of FCLAA to determine if Congress expressed any intention to exclude the 10-year production period from the scope of a section 39 suspension. We conclude that nothing in FCLAA or its legislative history negates our first conclusion.

A.

Congress enacted section 39 of the Act in 1933 to provide lessees with relief when the Secretary either directed or assented to a suspension of operations and production in the interest of conservation. S. Rep. No. 812, 72d Cong., 1st Sess. (1932); H.R. Rep. No. 1737, 72d Cong., 1st Sess. (1932).⁸ A suspension under section 39 denies the lessee all beneficial use of the lease, including production.⁹ Solicitor's Opinion M-36953, 92 I.D. 293, 296-99 (1985); see *Koch Exploration Co.*, 100 IBLA 352, 363 (1988). Congress provided two specific forms of relief from this denial of beneficial use. First, Congress extended the "term" of the lease by the period of suspension. Second, Congress relieved the lessee of the obligation to pay rent during the suspension. By directing or approving a suspension during the first 10 years of a coal lease, the Secretary prevents the lessee from "producing coal" during this period which would also prevent the lessee from "producing coal in commercial quantities" as required by section 7(a). The question is whether section 39 also relieves the lessee of the consequence of its inability to be producing coal in commercial quantities at the end of 10 years by extending this deadline by the period of the suspension.

The original section 39 applied only to oil and gas and coal leases. At that time (1933), oil and gas leases were issued for a 20-year term with a "preferential right in the lessee to renew" for 10-year periods, 30 U.S.C. § 226 (1935), and coal leases were issued for "indeterminate periods" subject to readjustment every 20 years, 30 U.S.C. § 207 (1970). See generally, Solicitor's Opinion M-36939, 88 I.D. 1003, 1004-05 (1981). Thus, the Committee reports note that the lease extension relief "has no applicability to coal-land leases which are granted for an indeterminate time" and the discussion of lease extensions focuses on oil and gas leases. S. Rep. No. 812, *supra* at 3; H.R. Rep. No. 1737,

⁸ At several points in the legislative history of sec. 39, Congress refers to the Department's prohibition on production. These references stem from various directives by the Secretary during the 1920's which suspended oil production from Federal leases. However, neither the bill nor the Committee Reports differentiate in any way between suspensions directed by the Secretary and those requested by a lessee.

⁹ "Beneficial use" refers to all operations and production conducted on the leased lands under the authority of the lease as part of the right and obligation granted to the lessee to find and develop the mineral deposit. The only exception would be for those operations which are necessary to maintain or preserve the mine workings, to conduct reclamation work or to protect the leased lands, mineral and other natural resources, or public health and safety. See Solicitor's Opinion M-36953, 92 I.D. 293, 298 n.4 (1985).

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supra at 3. However, Congress eliminated the indeterminate coal lease term when it enacted FCLAA and tied the existence of a coal lease to production of coal in commercial quantities by establishing in the new section 7(a) a "term of twenty years and so long thereafter as coal is produced annually in commercial quantities."¹⁰ Congress refers to this as the "primary term of twenty years." As we have stated above, Congress also directed in section 7(a) that a coal lease be producing coal in commercial quantities by the end of the tenth year or else the lease will terminate.

As Congress does not define the phrase "lease term" anywhere in the MLA, we must examine how the Department has analyzed this phrase's meaning to determine whether the 10-year production period is within its scope. In 1950, Solicitor White considered whether a section 39 suspension extended a lease which was already extended past its primary term by an earlier suspension. Solicitor's Opinion M-36031, 60 I.D. 408 (1950). The Solicitor noted that the "'term' of a lease is the period which is scheduled to elapse between its effective date and its expiration date." *Id.* at 409. As section 39 contains no limitation on its use of the word "term," such as "original terms," the Solicitor concluded that "term of such lease" which is extended under section 39 includes all periods of time between the effective date and the expiration date. *Id.*

Solicitor Armstrong expanded on this analysis of lease "term" in a 1956 opinion construing the extension provision for oil and gas leases segregated upon partial commitment to a unit agreement under section 17 of the MLA.¹¹ Solicitor's Opinion M-36349, 63 I.D. 246 (1956). The Solicitor stated:

Ordinarily, the word "term" when used with reference to a lease means the entire estate demised by the lease. [Citations omitted.]

... By definition, therefore, the word "term" when used alone applies to the whole estate and not to the fixed period specified.

That Congress was cognizant of that meaning of the word and that it customarily used it in that sense when standing alone is evident from a consideration of its use of it in the Mineral Leasing Act, as amended.

Id. at 246-47. The Solicitor then cited Solicitor White's 1950 opinion concerning section 39, *supra*, as an example of how Congress uses "term" in its broadest sense. The breadth of Congress' intent is evident from an examination of the legislative history of section 39.

The Court of Appeals for the District of Columbia Circuit described the intent of Congress when it enacted section 39 in the following manner:

¹⁰ See footnote 4, *supra*, for the text of sec. 7(a).

¹¹ In 1956, sec. 17 of the MLA contained no subdivisions. In the Mineral Leasing Act Revision of 1960, Congress divided sec. 17 into paragraphs and placed unit provisions in paragraph (j). In the Federal Oil and Gas Leasing Reform Act of 1987, Congress relettered the paragraph as sec. 17(m), 30 U.S.C. § 226(m).

the [legislative] history is consistent with the statute's use of the word "suspension" in its unqualified sense: "The very purpose of the bill is to give some equitable consideration to the many leases where the Department of the Interior, by its order, has prohibited production of oil from the leases." 76 Cong. Rec. 705 (1932) (remarks of Representative Eaton). It was further explained: "It seems unfair for the Government to order lessees to refrain from production and then collect rent for the nonproduction period." *Id.* at 1881 (1933) (remarks of Representative Eaton). Precisely the same rationale underlay the decision to extend leases for the period of the suspension. H.R. Rep. No. 1737, 72d Cong., 1st Sess. 3 (1932).

Copper Valley Machine Works, Inc. v. Andrus, supra, 653 F.2d 595, 603 (D.C. Cir. 1981).¹²

The House Report to which the Court of Appeals referred, after describing the effect of a suspension as "leaving the lessee . . . with but a paper title," further states:

Where by reason of the positive directions of the Secretary of the Interior, or by mutual assent of the Secretary and of the lessee, production is prohibited from the leased area, the suspension period surely should not be counted as a part of the prescribed term. Hence, the provision that such suspension period shall be added to the life of the lease.

H.R. Rep. No. 1737, *supra* at 3; accord S. Rep. No. 812, 72d Cong., 1st Sess. 3 (1932) (reprinted in 653 F.2d at 603).

During the debate on the bill that became section 39, Representative Eaton, the sponsor of the bill, summarized the effect of the relief as follows:

When the time of the lease is extended into the future . . . , you just push the whole lease along, day for day and year for year, and you cover exactly the same contract during the exact term with a later maturity date.

75 Cong. Rec. 15364 (1932) (remarks of Rep. Eaton).

By enacting section 39 to avoid unfairness, Congress mandated an equitable extension of the whole contract term as matter of law when the Department directed or assented, in the interest of conservation, to a prohibition on production. The 10-year production requirement clearly delineates a period of time between the effective date of the lease and an expiration date. A denial of beneficial use through a section 39 suspension will prevent a lessee from producing coal and will result in lease termination, a far more serious consequence than a suspension turning a lease into nothing more than a "paper title" which caused Congress to enact section 39 in 1933. As Solicitor Margold observed shortly after section 39 was added to the MLA, "[section 39] is clearly a relief section and, as such, it is to be liberally construed." *Solicitor's Opinion, "Interpretation of the Mineral Leasing Act of February 25, 1920* (41 Stat. 347), as amended," 56 I.D. 174, 195 (1937); see *Koch Exploration Co.*, 100 IBLA 352, 363 (1988).

¹² The issue before the court was whether the Department's approval of drilling activity on an oil and gas lease only during certain months constituted a suspension under sec. 39 for the months when drilling was prohibited. Based in part on its analysis of the legislative history of sec. 39, the court held that if the Department prohibits drilling during certain months to mitigate environmental impacts which the Department has identified during its review of an application for permit to drill, the Department has directed a suspension under sec. 39 for the period of prohibition.

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A suspension of operations and production in the interest of conservation under section 39 therefore must extend the 10-year production period or else the lessee does not have, as Representative Eaton explained in the floor debate as the purpose of section 39, "exactly the same contract during the exact term with a later maturity date." 75 Cong. Rec. 15,364 (1932) (remarks of Rep. Eaton). In fact, if the suspension does not extend the 10-year production period, the lessee will have no contract. If a lessee shows that a suspension would be "in the interest of conservation" and BLM approves the suspension, or if BLM directs that a coal lease be suspended for this reason, then operations and production obligations under the coal lease (beneficial use) are suspended, rental is suspended, and the lease term is extended by the period of the suspension, including the 10- year production period if the coal lease is in its first 10 years subject to FCLAA.

B.

Our interpretation that the extension of the term of a lease for the period of a suspension of operations and production in the interest of conservation under section 39 includes an extension of the 10-year production period prescribed by section 7(a) is consistent with the rules of statutory construction regarding amendments: "Provisions in the unamended sections [section 39] applicable to the original section [section 7] are applicable to the section as amended [section 79(a)] in so far as they are consistent." 1A Sutherland Stat. Const. § 22.35 at 296 (4th ed.). However, because the meaning of the statute is not entirely clear from a plain reading of the statutory provisions, we turn to the legislative history of FCLAA to determine whether Congress intended the 10-year production period to be unaffected by a section 39 suspension. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). We find no evidence of such an intent. Our interpretation is not contradicted in any way by the legislative history of FCLAA.

Congress added the 10-year production requirement in FCLAA to counteract the allegation that a substantial number of coal leases were being held for speculative purposes. H.R. Rep. No. 681, *supra* at 15. The legislative history of FCLAA is silent on the effect of a section 39 suspension on the 10-year production requirement. However, an extension of the 10-year period as the result of a suspension of operations and production pursuant to section 39 does not conflict in any way with this congressional purpose. Moreover, because section 39 suspensions must be "in the interest of conservation," the suspension and resulting extension will likely further the congressional purpose also addressed in FCLAA to provide control over the environmental effects of coal leasing and mining. *See* H.R. Rep. No. 681, *supra* at 18-20.

In the past, the Solicitor has twice explained the interaction of FCLAA and the relief provisions of section 39. In 1979, Deputy Solicitor Ferguson concluded that the royalty reduction authority of section 39¹³ applies to the royalty rate established in section 7(a) of the MLA as amended by FCLAA. Solicitor's Opinion M-36920, 87 I.D. 69 (1979). The Deputy Solicitor noted in this opinion that several statements made during the debates on the legislation that became FCLAA recognized the applicability of this royalty reduction authority to the new royalty rate. *Id.*, 87 I.D. at 74-75.

In 1985, Solicitor Richardson issued an opinion which analyzed various aspects of section 2(a)(2)(A) of the MLA as amended by FCLAA, 30 U.S.C. § 201(a)(2)(A) (1982), in which Congress prohibited issuance of mineral leases to certain entities who have held a coal lease for ten years without producing coal in commercial quantities.¹⁴ Solicitor's Opinion M-36951, 92 I.D. 537 (1985). When considering the effect of a section 39 suspension on the section 2(a)(2)(A) holding period, the Solicitor noted that the legislative history of FCLAA provides no help, unlike the statements concerning the applicability of section 39 royalty reductions. *Id.*, 92 I.D. at 553. He concluded that "it would be incongruous to charge such a [suspension] period against the 10-year holding period under section 2(a)(2)(A)" since the lessee is prevented from producing coal. *Id.* He went on to point out the "Congress knew how to modify section 39 when it wanted section 39 to be unavailable to provide relief from a specific new-FCLAA requirement." *Id.*, 92 I.D. at 553-54. The Solicitor then explained that section 14 of FCLAA amended section 39 of the MLA to preclude reduction of the advance royalty which may be paid in lieu of continued operation under section 7(b).¹⁵

Finally, Congress itself recognized that the 10-year production period has exceptions. In section 2(d)(3)(i) of the MLA as amended by FCLAA, 30 U.S.C. § 202a(3)(i), Congress allows production from within an approved logical mining unit to be construed as production on all

¹³ This authority is set out in the first sentence of sec. 39:

The Secretary of the Interior, for the purpose of encouraging the greatest ultimate recovery of coal, oil, gas oil shale, gilsonite (including all vein-type solid hydrocarbons), phosphate, sodium, potassium and sulphur, and in the interest of conservation of natural resources, is authorized to waive, suspend, or reduce the rental, or minimum royalty on an entire leasehold, or on any tract or portion thereof segregated for royalty purposes, whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the term provided therein.

¹⁴ Sec. 2(a)(2)(A) states:

The Secretary shall not issue a lease or leases under the terms of this chapter to any person, association, corporation, or any subsidiary, affiliate, or persons controlled by or under common control with such person, association, or corporation, where any such entity holds a lease or leases issued by the United States to coal deposits and has held such lease or leases for a period of ten years when such entity is not, except as provided for in section 207(b) of this title, producing coal from the lease deposits in commercial quantities. In computing the ten-year periods of time prior to August 4, 1976, shall not be counted.

¹⁵ Sec. 14 of FCLAA states:

Section 39 of the Mineral Lands Leasing Act (30 U.S.C. 209) is amended by adding the following sentence at the end thereof: "Nothing in this section shall be construed as granting to the Secretary the authority to waive, suspend, or reduce advance royalties."

Sec. 7(b) is set out in footnote 5, *supra*.

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Federal leases committed to the unit.¹⁶ In section 7(b) of the Act as amended by FCLAA, Congress felt compelled to state that none of the relief measures in section 7(b), i.e., force majeure and advance royalty, may be construed to delay commencement of production beyond the 10-year period set by section 7(a).¹⁷ If the 10-year period were absolute, this statement would be unnecessary.

Section 39 suspensions were clearly applicable to coal leases prior to FCLAA. Because a section 39 suspension is intended as a relief provision, there is nothing inherently inconsistent in a section 39 suspension extending the 10-year production period of section 7(a). Moreover, because section 39 suspensions are granted "in the interest of conservation," the suspension of production and accompanying extension of the 10-year period would be consistent with the environmental protection purposes of FCLAA. In two prior opinions, we have found no reason to conclude that section 39 does not apply to the provisions of FCLAA, except in the one instance in which Congress explicitly amended section 39. Finally, the provisions of FCLAA itself show that while Congress intended to be strict about production, it did not consider the 10-year period as absolute. We therefore conclude that the legislative history of FCLAA provides no indication of a congressional intent which contradicts our conclusion that a section 39 suspension extends the 10-year production period of section 7(a) of the MLA.

III. EFFECT ON THE REGULATIONS

The Department's MLA coal regulations are divided into three areas: (a) the coal management regulations for pre-lease planning, lease issuance and lease administration, 43 CFR Parts 3400-3470; (b) the coal lease operations regulations for diligence requirements, relief provisions, mining plans and logical mining units, 43 CFR Part 3480; and (c) the coal royalty regulations in 30 CFR Chapter II, Subchapter A, which are not relevant here. The coal management regulations were originally issued in 1979 to implement the Federal Coal Management Program. These regulations are, and always have been, administered by the BLM. When adopted in 1979, these regulations included provisions at 43 CFR 3473.4 to implement the

¹⁶ Congress makes a similar provision for oil and gas leases committed to unit plans in sec. 17(m) of the MLA, 30 U.S.C. § 226(m). See n.11, *supra*. The similarity of these two extension provisions for nonproducing leases committed to producing units suggests another similarity in the coal and oil and gas provisions of the MLA as they are affected by sec. 39. In 1935, Congress completely revised the oil and gas leasing provisions of the MLA by replacing the 20-year renewal leases with leases under sec. 17 of the MLA for a specific term of years and for so long thereafter as oil or gas is produced in paying quantities. Act of August 21, 1935, 40 Stat. 676. However, in neither the 1935 law nor in subsequent reenactments of sec. 17 did Congress specifically reference the effect of sec. 39 suspensions. Yet, sec. 39 suspensions are recognized as extending these leases past the statutory expiration date. Solicitor's Opinion M-36953, *supra*, 92 I.D. at 296-97; Solicitor's Opinion M-36031, *supra*. Congress similarly made no reference to the applicability of sec. 39 in the new coal leasing provisions when it enacted FCLAA in 1976.

¹⁷ The last sentence of sec. 7(b) states: "Nothing in this subsection shall be construed to affect the requirement contained in the second sentence of subsection (a) of this section relating to commencement of production at the end of 10 years." The full text of secs. 7(a) and 7(b) are set out in footnotes 4 and 5 *supra*.

section 39 suspension authority. At the time FCLAA was enacted, the coal lease operations regulations were set out in 30 CFR Part 211 and addressed mining and reclamation. These rules were administered by the U.S. Geological Survey and later by the Minerals Management Service (MMS). In 1982, the Department amended both the coal management regulations, 47 FR 33114 (July 30, 1982), and the coal lease operations regulations, 47 FR 33154 (July 30, 1982). In the latter rulemaking, MMS completely revised 30 CFR Part 211 and, among other things, included regulations to implement the section 39 suspension authority which had previously been addressed in the coal management regulations. The coal lease operations regulations were later redesignated 43 CFR Part 3480 after the Secretary removed responsibility for onshore mineral lease operations from MMS and delegated it to BLM. 48 FR 41589 (September 16, 1983).

As noted in our introduction, the 1979 coal management regulations contained a rule which addressed section 39 suspensions. The regulation, 43 CFR 3473.4, stated in part:¹⁸

(b) The term of any lease shall be extended by adding thereto any period of suspension of all operations and production during such term in accordance with any direction or assent of the Mining Supervisor.

The portion of the preamble to the final 1979 coal management rules which discusses the meaning of 43 CFR 3473.4 states in part:

The relationship between the Secretary's authority to suspend lease operations and lease obligations in § 3473.4, and the diligence regulations (§§ 3475.4, 3475.5), merits some discussion. In 1976 when the Secretary defined diligent development (subsection 3400.0-5(m)) to mean production in 10 years from lease issuance or by June 1, 1986, depending on when the lease was issued, he did not wholly abrogate the Secretary's authority to suspend a lease and lease obligations wholly under section 39 of the Mineral Leasing Act (30 U.S.C. 209), in the interest of conservation of the natural resources. *For a lease on which the lessee applies for and receives such a suspension, the period of the lease does not run, lease rental and royalty obligations do not accrue, and likewise the time for achieving diligent development does not advance for the period of the suspension.* In light of the Secretary's lease suspension authority, the regulatory definition means to the Department the "tenth lease year" from the date of lease issuance or June 1, 1986, depending on when the lease is issued.

¹⁸ The 43 CFR 3473.4 as adopted in 1979 stated in full:

(a) Application by a lessee for relief from any operating and producing requirements of a lease shall be filed in triplicate in the office of the Mining Supervisor. The Mining Supervisor is authorized to act on applications for suspension of operations or production, or both, filed pursuant to this section and to terminate suspensions of this kind which have been or may be granted.

(b) The term of any lease shall be extended by adding thereto any period of suspension of all operations and production during such term in accordance with any direction or assent of the Mining Supervisor.

(c) A suspension shall take effect as of the time specified in the direction or assent of the Mining Supervisor. Rental and minimum royalty payments will be suspended during such period of suspension of all operations and production, beginning with the first day of the lease month on which the suspension of operations and production becomes effective. If the suspension of operations and production becomes effective on any date other than the first day of the lease month, rental and minimum royalty payments shall be suspended beginning with the first day of the lease month following such effective date. The suspension of rental and minimum royalty payments shall end on the first day of the lease month in which operations or production is resumed. Where rentals are creditable against royalties and have been paid in advance proper credit shall be allowed on the next rental or royalty due under the lease.

(d) The minimum annual production requirements of a lease shall be proportionately reduced for that portion of a lease year for which suspension of operations and production is directed or granted by the Secretary in the interest of conservation.

(e) A suspension under this section affects only the operating and producing requirements of the lease, it does not suspend the permit and the lessee's reclamation obligations under it.

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44 FR 42584, 42607 (July 19, 1979). (Italics added.)¹⁹

Thus, the Department reached the same conclusion as this opinion when it issued the coal management regulations in 1979.

In the 1982 amendments to the coal lease operations regulations, the Department included regulations now at 43 CFR 3483.3(b) to address lease suspensions.²⁰ When this portion of the coal lease operations regulations was proposed, it would have specifically provided for extension of the diligent development period by the period of the suspension. 46 FR 62227 (December 22, 1981).²¹ However, when MMS issued the final rules in 1982, the drafters merely transferred the existing rules from 43 CFR 3473.4, amended them for editorial purposes and added the statement now in 43 CFR 3473.3(b)(1) that a section 39 suspension "also suspends all other terms and conditions . . . except the diligent development period."²²

The portion of the preamble to the 1982 final lease operations regulations which discusses the suspension regulation provides no analysis or background on this change from the proposed rulemaking:

One comment was in favor of suspensions of diligent development. The DOI has determined that such extensions are not provided by MLA. Several comments stated that suspensions should not extend the 10-year diligent development period. The MMS agrees and this final rulemaking has been revised accordingly.

47 FR at 33171. We have been unable to determine the basis for this statement that a suspension of operations and production in the interest of conservation does not extend the diligent development period. We have also been unable to identify in the record any comments on the proposed rules that clearly discuss the effect of a section 39 suspension on the 10-year production period. Rather, the comments expressed the view that the Department may not suspend the 10-year period for economic reasons, a matter outside the scope of section 39.

Thus, in 1979, the Department promulgated 43 CFR 3473.4(b) which, as explained in the preamble, included the 10-year production period in the extension of the term by the period of the suspension. This

¹⁹ The June 1, 1986, date was the diligence period established by regulation in 1976 for leases existing prior to enactment of FCLAA. This diligence rule was deleted in the 1982 rulemaking and pre-FCLAA leases were left subject to their terms and conditions until lease readjustment.

²⁰ See footnote 7, *supra*, for the full text of 43 CFR 3483.3(b).

²¹ The rules were proposed by the Department of Energy which had authority over Federal coal lease diligence pursuant to 42 U.S.C. §§ 7152, 7153. This authority was returned to the Department of the Interior by the Interior and Related Agencies Appropriations Act, FY 1982, Pub. L. 97-100. The MMS then adopted the proposed rulemaking as part of its own proposed rules for coal lease operations. 47 FR 819 (January 7, 1982).

²² The 1979 rule which extended the term of the lease and which was intended to extend the diligent development period, 43 CFR 3473.4(b), was not amended in 1982. The preamble to the 1982 amendments of the coal management regulations does not even discuss the transfer of 43 CFR 3473.4(c), (d), and (e) to the coal lease operations rules, let alone discuss any change in the meaning of paragraph (b). 47 FR at 33114-15, 33131-32. However, as the coal lease operations rules which were issued on the same day contained the limitation on the effect of a section 39 suspension (now at 43 CFR 3483.3(b)(1)), the meaning of 43 CFR 3473.4(b) must be governed by the later rules rather than by the 1979 preamble.

regulation was neither amended nor discussed in 1982 when the Department promulgated the regulation now at 43 CFR 3483.3(b)(1) and excluded the 10-year production period from an exclusion by the period of a section 39 extension. Moreover, this exclusion was not set out in the 1981 proposed rulemaking. The record of the 1982 rulemaking contains no analysis of this issue other than the conclusory statement in the 1982 rulemaking record provides no support for the new interpretation promulgated in the regulations. We conclude that an amendment to the regulations which restores the original interpretation promulgated in 1979 is fully supported by the law.

IV. THE DECISION IN MOUNTAIN STATES RESOURCES CORP.

In *Mountain States Resources Corp.*, 92 IBLA 184, 93 I.D. 239 (1986), the Interior Board of Land Appeals (Board) considered an appeal from a BLM decision which, among other things, had denied the appellant's petition for a "suspension of operations." The appellant had sought this suspension in order to prevent its lease from terminating under section 7(a) at the end of the tenth lease year for failure to produce coal in commercial quantities. Appellant argued that it was entitled to relief from lease termination because its failure to produce coal was a consequence of market conditions. The appellant did not identify any specific law or regulation which would authorize such a suspension. In particular, appellant did not request a suspension of operations and production in the interest of conservation under section 39. In the course of its decision affirming the decision by BLM, the Board makes a broad statement which could be considered inconsistent with the conclusion reached in this memorandum.

The Board begins its discussion of the suspension issue by stating: "The language of FCLAA, its legislative history, and the Department's regulations all foreclose a suspension of the diligent development [10-year production] requirement." 92 IBLA at 189, 93 I.D. at 242. The Board continues by referring to several statements in the legislative history of FCLAA which indicate that the speculative holding of coal leases is a problem which FCLAA addresses through its diligence provisions. 92 IBLA at 189-90, 93 I.D. at 242-43. The Board then notes that H.R. Rep. No. 681, 94th Cong., *supra*, reprints definitions of continued operation and diligent development which the Department was considering as regulations prior to FCLAA. The Board states that these proposed regulations only provide exceptions for continued operation; the proposed regulations contained no relief from the diligent development requirement. The Board then concludes: "Thus, the legislative history of FCLAA demonstrates that Congress was aware of and confirmed the view that the diligent development condition could not be suspended." 92 IBLA at 191, 93 I.D. at 243.²³

²³ In making this statement, the Board ignores the remarks of Representative Mink during the 1976 legislative debate that the FCLAA allows delay of the 10-year production period. 122 Cong. Rec. 504 (1976). The Board's failure to consider the remarks of one of the co-sponsors of the bill that became FCLAA also resulted in the Board commenting

Continued

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In support of its conclusion that the 10-year production period may not be suspended, the Board refers to various existing regulations which do not allow suspension of diligent development. 92 IBLA 191-92, 93 I.D. 243-44. The Board first discusses regulations which address the payment of advance royalty in lieu of continued operation. The Board correctly notes that advance royalty may not be paid to suspend diligent development. The Board then quotes the preamble to the 1982 coal lease operations rulemaking to the effect that economic conditions do not affect the diligent development requirement. Finally, the Board quotes the language in 43 CFR 3483.3(b)(1) which excludes the 10-year production period of section 7(a) of the MLA from the effect of a suspension of operations and production in the interest of conservation under section 39.

The Board's decision does not squarely address the issue analyzed in this memorandum. Rather, the Board addresses the narrower question of whether any provision in FCLAA or the regulations allows suspension of the 10-year production period because of market conditions. The appellant neither requested a suspension of operations and production under section 39 nor provided any justification why a suspension would be "in the interest of conservation." 92 IBLA at 184-88, 93 I.D. at 240-42. Moreover, the Board does not discuss the interaction between section 7(a), added to the MLA by FCLAA, and the provisions of section 39 which were not amended by FCLAA. The proposed regulations reprinted in the H.R. Rep. No. 681 which the Board points to as evidence of the different treatment by Congress in FCLAA of continued operation and of diligent development do not mention section 39 suspensions in any respect. The regulations and accompanying preamble which the Board describes as carrying out "congressional intent . . . after enactment of FCLAA," 92 IBLA at 191, 93 I.D. at 243, were the 1982 BLM and MMS rulemakings. The Board does not refer to the 1979 coal management regulations and accompanying preamble which recognized that a section 39 suspension does extend the 10-year production period of section 7(a). Finally, the Board had no need to analyze section 39 suspensions because even if the appellant had applied under section 39, the Board was bound to follow the duly promulgated regulation at 43 CFR 3483.3(b)(1) which excludes the 10-year production period from extension by a section 39 suspension regardless whether the Board considered this regulation consistent with the MLA. See *Western Slope Carbon, Inc.*, 98 IBLA 198, 201 (1987); *Robert P. Perry*, 87 IBLA 380, 388 (1985).

The Board properly applied the MLA and the regulations to the appellant's petition for a "suspension of operations" due to market conditions. The *Mountain States Resource Corp.* decision thus

that the *force majeure* provision in sec. 7(b) of the Act only relieves the continued operation condition and does not affect diligent development.

establishes the correct precedent that market conditions will not prevent a lease from terminating under section 7(a) for failure to produce coal in commercial quantities. However, this decision neither persuades us that a section 39 suspension has no effect on the 10-year production period nor does it bar BLM from eliminating the exception in 43 CFR 3483.3(b)(1) which prevents the extension of the 10-year production period by a section 39 suspension through the rulemaking process. A duly promulgated regulation would have the force and effect of law and be binding on all Departmental offices including the Board. *Western Slope Carbon, Inc., supra; Robert P. Perry, supra.*

V. CONCLUSION

The proposal by BLM to amend its regulation at 43 CFR 3483.3(b)(1) to provide that a suspension of operations and production in the interest of conservation under section 39 of the MLA suspends the 10-year production requirement and extends this 10-year period for the period of the suspension is fully supported by the law.

RALPH W. TARR
Solicitor

February 8, 1989

APPEAL OF MIDDLESEX CONTRACTORS & RIGGERS, INC.

IBCA-1964

Decided: February 8, 1989

Contract No. CX 1600-7-0046, National Park Service.

Affirmed.

1. Contracts: Generally--Contracts: Construction and Operation: Actions of the Parties--Contracts: Construction and Operation: Changed Conditions (Differing Site Conditions)--Contracts: Construction and Operation: Drawings and Specifications--Contracts: Performance or Default: Compensable Delays

A bidder is entitled to reasonably rely on indications in the specifications and the Government's pre-award actions in ascertaining the nature and timing of the work to be performed under a contract; and where numerous Government delays prevent timely performance and the work is carried over into the winter and spring months, causing substantial additional costs, the Government is liable for the additional costs.

2. Contracts: Construction and Operation: Modification of Contracts: Generally--Contracts: Performance or Default: Release and Settlement

Unspecific, standard release language in a contract modification is sufficient to dispose only of those matters to which it clearly relates and/or which were within the contemplation of the parties. A boilerplate claims release clause contained in a no-fault time-extension modification is not sufficient to release additional contractor cost claims that the parties have never considered.

3. Contracts: Disputes and Remedies: Damages: Liquidated Damages

An assessment of liquidated damages for delays in work completion is not sustained where the assessment is contested, where a justifiable extension of completion time is denied by the contracting officer for insufficiently specific reasons, where a preponderance of evidence shows that the work was substantially completed within the time extension anticipated, and where the Government has shown no injury as a result of the completion delay.

APPEARANCES: Edward F. Lawson, Esq., Weston, Patrick, Willard & Redding, Boston, Massachusetts, for Appellant; James E. Epstein, Esq., Department Counsel, Newton Corner, Massachusetts, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

General Background

This appeal has a long, complex, and convoluted history, some of which will be omitted as irrelevant to the issues now before the Board. Briefly, the case involves a claim by Middlesex Contractors & Riggers, Inc. (contractor/appellant), for extra costs (including, in effect, impact costs) because of additional work and unforeseen expenditures resulting from bad-weather delays and other problems alleged to have

been caused by Government errors in initiating, just before the onset of winter, the 1977 emergency relocation of the Old Harbor Life Saving Station (the Station)—an historic structure built in 1897-98, and the last remaining such structure on the East coast—from the then rapidly eroding southeastern area of Cape Cod, Massachusetts (specifically, Nauset Beach, between Chatham Harbor and the ocean), to a safer location on the northwestern tip of the Cape near Provincetown (Race Point), a successful move that nevertheless ultimately required a sustained Herculean effort and a great deal of skill on the part of the contractor.

The relocation, which was originally scheduled to require 30 days, was commenced by the contractor promptly upon its receipt, on October 27, 1977, of the Government's (National Park Service's—hereafter, NPS) belatedly mailed October 3 notice to proceed. The earlier starting date, which was clearly anticipated by the contract, was necessary to permit the contractor to take advantage of some exceptionally favorable mid-October high tides, needed to refloat the contractor's barge after the Station had been loaded. Because of the delay, however, and as a result of further erosion to the beach in the meantime, the contractor could not lift the Station onto its barge until November 29, 1977, and did not offload it until May 19, 1978—encountering in the interim some of the severest winter weather the Cape had ever recorded. The work of placing the Station on its new foundation at Race Point was not declared complete by NPS until September 13, 1978. Although NPS had granted the contractor three previous time extensions, it denied a final extension request and assessed liquidated damages against the contractor at \$50 per day, for a total of \$4,450, for the 89 days from June 17 to September 13. We find that the extension should have been granted and that the assessment was improper, for the reasons stated below.

The contractor refused to sign the final release form, tendered by NPS on or about October 3, 1978; and it presented the Government with a claim for the additional costs through its original attorney on October 25. No contracting officer (CO) decision was ever issued on the claim, though several draft decisions were prepared. "Final" payment was made on December 11 and received on December 14, but the contractor accepted the amount tendered as only a partial payment. It also objected to the liquidated damages deduction. The claim then languished, but the contractor retained a different lawyer and refiled the claim on September 10, 1984. The CO finally denied it, addressing the contractor's specific allegations, on October 15. An appeal was filed with the Board on December 27 but dismissed on February 27, 1985, because the contractor had failed to certify the claim.

A certified claim was resubmitted to the CO on February 12, 1985; but the CO refused to reconsider it because of an alleged conflict of interest on the part of appellant's counsel, a former Department of the Interior employee. The contractor on April 22 again appealed from the CO's failure to issue a decision, and the case was remanded to the CO

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by the Board on April 29, with no result. A third appeal was filed on July 3, 1985. The present decision is in response to that appeal.

From March 1985 until September 1987 there occurred a protracted period of legal squabbling, with letters and memoranda sometimes being exchanged by counsel almost daily, and their contents often being somewhat personal in nature. The CO also became involved, "supplementing" his October 15, 1984, decision with an August 5, 1985, letter to appellant's counsel and to the Board (apparently prepared by Department counsel) stating six varied legal reasons on which his decision to deny the claim was "also based," and again relying on the Government's repeated contention of a conflict of interest on the part of appellant's counsel—an issue which the Board had already resolved against the Government in its remand order of April 29, 1985, and in an order dated July 10, 1985, based on a decision by the Office of Government Ethics. The Government's August 28 answer to appellant's August 9, 1985, complaint was then accompanied by a motion to dismiss the appeal; and that motion was ultimately denied by the Board on March 21, 1986.

In addition to the two volumes containing 81 documents that the CO submitted on January 29, 1985, as the official appeal file, appellant's counsel on April 30, 1987, provided the Board with a two-volume supplement consisting of 80 documents; and Government counsel on May 4, 1987, provided still another two-volume supplement consisting of 36 additional documents, including the 169-page log of the project supervisor. By letter dated August 12, 1987, Government counsel added still a further document. All of these documents will be considered to be part of the record before the Board, since many of them represent the best evidence available.

As the case progressed, the principal substantive legal issue between the parties became the legal effect of "release" language contained in three "no cost" bilateral modifications signed by the parties to extend the period for completion of work under the contract. The parties' joint request for a hearing, dated March 6, 1987, cited "a basic disagreement over the status and validity of the change orders" as the sole reason the hearing was required. The Government later submitted a detailed prehearing brief, dated March 18, 1987, on the same issue. Although the parties jointly represented to the Board that this was the only issue in the case, the Government never conceded any liability; and the hearing went forward on the issue of Government liability generally. The Board agreed, however, to limit its decision to the entitlement issue (Tr. 341). If it found for appellant, the parties were then to negotiate quantum, subject to a further right of appeal by the contractor if they could not agree. Based on all of the evidence, we conclude that appellant is entitled to recover its additional costs.

Findings of Fact

1. Project Background

One of the earliest documents in the expanded record is the partial account of a September 5, 1975, meeting of the Cape Cod National Seashore Advisory Commission (CCNSAC) at which the preservation of the Station was discussed. The Commission had received letters from three conservation organizations in Chatham urging that the Station be preserved, but NPS was of the opinion that the building could not survive where it was and that the ocean would eventually reclaim it. Some 300 yards of beach in front of the Station had been washed away during the last 30 years. The Commission therefore voted unanimously to preserve the Station at some other location if at all possible (Appellant's Appeal File Supplement (hereafter "AS") 40). From that time on, NPS apparently began planning to move the Station, subject to availability of funds and to establishing a consensus as to a suitable new location. A certificate of fund availability for the relocation was approved on August 17, 1977, in the amount of \$100,000 (AS 2).

A July 14, 1977, memorandum from a three-person NPS site review team (AS 1), favoring an Orleans site because of lowest costs, drew a July 20 dissent from team member Marsha Fader, a NPS historical architect who later became the project supervisor. Fader questioned the alleged lower costs of an Orleans move and argued that Race Point should be ranked first from the standpoint of historical integrity (AS 44-45). The NPS Cape Cod superintendent later adopted her view in an August 3 memorandum to his Associate Regional Director, noting ownership problems with the Orleans site. The memorandum contains an undated handwritten note which states that the Race Point site had been agreed upon "due to tight deadline i e getting contract announcement, award etc." (AS 46).

The following day Fader mailed an environmental impact statement to NPS' chief of environmental compliance, asserting that a move to Race Point had "no potential for causing significant environmental impact" and that the move by water, which she deemed best, would cost \$55,000 to \$60,000 and could be accomplished in a month's time. The memorandum notes that, "High water mark at the present site has now reached the foundation understructure of the boathouse section of the building" (AS 47-48). By contrast, three members of the CCNSAC at their August 19 meeting "were astounded at the proposal to move the old station to Provincetown and felt it would be outrageously expensive to do this." Later at the same meeting, one of the three denied any parochial interest by the people of Chatham in the loss of the Station but said he felt "barging the structure was an impossibility" (AS 49).

Though plans for the move nevertheless went forward, they were apparently seriously hampered by environmental and conservation requirements. NPS' Regional Historical Architect sent proposed Station relocation specifications to its Regional Contracting Officer by memorandum dated August 15, 1977. The memorandum was hand-delivered by Fader on the 16th (Government Appeal File Supplement

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(hereafter "GS") 117 at 6). A note on the memorandum indicates that the bid package was not mailed to two known prospective contractors until August 30 (Appeal File (hereafter "AF") 1). Thereafter, Fader applied to the Chatham Conservation Commission for the necessary relocation permit under the Massachusetts Wetland Protection Act on September 7 (AS 3). She also wrote directly to the Commissioner of the Massachusetts Department of Environmental Quality Engineering on September 14 for a State wetlands exemption, on the ground that "the project at hand is of an emergency nature with a minimum of environmental disturbance" (AS 4). The record does not disclose whether a reply was ever received.

The Chatham Conservation Commission scheduled a September 21 public hearing on the wetlands aspects of the move (AF 3); but it was not until Fader wrote to the Commission on October 11, supplying additional information and referring to the "imminent threat of destruction [of the Station] as we find ourselves closer to the month of November" (AF 8), that the Commission issued its final Order of Conditions—with a 10-day right of appeal—on October 11. Thus, the order itself did not take effect until October 21, a week *after* the favorable tides specified in the relocation contract.

Fader also wrote to the Army Corps of Engineers on September 13 (AS 53) for a dredging permit to enable the contractor's barge to nose into the beach adjacent to the Station; and the Corps responded in a letter to her dated September 26 [by coincidence, also the last day specified in the solicitation for bid acceptance] that her application form was complete but contained insufficient information to make a proper determination (AS 5). The Corps' approval was not actually received until November 15 (AF 18)—approximately 2 weeks after the contractor had already commenced work and just 2 weeks before it succeeded in placing the buildings on a barge for the move to Provincetown (GS 117 at 73-78).

Approval of the Station's relocation by the Advisory Council on Historic Preservation was also apparently necessary under section 106 of the National Historic Preservation Act of 1966. Although the record does not indicate when this approval was sought, the approval document was not mailed to NPS' Acting Regional Director until November 30, 1977 (the day after the barge was loaded). The document itself is dated November 21, 1977 (AS 66).

At least to some extent, a similar Odyssey through Permitland was presumably required for unloading, transporting, and placing the Station on its new foundation at Race Point the following spring. But the only indication in the record of any attempt to obtain such permits is a March 30, 1978, letter to NPS' regional office, with a copy to Fader, from the Army Corps of Engineers indicating that they had received a complete application but that certification from the State of Massachusetts as to water quality would be necessary before the

division engineer could issue the necessary permit (AS 71). A reasonable inference, in light of the generous extent to which the record has been supplemented by the parties, is that while Fader applied to the Corps for the unloading permit, she did not apply for any others. However, NPS' direct initiation of the environmental permit applications apparently led appellant to believe, not unreasonably, that the only ones he was responsible for were the building movement permits from the Town of Chatham (Tr. 289-91).

2. Formation of the Contract

The contract document indicates that the solicitation for the relocation of the Station was sent to prospective contractors as IFB-NARO-7-003-8 on August 17, 1977 (AF 4), but this date conflicts somewhat with the notation on the August 15 memorandum from the Regional Historical Architect (already referred to) that bid packages were not sent to the two known prospective bidders until August 30 (AF 1). In any event, appellant variously alleges, and NPS does not deny, that initially no bids were received in response to the solicitation, and that Fader was forced to begin making telephone calls to possible bidders in order to try to stimulate interest in the project.

The "Abstract of Bids Data," dated September 27, 1977, indicates that fully 300 solicitations were ultimately mailed out (AF 56). A September 20 Fader memorandum to the CO, shortly after the bid opening day of September 16, 1977, stated that she had attempted to contact at least 12 firms by telephone, reaching only 5 successfully. Appellant was not one of the 12 but, rather, was one of 4 other contractors that Fader also sought by telephone to interest in the solicitation—all of whom subsequently visited the site. Appellant was not contacted until September 8, a week before the bid opening date. None of the other 15 prospective contractors even submitted a bid. Fader's September 20 memorandum gives the following explanation for this conspicuous lack of contractor interest in the project (AF 2):

In follow-up conversations with those firms who [sic] had begun bid preparations, the following issues were ascertained to be deterrents to final bid submittal: a Dodge Reporter listing \$40,000 as the budget; the ambiguity of the specifications regarding moving procedure, foundation debris, and required permits - the prospective bidders wished to have more answers prior to commitment; bathymetry which "could or should be provided by the Corps of Engineers"; and the general high risk nature of the project.

The solicitation specified bid acceptance within 10 days after the September 16, 1977, bid-opening date (AF 4 at 10); but it was not until the 11th day, September 27, that appellant's sole bid, submitted to NPS on the bid-opening day, was accepted. Appellant did not elect to disavow the award; and the record in general is consistent with the probability that appellant submitted its last-minute bid as much out of a desire to save the Station as out of a profit motive.

In any event, Contract No. CX-1600-7-0046, in the amount of \$119,750, was entered into by the parties on Standard Forms (SF) 23 (January 1961) and 23-A (Rev. 4-75), including the normal subdocuments, on September 27, 1977, with work to commence 10 days

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after the contractor's receipt of the notice to proceed and to be completed 30 days thereafter (AF 4). The SF 23-A contained the usual standard clauses concerning changes (Clause 3), Differing Site Conditions (Clause 4), Inspection and Acceptance (Clause 10), and Suspension of Work (Clause 17) as part of the contract's general conditions (AF 4 at 55).

The Specifications set forth the General Requirements of the contract in five sections. Section 01010 ("Summary of Work"), paragraph 3, provided: "*ACCESS: Access to the site will be from Route 6, onto Main Street and Beach Road in Orleans; approximately 6 miles south of the Orleans Beach town parking lot on a sand route; barge access by water.*" (Italics added.) Under "Hauling Restrictions," paragraph 3 concluded: "Comply with all Cape Cod National Seashore sand routes and those access routes marked on site drawings" (AF 4 at 66).

Section 01300 ("Submittals"), paragraphs 1 and 2, provided as follows (AF 4 at 69):

1. SUBMISSION PROCEDURE: At least *two weeks* before Contractor's need for approval, submit 4 copies or 4 specimens (unless a different number is specified in the individual section) of all submittals required under this section to Project Supervisor. Identify all submittals on National Park Service form DSC-1(CS). When approved, one copy will be returned to Contractor. The listing of submittals given below is intended to be as complete as possible. However, Project Supervisor reserves the right to request additional submittals. No materials requiring Project Supervisor's approval shall be delivered to the site until approval has been given. [Italics added.]

2. PROJECT SUPERVISOR'S APPROVAL: Project Supervisor will indicate his [sic] approval or disapproval of the submittals and if not approved as submitted will indicate his [sic] reasons therefor. Any work done prior to such approval shall be at Contractor's risk.

Section 01700 ("Project Closeout"), paragraph 2, Substantial Completion and Final Inspection, provided in part: "*Should Project Supervisor determine that the work is substantially complete, he [sic] will prepare a punch list of deficiencies that need to be corrected before final acceptance, and issue a notice of substantial completion with the deficiencies noted.*" (Italics added.) Paragraph 3, Acceptance of the Work, provided in part: "*Acceptance may be given prior to correction of deficiencies which do not preclude operation and use of the facility; however, final payment will be withheld until all deficiencies are corrected*" (AF 4 at 74, italics added).

Section 02101 ("Structure Moving"), Part 1: General, under 1-4 Job Conditions, paragraphs B and C, provided as follows (AF 4 at 77):

B. Environmental Protection: *The Contractor shall take all reasonable measures necessary to protect the sand dunes, beach grass and other vegetation, and shore line areas during and as a result of the moving procedure. Use of moving equipment shall be limited to the area immediately surrounding the building, the barge entry shore area up to 130 feet in width, and those areas specifically noted on the Race Point Site Plan. Any environmental disturbance shall be returned as close as possible to its original appearance.*

C. Coordination/Scheduling: The Contractor shall maintain an intimate knowledge of wind, temperature, and tide conditions and general weather forecasts. *Scheduling for the move shall aim for a Spring Tide, such as October 14, 15, 16.* [Italics added.]

The record indicates that, in fact, the *only* spring tides predicted to occur between the bid-opening date and the end of the year were those on the dates mentioned. Moreover, a major storm occurred on the first of November that substantially hindered the contractor's ability to move the Station onto a barge (Tr. 236-37). In light of NPS' delay of its award until September 27, it appears that, in order to comply with the foregoing submission procedure, and still be ready for the contract's proposed October 14 "spring tide" moving date, the contractor would have had to prepare, deliver, have approved, and receive back all of the submissions associated with the relocation within no more than 2 or 3 days. This conclusion, however, is purely academic because, as we have noted, NPS' October 27 notice to proceed was itself not only delayed until well after the spring tides had come and gone, but was not given until just before the November storm occurred.

Part 3: Execution, of Section 02101, under 3-2 Moving Procedure, paragraph A, provided (AF 4 at 78):

A. The Contractor shall obtain all necessary permits and coordinate all arrangements necessary for the moving of the building off of its present site, along the selected route, and onto the new site. *The Contractor shall ascertain from the Project Supervisor whether permits for possible dredging have been obtained.* The Contractor shall arrange for the placing of barricades, stationing of flagmen, and all other procedures for the relocation. [Italics added.]

These specifications, written during the week prior to August 15 (GS 117 at 6), again reflect NPS' bifurcated approach to the contract, for, as we have seen, the project supervisor, Marsha Fader, personally made a major effort between August 15 and October 11, 1977 (when the Chatham Conservation Commission's final order of conditions was issued), to obtain the necessary permits in the name of the Park Service. Under the circumstances, we find the contractor's conclusion that NPS itself intended to provide all of the necessary permits except the building movement permits (Tr. 215-16, 289-91, 321-23), was a reasonable reading of the contract.

3. Work Under the Contract

a. Onloading Phase

In reconstructing the events that occurred in connection with the relocation of the Station between the date the contract was awarded (September 27, 1977), and the date the CO declared the project completed (September 13, 1978), we rely almost entirely upon the documents in the original and supplemented appeal file, including the project supervisor's daily log, and upon the oral testimony of the contractor's principal, John J. Corey, given at the 3-day hearing held May 12-14, 1987. We generally do not rely on the testimony of any of the Government's employees, past or present, since not only were their memories dim as to the relevant events 10 years before, but in most instances they lacked any detailed personal knowledge of the project.

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By contrast, we find the contractor's testimony was both credible and, in light of his 42 years of experience in contracting—specifically involving the rigging and ocean moving of heavy equipment (Tr. 210-13)—entitled to great weight. Cf. *Vann v. United States*, 420 F.2d 968, 978 (Ct. Cl. 1970). The Government introduced no witnesses. Rather, it essentially relied on the legal effect of the releases contained in the contract modifications; on its cross-examination of appellant's witnesses—during which Department counsel himself supplied most of the testimony and the former or current Government employee on the witness stand merely dutifully assented; and on some sporadic but untimely legal arguments at the hearing; and it failed to call its potentially most valuable and available (Tr. 346) witness—the person who clearly had the most intimate knowledge of the details of the project besides the contractor himself—namely, Marsha Fader, the project supervisor.

Corey's firm first became involved in the project 4 or 5 days before the bid opening (Tr. 213). He visited the site, determined what methods could be used to remove the Station and which method was best, obtained barge and other cost estimates, and decided that his company could accomplish the move successfully. The plan was to move the Station by mobile equipment from its foundation to the barge, and to reverse the process at Race Point. He planned to come down to the Chatham site by the beach access road (Tr. 214). He read the "Access" provision of contract Section 01010 to mean that he was permitted to use that access road (Tr. 214-15). He did not think there was any satisfactory alternative way to accomplish the project (Tr. 216). He was prepared to start on the project immediately, because he saw it as "a very short duration type job, very intense, with only a short, small area to work it." It was "like threading a needle * * * a very precise job" (Tr. 216-17).

In submitting his bid, Corey anticipated moving the Station in the time frame the contract called for. The special mid-October high tides, which were approximately 2 feet higher than normal, would greatly have helped move the project along, because Corey's plan was to bring his barge up on the beach at high tide, load it, secure it, and then take it off at the next high tide; and the extra high tide would have enabled him to bring the barge closer to the building (Tr. 220-21). He submitted his moving plan to NPS on October 3 (AF 10), but NPS never commented on it (Tr. 221-22). The plan included reducing the weight of the two cranes he proposed to use, so that they could be towed from Orleans to Chatham by the sand road (Tr. 222-23). The total time he would have needed to move his cranes to Chatham and back to Orleans, disregarding working time on the site, was only 3 days (Tr. 224-25). He had no reason to think that the use of the sand road would be denied (Tr. 329).

Instead, Corey had to bring the cranes to the site by a harbor crossing from Chatham to the backside of Nauset beach, because the Chatham Conservation Commission insisted that he use special equipment designed for over-sand travel, and he was making no progress changing its mind (Tr. 225-26). In his opinion, no such specialized equipment existed (Tr. 296-97). Meanwhile, Corey had retained a consulting engineer to back up his own conclusions about the job; had received the engineer's preliminary plans at least before October 12; and had ordered the steel grillage needed to lift the Station on that basis (Tr. 226-30).

Because he was not permitted to move his cranes to the site by the sand route, Corey was forced to transport them across Chatham harbor by barge, which turned out to require 16 days. The following exchange between Corey and his counsel suggests the problems involved (Tr. 233-34):

Q And why did it take 16 days to bring the barges across the harbor?

A Well, we were in protected water, but we still had to work high tides. We had to bring our barge up on the beach at high tide. We had to make our own ramp, and we had to do all this and, hopefully, sail the next high tide, but there was a very quick current in Chatham Harbor. We didn't [dare] try to move across the harbor at night, there was too many moorings, too many other boats in the harbor. So, it actually meant the whole day before we could move it up to the next, to what we call Nauset Beach or the back of the Chatham place.

Q Why did you have to move at high tide?

A We would have had to put wheels on it if we didn't. It was a shallow harbor. That's the right way to do it, you know, you can't bring your barge up on the beach at low tide, and if you do, you're going to be working in the water.

None of these problems or delays appears to have been anticipated by NPS. At a preconstruction conference held on October 4, Corey was informed that he should "tentatively" plan to start work "on Tuesday" (October 11, 1977) "subject to getting all permits that are necessary." He was also told that "[s]top work order will be issued in the event of bad weather" (AS 7). As we have seen, Fader made a special, and ostensibly successful, effort on October 11 to obtain the necessary permit from the Chatham Conservation Commission (AF 8; GS 117 at 7). When it was issued, however, it not only incorporated a 10-day appeal period but set forth unrealistic conditions on the type of equipment that could be used (Tr. 296-97).

Corey also testified that considerable preliminary work could have been done at the site before the cranes arrived (apparently on November 16—see GS 117 at 51), but he was not allowed to do any work before October 25 (Tr. 231-32, 235-36, 298, 329). Shortly after that date, the November 1st storm washed away part of the beach, and he could not place his cranes where he had planned to. He also had to work the cranes at a larger radius than anticipated (Tr. 236), which created problems of excessive building weight and also required removal of the Station's chimney (Tr. 238-40, 242-43). Corey saw this sudden erosion as a differing site condition (Tr. 315-16). Also, having missed his schedule at Chatham, he lost his favorable weather at Provincetown as well.

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Therefore, he attributed all of his extra costs to the delay at the beginning of the job (Tr. 236-37, 242). In summary, Corey believed that the 30-day moving schedule originally estimated by NPS was impossible to accomplish unless he could have used the sand-dune route and everything else had worked out perfectly (Tr. 243-46). *Although even Corey's testimony was not accurate in all of its details (for example, his original October 3 moving plan also anticipated removing part of the Station's chimney—see AF 10 at 2), we are persuaded that it is substantially reliable.* NPS, in defending the appeal, has variously attributed the early delays in the project to delays by the contractor in submitting to it his plans, schedules, and bid and performance bonds; but its evidence in this respect is minimal. We find not only that Corey's moving plan as submitted on October 3 was essentially the same as his final plan, but also that a major reason for his failure to submit a more detailed engineer's plan before October 26 (AF 15) was NPS' refusal to let him do preliminary work at the site, as mentioned above. Testimony as to the bonds must also be resolved in favor of the contractor: Corey testified that he followed his normal procedures after the contract award (Tr. 274-75); the bonds themselves are dated October 5 (AF 4 at 6); and the Government did not prove its contention that the bonds were not promptly received (see Tr. 31-32, 40).

The contractor's version of events is corroborated by the fact that he Corps of Engineers' permit, with which NPS was greatly concerned, was not issued until November 15 (AF 18); by the fact that the 30-day no-fault delay given to the contractor by NPS on November 25 (AF 24) was given at the suggestion of the project supervisor (AF 22); and by the fact that the period from October 12 until at least October 25 was utilized by NPS personnel in frantically removing some 15-20 truckloads of fixtures, hardware, artifacts, and debris, and in applying linseed oil preservative to the Station's exposed wooden surfaces (AS 63, 64, 70; GS 117 at 8-40. *Accord, Corey's testimony on cross-examination, Tr. 298.* Fader's log even mentions a "slight confrontation" between NPS and the contractor on October 20 when the latter attempted to store some materials in the Station while the NPS salvage work was still in progress (GS 117 at 14). On cross-examination, Corey asserted that NPS did not even let him inspect the building adequately until October 26 (Tr. 279, 298), a month after the contract was entered into.

The record as a whole fully supports a conclusion that, during the months of June through September when NPS was intent on obtaining the legal and political authorizations and concurrences needed to relocate the Station, it completely failed to perform the preliminary onsite physical work required to ensure that the Station was ready to be moved. We also find it likely that, regardless of whether the contractor was ready, willing, and able to commence his removal

operations on or about October 3 (as he testified), the project supervisor would not willingly have let him begin the work until the removal of artifacts had been completed—on or about October 26, the date on which he finally received the NPS notice to proceed (AF 16).

Conservatively allowing the contractor another 10 days after October 3 for preparation, we find that Corey could have and would have been ready to move the Station by October 14 if he had been able to proceed as the contract contemplated, but that he was delayed essentially because of NPS' cumulative failures (1) to secure the permits for which they were responsible in sufficient time to meet the October 14-16 work dates specified in the contract, (2) to ensure that the Chatham Conservation Commission would permit use of the sand route by the type of lifting and rigging equipment a building-moving contractor would customarily use, and (3) to empty the Station of artifacts and otherwise to prepare it for transporting prior to October 26, a date 10 days after the favorable spring tides referred to in the contract had already come and gone. Accordingly, we agree with appellant that NPS is responsible for any adverse consequences reasonably encountered by the contractor in performing the work of the contract.

Despite frequent bad weather, the Station was loaded onto its barge, without damage, during a marathon work session that took place on November 29-30, 1977 (Tr. 244; GS 117 at 73-81); and it was successfully barged the 36 miles to the Provincetown area on or about December 1.

b. Storage and Offloading Phase

Transporting the Station to its destination, and unloading it there, however, were two vastly different things. In order to unload the Station, a combination of favorable winds and favorable tides during daylight hours was needed. Corey's testimony on this point was as follows (Tr. 245-46):

Q Why didn't you, once you got your equipment there, why didn't you simply land the barge the way you had it at Chatham?

A It's a, it's a — you just couldn't do it. What we needed, we needed a daytime high tide with about, daytime high tide with a southeast wind and about two days lead time to accomplish all this. It just doesn't happen in those months. It just doesn't happen.

Q Why did you need a southeast wind?

A Because that would have made where we were going to put the barge at [Race] Point in what they call the lee, where there was very little wind, and we needed those type conditions to unload it. * * * We tried that. We were in constant touch with the Weather Bureau, one to ten times a day, trying to get these conditions and whenever we thought we would get them, or they were supposed to happen, or even if there was a possibility it was going to happen, activated the towing company who had to come from Martha's Vineyard. I had a local fisherman who was going to assist us. I had to bring extra men down on the job, and we tried that three times from the period, say, from the 1st of December through the end of January, and the Harbor Master had it right when he says, "You're asking too much of the Lord, it just doesn't happen this time of year." And he was right, it doesn't happen.

Q Why did you use a towing company from Martha's Vineyard instead of a local towing company?

A There are none.

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In addition to the problems encountered in attempting to obtain favorable conditions for unloading the Station, the contractor encountered unusually severe weather during this period, as discussed below in connection with the circumstances relating to Change Order No. 3. Corey had already received, with the project supervisor's concurrence (AF 22), a 30-day extension of time from November 26 to December 16, 1977 (AF 24). But, by letter dated January 3, 1978, "[d]ue to the time of year and unknown conditions and difficulty forecasting right conditions," he was forced to seek another 60-day extension (AF 36), which was granted on January 9 as Change Order No. 2.

By January 27, however, it was becoming clear that weather conditions would not permit the Station to be unloaded during the winter months; and the contractor requested a suspension of operations until the first of May 1978, with another 45 days thereafter to completion (AF 38). Although the project supervisor concurred in the request, her February 3 memorandum to the CO (who was then about to retire from Government) suggested numerous conditions for the protection of the Station during the intervening months (AS 21). NPS therefore held a February 6 internal meeting, with both the old and the new CO present, to decide how to handle the matter (AS 22).

At the meeting, the new CO brought out that if an extension of time was granted, the Government could be held responsible for any additional claims created by it. The Regional Historical Architect nevertheless preferred an extension of time to a stop work order because it would allow the contractor flexibility in the moving of the Station. Ultimately, the new CO agreed to the extension of time, rather than the suspension, because he wanted "to see the contractor have the full responsibility for this building during the period for which he has been granted an extension of time." Therefore, NPS decided not to grant the extension until all conditions necessary to protect the Station over the winter months had been decided upon (AS 22, Tr. 122-29). (At the oral hearing, the new CO made clear that he considered the later delays to be the contractor's fault, since he had already been given two delays (Tr. 126).)

At the same February 6 meeting, Fader gave two related estimates of the time that would be required to finish the project once the Station had been unloaded. She first said that it would require 45 to 60 days after the movement of the building to complete the job. Then, when the question of rebuilding the Station's chimney (which the memorandum to the files by the new CO somewhat inaccurately said was "dismantled on the request of the contractor") was raised, she said that the contractor would need another 30 days or so for completion after the chimney was reassembled (AS 22). In fact, Corey had wanted to dismantle only the top portion of the chimney in order to reduce the Station's lifting weight; but Fader herself had insisted that if any part

of the chimney was removed, it would have to be totally rebuilt in its original form (Tr. 240) so that all of the bricks and mortar would match (GS 117 at 54-72, especially at 67-69, 71). Corey finally agreed to this condition, under oral protest, in Change Order No. 1, which he signed on November 29 (AF 24). No part of the claim before us is for the rebuilding of the chimney.

The contractor's request to defer unloading the building until spring was agreed to in Change Order No. 3, dated February 16, 1978, and signed by Corey on March 2. Since this change order is illustrative of NPS' attitude toward the contractor after the building had been saved from the tides, it is worth quoting from the order at length (AF 39):

We have adjusted your contract [pursuant to Corey's request], and the date of *June 16, 1978, is now recorded as your new completion date.*

You are hereby directed to perform the following additional work, as this time extension requires that care and protection of the building be provided:

- 1) Reinstall plywood covering on rear door opening of the main building; install plywood covering over openings in first floor framing of the main building.
- 2) Secure boathouse door in a manner approved by the Project Supervisor, to afford greater protection against possible intruders.
- 3) Eliminate ladder access onto barge, as a deterrent to intruders.
- 4) Submit sketch plan of barge security, showing location of anchors, lines, cables.
- 5) Submit name(s) of on-site watchman with telephone number for use by local police, Coast Guard, and N.P.S. Rangers; also submit additional name and telephone number to be contacted as an alternate.
- 6) Arrange tour of barge and buildings for local police and fire chiefs, Coast Guard representative, and N.P.S. Ranger; to be attended by the N.P.S. Project Supervisor.
- 7) Prepare written statement of understanding with local fire chief of proposed method of fire extinguishment based upon available equipment; maintain fire protection equipment in the building(s) as recommended by the Provincetown Fire Department and specified in the contract.
- 8) Prepare proposed dredging plan for the Race Point site, drawn to scale with all required information for application by the National Park Service to the U.S. Army Corps of Engineers, Mass. Dept. of Environmental Quality Engineering, and the Provincetown Conservation Commission.
- 9) Remove all equipment, tools, vehicles, and materials, from the upper level of the Race Point parking lot and store on the lowest level until work is again underway.

* * * * *

The above changes will be made, *as agreed*, at no change in contract cost. *This Change Order #3 results in no additional cost to the Government*, and your contract will remain as originally stated in the amount of \$119,750. [Italics added.]

The foregoing language is contained in a letter order signed by the new CO. Below his signature is a place for acknowledgement by the contractor, worded as follows: "*Notification* of Change Order #3, on contract No. CX1600-7-0046 for the Relocation of the Old Harbor Life Saving Station, Cape Cod National Seashore, Provincetown, Massachusetts, *is hereby received and accepted* by us on (date)." (Italics added.) But in a letter from Corey to NPS mailed later in the same month (in which Corey responded to an earlier NPS inquiry), he concluded by saying: "Potential problems at this time are weather conditions necessary to move barge from harbor to ocean side at Provincetown and go through turbulent conditions at Race Point."

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Additional costs are being considered and we are seeking advice on this matter" (AF 40, italics added). We find this language indicative of the fact, discussed below, that Corey did not regard Change Order No. 3 as precluding the later submission of claims for the extra costs he was then incurring.

Corey's January 27 letter requesting suspension of operations appears to be characteristic of his New England penchant for understatement, contrasting markedly with Fader's log and various newspaper accounts of weather during the period. Fader's January 9 log entry states that, "Despite the gale warnings, all was okay with buildings and barge." Her January 10 entry says she was wakened by a 2:06 a.m. telephone call initiated by the Provincetown police concerning broken barge lines, which caused the barge to ride above its adjacent wooden pier. Corey's men then worked to install new lines, and Fader notes: "It was truly a miracle that all was intact after what was pronounced to be Ptown's worst storm in 50 years, with winds gusting to 50-60 m.p.h., and flooding from the rains!" (GS 117 at 129-30).

Fader's entry for January 26 similarly states: "Forecasted weather conditions held true, with rains and winds 20-30 mph from the south beginning in the evening of 1-25. An early check on the building was difficult because of very dense fog. New plastic, however, was noted on the main building" (GS 117 at 145). Her January 27 entry then recites: "I met with Dan Tarr [Corey's foreman] at the condominium until 10:30 a.m. His description of yesterday's storm was that it was worse than that of January 9-10! Winds of 60-70 mph, with gusts (SW) up to 80-100! Dan said he had never seen the likes of it—with many mishaps at the pier. He admitted having questioned Dan Clarke's advice, but was mighty pleased to have had the (4) new anchors, two (5)-ton and 2 smaller anchors with 90' of chain" (GS 117 at 148).

After a third storm, on February 9, Fader's February 10 entry recounts the aftermath, as follows: "Photographed in b/w & color; inspected boat-hse. damage (2 areas of [ceiling] gone, corner wracked & interior sheathing buckled), flew over Nauset Beach & Race Point—Old Harbor Chatham site unrecognizable—extensive damage to two outbuildings, grass cover gone, flattened entire land mass, all adjacent properties damaged, building in bay; Race Point beach cut back considerably" (GS 117 at 156-57). A February 20 story in the Boston Globe, entitled "Old Harbor Station withstood the storm" (AS 24; attached hereto as Appendix A) vividly confirms this account.

In his testimony, Corey acknowledged that the Race Point building foundation had to be constructed twice (because he had a subcontractor that he "couldn't seem to make * * * live up to the specifications"), and that he ultimately had to reconstruct the foundation himself. But his claim makes no charge for this work (Tr. 251-54), and there is no indication that the rebuilding ever delayed the offloading of the

Station. Corey testified that it did not (Tr. 252), and, as late as May 15, Fader's log entry expressly states that "[i]n a telephone conversation with J. Corey, the inclement weather of rain, wind, fog would be held accountable for further delay" (GS 117 at 160).

However, after the contractor had accomplished his "mission impossible" and the Station was on land, Fader's attitude, for unexplained reasons, became increasingly critical. Her entries for May 19 (GS 117 at 162-65), the day the Station was off-loaded, illustrate her outlook and help shed light on her final, relatively favorable July 10 inspection report:

J. Brock and I arrived in the Harbor soon after 6 a.m. only to find one empty duck and very thick fog. The dozer was busy 'dredging' at Race Point. Soon mats were in transit for moving the cranes down the beach. Word arrived that Old Harbor had left the Harbor at 6:10 am. By 7:50 am. she was barely visible through the thick fog offshore. The cranes were not in position with counterwghts. and outriggers until 10-10:30 am., although the barge had come into full view in the dredged area by 8:35 am.

Three rangers, Jim Hankins, Tom Bradley, and John Hord were on duty. Line was strung through the previously-posted signs and crowds of 100-200 gathered.

The barge was not secured by [perpendicular] cables held by on-shore vehicles because she sat securely, although askew. The first lift swung the bldg. low on the rear side with structural dynamics which could unnerve anyone. This lift and all subsequent lifts would differ from Chatham in the angles of lift required from a low beach to higher ground. The steel hung-up on choulks [*i.e.*, the barge's movable corner anchoring posts] which, true to fashion, were torched off (much to the dismay of the barge owner's reps sitting nearby!) By 11:00 am, Old Harbor was on firm ground for the first time in 6 months. Dan Tarr took a bow to the crowd's ovation and I shook Jack's [Corey's] hand with gratitude.

But the May 19 log entry goes on to add (GS 117 at 164-65):

Timing for the entire operation was largely mismanaged: by high water at 9:30 am., the bldg(s) should have been off-lifted for shoving the barge offshore again. Although the dozer operator may have begun beach alterations by 8-9 am., the cranes were not in position with counterwghts. attached until at least 10 am. (and this work did not begin until after 7:7:30 am.). The barge came in close by 8:30-9 am. and drifted about while the welds were cut. While moving the Boathse. section to the shore end of the barge, a cable snapped. The Contractor resorted to using the front-end loader to pull, which caused the 24" I-beam to buckle! because of the off-center strain. Last minute decisions were made about a location for the Boathse. and directions given to the dozer operator to level the area.

The barge (once again) had to be pushed by the two dozers, lifted and pulled by the cranes, and pulled by the tugboat. With no radio communication between land and the tug, Dan Tarr and J. Brock went in the duck to tell the skipper not to continue pulling once off the beach, allowing time to disconnect the cranes! (and not pull them into the ocean also).

All men, save Rick, were "off" for the weekend by 2:30-3 pm.

Since Fader's views after the building was unloaded may ultimately have influenced the new CO's decision to assess liquidated damages, some of her later diary entries may also be pertinent:

May 22: "Work did not get underway until 8:30 am., although I had arrived by 7 am. and Rick and Ron were moving about. Two lifts were made of the main bldg. only which brought the structure to the edge of

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the excavation. The moving of timber mats for the cranes was incredibly time-consuming especially with poor judgment of the capacity/radius which necessitated moving back down the beach * * * (GS 117 at 166, italics added).

May 23: "By 8:10 am. the main bldg. was once again in the air and-it stayed there for several hours until timber cribbing was re-positioned and plumb lines dropped. When the station was finally set with wedges and shims, Roland discovered they were off the mark by 2-3 inches. Jack Corey and Dan Tarr both felt they would rather compensate for that on the final set-down. *Roland and I felt it should have been corrected*" (GS 117 at 166-67, italics added).

May 24: "Corey and Tarr began pressuring for permission to work the weekend, since they were now back to regular hours. *The requests were repeatedly denied* * * *" (GS 117 at 167, italics added). [At the preconstruction conference, the "Contractor was asked if he expected to work weekends or holidays - maybe. He was told to clear it with the Superintendent in advance so that he is aware and can make arrangements" (AS 7).]

May 30: "I worked at CACO HQ in the morning with calls to Blaine. At Race Pt. site until 4 pm., permission was given to use 8" reinforcing (horiz.) when the 10" supply was depleted. Permission was also given to locate the Boathse. section over a grassed area for a *max.* of 2 hrs. - its move was completed in several lifts this day. Roland was *actively* supervising masonry work, which was *slow* * * *" (GS 117 at 167-68, italics in original).

May 31: "Worked at HQ, with talks with Mr. Hadley and Frank Skeiber. Obtained shingling/painting estimates from Roland; *review estimates needed from Tarr (which were promised for this morning)*. The Pk radio was returned; *brick sizes were reviewed with Roland*. Estimate memo was given to Mr. Hadley, porch dwgs. reviewed, *brick submittal rejections made; camper memo*" (GS 117 at 168, italics added). [We note that the contractor's brick submittal was apparently made by on April 24 (GS 117 at 157), but it was 5 weeks later before Fader got around to rejecting it.]

June 26: "I arrived in Provincetown on the same flight with Dan Tarr. *He asked about the request to work weekends and I said it had to be directed to the C.O. (which Roland was supposed to have told Dan on Friday.)*"

"Cistern work, including a sample panel was reviewed with R.V. Brick approved by Roland for cistern and chimney work turned out to be brick rejected by myself previously (*and, reviewed with R.V. at the time*). The variation in surface color is rather disturbing. R.V. felt weathering would improve the deficiency and that original work also had color variations. Sample panel mortar was too gray, joints okay. Cistern mortar had whitened to become acceptable * * *" (GS 117 at 170, italics in original).

The June 26 entry, above, is also significant because it indicates, first, that even at that late date NPS' historical personnel did not agree among themselves about what extras should be expected from the contractor in connection with locating the Station on its new foundation (thus obviously delaying his progress while they decided) and, second, that NPS was determined to remain firm in holding the contractor to everything that they could agree among themselves that they wanted, without regard to the burden of extra costs that Corey had already incurred—which they apparently did not intend to pay for.

By July 10, however, the contractor's work was apparently almost complete, and Fader, in her own words, "inspected various aspects of the ongoing work at the site with R.V.," evaluating it as follows (GS 117 at 173):

- cistern brick veneer complete & ok/clean-up needed
- cistern cover incomplete/need hinges & trim
- bulkhead cover complete—suspect hinged on wrong side
- discovered center Boathouse girder at mid-pt. splice with 8" sq. post on top, with no post under (N.P.S. problem)
- chimney work nearly complete to 1st fl. level, clean out doors of cast iron, thimble set-in, brick, with bonding - all quite acceptable
- very damp corners (2) in basement from rainstorm
- organized Boathouse artifacts
- questioned J. Corey for written appointment of interim Proj. Supv./Foreman J. Corey "in" and "out"; son Patrick cleaning salvaged chimney brick.

At the hearing, Corey testified that when he requested NPS occupancy of the building on July 6 (AF 48), the relocation of the Station under the contract was substantially complete (Tr. 254-55). He later received the so-called punch list of minor discrepancies from the Government by letter dated July 18 (AF 51). He considered the work NPS was then requesting to be less than 1 percent of the total work of the project (Tr. 255); and the Government's cross-examination on that point failed to establish that any portion of the remaining 1 percent was significant work (Tr. 313-15). Given the very few deficiencies noted by Fader during her July 10 inspection, and in light of her demonstrated readiness during that period to document any contractor shortcomings, we regard Corey's testimony as entirely credible. We thus conclude that the building was substantially complete as of July 18 (when the punch list was issued) and that, at least from that point on, the liquidated damages levied by the CO were improperly assessed. It remains to be seen, however, whether Corey was entitled to a time extension beyond June 16 or whether the liquidated damages assessed between June 16 and July 18 were justified.

c. Recapitulation of the Change Orders

Change Order No. 1, dated November 25, 1977, was the result of a request by the contractor in a letter dated November 12, which called attention to the delayed starting date ("approximately 30 days later than anticipated") and to the delay provisions of the contract, but based the contractor's 18-day time extension request primarily on his inability to "navigate waters around the cape and along the coast due

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to winds, fog, and seas." On November 22, the project supervisor recommended that 20 days be granted (AF 22); but the change order as finally granted was for 30 days, which included 20 days for chimney reconstruction (AF 24). Corey agreed under protest to rebuild the chimney at no additional cost; but he did agree to do it. Only chimney costs were discussed at the time, however, and Corey did not regard his acceptance of this modification as relinquishing any other claim on the job (Tr. 240-43).

Change Order No. 2, dated January 9, 1978, resulted from the contractor's letter of January 3, in which he requested a 60-day extension (AF 36). This letter called attention to the excess wind and fog encountered in the harbor crossing and to the dangerous sea conditions caused by high winds at Provincetown, and requested another 60-day extension. NPS responded with a letter change order granting the request in the following language: "We have adjusted your contract * * * and the date of February 24, 1978 is now recorded as your new completion date. Please note that this Change Order #2 does not affect Contract price or any change in the specifications of your contract." It contained a similar acceptance provision to that in the previous change order, in which "Notification" of the change order was to be, and was, signed by the contractor as "received and accepted" (AF 37).

Change Order No. 3, dated February 16, 1978, was the result, as we have seen, of a January 27 request from the contractor for a suspension of operations until May because of continued weather problems, particularly citing high velocity winds (AF 38). The order, previously quoted, was issued on February 16 and extended the contract completion date to June 16, subject to detailed custodial conditions, allegedly at no change in contract cost (AF 39). Corey signed it because the CO at least impliedly threatened to assess liquidated damages for the whole period if he did not sign it (Tr. 249-50).

Change Order No. 4, dated April 12, 1978, differed slightly from the previous orders in that there were minor additions and deletions to the contract specifications that resulted in a \$1,172 *decrease* in contract cost. It provided that "[no] additional contract time will be allowed on account of the extra work involved and your completion time remains June 16, 1978" (AF 41).

On June 9, 1978, the contractor again wrote to the CO requesting an extension of time, from June 16 to July 28, 1978, "due to numerous complexities on job - only one being weather conditions" (AF 43). This request is consistent: (1) with Fader's May 15 log entry that "inclement weather of rain, wind, and fog would be held accountable for further delay" (GS 117 at 160); (2) with the fact that the building was not offloaded until May 19 (GS 117 at 162-65); and (3) with the fact that NPS knew that 45 to 60 days after the offloading of the building

would be required to complete the job (AS 22). However, by June 15, the new CO was already in touch with the Regional Solicitor, telling him that "the Government's position in this matter was that we would not grant this contractor an extension of time based on the fact that the contractor is not performing and has done an inadequate job up to the present time. *We feel that the delay of this contract was the contractor's fault*" (AS 29, italics added). This memorandum was followed by a memorandum to the CO by Fader, dated June 21, 1978, which appears to be disingenuous and self-serving on its face in several important respects. Its first paragraph is as follows (AS 73):

After careful review of the work in progress since April 25, 1978, I do not recommend an extension of contract time. Our Project Inspector, Roland Verfaille, has kept a Daily Diary which records four (4) days only of work suspension because of inclement weather conditions. No work was done on weekends, however, although permission had been given to do so up until the completion of the move. It was also not unusual for Fridays and Mondays to be less than 8-hour workdays. The first of many verbal requests for permission to work on weekends was made on May 24, 1978—the day following completion of the building move over the excavation. The return to a normal 40-hour week following the most difficult aspect of the contract work had been re-established verbally and in writing (dated 4/18/78). Regular Park working hours were a part of the Contract Specifications. The overtime costs for both park and regional personnel were considered an excessive and unjustified burden for work originally scheduled for completion in November 1978." (Italics added.)

By contrast, we find that: (1) for reasons unclear, neither Project Supervisor Fader nor Project Inspector Verfaille was called as a witness for the Government in this proceeding, to permit them to explain just what it was that the contractor was supposed to be doing on a full-time basis, or on weekends, prior to obtaining the favorable weather on May 19 that permitted him to unload the Station; (2) the diary in question was not introduced into evidence; (3) one of the principal reasons that the building foundation at Race Point had to be rebuilt twice was that NPS' specifications had a minimum temperature requirement for the preparation of mortar to be used in laying the concrete blocks needed for the foundation; but Corey's original subcontractor, in an effort to complete the work quickly, had tried to lay the blocks in weather with temperatures below the 35-degree minimum, which was unacceptable to NPS (*cf.* AF 4; GS 117 at 92; Tr. 251-52); (4) the Station could not be unloaded in the absence of both a favorable wind and tide (Tr. 245-46); and (5) it was entirely logical that the request for overtime work not be made until the Station had been unloaded, since it was not until then that the detailed work of marrying the building to its new foundation could be undertaken.

In addition, it seems a bit inapropos for a project supervisor who had personally endorsed the contractor's first delay request, and who had encouraged submission of the second delay request, now to complain (echoing the attitude of the new CO: *see* Tr. 126) that the work should have been completed as scheduled. Thus, the project supervisor's June 21 memorandum appears primarily to have been an attempt to augment the file after the fact, since the contractor's request had been

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promptly denied in writing by the new CO on June 15, before receiving Fader's memorandum, with notification that liquidated damages would be assessed beginning on June 17 (GS 116 at 22).

We therefore find that a 60-day period of time for the completion of the contract after the May 19 off-loading of the Station was reasonable under the circumstances and should have been granted, and that, accordingly, the contractor was entitled to a final completion date of July 18, 1978.

d. Intent of the Releases

Each of the four change orders contained virtually identical language stating that the particular change order did not affect contract price or make any change in the specifications of the contract. Each was in letter form with the signature of the CO at the end of the letter, followed by the language already noted; namely, "Notification of Change Order # _____ on Contract Number FX1600-7-0046 for the Relocation of Old Harbor Life Saving Station at Cape Cod National Seashore has been received and accepted by us on (date)," followed by a signature line for the contractor's acceptance.

When the first CO, who was responsible for the first two change orders, was on the witness stand, appellant's counsel asked:

Q Who actually wrote [Change Order No. 1]?

A I did.

Q Did you consult with anyone else?

A No.

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Q Do you regard change order No. 1 as encompassing a release of claims?

A No.

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Q How about change order No. 2, were you also involved in that?

A Yes, I was [Tr. 66].

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Q Did you write change order No. 2?

A Yes.

Q When you wrote that, did you intend to encompass any kind of a release of claims in that document?

A No [Tr. 70].

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Q When you wrote change order No. 2, did you intend that the contractor give up any claim that he might have against the Government?

A He didn't submit any claim.

Q So, therefore, you did not intend – answer my question. Did you intend that he give up any claim?

A No [Tr. 70-71].

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Q Was the, was the, extra time in this case required by adverse weather?

A Partially.

Q And to what extent was it required by something else?

A Change order No. 1 was partial weather and partial something else.

MR. EPSTEIN: Partially the chimney.

THE WITNESS: Yes [Tr. 72].

On cross-examination, Government counsel pursued the matter further:

Q Did you meet or have a discussion with the contractor leading up to change order 1?

A I don't believe I personally did. Marsha [Fader] handled that, and then I talked, discussed, it with Marsha.

Q What was your intent in issuing change order 1 with regard to pricing increase or claims under the change?

A There were no price increases mentioned.

Q Did the contractor submit a price increase at that time?

A There was no mention of any cost or price increases [Tr. 84].

A similar dialogue occurred when the second CO was on the witness stand:

Q Mr. Cintron, do you regard change order No. – if I use the term release of claims, do you know what that means?

A Yes, I do.

Q What does it mean?

A It means the claim is issued when the final of the contract is completed, and the release of claim, the release is sent to the contractor, and once he signs, he releases the Government of all obligations to the contractor.

Q So, release of claims releases the Government of obligations?

A Correct.

Q Did you regard change order No. 3 as a release of any claim which might [have] arisen outside of that change order?

A No [Tr. 147-48].

Direct and cross-examination continued concerning the effect of the notification and acceptance language of the change orders. At the end of this discussion, appellant's counsel referred to the six additions contained in Change Order No. 4 and inquired:

Q Why didn't you just include these, these six additional items in the change order and hope that the contractor would sign the change order and agree to them in that context?

A We're not accustomed to doing that. I assume that anything that we did with – on any change order was agreed to before the change order was issued [Tr. 151].

As we have seen, Corey saw Change Order No. 1 as NPS' solution to the chimney removal problem, and the only cost discussion in that context concerned NPS' efforts to ensure that the removal of the whole chimney would not result in any additional cost to them (Tr. 237-41). The question of the contractor giving up any other claim he might have was simply not discussed; and Corey testified that he would not have given up any such claim at the time because he believed he had encountered a different site condition at the beach than existed at the time of his inspection, for which he should be compensated (Tr. 242, 300-03). Similarly, he believed that the high tides he intended to make use of in placing and refloating his barge were part of the specifications (Tr. 242-43, 288).

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Corey further testified that no additional compensation or release of claims was ever discussed in connection with Change Orders No. 2 (Tr. 246-47) or No. 3, except for a vaguely implied threat of liquidated damages (Tr. 247-49); and, in connection with Change Order No. 4, the only discussion of costs had to do with the specifically added and deleted items (Tr. 250-51, 303-10). He refused to sign a general release at the end of the project (AF 116 at 23-24, Tr. 305); and the Government anticipated, at least as early as June 1978, that a claim would be filed (AS 73, Tr. 133-35).

Discussion

a. Arguments by Counsel

Appellant's original Complaint alleged 11 counts as bases for relief, including defective specifications (inadequate completion period), improper change orders (lack of additional compensation), denial of beach access (causing the project to extend into winter), NPS delay in obtaining wetlands permits (preventing work before October 21), insufficient funds (causing delay in issuing notice to proceed), cardinal change doctrine (lack of land access, missing spring tides), change in site conditions (NPS delays resulting in winter conditions), mutual mistake of fact (parties assumed beach access and spring tides), contract reformation (triple costs not anticipated by either party), improper denial of contract extension (denial of June extension request), and substantial completion in early July (liquidated damages improper).

Although these allegations were refined considerably during the course of the litigation, the essence of them remained the same, even in appellant's Post-Hearing Brief: namely, that NPS undertook a project and went out with a solicitation for formal bids without first having its planning completed—causing a work situation that neither party anticipated (mutual mistake, cardinal change, defective specifications, contract reformation), in an inaccessible location and at a site that was physically different from that contemplated, resulting in an inability to offload during winter months, with tremendous ensuing costs to the contractor (differing site condition, constructive change, unconscionability). Appellant also alleged substantial completion in early July (remission of liquidated damages).

Appellant's Reply Brief focuses primarily on the Government's arguments concerning the alleged conclusive effect of the same-cost, no-change language contained in the four change orders signed by the contractor, urging lack of consideration, no intention on the part of the parties to release all claims, NPS' failure to address the contractor's monetary claims, later waiver of release by the Government's actions, etc. The 34 cases cited in appellant's Post-Hearing Brief and the 14 additional cases cited in its Reply Brief generally tend to support its contentions.

Government counsel's various individual submissions, briefs, citations, and arguments are, if anything, even more prolific. The difference is, we do not generally find them to be consistent with the facts or the merits of the case before us. They involve far too much heat and far too little light.

For example, the Government's Post-Hearing Brief continues to rely primarily on the four change order releases executed by the contractor as its basis for denying the claims. Appellant asserts that the Government's position is that the language of the change orders constitutes a release of *all* claims for additional compensation. Government counsel protests that he must again "correct Appellant's misstatements," since the Government's contention is, rather, that the change orders "bar claims merely on the matters addressed by the change orders—as the instant claims."

Yet the uncontested testimony, not only of the contractor but also of the two CO's who appeared at the hearing, was that (with the exception of the chimney costs) none of the additional costs was ever even discussed by the parties in the context of *any* of the four change orders. And when the contractor was asked to sign a final release of claims at the conclusion of the project, he steadfastly refused to do so. Thus, the releases before us have neither the clarity and specificity needed for the release of a particular claim nor the finality and comprehensiveness of a general release, to say nothing of their lacking the knowledge and volition on the part of the contractor that many of the cases cited by Government counsel regard as essential. We therefore find the Government's arguments and citations in the context of this case to be singularly unpersuasive.

b. General Discussion

It ought not be inferred that this was a simple case to resolve. It was not. It was, in nearly all respects, an exceptionally difficult case, with facts that, thankfully, are quite rare. Appellant's counsel presumably has raised practically every theory of recovery known to the contract field because the case fits no easy mold. Likewise, the Government's arguments that the contractor had primary permit responsibility under the Permits and Responsibilities Clause; that bad weather gives rise to time extensions but not to damages; and that releases must be construed strictly, were major objections that had to be considered.

There was, in addition, the problem that the contractor inexplicably sat on its rights for nearly 5 years (1979 to 1984), a period during which a major fire destroyed a lot of its records (Tr. 263); which conceivably could explain why, when it did resubmit his claim, its counsel was a former member of the Regional Solicitor's office, who may have had some knowledge about the matter because of his previous employment, and apparently access to relevant records as well. As we have noted, the latter complication was resolved by the Office of Government Ethics, and not by the Board. As to the question of delay, our concern about possible prejudice to the Government was obviated by the fact that, on October 15, 1984, NPS elected to respond

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substantively to the contractor's undated September 1984 claim, thus waiving any claim of prejudice caused by delay (AF 78). Those actions, of course, did not relieve the Board of the obligation to research the scores of cases cited by the parties on the other issues.

On the other hand, there is no need to address all of the recovery theories advanced by appellant's counsel since, while we are generally in agreement as to the applicability of his cases, we conclude that recovery in the present case would be permissible under any of several theories. Many similar cases, particularly the earlier ones, do not rely on any one theory as the sole basis on which recovery was permitted.

Among the relevant cases cited by appellant in its Post-Hearing Brief are: *McKee v. United States*, 500 F.2d 525, 530, 205 Ct. Cl. 303 (1974) (an analogous case in which this Board was reversed, because the court concluded that a loss of the access anticipated by the specifications constituted a change); *Swinging Hoedads*, AGBCA No. 77-212, 79-1 BCA ¶ 13,859 (Government's erroneous representation that access would be available rendered it liable for increased costs incurred); *Carl W. Linderer Co.*, ENG BCA No. 3526, 78-1 BCA ¶ 13,114 (contractor was entitled to rely on positive statements made in specifications: "When the government has given a warranty in its contractual capacity, and the subject matter of the warranty is frustrated by any intervening cause, the contractor should be entitled to relief"); *Southern Paving Corp.*, AGBCA No. 74-103, 77-2 BCA ¶ 12,813 (another similar case, awarding entitlement to excess costs, including impact costs, based on differing site condition and changed requirements, where wheeled vehicles could not be used as anticipated, and heavier equipment and more expensive performance methods were required).

Appellant also cites *Edward R. Marden Corp. v. United States*, 442 F.2d 364, 194 Ct. Cl. 799 (1971), for the proposition that the sheer magnitude of additional work resulting from defective specifications, even though culminating in an identical result, can amount to a cardinal change in the work to be performed under a contract—since it is not "essentially the same work as the parties bargained for when the contract was awarded" (194 Ct. Cl. at 809). "Where a cardinal change is concerned, it is the entire undertaking of the contractor, rather than the product, to which we look" (*ibid.* at 810). Appellant notes that the cardinal change doctrine has been applied even though the contractor had signed a change order which required the additional work and increased the contract price and had accepted the final payment. *P. L. Saddler v. United States*, 287 F.2d 411, 412; 152 Ct. Cl. 557, 560 (1961).

Finally, appellant asserts that other cases hold that the Government must pay increased costs which arise when a delay in issuance of a notice to proceed forces a contractor to perform under adverse weather conditions, citing the Department of the Interior cases, *Abbett Electric*

Corp. v. United States, 162 F. Supp. 772, 775; 142 Ct. Cl. 604, 627-28 (1958); and *L. O. Brayton & Co.*, IBCA No. 641, 70-2 BCA ¶ 8510. In *Brayton*, we said:

On the record of this case, we believe that [the Southwestern Power Administration] unreasonably delayed in issuing a notice to proceed. In our opinion, such a delay creates a compensable suspension of work under paragraph SC-12, Price Adjustment for Suspension, Delay, or Interruption of the Work. The contract provision expressly makes compensable delay in any or all of the work caused by a failure of the contracting officer to act in the time specified in the contract, or within a reasonable time if no time is specified. *Although no time was specified in the contract for the issuance of the notice to proceed, we conclude that in the circumstances of this case any delay beyond September 1, 1963, was unreasonable*" (70-2 BCA at 39,554-55, italics added, footnotes omitted).

Virtually the same language of paragraph SC-12 is still contained in paragraph 17(b) of the Suspension of Work clause of SF 23-A (Rev. 4-75), which can be found in the present contract. Thus, we reach a similar result. Similar results were also reached in *Hensel Phelps Construction Co.*, IBCA No. 1010, 75-1 BCA ¶ 11,232. In following these cases, we distinguish *M. A. Mortenson Co.*, ENG BCA 4780, 87-2 BCA ¶ 19,718, *aff'd* CAFC No. 87-1591 (Apr. 4, 1988), a competitive situation in which the contractor twice willingly extended his second-low bid in hopes of obtaining the contract, and then tried to charge the Government the extra costs resulting from an inevitably delayed starting date. There, relief was denied. Here, we have an emergency situation, a single bidder, a limited period for performance specified by the contract and dictated by weather constraints, and specific work dates contemplated by the contract, upon all of which the contractor was entitled to rely.

Although influenced by the excellent cases cited by appellant, the primary test of entitlement we have applied in this case is one of reasonableness—particularly whether the contractor was reasonable in relying on the solicitation's references to permits, road access, and spring tides; whether NPS was reasonable in assuming that its 30-day job could become a 9-month job without any additional costs to the Government, after it had been primarily responsible for delaying the notice to proceed; and whether the contractor was reasonable in thinking that the releases he signed in connection with the change orders were merely boilerplate language that would not preclude his later submission of claims. See *Goudreau Corp.*, DOT BCA No. 1895, 88-1 BCA ¶ 20,479; and *A & K Plumbing & Mechanical, Inc. v. United States*, 1 Cl. Ct. 716 (1983).

Except with respect to the releases, to ask these questions is to answer them: that is, we think the contractor behaved eminently reasonably—which may be why the case arrived in the posture of requiring us primarily to decide the effect of the release clauses. But to banish all doubts, we hold that, having undertaken the task of obtaining permits in order to save time, and having specifically provided as well for beach access and for the use of spring tides in the contract, NPS is fully liable for the monetary consequences of (1) the untimely issuance of the Corps of Engineers and wetlands permits,

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(2) its belated notice to proceed, (3) the failure of the Chatham Conservation Commission to allow the contractor to bring his equipment to the work site by the sand road (*see Linderer, above*), (4) the delay caused by the time-consuming harbor crossing of the contractor's equipment, (5) delays until July 18, 1978, for the offloading and relocation of the Station, and (6) all other reasonable costs incurred by the contractor in the completion of the project that were not contemplated by its bid price, except for the costs involving the chimney or incurred in rebuilding the new foundation. *Goudreau, supra*.

Since we have already found that the entire project was substantially complete by July 18, 1978, it follows that the liquidated damages assessed by the CO were improper in their entirety and should be rescinded. Accordingly, there is no need to discuss the propriety of the imposition of such damages in other respects, such as whether the Government met its burden of proving that they were fair and reasonable, or whether it actually suffered any injury as a result of any completion delay. *See U.S. Floors, Inc.*, ASBCA No. 36356, 88-3 BCA ¶ 21,153; *KATCO, Inc.*, ASBCA No. 36092, 88-3 BCA ¶ 21,041.

Government counsel in this case put special reliance on a decision by this Board in *Jack Morehouse dba Morehouse Painting*, IBCA No. 2087, 86-3 BCA ¶ 19,014. Some consideration of that case is therefore also required. In *Morehouse*, we refused relief to a contractor who was denied the use of county roads because the county government chose to enforce its existing weight limits after the contract was entered into, in a situation where the contractor's bid had assumed that the weight limits would not be enforced. We pointed out that the Government was not responsible for the contractor's assumptions. That situation contrasts dramatically with the present case, where NPS not only undertook to obtain the necessary wetlands permit, but the contractor's assumption that he could use the sand road was based on the contract specifications. We think the differences are critical.

c. Effect of the Releases

In our review of modern cases on the effect of purported releases of contractor claims, we have concluded that the current trend of courts and boards is to hold that releases mean what they say, provided only that they say what they mean and that both parties actually intended the same thing—*i.e.*, that there was a meeting of the minds.

We therefore concur with the decision of the Armed Services Board in a recent case, *Leslie & Elliott*, ASBCA No. 36271 (Sept. 30, 1988), 88-3 BCA ¶ _____, which held that, despite the Navy's standard "remise, release, and forever discharge" language, the contractor's time extension claim was not precluded because it was never discussed by the parties. The board noted that Federal Acquisition Regulation (FAR) 43.204 requires CO's to negotiate with the contractor equitable adjustments resulting from change orders. Since there was no such

negotiation, the board did not sustain the release, citing *R. C. Hedreen Co.*, ASBCA No. 20599, 77-1 BCA ¶ 12,328, and *Southeastern, Inc.*, ASBCA Nos. 7677 and 8614, 1963 BCA ¶ 3904.

In its discussion, the board in *Leslie*, above, notes that even in the case of a general release, the law recognizes exceptions, quoting from *J. G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801 (1963) at 806-07, as to mutual mistake, contrary intention, oversight, and fraud or duress. It also mentions "the line of cases holding that consideration of a claim on the merits following execution of a release indicates the parties did not intend the release to extinguish the claim and therefore does not bar the claim," citing *A & K Plumbing*, above; *Bromley Contracting Co.*, ASBCA No. 20271, 77-2 BCA ¶ 12,715, and cases cited in *Bromley* (Slip Opinion at 9).

In the case before us, the contractor's claim was first submitted to the CO by its attorney on October 25, 1978 (AF 55). Correspondence concerning it was exchanged between the parties (with at least one meeting being held, in December 1978 (AF 60)) for nearly a year, including various letters to appellant's attorney from Government counsel (AF 66, 69, 72), before the CO concluded in February 1980 that no decision was required in the absence of a reply to Government counsel's last (October 10, 1979) letter (AF 75). During the period prior to October 10, 1979, it does not appear that the current Government defense of a previous contractual release was even considered; and when it was later raised, it was raised by Government counsel, not by the CO.

As we said in *Addison Construction Co.*, IBCA No. 1064, 76-2 BCA ¶ 12,118, "Boards of contract appeals have long followed the rule that in construing a release, it is proper to consider the circumstances under which it was executed, the relations between the parties and the nature and character of existing disputes * * *. We regard it as significant that the contracting officer did not rely solely on appellant's signing of the release as a basis for denying the request for an extension of time but proceeded to consider the request for an extension on its merits * * *. Since the contracting officer considered the request on its merits, the Board cannot avoid similar consideration of the merits in this appeal from the findings of the contracting officer," citing *National U.S. Radiator Corp.*, ASBCA No. 3506, 61-2 BCA ¶ 3192, and *Oregon Electric Construction, Inc.*, ASBCA No. 13778, 70-2 BCA ¶ 8594 (76-2 BCA at 58,213, footnotes omitted). Cf. *Hensel Phelps*, above, where the Board said, "[I]t is well settled that an agreement will not operate as an accord as to matters not contemplated by the agreement" (75-1 BCA at 53,458).

Cases to the same effect include *R. J. Crowley, Inc.*, ASBCA No. 28730, 86-1 BCA ¶ 18,379, heavily relied upon by appellant ("A claim is not released unless there are unequivocal acts showing expressly or by implication an intention to release * * * there can be no release without a showing of an intent to release, which must be sought from the entire instrument or the documents referred to

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therein, as well as the circumstances of its execution"; 86-1 BCA at 94,296); *McKee, Inc. v. City of Atlanta*, 431 F. Supp. 1198 (1977); *Chantilly Construction Corp.*, ASBCA No. 24138, 81-1 BCA ¶ 14,863 ("In this appeal, there was no mutual agreement in satisfaction of a claim in bona fide dispute for the simple reason, among others, that there was no meeting of the minds on the subject of delay or impact costs. Such costs simply were not mentioned or considered"); *U.S. Optics Corp.*, ASBCA No. 18972, 75-2 BCA ¶ 11,603 ("The modification * * * states that 'except as modified herein, the Contract remains unchanged.' There is no mention of price, no statement indicating that the modification constitutes a complete equitable adjustment resulting from the cited change, and no release by the contractor * * * the parties did not discuss price or monetary compensation").

U.S. Optics, above, cites *Kurz & Root Co.*, ASBCA No. 17146, 74-1 BCA ¶ 10,543, *aff'd*, 227 Ct. Cl. 522 (1981), in which ASBCA stated: "This Board has consistently held that language similar to 'the above change results in no change to contract price' does not have the legal effect of an accord and satisfaction with respect to matters which the parties have excluded from their negotiations," citing *Pan American World Airways, Inc.*, ASBCA No. 3627, 57-1 BCA ¶ 1240, and *Polyphase Contracting Corp.*, ASBCA No. 11787, 68-1 BCA ¶ 6759, also relied on by appellant. In *Polyphase*, the board said: "Although Modification No. 1 extended the time for performance of the contract without change in contract price, there is nothing in that modification or in any other evidence before us to indicate an intent by the parties to compromise any delay claims arising from those delays that necessitated that extension" 68-1 BCA at 31,264.

Such is also true of the case before this Board. Enough has been said to make clear that there is substantial legal support for the view that releases of unnegotiated claims by contractors are not automatic free benefits to the Government whenever any minor contract change is entered into, or that may be inferred from the standard "no change" language often inserted in contract modifications. Rather, there seems to be an ascending hierarchy of releases progressing from individual modifications, to final payment modifications, to general releases, to settlement agreements; and the lower on the ladder the alleged release is, the more difficult it is for the Government to assert credibly that it was intended to cover all possible claims. It is one thing to hold a contractor to a bargain he has made. It is quite another to try to hold him to a bargain he did not make, whether the issue has to do with the original contract or a "no cost" change. Here, since there is no evidence that the contractor ever intended to give up his monetary claims, we reject the Government's attempt to mandate that result.

Decision

In summary, having found that the contractor was entitled to an extension of time for work performance until July 18, 1978, and that the work was substantially complete as of that date, we reverse the liquidated damages imposed by the CO; and we find for appellant as to entitlement in virtually all other respects, as set forth above, with interest on the claim from February 12, 1985 (the date the certified claim was presented to the CO), in accordance with the Contract Disputes Act; with the right of further appeal by the contractor if agreement as to quantum cannot be reached by the parties within 120 days from the date appellant receives this decision.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

APPENDIX A

Boston Globe, February 20, 1978:

Photo Omitted: "Barge with 80-year-old Coast Guard station being towed into Provincetown Harbor last November. (AP photo)"

Headline: "OLD HARBOR STATION WITHSTOOD THE STORM By Margery Fagan, Globe Correspondent"

"PROVINCETOWN - The highest tides in 100 years crashed seawalls and sent floodwaters rushing through the town. Relentless seas smashed the dike at Hatch's Harbor. Basements flooded, felled tree branches lay strewn in yards and streets.

"The Blizzard of '78 caused an estimated \$1.5 million in damages to private homes and businesses here. But for the third time in as many months the sturdy Old Harbor Life Saving Station once the headquarters for dramatic sea rescues along the treacherous Cape Cod coast has survived the onslaught of winter winds and seas.

"After enduring a perilous 36-mile sea journey from Chatham to Provincetown, the monstrous January northeaster and the Great Blizzard two weeks ago, the station sits perched on a barge in Provincetown harbor. It now awaits relocation to Race Point where it will become a monument to the US Lifesaving Service.

"She lost a lot of plywood that had to be replaced and one of the walls was badly damaged by winds. But all in all she held up really well through the storm,' said Provincetown Harbormaster Stanley Carter of the wooden, nine-room, two-story structure and its four-story observation tower built in 1897. 'We all think she's just beautiful.'

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"Last January the National Park Service began plans to move the station from Chatham where it was threatened by encroaching seas at the eroding North Beach peninsula. The station was then 600 feet from shore. By November high tide waters lapped at its foundation.

"If the station hadn't been moved to Provincetown in November, we would have lost it. There's no way it could have survived this last storm," said Jack Clark, a Park Service technician. 'I flew over the beach in Chatham and the foundation was nothing but rubble.' [Italics added.]

"Because of the North Beach erosion, the Park Service decided to relocate the station on a 30-foot sand dune at Race Point, Provincetown's northern tip. 'As the ocean rises, we lose about three feet of land a year along the coast. But because of erosion patterns, Race Point gains about three feet of land a year,' Clark said. Relocation of the station at Race Point, he added, should insure against future erosion problems.

"For \$119,750 the Park Service hired a contractor to transport the station by barge the 36-mile distance. But the move posed problems from the start.

"After waiting days for calm seas and winds, workers on Nov. 30 reinforced the station with steel girders and prepared to lift it by cranes onto the waiting barge.

"Just as the two huge cranes hoisted the building from its foundation, one of the cables broke and had to be replaced. Then the loaded barge, which barely made it onto North Beach, got stuck on a sandbar on its way out and listed on the shoal from late afternoon until high tide at 3 a.m.

"Meanwhile, workers at Race Point tore down the station's intended foundation which, for the second time, failed to meet construction specifications. By the time the barge began moving again, high winds and rough seas forced it to lay over in Provincetown Harbor.

"The weather did not improve, however, and there the station remains—conspicuously [sic] grounded at low tide on its barge.

"The Park Service had planned to move the station to Race Point as soon as weather permitted. A tugboat steamed over from Martha's Vineyard four times to assist operations but each time seas became too rough.

"Then the January northeaster's gale-force winds nearly blew both the barge and the station out to sea.

"It looks like the station will stay in the harbor until April or May," said Marsha L. Fader, project coordinator and historical architect for the National Park Service. 'Weather conditions can be favorable in the harbor, but seas around the outer edge of Race Point have just been too rough to risk a move.'

"Fader hopes that the station will be open to the public by midsummer. Exhibits will emphasize the history of the lifesaving

service which was founded in 1872 and stayed active until its incorporation with the Coast Guard in 1915."

(Source: AS 24, *Middlesex Contractors & Riggers, Inc.*, IBCA-1964)

APPEAL OF HAL ALLRED

IBCA-2447-A

Decided: *February 16, 1989*

Contract No. IFB8210-87-06, National Park Service.

Sustained in part, denied in part.

1. Contracts: Construction and Operation: Conflicting Clauses--Contracts: Construction and Operation: Duty to Inquire--Contracts: Construction and Operation: General Rules of Construction

A contractor's claim for an equitable adjustment for extra trimming work allegedly incurred during performance of a tree clearing contract was denied, where the contractor's reading of the solicitation, combined with his actual knowledge of conditions that existed at the site created an ambiguity so patent, that a reasonable bidder would not have bid the contract without first seeking clarification from the contracting officer as to the actual contract requirements. It is well-settled that a contractor, faced with an obvious inconsistency or discrepancy of significance, is obliged to seek clarification from the Government prior to bidding.

2. Contracts: Construction and Operation: Actions of Parties

Where a contractor's conduct during performance of a tree-clearing contract strongly indicates that he understood that trimming was a significant part of the work, such conduct is considered persuasive evidence of what the contract required, in considering the contractor's claim for alleged extra costs incurred by such trimming.

3. Contracts: Construction and Operation: Modification of Contracts: Generally--Contracts: Disputes and Remedies: Burden of Proof--Contracts: Disputes and Remedies: Damages: Generally

Where the Government sought to modify the cutting requirements of a tree-clearing contract at a pre-bid inspection to include a 7 - 10-foot cutting variation, such modification, though relied upon by the contractor in computing his bid, was found to not alter the basic requirements of the contract. These requirements were misread by the contractor and resulted in his underestimating the scope of the work, but he failed to show damage or how such modification constituted extra work for which he was entitled to an equitable adjustment.

4. Contracts: Construction and Operation: Actions of Parties--Contracts: Disputes and Remedies: Equitable Adjustments--Contracts: Performance or Default: Inspection

Where a contractor demonstrated the established practice in the tree-clearing industry regarding the cutting of trees which were located on the outer border of the contract cutting zone, and the Government inspector's procedure indicates that he improperly directed the contractor to cut trees clearly beyond the area considered by industry practice to be within the cutting zone, the Board found such direction to constitute extra work for which the contractor was entitled to an equitable adjustment.

APPEARANCES: J. William Bennett, Attorney at Law, Portland, Oregon, for Appellant; William Silver, Department Counsel, San

February 16, 1989

Francisco, California, W. N. Dunlop, Department Counsel, Boise, Idaho, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

This appeal was timely filed by appellant, Hal Allred, from the October 22, 1987, final decision of the contracting officer denying appellant's claim in the total amount of \$33,056.24, for extra work allegedly incurred during performance of a roadside clearing contract at the Grand Canyon National Park. An evidentiary hearing in the matter was held May 4, 1988, in Boise, Idaho.

Findings of Fact

1. On May 5, 1987, Solicitation No. IFB8210-87-06 was issued to prospective bidders by the United States Department of the Interior, National Park Service (Government). The purpose of the solicitation was to seek bids for a roadside clearing project at the North Rim District of the Grand Canyon National Park, Coconino County, Arizona (Appeal File, Tab 1 at page 76).¹ The work encompassed approximately 22 miles of scenic secondary roads in five zones serving the Point Imperial and Cape Royal Canyon viewpoints on the North Rim of the Park. These roads are at an average elevation of 8,000 feet and traverse heavily forested areas. The project generally entailed clearing heavy vegetation, brush, and small trees 10 feet on each side from the paved edges of the roads. The solicitation also set forth the following pertinent provisions:

PART 1: GENERAL

1-1 DESCRIPTIONS/SCOPE/LOCATION:

C. Associated work that is a part of the contract is as follows:

1. All limbs, slash, and the smaller diameter stems, up to 6 inches in diameter and longer than 2 feet, shall be processed through a chipping machine. * * *

2. All cut stumps and also all vegetation cuts in the actual paved areas of the roadway shall be immediately treated with a special herbicide solution. * * *

3. All tree limbs/stems/trunks 6 inches and greater in diameter shall be bucked into lengths from 18 inches to 24 inches long and decked/hailed/stacked to locations designated by the Contracting Officer. * * *

4. Certain marked trees and snags, beyond the 10-foot cut line but that are a hazard to the roadway, shall be felled as part of the contract. There are approximately 150 of these involved. * * *

5. *Certain marked trees that are spectacular specimens but are within the 10-foot line shall be left standing but completely trimmed/pruned to a distance of 12 feet above the ground. There are approximately 25 such trees.* * * * [(AF-4 at 76, 77 (italics supplied).]

¹ Hereinafter, reference to the documents which comprise the official record in this proceeding will be typically abbreviated as follows: Appeal File, Tab 4 page 76 (AF-4 at 76); Hearing Transcript page 1 (Tr. 1); Appellant's Exhibit 1 (AX-1); Government's Exhibit A (GX-A); Appellant's Posthearing Brief at 10 (App. Br. at 10); and Government's Posthearing Brief at 20 (Govt's. Br. at 20).

PART 2: SPECIFIC WORK REQUIREMENTS**2-1 ROADSIDE AND ROADWAY CLEARING:**

The Contractor shall remove all trees and brush that are growing adjacent to the roadway from the edge of the pavement out 10 feet on the shoulder, perpendicular to the roadway. * * *

2-3 LARGE LIMBS AND STEMS:

Limbs and small diameter stems (slash) up to 6 inches in diameter and longer than 2 feet shall be processed through a chipping machine. * * *

2-4 LARGE LIMBS AND STEMS:

All tree stems above 6 inches in diameter shall be bucked in lengths from 18 inches to 24 inches long.

Certain tree stems 6 inches to 8 inches in diameter shall be marked by Government to be limbed and bucked in lengths of 8 feet and decked on the ground... * * *

2-7 SPECIMEN ROAD SHOULDER TREES TO REMAIN:

*Certain large trees within the cutting zone shall be marked by the Government to remain in place. The contractor shall trim these trees up to where canopy is at least 12 feet above the ground. * * * [AF-4 at 78, 79 (italics supplied).]*

2. Prospective bidders were given notice of a pre-bid inspection to be conducted during the afternoon of June 22, 1987 (Tr. 30; AX-4). During the morning prior to the pre-bid conference, appellant and an employee, Travis Campbell, after getting directions from William Dennis, the maintenance foreman for the North Rim District, drove to the project area to meet Ron Dovzak, a National Park Service inspector, who was marking trees for clearing and/or removal (Tr. 28-30, 32, 142, 279-80, 311-12). Messrs. Allred and Campbell found Dovzak in zone 3, and walked with him for a quarter of a mile while Dovzak sprayed red or blue paint on numerous trees (Tr. 32, 280-81).

3. The following testimony points up the principal factual dispute in this proceeding. Appellant testified that during their conversation, Dovzak indicated that the red paint designated trees to be removed and blue paint designated trees to be left at the site (Tr. 33, 110). Mr. Campbell corroborated Allred's testimony as to Dovzak's explanation for the red and blue markings and further testified that Dovzak never discussed that the blue marked trees would be required to be trimmed (lifted) to a canopy height of 12 feet (Tr. 142-43). Allred testified that "hundreds" of trees had been marked with blue paint (Tr. 115). In his testimony, Mr. Dovzak indicated that he specifically communicated such intent to Mr. Allred (Tr. 281).

4. The pre-bid tour of the site began at 1 p.m. on June 22, 1987. Present were Allred; Campbell, another prospective bidder; Dovzak; Dennis; and Lloyd Olson, a District ranger for the North Rim District who coordinated the project for the Government (Tr. 40, 216, 217, 226). Mr. Dennis, who acted as the contracting officer's representative (COR), during the early stages of the work conducted the tour (Tr. 41-

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42, 46, 143).² The group traveled through the five work areas described in the bid schedule, stopping a number of times along the way, and observing trees marked with red paint and trees marked with blue paint (Tr. 42-43, 282-83). The parties dispute what was said during the pre-bid inspection regarding trimming the trees painted blue. Appellant acknowledged that he saw blue paint on trees but testified that there were no representations by Government personnel as to what the markings denoted, other than that such trees should remain (Tr. 46-47). According to Dovzak however, during the pre-bid inspection the parties "discussed both the red and blue marks, and how trimming is going to be a major part of this and how the red trees come out and blue trees are going to be limbed" (Tr. 283). Similarly, Mr. Olson testified that he talked about the meaning of the blue paint markings with appellant wherein he explained that at least 3 times during the pre-bid tour, "blue trees were pointed out and discussed as to the trimming and removing" (Tr. 226-27).

5. During the pre-bid tour, Mr. Dennis indicated that some of the trees in the 10-foot cutting zone which were marked red for removal, "possibly" would not have to come out, due to the Government's desire to vary the cutting area from 7 to 10 feet in order to avoid a 10-foot straight swath (Tr. 45, 49, 119). The project inspector was to be the one who would determine which red marked trees within the cutting area would not be removed (Tr. 53, 58, 60, 121). Subsequently, appellant was determined to be the low bidder, and was awarded the contract in the total amount of \$58,442.02 on July 23, 1987 (AF-4 at 4). Work commenced on July 28, 1987.

6. When performance began, the inspector wanted an area of black locust (thorny underbrush) removed which was beyond the 10-foot cutting zone, but hanging out toward the road (Tr. 36, 69). The parties agreed that in exchange for this extra work, the Government would "trade" trees with appellant, by allowing him to fell certain trees down hill away from the road, rather than bucking them into fire wood and chipping the limbs (Tr. 68-69; AF-1). In addition, Mr. Allred testified that on the first or second day of work he was told by Mr. Dovzak that blue paint meant trim (Tr. 81-82). Appellant was allegedly advised that he could either trim the trees marked in blue or remove them (Tr. 82, 128, 138-39, 194). Dovzak testified however, that he never made such statements to appellant. Rather, Dovzak testified that appellant trimmed blue painted trees from the first day on the job, without instruction or discussion from him. "I never said anything like that, they knew what had to be trimmed," he stated (Tr. 283-84). Allred testified that he trimmed the first trees marked with blue paint on the second day of work, July 29 (Tr. 138-39).

* The record indicates that as of July 28, 1987, Mr. Dovzak was designated the COR for this project (AF-8); Tr. 302, 310). Prior to that time however, Mr. Dennis was considered to be the COR by the parties (Tr. 41, 305).

7. Appellant conceded that he did not complain to the Government about being required to trim trees marked with blue paint until after Steven Zundel, the contractor's representative³ arrived at the site on August 15, 1987, 6 days before the conclusion of the contract (Tr. 132). Appellant testified that it was 3 days into the contract before he realized a lot of trimming was being done, but that he did not think it "was really serious at that time" (Tr. 70). Appellant also testified he was trying to keep the project going smoothly and without controversy (Tr. 70). At that time however, appellant contacted Zundel to send more men to the job due to the amount of trimming that was being required and a dispute over the number of marked trees outside the 10-foot cutting zone (Tr. 162-63).

8. There was a continuing disagreement by the parties regarding the measurement of the 10-foot cutting zone. Appellant testified that the inspector insisted that any marked tree that could be touched from the road shoulder with a 10-foot measuring stick was inside the contract requirement (Tr. 76, 80-81, 173). Such an interpretation appellant argues, is contrary to industry practice, which allows that if a tree is more than one half inside the cutting line it was considered in and if it was more than one half on and one half off the line, industry custom was that the contractor cut every other one (Tr. 76-78, 172-73; AX-3). Dovzak testified that in cases where the tip of the measuring pole just touched a marked tree, 50 percent of the time he required the tree to be removed, and 50 percent of the time he allowed it to stay, depending on road safety and aesthetics (Tr. 302-03).

9. By August 7 or 8, appellant was concerned about the rate of progress on the job, and the fact that the crew seemed to be trimming an excessive number of specimen trees. At that time, Allred calculated that 100 to 150 trees had been trimmed (Tr. 74, 124). By August 15, when Mr. Zundel arrived at the site, they counted over 400 trees that had been trimmed (Tr. 75, 124). On August 17, 4 days before the conclusion of the 22-day contract, Zundel met with Mr. Dennis and Mr. Olson to submit the first invoice. At that time he formally complained about trimming trees which he felt did not fall into the category of spectacular specimens and were thus not covered by the terms of the contract. Zundel also complained that appellant was being forced to remove large trees which did not fall under the general term of small trees, categorized by Section 1, paragraph A of the specifications (Tr. 165-66). On August 18, the parties met to discuss the requirements of the contract (Tr. 84). As a result of that discussion, it was decided that during the remainder of the contract, some trees that were marked for removal could have the red paint scuffed off and be trimmed rather than removed (Tr. 85, 121-22).

10. The project was completed approximately August 22, 1987 (Tr. 86). In early September, appellant and Mr. Zundel prepared a work up

³ Mr. Zundel testified that his arrangement with Mr. Allred was that he would provide technical advice, bonding, rental of the chipper and chain saws, funds to make payroll, and "everything he needed to do the job," in exchange for 50 percent of the contract profits (Tr. 192). He had also helped appellant prepare his bid for the project (Tr. 156-57).

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for the extra costs allegedly incurred for submission of claims to the contracting officer (Tr. 87; AX-2). The claims were formally dated September 3, 1987 (AF-12). Appellant testified that prior to completion of the work he had counted 751 trees that had been trimmed (Tr. 88). These trees ranged "from medium to very large" (Tr. 89). With deduction of 25 spectacular specimens required to be trimmed by the contract, the contractor made a claim for trimming 726 trees (Tr. 88, 89). Allred estimated that overall trimming averaged 47 minutes per tree (Tr. 95-96, 145, 154, 176, 183-84). Allred also included the cost of the chipper, which he rented from Mr. Zundel for \$24 per hour (Tr. 97, 133-34, 185-86). The Government stipulated the hourly rate of appellant's trucks, and the labor, overhead, and profit rates applied to the claim (Tr. 6). Appellant thus claimed a total amount of \$20,545.80 for the additional trimming portion of the work (AF-12 at 4).

11. Also, appellant made a claim for the removal of 182 medium trees in the amount of \$5,065.06, and a claim for the removal of 72 large trees in the amount of \$4,470.65 (AF-12). These claims were based on appellant's position that the general scope of the contract only required him to remove small trees (AF-12; Tr. 135-36). Appellant testified that 20 to 25 percent of the medium trees he was required to remove and 75 percent of the large trees he was required to remove were outside the 10-foot cut zone (Tr. 98-99, 101, 107).

12. On October 22, 1987, the contracting officer issued a final decision denying the three claims at issue in this proceeding (AF-13). Allred timely appealed the contracting officer's decision on December 22, 1987.

Discussion

Claim 1 - Trimming

Appellant asserts that the work performance actually required in trimming the trees at the project site greatly exceeded the scope of work set forth in paragraph 1-1.C.5 of the specifications, which, he argues, expressly limited trimming to 25 spectacular specimen trees. Appellant contends that a reasonable reading of the specifications indicates that there is a direct correlation between the requirements of paragraph 1-1.C.5, referring to "spectacular specimen trees" that are to be trimmed, and its counterpart, paragraph 2-7 "Specimen Road Shoulder Trees To Remain." Appellant concludes the provisions are the same and that the terms "spectacular" and "specimen" refer to the same type of tree (Tr. 118). That is the understanding appellant had when he examined the project site prior to bidding, and which formed the basis of his bid.

The Government asserts that the contract provided for two separate categories of trees to be trimmed. The first were the 25 spectacular specimens, provided for in paragraph 1-1.C.5, and second, "certain large trees" contained in paragraph 2-7 of the contract provisions. The

Government further asserts that appellant has acknowledged the distinction between "spectacular" trees and "large" trees in its claims, and cannot now argue that paragraph 1-1.C.5 referring to spectacular trees and paragraph 2-7 referring to large trees both refer to the 25 spectacular trees. This interpretation, the Government argues, would make the term "large" in paragraph 2-7, meaningless.

In resolving this dispute, we take note of the basic principle of contract interpretation which provides that all parts of a contract must be read as a whole and harmonized, and that all provisions of a contract are to be given effect, if possible. *Appeal of Davidson Enterprises*, IBCA-1835, 2049, 2167 (Nov. 3, 1987), 88-1 BCA ¶ 20,267, citing *Union Pacific Insurance Co. v. United States*, 204 Ct. Cl. 686 (1974), and *Wayne Insulation Co.*, VABC No. 2024 (Feb. 4, 1986), 86-2 BCA ¶ 18,890. An interpretation which gives a reasonable meaning to all parts of the contract will be preferred to one which leaves a portion of it useless, inoperative, meaningless, or superfluous. *Hal-Gar Manufacturing Co. v. United States*, 169 Ct. Cl. 384 (1965); *P. T. Co-Electric Co.*, VABC No. 1797 (Dec. 24, 1985), 86-1 BCA ¶ 18,636.

In this instance, the contract required that both certain large and spectacular trees be "marked" by the Government (Findings of Fact No. 1). The Government undertook an extensive marking operation prior to the pre-bid inspection, when Mr. Dovzak applied blue paint to innumerable trees at the project site. As previously stated, Dovzak testified that he told appellant that the blue marked trees were to be trimmed, while appellant contends that only after the contract work commenced did he find out that the Government was expecting the trees marked in blue to be trimmed rather than left alone (Tr. 32-33, 45-47, 109-10, 142, 281).

[1] Appellant's reading of the solicitation however, and his actual knowledge of the conditions that existed at the pre-bid inspection, invoked an ambiguity, so patent, that a reasonable bidder would not have bid the contract without first seeking clarification from the contracting officer as to the actual contract requirements. Appellant's failure to ascertain which 25 trees were to be trimmed and which were to remain, was a critical error, foreclosing him from now asserting his claim. It is well settled that a contractor, faced with an obviously patent error, omission, inconsistently, or discrepancy of significance, is obliged to bring the situation to the Government's attention prior to bidding. *Jennings & Churella Engineers & Contractors*, DOTBCA No. 1820 (Mar. 31, 1988), 88-2 BCA ¶ 20,670; *West Construction Co.*, ASBCA No. 35191 (Feb. 4, 1988), 88-2 BCA ¶ 20,528.

[2] In addition, we must recognize that the position appellant takes with respect to his claim is not consistent with his conduct during performance of the work. Specifically, we note that appellant raised no objection concerning the trimming of trees with blue markings until after August 15, 6 days before the conclusion of the contract work (Tr. 132). Moreover, by August 7, less than halfway through the performance period, the record shows that appellant had already

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trimmed approximately 125 trees, five times the number that he now so vigorously asserts he expected to trim for the entire project (Tr. 124; AF-10). Appellant's explanation is that he did not realize at the time how many trees were actually being trimmed. Reflecting on these facts, however, we cannot accept appellant's contention that he began performance believing that the job only entailed the cutting of brush and small trees plus the trimming of 25 trees, slightly more than one tree per roadside mile. We find appellant conducted himself in a manner which strongly indicates that he understood that trimming would be a significant part of the contract work. The practical conduct of the parties during performance is persuasive evidence of what the contract means. *Bates Lumber Co.*, AGBCA Nos. 81-242-1, 84-210-1 (Apr. 18, 1988), 88-2 BCA ¶ 20,707 at 104,640.

For these reasons, the claim is denied.

Claims 2 and 3 - Removal of Medium and Large Trees

Appellant testified that he removed 182 medium and 78 large trees in excess of those that had been designated for removal, and thus claims an equitable adjustment for medium trees in the amount of \$5,065.06, and for large trees in the amount of \$4,470.65. The bases for appellant's claims is two-fold. First, appellant asserts that during the pre-bid tour, bidders were informed that not all trees marked for cutting within the 10-foot zone would be cut, but that there would be a cutting variation of 7-10 feet for aesthetic purposes (Tr. 268, 278). Appellant testified he priced his bid accordingly, but once performance began he was required to cut all the red marked trees within the 10-foot zone until Zundel protested to the Government on August 17 (Tr. 312). The cost of performing the extra removal work thus represents the first aspect of appellant's claim.

Second, appellant asserts that he incurred extra costs when he was ordered to remove trees which bordered the 10-foot cutting zone, and thus according to industry standards were outside the scope of the contract work. Therefore, appellant contends he is entitled to an equitable adjustment for this alleged extra work (Tr. 78; AX-3).

Paragraph 2-1 required appellant to remove "all trees and brush * * * growing adjacent to the roadway * * * out 10 feet." In addition, paragraph C.3 of the specifications required appellant to remove and buck into lengths from 18 to 24 inches, "all tree limbs/stems and trunks 6 inches and greater in diameter." Appellant, however, based his bid on the fact that he was only required to clear "heavy vegetation, brush and small trees back 10 feet from the paved edges of the road," as provided by paragraph 1-C.5. Reading these provisions as a whole, we conclude that *in general*, the vast majority of trees to be cleared were small trees. This did not mean however, that the contract required the removal of *only* small trees, as appellant asserts (Tr. 135-36). To accept appellant's interpretation, would be to ignore the pertinent provisions of paragraphs 2-1 and C.3, and render them

meaningless. Appellant, we conclude, was additionally required to cut numerous medium and large trees within the 10-foot zone to meet the requirements of the contract.

[3] The fact that the Government sought to modify the contract terms to provide for the 7 - 10- foot variation during discussions at the pre-bid inspection, did not modify the basic requirement that most of the red marked trees within the 10-foot zone would be removed. Appellant's foreman, Mr. Campbell, admitted this fact in his testimony (Tr. 144). Lloyd Olson, the Park Ranger who coordinated the project estimated that the number of trees that the contractor was advised that he would not have to take out of this area ended up being less than 20 (Tr. 269). Although appellant relied on the Government's statements relating to the variation of the cutting zone, we conclude that such statements did not significantly alter the basic requirements of the contract regarding the size and number of trees to be removed. These requirements were misread by appellant, and resulted in his underestimating the scope of the work. Given these facts, appellant has failed to demonstrate its damages, or how removing certain trees within the 10-foot zone constituted extra work for which he is entitled to an equitable adjustment.

With respect to the second aspect of appellant's claim, *i.e.*, that he was required to remove trees beyond the 10-foot line we find appellant is entitled to an equitable adjustment. This "alternative" theory of recovery does not raise any new factual elements that were not contained in the general allegations of the claim before the contracting officer. We therefore reject the Government's contention that the Board is without jurisdiction to consider this portion of the appeal.

The trees at issue here are trees that were on the outer border of the cutting zone. Appellant contends that he was required by inspector Dovzak to clear any tree that just touched the 10-foot cutting line, contrary to the established industry practice enunciated by him and by Mr. Zundel in his testimony (*see* Finding of Fact No. 8). Mr. Zundel, a tree service contractor with 20 years' experience (Tr. 155), testified that in the normal course of dealing, a tree on the border line was generally considered outside the 10-foot zone unless it lay more inside than outside the zone (Tr. 171-73). The Government has not disputed that this is the commonly accepted procedure in the industry. Rather, the Government seeks to refute appellant's assertion that Inspector Dovzak was unreasonable in his allowance of borderline trees. Dovzak testified that in cases where the tip of the 10-foot measuring pole just touched a red marked tree, 50 percent of the time he required the tree to be removed, and 50 percent of the time he allowed it to stay, depending on road safety and aesthetics (Tr. 302-03).

Dovzak's testimony however, reveals a flaw in his methodology. Reviewing appellant's exhibit 3, a diagram depicting industry practice for borderline trees, it is clear that any tree just touched by the tip of the measuring pole is considered out of the cutting zone. This testimony therefore demonstrates that Dovzak directed appellant to

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perform work not authorized by the contract or considered appropriate by industry standards. For such extra work, appellant is entitled to an equitable adjustment.

Appellant testified that 20 to 25 percent of the 182 medium trees that he was required to remove were outside the 10-foot line (Tr. 98-101), and that this 20 to 25 percent of the trees represented 50 percent of the effort expended on medium trees (Tr. 102). Mr. Zundel testified that 15 to 20 percent of the medium trees removed were outside the cutting zone, and represented 65 to 75 percent of the work on medium trees (Tr. 176-77). In addition, appellant testified that 75 percent of the 78 large trees removed were outside the cutting zone, and represented 85 to 90 percent of the effort on large trees (Tr. 177).

Although estimates, the above testimony constitutes the best evidence for which a quantum recovery for removal of trees outside the cutting zone can be based. Reviewing appellant's claim (A-12), we note the following cost breakdowns:

I. REMOVAL OF 182 MEDIUM TREES

Category	Per tree
Limb/fall/buck.....	5 min.
Stacker.....	8 min.
Chipping	27 min. (3 men @ 9 min. ea.)
Wood hauling	9 min. (3 men @ 3 min. ea.)
	49 min.
	x \$.3186/min.
	\$15.61 per tree labor

Equipment: Category

Per tree
Chipper - 9 min. @ \$24/hr.....
Chipper truck - 9 min. @ \$12/hr.....
Dump Truck - 3 min. @ \$12/hr

Equipment cost total	\$6.00
Labor	\$15.61
Overhead @ 12%	\$2.59
Profit @ 15%	\$3.63

Total.....	\$27.83
	x 182 additional trees

Grand Total medium trees..... \$5,065.06

II. REMOVAL OF 78 LARGE TREES

Category	Per tree
Falling/limbing/bucking.....	12 min.
Stacking.....	15 min.
Chipping	45 min. (3 men @ 15 min. ea.)
Wood Hauling.....	30 min. (3 men @ 10 min. ea.)
	102 min.
	x \$.3186/min.

Total Labor cost per large tree..... \$32.50

Equipment costs:

Category	Per tree
Chipper - 15 min. @ \$24/hr	\$6.00
Chipper Truck - 15 min. @ \$12/hr.....	\$3.00
Dump Truck - 15 min. @ 12/hr.....	\$2.00
Pickup - 10 min. @ \$6/hr	\$1.00
 Total Equipment cost per large tree.....	 \$12.00
Labor.....	\$32.50
Overhead @ 12%	\$5.34
Profit @ 15%	\$7.48
 Total.....	 \$57.82
	x 78
 Grand Total Large Trees	 \$4,470.65

The Government does not object to appellant's calculation of costs for the felling and disposal of medium and large trees, with the exception of appellant's claimed costs of \$24 per hour for the chipper, and its costs for wood hauling (Government's Brief at 38). Appellant acknowledged in its posthearing reply brief that it had presented a separate claim for wood hauling in its September 3, 1987, claim (AF-12) which was previously paid by the Government (Tr. 206; AF-13 at 3). The item for wood hauling therefore, should not be included in its present claim for removal of medium and large trees.

As for the disputed rental cost of the chipper, appellant testified that he paid Mr. Zundel \$24 per hour to rent the chipper used on the project (Tr. 97, 134). Appellant acknowledged that he did not inquire of anyone else about renting a chipper (Tr. 134). The Government however, presented evidence that the reasonable rental value of such equipment, as set forth in the standard industry blue book rental guide, was \$13 per hour or 22 cents per minute (Tr. 245-46). Appellant has failed to rebut the reasonable value established by the Government for rental of the chipper. Nor has it demonstrated that other comparable chippers in the vicinity were unavailable, in order to support its higher rental costs. In the absence of such proof, appellant's claimed costs above the industry established rental value of \$13 per hour or 22 cents per minute for the chipper is unallowable.

Using the above estimates, equipment and wood hauling adjustments, and Government stipulations, we are able to calculate a reasonable equitable adjustment, following the cost breakdowns contained in appellant's claim. These adjustments were based on application of appellant's estimate that 25 percent of all medium trees and 75 percent of all large trees removed were beyond the 10-foot cutting zone; and thus constituted extra work. Subtracting wood hauling labor time per tree, and unallowable chipper costs from appellant's claim, and adjusting overhead and profit accordingly, we conclude appellant is entitled to an equitable adjustment of \$1,002.82 for removal of 45.5 medium trees, and \$2,503.21 for removal of 58.5 large trees. A breakdown of our quantum calculations is as follows:

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I. Removal of 182 Medium Trees*Labor costs:*

	<i>Per Tree</i>
Falling/limbing/bucking.....	5 minutes
Stacker.....	8 minutes
Chipping (3 men x 9 min. each).....	27 minutes
	40 minutes
	$\times \$.3186/\text{minutes}$

Total Labor Cost Per Medium Tree..... \$12.74 per tree labor

Equipment

	<i>Per Tree</i>
Chipper - 9 min. \$13/hr. (\$0.22/min.)	\$1.98
Chipper Truck - 9 min. \$12/hr	1.80
Dump Truck - 3 min. \$12/hr60
Total equipment cost total per medium tree.....	\$4.38
Labor.....	\$12.74
Overhead 12% (of \$17.12).....	2.05
Profit 15% (of \$19.17).....	2.87

Total 25% of 182 medium trees x 45.5 \$22.04

Total Equitable Adjustment Medium Trees \$1,002.82

II. Removal of 78 Large Trees*Labor Costs*

	<i>Per Tree</i>
Falling/limbing/bucking.....	12 min.
Stacking.....	15 min.
Chipping (3 men x 15 min. each).....	45 min.
	72 min.
	$\times \$.3186/\text{min.}$

Total Labor Cost per Large Tree..... \$22.93

Equipment

	<i>Per Tree</i>
Chipper 15 min. \$13/hr. (\$0.22/min.)	\$3.30
Chipper Truck 15 min. \$12/hr	3.00
Dump Truck 15 min. \$12/hr	3.00
Pickup Truck 10 min. \$6/hr	1.00

Total Equipment Cost per Large Tree..... \$10.30

Labor

	<i>Per Tree</i>
Overhead 12% (of \$33.28).....	3.98
Profit 15% (of \$37.21).....	5.58
	\$42.79
Total 75% of 78 large trees.....	$\times 58.5$

Total Equitable Adjustment Large Trees..... \$2,503.21

Decision

In summary, claim No. 1 Trimming, is denied; Claim No. 2, Removal of Medium Trees, is sustained in the amount of \$1,002.82; Claim No. 3, Removal of Large Trees, is sustained in the amount of \$2,503.21, for a total equitable adjustment of \$3,506.03, plus interest thereon in accordance with the Contract Disputes Act of 1978.

DAVID DOANE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge



March 2, 1989

GEORESOURCES, INC.

107 IBLA 311

Decided: March 2, 1989

Appeal from a decision by the Bureau of Land Management, Montana State Office, rejecting oil and gas offers to lease MTM 72086, MTM 72087, MTM 72088, and MTM 72097.

Affirmed.

1. Regulations: Validity

While the Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department which have the force and effect of law, the Board will consider a challenge to Departmental regulations insofar as it is alleged that the regulations were not "duly promulgated."

2. Regulations: Validity

Regulations of the Department implementing 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act are duly promulgated in accordance with the requirements of Exec. Order No. 12291 and the Regulatory Flexibility Act.

3. Mineral Leasing Act: Generally--Oil and Gas Leases: Offers to Lease

Oil and gas offers to lease were properly rejected by BLM pursuant to 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act, 30 U.S.C. § 201(a)(2)(A) (1982), requiring that a lessee who has held a Federal coal lease for a period of 10 years must be producing coal in commercial quantities in order to qualify for other Federal leases under the Mineral Leasing Act, where oil and gas offers to lease were made, and offeror could not show that production was occurring in commercial quantities from a readjusted coal lease held by offeror for a period of more than 10 years.

4. Mineral Leasing Act: Generally--Coal Leases and Permits: Leases

Where offeror who has held a coal lease in excess of 10 years seeks to qualify for exemption from Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act requiring production from offeror's coal lease in commercial quantities, and claims that its lease is under application for a logical mining unit, offeror must show that its logical mining unit application was pending at the time the oil and gas offer to lease was rejected.

5. Mineral Leasing Act: Generally--Coal Leases and Permits: Leases

Under 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act requiring coal lessees who have held leases for a period of 10 years to produce coal in commercial quantities in order to qualify for other Federal leases, where coal lessee offers to bid on other Federal leases pursuant to the Mineral Leasing Act, terms and conditions of offeror's coal lease or leases are subject to the qualifying provision of 30 U.S.C. § 201(a)(2)(A) (1982), insofar as the lessee seeks to qualify to hold other Federal leases.

APPEARANCES: J. P. Vickers, President, GeoResources, Inc., Williston, North Dakota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS**INTERIOR BOARD OF LAND APPEALS**

GeoResources, Inc. (GeoResources), has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated January 23, 1987, rejecting oil and gas offers to lease MTM 72086, MTM 72087, MTM 72088, and MTM 72097, filed by GeoResources with the Montana State Office on January 20, 1987. BLM's rejection of appellant's lease offers relied on section 3 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), which amended section 2(a) of the Mineral Leasing Act of 1920 (MLA) to prohibit further lease issuances under the Act where the lessee has held a Federal coal lease for a period of 10 years after August 4, 1976, and has not produced coal from the lease in commercial quantities by August 4, 1986. 30 U.S.C. § 201(a)(2)(A) (1982).¹

Appellant does not dispute BLM's determination that its coal leasehold was not producing in commercial quantities at the time it made its oil and gas lease offers. Appellant argues that the coal lease in question is pending before BLM for a determination upon application for a logical mining unit (LMU), and claims exemption from compliance with the FCLAA amendment to section 2(a)(2)(A) of the MLA (hereinafter 2(a)(2)(A)) pursuant to 43 CFR 3472.1-2(e)(4)(i)(C). Appellant further contends that BLM's actions should be reversed because proper rulemaking procedures were not followed, in that BLM failed to consider rules made pursuant to 2(a)(2)(A) major rules under Exec. Order No. 12291 (Feb. 17, 1981) (5 U.S.C. § 601 note (1982)), and failed to consider their economic impact under the Regulatory Flexibility Act. *Id.*

[1, 2] While this Board will not entertain attacks upon the validity of duly promulgated regulations of the Department,² appellant charges that BLM has improperly promulgated regulations pursuant to 2(a)(2)(A), by failing to comply with Exec. Order No. 12291 and the Regulatory Flexibility Act, which require publication of a regulatory impact analysis for major rulemaking. The Board will consider appellant's argument insofar as it pertains to the question whether pertinent regulations were in fact "duly promulgated."

Proposed guidelines for the implementation of 2(a)(2)(A) were subject to a 60-day comment period published in the *Federal Register* on

¹ 30 U.S.C. § 201(a)(2)(A) (1982), provides:

"The Secretary shall not issue a lease or leases under the terms of this chapter to any person, association, corporation, or any subsidiary, affiliate, or persons controlled by or under common control with such person, association, or corporation, where any such entity holds a lease or leases issued by the United States to coal deposits and has held such lease or leases for a period of ten years when such entity is not, except as provided for in section 207(b) of this title, producing coal from the lease deposits in commercial quantities. In computing the ten-year period referred to in the preceding sentence, periods of time prior to August 4, 1976, shall not be counted."

P.L. 99-190 extended the effective date of the amendment to Dec. 31, 1986.

² See *Chugach Alaska Corp.*, 94 IBLA 24, 26 (1986), quoting *Chugach Natives, Inc.*, 80 IBLA 89 (1984):

"The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Board. *Sam P. Jones*, 71 IBLA 42 (1983); *Enserch Exploration, Inc.*, 70 IBLA 25 (1983); *Altex Oil Corp.*, 61 IBLA 270 (1982)." See also *Garland Coal & Mining Co.*, 52 IBLA 60, 88 I.D. 24 (1981).

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February 15, 1985. 50 FR 6398. That comment period was extended for an additional 30 days, in response to public requests. Final guidelines were published in the *Federal Register* on August 29, 1985. 50 FR 35125. Proposed rulemaking amending existing regulations at 43 CFR 3100, 3400, 3470, and 3500 was published in the *Federal Register* on October 20, 1986, and given a 30-day comment period from October 20 through November 19, 1986. 51 FR 37202.

Economic impacts are addressed in the proposed rulemaking at 51 FR 37203, as follows:

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

The economic impact of this rulemaking is not significant and its impact will fall equally on all affected entities, whether large or small.

In its notice of final rulemaking, published in the *Federal Register* on Friday, December 5, 1986, BLM explained that the amendments to existing regulations implementing 2(a)(2)(A) were effective upon publication in compliance with 5 U.S.C. § 553(d) (1982), because the rulemaking "recognizes exemptions and relieves restrictions."³ 51 FR 43911. BLM found "*the adverse consequences of section 2(a)(2)(A) will occur by operation of law on December 31, 1986, whether or not these regulations are in effect.*" *Id.* (Italics added).

Section 2(a)(2)(A) prohibits Federal lessees holding undeveloped coal leases for more than 10 years from further eligibility for leases issued pursuant to the MLA. Even if appellant's assumption that this limitation harbors adverse economic impacts were accepted, the consequences of this amendment have been mandated by Congress, and are without the purview of the Department's discretion. As BLM has stated, the adverse consequences of 2(a)(2)(A) became law on December 31, 1986. As 2(a)(2)(A) was enacted in 1976, appellant had 10 years to economically adjust.

While 5 U.S.C. § 603 (1982), requires the preparation of a regulatory flexibility analysis upon general notice of proposed rulemaking,⁴

³ 5 U.S.C. § 553 (1982), provides, in pertinent part:

⁴ § 553. Rule making

... (b) General notice of proposed rule making shall be published in the *Federal Register*. . . .

... (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. . . .

... (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

... (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

... (2) interpretive rules and statements of policy; or

... (3) as otherwise provided by the agency for good cause found and published with the rule.

... (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

5 U.S.C. § 603 (1982) provides, in pertinent part, as follows:

... (a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the *Federal Register* at the time of the publication of general notice of proposed rulemaking for the rule."

5 U.S.C. § 605(b) (1982), provides that: "Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." Further, Exec. Order No. 12291, at section 9, provides that "[t]his Order *** is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person." *Id.* Appellant's recourse, therefore, if it was aggrieved by BLM's rulemaking, was to file objection with BLM during the comment period from October 20 through November 19, 1986.

As required notices were published in the *Federal Register*, and as appellant was granted an opportunity to respond, we find that BLM committed no errors contrary to Exec. Order No. 12291 and the Regulatory Flexibility Act which would render regulations implementing 2(a)(2)(A) not "duly promulgated." Publication in the *Federal Register* meets the Administrative Procedure Act requirement of constructive notice to persons subject to proposed agency regulations. *Rodway v. U.S. Department of Agriculture*, 514 F.2d 809, 815 (D.C. Cir. 1975).

[3, 4] Appellant contends that it has had application pending for consideration of its leasehold as part of an LMU, and therefore is exempt from the requirements of 2(a)(2)(A) pursuant to 43 CFR 3472.1-2(e)(4)(i)(C), which provides:

(4)(i) An entity, seeking to qualify for lease issuance, or transfer approval under Subpart 3453 of this title, shall not be disqualified under the provisions of this subpart if it has one of the following actions pending before the authorized officer for any lease that would otherwise disqualify it under this subpart:

* * * * *

(C) Application for approval of a logical mining unit that the authorized officer determines would be producing on its effective date.

On March 13, 1987, subsequent to the filing of its notice of appeal in this action on February 20, 1987, appellant filed a letter with the Montana State Office, BLM, submitting an "amendment to Georesources' 1984 Logical Mining Unit (LMU) and Resource Recovery and Protection Plan (R2P2) application."

Previously, on June 12, 1984, BLM had corresponded with GeoResources concerning its LMU application as follows:

Our office has reviewed the preliminary R2P2 and LMU application which were hand delivered to us on May 17, 1984. We have provided our comments below on a point-by-point basis for items, which in our estimation are deficient.

* * * * *

In our opinion the necessity of an LMU in your case is questionable.

As was mentioned in your LMU application, the federal lease would not be mined on for eight years. In Year Nine, you produce 34,000 tons from the federal lease which satisfies your diligent development requirement within the ten year time limit. You then enter the continued operation phase which also requires the production of 8,000 tons/yr. If the mine plan is followed, 34,000 tons of federal coal are mined each year until the lease is mined out. No violation of continued operations would occur.

We cannot foresee that you need an LMU established at your mine. Our advice is to wait about five years to see if conditions change. For instance if you acquire American Colloid's lease or an emergency federal lease, then an LMU may become necessary. If

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you still wish to submit an LMU, you may certainly do so. Its merits will be judged when officially submitted.

Appellant's lease, issued on December 1, 1964, was readjusted effective December 1, 1984, and was agreed upon and accepted by appellant on August 30, 1984. Section 4 of the readjusted lease provides for diligent development of the lease, and contains provision for termination of the lease if the lessee has not produced coal in commercial quantities within 10 years. Section 5 of the readjusted lease contains the following terms with respect to LMU's:

Either upon approval by the lessor of the lessee's application or at the direction of the lessor, this lease shall become an LMU or part of an LMU, subject to the provisions set forth in the regulations.

The stipulations established in an LMU approval in effect at the time of LMU approval will supersede the relevant inconsistent terms of this lease so long as the lease remains committed to the LMU. If the LMU of which this lease is a part is dissolved, the lease shall then be subject to the lease terms which would have been applied if the lease had not been included in an LMU.

Appellant claims that its offers for oil and gas leases should not be denied under 2(a)(2)(A), but excused pursuant to 43 CFR 3472.1-2(e)(4)(i)(C), as it has a pending application for LMU on file with BLM. The June 12, 1984, letter from BLM, however, rejects appellant's "preliminary application" for LMU status. There is no documentation on file which would indicate that appellant reapplied to BLM until March 13, 1987, after this appeal was filed. 43 CFR 3472.1-2(e)(4)(i)(C) requires that an application for approval of an LMU be *pending* before the authorized officer for any lease that would otherwise disqualify it under 43 CFR Subpart 3472. Since appellant had no pending application for an LMU on file at the time official action was taken by BLM rejecting its oil and gas offers to lease, it cannot be excused from the operation of (2)(a)(2)(A) under the exemption provided by 43 CFR 3472.1-2(e)(4)(i)(C).

[5] A final question is addressed to clarify an ostensible ambiguity in BLM's actions with respect to appellant, raised by the June 12, 1984, letter by BLM rejecting appellant's LMU application, and the readjusted lease. The letter provides a 10-year development plan for the lease; the lease itself contains a termination clause if there is not production in commercial quantities within 10 years. Might appellant not assume that BLM had approved an "extension" of the 2(a)(2)(A) deadline by its tacit approval of a development plan that extends until December 1, 1994?⁵

BLM addressed this issue in the notice of final rulemaking published on December 5, 1986, as follows:

⁵ While appellant has not raised an estoppel argument in its statement of reasons, we address this issue *sua sponte* as this case is one of first impression before the Board and our analysis of the issues raised by appellant would itself create ambiguity if this obvious question were not addressed.

Section 2(a)(2)(A) is a "qualification" provision, affecting the ability of an entity, or any of its affiliates, to acquire new Federal leases granted under the Mineral Leasing Act. Section 2(a)(2)(A) is not a "diligence" provision. It is not to be equated with amended section 7(a) of the MLA which provides for production in commercial quantities at the end of 10 years after lease issuance or after the lease becomes subject to the amended Mineral Leasing Act, nor with amended section 7(b) of the Mineral Leasing Act, which provides for diligent development and continued operation. Diligence relates to the obligation to develop a specific Federal coal lease or lose that Federal coal lease. The diligence clock is tied to the date that the Federal coal lease is readjusted (20 years after issuance), or otherwise made subject to the amended Mineral Leasing Act. The diligence production clock is independent of the section 2(a)(2)(A) 10-year Federal coal leaseholding clock. *If a Federal coal lessee does not seek to qualify for new Federal leases granted under the Mineral Leasing Act (but decides rather to hold those Federal coal leases it currently holds), section 2(a)(2)(A) does not compel that Federal coal lessee to do anything.* Section 2(a)(2)(A) requires that a lessee be "producing" coal in order to be issued a new lease under the Mineral Leasing Act. [Italics added.]

(51 FR 43911. See also 50 FR 35126, explaining Departmental guidelines concerning coal leasing.) See *Conoco, Inc. v. Hodel*, 626 F. Supp. 287 (D. Del. 1986).⁶

BLM's communications rejecting appellant's LMU application and readjusting the coal lease concerned the MLA requirements of production within 10 years and diligent development of *appellant's coal lease*.⁷ The 2(a)(2)(A) requirement of production in commercial quantities before December 31, 1986, by Federal coal lessees in order to qualify for other Federal leases did not appear in BLM's correspondence with appellant concerning its LMU application or the readjusted lease. This is understandable, however, since the 2(a)(2)(A) requirement did not become an issue until BLM received notice of appellant's offers to bid on *other Federal leases* in the Montana State Office on January 20, 1987.

While BLM did not officially notify appellant of the specific consequences of the proposed 10-year development plan for its coal lease vis-a-vis appellant's ability to qualify for other Federal leases, appellant is not entitled to relief from the mandate of 2(a)(2)(A) because of reliance upon incomplete information. *Ward Petroleum Corp.*, 93 IBLA 267 (1986). As was stated in *Ward* at page 269:

All persons * * * who deal with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *Lynn Keith*, 53 IBLA 192, 88 I.D. 369 (1981). * * * reliance upon * * * incomplete information provided by a BLM employee cannot relieve an oil and gas operator of an obligation imposed by statute and regulation, create rights not authorized by law, or relieve the operator of the consequences imposed by the statute for failure to comply with its requirements. *Parker v. United States*, 461 F.2d 806 (Ct. Cl. 1972); *Montilla v. United States*, 457 F.2d 978 (Ct. Cl. 1972); *Northwest Citizens for Wilderness Mining Co.*, 38 IBLA 317 (1978).

⁶ The quoted material is taken from the notice of final rulemaking; the notice of final guidelines published in the *Federal Register* on Aug. 29, 1985 (50 FR 35125, 35126), provides essentially the same information. While this quotation is interpretative textual material which does not achieve the legal status of a regulation (see note 2, *supra*), an enforcing agency's interpretation of a statute is given great deference. See *Conoco, Inc. v. Hodel*, *supra*, upholding the Department's interpretation of 2(a)(2)(A) as applying to any Federal mineral leases, not just Federal coal leases.

⁷ See 30 U.S.C. § 207(a) and (b) (1982).

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

FRANKLIN D. ARNESS
Administrative Judge

I CONCUR:

ANITA VOGT
Administrative Judge
Alternate Member

**NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.
(PETITIONERS) v. OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT (RESPONDENT), WEST
ELK CO. & STATE OF COLORADO (INTERVENORS)**

107 IBLA 339

Decided: March 20, 1989

Petition for award of costs and expenses, including attorneys' fees, filed pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), and the regulations at 43 CFR 4.1290-4.1296.

Petition approved in part; information requested.

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

The provision for the awarding of costs and expenses, including attorneys' fees, in sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), is applicable to permit review proceedings initiated and prosecuted pursuant to sec. 514 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264 (1982).

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

Regulation 43 CFR 4.1294 provides that in order to recover an award of costs and expenses, including attorneys' fees, from a permittee, there must, *inter alia*, be a finding that the permittee violated the Surface Mining Control and Reclamation Act of 1977, the regulations promulgated pursuant to that Act, or a permit condition. Where in a proceeding to review the issuance of a permit to mine there is no such finding, a petitioner may not recover an award from the permittee.

3. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award--Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Substantial Contribution

Under 43 CFR 4.1294(b), a person who initiates or participates in a proceeding under the Surface Mining Control and Reclamation Act of 1977 may be eligible for an award of

costs and expenses, including attorneys' fees, from OSMRE where that person prevails in whole or in part, achieving at least some degree of success on the merits. However, to be entitled to an award the regulation requires that the record show that the person made a substantial contribution to a full and fair determination of the issues.

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

A person challenging issuance of a permit to mine will be deemed eligible for an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), and 43 CFR 4.1294(b), where the person achieved at least some degree of success on the merits. A finding by the Board of Land Appeals that, in part, vindicated the person's position that the permit was improperly issued, constitutes some degree of success on the merits even though the Board did not grant the ultimate relief requested by the person.

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

Where one is determined, pursuant to 43 CFR 4.1294(b), to be eligible for and entitled to an appropriate award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), a further determination must be made of what issues are compensable. This inquiry requires the identification of successful claims and those claims sufficiently related to the successful ones to warrant an award for time spent thereon. Unsuccessful claims unrelated to successful ones will not be compensated.

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

In determining the amount of an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), the Board of Land Appeals will use the "lodestar" formula, *i.e.*, the number of hours reasonably expended on qualifying work multiplied by the reasonable hourly rate. There is a strong presumption that the lodestar represents the reasonable fee to which counsel is entitled.

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

A person challenging issuance of a permit to mine may receive an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for work performed in preparing and filing the petition for review of the permit. However, such an award will not include compensation for work performed in state proceedings involving the same minesite and a related state permitting process.

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

A person challenging issuance of a permit to mine may receive an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for work performed with respect to procedural victories which contributed to the person achieving some degree of success on the merits. However, OSMRE is not liable for attorneys' fees for procedural victories against parties other than OSMRE.

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

In determining the number of hours reasonably expended on qualifying work with respect to an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), where the petitioner had achieved at least some degree of success on the merits, the Board may utilize, in the

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absence of an alternative approach, a page-counting method whereby the petitioner's major pleadings at various stages of the proceeding are examined to determine the number of pages devoted to a particular issue out of the total pages in the document. That percentage is then applied to the total number of hours sought to arrive at the number of hours reasonably expended.

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

A person challenging issuance of a permit to mine is not entitled to an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for work performed on unsuccessful settlement negotiations where the petitioner makes no attempt to relate the hours claimed to any particular entry on the attorneys' time records or to limit the hours claimed to only those issues upon which petitioner was ultimately successful.

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

A person who is eligible and entitled to an award of costs and expenses, including attorneys' fees, under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), may also receive compensation for work performed in prosecuting the petition for an award, commensurate with the degree of success achieved in the underlying proceedings.

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

In determining the reasonable hourly rate for purposes of calculation of the "lodestar" amount in an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), the Board will use that market rate prevailing at the time of the relevant administrative proceedings in the community where the proceedings took place. However, where the petitioner for an award can show that counsel with specialized expertise was essential to prosecution of the case, the Board may approve an hourly rate from the area where such counsel customarily practices.

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

No enhancement of a "lodestar" amount will be granted in an award of attorneys' fees under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), based on the contingency of the award, where the success and impact of the case were not exceptional.

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

A person challenging issuance of a permit to mine may receive an award of expenses under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for the expenses of an expert witness who assisted the person in preparing and presenting its case, commensurate with the degree of success achieved by the person on those issues addressed by the expert.

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

A person challenging issuance of a permit to mine may receive an award of expenses under sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1982), for those expenses which are normally passed along to clients of the

attorney representing that person, commensurate with the degree of success achieved by the person in the proceedings in question.

APPEARANCES: L. Thomas Galloway, Esq., and Daniel B. Edelman, Esq., Washington, D.C., and Albert H. Meyerhoff, Esq., San Francisco, California, for Natural Resources Defense Council, Inc., *et al.*; Robert E. Benson, Esq., Timothy M. Rastello, Esq., Myron J. Hess, Esq., Denver, Colorado, and Thomas F. Linn, Esq., Atlantic Richfield Co., Denver, Colorado, for West Elk Coal Co., Inc.; Linda E. White, Esq., Office of the Attorney General, State of Colorado, Denver, Colorado, for the State of Colorado; Anne C. Sanders, Esq., and Glenda H. Owens, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C. for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

This case concerns a petition filed by the Natural Resources Defense Council, Inc., and various named individuals (NRDC *et al.* or petitioners)¹ pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (1982), and 43 CFR 4.1290-4.1296, for the award of costs and expenses, including attorneys' fees, incurred in connection with various proceedings before the Department of the Interior.

I. FACTUAL AND PROCEDURAL BACKGROUND

The present case is the culmination of a lengthy series of proceedings which began with the August 11, 1981, filing by NRDC *et al.* of a petition for review of approval by the Office of Surface Mining Reclamation and Enforcement (OSMRE) of an application by the ARCO Coal Co. (ARCO), a division of the Atlantic Richfield Co., for a permit to conduct surface coal mining operations on Federal land at the Mt. Gunnison No. 1 Mine in Gunnison County, Colorado.² Jurisdiction over the review petition of NRDC *et al.* was initially lodged with the Interior Board of Surface Mining and Reclamation Appeals (IBSMA). In their petition, NRDC *et al.* charged that ARCO's permit application had been improperly approved, asserting in part that the Director, OSMRE, had failed to make independent findings that ARCO had affirmatively demonstrated that the proposed mine would comply with all the requirements of SMCRA and its implementing regulations and that such an affirmative demonstration had not been made. NRDC *et al.* sought a declaration that the permit

¹ The individual petitioners are Jamie A. and Dolores V. Jacobson, Mitchell N. and Sally R. Swain, Susan L. and Carl T. Brater, Mark Welsh, Charles V. Worley, Bradley E. Klafehn, and Charles H. Gilman, Jr.

² The permit (CO-0021), approved July 12, 1981, by OSMRE, authorized underground coal mining and reclamation operations for a period of 5 years on approximately 2,520 acres of private and Federal land. Such operations were envisioned by ARCO as part of a 40-year mining operation which would encompass 14,304 acres of land and recover an estimated 59 million tons of coal over the life of the mine.

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application had been improperly approved and that the permit was, therefore, "null and void and of no force or effect." *Natural Resources Defense Council, Inc. v. OSMRE*, 4 IBSMA 4, 5 (1982).

By order dated August 28, 1981, IBSMA granted requests by ARCO and the State of Colorado to intervene as parties in the review proceeding and directed briefing by all of the parties on the issues raised by the petition. The parties subsequently filed various motions and briefs, including a motion to dismiss filed by ARCO, in which the State joined, and a motion to dismiss filed by OSMRE. IBSMA denied OSMRE's motion to dismiss by order dated December 9, 1981. IBSMA held oral argument on December 15, 1981, and directed further briefing. The parties also engaged in unsuccessful settlement negotiations. Thereafter, in a February 24, 1982, order, IBSMA denied ARCO's motion to dismiss. In that order IBSMA also referred the question of the propriety of OSMRE's approval of ARCO's permit application to the Hearings Division, Office of Hearings and Appeals, for a hearing and recommended decision by an Administrative Law Judge. IBSMA specifically directed the Hearings Division to "set forth every material requirement for an application and an approval document and specify whether or not and when there was compliance." *Natural Resources Defense Council, Inc. v. OSMRE*, 4 IBSMA at 16. IBSMA assigned the burden of proof to NRDC *et al.*

Administrative Law Judge David Torbett held a hearing on May 25 through 27, 1982, and on June 15 and 16, 1982, at which NRDC *et al.*, OSMRE, ARCO, and the State of Colorado appeared. On June 24, 1983, Judge Torbett issued a decision recommending affirmance of OSMRE's approval of ARCO's permit application. By order dated July 8, 1983, this Board, to whom jurisdiction over appeals arising under SMCRA had been transferred concurrently with the abolition of IBSMA (48 FR 22370 (May 18, 1983)), established a schedule for the filing of exceptions to Judge Torbett's recommended decision. NRDC *et al.* and ARCO filed exceptions, and on September 27, 1985, the Board addressed those exceptions in *Natural Resources Defense Council, Inc. v. OSMRE*, 89 IBLA 1, 92 I.D. 389 (*Natural Resources Defense Council I*, appeal dismissed, *Natural Resources Defense Council, Inc. v. Hodel*, No. 86-K-2535 (D. Colo. June 30, 1988)).³

Before the Board, NRDC *et al.* raised numerous objections to OSMRE's approval of ARCO's permit application for the Mt. Gunnison No. 1 mine. In reviewing the objections relating to the hydrologic impact of mining and reclamation operations, we sustained NRDC *et al.*'s contention that OSMRE had failed to properly assess the probable cumulative impact (PCI) of all anticipated mining in the area on the

³ ARCO's exceptions were limited to the question of NRDC *et al.*'s standing to seek review of OSMRE's approval of ARCO's permit application and were briefly dealt with by the Board, after reviewing Judge Torbett's findings and conclusions in this respect, by essentially reaffirming IBSMA's conclusion that the individual petitioners and NRDC, on behalf of its members, had standing. 89 IBLA at 7-10, 92 I.D. at 393-94.

hydrologic balance, specifically the "surface and ground water systems of the general area of the proposed mining operation." *Natural Resources Defense Council I*, 89 IBLA at 33, 92 I.D. at 405. We rejected certain subsidiary questions, concerning whether OSMRE had, for purposes of making the proper PCI assessment, properly defined all anticipated mining; identified the relevant ground water basin; used a control watershed for comparison purposes; identified baseline conditions; and generally developed information appropriate for such an assessment. *Natural Resources Defense Council I*, 89 IBLA at 13, 18-19, 23, 25-28, 92 I.D. 385, 397-98, 400, 401-03. We also rejected NRDC *et al.*'s contention that ARCO had failed to determine the probable hydrologic consequences of mining and reclamation operations, in accordance with section 507(b)(11) of SMCRA, 30 U.S.C. § 1257(b)(11) (1982). *Natural Resources Defense Council I*, 89 IBLA at 69, 92 I.D. at 422.

The Board rejected all other objections raised by NRDC *et al.*, except for two concerning stipulations contained in the approved permit. The Board agreed with the charge made by NRDC *et al.* that OSMRE had failed to require ARCO to submit, in accordance with 30 CFR 785.19(d) (1981), information regarding the impact of mining and reclamation operations on an alluvial valley floor (AVF) prior to issuance of ARCO's permit. We based this conclusion principally on the fact that OSMRE had not even identified the AVF until permit issuance. *Natural Resources Defense Council I*, 89 IBLA at 55-56, 92 I.D. at 415-16. The Board also sustained the charge made by NRDC *et al.* that OSMRE erred in failing to require ARCO to submit, in accordance with 30 CFR 784.14(b)(1) (1981), a sedimentation control plan for a loadout facility prior to issuance of ARCO's permit. *Natural Resources Defense Council I*, 89 IBLA at 60, 92 I.D. at 417.

The result of the Board's initial decision in *Natural Resources Defense Council I*, *supra*, was that it sustained three of the objections raised by NRDC *et al.* In all other respects, OSMRE's decision to issue ARCO's permit was affirmed. For the purpose of determining the appropriate relief to be granted regarding the three deficiencies in the permit application approval process and in accordance with the understanding of the parties, we afforded the parties an opportunity to brief this matter. NRDC *et al.*, West Elk Coal Co., Inc. (West Elk),⁴ the State of Colorado, and OSMRE each filed a brief.

On November 18, 1986, the Board issued a decision which dealt with the question of appropriate relief concerning the three identified deficiencies. *Natural Resources Defense Council Inc. v. OSMRE* (*Natural Resources Defense Council II*), 94 IBLA 269, 93 I.D. 417 (1986).⁵ NRDC *et al.* had requested that the Board vacate West Elk's

⁴ By order dated Nov. 22, 1985, the Board granted West Elk's motion to substitute itself for the Atlantic Richfield Co. as intervenor in this case.

⁵ In addition, the Board addressed the question of its jurisdiction to resolve the matter of appropriate relief in response to a contention by West Elk that the Board lacked such jurisdiction. We concluded that the Board had jurisdiction. *Natural Resources Defense Council II*, 94 IBLA at 277, 93 I.D. at 421-22, *appeal dismissed*. *Natural Resources Defense Council II*, 94 IBLA at 277, 93 I.D. at 421-22, *appeal dismissed*.

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permit in part, direct the cessation of mining operations, and remand the case to OSMRE for preparation of a proper PCI assessment. In our decision, we found that the PCI deficiency had been rectified by the State's preparation of a PCI assessment, relating to two proposed revisions of West Elk's permit and mine plan, and the subsequent approval of those revisions and mining plan amendments in 1985 by the State and OSMRE, respectively, without objection by NRDC *et al.* *Id.* at 294-95, 93 I.D. at 431. The Board concluded that, based on petitioners' acquiescence to the State's PCI assessment, no relief was appropriate.

For the alluvial valley floor determination, the Board concluded that OSMRE's failure to require pre-permit information regarding the AVF had been rectified by the petitioners' failure to comment on the proposed approvals and the State's determination, in connection with the above-mentioned revisions, that the AVF would not be affected by mining operations. *Id.* at 297, 93 I.D. at 432. We concluded that NRDC *et al.* was not entitled to any relief.

OSMRE's failure to require pre-permit information regarding a sedimentation control plan for the loadout facility, we held, was a technical deficiency, in view of the fact that the sedimentation control plan was submitted to the State prior to any construction, albeit after permit issuance, and subsequently approved by the State. *Id.* at 299, 93 I.D. at 433. However, recognizing that NRDC *et al.* had not had an opportunity to comment on the plan prior to its approval, the Board afforded NRDC *et al.* a 30-day period following receipt of the Board's decision to request the State for a comment period. *Id.* at 300, 93 I.D. at 434. We stated that this opportunity was not to affect any ongoing operations by West Elk.

At the conclusion of *Natural Resources Defense Council II, supra*, we noted that NRDC *et al.* had asserted their entitlement to an award of attorneys' fees and expenses. We found that a ruling on entitlement to attorneys' fees and expenses was premature and stated that any party could seek an award of fees and expenses within 45 days of receipt of our decision in accordance with the procedures in 43 CFR 4.1290-4.1295.

On January 2, 1987, NRDC *et al.* filed a petition for the award of \$360,914.80 in attorney's fees and \$16,683.79 in costs and expenses (hereinafter Petition), in accordance with section 525(e) of SMCRA, which provides:

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

30 U.S.C. § 1275(e) (1982).

Petitioners contend that they are entitled to an award of costs and expenses, including attorneys' fees, because they were initiating parties

who "prevail[ed] in whole or in part, achieving at least some degree of success on the merits," in accordance with 43 CFR 4.1294(b), and the Supreme Court's pronouncement in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983). They argue that the extent of the award should be commensurate with the degree of their success on the merits in accordance with the standard enunciated in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), that attorneys' fees be awarded for work performed on successful and related unsuccessful claims.⁶ NRDC *et al.* then apply this standard to "seven major categories of legal work" performed in connection with the case: (1) preliminary work up to and including preparation and filing of the original petition for review; (2) work in connection with procedural matters arising before IBSMA; (3) pre-hearing, hearing, and post-hearing work before Judge Torbett; (4) work in connection with objections filed with the Board from Judge Torbett's recommended decision; (5) briefing of the Board regarding appropriate relief; (6) settlement negotiations; and (7) preparation of the fee petition (Petition at 6).

With the exception of work before Judge Torbett and in connection with objections to Judge Torbett's recommended decision filed with the Board, NRDC *et al.* contend that their legal work is fully compensable. In the excepted situations, NRDC *et al.* contend that the legal work is compensable in part and they set forth a percentage to be applied to the total number of hours worked in order to reflect work performed on successful claims and related unsuccessful claims. Based on this analysis, they determine the total number of compensable and noncompensable hours worked by their four attorneys, L. Thomas Galloway, Albert H. Meyerhoff, Lee L. Bishop, and Kent E. Hanson. See Petition at 22.⁷

Petitioners then set forth what they believe to be reasonable hourly rates for each attorney in accordance with the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation" as that standard is enunciated in *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). See Petition at 23. These rates are supported by signed statements of the various attorneys setting out their background and experience, affidavits of other practicing attorneys in the Washington, D.C., area, recent court awards of attorneys' fees and other evidence of prevailing rates. However, petitioners seek use of "current" hourly rates for computation of the lodestar amount.

⁶ In a footnote to the petition, at page 4, NRDC *et al.* note that the Departmental regulation which limits awards to a person "who prevails in whole or in part, achieving at least some degree of success on the merits" (43 CFR 4.1294(b)) was amended effective Dec. 16, 1985 (50 FR 47222, 47224 (Nov. 15, 1985)), following *Natural Resources Defense Council I*. Prior to that time, NRDC *et al.* point out, the regulation provided that awards would be limited to a person who "made a substantial contribution to a full and fair determination of the issues." 43 CFR 4.1294(b) (43 FR 34399 (Aug. 3, 1978)). NRDC *et al.* argue that the applicable standard for determining an award for work performed "through the merits decision" was the "substantial contribution" standard of the prior regulation and that under this regulation they are entitled to "full recovery," i.e., with no limitation on recovery based on the degree of success (Petition at 4, 5). NRDC *et al.* urge application of that standard but contend that, in any case, they are only seeking the requested award "in the interests of moderation." *Id.* at 5.

⁷ Summaries of time sheets detailing the amount of time spent by each attorney each day, the dates involved, and the nature of the work involved were attached either to the petition or a supplement to the petition.

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By multiplying the total number of compensable hours worked per attorney and the reasonable hourly rate for each attorney, NRDC *et al.* arrive at what they consider to be the "lodestar" fee or the total amount of attorneys' fees for which they are entitled to an award, under the formula set out in *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980), as adopted by IBSMA in *Council of the Southern Mountains, Inc. v. OSMRE*, 3 IBSMA 44, 53 (1981), vacated and remanded, Council of Southern Mountains, Inc. v. Watt, No. 82-45 (E.D. Ky. Oct. 18, 1982).⁸ See also *Virginia Citizens for Better Reclamation, Virginia D. Hill*, 88 IBLA 126 (1985). Petitioners' claimed "lodestar" fee is \$360,914.80.

Finally, petitioners set forth those costs and expenses for which they seek an award, broken down by the nature of the cost or expense and the attorney for whom the cost or expense was incurred.⁹ The total amount of costs and expenses claimed in the Petition is \$16,683.79. That total was adjusted by a supplement to the Petition filed on April 21, 1987, to \$16,578.15.

In addition, NRDC *et al.* filed another supplement to the Petition on February 26, 1987, requesting an additional \$13,166.94 for expenses incurred for the services of an expert witness (Leonard Rice Consulting Water Engineers, Inc. (LRCWE)).¹⁰ Because this expense involved work before Judge Torbett, for which NRDC *et al.* is seeking only partial compensation, NRDC *et al.* applied the same percentage reduction used in calculating compensable hours to the total expense incurred, in order to arrive at the requested amount.

OSMRE, the State of Colorado, and West Elk have all submitted briefs in opposition to NRDC *et al.*'s Petition. In turn, NRDC *et al.* have filed a response to the objections of OSMRE and West Elk. The Petition and the briefs filed in opposition thereto have raised a number of issues which we will deal with seriatim.

II. APPLICABILITY OF SECTION 525(e) OF SMCRA TO PERMIT REVIEW PROCEEDINGS

[1] We must first address the argument raised by OSMRE which goes to the heart of NRDC *et al.*'s Petition. OSMRE contends that section 525(e), 30 U.S.C. § 1275(e) (1982), was not intended by Congress to apply to permit review proceedings, but solely to "enforcement

⁸ NRDC *et al.* expressly do not seek an upward adjustment in the "lodestar" fee based on factors of delay in the award, contingency of the award, or quality of representation, pursuant to the *Copeland* formula, so long as "current hourly rates are awarded" (Petition at 3). However, in the absence of such an award, NRDC *et al.* assert their entitlement to such an upward adjustment. *Id.*

⁹ These expenses include expenses for postage, photocopying, courier service, travel, secretarial overtime, and express mail service. The expenses incurred are supported by the statements of the various attorneys and attached breakdowns of the expenses by date, purpose, and amount, submitted with either the petition or a supplement to the petition.

¹⁰ Attached to the supplement to the petition is the declaration of Leslie H. Botham, a professional engineer who was in charge of the work done by LRCWE on behalf of NRDC *et al.*, confirming the expenses incurred by NRDC *et al.* as set forth on attached statements.

proceedings." OSMRE asserts that statutory provisions providing for attorneys' fees and expenses with respect to work before an agency are "waivers of sovereign immunity" and, thus, must be strictly construed (*Opposition of OSMRE to Petition of NRDC et al. for Attorneys' Fees and Expenses* (OSMRE Opposition) at 5). OSMRE recognizes that section 525(e) of SMCRA refers to "any administrative proceeding under this chapter," but contends that the legislative history of section 525 of SMCRA, the contemporaneous Departmental construction of section 525(e) of SMCRA, and the case of *Utah International, Inc. v. Department of the Interior* (*Utah International*), 643 F. Supp. 810 (D. Utah 1986), support its contention that section 525(e) of SMCRA does not apply to permit review proceedings.

We are convinced by the language of section 525(e) of SMCRA, the legislative history of that section, the implementing regulations at 43 CFR 4.1290-4.1295, and by the *Utah International* case that OSMRE's contention has no merit.

Section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1982), provides for an award of fees and expenses "[w]henever an order is issued under this section or as a result of any administrative proceeding under this chapter * * *." NRDC *et al.* assert that OSMRE's position is contrary to the plain wording of the statute. It appears that at one point in its brief in opposition OSMRE is arguing that section 525(e) awards must be limited to proceedings arising under section 525 of SMCRA.¹¹ That construction would effectively eliminate the phrase "as a result of any administrative proceeding under this chapter" from section 525(e).

The phrase "[w]henever an order is issued *under this section*" was intended to authorize awards where an order issued as a result of a section 525 proceeding. (Italics added.) The "section" referred to in subsection (e) is clearly section 525. However, after specifically providing for awards in section 525 proceedings, Congress extended the authority to grant awards where an "order" is issued "as a result of any administrative proceeding." There is *no question* that Congress intended to encompass more than section 525 enforcement proceedings within the bounds of section 525(e).¹²

The issue OSMRE raises is whether Congress intended to extend the coverage of section 525(e) to include permit review proceedings. OSMRE's position is that Congress did not. It cites various documents in the legislative history of SMCRA in support of that claim.¹³ A

¹¹ It is not at all clear exactly to which "enforcement proceedings" OSMRE wants to limit sec. 525(e). At page 3 of its brief in opposition, it seems that it is arguing for a limitation to sec. 525 proceedings. Later, however, it cites a "contemporaneous and long-standing construction" of former Secretary of the Interior Cecil D. Andrus limiting the scope of sec. 525(e) to proceedings related to the "enforcement scheme" of SMCRA (OSMRE Opposition at 6). In a footnote to that statement in its brief, OSMRE explains that "[t]he proceedings involving the Act's enforcement scheme are adjudicatory proceedings. See 30 U.S.C. 1264; 1268(b); 1275(a)(2)." *Id.* at note 1. We fail to understand how this supports OSMRE's position, since 30 U.S.C. § 1264 (1982) is the statutory provision providing for the proceeding involved in this case—permit review.

¹² We need not determine for purposes of this case the breadth of that term. The proceeding giving rise to the attorneys' fee petition in this case is a permit review proceeding. We will limit our analysis to consideration of that proceeding.

¹³ Those documents are S. Rep. No. 101, 94th Cong., 1st Sess. 57; H. Rep. No. 896, 94th Cong., 2d Sess. 79; S. Rep. No. 698, 94th Cong., 1st Sess. 4502; Mark-up Session on the Surface Mining Control and Reclamation Act of 1977;

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review of those documents does not evidence an intent either explicitly or implicitly to exclude permit review proceedings from the purview of section 525(e). At best, the legislative history supports a limitation of section 525(e) to adjudicatory proceedings. A permit review proceeding is, however, an adjudicatory proceeding. The legislative history does not support the limitation urged by OSMRE.

In further support of its position OSMRE cites the "contemporaneous and long-standing construction of section 525(e) in 1978 by the former Secretary of the Interior, Cecil D. Andrus," limiting section 525(e) to enforcement proceedings under SMCRA (OSMRE Opposition at 6). This is an apparent reference to the procedural regulations governing attorneys' fees awards, 43 CFR 4.1290-4.1295, adopted by the Department in 1978. However, OSMRE does not analyze the language of those regulations, perhaps because such analysis does not favor its position.

The regulations provide at 43 CFR 4.1290:

4.1290 Who may file.

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

- (1) A final order being issued by an administrative law judge; or
- (2) A final order being issued by the Board. Italics added.]

There is no attempt by this regulatory language to exclude from its scope permit review proceedings.

In the preamble to the 1978 final rulemaking, the Department rejected a comment that the types of proceedings in which attorneys' fees and expenses may be awarded be "broadened" to include rulemaking. 43 FR 34385 (Aug. 3, 1978). The Department stated: "These regulations [43 CFR 4.1290-4.1296] only govern surface mining hearings and appeals procedures under the Act, and, therefore, this comment was not accepted."¹⁴ *Id.* The Department did not state that the attorneys' fees regulations were limited only to enforcement proceedings; rather the limitation was to "hearings and appeals procedures under the Act." The regulations support the conclusion that section 525(e) encompasses permit review proceedings.

Finally, OSMRE relies on *Utah International, supra*, to bolster its construction of section 525(e) as precluding awards in permit review

Hearings on H.R. 2 Before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs, 95th Cong., 1st Sess. 295 (Mar. 28, 1977); and H.R. Rep. No. 218, 95th Cong., 1st Sess. 90, 130 (1977) (OSMRE Opposition at 8-11).

¹⁴ This response completely undercuts OSMRE's position, set forth at page 7 of its opposition, that acceptance of the plain meaning of "any administrative proceeding" "means that every single administrative proceeding before the Office of Surface Mining or the Secretary of the Interior involving SMCRA has the potential for subjecting the government to attorney fees." OSMRE then lists, *inter alia*, rulemaking on the interim program, rulemaking on the permanent program, revisions to rules and petitions for rulemaking as examples of the types of proceedings for which awards could be made if NRDC *et al.*'s construction of sec. 525(e) is accepted. Obviously, OSMRE failed to realize that the Department had precluded such a construction in its 1978 rulemaking. Likewise, not even NRDC *et al.* urge such a broad construction in this case. They state that "[t]he Board need not decide the full reach of § 525(e) in resolving the instant dispute" (NRDC *et al.* Reply to Oppositions at 3 n.4).

proceedings. *Utah International* involved a petition for award of attorneys' fees and expenses, *inter alia*, pursuant to section 525(e), incurred in conjunction with a petition filed in 1979 seeking a declaration by the Secretary of the Interior, in accordance with section 522 of SMCRA, 30 U.S.C. § 1272 (1982), that certain lands abutting Bryce Canyon National Park and Dixie National Forest were unsuitable for surface coal mining operations. Following the Secretary's determination, certain lawsuits were filed. The petitioners sought an award for participation in the administrative proceedings leading to the unsuitability determination and for their participation in the subsequent judicial proceedings.

The court concluded that under section 525(e) only a "party" may be assessed fees and expenses and because the Secretary was not a party to the unsuitability proceeding, the Government could not be liable for an award under section 525(e).¹⁵ 643 F. Supp. at 825. The court also stated: "The problems posed by an application of Section 525(e) to non-enforcement, non-adversarial proceedings convinces [sic] us that Section 525(e) was not intended to provide for awards in such proceedings." 643 F. Supp. at 821.

The fact that the *Utah International* court used the word "non-enforcement" does not mean that it would support the interpretation pressed by OSMRE in this case. To the contrary, we have no doubt that were the *Utah International* court faced with the issue in this case—whether a permit review proceeding falls within the scope of section 525(e)—it would reach the same result that we have. Our basis for that conclusion is that OSMRE seeks to exclude from the scope of section 525(e) a proceeding (permit review) which the court expressly indicated was included. The court noted that the Department had limited section 525(e) to "proceedings related to the enforcement scheme of the Act." 643 F. Supp. at 824. In a footnote to that statement, citing 30 U.S.C. §§ 1264, 1268(b), and 1275(a)(2) (1982), the court stated that "proceedings involving the Act's enforcement scheme are also necessarily adjudicatory proceedings." 643 F.2d at 824 n.25. 30 U.S.C. § 1264 is the provision of SMCRA governing permit review. See note 11, *supra*.

As NRDC *et al.* point out, permit review proceedings involve the "permittee's compliance with statutory and regulatory requirements for permit issuance and the conditions under which the permittee would be allowed to operate consistent with the statutory enforcement scheme" (NRDC *et al.* Reply to Oppositions at 11 n.10). SMCRA is enforced not only by means of action taken by the regulatory authority after permit issuance, pursuant to section 521 of SMCRA, 30 U.S.C. § 1271 (1982), but also by means of determinations in the first instance whether to issue permits and under what terms and conditions, pursuant to section 514 of SMCRA, 30 U.S.C. § 1264 (1982).

¹⁵ The unsuitability petition did not challenge any action by the Secretary or make the Secretary a party to the proceeding. The court identified the Secretary's role in the unsuitability process as "akin to factfinder, decisionmaker or legislator." 643 F. Supp. at 825 (footnote omitted).

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Therefore, for the above-stated reasons we hold that section 525(e) of SMCRA applies to permit review proceedings.

III. ELIGIBILITY AND ENTITLEMENT FOR AWARD OF COSTS AND EXPENSES, INCLUDING ATTORNEYS' FEES

We turn to the question of whether petitioners are eligible for and entitled to receive an award of costs and expenses, including attorneys' fees, as a result of their initiation of and participation in the administrative review of West Elk's permit. The Secretary of the Interior has published regulations governing the awarding of attorneys' fees and expenses under SMCRA. 43 CFR 4.1290-4.1296. The regulation establishing the standards for such awards is 43 CFR 4.1294. The applicability of the various subsections of that regulation, however, is dependent upon whether OSMRE or West Elk (ARCO's successor in interest) or both would be liable for petitioners' attorneys' fees and expenses.

[2] NRDC *et al.* contend that both OSMRE and West Elk are "fully liable for all fees for which NRDC *et al.* is found entitled" (Petition at 2). NRDC *et al.* argue that by virtue of West Elk's intervention in the proceedings in defense of OSMRE's approval of the permit application, NRDC *et al.* prevailed against West Elk. NRDC *et al.*, however, make no attempt to show how 43 CFR 4.1294 operates to authorize an award against West Elk in the proceedings in question.

43 CFR 4.1294 provides:

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

(a) To any person from the permittee, if—

(1) The person initiates or participates in any administrative proceeding reviewing enforcement actions upon a finding that a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed, and the administrative law judge or Board determines that the person made a substantial contribution to the full and fair determination of the issues, except that a contribution of a person who did not initiate a proceeding must be separate and distinct from the contribution made by a person initiating the proceeding; * * *.

That regulation requires that in order to recover an award from a permittee, *inter alia*, a petitioner must have initiated or participated in an administrative review proceeding "reviewing enforcement actions." In addition, as a result of that proceeding there must be a finding that the permittee violated the Act, regulation, or permit.¹⁶ The proceeding in this case was initiated by NRDC *et al.* to review the issuance of the permit. We have indicated, *supra*, that a permit review proceeding may be considered as part of the enforcement scheme of the Act; however, there is no doubt in this case that there was no finding that West Elk violated the Act, regulations, or permit. In *Natural*

¹⁶ Although that regulation does not explicitly require a finding that the *permittee* violated the Act, regulations, or permit, as correctly pointed out by West Elk, that requirement is implicit (West Elk Response at 27). In addition, there is no issue of an imminent hazard in this case; therefore, there is no need to discuss that alternative basis for an award.

Resources Defense Council I, 89 IBLA at 71, 92 I.D. at 423, we found that each of the three deficiencies shown by NRDC *et al.* was due only to OSMRE failures. Since the Board made no finding that West Elk violated the Act, regulations, or permit, 43 CFR 4.1294(a)(1) is not applicable. Therefore, we conclude that no attorneys' fees or expenses may be awarded to NRDC *et al.* from West Elk.¹⁷

NRDC *et al.* may receive an award from OSMRE, if it has satisfied the requirements of section 525(e) of SMCRA and 43 CFR 4.1294(b). Section 525(e) provides that the Secretary may make any award that he "deems proper." The regulations promulgated to implement that section provide at 43 CFR 4.1294(b) that attorneys' fees and expenses may be awarded from OSMRE to any person "who initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues."

[3] Thus, the regulation incorporates two standards for one who initiates or participates in any proceeding under the Act. First, the person must show at least "some degree of success on the merits." This standard was added to the regulations, effective December 16, 1985, in order to conform the regulations to the standard established by the Supreme Court in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983). See 50 FR 47223 (Nov. 15, 1985). This Board had actually recognized the applicability of that standard to proceedings covered by section 525(e) prior to the amendment of the regulation in our decision in *Donald St. Clair*, 84 IBLA 236, 92 I.D. 1 (1985).

The second standard is that the person make a "substantial contribution to a full and fair determination of the issues." In the 1985 rulemaking the Department had proposed deleting that standard from 43 CFR 4.1294(b). In restoring that requirement in the final rulemaking, the Department explained:

In *Carson-Truckee Water Conservancy District v. Secretary of the Interior*, 748 F.2d 523, 526 (9th Cir. 1984), cert. denied sub nom. *Pyramid Lake Paiute Tribe of Indians v. Carson-Truckee Water Conservancy District*, ____ U.S. ___, 105 S. Ct. 2139 (1985), the court affirmed the denial of an award to a prevailing party and expressly rejected the contention that the *Ruckelshaus* decision had eliminated the requirement that a person make a "substantial contribution" to be eligible for an award. Furthermore, neither the proposed nor final rules have deleted the "substantial contribution" requirement for § 4.1294(a), and in consideration of concerns raised by comments concerning differing standards among the various subsections of § 4.1294, the "substantial contribution" requirement is restored to subsection (b) of the final rulemaking.

50 FR 47223 (Nov. 15, 1985).

The courts have indicated that there is a distinction between eligibility for an award and entitlement. Thus, the fact that a party is eligible for an award does not mandate entitlement. *Carson-Truckee*

¹⁷ Such a conclusion is consistent with the position that it would be inequitable to require a party who has completely vindicated his position to pay the attorneys' fees of his opposition. *Sierra Club v. Environmental Protection Agency*, 769 F.2d 796, 801-02 (D.C. Cir. 1985). We note also that NRDC *et al.* have not sought an award from the State of Colorado, nor would the regulations support such an award.

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Water Conservancy District v. Secretary of the Interior, 748 F.2d at 526; *Sierra Club v. Gorsuch*, 672 F.2d 33, 38 n.8 (D.C. Cir. 1982); *Utah International*, 643 F. Supp. at 826. The "some degree of success on the merits" standard has been identified by the courts as the eligibility standard. *Carson-Truckee*, 748 F.2d at 526; *Utah International*, 643 F. Supp. at 826. Thus, we must first consider whether petitioners achieved "some degree of success on the merits" in order to be eligible for an award.¹⁸

West Elk contends that NRDC *et al.* are not eligible for an award where they failed to achieve "at least some of the requested relief or some part of [the] declared objective" (Response of West Elk to the Petition (West Elk Response) at 12). West Elk argues that NRDC *et al.* achieved none of its declared objective, which was to have the permit vacated or denied, where the Board ultimately determined that no relief was appropriate. *Id.* at 14. West Elk characterizes the Board's holding that NRDC *et al.* might request a 30-day comment period on the sedimentation control plan for the loadout facility as a "trivial" success. *Id.* In the words of the State, "[n]othing at the site has changed as a result of this proceeding" (Response of the State of Colorado to the Petition for Award of Fees and Expenses (State Response) at 3).

[4] It is clear that West Elk construes the "some degree of success on the merits" standard for eligibility as requiring a determination regarding whether a party has achieved its desired ultimate result. In *Donald St. Clair*, we stated that petitioners must demonstrate that they have achieved "some of the benefit they sought in bringing this action before the Department." *Donald St. Clair, supra* at 250, 92 I.D. at 9.

In *Utah International*, the court found that no award could be made pursuant to section 525(e) of SMCRA for work done in conjunction with the unsuitability petition; however, it did discuss the eligibility standard with regard to proceedings before the court and concluded that the petitioners had achieved some degree of success on the merits. 643 F. Supp. at 826. The court's decision in *Utah International* establishes that some degree of success on the merits is not measured by whether a party succeeds with respect to every claim or at every stage of a proceeding, but whether it succeeds on some claim or at some stage.

Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 543 F. Supp. 126 (E.D. Va. 1982), involved a request for

¹⁸ In *Carson-Truckee*, 748 F.2d at 526, the court stated that:

"Ruckelshaus dealt only with eligibility for, not with entitlement to, a statutory award. . . . Nothing in Ruckelshaus suggests that the Court meant to reject the rule that, under the 'when appropriate' standard, an eligible party must make a substantial contribution to the goals of a statute to be entitled to attorney fees." Both in our *Donald St. Clair* decision, *supra*, and in the quote from the preamble of the Nov. 15, 1985, rulemaking revising 43 CFR 4.1294, the words eligible and entitled have been used interchangeably. However, as stated, *supra*, the courts have drawn a distinction between those terms.

attorneys' fees arising from a suit by a group of clinical psychologists seeking injunctive relief to overturn Blue Shield's policy of requiring clinical psychologists to bill through a licensed physician. Following a Fourth Circuit decision upholding the plaintiffs' claims, and denial of certiorari by the United States Supreme Court, the district court entered judgment in favor of plaintiffs. That order was modified subsequently when the need for prospective injunctive relief was no longer necessary because the Virginia Supreme Court upheld the constitutionality of a Virginia statute requiring the Blue Shield plans to reimburse clinical psychologists directly. Thus, the court merely required the defendants to notify practicing clinical psychologists of the Fourth Circuit's decision and to retain certain records. Nevertheless, the court concluded that plaintiffs had "substantially prevailed" within the meaning of the standard for an award of attorneys' fees and expenses under the relevant Federal statute (15 U.S.C. § 26 (1982)). As the court stated: "The minimal relief ultimately required by circumstances in no way detracts from plaintiffs' accomplishments in this litigation." 543 F. Supp. at 130; see also *Copeland v. Marshall*, 641 F.2d at 904-05, and cases cited therein.

Likewise, in the present case, NRDC *et al.*'s failure to obtain any of their desired ultimate relief against OSMRE should not detract from their "accomplishments" in this proceeding, as discussed *infra*. It is clear that this failure is attributable to circumstances which occurred during the pendency of the proceedings, i.e., the efforts of the State in preparing a PCI assessment and AVF determination in connection with revisions of West Elk's permit and mine plan and the submission and approval of a sedimentation control plan after permit issuance.

Therefore, we conclude that the ultimate relief granted in a particular case is not the only factor which determines whether the petitioner has achieved "some degree of success on the merits." In *Natural Resources Defense Council I*, we concluded that OSMRE failed, prior to approving West Elk's permit, to conduct an adequate PCI assessment; to make its AVF determination; and to require a sedimentation control plan for the loadout facility. These conclusions confirmed, at least in part, the charge made by NRDC *et al.* in their original petition for review that OSMRE had improperly approved ARCO's permit. In view of this partial vindication of its position, we must conclude that the petitioners achieved "at least some degree of success on the merits," regardless of whether they failed to succeed on their other charges or to obtain that relief which they regarded as appropriate. By focusing only on whether NRDC *et al.* achieved the desired ultimate result, West Elk has overlooked the success which NRDC *et al.* did achieve. NRDC *et al.* must be regarded as eligible for an award of costs and expenses, including attorneys' fees, under section 525(e) of SMCRA.

Although petitioners achieved some degree of success on the merits and are, thus, eligible for an award of attorneys' fees and expenses, an award does not automatically follow. The regulations require that we

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must further determine whether petitioners are entitled to an award—i.e., whether they made a substantial contribution to a full and fair determination of the issues.

West Elk argues that NRDC *et al.* failed to make a “substantial contribution to the goals of SMCRA” and, for that reason, are not entitled to an award (West Elk Response at 10 n.5). It argues, in the alternative, that even if NRDC *et al.* made a contribution to the goals of SMCRA, that contribution was not substantial.

The regulatory test is whether the petitioners made a substantial contribution to a full and fair determination of the issues. The substantive issues in this case were raised by petitioners. Those issues, along with certain procedural issues, were exhaustively litigated before Administrative Law Judge Torbett and this Board. NRDC *et al.*'s petition for review of the permit represented the first challenge to a permit issued by OSMRE under SMCRA. The issues presented were issues of first impression under that Act. There can be no dispute that petitioners' efforts resulted in a full and fair determination of those issues. NRDC *et al.* contributed to the resolution of all those issues, and we find that their contribution was substantial. Therefore, we conclude that petitioners are both eligible for and entitled to an award of costs and expenses, including attorneys' fees.

IV. CLAIMS FOR WHICH PETITIONERS ARE ENTITLED TO AN AWARD

[5] Having determined that petitioners are entitled to an award in this case, we must examine the difficult question of what issues are compensable. That involves the task of evaluating the “degree of success obtained” by petitioner. *Hensley v. Eckerhart*, 461 U.S. at 436. The inquiry requires the identification of successful claims and those claims sufficiently related to the successful ones to warrant an award for time spent thereon. *Utah International*, 643 F. Supp. at 826. Unsuccessful claims unrelated to successful ones should not be compensated. *Id.* As the Court stated in *Hensley*, 461 U.S. at 435, “unrelated [unsuccessful] claims [should] be treated as if they had been raised in separate lawsuits.” *See also Sierra Club v. Environmental Protection Agency*, 769 F.2d at 801-02. Thus, we undertake an issue-by-issue analysis to identify those three categories of claims: successful, unsuccessful related, and unsuccessful unrelated.

First, there is no question petitioners obtained the requisite degree of success for three claims. Those three successful claims were (1) the failure of OSMRE to assess the probable cumulative impacts of all anticipated mining in the area on the hydrologic balance, (2) the failure of OSMRE to make its AVF determination prior to permit

issuance, and (3) the failure of OSMRE to require plans for the loadout sedimentation pond prior to permit approval.¹⁹

Petitioners assert that an award should also be made for certain unsuccessful claims related to their successful PCI assessment claim. They identify those claims by referring to the sections of *Natural Resources Defense Council I* discussing those claims. They are as follows: III. *All Anticipated Mining*; IV. *Identification of Ground Water Basin*; V. *Control Watershed*; and VI. *Development of Information for Assessment of the Probable Cumulative Impact*. 89 IBLA at 11-28, 92 I.D. at 394-403. West Elk challenges that assertion, arguing that they are clearly distinct issues and that petitioners treated them as such in their briefs, as did the Board in its decision.

NRDC *et al.* contend that the following language from *Hensley v. Eckerhart* requires compensation for all the related PCI assessment issues: "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." 461 U.S. at 435. They argue that they raised several alternative grounds in attacking the PCI assessment and sought a ruling that it was performed in violation of section 510(b)(3) of the Act, 30 U.S.C. § 1260(b)(3) (1982), and that the Board, in fact, ruled that the PCI assessment did not satisfy the requirements of the Act.

We find no trouble in accepting petitioners' assertion that all the PCI assessment issues are related. As instructed by the court in *American Academy of Pediatrics v. Heckler*, 580 F. Supp. 436, 439 (D.D.C. 1984) (quoting from *Hensley v. Eckerhart*, 461 U.S. at 435), claims will be considered related where they were "integrally related to the central issue, 'involved a common core of facts' and were 'based on related legal theories.'" On the other hand, claims are not considered related where they are based on "different policy rationales and statutory provisions," even though they may arise from the same set of regulations and the same administrative record. *Sierra Club v. Environmental Protection Agency*, 769 F.2d at 803.

In *Natural Resources Defense Council I*, we stated under section III. *All Anticipated Mining* that "NRDC *et al.* set forth numerous objections focusing on the statutory requirements of section 510(b) of SMCRA, 30 U.S.C. § 1260(b) (1982)." 89 IBLA at 11, 92 I.D. at 394 (italics added). After quoting section 510(b)(3) of the Act, we stated "[p]etitioners' first charge is that OSM did not consider 'all anticipated mining' in its assessment of the probable cumulative impact (PCI)." *Id.* (italics added).

¹⁹ OSMRE concedes such success, but contends that NRDC *et al.* are not entitled to recover with respect to the "loadout facility issue" because the Board "awarded relief against the State of Colorado, not against OSMRE" (OSMRE Opposition at 18). OSMRE, however, overlooks the fact that the success NRDC *et al.* achieved with respect to this issue was again not the ultimate relief obtained, whether against OSMRE or the State, but the Board's declaration that OSMRE had failed to require the appropriate information prior to permit issuance. Thus, NRDC *et al.* are entitled to an award of attorneys' fees and expenses for work performed with respect to the "load-out facility issue," as well as the AVF issue.

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Sections IV, V, and VI of our decision also addressed issues raised by NRDC *et al.* related to perceived deficiencies in OSMRE's PCI assessment. Thus, all those assertions by NRDC *et al.* were integrally related to a central issue (the adequacy of the PCI assessment), involved a common core of facts (OSMRE's preparation of that assessment), and were based on related legal theories. The legal theories advanced by petitioners were related in the sense that each focused on various aspects of section 510(b)(3) of SMCRA and its implementing regulations. The intention of each theory was to show the inadequacy of OSMRE's PCI assessment.

West Elk argues that, even if unsuccessful claims are deemed to be related to successful claims, NRDC *et al.* entitled to recover with respect to such unsuccessful claims because such an award would not bear a reasonable relation to the results obtained. West Elk notes that the only relief NRDC *et al.* obtained was the "right to request a comment period on the sedimentation pond" (West Elk Response at 18-19). We agree with West Elk that the results obtained are a standard by which to judge whether to allow recovery with respect to related, unsuccessful claims. See *Hensley v. Eckerhart*, 461 U.S. at 440; *Illinois Welfare Rights Organization v. Miller*, 723 F.2d 564, 567 (7th Cir. 1983). However, as discussed *supra*, the ultimate relief afforded in this case is not the primary focus in judging the results obtained. NRDC *et al.* did succeed in establishing that OSMRE's PCI assessment was inadequate. That the Board ultimately denied any relief for that failure is directly related to circumstances which unfolded during the pendency of the proceedings and should not detract from any award which might otherwise be available to NRDC *et al.*

We find that NRDC *et al.* may receive an award for its unsuccessful claims related to the challenge to OSMRE's PCI assessment. All other substantive issues raised by NRDC *et al.* must be considered unrelated, unsuccessful claims and, therefore, not compensable.

V. HOURS REASONABLY EXPENDED ON QUALIFYING WORK

[6] We must now review the work done by counsel for petitioners in this case in relation to the qualifying issues in order to determine what work is compensable.²⁰ This entails an examination of the number of hours reasonably expended on qualifying work. That figure is then multiplied by a reasonable hourly rate in order to arrive at what is known as the "lodestar." *Hensley v. Eckerhart*, 461 U.S. at 433; *Copeland v. Marshall*, 641 F.2d at 891. A strong presumption exists that the lodestar represents the reasonable fee to which counsel is entitled. *Blum v. Stenson*, 465 U.S. at 897; *Utah International*,

²⁰ Documents submitted by petitioners' attorneys indicate that at the time of their participation in the proceedings Galloway, Bishop, and Hanson were engaged in the private practice of law, while Meyerhoff was affiliated with NRDC.

643 F. Supp. at 828. We examine first the hours requested for the seven categories of work.²¹

A. Preliminary Work

[7] Petitioners assert that all the time expended in the preparation and filing of the petition for review in this case is compensable. They claim a total of 189.55 hours expended in June 1981-August 1981 by three attorneys (Galloway-27.25 hours; Bishop-20.00 hours; and Hanson-142.30 hours) with respect to preliminary work. They state that the work for which compensation is sought involved discussions with clients, familiarization with the record made before OSMRE, analysis of the permit and supporting documentation, identification of issues, and preparation and filing of pleadings. NRDC *et al.* contend that "[a]llmost all of this work, * * * would have been necessary even if NRDC *et al.* had raised only those issues on which it ultimately prevailed" (Petition at 8-9).

West Elk strongly objects to the claim for preliminary work. It charges that NRDC *et al.* should not be compensated for taking a "shotgun approach" and that they should have concentrated their efforts from the beginning on issues on which they had some reasonable prospect of prevailing (West Elk Response at 41). West Elk also asserts that much of the time claimed by petitioners appears to be for an earlier proceeding. That proceeding, West Elk points out, was a challenge by petitioners to the State permit for the Mt. Gunnison No. 1 Mine before the Colorado Mined Land Reclamation Board (CMLRB), which was decided adversely to petitioners and appealed by them to the State court where the action was dismissed on November 29, 1981 (West Elk Response to Petitioners' Supplemental Submission at 3). West Elk objects to any recovery for work performed in connection with the State proceeding.

The time records submitted by petitioners in support of their petition show that during the months of June, July, and August 1981 the attorneys Galloway, Bishop, and Hanson each recorded more than the

²¹ West Elk objects to the fact that only Bishop's statement is in affidavit form, as required by 43 CFR 4.1292(a)(1), and contends that the petition should be "stricken" as insufficient, except as to Bishop (West Elk Response at 37). The cited regulation requires that a petition be supported by an "affidavit setting forth in detail all costs and expenses including attorneys' fees reasonably incurred for, or in connection with, the person's participation in the proceeding." 43 CFR 4.1292(a)(1). The signed statements of Galloway, Hanson, and Meyerhoff are technically not affidavits. Nevertheless, they are signed and indicate that they are declarations made "under penalty of perjury." In addition, the signatories are subject to the strictures of 18 U.S.C. § 1001 (1982). We find the signed statements acceptable under the regulation.

West Elk also contends that a supplementary affidavit of Bishop submitted Feb. 26, 1987, should be stricken as "untimely" (West Elk Response at 37). The regulations require the submission of a petition within 45 days of receipt of a final order by the Board and the submission of an affidavit detailing costs and expenses "in support of the petition." 43 CFR 4.1292(a). The regulation does not bar supplementary affidavits. In the absence of prejudice to other parties in this case, the supplementary affidavit is accepted.

West Elk further objects to NRDC *et al.*'s submission of prepared time records, rather than the actual contemporaneous time records (West Elk Response at 37). However, we are satisfied by the assertions in the attorneys' signed statements that the submitted records accurately reflect the actual records. This is sufficient to constitute "evidence concerning the hours expended on the case," as required by 43 CFR 4.1291(a)(3). See *Copeland v. Marshall*, 641 F.2d at 905. The circuit court in *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983), concluded that contemporaneous time records must be submitted to a district court only "upon request." The Department has made no such request in 43 CFR 4.1292(a)(3). Further, petitioners were not required to submit evidence regarding all of the hours expended on the case.

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total hours claimed per attorney. No attempt has been made to equate which of the entries on the time records were utilized to arrive at the totals for each attorney. Petitioners merely state that 189.55 hours were reasonably expended; however, as correctly pointed out by West Elk, many of the entries for those 3 months are not sufficiently detailed to determine whether or not they relate to the filing of the petition or reflect actions taken in or in preparation for proceedings involving the State of Colorado (West Elk Response, Attachments E and F; West Elk Response to Petitioners' Supplemental Submission at 3-5).

In response to West Elk's concerns, NRDC *et al.* have not clarified any of the entries; however, they do argue that work performed in related State proceedings is reasonably related to the work in this case and therefore compensable. In support of that assertion they cite *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546 (1986). In that case the Court held that work performed by counsel for the citizens' group during administrative proceedings seeking to enforce a consent decree requiring the State to implement a vehicle inspection and maintenance program was properly compensable as a cost of litigation under section 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d) (1982), even though it did not occur in the context of judicial litigation.

We find the cited case distinguishable from the present situation. Here, petitioners were not involved in some post-judgment monitoring of a consent decree. The State actions initiated by petitioners were not related to the Federal proceedings under consideration. Although the State proceedings involved the same minesite and a related State permitting process, there is no indication that petitioners were required to pursue any State action in order to preserve any rights to initiate the challenge to the permit which was involved herein. We find that any entries related to work performed in or in preparation for State proceedings do not represent hours reasonably expended on qualifying work.

Therefore, petitioners' request of 189.55 hours for preliminary work is not justified. However, the regulations at 43 CFR 4.1295(a) provide that an award under SMCRA may include costs and expenses incurred "as a result of initiation" of a proceeding under the Act. "Initiation" in this case involved counsels' time familiarizing themselves with the case and preparing the petition for review. Thus, some number of hours of preliminary work will be considered as reasonably expended; the question is how many? Our only recourse is to review the time records of each of the three attorneys for the time period in question—from June 1981 up to and including the filing of the petition with IBSMA on August 11, 1981.

Galloway's time records show 3 hours in June 1981. Three entries refer to calls to or from "client" or "Carolyn Johnson" concerning "case." The fourth entry shows 2.25 hours for "Review documents in

recent application." Since counsel may have been involved in activities related to proceedings before the State of Colorado at that time, the lack of specificity as to what "case" is being referred to, as well as the fact that the "application" is not identified, leads to the conclusion that none of the hours were reasonably expended with regard to the Federal proceedings.

The July 1981 time records for Galloway list 18 hours. The same deficiencies obtain for most of the July entries—"clients" and "case" are not further defined and certain entries clearly refer to State proceedings. We find 4.25 hours to have been work on qualifying proceedings (1.50 hours on July 14; 0.75 hour on July 15; 1 hour on July 16; 0.50 hour on July 21; and 0.50 hour on July 27).

Three entries totalling 7.75 hours are included in Galloway's time records for August 1981—on or prior to the filing of the petition on August 11, 1981. The first entry relates to an "appeal." Since no Federal proceeding had been initiated, the reference to "appeal" must have been to a State proceeding. The other two entries totalling 6.50 hours refer to the drafting and editing of the petition for review. We find that Galloway expended a total of 10.75 hours for preliminary work on qualifying proceedings.

Bishop's time records for the period up to and including August 11, 1981, show 23 hours. Petitioners have claimed 20 hours for Bishop for preliminary work, but have not identified which 20 hours. We will review all 23 hours. Of the 2.5 hours recorded in July 1981, not all were involved with development of the Federal case. We find that half of the 2.5 hours were expended for preliminary work on qualifying proceedings.

Much of Bishop's work in August 1981 involved reviewing OSMRE documents and the Federal permit. That time was expended on qualifying work. However, the entries for August 10, 11, and 12 refer to a request for hearing. The August 12 entry states "continue preparing request for hearing." NRDC *et al.* filed the petition for review in this case on August 11. We find the August 10, 11, and 12 hours are not compensable. The hours expended by Bishop in August 1981 are 17.50. The total hours expended by Bishop for preliminary work on qualifying proceedings are 18.75.

Hanson's time records for the preliminary period reveal time devoted almost exclusively to State proceedings. As we have stated, there may be no recovery for those hours. To the extent that any of his time may have been devoted to the proceedings in question, it is not specifically reflected in the time records. We find none of the hours claimed by Hanson for preliminary work to have been reasonably expended for qualifying work.

While we find that Galloway and Bishop devoted 29.50 hours to preliminary work on qualifying proceedings, due to petitioners limited success in this case we must reduce the hours accordingly. We conclude that counsel for NRDC *et al.* reasonably expended a total of 11.80 hours of their qualifying preliminary work time on compensable

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claims. Our conclusion is based on an application of the percentage for substantive issues (40 percent) which we calculate under the heading Section V.C. *Work Before the Administrative Law Judge, infra*. We resort to that percentage in the absence of another reasonable method for gauging the amount of hours devoted to compensable preliminary work, since the actual petition for review filed by NRDC *et al.* was a brief five-page recitation of their claims.

B. Procedural Matters Before IBSMA

[8] Petitioners claim 568.95 hours were reasonably expended on procedural matters before IBSMA between August 1981 and February 1982. They assert that they are entitled to an award based on work with regard to such matters because it was "absolutely necessary in order to prosecute the substantive issues on which NRDC *et al.* ultimately prevailed" (Petition at 12).

As a general matter, absent success on the merits, a party is not entitled to an award of attorneys' fees and expenses "for purely procedural victories." *Utah International*, 643 F. Supp. at 828 (citing *Hanrahan v. Hampton*, 446 U.S. 754, 757-59 (1980)). However, as the court concluded in *Utah International*, a party who has achieved a substantive victory is also entitled to an award "for the procedural victories which contributed to the ultimate success." *Id.*

Petitioners allege that "the Respondent (OSMRE) and both intervenors filed extensive motions to dismiss" and that since NRDC *et al.* prevailed on all issues raised and because work on the procedural issues was absolutely necessary in order to prosecute the substantive issues, "it is beyond cavil that all the work before the Board [IBSMA] on the motions to dismiss is compensable" (Petition at 12). Despite this claim by petitioners, it is clear that they seek compensation for all work done on all procedural matters, not just for the motions to dismiss. As pointed out by West Elk, petitioners also desire compensation for such things as a motion for temporary relief and memorandum in support thereof, which motion was not pursued by petitioners nor granted by IBSMA.

Although counsel for NRDC *et al.* did extensive procedural work, it is not all compensable. First, to the extent NRDC *et al.* achieved "procedural victories" against ARCO (West Elk's predecessor in interest) and the State in thwarting ARCO's motion to dismiss, which was joined in by the State, they are not entitled to an award from OSMRE. See *Natural Resources Defense Council v. Administrator, Environmental Protection Agency*, 595 F. Supp. 65, 70 n.1 (D.D.C. 1984); cf. *Avoyelles Sportsmen's League v. Marsh*, 786 F.2d 631 (5th Cir. 1986) (Federal statute authorizing awards against the Government when "appropriate" precludes an award for phases of the litigation where party seeking the award was opposed only by parties other than the Government). As we have held *supra*, neither West Elk nor the State

of Colorado are liable for attorneys' fees and expenses under the regulations. While OSMRE is liable for some fees and expenses, its motion to dismiss was simply a two-page motion requesting dismissal based upon an alleged failure properly to serve the petition for review. NRDC *et al.* filed a response to that motion, and IBSMA denied the motion without discussion as part of an order dated December 9, 1981.

Second, NRDC *et al.* filed numerous documents with IBSMA prior to that Board's February 1982 order, including the motion for temporary relief and memorandum in support thereof. In addition, petitioners' counsel participated in oral argument before IBSMA; however, as IBSMA stated in its February 24, 1982, order, it granted "the ARCO/Colorado motion for oral argument concerning their motion to dismiss." 4 IBSMA at 6. Thus, the ARCO motion to dismiss was the principal focus of the oral argument. The hours listed in support of these activities are compensable only to the extent they may be related to the success petitioners achieved in this case.

Petitioners assert that they are entitled to the following hours for their counsel: 298.25 hours for Galloway; 230.00 hours for Bishop; and 40.70 hours for Hanson. However, the time sheets for those attorneys from August 12, 1981 (the day following the filing of the petition for review), to and including February 24, 1982 (the date of IBSMA's order referring the case for a hearing), show a total of 443.75 hours for Galloway, 270.00 hours for Bishop, and 164.80 hours for Hanson. Petitioners have not shown what hours of those totals they utilized to arrive at the number of hours claimed for procedural matters before IBSMA, nor have they attempted to categorize the hours claimed so as to relate them to specific tasks, such as particularizing the various motions worked on or other tasks undertaken. Clearly, some of the hours listed during that period were spent on unsuccessful settlement negotiations which petitioners have designated as a separate category of work (*see, e.g.*, Galloway entries for October 15, 16, and 18, 1981, etc.); however, petitioners have left us to guess what entries support their totals for the procedural category.

Our recourse is to review the time sheets of each of the attorneys for the period from August 12, 1981, to February 24, 1982, based on our conclusions about what is compensable work, and determine the number of hours reasonably expended on procedural matters before IBSMA. Our review leads us to the conclusion that a total of 88.05 hours were spent on compensable procedural matters before IBSMA. (See Appendix A for the totals for each attorney.)

C. Work Before the Administrative Law Judge

[9] Petitioners assert that their counsel expended 1,849.10 hours between February 25 and September 17, 1982, on work before Administrative Law Judge Torbett (Galloway-755.50 hours; Meyerhoff-168.80 hours; Bishop-608.50 hours; and Hanson-316.30 hours). Petitioners identify the work as involving "extensive discovery, numerous depositions, pre-trial hearings and a minesite visit,

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preparation of experts, preparation for cross-examination of the opponents' experts, an extensive hearing, and hundreds upon hundreds of pages of post and pre-trial briefing and findings of fact and conclusions of law" (Petition at 14). Of this work, petitioners estimate that "approximately 25%" of the hours was devoted to procedural issues which they contend are fully compensable because it was necessary to address those in order to reach the substantive issues. The procedural work before Judge Torbett is identified as "standing depositions, interrogatories, preparation of depositions, pre-trial and post-trial briefing on procedural issues and so forth" (Petition at 15).

For the substantive issues, petitioners assert they are entitled to 44 percent of the total time expended. They arrive at this percentage by engaging in a page-counting exercise. They assert that "[a]s far as substantive issues are concerned, if one weighs the issues won by the pages devoted to the issue before the ALJ, Petitioners prevailed on issues which consumed 66 pages of 150 total pages or 44% of the total time expended" (Petition at 15). The page-counting method is a fair method of allocating time, petitioners argue. They contend it is the method adopted by the court in *In re: Surface Mining Regulation Litigation II*, No. 79-1144 (D.D.C. Aug. 1, 1985), in which some issues were won and some were lost. Petitioners conclude that they are entitled to 69 percent of the time expended before Judge Torbett (25 percent for procedural issues plus 44 percent for substantive issues) or 1,275.90 hours. Applying the 69-percent figure to the total hours expended per attorney, the following hours claimed are derived: Galloway-521.30 hours; Meyerhoff-116.50 hours; Bishop-419.85 hours; Hanson-218.25 hours.

West Elk strenuously objects to petitioners' methodology in determining the hours reasonably expended before Judge Torbett. It argues that petitioners do not disclose the basis for their 25-percent procedural estimate. This point is well taken. Although petitioners estimate that 25 percent of their attorneys' time was devoted to procedural issues, they have made no attempt to provide the Board with any breakdown of the time records to support such an estimate. Petitioners must have had some basis for the estimate, yet they have not shared it with the parties or this Board. West Elk characterizes petitioners' claim of 462 hours for procedural issues as an "outrageous assertion" (West Elk Response at 44).

The vagueness of petitioners' claim precludes any award for procedural matters. The party seeking compensation must bear the burden of providing sufficient details to tie its time records to the amount claimed. Petitioners have failed to do that.

Moreover, the procedural issues addressed by Judge Torbett in his recommended decision are found in Part II of that decision on pages 5-7 under the heading *PROCEDURAL RULES, STANDARD OF PROOF AND REVIEW*. None of the issues discussed therein was dispositive,

and it does not appear that work on those issues was absolutely necessary in order to prosecute the substantive issues upon which petitioners ultimately prevailed. Although Judge Torbett also addressed standing in his decision, he stated that he was bound by IBSMA's ruling in that regard "and that Petitioners have standing unless the proof shows the allegations contained in their affidavits filed before the Board are 'groundless in fact.' On this basis, there is no question in the mind of the undersigned that the Petitioners have standing to maintain this action" (Recommended Decision at 60).

Petitioners' claim for "approximately" 25 percent of its attorneys' hours before Judge Torbett for procedural issues must be rejected.

West Elk, OSMRE, and the State all object to the page-counting method utilized by petitioners to determine hours expended on substantive issues. OSMRE contends that this method will not accurately reflect the amount of time reasonably expended on successful issues, but rather the "petitioners' determination of the weight or space to be accorded a particular argument" (OSMRE Opposition at 15). The State and West Elk argue that the method will encourage lengthy submissions with respect to issues on which a party has a good chance of prevailing (State Response at 4; West Elk Response at 44). The courts have eschewed a "'mathematical approach'" to fee calculation, West Elk asserts, citing *Ramos v. Lamm*, 713 F.2d at 556 n.7 (quoting from *Hensley v. Eckerhart*, 461 U.S. at 435 n.11).

Although West Elk is correct that *Hensley* disapproved of a mathematical approach, it was not the page-counting method espoused by petitioners. In general, the Supreme Court in *Hensley* rejected use of a mathematical approach to determine the degree of success achieved by a prevailing party as an aid to determining a reasonable fee, not as a method to determine the number of hours reasonably expended on successful issues. A comparison of total issues to those prevailed upon would not give weight to the relative significance of issues. For example, if a case presented 10 issues and the party seeking attorneys' fees prevailed on only one of them, a pure mathematical approach would dictate that the party was only 10 percent successful, regardless of the relative importance of the issues.

The page-counting method was adopted by the district court in *In re: Surface Mining Regulation Litigation II*, No. 79-1144 (D.D.C. Aug. 1, 1985), which involved an award under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1982). The court reduced the total hours claimed by 21 percent on the basis that the petitioners had lost issues which had consumed 21 percent of their brief to the court. OSMRE seeks to discredit petitioners' reliance on the district court opinion by stating "[t]he present case, however, can hardly be compared to the *In Re* case which involved much more complex issues than the ones in this case * * *" (OSMRE Response at 15 n.4). We fail to see any basis for the attempted distinction by OSMRE. Moreover, OSMRE has not proposed any alternative approach to determining time spent on successful issues,

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nor has West Elk, although West Elk has engaged in its own percentage-page method. West Elk analyzed petitioners' major pleadings, Judge Torbett's decision, and the Board's decision to determine the number of pages devoted in each of those documents to the substantive deficiencies identified by the Board. West Elk concludes that petitioners are entitled to only approximately 16 percent of the time spent on those substantive issues (West Elk Response at 44-45 and Attachment C thereto). West Elk did not, however, include in its estimate those pages devoted to related unsuccessful claims, which we have held are compensable.

We find that in this particular case the page-counting method provides a useful means to determine the number of hours devoted to particular issues. Nevertheless, we recognize the deficiencies inherent in such a method. The number of pages devoted to an issue may not accurately reflect the amount of work involved in producing the product. Counsel may be completely familiar with certain issues and the number of pages in a brief may not at all reflect the hours necessary for its preparation. In addition, it could encourage a party to include all its research on a particular issue in its brief, regardless of the relevance. Although we expressly decline to adopt the page-counting method for all cases, we will employ the page counting method in this case to determine the hours reasonably expended before Judge Torbett.

Petitioners claim that they "prevailed on issues which consumed 66 pages of 150 total pages or 44% of the total time expended" (Petition at 15). West Elk correctly points out that petitioners do not specifically identify the document from which they derive their page count. Apparently, the document in question is petitioners' initial brief, dated August 2, 1982. That document contains 148 pages plus 14 separately numbered pages of findings of fact. For our purposes, we will consider the 148 pages. The three areas for which petitioners may receive credit for hours expended are the PCI assessment, AVF issue, and the loadout facility. There are 44, 6, and 1 pages in the brief related to those issues, respectively, for a total of 51 pages (pages 5-48, 103-108, and 109). Although petitioners claim 66 pages, they inexplicably do not identify which 66 pages, and thus, we will not speculate how they arrived at that total.

Our examination of that brief also reveals that Part III thereof, from pages 127-147 or 21 pages, was devoted to procedural issues.²² Since we are concerned with hours expended on substantive issues, we will subtract those 21 pages from the total 148 pages of the brief to arrive at the proper page total for determining the percentage for substantive

²² Petitioners do not state why the page-counting method was not presented as a way to measure the hours for procedural issues. However, we note that 21 pages of a total of 148 pages is 14 percent, and thus, less than the "approximately" 25 percent claimed by petitioners.

issues. Therefore, we find the pages devoted to compensable substantive issues are 51 of the adjusted total of 127 or 40 percent.

We also find, however, that the percentage derived for substantive issues from the page-counting method cannot, as asserted by petitioners, be applied directly to the total number of hours expended by petitioners' counsel. The following analysis must be invoked. Petitioners assert that 25 percent of the total time expended was for procedural matters. We have determined that the time claimed for procedural matters before Judge Torbett is not compensable. Therefore, we must subtract 25 percent of the total hours in order to derive the proper total to which the substantive issue percentage will apply. The adjusted total time expended is 1,386.80 hours (1,849.10 hours minus 25 percent of 1,849.10 hours). The total number of hours reasonably expended on work before Judge Torbett is 40 percent of 1,386.80 hours or 554.80 hours.

D. Initial Work Before the Board

Petitioners contend that their counsel expended 98.85 hours (87.75 by Galloway and 11.10 by Hanson) in work before the Board leading to the issuance of the Board's September 27, 1985, decision. They assert that "[b]ased on the pages devoted to issues on which Petitioners prevailed (64 of 136), Petitioners are entitled to compensation for 47% of the time expended before the Board" or 41.25 hours for Galloway and 5.22 hours for Hanson (Petition at 17, footnote omitted). Although petitioners do not so state, the document upon which they base their claim is their 138-page brief to the Board in which they set forth their objections to Judge Torbett's recommended decision. Petitioners do not disclose which 64 pages of that document they rely on to arrive at their 47-percent figure. West Elk argues that under its analysis NRDC *et al.* devoted only 21 pages of its brief to successful issues. Our own page counting results in the following conclusions: 48 pages for the PCI assessment issues, 7 pages for the AVF issue, and 2 pages for the loadout facility for a total of 57 pages of the 138 (pages 6-53, 105-11, and 112-13, respectively). That page count represents approximately 41 percent of the time spent on initial work before the Board. Accordingly, we conclude that petitioners are entitled to recover for 40.50 hours of work before the Board.

E. Briefing the Board on Relief

NRDC *et al.* claim that their attorneys expended 68.50 hours (63.50 by Galloway and 5.00 by Meyerhoff) in briefing the Board on the relief issues and that 100 percent of those hours are compensable. Petitioners argue that 68.50 hours is "plainly reasonable for the work product produced" and that "it was only through the use of experienced attorneys that the hours expended on the work were kept so modest" (Petition at 18). They contend that, despite the fact that the Board did not accept the relief requested, they prevailed on the merits of the

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issues addressed, and, therefore, are entitled to compensation for all the work done on the relief issues.

We agree that petitioners are entitled to compensation for the hours reasonably expended in briefing the Board on relief, and we conclude after reviewing the time sheets of Galloway and Meyerhoff for the relevant time period (from issuance of the Board decision on September 27, 1985, until the filing of petitioners' reply brief on January 6, 1986) that the hours claimed were reasonably expended and that petitioners are entitled to all 68.50 hours claimed.

F. Settlement Discussions

[10] Petitioners seek compensation for 279.25 hours allegedly expended in unsuccessful settlement negotiations pursued in the fall of 1981 and the summer of 1982. They state that they entered into settlement discussions in good faith and expended considerable resources in pursuing settlement. Compensation is justified, they assert, so long as the total time expended was reasonable. West Elk believes that the hours claimed by petitioners are clearly unreasonable and challenges them to substantiate their claim.

While some of petitioners' time record entries clearly relate to settlement discussions, petitioners make no attempt to relate the hours claimed to any particular entries on their attorneys' time sheets. In addition, even though some of the negotiations may have related to issues on which we have determined petitioners were ultimately successful, petitioners have not limited their claim to only those hours. Their compensation request embraces all hours expended on settlement negotiations. Moreover, they have cited no authority in support of their claim that they are entitled to attorneys' fees for the time spent on unsuccessful settlement negotiations.

Under the circumstances, we conclude that petitioners are not entitled to any of the hours claimed to have been expended on unsuccessful settlement discussions.

G. Fee Petition

[11] NRDC *et al.* assert that their attorneys expended 43.55 hours (40.75 by Galloway and 2.80 by Meyerhoff) preparing and filing this fee petition and that all that time is compensable. West Elk concedes that time incurred in seeking legitimate attorneys' fees is compensable. It argues, however, that where the fee petition is denied in whole or in part, the hours claimed should be reduced accordingly, citing *Utah International*, 643 F. Supp. at 831.

It is clear that hours reasonably expended in establishing an entitlement to a fee award are compensable. 43 CFR 4.1295 (b); *Hernandez v. George*, 793 F.2d 264, 269 (10th Cir. 1986). The *Utah International* court limited that rule when it stated that "[o]nly time

spent seeking fees which were actually awarded is compensable." *Utah International*, 643 F. Supp. at 831. Thus, awards for time expended on fee petitions are limited by the "degree of success" achieved by the petitioner in the other phases of the proceeding.

In this case petitioners seek compensation for a total of 2,428.61 hours of attorney work exclusive of the hours claimed for the fee petition. Of that total we have determined that petitioners reasonably expended 763.75 hours or 31 percent of the total requested. Therefore, applying that same percentage to the hours claimed for the fee petition, petitioners are entitled to recover for 18.50 hours for the fee petition.²³

VI. REASONABLE HOURLY RATE

[12] Having determined the number of hours reasonably expended on qualifying work, we turn to a consideration of the reasonable hourly rate which should be applied to those hours in order to arrive at the "lodestar" amount.

NRDC *et al.* contend that, with respect to each of the four attorneys involved in this proceeding, they are entitled to the prevailing rate as of 1985 for comparable work "in the Washington, D.C. legal community" because the case was litigated and decided by the Board in that area²⁴ (Petition at 29). They submit a number of affidavits from practicing attorneys and other evidence in support of those purported prevailing rates, as well as documentation on the background and experience of their four attorneys. Given that experience and demonstrated skill, petitioners contend that Meyerhoff and Galloway are entitled to be compensated at the rate of \$165 per hour, while Bishop and Hanson should command \$125 per hour. *Id.* at 23.

The Supreme Court has stated that the reasonable hourly rate will normally be considered that rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," as demonstrated by satisfactory evidence. *Blum v. Stenson*, 465 U.S. at 896 n.11; see also *Copeland v. Marshall*, 641 F.2d at 892. However, despite that general statement of the law regarding reasonable hourly rates, there has been considerable conflict in the Federal Circuit Courts of Appeal concerning how to calculate the counsel fees for attorneys who operate a private law firm, but who customarily charge fees below the prevailing community rate in order

²³ In connection with NRDC *et al.*'s reply to the objections raised by OSMRE and West Elk to the fee petition, they assert that they are entitled to an award for time expended in drafting that reply. We agree. Accordingly, NRDC *et al.* will be afforded an opportunity to file a supplement to their fee petition, setting forth the number of hours for which they seek compensation in this respect. Such a supplement must be filed within 30 days of receipt of this decision. The opposing parties will have 30 days from receipt of this supplement to respond thereto.

²⁴ West Elk generally challenges the use of multiple lawyers, contending that this constituted a duplication of effort (West Elk Response, Attachment D, at 3-4). This raises the question of whether the hours worked by each of the attorneys on the same matter were reasonably expended. See *Copeland v. Marshall*, 641 F.2d at 891. We conclude that there is no evidence that the four attorneys employed by petitioners engaged in duplication of effort. Rather, Galloway states in his Jan. 2, 1987, declaration at pages 7-8 (Petition, Attachment 1), that there was little or no duplication because each attorney was assigned a separate area of work.

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to serve a particular type of client. In *Student Public Interest Research Group of New Jersey, Inc. (SPIRG) v. AT&T Bell Laboratories*, 842 F.2d 1436 (3rd Cir. 1988), the court identified and discussed three separate approaches taken by courts of appeals. The first was the "billing rate rule" adopted in the District of Columbia and Eighth Circuits (*Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, rehearing en banc granted, 830 F.2d 1182 (D.C. Cir. 1987); *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985); *Shakopee Mdewakanton Sioux Community v. City of Prior Lake*, 771 F.2d 1153 (8th Cir. 1985), cert. denied, 475 U.S. 1011 (1986)), which directs use of actual billing rates whenever they exist, without regard to the fact that rates may be set artificially low to service the public interest. *SPIRG*, 842 F.2d at 1443.

Under the "micro-market" rule, endorsed in the Seventh and Eleventh Circuits (*Lightfoot v. Walker*, 826 F.2d 516 (7th Cir. 1987); *Mayson v. Pierce*, 806 F.2d 1556 (11th Cir. 1987)), market, rather than actual billing, rates are utilized, but the market is restricted to market rates for other public interest lawyers. *Id.* at 1445-46.

The *SPIRG* court rejected those two approaches in favor of the "community market rate rule," adopted by the Ninth and, apparently, the First Circuits (*Maldonado v. Lehman*, 811 F.2d 1341 (9th Cir. 1987), cert. denied, ____ U.S. ____, 108 S. Ct. 480 (1987); *Hall v. Ochs*, 817 F.2d 920 (1st Cir. 1987)). Under that rule, courts assess the experience and skill of the attorneys and compare their rates to those of comparable attorneys in the community. *SPIRG*, 842 F.2d at 1447.²⁵

Since the *SPIRG* court's decision, the Court of Appeals for the District of Columbia Circuit has reversed its position on the billing rate rule. In *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988), the court expressly overruled the *Laffey* decision regarding the rate to apply and held: "Henceforth, the prevailing market rate method heretofore used in awarding fees to traditional for-profit firms and public interest legal services organizations shall apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals" (*Id.* at 1524). Thus, the D.C. Circuit has also adopted the community market rate rule.

Our review of the cases considering this issue leads us to the conclusion that the community market rate rule is the proper approach for the present case.

We now address the issue of whether the market rate is the "current" rate, as argued by petitioners, or the historic market rates prevailing at the time of the proceedings herein, as argued by West Elk and OSMRE.

²⁵ The court also considered another method which had not been accepted in any of the circuits—the modified billing rate rule—which would utilize the actual billing rate plus a contingent multiplier. Although the court found certain aspects of the rule attractive, it declined to adopt it. *Id.* at 1446-47.

While there is some case precedent for applying current rates (*Ramos v. Lamm*, 713 F.2d at 555), it is now settled that historic rates are to be applied in computing the lodestar amount. See *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986). In *Utah International*, 643 F. Supp. at 830, the court determined that the protracted nature of proceedings resulting in delay in the assessment of attorneys' fees did not justify use of current rates as a method to compensate for such delay or as a shortcut for computing interest. The court's determination was based on its analysis of the *Shaw* decision and the Supreme Court's conclusion that the doctrine of sovereign immunity precludes the reading of Federal statutes to permit interest to run on a recovery against the United States, unless Congress affirmatively mandates that result. Thus, the court held in reliance on *Shaw* that, since section 525(e) of SMCRA did not waive the Government's sovereign immunity with regard to interest awards, awards of attorneys' fees under SMCRA should be computed "on the basis of historical rates." *Id.* Historic rates reflect the rates in effect at the time the work was performed. Thus, in *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d at 1525, the court remanded the case for the limited purpose of having the district court make "findings as to the reasonable hourly rates at the time the services were performed." We conclude that historic rates are properly applied in this case to compute the lodestar amount in determining OSMRE's liability for attorneys' fees.

Next, we must answer the question of what is the relevant community for purposes of determining the reasonable hourly rate. Petitioners claim Washington, D.C., rates are applicable for all four attorneys for all aspects of these proceedings. West Elk objects, contending that Colorado is the "relevant community," because that is where the hearing was held (West Elk Response at 40). West Elk notes that hourly rates relied on in *Utah International*, 643 F. Supp. at 830 n.38, were the prevailing rates in the community where "the judicial proceedings were located." Similarly, in *Ramos v. Lamm*, 713 F.2d at 555, the court concluded that, absent unusual circumstances, the hourly rates will be determined "based upon the norm for comparable private firm lawyers in the area in which the court sits." See also *Council of the Southern Mountains, Inc. v. OSMRE*, 3 IBSMA at 55.

In this case petitioners have broken down the work done in the various proceedings into the seven categories discussed *supra*. For one of those categories, unsuccessful settlement negotiations, we found the work noncompensable. All the other categories, except proceedings before Judge Torbett, involved activities before either IBSMA or this Board. IBSMA was, during its existence, located at the same situs as this Board - Arlington, Virginia, a suburb of Washington, D.C. While Judge Torbett's office was in Knoxville, Tennessee, he traveled to Denver, Colorado, to conduct the hearing in this case.

These facts suggest that two prevailing rates may be used depending upon whether the award is to be made for work before Judge Torbett

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or for the other proceedings, i.e., one for Denver and the other for the Washington, D.C., area.

Petitioners argue, however, that this case presents unusual circumstances which justify the use of rates other than those prevailing where the proceedings took place. Petitioners assert that where a proceeding requires counsel with specialized expertise such that local counsel could not render satisfactory services, the courts have approved the use of hourly rates from outside the local area. They cite, *inter alia*, *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 769 (7th Cir. 1982), cert. denied, 461 U.S. 956 (1983), and *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983), in support of that argument.

The present case involved the interpretation of SMCRA and its implementing regulations. At the time of the filing of the petition for review and during the subsequent proceedings, no significant body of law existed regarding SMCRA and little or none regarding the permitting process. Thus, petitioners claim that in this case the necessity for specialized expertise was absolutely essential and they quote from the court's decision in *Save Our Cumberland Mountains, Inc. v. Hodel*, 622 F. Supp. 1160, 1164 (D.D.C. 1985), *rev'd on other grounds*, 826 F.2d 43 (D.C. Cir. 1987), which described Galloway as "on[e] of the leading experts on the Surface Mining Act."

We are well aware of and have no reason to doubt Galloway's expertise in the surface mining area. Moreover, the cases cited by petitioners clearly support the use of rates from outside the local area. Nevertheless, we fail to see how Galloway's expertise, which would justify application of Washington, D.C., rates for all his work in the present case regardless of the situs of the proceedings, also supports a claim for Washington, D.C., rates for all aspects of this case for the other three attorneys in this case, especially when Meyerhoff and Hanson were located in San Francisco and Denver, respectively, during the relevant time periods. Therefore, we conclude as follows regarding the prevailing historic rates to be applied in this case for each of the attorneys: Galloway is entitled to Washington, D.C., rates for all claims; Meyerhoff, Bishop, and Hanson may receive Washington, D.C., rates for all work, except for the category of proceedings before Judge Torbett.²⁶ Work performed in that category by those three attorneys is compensable at the prevailing historic rates for Denver, Colorado.²⁷

The bulk of the evidence submitted by NRDC *et al.* relating to reasonable hourly rates concerns current rates as of 1985. NRDC *et al.* suggest, however, that the historical rates adopted by the district court

²⁶ West Elk contends that Meyerhoff should not be compensated where he participated in the proceedings as a client. See West Elk Response, Attachment G, at 3-4. In his December 1986 statement, Meyerhoff indicates that, while affiliated with NRDC, he served as "counsel for NRDC" in these proceedings (Petition, Attachment 9, at 1). Meyerhoff's time records reflect such participation. It is well established that so-called public interest attorneys can recover attorneys' fees. See *Utah International*, 643 F. Supp. at 831.

²⁷ Petitioners state that in the event the Board finds Denver, Colorado, rates to be applicable, it will submit affidavits regarding those rates.

in *Save Our Cumberland Mountains, Inc. v. Hodel*, 651 F. Supp. 1528 (D.D.C. 1986), for Galloway and Bishop provide a useful standard.²⁸ In that case, the court adopted rates for Galloway for the years 1981 to 1985 and for Bishop for the years 1981 to 1983. *Id.* at 1541. We will apply those rates, where applicable herein, since the district court determined those rates to be prevailing historic market rates for Washington, D.C., and, therefore, that approach is consistent with the circuit court's recent decision in *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C Cir. 1988). In addition, we recognize that certain work in the present case spanned a period of time following the years covered in that case. For Galloway and Meyerhoff, we will apply their requested rate for work performed in 1986 (\$165). This is clearly in line with those rates reported for 1985 and 1986 in the statements, respectively, of Arthur F. Mathews and Brent N. Rushworth submitted by NRDC *et al.* (Petition, Attachments 3 and 6). In the case of Hanson, we will apply his requested rate for work performed in 1985 (\$125). Again, this is in line with the Mathews and Rushworth statements.

In summary, we conclude that the following reasonable hourly rates apply for Galloway—1981-\$115; 1982-\$125; 1983-\$150; 1985-\$150; and 1986-\$165.²⁹ For Meyerhoff, who graduated from law school the same year as Galloway (1972) and whose experience level was nearly comparable to that of Galloway's, the rates will be the same as Galloway's, except for the year 1982 when his rate must be the community market rate for attorneys of comparable experience in Denver, Colorado. The rates for Bishop are \$85 for 1981 and for 1982 his rate must be the community market rate for attorneys of comparable experience in Denver, Colorado. NRDC *et al.* have not sought fees in this case for Bishop after 1982.

Hanson graduated from law school in 1976, the same year as Bishop. We will adopt, for his rates, for the years 1981, 1982 (for work before the Board), and 1983, the rates set by the *Save Our Cumberland Mountains* court (651 F. Supp. 1528) for Bishop—1981-\$85; 1982-\$90; 1983-\$90. For his work before the Administrative Law Judge in 1982, Hanson may receive the community market rate for attorneys of comparable experience in Denver, Colorado. For the year 1985, based on the information submitted by petitioners in their Petition regarding community market rates for Washington, D.C., and Hanson's level of experience, we establish his rate as \$125 for 1985.

²⁸ OSMRE argues that any rates adopted by the Board should not exceed those "claimed" by Galloway and Bishop in that case (OSMRE Opposition at 20). It is clear that OSMRE is not referring to the rates claimed by those attorneys, but rather those rates actually charged by the attorneys, as reported to the court. The court, however, explained in cogent terms why it adopted the rates it did, in particular adopting higher rates for Galloway than those actually charged by him, in order to conform to the prevailing market rate. See 651 F. Supp. at 1540-41. We adopt that analysis.

²⁹ None of the attorneys claims compensable hours in 1984; therefore, we need not establish a rate for that year. Where the category of work spanned 2 or more years, and we cannot, because of the methodology utilized in determining the compensable hours, identify the specific time when the work was done, we will apply an average rate to that work.

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Thus, in order to complete adjudication of the fee petition, petitioners must supply the Board with the rates they seek for Meyerhoff, Bishop, and Hanson for the year 1982 based on the historic community market rates for attorneys of comparable experience in Denver, Colorado. *See also* note 23, *infra*.

II. CALCULATION OF "LODESTAR" AMOUNT

Having determined the number of hours reasonably expended by the attorneys representing NRDC *et al.* and their reasonable hourly rates, except to the extent indicated above, the remaining task with respect to attorneys' fees is calculation of the "lodestar" amount. That calculation is reflected in Appendix B. It is incomplete, however, because of the necessity for the rates for Denver, Colorado.

VIII. MULTIPLIER

[13] We will briefly address the question of whether NRDC *et al.* are entitled to a multiplier in this case. In cases where the "lodestar" amount does not fully compensate a prevailing party, that amount may be enhanced by an upward adjustment in order to arrive at a "reasonable fee." *Save Our Cumberland Mountains, Inc. v. Hodel*, 651 F. Supp. at 1541. NRDC *et al.* seek, in the absence of application of current hourly rates, an upward adjustment in the "lodestar" amount based on the delay in the award, the contingency of the award, and the quality of the representation (Petition at 3). They seek a "modest multiplier." *Id.* at 36. Based on our analysis, we conclude that NRDC *et al.* are not entitled to an upward adjustment in the "lodestar" amount.

With respect to the quality of the representation, it is presumed that a high quality of representation was afforded consistent with the prevailing market rate, which rate forms the basis for the "lodestar" amount. Thus, no upward adjustment is permitted because of this factor. *Save Our Cumberland Mountains, Inc. v. Hodel*, 651 F. Supp. at 1542.

With respect to the contingency of the award, we will apply the test enunciated in *Save Our Cumberland Mountains, Inc. v. Hodel*, 651 F. Supp. at 1543, which requires that the evidence establish that:

(1) The risk of nonpayment was greater than the normal risk of nonpayment and the lodestar rate must not reflect this added risk; (2) the attorneys must not have adequate fee arrangements with their client and therefore must have shouldered a substantial risk of nonpayment; and (3) the success and impact of the case was exceptional.

Where these elements are satisfied, an upward adjustment is justified on the basis that it encourages attorneys to prosecute risky cases which ultimately achieve exceptional results. *Id.*; *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, ____ U.S. ____, 107 S. Ct. 3078 (1987).

We do not regard the present case as satisfying the test set forth above. We are not aware of the fee arrangement between NRDC *et al.*'s attorneys and their clients. Thus, we can make no specific findings regarding the risk of nonpayment.³⁰ However, we do find that the success and impact of the case were not exceptional. We recognize that the success achieved was important in the sense that the deficiencies in the original OSMRE permit approval process for the Mt. Gunnison No. 1 mine were identified. However, as noted *supra*, that success was limited. In addition, there is no evidence that the impact of the case reaches beyond its limits. This case clearly did not result in the "major breakthrough in mining regulation" experienced in *Save Our Cumberland Mountains, Inc. v. Hodel*, 651 F. Supp. at 1544.

Accordingly, no upward adjustment will be granted because of the contingency factor.

Finally, with respect to the delay in the award, the Supreme Court pronouncement in *Shaw* indicates that no enhancement of the "lodestar" amount is permitted because of any delay in receipt of an award of attorneys' fees, unless specifically mandated by Congress. *Utah International*, 643 F. Supp. at 830; see also *Save Our Cumberland Mountains, Inc. v. Hodel*, 651 F. Supp. at 1543 n.10. Section 525(e) of SMCRA contains no such mandate. As the Court stated in *Shaw*:

Interest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money. The no-interest rule has been applied to prevent parties from holding the United States liable on claims grounded on the belated receipt of funds, even when characterized as compensation for delay. [Citation omitted.]

478 U.S. at 322.³¹ Accordingly, we will not apply an upward adjustment in this case based on delay.

IX. COSTS AND EXPENSES

Having established their eligibility and entitlement to an award of attorneys' fees under section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1982), NRDC *et al.* are also entitled to an award of other costs and expenses reasonably incurred by them in the prosecution of this case. In their Petition, NRDC *et al.* claim a total of \$16,683.79 in costs and expenses, which encompass the costs of postage, photocopying, long-distance telephone calls, courier services, taxis and the subway, secretarial overtime, reporting services, temporary secretarial services, books, air delivery and Federal Express, and travel. NRDC *et al.* itemized these costs and expenses by attorney and category. See Petition at 37. With the exception of travel expenses for Meyerhoff, all the costs and expenses are attributed to Galloway, Bishop, and Hanson.

³⁰ See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, ____ U.S. ____, 107 S. Ct. 3078 (1987), for a discussion of adjustments for the risk of nonpayment.

³¹ However, we note that in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, ____ U.S. ____, 107 S. Ct. 3078 (1987), a case involving a claim for attorneys' fees under sec. 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d) (1982), in which the issue of delay was not presented, the Court nevertheless stated that "[w]e do not suggest, however, that adjustments for delay are inconsistent with the typical fee-shifting statute." 107 S. Ct. at 3082. The Court made no attempt to reconcile this statement with its express holding in *Shaw*, although, in *Shaw*, fees were being sought from the U.S. Government.

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In a supplement to the Petition, the expenses claimed for Hanson were adjusted downward from \$914.92 to \$809.28. The supplement included Hanson's itemization of those expenses. Thus, the adjusted expenses sought are \$1,046.59 for Meyerhoff, \$3,310.45 for Bishop, \$809.28 for Hanson, and \$11,411.83 for Galloway, for a total of \$16,578.15.

In another supplement to the Petition, NRDC *et al.* state that they spent an additional \$19,082.52 for the professional services of LRCWE, of Denver, Colorado. Attached to the supplement is a statement by Leslie H. Botham, Vice President of LRCWE, who states that, between November 1981 and July 1982, LRCWE reviewed the adequacy of the analysis in the permit application of the "hydrologic impact" of the proposed Mt. Gunnison No. 1 Mine and the "cumulative hydrologic impact of mining in general in the region" and testified at depositions and at the hearing. Also attached to the supplement are relevant billing statements from LRCWE, which indicate the amounts charged for the services of various employees of LRCWE and other costs. Petitioners seek, in accordance with the percentage sought under Section V.C. *Work Before the Administrative Law Judge*, 69 percent of \$19,082.52 or a total of \$13,166.94.

[14] We will deal first with the question of whether NRDC *et al.* are entitled to recover their costs and expenses with respect to LRCWE. West Elk contends that NRDC *et al.* are not entitled to any recovery where the supplement to the Petition was "not timely filed" (West Elk Response at 38). We presume that West Elk is again alluding to 43 CFR 4.1292(a), which, as we have construed it herein, requires that a fee petition be accompanied by an affidavit "setting forth in detail all costs and expenses," as well as receipts or other evidence of such costs and expenses. The supplement clearly did not accompany the Petition. However, OSMRE, West Elk, and the State have had ample opportunity to challenge the expenses claimed. Therefore, in the absence of any regulatory sanction for a late filing, we will consider the merits of NRDC *et al.*'s claim for such expenses, since 43 CFR 4.1295(a) specifically provides for awards for expert witness fees.

OSMRE contends that NRDC *et al.* are not entitled to recover any expenses associated with LRCWE because LRCWE was employed to contradict ARCO's analyses of hydrologic impact, not OSMRE's PCI assessment. We disagree; LRCWE's attention was not so limited. The analyses submitted by ARCO with its permit application were reviewed and in part relied upon by OSMRE in making its PCI assessment. It appears clear that the work of LRCWE contributed materially to NRDC *et al.*'s presentation of their case before Judge Torbett regarding issues associated with the question of the hydrologic impact of mining. Those issues are in part related to NRDC *et al.*'s successful claim that OSMRE's PCI assessment was inadequate. Thus, NRDC *et al.* are entitled to some recovery, but not in the amount sought. The amount of the recovery will be calculated based on our methodology for

determining the number of hours reasonably expended before the Administrative Law Judge. See Section V.C. *Work Before the Administrative Law Judge, supra*. The PCI assessment section of the brief before Judge Torbett contained 44 pages. Forty-four pages out of the adjusted total of 127 pages is 35 percent. Petitioners are entitled to expert witness fees of 35 percent of \$19,082.52 or \$6,678.88.

With respect to other costs and expenses, West Elk objects to any recovery because of the absence of receipts or other evidence of such, as required by 43 CFR 4.1292(a)(2) (West Elk Response at 37). However, the costs and expenses claimed by NRDC *et al.* are either supported by signed statements from the attorneys on whose behalf they were incurred or represented in the Petition itself. This constitutes sufficient "evidence" of such costs and expenses.

[15] The question of whether to allow an award for expenses turns on whether such expenses are routinely billed to clients or absorbed as part of the lawyer's overhead. *Ramos v. Lamm*, 713 F.2d at 559; *Save Our Cumberland Mountains, Inc. v. Hodel*, 622 F. Supp. at 1167. In *Ramos*, the circuit court affirmed the district court's rejection of a request for reimbursement for photocopying, postage, telephone calls, books, and overtime secretarial work where such costs were "normally absorbed as part of the firms' overhead." *Ramos v. Lamm*, 713 F.2d at 559. In the present case, Galloway asserted in his January 1987 statement that the expenses attributed to him were "of the type I normally pass along to clients" (Petition, Attachment 1, at 8). These types of expenses were approved for reimbursement by the court in *Save Our Cumberland Mountains, Inc. v. Hodel*, 651 F. Supp. at 1546, in which both Galloway and Bishop were involved. The evidence indicates that the expenses were reasonably incurred by NRDC *et al.* Accordingly, we conclude that they are entitled to an award with respect to those reported expenses.

Petitioners are not, however, entitled to be compensated for all of the reported expenses. As with attorneys' fees, compensation for such costs and expenses must be commensurate with the "degree of success" achieved by NRDC *et al.* In *Utah International*, the court awarded expenses only with respect to those phases of the proceeding in which the petitioners prevailed.

In this case we will examine the total number of compensable hours claimed by each attorney and compare those figures with the actual total hours found to be compensable. The percentages derived from those comparisons will be applied to the costs and expenses claimed by each attorney.

Galloway claimed 1,163.30 compensable hours. We found him entitled to an award for 419.75 hours or 36 percent of the hours claimed. He seeks compensation for \$11,411.83 in costs and expenses. We believe application of the 36-percent figure to those costs and expenses provides a reasonable award. Galloway is entitled to \$4,108.26 for costs and expenses.

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Bishop sought compensation for 713.62 hours of legal work. We found him entitled to 201.60 hours or 28 percent of the hours claimed. Applying that same percentage to his costs and expenses results in an award of \$926.93 (28 percent of \$3,310.45).

Hanson claims \$809.28 in costs and expenses. We found him entitled to 22 percent of the hours for which he sought compensation (100.25 hours of 461.17 hours). We find he is entitled to 22 percent of his costs and expenses or \$178.04.

We found Meyerhoff to be entitled to 56.55 hours or 42 percent of the claimed compensable hours of 134.07. Applying that same percentage to his claimed travel expenses of \$1,046.59 results in an award of \$439.57.

Accordingly, based on the present record, NRDC *et al.* are hereby awarded costs and expenses, including attorneys' fees, to the extent set out in Appendix B and Appendix C.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Petition of NRDC *et al.* is approved in part, as set forth above, and NRDC *et al.* are granted 30 days from receipt of this decision to submit to the Board information establishing the historic hourly market rate for 1982 for the community of Denver, Colorado, and the hourly rates for Bishop, Hanson, and Meyerhoff, based thereon. NRDC *et al.* shall have the same amount of time to file the information discussed in note 23, *supra*. OSMRE, or any other party, shall have 30 days from receipt of those submissions to file any desired response. The Board will entertain no reargument on the merits of this decision in those submissions. Upon receipt of the information from NRDC *et al.* and any responses thereto, the Board will act expeditiously to complete the calculation of the attorneys' fees and the total award.

BRUCE R. HARRIS
Administrative Judge

WE CONCUR:

GAIL M. FRAZIER
Administrative Judge

WILL A. IRWIN
Administrative Judge

APPENDIX A

**Summary of the Time Record Entries for Galloway, Bishop, and Hanson
for Which Hours Are Allowed for Procedural Matters Before IBSMA.
All Other Entries for the Dates August 12, 1981, Through February
24, 1982, Have Been Reviewed and Found Not To Be Compensable.**

Date	Hours	Hours allowed	GALLOWAY
			August 1981
08/12	2.00	2.00	Conference with Bishop re procedure issues; review of proposed procedures for case; discussions with DOI re their position on case.
08/14	1.50	1.50	Call from ARCO attorney re filing; call from clients re filing; conference with L. Bishop re approach on procedural issues.
08/18 [sic]	4.00	4.00	Call to Carolyn Johnson re status; update; call from ARCO lawyer re case; call to Walt Morris re case; work on procedural issues; call from Don Crane re case.
08/17	0.75	0.75	Call to Kent Hanson re federal appeal and allocation of work; call to NRDC re schedule.
08/24	0.25	0.25	Conference with L. Bishop re development of BD [Board] procedures.
8/25	2.25	2.25	Conference call from DOI attorneys re OSM position; call to client re our position; conference with L. Bishop re approach to case and possible positions.
08/26	6.00	4.00	Calls from and to Walt Morris re DOI position; call from ARCO; calls to Kent Hanson and Carolyn Johnson; conference with L. Bishop re status position; draft settlement position.
08/30	7.25	7.25	Calls to Carolyn Johnson re response to DOI order; review order; outline response; start draft on response.
08/31	4.75	4.75	Calls to M. Squillace re order; conference with L. Bishop re response to Bd Order, edit response; call to Carolyn Johnson re same.
			September 1981
09/01	6.00	4.00	Prepare for and call from ARCO re settlement; call to client in Denver; meeting with NRDC-Washington; conference with L. Bishop re work on order; call to K. Hanson re same.

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APPENDIX A—Continued

Date	Hours	Hours allowed	
09/03	5.00	2.00	Calls from M. Squillace re OSM/ARCO meetings; call to K. Hanson re same; conference with L. Bishop re approach; work on background to stay motion; edit memorandum on citizen part suits.
09/04	4.75	4.75	Call from M. Squillace re case; conference with L. Bishop re structure of brief and type of hearing required; research legislative history on permit hearings.
09/05	2.00	1.00	Work on response to Board order; review stay standards.
09/06	1.50	1.50	Continue work on response of procedures for review of permit; review and research APA case law.
09/08	3.50	1.25	Work on case law section of [stay] brief; review legislative history on permit hearings; conference with L. Bishop re same.
09/09	5.25	1.75	Edit citizen section of brief; conference with Bill Jordan re this section; call to M. Squillace re case; review and edit findings section; review and research "reasoned basis" cases.
09/10	10.00	3.00	Work on response on "no specific findings" section; review and research case law; research analogous proceedings; edit; conference with L. Bishop and B. Jordan re standing; calls to and from M. Squillace re motions.
09/11	8.25	2.75	Edit brief; call to Carolyn Johnson; calls and conference with Walt Morris and M. Squillace re case; conference re NRDC claim.
09/12	7.25	2.50	Work on response to BD order; research, edit, and drafting; prepare footnotes.
09/13	8.00	2.50	Continue work on response; call to Carolyn Johnson re edit; inclusion of comments.
09/14	4.75	1.50	Continue edit of response; call to Carolyn Johnson re BD stay; call to M. Squillace re stay.
09/15	2.75	1.00	Work on response to BD order and relevant issues; research on procedural regulations and response to motion to dismiss.

APPENDIX A—Continued

Date	Hours	Hours allowed	
09/23	3.75	1.00	Conference with L. Bishop on claim; conference re allocation of work on brief; work on brief.
09/24	5.00	4.00	Review record of permit case at OSM office; conference with L. Bishop re status; calls re settlement proposals.
09/25	3.00	1.00	Continue work on ARCO response; call from client re changes in response.
09/26	4.75	1.50	Work on filing; edit various responses to be filed on September 28.
09/27	5.25	1.75	Work on filing; edit motion to stay; edit and proof response; edit and review cases on time delay; edit response to motion to stay.
09/28	6.75	2.25	Final work on filing; call from Tom Linn re settlement; call to OSM re case.
			October 1981
10/05	2.00	1.00	Edit response to motion to dismiss; continue work on settlement; call from client re status of case.
10/13	6.00	4.00	Call from T. Linn re settlement; call to Carolyn Johnson re settlement position; continue to work on settlement proposal; call from M. Squillace; edit and file response to [OSMRE] motion to dismiss; call to Bd re same.
			February 1982
02/01	2.00	2.00	Start work on response to January 28 order; review federal permitting regulations and subchapter D.
02/03	2.00	2.00	Draft response to Board Order of January 28; review regulations re same.
Total hours allowed for Galloway.		76.75	

BISHOP

			August 1981
08/14	0.25	0.25	Confer with Galloway regarding case.
08/25	1.50	1.50	Confer with client and co-counsel regarding case strategy.
08/26	1.50	1.50	Confer with client and co-counsel, discuss expert witness availability with consultant.
08/28	0.25	0.25	Discuss status with Galloway.
08/31	4.50	4.50	Review papers filed in reply by OSM, confer regarding same with client and Galloway.
			October 1981
10/13	2.00	2.00	Review file, [OSMRE] motion to dismiss, confer with OSM counsel.

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APPENDIX A—Continued

Date	Hours	Hours allowed	
10/21	3.50	1.00	Confer with Galloway regarding settlement, discuss numbers with consultant, redraft settlement agreement, confer with Galloway and expert regarding technical documents.
10/30	0.50	0.50	Conference with expert.
Total hours allowed for Bishop.		11.50	
			HANSON
			October 1981
10/06	0.30	0.30	Review motion to dismiss [OSMRE] and [OSMRE] response.
10/14	0.50	0.50	Office conference with Carolyn Johnson re hydrology issues.
Total hours allowed for Hanson.		0.80	

APPENDIX B

GALLOWAY

Preliminary Work	Hours claimed	Hours allowed	Rate	Award
(6/81-8/11/81).....	27.75	4.30	\$115.00	\$494.50
Procedural Issues (8/12/81-2/24/82).....	298.25	72.75 (1981) 4.00 (1982)	115.00 120.00	8,366.25 480.00
Before ALJ (2/25/82-9/17/82).....	521.30	226.65	125.00	28,331.25
Before Board (9/18/82-9/27/85).....	87.75	35.95	* 140.00	5,033.00
For Relief (9/28/85-1/6/86).....	63.50	63.50	** 150.00	9,525.00
Settlement (Fall 81-Summer 82).....	171.00	0		
Fee Petition (1986).....	40.75	12.60	165.00	2,079.00
				\$52,230.00

MEYERHOFF

Preliminary Work	Hours claimed	Hours allowed	Rate	Award
(6/81-8/11/81).....	0			
Procedural Issues (8/12/81-2/24/82).....	0			

APPENDIX B—Continued

Before ALJ				
(2/25/82-9/17/82).....	116.50	50.65		Denver
Before Board				
(9/18/82-9/28/85).....	0			
For Relief				
(9/28/85-1/6/86).....	5.00	5.00	**\$150.00	\$750.00
Settlement				
(Fall 81-Summer 82).....	9.00	0		
Fee Petition				
(1986).....	2.80	.90	165.00	148.50

BISHOP				
		Hours claimed	Hours allowed	Rate
Preliminary Work		20.00	7.50	\$85.00
(6/81-8/11/81).....				\$637.50
Procedural Issues				
(8/12/81-2/24/82).....	230.00	11.50	85.00	975.50
Before ALJ				
(2/25/82-9/17/82).....	419.85	182.60	Denver	
Before Board				
(9/18/82-9/27/85).....	0			
For Relief				
(9/28/85-1/6/86).....	0			
Settlement				
(Fall 81-Summer 82).....	43.75	0		
Fee Petition				
(1986).....	0			

HANSON				
		Hours claimed	Hours allowed	Rate
Preliminary Work		142.30	0	
(6/81-8/11/81).....				
Procedural Issues				
(8/12/81-2/24/82).....	40.70	.80	\$85.00	\$68.00
Before ALJ				
(2/25/82-9/17/82).....	218.25	94.90	Denver	
Before Board				
(9/18/82-9/27/85).....	11.10	4.55	* 102.00	464.10
For Relief				
(9/28/85-1/6/86).....	0			
Settlement				
(Fall 81-Summer 82).....	54.70	0		
Fee Petition				
(1986).....	0			

* Represents average of the hourly rates for the years in which compensable hours were allowed in the category.

** No hours claimed for 1986.

APPENDIX C

	Attorneys' fee award	Costs and expenses award	Total
Galloway	\$52,230.00	\$4,108.26	\$56,338.26
Meyerhoff.....		439.57	
Bishop.....		926.93	
Hanson		178.04	
Expert witness fees awarded			6,678.88

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PETRO-LEWIS CORP.

108 IBLA 20

Decided: March 20, 1989

Appeal from a decision of the Director, Minerals Management Service, affirming assessment of royalty on crude oil used to fuel cogeneration facility. MMS 85-01220-O&G.

Affirmed in part; reversed and remanded in part.

1. Mineral Leasing Act: Royalties--Minerals Management Service: Generally--Oil and Gas Leases: Royalties--Oil and Gas Leases: Unit or Cooperative Agreement

Under 30 U.S.C. § 226(b)(1) (1982), royalty is properly assessed on the amount of crude oil used to generate electricity in a cogeneration facility, where that electricity is the subject of a sale to a third party, even if the same electricity is subsequently repurchased and used for beneficial purposes on the lease.

2. Mineral Leasing Act: Royalties--Minerals Management Service: Generally--Oil and Gas Leases: Royalties--Oil and Gas Leases: Unit or Cooperative Agreement

Where royalty is due on crude oil which is utilized to produce electricity, the proper method of valuation for purposes of determining the amount of royalty due is the value of the crude oil had it been sold.

APPEARANCES: Carleton L. Ekberg, Esq., Denver, Colorado, for appellant; Peter J. Schaumberg, Esq., and Douglas O. Bowman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

The Petro-Lewis Corp. (Petro-Lewis) has appealed from a decision of the Director, Minerals Management Service (MMS), dated May 22, 1986, affirming the assessment of royalty on a portion of the crude oil

used to fuel appellant's cogeneration facility¹ located within the North Kern Front Field Unit in Kern County, California.

The North Kern Front Field Unit (No. 14-08-0001-19647), covering approximately 960 acres, was formed in 1982 to facilitate the operation of a steam injection program for enhanced recovery of low gravity crude oil. Appellant burns crude oil recovered from the unitized formations to produce steam, which is then injected into the producing unitized formations. A portion of the steam passes through an in-line turbine generator to produce electricity. This electricity is both produced and actually used on the unit. Because appellant's unit operations consume more electric power than this cogeneration process produces, appellant purchases additional electric power from Pacific Gas and Electric Co. (PG&E).

Pursuant to the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601 (1982), appellant and PG&E entered into a contract relating to the electricity produced by the cogeneration facility. PG&E offered Petro-Lewis two different options: the net energy output option and the surplus energy output option. Under the net energy output option, all electricity would be purchased by PG&E and then resold to Petro-Lewis together with any additional electricity that might be needed for unit operations. Under the surplus energy output option, on the other hand, none of the electricity which Petro-Lewis generated would be sold to PG&E unless it was surplus to Petro-Lewis' needs. If Petro-Lewis failed to produce enough electricity for unit operations, it would purchase so much as was needed from PG&E.

Petro-Lewis originally elected the net energy output option when it executed its agreement with PG&E on April 9, 1985, with an effective date of June 12, 1984. Its choice was dictated by the fact that, at that time, there was a favorable price differential between the higher "avoided costs of power" rates at which PG&E purchased the energy produced by appellant and the lower "industrial" rates which were charged appellant when it repurchased the electricity which it produced and any additional amounts which were needed for unit operations.² Thus, so long as the price differential remained in effect, Petro-Lewis would make a profit on each kWh sold and then repurchased, dependent upon the amount of the differential between the two rates. This arrangement continued from February 1984 through March 1986, at which point in time Petro-Lewis switched to the surplus energy output option.³

¹ The regulations define "[c]ogeneration facility" as "equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy." 18 CFR 292.202(c).

² Appellant also noted that there was a convenience factor in its election. Thus, it was argued that the net energy sale option "met with PG&E's wishes as it provided them time to study prior arrangements made to supply power to our lease plus it provided us a financial incentive, as avoided costs at the time were slightly higher than the industrial power rates" (Letter dated Nov. 11, 1985, from Petro-Lewis cogeneration consultant to Chief, Royalty Valuation and Standards Division, MMS).

³ In May 1985, appellant decided that sale and repurchase of the cogenerated electricity had lost its economic advantage and changed to a surplus energy contract as of the next anniversary date of the contract, i.e., effective Apr. 9, 1986.

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On June 27, 1985, the Chief, Royalty Valuation and Standards Division of the MMS Royalty Management Program (RMP), sent appellant a letter informing it of his determination that royalty was due on the crude oil allocable to the production of the electric power appellant sold to PG&E. This determination was premised on the application of 30 CFR 206.103 which required the payment of royalty on the gross proceeds accruing to the lessee. For royalty purposes, MMS decided to use a "netback" procedure to value the oil used to generate electricity.

Petro-Lewis appealed this determination to the Director, MMS, pursuant to 30 CFR Part 290. In its statement of reasons, Petro-Lewis reiterated the fact that, even though it sold the cogenerated power to PG&E, all of the power which was generated was actually used on the lease for unit operations. Petro-Lewis argued that "the gross proceeds calculation should be based on the difference between the rate received from PG&E less the rate charged by them as multiplied by the period kw-hrs generated by the cogeneration facility," i.e., the price differential between the "avoided cost" rate and the "industrial" rate. Moreover, appellant further argued that no royalty should be assessed on electricity which, while sold, was nevertheless used on lease.

By decision dated May 22, 1986, the Director, MMS, denied the appeal. After briefly reviewing the arrangement between appellant and PG&E, he concluded that the RMP correctly recognized the transaction as a sale subject to royalty, even though the electricity appellant produced never left the unit. The fact that the electricity was sold to PG&E was a critical factor in the Director's decision. Thus, he noted:

The record suggests that the crude oil burned in the cogeneration facility to produce electric power for enhanced recovery operations is being consumed for a "beneficial purpose" in operating the unit. Ordinarily, no royalty would be assessed on lease production used for these purposes.

In this case, however, Petro-Lewis has elected for its own purposes to sell the electricity it produces from the cogeneration facility to PG&E. While it may be true that the power sold and repurchased never leaves the unit, the RMP is correct in recognizing the transaction as a sale. One consequence of the "net energy" arrangement selected by Petro-Lewis is that royalty is payable on the sale. The valuation procedure is affirmed in all respects.

(Decision at 3). Petro-Lewis has timely pursued an appeal of this determination to the Board.

In its appeal, Petro-Lewis makes two basic arguments. First, it contends that the oil used to generate steam and produce electricity used for unit operations is exempt from royalty payments. Second, it argues that, even if it is determined that such oil is not completely exempt from royalties, the Department should look at the entire transaction and the valuation placed on the oil should be modified accordingly. We will discuss these two contentions in order.

[1] The thrust of appellant's first contention is that, to the extent that the individual lease terms have been modified by the unit agreement, no royalty is owing for oil used to generate steam and to produce electricity used in the unit operations. Appellant's argument proceeds as follows. Under section 17(j) of the Mineral Leasing Act, 30 U.S.C. § 226(j) (1982), the Secretary of the Interior is authorized to establish, alter, or change royalty requirements set forth in oil and gas leases as he deems proper in connection with the institution and operation of a unit plan of development. Pursuant to this authority, the Secretary, acting through the United States Geological Survey, had approved the North Kern Front Field Unit Agreement with the express provision that "drilling, producing, rental, minimum royalty and royalty requirements of all Federal leases committed to said agreement are hereby established, altered, changed, or revoked to conform with the terms of [the unit] agreement." Appellant contends that, under the applicable provisions of the unit agreement, no royalty is properly assessed for cogenerated electricity used on the lease to enhance unit operations, regardless of whether or not this electricity is sold.

The key to appellant's position lies in the interpretation and application of Article 16 of the unit agreement. That Article, entitled "Use or Loss of Unitized Substances," provides as follows:

16.1 *Use of Unitized Substances.* Unit Operator may use as much of the Unitized Substances as it deems necessary for Unit Operations, including but not limited to the injection thereof into the Unitized Formations.

16.2 *Royalty Payment.* No royalty, overriding royalty, production or other payments shall be payable upon or with respect to Unitized Substances used or consumed in Unit Operations, or which otherwise may be lost or consumed in the production, handling, treating, transportation or storing of Unitized Substances.

16.3 *Substitute Power and Substances.* If Unit Operator substitutes fuel or power from an outside source for fuel or power obtainable from Unitized Substances, the amount of Unitized Substances so produced and delivered to Working Interest Owners which would otherwise have been used for fuel or power shall (subject to the express provisions of any particular lease) be free of royalty or other payment, as provided in Section 16.2 above, the same as if this amount of Unitized Substances had been used in Unit Operations.

16.4 *Exception.* The provisions of Sections 16.2 and 16.3 of this Article 16 shall be inapplicable with respect to royalty payable to the United States to the extent that the application of such provisions would be in conflict with statutes and/or valid regulations issued pursuant thereto.

Appellant posits two different theories as to why it is not properly assessed royalty on the crude oil used to produce the cogenerated electricity. First, it argues that under Article 16.2, all unitized substances used or consumed in production are exempt from royalty payments. Since the electricity produced by the steam is actually totally consumed on the lease, appellant argues that no royalty is properly assessed.

Recognizing that under MMS' sale and purchase analysis Article 16.2 might be judged inapplicable since the cogenerated electricity could be deemed to have been sold to PG&E with an equivalent amount being repurchased, appellant alternatively argues that Article

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16.3 would clearly exempt the crude oil used to generate the electricity from royalty assessment.

It seems clear that, if these two sections of Article 16 of the unit agreement are applicable, either would require a reversal of the MMS Director's decision. Thus, the major part of the disagreement in the instant case revolves around Article 16.4. As noted above, that Article provides that sections 16.2 and 16.3 are inapplicable with respect to the royalty interest of the United States "to the extent that the application of such provisions would be in conflict with statutes and/or valid regulations issued pursuant thereto."

MMS essentially argues that both section 16.2 and 16.3 are inapplicable to the extent that they conflict with 30 U.S.C. § 226(b)(1) (1982), and 30 CFR 202.150(b) and 206.103. Thus, MMS notes that 30 U.S.C. § 226(b)(1) (1982), provides that royalty must be paid on all production "removed or sold from the lease." Since, under the clear terms of the net energy output option Petro-Lewis accepted, the electricity was sold to PG&E, MMS argues that the statute affirmatively requires payment of royalty for the crude oil used to produce the electricity. MMS also notes the 30 CFR 206.103 requirement that, in computing royalty, the value of production shall not be deemed to be less than the gross proceeds accruing to the lessee. MMS contends that, because Petro-Lewis obtained gross proceeds from the sale of the electricity to PG&E (based on the "avoided costs" rate), the assessment of royalty on the crude oil used to produce the electricity is required by the regulations.

Appellant disputes this interpretation. In support of its position, appellant adverts to the history surrounding Notice to Lessees 4 (NTL-4). While we agree that this history is germane to the issue before the Board, we conclude, for reasons elucidated below, that a correct analysis of both the promulgation and ultimate judicial rejection of NTL-4, supports the conclusion of the Director, MMS, that royalty was properly assessed in the instant case.

NTL-4 was originally promulgated on November 15, 1974, with an effective date of December 1, 1974. In substance, this notice provided that, as of its effective date, royalty would be payable on the oil used for production purposes on a lease or unit as well as the oil lost in well tests, spills, blowouts and fires which occurred on a lease or unit, regardless of whether such loss might be deemed to be unavoidable. When the Department attempted to implement these changes, however, numerous oil companies challenged the authority of the Secretary to promulgate the new rules.

The Department's attempts to justify these provisions met with a notable lack of success in the Federal courts. Thus, in *Marathon Oil Co. v. Andrus*, 452 F. Supp. 548 (D. Wyo. 1978), the Wyoming District Court held that the Department's contemporaneous construction of both the original language of section 17 of the Mineral Leasing Act

and the 1946 amendments to the effect that royalties were not to be collected on oil and gas unavoidably lost or used in lease operations, was entitled to great weight, particularly in light of subsequent congressional ratification of that interpretation. Accordingly, the court struck down the conflicting provisions of NTL-4 as arbitrary, capricious, and an abuse of discretion.

Of more particular relevance to the instant appeal was the decision by the District Court for the Central District of California in *Gulf Oil Corp. v. Andrus*, 460 F. Supp. 15 (C.D. Cal. 1978), which, while it reached the same conclusion as the court in *Marathon*, used a different line of analysis. While the *Marathon* court had made an analysis of contemporaneous construction, the *Gulf* court examined the legislative history of the 1946 amendments to section 17 of the Mineral Leasing Act. Prior to 1946, the relevant language of section 17 had provided for a royalty of not less than 12 1/2 per centum "in the amount or value of the production." In 1946, this language was amended to read "in amount or value of production *removed or sold from the lease*." Act of August 8, 1946, 60 Stat. 951, as amended, 30 U.S.C. § 226(b)(1) (1982) (italics added).

In construing the language added by the 1946 amendments, the court referred to legislative history which had apparently been overlooked by the Department when it promulgated NTL-4.⁴ Because of its ultimate relevance to the disposition of the instant appeal, we set out the court's discussion *in toto*:

In determining this critical issue, the court must first decide what Congress intended by the 1946 amendment to Section 17. Although legislative history on the amendment is scanty, plaintiff has uncovered the following remarks made by C. P. Watson, Vice-President of Seaboard Oil Corporation, on August 30, 1945, during Senate Subcommittee hearings on the bill that amended the Mineral Leasing Act (S. 1236):

For years the Government, under regulations of the Interior Department, has been computing royalty on the basis of sales, or, as we in the industry say, on the "run tickets." Recently, I have been advised that the Interior Department is going to change that practice; that from now on Government lessees must account for and pay royalty not on the basis of the oil and gas removed from the lease, but on the basis of the production at the well.

Hearings on S.1236 Before the Subcommittee of the Senate Committee on Public Lands and Surveys, 79th Cong., 1st Sess., at 160. Mr. Watson then proposed an amendment to prevent the contemplated change in assessing royalty payments:

I would suggest for your consideration, therefore, the addition of the words "removed or sold from said lease" after the word "production" . . .

Id. Watson's suggested language was adopted by Congress verbatim. This is persuasive evidence that in enacting the 1946 amendment to Section 17 Congress intended to ensure

⁴ Thus, NTL-4 was premised on a legal analysis provided by the Solicitor and then approved by Secretary Kleppe. See M-36888 (Oct. 4, 1976). Therein, the Solicitor advised the Secretary,

"We can find no explanation for the addition of the phrase 'removed or sold from the lease.' S. 1236 was first introduced in the 79th Congress, 1st Session. That draft repeated the language of the original section 14 of the Mineral Leasing Act, and referred to 12 1/2 percent in 'amount or value of the production.' Section 2, S. 1236, July 6, 1945. On May 29, 1946, S. 1236 was reported from committee. Without explanation, section 2 of the earlier version, now section 3, was amended to read as eventually passed, '12 1/2 per centum in amount or value of the production removed or sold from the lease.' We have found no explanation of this change in the committee report, the conference debates, or correspondence." M-36888 at 7-8. *But see* discussion in text, *infra*.

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that royalty would be due only on oil and gas "removed" from the leasehold, not on total oil and gas produced at the well. Since oil and gas used for production purposes on the leasehold where they were initially produced are clearly not "removed" from that leasehold, no royalty should be required by Section 17. [Footnote omitted.]

460 F. Supp. at 17.

Appellant points to the last part of the discussion wherein the Court declared that royalty would be due "only on oil and gas 'removed' from the leasehold" in support of its contention that, since none of the electricity was removed from the leasehold, no royalty was due regardless of whether or not the electricity was "sold." We do not believe that such an interpretation is sustainable when read in the context of the court's decision or in light of Watson's testimony.

The thrust of appellant's argument would require us to ignore the word "sold" in the statutory language. The difficulty with this approach, besides the obvious problem of just striking the word, is that Watson's testimony was to the effect that the Department was about to abandon its past practice of computing royalty on *sales* in favor of a new approach, which looked merely to production. Watson's proposal was clearly one designed to maintain the status quo, which, as he testified, was one in which royalty was assessed when the product was sold.

Similarly, appellant places far too much weight on the court's discussion relating to the removal of oil and gas from the lease. There is no indication from the court's statement of facts that the crude oil was sold in the *Gulf* case, nor was there any hint that the Department was attempting to assess royalty based upon a sale of the crude. Rather, consistent with NTL-4, the Department was attempting to assess a royalty on oil produced and used in the production processes. In the absence of any allegation of a sale, the critical statutory language was the word "removed," since under 30 U.S.C. § 226(b) (1982), royalty could only be assessed for oil "removed or sold" from the lease. The fact that the court's decision was focused on this question can scarcely be said to support the conclusion that a sale of the oil would not trigger the statutory requirement that royalty be assessed, independent of any issue as to whether the oil was removed.

Subsequent to the judicial rejection of NTL-4, the Department abandoned its efforts to assess royalty on oil used in production or unavoidably lost. Effective January 1, 1980, the Department adopted NTL-4A. See 44 FR 76600 (Dec. 27, 1979). The relevant language of NTL-4A provides:

Oil production subject to royalty shall include that which (1) is produced and sold on a lease basis or for the benefit of a lease under the terms of an approved communitization or unitization agreement and (2) the Supervisor determines to have been unavoidably lost on a lease, communitized tract, or unitized area. No royalty obligation shall accrue as to that produced oil which (1) is used on the same lease, same communitized tract, or same unitized participating area for beneficial purposes or (2) the Supervisor determines to have been unavoidably lost.

It is clear from the context of the litigation which led to this amendment that the dichotomy being drawn in NTL-4A was between oil "produced and sold" and oil which was "produced * * * [and] used on the same lease." Nothing in this regulation could fairly be said to support an interpretation that oil "produced and sold but then repurchased and used on the same lease" would be free of royalty assessment. Yet, absent such an interpretation, the requirement that royalty be assessed where oil is sold must attach by operation of the clear statutory language of 30 U.S.C. § 226(b)(2) (1982).

Moreover, to the extent that the above analysis is correct, it would also follow that Article 16.3 is not applicable since, as applied to the Federal royalty interest, it would conflict with the relevant statutes and regulations and would, therefore, be expressly excepted by Article 16.4. We conclude, therefore, that the Director, MMS, was correct that, to the extent that oil was used to produce electricity which was then sold, royalty was properly assessed.

We recognize that this analysis may appear vulnerable to the criticism that it represents the triumph of form over substance. Thus, had Petro-Lewis elected to utilize the surplus energy output option, no sale of the electricity would have occurred and no royalty would have been assessed since all of the crude oil would have been used within the unit to enhance unit production and, under NTL-4A, such oil would be exempt from royalty payments.

But form has its own substance. There are myriad consequences attendant whenever certain choices are made, not all of them necessarily foreseeable. It is almost a certainty that appellant did not realize that, when it elected the net energy output option it was thereby rendering the oil needed to produce the electricity subject to royalty. Rather, it elected, for sound economic reasons, to opt for the net energy output option because a favorable price differential existed at that time between the "avoided costs of power" rate and the "industrial" rate. The problem, however, was that in order to avail itself of this favorable differential appellant *sold* the electricity to PG&E and then repurchased it. It is this act which triggered the requirement to pay royalties.

Appellant, in essence, seeks to have us treat the sale as a fiction. But it was not. The sale was a fact which, as one of its intended consequences, allowed appellant to avail itself of a favorable price differential. That it may have had a far more deleterious unanticipated consequence by rendering appellant liable for royalty payments does not justify ignoring the legal results which necessarily ensued upon the *sale* of the electricity to PG&E.

[2] There remains, however, the question of the proper basis upon which to assess royalty. Appellant objects to the netback procedure which MMS directed for calculating the royalty amount. Under this procedure, the royalty value per barrel of oil deemed to be used for production of cogenerated electricity is the total value of the electricity sold, less a processing allowance, divided by the total volume

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of oil burned for electricity generation. Petro-Lewis objects to this formula, arguing that:

Instead of the value being based upon the total amount received by Petro-Lewis for cogenerated electricity sold to PG&E under the Power Purchase Agreement (less a processing cost) or the value of the oil had it been sold at the tank battery, whichever is greater, Petro-Lewis submits that the per barrel value of the oil deemed to be used to produce cogenerated electricity should be based solely upon the value of that oil as if it had been sold at the battery with other oil from the unit rather than the "netback" value.

(Statement of Reasons at 27).

Appellant's objection to the netback valuation is basically that a portion of the value of the electricity is derived from the manufacturing process when the crude oil is converted to steam and then electricity. Petro-Lewis argues that MMS has no right to the increased value resulting from this manufacturing process. In support of its position, appellant draws a comparison between its situation and that involved in the assessment of royalties for casing-head gasoline.

As early as 1926, the Department eschewed any claim that its royalty for casing-head gasoline (a manufactured product) should be based on the value of the finished product. See *Operating Regulations to Govern the Production of Oil and Gas*, 52 L.D. 1 (1926). The Department noted that "[t]he value of [casing-head gasoline] is contingent upon the value of the raw material and the cost of its manufacture. The Government does not wish to collect royalty on that part of the value which is derived from the cost of manufacturing, inasmuch as the Government's equity is confined to the value of the raw material involved." *Id.* at 11. Accordingly, the Department directed that two-thirds of the value of the casing-head gasoline would be royalty free, as an allowance for the cost of manufacture. That allowance has continued to this day. See 30 CFR 206.106.

The allowance for casing-head gasoline proceeds from the same theoretical basis that animates allowance for certain transportation and processing costs. Thus, while the Department has refused to allow a transportation deduction for costs incurred in transporting oil or gas to a selling point *within* the field, it has allowed reasonable transportation costs *from* the field to the first point of sale. Compare *The Texas Co.*, 64 I.D. 76 (1957) with *Kerr-McGee Corp.*, 22 IBLA 124 (1975). In the former situation, the cost of transporting oil or gas to a market within a field was deemed to be one of the ordinary incidents of lease operations (see *The Texas Co.*, *supra* at 80), whereas in the latter, it has been deemed a post-production cost for which a deduction is properly allowed. See *United States v. General Petroleum Corp.*, 73 F. Supp. 225 (S.D. Cal. 1946); *Shell Oil Co.*, 70 I.D. 393 (1963).

Similarly, while the Department has held that costs encountered in placing oil or gas in a marketable condition are part of the costs of production and, hence, not deductible for royalty purposes (see *The*

California Co., 66 I.D. 54 (1959), *aff'd*, 296 F.2d 384 (D.C. Cir. 1961)), the Department has also recognized that certain processing costs, which go beyond merely rendering the product marketable but rather further enhance its value, may be deducted from gross value. See, e.g., *Black Butte Coal Co.*, 103 IBLA 145 (1988).

As we understand the decision of the Director, MMS, he recognized that some allowance was proper. Hence, the formula he adopted provided for the deduction of a processing allowance from the value of the electricity sold. The point at controversy herein is the fact that, because the formula of the Director starts with the value of the electricity sold and then subtracts processing costs, the remaining value base upon which royalty will be assessed includes any profit attributable to the electric generation facility.

The decision of the Director, MMS, did not address this contention regarding the netback procedure.⁵ However, counsel for MMS has directly confronted appellant's contention in its submission to the Board, by making two points. First, it points out that 30 CFR 206.103 expressly provides, in relevant part, that

[u]nder no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary.

According to MMS, this regulation did not merely permit a reference to the value of the electricity sold, it required it. That value constituted the "gross proceeds" obtained by Petro-Lewis.

Second, MMS points to Federal court decisions, most notably *Marathon Oil Co. v. United States*, 604 F. Supp. 1375 (D. Alaska 1985), *aff'd*, 807 F.2d 759 (9th Cir. 1986), as recognizing the netback procedure as "fully valid and consistent with the MMS regulation" (Answer at 17). Thus, it is contended that the decision of the Director, MMS, should be sustained. We agree that the decision in *Marathon* is of particular relevance to the question under examination, but are of the opinion that the *Marathon* decision substantially undermines, rather than supports, the arguments advanced by MMS.

To put the *Marathon* decision in perspective, it is necessary to briefly recount the salient facts. Marathon owned an undivided 50-percent working interest in various leases in the Kenai Field Unit in Alaska which had been producing natural gas since 1961. A portion of Marathon's allocated production was delivered to a liquefied natural gas (LNG) plant which it owned. The delivered gas was cooled through a multi-step cooling process and transformed into a liquid. The liquefied natural gas was then shipped to Japan, where it was sold.

Commencing in 1977, a dispute arose between the Geological Survey (which at that time was responsible for the management of producing Federal oil and gas leases) and Marathon as to the proper computation

⁵ Indeed, appellant did not make this argument to the Director, MMS. Rather, it asserted that the royalty value calculation should be based on the difference between the proceeds it received for the sale of electricity to PG&E and the amounts which it paid to repurchase the electricity. The Director rejected this contention.

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of royalty owed to the United States. Suffice it for our purposes to note that ultimately MMS directed Marathon to pay royalties based on the sales price which it received in Japan, less expenses, i.e., on a netback basis, which resulted in a substantially higher royalty assessment. Marathon refused to pay at the increased rate and, after receiving various orders from MMS requiring it to do so, sought declaratory relief from the United States District Court for Alaska.

In his decision, Judge Fitzgerald reviewed the applicable statutes and regulations, particularly 30 CFR 206.103, and expressly held that "the net back method was necessary to satisfy the gross proceeds requirement." 604 F. Supp at 1385. However, a close analysis of Judge Fitzgerald's reasoning discloses that MMS' reliance on his decision in the present appeal is totally misplaced.

First of all, Judge Fitzgerald pointed out that, in attempting to ascertain a reasonable value of the LNG being sold to Japan, MMS was forced "to look at the landed price in Japan and work back to arrive at a reasonable wellhead value." Judge Fitzgerald continued, "To do this, MMS proposed to make allowances for costs of liquefaction and transportation, *and for a reasonable rate of return on the LNG plant*. Deducting these allowances from the sales price in Japan would thus yield an estimated wellhead value for the gas." *Id.* (italics supplied). In effect, by allowing a reasonable rate of return to be deducted from the gross proceeds, MMS was eschewing a royalty assessment on the profits derived from the manufacture of the LNG.⁶

This is the precise point made by Petro-Lewis in the instant appeal, viz., MMS should not be permitted to assess royalty on profits derived from the processing of the crude oil into electricity, yet, by its computation method, MMS was essentially seeking a royalty upon the profits attributable to the cogeneration facility. We believe appellant's point is well taken. Even if the netback approach were applicable in the instant case, the decision of the Director, MMS, would have to be set aside since a review of the costs allowed appellant fails to disclose that any deduction was permitted for a reasonable rate of profit from the cogeneration facility.⁷

More critically, to the extent that the MMS approach is based on an attempt to netback from the value of the electricity sold, Judge Fitzgerald's analysis clearly establishes that it is improper. One of the arguments which Marathon made before the District Court was that the Director, MMS, is required to establish the reasonable value of production. Marathon argued that the LNG it sold in Japan was a

⁶ In this regard, it is interesting to note that in its appeal before the Ninth Circuit, Marathon argued that the 8 percent rate of return which MMS allowed was arbitrary and capricious. The court, however, held that this question was not ripe for judicial review since the district court had retained jurisdiction to conduct an accounting to determine the royalties due from Marathon. 807 F.2d at 766.

⁷ Thus, a review of the documents appended to the June 27, 1985, decision of the Chief, Royalty Valuation and Standards Division, discloses that the allowance permitted Petro-Lewis was based solely on costs absorbed in generating electricity. There is no indication that any allowance was made for profits derived from the process.

manufactured product distinct from the natural gas produced at the wellhead and, therefore, MMS could not derive the value of the natural gas from the price paid for the LNG. While Judge Fitzgerald rejected this contention, he did so on a basis critical to the determination of the instant appeal. He noted:

I am not persuaded [by Marathon's argument]. LNG is natural gas that has been cooled for purposes of storage or shipment. There is no alteration of the chemical properties of the gas. Regardless of whether liquefaction is termed "processing" or "manufacturing," the fact remains that the LNG delivered in Japan is chemically identical to the natural gas at the lease. Therefore, MMS did not violate the regulation when it directed that the royalty basis for the gas be derived from the sales price of the LNG in Japan. [Footnote omitted.]

Id. at 1386.

Applying this analysis to the facts of the instant case, it immediately becomes clear that, unlike the situation in *Marathon*, the crude oil produced and the electricity from which the netback procedure attempts to derive the value of the crude are inherently different substances. Even granting the argument that MMS must base its valuation on "gross proceeds," the question which still must be answered is "gross proceeds" of what?

The position which MMS has taken in this case ignores the fact that the first sentence of 30 CFR 206.103 grants it the authority to establish the "reasonable value of the *product*." (Italics supplied.) Furthermore, the gross proceeds referred to in the regulation are those "accruing to the lessee from the sale thereof." The *product* involved herein was crude oil. There are no "gross proceeds" from the sale of that product because there was no sale of crude oil. Rather, appellant converted the product to its own use when producing steam which was then used to produce the electricity it sold. As we noted above, royalty is properly due on the crude oil so consumed. However, we agree with appellant that the royalty therefor should be assessed against the value of that portion of the oil produced from the North Kern Front Field Unit, used for production of energy, in the form of steam, which was expended in the generation of electrical energy, and not on the value of the electricity which was generated.⁸ Therefore, to the extent that the decision of the Director, MMS, required the computation of royalty owed based on the netback method, it is reversed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision

⁸ In this regard, it is useful to keep in mind the fact that the United States always reserves the right to take its royalty in-kind. Had the United States elected to do so in the instant case, it would have received one-eighth of the crude oil attributable to the production of electricity. The cogeneration process Petro-Lewis used was not performed to upgrade the crude oil so as to make it marketable. Rather, the crude oil which the United States would receive would be in the exact same condition as that which Petro-Lewis was using to fire its steam generators and, indeed, the United States would be able to so use the crude without further alteration of the oil. A royalty based on value of the crude oil at the lease is the economic equivalent of the value of the royalty oil. By valuing the oil appellant consumed in the generation of energy in the form of steam which was then used to produce electricity, the United States is receiving all to which it is fairly entitled.

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of the Director, Minerals Management Service, is affirmed in part and reversed and remanded in part.

JAMES L. BURSKI
Administrative Judge

I CONCUR:

R. W. MULLEN
Administrative Judge

SAVE OUR CUMBERLAND MOUNTAINS, INC.

108 IBLA 70

Decided: March 23, 1989

Appeal from a decision of the Director, Tennessee Field Office, Office of Surface Mining Reclamation and Enforcement, in response to a request for inspection.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

When a citizen files a request for a Federal inspection in a state where OSMRE is enforcing the state's program, OSMRE is required to conduct a Federal inspection under 30 CFR 842.11(b)(1)(i) when the authorized representative has reason to believe on the basis of information available to him (other than information resulting from a previous Federal inspection) that there exists a violation of the Surface Mining Control and Reclamation Act of 1977, its regulations, the applicable program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air, or water resources. Under 30 CFR 842.11(b)(2), OSMRE has reason to believe that a violation exists if the facts alleged by the informant would, if true, constitute a violation. If there is a violation, OSMRE is required to take whatever action is necessary to secure abatement of the violation.

2. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

Under 30 CFR 942.816(e), in area mining, rough backfilling and grading of an area must be completed within 180 days following removal of coal from that area. If a citizen files a

complaint alleging that any area from which coal has been removed has been exposed for 180 days or more, OSMRE should inspect the site and take appropriate enforcement action, excepting only where the permittee has previously demonstrated through the detailed written analysis required by 30 CFR 780.18(b)(3) that further time is justified.

3. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally

When an appeal to the Board of Land Appeals is filed from a citizen complaint decision by an officer of OSMRE under 43 CFR 4.1280, OSMRE is obliged to submit the complete, original administrative record to the Board, including all original documentation involved in the matter. It is not adequate to submit copies of only those documents deemed relevant by OSMRE as part of the pleadings filed on appeal.

APPEARANCES: Thomas J. Fitzgerald, Esq., Frankfurt, Kentucky, for appellant; Judith M. Stolfo, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

INTERIOR BOARD OF LAND APPEALS

Save Our Cumberland Mountains, Inc. (SOCM), has appealed from the July 13, 1987, decision by the Director, Knoxville Field Office, Office of Surface Mining Reclamation and Enforcement (OSMRE), which disposed of SOCM's citizen's complaint (request for inspection). The complaint asserted that Rith Energy, Inc. (Rith), in its operations under permit No. 2583 at the Eagle-Ferguson Mine No. 1 in Bledsoe County, Tennessee, had violated the requirement of 30 CFR 942.816(e)(3) that rough backfilling and grading be completed no more than 180 days after coal removal. In its notice of appeal, SOCM "seeks review of this matter and an Order directing the Tennessee OSMRE to take appropriate enforcement action pursuant to 30 CFR 842.11(b)(1), 842.12, and 843.12(a)(1)."

As discussed more fully below, OSMRE has never transmitted a case file in this matter, and we are therefore forced to consider the case on the basis of the limited documentation included in the parties' pleadings. As we have no assurance that this documentation is complete, it is difficult to state with particularity what transpired. Nevertheless, we shall set out the circumstances of the matter as they appear from the documents to which we have been made privy.

By May 1987, Rith had already mined extensively at this site and was at the point where all available coal had been removed from the Richland seam. It desired to mine a new deposit, the Sewanee seam, but the coal from it was considered toxic. As a result, as early as June 1986, OSMRE had barred its removal unless Rith developed a toxic material handling plan as a revision to its permit. Rith applied for such revision on July 3, 1986, and OSMRE allowed continued mining

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only on the nontoxic Richland seam while the permit revision application was being considered. As discussed below, Rith's application for revision was eventually denied on July 2, 1987.

At the end of May 1987, SOCM filed its request for inspection under 30 CFR 842.12(a), dated May 28, 1987, with the Chattanooga, Tennessee, Area OSMRE Office, requesting an inspection of the Rith operation. In this inspection request, SOCM's representative Don Barger stated that he had inspected and photographed much of the Rith site on December 10, 1986.¹ The complaint noted that most of the area that was exposed at that time was still exposed and that, as of June 8, 1987, those areas would have been exposed for at least 180 days. This condition, he alleged, violated 30 CFR 816.101(a)(3) (1979), which mandated in part that, for area mines such as Rith's, "rough backfilling and grading shall be completed within 180 days following coal removal."

In response to SOCM's complaint, OSMRE inspected the site on June 3, 1987. The inspection report noted simply that coal had been removed from the extreme end of cut 13 since the last inspection conducted on May 7, 1987, and that the remaining length of that cut remained open. Other cuts mined prior to cut 13 were backfilled. The report concluded that "backfilling and grading requirements appear to be in compliance." No reference was made to how long cut 13 might have been open, despite the allegations in SOCM's complaint. OSMRE has subsequently explained that it believed that, because some coal had been removed from cut 13 within 180 days prior to its inspection, that is, some time between May 7 and June 3, 1987, no violation of 30 CFR 816.101(a) had occurred.

On June 12, 1987, OSMRE's Knoxville Field Office officially responded to SOCM's complaint, directing SOCM's attention to new regulations for the Federal program for Tennessee, specifically to 30 CFR 942.816(e)(2) (1987), governing backfilling and grading. OSMRE acknowledged that, under this regulation, a permittee of an area mine must complete rough backfilling and grading within 180 days or less following coal removal from the pit being worked, but stated that "OSMRE may grant additional time if the permittee can demonstrate that additional time is necessary." OSMRE explained that the Rith mine was already or would soon be at the point that no further coal could be removed without disturbance of the toxic Sewanee seam, and that Rith had requested a revision on July 3, 1986. OSMRE's response further noted a dilemma facing Rith:

Since OSMRE will not allow the mining to proceed until a revision for a toxic-material-handling plan is approved, [Rith] is faced with the situation of having to (1) leave the last pit open until a decision is made on the revision, or (2) backfill the pit and then reopen it if a revision were to be approved.

¹ We are left to speculate that Barger may have inspected the site in connection with SOCM's participation in OSMRE's consideration of Rith's application to amend its permit.

OSMRE noted that its position in this situation was as follows:

In those unforeseeable situations where a disturbed area is left unreclaimed, due to a change in mining operations that could necessitate the processing of a revision, OSMRE will evaluate the site conditions to determine whether the operation is in compliance with the performance standards. If an inspection indicates reclamation is in compliance, then OSMRE would not take action until a decision is made on the issues surrounding the related revision request. If the site is determined not to be in compliance OSMRE would take appropriate enforcement action to correct the situation.

Shortly after writing this reply to SOCM, on June 25, 1987, OSMRE wrote to Rith to discuss two distinct reclamation violations at the minesite. OSMRE noted that cuts 13 and 13c were both open at that time, a circumstance that violated no specific regulatory requirement but did violate a provision of Rith's reclamation plan that "only one complete length of cut will be open at one time." OSMRE also expressly recognized that coal removal from cut 13 had taken place in November and December 1986, and reclamation had not been completed within 180 days. However, OSMRE stated its position (previously explained to SOCM) that, since it was processing Rith's permit revision to allow handling of toxic material, it had "granted an extension to the 180-day [requirement] contingent upon timely processing of Rith's revision."² The letter advised Rith that OSMRE would soon reach a decision concerning the revision request and that the request would be denied if needed information was not provided by July 1. Finally, the letter stated: "If and when your request is denied, you will be required to begin reclamation operation immediately, and complete the reclamation including final grading and revegetation by September 30, 1987."

By letter dated June 28, 1987, SOCM requested that OSMRE's Field Office Director in Knoxville review the June 12 disposition of its complaint under 30 CFR 842.15(a). The letter reiterated that pits on the Rith site had been exposed for more than 180 days, that Rith's permit required that backfilling and grading would occur within 90 days, and that the determination that the Rith site was in compliance with the performance standards "is fundamentally at odds with the above-referenced performance standard." SOCM's letter stated that OSMRE had erred in assuming it could grant an extension beyond the 180-day limit if the permittee could demonstrate that additional time was necessary, pointing out that the sole vehicle for an extension or modification of the 180-day limitation would be a request submitted as part of the permitting process through a "detailed written analysis" under 30 CFR 780.18(b)(3), that additional time is necessary. SOCM also pointed out that Rith had neither provided such an analysis nor requested an extension of time during the permitting process, and that relief should not be given at that time in any event, because the toxic nature of the overburden and interburden material proposed to be disturbed under the mining and reclamation plan should have been

² The document actually states "we have granted an extension to the 180-day *request*" but this apparently makes no sense. (Italics supplied).

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identified in advance of the permit issuance. SOCM contended that it was both inequitable and contrary to law to allow a violation of what it termed the "contemporaneous reclamation requirements" on the basis of unforeseen circumstances which should have been foreseen during the permitting process.

As noted above, on July 2, 1987, OSMRE denied Rith's request for permit revision to allow handling of the toxic coal from the Sewanee seam. On July 13, 1987, the Director, Knoxville Field Office, sent a letter to SOCM in response to its request for review. However, the letter did not address SOCM's concerns about the 180-day violation. Instead, it merely indicated that OSMRE had denied Rith's request for permit revision and that reclamation was required to begin immediately and be completed by September 30, 1987. OSMRE's letter set out its holding that "this action satisfactorily addresses [SOCM's] concern regarding initiation of appropriate enforcement action at the Rith Site." SOCM appealed this determination to us, asserting that OSMRE failed to take appropriate action on its complaint.

[1] OSMRE is the regulatory authority under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201 - 1328 (1982), in the State of Tennessee. 49 FR 38874 (Oct. 1, 1984). Departmental regulation 30 CFR 842.11(b)(1)(i) indicates that OSMRE is required to conduct a Federal inspection in a state where OSMRE is enforcing the state's program when

the authorized representative has reason to believe on the basis of information available to him or her (other than information resulting from a previous Federal inspection) that there exists a violation of the Act, this chapter, the applicable program, or any condition of a permit or an exploration approval, or that there exists any condition, practice, or violation which creates an imminent danger to the health or safety of the public or is causing or could reasonably be expected to cause a significant, imminent environmental harm to land, air or water resources.

Subsection (b)(2) makes clear that OSMRE "shall have reason to believe that a violation exists if the facts alleged by the informant would, if true, constitute a violation." If there is a violation, OSMRE is required to take whatever action is necessary to secure abatement of the violation. See *Thomas J. Fitzgerald*, 88 IBLA 24 (1985).³

First, OSMRE argues that OSMRE did take appropriate enforcement action by issuing a notice of violation (NOV) and cessation order (CO) to Rith citing it for failing to comply with the terms of its permit at this mine. It is true, that, while SOCM's appeal was pending, OSMRE, on July 15, 1987, inspected the site and issued NOV No. 87-92-162-013, citing Rith generally for its failure to conduct operations according to

³ The *FitzGerald* case arose in a state where the state's program was carried out by the state regulatory authority, not OSMRE. Unlike the instant appeal, OSMRE was obliged to notify the state of a citizen's inspection request and conduct a Federal inspection only if the state had failed to take appropriate action after 10 days. We held that a state fails to take appropriate action if it does not take what action is necessary to abate the violation. It then becomes OSMRE's obligation to take whatever action is necessary to abate a violation. In the instant case, there is no 10-day delay before OSMRE's obligation to inspect and take action arises.

the reclamation plan and backfilling soil stabilization plan specified in its approved permit. A CO, No. 87-92-180-02, was then issued for failure to abate. The NOV and CO were challenged by Rith, but were affirmed as validly issued by the Board in *Rith Energy, Inc. v. OSMRE*, 101 IBLA 190 (1988).⁴

However, contrary to OSMRE's position, in that decision and in our order denying reconsideration thereof, we expressly ruled, citing the testimony of OSMRE's inspector, that the NOV and CO were issued by the inspector *only* to cite Rith because more than one cut remained open at the time of inspection, a condition which did not violate any specific regulation but was contrary to the mandatory terms of Rith's reclamation plan. *Rith Energy, Inc. v. OSMRE, supra* at 194; *Rith Energy v. OSMRE*, IBLA 88-89 and IBLA 88-90 (Apr. 18, 1988) (order denying reconsideration). We clarified therein that, although the two-cut violation had been abated, it did not necessarily follow that the cut that remained open was in compliance with the 180-day reclamation requirement, and that it was still incumbent on OSMRE to take whatever enforcement action was appropriate to abate other violations. *Id.* In other words, we held that this NOV and CO did *not* cover the "180-day open cut" violation alleged by SOCM in its request for inspection.

Accordingly, we reject OSMRE's argument in the instant appeal that, by issuing NOV No. 87-92-162-013 and CO No. 87-92-180-02, it cited Rith for failure to comply with 30 CFR 942.816(e)(2) (1987). Thus, we hold that, by issuing this NOV and CO, OSMRE did not answer the concerns raised by SOCM in its request for inspection.

[2] Thus, the issue becomes whether it was so clear that Rith's failure to complete backfilling and grading within 180 days of coal removal from certain land areas at this mine did not constitute a violation of the requirement set forth in 30 CFR 942.816(e)(2) (1987) that OSMRE was not required to take enforcement action. This section provides: "Rough backfilling and grading shall be completed within 180 days following coal removal and shall not be more than four spoil ridges behind the pit being worked, the spoil from the active pit being considered the first ridge."

OSMRE has also taken the position that Rith was not in violation of 30 CFR 942.816(e) (1987), since coal was removed from cut 13 as late as the end of May, so that 180 days had not expired at the time the complaint was filed. SOCM counters that the requirement to complete rough backfilling and grading attaches to an area of land at the time of coal removal from the land, and not at the time of final coal removal from a mining cut. We agree with SOCM.

OSMRE's position is aptly described by SOCM as being "grounded on the premise that the 180-day backfilling requirement does not attach to an area mine cut until the last lump of coal is removed from the last

⁴ Although received and docketed after the instant appeal, *Rith Energy, Inc. v. OSMRE, supra*, was reached first because it was entitled to expeditious treatment under 43 CFR 4.1180.

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portion of the mine cut." (Italics omitted.) SOCM argues, with reason, that this construction is contrary to law and, effectively, "eviscerates the concept of contemporaneous reclamation."

The intent of the backfilling and grading requirements of 30 CFR 942.816(e) of the Tennessee program regulations may fairly be discerned by reference to the regulatory history of 30 CFR 816.101, which is its Federal program counterpart. The intent of the backfilling and grading requirements of 30 CFR 816.101, which implement section 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1982), is to "insure the prompt restoration of disturbed lands to minimize additional damage to the environment and to return the land to a productive use." 44 FR 15226 (Mar. 13, 1979). The intent of 30 CFR 816.101, as finally adopted, was clear:

The intent of the Act is to compel reclamation as "Contemporaneously as practicable * * * and * * * as possible." It is necessary to establish a maximum time limit for backfilling and grading to insure that toxic-forming material in the spoil will not remain exposed to surface runoff over an indefinite period of time.

44 FR 15226 (Mar. 13, 1979).

The policy of requiring rapid reclamation of disturbed land is also readily apparent from the legislative history of SMCRA:

The essence of good reclamation therefore consists of reducing as much as possible the time from initial disturbance of the land surface to the successful reestablishment of a vegetative cover on stable spoil areas. In order to achieve this, performance standards relating to environmental protection must be carried on *concurrently with* the mining operations. [Italics added.]

H.R. Rep. No. 218, 95th Cong. 1st Sess. 79 (1977).

OSMRE's interpretation is not in accord with Congress' expressed concern for rapid and contemporaneous reclamation and therefore cannot be accepted. Indeed, the present case presents an apt example of why OSMRE's interpretation is flawed. There is no indication here that the cuts exposed in 1986 have ever been reclaimed. In a supplemental brief filed on May 2, 1988, SOCM stated that the cut remains open, an assertion which OSMRE does not challenge. Further, SOCM has presented uncontroverted evidence suggesting that leaving the cut open for a prolonged period may have resulted in water discharges from the open mine cut that are in violation of water quality standards, in that the mine discharge is acidic and heavily laden with manganese.

We turn now to the question of whether OSMRE could properly extend the 180-day reclamation period established by 30 CFR 942.816(e).⁵ Subsection (e)(3) provides that OSMRE "may grant

⁵ Curiously, on appeal, OSMRE denies that its decision not to take enforcement action following SOCM's request was based on its having granted Rith an extension of the 180-day compliance period. However, it is clear from the OSMRE's June 12, 1987, letter to SOCM that, at least at that time, OSMRE not only believed that it "may grant additional time if the permittee can demonstrate that additional time is necessary," but also that Rith's situation justified an extension of time. OSMRE's viewpoint on this question is absolutely clear from its June 25, 1987, letter to Rith, in which it expressly stated that, "because we have been processing your revision for toxic-material handling, we have granted an extension to the 180-day request contingent upon timely processing of your revision." (Italics supplied.)

additional time for rough backfilling and grading if the permittee can demonstrate, through the detailed written analysis under Section 780.18(b)(3) of this chapter, that additional time is necessary.”⁶ Section 780.18(b)(3) of 30 CFR in turn refers to a plan for backfilling, soil stabilization, compacting, and grading, with contour maps of cross-sections that show the anticipated final surface configuration of the proposed permit area, in accordance with 30 CFR 816.102 - 816.107.

It is evident from this that there is only one circumstance under which OSMRE could validly issue an extension to Rith: where the permittee had demonstrated through a detailed written analysis under 30 CFR 780.18(b)(3) that additional time was necessary. There is nothing to indicate that Rith submitted to OSMRE the “detailed written analysis” required as a condition to granting an extension. Thus, OSMRE’s attempts to justify its decision not to take enforcement action because an extension was granted are fruitless, as there is no evidence in the record that a request was validly made.

We conclude that there was ample reason presented by SOCM’s request for inspection for OSMRE to take enforcement action. We are aware that Rith has not participated in our consideration of SOCM’s appeal. However, there is nothing in the regulations expressly requiring that an operator be joined to a proceeding before this Board concerning a request for inspection.⁷ Furthermore, even if it were not otherwise aware of the pendency of this proceeding, Rith was so notified by our decision in *Rith Energy, Inc. v. OSMRE*, 101 IBLA at 194, and our order of April 18, 1988, denying reconsideration in which we expressly alluded to it. Thus, Rith had ample notice, well in advance of this decision, of the pendency of SOCM’s appeal and could have intervened. There may be mitigating factors involved in Rith’s apparent failure to comply with 30 CFR 942.816(e). Rith will have an opportunity to present arguments against any enforcement action ultimately taken against it by OSMRE (including its position on the

⁶ Subsec. 30 CFR 942.816(e)(3) appeared in the 1987 edition of 30 CFR, but is, inexplicably, not included in the 1988 edition. This omission appears to have been inadvertent, as we are aware of no amendment of this provision that occurred between publication of the 1987 and 1988 editions.

⁷ Under 30 CFR 842.15(b), the Director or his designate is required to give a copy of his decision concerning his review of a field level decision not to inspect or enforce to the “person alleged to be in violation.” Due to the absence of the case file in this matter, it is impossible to ascertain whether the Director, Tennessee Field Office, complied with this requirement. However, the photocopy of his decision of July 13, 1987, which SOCM has supplied does not indicate that a copy was given to Rith. As discussed below, in the unusual circumstance of the present dispute, OSMRE’s apparent failure to comply creates no hardship for Rith, as we expressly notified Rith of the pendency of SOCM’s appeal sufficiently in advance of this decision to allow it to participate.

Decisions by the Director of OSMRE or his delegate denying a citizen request for inspection are appealable to this Board under 43 CFR 4.1280 - 4.1286, 30 CFR 842.15(d); *Hazel King*, 96 IBLA 216, 227, 94 I.D. 89, 95 (1987); *Donald St. Clair*, 77 IBLA 283, 293-95, 90 I.D. 496, 501-02 (1983). Neither SOCM nor OSMRE has served copies of any pleadings on Rith during this appeal. However, the provisions of 43 CFR 4.1280 - 4.1286 apply generally to all appeals from decisions of the Director of OSMRE or his delegate, not just to citizen complaint proceedings. As a result, nothing in these provisions expressly requires that an operator accused of noncompliance be joined to the citizen complaint proceeding. Under 43 CFR 4.1283(a), an appellant is required to serve copies of his notice of appeal and other pleadings “on each party.” However, Rith has never become a party here.

Although Rith was notified of SOCM’s appeal and was therefore not prejudiced here by this lacuna in the regulation, the interests of ensuring full participation in citizen complaint appeals suggest a regulatory amendment that would automatically grant the party alleged to have committed a violation status as a “party,” thus granting it the right to receive service of pleadings under 43 CFR 4.1283(a), and to file an answer under 43 CFR 4.1284, and to request a hearing under 43 CFR 4.1286. Compare 43 CFR 4.1105(a)(2) (52 FR 39522, 39526 (Oct. 22, 1987), making an applicant for a mining permit a party in an appeal by a third party from the granting of the permit).

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proper interpretation of the contemporaneous reclamation provisions), if it seeks administrative review of such action.

[3] In closing, we wish to comment on the proper method of assembling the case record in appeals under 43 CFR 4.1280 from decisions of OSMRE officials. As noted above, no formal record has been presented to us by OSMRE. Rather, we have relied on documents attached to pleadings filed by its counsel. This is not adequate because we have no assurance that we have received the complete file. These comments are offered in hopes of correcting this situation for future appeals.

When an appeal of one of its officers' decisions is filed, OSMRE is obliged to submit the complete, original administrative record to this Board, including all original documentation involved in the matter. While our disposition of the instant appeal does not result from OSMRE's handling of the case record, it is nevertheless true that a decision of an officer of OSMRE may be set aside and remanded if it is not supported by a case file providing information upon which the Board may conduct an independent, objective review of the basis of the decision. *Fred D. Zerfoss*, 81 IBLA 14 (1984); see also *Wayne D. Klump*, 104 IBLA 164, 166 (1988) (concerning decisions by officers of the Bureau of Land Management); and *Dugan Production, Co.*, 103 IBLA 362 (1988) (concerning decisions by the Director, Minerals Management Service).

In *Mobil Oil Exploration & Producing Southeast, Inc.*, 90 IBLA 173, 177 (1986), we outlined the requirements for records forwarded by agencies whose decisions are subject to our review:

The proper assembly of a case record should not be difficult matter. However, the agency should not wait to begin this task until after a notice of appeal has been filed. It should start to assemble a file at the initiation of any process which might culminate in a decision subject to this Board's review. The first document in the record should be the one that initiates the process. In certain cases, this might be a notice from the agency, which should be placed in a file with any documents necessary to establish the basis for issuing the notice. Cases such as this, however, are initiated by an application by a member of the public, and a case file should be opened upon receipt of such a document. Any correspondence should be dated and included in the case file chronologically as it is issued or received, along with memoranda of meetings and telephone conversations. See *NLRB v. West Texas Utilities Co.*, 214 F.2d 732, 737 (5th Cir. 1954). It may be necessary to add additional reports, plans, and other documents, depending on the type of case. The final documents added should be the decision and proof of service thereof. The record should be maintained in such a manner that when a notice of appeal is timely filed, the only task remaining is to add the notice to the record and transmit it to this Board.

Further, as we explained in *Mobil Oil Exploration & Producing Southeast, Inc.*, *supra*, the agency case file must be complete because it may be subject to direct judicial scrutiny. It is well established that, absent a complete record, a reviewing court is incapable of complying with the procedural requirements statutorily mandated by the Administrative Procedure Act, 5 U.S.C. §§ 501 - 706 (1982). See, e.g., *Higgins v. Kelley*, 574 F.2d 789, 792 (3rd Cir. 1978). Where the

announced validity of the agency's action is not sustainable on the administrative record made by that agency, courts are instructed to vacate the agency decision and remand the matter for further consideration. *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

When a suit for judicial review of Departmental action is filed, the Board forwards to the reviewing court the agency case file that it has used, together with pleadings filed with it by the parties. In so doing, the Board is required to certify, under oath, that the records before it constituted the *complete* administrative record in the matter, so that the reviewing court may meet its statutory requirements under the APA. Thus, the onus is on the Board to ensure that it has received the complete file from the Departmental agency that is the sole repository of documentation on the matter, in this case, the Knoxville OSMRE office. By requiring Departmental agencies to assemble case records prior to administrative review, the Board not only ensures that it will have an adequate basis for intelligent review of the correctness of the agency's decision, but also greatly facilitates handling of appeals to the judiciary and, ultimately, avoids having decisions by agencies of the Department vacated on judicial review.

Apart from considerations of the adequacy of the case file, we can find no basis for sustaining OSMRE's action which is the subject of this appeal. Furthermore, SOCM's pleadings provide reason to believe that a violation of the 180-day reclamation requirement may still exist. Therefore, we conclude that OSMRE should conduct another inspection and, if it determines that violations are present, on the basis of the criteria set out above, it should take appropriate enforcement action.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed, and the case remanded for appropriate action consistent with this opinion.

DAVID L. HUGHES
Administrative Judge

I CONCUR:

Wm. PHILIP HORTON

Chief Administrative Judge

APPEAL OF R & R ENTERPRISES

IBCA-2417

Decided: *March 24, 1989*

Contract No. CC-9029-82-002, National Park Service.

Sustained in part.

Contracts: Contract Disputes Act of 1978: Jurisdiction

A concession contract entered into by NPS is a procurement contract subject to the Contract Disputes Act, since it is for services that the Government itself would otherwise provide, and no statutory exemption from the Act or exclusionary intent by Congress is evident.

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Contracts: Disputes and Remedies: Damages: Generally--Contracts: Performance or Default: Impossibility of Performance

Where a Regional Chief of Concessions of NPS, with 25 years of hospitality experience, recognized the marginal financial ability and inexperience of a proposed concessioner; was aware because of two prior concessioner failures of the hazards of a proposed winter operation (which included the freezing of pipes and an inadequate sewer system that could be condemned by the State); and knew that NPS was proposing to replace the water sewer system in the near future, which was likely to disrupt the concessioner's operations for from 6 months to a year or more; but nevertheless approved the concessioner's contract without adequately disclosing or discussing these problems with the proposed concessioner prior to approval, the NPS is liable for the disruption to the concessioner caused by the subsequent water and sewer construction project on the basis of its initial superior knowledge and its subsequent interference with the concessioner's efforts to carry out its service contract.

3. Contracts: Disputes and Remedies: Damages: Actual Damages

An NPS concessioner is not entitled to the award of lost profits where the alleged amount thereof is based on an inadequate period of operation and therefore is excessively speculative.

Contracts: Disputes and Remedies: Damages: Actual Damages

An NPS concessioner is not entitled to the award of consequent damages that may indirectly result from the forced sale of a residential property unrelated to the contract, even though the proceeds of such sale were subsequently used to prevent foreclosure on the concession property, because the loss on the sale of the unrelated property was too remote and indirect to have been reasonably anticipated by NPS at the time the concession contract was entered into.

Contracts: Disputes and Remedies: Damages: Measurement

Where an NPS concessioner was clearly damaged in its ability to operate its resort by the fact that NPS undertook the construction of a water and sewer project during its tenure, but the bases for ascertaining damages put forth by the concessioner were too remote and speculative for the Board to adopt, a determination of damages by jury verdict is appropriate.

APPEARANCES: Joseph J. Connelly, Esq., Attorney at Law, Lynnwood, Washington, for Appellant; Richard Neeley, Esq., Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

R & R Enterprises has appealed a July 16, 1987, final decision of the Acting Director of the National Park Service (NPS) denying its claim for \$157,246.63 (subsequently reduced in appellant's Post-Hearing Brief (AB) to \$60,643.69) in damages resulting from the alleged negligent failure of NPS to inform it--prior to approval of its concessionaire contract (No. CC-9029-82-002, for the operation of the Diablo Lake Resort, part of the Ross Lake National Recreational Area, in the Cascade Mountains northeast of Seattle, Washington)--of a proposed water and sewer project that, during its construction phase, wholly or partially disrupted appellant's resort operations for a period of 15 to 17

months and nearly caused its bankruptcy. The \$60,643.69 claim includes lost profits for 1984 and 1985 of \$32,886.05 and \$12,007.16, respectively, plus \$15,750.48 in consequential damages resulting from the forced sale of another of appellant's properties in order to save the resort from a threatened Small Business Administration (SBA) foreclosure.

Appellant's certified claim was received by NPS on September 23, 1985. A 4-day evidentiary hearing was held in Seattle, Washington, from August 30 to September 2, 1988, after a site visit by the Board on August 29 at the request of the parties. Appellant's final, Post-Hearing Reply Brief was received by the Board on February 21, 1989.

For the reasons set forth below, we find NPS was liable for appellant's losses during the period in question, and we award damages accordingly. However, we disagree with appellant's bases for calculating the amount of its damages. We determine the amount awarded by jury verdict, basing our decision in large part on the amount of appellant's mortgage payments, which were the primary ascertainable costs it incurred during the period.

General Facts

A. Resort Acquisition and Project Preconstruction Period

1. In mid-February 1982, Thomas M. Roberts and his wife, Nancy, who later became the general partners in R & R Enterprises, answered a business opportunity advertisement by a real estate broker in the *Seattle Times*, which advertised a resort for sale in the Northern Cascades. They later learned that the property was owned by the broker, and that it was on NPS land. They drove to the area, met briefly with NPS Skagit District Manager John Jensen, within whose jurisdiction the property was situated, and went to see the resort, which was closed for business but managed by a caretaker (Hearing Transcript (Tr.) 4-6). Although there was snow on the ground, they spent 4 to 5 hours touring the premises. They went into the restaurant and several cabins, using a bathroom in one of the cabins because the water in the restaurant had been turned off.

2. The Roberts assumed the plumbing in the cabins worked because the caretaker was living on the premises. They did not ask the caretaker specifically about any plumbing other than that in the restaurant, but they later did ask the real estate salesman if the utility system at the resort was operable and if it was included in the purchase, and was told "yes" on both counts. They did not make their own independent investigation of the matter, but were informed that the resort used a septic tank system, that there were four different septic tanks, and that the water storage facility was new (Tr. 164-66).

(The resort is located in a very remote but accessible area on the north shore of Diablo Lake (a small fishing lake) within the Ross Lake National Recreation Area (RLNRA), a unit of the North Cascades National Park, which is approximately 90 miles by air and 120 miles by road from Seattle, Washington. The road, SR 20, is a State-

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maintained, scenic road through the Cascades, which is closed in winter east of the Ross Lake area because of snow and land slides. From the west, it provides access to the three lakes (Ross, Diablo, and Gorge) formed by three dams of the same names on the Skagit River, all of which are part of a hydroelectric project, owned by Seattle City Light Co., that provides Seattle with electricity. SR 20 generally parallels the river on the trip from Seattle to the resort. A tour center is located in Diablo, and popular guided tours of the power company's generating facilities are available from mid-June to Labor Day. (*Source:* Information supplied by counsel and by NPS on informal tour of site; confirmed by 1985 AAA Road Atlas and 1987 AAA Tour Book.) In size, Diablo resort is very small, probably under 10 acres.)

3. The resort was originally built on Forest Service land as a worker camp for the construction of Diablo dam. In 1956, when the construction was over, the Forest Service issued a permit for Howard Bradley to operate the camp as a fishing resort; and NPS acquired the site in 1968 when the entire area became a National Recreational Area. Fishing and hiking were the only activities then available (Tr. 426-29; Government's Post-Hearing Brief (GB) 2-3). Bradley continued to operate the resort under a concession contract with NPS. At that time, the resort's facilities consisted of 18 housekeeping cabins, a store, three employee cabins, a laundry and restroom, campsites, and a floating marina for boat rentals (GB at 3). It was strictly a summer operation, and was initially quite successful (Tr. 434-35, 666-67).

4. However, in 1971, Bradley decided to build a resort as such, and in the fall of 1973, he negotiated a \$250,000 SBA-guaranteed bank loan and, in 1974, built a restaurant. Of the loan proceeds, \$198,000 was used to build the restaurant, and \$10,000 was used for equipment. The remainder was used to pay off an earlier loan. Thus, the restaurant's cost was only \$208,000 (Tr. 429-30). However, Bradley was never able to generate enough income to make his loan payments, and SBA was forced to take over the bank loan (Tr. 436). Then, in 1979, the resort was sold to a partnership known as L.M.H. Investments, consisting of Melvin G. Heide and M. Larayne Heide, his wife, as investors, and Anthony Fiore and Linda Fiore, his wife, as resort managers. Their premise in acquiring the property was that it could succeed if it were dramatically expanded and operated year-around; but in 1 year alone, without adding new units, Heide spent \$770,000 in producing only \$240,000 in gross receipts. The Fiores soon became disillusioned and left the partnership, and Heide began operating with hired help and putting less money into the operation (Appellant's Exhibit (AX) 1 at B-4; Tr. 374-75, 430-33).

5. In early 1981, Heide was still talking about expansion, but by mid-1981 he was trying to sell the property. NPS' Chief of Concessions for the Pacific Northwest Region, Steven Crabtree, whom the Government in effect treated at the hearing as an expert witness in the hospitality

field (Tr. 370-72), explained to Heide in August 1981 how NPS would go about such a sale. NPS prepared an application document package, and Heide began actively recruiting for people to buy his interest. This was an unusual procedure because such recruiting is normally done by NPS, but Heide wanted to do his own recruiting since he was in the real estate business. NPS also provided Heide with some names from its mailing list, and Heide sent NPS a series of people interested in the resort. Meanwhile, the resort had failed a second time under Heide, solely, according to Crabtree, because of the long-term SBA debt which, with deferred interest and closing costs, amounted to at least \$325,000 by the time appellants purchased the property in March 1982 for \$378,000, subject to and including the SBA loan (Tr. 375-76, 433, 169).

6. Because Crabtree believed that no concessioner could succeed under the burden of the SBA debt, he finally went to SBA to see if NPS could take over the loan without cost, so that the SBA debt could be eliminated; but there was no provision for SBA to transfer the loan, and NPS did not have the funds to purchase it. (Tr. 435-36). It then became NPS strategy to wait for SBA and Heide to work out an arrangement to "liquidate" the loan and get the property back on track, a strategy that worked for 6 months until Tom Roberts entered the picture. Roberts was so convinced he could succeed with the resort that NPS did not feel it had the authority to deny his application (Tr. 437, 384-86). Roberts' plan, after analyzing the Heide operation, was to make the resort a year-around *family* business, with himself and his wife serving as general partners and with their children helping out, with at least one as a limited partner (Tr. 224). This strategy would both aid in SBA loan payments and help reduce the high labor costs that had made Heide's expenses so excessive (Tr. 3, 10, 175-79, 383-86, 587-90, 667).

7. Government counsel and the Board inquired of Crabtree how and why Roberts' application was approved, in the following colloquy (Tr. 381-86):

Q. BY MR. NEELEY: Subsequently then, after you reviewed the application file, and so forth, what happened then?

A. Well, we had quite a discussion about this. We had had a pattern since the middle of '81 of people coming to us, hearing this story, talking to Mr. Heidi [sic], deciding they couldn't succeed, and giving up the opportunity to purchase the resort.

Mr. Roberts did not follow that pattern. He decided that he could succeed. *We analyzed his application and discovered that he planned to operate on a year-around basis to increase various aspects of gross sales significantly* [Tr. 382, italics added].

He appeared to have – with the sale of his house in Bothell, he appeared to have sufficient capital to start up the business. The principal financing was to be the SBA loan.

We were in a position where we could not overtly say that this was a foolish business to get into unless it was absolutely clear that the applicant didn't have money to buy the resort, couldn't succeed in getting the working capital that was needed. Mr. Roberts had applied to Seafirst Bank for \$40,000 of working capital. We were –

Q. Let me ask you, did the bank give any indication that they were going to loan him that money?

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A. With his application, there were two letters of reference from the Seattle First National Bank, both complimentary of Mr. Roberts, and we conditioned our approval on their providing him the working capital necessary.

Subsequent to his original application, he did provide us a letter that said they would provide him the necessary money.

I was advised, as was the regional director, and this was our practice at the time, that if we stepped in between a fully-knowledgeable, fully-aware buyer and a willing seller and caused the deal they were constructing to fall apart because we refused, that we could personally be held responsible by the seller for doing that (Tr. 383, italics added).

Mr. Roberts had made not unreasonable, he had not unreasonable expectations. We had seen Mr. Heidi [sic] do much more in sales than Mr Bradley had done. Mr. Roberts postulated significantly reduced expenses. Mr. Bradley [apparently, should be "Heide"] had a corporate organization with significant overhead to support.

I talked with Mr. Bradley – or Mr. Roberts – at the time and he was very confident that his estimates were proper, that he could, in fact, succeed, that he could finance the operation, that his family and he were willing to work as hard as we knew they would have to to make this operation go.

Q. But that –

A. We felt at the end of that that they were fully informed, that they had all the information, they knew what they were getting into. They had talked about it and agreed to it, that they could finance it. And on those conditions we approved it.

Q. *You apparently had some reservations about whether or not this was going to succeed?* [Tr. 384, italics added.]

A. This was a very difficult – had been a very difficult location. We had, prior to this, had road landslides. It's not a very attractive winter activity area. There's no ready skiing. You can cross-country ski in some fairly difficult spots. It's cold and damp and [has] rocksides over the road in the winter that can close the resort. You never really know your operating conditions.

At the time, the resort had surface water piping that would freeze up in the winter. In many of the cabins that were up there, there were 21 sellable units at that time, as I recall, that couldn't be used in the wintertime. They had no insulation in them (Tr. 384, italics added).

And his parcel was to sell everything he owned and put it all in this one activity. He was really taking a gamble.

We had all this history behind us and he was privy to all the failures that had gone before. *We didn't see any reason why he had any special expertise to all of a sudden turn this resort around and make it very successful. And his predictions of sales were that he would have significant increases in gross receipts. It wasn't impossible, but we had very serious reservations that he would, in fact, succeed* [Tr. 385, italics added].

THE COURT: May I interject a question? Did you tell all of this in pretty much those terms to Mr. Roberts, or did you not?

A. Yes, sir, *because our posture at the time was to talk people out of this by putting questions like that, statements like that: Do you understand this, do you know this, are you familiar with this experience, did you get this information, so that we could make sure that they were fully informed as to what they were really doing.* Yes. [Tr. 385, italics added.]

THE COURT: There is no doubt in your mind that he had that whole recital at the time that you met with him?

A. Yes, sir. *I was doing this as a matter of ritual* since the middle of 1981 [Tr. 385, italics added.]

* * * * *

Q. BY MR. NEELEY: But, you had no real basis then, actual basis, to deny the application?

A. The only basis we could have had is if he had no money, if he had created a circumstance where he was going to hire all the help and he was going to live in

Montana, or some place, and run it as an absentee landlord, or something equally ludicrous. What he suggested wasn't unreasonable. His family was all going to get together, they were going to go to a small business. They were all going to work really hard and put all their financial assets in this basket and they thought they could make it.

8. Although NPS' Crabtree was convinced that he mentioned to Tom Roberts the prospect of the resort's water and sewer systems being replaced—since that was part of the "little song and dance" that he did for all prospective applicants (Tr. 378) and was the "only bright spot on the horizon" (Tr. 376)—his *primary* concern with respect to such applicants was clearly whether they could bear the burden of the SBA loan and whether their financial projections were realistic (Tr. 376, 424). On inquiry by the Board into the matter, Crabtree related the following (Tr. 440-41):

Q. With respect to the water and sewer project, you discussed that with Mr. Roberts as an advantage. You're an experienced hospitality man, you have been in the business for 25 years, one way or another. Wouldn't it have occurred to you, perhaps more readily than to Mr. Roberts, that the water and sewer project could take six months to a year and disrupt his rosey [sic] projections?

A. What I was concentrating on was that this would be a way to solve a problem that had to be solved at the resort that they could never solve. They just couldn't add more long-term debt [Tr. 440, italics added].

Us doing it, the government paying for it, was a good thing because then they wouldn't have to worry about that issue, *the worry about the water system not working or the health people having to say, well, you can't use that water, or worry about the sewer system failing and polluting the lake and invoking their authority in this circumstance to close the resort*. Those were pluses [Tr. 440, italics added].

I probably understood there would be some disruption but I had not at that time seen any plans. I'm not sure there were any plans. I hadn't seen any plans as to where the pipes would go.

We normally conduct these kinds of activities in a way that accommodates the concessionaire's interests.

I assumed whatever we installed, we installed it in a way that would be, insofar as possible, compatible with the operation and I didn't raise it as a particular point [Tr. 440-41, italics added].

Q. So even though your memo, that's been introduced as Government Exhibit L, indicates you had serious concerns about Mr. Roberts' ability, you didn't tie that into the water and sewer project in any way? You didn't see the water and sewer project as necessarily disrupting his operation?

A. That memo is written, in fact, by Mr. Lewis, not by myself. But, no, I didn't see it as disrupting because the consequence of not doing it was pretty clear. *At any moment we could have no resort at all because we would have a failure of the system* [Tr. 441, italics added].

9. The memorandum in question is worth quoting in full because it clearly indicates that NPS personnel were not all in agreement that approving the Roberts' application was reasonable under the circumstances:

3/4/82

To: Steve Crabtree, Chief Concessions

Steve:

Mr. Roberts talked to Keith [Miller], John [Jensen], and myself yesterday in the office and we explained the operational and contractual obligations. Mr. Roberts appears to be

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a personable sort and to have made an intelligent evaluation and approach to generating an income from the Resort business, however his projected income for 9 mos. is based upon fragmentary financial information and not supported, plus the outstanding \$370,000 obligation payback. *I cannot in all good conscience see how the Roberts' family could survive without going under in the same situation as Howard Bradley was in.*

Vic Lewis

(GX L, italics added.)

. Crabtree had previously stated that, at the time Roberts applied for approval as a concessionaire, NPS

didn't actually have money in hand to build the water and sewer system. We told him we would build it, but we couldn't predict any given year when it would happen. *We thought we would get the money the Fall of '83, but things being what they are, we never can really predict, so I didn't look at it in that light at all* (Tr. 424, italics added).

11. Crabtree was also unsure when the conversation with Roberts concerning the water and sewer system had taken place but decided it must have been between March 3 when Roberts submitted his contingent, full-price offer on the property and March 25 when NPS approved the transaction (Tr. 378).

12. Of special significance, in the circumstances of this case, is the fact that Crabtree's later, more stream-of-consciousness recollection, upon redirect examination, varied somewhat from the scenario as he seemed to have reconstructed it from the documents he had studied prior to the hearing. On redirect examination, Government counsel asked him (Tr. 442-43):

Q. Mr. Crabtree, when you were talking with Mr. Roberts during this initial period and you indicate that possibly you had two meetings with him, what was his attitude towards any information that you might provide him?

A. The whole process was very upbeat. *I never saw Mr. Roberts. He had gone to Mr. Heidi [sic]. They had signed papers. Mr. Roberts had given Mr. Heidi [sic] \$10,000. They had made a deal. they wanted to close the deal* [Tr. 442, italics added].

What Mr. Roberts wanted from me was my approval, or really the approval of the regional director on my recommendation. What did he have to do. Here's the application package.

He asked some questions but he wasn't interviewing me for information in anticipation of making a deal or looking for data that would help him make a decision about making a deal. He had already made a deal. He wanted me to hurry up and approve it.

So it wasn't - we didn't have the kind of - most of this was us sort of expressing our amazement or caution or, have you looked at this, asking questions about what had been inquired of by Mr. Roberts.

But he wasn't in the mode of: I'm wondering about this; is this a good thing to do; would you tell me all about it. It was: I have signed the deal. I'm going to buy the resort. This is going to be great and everything will be wonderful. How long will it take you to approve it, was the atmosphere.

13. What is clear is that all of the operation levels of NPS involved in the resort were aware that the resort had serious water and sewer problems. Keith Miller, the retired former superintendent of the North Cascades NPS complex (September 1978 - July 1984) recalled that a study had already been done concerning the need to repair the resort's

water and sewer system when he first arrived at the park (Tr. 122). Miller testified that the system was in need of repair and, in fact, of complete reconstruction, because the facility had been a former camp for employees while they were building the facility at Ross Lake; and the water lines were not buried deep enough in the ground to avoid problems during the winter season. He also said that the sewer system was emptying into "a cesspool-type situation adjacent to the lake," that no drainfield existed, that the effluent went into steel tanks whose exact location was unknown, and that NPS did not know where the effluent went from here.

14. Thus, in 1980, Miller and Irving Dunton, his facility manager, were involved in the preparation of an NPS Form 10-238, a development study package, which was sent to NPS' Denver Service Center and resulted in a "task directive" and a preliminary cost estimate in February 1982. Melvin Heide was notified of this action, and, in fact, had been informed in May 1981 that the rehabilitation of the water and sewer system was the park's No. 1 priority (Tr. 124-28, GX I).

15. Renford Lee Casteel, the maintenance mechanic who was responsible for NPS improvements at the resort, was even more emphatic concerning the problems of winter operation. In response to questions by Government counsel, he stated (Tr. 472-75):

Q. At that time [i.e., when two new water tanks were installed by NPS], were you familiar with the distribution system for the water within the resort?

A. Yes. I had many occasions to help the then resort operator repair frozen lines and broken lines, and so forth * * *

Q. What was the situation with regard to the old system and its liability to freeze?

A. *Many sections of the line, if [they] were not readily exposed, were several inches below [the surface of the ground]. * * * And so when winter came, it was readily available to freeze up.* The size of diameters varied from an inch and a half to as small as half-inch lines running in different depths. *The problem was that most of the ground is extremely rocky and just sort of an all-temporary type of plumbing that had been put in.* [Seattle City Light was not] worried about it being a long-term development, or anything like that [Tr. 473, italics added].

* * * * *

Q. Did Mr. Bradley operate the cabins or the resort in the winter months?

A. It wasn't his practice to operate the cabins during the cold winter months. Basically November through March he didn't generally operate any of the cabins.

Q. What about the case of Mr. Heidi [sic] when he assumed the operation, what was his practice with regard to winter operations?

A. He tried to operate some of the cabins, but because of the distribution system, as I described it, he experienced a lot of frozen lines and a lot of frozen lines beneath the houses * * *. He had a lot of problems trying to keep water to the cabins.

16. On examination by the Board, Casteel provided further insight into Heide's winter operation problems (Tr. 502-04):

Q. * * * *Did Heidi [sic] discontinue winter operations before he otherwise closed down the facility?* [Tr. 502, italics added.]

A. * * * He made an attempt to utilize the full facility for winter-time operations and then greatly scaled that back by the time the next winter came by because of the abundance of the problems that he had with the freezing of pipes, and so forth.

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I don't think at any time he ever attempted to fully close everything. I think he kept continuing to try to do something, but he had a lot of problems that I think I was not really aware of.

But as far as we're talking about the water, and so forth, that was a serious problem for him to overcome because he had the shallow lines and he couldn't overcome those frozen lines [Tr. 502-03, italics added].

There were points that when the line was frozen, it would restrict water to a dozen cabins, or so, including the one that the people who lived in the resort were living in.

* * * *

Q. I think the thrust of my question is, would it or would it not be fair to say that the freezing of water lines, and so forth, that plumbing problems, were the principal reason he discontinued winter operations?

A. Yes. [Tr. 503, italics added.]

Q. It was the principal reason?

A. I would have to say that that was the principal reason because he couldn't provide any water to operate the facilities. He could provide heat to the buildings but he couldn't provide any water, which is a real amenity needed to operate the facility.

17. Since the Board had found Mr. Casteel to be a particularly candid and forthright witness, it asked him after discussing the problems encountered by the Roberts during the water and sewer system replacement project, whether the replacement project was essential to the future of the resort. Casteel's response was (Tr. 511-12):

A. It was essential – well, if the systems hadn't been installed, there was very frank discussion that the resort would not continue to operate. *We had been directed by the state, that you know, immediate action had to be undertaken to resolve the way the sewage was being treated and that the water had to be dealt with because the distribution system was, had rust problems, and so forth. And the Park Service didn't have any control over what was happening within those distribution systems, in that part of the distribution system, because it didn't belong to us [Tr. 511, italics added].*

So in order to comply, the new system had to be done, and it was – the knowledge that was related to me was that unless that was done, then *the future of the resort was that it would eventually be closed down by a directive from the State of Washington because of health reasons* [Tr. 512, italics added].

Q. One final question, and this really is my final question. In your opinion, would it have been feasible to operate the resort as a winter resort had the water and sewer project not been undertaken?

I don't believe you could ever operate that resort in a wintertime operation with that current water distribution system that it had [Tr. 512, italics added].

Q. And tell us why.

A. No. 1 is that the distribution system was too shallow. It was subject not only to the freezing of the lines itself, but to frost heave of the ground which would cause breaks in the line itself, even if the lines didn't freeze, but generally in that case, the lines were frozen.

Where the water lines were in underneath the buildings, those were a problem of their own. The wind coming off the lake is a problem, blowing at the skirting of any of the buildings, and it would freeze up.

You would need a large amount of heat to keep the piping within the buildings from freezing so that you have enough radiant heat that dissipates down through the floor that keeps the pipes from freezing.

Even if you could have kept the distribution system that was in the ground from freezing up, you had to first overcome the freezing of the distribution system.

And in all the years that I have been there that was in the ground, from the time that Howard Bradley was there, every winter I helped him thaw lines out and repair frozen lines.

When Heidi [sic] was there, I helped them repair frozen lines that were in the ground. I didn't - I was directed by my supervisor to do that. It wasn't just something that I just did on my own, but it was not a responsibility of the Park to undertake that. We were trying to help them out, keep them going [Tr. 513, italics added].

18. Like Concession Chief Crabtree, ex-Superintendent Miller was also convinced that he had talked with Tom Roberts about the water and sewer problems of the resort, but he also was not sure when he had done so. His testimony on the point was as follows (Tr. 129-30):

Q. BY MR. NEELEY: Mr. Miller, did you ever have occasion, that you can recall, to discuss the Diablo Lake Resort, or any aspect of it, with Mr. Roberts before he purchase it?

A. I discussed the operation with Mr. Roberts. I unfortunately do not have the date he came into the office, and I, on retirement, my notes went. And I don't have a date, but definitely I did discuss the operation at one time when he came into the office.

Q. And what did you inform him about the resort?

A. Well, basically we discussed everything that I could think of that would be pertinent to the operation of that resort. They were very interested in it, and, in fact, I would say enthusiastic about being involved with the resort, and covered every item that I could think of, including the park regulations, which are always a difficult thing for people coming in who have not been subjected to that.

We did discuss the projects, the construction projects, at that time. Again, I cannot give you a date of that meeting, but it was discussed thoroughly, anything that had to do with the operation up there, that I could think of.

Q. Did you inform him at that time as to the precise time this project was going to go forward?

A. No. I told him I had no firm date on that. We had a tentative '83 fiscal year, but, again, knowing when those projects are coming up depends on congressional approval and those things slide -- I have seen them [slide] as far as two, three, and four years. So I was unable to say that it's going to occur next week or next fiscal year. [Tr. 130, italics added].

19. The Roberts' recollections of events leading to their acquisition of the resort did not exactly coincide with those of NPS. According to Tom Roberts, after their initial visit to the resort, which was in the early part of the week or mid-week, they made another trip the following weekend. The caretaker was not there, so they merely sketched the layout of the resort (Tr. 166). They saw the closed resort as an opportunity, rather than a matter of concern. Their first meeting with Miller may have been about a week after the initial trip (Tr. 167). They made an offer on the property in the amount of \$220,000 or \$225,000 based on the newspaper advertisement, which was not accepted, and then they began dealing with Mr. Heide directly (Tr. 6-7, 168, 170). It was only then that they learned about the existing SBA loan, but that debt did not dampen their enthusiasm (Tr. 171-72).

20. An offer acceptable to Heide was made directly to him around March 3, 1982 (Tr. 380). The parties agreed on a price of about \$378,000 (includes closing costs? See GX K), with \$45,000 to be paid in cash and payments to be made to Heide to pay the SBA loan (Tr. 7-8). The amount of the payments was \$4,100 per month (Tr. 185). The contract contained several contingencies. One was that the Roberts apply to NPS for approval as a concessioner. They had never before dealt with NPS, so they placed a call to regional headquarters to ask

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about requirements and the contents of the application. A major part of the discussion, in Tom Roberts' recollection, had to do with Roberts' insistence that they be given a new contract, so that they would not be associated with past failures under the Bradley contract; and the application was made in the name of R & R Enterprises (Tr. 910). The application package, which was mailed to them at their home, required a complete financial disclosure, a history of experience, an operating plan, and a 3-year projection of income and expenses. The Roberts assumed these were routine documents required of anyone applying for NPS approval (Tr. 11-12).

21. Actually, according to Crabtree, NPS had never required a monthly analysis of potential sales for the first year (9 months of operation) or 3 years of financial projections before. NPS thought it was obligated to do so to make sure prospective buyers knew all of the conditions, so that they would have a fully informed buyer (Tr. 376).

22. It took the Roberts a great deal of time to fill out the application; but they were able to do so because they had developed similar information when they thought they would need a bank loan to buy out Heide, before they learned about the SBA loan. Nevertheless, it took them a week to complete the application (Tr. 12-13), which was provided to Miller and Crabtree separately on March 15 or 16 (Tr. 15-16, 379-80). The Roberts had also applied to a bank for a \$35,000 working capital loan (Tr. 172-73), and the bank had made a commitment to give them an answer within 3 working days (Tr. 16), so when the Roberts did not get an immediate response from NPS on their application, Tom Roberts went to NPS headquarters in Sedro Woolley "to simply make my presence known and offer any information they might want, or whatever."

23. At that point, Roberts was met by Vic Lewis, "and for the first time was met with hostility and told that if I would quit interrupting him, he would have a chance to evaluate it; he would call me if he needed anything from me. I made no further efforts to bother the National Park Service" (Tr. 16-17). Mr. Lewis, who ultimately opposed approval of the Roberts' application (GX L, Tr. 381), was not called as a witness at the hearing. Thus, some of the details concerning NPS' decision to approve the Roberts' application are not entirely clear.

24. The Roberts' application was approved about 2 weeks after it was submitted, in the form of an undated letter addressed to both of them (Appeal File (AF) 111). Crabtree testified that the approval date was March 25, 1982 (Tr. 450). That letter refers to a discussion with Crabtree; but the only meeting with Crabtree that Tom Roberts could recall was one at the latter's office to do a page-by-page review of the contract, where Crabtree showed Roberts the areas of the contract that had been changed. According to Roberts, all other conversations with Crabtree were telephone conversations that had nothing to do with the proposed water and sewer system (Tr. 17-18).

25. On cross-examination, appellant's counsel tried to learn from Crabtree the basis on which he remembered his conversation with Roberts on NPS' plans for the resort. Crabtree responded that there were no development plans but NPS had "this water and sewer project. This was a discussion that was on the table and in everybody's mind back in 1981." When counsel repeated the question, Crabtree said he could see in his mind Roberts sitting in a chair in his office and them talking about "this whole resort operation, his projections, and particularly the boat issue and how he would generate so much sales as he proposed from the boat issue. And we talked about the sewer and water system as well. *Can I remember the exact words of the conversation? No, I can't*" (Tr. 401-02, italics added). In his Post-Hearing Reply Brief (RB), appellant's counsel pointed out that any information giving rise to the "boat issue" could only come from the Roberts' March 15 application. Thus, any personal (*i.e.*, non-telephone) conversation that the two may have had could not have taken place in the early stages of the Roberts' interest as Crabtree thought (RB 4). Counsel asserts that this fact supports Roberts' testimony that his only personal discussion with Crabtree had to do with details of the proposed concession contract.

26. Later during cross-examination, Crabtree agreed that it was, indeed, very likely that he had met with Roberts sometime between March 15 and March 25, but he could not "pin that down" (Tr. 415). He knew that they had decided to use a new contract but could not remember whose idea it was. He recalled only two meetings with Roberts, and the second one was a meeting to sign the contract: "It wasn't really a meeting. He came in to sign the document. We may have had telephone conversations, but I just don't remember them and there are no records of those things" (Tr. 413-15).

27. In any event, Roberts was adamant that the water and sewer system improvements had never been mentioned to him by anyone during the negotiation period (Tr. 35, 609-10). Commenting on Crabtree's testimony as to what was discussed at their one meeting, Roberts testified that (Tr. 607):

A. [Crabtree's] recollection of where the meeting took place and the fact that he was sitting at the desk and I was sitting across from him is absolutely correct. The content of that meeting, however, differs considerably from his testimony.

That meeting and the purpose of that meeting was to review the contract that the National Park Service was preparing to enter into with myself and my wife.

And the entire 20 minutes of that meeting was spent flipping contract pages, one by one, and reviewing primarily the aspects of that contract that were changed from the ones that Mr. Heidi [sic] had.

I had been provided a copy of Mr. Heidi's [sic] contract and there were some changes in there: franchise fees, many other aspects of that contract. And where those changes had been made, Mr. Crabtree stopped and explained either the reasons for them and what affect [sic] they would have on us as concessionaires. That was the entire content of that meeting.

28. Roberts' wife, Nancy, the other general partner in the resort operation, who later lived on the premises and ran the restaurant,

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testified that on the occasion of the contract signing, the NPS regional director had conversed principally with her, mainly about the scenic view from his office window; that he had not mentioned the water and sewer project to her; and that, under the circumstances of the meeting, there was a 99-percent chance he did not mention it to her husband at that time, either (Tr. 563-64). She said that her husband shared everything with her, and that he had never mentioned the water and sewer project to her prior to the resort purchase (Tr. 582). She also testified that when the construction crew had first come on the property, "they were not aware that we lived there or that we were owners, or anything. They just came on the resort" (Tr. 570).

29. The Roberts actually took possession of the property on March 31, 1982, and their first cabin rental was on April 4, 1982 (Tr. 18). In describing that initial period, Tom Roberts testified as follows (Tr. 19-20):

A. We had made numerous trips to the resort, both to evaluate it prior to purchase and to do inventories, and what not, and there were certain aspects of the facilities that could not really be fully evaluated, because during the period of March, there was still snow on the ground.

One of the troubling areas to me was the fact that there was no water service to the restaurant. It was not until we took possession of the resort that we were able to restore water service to the restaurant and discovered a significant amount of damage had been done during that winter. The building had not been heated and the pipes froze and broke. And to the best of my recollection, we had something like 17 pipes inside the building and the walls that were broken. We had to open up walls and repair them.

30. However, the damage in the restaurant was the bulk of the damage. Tom Roberts testified that there may have been one or two broke pipes underneath a cabin, but no significant amount. The Roberts were able to operate successfully during the winter of 1982-83, partly because Seattle City Light furnished them with a "buzz box" that could unfreeze a particular section of pipe. They did not even meet Renford Casteel until the summer or fall of 1982, and he was never called upon to help them. They were never, in fact, greatly concerned with the condition of the existing system because they managed to get through their first winter without major problems and did not feel there was any reason why they could not continue to do so.

31. Roberts testified that they had no knowledge whatsoever of the earlier engineering plan or of the fact that the resort could have been closed up because its sewage system was leaching into the lake. But if there were such a problem, they still thought at the hearing that they would have been able to cope with it. In 1982, as far as they knew, one of NPS' alternative plans was still to do nothing (Tr. 231-32, 685-92). Roberts testified that he had never heard from anyone, prior to Casteel's testimony, that the State of Washington had threatened to shut down the resort because of pollution, although he had had meetings with the State while the sewer project was going on. He thought if that were the case, he should have been told about it during

the pre-purchase period (Tr. 628). (The Board notes that none of the Government's witnesses ever expressly testified that Roberts was so informed.)

32. During the hearing, Tom Roberts described at some length how NPS, rather than being a "partner," had added to their problems. For example, NPS insisted on a "pillow count" (of persons accommodated) based on a period from the 23rd of one month to the 22nd of the following month in order to compile their report to Washington, so the Roberts had to keep two sets of records (Tr. 21-22, 33). In early May 1982, Roberts inquired of NPS about when some construction work that was going on by the gas pumps coming into the resort would be completed. But no one could tell him (Tr. 42). Nancy Roberts complained that six or eight NPS people in uniform arrived for a pre-season inspection of the premises shortly after they took over and before they had a chance to do anything (Tr. 565).

33. The inspection incident had followed an episode in which the Roberts wanted to do some work on the store building but were told they could not make any modifications to the buildings unless they submitted detailed plans and had written authorization from the superintendent to do it. They found that difficult to accept since they had told NPS before the concession contract was approved what they intended to do. They then discovered that whenever they wanted to do anything differently from the previous owners, they had to justify what they were doing (Tr. 38).

34. The first major clash occurred when they were trying to find a food supplier in late May 1982, during a period of fluctuating prices just before the restaurant opened, and Nancy was trying to create a menu. One of the rangers came in, said he was happy they would be open for Memorial Day weekend, and asked to take a copy of the menu with him. Five days later, the Roberts were, in effect, accused of a contract violation, with a threat of adverse consideration at the time of contract renewal, because they had not submitted the menu for NPS approval, and gotten approval, 10 days before the menu prices were to be implemented (Tr. 39-40, AF 112). Despite such problems during the shakedown period, and other difficulties, the Roberts were able to reopen the resort. Their operation was rated satisfactory by the NPS for all 6 years but, as of the hearing date, they still did not think they were operating in a cooperative NPS environment (Tr. 41).

35. The Roberts began advertising their new operation from the outset. They printed new brochures advertising their "all-year operation" (Tr. 26). They attempted to generate business by word of mouth, did not raise rates, and concentrated on the Seattle, Everett, and Bellingham area (150-mile radius of the resort). Most of their quests (57 percent) made reservations ahead of time, and the Roberts attempted to concentrate on repeat business (Tr. 27-30). There was no significant local competition (Tr. 31).

36. Much of the testimony at the hearing also related to the differing views of NPS, and particularly of concession-expert, Crabtree, and the

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Roberts over how the resort was or should have been run, including matters concerning the serving of liquor, the desirability or non-desirability of operating a bar and lounge, type and amount of insurance coverage, restaurant hours, availability of the restaurant to unannounced bus tour passengers, grocery store and gas pump hours, seasonal versus non-seasonal resort operation, and the like. Although most of this material was irrelevant to the issue of whether NPS did or did not inform the Roberts of the proposed water and sewer project, and/or did or did not unreasonably interfere with their ability to operate while the water and sewer project was going on, we are nevertheless able, on the basis of the entire record, to find that the Roberts did run the resort in a manner that was reasonable under the circumstances, as evidenced in part by their continued NPS satisfactory ratings.

The Water and Sewer Project

37. The Roberts testified that they first became aware of the proposed water and sewer project during an NPS inspection in April 1982. They had become aware of a rust problem in the water line that made it difficult to do laundry for the cabins, and there was no other place to have laundry done. Nancy made telephone calls to investigate the possibility of using a filtering system, but the costs of such a system were prohibitive, so they decided to do some selective replacement of pipes. They mentioned this decision to NPS during the inspection and were told for the first time to abandon plans for selective replacement since the entire system was going to be replaced. NPS did not know when the replacement would occur but hoped to initiate it in 1983 (Tr. 34-35).

38. In June 1982 the Roberts were given a developmental concept plan, and their son attended an NPS meeting at which the water and sewer project was discussed in some detail. He made several suggestions at that meeting, including a suggestion that a water line extension be run to the gas pumps (Tr. 690, 130-32, GX A). But the project was still tentative, and the effect of it on the resort operation was something the Roberts had not yet had an opportunity to analyze (Tr. 691-95). It became a much more serious matter in February 1983 when the Roberts stopped at Park headquarters on another errand and were given a copy of a release of possessory interest to sign, with no prior discussion (Tr. 45-46). The Roberts responded by letter that they would sign the release as to their interest in the existing water and sewer system, but objected to its language waiving "any and all claims arising out of the removal, destruction, and obliteration" of the old system, because their "greatest fear" concerning the water and sewer project was that they might be closed down during their most productive months (AF 120, 121). NPS removed that language, and the Roberts signed the release (Tr. 43-44).

39. John Jensen, the NPS District Manager, testified that it was in the fall of 1982 or the spring of 1983 that NPS learned the water and sewer project would be funded in FY 1984. Because it was a "sanitary type thing," it was moved up on the project list considerably. However, until the funding was approved, it was always considered a "proposed project." Its implementation and supervision were the responsibility of the NPS' Denver Service Center (DSC) (Tr. 334-36). Jensen recalled that NPS itself had talked about the need to work together with the resort while the project was going on, but he did not recall that anyone had ever discussed with the Roberts the effect the project might have on their proposed year-around operation. Even if the Roberts had objected to the project, however, it probably would still have been undertaken (Tr. 337-38, 697). Irving Dunton, NPS' facility manager for the park, testified to the same effect (Tr. 353-54).

40. Dunton, however, was sufficiently concerned about the impact of the proposed construction on the operation of the resort that he prepared a letter for the superintendent's signature in July 1982, addressed to the NPS regional director, calling attention to the "pitfalls" involved if the project were to be negotiated as an 8A, minority set-aside, small business project. He mentioned in particular the inability to impose liquidated damages for delays, and went on to say (GX J, cf. Tr. 355-56, 362):

We have a real concern in that the Diablo Lake Resort is being run by a new operator with a need to operate with no interruptions if feasible. This project will disrupt the whole operation at times during the construction period. *If there are lengthy delays the Concession probably would have grounds to pursue recovery for disruption of business.* Safeguards and completion dates must be spelled out in detail to minimize the chances of this happening [GX J, italics added].

However, Roberts had no knowledge of this letter until the hearing (Tr. 700).

41. In May 1983 Roberts was invited to attend a meeting to discuss construction plans for the water and sewer project. When he got to the meeting, he met representatives of Seattle City Light, NPS' regional office, DSC, and NPS' park headquarters. The project engineer began the meeting by stating that everyone had received complete sets of drawings and plans, and that the purpose of the meeting was to finalize them. Roberts discovered that he was the only person in the room who had never resolved any part of the plans. At the end of the meeting, Superintendent Miller asked him to stay behind to chat with the project engineer; and Roberts expressed his outrage that no one had thought it important for him to have a set of the materials, particularly when even City Light had been given one. He asked the engineer to give him a copy of the meeting notes and found there was no mention of the resort or the resort operator—something the engineer later said was intentional, so that Roberts would not be considered a party to the contract (Tr. 48-50).

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42. Superintendent Miller confirmed Roberts' recollection of the May 1983 meeting (Tr. 156). He also acknowledged that the June 1982 meeting attended by the Roberts' son was the first time anyone from the resort had been invited to park headquarters to discuss the project (Tr. 158-60). Further, according to Roberts, it was not until April 1984, a year after the project engineer's meeting, that, in response to concerns that he had been expressing about his inability to operate, Roberts was given any sort schedule of the contractor's remaining construction activities (Tr. 48-51).

43. The contract for the water and sewer system was apparently put out for bids early in July 1983, because prospective contractors began coming to the resort in mid-July to inspect it, going into the restaurant and crawling under buildings. Roberts had to ask who they were, and then called Superintendent Miller, who again apologized that Roberts had not been informed (Tr. 697-98). Roberts' concern was not just that he was being ignored but that he was not being given an opportunity to provide information on how the project might be undertaken with the least adverse impact on their business (Tr. 699). Roberts did not see the contract itself until the end of July, and when he did, he found that he was not mentioned in it, as a person to be consulted or otherwise (Tr. 47).

44. Roberts testified that it was not until the preconstruction conference with the contractor, held at park headquarters in October 1983, that they first understood the realities of the water and sewer project, which was to begin in November, and began discussing how to prepare for it. They could not understand why the conference had been held at park headquarters rather than at the resort, but they decided to do everything they could to expedite the project, which the contractor felt could be completed by June or July 1984. When the NPS project supervisor arrived in November, they offered to let the contractor use some of the unused cabins; and meetings with the contractor were scheduled for November and early December, but he did not keep them. They ultimately rented cabins to him at \$300 per month (Tr. 223-25). Neither the contractor nor the project supervisor ever formally consulted with the Roberts, although Tom Roberts learned in April 1984 that the project supervisor had been told to work with him to determine the number of cabins that might be needed each weekend for anticipated guests (Tr. 47, 52).

45. The contractor did not begin moving his equipment on the site until approximately January 11, 1984 (Tr. 47). He arrived late in the afternoon with a construction trailer to be used as a field office, which he wanted to leave in the outer parking lot. Roberts objected to that location on a permanent basis, so the contractor proposed a location in the cabin area near the restrooms, suggesting that the location would not matter because the resort was not operating. The contractor's information was erroneous, since the resort was operating. The trailer

was finally placed in the upper resort area near the campgrounds. That site became the staging area for the project, and the maintenance and refueling bases were also located there. This equipment was not removed from the resort until about February 1985 (Tr. 54-57).

46. Despite valiant attempts by the Government to prove otherwise, we find that this 10-acre facility was clearly unable to be operated as an acceptable resort between mid-January 1984 and Memorial Day 1984. At the entrance to the resort, the outer parking lot was used to stockpile 16-foot sections of pipe, fittings, and crates, as well as gravel, sand, and large cement manholes (Tr. 58). The resort normally used this lot for second cars (where two couples shared a cabin), boat trailers, house trailers, and other long vehicles (Tr. 59-60). The contractor initially worked on the drain fields at the upper end of the resort, but he brought in earthmovers and backhoes on flatbeds and unloaded them at the inner, restaurant, parking lot, and left them there (Tr. 60-61). Then he began excavating sewer lines, digging manholes, laying pipe, and backfilling. New fill had to be used, the rocky soil excavated had to be stored, and the trenches were never filled or brought up to the ground surface level again during the period. It was also evident to the Roberts that the contractor was encountering installation problems, which caused him to have to reopen trenches that had already been filled (Tr. 61-62). Although the contractor attempted to work in phases to minimize disruption, first putting in the sewer lines and then going back and opening up the trenches to put in the water lines, it made little difference (Tr. 287-91) except to increase the amount of mud and dust (Tr. 69-71).

47. Roberts did not begin taking pictures of the work until the end of March 1984, but the 258 pictures introduced into evidence (Appellant's Exhibit (AX) 3) make abundantly clear the extent of the chaos that had resulted (Tr. 62-63, 67). He testified that only two or three cabins were accessible during the period; that the entire resort appeared to be the site of a major construction activity; and that there was no way anyone venturing on the site could have realized that there was an open and ongoing business in that location (Tr. 67-69). One of the Government's witnesses, the project supervisor, admitted that the area looked like a construction site the entire time, and testified that he would not have used the resort himself while the construction was going on (Tr. 289-92, 295-97). Two area residents, a deputy sheriff and the local school bus driver, stated that they would not have, either (Tr. 538-40, 532-33). The bus driver also testified that when picking up the Roberts' school children, there were times when he could not even get to his usual pickup spot near the restaurant because of a ditch across the road; that the ditch remained there for the remainder of the school year; and that there were times when it was open even at the beginning of the following school year, because of leaks that were being repaired (Tr. 531-32).

48. Prompted by the continuing complaints of the Roberts that their business was being ruined and that they would not survive unless they

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could open for the season by Memorial Day, NPS made a major effort to have the water and sewer project completed by May 15, 1984 (Tr. 239-41, 267-74). Although the contractor was not the best in the world in many respects (Tr. 294-97), the effort was initially successful (Tr. 273), and the resort was reopened for summer business as scheduled (Tr. 200). Unfortunately, the pumphouse near the restaurant and the firehose boxes remained to be built, and there continued to be problems with leaking pipes and a malfunctioning drain field. The new sewer system could not be connected until the drain field problem was solved. The inability of the contractor to build the drain field as designed was considered by the contractor to have resulted from a differing site condition, and he personally left the resort site for 6 to 8 weeks, in June and July, with much of the remaining work undone and equipment still on the site, while DSC attempted to work out the drain field problem (Tr. 292-307). During cross-examination, the project supervisor readily admitted that the continued construction work caused degradation of the environment of the resort during the summer months (Tr. 307-08), but he was less sure of his conclusion when the Board asked some similar questions (Tr. 311-12).

49. Tom Roberts, however, had no such doubts. He testified that while the resort was filled on Memorial Day, the people who had made reservations for a 2- or 3-day stay during that summer left after one night (Tr. 235-36). One of the initial problems was the resort's lack of preparation: Normally, the weekend before Memorial Day weekend was its shakedown period, because that weekend is the Canadian equivalent to our Memorial Day, and the resort gets a fair amount of Canadian business. In 1984, however, the resort was not ready to open, so it was not until the Memorial Day weekend itself that the Roberts discovered that faucets leaked, refrigerators did not work, the campgrounds were still unusable, etc. (Tr. 237-41). They refunded the money deposited on the campgrounds and referred the customers elsewhere (Tr. 80-82). Roberts testified that the construction continued all summer (Tr. 216-19).

50. Renford Casteel, who visited the site daily while the construction work was going on, although careful not to place the entire blame on the contractor because of the site problems encountered, considered the contractor to have been somewhat inefficient and quite difficult to deal with (Tr. 505-09). He said that construction was still going on after Memorial Day. When asked by the Board if he considered the resort to be operable after Memorial Day, he said "the amenities were there," but that "if I was the concessionaire, I wouldn't be ecstatic about a contract going on within the realm of the resort because that's not an attractive attribute to the mountain scenery, and things like that." When the Board said it was not asking if the resort were perfect but whether it was operable, Casteel uncharacteristically evaded the

question, merely pointing out that the project was necessary for the resort to continue to function (Tr. 509-12).

51. Although the resort's main season was from Memorial Day to Labor Day, significant income was anticipated in September and October as well. But as of October 1984, construction activity was still going on, and resort reservations were down considerably (Tr. 99-101). By October, the Roberts realized they were going broke, and they had to discontinue winter operations, because of the added risks during that season. Their idea was to develop enough business the following year to cover their overhead and then eventually resume winter operations when they could make a profit at it. One of the main reasons they could not operate in the winter of 1984 was that they had no reserves left, and they had to conserve what cash they had to stock up for the summer season in May 1985 (Tr. 72-75).

52. Some minor restaurant and monthly cabin income was received from the contractor in January and February 1985. NPS finally finished the work under the contract in March and April 1985, although the new system involved a number of maintenance problems and, as of the date of the hearing, still was not working properly (Tr. 100-01, 520-25). Resort income remained down in 1985 (Tr. 100-02)—mainly, in Roberts' view, because (Tr. 102):

We broke a building cycle in 1984. We relied very heavily on repeat visitors. They are really what keep us in business. The majority of the reservations that we take—I need to rephrase that. The majority of the cabin income business we take is done from reservations. Those reservations come from people who have either stayed at the resort before or have heard about it from people who have stayed there. The other half of that comes from people who drop in off the road and hopefully will tell others about it.

And I just—it is my opinion that in 1984—I know for a fact. I lived through it. 1984, we had people coming in who had two and three-day reservations, that after the first night, came in and said, "I'm sorry. This is not a vacation."

C. Appellant's Monetary Claims

53. The foundation for the Roberts' loss of income claim against NPS is its alleged failure to disclose to him the existence of the proposed water and sewer project, as well as its alleged breach of contract by interfering with the operation of the resort, which the Roberts had undertaken on a year-round, uninterrupted basis. The scars left by the construction further curtailed their business into 1985, when it remained at a very stagnant level (Tr. 636-38).

54. Tom Roberts testified that after 1985 the growth pattern that was established between 1982 and 1983 for the resort was re-established, and that there was a 12-percent increase in income in 1986 and a 10-percent increase over 1986 in 1987, even though the resort did not change its mode of operation (Tr. 102-03). It had increased its revenues 8.5 percent and its profits 5.1 percent from 1982 to 1983, and the Roberts had predicted—conservatively, in their view—a minimum 10-percent increase in gross receipts in 1984 without the water and sewer project. Operating costs had been reduced by 27 percent overall during their tenure. Thus, in seeking lost profits amounting to 5.1 percent on

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the basis of an assumed 8.5-percent increase in revenues for 1984 and 1985, they felt they were being extremely conservative (Tr. 104-09, 202-12). Their claim for lost profits (the difference between what they made and what they should have made) was \$32,886.05 in 1984 and \$12,007.16 in 1985, "for a total claim of lost profit of \$44,894.24" [sic] (Tr. 656, AX 5). Their claim for loss of investment at this point was \$20,000 (Tr. 656), but that claim was reduced to \$15,750.48 in Appellant's Post-Hearing Brief (AB 16).

55. The basis for the loss-of-investment claim was that, because of the cash-flow problem in operating their new resort business, the Roberts in 1983 had let payments become delinquent on a house they owned in Bothell, Washington, expecting to bring these payments up-to-date when they sold another piece of property in Everett, Washington. But because of the water and sewer project and their inability to operate the resort after mid-January 1984, they were forced to use the proceeds from the Everett house to keep SBA from taking action against Mr. Heide, who had not been receiving payments from the Roberts in order to make payments on the restaurant loan; and the Bothell house went to foreclosure (Tr. 92-99). The Roberts had purchased the house for \$170,000, and it was worth considerably more than that (Tr. 109-14); but because of the foreclosure, it brought only a total of \$154,249.52, exclusive of foreclosure costs, for a net loss of \$15,750.48 (AB 16).

56. The parties did not provide personal data on the Roberts family during the hearing, except briefly. Nancy Roberts was represented by her husband as having had 23 years of bookkeeping experience. Prior to going into the resort, she had handled "the entire real estate department for Metro-Media, which subsequently became Ackerley Communications, and she handled all the rental business. She was dealing with * * * a very high amount of money as disbursing [sic] rental payments, things such as that, and keeping the books" (Tr. 258). Her personal statement in the NPS application indicates that her last salary, in January 1982, was approximately \$23,750 per year (AX 4). She went to college at Ohio State and described herself as an accountant (Tr. 558). Tom Roberts' last salary, in February 1982, was approximately \$27,500 (AX 4), for a family total of over \$50,000 per year. Irving Dunton, a Government witness, indicated that Mike Stutzman, the Roberts' oldest son, was age 23 or 24 (Tr. 353). The Roberts' son, Tim, was represented as being 16 years of age, presumably at the time of the hearing (Tr. 621). Nancy represented her daughter as capable of doing some of the cooking (Tr. 571). Joanne Roberts, who may or may not have been the same daughter, helped keep track of inventory (Tr. 588).

Specific Findings

(“GF,” as used hereinafter, refers to General Facts in the previous section.)

1. The two principal witnesses to events before the Roberts purchased the resort were Steven Crabtree and Tom Roberts. As between the two, Roberts was the more convincing, possibly because this was his sole dealing with NPS, as contrasted with Crabtree’s four-state responsibility (GF 5, Tr. 404). Also, Roberts was unequivocal (GF 27); whereas, virtually every time Crabtree was asked about his conversations with Roberts, he qualified his response, saying, in effect, that he “must have” told Roberts about the proposed water and sewer project because it was a positive thing that NPS always told prospective purchasers about (GF 7). The Board was not easily able to distinguish between what Crabtree recalled and what he only thought he recalled.

In addition, Crabtree, by his own admission, was concerned primarily with the SBA debt rather than with the water and sewer system (GF 6-8); and he knew that the water and sewer project could still fall through (GF 10).

Roberts did not fit the pattern of the usual inquirer (GF 7, 12), and Crabtree admitted that his conversation with Roberts about the project might have occurred after the Roberts had already purchased the property (GF 25, 26). Thus, Crabtree’s recollection of factual details was not persuasive.

2. Similarly, although we find that Roberts had a conversation with Superintendent Miller before acquiring the property (GF 9), and that at some point they also talked about the resort’s water and sewer problems, we are unable to find that Miller or any other NPS employee specifically warned the Roberts about the condition of the water and sewer systems before he acquired the resort (GF 18, 23, 27)—even though we find that NPS generally knew that (a) the Roberts’ plan was based on winter operation (GF 7, 8); (b) the resort could not be reliably operated in the winter until a new system was installed (GF 13-17); and (c) the winter failures of the water and sewer system were the principal reason that Heide had been unable to operate during the winter as he had planned (GF 15-17). It seems highly unlikely that Superintendent Miller would have gone into a detailed discussion of NPS park regulations and procedures (which were a negative aspect of the resort operation) with someone who at that point was no more than a prospective applicant (*cf.*, GF 18).

3. In any event, taking Crabtree’s testimony at face value, we find that NPS approved the Roberts’ application knowing full well that they were marginal operators without any special expertise in operating a resort (GF 7); knowing that they were dependent on winter operation to succeed (GF 7); knowing that the resort’s water lines would freeze in the winter (GF 7) and that the plumbing system could easily fail entirely (GF 8, 16-17); not knowing when, if ever, the

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proposed water and sewer project would be approved (GF 10); and knowing that substantial disruption of resort operations could occur when the new system was put in (GF 8)—all of which was contrary to a staff recommendation (GF 9) and contrary to Crabtree's personal belief, as an expert in the hospitality field (GF 5), that no operator, even one with ample initial funds like Heide, could succeed at the resort under the excessive burden of the SBA debt, even if everything went perfectly (GF 5-7).

4. We also find that, even before the approved water and sewer project went out for bids, NPS knew a good deal about the likely extent of disruption to the resort's business once the construction had begun (GF 38, 40). But NPS' testimony was, and our finding is, that whether or not the Roberts had objected to the project, it nevertheless would have gone forward (GF 39).

5. As already noted, we find that the Roberts operated the resort reasonably under the circumstances after they acquired it, both prior to the onset of the water and sewer project (GF 36) and after it commenced (GF 46). We also find that the Roberts' business was seriously damaged not only during the main phase of the water and sewer project (January through May 1984) but also, both with respect to current and repeat business, between June 1984 and December 1985 (GF 49-52).

6. In our decision, we have given no weight to the testimony of Scott Parsons (Tr. 314-30), a witness whom we did not consider to be convincing.

Discussion

A. The Government's Position

The Board has expended an unusually large amount of time and effort on this appeal in relation to the size of the claim involved, for several reasons. First, it may be our case of first impression with respect to concession contracts since the advent of the Contract Disputes Act of 1978, 41 U.S.C. § 601; and it appears to be only the third such case to have come before us in the history of the Board. Second, the appeal involves a 25-page decision by an acting NPS director, which the Board, though its jurisdiction is *de novo*, does not overturn lightly. Several of the concepts set forth in that decision merit discussion. Third, it involves a situation in which NPS initially bent over backwards (mistakenly, as we shall see) to accommodate the putative interests of the two private parties involved; and in which it (figuratively) later performed surgery for the benefit of one of them, nearly resulting in the patient's death and subsequently resulting in a claim from which it was forced to defend itself. Fourth, although we conclude that the patient is entitled to recover damages, we can accept neither appellant's method of determining them nor some of the Government's underlying assumptions in seeking to deny appellant

recovery. We will address NPS' premises, as set forth in its decision and in Government counsel's brief, first.

Preliminarily, we note that NPS' July 16, 1987, final decision was based in part on factual conclusions with which the Board, based upon its own evidentiary hearing, cannot agree—principally those concerning whether the Roberts were informed of the proposed water and sewer project at the time they purchased the resort, whether they can reasonably be charged with the knowledge that the resort was really not operable in the wintertime and, finally, the extent to which the operation of the resort was adversely affected by the construction project after it was begun. Normally, these differing facts would be sufficient to account for our different conclusions. However, that is not entirely true here. Because of the unique posture of this case, we must note our disagreement with several of the more important principles set forth in NPS' legal analysis, which begins on page 19 of the decision.

The decision at page 21 points out that the appeal provision of section 17(c) of the contract (AF 29-31) does not apply to discretionary action or inaction by the United States in its sovereign capacity, which NPS says includes the decision by the Secretary to undertake the present water and sewer project (AF 246). However, the claim in this case *did not* challenge the propriety of the project as such but merely sought monetary damages for loss of income resulting from the project as a contractual matter. Thus, the appeal was proper.

[1] Second, the decision states on page 21 that:

*Concession contracts are not contracts for which benefits and obligations flow to the respective contracting parties. The Secretary of the Interior is not purchasing a service and undertaking a contractual obligation to insure the concessioner a profit. A concession contract is no more than a license to the concessioner to operate a business that provides services to visitors. * * * Assuming that the claimants could show an interference with their business, there is no legal basis upon which the NPS could authorize payment of the claim [AF 247, italics added].*

NPS has cited no legal authority for these propositions, and we find none. Perhaps it would be well at this point to review the history of NPS concessioner claims before the Board, along with subsequent developments.

In *Pirate's Cove Marina*, IBCA No. 1018, 75-1 BCA ¶ 11,109, the appeal arose as a result of a concession agreement under which the appellant was authorized to provide certain services for the public at a lake in Crab Orchard National Wildlife Refuge and required to pay NPS a franchise fee of 3 percent of gross receipts. Appellant contended that certain NPS restrictions made its operations unprofitable and impaired its ability to pay. We noted that implicit in any contract is a duty not to make performance by the other party more expensive and thus less profitable, but we were unable to grant the relief sought because it was not provided for by the express language of the contract (75-1 BCA at 52,865).

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In *Yosemite Park & Curry Co.*, 79-1 BCA ¶ 13,739, an NPS concessioner sought relief, claiming that NPS was overcharging it for electricity; but the Board was forced to dismiss the appeal because there was no disputes clause in the contract, and the newly enacted Contract Disputes Act (CDA) because of its effective date did not apply. However, the Government's arguments went beyond the issue of CDA's effective date. Counsel asserted that:

The Contract Disputes Act applies by its terms only to procurement contracts and to contracts for the disposal of personal property (41 U.S.C. § 602). [This] contract * * * falls under neither of these categories. It is a concession contract, subject to the provisions of Public Law 89-249 (16 U.S.C. §§ 20 *et seq.*; 70 Stat. 969 [79-1 BCA at 67,344-45].

The Board did not comment on this contention, noting that “[i]ncidental and gratuitous findings not relevant to a dispute over which the board has jurisdiction would have no finality whatsoever” (citing a Court of Claims case) (79-1 BCA at 67,346). Thus, this Board has never considered the applicability of the CDA to NPS concession contracts. However, since Government counsel's brief before us again postulates precisely the same view as the NPS decision does, with respect to the nature of a concession contract (GB at 26-27), it now appears appropriate for us to consider this issue.

As Government counsel suggested in *Yosemite*, the CDA applies only to express or implied contracts for the procurement of services and property and for the disposal of personal property. It does not cover all contracts. See *Coastal Corp. v. United States*, 713 F.2d 728 (Fed. Cir. 1983) at 730. Senate Report No. 1118, 95th Cong., 1st Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 5235 at 5251, with respect to the CDA, explained that:

Section 3 would make the provisions of the bill applicable to *all express or implied contracts entered into by an executive agency of the United States * * * for the procurement of property* (other than real property in being), services, for construction, alteration, repair, or maintenance of real property, for disposal of personal property and applicable to any other contract or agreement with the United States which by its terms is expressly made subject to its provisions. [Italics added.]

The remainder of the report would seem to indicate that only General Accounting Office contracts and matters arising in admiralty are excluded from the CDA (*ibid.* at 5252). However, the courts have since found such things as contractor selection procedures (*Coastal, supra*), Indian Self-Determination Act (25 U.S.C. § 450) contracts (*Busby School v. United States*, 8 Cl. Ct. 588 (1958)), and maritime subsidy contracts (*Newport News Shipbuilding v. United States*, 7 Cl. Ct. 549 (1985)), were also intended to be excluded from coverage. Otherwise, only procurement-type activities that are excluded by specific provisions of the various authorizing statutes appear to be exempt from the CDA. We find no general exclusion of NPS concession contracts.

The fact that NPS is exempted by statute from competitive bidding and property disposition requirements and procedures would appear to have no bearing on its CDA obligations; and the legislative history of Pub.L. 89-249, which is the current source of NPS' concession contract authority, does not imply otherwise. The Senate Committee Report on NPS' 1965 amendments refers specifically to NPS "lease and contracts," not to "licenses." Cf. S. Rep. No. 765, 89th Cong., 1st Sess., reprinted in 1965 U.S. Code Cong. & Admin. News 3489 at 3490. So does the statute itself (16 U.S.C. § 20b).

The Comptroller General has expressed the view that whenever a contract is to facilitate the provision of goods or services to a third party, the use of a procurement contract (rather than, for example, a cooperative agreement) is proper. In B-206272, Sept. 24, 1982, 61 Comp. Gen. 637 at 640, he said:

But, in our opinion, the [Cooperative Agreement] Act does not give HUD discretion to use a grant or cooperative agreement when third parties, such as NCPC, actually will be providing the technical assistance to authorized recipients * * *. When third parties are involved, in our opinion the choice depends upon whether the Government's principal purpose is to "acquire" an intermediary's services, which ultimately may be delivered to an authorized recipient, or whether the Government's purpose is to "assist" the intermediary in providing goods or services to the authorized recipient. In the former situation, we believe a procurement contract, rather than an assistance relationship, is proper. [Italics in original.]

In the case before us, since NPS clearly disavows any contractual purpose of "assisting" appellant to make a profit, its sole contractual purpose must therefore be to "acquire" the services of a private contractor who will be able to provide goods or services to the general public. We thus conclude, with the Comptroller General, that such contracts both are procurement contracts and are within the scope of the CDA.

To summarize, we hold that a concessionaire contract entered into by NPS is a procurement contract subject to the CDA, since it is for services that the Government itself would otherwise provide, and since no statutory exemption from the Act or exclusionary intent by Congress is evident in 16 U.S.C. § 20a, or elsewhere.

Next, the NPS decision at page 21 alleges that since the Roberts' claim involves an allegation that NPS "concealed" its plan to rehabilitate the water and sewer system at the resort, they are charging NPS with "fraud and misrepresentation," which not only sounds in tort rather than contract but is excluded from coverage by the Federal Tort Claims Act (28 U.S.C. § 2680(h)). However, in *Chain Belt Co. v. United States*, 127 Ct. Cl. 38, 54, 115 F. Supp. 701, 711 (1953), a case cited by both parties and particularly relied upon by the Government (GB at 21), the court said: "While it is true that this court does not have jurisdiction over claims sounding primarily in tort, an action may be maintained in this court which arises primarily from a contractual undertaking regardless of the fact that the loss resulted from the negligent manner in which [the Government] performed its contract" (citing cases).

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Since Government counsel has not espoused NPS' viewpoint, with which we do not agree in any event, it is unnecessary for the Board to do further research on the point in order to conclude that the present appeal is properly before us.

Finally, it may be useful to address three of NPS' legal conclusions, Nos. 1, 3, and 4, on page 24 of the decision, which are as follows:

1. *Concessioner has no legal basis for claiming breach of the concession contract* because the claim alleges breach only of an obligation stated in the recitals portion of the contract [i.e., an opportunity for the concessioner to make a profit is stated as a purpose of the contract].

* * * *

3. *Although there was no obligation on the part of the National Park Service to inform the Roberts of the intent to replace the existing water and sewer system, the evidence shows that Thomas Roberts *** was informed [when approval and appropriations were received].*

4. Assuming that the Concessioner was not informed of the project prior to purchase of the resort, *the failure to so inform concessioner does not constitute a legal or equitable basis upon which to assert a claim against the National Park Service (AF 250, italics added).*

In light of these conclusions on the part of NPS, a review of some of the fundamentals of Government contracting may be useful.

In *United States v. Oklahoma Gas & Electric Co.*, 297 F. 575 (1924), the court considered the Government's contention that because it, in its governmental capacity, had entered into a contract with the company to obtain electricity based upon then current rates, it was improper for the State utility commission to raise rates for it, even though the higher rates were also applicable to everyone else. The court made short shrift of the Government's arguments, pointing out:

Here the government was contracting with one of its citizens to do a very common and ordinary thing not in any way relating to or involving its existence, viz., furnish electricity for lighting and motor power at Ft. Reno Remount Depot. We see no reason why as to a contract of this nature the government should occupy any different position than if the same had been made between two of its citizens.

The court quoted from two Supreme Court cases on the subject, *United States v. Bostwick*, 94 U.S. 53, 66 (24 L. Ed. 65), and *Cooke v. United States*, 91 U.S. 389, 398 (23 L. Ed. 237). In the first, the court had said, "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf." In the second, the court, referring to the Government, said, "If it comes down from its position of sovereignty, and enters into the domain of commerce, it submits itself to the same laws that govern individuals there" (297 F. at 579).

However, because of its size, power, and potential ability to manipulate the market place, the Government may have obligations of fairness beyond those of the ordinary citizen. One of the best-known cases reflecting this point of view is *Bateson-Stolte v. United States* 145 Ct. Cl. 387 (1959), in which the Corps of Engineers signed a

\$7 million contract with plaintiff for the construction of a powerhouse at Clark Hill, Georgia, with prescribed Davis-Bacon wages based on existing local conditions. But a week later, the Atomic Energy Commission (AEC) entered into another contract at Clark Hill for a \$1-¼ billion project, and plaintiff was forced to pay substantially higher labor costs than were contemplated, as a result of a subsequent labor shortage. Because a wage freeze was in effect at the time, plaintiff had to pay its workers substantial overtime so that their take-home pay would equal that of workers on the AEC project. The court remanded the case to ascertain whether either or both of the parties knew or should have known of the proposed AEC contract at the time their contract was entered into. The court noted (145 Ct. Cl. at 391):

If it had been the Atomic Energy Commission that had dealt with plaintiff, it would have been its duty to disclose to plaintiff that it was going to use this very large force on this other project, so plaintiff could have taken this into consideration in estimating its labor costs. If it had not done so, it would have been responsible for the increase over what plaintiff had estimated in preparing its bid. [Italics added.]

The court went on to say (*ibid.* at 392-93):

We think it is immaterial to a proper disposition of this case that the Government in the erection of the Atomic Energy Commission project was or was not performing a sovereign act. Even though it was, the Government must have known that by the performance of that act it was going to increase plaintiff's cost of performance. If it had this knowledge, and plaintiff did not have it, it was under the duty to disclose it, whether it was a sovereign or not. The Government's status as a sovereign confers upon it no privilege to mislead contractors, or to profit from their ignorance. [Italics added.]

The Chief Judge of the court, in concurring, said (*ibid.* at 394-95):

If placing a frozen ceiling on the wages which plaintiff was permitted to pay and at the same time permitting the party instituting the freeze to pay higher wages on another tremendous project in the same neighborhood, which the officials must have known would absorb all the available labor in that area, is not interfering, then I have read the definitions in the law and secular lexicons to no purpose.

At the rehearing in this case, it turned out that AEC in fact had not selected, from among a number of possibilities, the actual location for its massive project at the time the Corps of Engineers had entered into the contract with the plaintiff; but that does not alter the principle the case represents (158 Ct. Cl. 455, 305 F.2d 386 (1962)).

A similarly interesting case is *Aerodex v. United States*, 189 Ct. Cl. 344 (1969), in which the court reversed the Armed Services Board. Plaintiff had entered into a contract with the Army to supply thermistor mounts used in the Nike-Hercules missile system; but the Government had specified in its solicitation a particular brand-name resistor that later proved to be commercially unavailable, and plaintiff incurred substantially increased costs in obtaining a substitute. The Government knew the components of the resistor at the time of bidding, but had failed to disclose them; whereas, plaintiff had failed to inquire about the availability of the resistor before bidding. Thus, both were at fault for the delay.

In finding for the plaintiff, on the ground that it was primarily up to the Government, not the contractor, to ascertain and assure bidders of

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the commercial availability of the resistor before advertising the contract, the court said that: "It was improper for the Government to cast this burden of advance ascertainment upon bidders *without explicit warning to them* of the questionable availability and physical makeup of the component" (189 Ct. Cl. at 354, italics added). Disclosure by the Government was thus mandatory.

Another case often cited on this point is *Hardeman-Monier-Hutchinson v. United States*, 198 Ct. Cl. 472 (1972). Here, plaintiff entered into a contract with the Navy to construct a pier in a remote area of Australia. The Government knew that the area was subject to extremely severe weather and sea conditions, particularly during certain periods of the year. The invitation for bids disclosed general information concerning winds, rainfall, and temperature, but not concerning the extreme weather and sea conditions. Plaintiff made a site inspection and concluded that it could work at the site approximately 88 percent of the time. Actually, the weather and sea conditions were such that work could be performed only about 40 percent of the time. Thus, contract performance cost the contractor much more time and money than it anticipated.

The court, finding for plaintiff on the ground of breach of contract, said: "It is well settled in this court that where the Government possesses special knowledge, not shared by the contractor, which is vital to the performance of the contract, the Government has an affirmative duty to disclose such knowledge. It cannot remain silent with impunity" (198 Ct. Cl. at 487, citing cases).

This Board had occasion to apply the *Hardeman* principle just a year later in *Power City Electric*, IBCA-950, 74-1 BCA ¶ 10,376. In that case, the contractor bid on the construction of a 52-mile transmission line for the Bonneville Power Administration, based on both an aerial and a ground survey of the area. The contract called for the access roads used by the contractor to be brought up to defined specifications. After the contract was let, the contractor found that most of the roads were not usable for its equipment in their existing condition; and it had to make far more road improvements than had been anticipated. The Government had intended to pay for only 40,000 feet of road improvement, as shown on a list of roads that it had produced before the bidding but not given to prospective contractors. The list was based on small truck but not equipment access, a fact also not disclosed by the Government in its solicitation. Although the contractor had suspected that the 40,000-foot estimate was too low, it made no inquiry before bidding.

The question was whether the Government or the contractor should be charged with the extra road costs involved. The Government argued that the costs should be borne by the contractor because it had failed to inquire. But the Board said it would not apply that rule because at

the time of the bids, the Government had the list in its possession and had failed to disclose it. The Board commented:

The courts and the Boards have taken an increasingly stringent attitude toward the withholding of information the disclosure of which would be likely to have a material effect on a contractor's estimate of costs. We, therefore, hold that *any possible duty of appellant to make inquiry has been nullified by Bonneville's failure to disclose* the access road improvement list which according to the Government's own admission contained the only improvements necessary for its needs and was based on standards not specified in the contract. *On balance, the appellant's fault was less serious than the Government's fault* [74-1 BCA at 49,005, italics added].

There are innumerable cases in the same vein. However, lest there be any question about whether the courts still view Government non-disclosures harshly, we note the recent Federal Circuit case of *Petrochem Services v. United States*, 837 F.2d 1076 (1988), in which the court vacated an Armed Services Board decision that had held an oral disclosure of a material fact to be sufficient. The contract involved the clean-up of an oil spill, which had leaked into the steam generator containment area at the Great Lakes Naval Base. The Government had calculated the amount of oil spilled to be approximately 21,000 gallons, but it had not put that number into its specifications. At its onsite inspection, the contractor had estimated that only 6,000 gallons had been spilled, and it bid the contract on that basis. However, during the contractor's visit, the Government supervisor in charge had had a conversation with the contractor in which the latter had mentioned his 6,000-gallon estimate. The supervisor promptly informed him of the Government's 21,000-gallon calculation and specifically stated that he felt that the 6,000-gallon figure was a mistake. Because of this oral disclosure, the Armed Services Board had found for the Government.

The court referred to a "veritable gold mine of circuit caselaw" that defines "the government's duty to disclose superior knowledge on contracts when equitable adjustment claims under contract clauses or breach of contract claims are raised," and said that in either type of claim "the doctrine of superior knowledge requires approximately the same elements to be satisfied" (837 F.2d at 1078). The court held:

In any instance the trial tribunal finds that oral communications were made, we now hold that the government may not satisfy its duty to disclose superior knowledge unless it shows that the communication was not only made, but also heard and understood, actually or apparently. The government may satisfy its burden by showing, either through conversations held between the contractor and government agent or other such evidence, that it reasonably believed the contractor was aware of the communication and understood its import. There is no practical way the government can know for sure that someone understands. If it has done all it can to get the information out loudly and clearly, it has done all it can. Comprehension is up to the recipient. In the instant case, the board found that the statement was made by [the supervisor] to [the contractor], but made no findings regarding whether [the contractor], heard or understood the statements or whether [the supervisor] thought he had [837 F.2d at 1080, italics added].

In remanding the case for additional facts, the court went on to say:

The government, to prevail, should present further evidence indicating that [the contractor] absorbed, digested, and comprehended the import of the figure [the supervisor] mentioned at the site inspection, whether or not he agreed with it; or at least that [the

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supervisor] supposed he had successfully communicated the information. * * * *The court concludes that the government bore the burden to provide appellant with the information regarding the number of gallons lost* [837 F.2d at 1081, italics added].

The Board is bound, as a matter of law, by the court's holding. In the case before us, we specifically find that even if NPS had been upheld in its contention that either Crabtree or Miller, or both, communicated the possibility of the planned water and sewer project to the Roberts before their purchase of the resort, the Roberts to the likely adverse consequences of the project on the resort's business. Thus, contrary to NPS' assertions, it could be found liable for breach of contract, and for the Roberts' reasonably resulting damages, on that basis alone.

NPS' conclusion No. 1, on page 24 of its decision (AF 250), is also contrary to law. NPS asserts that it has no obligation under the concession contract to provide the Roberts with an opportunity to make a profit, except as set forth in the operative provisions of sections 3(a)(1) and (2) of the contract itself. It cites Washington State law to the effect that recitals in the preamble of a contract are inefficacious. NPS' discussion, however, widely misses the mark. Not only is a Federal procurement contract not generally subject to the vagaries of state law, but the *opportunity* to make a profit is guaranteed by NPS' statute (16 U.S.C. § 20b(b)) and is the obvious underlying consideration for all concession contracts.

What this case is about is whether NPS, by commencing its lengthy and disruptive water and sewer project less than 2 years after the Roberts reopened the resort for business, deprived them of that opportunity. We will first consider the NPS statute.

16 U.S.C. § 20a authorizes NPS to take such actions as may be appropriate to "encourage and enable" concessioners to "provide and operate facilities and services" for the accommodation of park visitors. (We note, in passing, that the language cited sounds remarkably like a procurement function.) Section 20b(a) authorizes contract terms and conditions to assure the concessioner of adequate protection against loss of its investment resulting from NPS' discretionary acts, policies, or decisions. Loss of investment in subsection (a) refers to tangible property, not to loss of anticipated profits. Subsection (b) states that: "[NPS] shall exercise [its] authority in a manner consistent with a reasonable opportunity for the concessioner to realize a profit on his operation as a show commensurate with the capital invested and the obligations assumed." Subsection (c) deals with regulation of the concessioner's rates and charges to ensure reasonableness.

In the contract before us, section 3(a)(1) reflects subsection 20b(a), and section 3(a)(2) reflects subsection 20b(c) of the statute. Nothing in the contract, other than the last "whereas" clause of the preamble, reflects subsection 20b(b) above. Since this particular requirement is a statutory directive to NPS rather than a constraint imposed on the contractor, there is no necessary legal reason why subsection (b) should

be a separate provision of the contract, rather than being recited in the preamble; but that does not limit its efficacy. On the contrary, it would have the same force and effect of law even if it were not mentioned in the contract at all because, as we have noted, it is the underlying statutory consideration for the contract. No concessioner in his right mind would enter into an NPS contract if that opportunity were not present. Thus, we think that an *opportunity* to make a profit is a necessary component of all NPS concession undertakings involving private capital.

Our conclusion is not in any way undermined by *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976), a case both relied upon in the NPS decision and urged upon us by Government counsel. In that case, plaintiff, a public interest organization, sought under the Freedom of Information Act (FOIA) certain concessioner financial records filed with NPS. NPS denied the records, citing the confidential financial information exemption of FOIA; and plaintiff sued, charging that there could be no substantial harm to the concessioners if the records were disclosed, since the concessioners were, in effect, *guaranteed* a profit by 16 U.S.C. § 20b(b). The court upheld the NPS denial, noting that the statute could not be read to guarantee a profit since many concessioners apparently lose money. Rather, the court said, section 20b(b) "only directs [NPS] to exercise [its] authority over concession activities in a manner consistent with a reasonable opportunity to realize a profit" (547 F.2d at 684, italics in original).

We think the court in *National Parks* was rather magnanimously addressing what was quite obviously a very specious argument, and one that was clearly contrary to the ordinary and customary meaning of the words used in the statute. To have found for appellant in that case, the court would have had to say that "opportunity" and "guarantee" mean the same thing, which it understandably was not prepared to do. In this appeal, we find no merit in the Government's contention that the foregoing case stands for the proposition that there is no requirement of an *opportunity* for profit in each individual concession contract (or, if applicable, each group of related contracts). We hold that there is such a requirement, regardless of the language of the concession contract. See *Do-Well Machine Shop, Inc. v. United States*, Fed. Cir. No. 88-1534 (Mar. 14, 1989).

In fact, under the circumstances of this concession contract, with its history of concessioners losing money because of the resort's small, remote location, high debt burden, and substandard utilities, NPS *might* well have elected actually to guarantee its operator a profit, in order to keep the resort solvent until the water and sewer project could be completed. Something like that was done in *Macke Co. v. United States*, 199 Ct. Cl. 552, 467 F.2d 1323 (1972), where the concession location was the Kennedy Space Center. NASA officials thought the concessioner's prices were too high, and refused further increases; but the court found that Macke was entitled to recover the losses inherent

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in the concession operation and beyond its control, plus a reasonable profit, because a reasonable profit was shown to have been the intent of the parties at the time the contract was signed.

That leads us to the first main point of this rather lengthy discussion; namely, that the Government is not entitled to set up a situation by contract in which the private contractor is doomed to fail, and then abandon it to its own devices under the guise of free enterprise. We think that is exactly what happened here when Concession Chief Crabtree, against the advice of his staff, recommended approval of the Roberts' contract, knowing full well that winter operation was a vital part of their proposal, but also knowing full well that the water and sewer system on the resort property was wholly inadequate for such operation.

In our view, the obligation not to cause economic harm to the Roberts far exceeded NPS' obligation to Heide, since the former had a much greater chance of success at the time he took over from Bradley than the Roberts did at the time they took over from Heide. Moreover, at the time of the sale to the Roberts, Heide was already committed to the resort and was no worse off if he kept it; whereas, the Roberts were putting new money into an activity that Crabtree in his own mind thought could not succeed (GF 6, 7).

Crabtree had no duty to Heide to withhold the adverse facts from the Roberts, but he did have a major affirmative duty to the Roberts to disclose them, particularly in light of Vic Lewis' negative recommendation and NPS' general knowledge of the inadequacies of the water and sewer systems. We cannot find that the sale of the resort to the Roberts was prudently or properly approved. As the Engineers Board has observed, "In a situation involving a small business * * * it is especially important for the Government to reveal the information it possesses that would bear on the conditions of performance." *Tyroc Construction Corp.*, 84-2 BCA ¶ 17,308 at 86,261.

Non-disclosure, however, is not the only issue in this case. Just as there is an affirmative duty on the part of the Government to disclose material facts to a prospective contractor, so too there is a duty not to injure the contractor once he has begun performance under the contract. Appellant's counsel makes no legal distinction between the Government's non-disclosure of the poor condition of the existing water and sewer system, which was arguably always inadequate for appellant's proposed winter operation, and the post-contract damage to appellant's resort operation from the water and sewer construction project; but we find that, even if NPS had a right to initiate the water and sewer reconstruction project for reasons of the health and safety of visitors, it nevertheless could be held liable for any losses caused by its interference with the Roberts' contract performance.

As the Supreme Court said nearly 100 years ago in *Anvil Mining Co. v. Humble*, 153 U.S. 540 (1893):

A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused [153 U.S. at 552].

A discussion of the above principle is contained in *George A. Fuller v. United States*, 108 Ct. Cl. 70 (1947), in which the court said:

It is true that there is no express provision in the contract which renders the Government liable for delays it may cause the contractor in the performance of the work, nor is there any express provision exempting it from liability for such delay; it is, however, an implied provision of every contract, whether it be one between individuals or between an individual and the Government, that neither party to the contract will do anything to prevent performance thereof by the other party or that will hinder or delay him in its performance.

* * * * *

It is a necessary corollary to this principle that one who, while not preventing the other party from carrying out the contract, nevertheless hinders or delays him in doing so, breaches the contract, and is liable for the damage which the injured party has sustained thereby [108 Ct. Cl. at 94-95].

L.L. Hall Construction Co. v. United States, 177 Ct. Cl. 870 (1966), was a case in which the Government itself did not interfere with plaintiff's contract, but another contractor hired by the Government did. The court, in citing *Peter Kiewit Sons Co. v. United States*, 138 Ct. Cl. 557, 675, states that "the Government may not, with impunity, do whatever is in its own best interests regardless of the harm which may be done to its contractor." The court went on to say that, "It is plain that the Government is obligated to prevent interference with orderly and reasonable progress of a contractor's work by other contractors over whom the Government has control" (177 Ct. Cl. at 879).

To the same effect is *Lewis-Nicholson v. United States*, 213 Ct. Cl. 192, 550 F.2d 26 (1977), in which only a single contractor was involved but where the Bureau of Public Roads had failed to coordinate with the Forest Service, and had made numerous engineering errors in its preparations to build a 7-mile stretch of road through the California mountains. Its inefficiencies delayed the contractor, and the court awarded damages, noting that, "*Indeed, not only must the Government refrain from hindering the contractor's performance, it must do whatever is necessary to enable the contractor to perform*" (213 Ct. Cl. at 204, citing six cases and two law review articles; italics added).

This Board had occasion to follow *Lewis-Nicholson, supra*, in *Evergreen Helicopters, Inc.*, IBCA No. 1388, 81-2 BCA ¶ 15,286. The principle involved has, in fact, been generally followed by the boards. For example, in *Nichols Dynamics, Inc.*, 75-2 BCA ¶ 11,556, the Armed Forces Board commented that "[t]he most elementary of the Government's obligations was to avoid conduct interfering with appellant's performance of its obligations" (75-2 BCA at 55,169).

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[2] NPS in the case before us also appears to place reliance on its contention that the water and sewer project was undertaken as a sovereign act, thus asserting that appellant's claim was not subject to the disputes clause of the contract. We have already cited *Bateson-Stolte, supra*, to the effect that the undertaking of a sovereign act by a party to a contract does not relieve it from its obligations under the contract. However, in this case we also question whether a construction project solely affecting a single contractor who has an exclusive possessory interest in the entire parcel of real estate affected by the project has in any way the breadth or scope necessary for it to be construed as a sovereign, rather than proprietary, act.

For example, in *Franchi Construction Co.*, ASBCA No. 16735, 74-2 BCA ¶ 10,654, the contractor bid on the demolition of 54 wood frame Army buildings with the understanding, based on implicit but not compelling contract language that debris burning would be allowed. At the pre-work conference, however, the Post Engineer announced that no burning would be permitted on post property, because of a general non-burning regulation, urged by area residents, that had been adopted the day after the contract was awarded. The contractor claimed additional hauling and equipment costs as a result, and the Army denied the claim on the ground that the burning regulation had been adopted as a sovereign act. The Armed Services Board rejected the Army's contention, holding that:

The Government's contention that the ban on burning was a sovereign act without contractual liability has no merit. The very department of the Government that entered into this contract with the appellant also prohibited the burning of the debris. The purpose of the ban was to assuage the complaints of local residents and was not in the furtherance of a national purpose. *We cannot ascribe sovereignty to this purely local act.* See: *Empire Gas Engineering Co.*, ASBCA No. 7190, 1962 BCA ¶ 3323 [74-2 BCA at 50,598, italics added].

The Government's warranties or obligations to its contractors were generally summarized in *Johnson & Son Erectors*, ASBCA No. 24564, 81-1 BCA ¶ 15,082. They are agreed to include (81-1 BCA at 74,599):

1. Implied warranty of the adequacy of specifications.
2. Implied warranty of the duty to disclose superior knowledge.
3. Implied warranty to act with reasonable diligence.
4. Implied warranty to hinder the performance of the other party.

In the case before us, NPS breached not one, but two, of these warranties, specifically Nos. 2 and 4. Although we do not elect to award damages to appellant on that basis, the unusual posture of the case makes it desirable for us to announce this holding as such. In summary, we conclude that:

Where a Regional Chief of Concessions of NPS, with 25 years of hospitality experience, recognized the marginal financial ability and inexperience of a proposed concessioner, was aware because of two prior concessioner failures of the hazards of a proposed winter

operation (which included the freezing of pipes and an inadequate sewer system that could be condemned by the State); and knew that NPS was proposing to replace the water and sewer system in the near future, which was likely to disrupt the concessioner's operations for from 6 months to a year or more; but nevertheless approved the problems with the proposed concessioner prior to approval, NPS is liable for the disruption to the concessioner caused by the subsequent water and sewer construction project on the basis of its initial superior knowledge and its subsequent interference with the concessioner's efforts to carry out its service contract.

B. Appellant's Position

[3] Appellant's first claim is for lost profits for 1984 and 1985 when the construction project either prevented the resort from operating or caused a severe impact on its business, allegedly resulting in reasonably ascertainable lost or reduced profits. Government counsel responds (GB at 21) that even the cases appellant cites, *L'Enfant Plaza Properties v. United States*, 3 Ct. Cl. 582, 590 (1983), and *Chain Belt Co., supra*, are against it, since both cases hold, to quote the latter case, that "in the case of a new business there is no way, short of pure speculation, of determining what plaintiff's profits would have been" (115 F. Supp. at 716).

We agree that the *Chain Belt* principle applies here, for not only was appellant's business new, but it was irregular and cyclical by nature as well. No special business expertise is needed to know that failures in the restaurant and hotel businesses are legion, and that they outnumber successes by far. A 2-year operating history in this industry is much too short for us to determine lost profits on that basis. We therefore find that an NPS concessioner is not entitled to the award of lost profits where the alleged amount thereof, as here, is based on an inadequate period of operation and thus is excessively speculative.

[4] Appellant's second claim is perhaps less speculative, but considerably more remote. Appellant seeks to recover from the Government the difference between its original cost and the amount realized on foreclosure of a residential property in Bothell, Washington, on the theory that if NPS' water and sewer project had not intervened, it would have earned sufficient income from its year-around resort business to pay the SBA loan, and thus would not have had to use the funds from the sale of its property in Everett, Washington, to avoid an SBA loan foreclosure, but could have used the Everett property proceeds to redeem the Bothell property. Therefore, NPS is allegedly liable for the lost investment on the Bothell property.

Appellant presumes that, in order for it to recover on this theory, the consequential damages involved must merely have been foreseeable at the time the parties entered into the contract that was allegedly breached; and it argues that such loss was in fact foreseeable because its ownership of the Bothell property was disclosed to and allegedly relied on by NPS at the time appellant applied for approval as a

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concessioner on the resort property. Appellant cites the leading common law case of *Hadley v. Baxendale*, 9 Exch. 341 (1854), in support of this proposition; and our research confirms that this case is still good law. We therefore must examine its applicability.

According to appellant, 11 Williston on Contracts (3d ed. 1968), section 1356, at page 291, summarizes the rule of *Hadley v. Baxendale* as follows:

The result of the rule announced * * * is to increase the possibility of consequential damages beyond those resulting from the natural and proximate consequences of the breach, since not only is the defendant liable for such damages, but also, *if notice is given of special circumstances*, for damages which those circumstances make possible, though apart from such circumstances, they would be unusual and unrecoverable [not AB at 2; italics added].

Government counsel argues that consequential damages are not recoverable in common law damage actions against the United States, citing *Northern Helex Co. v. United States*, 524 F.2d 707, 720; 207 Ct. Cl. 862, 886 (1975).

A somewhat more useful discussion of consequential damages in relation to Government contracts is that in *Gardener Displays Co. v. United States*, 171 Ct. Cl. 497 (1965), a case in which the plaintiff entered into a contract on June 26, 1950, to supply rubber terrain maps to the Army, based on a supplier arrangement that guaranteed the availability of latex but not its price. The Army procrastinated in approving plaintiff's prototype; and meanwhile the Korean War (which commenced almost simultaneously on June 25, 1950) drove up latex prices, causing the contractor to sue for damages. The Government argued that the Korean War was not foreseeable under the doctrine of *Hadley v. Baxendale*, *supra*; and thus the Government was not liable for the increased latex costs. In deciding for plaintiff, the court expressed doubts about the consequential damages concept itself, noting that:

The true concept of consequential damages involves consideration of the type of loss foreseeable by the contracting parties at the time of their agreement. When the Government contracts it implies an obligation to respond in damages for any unreasonable delays which it may commit during contract performance, including increased material costs as in the present case. The cause or cost of such increases is not in every case material to and does not determine their foreseeability. *There may even be valid reason to fix the foreseeability at the time of the breach rather than at the time of the agreement, for it is at the breach time that the consequences of wrongdoing are more apparent and assessable, and the deterrent accordingly greater.* To illustrate, if the concrete results of delay in the form of war-inflated prices were not apparent to the Army when it awarded plaintiff the contract in suit just prior to the outbreak of the Korean War, most certainly the consequences became obvious in September 1950 when the breach occurred, for by then latex prices were on a rapid rise and the Army's risk more palpable [171 Ct. Cl. at 504-05, italics added].

The court went on to observe (171 Ct. Cl. at 505):

The parties have suggested no precedent where war-borne increases in the price of materials have been considered consequential to the war, and not the result of delays by

the Government, so as to preclude their recovery. In *Levering & Garrigues Co. v. United States*, 73 Ct. Cl. 566 (1932), the increase in cost of bricks during a period of delay by the Government was considered a recoverable item of damages *without inquiry into the cause or foreseeability of the increase. Such claim items are common in Government contract actions for delay-damages; contentions that they are not recoverable because they are consequential rather than proximate are not.* For a more extended discussion of the doctrine of consequential damages as it applies in Government contract cases, see *Appeal of Carteret Work Uniforms*, ASBCA No. 1015, decided July 25, 1952, and Law of Government Contracts, McBride & Wachtel, Vol. IV, Chapter 32 [now Vol. 4A, § 32.30] [italics added].

In the text cited, Vol 4A, § 32.30 at 32-31, the authors note that:

It may be stated as a general rule, in the absence of an express provision in the contract, that the Government is not liable for collateral, remote, or speculative damages, *Appeal of Alrae Construction Co., Inc.*, VACAB 970, 73-1 BCA 9872 (1973). Thus, the Government was not liable for consequential damages when it improperly terminated the contract for default, and the extent of the contractor's recovery was to be determined under the termination for convenience clause, *Appeal of Aerco, Inc.*, GSBCA 3776, 77-2 BCA 12775 (1977).

Commenting on appellant's argument, Government counsel contends:

It requires considerable imagination to assert that the loss of the Bothell property was foreseeable or within the contemplation of NPS at the time of the contract * * *. The property was listed as one of Appellant's assets which had no involvement in the operation of the resort. The property was in jeopardy prior to starting the sewer and water project. By November 1983 the Appellants were \$11,384 in default * * *. The property could have been saved at that time by payment of the amount in default. Moreover, the project cannot be blamed for the failure of the Appellants to keep the mortgage payments current. There is no legal or factual basis upon which Appellants may claim for loss of the * * * property [GB at 23].

We are inclined to agree. The problems of the Bothell property antedated, and were unrelated to, the water and sewer project. There has been no showing either (1) that the property had any connection with the concessioner contract other than its inclusion with the assets listed on appellant's financial statement or (2) that appellant could have made the delinquent payments on the mortgage but for the water and sewer project. The connection claimed, between the water and sewer project and the foreclosure, is simply too remote.

In short, we hold that an NPS concessioner is not entitled to the award of consequential damages that may indirectly result from the forced sale of an unrelated property, even though the proceeds of such sale were subsequently used to prevent foreclosure on the concession contract property, partly because the loss on the sale of the unrelated property is too remote and indirect to have been reasonably anticipated by NPS at the time the concession contract was entered into.

C. Contractual Basis for Appellant's Award

Although appellant has alleged, and we have found, that NPS violated the concession contract in two significant respects—viz., inadequate or nondisclosure of superior knowledge, and interference with contract performance—the contract itself and several of the cases cited provide an ample basis for any relief to which appellant may be

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entitled without our going outside the bounds of the contract. We thus see no reason to base our award on breach of contract. See, e.g., *Aerdco, Inc.*, cited by the court in *Gardner, supra*, in which the board said, at 77-2 BCA 62,083: "Where the parties agree to contractual limitations on cost recovery and procedures for the assessment of costs, those limitations and procedures, and not the common law, govern." See also *Macke, supra*, 190 Ct. Cl. at 561-62, 570-71.

Sections 11 and 12 of the NPS contract (AF 17-23), although not cited by the parties, provide for the whole or partial termination of the contract by the Government when necessary for the protection of visitors or resources, and for compensation of the concessioner in connection therewith. It is abundantly clear from the evidence presented by the Government at the hearing (which appellant does not contest) that the water and sewer systems at the resort were not only deficient for long-term operation but also, although appellant was unaware of it until the time of the hearing, in danger of condemnation by the State of Washington. Thus, NPS had an adequate reason for commencing the replacement of the water and sewer project when it did.

What NPS did not have, however, was any valid reason for attempting to undertake the construction project while still expecting appellant to provide a quiet, peaceful, attractive, restful, clean-air-and-water, environment for its largely urban-escape resort patrons. Nor was NPS reasonable in trying to ignore the fact that appellant's all-but-insurmountable (in Crabtree's view) debt burden did not cease while the project was going on. We therefore find that NPS' decision to initiate construction during appellant's marginal operation of the resort constituted a constructive partial termination of the concession contract for the convenience of the Government. Accordingly, appellant was entitled to all reasonably incurred costs of operating the resort during the period of interference and for a reasonable period thereafter, which we have found extended until the end of 1985. See NPS contract, subsections 12(a) and (e). See also *Macke, supra*; *Harbridge House, Inc.*, PSBA No. 264, 77-2 BCA ¶ 12,653; *Baifield Industries*, ASBCA No. 20006, 76-2 BCA ¶ 12,096.

[5] Section 12(e) of the contract expressly provides for "reasonable overhead expenses required by such termination, but not for lost profit or other anticipated gain from the operations authorized hereunder" (AF 23). Since the parties argued loss of profits and consequential damages which we have not allowed, we do not know the extent of appellant's actual operating costs (as opposed to pro forma operating profits) and related offsets during the period.

For example, no attempt was made to allocate time worked at the resort or salary equivalents for the six Roberts family members, or to offset the Roberts' operating costs, including salaries, with the residential and subsistence value of the property during the 2-year

period in question. Accordingly, an estimate of the amount of damages by the jury verdict method is appropriate. Cf. *J. F. Shea Co.*, IBCA No. 1191, 82-1 BCA ¶ 15,705; *Envirnoment Consultants, Inc.*, IBCA No. 1192, 79-2 BCA ¶ 13,937; *William P. Bergan, Inc.*, IBCA No. 1130, 79-1 BCA ¶ 13,671; *JB & C Co.*, IBCA Nos. 1020 & 1033, 77-2 BCA ¶ 12,782. The jury verdict approach is described in some detail in *Johnson, Drake & Piper, Inc.*, ASBCA No. 9824, 65-2 BCA ¶ 4868, at 23,073.

In arriving at a jury verdict in this case, we note that the court in one of the principal cases cited by the parties, *L'Enfant Plaza Properties, supra*, which denied the recovery of lost profits as too speculative but made an award on the basis of jury verdict, commented as follows (3 Cl. Ct. at 589):

There is, however, an element of general damage which L'Enfant has not expressly requested, but to which the court believes it entitled. If RLA had not properly delayed the waiver of the parking space width requirement, vesting would have occurred earlier and L'Enfant would not have been obliged to pay the specified monthly carrying charges for a period during which it should have been in possession. It is entitled to recover these expenditures. See *Peoples Mortgage Corp. v. Bedrosian*, 154 F.2d at 333.

In the case before us, appellant's SBA payments were \$4,100 per month. If we assumed virtually total disruption of appellant's business from January through May 1984, approximating 100 percent of rental value; 75-percent disruption during 1985, we would arrive at \$20,500 plus \$21,525 plus \$24,600, for a total of \$66,625. If we similarly assumed a labor value of \$50,000 per year for Tom and Nancy Roberts, and \$20,000 for the remaining four (parttime?) family members (GF 56), a total of \$70,000 per year—and multiplied that total by the same percentages as the rental value—we would arrive at \$29,167 plus \$30,625 plus \$35,000, for a total of \$94,792 in lost salary equivalents, for a lost rental and lost labor total of \$161,417, less, of course, whatever lodging and subsistence offsets might be appropriate.

Since appellant's total claim is only for \$60,644 including \$15,750 in the consequential damages that we have disallowed in their entirety, a jury verdict in the range of \$50,000 is a reasonable compromise; and we find for appellant in that amount.

Decision

Accordingly, we hold that appellant is entitled to recover damages in the amount of \$50,000, with interest from September 23, 1985, in accordance with the provisions of the Contract Disputes Act.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

April 17, 1989

APPEAL OF LEMIRE CONTRACTING

IBCA-2549 & 2550

Decided: *April 17, 1989*

Contract No. OR910-CT7-1124, Bureau of Land Management.

Denied.

1. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Contract Clauses—Contracts: Construction and Operation: Intent of Parties

Where a land-clearing contract required all hauled material to be relatively free of dirt or soil so it could be readily burned; and the Government's witnesses, including a fire-management expert, agreed unanimously that the debris piled by the contractor contained as much as 45 percent of dirt and did not readily burn, the contractor is not entitled to additional compensation for its unforeseen, but largely unsuccessful, extra work in attempting to meet the contract's specification on the mere allegation that the word "relatively" made the specification ambiguous.

2. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Contract Clauses—Contracts: Construction and Operation: Intent of Parties—Contracts: Contract Disputes Act of 1978: Termination for Convenience

Extra work by a land-clearing contractor that would not have been compensable if the contract had been successfully completed does not become compensable merely because the contract was later terminated for the Government's convenience.

APPEARANCES: Joe H. Lemire, Owner, Lemire Contracting
Clarkston, Washington, for Appellant; Barbara Scott-Brier, Esq.,
Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

Facts

On July 15, 1987, the Oregon State Office of the Bureau of Land Management (BLM) awarded firm-fixed-price Contract No. OR910-CT7-1124 for clearing Travis Tyrrell Seed Orchard area No. 9, in the amount of \$71,184 (the contract) to Lemire Contracting, owned by Joe H. Lemire of Clarkston, Washington (contractor/appellant). The contract was to be completed within 90 days and involved two parts: (1-A) clearing, grubbing, and debris removal and (2-B) leveling, ripping, and final debris removal. In particular, the contract at paragraph C.2.2.2 required all material hauled to be relatively free of dirt or soil, so that it could be readily burned. The contractor has apparently done extensive work for the Forest Service of the Department of Agriculture but had had only one previous land-clearing contract with BLM.

Performance concerns on the part of the Government arose from the start, because the work was seasonal and had to be completed before

winter set in. However, BLM was not able to locate the contractor to deliver its Notice to Proceed until August 3, 1987, and the prework conference did not take place until August 12. BLM sent a formal notice to the contractor on August 21 expressing its concern that work had not yet commenced, and work on the site did not actually begin until August 23. However, a contractor's letter to the contracting officer (CO) on August 24 (but dated September 24) foresaw no problem, "barring difficulties with weather, ground conditions, or problems meeting specs or change orders." The letter added: "We, of course, are subject to unforeseen problems, extensive breakdowns, etc." but said that the contractor had discussed "our method of clearing" with the COR (actually, with the CO's alternate representative, or ACOR) and that he seemed "agreeable with techniques at present" (Appeal File (AF) 240-47).

Agreement among persons at the clearing site, however, quickly became disagreement. By September 2, the COR's diary noted that the amount of soil left in debris piles was unacceptable. He met with the contractor, who agreed to provide cleaner burn piles but was disturbed about added time and costs. So was the Government. On September 5, the contractor showed the COR an acceptable debris pile (No. 3) but expressed concern that he could not complete the work in the time allowed. Since the COR shared the same concern, on September 10 they agreed to meet with the CO at the site on September 14 to try to resolve the problem (AF 232-38). Wes Hunter, stipulated by the parties to be a fire-management expert, also attended the meeting and inspected the contractor's work. In her memorandum to the file after the meeting, the CO detailed the contractor's concerns that BLM was being too demanding, but essentially concluded that the contractor was required to meet the standards of the contract as determined by the COR and ACOR (AF 222-25).

By September 23, the ACOR's diary notes that the contractor's progress was slowing down, and that he was only 20 percent finished with his work, although 58 percent of contract completion time had elapsed. The ACOR's entry for October 7 indicates 35-percent completion, with 72 percent of time used. On October 14, the CO wrote to the contractor suggesting that he consider subcontracting out part of the work since, despite good weather, he had only 17 days remaining, with only 44 percent of the work completed and accepted. On October 28, the COR's diary notes 97 percent of contract time elapsed, with only half of the work completed. Numerous oral and written deficiency reports were given the contractor during this period (AF 203-19).

The contractor fought back. He or his wife called or wrote to the CO on numerous occasions, complaining that the ACOR and COR, in particular, were imposing constraints on him beyond those required by the contract; that their standards were unreasonable; that he was incurring extra work that had not been anticipated when he bid on the contract; that he was being treated differently from an adjacent

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contractor working under a similar contract; that the language of paragraph C.2.2.2 of the contract requiring debris piles to be "relatively clean" was ambiguous and that, therefore, he was entitled to extra compensation for meeting the higher standards the COR had imposed. On October 27, 1987, he submitted a nine-page claim, seeking a 27-percent increase in work costs (AF 44-52).

By November 2, however, the first rain had occurred, and the ACOR told the contractor not to do any more work with heavy equipment beyond the cleared areas. On November 4, the ACOR issued a partial suspension order shutting down all heavy equipment work for the year as of November 6 because of wet soil conditions. Hand work continued at the site until November 18, when all work ceased under a second suspension order. On November 23, the CO terminated the remainder of the contract for the convenience of the Government (AF 190-202).

On November 24, the COR wrote a file memorandum denying the contentions of the contractor with respect to the claim, providing various photographs of the contractor's debris piles and those of the adjoining contractor, which showed the differences in the amount of soil the piles contained. Fire-management expert Hunter also provided a November 24 memorandum stating that all but one of the contractor's debris piles were too dirty to burn (AF 177-89). The CO responded to the contractor on December 28 with an eight-page, no-cost settlement proposal that would have allowed the contractor 6 percent above the prorated contract amount for the work completed, despite an alleged lack of claim documentation (AF 31-52). The contractor rejected the proposal in a 23-page letter dated January 8, 1988 (AF 8).

Apparently another meeting ensued, for on February 1, 1988, the contractor wrote to the CO reporting on an unsatisfactory meeting with the COR, whom he accused of being belligerent, narrow minded, and opinionated, and unwilling to consider the contractor's position. On February 2, the COR sent the CO a memorandum stating his disagreement with all of the contractor's contentions. The CO responded to the contractor's letter on February 16 and issued her denial of the claim on April 26, basing her decision primarily on the language of C.2.2.2 of the contract. The contractor apparently noted an exception to the release clause in the final payment document, and the CO issued her final decision in the matter on May 23, 1988 (AF 1, 147-76). The contractor appealed to the Board on August 20, 1988, and a 3-day hearing was held in Portland, Oregon, on February 28 - March 2, 1989.

Discussion

Although the Board recognized the various and obvious difficulties of appellant in attempting, as a *pro se* litigant, to prove his case at the evidentiary hearing, it soon became evident, once BLM began the

presentation of its case, that the primary issue in the case was the interpretation of the "relatively free of dirt or soil, so it can be readily burned" language of paragraph C.2.2.2 of the contract, referring to the debris piles. Virtually all of the extra work claimed by the contractor had to do with his attempts to make the individual loads of logs and stumps cleaner by dropping them several additional times before adding them to the debris piles.

The contractor's position was that the Government had caused it to incur additional expense by directing it to perform the additional drops. The Government's position, by contrast, was that it neither controlled nor attempted to control the manner in which the contractor met the "readily burnable" requirement of the contract: The Government stated that it was interested only in the cleanliness of the resulting debris pile, and that the contractor was free to achieve that cleanliness in any way it reasonably chose to do so.

[1] Although the contractor attempted to prove disparate treatment of similar contractors by the testimony of two of them—the one that worked on an adjacent parcel and the one that completed appellant's parcel after the termination for convenience—this testimony was useful primarily in establishing that BLM had imposed the same high cleanliness standards on them as well, and that "relatively clean," in their opinion, meant approximately 90-percent dirt free. BLM's fire-management expert testified to the same effect, as did the COR and ACOR. All three concluded that the contractor's debris piles, except for No. 3, contained at least 35 to 45 percent of dirt or soil.

Both parties to the appeal introduced large, before-and-after-burning, color photographs of the debris piles involved, which appear to be in direct conflict with one another. Appellant's photographs, Appellant's Exhibits A-1 through A-10, show not only its stump dropping technique but also four of the five piles before burning, and all five after burning. Both the piles and the burns appear to be satisfactory in appellant's photographs. By contrast, Government Exhibits Nos. 15, 18-21, 24, 26-28, 30, 32, 33, 35, and 36, which apparently show close-ups of the same five piles, manifest considerable dirt and soil in every pile before burning, except No. 3, and unsatisfactory results after burning for all but No. 3. There is no way to reconcile this conflicting evidence except to rely on the oral testimony of the parties.

However, even if we disregard the photographs and the testimony of both parties with respect to them, appellant still had the burden of proving that BLM required him to do something beyond the scope of the contract in making the piles clean enough to burn; and since we have determined the specifications involved to have been performance specifications, he has failed to do so. Thus, he has not met his burden of proof that he was required to do extra work under the contract.

Accordingly, we find that where the land-clearing contract before us required all hauled material to be relatively free of dirt or soil so it could be readily burned, and where credible testimony by the Government's witnesses, including a fire-management expert, was

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unanimous in stating that the debris piled by the contractor failed to meet that standard, the contractor is not entitled to additional compensation for its unforeseen, but largely unsuccessful, extra work in attempting to meet the contract's specification on the basis of the mere allegation that the work "relatively" made the specification ambiguous.

[2] The fact that the contract was terminated before completion at the Government's convenience does not alter that conclusion; for we conclude that extra work by a land-clearing contractor that would not have been compensable if the contract had been successfully completed does not become compensable merely because the contract was later terminated for the Government's convenience.

Besides his claim for 27-percent extra work, which we do not find to be meritorious, the contractor sought interest on various amounts claimed. Since we make no award on appellant's claim, the claim for interest is also denied.

The contractor also sought additional move-in and move-out expenses for his equipment, since the CO in her decision had prorated those amounts between the work that had been completed and the work that was still incomplete at the time of the termination for convenience. However, that claim became moot because the Government at the prehearing conference conceded its liability for the entire amount as a legitimate termination settlement cost.

Finally, the contractor claimed that the CO had not prorated correctly between item 1-A, clearing and grubbing, and item 2-B, leveling and ripping, and that he was due additional compensation on that basis. However, he not only did not prove the accuracy of his computations at the hearing, but BLM testified with equal credibility that even if the contractor's basis for proration were accepted, he had already been fully compensated for the small additional amount claimed as part of the termination settlement. In any event, we are unable to find that the contractor was successful in proving his allegations in this regard, so the claim must be denied.

Decision

In summary, the contractor has failed to carry his burden of proof, and his claims must be, and hereby are, denied in their entirety.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

**APPLICATION OF JAMES W. SPRAYBERRY CONSTRUCTION
FOR COSTS, FEES, & EXPENSES****IBCA-2298-F****Decided: May 4, 1989****Contract No. CX-5000-5-0027, National Park Service.****Sustained in part.****Equal Access to Justice Act: Contract Disputes Act of 1978:
Substantially Justified—Equal Access to Justice Act: Contract
Disputes Act of 1978: Allowable Expenses**

Upon determining that the inaction of the Government in failing to respond to the contractor's several requests for clarification of defective specifications was unreasonable, the Board holds that the Government has thus failed to establish a substantially justified position. Further, the Board holds: that it has no authority, under the EAJA, to allow an award for attorney fees in excess of \$75 per hour, in the absence of an agency regulation providing otherwise; that the EAJA excludes the allowance of costs for lay witnesses; that docket fees not paid are not allowable; and that photocopying charges not shown to be necessary in the preparation and presentation of the underlying litigation will not be allowed as excessive and unreasonable.

APPEARANCES: Martin R. Salzman & Jeffrey L. Evans, Hendrick, Spanos & Phillips, Attorneys at Law, Atlanta, Georgia, for Appellant; Donald M. Spillman, Department Counsel, Atlanta, Georgia, for the Government.

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

This timely filed application arises out of the decision by this Board in the *Appeal of James W. Sprayberry Construction*, IBCA-2130 (Mar. 6, 1987), 87-1 BCA ¶ 19,645, wherein we held a termination for default improper, as coming within the defective specifications or right to await clarification exception to the duty to proceed rule. We found that despite the contractor's many requests to do so, the project architect and contracting officer for the National Park Service refused to clarify the technical method or procedure to be employed by the contractor to install roofing materials and, at the same time, comply with the specifications of the contract. The decision resulted in the conversion of the termination for default to a termination for the convenience of the Government and an award to Sprayberry for costs incurred during performance of the contract. The amount of the award was \$45,120 together with statutory interest.

Pursuant to the Equal Access to Justice Act (EAJA), applicant claims a total of \$21,671.15 for attorney fees and costs involved in litigating the underlying appeal, IBCA-2130, and this proceeding. This claim for fees and costs has been presented to the Board in three segments: the Original Application, the Supplemental Application, and the Second Supplemental Application, substantially as follows:

May 4, 1989

Original Application

A. Costs incurred directly by the contractor, Mr. Sprayberry:

1. Transcript fee.....	\$124.75
2. Witness fees (lay & expert).....	2,426.08
3. Cost of copying papers.....	48.51
4. Miscellaneous, e.g. telephone/pstge.....	92.77
5. Docket fee under 28 U.S.C. § 1923	20.00
Total.....	\$2,712.11

B. Fees and costs of counsel for contractor:

(1) Attorney fees:

(a) Senior Atty—82.4 hrs. @ \$110.....	\$9,064.00
(b) Assoc. Atty—91 hrs. @ \$70	6,370.00

\$15,434.00

(2) Costs and Expenses:

(a) Postage	\$44.97
(b) Long distance telephone	131.73
(c) Photocopying charges	753.20
(d) Miscellaneous.....	128.61

1,058.51

Original application total

\$19,204.62

Supplemental Application

Fees and costs of counsel for contractor with respect to this EAJA proceeding:

(1) Attorney fees:

(a) Senior Atty—1.5 hrs. @ \$110	\$165.00
(b) Assoc. Atty—14.9 hrs. @ \$70	1,043.00

\$1,208.00

(2) Costs and expenses:

(a) Postage	\$2.75
(b) Photocopying charges	21.00

23.75

Total of supplemental application

\$1,231.75

Second Supplemental Application

Additional claims for time spent by lead counsel as well as other lawyers in the law firm for contractor, together with a claim for services of a legal assistant:

Lead counsel 5.2 hours @ \$110	\$572.00
Senior counsel 1.1 hours @ \$110	121.00
Senior counsel .5 hours @ \$110	55.00
Associate counsel .3 hours @ \$70.....	21.00
Associate counsel 1.8 hours @ \$80	144.00

Legal Assistant 11.1 hours @ \$35

388.50 \$1,301.50

Total of second supplemental application

\$1,301.50

Recapitulation

Original application	\$19,204.62
Supplemental application	1,231.75
Second supplemental application.....	1,301.50
Total claim for attorney fees and costs.....	<u>\$21,737.87</u>

As can be seen, there is a difference of \$66.72 between our addition and applicant's regarding the total amount claimed by this EAJA application.

The Government Position

The Government argues that its position in the underlying appeal was substantially justified, albeit incorrect, in that the contracting officer (CO) simply followed the *general rule* that failure of a contractor to proceed in accordance with an order of the CO will permit the Government to terminate for default; that the CO was not aware of the exceptions to the general rule set forth in the Board decision; and that had she been aware of them, she would not have recognized their applicability. Department counsel contends, on the basis of the authorities cited in his brief, that the Government here has met all the tests for substantial justification; that its position was reasonable; and that the subject EAJA applications for attorney fees and expenses should be denied. In addition, he pointed out that the net worth statement, showing that applicant qualified for an EAJA award, was lacking and that the supporting documentation for attorney fees was deficient because it did not detail the services performed by date, hours, and description. Finally, Government counsel objects to the hourly rate of \$110 per hour claimed for Senior attorneys. He argues: that the EAJA provides that attorney or agent fees shall not be awarded in excess of \$75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee; that the affidavits of counsel for applicant purporting to support the rate of \$110 per hour, on the ground of limited availability of qualified attorneys, have no evidentiary support and are contradicted by the yellow pages of Atlanta's telephone book which list at least eight firms and 14 individuals engaged in the practice of Construction Law; and that he is not aware of any agency regulation which would permit an award of attorney fees in excess of \$75 per hour.

The Government has not otherwise challenged applicant's claims with respect to either entitlement or quantum.

Discussion

The Substantial Justification Issue

In *Pierce v. Underwood*, 108 S. Ct. 2541 (June 27, 1988), 101 L.Ed.2d 490, the Supreme Court held that for purposes of EAJA applications for attorney fees and other expenses, the term, *substantial justification*, means "justified in substance or in the main, that is, justified to a degree that could satisfy a reasonable person." As a result

May 4, 1989

of *Pierce*, in *Application of Intersea Research Corp.*, IBCA-2084 F (Dec. 20, 1988), 89-1 BCA ¶ 221,448, we concluded that we need to ask, in determining each EAJA case, "Did the Government have a reasonable basis for its action or inaction?" We said, "If we find that it did not, then it follows that the position of the Government must be held not to have been substantially justified." In that case we also cited legal authority for the rule, that the Government bears the burden of proving its position to have been substantially justified.

In this case, we believe that the inaction of the Government in failing or refusing to respond to the contractor's several requests for clarification of the slope requirement for the roof installation was clearly unreasonable. Therefore, we hold that the Government has failed to meet its burden of showing its position to have been substantially justified.

Applicant's Net Worth and Supporting Documentation

We agree with the Government, that had the applicant submitted only his initial application in this proceeding, the net worth showing required by the EAJA would have been insufficient for qualification. Likewise, the supporting documentation for attorney fee claims, by not detailing services performed by date and description, was lacking. However, these deficiencies appear to have been corrected by the subsequent application supplementation and exhibits attached to applicant's briefs, and we so find. We note that the Government made no further objection after the supplementary documentation was filed. The Government conceded that applicant was a prevailing party in the underlying proceeding.

The Hourly Rate for Attorney Fees

The Government objection to the hourly rate of \$110 per hour claimed by applicant for Senior attorneys is well taken. Under 5 U.S.C. § 504(b)(1)(A), of the EAJA, "attorney or agent fees shall not be awarded in excess of \$75 per hour *unless the agency determines by regulation* that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee." (Italics supplied.) As Government counsel pointed out, applicant has not cited any agency regulation, and we know of none, whereby an award in excess of \$75 per hour has been determined to be justified. Consequently, we find and hold that we are not authorized to allow more than the \$75-per-hour rate for attorney fees. We find that 90.7 hours, at the rate of \$110, has been included in this application for Senior attorneys, and therefore, hold that the claim for that item must be reduced by 90.7 multiplied by a factor of \$35 (the difference between \$75 and \$110 per hour), or a total of \$3,174.50. Furthermore, in the Second Supplemental

Application, 1.8 hours at the rate of \$80 per hour has been included in applicant's claim for Associate Counsel fees. Therefore, an additional reduction of 1.8 hours at \$5, or \$9 must be made, for a total reduction of \$3,183.50 with respect to attorney fees.

Other Disallowed Expenses

Under section 504(b)(1)(A) of the EAJA, "fees and other expenses" are defined to include "reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees." We interpret this statutory provision to exclude an allowance for costs incurred with respect to lay witnesses, since in the definition, only reasonable expenses of *expert* witnesses were included. Therefore, we must and do disallow the expenses attributable to lay witnesses (one of whom was the applicant himself) as set forth in A.2. of the Original Application. We find the costs and expenses claimed for the expert witnesses, Mr. Bailey of Lieck Surveying Service, and Mr. Ross Andrews, Architect, in the amount of \$650 to be reasonable and will allow that sum. Accordingly, since the total expenses for both lay and expert witnesses were claimed to be \$2,426.08, the total amount of the disallowance is the difference between \$2,426.08 and \$650, or \$1,776.08.

Item A.5 in the Original Application, is a claim for a \$20 docket fee under 28 U.S.C. § 1923. Both the applicant and his counsel should know that no docket fee was paid in either this, or the underlying, proceeding, since docket fees are not charged in proceedings before this Board. They should also know that 28 U.S.C. § 1923 pertains only to court proceedings in the Judicial Branch of the Federal Government and is not applicable to proceedings before Boards of Contract Appeals. Therefore, that item of \$20 is disallowed.

We also find item B.(2)(c), photocopying charges, in the amount of \$753.20, to be exorbitant and unreasonable. We note that the supporting documentation lists charges on 13 separate days for photocopying and that the total amount is in excess of \$800. However, there is nothing in that documentation which shows to our satisfaction that that much photocopying was necessary for the preparation and presentation of the two proceedings involved. We also observe that the evidence fails to specify the number of documents copied as well as the cost per copy. For this expense, we will allow \$153.20 and disallow the remaining \$600 as unreasonable.

Recapitulation of Disallowances

Attorney fees.....	\$3,183.50
Lay witness expenses.....	1,776.08
Alleged docket fee	20.00
Excessive photocopying	600.00
Total disallowances.....	<u><u>\$5,579.58</u></u>

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Decision

Based on the foregoing findings, conclusions, and analyses, we subtract \$5,579.58 disallowed from the amount of \$21,737.87 actually claimed and award applicant the net sum of \$16,158.29 for attorney fees and other expenses incurred with respect to applicant's appeal docketed as IBCA-2130 and this proceeding.

DAVID DOANE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

**INTERPRETATION OF SEC. 203(a) OF THE RECLAMATION
REFORM ACT OF 1982 & SECS. 105 & 106 OF PUBLIC LAW
99-546***

M-36959

May 20, 1988

Contracts: Generally

Changes or amendments to water district contracts that do not require the United States to (1) expend significant funds, (2) commit additional water supplies, or (3) substantially modify contract payments it receives, do not constitute supplemental or additional benefits within the meaning of sec. 203(a)(2) of the Reclamation Reform Act of 1982 (RRA), and do not trigger the application of the discretionary provisions of the RRA.

Contracts: Generally

The "new or amended contracts" language in secs. 105 and 106 of the Coordinated Operations Agreement legislation, Public Law 99-546 (1982), is to be construed consistently with secs. 203(a)(1) and (2) of the RRA. Only new or amended contracts that trigger either secs. 203(a)(1) or (2) are subject to the water rate provisions of secs. 105 and 106.

* Not in chronological order.

Memorandum**To: Assistant Secretary, Water and Science****From: Solicitor****Subject: Interpretation of Section 203(a) of the Reclamation Reform Act of 1982 and Sections 105 and 106 of Public Law 99-546****I. Introduction**

This responds to your memorandum of February 22, 1988, requesting our opinion on the proper interpretation of two related provisions in Reclamation law. First, you request advice as to the proper interpretation to be given the "supplemental or additional benefits" language used in section 203(a)(2) of the Reclamation Reform Act of 1982 (RRA), 43 U.S.C. § 390aa *et seq.* That language defines contracts subject to the new pricing and acreage provisions of the RRA. Second, you ask whether sections 105 and 106 of Public Law No. 99-546, 100 Stat. 3050, 3051-3052 (October 27, 1986) (COA Legislation or COA), should be interpreted consistently with that language, such that the higher pricing provisions of those sections do not apply when amendments to district contracts *do not* enable the district to receive "supplemental or additional benefits" as the term is used in section 203(a) of the RRA.

In your memorandum you presented three general types of contract amendments which raise these questions: (1) amendments which are essentially for the benefit of the Bureau of Reclamation (Bureau); (2) amendments which constitute technical changes of mutual benefit to the Bureau and the water district; and (3) amendments which effect changes mandated by new legislation. For the most part, these types of amendments deal with minor aspects of water service contracts and are for administrative purposes only. For example water districts receiving Central Valley Project (CVP) water have requested contract actions from the Bureau in an effort to meet certain water quality standards or to achieve enhanced water conservation. In these circumstances, the water districts are requesting actions allowed under their contracts, actions which would not require amendment of the contracts. Examples of such actions might be a change in diversion points or any other benefit accorded by the contract that only needs approval of the Secretary to implement. To approve and implement these actions, the Bureau might require that the relevant contract be amended, for example, to revise the schedule of payments from the district to the United States. Therefore, it is not the "contract action" that is subject to scrutiny as an amendment, but the conditions imposed by the Bureau in exchange for its approval of contract action.

Another example given in your memorandum is the revision of the definition of the term "water-year" for some CVP water districts to

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provide greater flexibility and improved water use efficiency. A final example is the addition of a clause to all water service contracts to implement the requirements of the Privacy Act, 5 U.S.C. § 552(a).

The Bureau promulgated regulations which set out criteria for determining whether a contract amendment enables a district to receive supplemental or additional benefits. Applying those regulations to the foregoing contract amendments, the Bureau has found that these types of amendments do not meet those criteria. *See* 43 CFR 426.5(a)(2)(ii) (1987). Therefore, it has found that these amendments do not trigger the new pricing and ownership provisions of the RRA. Further, the Bureau has made the determination that contract amendments must meet the same standard, *i.e.*, must enable a district to receive supplemental or additional benefits, before the higher pricing provisions of the COA legislation are effective. We have reviewed the Bureau's regulations interpreting the term "supplemental or additional benefits" and conclude that they are consistent with the RRA. Further, the law supports the Bureau's administrative determination that the contract amendment provisions of the RRA and the COA legislation must be interpreted consistently, and thus, a contract amendment must enable a water district to receive a supplemental or additional benefit before the pricing provisions of the COA and the RRA are invoked.

II. *The Reclamation Reform Act of 1982*

In enacting the RRA, Congress established two general categories of water districts, those choosing to remain under prior Reclamation law, as amended by sections 209 and 230 of the RRA, and those coming under the new pricing and ownership limitations established by sections 203 through 208 of the RRA.¹ Section 203(a) sets forth the instances in which a water district becomes subject to the new pricing and ownership limitation provisions of the RRA. It provides:

The provisions of this title [RRA] shall be applicable to any district which—

- (1) enters into a contract . . . subsequent to the date of enactment of this Act;
- (2) enters into *any amendment of its contract . . . subsequent to the date of enactment of this Act which enables the district to receive supplemental or additional benefits;* or
- (3) which amends its contract for the purpose of conforming to the provisions of this title.

(*Italics added.*) 43 U.S.C. § 390cc(a). The specific question raised in your memorandum is the proper interpretation of the term "supplemental or additional benefits" as used in section 203(a)(2).

¹ The new pricing and ownership limitations represent a substantial change from prior law. For example, under the RRA, an individual has an ownership entitlement of 960 acres and pays a rate at least sufficient to cover full operation and maintenance charges. 43 U.S.C. §§ 390dd and 390hh. Under prior law, an individual has an ownership entitlement of 160 acres (320 acres for a husband and wife) and pays the so-called "contract rate" for water. 43 U.S.C. § 431. Therefore, the question of whether a water district remains under prior law or comes under the new provisions is an especially important one.

Congress authorized the Secretary to prescribe regulations to implement the provisions of the RRA. 43 U.S.C. § 390ww(c). Pursuant to this provision, the Department of the Interior (the Department) promulgated rules and regulations implementing that statute. See *Acreage Limitations Rules and Regulations*, 52 Fed. Reg. 11,938 (April 13, 1987), 43 CFR Part 426. Section 426.5(a)(3)(ii) of those regulations specifically addresses the term "supplemental or additional benefits." It states, in part, that:

All contract amendments will be construed as providing supplemental or additional benefits except those actions which *do not require the United States to expend significant funds, to commit to significant additional water supplies, or to substantially modify contract payments due the United States*. More specifically, amendments to existing contracts providing for the following shall *not* be considered to provide additional or supplemental benefits:

- (A) The construction of those facilities for conveyance of irrigation water that were contracted for by the district on or before October 12, 1982;
- (B) Minor drainage and construction work contracted for under a preexisting repayment or water service contract;
- (C) O&M (operation and maintenance) amendments, including Rehabilitation and Betterment loans that are considered loans for maintenance under § 426.13(a)(5);
- (D) The deferral of payments, provided the deferral is for a period of 12 months or less;
- (E) A temporary supply of irrigation water as set forth in § 426.13(a)(3);
- (F) The transfer of water on an annual basis from one district to another . . . ;
- (G) Other contract amendments which the Secretary determines do not provide additional or supplemental benefits.

(Italics added.) 52 FR 11,956-57 (April 13, 1987).

Section 426.5(a)(3)(ii) of the regulations represents the Department's administrative interpretation of section 203(a) of the RRA.² We necessarily begin our analysis with the very important presumption in favor of an administering agency's administrative construction of a statute. Under that presumption, the agency's interpretation will be affirmed by the courts unless it is inconsistent with the statutory mandate. *Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 30 (1982); and *American Maritime Ass'n v. Stans*, 329 F.Supp. 1179, 1183 (D.D.C. 1971). In this case, the Department's interpretation is not inconsistent with the statutory mandate.

The legislative history of the RRA indicates that the new pricing and ownership limitations of the RRA were, in part, the result of Congress' concern about establishing realistic acreage limitations and limiting deliveries of low cost water to large farming operations.³ See

² The Acreage Limitation Rules and Regulations were first issued by the Department on Dec. 6, 1983. 48 FR 54,768 (Dec. 6, 1983). When the rules and regulations were reissued on Apr. 13, 1987, 52 FR 11,938, the substance of sec. 426.5(a)(3)(ii) remained unchanged as it relates to this analysis.

³ Existing fixed rate contracts did not provide for interest charges in computing a district's repayment obligation and did not allow for reduced payments based upon the ability of the farms in the district to pay for water. See H.R. Rep. No. 458, 97th Cong., 2d Sess. 13 (1982). Moreover, before the RRA, Reclamation law only limited the amount of subsidized water that could be delivered to land in any one ownership, while deliveries to leased land were not limited. 43 U.S.C. § 431.

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H.R. Rep. No. 458, 97th Cong., 2d Sess. 13 (1982), and H.R. Rep. No. 855, 97th Cong., 2d Sess. 29-30 (1982). But rather than repudiate all existing fixed rate contracts, Congress carefully provided that, absent a voluntary election, the pricing and ownership limitations of the new law would apply only to districts executing a new water service contract or amending an existing contract. See RRA §§ 203(a)(1) and (2), and 208, 43 U.S.C. §§ 390cc(a)(1) and (2) and 390hh. Further, the RRA specifically provided that not *all* contract amendments would trigger the new provisions of the RRA but only those contract amendments which enable a district to receive a supplemental or additional benefit. See RRA § 203(a)(2), 43 U.S.C. § 390cc(a)(2).

Therefore, Congress was careful to fully honor valid contracts entered into before the amendment of the RRA. The House Committee on Interior and Insular Affairs stated:

[T]he Committee also recognizes that there are in existence valid contracts entered into in full compliance with the law which govern the obligations of the district and its members to the United States. The committee believes that where possible, the United States should be held *fully bound to its contracts* and that it would be inappropriate as a matter of public policy, if not of law, for Congress to *unilaterally* change a district contract to impose upon it an obligation different than that to which it is presently committed.⁴

(*Italics added.*) H.R. Rep. No. 458, 97th Cong., 2d Sess. 15 (1982).

Thus, in the case of an amended contract, the requirement that the amendment enable a district to receive supplemental or additional benefits before the United States imposes RRA pricing and ownership limitations resulted from Congress' intent that changes in district contracts not be unilaterally imposed. The RRA requires, then, that the United States remain fully bound by existing contracts until new pricing and ownership limitations become effective as to a district as contractual consideration for a new contract or for an amendment whereby the United States grants a district a supplemental or additional benefit. Without this element of consideration, imposing the pricing and ownership limitations of the RRA would abrogate existing contracts contrary to congressional intent.

Consequently, section 426.5(a)(3)(ii) of the regulations establishes the general rule that some consideration, *i.e.*, a supplemental or additional benefit, must flow *from* the United States to the contracting district. Thus, the rule excepts as not providing supplemental or additional benefits those contract amendments "which do not require the United States to expend significant funds, to commit to significant additional water supplies, or to substantially modify contract payments due the United States. . . ." An amendment requiring no consideration on the

⁴ Congress emphasized its opposition to unilateral changes in water contracts in sec. 203(d), which reads as follows: "Amendments to contracts which are not required by the provisions of this title shall not be made without the consent of the non-Federal party."

part of the United States to the district, therefore, would not provide a basis for imposing the pricing and ownership limitations of the RRA upon a water district. In this respect, section 426.5(a)(3)(ii) of the regulations is consistent with both the language of section 203(a)(2) and the legislative history of the RRA.

Accordingly, contract amendments that do not meet the criteria set out in section 426.5(a)(3)(ii) do not constitute amendments that enable a district to receive supplemental or additional benefits within the meaning of section 203(a)(2) of the RRA. Applying this standard to the general types of contract amendments at issue here, the Bureau has concluded that they do not constitute amendments that enable a district to receive Supplemental or additional benefits. Amendments which effect changes mandated by new legislation, for example, contract amendments for Privacy Act compliance, and amendments constituting technical changes of mutual benefit to the Bureau and a water district do not: (1) require the United States to expend significant funds, (2) require the United States to commit additional water supplies, or (3) modify contract payments due the United States substantially. Thus, these contract amendments do not convey supplemental or additional benefits within the meaning of section 203(a) of the RRA.

Further, while the record for approval of the water year amendment shows that the amendment would be of a benefit to water districts, the benefits mentioned, such as improved water conservation, do not flow from the United States, but from efficiencies in the operation of the water districts. Accordingly, there is no consideration flowing from the United States to the water district to support the imposition of a higher water rate in this instance.

In your example of contract actions that is, actions allowed by a contact but for which Bureau approval carries with it terms amending the contract, the amendments made for the benefit of the United States could result in increased payments due the United States. Section 426.5(a)(3)(ii) includes as providing a supplemental or additional benefit those amendments that "substantially modify contract payments" and could be read as including increases as well as reductions in payments. However, such a reading would be contrary to the statute, which requires that some benefit flow to the water district before higher ownership limitations and prices would apply. An increase in payments to the United States would not constitute an additional or supplemental benefit to the district within the meaning of section 203(a)(2) of the RRA. See Memorandum to the Commissioner, Bureau of Reclamation, from Assistant Solicitor, Water and Power, dated May 4, 1984. Therefore, the regulations can properly be read as requiring a decrease in payments due the United States before the district could be said to receive an additional or supplemental benefit from a contract amendment.

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Consequently, the RRA, its legislative history and the Department's regulations when read together support the Bureau's interpretation that the kinds of contract amendments referred to in your memorandum of February 22, 1988, do not constitute amendments that would enable a water district to receive supplemental or additional benefits within the meaning of section 203(a)(2) of the RRA.

III. Sections 105 and 106 of Public Law 99-546

A. Application of Plain Meaning Rule

Congress enacted Public Law 99-546, 100 Stat. 3050 (October 27, 1986) (the COA legislation or COA) to coordinate the operation of the Bureau's Project CVP and California's State Water Project, and to clear up the confusion surrounding the application of California water quality standards. H.R. Rep. No. 257, 99th Cong., 2d Sess. 6-7 (1986). Late in the legislative process a Senate amendment was passed which added what became sections 105 and 106 of the COA legislation, relating to the pricing of water delivered in the CVP.

Section 105 provides:

The Secretary . . . shall include *in all new or amended contracts* for the delivery of water from the Central Valley project a provision providing for the automatic adjustment of rates . . . if it is found that the rate in effect may not be adequate to recover the appropriate share of the existing Federal investment in the project by the year 2030.

(*Italics added.*) 100 Stat. 3051-3052. Section 106 of the COA legislation requires that "each *new or amended contract*" for delivery of water in the CVP include provisions, "ensuring that any annual deficit . . . incurred . . . in payment of operation and maintenance costs . . . is repaid . . . together with interest on any such deficit . . ." 100 Stat. 3052.

You have raised a question as to the proper interpretation of the term "new or amended contracts" in sections 105 and 106 of the COA legislation. Specifically, you have concluded that those sections should be read consistently with the provisions of the RRA requiring that an amended contract enable a district to receive a supplemental or additional benefit before it triggers a higher water price. We concur that the plain meaning of the statutory language as well as the legislative history of the COA supports your interpretation.

Within the context of Reclamation law, the plain meaning of the term "new or amended contract" incorporates the "supplemental or additional benefits" limitation of section 203(a) of the RRA. The "new or amended contracts" language is repeatedly used by Congress as shorthand for the language set out in section 203(a) of the RRA. The title of section 203 is "new or amended contracts." 43 U.S.C. § 390cc. Furthermore, the Conference Report on the bill that became the RRA repeatedly refers to the longer definition of contract amendments as

those "which enabl[e] a district to receive supplemental or additional benefits" in shorthand as "new or amended contracts." For example, the Conference Report stated:

House: The House amendment requires that all *new and amended contracts* provide that the price of project water shall be at least sufficient to recover all O&M water charges which the district is obligated to pay the United States. Each year the Secretary shall calculate such O&M charges and modify the price of project water accordingly. This provision does not apply to districts which operate and maintain project facilities without the benefit of Federal funds.

Senate: The Senate amendment has no comparable provision.

The conferees adopted a provision which would be applicable to all new contracts, contracts amended to receive additional or supplemental benefits after the date of enactment, and to districts electing to amend their contracts to take advantage of the benefits of the new law and to individuals electing to be subject to the new law.

(Italics added.) H.R. Rep. No. 855, 97th Cong., 2d Sess. 33 (1982). (See also page 35 of that Report, which states: "The House amendment requires a water conservation program applicable to districts which enter into new or amended contracts.") Therefore, the plain meaning of the "new or amended contracts" language, as used in the COA, is new contracts or amended contracts *which enable a district to receive a supplemental or additional benefit*.

Nevertheless, it could be argued that the language of sections 105 and 106 appears to require that *any* or *each* amendment to a contract bring with it the special rate provisions of sections 105 and 106. But even if we assumed arguendo that this was the "plain meaning" of those sections, the plain meaning rule is not to be applied unthinkingly or irrationally. In *Interstate Commerce Comm'n v. T-T Transport Co.*, 368 U.S. 81, 107 (1961), the Supreme Court stated:

[T]he plain meaning rule as an automatic canon of statutory construction is mischievous and misleading and has been long ago rejected. . . . [T]he real meaning of seemingly plain words must be supplied by a consideration of the statute as a whole as well as by an inquiry into the relevant legislative history.

In *Shapiro v. United States*, 335 U.S. 1, 31 (1948), the Court pointed out that "the plain meaning rule [must] give way where its application would produce a futile result or an unreasonable result." In this case, application of the plain meaning rule to read sections 105 and 106 of the COA legislation as applying to *any* contract amendment would implicitly amend section 203(a) of the RRA as it relates to the CVP and leads to an unreasonable result. However, this is a change, and a major change, just 4 years after the RRA was passed, and only months after the RRA became fully operable, that was never mentioned by Congress in the legislative history of the COA.

In 1982, Congress passed the RRA, the first comprehensive revision of Reclamation law in several years. The mainstay of the new scheme was realistic ownership allowances and pricing limitations.

Specifically, under the RRA, qualified recipients could own up to 960 acres, and would pay a rate at least sufficient to cover full operation

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and maintenance charges, as contrasted with an ownership allowance of 160 acres and contract rates under prior law. To assure no forced adherence to the new scheme, Congress provided that a water district could come under the new ownership and pricing provisions voluntarily, either by electing to come under those provisions or by executing a new contract or amending an existing one to enable it to receive supplemental or additional benefits. 43 U.S.C. § 390cc.

It is against this background that 4 years later Congress passed the COA legislation to set water rates specifically for the CVP. Whereas the RRA requires that districts that voluntarily come under the new provisions pay a minimum cost equal to operation and maintenance charges, sections 105 and 106 of the COA legislation require that new or amended contracts in the CVP contain provisions providing for cost recovery of a capital component and automatic rate increases to cover operation and maintenance deficits plus interest. 100 Stat. 3051-52. A reading of these sections that would apply them to any contract amendment, no matter how minor or technical or for whose benefit, would result in an increase in water rates in those contracts to a level above the minimum required by section 208 of the RRA. Therefore, CVP water users who would not otherwise come under the pricing provisions of the RRA would be forced nevertheless to pay higher water rates exceeding the minimum of section 208 of the RRA without the corresponding benefit of the increased ownership entitlement provided in section 204 of the RRA. This result would upset the fundamental and hard-fought compromise underlying the RRA—higher water rates voluntarily taken in exchange for some benefit, including increased ownership entitlements. See H.R. Rep. No. 855, 97th Cong., 2d Sess. 30 (1982). Thus, this interpretation would implicitly amend the scheme set out in section 203(a) providing that only those contract amendments which enable a district to receive supplemental or additional benefits trigger higher water prices. Implied amendments to statutes are as disfavored as implied repeals. *Regan v. Ross*, 691 F.2d. 81, 87 (2d Cir. 1982).

Furthermore, it is important to note that there is no evidence that Congress intended to establish a third type of water recipient in the CVP, i.e., one that did not come under the new pricing and ownership provisions of the RRA but who nevertheless must pay higher water prices than required in that Act.⁵ Given that the legislative history of the RRA indicates that Congress was reluctant even to establish two

⁵ Interpreting secs. 105 and 106 to apply to all contract amendments would create three types of water recipients in the CVP: (1) those triggering sec. 203(a) of the RRA who would therefore have increased acreage entitlements as either qualified recipients (960 acres) or limited recipients (640 acres) under sec. 204 of the RRA and who would pay COA water rates; (2) those not triggering sec. 203(a) and not otherwise triggering secs. 105 and 106, who would remain subject to the 160-acre entitlement of pre-RRA Reclamation law and who would pay contract water rates; and (3) those not triggering sec. 203(a) but who do trigger secs. 105 and 106 through a contract amendment, who would remain subject to the 160-acre entitlement of pre-RRA Reclamation law and would pay COA water rates.

types of water users in the RRA—those coming under the new provisions and those still under prior law—it is inconceivable that Congress would have intentionally established three types of water users through the COA legislation. In this regard, the House Report No. 458 states: “The Committee recognizes that it is not desirable to have a situation in which there are differing policies and laws applied to the administration of what is essentially the same Federal program.” H.R. Rep. No. 458, at 14-15.

Therefore, a reading of sections 105 and 106 that applies the sections to any and all contract amendments produces the bizarre result set forth above—a result completely inconsistent with the congressional intent underlying the RRA—and produces an implied amendment of section 203(a). Thus, even if we assumed that that reading represented the “plain meaning” of those sections, we must look at the legislative history of the COA to determine congressional intent on this issue. *Interstate Commerce Commission v. T.T. Transport Co.*, *supra* at 107.

B. Legislative History of Sections 105 and 106

The legislative history of sections 105 and 106 of the COA support an interpretation of the “new and amended contracts” language as incorporating the “supplemental or additional benefits” language of sections 203(a)(2) of the RRA. That history shows that Congress was not attempting to change the *trigger* for higher priced water in the CVP, but, rather, was focusing on the *formula* for determining the price of that water.

Specifically, the legislative history of sections 105 and 106 of the COA legislation indicates that in these sections Congress was primarily addressing the narrow issue of the *specific rate* to be charged for water in the CVP under the RRA. It was not attempting to amend section 203(a) of the RRA to determine *when* these higher rates would be imposed on water districts.

Congress achieved its intended result of setting out a formula for ratesetting by codifying existing Bureau practice concerning cost-recovery and repayment costs for the CVP. That practice included a rate higher than the minimum set out in the RRA, but a rate that was well within the framework set out in the RRA.

The Senate amendment which added sections 105 and 106 (previously, sections 103 and 104) to H.R. 3113, the bill that became the COA legislation, was introduced and approved in a hearing before the Senate Committee on Energy and Natural Resources held on December 17, 1985. Russ Brown, Minority Professional Staff Member, explained to the Committee that the amendment represented an agreement reached between Senator Metzenbaum’s staff and the Committee with regard to cost recovery and repayment costs for the CVP. *Coordinated Operations Agreement Act: Hearings on H.R. 3113 before the Committee on Energy and Natural Resources*, 99th Cong.,

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1st Sess. 3 (1985). Mr. Brown emphasized though that, “[t]he effect of this [the amendment] is to place in the statute *existing Bureau of Reclamation practice* for the Central Valley Project.” *Id.* at 4 (Italics added.)

The Senate Report on the bill formalized Mr. Brown’s comments on the Senate amendment to H.R. 3113 by stating that the “effect of this section is to codify current practice by the Bureau of Reclamation except for the imposition of interest charges on operation and maintenance deficits originating as a result of project irrigation functions.” S. Rep. No. 265, 99th Cong., 2d Sess. 12 (1986).⁶ This language hardly suggests a major change in the comprehensive scheme laid out in the hard fought 1982 legislation.

To understand what Congress intended to do in the COA legislation, then, we must understand what current Bureau practice was at the time of its passage. At the time of enactment of the COA legislation in 1986, the Bureau had in place an interim ratesetting policy for the CVP, which required the accumulation of operation and maintenance deficits on an individual contractor basis, rather than across the entire CVP, and required recovery of a capital component relating to project works. It did not require interest on operation and maintenance deficits. Moreover, the policy was that these higher water rates would apply, consistent with section 203(a)(2) of the RRA, only when a district’s contract was amended such that the district received some benefit.

The most important aspect of “Bureau practice” then, is the specific ratesetting policy set out there. This is the policy that Congress focused upon, adopting in part, and amending in part. The interim CVP ratesetting policy in effect in 1986 is described in a five-option proposal report, *Establishment of Irrigation Water Ratesetting Policy and Resolution of Inspector General Issues*, May 1985 (report).⁷ In this report the Bureau recommends the component ratesetting method as the preferred approach.⁸ The Mid-Pacific Region of the Bureau of Reclamation has used the component ratesetting method in its CVP water service contracts since 1981.⁹

⁶ This statement is made in the explanatory paragraphs for both secs. 103 and 104 (which later became secs. 105 and 106) except that the language concerning interest rates only relates to sec. 106.

⁷ The five options were as follows: (1) component ratesetting method, (2) the modified postage stamp ratesetting without individual (with pooled) contractor deficits, (3) the modified postage stamp method with individual contract deficits, (4) the postage stamp rate method, and (5) the double postage stamp method.

⁸ The component ratesetting method pools capital and O&M costs among six components where applicable on an individual district basis rather than across all CVP water districts. The six components are (1) water marketing (administration costs), (2) storage, (3) conveyance, (4) conveyance pumping (e.g., lifting water from the Delta-Mendota Canal into the San Luis Canal), (5) canalside (direct) pumping (canalside relief pumping plants built by but not operated by the Bureau), and (6) the San Luis Drain. Rates computed by this method also contain a capital adjustment component for historic net repayment or deficit balance.

⁹ In 1987, the Bureau prepared a report outlining a six-option approach for establishing a final CVP ratesetting policy. The report recommends the component ratesetting method as adjusted to comport with the COA legislation. It is the Bureau’s conclusion that the component ratesetting method represents the most sound approach for the CVP since this method will recover annual O&M costs, capital costs, and past O&M deficits, including interest thereon, by the year 2030.

There were two significant aspects to this component ratesetting method. First, it ensured that the water rate recovered the capital component of the project. Second, it required the accumulation of operation and maintenance deficits on an individual contractor basis rather than accumulating deficits across the entire CVP.¹⁰ Congress' essential purpose in enacting sections 105 and 106 was to codify this ratesetting method while adding an interest requirement for operation and maintenance deficits. See S. Rep. No. 265 at 12.

It is important to note that the ratesetting policy adopted for the CVP in the COA was entirely consistent with the framework for ratesetting set out in the RRA. Specifically, the RRA requires that the price of irrigation water be at least sufficient to recover all operation and maintenance charges which the district is obligated to pay to the United States. 43 U.S.C. § 390hh. The component ratesetting method is well above the floor set out in the RRA.

Accordingly, it was the CVP ratesetting policy set forth in the 1985 report that was the focus of congressional concern in enacting the COA. This policy was the Bureau's "current practice" for the CVP at the time the COA legislation was enacted and was the practice that was codified in that legislation.

A different reading of the COA, that is, that sections 105 and 106 impose higher water rates for any contract amendment, no matter how trivial, would contravene the congressional policy so forcefully stated only 4 years earlier in the RRA that the United States remain bound to existing water contracts unless a contract amendment enables a district to receive a supplemental or additional benefit. H.R. Rep. No. 458 at 15. The types of contract amendments addressed here are perfect examples of minor contract amendments that should not, under this policy, trigger higher water rates: (1) amendments essentially for the Bureau's own benefit, for example, conditions to approval of contract actions; (2) technical changes of arguably mutual benefit at best, for example, water year changes; or (3) changes imposed by other laws, for example, Privacy Act changes. If these amendments could trigger a higher water rate in abrogation of an existing contract with a water district, it would accomplish precisely what Congress chose to avoid in enacting the RRA. *Id.* In effect, the United States would be bargaining to add, for example, Privacy Act provisions to an existing water service contract in consideration for high water rates. We strongly question the mutuality of the promises made in this example. This is additional support for the argument that Congress did not intend sections 105 and 106 of the COA legislation to change for the CVP the scheme set out in the RRA regarding the imposition of higher water rates.

¹⁰ The codification of this latter policy by Congress helped fulfill one purpose of the COA legislation (see 132 Cong. Rec. S. 9111 (daily ed. July 16, 1986)) that water contractors of Federal projects meet their share of the burden of achieving the higher water quality standards of that Act because each district would have to repay with interest its accumulated share of operation and maintenance deficits.

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Consequently, based upon the plain meaning of the term "new or amended contracts" within the context of Reclamation law, the legislative history of the COA legislation, the language of the RRA, and its implementing regulations, we conclude that Congress intended sections 105 and 106 of the COA legislation to apply only to contract amendments which enable a district to receive an additional or supplemental benefit. The weight of logic argues against a reading of the new or amended contracts language of sections 105 and 106 of the COA legislation to apply it to each and every contract amendment. Rather, the better conclusion is that Congress used the term "new or amended contracts" as a shorthand for the types of contract amendments described in section 203(a)(1) and (2) of the RRA. Therefore, the Bureau's interpretation that sections 105 and 106 of the COA legislation require that an amended contract enable a district to receive supplemental or additional benefits before the higher rate provisions of those sections are imposed is legally supportable.

IV. Conclusion

We conclude, as discussed in detail above, that in regulations addressing contract amendments, the Bureau has interpreted the term "supplemental and additional benefits" consistently with the Reclamation Reform Act of 1982, 43 U.S.C. § 390aa *et seq.* Further, the law supports the Bureau's administrative interpretation that the contract amendment provisions of the RRA and the COA legislation must be applied consistently, and thus a contract amendment must enable a district to receive supplemental or additional benefits before the pricing provisions of the COA and the RRA are invoked.

RALPH W. TARR
Solicitor

FEDERAL RESERVED WATER RIGHTS IN WILDERNESS AREAS

M-36914 (Supp. III)

July 26, 1988

Water and Water Rights: Generally

Federal reservation of water rights may be implied from withdrawal of land from the public domain and its reservation for a particular purpose.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes

Reservation of Federal water rights may be implied only to the extent previously unappropriated water is necessary to the primary purposes of the withdrawal and reservation of land.

Water and Water Rights: Generally—Withdrawals and Reservations: Springs and Waterholes

A finding of implied reservation of water rights requires a determination that reservation of water was the actual, albeit unexpressed, intent of Congress.

Water and Water Rights: Federally Reserved Water Rights—Wilderness Act

Sec. 4(d)(7) of the Wilderness Act of 1964, 78 Stat. 890, 16 U.S.C. § 1133(d)(6), provides that nothing in that Act shall constitute an express or implied claim or denial of exemption from State water law.

Water and Water Rights: Federally Reserved Water Rights—Wilderness Act

The legislative history of sec. 4(d)(7) establishes that its purpose was to preclude assertion of reserved water rights based upon wilderness designation, while preserving reserved rights which antedated such designation.

Water and Water Rights: Federally Reserved Water Rights—Wilderness Act

Designation of Federal lands as wilderness establishes wilderness purposes as "supplemental," not primary, purposes of the lands in question.

Water and Water Rights: Federally Reserved Water Rights—Wilderness Act

Designation of Federal lands as wilderness does not give rise to reserved Federal water rights under the Wilderness Act.

Memorandum

To: Secretary

From: Solicitor

Subject: Federal Reserved Water Rights in Wilderness Area

I. INTRODUCTION

The Solicitor's Office has recently been asked to advise the Department on the issue of whether to file claims for Federal reserved water rights for wilderness areas administered by the Bureau of Land Management (BLM) and the National Park Service (NPS).¹ Although briefly examined in a prior Solicitor's Opinion, the question of whether the Wilderness Act of 1964, 78 Stat. 890, 16 U.S.C. § 1131 *et seq.* (Wilderness Act), provides an adequate legal basis for claiming Federal reserved water rights has been raised again in discussions within the Department. As a result of those discussions, we have been asked to examine in greater detail the issue of whether Federal reserved water rights are created when wilderness areas are designated.

¹ Presently ongoing are adjudications regarding the Beaver Dam Mountains Wilderness Area on the Virgin River, Utah, the Organ Pipe and Casa Grande National Monuments on the Gila River, Arizona, and the Saguaro and Taumacacori National Monuments on the Santa Cruz River, Arizona. Claims for water rights were recently filed in the adjudications involving the latter two river systems. The National Park Service did not include a claim for wilderness rights in those filings.

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Solicitor's Opinion No. M-36914 of June 25, 1979, 86 I.D. 553-618 (1979) (hereinafter, Prior Opinion), analyzed the nature and extent of non-Indian Federal water rights for the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and Bureau of Land Management. Among other matters, the Prior Opinion defined and characterized the reserved water rights those agencies may assert under various statutes, executive orders, and Secretarial orders. One of the statutes discussed was the Wilderness Act. Specifically, the Prior Opinion, after a summary, three-paragraph analysis, held that lands designated by Congress as wilderness areas under that Act receive Federal reserved water rights necessary to accomplish wilderness purposes.² These wilderness purposes are described in the Prior Opinion as preserving and protecting wilderness in its natural condition without permanent improvements or human habitation and as fulfilling the public purposes of recreational scenic, scientific, educational, conservation, and historic use. Prior Opinion at 86 I.D. 553, 609.³

On the basis of a detailed examination of the Wilderness Act and its legislative history, we conclude that the better legal view is that Congress did not intend to create Federal reserved water rights when it provided for the designation of wilderness areas. Rather, Congress intended wilderness purposes to be secondary to the purposes for which the reservation on which wilderness areas are designated were originally created. As such, wilderness areas enjoy the benefits of water reserved for underlying parks, forests, or refuges but are not entitled to a separate and additional reservation of water. To the extent that the Prior Opinion is inconsistent with this opinion, the Prior Opinion is modified and superseded.⁴

² The conclusions of that Opinion, and their consistency with applicable rulings of the Supreme Court, have previously been drawn into question. See Waring & Samelson, *Non-Indian Federal Reserved Water Rights*, 58 Den. L.J. 783, 792 (1981) ("The Solicitor's conclusions concerning reserved water rights for wilderness areas are not supported by the Supreme Court's analysis"); Tarlock, *Protection of Water Flows for National Parks*, 22 Land & Water L. Rev. 29, 44 (1986).

³ In addition, the question of wilderness area reserved water rights is being litigated in several cases. In *Sierra Club v. Block*, 622 F.Supp. 842 (D. Colo. 1985), *appeal dismissed, sub nom. Sierra Club v. Lyng*, No. 86-1153 (10th Cir. Oct. 8, 1986), memorandum opinion and order issued June 3, 1987, this Department was originally one of the defendants but was deleted from an amended complaint after the Department submitted evidence that it had claimed reserved rights for "wilderness preservation" purposes in several national parks in Colorado. *Id.*, Motion to Dismiss (filed Mar. 26, 1984). In the case remaining against the Department of Agriculture, the District Court has found that Federal reserved water rights are created when wilderness areas are designated. See *Sierra Club v. Lyng*, No. 86-1153, Slip. Op. at 4-5. To date no appealable order has yet been entered by the District Court, therefore, the United States has not been permitted to challenge this finding on appeal. To the extent that we would reach the opposite conclusion and withdraw wilderness claims currently pending in Colorado state adjudications, it may be appropriate to simultaneously advise the Federal court of our actions. A conclusion opposite that in *Sierra Club v. Block* was reached by the Special Master in *State of New Mexico v. Molybdenum Corp. of America*, CV 9780C (D. N. Mex.), Report of Special Master (filed Mar. 27, 1987) at 10-11, Report of Special Master affirmed by the Court, Feb. 2, 1988, Motion for Reconsideration denied June 2, 1988.

⁴ The Prior Opinion was modified in certain non-relevant respects by supplemental Solicitor's Opinions dated Jan. 16, 1981, 88 I.D. 253-258, dated Sept. 11, 1981, 88 I.D. 1055-65, and dated Feb. 16, 1983, 90 I.D. 81-84. In neither of these three later opinions did the Solicitor address the issue revisited in this memorandum.

II. FEDERAL RESERVED WATER RIGHTS IN GENERAL

The courts created the doctrine of Federal reserved water rights at the turn of the century.⁵ In 1899, the Supreme Court in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), recognized the Federal Government's superior authority under the Commerce Clause to preserve the navigability of navigable waters and to receive a flow of water necessary for the beneficial uses of Federal property.

Specifically, the Court noted two limitations on the power of the states to alter the distribution of water within its boundaries:

First, that, in the absence of specific authority from Congress, a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property; second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

Id. at 703.

Relying on its opinion in *Rio Grande*, the Supreme Court shortly thereafter recognized an implied Federal reservation of water in situations in which the Government had set aside land for Indians. In *Winters v. United States*, 207 U.S. 565 (1908), the Court addressed a statute that had set aside lands for an Indian reservation but had not expressly provided for water to irrigate those lands. Despite the absence of express language, the Court found an implicit reservation of sufficient water to meet the needs of the Indians. The Court based this finding on the clear intent of Congress that the Indians should become a pastoral and civilized people and the fact that this intent would be frustrated if those Indians lacked sufficient water to irrigate their land.

For many years, *Winters* was seen as establishing a special rule applicable only to Indian water law.⁶ This understanding was reinforced by *California Oregon Power Co. v. Beaver Portland Cement*, 295 U.S. 142 (1935), in which a unanimous Court praised the western states' appropriative water rights doctrine as essential to "the future growth and well being of the entire region" and held that the Desert Land Act of 1877 "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself." *Id.* at 157, 158. Thus, the Court concluded, "following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states" *Id.* at 163-64. Following *California Oregon Power Co.*, Federal and state agencies and private appropriators all generally assumed that the *Winters* reserved water rights doctrine applied only to Indian lands, and that the Federal Government would obtain water rights for non-Indian lands only by complying with the substantive provisions of state water law.

⁵ For a complete description and history of the Federal reserved water rights doctrine, see the Office of Legal Counsel's June 16, 1982, memorandum, "Federal Non-Reserved Water Rights." (6 Op. Off. Legal Counsel 329 (1982).)

⁶ See Trelease, *Reserved Water Rights Since PLLRC*, 54 Den. L.J. 473, 475 (1977); Tarlock, *supra* at 39.

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This assumption essentially came to an end with *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955) (also referred to as the *Pelton Dam* decision), in which the Court ruled that a state agency could not deny permission to a Federal licensee under the Federal Power Act to construct a dam on lands reserved by the United States for that purpose.⁷ The implication of this decision was that the licensee was exercising a right of the Federal Government to use water reserved at the time the dam site was reserved. The Court limited *California Oregon Power* to "public lands," which were defined to exclude lands reserved for a specific purpose. *Id.* at 448. *FPC v. Oregon* was followed in *Arizona v. California*, 373 U.S. 546 (1963), in which the Court upheld a Master's conclusion that the United States intended to reserve water sufficient for the future requirements of certain refuges, National Forests, and a recreation area. 373 U.S. at 601.

In recent cases, the Supreme Court has further defined the scope of the reserved water rights doctrine and clarified that it is a narrow doctrine, applicable only when failure to obtain water would defeat congressional purpose and intent in reserving land. In a 1976 case, the Court indicated that Federal reserved water rights may be implied when the Federal Government withdraws land from the public domain and reserves it for a particular purpose, but only to the extent that the water is the minimum amount of unappropriated water necessary to accomplish the primary purpose of the reservation. *Cappaert v. United States*, 426 U.S. 128 (1976). These criteria are set out in general in *Cappaert*, in which the Court found that reservation of Devil's Hole as a national monument under the Antiquities Act, 16 U.S.C. § 481, also reserved sufficient unappropriated water to maintain the scientific value of the reservation:

[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water, then unappropriated to the extent needed to accomplish the purpose of the reservation. In doing so, the United States acquires a reserved right in unappropriated water which vests in the United States on the date of the reservation and is superior to the rights of future appropriators.

426 U.S. at 138.

In a case decided 2 years later, *United States v. New Mexico*, 438 U.S. 696 (1978), the Supreme Court considered the issue of whether reserved water rights were created for the maintenance of instream flows,

⁷ The Court in *Pelton Dam* examined two issues: (1) the jurisdiction of the Federal Power Commission under the Federal Power Act, 16 U.S.C. §§ 791a-825r, to issue licenses for dams on Federal reserved lands; and (2) the power of the states to regulate the use of waters under the Desert Land Act of 1877, 43 U.S.C. § 321, and other statutes relating to water use. It was only in the first examination that the Court referred to a section in the Federal Power Act providing that the Act would not interfere with state laws and water rights. 16 U.S.C. § 821, cited in 435 U.S. at 445, n.15. The courts have interpreted this section as an answer to questions regarding preemption of state law otherwise applying to Federal power projects. See, for example, *First Iowa Hydro-Electric Co-operative v. Federal Power Comm'n*, 151 F.2d 20 (D.C. Cir. 1945), *rev'd on other grounds* 328 U.S. 152, *reh'g denied* 328 U.S. 879. The Court in *Pelton Dam* did not cite this section as relevant to the question of reserved water rights.

recreation and stockwatering in national forests under the Organic Administration Act of 1897, 16 U.S.C. § 473 *et seq.*, and the Multiple-Use-Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. § 528 *et seq.* In briefs filed in the Supreme Court, the United States had argued that it was “entitled to reserved water rights to the extent of the purposes of the federal enclave, whatever those purposes may be.” Brief for the United States, *United States v. New Mexico*, No. 77-510, filed March 1978 (Brief) at 20. Following this reasoning, the Government argued that water was necessary for such purposes as assuring minimum stream flow for protection against fire and erosion and desecration of the watershed, for conservation of living things and for recreation and stockwatering and that these subsidiary purposes met the ultimate purpose of improving and protecting the forests. Brief at 20, 30, 50, and 61. Water being necessary, the argument went, it must be deemed to have been reserved by Congress when the National Forest system was established. Brief at 36.

However, the Court declined to take such an expansive view of the reserved water rights doctrine. Rather, in an opinion written by then Associate Justice Rehnquist, the Court sought to limit that doctrine by tying it to the intent of Congress as expressed in the legislation creating the Federal reservation at issue. Specifically, the Court emphasized the general rule of deference to state law and the narrow exception that the reserved rights doctrine made to that rule. 436 U.S. at 715. The decision made clear that the presumption of the application of state law is overcome by an implied reserved water right only after a careful examination of “both the asserted water right and the specific purposes for which the land was reserved” and only if the Court could conclude that “without the water the purposes of the reservation would be entirely defeated.” *Id.* at 700.⁸ Implicit in this language is the conclusion that a reservation of land alone, without any other evidence of congressional intent, is insufficient to trigger an implication that water rights are reserved. Accordingly, the Court undertook a complete examination of the relevant statutes and their legislative histories in order to determine whether an inference could be drawn that Congress intended to create reserved water rights for the specified purposes in National Forests.⁹

After its examination, the Court in *New Mexico* denied Federal reserved rights for the purposes of maintenance of instream flows, recreation and stockwatering in National Forests, finding that these

⁸ The *New Mexico* Court gave several reasons for a cautious approach to a finding of implied reserved rights. First, any such reservation must be based upon implication in a situation in which Congress has not remained silent, it has “almost invariably” accepted state water law, that is, Congress has acted *against* the presumption asserted. Third, because the reserved right is unrecorded and has a priority backdated to the withdrawal which created it, it may upset existing water allocations, often by a “gallon for gallon reduction.” 436 U.S. at 701-03, 705.

⁹ It has been argued that the intent to create reserved water rights can be implied on the basis of a reservation of land and a showing that water is needed to meet the central purpose of the reservation. We do not disagree that these two elements are essential to a finding of reserved water rights. However, we do disagree that these are the only elements relevant to such a finding in light of the Supreme Court’s direction in *New Mexico* to consider carefully all facets of the statute at issue. Further, a reservation and need for water cannot overcome legislative history that evidences an intent to disclaim the creation of new reserved water rights.

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were not among the *primary purposes* included in the forest Service's Organic Administration Act and that these were not included as primary purposes under the MUSYA. Building on this finding, the Court held that it could not find an implication of congressional intent to reserve water rights for these secondary purposes. The Court explained:

[W]here water is only valuable for a secondary use of the reservation . . . there arises the contrary inference that Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator. In this regard, [w]here Congress has expressly addressed the question of whether Federal entities must abide by State water law, it has almost invariably deferred to the State law.

438 U.S. at 702. Therefore, implied Federal reserved water rights will be found by the Court only if necessary to accomplish the specific purposes for which Congress authorized reservation of the land and not for "secondary" or incidental uses.

With these legal standards in mind, we turn to the provisions of the Wilderness Act and the specific issue of whether Federal water rights are reserved when wilderness areas are designated.

III. SCOPE AND NATURE OF THE WILDERNESS ACT

Enacted in 1964 after 8 years of consideration, the Wilderness Act established a Federal policy of preserving congressionally designated "wilderness areas" on existing public lands. These areas remain within the jurisdiction of the agency originally responsible for them, but are to be "administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness . . ." Section 2; 16 U.S.C. § 1131(a). The land managing agency is responsible for preserving the wilderness character of a wilderness area while continuing to administer the area for such other purposes for which it may have been established originally. Section 4(b); 16 U.S.C. § 1133(b). With certain exceptions, the Act prohibits commercial enterprises, roads, motorized vehicles, and structures within areas designated as wilderness. Section 4(c); 16 U.S.C. § 1133(c). The Act authorizes construction of reservoirs and water conservation works within National Forest wilderness, upon authorization of the President. Section 4(d)(4); 16 U.S.C. § 1133(d)(4).

To date, Congress has designated about 456 segments of Federal land for administration under the Wilderness Act. Approximately half of these are within lands administered by this Department.

As Departmental holdings in relatively arid regions lie predominantly high in their respective watersheds where legal ownership of a right to instream flows has little practical impact,¹⁰ the issue of our ability to

¹⁰ See *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 859 (9th Cir. 1983), citing the unlikelihood of upstream diversion as one reason for denying a Forest Service claim for an instream flow right.

assert such rights has rarely arisen. Reports from regional offices indicate, for instance, that the Fish and Wildlife Service has filed no reserved water rights claims for wilderness areas, and the National Park Service has filed but four such claims.¹¹

IV. APPLICATION OF THE FEDERAL RESERVED WATER RIGHT DOCTRINE TO WILDERNESS AREAS

The Wilderness Act of 1964 contains no express reservation of Federal water rights. Historically, subsequent statutes designating specific wilderness areas have not mentioned water rights. Rather, they merely effected the designation and directed that the area be managed in accordance with the 1964 Act. Therefore, to find a Federal reserved water right for wilderness areas, we must find that Congress by implication intended in the 1964 Act to reserve water necessary to meet wilderness purposes and that those purposes are specific and primary. A judicial finding of an intent to reserve a water right represents a determination that it was the actual, albeit unexpressed, intent of Congress, to so reserve water. See *United States v. New Mexico*, 438 U.S. at 701-02. In addressing the question of congressional intent, we must bear in mind the Supreme Court's admonition that a careful and searching examination of the legislative history is required. *Id.* at 700.

Two portions of the Wilderness Act and their legislative history merit special attention in attempting to discern congressional intent as to water rights: section 4(d)(7), which directly addresses water rights, and section 4(a), which delineates the status of wilderness uses. A careful review of those sections and the legislative history thereof leads us to conclude that Congress expressed an intent not to create new Federal reserved water rights when it enacted the 1964 Wilderness Act. This conclusion is based upon our view of section 4(d)(7) as specifically disclaiming the creation of new reserved water rights and of section 4(a) as assigning wilderness a secondary purpose on Federal reserved lands.

A. The Wilderness Act's Provision on State Water Law

The Wilderness Act establishes the National Wilderness Preservation System by providing for congressional designation of wilderness area on forests, parks and refuges. 16 U.S.C. § 1131. The Act specifies that those areas suitable for designation are to be identified by the Secretaries of Agriculture and Interior. 16 U.S.C. § 1132. The Act requires that the areas are then to be managed by the Secretary having jurisdiction over the underlying reservation so as to preserve

¹¹ All of these claims are in Colorado, and are the same ones reported to the court in *Sierra Club v. Block* as follows: Mesa Verde National Park, Case No. W-1633-76, Water Division No. 7, Application filed Dec. 1976, Amended Application filed Feb. 1977; Black Canyon of the Gunnison National Monument, Case No. W-437, Water Division No. 4, Application filed Dec. 1971; Great Sand Dunes National Monument, Case No. 81CW164, Water Division No. 3, Application filed Nov. 14, 1981; Rocky Mountain National Park, Case No. W-1768, Water District No. 5, Application filed Dec. 19, 1971, and Case No. W-8788, Water Application filed Dec. 29, 1971, and Case No. W-8788, Water District No. 1, Amended Application filed Dec. 29, 1977.

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the wilderness character of the lands while still using them for the other purposes for which they had originally been established.

16 U.S.C. § 1133. In the section of the Act on use of wilderness areas, Congress specifies certain activities which are prohibited in wilderness areas. *Id.*

Congress did not expressly reserve Federal water rights to accomplish these purposes of the Act. In fact, water resources were mentioned only twice in the Act. In paragraph (d)(5) of section 4, Congress authorized the President to allow prospecting for water resources and the establishment and maintenance of reservoirs and water-conservation works. 16 U.S.C. § 1133(d)(6), Congress addressed the issue of whether the Act was intended to provide an exemption from state water law with the following:

Nothing in this Chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

Subsequent to the 1964 Act, Congress enacted a number of statutes which designated individual wilderness areas. Rather than clarifying the issue of reserved water rights, the vast majority of those acts merely refer back to the 1964 Act for guidance as to the Federal management of the areas designated, and in some cases, repeat the language of section 4(d)(7). *See, for example,* Arizona Wilderness Act of 1984, 98 Stat. 1485, §§ 101(b) and (e).¹²

To the extent that the individual designating statutes refer back to the 1964 Act, then, the language of that Act would be determinant of the question of a reserved water right. Of course, if the specific designating statute were to expressly reserve a Federal water right, then that expression would control in the specific wilderness area designated.

Although section 4(d)(7) is far from clear on its face, the legislative history of the Wilderness Act gives meaning to it. That legislative history demonstrates that the section was intended to disclaim any new or additional reserved water rights while not relinquishing any existing water rights.

1. Section 4(d)(7) Specifically Disclaims New Reserved Water Rights

The legislative history of section 4(d)(7) indicates that it was intended to achieve a particular congressional objective, *i.e.*, to alleviate the concerns of western states that the Wilderness Act would form the basis for the assertion of additional Federal reserved water rights. In this regard, Senator Hubert Humphrey stated as follows with respect to what was to become section 4(d)(7):

¹² See, also The California Wilderness Act of 1984, 98 Stat. 1619, § 101(a); An Act to Designate Certain Areas within Units of the National Park System as Wilderness, 90 Stat. 2692, § 1; An Act to Designate Certain Lands as Wilderness; 84 Stat. 1104, § 1; An Act to Designate the Ventana Wilderness, 88 Stat. 101, § 1.

Paragraph 5, the last in this section, contains language vital to colleagues from the West. When the first wilderness bill was being discussed, some of its opponents charged that its enactment would *change existing water laws and would deprive local communities of water, both domestic and irrigation. Although this was certainly not the intention of the sponsors*, it has seemed necessary to insert a short sentence to remove any doubts. The sentence added says: "Nothing in this act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws."

104 Cong. Rec. 11,555 (1958) (italics added).

That these concerns surfaced is not surprising. When the Wilderness Act was first introduced, the impacts of implied water rights reservations were the subject of significant legislative controversy. The *Winters* doctrine had originally been seen as limited to Indian water law, a belief reinforced by the statement in *California Oregon Power* that Federal water rights on public lands had long ago been severed from the land and subjected to State allocation. 295 U.S. at 158. Then, only 2 years before the wilderness bills were introduced, the Supreme Court decided the *Pelton Dam* case, which contained language implicitly extending the reserved rights doctrine to non-Indian lands. This development was seen as upsetting state water allocations and even Federal agency practices.¹³ Legislation seeking to overrule that controversial decision, and to revoke all *existing* Federal water rights reservations, had been referred to the Senate Committee on Interior and Insular Affairs, which held extensive hearings throughout 1956.¹⁴ When S. 1176, the predecessor of the Wilderness Act, was referred to that Committee in 1957, it came before a body already conversant with the effects both of implicit reservations and also of waiver of existing Federal water rights. Therefore, the legislative history of the Wilderness Act is replete with references to water rights issues. These issues repeatedly surfaced during consideration of the Act, with legislators and witnesses repeatedly expressing concern that the Act might cut off vitally needed water.¹⁵

However, S. 1176, as introduced and referred to the Interior and Insular Affairs Committee, contained no express provisions relating to water rights claims. During hearings, the bill was criticized by William Berry, testifying for California's Departments of Water Resources, Game and Fish, and Natural Resources:¹⁶

¹³ The Supreme Court noted that, prior to the *Pelton Dam* decision, *Federal Power Comm'n v. Oregon*, and *Arizona v. California*, the Forest Service "apparently believed that all of its water had to be obtained under state law." *U.S. v. New Mexico*, 438 U.S. at 708, n.7.

¹⁴ See Hearings on S. 863 Before the Subcomm. on Irrigation & Reclamation of the Sen. Comm. on Interior and Insular Affairs, 84th Cong. 2d Sess. (1956) [hereinafter Hearings on S. 863]. See also Memorandum of the Chairman to the Members of the Senate Comm. on Interior and Insular Affairs, in connection with the consideration of S. 863, at 2 (Comm. Print 1956) (Describing S. 863 as seeking "to overcome the ruling in the Pelton Dam case."); *U.S. v. New Mexico*, 438 U.S. at 702, n.5.

¹⁵ See, e.g., Hearings on S. 1176 Before the Senate Committee on Interior & Insular Affairs, 85th Cong., 1st Sess. 329-32 (1957) [hereinafter Hearings on S. 1176] (testimony of National Reclamation Ass'n); *id.* at 417 (statement of Upper Colorado River Comm'n) ("This legislation is hostile . . . to the 17 western states where water development practices would be prevented.")

¹⁶ *Id.* at 281. Senator Neuberger accordingly referred to "the California agencies represented by you" which sought amendments, and Berry cited "those agencies that I represent." *Id.* 288-89 (italics added).

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The committee is very familiar with the serious problems concerning the validity of State water law that have been brought about by court decisions in recent years, and especially by the Pelton Dam decision—Federal Power Commission versus Oregon, 349 U.S. 435, 1955.

As I understand it, however, the Pelton Dam case may be a precedent for holding that State water law has no validity on reserved or withdrawn federal land . . .

The bills now before you would include large areas of national forests and wildlife management land in the national wilderness preservation system . . . The *Federal courts might well hold that land within such a system is reserved in the same sense as the land involved in the Pelton Dam case, that the Desert Land Act did not apply, and that State water law need not be followed.*¹⁷

To remedy this concern, the California agencies proposed an amendment to S. 1176 to subject all unappropriated water in wilderness areas to “appropriation and use of the public pursuant to State law.”¹⁸ This broad amendment would not only have precluded water reservations based on a wilderness designation, but also could have repudiated Federal water claims that antedated the designation. In addition to affecting claims for park and refuge use, this repudiation could also have destroyed the long-established water claims for Indian reservations, because S. 1176 provided for establishment of wilderness areas on Indian lands.¹⁹

In response to those hearings, the concerns of the three California Departments were addressed in two revised drafts of wilderness legislation. See 104 Cong. Rec. 11,551 (1958). Draft No. 2 contained the provision that was to become section 4(d)(7). Its origin was explained as follows in a report prepared by Howard Zahniser for, and submitted for the record in Senate floor debate by, Senator Neuberger:

Certain changes now incorporated in committee print No. 2, have been made to meet suggestions by the Department of Water Resources of the State of California. A statement by this department at the hearing added to the considerations in connection with making the changes suggested at the hearings by the Forest Service as regards reservoirs. After this change was made in the posthearing draft and incorporated in committee print no. 1, further consultations with representatives of the California Department led to the following further changes:

1. . . .

2. The California Department also recommended the insertion of an added special section which would provide that “nothing in this act shall constitute an express or implied claim on the part of the United States for exemption from State Water laws.” *Following consultations with various others, including those within Government Departments as well as legislators and specially interested citizens, this has been added as a clarification that would protect the California Department of Water Resources and any other State or other agency from any misuse of the wilderness bill in connection with water programs.*

¹⁷ Hearings on S. 1176, *supra* at 286 (italics added).

¹⁸ *Id.* at 286-87.

¹⁹ S. 1176 would have legislatively designated 15 wilderness areas on Indian reservations, plus such other roadless and wild areas as the Secretary might designate with tribal approval. S. 1176, § 2(d), Hearings on S. 1176, *supra* at 5-6. The initial proposal would thus have repudiated *Winters v. U.S.*, as to these areas. Because many of the rights at issue in *Winters* and its pre-1955 progeny arose out of Indian treaties, the denial of existing Federal claims might well have raised the issue of treaty abrogation.

This is in keeping with the purposes of the wilderness bill to provide for wilderness preservation as part of an overall program that also includes economic and other enterprise. The added section reads as follows: "(5) Nothing in this act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.²⁰

It is our conclusion that this passage, reported simultaneously with the reporting of Committee Draft No. 2, proves that section 4(d)(7) was enacted to meet the concerns of western states regarding water rights, i.e., to specifically avoid the creation of new or additional reserved water rights in the wilderness areas to be created in the future. This conclusion is supported by other provisions of the legislative history of the Wilderness Act and the legislative history of a later specific wilderness bill.

Section 4(d)(7) was described by the Committee's chairman as a "disclaimer of any interference with *State or Federal* water rights" through enactment of the wilderness legislation.²¹

Senator Humphrey's assurances on the floor that his language was vital to western Senators and would "remove any doubts" that Congress did not intend to "change local water laws" has been mentioned previously.

Further, legislators and the public were repeatedly assured that, in light of this section, the wilderness bills if enacted would not interfere with state water rights. For example, Charles Collison of the National Wildlife Federation interpreted the language to guarantee that "no claim is made to exemption from State Water laws on wilderness areas." *Hearings on S. 4028 Before the Senate Committee on Interior & Insular Affairs*, 85th Cong., 2d Sess., Pt. 2 at 257 (1958) [Hereinafter Hearings on S. 4028]. The Citizen's Committee on Natural Resources argued that claims made by commercial interests were "completely without justification" because, *inter alia*, "A special provision in the bill safeguards State water laws." *Hearings on S. 174* at 275. The New York Conservation Council stated that "all existing rights . . . will continue to be recognized, as will State water laws." *Id.* at 341. These statements simply cannot be reconciled with, and are completely opposite to, a conclusion that the Wilderness Act was intended to embody an implicit exemption from state water laws.

In addition, subsequent legislation confirms the view that section 4(d)(7) disclaimed the creation of new Federal reserved water rights. A bill to designate certain lands in Idaho as wilderness areas was considered and finally passed in the 96th Congress. That bill, S. 2009,

²⁰ 104 Cong. Rec. 6344 (1958) (italics added).

²¹ *Hearings on S. 174 Before the Senate Comm. on Interior & Insular Affairs*, 87th Cong., 1st Sess. at 5 (1961) (italics added). [Hereinafter Hearings on S. 174]. Others shared this view. See *id.* at 61 (testimony of Forest Service spokeswoman: "There is nothing [in the wilderness bill] that changes the situation with respect to water rights. It is very clear and specific in the bill."); *id.* at 65; 104 Cong. Rec. 11,557 (1958) ("It has been made clear that nothing in this legislation may be construed to modify existing water law"); *Hearings on S. 4028 Before the Senate Comm. on Interior & Insular Affairs*, 85th Cong., 2d Sess., pt 2 at 257 (1959) ("No claim is made to exemption from State water laws on wilderness areas.").

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and parallel House bills, contained a provision referring back to section 4(d)(7) of the Wilderness Act to address the application of state water laws to the designated wilderness area. *See* section 7(b) of S. 2009; H.R. Rep. No. 838, 96th Cong., 2d Sess. at 20 (1980). That provision reads as follows:

As provided in paragraph 4(d)(7) of the Wilderness Act, nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

Senator Church explained that this provision applied State water law to the wilderness area as, he stated, the Wilderness Act had done in section 4(d)(7):

Moreover, we desired to reiterate and underscore the jurisdiction of the State of Idaho over the water resources and fish and game within the wilderness areas and accomplished that by repeating the provisions of the 1964 act which relate to these issues.

See, also 125 Cong. Rec. 17,180 (1980). The same explanation of section 7(b) of S. 2009 was contained in the Senate Report on the bill which stated that "Section 7 further reiterates and underscores the jurisdiction of the State of Idaho over the water resources within the wilderness area . . ." S. Rep. No. 414, 96th Cong., 1st Sess. at 22 (1980).

In light of these explicit statements as to the intentions of Congress in enacting section 4(d)(7), it is clear that Congress disclaimed any intent to create *new* or *additional* reserved water rights for wilderness areas. Any other conclusion would entirely ignore the political balance Congress sought to achieve to address the concerns of western states. That the balance was achieved and that the disclaimer was effective is evidenced by California Senator Thomas Kuchel's support of the wilderness bill. The bill's sponsor, Senator Humphrey, had given California Senator Thomas Kuchel *carte blanche* to solve his State's problems with the bill ("I said to Senator Kuchel, for example, about mining rights and water rights; I said 'there is nothing in this bill that will prevent us from making whatever changes are required so that California can have its water.' "),²² and Senator Kuchel found Committee Print No. 2 satisfactory ("I am particularly pleased to note two changes, which have eliminated the objections of certain officials in California"), adding "[t]hat the section 4(d)(7) language seems to me to be sufficient.")²³

2. Section 4(d)(7) Specifically Retains Existing Water Rights

While section 4(d)(7) *disclaimed* the creation of any new or additional reserved water rights, we believe that it specifically *retained* existing Federal water rights, such as those existing on Indian reservations. In

²² "Senator Hubert Humphrey's informal Hearing on S. 1167, known as the Wilderness Bill," transcript dated Dec. 10, 1957, at 12 (National archives, files of the Senate Interior & Insular Affairs Committee, Box 27 [hereinafter Committee Files].

²³ Correspondence from Senator Thomas Kuchel to Senator James Murray, dated Apr. 4, 1958 (Committee Files).

other words, it is our conclusion that the "no denial" language was added to California's suggested "no claim" language (and to section 4(d)(7)) to safeguard Federal reserved water rights then existing for park, forest and Indian purposes. As discussed above, the Wilderness Act merely imposed certain wilderness management restrictions on existing Federal reservations, which had recently been deemed by the courts to have implied water rights. The legislative history of the Act indicates that while Congress did not wish to reserve new rights, it did not intend to reopen the issue in relation to those rights already recognized.

The legislative history of the Wilderness Act shows that section 4(d)(7) was intended to serve two purposes: first, the provision was inserted to protect the states, but, second, it was also "in keeping with the purpose of the wilderness bill to provide for wilderness preservation as part of an overall program that includes also economic and other enterprises." 104 Cong. Rec. 6344. We suggest that the "no denial" clause accomplished the second purpose, being intended to preserve water rights *already* recognized at the time of the bill, especially reserved water rights on Indian reservations (which were included as sites for wilderness areas in early bills, *see* section 2(d) of S. 3619, 104 Cong. Rec. 5341 (1958)). In other words, the "no denial" language recognized that wilderness preservation is simply one part of larger programs, *i.e.*, systems of National Parks, National Forests, and Indian reservations, on which reserved rights already existed and it was those rights that had to be preserved through the "no denial" language.²⁴ The agreement arrived at by Congress which became the Wilderness Act was prospective only; it did not go so far as to eliminate existing rights.

The history of the Wilderness Act confirms this conclusion. California had originally suggested the addition of language to the wilderness bill that would disclaim *all* Federal exemptions from state law. *See* Hearings on S. 1176, at 286-87; 104 Cong. Rec. 6344. Senator Neuberger explained that after consultation with Government officials, legislators, and interested citizens, the California language was included in the wilderness bill, but with the addition of the "no denial" language. 104 Cong. Rec. 6344. One of the major problems here is the lack of legislative history to document the consultations referred to above and, thus, the reasons why California's suggested language was changed to the "no claim or denial" language presently in the law. However, we believe that the answer can be found in parallel legislative history concerning the same language as used in another bill.

Within the year prior to its considering the wilderness bills, the Senate Committee on Interior and Insular Affairs had considered several bills

²⁴ Hearings on bills to overturn Pelton Dam evidence great uncertainty as to the effect of the case, but it was clearly recognized that certain Federal reserved water rights existed, *e.g.*, on National Forests and Indian reservations. Hearings on S. 863, at 11, 13, 20-22.

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seeking to overturn *FPC v. Oregon (Pelton Dam)*. The wilderness bill language suggested by California was taken from these bills. For example, section 6 of S. 863, the Water Rights Settlement Act, 84th Cong., 2d Sess., stated as follows:

Sec. 6. Subject to existing rights under State law, all navigable and nonnavigable waters are hereby reserved for appropriation and use of the public pursuant to State law, and rights to the use of such waters for beneficial purposes shall be acquired under State laws relating to the appropriation, control, use and distribution of such waters.

The parallel with California's first proposal is apparent: indeed, Mr. Berry described that proposal as taken directly from H.R. 5871, S. 863's successor on the House side of the 85th Congress. *Hearings on S. 1176* at 286. However, this original S. 863 language incurred considerable criticism due to its overbroad reach. During hearings, the Assistant Attorney General for the Office of Legal Counsel argued that section 6:

expose[d] to loss, through appropriation by others under State law, *all presently vested rights* of the United States to the use of water on the Government's military establishments, national forests, Indian reservations, national parks and monuments, and other obligations in connection therewith is involved, should be noted.

Hearings on S. 863 at 55 (italics added).²⁵ The primary example, given repeatedly of rights potentially lost were rights of Indians and Indian tribes to the use of water on their reservations. *Id.*²⁶

We believe that fear of losing existing Federal reserved water rights was the reason why the same committee a year later in section 4(d)(7) substituted the "no claim or denial" language for California's "subject to existing rights" limitation, rather than any desire to extend the reserved rights doctrine to create new water rights. Only if this interpretation of section 4(d)(7) is accepted, i.e., that it preserved preexisting Federal rights while still safeguarding the primacy of state law, do subsequent descriptions of 4(d)(7) as "disclaimer of any

²⁵ The Assistant Attorney General, while pointing out the problem of safeguarding existing Indian rights, also pointed out the problems with utilizing the specific language "subject to existing rights" in the bill. *Hearings on S. 863* at 275. In testimony, he stated his conclusion that utilizing such language would be equally broad in the other direction by applying the concept of reserved rights to all future Federal reservations.

Senator BARRETT. That matter [Indian reservations] was brought to our attention the other day. In order to protect the rights of the Indians on any of those we decided the other day that line 22 would be changed by striking out the words, "under State law," and that has been agreed to. So that language reads:

Subject to existing rights, all navigable and nonnavigable waters are hereby reserved for appropriation, use—and so forth. We think that would protect any rights that the Indians might have.

Mr. RANKIN. I think it would, Senator, but I think it might destroy the effect of your bill.

Senator BARRETT. Why do you say that?

Senator RANKIN. Because I think, under the concept of the Pelton case, that would mean that the United States had all of the rights it has in reserve lands and the right to the use of the water and you put yourself right back where you don't accomplish what you appear to be trying to accomplish otherwise.

Hearings on S. 863 at 275-76.

²⁶ It could be argued, with regard to Indian Reservations, that the wilderness bill already contained a non-abrogation clause. See S. 1176, § 2(d). However, this does not detract from the argument that the "no denial" language was added to section 4(d)(7) to safeguard existing rights as: (1) not all Indian water rights derive directly from treaties; and (2) the committee had thought it appropriate to add a double protection to S. 863: "Congress is fully cognizant of the problem of Indian water rights . . . In fact, this legislation not only protects all 'existing water rights' generally, it also specifically provides in section 7 that nothing in the Act shall be construed to affect . . . Such rights belonging to Indian tribes . . ." S. Rep. No. 2587, 85th Cong., 2d Sess. at 11 (1956).

interference with *State or Federal* water rights" make sense. *Hearings on S. 174* at 5.

This reading of committee action on the future section 4(d)(7) in light of Justice objections to parallel language in S. 863 is reinforced by the only contemporaneous committee explanation of the addition of the words "no denial." Immediately following the drafting of Committee Print No. 2, the Committee was furnished a report prepared by Howard Zahniser, Washington Representative for Trustees for Conservation. An abstract of this report was inserted in the *Congressional Record* by Senator Neuberger as an explanation of the changes. 104 Cong. Rec. 6343 (1958). In that report, Mr. Zahniser stated that the "no denial" language had been inserted to anticipate and avoid objection on the part of the Department of Justice:

The [California] Department also recommended the insertion of an added Special section which would provide that "nothing in this Act shall constitute an express or implied claim on the part of the United States for exemption from State Water laws." Following consultations with various others including those within Government departments as well as legislators and specially interested citizens this has been added as a clarification that would protect the California Department of Water Resources and any other State or other agency from any misuse of the Wilderness Bill in connection with water programs. This is in keeping with the purpose of the Wilderness Bill to provide for Wilderness preservation as part of an overall program that includes also economic and other enterprise. In line with suggestions received in the course of the consultations regarding the proposed new section, the words "*or denials*" were also added to avoid a possible misinterpretation on the other hand and specifically to anticipate and avoid objection on the part of the Department of Justice. The added section reads as follows:

"(5) Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption in State water laws."²⁷

This language supports the view that Committee Print No. 2 was seen as resolving the California agencies' problems while avoiding interference with pre-wilderness-designation Federal water rights.

3. Arguments Against the Conclusion that Section 4(d)(7) Disclaims Federal Reserved Water Rights

The conclusion that section 4(d)(7) disclaimed any new Federal reserved water rights is opposite that reached in the Prior Opinion and by some commenters. That Opinion and those commentators support their conclusion that reserved water rights are created when wilderness areas are designated with one of several theories: (1) that section 4(d)(7) is neutral, merely preserving the *status quo* which applies Federal reserved water rights to wilderness areas; (2) that section 4(d)(7) was a compromise whereby the states retained some right to construct water projects in wilderness areas but lost the right to have water rights adjudicated under state law; and (3) that the subsequent use of the same language in the Wild and Scenic Rivers Act compels a conclusion that Federal water rights are reserved for

²⁷ Howard Zahniser, "Improvements in the Wilderness Bill," Feb. 15, 1958, at 6. (Committee Files.) (Italics added.)

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wilderness areas. For the reasons that follow, we find each of these theories to be unpersuasive.

a. Congressional Neutrality

The first theory advanced to support the existence of wilderness reserved water rights is that Congress, in enacting section 4(d)(7), sought to maintain "neutrality" with regard to the emerging doctrine of reserved water rights, doing nothing more than maintaining the *status quo*. This position essentially maintains that the use of "or denial" language in section 4(d)(7) either strips all meaning from its command that the Act not be read to assert any "claim" to exemption from State water laws, thus rendering the section completely meaningless,²⁸ or that Congress intentionally chose, not to be silent, but to be neutral on the issue of water rights. The argument then proceeds from the conclusion that section 4(d)(7) maintains the *status quo* to a further conclusion that water rights are thereby created because the *status quo* includes the Federal reserved water rights doctrine.²⁹ We find these arguments unpersuasive for several reasons.³⁰

A finding that section 4(d)(7) is essentially without meaning is an egregious violation of the cardinal principle of statutory construction that congressional enactments are not to be relegated to surplusage if there is a way of giving meaning to them. See, e.g., *National Insulation Transp. Comm. v. I.C.C.*, 683 F.2d 533 (D.C. Cir. 1982); *Zigler Coal Co. v. Kleppe*, 536 F.2d 398 (D.C. Cir. 1976); *Wilderness Society v. Morton*,

²⁸ Specifically, the Prior Opinion found that: "Giving literal effect to the "no implied claim . . . as to exemption from State water laws" phrase, denies the literal effect of the "no express laws" phrase, and vice-versa. (Italics added.)" Prior Opinion at 86 I.D. 553, 607-08, n.99, dealing with an identical provision in the Wild and Scenic Rivers Act, 16 U.S.C. § 1271 *et seq.* With regard to that provision, the Prior Opinion also noted:

There is no clarifying legislative history. I therefore must conclude that the provision is a *non sequitur* roughly designed to preserve the *status quo* of federal-state relations in water law under "established principles of law," including the reserved water rights doctrine. 16 U.S.C. § 1284(b).

²⁹ The Prior Opinion states as follows in regard to sec. 4(d)(7):

[I] do not view the provision of 16 U.S.C. § 1133(d)(7) (1976) as undercutting the implied reserved water rights doctrine. Rather, the provision is intended to continue the application of then-existing principles of federal-state relations in water law, which includes the reserved water rights doctrine. 86 I.D. 553, 610.

[R]ather, by not constituting either a new claim or a new denial or exemption from state water law, I am of the opinion that Congress intended to continue the *status quo* which allows for the creation and assertion of reserved water rights on lands withdrawn and reserved under the Wilderness Act. 86 I.D. 553, 610 n.106.

³⁰ The District Court, in *Sierra Club v. Lyng*, found these arguments to be convincing, holding that sec. 4(d)(7) merely maintained the *status quo*. However, as discussed *infra*, this interpretation renders that section surplusage, a result the rules of statutory construct would caution against. Taking the second step, the District Court found that Congress "disclaimed any decisional responsibility" for the issue of water rights in wilderness areas. Given that assumption, the court reasoned that it should step in and create such rights under the general Federal reserved water rights doctrine. However, this step seems to seriously misinterpret the role of the court in carrying out the Federal reserved water rights doctrine. That doctrine calls on the courts to interpret the intent of Congress in making reservations of Federal land. *Cappaert v. U.S.*, 426 U.S. at 138. It does not, nor does the separation of powers design of the Constitution, allow the courts to create reserved water rights when Congress declines to do so, even under the guise of "harmonizing" newly created congressional programs and pre-existing state law. The District Court seems to suggest that sec. 4(d)(7) gives a nod of approval to a judicial "legislative" process that created Federal reserved water rights absent affirmative congressional intent. Yet the constitutional bases of the implied reservation of water doctrine are found in the Commerce and Property Clauses, art. I, § 8 and art. (IV) § 3, see *Cappaert v. U.S.*, 426 U.S. at 138, both of which delegate powers to Congress and Congress alone.

479 F.2d 842 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973). Further, there is a complete lack of evidence, or even plausible speculation, of a legislative motive for enacting a meaningless command.³¹

As noted previously, what became section 4(d)(7) was first drafted as a repudiation of any "claim" to exemption. Prior to release of Committee Print No. 2, the "or denial" language was added. The argument that the "no denial" language strips the "no claim" language of meaning requires us to assume that Congress consciously added the "no denial" language to negate what it had already drafted. Yet the only contemporaneous explanation to be found in the Committee files mentions no such intent. Instead, it states that "The words 'or denial' were also added to prevent any possible misinterpretation on the other hand and specifically to anticipate and avoid objection on the part of the Department of Justice."³² This expression of a positive intent is in accord with Senator Humphrey's later description of section 4(d)(7) as "language vital to our colleagues from the West" and as removing "any doubt" that the bill was not intended to "change existing water laws and . . . deprive local communities of water."³³ The negation of a guarantee against extension of reserved Federal water claims would hardly be "vital to our colleagues from the West" nor remove doubt as to impact on local water needs.

Also, there seems little merit to the Prior Opinion's basic premise that the "*status quo*" that the Prior Opinion maintains was safeguarded by section 4(d)(7) was, in 1964 at the time of the Wilderness Act, understood to include the recently extended doctrine of implicitly reserved water rights. Throughout this period, Congress was considering legislation to overturn or modify *FPC v. Oregon (Pelton Dam)*, and in the Senate Interior and Insular Affairs Committee, such legislation was seen as restoring the legal *status quo* which mandated the primacy of state law.³⁴

In advancing this "status quo" theory, proponents cite to several events in the Wilderness Act's 5-year history. Following careful examination, we must conclude that these events lend more support to the conclusion that reserved water rights were not created for wilderness areas than to the opposite view.

³¹ It could be speculated that Committee staff might have held such a motive and, personally, attempted to thwart the Committee's desires. Apart from being a most questionable premise of legislative construction, there is no evidence to support this speculation. Moreover, this was an issue of great personal interest to the Committee in question. As the Committee and all its subcommittees held only 22 hearings during the first session of the 85th Congress, there would have been little necessity for members to give blind dependence upon staff. It is noteworthy that the 1957 hearings mention only one staff member in attendance—the clerk.

³² Zahniser, "Improvements in the Wilderness Bill," *supra* at 6.

³³ 104 Cong. Rec. 11,555 (1958).

³⁴ See, e.g., *Hearings on S. 862* at 7 (1956) (Senator Barrett: "For nearly a century it has been settled law that western water rights are dependent on and determined by State law."); *id.* at 328-29; *Hearings on S. 1275 Before the Subcomm. on Irrigation & Reclamation of the Senate Comm. on Interior & Insular Affairs*, 88th Cong., 2d Sess. at 24-25 (1964) (Senator Kuchel: "it has generally been assumed that the mere fact that nonnavigable water arises upon any United States retained lands would not affect the rights . . . acquired by persons or by State or local governments . . .") See generally Morreale, *Federal-State Conflicts over Western Waters*, 20 Rutgers L. Rev. 423, 446 (1966).

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The first such event consists of a two-paragraph telegram from Harvey Banks of the California Department of Water Resources to the chairman of the committee considering the wilderness bill objecting to the use of the "or denial language in section 4(d)(7)." He urged that the insertion would "leave room for further expansion of the Pelton Dam case, *FPN [sic] v. Oregon . . .*" *Hearings on S. 4028* at 198. The hearing record shows no response by the Committee. Such silence might be advanced as support for a view that Congress intended to apply *Pelton Dam* to wilderness areas. However, a careful review of Mr. Banks' hastily written two-paragraph letter and subsequent legislative history shows that this support is illusory. First, as noted earlier, when William Berry initially proposed the amendment to protect state water laws, he made clear that he represented three California officials—not only Mr. Banks, but also the directors of the Department of Fish and Game and of the Department of Natural Resources. *Hearings on S. 1176* at 289, 288-89. However, only Mr. Banks objected to the "no denial" language in his capacity as Director of the Department of Natural Resources; the latter two agencies, as well as the Governor, later endorsed the wilderness bill without reservation.³⁵

Second, even prior to receiving Mr. Banks' telegram, Senator Kuchel of California had notified the Committee chairman that he had reviewed Committee Print No. 2 and that he "was particularly pleased to note two changes, *which have eliminated the objections of certain officials in California.*" (Italics added.) Quoting what became sec. 4(d)(7), he concluded "this language seems to me adequate" and endorsed the proposals; "it is my hope that the Committee can give favorable consideration at a early date to the proposed changes."³⁶ Upon receipt of Mr. Banks' telegram some 3 months later, Senator Kuchel indicated no alteration in his views, but merely transmitted the telegram to the Committee chairman with a two-sentence note requesting its inclusion to the record.³⁷ This sequence is consistent with the view that the Committee deemed no reply necessary because Mr. Banks' views involved a misreading of the Committee's intent—the objections of the California officials had in fact been "eliminated," and all save Mr. Banks understood this and supported the amended bill.

Proponents of a "status quo" or "neutrality" argument also point to a statement made by Senator Kuchel during hearings on S. 174 in which he quotes several sections of the wilderness bill, including sec. 4(d)(7) and language concerning jurisdiction over fish and wildlife. Senator Kuchel then indicates that the bill does not resolve jurisdictional

³⁵ See, e.g., *Hearings on S. 4028*, pt. 2 at 653 (Department of Fish & Game); *Hearings on S. 174*, before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 87th Cong., 1st Sess., pt. III at 839 (1961) (California Resources Agency, Successor to Department of Natural Resources).

³⁶ Correspondence from Sen. Thomas Kuchel to Sen. James Murray, dated Apr. 4, 1958. (Committee Files.) (Italics supplied.)

³⁷ Correspondence from Sen. Thomas Kuchel to Sen. James Murray, dated July 25, 1958. (Committee Files.)

questions. *Hearings on S. 174* at 65. However, Senator Carroll clarifies this issue by stating that the jurisdictional questions they are discussing relate to powersites and Federal Power Commission jurisdiction. *Id.*

Even assuming that Congress meant to draft section 4(d)(7) to explicitly state its neutrality on water rights, it does not follow that reserved water rights are created. Reserved water rights, where they exist, are a creature of legislative intent. "The reserved rights doctrine is a doctrine built on implication. . . ." *United States v. New Mexico*, 438 U.S. at 696. When such rights are considered, "The issue is whether the Government intended to reserve . . . water." *Cappaert v. United States*, 426 U.S. at 139. If Congress genuinely had no collective intent either to claim water or to leave it unclaimed, as the Courts have no basis to assert such a claim without at least the ability to infer an implied congressional intention to do so.³⁸

b. Congressional Compromise

A second theory advanced to support wilderness water rights is that Congress sought a compromise on two water issues—the reserved rights doctrine and the question of water improvement construction within wilderness areas. This view hypothesizes a Committee agreement to accept negation of the proposed guarantee of state water rights in exchange for protection of access for water improvements. This explanation must be rejected for two reasons.

First, neither the published nor the Committee's files suggest that any such *quid pro quo* was intended. So important a compromise on two controversial issues would likely have been reflected in the record, not to mention cited in explanation of Members' positions. Nor is there any ready explanation of who would have been parties to the hypothesized compromise. The entire Committee was composed of Senators representing states with reserved water rights concerns. The same Committee had reported out, without recorded dissent, a bill to essentially overrule *Pelton Dam*. Senator Neuberger, first sponsor of the wilderness bill, had even sought to amend that bill to suspend the licenses issued to the Pelton Dam under the authority of that case. The Committee, in short, does not appear to have considered protection of *Pelton Dam* a high priority, and an explanation which requires us to assume that Senator Neuberger would have protected that case law, let alone at the price of incurring further opposition to his bill, simply runs contrary to all known fact.

³⁸ The view that reserved water rights are created by congressional neutrality implicitly treats water as claimed unless Congress expressly *denies* the claim. This disregards the counsel of the Supreme Court that implicit reservation of water is an "exception" to the rule of congressional deference to state water allocation. *U.S. v. New Mexico*, 438 U.S. at 715. In addition, this view would violate the principle of separation of powers because it would implicitly authorize the courts to act as legislators and to create water rights when Congress had evidenced no intent to create them. We do not believe that sec. 4(d)(7) can be read as having this effect.

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Second, this explanation is inconsistent with the subsequent course of the wilderness bills. If such a compromise had been reached, the proponents of water rights who were parties to it should have ceased opposition, and those not parties to it would have opposed the sacrifice of their desired water rights guarantees. In fact, the opposite appears to have occurred. Criticism of the bill's impact on water rights became all but nonexistent after publication of Committee Print No. 2, while Senators still in opposition to the bill roundly criticized its impact upon water *improvements*. This is consistent with the belief that problems with water rights had been *eliminated* while those with water projects *remained*, exactly the opposite of what the explanation offered by reserved water rights proponents requires. The minority views in the Committee reports in both the 87th and 88th Congresses, for example, devote an entire section to "The Impact on Western States," yet reflect no complaint that the bill had sacrificed protection of western water rights. In short, even if a compromise is assumed, it would appear to have involved a satisfaction of water rights concerns in exchange for only a partial satisfaction of water project difficulties—precisely the opposite of what this "compromise" theory requires.

Proponents of the "compromise" theory seek support in a dialogue between Senator Goldwater, who had opposed the Wilderness Act from the beginning, and certain Forest Service officials, who were testifying in its support. Yet a careful reading of the dialogue demonstrates that: (1) a distinction was drawn between water-rights guarantees and the power to construct water improvements in wilderness areas and (2) both parties to the dialogue conceded that water rights had been protected, while the power to construct improvements was curtailed—which contradicts the hypothesis of a "compromise" in favor of the latter. Senator Goldwater began by asking whether the Wilderness bill "would give you control over the water in these areas?" Forest Service Chief Richard McArcle replied "No, sir" and proceeded to quote the future section 4(d)(7). Senator Goldwater then introduced the requirement of presidential authorization for water projects in wilderness areas, to which the Director of the Division of Legislative Reporting and Liaison replied:

Senator Goldwater, the application of State water rights and the question of the right to construct waterworks on [sic] water improvements on Federal lands are two distinct questions. The application of State water laws does not necessarily give to the holder of a water right the privilege of constructing dams.

Senator Goldwater replied, concretely, "Yes, but what good are water rights without water?" and another Forest Service witness concluded: "you *have the right*, but if the President refused, it would not *implement* the right." After some discussion of water rights in Colorado, the chairman ended with "there is nothing in the bill that

changes the situation in these water rights is there?" and was assured by these witnesses: "There is nothing that changes the situations with respect to water rights. It is very clear and specific in the bill." *Hearings on S. 174* at 58-61 (italics added).

In brief, we find that the Goldwater—Forest Service dialogue reinforces rather than contradicts the conclusions reached in this opinion. A distinction was clearly drawn between State water rights, which the bill would not affect, and the construction of improvements in wilderness areas, which it would.

c. Wild and Scenic Rivers Act

The third theory upon which wilderness area reserved water rights have been based is the usage of language duplicative to that found in section 4(d)(7) in another act which appears to reserve water rights, the Wild and Scenic Rivers Act, 16 U.S.C. § 1271 *et seq.* The Wild and Scenic Rivers Act does contain the same language that is used in section 4(d)(7) of the Wilderness Act. This similarity, however, furnishes little assistance to the task construing the Wilderness Act. First, section 4(d)(7) of the Wilderness Act was drafted in 1958 and enacted in 1964. The Wild and Scenic Rivers Act was passed in 1968. References to congressional actions in 1968 to explain a clause drafted a decade before necessarily run afoul of the Supreme Court's admonition that "The views of a subsequent Congress of course afford no controlling basis from which to infer the purposes of an earlier Congress." *Haynes v. United States*, 390 U.S. 85, 87 n.4 (1968). See also *United States v. Price*, 361 U.S. 304, 313 (1960); *United States v. United Mine Workers*, 330 U.S. 258, 282 (1947).³⁹ This is particularly so when the subsequent explanations come from legislators who did not serve in the earlier Congress or were not members of the committee which reported out the earlier bill. *United States v. United Mine Workers*, *supra*. It is noteworthy that only five of the 17 members of the Senate Committee that considered the Wild and Scenic Rivers Act had served on the Committee when it drafted what became section 4(d)(7) of the Wilderness Act. Compare *Hearings on S. 1176, supra* at II, with *Hearings on S. 119 and S. 1092 Before the Senate Committee on Interior and Insular Affairs*, 90th Cong., 1st Sess. at II (1967).

Second, although the wording employed in the Wild and Scenic Rivers Act and the Wilderness Act is the same, the statutory context and stated legislative purpose are in sharp contrast. The language at issue appears in the Wild and Scenic Rivers Act in a subsection entitled "Compensation for Water Rights," the primary focus of which was to ensure that vested water rights are not taken without just

³⁹ The same admonition would apply to an attempt to use the National Wildlife Refuge System Act, 16 U.S.C. §§ 668dd-668ee, as a guide to interpreting the Wilderness Act. The Refuge System Act also contains language identical to that included in sec. 4(d)(7) of the Wilderness Act. 16 U.S.C. § 668dd(i). The Supreme Court, in *Arizona v. California*, let stand a master's conclusion that water had been reserved for one wildlife refuge. 373 U.S. at 601. However, neither the Supreme Court nor the master's decision referred to, much less analyzed or interpreted, sec. 668dd(i) of the Refuge System Act.

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compensation. 16 U.S.C. § 1284(b). The first sentence of the subsection provides that Federal-state jurisdictional questions will be settled by "established principles of law"; the second guarantees just compensation for any taking of water rights; the third contains the language at issue. The Senate Report treats the last sentence as having no separate significance, referring back to the first sentence as the operative language: "Any issues relating to exemption will be determined by established principles of law as provided in the first section." S. Rep. No. 491, 90th Cong., 1st Sess. 5 (1967). The better legal view of the "claim or denial" language in the Wild and Scenic Rivers Act, then, is that it was inserted not in response to the Federal reserved water right doctrine—the reservation of waters was made, with limitations, in the next section of the Act—but rather to prevent the reserved water rights created in the Act from eliminating existing rights under state laws that were being taken and which formed the basis for compensation.⁴⁰

In fact, the emphasis on composition in the Wild and Scenic Rivers Act is evident even in the reservation language, which reserves no more water than is necessary to meet the purposes specified in the Act, as follows:

* * * * *

(a) Compensation for water rights

The jurisdiction of the States and the United States over waters of any stream included in a national wild, scenic or recreational river area shall be determined by established principles of law. Under the provisions of this chapter, any taking by the United States of a water right which is vested under either State or Federal law at the time such river is included in the national wild and scenic rivers system shall entitle the owner thereof to just compensation. Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(c) Reservation of waters for other purposes or in unnecessary quantities prohibited

Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes.

(d) State jurisdiction over included streams

⁴⁰ The District Court in *Sierra Club v. Lyng* also relied on the use of the sec. 4(d)(7) language in the Wild and Scenic Rivers Act to support wilderness area reserved water rights, noting that Congress used this language in conjunction with language recognizing a possible Federal taking of privately held water rights. Memorandum Opinion and Order (issued June 3, 1987) at 3. (The court relied here in part on the Department of Justice argument in response to Intervenor's Motion for Summary Judgment that the use of the same language in the Wild and Scenic Rivers Act as was used in sec. 4(d)(7) appeared to show an intent by Congress to reserve water for wilderness areas). However, rather than disputing it, the court's notation strengthens our argument that the "claim or denial" language is used in a different context in the Wild and Scenic Rivers Act than it is used in the Wilderness Act. Having affirmatively recognized that a taking was occurring when waters were reserved, Congress made clear with the "claim or denial" language that rights were being taken, i.e., state-appropriated water rights. Otherwise, a court might find that the state rights were defeated by a reservation of Federal rights and hold that no taking had occurred.

The jurisdiction of the States over waters of any stream included in a national wild, scenic or recreational river area shall be unaffected by this chapter to the extent that such jurisdiction may be exercised without impairing the purposes of this chapter or its administration.

(e) Interstate compacts

Nothing contained in this chapter shall be construed to alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by any States which contain any portion of the national wild, scenic and recreational river system.

(f) Rights of access to streams

Nothing in this chapter shall affect existing rights of any State, including the right of access, with respect to the beds of navigable streams, tributaries, or rivers (or segments thereof) located in a national wild, scenic or recreational river area.

* * * * *

16 U.S.C. § 1284. Taken as a whole, these provisions evidence a congressional intent to minimize the impact of the Act on state water laws and rights created thereunder. Recognizing that water was being reserved under the Wild and Scenic Rivers Act, Congress made clear its intent to go no further than necessary in exempting the areas impacted from state law.

The contrasting uses of the provisions of the two statutes are more understandable when viewed against a historical background. As noted above, when the relevant section of the Wilderness Act was drafted, reserved water rights for non-Indian lands were very much a new issue, recently suggested (and never actually applied) by the Court. By the passage of the Wild and Scenic Rivers Act, the doctrine had become established law. The two statutes were debated and enacted against two separate and different legal and historical backgrounds.

Moreover, the Wilderness Act focused upon preserving land, which might or might not affect water rights. The Wild and Scenic River Act focused upon the water, expressly allowed taking of water rights upon compensation, 16 U.S.C. § 1284(b), expressly provided that the beds of designated streams and surrounding lands were "withdrawn," 16 U.S.C. § 1279, and contained no "within and supplemental" purposes clause. In contemplating the Wilderness Act, there was dispute over *whether* water rights should be acquired; in the Wild and Scenic Rivers Act debates, the issue was *how* they should be obtained.

Therefore, the arguments made in support of wilderness water rights are not persuasive on the issue, and as such, do not vary our conclusion that such rights are not reserved by the Wilderness Act of 1964.

B. Primary Purposes of Wilderness Areas

In analyzing the existence of reserved water rights for wilderness areas, we must next review the purposes for which wilderness areas are designated. That review demonstrates that Congress did not specify wilderness purposes as primary purposes for the Federal lands in which they are designated.

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In *United States v. New Mexico*, 438 U.S. at 702, the Supreme Court for the first time distinguished between the primary and secondary purposes of a Federal reservation of land in determining congressional intent as to the creation of Federal reserved water rights. In *New Mexico*, the Court concluded:

Where water is only valuable for a secondary purpose of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

In applying this distinction to purposes of National Forests, the Supreme Court held that in the Multiple-Use-Sustained-Yield Act, Congress did not add additional primary purposes to existing National Forests and thus did not intend to create additional Federal reserved water rights.

Section 1 of MUSYA, 16 U.S.C. § 528, states as follows in pertinent part:

That it is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of [this Act] are declared to be *supplemental to, but not in derogation of*, the purposes for which the national forests were established as set forth in the [Organic Administration Act of 1897, 16 U.S.C. § 473 *et seq.*]. (Italics added.)

The Supreme Court relied in part on the “supplemental to, but not in derogation of” language set forth above in determining that MUSYA’s purposes were secondary, not primary. 438 U.S. at 714. The Court then stated as follows:

As discussed earlier, the “reserved rights doctrine” is a doctrine built on implication and is an exception to Congress’ explicit deference to State water law in other areas. Without legislative history to the contrary, we are led to conclude that Congress did not intend in enacting the Multiple-Use-Sustained-Yield Act of 1960 to reserve water for the secondary purposes there established . . . Congress intended the national forests to be administered for broader purposes after 1960 but there is no indication that it believed the new purposes to be so crucial as to require a reservation of additional water . . .

Id. at 715. See also *United States v. City & County of Denver*, 656 P.2d 1, 25 (Colo. 1983).⁴¹

Like the language of section 1 of the MUSYA, paragraph (a) of section 4 of the Wilderness Act assigns wilderness purposes a secondary role to other purposes for which the lands are administered:

⁴¹ Having found that the MUSYA directs the Forest Service “to expand the purposes for which the national forests are administered,” the Colorado Supreme Court in *United States v. City & County of Denver*, concluded that the MUSYA did not effect an additional reservation with supplemental reserved water rights, but rather, was merely a mandate to expand the purposes for which the original forest reservations are to be administered. 656 P.2d at 25 (Colo. 1983).

The purposes of this chapter are hereby declared to be *within and supplemental* to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered . . . (Italics added).⁴²

In addition, the Act specifies that it should not be deemed to interfere with the purposes for which national forests are established and that it should not lower the standards evolved for the “use and preservation” of park system units. Section 4(a)(1) and (3); 16 U.S.C. § 1133(a)(1) and (3). Section 4(a)(3) provides: “Nothing in this chapter shall modify the statutory authority under which units of the national park system are created.” This point is emphasized in paragraph (b) of section 4 as follows:

Except as otherwise provided in this chapter, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and *shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character*. Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use. (Italics added.)⁴³

The plain language of these sections indicates an intent on the part of Congress in the Wilderness Act to make wilderness purposes as secondary uses of the land already reserved for other purposes, rather than adding them as primary purposes. As such, and in accordance with the Supreme Court’s decision in *New Mexico*, there is no implication that water has been reserved for these secondary uses.

The Prior Opinion interpreted section 4(a) in a contrary manner when it focused upon the word “within” in that section as indicating that wilderness purposes are to be considered primary purposes for the relevant reserved lands.⁴⁴ Despite the Wilderness Act’s use of

⁴² Sec. 4(d)(6), 16 U.S.C. § 1133(d)(6) (italics added). This and similar language throughout the Wilderness Act and its legislative history raises the additional issue of whether Congress in the Act intended to “reserve” lands for wilderness purposes. While we do not address the question of whether wilderness designations are in fact “reservations” of land, we note that a negative finding would preclude any argument that reserved water rights are created in wilderness areas as a reservation of land is a prerequisite to finding a congressional intent to create such rights. See *Cappaert*, 426 U.S. at 138.

⁴³ The legislative history of the Wilderness Act also makes this point. Congress made clear that the Act established only additional criteria under which wilderness areas would be managed, not new primary purposes for the land:

The proposed legislation simply establishes the criteria under which our wilderness areas will be managed so that we can assure their preservation for the cultural, inspirational, recreational, and scientific values that these areas can offer to ourselves and future generations. (Italics added.)

Remarks of Senator McGovern, 109 Cong. Rec. 5942-43 (1963).

A like comment was expressed by Senator Humphrey on a section in a predecessor bill that substantially became sec. 1133(b):

Section 3 on the “use of wilderness” is important, for it makes clear that the preservation of wilderness is not inconsistent with the purposes for which national parks, national forests, and other units have been established. These units will be administered for such other purposes as also to preserve their wilderness character.

104 Cong. Rec. 11,555 (1958).

⁴⁴ The Prior Opinion addresses this issue as follows:

[F]irst, as far as NPS and FWS areas are concerned, it is clear that wilderness designations establish purposes for the creation of the reservation; i.e., designation as wilderness does more than merely authorize secondary uses entailing no reserved water rights. 86 I.D. 553, 610.

[B]y stating that Wilderness Act purposes are “within” existing area purposes, this forecloses any argument that wilderness area designation is subsidiary to other management objectives. Cf. *U.S. v. New Mexico*, *supra* at 713-15. 86 I.D. 553, 610 n.105.

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language markedly similar to that at issue in *New Mexico*, the Prior Opinion interpreted the word "within" in section 4(a) to mean that wilderness purposes are primary. However, this conclusion ignores the "and supplemental" language of section 4(a), which clearly suggests secondary purposes.⁴⁵

Moreover, there is no indication in the legislative history of the Wilderness Act that the phrase "within and supplemental" as used in section 4(a) intended additional primary, as opposed to additional supplemental, purposes for areas already reserved for Federal purposes.⁴⁶ For example, the sponsors of the Wilderness Act explained that its provisions make "plain that the wilderness bill is in keeping with multiple-use policy, that wilderness preservation is to be one of the multiple-use purposes of the National Forests, and that the forests as a whole are to be administered with the general objectives of multiple use and sustained yield."⁴⁷

Like those applicable to National Refuges, Parks and Forests, BLM wilderness designations also serve a purpose additional to the other purposes for which BLM lands are administered. The Wilderness Act does not authorize designation of lands as wilderness areas except within National Refuges, Parks and Forests. See section 3; 16 U.S.C. § 1132. Other Federal public domain lands were not designated as wilderness areas until 1976 when Congress enacted the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.* Within that general land management statute, Congress directed the Secretary of the Interior to review and recommend areas for wilderness designation. 43 U.S.C. § 1782. Once designated as wilderness areas, those public lands would be used and administered in accordance with provisions of the Wilderness Act which apply to National Forest wilderness areas. *Id.*

In general, FLPMA sets out the goals and management objectives for public lands. In FLPMA, Congress makes it clear that the public lands

⁴⁵ The District Court, in *Sierra Club v. Lyng*, basically ignored both the "within" and "supplemental to" language. Citing a number of references in the Wilderness Act's legislative history to the effect that the preservation purposes of the Act are "crucial," the court reasoned that they were thus "primary" for reserved water purposes. *Sierra Club v. Block*, Memorandum Opinion and Order (issued Nov. 25, 1987). We do not believe that this omission is consistent with the careful analysis mandated by *U.S. v. New Mexico*. Particularly, we note that the court's decision is contrary to the principle that the Federal reserved water right doctrine is to be construed narrowly. *U.S. v. City & County of Denver*. The states, as Congress explicitly recognized in enacting the McCarran Amendment, 43 U.S.C. § 666, have a strong interest in regulating the water within their boundaries, including water appurtenant to Federal lands. As the Supreme Court has noted, "if the appropriation and use were not under the provisions of State law the utmost confusion would prevail . . . Different water rights in the same state would be governed by different laws and would frequently conflict." *California v. U.S.*, 438 U.S. 645, 667 (1978). The courts, although acknowledging the Federal reserved water rights doctrine, have continued to maintain strict requirements for its application and clearly regard it as an exception, not the rule, to a general deference to state law regarding appropriation and use of water. *U.S. v. New Mexico*, 438 U.S. at 703.

⁴⁶ H.R. Rep. No. 1538, 88th Cong., 2d Sess. (1964), suggests that the purpose of sec. 4(a) was to "preserve the integrity of several statutes governing national forests and national parks." Accordingly, sec. 4(a) would have the same general intention as sec. 1 of MUSYA, interpreted by the Supreme Court in *U.S. v. New Mexico*.

⁴⁷ 104 Cong. Rec. 11,557 (1958). See also *id.* at 6343; *Hearings on S. 174, supra* at 3. (Sec. 4(a) declares Wilderness Act purposes "supplement but do not interfere with the purposes of the National Forest Act of 1897 or the Multiple Use-Sustained Yield Act.") (Statement of the Chairman.)

will be managed for multiple use and sustained yield. *See* 43 U.S.C. § 1732(a). In the beginning of the Act, Congress included wilderness preservation as but one of these multiple purposes, when it declared that it was the policy of the United States that:

the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; *that, where appropriate, will preserve and protect certain public lands in their natural condition*; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use . . . (Italics added.)

43 U.S.C. § 1701(a)(8).

The District of Columbia Circuit rejected an argument by the Sierra Club that this language in FLPMA effected a reservation of land that conferred by implication Federal reserved water rights in waters appurtenant to the BLM lands reserved. *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981). Specifically, the Circuit Court found that FLPMA, while setting forth the “ ‘purposes, goals and authority for the use’ of the public domain,” did not establish a reservation from the public domain that brought with it reserved water rights. *Id.* at 206.

The specific provisions in FLPMA providing that other public domain land would be designated as wilderness areas must be reviewed in light of the court’s interpretation of these general provisions of the Act setting out its scope and effect. This review inevitably concludes that the preservation of wilderness on BLM lands is not the primary purpose for those lands.

Even if those specific sections in FLPMA relating to wilderness designations are viewed in isolation, *i.e.*, without recourse to the Act’s policy statements described above, the conclusion with regard to purposes is the same. The wilderness sections of FLPMA refer back to the Wilderness Act, specifying that BLM wilderness areas are to be used and administered according to provisions applicable to National Forests. 43 U.S.C. § 1782(c). As discussed above, the provisions applicable to National Forests mandate multiple use, with wilderness purposes being but one management goal. The same multiple use mandate likewise must apply to BLM wilderness areas, and, likewise, must preclude a finding that wilderness purposes are primary on BLM lands.

It has been argued that the prohibition of certain activities in areas designated as wilderness evidences congressional intent to make the preservation of wilderness the primary purpose for the lands upon which the areas are designated. For example, the Wilderness Act prohibits commercial enterprise, motorized and mechanical vehicles, equipment and transport, and structures and installations within wilderness areas. Section 4(c); 16 U.S.C. § 1133(c). This argument fails to persuade, however, in that it ignores the multitude of other uses that are not prohibited, and thus are allowed, in those areas. The Act

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makes clear that the other purposes for which the lands on which wilderness areas are designated, e.g., park and forest purposes, are to be continued. Section 4(b); 16 U.S.C. § 1131(b).⁴⁸ Furthermore, a prohibition of certain activities is insufficient to overcome the clear intent of Congress to make wilderness purposes secondary when it used the "within and supplemental" language in section 4(a) of the Wilderness Act.

Here, then, as in *New Mexico*, Congress intended that wilderness areas "be administered for broader purposes [after the enactment] but there is no indication that it believed the new purposes to be so crucial as to require a reservation of additional water." 438 U.S. at 715. Therefore, our conclusion must be the same as that reached in *New Mexico*—Congress did not intend to create reserved water rights for wilderness areas under the Wilderness Act of 1964.

V. CONCLUSION

We believe that the better legal view with regard to the creation of Federal reserved water rights in wilderness areas is that Congress intended not to reserve water for those areas. Section 4(d)(7) clearly evidences a desire to avoid creating a reservation of water additional to that already created for the underlying parks, forests, and refuges. Further, section 4(a) plainly assigns wilderness purposes to a secondary position. To the extent that wilderness areas are in need of water to achieve their purposes, such water may be acquired by purchase or by appropriation for wilderness or related purposes (e.g., instream flows for fish and wildlife purposes) under applicable state law. In addition, Congress can expressly reserve water for any wilderness area.

To the extent that the Prior Opinion is inconsistent with these conclusions, it is modified and superseded.

RALPH W. TARR
Solicitor

VALENCIA ENERGY CO., ET AL.

109 IBLA 40

Decided: May 26, 1989

Appeal from a decision of the Director, Albuquerque Field Office, Office of Surface Mining Reclamation and Enforcement, determining that certain lands were "Indian lands" within the meaning of the Surface Mining Control and Reclamation Act of 1977.

⁴⁸ Another flaw in this "primary purposes" argument is that it looks mistakenly at the primary purposes for wilderness areas, not at the primary purposes for the lands on which a wilderness area may be designated. A broader view brings into perspective the true relationship between wilderness and other purposes.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"*Supervised by an Indian tribe.*" As used in sec. 701(9) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(9) (1982), land is "supervised by an Indian tribe" where an Indian tribe owns either the mineral estate, the surface estate in fee, or both.

APPEARANCES: Geoffrey L. Denempont, Esq., Tucson, Arizona, for Valencia Energy Co.; Gordon Venable, Esq., Santa Fe, New Mexico, and A. Raymond Randolph, Esq., Washington, D.C., for the New Mexico Energy and Minerals Department; Paul E. Frye, Esq., Albuquerque, New Mexico, for the Navajo Tribe of Indians; Joseph M. Oglander, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Valencia Energy Co. (Valencia) and the State of New Mexico Energy and Minerals Department (EMD) have appealed from a decision of the Director, Albuquerque Field Office, Office of Surface Mining Reclamation and Enforcement (OSMRE), dated October 20, 1986, finding that the proposed Gallo Wash mine was located on "Indian lands," within the meaning of section 701(9) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1291(9) (1982). The effect of this determination was to make the proposed Gallo Wash mine subject to the Federal Program for Indian lands. *See* 30 CFR Part 750. The Navajo Tribe of Indians (Navajo Tribe/Tribe) has intervened in this appeal,¹ generally supporting the position of OSMRE that the lands involved are "Indian lands" within the meaning of SMCRA.

The proposed Gallo Wash mine is located on approximately 16,000 acres of land in T. 21 N., Rs. 8 and 9 W., New Mexico Principal Meridian, in San Juan County, New Mexico. With the exception of sec. 16, T. 21 N., R. 9 W., all of the land involved was originally patented to the Santa Fe Pacific Railroad (Santa Fe) in 1923 and 1934, apparently under the provisions of the Act of March 3, 1921, 41 Stat. 1225. In 1949, the subject land was included in a conveyance by Santa Fe to the Chaco Land and Cattle Co. (Chaco), subject to the reservation of

all oil, gas, coal and minerals whatsoever, already found or which may hereafter be found, upon or under said lands, with the right to prospect for, mine and remove the same, and to use so much of the surface of said lands as shall be necessary and

¹ By Order dated Feb. 2, 1987, this Board ruled, *inter alia*, that the Navajo Tribe was a proper party to the instant appeal. See 43 CFR 4.1284(a).

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convenient for shafts, wells, tanks, pipe lines, rights of way, railroad tracks, storage purposes, and other and different structures and purposes necessary and convenient for the digging, drilling and working of any mines or wells which may be operated on said lands.

(Warranty Deed, dated Aug. 16, 1949, at 4). An express provision for compensation for any use of the surface was also included. By warranty deed dated December 4, 1958, Chaco conveyed the land at issue, together with other described parcels, to the Navajo Tribe, subject to all easements, reservations, and exceptions of record. Thus, the Navajo Tribe is presently the owner in fee of the surface estate of the land.

Santa Fe subsequently leased its coal rights to the Gallo Wash Coal Co., which, in turn, subleased these rights to the Tucson Electric Power Co. (TEP) in 1977. In 1984, TEP assigned its rights to Valencia, a wholly owned subsidiary of TEP. Prior to this assignment, Alamito Coal Co. (Alamito), at that time another wholly owned subsidiary of TEP, negotiated an agreement with the Navajo Tribe with respect to the use of the surface of the land. This agreement recognized the Navajo Tribe as the owner of the surface in fee simple and Alamito as the holder of the reserved rights with respect to the coal located in the land. In substance, this agreement provided for the payment of \$1,250,000 to the Navajo Tribe:

for the exclusive right and possession of the aforesaid described land, to supervise, manage and use the land described herein including but not limited to the right to mine coal by surface methods, to construct roads, railroad spur, coal washing facilities, loading facilities, buildings[,] maintain coal storage piles, to operate a railroad, motor vehicles, heavy equipment including front end loaders, drag lines, dozers, to use explosives and in general to do all things and to make such use of the land described herein as is customary in the mining of coal by surface methods.

Memorandum of Agreement, dated Feb. 5, 1980, at 2). In 1984, Alamito's rights under this agreement were assigned to Valencia.

It should also be noted, in view of one of the arguments pressed by the Navajo Tribe, that the land in question was part of a large parcel of land included in Executive Order No. 709. Under Exec. Order No. 709, which was issued by President Theodore Roosevelt on November 9, 1907, approximately 1,900,000 acres of land were "withdrawn from sale and settlement and set apart for the use of the Indians as an addition to the present Navajo Reservation." This withdrawal was subsequently modified on January 28, 1908, by Exec. Order No. 744 in order to resolve a conflict between the lands included in Exec. Order No. 709 and lands included as an addition to the Jicarilla Indian Reservation by Exec. Order No. 711, dated November 11, 1907.

Subsequent to these Executive orders, Congress enacted the Act of May 29, 1908, 35 Stat. 444. Section 25 of that Act provided that

whenever the President is satisfied that all the Indians in any part of the Navajo Indian Reservation in New Mexico and Arizona created by Executive orders [Nos. 709 and 744]

have been allotted, the surplus lands in such part of the reservation shall be restored to the public domain and opened to settlement and entry by proclamation of the President.

Pursuant to this Act, a number of allotments were made, though the Navajo Tribe strongly asserts that significant numbers of Navajos failed to receive allotments.² In any event, on December 30, 1908, President Roosevelt issued Exec. Order No. 1000 which restored various unallotted lands within the limits of Exec. Order No. 709 to the public domain. Finally, on January 16, 1911, President Taft issued Exec. Order No. 1284, which provided that "all lands not allotted to Indians or otherwise reserved by Executive orders [Nos. 709 and 744], lying west of the first guide meridian west, be and the same hereby are restored to the public domain."³

It is the position of the Navajo Tribe that, notwithstanding the foregoing, the boundaries of the Navajo Reservation, as established by Exec. Order Nos. 709 and 744, have never been diminished. Thus, it argues that the land in question is within the exterior boundaries of the Navajo Reservation. The relevancy of this assertion to the issue under appeal is explored *infra*.

Under the structure of SMCRA, any parcel of land is subject to one of three possible classifications. First, it could be "Federal land." As defined in SMCRA, "Federal lands" means "any land, including mineral interests, owned by the United States * * *, *except Indian lands.*" 30 U.S.C. § 1291(4) (1982) (italics supplied). "Indian lands" are defined as "all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9) (1982). All other lands, that is, all lands which are not properly classified as either "Federal lands" or "Indian lands," are, by definition, "lands within any State." 30 U.S.C. § 1291(11) (1982).

As enacted by Congress, SMCRA envisioned a regulatory system in which states would be permitted to exercise primary authority for the enforcement of the Act. Accordingly, the Act provided that any state which desired to assume exclusive jurisdiction over the regulation of surface coal mining on "non-Federal lands" within the State could submit a state program⁴ to the Secretary of the Interior for his

² See Affidavit of Herbert C. Stacher, attached as Exhibit A to Memorandum dated Oct. 2, 1984, entitled "Jurisdiction over P & M South Mine, Crownpoint Mine, and Gallo Wash Mine - Opinion."

³ Since Exec. Order No. 1000 had restored all lands east of the First Guide Meridian to the public domain, with the exception of 110 specified pending allotment applications, Exec. Order No. 1284, when read in conjunction with Exec. Order No. 1000, effectively restored all lands which had been withdrawn by Exec. Orders Nos. 709 and 744 to the public domain except for the lands embraced in any of the 110 allotments expressly excepted from Exec. Order No. 1000 and which were located east of the First Guide meridian. See *Navajo Tribe of Indians*, 82 IBLA 387 (1984); *Tenneco Oil Co.*, 8 IBLA 282 (1972).

⁴ While use of the phrase "non-Federal lands," may be problematic with respect to "Indian lands," in that SMCRA expressly excludes "Indian lands" from the definition of "Federal lands," it is clear that state primacy does not attach to any lands properly deemed to be "Indian lands" under the regulatory definition. Thus, "State program" is defined as a program established under 30 U.S.C. § 1253 (1982), to regulate surface mining activities on "lands within such State." 30 U.S.C. § 1291(25) (1982). Since the statutory definition of "lands within such State" expressly excludes Indian lands, there can be no question that State primacy does not attach to "Indian lands." See also 30 CFR 731.12 and Part 750. Appellants herein do not contend otherwise. Rather, they argue that the lands at issue are not properly defined as "Indian lands."

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approval. 30 U.S.C. § 1253 (1982). With regard to "Federal lands," Congress determined that surface mining activities would, as a general matter, be subject to a Federal lands program. At the same time, however, Congress expressly provided that any state with an approved state program could enter into a cooperative agreement with the Secretary to provide for State regulation of surface coal mining operations on Federal lands within that state. 30 U.S.C. § 1273(c) (1982).

But, while states could, under these provisions, achieve primacy both for "lands within such State" and "Federal lands" within the State, Congress expressly precluded the States from regulating surface coal mining activities occurring on "Indian lands" located within the State. Indeed, cognizant of the special problems involved with the regulation of surface mining on "Indian lands," Congress authorized a study which would "include proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands." 30 U.S.C. § 1300(a) (1982). But, until such time as Congress acted pursuant to the report, the Secretary of the Interior was required to enforce the standards of the Act. See *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1363-65 (D.C. Cir. 1980). Accordingly, regulations have been adopted which establish a Federal program for Indian lands. See 30 CFR Part 750.

With respect to the State of New Mexico, we note that the New Mexico State Program was conditionally approved on December 31, 1980 (see 30 CFR 931.10), and, subsequent thereto, the State and the Department of the Interior entered into a cooperative agreement with respect to "Federal lands" within the State. See 30 CFR 931.30. Thus, so long as lands located in the State of New Mexico are not "Indian lands" within the meaning of 30 U.S.C. § 1291(9) (1982), the State of New Mexico has primary responsibility for regulation of surface coal mining operations.

The initial regulatory definition of "Indian lands," published in 1979, did nothing more than replicate the statutory language. See 44 FR 14901, 15314 (Mar. 13, 1979). However, on September 28, 1984, the Department promulgated regulations establishing the Federal Program for Indian Lands. See 49 FR 38462. While the definition of "Indian lands," was not altered, the preamble to the regulations provided that "OSM[RE] will continue to regulate as Indian land all land within the exterior boundary of Indian reservations, allotted lands, and all lands where either the surface or minerals are held in trust for or supervised by an Indian tribe or individual Indians." 49 FR 38463 (Sept. 28, 1984).

Subsequent to the promulgation of the regulations establishing the Federal Program for Indian Lands, a number of challenges, including one by the State of New Mexico, were brought in Federal court. The New Mexico suit was settled under an agreement in which the

Department agreed to issue a clarification of the regulatory preamble in which the Department would disclaim any assertion that *all* individual allotments outside of the exterior boundaries of an Indian reservation were "Indian lands" within the contemplation of SMCRA.⁵ For its part, New Mexico agreed that it would not contest the Secretary's assertion of exclusive authority over "Indian lands" within the State. *See New Mexico v. United States*, Civ. No. 84-3572 (D.D.C. 1984). It should be noted that, except for the question of individual Indian allotments, this settlement did little to advance a resolution of the scope of the statutory definition.

Responding to a request from the Albuquerque Field Office for clarification of the OSMRE policy with respect to Indian lands, in light of the settlement of the New Mexico suit, the Acting Director, OSMRE, issued a memorandum, dated September 27, 1985, in which he attempted to provide some guidance. With respect to fee land, the Director noted that "[b]ecause such lands are 'supervised by' the tribe, they would consequently fall within the statutory definition of 'Indian lands' at section 701(9) of the Act, and are subject to Federal regulatory authority."

Further clarification was provided by the Assistant Director, Western Field Operations, OSMRE, who, by memorandum dated March 19, 1986, advised the Director of the Albuquerque Field Office that tribal fee lands "are presumed to be supervised by the tribe and would fall within the statutory SMCRA definition of 'Indian lands' and OSMRE would be the regulatory authority." The Assistant Director cautioned, however that "if it were determined that such lands are not supervised by an Indian tribe, then these lands would be regulated by the state." This latter determination, the Assistant Director noted, could only be made on a case-by-case basis.

In April 1986, having been apprised of the Assistant Director's memorandum, Valencia sought a determination that the land on which it proposed to conduct surface coal mining operations was not "Indian land." Pursuant to a request by the Director, Albuquerque Field Office, both Valencia and the Navajo Tribe submitted written position papers.

In his October 20, 1986, decision, the Director, Albuquerque Field Office, concluded that the lands in question were "Indian lands" for the purposes of SMCRA. In making this determination, the Director did not assert that the lands were within the Navajo Reservation or were held in trust for the Navajo Tribe. Rather, he concluded that the lands were "supervised by an Indian tribe" within the meaning of the statutory definition of "Indian lands."

The Director supported his interpretation on two bases. First, he noted that ordinary usage would support a conclusion that land

⁵ While EMD asserts that the agreement reached resulted in a finding that *all* allotments were excluded from the definition of "Indian lands," it is the view of the Department of Justice that whether or not any specific Indian allotment is within the "Indian lands" definition of 30 U.S.C. § 1291(9) (1982), of SMCRA depends on whether the allotment can be deemed to be "held in trust for or supervised by an Indian tribe." See Exh. T to Navajo Tribe's Answer (II). This position has also been embraced by OSMRE. See 53 FR 3993 (Feb. 10, 1988).

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"owned" by the Tribe necessarily constituted land "supervised" by the Tribe. Thus, he argued that "if ownership were not supervision, it would be impossible for a property interest to reach the level of supervision."

As a second reason for interpreting ownership to necessarily include the concept of supervision, the Director turned to the legislative history of the Land Use Policy Planning and Assistance Act of 1973 (LUPA), which contained a similar definition of "Indian lands" and which was drafted approximately at the same time that the SMCRA definition of "Indian lands" was drafted.⁶ In explaining the scope of the phrase "supervised by an Indian tribe" in LUPA, it was noted that:

[T]he second part [of] the definition, which includes "all lands held in trust [for] or supervised by any Indian tribe," is intended to cover lands which are Indian country for all practical purposes but which do not enjoy reservation status. The Committee recognizes that Indian tribal land use planning processes and programs would be largely meaningless if the tribes could not control key tracts within their reservations which they did not own or *lands outside a reservation which they own* or for which they possessed administrative responsibility. [Italics supplied.]

S. Rep. No. 197, 93d Cong., 1st Sess. 127 (1973). The Director concluded, therefore, that lands *owned* by an Indian tribe are "Indian lands" within the purview of section 701(9) of SMCRA.

The Director also rejected an argument advanced by Valencia that the Tribe's lease of the premises vitiates the character of the land as "Indian land" for the purpose of SMCRA. The Director concluded that "nothing in this conveyance suggests that the Tribe has given up its underlying authority over the land," and that "[t]he 'supervision' conveyed to Valencia is less than the Tribe's full supervisory authority" (Decision at 3). Accordingly, he determined that the proposed Gallo Wash mine was located on Indian lands and, hence, subject to the Federal Program for Indian Lands. As noted above, both Valencia and EMD have appealed from this determination.

Both Valencia and EMD challenge the conclusion of OSMRE that lands which are owned by an Indian tribe, outside the exterior boundaries of an Indian reservation, are "Indian lands" for the purposes of SMCRA. Valencia argues that the Director's reliance on the legislative history of LUPA as an aid in the interpretation of the phrase "supervised by an Indian tribe" appearing in SMCRA is misplaced since LUPA was never enacted into law and SMCRA, itself, was not adopted until 4 years after LUPA had been considered. See Valencia Statement of Reasons (SOR) at 3.

Moreover, Valencia argues that an interpretation of the phrase "supervised by an Indian tribe" which includes land owned by the Navajo Tribe outside the reservation boundaries conflicts with section 710(h) of SMCRA, 30 U.S.C. § 1300(h) (1982), which provides, *inter alia*,

⁶ Recourse to this legislative history was justified on the ground that the legislative history of SMCRA did not specifically address the meaning of the phrase "supervised by an Indian tribe" (Dec. at 2).

that "nothing in this chapter shall change the existing jurisdictional status of Indian Lands." Since the lands in question are not presently within the Tribe's regulatory jurisdiction, Valencia contends that it is beyond the power of OSMRE to include such lands within the definition of "Indian lands."

Additionally, Valencia argues that, as a practical matter, inclusion of lands owned by Indian tribes in their proprietary capacity within the SMCRA definition of "Indian lands" would create great uncertainties in the operation of SMCRA. Thus, the acquisition by an Indian tribe of a surface estate could, during the course of mining, serve to remove the operation from the purview of an approved state program and require the operator to go through an entirely new permitting process. Thus, Valencia points out that "[p]ermitting tribal ownership of interests in off-reservation land to be determinative of tribal jurisdiction over surface mining activities places the owner of the mineral estate in a position where it potentially must answer to various regulatory agencies during the course of surface mining activities" (Valencia SOR at 4).

As a second ground for reversal of the decision of the Director, Albuquerque Field Office, Valencia assails his conclusion that the agreement between Valencia and the Navajo Tribe, entered into on February 5, 1980, did not deprive the Tribe of supervisory authority over the land. Valencia asserts that the Director was wrong in his assertion that the agreement covered only use of the surface estate for the purpose of coal mining, noting that the agreement expressly granted Valencia the exclusive use and supervision of the land, "including but not limited to" the right to mine coal by surface mining methods. Valencia contends that the Navajo Tribe has conveyed all of its rights to the surface for a period of approximately 50 years and that, under the agreement, the Navajo Tribe has no supervisory authority over the land until the expiration of the lease term. *See Valencia SOR at 7-8.*

EMD has also appealed from the decision of the Director, Albuquerque Field Office. In addition to the arguments made by Valencia, EMD contends that the decision should be vacated because it violates the procedural requirements of SMCRA. Thus, EMD notes that it originally issued a permit to Valencia for the proposed Gallo Wash mine in 1978. In 1981, the permit application under New Mexico's permanent program was duly published as provided for by 30 U.S.C. § 1263(a) (1982). EMD points out that 30 U.S.C. § 1263(b) (1982), grants a 30-day period in which any person, including the head of any Federal agency, having an interest which is or may be adversely affected may file an objection to the permit application. EMD further notes that neither the Navajo Tribe nor the Director of OSMRE's Albuquerque Field Office filed any objections to the permit application. Thus, EMD contends that both OSMRE and the Navajo Tribe are effectively estopped from challenging the permit which it issued to Valencia. *See EMD SOR at 6-8.*

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While in agreement with the substantive arguments made by Valencia, EMD amplified the argument that OSMRE's interpretation was contrary to the expressed congressional intent in maintaining the jurisdictional status quo. EMD notes that the Conference Committee explained its rejection of a Senate version which would have expanded tribal authority on the ground that the conferees "did not want to change the status quo with respect to jurisdiction over Indian lands both within and outside the reservation boundaries." *See H. Conf. Rep. No. 95-493, 95th Cong., 1st Sess. 114 (1977).* Thus, EMD contends that "[t]he critical question with respect to the Gallo Wash Mine * * * concerns the existing jurisdictional status of the lands in question." EMD argues that since, under existing law, the State of New Mexico exercises criminal and civil jurisdiction over the lands involved, maintenance of the jurisdictional status quo compels the conclusion that EMD is the proper regulatory authority with respect to the proposed Gallo Wash mine.⁷

EMD also argued that, under the literal terms of the definition of "Indian lands" appearing at 30 U.S.C. § 1291(9) (1982), the proposed Gallo Wash mine cannot be said to be within the scope of the definition. Thus, EMD notes that Congress defined "Indian lands" to encompass "all lands including mineral interests * * * supervised by an Indian tribe." EMD asserts that, since the Navajo Tribe does not own the mineral estate beneath the subject lands, these lands cannot be deemed "Indian lands," because, according to EMD's interpretation, only lands in which the Tribe owns the surface *and* the mineral estate can be brought within the statutory definition.

Both the Navajo Tribe and OSMRE have responded to the arguments presented by Valencia and EMD. OSMRE reiterates the arguments expressed by the Director, Albuquerque Field Office. In particular, with respect to whether the Navajo Tribe "supervises" the land, OSMRE notes, *inter alia*, that the Tribe's interest in the land will be whole at the conclusion of mining and argues that "[i]t is this interest in the land at the conclusion of mining which dictates which program applies" (OSMRE Answer at 8). Indeed, OSMRE argues that "the Tribe's remaining interest was significant in determining that the lands are Indian lands" precisely because "SMCRA is intended to assure post mining protection of the land." *Id.*

OSMRE also strongly takes issue with appellants' assertion that the legislative history of LUCA is irrelevant to the interpretation of "Indian lands" in SMCRA. Thus, OSMRE notes that both were prepared by the same Senate committee, both contained identical definitions of "Indian lands," and both dealt with land-use control and

⁷ We note, in passing, that a key predicate of EMD's theory was that Congress "borrowed" from the concept of "Indian country," as defined in 18 U.S.C. § 1151 (1982), in defining "Indian lands." *See EMD SOR at 12-14.* EMD, however, offers no textual or other support for this assertion. Paradoxically, the only support for this contention comes from the legislative history of LUCA, which both EMD and Valencia assert is irrelevant to the question before us.

planning. While admitting that numerous changes were made between 1973 and 1977 when SMCRA was finally adopted, OSMRE also points out that no changes were made in the definition of "Indian lands."

Finally, OSMRE argues that there is nothing inconsistent between the desire of Congress not to effect any changes in the jurisdictional status of Indian lands and the interpretation of OSMRE that "Indian lands" under SMCRA includes land owned by an Indian tribe outside of the exterior boundaries of a reservation. Thus, OSMRE contends it is entirely in keeping with the expressed desire to postpone resolution of the jurisdictional status of "Indian lands" for Congress to, in the interim, determine that the States could not exercise authority under SMCRA on "Indian lands," including lands owned by an Indian tribe outside of reservation boundaries. See OSMRE Answer at 10-12.

With regard to the contention of EMD that the statutory definition of "Indian lands" must be construed as requiring tribal ownership of both the surface and mineral estate of lands outside reservation boundaries, OSMRE notes that what little legislative history that does exist supports the conclusion that the phrase "including mineral interests" was added to remove any doubt that the term land would include ownership of the mineral estate.⁸ OSMRE also attacks EMD's assertion that OSMRE was estopped from asserting jurisdiction over the proposed Gallo Wash mine because it had failed to participate in the state permitting proceeding, contending that EMD had not established the necessary elements to effect an estoppel under the criteria set forth by the Interior Board of Surface Mining and Reclamation Appeals in *Mountain Enterprises Coal Co.*, 3 IBSMA 338, 347, 88 I.D. 861, 866 (1981).

For its part, the Navajo Tribe is generally supportive of the position of OSMRE that the land within the proposed Gallo Wash mine area may be deemed to be "Indian land" because the Tribe "supervises" it. In furtherance of the expansive reading which OSMRE has applied to the term "supervised," the Navajo Tribe points out that, in *Montana v. Clark*, 749 F.2d 740 (D.C. Cir. 1985), cert. denied, 474 U.S. 919 (1985), the court expressly noted that: "Rather than indicating a finely tuned calibration designed to differentiate among the various kinds of Indian lands, the overwhelming evidence suggests Congress' desire temporarily to postpone determining the locus of regulatory authority over all lands in which Indians have an interest." *Id.* at 752 (italics supplied).

We note, however, that in one important respect, the Navajo Tribe's analysis on this point differs from that of OSMRE. Thus, the March 19, 1986, memorandum from the Assistant Director, Western Field Operations, OSMRE, expressly noted that the question of

⁸ Thus, OSMRE refers to colloquy between Congressman Melcher of Montana and Congressman Udall of Arizona, Chairman of the House Committee on Interior and Insular Affairs:

"Mr. Melcher: [By inserting the words 'including mineral interests' in reference to lands held in trust or supervised by an Indian tribe. It was the purpose of this amendment to clarify the term 'land' so that it would be given its normal meaning to include mineral estates.]

"Mr. Udall: The gentleman is correct. That is correct." 121 Cong. Rec. H13377 (May 7, 1975).

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supervision was one of fact, determinable only on a case-by-case basis. The Navajo Tribe, on the other hand, argues, in effect, that "supervision" within the meaning of 30 U.S.C. § 1291(9) (1982), is a question of law, since, in the Tribe's view, ownership of either the surface fee or the mineral estate necessarily confers "supervision" under the statutory definition. *See Navajo Tribe Answer (II)* at 9-10.

In addition to supporting OSMRE's conclusion that the land in question is "supervised by an Indian tribe" within the meaning of 30 U.S.C. § 1291(9) (1982), the Navajo Tribe also takes the position that, independent of this question, the land should be deemed to be "Indian land" within the meaning of SMCRA because it is within the exterior boundaries of the Navajo Reservation. Relying on decisions such as *Solem v. Bartlett*, 465 U.S. 463 (1984), and *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994 (1986), the Navajo Tribe argues that, in the absence of specific language showing an intent to diminish the boundaries of the reservation or legislative history evincing "substantial or compelling evidence of a congressional intent to diminish" (*see Solem v. Bartlett, supra* at 472), the Act of May 29, 1908, *supra*, pursuant to which Presidents Roosevelt and Taft issued Exec. Order Nos. 1000 and 1284, respectively, cannot be said to have effected a diminution of the Navajo Reservation. *See Navajo Tribe Answer (I)* at 14-21.

Based on the foregoing, it is clear that the primary question presented by this appeal is whether the land within the proposed Gallo Wash minesite is "supervised by" the Navajo Tribe within the meaning of 30 U.S.C. § 1291(9) (1982), and thus subject to regulation by OSMRE pursuant to the Federal Program for Indian Lands. If this question is decided in the negative, it then becomes necessary to examine the Navajo Tribe's contention that the land is nevertheless subject to OSMRE's jurisdiction because it is within the exterior boundaries of the Navajo Reservation. Before turning to these questions, however, we wish to briefly address the contention of EMD that both OSMRE and the Navajo Tribe are estopped from challenging the State's assertion of jurisdiction because of the failure of either entity to participate in Valencia's permit application process under the New Mexico permanent program.

As noted above, EMD argues that, since both OSMRE and the Navajo Tribe failed to protest the assertion of EMD jurisdiction in the issuance of a permit to Valencia in 1981, they both are, in effect, collaterally estopped from asserting a lack of State jurisdiction in another forum. We cannot agree.

Both the Navajo Tribe and OSMRE argue that appellant EMD has completely failed to establish the elements necessary to establish estoppel against the Government, as delineated by prior decisions of the Department. *See, e.g., Gabriel Energy Corp. v. OSMRE*, 105 IBLA 53 (1988); *Ptarmigan Co.*, 91 IBLA 113 (1986); *Mountain Enterprises*

Coal Co., supra. Respondents are clearly correct in their assertions on this point. Moreover, since the essence of the question before the Board goes to the jurisdictional authority of EMD to approve Valencia's permit application, it is doubtful if estoppel could ever apply in such circumstances since, if the Navajo Tribe and OSMRE are correct, EMD lacked subject matter jurisdiction over the permit application and the approval of Valencia's permit application would be *ultra vires* and directly in conflict with its approved State program.⁹

Thus, the question which must be decided is whether the lands in question are "Indian lands," within the statutory definition of SMCRA. The key to this determination in turn depends on analysis of the phrase "supervised by an Indian tribe," a phrase which is, itself, neither defined in the statute nor explained in the legislative history of SMCRA.

As noted above, both OSMRE and the Navajo Tribe argue that ownership of either the surface fee or the mineral estate necessarily subsumes the concept of "supervision." Thus, the decision of the Director, Albuquerque Field Office, opined that "if ownership were not supervision, it would be impossible for a property interest to reach the level of supervision." The Navajo Tribe concurs in this assessment. Both OSMRE and the Tribe draw support from the legislative history of LUPA and the Navajo Tribe further argues that the Court of Appeals decision in *Montana v. Clark, supra*, bolsters this interpretation. Valencia and EMD dispute this interpretation, arguing that the legislative history of LUPA is irrelevant to the meaning of the phrase "supervised by an Indian tribe" in the context of SMCRA. Further, EMD seeks to distinguish the decision in *Montana v. Clark, supra*, by noting that it involved a discrete question, i.e., the distribution of Abandoned Mine Reclamation Funds under Title IV of SMCRA. For reasons which we will set forth, we find ourselves in substantial agreement with respondents and, accordingly, affirm, as modified herein, the determination of OSMRE that the lands in question are "Indian lands," within the contemplation of the Act and therefore subject to the Federal Program for Indian Lands.

[1] All parties to this appeal admit that the phrase "supervised by an Indian tribe," is not a term of art to which can be ascribed a settled meaning, free of dispute. Rather, the present controversy swirls around the attempt by OSMRE to flesh out the meaning of this nebulous expression.¹⁰ In this regard, both OSMRE and the Navajo Tribe draw

⁹ Indeed, in approving the New Mexico State program, the Department noted that a number of groups had expressed concern as to the applicability of the New Mexico State program to Indian lands outside of reservation boundaries. In response to requests that OSMRE obtain a specific disavowal of jurisdiction by the State with respect to such Indian lands, the Department declared:

"The Secretary has explicitly stated in his findings that the approval contained in 30 CFR 931.10 is limited to non-federal and non-Indian lands in the State of New Mexico. The Secretary's approval in no way acts to grant or endorse any assertion by New Mexico of jurisdiction over mining on Indian lands." 45 FR 86482 (Dec. 31, 1980).

¹⁰ Nowhere are the difficulties attendant to deciphering the meaning of this phrase more apparent than in the failure of either EMD or Valencia to propose a substitute interpretation of the statutory language. Thus, while both appellants argue strenuously that OSMRE's interpretation is wrong, neither appellant proffers any other interpretation.

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support from the legislative history surrounding similar language in LUPA. Certainly, an interpretation of the phrase "supervised by an Indian tribe," which embraced lands outside of a reservation which a tribe "own[ed] or for which they possessed administrative responsibility," would almost certainly compel a conclusion that the lands in question are "Indian lands" not subject to the State program.

Valencia and EMD argue that recourse to the legislative history of LUPA is unwarranted because it involves a different piece of legislation, one which was never enacted into law and which was considered 4 years before SMCRA was adopted. But, as the respondents point out, LUPA was considered by the same committee which was at that time in the process of formulating an earlier version of SMCRA, the definition of "Indian lands" in both bills was identical, and, despite the fact that numerous substantive provisions of SMCRA were changed in the ensuing 4 years, the definition of "Indian lands" remained the same. It is simply logical to assume that a single legislative committee, reviewing two separate pieces of legislation, both containing the same verbatim definition, intended the same interpretation of that definition to be applied with respect to both pieces of legislation.

Admittedly, the language of the statutory definition was fashioned by the 93d Congress and SMCRA did not become law until it was passed by the 95th Congress and signed by President Carter in 1977. Thus, appellants contend that, regardless of what may have been contemplated by the original drafters of the statutory language, their interpretation cannot be said to be binding on the 95th Congress. This argument would have more force if there was any affirmative indication in the subsequent legislative history of a *different* interpretation. No such manifestation exists. On the contrary, as the court in *In re Surface Mining Regulation Litigation, supra*, noted: "The statutory provisions with respect to Indian lands were fashioned in the 93d Congress and were carried forward, with continual reexamination *but without significant change*, into the Act." *Id.* at 1364 (italics supplied). Indeed, it was precisely because of this fact that the Court placed heavy reliance on the legislative history of the 1973 proposal in interpreting the meaning and scope of section 710 of SMCRA, 30 U.S.C. § 1300 (1982), as adopted in 1977. We therefore agree with OSMRE and the Navajo Tribe that recourse to the legislative history of LUPA for the purpose of ascertaining the meaning of the phrase "supervised by an Indian tribe," as it appears in 30 U.S.C. § 1291(9) (1982), was proper.

Moreover, we agree with the Navajo Tribe that the decision in *Montana v. Clark, supra*, lends additional support to the conclusion reached by OSMRE. EMD attempts to discount the relevancy of this decision, placing particular reliance on a statement by the court that "[w]e wish to make clear that our decision is limited to the narrow

question presented by this case, the rationality of a regulation providing for distribution of reclamation funds." 749 F.2d at 747 n.14. Indeed, EMD asserts that the decision did not "decide whether the ceded strip in Montana constituted 'Indian lands' so that State regulatory authority was ousted" (EMD SOR at 19). To the extent that EMD is arguing that the court did not *hold* that the ceded strip was "Indian lands" removed from state regulation under 30 U.S.C. § 1253 (1982), EMD is technically correct since that issue was not before the court. But, to the extent that EMD is contending that the court did not determine that the ceded strip was "Indian lands" within the statutory definition appearing at 30 U.S.C. § 1291(9) (1982), EMD is patently wrong.

As noted above, the decision in *Montana v. Clark, supra*, involved the question whether OSMRE correctly withheld from the State of Montana an allocation from the Abandoned Mine Reclamation Fund for fees paid by mines located on the "ceded strip," a 1.13 million-acre tract in Montana, ceded by the Crow Tribe to the United States under a 1904 treaty, but for which the Crow Tribe retained a beneficial interest in the coal deposits. The operative statutory provision, 30 U.S.C. § 1232(g)(2) (1982), provided that "[f]ifty per centum of the fund collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation by the Secretary * * *." In adopting regulations implementing this provision, the Secretary substituted the term "Indian lands" for "Indian Reservation." Montana argued that the effect of this alteration was to enlarge the statutory term "Indian Reservation" to include off-reservation lands, such as the ceded strip, which were covered by the statutory definition of "Indian lands" but which could not be deemed to be within an "Indian Reservation," and thereby prevent the State from receiving an allocation of the fees paid by mining operations thereon.¹¹

In affirming the actions of OSMRE, the court expressly noted that "the parties do not seriously dispute that the ceded strip qualifies as 'Indian land' as defined by the statute." *Id.* at 743. Indeed, Montana's entire basis for standing rested on the fact that, but for the alteration of the definition to include off-reservation lands, the monies derived from the ceded strip would have been distributed to the State. *Id.* at 746 n.9, 748-49. It is, therefore, totally disingenuous for appellant EMD to suggest that the court did not find that the ceded strip was "Indian lands" within the meaning of 30 U.S.C. § 1291(9) (1982).¹²

More critically, the substantive conclusion of the court was premised on an analysis of the State's authority under SMCRA to control reclamation activities on non-reservation Indian lands. Through an

¹¹ The Indian tribe, however, would not receive 50 percent of the monies collected. Rather, OSMRE was holding those funds in escrow pending a congressional clarification of regulatory jurisdiction over Indian lands. *Id.* at 743.

¹² Moreover, since the court expressly eschewed examining the Crow Tribe's allegation that the ceded strip was properly deemed to be a "reservation" (see 749 F.2d at 743 n.5), its decision necessarily rests on the conclusion that the reserved mineral estate was sufficient, by itself, to render the land "held in trust for or supervised by an Indian tribe." This, of course, totally refutes EMD's other argument that this statutory provision only applies when both the surface fee and the mineral estates are conjoined. See EMD SOR at 16.

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analysis of the interplay between 30 U.S.C. §§ 1232(g)(2), 1235 (1982), and the definitional provisions of section 1291(9), (11), and (25) (1982), the court concluded that "given Congress' clear intent to deprive the states of reclamation authority over non-reservation Indian lands, we find it inconceivable that Congress wished states to benefit from funds derived from those areas." *Id.* at 752. Thus, the court's declaration that "the overwhelming evidence suggests Congress' desire temporarily to postpone determining the locus of regulatory authority over all lands in which the Indians have an interest," is not, as EMD would have it, mere dictum irrelevant to the issues before the Board. Quite the opposite. The court's observation was an essential predicate to its ultimate holding, brightly illuminating the scope and ambit of the statutory language found at 30 U.S.C. § 1291(9) (1982), and directly germane to the issues presented in this appeal.

Thus, the court in *Montana v. Clark, supra*, broadly read the language of 30 U.S.C. § 1291(9) (1982), as covering "all lands in which the Indians have an interest." It is, of course, unnecessary for this Board to embrace this expansive reading in order to sustain the decision of OSMRE. Rather than asserting that all lands in which an Indian tribe had an interest were within the scope of the statutory definition, OSMRE's holding in the present case is that, because the Navajo Tribe owns the surface estate in fee, it necessarily "supervised" the land within the meaning of the statutory definition. We think that this interpretation is in accord with the relevant legislative history and is supported by the decision in *Montana v. Clark*.

We recognize, however, an inherent inconsistency between the analysis of the Director of the Albuquerque Field Office and the position espoused by the Assistant Director of the Western Region with respect to the question of supervision in fact. Clearly, the Assistant Director was of the view that unless tribal fee lands were actually "supervised" by a tribe they could not be deemed "Indian lands" within the contemplation of SMCRA. It was, no doubt, a direct result of this expression of concern which led the Albuquerque Director to analyze Valencia's argument that, even though the Navajo Tribe held the surface fee estate, the Tribe did not exercise supervision over the land. While we believe that the Albuquerque Director's analysis provided more than a sufficient basis upon which to find that the Navajo Tribe did exercise supervision in fact, we are also of the view that supervision in law, i.e., mere ownership of the surface fee, was sufficient, in and of itself, to compel the conclusion that the lands at issue were "Indian lands" subject to the Federal Program for Indian Lands.¹³

¹³ We recognize that it is theoretically possible that the situation could present itself where lands for which an Indian tribe has no ownership interest in either the surface or the mineral estate might be said to be subject to the Tribe's "supervision" in fact. Whether this would be sufficient to classify the lands in question as "Indian lands" under SMCRA we need not determine at the present time.

Both EMD and Valencia argue that an interpretation which results in an assertion of OSMRE jurisdiction via the Federal Program for Indian Lands over the subject lands runs afoul of the expressed congressional intent to avoid altering the jurisdictional status quo. In point of fact, however, nothing in our decision alters the jurisdictional status quo. Thus, in adopting SMCRA, Congress could have provided that all lands in which a tribe owned any interest would be subject to the tribe's regulatory jurisdiction of surface mining activities under an approved program. Or, alternatively, Congress could have provided that *some* of those lands would be so subject. What Congress chose to do was to put off this decision to a future date and provide for a study of the question of regulation of surface coal mining activities on Indian lands. *See* 30 U.S.C. § 1300(a) (1982). To effectuate this intent, Congress sought to place "Indian lands" in a jurisdictional limbo for purposes of SMCRA, outside the scope of both the Federal lands program and any approved state program.

The position of Valencia and EMD proceeds from the assumption that, to the extent that any parcel of land was subject to a state's general regulatory or police powers prior to adoption of SMCRA, it must be subject to the state's regulatory authority under SMCRA if the Act is not to alter the jurisdictional status quo. The essential fallacy of this position is that SMCRA is, itself, an assertion of Federal authority under the Commerce Clause to regulate all surface coal mining activities within the individual states. *See Hodel v. Virginia Surface Mining & Recl. Assn*, 452 U.S. 264 (1981). Admittedly, the Act provided express mechanisms by which a state could achieve primary enforcement authority within the state, but such primacy is expressly limited by its terms to non-Federal, non-Indian lands within the state. That Congress so limited the assumption of state primacy did not *change* the jurisdictional status quo with respect to any lands within the state. Rather, it *established* the jurisdictional status quo, for the elementary reason that, until SMCRA was adopted, no entity had jurisdictional authority under its provisions.

Nor does the fact that states may not exercise authority under SMCRA to regulate coal surface mining operations on certain lands within the state determine or even affect the exercise of state jurisdiction on such lands pursuant to other authority. Thus, the fact that the land may not be "Indian country" for the purposes of state criminal jurisdiction is simply irrelevant to the question of whether these lands are properly deemed "Indian lands" for the purposes of SMCRA.

Based on the foregoing, we conclude that, where an Indian tribe owns either the mineral estate or the surface in fee of any land outside of the exterior boundaries of an Indian Reservation, such land is "supervised by an Indian tribe" within the meaning of 30 U.S.C. § 1291(9) (1982), and is properly subject to the Federal Program for Indian Lands established in 30 CFR Part 750. In light of this conclusion, we need not reach the argument advanced by the Navajo

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Tribe that the subject land lies within the undiminished exterior boundaries of the Navajo Reservation.¹⁴

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

JAMES L. BURSKI
Administrative Judge

I CONCUR:

KATHRYN A. LYNN
Administrative Judge
Alternate Member

¹⁴ Since we have modified the decision of the Albuquerque Director to the extent it could be construed to hold that supervision in fact is the determinate factor in whether an Indian tribe "supervises" land, there remains no issue of fact which might be explored at a factfinding hearing. Accordingly, EMD's request that the case be referred to the Hearings Division under 43 CFR 4.415 is hereby denied. See *Marie M. Bunn*, 100 IBLA 1 (1987).

June 9, 1989)

**APPEAL OF SCALF ENGINEERING CO. & PIKE COUNTY
CONSTRUCTION CO. (A JOINT VENTURE)**

IBCA-2328

Decided: June 9, 1989

Contract No. K6840167, Office of Surface Mining Reclamation and Enforcement.

**Appellant's appeal sustained in part and denied in part;
Government's counterclaim denied.**

**1. Contracts: Disputes and Remedies: Burden of Proof--Contracts:
Disputes and Remedies: Termination for Default: Generally**

Where the Government was able to demonstrate that a reclamation contractor failed to comply with the terms of its contract to stabilize a landslide on an abandoned minesite, or complete the work within the time specified, it was found to have met its burden of proving the facts of the contractor's default.

**2. Contracts: Construction and Operation: Actions of Parties--
Contracts: Construction and Operation: Contracting Officer--
Contracts: Disputes and Remedies: Termination for Default:
Generally**

Where the evidence demonstrated the occurrence of a 2-year delay between the time a contract was terminated by the contracting officer and his final decision that the termination be for default, such action was upheld by the Board due to the contractor's failure to show that it was materially prejudiced by the delay, or that such delay was exclusively the fault of the Government.

**3. Contracts: Disputes and Remedies: Burden of Proof--Contracts:
Disputes and Remedies: Termination for Default: Generally**

Where a contractor failed to demonstrate that its nonperformance of a contract was otherwise excusable, the Board found the termination of such contract for default to be proper.

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

A contractor's claim for additional termination costs was not allowable where the evidence showed that but for the contractor's failure to comply with the specifications and its performance inefficiencies, such expenses would not have been incurred.

**5. Contracts: Disputes and Remedies: Damages: Measurement--
Contracts: Disputes and Remedies: Termination for Default: Excess
Costs**

In the absence of proof that the Government actually paid excess reprocurement costs to complete a contract terminated for default, its claim against the defaulted contractor for such costs was denied.

APPEARANCES: Francis D. Burke, Attorney at Law, Pikeville, Kentucky, for Appellant; Tara D. Campbell, Department Counsel, Pittsburgh, Pennsylvania, for the Government.

June 9, 1989

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

This appeal was timely filed by appellant, Scalf Engineering Co. and Pike County Construction Co., from the March 27, 1987, final decision of the contracting officer, terminating for default, contract No. K6840167, and partially sustaining appellant's claimed termination costs of \$85,919.95 for work incurred during reclamation of a landslide on an abandoned minesite. The final decision granted appellant the amount of \$39,670.18, which the contracting officer offset against the Government's excess reprocurement costs of \$77,368.99, leaving the amount of \$36,698.81 due the Government by appellant. An evidentiary hearing in the matter was held on October 4 through 5, 1988, in Lexington, Kentucky.

Findings of Fact

1. On September 27, 1984, appellant was awarded the subject contract by the Office of Surface Mining Reclamation and Enforcement (OSMRE) (Appeal File I, Section II).¹ The project, known as "Chloe Creek Landslide Phase II," was designed to stabilize a landslide located on Chloe Creek in Pike County, Kentucky. The area affected by the landslide had previously been mined for coal and left in an unreclaimed condition (Tr. 14-15).

2. OSMRE became involved with the Chloe Creek site in May 1983 following a landslide that filled the stream below the minesite with mud (Tr. 146). At that time OSMRE hired a contractor to clean the mud out of the stream and hired an architect/engineering firm, Nesbitt Engineering, Inc., to design an abatement plan to address the source of the problem (Tr. 146). Nesbitt Engineering recommended regrading of the spoil material on the hillside and construction of a gabion retaining wall at the bottom or "toe" of the regraded slope (Tr. 19).² The gabion dam was to serve as a foundation for the toe of the regraded slope, in order to provide support for the slope (Tr. 20). Based on this design, OSMRE awarded a construction contract in November 1983 which is referred to as Chloe Creek Phase I. During this phase, the slope was regraded and the gabion dam constructed in accordance with the design plans (Tr. 20, 27-28, 178).

3. The Chloe Creek site remained stable until May 1984 when Eastern Kentucky experienced very heavy rainfall that resulted in flooding of Pike County (Tr. 28, 97-98). Heavy rainfall, in addition to an

¹ Hereinafter, references to the documents which comprise the official record in this proceeding will be typically abbreviated as follows: Appeal File Part I or II, Section II (AF-I-II); Supplemental Appeal File (Supp. AF); Hearing Transcript (Tr.); Appellant's Exhibits (AX); Government's Exhibits (GX).

² A gabion retaining wall or dam consists of a series of rock-filled baskets tied together by wire. The baskets are constructed of high tensile, galvanized steel and are filled with either limestone or sandstone rock that measures 4 to 8 inches in diameter. The baskets are laced together and placed one upon the other (Tr. 19-20).

increased groundwater flow from the underground mine workings, caused saturation of the slope and subsequently another landslide at the Chloe Creek site (Tr. 28, 97-98).

OSMRE again hired Nesbitt Engineering to design a program to stabilize the hillside (Tr. 28). Nesbitt Engineering proposed the installation of a sub-drainage system on the hillside to pick up the water flow from the underground mine and drain it into the channel downstream (Tr. 29). In addition, Nesbitt Engineering recommended "partial" excavation of the slope, whereby only the saturated spoil material actually moving on the hillside would be excavated (Tr. 30-31). Using the gabion wall as a foundation for the toe of the slope, a rock buttress was to be built for additional support since additional material was being removed, creating a steeper grade (Tr. 30).

4. On September 18, 1984, a pre-bid conference was conducted by OSMRE for contractors who wished to bid phase II of the project to stabilize the landslide (AF-I, Sec. VII; Supp. AF-B; Tr. 132, 148). The contract specifications prepared by Nesbitt Engineering were reviewed (Tr. 34-39, 151). The specifications required the contractor to maintain the roads in adequate condition to safely accommodate public traffic (AF-II, Sec. 12 "Traffic Control and Protection of Roads"; and Sec. 18 "Access to the Project Area").

5. Dwayne Scalf, a field supervisor for appellant, prepared appellant's bid without having attended the pre-bid conference (Tr. 385-86). He did visit the site one day after the pre-bid conference. Subsequently, on September 27, 1984, appellant was awarded the contract, and ordered to begin construction on October 2, 1984 (AF-I, Sec. II.A). On October 3, 1984, a pre-construction conference was conducted by OSMRE Project Engineer, Jack Spadaro, and Project Manager, Nancy Roberts, for purposes of reviewing the plans and specifications with appellant, who was represented at the conference by Dwayne Scalf and Burl Osborne (AF-I, Sec. VII; Supp. AF-B; Tr. 40, 151, 352-58). Jim Holliday, the independent site inspector, was also in attendance (AF-I, Sec. VI). The maintenance of the access road and the work to be performed on the landslide were both discussed (Tr. 40). There is no evidence that either of appellant's representatives objected to the adequacy of the specifications to accomplish the work.

6. Pursuant to the specifications, appellant was to excavate the spoil material that was moving on the hillside and haul it to a designated waste area where it could be compacted and revegetated (AF-I, Sec. II.H). Two waste areas were designated in the work specifications, the principle waste area being the upper waste area and the other an area on the mine bench above the slide (AF-I, Sec. II.H, Sec. 22; Tr. 34). Prior to placing spoil material from the landslide on the upper waste area, the specifications required appellant to construct an underdrain system in the upper waste area for purposes of collecting drainage from the spoil material (AF-I, Sec. II.H, Sec. 22; Tr. 41).

7. Appellant began excavating the trench for the underdrain in the upper waste area when it encountered muddy soil, and subsequently,

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began placing the excavated soil on the mine bench to dry out (AF-I, Sec. VI). Excavation of the trench for the underdrain was undertaken by appellant with a Gradall, a rubber-tire-mounted piece of equipment having a long-arm extension with a bucket attached for excavation (Tr. 196-97). The evidence shows that appellant experienced repeated breakdowns of the Gradall (AF-I, Sec. VI; Tr. 197- 98). In many instances, the bucket fell off the long-arm extension while the Gradall was in use, creating numerous delays (Tr. 197-98). The Gradall eventually was replaced with a 690 Excavator, 3 weeks into the project (AF-I, Sec. VI).

8. The evidence further shows that appellant accomplished very little work in the period up to October 10, 1984 (AF-I, Secs. VI and VII). Holliday testified that during the first 2 weeks of work, appellant's supervisors inadequately directed the work (Tr. 200-201). On October 17, 1984, Spadaro and Roberts met with appellant's representatives regarding the equipment breakdowns and lack of supervision (AF-I, Secs. VI and VII; Tr. 43-45, 152-53).³ In addition, appellant requested, and was permitted, to extend the upper waste area in order to stockpile wet spoil material from the landslide (Tr. 45-46, 52-54). As a result, appellant was also required to extend the underdrain, which was completed October 31, 1984, 2 weeks after the parties agreed to the extension (AF-I, Sec. VI; Tr. 201).⁴

9. Due to muddy conditions existing on the access road, appellant performed no construction activities during the period October 23 through 26, 1984 (AF-I, Sec. VI). During a meeting on November 21, 1984, appellant complained about the difficulty it was having in hauling spoil material from the landslide area uphill to the upper waste area due to the condition of the access road (Tr. 57-58, 156). The evidence shows that appellant had failed to take adequate measures to properly gravel the access road (Tr. 153). Rather, appellant scraped mud off the surface of the road until dry material was exposed and pushed the mud off the side of the road or over the hill (Tr. 153). Appellant was again allowed to use another waste area (McKinney) which would allow appellant to haul the spoil material downhill (AF-I, Sec. VII; Supp. AF-B; Tr. 57-59, 156).

10. During the week of November 23 through 27, 1984, gravel was placed on the access road, and appellant was able to haul spoil material from the landslide area to the McKinney waste area (AF-I, Sec. VI; AX-2; Tr. 447-48). The following week however, appellant again experienced problems with mud on the access road and was prevented from hauling any spoil material (AF-I, Sec. VI; AX-2). The evidence

³ Subsequent to this meeting, appellant appointed Dwayne Scalp to act as project supervisor (AF-I, Sec. VI; Tr. 52, 153).

⁴ The Government contends that the additional work required by the extension of the underdrain should have only taken 1 week to complete (Tr. 54, 153). It argues that equipment breakdowns, lack of supervision, and the muddy conditions of the haul road contributed to the delay in completing the underdrain (AF-I, Sec. VI; Tr. 55, 201-03).

indicates that appellant did not continue to place gravel on the entire road in the manner it had the prior week (Tr. 447-57).

11. Problems associated with the access road continued to hinder work at the site (AF-I, Sec. VI; AX-2). By December 12, 1984, when Spadaro and Roberts visited the site again, the road was in poor condition, the slide area became increasingly unstable, and only two pieces of equipment were onsite (AF-I, Secs. VI and VII; Tr. 60-61, 157-58). On this date, Spadaro and Roberts informed appellant that they intended to recommend to the contracting officer that a cure notice be issued to appellant (AF-I, Secs. VI and VII; Tr. 60, 157). A cure notice was issued by the contracting officer the following day, December 13, 1984 (AF-I, Sec. V.A.). The cure notice required appellant to submit, within 10 days, a written work plan for completion of the work (AF-I, Sec. V.A.). By letter dated December 20, 1984, appellant proposed to the contracting officer that it be allowed to complete the removal of the spoil in the slide area and place the stone buttress behind the gabion wall by January 3, 1985 (AF-I, Sec. V.B.). Appellant further requested a suspension of work from January 3, 1985, until spring. Appellant described the poor weather conditions and other factors it claimed were affecting its work progress. Appellant's request for a suspension of work was subsequently denied (Tr. 169).

12. Appellant returned to the site but achieved little progress due, as alleged by the Government, to equipment problems and the poor condition of the access road (AF-I, Sec. VI; Tr. 234-35, 238-40).

Appellant continued to cut the access road and push the wet material to the side of the road (AF-I, Sec. VI). Moreover, appellant was piling spoil on the face of the slope, rather than being taken to the bottom of the slope as required by the specifications (Tr. 242). Subsequently, on January 3, 1985, a landslide occurred at the Chloe Creek site (AF-I, Sec. VII; Supp. AF-B; Tr. 65, 159). The landslide material went over the gabion wall, knocked out the top row of baskets, and filled the stream channel flowing toward homes located downstream (Tr. 65, 169).

13. Following the landslide on January 3, 1985, OSMRE ordered appellant to work 24 hours a day in order to control the flow of mud in the stream channel (AF-I, Sec. VI; Supp. AF-B). Appellant worked the site on a 24-hour basis until January 5, 1985 (AF-I, Sec. VI).⁵ Inspector logs show that January 6, 1985, was the last day appellant attempted to perform any work at the site (AF-I, Sec. VI). Thereafter, on January 8, 1985, OSMRE personnel and the contracting officer met with appellant at the site (AF-I, Sec. VII; Supp. AF-B). At that time the contracting officer decided to terminate appellant's contract, and a written termination notice was sent to appellant on January 14, 1985 (AF-I, Sec. III.A.).

14. Upon termination of appellant's contract, OSMRE contacted Nesbitt Engineering in order to have plans and specifications

⁵ During this period, on Jan. 8, 1985, the Fiscal Court of Pike County, Kentucky, was threatening an action for injunction against appellant due to mud on a county highway (Joint Stipulation of Fact No. 4). However, no action for an injunction was ever filed.

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developed to correct the landslide problem (Tr. 75-76). These specifications formed the basis of the reprocurement contract, referred to as Chloe Creek Phase III. The reprocurement contract was awarded to Fleetwood Johnson Construction Co. on January 25, 1985 (AF-II, Sec. XII). Johnson completed the work on August 16, 1985.

15. In his January 14, 1985, letter to appellant, the contracting officer did not determine whether appellant's failure to perform was excusable, and thus did not designate the termination as being either for default or for the convenience of the Government.⁶ In response to the termination notice, appellant by letter dated January 17, 1985, offered several reasons for its failure to make progress (AF-I, Sec. III.C.), including adverse weather conditions and deficiencies in the design and construction of the gabion dam. Appellant reiterated its position by letter dated March 7, 1985 (AF-I, Sec. III.E.). Except for a meeting between the parties on March 5, 1987 (AF-I, Sec. M), the evidence shows that there was never any written response to appellant's January 17, 1985, letter by the contracting officer.

16. Appellant submitted a final invoice dated January 28, 1985, for termination costs totaling \$85,919.95 (AF-I, Sec. III.D.). Subsequent to a meeting on August 22, 1985, appellant's counsel stated that he would provide the Government with certain engineering reports, which would show the work specifications defective, and the gabion wall design deficient. Thereafter, the parties exchanged correspondence relating to the discussions of August 22 (AF-I, Secs. III.J. and K.). By letter dated September 25, 1985, appellant modified its offer to provide engineering reports, saying it would only provide such reports if the Government likewise exchanged with appellant its engineering reports in support of the Government's claim that the work was not diligently performed, or was not in compliance with the terms of the contract. Appellant's counsel stated it never received a reply to its September 25, 1985, letter.

17. On March 7, 1987, OSMRE sent appellant correspondence from the contracting officer, with an alleged attached memorandum purporting to itemize the Government's counterclaim. The Government requested additional documentation to support appellant's claims because a number of receipts were not legible or allegedly not provided (AF-I, Sec. III.J., and Sec. IV.). On March 27, 1987, 26 months after the initial letter terminating appellant's right to proceed, the contracting officer issued a final decision designating appellant's contract in default (AF-I, Sec. III.M.). The contracting officer approved for payment \$39,670.18 of the \$85,919.95 claimed by appellant but applied the amount as an offset against claimed excess reprocurement costs of \$77,368.99 (AF-I, Secs. III.M. and X.). As a result, the Government

⁶ The contracting officer stated: "As soon as practicable I will give you a decision on whether your failure to perform arose from causes beyond both companies control * * * fault or negligence. At that time, both companies will be informed as to whether this termination is for default or at the convenience of the Government."

asserts the amount of \$36,698.81 remains due OSMRE by appellant. On June 1, 1987, appellant filed a timely appeal from the contracting officer's decision (AF-I, Sec. III.N.).

Decision

The Default clause in appellant's contract, 48 CFR 52.249-10, Default (Fixed-Price Construction) (April 1984), provides in pertinent part:

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise * * *. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

Upon termination of a contract for default, the Government has the burden of proving the facts of the contractor's default. Once demonstrated, it is incumbent upon the contractor to establish that its performance failure was due to causes which were beyond its control, fault, or negligence. *Arthur L. Cruz*, IBCA-2098 (Sept. 10, 1987), 87-3 BCA 20,142.

A review of the Statement of Work specifications (AF-I, Sec. II.H.), sets forth the scope of work which appellant was obligated to perform, including the following pertinent requirements:

1. improvements to allow access to the various areas of the work [this includes the requirement to maintain the access road in accordance with Sections 12 and 18 of the specifications];
2. excavation and placement of spoil;
3. construction of rock fill behind existing gabion buttress;
4. installation of French underdrains; and
5. provide adequate sedimentation and drainage control during and after construction.

Performance time under the contract was 90-calendar days after receipt of the Notice to Proceed, establishing a completion date under the contract as December 30, 1984 (AF-I, Sec. II.B.). Assessing this and other requirements of the contract, our view of the facts in this appeal convinces us that on the date of termination, January 14, 1985, the contracting officer had a reasonable basis for concluding that appellant had failed to meet the requirements of the contract, and that its lack of progress endangered contract performance. We thus conclude termination of the contract was proper. Our reasons for this conclusion follow.

First, the evidence shows that appellant's difficulties were due primarily to its failure to maintain the access road as required by Sections 12 and 18 of the specifications (Tr. 43, 69-70; Findings of Fact No. 7, 10). Appellant does not deny its responsibility to maintain the access road (Tr. 325, 389-90, 435-36). However, appellant failed to take

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proper steps to meet these contract requirements. Instead of constructing a solid gravel base on the entire length of haul road, as sound construction practice would dictate, appellant for the most part, opted to merely scrape mud off the surface of the road and push it off the side of the road or over the hill. This extensive cutting, the record shows, greatly contributed to appellant's lack of progress. As noted by the daily logs, there were numerous times when appellant could not work as a result of the muddy condition of the access road (AF-I, Sec. VI; AX-1, 2). On one such instance, October 16, 1984, appellant was prevented from hauling stone for the underdrain to the top of the slide area due to the poor condition of the access road (AF-I, Sec. VI; AX-1). In addition, OSMRE's project engineer, Spadaro, testified that had appellant built up a good gravel base, the access road was wide enough (12-14 feet) to install a drainage ditch against the hillside (Tr. 509-10). Appellant however, refutes this conclusion, stating that a drainage ditch could not be placed along the access road to the upper portion of the construction site because the road was only 7 feet 11 inches wide inside the berm on the outer edge of the road. It further asserts that it was not allowed to blast the sandstone rock on the hillside portion of the road to widen the road (AX-V; Tr. 297).

Despite appellant's arguments, the record is replete with instances where due to appellant's inefficiency, equipment problems, or its failure to adequately gravel the haul road, performance of the work was delayed. The independent site inspector, Jim Holliday, reported several days in late October 1984 when there were no construction activities due to the muddy conditions on the haul road (AF-I, Sec. III). Holliday testified that with proper maintenance of the access road, appellant could have completed the work on time (Tr. 202).

Both Holliday, and his successor, John Basso, testified, contrary to appellant's assertion that the spoil material was often too wet to haul to the fill area, that in fact, the spoil material was not too wet to haul, but rather the access road was too muddy to haul on (Tr. 204-06, 228-29). Both Holliday and Spadaro noted little work at the site in mid-and-late November, even during good weather, because the condition of the access road prevented hauling (AF-I, Sec. VI; Supp. AF-B; AX-2; Tr. 59, 60).⁷ By mid-December 1984, the condition of the haul road deteriorated, and the slide area became increasingly unstable (AF-I, Secs. VI and VII; Tr. 60-61, 157-58), which caused the contracting officer to issue the 10-day cure notice.

Subsequent to issuance of the cure notice, appellant's progress continued to be hindered by the poor condition of the haul road and numerous equipment problems. Equipment became stuck, ran out of fuel, or broke-down, creating innumerable delays (AF-I, Sec. VI; Tr.

⁷ The Board takes note of the fact that Spadaro's logs were not contemporaneous with the daily work at the site. At the hearing, Spadaro testified that he put together a chronological sequence of events over the previous 2 months, in December 1984, after the cure notice had been mailed to appellant (Tr. 52).

234-35, 238-40). By late December, the slide area became increasingly dangerous (Tr. 242-43). Both Spadaro and OSMRE Project Manager Roberts testified, and we so find, that the January 3, 1985, landslide occurred due to appellant's delay in removing spoil material in the slide area and because of appellant's improper method of removal (see Finding of Fact No. 12; Tr. 66-69, 159-60).

Spadaro estimated that at the time of the landslide, appellant had removed only 25 percent of the spoil material from the slide area (Tr. 67-68). The access road remained in poorly maintained condition, and work on the rock buttress and subdrainage system had not yet begun. Appellant thus failed to meet the schedule of work it had proposed in response to the cure notice. Moreover, the evidence shows that appellant did not perform any degree of work after January 6, 1985 (see Finding of Fact No. 13).

[1] Thus, by January 14, 1985, the record clearly established that appellant had failed to either comply with the terms of the contract, or complete the work within the time specified. Under such circumstances, we find the Government to have met its burden of proving the facts of appellant's default.

[2] With respect to the termination issue, we further find that appellant was not prejudiced by the delay between the time its contract was terminated by the contracting officer, and the latter's determination that such termination be for default. Although the period in question was over 2 years in duration, appellant has not shown any prejudice by the inordinate delay in terminating this contract for default. See *EL-ABD Engineering*, ASBCA No. 32023 (Jan. 25, 1988), 88-2 BCA ¶ 20,555.

The evidence shows that by January 14, 1985, when appellant received written notification to cease operations, its surety received a copy of the notice, and appellant had already begun to demobilize its equipment (AF-I, Secs. III.A. and VI.). No further work was performed at the site following the termination. Appellant alleges that it had purchased and stockpiled materials used by the reprocurement contractor, and submitted such claim by invoice of January 28, 1985. The evidence however, shows appellant's claims for these items, to the extent substantiated, were approved for payment and were used to offset the amount of the Government's excess reprocurement costs. Appellant has failed to offer any substantive evidence which shows that it was prejudiced by the delay, or that such delay, was exclusively due to the fault of the Government. Thus, appellant's charge that the Government ignored its claim for over 2 years is without merit, and is not sufficiently substantiated by the record.

The Government having demonstrated the facts of appellant's default, the burden rests with appellant to prove that its failure to comply with the terms of the contract was excusable. *J.M.T. Machine Co.*, ASBCA Nos. 23928, 24298, 24536 (Dec. 19, 1984), 85-1 BCA ¶ 17,820 at 89, 179. Appellant first asserts that because of severe weather

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conditions, its failure to perform on time arose out of a cause that was beyond its control or without its fault or negligence.

Normally severe weather, which should reasonably be expected, will not however, support a claim of excusable delay. It must be "unusually severe weather," e.g., "adverse weather which at the time of the year in which it occurred is unusual for the place in which it occurred."

T.C. Bateson Construction Co., GSBCA No. 2656 (Sept. 27, 1968), 68-2 BCA ¶ 7263. No matter how severe or destructive, if the weather is not unusual for the particular time and place, or if a contractor should reasonably have anticipated it, the contractor is not entitled to relief. A case of unusually severe weather is not established simply because weather charts indicate that on a certain day the precipitation is greater than average, since a variance in weather patterns is to be expected and is not necessarily unusually severe. *Bateson, supra* at 33,753. The term "unusually severe weather" thus does not include any and all weather which might interfere or prevent work under the contract.

In determining whether weather was sufficiently severe to be considered "unusual" and not be reasonably expected, boards have used as a basis of comparison, statistics concerning the weather for the locations involved *during the months in question over a number of years*. *Gibbs Shipyard, Inc.*, ASBCA No. 9809 (July 10, 1967), 67-2 BCA ¶ 6499 (5 years); *J& B Construction Co.*, IBCA-667-9-67 (Feb. 24, 1969), 69-1 BCA ¶ 7521 (10 years); and *James P. Purvis*, GSBCA Nos. 905, 1096 (June 4, 1969), 69-1 BCA ¶ 7723 (5 years).

Here, appellant introduced its exhibit 3, an official certified weather record from the Department of Commerce, National Climatic Data Center. Exhibit 3 shows rainfall during the period of October 1, 1984, through January 9, 1985, in the total amount of 15.7 inches. The same exhibit shows that in the months February through April 1985, total rainfall amounted to 3.74 inches. Appellant thus argues that in the 90-day period following the month of January 1985, rainfall was approximately one-fourth of the total rainfall during the period of attempted performance by appellant (App. Brief at 4). In addition, appellant offered the testimony of Patrick Howard, a licensed engineer with experience in rock mechanics and landslides. Howard testified that in his opinion, rainfall of 14-½ inches between October and December 1984, was indicative of unusually severe weather (Tr. 493).

By itself, the climatological information presented in appellant's exhibit 3 for October 1984 through April 1985, does not support appellant's allegation of unusually severe weather. No such data was submitted for any other years for the same period and location. While exhibit 3 does indicate moderately heavy rainfall during October 1984 through January 1985, without the benefit of comparative statistics, the Board is unable to conclude from the record herein that the weather for the periods and location involved was "unusually severe."

Moreover, appellant's attempt to compare rainfall for the period October through December 1984, with the 90-day period, February through April 1985, is irrelevant to the determination of this issue. Howard's testimony cannot be given sufficient weight to meet appellant's burden given the fact that he is not a qualified meteorologist, nor do his credentials demonstrate the expertise to draw such conclusions.

In addition, there is some dispute as to whether appellant's weather records accurately reflected conditions at Chloe Creek. We make this point, not because the Government has introduced any evidence which challenge these records, but because appellant's data, standing alone, does not adequately demonstrate the true conditions at the site as is its burden. Specifically, we note various discrepancies between appellant's weather data and logs recorded by Dwayne Scalf and Bennie Taylor, appellant's own personnel at the site (AX-12). For instance, on November 11, 1984, Scalf recorded "rain," and on November 15 recorded "work 6 hrs-rain out," yet the weather records shows no precipitation for either of these days (AX-1, 3). Similarly, Taylor's logs for November 15 through 17 noted shutdowns due to rain wherein AX-3 again showed no precipitation for those days (AX-2, 3).⁸ Appellant's attempts to explain these inconsistencies are not convincing (Tr. 341-43).

Moreover, the only evidence presented by appellant with regard to the location of the weather station was the testimony of Wallace Scalf that the precipitation was recorded by the state police which was approximately 3 miles from the job site (Tr. 341). The weather records themselves do not reveal the exact location of the weather station.

Appellant we conclude, has thus failed to establish a nexus between the conditions produced by the weather and its inability to perform in a timely fashion. See *Banner Engineering Corp.*, ASBCA No. 29467 (Dec. 14, 1984), 85-1 BCA ¶ 17,881. For these reasons, we cannot find its performance excusable due to unusually severe weather. As for its contention that it was at least entitled to cessation of work due to "days of inclement weather," as provided in the special contract requirements, appellant still has failed to demonstrate by a preponderance of the evidence, that its untimely performance was inordinately delayed by, or related to, such adverse weather, as opposed to its own work inefficiency.

Similarly, we do not accept appellant's argument of impossibility of performance predicated on commercial impracticality. This doctrine is grounded on the assumption that in legal contemplation something is impracticable when it can only be done at an excessive and unreasonable cost. *Natus Corp. v. United States*, 178 Ct.Cl. 1 (1967). The evidence fails to establish the contract was impossible to perform. That some hardship or inconvenience (including increased costs of

⁸ Taylor's logs further show 9-½ hours of work on Dec. 4, 1984, while in its Dec. 20, 1984, response to the cure notice, appellant claims that day as a bad weather day (AF-I, Sec. V.B.; AX-2).

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performance) was experienced by appellant in attempting to meet the schedule of work does not establish impossibility or excuse appellant's nonperformance. *Pamela J. Sutton*, PSBCA No. 1622 (Mar. 31, 1988), 88-2 BCA ¶ 20,680. As with its claim that its access to the project site was hindered,⁹ appellant has failed to present any evidence in support of these allegations.

Finally, we consider appellant's assertion that its nonperformance was excusable due to defective specifications. In this regard, appellant makes the following arguments: (1) that the flow of water from the deep mine at the bench area above the gabion dam produced sufficient water to be a destabilizing force on the slide area; (2) that soil compactability tests demonstrated that appellant could not achieve 90 percent compactability as required by the contract; (3) that the gabion dam baskets were snap-tied together which were not in compliance with the manufacturer's recommendations and thus, defective; and (4) that in the opinion of its expert engineer, the Government's overall design was defective, and incapable of meeting the problem it sought to solve, because the design failed to include a foundation study, with a standard penetration test, to determine pore pressure, cohesion, and unit weight of the material in order to predict the probability of slides. For these reasons, appellant asserts that the Government's defective specifications precluded it from performing the work in a timely or proper fashion.

With respect to appellant's first argument, OSMRE concedes that the underground water flow did produce sufficient water to be a destabilizing force on the slide area (Tr. 84-87). However, we conclude that the evidence shows the main reason for the unstable condition of the hillside, and the eventual landslide on January 3, 1985, was due to appellant's failure to comply with the specifications. Specifically, appellant failed to excavate spoil material from the upper limits of the project and continue downward as required by Section 11 of the specifications, choosing instead to pile spoil on the face of the slope rather than taking it to the bottom of the slope as required. This, in conjunction with appellant's failure to adequately gravel the haul road (as required by Sections 12 and 18, and as it had done the week of November 23 through 27, 1984, when it was able to haul spoil material from the landslide area (*see* Finding of Fact No.10)), created a situation where appellant's failure to make adequate progress in removing spoil, resulted in the creation of an increasingly unstable hillside area, which eventually led to the landslide.

⁹ The record shows that a private road existed across the property of an individual where appellant's equipment would have to be moved. Section 18 of the contract allowed the contractor to move and relocate a fence along the road subject to replacement at its original location after completion of the contract (Tr. 37-39). Appellant argues it was denied access to the site, apparently because the landowner requested the location of the fence be documented before being moved to assure its return to the original location (Tr. 237). The record shows that appellant never objected to this request to OSMRE personnel (Tr. 63-64, 159), or has it offered any support for such assertion.

We further conclude that there is no evidence which supports appellant's allegation that the gabion wall baskets were improperly constructed, and contributed to the landslide. To the contrary, the evidence shows that the wall was inspected in December 1983, and found to be in accordance with the manufacturer's specifications (Tr. 27, 147). Moreover, the record shows the gabion wall had not failed in any way during the landslide of May 1984 (Tr. 28, 147). Despite appellant's introduction of photograph No. 4, which purports to show that the gabion dam baskets were "snap-tied," appellant fails to offer any evidence how this caused a failure in the dam or resulted in the subsequent slide. It is well established that mere allegations, standing alone, do not constitute proof of facts. *Southwest Forestry Workers Co-Op.*, AGBCA No. 84-140-1 (Aug. 5, 1986), 86-3 BCA ¶ 19,203.

With respect to appellant's assertion that the spoil material could not be compacted as required by the specifications, we again find such contention unpersuasive. The record shows in the first instance that appellant failed to adequately stockpile saturated material as required by Section 22.4 of the specifications in order to allow for drying (AF-I, Sec. II.H.). Spadaro and Holiday testified that saturated spoil is generally dealt with by spreading it in piles, allowing it to remain in the weather for 3 through 4 days, exposed to sun and wind, in order to allow it to dry, so that it can then be compacted (Tr. 73, 206). Section 22.4 provided that "[t]he Contractor should realize that portions of the spoil may be saturated and therefore may require special handling, drying or mixing before compaction will be possible." Appellant seeks to create the impression that the weather conditions between October 1984 and January 1985, would not allow for any such drying of saturated spoil. However, in its letter of December 20, 1984, appellant only claimed 33 rain, snow, or sleet days, and 7 of those days November 15 and 17, and December 1, 3, 4, 5, and 8, were shown by appellant's own weather records to show .00 precipitation.¹⁰ Given this evidence and the disputed results of appellant's soil compactability studies performed on October 25, 1984, and January 18 and 19, 1985, we conclude that appellant has failed to establish that the specifications were defective with respect to its compactability requirements.

Finally, we consider the testimony of appellant's witness, Patrick Howard, a licensed engineer, who stated that OSMRE's design was defective and could not abate the problem (Tr. 496). Howard inspected the site on September 23, 1988, after completion of the Fleetwood Johnson contract and 2 weeks before the evidentiary hearing in this matter (Tr. 484, 487, 493).

Howard testified that had OSMRE conducted numerous studies, including a subsurface study of the No. 2 Elkhorn coal seam, it would have discovered the extensive water drainage and the design would

¹⁰ In addition, AF-I, Sec. VII, which contains a summary of the work from the technical project officer's personal journal, reveals numerous days in October, November, and December 1984, where the weather was sunny and mild during which time appellant could and should have complied with the specifications for drying saturated spoil.

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have indicated much more than 2,000 c.y. of material to be removed (Tr. 488). He concluded that even upon completion of Phase III of the work, due to toe failure of the slope and a fissure above the coal seam, that an unstable hillside still existed (Tr. 489). Other than reaching this conclusion however, Howard could not say what corrective measures should have been taken in the specifications to remedy the situation (Tr. 490). Basically, Howard's resolution of the problem rested in his belief that the project should have been undertaken in dry weather (Tr. 491, 496, 501). He failed to offer substantive engineering criticisms of the Nesbitt Engineering design, or specify in any detail, how he reached the conclusion that the specifications were defective. Nor did Howard point to any particular section of the specifications that he felt were defective. Such evidence does not establish the validity of the charge appellant seeks to prove.

In light of the fact that Phase II was an emergency project, and that such was made clear to prospective bidders at the pre-bid conference (Tr. 510-11), it is clear that the contract was to be performed during the period October through December 1984. Work at such time required risks by the contractor that it would encounter possible adverse weather conditions and other hardships. There are no grounds therefore, to allow appellant relief on the basis of defective specifications, because the project was undertaken in winter weather.

[3] For the above reasons, we find that appellant has failed to show that its nonperformance of the contract was excusable. The termination for default thus stands.

Calculation of Approved Termination Payments And Reprocurement Costs

On March 27, 1987, the contracting officer issued a final decision, approving payment against the January 28, 1985, invoice in the amount of \$39,670.18 (AF-I, Sec. III.M.). With respect to certain remaining invoice items, either partial payment was allowed or no payment at all. Line items, 13A, Gravel, and 13B, #2 stone, were partially approved in the amount of \$4,741.80. Because an unknown quantity of stone was left on the site by appellant, the contracting officer relied on measurements of the drain as to how much gravel and stone had actually been left on the site. A similar calculation was made for perforated pipe left on the site. The contracting officer's calculations were adequately explained and appellant has not shown them to be unreasonable.

Having previously determined that appellant was required to maintain the access road pursuant to Sections 12 and 18 of the contract, we find no basis to award its claim for road surge stone and filter fabric (AF-I, Sec. III.D.). Appellant seeks \$11,637.44 for 987.60 tons of surge stone, and \$1,890 for filter fabric. However, these items should have been included in appellant's bid, as it should have

anticipated that inclement winter weather conditions would require additional materials to maintain the access road.

[4] We next address appellant's invoice for \$32,729.50, for labor and equipment for work done on the project January 3 through January 9, 1985. This represents the costs expended by appellant subsequent to the landslide on January 3, 1985. As we have previously determined, appellant's failure to maintain the access road in order to allow it to haul the saturated spoil off the affected hillside, coupled with its failure to comply with the specifications in excavating spoil from the site was the principal reason for the landslide occurrence of January 3, 1985. Combined with numerous other examples of inefficiency, we conclude that but for appellant's method of performance these expenses would not have been incurred. The Government approved excavation and placement of 982 cubic yards of spoil for a total amount of \$8,592.50. The record shows no basis for allowing appellant any additional amounts for these invoice items.

Based on the evidence, appellant has thus failed to demonstrate that it is entitled to a credit for any additional amounts other than the \$39,670.18 approved for payment by the contracting officer.

Having so concluded, we next address the propriety of the excess costs decision. It is well-settled that on reprocurement, the Government must prove at least a *prima facie* case that reasonable efforts were made to mitigate damages. *Techcraft Systems*, VABCAs Nos. 1894, 2027, 2145 (Sept. 30, 1986), 86-3 BCA 19,320. The burden of showing that the Government failed to mitigate its damages rests with the defaulted contractor. *Miller v. United States*, 106 Ct.Cl. 239 (1946).

In addition, where the Government asserts excess reprocurement costs, it must demonstrate that the reprocurement action is completed, and the reprocurement contractor paid. *Whitlock Corp. v. United States*, 141 Ct.Cl. 758 (1958). See also *Lafayette Coal Co.*, ASBCA Nos. 32174, 33311 (Aug. 26, 1987), 87-3 BCA ¶ 20,116.

[5] Based on an extensive review of the evidence, we are unable to conclude that the Government has met these requirements. Specifically, it has failed to show that it actually made payment to the reprocurement contractor of the excess costs it now seeks to assess against appellant. In both the contracting officer's final decision, and the attached memorandum detailing OSMRE's excess costs, there is no evidence that such costs were finally paid, only that they are referred to in various documents as "incurred" (AF-I, Sec. III.M.; Sec. X). Nowhere in Part II of the appeal file which contains the documents pertaining to the reprocurement contract with Fleetwood Johnson, is there any evidence which demonstrates that OSMRE made payment for the reprocurement work. There is no certified payment voucher, or other documentation which establishes that OSMRE actually made payment for the amounts it claims to have incurred on reprocurement.

Without such evidence, the Government's counterclaim lacks merit. Essential facts upon which its excess costs claim must be based are not

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in evidence. For these reasons, the Government's counterclaim for excess reprocurement costs is denied.

Decision

Accordingly, we conclude that appellant is entitled to the \$39,670.18 in termination costs previously approved by the contracting officer's decision of March 27, 1987. The remaining elements of appellant's appeal are denied. The Government's counterclaim for excess reprocurement costs is denied.

RUSSELL C. LYNCH
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

E. J. BELDING, JR., MELINDA S. BELDING

109 IBLA 198

Decided: *June 12, 1989*

Appeal from a decision of the California State Office, Bureau of Land Management, declaring placer mining claims null and void ab initio. CA MC 39435, CA MC 39436, CA MC 49073.

Affirmed.

1. Mineral Lands: Generally--Mining Claims: Determination of Validity--Mining Claims: Lands Subject to

A necessary element in any determination respecting the validity of a mining claim is the availability of the land for mining location. Until it has been determined that land is subject to mining location, any decision relating to the mineral character of land embraced in a mining claim or the sufficiency of a purported discovery is premature insofar as the validity of the claim is concerned.

2. Mining Claims: Determination of Validity--Mining Claims: Possessory Right--Mining Claims: Powersite Lands--Mining Claims: Withdrawn Land--Mining Claims Rights Restoration Act

The Mining Claims Rights Restoration Act of 1955 did not unqualifiedly reopen all lands withdrawn from entry by the Federal Power Act. Sec. 4 of the Mining Claims Rights Restoration Act of 1955 required locators to file location notices as to otherwise void claims within 1 year from the effective date of the Act, or within 60 days of the date of a new location. Where the requirements of sec. 4 of the Mining Claims Rights Restoration Act of 1955 were not met, claimants could not achieve valid existing rights in the claims by application of the principle of adoption, which does not apply against the United States.

3. Mining Claims: Assessment Work--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Withdrawn Lands

Substantial compliance with the 1872 Mining Law, in the form of good faith acts of discovery and performance of assessment work, cannot confer vested rights, or valid existing rights, where Congress has withdrawn lands from location prior to the good faith acts of the locator.

4. Mining Claims: Determination of Validity--Mining Claims: Withdrawn Land--Mining Claims Rights Restoration Act--Wild and Scenic Rivers Act

Where lands were withdrawn from mineral entry in 1922 pursuant to the Federal Power Act of 1920, and in 1975 pursuant to the Wild and Scenic Rivers Act, and claimants could not show that their claims were located prior to 1975 in accordance with the Mining Claims Rights Restoration Act of 1955, appellants had no valid existing rights, and the claims were properly declared null and void ab initio.

APPEARANCES: Richard Keith Corbin, Esq., Sacramento, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

E. J. and Melinda S. Belding have appealed from the July 8, 1987, decision of the California State Office, Bureau of Land Management (BLM), declaring the Lucky B quartz (CA MC 39436) and Payday (CA MC 39435) and Golden Wonder (CA MC 49073) placer mining claims null and void ab initio because the lands in issue were withdrawn from location or entry by the Federal Power Commission on August 2, 1922, as part of power project 334, and because the lands are withdrawn from mineral entry pursuant to the Wild and Scenic Rivers Act of 1968 (WSRA), *as amended* January 3, 1975.

Appellants' claims are located within the N½ of sec. 36, T. 16 N., R. 12 E., Mount Diablo Meridian, along the North Fork of the American River. In their statement of reasons (SOR) at page 2, appellants state that the Lucky B quartz and the Payday placer claims were located by John L. Beecroft on July 1, 1927. Beecroft located the Golden Wonder placer claim on April 18, 1930. On September 11, 1964, Beecroft transferred the claims to Ralph C. and Helen I. Roper. The Ropers filed location and all other documents required by section 314 of the Federal Land and Policy Management Act of 1976 (FLPMA) in October 1979. The Ropers transferred the three Beecroft claims to appellants herein by quitclaim deed on April 17, 1987. *Id.*

A Notice of Intent to Operate the claims and an operating plan were filed by appellants with the U.S. Forest Service on May 21, 1987 (SOR at 2). They were informed by the Forest Service by letter dated June 10, 1987, that they could not operate until the validity of the claims was cleared by BLM. *Id.* BLM's decision declaring the claims null and void ab initio issued on July 8, 1987.

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BLM's decision declaring their claims null and void ab initio is improper, appellants argue, because it has not considered the statutory exception in the WSRA that withdrawal of lands thereunder is subject to "valid existing rights." Appellants contend that the 1922 withdrawal of their lands embracing their claims is subject to the Mining Claims Rights Restoration Act of 1955 (MCRRA), which reopened to mining location powersite lands that had previously been withdrawn from mineral entry pursuant to the Federal Water Power Act of 1920.

Appellants contend that possessory title to a mining claim staked during a period of withdrawal may be achieved, despite the withdrawal, by operation of the principle of adoption. According to appellants, the disputed claims were adopted by Beecroft in 1955 when MCRRA reopened lands previously closed to mineral entry under the Federal Power Act, and appellants are successors to this adoption. Appellants claim that Beecroft's adoption constitutes a "valid existing right" under WSRA. Appellants further argue that "[they] and their predecessors have substantially complied with the 1872 Mining Law for 60 years," and that performance in compliance with the 1872 Mining Law creates a valid existing right in the claim (SOR at 3).

BLM's decision states that the original locations in 1927 and 1930 are null and void because the lands were withdrawn under the Federal Water Power Act by the Federal Power Commission on August 2, 1922, for inclusion in Federal Power Project 334. As the claims were not relocated from the period of 1955 through 1975, when the lands were open for entry, BLM maintains that there are no "valid existing rights," to which the land is subject, and that entry upon the claims is now barred pursuant to 1975 amendments to WSRA.

[1] Under WSRA, appellants argue, designated lands may only be removed from mineral location subject to "valid existing rights." Appellants do not dispute that their claims are within one-quarter mile of the bank of the North Fork of the American River and are thus subject to the geographical limitations imposed by WSRA; rather, they claim that the withdrawal of lands on which their claims are located is subject to valid existing rights which derive from "the discovery of a valuable mineral deposit and a physical location of the claim," by their predecessors in possession, John Beecroft and Ralph and Helen Roper.¹

As appellants contend, BLM does not claim that no discovery has been made (SOR at 4). According to appellants, "[a] claimant who has made a discovery and properly located a claim has a valid existing

¹ 16 U.S.C. § 1280(a)(iii) (1982), pertains to minerals in Federal lands which are determined to be situated within one-quarter mile of the bank of any designated river under WSRA, as follows:

"Nothing in this chapter shall affect the applicability of the United States mining and mineral leasing laws within components of the national wild and scenic rivers system except that

"(iii) subject to valid existing rights, the minerals in Federal lands which are part of the system and constitute the bed or bank or are situated within one-quarter mile of the bank of any river designated a wild river under this chapter or any subsequent Act are hereby withdrawn from all forms of appropriation under the mining laws and from operation of the mineral leasing laws including, in both cases, amendments thereto."

right by his actions under the [1872] statute; * * *” (SOR at 4-5). Appellants argue that BLM has admitted the existence of their discovery, and therefore has acknowledged that the claims are valid. *Id.*

The Mining Law of 1872, 30 U.S.C. § 22 (1982), as derived and amended, provides, in pertinent part:

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, * * * shall be free and open to exploration and purchase * * * by citizens of the United States * * * under regulations prescribed by law, and according to the local customs or rules of miners in the several districts, *so far as the same are applicable and not inconsistent with the laws of the United States*. [Italics added.]

The 1872 statute, as amended, is thus not indifferent to the limitations that Congress might impose upon the right of the public to explore and purchase valuable mineral deposits. Indeed, the Mineral Leasing Act of 1920 is such a limitation, and was contemplated by the proviso, “[e]xcept as otherwise provided.”²

As Congress has reserved the right to limit public exploration and purchase of valuable minerals under the 1872 Mining Law, a necessary element in any determination respecting the validity of a mining claim is the availability of the land for mining location. Until it has been determined that land is subject to mining location, any decision relating to the mineral character of land embraced in a mining claim or the sufficiency of a purported discovery is premature insofar as the validity of the claim is concerned. Appellants’ assumption that BLM acquiesced in the existence of a discovery on their claims is therefore misguided; rather, BLM determined that the lands were unavailable for discovery as they had been withdrawn from the operation of the 1872 Mining Law by act of the Federal Power Commission in 1922, pursuant to authority granted by Congress under the Federal Power Act of 1920, and again in 1975, pursuant to WSRA.

[2] Appellants claim, however, the land was reopened for mineral entry under MCRRA, and that under the rule of *Noonan v. Caledonia Mining Co.*, 121 U.S. 393 (1887), they have adopted the Beecroft and Roper locations and thereby obtained valid existing rights. Appellants argue that,

[a]lthough in the instant case, the DECISION states, that in regard to the claims in question, they are “without legal effect from the beginning,” the *Noonan* case bestows rights later on, that date back to the restoration date. These rights are based upon the original act of location, and subsequent performance of the requisite labor and improvements. [³]

Noonan involved location of mining claims upon lands located in the Black Hills that were set apart as a reservation for the Sioux Indians. In 1877, the Sioux relinquished lands containing mineral deposits to the United States, and the Black Hills region was opened to

² 30 U.S.C.A. § 22 (1986), indicates by Historical Note that the words, “[e]xcept as otherwise provided,” were added by amendment “on authority of act of Feb. 25, 1920, c. 85, 41 Stat. 437, [the Mineral Leasing Act],” and that the language of R.S. § 2319 is “derived from Act May 10, 1872, c. 152, § 1, 17 Stat. 91.”

³ SOR at 6 (italics in original).

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exploration under the mining laws. The controversy in *Noonan* arose between miners who had established possessory interests on or before congressional ratification of the treaty with the Sioux on February 28, 1877, and those who entered the lands for prospecting subsequent to those already in possession. The Supreme Court held, *as between adverse locators*,

where a party was in possession of a mining claim on the 28th of February, 1877, with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, he could, by adopting what had been done, causing a proper record to be made, and performing the amount of labor or making the improvements necessary to hold the claim, date his rights from that day; and that such location and labor and improvements would give him the right of possession.

Noonan v. Caledonia Mining Co., *supra* at 403. The Court summarized that, “[b]y this rule substantial justice is done to all parties who were entitled to protection in their mining claims when the new agreement took effect.” *Id.*

Appellants argue that by placing the appropriate stakes and notices upon the land in 1927 and 1930, by filing location notices, and by filing and continuing to file proof of assessment work or notices of intention to hold the claim in accordance with local requirements, and by complying with the filing requirements of FLPMA, appellants' predecessors in possession adopted the Beecroft claims, and appellants, for good and valuable consideration, have purchased the adoption. While these arguments might be tellingly made against a rival locator, they are not controlling as against the United States. Crucial to an understanding of *Noonan* was that, in 1877, what had been Indian land was unreservedly opened to location. There must be a statute validating a prior illegal entry before adoption will lie. *See Ogala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1412 (8th Cir. 1983). In *Noonan*, the Supreme Court decided, as between adverse locators, that the one having possession, who had adopted the prior illegal entry and location, had the superior right. This doctrine, which is an application of the doctrine of *pedis possessio*, does not apply against the United States. *See United States Forest Service v. Milender*, 104 IBLA 207, 222, 95 I.D. 155, 164 (1988).

While MCRRRA reopened lands previously withdrawn from mining location by the Federal Power Act, it did not unqualifiedly reopen all lands withdrawn from entry under the mining law by the Federal Power Act of 1920. Section 4 of the Act, 30 U.S.C. § 623 (1982), provides, in pertinent part, that:

The owner of any unpatented mining claim located on land described in section 621 of this title shall file for record in the United States district land office of the land district in which the claim is situated * * * within one year after August 11, 1955, as to any or all locations heretofore made, or within sixty days of location as to locations hereafter made, a copy of the notice of location of the claim.

Section 2 of the Act, 30 U.S.C. § 621(b) (1982), provides, in pertinent part, that:

The locator of a placer claim under this chapter, however, shall conduct no mining operations for a period of sixty days after the filing of a notice of location pursuant to section 623 of this title. If the Secretary of the Interior, within sixty days from the filing of the notice of location, notifies the locator * * * of the Secretary's intention to hold a public hearing to determine whether placer mining operations would substantially interfere with the other uses of the land included within the placer claim, mining operations on that claim shall be further suspended until the Secretary has held the hearing and has issued an appropriate order. The order issued by the Secretary of the Interior shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining [with restrictions]; or (3) a general permission to engage in placer mining.

In *George L. Hawkins*, 66 IBLA 390, 392 (1982), this Board held that:

Public Law 84-359, 30 U.S.C. § 621 (1976), known as the "Mining Claims Rights Restoration Act of 1955," had as its purpose "[t]o permit the mining, development, and utilization of the mineral resources of all public lands withdrawn or reserved for power development * * *." After enactment of the statute on August 11, 1955, such lands were open to mineral location (with certain exceptions). However, mining claims which were located prior to that date after the land had been closed to mineral entry were simply null and void from their inception and the Mining Claims Rights Restoration Act, *supra*, did not operate retroactively to validate claims which were void when located. *John C. Farrell*, 55 IBLA 42 (1981); *Day Mines, Inc.*, 65 I.D. 145 (1958).

See also *United States Forest Service v. Milender*, *supra* at 222-23, 95 I.D. at 164.

While appellants claim that recent Board decisions have ignored the rule in *Noonan*, and have decided cases falling under MCRRRA "in a vacuum,"⁴ the statutory basis for our prior decisions is apparent: MCRRRA did not unqualifiedly reopen lands withdrawn from mineral entry, as was the case in *Noonan*, but required locators to file location notices as to otherwise void claims within 1 year from the effective date of the Act, or within 60 days of the date of a new location. By the terms of 30 U.S.C. § 621 (1982), if the locator who complied with section 623 was not notified within 60 days after locating under section 623 that a hearing would be held concerning the status of the location, then the claim was established. BLM has no evidence, nor has appellant provided proof, which would establish that Beecroft filed notices of location with BLM after August 11, 1955, and prior to August 11, 1956, as to the Lucky B quartz and Payday and Golden Wonder placer claims; nor did Beecroft ever attempt to locate the three placer claims in accordance with 30 U.S.C. § 623 (1982).

Since the lands had been withdrawn from entry in 1922 pursuant to the Federal Power Act, and were not reopened until August 11, 1955, Beecroft's 1927 and 1930 locations were in the nature of a trespass. Trespass does not establish a "valid existing right." *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 447 (9th Cir. 1971).⁵

⁴ SOR at 6.

⁵ See *United States v. Consolidated Mines & Smelting Co.*, *supra*, where the Court of Appeals quoted *Chanslor-Canfield Midway Oil Co. v. United States*, 266 F. 145, 151 (9th Cir. 1920), pertaining to the analogous situation of one who is attempting to acquire a claim through adverse possession, pursuant to 30 U.S.C. § 38 (1982).

Continued

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Beecroft could have established himself as more than a mere trespasser—as a locator with transferable valid existing rights in the claims—had he complied with the filing requirements under MCRRRA. 30 U.S.C. § 623 (1982).

Nor is there evidence that appellants' predecessors Ralph and Helen Roper made an attempt to locate the claims at any time prior to their filings pursuant to section 314 of FLPMA. The North Fork of the American River was designated for study under WSRA on January 3, 1975, and became part of the wild and scenic rivers system on November 10, 1978. The bed or banks and land situated within one-quarter mile of the river have been withdrawn from appropriation under the mining laws since January 3, 1975. Since the Ropers did not record their claims until October 1979, they had no valid existing rights to the claims on January 3, 1975, which would be transferable to appellants. *See Clarence E. Fitzgerald*, 55 IBLA 31 (1981).

[3] Appellants argue that their predecessors' omissions under MCRRRA, 30 U.S.C. § 623 (1982), should not be detrimental to them, as Beecroft, the Ropers, and now appellants have "substantially complied" with the requirements of the mining law, by complying with the filing requirements of section 314 of FLPMA, and by performing assessment work on their claims as required by 30 U.S.C. § 28 (1982).⁶ This compliance, according to appellants, is sufficient to establish "valid existing rights" in the claims.

Appellants cite *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639 (1935), and *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970), in support of their contention that substantial compliance with the 1872 Mining Law should constitute possession sufficient to constitute a valid existing right. *Union Oil Co. v. Smith*, 249 U.S. 337, 350 (1918), cited by *Ickes*, *supra* at 640, acknowledged that assessment work was "the condition subsequent prescribed by Congress to be performed in order to preserve the exclusive right to the possession of a *valid* mineral land location upon which discovery [has] been made." (Italics added.) It is of course, the existence of a valid mineral land location which is at issue here.

Congress has been granted the exclusive power to dispose of the public lands by the United States Constitution. In *Lutzenhiser v. Udall*, 432 F.2d 328, 331 (9th Cir. 1970), with regard to the power of Congress to manage the public lands, the Court of Appeals stated:

"But the statute just referred to [30 U.S.C. § 38 (1982)] is a part of the statutory chapters on mineral and mining resources, having to do with the evidence which will be regarded as sufficient to establish the right of one in possession and who has worked a mining claim to obtain a patent. The statute is based upon the premise that the lands had been open to entry and could be patented under the mining laws of the United States. It * * * has no application in the case of a trespasser on land, title to which cannot be acquired under the laws of the United States."

⁶ 30 U.S.C. § 28 (1982), as amended, generally provides, in addition to an archaic provision that miners may make regulations in accordance with local custom, not inconsistent with Federal or state laws, for the location and manner of recording mining claims, that all mining locations must be marked on the ground, and that a minimum of \$100 must be annually expended upon the claim in order to preserve one's rights in the claim as against another claimant.

The United States owned the lands and could constitutionally manage them in any way that it saw fit. As part of that freedom to manage, Congress could grant and withdraw rights to locate mining claims upon the public lands. The withdrawal could be accomplished in any way that Congress saw fit, with or without notice, at least prior to the time that private rights had vested. [Footnotes omitted.]

Derivative of the exclusive power granted to Congress to manage the public lands is that the lands may be both opened and closed to mineral entry by congressional action. Congress, therefore, may open lands to or withdraw lands from the exploration, discovery, and location of mining claims. It would thus seem axiomatic that congressional intent to withdraw lands from the operation of the general mining law cannot be subverted by the performance of the very acts which withdrawal of the lands would prohibit, and that private rights may not vest during a time when Congress has expressly prohibited entry. Thus, even good faith acts of discovery and performance of assessment work cannot confer vested rights, or valid existing rights, where Congress has withdrawn the lands from location prior to the good faith acts of the locator. *John Boyd Parsons*, 22 IBLA 328 (1975).

[4] Appellants' claims are located within the N 1/2 of sec. 36, T. 16 N., R. 12 E., Mount Diablo Meridian, and are within lands withdrawn from mineral entry pursuant to WSRA, subject to "valid existing rights." See *Clarence E. Fitzgerald, supra*; 45 FR 58634 (Sept. 4, 1980). Appellants do not have "valid existing rights" in the Lucky B quartz and Payday and Golden Wonder placer claims because they were located in 1927 and 1930, when the lands were withdrawn from entry pursuant to the Federal Power Act of 1920, by their inclusion in Federal Power Project 334 by the Federal Power Commission on August 2, 1922. Location notices were not filed within the time prescribed by MCRRA; thus, no rights exist in the claims which would render them valid. They are properly declared null and void ab initio. See *Clarence E. Fitzgerald, supra*.

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

FRANKLIN D. ARNESS
Administrative Judge

I CONCUR:

KATHRYN A. LYNN
Administrative Judge
Alternate Member

June 23, 1989

SALISBURY & DIETZ, INC. (APPLICATION FOR ATTORNEY FEES)

IBCA-2382-F

Decided: June 23, 1989

Contract No. SO134031, Bureau of Mines.

Granted in part.

1. Attorney Fees: Contract Disputes Act of 1978--Attorney Fees: Equal Access to Justice Act: Prevailing Party--Attorney Fees: Equal Access to Justice Act: Substantially Justified

The Government's position in denying a claim for overrun costs under a cost-plus-fixed-fee contract is found not to be substantially justified within the meaning of EAJA in regard to a claim on which the appellant prevailed where the Board finds that for the most part the arguments made by the Government in the Opposition filed to the EAJA application are identical in all material respects to the arguments made in the Government's posthearing brief and that such arguments and other arguments made by the Government in the Opposition had been considered and rejected in the underlying decision either explicitly or by implication.

2. Attorney Fees: Equal Access to Justice Act: Awards--Contracts: Contract Disputes Act of 1978: Attorney Fees--Equal Access to Justice Act: Contract Disputes Act of 1978: Prevailing Party

In a case where the appellant is a prevailing party on a claim constituting 39.24 percent of the total dollar value of the claims submitted, the applicant is awarded 75 percent of the attorney hours and other expenses claimed where the Board finds that the position of the Government in refusing to pay the appellant's claim in the amount initially submitted had little support in the law or in the facts.

APPEARANCES: William Perry Pendley, Comiskey & Hunt, Fairfax, Virginia, for the Appellant; Alton E. Woods, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE MCGRAW

INTERIOR BOARD OF CONTRACT APPEALS

Salisbury & Dietz, Inc. (S&D/applicant/appellant), has filed a timely application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, to recover attorney's fees and expenses incurred in the prosecution of its Contract Disputes Act appeal. The appeal was sustained in part in *Salisbury & Dietz, Inc.*, IBCA-2090 (Aug. 31, 1987), 94 I.D. 373, 87-3 BCA ¶ 20,107. There the Board found the appellant was entitled to recover a portion of the overrun costs claimed in excess of the ceiling established in its cost-plus-fixed-fee contract. Applicant also seeks to recover attorney fees and expenses incurred in the preparation and prosecution of the application.

Entitlement

The EAJA provides for an award of attorney's fees and other expenses to a prevailing party unless the Government's position is found to be "substantially justified" or it is found that special circumstances would make an award unjust. To be considered a prevailing party, it is not necessary that an appellant have a 100 percent success. Significant success which achieves some of the benefits sought is sufficient. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Prevailing Party and Substantial Justification

Appellant is a prevailing party with respect to the portion of its appeal for which the Board found that it was entitled to overrun costs in the amount of \$162,954.¹ The Government's Opposition (hereinafter Opposition) to the application for attorney fees and other expenses raises no question as to S&D being a prevailing party within the meaning of the statute; nor has it contested applicant's representations that it satisfies the eligibility requirements of EAJA in regard to the number of employees and net worth and the Board finds that applicant satisfies such eligibility requirements.

The Government does contend, however, that, in defending against the underlying appeal, its position was substantially justified. In this connection the Board's attention is called to the case of *Broad Avenue Laundry & Tailoring v. United States*, 693 F.2d 1387, 1391 (Fed. Cir. 1982), in which the Court of Appeals for the Federal Circuit stated that the term substantially justified "is essentially [a test] of reasonableness" and that "the mere fact that the United States lost the case does not show that its position in defending the case was not substantially justified" (Opposition at 12).

In the posthearing brief filed in the underlying appeal (IBCA-2090), the Government identifies the principal issues to be adjudicated in regard to S&D's overrun claim of \$162,954 to be as follows:

1. Whether the Appellant may, without notice to or the approval of the Contracting Officer, change its method of cost accounting seven months after the completion of a contract when such a change will allocate more of the contractor's indirect costs to the Government?
2. Whether the Appellant failed to give sufficient notice to the Contracting Officer of cost overruns in accordance with the "Limitation of Costs" provision of the contract?

(Government Posthearing Brief at 1).

All of the arguments advanced by the Government for denial of the application for fees and expenses relate to the issues identified above. A comparison between the contentions made by the Government in regard to issue 1 (the accounting change) in the brief filed in the underlying appeal and those made in the Opposition discloses that in

¹ The amount claimed in S&D's letter of May 30, 1985, was \$162,964 (Appeal File (hereinafter AF), tab 8). In the posthearing brief filed by appellant in the underlying appeal (IBCA-2090), the amount shown for this claim item is \$162,954 (Appellant's Posthearing Brief at 68), and this is the amount awarded by the Board in our Aug. 31, 1987, decision (94 I.D. at 394, 87-3 BCA at 101,823).

June 23, 1989

all material respects the contentions are identical. In fact, the language in which the contentions are couched and the arguments made in the Opposition pertaining to the accounting change were taken virtually verbatim from the Government's brief (compare language in brief at 3-6, 10-11 with language in Opposition at 2-5, 9-11). In regard to issue 2 (failure to give timely notice of cost overruns) the Government advances two contentions in the Opposition which were not made in the brief filed by the Government in the underlying appeal. Although the two new contentions are in the nature of *ipse dixits*, they will be considered later in this opinion. Except for the two items mentioned, a comparison of the contentions made by the Government in regard to issue 2 in the brief filed in the underlying appeal and the contentions made in the Opposition respecting such matters discloses that in all material respects the contentions are identical. In fact, the language in which the contentions are couched and the arguments made in the Opposition in regard to S&D's failure to give timely notice of the cost overrun were taken virtually verbatim from the Government's brief in the underlying appeal (compare language in brief at 6-10, 19-24 with language in Opposition at 6-9, 15-20).

In support of its request that the application for fees and expenses be denied, the Government states,

[I]t is important to emphasize that the final audit report from DCAA [Defense Contract Audit Agency] dated April 19, 1985, took exception to \$565,914 of the Appellant's costs. This was one of the factors, the other being no supporting documentation provided to support the requests, which [led] the CO [contracting officer] to deny the Appellant's final claim of \$162,954.

Immediately thereafter, the Government states: "The question that the Board must address in determining whether the Government's action(s) in this case were reasonable is[,] should the CO have blindly paid the Appellant's claim without receiving any documentation to support the requests for additional funding and in light of the DCAA final audit report?" (Opposition at 21).

As to the figure of \$565,914 to which the Government refers, the Board notes that in the final audit report the DCAA auditor distinguishes between what it categorized as unresolved costs in the amount of \$271,684 (claim of subcontractor, C.C. Hawley and Associates, Inc.); unallowable costs in the amount of \$130,776; and costs in excess of contract ceiling in the amount of \$163,454² (AF, tab 7, attachment 5 at 2, 5-6, 8). Concerning the costs in excess of contract ceiling, the final audit report states: "8. These costs are considered allowable in accordance with FPR 1-15.2, however, they are shown as questioned since they exceed the Limitation of Cost of the contract * * *" (*ibid.* at 8).

² The figure shown on page 5 of the final audit report is \$163,454 (AF, tab 7, attachment 5). This reflects an arithmetical error which had the effect of overstating the claim by \$500. Appellant has acknowledged that the correct figure is \$162,954 (Appellant's Reply Brief at 14).

With respect to the Government's assertion that the lack of supporting documentation for the overrun claims was one of two factors leading the CO to deny the claim for overrun in the amount of \$162,954, no explanation has been offered as to why, if this was so, the CO should have failed to refer to this matter in any way in his final decision (AF, tab 7). Although in the brief filed in the underlying appeal (pages 7-10, 19-21) the Government notes the absence of supporting documentation for the various requests for additional funds submitted by S&D, nowhere in the brief so filed does the Government indicate that the failure of S&D to furnish such information was a basis for denial of the \$162,954 overrun claim.

The record made in the adversary adjudication³ is devoid of any evidence showing the CO ever made a written request for supporting documentation in connection with any of S&D's overrun claims. From the letters to which the Board refers or from which it quotes in the underlying decision (94 I.D. at 389-90, 87-3 BCA at 101,819-20), it appears that the CO was content to have the DCAA auditors collect and evaluate the data made available by S&D in support of the costs claimed. From the time the final audit report was received in April 1985 (Tr. 182-83) until the final decision was issued on July 29, 1985 (AF, tab 7) and at all times thereafter, the CO had available to him the extensive volume of documents that the DCAA had obtained from S&D's files. At the hearing the CO stated that he had only examined such data in a cursory fashion because he did not feel adequate to go through that massive data by himself, since for that he would need the auditor's help, the person who had generated that data (Tr. 205).

The suggestion that S&D's failure to provide documents in support of its overrun requests should be considered in the light of DCAA's final audit report appears to have been made without regard to what such consideration would clearly show. As previously noted, the final audit report found that the \$162,954 of overrun costs with which we are here concerned were "considered allowable in accordance with FPR 1-15.2" and that they were only "shown as questioned since they exceed the Limitation of Costs of the contract." In his testimony at the hearing, the DCAA auditor went even further stating that the \$162,954 figure in question "was allocable, allowable" and "fair and reasonable" (Tr. 289-90).

Discussion

[1] The Government asserts that the CO acted reasonably in denying the claim for overrun costs here in issue on the ground that S&D

³ In *Kos Kam, Inc.*, ASBCA No. 34684 (July 25, 1988), 88-3 BCA ¶ 21,049 at 106,321, the Armed Services Board states:

"In deciding whether the position of the contracting agency was substantially justified, the EAJA instructs that the decision 'shall be determined on the basis of the administrative record, as a whole . . . made in the adversary adjudication for which fees and other expenses are sought.' 5 U.S.C. § 504(a)(1). Where the Board decides the merits of a CDA dispute, the administrative record available for use in determining whether the Government's position was substantially justified consists of those documents filed in the underlying appeal together with the hearing record, the so-called Rule 13 record, and such arguments, as opposed to facts, as may be found in the parties EAJA filings."

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changed its method of accounting after contract performance (Opposition at 14-15) and that the CO acted reasonably in denying the claim for such overrun costs on the ground that S&D failed to give timely notice of cost overruns (Opposition at 15). Apparently seeking to avoid the consequences of the Board having rejected these central contentions in the underlying decision, the Government refers to our decision in *Central Colorado Contractors, Inc.*, IBCA-2078-F (Nov. 28, 1986), 93 I.D. 437, 87-1 BCA ¶ 19,460, and in connection therewith states: “[T]his Board has also recognized that an application for attorney fees requires a *de novo* review of the underlying case” (Opposition at 13 (italics in original)). Although the “*de novo* review of the underlying case” language does not appear in our decision in *Central Colorado Contractors, Inc.*, the quoted language is used in *Stephen J. Kenney*, IBCA-2132-F (Oct. 8, 1987), 87-3 BCA ¶ 20,197 at 102,298. The effect to be given to a decision on the merits which has become final and the nature of the review to be provided to applications for attorney fees are clearly set forth in a subsequent decision of this Board in *A&J Construction Co.*, IBCA-2376-F (Feb. 4, 1988), 88-2 BCA ¶ 20,525 from which the following is quoted:

Government counsel appears to be contending that, because the Board's decision in the underlying case was incorrect as a matter of law, the Government was substantially justified in denying appellant's interest claim. As to the claim of legal error, inasmuch as the time period has expired for requesting reconsideration of the underlying case or for appealing the Board's decision to the court of appeals, [4] the decision in the case, erroneous or not, is now final in accordance with the principle of *res judicata*.

* * * * *

Thus, when the Board said in *Kenney*, *supra*, that an attorney fee application gives rise to a *de novo* review of the underlying case, it obviously was referring to a review only with respect to payment of attorney fees-not with respect to what was decided in the underlying case. Again, there are other avenues for review when the underlying decision is considered erroneous; and it may be significant that, in this case, counsel did not choose to pursue them.

(88-2 BCA at 103,757-58).

In its Opposition the Government has made no effort to show that although it lost the case with respect to S&D's claim for overrun costs in the amount of \$162,954, its position was nonetheless justified under the rationale espoused in any existing precedents. See, for example, *Zinger Construction Co.*, ASBCA No. 31858 (Mar. 7, 1988), 88-2 BCA ¶ 20,661 (Government's position during the appeal must be measured against the law as it existed at that time, and not against new law as enunciated by the Board); *Stephen J. Kenney*, *supra* at 102,299 (strength of appellant's case did not become apparent until at the time of the hearing); and *United States v. Reckmeyer*, 836 F.2d 200 (4th Cir. 1987) (Government's position found to be reasonable where case was

⁴ The Government neither filed a motion for reconsideration of our Aug. 31, 1987, decision, nor sought review thereof in the Court of Appeals for the Federal Circuit.

complex and involved the difficult task of construing a new and far-reaching piece of legislation).

Instead of undertaking to show that the opposition to S&D's application for attorney fees and other expenses should be viewed from a perspective different from the rationale which governed the Board's decision on the overrun claim of \$162,954 on the merits,⁵ the Government has chosen to simply repeat virtually verbatim contentions advanced and arguments made in the underlying case or in two instances to advance new contentions all of which were either explicitly or by implication rejected in the underlying decision on the merits.

The burden to establish that the Government's position was substantially justified rests on the Government. *Kos Kam, Inc., supra* at note 3.

The Government's position is substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 108 S.Ct. 2541, 2550 (1988). In this case the Government has failed to show how, even though it lost the case, its position regarding the overrun costs in question was substantially justified. It is not sufficient for the Government to simply reassert arguments it made, or could have made, in the underlying appeal which in its decision on the merits the Board addressed and found to be wanting. *Berkeley Construction Co.*, VABC No. 1962E (June 24, 1988), 88-3 BCA ¶ 20,941 at 105,810; nor should the Government be permitted through its Opposition to the EAJA application to relitigate those factual bases of the appeal that have been conclusively determined and are no longer open for consideration. *In-Vest Corp.*, GSBCA Nos. 8340 (6365), 8341 (7327) (Apr. 13, 1988), 88-2 BCA ¶ 20,807 at 105,176-77).

In the above circumstances and based upon the record made in the adversary adjudication for which fees and other expenses are sought, the Board finds that the Government has not shown that its position was substantially justified or that there were any special circumstances which would make an award unjust.

Quantum

Applicant initially sought attorney fees in the amount of \$71,175 and other expenses in the amount of \$11,575.57 for a total claim of \$82,750.57. The claim was later revised to include additional amounts for fees and expenses attributed to preparation and prosecution of the fee application. The revised claim includes a claim for attorney fees in the amount of \$75,900 and a claim for other expenses in the amount of \$12,065.33 for a grand total of \$87,965.33.

See *Zinger Construction Co.*, ASBCA No. 31858 (Mar. 7, 1988), 88-2 BCA ¶ 20,661 at 104,415 ("An award of attorney's fees is a judgment independent of the result on the merits and is reached by examination of the Government's position and conduct in meeting the EAJA statutory standard of substantially justified, not by redundantly applying whatever substantive rules governed the underlying appeal").

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Accompanying the application is a declaration of William P. Pendley, appellant's attorney, concerning the time that he and other members of his law firm expended on behalf of S&D in the proceedings before this Board. The declaration avers that for the purpose of the application the fees were computed at the rate of \$75.00 an hour.⁶ Included with the declaration is a tabulation of the attorney fees and expenses claimed showing opposite specific dates the number of attorney hours expended or expenses incurred and a brief description of the legal services rendered or the expense entailed. A similar tabulation has been submitted for the attorney fees and expenses claimed for in connection with the pursuit of the fee application.

Allowable Fees and Expenses Prior to Allocation

The EAJA requires the Government to pay to the prevailing party certain "fees and other expenses." 5 U.S.C. § 504(a)(1). The term "fees and other expenses" is defined in the Act to include "reasonable attorney * * * fees." 5 U.S.C. § 504(b)(1)(A) (italics added). When substantiated, the attorney fees and expenses recoverable include not only fees and expenses incurred in the prosecution of the underlying Contract Disputes Act appeal but also reasonable fees and expenses involved in pursuit of the EAJA application. *Margaret Howard*, ASBCA Nos. 28648, 29097 (Mar. 21, 1988), 88-2 BCA ¶ 20,655 at 104,391 and cases cited.

The Government has not challenged the amount claimed by applicant for either attorney fees or other expenses. In such circumstances, where the amount claimed appears to be reasonable, the Board may infer that the Government considers the fees and expenses claimed to be reasonable both as to purpose and amount. *Harrell Patterson Contracting, Inc.*, ASBCA Nos. 30801 *et al.* (Jan. 5, 1988), 88-1 BCA ¶ 20,510 at 103,687. Despite the inference that could be so drawn, the Board has reviewed the itemization of attorney fees and expenses with care.

In its claim as revised, S&D is claiming attorney fees for 1,078.5 hours which, computed at the statutorily prescribed rate of \$75 per hour, amounts to a dollar claim of \$80,887.50. Against this claim, applicant proposes a credit of 66-½ hours or a dollar credit of \$4,987.50 for attorney fee hours devoted to claims on which it did not prevail. Leaving aside for the moment the question of whether the credit offered is sufficient, the Board turns to an examination of the detailed information furnished with respect to the claim for attorney fees.

⁶ Subsequent to the filing of appellant's reply brief, S&D requested that a cost-of-living adjustment be made to the attorney fees applied for previously. Until the Department of the Interior issues a regulation providing for award of attorney fees of more than \$75 an hour, the amount of attorney fees the Board may award is capped at \$75 per hour, and a cost-of-living adjustment is not authorized. *James W. Sprayberry Construction*, IBCA-2298-F (May 4, 1989), 96 I.D. 194, 89-2 BCA ¶ ____; *Kos Kam, Inc.*, n.3 *supra* at 106,323; and *Berkeley Construction Co.*, VABC No. 1962E (June 24, 1988), 88-3 BCA ¶ 20,941 at 105,813.

Based on a review of the itemized listing, the Board finds that there are items for which fees have been claimed that have not been shown to be reasonably related to the fee application. Included in this category are 5-1/4 hours appellant's counsel spent in securing a ruling on post-employment limitations from the Office of Government Ethics and 7-3/4 hours taken up with telephone calls to Board personnel where the stated purpose of the call was to ascertain the status of the case or where the specific purpose of the telephone call could not be determined from the description furnished. Applying the \$75-per-hour rate to the 13 hours involved, the amount of disallowed attorney fees is \$975. In the absence of any objection being raised by the Government, the Board finds that the remaining balance claimed for attorney fees of \$79,912.50 to be reasonable.

In the initial application, the amount claimed for other expenses was in the amount of \$11,575.57. By applicant's reply brief, the claim for other expenses was increased to \$12,065.33. Except for some relatively minor items to which no objection is perceived, the principal expenses claimed are for transcripts (hearing and depositions), photocopying, delivery services, and travel, all of which the Board finds to be reasonable in the present circumstances. It notes, however, that applicant has failed to propose any credit against the amount claimed for other expenses to reflect the fact that it did not prevail on the majority of its claims. S&D has offered no explanation for its failure to propose such a credit and the Board perceives no reason for not applying the same credit in terms of percent to other expenses claimed as is found to be appropriate for the attorney fees included in the claim.

Allocation of Fees and Expenses

[2] The Board has found attorney fees and other expenses allowable prior to allocation to be in the respective amounts of \$79,912.50 and \$12,065.33. Where, as here, applicant prevailed on only a portion of its claims in the Contract Disputes Act appeal, it is necessary to allocate the 13 amount of allowable fees and expenses between the claims on which it prevailed and those on which it did not prevail. Before undertaking to make such an allocation, it would perhaps be well (i) to refer to some of the cases which have considered the question of allocation of fees and expenses where the appellant was not 100 percent successful; and (ii) to examine the record made in the underlying appeal with a view to ascertaining, as well as we can, the attorney hours expended and the expenses incurred in regard to the claim granted and to the claims denied.

In a case frequently cited in connection with applications for attorney fees, the Supreme Court held that where an appellant is only partially successful, the extent of appellant's success is a crucial factor in determining the proper amount of an award of attorney fees.

Hensley v. Eckerhart, 461 U.S. 424, 440 (1983). In a recent case where the applicant failed to allocate fees and expenses found to be allowable

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between the portion of an appeal on which it did prevail and the portion on which it did not prevail and no basis was perceived for reasonably segregating the attorney hours associated with appellant's successful portion of the appeal, the Veterans Administration Board of Contract Appeals determined the amount of attorney fees and other expenses to which the applicant was entitled by multiplying the claimed amounts by the contractor's percentage of recovery. *Berkeley Construction Co.*, VABC No. 1962E (June 24, 1988), 88-3 BCA ¶ 20,941 at 105,812-13. It has also been held, however, that where there is no precise dividing line between the efforts expended on the issues on which the appellant prevailed and those on which it did not, the amount of fees and expenses to be awarded may be determined based on a review of the record as a whole. *Margaret Howard, supra* at 104,390.

In the circumstances of this case, the Board concludes that the amounts of attorney fees and other expenses to which applicant is entitled can best be determined on the basis of a review of the record as a whole. At the outset, the Board notes that appellant was awarded the sum of \$162,954 out of a claim totaling \$415,014.64. Thus, the percentage of recovery on the claims submitted was approximately 39.24 percent. In the underlying decision the Board denied claims totaling \$252,060.64 where it found that S&D had failed to establish that it was entitled to recover by way of an equitable adjustment or by way of reformation on any of such claims. 94 I.D. at 391-94, 87-3 BCA at 101,821-23.

Insofar as the application for attorney fees and other expenses is concerned, the question is not, of course, whether the claims added by the amended complaint are meritorious, since in the underlying decision we determined that none of them were for the reasons stated therein. The question is rather how many attorney hours were expended and what amount of expense was incurred in the prosecution of these additional claims. While the answer to those questions cannot be determined with any degree of mathematical precision, the Board finds on the basis of the evidence available that, for whatever reason, appellant devoted a substantial amount of time to the prosecution of the claims added by the amended complaint (as revised) and in connection therewith incurred a commensurate amount of expenses.

The Board is mindful of the fact that the position of the Government in refusing to approve S&D's initial claim of \$162,954 had little support in either the law or the facts, as we found to be the case in the underlying decision. In attempting to allocate fees and expenses between successful and unsuccessful claims in the circumstances of this case, the Board must necessarily rely upon its estimate of the attorney hours and the expenses involved in the prosecution of the two categories of claims. From a study of the record before us, it is clear

that the great majority of attorney hours expended and expenses incurred were related to the claim on which appellant prevailed.

Decision

Taking into account the various factors enunciated above and recognizing that in the circumstances of this case the allocation of fees and expenses between successful and unsuccessful claims is necessarily dependent upon our estimate of the attorney hours and expenses entailed in the prosecution of the two categories of claims, the Board determines that the attorney fees and expenses to which applicant is entitled are in the respective amounts of \$59,934.37 and \$9,049 for an aggregate total of \$68,983.37, computed as follows

Attorney fees claimed	\$80,887.50
Less disallowed attorney fees	975.00
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Allowable attorney fees prior to allocation	79,912.50
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Attorney fees allocable to claim on which prevailed (75% × \$79,912.50)	\$59,934.37
Expenses claimed	12,065.13
Expenses allowable to claims on which prevailed (75% of \$12,065.33)	9,049.00
Total fees and expenses awarded	68,983.37

The application for attorney fees and expenses is granted in the amount of \$68,983.37 and is otherwise denied.

WILLIAM F. McGRAW
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

RENEWAL OF FRIANT UNIT CONTRACTS*

M-36961

November 10, 1988

National Environmental Policy Act of 1969: Environmental Statements

The DOI manual requires consideration of a checklist of factors before issuing a categorical exclusion of actions from the NEPA (National Environmental Policy Act) process. These criteria are: (a) the action or group of actions will have no significant effect on the quality of the human environment; and (b) the action or group of actions will not involve unresolved conflicts concerning alternative uses of available resources.

* Not in chronological order.

November 10, 1988

National Environmental Policy Act of 1969: Environmental Statements

Where the renewals of Friant Unit contracts, being nondiscretionary, do not constitute major Federal actions. Therefore, there is no requirement to do any environmental assessment (EA), or other impact analysis as a threshold to the renewals. Furthermore, the mere renewal of the contracts with no substitute changes in the terms, would not change the *status quo*.

Secretary of the Interior

The Secretary is not required, according to the 1956 Act, to affirmatively review and amend each existing contract, but at the same time not deny districts that contracted for water prior to 1956 a right to renewal of their contract, if they so request. Thus, the Secretary has no discretion as to whether to amend a contract to include a renewal clause if requested to do so. Furthermore, once a contract contains a renewal clause, the Secretary has no discretion to deny renewal of the contract.

Contracts: Generally

Where the renewal of Friant Unit contracts contain substantially the same terms and conditions as the prior existing contracts an environmental impact statement (EIS) or EA not required. Such a renewal would constitute a nondiscretionary action and do nothing more than retain the *status quo*.

Memorandum

To: Assistant Secretary, Water and Science

From: Solicitor

Subject: Renewal of Friant Unit Contracts

This memorandum responds to your inquiry concerning renewal of water service contracts for districts within the Friant Unit of the Central Valley Project (CVP). Specifically, we have been asked whether the provision in the NEPA, 42 U.S.C. §§ 4321 *et seq.* (1982), requiring preparation of an EIS or EA applies to the renewal of those contracts. The determination of this issue turns on the nature of the Secretary's discretion and the extent to which he intends to exercise any such discretion.

BACKGROUND

The Friant Unit of the CVP consists of 28 California irrigation and water districts and municipalities which hold water service contracts with the Bureau of Reclamation (Bureau).¹ Water to the districts comes from the Madera Canal or the Friant-Kern Canal, which flow from Millerton Lake behind the Friant Dam. The Dam and Lake are among the initial features of the CVP, which was funded by the

¹ This memorandum is confined to a discussion of the renewability of 23 of the contracts which are "9(e)" contracts. See discussion, *infra*. Not discussed are the five municipal water supply contracts authorized by sec. 9(c) of the Reclamation Project Act of 1939. 43 U.S.C. § 485h(c) (1986). The first of these "9(c)" contracts does not expire until 1995.

Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and reauthorized as a reclamation project by the Act of August 26, 1937 (50 Stat. 844). The Dam was completed in 1942, the Madera Canal in 1945, and the Friant-Kern Canal in 1951.

The first contract for water service from the Friant Dam was executed on August 5, 1948, between the Bureau and the Lindsay-Strathmore Irrigation District. Within a few years, more than a dozen similar contracts for water service from the Friant Dam had been signed with other irrigation districts. The first contract to expire will be the one with the Orange Cove Irrigation District. That contract will expire on February 28, 1989.²

The contracts with irrigation and water districts are the so-called "9(e)" or "utility-type" contracts which were authorized by section 9(e) of the Reclamation Project Act of 1939. 43 U.S.C. § 485(e). Section 9(e) of the 1939 Act authorized the Secretary to enter into short- or long-term contracts not to exceed 40 years to supply water for irrigation purposes at rates fixed to cover operating costs and only such share of construction costs as the Secretary deems proper. Section 9(e) contracts must be contrasted with repayment contracts entered into pursuant to section 9(d) of the 1939 Act, under which a district repays the applicable costs of construction of a project over a 40-year period.

The section 9(e) utility-type contracts were first used in contracting with CVP users and soon generated accusations that the Bureau had, through the use of these contracts, "initiated a program of nationalization of the water resources of the Valley." Abel, "The Central Valley Project and the Farmers," 38 Calif. L. Rev. 653, 664 (1950). The Bureau was portrayed by some as having the status of a superior water utility while the users were concerned that, under 9(e) contracts, they had no assurance of continued water service upon expiration of these contracts.

Judicial and legislative responses to the users' concerns evolved almost simultaneously. In *Ivanhoe Irrigation District v. All Parties*, 47 Cal.2d 597 (1957), a Friant user challenged the use of section 9(e) contracts partly because they did not include a provision for automatic renewal. The California Supreme Court invalidated the contracts on several grounds including the fact that no provision was made for repayment of a state amount within 40 years and that no permanent right to receive water was vested in the users. The United States Supreme Court reversed, partly on the ground that the users' objections had been rendered moot by a 1956 statute that extended renewal rights to

² The Lindsay-Strathmore contract will not be the first to expire because the 40-year term is measured from the initial delivery date which in the case of the Lindsay-Strathmore Contract was Mar. 15, 1950. The contract between the United States and the Orange Cove Irrigation District was signed on May 20, 1949. The term is for 40 years including the year in which the initial delivery date occurs. The contract defines "year" as the period from Mar. 1 of each calendar year through the last day of February of the following calendar year. The initial delivery date was July 9, 1949, and consequently, the last "year" of the contract will be the period from Mar. 1, 1988, through Feb. 28, 1989.

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9(e) contractors. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958).

The Act of July 2, 1956, 43 U.S.C. §§ 485h-1-h-5, relating to the administration by the Secretary of subsections 9(d) and (e) of the Reclamation Project Act of 1939, was passed with very little objection or debate. The impetus for the Act was the concern, primarily on the part of California farmers,³ about renewability of and repayment under 9(e) contracts and, inherent in the first concern, the availability of a continuous supply of water. Both the Senate and House reports on H.R. 101, which became the 1956 Act, state that the major objections met by the bill are:

- (1) that no assurance can be given in the contract itself or in any other document binding upon the Government that the contract will be renewed upon its expiration;
- (2) that the water users who have this type of contract are not assured that they will be relieved of payment of construction charges after the Government has recovered its entire irrigation investment; and (3) that the water users are not assured of a "permanent right" to the use of water under this type of contract.

S. Rep. No. 2241, 84th Cong., 2d Sess. (1956); H.R. Rep. No. 1754, 84th Cong., 2d Sess. 2 (1956).

The 1956 Act addressed concerns about contract renewals by requiring the Secretary of the Interior to include a renewal clause in any long-term contract entered into after the passage of the Act if the water users so request. 43 U.S.C. § 485h-1.⁴

It addressed concerns related to repayment by requiring the inclusion in any long-term section 9(e) contract of a clause allowing conversion of the contract to a section 9(d) contract at the request of the contractor. 43 U.S.C. § 485h-1(2).⁵ Concerns about a continuous supply of water were addressed by a provision which granted contractors a first right, during the term of the contract or any renewal thereof, to a stated share of water for beneficial use on irrigable lands of the contractors and a permanent right to that water once the project is repaid.

³ In explaining the bill, Senator Anderson of New Mexico noted that most of the 9(e) contracts at that time were in California and that the irrigation districts were in favor of the bill. 102 Cong. Rec. 10,635 (1956).

⁴ 43 U.S.C. § 485h-1 states:

In administering [section 9, subsections (d) and (e) of the Reclamation Project Act of 1939 (53 Stat. 1187, 1195)], the Secretary of the Interior shall—
(1) include in any long-term contract hereafter entered into under [said subsection (e)], if the other contracting party so requests, for renewal thereof under stated terms and conditions mutually agreeable to the parties. Such terms and conditions shall provide for an increase or decrease in the charges set forth in the contract to reflect, among other things, increases or decreases in construction, operation, and maintenance costs and improvement or deterioration in the party's repayment capacity. Any right of renewal shall be exercised within such reasonable time prior to the expiration of the contract as the parties shall have agreed upon and set forth therein.

⁵ 43 U.S.C. § 485h-1(2) states that the Secretary must:

include in any long-term contract hereafter entered into under said subsection (e) with a contracting organization provision, if the organization so requests, for conversion of said contract, under state terms and conditions mutually agreeable to the parties, to a contract under subsection (d) at such time as, account being taken of the amount credited to return by the organization as hereinafter provided, the remaining amount of construction cost which is properly assignable for ultimate return by it can probably be repaid to the United States within the term of a contract under said subsection (d).

43 U.S.C. § 485h-1(4).⁶ Obviously, such a first right was contingent upon a contractor's compliance with all other terms and conditions of its contract. Finally, the Secretary was authorized to negotiate amendments to existing contracts to bring them into conformance with the provisions of the Act. 43 U.S.C. § 485h-2.⁷

Approximately 16 section 9(e) contracts for water service from Friant Dam were signed within a few years of completion of the Madera and Friant-Kern Canals, but prior to the July 2, 1956 Act. It appears that seven Friant contracts were executed after the 1956 Act. These latter contracts all contain a renewal provision similar to the following:

The term of Part A shall extend for a period of forty (40) years from the initial delivery date: *Provided*, that under terms and conditions mutually agreeable to the parties hereto renewals of this contract may be made for successive periods not to exceed forty (40) years each. The terms and conditions of each renewal shall be agreed upon not later than one (1) year prior to the expiration of the then existing contract: *Provided further*, That upon written request by the District [the contract may be converted to a 9(d) contract under terms and conditions mutually agreeable to the parties . . .

Most of the pre-1956 contracts were amended within a few years of passage of the 1956 Act, pursuant to the authority granted to the Secretary under section 2 to include a similar renewal provision in contracts executed prior to the Act. The Bureau has treated requests to amend pre-1956 contracts to include a renewal clause as a matter of right. In a November 6, 1958, memorandum from the Associate Commissioner of Reclamation to the Secretary regarding an amended contract with Stone Canal Irrigation District, the Associate Commissioner noted that the contract was being amended to provide for renewal "in accord with [the 1956 Act]."

In contrast to the contracts described above, seven of the pre-1959 Friant irrigation contracts have never been amended to include a renewal provision. Those seven are held by the irrigation districts of Orange Cove, Lindmore, Lindsay-Strathmore, Porterville, Southern San Joaquin, Chowchilla, and Madera. It is our understanding, though, that many of these districts have requested amendment of their contracts to include a renewal provision, requests which have not yet been acted upon by the Bureau.

On April 29, 1988, the Commissioner approved a Basis of Negotiation which allowed the Regional Director to begin negotiations with Friant

⁶ 43 U.S.C. § 485h-1(4) provides that the Secretary must:

provide that the other party to any contract entered into pursuant to said subsection (d) or to any long-term contract entered into pursuant to said subsection (e) shall, during the term of the contract and of any renewal thereof and subject to fulfillment of all obligations thereunder, have a first right (to which the rights of the holders of any other type of irrigation water contract shall be subordinate) to stated share or quantity of the project's available water supply for beneficial use on the irrigable lands within the boundaries of, or owned by, the party and a permanent right to such share or quantity upon completion of payment of the amount assigned for ultimate return by the party subject to payment of an appropriate share of such costs, if any, as may thereafter be incurred by the United States in its operation and maintenance of the project works; . . .

⁷ 43 U.S.C. § 485h-2 states:

The Secretary is hereby authorized to negotiate amendments to existing contracts entered into pursuant to section 9, subsection (e), of the Reclamation Project Act of 1939 to conform said contracts to the provisions of this Act. (70 Stat. 484; 43 U.S.C. § 485h-2).

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users for renewal of their contracts. The initiation of this process has raised the issue of the applicability of the requirements of NEPA to these renewals. The Friant Water Users Association (FWUA), which represents the districts whose contracts are involved, has taken the position that, as a matter of reclamation law and under the state water right permits allocating water for the Friant Unit, the Friant users have a guaranteed right to renewal of their contracts for the full quantities of water received under the original contracts and, therefore, that NEPA does not apply to contract renewals. This position has been disputed by groups such as the Natural Resources Defense Council and the United Anglers of California, which assert that a full EIS is required on all Friant contract renewals.⁸

DISCUSSION

The purpose of NEPA is to require Federal agencies to consider environmental factors in making agency decisions. To the extent that a Federal action is ministerial, rather than discretionary, the courts have generally held that NEPA does not apply. See, e.g., *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 839-40 and n.13 (6th Cir. 1981); *State of South Dakota v. Andrus*, 614 F.2d 1190, 1193 (8th Cir. 1980), cert. denied 449 U.S. 822 (1980); *NRDC, Inc. v. Berklund*, 609 F.2d 553, 558 (D.C. Cir. 1979); *NAACP v. Medical Center, Inc.*, 584 F.2d 619, 634 (3d Cir. 1978). Therefore, the extent to which the requirements of NEPA are applicable to the renewal of Friant Unit contracts is dependent upon the nature of the Secretary's discretion. We begin with a discussion of the applicability of NEPA and then proceed to a discussion of the nature and effect of the Secretary's discretion in renewing Friant contracts.

A. The National Environmental Policy Act

The National Environmental Policy Act of 1969 is a declaration of national policy regarding consideration of environmental factors in making agency decisions. See 42 U.S.C. §§ 4321 et seq. NEPA is a procedural statute "intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 CFR 1500.1(c) (1987).

⁸ In addition, the Director of the Office of External Affairs for Region IX of the Environmental Protection Agency wrote to the Regional Director for the Mid-Pacific Regional Office of the Bureau expressing her belief that the Bureau should prepare an EIS for the renewal of Friant Unit contracts. Letter from Deanna M. Wieman, Director, Office of External Affairs, Environmental Protection Agency, to David G. Houston, Regional Director, Mid-Pacific Regional Office, Bureau of Reclamation, Oct. 19, 1988. The Director cites adverse effects on San Joaquin River water quality caused by reduced flows and agricultural runoffs from ongoing diversions as creating the necessity for environmental impact review. The Director, however, does not address the legal issue of the Secretary's discretion in the contract renewals. Thus, the Director skips the essential first step in determining whether NEPA compliance is required at all. In short, evaluation of the impacts of agricultural runoffs and reduced flows on water quality would be allowed, and would be meaningful, only if the Secretary had some discretion in contract renewals. As the following discussion shows, the Secretary has little discretion in this area.

A key feature of NEPA is section 102, which requires Federal agencies to prepare a detailed EIS for a “major Federal action significantly affecting the quality of the human environment . . .” 42 U.S.C. § 4332(2)(C). The statement must consider, among other things, the environmental impact of the proposed action, any unavoidable adverse environmental effects and alternatives to the proposed action. *Id.*

The meaning of the term “major Federal action” has been addressed on numerous occasions by the courts. Specifically, a series of cases has held that the term excludes actions that are ministerial rather than discretionary and actions that do not propose a change in the *status quo*. The Eighth Circuit, in *State of South Dakota v. Andrus, supra*, explained the reason for the exclusion for ministerial actions as follows:

Ministerial acts, however, have generally been held outside the ambit of NEPA’s EIS requirement. Reasoning that the primary purpose of the impact statement is to aid agency decisionmaking, courts have indicated that nondiscretionary acts should be exempt from the requirement. 614 F.2d at 1193.

The District of Columbia Circuit reached the same result as to coal leases. In *NRDC, Inc. v. Berklund, supra*, the court found that the Secretary of the Interior had a mandatory duty to issue a coal lease to a qualified applicant, and thus, the Secretary properly determined not to prepare an EIS:

Certainly, an agency cannot escape the requirements of NEPA by excessively constricting its statutory interpretation in order to erect a conflict with NEPA policies. But that is not the situation here, where the plain meaning of the statute as well as undisturbed administrative practice for nearly 60 years leaves the Secretary no discretion to deny a § 201(b) lease to a qualified applicant. 609 F.2d at 558.

Likewise, the District of Columbia Circuit, in *NAACP v. Medical Center, Inc., supra*, found that the Department of Health, Education, and Welfare was correct in deciding that no EIS need be prepared when the agency’s sole participation in the building of a medical center was the ministerial approval of the capital expenditure for the center and that approval was required because expenditure was authorized by the requisite state agency. 584 F.2d at 628-34. See also *Pacific Legal Foundation v. Andrus, supra* (NEPA requirements inconsistent with the mandatory duty of the agency to list endangered species upon a specific factual finding).

The courts have also held that a “major Federal action significantly affecting the human environment” does not encompass an action that does not change the status quo. In *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992 (D.C. Cir. 1979), cert. denied 445 U.S. 915 (1980), the District of Columbia Circuit held that the decision of the General Services Administration to lease a plaza area for use as a parking facility, as it had done since the 1930’s, did not require NEPA compliance. The court pointed out that “[t]he duty to prepare an EIS normally is triggered when there is a proposal to change the status quo.” 603 F.2d 1002-3. The Ninth Circuit, citing the *Committee for*

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Auto Responsibility arrived at the same conclusion in *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115 (1980). In that case, the court held that an EIS need not be prepared for the purchase of an airport by a city airport authority with the aid of Federal financial assistance because the sale would effect no change in the *status quo*. See also *Sierra Club v. FERC*, 754 F.2d 1506, 1510 (9th Cir. 1985).

To the extent that NEPA does apply to an action, the Council on Environmental Quality (CEQ), which was created by NEPA, has enacted regulations designed to clarify NEPA procedures, reduce paperwork, and minimize delay. 40 CFR 1500.1 *et seq.* The CEQ regulations provide for determining whether an EIS is necessary through the preparation of an EA. An EA is a concise public document that will “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” 40 CFR 1508.9(a)(1) (1987). An important part of the EA is a consideration of the environmental impacts of the proposed action and alternatives.

The CEQ has also provided for the identification of the kinds of actions that by their very nature do not require further NEPA compliance, even though they involve discretionary actions. These categories are called “categorical exclusions.” A “categorical exclusion” is “a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations” 40 CFR 1508.4 (1987). Federal agencies were required to adopt necessary procedures to supplement this CEQ definition, *id.* at 1507.3(b)(1), and in response, the Department of the Interior adopted categorical exclusions for each of its agencies. Those applicable to Bureau activities are incorporated into the Department of the Interior Manual (DOI Manual), at 516 DM 6, Appendix 9, and are set out in the Bureau of Reclamation NEPA Handbook (Handbook). The Handbook describes the Bureau’s NEPA policies, includes the CEQ regulations, and includes portions of the DOI Manual. The DOI Manual provides for a categorical exclusion for actions involving:

Approval, renewal, transfer, and execution of an original, amendatory, or supplemental water service or repayment contract where the only result will be to implement an administrative or financial practice or change.

516 DM 6, Appendix 9.4, D.14.

This categorical exclusion alters the general rule that an EIS should be done for contract amendments which have not already undergone NEPA review:

Proposed repayment contracts and water service contracts or amendments thereof or supplemental thereto, for irrigation, municipal, domestic, or industrial water where NEPA compliance has not already been accomplished.

516 DM 6, Appendix 9.3, A.3.

In determining whether a categorical exclusion applies to a Bureau action, the Handbook in virtually every case requires consideration of a checklist of factors.⁹ Handbook 2-3. The checklist is a means of evaluating an action in relation to the impacts it may cause. *Id.* The checklist questions expand upon the criteria to be used to determine if actions should be categorically excluded from the NEPA process. These criteria are: (a) the action or group of actions will have no significant effect on the quality of the human environment; and (b) the action or group of actions will not involve unresolved conflicts concerning alternative uses of available resources. 516 DM 22.3A. If any question in the checklist is answered "yes," an EA must be prepared "unless there is no doubt concerning the significance of the impact . . ." Handbook 2-3. Questions that are answered "uncertain" will trigger, at a minimum, more research or consultation to gather sufficient data to answer the question. *Id.* at 2-11.

B. Major Federal Action: The Secretary's Discretion and Effect on the Status Quo

In reviewing the applicability of NEPA to the renewal of Friant contracts, then, we must review the questions of whether the Secretary has discretion in the renewals and whether those renewals effect a change in the *status quo*. To the extent that the Secretary has discretion and utilizes that discretion to make changes in the renewed contracts, we must determine whether the changes are subject to a categorial exclusion from NEPA's required impact analysis.

With respect to those contracts that contain a clause granting the contractor a *right* to renewal, the Secretary has no discretion but to follow the terms of the clause. All contracts executed subsequent to the 1956 Act must include, pursuant to the provisions of that Act, such a clause when requested by the contractor. 43 U.S.C. § 485h-1.

There is a question, however, about those pre-1956 contracts that do not presently contain a "right of renewal" clause. With respect to those contracts, the Act authorizes the Secretary to amend them to conform to the provisions of the Act. 43 U.S.C. § 485h-2. The Bureau, since passage of the Act, consistently has interpreted this provision to be mandatory upon proper application of users who contracted with the Bureau prior to 1956. Most of the pre-1956 contracts have been so amended, but several requests for such amendment are currently pending. We have been asked to advise whether the Bureau's consistent administrative interpretation that pre-1956 contracts must

⁹ The only exclusions for which the checklist need not be used are those relating to certain planning activities or the classification and certification of irrigable lands. DOI Manual, 516 DM 6, Appendix 9.4 B.1, 9.4 B.2, and 9.4 C.1.

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be amended to include a renewal clause, if a request to do so is made, is appropriate.

The language of the statute does not definitively resolve this issue. The statute provides that the Secretary "shall" include a renewal provision in any contract entered into after passage upon request of the contractor, but provides that the Secretary is "authorized" to amend existing contracts to bring them into conformance with the provisions of the Act. Therefore, it is necessary to examine the legislative history of the 1956 Act to determine congressional intent regarding the nature of the Secretary's discretion concerning inclusion of renewal clauses in pre-1956 contracts. See *Nevada Power Co. v. Watt*, 711 F.2d 913, 920 (10th Cir. 1983); *United States v. Rogers*, 461 U.S. 677, 706 (1983).

We start with the basic premise that the 1956 Act was enacted to assure continuity of water service to all water users. Both the House and Senate reports on the bill which became the 1956 Act emphasized the fact that the bill was introduced to meet three major objections raised primarily by California farmers. Two of those objections related to continuity of water service: (1) the objection that no assurance could then be given that contracts would be renewed upon their expiration; and (2) the further objection that no assurance could then be given that water users could ever gain a permanent right to water under the service contracts. S. Rep. No. 2241, *supra* at 2; H.R. Rep. No. 1754, *supra* at 2.

The 1956 Act addressed these concerns through several provisions. The Act required the Secretary to include a renewal clause in any long-term contract executed after 1956, if requested by the water user, and further authorized the Secretary to conform any pre-1956 contracts to the provisions of the Act. In addition, the Act granted contractors a first right, during the term of a contract or any renewal thereof, to a stated share of water for beneficial use on the contractor's land and a permanent right to the water once the project is repaid.

Water users, such as those in the Orange Cove District, supported the Act as a method of assuring them that their water would not be taken away after 40 years of use. Representative Sisk, Congressman for the Orange Cove District, stated during committee consideration that the Act provided the assurance needed by Orange Cove and similar districts that the Federal Government could not, at the end of the contract term, put the water previously supplied on the auction block and auction it off to the highest bidder or make a contract with someone else after the district had developed a farm economy for 30 or 40 years. See Report of Proceedings, Hearing Held Before the Committee on Interior and Insular Affairs, Subcommittee on Irrigation and Reclamation on H.R. 101, 84th Cong., 2d Sess. 10 (1956). Representative Engle, the bill's chief sponsor, stated that the bill was

intended to assure water districts of continued water service and to dedicate facilities already built to the purpose of delivering water. *Id.* at 5. The Senate Report on the bill that became the 1956 Act emphasized this fact when it said ". . . [it] does give assurance of the right to *permanent water service* to the extent that a water supply is available." S. Rep. No. 2241, *supra* at 1 (italics added).

The 1956 Act's embodiment of the users' right to receive water beyond their 40-year contracts was recognized by the Supreme Court in *Ivanhoe Irrigation District, supra*. After pointing out that the 1956 Act included a requirement that the Secretary incorporate a renewal provision in all contracts executed after the Act, as well as an authorization to amend existing contracts to incorporate the new provisions of the Act, the Court said:

In view of the declarations and privileges incorporated in these amendments [the 1956 Act] we see no room for objection to the contracts on the ground that they infer that the water users are not entitled to water rights beyond the 40-year terms of the contracts, or that they do not make clear that the districts and landowners become free of indebtedness upon repayment. 357 U.S. at 298.

At the same time, there is nothing in the legislative history of the 1956 Act to suggest that Congress intended to assure this continuous water supply only to contracts entered into after 1956. The argument has been made that while the Secretary has an affirmative obligation to include a renewal clause in post-1956 contracts upon request, thus assuring a renewal of the contracts, he has no corresponding duty to include such a clause in pre-1956 contracts. The legislative history of the Act evidences no intent to create such an arbitrary distinction. Districts, such as Orange Cove, which already had contracts, sought and supported the 1956 Act. In addition, the Senate Report on the bill that became the 1956 Act made clear a congressional intent to assure *all* water users of this continuous water supply when it said: "On the subject of renewal, the bill *directs inclusion* in *any* long-term 9(e) type contract—one that extends for more than 10 years—of a provision for renewal if the contracting organization so requests." S. Rep. No. 2241, *supra* at 1 (italics added). There is simply no rational basis upon which to conclude that Congress intended to treat districts differently based on the time they entered into water service contracts.

In addition, the courts will accord great deference to the interpretation given to a statute by an agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). The Court in *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961), in part quoting from *Norwegian Nitrogen Products Co. v. U.S.*, 288 U.S. 294, 315 (1933), noted that this deference is particularly strong "when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " As we have noted, since the passage of the 1956 Act, the Secretary, consistent with the foregoing legislative history, has

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routinely granted requests to amend contracts to include a renewal clause, treating such clauses as a matter of right.

We conclude, therefore, that the Bureau properly interpreted the Act not to require the Secretary to affirmatively review and amend each existing contract, but at the same time not to deny districts that contracted for water prior to 1956 a right to renewal of their contract, if they so request.¹⁰ The Secretary, then, has no discretion as to whether to amend a contract to include a renewal clause, if requested to do so. Further, once a contract contains a renewal clause, the Secretary has no discretion to deny renewal of the contract.

Renewals of Friant Unit contracts, being nondiscretionary, do not constitute major Federal actions. Therefore, there is no requirement to do an EA, or other impact analysis as a threshold to the renewals.¹¹ This point is further made by the fact that the mere renewal of the contracts, with no substantive changes in their terms, would not change the *status quo*. Therefore, even if the renewal were viewed as discretionary, the act of renewing would not represent a major Federal action triggering the necessity to perform impact analysis under NEPA.

C. Other Changes in the Contracts

Even if we ignore the important distinction made in the NEPA case law between discretionary and mandatory acts, we nevertheless conclude that an assessment of environmental impacts need not be done for the renewal of Friant contracts, because the renewals implement only administrative or financial changes. As described in more detail above, contract renewals which implement administrative or financial changes only are categorically excluded from EIS requirements. Because these actions are presumed to have no significant impact on the environment, they are excluded from NEPA's requirements of impact assessment. We conclude that renewal of a contract according to and as required by its terms, in and of itself, is a renewal implementing only administrative or financial changes, which is categorically excluded from NEPA's requirement of impact assessment.

This conclusion assumes, of course, that the terms of the renewed contracts will not change substantially. If the Secretary exercises his discretion to make other substantial changes in the contracts at the

¹⁰ We caution that any renewal right created by the 1956 Act, or other authority, is conditioned upon the satisfactory adherence to the terms of water contracts and state and Federal law.

¹¹ The addition of a renewal clause to an existing contract would not constitute a supplemental or additional benefit which would subject a contractor to the increased acreage and pricing provisions of the Reclamation Reform Act. 43 U.S.C. § 390cc. Not constituting such a supplemental or additional benefit, the addition of a renewal clause likewise would not be an amendment that would trigger the pricing provisions of secs. 105 and 106 of P.L. No. 99-546, 100 Stat. 3050, 3051-52 (Oct. 27, 1986). See Memorandum from the Solicitor to the Ass't Secretary, Water and Science, regarding the "Interpretation of Section 203(a) of the Reclamation Reform Act of 1982 and Sections 105 and 106 of Public Law 99-546" (May 20, 1988).

time of renewal, then analysis must be undertaken to determine whether the exercise of discretion qualifies for a categorical exclusion from preparation of impact analyses under NEPA.

As discussed, there is no discretion with respect to the quantity of water to be supplied under a renewed contract. Section 4 provides "a first right . . . to a stated share or quantity of the project's available water supply for beneficial use on the irrigable lands within the boundaries of, or owned by, the [contracting] party . . ." 43 U.S.C. § 485h-1(d). Assuming that water supplied under a contract is beneficially used within the service area, and assuming that other terms and conditions of the contract have been met, the renewal of the contract must include the same quantity of water as under the original contract.

The Secretary has considerable discretion, however, to change other terms of the renewed contracts. Section 1 of the 1956 Act states that the Secretary must include a renewal provision in contracts executed after 1956 but that renewal will occur "under terms and conditions mutually agreeable to the parties." 43 U.S.C. § 485h-1. Further, that section specifically contemplates changes in the rates that will be imposed in the contracts.

To the extent that substantial changes in other terms or conditions are made, they must be examined to determine whether they fall within the categories of actions presumed to have no significant impact on the human environment. Most important, under the present circumstances, of course, is the categorical exclusion for actions which implement only an "administrative or financial practice or change." We do not believe that a change in rates charged for water would amount to more than a "financial change" in the renewed contracts. Likewise, we believe that the retention in renewed contracts of the terms of existing contracts is within the categorical exclusion covering renewals which incorporate only administrative and financial changes. However, other changes could subject those renewals to the requirement of impact assessment. Each proposed change must be examined on its own merits, utilizing the checklist developed in the Bureau's handbook for applicability of the categorical exclusion relating to renewed contracts.

Changes in the contracts must be reviewed carefully as they have not yet been the subject of NEPA review. As noted above, this careful review is mandated in the Handbook for contract actions for which NEPA compliance has not already been accomplished.

CONCLUSION

Based on the foregoing, we conclude that the Bureau of Reclamation is not required to prepare an EIS or assessment concerning mere renewals of Friant Unit contracts that contain substantially the same terms and conditions as are contained in existing contracts, because

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such renewals constitute nondiscretionary actions and do nothing more than retain the *status quo*. Even if the renewals were subject to NEPA, they would be subject to a categorical exclusion from the preparation of such environmental review documents. Changes in terms and conditions, with the exception of administrative and financial changes such as rates, however, may require some environmental assessment. The applicability of the categorical exclusion for contract renewals involving such changes in the contracts must be measured carefully on a case-by-case basis, utilizing the checklist included in the Bureau's Handbook.

RALPH W. TARR
Solicitor

COMPLIANCE WITH RAKER ACT BY CITY & COUNTY OF SAN FRANCISCO*

M-36962

November 10, 1988

Act of December 19, 1913

Where nothing in the Raker Act, 38 Stat. 242 (1913), precludes the City of San Francisco's arrangement for disposal of Hetch-Hetchy power as embodied in its contracts with Pacific Gas and Electric and with Modesto and Turlock Irrigation Districts.

Memorandum

To: Secretary

From: Solicitor

Subject: Compliance with Raker Act by City and County of San Francisco

Pursuant to your request, this memorandum memorializes the analysis we have previously provided you as to whether the City and County of San Francisco (City or San Francisco) has violated the requirements imposed by the Raker Act of 1913, 38 Stat. 242 (the Act) by entering into its contracts with Pacific Gas and Electric Co. (PG&E or the Company) and with the Modesto and Turlock Irrigation Districts. In analyzing whether the City is in compliance with the Act, this memorandum begins with a brief review of the key provisions of the Raker Act and of the history of the City's efforts in implementing the Act. It then discusses specific issues that have been raised concerning the validity of the City's present agreements with PG&E and the irrigation districts under the Act.¹ In summary, as we have advised

*Not in chronological order. Attachment not included due to illegibility.

¹ The issues addressed herein have been raised in a number of northern California publications, including a newsletter of the University of California Davis School of Law's Environmental Law Society.

you previously, we find nothing in the City's contracts with PG&E or the irrigation districts that suggests a violation of the proscriptions of the Raker Act and therefore see no reason to pursue further a possible claim against the city to terminate the use of the Hetch Hetchy Valley for a reservoir under that Act.

THE RAKER ACT

Carving lands out of Yosemite National Park and the Stanislaus National Forest, the Raker Act granted San Francisco all necessary rights-of-way and lands for the purpose of constructing, operating, and maintaining water and power supplies for its domestic and municipal uses. Act, § 1. The Act placed a number of specific conditions upon the grant and provided in section 9(u) “[t]hat the grantee shall at all times comply with and observe on its part all the conditions specified in th[e] Act . . .” Similarly, section 5 provided further “[t]hat, in the exercise of the rights granted by this Act, the grantee shall at all times comply with the regulations herein authorized.”

With regard to power generated by utilizing the grant pursuant to section 9(m), section 9(1) of the Act sets forth the permitted disposition of that power. First in priority are the requirements for the pumping of the water supply for San Francisco, and for the actual municipal needs of the City and County, which requirements are not to include “sale to private individuals or corporations.” Any power in excess of these requirements must be sold, on request, to satisfy the needs of the landowners of the Modesto Irrigation District and the Turlock Irrigation District for the pumping of subsurface waters to effectuate irrigation or drainage and for the needs of municipalities within those districts, again not including “sale to private individuals or corporations.” The section then sets forth the following proviso:

Provided, That said grantee shall satisfy the needs of the landowners in said irrigation districts for pumping subsurface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, *after which it may dispose of any excess electrical energy for commercial purposes.* [Italics added.]

Section 6 of the Act articulates a more general prohibition regarding disposition of the power generated and contains another proviso prohibiting assignment of the grant:

[T]he grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or electric energy sold or given to it or him by the said grantee:
Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to sell, assign, transfer, or convey, this grant shall revert to the government of the United States.

The Act contains two provisions respecting enforcement of the conditions referred to in this memorandum. Section 5 provides that

In the event of *any material departure* [from the regulations herein authorized] the Secretary of the Interior or the Secretary of Agriculture, respectively, may take such

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action as may be necessary in the courts or otherwise to enforce such regulations. [Italics added.]

More generally, section 9(u) provides:

[I]n the event that the [conditions specified in this Act] *are not reasonably complied with and carried out by the grantee*, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act. [Italics added.]

It is the latter section under which in an appropriate case the Secretary of the Interior would request in writing that the Attorney General commence proceedings to effectuate the reverter created in section 6 of the Act. *Starbuck v. City and County of San Francisco*, 556 F.2d 450, 456 (9th Cir. 1977).

HISTORY OF IMPLEMENTATION

The City commenced damming of the Hetch Hetchy Valley in 1914, finally completing the effort in 1938. The financial burden for the construction, operation, and maintenance of this project was borne entirely by the City. *United States v. City and County of San Francisco*, 23 F.Supp. 40, 42 (N.D. Cal. 1938).

From the time the Hetch-Hetchy power development first came on line in 1923, the City faced the problem of distribution of that power. Having never owned its own municipal power distribution system, the City, rather than construct a system to carry the Hetch Hetchy power, in 1925 entered into an agreement with PG&E whereby the utility would take a portion of the Hetch-Hetchy power, sell it to PG&E's customers, and pay San Francisco the revenues received for the power.

In an August 24, 1935, opinion, Secretary of the Interior Harold Ickes outlined a number of previous Departmental pronouncements expressing concerns about the 1925 agreement. *Sale of Electric Energy from Hetch Hetchy Power Site, California*, 55 I.D. 321 (1935). He noted that in 1925 Acting Solicitor Wright expressed his initial view that the contract appeared to be one of agency or consignment and not one of sale in violation of the Act, but indicated that the contract could be conducted in such a way as to reverse this conclusion. His interpretation of the Raker Act was the same as Solicitor Edwards in a 1928 opinion: the Act prohibits the sale of Hetch-Hetchy power by the City to PG&E for the purposes of resale. Opinion of Solicitor Edwards dated June 8, 1928 (M-10228). *Id.* at 323, quoting opinion of Acting Solicitor Wright dated July 20, 1925. Later Solicitor Finney declined to express an opinion on the facts before him, but suggested that the arrangement perhaps could only be justified as a temporary measure, pending acquisition by the City of its own distribution system. *Id.* at 323-24, referring to Opinion of Solicitor Finney dated May 29, 1929.

The Attorney General, as he had in 1925 upon a similar request from Interior, declined in 1930 to express an opinion and suggested representatives of the two Departments meet "to develop the situation more fully." *Id.* at 325. The Attorney General concluded during these discussions that additional information was needed and that no further action should be taken until after the August 26, 1930, submission to City voters of a bond issue that would finance the City's acquisition of transmission and distribution facilities. *Id.*

However, Secretary Ickes noted in his 1935 opinion that the voters of San Francisco subsequently defeated that bond issue and a second one in 1933 for the construction of a small municipal distribution system. Secretary Ickes then concluded that by entering into the 1925 contract and continuing beyond a temporary period the City was in violation of section 6 of the Raker Act for its sale of Hetch Hetchy power to PG&E for resale by PG&E to its customers. *Id.* at 321, relying in part on Opinion of Solicitor Margold dated October 27, 1933 (M-27615, 54 I.D. 316). The Secretary found that the 1925 contract between the City and PG&E was not, but its terms, one of agency or consignment, but, rather was one of sale for resale. *Id.* at 334.

Determining subsequently that compliance with his opinion was not forthcoming, the Secretary requested that the Attorney General commence suit against San Francisco on behalf of the Department of the Interior pursuant to section 9(u), seeking an injunction directing the City to comply with the Act. The matter ultimately reached the Supreme Court in *United States v. San Francisco*, 310 U.S. 16 (1940). The Court, concurring with Secretary Ickes' position, found that the City, pursuant to its 1925 agreement with PG&E, had transferred completely to a private utility the right to sell and distribute Hetch-Hetchy power in direct violation of section 6 of the Raker Act. *Id.* at 26.

Subsequent to the Supreme Court decision, the City and PG&E in 1945 entered into a new agreement to bring the City into compliance with the Raker Act. This agreement, substantially different from the 1925 contract, invalidated by the Supreme Court, provided that the City merely would utilize PG&E's transmission facilities and not transfer any interest in Hetch-Hetchy power to PG&E. The contract was subsequently amended and extended on numerous occasions and was finally replaced by a new contract, approved by the Federal Energy Regulatory Commission on March 31, 1988, carrying forth essentially the same terms as the contract it replaced.

The 1945 agreement provided that the ". . . Company shall furnish . . . facilities to transmit energy for City, and to furnish supplementary energy, standby service and other services . . ." 1945 Contract at p. 2. The transmission of Hetch-Hetchy power to San Francisco for its municipal uses over PG&E lines, along with the agreement of PG&E to provide supplemental firming power to the City

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on a requirements basis, was the essence of the 1945 contract. Under the agreement, PG&E charged the City for this transmission service a "wheeling" fee based upon each kilowatt hour of energy delivered. *Id.* at par. 8, p. 8. PG&E credited the City for any power the City delivered to PG&E in excess of the City's municipal needs. *Id.* at par. 4(c), p. 5.

Unlike the agreement between the City and PG&E struck down in *United States v. San Francisco*, the agreement initiated in 1945 has never been reviewed in the courts for compliance with the Raker Act.² The Department, however, dating from Secretary Ickes' initial review of the agreement in 1945, has consistently found the contract to be in compliance with the Act.

In a letter to Mayor Lapham of San Francisco, dated June 11, 1945, (copy attached hereto for your reference) Secretary Ickes, the same Secretary who had challenged the 1925 contract, found that with the incorporation of one modification to the contract between San Francisco and the Modesto and Turlock Irrigation Districts outlined in his letter,³ the 1945 agreement between the City and PG&E and its proposed disposition of project power would be technically in compliance with the Act. He also reported that the Department of Justice had advised his office "of its concurrence in the view that, if amended as suggested above, the contract would be in reasonable compliance with the Raker Act."

The contract was discussed at hearings on July 2, 1945, and July 9, 1945, before Judge Roche, the same District Court Judge whose original ruling that the 1925 contract violated section 6 was affirmed in *United States v. San Francisco*. During the hearing the U.S. Attorney reported:

I understand, your Honor, that the Secretary [of the Interior] has ruled that the proposed disposition as contemplated [in the 1945 contract] . . . would constitute a reasonable compliance with the [Raker] act. I do not think there is any question about that.

July 9, 1945 Hearing, R.T. 34.

The U.S. Attorney continued:

² Several other suits have been initiated under the Act, however; *United States v. City & County of San Francisco*, 112 F.Supp. 451 (N.D. Calif. 1953) (action by the United States seeking compensation from San Francisco for maintenance of Hetch-Hetchy project roads); *City of Palo Alto v. City & County of San Francisco*, 548 F.2d 1374 (9th Cir. 1977) (suit to enjoin increase by San Francisco in rates on water delivered from the Hetch Hetchy project); *Starbuck v. City & County of San Francisco*, 556 F.2d 450 (9th Cir. 1977) (citizen complaint that the City's wheeling agreement with PG&E violated the Raker Act); *City & County of San Francisco v. U.S.*, 616 F.2d 1063 (9th Cir. 1979) (complaint that the Raker Act requires approval by the Secretary of the Interior of rates set by San Francisco for Hetch-Hetchy power).

³ Secretary Ickes stated that "[t]he Contract could, and should, contain a clause specifically binding the Districts not to increase their sale of energy to any private utility company for resale," so that the Districts would not become mere conduits for the City to transfer power to PG&E. This modification was effected and has been retained.

I think at this stage of the proceedings we have arrived at a legal and proper disposition of the Hetch Hetchy power. I think it conforms to the provisions of the Raker Act, and it certainly is in compliance with the injunction.

Id., R.T. 81. The U.S. Attorney pointed out that the court was not being called upon to approve the contract because the Secretary of the Interior had already done so. *Id.*, R.T. 77.

Subsequently, Solicitor Melich in June 17, 1971, letter responded on behalf of the Secretary and the Attorney General to allegations that the City was in violation of the Raker Act. In that letter, the Solicitor expressly disagreed with the proposition that the Raker Act requires the City to construct and operate its own system for the sale and distribution of Hetch-Hetchy power for the citizens of San Francisco rather than contracting with PG&E:

Although some of the sponsors of the [Raker Act] legislation may have hoped that the City would take over the distribution systems of the Pacific Gas and Electric Company within the City limits and furnish retail electric power service to the citizenry, Congress did not write such a requirement into the Act. It chose, instead, to rely on the negative sanction of section 6 of the Act forbidding the City to sell Hetch-Hetchy power to a private corporation for resale.

Yet, again, Secretary Morton responded to a letter informing him of a 1973 San Francisco Grand Jury report, which concluded that San Francisco's contract with PG&E violated section 6 of the Raker Act and the order in *United States v. San Francisco*. The Secretary declined to act on the allegations, indicating that he doubted the merits of the Grand Jury's conclusions because the contract differed from the one involved in the prior Supreme Court case. *Starbuck v. City and County of San Francisco*, 556 F.2d, *supra* at 458, n.15.

DISCUSSION

Once again, the same allegations that prompted the foregoing Department reviews are being advanced, despite the fact that the consistent administrative interpretation since 1945 in response to such allegations has been that the City's contracts with PG&E and the Modesto and Turlock Irrigation Districts do not violate the Raker Act.⁴ Specifically, allegations are currently being made that the City's contracts with PG&E and the Modesto and Turlock Irrigation Districts violate § 6 of the Raker Act. These allegations are made primarily on the basis that the contracts contravene the prohibition against the City selling or letting the right in turn to PG&E to sell or sublet Hetch-Hetchy power and against selling, assigning, transferring, or conveying the grant.

⁴ No allegation has been made, nor does our review suggest, that the most recent contractual arrangement approved by FERC on Mar. 31, 1988, substantially differs from the 1945 arrangement approved by Secretary Ickes. The most significant difference is that the 1945 contract provided for the sale to PG&E of "dump power," while the current contract makes no provision for sale of any power to PG&E. This change is in the direction of even clearer compliance with the Raker Act.

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With regard to the irrigation district contracts, the prohibition of section 6 against selling or letting the right in turn to sell or sublet Hetch-Hetchy power, by its terms, does not apply to municipal water districts or irrigation districts.⁵ Secretary Ickes did place a restriction on this exception by requiring the inclusion of a provision that would prevent the irrigation districts from selling or subletting to PG&E. See n.3, *supra*, and accompanying text. There is no allegation, however, that that restriction has been violated.

With regard to the PG&E contract, essentially the argument is that the City can only be in compliance with the Raker Act if it owns and operates its own transmission lines for the citizens of San Francisco. Under any other arrangement, the argument continues, such as under the current contract, the City has abdicated control over sale and ultimate distribution of Hetch-Hetchy power and PG&E unlawfully profits from the arrangement.

Proponents of the argument that San Francisco can be in compliance with the Raker Act only if it has its own distribution system for the citizens of San Francisco point to language contained in the 1940 Supreme Court opinion in *United States v. San Francisco*, *supra*, striking down the 1925 contract between PG&E and the City. In the opinion, Mr. Justice Black quotes extensively from the legislative history referred to in the following summary:

From the congressional debates on the passage of the Raker Act can be read a common understanding both on the part of sponsors of the Bill and its opponents that the grant was to be so conditioned as to require municipal performance of the function of supplying Hetch-Hetchy water and electric power directly to the ultimate consumers, and to prohibit sale or distribution of that power and water by any private corporation or individual. 310 U.S. 16, 22 (n. omitted).

After quoting a number of statements of Members of Congress, the Court concludes:

To limit the prohibitions of § 6 of the Act narrowly to sales of power for resale without more, as the City asks, would permit evasion and frustration of the purpose of the lawmakers. Congress clearly intended to require—as a condition of its grant—sale and distribution of Hetch-Hetchy power exclusively by San Francisco and municipal agencies directly to consumers in the belief that consumers would thus be afforded power at cheap rates in competition with private power companies, particularly Pacific Gas & Electric Company. 310 U.S. 16, 26.

One other passage of the opinion is frequently raised by proponents of this argument:

On the contrary, the Government's position rests upon the claim that Pacific Gas & Electric Company is not in reality selling and distributing Hetch-Hetchy power as consignee and agent but as purchaser for resale; that the grant to the City was made upon the mandatory condition that this power be sold solely and exclusively by the City

⁵ "[T]he grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee . . ." Act, § 6 (italics added).

directly to consumers and without private profit in order to bring it into direct competition with adjacent privately owned utilities; and that § 6 not only withholds the right of selling for resale but also prohibits the City "from ever selling or letting" to any private corporation "the right" to sell or sublet the . . . electric energy sold or given to it by the City. The language of the Act, its background and its history require the construction given § 6 by the Government. 310 U.S. 16, 20.

From such passages, it is thus asserted, the Supreme Court concluded that San Francisco was required to have its own distribution network and deliver power directly to the citizens of San Francisco to be in compliance with the Act. However, a careful reading of the case and the *dicta* cited by proponents fails to provide support for this assertion.

The language of the opinion must be placed in the context of the issue before the Court. The Court was evaluating a contract between the City and PG&E under which power was delivered to PG&E and thereafter was under the company's complete control. PG&E would market the power, deliver the power to its customers, bill the customers, and pay the City on a fixed-fee basis set out in the contract, even for power it did not resell and for power it did not take from the City when offered. The Court rejected the argument that the contract was valid as a consignment arrangement, looking through the terminology to find that what was actually done by the City was transfer by sale to PG&E in direct contravention of the proviso in section 6 of the Act.

When we look behind the word description of the arrangement between the City and the power company to what was actually done, we see that the City has—contrary to the terms of § 6—abdicated its control over the sale and ultimate distribution of Hetch-Hetchy power. 310 U.S. at 28.

Thus, the court simply held that the contract violated section 6 of the Act because the City had surrendered dominion and control over the project power to PG&E. Despite the ambiguity of the language of the opinion when applied to the present context, in referring to distribution, the court was focusing merely on the selection of and marketing to customers. The court had no occasion to consider whether the City must itself own the physical distribution network or can through a wheeling arrangement utilize the network of a third party to deliver project power.

Any suggestion that the above-quoted passage concerning the Government's position reflects a view of the Department at the time that the City must itself own the distribution network in order to comply with section 6 of the Act is clearly refuted by the fact that Secretary Ickes, who had challenged the 1925 contract, approved the 1945 arrangement. In doing so, he did state his view that the citizens would get the full benefit, as intended by the Congress, only if the city brought the energy to San Francisco and distributed it to them. Nevertheless, he indicated that he could not oppose the technical adherence to the Act represented by the 1945 contract with PG&E. Letter from Secretary Harold Ickes to Mayor Lapham, June 11, 1945.

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Thus, Secretary Ickes, in effect, took the position that whatever various Members of Congress had in mind when the Raker Act was passed, it is the plain terms of section 6 of the Act that must govern.⁶ These terms set out the mechanism which Congress agreed upon to condition the grant. Secretary Ickes concluded, as has the Department consistently since that time, evidenced by the previous references to Solicitor Melich and Secretary Morton, that nothing in the Act precludes the City from delivering project power through a wheeling arrangement with a third party.⁷

More recently, there has been judicial consideration of this issue. In *Starbuck v. City and County of San Francisco, supra*, "residents, taxpayers, and consumers of electricity in San Francisco" alleged that San Francisco's wheeling arrangement with PG&E violated section 6 of the Raker Act. 556 F.2d at 452. The court did not, however, reach the merits of appellants' claim. Rather, it found that the Raker Act makes no provision for a private enforcement action and that appellants did not have standing to challenge the agreement under the Administrative Procedures Act. *Id.* at 457, 458-59.

The court in *Starbuck* had occasion to address the issue of the City's ownership of distribution facilities in applying the factors used in determining whether there is an implied cause of action in the plaintiffs under the Raker Act.⁸ Specifically, the Court, among other things, held that the plaintiffs could not demonstrate that it would be consistent with the underlying purposes of the legislative scheme to imply such a cause of action:

In 1913 Congress anticipated that San Francisco would shortly build its own transmission lines and that direct service to consumers would provide consumers with abundant power more cheaply than that supplied by private utilities. The congressional assumptions might have come true had the taxpayers seen it Congress' way in the decades that followed the Raker Act. But the taxpayers repeatedly refused to approve

⁶ There is language in Secretary Ickes' 1935 opinion that on superficial reading might lead one to conclude that the Secretary believed the City was legally obligated to own a distribution network for delivery of Hetch-Hetchy power. 55 I.D. 321, 327-29. A careful reading of the opinion reveals that, consistent with his subsequent approval of the 1945 contract, he did not intend to express such a view. The following passage reflects the true import of his statements in this regard:

The contention that Congress does not have power to compel the City and County of San Francisco to acquire and operate its own distributing system, while true (see *Uhl v. Badaracco*, 199 Cal. 270), is quite beside the point. We are not concerned here with a direct attempt to force municipal ownership and operation on the City and County of San Francisco by a mandatory Congressional enactment. We are dealing merely with a specification by Congress of the terms and conditions under which it was willing to grant certain rights to San Francisco with respect to the generation and utilization of electrical energy on the Federally owned land embracing the Hetch Hetchy Project. 55 I.D. at 328.

Thus, Secretary Ickes stated that the issue before him was compliance with the conditions stated in the Act, not the results of compliance with those conditions as asserted by the City. Although the City asserted that it would have no choice but to build its own distribution system if it could not sell to PG&E for resale, its 1945 wheeling arrangement demonstrates that it did have another legally permissible alternative to comply with the conditions of the Raker Act. 55 I.D. at 328.

⁷ See Opinion of the Solicitor John H. Edwards dated June 8, 1923 (M-10228), at 11: "But instead of selling this power for resale and distribution, as has been done and as further proposed, it occurs to me that it would be feasible for the parties to agree upon terms by which the grantee would have its power transmitted over the lines of the concern owning or controlling the existing distribution system. This method would avoid conflict with the provisions of the law and apparently would accommodate the grantee to the existing conditions of the project."

⁸ The Court applied the factors set forth in *Cort v. Ash*, 422 U.S. 66, 78 (1975).

bond issues that would have supplied the revenue to build the transmission facilities. In the meantime, energy shortages, inflation and escalating costs of rights of way, of construction, and of the debt service have obliterated Congress' rosy vision of San Francisco's energy future. Even if we could reasonably assume that Bay Area taxpayers would now be willing to assume the debt burden to build these facilities, we cannot infer that energy delivered over those newly constructed lines would be cheaper than energy delivered over PG&E's lines. The rate structure for direct delivery would necessarily reflect the enormous costs involved in building the system. If any inference would be permissible, it would be that the cost of energy to the consumers would be more, not less, than that available under the present wheeling arrangements. In short, the dominant cheaper energy purpose of the Raker Act would be defeated, rather than fulfilled, if appellants were to be given the remedy they seek. 556 F.2d at 456.

Similarly, in evaluating the plaintiff's standing under the Administrative Procedures Act, the Court concluded that plaintiffs failed to make the necessary showing because they could not allege injury-in-fact, namely, that their rates would be lower if San Francisco did not use PG&E facilities to transport Hetch-Hetchy power, resulting from their allegation that the Secretary had failed to enforce section 6:

Appellants have not made any showing that their rates would decrease if they were successful in this action. For the reasons that we have previously stated, we do not believe that the essential showing can be made . . .

Similarly, appellants cannot show the essential causal link between their injury and the Secretary's alleged inaction . . . We cannot ignore the reality that the consumer's costs of energy are far more attributable to national and international forces of supply and demand than they are to the Secretary's actions and omissions in respect to Hetch Hetchy power. Nor do we have any facts to assume that appellant's energy woes will be cured by the remedy that appellants ask us to compel." 556 F.2d at 458-59.

Thus, implicit in the Court's words is that regardless of the intent or "assumptions" of some of the legislators, the Raker Act by its terms does not require the city to own a transmission system for delivery of Hetch-Hetchy power to the citizens of San Francisco. Certain conditions on the grant are specified in the Act and Congress could have included this one, but did not. We must conclude, therefore, that there is no merit to the argument that the contract with PG&E is unlawful because it involves acquisition of wheeling services.

Even though San Francisco is not required by the Act to distribute on its own the Hetch-Hetchy power, the argument has been made that a third party such as PG&E is prohibited by the Act from receiving a profit for providing wheeling service. Once again, review of the plain language of the Act does not reflect the broad sentiments suggested in the sources cited to support the argument.

In its contract with the City, PG&E is allowed as compensation for its wheeling services a rate of return that includes a profit. This return is regulated and controlled at the Federal level by the Federal Energy Regulatory Commission and at the State level by the California Public Utility Commission.

Here again, the argument that the Act forbids PG&E from earning a profit from the transmission of Hetch-Hetchy power is based upon

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broad language in the *United States v. San Francisco*, *supra*, opinion of the Supreme Court. Frequently cited is the following language of the opinion: "the grant to the City was made upon the mandatory condition that this power be sold solely and exclusively by the City directly to consumers and without private profit in order to bring it into direct competition with . . . adjacent privately owned utilities." 310 U.S. at 20. The Court cites comments of various Members of Congress for this proposition, including, for example, that of Congressman Kent, a leading supporter of the bill: "there is no possibility of selfish gain, and that no corporation or individual can obtain any benefits whatsoever from this bill." 310 U.S. at 23. See also 310 U.S. at 25-26, n.17.

Again, the language of the opinion and its use of the legislative history were to assist the Court in answering the question of whether the Act prohibited only the sale of power for resale or also prohibited the arrangement before it, involving the complete transfer of dominion and control over project power to PG&E. It is improper to take the Court's statements out of their context and utilize them to argue that the Court suggested that the City must not pay more than actual cost for the services or products necessary to realize the benefits of the grant.

More appropriate analysis requires looking to the plain language of the Act. Whatever the motivations expressed during the congressional debate, section 6 articulates the relevant specific conditions placed on the grant by Congress. That section prohibits the sale of power by the City to third parties for resale by those parties (with certain exceptions not applicable to PG&E). Nothing in section 6 precludes the City from paying or PG&E from receiving more than the actual cost to PG&E of performing wheeling services.

Therefore, we cannot disagree with the Department's approval of the PG&E contract over the past 43 years, even though PG&E is receiving a profit for providing transmission services.

CONCLUSION

We are aware of no reason to question the legality under the Raker Act of the City's arrangement for disposal of Hetch-Hetchy power as embodied in its contracts with PG&E and with Modesto and Turlock Irrigation Districts. The Department's longstanding administrative practice has been to approve the arrangement under the Act. That practice appears to be a correct reading of the conditions imposed by the Raker Act. We, therefore, see no basis upon which to pursue a challenge to the contracts.

RALPH W. TARR
Solicitor

July 6, 1989

APPEAL OF R & R ENTERPRISES

IBCA-2417

July 6, 1989

Contract No. CC-9029-82-002, National Park Service.

APPEARANCES: Joseph J. Connolly, Esq., Attorney at Law, Lynnwood, Washington, for Appellant; Richard Neely, Esq., Department Counsel, Portland, Oregon, for the Government.

Order Granting Government Motion for Reconsideration and Affirming Board's Decision

The Board issued its decision, partially sustaining the appeal in the above-entitled matter, on March 24, 1989, at 26 IBCA 89 (89-2 BCA ¶ 21,708). On April 24, we received a Government request for reconsideration and, on the same date, permitted a period of time ending on June 30 for receipt of the Government's brief. The brief was duly received and reviewed, and the Board's decision is hereby affirmed.

In its decision, the Board concluded that concession contracts entered into by the National Park Service (NPS) are subject to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601, since they are for the procurement of services that the Government would otherwise provide, and no statutory exemption or congressional exclusionary intent is evident in the CDA or the NPS statute (16 U.S.C. § 20a). 26 IBCA 128-32. The CDA was intended to govern all types of procurements of goods and services by Federal agencies, subject to certain narrow, explicit exceptions. There was no such exception for NPS concession contracts.

Government counsel argues, first, that concession contracts have never been regarded by NPS as procurement contracts and, second, that even if they are procurement contracts under the CDA, the Board's conclusion to that effect is not germane to the issues in the appeal, since the appeal was ultimately decided exclusively on the basis of the provisions of the concession contract involved, rather than on the basis of the CDA.

We do not agree. First, in each of the three appeals involving concession contracts that have come before the Board, as well as in the agency's final decision under review in this case, the Government has asserted that NPS concession contracts are not procurement contracts, suggesting that the Board would have no jurisdiction over the appeal but for the disputes provision of the contract itself, under which discretionary appeals are made to the Secretary and delegated to the Board pursuant to 43 CFR 4.1. In our decision, we made clear our view that we have jurisdiction over concession contract appeals by reason of the CDA, regardless of the inclusion or exclusion of such provisions in the concession contract.

Second, both the NPS final decision and counsel's brief cited as authoritative cases from state courts that have no relevance to Federal procurement contracts, as well as other legal principles we regarded as inapplicable to such contracts. We think it was incumbent upon the Board to set forth our view that Federal contract disputes are properly decided on the basis of Federal contract law unless they are not subject to the CDA—as was the case, for example, with Indian Self-Determination cases before the Congress legislated otherwise in P.L. 100-472 (Oct. 5, 1988).

Third, also in fairness to the parties, the Board wanted to make clear in its decision that, even if the decision were overturned by an appeals court with respect to the applicability of sections 11 and 12 of the contract and our conclusion that there had been a constructive partial termination of the contract for Government convenience, we nevertheless would again find for the appellant on the basis of established procurement law principles. Thus, our underlying conclusion that the contract in question was a procurement contract was fundamental, and entirely appropriate for an appellate court's legal review, since any subsequent remand by the court would inevitably result in another award to the appellant unless the court concluded that concession contracts were not procurement contracts.

Finally, we cannot agree with Government counsel's various assertions that the Board was not adequately informed concerning the nature of concession contracts at the time it decided the case. The issue involved, in the Board's view, was clearly one of law, not fact; and no amount of further briefing on the subject of NPS' long years of experience with concession contracts would have changed our legal conclusion that the 1978 CDA, which was enacted only 10 years ago for the specific purpose of unifying Government contracting practices, applies by its terms to these contracts, like any other procurement contracts (*see, e.g., Shirts 'N' Stuff*, ASBCA No. 32206, Mar. 24, 1989, in which the Armed Forces Board assumed the applicability of the CDA to concession contracts without even discussing the question).

In any event, if Government counsel is correct that the Board's CDA conclusions were only dicta, then no harm was done, because NPS would not be bound by such views. But the Government should be aware that this Board will in the future decide similar cases on the basis of procurement law principles under the CDA unless the Court of Appeals for the Federal Circuit or the Congress tells us otherwise.

The Government has provided us with no new evidence or other legal basis for modifying our March 24 decision in this matter, and our decision must therefore be affirmed.

BERNARD V. PARRETTE,
Administrative Judge

July 13, 1989

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

ROBERT E. SHOEMAKER

110 IBLA 39

Decided: *July 13, 1989*

Appeal from a decision of the District Manager, Medford District Office, Bureau of Land Management, rejecting a mining claimant's request to remove stream improvement structures placed by BLM under authority of the Surface Resources Act. OR MC 033947.

Affirmed as modified.

1. Mining Claims: Surface Uses--Surface Resources Act: Management Authority

Fish and fish habitats are "other surface resources" which the Department of the Interior has authority to manage on the surface of mining claims under subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982).

2. Mining Claims: Surface Uses--Surface Resources Act: Management Authority

The Surface Resources Act granted Federal agencies authority to manage and dispose of the resources found on the surface of mining claims. When Federal management of surface resources conflicts with the legitimate use of the surface or surface resources by a mineral locator so as to endanger or materially interfere with prospecting, mining, or processing operations, or uses reasonably incident thereto, Federal management must yield to mining as the dominant and primary use.

3. Mining Claims: Surface Uses--Surface Resources Act: Management Authority--Words and Phrases

"*Endanger*" and "*materially interfere*." The terms "endanger" and "materially interfere" used in subsec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), set forth the standard to be applied to determine whether a specific surface management action must yield to a conflicting legitimate use by a mining claimant. Where there is no evidence that such action endangers the claimant's operations, the question is whether the surface management activity will substantially hinder, impede, or clash with mining operations or a reasonably related use.

APPEARANCES: Robert E. Shoemaker, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

Robert E. Shoemaker (Shoemaker) has appealed the January 22, 1987, decision of the District Manager, Medford District Office, Bureau of Land Management (BLM), rejecting a request to remove stream improvement structures placed by BLM on the Treetopper I placer mining claim, OR MC 033947, or be compensated for the loss of his

mining rights.¹ The claim was located by Robert E. Shoemaker and Jerry McLean on May 23, 1980, and occupies the SE $\frac{1}{4}$ SW $\frac{1}{4}$, sec. 27, T. 35 S., R. 7 W., Willamette Meridian, in Josephine County, Oregon. Maps in the case file show Pickett Creek to cross the claim diagonally, flowing from the southwest corner of the claim to the northern border near the northeast corner.

During the summer of 1986, BLM constructed 10 fish weirs in Pickett Creek within the Treetopper I's boundaries. A BLM report of a December 1, 1986, inspection it conducted after Shoemaker complained about the structures, describes them as follows:

Each structure is composed of 2 foot diameter logs placed diagonally and perpendicular to the flow of the creek and tied into the banks with cables. Gravel was placed on the upstream side of most logs for spawning beds. Spacing of the structure is as shown on the attached map. The area affected by the structure is a three foot deep pool 10-15 feet long below the logs and up to 18 inches of gravel above the structure for 20 to 40 feet, depending on site conditions. There is an average of 60 feet of natural, undisturbed stream bed between each structure.

Included in the report are engineering diagrams of "typical" installations. Eight of them are "reverse log V installations" which consist of two 2-foot diameter logs placed to form a "V" pointing upstream. The logs are secured to each other, and to anchor trees or stumps on the stream banks or in the stream bed, with three-eighths-inch galvanized cable. The diagram of this kind of installation shows, instead of gravel, two rows of 18-24-inch diameter rock, individually placed, along the upstream side of each side of the "V," and a minimum of four cubic yards of rock fill, including boulders, on the downstream end of each of the logs that form the "V." A triangular pool approximately 15 feet from apex to base is formed or excavated immediately downstream of the apex of the "V." The design calls for an additional "cull" log to be placed and secured behind and parallel to one side of the "V" and another "deadman" log to be buried in the streambed upstream of the point of the "V." The other two installations, one a "log sill," the other a "digger log," are also depicted as constructed of anchored logs and rock fill, except they are placed perpendicular to the flow of the creek.

The case file contains a copy of a Mining Feasibility Study of the claim done by Shoemaker, presumably in support of his original November 1986 complaint about the installation of the weirs.² Shoemaker estimates that Pickett Creek is approximately 1,490 feet long as it crosses his claim. Of this, he estimates he had mined approximately 235 feet and that 322 feet of the remaining 1,255 feet of

¹ The decision states that the claimants have the right to appeal the decision "to the State Director, and thereafter to the Board of Land Appeals of the Department of the Interior." Appellant's notice of appeal was addressed to the district manager and was forwarded to the Board with the case file. It appears that BLM may have had in mind appeal procedures established under the surface management regulations. See 43 CFR 3809.4. Those regulations, however, are not applicable here because the decision on appeal concerns actions taken on the surface of a mining claim by BLM rather than the requirements imposed on mineral locators by 43 CFR Subpart 3809.

² Neither the case file submitted to the Board by BLM in response to Shoemaker's appeal nor the file for the mining claim submitted in response to our order of June 14, 1989, contains the original of this document, so the apparent color coding of the accompanying maps cannot be read.

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streambed have been covered by BLM's gravel. He says the water levels have been raised behind the weirs. As a result, in his view, a different type of mining equipment will have to be bought and ground sluicing will be eliminated, thus making these parts of the claim, i.e., those behind the weirs, "less economical to mine--more work for the same amount of gold" (Study at 5). He estimates the gravel at "upwards to +4' feet thick near the weirs and down to 4"-6" inches deep at there ends [sic]." "During heavy rains and flood[s] there is no doubt that this gravel will move down stream covering and intermixing with gold bearing gravel making it increasing[ly] less economical to mine" (Study at 6). Shoemaker also comments that because of the weirs "gravel movement [through the] claim will come to a standstill, the bottom half will have little to no gravel bearing gold [sic] movement and the top end of claim will have stagnate [sic] movement" (Study at 8). Finally, Shoemaker explains that they began by working the claim at the upstream (southern) end but then shifted to the downstream end, where they found better deposits, and worked upstream. "But also sniping th[r]oughout the whole claim has been done, finding pockets with dredge, sl[u]ice box, and by panning" (Study at 9).

BLM conducted the December 1, 1986, inspection mentioned above "to determine if, in fact, those fishery improvements were materially interfering with the claimants['] activities." BLM describes Pickett Creek as follows:

There is almost no gravel over bedrock which makes it easy for operating a suction dredge "sniping" for gold along bedrock. The natural water depth during summer is less than two feet. * * * [T]here are very little deposits outside the stream banks. Bedrock strikes at various angles but nearly perpendicular to the stream flow, forming natural riffles. The rock is highly fractured graphite shale-siltstone.

The author of the report comments that small suction dredges cannot work very much ground, and estimates that Treetopper I's claimants "couldn't possibly dredge more than 50 to 75 feet of their claim in a single operating season." "There are approximately 1,119 feet of exposed unaltered streambed not affected by fish structures on the claim, representing 73 percent of the stream length. This situation suggests that there is an adequate area in which to operate," the author observes. As to Shoemaker's concerns about raised water levels and increased costs, the report responds:

1. * * * [T]he water level is only raised a foot near the structure which may be to his benefit during his operating period. The higher water level will extend the area to operate his suction dredge.

2. There is, at most, 18 inches of gravel over the natural gravels where the log weirs have been placed. The BLM is not restricting the claimant from mining through those gravels, and we recognize there is some minimal amount of additional effort to remove those gravels. This might be interpreted as materially interfering, but remember the bureau requires other operators to comply with state environmental regulations which attaches additional costs to miners for reclamation work or operating methods. * * *

[W]e feel that our structures do not violate his rights and do not prevent him from mining his placer claim.^[3]

BLM's January 22, 1987, decision rejected Shoemaker's concern that the weirs would prevent new gold from migrating onto his claim. "[I]n fact, any gold that might migrate downstream will be trapped by the structures on your claim. The BLM does not object to you mining the gravels collected behind the log weirs," the decision stated. The decision also rejected his concerns about raised water levels and increased costs:

Our mineral examiner has found that the water level will not be significantly raised and that although we have placed gravel above the logs, there is ample area remaining on your claim that the structures have not affected. Furthermore, the amount of increased effort required on your part at or adjacent to the structures is not that significant. Because of the nature of the placer deposit on your claim, you are limited to use of portable suction dredge and hand tools for mining on your claim. We believe for this form of mining there is ample undisturbed stream bed available to you.

The decision concluded with an expression of regret that Shoemaker was not notified of BLM's intention to install the weirs before they were installed. "In the spirit of cooperation, we are willing to work with you to remove a few of the structures to expand some of your working area to expose more bedrock," the decision stated, and suggested meeting to discuss what measures could be taken "to reach an amicable agreement."

The case file also contains a document, prepared by a Medford District fishery biologist, entitled "Pickett Creek Position Paper" and dated February 11, 1987.⁴ This paper explains that BLM places logs and boulders in selected stream segments in order "to create deep pools for young fish to live in and provide better spawning habitat for adult fish." "Occasionally, as in the case of Pickett Creek, we also place gravel so that spawning areas are available immediately. * * * In some cases, Pickett Creek for instance, we've dug and blasted pools in bedrock to try to improve on a natural condition." "Anadromous

³ The Dec. 1, 1986, inspection report concludes:

"The BLM fishery habitat improvement program is an essential program to revive the fishery population which has been so severely impacted by both logging and placer mining over the past 100 years. We believe that the fishery program and mining activities can co-exist and do co-exist over most of the district. It is, however, unfortunate that a small minority of the mining community will always be present which will not cooperate with federal programs."

⁴ This document was placed in the file after BLM made its decision but before Shoemaker filed his notice of appeal on Feb. 18, 1987.

"The Board of course finds it helpful to have the kind of background and analysis that BLM provided in this case, either directly or via the Office of the Solicitor, and welcomes its submission. * * * If it is placed in the file after BLM makes its decision but before a person files a notice of appeal, there is no regulation requiring that it be sent to affected parties; nevertheless, in fairness BLM should mail a copy of it to such persons at the time it is placed in the file so that they may consider it in deciding whether to appeal the decision and what to say in a statement of reasons." *Amoco Production Co.*, 101 IBLA 152, 156-57 (1988).

Cf. Metropolitan Water District of Southern California, 109 IBLA 327, 329 n.2 (1989):

"BLM is advised that, under 43 CFR 4.27(b)(1), it is required to furnish appellants copies of all communications that concern the merits of the appeal and that are placed into the official record after the notice of appeal is filed. This includes not only answers and other pleadings filed with the Board, but also copies of memoranda that are not addressed directly to the Board, because we will nevertheless have them before us in the file as we consider the appeal. Appellant is normally to be provided the opportunity to respond to such communications by BLM. 43 CFR 4.27(b)(1). In the present case, we choose not to delay our decision by requiring service of this memorandum. However, BLM is further advised that failure to comply in the future may, in appropriate circumstances, result in the imposition of sanctions against it. 43 CFR 4.27(b)(2)." These statements apply to BLM's Chronology of Events in this case, which was placed in the case file after the filing of the appeal.

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fish belong to everyone and in part are dependent on public land," the paper continues:

We have identified specific potential project sites throughout the district. It would be irresponsible for us to avoid an area just because it contains a mining claim, especially since * * * Public Law 167 (Multiple Use Act) gives us the authority to manage surface resources, interpreted by us to include water and fisheries, on mining claims to the extent that our activities do not materially interfere with prospecting, mining or processing operations.

The paper enumerates several reasons why its author does not believe BLM's management significantly affects Shoemaker's claim. In addition to those mentioned in the inspection report summarized above, the paper suggests the series of log structures "may actually act as a riffle board, trapping any gold that may work its way downstream onto the claim during high winter streamflow."

Appellant's notice of appeal states that previously Pickett Creek "was a very economical mining creek because there was so much bedrock outcropping throughout the claim. It acted as a big sluicebox catching gold and washing out (off) waste rock down stream * * *." Now, appellant says:

The fish weirs placed over our claim clog the movement of gravel through the claim. The road gravel behind the weirs completely bury the gold burying [sic] gravel. With the weirs in, the water take behind them is raised. It wouldn't be as bad with weirs catching native gravel behind them but with weirs with road gravel dumped behind them, * * * [t]he heavier matter [e.g., placer gold] will be caught in the round gravel and trapped working its way down to the bottom, but with +200 yards of gravel to move before reaching the gold bearing gravel will make it highly impractically [sic] and economically unfeasible to mine.

Appellant states that the "bottom two weirs are over considerable gravel beds."

Appellant contends that placement of the structures in Pickett Creek was "an infringement on my basic mining rights, granted in 1872 and revised under the Public Law 167 of 1955," i.e., granted by the Mining Act of 1872 and "revised" by section 4(b) of the Surface Resources Act of 1955, P.L. 84-167, 69 Stat. 367, 368-69, *codified at* 30 U.S.C. § 612(b) (1982). He also says Or. Rev. Stat. § 517.520 "was not followed."⁵ Shoemaker says the weirs of his choice should be removed or he should be awarded compensation for the loss of his rights.

Section 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), provides:

⁵ Appellant cites the Oregon statute as "State Law § 108-504" and gives its title. The section of the Oregon statutes which bears the title "Maintenance of fishing conditions; cooperation of placer and fishing interests" is sec. 517.520 and is part of a statute establishing and granting powers to the Rogue River Coordination Board. See Or. Rev. Stat. §§ 517.510-517.550. The statute gives that Board jurisdiction over placer mining operations on the Rogue River and its tributaries and authorizes it to regulate placer mining operations for the mutual benefit of placer mining interests and fishing interests. Pickett Creek is a tributary of the Rogue River. The report of BLM's Dec. 1, 1986, mining inspection states: "The new state regulations for operating dredges within the stream channel precludes mining on tributaries to the Rogue River between September 15 and June 15, except where the Oregon Department of Fish and Wildlife grant a waiver. Mr. Shoemaker was not granted a waiver." No copy of these regulations is contained in the case file.

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the *right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof* (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto * * *. [Italics added.]*

[1] The phrase "other surface resources," underlined above, is ambiguous. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1280 (9th Cir. 1980); *United States v. Richardson*, 599 F.2d 290, 294 (9th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); *United States v. Curtis-Nevada Mines, Inc.*, 415 F.Supp. 1373, 1375, 1377 (E.D. Cal. 1976). From the legislative history of the Act, however, we have no difficulty concluding that the phrase includes fish and fish habitats.

The legislation was intended to provide statutory authority "which would operate to encourage mining activity on our vast expanse of public lands compatible with utilization, management, and conservation of surface resources such as water, soil, grass, timber, parks, monuments, recreation areas, *fish*, wildlife, and waterfowl." (Italics added.) H.R. Rep. No. 730, 84th Cong., 1st Sess. 3, reprinted in 1955 U.S. Code Cong. & Admin. News 2474, 2475. One of the problems the legislation was intended to address was that mining claims frequently blocked access

to agents of the Federal Government desiring to reach adjacent lands for purposes of managing wild-game habitat or improving fishing streams so as to thwart the public harvest and *proper management of fish and game resources on the public lands generally, both on the located lands and on adjacent lands.* [Italics added.]

Id. at 6, 1955 U.S. Code Cong. & Admin. News at 2478-79.

Like the House report, the Senate report states, in discussing conflicts between surface and subsurface uses: "Surface uses include stock grazing, forestry, soil-erosion control, watershed purposes, *fish* and wildlife preservation, and recreational areas." (Italics added.) S. Rep. No. 554, 84th Cong., 1st Sess. 3. The Senate report also notes the problem of mining claims having prevented access for the *"proper management of fish and game resources on the public lands generally, both on the located lands and on adjacent lands."* *Id.* at 5 (italics added).

After passage of the Surface Resources Act, the Department of the Interior promulgated regulations under its authority. 21 FR 7619 (Oct. 4, 1956). One portion of the regulations was apparently based in part on this legislative history. In relevant part it states:

Except as such interference may result from uses permitted under the act, the locator of an unpatented mining claim subject to the act may not interfere with the right of the United States to manage the vegetative and other surface resources of the land, * * * or prevent agents of the Federal Government from crossing the locator's claim in order to reach adjacent land for purposes of managing wild-game habitat or improving fishing

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streams so as to thwart the public harvest and proper management of fish and game resources on the public lands generally, both on located and on adjacent lands.

43 CFR 3712.1(b).

From these statements it is clear that fish and fish habitats are within the intended scope of the "other surface resources" that BLM has authority to manage on the surface of mining claims under 30 U.S.C. § 612(b) (1982). From the information in the record before us, it is apparent that installing weirs in streams is a recognized technique of enhancing fish habitats, and is thus an acceptable management practice.

However, employing this practice is subject to the statutory limitation, underlined above, that "any use of the surface of any * * * mining claim by the United States * * * shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto * * *." We must therefore consider whether the weirs placed on the Treetopper I claim endanger or materially interfere with the operations conducted by the claim owners.

Like "other surface resources," the terms "endanger" and "materially interfere" are general. Although the terms are not precise, the legislative history is clear as to their intended effect. In reference to the portion of the statute containing the terms, the House and Senate reports both state:

This language, carefully developed, emphasizes the committee's insistence that this legislation not have the effect of modifying longstanding essential rights springing from location of a mining claim. *Dominant and primary use of the locations hereafter made, as in the past, would be vested first in the locator; the United States would be authorized to manage and dispose of surface resources, or to use the surface for access to adjacent lands, so long as and to the extent that these activities do not endanger or materially interfere with mining, or related operations or activities on the mining claim.* [Italics added.]

H.R. Rep. No. 730, 84th Cong., 1st Sess. 10, reprinted in 1955 U.S. Code Cong. & Admin. News 2474, 2483; S. Rep. No. 554, 84th Cong., 1st Sess. 8-9.

Similar language appears in the legislative history concerning subsection 4(c) of the Act, which in part provides:

Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, * * * no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under subsection (b) of this section.

30 U.S.C. § 612(c) (1982). The House and Senate reports contain identical statements concerning this provision: "This language, read together with the entire section, emphasizes *recognition of the dominant right to use in the locator*, but strikes a balance, in the view of the committee, between competing surfaces uses, and surface versus

subsurface competing uses." (Italics added.) H.R. Rep. No. 730, 84th Cong., 1st Sess. 10, *reprinted in* 1955 U.S. Code Cong. & Admin. News 2474, 2483; S. Rep. No. 554, 84th Cong. 1st Sess. 9.

Senator Anderson of New Mexico, who introduced the Senate version of the bill, made similar comments on the Senate floor. First, in responding to criticism of the legislation he stated: "On a claim located after enactment, the locator would have full right to all surface resources of the claim which may be needed for carrying on mining activities." 101 Cong. Rec. 9334 (June 28, 1955). He went on to describe subsection 4(c) as recognizing "that a mining claimant has the first right, the first call on any and all surface resources of his claim which he needs for carrying on activities related to mining." *Id.*

When these statements are considered in relation to the mining laws as they stood at the time, it is clear that the legislation did not diminish the rights of locators to use the surface of mining claims. The Mining Law of 1872 provides that locators of mining claims "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations." 30 U.S.C. § 26 (1982). Although once understood by some to mean that a locator had an unrestricted right to make use of the surface in whatever manner and for whatever purpose chosen, the judicial decisions addressing the matter made clear that the right to use the surface and surface resources was limited to uses "reasonably necessary in the legitimate operation of mining," *Teller v. United States*, 113 F. 273, 280 (8th Cir. 1901), or "incident to mining operations." *United States v. Rizzinelli*, 182 F. 675, 684 (D. Idaho 1910). Thus, in declaring that mining claims subsequently located "shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto" (30 U.S.C. § 612(a) (1982)), the Surface Resources Act was "simply declaratory of the law as it existed *prior to* 1955." *Bruce W. Crawford*, 86 IBLA 350, 364, 92 I.D. 208, 216 (1985) (italics in original, footnote omitted); see *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d at 1280-81.

[2] The change made by the Surface Resources Act was to create in the United States explicit authority "to manage and dispose of the vegetative surface resources * * * and to manage other surface resources." 30 U.S.C. § 612(b) (1982). Previously, Governmental agencies had been unable to do so once a mining claim had been located, even though the locator had only a limited right to use the same resources. See *Bruce W. Crawford*, *supra* at 365-66, 92 I.D. at 216-17. Congress recognized that there would be instances in which Federal management of the surface resources found on a mining claim would conflict with legitimate use of the surface and surface resources by the claimant. The balance it struck in order to resolve such conflicts was to specify that the authority the statute granted would apply only so long as and to the extent that Federal use of the surface did not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." 30 U.S.C. § 612(b)

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(1982); see *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d at 1283, 1285. When it does, Federal surface management activities must yield to mining as the "dominant and primary use," the mineral locator having a first and full right to use the surface and surface resources.⁶

[3] Understood in this context, the terms "endanger" and "materially interfere" set forth the standard to be applied to determine whether a specific surface management action must yield to a conflicting legitimate use by a claim owner and may be given their ordinary meanings. To "endanger" is "to bring into danger or peril." *Webster's New Collegiate Dictionary* (1977) at 375. In this case there is no evidence that the weirs cause danger or peril to appellant's operations, so we turn to whether the weirs "materially interfere" with them. To "interfere" is "to interpose in a way that hinders or impedes"; and "material" means "being of real importance or great consequences." *Webster's New Collegiate Dictionary* (1977) at 602, 709. *Webster's Third New International Dictionary* (1971) defines "material" as "being of real importance or great consequence: substantial" (at 1392), and "interfere" as "to come in collision: to be in opposition: to run at cross-purposes: clash <interfering claims>— used with *with*" (at 1178 (italics in original)). Thus, the question is whether BLM's fish weirs substantially hinder, impede, or clash with appellant's mining operations.

Although there are some disparities between BLM's reports of the effects of its installing the weirs and appellant's, e.g., concerning the maximum depth of the gravel, even BLM's version of facts in this case leads us to conclude that BLM materially interfered with appellant's mining operations. The logs are 2 feet thick and fixed in place. The gravel BLM deposited covers at least 20 percent of the streambed (Position Paper at 1). Although the gravel BLM deposited may be "less than 15 inches in most locations" (Position Paper at 2) and "at most, 18 inches" over the natural gravel (Inspection Report at 2), before it was deposited there was almost no gravel over the bedrock, making it easy to operate a suction dredge. *Id.* at 1.

The statement in BLM's decision that "there is ample area remaining on [the] claim that the structures have not affected" does not negate the fact that it has obstructed 20 percent of the total streambed (and more of the unworked streambed). Nor do we believe BLM's judgment that "the amount of increased effort required on [appellant's] part at or adjacent to the structures is not that significant" is reasonable. Removing up to 18 inches of gravel from 20 percent of the streambed in order to be able to operate a suction dredge on the native gravels and fractured bedrock would in our view substantially impede appellant's mining operations.

⁶Cf. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d at 1286: "[I]n the event that public use interferes with prospecting or mining activities . . . [t]he mining claimant can protest to the managing federal agency about public use which results in material interference and, if unsatisfied, can bring suit to enjoin the activity."

The record indicates that after its January 22, 1987, decision, BLM attempted to negotiate with Shoemaker. A February 5, 1987, Conversation Record of a conference of five members of BLM staff states: "Bob Bessey [Medford District Fishery Biologist] explained that the lower 2 weir[s] were the most important structures and that we should remove the upper structures and all present agreed. Gerard Capps was to arrange meeting with Mr. Shoemaker (Senior) to inform him of our decision and explain reasons." A February 6, 1987, Conversation Record indicates appellant's father told BLM if it was not willing to remove the lower two weirs there was nothing to meet about. We interpret these documents as evidencing an intent by BLM, at one point, to accommodate appellant by removing all but the lower two weirs.⁷ In view of our conclusion that the 10 weirs, taken together, materially interfere with appellant's mining operations, we find the appropriate resolution of this case is to direct BLM to undertake what it offered to do, *i.e.*, remove all but the lower two weirs. Leaving the lower two weirs would not materially interfere with appellant's operations, especially in light of the fact no gravel was placed by one of them. *See Study at 1.*

Therefore, in accordance with 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 to the extent that the upper eight weirs should be removed.

WILL A. IRWIN
Administrative Judge

I CONCUR:

BRUCE R. HARRIS
Administrative Judge

APPLICATION OF HAWKINS & POWERS AVIATION, INC., FOR FEES & OTHER EXPENSES

IBCA-2243-F

Decided: July 21, 1989

Contract No. 80-0063, Office of Aircraft Services.

Sustained in part.

**Equal Access to Justice Act: Contract Disputes Act of 1978:
Substantially Justified--Equal Access to Justice Act: Contract Disputes Act of 1978: Allowable Expenses**

Where, in the underlying proceeding, involving a 90-day contract to furnish five C-119 aircraft for firefighting purposes in Alaska, the Board concluded that a 3-week delay for an airworthiness inspection ordered by the contracting officer constituted a suspension of

⁷ We note that the Pickett Creek Position Paper indicates an offer was made to appellant regarding removal of fewer than eight weirs.

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work for an unreasonable period, and such conclusion was based on findings that the contractor's aircraft were airworthy, that the inspection was for the convenience of the Government, and not based on the fault or negligence of the contractor, the Board holds that the Government failed to sustain its burden of proving substantial justification. Further, the Board holds that under the EAJA, Sec. 5, Title 5, *United States Code*, it has no authority to award attorney fees in excess of \$75 per hour, or to award costs for travel or other expenses which cannot fit into one of the categories itemized in (b)(1)(A) of said section.

APPEARANCES: Michael R. Sullivan, Douglas G. Carroll, Williams, Walsh & Sullivan, Attorneys at Law, Los Angeles, California, for Appellants; Bruce E. Schultheis, Department Counsel, Anchorage, Alaska, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

This timely filed application arises out of the decision by this Board in the *Appeal of Hawkins & Powers Aviation, Inc.*, IBCA-1608 (Sept. 4, 1986), 86-3 BCA ¶ 19,279, wherein appellant (H&P) was awarded a total of \$136,292 plus interest. The background of that proceeding is that under a 90-day contract to furnish five C-119 aircraft for firefighting purposes in Alaska, the contracting officer suspended performance resulting in a 3-week delay to the contractor in order to comply with an unscheduled airworthiness inspection. This inspection order was issued because of a crash of a similar C-119 aircraft in California under contract with the Forest Service, but having no relationship to the subject H&P aircraft. Among other things, we found that the Government failed to prove the contractor's aircraft to be unairworthy; that the suspension for the emergency inspection, although authorized under the contract, was for the convenience of the Government, not based on the fault or negligence of the contractor, and was for an unreasonable period. We then concluded that the contractor was entitled to an equitable adjustment pursuant to the suspension clause consisting of lost availability payments and its extra inspection costs, plus interest.

By this application, H&P seeks attorney fees and costs pursuant to the Equal Access to Justice Act (EAJA) under 28 U.S.C. § 2412, even though the correct citation to the EAJA statute regarding adversary proceedings before quasi-judicial or administrative tribunals, such as Boards of Contract Appeals, is 5 U.S.C. § 504. Administrative tribunals in the Executive Branch of Government are governed primarily by the administrative law statutes found under Title 5 of the *United States Code*, while Title 28, U.S.C., cited by applicant, deals with the courts and judicial procedures of the Judicial Branch. These two EAJA statutes are almost identical and are designed to accomplish the same purpose, but there is one basic distinction applicable to the circumstances of this proceeding. That distinction is that in Title 28,

the amount of attorney or agent fees that may be awarded is limited to \$75 per hour, unless the *court determines* that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee; while in Title 5, the same \$75-per-hour limitation is imposed, unless the *agency determines by regulation* that an increase in the same kinds of costs or a special factor justifies a higher fee.

By its application, H&P claims entitlement to the following items:

I. Transcript and reproduction costs.....	\$2,677.73
II. Consultation fee for expert witness.....	240.00
III. Attorney fees for three attorneys, one partner and two associates for a total of 411.8 hours over the period from 7/82-11/86, at hourly rates varying from \$90 per hour to \$200 per hour.....	70,870.00
IV. Out-of-pocket travel expenses incurred directly by H&P over the same period	5,129.26
Total	<u>\$78,916.99</u>

The Substantial Justification Issue

The Government does not contest this application in any respect, except to assert that its position was substantially justified because "its actions were in response to a concern for safety only."

As a result of the Supreme Court decision in *Pierce v. Underwood*, 108 S.Ct. 2541 (June 27, 1988), we concluded, in *Application of Intersea Research Corp.*, IBCA-2084-F (Dec. 20, 1988), 89-1 BCA ¶ 21,448, that the test for substantial justification is simply whether the Government had a reasonable basis for its action or inaction, and if it did not, we must hold its position not to have been substantially justified.

In this case, in our decision in the underlying proceeding, we found that the Government failed to provide any evidence that certain cracks or corrosion in nine aircraft parts would cause an unsafe or unairworthy condition; that absent an indication of unairworthiness, it must be assumed that replacement of such parts could have awaited the next scheduled maintenance. We found that H&P provided airworthy aircraft under the contract, and concluded: that the required emergency inspection was for the convenience of the Government and not based on the fault or negligence of the contractor, and that the 3-week delay for the inspection, under a contract of only 90-days duration, constituted a suspension of work for an unreasonable period.

On the basis of such findings and conclusions, we have little difficulty holding, and we do hold, that the Government, in this

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proceeding, has failed to sustain its burden of proving substantial justification.

EAJA Limitations on Allowances

H&P represents that when it filed its claim, it was a corporation with less than 500 employees and had a net worth of less than \$7 million. It therefore qualifies for the benefits of the EAJA. However, the EAJA makes no attempt to reimburse a prevailing litigant for all its expenses incurred in an adversary proceeding against the Government. It imposes certain limitations on allowances, and this Board is obligated to apply those statutory limitations, and is without discretion to do otherwise.

As pointed out above, the applicant failed to cite the correct statute as the basis of its claim for attorney fees, and it did not cite any regulation promulgated by the Department of the Interior, and we know of none, which allows, under any circumstance, more than \$75 per hour for attorney fees.

Counsel put forth a great deal of effort to establish entitlement to enhanced fees based on cost of living increases and the special expertise of Mr. Sullivan because of his aviation background as a pilot and his specialty in aviation law. This was all of no avail, however, because we are simply not authorized, under Title 5 U.S.C. § 504, to award more than \$75 per hour for attorney fees.

Also, as counsel acknowledged in the application with respect to item IV, there is no statutory authority for awarding reimbursement for travel and other expenses which cannot fit into one of the categories for attorney fees, expenses of expert witnesses, or costs of a study, analysis, engineering report, test, or project found necessary for the preparation of the party's case and itemized in 5 U.S.C. § 5(b)(1)(a). Consequently, the full \$5,129.26 claimed under item IV must be disallowed, since it fits into none of the mentioned categories. The claim of \$70,870, under item III, must be reduced by \$39,985 to comply with the \$75-per-hour limitation. The attorney fees allowance is computed by multiplying \$75 times 411.8 hours, resulting in an award for this item of \$30,885. We will allow all of item I, for transcript and reproduction costs in the amount of \$2,677.73, as being part of attorney services rendered, and the expert witness consulting fee of \$240, in item II, is allowed. A recapitulation of the allowances and disallowances is as follows:

I. Transcript & reproduction costs	\$2,677.73
II. Expert witness consultation fee	240.00
III. Attorney fees—\$75 x 411.8 hrs.....	30,885.00

—Continued

IV. H&P travel expenses—disallowed	_____
Total allowed.....	<u>\$33,802.73</u>

Decision

Accordingly, in the absence of any Government opposition to the application as submitted, except the substantial justification argument, and based on the foregoing findings, conclusions, and discussion, we award applicant the total sum of \$33,802.73 for attorney fees and expenses.

DAVID DOANE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

CITY OF EAGLE BUTTE, SOUTH DAKOTA v. ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

17 IBIA 192

Decided: *July 25, 1989*

Appeal from a decision of the Aberdeen Area Director, Bureau of Indian Affairs to take certain land within the city limits of Eagle Butte, South Dakota, into trust for the Cheyenne River Sioux Tribe.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Lands: Trust Acquisitions

The decision whether to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Indians: Lands: Trust Acquisitions

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof that each of these factors was considered must appear in the administrative record when the Bureau approves a trust acquisition.

APPEARANCES: Priscilla A. Wilfahrt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for appellee.

July 25, 1989

**OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN
INTERIOR BOARD OF INDIAN APPEALS**

Appellant City of Eagle Butte, South Dakota, seeks review of an October 24, 1984, decision of the Aberdeen Area Director, Bureau of Indian Affairs (BIA; appellee), concerning taking certain land within appellant's city limits into trust for the Cheyenne River Sioux Tribe (tribe). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

By resolution 367-83-CR, December 7, 1983, the Cheyenne River Sioux Tribal Council requested the United States to take into trust status for the tribe lot 14 of block 7; lots 1, 2, 3, and 4 of block 11; lots 2, 3, and 4 of block 16; and lots 1, 2, 11, and 12 of block 17, all within appellant's city limits. The lots were apparently owned by the tribe in fee status.

Because the trust acquisition would remove land from appellant's tax base, appellant was advised of the tribe's request. By letter dated May 15, 1984, appellant raised objections to the conveyance based upon the loss of its tax base, the allegation that lots 1, 2, 3, and 4 of block 11 were owned by the Cheyenne River Development Corp. rather than by the tribe, and the fact that lots 1, 2, 3, and 4 of block 11, and lot 14 of block 7 were leased to non-Indian corporations that were not members of the tribe.

After considering appellant's objections and the requirements of 25 CFR Part 151, by memorandum dated May 31, 1984, the Superintendent, Cheyenne River Agency, BIA (Superintendent), recommended to appellee that the conveyance to trust status be approved.

By memorandum dated October 24, 1984, appellee advised the Superintendent that the request was approved. Appellant appealed this decision to the Washington, D.C., BIA office, which, by memorandum dated July 22, 1988, requested additional supporting information from appellee. The requested information was received on November 15, 1988.

The appeal was still pending before the Washington, D.C., BIA office on March 13, 1989, the date new appeals regulations for BIA and the Board took effect.¹ The appeal was transferred to the Board on May 16, 1989, for consideration under the new appeals procedures.

By notice of docketing dated May 18, 1989, the Board gave the parties an opportunity to file any additional statements with it. Appellee filed a motion to dismiss; no other party filed an additional statement.

¹See 54 FR 6478 and 6483 (Feb. 10, 1989).

Discussion and Conclusions

On appeal, appellant continues to argue that the conveyance into trust status will cause significant problems based upon its loss of tax base; lots 1, 2, 3, and 4 of block 11 are not owned by the tribe, but rather by the Cheyenne River Development Corp.; and lots 1, 2, 3, and 4 of block 11 and lot 14 of block 7 are leased to non-Indians.

[1] The Board has previously held that approval of conveyances of Indian trust or restricted land is committed to the discretion of BIA. *White v. Acting Deputy Assistant Secretary-Indian Affairs (Operations)*, 15 IBIA 142 (1987). Similarly, approval of requests under 25 U.S.C. § 465 (1982), for the acquisition of land in trust status is committed to BIA's discretion.² See *State of Florida v. United States Department of the Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986); *City of Tacoma v. Andrus*, 457 F.Supp. 342 (D.D.C. 1978). The Board does not have jurisdiction to substitute its judgment for that of BIA in a decision based solely upon an exercise of discretion. *Simmons v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 14 IBIA 243 (1986). It does, however, have authority to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations. *White, supra*; *Nambe Pueblo v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 13 IBIA 53, 55 (1984), and cases cited therein.

[2] When BIA reviews a request to acquire land in trust status for an Indian tribe or individual, it must follow the regulations in 25 CFR Part 151, including the requirement that it consider the factors listed in section 151.10. As relevant to the present appeal, section 151.10 states:

In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of * * * the tribe for additional land;
- (c) The purposes for which the land will be used;

* * * * *

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

² Sec. 465 provides in pertinent part:

"The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians."

* * * * *

"Title to any lands or rights acquired pursuant to [the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1982)] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

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Proof that these factors were considered must appear in the administrative record. Because the final decision on whether or not to acquire land in trust status is committed to BIA's discretion, there is no requirement that BIA reach a particular conclusion as to each factor. *See also State of Florida*, 768 F.2d at 1256: "The regulation does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor." In order to avoid any allegation of abuse of discretion, however, BIA's final decision should be reasonable in view of its overall analysis of the factors listed in section 151.10.³

In the present case, the record as supplemented demonstrates that BIA thoroughly considered each of the relevant factors in 25 CFR 151.10 and the objections raised by appellant.⁴ The conclusion reached after such consideration is reasonable.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the October 24, 1984, decision of the Aberdeen Area Director is affirmed.⁵

KATHRYN A. LYNN
Chief Administrative Judge

I CONCUR:

ANITA VOGT
Administrative Judge

PUEBLO OF SANDIA BOUNDARY*

M-36963

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Administrative Procedure: Burden of Proof

Where there is the usual presumption that surveys of the United States are correct and in compliance with statutory requirements, there then exists a burden upon the claimant arguing survey error to establish, by a preponderance of the evidence, that the survey was fraudulent or grossly erroneous. If a preponderance of the evidence indicates, in fact, that a fraudulent survey did not take place, the Secretary has no grounds upon which to issue a new survey.

Act of August 13, 1946--Statute of Limitations

The Indian Claims Commission was established by the Act of Aug. 13, 1946, 60 Stat. 1049, to compensate Indian tribes through the payment of money damages for past wrong doings by the United States. Until 1946, Indian tribes could not litigate claims against the United States unless they obtained specific permission from Congress. The

* A decision to approve a trust acquisition must show that all of the factors were considered. A decision to disapprove a trust acquisition may be based on a more limited analysis of only some of the factors, if BIA's analysis shows that those factors weigh heavily against the trust acquisition.

* The Board notes that the record before supplementation would not be adequate to support BIA's decision because it does not demonstrate that the factors listed in 25 CFR 151.10 were considered.

* Because of the Board's disposition of this matter, appellee's motion to dismiss is denied.

* Not in chronological order. Appendices not included.

Commission was authorized to hear all tribal claims against the United States that existed before Aug. 13, 1946. The Pueblo of Sandia did not participate in any proceedings before the Commission in reference to the lands involved here thus letting the statute of limitations run.

Memorandum

To: Secretary

From: Solicitor

Subject: Pueblo of Sandia Boundary

You have asked this Office to review the claim by the Pueblo of Sandia (Pueblo) that it is entitled to certain lands approximately 13 miles north of Albuquerque, New Mexico. The Pueblo claims that approximately 10,000 acres of land were incorrectly excluded from a patent issued to the Pueblo by the United States in 1864 because the surveyor erred in not including all of the land originally granted the Pueblo by the Spanish in 1748. The major portion of the land claimed is managed by the United States Forest Service as parts of the Cibola National Forest and the Sandia Mountain Wilderness. The claimed area includes 665 acres of private inholdings (inholdings, private inholders, or inholders), as well as the Juan Tabo Recreation Area.

The Pueblo requests that the Secretary recognize that an error was made in the survey, order a resurvey, and issue a corrected patent encompassing the additional acreage claimed (claimed area). (A map of the Pueblo showing its current boundaries and the claimed area is attached as Appendix I.) The Pueblo has indicated that it does not seek to divest the private inholders of their title and would not seek to assert civil or criminal jurisdiction over the inholders or the private lands.

We conclude that the Pueblo's claim is without merit and that the Secretary has no authority to take the type of action requested by the Pueblo.

I. BACKGROUND

A. Historical Context

The United States acquired the territory that is now the State of New Mexico through the Treaty of Guadalupe Hidalgo on February 2, 1848, ending the war with Mexico. Although the Pueblos were not specifically mentioned in the Treaty, Articles VIII and IX generally guaranteed the liberty and property of those residing in the territories acquired under the Treaty. 9 Stat. 922, 929-30. In 1854, Congress acted to implement that guarantee by establishing the Office of Surveyor-General of New Mexico. 10 Stat. 308. One duty of that Office was to prepare and submit to Congress reports on all claims to land acquired by the United States under the Treaty of Guadalupe Hidalgo, and to

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"ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico." With respect to the Pueblos, the Surveyor General was to report "the extent and locality of each, stating the number of inhabitants in the said Pueblos, respectively, and the nature of their titles to the land . . . which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants and give full effect to the treaty . . . between the United States and Mexico . . ." *Id.* The Commissioner of the General Land Office (hereinafter Commissioner) wrote to the Surveyor-General of New Mexico in 1854 to advise him that the Government is obligated to address private land titles and the Pueblos, as Mexico would have done had sovereignty not been changed. Wilson to Pelham, August 31, 1854, Senate Misc. Doc. No. 12, 42d Cong., 1st Sess. 1-7 (1854).

Pursuant to the direction of Congress, the Surveyor-General appears to have accepted Spanish documents relevant to the claim of the Pueblo of Sandia and transmitted these (the documents referred to in footnote 2 as SANM II) to the Commissioner. We can find no independent report from the Surveyor-General concerning the Pueblo and the Pueblo has come forward with no such report. The Pueblo was unique in that it was the only one which still had its official grant documents to evidence ownership.¹ The Secretary of the Interior in turn submitted the Spanish documents, translated by one David Whiting, to Congress. These were included in 1748 Pueblo of Sandia Grant, H.R. Executive Document No. 36, 34th Cong., 3d Sess. (1857) (H.R. Exec. Doc. No. 36).²

Congress confirmed that the Pueblo's claim on December 22, 1858, in "[a]n Act to Confirm the Land Claims of Certain Pueblos and Towns in the Territory of New Mexico." 11 Stat. 374. To implement that confirmation, Congress directed that "the Commissioner of the Land-Office shall issue the necessary instructions for the survey of all said claims, as recommended for confirmation by the said surveyor-general, and shall cause a patent to issue therefor as in ordinary cases to

¹ The Pueblos of Isleta, Nambe, Pojoaque, San Ildefonso, Santa Ana, Santa Clara, Taos, and Tesuque did not have their original grant papers. Their officers appeared before the Surveyor-General and testified that their communities had been living upon their lands within the memories of their eldest members. Dept. of the Interior, *Pueblo of Sandia Land Status*, 3 (Apr. 1, 1940).

² There is a significant factual dispute as to whether there are two sets of official grant documents in the Spanish Archives of New Mexico, referred to by researchers as SANM I, #848, and SANM II, #484. The documents included in the latter set were those used by Congress and the Surveyor-General to confirm the grant to the Pueblo of Sandia, being included within H.R. Exec. Doc. No. 36. The Pueblo's experts contend only the documents in SANM I, #848, are official and the documents translated by the Surveyor-General of New Mexico and submitted to Congress inexplicably were altered copies of the original documents. One of the Pueblo's experts believes that there are three sets of documents, the two mentioned above and an original translation of David Whiting, which was altered before it was sent to Congress and included in H.R. Exec. Doc. No. 36. "The Pueblo of Sandia Grant Boundary Issues and Encroachments," Ward Alan Minge, Jan. 1983, at 33-36. The Pueblo holds that the duplicate originals in its possession are the same as the documents in SANM I. We will focus on the SANM I documents as translated by the Pueblo's expert, Dr. Myra Ellen Jenkins, however, as these are the documents and the translation proffered by the Pueblo in its arguments as being the official documents.

private individuals." *Id.* The Commissioner reiterated these instructions when he directed the Surveyor-General to:

Let your instructions, founded upon the original title as confirmed, and the date of fixing the locality of the confirmed claims, be drawn with such particularity and care that each survey shall embrace the precise tract included in the confirmation . . . Hendricks to Pelham, April 23, 1859, NA, RG 49, GLO, Div. E., I, p. 219.

The Surveyor-General let the surveying contracts to John Garretson. The Surveyor-General forwarded the grant documents to Garretson and instructed him to survey the areas "in such a manner as to embrace in each survey the precise size tract included in the confirmation." Pelham to Garretson, June 10, 1859, Surveyor-General Records, Letters Sent, Vol. I, pp. 193-195, State Records Center and Archives. The Surveyor-General further instructed Garretson on the proper drawing of leagues from a center church when the grants called for "one league from each corner of the church . . ." He was told to report and await further instructions "(w)henever natural boundaries are mentioned in the grant as boundaries" and whenever he had any doubt about the location of the boundary. *Id.* In a separate letter the Surveyor-General requested that an agent of the Indian Department accompany Garretson in the surveys to explain the surveys to the Indians, to protect their rights while the boundaries were being drawn and to settle any disputes that might arise during the course of the surveys. Collins to Archuleta, June 11, 1859, NA, RG 75, BIA, Letters Received by the New Mexico Superintendency [M 234], Roll 549. In addition, the Surveyor-General received an admonition from the Commissioner that it was the duty of the surveyor to have claimants point out boundary calls on the ground:

Thus fortified, in repairing to the field, it is their business when on the spot, to call upon claimants to point out and establish by satisfactory showing the calls, which they claim of their confirmed grant and to see that the official data and such evidence agree, and unmistakably fix the true boundaries of the title as confirmed. Wilson to Pelham, September 16, 1859, NA, RG 49, GLO, Div. E, Letters Sent, p. 164.

In September 1859, Garretson informed the Surveyor-General that he could not finish the surveys of several Pueblos, including Sandia, and requested that he be allowed to relinquish those surveys. Garretson to Pelham, September 20, 1859, NA, RG 49, GLO, Div. E, Letters Received from the Surveyor-General of New Mexico. The reason for the delay in surveying the pueblos was given as "a difficulty having arisen concerning the boundaries of the Indian Pueblos of Santa Domingo, San Felipe, and Sandia which requires the interposition of the Indian Department." *Id.* The Surveyor-General then entered into a contract with R. E. Clements, a deputy surveyor, to survey the three pueblos.

The only correspondence or instructions from the Surveyor-General to Clements found in the records is his contract, which does not provide instructions on how to lay out a Pueblo grant. Contract of Reuben E. Clements, September 21, 1859, NA, GLO, Div. E, Contracts and Bonds

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Files, New Mexico. Thus, we have no information of record as to the precise instructions Clements received.

The field notes of the survey made by Clements indicate that he started his survey of the Pueblo of Sandia at "a rock, about fifty feet in height, and marked with a large cross (+) near the top, in a canon commonly called de al Agua, it being the N.E. corner of the Grant." Reuben E. Clements, Field Notes of the 1859 Survey Plat of the Pueblo of Sandia Grant, Bureau of Land Management, Santa Fe, New Mexico. He appears then to have proceeded west to the Rio Grande River, setting stones along the way. He then meandered the Rio Grande River south to the Southwest corner of the grant. Clements then travelled east, again setting stone mounds along the way, until he reached "a rock one hundred feet in height marked with a large cross (+) the S.E. corner of Grant." Clements indicated that "This rock stands in the canon near the Carrisito Springs in the mountains of Sandia." Clements then indicated that he meandered the Sandia Mountains "being the east boundary of the Sandia Grant" to close back to the rock at the northeast corner of the grant.

In total, the survey indicated a grant of slightly more than 24,000 acres. Clements indicated that "about one third of this grant is first rate bottom land easily irrigated and cultivated," and further "there is considerable cottonwood timber along the Rio Grande" and "the hill land produces fine grass."

On December 18, 1859, the Indian agent assigned to accompany the surveying party wrote to the Superintendent of Indian Affairs to report that the surveys of the pueblos of Santa Domingo, San Felipe, and Sandia were complete. Archuleta to Collins, December 18, 1859 (translation) included in Collins to Greenwood, December 28, 1859, NA, RG 75, Office of Indian Affairs, New Mexico Superintendency, Letters Received, 1849-1880, [M 234], Roll 550, transcription by Dr. Myra Ella Jenkins. The agency indicated that the Indians of Santa Domingo and San Felipe were not satisfied with the drawing of their boundary lines, a fact the agent states was communicated by the Indians previously to the Superintendent. The agent mentioned the Pueblo of Sandia only to indicate that there were several non-Indian settlements and houses contained within the Pueblo's boundaries. On the matter of boundary disputes, the surveyor remained silent. However, a report submitted by one of the Pueblo's experts seems to suggest that the Pueblo did play some role in setting out its boundaries. The report states that the Pueblo specifically claimed non-Indian settlements, specifically, portions of Corrales and Bernalillo, as well as the house of a non-Indian. Minge Report at 37. The Indian agent assigned to accompany the surveying party made no indication that the Pueblo of Sandia disagreed with or was otherwise unhappy with the completed survey.

His work completed, Deputy Surveyor Clements then signed his solemn pledge at the close of his surveying notes:

I R.E. Clements, a Deputy Surveyor do solemnly swear that in pursuant of a contract with Mr. Pelham Surveyor of the Public lands of the U.S. in the Territory of New Mexico being date 21st September 1859 in strict conformity to the laws of the U.S. & instructions of said Surveyor General³ I have faithfully surveyed the Pueblo of Sandia & do further solemnly swear the foregoing are the true & original field Notes of said survey.

Reuben C. Clements, Field Notes and Survey plat of Pueblo of Sandia Grant, Bureau of Land Management, Santa Fe, New Mexico.

The contemporaneous expert apparently approved this solemn pledge: Clements' field notes were notarized by David V. Whiting, the translator of the Sandia grant documents.

The field notes were then examined and approved by the Surveyor-General on January 12, 1860:

The foregoing field notes of the Survey of the Indian Pueblo of Sandia, being in Townships 11.12.13 North of the Base line and Ranges 3 and 4 East of the Principal Meridian in New Mexico executed by R.E. Clements, under his Contract, bearing date 21st of September 1859 in the month of November 1859, having been critically examined, the necessary corrections and explanations made, the Said Field Notes and the Survey they describe, are hereby approved.

On October 15, 1860, the Surveyor-General approved the plat of the survey of the grant (copy attached as Appendix II).

The survey having been completed and approved, President Abraham Lincoln issued a patent on November 4, 1864 to the Pueblo of Sandia. The patent identified the parcel as "Survey No. 14 containing 24,187.29 Acres in Township 11 and 12 North of Ranges 3 and 4 East of the New Mexico Meridian . . ." A detailed metes and bounds description was also set forth in the patent document.

Subsequently, the essential accuracy of the survey was upheld. Although not contemporary, another survey closer in time to the disputed events than we are today was done by one E.G. Harrington. Harrington resurveyed the Sandia Pueblo in 1914-1915 at the joint request of the Bureau of Indian Affairs and the Pueblo because of several boundary disputes. This survey required a retracing of the Clements survey. Brass caps were placed at the northeast and southeast corners conforming to the boundary as surveyed by Clements. Harrington was able to relocate the rock marked with a cross which Clements had indicated stood at the southeast corner in the canyon near Carrisito Springs. However, the springs themselves could not be found. He was also above to relocate the rock, marked

³ Clements certifies that he followed his instructions from the Surveyor-General. The fact that after more than 120 years no one can locate a document reflecting those instructions does not establish that he received no instructions or the instructions were not the same as those issued to Garretson.

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with a cross, at the northeast corner in the canyon referred to as "de la Agua" by Deputy Surveyor Clements. Harrington Survey and Field Notes, NA, RG 75, Surveying and Allotting Records, Entry 313, Vol. 271. Both rocks still exist and have been viewed by the various interested parties.

For the next 120 years, there was considerable activity in the area to the east of the Pueblo. The Federal, state, and local Governments and the local citizens have treated the claimed area as Federal non-Indian property, except for eventual private inholdings, since 1864.

After the 1864 patent to the Pueblo of Sandia, the claimed area continued to be in public land status, and ultimately jurisdiction to manage the area was transferred from the Interior Department to the Department of Agriculture (USDA). On November 6, 1906, President Theodore Roosevelt reserved most of the claimed area as part of the Manzano Forest Reserve. It, in turn, was enlarged and renamed the Cibola National Forest on December 3, 1931. Executive Order No. 5752. Included are the Juan Tabo and la Cueva picnic sites and the La Luz and Piedra Lis Trails. In 1978 Congress passed the Endangered American Wilderness Act, 92 Stat. 42, which designated most of the claimed area, including a large portion of the west face of the Sandia Mountains, to be managed by the Forest Service as part of the Sandia Mountain Wilderness area. The claimed area constitutes about 19% of that wilderness area.

The State of New Mexico has regulated hunting in most of the claimed area since as early as the 1920's and has made special provisions for Indian hunting on several occasions since that time. In 1940, for example, the Pueblo engaged in extensive negotiations with the State of New Mexico to resolve issues relating to the taking of animals for ceremonial purposes on the claimed area, which was then run as a State game reserve. Minge Report at 100-03. In 1942, the Pueblo again requested permission to hunt on the Sandia Game Range. *Id.* The authority for such State regulation is currently the "Sikes Act," 43 U.S.C. § 670h(c)(4) which provides that ". . . hunting, fishing and trapping shall be permitted . . . in accordance with applicable laws and regulations of the State in which such land is located on public land . . . subject to a conservation and rehabilitation program . . ." pursuant to a cooperative agreement between the State and the appropriate land-managing Department. The State has designated the Sandia Mountains as a Wildlife Refuge. Administration of the Refuge is the responsibility of the U.S. Forest Service, which consults with the New Mexico Department of Game and Fish concerning activities within the area.

In addition, over 600 acres of the claimed area eventually came into private ownership. These inholdings were generally acquired over the

years through land exchanges with the Forest Service. The claimed area now includes subdivided and developed lands, including the subdivisions of Sandia Heights, Sandia Heights North, and Tierra Monte in which over 100 families reside. It also includes a Bernalillo County dedicated right-of-way.

B. Forums for Pueblo Title Disputes

In the more than 120 years since the patent to the Pueblo, Congress has established several forums for resolving pueblo and general Indian claims. First, Congress established the Court of Private Land Claims by Act of March 3, 1891, 26 Stat. 854, providing it with jurisdiction to adjudicate all private claims to lands ceded from Mexico which had not been confirmed by Congress prior to passage of the Act. The Pueblo did not file a claim in this court.

Next, Congress established the Pueblo Lands Board by the Act of June 7, 1924, 43 Stat. 636, to settle claims of third parties to Pueblo lands in light of a change in case law concerning the ability of the pueblos to alienate their lands. *United States v. Sandoval*, 231 U.S. 28 (1913). The Court's decision in *Sandoval* cast a cloud over the title of approximately 3,000 non-Indians who had acquired putative ownership of land located within the boundaries of the pueblo land grants. The Pueblo Lands Act of 1924 was designed to settle the consequences of these past transactions. (For an indepth discussion of the Act, see *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985).)

Showing both inclination and ability to participate in administrative land claims dispute resolution, the Pueblo of Sandia asked the United States to bring suit before the Pueblo Lands Board against several private claimants to parts of their grant as patented. During this process and at the request of the United States, the Pueblo Lands Board conducted an extensive study of the Pueblo, recalculating the entire grant area. The board's 461-page report, issued January 10, 1928, fully adjudicated at least 369 separate land claims. Significantly, the Board, at page 461, found that after adding a little over 500 acres to adjust for the meandering of the Rio Grande River, "no lands other than said Pueblo Grant acquired by said Indians as a community by grant, purchase or otherwise" were properly part of the Pueblo's lands. In reaching this conclusion, the Board carefully reviewed the 1914-15 resurvey, found that it did not essentially change the Clements survey, and ratified the 1914-15 survey as correct. *U.S. v. Abouselman*, No. 1839 (D.N.M. Dec. 16, 1929) slip op. at 1. *Sandia Pueblo*, Report of Title to Lands Granted or Confirmed to Pueblo Indians not Extinguished. The Pueblo was apparently satisfied with this ratification and did not question the survey as to the eastern boundary as it does today over 60 years later.

Finally, the Indian Claims Commission was established by the Act of August 13, 1946, 60 Stat. 1049, to compensate Indian tribes through

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the payment of money damages for past wrongdoings by the United States. Until 1946, Indian tribes could not litigate claims against the United States unless they obtained specific permission from Congress. The Commission was authorized to hear all tribal claims against the United States that existed before August 13, 1946. The Pueblo did not participate in any proceedings before the Commission in reference to the lands involved here.

C. This Proceeding

The Sandia Pueblo appears to have first approached the Department of the Interior regarding its eastern boundary in 1983. The Pueblo asked the Department to review the boundary of its land in light of a January 1983 report of Ward Alan Minge, Ph.D. The Bureau of Indian Affairs (BIA) subsequently provided funding for the Pueblo to hire additional experts to study the matter. Based on that additional work, the Pueblo approached the central office of BIA in February 1986 to request that the Department review and act on the claim.

The Pueblo's claim was referred to this Office by the BIA shortly after they received the Pueblo's request. On April 8, 1987, we submitted a staff draft opinion to the General Counsel of USDA for comment. We subsequently received written comments from Agriculture on June 4, 1987, and an oral presentation from USDA on its position on December 15, 1987. USDA made our draft widely available to the public at that time.⁴ USDA also released its June 4, response to the public, sending a summary of the response to all residents in the claimed area, newspapers, groups who use the claimed area, and local, state, and Federal elected officials. USDA supplemented its earlier response with a historical study commissioned by USDA and submitted it to us on September 29, 1988.

As a result, all affected parties received actual notice of the Pueblo's request and our initial position. We have received dozens of written comments both in support and opposition to the Pueblo's claim from the private inholders, other pueblos, local governments, state officials, private groups, and individuals in the form of reports, letters, telegrams, and petitions to the Secretary and the Solicitor, mostly in the spring and summer of this year. We also met on more than one occasion with representatives of the Pueblo and of the private inholders and other interested members of the public to receive oral presentations on their respective positions. The major submissions, aside from those from USDA and the Pueblo, have been in the claimed area, the Sandia Mountain Coalition (Coalition). They submitted their experts' report at a meeting with the Under Secretary and the

⁴ We had requested that the draft not be made publicly available at that stage so as not to alarm potentially interested parties with very early and premature discussions and conclusions. We regret that USDA violated our confidence.

Solicitor on July 20, 1988. The Coalition supplemented that report on August 17, 1988, with the results of a field inspection and a line-by-line review of the three expert reports submitted by the Pueblo. The Pueblo, in turn, responded in writing in whole or in part to each of the Coalition reports and the USDA submissions. (*See Appendix III.*)

There also has been considerable interest shown in this matter by the New Mexico Congressional delegation. Members of the delegation have expressed their concern—in writing to and through telephone calls and meetings with the Secretary and the Solicitor—that this matter be given full and fair consideration to all involved. For example, in a June 28, 1988, letter, Congressmen Lujan, Skeen, and Richardson, and Senators Domenici and Bingaman, urged the Department to issue an opinion on the Pueblo's claim as soon as possible, but did not support the position of any of the various parties.

II. CONTENTIONS OF INTERESTED PARTIES

A. Pueblo of Sandia

The Pueblo contends that the survey conducted by Clements incorrectly excluded areas that were included in the original Spanish grant to the Pueblo. Specifically, the Pueblo argues that the patent issued on the basis of that survey is incorrect in drawing the Pueblo's eastern boundary at the western foothill of the Sandia Mountains, rather than on the crest of the mountains. The Pueblo's principal argument is that the plain meaning of the grant language specifically designates the "main ridge" of the Sandia Mountains as the eastern boundary and that the "main ridge" refers to the crest of the mountains.

The Pueblo's expert argues that this interpretation is supported by the meaning given to similar Spanish phrases in other pueblo grants; the boundaries of other pueblo grants in the area, as surveyed or later readjusted; the fact that the natural resources to be included in the grant are found in the claimed area; and certain other circumstantial evidence.

B. The Department of Agriculture

The Department of Agriculture takes the position that the eastern boundary line of the Pueblo of Sandia, as determined by the Clements survey and contained in the present patent to the Pueblo, is correct. USDA apparently supports the position that the Sandia Mountains are the eastern boundary of the Pueblo, but argues that, for several reasons, it is logical to conclude that the western foothill of the range was the intended eastern boundary. The reasons for this conclusion include, among others, the facts that the acreage of the Pueblo as granted in the patent is more consistent with a "formal pueblo" than if the boundary were set at the crest of the mountains, and that the

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resources the grant was to include are found in the patented area and not in the claimed area.

USDA takes the further position that even if the survey varied from the original Spanish grant, the surveyor had the authority to adjust the grant in performing his survey. It then seeks to support Clements' determination of the current boundary with an expert's report asserting that it was reasonable for Clements to have meandered the foothill.

The Department of Agriculture also raises several technical defenses to the Pueblo's claims. First, USDA argues that the Pueblo has waived or otherwise lost any new claims by failing to raise them for over 100 years, especially by failing to raise them in several forums for the adjudication of pueblo and other Indian land claims established by Congress since the Pueblo's land was patented in 1864. Second, the USDA argues that any Indian title that may have existed in the claimed area was extinguished by Congressional action after 1864 in reserving the claimed area as a national forest, and later designating it as a wilderness area.

Finally, USDA argues that even if the claim were valid and not barred by any of the technical defenses, the Secretary of the Interior has no legal authority to correct the Pueblo's patent administratively.

C. *The Private Inholders*

As previously noted, the private landowners within the claimed area have established an informal coalition, the Sandia Mountain Coalition, to oppose the Pueblo's claim. The Coalition has submitted various reports to the Department to support its contention that the crest of the Sandia Mountains is not the eastern boundary of the grant confirmed by Congress in 1858.

The Coalition advances as its principal argument that the Pueblo was granted a "formal pueblo." That term, the Coalition argues, was well understood to mean that area contained within the extension of 1 league from the Pueblo's church in each of the four cardinal directions. The reference to the Sandia Mountains on the east, the Coalition avers, is not a call to the mountains as a boundary, but specifies the direction of the measurement of 1 league to the east. To the Coalition, the meaning of the "main ridge" of the mountains, whether the foothills or the crest, is irrelevant to proper placement of the eastern boundary of the grant. Thus, the Coalition argues that the Pueblo has been treated more than fairly because the Pueblo's patent probably contains more acreage (slightly more than 24,000 acres) than was included in the original grant from the Spanish (a formal pueblo usually contained slightly more than 17,000 acres). Although the Coalition makes no claim that the Pueblo does not now have a right to

the land described in its patent,⁵ it does oppose the Pueblo's claim now to have its eastern boundary extended farther to the east (for a total land area of approximately 34,000 acres).

D. State and Local Governments

The City of Albuquerque and the County of Bernalillo have both passed resolutions expressing grave concerns about the claim of the Pueblo and requesting public hearings on the claim. The County expresses doubts about the validity of the Pueblo's claim and the authority of the Secretary to grant the relief the Pueblo requests.

Similarly, the Attorney General of New Mexico has written to express agreement with the position taken by USDA.

III. LEGAL ISSUES

In response to the claim of the Pueblo of Sandia, the Department in general, and this Office in particular, has devoted an enormous amount of time to collecting and studying the relevant facts and law. In our review of the claim, we focused upon the issue of whether the Pueblo has met the legal standard for overcoming the presumption that surveys of the United States are correct.

A. Legal Standard for Overcoming Presumption of Correct Survey

The Pueblo claims that the United States has failed to provide it title to all of the land originally granted to the Pueblo by the Spanish in 1748. The Pueblo contends that this failure was the result of an erroneous survey that resulted in a patent that placed the eastern boundary on the ridge of a foothill as opposed to the summit of the Sandia Mountains, some 2.5 miles farther to the east. The issue presented, then, is whether the patent issued to the Pueblo based on the survey done by Clements in 1859 accurately represented the grant of land given the Pueblo when it was established in 1748. In evaluating this issue we have exhaustively reviewed numerous documents and written arguments referenced or submitted by the Pueblo and other interested parties. These documents and written arguments are listed in Appendix III hereto.

We begin with the usual presumption that surveys of the United States are correct and in compliance with statutory requirements. 11 C.J.S. § 104; *Nina R. B. Levinson*, 1 IBLA 252 (February 2, 1971). The burden is on the claimant arguing survey error to establish by a preponderance of the evidence that the survey was fraudulent or grossly erroneous. *Peter Paul Groth*, 99 IBLA 104 (September 24, 1987), citing *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984). Therefore, the Pueblo must establish by a preponderance of the evidence that the Clements survey of its 1748 grant was either fraudulent or grossly

⁵ Indeed, any legal action by the U.S. to challenge the patent would be barred by the statute of limitations.

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erroneous. If it fails to do this, the Secretary has no grounds upon which to issue a new survey.⁶

The Pueblo attempts to meet its burden of persuasion by first challenging the conduct of the survey and the qualifications of the surveyor. Second, the Pueblo contends that regardless of any questions as to the conduct of the survey, it misinterprets or misapplies the language of the original Spanish grant.

The Pueblo asserts there are several indications the survey as conducted by Clements in 1859 does not merit the usual presumption. Among these are: (1) the lack of any reference in the surveyor's notes to being accompanied by an Indian agent or having consulted the inhabitants of the Pueblo; (2) the failure of the surveyor to measure the Pueblo from the four corners of the church; (3) a number of alleged technical errors in the surveyor's measurements; and (4) allegations that the surveyor's work on other surveys has been criticized for its inaccuracy. Jenkins and Brandt, "The Sandia Eastern Boundary: A Response to Morgan," October 1988, p. 14.

We are unpersuaded by these arguments. The Pueblo's basic argument that its members were not consulted or considered in performing the survey is speculation at best. The Pueblo argues that Clements' notes do not contain any references to having consulted with the Pueblo or an Indian agent. We cannot view the absence of specific references in Clements' notes as conclusive evidence that he did not follow his instructions in having an Indian agent accompany him in the survey and in consulting with the members of the Pueblo in setting out the boundaries of Sandia Pueblo. We believe that we must presume the regularity of his activities in the absence of evidence to the contrary. In fact, the surveyor certified they reviewed, corrected, and found the survey consistent with their instructions.

Furthermore, the preponderance of the evidence indicates that an Indian agent did accompany the surveyor to the extent necessary, as reflected in the correspondence between the assigned Indian agent and the Superintendent. Archuleta to Collins, December 18, 1859, *supra*. In addition, the fact that Clements began his survey at a stone marked with a cross which he identified as the northeast corner of the grant, as opposed to starting at the church, strongly suggests that he did consult the inhabitants as he was supposed to do. We doubt he would have found this stone and the one at the southeast corner had he not done so. See Keene Report at 17. There is no indication in his notes

⁶ In fact, the Secretary would be prohibited from issuing a new patent in that situation by several statutes, including 16 U.S.C. §§ 472, 488, 1181(a), 1132(e), and 43 U.S.C. §§ 2, 52, 150, and 25 U.S.C. §§ 211 and 398d. The importance of this standard of proof is illustrated by these provisions. Even under the narrowest readings of these statutes, the Secretary would have no authority to act, unless he found that the United States never owned the disputed lands. Under such narrow readings, the Secretary's factual determination thus determines whether he has any legal authority.

that he worked backward to arrive at this point. Further, the Indian agent was aware of the Pueblo's claim to certain inholding and had the Pueblo's permission to enter the land. Thus, some consultation with the Pueblo apparently occurred. *See Minge Report at 37; Archuleta to Collins, December 18, 1859, supra.*

The failure of the surveyor to measure the Pueblo from the four corners of the church may indicate a failure to follow specific instructions. However, it is more probable that the failure to measure from the church indicates a conflict in instructions. As noted in the proceeding paragraph, one might assume that the surveyor started at a large stone because he was directed there by the inhabitants of the Pueblo. Thus the instruction to measure from the four corners of the church gave way to the instruction to consult with the inhabitants of the pueblos in setting out their boundaries. Further, the failure to measure from the church is irrelevant to the Pueblo's argument because the Pueblo does not dispute the measurements to the east made by Clements but, rather, argues that he erred in not utilizing the mountain crest as a natural boundary call. Nor does the Pueblo question the measurements to the north or the south, accepting the boundary lines on which rest the two large stones cited by Clements.

None of the technical errors in the survey's measurements alleged by the Pueblo involves the eastern boundary of the grant, and we are unconvinced that the allegations of inaccuracy in other respects are sufficient to overcome the presumption of the regularity of Clements' survey.⁷ In fact, the Pueblo Lands Board carefully reviewed the Harrington resurvey of the Clements' survey completed in 1914-15 and declared that it did not essentially change the 1859 survey.

Abouselman, supra.

The Pueblo's principal contention, however, is that Clements survey is in error not because he did not measure from the church, but because the surveyor misperceived the appropriate location of the east boundary of the grant by misinterpreting the grant language. USDA suggests that it is unnecessary to ascertain the proper interpretation of the grant because Clements enjoyed considerable discretion in setting the boundaries of the grant. USDA's argument is simply without foundation.

The 1854 Act makes it clear that Congress intended to grant the Pueblo title to all lands held by the Pueblo while it was under Spanish dominion. The Treaty of Guadalupe Hidalgo, as previously mentioned, guaranteed the liberty and property of those residing in the newly acquired territory. 9 Stat. 922, 929-30. Further, cases decided around the time of the Sandia grant confirm that the United States was not

⁷ Specifically, the Pueblo argues that Harrington found many errors in the Clements survey. They also cite a U.S. Forest Service surveyor's report on the Clements and Harrington surveys which they posit evidences several inconsistencies: (1) a difference in the size of the boulders marking the corners of the grant; (2) a misclosure of over 30 chains (about 2,000 feet) when Harrington traced the original survey; and (3) a difference of 7.79 chains along the south boundary. Brandt, "Comments on Wozniak 'Reviews of Four Documents,'" September 2, 1988, pp. 14-15.

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granting a new right to property in issuing patents to the pueblos. Rather, the United States was recognizing the legitimacy of a pre-existing right.

In *United States v. Joseph*, 94 U.S. 614 (1877), the Court said at 618-19:

The pueblo Indians . . . hold their lands by a right superior to that of the United States. Their title dates back to grants made by the government of Spain before the Mexican revolution,—a title which was fully recognized by the Mexican government, and protected by it in the treaty of Guadalupe Hidalgo . . .

[T]his was a recognition of the title previously held by these people, and a disclaimer by the government of any right of present or future interference, except such as would be exercised in the case of a person holding a competent and perfect title in his individual right.

Congress' confirmation, then, was a recognition of the Pueblo's title to all of the land described in the grant. *Id.* at 663. See also, *Tameling v. United States Freehold, Etc. Co.*, 93 U.S. 644, 661 (1877) (". . .

[I]ndividual rights of property in the territory acquired by the United States from Mexico, were not affected by the change of sovereignty and jurisdiction.").

There is no indication that Congress intended to authorize the surveyor or the Commissioner to exercise discretion in determining the amount of land that would be granted to the Pueblo. As quoted previously, the Land Commission's instructions to the Surveyor-General support the conclusion that the surveyor's task was to describe precisely the tract embraced in the confirmatory act of Congress. See p. 3, *supra*.

Therefore, it is necessary to ascertain the proper interpretation of the original grant to the Pueblo in order to determine whether or not Clements placed the eastern boundary of the grant where it was intended to be placed by the Spanish rulers of the time. the Pueblo's principal argument rests on one sentence in David Whiting's English translation of the grant forwarded to Congress to support passage of the confirmatory legislation:

And, in order to perpetuate their boundaries, I directed them to establish landmarks, or mounds of mud and stone the height of a man with wooden crosses on their summits, the boundaries being on the north an old tower opposite the point of a canon commonly called "De la agua," and on the south the Mayqua Hill opposite the spring of the Carrisito, and on the east the main ridge called Sandia. Executive Doc. No. 36.

The Pueblo argues that the reference to the Sandia Mountains is a call to a boundary and that the Whiting translation specifies that the eastern boundary is the "main ridge" of the mountains, rather than the foothill erroneously specified in the Clements survey. A review of the documents leading to the establishment and grant of the Pueblo reveals that the issue of the correct placement of the eastern boundary is not as simple as the Pueblo argues based upon this excerpt from the Whiting translation. The grant must be viewed as a whole, and as so

viewed, we do not believe the Pueblo has adequately established the main ridge as the eastern boundary.

Dr. Myra Ellen Jenkins, retired State Historian for the State of New Mexico, upon whose work the Pueblo in part relies in making its claim, believes that the Whiting translation is of an altered and unofficial copy of the grant. Dr. Jenkins proffers the following English translation of the grant document provided to the Pueblo in 1748, which she believes is the official document:

And in order to perpetuate the memories and the designations I ordered them to place monument markers, mounds of mud and stone of the height of a man, with wooden crosses on top, these being on the north facing the point of the canada which is commonly called "del Agua." and on the south facing the mouth of the canada de Juan Tabovo, and on the east the sierra madre called Sandia . . .

We believe that Dr. Jenkins' opinion as a Spanish expert should be accorded considerable weight. For this reason, and because the Pueblo proffers it as the correct translation, we utilize the documents of SANM I as translated by Dr. Jenkins in our analysis, although we believe our conclusion would be the same whether we use that document and that translation or the document translated by Whiting. Although Dr. Jenkins concludes that this language specifies the eastern boundary as the main ridge of the Sandia Mountains, we believe that the language, in the context of the grant documents as a whole, presents more evidence than not that the proper boundary is not on the main ridge of the Sandia Mountains. Of course, Dr. Jenkins' construction of the Pueblo's eastern boundary is not definitive. We must review the basis for her opinion, including her interpretation of the grant language as translated, and make an independent decision as to its credibility.

The Pueblo's documents⁸ indicate that the original petition for the establishment of the Pueblo of Sandia was made by Friar Juan Miguel Menchero, Procurator General and Delegate General Commissary, to Don Joachin Codallos y Rabal, Governor and Captain General of New Mexico, in April 1748. The Friar requested the establishment of a formal pueblo to be the home of 70 families of converts, 350 total, that he had made among the peoples of the Moqui (Hopi) pueblos. As a site for the Moqui converts, the Friar proposed an area that had been abandoned during the Pueblo Revolts of 1680-1696. Friar Menchero believed the site was appropriate because it would close the door to the more hostile tribes who had a habit of entering from that direction to attack the Spanish settlers to the west of the Rio Grande in and around the City of Albuquerque. The transplanted residents of the new pueblo could be expected to combine with the Spanish soldiers stationed in that area to halt such invasions by the hostile tribes.

* The documents referred to are from SANM I #848, see n. 2, *supra*, Jenkins, Ph.D., Former Historian of New Mexico. Attached as Appendix IV is a set of these translated documents.

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In response to the Friar's petition, Governor and Captain General Don Joachin Codallas y Rabal on April 5, 1748, commissioned Lieutenant General Don Bernardo du Bustamante to establish the Pueblo, "partly so that the said pueblo will be a barrier to halt the invasions from the enemy Gentile who are accustomed to come into the said kingdom by entrance through the said site," and in recognition of the request from the Moqui Nation that a pueblo be founded for them in which they could reside and establish their abode. He directed Lieutenant General Bustamante to "scrutinize and examine the said site, carrying out the allotment of lands, waters, pastures, and watering places which should pertain to a formal pueblo of Indians, in accordance as the royal regulations prescribed for this matter as to the statement of their boundaries."⁹ Jenkins translation, Appendix IV. All of the authorities appear to agree that a "formal" or "regular" pueblo was generally a grant of 4 leagues square, that is, a league in each direction from the center (usually a church) of the pueblo. Minge Report at 28.

In response to these directions, Lieutenant General Bustamante on May 14, 1748, went to the site chosen for the Pueblo where he called the landowners on the west side of the river together and had them sign statements that acknowledged the granting of the site to the Moqui converts. Because the Pueblo could not stretch a league to the west, that is, could not cross the Rio Grande, Bustamante also had the landowners agree as a compromise to permit the residents of the new pueblo to pasture their livestock on the lands of these Spanish settlers. In the words of Lieutenant General Bustamante:

... I made aware of the commission which I hold for the royal possession which I am to give to the said sons of the said pueblo and their minister, and having made them aware that *I am relieved from giving to the said Indians the league to the west wind, as the law provides shall be one [league] to each one [wind: direction]* that there must be a compromise so that the said Moquino sons of this new resettlement for all time can and will be able (because of the many dangers which their stock have on this bank) to pass in order to pasture on the said lands of the said Spaniards, of which I notified them before witnesses for complete compliance. And I asked them once and several times more if they would comply or not, and they gave their consent to what was asked by the said Indians and by their minister to which they stated, all together and each one for himself *insolidum*, that they gave and did give full and sufficient consent so that at this time and forever they can pass and will be able to pass to pasture their said stock with confidence and safety, that for themselves, their children and their successors they [the Spaniards] do not place any impediment against that which the said Indians have petitioned, that they do so notwithstanding any damage. Jenkins translation, Appendix IV (italics added).

Finally, on May 16, 1748, Lieutenant General Bustamante performed the rituals then associated with a grant from Spain as memorialized in a document known as the Act of Possession. He first called together

⁹ The similar portion of the Whiting Translation of the documents in H.R. Exec. Doc. No. 36 (1857), reads as follows: "distribute the lands, waters, pastures, and watering places, sufficient for a regular Indian pueblo, as required by the royal orders concerning the matter, setting forth the boundaries thereof."

the neighboring residents to the north and the south and advised them of his commission and that they may be affected by his carrying it out. These inhabitants understood that the pueblo would encompass some of their granted and purchased lands but indicated they would not object. He next named the Pueblo "Nuestra Senora de los Dolores y San Antonio de Sandia," and proceeded to give royal and personal possession through a livery of seisin ritual, as described in the Act of Possession:

... all of the recently converted Indians of the said nation as resettlers gathered together and their father minister who is the Reverend Father Preacher Fray Juan Joseph Hernandez, whom I led by the hand and in the name of his Majesty (may God guard him) I proceeded over the said land, I shouted and they shouted, threw rocks and pulled up grass and in a loud voice shouted many times "Long live the King, our Lord," and they received the royal possession without opposition. *The leagues conceded for a formal pueblo were measured* and the cordels [measuring cords] extended to the west wind as far as the Rio del Norte, which is the boundary, having no more than 12 cordels of 120 Castilian varas each one which consisted of 1,440 varas, and in order to complete those which were lacking in this direction it was necessary to increase the leagues which pertain to the north and south winds equally so that the Spanish settler grantees would not be injured, some more than others. The land which is encompassed in these three winds [directions] is all for raising wheat with the conveniences of water for the purpose of the land. And in order to perpetuate the memories and the designations I ordered them to place monument markers, mounds of mud and stone of the height of a man, with wooden crosses on top, these being on the north *facing* the point of the canada which is commonly called "del Agua," and on the south *facing* the mouth of the Canada de Juan Tabovo, and on the east the sierra madre called Sandia, within which limits are the conveniences of pastures, woods, waters and watering places in abundance in order to maintain their stock, both large and small and a horse herd, all of which Moquino Indian neophytes who are congregated as stated, so that they may enjoy them for themselves, their children, heirs and successors. Jenkins translation, Appendix IV (italics added).

These documents, therefore, leave little doubt that the Spanish intended to grant a formal pueblo of as close to 4 square leagues as possible to the Sandia Pueblo. The instructions from the Spanish Governor of New Mexico to General Bustamante specified that lands ". . . sufficient for a formal Indian Pueblo" be granted to Sandia. Bustamante characterized his instructions from the Governor as dealing with a "royal mandate, which provides for one league towards each of the four cardinal points . . ." (Italics added.) The area of 4 square leagues¹⁰ is approximately 17,360 acres, considerably smaller than the 24,000 acres encompassed within the current boundaries.

General Bustamante reported his compliance with these instructions: "the leagues conceded for a formal Pueblo *were measured* . . ." (Italics added.) The first sentence of the quote excerpt from the Act of Possession then proceeds in great detail to address those measurements. The line drawn to the River on the west was 4,760 varas less than a league. Leagues "toward the north and south equally" were increased to compensate exactly for that part of the league lost on the west. Thus, the grant measured 240 varas or 0.5

¹⁰ A league is approximately 2.6 miles.

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leagues from the church to the Rio Grande River, the western boundary of the grant, and 7,380 varas or 1.48 leagues to the north and south from the church.

As described in the Act of Possession "the leagues conceded for a formal pueblo were measured" the logical inference being that 1 league was measured to the east without any difficulty requiring further discussion. One league to the east, or 2.6 miles, would be far short of the current boundary, the first foothill of the Sandias, some 4.8 miles from the church, or of the proposed boundary, nearly 2.6 leagues or 6.8 miles from the church.¹¹ Further inference in support of the boundary being 1 league to the east comes from the careful extension of boundaries to the north and south to compensate exactly for the shortfall in distance toward the west. This precision in the measurements to the other three winds would make no sense if the intendment was to extend the boundary some 2.6 leagues to the east, to the crest of the Sandia Mountains. It makes sense only if Bustamante was attempting to maintain the overall size of a formal pueblo. It would seem that an expansion of nearly 2.6 leagues to the east would have resolved any need to adjust the north and south measurements and the resulting need to contact and obtain approval from the Spanish inhabitants of the neighboring lands whose property rights were to be adversely affected.

Rather than reading as a whole the Act of Possession laying out the Pueblo, the Pueblo focuses entirely on the third sentence of the quoted paragraph of the Act of Possession. Reviewing the paragraph as a whole, the first sentence, as just discussed, describes the measurements that were preformed in physically laying out the Pueblo on the ground. The third sentence memorializes Bustamante's direction to place markers of mud and stone the height of a man to perpetuate the memories and designations as he had already laid them out on the ground. Bustamante ordered that these markers be placed "on the north *facing* the point of the *canada* which is commonly called 'del Agua,' and on the south *facing* the mouth of the *Canada de Juan Tabovo*, and on the east the *sierra madre* called *Sandia*." (Italics added.)

The omission of the word "facing" in the last phrase is what has created the controversy. Thus, the issue in this matter is not over the meaning of the phrase "the *sierra madre* called *Sandia*," that is, whether the Spanish term translated "main ridge" by Whiting refers to the foothill or the crest of the mountains. Rather, the issue is whether the reference to the mountains is a call to a natural feature

¹¹ It is thus apparent that, even if Clements had measured from the church, either the boundary set by the surveyor, or that proposed by the Pueblo at present would be considerably farther from the church than the establishment of a regular pueblo would dictate. Thus, the Pueblo's criticism of the Clements survey for not measuring from the church is without relevance to its claim.

as a boundary or is a directional reference to a natural feature facing which the monument was to be placed.

The logical inference from a review of the entire document is that the mountains mentioned in the third sentence are not themselves the eastern boundary. Grammatically, the sentence itself suggests a parallel construction was intended for the last clause. It would certainly not be uncommon to omit the word "facing" in the last of the three parallel clauses.

More importantly, this third sentence of the quoted material from the Act of Possession is not seeking to describe the boundaries, but rather to memorialize the setting of monuments. One would expect that if a departure from this approach in the first part of the sentence were intended in the third clause, a clearer expression of an intent to call to a natural feature as a boundary would have been provided.

Significantly, the sentence is not even an exhaustive reference to the boundaries. It makes no reference to the western boundary, which is clearly stated earlier in the Act of Possession to be a natural feature, the Rio Grande River.

In the context of the entire document, the sentence provides for the placement of monuments in each of the *measured* directions, 1.48 leagues to the north and south and 1 league to the east. The western boundary, being a natural feature, needed no reference monument. Likewise, if the Sandia Mountains were the eastern boundary, no manmade monuments would be necessary, as evidenced from the fact Bustamante did not order the natural west boundary, the Rio Grande, be monumented. The clear inference, then, is that the reference to the east in the third sentence was not to a natural boundary, but to the direction for measurement of the 1 league upon which manmade monuments were to be established, because there was no natural feature to cite as the boundary.

Thus, the construction advanced by the Pueblo would require us to view the language of the document as internally inconsistent and to ignore the remainder of the key documents. Specifically, we would have to ignore: (1) several references to the intent to establish a formal Pueblo, (2) reference to the leagues for a formal Pueblo actually having been measured, and (3) references to the careful adjustment or "netting out" of distances from the church to the western, northern, and southern boundaries.

Furthermore, one would have expected that if Bustamante had intended to grant the land between the river and the foothill of the mountains, the current boundary, a total distance of about 2.2 leagues, provided by the current patent, he would have clearly announced that intention from the outset, and simply measured 1 league to each of the north and south directions. That would have resulted in an acreage very close to that of a formal pueblo, and would not have required consultation with and effect to the neighbors on the north and south.

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The Pueblo, argues though, for an even less plausible position, that the intent was to grant to the crest of the mountains, some 2.6 leagues from the church and some 3.1 leagues from the river.

The Pueblo seeks to diminish the importance of the formal pueblo language in the documents by arguing that the size of a formal pueblo, 4 square leagues or about 17,360 acres, was only a minimum and should not be given much significance. In support of this argument, the Pueblo submitted a list of the pueblos in New Mexico showing the acreage of each. A copy of this list is attached as Appendix V. A review of this list, rather than supporting the Pueblo's argument, seems to establish that the concept of a formal pueblo was well settled in the practice of the day. Twelve of the 22 pueblos listed have an acreage that is exactly, or within about 300 acres of 17,360. Four of the pueblos are smaller than 17,360 acres. The remaining seven pueblos, including Sandia, are larger. Thus, although not every pueblo received the standard acreage, it is clear that the size of a formal pueblo was well settled in the practice of the time. Even one of the Pueblo's principal experts, the author of the report apparently initiating its present claim, agrees that a 4-league square was the accepted size for an Indian pueblo in 1748. Ming Report at 28.

In any event, the Pueblo suggests two reasons why its grant was intended to exceed the size of a formal pueblo. First, although the Pueblo argues the point somewhat obliquely, in the work of its experts there is a suggestion that the Pueblo was established to approximate the pueblo that had been in the area prior to the pueblo revolts.¹² As a result of this suggestion, there is a great deal of dispute as to whether the current inhabitants of the Pueblo are the direct descendants of the original inhabitants, or whether they are Moquis (Hopis) people who were totally transplanted to the area.

This factual dispute is of little moment to the disposition of the Pueblo's claim. Neither the documents seeking establishment of the Pueblo, nor those memorializing its approval and physical establishment, evidence any intent to expand the size of a formal pueblo in an effort to approximate the territory inhabited by the residents of the previous pueblo.¹³ There is no suggestion in the documents that the purpose of the establishment of the Pueblo on that site was to replicate the earlier pueblo in its entirety. More significantly, the documents contain no discussion of the extent of the territory occupied by the previous pueblo or any effort to ascertain it.

¹² The various pueblos in the area of New Mexico revolted against Spanish rule in 1680 and fled from their homes. Jenkins, "The Pueblo of Sandia and Its Land," pp. 16-24.

¹³ The site was selected in part because it had previously been the site of a pueblo, and because of its strategic position as a block to less friendly tribes in the area.

Second, the Pueblo suggests that the boundary was expanded to the east in order to encompass within the grant the kinds of resources that were customarily settled to a pueblo. More specifically, the argument has been advanced that the Act of Possession refers to the resources within the three winds—north, south, and west—as follows:

The land which is encompassed in these three winds is all for raising wheat with the convenience of water for the purpose of the land.

The third sentence then refers to the resources within the limits of the entire grant as follows:

within which limits are the convenience of pastures, woods, waters and watering places in abundance in order to maintain their stock.

The Pueblo's argument is completed by the assertion that these additional resources were added by the expansion of the grant to the east, and that only by expansion of the grant to the crest of the mountains would these resources be included within the grant boundaries. USDA seems to accept the premise of the argument, but argues that as a factual matter the resources referenced are found within the limits of the current grant and expansion of the boundary to the crest of the mountains would do nothing to add the resources to which the Act of Possession refers.

As interesting as these arguments are, the Act of Possession evidences no such intention to extend boundaries to encompass certain resources in establishment of the grant. One would have expected that if the grant had been extended beyond the customary 1 league to the east to seek additional resources, Bustamante, instead of simply reciting that the leagues in each direction were measured, starting with the west and adjusting the north and south, would have articulated the process of expansion beyond the 1 league to the east, instead of remaining silent on the specifics of the eastern measurement. We must assume from the lack of such a description that the language regarding the resources encompassed within the limits of the grant was intended to certify that Bustamante had fulfilled his charge to ". . . scrutinize and examine the said site, carrying out the allotment of lands, waters, pastures, and watering places which should pertain to a formal pueblo of Indians." Jenkins translation, Appendix IV.

There appears to be little question the resources recited in the Act of Possession are contained within the existing boundaries of the Pueblo. Clements, in his notes, indicated that the area surveyed contained considerable "first rate bottom land easily irrigated and cultivated," cottonwood timber and fine grass.¹⁴

¹⁴ The Pueblo's expert argues that the wood found at the river is cottonwood and is not well suited for construction. The expert argues that the custom was to include in a pueblo sufficient wood for fires and constructions, and that only the pines and other trees found in the claimed area fit this description. Whether or not such a custom existed, based upon the documents we have reviewed, we can find no evidence of any effort to categorize the resources and expand the grant to include specific resources. Further, there was no reference to woods in the order to Bustamante directing him to create the Pueblo, only lands, waters, and pastures. The description of Bustamante of the grant as containing woods is accurate.

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In addition, Bustamante went to great lengths to reach a compromise, acknowledged in writing, with the Spanish settlers on the west bank of the river to permit the new pueblo to utilize the Spaniards' land to water and pasture their cattle. Again, this fact belies any effort to continue expanding the grant to the east until waters and pastures were located. Both the arguments of USDA and the Pueblo in this regard are not well founded.

We also note the lack of circumstantial evidence available to support the Pueblo's claim. The Pueblo's expert notes the possible discovery on the crest of the mountains of the remnants of the kind of markers Bustamante directed to be placed. He does not, however, make the argument that these are in fact the markers left by Bustamante. An expert for the inholders points out that the markers, created some 240 years ago of mud and stone with a wooden cross, could not be expected to have survived to this date. Rather, the expert posits, the remnants discovered by the Pueblo's expert are more likely the remains of the campfires of the numerous hikers who frequent the area. We find that the Pueblo has not established that these "finds" are the remnants of Bustamante's markers.

Similarly unhelpful are the sketch maps of the Surveyor-General of New Mexico of 1859 and 1860. The Pueblo asserts that these maps show the eastern boundary of the Pueblo as being on the crest of the mountains, while the sketch maps in 1862 and following reflect the Clements survey showing the east boundary as the foothill. It is our understanding that the level of detail in the maps is not intended to enable one to distinguish between the crest of the mountains and the foothills, nor that these maps were intended to be in any way definitive on such a question prior to completion of a survey.

Also unpersuasive is the 1776 report of Fray Francisco Atansio Dominguez describing the missions, which makes references to the Sandia Mountains in describing the Pueblo of Sandia. We cannot agree with the Pueblo's expert, who asserts that Dominguez was describing the boundary of the Pueblo. The reference is merely to the fact that the Sandia Mountains are to the east and describes the Pueblo as being in the middle of the plain.

The Pueblo also points out that in three other situations involving grants in the same area whose descriptions included references to a "sierra" as a boundary, the Court of Private Land Claims found that boundary to be the crest of a mountain. In the Elena Gallegos grant, the eastern boundary is indicated as "la sierra de Sandia." The Cristobol de la Sierra grant in the Taos area states as its eastern boundary "la sierra." The Lo de Padilla grant had "la sierra de Sandia" as its eastern boundary. The Pueblo also points to the resurvey done on the Pueblo of Isleta grant whereby the Department

of the Interior found the eastern boundary of the pueblo, described in patent documents as "el espinazo de la sierre," to be the crest of the mountains. The Pueblo of Sandia argues that similar language in its grant, ". . . y por el oriente la Sierra Madre que llaman de Sandia" should be interpreted as setting its eastern boundary on the crest of the Sandia Mountains, relying largely on language in the case of the Gallegos property, which reads as follows:

The Spanish words in the original text of the Archive document are, 'por el oriente con la sierra de Sandia,' a proper translation of which, into requisite English, is: 'On the east by the crest of Sandia Mountain.' The primary meaning of the word 'sierra' is a saw.

As applied to mountains its figurative, general meaning is a range; as 'La sierra Madre', 'La sierra Nevada', the Mother range and the snowy range of the Rocky Mountains. In a special application of the term to *a single mountain or mountains not properly constituting a range*, the word Sierra especially refers to and denotes the serrated crest, comb, ridge or summit. The word may be applied, in common parlance, to entire mountain, a smoothly rounded (sic), as to those with rugged ridges, *but when employed in relation to a boundary point of land, there can be no room for doubt that the cumbres, apex or summit is intended as the true and precise definition of the land mark.* Decree attached as Appendix VI (italics added).

As we have already indicated, to the extent these arguments speak to the issue of whether the reference to the mountains places the boundary on the foothill or the crest of the mountains, they speak to the wrong issue. The Pueblo of Sandia is the only pueblo to actually have its original documents, *see n.1, supra*. As we have indicated, those documents suggest another approach entirely, *i.e.*, establishment of a formal pueblo. The issue presented by the Sandia grant documents is whether Bustamante established a "regular" pueblo, extending only 1 league to the east from the Pueblo's center, or went against custom to extend that boundary to the mountains. The issue presented in the other cases was truly whether the boundary went to the crest of the mountains, or just to the base.

To the extent the use of other grants are designed to provide circumstantial evidence that the pueblo grants in the area customarily went to the crest of the Sandia Mountains, we are unpersuaded. Each of these grants has its own history and the grants were not all made at the same time. They are therefore more idiosyncratic than thematic. For example, in the case of the Isleta Pueblo, the evidence of the extent of the grant was not a specific writing, but, rather, was oral history and tradition which was used to support the issuance of a patent. That oral history was supported by strong evidence of actual use and possession of the face of the mountain. Furthermore, the issue there was whether the base or the crest of the single mountain to the east was the boundary. In the case of the Gallegos grant, likewise, there was evidence of actual use and possession of the claimed area. In addition, the Gallegos grant did not, of course, deal with establishment of a formal pueblo as the grant was originally made to non-Indians. Finally, the language used in the Gallegos grant was much clearer

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with regard to the mountain being a call to a natural boundary, the word "con," translated "by" or "with," being used in the grant.

The failure to challenge the patent until 1983, some 120 years after its issuance, is the most troubling circumstantial evidence involving this claim. The Pueblo apparently asserted no claim to the 10,000 disputed acres prior to 1983. As a consequence, the Pueblo's eastern boundary remained essentially unquestioned for over 120 years, with the Federal, state and local governments, as well as private citizens, treating the boundary as drawn in the Clements survey as entirely accurate. This apparent acquiescence in the eastern boundary must be considered in light of the fact that the Pueblo revered that area as one of deep cultural and religious significance to its members. In fact, the Pueblo's religious reverence for the area existed comfortably with respect to the eastern boundary as patented for at least a half-century.

The evidence suggests strongly that the Pueblo has been on notice of what it now calls the erroneous placement of its eastern boundary for the past 120 years. When Clements performed his survey, he began at a stone with a cross etched into it, which Clements believed to be the northeast corner of the grant. The surveyor then proceeded to another such stone he believed to be the southeast corner of the grant, and then closed the eastern boundary by meandering the foothill connecting the two stones.¹⁵

These stones were in place at the time of the survey and are still in existence. Therefore, the Pueblo must have been on notice as to the eastern boundary of the grant as determined by Clements.

Furthermore, the Pueblo must be deemed to have known the difference between this boundary, the foothill, and the crest of the mountains. Yet, unlike the two other pueblos whose lands were surveyed at the same time, the Pueblo of Sandia raised no objection to the Clements survey either in the administrative determination, or the patent process.

In addition, although a great deal of tension existed as to the correctness of the lands settled to the pueblos in New Mexico, the Pueblo of Sandia made no claim. This tension led to the resurvey of pueblo lands in the second decade of this century, with a dependent resurvey of the Pueblo of Sandia being completed in 1915 because of lingering boundary disputes. Again, there is no indication that the Pueblo asserted any claim to the area now in dispute during that resurvey.

Neither did the Pueblo raise a claim when a similar grant to a neighboring pueblo was questioned, resulting in a resurvey and new patent. Unlike the Pueblo of Sandia, Isleta made a claim to additional

¹⁵ These stones clearly do not resemble the markers Bustamante directed to be set.

area, in 1918, as soon as they learned that it had been excluded from their patent. Like the Pueblo of Sandia, the grant to the pueblo of Isleta was confirmed by the Act of December 22, 1858. That grant described the eastern boundary of the pueblo as the "backbone" of the Sandia Mountains. The patent described the boundary as a meander of the base of the Sandia Mountains. As in this case, the disputed land was controlled by the United States Forest Service. In resolving the dispute, the Secretary did entertain the Isleta claim, determined that the grant did include all of the land to the summit of the Sandia Mountains, and found that the patent was incorrect. A new survey and issuance of a supplemental patent for the excluded lands were ordered. The Pueblo agreed to waive any claims to existing inholdings of non-Indians and executed quitclaim deeds for those claims. Interior Document D-29675, July 18, 1918.

As we have previously discussed, when the ferment over pueblo lands continued, especially as a result of private encroachments upon these lands, Congress provided the Pueblo Lands Board to settle once and for all the boundaries of pueblo lands and the claims of private inholders. As discussed earlier, the Board was given the authority and the duty of "investigating, determining, and reporting the status of land within the exterior boundary of all lands claimed by the Pueblo Indians."

Pueblo of Sandia Land Status at 8 (1940). Although the Pueblo of Sandia engaged the Government to sue a number of private claimants to parts of the grant as currently patented, no claim was made by the Pueblo that the eastern boundary was incorrect. As noted, the Board did conduct an extensive study of the Pueblo, recalculated the entire grant area, and found, after adding a little over 500 acres to adjust for the meandering of the Rio Grande River, that "no lands other than said Pueblo Grant acquired by said Indians as a community by grant, purchase or otherwise" were properly part of the Pueblo's lands. See *Abouselman, supra.*¹⁶

Similarly, the Pueblo made no claim as the Forest Service acceded to management of the area as a national forest and later as a wilderness area. Apparently, the Pueblo had several occasions to have dealings with the Forest Service, being forced to obtain permits to hunt for ceremonial and religious purposes within the claimed area. Yet, the Pueblo made no assertion of ownership over the area.

In addition, there is no indication the Pueblo made any claim when the private inholdings were developed in the claimed area, bringing additional people and activity to the area. Despite the fact that this development involved ingress and egress over the Pueblo's current patented area, the Pueblo apparently did not object.

¹⁶ As late as 1983, in a letter from the Superintendent of the Southern Pueblos Agency of the BIA to Commissioner John Collier of the General Land Office, the Superintendent indicated that he had been advised by the Sandia Pueblo Council that the Pueblo was not interested in using Pueblo Lands Board Funds to purchase additional lands:

"The Sandia Indians decided that they had sufficient lands for their needs . . ." Towers to Collier, June 27, 1933, NA, Denver, RG 75, BIA, Southern Pueblo Agency, Box 82, CCF 381.

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The silence of the Pueblo in light of this considerable activity and active dispute concerning pueblo lands is a rather troubling and significant piece of circumstantial evidence that the Pueblo did not historically believe that an error had been made in the Clements survey. It is equally troubling to consider the fact that, after 120 years, the Pueblo is not making a claim to an additional 10,000 acres on the basis of newly discovered evidence. Rather, the Pueblo is basing its claim on documents which it has either had in its possession or had access to for all of those 120 years, that is, the original grant documents, the survey documents, and the Pueblo's patent.

We are mindful of the general canon of construction that legal ambiguities in treaties and statutes passed for the benefit of Indians should be resolved to the Indians' benefit. *Handbook of Federal Indian Law*, Felix Cohen (1982) at 221. The canon, however, is not a license to disregard congressional intent. *DeCoteau v. District County Court*, 420 U.S. 425, 447; see also, *Rosebud Sioux Tribe v. Kleppe*, 430 U.S. 584 (1977). We must first seek to derive the intent of Congress and the original Spanish grantors from the record they themselves made, as reflected in the legislative history of the Act. As Cohen states at 223, ". . . the weight of authority indicates that such an intent can also be found . . . from clear and reliable evidence in the legislative history of a statute." Here, the intent of Congress is clear—to confirm Spanish and Mexican land grants under the customs of Spain and Mexico. There was no evidence that Congress intended to confer a benefit other than to recognize existing title. See discussion at pp. 2-3. Thus, it is questionable that the canon is applicable. Even if it does apply, given the foregoing analysis of the documents relating to the grant, we do not believe that the Pueblo has provided sufficient evidence to support their claim or to demonstrate sufficient ambiguity to trigger the canon of construction.

IV. ADDITIONAL LEGAL CONSIDERATION

The parties have raised two broad groups of additional legal issues that have yet to be addressed. The first group of issues, raised by the USDA, involves defenses of laches, abandonment, acknowledgment of the survey boundaries, and congressional extinguishment of whatever title to the claimed lands the Pueblo may at one time have had. The second group of issues involves the extent of this Department's administrative authority to entertain this claim and to take the action requested by the Pueblo. In view of our conclusion that the Pueblo never owned the claimed land, there is no need for discussion of the first group of issues. We proceed to discuss the second group, as it goes to the fundamental authority of the Department to consider and act upon such a claim and will undoubtedly arise in the future.

A. *The Quiet Title Act and the Indian Claims Commission Act*

In our view, there are two statutory bars that relate to the granting of relief on the Pueblo's claim. First, in the Quiet Title Act of October 25, 1972, 86 Stat. 1176, *as amended* by Act of November 4, 1986, 100 Stat. 2251, 28 U.S.C. § 2409a, Congress for the first time waived the United States sovereign immunity and consented to be sued as a party defendant in civil actions to adjudicate title disputes involving real property. See H.R. Rep. No. 1559, 92nd Cong., 1st Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4557. The Act provides for a 12-year statute of limitations, stating:

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. § 2409(a).

The waiver of sovereign immunity included in the Quiet Title Act is limited, and the 12-year statute of limitations is jurisdictional. Thus, no subject matter jurisdiction vests in any Federal district court to consider the Pueblo's claim. See, e.g., *United States v. Mottaz*, 476 U.S. 834, 851 (1986) ("The limitations provision of the Quiet Title Act reflects a clear congressional judgment that the national public interest requires barring stale challenges to the United States' claim to real property, whatever the merits of those challenges.") Moreover, because the Quiet Title Act involves only a limited waiver of sovereign immunity, it is possible that administrative consideration of the Pueblo's claim would also be precluded by the 12-year statute of limitations. As the following discussion makes clear, however, we need not resolve this issue inasmuch as the Indian's claim is barred by a much more specific statute.

The second and more definitive barrier to consideration of the Pueblo's claim is included in the Indian Claims Commission Act (ICCA) of August 13, 1946, *as amended*, 60 Stat. 1049, formerly codified as 25 U.S.C. § 70. The ICCA gave the Commission jurisdiction to hear all claims of Indian tribes against the United States existing prior to August 13, 1946. The breadth of claims which the Commission had jurisdiction to consider included any "claim[] in law or equity arising under the Constitution, laws, treaties of the United States and Executive Orders of the President." But, the Commission's sweeping jurisdiction did not stop there. Congress, apparently tired of the frequent requests for special jurisdictional legislation to enable Indian aboriginal claims to be heard on a piecemeal basis, decided to throw open the Commission's jurisdiction, literally, to any claim, even claims "not recognized by any existing rule of law or equity." 60 Stat. 1049.¹⁷

¹⁷ The five categories of jurisdiction authorized the Commission to consider any "(1) claims in law or equity arising under the constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress,

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Moreover, in order to invite the tribes to bring any and every claim, no matter how stale, the Act expressly waived the United States' defenses of statute of limitations and laches.

Thus, the Act was designed to provide a forum for consideration of any and all Indian claims existing prior to August 13, 1946. In return for this extraordinary waiver of sovereign immunity, Congress expressed its intent to dispose of Indian claims once and for all. The "chief purpose of the [ICCA was] to dispose of the Indian Claims problem with finality." *United States v. Dann*, 470 U.S. 39, 45 (1985) (quoting H.R. Rep. No. 1446, 79th Cong. 2d Sess. 10 (1945)). Thus, in section 12 of the Act, Congress barred any subsequent consideration of any historical claim not timely presented to the Commission. Section 12, 60 Stat. 1052, said:

The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or *administrative agency* for consideration, nor will such claim thereafter be entertained by the Congress. (Italics added.)¹⁸

The Pueblo's claim in this matter is based on an alleged mistake in a patent that President Lincoln issued in 1864. The decision of the Tenth Circuit in *Navajo Tribe v. State of New Mexico*, 809 F.2d 1455 (10th Cir. 1987) (*Navajo Tribe*), dispository puts to rest all stale historical claims such as the Sandia Pueblo's Civil War era claim. *Navajo Tribe* involved the issuance by President Theodore Roosevelt of several Executive Orders adding large acreages of land to the Navajo Reservation in New Mexico and Arizona. The Executive Orders were revoked in 1908 and 1911. Prior to 1946 much of the land was patented to private parties, and to the State of New Mexico, with substantial portions remaining in Federal ownership. In 1982, the Navajo Tribe brought suit claiming it still owned the lands subject to the 1907 Executive Orders, maintaining that the subsequently issued orders were invalid.

The Tenth Circuit concluded that the claim was forever barred because the Navajo Tribe had failed to raise it before the Indian Claims Commission. As the Pueblo is doing here, the Navajo Tribe had contended that it was seeking to establish its title to the land, rather than to recover money for its loss, and that a claim to land ownership

unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of land owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

¹⁸ To the extent that Congress barred from considering pre-1946 claims this, of course, is merely an expression of intent that such claims will not be cognizable by any branch of the United States Government. Congress may pass a new law; administrative agencies and Federal courts do not have that authority or option. As to the administrative bar, we would have doubt about the constitutionality of this provision if read to preclude the President from making recommendations to Congress respecting Indian claims legislation. The Constitution expressly provides that the President shall have that authority. U.S. Const. Art. III, § 3. In any event, there is no constitutional implication in Congress' complete preclusion of administrative authority to act on pre-1946 claims.

was outside the jurisdiction of the Commission. The Tenth Circuit disagreed, holding that the Navajo's argument confused the question of the ICCA's jurisdiction over a substantive right with the question of appropriate remedy for violation of the right. The court reasoned that the ICCA had jurisdiction to entertain a broad range of claims existing prior to 1946 while the sole available remedy it could grant was money damages. Because the Tribe had not pursued this remedy, the Tenth Circuit held the claim barred by section 12 of the ICCA. It stated:

The Tribe simply would have had to accept just monetary compensation if the Commission found their claim to title valid. This restriction as to remedy represents a fundamental policy choice made by Congress out of the sheer, pragmatic necessity that, although any and all land title in 1946 could not be disturbed because of the sorry injustices suffered by native Americans in the eighteenth, nineteenth, and early twentieth centuries. Those injustices would have to be recompensed through monetary awards.

809 F.2d 1455, 1467.

The Tenth Circuit also held that the Navajo Tribe's claim would be barred by the 12-year statute of limitations period of the Quiet Title Act even if the claim were not barred by the ICCA. It reasoned that "Congress intended the Quiet Title Act to provide the exclusive means by which adverse claimants could challenge the United States' title to real property," 809 F.2d 1455, 1468, quoting *Block v. North Dakota*, 461 U.S. 273, 286 (1983); and it concluded that "the Tribe cannot bring a quiet title action for these lands against the Government." 809 F.2d 1455, 1469.

Thus, even if the Pueblo's claim to the 10,000 acres had any plausibility or color of merit, this Department would, in our view, indisputably be barred by the ICCA from taking administrative action on it and possibly by the Quiet Title Act as well. This is particularly true in view of the availability to the Pueblo as early as the 1859 survey of all of the facts and circumstances upon which it now relies.¹⁹ Cf., *Oglala Sioux Tribe v. United States*, 650 F.2d 140, 143 (8th Cir. 1981) ("This precise statutory language [section 12 ICCA] reflects Congress' intention to provide a one-time, exclusive forum for the resolution of Indian treaty claims.")²⁰

B. The Federal Land Policy and Management Act

The Pueblo has tried to characterize its claim as predicated simply on the Secretary's authority to survey public lands and to correct errors in patents. All of the Secretary's general authorities in this regard

¹⁹ Counsel for the Pueblo in its submissions to this Department stated that "Sandia has never brought any claim for the tract on the western slope of the mountain because the Land Board and Indian Claims Commission offered only monetary compensation. The people of Sandia believe that nothing could adequately compensate them for the loss of their most sacred land and the extinction of their religion. Instead they now seek to regain clear title to the land." Arnold & Porter submission of Mar. 14, 1986, pp. 6-7.

²⁰ We are aware of only one questionably reasoned district court decision which offers even tangential support to the Pueblo's claim. The case, *Pueblo of Taos v. U.S.*, 475 F.Supp. 359 (D.D.C. 1979), is inapposite because the Taos Pueblo's claim was not a pre-1946 claim. Neither is the oft-cited Attorney General's Opinion respecting the Yakima Indian Reservation relevant. 42 Op. Att'y Gen. 441 (1972). In that instance, the Yakima Tribe had timely filed an action under the ICCA.

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were codified in statutes at the time of the passage of the ICCA. Section 316 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1746, was passed in 1976 and authorizes the Secretary to "correct patents or documents of conveyance . . . relating to the disposal of public lands where necessary in order to eliminate errors." Such authority to make factual corrections cannot be used, however, to revive stale historical claims which Congress has expressly barred in section 12 of the ICCA. See discussion above. This would be true even if the claim were meritorious, which we have concluded it is not. There is no indication in the legislative history or the statute itself indicating an intent to disrupt the strong policy of repose embodied in the ICCA as to pre-1946 claims.

In addition, under the Department's implementing regulations, 43 CFR 1865.0-5(b), the authority to correct patents under section 316 of FLPMA, 43 U.S.C. § 1746, extends only to the correction of erroneous factual "descriptions, terms, conditions, covenants, reservations, and names." These corrections of errors would not include errors predicated upon a claimed misreading of the scope of a grant, as is involved in the matter before us.

CONCLUSION

In conclusion, we find that the Pueblo of Sandia has not met its burden of demonstrating by a preponderance of the evidence that the survey done in 1858 was fraudulent or grossly erroneous. Quite the opposite, our review indicates that the Pueblo received in its 1864 patent at least as much land as was intended in the 1748 Spanish grant, and most likely, more. Even if the Pueblo had shown that the survey was in error, this Department is now precluded by the Indian Claims Commission Act, and perhaps by the Quiet Title Act as well, from acting upon the Pueblo's claim to additional lands.

RALPH W. TARR
Solicitor

I CONCUR:

DONALD PAUL HODEL

August 21, 1989

ATLANTIC RICHFIELD CO. (ON RECONSIDERATION)

110 IBLA 200

Decided: August 21, 1989

Petition for reconsideration of *Atlantic Richfield Co.*, 105 IBLA 218, 95 I.D. 235 (1988), which set aside and remanded a decision of the Montana State Office, Bureau of Land Management, upholding a Miles City District Office decision assessing compensatory royalty for oil and gas drained from lease M-60749.

Petition granted; prior decision affirmed.

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

The prudent operator rule limits the duty of a common lessee to protect Federal lands from drainage, i.e., a common lessee must pay compensatory royalty on oil and gas that it drained from a Federal lease only if the reserves recoverable by a protective well on the Federal lease are sufficient to pay a reasonable profit over and above the cost of drilling and operating the well.

APPEARANCES: Mary Katherine Ishee, Esq., Paul B. Smyth, Esq., L. Poe Leggette, Esq., Office of the Solicitor, Washington, D.C., and Roger W. Thomas, Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management; Gregory J. Nibert, Esq., Roswell, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

By order of May 12, 1989, the Director, Office of Hearings and Appeals, granted a request by the Bureau of Land Management (BLM) to direct this Board to reconsider *Atlantic Richfield Co.*, 105 IBLA 218, 95 I.D. 235 (1988). Prior to this order, BLM had filed a petition for reconsideration with the Board, but the Board denied it as untimely. See Order of February 8, 1989. Pursuant to the Director's May 12, 1989, order, we reexamine the merits of this appeal.

Atlantic Richfield Co. held that the prudent operator rule limits the duty of a common lessee to protect Federal lands from drainage, i.e., a common lessee must pay compensatory royalty on oil and gas it drains from a Federal lease only if the reserves recoverable by a protective well on the Federal lease are sufficient to pay a reasonable profit over and above the cost of drilling and operating the well.

The Federal lease in question, M-60749, is located within the N½ of sec. 5, T. 31 N., R. 59 E., Montana Principal Meridian. The lessee, *Atlantic Richfield Co.* (ARCO), is also the lessee of the adjacent private lands on which its well, the Hoffelt #2, is located.

The Miles City District Manager found that the Hoffelt #2 well was draining Federal lease M-60749 by a drainage factor of 4.4 percent.

Citing lease provisions and applicable regulations, the District Manager assessed ARCO for compensatory royalties effective the date of first production from the Hoffelt #2 well and continuing until the date of last production, or the effective date of the relinquishment of affected portion(s) of lease M-60749, or the date on which production commences from a protective well. Production was first reported for January 1985, but since July 1, 1986, production from the relevant Gunton formation has been shut off. No protective well has been drilled by ARCO.

BLM urges this Board to reconsider *Atlantic Richfield Co.*, arguing that the prudent operator rule, which is generally applied in diverse ownership cases, has been greatly modified (if applied at all) in common lessee cases. According to BLM, a number of courts have refused to apply the prudent operator rule when, as here, a common lessee is causing the drainage. BLM asserts that the basis for this distinction is the recognition of implied obligations beyond the mere duty to drill an offset well (Petition for Reconsideration, Feb. 6, 1989, at 10). BLM asserts that courts have recognized the contractual relationship created by a lease imposes a good faith obligation upon the lessee to refrain from any affirmative action which would deplete the leasehold property.

BLM contends that ARCO breached this implied duty (also known as the covenant not to deplete or impair) by draining Federal lease M-60749 through the Hoffelt #2 well, which is located on adjacent private lands. BLM states:

ARCO did not notify the BLM of its intent to drill, although the proposed well location was immediately adjacent to its Federal lease; it did not, prior to first production or any time thereafter, attempt to mitigate its losses or protect the Federal royalty interests through unitization or any other means, although its lease specifically requires it to pay royalties on production from the Federal tract; and, it has received the benefit of the reserves attributable to the Federal lease without having to incur the costs of an offset well.

Id. at 11.

ARCO, as the party in control of operations on both the producing and nonproducing leases, has more options for lease protection than might be available to a third-party lessee, BLM states. The common lessee knows where and when it intends to drill. BLM maintains that even if the common lessee wishes for sound business reasons to retain both leases and thereby prevent drilling or development in competition to its own activities, it may unitize the parcels so that the interests of its lessor on the undeveloped tract are protected. *Id.* at 12. BLM cites *Williams v. Humble Oil & Refining Co.*, 432 F.2d 165 (5th Cir. 1970), for the proposition that the liability of a common lessee for compensatory royalties can be predicated as much on the lessee's failure to unitize or pool as upon a failure to drill offset wells.

It is possible, BLM states, that a common lessee might under some circumstances escape liability for payment of compensatory royalties if it can show that it had taken all reasonable efforts to protect the lease

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from depletion. These facts are not present here, BLM maintains, because ARCO failed to notify BLM of its intent to drill and failed to unitize the private and Federal lease.

BLM acknowledges that requiring a common lessee to pay compensatory royalty, regardless of whether an offset well would be profitable, may often place the lessee in the position of paying double royalties on the drained reserves, i.e., a royalty to the private lessor and a compensatory royalty to the United States (Petition for Reconsideration, *supra* at 16). A common lessee, however, has several options to protect itself from double royalties, BLM explains. These options include unitization and relinquishment of the lease. *Id.* Having made no showing of any attempt to protect itself by unitization, relinquishment, or other means, ARCO has little basis to complain, BLM states.

In response, ARCO argues that *Atlantic Richfield Co.* is supportable by the common law in a majority of oil and gas producing states. Courts have not made absolute the implied covenant to protect the lessor against drainage, ARCO states, but have properly considered this duty in the context of the expectations of the parties and the law of capture. It notes that one of the elements in a cause of action for breach of this covenant is the prudent operator standard, which requires a showing that a protective well could maintain sufficient production to yield a reasonable profit after paying all drilling, operating, and other burdens and expenses (Response to Petition for Reconsideration, July 5, 1989, at 5).

ARCO states:

The rationale for the [prudent operator] rule is that the lessor should not be placed in a more favorable position by bringing an action against the lessee for damages from drainage caused by adjacent production if the lessor would not have protected his mineral estate from drainage had his minerals remained unleased. A lessor should not be able to require his lessee to pay damages, drill an offset well, or relinquish the lease if the lessor, as an unleased mineral owner, would not be reasonably expected to make the capital investment required to prevent such drainage because a reasonable profit will never be recouped on such investment.

Id. at 6.

ARCO disputes BLM's view that the act of drilling a well on an adjacent parcel is an affirmative act which depletes the property of the Federal parcel. Cases using this language involve lessee actions to intentionally cause a migration of minerals, and such acts are generally motivated by a differential burden under the respective leases (Response at 15). ARCO maintains that the geologic conditions in the area dictated the location of its well, and that it located the Hoffelt # 2 well on private lands, even though the royalty burdens placed on production on the private lands exceeded those of the

Federal lease¹ (ARCO's Response to BLM Answer, June 12, 1987, at 14).

In response to BLM's suggestion that ARCO could have protected the Federal royalty interest by informing BLM of its intention to drill, ARCO replies that it had no duty to notify BLM of its activities on private lands and that no regulation requires such notice. Responding to BLM's suggestion that unitization was available to protect the Federal royalty interest, ARCO states that BLM has failed to present facts showing that unitization was practical under the circumstances. BLM's arguments fail to recognize the complex nature of unit formation, ARCO contends, and offer no support for a duty to unitize (ARCO's Response to BLM's Petition for Reconsideration, *supra* at 16).

[1] After careful review of the pleadings filed by BLM and ARCO, we affirm *Atlantic Richfield Co.* We do so because this decision accurately reflects the majority position of courts that have confronted the issue whether a common lessee must pay compensatory royalty for draining its lessor. See 5 Williams and Meyers, *Oil and Gas Law* § 824 (1986). In addition, the majority position avoids the payment of double royalties by a common lessee who, as alleged here, locates its well on the basis of geology after concluding that reserves can support but one well.²

BLM maintains that the distinguishing factor making the prudent operator rule inapplicable to the instant case is the presence of an implied covenant to refrain from affirmative acts that would impair the value of the lease. Case law does not support this view, however. Indeed, one of the cases cited by BLM in support of the implied covenant to refrain from depleting, *Humphreys Oil Co. v. Tatum*, 26 F.2d 882 (5th Cir.), cert. denied, 278 U.S. 633 (1928), appears to incorporate the prudent operator rule.³ *Shell Oil Co. v. Stansbury*, 410 S.W.2d 187 (Tex. 1966), leaves no doubt that a common lessee's duty to protect its lessor against depletion is limited by the prudent operator rule.

Moreover, we note that those cases holding the prudent operator rule inapplicable to common lessee drainage ignore the oil and gas industry practice of blocking up a large acreage before drilling. In *Geary v. Adams Oil & Gas Co.*, 31 F.Supp. 830, 834 (E.D. Ill. 1940), which is frequently cited in the cases holding the prudent operator rule inapplicable, the court explains its departure from the prudent operator rule in these terms:

But here the mind is haunted by the fact that the defendant is the beneficiary of the oil drained from plaintiff's land by the wells on the north and south which belong to the

¹ ARCO states that it pays royalties of 15.6837 percent on production from the Hoffelt #2 well (ARCO's Response to BLM's Answer, June 12, 1987, at 18). The royalties due on production from M-60749, a competitive lease, begin at 12-½ percent and increase to a maximum of 25 percent as average production per well per day increases. See Schedule B to lease M-60749.

² Whether ARCO's conclusion was accurate is a question presently pending on remand. 105 IBLA at 229, 95 I.D. at 242. If an economic well could have been drilled, ARCO must pay compensatory royalties.

³ See also *Tide Water Associated Oil Co. v. Stolt*, 159 F.2d 174 (5th Cir. 1946), cert. denied, 331 U.S. 817 (1947), and 5 Williams and Meyers, *Oil and Gas Law* § 824 n.7 (1986), for a discussion of this case.

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defendant. It has not only been saved the cost of drilling, equipping and operating a protecting well but it gets the oil anyway without plaintiffs being paid for it.

Such a view makes the common lessee a guarantor of royalties to a lessor whose lands do not justify drilling. Double royalties result, and reserves remain unrecovered.

BLM's suggestion that a common lessee should be required to unitize tracts sharing a common reservoir finds support in *Williams v. Humble Oil & Refining Co.*, *supra*, and offers some legal basis for compensating the lessor of the drained tract. It is clear that the Secretary can compel unitization in the case of offshore leases. See *Sun Oil Co.*, 67 IBLA 80 (1982). The Secretary can also prescribe a unit plan for development of an onshore field. See 30 U.S.C. § 226(j) (1982). However, there is nothing in the statutes or regulations which would compel a common lessee to seek unitization in cases such as this. Should BLM adopt such a view in its policy review⁴ and promulgate a regulation to that effect, lessees such as ARCO would have ample notice of a duty to unitize. In this way the lessor of a tract holding insufficient reserves to support a well could be compensated without the common lessee paying double royalties.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, *Atlantic Richfield Co.* is affirmed.

R. W. MULLEN
Administrative Judge

I CONCUR:

BRUCE R. HARRIS
Administrative Judge

TRANSCO EXPLORATION CO. & TXP OPERATING CO.

110 IBLA 282

Decided September 13, 1989

Appeal from a decision of the Director, Minerals Management Service, determining that \$1,416,084.09 was due as a result of underpayment of gas royalties between March through August 1980, and August 1982 through September 1983, attributable to production on lease OCS-G 1960. MMS 83-46-OCS.

Affirmed.

1. Outer Continental Shelf Lands Act: Oil and Gas Leases--Regulations: Interpretation--Rules of Practice: Generally

⁴ In its petition, BLM explains at page 6 that its drainage policies, as set forth in its interim Manual and Handbook, are not yet finalized.

The procedures set forth at 30 CFR 250.70 - 250.80 (1987) only apply in those cases involving the assessment of a civil penalty.

2. Notice: Constructive Notice--Rules of Practice: Generally

Where an oil and gas lessee has entered into a seller's representative agreement and designated the operator of the lease as its representative for the tender of royalty payments to the United States, service of documents relating to those payments on the operator constitutes effective service upon the lessee.

3. Outer Continental Shelf Lands Act: Oil and Gas Leases--Rules of Practice: Appeals: Generally

Where MMS issues an order requiring the submission of additional past royalties and thereafter denies a request from the lessee that it be permitted to post a bond in lieu of tendering the money during the pendency of an appeal, the failure of the lessee to appeal from the decision of MMS denying the request to post a bond and the subsequent tender of the amount demanded constitutes a waiver of any objection to the requirement that the money be tendered during the pendency of the appeal.

4. Oil and Gas Leases: Royalties: Generally--Outer Continental Shelf Lands Act: Oil and Gas Leases

Where the appropriate Oil and Gas Supervisor issues a letter determining the proper method of computing royalties owed to the United States based on the assumption that the natural gas involved is subject to price control, and that gas is subsequently decontrolled, the letter ceases to be a valid basis for the computation of the amount of royalty due to the United States.

5. Oil and Gas Leases: Royalties: Generally--Outer Continental Shelf Lands Act: Oil and Gas Leases

As a general rule, "reasonable value" for the purpose of calculating royalties due to the United States will be the highest price paid for the major portion of like quality products produced or sold from the same field or area or the gross proceeds actually received by the lessee, whichever is higher.

6. Oil and Gas Leases: Royalties: Generally--Outer Continental Shelf Lands Act: Oil and Gas Leases

Where royalty payments are dependent upon the price at which the product is marketed, oil and gas lessees are generally deemed to have an implied obligation to exercise good faith in the marketing of the production from the lease, though claims for increased royalties are subject to the defense that the lessee exercised reasonable business judgment. Where, however, for no justifiable reason, a lessee fails to timely invoke a clause permitting renegotiation of the price received with the result that royalties continue to be based on a lower price, the lessee is properly required to tender additional royalties based on the prices received by other lessees who timely invoked similar renegotiation provisions.

7. Oil and Gas Leases: Royalties: Generally--Outer Continental Shelf Lands Act: Oil and Gas Leases

Where a Federal oil and gas lessee voluntarily agrees to reduction in the price paid for oil or gas by an affiliated purchaser, and the evidence establishes that, but for the affiliated relationship between the lessee and the purchaser, a higher price would have been obtained for the production, the lessee is properly deemed to have breached its duty of fair dealing with the lessor and royalty is properly computed based on the prices received by other lessees who had similar contractual arrangements with the producer but who refused to assent to lower payments for their production from the same lease.

APPEARANCES: Rene P. Lavenant, Jr., Esq., M. W. Parse, Jr., Esq., and Robert L. McIntyre, Esq., Houston, Texas, for appellants;

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**Peter J. Schaumberg, Esq., and Kathleen L. Walz, Esq., Office of the
Solicitor, Washington, D.C., for the Minerals Management Service.**

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Appellants Transco Exploration Co. (TXC) and TXP Operating Co. (TXPO) have appealed from a decision of the Director, Minerals Management Service (MMS), dated April 18, 1986, finding that, for the period March through August 1980, and August 1982 through September 1983, appellants undervalued production attributable to their 15-percent working interest share of gas from Outer Continental Shelf Lands (OCS) oil and gas lease OCS-G 1960 and that the value of the production should be determined by reference to the price received by Enstar Petroleum Co. (Enstar) pursuant to its contract with Transcontinental Gas Pipeline Corp. (Transcontinental).

Oil and gas lease OCS-G 1960, South Timbalier Block 148, offshore Louisiana, was issued pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 (1982), effective February 1, 1970. The undivided working interest in OCS-G 1960 is held by Chevron USA, Inc. (Chevron), 40 percent; Enstar and five other companies, which are collectively referred to herein as Enstar, 45 percent; and TXC, 15 percent. Enstar was the designated operator for the lease.¹

By assignment dated July 15, 1983, TXC transferred its interest in OCS-G 1960 to TXPO, a Texas limited partnership in which TXC is the managing general partner. Transco Energy Co., the parent-corporation of both TXC and TXPO, is a special general partner and Transco Exploration Partners, Ltd., a Texas limited partnership, is the sole limited partner in TXPO. TXC and TXPO are similarly situated for purposes of this appeal and will hereinafter be collectively referred to as "appellants."

Between November 1977 and December 1978, TXC, Chevron, and Enstar separately entered into three substantially similar long-term gas purchase contracts with Transcontinental for the disposition of their respective working interest share of gas from OCS-G 1960. TXC's contract with Transcontinental was dated November 16, 1977; Enstar's contract with Transcontinental was dated December 15, 1977; and Chevron's contract with Transcontinental was dated September 11, 1978. The date of first delivery of production under all three contracts was February 11, 1979.

The contracts between Transcontinental and Chevron, and Transcontinental and Enstar were between nonaffiliated parties. However, since Transcontinental, like TXC, is a wholly owned

¹ Enstar Petroleum Co. eventually became the successor-in-interest to C&K Marine Production Co. (C&K), which had initially entered into the gas-purchase contract with Transcontinental. However, in order to lessen the likelihood for confusion, we will refer to the operator and holder of the 45-percent interest as Enstar throughout this opinion.

subsidiary of Transco Energy Co., the contract between TXC and Transcontinental was between affiliated parties and, by definition, was not at arm's length.²

Transcontinental's contracts with Enstar and TXC, respectively, were identical in all respects, including quantity, price, and term. Thus, both contracts required Transcontinental "to receive or pay for if available for delivery and not taken" (take or pay) an average daily contract minimum quantity of gas well gas equivalent to 90 percent of seller's (Enstar and TXC's) delivery capacity for the first 5 years and 80 percent of seller's delivery capacity for the remainder of the term of the contract (*compare* Enstar-Transcontinental contract at 10 with TXC-Transcontinental contract at 10). Both contracts originally provided for a 5-year makeup period (makeup) during which Transcontinental could makeup or recover (in kind only) deficiencies where it had paid for gas volumes which were previously available but not taken by Transcontinental. Cash settlement for volumes paid for but not taken was limited to the differential in price between the price in effect at the time the deficiency was incurred, and that price in effect at the time of taking.³ Transcontinental's rights to makeup deficiencies were lost at the termination of the contract.

Transcontinental was also required to take all "casinghead gas" under both contracts (*see, e.g.*, TXC-Transcontinental contract at 13).

The price provisions in both the Enstar and TXC contracts were identical as well, including an initial base price of \$1.90 per Mcf, quarterly price escalations, the right to redetermine price subsequent to the effective date of deregulation, and annual price redeterminations thereafter. Both contracts provided for a primary term of 20 years from date of first delivery and year-to-year terms thereafter, subject to termination on any anniversary date of first delivery (*see* Enstar-Transcontinental contract at 17-22; TXC-Transcontinental contract at 17-22).

The terms of the Chevron-Transcontinental contract were similar with the exception of a few deviations in quantity, price, and term. Under the Chevron contract, Transcontinental was required to take or pay for a minimum average daily contract quantity of gas well gas equivalent to 80 percent of Chevron's delivery capacity for the entire term (Chevron-Transcontinental contract at 9). Transcontinental's makeup period extended to 3 years initially, but was thereafter

² The fact that a contract is not at arm's length does not, of course, make the contract invalid. However, in such a situation the Department will not assume that the negotiated price represents fair market value unless there is independent indicia establishing that the contract price is one fairly derived from the marketplace. *See generally Getty Oil Co.*, 51 IBIA 47, 51 (1980). As the subsequent text makes clear, there is no question that the original contract between TXC and Transcontinental resulted in a price reflective of other contracts being entered into at that time. The issues presented by this appeal relate to subsequent actions under and modifications of that contract which resulted in a lowering of the price received by appellants vis-a-vis the price received by other producers who originally had the same contractual arrangements with Transcontinental.

³ This provision, by its terms, inured to the benefit of the "Seller," to the extent that the price of volumes when taken exceeded the price when volumes were initially paid for. Thus, the provision provided in pertinent part: "Any makeup gas well gas shall be taken without further payment, except for any differential in price between those in effect at the time the deficiency was incurred and that in effect at the time of taking." Enstar-Transcontinental contract at 12-18; TXC-Transcontinental contract at 12-13.

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amended to reflect a 5-year makeup period (see Amendment to Chevron-Transcontinental contract, dated November 13, 1978, at 1-2).

The Chevron-Transcontinental price provision was identical except that it provided for an initial base price of \$2.25 per Mcf (see Chevron-Transcontinental contract at 17-21). The Chevron-Transcontinental contract was for a primary term of 5 years from the date of first delivery and year-to-year thereafter, subject to termination on any anniversary date of first delivery.

By letter agreement dated July 28, 1980, TXC, pursuant to a "Seller's Representative Agreement," designated Enstar as its representative for all purposes under its gas-purchase contract with Transcontinental "including, but not limited to, delivery, operation, allocation, accounting, and receipt and disbursements of payments to Seller under this agreement."

Pursuant to the provisions of the "Seller's Representative Agreement" and the course of dealings between the parties, Enstar disbursed royalty to MMS for the account of TXC until Enstar revoked said agreement with respect to the "receipt and disbursement of revenues only" (i.e. royalty) by letter dated January 4, 1984 (effective February 1, 1984).⁴

At the time the contracts were entered into, all gas sold to Transcontinental under the respective contracts was required to be sold pursuant to section 102 of the Natural Gas Policy Act (NGPA), 15 U.S.C. § 3312 (1982), and royalty was tendered to MMS on the section 102 regulated price.⁵ The royalty payment procedure applicable during this period was set forth in a July 16, 1979, letter from MMS to Enstar, which is discussed in greater detail, *infra*.

Almost immediately upon deregulation of high-cost natural gas, Enstar sought to obtain deregulated section 107(c) prices for gas sold under its contract with Transcontinental.⁶ Section 107 approval, pursuant to applicable regulations (45 FR 28092, 28095-96 (Apr. 28, 1980)), permitted collection of the section 107 price retroactive to the date of a producer's application if the producer's contract so permitted. The Enstar price provisions provided that the effective date of a redetermined deregulated price would be the month following 60 days after Enstar made a written request to Transcontinental to renegotiate a deregulated price.

Enstar gave notice to Transcontinental, as required by its contract, on December 13, 1979. Thus, the earliest date under the contract that Enstar could receive the section 107 deregulated price was March 1,

⁴ In this letter, Enstar noted that "[a]s a result of TXP[O] accepting Transcontinental's Gas market out, Enstar has experienced excess royalty problems with the Minerals Management Service. . . . In order to avoid further problems with MMS, Enstar hereby cancels the referenced Agreement for receipt and disbursement of revenues only, effective with February 1, 1984 deliveries."

⁵ See 15 U.S.C. § 3331(b) (1982), and 44 FR 57726, 57739 (Oct. 5, 1979).

⁶ High-cost natural gas, as defined by subsecs. 101(c)(1)-(4) of the NGPA, 15 U.S.C. § 3317(c)(1)-(4) (1982), was deregulated effective Nov. 1, 1979. On Dec. 13, 1979, Enstar filed an application for approval under sec. 107(c)(1) of the NGPA, 15 U.S.C. § 3317(c)(1) (1982). The application received final jurisdictional approval on Apr. 28, 1980.

1980. The new deregulated price (\$5.63), as determined by Enstar and Transcontinental pursuant to their contract, was based on a deregulated section 107(c) sale between Northern Natural Gas and Anadarko Production Co. covering production from West Delta Blocks 137 and 138, OCS, Louisiana.⁷

Enstar and Transcontinental, in addition to redetermining the new deregulated price, amended the pricing provision to provide Transcontinental with the right to reduce the price if Transcontinental's average rolled-in gas cost at New York City exceeded the Btu equivalent cost of the lowest price No. 2 fuel oil.⁸ In the event that this occurred, Transcontinental acquired the right to nominate the highest marketable price for gas sold and purchased on its system and, if the price paid to Enstar exceeded the former, Transcontinental could elect to notify Enstar that it would not pay the higher price and offer the highest marketable price for gas sold and purchased on its system as the new price under the contract. Under this provision Enstar would have 60 days to solicit offers from other purchasers. Transcontinental was permitted 30 days to match a higher bona fide offer and, if matched, the matched price constituted the new applicable price under the contract. If Transcontinental elected not to match, Transcontinental agreed to terminate the contract and provide transportation ashore for the sale of the affected gas to others. If no bona fide offers were received, Transcontinental's offer would be the new price payable by Transcontinental under the contract.

The amended pricing provision based on Transcontinental's rolled-in average cost in effect provided Transcontinental with a limited market-out provision. This must be distinguished from what is commonly referred to by appellants, Transcontinental, and MMS as a "market-out" or "economic-out" which permits a gas purchaser (e.g., Transcontinental) to reduce the price in light of current market conditions that render the gas at any particular point in time uneconomical. See *Manual of Oil & Gas Terms*, Williams & Meyers, 6th ed. (1984) at 265.

On July 1, 1980, TXC exercised its rights under the price provision of its contract to obtain a deregulated price of \$6.397. The deregulated price was effective September 1, 1980. The deregulated price was based

⁷ The pertinent portion of Article XI of the Enstar-Transcontinental contract provided:

"3. If at any time during the term of the contract the Federal Power Commission (or any successor governmental agency having jurisdiction over the rates charged for gas sold thereunder) ceases to have jurisdiction over the price of gas sold, ceases to exercise control over gas sold, or permits indefinite pricing provisions to become operative in a manner applicable under the contract, then, at Seller's request, the parties shall renegotiate the price at which natural gas is to be sold under the Contract. Any such request shall be made to Buyer in writing and may be made at any time following the effective date such deregulation or indefinite pricing provisions become operative, and subsequently at intervals not more than once each year. The renegotiated price shall take into account the highest effective price in any contract for bona-fide offer made by an interstate pipeline company of gas of comparable quality and quantity in the Federal Domain offshore Louisiana, under a contract containing comparable terms and conditions.

"4. The price so renegotiated shall become effective on the first day of the month following the expiration of sixty (60) days from the date of Seller's written request for such renegotiation. In no event shall the new price be lower than the price in effect prior to the time the price was renegotiated. The fixed quarterly periodic escalations provided for in the price schedule under the contract [1-1/4% annually] shall be applicable to any renegotiated price at the end of each one (1) quarter period following the date that any such renegotiated price becomes effective."

⁸ See Letter dated July 10, 1980, from Transcontinental to Enstar at 1-7.

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on the same third-party contract (between Anadarko Production Co. and Northern Natural Gas) which had been used by Enstar to establish its initial deregulated price under the Enstar-Transcontinental contract.

TXC and Transcontinental, in addition to redetermining the deregulated price, amended the price provision of their contract to incorporate Transcontinental's right to lower the price if Transcontinental's average rolled-in unit cost exceeded the Btu equivalent cost of the lowest price No. 2 fuel oil. The provision incorporated was identical to that incorporated by Transcontinental in the Enstar-Transcontinental contract, *see note 7, supra*.

By letter dated November 6, 1980, Chevron, the other nonaffiliated seller of gas from the lease, advised Transcontinental of its intention to redetermine the deregulated price. Chevron, therefore, did not obtain the deregulated section 107(c)(1) price until February 1981.⁹ The Chevron deregulated price was based on the TXC-Transcontinental sale price and, like the TXC price provision, allowed automatic quarterly escalations of 1.5 percent.

Effective February 1, 1981, the deregulated section 107(c)(1) price under the Chevron-Transcontinental contract was \$6.5904 per MMBtu.¹⁰ The Chevron-Transcontinental redetermination letter agreement also incorporated, as did the price redetermination agreements of TXC and Enstar, an amendment granting Transcontinental the right to reduce the price if Transcontinental's average rolled-in unit cost at New York City exceeded the Btu equivalent of the lowest price No. 2 fuel oil.

In summation, by February 1, 1981, 100 percent of the working interest in OCS-G 1960 had taken action to obtain the higher section 107(c)(1) deregulated prices and all three producers had amended their contracts to grant Transcontinental the right to reduce the price received by them if Transcontinental's rolled-in average unit cost exceeded the lowest price paid for No. 2 fuel oil.

Thereafter, by written notice dated July 1, 1981, TXC exercised its right to renegotiate the price again, pursuant to the annual price redetermination provision of its contract with Transcontinental. On March 8, 1982, the parties agreed that the new deregulated price would be \$8.496 MMBtu, based on a sale between Tennessee Gas Pipeline and Columbia Gas Transmission Corp. and Chevron USA, Inc.,

⁹ The letter agreement reflecting the redetermined deregulated price dated Jan. 26, 1981, was not executed by the parties until Sept. 30, 1981. The redetermined price was applied retroactively to Feb. 1, 1981.

¹⁰ In connection with the deregulated price redetermination, all three contracts had been amended immediately preceding deregulation to provide for the metering and measuring of volumes and the calculation of price based on a Btu basis as opposed to an Mcf basis. Thus, all prices appearing hereafter in the text are on an MMBtu rather than Mcf base.

covering South Pass Block 78 OCS, Louisiana. This new price was made effective as of September 1, 1981.¹¹

Soon after this agreement was reached, however, TXC agreed to reduce the price payable by Transcontinental to \$5.00 per MMBtu. TXC's actions were taken in response to a letter from Transcontinental, dated June 1, 1982, in which Transcontinental described various marketing problems it was experiencing. Transcontinental's letter advised that it had given notice to sellers, under those section 107 gas purchase contracts which contained "market-out" provisions, that the new (reduced) price to be paid would be \$5.00 per MMBtu (inclusive of tax reimbursement and all other adjustments and escalators).

As noted above, the TXC-Transcontinental contract did not contain such a general market-out provision. Nonetheless, Transcontinental requested that TXC voluntarily agree to reduce the price for its production.¹² By letter dated June 2, 1982, TXC agreed.

Between August 1982 and May 1983, Enstar, as Operator and pursuant to TXC's request, paid royalties to MMS on the reduced value (\$5.00 per MMBtu) for TXC's account. We note, by way of comparison, that during the last quarter of 1982, Enstar pursuant to its contract with Transcontinental, received and paid royalty at the rate of \$9.325 per MMBtu.

Thereafter, on May 31, 1983, TXC again voluntarily agreed to a further reduction in the price payable by Transcontinental to \$4.00 per MMBtu, effective as of May 1, 1983.¹³ This letter agreement expressly noted:

¹¹ Pursuant to Article XI(3) and (4) of the TXC-Transcontinental contract this price increase was effective Sept. 1, 1981. See Letter-agreement dated Feb. 17, 1982, from Senior Vice President, Gas Supply, Transcontinental, to Vice President and Associate General Counsel, TXC.

¹² Transcontinental's June 1, 1982, letter stated, in pertinent part:

"[Transcontinental] is also requesting Sellers under those Section 107 gas purchase contracts which do not contain market-out provisions to voluntarily reduce deliveries and associated potential take-or-pay obligations by 25% from current levels. However, the result from these actions is not expected to bring TGPL's market problems to a completely manageable level. In order to assist in preventing the anticipated erosion of the industrial market and to preserve to the maximum extent possible a long term market for TXC's deep gas reserves, we are asking TXC to consider reducing, hopefully on a temporary basis, the price to be paid by TGPL for deregulated gas purchases under the above referenced contract(s) to 5.00 per MMBtu (inclusive of tax reimbursement and all other adjustments and escalators). This request is subject to receipt by TGPL of the requisite consent from the Trustee under the Mortgage and Deed of Trust dated May 15, 1949, between TGPL and the Chase Manhattan Bank (N.A.) and C.F. Ruge. Should you give favorable consideration to our request, we propose that this price reduction be made effective retroactively to May 1, 1982, the date the majority of the market-out reductions were made effective."

"While it is impossible to estimate with precision the future course of fuel oil prices and the resultant effect on the industrial market, it is quite possible that the current depressed level of prices is only a short term condition. We, therefore, propose that the \$5.00 price level, if agreed to by TXC, would be reviewed by TXC and TGPL on a periodic basis to monitor competitive conditions in order to permit a return to the applicable contract price level at the earliest time market conditions would permit.

"While we recognize that you are not contractually required to agree with our request, your favorable consideration would be greatly appreciated. In addition to considering the market situation discussed above, you should also be aware of the recent Notice of Inquiry issued April 28, 1982 by the Federal Energy Regulatory Commission in Docket No. RM82-26 to investigate whether serious economic distortions may be evolving in the nation's natural gas markets and to examine its authority to take corrective action. The Commission noted that allegations have been made that various provisions in producer gas contracts, such as price escalation and take or pay clauses, may cause market disorders. Based on the record developed in the proceeding, the Commission will determine whether to initiate a Notice of Proposed Rulemaking and/or make recommendations to Congress. TGPL believes that it is desirable for the industry to take responsible corrective action on a voluntary basis rather than face legislative or administrative action which could unduly and perhaps unrealistically restrict industry practices."

¹³ See Letter-agreement dated May 16, 1983, from Transcontinental to TXC, approved by TXC on May 31, 1983.

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TGPL [Transcontinental] recognizes that the possibility exists that TXC may be required to pay royalty based upon the deregulated price otherwise provided for in the Subject Contracts rather than the \$4.00 per MMBtu price established hereunder. Therefore, in exchange for TXC's agreement to forego revenues otherwise legitimately available to it, TGPL agrees that the "excess royalty" provision contained in Section 5 of Article XI of the Vermilion Area, Block 25 Field gas purchase contract, and *Section 6 of Article XI of the South Timbalier Area, Block 148 Field gas purchase contract*, [¹⁴] shall apply with full force and effect to gas purchased at the prices established hereunder. [Italics supplied.]

Between May 1 and November 1, 1983, Enstar, on behalf of appellants, received from Transcontinental and disbursed royalties on the basis of the reduced value of \$4.00 per MMBtu. During the same second quarter of 1983, by contrast, the price payable by Transcontinental to Enstar for its own account continued to escalate from \$10.097 to \$10.248 per MMBtu. Enstar duly tendered royalty to MMS on these higher values for its own account. Chevron, during the same period, received \$10.097 per MMBtu and similarly paid royalties on this higher value basis.

On July 12, 1983, only 2 months after the price reduction to \$4.00 per MMBtu, TXC and Transcontinental further amended their outstanding contracts, effective January 1, 1984. Under this amendment, Transcontinental's obligation to take or pay for a daily contractual minimum equivalent to 90 percent of TXC's delivery capacity was changed to require that Transcontinental take or pay for not more than an average daily contract minimum quantity equal to TXC's proportionate share of Transcontinental's market. See "Amendment to Gas Purchase Contract," executed July 12 and 13, 1982 (General amendment).¹⁵ The amended take or pay obligation provision was not limited to periods of market erosion but rather was effective from January 1, 1984, through termination of the contract. *Id.*

Transcontinental's makeup rights for gas paid for but not taken were substantially broadened to include cash settlement makeup. The General amendment permitted Transcontinental to obtain a cash settlement for volumes initially paid for but not taken if

¹⁴ The Excess Royalty provision (Article XI(6)) contained in appellants' original contract provided:

"6. Buyer agrees, subject to Seller obtaining any necessary authorization from the Federal Power Commission, to reimburse Seller for all "excess royalty payments" which Seller may be required to pay (or which Seller demonstrates to the satisfaction of Buyer that there is reasonable probability that it may be required to so pay) to any royalty owner (but not overriding royalty interests created during the term hereof) with respect to gas delivered to Buyer hereunder, as such royalty interest is in effect at the date of execution of this agreement under Seller's lease(s) on the acreage described in Exhibit "A" hereof. "Excess royalty payment" as used herein is defined as the amount by which royalty payments under Seller's lease(s) on the acreage described in Exhibit "A" hereof, exceed the amount such payments would have been if made at the prices received by Seller under the terms of this agreement. In the event demand is made on Seller by any royalty owner for settlement of royalty payments on any amount in excess of the prices received by Seller under the terms of this agreement, Seller shall notify Buyer of such demand as soon as is practicable."

¹⁵ As noted in the text, this amendment affected a number of existing contracts between TXC and Transcontinental. On the same date, however, an additional amendment was agreed to by TXC and Transcontinental. This amendment affected only the TXC-Transcontinental contract for gas produced from OCS-G 1960. In order to differentiate between these two amendments, we shall refer to the first amendment as the General amendment and the second one as the contract amendment.

Transcontinental had not recovered volumes within 5 years of date of occurrence, with interest. *Id.* TXC also released and discharged Transcontinental from any and all claims attributable to obligations of Transcontinental under those contracts to take or pay for gas tendered for delivery prior to January 1, 1984, or the date of first delivery, whichever was later. Thus, in effect, TXC waived any rights that it had to enforce Transcontinental's take or pay obligations retroactive to the date of first delivery through termination of the contract.

By another amendment of the same date, TXC and Transcontinental amended the gas purchase contract for lease OCS-G 1960 to provide for a market-out or economic-out provision inuring to Transcontinental's benefit. This market-out provision provided that, notwithstanding anything to the contrary in the TXC-Transcontinental contract, the price paid by Transcontinental shall never exceed a price which, in Transcontinental's "sole opinion, will render the gas uneconomic to [Transcontinental] or its customers." This amendment further provided that, if Transcontinental should exercise its market-out authority, TXC could terminate the agreement only to the extent that it could obtain a higher price for the gas from a third party. The purported consideration for the contract amendment consisted of Transcontinental's agreement to purchase TXC's gas reserves located at Eugene Island Area Block 46 Field, West Cameron Area Block 215 Field, High Island Area Block A-438 Field, and High Island Area, South Addition, Block A-552 Field on unspecified terms.

On September 27, 1983, 4 months after the amendment of the TXC-Transcontinental contract to provide for the market-out provision, Transcontinental exercised its right to market-out. Transcontinental nominated a base market-out price of \$2.80 per MMBtu (inclusive of all tax reimbursement and, without limitation, any and all other adjustments and escalators). See Letter dated September 27, 1983, from Transcontinental to TXC. Transcontinental offered pricing alternatives of \$3.10 and \$3.40 per MMBtu, to the extent that purchasers elected to waive past and future take-or-pay requirements accrued under the subject contracts (the market-out letter applied to a list of contracts which included the one at issue). Appellants elected to accept the second pricing alternative on October 15, 1983, which provided *inter alia*:

[F]or those producer-suppliers with two or more existing contracts for the sale of gas to Transco (at least one of which does not contain a "market out" provision), we will agree to a maximum price of \$3.40 per MMBtu (inclusive of tax reimbursement, and without limitation, any and all other adjustments and escalators) for all gas delivered under the subject contract, effective November 1, 1983, in consideration for your agreement to release Transco from any past take or pay or minimum take requirements accrued under all gas purchase contracts between you and Transco and release Transco from any additional requirements that may accrue for the time period that the \$3.40 price remains in effect.

Id.

By accepting this second pricing alternative, appellants waived Transcontinental's obligation pursuant to the amended contract to

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take the average daily contract minimum quantity equivalent to TXC's proportionate share of Transcontinental's market and waived minimum take requirements and associated take-or-pay obligations under *all* contracts it had with Transcontinental. As noted above, TXC had previously essentially waived Transcontinental's take-or-pay obligations with respect to the instant contract in the July 1983 General amendment. Consequently, effective November 1, 1983, appellants, pursuant to the amended TXC-Transcontinental gas purchase agreement, received \$3.40 per MMBtu and royalty was paid on this value to MMS.

During the period from August 1982 through September 1983, there is no evidence in the record that either Enstar or Chevron voluntarily assented to reduce the prices obtained under their contracts. Nor is there any indication that, during this period, Transcontinental attempted to exercise its right to reduce the cost of gas under the Chevron or Enstar contracts on the basis that the average rolled-in unit cost for gas exceeded the lowest price paid for No. 2 fuel oil. Rather, the record reflects that Chevron and Enstar consistently, through annual price redetermination and quarterly price escalations, renegotiated and obtained higher prices during the August 1982 through September 1983 period.

By memorandum dated October 6, 1983, the Chief, Royalty Valuation and Standards Division (RVSD), advised the Regional Manager, Houston Regional Compliance Office (Manager), that the royalty base for appellants' gas should not be less than the value negotiated between Enstar and Transcontinental.

By letter dated October 31, 1983, the Manager advised Enstar, as operator, that the royalties paid on behalf of appellants for gas production under OCS-G 1960 "are probably understated." The Manager's letter advised, *inter alia*, that if Enstar had "any additional data or information that will demonstrate that the prices on which royalty payments attributable to TXC's production fulfill the requirements of 30 CFR 250.64, you must submit the additional data to Houston Regional Compliance Office within 15 days from receipt of this letter * * *."

Enstar transmitted a copy of the letter to appellants and immediately advised the Manager that it would forward any justification supplied by appellants in support of the challenged royalty valuation practice. No response from TXC was forthcoming nor did the Manager receive any further information before he issued the November 14, 1983, demand letter to Enstar.

In this letter, the Manager determined that royalties had been underpaid in the amount of \$1,251,317.07, and he directed Enstar to remit the same on behalf of TXC. The amount of royalties deemed owing was calculated based on the prices received by Enstar pursuant to its contract with Transcontinental. A copy of this letter was

transmitted to TXC, which subsequently tendered the amount in question, together with \$164,767.02 in accrued interest, under protest.

On December 5, 1983, TXC, on behalf of itself and TXPO, appealed the decision of the Regional Manager to the Director of MMS, pursuant to 30 CFR 290.3(a). Appellants filed a motion to vacate and, alternatively, a brief on the merits. Their motion to vacate was based on alleged procedural deficiencies which they asserted had occurred below. By order dated December 12, 1984, the Director, MMS, denied the motion to vacate.

In his December 12 order, the Director held that, contrary to appellants' assertions, the administrative procedures provided in 30 CFR 250.70 (Investigations) through 30 CFR 250.80 (Remedies and Penalties) (1987)¹⁶ were inapplicable absent the imposition of civil penalties. The Director further concluded that appellants had suffered no prejudice in the proceedings below and that their due process rights were fully protected since they had the opportunity to be heard through the filing of documentary evidence and affidavits before RVSD as well as before the Director. The Director also noted that appellants' rights were further safeguarded by the possibility of review by this Board.

With respect to the substantive royalty valuation issue, the Director granted appellants an additional 21 days in which to file any further written documentary evidence, including evidence concerning the fair market value of the production during the relevant period, evidence of posted prices, and other relevant matters to be considered in determining "value" under the lease and regulations (see 30 CFR 206.150). Appellants likewise were invited to submit for the record all amendments to gas purchase contracts with Transcontinental and requests for new value redetermination letters which may have been filed by them or on their behalf with the Geological Survey (Survey) based on such contract amendments. Thereafter, appellants filed an extensive memorandum, copies of contract amendments, and evidence of market conditions between August 1982 through September 1983. On July 16, 1985, RVSD submitted a report in response to these submissions and appellants subsequently filed a reply to this report.

By decision dated April 18, 1986, the Director, MMS, determined that the prices which Enstar received were properly determined to be the royalty value of appellants' production under the lease during the relevant periods. Accordingly, he affirmed the decision of the Manager requiring the payment of \$1,416,084.09, representing additional royalties and accrued interest. TXC and TXPO thereupon pursued an appeal to this Board.

¹⁶ Subsequent to the filing of this appeal, the regulations appearing at 30 CFR 250.70 - 250.80 (1987) were amended on Apr. 1, 1988. See 53 FR 10596. Thus, 30 CFR Subpart 250.70 (1987) (Investigations) was deleted on the ground that it contained "MMS internal procedures that are inappropriate as regulatory provisions." 51 FR 9338 (Mar. 18, 1986) (Proposed Rule). At the same time, 30 CFR Subpart 250.80 (1987) (Remedies and Penalties) was revised, redesignated as Subpart N and recodified at 30 CFR 250.200 (1988). For the sake of clarity, however, and because these regulations were in effect when the appeal arose, we shall refer to the regulations in question as 30 CFR 250.70 - 250.80 (1987) throughout the text.

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With respect to the instant appeal, we note that, in addition to challenging the substantive correctness of the MMS decision, appellants reiterate their claim that the procedures utilized below violated their due process rights. We will deal with these contentions first.

Appellants maintain that MMS was bound to follow the procedures set forth in 30 CFR 250.70 - 30 CFR 250.80 (1987) and failed to do so in this case. Based on their assertion that the Department has violated its own regulations, appellants contend that, under the principles exemplified by *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the decisions below must be vacated. Appellants argue further that they have been denied procedural due process because the Director made no attempt to identify which "rules of practice" did apply to the Manager's order. Finally, appellants contend that notice to Enstar was not equivalent to notice to appellants. See generally Statement of Reasons (SOR) at 11-26; Supplemental Statement of Reasons (Supp. SOR) at 37-52.

In response to appellants' procedural arguments, MMS asserts that the Manager complied with all applicable rules and regulations of the Department of the Interior. More specifically, MMS contends that the procedures provided by 30 CFR 250.70 - 30 CFR 250.80 (1987) are not applicable to the Manager's order or the conduct of MMS staff preliminary to this order absent the imposition of civil penalties. MMS asserts that, except for the general regulations set forth in 30 CFR 243.2 and 30 CFR Part 290, there are no regulations specifically prescribing procedures for issuance of an order relating to nonpayment or underpayment of royalties, and no such regulations existed at the time of issuance of the demand letter by the Regional Manager. Rather, MMS states that its practice is purely informal with respect to such questions. MMS concludes that the decision below is not open to challenge for failure to follow any specified regulatory requirements except for those set forth in 30 CFR 243.2 and 30 CFR Part 290. See MMS Answer (Answer) at 36-47.

In any event, MMS suggests that the real question is not whether the specific procedures outlined in 30 CFR 250.70 - 250.80 (1987) were followed but whether appellants were afforded the opportunity to present their evidence and arguments to an impartial decisionmaker. In other words, did appellants receive the process which was due? In this regard, MMS notes that appellants were given ample opportunity to review MMS preliminary findings, submit information before the final order was issued, and file extensive briefs on appeal to the Director. Moreover, appellants were then permitted, pursuant to Departmental regulations, to appeal from the Director's adverse decision to this Board. Thus, MMS argues, the Department has provided appellants with the fair hearing before an impartial body mandated by due process considerations.

[1] Appellants contend that the Department was required to follow the regulations set forth at 30 CFR 250.70 - 250.80 (1987) as a precondition for the assessment of underpaid royalties. We do not agree. On the contrary, we believe that a review of both the language of the regulations as well as the explanatory comments which accompanied the adoption of these regulations leads ineluctably to the conclusion that these regulations only apply where the question at issue is the assessment of civil penalties.

The regulations at issue were promulgated in 1979. Until that time, the regulations at 30 CFR 250.80¹⁷ governed "Procedure in the Case of Default by Lessee" and provided procedures for implementing section 5(a)(2) and 5(b)(1) and (2) of OCSLA, 43 U.S.C. § 1334(a)(2), (b)(1), and (b)(2) (1976). Prior to the adoption of the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA Amendments Act), 92 Stat. 629, these sections provided authority for the assessment of criminal penalties (section 5(a)(2)), the administrative cancellation of a non-producing lease where a default under the lease continued for a period of 30 days after the mailing of notice to the lease owner (section 5(b)(1)), or the judicial cancellation of a producing lease (section 5(b)(2)).¹⁸

In 1978, however, Congress adopted the OCSLA Amendments Act. Section 209 of this Act added a number of new sections to the original OCSLA, including, *inter alia*, a new section 24 entitled "Remedies and Penalties." This section is now codified as 43 U.S.C. § 1350 (1982). Section 24 provided for increased criminal penalties, made such criminal penalties applicable to corporate officers and agents who "knowingly and willfully authorized, ordered, or carried out the proscribed activity," and authorized the institution of civil action in United States District Courts for the purpose of obtaining injunctive relief in certain circumstances. And, of particular relevance herein, section 24(b) granted authority for the assessment of civil penalties. Section 24(b), 30 U.S.C. § 1350(b) (1982), provides:

If any person fails to comply with any provision of this subchapter, or any term of a lease, license, or permit issued pursuant to this subchapter, or any regulation or order issued under this subchapter, *after notice of such failure and expiration of any reasonable period allowed for corrective action*, such person shall be liable for a civil penalty of not more than \$10,000 for each day of the continuance of such failure. The Secretary may assess, collect, and compromise any such penalty. No penalty shall be assessed until the

¹⁷ There were no regulations at 30 CFR 250.70 prior to the 1979 amendments.

¹⁸ Appellants' assertion that this regulation was a broad "default" provision, embracing any alleged underpayment of royalties and not necessarily premised on any specific statutory penalty provision, does not withstand analysis. Appellants contend that 30 CFR 250.80 (1970) afforded the supervisor authority to recommend (a) cancellation, (b) a penalty, or (c) "the exercise of such other legal or equitable remedy as the lessor may have" (Supp. SOR at 38). The regulation, however, provided, in relevant part:

"Whenever the owner of a lease fails to comply with the provisions of the regulations in this part, the supervisor is authorized to give 30-day notice of such default by registered letter to the lessee at his record post office address *as provided in section 5(d)(1) of the act* and to recommend to the Secretary through the Director . . . the exercise of such other legal or equitable remedy as the lessor may have." 30 CFR 250.80 (1970) (italics supplied).

This regulation was, thus, expressly grounded in 43 U.S.C. § 1334 (1976). Moreover, by its terms, this regulation was not directory but merely "authorized" the Supervisor to give the notice required by 43 U.S.C. § 1334(b)(1) (1976). It in no wise purported to establish a comprehensive procedure applicable, as appellants would have it, to any request for the payment of additional royalties. See, e.g., *The Superior Oil Co.*, 12 IBLA 212 (1973).

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person charged with a violation has been given an opportunity for a hearing. [Italics supplied.]

In explaining the import of this provision, H.R. Rep. No. 590 noted that “[s]ubsection 24(b) provides for a civil penalty to be assessed against any person, who after notice, a reasonable period for corrective action, and a hearing, continues to fail to comply with the Act, any regulation or order under it, or the terms of an OCS lease, license or permit.” H.R. Rep. No. 590, 95th Cong., 2d Sess. 163, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 1569. It seems clear beyond cavil that this statute does not, by its terms, apply to a situation, such as that involved in the instant appeal, where a lessee has been informed that additional royalties are due and owing and the lessee, or his agent, timely complies with the order and submits the money demanded.

Appellants, in fact, do not contend that they are liable for a civil penalty under 43 U.S.C. § 1350 (1982). Rather, they argue that the procedures set forth at 30 CFR 250.80 (1987) are applicable when the Department determines that an underpayment in royalty has occurred, even if the Department is not seeking civil penalties. The difficulty with appellants' position is that the regulations in question were clearly adopted to implement the civil penalties provision of 43 U.S.C. § 1350 (1982).

Thus, in proposing the regulations which eventually became 30 CFR Subpart 250.80, the Department noted that “[t]he most significant changes proposed for Part 250 are (1) the substitution of a new ‘Remedies and Penalties’ section to incorporate the civil penalties requirements of section 24 of the OCS Lands Act, as amended * * *.” 44 FR 13527-28 (Mar. 12, 1979). Subsequently, it was noted that “[section 250.80] has been added to implement the provisions of section 24 of the Act.” 44 FR 13529. In adopting these regulations, the Department noted that “[t]he more important changes are: (1) The establishment of a ‘Remedies and Penalties’ procedure which implements the civil penalty requirements of section 24 of the Act * * *.” 44 FR 61886 (Oct. 26, 1979). The clearly manifested intent of the Department was to establish procedures for the implementation of the civil penalty assessment authority with which it had been provided by the OCSLA Amendments Act.

This intent is reflected in the regulation, as well. Thus, 30 CFR 250.80-1(a)(1) (1987) provides for the appointment of Reviewing Officers by the Director, MMS. The remaining portions of 30 CFR 250.80-1 address the actions of the Reviewing Officer in deciding cases and provide for a review of the Reviewing Officer's decision by the Director, MMS. Not only is the remainder of this regulation clearly focussed on the procedures to be followed in determining whether a civil penalty will be assessed, but the regulations expressly define “Reviewing Officer,” as “an employee of the Minerals Management Service who is

delegated the authority to assess civil penalties and, when appropriate, to recommend the initiation of criminal proceedings." 30 CFR 250.2(nn) (1987).

We hold, therefore, that the procedures delineated by 30 CFR 250.80 (1987) are applicable only in those cases involving the assessment of a civil penalty. The ascertainment of the value of gas for royalty purposes does not invoke these procedures *unless* the lessee refuses to comply with an order of MMS to tender increased royalty *and* MMS thereafter attempts to assess a civil penalty for this refusal to comply with its order. This, indeed, is essentially what occurred in *Marathon Oil Co. v. MMS*, 106 IBLA 104, 95 I.D. 265 (1988), *appeal filed*, Civ. No. A89-064 (D. Alaska Mar. 1, 1989).¹⁹ Appellants' contention that we should set aside the decision of the Director, MMS, because of a failure to comply with the procedures set forth at 30 CFR 250.80 (1987), must be rejected for the simple reason that those procedures are inapplicable to the case on appeal. See also *Marathon Oil Co.*, 90 IBLA 236, 93 I.D. 6 (1986).

Appellants' complaint with respect to the failure of the Director, MMS, to specify which rules of practice were applicable essentially goes to the actions of the Regional Manager preparatory to the initial issuance of the November 14, 1983, demand letter to Enstar, as Operator, directing the payment of \$1,251,317.97 in additional royalties due from production attributable to TXC's 15-percent interest in the lease. Intertwined with this general argument is the contention that the prior notice sent to Enstar requesting further information relative to the valuation of the gas for royalty purposes was not adequate notice to TXC. Appellants assert that the failure of the Department to establish applicable procedures outlining the steps which would be taken prior to issuance of the demand letter adversely affected their due process rights.

[2] On this point, we must reject appellants' contention that service on Enstar of the Regional Manager's October 31, 1983, letter advising it that the appellants' royalties were probably understated and soliciting any further data which might support the valuation of TXC's production, did not constitute service on appellants. As noted above, TXC had entered into an agreement with Enstar on July 28, 1980, designating Enstar as TXC's representative for all purposes under TXC's gas purchase contract with Transcontinental. While this

¹⁹ *Marathon Oil Co. v. MMS*, *supra*, involved the assessment of a civil penalty under sec. 109(c) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1719(c) (1982), for the knowing and willful failure of appellant to pay royalty on certain uplands oil and gas leases. Sec. 109 of FOGRMA expressly provides that, except for certain situations such as the knowing and willful failure to make any royalty payments by the date specified in the lease, if the lessee, after due notice, corrects the violation within 20 days or such longer period as the Secretary agrees to, there will be no assessment of a civil penalty. See 30 U.S.C. § 1719(a)(1)(B) (1982). It also requires that a hearing be held before the assessment of any civil penalty. 30 U.S.C. § 1719(e) (1982).

While the issues confronted by the Board in its adjudication of Marathon's appeal were related to the assessment of civil penalties, an earlier appeal within MMS had involved the question of the proper basis of computation of the value of certain gas produced and ultimately sold in the form of liquified natural gas. The question of valuation was determined through the general appeal structure provided by 30 CFR Subpart 290. After it was determined by the Assistant Secretary that Marathon had undervalued its gas for royalty purposes and Marathon continued to refuse to submit the monies deemed to be owing, the Director, MMS, commenced the procedures set forth at 30 CFR 241.51 to assess a civil penalty. See *Marathon Oil Co. v. MMS*, *supra* at 114-19, 95 I.D. at 271-74.

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agreement, by its terms, relates to the "delivery, operation, allocation, accounting, and receipt and disbursement of payments" to TXC under the TXC-Transcontinental contract, it is clear that included within the ambit of this agreement was the responsibility of Enstar to tender to the Government the royalty payments due from TXC's share of the production.²⁰ Accordingly, with respect to questions relating to the determination of the amount of royalty due from TXC, Enstar was properly deemed to be TXC's agent. Thus, service on Enstar was, in law, constructive service upon TXC. *Accord, United States v. Mine Development Corp.*, 27 IBLA 238 (1976) (service on attorney of record constitutes effective service on the attorney's client).

[3] More problematic, however, is appellants' assertion that the failure of the Department to provide rules prescribing procedures to be followed prior to issuance of an order requiring payment of increased royalties adversely affected appellants' substantive rights. Thus, appellants note that once the Regional Manager had determined that they owed additional royalties and demanded that these monies be remitted, appellants were faced with unpalatable choices. They could pay the monies under protest, as they did. The problem with this course of action is that, even if they were ultimately to prevail in their assertion that no additional royalties were owed, they would suffer the economic loss attendant upon the loss of use (interest) of the funds which they had paid under protest. On the other hand, if they refused to pay in compliance with the Regional Manager's instructions, they would make themselves liable for the assessment of civil penalties and possibly cancellation of the lease under 43 U.S.C. § 1350 (1982). Thus, appellants conclude, the mere issuance of the decision of the Regional Manager, prior to their being afforded an opportunity to be heard, violated their rights to due process protected by the Constitution.

There are, however, a number of difficulties with appellants' analysis. First of all, as we have indicated above, service of the October 31, 1983, letter on Enstar was constructive service upon appellants. Thus, they *were* afforded an opportunity to be heard prior to the issuance of the demand letter on November 14, 1983.²¹

²⁰ Thus, during the 1982 through 1983 period, appellants affirmatively directed Enstar to pay its royalties on the basis of \$5.00 per MMBtu. See Letters dated Sept. 23, 1982, from Elmer L. Hitt, Acting Supervisor, Gas Marketing, for TXC and Sept. 27, 1982, from Cyndi Becker, Director, Revenue Accounting, for TXC. At no time did appellants contest Enstar's authority to act as appellants' agent until Enstar cancelled the Seller's Representative Agreement on Jan. 4, 1984 (see n. 4, *supra*).

²¹ Appellants correctly point out that, while the Oct. 31 letter gave Enstar 15 days from receipt of the letter in which to submit any additional data that would demonstrate that "the prices on which royalty payments attributable to TXC's production fulfill the requirements of 30 CFR 250.64," the demand letter of the Regional Manager was issued only 13 days after Enstar received the initial letter. While this action may well be deemed premature, appellants have failed to establish how they have been adversely affected by the failure of the Regional Director to wait the full 15 days. Thus, Enstar promptly responded to this inquiry and sent the Regional Manager copies of its correspondence with TXC regarding this issue. And the record establishes that these documents were reviewed prior to the issuance of the Nov. 14, 1983, order. In the absence of any indication that further justification would be forthcoming, it seems entirely reasonable for the Regional Manager to proceed to issue the demand letter on Nov. 14. In point of fact, appellants submitted nothing to the Regional Manager until Dec. 5, 1983. Thus, even if issuance of the demand letter could be adjudged premature, appellants can show no prejudice from this action.

Second, the law is well settled that due process does not require notice and an opportunity to be heard prior to the initial decision in every case where a person may be deprived of an asserted right so long as the individual is given notice and an opportunity to be heard before the initial decision becomes final. *Citizens for the Preservation of Knox County*, 81 IBLA 209, 219 (1984); *Francis Skaw*, 63 IBLA 235, 239 (1982); *Dorothy Smith*, 44 IBLA 25, 28-29 (1979). Thus, insofar as the determination of value of the gas produced is concerned, appellants' due process rights were more than adequately protected by the right of appeal to the Director, MMS, and subsequently to this Board. *Dorothy Smith, supra*. Appellants argue, however, that, to the extent they were required to tender the money during the pendency of the appeal, they have suffered an injury since they have lost the use of that money, even if they ultimately succeed in their appeal.

The fact of the matter, however, is that appellants could have refused to tender the money. It is true, as indicated above, that such a course of action might have made them liable to the assessment of civil penalties. 43 U.S.C. § 1350(b) (1982). But, such a contingency could only occur if it were ultimately decided that appellants' substantive arguments must be rejected. We recognize that a company in appellants' situation might be reluctant to expose itself to this increased liability. But this reluctance does not alter the fact that the option still exists. That appellants ultimately decided to forego such a risk does not render their choice any less real.

Moreover, there was another option arguably available to appellants. Appellants note that they requested a suspension of the requirement that they submit the money deemed owing, expressing their willingness to post an interest-bearing bond, but that their request was denied (see Supp. SOR at 6). Appellants did not seek a review of the denial of their suspension request before this Board, but rather thereupon paid both the royalty and accrued interest under protest. However, had they, in fact, pursued an appeal before the Board, it seems reasonably clear that they would have prevailed.

Thus, in *Marathon Oil Co.*, 90 IBLA 236, 93 I.D. 6 (1986), the Board reversed a decision of the Director, MMS, refusing to permit the appellant therein to post a bond in lieu of submitting the additional royalties deemed due. In *Marathon*, the Board adopted the analysis of the court in *Placid Oil Co. v. U.S. Department of the Interior*, 491 F.Supp. 895 (N.D. Texas 1980), that the threat of lost interest on monies tendered in response to an order to pay additional royalties constituted the threat of irreparable injury, since, even if the lessee were successful, the interest could not be recovered. Accordingly, the Board held in *Marathon* that the decision of the Director, MMS, refusing to allow Marathon to post a bond in lieu of tendering the amount of royalties deemed outstanding, could not be sustained.

Admittedly, the regulation applied in *Marathon*, 30 CFR 243.2, was not adopted until September 21, 1984, over 9 months after appellants had filed their appeal with the Director, MMS. However, the

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regulation, as adopted, was expressly made retroactive to August 12, 1983, and would thus have applied in the adjudication of any appeal to this Board (*see* 30 CFR 243.2). In any event, even in the absence of a specific regulation authorizing the submission of a bond,²² the decision of the Board in *Marathon* makes it abundantly clear that the refusal of the Director, MMS, to permit the posting of a bond would constitute the infliction of irreparable injury should appellants ultimately prevail in their appeal. It could, therefore, be expected that had appellants filed an appeal from a denial of their request that they be permitted to post a bond, the appeal would have received favorable consideration by the Board.

But, as noted above, appellants chose not to appeal to this Board. Nor did they elect to seek injunctive relief in the Federal Courts. *See, e.g., Placid Oil Co. v. U.S. Department of the Interior, supra; Conoco, Inc. v. Watt*, 559 F.Supp. 627 (E.D. La. 1982). Rather, they submitted the royalty payments as directed. By doing so, they effectively waived the objection to the requirement that they submit the past royalties and accrued interest during the pendency of the appeal.

Ultimately, of course, appellants will have suffered injury by the failure of the Director, MMS, to permit them to post a bond only if they prevail on the substance of their appeal, since, if the decision of the Director is determined to be correct, they have suffered no injury by being required to tender the past royalties during the pendency of the appeal. It is to these substantive issues which we now turn our attention.

With respect to the substantive facets of the Director's decision, appellants make numerous arguments. Initially, they contend that MMS is bound by the Oil and Gas Supervisor's royalty payment instructions contained in his July 16, 1979, letter since that letter has never been revoked. They argue that they have accounted for their share of the production at the price paid by Transcontinental under its contract with appellants in accord with these instructions.

[4] The July 16, 1979, instructions from the Oil and Gas Supervisor, Accounting, Gulf of Mexico, to Enstar required that royalty payments be computed "based on the lease delivery volumes times the applicable FERC-approved sales price, or higher price if received." Appellants argue that their payments have been made in compliance therewith and that the Regional Manager lacks authority to retroactively alter this determination of value.

²² And, in this regard, we would point out that there had been a prior regulation, 30 CFR 250.81 (1979), which expressly authorized the submission of a bond in cases involving OCS oil and gas leases as well as an existing regulation, 43 CFR 3165.4 (1983), with respect to uplands oil and gas leases which also authorized the submission of a bond. It seems reasonably clear that the omission of the language authorizing the submission of a bond occurred inadvertently during the promulgation of general revisions in 1979. Compare Proposed regulation 30 CFR 250.81, 44 FR 13542 (Mar. 12, 1979), with Final regulation 30 CFR 250.81, 44 FR 61907 (Oct. 26, 1979), particularly in light of the Preamble to the Final Regulation which noted that "[t]he changes made in § 250.80 are primarily organizational in nature and have been made to clarify the provisions." 44 FR 61892.

The problem with appellants' analysis is that, at the time that the letter was issued to Enstar, the gas being produced was section 102 gas, 15 U.S.C. § 3312 (1982), the price for which was controlled by FERC. Effective November 1, 1979, high-cost natural gas, as defined by section 107(c) of the NGPA, 15 U.S.C. § 3317(c) (1982), became deregulated.²³ On October 29, 1979, interim regulations were published providing, *inter alia*, for procedures by which gas producers could obtain a final eligibility determination that their gas qualified under the Act. See 44 FR 61950. Final rules were thereafter promulgated on April 28, 1980. See 45 FR 28092. Pursuant thereto, the gas produced from lease OCS-G 1960 was determined to be high-cost gas, within the meaning of section 107 of the NGPA, and accordingly was no longer subject to FERC-approved sales prices.

As the result of this action, the letter of the Oil and Gas Supervisor ceased to have any legitimate bearing with respect to the valuation of production under this lease since a clear precondition thereof, that the production was subject to FERC-approved sales price regulation, no longer obtained. That this was an intrinsic part of the letter is made clear by reference to the controlling regulations. Thus, 30 CFR 250.64 (1970)²⁴ provided:

The value of production, for the purpose of computing royalty, shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field or area, to the price received by the lessee, to posted prices, and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value computed on the basis of the highest price paid or offered at the time of production in a fair and open market for the major portion of like-quality products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.

While a number of elements are, therefore, properly weighed in determining the value of production, this regulation establishes two general rules. Thus, in the absence of a determination of reasonable unit value by the Secretary, the highest price paid for the major portion of like-quality products sold from the field or area will normally be considered reasonable value. But, in no circumstances, shall the value be less than the gross proceeds actually accruing to the lessee. The Oil and Gas Supervisor's July 16, 1979, letter clearly reflected both of these rules. Thus, since gas prices were then controlled, the controlled price (*i.e.*, "the applicable FERC-approved

²³ Sec. 121(b) of the NGPA, 15 U.S.C. § 3331(b) (1982), provided that:

"[E]ffective beginning on the effective date of the incremental pricing rule required under section 3341 of this title, the provisions of part A of this subchapter respecting the maximum lawful price for the first sale of natural gas shall cease to apply to the first sale of high-cost natural gas which is described in section 3317(c)(1), (2), (3), or (4) of this title." The incremental pricing rule became effective on Nov. 1, 1979. See 44 FR 61951 (Oct. 29, 1979).

²⁴ We note, in passing, that appellants have argued that the regulations applicable are those regulations which were in effect as of the date of issuance of the subject lease, and not the present regulations. It is unnecessary to resolve this question with respect to the valuation regulations as we are in agreement with MMS that the substance of those regulations has remained substantially the same.

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sales price") would necessarily represent the highest price paid for the *major portion of like quality products*. Yet the Supervisor was careful to note that, if the seller obtained a higher price ("higher price if received"), royalties would be assessed on that basis.

Once production from the lease was price-decontrolled, however, the letter clearly had no continuing applicability, as there was no longer any applicable FERC-approved sales price which could be used to establish the price paid for the major portion of like quality products. Thus, the first benchmark once again reverted simply to the highest price paid for the major portion of like quality products. We note that appellants make a strenuous challenge to whether MMS has correctly determined this value. We will examine that question, *infra*. Suffice it for our present purposes to note that, to the extent that appellants contend that the letter of June 16, 1979, prevents assessing value for royalty purposes based on the price paid for the major portion of like quality products, their argument must be rejected.

Appellants also assert that the Department has established, via regulations and policy pronouncements, five rules to be used in determining "reasonable value"²⁵ for royalty valuation purposes. See Supp. SOR at 17-35. Appellants contend that these five rules consist of (1) a pricing floor rule, embodied in 30 CFR 250.64 (1970), that the reasonable value of production will be deemed to be at least as high as the gross proceeds actually received by the lessee from the disposition of that production; (2) an alternative pricing floor rule, also premised in 30 CFR 250.64 (1970), that the reasonable value of production will be deemed to be at least as high as any "reasonable unit value" determined by the Secretary; (3) a general standard that reasonable value is measured by fair market value *at the time of production*, also premised on language appearing in the 1970 version of 30 CFR 250.64 (1970); (4) a rule recognizing that a price reduced at arm's length to reflect market conditions will be deemed to properly reflect value, based on a letter dated October 19, 1984, from the Director, MMS, to appellants' counsel;²⁶ and (5) as a corollary to the preceding rule, a rule providing that prices reduced between affiliates will be tested by a benchmark derived from arm's-length prices, also derived from the October 19, 1984, letter from the Director, MMS. While appellants recognize that the second "rule," i.e., production will be valued at least as high as the reasonable unit value as computed by the Secretary, is not applicable as the Secretary has not established a reasonable "unit value" for production, they contend that the Director's decision was

²⁵ The discussion which follows will utilize the terms "reasonable value" and "fair market value" interchangeably as they both encompass the same concept.

²⁶ We are constrained to point out that, quite apart from the questionable assertion that the letter from the Director, MMS, to appellants' counsel can establish binding rules (*but see, e.g., Thunderbird Oil Corp.*, 91 IBLA 195, 204 (1986), *aff'd sub nom. Planet Corp. v. Hodel*, CV No. 86-679 BB (D. N.M. May 6, 1987); *The Joyce Foundation*, 102 IBLA 342 (1988); *Pamela S. Crocker-Davis*, 94 IBLA 328, 332 (1986)), appellants' reliance on this letter undercuts its assertion that *only* regulations (i.e., rules) in effect when the lease issued are properly applied in this appeal (see n.24, *supra*).

arbitrary and capricious because he only considered one factor, *i.e.*, the price obtained by nonaffiliated producers, to the exclusion of all other considerations.

[5] To the extent that appellants are contending that the Department has established five separate "rules," each of which must be utilized in arriving at the ultimate fair market valuation, their argument does not withstand analysis. Thus, even appellants recognize that two of these "rules" merely establish a floor for the purposes of royalty assessments. In other words, regardless of what fair market value might be deemed to be, the value for royalty purposes will not be permitted to fall below a certain specific value.

That a floor price does not necessarily result in fair market value is easily demonstrated. Thus, we could assume that on a date certain gas has a fair market unit value of \$5.00 per MMBtu. On that date, a holder of a Federal lease, either through use of superior bargaining position or shrewdness in negotiations, is able to obtain a price of \$6.00 per MMBtu. The floor provision of the regulations simply provides that the lessee will pay royalty based on a value of \$6.00 per MMBtu, irrespective of whether or not the lessee can demonstrate that \$5.00 per MMBtu is the price at which a willing and knowledgeable seller would sell and a willing and knowledgeable buyer would buy. Thus, the sole relevancy of the actual prices which appellants received, *absent independent indicia that these prices constituted fair market value*, is to establish a minimum value for royalty purposes.

Appellants' fourth and fifth "rules" are not so much independent methods of ascertaining fair market value as they are application of the general rule set forth at 30 CFR 250.64 (1970) to specific circumstances. Thus, the Director of MMS, in response to an inquiry from appellants' counsel as to situations in which, as a result of negotiations between a producer and purchaser bound by an arm's-length contract, the price of gas is reduced to reflect market conditions, replied that:

[I]f an arm's length contract, either by renegotiation or by operation of the contract terms, results in a reduced price for the gas, resulting in reduced gross proceeds from the sale, the gross proceeds would be accepted by the Minerals Management Service (MMS) as the basis for determining royalties due on the gas sold.

(Letter from William D. Bettenberg, Director, MMS, to Lynn R. Coleman, counsel for appellants, dated Oct. 19, 1984). This letter continued, however, by noting that, in those situations in which affiliated companies enter into agreements which result in a reduced price for the gas and, hence, a reduced royalty payment to the United States, the Department would look to the prices paid pursuant to arm's-length contracts in the same producing field or area. *Id.* With one important caveat, we believe that the foregoing correctly states the law. Our concern is with the inference which could be derived from the Director's initial statement that the reduced price received through arm's-length negotiations is, *ipso facto*, the fair market value for royalty purposes. This is not correct.

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Under the regulations in effect in 1970, or in 1984 when the letter was written (30 CFR 206.150 (1985)), it is clear that, while the price obtained by open and free negotiations is a relevant consideration in determining fair market value, the mere fact that a specific price is obtained is not preclusive of a determination that a higher figure represents fair market value. Thus, the simple fact that lower prices are the result of arm's-length negotiations cannot prevent the Department from determining that the new negotiated price does not adequately represent fair market value and requiring the lessee to submit royalty payments on a higher value basis than is actually obtained.

The essential difference between a lowered price obtained by arm's-length negotiations and one which is the result of a non-arm's-length negotiation is that a presumption arises in the first situation that the price obtained fairly reflects the marketplace while, in the latter case, no such presumption can be indulged. Rather, where the contract is between affiliates or subsidiaries, there must be independent indicia establishing that the contract price is one fairly derived from the marketplace. See generally *AMAX Lead Co. of Missouri*, 84 IBLA 102 (1984); *Getty Oil Co.*, 51 IBLA 47 (1980). Indeed, inasmuch as Departmental adjudications had long proceeded along such an analysis, it is obvious that, far from announcing new "rules" in his letter, the MMS Director was merely restating traditional Departmental policy.

The remaining "rule," viz., that, as a general matter, reasonable value is measured by fair market value at the time of production, borders on the tautological. However, it must be noted that the actual language of the regulation on which appellants rely provides:

In the absence of good reason to the contrary, value computed on the basis of the highest price paid or offered at the time of production in a fair and open market for the major portion of like-quality products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.

30 CFR 250.64 (1970). The interpretation of this provision and the concomitant ascertainment of fair market value are at the heart of this appeal, particularly as it relates to the demand for back royalty for the period from August 1982 through September 1983. This issue is examined *in extenso* later in the text. At this time, however, we wish to turn our attention to the demand by MMS for additional royalties for the period between March through August 1980.

In the decision under appeal, the Director, MMS, held that TXC underpaid royalty during the period from March through August 1980, since TXC's royalties were based on controlled section 102 prices while Enstar was, during the same period, tendering royalties based on deregulated section 107 prices. The Director concluded that TXC should have tendered the royalties based on the same valuation which Enstar used. The amount of royalty allegedly underpaid during this period aggregated \$114,240.62.

Appellants argue that TXC was contractually barred from renegotiating a higher deregulated price until August because price could only be redetermined annually under the annual price redetermination provision. However, this assertion is clearly at odds with the pertinent portion of the price provision in the TXC-Transcontinental contract. Thus, Article XI(3) provided, in relevant part:

If at any time during the term of the contract the Federal Power Commission (or any successor governmental agency having jurisdiction over the rates charged for gas sold thereunder) ceases to have jurisdiction over the price of gas sold, ceases to exercise control over gas sold, or permits indefinite pricing provisions to become operative in a manner applicable under the contract, then, at Seller's request, the parties shall renegotiate the price at which natural gas is to be sold under the contract. *Any such request shall be made to Buyer in writing and may be made at any time following the effective date such deregulation or indefinite pricing provisions become operative, and subsequently at intervals not more than once each year.* [Italics supplied.]

Additionally, section 4 of Article XI provided that “[t]he price so negotiated shall be effective on the first day of the month following the expiration of sixty (60) days from the date of Seller's written request for such renegotiation.”

Under this provision, appellants could have requested renegotiation of the price at any time after the effective date of deregulation, November 1, 1979 (*see n. 23, supra*). In fact, Enstar, with virtually the exact same provision, swiftly acted to avail itself of the decontrolled price. Thus, on December 11, 1979, Enstar made an interim collection filing with FERC. Two days later, on December 13, 1979, Enstar filed its Application for Determination under section 107(c) of the NGPA. On this same date, Enstar advised Transcontinental that it was exercising its option under Article XI(3) of its contract.

Enstar's Application for Determination received preliminary jurisdictional agency approval on February 27, 1980, and final approval on April 28, 1980. Final approval from FERC was obtained on June 19, 1980. Pursuant to applicable FERC rules and subject to the contractual arrangements of the producer and the pipeline company, retroactive collection of the higher rates was permitted for any period between the date of filing for the determination of eligibility and the date of determination. Furthermore, if the application for determination was filed on or before June 23, 1980, retroactive collection of the higher prices was permitted for first sales of natural gas delivered on or after November 1, 1979 (*see 18 CFR 273.204(a)(2) (1981)*).

Thus, reading the applicable FERC regulations in light of the relevant provisions of the Enstar-Transcontinental contract, Enstar was entitled to the increased prices effective March 1, 1980, and ultimately did receive an increased price of \$5.62 per MMBtu for the production between March 1 through March 30, 1980. Furthermore, the new pricing provision provided, until future renegotiation was requested, that commencing on April 1, 1980, and at quarterly intervals thereafter, the price would increase by 1-½ percent over the

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immediately preceding calendar quarter (see Letter-agreement between Enstar and Transcontinental, dated July 10, 1980).

While Enstar acted quickly to obtain the higher prices afforded by decontrol, TXC did not seek to exercise the Article XI(3) renegotiation option under its contract with Transcontinental until July 1, 1980, and, therefore, did not obtain a deregulated price (\$6.397 per MMBtu) until September 1, 1980.

As noted above, appellants assert that their failure to obtain a deregulated price at the same time as Enstar was the result of the differing dates on which Enstar and TXC, respectively, entered into their contracts with Transcontinental (Supp. SOR at 5 n.5). This assertion, however, is simply not borne out by the relevant contract provisions. There was no contractual bar to TXC's receipt of higher prices at the same time which Enstar obtained them. Rather, its failure to obtain such prices was the direct result of TXC's failure to diligently and expeditiously request renegotiation of the contract price under Article XI(3).

[6] As MMS notes, where royalty payments are dependent upon the price at which the product is marketed, oil and gas lessees are generally deemed to have an implied obligation to exercise good faith in the marketing of gas. See, e.g., *El Paso Natural Gas Co. v. American Petrofina Co.*, 733 S.W.2d 541, 550 (Tex. App. 1986); *Amoco Production Co. v. First Baptist Church*, 579 S.W.2d 280, 285-87 (Tex. Civ. App. 1979); 5 Williams & Meyers, *Oil and Gas Law* § 856.3. This obligation is strictly enforced where the interests of the lessee and the lessor diverge, as in such a situation it can no longer be expected that the lessee will attempt to maximize the selling price in order to maximize its own return. See *Harding v. Cameron*, 220 F.Supp. 466 (W.D. Okla. 1963); *Amoco Production Co. v. First Baptist Church, supra*.

It must be recognized, however, that this obligation does not rise to the level of a fiduciary duty and claims for increased royalties are subject to the defense that the lessee exercised reasonable business judgment. Thus, in *Piney Woods Country Life School v. Shell Oil Co.*, 539 F.Supp. 957 (S.D. Miss. 1982), *aff'd in part, rev'd in part and remanded*, 726 F.2d 225 (5th Cir. 1984), the court rejected claims that the lessee should have obtained a price renegotiation provision in a gas sale contract, concluding that the terms received represented the best obtainable price. *Accord Poafpybitty v. Skelly Oil Co.*, 517 P.2d 432 (Okla. 1973); *Gazin v. Pan American Petroleum Corp.*, 367 P.2d 1010 (Okla. 1962).

The instant case, however, does not present a situation in which a renegotiation clause was not included and appellants assert that there were sound business reasons for the failure to obtain such a provision. On the contrary, the TXC-Transcontinental contract clearly provided for the renegotiation of the contract price after deregulation. TXC was simply dilatory in seeking a renegotiated price. Appellants have

advanced no justification for TXC's failure to timely invoke the renegotiation provisions of its contract with Transcontinental and none comes to mind. We conclude, therefore, that the Director was correct in demanding additional royalties for the period from March through August, 1980, based on his determination that the reasonable value of the gas produced was established by the Enstar renegotiated price.²⁷

Appellants point out that the price which TXC obtained, commencing on September 1, 1980, was higher than that received by Enstar for the period from September 1980 through March 1981. This was a result of the fact that this was a period of rapid price escalation with respect to natural gas and thus the price had continued to rise after Enstar had established a renegotiated price with Transcontinental. We recognize that, had TXC not waited until July 1, 1980, to exercise its price renegotiation option, it would have obtained a lower price (\$5.62 per MMBtu) and the United States would have received proportionately lower royalty payments for the period from September 1980 through February 1981. Inferentially, appellants argue that it is unfair to assess their royalty at the price obtained by Enstar for the period from March through August 1980, and then base the royalty on the higher rates obtained by TXC from September 1980 to March 1981, when the only reason that these higher rates were obtainable was that TXC had delayed in renegotiating the sale price with Transcontinental.

While there is a certain surface appeal to appellants' argument, deeper reflection shows that it is intrinsically flawed. First of all, as we have held above, the price renegotiated by Enstar represented reasonable value for production from the lease for the period from March through August 1980, and appellants were properly directed to compute the royalty value of their production on that basis. After September 1, 1980, however, appellants *obtained* a higher price. Regardless of whether the price received by Enstar thereafter might still be considered a "reasonable value of the product," after September 1, 1980, appellants were obligated to tender royalties at the higher rate, since the applicable regulation clearly provided that, "[u]nder no circumstances shall the value of production * * * for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof * * *." See 30 CFR 250.64 (1970).

Second and of equal importance is the fact that the adverse effects generated by TXC's delay in exercising its renegotiation option were not limited to the period from March through August 1980. As pointed out earlier, under Article XI(3) of both the Enstar-Transcontinental and the TXC-Transcontinental contracts annual price redeterminations were permitted *after* the initial price redetermination following

²⁷ We note that Chevron failed to invoke its right to a price renegotiation until Nov. 6, 1980, and did not obtain a higher price (\$6.5904 per MMBtu) until Feb. 1, 1981. While the record before the Board does not establish whether MMS has assessed Chevron for underpayment of royalties between Mar. 1, 1980 to Feb. 1, 1981, we note that the rationale in the text with respect to TXC's obligations would be equally applicable to Chevron's situation.

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decontrol. Thus, Enstar was able to obtain another renegotiated price as of March 1, 1981, at a higher rate than that being obtained by TXC. MMS did not, however, attempt to assess appellants additional royalties for this increase. Rather, as was noted in a memorandum dated March 23, 1984, from the Royalty Manager, Houston Regional Compliance Office, MMS, to the Chief, Appeals Division, MMS:

For the period September 1980 through July 1982, we noted that prices received by TXC for its gas did vary up and down from the prices received by Enstar for its gas. Royalties for Enstar's share of the gas were always based on the FERC approved sales prices. In those months where TXC's prices were higher than the arm's-length contract prices received by Enstar, the royalties attributable to TXC's share of the gas were based on their price received which is in accordance with the Oil and Gas Supervisor's instructions. *For some months, Enstar's prices were higher than those received by TXC but not to a degree where we sought to question whether the non-arm's-length contract price received by TXC was not similar to the arm's-length contract price received by Enstar.* [Italics supplied.] *Id.* at 5-6.

The decision of the Director, MMS, with respect to the question of additional royalties owing for the period from March through August 1980 is thus a balanced approach which takes into account the need to avoid undue rigidity in the determination of what constitutes a reasonable value for royalty purposes and, at the same time, enforces the obligation of fair and responsible dealing between the lessee and the Government. If appellants find themselves in the position of owing additional royalties for this period it is only because TXC failed to act in an expeditious manner to protect both its own interests and those of the United States.

We turn now to the determination of the MMS Director that additional royalties were also owing for the period from August 1982 through September 1983. As indicated above, until August 1982, the prices received by all three working interest owners of OCS-G 1960 continued to move upward, driven originally by the price renegotiation provisions of their respective contracts with Transcontinental and, subsequently, by the quarterly price escalations built into those contracts. By August 1982, however, the economics of the natural gas market had undergone a radical reversal from the period during which these contracts had been entered into. There is no question but that the natural gas market had proceeded from a short supply situation (a seller's market) in 1978 to a condition marked by an overabundance of supply, at least at previously prevailing prices (a buyer's market) by mid-1982.

The fall in gas prices was made especially precipitous by the simultaneous collapse in elevated oil prices. Since, for many industrial applications, gas and oil may be interchanged, the fall in oil prices led to increased downward pressure on the price of natural gas.²⁸ Thus,

²⁸ While there could be substantial initial expense in any switching over from gas to oil or vice-versa, long-term price differentials between oil and natural gas could make these expenditures economical, as, indeed, they had in the early 1970's when rapidly escalating oil prices, at a time of natural gas price control, induced many companies to shift from oil to gas.

appellants assert that, by 1982-83, new contracts governing OCS gas were being negotiated for approximately \$4.00 per MMBtu. Further, such contracts often contained market-out provisions and normally avoided any take or pay requirements, in direct contrast to those contracts entered into at the end of the 1970's, such as the three contracts between Transcontinental and the working interest owners of the instant OCS lease.

Caught in the middle of this economic reversal were numerous pipeline companies which, in the days when ever-increasing oil and gas prices were deemed an intrinsic part of the economic landscape, had entered into gas purchase contracts with built-in price escalators and large take or pay obligations. Clearly, Transcontinental was numbered among these (*see n. 12, supra*). To the maximum extent possible, these companies invoked market-out provisions and other mechanisms to lower per-unit costs. There still, however, remained a number of gas-purchase contracts which were, because of their provisions, not susceptible to reductions in quantity or in price. Included among these were the three contracts entered into between Transcontinental and TXC, Enstar, and Chevron, respectively.²⁹

As noted above, by letter dated June 1, 1982, Transcontinental requested that TXC accept a reduced price of \$5.00 per MMBtu (inclusive of tax reimbursement and all other adjustments and escalators) for two gas purchase contracts between TXC and Transcontinental covering production on the OCS, including the contract covering OCS-G 1960. Transcontinental also requested that TXC "voluntarily reduce deliveries and associated potential take-or-pay obligations by 25% from current levels." This letter expressly noted that "[w]hile we recognize that you are not contractually required to agree with our request, your favorable consideration would be appreciated."

In marked contrast with the delay which had preceded TXC's election to renegotiate a deregulated price in 1980, TXC responded to Transcontinental's request with alacrity. By letter dated June 2, 1982, TXC agreed to this price reduction and agreed to make the reduction retroactive to May 1, 1982.³⁰ TXC justified its decision as "in the interest of protecting its long term gas market."

The same request to which TXC so rapidly responded in the affirmative was also apparently sent to both Enstar and Chevron (*see Supp. SOR at 23*). Neither chose to accept this "proposal." As a result, therefore, while the Enstar price rose from \$9.325 per MMBtu in the

²⁹ While we noted above that, by 1982, all three contracts contained a limited market-out provision, allowing for a reduction in the price paid where Transcontinental's average rolled-in gas cost at New York City exceeded the Btu equivalent cost of the lowest priced No. 2 fuel oil, this provision was not utilized during the period in question with respect to any of the three gas purchase contracts.

³⁰ This was the date that market-out reductions were made effective as to those contracts which Transcontinental had entered into which made allowance for a general market-out. As noted above, however, no such general market-out provision was applicable to the instant TXC-Transcontinental contract. Moreover, by making the decrease retroactive to May 1, 1982, the parties were also amending Article XI(4) of the contract, since that provision clearly made any renegotiated price effective 60 days *following* the request for renegotiation. Indeed, appellants now suggest that, since they tendered payment for June and July at the "old" contract rate, they should receive a refund for "overpaid royalties" (*Supp. SOR at 5 n.5*).

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last quarter of 1982 to \$9.607 per MMBtu by the second quarter of 1983, the TXC price remained pegged at \$5.00 per MMBtu for its share of production from the same lease.

On May 31, 1983, pursuant to another request from Transcontinental, TXC agreed to a further reduction of price, this time from \$5.00 per MMBtu to \$4.00 per MMBtu. This agreement was made retroactive to May 1, 1983. It also provided that "in exchange for TXC's agreement to forego revenue otherwise legitimately available to it," Transcontinental agreed that the Excess Royalty provision of the original contract would be applicable to this agreement.

Less than 2 months thereafter, TXC and Transcontinental agreed to a major restructuring of their relationship. As was noted earlier in the text, two agreements were entered into on July 12, 1983. The first, which had an effective date of January 1, 1984, and which we have termed the General amendment, involved a general waiver of *outstanding take-or-pay liabilities* with respect to a large number of existing contracts, and limited future take-or-pay obligations to TXC's proportionate share of Transcontinental's market. Further, the agreement expressly provided that "[i]n the event [Transcontinental] has not received the volumes of gas paid for but not taken, within five (5) years of the date such deficiency was incurred, TXC shall refund to [Transcontinental], with interest * * * all sums still outstanding for unrecovered volumes." See Section 3 of the General agreement. The effect of this last provision, of course, was to essentially abrogate *any* take-or-pay obligations on the part of Transcontinental. The putative justification for this agreement was "an effort to maintain the resale markets for the gas produced under the Subject Contracts and improve the stability of those markets."

On that same date, a revision to Article XI of the contract between TXC and Transcontinental with respect to lease OCS-G 1960 was also agreed to, with an immediate effective date. This revision added a new section 8 to Article XI, which, in effect, granted Transcontinental a broad market-out right as opposed to the limited market-out right which had theretofore existed. The agreement recited that the agreed-to revision was in "partial consideration" of Transcontinental's willingness to enter into purchase agreements with respect to certain other gas reserves.

Effective 8 days after these two revisions, TXC transferred all of its assets, including its interest in the subject lease, to Transco Exploration Partners, Ltd. (TXP), in exchange for a 90-percent interest therein. The remaining 10-percent interest was offered and sold to the public. TXP, in turn, operated through TXPO, in which TXP owned a

99-percent limited partnership interest while TXC and Transco Energy Co. jointly held a 1-percent general partner's interest.³¹

By letter dated September 27, 1983, Transcontinental informed appellants that its market position had continued to deteriorate. Accordingly, "[i]n an effort to forestall further erosion of the natural gas markets on its system," Transcontinental exercised its newly acquired rights under Article XI(8) to market-out appellants' production from OCS-G 1960. Various pricing options were presented. Appellants chose an option providing \$3.40 per MMBtu.³²

As might well be expected, the sharp decline in royalty payments for appellants' 15-percent interest in the subject lease, particularly when viewed in light of the continued upward trend for the remaining 85 percent of the lease, eventually came to the attention of MMS, and the proceedings which have culminated in this appeal commenced.

[7] While appellants do not dispute the facts set forth above, they strenuously argue that they have tendered the proper royalty for the period in question in conformity with the regulations. Thus, they argue that the Transcontinental market-out prices fairly depicted the reasonable value of gas being produced and sold at the times that those prices were in effect for a majority of the lease interests in the Gulf of Mexico. This, they urge, is the test applicable under 30 CFR 250.64 (1970), i.e., the "value computed on the basis of the highest price paid or offered at the time of production in a fair and open market for the major portion of like-quality products." Appellants contend that, in the absence of even an allegation that they received more money from Transcontinental, the value which they received from Transcontinental demonstrably represented fair market value and served as the basis upon which their royalty payments should be calculated.

MMS counters by noting that the non-arm's-length agreements between appellants and Transcontinental must be examined in the light of the arm's-length Transcontinental transactions with Enstar and Chevron, respectively, which, MMS suggests, are the proper standard from which to determine reasonable value for production, since they represent 85 percent of the production from the lease. Judged in this light, MMS argues, there is no question that the price obtained by appellants does not represent a "reasonable value of the product."

Appellants devote considerable time and effort in an attempt to establish that all natural gas produced from the OCS is intrinsically the same, that the relevant field or area for the purposes of making value comparisons is the entire Gulf of Mexico, and that the market-out prices which Transcontinental was offering to its buyers were

³¹ We note that, while it was the apparent intent of the parties that TXC assign its assets to TXP and then for TXP to reassign them to TXPO (see Letter dated July 15, 1983, from TXC to Transcontinental), in actual fact, TXC assigned its interest in the subject lease directly to TXPO. See Assignment of OCS-G 1960, signed July 15, 1983.

³² Since this option was only available to suppliers who had more than one gas purchase contract with Transcontinental, at least one of which did not have a market-out provision, it was clear that the availability of this option to appellants was the result of some lease other than OCS-G 1960, since, by this time, the purchase contract covering that lease had been duly impressed with a general market-out provision (see discussion, *supra*).

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reflective of the general market price at that time. The conclusion which they obviously hope to foster is that the price which they obtained for the natural gas for the period from August 1982 through September 1983 was at least as high as the price paid for a majority of like-quality products in the area (if not higher). But, even if appellants were successful on each element of their analysis,³³ the point which they ignore is that the regulation provides that value computed on the basis of the highest price paid at the time of production for the major portion of like-quality products in the area will be considered a reasonable value, “[i]n the absence of good reason to the contrary.” 30 CFR 250.64 (1970) (italics supplied). And, compelling reasons exist for declining to accept the prices received by appellants as a “reasonable value” for the production from lease OCS-G 1960.

It may well be true that anyone attempting to make an initial sale of natural gas on the OCS in mid-1982 would have found a price of \$5.00 per MMBtu acceptable considering the prevailing market conditions. The fact of the matter, however, is that TXC was not in *that* market. On the contrary, TXC, through the vicissitudes of fortune, had managed to secure for itself an envious position. It had a contract requiring Transcontinental to purchase 90 percent of its delivery capacity of natural gas (Article VI) at a price (\$8.496 per MMBtu as of September 1, 1981, with automatic quarterly escalations of 1-½ percent thereafter) substantially in excess of the then-going rate. Moreover, TXC’s contract contained a take-or-pay requirement for 90 percent of its delivery capacity, and the contract did not contain a general market-out provision which would permit Transcontinental to obtain relief from adverse market conditions. Yet, in less than 2 years, TXC had managed to exchange this contractual arrangement for one in which it was obtaining \$3.40 per MMBtu and which, effectively, had no minimum purchase requirement even at that price. In addition, TXC had waived all future, as well as *past*, take-or-pay liability. The transcendent question is “Why”?

Appellants really have no answer. They make repeated references to the difficulties in which Transcontinental found itself. But, appellants fail to explain how these difficulties of its purchaser compelled TXC to surrender valuable contract rights and to abandon a dominant bargaining position. Appellants strongly object to the assertion by MMS that the only reason TXC was so receptive to Transcontinental’s repeated requests to lower the price which it paid for TXC’s production and otherwise abandon a favorable bargaining position was that they

³³ Without embarking on a point-by-point refutation of appellants’ assertions, we would suggest that the contention that the entire Gulf of Mexico is the relevant area for comparison of prices borders on the ludicrous. The language in the regulation requires reference to “the field or area where the leased lands are situated.” Since this regulation was originally promulgated in 1954 and, by its terms, applies only to the OCS, all of the leased lands would have been “situated” in either the Gulf of Mexico or off the West Coast. Thus, there would have been no need to make reference to the “field or area” where the lands were “situated.”

were both wholly owned by the same parent corporation. But if this is not the explanation, what is?³⁴

From the point of view of the parent corporation, it is generally a matter of no moment as to what price the producer (TXC) can exact from the pipeline (Transcontinental) since these costs will be passed on to the ultimate purchaser. There are, however, important caveats. Thus, to the extent that the producer must pay royalty on the sold product, there is an in-born bias against higher producer prices. The reason for this can be seen in the following example. For the sake of simplicity, we will assume that a producer, subject to a 10-percent royalty interest, is selling 100,000 MMBtu of natural gas for \$5.00 per MMBtu. The royalty payment is thus \$50,000. If, however, the price goes up to \$10.00 per MMBtu, the royalty interest payment rises to \$100,000. From the point of view of the producer, this may be readily acceptable since its gross income less royalty has risen from \$450,000 to \$900,000. However, from the perspective of the pipeline, its expenditure has risen from \$500,000 to \$1,000,000. More importantly, insofar as the parent is concerned, absent consideration of profit, the rise in the price per MMBtu actually has a negative impact on the net return to the parent since the net outflow from the parent has increased from \$50,000 to \$100,000, the amount of the royalty payment. Of course, so long as the pipeline is able to pass along its increased cost, this creates no problem, particularly if the pipeline's own profit is a function of its expenditures.

Problems result, however, when the pipeline is no longer able to pass along all of its costs. And it is at this point that the nature of affiliated companies distorts the normal marketplace. Thus, generally speaking, a producer will seek to maximize its return, even if its purchaser is suffering an economic loss through the transaction. But where affiliated companies are involved, it is better for the parent corporation that any loss be suffered on the production side rather than the distribution side of the ledger. The reason, of course, is that royalty must be paid on production. Returning to our example, if we assume that the pipeline is only able to allocate \$800,000 in income to the purchase price of \$1,000,000, the pipeline is losing \$200,000 on the transaction. If we assume that the costs of production (not including the royalty interest) is \$8.00 per MMBtu, the producer is showing a net profit of \$100,000. The parent corporation is thus suffering a net loss of \$100,000.

³⁴ Appellants' contention that no undue influence was exerted by Transco Energy Co. over the agreements between Transcontinental and TXC, both wholly owned subsidiaries, is sharply undercut by a contemporaneous statement made before the Federal Energy Regulatory Commission in Docket No. RP-88-96-000. Therein, it was stated:

"Transco has not treated its affiliated producer, Transco Exploration Company (TXC), any more favorably than other producers. In fact, TXC has been treated *less favorably* than non-affiliated producers in certain circumstances, most notably with respect to Transco's reduction of prices paid to TXC for deregulated gas even under contracts between Transco and TXC which did not contain 'market-out' clauses."

(Written Statement of Transcontinental Gas Pipeline Corp., filed July 5, 1983, at 18 (italics in original)). Since Transcontinental was able to "treat" TXC differently only with TXC's consent, the implication seems clear that TXC's consent was not the product of a free choice, uncolored by the affiliated relationship between Transcontinental and TXC, but rather was a direct result of this status.

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In the above scenario, it is in the economic interest of the parent corporation to lower the price charged to the pipeline. Thus, if the price reverts to \$5.00 per MMBtu and all other factors remain the same, the pipeline goes from a \$200,000 loss to a \$300,000 profit, the producer goes from \$100,000 profit to a \$350,000 loss and the parent corporation has cut its total transactional loss from \$100,000 to \$50,000.³⁵ This entire reduction, however, is made at the expense of the royalty interest which has seen its income decline \$50,000. In effect, the royalty interest is being used to subsidize the pipeline's operating expenses. It is this very real possibility that animates the concerns which arise when affiliated parties deal with each other. It is because of this distortion in the normal economic marketplace that transactions between affiliates are routinely examined closely in order to make sure that the actions are the result of sound business judgment untainted by the special relationship that obtains between affiliated concerns. And it is at this point that appellants have totally failed to posit any justifiable business reason, other than their affiliated status, for their repeated acquiescence in the acceptance of lower prices for the production from the lease.

Certainly, it was not the consideration offered by Transcontinental. No real consideration, whatsoever, was offered for TXC's agreement in June 1982 and May 1983 to accept \$5.00 and \$4.00 per MMBtu, respectively, for its production.³⁶ Nor was any consideration proffered for the effective abandonment of all take-or-pay liabilities in the General amendment which TXC agreed to on July 12, 1983. Indeed, except for the July 12, 1983, contract amendment adopting a general market-out provision, all of the contractual documents are completely silent as to any benefits flowing to TXC. And even for the July 12 contract amendment, only the most ephemeral form of consideration was offered—an agreement by Transcontinental to purchase gas from other wells at unspecified prices and under unstated terms.

We recognize that there may have been other intangible items which made the Transcontinental "offers" more appealing than they might otherwise seem. Yet, though offered the same arrangement, neither Enstar nor Chevron, the working interest owners of 85 percent of the production from the lease, sought to avail themselves of the

³⁵ We fully recognize that there may well be regulatory constraints on the ability of the pipeline to maintain its selling price where the cost of the gas has declined over 50 percent. But this merely imposes a downward limitation on the economic principles governing the relationship of affiliates in the marketplace. We also note that, in their Reply to MMS' Answer, appellants argued that FERC had determined that interstate gas pipelines would not be allowed to include in their cost of gas prices paid to affiliates which are in excess of the weighted average prices paid in comparable purchases by the pipeline to nonaffiliated suppliers or by other pipelines (Reply at 4). It is, of course, unclear whether this position has any effect on the instant matter, since the ultimate question would be the nature of "comparable" purchases. In any event, this Board is without authority to pass on the wisdom or correctness of FERC's actions in regulating interstate pipelines. See generally *Hoosier Environmental Council*, 109 IBLA 160, 174 (1989).

³⁶ Admittedly, the May 1983 agreement made a reference to the fact that the "excess royalty payments" protection afforded by Article XI(6) would apply to the arrangement. But, by its own terms, this provision would have applied under the original contract. A restatement of certain existing rights cannot provide consideration for the abandonment of others.

opportunity to obtain lower prices under less favorable contractual conditions. Only TXC, a wholly owned subsidiary of Transco Energy Co., agreed to the offer Transcontinental, another wholly owned subsidiary of Transco Energy Co., was making.

Appellants suggest that it would be wrong to impute improper motivation in the foregoing transactions because they have fiduciary responsibilities to their shareholders. This argument is fallacious for two reasons. First of all, the mere existence of fiduciary duties does not establish that those duties have been faithfully discharged. Second, and more critically, no such fiduciary responsibilities existed until July 30, 1983, *after* all of the relevant contractual revisions had been agreed to by TXC. By the time TXC, the wholly owned subsidiary, transferred the subject lease to TXPO, of which 10 percent is publicly held, the TXC-Transcontinental contract already contained a general market-out provision and no longer contained a realistic take-or-pay obligation. TXC had already agreed to accept \$4.00 per MMBtu for its production. In short, the damage had already been done.

We noted above that an oil and gas lessee has an obligation of fair dealing with its lessor. By abandoning the favorable terms of their gas purchase contract with Transcontinental and seeking to pay the royalties owed to the United States on the reduced amounts which they received, appellants violated this duty. In order to ascertain what was a reasonable value of production, the Director, MMS, was perfectly correct in looking to the prices obtained by Enstar, which owned 45 percent of the production from the lease and which was in the same situation as appellants prior to the actions delineated above. His demand for additional royalties plus accrued interest was fully in accordance with the law.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director, MMS, is affirmed for the reasons set forth above.

JAMES L. BURSKI
Administrative Judge

I CONCUR:

Wm. PHILIP HORTON
Chief Administrative Judge

APPEAL OF D. H. BLATTNER & SONS, INC.

IBCA-2589 & IBCA-2643

Decided: *September 18, 1989*

Contract No. 5-CC-60-00990, Bureau of Reclamation.

The Government's Motion to Dismiss and Appellant's Motion for Summary Judgment Denied; the Government's Cross Motion for Summary Judgment Granted.

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1. Contracts: Contract Disputes Act of 1978: Interest--Contracts: Disputes and Remedies: Generally

Under the Prompt Payment Act no interest is payable on an agreed upon equitable adjustment for a change until a modification reflecting the agreement between the parties has increased the contract price, since prior to that time there was neither a proper invoice nor a required payment date as specified in the Prompt Payment Act.

2. Contracts: Contract Disputes Act of 1978: Interest--Contracts: Disputes and Remedies: Generally

A claim for interest under the Contract Disputes Act from the date a certified request for an equitable adjustment is received is denied, where the Board finds (i) that the letter containing the certification was an invitation to the Government to negotiate on the amount of equitable adjustment to be provided; (ii) that the letter did not constitute "a written demand" by the contractor, "seeking, as a matter of right, the payment of money in a sum certain"; and (iii) that the letter did not constitute the submission of a claim to the contracting officer for a decision on which interest would be payable from the date of receipt to the payment thereof.

APPEARANCES: M.T. Fabyanske, Holly A.R. Hart, Fabyanske, Svoboda, Westra & Davis, Saint Paul, Minnesota, for Appellant; Karan L. Dunnigan, Department Counsel, Billings, Montana, for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government initially moved to dismiss the appeal docketed as IBCA-2589 on the ground that appellant (Blattner) had failed to certify its claim as required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. While denying that a claim for CDA interest in excess of \$50,000 (as opposed to the underlying claim) is required to be certified,¹ Blattner did certify its claim for interest in the amount presently claimed of \$61,181 and requested a contracting officer's (CO's) decision. When the CO denied the claim, Blattner timely appealed his decision to which docket number IBCA-2643 was assigned. As the two appeals involve factual and legal issues which are identical, they have been consolidated for the purpose of decision.

Background

On March 22, 1985, the Bureau of Reclamation (Bureau/Government) awarded a contract to D. H. Blattner & Sons, Inc., for major modifications to the Pactola Dam, Pick-Sloan Missouri Basin Program, South Dakota. Notice to proceed was received by Blattner on

¹ In support of its position Blattner cites and quotes from the decisions in *J.M.T. Machine Co. v. U.S.*, 826 F.2d 1042, 1045 n.1 (Fed. Cir. 1987) ("[t]here is no provision in the CDA for a claim for interest, alone") and in *George Shadie Electrical Associates, Inc.*, GSCBA No. 7627 (Feb. 3, 1988), 88-2 BCA ¶ 20,720 at 104,706 ("The Contract Disputes Act of 1978 has its own provision for interest and . . . requires no separate claim for interest") (Appellant's Motion for Summary Judgment at 11). All of the cases cited by the Government in its motion to dismiss are inapposite to the question presented. The Board finds that there was no CDA requirement for the appellant to separately certify its claim for interest. *Brookfield Construction Co. v. U.S.*, 228 Ct. Cl. 551, 562 (1981).

March 25, 1985. The work was accepted as substantially complete on November 6, 1987. A unilateral modification to the contract (Modification No. 010) was issued on March 17, 1986. The changes specified in Modification No. 010 resulted from unforeseen variations in the availability of rockfill material for performance of the contract work. The modification stated that any proposal for an equitable adjustment attributable to the change should be submitted to the CO within 30 calendar days from the contractor's receipt of the changes (Appeal File, IBCA-2589, Exhibit 3 (hereafter AF I, Exh. 3)).

By letter dated June 11, 1986, Blattner requested an equitable adjustment in the amount of \$1,705,381 and a net time extension of 11.5 months, moving the completion date up to November 4, 1987. The concluding paragraphs of the June 11 letter read as follows:

Obviously, we already have a considerable investment in this change because of the no-pay stockpiling work. This puts us in the position of financing the Government construction effort; consequently, we would appreciate anything you can do to expedite negotiation of this change.

In accordance with the requirements of Specifications section 1.1.8 part (d)(2) [²] we hereby certify that this claim is made in good faith; that the supporting data are accurate and complete to the best of our knowledge and belief; and that the \$1,705,381 requested accurately reflects the contract adjustment for which the Government is liable.

(AF I, Exh. 8).

Prior to the parties agreeing upon the amount of the equitable adjustment attributable to the issuance of Modification No. 010, the provisional payments authorized to be made to Blattner totaled \$720,000. Modification No. 017 dated October 8, 1986, authorized payments up to \$295,000 and Modification No. 044 dated September 22, 1987, authorized additional payments to be made in the amount of \$425,000 (AF I, Exhs. 4 and 5). Negotiations concerning the amount of the equitable adjustment to be provided did not commence until April 1988. The negotiations culminated in the parties agreeing upon an equitable adjustment in the amount of \$1,022,000, excluding the amount claimed by Blattner for interest. Modification No. 054 increased the contract price by the lump sum of \$1,022,000. Blattner signed the modification on June 20, 1988, but excepted from the release language included therein payment of interest on the claim as provided in the *United States Code*, Title 41, section 611. Modification No. 054 was signed by the CO on July 1, 1988, and became effective on that date (AF I, Exh. 6).

In a letter to the CO under date of June 20, 1988, Blattner stated that it was again requesting interest upon the amount agreed upon for the equitable adjustment and that if the CO disagreed that it was entitled to interest thereon, a CO's decision was requested (AF I, Exh. 10). On August 29, 1988, the CO denied Blattner's interest claim

² The reference is to the "Disputes" clause of the contract which incorporates into the subparagraph cited language from the CDA requiring contractors to certify all claims against the Government for more than \$50,000 (41 U.S.C. § 605(c)(1)).

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finding that it was not entitled to interest on the amount of the equitable adjustment under either the CDA or the Prompt Payment Act (PPA), 31 U.S.C. §§ 3901-3906.³

While protesting the position of the Government that a claim for interest of more than \$50,000 must be certified, Blattner nevertheless certified its claim for interest in the amount of \$65,181 and submitted the same to the CO for decision by its letter of February 7, 1989 (Appeal File, IBCA-2643, Exhibit 11a (hereafter AF II, Exh. 11a)). By unilateral Modification No. 063 dated April 7, 1989, the CO denied the certified claim for interest (AF II, Exh. 1). In support of the denial, the CO stated:

The Contractor's proposal of June 11, 1986 for adjustment is not a claim because the Contractor was not entitled to payment of money for the change work as a matter of right. No payments for change work can be made until the value of the change work becomes a part of the contract price by adoption of a modification.

(AF II, Exh. 1).⁴

Discussion

Shortly after completion of briefing on the instant appeals, the Board rendered its decision in *Columbia Engineering Corp.*, IBCA-2322 (Apr. 21, 1989), 26 IBCA 167, 89-2 BCA ¶ 21,762, 31 G.C. ¶ 168. The appeal in *Columbia* involved interest claimed to be owing under the PPA and CDA for delays in incorporating four modifications into the contract.

Prompt Payment Act Interest

The position of the appellant in *Columbia Engineering, supra*, was that the reference in the PPA to "proper invoice" was to the documentation supporting its claims for extra compensation and that the "required payment date" under the contract was within 30 days after the Government received the proper documentation supporting its claims since a specific payment date for the modifications was not established by the contract.

The Board rejected the appellant's view of when a "proper invoice" could be said to have been received for the purpose of determining when PPA interest commences to accrue on a claim for equitable adjustment. After quoting section 3903 of the PPA and after taking note of the appellant's position that, in the absence of a specified

³ (AF I, Exh. 1). In the Complaint filed in IBCA-2589, appellant requested that interest also be awarded under the PPA (Complaint, paragraphs 10 and 11 at 3).

⁴ This question was addressed in *Ricway, Inc.*, ASBCA No. 30205 (Oct. 23, 1985), 86-1 BCA ¶ 18,539 at 93,136, from which the following is quoted:

"At the time appellant submitted invoice No. 1, the 'total' contract price was the award price of \$71,055 which had not yet been adjusted to include the value of the changed work. The fact that appellant had submitted to the OICC its proposal for the increase in the contract price did not make the requested amount a part of the contract price. The value of the changed work did not become a part of the contract price until adopted in Modification P00001." See also *Hunter Construction Co.*, ASBCA No. 32198 (May 15, 1989), 89-2 BCA ¶ _____.

payment date in the contract, interest should accrue within 30 days after the documentation claiming compensation for the modification work was received by the Government, the Board stated:

There is an obvious problem with this position in that it presupposes that the amount claimed by appellant for the added or changed work is correct and therefore promptly payable. This position does not allow for the exercise of any judgement by Government personnel in evaluating the claimed compensation and determining it to be in error or excessive. Acceptance of this position would be tantamount to saying that amounts claimed by contractor for changes become immediately due and payable without negotiation, evaluation for merit or error, or other considerations of validity; all on the principle that the Prompt Payment Act places accrual of interest over the determination of merit of the claimed compensation.

The documentation submitted by appellant for each of the modifications were simply proposals for adjustments of the contract price to pay for the changed work. Prior to incorporation into the contract, the proposed price is subject to change by reason of various reviews by Government personnel and by reason of negotiation with appellant. Until a proposal is accepted by the Government and incorporated into the contract, there exists no sum certain owing to the contractor. Therefore, there cannot be a proper invoice against the contractor's proposed price adjustment prior to incorporation of the agreed amount into the contract.

(26 IBCA 171, 89-2 BCA ¶ 21,762 at 109,509-10).

Although Blattner does not specifically refer to the PPA in its Motion for Summary Judgment, Blattner is claiming for PPA interest (note 3, *supra*). Our decision in *Columbia Engineering*, *supra*, is considered to be dispositive of Blattner's PPA interest claim. There the Board expressly found that "there cannot be a proper invoice against the contractor's proposed price adjustment prior to incorporation of the agreed amount into the contract" (26 IBCA at 171, 89-2 BCA ¶ 21,762 at 109,510). In the instant appeals this did not occur until the CO signed Modification No. 054 on July 1, 1988 (AF I, Exh. 6).

Under the rationale of *Columbia Engineering*, *supra*, and *Ricway, Inc.* (note 4, *supra*), no PPA interest could accrue before July 1, 1988 (i.e., the date when the amount agreed upon as the equitable adjustment was incorporated into the contract). Since the PPA provides that interest thereunder ceases to accrue after a claim is filed under the CDA (31 U.S.C. § 3906(b)(1)(A)), and since Blattner's letter of June 20, 1988, requesting a CO's decision constituted the filing of a CDA claim, no PPA interest could accrue after that date.

For the reasons stated and on the basis of the authorities cited, the claim for PPA interest is denied.

Contract Disputes Act Interest

The Board in *Columbia Engineering*, *supra*, also found that the appellant's proposals for an equitable adjustment of the contract price were never claims within the meaning of the CDA and that therefore the appellant was not entitled to CDA interest. In support of its holding, the Board found (i) that in the circumstances present the appellant could not contend that the claimed contract price adjustments were appealable claims under the CDA; (ii) that the

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proposed adjustments were not denied by the CO; (iii) that the appellant did not make a written demand for a prompt decision and appeal the failure of the CO to render such a decision; and (iv) that the appellant had not excepted the interest being claimed from the release included in the modifications which it signed. The Board contrasted the situation present in *Columbia, supra*, with that present in *A & J Construction Co.*, IBCA-2269 (June 29, 1987), 94 I.D. 211, 87-3 BCA ¶ 19,965, in which the appellant not only had expressly excepted the interest claim from the release it executed, but had clearly converted its demand for payment⁵ into a claim under the CDA by certifying it and making a written demand for a CO's decision (26 IBCA at 171, 89-2 BCA ¶ 21,762 at 109,510).

No definition of claim is contained in the CDA. *Mayfair Construction Co.*, ASBCA No. 30800 (Dec. 23, 1986), 87-1 BCA ¶ 19,542 at 98,742.⁶ In the absence of a CDA definition, the term "claim" as used in the CDA has been given a variety of meanings by the courts and by the boards of contract appeals depending upon how the word "claim" is defined in the Disputes clause contained in the contract in issue,⁷ in the applicable regulations, in the CDA's legislative history, or in some combination of these sources of definition. In the final guidelines issued by the Office of Federal Procurement Policy (OFPP), a claim is defined as "a written demand by one of the contracting parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or related to the contract" (OFPP Policy Letter 80-3, May 9, 1980, 45 FR 31,035). The Disputes clause contained in the instant contract (48 CFR 52.233-1) defines "claim" to mean "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" (AF I, Exh. 2).

In this case appellant requests that it be awarded interest in the amount of \$65,181 on the equitable adjustment of \$1,022,000 provided in Modification No. 054. To support the interest claim, Blattner relies

⁵ In *A & J* the Board noted that a dispute as such is not required for the filing of a claim, after which it stated: "[S]With respect to interest, we do not think that any computation of the interest amount itself is required; but the underlying claim upon which the interest claim is based should be definite and specific, and it should be accompanied by a demand for payment and by sufficient documentation and information to enable the CO to make an informed decision as to its merits." (94 I.D. at 219, 87-3 BCA at 101,080).

⁶ In *Mayfair* the Armed Services Board denied a contractor's claim for interest upon the amount agreed upon to settle a convenience termination where it found that the contractor's settlement proposal was not a disputed claim under the contract's Disputes clause, even though the contractor had certified its proposed settlement and identified it as a claim under the CDA.

⁷ The ASBCA decision in *Mayfair, supra*, was affirmed in *Mayfair Construction Co. v. U.S.*, 841 F.2d 1576, 1578 (Fed. Cir. 1988), where, in connection with sustaining the action of the ASBCA in relying upon the definition of claim set forth in the contract's Disputes clause, the Court of Appeals for the Federal Circuit stated:

"In order to dispose of this case, we need not, and do not, decide whether the CDA requires a claim to be disputed.* If we were to decide that the CDA requires a dispute, the Mar. 1979 Disputes clause would certainly be valid. If we were to decide that the CDA does not require a dispute, this would not mean that the CDA prohibits the parties from agreeing to such a requirement, and there is nothing in the language of the CDA to suggest such a prohibition."

(Asterisked (*) remark omitted, italics in original).

upon the fact that on June 11, 1986, it certified and submitted to the CO its request for an equitable adjustment in the amount of \$1,705,381. In appellant's view the fact that its request for equitable adjustment was certified as required by the CDA is sufficient to establish the request as a claim within the meaning of the CDA entitling appellant to CDA interest (Appellant's Motion for Summary Judgment at 6). In addition to other authorities, appellant cites our decision in *A & J Construction Co., supra*. As noted by the Board in *Columbia Engineering, supra*, however, the appellant in *A & J* converted its demand for payment into a claim under the CDA by certifying it and making a written demand for a CO's decision. In *A & J* there was clearly a demand for payment as well as certification. In this case, however, no demand for payment is contained in Blattner's letter of June 11, 1986, upon which appellant relies to establish its claim for interest.

Also relied upon by appellant is our decision in *Columbia Engineering Corp.*, IBCA Nos. 2351, 2352 (Mar. 7, 1988), 88-2 BCA ¶ 20,595 at 104,091. Included in the portion quoted therefrom in appellant's motion is the following: "[T]he law appears to be well settled that a letter containing a proper CDA certification is, by its very nature, a request for a CO's decision" (Appellant's Motion for Summary Judgment at 9). The decision in *Columbia Engineering*, however, from which we have just quoted, did not concern a request for an equitable adjustment as was involved in the April 21, 1989, *Columbia Engineering* decision, and as is involved here. The earlier decision involving *Columbia Engineering* clearly shows (i) that the parties were at an impasse, (ii) that the CO had previously denied the contractor's uncertified claim, and (iii) that by furnishing the certification required by the CDA, the contractor was in a position to formally make claim under the CDA for release of any and all funds payable to the contractor retained by the Government and interest thereon under the PPA and the CDA.⁸

We now turn to a more detailed consideration of appellant's claim for CDA interest in the light of Blattner's letter to the CO of June 11, 1986, and of the especially pertinent provisions of the contract's Disputes clause. As previously noted, the Disputes clause contained in the instant contract defines a "claim" as "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 language employed in Blattner's June 11, 1986, letter militates against accepting appellant's view that at the time the letter was submitted to the CO

⁸ The circumstances preceding and surrounding the certification of the claim by *Columbia Engineering* are succinctly stated in the decision from which the following is quoted:

"In the case before us, CBC filed its CDA claim on January 17, 1987, complete with proper certification. * * * In that January 17 letter, appellant stated in part: 'In your letter of November 21, 1986, you denied our request, dated October 29, 1986, for final payment and release of retainage of 1.62% on the above-described project. Please be advised that we formally make claim, under the Contract Disputes Act and the Prompt Payment Act which entitles us to interest on the unpaid amount, for the release of any and all funds payable to our company retained by you.' "(88-2 BCA at 104,091 (italics in original)).

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Blattner was "seeking, as a matter of right, the payment of money in a sum certain." While the certification contained in the June 11 letter does state "that the \$1,705,381 requested accurately reflects the contract adjustment for which the Government is liable," the paragraph in the letter immediately preceding the certification states: "[W]e would appreciate anything you can do to expedite negotiation of this change" (AF I, Exh. 8).

In these circumstances, the Board concludes that in certifying its claim in the amount of \$1,705,381, the contractor was in effect certifying that the contract adjustment for which the Government was liable was not in excess of the stated amount. That the June 11 letter should be viewed as an invitation to the Government to negotiate the request for an equitable adjustment—rather than as a demand for payment as contemplated by our decision in *A & J, supra*—is borne out by the fact (i) that in a two-page letter the appellant uses some variation of the word proposal eight times; (ii) that the dictionary defines the word proposal as "1. the act of offering or suggesting something for acceptance, adoption, or performance" (The Random House College Dictionary (1973)); (iii) that over 21 months later in a letter to the CO on March 25, 1988, Blattner was still referring to its June 11, 1986, submission as "a proposal" (AF I, Exh. 9); and (iv) that the equitable adjustment agreed upon of \$1,022,000 was approximately 60 percent of the amount certified in the June 11, 1986, letter of \$1,705,381.

Based on the above analysis, the Board finds (i) that the contractor's letter of June 11, 1986, was an invitation to the Government to negotiate with respect to its request for an equitable adjustment in the amount of \$1,705,381 and that the CDA certification of its equitable adjustment request in such circumstances did not constitute "a written demand" by the contractor, "seeking, as a matter of right, the payment of money in a sum certain," as required by the contract's "Disputes" clause. So finding, the Board further finds that the contractor's letter of June 11, 1986, did not constitute the submission of a claim to the CO for a decision on which interest would be payable on the amount found due from the date of its receipt to the payment thereof (41 U.S.C. § 605(a); 41 U.S.C. § 611). Accordingly, appellant's claim for CDA interest is denied.

The Government's Motion to Dismiss and the appellant's Motion for Summary Judgment are both denied; the Government's Cross-Motion for Summary Judgment is granted; and the appeals are dismissed with prejudice.

WILLIAM F. McGRAW
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

AMERICAN GILSONITE CO.

111 IBLA 1

Decided September 19, 1989

Appeal from a decision by the Utah State Office, Bureau of Land Management, denying a protest to a preliminary Record of Decision to issue gilsonite prospecting permits in Uintah County, Utah. U-50245 etc.

Affirmed in part, reversed in part, and remanded.

1. Administrative Procedure: Generally--Rules of Practice: Generally--Rules of Practice: Appeals: Answers--Rules of Practice: Appeals: Extensions of Time

Where an adverse party files an untimely motion for extension of time within which to file an answer, the Board of Land Appeals may, in its discretion, grant the motion pursuant to 43 CFR 4.22(f).

2. Regulations: Validity

While the Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department which have the force and effect of law, the Board will consider a challenge to Departmental regulations insofar as it is alleged that the regulations were not "duly promulgated."

3. Mineral Leasing Act: Generally--Mineral Leasing Act: Gilsonite Leases and Permits--Regulations: Validity

Promulgation of 43 CFR 3550 (1986) pursuant to sec. 21 of the Mineral Leasing Act, as amended by the Combined Hydrocarbon Leasing Act of 1981, 30 U.S.C. § 241 (1982), establishing a dual competitive/noncompetitive leasing system for gilsonite, was within the Secretary's discretion pursuant to sec. 21 of the Act, is reasonably adapted to the administration of the Act, is not inconsistent with it, and has the force and effect of law.

4. Evidence: Generally--Evidence: Preponderance--Mineral Leasing Act: Generally--Mineral Leasing Act: Gilsonite Leases and Permits: Generally

Where BLM prepares a Technical Mineral Report for purposes of evaluation, based upon geologic considerations, of the extent of known gilsonite deposits, the Secretary is entitled to rely upon the expertise of his technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of opinion with the expert will not suffice to reverse the reasoned opinions of the Secretary's technical staff.

5. Evidence: Generally--Evidence: Preponderance--Mineral Leasing Act: Generally--Mineral Leasing Act: Gilsonite Leases and Permits: Generally

Where appellant attempted to show error in a Technical Mineral Report prepared by BLM by alleging inconsistency in the report, by alleging that as a basis for its report, BLM used criteria applicable to the coal mining industry and not appropriate to the gilsonite industry, and by arguing that BLM's choices of parameters for competitive leasing are not based in fact; and where appellant submitted no proof other than an

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affidavit by its president, which did not indicate any basis in geologic analysis, appellant did not establish error in the Bureau's report by a preponderance of the evidence, and the Secretary was entitled to rely upon the reasoned opinions of his technical expert.

6. Mineral Leasing Act: Gilsonite Leases and Permits: Workability--Words and Phrases

"*Workability.*" Although the definition of "workability" concerns the extent of known deposits, the test of workability is dependent upon intrinsic economic factors, which take into account whether the value of extraction of the mineral is greater than the cost of its extraction.

7. Mineral Leasing Act: Gilsonite Leases and Permits: Workability

Workability may be established by geologic inference where detailed information is available regarding the existence of a workable deposit in adjacent lands and there are geologic and other surrounding conditions from which the workability of the deposit can be reasonably inferred. The fact that lands applied for adjoin other lands which contain known workable gilsonite deposits does not, alone, establish a geologic inference that the lands under application contain known workable deposits as well.

8. Evidence: Preponderance--Mineral Leasing Act: Gilsonite Leases and Permits: Workability

In determining whether lands are of such character as to subject them to leasing rather than prospecting under permits, absent a showing of error by a preponderance of the evidence, the Secretary is entitled to rely upon the reasoned opinion of his technical experts. A mere difference of opinion will not establish such error.

9. Mineral Leasing Act: Gilsonite Leases and Permits: Applications

Where applications for prospecting permits filed prior to the effective date of authorizing regulations are not rejected by BLM, they may be cured by amendment, with priority established on the date amendments are filed. For the purpose of establishing priority, the amended applications are treated in the same manner as over-the-counter lease offers. If the filing of intervening applications prevents a determination of priority, the ambiguity should be remedied by simultaneous drawing.

APPEARANCES: Phillip Wm. Lear, Esq., and Mark Said, Esq., Salt Lake City, Utah, for appellant American Gilsonite Co.; Robert G. Holt, Esq., Salt Lake City, Utah, for Hydrocarbon Mining, Inc.; Mitchell A. Lekas, Salt Lake City, Utah, *pro se*; David K. Grayson, Esq., Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

American Gilsonite Co. (AGC) appeals from a decision by the Bureau of Land Management (BLM) denying AGC's protest of a preliminary record of decision authorizing the issuance of prospecting permits for gilsonite.¹

¹ BLM has entered into an agreement whereby the word "gilsonite," is enclosed in quotations and capitalized due to the status of the word as a trademark. See 51 FR 15204, 15210, where the following comment is made:

"The trademark registration papers indicate that the trademarked term is for a commercial product rather than for ore in the [g]round as the Congress used the term in CHLA and in other statutes at least as far back as the Act of

Continued

Shortly after enactment of the Combined Hydrocarbon Leasing Act of 1981 (CHLA), P.L. 97-78, 95 Stat. 1070, effective November 16, 1981, companies interested in expanding their gilsonite mining operations began to file applications for prospecting permits for gilsonite with the Utah State Office. After issuance of Departmental regulations, effective May 22, 1986, providing for development of gilsonite located on Federal lands under a dual system encompassing both competitive leasing and the issuance of prospecting permits for veins of dubious workability, BLM prepared an environmental assessment and a technical review of outstanding permit applications. A preliminary record of decision issued on December 5, 1986.

The preliminary record of decision approved 9,567.63 acres for prospecting, covering all or parts of 28 applications; and approved for competitive leasing the remaining 710.44 acres, which cover parts of eight prospecting permit applications. The four companies granted prospecting permits by the preliminary record of decision were American Gilsonite Co., Hydrocarbon Resources, Ziegler Mining Co., and Steven Malnar/Julius Murray.

On March 6, 1987, AGC filed a protest to the preliminary record of decision issued by BLM, challenging the authority of BLM to issue the permits, and claiming that applications for permits filed prior to May 24, 1984, are invalid.² This protest was denied by decision of the Utah State Office issued on June 10, 1987. The preliminary record of decision became final on that date.

A notice of appeal to BLM's Final Decision of Record was filed with the Utah State Office by appellant on July 9, 1987. In conformity to 43 CFR 4.412, appellant filed a statement of reasons (SOR) on or before August 10, 1987. On October 5, 1987, appellant filed a supplement to the SOR. Mitchell A. Lekas filed a response to this supplement on October 22, 1987. On November 2, 1987, the Office of the Solicitor entered an appearance and filed a response to the supplemental SOR on behalf of BLM. On November 19, 1987, Hydrocarbon Mining Co. (Hydrocarbon) entered an appearance and requested an extension of time within which to file an answer to AGC's appeal. Appellant has objected to Hydrocarbon's answer, claiming that it was not timely filed, and therefore should not be considered by the Board.

While the SOR contains eight points, issues raised by appellant may be distilled into five: whether an adverse party to an appeal before the

June 7, 1897 (30 Stat. 62, 87). The final rulemaking, when using the term 'Gilsonite,' capitalizes the word and sets it off in quotes to avoid controversy over the registered status of the term."

The word "gilsonite," is used in this opinion as a name for a vein or veins of solid hydrocarbon asphaltite located in and under the earth's surface, and is not used to describe any product which might be sold or distributed pursuant to commercial venture after it is extracted from the earth. As such, the word "gilsonite," is used herein in the same manner as any other word which connotes a mineral subject to the Mineral Leasing Act—i.e., oil, gas, quartz, or coal—and is therefore not enclosed in quotations and capitalized.

² On May 25, 1984, regulations were enacted by BLM providing for the leasing of Federal lands for purposes of gilsonite prospecting on a noncompetitive basis. See 49 FR 17892. On Apr. 12, 1985, those regulations were withdrawn and new proposed regulations were issued providing only for the competitive leasing of public lands for the recovery of gilsonite. See 50 FR 14512. Subsequent to submission of comments, the current regulations were proposed as final regulations on Apr. 22, 1986, and became final on May 22, 1986. AGC challenges the validity of the applications filed before the enactment of the May 25, 1984, regulations providing for the issuance of gilsonite prospecting permits.

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Board may file an untimely answer; whether section 21 of the Mineral Leasing Act (MLA), *as amended by* CHLA, 30 U.S.C. § 241 (1982), grants the Secretary authority to issue prospecting permits to promote the mining of gilsonite; whether BLM's technical conclusions are reasonable and supportable with respect to lands to be opened to prospecting; and whether, even if applicable regulations are "duly promulgated," they have been misapplied, as all deposits of gilsonite, especially those in the Bonanza lithologic sequence, are known valuable deposits. Last, appellant argues that all applications for prospecting permits filed before May 25, 1984, the effective date of regulations officially opening public lands to gilsonite prospecting, are invalid because they were filed prematurely, and cannot be amended to reflect a filing date which would render them valid.

[1]Appellant argues that Hydrocarbon is foreclosed from filing an untimely answer pursuant to Departmental regulations which require the filing of an answer within 30 days subsequent to receipt of the SOR. 43 CFR 4.414. This regulation provides, in pertinent part, that "[i]f an answer is not filed and served within the time required, it may be disregarded in deciding the appeal, unless the delay in filing is waived as provided in [43 CFR] § 4.401(a)." 43 CFR 4.401(a) provides for a 10-day waiver of a filing deadline for documents required to be filed within a time certain under "this subpart," where the document was probably transmitted within the period in which it was required to be filed. Appellant asserts that this grace period is the only flexibility provided within Departmental regulations governing administrative appeal procedures with respect to late filings.

Departmental regulation 43 CFR 4.414 states that an answer *may* be disregarded when untimely filed. 43 CFR 4.22(f) provides that "[t]he time for filing * * * 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.*" (Italics added.) In the context of this case, an answer is clearly "any document" with respect to which the Department has established a time for filing which may be extended, and, thus, authority to extend that time is available under the terms of 43 CFR 4.22(f).

We find no authority to support a conclusion that granting an extension of time for filing an answer is "contrary to law or regulation." The only document which is expressly excepted from 43 CFR 4.22(f) by law or regulation is a notice of appeal. That exception is found at 43 CFR 4.411(c), which provides, "No extension of time will be granted for filing the notice of appeal."

It might be argued that an extension of time for filing an answer is excepted from 43 CFR 4.22(f) because 43 CFR 4.414 mandates that an answer be filed within a certain time. However, the fact that a time is set for filing a document does not except that document from the

operation of 43 CFR 4.22(f). The prime example of this is an SOR for appeal. Departmental regulation 43 CFR 4.412 provides that such a statement "shall [be] file[d] * * * within 30 days after the notice of appeal was filed." Nevertheless, the Board has long granted extensions of time for filing SOR's. *See Robert L. True (d.b.a. Comanche Enterprises)*, 101 IBLA 320, 324 (1988); *Eloise Joyce Williamson*, 50 IBLA 42, 43 (1980).

To date, the Board has not found any document to be excepted from 43 CFR 4.22(f) on the grounds that the granting of an extension was impliedly contrary to law or regulation. On the contrary, the only document found by the Board to be excepted is a notice of appeal, which is expressly excepted by regulation. *See* 43 CFR 4.411(c). We see no reason to change that approach now. Since we find no law or regulation which expressly prohibits the granting of an extension of time for the filing of an answer under 43 CFR 4.414, we conclude that such extension may be granted under 43 CFR 4.22(f).

Given that an extension of time within which to answer may be granted pursuant to 43 CFR 4.22(f), we must address the question whether such an extension is appropriate in this case. Hydrocarbon entered an appearance on November 18, 1987, and requested an extension of time within which to answer, counsel having received copies of the Notice of Appeal, SOR, and Supplement to the SOR on November 16, 1987.

In its objection to Hydrocarbon's motion for extension of time within which to file an answer, appellant argues that Hydrocarbon did not maintain a current address with BLM, and appellant was unable to mail or forward the notice of appeal to a current address, but that Hydrocarbon probably received actual notice of the appeal on or about August 19, 1987, at its corporate offices in Midvale, Utah, by virtue of forwarding through the U.S. Postal Service. According to affidavit of Phillip Lear, corporate personnel of a parent company, Western Strategic Minerals, contacted appellant on or about October 12, 1987, and requested copies of pleadings, to be picked up by courier. Appellant states by affidavit that the documents were mailed to the offices of Western Strategic Minerals on October 27, 1987.

Thus, at worst, Hydrocarbon's motion for extension of time was filed approximately 90 days subsequent to receipt of actual notice; at best, it was filed within 40 days of Western Strategic's first contact with appellant's attorney, and 2 days after Hydrocarbon's attorney was informed of the appeal. In *California Portland Cement Co.*, 40 IBLA 339 (1979), this Board held that an answer filed by BLM 28 days late would, in the exercise of the Board's discretion, be considered despite its tardiness. In that case, the Board observed that appellant did not show it was adversely affected by the delay in the filing.

In this case, appellant filed a supplemental SOR on October 5, 1987, and a response was filed by BLM as late as November 2, 1987. Appellant filed replies to each of the responses to the supplemental SOR. On February 16, 1988, appellant filed a lengthy response, a

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document not specifically provided for by Departmental regulations, to Hydrocarbon's answer. As the answer was filed within a reasonable time in relation to all other pleadings filed, and as appellant has not shown any factual circumstance whereby the Board's consideration of Hydrocarbon's answer will adversely affect appellant, we are inclined to exercise our discretion in this case in a manner which will allow all relevant information before us to be considered. This approach is consistent with general principles of administrative law and procedure. *See United States v. Victor Material Co.*, 67 IBLA 274, 276 (1982). Over appellant's objection, we therefore grant Hydrocarbon's motion for extension of time within which to file an answer, and consider all pleadings filed in the disposition of this case on the merits.

[2, 3] Appellant argues that the regulations lack statutory basis, in that section 21 of the MLA, as amended, does not provide for prospecting as a means of gilsonite development, and that regulations establishing a permitting system therefore are not "duly promulgated," and are unconstitutional (SOR at 9, 10).³ The MLA, as amended by CHLA, appellant argues, mandates that development of gilsonite from public lands may only be achieved by competitive leasing. Additionally, appellant claims that all gilsonite deposits are known; therefore, the purposes of the MLA are best served by competitive leasing (SOR at 5, 26, 36, 38).

Appellant assumes that if the regulation has no statutory basis, this Board can declare the statute invalid, despite the facts that procedural protections were afforded during promulgation, and that the Department has no pattern of nonenforcement.

The Board of Land Appeals has no authority to treat as insignificant or to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department. *Sam P. Jones*, 71 IBLA 42 (1983); *Enserch Exploration, Inc.*, 70 IBLA 25 (1983). While this Board has no authority to declare duly promulgated regulations invalid, we nevertheless address the question whether the Secretary has been granted discretion pursuant to 30 U.S.C. § 241 (1982) to issue regulations authorizing prospecting permits for gilsonite. Where Congress has

³ Appellant cites *Garland Coal & Mining Co.*, 52 IBLA 60, 88 I.D. 24 (1981), in support of its contention that regulations authorizing the issuance of prospecting permits for gilsonite are not duly promulgated, and should be declared invalid. In that case the Board held that where a regulation "was not properly promulgated, is lacking in statutory basis, and has been consistently ignored in actual practice, that regulation will be accorded no force or effect." *Id.* at 30. As final regulations have so recently issued, appellant of course makes no argument that they have been ignored in actual practice. Neither does appellant allege procedural irregularities in the promulgation of the regulations authorizing prospecting permits for gilsonite. On the contrary, it is conceded that appellant was afforded an opportunity to be heard concerning regulatory changes. According to the SOR at page 4,

"On September 8, 1984, AGC filed its request for competitive bid affecting some, if not all, of the lands covered by the prospecting permits of Hydrocarbon and others. On April 12, 1985, the BLM withdrew the prospecting permit regulations and issued new proposed regulations. The new proposed regulations again established an all competitive leasing system. 50 Fed. Reg. 14512. AGC met with BLM officials in the Vernal District Office, Utah State Office, and in Washington, D.C., to provide industry input primarily on the issue of what is valuable and what is not a valuable mineral deposit for competitive bidding purposes. AGC offered much technical data which it thought would be helpful to the BLM in finalizing leasing regulations."

delegated authority to administrative agencies to carry out legislative purposes, those agencies bear the primary responsibility of interpreting statutory language, and such interpretations are given deference by the courts. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984).

As appellant has raised the issue of whether BLM has authority under the MLA to issue prospecting permits for gilsonite, and as BLM has not heretofore addressed in detail the legal authority for its regulatory scheme, we would be remiss under 43 CFR 4.1 if we did not determine, "as fully and finally as might the Secretary" (*id.*), whether the MLA grants the Secretary discretion to institute a permitting system prior to issuance of leases for mining gilsonite. We address this issue in the interests of judicial economy as well, since our failure to do so could result in piecemeal litigation through subsequent motion practice and appeal. *See* 43 CFR 4.21(b), (c).

The MLA, 30 U.S.C. § 181 (1982), provides for the mining and development of certain minerals located on designated public lands through a permitting and/or leasing system. The Act authorizes the Secretary of the Interior to issue prospecting permits, exploration licenses, and noncompetitive and competitive leases to qualifying members of the private sector in order to accomplish its purposes.⁴ Minerals subject to the MLA include coal, phosphates, oil and gas, oil shale, gilsonite and solid hydrocarbons, sodium, sulphur, and potassium. *Id.*

The Secretary of the Interior is the general manager of the public lands. *Boesche v. Udall*, 373 U.S. 472 (1963); *United States v. Wilbur*, 283 U.S. 414 (1931). In administering the MLA, the Secretary exercises a discretionary function. The MLA authorizes the Secretary "to prescribe necessary and proper rules and regulations" to accomplish its purposes. 30 U.S.C. § 189 (1982); *Sam P. Jones, supra*. It has long been recognized that the Secretary may, within the confines of the statute, create and operate a program designed to implement the provisions of the MLA. *Joseph A. Talladira*, 83 IBLA 256 (1984).

Inclusion of gilsonite within the MLA resulted from CHLA, in which Congress sought to encourage production of oil from tar sand and other hydrocarbon deposits. Prior to the 1981 amendments, both gilsonite and oil from tar sands had been governed by provisions set forth in section 21(a) and (c) of the Act, as amended on September 2, 1960, by P.L. 86-705, § 7, 74 Stat. 790, under the terms "native asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried)." *See* 30 U.S.C. § 241(a) and (c) (1976).

Gilsonite veins were first discovered in the Uinta Basin in 1869. In the 1870's and 1880's, discoveries were made in Duchesne County,

⁴ If we took appellant's argument to its logical extreme; that is, if the issuance of permits and leases is considered to be mutually exclusive, the very fact that the MLA is a *leasing* act would prohibit issuance of prospecting permits under the statute.

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Colorado. Discoveries, however, were not open to legal acquisition and mining under the Federal mining laws because the veins were located within Indian reservations. Early development of the mineral included a war between "trespassing prospectors and patrolling Indian agents" which lasted for over 20 years, until 1903. Appellant's Exhibit "A" at page 28,⁵ includes the following brief history of the development of the gilsonite industry:

In 1885 the substance was classified and named "Uintaite" by Professor Wm. P. Blake. However, in 1886 Samuel H. Gilson began to prospect the area and was successful in promoting a market for the new mineral, and a new name, "Gilsonite", was adopted in his honor by the people who later came to mine and market the mineral. At first gilsonite was merely a local name, later a trade name for the marketed substance, and finally it became the accepted technical name for this unusual mineral.

* * * * *

In 1903 Congress passed an Act (Act of March 3, 1903; 3 Stat. 998, c. 994) which gave legal recognition to all trespassing "claims" located prior to 1891, and provided for a sealed bid sale of the mineral bearing tracts on the even-numbered sections of the reservations not covered by pre-1891 claims. Fortunately Congress provided a 90-day period during which the miners could re-record their claims in the local mining records. As a result a large number of claims * * * probably discovered considerably after 1891, achieved legality and were subsequently patented. *Id.*

In 1906, by proclamation, Theodore Roosevelt withdrew from acquisition and reserved all lands containing gilsonite not disposed of by 1910. *Id.* at 29. The Federal lands were thus closed to additional exploitation of gilsonite until September 2, 1960, when the MLA was amended to include "native asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried)." 74 Stat. 790.

Technically, gilsonite is defined as "[a] solid pyrobitumen, an asphaltite, * * * found in the Uinta Mountains of eastern Utah and in western Colorado[.] * * * [occurring] in veins in Tertiary shales." "Asphaltite" is a harder, solid hydrocarbon with a higher melting point than asphalt.⁶ Historically, gilsonite could be claimed as a lode claim, and could be entered and patented "by means of the location of lode mining claims, * * * [but not] by means of placer claims." *Webb v. American Asphaltum Mining Co.*, 157 F. 203, 207 (8th Cir. 1907). As early as this 1907 opinion, a distinction was realized between "asphaltum," and "gilsonite." Gilsonite was recognized as a hard solid substance, whereas "asphaltum" could vary in its consistency from a liquid or semi-liquid to a hard or solid condition. *Id.* at 206.

The 1960 amendments to the MLA and initial regulations promulgated by BLM with respect to the leasing of gilsonite did not reflect these early technical distinctions, however. Statutory

⁵ SOR, Exh. "A": Pruitt, Robert G., Jr., *The Mineral Resources of Uintah County* (Salt Lake City: Utah Geological & Mineralogical Survey, 1961), 23.

⁶ Levorsen, A. I., *Geology of Petroleum*, 2d Ed. (San Francisco: W.H. Freeman & Co., 1967), at 675-79.

amendments did not mention gilsonite. Initial regulations, promulgated July 4, 1962, quoted the statutory amendment, which included the mineral within the category, "native asphalt solid and semisolid bitumen and bituminous rock leases." Initial regulations provided that "[a]ll leases will be issued through competitive bidding * * *." See 27 FR 6329; 43 CFR 203.2(d) (1963). Until 1970, regulations enacted pursuant to the MLA were generally classified by mineral, although, on March 31, 1964, regulations governing the leasing of native asphalt, solid and semisolid bitumen, and bituminous rock were simply classified under "Asphalt Leases." See 29 FR 4547; 43 CFR 3190 (1965).

On June 13, 1970, regulations promulgated pursuant to the MLA were reorganized, and all minerals other than oil and gas were grouped into 43 CFR 3500. While 43 CFR 3521.2-2 classified "asphalt" as a hard-rock mineral, asphalt leases were issued under the provisions of 43 CFR 3120, relating to competitive leasing for oil and gas. See 43 CFR 3521.2-2(c)(3)(i)(b) (1972). Asphalt—hence, gilsonite—was competitively leased under the same procedures as were oil and gas until April 25, 1984, when preference right leasing was provided for gilsonite pursuant to 43 CFR 3520.2-1(b) (1984), and prospecting permits were authorized for any solid MLA mineral, other than coal and oil shale, under the MLA.⁷

On April 12, 1985, a regulatory scheme was proposed which again provided for mineral-specific sections pertaining to solid minerals other than coal or oil shale. 50 FR 14512 (Apr. 12, 1985). In that proposed rulemaking, the noncompetitive leasing provisions for gilsonite were replaced with an all-competitive system. According to the *Federal Register*, the proposed regulations were subject to an approximate 3-month comment period. During the comment period, BLM received five comments pertaining to the competitive leasing of gilsonite deposits. As a result of these comments, the prospecting permit/preference-right lease system for gilsonite was reinstated, and became effective on May 22, 1986. See 51 FR 15210 (Apr. 22, 1986). The rationale for adoption of the permit/preference-right system was explained by BLM as follows:

The proposed rulemaking provided for [an] all competitive leasing program for "Gilsonite" because of the assumption that all "Gilsonite" deposits were already known. Although most of the unleased Federal lands in the Uintah Basin near Bonanza, Utah, embrace known deposits of "Gilsonite," the comments received * * * indicate that there are other lands in Utah and Colorado which may contain "Gilsonite" deposits, but exploratory work is needed to determine their existence and workability. For this reason, the prospecting permit/preference right lease system used in other sections of the

⁷ 43 CFR 3520.1-1(a) (1984) provided that:

"The authorized officer shall, upon application, issue a lease to the holder of a prospecting permit for any leasable mineral or hardrock mineral if the permittee shows that, within the term of the permit, he/she discovered a valuable deposit of the mineral for which the permit was issued, and in the case of potassium, sodium and sulphur applications, if the land is chiefly valuable for said mineral." 43 CFR 3511.3-1(a) (1984) provides that gilsonite prospecting permits may be extended for a period of 2 years. Although not specifically stated, under the 1984 regulatory amendments, a prospecting permit could apparently issue for any solid mineral under the MLA other than oil shale and coal. See 43 CFR Subpart 3511 (1984).

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proposed rulemaking is being reinstated by the final rulemaking in the revised part 3550.

Id. The regulatory scheme, summarized at 43 CFR 3550.1, entitled "Leasing procedures," provides as follows:

The regulations in this part provide the procedures for qualified applicants to obtain rights to develop deposits of "Gilsonite," found on lands available for leasing. The regulations provide for this in the following manner:

- (a) "Prospecting permits" allow the permittee to explore for deposits of "Gilsonite".
- (b) "Preference right leases" are issued to holders of prospecting permits who demonstrate the discovery of a valuable deposit of "Gilsonite" under the permit.
- (c) "Exploration licenses" allow the licensee to explore known deposits of "Gilsonite" to obtain data but do not grant the licensee any preference or other right to a lease.
- (d) "Competitive leases" are issued for known deposits of "Gilsonite" and allow the lessee to mine the deposit.
- (e) "Fringe acreage leases" are issued noncompetitively for known deposits of "Gilsonite" adjacent to existing mines on non-federal lands which can only be mined as part of the existing mining operation.
- (f) "Lease modifications" are used to add known deposits of "Gilsonite" to an adjacent Federal lease which contains an existing mine provided the deposits can only be mined as part of the existing mining operation.

Other minerals under the jurisdiction of the MLA are subject to a variety of development schemes. For example, the Act provides for the issuance of both exploration licenses and leases to encourage the development of coal deposits. 30 U.S.C. § 201 (1982). Lands containing phosphate deposits may be leased by "competitive bidding, or *other such methods as [the Secretary] may by general regulations adopt.*" 30 U.S.C. § 211(a) (1982) (italics added). 30 U.S.C. § 211(b) (1982) further provides:

Where prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area, the Secretary * * * is authorized to issue, * * * a prospecting permit which shall give the exclusive right to prospect for phosphate deposits, including associated minerals, for a period of two years; * * * and if prior to the expiration of the permit the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit.

Similar provisions granting the Secretary authority to issue prospecting permits for exploration, preference-right leases upon discovery of valuable deposits, and finally, competitive leases where lands contain known valuable deposits, are specifically included in the MLA for sodium (30 U.S.C. §§ 261, 262 (1982)), sulfur (30 U.S.C §§ 271-273 (1982)), and potassium (30 U.S.C. §§ 281-283 (1982)).

With respect to oil and gas, the Act of 1920 authorized the issuance of a permit for prospecting on areas not situated within a known geologic structure of a producing oil or gas field, with a preference right, upon discovery of oil or gas, to lease the acreage. 41 Stat. 437. The Act of August 21, 1935, 49 Stat. 674, significantly altered provisions for development of oil and gas located on Federal lands, by providing for an all-leasing system, thus eliminating prospecting

permits. See *Anne Burnett Tandy*, 33 IBLA 106 (1977). Most recently, by the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), P.L. 100-203, 101 Stat. 1330-260, §§ 5101-5113, 30 U.S.C. § 226 (West Supp. 1989), Congress has expressed its will that Federal oil and gas deposits shall be developed *only* through competitive leasing, without regard to whether deposits are within a "known geologic structure," as had been the case since 1935.

To encourage the development of oil from tar sands in 1981, Congress enacted the CHLA, which placed all hydrocarbons recoverable from tar sands under section 17 of the Act (30 U.S.C. § 226 (1982)) governing oil and gas leasing, and redefined the minerals to be included under section 21 (30 U.S.C. § 241 (1982)) as "gilsonite (including all vein-type solid hydrocarbons)." In support of the amendment, H.R. 3975, Representative Santini of Nevada stated on the date of its passage that

[t]he concept of a combined hydrocarbon lease has been under consideration by the administration and Congress for several years. H.R. 3975 would include all hydrocarbons in one lease, with the exception of gilsonite, oil shale, and coal. *The latter three are easily distinguishable* and would remain under section 21 and section 2 of the Mineral Leasing Act. [Italics added.]

127 Cong. Rec. 15651 (1981) (statement of Rep. Santini).

Thus, to the extent the 1960 amendments to the MLA and implementing regulations may have harbored ambiguity concerning how gilsonite was to be developed, the Hydrocarbon Leasing Act of 1981 left no doubt that Congress intended to include gilsonite within the MLA, but to exclude it from the leasing scheme set by section 17 for oil and gas. The intent was to segregate tar sand hydrocarbons from other section 21 minerals (including gilsonite), by allowing oil and gas developers to lease the tar sand minerals in combination with other oil and gas interests. Therefore, to the extent that appellant argues that the MLA requires gilsonite to be leased in a manner like oil and gas, we find no basis in the Act for this restrictive interpretation.⁸

Section 21 of the MLA, 30 U.S.C. § 241 (1982), provides, in pertinent part:

The Secretary of the Interior is hereby authorized to lease to any person or corporation qualified under this chapter any deposits of oil shale, and gilsonite (including all vein-type hydrocarbons) belonging to the United States and the surface of so much of the public lands containing such deposits, or land adjacent thereto, as may be required for the extraction and reduction of the leased minerals, under such rules and regulations, not inconsistent with this chapter, as he may prescribe.

In *Daniel A. Engelhardt (On Reconsideration)*, 62 IBLA 93, 97, 89 I.D. 82, 85 (1982), this Board set aside a prior decision ordering a hearing into whether BLM correctly denied a noncompetitive lease

⁸ That this usage was intended by Congress in CHLA, is indicated by legislative history, which notes: "Section 3 adds the phrase 'gilsonite (including all vein-type solid hydrocarbons),' to section 39 of the Mineral Lands Leasing Act. Gilsonite is added to those sections of the Mineral Lands Leasing Act with general applicability to assure that gilsonite lessees will have the same rights and responsibilities as other mineral lessees." See 1981 U.S. Code Cong. & Ad. News (97th Cong., 1st Sess.) 1740, 1744.

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offer because the land was within a known geologic structure. Holding that, since the land was within a special tar sand area, CHLA left BLM no discretion to noncompetitively lease the disputed tract, the Board stated: "Ultimate control of the disposition of public lands and resources belongs to Congress, and the responsibility of the Interior Department is to administer them in accordance with the dictates of the legislative branch." Prior to removal of the tar sand areas from section 21 of the MLA, BLM had historically exercised its discretion to make known geologic structure determinations for tar sand areas, even though section 21 did not specifically grant the Secretary the authority to do so.

The question before us, then, is whether Congress, by not specifically authorizing prospecting permits for gilsonite, has dictated that such permits may not be issued by the Secretary; or, does the MLA grant the Secretary discretion to implement a regulatory scheme other than, or in addition to, competitive leasing for the development of Federal gilsonite reserves?

While the Act specifies systems to be used to develop particular minerals, the Secretary nonetheless has been granted wide discretion in its implementation. In *Boesche v. Udall*, *supra*, the U.S. Supreme Court held that the Secretary of the Interior, under his general powers of management over the public lands, has authority to cancel a lease administratively for invalidity at its inception, *unless such authority was withdrawn by the MLA*. We find no authority which persuades us that Congress intended to withdraw from the Secretary the discretion to establish a permitting scheme preliminary to the leasing of gilsonite if he chose to do so. While gilsonite has been competitively leased since its inclusion under the MLA, we find no statutory strictures that would limit the Secretary to such a procedure.

This Board considered the question of when a regulation enacted by the Department is without the scope of statutory authority granted by Congress in *Donald St. Clair*, 84 IBLA 236, 92 I.D. 1 (1985). In that case, we considered the impact of *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), pertaining to Federal statutes awarding attorney's fees, upon section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and implementing regulations, 43 CFR 4.1290-4.1294 (1984), as enforced by the Office of Surface Mining Reclamation and Enforcement (OSMRE). The Board determined that OSMRE's regulatory scheme was inconsistent with the statutory authorization for payment of attorney's fees as interpreted by *Ruckelshaus*. As the standard for award set forth in 43 CFR 4.1290-4.1294 was broader than the statutory limits enunciated in *Ruckelshaus*, we declined to apply the regulatory standard, thereby denying an award to appellants. Thus, *Donald St. Clair* requires that a regulatory scheme must not be broader than the statutory limits, and must be otherwise consistent with statutory provisions as they have been interpreted by the courts.

Section 241 grants the Secretary the authority "to lease * * * gilsonite * * * belonging to the United States * * * under such rules and regulations, not inconsistent with this chapter, as he may prescribe." (Italics added.) Congress has therefore deferred to the Secretary's discretion in the implementation of statutory provisions for the leasing of gilsonite. Our review of the overall statutory framework of the MLA leads us to conclude that regulations permitting prospecting prior to lease issuance in order to determine the workability of gilsonite veins are not inconsistent with any provision of the MLA, nor are they broader than the statutory limits defined by the courts.

Appellant argues that the MLA indicates a preference for competitively leasing all known mineral deposits. The regulations in effect support this assertion. 43 CFR 3555.1 provides, in pertinent part:

Lands available for leasing that have surface and/or subsurface evidence to reasonably assure the existence of a valuable deposit of "Gilsonite" may be leased only through competitive sale * * *. A competitive lease sale may be initiated either through an expression of interest or on Bureau motion.

The permitting procedure is aimed at those deposits which might not be explored for development due to their questionable workability. 43 CFR 3552.1 sets forth the areas subject to prospecting as follows:

A prospecting permit may be issued for any area of available public domain or acquired lands subject to leasing where prospecting or exploratory work is necessary to determine the existence of or workability of "Gilsonite". Discovery of a valuable deposit of "Gilsonite" within the terms of the permit entitles the permittee to a preference right lease.

Insofar as the regulatory scheme establishes a system of permitting based upon workability, and competitive leasing based upon reasonable assurance of an existing valuable deposit, it is consistent with statutory provisions which pertain to prospecting permits, and is therefore not inconsistent with the provisions of the MLA. See 30 U.S.C. § 211; 30 U.S.C. §§ 261, 262; 30 U.S.C. §§ 271-273; and 30 U.S.C. §§ 281-283 (1982).

Appellant would have the Board declare the regulations invalid because the regulations do not specify that all gilsonite deposits in Bonanza, Utah, are known. The MLA has vested the Secretary with discretion to choose a regulatory scheme, not inconsistent with the Act, for the management of the development of gilsonite located upon Federal lands. Our review *supra* of the promulgation of 43 CFR 3500 leads us to conclude that 43 CFR 3500 was "duly promulgated," and that appellant was provided and availed itself of the opportunity to be heard during the promulgation process (*see note 3, supra*). That an affected citizen disagrees with duly promulgated regulations does not endow this Board with authority to declare them invalid. Regulations reasonably adapted to the administration of a congressional act, and not inconsistent with any statute, have the force and effect of law, and this Board has no authority to declare such invalid. *General Services*

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Administration v. Benson, 415 F.2d 878, 880 (9th Cir. 1969); *St. Scholastica Academy*, 40 IBLA 175 (1979); *Sam P. Jones, supra*.

[4, 5] Appellant argues that "BLM has drawn geological conclusions and inferences in its Technical Mineral Report which are not reasonable or supportable" (SOR at 19). Appellant quarrels with BLM's criteria for determining when gilsonite veins will be subject to competitive leasing, and when explorers will be permitted to prospect for gilsonite. Appellant claims that BLM's determination that an 18-inch or greater surface width is necessary for a competitive lease is not consistent with knowledge in the industry concerning whether a valuable deposit exists (SOR at 20-21). AGC contends that BLM has determined that lands "containing Gilsonite outcrops appearing within one-quarter mile from existing veins in the Bonanza System are to be leased competitively while lands containing outcrops in excess of one-quarter mile from existing veins in the Bonanza System are to be leased noncompetitively" (SOR at 20), and that this one-fourth-mile standard is a known criterion for coal, and is not a sound standard upon which to judge whether a gilsonite vein is workable for purposes of competitive leasing. *Id.* According to AGC, the standard should be "projectability based upon one-half the distance of known reserves, adjusted by recently gathered data which would affect projectability" (SOR at 23). Appellant admits that

[s]uch an inference would project the vein substantial distances beyond one-quarter or even one-half mile. It would effectively remove the great bulk of land designated available to prospecting permitting and include it within lands which by regulatory definition should be subject to leasing only.

Id. Appellant charges that BLM's use of a one-half mile interval from a known vein in the Cottonwood System to justify a preference-right lease is not supportable in fact, as mining companies have drilled one-half-mile holes not to explore for gilsonite in the Cottonwood System, but to mine it (SOR at 21). Appellant argues that there is inconsistency between the technical report and the flow chart, as the technical report establishes a one-half-mile interval of lateral continuity for veins greater than 18 inches wide located in the Bonanza sequence in order to lease these veins competitively, yet the flow chart shows a one-quarter-mile lateral continuity (SOR at 25).

Appellant has submitted an affidavit by Robert Haffner, president of AGC. Haffner states that AGC has profitably mined gilsonite veins of 15-inch thickness, that AGC would consider the mining of veins in the "northwest end of the Gilsonite vein system in the Uinta host formation [that are] less than eighteen (18) inches in thickness to be prudent and economic" (Haffner Affidavit at 2), and that since the existence of gilsonite veins is reasonably well known, "no additional prospecting is necessary to establish the existence or workability of deposits." *Id.*

BLM's technical report was prepared by a staff geologist for the Bookcliffs Resource Area. The report is based largely upon geologic considerations, as evidenced by the following excerpt:

An evaluation of the type rock encompassing the gilsonite, also termed host rock, was one factor considered in our geologic analysis. Two lithologic or rock sequences were identified in the Uintah and Green River formations within the general area encompassing the applications. One is in the Bonanza area where eight applications (termed the Bonanza group on Map 1) are located. * * * Here the subsurface sedimentary sequence is dominated by thick intervals of sandstones. This is simply termed a Bonanza lithologic sequence for purpose of this report. I observed such a thick sandstone sequence in an American Gilsonite Company's mine on the Little Emma vein, Federal Lease U-126938 (only $\frac{1}{2}$ mile from application area U-54591). Gamma ray logs from seven oil and gas wells in this area show thick sequences of nonshale rock units. The fact [that] the Bonanza area is the only location with operating gilsonite mines is an indication of the favorable mining conditions which exist there.

The lithologic sequence changes considerably to the southwest and west of Bonanza becoming a more interbedded siltstone and marlstone deposit. Sandstone units in the area are substantially thinner and discontinuous than in the Bonanza area. This is termed a Cottonwood lithologic sequence. The remaining applications are within a wide area influenced by this lithologic sequence and fall into five geographic groups. The Canyon Country, Cottonwood, Natural Buttes, Upper Willow Creek and Lower Willow Creek groups are shown on Map 1. There are no operating gilsonite mines in this area. The only information available from any of the past mining operation in this area is contained in a report by Hydrocarbon Mining Inc. (Lekas, 1986). The report describes and illustrates the erratic nature of the gilsonite encountered in the company's four inactive mines. * * * The report did not include mine specific description of host rock lithologies. Fifteen gamma ray logs from oil and gas wells in this large area were evaluated and show no consistently [sic] thick favorable host rock sequences that are present in a Bonanza sequence.

(Technical Mineral Report at 1-2).

The report states that “[t]he host rock type and thickness is very important in our evaluation,” and concludes that

The northwest trending of the gilsonite veins was caused by fracturing (as a result of tension) of the rocks in the Uinta Basin. The thick sandstones in the Bonanza area represent the best confining or host rock for gilsonite since it fractured uniformly. Being a competent rock, the fractures stayed open and where the conditions were right, were filled with gilsonite. The fracturing within the sedimentary rocks of the Cottonwood Depositional Environment occurred in rocks of varying competence. While the thin sandstones might hold open after fracturing, the less competent rocks (especially shales and marlstones) would close the fracture by flowing under pressure into the void. The brittleness of the marlstones could cause the fracturing mechanism to create a zone of brecciation [sic] instead of open space. Both scenarios within a Cottonwood Sequence lessens the economic potential of the acreage.

Id.

BLM's geologist determined that, in the richer Bonanza area, proximity to measured underground occurrences of mineable gilsonite would be a deciding factor in determining whether the application was to be considered for prospecting. “Due to the lithologic sequence in the Bonanza area,” if an underground measurement was greater than 18 inches, a one-half-mile projection beyond the last gilsonite measurement was made. *Id.* at 2-3. In the Cottonwood lithologic sequence,

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a more consistent (mineable) gilsonite width along a strike (of the vein) of 2640 feet or greater was considered in excluding portions of the application areas. A projection of $\frac{1}{4}$ mile (1320 feet) past the last measured gilsonite mineable width was made if the geologic data was sufficient to make such an extension. The continuity of width along the strike length of a mineable gilsonite vein was considered since the gilsonite may not be consistent (in width) downward in keeping with the variability of the rock types in the Cottonwood lithologic sequence. In this area the gilsonite may be mined by a method other than the conventional underground method utilized on federal leases in the Bonanza area. On these federal leases a surface pillar is left in place. In the case of the Cottonwood type depositional environment leaving such a pillar may not be economic. Extensive surface mining of gilsonite by trenching occurred to the southeast of the Canyon Country group and to a limited extent at Hydrocarbon's Midas mine in Section 26, T. 9 S., R. 21 E. Portions of lands under applications U-50248, U-50250, U-54598, U-54594, and U-54970 are recommended for exclusion based upon the above criteria.

Id. at 3.

Appellant's assertions that BLM's geologist adapted criteria used to determine workability of coal resources are grounded in the final paragraph of the Technical Mineral Report, where the following comment is made:

A note should be made concerning projections made past mineable widths of gilsonite. There is no published information regarding calculations of gilsonite resources (i.e., measured, indicated, inferred). Some gilsonite companies have submitted plans to explore for gilsonite by one drill hole per half mile. Companies have done such drilling in advance of mining operations. Therefore, as similar to coal, a $\frac{1}{4}$ mile distance from a known width would yield a measured resource and a $\frac{1}{2}$ mile distance would be an indicated resource. A $\frac{1}{2}$ mile projection was made from a measured laterally continuous mineable width in the Bonanza area due to the geologic conditions, (i.e., the continuation of a mineable width of the fracture filling gilsonite farther along strike is reasonably assured). In the Cottonwood lithologic sequence areas a $\frac{1}{4}$ mile projection (if applicable) was made from a laterally continuous mineable width due to the geologic uncertainty of the lateral extent of a favorable host rock for the gilsonite.

Id.

Attached to the Technical Mineral Report is a "gilsonite acreage flow chart." The chart divides the acreage into Bonanza and Cottonwood host rock determinations, and lists the criteria to be used in BLM's determination as to whether the acreage in each lithologic sequence should be competitively or noncompetitively leased. According to the flow chart, a surface vein of less than 18 inches will be noncompetitively leased in both the Bonanza and Cottonwood lithologic sequences.

In the Cottonwood sequence, if the surface vein is greater than "eighteen inches thick,"⁹ a lateral continuity of this thickness for greater than 2,640 feet (one-half mile) will yield a competitive tract, if the number of surface measurements for geologic interpretations is sufficient. The boundary of the competitive lease, if awarded, will extend 1,320 feet (one-quarter mile) past the last known point greater

⁹ From context we assume that "18 inches thick" refers to a measurement taken on the surface of the ground which actually yields what would commonly be referred to as width, as opposed to length or depth. Likewise, we assume "lateral continuity" means length.

than 18 inches thick. If the lateral continuity of the 18-inch thick vein is not greater than 2,640 feet, the vein will be subject to prospecting. If the lateral continuity of the 18-inch thick vein is greater than 2,640 feet, but surface measurements for geologic interpretations are deemed by BLM to be insufficient, the vein will be permitted for prospecting. The chart indicates that, in the Bonanza sequence, if the lateral continuity of the vein measuring 18 inches thick is greater than 1,320 feet, the tract will be competitively leased.

The Technical Mineral Report is an evaluation, based upon geological considerations, of the extent of known gilsonite deposits for purposes of deciding whether to issue prospecting permits or competitive leases. As such, the report is similar to geologic analyses conducted in a variety of other contexts where determinations of known mineral deposits must be made. Such appraisals are used to determine whether phosphate deposits are sufficiently workable to justify competitive leasing. *Elizabeth B. Archer*, 102 IBLA 308 (1988); *Earth Sciences, Inc.*, 80 IBLA 28 (1984). Prior to passage of FOGLRA, geologic analyses were routine in the context of Federal oil and gas leasing to assess whether lands were within "known geologic structures," and thus subject only to competitive leasing. See *Jack J. Grynberg*, 104 IBLA 51 (1988); *Robert E. Eckels*, 104 IBLA 28 (1988); *Carolyn J. McCutchin*, 103 IBLA 1 (1988); *Richard E. O'Connell*, 98 IBLA 283 (1987). In *Daniel A. Engelhardt, supra*, this Board ordered a hearing where designated tar sands areas in eastern Utah were classified within a known geologic structure, and Engelhardt had submitted an affidavit by an independent consulting geologist that refuted BLM's geologic conclusions.

In *Clear Creek Inn Corp.*, 7 IBLA 200 (1972), with respect to a BLM determination concerning whether coal lands were of such character to subject them to leasing rather than prospecting under permits, this Board held that,

we recognize that the Geological Survey in conducting its field examinations and collection of other data is acting as the Secretary's expert and is providing technical advice so that a proper determination can be made in these matters. * * * [W]hen the Geological Survey has concluded from all the available geological data that further exploration is, or is not, needed to determine the existence or workability of coal deposits in a particular area, the Secretary is entitled to rely upon the reasoned opinion of his technical expert in the field. [Citations omitted.]

Id. at 213-14.

While this Board has not heretofore addressed what will be sufficient to justify a conclusion by BLM concerning whether a prospecting permit or a lease should issue with respect to gilsonite, we see no reason to depart from standards developed through cases involving other minerals where similar issues have been raised. It is well settled that the Secretary is entitled to rely upon the expertise of his technical experts, and absent showing of error by a preponderance of the evidence, a mere difference of opinion with the expert will not suffice

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to reverse the reasoned opinions of the Secretary's technical staff.
Robert E. Eckels, supra; Wilfred Plomis, 104 IBLA 34 (1988).

Where, however, BLM has provided insufficient documentation, or relies on unsupported documentation of a conclusory nature, a challenge may be successfully pursued. See *Petex, Inc.*, 104 IBLA 72 (1988). In order to prevail, an appellant must establish error on the part of BLM by a preponderance of the evidence. *Richard E. O'Connell, supra; Carolyn J. McCutchin*, 93 IBLA 134 (1986); see *Bender v. Hodel*, 744 F.2d 1424 (10th Cir. 1984). The "preponderance of the evidence" standard has been defined as:

[Establishing] * * * that something is more likely so than not so; in other words, the "preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, [that] has [the] more convincing force and produces in your [mind the] belief that what is sought to be proved is more likely to be true than not true.

Thunderbird Oil Corp., 91 IBLA 195, 201 (1986), *aff'd sub nom., Planet Corp. v. Hodel*, CV No. 86-679 HB (D.N.M. May 6, 1987), quoting *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 778 (6th Cir. 1970).

Appellant has attempted to show error in the Technical Mineral Report by alleging inconsistency between the report and the flow chart, by alleging that BLM has used criteria applicable to the coal mining industry and not appropriate to the gilsonite industry, and by arguing that BLM's choice of standards for competitive leasing are not based in fact. In support of its contentions, appellant has submitted no proof other than an affidavit by its president, which does not show that it is founded on geologic analysis. Moreover, this affidavit is refuted by two letters filed by Mitchell A. Lekas, who concludes that "there is *no* reasonable assurance that narrow veins exposed on the surface will increase in width at depth to a mineable thickness." (Italics in original.)¹⁰

We do not find that appellant has shown inconsistency between the mineral report and the flow chart. Appellant assumes that the chart has limited a competitive lease in the Bonanza sequence to one-quarter mile past the last known 18-inch point, and is thus inconsistent with the report. Appellant's analysis, however, confuses the one-quarter-mile lateral continuity referenced in the chart underneath the "Bonanza host rock determination," with the one-half-mile leasing distance for the Bonanza sequence mentioned in the mineral report.

The flow chart indicates that a one-quarter-mile lateral continuity for an 18-inch surface gilsonite width will support a competitive lease in the Bonanza sequence, whereas one-half mile, in addition to sufficient surface measurements, is required for competitive leasing (for an 18-inch surface width) in the Cottonwood sequence. Thus, in the

¹⁰ Letter to the Board from Mitchell A. Lekas, dated Nov. 16, 1987. While not in affidavit form, both Lekas correspondences generally support the Lekas report referenced in the Technical Mineral Report.

richer Bonanza lithologic sequence, the length of vein required for competitive leasing will be one-half that required for a competitive lease in the Cottonwood sequence.

Admittedly, the chart does not include lease area standards for the Bonanza lithologic sequence, which, according to the mineral report, are one-half mile, assuming a vein thickness greater than 18 inches for a distance (lateral continuity) greater than 1,320 feet (one-quarter mile). Thus, the chart could be completed by adding the words, "(extended 2640' past last known point >18" thick)" underneath the word "competitive," listed on the right hand side of the chart, which sets forth leasing criteria for the Bonanza host rock formation. This omission, however, does not produce an inconsistency, nor does it render the report or the chart meaningless. It cannot be said to constitute fatal error to BLM's geologic conclusions.

Appellant has emphasized the similarity of BLM's geologic analysis to that applied in coal leasing. Appellant has not cited specific BLM regulations or policies to buttress its allegations, other than those referenced in the technical report itself. Taking appellant's argument in its most favorable light, we cannot, on this basis alone, find fault with BLM's geologic conclusions. Appellant fails to show that these acknowledged similarities have undermined or created error in BLM's geologic analysis.

Appellant has advanced its own standard for competitive leasing: "projectability based upon one-half the distance of known reserves, adjusted by recently gathered data which would affect projectability" (SOR, *supra*). No geologic report or evidence has been presented, however, which establishes the conclusions of BLM as geologically unsound, and supports appellant's standard as geologically sound. Relying generally on Pruitt's report (*see note 5, supra*), appellant claims that all gilsonite should be competitively leased because all reserves are known. Pruitt, however, admits that "legal restrictions imposed against gilsonite mining on the public domain, in effect for 50 years, have accounted in large part for the lack of information on certain undeveloped gilsonite areas encountered in collecting data on the deposits and chronicaling [sic] the development of the industry." Pruitt also notes that "the Willow Creek and lower White River gilsonite fields were discovered [after 1896], and these last veins are still relatively unexplored today."¹¹

We do not find that appellant has demonstrated error in the Technical Mineral Report by a preponderance of the evidence. We find appellant's argument with BLM's technical conclusions to be a mere difference of opinion, and insufficient to reverse the opinions of the Secretary's technical staff. *Robert E. Eckels, supra*; *Clear Creek Inn Corp., supra*.

¹¹ Pruitt, *op. cit.* at 29, 28. Willow Creek appears in the Technical Mineral Report as part of the Cottonwood lithologic sequence.

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[6-8] Appellant argues that BLM has misapplied its own regulations to gilsonite deposits in the Bonanza area. AGC reasons as follows: "No one disputes the fact that the area for which prospecting permits have been applied is known to contain Gilsonite deposits" (SOR at 26). Since these deposits are known, 43 CFR 3550.1(d) requires that competitive leases be issued. *Id.* 43 CFR 3550.1(a) allows prospecting permits to be issued only to explore for gilsonite; since all gilsonite deposits in the Bonanza area are known, there is no need for exploration, and therefore no need to issue permits for such activity (SOR at 26-27).

According to appellant, 43 CFR 3552.1 precludes prospecting where there is reasonable assurance of a valuable deposit of the mineral. Appellant argues that Haffner's affidavit establishes that the deposits in the Bonanza area are valuable at less than an 18-inch surface thickness. Since the veins are valuable at this width, their workability or existence cannot be questioned; therefore, appellant concludes, 43 CFR 3552.1, which provides that prospecting permits may issue for an area "where prospecting or exploratory work is necessary to determine the existence or workability of Gilsonite," is simply not germane (SOR at 26-36).

Appellant continues by arguing that even if workability is in issue, BLM has applied the wrong standard for determining whether a deposit is workable. Appellant claims that BLM's standard for determining whether a gilsonite deposit is workable is "purely economic," and that the standard should be whether it is technically feasible to mine the gilsonite (SOR at 28). In support of the contention that BLM has adopted the wrong test, appellant cites *Atlas Corp.*, 74 I.D. 76, 84 (1967), for the proposition that "leasing need not be restricted only to those situations when the BLM can predict the deposit will be mined profitably" (SOR at 30). Appellant contends that the establishment of a surface thickness of 18 inches as the threshold for "workability," is an arbitrary standard, because surface thickness does not indicate subsurface thickness. *Id.*

In its decision, BLM states that the 18-inch standard is based upon technological considerations, and that it has not been informed of technical advances which justify lowering the minimum (Decision, June 10, 1987, at 7). BLM states that the 18-inch minimum only establishes feasibility of mining, and in no way establishes profitability. *Id.* According to BLM, "prospecting is needed to prove workability" where surface thickness is less than 18 inches. *Id.* BLM has not been convinced that veins of less than 18-inch surface thickness "can be mined with a reasonable prospect of success." *Id.* Further, BLM relies on the technical report in determining that location in the Bonanza reserve does not guarantee a workable deposit of gilsonite in all instances. *Id.*

A "valuable deposit," as defined by 43 CFR 3500.0-5(i), is "a mineral occurrence 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/her labor and means, with a reasonable prospect of success, in developing a valuable mine."

Concerning the concept of "valuable deposit," the Assistant Secretary of the Interior stated in *Atlas Corp.*:

[I]n determining whether lands are valuable for coal [the pertinent rules and decisions previously applied by the Department] were discussed at length in *State of Utah, Pleasant Valley Coal Company, Intervenor v. Braffet*, 49 L.D. 212 (1922), as follows:

* * * * *

[I]n order to except lands from the grant to the State it must appear that * * * the known conditions were such as to engender the belief that the land contained coal of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end; * * *. 49 L.D. at 28.

* * * * *

After enactment of the phosphate permit statute, the same criteria have been considered in determining whether phosphate prospecting permits or leases are to be issued. The Department has consistently held that the Secretary is without authority to issue a prospecting permit for more detailed exploration on land where phosphate deposits are known to exist in workable quantity and that it is not necessary, in order to sustain a finding that such deposits do exist in workable quantity, that a determination can be made with some degree of assurance that a mining operation will be an economic success. Rather, it is enough that the available data is sufficient to determine that the lands under consideration would require only limited prospecting to project a program for development but would not require prospecting for the purpose of determining the presence or workability of the deposit. [Footnotes and citations omitted.]

Atlas Corp., supra at 83-84.

In *Elizabeth B. Archer*, 102 IBLA 308, 313-14 (1988), this Board determined that the concept of workability has an intrinsic economic component, but is not based upon the requirement of commercial success. In that case, the Board elaborated upon the standard set forth in *Atlas*, as follows:

BLM placed much emphasis * * * on language in decisions such as *Atlas Corp., supra*, which declared that "it is not necessary, in order to sustain a finding that such deposits do exist in workable quantity, that a determination can be made with some degree of assurance that a mining operation will be an economic success." * * * This assertion was, and continues to be, a correct statement of law. But it does not mean, as it was apparently interpreted by BLM officials * * *, that the concept of workability has no economic component. This seeming contradiction was best clarified by Office of Hearings and Appeals Director Day, sitting *ex officio* in *James C. Goodwin*, 9 IBLA 139, 80 I.D. 7 (1973). Therein, Director Day noted:

Although workability is basically a problem of the physical parameters of the coal, the test of workability is dependent upon economic factors. If the value of the coal is greater than the cost of its extraction, the deposit is workable. It is not enough to show that mining is physically possible * * *.

Workability as defined by the USGS [Geological Survey] is concerned with the economics of the intrinsic factors. Extrinsic factors such as transportation, markets, etc., are not considered. However, the cost of mining must be considered. In its classification of coal lands, USGS has anticipated and assumed the ultimate coming of conditions favorable for mining and marketing of any coal if the coal is workable in terms of the intrinsic factors. In this respect, the test of workability under the Mining Leasing Act differs from the prudent man rule under the mining laws.

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The underlying assumption advanced by appellant is that all gilsonite deposits are known and are therefore valuable. Appellant assumes that, at least in the Bonanza area, surface outcropping guarantees a valuable deposit. Appellant has argued that the 18-inch surface thickness requirement imposed by BLM as a threshold for workability is tantamount to requiring assured commercial success before a competitive lease will issue.

To accept appellant's position, however, is to ignore the concept of workability altogether. In *Elizabeth Archer, supra* at 314, we stated that, "quite apart from the propriety of a classification designation, no prospecting permit could properly be issued for lands which contain a deposit of phosphate which is *known to be workable*." (Italics supplied.) The regulatory scheme is thus premised upon a requirement that lands not be designated "known," for purposes of competitive leasing until their workability has been established. Taking Haffner's testimony at its most favorable, the fact that in some instances 12-inch veins have been mined to commercial success does not establish workability of the entire lithologic sequence.

The Technical Mineral Report indicates that BLM has considered the intrinsic economic factors in the mining of gilsonite.¹² This analysis is appropriate, as "[i]t is not enough to show that mining is physically possible * * * [;] [t]he cost of mining must be considered." *James C. Goodwin, supra*.

Goodwin provides the following comments apropos to BLM's method for determining workability:

Workability may be established by geologic inference where detailed information is available regarding the existence of a workable deposit in adjacent lands and there are geologic and other surrounding conditions from which the workability of the deposit can be reasonably inferred. *Atlas Corp., supra*. See *Diamond Coal and Coke Co. v. United States*, 233 U.S. 236, 249 (1914). However, geologic inference, as a tool for determining workability, has certain limitations. The mere fact that lands adjoin other lands which contain workable coal deposits does not, *per se*, permit the inference that they contain coal deposits in workable quantity and quality. As pointed out in *Atlas, supra*, geologic and other surrounding conditions must lead reasonably to the inference of workability. It has been held that a coal prospecting permit may be issued for lands which adjoin other lands containing known workable deposits of coal but which themselves are not known to contain coal in workable quantity and thickness, *Clarence E. Felix*, A-30197 (January 7, 1965), even where there were known outcrops of coal on the application lands. [*Emil Usibelli, A. Ben Shallitt*, A-226277 (Oct. 2, 1951).]

Id. at 16.¹³

¹² The mineral report, at page 3, makes the following observation:

"The continuity of width along the strike length of a mineable gilsonite vein was considered since the gilsonite may not be consistent (in width) downward in keeping with the variability of the rock types in the Cottonwood lithologic sequence. In this area the gilsonite may be mined by a method other than the conventional underground method utilized on federal leases in the Bonanza area. On these federal leases a surface pillar is left in place. In the case of the Cottonwood type depositional environment leaving such a pillar may not be economic."

¹³ We are aware that *Goodwin* and *Atlas*, both *supra*, involved Federal coal deposits. Appellant has presented no argument justifying why the principles governing "workability" set forth in these coal dispositions would not apply equally to other minerals subject to the MLA, including gilsonite. *Atlas Corp.*, quoted above, notes that,

Continued

A determination of workability is solely within the authority of the Secretary, who is entitled to rely on the reasoned opinions of his technical experts. Absent a showing of error by a preponderance of the evidence, the Secretary's reliance upon geological data supplied by his technical expert will not be overturned. *James C. Goodwin, id.; Clear Creek Inn Corp., supra.* Appellant has not shown error in BLM's geological inference that an 18-inch surface thickness will be required before a vein will be considered workable. We are not persuaded by the Haffner affidavit, nor by any other evidence submitted by appellant, that BLM's ultimate conclusions, drawn from the Technical Mineral Report, pertaining to which tracts are workable and which are not, are in error.

Finally, appellant attacks BLM's decision concerning workability of the gilsonite deposits in the Uinta Basin by arguing that since all gilsonite deposits in the Uinta are known, BLM should declare the Bonanza area a "known gilsonite resource area." Arguing that BLM has conceded this issue, AGC has quoted, in the SOR at page 37, comments from the preamble to the April 22, 1986, final rule, as follows:

The proposed rulemaking provided for all competitive leasing program for "Gilsonite" because of the assumption that all "Gilsonite" deposits were already known. Although most of the unleased Federal lands in the Uinta Basin near Bonanza, Utah, embrace known deposits of "Gilsonite," the comments received on this part indicate that there are *other* lands in Utah and Colorado which may contain "Gilsonite" deposits, but exploratory work is needed to determine their existence and workability. *For this reason,* the prospecting permit preference right lease system used in other sections of the proposed rulemaking is being reinstated by the final rulemaking in the revised part 3550. [Italics in SOR.] [14]

BLM has responded in its June 10, 1987, decision, with the following comments:

We do not agree with the AGC conclusion that BLM specifically recognized and admitted that the "Gilsonite" deposits near Bonanza, Utah are all known and that no areas in that vicinity are appropriate for prospecting permits. The general language in the preamble with respect to the implied assumption that all "Gilsonite" deposits were already known was based on an overview of available surface and/or subsurface evidence. The lands recommended for prospecting do not have the surface and/or subsurface evidence available to reasonably assure the existence of a *valuable deposit* of "Gilsonite," (italics added). Consequently, further exploration is necessary to determine if valuable deposits exist.

(Decision at 8).

Once again, appellant has shown a difference of opinion with respect to BLM's characterization of gilsonite lands in the Uinta Basin, but

"Over the years the Department has applied the same or similar criteria to the adjudication of applications for coal prospecting permits * * *. The same standard determines whether leases or permits are to be issued for sodium minerals * * *, and for potassium, * * * under statutes authorizing the issuance only of leases and not permits, if the land is known to contain valuable deposits of sodium or potassium minerals." (citations omitted).

The opinion further refers to phosphate minerals. *Id.* While underlying facts may generate mineral-specific data, the concept of workability appears in the broader context of whether BLM will lease Federal mineral lands for mining, or will require exploration prior to leasing through the issuance of prospecting permits.

¹⁴ Appellant does not emphasize that the comment limits known gilsonite deposits to *most* unleased Federal lands in the Uinta Basin.

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has not shown that BLM erred in respect to individual lands. The determination whether lands contain valuable deposits of a mineral resource is solely within the discretion of the Secretary; absent showing of error, the Secretary is entitled to rely upon the technical opinions of his experts.

[9] Appellant has alleged that applications for prospecting permits filed prior to May 25, 1984, are invalid, and cannot be revived by amendment. Citing *Irvin D. Bird, Jr.*, 73 IBLA 210 (1983), appellant claims that 43 CFR 2091.1 mandates that

applications * * * must be rejected and cannot be held, pending possible future availability of the land or an interest in the land, when approval of the application is prevented by a withdrawal or reservation of lands or when the lands are classified in such a manner that the applications cannot be given effect.

(SOR at 13-14).

Our historical review of the regulatory scheme for development of gilsonite on public lands reveals that gilsonite was competitively leased until April 25, 1984, when preference right leasing was established pursuant to 43 CFR 3520.2-1(2)(a). Where duly promulgated regulations specify that lands are to be competitively leased, applications for prospecting permits must be rejected, as the Secretary is bound to follow his own regulations. *Sam P. Jones, supra*; *Enserch Exploration Co., supra*; *Jack J. Grynberg*, 96 IBLA 316 (1987). We thus are in agreement with appellant that applications for permits filed prior to the effective date of regulations to permit prospecting should have been rejected. Indeed, applications U-49799, U-49800, U-49801, and U-49802 filed by Hydrocarbon, on September 14, 1981, were rejected.

Hydrocarbon, however, filed nine applications for prospecting permits on December 28, 1981, while BLM's rejection of its earlier applications was on appeal.¹⁵ No action was taken by BLM to either accept or reject these applications until the June 10, 1987, decision awarding the permits. These nine applications were amended on May 17 and 25, 1984, to conform to the effective date of the new regulatory scheme. Other amendments to the applications were filed by Hydrocarbon on June 6, 1984. Hydrocarbon filed eight additional applications for permits on May 25, 1984. All other applications approved by BLM's June 10, 1987, decision were filed subsequent to May 25, 1984, with the exception of U-53427 and U-56217, filed by Steven A. Malnar and Julius R. Murray on July 15, 1983, and November 3, 1984, respectively. According to records submitted by BLM,¹⁶ the Malnar and Murray application filed July 15, 1983, was never amended to reflect a filing date subsequent to May 25, 1984.

Hydrocarbon, however, alleges that its premature applications were revived by amendment on May 25, 1984. Hydrocarbon correctly states

¹⁵ Serial numbers for applications filed by Hydrocarbon on Dec. 28, 1981, are U-50245 through U-50253.

¹⁶ All information concerning dates of original filings and amendments is taken from the BLM record, "Gilesonite Prospecting Permit Applications."

that, prior to official rejection by BLM, defective over-the-counter noncompetitive oil and gas lease applications are curable by amendment, effective as of the date of the cure. *See Gian R. Cassarino*, 78 IBLA 242, 91 I.D. 9 (1984). As priority for obtaining prospecting permits is established in the same manner as it is for over-the-counter noncompetitive lease offers, we find that all premature applications amended on or subsequent to May 25, 1984, were cured, and became effective when filed. As the record does not reflect that the Malnar and Murray application U-53427, filed July 15, 1983, was amended, this application is void.

Finally, the record does not indicate whether applications were filed by other prospectors which might have priority over the amended applications for lands embraced by Hydrocarbon applications U-50245 through U-50253. To the extent that other applications may have been filed on May 25, 1984, prior to Hydrocarbon's filing of amendments, the Hydrocarbon applications should be rejected. *See Beard Oil Co.*, 105 IBLA 285 (1988). To the extent the time of filing cannot be determined, BLM should treat such applications, if there are any, as simultaneously filed. *See* 43 CFR 1821.2-3.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, and remanded for further action consistent with this opinion.

FRANKLIN D. ARNESS
Administrative Judge

ADMINISTRATIVE JUDGE HUGHES CONCURRING:

While in full agreement with Judge Arness' opinion, I am writing separately to voice my views on two points.

First, it should be noted that Hydrocarbon Mining Co. (Hydrocarbon) did file its answer on January 15, 1988, within the time allowed by us by order dated December 2, 1987. Hydrocarbon had entered its appearance on November 19, 1987, and, at the same time, requested an extension of time until January 15, 1988, to file its answer. Subsequent to the granting of the additional time, American Gilsonite Co. (AGC) filed both a strenuous objection to granting an extension and a motion to disregard the answer, arguing that Hydrocarbon's request for extension was itself filed out of time.¹ However, by order dated December 23, 1987, we expressly overruled AGC's objection and its motion to disregard and decided to consider the answer, when filed. The present decision correctly reconfirms that order.

It is within our authority, under the general provisions regarding filing of documents in the Office of Hearings and Appeals, to grant requests for extensions of time to file pleadings. 43 CFR 4.22(f). Although, under these general rules (43 CFR 4.22(f)(2)), such requests

¹ AGC's objection to granting the extension crossed in the mails with our order dated Dec. 2, 1987, granting the extension.

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are expected to be filed within the time allotted for filing the pleading, the rule specifically governing the filing of answers with the Board of Land Appeals (43 CFR 4.414) gives the Board discretion in determining whether or not to disregard an answer that is not filed within the time allotted.² The specific regulation governing answers properly controls here.

Our decisions to allow Hydrocarbon to file an answer and to consider that answer (even though the time provided for so doing might have expired without its having requested an extension of time³) were a proper exercise of the discretion granted to us under 43 CFR 4.414. The interests of judicial economy are served by allowing full consideration of issues in adjudication at the Departmental level, and it is therefore appropriate for us to allow full exposition of opposing views in a dispute. In view of the length of time that an appeal is presently before the Board before it is reached for consideration, the practice of liberally granting extensions to file answers does not delay resolution of disputes.

Second, the Board is generally bound to follow duly promulgated regulations of the Department, and it is only in very rare circumstances that a regulation is not binding because it is not "duly promulgated" due to lack of authority for it. Such is clearly not the case here, and I wish to add my comments to those of Judge Arness in ruling that the regulation is binding.

Various sections of the Mineral Leasing Act (MLA)⁴ specify particular methods for leasing minerals other than vein-type solid hydrocarbons. Thus, coal (30 U.S.C. §§ 201 (1982)) and oil (30 U.S.C.A. § 226 (West Supp. 1989)) are generally leased only by competitive bidding, while sodium (30 U.S.C. §§ 261-263 (1982)), sulphur (30 U.S.C. §§ 271-276 (1982)), and potash (30 U.S.C. §§ 281-287 (1982)) are subject only to a prospecting permit/preference-right lease system. Significantly, the MLA does *not* specify a method of leasing for vein-type solid hydrocarbons, including gilsonite. 30 U.S.C. § 241 (1982). Instead, it leaves the matter to the discretion of the Secretary, who is expressly authorized to lease gilsonite "under such rules and regulations, not inconsistent with this chapter, as he may prescribe." Although some specific restrictions are placed on leasing (e.g., acreage limitations and rental rate), nowhere in the chapter is any specific leasing system described. Thus, by its own terms, the MLA imposes no restriction on the method of leasing and gives the Department broad

² The Board also enjoys discretion as to whether or not to accept an untimely statement of reasons. 43 CFR 4.402, 4.412(c); *Tagala v. Gorsuch*, 411 F.2d 589 (9th Cir. 1969); *James C. Mackey*, 96 IBLA 356, 94 I.D. 132 (1987).

³ The question of when the time for Hydrocarbon to prepare an answer began to run is in dispute. In view of our decision to accept the answer, even if the extension were not timely filed, it is unnecessary to resolve this question.

⁴ Originally known as the Mineral Lands Leasing Act of 1920, the grant of authority to the Department of the Interior to lease certain minerals has been repeatedly amended. Over the years, this authority had been referred to as the Mineral Leasing Act, and Congress formalized the use of this name in sec. 5113 of the Federal Onshore Oil and Gas Lease Reform Act of 1987 (FOOGLRA), 101 Stat. 1330-263. The MLA, in its present form, including the amendments wrought by FOOGLRA and CHLA is found at 30 U.S.C.A. §§ 181-287 (West 1986 & West Supp. 1989).

authority to adopt a leasing system for gilsonite and other vein-type solid hydrocarbons.

Congress, in the MLA, gave the Department substantial authority over mineral leasing, including even the authority to cancel leases administratively in some circumstances, which authority may be exercised until Congress withdraws it. *See Boesche v. Udall*, 373 U.S. 472, 482-83 (1963). Section 21(a) of the MLA, 30 U.S.C. § 241(a) (1982), was most recently amended by the Combined Hydrocarbon Leasing Act of 1981 (CHLA), 95 Stat. 1070-72. The extent of the authority granted to the Department by section 21 to issue leases under such rules and regulations as it might prescribe was not altered by CHLA. *Compare*, 30 U.S.C. § 241(a) (1976) (which was generally unaltered by CHLA, except to remove tar sands to section 18 and to clarify that oil shale and gilsonite are covered by section 21). Thus, Congress has not withdrawn the Secretary's discretion to elect how to lease gilsonite, but has continued to defer to it.⁵

The Department's present regulations, which establish a dual system for oil shale and gilsonite involving both prospecting permit/preference right leases and competitive leases, 43 CFR 3550.1, do not conflict with the statutory grant of authority under section 21 of the MLA. Significantly, section 21 does not specify that the Secretary *must* lease oil shale and gilsonite only competitively, or that he *must* use only a prospecting permit/preference-right lease system, or that any specific method should be used. Rather, it leaves the method to be chosen to the discretion of the Secretary, through the promulgation of such rules and regulations as he may prescribe. Since the regulations promulgated by the Department are plainly consistent with the statute, we are plainly obliged to affirm BLM's decision to apply them.⁶

DAVID L. HUGHES
Administrative Judge

APPEAL OF NORRIS E. DIXON

IBCA-2581

Decided: September 27, 1989

Blanket Purchase Agreement No. 85-2016-87, Office of Personnel Management.

Denied.

* Prior to removal of the tar sand areas from sec. 21 of the MLA, the Department exercised its discretion to issue noncompetitive leases for tar sands area, even though sec. 21 of the MLA, 30 U.S.C. § 241 (1976) (which governed tar sands prior to CHLA), did not specifically grant the Secretary the authority to do so. *See Daniel A. Engelhardt*, 61 IBLA 65, 66 (1982); 46 FR 6077-78 (Jan. 21, 1981), 45 FR 76800-01 (Nov. 20, 1980).

* As pointed out by Hydrocarbon in its answer, if we accepted the logic of AGC's argument that prospecting permit/preference-right leases may not be issued because they are not expressly authorized by 30 U.S.C. § 241(a) (1982), it would also follow that competitive leases (which AGC favors) could not be issued, because they, too, are not expressly authorized.

September 27, 1989

Contracts: Contract Disputes Act of 1978: Generally--Contracts: Disputes and Remedies: Burden of Proof--Contracts: Disputes and Remedies: Damages

The Board denies a claim for breach of contract damages by an investigator supplier under a BPA where it finds: (i) that the placement of calls (orders) for background investigations of individuals for sensitive positions in the Government is discretionary with OPM; (ii) that under the terms of the BPA, OPM is only liable for calls actually placed with an investigator supplier; (iii) that it is undisputed that the appellant has been paid for all of the calls, actually placed with him; and (iv) that assuming, *arguendo*, that the terms of the BPA were breached in some way, appellant has failed to show any damages caused by the breach.

APPEARANCES: Norris E. Dixon, Doraville, Georgia, for Appellant; Phillip C. Mokris, Government Counsel, Office of Personnel Management, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE MCGRAW

INTERIOR BOARD OF CONTRACT APPEALS

Background

Norris E. Dixon (hereinafter contractor/appellant/Dixon) has timely appealed from a decision of the contracting officer (CO) dated February 15, 1989, denying Dixon's claim for breach of contract damages. In a letter to the Director, Office of Personnel Management (OPM), dated August 20, 1987, the contractor claimed damages in the amount of \$12,225 (Appeal File, Exhibit J; hereinafter AF, Exh. J). The Notice of Appeal of February 21, 1989, however, reduced the amount claimed as breach of contract damages to \$5,000.

The instant appeal arose out of appellant's status as an investigator supplier under a Blanket Purchase Agreement (BPA) under which to the extent of calls (orders) received, Dixon was to conduct background investigations of individuals being considered for sensitive positions in the Federal Government. Procedures for contracting with OPM under the Personnel Investigations Contract Support Program are described in OPM Brochure OFI-6 (AF, Exh. C). Individuals selected to provide services to OPM are placed under a BPA. The terms and conditions of the BPA here in issue are set forth in Attachment 1A to BPA No. 85-2016-87 (AF, Exh. B) and in Attachment 6 to Brochure OFI-6 (AF, Exh. C).

On February 6, 1986, Dixon was issued BPA No. 85-2095P-86 for services as an investigator supplier to OPM from February 5 through September 30, 1986 (AF, Exh. A). On October 7, 1986, Dixon was issued BPA No. 85-2016-87 for services as an investigator supplier to OPM during the period from October 1, 1986, through September 30, 1987 (AF, Exh. B). In the period covered by the two BPA's, Dixon accepted and completed 97 background investigations pursuant to calls issued to him by OPM.

By reason of reviews received from the OPM Investigations Background Branch, Office of Federal Investigations, regarding the quality of calls performed by Dixon, OPM decided to issue no additional calls for services to him pending an overall review of the quality of his work. Based upon the results of such review and considering the contentions made by appellant in his letters to the CO of May 26, June 15, and July 22, 1987 (AF, Exhs. D, F, and G), the CO advised the appellant that his work had been determined to be deficient (AF, Exh. I, Letter of Aug. 17, 1987). In the same letter appellant was advised that no more calls for services would be issued to him and that BPA No. 85-2016-87 was therefore being terminated.

Among the provisions included in BPA No. 85-2016-87 were the following:

1. The Office of Personnel Management is obligated only to the amount of authorized calls actually placed against this BPA.
- * * * * *

4. Procedure for placing orders:

Calls will be placed by mail or in person by the COR(s) specified above, using case scheduling/transmittal form(s). An order may include several separate investigations. Orders will be placed at the discretion of the Government. Each order will be identified using a BPA Call Number.

* * * * *

9. Quality standards:

All services and deliverables provided under this BPA must conform to the published OPM quality standard. The Government reserves the right to reject or return unsatisfactory deliverables or services and require correction at no cost to the Government.

* * * * *

10. No agreement other than as specified herein shall be applicable to Call (orders) placed hereunder. This agreement is effective and remains in effect until the expiration date specified above.
- * * * * *

(AF, Exh. B, Attachment 1A).

In the Notice of Appeal of February 21, 1989, appellant states:

Summary: I received 97 case assignments through the OPM contract Blanket Purchase Agment (BPA) - Calls for Service system from February 1986 to April 1987. I completed the 97 cases and I was paid for the work. There were 14 deficients in the 97 cases. (failure to cover specified periods, failure to resolve material questions, or failure to present material in a logical, well-phrased manner). OPM allowed me to correct five (5) of the deficiencies at no expense to the government, but they did not allow me to correct the other nine (9) deficiencies at-my-own-expense as the contract-by-reference requires, instead, they refused to issue to me Calls for Service (case assignments) after April 1987 and further terminated the BPA early, August 17, 1987. The contract-by-reference includes a statement that a 4% deficiency rate is unacceptable, but it does not state that the contractor will not receive more Calls For Service as a result of a deficiency rate in excess of 4%, in fact, it requires OPM Investigation Division to take other very specific actions, which they failed to do, and those failures are the basis for this appeal. End of summary.

September 27, 1989

Discussion

In her letter to appellant of August 17, 1987 (AF, Exh. I), the CO found that the Contracts Disputes Acts of 1978 (CDA) was not applicable to the claim submitted, since all the calls placed under BPA's had been completed and the contractor had been paid for all of such calls. The Board notes, however, that Brochure OFI-6 invokes the authority of the CDA for the contractual arrangement with which we are here concerned (*i.e.*, the above-cited BPA's and the calls placed thereunder) (AF, Exh. C, at 13). Also noted is the fact that the instant appeal involves a claim for breach of contract. It is well established that the CDA vests boards of contract appeals with jurisdiction over breach of contract claims. See *Paragon Energy Corp. v. United States*, 227 Ct. Cl. 176 (1981), and authorities there cited. The Board therefore finds that it has jurisdiction over this appeal.

Very recently the Court of Appeals for the Federal Circuit decided the case of *San Carlos Irrigation & Drainage District v. United States*, 877 F.2d 957 (1989). There the Court stated, at page 959: "To recover for breach of contract, a party must allege and establish: (1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach."

In the Notice of Appeal appellant charges that OPM violated the terms of the contract in a number of ways. More specifically, appellant states that OPM (i) ceased issuing calls for services (case assignments) to contractor after April 1987; (ii) failed to request additional investigations by Dixon of alleged deficiencies; (iii) refused to allow Dixon to complete nine deficiencies at no additional costs to the Government; (iv) inspected the services covered by the calls issued in such a manner as to unduly delay the rendition of the services; and (v) did not permit Dixon to proceed diligently with performance of the contract pending final resolution of his request for relief, claim or appeals.

In undertaking to enumerate the various ways which OPM breached its contract, appellant appears to have overlooked or, perhaps, may have chosen to ignore the fact that in two different places the contractor is told that "[o]rders will be placed at the discretion of the Government" (AF, Exh. B, BPA Order No. 85-2016-87, Attachment 1A, Item 4; AF, Exh. C, Brochure OFI-6, Attachment 6, Item 4). Appellant also appears to be oblivious of the fact that in two different places the contractor is told that "[t]he Office of Personnel Management is obligated only to the amount of authorized calls actually placed against this BPA" (AF, Exh. B, BPA Order No. 85-2016-87, Attachment 1A, Item 1; AF, Exh. C, Brochure OFI-6, Attachment 6, Item 1).¹

¹ In *Mid-America Officials Assn.*, ASBCA No. 38678 (Aug. 22, 1989), the Armed Services Board of Contract Appeals (ASBCA) had occasion to consider the effect to be given to a BPA containing a paragraph entitled "Extent of

Continued

Assuming, *arguendo*, that OPM may have breached its contract in some respect (e.g., the refusal to permit appellant to complete the nine deficiencies listed in the CO's letter of August 17, 1987 (AF, Exh. I)), no damages are shown to have been caused by any of the assigned breaches of contract. It is undisputed that the contractor was paid the agreed amount for all the calls actually placed. Appellant has not even alleged that any services as an investigator supplier were rendered to OPM over and above the 97 calls received and completed for which payment in full has been acknowledged. Under the tests for recovery on a breach of contract claim enunciated in *San Carlos Irrigation & Drainage District, supra*, appellant is not entitled to prevail.

Decision

For the reason stated and upon the basis of the authorities cited, the appeal is denied.

WILLIAM F. McGRAW
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

Obligation." ("The Government is obligated only to the extent of authorized calls actually placed against this blanket purchase agreement (BPA) * * *") There, in the course of denying the claim, the ASBCA stated:

"The Federal Acquisition regulation (FAR), the contents of which appellant was deemed to have been on notice at the time of acceptance of the BPA, make it clear that the BPA did not confer any right or preference upon appellant to be awarded orders for services during the 1988-89 season.

"The issuance of the BPA itself did not confer such rights. The BPA itself is not a contract of purchase. All that it purports to do is prescribe terms and conditions for any orders that may be awarded. All that is accomplished by issuance of a BPA is the establishment of a "charge account" with the vendor so purchases can thereafter be made without having to issue individual purchase documents each time. FAR 13.201." (Slip Opinion at 8).

January 5, 1989

**PROPOSED INSTALLATION OF MCI FIBER OPTIC
COMMUNICATIONS LINE WITHIN SOUTHERN PACIFIC
TRANSPORTATION CO.'S RAILROAD RIGHT-OF-WAY***

M-36964

January 5, 1989

Rights-of-Way: Act of January 27, 1866--Rights-of-Way: Act of March 3, 1875--Rights-of-Way: Jurisdiction Over--Rights-of-Way: Nature of Interest Granted

The Southern Pacific Transportation Co.'s interest in railroad rights-of-way granted to it pursuant to the General Railroad Right-of-Way Act of Mar. 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1982), and the Act of July 27, 1866, ch. 278, 14 Stat. 292, are sufficient to enable it to authorize another company to install a fiber optic communication system on the surface in the subsurface of such rights-of-way where they cross public lands, without either a consent or a right-of-way grant from the Bureau of Land Management.

Memorandum

To: Assistant Secretary--Land and Minerals Management

From: Acting Solicitor

Subject: Proposed Installation of MCI Fiber Optic Communications Line within Southern Pacific Transportation Co.'s Railroad Right-of-Way

This opinion memorializes and expands upon the guidance we have previously provided you as to whether MCI Telecommunications Corp. (MCI) or Southern Pacific Transportation Co. (SPT) must obtain right-of-way grants or permits from the Bureau of Land Management (BLM), in addition to those currently possessed by SPT, in order for MCI to install a fiber optic communications line and associated facilities (*i.e.*, equipment shelters) within existing railroad rights-of-way of SPT which cross public lands.

On July 15, 1988, the Acting Assistant Secretary--Land and Minerals Management sent a letter to counsel for MCI, indicating that no additional right-of-way grant was necessary for installation of the line. We approved sending that letter, notwithstanding our ongoing review of the general issues implicated in this matter, because of our conclusion that even under the most stringent standard for the railroad's use of its right-of-way grant, the installation of the line would be deemed to be within the scope of the grant, in that it furthers railroad purposes. The completion of our review has resulted in this opinion. Although this memorandum addresses the MCI-SPT situation in particular, it is intended to provide general guidance in similar situations.

*Not in chronological order.

Based on the information provided by MCI and SPT, and based on our review of authorities describing the scope of the rights-of-way currently possessed by SPT, we conclude that installation of the line and associated facilities is within the scope of the railroad's existing grants.

BACKGROUND

MCI and SPT have entered into an agreement whereby SPT will grant MCI the right to install a fiber optic telecommunications line within SPT railroad rights-of-way between Rialto, California, and Texas. MCI has described the fiber optic line as a single cable, five-eighths of an inch in diameter, which will be buried within the rights-of-way to a depth of 36 to 40 inches. In some areas, the cable will be sheathed in a conduit 2 inches in diameter. At approximately 30-mile intervals, surface electronic apparatus will be installed in shelters which will measure 11 by 18 feet. MCI will operate the line as a commercial trunk line, with a portion of the line's capacity dedicated to SPT's use for railroad communications purposes.

Segments of the SPT rights-of-way in question traverse public lands administered by BLM. The total length of the segments is approximately 185 miles. BLM state offices have advised MCI and SPT that, in order to cross these segments, MCI must obtain right-of-way grants from BLM, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771. BLM has taken this position because of a memorandum and a letter issued by the Associate Solicitor—Energy and Resources in 1985 and 1986, respectively, concerning a similar situation.

The Associate Solicitor's memorandum to the Director, BLM, dated July 5, 1985, states that two circuit cases, *Energy Transportation Systems, Inc. v. Union Pacific Railroad Co.*, 606 F.2d 934 (10th Cir. 1979), and *Energy Transportation Systems, Inc. v. Union Pacific Railroad Co.*, 619 F.2d 696 (8th Cir. 1980),¹ had construed the right-of-way granted by the Pacific Railroad Act of July 1, 1862, ch. 120, 12 Stat. 489, as amended by the Act of July 2, 1864, ch. 216, 13 Stat. 356, to be "a mere surface easement." From this premise, the memorandum reasoned that where such rights-of-way traverse public lands administered by BLM, the subsoil, or servient estate, beneath the right-of-way is unappropriated public land like land adjacent to the right-of-way. That being so, the subsoil was said to come within the operation of Title V of FLPMA, as public lands administered by BLM, and a right-of-way issued pursuant to Title V was viewed as being required in order to install a cable within the subsoil. The memorandum comes to the same conclusion with respect to the subsoil beneath rights-of-way granted by the General Railroad Right-of-Way Act of March 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1982).

¹ Hereinafter referred to, respectively, as "ETSI-10" and "ETSI-8," and collectively as the "ETSI decisions."

January 5, 1989

The Associate Solicitor's letter, dated February 24, 1986, to Mr. Robert E. Walkley, General Contract Counsel, Union Pacific System, was written in response to Mr. Walkley's request that the memorandum be reviewed. The Associate Solicitor concluded that the memorandum was correct. He noted that the courts in the *ETSI* cases had held that the rights obtained by the railroad under the 1862 Act extend only to the use of the surface of the land for railroad right-of-way purposes, and that such rights extend in some degree to the subsurface as well, for tunnels, cuts, fills, and structures necessary for railroad purposes. He stated that the railroad unquestionably could install electronic cables within its right-of-way for railroad purposes, but that it could not authorize a third party to install a commercial cable within the right-of-way.²

For the reasons specified herein, the memorandum and letter are overruled.

DISCUSSION

In order to determine whether the scope of SPT's rights-of-way permits installation by MCI of the fiber optic communications line and associated facilities, it is necessary to examine the statutory terms of SPT's rights-of-way grants. Then we must turn to the Supreme Court and lower court authority interpreting the scope of railroad rights-of-way. Finally, we must examine whether the Department's administrative practice assists in resolving this issue.

Review of Statutes Granting SPT's Rights-of-Way

SPT's rights-of-way were granted to SPT's predecessors in interest by the United States pursuant to the Act of March 3, 1871, ch. 122, 16 Stat. 573, and the General Railroad Right-of-Way Act of March 3, 1875, *supra*. The Act of March 3, 1871, authorized the Texas Pacific Railroad Co. to construct a railroad and telegraph line from Marshall, Texas, to San Diego, California. Section 23 of the Act, 16 Stat. 579, provides:

That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California, by the Act of July twenty-seven, eighteen hundred and sixty-six . . .

The Act of July 27, 1866, ch. 278, 14 Stat. 292, is one of a class of similar railroad right-of-way grant statutes, enacted by Congress

² We note that neither the memorandum or letter of the Associate Solicitor contained a comprehensive, indepth review of the case law concerning the scope of railroad grants.

between 1850 and 1871, which are commonly referred to as "pre-1871 grants." The 1866 Act authorized the Atlantic and Pacific Railroad Co. to construct a railroad and telegraph line from Missouri and Arkansas to the Pacific coast. Section 18 of the Act, 14 Stat. 299, provides that the Southern Pacific Railroad was authorized to connect with the Atlantic and Pacific near the California boundary to construct a railroad line to San Francisco. Section 18 further provides, that to aid in its construction, the S.P.T. "shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific railroad herein provided for." Section 2 of the Act, 14 Stat. 294, which granted the right-of-way to the Atlantic and Pacific, therefore made a like grant to the Southern Pacific. It provides:

That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station-buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations. . . .

Section 5 of the Act, 14 Stat. 295, provides:

That said Atlantic and Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turn-outs, stations, and watering-places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line. . . .

Section 7 of the Act, 14 Stat. 296, authorizes the railroad company to purchase or condemn any lands necessary for the construction and working of the road, up to 100 feet on each side of the road, and also any lands that might be necessary for "turn-outs, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road."

The only express condition on the grants of land made by the Act is, in essence, the construction and continued use of the railroad line. Cf. Sections 8 and 9. The Act states only two significant limitations on the railroad's use of the land. First, "mineral lands" are excluded by section 3 from the operation of the Act, except that the word "mineral" by definition does not include iron or coal. Section 3. Second, Section 11 of the Act requires the line to be subject to "use of the United States for postal, military, naval and all other government service."

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The statute granting the remainder of the pertinent SPT rights-of-way is the General Railroad Right-of-Way Act of March 3, 1875, ch. 152, 18 Stat. 482; 43 U.S.C. § 934 (1982).³ Section 1 of that Act provides that:

[The right of way through the public lands of the United States is hereby granted to any railroad company . . . to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turnouts, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Section 3 of the 1875 Act specifies a condition on the grants similar to that stated in the 1866 Act, namely, that failure to complete the railroad results in forfeiture of the grant.

Section 4 of the Act, 18 Stat. 483, 43 U.S.C. § 937, provides that, upon approval by the Secretary of the Interior of the profile of a company's road, the right-of-way shall be noted on the land office plats "and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

Another relevant statute is the Railroad Right-of-Way Abandonment Act of March 8, 1922, ch. 94, 42 Stat. 414, 43 U.S.C. § 912. It provides for the disposition of erstwhile public lands granted to railroads for rights-of-way or as sites for railroad structures when such lands are abandoned or forfeited by the railroad. The statute becomes operable when the railroad's use and occupancy of the land ceases by forfeiture or abandonment decreed by a court of competent jurisdiction or by an act of Congress. It provides that in such event:

all right, title, interest and estate of the United States in said lands shall . . . be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid . . . and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever.

The statute provides that where such a transfer occurs, title to the minerals shall be reserved to the United States. Where these lands are within a municipality, title to them is transferred to the municipality. It further provides that it does not affect conveyances made by railroads to third parties which, before forfeiture or abandonment, have been or may be confirmed by Congress.

Supreme Court and Lower Court Authority

³ The 1875 Act was repealed, effective Oct. 21, 1976, insofar as applicable to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System, by sec. 706(a) of FLPMA, Pub. L. 94-579, 90 Stat. 2793. Sec. 701(a) of FLPMA, 90 Stat. 2786, provides that the repeal did not affect rights-of-way previously granted.

Not long after the passage of the 1866 Act, the Supreme Court, in *New Mexico v. United States Trust Co.*, 172 U.S. 171 (1898), had occasion to consider whether that Act granted a fee interest or a mere right of passage to the railroad. The Court noted that in an earlier decision, *Missouri, Kansas & Texas Railway v. Roberts*, 152 U.S. 114 (1893), the Court had held that a similar grant conveyed a fee interest.⁴ The Court referred approvingly to the opinion in the *Roberts* case, rejecting the suggestion of the appellant in the *United States Trust* case that the issue of fee-versus-easement had not been faced in *Roberts*. The Court then proceeded to confirm that the interest possessed by the railroad amounted to a fee, even if the appellant disagreed with labeling it as such:

But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal property.

152 U.S. at 183 (italics added).

Several years later, in the landmark case of *Northern Pacific Railway v. Townsend*, 190 U.S. 267 (1903), the Supreme Court held that another pre-1871 grant, under the Act of July 2, 1864, ch. 217, 13 Stat. 365 (similar to the 1866 statute at issue here), conveyed a “limited fee” interest in the right-of-way. The Court described the grant as follows:

Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered, *New Mexico v. United States Trust Co.*, 172 U.S. 171, 181; *St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. 426, it must be held that the fee passed by the grant made in section 2 of the Act of July 2, 1864. But, although there was a [] present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the *Baldwin* case) “to those necessarily implied, such as that the road shall be . . . used for the purposes designed.” Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.

190 U.S. at 271 (italics added). Thus, the “limit” in the “limited fee” refers to the condition of reverter, not to the physical extent of the land to which the fee attached.

In the following year, in *Western Union Telegraph Co. v. Pennsylvania Railroad*, 195 U.S. 540 (1904), the Court made the following statement:

A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in *New Mexico v. United States Trust Co.*, 172 U.S. 171. We there said (p. 183) that if a railroad's right of way was

⁴ In the *Roberts* decision, the Court stated: “The title to the land for the two hundred feet in width thus granted vested in the company . . . That grant was absolute in terms, covering both the fee and possession . . . 152 U.S. at 116-17 (italics added).

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an easement it was "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal property."

* * * * *

A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given . . .

195 U.S. at 570 (italics added). Although this case dealt with the right-of-way (apparently stated-granted) of the Pennsylvania Railroad, and did not involve a Federal railroad right-of-way grant, the Court's reliance on *New Mexico v. United States Trust Co.* confirms the Supreme Court's consistent view of the scope of pre-1871 Federal railroad grants.

More recently, in *United States v. Union Pacific Railroad Co.*, 353 U.S. 112 (1957), the Supreme Court considered whether the pre-1871 grant to the railroad company made by the Pacific Railroad Act of July 1, 1862, 12 Stat. 489, included mineral rights. The Court held that it did not. The Court reached this result by reviewing the Federal mineral policy at the time of the grant, holding that the exception for "mineral lands" contained in the Act's section 3, which made "checkerboard" land grants, applied as well to section 2 of the Act, which granted the right-of-way. The Court found its prior cases inapt, on the basis that none of these cases had involved a contest between the United States and the railroad-grantee over mineral rights underlying the right-of-way. As the Tenth Circuit pointed out in *Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir. 1967), *cert. denied*, 389 U.S. 985 (1967), the *Union Pacific* decision did not overruled *Townsend* or any other limited-fee decisions, and did not declare that pre-1871 rights-of-way are easements.⁵

We observe that *Union Pacific* left the limited-fee precedents in place, and acknowledged in *dicta* that under those precedents the railroads received *at least* all surface rights to the right-of-way and all rights incident to a use for railroad purposes. Moreover, the court did not rely on a "surface-only" view of the scope of the limited fee in order to reach its conclusion concerning mineral rights. Accordingly, the dissent of Mr. Justice Frankfurter, in which two other Justices joined, from the holding of the majority in *Union Pacific* that mineral rights could be viewed as specifically reserved to the United States by statute contains persuasive and uncontradicted guidance on the scope of pre-1871 rights-of-way:

To argue that the "limited fee" . . . granted a fee merely in the surface is to palter with language and with our decisions. "Surface" could not, of course, mean merely the area

⁵ See *Kunzman v. Union Pacific R.R. Co.*, 169 Colo. 874, 456 P.2d 743 (1969), *cert. denied*, 396 U.S. 1039 (1970).

that is seen by the eye. To say that it means the visual area and an indeterminate depth – x inches or x feet – necessary for support is to ask the Court to rewrite legislation and to cast upon it administrative tasks in order to accomplish a policy that seems desirable a hundred years after Congress acted on a different outlook.

353 U.S. at 131 (italics added). This reasoning clearly emphasizes the propriety of grantees' use of the non-mineral subsurface of rights-of-way.

Mr. Justice Frankfurter's views on reading limitations into pre-1871 grants also provide useful guidance here:

The Townsend case also serves to refute the suggestion that the railroad in its use of the right of way is confined to what in 1957 is narrowly conceived to be "a railroad purpose" . . . The Court [in Townsend] recognized that the land could revert to the grantor only in the event that it was used in a manner inconsistent with the operation of the railroad . . . Had Congress desired to make a more restrictive grant of the right of way, there would have been no difficulty in making the contingency for the land's reversion its use of any purpose other than one appropriately specified.

353 U.S. at 131-32 (italics added).⁶

This portion of Mr. Justice Frankfurter's dissent rightly focuses our attention on maintaining a clear distinction between the *scope* and *duration* of the pre-1871 Act rights-of-way. The *scope* of these rights-of-way is a fee interest. A fee interest inherently encompasses surface and subsurface rights. The Supreme Court authority from *New Mexico* through *Townsend* and *Union Pacific* suggests only one limitation on the scope of these rights-of-way: the mineral rights are excluded from the estate possessed by grantees. Further, another line of Supreme Court decisions confirms that the estate possessed by the grantees includes the power to authorize third parties (such as MCI, in the current matter) to use the rights-of-way for other purposes which are not inconsistent with railroad operations.⁷

The *duration* of the pre-1871 rights-of-way is specified by the nature of the "limit" in the "limited fee." The Supreme Court authority reviewed previously is consistent in finding that a grantee's abandonment of a right-of-way for the operation of a railroad is the "limiting factor" which would lead to termination of the fee. In these circumstances, if a court decree or act of Congress determined that abandonment had occurred, the grant would become subject to operation of the previously discussed 1922 abandonment statute, 43 U.S.C. § 912.

As discussed previously, the other rights-of-way possessed by SPT and at issue here are those granted pursuant to the General Railroad

⁶ Here again, nothing in the majority opinion contravenes this view of the scope of rights-of-way.

⁷ See *Grand Trunk R.R. Co. v. Richardson*, 91 U.S. 454, 468-69 (1875). See also *Hartford Insurance Co. v. Chicago, M. & S.P. Ry.*, 175 U.S. 91, 99 (1899); *Union Pacific Ry. v. Chicago, R.I. & P. Ry.*, 163 U.S. 564, 581 (1896). Other courts have applied this principle in a wide variety of contexts. See, e.g. *Mississippi Investments Inc. v. New Orleans & N.E. R.R.*, 188 F.2d 245, 247 (5th Cir. 1951) (commercial warehouse); *Mitchell v. Illinois Central R.R.*, 51 N.E.2d 271, 275 (Ill. 1943) (commercial gas station). It should be noted that the right-of-way statutes themselves do not prohibit the railroad from authorizing third parties to use portions of its right-of-way. Compare Act of July 27, 1866, ch. 278, 14 Stat. 292; Act of Mar. 3, 1871, ch. 122, 16 Stat. 573; Act of Mar. 3, 1875, ch. 152, 18 Stat. 482, 43 U.S.C. § 934; with Act of Mar. 30, 1896, ch. 82, 29 Stat. 80; Act of Feb. 28, 1902, ch. 134, 32 Stat. 43.

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Right-of-Way Act of 1875. The Supreme Court has not addressed the scope of 1875 Act rights-of-way on as many occasions as it has the scope of the pre-1871 rights-of-way. In *Great Northern Railway Co. v. U.S.*, 315 U.S. 262 (1942), the Supreme Court considered whether an 1875 Act grant included the right to oil and minerals underlying the right-of-way. In holding that the grants did not include the right to oil and minerals, the Court noted that rights-of-way granted by the 1875 Act are "easements" and not fees. The Court distinguished the 1875 Act grants from grants made prior to 1871 which, it reiterated, did convey fee interests. *Id.* at 278. The Court did not elaborate as to the rights of railroads under 1875 Act grants, except to state that they have the right of use and occupancy but no right to the underlying oil and minerals.

For our purposes, the most important guidance provided by *Great Northern* is its confirmation of the significant rights of the 1875 Act grantees, *i.e.*, use and occupancy of the land. The Court did not limit the grantees' rights to those of a *common-law* easement (or limit grantees to surface use only) and, indeed, it is unjustifiable to force a unique estate created by Congress into a common-law label, especially when the term "easement" was well understood at the time and could have been used by Congress if it had so desired.

This approach to the 1875 Act grants and their scope was confirmed in a recent district court decision, *Idaho v. Oregon Short Line Railroad Co.*, 617 F.Supp. 207 (D. Idaho 1985). A primary focus of the case was whether the 1922 railroad abandonment statute, 43 U.S.C. § 912, applied to 1875 Act grants. In reviewing the precedents, the court held that:

. . . Congress, in granting the 1875 Act rights-of-way, did not intend to convey to the railroads a *fee interest in the underlying lands*. Congress did, however, intend to give the railroads an interest suitable for railroad purposes – a right-of-way, which, by definition, carried with it the *right to exclusive use and occupancy of the land*.

617 F.Supp. at 212 (*italics added*).⁸ This holding can be fairly read as confirming that railroads possessing 1875 Act "easements" have exclusive use and occupancy of (though not a *fee interest* in) the nonmineral subsurface (*i.e.*, "underlying") lands.

Clearly, however, the 1875 Act anticipated a retained interest in the United States in addition to the mineral rights. As stated by the court in *Oregon Short Line*:

In enacting these statutes, Congress clearly felt that it had some retained interest in 1875 Act rights-of-way. *The precise nature of that retained interest need not be shoe-horned into any specific category cognizable under the rules of real property law.*

⁸ See also *Puett v. Western Pacific R. Co.*, ____ Nev. ____, 752 P.2d 213 (1988).

Id. (italics added). The most logical characterization of this interest is a secondary right to use the subsurface of the rights-of-way.

The ETSI Decisions

The memorandum and letter issued by the Associate Solicitor-Energy and Resources in 1985 and 1986, respectively, reflect inappropriate reliance on the *ETSI*-10 and *ETSI*-8 decisions.⁹

These decisions involved the efforts of Energy Transportation Systems, Inc., to obtain transverse crossings of pre-1871 railroad rights-of-way in order to install a coal slurry pipeline. Reliance on the *ETSI* decisions is inappropriate when addressing the issues presented here because the decisions do not address the extent of the *affirmative rights* of a railroad to authorize uses of its rights-of-way, such as are at issue here.¹⁰

Moreover, the vitality of the holding of the *ETSI* decisions (though inapplicable to the issue presented here) is called into clear question by a subsequent Tenth Circuit decision. In 1981, in *Missouri-Kansas-Texas Railroad Co. v. Early*, 641 F.2d 856 (10th Cir. 1981), the Tenth Circuit considered the interest granted to the Union Pacific Railroad Co. by the Acts of July 25, 1866, ch. 241, 14 Stat. 236, and July 26, 1866, ch. 270, 14 Stat. 289, which authorized a right-of-way across lands granted to the Creek Nation by the Treaty of July 19, 1866, 14 Stat. 785. Citing *Railroad Co. v. Baldwin*, 103 U.S. 426 (1881); *U.S. Trust Co.; Roberts*; and *Great Northern*, and ignoring the *ETSI* decisions, the court concluded that the railroad had been granted a fee interest and did not limit its holding to the surface interest. Although Indian lands rather than public lands were involved, the situation appears to have been indistinguishable from that in the *ETSI* decisions. Thus, the Tenth Circuit did not adhere to its earlier *ETSI*-10 decisions. The broad scope of the interest, i.e., the fee interest, recognized in the 1981 *M-K-T* decision is inconsistent with a limitation of the railroad's rights in the nonmineral subsurface.

⁹ *Energy Transp. Systems, Inc. v. Union Pacific R. Co.*, 606 F.2d 934 (10th Cir. 1979); *Energy Transp. Systems, Inc. v. Union Pacific R.R. Co.*, 619 F.2d 696 (8th Cir. 1980). The Eighth Circuit opinion's reasoning is basically the same as the Tenth Circuit's. It should be noted that the United States was not a party in any of these cases.

¹⁰ Moreover, the *ETSI* decisions may well have been influenced by the public policy considerations disfavoring a railroad's attempt to block a transverse right-of-way crossing not interfering with railroad operations. In *ETSI*-10, the opinion below (which was affirmed) states: "while this Court recognizes that the railroad has substantial rights which are entitled to protection, it cannot conclude that Congress created a 'Maginot Line' in the form of a limited easement, through which the railroads' commercial rivals may not pass [citing *Townsend*, among other authorities]." 435 F.Supp. at 318. Moreover, the court's sympathy for the railroad's position may have been sorely tried by the fact that Union Pacific had allowed pipeline crossings (for non-competing pipelines) on numerous prior occasions. See 435 F.Supp. at 315.

The *ETSI* decisions also appear to confuse, by misapplication of Union Pacific dicta, the duration of the railroad's estate with the scope of the estate. That is, a servient estate is postulated which gives an adjacent landowner *current* rights in the right-of-way subsoil. Adjacent landowners only have *future* rights in the right-of-way, i.e., only upon abandonment. This servient estate is utilized by the *ETSI* courts as a vehicle for identifying a party who can and will affirmatively authorize a subsoil transverse crossing, thereby avoiding the "Maginot Line" problem. The equation of a reversionary ("limited fee") interest with a current subsurface interest appears to be based on the following *Union Pacific* dicta: "The most that the 'limited fee' cases decided was that the railroads received all surface rights to the right of way and all rights incident to a use for railroad purposes." 619 F.2d at 698; 606 F.2d at 937. However, neither the "limited fee" cases nor the *Union Pacific* decision restricted the extent of subsurface rights, nor for that matter, defined "surface rights." Finally, the *ETSI* decisions' minimization of the scope of the pre-1871 rights-of-way could be read as inconsistent with the Supreme Court authorities discussed previously.

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Administrative Practice

Numerous administrative decisions of this department similarly hold that the lands within pre-1871 rights-of-way are, except for the mineral estate, the private property of the railroad, *A. Otis Birch & Estelle C. Birch (On Rehearing)*, 53 I.D. 340 (1931); *Abilene Oil Co. v. Choctaw, Oklahoma & Gulf R.R. Co.*, 54 I.D. 392 (1934), and are not subject to the administrative jurisdiction of this department. See *Townsend; Window Reservoir & Canal Co. v. Miller*, 51 L.D. 27 (1925); *E. A. Crandall*, 43 L.D. 556 (1915).

Historically, railroads have customarily allowed a wide variety of third-party uses of their rights-of-way,¹¹ a fact well known to, and sanctioned by, the Department.¹²

Accordingly, the administrative practice of this Department is consistent with the Supreme Court authority discussed herein.

Summary

In summarizing the case law and administrative practice concerning the scope of pre-1871 and 1875 Act grants, and applying it to the question at hand, we are guided by the principles set forth in the Supreme Court's decision in *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), in which it surveyed the history and purpose of railroad grants. In so doing, the court referred to:

. . . the familiar canon of construction that when grants to Federal lands are at issue, any doubts "are resolved for the Government, not against it." [Citations omitted.] But this Court long ago declined to apply this canon in its full vigor to grants under the railroad Acts.

440 U.S. at 682. Indeed, the *Leo Sheep* decision proceeded to expand on the nondispositive character of this canon in the context of railroad grants by quoting approvingly from its earlier opinion in *United States v. Denver & Rio Grande Railroad Co.*, 150 U.S. 1, 14 (1893):

" . . . When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individual or to corporations *as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character* in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and *should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted.*"

440 U.S. at 683 (italics added). This approach, as we have seen, is consistent with the Supreme Court authority reviewed with respect to the scope of the pre-1871 and 1875 Act grants.

¹¹ See generally *Use & Disposition of Railroad Right-of-Way Grants: Hearings on H.R. 663, et al., Before the Subcomm. on Public Lands of the House Comm. on Interior & Insular Affairs*, 87th Cong., 1st Sess. (1961); *Public Land Law Review Comm'n Report, One-Third of the Nation's Land*, 230-32 (1970).

¹² See Solicitor's Opinion, M-36016 (Oct. 17, 1949); *Clear Water Short Line Ry. Co.*, 29 L.D. 569 (1900).

With respect to the pre-1871 grants, the Supreme Court's ruling in *Townsend* is the controlling precedent. Under *Townsend*, the railroads have fee ownership of their pre-1871 rights-of-way. Under *Union Pacific*, where the mineral estate was reserved to the United States, it does not pass to the railroad.

The scope of these rights-of-way, consistent with the fee nature of the estate, includes the surface, subsurface (except minerals) and airspace. The duration of the rights-of-way is perpetual, subject to a possibility of reverter if the lands are no longer used for railroad purposes. Given the fee nature of the grantee's interest, the grantee may authorize third parties to utilize its right-of-way for activities and structures not inconsistent with the grantee's operation of a railroad. The United States may bring suit to recover title where it appears that the reverter has been triggered; but while title is vested in the railroad, the land within the right-of-way, being privately owned, except for reserved minerals, is not subject to the administrative jurisdiction of this Department.

Therefore, SPT possesses a fee interest in its pre-1871 rights-of-way. It may utilize, and authorize MCI to utilize, for the fiber optic line and associated shelters, the surface and subsurface, without the grant of an additional permit or right-of-way from BLM.¹³ We note that installation of the fiber optic line does not interfere with SPT's continued operation of the railroad, and thus does not trigger the Government's reversionary interest.

Under the 1875 Act, railroads were granted an "easement." The scope of this easement, unlike an ordinary common-law easement, is an interest tantamount to fee ownership, including the right to use and authorize others to use (where not inconsistent with railroad operations) the surface, subsurface, and airspace. The grantee's rights to use and occupy the surface are exclusive. Because the granting statute imposed no express limitation on its duration, this right-of-way

¹³ FLPMA permitting requirements apply only to "public lands," as defined in 43 U.S.C. § 1702. Lands subject to pre-1871 grants are not subject to BLM's FLPMA permitting authority because they are not public lands within the meaning of FLPMA. The reversionary interest remaining in the United States is not a present interest subject to FLPMA authority. See generally *Northern Pacific Ry. v. Townsend*, *supra*; *Union Pacific Railroad Co.*, 72 I.D. 6, 81 (1965), *aff'd sub nom. Wyoming v. Udall*, 255 F.Supp. 481 (D. Wyo. 1966), *aff'd* 379 F.2d 635 (10th Cir. 1967), *cert. denied* 389 U.S. 985 (1967); *E. A. Crandall*, 43 L.D. 556 (1915). See *Moore v. Robbins*, 96 U.S. 530 (1878); *Kirwin v. Murphy*, 83 F. 275, 280 (8th Cir. 1897), *appeal dismissed*, 170 U.S. 205 (1898).

Further, we note that although FLPMA supplanted preexisting statutes for future rights-of-way, 43 U.S.C. § 1770, it was not intended to infringe on the rights of those who held rights-of-way at the time of its enactment. Sec. 509(a) of FLPMA, 43 U.S.C. § 1769, states that: "Nothing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted." The point is reiterated at sec. 701(a) of FLPMA, 90 Stat. 2786, 43 U.S.C. § 1701, note, which provides that:

Nothing in this Act . . . shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.

Also, sec. 701(f) of FLPMA provides that, "Nothing in this Act shall be deemed to repeal any existing law by implication," and sec. 701(h) provides that, "All actions by the Secretary [of the Interior] under this Act shall be subject to valid existing rights." The report of the conference committee, H.R. Rep. No. 174, 94th Cong., 2d Sess. 65 (1976), makes it clear that railroad rights-of-way are to be protected:

[The legislation] protects all valid rights existing on the date of its approval, including grants under the railroad right-of-way act of 1875 which have attached prior to that approval date.

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continues in perpetuity, impliedly subject to termination if the easement is no longer used for railroad purposes.

Therefore, SPT possesses what is tantamount to a fee interest in its 1875 Act rights-of-way. It has exclusive use and occupancy of the surface, and has use and occupancy of the subsurface and airspace. Accordingly, it may utilize and authorize MCI to utilize the subsurface for a fiber optic line and the surface for the associated shelters without the grant of an additional permit or right-of-way from BLM.¹⁴ See *Kansas City Southern Ry. Co. v. Arkansas Louisiana Gas Co.*, 476 F.2d 829, 834 (10th Cir. 1973).

In other words, the grantee's estate includes not only the exclusive possession of the surface of the right-of-way, but also includes the possession of such portion of the subsurface and superjacent airspace as may be used for the installation and support of structures and other improvements of the railroad and third parties authorized by the railroad. The estate retained by the Government (where the right-of-way crosses public land) consists of the remaining subsurface (including the minerals therein) and airspace.

CONCLUSIONS

Based on the foregoing discussion, we have reached the following conclusions:

1. The scope of the rights-of-way granted to SPT by the General Railroad Right-of-Way Act of 1875 and the Acts of July 27, 1866 and March 3, 1871, allows SPT to permit MCI to install, without BLM permit or grant, the fiber optic line and associated equipment in and on the rights-of-way where they cross public lands.
2. The views of the prior Associate Solicitor—Energy and Resources, expressed in the memorandum of July 5, 1985, and the letter of February 24, 1986, referenced above, are overruled.

HOWARD H. SHAFFERMAN
Acting Solicitor

¹⁴ See note 18, *supra*, for a discussion explaining that FLPMA's coverage extends only to "public lands." SPT's interests in its 1875 Act grants are not "public lands," and thus are not subject to FLPMA. See generally *Stalker v. Oregon Short Line*, 225 U.S. 142, 158 (1912); *Noble v. Union River Logging R.R.*, 147 U.S. 165 (1893); *Boise Cascade Corp. v. Union Pac. R.R. Co.*, 630 F.2d 720, 723 (10th Cir. 1980); *Rice v. United States*, 345 F.Supp. 254 (D.N.D. 1972), aff'd 479 F.2d 58 (8th Cir. 1973), cert. denied 414 U.S. 858 (1973); *Union Pac. R.R. Co.*, 72 I.D. 76, 81 (1965), aff'd *sum. nom. Wyoming v. Udall*, 255 F.Supp. 481 (D. Wyo. 1966), aff'd 379 F.2d 636 (10th Cir. 1967), cert. denied 389 U.S. 986 (1967).

If BLM were approached directly by a third party seeking authorization to utilize the Government's retained subsurface or airspace interests in an 1875 Act grant, a FLPMA permit would be required and, subject to the requirements of Title V of FLPMA, could be issued if its grant would be consistent with the rights of the railroad (and its existing authorized users) as specified herein.

GOLDEN REWARD MINING CO.

111 IBLA 217

Decided October 16, 1989

Appeal from a decision of the Montana State Office, Bureau of Land Management (BLM), declaring 11 lode mining claims null and void ab initio. M MC 132703(SD) through M MC 132708(SD), and M MC 132777(SD) through M MC 132781(SD).

Affirmed.

1. Federal Land Policy and Management Act of 1976: Conveyances--Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests--Federal Land Policy and Management Act of 1976: Sales--Mining Claims: Lands Subject To
 Sec. 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719 (1982), provides that conveyances of title issued by the Department for sales pursuant to sec. 203 of FLPMA, 43 U.S.C. § 1713 (1982), shall reserve to the United States all minerals in the lands, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe. In the absence of regulations expressly approving the location of mining claims for the locatable minerals reserved upon the patenting of lands under sec. 203, mining claims located on such lands are properly declared null and void ab initio.

APPEARANCES: Max Main, Esq., Belle Fourche, South Dakota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

INTERIOR BOARD OF LAND APPEALS

The Golden Reward Mining Co. (Golden Reward) has appealed from the September 1, 1987, decision of the Montana State Office, Bureau of Land Management (BLM), declaring 11 lode mining claims null and void ab initio.

Specifically, Golden Reward objects to that portion of BLM's decision relating to 10 of the claims in which BLM ruled as follows:

The Ann & Patti #1 through Rosie #3 (M MC 132703(SD) through [M MC] 132708(SD)), EASTER, RLA, ALS (M MC 132777(SD) through [M MC] 132779(SD)), and KIRSTIN (M MC 132781(SD)) lode mining claims are located on lands which were patented with a reservation of the minerals to the United States subject to applicable law and such regulations as the Secretary of the Interior may prescribe. No regulations have been promulgated by the Secretary[; therefore, these lands are not open to mineral entry.]^[1]

No citations were supplied by BLM in support of this conclusion.²

¹ BLM declared 11 claims null and void ab initio in their entirety. First, BLM ruled that all 11 claims had been located in whole or in part on lands patented without a reservation of minerals. Second, it found that 10 of the claims were located on lands patented with a reservation of minerals, but that such lands were not open to mineral entry. Therefore, only one claim (M MC 132780 (SD)) was declared null and void because it was located entirely on lands patented without a reservation of minerals. That claim is not in dispute herein.

The other 10 claims, therefore, were declared null and void in their entirety because they were located in part on lands patented without a reservation of minerals and in part on lands patented with a reservation of minerals, but not open to entry. It is only the latter ground which appellant attacks.

² We note that in the section of the BLM Manual relating to public sale procedures, there is a provision at 2711.51 A addressing locatable minerals which states that "[l]ocatable minerals reserved under section 203 of FLPMA are not

Continued

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The record reveals that the lands that are subject to these claims were patented in January 1982 under Patent No. 40-82-0019, pursuant to sections 203 and 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1713 and 1719 (1982). The patent contains the following exception and reservation:

EXCEPTING AND RESERVING TO THE UNITED STATES * * * All the mineral deposits in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same *under applicable law and such regulations as the Secretary of the Interior may prescribe.* (Italics supplied.)

In its statement of reasons, Golden Reward, after quoting BLM's holding, states as follows:

The reference to "such regulations as the Secretary of the Interior may prescribe" is apparently a citation of 43 U.S.C. § 1719(a) [(1982)], which provides that all conveyances of title "shall reserve to the United States all minerals in the lands, together with the right to prospect for, mine, and remove the minerals under applicable law and such regulations as the Secretary may prescribe."

The [BLM's] assertion that the "lands are not open to mineral entry," because the Secretary has not prescribed new regulations is incorrect. The previously cited subsection (a) of 43 U.S.C. § 1719 does not state that the Secretary *must* prescribe new regulations prior to the public's exercise of its "right to prospect for, mine, and remove the minerals"; the said subsection (a) only provides for "*such regulations as the Secretary may prescribe.*" (Italics added.) The BLM's interpretation of 43 U.S.C. § 1719(a) operates as a *de facto* withdrawal of Federal minerals from location and development by the public. Such *de facto* withdrawal is contrary to the Mining Law of 1872 and all acts amendatory thereto.

We disagree.

[1] Section 209 of FLPMA, provides that conveyances of title issued by the Department for sales pursuant to section 203 of FLPMA, "shall reserve to the United States all minerals in the lands, together with the right to prospect for, mine, and remove the minerals *under applicable law and such regulations as the Secretary may prescribe* * * *" (italics supplied). The operative language, emphasized above, is incorporated into the reservation clause in the patent, set out above, and in the Departmental regulations governing sales under section 203. 43 CFR 2711.5-1.³

Significantly, section 2 of the Act of June 1, 1938, *as amended* (the Small Tract Act), 43 U.S.C. § 682b (1970),⁴ contained identical language concerning reservation of mineral interests in lands patented under the Act:

Patents for all tracts purchased under the provisions of [the Small Tract Act] shall contain a reservation to the United States of the oil, gas, and all other mineral deposits,

subject to prospecting and location unless and until the Secretary issues regulations providing for their disposal on lands sold under FLPMA. The Master Title Plats should be so noted." The Manual also provides that after title passes "leasable minerals are available for disposition under the various leasing authorities * * *" (BLM Manual 2711.51 B).

³ The regulation states "[p]lats and other conveyance documents issued under this part shall contain a reservation to the United States of all minerals. Such minerals shall be subject to the right to explore, prospect for, mine, and remove *under applicable law and such regulations as the Secretary may prescribe*" (italics supplied).

⁴ This provision was repealed by sec. 702 of FLPMA, 90 Stat. 2787, subject to valid existing rights, effective Oct. 21, 1976, for lands in the contiguous 48 states and effective Oct. 21, 1986, for lands in Alaska.

together with the right to prospect for, mine, and remove the same *under applicable law and such regulations as the Secretary may prescribe.* (Italics supplied.)

In view of its similarity to section 209 of FLPMA, Departmental interpretation of this provision is instructive.

The reservation language from the Small Tract Act was specifically interpreted in connection with the question of the availability of lands subject to small tract leases for the location of mining claims. The Secretary (acting through the Deputy Solicitor in accordance with the administrative appeal system in place at that time) affirmed BLM's decision voiding mining claims located on such lands, ruling as follows:

As the [Small Tract Act] provides that the reserved minerals in lands subject to its provisions may be prospected for, mined, and removed only *under applicable law and such regulations as the Secretary may prescribe* and as the Secretary has not to date prescribed regulations permitting prospecting on lands under lease or patent pursuant to the Small Tract Act, it follows that those lands are not subject to location under the mining laws.

The appellant contends that the fact that the Secretary has issued no regulations relating to mining on those lands is proof that the mining laws apply. This is not so. The act makes the reserved minerals subject to disposition only under applicable laws "and such regulations as the Secretary may prescribe." The Secretary has prescribed that there shall be no prospecting for or disposition of the reserved deposits at this time and *until he prescribes regulations permitting the prospecting for, mining and removal of such reserved deposits the lands in which such deposits may be found are not open to location under the mining laws.* (Italics supplied.)

The Dredge Corp., 64 I.D. 368, 373-74 (1957), *aff'd*, *Dredge Corp. v. Penny*, 362 F.2d 889 (9th Cir. 1966). In affirming the Secretary's decision the Ninth Circuit added its voice to the question of the effect of the Small Tract Act's reservation language:

The Act does not provide that reserved minerals shall continue open to entry and location. Instead it leaves to the Secretary the question of how and to what extent they shall be made available.

The Dredge Corp. v. Penny, *supra* at 890.

There is one salient difference in the situations presented by *Dredge* and the instant appeal. At the time of *Dredge*, Departmental regulations expressly provided that non-leaseable minerals reserved under the Small Tract Act were *not* subject to prospecting or disposition until regulations were adopted. See 43 CFR 257.15(a) (1955) (later redesignated as 43 CFR 257.16(a) (1959)). In contrast, no such guidance concerning the locatability of mining claims for mineral interests reserved *per* section 209 of FLPMA, has been provided by the Department in its regulations governing sales under section 203 of FLPMA. See 43 CFR 2711.5-1. Thus, it could be argued in this case that the lack of such a regulation dictates a result different from that in *Dredge*. For the reasons stated below, we think not.

Although there is nothing in today's regulations expressly forbidding location of mining claims for minerals reserved under section 209 of FLPMA, it may be fairly inferred from these regulations that such minerals are not locatable. Under 43 CFR Part 3810, entitled "Lands and Minerals Subject to Location," specific situations are listed in

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which minerals reserved in patents are subject to location, including minerals reserved in patents issued under the Color of Title Act, by exchange under the Taylor Grazing Act, and Forest Exchanges (43 CFR 3811.2-9), the Stock Raising Homestead Act (43 CFR 3814.1), and the Alaska Public Sale Act (43 CFR 3811.2-8 and 3822.1).⁵ Minerals reserved under patents issued under section 203 of FLPMA are not included, thus strongly suggesting, in light of the affirmation that other types of reserved mineral interests are locatable, that the Department does not wish mineral interests reserved under FLPMA to be locatable.⁶ Therefore, in the absence of any regulations either specifically approving or restricting mineral location and development of these reserved mineral interests, we deem it appropriate to follow the reading of the statutory provision to disfavor locatability, as adopted in *The Dredge Corp.*, *supra*.⁷

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

DAVID L. HUGHES
Administrative Judge

I CONCUR:

BRUCE R. HARRIS
Administrative Judge

VALLEY CAMP COAL CO. v. OFFICE OF SURFACE MINING RECLAMATION & ENFORCEMENT

112 IBIA 19

Decided November 16, 1989

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying applications for review of and temporary relief from Notice of Violation 80-I-38-23 and Cessation Order 80-I-38-10 (CH O-268-R and CH O-310-R).

⁵ The regulations also expressly allow location of mining claims in other specific situations where the surface estate is not patented away from Federal ownership but is nevertheless reserved for some specific purpose: lands in certain national parks and monuments (43 CFR 3811.2-2); lands in national forests (43 CFR 3811.2-4); lands in powersite withdrawals (43 CFR 3811.2-6); and reclamation withdrawals (43 CFR 3816.1); and others.

⁶ This impression is also strengthened by the fact that the BLM Manual expressly states that locatable minerals reserved under sec. 203 of FLPMA are not subject to location. BLM Manual 2711.51 A. Of course, if BLM, as a matter of policy, wished to open mineral interests retained under FLPMA to mineral entry, it could do so by a change in regulations.

⁷ See also *Superior Sand & Gravel Mining Co. v. Territory of Alaska*, 224 F.2d 623 (9th Cir. 1955), in which the court pointed out that, in the absence of contemplated administrative regulations for the safeguarding of the interests and the protection of the rights of those holding under the granting statute, deeming lands to be open to location of mining claims might circumvent the purpose of that statute by allowing mineral development to interfere with the contemplated use of the surface. Likewise, in the present context, we are unwilling to interpret FLPMA to provide that reserved mineral interests are subject to mineral entry without the Department's first having had the opportunity to consider (in the rulemaking context) the possibility of adopting measures to protect the surface estate granted under sec. 203.

Affirmed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." The stockpiling of coal from an underground mine will be considered a surface coal mining operation subject to the prohibitions in sec. 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e) (1982), where the evidence establishes that such stockpiling was incident to the surface operations of the mine.

2. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

A coal stockpiling operation which was conducted on two occasions, first in 1974 and again in 1980, was not "in existence" on Aug. 3, 1977, so as to be excepted from the prohibition against conducting surface coal mining operations within 100 feet of a public road embodied in sec. 522(e)(4) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e)(4) (1982).

3. Surface Mining Control and Reclamation Act of 1977: Prohibition of Mining Operations: Generally--Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

In West Virginia, to have valid existing rights in 1980 to stockpile coal within 100 feet of a road, in violation of sec. 522(e)(4) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e)(4) (1982), a person must demonstrate property rights in existence on Aug. 3, 1977, that were created by a legally binding document authorizing the applicant to produce coal by surface coal mining operations, and a good faith effort to obtain all permits required to conduct such operations, or that the coal is both needed for and adjacent to an ongoing surface coal mining operation.

4. Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

An applicant for valid existing rights bears the burden of proving entitlement.

APPEARANCES: Ronald B. Johnson, Esq., Wheeling, West Virginia, for appellant; Richard H. McNeer, Esq., and Angela F. O'Connell, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

INTERIOR BOARD OF LAND APPEALS

Valley Camp Coal Co. (Valley Camp) has appealed from a decision by Administrative Law Judge Joseph E. McGuire, dated May 16, 1984, denying its applications for review of and temporary relief from Notice of Violation (NOV) No. 80-I-38-23 and Cessation Order (CO) No. 80-I-38-10, issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) pursuant to section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(3) (1982).

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On May 12, 1980, OSMRE issued NOV No. 80-I-38-23 to appellant for conducting surface coal mining operations in violation of section 522(e)(4) of SMCRA, 30 U.S.C. § 1272(e)(4) (1982), by stockpiling coal within 100 feet of the outside line of a public road right-of-way (U.S. Route 40) without a mining permit.¹ OSMRE required appellant to remove the stockpiled coal, beginning no later than May 23, 1980, and ending no later than June 20, 1980, and to either reclaim the disturbed area or obtain the necessary mining permit no later than August 8, 1980. On May 27, 1980, appellant filed an application for review of and temporary relief from NOV No. 80-I-38-23 pursuant to section 525 of SMCRA, 30 U.S.C. § 1275 (1982).

On July 29, 1980, OSMRE issued CO No. 80-I-38-10 to appellant for failure to abate the violation cited in NOV No. 80-I-38-23, requiring appellant to remove the stockpiled coal "as expeditiously as possible" and to reclaim the disturbed area. On August 4, 1980, appellant filed an application for review of and temporary relief from CO No. 80-I-38-10.

The applications for review and the applications for temporary relief were consolidated for hearing before Judge McGuire, which hearing was held on August 12, 1980, in Wheeling, West Virginia. In his May 16, 1984, decision, Judge McGuire denied appellant's application for review of NOV No. 80-I-38-23² and its application for review of and temporary relief from CO No. 80-I-38-10, concluding that appellant's stockpiling operations constituted surface coal mining operations in violation of section 522(e)(4) of SMCRA, and that appellant had engaged in such operations without possessing a valid existing right (VER).

Section 522(e)(4) of SMCRA provides in relevant part:

After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted.

* * * * *

(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public

¹ In this NOV, OSMRE Inspector Pettito stated further that Valley Camp had engaged in such stockpiling "without permit from regulatory authority after public notice and opportunity for public hearing with written finding that the interests of the public and the landowners affected will be protected." Sec. 522(e)(4) of SMCRA provides that "the regulatory authority may permit . . . the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected . . ." There is no evidence in the record that Valley Camp attempted to obtain such a permit. The record contains no evidence that Valley Camp holds the requisite SMCRA permits to conduct surface coal mining operations in connection with the No. 3 underground mine. OSMRE Inspector Pettito did not refer to any permit number in issuing the subject NOV and CO. The Judge in his decision at 7 makes reference to appellant's failure to amend "current or subsequently issued permits," and OSMRE asserts in its response to the Board's show cause order that "the stockpile was immediately adjacent to the permitted mine site" (Response at 10). However, at the beginning of the hearing, counsel for Valley Camp pointed out to Judge McGuire that there was no permitted area since the operation was not, in Valley Camp's opinion, subject to SMCRA (Tr. 10).

² In his May 16, 1984, decision, Judge McGuire does not address Valley Camp's application for temporary relief from NOV No. 80-I-38-23.

hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected * * *.

By order dated February 25, 1986, this Board ruled that “[o]n the facts of the case, [it] would conclude that appellant, by stockpiling coal, was engaged in ‘surface coal mining operations’” (Order dated Feb. 25, 1986, at 2). However, the Board suspended consideration of this case for the following reasons:

In his May 1984 decision, Judge McGuire reached and decided the question of a valid existing right, concluding that appellant did not have such a right which permitted it to stockpile coal in violation of section 522(e) of SMCRA, *supra*. In so deciding, Judge McGuire applied the definition of “[v]alid existing rights” set forth at 30 CFR 761.5 (1980). However, that regulation was amended in part effective October 14, 1983, by OSM. See 48 FR 41349 (Sept. 14, 1983). We would ordinarily give appellant the benefit of the amended regulation where to do so does not contravene intervening rights or matters of public policy. *James E. Strong*, 45 IBLA 386 (1980); *B. B. Wadleigh*, 44 IBLA 11 (1979); see also *Elbert O. Jensen*, 39 IBLA 62 (1979). However, on March 22, 1985, the court in *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. Mar. 22, 1985), remanded the amended regulation to the Secretary because the final rule was promulgated without notice and comment. As a result, the Board is of the position that there is no regulation to apply in this case in determining whether appellant has a valid existing right. We have not been advised what the Department intends to do in response to the March 1985 court order. In order that appellant may have the benefit of the Department’s current interpretation of “valid existing rights” under section 522(e) of SMCRA, *supra*, we have decided to suspend consideration of this case pending promulgation of a final rule defining that statutory term. Cf. *Grace Cooley Coleman*, 35 IBLA 236 (1978). The Board will afford the parties an opportunity to brief the Board on the question of valid existing rights as applied to this case once a final rule has been promulgated. A Board decision on all issues will then follow.

(Order dated Feb. 25, 1986, at 2-3).

On September 29, 1988, OSMRE filed a “Motion to Lift Stay of Proceedings” in the instant case. OSMRE pointed out that in *In re Permanent Surface Mining Regulation Litigation*, 22 E.R.C. 1557 (1985), Judge Flannery remanded the “taking” test for VER (48 FR 41312, 41349 (Sept. 14, 1983)) for proper notice and comment, and that OSMRE suspended that test on November 20, 1986 (51 FR 41952). In the suspension notice, the Secretary explained that for non-Federal lands in states which have obtained permanent program approval, “State programs will remain in effect until the Director of OSMRE has examined the provisions of each State program to determine whether changes are necessary and has notified the State regulatory authority * * * that a State program amendment is required.” 51 FR 41952 (Nov. 20, 1986).

In its September 29, 1988, motion, OSMRE explained that the State of West Virginia obtained State program approval in January 1981, and that with regard to non-Federal lands in West Virginia, in accordance with the above-referenced suspension notice, the State’s definition of “valid existing rights” should be used in making VER determinations. OSMRE stated further that West Virginia’s permanent program contains the following VER definition, which was not affected by the District Court’s remand of 30 CFR 761.5 for lack of notice and comment:

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Valid Existing Rights exists, except for haulroads, in each case in which a person demonstrates that the limitation provided for in Section 22(d) of the Act would result in the unconstitutional taking of that person's rights. For haulroads, valid existing rights means a road or recorded right-of-way or easement for a road which was in existence prior to August 3, 1977. A person possesses valid existing rights if he can demonstrate that the coal is immediately adjacent to an ongoing mining operation which existed on August 3, 1977 and is needed to make the operation as a whole economically viable. Valid existing rights shall also be found for an area where a person can demonstrate that an SMA number had been issued prior to the time when the structure, road, cemetery or other activity listed in Section 22(d) of the Act came into existence.

(W.Va. Code of State Regulations § 38-2-2.119 (1987)). OSMRE requested the Board to lift the stay and render a decision in the instant case using the VER regulation set forth above.

On October 25, 1988, appellant filed a response to OSMRE's motion, concurring in the request that the Board lift the stay. Appellant, however, requested the Board to reverse Judge McGuire's decision on the basis that he applied an incorrect definition of "valid existing rights," and to remand the case to him.

By order dated November 10, 1988, the Board responded to OSMRE's motion to lift the stay in these proceedings as follows:

Consistent with our order of February 25, 1986, whether or not this case should continue in suspended status depends upon whether a clear standard exists for determining whether Valley Camp had valid existing rights to stockpile the coal in violation of section 522(e)(4) of SMCRA, *supra*. OSMRE issued the NOV involved in this case on May 12, 1980, and issued the related CO on July 29, 1980. OSMRE moves to reinstate this case to active status, and to apply West Virginia's regulation, when West Virginia's permanent program was not approved until January 1981. OSMRE has not suggested that new Federal regulations now exist. Neither OSMRE nor Valley Camp explains why or how West Virginia's permanent program regulation would apply rather than the Federal regulation in effect when the NOV and related CO were issued.

The Board directed that within 30 days from receipt of its November 10, 1988, order, OSMRE file a brief with this Board supporting its motion, responding to a number of specific questions relating to whether a clear standard exists for determining whether Valley Camp had VER to stockpile the coal.

OSMRE did not submit a brief as directed. Rather, on January 11, 1989, OSMRE filed a motion requesting the Board to vacate the NOV and the CO issued to appellant in 1980. Therein, OSMRE notes that section 522(e)(4) of SMCRA prohibits surface coal mining operations within 100 feet of the outside line of a public right-of-way, with two exceptions: (1) where the operator has VER; and (2) where the subject operation was in existence on the date of enactment of SMCRA. OSMRE explains its motion as follows:

Throughout the development of this case Valley Camp's defense has been that it is exempt from the proscriptions of Section 522(e)(4) of SMCRA because it had "valid existing rights" ("VER") to mine the area in issue. However, Valley Camp is not required to establish valid existing rights under Section 522(e) if its operations were in existence on the date of enactment of SMCRA. OSMRE permit files, as well as factual findings made by the Administrative Law Judge at the hearings level, establish that

Valley Camp's operations were indeed in existence both on and before the date of enactment of SMCRA.

(Motion to Vacate at 2-3). Thus, OSMRE concluded that because appellant's stockpiling operation existed on the date of enactment of SMCRA, appellant had no obligation to "secure a surface mining permit under either the West Virginia State Law or under SMCRA. Nor were its surface mining operations subject to the prohibitions of Section 522(e). OSMRE's enforcement action, therefore, must be set aside." *Id.* at 3.

By order dated May 11, 1989, the Board granted OSMRE's September 29, 1988, motion to lift the stay in this case, and denied OSMRE's motion to vacate the subject NOV and CO. The Board then considered the merits of OSMRE's September 29, 1988, motion that the Board lift the suspension previously imposed in this case. In granting OSMRE's motion, the Board announced the legal standard to be applied in evaluating whether Valley Camp had VER to stockpile coal within 100 feet of U.S. Route 40:

OSMRE pointed out that on November 20, 1986, it promulgated a final rule at 51 FR 41952 suspending the definition of "valid existing rights" which the District Court in *In re Permanent Surface Mining Regulation Litigation*, [22 E.R.C. 1557 (1985) (the "taking" test)], remanded for proper notice and comment. In the suspension notice, the Secretary explained that for non-Federal lands in states which have obtained permanent program approval, "State programs will remain in effect until the Director of OSMRE has examined the provisions of each State program to determine whether changes are necessary and has notified the State regulatory authority * * * that a state program amendment is required." 51 FR 41952 (Nov. 20, 1986).

OSMRE explains in its motion that the State of West Virginia obtained State program approval in January 1981, and that with regard to non-Federal lands in West Virginia, in accordance with the above-referenced suspension notice, the State's definition of "valid existing rights" should be used in making valid existing rights determinations. As the State program was not approved when the NOV was issued we are not persuaded that the State definition is applicable in this case. On reviewing the record in this appeal the Board has reconsidered its position to stay consideration of this appeal. In doing so, the Board is of the opinion that the definition of "valid existing rights" to be applied herein is the one in effect at the time the NOV was issued. Thus, in determining whether Valley Camp has valid existing rights to stockpile coal in violation of section 522(e)(4), the Board will apply "the 1979 test, including the 'needed for and adjacent' test, as modified by the August 4, 1980, suspension notice which implemented the District Court's February 1980 opinion in *In Re: Permanent* [I, 14 E.R.C. 1083 (D.D.C. 1980)]." 51 FR 41954 (Nov. 20, 1986).

(Order dated May 11, 1989, at 5-6). The Board granted the parties 30 days from receipt of its order to show cause why, in deciding this appeal, it should not apply the definition of "valid existing rights" extant when the NOV was issued. Both OSMRE and Valley Camp filed responses to the Board's order to show cause. While Valley Camp did not challenge the Board's decision to apply the VER definition existing when the NOV and CO were written, it made clear that it agreed with OSMRE's position that it was exempt from the application of section 522(e)(4).

[1] As a preliminary matter, we find no merit in Valley Camp's argument that in stockpiling the coal at issue herein it was not

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engaged in "surface coal mining operations" as defined at section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (1982). Section 701(28) of SMCRA provides as follows:

"surface coal mining operations" means—

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the minesite * * *; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities; * * *. [Italics added.]

In its initial brief filed with the Board, Valley Camp argued, as set forth below, that its stockpiling activity does not meet this definition:

Subparagraphs (A) and (B) set forth a two-prong test for determining whether an operator is engaged in "surface coal mining operations." Subparagraph (A) sets forth the "activities" that constitute surface coal mining operations and subparagraph (B) refers to geographic "areas upon which such activities occur or where such activities disturb the natural land surface." Thus, to be engaged in surface coal mining operations, an operator must be engaged in the specific "activities" set forth in subparagraph (A) and such activities must occur upon the area set forth in Subparagraph (B) and must result from, or be incident to the activities set forth in Subparagraph (A) * * *. In this case, there is no evidence in the record that the operator was engaged in any of the activities set forth in Subparagraph (A). Nor did the ALJ make any finding that it was engaged in any such activities. [Italics added.]

(Valley Camp's Brief at 17-18).

Valley Camp's interpretation of section 701(28) of SMCRA is unduly narrow. The use of the phrases "[s]uch activities" in subsection (A) and "[s]uch areas" in subsection (B) indicates that Congress did not intend to provide an exhaustive list of activities or areas which meet the definition. As OSMRE pointed out in its initial brief before the Board, in *Roberts Brothers Coal Co.*, 2 IBSMA 284, 293, 87 I.D. 439, 444 (1980), the Board stated that subsection (B) of section 701(28) "is apparently intended to define additional areas to be covered, not to describe, define, or limit the activities included in the first subsection" (italics in original).

Even if we were to accept Valley Camp's restrictive interpretation of section 701(28), we would still conclude that Valley Camp's stockpiling operation is subject to SMCRA. Among the activities specifically

included in subsection 701(28)(A) are “the *cleaning*, concentrating, or other processing or *preparation*, *loading* of coal for interstate commerce at or near the minesite” (italics added). Below is Valley Camp’s own description of its surface activities:

As the ALJ noted, Valley Camp has operated this deep mining facility, known as No. 3 mine, together with its *surface coal preparation plant and loading facility* since the 1980’s or 1940’s * * *. The *surface facilities* included the mine opening; a *wet process preparation plant* equipped with thermal dryer; a coal storage silo having a capacity of 10,800 tons, with an overhead conveyor belt connecting it to a unit train *loading facility*; an area devoted to the above-ground storage of mining equipment; a unit train loading facility, or surge bin; * * *. [Italics added.]

(Valley Camp’s Brief at 2). Given Valley Camp’s own description of the surface activities it conducts in connection with its underground mine, we fail to comprehend the assertion that it was not engaged in any of the activities mentioned in subsection 701(28)(A).

We have no difficulty with Valley Camp’s contention that “surface operations and surface impacts incident to an underground coal mine” for purposes of the definition at section 701(28) of SMCRA are defined with reference to section 516 of SMCRA. However, we reject Valley Camp’s notion that in order to have found that Valley Camp was engaged in “surface coal mining operations,” Judge McGuire was required to “make a specific finding in his decision that the mining activities of [Valley Camp] were ‘subject to the requirements of § 516’” (Valley Camp’s Brief at 21). The definition at section 701(28) specifically refers to section 516. Judge McGuire’s specific finding that Valley Camp was engaged in “surface coal mining operations” as defined at section 701(28) implies a finding that such operations were subject to the requirements of section 516. In subsection (a) of section 516, Congress provided that the Secretary shall promulgate rules and regulations directed toward the surface effects of underground coal mining operations, and in subsection (b), it made clear that such operations are subject to SMCRA’s permitting requirements, and set forth what a permit related to underground coal mining must require of the operator. Section 516 of SMCRA in no way relieves Valley Camp from the application of SMCRA; indeed, section 516 explains how SMCRA applies to Valley Camp’s operations.

In concluding that Valley Camp conducted “surface coal mining operations” within the meaning of section 701(28) of SMCRA, Judge McGuire made the following statement, with which we are in complete agreement:

[E]ven when granting to the applicant the benefits of all reasonable doubts by way of rendering to the statutory/regulatory language employed the strictest interpretation allowable, as well as assigning to those definitional words their plain meanings, one is persuaded that in having conducted the stockpiling activity in the manner described in this administrative record, applicant clearly engaged in “surface coal mining operations” and, in doing so, subjected itself to the provisions of the Act as well as the implementing regulations.

(Decision at 6).

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The inevitable conclusion that in stockpiling coal Valley Camp conducted "surface coal mining operations" leads to certain consequences. Foremost among those consequences is that its operations are subject to the permitting requirements of SMCRA. At the hearing, Judge McGuire asked counsel for Valley Camp whether the stockpiling activity was taking place "on the permitted area," and he responded, "[i]f the Court is using the term 'permitted area' within the nature of the Act, we would only have to say that we do not think that any surface mining activity is taking place" (Tr. 10). During cross-examination, when counsel for OSMRE asked James L. Litman, Vice President of the Eastern Division of Valley Camp, if he was "aware of any contact that might have been made by Valley Camp Coal Company to anybody in the Office of Surface Mining with respect to the stockpile area," he stated, "I am not" (Tr. 52, 53). Upon redirect examination, when counsel for Valley Camp asked Litman why he "didn't * * * contact anyone from the OSM," he responded, "I had no idea that anything we were doing would affect the Office of Surface Mining" (Tr. 53). Subsequently, counsel for OSMRE asked Richard L. Burghy, Construction Engineer for Valley Camp's Eastern Division, if he "[w]ere * * * aware of the presence of the Office of Surface Mining as a regulatory authority in this general field of surface and deep mine operations," and he answered, "yes" (Tr. 64-65).

Despite its admitted awareness of OSMRE's existence and the nature of its responsibilities regarding surface impacts of underground mining, Valley Camp made no effort to contact OSMRE with regard to its stockpile. However, Valley Camp inquired of the West Virginia Department of Natural Resources (WVDNR) "whether or not there would be any objection to [its] utilizing the stockpile area for stocking coal," in order "[t]o make sure that [Valley Camp] wouldn't be opening [it]self up to a violation of the law and a subsequent penalty" (Tr. 42). WVDNR did not provide Valley Camp with "any type of written document or waiver or permit that would approve the use of this stockpile" (Tr. 52), but simply "voiced no objection" (Tr. 60). The responsibilities of the WVDNR official whom Valley Camp contacted concerning the stockpile were "almost entirely restricted to water quality issues" (Tr. 76). Moreover, he had no "authority to grant individual companies waivers or exemptions from the requirements of the Act or regulations, either under West Virginia or the Federal law" (Tr. 77-78); he does not "get involved in OSM regulations, as a practical matter" (Tr. 79); and he "didn't intend to say anything or imply anything along * * * the lines" that Valley Camp was not subject to section 522(e)(4) of SMCRA (Tr. 79).

In its January 11, 1989, motion to vacate the NOV and CO, OSMRE asserts that "[b]ased on the factual finding that Valley Camp's surface coal mining operation existed on the date of the enactment of the SMCRA, Valley Camp had no obligation on this interim program site

to secure a surface mining permit under either the West Virginia State Law or under SMCRA. Nor were its surface mining operations subject to the prohibitions of Section 522(e)" (Motion to Vacate at 3). The error of OSMRE's assertion is made apparent from a quick review of relevant SMCRA and regulatory provisions. Section 516(a) of SMCRA provides that "[t]he Secretary shall promulgate rules and regulations directed toward the surface effects of underground coal mining operations * * *." Those implementing regulations include the requirement that "[a]ll underground coal mining and associated reclamation operations conducted on lands where any element of the operations is regulated by a State shall comply with the initial performance standards of this part according to the time schedule specified in § 710.11." 30 CFR 717.11. The State of West Virginia has regulated certain aspects of underground coal mining since at least 1906. See, e.g., *Gawthrop v. Fairmont Coal Co.*, 70 S.E. 556 (W. Va. 1911) (construing W. Va. Code 1906, ch. 79, § 7, which prohibits an owner or tenant of land containing coal from opening, sinking, digging, excavating, or working in any coal mine or shaft within 5 feet of the line dividing said land from that of another person or persons, without the consent, in writing, of every person interested in, or having title to, such adjoining lands). Thus, any surface coal mining operations conducted by Valley Camp in connection with its underground mine are subject to 30 CFR 710.11, which provides:

(2) *General obligations.* (i) A person conducting coal mining operations shall have a permit if required by the State in which he is mining and shall comply with State laws and regulations that are not inconsistent with the Act and this chapter.

(3) *Performance standards obligations.* (i) A person who conducts any coal mining operations under an initial permit issued by a State on or after February 3, 1978, shall comply with the requirements of the initial regulatory program. Such permits shall contain terms that comply with the relevant performance standards of the initial regulatory program.^[3]

(ii) On and after May 3, 1978, any person conducting coal mining operations shall comply with the initial regulatory program * * *.

(iii) A person shall comply with the obligations of this section until he has received a permit to operate under a permanent State or Federal regulatory program.

The permanent program permit referred to in 30 CFR 710.11(a)(3)(iii) must be issued in accordance with section 502(d) of SMCRA, 30 U.S.C. § 1252(d) (1982), which provides:

Not later than two months following the approval of a State program pursuant to section 1253 of this title * * * all operators of surface coal mines in expectation of operating such mines after the expiration of eight months from the approval of a State program * * * shall file an application for a permit with the regulatory authority.

In addition, section 506(a) of SMCRA, 30 U.S.C. § 1256(a) (1982), provides:

³ The initial regulatory program includes the environmental performance standards of 30 CFR Parts 715 through 718, the inspection and enforcement procedures of 30 CFR Parts 720 through 723, and the reimbursements to States provisions of 30 CFR Part 725. See 30 CFR 710.1.

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No later than eight months from the date on which a State program is approved by the Secretary, pursuant to section 1253 of this title * * * no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program * * *; except a person conducting surface coal mining operations under a permit from the State regulatory authority, issued in accordance with the provisions of section 1252 of this title, may conduct such operations beyond such period if an application for a permit has been filed in accordance with the provisions of this chapter, but the initial administrative decision has not been rendered.

Valley Camp and OSMRE appear to assume that if a surface coal mining operation otherwise prohibited by section 522(e) is "in existence" on August 3, 1977, or if the permittee has VER to conduct such an operation, that operation is exempt from the requirements of SMCRA and implementing regulations. This assumption is false. If the prohibited operation is "in existence," or if the permittee has VER to conduct such operation, section 522(e)(4) merely exempts the operation from the prohibition. The permittee is still required to conduct that operation in compliance with SMCRA and applicable regulations. Regardless of whether Valley Camp's stockpiling operation was in existence on August 3, 1977, that operation, plus any other surface coal mining operations conducted in connection with the underground mine, are subject to the provisions of SMCRA, including those governing the issuance of permits. Moreover, even if an operator has VER to conduct certain surface coal mining operations, those operations must be conducted in accordance with SMCRA pursuant to a permit issued by the appropriate regulatory authority. VER only confers the right to conduct a certain operation; that operation must be conducted in accordance with SMCRA.

Another consequence of Valley Camp's conducting surface coal mining operations in connection with its underground mine is that it may not conduct such operations within 100 feet of a public highway except pursuant to certain exemptions embodied in section 522(e)(4) of SMCRA. As noted *supra*, that statute provides: "After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted * * * within one hundred feet of the outside right-of-way line of any public road * * *." Valley Camp concedes that it stockpiled coal within 100 feet of U.S. Route 40 (Tr. 50).

[2] We will first address OSMRE's contention that Valley Camp's stockpiling operation is exempt from the prohibition at section 522(e)(4) because it is incident to a "pre-existing" underground mining operation, i.e., that the operation was "in existence" on August 3, 1977. In its response to the Board's show-cause order, OSMRE recognizes that the sweeping definition of "surface coal mining operations" at section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (1982), "draws a broad array of mining and related activities, and the lands they occupy, into the permitting and reclamation requirements of SMCRA," but argues

that Congress then exempted those activities and areas from the prohibitions of section 522(e) "when it partially 'grandfathered' pre-existing 'surface coal mining operations'" (OSMRE's Response at 4). In OSMRE's view, that Valley Camp "had a plan to stockpile coal near the road, if necessary," is sufficient to bring the stockpiling activity within the exemption of section 522(e)(4).

The Board rejected this argument in its May 11, 1989, order denying OSMRE's motion to vacate the NOV and the CO. The Board's reasoning is repeated below:

Appellant has operated a deep mine facility together with an adjoining surface coal preparation plant since the 1930's or 1940's. The record is void of any evidence to support OSMRE's argument that appellant's stockpiling activity existed on the date of enactment of SMCRA. This activity was described by the Administrative Law Judge in his decision as follows:

The unplanned, impromptu stockpiling effort in 1974 was occasioned by an emergency *** which was not experienced again until February 1980. The informal designation of the offending stockpile storage area was never documented and the area in question was not so designated by way of an appropriate amendment to the then current or subsequently issued mining permits.

(Decision at 7). He concluded that by stockpiling coal Valley Camp was engaged in surface coal mining activities that subjected it to section 522(e) of SMCRA. Nowhere did the Judge conclude that this activity was in existence on the date of the enactment of SMCRA. If an operator was not engaged in a particular operation on the date of the enactment of SMCRA, the "in existence" exception of section 522(e) would not apply. Unless appellant can demonstrate that it had "valid existing rights" to engage in this particular activity, it cannot escape the restriction set forth in section 522(e)(4). Thus, we discern no legal justification for vacating the NOV and CO based on the theory advanced by OSMRE in its motion.

(Order dated May 11, 1989, at 4-5).

We conclude that Valley Camp's stockpiling operations were not "in existence" on August 3, 1977. The fact that Valley Camp stockpiled coal within 100 feet of the public road on two occasions, once in 1974 and again in 1980, notwithstanding the fact that such coal was produced by an underground mine which Valley Camp has operated since the 1930's or 1940's, does not mean that the stockpiling operation was "in existence" on August 3, 1977. The offending operation must be "in existence" on August 3, 1977, to be exempt from the prohibition of section 522(e)(4). We reject the argument that Valley Camp or any other operator has the authority to conduct any of the activities proscribed in section 522(e)(4) as long as they are incident to some other operation which existed on August 3, 1977.

[3, 4] Since Valley Camp has failed to demonstrate that its stockpiling activity was "in existence" on August 3, 1977, we must, contrary to the argument advanced by OSMRE and Valley Camp, determine whether Valley Camp had VER to conduct such activity in the spring of 1980, when OSMRE issued the subject NOV. As stated in our May 11, 1988, order we will apply the definition of VER which was in effect on the date when the violation took place: "the 1979 test, including the 'needed for and adjacent' test, as modified by the

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August 4, 1980, suspension notice which implemented the District Court's February 1980 opinion in *In Re: Permanent (I.)*.^{51 FR 41954} (Nov. 20, 1986). According to the 1979 definition, VER means:

(a) Except for haulroads,

(1) Those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorized the applicant to produce coal by a surface coal mining operation; and

(2) The person proposing to conduct surface coal mining operations on such lands either

(i) Had been validly issued, on or before August 3, 1977, all State and Federal permits necessary to conduct such operations on those lands, or

(ii) Can demonstrate to the regulatory authority that the coal is both needed for, and immediately adjacent to, an on-going surface coal mining operation for which all mine plan approvals and permits were obtained prior to August 3, 1977.]

On judicial review, Judge Flannery remanded to the Secretary the "all permits" test (30 CFR 761.5(a)(2)(i)), and indicated that "a good faith attempt to obtain all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test." *In re Permanent Surface Mining Regulation Litigation*, 14 E.R.C. at 1090. The Secretary modified 30 CFR 761.5(a)(2)(i) accordingly:

To comply with the court's 1980 opinion, OSMRE suspended the definition only insofar as it required that to establish VER all permits must have been obtained prior to August 3, 1977. (45 FR 51547, 51548, August 4, 1980). The notice of suspension stated that, pending further rulemaking, OSMRE would interpret the regulation as including the court's suggestion that a good faith effort to obtain permits would establish VER.

51 FR at 41954.⁴

Initially, we note that the record is barren of any evidence of "property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorized [Valley Camp] to produce coal by a surface coal mining operation" under 30 CFR 761.5(a)(1) (1979). At the hearing, counsel for Valley Camp simply stated that "the No. 3 mine has been in existence and the Preparation Plant as an adjunct to the mine, has been mining coal back into the 1930's and '40's" (Tr. 9). The record does not contain "a legally binding conveyance, lease, deed, contract or other document" as called for by the regulation.

In order to meet the criterion of 30 CFR 761.5(a)(2)(i), as modified in accordance with Judge Flannery's remand, Valley Camp must demonstrate "a good faith attempt to obtain all permits before the August 3, 1977 cut-off date." 51 FR at 41954. As previously discussed,

⁴ We note that in Federal program states where OSMRE is the regulatory authority, the effect of suspending the "all permits" component of 30 CFR 761.5(a)(2)(i) (1979), and adopting the "good faith attempt to obtain all permits" standard suggested by Judge Flannery, left in place the same test which we find applicable herein. OSMRE summarized that test as follows:

"OSMRE will make VER determinations on a case-by-case basis after examining the particular facts of each case, and will consider property rights in existence on August 3, 1977, the owner of which by that date had made a good faith effort to obtain all permits, as one class of circumstances which would invariably entitle the property owner to VER. VER would also exist when there are property rights in existence on August 3, 1977, the owner of which can demonstrate that the coal is both needed for and immediately adjacent to a mining operation in existence prior to August 3, 1977." 51 FR at 41955.

the only evidence introduced by Valley Camp with regard to obtaining approval to conduct its stockpiling operations concerned its dealings with the WVDNR official, who simply "voiced no objection" to the activity. Otherwise, Valley Camp introduced absolutely no evidence of any attempt to obtain any permit prior to, or even after, August 3, 1977.

Alternatively, to qualify for VER under 30 CFR 761.5(a)(2)(ii) (1979), Valley Camp must "demonstrate * * * that the coal is both needed for, and immediately adjacent to, an on-going operation for which *all permits were obtained prior to August 3, 1977*" (italics added). As noted, Judge Flannery rejected the "all permits" test, stating that a showing of a good faith attempt to obtain all permits would be sufficient to confer VER to conduct the questioned operation. His modification of the "all permits" test is relevant in applying 30 CFR 761.5(a)(2)(ii) as well, since as promulgated, that provision required the operator to have obtained all permits prior to August 3, 1977, for conducting the ongoing surface coal mining operation. Based upon *Cogar v. Faerber*, 371 S.E.2d 321 (W. Va. 1988), discussed *infra*, we conclude that in order to meet the "needed for, and immediately adjacent to" test, Valley Camp must demonstrate that it had made a good faith effort at obtaining all necessary permits prior to August 3, 1977, for conducting the "on-going surface coal mining operation."

Valley Camp originally argued before Judge McGuire that since its operation was an underground mine, it was not subject to SMCRA, and accordingly that there was no "permitted area" as such (Tr. 10). Now Valley Camp and OSMRE contend that there is an "on-going surface coal mining operation" for which the stockpiled coal is needed and to which such coal is adjacent. We conclude that if Valley Camp were conducting "on-going surface coal mining operation[s]" on August 3, 1977, they must be its surface operations incident to its underground mine, *i.e.*, its preparation plant and related activities, as set forth at section 701(28) of SMCRA, and as discussed *supra*.

In *Cogar v. Faerber, supra*, the Supreme Court of Appeals of West Virginia applied the "needed for, and adjacent to an on-going surface coal mining operation" test, as it appears in West Virginia's permanent regulatory program. To the extent that we are now applying the same test, the court's guidance is helpful. In *Cogar*, certain citizens objected to the modification of the permanent program permit issued to Spring Ridge Coal Co. (Spring Ridge) in 1983 to operate the Smoot Mine. The modification would allow new openings to an underground mine to be created within 100 feet of a public road and within 300 feet of occupied dwellings, in violation of West Virginia Code § 22A-3-22(d)(3) and (4) (1985 Replacement Volume).⁵ West

* The relevant portions of that statute declare that after Aug. 3, 1977, "subject to valid existing rights, no surface mining operations, except those which existed on that date, shall be permitted * * * [w]ithin one hundred feet of the outside right-of-way line on any public road * * *," or "[w]ithin three hundred feet from any occupied dwelling." In addition, W. Va. Code § 22A-3-3(w)(1)(1985 Replacement Vol.) provides that surface mining operations include the surface impacts incident to an underground coal mine.

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Virginia's Board of Reclamation Review argued that Spring Ridge had VER to create the new openings on August 3, 1977.

The court found that under OSMRE's suspension notice dated November 20, 1986 (51 FR 41952), the definition of VER included in West Virginia's permanent program controlled the issue. Under that definition, "a person possesses valid existing rights if he can demonstrate that the coal is immediately adjacent to an ongoing mining operation which existed on August 3, 1977 and is needed to make the operation as a whole economically viable." W. Va. Code of State Reg. § 38-2-2.119 (1983). The Board of Reclamation and Spring Ridge argued that Spring Ridge had VER to create the mine openings on three bases: (1) the entire 1,825-acre tract for which Spring Ridge has mineral rights should be considered a single mining operation; (2) since mining has been conducted on various locations on that tract since before August 1977, the various activities on the tract should be considered a single ongoing operation which has been in existence since before that date; and (3) without this modification of the permit, the Smoot mine would have to be closed within a brief period of time, but that with it, the mine can be productively worked for another 20 years, thus making the modification necessary for continued economic viability.

The *Cogar* court observed that "the term 'surface mining operations' is most often used in connection with activities occurring within an area currently under permit or for which a permit application has been filed." 371 S.W.2d at 324. Thus, the court concluded that "[i]n the context of valid existing rights, we read the statute to mean that an operation includes only that area covered by a permit or permit application." *Id.* The court noted that "some mining" has been conducted on the 1,825-acre tract since well before August 1977. However, there was no showing that any of that 1,825-acre tract was permitted prior to 1983, when the Smoot mine was permitted under West Virginia's permanent regulatory program. The Board of Reclamation and Spring Ridge argued that "because the entire tract should be treated as a single mining operation, the fact that the Smoot mine was only begun in 1983 is irrelevant to our decision today." *Id.* at 323. The court rejected their argument, reasoning that the modification sought by Spring Ridge was not "adjacent" to an "on-going surface mining operation," since the new mine opening would not be "adjacent" to an area covered by a permit issued prior to August 3, 1977. The court did not state that the operator must have all permits in fact for the ongoing surface mining operation, but that the operator must have applied for them by August 3, 1977. The court's ruling on the VER issue, which reflects Judge Flannery's "good faith" modification, is as follows:

Therefore, in order to have valid existing rights so as to provide an exception to West Virginia Code § 22A-3-22(d), an operator must have, by August 3, 1977, completed its

portion of the application process for all the necessary state and federal permits to conduct surface coal mining in an area contiguous to the proposed operation.

371 S.W.2d at 324.

Certain activities constitute "surface coal mining operations" because they meet the definition of SMCRA whether or not they are covered by a permit. The *Cogar* court defines an "on-going surface mining operation" in terms of whether it is subject to a permit. Under the *Cogar* court's reasoning, which we find persuasive, in order to qualify for VER under the "needed for, and immediately adjacent to, an on-going surface coal mining operation" test, as modified by Judge Flannery, Valley Camp must still have made a good faith attempt to secure the requisite permits for conducting its "on-going surface coal mining operation" prior to August 3, 1977. Again, other than seeking oral approval from WVDNR for its stockpiling operation, Valley Camp has made no showing that it made any effort to obtain any permit with regard to the surface impacts of the underground mining operation. Under the reasoning of *Cogar*, we conclude that Valley Camp's stockpiling activity is not being conducted "immediately adjacent to an on-going surface coal mining operation."

Moreover, we reject the argument that Valley Camp has demonstrated that the stockpiling activity is "needed for" the underground mining operation. In support of this argument, OSMRE points to the following definition of VER contained in the Department's permanent program regulations promulgated on September 14, 1983, at 30 CFR 761.5(c):

A person possesses valid existing rights if the person proposing to conduct surface coal mining operations can demonstrate that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation which existed on August 3, 1977. A determination that the coal is "needed for" will be based upon a finding that the extension of mining is essential to make the surface coal mining operation as a whole economically viable.

In the preamble to the above rule, OSMRE explained that "[w]here a person claims VER on the basis that the coal from the proposed operation is 'needed for' an ongoing operation, information regarding the size of the proposed site and the proportion it represents of the whole operation is helpful to evaluate this claim." 48 FR 41316 (Sept. 14, 1983).⁶

In its response to the Board's show-cause order, OSMRE couches its argument that Valley Camp's stockpiling operation is "needed for" its underground coal mining operation in terms of the "economically viable" language of the 1983 VER definition. We think that such an application of the "needed for" test is reasonable. In its response, OSMRE quotes the following passage from Judge McGuire's decision:

On that occasion [1974], the coal had been stockpiled in order to avoid a shutdown of the mine. * * * Between the years 1974 and 1980 the demand for applicant's coal was such

⁶ In *In re Permanent Surface Mining Regulation Litigation*, 22 E.R.C. 1557 (1985), Judge Flannery remanded this regulation because it had been promulgated without notice and comment. The Department formally suspended the regulation on Nov. 20, 1986 (51 FR 41954).

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that stockpiling was unnecessary. However, in February 1980, due to slackened demand, applicant found it *necessary to again stockpile* some 8,200 tons of coal *rather than close the mine* and the area selected for storage in February 1980 was the same area that had been utilized in 1974 except that some of the employees parking lot was also utilized on the latter occasion. [Italics added by OSMRE].

(Decision at 3-4).

Apparently, Judge McGuire found that Valley Camp stockpiled the coal in 1974 and again in 1980 because of a "slackened demand." He did not make this finding in the context of an application of the "adjacent to and needed for" test. At the hearing, James Litman, Vice President of the Eastern Division of Valley Camp, gave the following testimony which raises a serious question as to whether it was "necessary" to stockpile the coal:

JUDGE McGUIRE: How much of the coal [6,000 to 6,200 tons] has been moved during that period [August 6, 1980 through August 12, 1980], sir?

THE WITNESS: About 2,000 tons, totally, between the sale to [J. E. Baker's power plant in Millersville, Ohio.] and removal to the silo.

JUDGE McGUIRE: Let's see; now, you removed 2,000 tons to date and where have you stored it, sir?

THE WITNESS: In the storage silo for clean coal at the No. 3 Preparation Plant facility. We put it right back in the silo we took it out of when we had no sale for it.

JUDGE McGUIRE: When did the room in the silo at the No. 3 plant first become available for storage purposes for that coal, sir?

THE WITNESS: I can't answer that. The silo is up and down in capacity continuously; and if you're asking was there capacity in the silo for the coal between February the 22nd and now, the answer is yes. We took -

JUDGE McGUIRE: When was it - when was this first available for placement in the silo had you chosen to do so?

THE WITNESS: As soon as we took it out; there was room to put it back in.

JUDGE McGUIRE: *In other words, there was no actual need to stockpile the coal in the manner in which you did?*

THE WITNESS: *No, sir.* We took - the normal operation of the mine requires that we have silo capacity, that we have a location for the cleaned product. Now, if the cleaned product is not removed from the silo through sales, then we cannot operate the preparation plant and, therefore, cannot operate the mine.

When we removed the 8,200 tons from the silo in February, it gave us capacity to operate for the balance of February. Our sales then allowed us to keep up with mine production until April of 1980. In April of 1980, we still were unable to sell enough coal to keep the mine in operation; so, the mine was idle for two weeks. [Italics added].

(Tr. 84-86).

Even if we were to find that Valley Camp's surface operations at the No. 3 underground mine qualified as "on-going surface coal mining operations" for VER purposes, we would reject the argument that stockpiling coal on two occasions, first in 1974 and again in 1980, is sufficient to demonstrate that such activity is "needed for" an ongoing surface coal mining operation. In *In re Permanent Surface Mining Regulation Litigation*, 14 E.R.C. at 1091, Judge Flannery stated in response to an argument that the "needed for" test be eliminated from the VER definition, "the need and adjacent test requires a valid

existing right exemption when denial of mining on the adjacent area will rob the mining operation, as a whole, of its value." Valley Camp has not demonstrated that denial of the right to stockpile coal along U.S. Route 40 will rob underground mine No. 3 of its value. We could explain the fact that the mine was idle for 2 weeks on any number of other equally convincing bases, i.e., the capacity of the storage silo is insufficient to accommodate the coal produced from the mine, or Valley Camp was producing more coal than its market required. We reject the argument that stockpiling this coal is "needed for" any "ongoing surface mining operation" conducted by Valley Camp.

Accordingly, we conclude that Valley Camp has not shown that its stockpiling activity was "in existence" on August 3, 1977, or that it had VER to conduct such activity under 30 CFR 761.5(a) (1979), as modified by Judge Flannery in *In re Permanent Surface Mining Regulation Litigation, supra*.

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, and this case is remanded to OSMRE for action consistent with this decision.

GAIL M. FRAZIER
Administrative Judge

I CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

QUALITY SEEDING, INC. (APPLICATION FOR ATTORNEY FEES)

IBCA-2552-F

Decided: November 17, 1989

Contract No. 5-CS-5D-04180, Bureau of Reclamation.

Granted in part.

1. Contract Disputes Act of 1978: Attorney Fees: Substantially Justified--Equal Access to Justice Act: Contract Disputes Act of 1978: Substantially Justified

The Government's position is found not to be substantially justified in a case involving a contract partially terminated for the Government's convenience, where the Board finds (i) that there was no constancy in the Government's estimate of the costs to complete the terminated portion of the contract; (ii) that at the contracting officer level and in litigation the Government ignored the distinction between what might be considered a fair profit under a competitively bid contract terminated for the Government's convenience and what would be a fair profit if a negotiated contract is so terminated; and (iii) that in determining what a fair profit should be the contracting officer largely ignored the factors set forth in FAR 49.202 (b).

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2. Contract Disputes Act of 1978: Attorney Fees: Allowable Expenses--Equal Access to Justice Act: Awards

Under an EAJA application, the Government's contention that the hours claimed for attorneys and a consultant were excessive is rejected by the Board, where it finds that although the hours claimed in both categories appeared to be high upon an initial review, a careful examination of the detailed information submitted in support of the application convinced the Board that none of the time expended was unreasonable for the tasks undertaken and that each task was appropriate for proper representation.

APPEARANCES: Peter N. Ralston, Oles, Morrison & Rinker, Seattle, Washington, for Appellant; Emmett M. Rice, Department Counsel, Tulsa, Oklahoma, for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

Quality Seeding, Inc. (QSI/appellant/applicant), has submitted a timely application under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, to recover attorney fees and other expenses incurred in the prosecution of its Contract Disputes Act (CDA) appeal. The appeal was sustained in the full amount claimed in *Quality Seeding Inc.*, IBCA-2297 (Aug. 8, 1988), 95 I.D. 125, 88-3 BCA ¶ 21,020. In that case, QSI had appealed from the amount found due by the contracting officer (CO) in the Settlement by Determination of its claim for the partial termination of its competitively bid fixed-price contract.

The EAJA provides for an award of attorney fees and other expenses to a prevailing party unless it is found that the position of the Government was "substantially justified or that special circumstances make an award unjust." *Berkeley Construction Co.*, VABC No. 1962E (June 24, 1988), 88-3 BCA ¶ 20,941. The Government admits that the applicant is a prevailing party and that it is otherwise an eligible party to receive an award. The Government has not asserted that any special circumstances exist which would make an award unjust. The Board finds (i) that the applicant is a prevailing party; (ii) that it is otherwise an eligible party; and (iii) that there are no special circumstances which would make an award of attorney fees and other expenses to QSI unjust.

I. Substantial Justification

The contract involved in the underlying appeal called for QSI to seed, fertilize, mulch, and irrigate 198 acres of land contiguous to one of the water conveyance channels forming a part of a larger water project in Colorado known as the San Luis Valley Project (Reach B) and to seed, fertilize, mulch, and irrigate 62-1/2 acres of land contiguous to another water conveyance channel in the same project (Reach A) (Appeal File, Exhibits 48 and 49; hereinafter AF, Exhs. 48 and 49). As a result of the construction contractor working in the area

of Reach B not having completed its work as soon as the Bureau of Reclamation (BOR) would have hoped, the contract was partially terminated for the convenience of the Government. Some time after QSI had submitted its termination proposal, the contractor was directed to resubmit its proposal on a total cost basis. Although Federal Acquisition Regulation (FAR) 49-105(c) calls for the CO to promptly hold a conference with the contractor to develop a definite program for effecting a termination settlement, such a conference was never held.¹ At one time BOR agreed to a face-to-face meeting with the contractor to discuss the claim, as had been proposed by QSI. The BOR cancelled the scheduled meeting, however, and thereafter refused to schedule another meeting² (AF, Exhs. 31-34; Tr. 103-08). No agreement for a termination settlement having been reached, the CO issued his Settlement by Determination on January 6, 1987 (AF, Exh. 45).

In the underlying decision, the Board noted that because QSI had reduced its claim to \$50,000, the case could be decided by making a profit analysis based upon certain cost figures conceded by both parties to be proper. Proceeding in this manner, the Board found that the two questions requiring resolution were (i) the amount of the costs to complete the project as originally intended and (ii) the proper profit allowance.

Concerning the former question, the Board found (i) that the presentation made by QSI established a *prima facie* showing of the cost to complete reflected in its claim; (ii) that BOR's opposition to acceptance of QSI's cost to complete was not supported by probative evidence; and (iii) that it failed to otherwise undermine the validity of QSI's cost to complete. As to BOR's request that the Board consider Attachment B to its brief as the "most viable method" for projecting the cost to complete,³ the Board found that some of the assumptions on which Attachment B was based were assumptions for which there was no evidence of record and concerning which appellant's counsel had been afforded no opportunity to cross-examine. So finding, appellant's Motion to Strike Attachment B was granted and the cost to complete the terminated portion of the contract was found to be the amount projected by QSI of \$29,642 (95 I.D. at 128-32, 88-3 BCA ¶ 21,020 at 106,178-80).

¹ The FAR lists various subjects that should be addressed at such a conference. E.g., "10. Form in which to submit settlement proposals" (FAR 49.105(c)). If, as contemplated, the conference had been promptly held, it appears to be likely that QSI would have been told in early July of 1985 rather than in that October to submit its termination claim on a total cost basis (i.e., QSI could have avoided the expenses involved in submission of its initial claim and saved 3 months time).

² A face-to-face meeting between the parties would seem to be particularly appropriate where, as here, there was a wide variation in BOR's own assessment of the profit/loss position on the contract. Thus, depending on how the costs to complete Reach A were computed and projected to the terminated work, QSI would have realized a profit of about \$59,000 or sustained a loss of \$106,704.65 (AF, Exh. 36 at 14).

³ One of the means by which BOR attempted to prove the reasonableness of Attachment B's labor costs for the terminated work as shown therein was to compare the per-acre labor costs of a follow-on contract let to another contractor the following year. As a predicate for such comparison, BOR cites its hearing Exhibit A. In the underlying decision, however, no significance was attached to Exhibit A since no testimony was adduced as to its contents and QSI had had no meaningful opportunity for cross-examination or rebuttal (95 I.D. at 131; 88-3 BCA ¶ 21,020 at 106,179).

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After determining the cost to complete the contract, the Board turned to the factors enumerated in FAR 49-202(b) as guidelines for determining a fair profit in a termination settlement.⁴ Two of such factors were found to have no application to this case. In the course of considering the seven remaining factors in the light of the arguments advanced by the parties in support of their respective positions, the Board found the position of QSI to be superior either because BOR failed to cite any evidence of record in support of its position or the evidence that it did cite was not persuasive as to the particular factor for which it was cited. Having found for the appellant on the question of the cost to complete and on the question of what would constitute a fair profit and using those figures in conjunction with other figures about which there was no dispute or which were presumed to be correct, the Board sustained the appeal in the amount of \$50,000, noting that the appellant had waived the right to compensation in excess of that amount (95 I.D. 132-38; 88-3 BCA ¶ 21,020 at 106,180-83).

In its response to appellant's application for attorney fees and costs (hereinafter Opposition) the Government states that the issues to be decided are: (1) Whether the Government's litigation position was substantially justified, but assuming it is found not to be, then (2) whether the claimed costs, expenses, and fees are proportionate, reasonable, equitable, or lawful under the circumstances of this case. At the outset, the Board notes that issue No. 1 has not been properly formulated since "[t]he EAJA, as amended, defines the term 'position of the agency' to require consideration of the underlying action which led to litigation, as well as its litigation position. 5 U.S.C. sec. 504(b)(1)E." *Yamas Construction Co.*, ASBCA No. 27366 (Feb. 18, 1987), 87-2 BCA ¶ 19,695 at 99,726.

In the one and a quarter pages of the Opposition devoted to the "substantial justification" question, the Government states (i) that the projected contract costs for completion of the terminated work in appellant's claim were reasonably questionable because they were disproportionate to costs required to complete the first reach of seeding; (ii) that the record reveals that the projected profit claimed far exceeded percentages for the same or similar work common to the BOR's experience; (iii) that it appears to be patent from the Board's decision, involving resolutions of many disputed issues and a complex interpretation of the applicable FAR, that justiciable factual and legal issues did exist and that the Government's litigation position was substantially justified although appellant prevailed; and (iv) that under the facts, circumstances, and complex legal issues involved in this case, the Government has demonstrated that its basis for litigating

⁴ The contract termination clause (FAR 52.249-2) – Termination For Convenience Of The Government (Fixed Price) (APR 1984) lists the costs to be reimbursed in a termination settlement, including a "sum, as profit" * * * determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable" (AF, Exh. 48 at 18-19).

this dispute was reasonable within the scope or purview of the authorities cited by appellant (Opposition at 2-3).

In regard to item (i) above, the record shows that throughout the proceeding the standard invoked by the Government to justify its questioning of appellant's estimate of the cost to complete the terminated work shifted a number of times and in differing directions. Thus, according to the Government's own figures, the cost required to complete the first reach of seeding (Reach A): (a) entailed a loss of almost \$19,000 (AF, Exh. 36 at 8); (b) reflected a windfall profit (AF, Exh. 45 at 12-13); or (c) indicated a loss of almost \$7,500 (Respondent's Closing Brief in underlying action at 14).

As to item (ii), a review of the record discloses that at both the CO level and in litigation, the Government ignored the distinction between what might be considered to be a fair profit under a competitively bid contract terminated for the Government's convenience as is the case here and what would be a fair profit under a negotiated contract or modification. In concluding that QSI was entitled to only a 12-percent profit on the costs involved, the CO specifically considered and apparently relied heavily upon the factors listed in Reclamation Acquisition Regulation (RAR) 15.905-80, even though such regulation reflects a structured fee approach for determining profit when contracting by negotiation. The passing reference by the CO to FAR 49.202(b) appears to be only a form of "window dressing" since the FAR factors for determining a fair profit in a termination settlement are neither listed nor discussed in the CO's decision (AF, Exh. 45 at 13-14). It is deemed to be highly significant that at the hearing neither of the Government witnesses offered any testimony as to what would constitute a fair and reasonable profit under a competitively bid contract terminated for the Government's convenience (i.e., the case involved here) (Tr. 167-69; 177-78).

Concerning item (iii), the Board notes that the question is not whether the case raises justiciable issues, since any appeal over which the Board has jurisdiction involves justiciable issues. Even in cases where a motion for summary judgment is granted, the Board must address the justiciable issues of whether there are any material facts in dispute and whether the moving party is entitled to judgment as a matter of law. The Board does not consider that the number of factual issues required to be resolved in order to arrive at a decision in the underlying case were greater than the number of disputed factual issues coming before the Board and requiring resolution in many, if not most, of our decided cases. Once the disputed questions of fact were resolved, the manner in which the FAR factors for determining a fair profit were to be applied was not considered to involve complex interpretation questions or to be otherwise particularly difficult.

With respect to item (iv), the Government appeared to be involved in a "bootstrap operation." Although asserting that the Government has demonstrated that its basis for litigating this dispute was reasonable within the scope and purview of the authorities cited by the appellant,

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the Government has not identified the portions of the holdings on which it purportedly relies; nor has it undertaken to say in what manner the cases cited by the appellant supports the Government's position.

Discussion

[1] In the case to which the application for attorney fees and other expenses pertains, the CO found that, by reason of the partial termination of its contract with BOR, QSI was entitled to be paid the sum of \$31,119.55. On appeal, the Board found that QSI was entitled to be paid an additional \$50,000. While acknowledging that QSI prevailed in the underlying appeal, the Government denies that QSI should be awarded attorney fees and other expenses under the EAJA on the ground that the Government's position was substantially justified. None of the contentions advanced by the Government in support of its position are supported by any citation to the record or to any of the parties' briefs. In the preceding text, all of the Government's contentions have been found to be without merit.

The burden to establish that the Government's position was substantially justified clearly rests with the Government. *Trundle v. Bowen*, 830 F.2d 807 (8th Cir. 1987). The Government's position is substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 108 S. Ct. 2541, 2550 (1988).

Under the authorities cited and based upon the record made in the adversary adjudication for which fees and other expenses are sought, the Board finds that the Government has failed to show that its position was substantially justified.

II. Amount of Allowable Fees and Expenses

After giving effect to the \$75-per-hour limitation on an EAJA award of attorney fees by agency boards of contract appeals,⁵ QSI's claim for attorney fees and other expenses is in the amount of \$31,597.61. Accompanying the applicant's Memorandum of Authorities in Support of Taxation Litigation Costs and Fees, is an affidavit of Peter N. Ralston concerning the time that he and other members of the law firm and paralegals expended in prosecuting QSI's appeal before this Board. Submitted with the Bill of Costs and Application for Attorney Fees and Other Expenses under U.S.C. section 504 (5 U.S.C. § 504) were three schedules. Schedule 1 shows the claim for attorney fees to be in the amount of \$17,608.75. Schedule 2 shows fees and expenses of a consultant to be in the amount of \$11,827.65, comprised of charges for (i) consultant's services (\$11,059.50); (ii) mileage (\$310.50); and (iii) expenses (\$457.65). Schedule 3 lists Other Expenses totaling

⁵ See *Salisbury & Dietz, Inc.*, IBCA-2382-F (June 23, 1989), 96 I.D. 280, 286; 89-3 BCA ¶ 21,981 at 110,559 n.6.

\$2,161.21 which are shown to be for (a) photocopies - \$573; (b) superior retrographics (enlargements for hearing) - \$86.21; (c) transcript - \$203; and (d) word processing - \$1,299.

Having found that the Government's position on the underlying claim was not substantially justified, we now turn to consideration of the Government's contention that the amounts claimed for attorney fees and consultant's fees were excessive.⁶ After asserting that he has defended in a number of contract appeals cases most of which have been far more complex than the instant one, Government counsel states "that approximately one-third of the total hours claimed by both Appellant's attorney and consultant would be a more realistic, more reasonable expression of the hours that should have been consumed by professionals of their stature" (Opposition at 4).

[2] The essence of BOR's objection appears to be that in the aggregate the amount sought for attorney fees and the amount charged as consultant fees appear to be inordinately high when expressed as a percentage of the amount recovered on the claim (Opposition at 4). Despite the lack of any specific objection by Government counsel to particular fees for which claim has been made, we have carefully reviewed the documentation submitted by applicant with respect to both the claim for attorney fees and the charges for the consultant retained by QSI. See *Shirek Construction Co.*, ASBCA No. 28414 (Apr. 3, 1987), 87-2 BCA ¶ 19,765. While the Board's initial reaction to the hours claimed for both the attorneys involved and for the consultant was that they were on the high side, our review of the detailed information furnished in support of the claimed hours has convinced us that none of the time expended was unreasonable for the specific tasks undertaken and that each of the tasks was appropriate for proper representation.

In arriving at the above conclusion, the Board gave considerable weight to the fact (i) that to the extent that QSI's presentation to the Board was complex, that complexity was largely attributable to appellant's need to develop facts and background for the FAR provisions because BOR had not adequately addressed those provisions administratively; (ii) that the experience of Government counsel in defending contract appeals cases is not a proper standard by which to measure the time and effort required to effectively present an appellant's case, since in all of such cases the appellant has the burden of proof, as was true in the underlying appeal; and (iii) that some of the actions by the Government in this case demonstrably increased the number of hours that appellant's attorneys had to devote to the case. (E.g., the Motion for Summary Judgment filed by the Government in the proceeding had little prospect for success but responsible representation required appellant's counsel to prepare and file a response in opposition to the Government's motion.)

⁶ No claim has been made for reasonable fees and expenses incurred in the pursuit of the EAJA application. See *Margaret Howard*, ASBCA Nos. 28648, 29097 (Mar. 21, 1988), 88-2 BCA ¶ 20,655 at 104,391 and cases cited.

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In concluding that the total hours expended by appellant's attorneys and its consultant on the case were reasonable, the cavalier attitude consistently displayed by the CO to the FAR provisions governing termination settlements was considered to have contributed significantly to the number of hours required to be devoted to the case by the professionals retained by the appellant (notes 1 and 4, *supra*, and accompanying text). The failure of the CO to take seriously the FAR provisions (particularly in the area of what would be a fair profit in the circumstances present here) resulted in appellant's counsel having to prove or brief matters that should have been admitted.

Of even greater significance, perhaps, was the adamant refusal of the CO to meet face-to-face with QSI representatives (note 2, *supra*). If such a meeting had gone forward (as was agreed to at one time by BOR), a settlement might not have been achieved but it seems highly likely that at a face-to-face meeting some of the issues in the case would have been eliminated entirely and that others would have been narrowed considerably. In our considered judgment the probable consequences of such a meeting between the parties would have been a material reduction in the number of hours that appellant's attorneys and its consultant would have had to spend in the preparation and presentation of the case.

The Board has also reviewed the other expenses claimed by appellant's attorney in the amount of \$2,161.21 and the expenses listed in the statement submitted by QSI's consultant. Based upon that review, the Board finds that all of such expenses were related to the prosecution of the appeal and were reasonable in amount except for some expenses shown to have been incurred by QSI's consultant prior to the issuance of the CO's decision on January 6, 1987. Absent a specific showing that pre-decision expenses are attributable to an "adversary adjudication" which is the subject of an EAJA application, such expenses are deemed not to have been incurred in connection therewith. *Elias Pamfilis Painting Co.*, ASBCA Nos. 30839, 31355 (Jan. 11, 1988), 88-1 BCA ¶ 20,495 at 103,655-56. QSI has made no such showing.

In regard to the questioned expenses, the detailed information furnished shows that in December of 1986, the consultant incurred expenses in the amount of \$35.78 and that on January 22, 1987, he was billed for long-distance telephone charges in the amount of \$33.71 covering the period from December 13, 1986, through January 14, 1987. Allocating these charges as best we can from the information available, it is determined that \$25.28 of the telephone charges were incurred in the pre-decision period. The Board therefore finds that \$61.06 of the consultant's expenses are related to routine claim processing; that such expenses are not covered by the EAJA; and that the consultant's expenses reimbursable to QSI under the EAJA are for the amount of \$707.09.

Decision

For the reasons stated and based upon the authorities cited, QSI's application for attorney fees and other expenses is granted in the amount of \$31,536.55 and is otherwise denied.

WILLIAM F. McGRAW
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

APPLICATION OF RUSSELL DRILLING CO., INC., FOR FEES & EXPENSES UNDER EAJA

IBCA-2560-F

Decided November 30, 1989

Contract No. 3-C-60-00370, Bureau of Reclamation.

Denied.

Attorney's Fees: Generally--Attorney's Fees: Equal Access to Justice Act--Equal Access to Justice Act: Generally--Equal Access to Justice Act: Contract Disputes Act of 1978: Substantially Justified

The position of the Government in denying appellant's termination settlement claim was reasonable and substantially justified where the parties negotiated a settlement agreement, without litigation, including only 18 percent of the claimed direct and indirect costs and profit claimed, and such agreement reimbursed appellant for the expenses incurred during the negotiation period, including loan interest expense, settlement expenses, attorney fees, and Contract Disputes Act interest on the amount awarded.

APPEARANCES: Patrick R. Harkins, Attorney at Law, Spriggs & Hollingsworth, Washington, D.C., for Appellant; Gerald R. Moore, Department Counsel, Billings, Montana, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

Russell Drilling Co., Inc. (Russell), a subcontractor of Central Excavating Co. (Central) filed an application for attorney fees under the Equal Access to Justice Act (EAJA) in the amount of \$16,060 on September 21, 1988. The application was supplemented on October 26, 1988, claiming an additional amount of \$8,777.50. Neither filing contains any information concerning Russell's eligibility as a party qualifying to apply for the award of fees and expenses under the Act. Under date of August 18, 1989, counsel for Russell has filed a Motion for Order Directing Payment to the law firm of any and all amounts

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which may be awarded pursuant to the application under the EAJA. This decision is dispositive of both the application and the motion.

Background

On August 26, 1983, Central was awarded a contract for \$12,167,864 for the construction of the Lone Tree Dam and associated works as part of a large irrigation development project in North Dakota designated as the Garrison Diversion Unit. On December 13, 1983, Central awarded a contract to Russell to construct six relief wells for \$471,432. On March 6, 1984, the Government issued modification 1 to Central's contract to require the construction of an additional seven relief wells to be completed prior to April 30, 1984. Central was directed to submit a cost proposal for the work required by modification 1 within 30 days. The added work was ordered of Russell by Central, and the additional wells were timely completed. The Government made progress payments to Central at the unit prices bid in the contract for the added work required by modification 1. On October 19, 1984, Russell submitted a cost proposal in the amount of \$624,438 for the added wells, but no final price agreement was arrived at between the Government and Central and Russell.

As a result of a congressional direction, expenditures for the Garrison project were suspended between October 1, 1984, and January 1, 1985, while the project was reviewed. That review resulted in a recommendation, adopted by the Department and the Congress, to eliminate the Lone Tree Dam portion of the Garrison project. Consequently, Central's contract was terminated for the convenience of the Government on February 1, 1985, with a considerable amount of the work uncompleted. At the time of the termination, Russell had completed all the work called for in its contract, including the added wells required by modification 1. After termination of its subcontract, Russell continued to seek a price adjustment for modification 1, but the parties were not able to agree.

On July 7, 1986, Russell filed an appeal with this Board pursuant to a written authorization from Central. The appeal requested the Board to direct the contracting officer to issue a decision within 15 or 30 days on the claim for extra work required by modification 1, and cited Russell's request for final decision on its certified claim submitted to the contracting officer on February 12, 1986. By order dated August 12, 1986, the appeal was remanded to the contracting officer for the issuance of a final decision within 30 days. On September 25, 1986, a telephonic conference was held with the parties, during which the Government expressed its concern that the inability to segregate costs between the initial wells and those required by modification 1 made the final decision difficult to determine. It was noted by the Board that only a change order claim had been submitted despite the fact that Russell's subcontract had been terminated for convenience,

and that no termination settlement proposal had been submitted. Having determined that the changes claims prior to termination were subsumed in the termination for convenience, the order was modified on October 9, 1986, to require a decision by the contracting officer within 60 days after receipt from appellant of a complete termination settlement proposal.

Russell's termination settlement proposal dated November 11, 1986, was received by the Government on November 17, 1986. The claimed termination costs and profits were \$1,589,000, including a base cost of \$513,036.39 for the original six wells (indicating a loss of \$41,604 prior to the issuance of modification 1). An audit of the settlement proposal dated January 8, 1987, allowed a total of \$982,922 for costs and profits, leaving a balance of \$109,204 of progress payments made above the recommended amount to be allowed. On January 16, 1987, the contracting officer issued a final decision allowing a total of \$994,524, and indicating that the Government was open to further negotiations to resolve differences between the allowed amount by determination and the claimed amount. Among the conclusions of the audit report on which the contracting officer relied were: (1) the termination proposal was not based on actual costs, (2) duplicate costs were claimed, and (3) estimated costs were claimed which were not incurred or reflected in the accounting records.

Following the contracting officer's decision, appellant's attorney advised Department counsel that Russell refused to negotiate pursuant to the Government offer transmitting the final decision. Instead, Russell filed an amended complaint on August 27, 1987, appealing the final decision. There were never proceedings before the Board on the merits, however, there were two telephonic conferences with the parties in which the parties discussed their differences and asked the Board to comment on the allowability of certain categories of costs.

A negotiated settlement was reached during June 1988 according to the contracting officer's affidavit attached to the Government's brief. The proposed settlement agreement was forwarded to Russell and his attorney by letter of July 18, 1988, and returned with the signatures of Central and Russell by Central's transmittal letter of August 2, 1988. The contracting officer signed the agreement on August 8, and by transmittal letter dated August 10, sent a duplicate original of the fully executed agreement to Central with a copy indicated for Russell. Russell's termination settlement proposal claimed \$9,386 in settlement expenses and \$24,301 in attorney fees, for a combined total of \$33,687. The settlement agreement allowed \$12,382 in settlement expenses and \$37,349 in attorney fees, for a combined total of \$49,731. The excess of \$16,044 represents the allowance of additional settlement expenses incurred subsequent to submittal of the claim.

The additional attorney fees claimed by appellant's application are the fees incurred as a result of pursuing the appeal before the Board. The application states that neither Russell nor its attorney received a copy of the settlement agreement, but that Russell received notice of

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the final settlement upon receipt of a check for \$138,235.20 on August 22, 1988. The amount of the check represents the difference between the settlement amount of \$1,231,091 and the amount of progress payments previously received by Russell, i.e., \$1,092,126. In the Motion for Order Directing Payment, Russell's counsel states that it was not paid for accrued fees by Russell from the proceeds of the settlement check.

Discussion and Findings

In this instance of a settlement agreement between the parties without substantive proceedings on the merits before the Board, the record consists primarily of appellant's application for fees and the Government's brief, together with the documents attached to both filings. We bypass the Government's contention of untimeliness of the filing of the application on September 21, 1988, because of the general rule that the time for filing an application for fees starts with the Board's dispositive action on the appeal. In this instance, the Board dismissed the appeal with prejudice by order dated September 21, 1988, after notice of the settlement agreement by letter from Russell's counsel dated September 20, 1989.

Additionally, we make no finding respecting the eligibility of Russell as a party qualifying to apply for award of fees and expenses under the EAJA. Appellant has provided no information showing qualification as a party subject to the EAJA, and the failure so to do would be a basis for denying the application.¹ The Board has no independent information to indicate that Russell is a qualifying party. However, the parties have provided a record sufficient for a finding respecting whether the position of the Government was substantially justified. This is the central issue to be decided under the EAJA and we proceed to address that issue.

Appellant's application contains the following statement, which is consistent throughout all the pleadings in the prosecution of the appeal: "Russell assumed all expenses and risks associated with construction of the seven additional relief wells." This misleading approach suggests a cavalier indifference to the plight of Russell on behalf of the Government, and ignores the fact that progress payments were made to cover more than the direct and indirect costs of the work required by modification 1. Instead of the entire costs of performing the work of the modification being issued, contemporaneous progress payments on the contract of \$1,092,126 effectively made the claimed amount to be \$3,744 on October 19, 1984, when Russell submitted a cost proposal for modification 1 work in the amount of \$624,438. Had

¹ Inasmuch as the Board's interim procedures detailing the requirements for proper filing of EAJA applications were not provided to the parties, we elect to deal with the merits rather than procedural requirements in the disposition of this application.

the cost proposal been accepted, and added to the contract amount of \$471,432, the new contract total would have been \$1,095,870.

When the Government received the termination settlement proposal on November 17, 1986, the total claimed amount was \$1,589,000, increasing the amount in issue to \$496,897, the amount exceeding prior progress payments. Prior to this escalation of the claim, the Government's position was not to consider the reasonableness of agreeing to a cost proposal exceeding the prior payments by only \$3,744, but rather to determine the reasonableness of the claims of \$624,438 for drilling seven wells. An audit of the claimed amount did little to resolve the question because of the difficulty of segregating costs between the original six wells and the seven wells under modification 1. A simple comparison of the original contract and the modification proposal would show that the average cost per well under the original contract was \$78,572, and the average cost per well under the modification was \$89,205. All of the wells were constructed in the brief period between December 13, 1983, and April 17, 1984. The record before us does not reveal any basis to indicate that the seven wells under modification 1 were any more difficult or costly than those required under the original contract. With the contractor claiming only \$3,744 in excess of prior payments, it would seem unreasonable to impute to the contracting officer a cause for urgency to resolve the cost proposal claim without seeking to determine why the second seven wells were claimed to cost an average of \$89,205 as opposed to the average for the first six at \$78,572.

On November 7, 1984, Russell increased its claim to \$643,433 for the modification 1 work, largely due to an increase of the administrative overhead rate claimed from 8 to 9.7 percent. On June 7, 1985, the claim was increased to \$807,229. A portion of the increase was the result of again increasing the claimed administrative overhead rate from 9.7 to 14.7 percent. The unresolved cost proposal became the subject of an appeal to the Board by letter dated July 7, 1986.

After submission of a complete termination settlement proposal, appellant's total claim for the work under the contract, including modification 1, was \$1,589,000. This was \$496,897 in excess of prior payments. Under the settlement agreement, Russell agreed to accept a payment of \$138,964.55 over the prior payments of \$1,092,126. The settlement reduced direct and indirect costs from the claimed amount by \$239,059, but allowed \$20,000 of loan expense interest incurred after the claim was filed. Profit was reduced by \$150,330, or less than one-half of the claimed amount. The settlement included \$16,044 over the claim for settlement expenses, including attorney fees. Additionally, the settlement allowed \$15,413 for interest on the claim.

Stripped of the costs allowed in the settlement that accrued after the claim was filed, appellant's claims of \$496,897 was settled for \$87,508 for added direct and indirect costs and profit. The settlement resulted from negotiation and was never litigated before the Board. The

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settlement included a total of \$37,349 for attorney fees incurred during the negotiation process.

In this instance, the question of whether the Government was substantially justified in the position it took regarding the claim is the controlling issue, rather than whether appellant was the prevailing party in settling for 18 percent of its claimed amount. The fact that appellant received a small portion of its claim in the settlement does not automatically qualify it as a prevailing party. The Government's position was based on the conclusion that the claim was excessive and could not be supported by documentation of the actual costs incurred. Absent an audit, negotiation, and discussions to verify any questioned costs, the Government had no means of determining that any specific amount over the amount of progress payments already made was due appellant. Therefore, the Government denied the claim and went through the lengthy process of requiring appellant to justify each element of the claimed costs. In so doing, 82 percent of the claimed costs were eliminated from the settlement agreement. This result supports the original conclusion that the claim was excessive and unsupportable, and compels our finding that the Government's position was substantially justified.

Our finding that the Government's position was substantially justified and the agreement eliminating four-fifths of the claimed costs clearly shows the Government to be the prevailing party in reducing an excessive claim. Appellant must bear the responsibility for the lengthy process that resulted from a denial of an inflated and unsupportable claim, and the ultimate allowance of only 18 percent of the amount claimed. Had a realistic claim been made based on the cost records and information better known to appellant than to the Government, the claim resolution process may well have been shortened. Despite these circumstances, appellant has been paid in the settlement agreement the added interest, settlement expenses, and attorney fees it incurred by reason of the delay in resolution.

Appellant did not prevail in the negotiated settlement.

Conclusion

Appellant's claim for attorney fees and costs are hereby denied. The Motion for Order Directing Payment to appellant's counsel is mooted by our decision.

RUSSELL C. LYNCH
Chief Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

December 14, 1989

APPEAL OF PETER KIEWIT SONS' CO.

IBCA-1789

Decided: *December 14, 1989*

Contract No. 1-02-3D-C7489, Bureau of Reclamation.

Sustained.

1. Contracts: Construction and Operation: Contract Clauses-- Contracts: Contract Disputes Act: Burden of Proof

An "act of God" is a natural event causing adverse economic consequences that, because of its rarity, intensity, magnitude, location, duration, and/or time of occurrence, was not reasonably foreseeable. An act of God requires something more than an ordinary natural occurrence at the time and place involved, and its adverse consequences must not be primarily attributable to anyone's negligence.

2. Contracts: Construction and Operation: Contract Clauses-- Contracts: Contract Disputes Act: Burden of Proof

Where a construction contractor's site was damaged by water runoff from another contractor's construction site (1) in the context of a general rainstorm exceeding the 100-year level; (2) where even the finished overall project as designed would not be protected beyond the 100-year storm level; (3) where damage to the first contractor's site probably would have occurred even if the second contractor were not contributorily negligent; (4) where the second contractor was not proved to be negligent in its construction methods under the circumstances; and (5) where there is evidence that the first contractor was at least as negligent as the second contractor may have been in causing the damage, the rainstorm was an act of God, and the first contractor is not entitled to recover its clean-up costs; and if the Government chooses to indemnify the first contractor for these costs, it does so as a volunteer and not because it was liable for such costs under SF 23-A.

APPEARANCES: Charles W. Herf, Esq., Wentworth, Lundin & Herf, Phoenix, Arizona; Bruce Clawson, Esq., Raymond B. Roth, Esq., Peter Kiewit Sons' Co., Omaha, Nebraska, for Appellant; Fritz L. Goreham, Esq., 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 Peter Kiewit Sons' Co. from a final decision by a Bureau of Reclamation contracting officer to assess it \$241,960 in damages as a result of the inundation of another contractor's facility—a pumping plant which was also part of the mammoth Central Arizona Project—by a sudden downpour of rain in August 1982, during which a substantial portion of the waters damaging the pumping plant came from appellant's work site. We sustain the appeal on the ground that the rainfall, which exceeded the 100-year expectation, was an act of God, for which each contractor, in the absence of clear negligence by the other, was required to bear the resulting loss.

Here, the Government, which had the burden of proof, failed to show the required degree of negligence or, indeed, any negligence by appellant. It also failed to establish that it was liable in any way to the damaged contractor for the loss incurred, a prerequisite for the imposition of costs upon appellant.

FACTS

A. *Joint Pre-Hearing Statement*

Immediately prior to the hearing on the matter, the parties submitted a joint pre-hearing statement (PHS), which was accepted by the presiding Administrative Judge as a stipulation of fact (Hearing Transcript (Tr.) at 3-4). Although subsequently, in its various post-hearing briefs, the Government appeared to question the accuracy, meaning, or significance of some of the facts the stipulation contains, apparently on the basis of oral testimony at the hearing, we find on the basis of the entire record that the stipulation was both accurate and consistent with the oral evidence, except as otherwise qualified or modified in this opinion. An abridged, but substantively verbatim, version of this PHS, is as follows:

I. INTRODUCTION AND BACKGROUND OF APPEAL.

A. Introduction.

This Appeal arises out of the Bureau of Reclamation (BOR/Government) Contracting Officer's January 4, 1984, decision assessing costs of \$241,960 against Peter Kiewit Sons' Co. (Kiewit/appellant). The costs represent those which the Government paid in settlement to an adjacent contractor, Boecon Corp. (Boecon) for damages allegedly caused by Kiewit's negligence during work on the Granite Reef Aqueduct Reach 1 Project of the Central Arizona Project (CAP). The adjacent contractor's work was flooded when runoff from a storm inundated the jobsite areas of both contractors. Runoff from drainage into Kiewit's jobsite overtopped an embankment, a "hard plug" at Station 1289+50 used to protect Kiewit's canal excavation and then overtopped a temporary dike within the excavation, flowing into Boecon's work. Runoff flowed into Boecon's work directly from the Boecon jobsite. The Government paid Boecon's claim for damages and then offset its settlement costs against Kiewit's contract funds.

B. Background.

Pursuant to the Colorado River Basin Project Act, 43 U.S.C. § 1501 *et seq.*, BOR constructed the CAP to carry Arizona's entitlement of Colorado River water some 300 miles from Lake Havasu on the Colorado River through Phoenix to its terminus south of Tucson, Arizona. The CAP delivery system is an open canal or aqueduct. The top of the aqueduct is above and generally level with the land surface and thus excavation of a canal prism is necessary. Once excavated, the bottom and sides of the canal are lined with concrete to preserve the canal and prevent the water from seeping into the ground. Generally the elevation of the canal declines along with path of the canal thus allowing the water to travel east and south by the force of gravity. However, between the Colorado River and Phoenix, the land surface rises. Pumping plants are required to accommodate the land surface to allow water to run downhill in the canal.

A pumping plant is an indoor-type structure with a reinforced concrete substructure, an intermediate structure approximately 400 feet long, and a precast concrete superstructure. The pumping plant contains 10 pumping units powered by electricity. The pumping units force the water to the higher elevation of the downstream side so that the gravity will once again be able to force the water downstream toward its destination. The higher elevation and downstream canal are connected to the pumping plant by an inlet transition area. The pumping units are connected to discharge pipes

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which flow into outlet structures which in turn connect to the canal on the downstream side.

The Bouse Hills, Little Harquahala, and Hassayampa pumping plants were constructed as part of the CAP. The CAP was designed to be built through phased construction. As part of the construction plan, the work was separated into several divisions. The Granite Reef Division included the construction of the Bouse Hills pumping plant (plant) and inlet transition as well as the excavation and lining of the canal upstream from the plant.

On March 7, 1980, Boecon, headquartered in Seattle, Washington, was awarded the contract to construct the plant, the inlet transition, and other features of the CAP at a price of \$51,638,083.00. Boecon received its notice to proceed with the work under the contract on March 10, 1980. On December 11, 1981, Kiewit was awarded a contract (BOR Contract No. 2-07-3D-C7489) (the contract) to construct Reach 1 of the Granite Reef Aqueduct (the aqueduct), which consists of approximately 17.5 miles of unreinforced concrete-lined aqueduct and .58 miles of reinforced concrete-lined aqueduct at a price of \$31,247,000.00. Kiewit received its notice to proceed with the work under the contract on December 14, 1981.

II. UNDISPUTED FACTS.

The aqueduct has an 80-foot bottom width, except for approximately one mile at the beginning of Reach 1 where the bottom width is 24 feet. Structures for Reach 1 include pipe culverts, floatwells, bridges, and barbed wire fence. It begins at the end of the outlet transition of the Buckskin Mountains Tunnel 18 miles east of Parker, Arizona, and extends southeast terminating at the beginning of the inlet transition to the plant, all in Yuma County, Arizona. The Granite Reef Aqueduct is a major feature of the Central Arizona Project and will convey Colorado River water from Lake Havasu near Parker, to the Gila River Basin which encompasses agricultural areas as well as the metropolitan areas of Phoenix and Tucson.

Pursuant to the contract, specifications and drawings, Kiewit excavated, constructed and lined the approximately 17.5 mile long canal from Station 360+91.61 to Station 1315+51.31. The inlet to the plant was constructed by Boecon under its separate contract.

The specifications called for installation of single or multiple culverts, as designed by the Government, at eighteen locations along the canal, to convey cross drainage under the completed canal (Plan & Profile Drawings 344-330-2653A through 2670A and 3028A). In order to minimize the number of drainage structures crossing the canal, the work included filling low areas and cutting drainage ditches generally parallel to the embankment through existing drainage divides. The cross drainage designated by the contract varied from 5 seven-foot diameter pipe culverts to a single four-foot diameter pipe culvert. The Government specified a seven-foot diameter single-barrel culvert at 1289+50, to provide drainage for an existing natural drainage channel and for the runoff from an adjacent drainage basin east of the channel as a result of a contractually required cut through a drainage divide at approximately Station 1300+00. As a result of the work incorporated in the project by the Government design, the natural drainage channel at approximately Station 1289+50 was required to handle a larger runoff. The design called for modification of the drainage east of Station 1289+50 so that two drainage basins converged at 1289+50, and the design also required an embankment to run parallel to the canal to an elevation of 1222.0± at Station 1289+50. On June 14, 1982 the Government increased the length of the culvert at Station 1289+50. The increased length was entirely on the downstream outlet side.

On August 12, 1982, a rainstorm of great intensity and magnitude began at approximately 4:00 a.m. and ended at approximately 10:30 a.m. The precipitation gauge at the plant indicated 4.53 inches of rain fell between 4:00 a.m. and noon. BOR records indicate that for the project, a six-hour, fifty-year general storm would provide 2.7 inches of precipitation, a six-hour, 100-year general storm would provide 3.10 inches of precipitation and a three-hour, 100-year thunderstorm would provide 2.85 inches of

precipitation. The rainfall that occurred on August 12, 1982 was in excess of any of the 100-year storm records. The area in question is drained by three drainage basins. Drainage Basins A and B, drain areas of 1.47 and 1.19 square miles respectively, and Drainage Basin C drains an area of .4 square miles. Basins A and B are east of the project and Basin C is adjacent to the Bouse Hills Pumping Station. ("A Study of the August 12, 1982 Storm and its Effects on the Central Arizona Project Reach 1," Paul R. Ruff, P.E. (Ruff Report), at 2, Appeal File (AF), Tab 15).

At the time of the August 12 storm, appellant had installed the embankment, a hard plug at 1289, and a temporary dike at the inlet to the plant (Affidavit of Carlos Hobson). The embankment, located at Station 1289+50, was five feet high, twelve feet wide at the top, and thirty feet wide at the bottom. The other dike was located within the aqueduct just outside the plant and was twelve feet wide at the top, twenty-two feet wide at the bottom and four to five feet high. Presumably, these embankments would have been adequate to retain normal rainfall in the project area during the construction of the project prior to installation of the culvert (Letter dated Apr. 8, 1983, supplementing the Ruff Report (Ruff Supplement), AF 15).

The storm runoff overtopped the embankment at 1289+50 and ran into the canal excavation. The waters eventually overtopped both the hard plug and the temporary dike at the inlet transition within the canal excavation (Ruff Report at 3, AF 15).

Waters entering the plant came from drainage Basins A and B through Station 1289+50 and from drainage Basin C, which was under the control of Boecon. The natural drainage channel of Basin C bordered the Government office and laboratory trailers, and the Boecon storage yard. The Basins are identified as such by Ruff.

Seven to eight hours after the 4:00 a.m. rain, there were still 12-24" of water standing around and under the office trailers in the yard complex. This water originated south and west of the yard site but overflowed the diversion channel, forcing it through the office area, and some of it went into the canal (Affidavit of Carlos Hobson; Ruff Report at 3, AF 15; Technical Analysis, AF 13). Water ponded immediately behind (south of) the pumping plant and flowed around the plant to enter the inlet transition excavation and the plant on the north side.

On August 12, 1982, Boecon informed the Government that the plant and adjoining area had been flooded (Government's Memorandum at 6; AF 26). On August 16, 1982, the Government directed Boecon to immediately resume operations to complete their work, including cleanup and restoration of the plant and site damaged by the heavy rains, and requested that Boecon advise it of their position concerning Boecon's failure to protect its work from the occurrence (Government Memorandum at 6; AF 25).

In response, Boecon refused to start cleanup until the Government agreed to pay for the cleanup. Boecon stated that the damages were caused by the action/inaction of the Government or unnatural occurrence beyond the control of Boecon. Boecon also requested relief from the Government's previous notice that Boecon was in default of its contract and the Government would collect liquidated damages (AF 24).

On August 19, 1982, the Government advised Boecon to perform the work pursuant to the Disputes clause of its contract (Government's Memorandum at 6; AF 23), and sent a mailgram to Kiewit referencing specification Section 2.4.1 ("Cross Drainage") and General Provision 14 ("Other Contractors"), and indicating that after the extent of damages and cleanup costs had been determined Kiewit would be informed of the extent to which Kiewit would be considered responsible (AF 22). The Government negotiated a settlement with Boecon on February 11, 1983 (AF 20), and by letter of March 24, 1983, then informed Kiewit that the Government was going to assess the settlement cost against Kiewit, proposing to deduct the amount from future payments (AF 18).

In the meantime, Kiewit had contacted its insurance carrier, Aetna Casualty & Surety Co., Phoenix office, to investigate the incident. Aetna had informed the Government on September 17, 1982, that it was investigating and would advise the Government (AF 21). Aetna retained Prof. Paul Ruff, Professional Engineer and hydrologist at the Arizona State University Engineering Center, to report on the incident. Based on Professor Ruff's conclusions, Aetna informed the Government by letter of March 22, 1983, that Kiewit was not negligent, that the storm was classified as 100-year intensity by the National Weather Service, that the measures taken by Kiewit would have been adequate but for the storm's unanticipated intensity, that even had the specified culvert been in place it

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wouldn't have handled the run-off, that Boecon's blockage of its own drainage basin caused flooding of the plant, that the incident was an Act of God—not negligence on the part of Kiewit, and that Aetna denied the Government claim (AF 19).

On April 12, 1983, representatives of Kiewit met with the Contracting Officer, B. J. Wolfenbarger, and other Government representatives. The Contracting Officer (CO) was asked to explain the Government's position. He indicated that Boecon had already been paid \$237,000 and stated that the key question was simply "Did Kiewit adequately protect from flooding as required by the specs?", with the Government taking the view that Kiewit did not and inviting Kiewit to present its defense. Kiewit presented its position that pursuant to the basic contractual provision regarding responsibility for property damage, the Permits & Responsibilities Clause (General Provision 12), Kiewit was responsible for damage to an adjacent contractor's work only if caused by Kiewit's fault or negligence, and that the cause was not fault of negligence on Kiewit's part but an unforeseeable 100-year event, an Act of God. The Government stated that Kiewit was responsible because the water came from Kiewit's work. After additional exchanges of correspondence, a claim against Kiewit was asserted by the Government based on the contracting officer's decision, and this appeal followed.

B. Evidence Presented at the Hearing

At the hearing, which took place 4 years after the damage occurred, the Government relied entirely upon three witnesses, and Kiewit upon two. The Government's witnesses were, respectively, the resident BOR engineer in charge of the portion of CAP construction that included work by both Kiewit and Boecon (BOR Supervisor); the BOR engineer in charge of Boecon's construction of the plant (BOR Plant Engineer); and BOR's chief of location, surveys, and design for the entire CAP (BOR Design Engineer).

Kiewit's witnesses were its Arizona area manager and job sponsor for its portion of CAP (Kiewit Supervisor), and its expert witness, the Arizona State University professor of civil engineering, a hydraulic engineer by training, originally hired by Kiewit's insurer to investigate the flooding incident (Professor Ruff). In addition, numerous exhibits were admitted, including photographs of both construction sites taken independently by the BOR Supervisor and by the Kiewit Supervisor on the day of the flood, and several more taken later by, or in the presence of, Professor Ruff. In our review of the record, we found the photographs to be of particularly great value in determining the objectivity and reliability of some of the oral and written presentations by the parties.

The parties' principal legal contentions, as summarized by Government counsel at the hearing, were, on the part of BOR, that Kiewit in its manner of construction did not comply with the specifications in providing for the passage of water runoff during construction; and, on the part of Kiewit, one, that it did adequately provide for the passage of the water; two, that the storm was an act of God which absolved Kiewit of any liability; and three, that Boecon failed to protect its construction site and was responsible for its own damage.

The synopsis of testimony that follows, though representative of that given by the witnesses and fairly complete, does not purport to

summarize everything that was said, and makes no attempt to achieve transitional coherence. Points omitted were deemed either insufficiently relevant, repetitious, or inconsistent with stipulated facts.

GOVERNMENT WITNESSES

1. The BOR Supervisor

The BOR Supervisor did not spend a great deal of time at either project site. He visited the plant two or three times a week (Tr. 18-19), but there were times after heavy rains when he knew the washes would be running, so he sent someone else (Tr. 23). However, on the day of the storm he got word through Boecon's people that the plant had been flooded, and he made arrangements for a helicopter tour of the site. A lot of his people tried to get to the plant but were turned back by the highway patrol before they even got to Bouse (Tr. 23-24). He was not aware that Kiewit had built an embankment at right angles to the wash at Station 1289 + 50 (hereafter, 1289); but doing so is just asking for trouble, since rain has to go somewhere (Tr. 25). He did not know the details of drainage on the Kiewit project (Tr. 26-27). In Area C, the trailer area was higher than the plant site, but water should pass (west and north) down the normal wash (Tr. 27-29). As to the Kiewit project, cross-canal culverts normally may or may not be installed first; it is a contractor decision how to build as long as he makes provision for water passage (Tr. 29-32). The culvert pipe for 1289 was not yet on the site at the time of the storm (Tr. 31). Kiewit was in the midst of construction, so it was difficult to know what its plan for water runoff was (Tr. 32-35).

On cross-examination, he admitted that there were weekly meetings at which Kiewit advised BOR of its scheduling and plans, and BOR was aware that Kiewit had decided to excavate the south portion of the canal before the middle section in order to take care of the rock involved while its blasting equipment was still on hand. He thought there must have been discussion at that time of the need not to block cross drainage, but he could not recall when or where the discussion occurred (Tr. 36-38). By the time he arrived at the site at 10 a.m. on the day of the storm, most of the water was already in place, and the relative sources of the water were hard to determine except as shown by the photographs. He did not recall if Boecon was behind schedule at the time. Kiewit paid for its own damage caused by the storm (Tr. 42). As to Area C, it was clear that water had come into the plant area from the south, but he could not say how much, nor could he recall whether he saw any signs of water entering the canal from the west (Tr. 38-49).

He did recall that Boecon at one time had constricted the wash west of the construction site (Area C), but he did not know its status on the day of the storm (Tr. 49-50). There were other ways Kiewit could have done its construction at 1289 without blocking the wash. One other site at which Kiewit had left a drainage channel had previously been

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flooded, and at the time of this storm, others that were not complete had collected water. He did not recall if any of the culverts were filled with silt, but this August 12 storm was the most severe rainstorm that occurred during the construction of this portion of CAP (Tr. 50-53).

2. *The BOR Plant Engineer*

The BOR Plant Engineer lived at Parker Dam, California, and commuted 50 miles daily to the plant, which was about 8 miles by gravel road from Bouse. Washes would run any time there was rainfall, and if it rained during the day, workers would shut down early to get out before the washes started running. He saw the wash at 1289 running several times (Tr. 58-60). The plant has a sump area, about 30 feet below the pumps. There is a 3-½ foot lip below the intake structure itself (Tr. 61-63). He had no occasion to observe the left embankment (where Kiewit was working). On the day of the storm, he arrived at the plant by helicopter with the BOR Supervisor. None of his people were able to get there by automobile. His office was in the trailer area (of Area C, west and slightly north of the plant), so he was familiar with that area. The ground there slopes away from the plant to a wash located between the waste area and the hill. Bouse hills go both to the east and west (south of the plant), and on the west they also run in a northeast direction. He could see no erosion into the canal from the west in the photographs, and no water was running into the canal from the south (when the helicopter arrived), although water was standing in the trailer area at the time (Tr. 64-68).

On cross-examination, he admitted that the water ponding to the south of the plant had come from the south, where the amount of erosion was significant. He did not actually see the source of the water that filled the inlet transition (of the canal). He was not positive whether Boecon was or was not on time with its construction, nor what its completion date was. He was aware that Boecon had been threatened with liquidated damages because of delays in construction, but did not know whether that was before or after the flood. He had not seen the BOR technical report on the storm, and did not remember being asked for input on it. He saw no water at all running into the canal from the west during the time he was at the site between 10 and 11 a.m. He had not previously observed the Kiewit (canal left) embankments. He was aware of the soft plug or dike that was at the end of the inlet transition, since he had insisted on it. He did not specify a particular height, nor object to its adequacy after its construction. The August 12 storm was the most intense rain that occurred while the plant was under construction (Tr. 68-73).

Photograph LL, taken July 16, was taken after Kiewit had shot the rock and commenced excavation for the canal but before much other work had been done. The soft plug was adequate for any water that would gather within the canal up to the next plug (Tr. 74-75). The eroded area south of the plant contained loose fill and was to remain

that way. There was also a foot of low grade fill for 100 feet behind the plant. Boecon had a batch plant west of the pumping plant, where transit mixers were filled; and a natural hollow developed there when the trucks were washed. The amount of water that could be contained (in the sump area) below the lip of the plant was 1.25 million gallons, or roughly 4 acre-feet. Between 270 and 300,000 gallons of rainwater fell directly into the canal. He had made no calculations as to the amount of water that entered the canal from the south (Tr. 76-81).

On Rebuttal: The wash south and west of the plant had a well-defined bank on the west side. On the east side, it had a gently sloping bank up a hill, and as it got closer into the work site area the bank on the east side became more defined to where it was a well-defined bank. There was no water flowing in the wash at 10 a.m. on the day of the storm, and there was no evidence that water had flowed over the banks or outside the wash itself. On cross-examination, he initially stated that although the intense rain had stopped by 10 a.m., the other drainage areas, such as the area of 1289, were still flowing. However, photo G (taken at the same time) does not show any southerly flow over the embankment at 1289, and the type of flow referred to by other witnesses no longer existed at that time (Tr. 221-22).

3. *The BOR Design Engineer*

The BOR Design Engineer was basically in charge of the preconstruction aspect of the project, including the location of the plant and the canal. He was familiar with the location of Areas A, B, and C, and he had provided Professor Ruff with much of his information. Area C was to the south and west of the plant and would not intercept Reach 1 at all. The design of the project was to take the water from Area B and divert it north to combine with drainage Area A at 1289. The left O & M road, which ran for 4½ miles along Reach 1, had an embankment to contain the water, which would then exit at any of five drainage structures under the canal that were designed to take water across into the major washes (Tr. 88-86):

So our plan was to move the water north to A and then tie A and B into the rest of the structure, with drainage channels cut on the left side of the canal, some adjacent to the canal, some further back up to take advantage of lower saddles between the ridges so that the water could move to the north for a heavy storm on drainage areas A & B, or if the heavy storm come [sic] on the areas north of that, could move south through those same drainage channels to this structure that could go under the canal at 1289 plus 50 [Tr. 86].

The large waste embankment on the left side of the canal was intended to protect the plant from drainage Area B. Kiewit was to have continued the embankment north to 1289. "I can't recall whether it went north of that or stopped to the south of that, where the O & M road elevation was such that it served as the embankment for containing the storm waters from the south." Under the final design, if the water did not pass through the culvert at 1289, it could pass to the north and go through any of the culverts to the north. "The design for any of our structures was to try to limit any flow we put it through to

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not exceed the 100-year capacity of that wash. That's the basis for one culvert at that site." (Italics added.) At the outlet, the water from a 100-year storm would pass through without any construction. A 100-year storm is any storm that has one chance in a hundred of meeting NOAA criteria on the amount of rainfall that could fall in a particular area. On photograph D, the channel going north from drainage Area A at 1289 appears to be blocked by a haul road (Tr. 86-90).

The water standing at 1289 does not appear to have come from a flash flood. "[I]t looks like the water built up and stood there and let the sediment fall out before it went over the top of the embankment there." The water overtopped the embankment in two places, one (stream) going into the canal and the other going north into the channel adjacent to the O & M road. The area south of the hard plug received 55 acre-feet of water, and the area north of the hard plug received roughly 32 feet, assuming a 15-foot depth. From the photographs, he could see no passage of water over the hard plugs (Tr. 90-93).

Area C would drain north past the plant along the west side of the waste embankment. The design was to have a channel along the west side to take the water out of Area C north and west of the plant into the wash that was cut off by the excavation and the embankment on the east side and north of the plant. Area C includes the area west of Reach 2, south of the plant. Not by photographs but by topographic maps, he estimated that only $\frac{1}{100}$ of a square mile of Area C could drain into the Boecon site area. The water would enter from the portion of Reach 2 that was not completed and into the outlet structures there and "go down the discharge line to the plant" (Tr. 93-95). Two acre-feet would be the maximum that could get into the Boecon area based on 4- $\frac{1}{4}$ inches of rainfall, of which $\frac{1}{10}$ of an acre-foot would be ponded in the 100- by 400-foot area south of the plant, leaving only slightly more than an acre-foot that could get into the plant. The sump area of the plant would hold nearly 4 feet of water below the lip, but 55 acre-feet of water came down the canal, and only 25 acre-feet could be contained north of the soft plug. He saw no evidence that any water entered the canal from the west (Tr. 95-98).

On cross-examination, he admitted that he had not visited the plant after the storm, and that his testimony was predicated on photographs and on what he had been told. However, he did not think that water from Area C could have entered the canal, since he had designed the waste embankment area west of the plant to slope to the north and west. It should not have gone into the trailer area. The photographs do show that some water entered the canal from the west O & M road, but he had made no calculations in that regard. He made his other calculations the week before the hearing. His main concern was with preconstruction, not the construction phase. The 300,000 gallons that fell into the inlet cannot be added to the gallons that came from Area

C to arrive at a million gallons, since his calculations for Area C also took the whole drainage area into consideration. A 4.5-inch rainstorm is probably a maximum probable storm, "which is the maximum storm you could assume could ever happen in that situation." It exceeds design standards for canal cross-drainage (Tr. 98-104).

The various photographs do not indicate that water at 1289 went first to the north and then south across the hard plug; they indicate that the water ran in both directions at the same time (Tr. 105-10). However, it is true that during construction, the whole drainage system might not be operative. Had it been, the culvert at 1289 might or might not have handled the water, depending on the size of the storm. The contract did not require construction from north to south, and he did not make any recommendation for the drainage culverts and cuts parallel to the canal to be put in first, although that was what they had in mind in designing the canal. He could not say how many inches of rain the drainage system was designed for; but a 6-hour storm would be 3.1 inches of rain, and based on the water contained in the canal after the storm, he assumed that 2 inches of rain or less fell in the vicinity of 1289 (Tr. 110-17).

APPELLANT'S WITNESSES

4. Kiewit Supervisor

Underdrains on this type of job are normally first order work, preceding excavation. Embankments are next. On Reach 1, Kiewit began at the north and then worked south. Kiewit kept BOR informed on its plans 2 weeks in advance, and updated the information weekly. There were no drainage discussions prior to bidding (Tr. 120-22). The job had three excavation areas, north, center, and south. Both the north and south area had rocky material that had to be drilled and shot, which required specialized crew and equipment that was otherwise unnecessary (Tr. 123-24). Culvert pipe deliveries had also been scheduled north to south, and in some areas to the north, culvert installation preceded canal excavation. But they required little excavation, and no drilling and shooting. Station 1289, however, required both, since it was rocky and the flow area was below grade. Thus, it had to be excavated before the culvert could be installed (Tr. 125-26).

The purpose of the hard plug at 1289 was so that the excavating equipment could get out of the excavation with material for the embankment. Excavation areas are 700 to 800 feet long between plugs. Excavating the entire area between 1289 and the hard plug to the north would take four or five shifts, working two shifts a day. It would take 4 or 5 hours per shift just to open the embankment each day, which would be impractical. No culvert was in place on August 11. The pipe for 1289 was not yet on the job. No BOR representative ever expressed concern about Kiewit's excavation method. To protect Boecon, and to keep water out of the plant, Kiewit had built a soft plug at Station 1315 (hereafter, 1315). A dike embankment at 1289 was also

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built, but 1289 was an active excavation area at the time. The existing embankment that was already part of Area B was then about 15 feet high. There had been no difficulty with rain prior to the storm (Tr. 126-31).

The Kiewit Supervisor had also experienced the other rains referred to previously, but they caused no construction problems. The parties had not discussed anticipated storm severity, and Kiewit merely followed the standards of the specifications. The soft plug and the embankment would normally have been adequate to protect against reasonably foreseeable rainfall, and they were almost adequate for this event (Tr. 132-34). At about 3:30 or 4:00 a.m. on August 12, in Parker, Arizona, he was awakened by the pounding of the rain. He got up at 5:00 or 5:30 and tried to get to the project, but Osborn Wash (20 miles or so from the plant) was so high he could not get any farther. It was 2:00 or 2:30 before he could cross it. The heavy rain stopped around 7 or 8 a.m., with drizzles until 9:00 or 9:30. He went to the yard at Station 600 and got a 4-wheel-drive vehicle and drove to the plant (Tr. 135-36).

On the way, at 3:30 p.m., at Station 750, the 5-barrel culvert was ponded, full of water; at 757 the 3-barrel culvert was full of water and Kiewit's excavation equipment was submerged; at 796 not only the 4-barrel culvert but the whole facility was submerged; at 1108 the 5-barrel culvert was completely filled in; at 1133 the excavation for the culvert was completely filled in with silt, back to the original ground level; at 1171 the cutout for the 2-barrel culvert was also completely filled in with silt and material. For the culvert at 1289 to have functioned, the area would have had to be drilled and shot, the excavation would have to be complete, the concrete collars and the inlet-outlet structure would have to be in place, the pipe would have had to be backfilled, and the embankments would have to have been built. But on June 14, BOR had requested an extension of the right O & M grade and the length of pipe at 1251+80 and at 1289, and that pipe probably was not laid until a couple of months after the storm (Tr. 136-42).

At the plant, he saw lots of ponded water, including the inlet transition and canal excavation, as shown in Exhibit C. Kiewit's Reach 1 superintendent was also present at the time. They took pictures of the left and right O & M grades, the area south of the plant, and 1289. At 4 p.m., the conditions shown in photographs D and E were essentially unchanged. He observed water flowing from Area C into the inlet, particularly water going over the bank onto the O & M road close to 1350. Exhibits J through P show erosion from water running north behind the plant. He took the 10 photographic Exhibits, X through GG, which largely show erosion from the left and right O & M roads of Area C into the plant area (Tr. 142-54). Exhibits U, V, and W

are photographs showing the excavations at 1171, which were completed filled in by silt (Tr. 155-56).

In his opinion, on the basis of photographs F and I, water from drainage Areas A and B, which came together at 1289, overtopped the embankment, went north, filled up that canal excavation, and then overtopped the hard plug and went south (Tr. 156-58). In addition, based on the previous 10 photographs, water went onto the O & M roads from Area C and then flowed over into the plant inlet. Flooding from Area C would have happened first, since the water coming from 1289 would previously have had to flow north, then build up and breach the embankment at 1289, before flowing into the north portion of the canal excavation and then eventually back across the hard plug in order to enter the south portion of the excavation (Tr. 158-59). The area below the lip of the plant would hold only 622,000 gallons based on the differential elevation between the lip and the concrete floor of the inlet transition. Since 277,000 gallons rained directly into the inlet transition, only another 345,000 gallons needed to come from Area C to cause flooding in the plant (Tr. 159-61).

Under normal circumstances, the precautions taken by Kiewit to protect Boecon's construction would have been more than adequate. Water entering the plant site from the south would have been heavily laden with silts and sand, based on the clean rock where the erosion had occurred, but water from the north would have had time to settle (Tr. 161-62). On cross-examination: There was no plug in the 2,600 feet of the canal between the hard plug and the inlet because that excavation was complete, and the hard plugs there had already been removed. The excavation at 1289 would have had to be opened and closed each day to keep the cross-drainage intact because the plug and the haul road on the embankment were needed during construction. The existing embankment east of the canal did prevent water from going north until it overtopped the embankment. Photographs C, D, and E show water going to the north first at 1289. The water in the north section of the canal is lower probably because of seepage and evaporation. The concrete floor of the canal was not yet in place (Tr. 164-68).

5. Professor Ruff

Professor Ruff was a graduate of Case Institute with a master's degree, originally employed by TVA as a hydraulic engineer. He had taught at Washington State College, Berkeley, and Arizona State. Hydraulic engineering differs from hydrology in that the hydrologist is not given the background in mathematics, physics, and engineering mechanics that the hydraulic engineer is. Otherwise, the same principles apply to both sciences (Tr. 175-78). Aetna Insurance Co. asked him to investigate the situation at the plant site resulting from the August 12, 1982, storm. He visited the site on three occasions, the first time on August 21. He drove from Phoenix and saw railroad tracks washed out, and other signs of a major rainstorm. He prepared

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a study of the storm and its effects on the CAP (AF 15). He did not learn until 2 months before the hearing that the matter was in litigation. He later wrote a letter to Aetna concerning the report (AF 15). The data concerning the 50- and 100-year storms, and the information concerning Areas A and B, in the report were provided by BOR. He was given no data concerning Area C. On his August 21 visit, he toured Areas A, B, and C, but no pictures were taken (Tr. 178-86).

In November, he made a more indepth inspection and, in particular, walked the area and determined the direction of water flow in Area C. Plates 12, and 28 through 33, show the topography. The drainage channel to the south and west of the trailer area had constrictions restricting its flow. Plate 27 shows that its east bank was very small and, in some places, non-existent. The lack of a channel bank would have permitted the water to escape rapidly and fan out, with very little water going downstream. On his December visit, he used an engineer's level and grade bar and took the relative elevations on Figure 7 of the report. He concluded that water could indeed flow from the wash through the trailer area and into the canal. Exhibit QQ shows the same figures plotted in another way (Tr. 186-98). He calculated that if 4.53 inches of rain fell, as much as 36 acre-feet of water could have run into the canal from Area C. If only the amount of rain of a 6-hour, 100-year general storm, 3.10 inches, were used, the Area C runoff could still have been 25 acre-feet. Potentially, most of that water would have flowed into the inlet transition of the plant. That conclusion is supported by the photographs in Plates 22-24 of the report (Tr. 193-96).

He therefore concluded that water runoff from the storm would have damaged the plant even if no water had entered from the Kiewit site. The basis for the opinion was the proximity of Area C to the inlet transition, its small size, and the extremely short time and rapidity of the runoff because of the steepness of the land. Based on Exhibits D, E, F, and I, and his visits to the site, he concluded that water from Areas A and B flowed into the aqueduct in a northerly direction; and when it was filled, the water came back and overtopped the hard plug at 1289 and filled up the portion of the aqueduct south of 1289. Exhibit I, showing erosion on the downstream side of the plug, supports that conclusion (Tr. 198-202). Exhibit OO, an aerial photograph looking south, showing darker water to the south, graduating to a fairly uniform color to the north, suggests sediment in the water from Area C. There is also evidence of erosion from the trailer area access road down into the canal. There was no evidence of protective measures by Boecon to prevent water from entering its site (Tr. 201-03).

On cross-examination, he explained the significance of Figure 7 without altering his opinion (Tr. 207-10). It is theoretically possible to calculate the amount of rainfall from the amount of water in the canal, but it would be difficult, and there are other variables. It is

possible for the magnitude of storms to vary in the same general area. However, he had the idea that the storm "was pretty much of a general storm rather than a typical Arizona thunderstorm" (Tr. 211-12).

C. Specific Additional Findings

Government counsel has stated, "The amount and sources of water, i.e., drainage areas 'A,' 'B,' 'C' and rainfall directly into the inlet transition, are in dispute and the testimony cannot be reconciled" (Appellee's Opening Brief (OB) at 10). We agree. However, we find that the concern of the Government witnesses at the hearing was almost exclusively with what they thought must have happened at the Kiewit site, particularly at 1289; whereas, the Kiewit Supervisor and Professor Ruff took pictures specifically of Area C. These photographs were extremely helpful; and we found appellant's testimony to be entirely consistent with the Area C site pictures that were placed in evidence.

Further, we did not find the testimony of the Government witnesses to be adequately supported either by the photographic evidence or by the testimony of Professor Ruff, a relatively impartial expert witness who toured the Boecon construction area and made empirical calculations of the amount of water that could have entered the canal from Area C west of the Boecon site. The testimony of the BOR Design Engineer, in particular, seemed to be carefully limited to pre-construction topographic and design considerations, and he did not visit the site itself after the storm (Tr. 95, 98-99). Accordingly, on the basis of the entire record, we find that:

1. The August 12, 1982, rainstorm clearly exceeded the 100-year rainstorm for which the CAP was designed; and it was probably, as suggested by the BOR Design Engineer, a maximum probable storm (Tr. 103-04). Therefore, as discussed hereinafter, it was an act of God.

2. Apart from the inferences and calculations made by the BOR Design Engineer the week before the hearing (Tr. 100, 111, 116), there was no evidence whatsoever that the amount of rain which fell in Areas A and B, or at 1289, was any less than the 4.53 inches that fell at the plant itself. Rather, the record indicates that the storm was an unusual, intense, general storm that affected the area for many miles to the north, east, and west of the plant, as well as the plant itself (Tr. 23-24, 53, 104, 135-39, 156, 179). Therefore, we find that an amount of rain in excess of the 100-year level also fell at 1289 and in Areas A and B.

3. Even had all practicable steps been taken by Kiewit to keep the cross-drain at 1289 open in accordance with final design specifications during the 4 or 5 shifts (2 to 3 days) needed to excavate the area between 1289 and the next plug to the north, there would have been no assurance that major damage would not have resulted from such a storm, since the storm that occurred substantially exceeded CAP design specifications (Tr. 104, 133). No witness testified that Kiewit was negligent in its construction methods under the circumstances.

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Regardless of whether Kiewit was or was not partly negligent in temporarily blocking the natural drainage channel at 1289, however, any such imputed negligence does not appear to have been the proximate cause of the damage to Boecon's site or to its plant. Rather, an act of God was. Thus, we do not find that the Government, which had the burden of proof, established by a preponderance of evidence that any of Kiewit's acts or omissions were the proximate cause of the damage to the plant.

4. The precautions taken by Kiewit to avoid flooding damage were in fact reasonable, given that (a) they were almost adequate to avoid damage to the Boecon site despite the intensity of the storm (Tr. 134, 161-62), and that (b) a 100-year storm by definition is one having only a 1 percent chance of occurring in a given year—or only a $\frac{1}{36500}$ chance of occurring on a given day, as appellant's counsel has pointed out (Tr. 88; Appellant's Post-Hearing Brief (AB) at 44; cf. 44 CFR 59.1). Specifically, appellant argues that, during the 2 to 2- $\frac{1}{2}$ days of Kiewit's construction in the vicinity of 1289, there was only a 0.000082 percent chance of a 100-year rainfall occurrence. That allegation appears to be consistent with the definition of a 100-year event.

5. Kiewit took substantially greater precautions to avoid storm damage than Boecon, including construction of a soft plug at the beginning of the inlet transition as requested by the Government. By contrast, at the time of the storm Boecon had virtually no protection in place to avoid runoff from the east, south, or west of its plant (cf. Professor Ruff's conclusion to the same effect, Tr. 203). In addition, the BOR Supervisor admitted that the Government was aware that Boecon had infringed on the drainage channel west of its construction area (Tr. 49-50). Therefore, if Kiewit was negligent, Boecon was even more negligent. This finding is reinforced by the facts that (1) the photographic evidence in the record (especially Exhibits O, P, X-Z, and AA-GG) makes abundantly clear how minimal Area C's O & M road embankments were; and (2) Plates 27-29 of the Ruff Report (AF 15) show that the "infringement," or constriction, of the drainage channel west of the Boecon construction site, referred to by the BOR Supervisor, still existed as late as November 1982 when those photographs apparently were taken (Tr. 185-90).

6. The Government was not shown to be negligent in any way with respect to its supervision of Kiewit's site. On the contrary, if there was any negligence on the part of the Government with respect to this portion of the CAP, it was primarily in its failure to require Boecon to protect its site more adequately from Area C runoff—just as it required Kiewit to protect Boecon's site from canal runoff by means of a soft plug. There is no evidence that Boecon ever complained either to Kiewit or to BOR about any inadequacy of the soft plug or any other aspect of Kiewit's construction, and there is no indication that the

Government ever complained either about Kiewit's method of construction or its blockage of the drainage channel at 1289.

7. Similarly, there is no evidence that the two washes carrying rain runoff from Areas A and B, and converging at 1289, were anything but natural drainage channels, as distinguished from watercourses. Even if they could be considered the latter, the Government has failed to prove it. Its attempt to elicit an admission from Professor Ruff to that effect (Tr. 212-13) fell short because the foundation of counsel's question was inadequate to put Ruff on notice as to the distinction the Government had in mind. Thus, his answer was not probative on this point. In addition, the Board must give considerable weight to the fact that the joint PHS specifically refers to existing natural drainage channels or basins, rather than watercourses, converging at 1289. If the Government had intended to insist that these water channels were watercourses in any technical sense, it should not have signed this joint stipulation in its submitted form.

8. The fact that Professor Ruff was a hydraulic engineer, rather than a hydrologist, did not lessen his expertise or credibility. As between Professor Ruff and the BOR Design Engineer, we find Professor Ruff was the more credible, for reasons previously stated. Accordingly, we accept as accurate his testimony that damage would have occurred to the plant as a result of Area C runoff, even without any water entering the inlet transition from Kiewit's site (Tr. 191).

9. Both Boecon's and Kiewit's construction contracts contained Standard Form 23-A (Rev. 4-75), which included at Clause 12 the standard "Permits and Responsibilities" provision making the contractor responsible for its own work until the work's completion and acceptance by the Government. Therefore, contractually, Boecon assumed the same risks of storm damage that Kiewit did.

10. The record contains no adequate explanation of why BOR paid Boecon for the costs of its storm clean-up, nor any adequate evidence of Government negligence with respect to either Kiewit's or Boecon's site. Accordingly, we find that the Government paid Boecon's clean-up costs strictly as a volunteer.

D. *The Kiewit Contract*

In addition to General Provisions (GP) 3 (Changes), 4 (Differing Site Conditions), 6 (Disputes), 12 (Permits and Responsibilities), 13 (Conditions Affecting the Work), 14 (Other Contracts), and 17 (Suspension of Work) of SF 23-A, the specifications of the Kiewit contract contained the following special provisions:

1.2.8 OTHER CONTRACTS

During the progress of the work under these specifications, additional work is being performed concurrently by other contractors under specifications DC-7400 in the vicinity of station 1315+51.31.

The contractor under these specifications shall fully cooperate with such other contractors and Government employees as provided in clause entitled, "Other Contracts" of the General Provisions.

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When working space is limited, use of working space will be subject to the approval of the contracting officer.

1.5.9 CONSTRUCTION AT EXISTING WATERCOURSES AND UTILITIES

Where the work to be performed under these specifications crosses or otherwise interferes with water, sewer, gas, or oil pipelines; buried cable; or other public or private utilities, or with artificial or natural watercourses, the contractor shall provide for such utilities and watercourses, and shall perform such construction during the progress of the work so that no damage will result to either public or private interests. The term "watercourses" includes ditches, terraces, furrows, or other features of surface irrigation systems. The Government does not represent that the locations of watercourses and utilities shown on the drawings are exact. It shall be the responsibility of the contractor to determine the actual locations of and make provision for all watercourses and utilities.

Before any watercourse or utility is taken out of service, permission shall be obtained from the owners. The contractor shall be liable for all damage that may result from failure to provide for watercourses or utilities during the progress of the work and the contractor shall indemnify and hold harmless the Government from claims of whatsoever nature or kind arising out of or connected with damage to watercourses or utilities encountered during construction, damages resulting from disruption of service, and injury to persons or damage to property resulting from the negligent, accidental, or intentional breaching of watercourses or utilities.

If the contractor does not maintain the existing watercourses and utilities in such condition that no damage will result to either public or private interests, the Government will cause the necessary repairs to be made and backcharge the contractor for such work.

Except as otherwise provided below, the cost of all work described in this paragraph shall be included in the prices bid in the schedule for other items of work.

Where construction of new structures or modifications of existing structures are required to render the watercourses or utilities operative beyond the period of the contract, the contractor shall notify the contracting officer so that arrangements can be made with the owners for the construction or modifications required. When it is determined that such work is to be performed by the contractor, and such items of work are not provided for in the schedule, the contractor shall perform the necessary work in accordance with clause No. 3 of the General Provisions.

Where watercourses or utilities are encountered, but are not shown on the drawings or otherwise provided for in these specifications, all additional work required to be performed by the contractor as a result of encountering the watercourses or utilities shall be performed in accordance with clause No. 3 of the General Provisions.

2.4.1 CROSS DRAINAGE

The contractor shall handle all flows from natural drainage channels intercepted by the work under these specifications, perform any additional ditching and grading for drainage as directed, and provide and maintain any temporary construction required to bypass or otherwise cause the flows to be harmless to the work and property. When the temporary construction is no longer needed and prior to acceptance of the work, the contractor shall remove the temporary construction and restore the site to its original conditions as approved by the contracting officer. The cost of all work and materials required by this paragraph shall be included in the prices bid in the schedule for other items of work.

E. *Contentions of the Parties*

GOVERNMENT CONTENTIONS

Since this is a highly fact-intensive case, it might seem that our foregoing specific findings of fact, which have essentially undermined the foundation upon which the Government's assertions were premised, would be nearly sufficient to dispose of it. However, this has been a drawn-out and hotly contested matter and, as appellant has noted, the Government's position since 1982 appears to have evolved all the way from a position charging Boecon with the responsibility for its own storm clean-up to one suggesting strict liability on Kiewit's part for Boecon's damage, regardless of the presence or absence of any Kiewit negligence.

The CO's August 16, 1982, telegram directed Boecon to resume operations, including work to accomplish clean-up, and to advise the CO of its position concerning its failure to protect the work area from the occurrence (AF 25). When Boecon on August 17 refused to do so without being given assurance of indemnification, citing GP's 3, 4, and 17 (AF 24), the CO on August 19 ordered it to proceed under the Disputes Clause (GP 6f) (AF 23); and the same day he in turn notified Kiewit of its proposed liability under the Other Contracts clause (GP 14) and Specification 2.4.1. because it had blocked the channel at 1289 (AF 22). It is noteworthy that the CO's telegram to Kiewit made no mention of Specification 1.5.9. Nevertheless, on February 11, 1983, the Government, in a meeting at which Kiewit was not present, agreed to limit Boecon's liability to only 2-½ percent of all costs involved for flood-related work (AF 20).

When Kiewit denied any liability and submitted the Ruff Report (AF 15) in support of its denial, the CO ordered a technical report from its construction engineer (AF 14). That report, dated June 20, 1983, noted in part:

10. Clause 4 provides for recovery of additional expense when a contractor encounters unanticipated man-made conditions which did not exist at the time of the award. However, in the cases researched, recovery was limited to circumstances where the Government could have corrected the condition (or caused the condition to be corrected) but failed to do so.

Since it has not yet been determined that the Government shares responsibility for the flood at Bouse Hills Pumping Plant, it is not clear whether Boecon encountered a changed condition within the definition of Clause 4.

It is fairly obvious that Boecon encountered an unanticipated man-made condition, but maybe he should have sought or still should seek recovery direct from [Kiewit].

It would appear that the Contracting Officer was within his authority to direct Boecon to resume work and that the issuance of a modification was a last resort move to avoid further delay.

Payment to Boecon for clean-up may be interpreted as an admission of sharing responsibility for the flood at Bouse Hills Pumping Plant.

(AF 13 at 3-4).

From this comment, it would appear that the author of the technical analysis did not know that BOR had already agreed some 10 months previously to accept responsibility for Boecon's costs. Parenthetically, we also note that the Analysis Section of the same report states, also

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at page 4, that “[t]he drainage system in the area of the embankment failure was designed as a unit. Without the drainage channels in place, *the culvert would also have failed* without the flow being channeled around or through the site.” (Italics added.) Thus, even if the culvert at 1289 had been in place, there apparently was no satisfactory way to avoid damage from a storm of such magnitude during the brief period of construction.

In any event, this technical analysis also makes no mention of Specification 1.5.9.

The Government concedes that when construction work is damaged through no fault of the owner or the contractor, the contractor is responsible for correcting the damaged work and providing the facilities it contracted to provide at no additional cost. However, it contends that where damage to a Government contractor's work is caused by a second Government contractor, the contractor whose work was damaged is not responsible for the loss where the Government could have corrected the condition created by the second contractor that ultimately caused or contributed to the loss, but fails to correct it (Memorandum in Support of Motion for Summary Judgment (GSJ) at 16, citing cases with respect to both propositions).

The Government then points out that actions by an uphill or upstream contractor that pass water or debris onto the downhill or downstream contractor have been held to constitute a man-made changed condition (citing cases), and the downstream contractor has not been charged with the cost of repair. It alleges that this rule also holds true where the owner has failed to require the uphill or upstream contractor to perform his work in a manner so as not to damage the downstream contractor, on the ground that such failure constitutes a breach of the owner's duty to compel cooperation and renders the owner liable for damages (GSJ at 16-17).

As to Specification 1.5.9, the Government alleges (GSJ at 18-19):

When Kiewit's work interfered with natural watercourses, Kiewit was required to perform its work in a manner so that no damage would result to public or private interests. * * * The contract further provided that the contractor, Kiewit, would be liable for all damage that resulted from its failure to provide for watercourses during the work and that Kiewit was required to indemnify and hold harmless the government from all claims and damage to property resulting from Kiewit's negligent, accidental, or intentional breaching of watercourses. [If] Kiewit did not maintain the existing watercourses in a condition that no damage would result to public or private interests, the Government would cause the necessary repairs to be made and backcharge Kiewit for the cost of the repair work. * * *

It is an undisputed fact that Kiewit blocked the natural watercourse that bisected the canal alignment at Station 1289 + 50.

Essentially the same allegations were set forth with even greater forcefulness by the Government in its various briefs after the hearing (e.g., OB at 26-28).

APPELLANT'S CONTENTIONS

Appellant argues that the cases involving Government liability cited by the Government are limited to situations where the Government had notice that a condition existed which endangered the downstream, downhill, or adjacent contractor; had an opportunity to require correction of that condition; and then failed to do so (citing cases). It notes that, here, Kiewit's dike at 1289 went without objection from either Boecon or the Government (Appellant's Post-Hearing Brief (AB) at 39-40). As for Specification 1.5.9, Kiewit argues that it does not apply because the wash at 1289 was not a watercourse but a natural drainage channel referred to in Specification 2.4.1; and that the latter provision, like the Permits and Responsibilities clause (GP 12), requires fault or negligence in order for the contractor to be liable for loss or damage.

Even if Specification 1.5.9 were held to be applicable, appellant contends, its application would be limited to situations involving negligence since, in the absence of unequivocal language to the contrary, it is a subordinate provision that must be construed within the limitations of the fault or negligence provisions of GP 12 (AB at 41-42).

Appellant urges the general rule that neither party to a contract is liable for an act of God unless the liability is expressly assumed. As to the Government's argument that Kiewit's actions "humanized" the event, appellant asserts that the "humanizing" giving rise to liability in the cases the Government cites clearly has to do with human negligence rather than with mere human involvement, quoting 78 Am. Jur. 2d § *Waters* (1975), and distinguishing certain of the State court cases cited by the Government. As to the other State court cases holding that strict liability attaches in connection with the diversion of a watercourse, appellant contends that even those cases recognize no duty to provide for floods so unusual and unforeseeable as to bring them within the act of God category (AB at 47-53).

Similarly, as to Specification 2.4.1, appellant argues that to hold it liable for not "handling" the flows from natural drainage channels under the circumstances of this case would be to impose absolute liability, which the clause does not contemplate (citing 4 McBride and Wachtel, *Government Contracts*, sec. 28.40[2], at 28-143). On the contrary, appellant asserts, "it takes clear and unambiguous language for general portions of the specifications to override a standard clause of broad application," such as GP 12, which requires negligence for liability (AB at 53-55). In addition, appellant contends, Specification 2.4.1 as written appears not to apply to an adjacent contractor's site but, rather, to the contractor's own site. Appellant alleges that this provision was changed to refer to "other ongoing contracts" in BOR's subsequent CAP contracts. Finally, appellant argues that the position taken by the Government, that all runoff would have flowed across the canal and harmlessly into the desert but for appellant's blockage, fails

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to recognize that the drainage area was not, and could not be, maintained in its preconstruction state if the canal were to be built, which was the purpose of the Government's contract (AB at 56-60).

DISCUSSION

A. General

The Board is indebted to the parties for the thoroughness and depth of their research in the eight briefs they submitted during the pendency of this appeal. Without this research, which we think was probably duplicated and broadened, with even greater depth, by the Board, we might not have been able to satisfy ourselves that we had adequately considered all of the pertinent questions, much less evaluated all of their possible answers.

Government counsel in this case, nevertheless, had the anomalous burden of trying to prove, or at least justify, the Government's contention that *it was liable* to Boecon for the rainstorm damage, when most case law, particularly with respect to acts of God, seemed to hold otherwise. Thus, the Government's factual testimony, as well as its legal research, heavily emphasized the water runoff from Kiewit's site; but it unduly minimized both the intensity of the storm that actually occurred, which was sufficient to place it in an act of God category, and the fact that much of the damage to the plant was caused by runoff from Boecon's own site.

We will not, therefore, burden the text of this opinion either with all of the cases that were cited by the parties, with all of the additional cases that we researched, or even with the full citations of the cases referred to in the body of this decision. Appellant, in its various briefs, has fully responded to, and generally distinguished, the Government's most troublesome, but generally less apropos and often non-Federal, contrary cases. What primarily remains is for the Board simply to enunciate the principles it applied and the Federal cases from which they came. More complete citations, and other relatively similar cases—including summaries of their salient points—have been included for reference in a chronological appendix to this decision.

B. Specifications 1.5.9 and 2.4.1

Specification 2.4.1 is the easier to handle, since it purports to impose no standard of liability of its own, and therefore is clearly subject to the "fault or negligence" standard of GP 12 of SF 23-A. It also lacks the express language necessary to make Kiewit an outright insurer or indemnitor, or to subject Kiewit to absolute liability in the absence of fault or negligence. Cf. (Court of Claims): *McNamara, Tombigbee, Paccon, Thompson Ramo Wooldridge*, and *Gilbane*. Also, 2.4.1 is at best ambiguous as to whether negligence is required for liability; and under such conditions, as appellant has pointed out, its reasonable assumption that negligence would be required for it to be liable would necessarily prevail. See (U.S. Sup. Ct.) *United States v. Seckinger*.

Finally, we agree with appellant that 2.4.1 appears by its terms to refer specifically to flows affecting the contractor's own site. In this connection, it is significant that, in its subsequent CAP contracts, BOR apparently changed the wording of the provision to include "other ongoing contracts" (Attachment to Hobson Affidavit, Appellant's Memorandum in Support of Its Response to Government's Motion for Summary Judgment). But that change was a bit late to affect Kiewit's situation. Therefore, we conclude that the inclusion of Specification 2.4.1 in appellant's contract does not render it liable to the Government or Boecon under the facts of this case.

Specification 1.5.9 is one whose meaning ought to be clear, at least to BOR, since it has been in use in essentially the same form for no less than 30 years. See (IBCA) *Barnard-Curtiss*. Appellant points out, however, that this Board was critical of its vagueness and ambiguity to others as long ago as 1971 in *Kletch*, a case in which we found for appellant on the basis of the *contra proferentem* rule. Appellant argues that the clause is no less vague now than it was then, and that the best that can be said for the Government's argument in favor of strict contractor liability under the clause is that its reading is as reasonable as appellant's. "And, again, under such circumstances, appellant's interpretation must prevail as a matter of law since the Government drafted the language" (Appellant's Sept. 27, 1988, Response at 6). We agree.

However, as previously suggested, and in light of BOR's obvious fondness for this clause, we find even more significant the fact that neither BOR's August 19, 1982, telegram (AF 22) seeking to impose liability on Kiewit, which expressly mentioned GP 14 (Other Contracts) and 2.4.1, nor its June 20, 1983, technical analysis (AF 13), which again mentioned GP 14 and 2.4.1, along with GP 12 (Permits and Responsibilities), as most obvious bases for contractor liability, made any mention whatsoever of 1.5.9 in this context.

Under the circumstances, we conclude, as appellant has argued, that 1.5.9 was intended only to cover "ditches, terraces, furrows, or other features of surface irrigation systems" and not natural drainage channels, which were separately covered under 2.4.1. (Italics added.) This interpretation, we think, not only gives the most logical meaning to the two disparate, and otherwise potentially conflicting, specifications but also would seem to be the most consistent with the paramount value universally placed upon maintaining water flows for irrigation and related purposes in the western States.

Since we do not find that the natural drainage channels temporarily blocked by Kiewit at 1289 had any irrigation purpose, we are confirmed in our conclusion that they were not watercourses within the contemplation of 1.5.9 and that, therefore, Kiewit did not assume any absolute contractual liability concerning them.

C. Whether the Storm was an Act of God

1. General Tort Law

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In the 4th Edition (1971) of his Handbook on The Law of Torts (hereafter, Prosser), Professor Prosser more than once expresses the view that nothing in the entire field of law has called forth more disagreement or generated more confusion than the requirement "that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered," which connection is "usually dealt with by the courts in terms of what is called 'proximate cause'" (*Prosser* at 236, 250). He goes on to define "proximate cause" as "the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct" (*ibid.* at 236).

Negligence, Professor Prosser tells us, is

conduct which falls below the standard established by law for the protection of others against unreasonable risk. It necessarily involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger. *If the defendant could not reasonably foresee any injury as the result of his act, or if his conduct was reasonable in light of what he could anticipate, there is no negligence, and no liability.* [Italics added.]

(*Ibid.* at 250.) In citing examples of situations in which the standard of reasonable conduct does not require the defendant to recognize the risk, or to take precautions against it, Prosser mentions that "no one is required to anticipate a storm of unprecedented violence" (*ibid.* at 245).

On the other hand, Prosser acknowledges (as the Government argues here) that quite often when negligence of the defendant "concurs" with an act of God, which is to say "an unforeseeable force of nature," he is held to be liable. This seems to be especially true when "the result brought about by the act of God is the same as that threatened by the defendant's negligence, so that he is held liable for the foreseeable result." In such cases, the result is within the scope of the defendant's negligence. Exceptions occur, however, where third parties intervene and, through either intentional torts or even greater negligence, transform what was otherwise only a possible result into a virtual certainty. In such cases, courts may hold that responsibility is shifted to the second actor (*ibid.* at 284-89).

2. The Government's Principal Authorities

The Government here appears to place its principal reliance on (D.C. Cir.) *Shea* (Court of Claims) *Hoffman* and *Callahan*. In *Shea*, Contractor B sought damages from the Washington Metropolitan Area Transit Authority (WMATA), and from Contractor A, because of recurrent overflows of water from A's site onto B's. Each contractor had contracted separately with WMATA for construction of different segments of WMATA's subway system. Contractor A was obligated under its contract to control groundwater within its area and to prevent the sewer from overflowing, and B was found to be a third-party beneficiary of that contract. The trial court had limited B's damages, however, because it concluded that the first rainstorm was

an act of God, and because B should have mitigated its losses by building a dike to contain the water. The court remanded the case on the grounds that (1) there had been no proof that the first storm was an act of God—*i.e.*, an unprecedented and extraordinary occurrence of unusual proportions that could not have reasonably been foreseen by the parties; (2) WMATA had a duty under its contract with A to compel cooperation by A (citing *Hoffman*); and (3) B had a right to rely on WMATA's control of A.

Appellant here, however, points out that in a discussion of *Shea* in *Miller* (ASBCA), the board noted that B's site had been flooded seven times before it brought finally suit against A and WMATA. In *Miller*—similarly cited by the Government here—the board, based on *Callahan* and *Hoffman*, sustained an appeal by a contractor damaged after the Government, in an unrelated contract entered into 9 months later, required that substantial quantities of sand be stored on an adjacent site, and the sand was washed onto appellant's site. However, the appellant had undertaken various steps to protect its site and had protested previous overflows, and the Government had done nothing to alleviate the known hazard. Also, the board noted that the rain that had occurred at the time could not be considered unusual.

Hoffman appears to be a principal source of the apparent confusion with respect to "man-made" hazards. *Hoffman*, the second contractor, was given a notice to proceed when the first contractor had already flooded the previously dry second contractor's site. The second contractor argued that there was a man-made differing site condition that interfered with its ability to proceed. The Government eschewed any involvement, despite its right to require cooperation from the first contractor. The court held for *Hoffman*, on the ground that the Government had clearly breached its contractual duty of cooperation and non-interference.

In *Callahan*, the Government, after letting a contract for plaintiff to build a dam on a frequently flooded river in Panama, had entered into another contract for trees to be cut in an area upstream from plaintiff's work area, at a location where the Government was also engaged in cutting trees. When the river flooded, the trees and logs from the upstream site were carried downstream and seriously damaged plaintiff's site. Plaintiff had taken pains to protect its site from normal flooding, but its work was not designed to withstand the impact of the logs. The court held that the Government was responsible for plaintiff's damage.

We note that in all of these cases, the Government was either repeatedly on notice of the hazard, and did nothing, or had itself created or aggravated the hazard which later caused the damage. Also, none of them was held to involve an act of God. We therefore see no similarity between the facts of these cases and those of the case before us. Far more pertinent to this case are (U.S. Sup. Ct.) *Day v. United States* and (Court of Claims) *Turnkey, Broome, Tombigbee, Security National, McShain, Amino Bros., Lenry, Carman, Warren Bros.*,

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DeArmas, and *Arundel-2*, all of which deny Government liability for damage caused by acts of God.

3. Case Law Concerning Acts of God

[1] In our Westlaw word search, we discovered that more than 800 Board of Contract Appeals cases since 1980 have at least mentioned the phrase, "act of God." We made no effort to research all of them. However, in our attempt to review at least some of the leading cases and our own Board precedents, we soon discovered that there was a period of time, mainly pre-1980, when there was little or no consistency among the cases as to the meaning of "act of God." The more conservative view was represented by Black's Law Dictionary, 4th Edition (1968), in which the first definition postulates "an act occasioned exclusively by violence of nature without the interference of any human agency." Obviously, that was the view taken by the Government in this case, apparently relying principally on footnote 6 in *Shea-S&M Ball*, D.C. Circuit, 1979. Other cases, including some by this Board, have equated an act of God with almost any natural event, such as an ordinary rainfall. The majority view and, in our opinion, the proper definition, lies somewhere in between—as in fact suggested by the *Shea* court in its more general discussion of the subject, *supra*.

By "act of God" here, we mean a natural event causing adverse economic consequences that, because of its rarity, intensity, magnitude, location, duration, and/or time of occurrence, was not reasonably foreseeable. An act of God, in our view, must be something more than an ordinary natural occurrence at the time and place involved, and its adverse consequences must not be primarily attributable to anyone's negligence. In fact, a key characteristic of an act of God is that its adverse consequences probably would have occurred regardless of any negligence on anyone's part. Cf. (BCA) *Scalf, Warwick*.

[2] Thus, the Government or another contractor would ordinarily be liable for loss or damage resulting partly from an act of God only if their intervening negligence was of such magnitude that it substantially increased the damage that would otherwise have occurred—in other words, if they, rather than the natural occurrence, should be considered the supervening or proximate cause of the damage.

That did not happen here. The facts clearly show that Kiewit's blockage of the natural drainage channel was not only temporary, occurring during the period of construction—cf. (Court of Claims) *Hedin, De Armas* and (IBCA) *Barnard-Curtiss*—but of almost insignificant duration; whereas, the rainstorm that occurred exceeded the 100-year level, which is the maximum level that the finished canal, with all of its elaborate drainage systems in place, would ever have protected against. Thus, we think that Boecon was entirely responsible for its own clean-up, and that the Government ultimately paid for Boecon's clean-up for reasons of its own, having little or nothing to do with

Kiewit's portion of the project. Cf. (Court of Claims) *Paccon and Brown & Root*, and (BCA) *T. L. James, C.O.A.C., Beach Building, Titan Pacific, Roen Salvage, Antrim, Steenberg, Allison & Haney*, and *Charles T. Parker*. Since we do not find Kiewit liable, we see no need to go into the question of whether BOR was justified in charging clean-up costs against Kiewit directly rather than tendering the proposed indemnification to it before paying Boecon, as Kiewit argues should have been done. Cf. *Brown & Root*, above.

In addition, we question whether all of the damage to Boecon can be said to have occurred beyond the control, and without the fault or negligence, of that contractor. We take particular note that Kiewit built its soft plug at 1315 to a height that almost prevented damage; whereas, Boecon apparently never corrected the drainage channel constriction in the area west of its trailer site, which the Government testified it had already complained about. Cf. (BCA) *Orbit, Barnard-Curtiss*.

There is still another reason why this case differs from a case like *Callahan*, and it was well expressed by the full ASBCA complement during its reconsideration of *Golder* (see 58-1 BCA at 6691); namely, that there is a difference between a situation where a contractor involved in a totally unrelated project somehow damages the appellant's site (as occurred in *Callahan*); and one in which the work on the same project was divided among several contractors, where each contractor inevitably assumed the normal risks incident to the construction of the common project. In the latter case, it might well be said that the risk of damage to the work by another contractor working on the same job at the same time was a risk within the contemplation of the parties; whereas, such would not be the expectation where unrelated contracts were involved. We are inclined to agree with the ASBCA on this point; and it is possible that even if we had found less-than-gross negligence on Kiewit's part in connection with its temporary blocking of the wash at 1289, Boecon still might not be entitled to recover, since both contractors were working on related aspects of the same project.

In summary, we hold that where a construction contractor's site was damaged by water runoff from another contractor's construction site in (1) the context of a general rainstorm exceeding the 100-year level; (2) where even the finished overall project as designed would not be protected beyond the 100-year storm level; (3) where damage to the first contractor's site probably would have occurred even if the second contractor were not contributorily negligent; (4) where the second contractor was not proved to be negligent in its construction methods under the circumstances; and (5) where there is evidence that the first contractor was at least as negligent as the second contractor may have been in causing the damage, the rainstorm was an act of God, and the first contractor is not entitled to recover its clean-up costs; and if the Government chooses to indemnify the first contractor for these costs, it does so as a volunteer and not because it was liable for such costs.

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under SF 23-A. *Barnard-Curtiss*, IBCA No. 82, 57-2 BCA ¶ 1373, and 58-1 BCA ¶ 1582, *recon. den.*, 58-1 BCA ¶ 1627; *aff'd*, 157 Ct. Cl. 103, 301 F.2d 909 (1962).

DECISION

The Government has not sustained its burden of proof. Accordingly, appellant is entitled to recover a final payment under its contract of \$241,960, plus interest from the date the final payment was due, in accordance with the Contract Disputes Act.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

APPENDIX

A. U.S. Court of Claims cases

B. Other Federal court cases

C. Board of Contract Appeal cases

A. U.S. COURT OF CLAIMS CASES

TURNKEY ENTERPRISES, 220 Ct. Cl. 179, 597 F.2d 750 (1979), at 194-96: Good discussion of differences between *Briscoe* and *Hoffman* and normal rule. Here, drought causing problem 2 months after contract was entered into was "unprecedented, unanticipated, and unforeseeable in duration," and therefore not a differing site condition (DSC), citing *Arundel-2* at 116, thus Government (Govt) not responsible. *Briscoe* involved man-made condition. "Where climatic conditions produce unexpected, unanticipated and unprecedented weather conditions which affect contract performance, such weather conditions, deemed to be act of God, generally are not within the purview of the Differing Site Conditions (changed conditions) Article." Citing *Banks, Carman, Warren, Arundel-2*, and *Barnard-Curtiss*; also *Concrete Construction Corp.*, IBCA, 65-1 BCA ¶ 4520.

BLAKE CONSTRUCTION, 218 Ct. Cl. 163, 585 F.2d 998 (1978): Govt set off amounts paid to adjacent property owners for building damage allegedly caused by this contractor's (Kr's) construction activities. Court holds for Govt, noting that (185-86) "Under the foregoing facts it was practically inevitable that damages would result to the adjacent buildings. As a matter of fact, it appears from the precautions taken by Blake and the Government to detect damages to the buildings that they expected such damages to occur. We hold that under the facts the damages to the AVA and Riggs buildings were reasonably anticipated

and foreseeable by Blake, Eastern and the Government. We hold further that the Government could not escape liability for such damages because they were caused by the negligence of Eastern, an independent subcontractor." Note: case relies on *Brown & Root*, 126 Ct. Cl. 684 (1953).

McNAMARA CONSTRUCTION, 206 Ct. Cl. 1, 509 F.2d 1166 (1975), at 8-13: Labor strike analogous to act of God, citing *Tombigbee. National Presto* distinguishable because parties there were engaged in joint enterprise. Here, no mutual mistake as to risk of labor difficulties, and no joint enterprise. Govt received no benefit from additional costs of labor strike, expressed no willingness to assume such costs, and such willingness cannot be inferred. (11) "It is true that neither party to the contract was to blame for the illegal, unreasonable labor trouble and misbehavior that increased plaintiff's costs. But, that does not justify a shift of such costs to defendant unless defendant had agreed to accept them," or unless *National Presto* facts exist.

BROOME CONSTRUCTION, 203 Ct. Cl. 521, 492 F.2d 829 (1974), at 531: "Unusually severe weather must be construed to mean adverse weather which at the time of year in which it occurred is unusual for the place in which it occurred. * * * Moreover, the Government is not obligated to anticipate acts of God and abnormal conditions that might interfere with contract performance. It is supposed that bidders allow for this in their bids," citing cases.

HARDEMAN-MONIER-HUTCHERSON, 198 Ct. Cl. 472, 458 F.2d 1364 (1972), at 584-89: Plaintiff attempts to distinguish weather cases disallowing recovery because all those cited involved sudden and intermittent weather occurrences, as opposed to prevailing abnormal sea conditions. Govt relies on general rule that weather is not a risk which is shifted to the Govt via the Changed Conditions clause, citing *Tombigbee. Security, Banks, Lenry*. Court affirms Board on this ground, but reverses on superior knowledge.

MERRITT-CHAPMAN & SCOTT, 194 Ct. Cl. 461, 439 F.2d 185 (1971): Court decided that Govt's failure to make construction site available caused Kr to lose construction season, that contract dates were representations amounting to warranties regardless of Govt's reasons, and that Kr thus was entitled to additional costs incurred. Cites *Abbott Electric Corp.*, 142 Ct. Cl. 609, 616; 162 F.Supp. 772, 776 (1958).

TOMBIGBEE CONSTRUCTORS, 190 Ct. Cl. 615, 420 F.2d 1037 (1970), at 626-27: Contractor had prior knowledge of potential flooding conditions, and thus assumed risk "or, at least, did not in the contract put the risk on the government." Mutual mistake not available where Kr assumed risk, citing authorities. "[B]ad weather such as unusually heavy rainfall is ordinarily an act of God; the Government does not assume the risk of rainfall or flood by making a change which causes the contractor to marshal men and equipment so as to be delayed by a

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heavy rain," citing *Warren Brothers*. "Neither party to a contract is responsible to the other for the damages caused by an act of God, where the contract is silent as to the allocation of the loss to one or the other party," citing *Arundel-2*. "Under the circumstances, the flood entitled plaintiff only to an extension of time, and he received such an extension."

(627) "There is accordingly no basis for shifting to the Government the loss caused to plaintiff by the rain and the flood. An unflooded pit was not the premise of the contract even for plaintiff, and the contract reached by the parties left the risk of flood where it fell and the loss from flood unremediable. The fact of the matter seems to be that plaintiff seized on the coincidence that the pit was fully flooded on the day of the negotiations, to create a claim of rescission or reformation for mutual mistake of fact."

HEDIN CONSTRUCTION, 187 Ct. Cl. 45, 408 F.2d 424 (1969): Default termination overturned and Kr awarded damages. In its discussion, the Court noted: "In certain instances, the [VA] Board treated temporary or unfinished work or installations (including work in progress)—even though reasonable at that particular stage of the work—as defective because, understandably, the work did not conform at that time with the final product demanded by the specifications. Also, there is no substantial evidence to support several Board findings in which reliance is placed on speculation or summary written denials, rather than firm evidence."

PACCON, INC., 185 Ct. Cl. 24, 399 F.2d 162 (1968), pp. 33-35: GP 12, Other Contracts, cannot be stretched "to cover an unusual assumption by the Government of responsibility without fault for the actions, not of its own servants, but of an independent contractor. As for the general rule that neither contracting party can obstruct the other's performance, the court said in *L. L. Hall Construction Co.* [cite], a comparable case involving a second contractor, that 'it is clear * * * that defendant is not liable for delays which it did not cause, over which it had no control, or delays encountered by a contractor notwithstanding defendant's diligence in performance of its responsibilities under the contract.' An absolute guarantee of third-party performance was thus found not to be subsumed in the general duty to forebear [sic] from interference with the contractor.

"There are, however, obligations less than that of an absolute guarantee. The court has recently held that the United States can incur liability toward the disfavored contractor in a 'two contractor situation' where the Government is at fault in some way," citing *Hoffman* and *Hall*. "The real issue, then, is whether the defendant had such a narrower responsibility in this case." Court says that Govt obligation may be different "once its attention [is] called to the problem." Thus, Govt cannot knowingly let Kr 2 interfere with Kr 1's

progress where Govt has control of Kr 2 (same cites). But Govt fault is necessary for *Hoffman* and *Hall* result to apply.

PHILLIPS CONSTRUCTION, 184 Ct. Cl. 249, 394 F.2d 834 (1968), at 253: "Plaintiff's completion of the [Capehart housing] project was not easily come by. Some of the heaviest rainfall in the history of this area seriously impeded plaintiff's construction work, and the Board found that the 'quagmire' conditions existing on the site for prolonged periods during construction caused plaintiff to suffer 'a considerable loss.' Plaintiff has never disputed that it assumed the risks incident to abnormal rainfall as such. But it claimed its difficulties were greatly compounded by what it considered to be the inadequacy of the Government-designed drainage system for the project." The board found that plaintiff was entitled to rely on the Govt's implied warranty that the drainage prescribed by the Govt would be adequate. (255) "Another contention by the Government before the Board (and in this court also) was that rainfall alone caused plaintiff's difficulties and that, since rain is an act of God, it cannot be considered a changed condition. The Board replied, however, that the abnormal rainfall was only one factor and that the failure of the drainage system to disperse the water 'was a contributing cause of the quagmire conditions' which qualified as a changed condition * * *."

SECURITY NATIONAL BANK OF KANSAS CITY, 184 Ct. Cl. 741, 397 F.2d 984 (1968): Three-month rainfall totaled more than 24 inches, over 9 inches above normal and the greatest amount for that period on record. The flood itself was comparable to those in 1927 and 1945, the two highest floods recorded. Here, plaintiff received extensions of time totaling 417 days, a period longer than the original contract period of 1 year, for the delay caused by the flood, but "[t]he defendant is not liable in damages for delays caused by acts of God," citing *Arundel-2*, *Amino*, and *Banks* at 752. In discussing *Hoffman* at 754, the court said: "In the present case, if the continued construction of the dam rather than an act of God had caused plaintiff's delay, and if plaintiff could not have foreseen this, and if the continued construction was not reasonable under the circumstances and defendant could have stopped it or delayed it, plaintiff could have received an equitable adjustment under the contract. But, in the instant case, the supervening act of God, a major flood of a magnitude unexpected by everyone, caused the damage. * * * [755] There was no way for the Government, or anyone else, to anticipate the record rains which caused the flooding. * * * The evidence clearly supports the board's finding that the flooding could not have been alleviated by removing the penstock gates, since there was no practical way that the gates could be removed at this stage of the dam construction, once they were wedged in place."

JOHN McSHAIN, 179 Ct. Cl. 632, 375 F.2d 829 (1967), at 638: Standard changed condition clause refers to latent condition existing at the time the contract was entered into and not one occurring thereafter,

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distinguishing *Callahan*, where damage had been caused by the acts of the authorized agents of the United States, whereas in this case the damage to the work was without fault as to either contracting party.

AMINO BROTHERS, 178 Ct. Cl. 515, 372 F.2d 485 (1967), at 523-26: "The Board found with respect to the first washout that it was caused solely by heavy rainfall and natural run-off of uncontrolled flood waters * * * and that defendant's operation of the dam did not in any way contribute to it. This was clearly an Act of God for which defendant could not be responsible. * * * The defendant was not an insurer for plaintiff against acts of nature," citing *Banks*. As to a second flooding of plaintiff's site, caused when defendant released water from the Kanopolis Dam, fact that contract gave plaintiff a choice of constructing a low-water or high-water crossing did not mean that the low-water crossing that plaintiff chose would always be available, and that if it were destroyed by a sovereign act, defendant would pay the consequent damages for such destruction.

L. L. HALL CONSTRUCTION, 177 Ct. Cl. 870, 379 F.2d 559 (1966): Govt allowed two inefficient contractors that were substantially behind schedule and proceeding slowly, to continue work but shut down plaintiff ("whose operations were efficient and expeditious") for its own purposes. "It is plain that the Government is obligated to prevent interference with orderly and reasonable progress of a contractor's work by other contractors over whom the Government has control," citing *Peter Kiewit*, 138 Ct. Cl. 668, 151 F.Supp. 726 (1957), at 675, to the effect that "the Government may not, with impunity, do whatever is in its own best interests regardless of the harm which may be done to its contractor."

UNITED CONTRACTORS, 177 Ct. Cl. 151, 368 F.2d 585 (1966), at 164-66: Court holds Govt to water conditions in excavation that parties anticipated per Govt logs, etc., despite Govt disclaimer in special provisions of contract, noting that (166) "general portions of the specifications should not lightly be read to override the Changed Conditions clause (cite). It takes clear and unambiguous language to do that, for 'the provision sought to be eliminated, or subordinated, is a standard mandatory clause of broad application,'" citing *TRW*, 175 Ct. Cl. 527, 536, 361 F.2d 222, 228 (1966).

BANKS CONSTRUCTION, 176 Ct. Cl. 1302, 364 F.2d 357 (1966), at 1324: "[I]t is the implied condition of every contract that neither party will do anything to hinder or prevent the other in the performance of the contract [citing cases]. In preparing the design of the work, primary concern was for the finished product, i.e., roads serviced by drainage ditches. Defendant has never considered it necessary to drain the entire military reservation and, of course, had no control over other property. The expense of such drainage would not have had

commensurate value to defendant's mission in the area nor have been necessary to provide roads. A ditch serves several purposes, that of collecting water, storing it and directing its flow. The preexisting ditches in this contract were designed to provide for each of those functions and to move the water slowly from the flat area to the outfall. It was not the intent, nor was it contemplated by the contract that water would drain rapidly from the work area. * * * Since the contract neither required the defendant to insure rapid drainage nor provide plaintiff with optimum working conditions, an obligation cannot be imposed upon the defendant to provide against every contingency that plaintiff may have encountered." Cites *MacArthur*, 55 Ct. Cl. 181 (1920), *aff'd*, 258 U.S. 6.

THOMPSON RAMO WOOLDRIDGE, 175 Ct. Cl. 527, 361 F.2d 222 (1966), at 536: "The key to the textual problem is the established canon that contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible," citing *Hol-Gar Mfg.*, 169 Ct. Cl. 384, 295- 96, 351 F.2d 972, 979 (1965); 3 Corbin, Contracts sec. 549 (1960). "This is particularly so when the provision sought to be eliminated, or subordinated, is a standard mandatory clause of broad application, like the [Additional General Provision] Government-furnished Property article." (citing cases) "Such a standard article, incorporated in the agreement, cannot lightly be read out of it, or deprived of most of its normal substance."

(537) "Furthermore, it is settled that 'if some substantive provision of a government-drawn agreement is fairly susceptible of a certain construction and the contractor actually and reasonably so construes it, in the course of bidding or performance,' this court will adopt that interpretation [where no reason not to do so]." (539) The Government "must therefore bear the onus of failing to convey exactly the intended scope and interconnection of the two clauses, or more precisely, the risk of failing clearly to express its meaning in the disclaimer language in the Schedule article."

GILBANE BUILDING, 166 Ct. Cl. 347, 333 F.2d 867 (1964), at 350: "The trial commissioner has found that none of the delay in filling in the site can be attributed to any fault or negligence on defendant's part, which is fully supported by the evidence. The issue then is, whether defendant is liable for Raymond's delay even though it did not wrongfully cause it. Such liability, if it exists at all, must be found in the express language of the contract; it cannot arise solely by implication. As the Supreme Court said in *H. E. Crook Co. v. United States*, 270 U.S. 4 (1926), the seminal case in this area, it is not within the realm of normal expectation that the Government would voluntarily stand as a guarantor of the performance of his contract by another contractor within the specified time. To the same effect are *United States v. Rice*, 317 U.S. 61 (1942), and *United States v. Foley*, 329 U.S. 64 (1946)." Here, the court finds that the Govt's representation in the contract that the site would be ready at a

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specified time was not a warranty or guarantee, since other contract provisions contemplated possible delays.

LEE HOFFMAN, 166 Ct. Cl. 39, 340 F.2d 645 (1964): Second contractor was given notice to proceed at a time when first contractor (a subcontractor of the Govt's contractor) had flooded the previously dry second contractor's site. The CO took a hands-off position, approved by the board, despite duty-to-cooperate language in each contract. Second contractor pointed out that differing site condition was "man made" by the other contractor before he even had authority to proceed with his construction. Court agreed completely with second contractor, that Govt had totally disregarded the rights of plaintiff to cooperation from upstream contractor whose acts were the cause of plaintiff's difficulties. "These rights inured through the right of the Government to require cooperation from this subcontractor through the Government contract with the prime contractor, the State of Oregon" (at 48).

UNITED FOUNDATION, 158 Ct. Cl. 41 (1962): By contract, the contractor was responsible for work until completion, except for flood damage not due to failure to take reasonable precautions or to exercise sound engineering practice. Govt warned Kr of possible flood on June 17. During heavy rain on June 18, Kr sent his men home. Govt again warned Kr to take precautions, but nothing was done. By June 19 flooding was occurring, and Kr was warned again; but it was too late to remove pumps, and Kr did nothing except remove magnetos from them. CO denied Kr's subsequent claim. On appeal, Kr argued that there was nothing he could have done to prevent damage. Engineers Board and the court upheld the CO's finding that Kr did not take adequate steps to guard project.

BARNARD-CURTISS, 157 Ct. Cl. 103, 301 F.2d 909 (1962): Plaintiff contracted with BOR to rehab a NM dam. Work, which included excavating and elevating existing spillway, carried over winter into late spring; and on May 17-18, 1955, "an unprecedented and unforeseeable amount of rain fell in the watershed covered by the Vermejo project. As a direct result of this, a large amount of water from the Willow Creek watershed flowed into the site of the wastewater structure, overtopped the protective dike and flowed through the excavated opening in the earthen dam, thereby eroding a large part of the dam."

Thereafter, plaintiff was directed by appropriate Government personnel to repair the flood damage and to continue with its performance of the contract. On June 22, 1955, plaintiff notified BOR that it would complete the Willow Creek work, but protested the requirement of rehabilitating the construction site without additional compensation, which was later denied. IBCA found that plaintiff was not responsible for the erosion of the dam and awarded reimbursement

for 1,530 c.y. found to have been physically placed in an area for which the Govt was still responsible, but denied reimbursement for the 3,720 c.y. placed in the area for which plaintiff was responsible under the contract. Ct. Cl. affirmed IBCA and found that flood was an act of God, and that Kr was required to deliver project in completed state. Cf. IBCA 82, 57-2 BCA ¶ 1373, claim item 2, at 4477; 58-1 BCA ¶ 1582 *passim*; and *rehearing petition den.*, 58-1 BCA ¶ 1627. NB: Facts are very similar to Peter Kiewit.

LENRY, INC., 156 Ct. Cl. 46, 297 F.2d 550 (1962), at 48-49: "Before reaching the merits of plaintiff's claim, we wish to point out for the sake of clarity what issues are *not* involved in this suit. To begin with, we recognize that the increased costs of performance incurred by plaintiffs were proximately caused by a hurricane and resulting flood which were completely unforeseen by the parties. That this was an act of God, as that term is understood in its legal sense, we have no doubt. Therefore, unless plaintiffs can show that it is inapplicable to the unique circumstances of this case, we must deny them recovery under the general principle of law that neither party to a contract is responsible to the other for loss occasioned by an act of God." (Italics in original.)

Here, plaintiff incurred greater costs than were anticipated when a flood brought about by a hurricane destroyed parts of certain streets in the city of Scranton adjacent to, as well as in the general vicinity of, the construction site, rendering them unavailable for use as access roads as contemplated. The streets were in existence at the time of contracting and were incorporated into a contract site drawing.

(52): "The thrust of plaintiff's principal argument [was] (1) plaintiffs were obliged to visit the construction site to determine the availability of roads; (2) certain roads were in existence at the time of contracting; (3) plaintiffs were required to use established roads; (4) parts of the established roads * * * were shown on the contract drawing; and (5) defendant agreed to compensate plaintiffs for losses sustained by reason of unusual conditions. Ergo, say plaintiffs, defendant impliedly warranted, for the life of the contract, the continued availability of the streets to be used as access roads."

"There is a dearth of legal precedent as to whether an implied warranty exists in circumstances similar to those in issue. Be that as it may, however, we cannot accept the validity of plaintiff's argument.

* * * For example, there is no indication in the record that defendant knew, or should have known, of the particular method of operation originally selected by plaintiffs, since it formed no part of this contract. Again, it must be remembered that we are concerned with * * * an act of God. Still another matter of major significance is the fact that the streets here involved were city streets, under the jurisdiction of municipal authorities and in no way under the control of defendant.

* * * Had defendant ever intended to make such a unique and all-encompassing guarantee, and had plaintiffs expected it, we believe

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they would have so specified in clear and unmistakable language. In the absence of such language, it would require a more substantial basis than that shown by plaintiffs to impose the type of burden contended for upon defendant."

FOX VALLEY ENGINEERING, 151 Ct. Cl. 228 (1961), at 238-39: "Finally, defendant contends that in any event no liability can be imposed upon it because of the specification provision (1-06) which reads:

RISK-The Contractor shall assume all risks in connection with the execution of this contract and waive any claim against the Government for damages arising out of the performance of the work specified and shall agree to protect and save harmless the Government from any claims from damages which may result from injuries to property or persons in connection with this work.

"This provision cannot possibly be construed so as to insulate defendant from liability for any and all acts on its part which might constitute breaches of the contract or otherwise give rise to justifiable claims under the contract. Such an interpretation, hardly consistent with the 'rational intention of the parties,' would certainly present 'a serious question of public policy' and, therefore, of the validity of the provision. *Ozark Dam Constructors v. United States*, 130 Ct. Cl. 354, 359-360. The provision was clearly intended to provide immunity to the Government only as to claims by third parties for damages for injuries arising out of plaintiff's performance of the contract."

JACK CARMAN, 143 Ct. Cl. 747 (1958), at 751: "The question for decision is, in general, who must bear the loss from a destruction of part of the work which the contractor has contracted to do while the work is still in an unfinished stage, where the destruction is brought about by an act of God [i.e., a flood] and through no fault of either contracting party. We are of the opinion that under the circumstances of this case the requirement by the defendant that plaintiff re-clear the area was not an order to perform extra work or a change in the plans and specifications requiring a change order within the meaning of Article 3 of the contract. * * * We are further of the opinion that the happening of the flood in May 1949 was not a 'changed condition' within the meaning of Article 4 of the contract." (752): "Where the work was damaged before completion by the forces of nature and without anyone's fault, plaintiff was under an obligation to repair such damage and complete the project as required by the contract. The Government was under no obligation to reimburse the plaintiff for the extra costs incurred in completing the contract work," citing *De Armas*, 108 Ct. Cl. 436.

PETER KIEWIT SONS, 138 Ct. Cl. 668 (1957), at 674: "[T]here is in every Government contract, as in all contracts, an implied obligation on the part of the Government not to willfully or negligently interfere

with the contractor in the performance of his contract," citing *Chalender* and *Fuller*.

BROWN & ROOT, 126 Ct. Cl. 684, 116 F.Supp. 732 (1953), at 694: "The more serious question, however, is whether the Government was liable at all for any damage which the contractor might have done to the garden outside the right-of-way. If not, the contractor cannot be held accountable since the defendant was under no obligation to pay the money expended." (694-95) "While agreeing that plaintiff was an independent contractor who is normally solely responsible for his torts, defendant urges that the italicized portion of the above provision [that the contractor would be responsible for damages off the right-of-way] obligated plaintiff to settle for damages outside the right-of-way and having failed to do so, defendant was entitled to effect such a settlement and charge plaintiff for the amount thus expended. We do not agree" (italics added) (pointing out that plaintiff was solvent and amenable to suit and that it had offered to post a bond). (695) "We cannot say that an agreement 'to be responsible' is tantamount to an agreement for extra-judicial settlement by arbitration."

However, (698) Govt was liable for damage (under Texas law) to an adjacent landowner where a high mound of soil left by Kr acted as a levee preventing normal drainage of the adjacent land for a period of 2 years.

WARREN BROS. ROADS, 123 Ct. Cl. 48, 105 F.Supp. 826 (1952), at 79: "Defendant had the right to change the specifications and it notified plaintiff it had done so before the contract was signed. Plaintiff's losses were not due to any wrongful act of defendant's, but were due solely to the adverse weather conditions which were unexpectedly encountered and which delayed the grading operations. The unusual quantities of rain which fell during March and April were an act of God, for which neither party to the contract was responsible," citing three Supreme Court cases. "Plaintiff is not entitled to recover on this cause of action."

DE ARMAS, 108 Ct. Cl. 436 (1947), at 467: "The theory of this part of the plaintiff's claim is not clear. He insists that he was not at fault in regard to the damage, and seems to deduce from that he should not bear the loss. But of course that does not follow. There are losses and misfortunes not due to the fault of anyone and their incidence cannot, therefore, be determined on the basis of fault." (468) "[B]oth the plaintiff and the Government men on the project were as familiar with the area and its problems as anyone was. The Government inspector directed the plaintiff to keep on sinking mattresses while the weather was calm in the gulf on January 16th, so apparently he was not aware of the danger that might be caused by a storm if one occurred before the core and cover stone were placed. But the plaintiff's superintendent readily acquiesced in the direction, hence he also was apparently unaware of the danger. No fault can be therefore be

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assessed as to the order in which the work was directed to be done, and was done."

"The question then, is, who must bear the loss from a destruction of a part of the work which the plaintiff had contracted to do, while that work was in an unfinished stage. The specifications * * * require of the plaintiff a completed job, quite comparable to a construction job. * * * We think, therefore, that its being damaged by forces of nature and without anyone's fault before it was completed and accepted as complete, was the plaintiff's misfortune and loss." Note: The court did excuse plaintiff from liquidated damages because of the unanticipated weather severity.

ARUNDEL CORP. (*Arundel-2*), 103 Ct. Cl. 688 (1945), *cert. den.* 326 U.S. 752, at 711-12: "We think the Government did not, by art. 4, assume an obligation to compensate plaintiff through an increase in the contract unit price for any increase in its anticipated dredging costs per cubic yard, or reduction of its anticipated profit not caused by any act or fault of the Government, but brought about and caused by a hurricane which neither party expected or could anticipate. *The Arundel Corporation v. United States*, 96 Ct. Cl. 77. The plaintiff assumed the risk of the amount of material to be dredged being reduced, as it was, by the hurricane, an act of God, just as the Government would have had to assume the risk of having to pay for an increase in the material necessary to be dredged for the same reason, as was the case in *Tacoma Dredging Co. v. United States*, 52 Ct. Cl. 447, where a flood caused an increase of 67,000 cubic yards. It is a general principle of law that neither party to a contract is responsible to the other for damages through a loss occasioned as a result of an act of God, unless such an obligation is expressly assumed. Here, the contract was silent in that regard and whatever loss plaintiff may have sustained must be borne by it, and not by the Government. Plaintiff is not entitled to recover, and the petition must, therefore, be dismissed. It is so ordered." Note: A dissent by J. Madden argues that since the loss of pay unit material had already occurred, unbeknownst to the parties, at the time they signed the contract, an equitable adjustment under the DSC clause was proper.

ARUNDEL CORP. (*Arundel-1*), 96 Ct. Cl. 77 (1942), at 115-18: Plaintiff's work was located below a dam on the Savannah River, which flooded while the work was in progress. The CO had told the Kr that, in the event of flood, the floodgates would not be opened (to reduce pressure and velocity) unless the banks below the locks had been protected against erosion. When the flood was imminent, the Kr asked for the gates to be opened, acknowledging that the banks were not yet protected. The dam engineer refused until the work was done. Kr belatedly did the work, but by the time the gates were opened, the pressure was too great, and the construction site was damaged. The

court said it was the duty of the CO to protect the work already done, and up to the Kr to properly protect the banks, which it did not do until too late. Therefore, the Kr was not entitled to recover.

CALLAHAN CONSTRUCTION CO., 91 Ct. Cl. 538: Because the contractor had by contract assumed all risks of flood damage to his work, it had taken normal flooding into account in its construction methods, which included the erection of three tramway towers and a cable conveyance system adjacent to the river to transport gravel to its dam construction site. The towers were designed to withstand the forces of the usual high waters in the river. Subsequently a major but not unusual flood occurred; and the towers collapsed, with other related damage. The court found that the cause of the damage was the fact that the Govt had subsequently, both itself and by another contractor, cut trees in a basin above the dam and had left large logs and other debris at the site. When the river flooded, the logs, trees, and debris were carried downstream and overturned the towers, disrupting appellant's transportation system and causing additional costs to repair the damage.

(619-20) The court said that the Kr had assumed only the risks of flooding that were reasonably expected, and that the Govt was responsible for the additional hazards it had created, since it had a duty to see that its logs would not be left where they would be carried down the river and cause damage to the Kr. Govt had impliedly agreed to assume the risks of any extra or unusual hazards caused by its agents, "whether or not they were imposed carelessly, accidentally, or otherwise."

B. OTHER FEDERAL COURT CASES

UNITED STATES v. SECKINGER, 397 U.S. 203 (1970) (from 5th Cir.): (211) "[W]e agree with the Court of Appeals that a contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties. This principle, though variously articulated, is accepted with virtual unanimity among American jurisdictions." (216) "In no event will [the contractor] be required to indemnify the United States to the extent that the injuries were attributable to the negligence, if any, of the United States. In short, [the contractor] will be responsible for the damages caused by its negligence; similarly, responsibility will fall upon the United States to the extent that it was negligent."

"Finally, our interpretation adheres to the principle that, as between two reasonable and practical constructions of an ambiguous provision, such as the two proffered by the Government, the provision should be construed less favorably to that party which selected the contractual language."

UNITED STATES v. SPEARIN, 248 U.S. 132 (1918) (affirming 51 Ct. Cl. 155): (136) "Where one agrees to do, for a fixed sum, a thing

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possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered," citing Day and Phoenix Bridge. "But if the contractor is bound to build according to the plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications," citing state cases.

DAY v. UNITED STATES, 245 U.S. 159 (1917) (affirming 48 Ct. Cl. 128 and 50 Ct. Cl. 421): (160-61) "The Government had built a bulkhead to protect the work, 142 feet high, which was the height of the projected work and was supposed to be high enough for floods, but in May and June 1894, the flood in question rose three feet above it, necessitating the extra work now sued for, and leading to a change in the project so as to add six feet to the height of the protecting dam. The Government, however, had not guaranteed that the bulkhead should be sufficient or that it would protect the work while going on. * * * One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking."

Cf. 48 Ct. Cl. 128, at 139-40: "The most that can be said in the present case is that by reason of the rise of the water in the river above the elevation of 142 feet the claimants were put to much greater expense in the performance of their contract than they would have been had the flood not occurred. This may be a hardship, but it is one against which the claimants might have guarded by a proper provision in the contract."

UNITED GAS PIPELINE v. F.E.R.C., 824 F.2d 417 (5th Cir. 1987): (428-29) "Fault" is the equivalent of negligence. "Negligence is generally defined as the failure to exercise reasonable care, that is, the degree of care which a person of ordinary prudence would exercise in the same or similar circumstances. For liability, the action complained of must have been reasonably foreseeable and avoidable."

SHEA-S&M BALL v. MASSMAN-KIEWIT-EARLY, 606 F.2d 1245 (D.C. Cir. 1979): (1249) "Heavy rainfalls, unless they are unusual and extraordinary, are not considered acts of God," citing D.C. Mun. App. case to the effect that, "We take judicial notice that rains of heavy intensity *and average duration* (italics added) are occurrences of common experience. * * * Such events, though infrequent, are to be expected. They do not create the widespread devastation commonly associated with earthquakes, tornadoes, hurricanes or extraordinary floods. * * * To classify [the occasional filling of low-level areas by rain water] as an act of God is an unwarranted extension of that doctrine not supported by the authorities." Court found that here, as in *Hoffman*, the contracting authority had the duty to compel cooperation among contractors but failed to do so. *Paccon* and *Hall* also cited.

MERRITT, CHAPMAN & SCOTT, 295 F.2d 14 (9th Cir.

1961): Contractor was damaged by 2nd Kr. Latter raised Govt Kr defense. Court disagreed, where Govt not negligent and 2nd Kr had right to determine how construction would be carried out. Court found nothing in the record to convince it that "appellants were *required* by any government directive or authority to do that which was charged against them as negligent acts * * *. We find no evidence of government compulsion with respect thereto. It is elementary that *compulsion* must exist before the 'government contract defense' is available."

UTILITY CONTRACTORS, 8 Cl. Ct. 42 (1985): (51) Cites *Roen Salvage* to the effect that "inundation by surface flooding following heavy rains is one of the hazards of the undertaking a contractor assumes when he enters into a contract." Also, *Arundel-2* and *Turnkey* to the effect that neither party is responsible to the other for loss by act of God.

C. BOARD OF CONTRACT APPEALS CASES

SCALF ENGINEERING, 89-3 BCA ¶ 21,950, IBCA 2328, at 110,422: "Normally severe weather, which should reasonably be expected, will not, however, support a claim of excusable delay. It must be 'unusually severe weather,' e.g., 'adverse weather which at the time of the year in which it occurred is unusual for the place in which it occurred.' *T. C. Bateson Construction Co.*, GSBCA No. 2656 (Sept. 27, 1968), 68-2 BCA ¶ 7263. No matter how severe or destructive, if the weather is not unusual for the particular time and place, or if a contractor should reasonably have anticipated it, the contractor is not entitled to relief." Accord: *Essential Construction*, ASBCA No. 18706, 89-2 BCA ¶ 21,632; *Huntington Construction*, ASBCA No. 33525, 89-2 BCA ¶ 21,867.

T. L. JAMES, ENG BCA No. 5328, 89-2 BCA ¶ 21,643: Follows *Turnkey* in holding that there are no compensable changes or DSC's based on weather alone. (108,890) Appellant's reliance on *Merritt-Chapman & Scott*, 192 Ct. Cl. 848, 429 F.2d 431 (1970), and *Fruehauf*, 587 F.2d 486, 218 Ct. Cl. 456 (1978), is misplaced, since those cases involved Govt's "direct, causative *involvement*, either in inadequately investigating subsurface conditions and ordering corrective changes or by virtue of another Government contractor's delays and interference. Those cases do not hold that the Government will pay for delays caused solely by weather."

C.O.A.C., INC., VABC A No. 2618, 88-3 BCA ¶ 21,159, at 106,810: Fact that appellant was impeded by heavy rainfall, water and mud in the tunnels, and ground too wet for concrete trucks does not mean that such conditions were unexpected or contrary to Govt representations. No evidence that rainfall was unusually severe, and no contract clause entitling appellant to relief. Reliance on DSC clause is misplaced, citing *Coliseum Construction*, VABC A No. 2192, 86-2 BCA ¶ 18,857, at 95,039: "Rain is not the sort of 'physical conditions at the site' which is

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contemplated by the Differing Site Conditions clause. Weather is not a risk which is shifted to the Government via that clause," citing *Hardeman-Monier-Hutcherson, Turnkey, Arundel-2, and Utility Contractors* (8 Cl. Ct.).

BEACH BUILDING CORP., ASBCA No. 30969, 88-1 BCA ¶ 20,490, at 103,646: "The law is clear and well-established that when a contract includes the standard Permits and Responsibilities and similar clauses * * *, the contractor assumes strict liability for its work and materials until accepted by the Government," citing *McShain*, 179 Ct. Cl., et al. (103,647) "In seeking to escape the consequences of its assumption of strict liability under the referenced contract clauses for its own work by shifting the blame to the Government, *appellant has a heavy burden of proof which has not been carried by this or the other arguments presented.*" citing *Santa Fe Engineers, Inc.*, ASBCA No. 27933, 85-2 BCA ¶ 18,001 (italics added).

TITAN PACIFIC CONSTRUCTION CORP., 87-1 BCA ¶ 19,626, ASBCA No. 24148, at 99,356: "To the extent that [the] work was necessary to remove [the storm] debris from earthwork and roadwork under construction, we regard it as the repair of work damaged by an act of God and within the responsibility of appellant under the Permits and Responsibilities clause of the contract, and the cost thereof must be borne by appellant."

STEPHENSON ASSOCIATES, INC., GSBCA No. 6573, 86-3 BCA ¶ 19,071: Appellant was the HVAC Kr on major project involving numerous other contractors under a Construction Manager that operated "w/o authority to bind Govt." Kr did its work on time but had to return several times to re-do work because of actions and delays of other Krs. Contract contained an escape clause that Govt would not be liable for any costs incurred by Kr by reason of any other Kr's failure to coordinate or to comply with directives of Construction Mgr or CO, "it being understood and agreed that the Govt does not guarantee that other Krs will not breach their obligations to coordinate their work with that of the Kr." Board said Govt was trying to have it both ways, that it would be accountable for actions of Mgr, and that exculpatory language did not overcome Govt's liability under Suspension of Work clause for unreasonable delays caused by the Govt's failure to coordinate the work of its prime contractors, citing *Pierce Associates, Inc.*, GSBCA No. 4163, 77-2 BCA ¶ 12,746, "and we will apply the same rule to constructive change claims under the Changes clause."

EXCAVATION-CONSTRUCTION INC., ENG BCA No. 4225, 86-2 BCA ¶ 18,747: The contractor claimed that WMATA delays caused it to be exposed to unusually severe weather causing increased costs. Board says K price adjustment must reflect all changed circumstances at the

actual time of work performance, but that WMATA did not cause the unusually severe weather in January and February 1977 and is not responsible for any increased costs associated with it as such—i.e., no separate adjustment because of weather.

ORBIT CONSTRUCTION CO., ENG BCA No. 3734, 86-2 BCA

¶ 18,748: Appellant sought delay and additional compensation because of “excessive rain, high water, and flooding” but Board found that no flood existed and that water levels did not vary materially from those anticipated by the specifications, and that much of the damage was caused by Kr’s own failure to place protective measures on the sand-earthfill within a short time after placement of the fill, and thus to follow good construction practices.

SANTA FE ENGINEERS, INC., ASBCA No. 27933, 85-2 BCA

¶ 18,001: Contractor alleged defective specifications when cast iron pipe broke after installation, but Board held that Kr had burden of proving full compliance with the specifications, and Govt expert testified that lack of compaction was probable cause of break. Thus, controlling rule of law was that Kr under Permits and Responsibilities clause had risk of loss or damage due to any cause other than fault or negligence of Govt until completion and acceptance.

WARWICK CONSTRUCTION, INC., GSBCA No. 5070, 82-2 BCA

¶ 16,091, at 79,855: Board holds that Govt must compel cooperation from other contractors, and if Kr is delayed by them, and K contains standard Suspension of Work clause, Govt cannot escape by showing that the delay was not due to its fault or dereliction, citing *Fruehauf Corp.*, 218 Ct. Cl. 456, 469-75, 587 F.2d 486, 493-97. (79,856) Board also holds that “a contractor’s right to contract schedule extensions due to unusually severe weather is to be established not by looking at the weather *per se*, but rather the effect of unforeseeable, unusually severe weather on the work being performed” citing *Essential Construction Co.*, ASBCA No. 18491, 78-2 BCA ¶ 13,314, at 65,122. However, since weather delays are not compensable (citing *Turnkey*), and Kr has not sought a delay as such, it cannot recover damages since they were incurred by reason of an act of God (flooding), and the contract did not allocate such losses to the Govt, citing *Tombigbee*. (79,859) Also, since neither party can recover against the other under such circumstances (citing *Broome* and *McShain*, 188 Ct. Cl.), Board refuses to allow Govt to collect liquidated damages.

JAMES McHUGH CONSTRUCTION CO., ENG BCA No. 4600, 82-1 BCA ¶ 15,682: Board permits WMATA to enforce an unambiguous contract disclaimer regarding subsurface conditions because (77,529) “while the DSC clause is mandatory for a federal agency, it is not mandatory for WMATA.”

ROEN SALVAGE CO., ENG BCA No. 3670, 79-2 BCA ¶ 13,882, at 68152-53: The contractor expected to work in half foot of water but in fact had to work in water three to four times deeper. Board said Govt

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had made no representation, and that even if the drawings had shown a current elevation, that would not guarantee that elevation might not be exceeded, citing *Key, Inc.*, IBCA No. 690, 68-2 BCA ¶ 7385, since mere depiction was not a representation. Also, DSC clause requires a latent condition at the time K was entered into, not one occurring thereafter, citing *Arundel-2* and *Security Construction*, 68-2 BCA ¶ 7097, and *McShain*, 179 Ct. Cl. *Arundel-2*, which contains later language, had said that DSC clause did not apply to hurricanes, which was an act of God. (68154) “[I]nundation by surface flooding following heavy rains is one of the hazards of the undertaking a contractor assumes when he enters into a contract” citing *Amino Bros., Tombigbee*, and other cases. “The rule is different when the Government unreasonably orders or permits a contractor's site to be flooded” citing *Hoffman*. “But in [*Security National Bank*], ‘a supervening act of God, a major flood of a magnitude unexpected by everyone,’ caused the damage. The Court observed, ‘The Government is not an insurer against acts of nature.’”

“Even where the Government intentionally causes his work site to be flooded, this will not entitle a contractor to damages if the flooding was necessary in the performance of a Government function.” *Amino Brothers Co., Security National Bank*.

BROWN & ROOT WESTERN, IBCA No. 1220, 79-1 BCA ¶ 13,795: Board said that the contractor bears risk of increases in the cost of the work caused by forces of nature, and that damage or destruction of an access road to a remote work site by heavy snowfall was not compensable, citing *Montgomery-Macri Co.*, IBCA No. 59, 63 BCA ¶ 3810, and *Concrete Construction Corp.*, IBCA No. 432, 65-1 BCA ¶ 4520. Here, no recovery. (*See also, Antrim and Steenberg*, below.)

FRANK W. MILLER CONSTRUCTION, ASBCA No. 22347, 78-1 BCA ¶ 13,039: Govt had required substantial quantities of sand fill to be placed on an adjacent site in connection with another (dormitory) contract. The possibility of the sand washing down onto the Kr's dining hall site was not an obvious condition that should have been anticipated by it. It did not complain about extra costs in connection with 10 previous days of rain and had constructed diversion ditches to avoid further problems; but 9 months after its K had been awarded, the dormitory K was awarded and the sand filled the ditches. Govt held discussions with two Krs, but did nothing. Then some 3-½ inches of rain fell one night (not unusual in Texas), and sand damaged Kr's utility openings. Board said Govt was aware of danger, and Kr was allowed to recover under *Callahan* and *Hoffman* precedents.

F. H. ANTRIM CONSTRUCTION, IBCA No. 914, 73-1 BCA ¶ 10,017, at 47,022: “It would, of course, appear to be clear that some water would have flowed off of the site and against the lagoon banks in the absence

of the dike. This is consistent with Mr. Williams' testimony that water which overflowed the lagoon banks came from off the site to the west. We find that the dike was to the southwest of the lagoon and could not have channeled flood waters directly into the lagoon. * * * It is well settled that a contractor seeking to shift to the Government the risk of loss placed upon it by the Permits and Responsibilities clause must prove by a preponderance of the evidence that the loss was attributable to fault of the Government [citing *Steenberg* at 44,027]. The most that could be said here is that the dike had some indeterminate effect in concentrating floodwaters in the lagoon area. Appellant has failed to demonstrate that damage to the lagoon was attributable to fault of the Government."

STEENBERG CONSTRUCTION CO., IBCA No. 520, 72-1 BCA

¶ 9459: A high pressure oil pipeline ruptured adjacent to the contractor's concrete batching plant. The CO blamed the Kr, but Board found that cause was uncertain. Kr claimed damage to equipment, sand and gravel, and site and sought recovery from Govt. (44,027)

"There is insufficient evidence to support a finding that the appellant was at fault. This alone is not enough, though. A contractor in this situation must bear the burden of proving Government fault by a preponderance of the evidence. Here, appellant has failed. The record simply does not establish that the oil pipeline break was caused by an instrument under Government control. * * * There are losses and misfortunes not due to the fault of anyone and their incidence cannot, therefore, be determined on the basis of fault" [citing *De Armas, McShain*]. We hold that the risk of loss was on the appellant under the Permits and Responsibilities clause.

JOHN M. KELTCH, INC., IBCA No. 831, 71-1 BCA ¶ 8914: Decision cited by Kiewit criticizing BOR contract language dealing with watercourses as vague and ambiguous. Board holds for Kr on ground that both Govt's and its reading are reasonable, so K must be construed against Govt. Note: While K language is criticized, case does not turn on same ambiguities as Kiewit.

ALLISON & HANEY, INC., IBCA No. 587, 69-2 BCA ¶ 7807, at 36,268: "In addition, there was an intervening or superseding development, viz., the heavy rainfall, which was the direct cause of the damage. This is clearly an Act of God for which the Government was not responsible [citing *Amino Bros.*]. The Government is not an insurer of contractors against acts of nature [citing *Banks*]. Damage from that cause is a risk which contractors must bear."

CONCRETE CONSTRUCTION CORP., IBCA No. 432, 66-1 BCA

¶ 4520: Abnormally heavy rainfall was not a DSC, and its effects did not constitute changed conditions.

CHARLES T. PARKER CONSTRUCTION, INC., IBCA No. 335, 1964 BCA ¶ 4017: Heavy rainfall on Mt. Hood melted a glacier and caused a mudflow with logs and debris to run downhill and damage a

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Bonneville Power tower that had been completed by the contractor but not yet accepted in writing by Govt. Govt paid for debris removal but not for damage to tower. Kr argued that the logs belonged to Govt. Board said: "We do not find the question of ownership of the logs and debris to be of particular legal significance. The evidence discloses that the mud flow which was of deluge proportion, was triggered by a heavy rainstorm that fell upon a glacier, the lower portions of which had been made unstable by exceptionally high melting induced by exceptionally hot weather. The cause of the damage must therefore be attributable to an Act of God or to other forces of nature. We find that neither the appellant nor the Government was at fault." Board therefore denied recovery.

JOSEPH F. NEBEL CO., ASBCA No. 6959, 61-2 BCA ¶ 3164:

Contractor's work was damaged by an explosion caused by unstable rocket propellants being stored at an adjacent site which was under Govt control. Board found that damage was either caused by Govt or by parties under its control, and therefore awarded recovery to Kr on breach of K theory.

BARNARD-CURTISS CO., IBCA No. 82, 58-1 BCA ¶ 1582:

Unprecedentedly heavy rainstorm washed out contractor's excavations and work below dam. Govt contended that Kr was negligent in not protecting work. Board found that Kr had not been negligent, that it only had to repair its own damage, and that it should be paid for damage outside of its own work area. Petition for rehearing denied, 58-1 BCA ¶ 1627. Note: See discussion in 57-2 BCA!

GOLDER CONSTRUCTION CO., ASBCA No. 4390, 58-1 BCA ¶ 1626, at 5993: Board cites 53 ALR 103 annotation dealing with builders' risks. "The general rule is that the builder has the risk of loss from damage to or destruction of the project under construction until its completion and final acceptance" subject to partial acceptance by owner or to acceptance by owner of the beneficial use and occupancy of the project. "Builders' risk includes damage or destruction due to casualties and accidents that are not the fault of either party, but does not include damage caused by the fault of the owner." The builder is also responsible for protecting project from trespassers. (5995) However, Kr is not liable for damage to the work caused by the negligence of another Kr when appellant was not at fault, citing *Callahan*.

58-1 BCA ¶ 1739, *GOLDER, supra, on recon. by full board*, at 6690: "While in the *Callahan* case the flood damage resulted in part from the acts of the Government, the court made no distinction between acts of the Government's own officers and employees and acts performed by an independent contractor in carrying out a contract with the Government. In neither case did the court say the acts constituted negligence. The court said that it made no difference

whether or not the additional hazards imposed on the contractor were 'imposed carelessly, accidentally, or otherwise.' The important point to the court was that the increased hazards were created by the Government, either by its own acts or in carrying out a contract made by the Government."

(6691) "We are of the opinion that the *Callahan* case and the *Mittry* case [73 Ct. Cl. 341 (1931)] are not in conflict and the decisions reaching opposite results can be reconciled. In the *Callahan* case the court emphasized the risks and hazards in the contemplation of the parties when the contract was made and interpreted the contract as imposing on the contractor only the risks arising from the conditions existing at that time, whereas the damage was found to have been caused by the supervening acts of the Government which created additional and unexpected hazards after the contract was entered into. Under the court's view it made no difference whether these supervening acts creating unexpected hazards were acts of the Government or whether the acts were accomplished pursuant to a contract with the Government. In the *Mittry* case there was no supervening act of the Government increasing the hazard. All of the ten contracts were let at the same time, and since it was necessary for all ten contractors to perform at the same time, in order to produce a completed hospital, it was within the contemplation of the parties that each contractor assume the normal risks incident to the construction of a project where the work is divided among several contractors and each contractor is dependent on the progress of other contractors for completion of his contract. Thus, it may be said that the risk of damage to the work by another contractor working on the same job at the same time was a risk within the contemplation of the parties under the circumstances surrounding the letting of such contracts.

* * * [Here] it may be said that the award of a second contract to be performed before the completion of appellant's contract created an additional hazard that was not within the contemplation of the parties and not assumed by the contractor."

The Board concluded that appellant was not liable for the water damage to the work because it was caused by the negligence of another unrelated contractor without any fault by appellant.

BARNARD-CURTISS CO., IBCA No. 82, 57-2 BCA ¶ 1373, at 4473: "A heavy rainstorm occurred at the site of the work and in drainage areas upstream therefrom at the time work under the contract was being performed. The rainstorm, which began on May 17 and continued through May 20, 1955, produced a total precipitation at the site of the work of 7.02 inches, which was 50 percent of the average annual precipitation, and approximately 400 percent of the average precipitation in May in the locality of the work. The floods resulting from the storm inundated and damaged much of the contractor's work.

* * * The contractor repaired the damage but did so under protest, claiming that the protective works which it had constructed with the

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approval of the Government inspectors, would have been sufficient except for the wholly unexpected rainstorm, and that it was, therefore, entitled to additional compensation under Article 4 [changed conditions, DSC]."

(4473-74) The Govt denied the claim on the ground that the Kr was responsible for the work until final acceptance. Board cites *Arundel-1* and *Arundel-2*, that neither party is responsible to the other for losses from act of God, noting that: "The fact that the protective works constructed by the contractor may have been satisfactory to the Government inspectors cannot be held to have lessened the responsibility of the contractor, for this responsibility was imposed upon it by the terms of the contract. Indeed, it would have made no difference if the Government itself had constructed the protective works so long as it did not warrant their adequacy" (citing *Day*, 245 U.S. 159. Note: Contract contained 1.5.9 watercourse language.)

CLAIM ITEM 1: (4475) "At the time of the rainstorm with its resulting flood the Eagle Tail headworks was almost completed, and the prime contractor's dragline was close to the structure site. However, the concrete placement had not been entirely completed, and the forms had not been removed. As protective measures, the prime contractor had left 'plugs' or unexcavated earth sections, both above and below the structure site in order to direct the flow of water around the structure site into the old channel. Although the plugs remained intact after the flood, the structure site was inundated, the waters both flowing through the site and backing up into it. Nevertheless, the structure itself was not washed out, and there was no significant damage other than the depositing of silt. The problem of restoring the *status quo* was, therefore, primarily one of pumping and cleaning."

(4476-77) "Another contention of the contractor appears to be that the Eagle Tail Headworks were so located and designed that 'in the event of a flood it would of necessity be completely covered by water with resultant damage.' Even assuming that this contention is well-founded—and the readiness with which the structure was flooded during and after the storm lends some credence to the contention—both the location and design of the structure was, of course, known to the contractor, and it, therefore, necessarily accepted the risk that flooding might occur during the period of construction. In other words, the contention is only a statement in another form of the contractor's general contention that it was not responsible for the repair of the flood damage."

CLAIM ITEM 2: (4478) "To protect the excavation the contractor's subcontractor * * * placed material therefrom along the lower bank of the Eagle Trail Canal between the canal and the structure site. This protective dike, which appears to have been deposited in rough waste piles, was * * * approximately 15 feet in height. In addition, Caldwell constructed across the silt bed an access road which blocked the canal

directly in front of the structure site, except for a culvert consisting of a 30" pipe * * *. Prior to the commencement of the construction work under the contract the Vermejo Conservancy District had used the dam or dike across Willow Creek as an access road to the lower reaches of the canal. When Caldwell's excavation breached the road, the District used a bulldozer on the rough spoil piles that formed the protective embankment for the structure site to convert it into a substitute access road. This was done without objection on the part of the subcontractor.

"It appears also that during the progress of construction before the flood the District decided to relocate a channel for the Eagle Tail Canal across the silt bed above mentioned. The channel was 8 feet wide at the bottom and 20 feet wide at the top, and natural earth plugs were left at the intake and outlet ends of the channel, so that the water from the Eagle Tail Canal would not enter the channel. This relocated channel across the silt bed was actually constructed under a cooperative arrangement between Caldwell and the District * * *. At the request of the District, the Bureau of Reclamation staked the excavation for the relocation of the Canal but did not otherwise participate in its construction.

"Prior to the occurrence of the rainstorm on May 17, the old wastewater structure had been removed, the required excavation had been substantially completed, the pipe had been laid, and the concrete poured for the floor of the outlet structure. So severe were the effects of the storm, that the flood poured over the canal banks, and the contractor's protective dike, and flowed right through the construction site" (causing major damage).

(4479-80) "The Government and the contractor accuse each other of conduct that contributed to the magnitude of the disaster caused by the storm. The Government argues that the contractor was at fault * * * in failing to construct more adequate protective works [and] in constricting the channel * * * with a culvert that had too small a diameter."

"The contractor contends * * * that the Government was at least partly responsible for the damage caused by the storm because it permitted the Vermejo Conservancy District to construct the substitute access road and relocate the channel across the silt bed. So far as these contentions are concerned, inasmuch as the subject matter of the contract was rehabilitation work on an existing irrigation system, the contractor should have expected that some maintenance work and even minor construction work would be performed during the construction period of the contract. The contractor could hardly have regarded this work as unusual since it raised no objection to either the access road or the relocation of the canal at the time the work was performed. In any event, the Board must find that the preponderance of the evidence supports the contention of the Government that the contractor has failed to show that there was a causal connection

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between the work performed by the District and the damage to the contractor's work."

(4481)"The Government made a determined effort at the hearing to prove that the contractor had been at fault in the conduct of its operations prior to the storm but, so far as the Willow Creek wasteway is concerned, the Board is unable to conclude that such fault has been established. The burden of proving fault in such a situation as this rests with the Government, which is the party alleging the fault."

"While it is true that the responsibility for providing adequate protective works was that of the contractor, and that it was not relieved of this obligation by the presence of the Government inspectors or even by their approval of the protective works provided by the contractor, the fact that these works appear to have been wholly satisfactory to the project personnel militates against any conclusion that the contractor was negligent. The contractor was entirely cooperative, and would have provided additional protection if it had been clearly demanded or even suggested by project personnel. The storm proved to be, however, of such magnitude that its consequences could hardly be said to have been foreseeable either by the contractor or by project personnel, and hindsight should not be substituted for foresight in determining whether the contractor was negligent. * * * As the contractor was not negligent in the conduct of its operations at the Willow Creek wasteway, its obligation was only to restore the contract work that had been damaged."

