

UNITED STATES DEPARTMENT OF THE INTERIOR

Stewart L. Udall, Secretary

Frank J. Barry—Edward Weinberg, Solicitor

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

Edited by
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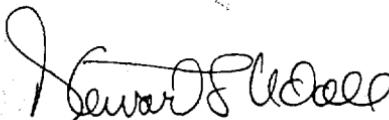
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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1968, to December 31, 1968. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Stewart L. Udall served as Secretary of the Interior during the period covered by this volume; Mr. David S. Black served as Under Secretary; Messrs. Harry R. Anderson, Stanley A. Cain, Frank C. Di Lusio, Max N. Edwards, Kenneth Holum, J. Cordell Moore, Robert C. McConnell, and Clarence F. Pautzke served as Assistant Secretaries of the Interior; Mr. George E. Robinson served as Deputy Assistant Secretary for Administration; Messrs. Frank J. Barry and Edward Weinberg served as Solicitor of the Department of the Interior and Messrs. Edward Weinberg and Richmond F. Allan as Deputy Solicitor.

This volume will be cited within the Department of the Interior as "75 I.D."



Stewart L. Udall
Secretary of the Interior

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ERRATA

Page 28—Footnote 25, should read Footnote 36 Appellant's claim letter, attached as "Exhibit A" to the Findings of Fact, Exhibit No. 1.

Page 32—Footnote 62, should appear as 67.

Page 72—Appeal of *Galland-Henning Manufacturing Company*, IBCA-534-12-65, *Decided March 29, 1968*, the following insert should appear after Headnote, *Layne and Bowler Export Corporation*, IBCA-245 (Jan. 18, 1961), 68 I.D. 33, Overruled, insofar as it conflicts with *Schweigert, Inc. v. United States*, Ct. Cl. No. 26-66 (Dec. 15, 1967), and *Galland-Henning Manufacturing Company*, IBCA-534-12-65 (Mar. 29, 1968).

Page 77—Paragraph 2, Lines 4 and 5, the word *compoments* should appear as *components*.

Page 108—I *concour* should appear as I *concur*.

Page 122—Topical Index Heading Bureau of Reclamation: *Exess Lands* should appear as *Excess Lands*.

Page 185—Appeal of Power City Construction & Equipment, Inc. *July 18, 1968*, should appear as *July 17, 1968*.

Page 185—2d Topical Index Heading: *Contract*: Construction and Operation : Changes and Extras should appear as *Contracts*.

Page 199—Footnote 53, *Robert E. Lee and Company, Inc., Crosland-Roof Co. v. United States*, 164 Ct. Cl. 365, 271-72, should appear as 365, 371-72.

Page 223—4th Paragraph—Line 8 position does *no* evince should appear as position does *not* evince.

Page 289—First Syllabus—Line 2, *40 Stat. 383* (1935), and Paragraph 3, Line 2, should appear as *49 Stat. 383* (1935).

Page 303—Paragraph 3—Line 2 attempting to obtain for sand should read: attempting to obtain *a permit* for sand.

Page 312—Syllabus—Line 1, A prudent man could not *reasonable* should appear as *reasonably*.

Page 316—Paragraph 2, Line 4 *Castle v. Womble*, 19 L.D. 445, should appear as 455.

Page 320—Footnote 4—Line 4, 1950, 64 Sat. 798, should appear as 1950, 64 Stat. 798.

Page 332—Footnote 2—Line 2, CFR 3217.3 should appear as CFR 3127.3.

Page 445—Topical Index Heading should read: Contracts: Disputes and Remedies: *Damages*: Liquidated Damages.

Page 459—Mining Claims: Discovery—Fourth Syllabus should appear as 4 instead of 1.

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Andrew J. Kalerak, Jr. et al. v. Stewart L. Udall, Civil Action No. A-35-66, D. Alas. Judgment for Plaintiff October 20, 1966. Appeal filed November 15, 1966, 9th Cir. Reversed 396 F. 2d 746 (1968).

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Allied Contractors, Inc. v. United States, Court of Claims No. 163-63. Stipulation of settlement filed March 3, 1967. Compromised.

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Autrice C. Copeland, 69 I.D. 1 (1962)

Autrice Copeland Freeman v. Stewart L. Udall, Civil Action No. 1578. D. Ariz. Judgment for Defendant, September 3, 1963 (opinion). Affirmed, 336 F. 2d 706 (1964). No petition.

Max Barash, The Texas Company, 63 I.D. 51 (1956)

Max Barash v. Douglas McKay, Civil Action No. 939-56. Judgment for Defendant, June 13, 1967; reversed and remanded, 256 F. 2d 714 (1958);

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judgment for plaintiff, December 18, 1958. Supplemental Decision, 66 I.D. 11 (1959). No petition.

Barnard-Curtiss Co., 64 I.D. 312 (1957), 65 I.D. 49 (1958)

Barnard-Curtiss Co. v. United States, Court of Claims No. 491-59. Judgment for Plaintiff, 301 F. 2d 909 (1962).

Eugenia Bate, 69 I.D. 230 (1962)

Katherine S. Foster & Brook H. Duncan, II v. Stewart L. Udall, Civil Action No. 5258, D. N. M. Judgment for Defendant, January 8, 1964. Reversed, 335 F. 2d 828 (1964). No petition.

Sam Bergesen, 62 I.D. 295. Reconsideration denied, IBCA-11 (December 19, 1955)

Sam Bergesen v. United States, Civil Action No. 2044, D. Wash. Complaint dismissed March 11, 1958. No appeal.

BLM-A-045569, 70 I.D. 231 (1963)

New York State Natural Gas Corp. v. Stewart L. Udall, Civil Action No. 2109-63.

Consolidated Gas Supply Corp. v. Stewart L. Udall, et al., Civil Action No. 2109-63. Judgment for Defendant, September 20, 1965. Affirmed, April 28, 1966. No petition.

Melvin A. Brown, 69 I.D. 131 (1962)

Melvin A. Brown v. Stewart L. Udall, Civil Action No. 3352-62. Judgment for Defendant, September 17, 1963. Judgment reversed, 335 F. 2d 706 (1964). No petition.

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R. C. Buch v. Stewart L. Udall, Civil Action No. 68-1358-PH, C.D. Cal. Suit pending.

The California Company, 66 I.D. 54 (1959)

The California Company v. Stewart L. Udall, Civil Action No. 980-59. Judgment for Defendant, October 24, 1960 (opinion). Affirmed, 296 F. 2d 384 (1961).

In the Matter of Cameron Parish, Louisiana Cameron Parish Police Jury and Cameron Parish School Board, June 3, 1968, approved by Secretary July 5, 1968, 75 I.D. 289.

Cameron Parish Police Jury v. Stewart L. Udall et al., Civil Action No. 14, 206, W.D. La. Suit pending.

Carson Construction Co., 62 I.D. 422 (1955)

Carson Construction Co. v. United States, Court of Claims No. 487-59. Judgment for Plaintiff, December 14, 1961. No appeal.

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Chemi-Cote Perlite Corp. v. Arthur C. W. Bowen, 72 I.D. 403 (1965)

Bowen v. Chemi-Cote Perlite, Arizona Court of Appeals, Div. Two, Affirmed decision of lower court which found against this Department, 423 P. 2d 104 (1967). Supreme Court of Arizona Reversed, Motion for Rehearing denied, November 21, 1967. 432 P. 2d 435 (1967).

Mrs. Hannah Cohen, 70 I.D. 188 (1963)

Hannah and Abram Cohen v. United States, Civil Action No. 3158, D. R.I. Compromised.

Barney R. Colson, 70 I.D. 409 (1963)

Barney R. Colson et al. v. Stewart L. Udall, Civil Action No. 63-26-Civ.-Oc. M.D. Fla. Suit pending. Dismissed with prejudice, 278 F. Supp. 826 (1968). Appeal docketed.

Columbian Carbon Company, Merwin E. Liss, 63 I.D. 166 (1956)

Merwin E. Liss v. Fred A. Seaton, Civil Action No. 3233-56. Judgment for Defendant, January 9, 1958. Appeal dismissed for want of prosecution, September 18, 1958, D.C. Cir. No. 14,647.

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Continental Oil Co. v. Stewart L. Udall et al., Civil Action No. 366-62. Judgment for Defendant, April 29, 1966. Affirmed, February 10, 1967, Cert. den., 389 U.S. 839 (1967).

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See *Leslie N. Baker et al.*

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John C. deArmas, Jr., P. A. McKenna, 63 I.D. 82 (1956)

Patrick A. McKenna v. Clarence A. Davis, Civil Action No. 2125-56. Judgment for Defendant, June 20, 1967; aff'd, 259 F. 2d 780 (1958); cert. den., 358 U.S. 385 (1958).

The Dredge Corporation, 64 I.D. 368 (1957), 65 I.D. 336 (1958)

The Dredge Corporation v. J. Russell Penny, Civil Action No. 475, D. Nev. Judgment for Defendant, September 9, 1964. Aff'd, 362 F. 2d 889 (9th Cir. 1966). No petition. See also *Dredge Co. v. Husite Co.*, 369 P. 2d 676 (1962). Cert. den., 371 U.S. 821 (1962).

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Franco Western Oil Company et al., 65 I.D. 316, 427 (1958)

Raymond J. Hansen v. Fred A. Seaton, Civil Action No. 2810-59. Judgment for Plaintiff, August 2, 1960 (opinion). No appeal taken.

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Gabbs Exploration Co., 67 I.D. 160 (1960)

Gabbs Exploration Company v. Stewart L. Udall, Civil Action No. 219-61. Judgment for Defendant, December 1, 1961. Affirmed, 315 F. 2d 37 (1963), *cert. den.*, 375 U.S. 822 (1963).

Stanley Garthofner, Duval Brothers, 67 I.D. 4 (1960)

Stanley Garthofner v. Stewart L. Udall, Civil Action No. 4194-60. Judgment for Plaintiff, November 27, 1961. No appeal.

General Excavating Co., 67 I.D. 344 (1960)

General Excavating Co. v. United States, Court of Claims No. 170-62. Dismissed with prejudice December 16, 1963.

Nelson A. Gerttula, 64 I.D. 225 (1957)

Nelson A. Gerttula v. Stewart L. Udall, Civil Action No. 685-60. Judgment for Defendant, June 20, 1961; motion for rehearing denied, August 3, 1961. Affirmed, 309 F. 2d 653 (1962). No petition.

Charles B. Gonsales et al., Western Oil Fields, Inc. et al., 69 I.D. 236 (1962)

Pan American Petroleum Corp. & Charles B. Gonsales v. Stewart L. Udall, Civil Action No. 5246, D. N.M. Judgment for Defendant, June 4, 1964. Affirmed, 352 F. 2d 32 (1965); no petition.

Gulf Oil Corporation, 69 I.D. 30 (1962)

Southwestern Petroleum Corp. v. Stewart L. Udall, Civil Action No. 2209-62. Judgment for Defendant, October 19, 1962. Affirmed, 325 F. 2d 633 (1963). No petition.

Guthrie Electrical Construction, 62 I.D. 280 (1955), IBCA-22 (Supp.) (March 30, 1956)

Guthrie Electrical Construction Co. v. United States, Court of Claims No. 129-58. Stipulation of settlement filed September 11, 1958. Compromise offer accepted and case closed October 10, 1958.

L. H. Hagood et al., 65 I.D. 405 (1958)

Edwin Still et al. v. United States, Civil Action No. 7897, D. Colo. Compromise accepted.

Raymond J. Hansen et al., 67 I.D. 362 (1960)

Raymond J. Hansen et al. v. Stewart L. Udall, Civil Action No. 3902-60. Judgment for Defendant, June 23, 1961. Affirmed, 304 F. 2d 944 (1962). Cert. den., 371 U.S. 901 (1962).

Robert Schulein v. Stewart L. Udall, Civil Action No. 4131-60. Judgment for Defendant, June 23, 1961. Affirmed, 304 F. 2d 944 (1962). No petition.

Kenneth Holt, an individual, etc., 68 I.D. 148 (1961)

Kenneth Holt, etc. v. United States, Court of Claims No. 162-62. Stipulated judgment, July 2, 1965.

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Hope Natural Gas Co. v. Stewart L. Udall, Civil Action No. 2132-63.

Consolidated Gas Supply Corp. v. Stewart L. Udall, et al., Civil Action No. 2109-63. Judgment for Defendant September 20, 1965. Per curiam decision, April 28, 1966. No petition.

Boyd L. Hulse v. William H. Griggs, 67 I.D. 212 (1960)

William H. Griggs v. Michael T. Solan, Civil Action No. 3741, D. Idaho. Stipulation for dismissal filed May 15, 1962.

Idaho Desert Land Entries—Indian Hill Group, 72 I.D. 156 (1965)

Wallace Reed et al. v. U.S. Department of the Interior et al., Civil Action No. 1-65-86, D. Idaho. Order denying preliminary injunction, September 3, 1965. Appeal, 9th Cir., 20350, September 20, 1965. Dismissed, November 10, 1965. Suit pending.

Interpretation of the Submerged Lands Act, 71 I.D. 20 (1964)

Floyd A. Wallis v. Stewart L. Udall, Civil Action No. 3089-63. Suit pending. Dismissed with prejudice, March 27, 1968.

J. A. Terteling & Sons, Inc., 64 I.D. 466 (1957)

J. A. Terteling & Sons, Inc. v. U.S., Ct. Cl. No. 114-59. Judgment for Defendant, 390 F. 2d 926 (1968).

J. D. Armstrong Co., Inc., 63 I.D. 289 (1956)

J. D. Armstrong, Inc. v. United States, Court of Claims No. 490-56. Plaintiff's motion to dismiss petition allowed. June 26, 1959.

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Earl M. Lutzenhiser and Leo J. Kottas v. Stewart L. Udall et al., Civil Action No. 1371, D. Mont. Suit pending. Judgment for Defendant June 7, 1968.Appealed docketed.

Max L. Krueger, Vaughan B. Connelly, 65 I.D. 186 (1958)

Max Krueger v. Fred A. Seaton, Civil Action No. 3106-58. Complaint dismissed by Plaintiff, June 22, 1959.

W. Dalton La Rue, Sr., 69 I.D. 120 (1962)

W. Dalton La Rue, Sr. v. Stewart L. Udall, Civil Action No. 2784-62. Judgment for Defendant, March 6, 1963. Affirmed, 324 F. 2d 428 (1963). Cert. den., 376 U.S. 907 (1964).

L. B. Samford, Inc., 74 I.D. 86 (1967)

L. B. Samford, Inc. v. United States, Court of Claims No. 393-67. Suit pending.

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

Bernard E. Darling v. Stewart L. Udall, Civil Action No. 474-64. Judgment for Defendant, October 5, 1964. Appeal voluntarily dismissed, March 26, 1965.

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

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Hope Natural Gas Company v. Stewart L. Udall, Civil Action No. 2132-63.

Consolidated Gas Supply Corp. v. Stewart L. Udall et al., Civil Action No. 2109-63. Judgment for Defendant, September 20, 1965. Affirmed, April 28, 1966. No petition.

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

Mrs. Elgin A. McKenna as Executrix of the Estate of Patrick A. McKenna, Deceased v. Udall, Civil Action No. 2001-67. Judgment for Defendant, February 14, 1968. Appeal docketed.

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

A. G. McKinnon v. United States, Civil No. 9833, D. Ore. Judgment for Plaintiff, December 12, 1959. (opinion); reversed, 289 F. 2d 908 (9th Cir. 1961).

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Wade McNeil v. Albert K. Leonard et al., Civil Action No. 2226, D. Mont. Dismissed, November 24, 1961 (opinion). Order, April 16, 1962.

Wade McNeil v. Stewart L. Udall, Civil Action No. 678-62. Judgment for Defendant, December 13, 1963 (opinión). Affirmed, 340 F. 2d 801 (1964). *Cert. den.*, 381 U.S. 904 (1965).

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

Salvatore Megna, Guardian etc. v. Fred A. Seaton, Civil Action No. 468-58. Judgment for Plaintiff, November 16, 1959; motion for reconsideration denied, December 2, 1959. No appeal.

Philip T. Garigan v. Stewart L. Udall, Civil Action No. 1577 Tus., D. Ariz. Preliminary injunction against defendant, July 27, 1966. Supplemental decision rendered September 7, 1966. Judgment for Plaintiff, May 16, 1967. No appeal.

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

Louise Cuccia and Shell Oil Company v. Stewart L. Udall, Civil Action No. 562-60.

Judgment for Defendant, June 27, 1961; no appeal taken.

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Duncan Miller v. Stewart L. Udall, Civil Action No. 931-63. Dismissed for lack of prosecution, April 21, 1966. No appeal.

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

Samuel W. McIntosh v. Stewart L. Udall, Civil Action No. 1522-64. Judgment for Defendant, June 29, 1965. No appeal.

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

Duncan Miller v. Udall, Civil Action No. C-167-66, D. Utah. Dismissed with prejudice, April 17, 1967. No appeal.

Bobby Lee Moore et al., 72 I.D. 505 (1965), *Anguita L. Kluenter et al.*, A-30483 (November 18, 1965)

Gary Carson Lewis, etc., et al., v. General Services Administration et al., Civil Action No. 3253 S.D. Cal. Judgment for Defendant, April 12, 1965. Affirmed, 377 F. 2d 499 (1967). No petition.

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Henry S. Morgan v. Stewart L. Udall, Civil Action No. 3248-59. Judgment for Defendant, February 20, 1961 (opinion). Affirmed, 306 F. 2d 799 (1962); cert. den., 371 U.S. 941 (1962).

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

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

Richard L. Oelschlaeger v. Stewart L. Udall, Civil Action No. 4181-60. Dismissed, November 15, 1963. Case reinstated, February 19, 1964. Remanded, April 4, 1967. Appeal taken. Reversed and remanded with directions to enter judgment for Appellant. 389 F. 2d 974 (1968). Cert. den., 392 U.S. 909 (1968).

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Superior Oil Co. v. Robert L. Bennett. Civil Action No. A-17-63, D. Alas. Dismissed, April 23, 1963.

Native Village of Tyonek v. Robert L. Bennett, Civil Action No. A-15-63, D. Alas. Dismissed, October 11, 1963.

Mrs. Louise A. Pease v. Stewart L. Udall, Civil Action No. A-20-63, D. Alas. Dismissed, October 29, 1963. (Oral opinion). Affirmed, 332 F. 2d 62 (1964). No petition.

George L. Gucker v. Stewart L. Udall, Civil Action No. A-39-63, D. Alas. Dismissed without prejudice, March 2, 1964. No appeal.

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

Paul Jarvis, Inc. v. United States, Court of Claims No. 40-58. Stipulated judgment for Plaintiff, December 19, 1958.

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

Peter Kiewit Sons' Co. v. U.S. Ct. Cl. No. 129-66. Judgment for Plaintiff, May 24, 1968.

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

Duncan Miller v. Stewart L. Udall, Civil Action No. 1351-62. Judgment for Defendant, August 2, 1962. Affirmed, 317 F. 2d 573 (1963). No petition.

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

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Richfield Oil Corporation v. Fred A. Seaton, Civil Action No. 3820-55. Dismissed without prejudice, March 6, 1958. No appeal.

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

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

Seal and Company, Inc. v. U.S., Court of Claims No. 274-62. Judgment for Plaintiff, January 31, 1964. No appeal.

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

Shell Oil Company v. Udall, Civil No. 216-67. Stipulated dismissal August 19, 1968.

Sinclair Oil and Gas Company, 75 I.D. 155 (1968)

Sinclair Oil and Gas Company v. Stewart L. Udall, Secretary of the Interior et al., Civil Action No. 5277, D. Wyo. Suit pending.

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

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

Southwestern Petroleum Corp. v. Stewart L. Udall, Civil Action No. 5773, D. N.M. Judgment for Defendant, March 8, 1965. Affirmed, 361 F. 2d 650 (1966). No petition.

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

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

James K. Tallman et al. v. Stewart L. Udall, Civil Action No. 1852-62. Judgment for Defendant, November 1, 1962 (opinion). Reversed, 324 F. 2d 411 (1963). Petition for rehearing denied, October 16, 1963. Cert. granted, 376 U.S. 961 (1964). Dist. Ct. Affirmed, 380 U.S. 1 (1965). Rehearing denied, 380 U.S. 989 (1965).

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Texaco, Inc., a corp. v. Secretary of the Interior, Civil Action No. 446-68.
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Texas Construction Co., 64 I.D. 97 (1957), Reconsideration denied,
IBCA-73 (June 18, 1957)

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(1957)

Joe Hayes v. Fred A. Seaton, Secretary of the Interior, Civil Action No. 859-581. On September 18, 1958, the court entered an order granting Defendant's motion for judgment on the pleadings or for summary judgment. The Plaintiffs appealed and on July 9, 1959, the decision of the District Court was affirmed, and on October 5, 1959, petition for rehearing en banc was denied, 270 F. 2d 319. A petition for a writ of certiorari was filed January 28, 1960, in the Supreme Court. Petition denied, 364 U.S. 814 (1960), rehearing denied, 364 U.S. 906 (1960).

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

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

See also:

Thor-Westcliffe Development, Inc. v. Stewart L. Udall et al., Civil Action No. 2406-61. Judgment for Defendant, March 22, 1962. Affirmed, 314 F. 2d 257 (1963). Cert. den., 373 U.S. 951 (1963).

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

Bert F. Duesing v. Stewart L. Udall, Civil Action No. 290-62. Judgment for Defendant, July 17, 1962 (oral opinion). Affirmed, 350 F. 2d 748 (1965). Petition for rehearing en banc denied. Cert. den., 383 U.S. 912 (1966).

Atwood et al. v. Stewart L. Udall, Civil Actions 293-62—299-62, incl. Judgment for Defendant, August 2, 1962. Affirmed, 350 F. 2d 748 (1965). No petition.

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

The Superior Oil Co. et al. v. Stewart L. Udall, Civil Action No. 1521-68. Judgment for Plaintiff, July 29, 1968, modified, July 31, 1968. Appeal docketed August 2, 1968.

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

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Equity Oil Company v. Stewart L. Udall, Civil Action No. 9426, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

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

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

The Oil Shale Corporation et al. v. Secretary of the Interior, Civil Action No. 8680, D. Colo. Judgment for Plaintiff, 261 F. Supp. 954 (1966). Appeal taken.

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

Joseph B. Umpleby et al. v. Stewart L. Udall, Civil Action No. 8685, D. Colo. Judgment for Plaintiff, 261 F. Supp. 954 (1966). Appeal taken.

Union Oil Company of California, a Corp. v. Stewart L. Udall, Civil Action No. 9461, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

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

Union Oil Company of California v. Stewart L. Udall, Civil Action No. 2595-64. Judgment for Defendant, December 27, 1965. No appeal.

Union Pacific Railroad Company, 72 I.D. 76 (1965)

The State of Wyoming and Gulf Oil Corp. v. Stewart L. Udall, etc., Civil Action No. 4913, D. Wyo. Dismissed with prejudice, 255 F. Supp. 481 (1966). Affirmed, 379 F. 2d 635 (1967). Cert. den., 389 U.S. 905 (1967).

United States v. Alonzo A. Adams et al., 64 I.D. 221 (1957), A-27364 (July 1, 1957)

Alonzo A. Adams et al. v. Paul B. Witmer et al., Civil Action No. 1222-57-Y, S.D. Cal. Complaint dismissed, November 27, 1957 (opinion); reversed and remanded, 271 F. 2d 29 (1958); on rehearing, appeal dismissed as to Witmer; petition for rehearing by Berriman denied, 271 F. 2d 37 (1959).

United States v. Alonzo Adams, Civil Action No. 187-60-WM, S.D. Cal. Judgment for Plaintiff, January 29, 1962 (opinion). Judgment modified, 318 F. 2d 861 (1963). No petition.

United States v. Ford M. Converse, 72 I.D. 141 (1965)

Ford M. Converse v. Stewart Udall, Civil Action No. 65-581, D. Ore. Judgment for Defendant, 262 F. Supp. 583 (1966). Affirmed, 399 F. 2d 615 (1968).

United States v. Alvis F. Denison et al., 71 I.D. 144 (1964)

Marie W. Denison, Individually and as Executrix of the Estate of Alvis F. Denison, Deceased v. Stewart L. Udall, Civil Action No. 963, D. Ariz. Remanded, 248 F. Supp. 942 (1965).

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Reid Smith v. Stewart L. Udall etc., Civil Action No. 1053, D. Ariz. Suit pending.

United States v. Everett Foster et al., 65 I.D. 1 (1958)

Everett Foster et al. v. Fred A. Seaton, Civil Action No. 344-58. Judgment for Defendants, December 5, 1958 (opinion); affirmed, 271 F. 2d 836 (1959). No petition.

United States v. Henault Mining Co., 73 I.D. 184 (1966)

Henault Mining Co. v. Harold Tysk et al., Civil Action No. 634, D. Mont. Judgment for Plaintiff, 271 F. Supp. 474 (1967). Appeal taken, October 23, 1967.

United States v. Charles H. Henrikson et al., 70 I.D. 212 (1968)

Charles H. Henrikson et al. v. Stewart L. Udall et al., Civil Action No. 41749, N.D. Cal. Judgment for Defendant, May 28, 1964. Affirmed, 350 F. 2d 949 (1965); rehearing den. October 28, 1965. Cert. den., 389 U.S. 940 (1966).

United States v. Independent Quick Silver Co., 72 I.D. 367 (1965)

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

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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

APPEAL OF COMPEC (A JOINT VENTURE OF COMMONWEALTH ELECTRIC CO. AND POWER CITY ELECTRIC, INC.)

IBCA-573-6-66 Decided January 4, 1968

Contracts: Construction and Operation: Drawings and Specifications—

**Contracts: Construction and Operation: Actions of Parties—Contracts:
Construction and Operation: Changes and Extras**

Where under a contract for the erection of transmission line towers of a new type the specifications required that the guy lines supporting the towers be drawn "snug but not excessively tight" and that thereafter there should be "no visible deformation of the tower," and where early in contract performance the parties by their conduct evidenced agreement that bringing the guy lines to a tension of 7,000 pounds would satisfy the requirements imposed by the general language of the specifications but subsequently the Government increased the tension requirements to 12,000 pounds, the Board finds that the imposition of the latter requirement constituted a constructive change and, pursuant to a stipulation of the parties, remanded the case to the contracting officer for determination of the amount of the equitable adjustment.

BOARD OF CONTRACT APPEALS

The contractor has timely appealed the contracting officer's denial¹ of its claim for additional compensation for bringing the guy lines supporting the type 28Q towers covered by the instant contract to a specific tension of 12,000 pounds. By stipulation between the parties, the issues presently before the Board relate only to the question of liability.

The contract was awarded on June 29, 1965, having been prepared on the standard forms for construction contracts including the General Provisions of Standard Form 23-A (June 1964 Edition). It covered clearing the right-of-way and construction of the Grizzly-Foster Butte Section of the 500 KV Line No. 1 in Jefferson, Crook, Deschutes and Lake Counties, Oregon, as called for in Schedule I of Invitation No. 92, dated May 3, 1965, and Addenda 1, 2 and 3 thereto. The contract was on a lump sum and unit price basis with an estimated contract price of \$2,972,310. Included among the items of work was a

¹ Findings of Fact of April 21, 1966, Exhibit No. 8 of appeal file. Except as otherwise specifically noted, all references to exhibits are to the appeal file.

requirement for the erection of 273 type 28Q towers. Notice to proceed was issued on July 9, 1965.

At the time the initial 19 towers of the 28Q type were erected, there was no requirement that the guy lines supporting the towers be installed to any specific tension. It appears that prior to the time the contractor commenced erecting towers the Government knew that it would be imposing a specific tension requirement and that, insofar as the Government was concerned, the only question open was the amount of tension to be required.² There is no indication in the record, however, that the contractor or other prospective bidders were aware of the Government's intentions in this respect. It is undisputed that a short time after erection of the towers commenced the Government inspector was provided with a tensiometer and the guy lines on 19 towers erected thereafter were required to have a tension of 7,000 pounds. Some time prior to November 15, 1965, the Government made an engineering study and concluded that the guy lines for the 28Q type towers should be installed at a tension of 12,000 pounds. Within a relatively short time the contractor was advised of the results of the study and, subsequently, a directive was issued requiring the contractor to meet a 12,000-pound tension requirement on all of the guy lines for the 28Q type towers thereafter installed. In addition, the contractor was required to bring the guy lines on the initial 19 towers erected to a tension of 12,000 pounds. It also appears that additional work was done on at least some of the towers for which the guy lines had been tensioned to 7,000 pounds so as to satisfy the new tension requirement of 12,000 pounds. From the exchanges between counsel at the hearing, it is understood that the Government has paid or agreed to pay the contractor additional compensation for as many of the first 38 towers erected as were subsequently brought to a tension of 12,000 pounds. This appeal concerns the remaining 235 towers for which the contractor is claiming an equitable adjustment of \$15 per guy line or \$60 per tower.

The principal question presented is the proper interpretation to be placed upon the section of the contract specifications quoted below:

8-108. *GUY INSTALLATION.* Guys shall initially be cut to a length of a little more than will be required, and attached to the tower before the tower is erected. Guys shall then be cut to such length that not more than one-half the available take-up on the turnbuckle is used. Guys shall be pulled up snug but not excessively tight. After guys are properly installed there shall be no visible deforma-

² The following colloquy took place between the Hearing Officer and the Government inspector: "[Q] Mr. Toliver, do you know why you didn't have a tensiometer for the first 19 towers? * * * [A] It was—Design brought it out to us and Bonneville personnel tensioned the first tower that they had set and the man from Design took the machine back into town to recheck calibration and everything, to make sure that it was giving us what we were getting in the field; and it was tied up, I guess, in the laboratory or in Portland or someplace until it got back on the job. [Q] Did you know when you first went on this job that you would be using tensiometers to test tension on the towers? [A] You mean do I know it when they started setting towers? The Board: Yes, [A] I knew it, yes." (Tr. 85, 86)

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tion of the tower. Cross-guy clamps shall be installed on the guys in the manner shown on the drawings after all guys on a tower have been installed.³

Briefly stated the appellant's contentions are: (i) the general nature of the language employed⁴ and the visual test suggested in the clause for determining proper guy installation⁵ preclude the Government from requiring the guy lines to be installed to a specific tension as part of the original contractual obligation; and (ii) the imposition of such a requirement after the award of contract and subsequent to the commencement of performance constituted a constructive change entitling the contractor to additional compensation to the extent that its costs were increased thereby. For its part the Government contends that under the language of the specification provision it could properly require that the guy lines be installed to meet a specific tension so long as the tension specified was reasonably related to a demonstrated Government need.⁶ The Government also denies that the appellant would be entitled to any additional compensation even if it were to be assumed that a constructive change did occur. This is because, in the Government's view, the requirement that the guy lines be installed at a tension of 12,000 pounds did not significantly or measurably increase the appellant's costs.⁷

The sweeping assertions of the parties concerning the obligation imposed by the contract in the respects noted must be viewed, however, in the light of their conduct during the early months of contract performance. When so viewed, we find that we are unable to accept the contentions of either party at face value.

The appellant's position gives no effect whatever to the fact that the general language in which the contractual obligation is couched clearly connotes some leeway for the exercise of discretion⁸ on the part

³ Contract, Part VIII, ERECTION OF STEEL TOWERS, pp. 75, 76.

⁴ " * * * Snug is a very general term and would not require the use of special gauging equipment, or pulling guys to specific tensions." (Notice of Appeal, p. 1; Exhibit No. 9.)

⁵ " * * * The specifications prescribed only a simple, visual standard : that the guys be snug and the tower be without visible deformation." (Appellant's Post-Hearing Brief, p. 8.)

⁶ " * * * The type 28Q tower was a novel and unusual tower first used by Bonneville Power Administration on this contract (Tr. 14). BPA had no guyed towers similar to this type in general use nor had it previously utilized this design (Tr. 15). In those guyed towers previously used on transmission lines erection of the tower to plumb and stringing of the conductor automatically resulted in proper tension on the supporting guys (Tr. 15, 26, 30, 33). The tensions specified by BPA (12,000 pounds) are comparable in terms of ultimate tensile strength with those established for other guyed towers (Tr. 18, 21). Introduction of tension of this magnitude was not unreasonable, but was in fact necessary to maintain these towers in plumb when loaded." (Tr. 30) (Post-Hearing Brief of the Government, pp. 3, 4.)

⁷ Statement of Government's Position, pp. 4, 5.

⁸ See *Cameo Curtains, Inc.*, ASBCA No. 3374 (December 30, 1958), 58-2 BCA par. 2051, in which the Board stated: " * * * It is apparent that the evaluation of particular irregularities against the contract requirement of a 'comparatively uniform surface free from excessive irregularities' * * * and the classification of defects as major and minor required the exercise of individual judgment. This latter circumstance, however, in our opinion, does not entitle the contractor to additional compensation, if, indeed, relief is claimed for it. * * * "

of the Government personnel charged with responsibility for determining compliance with the specification requirements. In proposing that the eventual Government order for 12,000 pounds of tension on the guys be accepted as the sole test for determining the reasonableness of its demands,⁹ however, the Government appears to have overlooked or chosen to ignore the fact that it had previously indicated that a tension of 7,000 pounds would satisfy its needs and directed the contractor to proceed accordingly. The need of the Government for a particular level of performance is not the proper test for determining whether the requirements of a Government drafted specification have been met in any event,¹⁰ unless the language of the specification can be reasonably interpreted as setting forth those needs either expressly or by necessary implication. This is particularly true where, as here, there has been no showing that the contractor is more knowledgeable in the area indicated than the Government personnel concerned.

It has been stated—and we think rightly so—that the reach of general language in a Government specification must be determined perforce by resort to the test of what is reasonable.¹¹ We need not embark upon such a quest in this case, however, for the parties themselves by their conduct antedating the dispute¹² have construed the contract provision in question as satisfied by the guy lines for the type 28Q tower being brought to a tension of 7,000 pounds.

While the appellant has denied that it ever agreed that tensioning of guys to 7,000 pounds was covered by the specifications¹³ and while

⁹"In requiring the contractor to tighten the guy lines to 12,000 pounds BPA was acting within the specification quoted above by insisting on the degree of snugness which it felt appropriate from an engineering standpoint to achieve what was required by the specifications from the outset. * * * All that was required of the contractor was that he obtain a degree of snugness satisfactory to BPA which has been determined to be 12,000 pounds. * * *" (Statement of Government's Position, pp. 3, 4.)

¹⁰B. H. Tanner, ASBCA No. 4917 (December 22, 1958) 58-2 BCA par. 2046, ("* * * On the other hand when, as here, the Government could have been specific as to the tests to be met but instead used such a general contract description, there are clearly limits to the degree of resistance that the Government can insist on. And the test is what the contract requires and not what the buyer needs since a buyer can in all good faith understate, or for that matter overstate, his needs in the contract wording or the needs may even change after the contract is awarded.")

¹¹B. H. Tanner, ASBCA No. 4917, note 10, *supra*. ("Appellant * * * points to the fact that * * * the contract does not set forth the tests that are to be met; and to the fact that the contract does not say to what extent the tile is to be resistant to water, grease, oil, mineral spirits, etc. This is, of course, the crux of the case for in the absence of definite tests and requirements we can but use the inexact standard of reasonableness.")

¹²It has been repeatedly held that the conduct of the parties under a contract is an important aid in interpreting it. See, for example, *Universal Match Corporation v. United States*, 161 Ct. Cl. 418 (1963) and authorities there cited. For a Board case emphasizing the importance to be ascribed to conduct in interpreting contractual provisions, see *General Electric Company*, IBCA-451-8-64 (April 13, 1966), 73 I.D. 95, 66-1 BCA par. 5507.

¹³See Contractors' Reply to Statement of Government's Position. There is no evidence to indicate that the contractor protested the requirement that the guy lines be tensioned to 7,000 pounds, however, as it clearly did when the 12,000-pound tensioning requirement was imposed. We think it is a fair inference from the appeal record that the contractor accepted the 7,000-pound tension requirement as within the area of the Government's discretion in interpreting the specifications. The memoranda attached to the Contractor's Reply to Statement of Government's Position are regarded as support for this view.

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the Government seeks to treat the imposition of the 7,000-pound tensioning requirement as purely of a tentative nature,¹⁴ we find: (i) at the time the 7,000-pound test was imposed the Government considered that it was establishing an objective standard for determining whether the requirements of the general language of the specifications had been met; and (ii) without a written or even an oral protest the contractor complied with the Government's demand that the 7,000-pound tension requirement be met as part of the contractual obligation assumed.¹⁵ We find, therefore that the subsequent increase in the tensioning requirement for the guy lines supporting the type 28Q towers from 7,000 to 12,000 pounds constituted a constructive change.¹⁶

Remaining for consideration is the Government's contention that the contractor's costs were not significantly or measurably increased as a result of the imposition of the 12,000-pound tensioning requirement. Acceptance of the Government's position would entail rejecting the testimony offered by the appellant at the hearing and ignoring the substantial variations in estimates submitted by Government personnel as to the amount of work involved in complying with the Government's directive. This we are not prepared to do.

Appellant's witness Pace testified that in his capacity of project superintendent for the appellant he was personally present during the erection of the type 28Q towers. It was his testimony that simply drawing the guy lines snug (i.e., before the imposition of a specific tension requirement) could be accomplished by the use of two men on the bar for the turnbuckle; that achieving a tension of 7,000 pounds on the guy lines required the use of three or four men on the bar; and that after the Government increased the tension requirement to 12,000 pounds, it was necessary to use four men on the bar for the turnbuckle (Tr. 39-41). Mr. Pace also testified that from the time all slackness has been taken out of the guys until a 12,000-pound tension was achieved on the guy lines, 5 to 7 turns on the turnbuckle were required depending on the length of the guys; that increasing the tension to 12,000 pounds affected the plumb of the tower; that in most cases it was necessary to adjust all four guy wires in order to maintain the 12,000-pound tension on the guys and keep the tower plumb; that it was sometimes necessary to loosen particular guys to eliminate a portion of the tension that had been achieved; and that bringing the guys supporting the towers to a tension of 12,000 pounds required extra

¹⁴ Note 9, *supra*.

¹⁵ The contractor's acceptance may have been induced, at least in part, by the fact that (according to the uncontradicted testimony of the Government inspector) bringing some of the guys to a position of snug without visible deformation of the tower resulted in their being under a tension of 7,000 pounds or higher (Tr. 80-83).

¹⁶ *Cameo Curtains, Inc.*, ASBCA No. 3574, note 8, *supra*; *B. H. Tanner*, ASBCA No. 4917, note 10, *supra*.

crew time of 20 minutes per tower over the time required to erect a tower so that it was plumb, in alignment and showing no visible sign of deformation but to no specific tension (Tr. 41-44; 50-51).

There were substantial differences between the testimony of Mr. Pace and that offered by Government witness Toliver. The latter testified that in his capacity of inspector he had witnessed the erection of some 80 or 90 type 28Q towers under the contract and that he had observed the contractor's operations both before and after the Government required the guy lines for such towers to meet specific tension requirements. Mr. Toliver also testified that there was no increase in the number of men involved in, or the equipment required for, the erection of the towers after the imposition of the 12,000-pound tension requirement; that tensioning the guys to 12,000 pounds required adjustment of all four guys on from 40 to 50 percent of the towers at the outside; and that increasing the tension on the guys from 6,000 or 7,000 pounds to 12,000 pounds would require 4 or 5 minutes of time for 3 or 4 men per tower (Tr. 75-81).

The apparent differences in the testimony offered by Mr. Pace and the Government inspector are accounted for in part by the fact that the two men appear to have been measuring the amount of work involved from a different starting point. Mr. Toliver's estimate of 4 to 5 minutes extra work per tower was the time required to bring the guy lines to a tension of 12,000 pounds measured from the time the guys had achieved a tension of 7,000 pounds (Tr. 84, 85). Mr. Pace's estimate of 20 minutes per tower covered, however, the time required to achieve a tension of 12,000 pounds on the guy lines measured from the time when there was no visible deformation of the guy wires of the tower (Tr. 52, 53).

All of the differences in the testimony of Mr. Pace and Mr. Toliver, however, do not appear to be readily reconcilable. For a number of reasons we consider that Mr. Pace's testimony is more credible. Of prime significance is the fact that Mr. Toliver's estimate of 4 or 5 minutes per tower was based on timing the contractor's operations on only two to three towers on one day,¹⁷ as contrasted with the fact that Mr. Pace's estimate was based upon observations extending over several weeks (Tr. 43). Other factors considered by the Board were (i) the apparent absence of a detailed job diary which could have been used to refresh Mr. Toliver's recollection as to events transpiring many months before;¹⁸ (ii) a contemporaneous record corroborating the significance that Mr. Pace attributed to the increase in the tensioning

¹⁷ Tr. 85.

¹⁸ See *Kean Construction Company, Inc.*, IBCA-501-6-65 (April 4, 1967), on reconsideration, 74 I.D. 106, 67-1 BCA par. 6255, in which a detailed diary maintained by the Government inspector was one of the important factors considered in resolving conflicting testimony.

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requirement to 12,000 pounds;¹⁹ (iii) Mr. Pace's flat assertion that during the course of demonstrating the amount of work involved he informed Mr. Toliver that tensioning the guys to 12,000 pounds was taking 20 minutes per tower and that Mr. Toliver agreed with this estimate;²⁰ and (iv) in testimony given subsequently Mr. Toliver failed to specifically deny or to otherwise allude to Mr. Pace's unqualified assertion.²¹

In denying that the contractor's costs were significantly increased by the 12,000-pound tensioning requirements, the Government appears to attach considerable importance to the fact that imposition of the requirement resulted in no increase in the number of men in the crews involved in the erection of the type 28Q towers, as well as to the fact that no additional equipment was needed.²² The absence of such factors does not mean that additional costs were not, in fact, sustained or that they were not significant. The evidence offered by the appellant refutes any such inference as does at least one of the estimates furnished by the Government personnel concerned.²³

We find, therefore, that the constructive change resulting from the imposition of the 12,000-pound tensioning requirement increased the contractor's cost significantly and that the contractor is entitled to an equitable adjustment in the contract price, pursuant to Clause 3, Changes.²⁴ In accordance with their stipulation, the question of the amount of the equitable adjustment to which the contractor may be entitled is returned to the parties for negotiation. In the event they are unable to reach an agreement, the contracting officer should reduce his

¹⁹ Intercompany memorandum of December 15, 1965 from Verg Pace to E. B. DeFeyter in which the former stated: " * * * The specifications state the guy wires will be 'Snug.' To obtain the required 12,000 lbs; it takes an additional 15 to 20 crew minutes at each tower. The inspector will verify the additional time. Believe we should ask for a change order and submit a price for this added work." (Attachment to Contractor's Reply to Statement of Government's Position.)

²⁰ "[Q] Did you mention to him [Mr. Toliver] that you found that it was taking 20 minutes per tower? [A] Yes. [Q] Did he agree or disagree with that? [A] Well, he agreed." (Tr. 44.)

²¹ The memorandum of December 15, 1965, note 19, *supra*, indicates, however, that what the inspector agreed to was that achieving the 12,000-pound tension was taking an additional 15 to 20 crew minutes at each tower.

²² Post-Hearing Brief of the Government, p. 5.

²³ "The whole process of tensioning takes between five and ten minutes for four men. There may be small delays for the man putting on the guy clamps and removing the tie lines. If we consider one man hour as the time it should cover any possible extra costs for this work" (Government memorandum of February 2, 1966, from Abplanalp to Picchioni, Exhibit No. 3.) The range of this estimate is considerably higher than Mr. Toliver's estimate of "4 or 5 minutes for 3 to 4 men" (Tr. 80, 81) and markedly higher than that reported at page 3 of the Statement of Government's Position: " * * * On an average, only two or three additional turns of the turnbuckle are necessary to increase the tension from 7,000 pounds to 12,000 pounds. The BPA field personnel state that this does not require more than an additional one or two minutes. * * *"

²⁴ *Lincoln Construction Company, IBCA-438-5-64* (November 26, 1965), 72 I.D. 492, 65-2 BCA par. 5234.

decision to writing and furnish the same to the contractor who may again appeal to the Board pursuant to Clause 6, Disputes.

CONCLUSION

The appeal is sustained as to liability and remanded to the contracting officer for the action previously indicated.

WILLIAM F. McGRAW, *Member.*

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

TEXACO, INC.

A-30772 *Decided, January 24, 1968*

Oil and Gas Leases: Generally—Outer Continental Shelf Lands Act: Boundaries—Outer Continental Shelf Lands Act: State Leases: Generally

An application for a permit to drill a well on the outer continental shelf pursuant to a validated State oil and gas lease is properly rejected when it is determined that in validating the lease under section 6 of the Outer Continental Shelf Lands Act the extent of the lease into the Gulf of Mexico was measured from the shore line of an island and the adjacent mainland, and the site of the proposed well is outside that area. The fact that another line had been adopted by the United States in other litigation to establish "the coast line" for purposes of the Submerged Lands Act does not vary the external boundaries of the lease as validated although it may affect the proportions of Federal and State lands included within those boundaries by changing the location of the State boundary, which separates those areas.

APPEAL FROM THE GEOLOGICAL SURVEY

Texaco, Inc., has appealed to the Secretary of the Interior from a decision dated December 19, 1966, of the Director of the Geological Survey which affirmed the denial by the Acting Oil and Gas Supervisor of its application for permission to drill a well in the Tiger Shoal field, South Marsh Island area,¹ on the ground that the location of the proposed well is outside the seaward limits of the oil and gas lease, OCS 0310, under which Texaco seeks the permit.

This lease was originally issued by the State of Louisiana for certain beds and bottoms of water bodies belonging to the State of Louisiana lying, insofar as material here, in the Gulf of Mexico south of the south shore line of Marsh Island.

As a result of an application filed by the appellant under section 6 of the Outer Continental Shelf Lands Act, 43 U.S.C. sec. 1335 (1964),

¹ There seems to be an uncertainty as to whether the proposed well location is in the South Marsh Island prospect or in the Southwest Marsh Island prospect. However, the same considerations apply to both areas so far as the question raised here is concerned.

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the Department found in a decision dated February 12, 1958, that the lands described in the lease included some areas which extended beyond 3 geographical miles from the coast line of Louisiana and held that the lease should be validated as a Federal lease under section 6 for the areas lying between the 3-mile and the 3-marine league (9 geographical miles) lines. *The Texas Company*, 65 I.D. 75.

In a decision dated March 12, 1958, signed by the Director, Bureau of Land Management, and approved by the Solicitor, the South Marsh Island prospect encompassed by the validated lease was described as—
BEGINNING at a point in the South shore line of Marsh Island * * *
THENCE South into the Gulf of Mexico to a point in the Three League Line, said Three League Line being the line every point of which is three marine leagues from the nearest point on the coast line of the State of Louisiana;
THENCE Easterly along said Three League Line * * *
THENCE North through the Gulf of Mexico to the South shore of Marsh Island;
THENCE Westerly following on and along the shore of Marsh Island to the place of beginning.

The question presented in this appeal is whether the seaward reach of the lease was measured from the so-called Chapman Line, which in the area under consideration runs along the south shore of Marsh Island and which south shore in turn is the northern boundary of the lease, or was to be measured from a coast line which was then not yet fixed.

The Chapman Line is a line adopted in 1950 by certain Federal officials to mark the coast line. It was used as the base line from which to measure the seaward extent of several of the zones set up by the United States and Louisiana in an Interim Agreement dated October 12, 1956, for the purpose of administering the disputed area of the continental shelf involved in *United States v. Louisiana*, 363 U.S. 1 (1960), 364 U.S. 502 (1960). These decisions held that Louisiana's boundary within the meaning of the Submerged Lands Act, 43 U.S.C. sec. 1301 *et seq.* (1964), is three geographical miles from the coast line, but left unresolved the location of the "coast line" from which the three miles should be measured. Zone 1 was fixed in the Interim Agreement as the area lying three miles seaward of the Chapman Line.

On December 13, 1965, the court entered a supplemental decree in the proceedings, *United States v. Louisiana*, 382 U.S. 288 (1965) on the motion of the United States which, for the purpose of giving effect to the court's earlier conclusions, held, insofar as material here, that Louisiana was entitled, as against the United States, to all the lands, minerals and other natural resources in the disputed area lying between the seaward boundary of Zone 1 of the Interim Agreement and a line three miles distant from a base line lying farther seaward than the Chapman Line. The decree fixed the location of this base line. In explaining the United States' motion the Solicitor General said: "South

of Marsh Island * * * where the Chapman Line followed the mainland shore, we now extend the coast line to include numerous small islets and low-tide elevations, in accordance with the provisions of the Convention on the Territorial Sea and the Contiguous Zone.”² The effect of the new base line was to move the “coast line” some distance seaward of the Chapman Line and thereby extend the area recognized as belonging to the State.³

The appellant contends that the seaward boundary of lease OCS 0310 moved seaward with the new “coast line.”

The site of the well Texaco intends to drill lies between the seaward line of the lease as based on the Chapman Line, and what would be that line if it were based on the new “coast line.” That is, the proposed well site is more than 3 marine leagues from the Chapman Line but within 3 leagues of the new “coast line.”

The Director of the Geological Survey held that the seaward boundary of lease OCS 0310 had been measured from the shore line of Marsh Island, that the shore line was considered to be the “coast line,” and that the boundary of the lease was not changed either by the Department’s decisions in 1958 (*supra*) or by the Supreme Court decisions in *United States v. Louisiana* (*supra*).

The decision of March 12, 1958, validating the lease stated:

On appeal by the above-named leaseholder to the Secretary of Interior from decisions of the Director or Acting Director of the Bureau of Land Management, dated May 15, August 1, and August 2, 1956, the Solicitor, pursuant to the authority delegated to him by the Secretary (Sec. 23, Order No. 2509, as revised; 17 F.R. 6794), in a decision decided February 12, 1958 determined that the State Lease included lands out to the three-league line from the coast line, as defined in Section 2(c) of the Submerged Lands Act of May 22, 1953 (67 Stat. 29; 43 U.S.C. Sec. 1312), but, so far as lands beyond the three-league line are concerned, he reached a contrary conclusion.

It then went on to identify the leased areas in the language we have quoted above.

The crucial question is whether the reference to coast line in the second paragraph of the description which reads:

THENCE South into the Gulf of Mexico to a point in the Three League Line, said Three League Line being the line every point of which is three marine leagues from the nearest point on the *coast line* of the State of Louisiana; (Italics added)

is to the Chapman Line or to some line to be established later.

The description in the validating decision refers only to the “coast line of the State of Louisiana.” The appellant urges that the “coast

² Memorandum In Support of Motion For Supplemental Decree (No. 1), pp. 18-19.

³ The new “coast line” is not necessarily in its final location. It marks the innermost or most landward location that the United States can assert to be the coast line. Louisiana is contending that the “coast line” is located considerably more seaward. The final location of the “coast line” will be determined in the pending litigation.

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line" means the "coast line" as defined in the Submerged Lands Act (*supra*) and that this line, at its most landward location, has been fixed by the supplemental decree. In support it relies upon the statement in the March 12, 1958, decision that in the February 12, 1958, decision the Department "determined that the State Lease included lands out to the three-league line from the coast line, as defined in section 2(c) of the Submerged Lands Act of May 22, 1953 (67 Stat 29; 43 U.S.C. sec. 1312) * * *."

Section 2(c) provides:

The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters; 43 U.S.C. sec. 1301(c) (1964).

While the March 12, 1958, decision does refer to the definition of "coast line" in the Submerged Lands Act, it does so only in summarizing what the Department had decided in its February 12, 1958, decision. It did not purport to establish a base line of its own but only sought to repeat what the Department had already determined.

To see, then, what the Department had in mind, we must turn to the decision of February 12, 1958. There the Department defined the problem as follows:

Insofar as the leases under consideration are concerned, the primary question simply is—Where is Louisiana's outer boundary in the Gulf of Mexico? A preliminary answer is fairly obvious. Under applicable law, that outer boundary either is 3 miles from the shoreline or it is 3 marine leagues from the shoreline. The secondary question is—Where is the shoreline?

The better authority is that the shoreline is a combination of the low water-mark on the shore and straight lines from outer points on bays. This is consonant with the Submerged Lands Act. The Secretary's authority under specific provision of statutory law to validate leases clearly comprehends leases for those areas between that 3-mile line and the 3-marine-league line drawn from the shoreline which were granted in good faith by the State of Louisiana under the assumption that the resources were its property. In that area it appears clear that The Texas Company is entitled to validation. 65 I.D. at 90.

The narrow question presented then is whether, in validating appellant's lease, the Department fixed the shoreline, or coast line, from which the 3-marine-league line was to be drawn or left it floating, for future determination. As we have noted, the coast line even now has not yet been fixed in its final location (footnote 3, *supra*).

We find no precise language in the decision of February 12, 1958, which answers this question. However, the decision contains no language suggesting that it was validating a lease with an indeterminate seaward boundary. The language was to the contrary. Thus, the decision stated:

* * * it is by no means clear just what areas are physically involved. This difficulty stems from the fact that none of the points of reference has as yet been fixed. There is at this moment pending before the United States Supreme Court

the case of *United States v. Louisiana* (No. 11 Orig., 1956 Term), a proceeding to determine whether the Submerged Lands Act granted Louisiana the lands and resources under navigable waters extending into the Gulf of Mexico to the extent of 3 marine leagues (or 9 geographical miles). If this issue is decided in favor of Louisiana, it obviously would remove a large area from this dispute. There would still, however, remain the problem of ascertaining the baseline from which the 9-mile belt is to be measured. *The farther southward this line is set, the smaller becomes the possible area as to which validation would be necessary.*

Alternative locations for this line vary from the so-called Chapman line, which in the area covered by the Marsh Island Prospects approximates their northern boundary, to the line set by the Louisiana Legislature in Act. No. 33 of 1954 * * * which adopts a line roughly 10-15 miles farther seaward *as the coastline of the State* and places the State boundary 3 marine leagues south of that line. If the latter line is adopted as the boundary of Louisiana, * * * *still more of the area in dispute would be removed from these applications.* (Italics added) 65 I.D. at 79-80.

The significance of the language italicized is clear. The appellant was contending that its lease extended 27 miles into the Gulf from the coast line. This area would encompass land belonging to the State, whether 3 miles or 3 leagues from the coast line, and land situated on the outer Continental shelf. What the Department was saying in the language quoted was that the proportionate area on the shelf would vary according to placement of the State boundary line. This is consonant only with the assumption that the seaward limit of the lease in the shelf was fixed.

This was also brought out in the Director's decision of March 12, 1958, where he said, after describing the areas embraced in the two Prospects and the Rabbit Island Dome Area:

Available information indicates that the area embraced in the State Lease is crossed by a line that marks the seaward boundary of the State as established by the Submerged Lands Act. The exact location of the State's said seaward boundary, believed by this Department to be a line three geographical miles seaward of the coast line of the State, has not been determined. Pending final determination of the position of the boundary, the acreage shown in the caption will be administratively considered to be the acreage of the State Lease situated on the outer Continental Shelf.

The only variable here is the location of the State boundary, whose location, the Director says, will determine the acreage actually covered by the validated portion of the lease. In other words, the northern and southern boundaries of the lease as issued by the State were considered to be fixed by the shoreline and the 3-league line measured from it, respectively, but the areas within those boundaries which are Federal or State would depend upon where the State boundary is finally located. The farther seaward the State boundary lies the less acreage there is in the Federal lease. The variable boundary of the Federal lease is not the southern one but the northern one, which is coterminous with the State boundary, a conclusion which does not diminish the total area leased to Texaco, but only reapportions that area between the United States and Louisiana.

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This is also clearly evidenced by the Director's statement that—

Rental payable to the United States shall be in the proportion that the acreage of the land embraced in the lease herein determined as entitled to continuance [the portion situated on the outer Continental Shelf] bears to the acreage embraced in the former state lease. Pending final determination of the acreage covered by the lease, the proportionate rental shall be calculated on the basis of the tentative acreage shown in the caption, subject to adjustment upon such final determination.

This language and the other language quoted from the decisions of March 12, 1958, and February 12, 1958, convey the concept of a fixed lease area with only the proportion of Federal and state areas to be determined upon a final location of the State boundary line which would divide the Federal and state areas.

That the southern boundary of the lease was not intended to float becomes even clearer when we recall the purpose of the validation proceedings. Section 6 of the Outer Continental Shelf Lands Act, *supra*, was to validate leases for those areas which were granted in good faith by the State of Louisiana under the assumption that the resources were its property. The extent of the lease is what Louisiana thought it was conveying in 1936, not what later litigation, statutes, and conventions for one reason or another should use as a base line for measuring areas conveyed to the State.

As was noted earlier, the location of the State boundary is still to be fixed. It may be on the most landward line or the most seaward line established by the supplemental decree of December 13, 1965, or on a line between those two extremes. Any locating of the line southward of the most landward position would, according to the appellant, further push the seaward boundary of its lease into the outer Continental Shelf. In other words, appellant would have it that in 1958 the Department validated a lease with an uncertain reach into the shelf area and that almost 10 years later, the extent of that reach has been fixed only as to minimum and maximum limits. We cannot read the 1958 decisions as having such uncertainty.

We can only conclude that the 1958 decisions validated a lease of an area with a fixed northern and southern boundary, the northern boundary being the shoreline of Marsh Island and the adjacent mainland and the southern one being a line 3 leagues distant from the northern one. Since the application for a permit to drill describes a location for a well outside the leased area, it was properly denied.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision of the Director of the Geological Survey is affirmed.

FRANK J. BARRY,
SOLICITOR.

UNITED STATES

v.

SIDNEY M. AND ESTHER M. HEYSER

A-30810

*Decided January 24, 1968***Patents of Public Lands: Generally—Surveys of Public Lands: Generally**

Where, subsequent to the issuance of patent to sec. 33, T. 28 S., R. 34 E., a resurvey was made which resulted in a determination that the area so patented lay within the limits of a different township and in the designation of a different area as sec. 33, T. 28 S., R. 34 E., and where the jurisdiction of the United States over a part of the land now designated as section 33 is challenged on the premise that title to the area in question passed from the United States by virtue of the patent, the lack of jurisdiction over the land can be demonstrated only by showing that the disputed area is within the limits of the original section 33 as it was surveyed on the ground, and any showing of error in either the original plat of survey or the plat of resurvey is immaterial if it fails to establish that fact.

Surveys of Public Lands: Generally

A survey of public lands creates, and does not merely identify, the boundaries of sections of land, and public land cannot be described or conveyed as sections or subdivisions of sections unless the land has been officially surveyed.

Surveys of Public Lands: Generally

When the locations of corners established by an official Government survey are identified, they are conclusive, and the corner of a Government subdivision is where the United States surveyors in fact established it, whether such location is right or wrong.

Patents of Public Lands: Generally—Surveys of Public Lands: Generally

A patentee of public land takes according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground, and the Federal Government is without power to affect, by means of any subsequent survey, the property rights acquired under an official survey.

Conveyances: Generally

Where a deed from the United States describes the land as being in a particular section and township, and there are, at the time of the conveyance, two tracts of land which have been designated by official surveys of the United States as constituting that section and township, but it is clear from the nature and the language of the deed that the description refers to the earlier survey, the deed will be interpreted by reference to that survey, even though the description of land in a conveyance from the United States is ordinarily governed by the latest official survey.

Mining Claims: Determination of Validity

Where a hearing examiner has declared a mining claim to be null and void for lack of a discovery, his determination of the invalidity of the claim is a reasonable interpretation of the evidence presented at the hear-

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ing, and the mining claimant makes no attempt to show error in that particular finding in subsequent appeals from the hearing examiner's decision, the hearing examiner's conclusions will not be disturbed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Sidney M. and Esther M. Heyser have appealed to the Secretary of the Interior from a decision dated April 4, 1967, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner declaring null and void the High-Wide and Handsome lode mining claim in sec. 33, T. 28 S., R. 34 E., M.D.M., California.

Pursuant to a complaint filed at the request of the Forest Service, United States Department of Agriculture, on November 23, 1964, a hearing was held at Los Angeles, California, on June 8, 1965, to determine the validity of the High-Wide and Handsome mining claim, the complaint having charged that a discovery of a valuable mineral deposit did not exist within the limits of the claim. At the hearing, Westley G. Moulton, a mining engineer employed by the Forest Service, testified that he examined the claim in the presence of the mining claimants on September 9, 1963 (Tr. 13). At that time he found an old tunnel on the claim, reportedly 400 feet deep, which was caved at the portal and could not be entered. A new tunnel had been opened for approximately 50 feet. Other improvements on the claim consisted of a cabin and roads (Tr. 14). The witness took two mineral samples from the claim. The first, taken from pieces of quartz found in the overburden of a small pit which was supposed to but was not found to contain a quartz vein, had an assay value of \$2.45 per ton in gold and \$0.89 per ton in silver. The second sample was taken from a small quartz streak about three to four feet long and an inch wide in a road near the pit which showed values of \$1.75 and \$0.75 per ton of gold and silver, respectively. Adjusted to a minable width, the witness stated, the indicated values would be approximately \$0.05 per ton. The witness expressed his opinion that a prudent man would not be justified in spending time and money on the claim (Tr. 15-19).

Appellant Sidney M. Heyser testified on behalf of the mining claimants. He offered no samples or assay reports and attempted simply to explain away the significance of the findings of the Government's expert witness without offering any substantive evidence that he had, in fact, discovered a valuable mineral deposit on the claim. At the outset of the hearing the appellants contended that the land upon which the mining claim is situated is patented land and that the Government has no jurisdiction to determine the validity of the claim, and their arguments throughout the proceeding have been directed to establishing the validity of that contention.

By a decision dated October 27, 1965, the hearing examiner found that the mining claim was, in fact, located on public domain, and he

denied appellants' motion to dismiss the complaint. After summarizing the testimony given at the hearing he concluded that the contestants had not offered evidence tending to show a discovery of a valuable mineral deposit, and he declared the claim null and void.

Appellants' present appeal is, as was their appeal to the Director, Bureau of Land Management, directed solely to the issue of the Department's jurisdiction over the land embraced by their mining claim. The question of jurisdiction over the land in this case arises as the result of error in the original survey of T. 28 S., R. 34 E., and the steps taken subsequently to correct the error. There is no dispute as to the general course of events which transpired in relation to the surveying of that township. Conflict arises, however, with respect to the significance of some of the facts which are clearly established and the significance of some of the facts which the appellants allege.

The record shows that T. 28 S., R. 34 E., was surveyed between 1876 and 1882 and that the official plat of survey was approved on January 20, 1883. The Bureau found in its decision of April 4, 1967, that it was discovered prior to 1900 that there was an overlap between Ts. 28 and 29 S., R. 34 E., and that, as a result of this and other discrepancies developed through subsequent investigations, a resurvey of T. 28 S., R. 34 E., was authorized by the Commissioner of the General Land Office on January 17, 1936. Pursuant to that authorization, the Bureau further explained, an independent resurvey of T. 28 S., R. 34 E., was made in 1940. At the same time a dependent resurvey of secs. 1 through 6, T. 29 S., R. 34 E., was made in accordance with instructions directing a dependent resurvey of the 7th Standard Parallel South as originally surveyed by Carlton in 1876 as the north boundary of T. 29 S., R. 34 E., the establishment of standard corners for T. 28 S., R. 34 E., on this line, the subdivision of T. 28 S., R. 34 E., based on a sectional correction line established from the section corner for sections 25 and 36, T. 28 S., R. 34 E., and sections 19 and 30, T. 28 S., R. 35 E., the survey by metes and bounds of areas in T. 28 S., R. 34 E., patented upon the basis of corners established in the survey approved in 1883 and the designation of these parcels by tract numbers, and the resurvey of the north tier of sections in T. 29 S., R. 34 E., to accommodate tracts previously patented as lands in T. 28 S., R. 34 E. Plats of survey resulting from the execution of these instructions were accepted on March 3, 1943. The area embraced in sec. 33, T. 28 S., R. 34 E., as defined by the 1883 survey, was designated as Tract 40 in T. 29 S., R. 34 E., and was found to lie wholly within that township and to be comprised of portions of secs. 3 and 4, T. 29 S., R. 34 E. According to the field notes accompanying the dependent resurvey of part of T. 29 S., R. 34 E., Tract 40 includes "all of sec. 33, designated as Southern Pacific Railroad Land. Patented. Beginning at the original cor. of secs. 27, 28, 33 & 34 * * *."

Sec. 33, T. 28 S., R. 34 E., was patented to the Southern Pacific Railroad Company pursuant to the act of July 27, 1866, 14 Stat. 292, and

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Joint Resolution of June 28, 1870, 16 Stat. 382, by Railroad Patent No. 55 dated September 30, 1896. By a deed dated July 17, 1899, George I. Scofield conveyed to the United States land described as all of sec. 33, T. 28 S., R. 34 E., M.D.M., California, as the basis for a forest lieu selection. By a deed dated February 13, 1958, the United States quitclaimed to Scofield, his heirs or assigns, all right, title or interest which it may have acquired in the land described in the deed from Scofield, reciting in part that:

WHEREAS, by deed executed on July 17, 1899, George I. Scofield conveyed to the United States the land hereinafter described as a basis for a forest lieu selection under the Act of June 4, 1897 (30 Stat. 36), which selection was canceled; * * *

* * * * *

NOW, THEREFORE, the Director of the Bureau of Land Management does hereby remise, relinquish and quitclaim to the party named in the first paragraph hereof, his heirs or assigns, all right, title or interest in or to the following described land which the United States may have acquired by virtue of that certain deed executed by the party on the seventeenth day of July in the year of our Lord one thousand eight hundred and ninety-nine * * * :

T. 28 S., R. 34 E., M.D.M., California, sec. 33, All containing a total of 640.00 acres.

Although appellants' theory of the case is not entirely clear, their consistent contention that the land embraced in their mining claim is removed from the jurisdiction of this Department appears to rest upon the alternative premises that (1) the mining claim is within the limits of sec. 33, T. 28 S., R. 34 E., as it was patented in 1896, or (2) even if it was not included within such limits, it is included in the area which was quitclaimed by the United States in 1958 and is, therefore, no longer public land of the United States. Their arguments reveal an incomplete understanding of the applicable principles of law and a misapprehension of the showing which they must make in order to establish the validity of their contention that the United States has no jurisdiction over the land in question.

In order to view the particular problem found here in a proper perspective, a few of the principles of law and of administrative practice which govern the surveying of public lands and the disposition of lands by the United States in accordance with the public land surveys must be understood. The principles which appear to be particularly applicable in this case are:

(1) A survey of public lands creates, and does not merely identify, the boundaries of sections of land, and public land cannot be described or conveyed as sections or subdivisions of sections unless the land has been officially surveyed. *Cox v. Hart*, 260 U.S. 427, 436 (9th Cir. 1922); *Carroll v. United States*, 154 Fed. 425, 430 (9th Cir. 1907); *Sawyer v. Gray*, 205 Fed. 160, 163 (W.D. Wash. 1913);

(2) When the locations of corners established by an official Government survey are identified, they are conclusive, and the corner of a

Government subdivision is where the United States surveyors in fact established it, whether such location is right or wrong. *O. O. Cooper et al.*, 59 I.D. 254, 257 (1946), and cases cited; *Texaco, Inc.*, A-30290 (April 29, 1965);¹

(3) A patentee of public land takes according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground, or the patent description may be in error as to course or distance or the quantity of land stated to be conveyed. *Ingrid T. Allen*, A-28638 (May 24, 1962); cf. *Texaco, Inc.*, *supra*;

(4) The Federal Government is without power to affect, by means of a second survey, the property rights acquired under an official survey. *O. R. Williams*, 60 I.D. 301, 303 (1949); *Nelson D. Jay*, A-27468 (December 4, 1957);

(5) Where lands have been surveyed it is sometimes necessary to conduct resurveys either to correct errors in prior surveys or to reestablish survey corners which have been lost or obliterated. Two general types of resurvey are used: the dependent resurvey and the independent resurvey. A dependent resurvey consists of a retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners, and the section lines and lines of legal subdivisions of the dependent resurvey in themselves represent the best possible identification of the true legal boundaries of lands patented on the basis of the original survey. An independent resurvey, on the other hand, is a running of what are, in fact, new section or township lines independent of and without reference to the corners of the original survey. In an independent resurvey it is necessary to preserve the boundaries of lands patented by legal subdivisions of the sections of the original survey, which are not identical with the corresponding subdivisions of the sections of the resurvey, and this is accomplished by surveying out by metes and bounds and designating as tracts the lands patented on the basis of the original survey. These tracts represent the position and form of the lands alienated on the basis of the original survey, located on the ground according to the best available evidence of their true positions. See *J. M. Beard* (on rehearing), 52 L.D. 451 (1928).

It was in accordance with this principle that the resurveys of the

¹ The Bureau's *Manual of Instructions for the Survey of the Public Lands of the United States*, 1947, provides in part that:

"394. The position of a tract of land in a surveyed township, described by legal subdivisions, is absolutely fixed by the original corners and other evidences of the original survey and not by occupation or improvements, or by the lines of a resurvey which do not follow the original. * * * Under fundamental law the corners of the original survey are unchangeable. * * *

* * * * *
 "564. The subdivisions are based upon and are defined by the monuments and other evidences of the controlling official survey, and so long as these evidences are in existence the record of the survey is an official exhibit and presumably correctly represents the actual field conditions. If there are discrepancies the record must give way to the evidence of the corners in place."

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townships in question were accomplished—the dependent resurvey of the northernmost sections of T. 29 S., R. 34 E., and the independent resurvey of T. 28 S., R. 34 E. The net effect of the resurveys, so far as is pertinent to this case, was a determination that the entire area identified as sec. 33, T. 28 S., R. 34 E., by the survey approved in 1883 is within the limits of T. 29 S., R. 34 E., as it has been defined. The resurveys did not purport to affect the boundaries of the land patented as sec. 33, T. 28 S., R. 34 E., and, as a matter of law, cannot affect them.

Appellants' basic contention appears to be that the Government has never correctly surveyed sec. 33, T. 28 S., R. 34 E., and that if it were correctly surveyed it would be found to include the area embraced in their mining claim. They assert that:

* * * The Patent from the Government to the Southern Pacific Railroad in 1896 bears no relation to the land that *had* been formerly said to be section 33, and which was later (1940) designated as Tract 40. [Italics in original.]

The discrepancy in the original survey plat (1883) had been discovered and the plat withdrawn in 1891, and so was known at the time the patent was given to the S.P. Railroad in 1896, and at the time of the conveyance of the deed from the railroad to Geo. I. Scofield in 1899.

If it had been intended to convey title to land in township 29, it would have been so stated. It did not so state, but conveyed the title to a section of land in T28S, R34E, MDM.

The original location of the township line surveyed by W. H. Carlton, Sept. 11, 1876, and affirmed by I. N. Chapman as to the location of the township line in 1894, varied only a few feet from the survey by Wayne Forrest in 1940 with the exception of the location of the former section 33. Both surveys show the location of the original north boundary [sic] of the section 33 in question, to be at about 35 chains north of the township line in Range 34, (the seventh Standard Parallel). These 35 chains are still north of the township line and are a part of the present section 33.

A comparison of the 1883 plat and the 1940 plat of T28S, R34E will show the difference of about one half mile in length from north to south. The 1940 plat shows the area on French Creek where the claim in question is located, to be more than five miles south of the north boundry [sic]. It has always been there on French Creek. The Creek has not moved, the north boundry [sic] of the Township is the same, so it is obvious that the original plat was in error as to the location of the Creek and the claim site was always in the 31-36 tier of sections. In the 1940 plat one half mile was shown cut from the original township plat which was six miles square. This half mile represents the overlap into township 29. The 1940 plat showing Tract 40 with an overlap of a full mile into township cannot possibly be correct. The survey by Wayne Forrest in 1940 was probably accomplished as he stated that it was, but the cartography is in error.

Although, as noted earlier, appellants' theory of this case is not entirely clear, it would appear that their conclusions have been reached by a comparison of the survey plats of the townships in question with each other and with the survey plats of adjacent townships without reference to the survey on the ground and without regard for the principles enumerated above. Moreover, appellants have reached certain conclusions, apparently upon the basis of notations appearing in official records, without understanding the meaning of the notations.

Since the 1883 survey plat showed T. 28 S., R. 34 E., as extending 6 miles from north to south, and the 1943 survey plat shows a distance of approximately 5½ miles, a difference of only ½ mile, appellants ask, how can it be that the southern boundary of the township has been moved northward a full mile? The simple answer to that question is that the original survey plat did not necessarily reflect the actual distances on the ground or the correct position of the corners as surveyed on the ground. The distance between the north boundary and the south boundary of the township, as established by monumented corners, may have been 4 miles, 8 miles, or some other distance. The survey corners themselves may have been established at entirely different points from what the plat would indicate, and the survey plat may show a perfect six-mile-square township while the area surveyed on the ground bears little resemblance to such a square. Moreover, the fact that the 1883 survey plat of T. 28 S., R. 34 E., stated that the south boundary of the township was surveyed by W. H. Carlton on September 11, 1876, which was the date that the north boundary of T. 29 S., R. 34 E., was surveyed by the same person, does not mean that the south boundary of T. 28 S., did conform with the north boundary of T. 29 S. The basis for the resurvey, of course, was that the south boundary of T. 28 S., as surveyed, was not, in fact, the same as the north boundary of T. 29 S., although the survey purported to accept the same line as a common boundary. The precise nature or degree of the error is immaterial to the question now before us.

Three questions, if they can be answered, will be dispositive of the contentions made here:

- (1) What land was patented to the Southern Pacific Railroad Company in 1896 as sec. 33, T. 28 S., R. 34 E.?
- (2) What land was quitclaimed by the United States to the heirs or assigns of George L. Scofield in 1958?
- (3) Does the land claimed by appellants as the High-Wide and Handsome mining claim lie within the limits of the areas contemplated in questions (1) and (2)?

Appellants' initial error lies in supposing that the 1896 patent conveyed land other than sec. 33, T. 28 S., R. 34 E., as defined by the erroneous survey approved in 1883. What do the appellants mean when they say that the patent "bears no relation to the land that had been formerly said to be section 33?" To what can they relate the description in the patent if not to the 1883 survey? Whether or not the error in the 1883 survey was known prior to issuance of the patent is immaterial. Sec. 33, T. 28 S., R. 34 E., was identifiable in 1896 only by reference to the 1883 survey, and, if anything was conveyed by that description, it was the land so designated by the official survey plat then in use.² Similarly, the 1899 deed from Scofield to the United

² Appellants have inferred from a notation on the margin of the 1883 survey plat, "Withdrawn, Letter P, Nov. 5, 1891," that the survey plat itself was withdrawn from

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States can be interpreted only by reference to the 1883 survey. Thus, there can be no question as to the source of identification of the patented land.

What was the land which was, in fact, surveyed on the ground as sec. 33 in the original survey of T. 28 S., R. 34 E.? As we have already noted, Forrest purported, at least, in resurveying Ts. 28 and 29 S., R. 34 E., in 1940, to retrace the lines defining sec. 33 as designated in the 1883 survey. He identified this area as "Tract 40" in T. 29 S., R. 34 E. If his reference points on the ground were correct, and appellants make no suggestion that they were not, Tract 40 is by definition the area formerly designated as sec. 33, T. 28 S., R. 34 E., and patented to the Southern Pacific Railroad Company in 1896, and it lies wholly to the south of the line designated as the boundary between Ts. 28 and 29 S.

Appellants appear to argue that, in any event, the quitclaim deed from the United States in 1958 of section 33, T. 28 S., R. 34 E., removed the land embraced by their mining claim from the jurisdiction of the United States. Had that deed described the land simply as sec. 33, T. 28 S., R. 34 E., without explanatory language, there could be a substantial question as to what land was described, for there were, in 1958, two different tracts of land so identified by official survey plats in the land office. However, the deed from the United States is so explicit in its reference to the 1899 conveyance as to preclude a finding that land other than that previously conveyed by Scofield and now identified as Tract 40, T. 29 S., R. 34 E., was contemplated.³

In order to sustain their position, then, appellants must show either that the Government's surveyor erred in 1940 in his identification of the original corners of sec. 33, T. 28 S., R. 34 E., or that their mining claim is, in fact, within the limits of Tract 40, as that land has now been identified. They have done neither. It is undisputed that the mining claim is within the limits of the area identified as sec. 33, T. 28 S., R. 34 E., according to the 1943 resurvey (see Tr. 48-49, 69), and it is not suggested that there is any overlapping of that area and of Tr.

further use as of that date. Further investigation would have disclosed that "Letter P" of November 5, 1891, withdrew the *land in the township* from further entry under the public land laws for inclusion in the Tulare Forest Reserve (subsequently the Sequoia National Forest). It did not purport to affect use of the survey plat. However, even if appellants' interpretation of the notation were correct, their argument would be no stronger, for, whether or not reference to the 1883 survey plat was proper in 1896, sec. 33, T. 28 S., R. 34 E., could not be identified except by reference to that plat inasmuch as there was then no other definition of the land so described.

³ Appellants attempted earlier to relate the quitclaim deed of 1958 to the 1943 survey plat of T. 28 S., R. 34 E., relying upon a letter from the Bureau of Land Management dated April 24, 1958, which stated that the "resurvey plat, which was accepted March 3, 1943, is the governing plat with regard to any action by the office as to the lands in section 33." This general statement to the effect that dispositions of land by the United States are made in accordance with the latest official plat of survey cannot reasonably be construed as a statement that the description in the 1958 deed, which clearly is based upon the earlier survey, is to be interpreted by reference to the 1943 plat of survey. Appellants have not pursued this argument in their present appeal.

40, T. 29 S., R. 34 E. Thus, it can only be concluded from the evidence of record that appellants have not shown that the mining claim is on patented land and that the hearing examiner acted properly in refusing to dismiss the contest on grounds of lack of jurisdiction over the land.

Appellants have requested a hearing in order that a fair opportunity may be afforded to present those matters not previously considered by the Bureau. Inasmuch as it does not appear that they are prepared to allege facts which would warrant a different conclusion, their request for an additional hearing is denied.

Appellants have made no attempt to refute the hearing examiner's findings with respect to the issue of discovery of a valuable mineral deposit. A review of the record is persuasive that his conclusions were sound, and they will not be disturbed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

APPEALS OF HUMPHREY CONTRACTING CORPORATION

IBCA-555-4-66

IBCA-579-7-66

Decided January 24, 1968

Contracts: Performance or Default: Acceleration—Contracts: Construction and Operation: Changes and Extras

Under a contract to clear a reservoir of trees, brush and debris in mountainous country at elevations (1) below 7,388 feet and (2) between 7,388 and 7,519.4 feet, by February 8, 1966, which provided that storage in the reservoir would begin "about November 1, 1965," and which required operations to be conducted so that clearing was completed in advance of water being impounded by a dam, a contractor, who encountered abnormally high water from sources other than the dam who proceeded by increasing the size of his crew and substituting manual labor for mechanical operations in order to comply with such provision, and who completed all work on November 19, 1965, was not entitled to additional compensation on the ground that his performance was accelerated, where (i) he did not request the Government to extend his time to perform or delay closing the dam; (ii) there is no proof of any Government conduct equivalent to an order to accelerate; (iii) he could have continued to perform some clearing both below and above 7,388 feet through February 8, 1966; and (iv) the contractor planned from the outset to complete all work by November.

Contracts: Construction and Operation: Changed Conditions

A contractor under a contract to clear a reservoir of trees, brush and debris in connection with the construction of a dam in mountainous country who encountered heavy quantities of down and dead debris was not entitled to relief under section (a) of the Changed Conditions clause, on the ground that the material was concealed and constituted a latent condition, where the

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existence of such down and dead debris was clearly indicated in the contract and the Government had made no representation as to the amount thereof that might be found.

Contracts: Construction and Operation: Changed Conditions

Where a reasonably careful pre-bid investigation by the contractor would have disclosed the existence of large quantities of down and dead debris, the presence of such quantities of down and dead debris at high elevations above the water where timber is no longer found standing was not uncommon in the area, and the contractor had seen some such debris in his investigation, the existence of such down and dead debris was not an unknown condition of an unusual nature within the meaning of section (b) of the Changed Conditions clause.

BOARD OF CONTRACT APPEALS

These are appeals from two decisions of the contracting officer. They arose under a contract to clear the Blue Mesa Reservoir of trees, brush and debris, in connection with the construction of Blue Mesa Dam, in Gunnison County, Colorado. The appeal from the first decision (IBCA-555-4-66) relates only to the denial of appellant's claim No. 4, for additional compensation in the amount of \$36,628.16, resulting from an alleged acceleration of performance. The second appeal (IBCA-579-7-66) is from a decision of the contracting officer denying appellant's claim for additional compensation in the amount of \$27,364.73, due to an alleged changed condition. By agreement of the parties, the only issue confronting us is whether appellant is entitled to an equitable adjustment and we are not concerned with the amount thereof, if any.¹

IBCA-555-4-66

The contract is dated January 14, 1965. Under its terms all work was to be completed by February 8, 1966. However, subsection b of section 32 of the Special Conditions provided that storage in the reservoir would begin "about November 1, 1965," and required the contractor to "so conduct his operations that clearing will be completed in advance of rising reservoir water."

Appellant has alleged that during June, August, September and October 1965, its work was severely impeded by unusually high water. The high water was caused by runoffs from the Gunnison River and its tributaries into the reservoir. It resulted from the melting of abnormally heavy snow and from the release by the Government of quantities of water from the Taylor Park Reservoir into the Gunnison.² The appellant contended originally that the inordinate amount of water constituted a changed condition under Clause 4 of the General Provisions of the contract (Standard Form 23-A, June 1964 Edition).

¹ Stipulation, dated April 24, 1967, as amplified at the hearing. Tr. 5, 75-6.

² In his Findings of Fact and Decision, dated March 21, 1966, the contracting officer allowed appellant's claims for an equitable adjustment related to the releases of water from Taylor Park Reservoir. Exhibit No. 2. All exhibits referred to are contained in the appeal file.

The contracting officer found that "flows of the Gunnison River and tributaries to the Blue Mesa Reservoir, during the period July through October, were 140 to 365 percent of normal." Nevertheless, he held that the Changed Conditions clause was inapplicable in this situation.

The contracting officer was correct in his assertion that "neither of the two categories of changed conditions comprehends storms, floods, or other forms of abnormal weather."³ We so held in *Concrete Construction Corporation*.⁴ The Government is not responsible for such Acts of God as heavy rainfall or snowfall.⁵

Appellant now maintains that it is entitled to an equitable adjustment because the Government accelerated performance.⁶ Appellant's argument is that the Government required the work to be done not by February 8, 1966, but instead within a few weeks after October 26, 1965, the actual date of the closing of the Blue Mesa Dam.⁷ According to appellant, this forced it to proceed with the work while the water was still unseasonably high. Therefore, appellant claims, not only was it unable to delay its work until the water receded, but the problems arising from the high-water level were aggravated by the addition of water impounded by the dam.

Appellant's witness testified at the hearing that the water generally receded during the months of July, August and September.⁸ He reached this conclusion after studying the hydrographs of the Gunnison River and its tributary, the Lake Fork River, which were part of the contract documents, and which show the mean daily discharge in thousands of cubic feet per second, the total runoff, and the momentary peak.⁹ Accordingly, appellant scheduled its work in the higher elevations for the "early months of the winter and later spring months" of 1965 and "close to the river or in low elevations" from July through October.¹⁰ However, during July, August and September of 1965, the water did not recede to the level appellant expected.¹¹ In order to perform the clearing in the low elevations prior to the time that the

³ Findings of Fact and Decision, p. 4, Exhibit No. 2.

⁴ IBCA-432-8-64 (November 10, 1964), 71 I.D. 420, 65-1 BCA par. 4520.

⁵ *Amino Brothers Co. Inc. v. United States*, 178 Ct. Cl. 515 (1967), cert. denied 389 U.S. 846, 88 Sup. Ct. 98 (1967). The Government is not an insurer of contractors against acts of nature. *Banks Construction Co., Inc. v. United States*, 176 Ct. Cl. 1302, 1317 (1966).

⁶ This theory was first alluded to by the appellant in its claim letter, dated November 5, 1965, attached as "Exhibit 3" to the Findings of Fact and Decision, Exhibit No. 2. It was not advanced in any detail until appellant filed its reply brief, dated July 21, 1966, to Government's motion to dismiss. The motion to dismiss was denied by interlocutory order, dated March 21, 1967.

⁷ The term "about November 1" means "substantially the date fixed or near approximation thereto." *North American Ginseng Co. v. Gilbertson* 206 N.W. 610, 611 (Sup Ct. Iowa, 1925). We conclude that under those tests October 26, 1965 was "about November 1."

⁸ Tr. 57.

⁹ Tr. 56. The hydrographs are numbered 622-D-211 through 622-D-214 and cover the years 1938-1951 for the Gunnison River and 1938-1959 for the Lake Fork River. A summation of the hydrographs for the years 1942-1951 is attached as "Exhibit 7" to the Findings of Fact and Decision, Exhibit No. 2.

¹⁰ Tr. 56. The bidding schedule and specifications divided the work into Item No. 1, clearing the reservoir below elevation 7,388; and Item No. 2, clearing the reservoir between elevation 7,388 and 7,519.4. Special Conditions 12, 32 and 35, Exhibit No. 1.

¹¹ Tr. 57.

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appellant expected to run into problems resulting from closure of the dam about November 1, appellant increased the size of its working crew and substituted manual operations for the mechanical operations that the high water prevented.¹²

Despite the alleged lingering high water problem, appellant did not request the Government to extend its time to complete the contract or to delay closing the dam.¹³ The explanation offered by appellant's witness for not doing so was the following:

* * * Asking them to hold up closure just seemed inconceivable to me. That would seem like such a momentous decision. While they were arguing about it and deciding about it, I would be losing time. I just anticipated the kind of answer I would get. I just didn't think in terms of asking anybody to hold up closure of the dam. We were working in there on a hundred thousand dollar contract and here is probably a hundred million dollar one coming to some dramatic point of its completion. It didn't seem conceivable they would delay closure of the dam (Tr. 69-70)

Appellant contends that at the same time "requests" to accelerate its work were made by "government representatives."¹⁴ At the hearing appellant's witness testified:

Q. * * * did you have any discussions with anybody representing the Government about this problem that you were in between the water and the closing of the dam?

A. Yes. This was kind of a crucial thing on our job. It was "we have got to get this bottom finished. When are you going to get down in there?"

Q. Who was talking?

A. I would say the inspector, Mr. Seery, Mac [Chief Inspector] and Mr. Wren. In any number of conversations I had with them this was on people's minds although I can't recall specific conversations except to know that there was an atmosphere there of concern on everybody's part.¹⁵

Mr. Wren, the Government's assistant project construction engineer, conceded that his office "called" to appellant's "attention" the November closing date.¹⁶

There is no contention here that the Government effected a change by expressly directing or ordering appellant to expedite performance. The claim, rather, is that the Government made a constructive acceleration which resulted in a constructive change.

Ordinarily when a constructive acceleration claim is made the contractor asserts that it was forced to complete its work at a date earlier than contractually required because the contracting officer failed or

¹² Tr. 60-62, 64-67.

¹³ Tr. 69, 80-81. Under the circumstances set forth in Clause 5(d) of the General Provisions the time for completing the work may be extended by the contracting officer.

¹⁴ Appellant's Post-Hearing Brief, p. 5.

¹⁵ Tr. 67-68.

¹⁶ Upon cross-examination he testified (Tr. 143):

"* * * you said that your people talked about it and were apprehensive about Mr. Humphrey getting this work done down there because of this closing of the dam?"

"A. We were apprehensive."

"Q. And that you brought this to Mr. Humphrey's attention through the people in your office. You put pressure on him, did you not?"

"A. I don't know if it was pressure. It was called to his attention."

refused to grant a time extension for excusable delay. In such cases the contracting officer is alleged to have insisted upon adherence to the contract schedule knowing that the contractor was claiming a right to a time extension. Thus, if an excusable delay is found to have existed, the effect of the contracting officer's action or inaction may have been to shorten the work schedule for the project. Requiring a contractor to meet the shortened schedule is regarded as a constructive acceleration under the Changes clause.¹⁷

The Government acknowledges that appellant "would have been entitled to a performance time extension of the contract termination date."¹⁸ But, since appellant admittedly did not request a time extension and the contracting officer did not fail or refuse to grant an extension, the Government argues that two of the essential elements of an acceleration claim are absent. In addition, the Government contends that the "Contracting Officer did not expressly order completion of the work within the work performance period."¹⁹ For these reasons it is the Government's position that whatever acceleration occurred was voluntary.

This would not seem to be the garden-variety type of constructive acceleration claim that the Government would make it. In this case appellant has sought to demonstrate that the Government had actual notice of the occurrence of an excusable delay situation.²⁰ Appellant then maintains that requests for an extension of time were therefore not only unnecessary, but would not have been granted anyway because the Government would not extend the November 1 date for closing the dam. Appellant argues that the Government "requested" it "to speed up" its operations, which was equivalent to an order to accelerate.²¹

Two recent decisions of the Armed Services Board of Contract Appeals provide a measure of support for the appellant's legal position.²² These cases hold that a request for time extension and its refusal are not necessarily conditions precedent to a claim for acceleration where a completion requirement contained in a contract is reinforced by unequivocal Government orders to complete. The ASBCA reasoned that the "usual requirements for a request for time extension and its refusal * * * were * * * eliminated by the Government's unequivocal mandatory completion orders given without regard to past or future excusable delays."²³

¹⁷ *Farnsworth & Chambers Company, Inc.*, ASBCA Nos. 4945, 4978 and 5129 (November 24, 1959), 59-2 BCA par. 2433.

¹⁸ Post-Hearing Reply Brief of United States, p. 5. Underscoring omitted.

¹⁹ *Id.*

²⁰ Tr. 157, 170. In any event, as mentioned, *supra*, the Government has admitted that appellant would have been entitled to a time extension on account of excusable delay.

²¹ Appellant's Post-Hearing Brief, p. 10.

²² See *American Machine & Foundry Company*, ASBCA No. 10173 (August 21, 1967), 67-2 BCA par. 6540, at 30,385; *Gibbs Shipyard, Inc.*, ASBCA No. 9809 (July 10, 1967), 67-2 BCA par. 6499, at 30,159-60.

²³ *American Machine & Foundry Company*, note 22, *supra*.

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Appellant's problem, however, is that while in some circumstances the failure to request a time extension may be excused, the appeal record will not support a finding that an unequivocal mandatory completion order was given on this project, or even that one would have been needed. Appellant planned at the outset to complete all work under the contract "around November."²⁴ The Government's concern related solely to clearing of the lower area so as to "keep the debris out from around" the dam.²⁵ The Government did not require that all clearing cease by November 1.²⁶ The work continued beyond that date and was in fact completed on November 19, 1965.²⁷ After the closing of the dam, up to and including February 8, appellant could have performed Item 2 clearing without any difficulty from the water.²⁸ The evidence also indicates that between the date of closing of the dam and February 8, at least some part of Item 1 clearing could have been accomplished.²⁹

The role the Government played in the acceleration is unclear at best. Here we have expressions of concern by members of the inspection force which we find were not sufficiently strong to constitute "orders."³⁰ Such statements should have evoked a request for time extension by the appellant, if it believed itself entitled thereto, and not having had such an effect do not support a claim for acceleration.³¹ The contracting

²⁴ Appellant's witness testified at the hearing (Tr. 80) :

"* * * I had planned on being out of there before bad weather set in for the next year. I planned on being out of there around November because I didn't want to go into another winter."

²⁵ Tr. 135. The Government concedes that as to some of the lower elevation work the February 8, 1966 completion date "wasn't material." Post-Hearing Reply Brief, p. 5.

²⁶ Tr. 140-41, 144.

²⁷ Tr. 73-4, 82-3.

²⁸ Tr. 131-32, 144, 154. Mr. Wren testified (Tr. 140) :

"Q. With regard to this band area that we discussed and the closing of the reservoir, would it have been possible for the contractor to have worked from November 19 to February 8 on Item 2 of the contract?

"A. Yes, it would in this upper band.

"Q. The water didn't get into this area?

"A. That is correct.

"Q. Proper work sequence would have allowed this?

"A. It could have, yes."

²⁹ According to the Government's chief inspector, "* * * it would take considerable time before the water would get up to 7388 * * *." Tr. 154. On November 1 the water had reached elevation 7247.2. On February 8, the water had reached elevation 7364.6. Tr. 131. (Referring to water elevation reports, dated February 18, 1966 and November 5, 1965, respectively, Government Exhibit Nos. 13 and 14).

³⁰ General statements of the urgency of contractor's performance and exhorting contractor to stay on schedule were held not to be the equivalent of orders in *Kaiser-Raymond-Macco-Puget Sound*, ASBCA No. 10293 (April 28, 1966), 66-1 BCA par. 5556, at 25,988 and *Carroll Services, Inc.*, ASBCA Nos. 8362 and 8363 (July 31, 1964), 1964 BCA par. 4365.

³¹ See *Kaiser-Raymond-Macco-Puget Sound*, note 30, *supra*. In *Aero Corp.*, ASBCA Nos. 7920 and 8237 (May 25, 1964), 1964 BCA par. 4268, the Board said, at 20,639 :

"* * * The Government concedes that it exerted considerable pressure on the contractor to perform in accordance with the agreed schedule, but we do not think such urging can bottom a claim for compensation on a theory of acceleration ordered by the Government unless the evidence shows a refusal, or action (or inaction) tantamount to a refusal, to grant an extension request by the contractor." * * *

officer was given no opportunity to work out a means of ameliorating the scheduling difficulties created by the high water and the dam closure, or to provide information on expected reservoir levels for given fall and winter dates subsequent to that closure.

Hyde Construction Company, et al.,³² which appellant cites for the proposition that a "request" to speed up may be the equivalent of an order, is clearly distinguishable. There the Government initiated the acceleration because it wanted part of the work completed earlier than originally scheduled and eventually issued a directive to accelerate, for which the contractor was paid. Here the Government sought only to keep appellant on the schedule which was established in the contract and which the appellant made no effort to have extended.³³

An acceleration claim must be based upon much more substantial evidence than is present here. Appellant has failed to establish that it was required by the Government to accelerate performance. On the contrary, it appears that any accelerated performance of work on the project was voluntary. The appeal is therefore denied.

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In the course of performing Item 2 work appellant encountered "the continuous occurrence of floatable down and dead debris between El. 7,388 and El. 7,519.4 along canyon walls and slopes in the Gunnison River and its major tributaries in the reservoir area"³⁴ Appellant alleges that "[t]his material was not apparent to us in any of our pre-bid and post-bid site investigations."³⁵ According to appellant, the "combination of choppy ground, small ground cover and the weathered color renders the subject material invisible until you are within feet of its location."³⁶ It claims that the existence of "a great quantity of dead and down debris" could not have been foreseen or reasonably anticipated.³⁷ Appellant seeks to recover the cost plus profit of the work involved in clearing such debris, on the ground that its presence constituted a changed condition under Clause 4 of the General Provisions.

To be afforded relief under the Changed Conditions clause, a contractor must establish by the preponderance of the evidence either that it (1) encountered subsurface or latent physical conditions at the site differing materially from those indicated in the contract, or (2) was confronted with unknown physical conditions of an unusual nature.

³² ASBCA No. 8393 (October 8, 1963), 1963 BCA par. 3911.

³³ Appellant's witness testified (Tr. 83) :

"Well, nobody gave me any written explicit orders to accelerate my job. The conditions and the problems, the combination of the high water and the closure of the dam just dictated an acceleration of the job."

³⁴ Appellant's claim letter, dated October 27, 1965, p. 1, attached as "Exhibit A" to the Findings of Fact and Decision, dated June 16, 1966, Exhibit No. 1.

³⁵ *Id.* As will appear, *infra*, after the bid opening confirmation of appellant's bid was requested and appellant made a second site investigation prior to award. Tr. 44.

³⁶ Appellant's claim letter, attached as "Exhibit A" to the Findings of Fact, Exhibit No. 1.

³⁷ Appellant's Post-Hearing Brief, p. 13.

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differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

In its Post-Hearing Brief appellant has denominated this claim as its "Unknown Physical Condition Appeal," a changed condition of the second category.³⁸ Yet in its Reply to the Government's Motion to Dismiss³⁹ and in its Post-Hearing Brief,⁴⁰ the appellant has alleged that the Government was aware of the existence of the down and dead debris but failed to reveal it to appellant and the other bidders. And while expressly admitting that the "down and dead debris encountered * * * was not sub-surfaced," it simultaneously asserted that the material was "concealed"⁴¹ and constituted "a latent condition."⁴² Appellant has therefore raised for our consideration the question of the applicability of the first category changed condition, as well.

The elements required to support a changed condition of the first category are not present here. Clearing assorted debris was the very purpose of the contract. The work to be performed between elevations 7,388 and 7,519.4 is described in great detail in paragraphs 12b and 35b, of the Special Conditions of the contract. Paragraph 35b specifically provided that all "loose floatable and combustible materials including felled timber and brush (including sagebrush), dead timber, down timber, logs, branches, slashings, driftwood, and floatable debris larger than four inches in diameter and longer than five feet in length shall be piled and burned or otherwise disposed of" and that materials "which normally would not require clearing but which become floatable due to the contractor's operations shall also be cleaned and burned." The existence of down and dead debris was thus clearly indicated in the contract.⁴³ We find no evidence of misrepresentation by the Government. No assertion has been made or proof presented that the Government refused to answer inquiries. No quantitative estimate or characterization of the amount of down and dead debris that might be found was given in the specifications.⁴⁴ We also note that appellant's witness

³⁸P. 12. The Government has taken the position that appellant is thereby limiting its claim to a changed condition of the second category. Post-Hearing Brief of the United States, p. 9. However, we hold that an appellant is not bound by the label it applies to a case: *Peter Kiewit Sons' Co.*, IBCA-405 (March 13, 1964), 1964 BCA par. 4141.

³⁹P. 3.

⁴⁰P. 23. However, at the hearing appellant's witness testified that the condition was a surprise to the Government. Tr. 26.

⁴¹Post-Hearing Brief, p. 19.

⁴²Notice of Appeal, p. 3, Exhibit No. 2.

⁴³See *Swauger Contractors*, IBCA-609-12-66 (July 11, 1967), 67-2 BCA par. 6430. Appellant's witness testified at the hearing that paragraph 35 described "real well" the material it was required to clear. Tr. 37. The following exchange took place (Tr. 38):

"Q. And what you found was no different from what was described and what you were required to remove was no different from what you did remove?

"A. That is right."

⁴⁴See *Banks Construction Co. v. United States*, note 5, *supra*; *T. F. Scholes, Inc. et al. v. United States*, 174 Ct. Cl. 1215, 1224 (1966). The case of *Dunbar & Sullivan Dredging Co. v. United States*, 65 Ct. Cl. 567 (1928), cited by appellant is wholly distinguishable. There the Government knew that the contractor would encounter hardpan, but omitted any mention from the contract and upon inquiry from the contractor gave no information of its presence.

testified at the hearing that he actually saw floatable down and dead debris during his site investigation.⁴⁵

According to the appellant's Post-Hearing Brief, the second category changed condition "arises out of the fact that Humphrey encountered a great quantity of dead and down debris in an area where he could not have foreseen or reasonably expected its existence and which was not revealed to him even though he made a thorough site investigation. In clearing land one expects to find substantial quantities of dead timber and other debris down along creek and river banks * * * due to the fact that timber and vegetation of all kinds exist in greater abundance and variety where there is water. One does not expect to find a lot of down and dead debris high up on canyon walls, far above the rivers and creeks. Humphrey did encounter a great unexpected quantity of down and dead debris on the canyon walls of this project and he did not expect to find this material and his site investigation failed to reveal its existence."⁴⁶

It is well settled that a changed condition of the second category does not exist if a reasonable pre-bid investigation would have disclosed the existence of the condition which is the subject of the claim.⁴⁷ As we have seen, the appellant contends that it "made a thorough site investigation." The Government, however, takes the position that it was inadequate.

At the hearing appellant's witness testified in great detail concerning the site investigation he made.⁴⁸ He described the site as a "mountainous or canyon type area" and as "generally pretty rugged, steep, inaccessible country."⁴⁹ He studied the drawings that were part of the contract documents.⁵⁰ He "spent a little time" driving in the area and "got a real general idea of what the country looked like."⁵¹ At his request the Government furnished its employee, Mr. Boren, who had established the elevations for the clearing, and a vehicle with four-wheel drive "to help me get around in this thing a little better."⁵² From various vantage points, accompanied by Mr. Boren, he had a "good view" of the "area * * * between elevation 7,388 and 7,519.4" which "was up on the canyon walls * * * maybe 300 to 800 feet away."⁵³ The following day he obtained aerial photographs which "weren't too much help"⁵⁴ and then he went out by himself "and checked a little closer some of what I thought were maybe problems, the

⁴⁵ Tr. 35.

⁴⁶ P. 13.

⁴⁷ *Ray D. Bolander Company, Inc.*, IBCA-331 (November 16, 1965), 72 I.D. 449, 461, 65-2 BCA par. 5224.

⁴⁸ Appellant's claim letter, note 34, *supra*, also contains a detailed description of appellant's site investigation.

⁴⁹ Tr. 9.

⁵⁰ Tr. 10.

⁵¹ Tr. 10-11.

⁵² Tr. 11, 86.

⁵³ Tr. 14, 15. The trip with Mr. Boren "took ten to twelve hours." Tr. 15.

⁵⁴ Tr. 17.

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timbered draws.”⁵⁵ Appellant made a post-bid investigation after the Government advised it that its bid of \$110,000 was 75 percent below the Government engineer’s estimate, 23 percent below the second low bid of \$143,000 and 42 percent below the third low bid of \$191,350, and requested appellant to verify its bid.⁵⁶ The post-bid investigation took two days.⁵⁷

A site investigation is not rendered adequate merely by virtue of the amount of time spent in conducting it. Its adequacy depends upon the quality of the investigation. When we analyze the nature and scope of appellant’s investigation we must conclude that it was inadequate in the circumstances.

Appellant’s investigator was by his own admission “not a mountain man.”⁵⁸ He was bidding on a job requiring clearing of a “mountainous or canyon type area.” Yet he made no “lateral or horizontal walk of the band.”⁵⁹ He only “walked it vertically * * * on [his] way up to some timbered draws.”⁶⁰ He testified: “* * * there was nothing to drive me or lead me to feeling the need for walking that contour when I saw from not too far a distance most of the contour.”⁶¹ He based his calculations on what he could see from his trail and road travels through the area, not from a close view.⁶² We find this was insufficient.

In the course of making its investigation appellant’s investigator did encounter “scattered, infrequent tree growth” between elevation 7,388 and 7,519.4.⁶³ He did see some floatable down and dead debris.⁶⁴ Appellant’s complaint is that “in view of the very sparse existing tree growth, there was no real basis to ascertain or suppose or assume that dead and down debris would exist in near the quantity nor frequency of its actual occurrence.”⁶⁵ As a result appellant gave “no consideration for a continuous occurrence of this floatable debris” in its bid.⁶⁶

⁵⁵ Tr. 20.

⁵⁶ Letter to appellant, dated December 15, 1964, attached as “Exhibit B” to the Findings of Fact, Exhibit No. 1. The letter called upon appellant to “confirm in writing that the amounts bid for each of the two items in the Schedule, especially the amount bid for Item No. 2 and the total amount are correct.” The letter pointed out that the “principal variation is in the quotation for Item 2 * * *, for which you quoted \$40,000 compared to \$116,600 and \$125,350, by the second and third low bids, respectively.”

⁵⁷ Tr. 44. Appellant’s witness testified: “* * * I came out and spent two more days going over the job again, looking for something that I had left out * * * and I couldn’t find it.” On this occasion appellant’s witness was accompanied by its superintendent. Tr. 48.

⁵⁸ Tr. 39.

⁵⁹ Tr. 42.

⁶⁰ *Ibid.*

⁶¹ Tr. 39.

⁶² On cross-examination of appellant’s witness the following exchange took place (Tr. 39-40):

“Q. But you were calculating how much was up there? You knew you had to remove floatable debris and you were just calculating from the railroad bed and the trails as to what was up there?

“A. Yes.”

⁶³ Tr. 30.

⁶⁴ Tr. 35.

⁶⁵ Appellant’s claim letter, note 34, *supra*, p. 3, Exhibit No. 1. Underscoring omitted.

⁶⁶ Tr. 35.

But, the presence of some tree growth, the existence of some dead and down debris constituted unmistakable warnings that similar material might be found elsewhere in the work area.⁶⁷ The condition was therefore not "unknown" within the context of a second category changed condition. Its occurrence in greater abundance than appellant had anticipated is not the Government's risk.

Clause 13 of the General Provisions imposed upon appellant the responsibility "for having taken steps reasonably necessary to ascertain * * * the * * * local conditions which can affect the work or the cost thereof." At the time of performance under this contract appellant had only had one previous mountain job; its work had been primarily in the plains area of the country.⁶⁸ It was incumbent upon appellant to familiarize itself with local conditions and to make inquiry regarding local problems.⁶⁹ There is no proof in the record that this was done. Accordingly, appellant's witness was "surprised" by the vast quantity of down and dead debris he found on the canyon walls when work actually commenced.⁷⁰ However, it is not unusual to find down and dead debris even where there is no standing timber in the mountains where this work was performed.⁷¹ The condition was therefore not "of an unusual nature" within the context of a second category changed condition.

We find no changed condition present and the claim is therefore denied.⁷²

CONCLUSION

The appeals are denied.

SHERMAN P. KIMBALL,

Alternate Member.

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

⁶⁷ *Nell H. Ray*, ASBCA No. 1972 (July 21, 1958), 58-2 BCA par. 1882, at 7603.

⁶⁸ Tr. 33-34.

⁶⁹ *National Concrete and Foundation Co. v. United States*, 170 Ct. Cl. 470, 475 (1965); *Hunt and Willett, Inc. v. United States*, 168 Ct. Cl. 256, 263 (1964); *Zisken Construction Company*, ASBCA No. 7876 (November 29, 1963), 1963 BCA par. 3969, at 19,646. See *Petroleum Tank Service, Inc.*, ASBCA No. 11043 (June 30, 1966), 66-1 BCA par. 5674, in which recovery under the Changed Conditions clause was not allowed where the contractor encountered a severe rust condition when it cleaned the interior of fuel storage tanks. After acknowledging that inspection of the tank interiors would have been extremely difficult, the Board said, at 26,448: "* * * But an adequate site investigation includes asking questions about relevant matters, not otherwise readily disclosed." * * *

⁷⁰ Tr. 21.

⁷¹ Mr. Boren, a long-time resident of the area (Tr. 119), testified (Tr. 103):

"Q. In your opinion is this unusual to find down and floatable debris at that high elevation where there is no standing timber?"

"A. No, sir, it is not unusual."

"Q. This is the usual thing that you found?"

"A. In this mountain country, yes sir."

At the hearing the presence of the down and dead debris on canyon walls far above the water was attributed to overgrazing which killed the standing trees and prevented regrowth. Tr. 117. Mr. Wren testified (Tr. 189): "* * * I think it is common knowledge of anyone that is in this area about this overgrazing."

⁷² *Leal v. United States*, 149 Ct. Cl. 451 (1960).

A. L. SNYDER ET AL.**A-30880***Decided February 14, 1968***Mining Claims: Lands Subject to—Mining Claims: Withdrawn Land—****Mining Claims: Power Site Lands—Withdrawals and Reservations: Power Sites**

Lands which were reserved from mining location by reason of inclusion in an application for a power project filed prior to August 11, 1955, and which were opened to location by section 2 of the act of August 11, 1955, become closed to location thereafter if they come under examination and survey by a prospective licensee holding an uncancelce preliminary permit issued by the Federal Power Commission after August 11, 1955, and mining claims on such lands located thereafter are void *ab initio*.

Mining Claims: Lands Subject to—Mining Claims: Withdrawn Land

Mining claims located on land in a first-form reclamation withdrawal are properly declared to be null and void *ab initio*.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

A. L. Snyder, Myron C. Smith, Earl M. Oglevie, and Clarence Black have appealed to the Secretary of the Interior from a decision dated August 4, 1967, of the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of the Sacramento land office holding their Feather Lime Nos. 2, 3, 4 and 5 lode mining claims null and void on the ground that they were located on land withdrawn from mineral location.

The claims were located on September 2, 1961, for land in the NE $\frac{1}{4}$ sec. 2, T. 21 N., R. 6 W., M.D.M., California. The records show that the area covered by the mining claims, which is within the Plumas National Forest, was included in an application for Power Project No. 2134 filed on May 25, 1953. A preliminary permit for the power project was issued on February 1, 1957, for a 3-year period and an application for a license was filed on December 22, 1959, by the permittees. Section 24 of the Federal Power Act, 16 U.S.C. sec. 818 (1964), reserves from entry, location, or other disposal public land included in any proposed power project from the date the application for the project is filed. Section 2, however, of the act of August 11, 1955, 30 U.S.C. sec. 621 (1964), opened to mineral entry public lands "heretofore, now, or hereafter" withdrawn for power development or power sites, but excepted in its third proviso:

* * * lands (1) which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress, or (2) which are under examination and survey by a prospective licensee of the Federal Power Commission, if such prospective licensee holds an uncancelce preliminary permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands * * *.

The decisions below held that the lands covered by the mining claims fell within the terms of the second clause of the third proviso and were consequently withdrawn from mineral location.

The decision of the Office of Appeals and Hearings also pointed out that the NE $\frac{1}{4}$ sec. 2 was withdrawn from mineral entry by a first-form reclamation withdrawal dated February 27, 1952, which was revoked by Public Land Order No. 3187, July 31, 1963, 28 F.R. 8038 (1963), and the land opened to mineral location on January 30, 1964. Thus, at the date the claims were located the land was withdrawn from mineral entry and the claims were null and void. *Robert K. Foster et al.*, A-29857 (June 15, 1964), affirmed in *Foster v. Jensen*, Civil No. 64-1110-WM in the United States District Court for the Southern District of California (September 13, 1966).

In their appeal to the Secretary, the appellants state that, rather than dispute the correctness of the Bureau's decision as it relates to the effect of the reclamation withdrawal, they, on August 17, 1967, relocated their claims as the Feather River Lime Nos. 1, 2, 3 and 5. The relocation, after the date on which the lands were opened to mineral entry so far as the reclamation laws were concerned, removes the reclamation withdrawal as a reason for holding the claims null and void.¹

The appellants ask that the case on appeal be decided as though the relocated claims had been held null and void by the land office and the Office of Appeals and Hearings on the basis of the third proviso of section 2 of the act of August 11, 1955, quoted above. They contend that this provision does not apply to their claims. They say that whether land which otherwise would have been opened to mineral location by section 2, *supra*, was closed by the third proviso is to be determined by the conditions existing on the date of the act, that is, August 11, 1955. If, they contend, on that date previously withdrawn land was not covered by an uncancelle preliminary permit, which had not been renewed more than once, or was not in any project operating or being operated under a license or permit, the land was opened to mineral location on August 11, 1955, and remained open from that time on. In other words, they argue that the third proviso does not apply prospectively so that it cannot operate to close to mineral entry lands open to mineral location on August 11, 1955.

The Department has held in a case on all fours with this appeal that mining claims are void *ab initio* if they are located on lands de-

¹ The appellants nevertheless contend that the Office of Appeals and Hearings improperly relied on it as a ground for holding their claims null and void since it was not used as a reason by the land office.

This argument is without merit, for it is the actual status of the land that determines whether public land is available for disposition, not whether the land office adverted to one reason or another for holding a claim invalid, or indeed whether the land office may have ruled it was open to mineral location when in fact it was not.

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scribed in a pending application for a license filed during the life of a 3-year preliminary permit, issued after August 11, 1955, pursuant to an application filed for a proposed project under the Federal Power Act (*supra*) prior to that date. *Francis N. Dlouhy*, A-28597 (May 18, 1962). That decision, however, was more concerned with whether clause (2) encompassed an application for a license filed during the life of the preliminary permit after the permit expired than with whether land in the mining claims was affected by the third proviso of section 2 as of August 11, 1955.²

In support of their contention the appellants say that the act of August 11, 1955, shows a Congressional intent that mineral entry and power development co-exist on public land and that the construction put on the law in the decisions appealed from would open land to mineral entry only to withdraw it again as soon as a preliminary permit was issued, thus frustrating the purpose of the act.

This result, of course, follows from the view of the law taken by the Office of Appeals and Hearings and the land office. Whether the holding is correct is the question to be decided. If it flows from the entire statute as enacted, then it cannot be said to frustrate the Congressional purpose, for the limitation is as much a part of the act as the general provision.

Next the appellants cite some legislative history which, they say, confirms their position. The quotations which advert to protecting "outstanding" licenses and permits on lands "previously" withdrawn for power purposes do not have the thrust appellants would place upon them.³ They are as pertinent to a situation arising after August 11, 1955, as to one then existing, for future licensees and permittees are as much in need of protection as licensees and permittees on August 11, 1955. Appellants say that "future" permittees and licensees would be on notice of the possibility of mineral entries and could formulate their plans accordingly. But how one can plan to accommodate a mining operation for a hidden mineral in an unknown location to be mined by unrevealed methods is not elucidated.

Finally, appellants urge that the wording of section 2 indicates that the third proviso does not operate prospectively. We believe that the wording indicates the contrary. The principal clause of section 2 opens to mining location all public lands "heretofore, now or hereafter" withdrawn for power purposes subject to three provisos. These provisos would normally be construed to run to the entire principal clause and

² *C. A. Anderson*, A-29999 (March 23, 1964), reaches the same conclusion. There the land was in a 3-year preliminary permit which expired on November 30, 1957. An application for a license was filed on November 29, 1957, the mining claim was located on October 2, 1960, and the license issued on June 1, 1961. The mining claim was held void *ab initio*.

³ S. Rep. No. 1150, 84th Cong., 1st Sess. 5 (1955); H.R. Rep. No. 1610, 84th Cong., 1st Sess. 3 (1955).

not to just a portion of it unless there is express language or necessary implications which requires a more limited application. There is no express language and we perceive no implication that would limit the third proviso to apply only to land "heretofore" or "now" withdrawn and not to land "hereafter" withdrawn. As we noted earlier, a prospective licensee holding a preliminary permit issued after August 11, 1955, is as much in need of protection as one holding a permit issued before that date.⁴

The statute opens to mineral entry lands "hereafter withdrawn" for power development or power sites, as well as those "heretofore" or "now" so withdrawn. The lands "hereafter" withdrawn,⁵ which presumably were open to mineral location until the withdrawal became effective, remain open to mineral entry until one of the contingencies described in the third proviso occurs and they then remain withdrawn as long as the condition exists. That land may oscillate between being open to and closed to mineral entry is of no consequence. The third proviso was intended to protect from mineral location land held under the conditions it describes. When those conditions exist, the land is not open to mineral entry; when they do not, the land is open to mineral entry.

Accordingly, it is concluded that the third proviso of section 2 applies to lands falling within its terms after the passage of the act of August 11, 1955 (*supra*), as well as to those in that condition on that date.

The land in appellants' mining claims was described in an application for a power project filed on May 25, 1953, and was withdrawn from mineral location on that date. They were opened to mineral location on August 11, 1955, but were withdrawn again on February 1, 1957, when the 3-year preliminary permit issued. The filing of an application for a license on December 22, 1959, kept the land "under examination and survey by a prospective licensee of the Federal Power Commission" within the meaning of clause (2) since it was filed before the permit expired and preserved the priority of the permittee under the permit. *Francis N. Dlouhy, supra*; *E. A. Anderson, supra*. The appellants' mining claims, then, were located on land on a date when the land was not open to mineral entry and are void *ab initio*. *Dorothy L. Benton, A-30729* (May 31, 1967); *Armin Speckert, supra*.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the

⁴ We note that it was the Federal Power Commission, the initiator of the third proviso, which reported to the land office by letter dated June 24, 1966, that the land in question was deemed to fall within the purview of clause (2) of the third proviso on the basis of the facts presented here.

⁵ The appellants assume that lands are withdrawn under sec. 24 of the Federal Power Act, *supra*, only by the filing of an application for a power project, but they may also be withdrawn by inclusion in a powersite reserve or a powersite classification. *Armin Speckert, A-30854* (January 10, 1968).

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decision appealed from is affirmed and the claims relocated on August 17, 1967, are declared to be null and void *ab initio*.

ERNEST F. HOM,
Assistant Solicitor.

NORMA J. ROSE

A-30881 Decided February 19, 1968

Administrative Practice—Applications and Entries: Filing

When mail is properly addressed and deposited in the United States mails, with postage thereon duly prepaid, there is a rebuttable presumption that it was received by the addressee in the ordinary course of mail.

Administrative Practice—Applications and Entries: Filing

Delivery by post office of a document to a land office by the placement of mail in a post office box, where the land office customarily receives its mail, during the hours in which the land office is open to the public for the filing of documents constitutes delivery to and receipt by the land office of the document.

Oil and Gas Leases: Applications: Sole Party in Interest

Where an oil and gas lease offeror's statement of interest and qualifications, addressed to the land office at its post office box address in Santa Fe, New Mexico, was postmarked in Cheyenne, Wyoming, on May 8, 1967, and it is established that in the ordinary course of mail it would have been delivered to the land office at its post office box prior to 4 p.m. on the following day, the last hour for the filing of such a statement, but that mail placed in the box after 1 p.m. would not have been picked up by the land office until a day later, the statement of interest is presumed to have been filed on May 9 even though the date and time stamp of the land office indicates that it was not received until May 10.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Norma J. Rose has appealed to the Secretary of the Interior from a decision dated August 7, 1967, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the New Mexico land office rejecting her noncompetitive oil and gas lease offer New Mexico 2365, filed pursuant to section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. sec. 226 (1964).

The appellant's application was filed on April 24, 1967, for inclusion in a drawing of simultaneously filed lease offers and was awarded first priority for the lands which it described in a drawing held on May 8, 1967. The lease offer named two other parties, Leona Hagedorn and JoAnn Furman, as each having a one-third interest in any lease to be issued, but it was not accompanied by the statement of interest and qualifications of the offerors required by Departmental regulation 43

CFR 3123.2(c) (3).¹ Such a statement was, however, subsequently filed and was stamped as received in the land office at 10 a.m. on May 10, 1967.

By a decision dated May 16, 1967, the land office rejected appellant's lease offer for the reason that her statement of interest was filed after the expiration of the 15-day period prescribed by the Department's regulation.

Appellant contended, in appealing to the Director, Bureau of Land Management, that her statement of interest was deposited in the post office at Cheyenne, Wyoming, on the morning of May 8, 1967,² for transmittal by air mail and that it would have been received by the land office in Santa Fe, New Mexico, before 4 p.m. on May 9, 1967, the last day for filing the statement, but for the negligence of the land office in failing to pick up mail from the post office after 1 p.m. even though the land office was open to the public for the filing of documents until 4 p.m.³ In support of her contentions she submitted, *inter alia*, a letter from the superintendent of mails at Albuquerque, New Mexico, indicating that air mail left Cheyenne on one flight at 10:32 p.m. on May 8, arriving at Santa Fe at 9:50 a.m. on May 9 and that air mail left Cheyenne on another flight at 8:48 a.m. on May 9, arriving at Santa Fe at 1:31 p.m. on the same day. The mail superintendent stated that:

If the Bureau of Land Management in Santa Fe, New Mexico has a post office box, [⁴] your letter would have been in the box prior to the 4 p.m. deadline on May 9, 1967. If the Bureau of Land Management receives carrier delivery, your letter would not have been delivered until May 10, 1967.

The Office of Appeals and Hearings acknowledged the validity of appellant's charge that persons using the mails for transmittal of documents do not receive equal consideration with persons filing documents over the counter at the land office where the local office fails to make a mail pick-up after 1 p.m. and there is a possibility that mail

¹ The regulation provides in pertinent part that:

"* * * If there are other parties interested in the offer, a separate statement must be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the leave offer. * * *

² The record shows that appellant mailed two copies of her statement of interest to the land office, one by certified air mail and the other by regular air mail. The envelopes containing both statements were postmarked in Cheyenne, Wyoming, "May 8 PM," and both were stamped in the land office at Santa Fe, New Mexico, as having been received at 10 a.m. on May 10, 1967.

³ Appellant stated that her investigation of the reasons for the tardy receipt of her statement of interest disclosed that the Santa Fe office of the Bureau of Land Management picked up mail from its post office box at 8 a.m., 10 a.m., and 1 p.m. daily, whereas the Bureau's Cheyenne office picks up mail at those same hours and again just before 4 p.m. A memorandum from the New Mexico State Director, Bureau of Land Management, confirms appellant's statement with respect to the prevailing practice in the Santa Fe office prior to May 23, 1967. It also indicates that since that date an additional mail pick-up has been made at 4 p.m.

⁴ It does.

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will be placed in the post office box between 1 and 4 p.m. It held, however, in affirming the rejection of appellant's lease offer, that actual receipt in the land office within the period prescribed by the regulation is mandatory. It distinguished the present circumstances from the case of *H. C. Hathorn*, A-30257 (February 3, 1965),⁵ upon the premise that "in that case there was a strong presumption that the document had been delivered timely to the Bureau's mail agent by the Post Office Department," whereas, in this instance "there is only supposition that the document might have been placed in the Bureau's post office box in time to have been picked up before the deadline for filing."

In her present appeal the appellant charges that the Bureau's decision does not respond to her principal contention that the land office practice in picking up mail shows lack of reasonable diligence and is, in effect, a modification of the regulation, depriving her of a part of the 15-day period to which she is entitled for the filing of the required statement.

Problems arising from the transmittal by mail of documents which are required to be filed in a particular office by a specified date are not new, and the rule is now well established that the deposit in a post office of a letter properly addressed, with duly prepaid postage, creates a rebuttable presumption that the letter was received by the addressee in the ordinary course of mail. *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884); *Dunlop v. United States*, 165 U.S. 486, 495 (1897); *Hagner v. United States*, 285 U.S. 427, 430 (1932); *Detroit Automotive Products Corp. v. Commissioner of Internal Revenue*, 203 F.2d 785 (6th Cir. 1953); *Charlson Realty Company v. United States*, No. 388-62 (Ct. Cl. October 13, 1967); *H. C. Hathorn, supra*.

In this case, it is undisputed that appellant's statement of interest was correctly addressed to the New Mexico land office and was deposited in the mail in Cheyenne with proper prepayment of postage on May 8, 1967, that in the ordinary course of mail it would have arrived in Santa Fe no later than 1:31 p.m. on May 9, 1967, and would have been deposited in the Bureau's post office box at Santa Fe before 4 p.m. on that same day, and that, if it were placed in the box between the hours of 1 and 4 p.m., it would not have been taken from the post office by a Bureau employee until the following day. In these circumstances, under the rule noted above, there is a presumption that appellant's statement was, at least, placed in the addressee's post office box.

⁵ In the *Hathorn* case, the Department, relying upon the presumption that mail, properly addressed and posted, will be received by the addressee in the ordinary course of mail, held a lease rental payment to have been filed on the day on which it should have been received, even though it was stamped as having been received in the Bureau of Land Management on the following day.

prior to 4 p.m. on May 9, 1967.⁶ The question which remains to be determined is whether or not the deposit of mail in the post office box is equivalent to filing it in the land office, for the Department's regulations specify that the statement of interest "must be filed not later than 15 days after the filing of the lease offer" (43 CFR 3123.2(c)(3)) and that "filing is accomplished when a document is delivered to and received by the proper office" (43 CFR 1821.2-2(f)).

Substantially, the same question was considered in *Central Paper Co. v. Commissioner of Internal Revenue*, 199 F. 2d 902 (6th Cir. 1952), in which case a petition to the Tax Court of the United States for reconsideration of a ruling of the Commissioner of Internal Revenue was stamped as received and filed on December 7, 1950, two days after the deadline for the filing of such a petition. From the evidence it was determined that the petition was mailed from Chicago, Illinois, at 3:30 p.m. on December 1, 1950, that in the ordinary course of mail it would have arrived in Washington, D.C., at 4:30 p.m. on December 2, 1950, and that it would, in normal course, have been placed the same day on a ledge at the post office where mail addressed to the Tax Court was normally piled until called for by a messenger from the court. Applying the presumption that the petition was so received and placed by the post office, the court found this presumption of delivery to be the equivalent of filing of the document in the court, stating that:

We are of the opinion that such a delivery by the Post Office constituted delivery to The Tax Court, although not a physical delivery to the Clerk's Office of the The Tax Court. It had made delivery at the place directed by the addressee. At that time the Post Office had no further duty to perform in connection with its obligation to deliver. There is no twilight zone between delivery by the Post Office to the addressee, and receipt, either actual or constructive, by the addressee. 199 F. 2d at 904.

Cf. Phinney v. Bank of Southwest National Association, Houston, 335 F. 2d 266 (5th Cir. 1964), in which the court held that the receipt of a tax return in a post office on a Saturday morning, when the office of the District Director of Internal Revenue was closed, and the segregation of mail addressed to the district director from other mail did not give the district director such dominion and control over the return as to constitute a filing of the return on Saturday.

Applying the foregoing principles to the facts of this case, we find that the placing of a document by the post office in a mail box accessible

⁶ A "presumption" has been defined as a "rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved." *Black's Law Dictionary* 1349 (4th ed. 1951).

A "supposition," on the other hand, has been defined as a "conjecture based upon possibility or probability that a thing could or may have occurred, without proof that it did occur." *Id.* at 1609.

We find no basis for the Bureau's observation that there is "only supposition" that appellant's statement was deposited in the Bureau's Santa Fe post office box prior to the indicated date and hour.

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to the land office during the hours in which the land office is open for the filing of documents constitutes delivery to and receipt by the land office. Accordingly, we conclude that appellant's statement of interest, in the absence of any evidence to the contrary, must be presumed to have been filed on May 9, 1967, within the period prescribed for such filing.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is reversed, and the case is remanded to the Bureau of Land Management for appropriate action.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF HOEL-STEFFEN CONSTRUCTION COMPANY

IBCA-656-7-67 *Decided March 18, 1968*

Contracts: Performance or Default: Suspension of Work—Contracts: Construction and Operation: Notices

A claim based upon an allegation that a Government project supervisor required the work force of a construction contractor to stand aside and give first priority to the activities of another Government contractor in a project area containing limited working space was denied because it was made for a claim period during which the appellant gave no notice that a constructive suspension of work had been caused by the acts of a Government representative—as to one portion of the claim period the appellant provided no notification of any kind as to alleged acts of the Government causing delays, hindrances, interferences or suspension, and as to the remainder it had requested time extensions only. Because a supplemental agreement provided for the acceleration of work during the claim period, it was of particular importance that the contracting officer be given notice, in order to afford him an opportunity to investigate whether a reasonable program of coordination of the activities of the two contractors had been worked out, and to attempt to remedy any unfair scheduling.

Contracts: Construction and Operation: Notices—Contracts: Performance or Default: Suspension of Work

Notification of a monetary claim that is given under a provision such as the Changes clause, Changed Conditions clause, or an Extra Work clause may in some circumstances be treated as a proper notice under the standard-construction contract Suspension of Work clause (which clause bars claims for costs incurred more than 20 days prior to the contracting officer's receipt of notice of a constructive suspension of work); however, an appellant's notification of a claim for an extension of time based upon delays resulting from the operations of another contractor (or the Government's grant of such extension) will not constitute a notice under the Suspension of Work clause.

BOARD OF CONTRACT APPEALS

The claim to be considered in this appeal is for approximately \$151,000. Originally it was based upon asserted delays and interferences of other contractors, and the letter that first stated the claim made no reference to improper or unreasonable Government actions. The Notice of Appeal that was filed after issuance of the contracting officer's initial findings of fact advised that the interferences should be considered as changed conditions. The contracting officer, in reviewing the matter in a supplemental findings of fact, took into account the provisions of the standard clause entitled "Price Adjustment for Suspension, Delay, or Interruption of the Work for Convenience of the Government" (commonly referred to as the Suspension of Work clause). Since that time the parties have directed their efforts to the question of whether recovery should be allowed under that clause. The Notice of Appeal from the supplemental findings contends that interferences, interruptions, delays, and work stoppages resulted from "acts of the Contracting Officer." In addition, it alleges that as a result of the Government's negligence the appellant has been unjustly and unreasonably penalized.

The contract was awarded in the estimated amount of \$1,071,027, and called for interior construction work at the Gateway Arch and Interim Visitors Center, which is a feature of the Jefferson National Expansion Memorial in St. Louis, Missouri. Some of the principal items of the work were installation of partitions; suspended ceilings; concrete, polished aggregate and tile bases; metal doors and frames; painting; plumbing and electrical work; and heating, ventilating and air conditioning. This dispute concerns the work required to place duct in the North Leg of the Arch. The duct carries hot or cold air up that Leg, in order that the observation area at the top of the Arch can be properly heated or cooled.

The Gateway Arch is 630 feet high. Each of its legs is made up of sections that are equilateral triangles. At the bottom each of the three sides of a leg is 54 feet long. There is a decrease in the length of the sides as the Arch rises, so that at the top they are 17 feet long. Attached inside the legs are stairs, interior steel members, conduit, and the transportation system. That system incorporates a 40-passenger "capsule" train in each leg. The train capsules are mounted like Ferris wheel baskets. This allows the seats in capsules of the trains to remain level as they proceed up rails inside the Arch. In each of the legs there also is an elevator which goes to the 380-foot level.

At the hearing of this appeal the parties seemed to be in agreement that as a difficult construction job the Gateway Arch stands apart. Many phases of construction did not progress at the originally scheduled rate, including erection of the Arch, installation of the transpor-

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tation system, and the appellant's interior work which is involved in this appeal.

Important contract clauses which specify rights and obligations of the parties to be considered herein are as follows:

SW-3 PHASES AND COMPLETION OF WORK

* * * * *

c. The Contractor will be held to have fully informed himself of, and to have taken full cognizance of, the nature, extent, progress, time scheduling and other factors, relative to work which is being prosecuted and which will be prosecuted under other contracts within and adjacent to the Memorial Arch which would or could affect the progress and performance of his work. The Contractor will be held fully responsible for pre-planning and conducting his work so that no delay in completion of the work included under this contract shall occur, and further, that the scheduling and conducting of his work shall in no way interfere with or delay the progress and completion of work prosecuted under other contracts.

* * * * *

14. OTHER CONTRACTS

The Government may undertake or award other contracts for additional work, and the Contractor shall fully cooperate with such other contractors and Government employees and carefully fit his own work to such additional work as may be directed by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by Government employees. (Standard Form 23A, June 1964 Edition)

* * * * *

36. PRICE ADJUSTMENT FOR SUSPENSION, DELAY, OR INTERRUPTION OF THE WORK FOR CONVENIENCE OF THE GOVERNMENT

* * * * *

(b) If, without the fault or negligence of the Contractor, the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of the contract, or by his failure to act within the time specified in the contract (or if no time is specified, within a reasonable time), an adjustment shall be made by the Contracting Officer for any increase in the cost of performance of the contract (excluding profit) necessarily caused by the unreasonable period of such suspension, delay, or interruption, and the contract shall be modified in writing accordingly. No adjustment shall be made to the extent that performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted. No claim under this clause shall be allowed (i) for any costs incurred more than twenty days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply where a suspension order has issued), and (ii) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption but not later than the date of final payment under the contract. Any dispute concerning a question of fact arising under this clause shall be subject to the Disputes Clause. (From additional General Provisions)

* * * * *

SP-8. *JOB CONDITIONS: WORK BY OTHERS:* A contract for construction of Gateway Arch and "shell" of Visitor Center is now in progress, and one or more contracts covering grading, paving of roads and walks, and landscaping are expected to be let during the life of this interior finish contract.

In submitting his bid, the Contractor acknowledges that he has taken into account the effects of the above-mentioned contracts on the performance, progress, and completion of his own work, and in addition, has satisfied himself as to all local conditions which have a bearing on the cost of his work, including transportation, handling and storage of materials, and availability of labor.

Any failure by the Contractor to acquaint himself with available information will not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work. (From Special Provisions)

SP-9 OPERATIONS AND STORAGE AREAS

* * * * *

This Contractor will have rights in common with other contractors to the use of existing roads, storage areas, and other facilities (subject to limitations elsewhere set forth), and shall coordinate his activities with theirs so as to cause a minimum of interference. The Government will decide any questions in dispute regarding performance of work, access to and cleaning of site, and priority between various contractors.

The appellant's claim letter, dated June 2, 1967,¹ stresses the fact that its bid was submitted in August 1965, and that it made a pre-bid investigation of the status of the construction of the Arch and the transportation system. From its investigation Hoel-Steffen concluded that completion of the Arch and installation of the trains would be fully carried out in December 1965. The letter states:

The Arch and Transportation System Contractors did *not* finish their work as scheduled in December, 1965 and they have been on penalty under their contract with the Government ever since. The Arch and Transportation System Contractors continued to work in the Arch legs hampering and hindering our duct installation through all the year 1966 and into the year 1967. The *complete* installation of the duct work in the *North* leg was installed under conditions and circumstances *not* taken into account at the time of the bid because the Arch and Transportation System Contractors were present in the Area long over their contract completion date. The Arch and Transportation System Contractors installed stairways, stair railing, train system equipment, panels, doors, plates, et cetera, all required to complete their work with the Government during our installation of the duct work and this interference has caused our labor installation budget to be tripled in the *North* leg. * * *

MacDonald Construction Company was the prime contractor for the Arch and Visitor Center and for the transportation system. Installation of the transportation system was subcontracted by MacDonald to the Planet Corporation. MacDonald and Planet are the "Arch and Transportation System Contractors" referred to by Hoel-Steffen. The Government-MacDonald agreements were entered into in 1962.

¹ Item 1A, Appeal File.

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Propriety of Submission of the Claim by Hoel-Steffen

The duct work in the North Leg was performed by the St. Louis Sheet Metal Company, a subcontractor for Hoel-Steffen. The appellant's president testified that the subcontractor, rather than the prime contractor, incurred the expense which Hoel-Steffen is seeking to recover.² He added that the subcontractor had been "dissolved" and that it had been necessary for Hoel-Steffen to take over the subcontractor's work. He asserted that in completing such work (in areas other than the North Leg) Hoel-Steffen was "suffering almost a \$370,-000 loss, * * * this \$150,000 is a part of it." A similar claim theory is advanced in the June 2, 1967 claim letter:

Including the projected costs for completion the total job costs will be \$845,-550.11. This amounts to an overrun of \$275,761.11.

By contract our firm must complete this project under a financial hardship, that will cause our firm to also be insolvent if consideration is not given to this request for relief.

We ask that \$108,151.77, which is two-thirds of the St. Louis Sheet Metal Company's labor cost between February 16, 1966 and January 20, 1967, plus 21 percent taxes and insurance paid by St. Louis Sheet Metal Company on labor, plus 15 percent overhead, or a total of \$150,493.19,³ be added to our contract to allow us to be compensated for extra cost beyond our contract and also to allow us to continue this project to completion.

There is no evidence in the appeal record that the subcontractor or its trustee in bankruptcy⁴ ever requested that this claim be filed. In fact, the appellant's president testified that the claim is being submitted on Hoel-Steffen's behalf, not on behalf of the subcontractor.⁵ The appellant did, however, meet the payroll of the St. Louis Sheet Metal Company for one week in January 1967 (that payroll covering work performed in the North Leg).⁶ This was necessary because checks of the subcontractor were not honored due to insufficient funds.

In his Post-Hearing Brief, Government counsel voices a strong objection to the appellant's right to maintain this appeal, stating that this case "does not present a situation where the prime sues to recover damages arising from a claim against him by the subcontractor," and "that although the loss was the subcontractor's, neither the appeal was in the subcontractor's behalf, nor would the damages sought be to its credit."

We are in an area that is covered excellently in *A Plea for Abolition*.

² Tr. 224.

³ The claim amount was increased at the hearing to \$151,198.30.

⁴ The appellant's project manager testified that he had seen documents stating that the subcontractor was in bankruptcy. Tr. 50.

⁵ Tr. 220.

⁶ Tr. 220.

of the *Severin Doctrine*, 34 Geo. Wash. Law Rev. 746 (1966).⁷ That article notes a Court of Claims decision,⁸ in which a layman's expression of opinion as to his legal rights was disregarded in favor of a presumption that a prime contractor was liable to his subcontractor. It also refers to (as "straightforward, though perhaps unintended") a statement contained in a decision of this Board that was issued more than eleven years ago:⁹

* * * The established principle is that a contractor may prosecute a claim against the United States for the contract price of work performed or materials furnished by a subcontractor, irrespective of whether the contractor is liable to the subcontractor * * *.

Because we ordinarily will disregard the question of the prime contractor's liability to its subcontractor when a claim is submitted under one of the clauses in a contract,¹⁰ and because counsel for the appellant has asserted in his Post-Hearing Reply Brief that Hoel-Steffen did in fact pay its subcontractor's labor costs,¹¹ we have concluded that a full review of this matter should be made.

The Supplemental Agreement

A supplement to the prime contract was executed by Hoel-Steffen and the Government on April 15, 1966.¹² It provided for the "Modification of order of work specified in Contract No. 14-100232-774 to require completion within 91 days after execution of this contract of that work in the North leg of the Gateway Arch necessary to permit operation of the passenger transportation system in that leg." It also contained a \$750 per day liquidated damages provision.

Another paragraph in the supplement stated:

4. Completion of the work herein specified will be considered accomplished when facilities necessary to permit public use of the transportation facilities

⁷This article, also to be found in the Yearbook of Procurement Articles, Vol. 3, 1966, pp. 523-545, observes (p. 532):

"* * * When an indirect action is allowed because of a presumption of liability, even though liability in fact does not exist, one can only conclude that the importance of the privity requirement is not pre-eminent. The short-hand fictions, that the Government has simply failed to rebut the presumption or has waived its right to do so, are unsatisfactory explanations. * * *" Equally perplexing is the presentation of a claim that is for costs incurred by a subcontractor, but it is said not to be made on behalf of the subcontractor.

⁸Kaiser Industries Corporation v. United States, 340 F. 2d 322 (1965).

⁹Wiscombe Painting Company, IPCA-78 (October 26, 1956), 56-2 BCA par. 1106.

¹⁰R. C. Hughes Electric Company, Inc., IPCA-509-8-65 (November 30, 1966), 66-2 BCA par. 5989.

¹¹In *Blount Bros. Construction Co.*, 171 Ct. Cl. 478, 484 (1965), considering a similar allegation is to be found in footnote 7:

"At one point in its papers before the trial commissioner, plaintiff stated that 'the burden of extra costs fell upon Whittington & Brown Co., Inc., the concrete subcontractor, and not on Blount Brothers Construction Company, the prime contractor.' We do not read this unguarded comment as a true concession of nonliability on the part of plaintiff, but rather as a reference to the conceded fact that the initial and direct impact of the allegedly extra costs fell upon the subcontractor. Plaintiff's counsel has since disavowed the statement if it means anything more."

¹²Exhibit 4.

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shall be available, which will include but not be limited to completion of the north exterior ramp, the lobby areas, exclusive of the fountain but including the men's and women's toilet rooms, the north lower ramp, including the north loading zone, and the electrical work (except full testing will be permitted after the passenger transportation system has been placed in operation). All work on the air handling system within the North leg will be complete, and the air handling system shall be operational. The failure of the passenger transportation facilities to be placed in operation by reason of causes not connected with the work under this contract shall not be construed in any manner to affect the determination of the contracting officer of the date when the work under this contract is completed.

The price paid by the Government for the acceleration of work under the supplement was \$97,500.

At the Government counsel's first mention of the supplement during the hearing,¹³ the appellant's counsel objected, taking the position that the Government was advancing an affirmative defense that had not been brought up until after commencement of the hearing. The appellant raised a continuing objection to any testimony about the supplement, and to the admission of that document into the appeal record.¹⁴

The appellant's June 2, 1967 claim letter, on page 3 shows an amount under a bid tabulation listing with the reference "Modification #1" and "(expedite North Leg of Arch)." Thus, the claim letter itself recognizes the fact that the supplement was entered into by the parties.

The contracting officer's first findings of fact (dated July 11, 1967), did little more than conclude that the claim was "based on a breach of contract purportedly arising out of Government delays for which I do not have the power to negotiate and decide responsibility." The supplemental findings of fact (dated September 6, 1967), took up the question of whether the claim was payable under the Suspension of Work clause. The contracting officer concluded that there had been no breach of duty on the Government's part, or unreasonable delay chargeable to the Government. He ruled in general fashion, with the inclusion of few facts, that the additional amount sought by the appellant would not be allowed because he did not find (i) evidence of a breach of duty on the Government's part (ii) unreasonable delay chargeable to the Government; or (iii) that the Government could be held responsible for alleged interference and delays caused by other contractors. Notwithstanding the fact that the supplemental findings was made up for the most part of conclusions, the appellant proceeded with the presentation of this matter without asking that those findings be amplified.

The Board has considered the action of its hearing official in admitting the contract supplement (Exhibit No. 4) to the appeal record, and taking testimony and admitting other documents which

¹³ Tr. 40.

¹⁴ Tr. 228-9.

pertain to the supplement. We hold that no proper basis exists in this case for excluding the supplement. The parties agreed to the supplement as much as they did to the original document, and the duct work in the Arch's North Leg is specifically designated as part of the work that was to be accelerated under the supplement.

The appellant's president, a registered professional engineer with a degree in mechanical engineering,¹⁵ wrote a letter dated April 1, 1966,¹⁶ explaining the factors that led him to request \$100,000 as the consideration for agreeing to the supplement (as has been indicated, when the supplement was executed two weeks later the consideration actually named was \$97,500). Three significant paragraphs of the April 1, 1966 letter are as follows:

We have contacted all of our subcontractors and material suppliers on the subject project with respect to re-scheduling the project to allow operational use of the North leg of the Arch for public operation of the train system to the observation platform at the top. This operational use would include the completion of the North exterior ramp, the entire lobby area including the men's and women's toilet rooms and the North lower ramp including the North loading zone. The air-conditioning system and electric system would be installed; however, completion and test-out would not be completed entirely by July 1, 1966. The toilet facilities would be installed and in operation for public use by July 1. Some phases of the fountain would not be entirely completed by July 1. However, this would not affect the operational use of the lobby area.

To accomplish this re-scheduling would entail considerable overtime work by all trades on the project. Also additional administrative time would be spent in expediting materials and deliveries to the accelerated schedule of the project. The earlier delivery dates would require special inducements to the material suppliers and subcontractors. All of these factors will add to the cost of the contract, especially the double time labor cost incurred by the overtime required to expedite the work to the July 1st date. These costs would require that the contract be increased by One Hundred Thousand dollars (\$100,000.00). For every day after July 1st that the work remains uncompleted to make the North leg inoperative, we will credit this extra cost in the amount of One Thousand dollars (\$1,000.00) and shall be limited to a maximum credit of Fifty Thousand dollars (\$50,000.00) against the total extra cost of this proposal. Inoperative is defined as a condition that will not allow public use of the North train and North Arch leg. This does not infer that we guarantee operational use of train or Arch interior not controlled by our contract. Further, operational use does not include the completion and testing out of the air conditioning and ventilation system on date of July 1, 1966. The total completion of this project shall remain the same including the new completion date of October 17, 1966. The liquidated damages for non-completion by date of October 17, 1966 shall remain as called out in the original contract documents of \$250/day.

In order that this project be expedited on this overtime basis, we must ask that crafts under our contract take precedent over all other contractors working on the Gateway Arch on the overtime hours between 4:30 p.m. and 8:00 a.m., Monday through Friday.

¹⁵ Tr. 129.

¹⁶ Exhibit No. 7. This letter superseded one dated March 28, 1966 (Exhibit No. 6).

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The appellant had performed only a minor percentage of the North Leg duct work prior to the April 1-15, 1966 period. Prior to that time, it had not been possible to perform such work because of a union boycott of Hoel-Steffen's operations and other delays which the appellant contends were not within its control and had no effect on the costs claimed in this appeal.¹⁷ The two legs of the Arch had been brought together by installation of the "keystone" section in October 1965.¹⁸ Neither the Arch nor the transportation system was complete at the time of the execution of the Government-Hoel-Steffen supplement. The Arch itself was found by the Government to be substantially complete on June 28, 1966, about ten weeks after the supplement was signed. The transportation system was to be completed within 95 days after completion of the Arch and its acceptance by the National Park Service.¹⁹ Planet Corporation's installation of the train in the North Leg was accepted in May 1967, and placed into operation in July 1967.²⁰ Thus the subcontractor worked on the installation of that portion of the system, and on getting it to operate properly, for more than a year after the date of the supplement.

In its bidding preparations the appellant seems to have learned of a December 24, 1965 projected completion date for the Arch that MacDonald had supplied to the Government in March 1965. A good deal of testimony was given on the question of when Hoel-Steffen officials and Government contract administrators expected the Arch to be finished when they had dealings in the last half of 1965. However, we will not dwell upon that matter, because of the fact that the appellant, in preparing to execute the supplement in the spring of 1966, obviously was required to make a complete reassessment of its position. On cross-examination the contracting officer described the situation during the period when the supplement was negotiated (Tr. 307) :

Q. So there would be no way of Hoel-Steffen knowing at that time how much, if any, interference MacDonald would be to them?

A. Oh, I think that a review of the limited space up there would have revealed to anybody that there was going to be problems with two contractors there.

Q. Yes, but how much interference there'd be no way of knowing.

A. No.

Q. You'd realize there was going to be some, of course?

A. That's right.

Q. Now, in April, in March and April of '66 did you even know at that time when MacDonald was going to get out of there?

A. No, but * * * since they did not have the transportation system operating, it was apparent that it would be at least July before they would have the transportation system operating. Now, when he got out of there may have been considerably after that because he had a lot of little work downstairs.

¹⁷ Tr. 214-15; page 4, appellant's Post-Hearing Brief.

¹⁸ Tr. 137.

¹⁹ Tr. 353.

²⁰ Tr. 282.

The appellant's project manager agreed that Planet Corporation "had work to do" when the appellant commenced its work in December 1965, and testified as follows (Tr. 69-70) :

Q. And that work was going on right down through your entire period of construction in there?

A. Yes, that's true.

Q. And as you first went on the job, you were able to see that the other contractors had work to do in the north leg of the Arch with which you would have to coordinate your work, isn't that right?

A. I expected to make normal coordinations,²¹ yes sir.

The Performance of Work Under the Supplement

The appellant contends that acts of the Government denied its subcontractor access to the work and hoisting area in the North Leg and granted absolute and continuous priority to MacDonald (and its subcontractor, Planet Corporation). In agreeing to the supplement the appellant did not anticipate that its subcontractor would have unimpeded access to the area in question at all times. The request in the appellant's April 1, 1966 letter²² "that crafts under our contract take precedent over all other contractors working on the Gateway Arch on the overtime hours between 4:30 p.m. and 8 a.m., Monday through Friday" is a clear indication that Hoel-Steffen expected work conflicts to develop during day shifts. The sheet metal subcontractor's general foreman, who knew of the existence of the "acceleration contract" (supplement), but did not know the particulars of it,²³ testified that he had advised Hoel-Steffen's project manager that the "very minimum" time needed for duct work in the North Leg was "from 12 o'clock on each day to do our hoisting."²⁴ The period actually available to the subcontractor was from 1 to 3:15 p.m., and from 4 p.m. on until the end of the night shift.²⁵

At the hearing witnesses for the appellant and the Government referred to MacDonald's status as "in liquidated damages" after May 1965. However, MacDonald's officials, if asked in 1965 or 1966, almost certainly would have contended that this was not the case, since the 1965-1966 winter and the following spring MacDonald had substantial time extension requests pending both for the Arch and the transportation system.²⁶ If it is assumed that on April 15, 1966, when the supplement was signed, MacDonald was "in liquidated damages" with re-

²¹The duct subcontractor's general foreman acknowledged that when MacDonald's activities prevented the hoisting of duct in the North Leg he was able "to some degree" to keep his forces occupied with contract work. He stated that at times it would "take longer to do something by working at it backwards." Tr. 181.

²² Exhibit No. 7.

²³ Tr. 173.

²⁴ Tr. 175.

²⁵ Tr. 176.

²⁶ Exhibit No. 14.

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spect to the Arch work, the time for completion of the transportation system nonetheless on that date was to run beyond the 91-day accelerated completion period established in the supplement. This is because the time allotted for the transportation system extended 95 days beyond completion and acceptance of the Arch, which had not occurred on April 15, 1966.

There are no expressions of dissatisfaction about Government acts on the part of Hoel-Steffen or its duct work subcontractor contained in job records kept during the period from early April 1966 to July 1, 1966, or in letters written during that period. That period makes up the lion's share of the 91-day accelerated time for completion of duct work. Letters were written by the appellant requesting a 2- or 3-day time extension for a wildcat strike that occurred in late May.²⁷ By a letter dated July 1, 1966,²⁸ the appellant notified the Government of a more serious strike by sheet metal workers. The letter states that "without sheet metal workers, it will be impossible to complete the air conditioning system in the North Leg by July 15, 1966." It also requests an extension of time applicable to "the expedited portion of the contract which requires the operational completion of the North leg of the Arch by July 15, 1966." Although Hoel-Steffen's duct subcontractor had worked all but 15 days of the 91-day period, no reference was included to priorities, directions, lack of work space, or the other alleged problems that were emphasized at the hearing. The strike which began on July 1 did not end until September 12, 1966.

The appellant's president testified that in a meeting in the last part of April 1966, the Government's project supervisor said that the train installation "had to proceed and it could not be stopped," and that he (the project supervisor) "would hold meetings and give directions on who could work in what areas at what times so that this project could be completed with both contractors simultaneously."²⁹ The recollections of the appellant's project manager about that meeting were not as definite,³⁰ but he recalled that a schedule for hoisting of the duct was, "generally discussed." The Government's project supervisor thought that the meeting had been held on May 2:³¹

That was, to my knowledge, the first meeting that we had where we discussed with them that they did have to get along, they'd have to work together and they better do it because it was in the contracts.

This was the only meeting on the subject that was held in the spring or summer of 1966. However, as will be discussed, the work space prob-

²⁷ Copies of these letters are in the Appeal File.

²⁸ Item 6, Appeal File.

²⁹ Tr. 190. The meeting in the spring of 1966 was the only one attended by the appellant's president, Tr. 191.

³⁰ Tr. 17.

³¹ Tr. 330.

lem required meetings beginning in October 1966.³² The project supervisor also testified:³³

I do not recall ever having instructed anybody there would be a preference. In fact, I stayed very clear of directing a contractor verbally about anything.

In addition, he stated that at the May 2 meeting, Hoel-Steffen had presented a schedule, that everyone had agreed that they would try to get along, and that he did not remember "specific complaints from then on until early October, the middle of October."³⁴

On a space provided for "Delays, unusual conditions or findings," included on the form used for the "contractor daily report," Hoel-Steffen's representative did not list anything about "delays or complaints of the operation of the work as it progressed on the Arch" during April and May 1966.³⁵

The appeal record will not support a finding that there was a suspension, delay or interruption resulting from an act of the contracting officer or any of his representatives during April, May or June 1966. The situation seems to have been about what the top management of Hoel-Steffen and the duct work subcontractor anticipated when the appellant signed the supplement in the middle of April. No extensions of time were requested for delays or interruptions during that period (except for the wildcat strike). No notification of a claim for delay costs was given under the Suspension of Work paragraph (Clause 36) or any other provision of the contract—in fact, no such notice of claim applicable to the North Leg was given during the entire period required for completion of the duct work in that Leg. Since the appellant had agreed to the acceleration supplement and in doing so realized without question that its forces and MacDonald's forces would have a work space problem in the North Leg little significance can be attached to (i) the scheduling of the meeting in early May, and the discussion at that meeting of the difficulties that were inherent in the sharing of the North Leg, or (ii) the work by employees of the duct subcontractor on some nights and weekends, and the extension of the work day to 10 hours which commonly is reflected in the payrolls for the April 15–July 1, 1966 period.³⁶ The evidence in this appeal would indicate that in the fall of 1966, the effect of the transportation system work on progress by the appellant's duct work subcontractor was more disruptive, a matter which we will now consider.

³² Tr. 331.

³³ Tr. 362.

³⁴ Tr. 332. When he was asked about testimony that he had directed the contractors as to the time they could work the project supervisor stated "That is not true." Tr. 340. He denied that oral instructions establishing priorities had been given. Tr. 368.

³⁵ Tr. 336.

³⁶ Exhibit No. 13.

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Installation of Duct Following the Summer 1966 Strike

The effort by the appellant's subcontractor to install the duct in the North Leg was plagued by labor difficulties. A strike in the first two months of 1966 caused a 45-day delay.³⁷ Three days were lost because of the wildcat strike in May.³⁸ The third strike, July 1, 1966 to September 12, 1966, was extremely disruptive—the parties agreed that twenty-six days were required after the strike ended September 12 for the re-hiring of sheet metal workers and remobilization.³⁹ Change Order No. 3, was executed on July 25, 1966,⁴⁰ extended the completion date in the "accelerated agreement" from July 15 to August 14, 1966. It also refers to the sheet metal work (which includes the duct work), indicating that a time extension allowing for the effect of the sheet metal worker's strike (which was on at that time) would be granted "subsequent to the termination of the strike."⁴¹ This was accomplished in Change Order No. 5.

While on the subject of Change Order No. 5, we will quote the statement in that Order which is urged by the appellant's counsel as notification of the claim now made by Hoel-Steffen. The Change Order begins with a general indication that a time extension for work delays is granted. After dealing with the specifics of the time allowed for the long summer strike, for re-hiring and remobilization (and the effect of the wildcat strike), Change Order No. 5,⁴² which grants a time extension for the acceleration supplement from August 14, 1966 to October 10, 1966, states in the final two sentences of the first paragraph on page 2:

We are aware that progress on some portions of your work has been slowed by another contractor. This will be considered when you document the extent of such delay.

True to the promise in Change Order No. 5, which was dated October 17, 1966, Change Order No. 6, issued a month later,⁴³ extended the date for completion of the acceleration agreement from October 10, 1966 to November 10, 1966. This grant of time was stated to be based upon an analysis of the "daily logs of the Government's Project Supervisor, the Resident Architect, and your own letters and daily reports," and the MacDonald daily log. The period considered in the analysis was September 23, 1966 through October 25, 1966.⁴⁴ The time granted was

³⁷ Change Order No. 1 (Included in Exhibit No. 1).

³⁸ Change Order No. 5 (Included in Exhibit No. 1).

³⁹ Change Order No. 5 (Included in Exhibit No. 5).

⁴⁰ Change Order No. 3 (Included in Exhibit No. 1).

⁴¹ The occasion for negotiating the money and time allowances provided for in Change Order No. 3 would of course have been the logical time for the raising of a claim based upon delays or interferences by MacDonald or the Government during the April-July 1966 period. This was not done.

⁴² Included in Exhibit No. 1.

⁴³ Included in Exhibit No. 1. This Change Order is dated November 16, 1966.

⁴⁴ Change Order No. 6, included in Exhibit No. 1.

found to have been lost "as a direct result of your lack of access to the north leg of the Gateway Arch," and it was acknowledged that the appellant's work was being slowed due to the activity of another contractor (MacDonald).

Change Order No. 7⁴⁵ is similar to Change Order No. 6. It reviews the time available for duct work in the North Leg between November 11, 1966 and December 21, 1966, and changes the completion date for the acceleration supplement from November 10, 1966 to December 21, 1966. It relies upon the sources of information mentioned in Change Order No. 6, and grants the additional time for work delays beyond Hoel-Steffen's control, i.e., those associated with the necessity to "share accessibility to the work area in the north leg of the Gateway Arch."

The sentences in Change Orders No. 6 and 7 which allot the additional time conclude with the phrase "with no change in the amount of compensation." In addition each of the change orders contains this sentence:

The monetary amount of this supplement agreement remains at \$97,500.

The portion of the orders preceding the signature line for the appellant's authorized officer recites that "no additional compensation is included by reason of" Change Orders No. 6 and 7. The Government counsel asserts in his Post-Hearing Brief that the change orders constitute a bar to Hoel-Steffen's claim for additional compensation for delay costs, on the theory that the appellant, by signing them, released any right that it had to make such a claim.

It is clear from the appeal record that in the summer and fall of 1966, the parties discussed only the appellant's desire to avoid the assessment of liquidated damages, and the resulting requests for extensions of time that were made periodically. Hoel-Steffen's failure to have suggested in any manner that it intended to press a claim for additional compensation⁴⁶ has consequences which will be discussed when we consider the merits of the suspension of work claim. The fact that there was no such claim pending also must be taken into account in our review of the language of the change orders.

The absence of specific wording which eliminates the appellant's right to file a claim for money based upon delay prevents a finding that an accord and satisfaction concerning such a claim has been reached. Thus, in *Premier Gear and Machine Works, Inc. and H. and K. Constructors, Inc.*, ASBCA No. 9978 (October 29, 1965), 65-2 BCA par. 5182, it is stated:

* * * [A] modification recites that the contractor will be compensated for excise and duty taxes on materials and equipment imposed by U.S. Customs. Its penultimate paragraph states that the reimbursement allowed constitutes

⁴⁵ Included in Exhibit No. 1, Appeal File.

⁴⁶ The appellant's president conceded that the first demand upon the Government for "payment of delay time" was made in the spring of 1967. Tr. 260.

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"payment in full and accord and satisfaction for all additional costs, incurred * * * in connection with excise and duty taxes imposed and as indicated in this modification." Finally the modification states that no additional time is allowed. * * * The modification on its face purports to apply only to duty imposed and the accord and satisfaction is as to costs incurred in connection only with duty imposed. At the time the modification was negotiated and executed [a subcontractor's] claim had not been formally asserted. There is no reference therein to delay costs arising out of the duty "incident" nor apparently was there an attempt to write into the modification broad language which would release the Government from any claim, present or future, which might in any way arise out of the events detailed in this opinion. [No accord and satisfaction was found as to the subcontractor's claim.]

The general language in Change Orders No. 6 and 7 is not sufficient to bar the appellant from making the claim which is considered in this opinion.

The Fall Meetings

Prior to the meetings that were held beginning in late October 1966, to consider work space and access problems, Hoel-Steffen's project manager wrote a letter to the National Park Service touching upon the subject. This letter is dated October 10, 1966,⁴⁷ and for the most part is concerned with delays and difficulties experienced by the appellant's subcontractor in obtaining crews of qualified men to resume work on the duct following the end of the July 1-September 12 strike. A good deal of information about post-strike hiring difficulties is given in support of a request for a 30-day time extension of the acceleration supplement's completion date. As additional justification for that request the following statement is included in the letter:

I should also like to point out that at various times, when we have tried to make arrangements to resume in the Arch Leg we have been informed by Mr. Bob Beal of Planet Corporation that he was running tests on the passenger conveyance system to get all of the bugs out, and that the conductor bars would be energized almost continuously. He also informed me there would be no way of knowing when, or how long, they would be shut off. This has also hampered the resumption of our work on this high pressure duct.

On October 11, 1966, the project manager sent a letter⁴⁸ that was concerned in its entirety with the conflict between running the conveyance system and installing duct in the North Leg. The letter refers to a discussion on October 11, between the project manager and the Government's project supervisor in which the latter was informed of the conflict, and advises:

* * * It was my opinion after the meeting we held with the Park Service on October 7, 1966, that they would procure from MacDonald Construction Company what days the train would be testing so we could work up our schedule for the days we could work in the North Leg of the Arch. [The project supervisor] ad-

⁴⁷ Item No. 8, Appeal File.

⁴⁸ Exhibit No. 12.

vised me that we were to sit down with MacDonald Construction Company ourselves, and work out this schedule. I attempted to do so this afternoon, with Bill Netzela of MacDonald and Bob Beal of Planet, and was advised by these people that it would be impossible to make up a schedule and that we would not be able to resume work on the North Leg of the Arch for the rest of the week because the conductor bars would be constantly energized.

We have been constantly badgering Sheet Metal Local 36 in effort to obtain a sufficient number of men to resume the work on all phases of sheet metal work on this project. We now have enough men to start on the High Pressure Duct Work but are delayed due to another contractor occupying the area in which we are to work.

It may be that work on the testing of the conveyance system had progressed during the July, August and September strike period to the point that coordination of the two types of work had become a considerably more difficult undertaking than it was earlier in the year. The appeal record does not allow a definite conclusion on this point to be reached. It does show unquestionably, however, that from mid-October on, the degree of participation by Government officials in achieving the necessary coordination was increased greatly. Hoel-Steffen's project manager referred to ensuing "daily"⁴⁹ meetings, and asserted that the project supervisor presided and gave "directives."⁵⁰ He estimated that approximately 25 "called" meetings had been held. He did not enter any information about the meetings in the appellant's daily log or otherwise record what took place when they were held.⁵¹ The meetings "were called primarily to see who could get in and get the work done in the north leg which was our primary interest."⁵² His position concerning the amount of time obtained for the subcontractor's duct work was (Tr. 60):

I think I made known the fact that I was wanting to get my work done in there. I don't think I physically protested or made a big issue of it with [the project supervisor].

He denied that the time available for Hoel-Steffen progress was worked out with MacDonald.⁵³ His idea of normal coordination is that it is "a case of give and take between the two contractors."⁵⁴

The Government's project supervisor testified that, beginning on October 24, 1966, fifteen to twenty meetings were held for the purpose of "adjusting use of the time on the Arch."⁵⁵ He found that quite a problem existed:

* * * because each fellow was wanting to get in certain areas and everybody was in everybody's way. I noticed we were about an hour in that meeting and it

⁴⁹ Tr. 27. He recalled that the meetings started "at the end of October or the first part of November, and lasted on through into about January sometime, I think."

⁵⁰ Tr. 28.

⁵¹ Tr. 57-58.

⁵² Tr. 58.

⁵³ Tr. 62.

⁵⁴ Tr. 80.

⁵⁵ Tr. 329.

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seemed to resolve itself, and the people themselves came to an agreement and they went out and for a day or so things were not too bad. (Tr. 330-332)

As we have indicated previously the project supervisor did not "recall ever having instructed anybody there would be a preference."⁵⁶ As he remembered the meetings, the representatives of the prime contractors and subcontractors would discuss their problems, and disagreements were resolved as follows:

* * * if it was at an impasse many times I would ask one or the other can you give a little and will you allow the other people in. Many times I asked that of [the appellant's project manager] and many times he did it, but it is not a direct [sic] to do it, they had to do it. The last thing I tried to do at each meeting was, so that I understood, and everybody else would, we would say now this is what we think should happen the next day or two, whatever it is. (Tr. 340-341)

At the fall meetings both contractors complained about denial of access or that they were unable to perform their work.⁵⁷ The project supervisor reiterated upon cross-examination that he had merely recited the agreements that the contractors had made "back to them," and that they had resolved the disputes over access and work space themselves.⁵⁸ Further questioning about his conversations with Hoel-Steffen's project manager went this way:

Q. You would have turn to him and ask him, will you let them work?

A. Yes; and I would do the same thing to MacDonald.

Q. Could he have taken that to be an instruction from you that you are not allowed in there?

A. No.

Q. Could he have taken that as a directive from you and say you aren't allowed in there any more because they have to use that train?

A. I don't see how he could. (Tr. 370)

The South Leg Suspension Order

Hoel-Steffen notified the Government by a letter dated December 15, 1966,⁵⁹ that the work covered by the acceleration supplement would be completed on the following day. The Government does not seem to dispute that such work was completed at about that time, although some work not included in the supplement was performed in the North Leg in January 1967. In the same month, sheet metal work under the Hoel-Steffen contract was started in the South Leg of the Arch. That work was not referred to in the acceleration supplement, and was covered only by the original contract.

⁵⁶ Tr. 332. When asked whether he had directed the appellant or its subcontractors to stay out of or away from the North Leg areas, he replied: "I did not; neither did I do that to MacDonald. I have no right to do it." (Tr. 371)

⁵⁷ Tr. 364.

⁵⁸ Tr. 366. The payrolls (Exhibit No. 18) are corroborative of this statement since they show that full shift night work operations were terminated within two weeks after the meetings started.

⁵⁹ Exhibit No. 10.

Very shortly after work in the South Leg commenced, the contracting officer issued a "directive" requiring the appellant to program work in a manner that would assure non-interference by the appellant's work with "progress of the MacDonald Construction Company, or its subcontractors."⁶⁰ The appellant replied in writing to the "directive,"⁶¹ advising that it "has seriously affected the cost and completion schedule of our work, particularly in the South Leg of the Arch where the majority of our work remains to be completed." The reply requested that the Government give consideration to reimbursing Hoel-Steffen for the hardships resulting from issuance of the "directive." In making this request as to the South Leg, the appellant's president made specific reference to "Paragraph 36—Price Adjustment for Suspension, Delays, or Interruptions of Work for the Convenience of the Government—U.S. Department of the Interior, Form 10-292"—the Suspension of Work clause. For more than nine months prior to that request and a period of four and one-half months thereafter, no request for a monetary adjustment, or mention in any way of the Suspension of Work clause, was made respecting the North Leg Work.

On January 20, 1967, a Stop Order⁶² was issued directing that work in the South Leg be suspended for the convenience of the Government. An Order to Resume Work was issued on June 13, 1967.⁶³ In July 1967, Change Order No. 11⁶⁴ was agreed upon by the parties. It provided for a time extension of 155 days and an increase in the contract amount of \$32,923.01, as adjustments required because of the January 20 Stop Order.

Decision

For the entire period prior to the fall of 1966 the appellant has nothing to point to as notice of a claim made under the Suspension of Work clause. There is little need, therefore, to discuss the portion of the claim that is associated with work performed in the North Leg during that period. The part of the Suspension of Work clause providing that a claim made thereunder shall not be allowed "for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved" (applicable to a constructive suspension) will be enforced by a contract appeals board.⁶⁵ Its enforcement will not be precluded by the lack of proof or absence of a contention on the Government's part that it was prejudiced by the appellant's failure to give an earlier notice.⁶⁶

⁶⁰ Letter from the contracting officer to Hoel-Steffen, dated January 9, 1967, Appeal File, Item 14.

⁶¹ Hoel-Steffen's reply letter is dated January 17, 1967, Appeal File, Item 15.

⁶² Item 17, Appeal File.

⁶³ Item 20, Appeal File.

⁶⁴ Item 22, Appeal File.

⁶⁵ *Structural Restoration Company*, ASBCA Nos. 8747 and 8756 (July 16, 1965), 65-2 BCA par. 4975.

⁶⁶ *Ibid.*

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The delaying effect of the work by the Arch contractor and its transportation system subcontractor cannot, standing alone, provide the basis for a claim made under Clause 36. It must be established that there was a Government delay of Hoel-Steffen's performance in an unreasonable manner.⁶⁷ With these considerations in mind, plus the previously noted provision that eliminates costs incurred more than twenty days prior to notification of the act or failure to act involved, we will consider the claim as it relates to performance of the North Leg duct work subsequent to September 23, 1966 (when the record indicates that Hoel-Steffen's subcontractor had remobilized its forces following the long summer strike).

The appellant's president and its project manager conceded freely that no notice of claim (i) requesting additional compensation, or (ii) referring to the Suspension of Work clause was given in the fall of 1966 or even during the 1966-67 winter. We must, therefore, look into the question of whether other actions on their part should be deemed to comply substantially with the notice requirement. Unlike the standard "Changes" clause, the Suspension of Work clause does not contain specific authorization for a contracting officer (or a Board) to waive a contractor's failure to provide timely notice of an alleged constructive suspension. While the power to waive specific notice is not entirely lacking, it is extremely limited. FPR Circular No. 5,⁶⁸ provides an explanation of the conditions that must be met:

[A price adjustment will be made where] Notice has been given by the contractor to the contracting officer, except where a suspension order was issued, of the act or failure to act involved. No provision is contained in the clause whereby the contracting officer may waive a failure to comply with this notice requirement. However, this will not preclude adjustment where a notice of delay has been given by the contractor under another clause of the contract.

The October 10 and 11, 1966 letters from the appellant to the Government inform the contracting officer of the hampering effect of the transportation subcontractor's activities. The only reference to action by a Government representative is the statement in the October 11,⁶⁹ letter that the Government's project supervisor advised "that we were to sit down with MacDonald Construction Company ourselves, and work out this schedule." When that suggestion did not prove to be

⁶⁷ *Arvid E. Benson*, ASBCA No. 11116 (October 19, 1967), 67-2 BCA par. 6659. The clause contains a reference to suspension delay or interruption of work for an unreasonable period of time, and a reference to the failure of the contracting officer to act within a reasonable time. In *Fryd Construction Corp.*, ASBCA No. 11017 (April 29, 1966), 66-1 BCA par. 5553, payment under the clause was ordered for a two-day work stoppage period that resulted because a contracting officer waited too long to check on the availability of funds. Thus, the reasonableness of an act that caused a short delay can become more important than its duration.

⁶⁸ Issued by the General Services Administration on January 20, 1960, when use of the Suspension of Work clause on an optional basis was approved.

⁶⁹ Exhibit No. 12.

the answer, the access problem was considered at the 20 or 25 fall meetings which have been described in this opinion. The information in the letters about the delays caused by Planet Corporation's testing work does not include a reference to any contract clause; however, almost certainly it was given in the expectation that the Government would step into the dispute over access, so that it may be regarded as having invoked Clause SP-9, under which the "Government will decide any questions in dispute regarding performance of work, access to * * * site, and priority between various contractors." Change Orders No. 6 and 7, which granted time extensions because of the necessity for Hoel-Steffen to coordinate its work "with that of another prime contractor," and because the appellant's work had been "slowed due to the activity of another contractor," were issued under Clause 5. That clause, in Standard Form 23A (June 1964 edition), authorizes time extensions for "unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather * * * [and certain delays of subcontractors or suppliers]."

If a contractor gives a notice to the contracting officer under a monetary claim provision of the contract, such as the Changes clause, the Changed Conditions clause, or an Extra Work clause, and does not mention the Suspension of Work clause, the explanatory statement in FPR Circular No. 5 should be called into play. In that situation, consideration of the claim on its merits under the Suspension of Work clause should not be defeated by a technicality. However, here we are dealing with a different matter. Neither (i) a complaint about the activities of another contractor which is not followed up by a timely allegation that a Government representative has taken unreasonable or unfair measures in attempting to resolve the problem, nor (ii) time extension requests referring only to acts of another contractor in the performance of a Government contract, can be viewed as notice under the Suspension of Work clause.

The requirement that a notice of claim be reasonably explicit has been invoked in the review of claims advanced under clauses other than the Suspension of Work clause.⁷⁰ In addition, it has been held that the granting of a time extension, and the resulting reduction in the amount of liquidated damages recoverable under the contract, although it "may tend to raise some question of Government-caused de-

⁷⁰ *Northeast Construction Company*, ASBCA No. 11049 (February 28, 1967), 67-1 BCA par. 6195 (Changed Conditions clause); *Sherwin Electric Service*, VACAB No. 563 (January 31, 1968), 68-1 BCA par. 6843 (Changes clause).

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lay * * * is not tantamount to admitting liability for breach of contract; there is no necessary connection."¹¹ There is no reason to rule otherwise when a suspension of work claim is made, since the Suspension of Work clause was developed in order to provide administrative relief for unreasonable delay or hindrance by the Government, and in its absence the contractor's remedy would be in court for breach of contract.

We hold that the appellant can recover no costs incurred in performing duct work in the North Leg during the fall of 1966 or during the 1966-67 winter, because the notice required by the Suspension of Work clause was not given. Had the contracting officer been advised that Hoel-Steffen expected to file this claim for additional costs, which runs about \$25,000 per month for the period when work was performed in the North Leg, he and the project supervisor might well have arranged different work schedules for the contractors who were sharing access. It should be recalled that the April 1, 1966 letter from Hoel-Steffen (discussing the acceleration proposal) mentions its need for considerable overtime by all trades, and requests unhindered night working time.¹² Performing most of the work at night, at a double-time rate, seemingly would have been better than placing the principal reliance on day shift work, as the appellant's subcontractor did.¹³ It should be noted that the appellant, in making its claim, asserts that two-thirds of the labor costs for the duct work are chargeable to the Government, due to problems resulting from trying to work in the North Leg during the day in competition with workers employed by the transportation subcontractor.

There is room for serious concern as to whether the appellant's subcontractor in fact accelerated the work in accordance with the requirements of the supplement. As we have stated, there is almost no substantiation for the appellant's claim in so far as it is made for April, May and June 1966; moreover, when the strike commenced on July 1, 1966, the subcontractor had only 15 days remaining of the work period established in the supplement. The subcontractor's gross corrected payrolls for the work in question accomplished during the first half of 1966 (through the period ending on July 6), total less than \$30,000. The corresponding payrolls reported between September 21, 1966 and January 18, 1967 (when the duct work was completed), total more than \$135,000. The appellant contends that it was interfered with

¹¹ *Robert E. Lee and Company, Inc. and Crosland-Roof Construction Company v. United States*, 164 Ct. Cl. 365 (January 24, 1964).

¹² Exhibit No. 7. The duct subcontractor's general foreman wanted the period available for his work to be from 12 o'clock on each day, rather than beginning at 1 p.m., with a break between the end of the day shift and the beginning of the night shift.

¹³ His payrolls (Exhibit No. 18) show this to be the case; in addition, they show that his forces worked full shifts on 26 nights (most of them in October and early November), 17 Saturdays and two Sundays. The rest of the overtime worked consisted of shorter periods (usually 2½ hours) added to the regular day shifts of the sheet metal workers.

and delayed, and that MacDonald's priority was absolute and continuous, from mid-April 1966, to mid-January 1967 (excepting the 2½-month summer strike). The Saturday and full night shift work performed in the fall was greatly in excess of that in the April 15-July 1 period. That work should have resulted in the best duct work progress, since the coordination problem during the overtime periods was minimal. The payrolls would indicate that most of the duct work that was to be accelerated under the terms of the supplement had not been installed when the strike halted the job on July 1, when 76/91st of the period designated in acceleration supplement had expired. It appears that the contracting officer was exceedingly generous in the time extensions that he granted, and in not insisting upon adherence to the schedule in the supplement.

A comparison of the costs incurred in the installation of duct in the North Leg with costs for the same work in the South Leg, proposed by Hoel-Steffen as the method of calculating damages in this appeal, is seriously deficient for that purpose. We reach this conclusion because (i) the management of the North Leg job was not the same as that of the South Leg job (ii) the North Leg job was affected by two lengthy strikes and one short strike⁷⁴ (iii) installing the duct in the North Leg, an undertaking of a type that had not been performed before, would have resulted in the acquisition of "know-how" that would be a material factor in speeding up the later South Leg work (iv) the South Leg work proceeded under conditions of non-interference by MacDonald's subcontractors, following the issuance of a stop order under which the Hoel-Steffen work was held in abeyance while the South Leg transportation system was completed. Hoel-Steffen, after executing the acceleration supplement, had no reason to anticipate working in the North Leg as the only contractor. In fact, the appellant's project manager acknowledged that he expected to coordinate the appellant's work with that of MacDonald. All in all, we view the requested comparison as one involving "apples and oranges," rather than one which is ideal, as the appellant suggests.

The appellant did not record day-to-day observations about the alleged wasted or hampered activities of its workmen. Considering this, and the inexplicably lopsided scheduling of overtime and assignment of sheet metal workers by the appellant's subcontractor, we conclude that a reasonably complete account of what took place when the North Leg duct was installed is lacking. The Notice provision was incorporated in the Suspension of Work clause in order to provide the opportunity for an accurate determination of whether workmen were delayed or halted in their assignments, specifically when this happened

⁷⁴ The extreme disruption during periods following the strikes, the loss of personnel due to the strikes and other hindrances arising therefrom are described in letters from the appellant and its subcontractor, to be found in the appeal file. The first labor dispute was ended by a court order which required the workers to return to the job. Tr. 144.

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and the extent to which it was not possible to assign them to other work on the project. Generalizations about unreasonable "directions" by a Government representative, denial of access, and interruptions are easy to make, but are of little assistance when this type of claim is reviewed. During the performance of the work in question the appellant and its subcontractor did not act as if they were being unfairly penalized, or that the Government was demanding performance other than that required by the acceleration supplement. We find no basis for allowing this claim.

Conclusion

The appeal is denied.

DEAN F. RATZMAN, *Chairman*.

I CONCUR:

WILLIAM F. McGRAW, *Member*.

MALVIN PEDROLI ET AL.

A-30861

Decided March 19, 1968

Grazing Permits and Licenses: Appeals

An applicant for a grazing license or permit who, after proper notification, fails to protest or appeal a decision of a district manager within the period prescribed in the decision is barred thereafter from challenging the matters adjudicated in such decision, and an appeal to a hearing examiner from a district manager's partial rejection of an application for grazing privileges is properly dismissed where the appeal is, in fact, an appeal from an earlier adjudication which is no longer subject to appeal.

Grazing Permits and Licenses: Adjudication—Grazing Permits and Licenses: Appeals

The applicability of regulation 43 CFR 4115.2-1(e)(13)(i) precluding the right of a licensee or other user of the range to demand a readjudication of grazing privileges after they have been held for a period of three years is not limited to situations where an adjudication of the unit has been made as set out in 43 CFR 4110.0-5(r), but is also applicable where adjudications of licenses in the unit have been made over a long period of time on the basis of information available and not challenged by other licensees.

Grazing Permits and Licenses: Adjudication—Grazing Permits and Licenses: Appeals

Although other licensees may have lost their right to have their or anyone else's license readjudicated, the Bureau of Land Management retains discretionary authority to make adjustments in a license at anytime when necessary to comply with the Federal Range Code for Grazing Districts, and the Bureau properly exercises that authority to cut licenses in a unit by 50 percent where such a reduction has been ordered by the Department for all users in the unit and only some of the users have suffered the reduction.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Malvin Pedroli and Garteiz and Son have appealed to the Secretary of the Interior from a decision dated June 27, 1967, of the Chief, Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of a hearing examiner remanding the case to the district manager for an adjudication of their base property qualifications and the recomputation of the percentage of a reduction to be imposed on each licensee of a grazing unit in order to reach the grazing capacity of the Federal range.

The proceedings arose from an appeal by Robert Hay from a decision of the district manager rejecting in part his application for grazing privileges for the 1966 grazing season.

Hay, Pedroli, Garteiz, and one other licensee, or their predecessors, have each for many years been licensed to graze in a common allotment in what is now known as the Winnemucca Administrative Unit of Nevada Grazing District No. 2. The unit is within the primary limits of a grant to a railroad of every odd-numbered section of public land. The railroad or its transferees apparently having retained ownership of the granted lands, the public lands in the area were the even-numbered sections, so that the land ownership pattern constituted a "checkerboard." Since the grazing on which the qualifications of the base properties depend was over both the railroad and the public land, the Department, in an earlier proceeding involving the same unit, *J. W. Solen*, I.G.D. 350 (1943), held that dependency by use of the base properties could only be 50 percent (the extent of the public land in the grazing area) of the livestock grazed on the range in the priority years.¹ The case also held that prior to imposing a horizontal reduction in all licenses to meet the carrying capacity of the range the licenses should first be reduced by one-half to take into account the fact that during the priority period the base properties were used in connection with land at least 50 percent in private ownership, or, in other words, that the base properties were dependent by use only to the extent of 50 percent of the livestock grazed on the range during the priority period.

There does not appear to have been any immediate response by the district office to the Department's instructions. It was not until 1958 that the district office imposed the 50 percent land pattern reduction on Hay, who had purchased the Robinson ranch in 1953, and reduced the Class 1 priority from 700 to 350 AUM's. At the same time a similar reduction was imposed on what was then the Hay ranch and is now owned by John and Julia Atkins. (Tr. 33)² There is nothing in the

¹ Taylor Grazing Act, 43 U.S.C. § 315 *et seq.* (1964); 43 CFR 4110.0-5(k).

² This and similar references are to the pages of the transcript of the proceedings before the hearing examiner held on November 3, 1966.

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records to indicate that a comparable reduction was applied to the Pedroli or Garteiz operations.

Hay neither protested nor filed an appeal from the district office action in 1958 (Tr. 61) and he was thereafter licensed on the basis of the qualifications then established.

In 1963 the district office made a unit-wide adjudication of the Winnemucca unit. In a notice and decision of the district management sent to all licensees under date of March 29, 1963, qualifications for Federal range use in the unit of each licensee were set out. Hay, who received his notice on April 5, 1963, was informed that his was 350 AUM's.

The decision also provided for the imposition of a 48.7 percent reduction in privileges in order to reach the grazing capacity of the range, with the reduction being scheduled in steps over a three-year period. A paragraph in the notice stated that an appeal could be taken from the decision within 30 days. Hay did not appeal nor did any of the other licensees, all of whom suffered a similar reduction.

In 1964 and 1965 Hay was licensed in accordance with the conditions of the March 29, 1963, notice, although he received some additional temporary use in 1964. In 1965 he applied for 700 AUM's for 1966, saying in his application that his Class 1 qualifications had been incorrectly determined at 350 AUM's for adjudication purposes. From a decision dated February 4, 1966, of the district manager, Hay appealed to the hearing examiner.

The hearing examiner held, first, that the base property qualifications of Pedroli and Garteiz had not been established in accordance with the grazing regulations or the decision of the Department in *J. W. Selen, supra*. He next held that, before the 48.7 percent reduction could be imposed on Hay, the Pedroli and Garteiz licenses would have to be adjusted and then the reduction applied in light of the new total qualified demand. He also concluded that Hay had not lost his right to challenge the base property qualifications of the other licensees by failing to appeal or protest at an earlier stage of the proceedings.

On appeal the Office of Appeals and Hearings affirmed, holding that the Garteiz and Pedroli base property qualifications had not been properly determined on the basis of the number of livestock used during the priority period, as required by the applicable provisions of the Federal Range Code, or reduced by 50 percent, as directed by the Department in the *Selen* case (*supra*), to reflect the checkerboard nature of the land pattern. It also held that, while Hay had made a timely objection to the 1963 adjudication of the range, it was not significant whether he had or not because there had not been a proper

adjudication of the range in question and the Department is not estopped from correcting improper use of the range merely because an error has been made in the past.

On appeal to the Secretary, Garteiz and Pedroli assert that it was error to permit Hay to object to their qualifications, as recognized by the Bureau, and to find that their base property qualifications had not been properly determined in accordance with the Federal Range Code or reduced by 50 percent to reflect the checkerboard nature of the land pattern.

Hay, in reply, says that the district manager is required to comply with the *Solen* decision, that regulation 43 CFR 4115.2-1(e) (13) (ii) authorizes the Bureau to make adjustments in licenses and permits at any time when necessary to bring them into compliance with the Federal Range Code for Grazing Districts, and that he objected to the qualifications of the appellants within the three years allowed by 43 CFR 4115.2-1(e) (13) (i).

The hearing examiner rejected both of the reasons urged by the district manager and the appellants in support of their contention that Hay's attempt to have the base qualifications of Garteiz and Pedroli recomputed came too late. The first provision they relied upon provides:

(a) Any applicant whose interest is adversely affected by a final decision of the district manager may appeal to an examiner by filing his appeal in the office of the district manager within 30 days after receipt of the decision. The appeal shall state the reasons, clearly and concisely, why the appellant thinks the decision of the district manager is in error. All grounds of error not stated will be considered as waived, and no such waived ground of error may be presented at the hearing unless ordered or permitted by the examiner.

(b) Any applicant for a grazing license or permit or any other person who, after proper notification, fails to protest or appeal a decision of the district manager within the period prescribed in the decision, shall be barred thereafter from challenging the matters adjudicated in such final decision. 43 CFR 1853.1.

The appellants pointed out that in the district manager's decision of March 29, 1963, Hay was notified that he was qualified for 350 AUM's and that he would be allowed active use of only 180 AUM's with the reduction of the remaining 170 AUM's being carried out over three years. Hay did not appeal from this decision, or from his licenses of the next two years, 1964 and 1965, which carried out the first two steps of the 48.7 percent reduction. In 1965 he applied for 700 AUM's. When he was allowed 179 AUM's, the amount of the final step in the 3-year reduction, he filed a timely appeal.

The hearing examiner concluded that since Hay had received all the grazing privileges he had requested in 1963, 1964, and 1965, an appeal in those years could have been dismissed on the ground that

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he was not adversely affected. Since only the 1966 decision adversely affected Hay, by refusing him some of the privileges he had applied for, the hearing examiner found that Hay was required to appeal from it and he having done so within the time allowed, his appeal was timely.

We cannot agree that the 1966 decision was the first one adverse to Hay. The March 29, 1963, decision imposed a drastic reduction on his grazing privileges and set out a schedule for placing the reduction in effect. That the reduction was not to begin to impinge on Hay's operations for another year did not make the decision any less adverse. If he wished to avoid being bound by its terms, he was obligated to take an appeal and prove its conclusions improper. Having failed to do so he cannot appeal in a later year from an allowance of privileges made in accordance with that decision unless he can demonstrate that range conditions have changed or that the terms of the decision are not being followed. *Levell Neal*, A-30529 (May 2, 1966); cf. *Archie L. Carberry*, A-30704 (October 23, 1967).

The appellants had also contended that Hay is barred from questioning the base qualifications of Garteiz and Pedroli because their qualifications had been recognized for more than 3 years. They rely upon 43 CFR 4115.2-1(e)(13) which provides:

- (i) No readjudication of any license or permit, including free use license, will be made on the claim of any applicant or intervener with respect to the qualifications of the base property, or as to the livestock numbers or seasons of use of the Federal range allotment where such qualifications or such allotment has been recognized and license or permit has issued for a period of three consecutive years or more, immediately preceding such claim.
- (ii) The Bureau of Land Management may make adjustments in licenses and permits at any time when necessary to comply with the Federal Range Code for Grazing Districts.

The hearing examiner and the Bureau held that Hay's appeal on March 9, 1966, was within the 3-year period following the adjudication of grazing privileges made by the notice of March 29, 1963. While the Bureau decision did not elaborate the reasons for its conclusion, the hearing examiner held that the qualifications of Garteiz and Pedroli had not been established on the basis of use during the priority years and that they had not been reduced by 50 percent to reflect the checkerboard pattern of the range and then concluded that there had not been a proper adjudication of the range as contemplated by the regulations and that, in the absence of such an adjudication, section 43 CFR 4115.2-1(e)(13)(i) did not apply.

As the hearing examiner recognized, the Pedroli and Garteiz qualifications have been recognized for more than three years. Pedroli has been licensed in the unit on the basis of property he or a predecessor owned in the priority period since 1938. His licenses from 1958 are based on Class 1 qualifications of 386 AUM's in the Winnemucca unit (Tr. 31, 43, Exhibit 5). Garteiz' licenses go back to 1936 and since 1948 have been based on a Class 1 qualification of not less than 690 AUM's. This is also the amount which was recognized as the base property qualification in a decision dated December 23, 1958, of the district manager.

The licenses issued after the range had been surveyed in 1962 did not change the Class 1 qualifications of the appellants but only applied to them the same horizontal reductions that were applied to Hay.

In a recent decision, *Western States Cattle Company, Inc. et al.*, A-30572 (October 10, 1966), the Department considered the nature of an "adjudication" required to have been made before the limitation imposed on "readjudication" by regulation 43 CFR 4115.2-1(e)(13) (i) comes into play. There the licensees had been granted grazing privileges at least since 1940, the unit was divided into a common allotment and a separate allotment, a range survey had been conducted in 1962, and a decision issued in 1963 imposed a 54.8 percent reduction of grazing privileges in the common allotment for a 3-year period beginning in 1964. The decision held that the term "readjudication" is not to be equated with the term "adjudication" as defined in 43 CFR 4110.0-5(r),³ that a regulation limiting "readjudication" had been in the Federal Range Code for 11 years in one form and 4 years in its present form prior to the adoption of the definition of "adjudication," that "readjudication" was to be defined on its own, without reference to a definition of "adjudication," that the word "adjudication" had long had a general meaning of "processing within the Department of applications, entries, claims, etc. to assure that there has been full compliance with the public land laws and regulations."

It then concluded:

* * * In this sense the licenses of all the range users of the unit had been "adjudicated" for many years prior to 1963, so far as it was possible to do so. The records of the users of this unit show that determinations have been made as

³ "Adjudication of grazing privileges" is the determination of the qualifications for grazing privileges of the base properties, land § 4110.0-5(k)(1) or water (§ 4110.0-5(p)(1)) offered in support of applications for grazing licenses or permits in a range unit or area, and the subsequent equitable apportionment among the applicants of the forage production within the proper grazing season and capacity of the particular unit or area of Federal range, and acceptance by the applicants of the grazing privileges based upon the apportionment or its substantiation in a decision by an examiner, the Director, or the Secretary upon appeal (Applicable provisions are Subpart 4111 and § 4115.2-3).

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to base property qualifications and as to the carrying capacity of the range as long ago as 1940 on the basis of what information was available at that time and that grazing privileges have been granted as a result of such determinations.

It then affirmed the decisions of the district manager and the Bureau holding that the appellants were precluded from challenging the licenses of some intervenors and from having a change made in the allotment boundaries.

The same considerations are controlling here. The grazing privileges have been granted for almost 30 years on essentially the same qualifications of base property and for many years for the same numbers of livestock. The appellants' licenses have been "adjudicated" for many years within the meaning of the regulation, 43 CFR 4115.2-1(e)(13) (i), and are protected from attack by Hay. We need not determine exactly when the 3-year period ran against Hay or his predecessors. Even if it were to be measured only against Hay's own tenure, the period would long since have elapsed.

When Hay acquired his base property in 1953, the base property qualifications of the appellants had been recognized for many years. While perhaps he had no particular reason to complain then because no change was made in the existing relationships, he also remained silent in 1958 when his qualifications were reduced by 50 percent. Even assuming that Hay had a right to attack such long established qualifications, though there is no provision in the regulation for giving a newcomer an opportunity to seek a readjudication of another's license when his predecessor was not eligible to do so, the very latest time for him would have been in 1958 in response to so serious a cut in the scope of his operations. At least at that time he could have asked why appellants' privileges were not cut 50 percent in accordance with the *Solen* decision. He, however, raised no objection to the appellants' licenses until 1965, long after a 3-year period beginning in 1958 would have ended.

For these reasons, then, it is concluded that Hay had no right to challenge the base property qualifications of the appellants in 1965.⁴

To hold so, however, does not end the matter. The same regulation, as we have seen, which limits Hay, authorizes the Bureau of Land Management to make adjustments in licenses and permits at any time when necessary to comply with the Federal Range Code, even though no one else can complain of the existing dispositions.⁵ The question

⁴ *W. Dalton LaRue, Sr., and Juanita S. LaRue*, A-30391 (March 16, 1966); *Fred E. Buckingham et al.*, 72 I.D. 274 (1965); *Kermit Purcell*, A-29661 (November 15, 1963); *Foster L. Mills*, A-29330 (January 14, 1963).

⁵ *W. Dalton LaRue Sr. et al.*, *supra*; *Kermit Purcell*, *supra*.

then is whether the discretionary authority should be exercised.

As we read the record, it seems that the Class 1 qualifications of all the licensees in the unit have been established and accepted for many years. There is nothing to warrant a reexamination of the base property qualifications of the licensees. The qualifications have been a matter of record available to all and remained unchallenged for a long period of time. Whatever defects there may be were discoverable from the records and in the absence of any attempt to use them sooner to demonstrate error in a licensee's qualifications, the Department is not now disposed to upset relationships of such long standing. See *W. Dalton LaRue, Sr. et al. supra; Foster L. Mills et al., supra*.

There remains the issue of whether the 50 percent reduction was or should be imposed upon the Garteiz and Pedroli qualifications. As we have seen, although the Department directed in 1943 that all qualifications be adjusted to take into account the checkerboard nature of the land pattern, it was only in 1958 that the 50 percent reduction was applied to licenses in the unit, and then only to Hay and one other licensee, the Aitkens. If the reduction was not made uniformly, as it should have been, the results are so inequitable that they should not be permitted to stand uncorrected unless there are extremely persuasive reasons for allowing the error to persist. Since Hay was objecting to the uneven application of the cut by 1965, there was no great lapse of time to add a gloss of acceptability to a patently unfair situation.

The only reason offered by the appellants in opposition to reexamining the imposition of the cut is that to do so might affect the stability of grazing operations. They, however, offered no evidence that it would have such consequences. Furthermore, the unsettling effect of the double reduction of Hay's privileges on his operations must also be considered in evaluating the overall effect of not disturbing the status quo on the stability of grazing operations in the unit.

As both the hearing examiner and Bureau found, there does not seem to be any question but that the Pedroli operations were never reduced by 50 percent to allow for the checkerboard land pattern. Garteiz asserts that while the 50 percent land pattern cut may not have been applied to its operations in the same form as it was to other licensees, it did take a substantial cut in 1944 because of its loss at that time of a lease of railroad land in the area, which was in effect the equivalent of the 50 percent land pattern reduction. The record does not support the contention. The hearing examiner reviewed in detail the history of the Garteiz operation and found, as did the Bureau, that the 50 percent reduction had not been applied to Garteiz' base qual-

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fications.⁶ After a careful review of the record we too have come to the same conclusion.

In summary then, it is determined that the Pedroli and Garteiz base property qualifications have not been subject to the 50 percent reduction required by the *Solen* decision which was imposed on the Hay and Aitkens base properties, that the base property qualifications of the Pedroli and Garteiz operations are not to be readjudicated, but are to be accepted as they are now recognized, subject to the 50 percent land pattern reduction. When this has been done, the percentage of the reduction necessary to bring the grazing privileges in line with the

⁶ The hearing examiner's decision reads as follows:

"In regard to the Garteiz' operation Mr. Morck testified that there was a land pattern cut in 1944 'when the operation was reduced to 138 head of cattle for 690 AUMs' (Tr. 39). The Bureau file does not support this testimony. In 1944 the Bureau suspended the Garteiz license until use during the priority period was established. On the copy of the letter dated January 8, 1944, in the file announcing the suspension there is a penciled note that Garteiz ran 'cattle in area in question from ranch from 1928 to about 1932 or 1933 and had 145 cattle.' He was then licensed for 150 cattle over a 5 month period for 750 AUMs during the 1944 grazing season."

In 1948 Garteiz applied for 150 cattle over a five month period. This application is followed by a penciled note which states that there are '1880 animal unit months in Thomas Canyon area—940 AUMs on RR land leaving 940 for Garteiz and Kershen-Kershen gets 250 AUMs, Garteiz gets 690 AUMs—138 cattle for 5 m.' The note is signed with the initials 'D.S.F.' Darrel S. Fulwider was the district manager at the time.

Later an adjudication report dated February 15, 1952, summarizes the Garteiz operation as follows:

#2—Garteiz Ranch

'From the D.P.S. by Roy Persson states priority use as 1931-1934 for 130 Cattle and 10 Horses for 4 months.'

'A note on the Advisory Board notice of January 8, 1944 states that he had run cattle in the area around the ranch from 1928-1932 or 1933 and had 45 cattle.'

'A note in the file states the use of 138 cattle on the Federal Range for a five-month period.'

'From these sources of information it is shown that the priority operation is approximately as follows:

'145 Cattle \times 5 months = 725 AUM's on F. R. and private land. However these Cattle were run on a Railroad land Area therefore the priority will be figured as

752 AUM's @ 50% = 373 AUMs on the F. R.'

(This should be 725 AUMs at 50% = 363 AUMs on the F.R.)

(This report was followed by a 'Dependent Property and Adjudication Summary' dated March 12, 1959, in which Garteiz Class 1 qualifications were recognized for 138 AUMs for 5 months for a total of 690 AUMs. Garteiz has been recognized and licensed for 690 AUMs from 1948 to the present time. The 1952 report reducing the Garteiz qualifications to 376 AUMS was never used.)

The Bureau file established that the Garteiz qualifications were not based on use of the Federal range during the priority period. They were based on the district manager's determination in 1948 that there were 940 AUMs of Federal range available of which 690 AUMs were allotted to Garteiz. At the time this determination was made there was information in the file that Garteiz claimed 145 cattle during the priority years. If the use of the checkerboard range was for a period of 5 months as suggested by the adjudication report of February 14, 1952, the Garteiz operation can qualify for not more than 145 AUs \times 5 months \times 50% = 363 AUMs. If the use was for a period of 8 months the qualifications would be not more than 145 AUs \times 8 \times 50% = 530 AUMs. In either event the appellant has shown that the base property qualifications were not established in conformity with the grazing regulations or the decision of the Department in *J. W. Solen* appeal of 1948."

grazing capacity of the Federal range shall be recomputed and applied to all the licenses in the unit.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision of the Bureau of Land Management is affirmed insofar as it directed the recomputation of the percentage of reduction necessary to reach the grazing capacity of the range and insofar as it held that the 50 percent land pattern reduction is to be imposed on the Pedroli and Garteiz base property qualifications, reversed insofar as it held that the base property qualifications of Garteiz and Pedroli are to be determined on the basis of actual use during the priority years, and remanded for further proceedings consistent herewith.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF GALLAND-HENNING MANUFACTURING COMPANY

IBCA-534-12-65 *Decided March 29, 1968*

Contracts: Construction and Operation: Subcontractors and Suppliers—

Contracts: Performance or Default: Excusable Delays—Contracts:

Disputes and Remedies: Damages: Liquidated Damages

Under a contract for supplying four gate hoists for a dam, and providing as to each hoist for assessment of liquidated damages for each day of delay, where the contractor and its first-tier subcontractor were tardy in ordering steel from a second-tier supplier, such delays in purchasing will be taken into account and deducted from extensions of time for performance that are otherwise allowable because of delays in delivery of steel due to the fault of the second-tier supplier (pursuant to the decision in *Schweigert, Inc. v. United States*, Ct. Cl. No. 26-66, December 15, 1967).

BOARD OF CONTRACT APPEALS

On December 2, 1963, the Bureau of Reclamation awarded a contract in the amount of \$168,880 to the above-named appellant, for the manufacture and delivery of four gate hoists and accessories, to be used in the penstock intakes of the Yellowtail Dam. The completed hoists were to be delivered in accordance with the schedule set forth below, but were actually delivered late on the dates indicated:

	<i>Hoist No. 1</i>	<i>Hoist No. 2</i>	<i>Hoist No. 3</i>	<i>Hoist No. 4</i>
Contract shipping date-----	11/28/64	12/28/64	1/27/65	2/26/65
Actual shipping date-----	5/6/65	6/10/65	6/18/65	7/23/65
Days of delay-----	159	164	142	147

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The total of 612 days of delay resulted in an assessment of liquidated damages of \$30,600 at the rate of \$50 per day, as provided by the contract in Paragraph B-8 of the invitation for bids, amending paragraph 11(f) of Clause 11, Default, of Standard Form 32.

Clause 11, Default, of Standard Form 32 (September 1961 edition), a General Provision of the contract, describes in paragraph (c) thereof the circumstances in which the contractor may be excused for failure to perform the contract in accordance with its terms:

(c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes *beyond the control of both the Contractor and subcontractor*, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule. (Italics added.)

The contractor requested extensions of time on several occasions during performance, pleading difficulties in manufacture of the hoists in accordance with specifications, and the failure of the U.S. Steel Company to deliver steel to Milwaukee Boiler Manufacturing Company (the first-tier subcontractor) as promised. The contracting officer, in his letter decision of November 15, 1965, found that the delays were not excusable, and denied the appellant's requests for extensions of time and for return of the liquidated damages. A timely appeal was filed on December 13, 1965.

The Board held a conference on the appeal at Denver on August 22, 1966, and thereafter the parties filed additional briefs in support of their respective positions, submitting the appeal for decision without a formal hearing. A transcript was made of the discussions had at the conference, and there appears to be no substantial dispute concerning the facts. As a result of the conference, the contracting officer issued Findings of Fact dated November 2, 1966, extending the total time for shipment of each of the four hoists by 14 calendar days, because of mistakes and omissions in the drawings that accompanied the invitation to bid. All other claims for extension of time were denied.

The position taken by the Government is that under paragraph (c) of Clause 11, the prime contractor may not be excused for the default of a subcontractor of whatever tier, unless the failure to perform is due to causes beyond the control of and without the fault or negligence of the prime contractor and of *all* of the subcontractors (including those in second and lower tiers) involved in the delay.

Appellant argues, *inter alia*, that the Government sustained no actual damages; that it is not liable for the delays of its subcontractor, Milwaukee Boiler Manufacturing Company; and that in any event it should not be charged with the delays of the second-tier supplier, U.S. Steel Company, and of another subcontractor, Acipco Steel Products. Furthermore, appellant alleges that it (and its first-tier subcontractor) were without any power to protect themselves against the delays of a large subcontractor or supplier; that such large concerns will not accept orders providing for payment of liquidated damages in the event of delays.

The construction placed upon paragraph (c) by the Government is the same interpretation uniformly adopted by the Board with respect to that provision, on several prior occasions¹ involving construction contracts (Standard Form 23-A), as well as supply contracts. Except for the requirement in Clause 5(d) of Form 23-A that the delay be "unforeseeable" in addition to the conditions imposed by Form 32, the two clauses are virtually alike.

In December 1967, the United States Court of Claims decided the case of *Schweigert, Inc. v. United States* (Ct. Cl. No. 26-66, December 15, 1967). That litigation involved a construction contract for the furnishing and installation of air compressors for the Navy, and performance was delayed by reason of a corresponding delay on the part of a second-tier subcontractor. The delay of the latter was due to a cause that was not unforeseeable and without its fault or negligence as required by Clause 5(d) of Standard Form 23-A (April 1961 edition).²

¹ See, e.g., *Layne and Bowler Export Corp.*, IBCA-245 (January 18, 1961), 68 I.D. 33, 61-1 BCA par. 2921 (supply contract), cited in *Elin Peterson Construction Company*, IBCA-532-12-65 (October 20, 1966), 66-2 BCA par. 5906 (construction contract).

² "(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

"(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or *delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers.*" (Italics provided by the Court in *Schweigert*.)

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The Board issued an order on December 22, 1967, citing the *Schweigert* decision and allowing the submission of supplemental briefs by both parties, touching upon the applicability of that decision to the facts of this appeal. Both parties submitted such briefs, the last supplemental brief having been received by the Board on February 1, 1968.

The issue presented in *Schweigert*, as stated succinctly by the Court, was “* * * whether plaintiff should be excused for a delay which was solely the fault of a second-tier subcontractor.” In brief, the Court held that the prime contractor should be excused for the delay of the second-tier subcontractor for the following reasons:

1. There was no privity of contract between the prime contractor and the second-tier subcontractor.

2. The word “subcontractors” as used in the clause “* * * means those whom the principal contractor could control, or for whom it was contractually responsible, and not those concerning whose conduct and reliability a contractor could only hopefully and helplessly speculate. * * *”

3. The Government, as the author of the contract, said the Court, “* * * must shoulder the burden of seeing that the words employed communicate the proper notion, and if it was the Government’s intention that the clause was to include those not in privity of contract with plaintiff, it should have specifically said so in the contract. * * *”

The Board is constrained to follow the holding in *Schweigert* concerning subcontractors of the second and lower tiers. However, we admit to some difficulty in following the line of reasoning that postulates the necessity for privity of contract, and also limits all control or responsibility to the prime contractor vis-a-vis the first-tier subcontractor. The final phrase of the clause, italicized as quoted in the decision (note 2, *supra*), as the Board has previously interpreted it, does not excuse a delay within the control of the first-tier subcontractor, and the latter has control and responsibility (and privity of contract), respecting its purchases from its immediate lower-tier subcontractor. Hence, the Board has previously considered that the need for privity of contract does not exist, as between the prime contractor and the second-tier subcontractor. For if the clause in the prime contract had expressly provided for its applicability to the delays of second-tier subcontractors, that express provision would not of itself have created a privity of contract between the prime contractor and the second-tier subcontractor.

It must be conceded, however, that some standard forms of Government procurement contract clauses have been amended in order to make it more clear how far an obligation is passed down through more than one tier of subcontractors. For example, the contractor is required to include the applicable provisions of Clause 18, Nondiscrimination In Employment, of the instant contract (S. F. 32, September 1961 edition) in every subcontract or purchase order (if not exempt). No mention is made of any tiers.

In the June 1964 edition of STANDARD FORM 32 the same language is used but a note in italics at the end of Clause 18 (re-titled "Equal Opportunity") states:

* * * Unless otherwise provided, the Equal Opportunity Clause is not required to be inserted in subcontracts *below the second tier* except for subcontracts involving the performance of "construction work" at the "site of construction" (as those terms are defined in the Committee's rules and regulations) in which case the clause must be inserted in *all such subcontracts*.³ Subcontracts may incorporate by reference the Equal Opportunity Clause. (Italics added.)

The June 1964 edition of STANDARD FORM 23-A at the end of Clause 21, Equal Opportunity, repeats verbatim the foregoing quoted note in italics concerning second-tier subcontracts and exceptions as to construction work.

The *Schweigert* holding has been followed by the Armed Services Board of Contract Appeals.⁴

As heretofore noted, the contract award was received by appellant on December 4, 1963. In reviewing the drawings and specifications after the award, appellant discovered a number of items that had been overlooked in its first examination of those documents before bidding. It then did "some careful shopping" for a period of about two months, to see where costs could be reduced, and this, of course, resulted in a substantial delay. In March 1963 (exact date not stated), appellant awarded a subcontract for eight steel cylinders to Milwaukee Boiler Manufacturing Company.⁵

A part of this delay (14 days) as stated, *supra*, was later found to have been due to Government delay in furnishing corrected drawings, that delay running from December 30, 1963 to January 13, 1964. The remainder of the delay, after January 13, 1964, was found by the contracting officer to be not excusable. The efforts of appellant and Mil-

³ Evidently, from the context, intended to mean "all such subcontracts (of whatever tier)."

⁴ *Reynolds Construction Company*, ASBCA No. 12015 (12/20/68), 68-1 BCA par. 6756.

⁵ Statement of Mr. Peter Weil, Plant Superintendent of Galland-Henning Manufacturing Company, Tr. 6, 7.

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waukee Boiler to obtain quotations from various sources contributed to a further delay on the part of appellant and/or Milwaukee Boiler in ordering steel. The steel was not ordered until April 10, 1964 (a Friday) by Milwaukee Boiler, requesting delivery during the week of May 10, 1964 (a Sunday).⁶ United States Steel Corporation advised Milwaukee Boiler that the best delivery that could be offered was the week of June 28, 1964 (a Sunday), "with a July validation," as related by telephone to Milwaukee Boiler on April 13, 1964, the date of receipt of the order. Because of an unanticipated high percentage of orders for heavy plates and several rejections, including a serious defect in one of the 16 plates ordered, delivery of the steel was delayed. The 15 acceptable plates were shipped August 14, 1964 (a Friday), and the remaining plate was shipped September 2, 1964 (a Wednesday).⁷

The delay in steel delivery was at most, therefore, from June 29, 1964 (the first business day of the promised week of shipment), to August 14, 1964, with respect to Hoist Nos. 1, 2 and 3, or 47 days for each. Assuming that the cylinders for Hoist No. 4 required a full complement of steel plate in order to avoid further delay in processing by Milwaukee Boiler, the delay as to Hoist No. 4 amounted to 66 days.

The Board considers that in the circumstances, including the factors of appellant's state of unawareness concerning the full extent of the contract requirements until after the award, the consequent abnormal length of time spent in obtaining sources and quotations for components and materials after award,⁸ and the time lost between the execution of the subcontract with Milwaukee Boiler in March 1964 and the ordering of steel in April 1964, that appellant and Milwaukee Boiler were both remiss in their arrangements which culminated in ordering steel too late for timely delivery. Appellant argues that even assuming that the steel had been ordered on March 10, 1964, rather than the actual date of April 10, 1964, the delay in shipment would have been equally as great. The record will not support such a speculative finding.

Accordingly, we find that at least 30 days of the delay in delivery of

⁶ Throughout the conference, and in other portions of the record, the date of May 10, or the month of May 1964, is referred to as the time when U.S. Steel Corporation promised to deliver the steel. The explanation for this erroneous reference may be that in early discussions in February or March 1964, the May date was the basis of oral quotations, but, as noted herein, the order was not received by U.S. Steel Corporation until April 13, 1964 (Tr. 7).

⁷ Letter of January 6, 1965, from U.S. Steel Corporation to Milwaukee Boiler (Exhibit 9a of appeal file).

⁸ Statement of Mr. Weil, Tr. 7: "*** about one good month was lost in shopping around looking for jobs, but it takes quite a while to process drawings, etc."

steel as to each hoist was due to the lack of timely purchasing procedures on the part of appellant and Milwaukee Boiler.

After the steel was received by Milwaukee Boiler, manufacturing difficulties caused further delay, and the first five of eight steel plate cylinders delivered to appellant were rejected by appellant because they were one quarter of an inch oversize. Appellant was thereby confronted with a difficult choice: (1) using the five defective cylinders after expensive modifications, and ordering three cylinders elsewhere having the same oversize dimensions, with similar modifications (all cylinders were required to have the same size bore, for purposes of interchangeability and replacement), with a reduction of the contract price to the Government,⁹ or (2) reordering all of the eight cylinders, to be produced in accordance with the specifications, using a centrifugally cast method of manufacture instead of plates, from a new subcontractor, Acipco Steel Products.

Appellant chose the latter course, and ordered centrifugally cast steel cylinders from Acipco. While Acipco had difficulties and delays in producing the cylinders, they were finally delivered and accepted after an average delay of about 38 days per hoist. The hoists were then completed by appellant after further complications, including delays connected with the refusal of a painting subcontractor to paint the hoists until negotiation of a 100 percent increase in its original price. Thereafter, taking advantage of appellant's urgent need for completion, the painting firm insisted on negotiating an additional payment for time and a half, causing further delay (Tr. 17). Of course, none of the problems and delays included in the foregoing recital of appellant's difficulties would constitute an excusable cause of delay (excepting the steel delay) under Clause 11. The Board has scrutinized the record with considerable care, to ensure that no possible means of affording relief under the contract would be overlooked. The replacement subcontractor for the steel cylinders, Acipco Steel Products, was not a second-tier subcontractor, but a substitute for Milwaukee Boiler, although Acipco usually has been bracketed with U.S. Steel Corporation in appellant's claims and briefs, as if it were regarded as a second-tier subcontractor.

After the conference on August 22, 1966, appellant filed in its post-conference brief additional claims alleging excusable causes of delay due to acts of the Government. These claims were considered by the

⁹ After rejection of the first five cylinders, Milwaukee Boiler was unwilling to produce the remaining three cylinders, and refused to share any of the expense of modification. No legal recourse was had by appellant against Milwaukee Boiler (Tr. 19, 20).

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contracting officer in his Findings of Fact dated November 2, 1966. One claim was allowed to the extent of 14 days of excusable delays (the period claimed by appellant) as we have stated. The Board finds no justification for increasing that extension of time, which was based on Government delay in correcting drawing errors or omissions, as listed in Claim II-A of Appendix A to appellant's brief.

The other new claims filed in appellant's post-conference brief was as follows:

Claims II-B, E, G and H. These alleged Government delays all involved requests by appellant for deviations from the specifications, solely for the convenience and benefit of the contractor. The Government approved each of the requests. The appellant's requests and the replies by the Government were dated as shown in the schedule below. About two or three days were required for transmittal of mail. The contracting officer's denials of the claims for the reason that the periods of time intervening between the dates involved were reasonable in all cases, is hereby affirmed.¹⁰

<i>Claim No.</i>	<i>Contractor's request date</i>	<i>Government's approval date</i>
II-B	March 6, 1964	March 19, 1964.
II-E	April 6, 1964	April 21, 1964.
II-G	May 5, 1964	May 14, 1964.
II-H	April 16, 1965	April 30, 1965.

Claims II-C and D are claims involving alleged Government delay in returning data required by the contract to be submitted for approval, a period of 20 days being allowed by the contract for Government replies in such cases.

<i>Claim No.</i>	<i>Contractor's request date</i>	<i>Government's approval date</i>
II-C	March 30, 1964	April 10, 1964.
II-D	March 31, 1964	April 10, 1964.

Since both of these matters were acted upon by the Government well within the 20-day period allowed, the decision of the contracting officer denying the extensions is affirmed.

Claim II-F is based on alleged Government delay in answering appellant's request for clarification of Paragraph D-7d(2) of the specifications concerning painting, so that the painting contractor could submit paint samples for approval. The contracting officer found

¹⁰ It is observed that in the case of submittal of data for Government approval, the contract allows the Government 20 days for consideration and reply, as discussed, *infra*.

that the provision in question was clear, grammatically correct, contained no ambiguity and that clarification was unnecessary. Moreover, it was not shown that the contract performance was delayed by the time required for the Government's reply (the painting work was performed during the final stages, a year later). The contractor's request was dated May 6, 1964, and the Government's reply was dated May 22, 1964. Accordingly, after review of the provision in question, we affirm the findings and decision of the contracting officer.

Appellant's remaining argument, that the Government sustained no actual damage, is not valid. It is well settled that actual damages need not be shown. The provisions for liquidated damages are to be judged as of the time of execution of the contract.¹¹

CONCLUSION

1. The shipping requirements for the four hoists are hereby revised to give effect to our findings with respect to extensions of time due to excusable causes of delays in delivery of steel by the second-tier subcontractor, U.S. Steel Corporation, taking into account the reduction of 30 days that we found to be the responsibility of appellant and Milwaukee Boiler Manufacturing Company in connection with tardy placing of orders for such steel. Accordingly, the appeal is sustained in part as reflected in the table set forth below:

	<i>Hoist No. 1</i>	<i>Hoist No. 2</i>	<i>Hoist No. 3</i>	<i>Hoist No. 4</i>
Contract shipping dates	11/28/64	12/28/64	1/27/65	2/26/65
As extended by Contracting Officer	12/12/64	1/11/65	2/10/65	3/12/65
Days extended by Board	17	17	17	36
Revised shipping dates	12/29/64	1/28/65	2/27/65	4/17/65
Actual shipping dates	5/6/65	6/10/65	6/18/65	7/23/65
Days of delay not excused	129	134	112	97
Total days of delay not excused				472

2. The appeal is denied in all other respects.

THOMAS M. DURSTON, Deputy Chairman.

WE CONCUR:

DEAN F. RATZMAN, *Chairman.*

WILLIAM F. McGRAW, *Member.*

¹¹ *Southwest Welding and Manufacturing Division, Yuba Consolidated Industries, Inc., IBCA-281* (October 29, 1962), 69 I.D. 173, 1962 BCA par. 3564, citing *inter alia*, *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947).

T. JACK FOSTER
April 2, 1968

T. JACK FOSTER

A-30897

Decided April 2, 1968

Oil and Gas Leases: Rentals—Oil and Gas Leases: Unit and Cooperative Agreements

When a producing oil and gas lease is partially committed to a unit agreement, it is segregated into two leases—one covering the unitized portion and the other the nonunitized portion — and the rental obligations of each lease are those set by the statute, regulation and lease, even though there is no formal notification to the lessee of the segregation and the rentals due on each lease.

Oil and Gas Leases: Rentals—Oil and Gas Leases: Royalties—Oil and Gas Leases: Unit and Cooperative Agreements

When a producing lease is segregated into two leases upon partial commitment to a unit, the nonunitized portion, which does not contain a producing well, does not remain in a minimum royalty status but reverts to a rental basis which is determined by its own situation.

Oil and Gas Leases: Rentals—Oil and Gas Leases: Termination

The automatic termination provisions of the Mineral Leasing Act, as amended, do not apply to a lease issued prior to July 24, 1954, unless the lessee consents to have the lease made subject to them, and the consent cannot be made effective as of a date prior to its filing even though rentals have accrued on part of the lease as a result of the segregation of the lease into two leases by unitization by a procedure which the lessee says deprived him of a timely opportunity to prevent the accumulation of several years rental.

Oil and Gas Leases: Rentals

Oil and gas lease rentals cannot be reduced or waived under section 39 of the Mineral Leasing Act where such action has no relation to encouraging production or the conservation of natural resources.

Oil and Gas Leases: Rentals—Oil and Gas Leases: Unit and Cooperative Agreements

Where part of a unitized oil and gas lease is eliminated from a unit agreement it remains part of the unitized lease and the annual rental for that part is \$1 per acre if any portion of the lease is within the known geologic structure of a producing oil and gas field.

Oil and Gas Leases: Rentals—Oil and Gas Leases: Unit and Cooperative Agreements

Where notice that part of a lease is on the known geologic structure of a producing field has been given while the lease was undivided, the fact that it is later segregated into two leases as a result of unitization does not require that a new notice be given before the increased rental applicable to leases which have lands on a known geologic structure becomes due.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

T. Jack Foster has appealed to the Secretary of the Interior from a decision dated September 29, 1967, of the Office of Appeals and Hearings, Bureau of Land Management, which affirmed two decisions of the New Mexico land office holding that there is \$13,000 due in rentals on oil and gas leases SF 078932 and NM 0560361.

The record shows that noncompetitive oil and gas lease SF 078932 was issued to appellant effective February 1, 1948, for 2,560 acres consisting of all of secs. 15, 21, 22 and 23, T. 26 N., R. 13 W., N.M. P.M., New Mexico. After the lease had been extended for a five-year term through January 31, 1958, a productive well was completed on December 2, 1956, in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ sec 21, with an initial production of 60 barrels a day. In a form notice dated April 25, 1957, the lessee was notified that all or part of the lands in the lease was within the known geologic structure of the Bisti Field. A few years later the lease was partly committed to the West Bisti Lower Gallup Sand Unit by an agreement which was approved by the Director, Geological Survey, effective July 1, 1960.¹ 720 acres of the lease were unitized and 160 acres of the unitized portion were included in the participating area. The nonunitized portion, consisting of 1,840 acres, included the N $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 21, which is on the known geologic structure of a producing oil and gas field.

The dispute over rentals arose in 1966 and concerns the 6 lease years beginning on February 1, 1961, and ending January 31, 1967. As a lease in its extended term beginning February 1, 1953, annual rental prior to the discovery well was 50 cents per acre. Upon the discovery on December 2, 1956, the lessee became obligated to pay \$1 per acre per year at the expiration of the lease year beginning after discovery as minimum royalty in lieu of rental, or if there was production the difference between the actual royalty and the prescribed minimum royalty. 30 U.S.C. sec. 226(d) (1964). The form notice dated April 25, 1957, stated that because all or some of the lands were within the known geologic structure of a producing oil and gas field, presumably as a result of the discovery, the annual rental became \$1 per acre beginning with the first lease year after the expiration of 30 days from the date of the notice (the lease year commencing on February 1, 1958) and until discovery or commitment to a unit plan 43 CFR 192.80(b)(1) (1954).² However, since a discovery had already been made on the lease, it was subject to the minimum royalty and not to

¹ The lease had been extended beyond January 31, 1958, by reason of production in paying quantities.

² The rate for lands in this category is now \$2 per acre per year. 43 CFR 3125.1(b)(1).

April 2, 1968

the known geologic structure rental rate so long as there was no change in the lease.

Such a change occurred a few years later. The West Bisti Lower Gallup Sand Unit was approved by the Director, Geological Survey, effective July 1, 1960, and 720 acres of the lease were committed to the unit as of the same date. Of the 720 unitized acres 160 were within the participating area and 560 were outside the participating area.

As noted earlier, the nonunitized portion of 1,840 acres included a tract of land which had been determined to be within the known geologic structure of a producing field. There was no production from that tract or the remainder of the 1,840 acres.

The next change was the elimination from the unit, in accordance with the terms of the unit agreement, of the 560 nonparticipating acres effective as of November 7, 1965.

The land office then reviewed the status of the lease. In a decision dated June 22, 1966, it held that upon partial unitization of the lease the nonunitized 1,840 acres were segregated into a separate lease as of the date of unitization, July 1, 1960, and that the annual rental for the segregated lease, designated as NM 0560361, which contained some land in a known geologic structure, was \$1 per acre, or \$1,840 per year, for the six years commencing February 1, 1961, a total of \$11,040.³ The land office then held that the rental on the 560 acres eliminated from the unit agreement was \$1 per acre per year or \$560 for the lease year February 1, 1966, through January 31, 1967.

On July 21, 1966, the land office amended its decision to hold that the lessee also owed rental at the rate of 50 cents per acre per year on the 560 acres in SF 078932, or \$280 per year, for the 5 years from February 1, 1961, to January 31, 1966, a total of \$1,400. 43 CFR 3125.1(b) (2) and 43 CFR 3125.2. It added the sum of \$1,400 to the rental due for a total amount due of \$13,000.

³ Section 11 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(j) (1964), formerly 30 U.S.C. § 226(e) (1958), provides that:

* * * "Any lease heretofore or hereafter committed to any such [unit] plan, embracing lands that are in part within and in part outside of the area covered by any such plan shall be segregated into separate leases as to the lands committed and the lands not committed as of the effective date of unitization: * * *." The pertinent regulation is 43 CFR 3127.4(c).

43 CFR 192.80(b)(1)(1954), now 43 CFR 3125.1(b)(1), set the rental rate at \$1 per acre per year for nonunitized noncompetitive leases which are situated wholly or partly within the known geologic structure of a producing field. Schedule "A" of the lease—"Rents and Royalties," (b)(1). The notice of April 25, 1967, *supra*, also stated:

"Upon segregation of the lands in this lease, by assignment or otherwise, the annual rental of \$1 per acre or fraction thereof shall also be payable on any segregated portion which includes all or part of the lands situated within the known geologic structure."

Up to the time of the land office decisions in 1966, appellant's lease had apparently been carried as a single lease of 2,560 acres under its original serial number, SF 078932. And, since the royalty on production from the lease had exceeded the minimum royalty rate of \$1 per acre, no payment of other than the royalty on production had been billed or made.

On September 26, 1966, Foster filed a partial relinquishment of SF 078932 for the 560 nonparticipating acres and asked that it be made effective as of August 1, 1960. He next filed on October 5, 1966, a notice of election to have lease NM 0560361 governed by the provisions of the act of July 29, 1954, amending section 31 of the Mineral Leasing Act of 1920, 30 U.S.C. sec. 188 (1964), which automatically terminate, in certain circumstances, an oil and gas lease for failure to pay timely the annual rentals. He asked that the consent be deemed effective as of August 1, 1960.

The Office of Appeals and Hearings affirmed the land office determination of the rental due. It also held that the relinquishment and the consent were effective from the respective dates on which they were filed but that they could not be given any retroactive effect.

On appeal to the Secretary, Foster first contends that he should not be liable to pay the claimed rental because no adequate notice was given him; consequently, he believed the lease to be on a minimum royalty basis and was deprived of an opportunity to protect himself against the accrual of additional rentals.

We do not find this argument persuasive. The appellant knew or ought to have known of the provisions of the lease, the regulations, and the statute. The operative event which changed the royalty and rental status of his lease was its partial commitment to the unit agreement. There is no question that he knew the unit had been approved and that only 720 acres of his lease had been placed within the unit. As soon as this happened, the rental consequences were only a matter of applying the provisions of his lease to the new situation. That a formal segregation of the lease was not made until 1966 does not nullify the mandatory language of the statute. If he had desired to relinquish the segregated nonunitized portion or to subject it to the automatic termination provisions of section 31 of the Mineral Leasing Act, as amended, *supra*, he could easily have found apt language to make his desires known. The failure to bill him for the rental does not relieve him of the obligation to pay the amount otherwise properly due.
F. F. Hintze, A-29946 (March 27, 1964).

April 2, 1968

The appellant refers to a *Solicitor's Opinion*, M-36458, 64 I.D. 333 (1957), for support of his contention that notice was necessary before he could be held bound to pay the rentals now found due. The opinion considered the rental obligation of an oil and gas lessee who had applied for an extension of his lease beyond its 5-year term but whose application had not been approved until the last day of the 6th lease year so that he had no opportunity to pay the rental before the anniversary date of the lease so as to prevent its termination. It was held that the automatic termination provision would not apply if the lessee had not had reasonable notice that his lease had been extended so that he knew the rental was due.

The situation is not comparable to appellant's. There the lessee did not know of the operative fact that his lease had been extended. Here Foster knew what had happened to his lease and, as we have said, knew or ought to have known of the consequences.

Accordingly, it is concluded that the rentals are due on Foster's leases in accordance with their terms even though a decision did not issue specifically saying that SF 078932 had been segregated into two leases and detailing the rental obligations under each lease.

Next Foster urges that up to the time of segregation in 1966 lease SF 078932 should be viewed as being on a minimum royalty basis, so that since the royalty on production always exceeded the minimum royalty no rental is due. This argument runs plainly counter to the specific language of section 17(j) of the Mineral Leasing Act, as amended:

* * * The minimum royalty or discovery rental under any lease that has become subject to any cooperative or unit plan of development or operation, or other plan that contains a general provision for allocation of oil or gas, shall be payable only with respect to the lands subject to such lease to which oil or gas shall be allocated under such plan.* * * 30 U.S.C. sec. 226(j) (1964).

The Departmental regulation is equally explicit:

* * * a minimum royalty of \$1 per acre in lieu of rental, shall be payable at the expiration of each lease year after a discovery has been made * * * except that on unitized leases the minimum royalty shall be payable only on the participating acreage. * * * 43 CFR 3125.2.

Foster urges, however, that a lease which is in a producing status by virtue of actual production should never lose its producing status and should remain on a minimum royalty basis even after partial unitization. There is no support for such a view. The language of the statute and regulation is quite specific. The appellant's view could as often work to the disadvantage of a lessee by imposing a larger minimum

royalty obligation if the royalty on production did not equal the minimum royalty due on an entire lease.

The Department has held in other situations that acreage once subject to minimum royalty can revert to a rental status. In *Murphy Corporation*, 71 I.D. 233 (1964), it ruled that a lease which was placed on a minimum royalty basis when it was unitized and placed in a participating area, but on which there was no producible well, reverted to a rental basis upon the termination of the unit agreement and the dissolution of the unit. It also pointed out that a lease which was created by assignment out of a lease on a minimum royalty basis because of discovery but which (the assigned lease) had no producing well was freed of the obligation to pay minimum royalty. It said too that a unitized lease on which there was no producing well, but which is on a minimum royalty basis because it is in a participating area in which there is a producing well, reverts to a rental basis when it is excluded from the participating area.

The creation of separate leases by segregation upon commitment of part of a lease to a unit is analogous to the creation of separate leases by assignment. The Department's practice in the latter situation buttresses the conclusion that in the former situation the nonunitized portion on which there is no producing well is not to be on a minimum royalty basis, even though it was prior to segregation.

The decisions below properly concluded that SF 078932 had been segregated into two leases as of the effective date of unitization and the rental computations were to be made on that basis in accordance with the statute, regulation and lease.

The appellant's contentions based upon the concept that the leases were not segregated until 1966 need not be discussed, for our conclusion that the leases were segregated as of the effective date of the unit agreement renders them moot.

Foster also argues that his consent to have the segregated lease NM 0560361 subjected to the automatic termination provisions of section 31 of the Mineral Leasing Act, as amended, should be given effect retroactively to the effective date of the unit agreement. He points out that the practice has been to give each leaseholder notice of his opportunity to bring his lease under the automatic termination provisions, and he says that he was not given a choice.

There is no provision in the statute or regulations for making the election retroactively. The Department has consistently held that a lessee who does not file a consent prior to the accrual of rental cannot bring his lease under the automatic termination provisions for the

rentals already due. *Stanley Odlum and Avila Oil Co.*, 65 I.D. 25 (1958); *Clyde B. Neill*, A-27650 (September 16, 1958).

The fact that the lessee may not have received notice of his opportunity to make an election does not require a different result. The practice of giving notices originated when the change in the law was still a novelty and the Department wished to let all its lessees know of it. The law, however, has now been on the statute books for almost 14 years and part of the regulation for practically the same length of time. The notice is, at most, a courtesy to the lessee and he can gain no rights if he does not receive one.

The appellant also suggests that the rentals found due should be waived or reduced under section 39 of the Mineral Leasing Act, as amended, 30 U.S.C. sec. 209 (1964). That section, however, authorizes a waiver or reduction in rentals only for the purpose of encouraging the greatest ultimate recovery of oil and in the interest of conservation of natural resources, conditions which are clearly in opposite here.

The appellant objects to the assessment of rentals for the 560 acres eliminated from the unit at \$1 per acre for the lease year February 1, 1966, to January 31, 1967. Although, the land office did not specify under what provisions of the lease or regulation it fixed the rental, it apparently believed that upon elimination from the unit the 560 acres were to be treated for rental purposes the same as the 1,840 acres—that is, as lands on a known geologic structure not in a unitized lease. 43 CFR 3125.1(b) (2).

The regulation does not clearly set out how leases partly within and partly without a unit are to be treated for rental purposes. It distinguishes between "leases" unitized and nonunitized, but not between ones unitized only in part, as SF 078932 now is. The lease itself, however, is more explicit. Schedule A, which sets out the rents and royalties to be paid under the lease, provides:

"Rents—To pay the lessor in advance on the first day of the month in which the lease issues a rental at the following rates:

(a) If the lands are wholly outside the known geologic structure of a producing oil or gas field:

- (1) For the first lease year, a rental of 50 cents per acre.
- (2) For the second and third lease years, no rental.
- (3) For the fourth and fifth years, 25 cents per acre.
- (4) For the sixth and each succeeding year, 50 cents per acre.

(b) On leases wholly or partly within the geologic structure of a producing oil or gas field:

- (1) Beginning with the first lease year after 30 days' notice that all or part of the land is included in such a structure and for each year thereafter, prior to a discovery of oil or gas on the lands herein, \$1 per acre.
- (2) On the lands committed to an approved cooperative or unit plan which includes a well capable of producing oil or gas and contains a general provision for allocation of production, for the lands not within the participating area an annual rental of 50 cents per acre for the first and each succeeding lease year following discovery."

Since SF 078932 is partly within the known geologic structure of a producing oil or gas field, the provisions of (b) are relevant. There we see that under paragraph (1) the \$1 per acre rental is due on all of the acres in the lease if any of the land in the lease is included in such a structure. Paragraph (2), however, excludes from the \$1 per acre charge, only those *lands* committed to a unit agreement and not within the participating area. It does not apply to lands not committed to the unit agreement which, of course, could not be within the participating area. The rental due on nonunitized land within a lease unitized in part is set by paragraph (b) (1) and is, as the decisions below held, \$1 per acre.

Finally the appellant queries whether, even if NM 0560361 is to be considered segregated as of July 1, 1960, he received the required notice that part of that lease was in a known geologic structure and that the rental would be \$1 per acre per year. Such notice was, as we have seen, given on April 25, 1957, prior to the segregation of the parent lease. We can see no reason why that notice is not sufficient. The segregation did not change the lessee or the terms or conditions of the lease. Just as they carried over to the new lease, so a notice given a lessee prior to segregation concerning lands later placed in the new lease remains effective after segregation.

Accordingly, it is concluded that the decisions below correctly computed the rental due on leases SF 078932 and NM 0560361.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

*April 16, 1968***APPEAL OF MSI CORPORATION****IBCA-554-4-66***Decided April 16, 1968***Contracts: Construction and Operation: Drawings and Specifications—
Contracts: Disputes and Remedies: Burden of Proof**

Under a contract for construction of a building and an adjoining open plaza, where the specifications require the use of an asphaltic light-weight concrete insulating fill for the plaza and roof similar to a brand-name material conforming to specifications supplied by a producer of the brand-name product, followed by a list of the required properties and characteristics of the material, and method of application, the contractor must establish by a preponderance of the evidence that the contracting officer erroneously determined that a different brand-name material offered as a substitute was not substantially equal to the material named in the contract, as required by other provisions of the contract.

**Contracts: Construction and Operation: Drawings and Specifications—
Contracts: Construction and Operation: Protests—Contracts: Formation and Validity: Bid and Award—Contracts: Construction and Operation: Waiver and Estoppel**

Where the provisions of an invitation for bids clearly and explicitly require the bidder to furnish a material similar to a brand-name product, or a substitute material determined by the contracting officer to be equal thereto, the contractor, having remained silent during the bidding period without protest and having made no inquiry of the contracting officer as to the availability of such brand-name material, or of a material substantially equal to it, is not entitled after award to assert that the specification requirements are invalid for requiring the contractor to procure the material from a sole source (the contractor's post-award allegation being that it was unable to find a different source for a similar material).

Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: General Rules of Construction

The use of a "brand name or equal" type of specification does not constitute a representation by the Government regarding the existence of acceptable substitutes for the brand-name product, nor does it constitute a representation that an existing substitute would receive approval prior to the submission by the contractor of date establishing the equality of such substitute.

BOARD OF CONTRACT APPEALS

Appellant timely appealed the contracting officer's denial of its claim of \$28,984.60 for increased construction costs. The additional costs are alleged to be a result of being required to use a proprietary product, specified by the trade name All-weather Crete, for the insulating fill for the main and penthouse roofs and plaza deck of an

office building. A trade name product called Permalite was proposed for use by appellant as an equal to All-weather Crete. It was disapproved by the contracting officer because it did not meet the specification requirements.

The MSI Corporation, appellant, and the contracting officer, representing the Bureau of Reclamation, Denver, Colo., entered into contract No. 14-06-D-5277, dated October 23, 1964. The contract required construction, among other things, of a 14-story office building and penthouse at the Federal Center, Denver, Colo. The contract, prepared on Standard Form 23 (January 1961 Edition), included Standard Form 23A, General Provisions (April 1961 Edition) containing the standard clauses for Disputes and Material and Workmanship.

The contract price was \$5,843,035. It was based upon bid schedule of 14 items. Item 1, the office building, was for a lump sum amount of \$5,575,000. The contract was to be completed within 730 calendar days after the date of receipt of notice to proceed, plus any extensions of time granted under the terms of the contract.

Appellant's claim is directly concerned with the insulating fill specified for use on the roofs and the plaza deck. The specifications for the insulating fill are set forth in full below:

INSULATING FILL

1. GENERAL:

- a. The Contractor shall provide insulating fill for roof insulating and for insulation at plaza level as indicated on the drawings.

2. MATERIALS:

- a. Insulating fill shall consist of an asphaltic light weight concrete fill similar to All-weather Crete conforming to specifications supplied by Silbrico Corp., Chicago, Ill. Insulation shall meet the following requirements:

(1) Moisture absorption not over 4.5% by volume when tested in accordance with ASTM C209-60.

(2) Capillarity—No capillary action.

(3) Density—18 to 22 pounds per cubic foot.

(4) Load Indentation—.06" indentation at 40 pounds per square inch.

(5) Thermal Conductivity—.40 K Factor at 75 degrees F.

3. INSTALLATION:

- a. Concrete deck shall be primed in accordance with manufacturers directions prior to application of insulating fill.

b. Insulating fill shall be spread over surface and screeded to such a depth that when compacted, will conform to the grades and elevations indicated on the drawings, and so that roof areas will pitch to drains.

c. Insulation shall be compacted using roller of sufficient size and weight to achieve the density specified. Finished surface of insulation shall be smooth and even without low spots and irregularities which would tend to pocket water.

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Government Exhibit No. 11, a brochure on All-weather Crete, contains the following information about that product.

All-weather Crete roof deck insulation is a combination of two precisely manufactured products. One is an expanded volcanic Glass rock—the other a thermoplastic binder. These two products are carefully combined at the job-site to produce a roof deck fill with a K-factor better than any other poured roof deck insulation.

After being mixed on the job-site according to exact specifications, the All-weather Crete is hoisted to the roof deck and is then dumped into a waiting power-buggy for easy transportation to any spot on the roof deck.

Screeds are adjusted to distribute uncompacted All-weather Crete to the thickness specified. Instrument leveling of low spots in deck to minimize "bird baths" at slight premium. All equipment used is custom designed, and varies with the type and size of deck.

Vapor transmission. An inter-connected chain of air spaces between the volcanic glass particles allows the lateral passage of vapor pressures. This "breathing" action prevents pressure build-up in the insulation under the base ply of roofing—a common cause of blisters and deterioration. AWC is virtually unaffected by this vapor transmission and will remain stable.

The cover page of the brochure lists the following "All-weather Crete ROOF DECK INSULATION—Applied by LICENSED APPLICATORS," and states that it was developed by SILBRICO Corporation.

The five physical properties of All-weather Crete in the contract specifications for Insulating Fill are the same as those given in the brochure under "Physical Properties."

The areas where the insulating fill was required to be installed were on the roofs and the plaza deck. The roof areas consist of the roof over the main building which was enclosed by parapet walls and the penthouse, whch was a small area with the roofing extending to the edge where it terminated against a roof stop. The largest area was the plaza deck which occurred at the lobby level. The plaza deck surrounds the building, is exposed to the elements, and is subject to pedestrian traffic. The rooms on the ground level beneath the plaza deck are devoted to working or service areas.

The plaza deck was constructed of a 4 inch reinforced concrete structural slab supported on reinforced concrete joists 18 inches in depth; an asphalt primer was mopped on top of the slab, with the insulating fill, having a maximum thickness of 4 inches, applied over the primer; a neoprene sheet of waterproof material was placed over the insulating fill; $\frac{1}{8}$ inch asphalt impregnated board covered the neoprene sheet; and a 3 inch concrete slab-wearing surface covered the asphalt board.

The roof of the main building was the same as the plaza deck, except a built-up roof instead of the heavy roofing felt and 3 inch concrete slab-wearing surface, was placed on top of the neoprene sheet. The penthouse roof was the same as the roof for the main building except that steel joist and steel deck replace the reinforced concrete slab and joists.

Hellmuth, Obata, and Kassabaum, Inc., Architects, St. Louis, Mo., designed the office building and prepared the contract drawings and specifications for the contracting officer. The Architects also were responsible for the approval or disapproval of data, drawings, and materials proposed for use in the construction.

The contract contained two separate provisions dealing with brand or trade name references. One of the provisions was a part of a clause in Standard Form 23A, General Provisions. It reads as follows:

9. *Materials and Workmanship.*

(a) * * *

* * * * *

* * * Unless otherwise specifically provided in this contract, reference to any equipment, material, article, or patented process, by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition, and the Contractor may, at his option, use any equipment, material, article, or process which, in the judgment of the Contracting Officer, is equal to that named. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer, the model number, and other identifying data and information respecting the performance, capacity, nature, and rating of the machinery and mechanical and other equipment which the Contractor contemplates incorporating in the work. When required by this contract or when called for by the Contracting Officer, the Contractor shall furnish the Contracting Officer for approval full information concerning the material or articles which he contemplates incorporating in the work.

The other provision which is part of the General Requirements, Division 1, Section 1A, differs from the one in Standard Form 23A and reads as follows:

19. *Reference Specifications:*

* * * * *

The references to materials, wherein manufacturer's products or brand are specified, are made as standards of comparison only as to type, design, character, or quality of the article desired, and do not restrict bidders to the manufacturer's products or the specific brands named. It shall be the responsibility of the contractor to prove equality of materials and products to those referenced.

This provision was referred to in Supplemental Notice No. 1, dated September 23, 1964, which amended certain provisions of the drawings

and specifications. It added the following subparagraph (b) (9) to paragraph 2, Division 1, Section 1A, of the specifications.

2. *Explanation of the Specifications:*

* * * * *

(9) Regardless of any statements to the contrary throughout these specifications, the provisions of Paragraph 19, Section 1A, Division 1 regarding manufacturer's products and brand names shall apply.

Appellant by letter of December 29, 1964, submitted to the Architects Resident Representative, hereafter called Architects, the name of a product called "Permalite" for use as the insulating fill specified. Upon receipt of appellant's request to use Permalite for the insulating fill, the Architects referred the matter to their Consulting Engineers, Ketchum, Konkel, Ryan and Fleming, hereafter referred to as KKRF. A meeting took place and KKRF advised the Architects by letter dated January 7, 1965:

We do not recommend the substitution of Permalite concrete insulating fill especially on the plaza level for the reasons explained by Mr. Nickel in our meeting today, but we feel your office should make the final decision.

On January 8, 1965, the Architects advised appellant "It is the opinion of the Architects and KKRF that Permalite is not an equal to Tufcrete as specified."

Government Exhibit No. 10, consists of two brochures, "Perlite Concrete Aggregate" and "Permalite Concrete Aggregate." The brochure on Permalite describes the material as follows:

Permalite is a registered brand name of premium quality expanded perlite aggregates produced by licensed franchises of Great Lakes Carbon Corporation. Perlite is a type of volcanic glass rock containing trapped water. When heated above 1500° F. the crude perlite particles expand and turn white—much like popcorn—as the trapped water vaporizes to form microscopic cells or voids in the heat softened glass. The resulting honeycomb structure accounts for the light weight and excellent thermal insulation of expanded perlite.

Permalite expanded perlite is one of the most efficient insulating materials known. When mixed with portland cement it produces concrete that offers up to 20 times more thermal insulation than ordinary concrete. A 2-inch thickness has an insulating value equivalent to a 1-inch insulating board.

Some of the physical properties of Permalite given in the brochure are as follows: Density, oven dry, pounds per cubic foot 22; Thermal Conductivity "K," .51; Indentation strength, 70 pounds (required to imbed $\frac{1}{2}$ inch ball $\frac{1}{4}$ inch).

On January 11 and 13, 1965, appellant advised the Architects that Permalite was technically equal to All-weather Crete. Technical data on Permalite was submitted with the following remarks:

Permalite is referred to in the trade as Perlite as opposed to All-Weather Crete, while tufcrete is the specified lightweight insulating fill. The enclosed technical data clearly bears out that with a slight increase in thickness that Perlite will give adequate insulating value and that it gives a substantially greater load bearing quality. With the above information we feel that an equal value is borne out.

Permalite was again rejected by the Architects' letter dated February 2, 1965. Its rejection was based upon comments contained in a letter dated January 28, 1965, from their St. Louis Office. The reasons for the rejection are given below:

1. Permalite will not provide the vapor barriers in the roof fill that will be obtained by the use of All-Weather Crete. All-Weather Crete having an asphaltic emulsion as the binder requires that the structural deck be mopped with a sealer before the application of the fill material. This would provide a vapor barrier below the fill material rather than directly below the roofing material. The vapor barrier directly below the roofing could result in the roofing material blistering at a later date.

2. The Permalite being a material which tends to expand due to a rise in temperature, and not to contract. This could possibly result in expansion occurring which results in problems around the perimeter of the building. All-Weather Crete will not do this.

3. Permalite insulating fill indicates a density of 22#—oven dry. Under the installation and location conditions, it is not probable that oven dry conditions will ever be present. All-Weather Crete having an asphaltic binder is more impervious to moisture and as such, would maintain the density specified.

4. We can only presume that KKR & F's objection to Permalite insulating fill being used for the Plaza area is based somewhat on our opinion.

Efforts were continued by appellant to obtain approval of Permalite as the insulating fill without success. They culminated in a letter from the Architects dated August 26, 1965, which reiterated the reasons given earlier for not approving Permalite. The letter ended as follows:

The specifications enumerate the requirements for the insulating fill. The material proposed—Permalite—does not satisfy these requirements. Any material to be used as "Insulating Fill" must meet the contract requirements.

We will be glad to consider other materials. However, any material proposed must meet the specification requirements for the particular area and conditions indicated by the Contract Documents.

Appellant dispatched a letter on September 3, 1965, in reply to the Architects' letter of August 26, 1965, disapproving Permalite stating in part:

April 16, 1968

We have spent considerable time in attempting to find a material similar to All-weather Crete. We have exhausted every avenue of investigation and while realizing that it is not the architect's responsibility to name a similar material or manufacturer, we never the less requested that your office apprise us of same. Inasmuch as this has not been forth coming we are contending that the specifications as written are based on a proprietary item.

* * * Further-more if All-weather Crete is the only acceptable installation we shall follow the decision from your office but at the same time register our claim for the difference in installations between All-weather Crete and a Perlite material.

The Architects reply on September 22, 1965, as follows:

* * * Please be advised that when the specifications were prepared an asphaltic light-weight concrete fill was specified in Division 7, Section 7C, Paragraph 2 of the specifications, a material meeting the requirements of subparagraph 2a (1) through (5) was found necessary to provide a material resistant to moisture and to provide a satisfactory vapor barrier. The All-weather Crete supplied by Silbrico Corporation meets the specified requirements while Permalite does not. We are unable to furnish you the name of another manufacturer who makes a product which meets the specifications. However, it is my understanding that "All-weather Crete" is the name of a material which can be manufactured and installed by any one wishing to do so.

As stated above and as you have been previously advised, Permalite is not acceptable for the insulating fill for the roof deck and the plaza level. If you are unable to submit any other product for our approval, the All-Weather Crete should be quite satisfactory for the purpose intended when it is properly installed as specified.

Your position is difficult to comprehend since there has been no change in the requirements and no exceptions were included with your bid.

This is the architect's final decision in this matter, and we must ask that you proceed accordingly.

Attempts were continued to win approval of Permalite for use as insulating fill to no avail. Finally, the engineering and authorized representative of the contracting officer advised appellant by letter dated December 29, 1965, that since the Architects did not agree that Permalite was equal to the specified All-weather Crete, and appellant had failed to establish that it was equal, appellant should proceed in accordance with the instructions contained in the Architects' letter of September 22, 1965, a copy of which was enclosed.

Appellant accepted the engineer's letter as the final decision of the contracting officer and by letter of January 3, 1966, a little more than a year after the first attempt to get Permalite approved, filed a claim in the amount of \$28,984.60 for the additional cost. On March 7, 1966, a "Findings of Fact and Decision by the Contracting Officer" was issued to appellant in which his claim was denied in its entirety.

The Findings of Fact included the following tabulation comparing the Properties of All-weather Crete and Permalite.

10. The following tabulation of comparative properties was extracted from the technical data as shown in Sweets' Architectural Catalog, 1964, for the two products mentioned above in these findings:

<i>Properties</i>	<i>All-weather Crete</i>	<i>Permalite concrete with Permalite perlite aggregate*</i>
Moisture absorption.	Not over 4.5% by volume when tested in accordance with ASTM C209-60.	No information available.
Capillarity-----	No capillary action-----	No information available.
Density-----	18 to 22 pounds per cubic foot.	22 to 36 pounds per cubic foot (oven dry).
Load Indentation.	0.06-inch indentation at 40 pounds per square inch.	1-inch-diameter disk—185 pounds per square inch, failure $\frac{1}{2}$ -inch-diameter ball—70 pounds per square inch to embed ball to $\frac{1}{2}$ its diameter (22 pounds per cubic foot density).
Thermal conductivity.	0.40 K factor at 75 degrees F.	0.51 to 0.77 K factor.
Curing time-----	None (applied hot & dry)-----	Similar to curing for regular concrete.
Binder-----	Thermoplastic-----	Portland cement.
Aggregate-----	Expanded volcanic glass rock.	Expanded volcanic glass rock.
Joints-----	Monolithic, sufficient resiliency to prevent lateral pressure. Does not require expansion strips.	Required at edges and at vents, 1-inch expansion joint or 1-inch air space.
Thickness-----	4-inch maximum shown on drawing.	5.1-inch maximum required for same thermal resistance.

*Data is same in Permalite concrete aggregate for roof decks and floor fill, Catalog No. C15, 1964 (A.I.A. File No. 4-E13 and 37-B-2).

It then gave the following reasons for not approving Permalite:

11. Referring to Paragraph 5 above, the specifications require that the insulating fill shall be an "asphaltic" lightweight concrete fill. As shown in the tabulation above in Paragraph 10, the binder for All-weather Crete is thermoplastic whereas the Permalite binder is Portland cement. Permalite does not meet the specifications in this respect.

As shown in Paragraph 10 above, the density of Permalite is listed as 22 to 36 pounds per cubic foot (oven dry). An oven dry condition could never be achieved for Permalite under installation conditions; therefore, the density of Permalite would exceed the permissible density of 18 to 22 pounds per cubic foot required by the specifications.

The thermal conductivity of Permalite from 0.51 to 0.77 K factor, as listed in Paragraph 10 above, exceeds the conductivity of 0.40 K factor at 75 degrees F as specified in Division 7, Section 7C, Subparagraph 2a. (5) of the specifications.

As shown in Paragraph 10 above, 1-inch expansion joints or 1-inch air spaces are necessary at edges and around vents (deck drains) when Permalite is used, whereas All-weather Crete is monolithic, resilient, and does not require expansion strips. The expansion and contraction of the Permalite over the bonded sheet neoprene would, with repeated movement, rupture the neoprene membrane.

Both moisture absorption and capillarity are important in considering the comparative properties of the two products since both properties are listed in the specifications (see Paragraph 5 above, 2a. (1) and (2). The specifications for Permalite are silent in both of these properties.

The drawings show a maximum thickness of 4-inch for the insulating fill. A 5.1-inch thickness of Permalite insulating concrete fill would be required for the same thermal resistance. The details of the building are such that the greater thickness cannot be tolerated.

12. In view of the deficiencies of Permalite properties as outlined in Paragraphs 10 and 11 above, and I find that the contractor has failed to prove the equality of the proposed substitute to the specified product and that the contractor has not proposed an equal substitute. Accordingly, there is no proper basis for a claim that the Government increased the contractor's costs by refusing to approve an allegedly equal substitute material. The claim is therefore denied.

At the hearing, appellant's witness, Mr. Arthur Masbruch, an employee of the Commercial Testing Laboratories of Lakewood, Colo., testified that he had tested for density three samples of material that had been furnished to him for that purpose. Later testimony developed the information that these samples were All-weather Crete materials (installed by the appellant) that had been cut from the upper plaza level on the west side of the building. No samples were taken from the roof of the building. The tested materials were found by Mr. Masbruch to have an average density of 26.26 pounds per cubic foot (Tr. 11).

Appellant's next witness was Mr. J. D. Moore, III, Project Manager for appellant concerning the construction of the building. On the day prior to the hearing, he had observed the taking of the samples that were later tested by Mr. Masbruch (Tr. 12). He also testified on cross-examination that the samples were taken from a single panel 30 feet by 30 feet in area. Mr. Moore solicited the contract from All-weather Crete (Appellant's Exhibit A) and had previously obtained a proposal (Appellant's Exhibit B) from the Permalite Company (Tr. 15, 16). About 90 percent of the insulation had been completed at the time of the hearing. He was unable to state whether the density found by Mr. Masbruch was representative of any other locations on the building (Tr. 21). The occasion of this project was the first experience Mr. Moore had with the use of All-weather Crete (Tr. 23). Some leakage had occurred in the plaza, but Mr. Moore was not certain as to the

cause. It could be coming from around the edges of the sheet neoprene (Tr. 24, 25).

Mr. Robert L. Boyle, a well-qualified consulting engineer who had been employed by the appellant from 1958 to 1964, testified on behalf of appellant. Mr. Boyle stated in substance that because of the published information as to superior insulating qualities (K factor) of All-weather Crete as compared with Permalite, there would be a certain increase in the amount of heat loss if Permalite were used in the roof of the building. Based on the use of oil for heating, an area of 23,000 square feet of roof and the same thickness of material, the additional total cost of heating would be about \$2,000 to \$3,000 over a 20-year period if Permalite were used instead of All-weather Crete (Tr. 35).

Upon cross-examination, Mr. Boyle testified that he had not included in his calculations any cost factors for air conditioning, that he was not familiar with the building, and did not know its size. He had not seen the drawings. It was his opinion, however, that the additional cost of air conditioning would not be significant (Tr. 38, 39, 40). Mr. Boyle's testimony completed the appellant's evidence at the hearing.

The Government's case was based on the testimony of Mr. George Kassabaum, a partner in the firm of architects that had designed the building. Mr. Kassabaum was well qualified by education, and by experience in teaching architectural subjects, as well as in design of a number of different types of large public buildings, housing projects, university and school structures, and other Federal buildings (Tr. 45). He was the only witness at the hearing who had previous experience in the use of All-weather Crete as well as with Permalite.

Mr. Kassabaum testified that the primary function of the asphaltic light-weight material specified in the contract was that of providing insulation (Tr. 52). Problems of leakage of roofing materials had been prevalent in his recent experience with various combinations of insulating materials (having water resistant characteristics) with other materials, including those of a waterproofing nature. The comparative success of these combinations depends somewhat upon weather conditions at the time of installation and the skill of the workmen (Tr. 52). No positive guarantee against leakage is feasible with any combination of materials (Tr. 55).

Mr. Kassabaum testified with respect to the contract specifications and requirements for insulation material as follows, with comparisons between All-weather Crete and Permalite as to compliance with those requirements:

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(1) Moisture absorption not over 4.5 percent. This requirement is met by All-weather Crete. Permalite is much more absorptive (Tr. 58, 69).

(2) Capillarity. No capillary action permitted. This requirement is met by All-weather Crete. Permalite allows water to pass through it much more readily. This could reduce further its effectiveness as an insulator and would, in the judgment of Mr. Kassabaum, eventually cause some disintegration of the material if water or vapor were to come in contact with it. Whether these conditions develop depends on the effectiveness of the waterproofing materials used above and below the insulation. Problems often arise that would prevent the obtaining of a perfect seal that is sought by the use of waterproofing material above the insulation. These problems increase the importance of insulation that has little or no capillary action (Tr. 58, 65).

(3) Density. 18 to 22 pounds per cubic foot. This is met by both products according to the published data previously referred to, although the limitation of "ovendry" as to Permalite describes a condition that could not be obtained during construction in the field, in Mr. Kassabaum's opinion. At the time the Permalite materials are mixed, water is added to the cement, so the water is already present in the concrete. Also, rain or moisture in the air would affect this factor (Tr. 59, 65, 66).

(4) Load indentation. This requirement is met by both products (Tr. 66).

(5) Thermal conductivity (0.40 K factor at 75° F.). This is met by All-weather Crete but not by Permalite. Even if it were possible to apply Permalite in an ovendry condition, its thermal conductivity (0.51 to 0.77 K factor) would be about 25 percent less effective as insulation than the asphaltic material. Where the concrete is mixed with the normal amount of 25 percent water, Permalite would have about a 1.00 K factor (Tr. 69).

Other properties of the materials that would have an effect upon the comparative desirability of the two products are as follows, according to Mr. Kassabaum:

(a) All-weather Crete is a stable material that does not expand beyond the normal expansion of concrete and other materials in a building. Permalite requires a one-inch air space or one-inch expansion joint, according to the Permalite catalog, to separate it from all walls, vents or other projections (Tr. 63, 67).

(b) All-weather Crete can be installed at any time, while Permalite cannot be installed when temperatures near or below 40 degrees are an-

ticipated, according to the catalog. Under such conditions Permalite must be protected, hot water must be used and the deck must be heated underneath (Tr. 63, 67). If rain occurs, the area must be dried out before application.

(c) All-weather Crete can be formed easily to slope toward drains, and can be patched easily or added to in case of low spots. Permalite is wet and tends to flow. It cannot be patched easily, must be cut out and replaced in the event that such repairs are required (Tr. 63, 67).

The aggregate used in both products is perlite, an expanded volcanic glass rock. The Permalite firm licenses its applicators (as is the case with the Silbriko Corporation). However, since there is no patent involved, we conclude that the term "license" as used here, refers only to the right to use the names of the companies and the brand names of their respective combinations of perlite with asphaltic binder in the case of Silbriko Corporation and All-weather Crete, and the mixture of perlite with cement and water as promoted by the Permalite Company under its brand name.

Mr. Kassabaum stated that the National Roofing Contractors Association does not recommend the use of Permalite on a concrete roof deck because of the moisture it contains, which turns to vapor under a high sun. The heated vapor creates blisters in the roofing material or waterproofing material. In order to prevent such results, the Association recommends venting the areas about once every 1,000 square feet. This would not have been feasible on the deck or plaza which was intended to be used without such obstructions as a pleasant and attractive walking and viewing area. Vents could be used on the roof, but in both areas the vents could be invaded by wind-driven rain or snow, causing leaks (Tr. 69, 70).

It was Mr. Kassabaum's opinion that the use of Permalite on the deck and the roof would require additional expenses, such as more equipment for steam heat, electricity, air conditioning, etc. The cost of amortizing these increases would be about \$1,975 per year over a 20-year period (Tr. 72).

If the Government had been required to accept Permalite as a substitute, it would have been his recommendation to increase the thickness by about 2 inches. This would have created other difficulties such as with thresholds and interior floor levels. Hence, it would probably have been necessary to settle for less thickness (Tr. 73, 74). The necessity for use of expansion joints with Permalite would have raised additional problems respecting the gap next to the neoprene sheet, and some type of support for the neoprene (Tr. 74).

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Permalite moves a great deal more with extremes of temperature than the asphaltic material. This would have put additional stress on the neoprene sheet and could certainly open up the expansion joints required with the use of Permalite (Tr. 74).

Mr. Kassabaum's previous unsatisfactory experience with Permalite in some projects involved considerable delay periods because of rain that compelled the postponement of roof construction. In one case, discoloration of the interior acoustical board due to moisture, appeared two or three years after the building was occupied. There was no evidence of leaks or dripping and the conclusion reached was that the moisture came out of the Permalite (Tr. 76). It would be possible to use Permalite on the penthouse roof with a minimum of interior problems, because it had a steel deck instead of the concrete used on the plaza and remaining roof area.

Upon cross-examination, Mr. Kassabaum testified that concerning all types of structures, including steel structures, there is a more widespread use of Permalite or Zonalite (a vermiculite type of lightweight aggregate) than of All-weather Crete.

At the time the use of Permalite was requested, the plaza deck had not been poured, and Mr. Kassabaum conceded that it might have been possible to change the building dimensions so as to decrease the height of the ceilings below by one or two inches, to accommodate the added thickness of Permalite. However, Mr. Kassabaum was not certain as to the clearances required below for mechanical equipment. It would have been possible to increase the thickness of Permalite on the roof for the purpose of increasing its insulating quality (Tr. 82, 83).

Mr. Kassabaum emphasized that All-weather Crete moved or expanded less than Permalite, and that Permalite moves more than other materials that go into buildings. It is for this reason that Permalite requires expansion joints. Its movements would also have more of an abrasive effect on the neoprene inner layer than would All-weather Crete, according to Mr. Kassabaum. In his experience with All-weather Crete there never had been any difficulty with its expansion.

There is no patent or limitation concerning the combining of perlite and asphalt. Both materials are available anywhere (Tr. 91).

Mr. Kassabaum testified further on this point as follows: (Tr. 90)

Q. In your opinion then, and knowing the previous clause in Division 1, what material is equal to All-weather Crete? or similar?

A. In my opinion, there are asphaltic—any combination of asphaltic and Perlite would be similar to All-weather Crete.

Q. In your opinion, that is the only thing that would be equal then is any combination—

A. —I think we need the asphaltic binder.

Concerning the availability of All-weather Crete the Government offered Exhibit No. 20, a letter from a Vice President of Silbrico Corporation, which explained its availability in this manner:

The All-weather Crete specified on the Bureau of Reclamation is an asphaltic insulating concrete which is a non-proprietary item.

There is no patent held by our company for this product or its application. Any firm who would care to invest approximately \$60,000 for equipment can be in this business. However, to come up with a finished product to meet the specifications would require people skilled in the application of this material.

The architect also testified (Tr. 91) as follows on the availability of All-weather Crete:

Hearing Official: Do you know what other suppliers there are of a material similar to All-weather Crete?

The Witness: You mean now, as far as the licensing responsibility?

Hearing Official: Licensing or sources of supply other than Silbrico.

The Witness: I think the source of supply—it's my understanding that this is available anywhere. Combining Perlite and asphalt, there is nothing patented or limited about that. Now, as far as I know, the Silbrico Company are the only ones that are licensed applicators. The applicators are across the country and I do not know of a company that licenses applicators.

Earlier the architect had testified (Tr. 56) as follows in answer to a question concerning perlite and asphalt:

Q. Where are these components obtainable?

A. As far as I know, anywhere. Everywhere.

Q. Can you buy these component materials from more than one supplier?

A. Yes.

Appellant introduced Exhibits A and B at the hearing. Exhibit A was described as the contract between All-weather Crete and appellant. Actually, the contract was with R-P All-weather Crete Co., St. Louis, Mo. The amount is indicated as \$52,000 and it is dated January 7, 1966, about one year after appellant had first requested approval of perlite. Exhibit B was described as the proposal by Construction Specialties Co., for the perlite. The amount of the perlite proposal is indicated as \$28,180 and it is dated January 12, 1965. Both exhibits cover the insulation fill for roofs and plaza deck required by the contract specifications. The difference between \$52,000 (the contract amount for All-weather Crete) and \$28,180 (the amount of the proposal for Permalite) is \$23,820. Appellant's claim for additional costs is \$28,984.60. No other evidence was introduced nor was any testimony given concerning the two exhibits or the amount of appellant's claim.

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As required by the contracting officer, appellant used All-weather Crete for the insulation fill on the roofs and plaza deck.

The Issue

The issue involved is whether the Government had a right, under the specifications of the contract, to disapprove a substitute insulating fill material offered by appellant, because it was not equal, in the judgment of the contracting officer, to the brand named product specified, as required by Paragraph 19 of the Reference Specifications.

For reasons given below, the Board concludes that the contracting officer properly exercised his right to disapprove the substitute insulating fill material offered because it was not equal in several important respects to the specified brand name product.

Appellant contends that the Government, by insisting that the substitute insulating fill material offered be equal to the principal or important specification requirements of All-weather Crete, actually specified a proprietary or sole source product.

The Government advanced the following arguments to refute appellant's contention. 1. One of the basic premises behind the construction of any Government specification is that it is the Government's responsibility to state the products and design which will meet the Government's minimum needs. 2. If a prospective contractor has any objections concerning the design, the products therein, or the restrictiveness of the specifications, he is required to object prior to bidding or to refrain from bidding. 3. Having bid on and thereby accepted the specifications as written the contractor is in no position to complain about the design or the products specified unless the design is inadequate or impossible of construction. 4. The Government is entitled to have the work performed in strict compliance with the contract requirements.

As a mere threshold obstacle that would defeat appellant's claim, it is well settled that protests by prospective bidders as to alleged restrictive specifications must be raised prior to bidding.¹ It would seem that it was incumbent upon the appellant to make inquiries concerning the availability of similar substitute materials or to seek clarifica-

¹ *Urban Plumbing and Heating Co.*, ASBCA No. 9831 (December 30, 1966), 66-2 BCA par. 6062; *R. L. Pruitt Sheet Metal, Inc.*, IECA-560-5-66 (July 27, 1966), 66-2 BCA par. 5714, and authorities cited therein.

tion from the contracting officer prior to bidding.² No testimony was offered by appellant to indicate that at the time of bidding it was in complete ignorance of the circumstances, well known to it since the award, that Silbrico and its applicators seemed to be the only known sources for mixing and applying the combination of perlite and asphalt. Appellant is a contractor of some experience in the construction industry.

There is no evidence that in advance of the award the Government possessed knowledge of the characteristics or limited sources of All-weather Crete, that was superior to information known or available to appellant and to other bidders, through catalogs issued by Silbrico. No witnesses were called by appellant to testify whether its bid was based on the use of Permalite or on the use of All-weather Crete, and there is no evidence before us, such as cost estimates and working papers used in preparation of appellant's bid to prove whether its bid included the estimated cost of Permalite or All-weather Crete. Appellant's project manager testified that he had no previous experience with All-weather Crete, but that was all that was offered on the subject.

Wholly apart from the considerations discussed above, appellant is faced with a double difficulty which it has failed to overcome. We have long held, as have the courts, that an appellant must show by a preponderance of the evidence that its claim is valid.³ It has a similar impediment in the contract language quoted earlier, that stated:

It shall be the responsibility of the contractor to prove equality of materials and products to those referenced.

Here, the majority of the Board finds that the Government has demonstrated by a preponderance of the evidence that Permalite was not equal, in several substantial respects, to All-weather Crete.

Appellant takes the novel position in its reply to the Government's post-hearing brief that it declined to assume the cost of developing an asphaltic binder for insulating concrete, in view of the fact that the contract provides for supplemental specifications to be furnished by the Government, and this the Government failed to do. Accord-

² *Gelco Builders et al. v. United States*, 177 Ct. Cl. 1025, 369 F. 2d 992 (1966); *R. E. Hall Construction Company and Clarence Braden, a Joint Venture*, IBCA-465-11-64 (September 26, 1967), 67-2 BCA par. 6597, quoting *Consolidated Engineering Company, Inc. v. United States*, 98 Ct. Cl. 256, 280 (1943): "We think that plaintiff, aware of an ambiguity, perhaps inadvertent, in the defendant's invitation to a contract, could not accept the contract and then claim that the ambiguity should be resolved favorably to itself."

³ *Connolly-Pacific Co. et al. v. United States*, 175 Ct. Cl. 184, 358 F. 2d 995 (1966); *R. E. Hall Construction Company et al.*, note 2, *supra*; *Vitro Corporation of America*, IBCA-376 (August 24, 1967), 74 I.D. 253, 67-2 BCA par. 6536, and authorities cited.

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ingly, appellant asserts that this failure on the part of the Government constituted a change.

Appellant is mistaken in its reading of the contract terms. We again quote a part of those terms:

2. Materials:

a. Insulating fill shall consist of an asphaltic light weight concrete fill similar to All-weather Crete conforming to specifications supplied by *Silbriko Corp., Chicago, Ill.* (Italics added.)

Appellant does not identify the contract provisions to which it has referred as requiring that the Government must furnish supplemental or more detailed specifications to bidders if such details are not available from the manufacturer. The contract provisions for Reference Specifications in Section 1A (a portion of which has been quoted earlier) requires the Government only to furnish or make available for examination Federal Specifications, Bureau of Reclamation Specifications, and information as to the availability of other specifications. There is no evidence that the Government was in possession of or could have at any time secured such detailed Silbriko specifications. In fact, the main thrust of appellant's previous arguments was that All-weather Crete could only be obtained from applicators licensed by Silbriko. It is obvious from examination of the Silbriko catalog⁴ that the method of mixing the materials at the job site and the proportions of the ingredients constituted the data that appellant lacked, and this data was not available except to applicators whose crews had been trained by Silbriko for this work, using special machinery that was "custom-designed" for various types and sizes of decks.

Keeping in mind the realities and practical considerations involved, one might well inquire concerning the purpose that would have been served if appellant had been able to obtain such detailed specifications from Silbriko. The Perlite and Permalite catalogs⁵ contain tables of mix designs and instructions for various purposes, using perlite aggregate, water and portland cement, to be mixed at the job site or in transit. However readily the Permalite specifications might be obtained (as opposed to those for All-weather Crete), it should not be presumed that appellant expected to invest in the equipment and training necessary to become a licensed Permalite applicator or "franchisee." Quite the contrary, for appellant's Exhibit B is a pro-

⁴ Government's Exhibit 11.

⁵ Government's Exhibit 10.

posal from a Permalite applicator, and it is evident from the Permalite catalog that mixing equipment is required as well as equipment for depositing and screeding the mixture in a continuous operation until a panel or section is completed (Curiously enough, the Permalite catalog lists Silbrico Corporation as a Permalite franchisee). Hence, the only evidence before the Board concerning this aspect points to an intent on the part of appellant to use a subcontractor with equipment and trained crews to mix and apply Permalite if that product should be approved, just as it was necessary with respect to All-weather Crete.

The majority of the Board considers the rules stated in *The George Hyman Construction Company v. United States*,⁶ to be dispositive of this appeal. Appellant's brief is critical of the application of that decision to the facts we have here, on the ground that *Hyman* involved an alleged subjective judgment by the architect concerning the color and appearance of substitute granite as compared with the specified type from a certain quarry. Actually, the limitations in those specifications are quite similar in effect to the specifications in the instant appeal.⁷ Moreover, the decision rests on broad principles that are for general application to all cases of this kind. The Court said in part:

* * * the Board specifically rejected plaintiff's claim that section 20-3 of the specifications constituted a representation by the defendant regarding either the existence of acceptable substitutes for the named stones, or, as plaintiff further alleges, a representation that one of these existing substitutes would receive approval. We concur in the Board's rejection of this argument.

* * * To construe (that is, to limit) the "substitution clause" as requiring the use of known substitutes would be as unreasonable, in this instance, as defendant's demand in *Rust* that a contract specification be met by the use of an unknown product. Indeed, to accept plaintiff's view of the matter would result in placing defendant in the position of having to accept as a substitute a granite which it could as readily have specified by name. * * *

There was no favoritism or preference involved and the judgment of the contracting officer was reasonably exercised. The majority opinion did not disregard the language of Clause 9 and Paragraph 19, as stated in the dissenting opinion. It is plain, however, that appellant

⁶ 177 Ct. Cl. 313, 366 F. 2d 1015 (1966).

⁷ The contract specified "Granite indicated on the drawings as Type "A" shall be 'Milford Pink' as quarried by the H. E. Fletcher Company, West Chelmsford, Mass. * * *

"Naming of Stone.—The naming of granites is for the purpose of indicating the type that is required, but is not intended to exclude any granite having the characteristics which in the opinion of the Service, are so nearly like those names that they will give practically the same effect."

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disregarded it. The provisions were not hidden away in fine print on the back pages of the contract. The invitation for bids contained clear and prominent warnings in large type with respect to all of the requirements that should have been heeded by the contractor.

The *Melrose* case, cited in the minority opinion, is clearly distinguishable from the instant appeal. *Melrose* involved Federal specifications, and a credit was offered for use of a less effective insulation board, in lieu of the specified "Foamglass" insulation. No price reduction was offered here. There were no problems of conflicting dimensions in *Melrose* (which involved roofing only), and there were no other objectionable features such as we have here, concerning the necessity for expansion joints, venting the plaza and possible blistering of the roof, to name but a few, if Permalite were to be used.

Contrary to intimations in the minority opinion, the appellant had every reason and duty to ascertain, prior to bidding, whether any other mixture of asphaltic concrete similar to All-weather Crete were available, if it intended to offer any substitute. As stated in *Hyman, supra*, the contract provisions respecting substitutes are not representations regarding the *existence* of acceptable substitutes. In this connection, appellant has introduced as "Exhibits" attached to its post-hearing brief and later briefs, for example, specifications for asphaltic concrete materials intended for roads or for purposes other than for roofs and decks. This is negative evidence, together with appellant's assertions in correspondence prior to the hearing that it was unable after extensive inquiries, to locate a source for a mixture similar to All-weather Crete. But this is immaterial and is otherwise questionable as to its admissibility because of its late submission.

The evidence at the close of the hearing indicated only that the Government architect *did not know* of any other sources. It may well be that All-weather Crete represents a comparatively new method of combining an asphaltic binder with perlite. The majority finds it illogical to say, as the minority seems to imply, that a new product, clearly more suitable for the intended purpose than older types, must be excluded from the Federal procurement market because it carries a brand-name and no similar and equal product can be found by the bidder.

To paraphrase *Hyman*, the purpose of the substitution clause in a situation such as existed in this case is to permit the approval of a similar material not yet produced, or unknown to the Government at the time of contract execution. For who can say with any degree of

certainty at the time the specifications are prepared that no such similar material exists, or that it will not become available after contract execution?

In the recent case of *Fusco-Amatruda Co.*,⁸ the Department of Transportation Contract Appeals Board, following and citing the *Hyman* decision, stated:

* * * The inclusion of an "or equal" clause in the contract does not constitute a representation by the Government that a known acceptable substitute for the named item exists. * * * A prospective contractor who bids for a contract to furnish a "brand name or equal" product must, before bidding, assure himself of the availability of the brand name product or an equal substitute. AERODEX, INC., ASBCA No. 7121 [September 11, 1962], 1962 BCA par. 3492.

Conclusion

The appeal is denied.

THOMAS M. DURSTON, *Deputy Chairman.*

I CONCOUR:

DEAN F. RATZMAN, *Chairman.*

I DISSENT FOR THE REASONS STATED
IN THE ATTACHED OPINION.

ARTHUR O. ALLEN, *Alternate
Member.*

MR. ALLEN, DISSENTING

I cannot agree with the opinion of the majority because it does not address itself to the real issue involved. In my opinion, the real issue concerns the application of the "brand-name or equal" provisions contained in the contract to the insulation fill specified by manufacturer's name as "All-weather Crete." The record is clear that no other insulating fill material is manufactured with an asphaltic binder as used in All-weather Crete. The contracting officer insisted that the insulation fill meet the requirements of All-weather Crete. The record is likewise clear that at the time the specifications were prepared it was the intention of the Architect—who designed the building for the Government and who prepared the specifications—that All-weather Crete was the material that was to be used. An insulating fill commonly used for the same purpose as that specified for All-weather Crete, with the brand-name of Permalite, was offered as an equal but not approved because it did not conform to the identical specifications for All-weather Crete.

⁸ DOTCAB No. 67-23 (November 24, 1967), 68-1 BCA par. 6745.

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By refusing to accept any other material as an equal to All-weather Crete, the contracting officer completely disregarded the plain language of the contract and its intended application to material that is specified by brand-name or equal.

There is no disagreement that it is the Government's responsibility to specify products that will meet its minimum needs, and that can include proprietary products. But where a proprietary product is specified, and it is the only one that will meet the Government's needs, it is incumbent upon the Government to make that fact known by inserting cautionary language in the specifications.⁹ To hold that the appellant is foreclosed from objecting to the use of restrictive specifications, because no protest was lodged prior to bidding, has no application to this appeal. Appellant in reliance on the brand-name or equal provisions in the contract, as he had a right to do, had no way of knowing before bidding that a product specified by brand-name would be a product the Government would determine to be the only one that would meet its needs. There is nothing in the record, contrary to the majority opinion, indicating that appellant knew before bidding that he would be required to furnish All-weather Crete, the identical brand-named product that was specified, and no other. To hold otherwise is pure conjecture. There was likewise nothing in the specifications that put appellant on notice to inquire about the manner in which the brand-name provisions would be interpreted. Appellant had every right to expect that the brand-name or equal provisions would be applied as they indicate. Although a potential contractor may have some duty to inquire about a major patent discrepancy, or obvious omission, or a drastic conflict in provisions, he is not normally required, absent a clear warning in the contract, "to seek clarification of any and all ambiguities, doubts, or possible differences in interpretation."¹⁰

Clause 9—Materials and Workmanship and Paragraph 19—Reference Specifications contained the "or equal and brand-name" provisions and they indicate how those provisions are to be interpreted when a product is specified as "or equal" or by "brand-name." It is most difficult to understand how those provisions can be discarded as having no application to appellant's claim simply because the contracting officer chose to disregard them. A contracting officer's discretion in this regard is not absolute, nor may it be exercised arbitrarily.¹¹

⁹ *W.P.C. Enterprises, Inc. v. United States*, 163 Ct. Cl. 1 (1963), 323 F. 2d 874.

¹⁰ *Ibid.*

¹¹ *Noonan Construction Co., ASBCA No. 8320 (January 17, 1968)*, 1968 BCA par. 3688.

One of the principal purposes to be served by those provisions, as has been so aptly stated, is to discourage the potential monopolistic practice of demanding the use of brand-name or designated articles or products in Government contracts and to bar procurement officials from choosing a particular source either out of favoritism or because of an honest preference.¹²

The facts in this appeal markedly resemble those in *Melrose Waterproofing Co.*¹³ In that case, the specifications called for roof insulation conforming to a Federal Specification. The insulation material specified in the Federal Specification was a brand-name product known as Foamglass which was manufactured by only one firm. The contract also contained a brand-name or equal provision similar to those in appellant's case. The Foamglass was specified to be 1½" thick with a C (thermal conductivity) factor of .24. A substitute insulation board was proposed called Dow Roofmate 1¼" thick with a C factor of .24, plus a credit of one thousand (\$1,000) dollars, or a Dow Roofmate insulation board of 1⅓" thickness with a C factor of .19 with no credit. The substitute insulating board was rejected on the basis that it did not meet the Federal Specifications. Commenting on the reason for the rejection, the Board stated:

We regard that as a euphemism, since there was no other product in existence of which the basic material could meet the numbered specification.

That statement is equally applicable to appellant's case. In the instant appeal, the Government, through its Architect who prepared the specifications, admitted that it knew of no other manufacturer that made a product that would meet the specifications for All-weather Crete, the brand-name product specified. Correspondence in the record (Architect's letter of September 22, 1965, to appellant) and the Architect's testimony indicate that All-weather Crete was selected when the specifications were prepared with the intent that it would be used, because its asphaltic binder was needed (Tr. 90). Yet, notwithstanding those admissions, appellant was advised in the same letter in which the Architect admitted it knew of no other manufacturer that made a product meeting the All-weather Crete specifications, and in which Permalite was again disapproved, that if appellant submitted a product meeting the specification requirements, it would be considered.

There is, in my opinion, no reason why Clause 9 and Paragraph 19 should not be accorded their ordinary meaning in the present contract. Reference to the specifications for All-weather Crete should be inter-

¹² *The Jack Stone Co., Inc. v. United States*, 170 Ct. Cl. 281 (1965), 344 F. 2d 370.

¹³ ASBCA No. 9058 (January 31, 1964), 1964 BCA par. 4119.

April 16, 1968

preted as establishing a standard of quality—as those provisions require. The Court of Claims, in interpreting a brand-name or equal contract provision similar to the one in appellant's appeal, and in reversing an administrative decision, stated:

* * * To advance this long-accepted end of freer competition, the paragraph expressly declared, in the broadest terms, that a reference by the specification writer to "any article, device, product, materials, fixture, form or type of construction by name, make, or catalog number *shall* be interpreted as establishing a *standard of quality*, and *not* as limiting competition" (italic supplied). The normal understanding of this provision would be that, every time a brand name appeared in the specifications, it should be read as referring, not only to the particular manufacturer or producer which was designated, but also to any equal article or product.

The use of "shall", not "may", shows that the clause does not merely give the contracting officer permission, if he so desires to allow an item of another manufacture; he is required by paragraph 1-19 to interpret the brand-name citations in the specifications as establishing no more than a "standard of quality." The contracting officer does have to exercise judgment to determine whether the item proposed to be substituted is equal in quality and performance to the designated proprietary product, but his power does not extend to a refusal to allow a replacement which is equal in these respects.¹⁴

The GSBCA in upholding an appeal, interpreted the very same brand-name or equal contract provision as contained in *The Jack Stone Co., Inc.* case, *supra*, by stating:

* * * In view of Par. 1-19(c) of the General Conditions, *supra*, Appellant had a right to believe that boilers meeting the specifications of Sec. 68-15, *supra*, were substantially the same as boilers produced by more than one manufacturer and on the date of opening of bids, had been in successful commercial use and operation for at least one year in projects and units of comparable size. The evidence before us indicates that the Babcock and Wilcox Co. was the only manufacturer meeting those standards. * * *¹⁵

Yet, even though the contract contained the or equal and brand-name provisions applicable to the product specified, All-weather Crete, it is apparent that the Government subtly by the use of performance specification, of a type, and by inadequately revealing its intended restrictiveness, required appellant to install a proprietary product. This, in my opinion, was a change compensable under the Changes clause.¹⁶ If the Government desired that All-weather Crete insulating fill be used to the exclusion of all other types of insulating fill generally used for the same purpose, it should have taken appropriate steps to omit or change the language of Clause 9 and Paragraph 19

¹⁴ *The Jack Stone Co., Inc. v. United States*, 170 Ct. Cl. 281 (1965), 344 F. 2d 370.

¹⁵ *Algernon Blair, Inc.*, GSBCA No. 2116 (July 13, 1967), 67-2 BCA par. 6453.

¹⁶ *Ibid.*

or by other means made clear its intention. Since Clause 9 and Paragraph 19 were included in the contract, they should be given their normal sphere of operation.¹⁷ In my opinion appellant was not required by the contract to furnish All-weather Crete insulating fill, but could have supplied a product then available of another manufacture if it was equal. And by equal is meant a product suitable for the purpose intended, and one that could have performed the same function in a similar manner. This, appellant was not permitted to do.

I cannot agree that appellant failed to prove equality of the substitute material and that the Government demonstrated by a preponderance of the evidence that Permalite was not equal in several substantial respects to All-weather Crete. The Government by refusing to accept any material except All-weather Crete because of its asphaltic binder, made it impossible for Permalite, which has a cement binder, or any other product, to be considered equal. This action by the contracting officer, which is concurred in by the majority, was contrary to the plain language of Clause 9 and Paragraph 19.

Since the contracting officer and the majority have indicated that All-weather Crete was readily available and that it could be installed by anyone wishing to do so, and that there is no patented process which controls its use, only a brief discussion of its availability is necessary to show the inaccuracy of those claims. There is adequate evidence in the record to discredit the assertion that the product "All-weather Crete" is available to anyone wishing to use it.

It is significant to note that the specifications state:

Insulating fill shall consist of an asphaltic lightweight concrete fill similar to All-weather Crete conforming to *specifications supplied by Silbrico Corp., Chicago, Illinois.* (Italics added.)

It is also significant to note that the Architect for the Government testified, as quoted in the majority opinion, that the materials were available to anyone. (Tr. 91.)

That testimony is not very convincing or knowledgeable coming from the Architect who was responsible for the preparation of the specifications for the insulating fill included in the contract. Considering that the answer was given to explain the availability of other products that were available and similar to All-weather Crete, it simply confuses the confusion. To further indicate the ease in obtaining All-weather Crete, a letter (Government Exhibit 20) from a Vice President of Silbrico Corporation, cited in the majority opinion, was

¹⁷ *Kaiser Industries Corp. v. United States*, 169 Ct. Cl. 310, 340 F. 2d 322 (1965).

introduced in an attempt to explain the availability of All-weather Crete.

What the Architect by his testimony and the Vice President by his letter failed to explain was how anyone, and appellant in particular, interested in installing All-weather Crete in accordance with this contract could do so unless, of course, they were willing to enter into a licensing arrangement with Silbrico Corporation, and presumably to invest \$60,000 in order to obtain the specifications and other particulars about it, including installation. This, in effect, would have required appellant to invest more than it cost to have All-weather Crete furnished and installed by a licensed applicator, and would require appellant to become engaged in the production of a material needed for the performance of the contract. A construction contractor is not ordinarily expected to engage in the production of materials needed to perform a contract. This majority implies that the use of Permalite would have presented the same problem to appellant. This would be so if appellant did not wish to use a licensed Permalite applicator or "franchisee." But that is not the issue. The issue is that appellant was not permitted to use any insulation fill product other than All-weather Crete. It seems abundantly clear from the record that appellant intended to use an approved applicator of the material approved. While it is not necessary to engage in speculation concerning what, if any, control the Silbrico Corporation has over the installation of All-weather Crete, it need only be observed that the reference "Applied by Licensed Applicators" on the cover of the brochure on All-weather Crete would, in the ordinary sense that "licensing" is used in similar situations, imply control of some degree. To license means to confer upon a person the right to do.¹⁸ It can only be concluded that the availability and installation of All-weather Crete was limited to those firms who had been determined to be qualified applicators by, and who had obtained a license for its installation from, Silbrico Corporation.

Since the majority relies on the rules in *The George Hyman Construction*¹⁹ case to be dispositive of this appeal, a brief discussion of that case is necessary to show its inapplicability. While no purpose would be served to analyze the *Hyman* case in detail, its application to this appeal is typical of what so often happens when a rule of law, espoused in one case, is applied to others where the facts seem to appear to be the same, but are not. The decision in the *Hyman* case did not

¹⁸ 33 Am. Jur. 325.

¹⁹ Note 6, *supra*.

turn on language dealing with brand-name or equal products such as contained in this appeal. Rather, the *Hyman* case contained a provision designed to meet the specific needs of that contract and the granite specified by name and quarry location.

The majority opinion cites the paragraph titled "20-3 Naming of Stone"²⁰ used in the *Hyman* case. This paragraph plainly is not similar in language to Clause 9 or Paragraph 19 as used in appellant's appeal. The majority opinion implies that there is no difference but it failed to mention the language in that paragraph relied upon by the court in its decision.

The Court stated:

* * * By its terms, defendant was obligated to accept either the named granite or a substitute so nearly the same as would give "practically the same effect." Surely there is no ambiguity present here. Moreover, the contract specifically stated that the "naming of granites is for the purpose of indicating the type that is required" and thus it clearly specified the standard by which both the architect and contracting officer would have to be guided in deciding whether substitutes were "so nearly like those named that they will give practically the same effect." Hence, we have neither an undisclosed guideline nor an undisclosed intent. To prevail, it is incumbent upon plaintiff to show that what was offered would have met this requirement of "practically the same effect." * * *

It is quite clear that language used in the *Hyman* case was specific as to what the substitute material had to meet in order to be approved and surely, specific language of that type designed to meet a special need, should not be equated to the general type of language regarding brand-name or equal products used in this contract. To do so distorts the plain provisions of the contract.

Only a brief comment need to be made regarding the "*Fusco-Amatruda Co.*"²¹ appeal also cited by the majority. While the brand-name or equal language in *Fusco* is not the same as used in appellant's contract, it does approximate it to a greater degree than the language used in the *Hyman* case. But in *Fusco*, a restrictive specification was not involved because there was at least one other product available that would have been acceptable as an equal to the brand-name product specified which was not so in this appeal. The *Fusco* appeal also relies on the *Hyman* case as authority and the inapplicability of that case to this appeal has been discussed above.

The facts in *The Jack Stone Co., Inc. v. United States*,²² the *Melrose Waterproofing Co.*,²³ and the *Algernon Blair, Inc.*²⁴ appeals are more

²⁰ Note 15, *supra*.

²¹ Note 8, *supra*.

²² Note 12, *supra*.

²³ Note 18, *supra*.

²⁴ Note 15, *supra*.

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representative of the factual situation in this appeal than are those in the cases cited by the majority.

I would have sustained the appeal.

**160-ACRE WATER DELIVERY LIMITATIONS AS APPLIED TO
FAMILY HELD CORPORATIONS**

Bureau of Reclamation: Excess Lands

The excess land provisions of reclamation law place limitations on the delivery of project water to land owned by corporations. Corporate ownership of land may not be used as a device to avoid the excess land laws. The corporation land may also be attributed to stockholders for the purpose of ascertaining the amount of eligible land a stockholder may claim as an individual.

M-36729

April 22, 1968

To: FIELD SOLICITOR, BOISE, IDAHO.

SUBJECT: 160-ACRE WATER DELIVERY LIMITATIONS AS APPLIED TO
FAMILY HELD CORPORATIONS.

In your memorandum of January 8, 1968, you asked for our advice with regard to the excess land problem posed by Mr. Goldsmith, an attorney in Portland, Oreg. The situation posed by Mr. Goldsmith is as follows: Mr. Hubbard, Sr. and Mr. Hubbard, Jr. organized Hubbard Farms, Inc. in 1966, for tax reasons. All of the land owned and farmed by the individuals, about 1,060 acres, was transferred to the corporation. Apparently, the land in the Fern Ridge Reclamation Project, did not receive project water prior to its transfer to the corporation. Project water is now available and the Hubbards would like to irrigate about 640 acres. Mr. Goldsmith requests that the Department look through the corporate entity and view the ownership as if in four individuals, Hubbard, Sr. and wife and Hubbard, Jr. and wife, with each individual eligible to receive water for 160 acres. In the alternative, Mr. Goldsmith suggests that the corporation create three subsidiary corporations, each with a right to receive project water for 160 eligible acres. Of immediate concern are the rules applicable to analysis of corporate ownership of excess lands and what would result from the application of these rules to the described situation.

There are three fundamental rules generally applicable to corporate ownership of land subject to the acreage limitation of reclamation law. The first rule is that no corporation may hold more than 160 acres as

eligible land. This follows from the immediate fact that a corporation is a private owner in law under both section 5 of the Reclamation Act of 1902 and under section 46 of the Omnibus Adjustment Act of 1926. The rule is a result of the juristic concept of the corporate entity. The second fundamental rule is that the corporate form can be disregarded and the land held in corporate ownership viewed as if held by its stockholders in order to determine whether any stockholder, as a beneficial owner of a pro rata share of the corporate land holding, is holding land in excess of 160 acres. To disregard the corporate form however, does not mean that the first rule is disregarded. The first rule is *always* applicable, without regard to the number, character, or extent of individual land holdings of the corporation's stockholders. The third rule is that the corporation or corporations, were not established with a primary purpose to avoid the application of the excess land laws.

The rules stated above are not of recent origin in the application of reclamation law. The identical position was taken in *Williston Land Company*, 37 L.D. 428 (1909).

This construction [that a corporation may take a water right] does not tend to defeat the evident intent of the act, to assure actual small holdings. Though the same few persons required by local law to organize a corporation may organize many corporations under different names, they cannot thus, without limit, absorb and control large areas of land irrigable under any project into the holding of few individuals. A corporation is but a fictitious person created by the law and permitted to be used by real persons for convenience and purposes of business. But when this fiction is attempted to be used for a fraudulent purpose or to evade the policy of a statute, the tribunal before which such fiction is attempted to be availed of may always look beyond the corporate name and fiction of a new person to distinguish and recognize the individuals its represents and attempts to conceal. *McKinley v. Wheeler* (130 U.S. 630, 636); *Bank of the United States v. Deveaux* (5 Cranch 61, 87); *United States v. Trinidad Coal Company* (137 U.S. 160, 169); *Baltimore and Potomac R.R. Company v. Fifth Baptist Church* (108 U.S. 317, 330); *J. H. McKnight Company* (34 L.D. 443, 444).

In the last cited case the Department so applied the rule to defeat fraud upon the desert-land act. Upon the same principle and in the same manner, fraud by this device and fiction upon the limitation of area of water rights fixed by the reclamation act may readily be prevented.

This opinion was later limited by subsequent instructions and decisions prohibiting corporations from making application for water rights on reclamation projects. See 42 L.D. 250 (1913) and 42 L.D. 253 (1913). It has, however, remained in effect as to corporate holdings of land in reclamation irrigation districts under other circumstances.

In more recent years the same construction of reclamation law has been voiced by the Department of the Interior. For example, in a letter of March 18, 1955, the Regional Solicitor, Sacramento, Calif.,

TO FAMILY HELD CORPORATIONS

April 22, 1968

in discussing a situation where landowners had formed four corporations to hold irrigable land held that each of the corporations would be able to hold 160 acres of irrigable land, stating that, "The corporate entity of each (corporation) would not be disregarded unless or until the land representing any stockholder's interest in the corporation, added to any other land he owns in the district, is in excess of the amount of land for which he is eligible to receive project water." The Regional Solicitor correctly stated that individuals could form corporations to hold eligible irrigable land within a district to the extent of 160 acres per corporation, provided the land so held when distributed ratably among the stockholders as if owned by them would not exceed the acreage which each stockholder individually could hold as eligible land.

An identical position was taken in a letter of May 6, 1959, to Senator Clinton P. Anderson from the Assistant Secretary of the Interior, Mr. Fred Aandahl. The Assistant Secretary stated: "While it is true that a corporation is technically a distinct entity under the law, if the landowner also owned and controlled the corporation we could not consider that he had divested himself of the beneficial ownership of the lands in question. We would, therefore, be required to consider that such portion of the lands owned by the corporation as was represented by his ownership of the corporation would be accounted for in computing his total acreage under the project."

The third rule was reiterated in the Committee Print, *Acreage Limitation Policy*, Senate Committee on Interior and Insular Affairs, 88th Cong. 2d Sess. p. 14 (1964).

Since the effective date of the act of May 25, 1926 (44 Stat. 636), corporations have been permitted to acquire private land in tracts not in excess of 160 irrigable acres and secure project water therefor in the same manner as natural persons, subject only to the requirement that the purpose and business intent of each such corporate entity will be considered individually and no corporation can receive project water if it is determined that said corporation was established for the purpose of holding project lands in a manner inconsistent with the acreage limitation provisions of reclamation law.

In applying the third rule, we believe that the parties involved should bear the burden of establishing sound independent reasons and purposes for establishing multiple corporations to hold irrigable land subject to acreage limitations, other than a motive to avoid the application of the excess land laws.

Although the stated rules will prevent abuse and evasion of the acreage limitations in most cases of family or closed corporations,

there may yet remain situations which will require additional analysis. We have in mind particularly the kind of situation which could develop where a number of unrelated individuals would create several corporations on paper to hold irrigable land, assigning 160 acres to each corporation and taking advantage of the element of permissiveness in the second rule to effect eligible ownerships of land in fraud of the acreage limitations. Further, we do not know how the second rule can be applied practically in the case of publicly owned corporations. As to such corporations the first rule should be sufficient, unless it is known that a significant portion of the outstanding shares are held by a single stockholder. We would consider ten percent a significant portion. The public corporation could be asked to identify such stockholders, if any.

Analysis of the Hubbard Farms, Inc. situation in terms of the above rules leads to the following conclusions. First, Hubbard Farms, Inc. can hold only 160 acres as eligible land. Second, the creation of three subsidiaries cannot increase the eligible acreage, assuming that the parent corporation, Hubbard Farms, Inc., is the sole stockholder of the subsidiaries. In this regard we wish to point out that disregarding the corporate form does not require the Department to go any further than to ascertain the immediate stockholders of any corporation as a specific legal entity. It is not feasible, in view of the manifold levels of ownership which can be created in corporate structures, for us to try to pierce through to the "ultimate" owners. Therefore, we would consider Hubbard Farms, Inc., and not its stockholders, as the beneficial owner of its subsidiaries.

A different hypothetical situation would exist, however, if three new separate corporations were established whose stock was held by the same individuals and assuming the third rule was not violated. Then application of the second rule would lead to a somewhat different result, but still on the same level of analysis. What would then control the amount of eligible land which could be held by the four corporations would be the pro rata share attributable to the beneficial ownership of the largest common stockholder. If, for example, one of the four stockholders owned 50 percent of the shares of each corporation then his portion as a beneficial owner would account for 160 acres as to two of the corporations. The other two corporations would be in excess status as to any land held, or the eligible land held by each corporation would have to be reduced to 80 acres, if four corporations were used. The point to remember is that the assets of a corporation

BY GLENN H. WEYER IN AINSWORTH IRRIGATION DISTRICT

April 22, 1968

cannot in fact be segregated, each stockholder has an interest in each asset. We only attribute beneficial ownership to stockholders *as if* they owned the land.

EDWARD WEINBERG,
Acting Solicitor.

**CORPORATE OWNERSHIP OF EXCESS LANDS—LAND OWNED BY
GLENN H. WEYER IN AINSWORTH IRRIGATION DISTRICT**

Bureau of Reclamation: Excess Lands

The excess land provisions of reclamation law place limitations on the delivery of project water to land owned by corporations. Corporate ownership of land may not be used as a device to avoid the excess land laws. The corporation land may also be attributed to stockholders for the purpose of ascertaining the amount of eligible land a stockholder may claim as an individual.

M-36730

April 22, 1968

To: REGIONAL SOLICITOR, DENVER, COLO.

SUBJECT: CORPORATE OWNERSHIP OF EXCESS LAND.

In your memorandum of January 19, 1968, you submitted a question concerning corporate ownership of excess land to the Assistant Solicitor, Branch of Reclamation. The situation which you presented with respect to ownership of land by Mr. Glenn H. Weyer in the Ainsworth Irrigation District can be briefly stated as follows: Mr. Weyer is the owner of, or has an interest in, 245.6 acres of irrigable land within the District. Mr. Weyer has designated 39.2 acres as excess land. Of the remaining 206.4 acres, Mr. Weyer owns individually 106.1 acres. His interest in the remaining 100.3 acres, which, apparently is an undivided one-half interest, he would deed to a corporation of which he owns 60 percent of the capital stock. Of immediate concern are the rules applicable to analysis of corporate ownership of excess lands and what would result from the application of these rules to the described situation.

There are three fundamental rules generally applicable to corporate ownership of land subject to the acreage limitation of reclamation law. The first rule is that no corporation may hold more than 160 acres as eligible land. This follows from the immediate fact that a corporation is a private owner in law under both section 5 of the

Reclamation Act of 1902 and under section 46 of the Omnibus Adjustment Act of 1926. The rule is a result of the juristic concept of the corporate entity. The second fundamental rule is that the corporate form can be disregarded and the land held in corporate ownership viewed as if held by its stockholders in order to determine whether any stockholder, as a beneficial owner of a pro rata share of the corporate land holding, is holding land in excess of 160 acres. To disregard the corporate form however, does not mean that the first rule is disregarded. The first rule is *always* applicable, without regard to the number, character, or extent of individual land holdings of the corporation's stockholders. The third rule is that the corporation or corporations, were not established with a primary purpose to avoid the application of the excess land laws.

The rules stated above are not of recent origin in the application of reclamation law. The identical position was taken in *Williston Land Company*, 37 L.D. 428 (1909).

This construction [that a corporation may take a water right] does not tend to defeat the evident intent of the act, to assure actual small holdings. Though the same few persons required by local law to organize a corporation may organize many corporations under different names, they cannot thus, without limit, absorb and control large areas of land irrigable under any project into the holding of few individuals. A corporation is but a fictitious person created by the law and permitted to be used by real persons for convenience and purposes of business. But when this fiction is attempted to be used for a fraudulent purpose or to evade the policy of a statute, the tribunal before which such action is attempted to be availed of may always look beyond the corporate name and fiction of a new person to distinguish and recognize the individuals it represents and attempts to conceal. *McKinley v. Wheeler* (130 U.S. 630, 636); *Bank of the United States v. Deveaux* (5 Cranch 61, 87); *United States v. Trinidad Coal Company* (187 U.S. 160, 169); *Baltimore and Potomac R.R. Company v. Fifth Baptist Church* (108 U.S. 317, 330); *J. H. McKnight Company* (34 L.D. 443, 444).

In the last cited case the Department so applied the rule to defeat fraud upon the desert-land act. Upon the same principle and in the same manner, fraud by this device and fiction upon the limitation of area of water rights fixed by the reclamation act may readily be prevented.

This opinion was later limited by subsequent instructions and decisions prohibiting corporations from making application for water rights on reclamation projects. See 42 L.D. 250 (1913) and 42 L.D. 253 (1913). It has, however, remained in effect as to corporate holdings of land in reclamation irrigation districts under other circumstances.

In more recent years the same construction of reclamation law has been voiced by the Department of the Interior. For example, in a letter of March 18, 1955, the Regional Solicitor, Sacramento, Calif., in

BY GLENN H. WEYER IN AINSWORTH IRRIGATION DISTRICT

April 22, 1968

discussing a situation where landowners had formed four corporations to hold irrigable land held that each of the corporations would be able to hold 160 acres of irrigable land, stating that, "The corporate entity of each (corporation) would not be disregarded unless or until the land representing any stockholder's interest in the corporation, added to any other land he owns in the district, is in excess of the amount of land for which he is eligible to receive project water." The Regional Solicitor correctly stated that individuals could form corporations to hold eligible irrigable land within a district to the extent of 160 acres per corporation, provided the land so held when distributed ratably among the stockholders as if owned by them would not exceed the acreage which each stockholder individually could hold as eligible land.

An identical position was taken in a letter of May 6, 1959, to Senator Clinton P. Anderson from the Assistant Secretary of the Interior, Mr. Fred Aandahl. The Assistant Secretary stated: "While it is true that a corporation is technically a distinct entity under the law, if the land-owner also owned and controlled the corporation we could not consider that he had divested himself of the beneficial ownership of the lands in question. We would therefore be required to consider that such portion of the lands owned by the corporation as was represented by his ownership of the corporation would be accounted for in computing his total acreage under the project."

The third rule was reiterated in the Committee Print, *Acreage Limitation Policy*, Senate Committee on Interior and Insular Affairs, 88th Cong. 2d Sess. p. 14 (1964).

Since the effective date of the act of May 25, 1926 (44 Stat. 636), corporations have been permitted to acquire private land in tracts not in excess of 160 irrigable acres and secure project water therefor in the same manner as natural persons, subject only to the requirement that the purpose and business intent of each such corporate entity will be considered individually and no corporation can receive project water if it is determined that said corporation was established for the purpose of holding project lands in a manner inconsistent with the acreage limitation provisions of reclamation law.

In applying the third rule, we believe that the parties involved should bear the burden of establishing sound independent reasons and purposes for establishing multiple corporations to hold irrigable land subject to acreage limitations, other than a motive to avoid the application of the excess land laws.

Although the stated rules will prevent abuse and evasion of the acreage limitations in most cases of family or closed corporations, there may yet remain situations which will require additional analysis. We have in mind particularly the kind of situation which could develop where a number of unrelated individuals would create several corporations on paper to hold irrigable land, assigning 160 acres to each corporation and taking advantage of the element of permissiveness in the second rule to effect eligible ownerships of land in fraud of the acreage limitations. Further, we do not know how the second rule can be applied practically in the case of publicly owned corporations. As to such corporations the first rule should be sufficient, unless it is known that a significant portion of the outstanding shares are held by a single stockholder. We would consider 10 percent a significant portion. The public corporation could be asked to identify such stockholders, if any.

In applying the rules to the given situation it can readily be seen that the corporation is within 160 acres of eligible land, assuming that the undivided one-half interest in 100.3 acres is the total corporate holding. Attributing 60 percent of that to Mr. Weyer makes him the beneficial owner, or part owner, of about 205.5 acres, of which 39.2 are under recordable contract. There remains 166.2 acres, or 6.2 acres in excess of his eligible acreage. Except for the 6.2 acres, Mr. Weyer is in substantial compliance with the acreage limitation.

EDWARD WEINBERG,
Acting Solicitor.

CORPORATE OWNERSHIP OF EXCESS LANDS—LAND OWNED BY SILL PROPERTIES, INC. AND ICARDO BROS., INC.

Bureau of Reclamation: Excess Lands

The excess land provisions of reclamation law place limitations on the delivery of project water to land owned by corporations. Corporate ownership of land may not be used as a device to avoid the excess land laws. The corporation land may also be attributed to stockholders for the purpose of ascertaining the amount of eligible land a stockholder may claim as an individual.

M-36731 April 22, 1968

To: REGIONAL SOLICITOR, SACRAMENTO, CALIF.

SUBJECT: CORPORATE OWNERSHIP OF EXCESS LANDS.

In your memorandum of December 11, 1967, to the Associate Solicitor, Reclamation and Power, you requested advice on two separate situ-

ations of corporate ownership of irrigable land, the Sill Properties, Inc. case, and the Icardo Bros., Inc. case.

In the Sill Properties, Inc. case, Sill Properties owned 615.33 acres in the Shafter-Wasco Irrigation District. It designated 160 acres as eligible land and has foregone water for 455 excess acres. On March 1, 1967, Sill Properties sold 140 excess acres to Charles Sill Company, Inc. which owns no other land in the District. Stockholders and their interest in the two companies are as follows:

	Sill Properties, Inc.	Charles Sill Co.
	(percent)	(percent)
Ben Sill	20	20
Hugh Sill	20	20
Charles Sill	20	20
Frank Sill	20	20
Jack Sill	16.64	20
Betty Sill	3.36	

No information is available as to the time or purpose for the establishment of Charles Sill Company, Inc.

Icardo Bros., Inc., apparently has total holdings of about 165 acres in Arvin-Edison Water Storage District. The corporation is owned 50 percent by Jimmie Icardo and 50 percent by Arthur Icardo. It was established in 1946, long before service to the District. Jimmie Icardo and his wife also own 416.82 acres in the District and have designated 320 acres as eligible land.

There are three fundamental rules generally applicable to corporate ownership of land subject to the acreage limitation of reclamation law. The first rule is that no corporation may hold more than 160 acres as eligible land. This follows from the immediate fact that a corporation is a private owner in law under both section 5 of the Reclamation Act of 1902 and under section 46 of the Omnibus Adjustment Act of 1926. The rule is a result of the juristic concept of the corporate entity. The second fundamental rule is that the corporate form can be disregarded and the land held in corporate ownership viewed as if held by its stockholders in order to determine whether any stockholder, as a beneficial owner of a pro rata share of the corporate land holding, is holding land in excess of 160 acres. To disregard the corporate form however, does not mean that the first rule is disregarded. The first rule is *always* applicable, without regard to the number, character, or extent of individual land holdings of the corporation's stockholders.

The third rule is that the corporation or corporations, were not established with a primary purpose to avoid the application of the excess land laws.

The rules stated above are not of recent origin in the application of reclamation law. The identical position was taken in *Williston Land Company*, 37 L.D. 428 (1909).

This construction [that a corporation may take a water right] does not tend to defeat the evident intent of the act, to assure actual holdings. Though the same few persons required by local law to organize a corporation may organize many corporations under different names, they cannot thus, without limit, absorb and control large areas of land irrigable under any project into the holding of few individuals. A corporation is but a fictitious person created by the law and permitted to be used by real persons for convenience and purposes of business. But when this fiction is attempted to be used for a fraudulent purpose or to evade the policy of a statute, the tribunal before which such fiction is attempted to be availed of may always look beyond the corporate name and fiction of a new person to distinguish and recognize the individuals it represents and attempts to conceal. *McKinley v. Wheeler* (130 U.S. 630, 636); *Bank of the United States v. Deveaux* (5 Cranch 61, 87); *United States v. Trinidad Coal Company* (137 U.S. 160, 169); *Baltimore and Potomac R.R. Company v. Fifth Baptist Church* (108 U.S. 317, 330); *J. H. McKnight Company* (34 L.D. 443, 444).

In the last cited case the Department so applied the rule to defeat fraud upon the desert-land act. Upon the same principle and in the same manner, fraud by this device and fiction upon the limitation of area of water rights fixed by the reclamation act may readily be prevented.

This opinion was later limited by subsequent instructions and decisions prohibiting corporations from making application for water rights on reclamation projects. See 42 L.D. 250 (1913) and 42 L.D. 253 (1913). It has, however, remained in effect as to corporate holdings of land in reclamation irrigation districts under other circumstances.

In more recent years the same construction of reclamation law has been voiced by the Department of the Interior. For example, in a letter of March 18, 1955, the Regional Solicitor, Sacramento, Calif., in discussing a situation where landowners had formed four corporations to hold irrigable land held that each of the corporations would be able to hold 160 acres of irrigable land, stating that, "The corporate entity of each (corporation) would not be disregarded unless or until the land representing any stockholder's interest in the corporation, added to any other land he owns in the district, is in excess of the amount of land for which he is eligible to receive project water." The Regional Solicitor correctly stated that individuals could form corporations to hold eligible irrigable land within a district to the extent of 160 acres per corporation, provided the land so held when distrib-

BY SILL PROPERTIES, INC. AND ICARDO BROS., INC.

April 22, 1968

uted ratably among the stockholders as if owned by them would not exceed the acreage which each stockholder individually could hold as eligible land.

An identical position was taken in a letter of May 6, 1959, to Senator Clinton P. Anderson from the Assistant Secretary of the Interior, Mr. Fred Aandahl. The Assistant Secretary stated: "While it is true that a corporation is technically a distinct entity under the law, if the landowner also owned and controlled the corporation we could not consider that he had divested himself of the beneficial ownership of the lands in question. We would therefore be required to consider that such portion of the lands owned by the corporation as was represented by his ownership of the corporation would be accounted for in computing his total acreage under the project."

The third rule was reiterated in the Committee Print, *Acreage Limitation Policy*, Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess. p. 14 (1964).

Since the effective date of the act of May 25, 1926 (44 Stat. 636), corporations have been permitted to acquire private land in tracts not in excess of 160 irrigable acres and secure project water therefor in the same manner as natural persons, subject only to the requirement that the purpose and business intent of each such corporate entity will be considered individually and no corporation can receive project water if it is determined that said corporation was established for the purpose of holding project lands in a manner inconsistent with the acreage limitation provisions of reclamation law.

In applying the third rule, we believe that the parties involved should bear the burden of establishing sound independent reasons and purposes for establishing multiple corporations to hold irrigable land subject to acreage limitations, other than a motive to avoid the application of the excess land laws.

Although the stated rules will prevent abuse and evasion of the acreage limitations in most cases of family or closed corporations, there may yet remain situations which will require additional analysis. We have in mind particularly the kind of situation which could develop where a number of unrelated individuals would create several corporations on paper to hold irrigable land, assigning 160 acres to each corporation and taking advantage of the element of permissiveness in the second rule to effect eligible ownerships of land in fraud of the acreage limitations. Further, we do not know how the second rule can be applied practically in the case of publicly owned corporations. As to such

corporations the first rule should be sufficient, unless it is known that a significant portion of the outstanding shares are held by a single stockholder. We would consider ten percent a significant portion. The public corporation could be asked to identify such stockholders, if any.

Applying the rules to the Sill corporations it can be readily seen that each corporation could hold up to 160 acres of eligible land, provided the facts show that the third rule is met. Each major stockholder would be considered as the beneficial owner of 60 acres (32 in Sill Properties and 28 in Charles Sill Company). It is assumed that the individuals hold no other irrigable land in the district. We also assume that you will ascertain whatever additional facts are necessary to analyze the Sill matter completely.

As to the Icardo Bros., Inc., it cannot hold any land as nonexcess because Jimmie Icardo is already an excess landowner. The only alternative would be for Jimmie to redesignate 80 acres of individually owned eligible land as excess so a corporate eligible share could be attributed to him, if he so desired. Without such redesignation we cannot agree with the suggestion that Icardo Bros., Inc. could designate 80 acres as eligible, theoretically excluding as ineligible 80 acres attributable to Jimmie Icardo. Even though an attribution of ownership is made under rule two to ascertain Jimmie Icardo's individual beneficial ownership of land, as a stockholder he still receives a benefit from all the corporate assets. Thus, even if only 80 acres of corporate land were to be considered eligible, Jimmie Icardo would, as a 50 percent stockholder, still get half the benefit of the 80 acres.

This memorandum should also answer your memorandum of January 9, 1968, requesting our comment on a proposed set of guidelines on corporate ownership of excess lands. The rules cited herein more or less parallel your proposed guidelines and will serve the same purpose. This memorandum should also provide answers to your inquiries of July 5, 1967 and July 24, 1967. We agree that the position set forth in the Assistant Regional Director's memorandum of March 17, 1967, on the Mathews case, is the correct one.

EDWARD WEINBERG,
Acting Solicitor.

UNITED STATES *v.* U.S. MINERALS DEVELOPMENT CORPORATION

A-30407

Decided April 30, 1968

Mining Claims: Common Varieties of Minerals—Mining Claims: Special Acts

The act of July 23, 1955, had the effect of excluding from the coverage of the mining laws "common varieties" of building stone, but left the act of August 4, 1892, authorizing the location of building stone placer mining claims effective as to building stone that has "some property giving it distinct and special value."

Mining Claims: Common Varieties of Minerals—Mining Claims: Determination of Validity

To determine whether a deposit of building stone or other substance listed in the act of July 23, 1955, is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type minerals in order to ascertain whether the deposit has a property giving it a distinct and special value. If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use and that this value is reflected by the fact that the material commands a higher price in the market place. If, however, the stone or other mineral has some property making it useful for some purpose for which other commonly available materials cannot be used, this may adequately demonstrate that it has a distinct and special value.

Mining Claims: Common Varieties of Minerals—Mining Claims: Hearings—Rules of Practice: Hearings

A stipulation between the Government's attorney and the mining claimant's attorney at a hearing to determine whether a building stone is of a common or uncommon variety under the act of July 23, 1955, that the stone is marketable, does not preclude a further hearing to consider whether the facts relating to the marketability demonstrate that the stone has some property giving it a distinct and special value over other stones used for the same purposes which are also marketable but are considered to be of a common variety.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The U.S. Minerals Development Corporation has appealed to the Secretary of the Interior from a decision by the Chief, Office of Appeals and Hearings, Bureau of Land Management, dated October 29, 1964, declaring its placer mining claim located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 21, T. 3 S., R. 21 E., S.B.M., Riverside County, Calif., to be null and void on the ground that the material within the claim is a common

variety of stone not locatable under the mining laws since the enactment of the act of July 23, 1955, 69 Stat. 367, 30 U.S.C. secs. 601-615 (1964). The decision reversed a decision by a hearing examiner dated July 22, 1963, dismissing a contest brought by the Government against the claim. The hearing examiner held that the stone within the claim has a distinct and special commercial value and thus is not to be considered as a common variety under the act of July 23, 1955.

Section 3 of that act provides as follows:

A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. 69 Stat. 368, 30 U.S.C. § 611.¹

The appellant's mining claim was located in 1962 for a reddish quartzite stone which it contends has an attractive, shiny luster, and which has been sold under the trade name of "Rosado stone" for use as veneer on walls and for fireplaces, patio floors and other building purposes. At the hearing the parties orally stipulated that the stone had been used solely for building purposes, that it is found within each ten-acre subdivision of the claim, and that its marketability was not in issue, but that the sole issue to be determined was whether the stone is a common variety no longer locatable under section 3 of the act of July 23, 1955, quoted above.

The question considered by the hearing examiner and the Office of Appeals and Hearings, with opposite conclusions reached, was whether or not the stone came within that provision of section 3 of the act excluding the materials listed in that section from being common varieties where the deposits of material are valuable "because the deposit has some property giving it distinct and special value." The hearing examiner emphasized that the stone had an attractive color and appearance and sufficient schistosity, making it valuable as a building stone marketable at a higher price than ordinary desert stone

¹ An amendment by the act of September 28, 1962, 76 Stat. 652, 30 U.S.C. § 611 (1964), also added petrified wood to the materials listed in this section.

in the area, and is located near transportation and accessible to a substantial market area. These qualities, he found, brought the stone within the definition of uncommon varieties set forth in a regulation defining them, 43 CFR 3511.1(b), formerly 43 CFR 185.121(b) (amended as published in 27 F.R. 9137, September 14, 1962).

In reversing the hearing examiner's decision, the decision below held that as the Rosado stone was used for building and construction purposes the same as other deposits of stone which are widely available, it can not be considered an uncommon variety. The decision stated that the hearing examiner's interpretation of the regulation was erroneous and that his decision did not comport with Departmental decisions rendered after its amendment in 1962, *United States v. D. G. Ligier*, A-29011 (October 8, 1962); *United States v. Kelly Shannon et al.*, 70 I.D. 136 (1963); *United States v. Frank Melluzzo et al.*, 70 I.D. 184 (1963); *United States v. Kenneth McClarty*, 71 I.D. 331 (1964) (rendered after the examiner's decision); as well as decisions prior to the amendment, e.g., *United States v. J. R. Henderson*, 68 I.D. 26 (1961).

The appellant has several objections to the decision of the Office of Appeals and Hearings and to the Departmental decisions relied on by it. Its major contention is that the Rosado stone has intrinsic characteristics which set it apart from other quartzite and building stones in the marketing areas, that it is not a stone of widespread occurrence, that it is marketable, and thus must be considered an uncommon variety still locatable under the mining laws.

Appellant contends that the decision by the Office of Appeals and Hearings constitutes a ruling that no building stone claim can be upheld as containing uncommon varieties and that building stone deposits are not locatable as a matter of law under the mining laws. It charges, in effect, that the Department has interpreted the act of July 23, 1955, as repealing section 1 of the act of August 4, 1892, 27 Stat. 348, 30 U.S.C. sec. 161 (1964), which authorized the location of placer mining claims for lands "that are chiefly valuable for building stone." The basis of the charge is that the Department's decisions have emphasized the use of the material as the criterion for determining whether it is common or uncommon and have held that where material is used for the same purposes as common varieties of the material it is considered a common variety despite its having distinctive and special qualities. Since, appellant asserts, ordinary stone can be and is used for

building purposes, no stone used for building purposes can, under the Department's rulings, be an uncommon variety; hence, the Department has in effect held that the 1892 act has been repealed by the 1955 act.

Appellant states that the "special and distinct value" prescribed in the 1955 act must mean an "economic value," and that the emphasis by the Department on the use of the material rather than on its economic value or intrinsic characteristics has destroyed all standards. It contends that the decision below and other Departmental rulings are unreasonable, out of harmony with the statute, and, hence, are invalid.

It is clear from a recent ruling by the Supreme Court involving the effect of the 1955 act upon the mining laws as to building stone, that the act removed from the coverage of the mining laws "common varieties" of building stone, leaving the provisions of the mining laws, including the 1892 act relating to building stone, effective as to building stone that has "some property giving it a distinct and special value." *United States v. Coleman*, No. 630, April 22, 1968, ____ U.S. ____.

This has been the position of the Department since the enactment of the 1955 act. The question presented since that enactment as to mining claims located thereafter has been to determine whether a building stone was a common or uncommon variety of stone within the meaning of the act. Contrary to appellant's contentions, the Department has not ruled that simply because the stone is used for building purposes it must be considered to be a common variety and therefore not locatable under the mining laws. To read such a ruling in any Departmental decision issued after enactment of the 1955 act is to read something which is not there. An analysis of the 5 Departmental decisions concerned with this question as to whether the building stone on a claim located after the date of the act was a common or uncommon variety of stone shows that they do not stand for the proposition asserted by appellant and also reveals the criteria that are to be used in determining what constitutes having a "property giving it distinct and special value."

In *United States v. D. G. Ligier, supra*, the stone was a tuff having colors ranging from white through cream, pink, lavender and brown, with high compressive strength and light weight. The locators hoped to develop a market for the stone as an ornamental building stone, but only one carload had been removed from the claims, and there was a vast deposit not only on the claims but in a 20-mile area surrounding the claims. It was found that the claims had no special economic value over and above the general run of deposits of building stone. It

was also held that as marketability of the stone had not been proved, in any event, there was not a discovery of a valuable deposit even if the claims were locatable.

In *United States v. Kelly Shannon, supra*, the building stone had pleasing colors and split readily—both qualities asserted for the Rosado stone here. However, in the *Shannon* case only a few sales had been made, primarily to an interested party, and the Government witness had taken the stone to 15 rock dealers who were not interested in it. It was held that this limited use did not indicate that the stone was of an uncommon variety.

In *United States v. Frank Melluzzo, supra*, a pink quartz had been sold and used for some ornamental building purposes, and a small amount of stone had been sold as gem stone for lapidary purposes. This latter stone was disseminated throughout the lower grade building stone. There were other large deposits of the building stone in the area, and similar deposits elsewhere in the State and two other States. The decision held that the lower grade stone was sold for the ordinary uses to which any colored building stone is put and that it was a common variety. The claimants contended that because the stone sold for \$20 to \$40 per ton, whereas ordinary stone is sand, rock, or other material selling for from \$0.25 to \$10 per ton, their stone should be considered to be an uncommon variety. The Department said that price alone was not the pertinent criterion but only a factor that might be of relevance.

As for the stone suitable for lapidary purposes, assuming that it could be considered to be an uncommon variety, the Department found it could not be segregated as a separate deposit from the mass of ordinary stone and that, even if it could be, the two sales of 520 pounds of the stone for \$260 in two years fell short of demonstrating that the lapidary stone constituted a valuable mineral deposit.

In *United States v. Kenneth McClarty, supra*, the stone was used as veneer on walls, for chimneys, patios, and general rubble construction. There were other deposits of the stone in the area and in other parts of the State and another State, but the unique feature claimed for the deposit in question was that a high percentage of the stone was fractured naturally into regular shapes which could be used for construction with a minimum of cutting or splitting. The hearing examiner found that the naturally fractured stone was not distinguishable from the other stone in the area and that the economic advantage enjoyed by the deposit over other deposits because of its higher concentration

of naturally fractured regularly shaped stone did not give the deposit a special and distinct economic value. The Director overturned this decision, finding that there were commercial quantities of the material. In reversing the Director's decision on appeal to the Secretary, it was found that although most of the stone was regular in size and shape no special value had been recognized in actual usage because of these characteristics, and that the regularly shaped stone on the claim was used for the same purposes as the irregularly shaped stone in the same deposit, and as stone found in other deposits in the locality. It was stated that the fact the stone did not require as much cutting or shaping did not endow the stone with the character of an uncommon variety. It was also stated that there was no evidence that the colors of the stone were more varied or more desirable for construction purposes, giving it a special and distinct value, over other colored stone in the vicinity.

In *United States v. E. M. Johnson et al.*, A-30191 (April 2, 1965), limited sales of limestone were made for ordinary construction purposes. A Government witness testified that it was useful only as rubble, that it had wide occurrence and no special characteristics, and that nine stone dealers were not interested in buying it. The Department held that merely because a material may have commercial value, this does not establish that it is an uncommon variety.

These decisions fall far short of a ruling of law that building stone, as a category of materials, may never be found in a deposit which can be considered an uncommon variety. No such arbitrary ruling has been made, nor has any other arbitrary formula or standard been set forth for determining whether a claim contains a common variety or uncommon variety under the 1955 act. Each case presented has been determined on its own merits in order to ascertain whether the statutory definition was satisfied.

This does not mean that there may not be any guidelines or factors developed to help in determining whether a deposit is an uncommon variety. The most important factor inherent from the language of the statute is that there must be a comparison of the mineral deposit in question with other deposits of such minerals generally. Certainly, there can be no evaluation of whether the properties allegedly giving a deposit a "distinct and special value" really do so without such a comparison. Although, appellant suggests that this Department has over-emphasized the factor of how the mineral is to be used in determining whether or not it is a common variety there is apparently

some misunderstanding of the rationale behind the Department's decisions. The use of the mineral is not the sole criterion in determining whether the mineral is of a common or uncommon variety, but it is an important factor to be considered as a basis of comparison of one deposit with other deposits to ascertain whether the given deposit has properties giving it a special and distinct value.

This real significance of the use factor is reflected in the *McClarty* case where it was claimed that the naturally occurring regular shapes of the stone gave it a special and distinct value. However, there was no evidence that in the use of the stone in the building trade any significant value was attributed to the stone because of that quality. It was found, on the contrary, that it was used in the same manner as other, irregularly shaped stone found on the same claim. The claim did have a greater concentration of the naturally fractured regularly shaped stone which might give the claimants some economic advantage in that it would reduce the cost of cutting and shaping the stone, but this fact was considered insufficient to warrant the stone being considered an uncommon variety because this unique characteristic of the deposit of stone did not give it any distinct or special value. That is, a purchaser who wanted regularly shaped stone would not pay any more for a naturally shaped stone than he would for a stone that had to be cut to shape. It would make no difference to him how the shape of the stone was achieved, whether by natural fracturing or by fabrication.

It must be conceded that the language used in some of the Department's decisions on common varieties could lead to the conclusion that the Department would hold to be a common variety any mineral deposit that was used for the same purposes as deposits of admittedly common varieties of the same mineral. See the *Ligier*, *Melluzzo*, and *McClarty* cases, also *United States v. J. R. Henderson, supra*; *United States v. J. R. Cardwell and Frances H. Smart*, A-29819 (March 11, 1964); *United States v. R. R. Hensler, Sr., et al.*, A-29973 (May 14, 1964); *United States v. L. N. Basich*, A-30017 (September 23, 1964). However, the statements in all these cases must be evaluated in light of the fact that in none of the cases was there any evidence that the unique characteristics claimed for the minerals involved gave them a distinct and special value. For example, as in the *McClarty* case, the sand and gravel in the *Basich*, *Hensler*, and *Henderson* cases, which were used for the same purposes as ordinary sand and gravel, were

not shown to command a higher price for the unique characteristics claimed to make them more suitable for such purposes.

In short, the Department interprets the 1955 act as requiring an uncommon variety of sand, stone, etc. to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. It must give the deposit a distinct and special value. The value may be for some use to which ordinary varieties of the mineral cannot be put, or it may be for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. For example, suppose a deposit of gravel is found which has magnetic properties. If the gravel can be used for some purpose in which its magnetic properties are utilized, it would be classed as an uncommon variety. But if the gravel has no special use because of its magnetic properties and the gravel has no uses other than those to which ordinary nonmagnetic gravel is put, for example, in manufacturing concrete, then it is not an uncommon variety because its unique property gives it no special and distinct value for those uses.

The question is presented as to what is meant by special and distinct value. If a deposit of gravel is claimed to be an uncommon variety but it is used only for the same purposes as ordinary gravel, how is it to be determined whether the deposit in question has a distinct and special value? The only reasonably practical criterion would appear to be whether the material from the deposit commands a higher price in the market place. If the gravel has a unique characteristic but is used only in making concrete and no one is willing to pay more for it than for ordinary gravel, it would be difficult to say that the material has a special and distinct value.

This may appear to be inconsistent with the statement in the *Mel-luzzo* case, *supra*, that "price is [not] the pertinent criterion for determining whether a mineral is a common variety. It is only a factor that may be of relevance." 70 I.D. at 187. This statement must be read in the context of the mining claimants' argument in that case that a common variety of stone consists of sand, rock, and other material generally sold for 25 cents a yard or ton to \$4, \$5 or \$10 per ton whereas the pink quartz involved in that case sold for \$25 to \$35 per ton. The Department considered that the price difference meant nothing unless the same classes of material were being compared. For example, the

claimants lumped together as common varieties rock selling at \$4 per ton or \$10 per ton, despite the fact that the \$10 price was 2½ times the \$4 price. Yet they claimed that the \$25 price for their stone made it an uncommon variety although that price was only 2½ times the price for a common variety of rock. The Department pointed out that there was a far greater price spread between the 50 cents per pound at which some pink quartz was sold for lapidary purposes and the .0175 cent per pound at which most of the pink quartz was sold than there was between the price of \$10 per ton and \$25 per ton which the claimants said would separate a common from an uncommon variety of stone. The Department's statement that price is not *the* pertinent criterion must be read in this context.

When the same classes of minerals used for the same purposes are being compared, about the only practical factor for determining whether one deposit of material has a special and distinct value because of some property is to ascertain the price at which it is sold in comparison with the price for which the material in other deposits without such property is sold.

With these principles in mind we turn to a consideration of the facts in this case. The special properties claimed for the Rosado stone are its reddish color and luster and its easy cleavability. The stone is a quartzite, i.e., a metamorphosed sandstone (Tr. 57). The evidence indicates that the nearest similar deposit of quartzite is 14 or 15 miles away (Tr. 20, 23), although one of appellant's officers testified that it was not of the same quality (Tr. 88). As noted earlier, the stone has been sold and used in a variety of building construction, as veneer in walls, in fireplaces and hearths, and in patio floors. Two stonemasons testified for the appellant that people like the color of the Rosado stone and that it was good to work with (Tr. 119, 133). However, it was not used for any purpose that other decorative building stone is not used for (Tr. 141).

Since no unique use is claimed for the stone and it is used only for the same purposes as any decorative building stone, the question is whether the special properties of the stone, color and cleavability, give it a special and distinct value for such uses. That is, does it command a higher price than other decorative building stone in the area?

On this point the record is not satisfactory. The evidence is limited, apparently because of the stipulation by the parties that the market-

ability of the stone was conceded. There is evidence indicating that there are several other varieties of building stone in the market area of the Rosado stone, for example, Palos Verde stone, Silver Mist sandstone from Utah, Arizona pink flagstone (Tr. 61, 113-115, 119, 127, 142). However, although there were statements that the Rosado stone sold for \$50 and around \$42.50 per ton (Tr. 15, 85), appellant's counsel objected to a question directed to appellant's officer as to the price at which the stone had been sold, the objection being on the ground that marketability was not an issue (Tr. 113). Counsel also objected to a statement of a Government witness that the Rosado stone should not be judged only against other quartzites but against other building stones (Tr. 141).

It seems evident that the stipulation as to marketability precluded the full development of evidence necessary to determine whether all the criteria for an uncommon variety of mineral have been satisfied so far as the Rosado stone is concerned. A proper determination of the question cannot be made on the basis of the present record. Further evidence is needed as to the extent of other building stone in the marketing area which is used for the same purposes as the Rosado stone—and it is immaterial whether such other stone is a quartzite—and evidence is needed as to the price commanded by the other stone in comparison with the price of the Rosado stone. Only with this comparative evidence can a proper determination be made as to whether the Rosado stone is an uncommon variety.²

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decisions below are set aside and the case is remanded for a further hearing to develop further evidence in accordance with the views set forth in this decision.

EDWARD WEINBERG,
Acting Solicitor.

² The fact that the parties entered into a stipulation regarding the issue of marketability does not preclude this Department from considering further the facts relating to the value of the building stone on this claim in relation to other building stone. It has long been the position of the Department that a stipulation entered into by a Government agent and a mining claimant does not bind this Department or preclude consideration of any questions vital to the determination, even if they were covered by the stipulation. *Stanislaus Electric Power Co.*, 41 L.D. 655 (1912).

WOLF JOINT VENTURE ET AL.

A-30978

*Decided May 2, 1968***Sodium Leases and Permits: Generally—Mineral Leasing Act: Applicability**

Substances of sodium enumerated in section 23 of the Mineral Leasing Act, whether simple, double or complex compounds of sodium, are subject to disposition only under the provisions of the Mineral Leasing Act.

Administrative Procedure Act: Hearings—Rules of Practice: Hearings—**Sodium Leases and Permits: Generally**

Applicants for sodium preference right leases will be afforded an opportunity to present evidence at a hearing in accordance with the provisions of the Administrative Procedure Act where there may be questions of fact as to the extent and nature of the occurrence of the minerals in the deposits and as to the feasibility of the development of the deposits.

DECISION

Wolf Joint Venture, Oluf N. Nielsen, and John W. Savage, Rock School Joint Venture, and Ridge Minerals Venture,¹ on April 28, 1966, filed applications for sodium preference right leases, totaling 9,677.73 acres, reciting that valuable deposits of sodium minerals located in the Green River formation had been discovered in certain lands in T. 1 S., R. 98 W., 6th P.M., Rio Blanco County, Colo., pursuant to the provisions of sections 23 and 24 of the Mineral Leasing Act, as amended, 30 U.S.C. secs. 261 and 262 (1964).

On January 23, 1964, Oluf N. Nielsen filed sodium prospecting permit applications Colorado 0118326 and 0118327, and on February 10, 1964, John E. Dunn filed sodium prospecting permit applications Colorado 0119985 and 0119986. Permits were issued effective April 1, 1964. Subsequently, the permits were assigned in whole or part,² and on April 28, 1966, timely preference right lease applications were filed by each of the assignees and/or the original permittees claiming that valuable deposits of sodium had been discovered in the land covered by the prospecting permits before the expiration of the permits.

¹ Colorado 0118326—Wolf Joint Venture, consisting of Colorado Mineral Land Corp. and Wolf Ridge Corp. containing 2,198.14 acres; Colorado 0118327—Oluf N. Nielsen and John W. Savage, assignment to Wolf Ridge Minerals Corp., filed August 8, 1966, pending containing 2,560 acres; Colorado 0119985—Rock School Joint Venture, consisting of Advance Minerals Corp. and Rock School Corp. containing 2,519.59 acres; and Colorado 0119986—Ridge Minerals Venture, consisting of Colorado Mineral Land Corp. and Wolf Ridge Corp. containing 2,400 acres.

² Colorado 0118326 was assigned to Wolf Joint Venture, effective Mar. 1, 1966; Colorado 0118327 was assigned in part (80 percent undivided interest) to John W. Savage, effective Oct. 1, 1965, an assignment to Wolf Ridge Minerals Corp., filed Aug. 8, 1966, is pending; Colorado 0119985 was assigned to Rock School Joint Venture, effective Mar. 1, 1966; and Colorado 0119986 was assigned to Ridge Minerals Venture (except for SW $\frac{1}{4}$ of sec. 34, for the reason that sodium deposits are not reserved to United States), effective Mar. 1, 1966.

In support of the statutory requirement that valuable deposits of sodium be discovered, each application states that the data concerning the extent and mode of occurrence of the sodium deposits have been furnished directly to the Regional Mining Supervisor, Geological Survey. The data include: (1) a plat showing the location of the drill hole (2) a "Drill Hole Summary" (3) a lithologic log of the drill hole showing the extent of nahcolite, dawsonite, and the presence of other sodium minerals, and (4) a record of analysis of the drill hole for percent dawsonite over a certain section. The applicants initially supplied 311 assays for nahcolite and dawsonite from cores from the four permits and have since supplied additional assays.

In view of the importance of the questions to be decided, jurisdiction over each of the sodium preference right lease applications is assumed in the exercise of the supervisory authority of the Secretary. *George C. Vournas*, 56 I.D. 390 (1938); *United States v. M. V. Browning, Administrator*, 68 I.D. 183 (1961); *Public Service Company of New Mexico*, 71 I.D. 427 (1964); *Susquehanna-Western, Inc.*, A-30714 (August 18, 1967).

The data have been examined by the Geological Survey and the Bureau of Mines. The data show that sodium minerals claimed to have been discovered by the applicants are found in a saline-rich oil shale zone found in the lower half of the Parachute Creek member of the Green River formation. From this data it is clear that the saline-rich oil shale zone, in addition to substantial quantities of shale oil, contains minerals potentially valuable for sodium and aluminum. However, there may be questions of fact as to the nature of the occurrence of the minerals in the deposits, as to the extent of the deposits and as to the feasibility of the development of the various minerals in the deposits. In our judgment, the applicants should be afforded an opportunity for a hearing to be conducted in accordance with the provisions of the Administrative Procedure Act at which the applicants, as well as the Government, may present evidence bearing upon these questions. If a hearing is held, the hearing examiner shall submit a recommended decision to the Secretary of the Interior.

Before proceeding to what specific questions must be considered by the hearing examiner, a threshold question is presented as to dawsonite ($\text{NaAl(OH)}_2\text{CO}_3$). That question is whether dawsonite, since it contains aluminum, is a locatable rather than a leasable mineral. The sodium provisions of the Mineral Leasing Act, *supra*, clearly establish that dawsonite, whatever may be its availability for leasing in the circumstances presented by these applications, is not open to location and disposition under the mining laws of 1872.

Under the sodium provisions a permittee is entitled to a lease upon showing to the satisfaction of the Secretary of the Interior, *inter alia*, that valuable deposits of one of the enumerated sodium substances,

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including carbonates of sodium, have been discovered. Dawsonite is a double salt—a sodium aluminum carbonate, but it is nevertheless a sodium carbonate.³ Notwithstanding the presence of aluminum as a constituent element of the mineral, dawsonite is among the sodium substances enumerated in section 23 of the Act. As such, dawsonite, as well as all of the other enumerated substances of sodium, is subject to disposition only under the provisions of the Mineral Leasing Act.⁴ *United States v. U.S. Borax Co.*, 58 I.D. 426, 432 (1943).

Turning then to the matter of what questions are to be considered at a hearing, evidence bearing upon the deposits alleged to have been discovered during the 2 year term of each permit within the areas covered by the applications may be presented upon, but not limited to, the following:

1. What was the nature of the occurrence of the minerals alleged to have been discovered in said deposits within areas covered by the applications?

(a) Is the dawsonite that was found a constituent of, or commingled with, or separate from the oil shale?

(b) Is the nahcolite that was found a constituent of, or commingled with, or separate from the oil shale?

(c) Can either the nahcolite or the dawsonite be mined, i.e., physically taken out of the ground, without also mining, or interfering with, or disturbing the oil shale?

2. Are said deposits, or any of them, available for leasing in view of Executive Order No. 5327 of April 15, 1930, as modified by Executive Order No. 7038 of May 13, 1935?

3. Are said deposits, or any of them, oil shale, sodium, or both?

4. Are said deposits leasable under the sodium provisions or under the oil shale provisions, neither, or both, of the Mineral Leasing Act?

5. If said deposits, or any of them, are otherwise subject to leasing under the sodium provisions of the Mineral Leasing Act, is the oil shale cognizable under such leases as a related product?

6. Were valuable deposits of sodium discovered?

(a) What is the nature and extent of the sodium deposits that were found within the limits of each permit?

(b) Is their extraction economically feasible, considering such relevant factors as quality, quantity, and mining, production and marketing costs, and markets?

³ The Act speaks broadly of carbonates of sodium. There is no limitation that the form or mode of occurrence be simple salts of sodium. To the contrary, in a hearing on the Potassium Act of 1927, as amended, 30 U.S.C. secs. 282 et seq. (1964), the Director of Geological Survey gave examples of double salts and complex silicates of potassium as leasable minerals: alunite, a potassium aluminum sulphate, $KAl_3(OH)_6(SO_4)_2$; and leucite, a potassium aluminum silicate, $(KA1Si_2O_6)$. *Hearings before the House Committee on the Public Lands on H.R. 9029*, 68th Cong., 2d Sess., 39 (1925); see Wayland, *Is the Mineral Locatable or Leasable?*, Mining Congress Journal, pp. 36-40, July (1967).

⁴ E.g., analcite ($NaAlSi_2O_6 \cdot H_2O$).

7. Are the lands chiefly valuable for sodium?
 8. Do any of the applicants exceed the sodium acreage limitations?
- 30 U.S.C. sec. 184 (b) and (e) (1964).

Section 24 of the Act, *supra*, requires that, in order to qualify for a sodium preference right lease, the applicants must show "to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 23 hereof have been discovered by the permittee within the area covered by his permit and that such land is chiefly valuable therefor * * *." Therefore, if a hearing is held, the applicants shall have the initial burden of going forward with evidence, as well as the ultimate burden of proof, to support their claim to sodium preference right leases.

Accordingly, the applicants are hereby allowed 30 days in which to request of the Director, Bureau of Land Management, a hearing in accordance with this decision.

EDWARD WEINBERG,

Solicitor.

R.C. BUCH

A-30777

Decided June 4, 1968

Mining Claims: Lands Subject to—Notice—Public Lands: Classification—Recreation and Public Purposes Act

A classification of land by Bureau motion for disposition under the Recreation and Public Purposes Act segregates the land from mineral locations even if the classification is not published in newspapers or the *Federal Register* and is only noted on a land office supplemental plat, and it is proper for the Bureau of Land Management to declare a mining claim null and void *ab initio* because of the classification.

Mining Claims: Lands Subject to—Public Lands: Classification—Recreation and Public Purposes Act

Although the Recreation and Public Purposes Act and regulations thereunder provide in effect that if no application is filed for lands classified on Bureau motion for disposition under that act within 18 months from the classification then the Secretary shall restore the land for appropriation under other public land laws, such a provision is not self-executing and the lands remain segregated from mineral location after the 18-month period where no action has been taken to restore the lands to appropriation under the mining laws.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

R. C. Buch¹ has appealed to the Secretary of the Interior from a decision by the Acting Chief, Office of Appeals and Hearings, Bureau

¹ The decision of the Office of Appeals and Hearings erroneously gave his name as Robert C. Burch. He also goes by the name of Robert C. Buch.

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of Land Management, dated December 13, 1966, which affirmed a decision by the Riverside district and land office, dated April 12, 1966, which declared the Rusty Can No. 1 lode mining claim to be void *ab initio* for the reason that the land in the claim was segregated from mining location at the time the claim was located thereon by reason of a classification of the land for disposal for recreational purposes under the provisions of the Recreation and Public Purposes Act, 43 U.S.C. sec. 869 (1964).²

The land in question here was within the Zenda No. 1 mining claim, shown as M.S. 6581 on the Bureau plats and now designated as Government Lot 42, sec. 22, T. 10 N., R. 1 E., S.B.M., Calif. The Zenda No. 1 claim was declared invalid by a land office decision of May 28, 1964, which has become final. Appellant states that the Rusty Can No. 1 lode mining claim was and is located on the same ground as the Zenda No. 1 claim. Appellant's original notice of location was dated November 1, 1965, and recorded in the San Bernardino County records on November 2, 1965. The Bureau found that the land embraced in the claim was classified under the Recreation and Public Purposes Act on August 12, 1964, by motion of the Government, that the classification was regularly entered upon the public records of the land office, including the tract book, that appellant is chargeable with notice of the classification order, and that the order segregated the land from mineral appropriation for 18 months, even in the absence of an application for the land being filed; under regulation 43 CFR 2232.1-4, which provides as follows:

(a) Lands in Alaska classified under the act and lands in the States classified pursuant to the act under section 7 of the act of June 28, 1934 (48 Stat. 1272, 43 U.S.C. 315f), as amended, will be segregated from all appropriations, including locations under the mining laws, except as provided in the order of classification or in any modification or revision thereof.

(b) Classifications made pursuant to the act on the motion of the Government for which no application is filed within 18 months after issuance will be vacated and the land restored to its former status.

In this appeal the appellant has submitted copies of two amended notices of location for the claim, each identifying the claim as having the same boundaries as Zenda No. 1 shown on U.S. Mineral Survey No. 6581, and indicating that the amended notice was made without waiving, relinquishing, or abandoning any previously acquired rights, claim, or title, and for the purpose of more accurately stating the description of the claim and correcting any other error or defect. The first amended notice is dated November 3, 1966, on which day it was recorded. The second amended notice is dated March 2, 1967, with a recording date of March 7, 1967.

² Also named in the land office decision was E. E. Mitchell, who was listed as one of the locators with Buch on the notices of location of the mining claim. He did not appeal from the decision.

Appellant contends basically that there has never been an effective classification made which had the effect of being an effective withdrawal of the lands from location under the mining laws (30 U.S.C. sec. 22 *et seq.* (1964)). He points out that there is a Bureau motion classification statement for the land dated August 12, 1964, found in case file Riverside 02287, but he asserts that this classification is not disclosed by the tract books or in the plat books and there is no record of posting or publication. He states that on August 2, 1967, or possibly at some later date, someone made an entry in the plat book "as of August 12, 1964" and that this was the first public notice or record of the classification action. He asserts that there is no application pending and that there has not been any at any time involved in this matter for a lease or sale of the land involved here. He contends that in the absence of an appropriate entry in the public records and of public notice there has been no effective classification to prevent the location of mining claims on the dates the original notice or the amended notices of location were filed.

Furthermore, appellant refers to the provision in the Recreation and Public Purposes Act that, if within 18 months following a classification for the purposes of the act no application has been filed, the Secretary "shall restore such lands to appropriation under the applicable public land laws," and to the provision in regulation 43 CFR 2232.1-4(b) quoted above that the classification action "will be vacated" and the "land restored to its former status" after the 18 months have passed. He requests such a restoration for the record as of the expiration of the 18-month statutory period, although he contends that a restoration is unnecessary as there was no effective withdrawal.

Appellant's appeal thus poses two questions: first, whether or not the original classification was effective to segregate the land from mining location; and second, assuming that the answer to that question is that it did, whether or not mining locations made after the 18-month period following the classification of the land were valid. The Bureau's decisions dwelt only with the first question and concluded that it was. The second question need only be considered here if we agree with the Bureau's conclusion.

The record in this case as to the classification action is somewhat unsatisfactory. It is apparent, however, that the land involved here was considered for classification under the Recreation and Public Purposes Act in 1962 together with other lands in section 22 which were so classified and for which leases under that act subsequently issued. It appears that the County of San Bernardino has been interested in this land at least since that time and has so informed the land office. However, prior to an actual classification the land would be open to mineral location. *Cf. Harry E. Nichols et al.*, 68 I.D. 39 (1961).

The land adjoins the Calico Ghost Town which was run by a private interest, Knott's Berry Farm, which has now transferred its inter-

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est to the county for a county recreational development. A special land use permit, Riverside 01435, was issued October 15, 1963, for 5 years to Knott's Berry Farm for the land involved here for use as a parking lot and tramway in connection with the Calico Ghost Town.³ The land office informs us that improvements for those uses cover a portion of the land. There is in case file Riverside 01435 a letter dated April 7, 1967, from the County of San Bernardino informing the land office that the county had taken over the Calico Ghost Town as a public recreation area, and requesting that the special land use permit be discontinued and the land therein be included in a lease which the county has under the Recreation and Public Purposes Act for lands in the area. The county was informed by a land office letter of May 22, 1967, that action on this request had to be delayed for several reasons unnecessary to discuss here.

The classification action was taken by a classification statement found in case file Riverside 02287 which states that it constitutes an amendment to the Bureau's Motion Classification of October 24, 1962. It further states that the lands in question, described as Mineral Survey No. 6581, "are hereby classified as proper for lease and/or sale under the provisions of the Recreation and Public Purposes Act, for recreation purposes." It advertises to the fact that the Zenda No. 1 lode mining claim was declared null and void on May 28, 1964, and that the lands have definite recreational potential in connection with county development of the Calico area. The land office informs us that the classification action was taken pursuant to the county's expressed interest in the land, that the county did not include the tract of land in its formal application under the act (Riverside 04082), because of the known conflict with the then existing mining claim Zenda No. 1. The land office states that it is anticipated that a future conveyance to the county will include this land.

In response to an inquiry from this office, the land office, which maintains the land status records, has informed us that this classification was noted on the land office records and that no other public notice of the classification was given. As to the land office records, the acting manager of that office states that it has been their normal procedure to record the classification "only on supplemental township diagrams (Form D1-12) which are filed with the appropriate plat of survey" as this is the most satisfactory means of recording classification actions because of numerous amendments and changes.⁴ He has submitted a copy of the supplemental plat reflecting the classification action.

This plat shows section 22 (exclusive of two patented tracts) out-

³ The regulations regarding special land use permits provide that the mineral contents in land in permits shall be subject to the mining laws. 43 CFR 2236.0-7(b)(2).

⁴ The Office of Appeals and Hearings was apparently in error in stating that the classification was also noted in the tract books.

lined by areas in two colors. The areas outlined in blue carry the original legend "LA 0147674 10/24/62 Land Mineral in character (In Section 22)." The areas outlined in yellowish-orange carry the original legend "LA 0147674 10/24/62 Land Proper for Recreation & Public Purposes (In Section 22)." Included in one blue area is the outline of the Zenda No. 1 claim which is designated by the letter "A." Thus it appears that when the original classification action was taken on October 24, 1962, under serial designation LA 0147674, the land in the Zenda No. 1 claim, Mineral Survey No. 6581, was shown on the plat as not being within the recreation and public purposes classification.

Subsequently, on or after August 12, 1964, the additional entry was made on the plat: "A=RO 2287—8/12/64—For Rec. & P.P.—in Sec. 22 M.S. 6581." This was clearly the entry made to reflect the classification action taken on August 12, 1964, which added the area in Mineral Survey No. 6581 to the original recreation and public purposes classification made on October 24, 1962. Apparently at the same time the original references to "LA 0147674" were lined out and "R—02287" substituted.

At some later time a line was also drawn through the entry "A=RO 2287," etc. Apparently at a still later time the words "in error" were inserted over this entry. Also, apparently at another time, there was added at the end of the legend explaining the yellowish-orange areas the following: "Amended 8-12-1964 to include MS 6581—now Lot 42."

It is not clear when all the various entries were made. In the absence of evidence to the contrary, and none has been submitted, it may be presumed that the entry "A=RO 2287," etc. was made on or about August 12, 1964. The land office does not know when that entry was erroneously lined out but states that status information indicates that the classification was of record on July 29, 1966, so it can only presume that the deletion had not been made prior to that date "and in more particularly, on March 7, 1967 or November 1, 1965." Elsewhere the land office states that the classification amendment was again noted on the records on August 2, 1967. This suggests that the deletion was made between March 7, 1967, and August 2, 1967.

If this is so, the classification entry as to Mineral Survey No. 6581 existed unimpaired when the Rusty Can No. 1 was originally located on November 1, 1965, and when the amended locations were made on November 3, 1966, and March 2, 1967.

Appellant offers no evidence to the contrary but contends that there was not effective notice of the classification action to segregate the lands. However, he cites no authority and gives no reasons to support this contention. Also, he has not shown that he did not have actual notice that the lands were designated for recreation and public purposes. He did file a protest on November 29, 1965, generally against "the withdrawal of mineralized lands in the Calico Area" and against

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the lack of notice in the public papers. The land office responded to this only by declaring the claim null and void because of the classification action. Appellant does not in his appeal attack the classification other than by insisting that it was ineffective because of lack of notice. A checking of the land office records should have revealed the classification action as it was noted on the supplemental plat in a way which should have apprised a careful seeker of the status of the lands. Such action should also have been noted on the tract books (see 43 CFR 1813.1-1(c)) but there is no mandatory direction that such notation must be made.

Appellant assumes that some notice of the classification must be given before it is effective to segregate the land. However, as indicated previously, he has not cited any authority or given any reason to demonstrate what form or, indeed, what, if any, public notice of the classification must be made in order for the classification to segregate the lands from mining location. The Recreation and Public Purposes Act itself does not prescribe any requirement other than classification. Section 1(a) of the act, as amended by the act of June 4, 1954, 68 Stat. 173, 43 U.S.C. sec. 869(a) (1964), provides in pertinent part, after authorizing the Secretary to dispose of public lands for recreational or public purposes:

* * * The Secretary may classify public lands in Alaska for disposition under this act. Lands so classified may not be appropriated under any other public land law unless the Secretary revises such classification or authorizes the disposition of an interest in the lands under other applicable law. If, within 18 months following such classification, no application has been filed for the purpose for which the lands have been so classified, then the Secretary shall restore such lands to appropriation under the applicable public land laws.

The legislative history of the act of June 4, 1954, reveals that this provision regarding classification specifically mentioned Alaska because the classification provisions of section 7 of the Taylor Grazing Act, 43 U.S.C. sec. 315f (1964), did not apply there, and such provisions were considered adequate to authorize classification for other public domain lands, but it appears that Congress intended the segregative effect of classification for purposes of the act to be effective generally. For example, the House Committee on Interior and Insular Affairs reported that:

As amended by the committee, authorization is given by the Secretary of the Interior to classify lands for disposition under the act; when so classified, such lands may not be appropriated under any other public land law unless the Secretary revises such classification or authorizes the disposition of an interest under applicable law. House Report No. 353, 83d Cong., 1st Sess. 2 (1953).

Departmental regulation 43 CFR 2232.1-4, quoted *supra*, reflects this understanding. Generally, a "classification" is a "designation of public lands as being valuable, or suitable, for specific purposes, uses,

or resources * * *." *Glossary of Public Land Terms*, BLM, United States Department of Interior (1959 reprint of 1949 edition), p. 6. Appellant does not dispute the fact that there was indeed such a designation of the land involved here for disposal under the Recreation and Public Purposes Act. Thus, in the absence of more being shown, it appears that there was a classification under the act, and such a classification by itself was sufficient under the terms of the act and regulations to segregate the land from mining location. *Of. C. V. Armstrong et al.*, A-30889 (February 28, 1968); *Carl F. Murray and Clinton D. Coker*, 67 I.D. 132 (1960).

If we were to hold in this case that the classification action was not effective to segregate the land despite the action taken, the intent of Congress to have such land free from appropriation under other public land laws would be frustrated. In contrast, where specific public notice is desired by Congress before lands are segregated, it has expressly provided for the type of notice, when the segregation would be effective, and other conditions, such as are set forth in sections 2 and 4 of the Multiple Use Act of September 19, 1964, 43 U.S.C. secs. 1412 and 1414 (1964). Thus, we must conclude that as there was a classification of the land under the Recreation and Public Purposes Act, it was effective to segregate the land from mining location.

We are now led to the question which the Bureau did not need to consider as to whether the classification is still effective in view of the statutory and regulatory language concerning the 18-month period following classification. We may note that although no formal application for the land under the act may have been filed during that time, the land office was aware that the County of San Bernardino desired the land in connection with the recreational area which it was in the process of acquiring. In any event, however, the land office has reported that the classification was never revoked and has been considered as continuing and effective. Since no action has been taken by this Department to change the classification and to restore the lands to appropriation under the applicable public land laws, this raises the question as to whether the act and the regulations alone have this effect. Appellant again has not given any reasons or authorities which would support a conclusion that the statute or regulation is self-executing. On the contrary the language of both is expressed in terms calling for action by the Secretary and, therefore, clearly did not have the effect of restoring such lands from the effect of such a classification without specific action by the Department.⁵ As no action has been taken, the lands are still not open to

⁵ Compare section 4 of the Multiple Use Act of Sept. 19, 1964, *supra*, which provides that publication of notice in the Federal Register of a proposed classification of land shall segregate the land from settlement, location, etc. for 2 years and that if the land is not offered for sale or other disposal "the segregative effect shall cease at the expiration of 2 years from the date of publication."

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appropriation under the other public land laws, including the mining laws. Thus appellant's amended notices of location of the Rusty Can No. 1 lode mining claim give him no rights to the land. *Cf. Ernest Alpers*, A-30627 (March 10, 1967). The claim is accordingly also declared null and void under the amended notices.

Pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

**UNION OIL COMPANY BID ON TRACT NO. 228,
BRAZOS AREA, TEXAS OFFSHORE SALE**

Federal Employees and Officers: Authority to Bind Government—Oil and Gas Leases: Competitive Leases—Contracts: Formation and Validity: Bid and Award—Outer Continental Shelf Lands Act: Oil and Gas Leases

A mere statement by a Departmental officer at an opening of bids for competitive leases that an unnamed bid is unacceptable because it is unsigned does not of itself constitute a rejection of that bid, binding on the United States.

Oil and Gas Leases: Competitive Leases—Contracts: Formation and Validity: Bid and Award—Outer Continental Shelf Lands Act: Oil and Gas Leases

An opening of bids for competitive leases is simply a public opening and reading of bids which have been submitted. Bids are not ordinarily subject to final acceptance or rejection at that time.

Oil and Gas Leases: Competitive Leases—Contracts: Formation and Validity: Bid and Award—Outer Continental Shelf Lands Act: Oil and Gas Leases

The cashing of a check, which has been submitted in conjunction with a bid for a competitive lease, and the placing of the funds in a suspense account do not in any way constitute an acceptance of the bid.

Oil and Gas Leases: Competitive Leases—Contracts: Formation and Validity: Bid and Award—Outer Continental Shelf Lands Act: Oil and Gas Leases

An unsigned bid for a competitive lease may be accepted when it is accompanied by documentary evidence of the intent to submit the bid.

To: DIRECTOR, BUREAU OF LAND MANAGEMENT.

SUBJECT: UNION OIL COMPANY BID ON TRACT No. 228, BRAZOS AREA,
TEXAS OFFSHORE SALE.

Pursuant to section 8 of the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. sec. 1331 *et. seq.*, the Acting Associate Director of the Bureau of Land Management, with the approval of the Secretary of the Interior, gave notice by publication in the Federal Register of the receipt of sealed bids for oil and gas leases covering certain specified areas of the Outer Continental Shelf offshore the State of Texas (33 F.R. 4477, March 13, 1968).

The notice of sale provided that, pursuant to the statute and applicable regulations, sealed bids addressed to the Manager, New Orleans Outer Continental Shelf Office, Bureau of Land Management, would be received until 9:30 a.m., c.s.t., on May 31, 1968, for the lease of oil and gas in specified areas. The bids were to be opened publicly at 10 a.m. on the same day. In addition to requiring compliance with other applicable regulations, the notice provided that the bidders must submit with each bid one-fifth of the amount bid, in cash or by cashier's check, bank draft, certified check, or money order, payable to the order of the Bureau of Land Management. The notice further provided that bids would be considered on the basis of the highest cash bonus; that no bid amounting to less than \$25 per acre or fraction thereof would be considered and that the United States Government reserved the right to reject any and all bids even though the bid might exceed the minimum acceptable amount per acre. A separate bid in a sealed envelope was required for each tract.

Prior to the deadline for receipt of bids, Union Oil Company of California, hereinafter referred to as Union, delivered to the office of the Manager of the New Orleans Office, Bureau of Land Management, a letter (Exhibit "A" p. 154) transmitting to the Manager sealed bids on Tracts 228, 240, and 262. The letter was on company stationery and signed by one W. F. Bolding¹ under the typewritten name "Union Oil Company of California." The original letter was received on a duplicate signed copy on its face by an employee of the land office.

All bids were opened in public at 10 a.m., and, as is customary, the land office manager (who is also the manager of the Outer Continental Shelf Office) first read the tract number, stated the total number of bids received and then opened the bids at random, reading from each the name of the bidder, the total amount bid and the amount bid per acre.

When Tract No. 228 was reached, the following occurred (as it ap-

¹ A power of attorney designating Mr. Bolding to act for Union is a part of Misc. File No. 3 in the Land Office.

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pears from a transcript of a tape recording made at the time of the bid opening) :

Manager: The next is Tract 228—there are nine bids. Gentlemen, this is a joint bid from Ashland, Canadian Superior, General Crude, Highland, Kerr-McGee, Texas Eastern, Trans Ocean, and Superior. The amount of this bid is \$11,628,691.20. The per acre amount is \$2,018.87.

The next bid is from Texaco, \$3,386,880.00, \$588.00 an acre.

The next bid * * * Gentlemen, I regret to announce that the next bid is not an acceptable bid. It has not been signed.

After reading the remaining bids, all of which were less than the amount of the first bid opened submitted by the Superior Oil Group, the Manager made the following statement:

Gentlemen, the * * * the * * * unsuccessful bid, or rather the * * * the * * * unacceptable bid, was a bid that was not signed and it was * * * ah * * * in an amount greater than the highest bid that I read.

The bid (or form of bid) referred to by the manager as "unacceptable" was on stationery of Union. It was addressed to the Manager of the New Orleans Office, referred to Tract No. 228 as the tract bid upon, and referred to the articles of incorporation, amendments thereto, corporate qualifications and authority of the signing officers to be found as previously filed in New Orleans Miscellaneous File No. 3, a file in the manager's office records. The bid was in a total amount of \$13,600,000. It bore the typewritten name "Union Oil Company of California." Under this was a line for the signature of the Attorney in Fact for the corporation. However, no signature of the attorney or agent of the company appears thereon or, for that matter, at any place on the bid form (Exhibit "B" p. 154).

On the bid form, under the line "Amount submitted with bid" appears the figure \$2,720,000. This amount equals one-fifth of the total bid.

Accompanying the bid form in the sealed envelope was a cashier's check of the Bankers Trust Company, New York, N.Y., in the sum of \$2,720,000, there being typewritten thereon the name "Union Oil Company of California" in the upper left hand corner and under the written amount the words "Not valid over \$5,000,000." The check is payable to the Bureau of Land Management.

Subsequently, upon instructions received, the Manager of the New Orleans Land Office took no further action with respect to the purported bid of Union and the bid form, letter of transmittal² and cashier's check were retained in their original form. The cashier's check accompanying the bid of the Superior Oil Company group, representing one-fifth of their bid of \$11,628,691.20 was, however,

² The other two bids referred to in the letter were signed by the attorney in fact.

deposited by the manager in a special suspense account and the check paid by the drawee bank.

On the day after the sale, and before any further action had been taken, Union, in a letter to the Bureau of Land Management, alleged error and inadvertence in failure to sign its bid for Tract 228, stated its willingness to complete the bid by signing it and to pay the balance of the bid price.

The Superior group contends that it is entitled to a lease. Essentially, the group contends that it is the "highest qualified bidder" in that Union's bid is a nullity because not signed; that Union's bid was rejected by the "authorized officer" under his delegated authority at the time of the bid opening and, that its bid has been accepted by the action of the Government in cashing its bid deposit check.

The Superior group further contends that it would not be in the public interest to reject all bids and readvertise Tract No. 228 for a resale of a lease thereon, because a lease on an adjacent tract has already been issued to Union, and leases have been issued on other nearby tracts. The point is made that before a reoffering it would be possible for Union and other companies to drill in the adjacent and nearby tracts. This, the Superior group contends, would place it at a competitive disadvantage because of information not available to it which would be acquired by its competitors through such drilling activity. The further point is made that such drilling could destroy the value of Tract 228 if efforts on the adjacent or nearby tracts were unsuccessful.

Both interested parties were informally invited to file legal memorandums in support of their positions with the Office of the Solicitor. Each has filed such a memorandum. Because of the nature of this matter, and the importance of a timely final decision, I deem it in the public interest that there be a final administrative decision upon the legal validity of bids for Tract 228. Accordingly, I have exercised supervisory authority and jurisdiction over this matter.

Consideration must first be given to the action of the manager in announcing at the sale that "the next bid is not an acceptable bid,"³ referring, of course, to the Union bid, and his subsequent action in depositing the Superior group check.

Neither the applicable regulations nor the notice of sale require that the manager act upon or adjudicate the bids at the time of the bid opening. As to the sequence of events, the notice of sale provided only the time and place for opening bids. More importantly, however, it also reserved for the Government the right to reject all bids.

The normal practice of the Bureau of Land Management involves (1) the opening of bids (2) the later examination of bids received for

³ It is to be noted that the name of the bidder was not announced nor was the exact amount of the bid announced.

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compliance with the statute and regulations (3) evaluation of bids as to adequacy (4) rejection of inadequate bids by return of the bidders' deposits (5) acceptance of the high bids which are determined to be adequate by letter notification accompanied by a lease form to be executed by the high bidder, and (6) execution of the lease on behalf of the Government.

While each step of the described procedure is not spelled out in the regulations, neither the established procedure nor the regulations can be said to contemplate a final action, binding upon the Government, at the time of the bid opening. 43 CFR 3382.5 provides in its pertinent parts as follows:

Award of Lease.

*Following the public opening of the sealed bids as provided for in the notice of lease offer, the authorized officer, subject to his right to reject any and all bids will award the lease to the successful bidder. * * * If the authorized officer fails to accept the highest bid for a lease within 30 days after the date on which the bids are opened, all bids for such lease will be considered rejected. Notice of his action will be transmitted promptly to the several bidders. If the lease is awarded, three copies of the lease will be sent to the successful bidder and he will be required within 30 days from his receipt thereof to execute them, pay the first year's rental, the balance of the bonus bid, and file a bond as required in section 3384.1. Deposits on rejected bids will be returned. * * * If before the lease is executed on behalf of the United States the land is withdrawn or restricted from leasing, all payments made by the bidder will be refunded. * * * When the three copies of the lease are executed by the successful bidder and returned to the authorized officer, the lease will be executed on behalf of the United States, and one fully executed copy will be mailed to the successful bidder. (Italics supplied.)*

It can scarcely be argued that the regulations contemplate that the lease be "knocked down" to the highest bidder at the time of the bid opening, or that any question in respect thereto be adjudicated at that particular time. On the contrary, the regulations and procedures clearly contemplate that the award of leases shall be made at a time subsequent to the bid opening. They provide that the award shall be made *following* the public opening; that the right to reject any and all bids is reserved; that the authorized officer shall have a period of 30 days in which to act and, make provision for a possible withdrawal or restriction of the leased area even after the bid opening.

If the procedures and regulations do not contemplate the award of a lease at the time of the public opening, then they do not contemplate that the authorized officer should at that time adjudicate any other question bearing upon the validity of adequacy of the bids. In short, the bid opening is nothing more than that—a public opening and reading of the bids received. If in fact, the authorized officer should, as it is contended he did here, attempt to accept or reject a bid received

and his action is erroneous, it is subject to correction at any time before the lease is actually awarded. The public interest demands this, and it is the very essence of the provision of the regulations reserving the right to reject any and all bids and fixing a reasonable time within which the authorized officer may act. See *New York v. Union News Co.*, 222 N.Y. 263, 118 N.E. 635 (1918). Furthermore, if the decision of the manager as to the acceptability of the Union bid was, in fact, erroneous, the Government cannot be bound thereby. *Donald S. Tedford*, A-29963 (March 24, 1964). Therefore, if the Union bid was not fatally defective because of a lack of signature, the action of the manager in orally declaring it unacceptable cannot be held to have been a rejection of the bid.

The Superior group contends, however, that its position is further strengthened by the action of the manager in cashing its check and depositing the funds to the credit of the United States. This, they contend, was not only further evidence of the manager's intent to finally reject Union's bid, but was an acceptance of its bid. Assuming, arguendo, that the manager had rejected the Union bid and that the rejection was proper, while the Superior group might then have become the "highest responsible" bidder, the deposit of its check alone does not confer upon it a right to a lease. There is nothing in the regulations which requires the manager to retain the deposit in its original form. The regulations do not require that the particular check, money order or cash will be returned but only that the deposit will be returned. The deposits are made to a special or "suspense" account and are not covered into the general fund of the Treasury. The funds are available for return to unsuccessful bidders from this account and are not available for Government use until a lease is issued. The deposit is made to guard against loss of the deposit by accident or the design of a dishonest employee and protects the bidder as well as the Government. This is not the exercise of dominion constituting an acceptance as the rule is stated in section 72(2) Restatement of Contracts and the cases cited by the Superior Group. Furthermore, the regulations specifically contemplate possible action by the Government itself subsequent to the bid opening and before the execution of a lease which would prevent the lease from issuing and entitle a bidder only to the return of his deposit. 43 CFR 3382.5, *supra*. It cannot be held, therefore, that the Government is bound to the issuance of a lease to any bidder *until the lease is executed on behalf of the United States*.

The actions of the Manager resulting neither in a rejection of the Union bid nor an acceptance of the Superior Group bid cannot foreclose further consideration of the validity of the Union bid.

Generally speaking, the only infirmities in a bid which may be waived are those which do not go to the substance of the bid and do not work an injustice to other bidders. The bidder cannot be placed in a posi-

AREA, TEXAS OFFSHORE SALE

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tion to make an election either to abide by its bid or to claim that it was submitted in error.

While no specific form of bid is required by the regulations for Outer Continental Shelf Lands lease bids, the notice of sale set forth in detail a requested form of bid. The requested form provided for a signature. Additionally, both by the notice and regulations, corporate bidders were required to submit a copy either of the "minutes of the meeting of the board of directors or of the by-laws indicating that the person signing the bid has the authority to do so." 43 CFR 3382.4(a)(1).

Obviously, the signature of the person submitting a bid on behalf of a corporation is a matter of substance. Thus, the deficiency in Union's bid cannot be waived, nor can it be supplied after the time for receipt of the bids. This, however, does not mean that the bid is unacceptable.

It is a settled rule of Government contract law that an unsigned bid may be considered for an award if accompanied by a letter, bond or other document signed by the bidder clearly evincing his intent to submit the bid. *17 Comp. Gen. 497 (1937)*, *34 Comp. Gen. 439 (1955)*, *36 Comp. Gen. 523 (1957)*.

This principle has been incorporated into the Federal Procurement Regulations which provide that the failure to sign a bid may be considered a minor informality or irregularity if "accompanied by other material indicating the bidder's intention to be bound by the unsigned bid document, such as the submission of a bid guarantee, or a letter signed by the bidder with the bid referring to and clearly identifying the bid itself." *41 CFR 1-2.405(c)*.

Here the bid was transmitted by letter together with two other signed bids in the same form. The bid was on a letterhead identical with that of the transmittal letter. The transmittal letter was signed by the agent of the corporation authorized to submit bids on its behalf and the letter clearly referred to a bid on Tract 228 as did the bid itself. Furthermore the bid was accompanied by the required guarantee in the form of a cashier's check bearing the name of the bidder. Under these circumstances, the rationale of the Comptroller General's Opinions cited herein is persuasive and controlling and the bid of Union Oil Company of California must be considered a valid bid.

You are, therefore, directed to consider the bid of Union Oil Company of California as a valid bid for Tract No. 228 offered for lease in the sale held May 21, 1968, and the matter is remanded to you for consideration of the bid as to adequacy only. If you find the bid to be adequate as to amount, you are directed to forward a lease for the lands embraced in Tract No. 228 to Union Oil Company of Cali-

fornia in accordance with 43 CFR 3382.5. As to those issues decided herein, this memorandum constitutes a final Departmental decision.

/s/ STEWART L. UDALL,
Secretary of the Interior.

EXHIBIT A

225 Baronne Street, New Orleans, La. 70112
Telephone (504) 529-4201

May 20, 1968

Manager, Bureau of Land Management
Department of the Interior
Post Office Box 53226
T-9003 Federal Office Building
New Orleans, La. 70150

Re: Texas Offshore Sale

Gentlemen:

Attached are the following sealed bids in connection with the Texas Offshore Sale:

Tract No. 228

Tract No. 240

Tract No. 262

It will be appreciated if you will receipt for same by signing in the space below.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA
W. F. BOLDING

Received this 21st day of May, 1968.

BACHMAN

EXHIBIT B

800 Prudential Building, Houston, Tex. 77025
Telephone (713) 748-2076

May 20, 1968

Manager, Bureau of Land Management
Department of the Interior
Post Office Box 53226
T-9003 Federal Office Building
New Orleans, La. 70150

June 20, 1968

OIL AND GAS BID

The following bid is submitted for an oil and gas lease on land of the Outer Continental Shelf specified below:

Area: Brazos. Official Leasing Map No. 5.

Tract No.	Total amount bid	Amount per acre	Amount submitted with bid
228	\$13,600,000	\$2,361.11±	\$2,720,000

Articles of Incorporation, amendments thereto, corporate qualifications and authority of the signing officer can be found in New Orleans Miscellaneous File No. 3, Form 1140-1 (November 1966) has been completed and is also in said file.

UNION OIL COMPANY OF CALIFORNIA

By _____
(Attorney in Fact)

SINCLAIR OIL AND GAS COMPANY

A-30709 Decided June 20, 1968

Oil and Gas Leases: Royalties

Where a portion of the land in an oil and gas lease lies within the horizontal limits of an oil or gas deposit which was known to be productive on August 8, 1946, the lessee is not entitled under item (1) of section 12 of the act of August 8, 1946, to a flat royalty rate of 12½ percent on production later obtained from deeper zones underlying the same horizontal limits, which deeper zones were discovered by wells drilled outside the lease boundaries subsequent to August 8, 1946.

Federal Employees and Officers: Authority to Bind Government—Oil and Gas Leases: Royalties

The United States cannot be deprived of its right to receive all of the royalty payments due under the terms of an oil and gas lease and the applicable statutory provisions by the unauthorized acts of its employees, and the failure of the Geological Survey to collect all the royalty due by tacit acceptance of the lessee's determination of its royalty obligation for 13 years does not waive the right of the United States to receive full royalty payment in accordance with the lease terms or estop it from demanding payment of the balance due under those terms.

APPEAL FROM THE GEOLOGICAL SURVEY

Sinclair Oil and Gas Company has appealed to the Secretary of the Interior from a decision dated July 29, 1966, whereby the Acting Director, Geological Survey, affirmed a decision of the Regional Oil

and Gas Supervisor, Casper, Wyo., calling for the payment of more than \$3,200,000 in additional royalties for oil produced from lands covered by noncompetitive oil and gas leases Cheyenne 029630(a) and 065546 in T. 26 N., R. 90 W., 6th P.M., Wyoming, in the Lost Soldier Field.

The material facts of the case are not in dispute, the controverted issues being as to the proper interpretation of item (1) of section 12 of the act of August 8, 1946, 30 U.S.C. sec. 226c (1964),¹ and the effect to be given to two determinations of productive limits of oil and gas deposits made by the Geological Survey in 1948.

Lease Cheyenne 029630(a), which embraces the W $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 2 and E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 3, T. 26 N., R. 90 W., provides for the payment of royalties on oil production at modified 12 $\frac{1}{2}$ to 32 percent step-scale rates. Lease Cheyenne 065546, which embraces lots 3 and 4 and the S $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 2, lots 1, 2, and 3 and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 3, W $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 4, E $\frac{1}{2}$ sec. 9, NE $\frac{1}{4}$ sec. 22, and SW $\frac{1}{4}$ sec. 23, T. 26 N., R. 90 W., provides for the payment of royalties on oil production at 12 $\frac{1}{2}$ to 32 percent step-scale rates. Prior to January 1948 there was oil production from both leases only from the Pennsylvanian Tensleep or shallower formations for which royalties were and are payable at the rates established by the leases.

By separate letters dated January 16, 1948, the appellant requested that the Geological Survey, with respect to the lands covered by each of the leases in question,

* * * find and determine that the * * * [described lands] are outside and not within the productive limits of any producing oil or gas deposit lying below the base of the Tensleep formation, as such productive limits were known to exist on August 8, 1946, as authorized by section 12 of the Act of Congress approved August 8, 1946 (Public Law 696-79th Congress).

By a letter dated January 28, 1948, the Acting Director, Geological Survey, stated, with respect to the land embraced in lease Cheyenne 029630(a), that:

¹ Section 12 of the act provides that:

"From and after * * * [August 8, 1946], the royalty obligation to the United States under all leases requiring payment of royalty in excess of 12 $\frac{1}{2}$ per centum, except leases issued or to be issued upon competitive bidding, is reduced to 12 $\frac{1}{2}$ per centum, in amount or value of production removed or sold from said leases as to (1) such leases, or such part of the lands subject thereto, and the deposits underlying the same, as are not believed to be within the productive limits of any oil or gas deposit, as such productive limits are found by the Secretary to exist on * * * [August 8, 1946], and (2) any production on a lease from an oil or gas deposit which was discovered after May 27, 1941, by a well or wells drilled within the boundaries of the lease, and which is determined by the Secretary to be a new deposit; and (3) any production on or allocated to a lease pursuant to an approved unit or cooperative agreement from an oil or gas deposit which was discovered after May 27, 1941, on land committed to such agreement, and which is determined by the Secretary to be a new deposit, where such lease was included in such agreement at the time of discovery, or was included in a duly executed and filed application for the approval of such agreement at the time of discovery."

It is not suggested that either item (2) or item (3) is applicable to the leases in question.

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On the basis of Geological Survey records and information, determination is hereby made that on August 8, 1946, the land described above was not considered to be within the productive limits of any oil or gas deposit occurring stratigraphically below the base of the Pennsylvanian Tensleep sandstone.

With respect to the land in lease Cheyenne 065546, the Acting Director responded in a letter of the same date that:

On the basis of Geological Survey records and information, determination is hereby made that on August 8, 1946, lots 1, 2, and 3, S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 3, described above, were not considered to be within the productive limits of any oil or gas deposit occurring stratigraphically below the base of the Pennsylvanian Tensleep sandstone, and that the remainder of the land described above was not considered to be within the productive limits of any recognized oil or gas deposit.

On January 4, 1948, just prior to the Geological Survey's determinations of January 28, 1948, a discovery well was completed for production from the Madison formation, underlying the Pennsylvanian Tensleep sandstone, on non-Federal land in the Lost Soldier Field. A few months later, on June 26, 1948, a discovery well, also on non-Federal land in the Lost Soldier Field, was completed for production from the Cambrian formation. Productive wells were completed to the Madison formation underlying lease Cheyenne 065546 in April 1948 and to that underlying lease Cheyenne 029630(a) in August 1948, and productive wells were completed to the Cambrian formation underlying the respective leaseholds in May 1950 and September 1949. Royalty on oil production from the two leases, as to those formations, was computed by the Geological Survey at a flat rate of 12 $\frac{1}{2}$ percent through September 30, 1961.

By a letter dated November 22, 1961, the Regional Oil and Gas Supervisor notified appellant that he had been instructed to recompute the royalties on production from the two leases for the period April 1, 1948, to September 30, 1961, at the rates provided in the leases. The recomputation resulted in a determination that appellant owed the sum of \$3,209,763.30 in additional royalty payments. Sinclair appealed to the Director, Geological Survey, from that determination, asserting, at it does in its present appeal to the Secretary, that it is entitled to the relief provided by section 12 of the act of August 8, 1946, *supra*, as to each of the leases in question and that, even if it is not entitled to that relief, the Geological Survey determined in 1948 that the provisions of that act applied to those leases and is now estopped from determining otherwise.

In his decision of July 29, 1966, the Acting Director, Geological Survey, held that this case is controlled by the decision in *Richfield*

Oil Corporation, 62 I.D. 269 (1955), in which the Department held that where leased lands lie within the horizontal limits of an oil or gas deposit which was known to be productive on August 8, 1946, the lessee is not entitled under item (1), section 12, of the act of that date to a flat royalty rate of 12½ percent on production later obtained from deeper zones underlying the same horizontal limits, which deeper zones were discovered by wells drilled outside the leased lands subsequent to August 8, 1946.² With respect to the contention that the determinations of January 28, 1948, were binding and conclusive determinations establishing a flat rate of royalty of 12½ percent in production from the Madison and Cambrian formations, the Acting Director found that these determinations simply stated the facts as to the existence on August 8, 1946, of oil and gas deposits in relation to the leased lands in question without stating that the flat royalty rate of 12½ percent applied to production from those formations. He held, however, that even if the Acting Director had specifically stated in 1948 that the 12½-percent royalty rate did apply his determination would have involved an erroneous construction of section 12, *supra*, and could not confer a right not authorized by law or estop the United States from requiring payment of the full royalty lawfully due. In response to appellant's contention that the oil and gas supervisor's approval of division orders filed by the appellant covering production from the Madison and Cambrian formation constituted acceptance and approval of the flat 12½-percent royalty rate provided for in the division orders, the Acting Director noted that these division orders, in accordance with the policy of the Geological Survey, were not executed by the Survey but were approved by it "subject to the condition that nothing herein shall be construed as affecting any of the relations between the lessee and the Secretary of the Interior." This conditional approval, the Acting Director held, could not be regarded as sanctioning a royalty rate inconsistent with the terms of the leases and could not, in any event, change the royalty rate if the applicable law required a higher rate than that provided for in the division orders.

Sinclair's present appeal is, in essence, an attempt to overturn the Department's decision in *Richfield Oil Corporation*, *supra*. In attack-

² Richfield sought judicial review of the Department's interpretation of the statute in an action entitled *Richfield Oil Corporation v. Fred A. Seaton*, Civil No. 3820-55, in the United States District Court for the District of Columbia. That action was dismissed on Mar. 6, 1958, upon the filing of a stipulation by the parties to the effect that such dismissal should be without any prejudice to the right of the plaintiff to refile that action or to file a new action "if and at such time as the United States Geological Survey in accordance with * * * [the departmental decision in *Richfield Oil Corporation*, *supra*] requires payment of a royalty of more than 12½ percent upon production from any separate zone or zones or on production allocated under a unit agreement to any of the land involved in the above case." Thus, there has been no judicial ruling on the correctness of the Department's interpretation of item (1) of section 12.

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ing that decision, appellant has challenged the Department's conclusions upon the basis of (1) the language of section 12(1) of the act of August 8, 1946 (2) the legislative history of the act; and (3) the declared objectives of the act which are, allegedly, frustrated by the Department's interpretation. In claiming that it is entitled to the benefits of item (1) of section 12 of the act, appellant argues, in substance, that the provision is applicable to any well, except on a lease issued pursuant to competitive bidding, which produces from an oil or gas deposit not known to exist on August 8, 1946, even though the *land* on which the well is situated was within the known productive limits of some other oil or gas deposit on that date.

In the *Richfield* decision, *supra*, we acknowledged that the language of item (1) of section 12 "is not too clear" and that, viewed by itself, the language "is possibly susceptible of the interpretation advanced by the appellant." We concluded, however, that:

* * * when viewed as against the language employed in items (2) and (3) of the same section, item (1) is more reasonably construed as the Acting Director has construed it. Both items (2) and (3) grant the flat 12½-percent royalty rate to "any production * * * from an oil or gas deposit * * * which is determined by the Secretary to be a new deposit." This language plainly shows that in making a determination under item (2) or (3), the Secretary is to act only upon the basis of "deposits." That is, in acting upon a request under either item (2) or (3) for a determination that the flat 12½-percent royalty rate be granted to production from a certain deposit, the Secretary determines only whether the deposit in question is a new deposit separate and distinct from any other deposit previously discovered. It necessarily follows that if the deposit in question is vertically separated from an existing deposit, it comes within item (2) or (3) regardless of whether it falls within vertical extensions of the horizontal limits of the existing deposit.

The language of item (1) is distinctly different. It does not extend the flat 12½-percent royalty rate to production from a "deposit"; it extends the flat royalty rate to production from "such leases, or such part of the *lands* subject thereto, and the deposits underlying the same, as are not believed to be within the productive limits of any oil or gas deposit" [Italics supplied], as such limits existed on August 8, 1946. Moreover, it is to be noted that item (1) says "such leases, or such part of the lands subject thereto, and the deposits underlying the same, as are not believed," etc. [Italics supplied.] It does not say "such deposits." The flat 12½-percent royalty is to be extended only to such leased *land* as is not within the productive limits of an existing deposit, and not to such *deposits* as are not within the productive limits of an existing deposit. Accordingly, it seems plain that the Secretary is required to determine only whether the leased *land*, or part of it, lies within the productive limits of a deposit in existence on August 8, 1946. This clearly conveys the idea that the Secretary is only required to determine whether the leased land lies within the horizontal limits of any existing deposit. * * *

The inclusion in item (1) of the phrase "and the deposits underlying it" also bears out this conclusion. That is, item (1) seems to say that only where the leased land and the deposits underlying it are not within the productive limits of

a deposit found to exist on August 8, 1946, will the lessee be entitled to the flat royalty rate. This negates the idea that item (1) applies to leased land where one or more of the deposits underlying the land have been found to be in existence on August 8, 1946. * * * 62 I.D. at 273-274 (Emphasis ours).

The net effect of the Department's ruling in that case was to limit the applicability of item (1) to wells drilled on lands which (lands) were not, on August 8, 1946, believed to be within the productive limits of *any* oil or gas deposit. The issue in the present case, as in *Richfield*, is whether the "horizontal limits" interpretation adopted by the Department or the "horizontal and vertical limits" interpretation advocated by appellant expresses the intent of Congress.

After careful review of item (1) of section 12, we remain convinced that the interpretation given it by *Richfield* is correct. This interpretation is the only one which makes syntactical sense. To repeat, section 12 provides that, except as to competitive leases—

* * * the royalty obligation * * * under all leases requiring payment of royalty in excess of 12½ per centum * * * is reduced to 12½ per centum * * * as to (1) such leases, or such part of the lands subject thereto, and the deposits underlying the same, as are not believed to be within the productive limits of any oil or gas deposit [as of August 8, 1946] * * *.

Item (1) clearly applies only to "such leases" (*i.e.*, leases providing for royalties in excess of 12½ percent) "as" are outside the productive limits of a deposit on August 8, 1946, or to "such part of the lands subject thereto" (*i.e.*, to a lease providing for royalties in excess of 12½ percent) "as" are outside the productive limits of a deposit on August 8, 1946. Item (1) does not refer to "such" deposits "as" are outside the productive limits of a deposit as of August 8, 1946. It refers only to "the" deposits underlying the "same." What is the "same"? Obviously, "same" means "such leases" or "such part of the lands" in such leases "as" lie outside the productive limits of the deposit. In other words, the only "deposits" covered by item (1) are those deposits which underlie leases or parts of leased lands which lie outside the productive limits of an oil and gas deposit as of August 8, 1946. If the lease or part of the leased land lies within the productive limits of such a deposit, then the 12½-percent royalty rate does not apply to production from that lease or that land or, *a fortiori*, from any deposit underlying that lease or that land.

In short, the determination to be made under item (1) is whether the *lease* or *any part of the leased land* falls within the limits of a deposit as such limits existed on August 8, 1946. It is *not* whether the *deposit* in question underlies the productive limits of another deposit as they existed on August 8, 1946.

Appellant contends that the "plain language of section 12(1)" extends the flat royalty rate of 12½ percent to:

(a) such leases, or

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(b) (1) such part of the lands subject thereto [such leases], *and*
(2) the deposits underlying the same [such leases], as are not believed to
be within the productive limits of any oil or gas deposit, as such productive
limits are found by the Secretary to exist on the effective date of this Act. * * *
(Italics added.)

"Part (a)," appellant argues, "refers to the situation where no part of the lease is within productive limits of an oil or gas deposit on the effective date of the act," and the phrase "'and the deposits underlying the same' has no bearing in this situation."³ "Part (b)," it is argued, "covers the situation where part of the lease is within productive limits of an oil or gas deposit on August 8, 1946," and, in this situation, "the flat rate was extended by Congress (1) to such part of the land subject to such leases as is not believed to be within productive limits of an oil or gas deposit on the effective date, and (2) to the deposits underlying such leases as are not believed to be within productive limits of an oil or gas deposit but which underlie lands within productive limits of an oil or gas deposit on the effective date."

Appellant contends that the Department, by holding that the flat royalty rate applies only where the leased land *and all of the deposits underlying it* are not within the productive limits of a deposit as found to exist on August 8, 1946, has rendered surplus the phrase "'and the deposits underlying the same,'" since the meaning would be exactly the same, under the Department's interpretation, without that phrase. This phrase, appellant asserts, "has an independent role in section 12(1) to extend the flat rate to deposits underlying lands determined to be within productive limits of an existing deposit on the effective date of the Act." Appellant discounts the distinction noted in the *Richfield* decision, *supra*, between the language of item (1) and that of items (2) and (3) upon the theory that since items (2) and (3) were added to the section by the House and Senate conference committee, they were not intended in any way to affect or curtail the benefits granted under item (1), and that the reference in items (2) and (3) solely to oil or gas "deposits" cannot, therefore, be construed as evidence that something other than deposits was contemplated in item (1).

We are unable to assent to the validity of appellant's argument. While appellant chides the Department for its failure to give what it regards as proper effect to the modifying phrase "'and the deposits underlying the same,'" appellant is not abashed by the redundancy which its interpretation of item (1) would produce. Under that inter-

³This argument would appear to be somewhat inconsistent with appellant's analysis of the statute in which part "(b)(2)" is defined as the phrase "the deposits underlying the same [such leases]."(Italics added.)

pretation, the status on August 8, 1946, of the deposit in question becomes the sole critical factor for determining applicability of the provision to that deposit and the reference to "such leases, or such part of the lands subject thereto" becomes surplusage, since a finding that a deposit was not within the productive limits of an oil or gas deposits as found to exist on August 8, 1946, would make it unnecessary to determine whether the land overlying the deposit was within such limits.

Moreover, we are not persuaded by appellant's argument that the conference committee, which so explicitly related the benefits granted under items (2) and (3) to oil or gas deposits, failed to incorporate similarly clear language into item (1), which remained substantially intact from its inception,⁴ only because of the haste with which items (2) and (3) were added to the section. This argument would seem to imply that, while Congress may have difficulty, after lengthy deliberation, in conveying a particular concept in unambiguous language (in item (1)), it can always set forth the intended meaning clearly and concisely (in items (2) and (3)) if it acts hastily. Nothing has been called to our attention to indicate that the same careful attention was not given in conference to item (1) as was given to items (2) and (3). That the conference committee did not conform the language of item (1) to that used in items (2) and (3) is more properly taken to mean that the committee intended a difference in meaning rather than that it was sloppy in its draftsmanship.

Appellant's interpretation, as a matter of grammatical construction, is subject to several more infirmities. As appellant views the provision, the flat royalty rate is applicable:

- (1) Where the entire leased area lies outside the productive limits of any oil or gas deposit as determined on August 8, 1946, to all production from that leasehold; or

⁴ The pertinent language of item (1), as originally contained in the bill reported by the Senate Committee on Public Lands and Surveys (S. Rep. No. 1392, 79th Cong., 2d Sess. (1946)), and as finally enacted, read as follows, words in italics having been added and the word in brackets having been deleted by the House Committee on Public Lands (H.R. Rep. No. 2446, 79th Cong., 2d Sess. (1946)): *

"* * * (1) such leases, or such part of the lands subject thereto, and the deposits underlying the same, as are *not believed to be* within the [known] productive limits of any oil or gas deposit, as such productive limits *are found by the Secretary to exist* on the effective date of this Act."

The modification of the language was made in response to objections by this Department that the original language would have imposed a severe administrative burden upon the Department in determining, within the exterior boundaries of any *known geological structure*, the known productive limits of each producing oil or gas deposit. The language adopted, the Committee stated, would "allow to the Department very considerable latitude in such determination, to the end that only those lands, the development of which is clearly extremely hazardous, will be granted the exploratory royalty rate of 12½ percent." * * * H.R. Rep. No. 2446, *supra* at 4.

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(2) Where part of the leased area lies inside and part outside such productive limits, to all production from the area outside the productive limits; or

(3) Regardless of whether or not the leased area or any part of it lies within the productive area of a deposit, to any production from a deposit outside the productive limits of any other deposit as such productive limits were defined on August 8, 1946.

Apart from the fact, already noted, that condition (3), as set forth here, would appear to include every situation in which (1) or (2) could occur, thus making (1) and (2) unnecessary, this interpretation requires a reading of the language of the statute as though it were phrased as follows:

* * * the royalty obligation * * * under all leases requiring payment of royalty in excess of 12½ per centum * * * is reduced to 12½ per centum * * * as to (1) such leases, or such part of the lands subject thereto, *or such deposits underlying the same as are not believed to be within the productive limits of any oil or gas deposit [as of August 8, 1946]* * * * (Italics added).

The fact is that the statute does not read in this fashion. It does not say "or such deposits underlying the same as are not believed," etc. It says "and the deposits underlying the same," without further modification of that phrase by the clause "as are not believed," etc.

The words, "the deposits underlying the same," cannot be made to stand alone. Contrary to appellant's contention, this phrase has no independent role, but it must be read in relation to that which precedes it. The statute provides that the *lease or leased lands* and the underlying deposits must be outside the productive limits of any oil or gas deposit in order to qualify for the proffered benefits. If the lease or leased lands are within the productive limits of a deposit, as found on August 8, 1946, but production is thereafter obtained from a deeper deposit within the same areal limits, can it be said that the *lease or leased lands* and the underlying deposits are outside the productive limits of a deposit as determined on August 8, 1946?

That the answer must be in the negative is clearly shown by consideration of another lease held by the appellant, Cheyenne 029630(b), which is not involved in this appeal but is mentioned in the Acting Director's decision. By letter dated February 6, 1948, appellant requested that the Survey make a determination that the 160 acres in that lease, consisting of two 80-acre tracts adjoining the two 80-acre tracts in Cheyenne 029630(a), "are outside of and not within the productive limits of any producing oil or gas deposit, as such productive

limits were known to exist on August 8, 1946 * * *. The Acting Director replied by letter dated February 20, 1948—

that on August 8, 1946, the E $\frac{1}{2}$ SW $\frac{1}{4}$, sec. 2, T. 26 N., R. 90 W., 6th P.M., Wyoming, was not believed to be within the productive limits of any producing oil or gas deposit found to exist on that date; and that the W $\frac{1}{2}$ SW $\frac{1}{4}$, sec. 3, T. 26 N., R. 90 W., 6th P.M., *was believed to be within the productive limits of the producing Tensleep oil and gas deposit* of the Lost Soldier field, though not believed to be within the productive limits of any other producing oil or gas deposit, found to exist on that date. (Italics added).

Let us see how item (1) of section 12 applies to this lease. Clearly the E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 2 was "such part of the lands subject thereto * * * as are not believed to be within the productive limits of any oil or gas deposit"; consequently, that tract "and the deposits underlying the same" qualify for the flat 12 $\frac{1}{2}$ -percent royalty rate. Equally clearly, however, the W $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 3 was *not* "such part of the lands subject thereto * * * as are not believed to be within the productive limits of any oil or gas deposit" since that tract was found "to be within the productive limits of the producing Tensleep oil and gas deposit." Therefore that tract "and the deposits underlying the same" are *not* qualified for the flat 12 $\frac{1}{2}$ -percent royalty rate.

Thus, from the language of the statute alone, we can only conclude that, while more precise language could have been used to express the legislative intent, the Department's interpretation of the language that was used is a reasonable one, whereas that advocated by appellant requires the substitution of some small but important words to convey the meaning which appellant finds.

Appellant contends, however, that even if the language of the statute does not clearly establish the correctness of the position which it takes, it is clear from the legislative history of the act that appellant's view is the only proper one. In advancing this argument, appellant has placed great emphasis upon the views of representatives of the oil and gas industry expressed in hearings before Congressional committees, upon statements of Members of Congress who sponsored the legislation, and upon the fact that departmental opposition to some proposed measures was overruled by the enactment of those very measures.

The most extreme position taken by some in the industry is expressed in the following excerpt from the testimony of Warwick W. Downing, attorney for the Interstate Oil Compact Commission, given before the Senate Committee on Public Lands and Surveys on May 9, 1946:

* * * [W]e recommend that all leases hereafter issued on nonproven areas carry the flat $\frac{1}{8}$ royalty; that all noncompetitive leases on which discovery has not been made, shall also carry the flat $\frac{1}{8}$ royalty, and that all wells hereafter drilled on existing leases, or leases issued under existing applications, including

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all renewal, exchange and preference rights leases, which are in fact, exploratory, regardless of their location, and regardless of leasehold boundaries or structural boundaries upon which they may be located, are entitled to the incentive of the flat $\frac{1}{8}$ royalty.

This incentive should apply to exploratory wells, not only to test deeper strata, but to develop down-structure deposits.

What good is the discovery of a well, unless after you make it you try to discover how much area the structure takes, and every down-structure well is entitled to the same encouragement as the original well to a somewhat deeper sand. *Hearings on S. 1236 Before the Senate Committee on Public Lands and Surveys*, 79th Cong., 2d Sess., pt. 2, at 333 (1946).

There is evidence that the industry wanted the flat royalty rate extended to cover the situation found to exist in the present case. The testimony of industry spokesmen is persuasive that the industry wanted the broadest possible application of the flat royalty rate.⁵ It is clear that this Department wanted the flat royalty rate limited to leases which were clearly exploratory, that it objected to any change that would reduce revenues from producing leases, and that it objected to the granting of a flat 12½-percent royalty rate to all future noncompetitive leases, as well as to all outstanding leases which were not within the known geologic structure of a producing field and on which nothing was done to make a discovery of a new field or deposit. See H.R. Rep. No. 2446, *supra*, at 5-7. It is also clear that Congress did not share the Department's concern over the loss of future revenues and that it did extend the flat royalty rate to all future noncompetitive leases, as well as to outstanding noncompetitive leases, which were, on the date of the act, not believed to be within the productive limits of any oil or gas deposit. *Id.* at 4-5. It does not follow, however, from the fact that Congress did adopt some proposals of the oil and gas industry over the objections of this Department that it gave the industry all that it requested. While Congress undeniably intended the benefits of the act to apply where it considered such benefits to further oil and gas exploration, we are unable to find any clear suggestion that it intended to extend the benefits to producing leases except for exploratory wells. The expressed attitude of Congress, we believe, is exemplified in the following remarks of Senator O'Mahoney:

* * * [T]here's a question here that's much broader than the mere interest of the oil industry. I will grant that without any question it would be much

⁵ It is to be noted, however, that the statements by industry representatives were not directed to section 12 in the form in which it was enacted. Indeed, the statements were made at hearings held before section 12 even appeared in a committee print of S. 1236 dated May 22, 1946. As introduced, the bill carried only a provision continuing and broadening the incentive provisions of the act of Dec. 24, 1942, 56 Stat. 1080, which gave a flat 12½-percent royalty rate for 10 years to a lessee who drilled to a discovery of a new oil or gas field or deposit. The bill continued the requirement that the discovery must be of a new field or deposit.

better and simpler for the oil industry to have a flat royalty and no questions asked, but whether or not we should, in the Public Lands Committee, write off completely any claim on behalf of the people of a State to share beyond 12½ percent in rich deposits, the richness of which we may be unable to judge at the present time, I'm frank to say I've reached no definite conclusion. * * * *Hearings on S. 1236 Before a Subcommittee of the Senate Committee on Public Lands and Surveys*, 79th Cong., 1st Sess. 24 (1945).

I do not advocate extending this flat royalty to lands which are known to contain oils. Such lands, it seems to me, ought to pay whatever the market will bring. * * * Senate Hearings, pt. 2, *supra* at 241.

In none of this do we find any plain manifestation of intent on the part of Congress to extend the 12½ percent royalty rate to nonexploratory wells on producing leases even though production should come from deposits discovered after August 8, 1946. The legislative history clearly sets forth the problems which served as the motivation for the legislation, as well as the conflicting views on how the problems should be solved, but only in the language of the statute do we find disclosed the final response of Congress with respect to the resolution of the particular problem presented here.

Finally, appellant contends that, by its interpretation in the *Richfield* case, *supra*, the Department has thwarted the declared objectives of the act. It points out that the stated purpose of the act is "to promote the development of oil and gas on the public domain" in contrast to the earlier O'Mahoney Act of December 24, 1942, *supra* footnote 5, which was designed to "encourage the discovery of oil and gas on the public domain." The distinction between the use of "development" and "discovery," appellant argues, demonstrates Congressional intent to broaden the scope of the royalty benefits beyond that contemplated under the O'Mahoney Act and to grant those benefits to developers, as well as to discoverers, of new deposits.

We note first that when the 1946 Act was originally introduced (S. 1236, 79th Cong., 1st Sess.) it was entitled a bill to "promote the development of oil and gas." Yet at that time it did not provide for a flat 12½-percent royalty rate for noncompetitive leases but continued, instead, the existing statutory provisions for a royalty of not less than 12½ percent. Evidently the continuation of the provisions permitting graduated royalty rates was not deemed by the authors to be inconsistent with promoting the "development" of oil or gas.

We could hardly question appellant's major premise that the 1946 Act, which extended the flat royalty rate, without limitation, to all future noncompetitive leaseholders, regardless of the degree of risk which each might, in fact, take in exploring or developing his leasehold, and to all holders of prior noncompetitive leases on unproven lands, as well as to the discoverers of new deposits underlying known

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productive deposits, is broader in scope than the 1942 Act which only extended the same royalty rate, for a period of 10 years, to the lessee who discovered a new field or deposit by virtue of a well or wells drilled within the boundaries of a Federal lease. Nevertheless, it does not follow as a matter of law or of reason that the 1946 Act accomplished or authorized every step which could be construed as encouraging development of oil and gas. Clearly, it did nothing to encourage exploration for or development of deeper and unknown deposits beneath lands which were leased competitively, although we suppose that there are reasons for encouraging exploration for deeper deposits beneath those lands as well.

Appellant attempts to explain away any comparison between competitive and noncompetitive leases by stating simply that "Congress chose not to extend the flat rate to leases issued competitively before or after the effective date of the 1946 Act because lands which are so leased are reasonably believed to contain oil or gas and no further incentive is thought necessary for development of such lands." In spite of appellant's assertion that, under the *Richfield* decision, "holders of noncompetitive leases outstanding on August 8, 1946, are penalized by virtue of money and effort spent in developing their leases," it is our view that the present situation is, in principle, most nearly comparable with that of a competitive lessee and that there is no penalization involved but only the defining of the limits for the granting of a benefit.

To illustrate our point, let us assume that two leases were issued, the first noncompetitively and the second competitively, and that, prior to August 8, 1946, production was obtained on both leased tracts from the same oil or gas deposit. The first lease was issued at a time when the land was not known to be underlain by oil and gas deposits. The second was issued after oil or gas had been discovered and a structure had been defined, and, because the second lessee took a smaller risk in drilling a well on his land than the first lessee took, he was required to pay a higher price for his land and to bid in competition with others who might desire to take the same risk. By the successful drilling of wells both lessees have attained their objectives and have been rewarded in the manner contemplated under the mineral leasing laws. But what about further exploration? Both lessees take the same risk in drilling deeper in search of new deposits. It is difficult to imagine why the first lessee, who has a producing well, should need a special incentive to motivate him to drill deeper in search of additional deposits, while the second lessee, who paid substantially more for his lease, has incentive enough in the fact that he has already found oil.

However that may be, Congress undeniably saw fit to confer upon the first lessee a special inducement to explore for new deposits which it did not make available to the second lessee. Moreover, it offered the same reduced royalty rate to all future noncompetitive lessees, regardless of the individual risks that might be involved, so that the holder of a noncompetitive lease might not drill a well until after the land had been proved valuable by a discovery on adjacent land, in which case he would take the same risk in drilling as an adjoining competitive lessee but would have the advantage of a lower royalty rate as well as a lower initial cost for his lease. It will readily be seen, then, that it is difficult, if not impossible, to find in the oil and gas leasing provisions a system based upon complete fairness and that any attempt to surmise the intent of Congress upon a theory of fair and equal treatment rests upon an insecure foundation.

Accordingly, it remains our view that the *Richfield* decision, *supra*, represents the correct interpretation of section 12(1) and that appellant was not entitled to the flat 12½-percent royalty rate for any production from the Madison and Cambrian formations underlying the lands in question.

Appellant contends, however, that even if the *Richfield* decision is correct, it sets no precedent for this case in which the Department had already determined 7 years earlier that the lessee was entitled to a flat royalty rate of 12½ percent. Appellant asserts that the Department is now estopped from denying the validity and effect of the determinations of royalty obligations which it made in 1948, and it cites numerous court decisions dealing with the question of estoppel which, it contends, show that the Department, in cases such as this, may be estopped under circumstances that would estop an individual from the assertion of a similar claim. In raising this argument, appellant points out that it has paid overriding royalties on lease Cheyenne 065546, that it purchased the net profits interest of Hughes Oil Company in lease Cheyenne 029630(a) on January 17, 1961, for a cash consideration of \$6,500,000, and that it has paid State, county and school taxes, all in reliance upon the flat 12½-percent royalty rate on production from the Madison and Cambrian formations. Moreover, it argues, had it had not relied upon what it considered to be a determination of its royalty obligations, it would most certainly have taken steps to assure itself of the benefits of section 12 either by unitization of the Madison and Cambrian formations or by drilling exploratory wells on Federally leased lands rather than upon private lands.⁶ These acts of reliance upon au-

⁶ Appellant's retrospective view as to what it would have done had it been properly apprised of the Department's interpretation of the statute is open to some question. Dis-

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thorized acts of Departmental officials, it is claimed, serve as the basis for application of the doctrine of equitable estoppel.

The general rule is, of course, well established that neither the unauthorized acts of Government employees nor their laches can affect the rights of the United States or confer upon any individual or entity a right not authorized by law. *Lee v. Munroe and Thornton*, 11 U.S. (7 Cranch) 366, 369 (1813); *United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 720 (1824); *Filor v. United States*, 76 U.S. (9 Wall.) 45, 49 (1869); *Hart v. United States*, 95 U.S. 316, 318 (1877); *Steele v. United States*, 113 U.S. 128, 134-135 (1885); *United States v. Beebe*, 127 U.S. 338, 344 (1888); *United States v. Michigan*, 190 U.S. 379, 405 (1903); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Wilber National Bank of Oneonta v. United States*, 294 U.S. 120, 123-124 (1935); *United States v. City and County of San Francisco*, 310 U.S. 16, 31-32 (1940); *United States v. California*, 332 U.S. 19, 39-40 (1947). On the other hand, the acts or omissions of officers of the Government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the Government if the officers have acted within the scope of their authority. *Ritter v. United States*, 28 F. 2d 265, 267 (3d Cir. 1928); *Municipality of Rio Piedras v. Serra Garabis & Co.*, 65 F. 2d 691, 694 (1st Cir. 1933); *United States v. Coast Wineries*, 131 F. 2d 643, 650 (9th Cir. 1942). See discussion of both of these rules in *Smale & Robinson, Inc. v. United States*, 123 F. Supp. 457, 464-465 (S.D. Calif. 1954).

Appellant's invocation of the doctrine of equitable estoppel rests upon the propositions that the Geological Survey, acting within the scope of its authority, determined the royalty rate on production from

covery of oil in the Madison formation on fee land was made prior to the submission of appellant's request for a determination of productive limits. Thus, as to the Madison formation, at least, appellant made a decision to drill a well on privately owned land before it even raised the question of royalty rates with the Geological Survey. Appellant is cognizant of this fact, however, for, although in its initial statement of reasons for its appeal to the Secretary, it stated:

"The rulings were requested and granted; subsequent thereto oil and gas was discovered in both the Cambrian and Madison formations * * *."

in a subsequent brief, appellant corrected the statement by saying that

"* * * determinations were requested by Sinclair shortly after the company completed a discovery well to the Madison formation on Sinclair fee land on January 4, 1948. * * * At the very least, knowledge of existing structures would have led Sinclair to locate its Cambrian discovery well on one of the subject leases, thereby assuring a flat rate under section 12(2) on Cambrian production from such lease."

Although it is immaterial in our view, we would surmise that, regardless of the Department's interpretation of section 12(1), appellant's primary consideration in selecting the sites for its discovery wells is determination of the most favorable point for drilling to the contemplated formation whether it should be on Federal land or on private land.

Moreover, it appears from appellant's recitation of the facts that the objection of Hughes Oil Company, which had an interest in lease Cheyenne 029630(a) until 1961, may have constituted a major obstacle to be overcome before unitization of the leased lands could have taken place.

the Madison and Cambrian formations underlying the leases in question to be a flat 12½-percent, that its determination constituted a Departmental interpretation of section 12(1) of the 1946 Act, and that the *Richfield* decision, *supra*, made at a subsequent date, has been improperly and retroactively applied in this case to appellant's detriment. We do not find any of these premises to be valid. Moreover, we do not find, in any of the cases cited by appellant in support of its argument, an instance in which the doctrine of estoppel has been applied against the Government upon a finding of facts comparable with those shown here.

Appellant's theory of the applicable law is predicated upon the supposition that in the *Richfield* decision the Department modified its interpretation of section 12(1) and that its earlier construction of the statute is reflected in the determination in this instance that appellant was entitled to the flat 12½-percent rate. We find no basis for concluding that this is so.

The Department's regulations provided, at the time that appellant made its request for determination of the status of the lands, that:

On and after August 8, 1946, the following royalty rates shall be paid on the production removed or sold from leases:

* * * * *

(3) 12½ percent on all leases theretofore issued, except competitive leases, and on exchange and renewal leases thereafter issued, as to production from

(i) *Land* determined by the Director, Geological Survey, not to be within the productive limits of *any* oil or gas deposit on August 8, 1946. 43 CFR 192.82(a), 11 F.R. 12956, Oct. 28, 1946. (Italics added).⁷

This regulation was approved on October 28, 1946, as a part of the general revision of the oil and gas regulations to incorporate the many changes made by the act of August 8, 1946. Before approval of the regulations they were the subject of a public hearing held in Denver, Colo., on September 30, 1946. The proposed rental regulation quoted above was in the same form in which it was finally approved. Adoption of the regulations was announced in a press release issued on October 30, 1946, in which it was stated that "the Government will collect only a flat royalty of 12½ percent on any production under leases involving *lands* not within the known productive limits of a producing deposit on August 8, 1946. * * *" (Italics added).

Thus from the very beginning the Department has always taken the position that the entitlement of a lessee to the 12½-percent royalty depends on whether the leased *land* is within or outside the limits of a deposit.

Moreover, the records of this Department show that on May 1, 1947, 9 months before appellant's requests, the Director of the Geological

⁷ The corresponding provision (43 CFR 3125.3(a)(3)) is unchanged in the current regulations.

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Survey advised Messrs. Hervey, Dow, and Hinkle of the law firm of that name in Roswell, N. Mex., in response to their request for a determination, under the act of August 8, 1946, and the regulation just cited, that certain lands should be classified as "not being within the productive limits as far as * * * zones [beneath the upper Permian zone] are concerned," that:

* * * As there appears to be no reasonable question in your mind or mine that the land under consideration is within the productive limits of a Permian oil deposit referred to for convenience as the Eunice-zone deposit, a determination that the land under consideration is "not believed to be within the productive limits of *any* oil or gas deposit" on the effective date of the Act is clearly impossible.

That the Act contemplates selective, qualified determinations, deposit by deposit, for each legal subdivision of the public domain is not evident from its wording, and is so overwhelming in import and so utterly impossible of accomplishment as to be inconceivable. That it seeks merely to distinguish lands that are rather clearly within the areal limits of one or more productive deposits from other lands that are not reasonably considered to be within the limits of *any* productive oil or gas deposit on August 8, 1946, appears to me to be the most logical, defensible and workable interpretation. * * * (Italics added).

It is abundantly clear then that the *Richfield* decision marked no departure from prior Departmental construction of the statute. Rather, it represented simply the first full review of the issue at the Departmental level, a review which resulted in affirmation of the view previously espoused by the Geological Survey and indicated in the Department's regulations. Thus, we can only conclude that, if the Acting Director intended in the present case to find that appellant was entitled to the 12½-percent royalty rate for production from deposits lying beneath the Pennsylvania Tensleep formation, his determination was not an expression of Departmental construction but was an aberration, a complete departure from all Departmental precedent as well as from subsequent Departmental interpretation of the statute. In these circumstances, the cases cited by appellant in which agency construction of a statute has been held controlling are inapposite.

We do not find it necessary to decide here whether or not, in any circumstance, the Director of the Geological Survey could have made a determination that appellant was entitled to the benefits of section 12(1) with respect to the lands in question which would have estopped the Department from denying thereafter the efficacy of his determination, for we do not find that the Director, in fact, attempted to make such a determination.

As we have already noted, in its letters of January 16, 1948, appellant simply requested the Geological Survey to determine that the lands in question "are outside and not within the productive limits

of any producing oil or gas deposit lying below the base of the Tensleep formation, as such productive limits were known to exist on August 8, 1946, as authorized by section 12 of the Act of Congress approved August 8, 1946." Appellant now says that it wished to have the Geological Survey determine that the lands described were "outside and not within the productive limits of any producing oil or gas deposit lying below the base of the Tensleep formation, as such limits were known to exist on August 8, 1946, and that royalty on production from any deposit lying below the base of the Tensleep formation within the same areal limits should be fixed at 12½ percent, as authorized by section 12, etc." The omission of the phrase emphasized, or equivalent language, leaves an obscure meaning.⁸ The language used would seem to have asked the Geological Survey only to make the requested determination of fact. Whether or not the Geological Survey should reasonably have been expected to read into appellant's letter the implied request for a determination of the royalty obligation for production from deeper strata, its reply exhibited no hint of recognition of that question. It responded simply by determining, as a matter of fact, that the lands in question were "not considered to be within the productive limits of any oil or gas deposit occurring stratigraphically below the base of the Pennsylvania Tensleep sandstone" on August 8, 1946. The correctness of the Survey's statement is not questioned and the Survey did not go beyond a statement of that finding. It did not purport to determine the legal consequences of its factual determination but left the appellant to pursue such course as it saw fit upon receipt of the Survey's determination.

⁸ The wording of appellant's request for a determination was, in some important respects, distinctly different from the request for a similar determination in the *Richfield* case, *supra*, which prompted the Department to observe that the request in that case was, in effect, a request for a royalty limitation of 12½ percent on production under the lease from certain zones. Richfield opened its request with a statement of the text of the statute and of the Department's regulation. It then stated that:

"At the present time production on the above mentioned Gordon lease is being obtained from the Coal Oil Canyon Zone, the Oocene OA-1 Zone and the Eocene Zone. It is expected that production will in the future be obtained from the Valv Zone, the Oocene OA-2 Zone, the Vedder Zone above the thrust fault and the RB-2 Zone.

"With the exception of the two old wells known as Gordon No. 1 and Gordon No. 2 which were drilled before Richfield acquired this lease, Richfield is currently paying royalty on production from the Gordon lease on the basis that the royalty rates on all zones hereinafter mentioned under said lease have been reduced to 12½ percent in accordance with the above quoted portion of the Leasing Act and Regulations."

Following this statement of the basis for its request, Richfield asked the oil and gas supervisor to make four specific findings of fact and to determine

"5. that with respect to all of the zones listed above under requested determinations numbers 1, 2, and 4 and the oil and gas deposits therein underlying the Gordon lease, such zones and deposits are not believed to be within the productive limits of any oil or gas deposit, as such productive limits existed on August 8, 1946."

Thus, regardless of any ambiguity that may have been found in request No. 5, standing alone, the issue of the proper royalty rate was clearly raised in Richfield's letter. This was not true of appellant's inquiries.

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Appellant has attempted to step from assumption to assumption until it could bridge the gap between advocacy of a particular interpretation of the statute on its part and acceptance of that interpretation on the part of the Geological Survey. In other words, appellant would require the Geological Survey to answer all questions of law that might be implied in a request for a determination of fact or have its silence construed as assent to the correctness of any proposition of law underlying an implied question. No case has been called to our attention in which such a burden has been imposed upon an agency of the Government. If such were the rule, the Department would act at its peril in responding to any request for a determination of fact unless it first ascertained the inquiring party's interpretation of all relevant laws and regulations. Such a ruling, however, would seem essential in order to convert the Geological Survey's determination that the lands in question were "not considered to be within the productive limits of any oil or gas deposit occurring stratigraphically below the base of the Pennsylvania Tensleep sandstone" into a determination that appellant was entitled to the flat 12½-percent royalty rate on production from the Madison and Cambrian formations.

The limited view taken of the rulings of the Geological Survey is not quibbling. This is demonstrated by the exchange of correspondence at the same time between the appellant and the Survey concerning lease Cheyenne 029630(b). As pointed out earlier, appellant asked the Survey to determine that the two tracts in that lease were not within the productive limits of *any* deposit as of August 8, 1946. The Survey determined that one tract was not believed to be within the productive limits of *any* deposit but that the second tract was believed to be within the productive limits of the Tensleep deposit but not within the productive limits of *any other* deposit. If, as appellant argues here, its request was for a determination that the royalty rate on any production to be obtained from lease Cheyenne 029630(b) was 12½ percent (because the two tracts were not within the productive limits of *any* deposit), then the Survey's response must be read as having said (1) that the 12½-percent rate would apply to the first tract (since it was not within the productive limits of *any* deposit) but (2) that the 12½-percent rate would *not* apply to the second tract (since it was within the productive limits of a deposit (the Tensleep deposit) although not within the limits of *any other* deposit). Yet the determination made by the Geological Survey as to the second tract is precisely the determination that it made as to the two leases involved here.

Appellant places additional reliance upon the fact that the regional oil and gas supervisor approved division orders, prepared by appellant, providing for royalty payment at the rate of 12½ percent for produc-

tion from the Madison and Cambrian formations. This approval of the division orders, appellant appears to argue, coupled with the fact that the Geological Survey billed appellant and accepted payment at the rate of 12½ percent until 1961, estops the United States from asserting any right to additional royalty payment notwithstanding the fact, pointed out by the Geological Survey and acknowledged by appellant, that the oil and gas supervisor approved the division orders "subject to the condition that nothing herein shall be construed as affecting any of the relations between the lessee and the Secretary of the Interior."

Again, we are unable to see wherein the cited acts demonstrate an affirmative determination by the Geological Survey that the accepted royalty payments constituted full payment of appellant's royalty obligation. The most that the evidence establishes is that the Geological Survey accepted appellant's own determination of its royalty obligation for 13 years without question. We cannot deny that this acceptance of lesser payments than those called for under the terms of the leases constituted error on the part of the Geological Survey, but it was error of the nature that traditionally has been held not to estop the United States from demanding payment of that which is lawfully due.

In *City and County of San Francisco v. United States*, 223 F. 2d 737 (9th Cir. 1955), cert. denied, 350 U.S. 903 (1955), the court upheld the right of the United States, after waiting 10 years before making a claim and 19 years before bringing suit, to recover the cost of maintenance and repair of certain trails, roads, and bridges in Yosemite National Park for which, by law, the city was required to reimburse the United States but for which, under an agreement between the city and the Secretary of the Interior, later held to be unauthorized, the city was excused from making payment. If the United States cannot be estopped from demanding payment of that which is lawfully due by an express, albeit unauthorized, waiver of an obligation by the Secretary of the Interior, it is exceedingly difficult to see upon what principle it could be estopped from making the same demand by any act of a Departmental employee short of an express waiver of the obligation. Cf. *Automobile Club of Michigan v. Commissioner of Internal Revenue*, 353 U.S. 180, 183 (1957), and *Dixon v. United States*, 381 U.S. 68, 72 (1965), in which the Court held that the acquiescence of the Commissioner of Internal Revenue in an erroneous ruling does not bar him from correcting a mistake of law or estop the United States from collecting a tax that is lawfully due.

The facts in the present case would seem to be analogous with those found in *United States v. Ohio Oil Co.*, 163 F. 2d 633 (10th Cir. 1947), in which case the Secretary of the Interior, acting under asserted

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authority of an administrative regulation embodied in Departmental oil and gas leases, determined the minimum value for which he would accept payment for royalty oil from such leases in Wyoming and threatened to institute proceedings to cancel the leases there in question unless the lessees paid the minimum price fixed and determined by the Secretary. The Ohio Oil Co., under protest, paid the difference between 77 cents per barrel, the price for which it sold royalty oil to a pipeline company, and \$1.02, the price established by the Secretary, and instituted action to recover that money. In upholding the authority of the Secretary to exact the specified payment, the court stated that:

"We agree with the appellee that in all of his transactions with the lessee, the Secretary acted for and on behalf of the Government in a proprietary capacity, and that his contractual powers were measured by the basic enabling Act and the amendments thereto." *

* * * It is said that the contract [between the producer and the pipeline company] was fairly and openly entered into with the Secretary's knowledge and consent, that the producers were obligated to and did sell and deliver approximately 16 million barrels of oil thereunder, and the Government is estopped to deny that it does not represent the reasonable minimum value of the oil.

On the question of estoppel, it is sufficient to say that the purchase contracts were submitted to and approved by the Secretary, with the express understanding that his approval should not be construed as an admission by the United States that the prices to be paid for the crude oil under the agreement, insofar as it applied to the Government royalty oil, "are reasonable or representative of its fair value, or acceptable to the United States." It is thus plain that aside from the traditional inapplicability of the doctrine of estoppel against the United States, * * * the Secretary is not estopped to determine the reasonable minimum value of the royalty oil. 163 F. 2d at 639, 641.

Under the principles which have been found controlling in the cited cases, it seems clear that there has been no estoppel in the present case and that the Secretary is without authority to accept anything less than the royalty called for by the terms of the leases in satisfaction of appellant's obligation to the United States. See *Pine River Logging Co. v. United States*, 186 U.S. 279, 290 (1902).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

EDWARD WEINBERG,

Solicitor.

STATE OF CALIFORNIA

v.

E. O. RODEFFER

A-30611

Decided June 28, 1968

Mineral Lands: Determination of Character of—State Exchanges: Generally—State Selections—School Lands: Mineral Lands

To establish the mineral character of lands sought by a State, either in exchange for other lands or as indemnity for lost school lands, it must be shown that known conditions are such as reasonably to engender the belief that the lands contain mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end.

Mineral Lands: Determination of Character of—School Lands: Mineral Lands

The mineral character of land may be established by inference without actual exposure of the mineral deposit for which the land is supposed to be valuable, but the inferred existence of a deposit of high-quality limestone at unknown depth does not establish the mineral character of land in the absence of evidence that extraction of the limestone is economically feasible, thereby giving the land a practical value for mining purposes.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of California has appealed to the Secretary of the Interior from a decision dated March 3, 1966, whereby the Office of Appeals and Hearings, Bureau of Land Management, declared the Mountain Top Nos. 15, 16, 17, 20, and 22 and Cordelia placer mining claims in secs. 22, 25, 26, and 29, T. 4 N., R. 2 E., S.B.M., California, to be null and void and the lands upon which they were located to be mineral in character.

By a decision dated February 5, 1963 (*State of California*, A-29002), the Department remanded to the Bureau of Land Management for further consideration State selection applications Los Angeles 0106494, 0125042 and 0126829 after the Appeals Officer of the Bureau affirmed decisions of the Los Angeles, Calif., land office rejecting those applications as to certain lands in secs. 22, 25, and 29, T. 4 N., R. 2 E., selected by the State of California as indemnity for school lands lost to it. The applications were initially rejected as to the lands in question for the reasons that the lands were mineral in character and were embraced in valid mining claims. By another decision (*Mansell O. La Fox et al., State of California*, 71 I.D. 199 (1964)), the Department remanded to the Bureau State exchange application Los Angeles 0134989, directing a hearing to determine the questions of the mineral character of certain selected lands and the validity of mining claims located thereon and found by the Bureau to be valid. Pursuant to the latter decision, on July 10, 1964, the Chief, Office of Appeals and Hearings, ordered

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a hearing in connection with the State exchange application, instructing the appointed hearing examiner to make a recommended decision and to submit the record of the hearing, together with the recommended decision, to the Director, Bureau of Land Management, for initial decision in accordance with 43 CFR 1852.3-8(c). On July 20, 1964, upon the recommendation of the Riverside, Calif., land office, the State of California filed contest complaints, in three separate actions, against mining claims embracing lands described in the indemnity selection applications.

At the request of the contestee, and in view of the fact that all of the lands in controversy are in the same township and the parties and issues are the same in each case, the four actions were consolidated into one proceeding. A hearing was held at Los Angeles, Calif., on October 7, 1965, and after the hearing examiner made his recommendations, the Office of Appeals and Hearings issued its decision of March 3, 1966.

From the evidence presented at the hearing, the Office of Appeals and Hearings found that the mineral materials disclosed on the mining claims consist of lime-bearing marl and caliche and sparse pieces of limestone, that such materials are found in varying quality and quantity throughout the desert in the vicinity of high quality limestone deposits where lime has been spread by leaching and erosion, and that the minerals found on the mining claims can be used in the manufacture of cement and are superior for such use to common clays but are, nevertheless, merely a constituent material. It further found that the minerals exposed on the claims have had no market at any time because there has been no processing plant at which they could be used, that, in the absence of such a plant, the minerals have no commercial value, and that the mining claimant had no plans to construct such a plant but merely hoped to sell the claims to an association that had not agreed to purchase the claims and had not determined that the construction of the plant needed to utilize the minerals found therein was feasible. It also found that the Blackhawk Breccia formation of high quality limestone may extend under the mining claims, although no significant quantities of limestone have been exposed on any of the claims, which claims have been explored only to the extent of bulldozer cuts of insignificant depth.

The Office of Appeals and Hearings held that where nonmetallic minerals of widespread occurrence are located under the mining laws, discovery of a valuable mineral deposit can be demonstrated only by showing present marketability of the minerals and that, since the marl and other materials exposed on the claims are without commercial value until a suitable plant is available to process them and since

there has never been such a plant and there has not been a firm plan for the construction of a plant, there has never been the required present market for the materials necessary to demonstrate the discovery of a valuable mineral deposit.¹ It concluded, therefore, that the claims were invalid. At the same time, it found the lands to be mineral in character, holding them to be "prospectively valuable in that, by geological inference, the Blackhawk Breccia formation of quality limestone may extend under such lands," and it held that the State's selection of the lands could be allowed only under the conditions specified in 43 U.S.C. secs. 851 and 852 (1964).²

The Bureau's decision, insofar as it held the mining claims in question to be invalid, has not been challenged; therefore the Bureau's finding on that issue is now a conclusive determination of the rights of the mining claimant. However, the State has appealed from that portion of the decision declaring the lands embraced in the mining claims to be mineral in character. It contends that the Bureau employed an improper standard in finding the lands to be "prospectively valuable" for limestone, that the only difference between the test for determining whether or not land is mineral in character and the test of discovery is that the former does not require an actual discovery. The State asserts that the evidence presented at the hearing does not support the finding that the lands contain valuable mineral deposits.

The issues of discovery and of the mineral or nonmineral character of lands have been before the Department for consideration in a wide variety of situations but rarely, if at all, in the posture which they assume in this instance. Although it has been customary in contests of mining claims for the contestants to make the dual charges that no discovery has been made and that the lands embraced in mining claims

¹ The "marketability test," as a proper complement to the "prudent man test" of the discovery of a valuable mineral deposit, was recently upheld by the Supreme Court in *United States v. Coleman*, 390 U.S. 599 (1968).

The Office of Appeals and Hearings also found that the minerals exposed on the claims were "common varieties," not locatable after July 23, 1955. It found, however, that it was not clear from the evidence in the record whether the claims were located before or after July 23, 1955, and, therefore, it did not attempt to determine whether or not the minerals in the claims were locatable at the time of the mining claim locations. Since the Bureau's decision did not turn upon the issue of "common varieties," and that question is not at issue in the present appeal, we find it unnecessary at this time to examine the correctness of the Bureau's finding on that point.

² Rev. Stat. secs. 2275 and 2276, as amended, 43 U.S.C. secs. 851 and 852 (1964), authorize the selection of indemnity lands which are mineral in character only "to the extent that the selection is being made as indemnity for mineral lands lost to the State or Territory because of appropriation prior to survey." Prior to the act of August 27, 1958, 72 Stat. 928, the statute authorized the selection only of lands "not mineral in character."

In a State exchange of lands under section 8 of the Taylor Grazing Act, 43 U.S.C. sec. 315g (1964), the Secretary of the Interior is required to issue a patent with a reservation of all minerals to the United States if the exchange involves lands of equal acreage and the selected lands are mineral in character; and he is authorized to issue a patent with a reservation of minerals if the exchange involves lands of equal value, but consummation of an exchange is not barred by a determination that the selected lands are mineral in character.

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are nonmineral in character, a finding on one of the issues is normally dispositive of a controversy and makes it unnecessary to make a finding on the other issue. The reason for this is fairly obvious. Proof of the discovery of a valuable mineral deposit is concurrent proof of the mineral character of the land on which the discovery is made, and, where a discovery is shown, there is no occasion to make a separate finding with respect to the mineral character of the land on which the discovery has been made. On the other hand, a finding that there has not been a discovery normally renders moot the question of mineral character, since the discovery of a valuable mineral deposit is indispensable to the validity of any mining claim and a finding that land in a mining claim is mineral in character can not validate the claim in the absence of a showing of discovery. A finding that land is not mineral in character, of course, is necessarily a finding that a discovery has not been made upon that land.

For these reasons, the Bureau having determined that the mining claims in question are invalid for lack of discovery, it is not essential to determine whether the lands in the claims are mineral in character so far as the validity of the claims is concerned. It remains necessary, however, to determine whether the lands are mineral in character so far as the State applications are concerned. In other words, with the mining claims out of the way as absolute barriers to allowance of the State's applications, the case comes down to the ordinary one of the allowability of a State application where no mining claim is concerned but there is a question as to whether the lands applied for are mineral in character.

The terms "mineral lands," "lands known to be valuable for minerals," and "lands mineral in character" have been used in the statutes, regulations and decisions relating to the public lands without a perceptible difference in meaning in describing the lands which are excluded from operation of many of the nonmineral public land laws because of known or supposed mineral values. The recognized test for determining whether or not land is properly included in the category described by these terms is whether the known conditions were, at the time the determination was to be made, such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. *Diamond Coal and Coke Co. v. United States*, 233 U.S. 236, 240 (1914); *United States v. Southern Pacific Company*, 251 U.S. 1, 13 (1919); *United States v. State of California et al.*, 55 I.D. 121, 177 (1935), *aff'd Standard Oil Co. of California v. United States*, 107 F. 2d 402 (9th Cir. 1939), *cert. denied*, 309 U.S. 654, 673, 697 (1940); *Southern Pacific Company*, 71 I.D. 224, 233 (1964); *John M.*

DeBevoise, 67 I.D. 177 (1960).³ It will be readily observed that this test is similar to the "prudent man" test of discovery set forth in *Castle v. Womble*, 19 L.D. 455 (1894), requiring that a discovery be shown by evidence of the finding of minerals of such value as to justify a person of ordinary prudence in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. In spite of the similarities, however, the two standards are not identical.

The Department has long held that the discovery of a valuable mineral deposit can be demonstrated only by the physical exposure within the limits of a mining claim of the mineral deposit for which the claim is alleged to be valuable and that inference of the presence of valuable minerals, drawn from the proved existence of mineral deposits outside the limits of the claim or from the geology of the area, cannot be substituted for the actual exposure of a mineral deposit within those limits. See, e.g., *United States v. Kenneth O. Watkins and Harold E. L. Barton*, A-30659 (October 19, 1967), and cases cited; *United States v. Taylor T. Hicks et al.*, A-30780 (October 24, 1967). On the other hand, the mineral character of land may be established by geological inference without the exposure on the land of the minerals believed to be found therein.

* * * It is not essential that there be an actual discovery of mineral on the land. It is sufficient to show only that known conditions are such as reasonably to engender the belief that the land contains mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. Such belief may be predicated upon geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent and experienced men are shown to be accustomed to act. *Southern*

³ In early cases involving the question of mineral character of lands, the Department frequently employed a standard of comparative values. That is, lands which were found to be more valuable for mining than for agricultural use were determined to be mineral lands. In *Cataract Gold Mining Co. et al.*, 43 L.D. 248 (1914), the Department reexamined the basis for determination and concluded that:

"* * * There are a number of decisions of this Department which dispose of controversies between mineral and agricultural claimants upon the stated ground that the lands are more valuable for agriculture than for mining or vice versa, but a careful consideration of those opinions seems to support the view that the expression used was based, upon the fact that the land involved possessed a positive or greater value for the purpose for which the award was made and no practical or commercial value for the purpose for which patent was denied.

"* * * [A] careful review of the laws and of the various decisions of this Department and of the courts appears to support the conclusion that if a mineral claimant is able to show that the land contains mineral of such quantity and value as to warrant a prudent man in the expenditure of his time and money thereupon, in the reasonable expectation of success in developing a paying mine, such lands are disposable only under the mineral laws, notwithstanding the fact that they may possess a possible or probable greater value for agriculture or other purposes. In other words, the mineral deposit must be 'valuable' one; such a mineral deposit as can probably be worked profitably; for, otherwise, there would be no inducement or incentive for the mineral claimant to remove the minerals from the ground and place the same in the market, the evident intent and purpose of the mining laws." Pp. 252, 254.

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Pacific Company, supra, at 233; see *United States v. U.S. Borax Co.*, 58 I.D. 426, 433 (1943), and cases cited.

The most obvious difference between the two tests then is that a determination that land is mineral in character does not depend upon an actual discovery or exposure of mineral upon the land. The existence of the mineral, its quality and quantity, may be determined by geologic inference or by less conclusive evidence than is required to establish the existence of a discovery under the mining laws. Thus, a determination that land is mineral in character may not be inconsistent with a finding that a valuable mineral deposit has not been found on that land. However, whether the question is one of a discovery under the mining laws or the mineral character of land under a nonmineral land law, the end inquiry is essentially the same, namely, whether or not exploitation of the minerals is believed to be economically feasible. To this inquiry we now turn.

The Bureau's determination that the lands in question are mineral in character rests upon a summary finding that, "by geological inference, the Blackhawk Breccia formation of quality limestone may extend under such lands." The Bureau's decision reflects no consideration of any other criteria in making the determination. Upon review of the evidence in the record we find no sound basis for this conclusion or for concluding that the lands in question contain mineral of such quality and in such quantity as to render its extraction profitable and to justify expenditures to that end.

The record shows that the mining claims in question, as well as many more mining claims held by Rodeffer in the same township which are not at issue here, were examined by G. W. Nielsen, a mining engineer employed by the Bureau of Land Management, in July 1956 and April 1957. In the report of his examination of July 1956 Nielsen found that:

The claims are located on the south side of Lucerne Valley which is part of the Mojave Desert. These claims lie just below and to the north and northeast of Black Hawk Mountain.

The lower portion of this land lying to the north have been located for its Marl. This Marl is an impure calcareous mixture of sand, limestone, and clay. This Marl has been laid down in a thin, broad, flat sheet covering large areas in and just above the valley. It is an erosion [sic] product which has been carried off of the mountains and laid down in the valley. It varies in thickness from a few inches to many feet. The lime content which has cemented the material together originated from the Furnace Limestone to the south and southeast. The Furnace Limestones, which are the parent or originating source of the lime found on these claims, has been dated by Paleontologists as being of the carboniferous age, as these fossil horizons have not been worked out, only a general dating can be given the Furnace formation.

Those claims that are located at the higher elevations and designated as "stone" in the * * * [table contained in the report] are located in a brecciated material of good quality limestone which appears to have slid from Black Hawk Mountain as a landslide. In the early studies of this area this type of material has been termed Blackhawk Breccia.

* * * * *

The Mountain Top claims No. 1 thru 14 [with which we are not now concerned] are all good limestone. This stone occurs as fragmented masses in place which can be mined by a power shovel without either drilling or blasting. The stone on these claims would be most simple and inexpensive to mine.

All other claims listed [including the ones in issue], on [sic] are located on the flat [sic] and were staked for the Marl which contains from 13 to 40 percent CaO on the *raw ore* basis. * * * (Italics supplied).

The claims in issue were tabulated as having a CaO content of from 12.9 percent to 41.3 percent whereas the Mountain Top Nos. 1 to 14, described as being "all good limestone," were listed as having a CaO content of from 42.2 percent to 55.4 percent.

After discussing the mining claimant's plans to utilize the limestone and marl on the claims in the manufacture of cement, Nielsen determined that:

The obvious conclusion to be drawn is * * * that the limestone materials found on the claims are suitable for the manufacturing of many of the more popular types of cement in demand.

The conclusion that a market is available and that the claims are located in a competitive area is logical and born out by the fact that Permanente Cement Co., is building a large plant in the immediate area and several other cement companies are scouting and taking options on local limestone properties.

* * * * *

It is therefore concluded that these lands are mineral in character within the meaning of the public law.

However Nielsen went on to say:

Though it appears that there is a market for this material, the claimants have yet to prove this by the construction of a lime processing plant.

Without such a plant the claimants would not be able to market this material and the majority of it would be without value.

At the hearing, George W. Ginn, a geologist employed by the State, testified that the claims at issue are situated in an arm of the Majave Desert known as Lucerne Valley, that they are near the base and north of the San Bernardino Mountains, that there are several limestone operations from 3 to 6 miles south and southwest of these claims in the foothills of the mountains at which mining is done from the Blackhawk Breccia, and that the Blackhawk Breccia is not exposed on any of the claims in question but may extend beneath them at an unknown depth (Tr. 21, 33-35, 41-44). In explaining the reasons for his opinion, expressed at the hearing, that the claims do not contain any known

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mineral deposits in any value sufficient to justify the expense of exploitation at the present time or in the foreseeable future, Ginn stated:

* * * I think if limestone were sought, and I believe that's what these claims are for, a person would, a prudent operator, in my opinion, would have too much alluvium to remove to get to any limestone deposits which may or may not lie underneath. You have the Blackhawk Breccia which is adjacent, which would have been a more likely site to do prospecting for limestone.

You also have great competition from the furnace limestone which was being mined and produced by operators farther up the mountain. Tr. 37.

E. O. Rodeffer, the mining claimant and contestee in the proceeding, testified that he planned to use the marl or caliche from the claims in question, along with limestone taken from other nearby mining claims under his control, in the manufacture of portland cement (Tr. 68-71). However, although he first talked about building a plant to produce cement for his own use from all his claims, including some at a higher elevation and having a high quality limestone (Tr. 61-65), he eventually revealed that he was negotiating to sell his claims to a company which would build the plant and manufacture cement (Tr. 71-73).

Robert E. Freeland testified that he was examining the claims for the prospective purchaser but had not completed his investigation. He thought that the marl or caliche could be a constituent of cement (Tr. 87, 89-93).

A fair summary of the evidence is that the claims in question have value only for the marl or caliche on them as distinguished from limestone and that the value of the marl or caliche depends upon the economics of constructing a cement plant to process the material from numerous claims in the vicinity, including those with high grade limestone deposits. The fact that an investigation was being made at the time of the hearing in October 1965 but that Rodeffer did not appeal from the Bureau's decision of March 3, 1966, suggests that expectations for the claims did not materialize. Therefore, as far as the marl or caliche is concerned, we are unable to point to any evidence which would sustain the conclusion that the lands in question are valuable for that material.

As we have seen, the Bureau made no attempt to reach such a conclusion but based its decision solely on a determination that by geological inference the Blackhawk Breccia formation of quality limestone might extend below the lands. We can find no substantial evidence to support this conclusion. The testimony of Ginn to that effect was little more than conjecture and the Bureau cites no other evidence.

Aside from this lack of evidence as to value for limestone, in finding that the lands are "prospectively valuable" for limestone, the Bureau

apparently attempted to use the same standard which is employed with respect to oil and gas and some other minerals. In doing so, it has overlooked the fact that the "prospectively valuable" standard rests upon the act of July 17, 1914, as amended, 30 U.S.C. secs. 121-123 (1964), which applies only to "phosphate, nitrate, oil, gas, or asphaltic minerals." The rationale of the "prospective value" standard is set forth in *Foster v. Hess* (on rehearing), 50 L.D. 276 (1924); see also *Solicitor's Opinion*, 65 I.D. 39, 41-42 (1958).

As we have already explained, the criteria for determining land to be valuable for other minerals are substantially different. The fact that land is underlain with deposits of limestone sufficient in both quality and quantity to be useful does not establish the mineral character of the land if, for some reason such as cost of extraction, lack of access to a market or inferiority in grade in comparison with other equally accessible deposits, the limestone has no practical economic value. See *Morrill v. Northern Pacific R.R. Co. et al.*, 30 L.D. 475 (1901); *Holman et al. v. State of Utah*, 41 L.D. 314 (1912); *Gray Trust Company* (on rehearing), 47 L.D. 18 (1919); *Big Pine Mining Corporation*, 53 I.D. 410 (1931); *United States v. C. E. Strauss et al.*, 59 I.D. 129 (1945). *A fortiori*, the mere possibility that land may contain a limestone deposit does not, by itself, establish the mineral character of the land. Accordingly, the Bureau erred in finding the lands in question to be mineral in character in reliance upon nothing more than an inference that they contain deposits of quality limestone.

In finding that the mineral character of the lands in question has not been established, we do not make a conclusive finding that the lands are not mineral in character. We find only that the evidence presently of record does not sustain the Bureau's determination. If there is other evidence, not contained in the record, that the lands do possess an economic value for their mineral resources, the Bureau is not precluded from considering that evidence and taking such action as may be appropriate. If, on the other hand, there is no evidence of economic value beyond that now disclosed, the State's applications should be processed to final disposition upon a finding that the lands are not mineral in character.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2,2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed insofar as it held the Mountain Top Nos. 15, 16, 17, 20, and 22 and Cordelia mining claims to be invalid, and it is vacated insofar as it held the lands embraced in those claims to be mineral in character, and the case is remanded to the Bureau of Land Management for further action consistent with the views expressed herein.

ERNEST F. HOM,
Assistant Solicitor.

*July 18, 1968***APPEAL OF POWER CITY CONSTRUCTION & EQUIPMENT, INC.****IBCA-490-4-65***Decided July 17, 1968***Rules of Practice: Evidence—Contracts: Disputes and Remedies:
Generally**

Adhering to principles enunciated in a prior decision, the Board finds that a memorandum from a Government employee to his superior containing a recommendation as to settlement of a claim constituted a privileged communication to which the appellant was not entitled, insofar as the nonfactual portions of such memorandum are concerned.

**Rules of Practice: Appeals: Dismissal—Contracts: Disputes and Remedies:
Jurisdiction—Contract Construction and Operation: Changes and
Extras**

The Board denies the Government's motion to dismiss an appeal as beyond the purview of its jurisdiction where it finds: (i) that a delay of approximately 30 days in supplying a contractor with Government-furnished steel had no significant impact upon the overall performance of the contract; and (ii) that the Government's action in furnishing large quantities of misfabricated steel not only disrupted the contractor's assembly and erection program as had been recognized by the contracting officer in a proposed amendment to the contract but on a rather short schedule job necessarily disrupted the succeeding program of conductor stringing as well, with the result that the costs shown to be attributable to the Government's action were found in both instances to stem from a constructive change.

**Contracts: Disputes and Remedies: Equitable Adjustments—Contracts:
Disputes and Remedies: Damage: Measurement**

Finding that the claims involved had been submitted on a total-cost basis and that the record shows the contractor to have been responsible for a significant portion of the costs for which claims had been made, the Board determines the equitable adjustment to which the appellant is entitled by resort to the so-called "jury-verdict" approach.

BOARD OF CONTRACT APPEALS

The instant appeal raises serious questions as to (i) jurisdiction (ii) liability; and (iii) quantum. Before considering these questions we will undertake to briefly summarize some of the background against which the disparate contentions of the parties should be viewed.

The contract¹ was awarded on May 22, 1963, in the estimated amount

¹ Listed in the Appeal File Index as Exhibit No. 70. To avoid confusion this reference will be used in the opinion. It should be noted, however, that the Appeal File Index assigns exhibit numbers 18 through 69 to the weekly digests of Government inspection reports even though only 42 digests are involved. Treating the earliest digest (6/6—6/12/63) as Exhibit No. 18 and numbering the balance consecutively therefrom, the weekly digests comprise exhibit numbers 18 through 59. Except as otherwise indicated, all references to exhibits are to those contained in the appeal file.

of \$169,977 with payment for the work performed to be made on a unit price or a lump-sum basis as specified in a schedule of unit prices. It provided for clearing the right-of-way, construction of access roads and construction of the Stevenson tap to Bonneville-Alcoa No. 1 and No. 2 115 KV line. Prepared on standard forms for construction contracts (including General Provisions as set forth in Standard Form 23-A, April 1961 Edition), the contract contained the following provisions of particular interest in addition to Clause 3, Changes and Clause 5, Termination For Default—Damages For Delay—Time Extensions of the General Provisions:²

3-102. MATERIALS, TOOLS AND EQUIPMENT FURNISHED BY THE GOVERNMENT A. Materials, tools and equipment, which are specified in Part I of these specifications and on bills of material and drawings to be furnished by the Government, will be delivered to the contractor as indicated below:

* * * * *
2. For construction of transmission lines: Government-furnished materials, tools and equipment will be delivered to the contractor at storage points as designated in Part I of these specifications.

* * * * *
F. The Government will make every reasonable effort to secure delivery of construction materials, tools, and equipment which the Government is to furnish so as to avoid any delay in the progress of the contractor's work as outlined in his construction program. However, should the contractor be delayed because of failure of the Government to make such deliveries, the contractor shall be entitled to no additional compensation or damages on account of such delay. The only adjustment will be the granting of an appropriate extension of time within the provisions of Clause 5, General Provisions, of this contract. (PART III, GENERAL TECHNICAL PROVISIONS.)

8-112 PAYMENT:

* * * * *
N. Misfabricated Steel

* * * * *
2. When major misfabrication occurs, such as pieces incorrectly bent which might require dismantling of a tower or other work of a major nature, the contracting officer will, at his option, require correction to be made by the steel supplier or negotiate such correction with the contractor as extra work, whichever is in the best interest of the Government. * * * (PART VIII, ERECTION OF STEEL TOWERS.)³

Under the terms of the contract the Government was required to furnish the steel needed to construct the transmission line which was approximately ten and one-half miles in length. As to the availability of such steel, Addendum No. 2 to the invitation revised a portion of Section 1-106 of the specifications, as previously amended, to read:

² Also of interest is Clause 2-115 of the Supplementary General Provisions entitled "Extra Work."

³ Elsewhere in the contract there is an identical provision pertaining to the placement of structural steel in foundations and guy anchors (Section 7-506D) and a virtually identical provision for tubular pole steel towers (Section 8-209F).

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It is anticipated these materials will be available at the Government's storage yard, as follows:

Tubular steel poles	July 25, 1963
Tower footing steel	June 15, 1963
Tower steel	July 20, 1963

The completion time specified in Section 1-108 COMMENCEMENT, PROSECUTION AND COMPLETION, is changed from 135 calendar days to 160 calendar days.

At the award conference on May 22, 1963, the status of prospective deliveries of Government-furnished steel was discussed.⁴ Based upon information obtained from the steel supplier concerned, the contractor was advised that there would be no change in the above-specified date for tubular steel poles but that deliveries of tower footing steel and tower steel would be five and ten days later, respectively, than the dates shown in Addendum No. 2. Recorded remarks of representatives of both the contractor and the Government indicate that past experience with the supplier from whom the steel was to be obtained had not been satisfactory. Prior to award a Government representative advised the contractor that the steel contract required the steel to be assembled into towers before it was shipped.⁵ During the discussion following the award of contract, the Government gave the contractor further assurances respecting the requirements of the steel contract as well as the inspection to be provided by the Government therefor.⁶

The notice to proceed was issued on May 27, 1963, with an agreed upon effective date of June 3, 1963. This established a scheduled completion date of November 10, 1963. By letter of January 30, 1964 (Exhibit No. 7), the contractor requested a 45-day extension in the time for performance. The Government, subsequently, issued Contract Change B, dated March 2, 1964, by which the contract per-

⁴ See Government memorandum dated May 23, 1963; Appellant's Exhibit No. 3.

⁵ "Mr. Stewart: In way of explanation, this steel contract has a clause that all steel has to be assembled into towers before it is shipped. He makes a prototype, assembling the tower on the floor, before he moves into production. * * *" (Appellant's Exhibit No. 3.)

⁶ "Mr. Gustafson: He [the supplier] sends pictures of them completely assembled and then they aren't that way. The sections aren't put together. Mr. Stewart: We are going to have a man down there watching him on this job. Mr. Gustafson: Good." (Appellant's Exhibit No. 3.)

formance time was extended by 37 calendar days⁷ to December 17, 1963,⁸ the date of contract completion.

The contractor, subsequently, made a claim for additional costs said to be due to the change in job conditions created by the material delivery.⁹ In response to the Government's request for substantiation of the additional cost claimed, the contractor furnished considerable information as to the manner in which its bid estimates were prepared and undertook to relate the granting of the time extension to the merits of the claim.¹⁰ Thereafter, the contractor submitted its letter of March 25, 1964 (Exhibit No. 13), in which the claim was substantially revised and reduced to the sum of \$24,199.46. After outlining the difficulties experienced as a result of the late arrival of steel and the inferior fabrication encountered, the contractor presented two claims. The claim for cleanup¹¹ is based upon the contractor's progress reports showing that 538 man-hours were expended over and above the amount allowed for misfabrication in the misfabrication reports together with the related amounts claimed for equipment and overhead. The claim for conductor stringing¹² is predicated upon the contractor's contention that 1,302 hours were required to complete the work in excess of what had been estimated therefor together with the related amounts claimed for equipment and overhead.

In the Findings of Fact (Exhibit No. 17), the contracting officer acknowledged (i) that because of late deliveries and large quantities of rejections, "substantially complete availability of tower steel was not achieved until August 26, 1963" (i.e., almost a month later than the date estimated at the award conference of May 22, 1963) (ii) that some replacements for misfabricated steel pieces came in after that

⁷ Contract Change B increased the Schedule of Unit Prices by the lump sum of \$716.65 for the labor, tools and equipment required to make corrections of a major nature because of misfabricated steel and included the following finding: "The contractor was delayed due to performance of this extra work and because of additional time needed by the Government to provide him with properly fabricated steel. It is determined that the contractor was delayed by unforeseen causes beyond his control and without his fault or negligence and that he is entitled to an extension of 37 calendar days for completion of the contract."

⁸ Findings of Fact of February 26, 1965; Exhibit No. 17.

⁹ Contractor's letter of February 24, 1964 (Exhibit No. 9), in which the claimed costs totaled \$36,812.14.

¹⁰ The contractor states in a letter of March 13, 1964 (Exhibit No. 11): "We maintain and by the granting of a 37 day time extension, feel you have admitted to a change in contract conditions. We do not feel that as contractors we should be penalized in a monetary sense because we were forced to perform work under adverse weather conditions and did not have material available to work during good weather conditions. * * *"

¹¹ " * * * This cleanup consisted of tightening bolts, replacing pieces of misfabricated leg extensions and correcting other misfabrications. * * *" (Exhibit No. 13.)

¹² "The very thing that we feared most on this contract happened when we started our conductor stringing. The rains came! Our man hours on conductor stringing exceeded the estimate by some 124 man hours per mile. Our costs skyrocketed due to the additional overtime pay required to maintain any acceptable type of schedule." (Exhibit No. 13.)

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date, as late as October 10, 1963; and (iii) that large numbers of steel pieces had to be corrected at the Government's storage yard by the steel supplier, refabricated or replaced by local vendors or re-ordered and shipped from the steel supplier's plant.

Treating the contractor's claim as based "on the cumulative effect of delayed delivery of government-furnished material,"¹³ the contracting officer denied the claim under the authority of Section 3-102 *supra*, except to the extent of \$3,802.79, allowed for replacing major misfabricated pieces of steel pursuant to the provisions of Sections 7-506D (note 3, *supra*) and 8-112N *supra*.¹⁴ He also noted that the contractor had previously received an extension of 37 days in the time for performance of the contract due to late delivery of steel and delays caused by correction of misfabricated pieces.¹⁵

The contracting officer also found (i) that the \$24,199.46 claimed for in the letter of March 25, 1964 (Exhibit No. 13), was "represented to be the value of labor and equipment used in excess of that estimated by the contractor at the time of preparing its bid as being required to complete the contract,"¹⁶ and (ii) that "the contractor could have avoided some of his cost by prosecuting the work in a more vigorous, orderly, and efficient manner." The latter determination was supported by the following additional findings: (i) the contractor's request for approval of its subcontractor for footing installation was not submitted until July 15, 1963, with the subcontractor not beginning the footing work until July 22, 1963, which dates were 42 days and 49 days, respectively, after the notice to proceed (ii) on the basis of the steel available the contractor could have started assembly of structures on August 5, 1963, instead of August 22, 1963, with the result that steel pole structures could have been erected and guyed during this period (iii) if a small assembly crew and erection crew had been started on August 5, 1963, using the small crane available,

¹³This is not an accurate characterization of the claim. The contractor had consistently coupled late deliveries and excessive misfabrication as the joint cause of its difficulties. Elsewhere in the findings the basis upon which the claim had been asserted is explicitly recognized.

¹⁴The finding is not entirely accurate. Both the memorandum of November 30, 1964 (Exhibit 15), upon which the determination appears to be based, and proposed Contract Change C (Appellant's Exhibit No. 5), clearly show that the amount found to be due the contractor includes allowances for correction of misfabricated pieces.

¹⁵This reflects the basis upon which the time extension was sought (Exhibit No. 7), rather than the basis for granting the time extension as set forth in Contract Change B (note 7, *supra*).

¹⁶The notice of appeal contains an exception to this statement: "* * * In our letter of March 13, 1964, we conceded a 20% error in estimate as being our responsibility, and this amount is not reflected in our change order request. Again in our letter of March 21st [sic] we did not include one additional dollar in our request for assembly or erection, which items had exceeded our estimate by 20%. * * *" (Notice of Appeal; accompanying letter of March 26, 1965, p. 1.)

much productive work could have been accomplished by August 15, 1963, when all of the 10L tower steel became available (iv) if assembly had followed this pattern and if the contractor had enlarged its assembly crews earlier than it did, enough steel could have been assembled for erection to have begun on approximately September 16, 1963, instead of September 30, 1963; and (v) tower cleanup—consisting of installation of many missing bolts, correction of incorrect piece installations and tightening of loose bolts—should have been performed concurrently with erection.

Addressing himself specifically to the major element of the contractor's claim (i.e., the excessive man-hours required to perform the stringing operations), the contracting officer questioned whether the Government's delay, in furnishing the steel¹⁷ had been responsible for costs incurred at least to the extent claimed, noting: (i) at the outset the contractor had indicated that stringing operations were to be performed during the period from September 25 to November 9, 1963, a period of 45 calendar days including 33 working days (ii) actual stringing operations occurred between November 11 and December 15, a period of 34 calendar days with 23 possible non-overtime working days (iii) the three days of overtime worked during actual stringing operations only compensated for the three days lost commemorating national holidays of which only one was reflected in the foregoing computations, with the net result that the contractor worked his stringing crews a total of 24 days (iv) as the number of men comprising the stringing crew was not regarded as above normal, the stringing progress attained of approximately one-half mile per day and 2½ miles per five working days was considered a reasonably satisfactory rate of progress (v) the contractor should have expected that a considerable portion of the stringing work might have to be done in wet weather, since climatological data pertaining to the Bonneville Dam area indicates that substantial precipitation can be expected to begin in September and rise to a high average in November; and (vi) progress on tower erection was such that stringing could have started as early as October 16, or almost a full month before the date actual stringing operations began.

Questions Presented

Before proceeding further we will pass upon exceptions taken by appellant's counsel to rulings by the hearing member under which (i) the Government's claim of privilege concerning a memorandum dated July 31, 1964, was partially sustained and (ii) appellant's witness

¹⁷ The findings do not distinguish between the initial delays in furnishing the required steel and the disruption of the contractor's performance resulting from misfabricated steel having been supplied which had to be corrected or replaced.

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Gustafson was precluded from offering evidence of experience on other contracts in support of his testimony as to what a reasonable rate of progress for stringing conductor would be. As to the first item, Mr. Gustafson testified that at a conference held in Olympia (Washington) on July 28, 1964, he had been told by Mr. Pratt (Project Engineer, Bonneville Power Administration), that the entire amount of the claim would be recommended for allowance except for seven dollars (Tr. 71-74). Mr. Pratt acknowledged in his testimony that in the memorandum of July 31, 1964, he had made a recommendation to his superiors with respect to the claim asserted (Tr. 191-194). He emphatically denied, however, that he had informed Mr. Gustafson as to what that recommendation would be (Tr. 192). He also stated that the purpose of the meeting was to determine whether the Government had breached its contract by reason of late delivery of steel and misfabricated steel (Tr. 181-182).¹⁸ Appellant's counsel asserts that "Mr. Pratt's testimony should be ignored here, because the hearing member would not permit his testimony to be impeached by his post-negotiation report."¹⁹

Prior to the hearing appellant's counsel had requested that a copy of the memorandum concerning the conference in Olympia, on July 28, 1964, be made available. Faced with the Government's claim that the memorandum constituted a privileged communication between an employee and his superior, the full Board reviewed the memorandum in advance of the hearing. Applying the principles enunciated in *Vitro Corporation of America*, IBCA-376 (August 6, 1964), 71 I.D. 301, 1964 BCA par. 4360, the Board concluded that the Government's claim of privilege should be sustained in part. The decision was communicated to the parties at the commencement of the hearing and the portion of the memorandum of July 31, 1964, considered to be primarily factual in nature was furnished to the appellant. At that time and throughout the hearing appellant's counsel took vigorous exception to the Board's ruling (Tr. 6-10, 186-195).

The non-privileged portion of the memorandum of July 31, 1964,²⁰ (i) confirms the time and place of the meeting (ii) lists Messrs. Gustafson, Pratt and Gibbs as in attendance (iii) recites that the purpose of the meeting was to review the claim and "to arrive at some common agreement if possible" (iv) discloses that the costs incurred in

¹⁸ "[Q] And you stated that the contractor had been given allowances for everything that could be given him under the contract? [A] That was part of our discussion on July 28th, and it was recognized by Mr. Gustafson that there was nothing further we could do at that time insofar as the contract, and he recognized that any other decision or any other consideration would have to be made at a higher authority than I had." (Tr. 182)

¹⁹ Post-Hearing Brief of appellant, p. 8.

²⁰ Appellant's Exhibit No. 7.

performing the contract were approximately \$46,000 in excess of the contract price based upon a review of the contractor's records pertaining to the job; and (v) notes that after several hours of discussion much information had been uncovered, "favoring the contractor's contention that late and misfabricated steel had ruined his systematic planning and had forced him to extend his operations into bad fall weather."

While appellant's counsel has renewed his objection to the Board's ruling in the Post-Hearing Brief, the position advanced is not supported by any citation to authority. As to the stated objection it is deemed sufficient to note that the full Board reached its decision on the privileged status of the memorandum in question (i) in advance of Mr. Pratt's testimony having been received; and (ii) by applying the principles respecting privileged communications outlined in *Vitro, supra*, to such memorandum.²¹

At the hearing and in the Post-Hearing Brief,²² appellant's counsel also took exception to the ruling by the hearing member which precluded Mr. Gustafson from testifying as to the experience of the appellant on other contracts with the Bonneville Power Administration involving conductor stringing. This was offered in support of Mr. Gustafson's testimony as to what would have constituted a reasonable rate of progress for stringing conductor on the instant contract but for the conditions encountered (Tr. 104-107). The question involved in the ruling has been rendered academic by the failure of the Government to offer any evidence to support the contracting officer's view that stringing conductor at the rate of approximately one-half mile per day and 2½ miles per five working days constituted a reasonably satisfactory rate of progress.²³

We turn now to the principal issues involved in the appeal. The Government does not contest that the required steel was furnished late; nor does it deny that there was a substantial amount of misfabrication in the steel supplied which required correction or replacement.

It vigorously contests the appeal, however, on the following principal grounds: (i) the appellant's claims are based primarily upon

²¹ Cf. *Johnson, Drake and Piper, Inc., and D. R. Kincaid, Ltd.*, ASBCA Nos. 9824 and 10199 (May 26, 1965), 65-2 BCA par. 4868, at 23,074, in which the Board acknowledged that its decision had been considerably influenced by the fact that during the course of contract performance the parties had "agreed upon a compromise figure as a fair price for finishing the job in the manner in which essentially it was finished."

²² Post-Hearing Brief of appellant, p. 14; Tr. 108.

²³ Cf. *Hoel-Steffen Construction Company*, IBCA-656-7-67 (March 18, 1968), 75 I.D. 41, at 62, 68-1 BCA par. 6922 at 32,025 (involving performance of the same work under the same contract but in different locations and at different times) in which the Board stated: " * * * All in all, we view the requested comparison as one involving 'apples and oranges,' rather than one which is ideal, as the appellant suggests."

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the Government's delay in performing its contractual obligation for which the contract provides no remedy (ii) under Contract Change B,²⁴ and proposed Contract Change C,²⁵ the contracting officer provided the maximum amount allowable for major misfabrication as contrasted with delay (iii) the contracting officer correctly found that the contractor could have commenced conductor stringing at an earlier date than it did; and (iv) despite the appellant's protestations to the contrary the claims are based on total cost.²⁶

The Motion To Dismiss

Shortly prior to the hearing, the Government filed a motion to dismiss the instant appeal.²⁷ The motion was renewed in the Post-Hearing Brief of the Government in which it is asserted that "the entire hearing and appellant's post-hearing brief premise the claim only on delay."²⁸ This view of the matter is flatly denied in the Reply Brief of Appellant in which it is stated: "* * * with the one exception of the original Reply Brief of Appellant filed prior to the proceeding, the case was presented on the basis of misfabrication both as to testimony and argument."²⁹

In passing upon the Government's motion we will distinguish between (i) Government delays in completing deliveries of the tower steel required for performance of the contract (virtually all of which occurred prior to the contractor commencing assembly and erection) and (ii) the Government's action in furnishing relatively large quantities of misfabricated steel (very little of which appears to have been discovered until after the contractor had embarked upon its assembly and erection program). As to the former item, any claims for addi-

²⁴ Describing the reason for the change the contract amendment states: "The contractor encountered steel misfabrication of a major nature requiring change-outs and alterations of misfabricated and poorly fabricated steel as itemized in the following misfabrication reports: 4-1, 22-7, 26-11, 25-10, 53-29, 57-33, 56-32, 55-31, 54-30, 61-37, 52-28, 60-36, 59-36, 58-34, 63-38, 64-39 and 65-40. The contractor submitted invoices for extra work caused by misfabrications which are considered reasonable and acceptable to the Government."

²⁵ "During erection of towers, the contractor encountered steel misfabrication of a major nature requiring change-outs and alterations of misfabricated and poorly fabricated steel. Therefore, the Schedule of Unit Prices is amended by adding Item 92 as follows: * * * Labor, tools and equipment necessary to make corrections of a major nature because of misfabricated steel, as detailed below. Lump Sum \$3,802.73 * * *." (Appellant's Exhibit No. 5.)

²⁶ "* * * it is clear that the claim is based on total cost. Contractor assumes a certain rate of progress, i.e., a total cost concept, and as the job cost him, according to his testimony, \$46,000 more than it should, he is asking reimbursement for an arbitrary, speculative amount which is approximately half that sum." Post-Hearing Brief of the Government, p. 14.

²⁷ Motion to Dismiss Appeal, dated September 6, 1966.

²⁸ Post-Hearing Brief of the Government, p. 15.

²⁹ Reply Brief of Appellant, p. 1.

tional compensation or for damages based upon the delay of the Government in completing deliveries of the required steel would not appear to be allowable by reason of the specific prohibition contained in Section 3-102F, *supra*. If the contract did not contain such a prohibition, however, claims for costs attributable to such cause would be dismissed as beyond the purview of our jurisdiction since no pay-for-delay type clause is included in the contract.³⁰

In all of the claim letters the contractor consistently treated the Government's failure to make timely delivery of the required steel as one of the causes for the incurrence of additional costs for which claims have been made. At the hearing it was acknowledged by the appellant's principal witness that there had been no segregation of costs attributable to such cause and those resulting from the Government having furnished improperly fabricated steel (Tr. 80). A question arises, therefore, as to whether any allowance for the costs claimed may not actually entail an allowance of some portion of the prohibited costs. In the circumstances of this particular case, the question is regarded as raising more of a theoretical than a practical problem.

Irrespective of whether the reckoning of the Government³¹ or of the appellant (Exhibit No. 4), is adopted, the Government's delay in completing delivery of the quantity of steel required for performance of the contract amounted to approximately 30 days. Throughout virtually the entire period (July 30-August 26, 1963), the contractor's own work force consisted of only a superintendent and two equipment operators,³² who as late as the third week in August were engaged in improving access roads (Exhibit No. 31). When assembly was actually commenced on August 22, 1963, all of the steel required for the regular 10L-type towers had been available since August 15th, and the balance of the steel required for contract performance was made available on August 26, 1963.³³ In evaluating the impact upon the contractor's performance of the delayed deliveries of the required steel, we have also taken into account the fact that the contractor was approximately two weeks late in commencing the footing work.³⁴

³⁰ E.g., *Martin K. Eby Construction Company, Inc.*, IBCA-355 (March 8, 1963), 1963 BCA par. 3672.

³¹ "On August 15, 1963 all the 10L tower steel was available and on August 26, 1963, all the steel was available." (Exhibit No. 14, Summary of Job, p. 2.)

³² "The contractor, except for the clearing and footing subcontractors' crews, had only 3 men on the job prior to August 22, 1963. These consisted of a superintendent and 2 equipment operators. * * *" (Findings, p. 4; Exhibit No. 17.)

³³ Note 31, *supra*.

³⁴ The contractor's progress schedule for steel tower construction (Exhibit No. 2) showed work on the footings commencing on or about July 7, 1963. Work on the footings commenced with the contractor's own forces on July 11, 1963, but was discontinued on the following day when the contractor's superintendent received notice that the work involved in the footings and anchors would be subcontracted. The subcontractor, Ted Marx, did not commence such work until July 22, 1963 (Exhibit No. 14; Summary of Job, pp. 1, 2; Exhibits 22-24). The tardy start on the footings was not due to any shortage of steel (Exhibit No. 21; Tr. 119.)

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We find, therefore (i) that the Government's delay in delivering the required steel was without any significant impact on the overall performance of the contract, and (ii) that if there were any increase in the cost of performing the contract by reason of such Government delay, it was *de minimis*.³⁵

Entirely different conclusions are warranted with respect to the effect of the Government having furnished substantial quantities of misfabricated steel. According to its terms Section 3-102F, *supra*, only applies to the Government's failure to make timely delivery of construction materials, tools and equipment which it was to furnish.

By the execution of Contract Change B,³⁶ and by submitting proposed Contract Change C,³⁷ to the contractor for signature, the Government has recognized that the contract provides a basis for additional reimbursement when major misfabrications are shown to be present in the Government-furnished steel. The question raised by this record is whether the Government is correct in asserting that the only additional compensation to which the contractor is entitled by reason of the major misfabrications encountered is the \$3,802.73 specified in proposed Contract Change C.

In addressing ourselves to this question we note that the serious problems involving Government-furnished steel appear to have had their genesis in the failure of the Government to make the inspection promised to the contractor at the award conference on May 22, 1963 (notes 5 and 6, *supra*). Although the issue was squarely raised in the notice of appeal,³⁸ the Government offered no evidence to show the nature of the inspection provided at the steel supplier's plant. Also noteworthy is the extensive amount of misfabrication in the steel supplied which plagued the contractor from the day it commenced assembly and erection on August 22, 1963, until shortly prior to the completion of contract performance some four months later. As an examination of the nature of the costs underlying Proposed Contract Change C will disclose,³⁹ the Government recognized the disruptive effect that misfabricated steel had had upon the contractor's operations in August and September. It refused to recognize, however, the dis-

³⁵ See *Larsen-Meyer Construction Co.*, IBCA-85 (November 24, 1958), 65 I.D. 463, 466, 58-2 BCA par. 1987, at 8236, and authorities there cited. For a discussion of the application of the *de minimis* rule in a different context, see 44 Comp. Gen. Dec. 753 (1965).

³⁶ Note 24, *supra*.

³⁷ Note 25, *supra*.

³⁸ "The contracting officer has totally disregarded statements made as to the quality of the steel and factory inspection promised at the contract award conference." (Letter accompanying the notice of appeal, p. 1.)

³⁹ See Summary of the Job (Exhibit No. 14) and Government memorandum of November 30, 1964 (Exhibit No. 15).

ruptive effect from the same cause upon the contractor's operations during the later months except to the extent of the payment made for the extra work performed in correcting particular misfabrications as reflected in various misfabrication reports (note 24, *supra*).

We can see no valid reason for recognizing costs attributable to disruption of one phase of the contractor's construction program (assembly and erection) as cognizable under the Changes clause,⁴⁰ and refusing to recognize disruption of another phase of that program (stringing of conductor) as cognizable thereunder. In our view of the matter the numerous misfabrications present in the Government-furnished steel, as well as the fact that they were continually encountered, materially altered the work performance conditions. The conditions actually encountered did not correspond to those reasonably contemplated when the contract was bid upon with the result that the Government's action constituted a constructive change.⁴¹ The Government's motion to dismiss the appellant's claims for want of jurisdiction is accordingly denied.

Delay in Prosecution of the Work

In its post-hearing brief the Government attempts to defend the contracting officer's findings that steel assembly could have started sooner than it did by referring to testimony of appellant's witness Gustafson in which he admitted that this was so (Tr. 101). Of far greater significance, however, is Mr. Gustafson's testimony concerning the economic feasibility of proceeding with assembly and erection before a substantial portion of the tower steel required was available. Contesting the finding that assembly of steel could have started on August 5, 1963, Mr. Gustafson testified (i) that on that date the structures were scattered throughout the entire length of the line as shown by appellant's Exhibit No. 6; and (ii) that they were not in sequence to allow an economical operation (Tr. 102-103).

It is undisputed that all of the steel for the regular type towers did not become available until August 15, 1963 (note 31, *supra*), and that within a week of that date a crew for assembly and erection

⁴⁰ Contract Change C cited the Changes and the Extra Work clause as the authorities for the proposed amendment to the contract in contrast to Contract Change B which also included a reference to a contract provision pertaining to misfabrication among the authorities listed (note 8, *supra*).

⁴¹ Cf. *United States Hoffman Machinery Corporation*, ASBCA No. 10906 (April 25, 1968), 68-1 BCA par. 7027 (Intermittent disruption of contractor's production by unwarranted rejection of in-process and finished end-items changed the nature of the original undertaking and delayed reasonable completion of contract, resulting in constructive change); *Bendix Field Engineering Corporation*, ASBCA No. 10124 (November 8, 1966), 66-2 BCA par. 5959 (Constructive change found where Government-furnished equipments supplied to a contractor for repair failed to conform to samples exhibited to contractor for purpose of making cost estimates and ceiling price proposals).

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was organized and at work. Through its own witnesses the Government made no attempt to support the contracting officer's findings in this area or in other areas related to the manner in which the contractor's operations involving assembly and erection were conducted, exclusive of matters related to cleanup. In the absence of such testimony, we find the contracting officer's findings in the indicated areas are without substantial support in the record.

The Government made a concerted effort to show, however, that the contractor could have commenced the stringing of conductor at a much earlier time than it did. Chief Inspector Gibbs testified that all of the pieces of steel critical to the stringing of conductors were available to the contractor, in the Government's storage yard by October 10, 1963 (Tr. 135);⁴² that all of such pieces were in the possession of the contractor by October 17, 1963 (Tr. 136);⁴³ and that the contractor could have commenced conductor stringing shortly after the last of the critical pieces were received for by the contractor on October 17, 1963 (Tr. 144), or even shortly after they became available to the contractor in the Government's storage yard (Tr. 144, 161). According to Mr. Gibbs a critical piece of steel is one that would have to be installed in the tower before the contractor would be allowed to string the conductor (Tr. 148).

Although, upon cross-examination, Mr. Gibbs maintained the position taken (Tr. 149, 154), he acknowledged (i) that a 10-L-5 (a piece of steel considered by him to be noncritical) was a strengthening member for the tower and (ii) that because of misfabrications encountered 10-L-5 pieces were replaced in the towers in October, November and December (Tr. 153, 165). In his testimony Government witness Pratt confirmed the fact that failures involving the 10-L-5 pieces had occurred on the Stevenson job which he thought had happened late in November and December (Tr. 184-186). He also pointed out that the failure of a 10-L-5 piece might result in the loss of a tower (Tr. 186).⁴⁴

Mr. Gibbs' testimony has been vigorously attacked in the post-hearing briefs of the appellant on the grounds: (i) that pieces of steel recognized as strengthening members for the towers continued to be

⁴² See Government's Exhibits C and C-1.

⁴³ See Government's Exhibits B and B-1.

⁴⁴ The Government has acknowledged that some 10-L-5 pieces were taken from the instant contract for use on another job then in progress. It denies, however, that the contract work was delayed in any way by reason of such action (Tr. 166, 184-185). The appellant has asserted that any parts taken from the job delayed performance (Tr. 128, 129), but has failed to designate the parts involved and has failed to show the manner in which or the period for which it was delayed. *Larsen-Meyer Construction Co.*, note 35, *supra*.

changed out in November and even December, and (ii) that Mr. Gibbs was not an engineer and hence not qualified to pass upon the technical questions involved in determining the criticality of particular tower members. As to the first item it is noted that the misfabrication reports offered in evidence as appellant's Exhibits 8, 9 and 10, relate to when the work was performed rather than when the misfabrications were discovered. This distinction was clearly developed in the colloquy between appellant's counsel and Mr. Gibbs upon cross-examination.⁴⁵ This is not to say that misfabrications may not have been discovered late in the job. In fact the testimony of Mr. Pratt previously mentioned clearly indicates that the defective 10-L-5 pieces may have been discovered very late in the job as a result of a Government-ordered inspection. Respecting the latter item, it is clear from Mr. Gibbs' testimony that he was not relying upon his own judgment for the determinations made respecting criticality but was simply adhering to standards established for earlier contracts on which he had been involved (Tr. 154-155). Moreover, Mr. Pratt, Project Engineer (Mr. Gibbs' supervisor on the contract in question), testified that the contractor could have installed the missing pieces at an earlier date and that it would have been reasonable to expect the contractor to proceed with such work as soon as they became available in order that the stringing operation could begin (Tr. 183, 184).

Assuming, however, that any piece of steel acknowledged to be a strengthening member for the tower should be regarded as critical, the appellant would still have failed to show that after October 10, 1963, it was precluded from commencing conductor stringing by reason of lack of replacements for misfabricated parts whether previously discovered or discovered thereafter.⁴⁶ For example, it is obvious that the replacement of a defective 10-L-5 piece on December 4, 1963 (appellant's Exhibit No. 8c), could not have affected the commencement of conductor stringing, as the contractor had begun such work almost a month before and completed it within less than two weeks from such date (Appellant's Exhibit No. 2).

The record indicates that the reason the contractor did not commence conductor stringing for almost a month after substantial quantities of replacement parts for misfabricated steel became available in the Gov-

⁴⁵ "[Q] The last date couldn't have been earlier than December 4th. [A] These were the times that they corrected these. Now, this was not—this does not signify the time that the material was on hand in the material yard to do this corrective work. [Q] It doesn't show, in fact, when it was discovered at all? * * *" (Tr. 170, 171).

⁴⁶ See *Hardeman-Monier-Hutcherson*, ASBCA No. 11785 (March 18, 1967), 67-1 BCA par. 6210, at 28,748 ("A contractor has the duty to minimize its costs in the execution of a change order in the same manner as he must mitigate his damages after a breach. * * *")

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ernment's storage yard,⁴⁷ was the fact that the equipment and crew ultimately used on the job were involved in the performance of another transmission line contract then in progress (Tr. 172-174).⁴⁸ Mr. Gustafson sought to relate the delay in commencement of this work to the excessive amount of cleanup remaining to be done before the conductor stringing could be commenced (Tr. 122).⁴⁹ He failed to offer any explanation, however, for the marked reduction in the size of the crew performing cleanup which occurred during this period,⁵⁰ nor is this testimony regarded as consistent with the explanation offered by the contractor's field superintendent when questioned about the matter.⁵¹

Appellant's counsel appears to argue that consideration of such questions as the delay in the prosecution of the work is irrelevant. In his view of the issuance of Contract Change B granting the 37-day extension in time for performance forecloses the Government from relying upon such matters as a defense to the claim.⁵² This contention, however, overlooks the fact that one of the authorities cited for Contract Change B is Clause 5, Termination For Default—Damages For Delay—Time Extensions, and that the findings respecting the time extension granted are couched in the language of that clause; nor is the position taken consistent with decisions of the Court of Claims,⁵³ to which the Board adheres.⁵⁴

⁴⁷ Government's Exhibits C and C-1.

⁴⁸ Exhibit No. 52. For a portion of such time the footing subcontractor (responsible for completing the backfill and painting the towers before conductor stringing could commence) was also unavailable for the same reason (Exhibit Nos. 42 and 47).

⁴⁹ He also asserted that the decision to utilize another crew (from the Longview-Chehalis job), rather than form a new crew, was reached "because the two dates were dovetailing together very roughly". (Tr. 122). The "dovetailing" involved a time-gap of over three weeks if the dates the contractor received for the steel pieces regarded as critical by the Government are employed (Government Exhibits B and B-1) and almost a month if the date all of such steel became available in the Government's storage yard is utilized (Governmental Exhibit C).

⁵⁰ " * * * The cleanup is going very slow, but with a crew of only four men on the job it is to be expected. Have asked Red Cahoon why he does not have more men on cleanup. His answer is that he takes his orders from Mr. Gustafson and that this is all the men he will have until the wire crew gets here. * * *" (Weekly digest—October 24-30, 1963; Exhibit No. 51).

⁵¹ " * * * the talk of contractor 'negligence,' 'inefficiency' and so forth is irrelevant even if it were true. *Irrelevant*, because by Change Order B the net delay of thirty-seven days due to misfabrication was already, long since, established and decided by solemn written contract between the parties" (Post-Hearing Brief of Appellant, p. 13).

⁵² E.g., *Robert E. Lee and Company, Inc., Crosland-Roof Construction Co. v. United States*, 164 Ct. Cl. 365, 271-72 (1964). "We think it decidedly unwise to give almost-conclusive weight to the contracting officer's decision to grant extra time, for such a rule would tend to foster a policy which will ultimately work to the detriment of all contractors. In doubtful cases, contracting officers would be quite wary of granting additional time for fear that their decisions might later become the foundation for a breach of contract action. * * *

⁵³ See *Hoel-Steffen Construction Company*, note 23, *supra*.

Based upon the foregoing analysis and accepting Mr. Gustafson's testimony that a crew for stringing conductor could have been organized within a week (Tr. 123-124), we find that the contractor should have been in a position to commence stringing of the conductor by October 18, 1963. We further find that had the contractor commenced stringing on that date the contract work could have been completed by November 26, 1963, or three weeks prior to the time it was completed.

Total-Cost Basis of Claims

In his testimony Mr. Gustafson acknowledged that the 538 hours involved in the claim for cleanup represented the excess hours over what the appellant had anticipated less the allowance received therefor in the misfabrication reports (Tr. 65, 93). He also testified that the 1,302 hours involved in the claim for stringing conductor represented the excess hours over what could reasonably be estimated as being the man hours required for that phase of the contract work under normal conditions (Tr. 119-120). Mr. Gustafson denied, however, that the claims had been presented on a total-cost basis, pointing out (i) that actual costs had exceeded the bid price by some \$46,000 and (ii) that the appellant had acknowledged an error of 20 percent in estimating the man hours required for assembly and erection for which no amount had been included in the claim (Tr. 61, 89, 113).⁵⁵

Bearing in mind the rationale for the objections to claims presented on a total-cost basis⁵⁶ and the indicated failure to distinguish in the contractor's records between Government-caused and contractor-caused costs (Tr. 27, 39),⁵⁷ or to segregate in such records costs for which the contractor was responsible because they were for correcting work damaged during a time when the contractor was clearly in control of the job prior to acceptance (Tr. 132, 208),⁵⁸ we find that the

⁵⁵ See also note 16, *supra*.

⁵⁶ *F. H. McGraw and Company v. United States*, 131 Ct. Cl. 501, 511 (1955). ("This method of proving damage is by no means satisfactory, because, among other things, it assumes plaintiff's costs were reasonable and that plaintiff was not responsible for any increases in cost, and because it assumes plaintiff's bid was accurately computed, which is not always the case, by any means.")

⁵⁷ "Ted Leffler of Power City Constr. & Equipment Inc., was on the job last Thursday, Nov. 21, 1963 and fired Bob Cahoon. He said he did not know what a mess things were in on this job. He made the statement that he did not blame Cahoon fully and was going to have some words with Swede Johnson who was foreman of the erection crew when he saw him. Ted thought that Gustafson was taking care of this job and made the statement that he and Gus were just as much at fault for the situation getting out of hand and one of them should have been keeping a closer look into the situation. These words are not verbatim. Jim Hicks is running the job now. Ted Leffler will be back on the job Tuesday, Dec. 3, 1963." (Weekly digest Nov. 21-27, 1963, Exhibit No. 56). See also Exhibit No. 51 and Government Exhibit A-1.

⁵⁸ See Exhibit No. 55.

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claims have been presented on a total-cost basis.⁵⁹ This does not mean, however, as the Government appears to assume, that no equitable adjustment exceeding that allowed by the contracting officer can be made because the task of determining the proper amount of such adjustment is a formidable one.⁶⁰

Cleanup—\$6,833.48

As described by appellant's witness Gustafson the steel supplied by the Government was of a "tremendously inferior quality" and there was a "tremendously extensive amount of misfabrication" (Tr. 52, 53). The same witness referred to the materials involved as having been "mass misfabricated." (Tr. 97). The Government does not contest the fact that there was an extensive amount of misfabrication in the steel delivered.⁶¹

At no time did the nature and extent of the misfabrication in the Government-furnished steel preclude the contractor from proceeding with some portion of the contract work. The exigencies created by the misfabrications resulted in the contractor abandoning procedures customarily followed in building transmission lines, however, and resorting to expedients both costly and time-consuming. Appellant's witness Mr. Fanning testified that the normal way of building a transmission line was to start at one end and go to the other (Tr. 30). He pointed out, however, that due to misfabrications there were many instances when the contractor's forces were unable to complete a tower at the time they were assembling it which accounts for the work proceeding simultaneously on various towers at widely scattered locations over a period of several months (Tr. 31-32, 35). This condition is portrayed graphically in appellant's Exhibit No. 2, which was characterized by Mr. Gustafson as showing complete discontinuity of operations (Tr. 55).

Another construction procedure resorted to by the contractor and attributed by Mr. Gustafson to misfabrication was the stacking of

⁵⁹ See *H. R. Henderson & Co. et al*, on motion for reconsideration, ASBCA No. 5146 (September 28, 1961), 61-2 BCA par. 3166, at 16,446. ("* * * Whether there existed a formal change order or not, appellant, acting as a prudent contractor and aware of its potential claim, should have kept records reflecting the extra costs attributable to the de facto change.")

⁶⁰ *Lincoln Construction Company*, IBCA-438-5-64 (November 26, 1965), 72 I.D. 492, 65-2 BCA par. 5234, upon reconsideration, 73 I.D. 49, 66-1 BCA par. 5343 (February 4, 1966); considered by the Comptroller General in Comp. Gen Dec. B-158578 (May 24, 1966).

⁶¹ Exhibit No. 17; Findings, p. 3; Tr. 146.

towers.⁶² This was not a normal method of proceeding. It was adopted in prosecuting the work on the instant contract only because the contractor wanted to get the heavy crane through the job as rapidly as possible in view of the imminent prospect of bad weather.⁶³

The entire claim for cleanup is attributed by the appellant to misfabrication (Tr. 96-97). Appellant's witnesses acknowledged (i) that cleanup is an essential part of any job (ii) that what can be described as normal cleanup was going on simultaneously with the cleanup resulting from misfabrication; and (iii) that appellant's Exhibit No. 2 shows normal cleanup as well as that due to misfabrication in the work depicted for assembly and erection.⁶⁴ Mr. Gustafson denied, however, that any work involving normal cleanup was included in the 538 excess man hours upon which the claim for cleanup was based (Tr. 116).

The Government has made no serious effort to directly contest the appellant's testimony in this area.⁶⁵ While the appellant has indicated some doubt about the basis for the reimbursement proposed in Contract Change C,⁶⁶ and has raised a question concerning its relationship to the claim for cleanup, it is noted that at one point in his testimony Mr. Gustafson acknowledged that Contract Change C included some of the time reflected in the claim for cleanup (Tr. 129-130). It is also noted that by reason of the time period to which the proposed reimbursement relates (August 22 to September 19, 1963),⁶⁷ Contract Change C clearly includes no allowance for costs related to conductor stringing which is the only other claim presently before us.

Determining the equitable adjustment to which the appellant is entitled by reason of the claim for excess cleanup is not a simple matter. Although Mr. Gustafson testified that all of the costs included in the claim were the result of the Government's action in furnishing misfabricated steel and that it contained no amount involving normal cleanup, we are unable to accept this testimony at face value. We

⁶² "[Q] * * * what is meant by the word 'stack.' [A] This is a means of getting the towers in the air as rapidly as possible without cleaning up the towers, doing all the necessary cleanup, putting in all the bolts and tightening all the nuts, and putting on pal nuts, et cetera" (Tr. 62).

⁶³ Tr. 62-63, 117-118.

⁶⁴ Tr. 39, 115-116.

⁶⁵ It disputes the claim on the grounds previously mentioned, of course, including the appellant's reliance upon the total-cost basis for proof of its damages.

⁶⁶ In authorizing the payment proposed in Contract Change C, the contracting officer did not purport to exercise the special statutory authority of the Bonneville Power Administration; nor does it appear that he was empowered to do so. Government Counsel also denies that the Board is vested with any such special statutory authority citing and construing 16 U.S.C. sec. 832a(f) (1964), and the delegation of authority from the Secretary of the Interior dated March 31, 1966 (F.R. Doc. 66-3742, 31 F.R. p. 5529). (Motion to Dismiss Appeal, dated September 6, 1966). As the appellant has not requested that we undertake to act under the special statutory authority and as we have not done so, there is no reason to pass upon the question of whether we in fact have any residual authority in the area indicated.

⁶⁷ Note 39, *supra*.

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note (i) that Mr. Gustafson was very rarely at the job site during the progress of the work,⁶⁸ and (ii) that his testimony demonstrated a lack of familiarity with the details of the job even in the extremely important area of field supervision.⁶⁹ In these circumstances Mr. Gustafson's opinions in the areas mentioned can hardly be regarded as more than an expression of confidence in (i) the accuracy of the contractor's bid estimate, and (ii) the skill with which the contractor prosecuted the work.⁷⁰ It is clear, however, that most of the costs claimed for excess cleanup are attributable to the fact that the work was performed under the adverse working conditions prevalent in the late fall months in the Pacific Northwest (Tr. 96),⁷¹ and that a substantial portion of the costs due to such conditions could have been avoided if the contractor had prosecuted the cleanup work with greater vigor during the good weather.⁷²

In Contract Change B,⁷³ the contractor was reimbursed for the specific extra work described in seventeen misfabrication reports (Tr. 58-59). The ten such reports introduced into evidence as appellant's Exhibits 8, 9 and 10 show the work involved therein to have been performed during the period from October 30 (appellant's Exhibit No. 10a) to December 4, 1963 (appellant's Exhibit No. 8c). The record discloses however, that much of the work represented by appellant's Exhibits 8, 9 and 10 could have been done in the relatively good weather which prevailed throughout most of the month of October.⁷⁴ Taking this into account and, in the absence of better evidence, proceeding on the assumption that the extent of the disruption of the contractor's cleanup program can be gauged by the number of misfabrication

⁶⁸ He testified that he was there about five days (Tr. 116-117). According to the weekly digests of the inspection reports, however, he was there on only three occasions, none of which occurred while the wire stringing was in progress (Exhibit Nos. 19 and 36).

⁶⁹ Concerning Mr. Robert Cahoon (the contractor's initial superintendent), Mr. Gustafson testified that in the field the job was essentially Mr. Cahoon's responsibility until about October 1st or for only a short period after the conclusion of the early phase of the job in mid-September (Tr. 117, 127). In fact Mr. Cahoon's services were not dispensed with until November 21, 1963, or less than a month before the transmission line was turned over to the Government as substantially complete. Insofar as the record discloses, Mr. Cahoon continued to be the contractor's field superintendent until the day he was discharged (notes 51 and 57, *supra*; Government Exhibits B and B-1).

⁷⁰ Cf. Note 57, *supra*. See also Exhibit No. 52 ("Ted Leffler, superintendent for Power City arrived at this office Monday, Nov. 4, 1963 and the same day equipment started arriving from the Chehalis-Longview job * * * Mr. Leffler gave me the impression that he was not too happy with the progress of this project at the present time and that he had expected it to be more in readiness for the stringing operation than it is. * * *").

⁷¹ "The claim is for *misfabrication*. The claim letter (item 13 in the Appeal File) asks for 'excessive' man hours of clean-up *all* due to working in winter. * * *" (Post-Hearing Brief of Appellant, p. 10). But see testimony of Mr. Gustafson reported at Tr. 93.

⁷² Notes 51 and 70, *supra*; Exhibit Nos. 47 and 48. Tr. 143-145, 183-184.

⁷³ Note 24, *supra*.

⁷⁴ Note 72, *supra*.

reports during a given period, we find that 58.8 percent of the costs for excess cleanup or \$4,018.08 are for costs incurred on or after October 30, 1963, for which the Government and the contractor should bear equal responsibility. The balance of the costs involved amounting to \$2,815.40 are considered to be the Government's responsibility. This claim is allowed in the total amount of \$4,824.44.

Conductor Stringing—\$17,365.98

The remarks made in the preceding section concerning the nature and extent of the misfabrication encountered are equally germane to the contractor's claim for conductor stringing. Since the Government has acknowledged no responsibility for the costs involved in this claim, however, we shall examine in somewhat greater detail the background against which the claim asserted should be viewed.

At the award meeting on May 22, 1963, Mr. Picchioni stressed the fact that the instant contract involved a "rather short schedule job."⁷⁵ In the same meeting the Government assured the contractor (i) that the contract with the steel supplier required the steel to be assembled into towers before it was shipped, and (ii) that a Government man would be at the steel supplier's plant to insure compliance with that requirement.⁷⁶ The appellant refers to these assurances in its letter of September 16, 1963.⁷⁷ The contracting officer's findings contain no references to the assurances given to the contractor at the award meeting in the areas mentioned; nor is there any indication therein as to the nature and extent of the Government inspection made at the steel supplier's plant. Although the question was raised again in the notice of appeal,⁷⁸ the Government offered no evidence to show what, if anything, had been done to implement the commitment made to the contractor at the award meeting. Since towers are built like erector sets (Tr. 52), however, it appears that adherence to the Government's commitment respecting inspection would have eliminated most of the misfabrications involved on the instant contract.

There are a number of matters which the Government does not dispute. It does not contest the fact that the contractor contemplated commencing conductor stringing by October 1. It admits that all of the replacements for misfabricated pieces considered critical to the commencement of conductor stringing did not become available in the Government's storage yard until October 10, 1963, and that they were

⁷⁵ Government memorandum of May 23, 1963, p. 2; Appellant's Exhibit No. 3.

⁷⁶ Notes 5 and 6, *supra*.

⁷⁷ "Regarding the award meeting, you will remember the disappointment expressed by our concern over the steel suppliers on the subject contract. We were assured however that each tower type would be assembled and erected complete by the supplier with an inspector present." (Exhibit No. 4).

⁷⁸ Note 38, *supra*.

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not received for by the contractor until October 16 and 17, 1963.⁷⁹ It acknowledges that many items of material that had been misfabricated were probably delivered out of the Government's storage yard to the contractor after the last mentioned dates (Tr. 163-164). Based upon the climatological data, the contracting officer found that precipitation in the Bonneville Dam area can be expected to rise to a high average in November and that the weather experienced in that area in November of 1963 was approximately ten percent higher than the average for that month. The weekly digests of inspection reports show the formidable problems with which the contractor had to contend throughout virtually the entire month of November in proceeding with contract performance.⁸⁰

Of crucial significance is the undisputed fact that the work directly related to the construction of the transmission line was to be performed in the sequence of (i) footings (ii) assembly and erection, and (iii) conductor stringing.⁸¹ Overlaps in these programs were contemplated by the contractor, however, as was acknowledged by appellant's witnesses.⁸² But generally speaking work at particular locations had to be performed in the sequence listed (Tr. 49-50).⁸³ In these circumstances it is clear that any significant disruption in an earlier program would have a disruptive effect upon the succeeding program or programs, particularly where, as here, the contractor was being required to meet a rather short schedule. As we have previously noted, the Government clearly acknowledged the disruption to the contractor's assembly and erection program caused by misfabrication and sought to provide compensation therefor by forwarding proposed Contract Change C for signature.⁸⁴

We find, however, that not only was the contractor's assembly and erection program seriously disrupted and adversely affected by the Government's action in furnishing large quantities of misfabricated steel but that as a concomitant⁸⁵ thereof the contractor's conductor

⁷⁹ Government Exhibits B and B-1, C and C-1; Tr. 141-142, 147.

⁸⁰ E.g., weekly digest of Nov. 21-27, 1963 (Exhibit No. 56). ("The seven, eight and part of nine mile are a muddy mess and access roads virtually impassable with any equipment except cats, half tracks and tank retrievers. Can hardly call them access roads any more, just good and sloppy 'cat' roads.").

⁸¹ Exhibit No. 2; Tr. 49-50.

⁸² Tr. 30, 50, 121-122.

⁸³ The fact that certain members of the tower are not in place may or may not preclude stringing depending upon the importance of the particular member to the tower (Tr. 118, 146-147).

⁸⁴ Notes 25 and 39, *supra*; Tr. 169-170.

⁸⁵ This is not to suggest that conductor stringing may not have been directly affected by misfabrications encountered late in the job (Tr. 163-164). The pervasive character of the misfabricated steel is illustrated by the fact that even after the transmission line had been built and energized, the Government maintenance people concerned were directed to re-inspect the 10-L-5 pieces to see if they were all right (Tr. 167, 186).

stringing program was similarly affected for which the contractor should be reimbursed as a constructive change to the extent that its costs of performing the contract were increased thereby.⁸⁶

Remaining for consideration is the amount of the equitable adjustment to which the appellant is entitled by reason of the claim for conductor stringing. We have previously found that the contractor should have commenced conductor stringing on October 18, 1963, and that if the work had progressed at the rate of progress actually achieved during the stringing, the contractor would have completed the work by November 26, 1963. We further find that costs incurred after that date are the contractor's responsibility.⁸⁷ An adjustment must be made in the costs allocated to such period, however, to reflect the fact that the working conditions in December were generally better than they were in November.⁸⁸ As a corollary of its responsibility for work performed prior to acceptance, we also find the contractor responsible for the costs involved in redoing certain of the stringing work.⁸⁹ Taking into account the foregoing factors, we find the appellant is entitled to an equitable adjustment in the contract price for the stringing work in the amount of \$10,653.

CONCLUSIONS

1. The Government's motion to dismiss the appeal for lack of jurisdiction is denied.
2. The claim for cleanup is allowed to the extent of \$4,824.44.
3. The claim for conductor stringing is allowed to the extent of \$10,653.
4. The appeal is otherwise denied.

WILLIAM F. McGRAW, *Member.*

I CONCUR:

SHERMAN P. KIMBALL, *Member.*

Mr. Dean F. Ratzman, Chairman, disqualifyed himself from consideration of this appeal, pursuant to 43 CFR 4.3.

⁸⁶ Note 41, *supra*.

⁸⁷ Assuming that conductor stringing had commenced on October 18, 1963, and had been completed on November 26, 1963, there would have been twenty-seven non-overtime working days in addition to the one day of overtime worked during that period. In the period from November 27 to December 17, 1963, the contractor strung conductor on thirteen non-overtime working days in addition to two days of overtime worked during that period. This represents 53.57 percent of the time required to complete the actual stringing.

⁸⁸ The contracting officer found that the precipitation encountered was 40 percent less than average for December (Exhibit 17, p. 5).

⁸⁹ See Exhibit No. 55. The amount involved has been computed to be \$883.

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**APPEAL OF JAMES HAMILTON CONSTRUCTION COMPANY AND
HAMILTON'S EQUIPMENT RENTALS, INC.**

IBCA-493-5-65 Decided July 18, 1968

**Contracts: Disputes and Remedies: Jurisdiction—Contracts: Construction
and Operation: Labor Laws—Contracts: Disputes and Remedies:
Equitable Adjustments—Rules of Practice: Appeals: Dismissal**

Where a contract for the construction of a road required a contractor to "observe and comply with all Federal, State and local laws," but did not specifically provide for compliance with the Fair Labor Standards Act, and the contractor was ordered by the U.S. Labor Department to pay overtime wages under the FLSA, a claim by the contractor for reimbursement of such overtime wages paid, grounded upon an alleged misrepresentation by the procuring agency of the applicability of the FLSA to the work will be dismissed as outside the jurisdiction of the Board.

**Contracts: Construction and Operation: Changes and Extras—Contracts:
Formation and Validity: Implied and Constructive Contracts—Con-
tracts: Disputes and Remedies: Equitable Adjustments**

Under a contract for construction of a road, the Board finds that rejection by the contracting officer's representative of the subbase, following a visual inspection, after it was ready for application of the base course, and his direction to reprocess the subbase, were based upon an erroneous interpretation of the specifications and constituted a constructive change entitling the contractor to an equitable adjustment; but such adjustment may not include the contractor's cost of utilizing a commercial testing laboratory to establish that the Government's rejection was unjustified, since such a charge is an expense for preparing and prosecuting a claim and is unauthorized.

**Contract: Disputes and Remedies: Equitable Adjustments—Contracts:
Construction and Operation: Changes and Extras**

Where a road construction contract called for 310 tons of RC asphalt, which is not readily available, to be used as prime coat, and the contractor procured the entire supply necessary in advance, and the contracting officer thereafter changed the type to MC asphalt, the contractor was entitled to recover the cost of converting the unused RC asphalt to penetration asphalt (the most economic means of disposing of the excess).

**Contracts: Disputes and Remedies: Equitable Adjustments—Contracts:
Construction and Operation: Changes and Extras**

Where a contractor under a road construction contract in which a certain pit was designated as the source of specified material was directed to blend the material produced with blow sand (it having been ascertained that the material produced did not comply with the specifications), an adjustment made by the Government to compensate the contractor therefor was inadequate in that the contractor was paid only at the unit price rate for the items blended and should also have received compensation for the cost of increased crushing and other difficulties in meeting the requirements of the specifications resulting from the blending.

Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Estimated Quantities—Contracts: Disputes and Remedies: Equitable Adjustments

Where the total amount of cover aggregate required by the Government was 1,272.7 tons, instead of the 2,230 tons estimated in the bid schedule, under a road construction contract providing for payment at unit prices only for work that was actually performed, and further providing for an adjustment of contract price in the event of increase or decrease in quantity only in several specified circumstances, in the absence of a showing that the exceptions are applicable, a contractor who over-produced cover aggregate was not entitled to be compensated therefor, since the possibility of an underrun was foreseeable and it appeared that the overproduction resulted from the contractor's inability to control production.

Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Equitable Adjustments—Contracts: Construction and Operation: Changes and Extras

In a dispute over the quantity of unclassified excavation performed under a road construction contract, where the contractor's measurement was based upon the average-end-area method required by the contract, but was made after subbase material was in place, and the Government was unable to prove that it utilized that method, in the absence of a showing that the presence of the subbase resulted in an error in the contractor's calculation, the Board finds that the contractor established its claim by a preponderance of the evidence; however, contractor is not entitled to recover the cost of employing an independent engineering firm to perform the measurement, since such a charge is an expense of preparing and prosecuting a claim and is unauthorized.

BOARD OF CONTRACT APPEALS

This appeal encompasses nine claims aggregating \$78,885.25 under the three contracts. The claims will be considered under the headings of the contract with which they are concerned, and in the order followed at the hearing. The Board's action with respect to the Government's motion to dismiss certain claims is reflected in the Board's treatment of those claims.

Contract No. 14-20-0600-6327
Project N12(5A)2 & 4 & (5B)1

This contract was in the estimated amount of \$349,950.52, and required the construction of a bridge and 3.387 miles of road on Route 12 in the Navajo Indian Reservation, New Mexico. It included FP-57¹ as modified, as well as Standard Form 23A (March 1953 edition). Two claims were filed under this contract.

¹ "Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects," dated January 1957, issued by the Bureau of Public Roads, U.S. Department of Commerce. FP-61, referred to *infra* in connection with certain other claims, is a revised edition dated January 1961.

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Claim No. 1—Overtime Pay—\$2,616.46

Appellant claims that it is entitled to reimbursement for overtime payments, alleging that over a period of several years, prior to the award of this contract, representatives of the Bureau of Indian Affairs assured it that projects on the Navajo Indian Reservation were not subject to the "40-hour law" provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. sec. 201 *et seq.*). In substance, section 207 of the Act provides, *inter alia*, that contractors engaged in interstate commerce shall pay their employees overtime wages amounting to at least one and one-half times the regular rate, for hours worked in excess of 40 hours per week.

Appellant was evidently under the misconception, when performing this and previous contracts for the Bureau, that the 40-hour law did not apply to work performed on the Navajo Indian Reservation. There is some evidence that this misconception was shared by certain BIA personnel. In any event, it appears that the law was never enforced as against appellant until after completion of this contract. At that time, according to appellant, the U.S. Department of Labor, Wage and Hour and Public Contracts Division, in Phoenix, Arizona, determined that the contract performed by appellant was an instrument of interstate commerce, and that appellant was obligated to pay its employees additional compensation for work in excess of 40 hours per week (in addition to overtime paid pursuant to the contract for work in excess of 8 hours per day).²

The contract does not specifically provide for compliance with the Fair Labor Standards Act, nor is that statute required to be referred to in public contracts, but the contract does state that "The contractor is assumed to be familiar with, and at all times shall observe and comply with all Federal, State and local laws * * *."³ Also, the contracting officer's letter to the contractor authorizing overtime work called the attention of the contractor to "all existing labor regulations" (Exhibit 16 of the Contracting Officer's Findings).

The Board had occasion to consider a similar question in *R. G.*

² Clause 21, "Eight-Hour Laws—Overtime Compensation" of Standard Form 23A, and Article 21.1 "Hours of Work," of the Special Provisions of the contract. If an employee worked 10 hours on one day but only 8 hours per day for the remainder of a total work week of 6 days, both laws would apply.

³ Article 7.1 of General Requirements of the contract.

Brown, Jr., and Company,⁴ where the Labor Standards Act had been amended to provide for an increase in minimum wage rates, to become effective March 1, 1956, after the contract had been awarded. The contractor was under the erroneous impression that the Act did not apply to his contract for construction of a road. Nevertheless (as was the case here), he did not attempt, prior to bidding, to verify his impression of nonapplicability by inquiry of his attorney or appropriate officials of the Department of Labor. In *Brown* the Board held that the contracting officer was not required to advise the contractor with respect to the applicability of the minimum wage provisions of the Fair Labor Standards Act.

We do not think that the evidence in this case would support a finding that there were representations or misrepresentations on the part of any authorized officials⁵ of the BIA that would bind the Government to pay this claim. If we assume *arguendo* that there were such representations or misrepresentations concerning the applicability of the 40-hour law portion of the Act, we would be without jurisdiction under the Disputes clause of Standard Form 23A to grant relief, for the contract does not contain any provision allowing adjustment of the contract price in such circumstances.⁶ Because the contractor's claim is based upon an alleged misrepresentation, we are not authorized to review it.⁷

Accordingly, the appeal as to Claim No. 1 under Contract No. 14-20-0600-6327 is dismissed.

Claim No. 2—Unnecessary Reprocessing of Subbase—\$11,995.03

The remaining claim under Contract No. 14-20-0600-6327 arises from alleged directions of the contracting officer's representative and resident engineer to reprocess or scarify and re-lay the minus 3-inch subbase of the road. At the time of such directions, the subbase was ready for application of the 1½ inch base course.

The resident engineer was deceased prior to the time of the hearing. Mr. Bill Hopwood, appellant's project superintendent, testified that the resident engineer was in poor health while the contract was being

⁴ IBCA-241 (December 12, 1961), 61-2 BCA par. 3230, at 16,741, citing, *inter alia*, *Ross Engineering Company v. United States*, 130 Ct. Cl. 368, 375 (1955).

⁵ Cf. *R & R Construction Company*, IBCA-413 and IBCA-458-9-64 (September 27, 1965), 72 I.D. 385, 65-2 BCA par. 5109, concerning statements by unauthorized Government personnel and the principle of merger of preliminary agreements, citing *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), and *United States v. Croft-Mullins Electric Co., Inc.*, 333 F. 2d 772, 779 (5th Cir. 1964).

⁶ *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 404 (1966); *R. G. Brown, Jr., and Company*, note 4 *supra*. See also *W.R.S. Pavers, Inc.*, IBCA-445-6-64 (March 30, 1967), 67-1 BCA par. 6238, denied on reconsideration (August 24, 1967), 67-2 BCA par. 6537; *Flora Construction Company*, IBCA-180 (June 30, 1961), 61-1 BCA par. 3081, at 15,951.

⁷ *Desert Sun Engineering Corporation*, IBCA-470-12-64 (October 25, 1966), 73 I.D. 316, 381, 66-2 BCA par. 5916.

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performed, that he took medication heavily, was moody and changed his decisions frequently. On some occasions he would be "very happy" (Tr. 59). At certain times Mr. Hopwood considered him to be unfit for working. On most occasions, however, he was very competent in his work (Tr. 115-116).

No evidence was offered by the Government in contravention of this claim, although it appears from the testimony of Mr. C. D. Benton, Jr., appellant's engineer, that in addition to the resident engineer there were several other BIA representatives or inspectors present on the project at all times (Tr. 142).

During all of the work of constructing the subbase there had been no complaints on the part of the Bureau relative to any deficiencies in the subbase, according to Mr. Benton. Mr. Benton was a graduate engineer with about 15 years' experience, including 8 or 9 years in the general area of the project (Tr. 6-7). The subbase had been constructed during a period of two weeks or more, and portions of it had been completed for intervals varying from several days to two weeks prior to the time it was rejected on Monday, June 19, 1961, by the resident engineer (Tr. 140-141). In the opinion of Mr. Benton, the subbase on this project was as good as or better than the subbase on a similar nearby project that had just been completed by this contractor under less favorable weather conditions and without any trouble as to acceptability (Tr. 139).

The contractor had other difficulties associated with its performance because of local public traffic using the adjacent and connecting new road during final sealing operations by the contractor. This was also an entirely new road constructed under the other project mentioned above. There were other old roads available for public traffic, although they were not in as good condition as the new roads under construction. The contractor attempted to prevent public use of the new roads during construction, while the resident engineer (who was in charge of both projects) insisted upon allowing traffic to use both new roads while they were under construction. This disagreement culminated in a decision by the resident engineer on Friday, June 16, 1961, that he would shut down the project unless the contractor permitted public use of both roads (Tr. 44). On Saturday, June 17, 1961, Mr. Hopwood advised the project engineer that the subbase for this project would be completed that day, and that on the following Monday appellant expected to begin processing the next layer or base course of the road. At that time the project engineer was apparently agreeable to Mr. Hopwood's proposal and raised no objections as to the subbase that was virtually completed.

The following Monday (June 19, 1961) the contractor commenced processing the base course, but at about 9:15 a.m. the project engineer informed Mr. Hopwood that the rock crusher should be shut down (this is denied in the project engineer's report) and the work on the base course should cease until the subbase had been reprocessed and recompacted (Tr. 44-46; Mr. Hopwood's diary (Appellant's Exhibit No. 1)). No tests of the subbase had been made by the Government, and none were ever made except by testing laboratories employed by the contractor. At the request of Mr. Hopwood, the contractor was provided with a letter dated June 20, 1961, signed by the project engineer, confirming the oral instructions to "* * * cease the placing of [that] material on the road until the course underneath is properly mixed and compacted including the picking up of 3" material which is over the side of the fill and in the ditches along the road. In this regard, you are referred to Section 200, Paragraph 200-3.5, Federal Specifications, FP-57, which is part of your contract" (Exhibit 19).⁸

The letter also stated that an inspection of the project "* * *" by the undersigned and the Agency Road Engineer on Monday, June 19, 1961, revealed the fact that you are placing 1½ inch base course on a 3 inch course which has not been properly mixed and compacted."

The references to 3" or minus 3" course and 1½" or minus 1½" course are intended to describe the maximum size of the fragments of rock aggregate material that could be used for the subbase and the base course, respectively. The subbase of "minus 3 inch" rock was 6 inches deep, and was placed on the dirt subgrade. The base course of "minus 1½ inch aggregates" was the next layer, also 6 inches in thickness. The next upper layer was an asphalt paving mix, and the final step was application of the "chip seal" coating (Tr. 138; Appellant's Exhibit No. 11, consisting of diagrams representing cross-sections of the road, not to scale). The subbase could include a maximum of 70 percent of the 3" rock material.

The protests of the contractor relative to the quality of the subbase and the tardiness of the decision of rejection as confirmed in the June 20th letter were of no avail, and the contractor thereupon proceeded in accordance with instructions of the resident engineer. These instruc-

⁸ "200-3.5 Mixing and Spreading. After each layer of base-course material has been placed, and filler added when required, it shall be thoroughly mixed to its full depth by means of power graders, traveling mixers, or other mixing equipment. During the mixing, water shall be added in the amount necessary to provide the optimum moisture content for compacting as specified in article 200-3.6. When uniformly mixed, the mixture shall be spread smoothly to a uniform thickness or, in case of the top layer, to the cross section shown on the plans.

"When power graders are used for mixing, at least one grader shall be operated continuously for each 100 cubic yards, or fraction thereof, of base material placed per hour. Power graders shall have blades not less than 12 feet long and wheelbases of not less than 17 feet. They shall be not less than 6 tons in weight and shall be equipped with pneumatic tires."

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tions required scarification of the completed subbase, re-mixing the material, adding water and rolling the material so that the larger or 3" rocks were "punched down" below the surface, instead of appearing on the surface (Tr. 50-51).

By letter of June 22, 1961 (Exhibit 20), the contractor advised the contracting officer that the Albuquerque Testing Laboratory had been engaged to make tests of the subbase. Additional tests were made for the contractor by the Phoenix Testing Laboratory. These tests were made beginning June 21, 1961. A letter dated June 23, 1961, from the resident engineer to the contractor (Exhibit 23), permitted the contractor to proceed with placing of the base course from Stations 525 to 606. This letter complied with Mr. Hopwood's request for written approval for placing the base course in that area, in view of the earlier rejection of the entire roadway. Later, by letter of July 6, 1961, the contractor was permitted to place the base course in another area that had not yet been reprocessed, from Stations 606+00 to 626+30 (Exhibit 26).

The two letters just described also approved those portions of the subbase that had been rejected on June 19, 1961. These approvals resulted in a reduction of about 30 percent of the original order for reprocessing of the entire subbase (Tr. 51).

Exhibits 17 and 18 of the Findings are reports that reflect the results of the tests made by the Albuquerque and the Phoenix testing laboratories, respectively. As stated in the contractor's claim letter of October 23, 1962 (Exhibit 3), the results of the tests indicate substantial compliance with the contract requirements for compaction.

Paragraph 18.B. of the Findings of the contracting officer, dated June 18, 1963, refers on page 17 to the letter of June 20, 1961, ordering the discontinuance of placement of base course. No exceptions were included in that letter as to acceptability of any portion of the subbase. Paragraph 18.G. on page 20 quotes a memorandum dated April 19, 1963 (Exhibit 27), from the resident engineer, stating in part: "I did not stop Contractor from crushing as he had sections ahead of him that the subgrade met specifications."

The inspection that took place on June 19, 1961 was visual, and the rejection seems to have been based principally upon the presence of 3" rock on the surface of the subbase, as well as on the shoulders and in the ditches, according to Paragraph 18.E. of the Findings (pp. 17-19). Compaction tests were not made by the Government and were not necessary in these circumstances, according to the Findings.

The unrebutted testimony of the contractor's engineer, Mr. Benton, was in substance that the 3" minus size of rock specified by the con-

tract is rather large for the purpose, and is not very commonly used in a subbase (Tr. 140). There was no excessive waste of material. In the process of mixing the material by moving it from side to side from the windrows previously dumped by trucks (in spite of careful operation of the blade machinery), it would be impossible to avoid losing some rocks that would roll down the "4 to 1" slopes along the edges of the subbase. In a few cases the subbase material that is spread contains a surplus of 3" rocks, and these are left on the slopes for later incorporation in the base course, because the latter would provide the necessary "fines" (smaller particles) for proper compaction. The blades that perform this moving and mixing operation must go out to a point about one foot within the staked line marking the edges of the subbase on each side of the road. Water is added as the mixing and spreading of the material is being completed. The general engineering practice that was followed by the contractor as to finishing or dressing the slopes is to go along the edges of the road with a blade or similar equipment after the next or base course has been finished and the road has been nearly completed except for priming and paving. In the process of dressing the slopes some of the dirt and the rocks that have gone over the edge are brought back up to fill voids and to present a pleasing appearance (Tr. 143-145, 149, 151). The normal practice is to remove any remaining excess rocks in the ditches in the final cleanup.

Appellant introduced in evidence a series of photographs, numbered 1 to 31, inclusive (Appellant's Exhibit No. 3), taken June 23 and 24, 1961, purporting to depict the entire length of the road, some showing the rejected subbase sections, others showing stretches that had been rejected but were later accepted without reprocessing, and areas that were reprocessed at the direction of the resident engineer. Photographs 1 and 2 show the windrows of base course material that had been dumped on the subbase just prior to the rejection of the subbase. A line of loose rocks of 3" size appear on the slopes near the stakes and a few other scattered rocks are shown as protruding from or lying on the surface of the subbase along the center of the road. Picture No. 3 shows the next section that was ready for the base course. It is comparatively free from loose rocks on the surface. Nevertheless, all three sections were rejected.

Picture No. 4 shows an instance of surplus 3" rocks along the slopes, within the stake lines, that were not incorporated in the subbase, as described earlier, because of insufficient fines or smaller material which could be supplied later by the base course material. No large loose-

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rocks appear on the top surface of the road. This section was also rejected. Mr. Hopwood stated, "* * * It's impossible to work an aggregate of this size and not have loose material somewhere * * *" (Tr. 68).

Picture No. 5 shows a fairly neat appearing area that was rejected. Picture No. 6 depicts an area that was adjacent to the other project and had been subjected to wear and tear due to hauling asphalt over the subbase to the other project. It had previously been agreed by the contractor that this section would be reprocessed at no cost to the Government.

Pictures 7, 8 and 9 portray areas that had been rejected and reprocessed and then accepted, although after reprocessing these three sections appear to have about as many loose rocks on the surface as before, according to Mr. Hopwood (Tr. 69-70).

Moreover, some of the remaining pictures show areas that were originally rejected and later accepted without reprocessing. The appearance of these sections in general is no better than those that were required to be reprocessed, or those that were accepted only after reprocessing.

It appears to the Board that there was no logical basis for the rejections, and that very little consistency was observed between cases where rejection was reversed and sections thereafter accepted without reprocessing, and areas that were accepted only after reprocessing (Tr. 70-77).

Mr. Hopwood was of the opinion that the presence of a moderate quantity of loose 3" rocks on or protruding from beneath the surface of the subbase would tend to stabilize, rather than to harm the 6" thick layer of base course (consisting of 1½" material) on top of the subbase (Tr. 80). It was also his opinion that the method of reprocessing as required by the resident engineer was detrimental to the quality of the subbase. That method consisted of scarifying the material that previously had been mixed, overwatering it so as to bring the fines to the top and settle the rocks to the bottom. This had the effect of segregating the materials previously mixed in accordance with the specifications. The material was then heavily rolled to present a smooth appearing surface, with the fine materials on top (Tr. 61).

Mr. Hopwood's testimony was not contradicted, hence, we rely upon his opinion with respect to the segregation effect caused by the reprocessing. This being so, the directions of the resident engineer as

to the manner of reprocessing would be in violation of the requirements of FP-57, Article 104-3.2 of Section 104—SPECIAL SUBBASE:

104-3.2 Placing. Subbase material shall be placed in accordance with the requirements of section 106. *Segregation of coarse and fine material shall be avoided.* (Italic added.)

A minor question arises, however, from the manner in which the Bureau undertook to modify portions of Division II of FP-57. On page 15 of the special provisions, under "SECTION 104—SPECIAL SUBBASE," the following appears:

104-3.2 *Placing:*

All special subbase material of the blowsand type shall be placed in layers not to exceed 3" in thickness. All special subbase material other than blowsand that may be used shall have a maximum size not to exceed $\frac{1}{3}$ the depth of the layer being placed.

If it had been intended to delete the provision of FP-57 quoted above, and substitute therefor the paragraph in the special provisions, the effect would have been to delete all reference to Section 106 of FP-57 providing for the method of placing and compacting the subbase materials (in the same manner as for embankment). The parties have performed as if Section 106 were intended to govern the method of placing and compacting the subbase and on this point no question of dispute has arisen. Article 106-3.5 Compaction, provides in substance, *inter alia*, that the engineer may make practical density tests during the progress of the work. In our opinion, this does not mean that the entire length of the subbase may be rejected on a visual inspection basis, after it has been fully completed, with continuous daily inspection of the placing of the subbase.

The Board finds that the rejection by the resident engineer of the subbase, and his instructions for reprocessing those sections that were rejected, were based upon erroneous interpretations of the contract requirements, and as such, his instructions constituted constructive changes for which the contractor is entitled to an equitable adjustment.⁹ To the extent that the contractor was required to redo work unnecessarily, an equitable adjustment will be made for the expense thereof.¹⁰

⁹ *C. W. Schmid v. United States*, 173 Ct. Cl. 302 (1965); *Lincoln Construction Company*, IBCA-438-5-64 (November 26, 1965), 72 I.D. 492, 65-2 BCA par. 5234. *D. R. Kincaid, Ltd.*, ASBCA No. 8615 (April 28, 1965), 65-1 BCA par. 4810.

¹⁰ *Kinemax Corporation*, IBCA-444-5-64 (January 19, 1967), 74 I.D. 28, 67-1 BCA par. 6085; *Tree Land Nursery*, IBCA-436-4-64 (October 31, 1966), 66-2 BCA par. 5924.

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Appellant's claim is in the sum of \$11,995.03 and consists of three items: (1) labor and equipment standby time, amounting to \$7,535.51; (2) the cost of reprocessing, amounting to \$3,829.52; and (3) the cost of testing to establish that the Government's rejection of the subbase was unjustified, amounting to \$630. The contracting officer denied the claim in its entirety.

We recently held that a claim for the standby cost of idle equipment will be dismissed for lack of jurisdiction where the work was held up pending determination by the contracting officer as to the necessity for corrective measures, in the absence of a contractual clause providing for compensation for suspension of work by the Government.¹¹ The Suspension of Work clause here (Article 8.7 of the General Requirements) contains no provision for an equitable adjustment, but provides only for extensions of time under certain circumstances. However, we cannot dispose of the question on that basis because we are uncertain, from the present record, that appellant was in fact standing by and, if it was, to what extent.

Appellant claims that as a result of the shutdown during the period from June 20 through June 23, 1961, certain of its rented equipment was kept idle at a loss to it of \$5,947.50.¹² It also contends that it had to compensate one crusher foreman, one shovel operator, two tractor operators, one motor scraper operator, one dumptruck operator, three crusher operators, two "8-12 cy" truck drivers, three "16-20 cy" truck drivers, and three laborers and dumpman, a total of \$1,250.40, plus \$150.05 for taxes and insurance, at a rate of 12 percent, and \$187.56 for overhead, at a rate of 15 percent.

There are, however, serious discrepancies between the data submitted in appellant's claim and the payroll sheets.¹³ For example, no motor scraper operator and only two crusher operators are listed on the payroll records, and the crusher foreman and shovel operator actually worked overtime, according to the payroll records, while allegedly on standby time. As to the former, the explanation offered by Mr. Hopwood was "the fact that these people aren't shown for this

¹¹ *W.R.S. Pavers, Inc.*, note 6, *supra*.

¹² Exhibit 3. The contracting officer determined (par. 27(a)(1), p. 31) that approximately \$2,250 of appellant's standby claim, "without consideration of taxes, insurance and overhead is unsupported by Contractor's payrolls." His calculations were not set forth in the decision.

¹³ Exhibits 28-30. A chart prepared by the Contracting Officer comparing the data for the workers involved in the claim with the payroll records appears on page 23 of the Findings of Fact.

particular classification on the payroll is no means to determine that they weren't doing this particular type of work." ¹⁴ The latter discrepancy was not explained, nor was he able to explain why appellant reported certain employees on its payrolls only for the June 20 through 24 period and thereafter neither employed nor replaced them (Tr. 135). With respect to the cost of the equipment being idle, this observation of the Contracting Officer is relevant:

The discrepancies between the hours reported on the payrolls and those claimed as stand-by time for operators should also be taken into consideration in evaluating the time claimed for equipment stand by (Findings, par. 21(a)(5), p. 24).

These discrepancies should be resolved fully. In addition, the contracting officer cast further doubt upon the appellant's standby time claim when he revealed that concurrent with its work under this contract appellant was performing work at the Navajo Tribe sawmill which involved in part crushing and hauling the crushed material (Par. 22, pp. 27-29). According to the contracting officer the crushed material was produced at the same pit used for this project. Incorporated into the appeal file are memoranda, dated in 1963, from Government engineers, including the project engineer at the sawmill, stating that appellant was hauling crushed material to the sawmill between June 20 and June 24, 1961 (Exhibits 27, 31 and 32). At the hearing Mr. Hopwood denied that the crushers were used for the sawmill contract "during this period" (Tr. 107). He testified that the material appellant was hauling to the sawmill was of a smaller size than the material crushed in performance of this contract, that it was already on hand and that it did not have to be crushed (Tr. 132). He stated that "it would have taken well over a day to change the crushers" so as to produce the smaller sized material required for the sawmill (Tr. 132).

Because the questions discussed above were left unresolved by the contracting officer, we remand appellant's standby claims to him to determine whether or not appellant's equipment and crew were actually on standby, idle or otherwise nonproductive on June 20, 21, 22 and 23, 1961. If the contracting officer finds that during the shut-

¹⁴ Tr. 134. He testified (Tr. 133) :

"Q I believe you testified you paid certain crusher operators during June 21st and 22d?

"A Yes.

"Q Would you tell us generally the type of work they would do a day like that?

"A They would go around and perhaps service the parts of the machinery, check for loose bolts, check for wear points, just general maintenance work, not necessary to be productive, but just kind of putting in time."

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down period appellant's equipment and crew were not idle and standing by, but were in fact being utilized in another endeavor, appellant is not entitled to be compensated for any or all of that time. In the event that he finds that appellant's equipment or crew were idle and nonproductive for any or all of the period between June 20 and June 23, 1961, as a direct result of the constructive change, appellant is entitled to be compensated therefor because the costs involved were integrally associated with that change.

With respect to the cost of reprocessing, the contracting officer found that of the amount claimed \$2,180.02 was "unsupported by Contractor's payrolls" (par. 21, p. 27; par. 27(b) (1), p. 32). Appellant has not submitted any proof to overcome this finding. Accordingly, we disallow \$2,180.02 of appellant's claim for reprocessing cost. We hold that appellant is entitled to an equitable adjustment in the amount of \$1,649.50 for the cost of reprocessing.

The cost of utilizing commercial testing laboratories to establish that the Government's rejection of the subbase was unjustified is in the nature of an expense for preparing and prosecuting a claim. Recovery of such a disbursement is unauthorized.¹⁵ Appellant's claim for \$630 is therefore denied.

*Contract No. 14-20-0600-5880**Project N12(5) 2 & 4*

This contract was in the estimated amount of \$602,100.14, and required the construction of 9.939 miles of roadway on the Window Rock-Fort Defiance road, on the Navajo Indian Reservation, from one mile southeast of Fort Defiance, Arizona, north toward Red Lake, New Mexico.

Six claims were filed under this contract. Claim No. 4 was allowed by the contracting officer and is no longer in dispute.¹⁶

Claim No. 1—Increased Wage Costs—\$2,139.23

By virtue of Article 20.1 of the Special Provisions and Addendum No. 1 (Exhibit 16), the minimum wage rates for the work to be done

¹⁵ See *William C. Ramsey et al. v. United States*, 121 Ct. Cl. 426, 484 (1951); *R. E. Hall Construction Company*, IBCA-465-11-64 (September 26, 1967), 67-2 BCA par. 6597, at 30,608; *Southern Plumbing and Heating Company*, ASBCA No. 10986 (December 14, 1966), 66-2 BCA par. 6028, at 27,861; 41 CFR 1-15.205-31(c).

¹⁶ Findings of Fact and Decision, par. 15, p. 54; Tr. 328.

in Apache County, Arizona, set forth in Department of Labor wage determination decision U-17,988 were incorporated into the contract. On June 23, 1960, one day prior to award of the contract, the decision expired. It was replaced on July 27, 1960, by Department of Labor wage determination decision Y-1,499 (Exhibit 17). The contracting officer issued Change Order No. 2 (Exhibit 9) on August 9, 1960, in order to incorporate decision Y-1,499 into the contract in place of decision U-17,988.¹⁷ As a result of the new wage rates appellant incurred additional labor costs.¹⁸ This is a claim for reimbursement in the amount of such costs.

During the history of this claim, the precise amount sought by the appellant has varied. On August 17, 1960, appellant requested \$2,821.83 (Exhibit 18). The Government rejected this amount as excessive (Exhibits 19, 20). On July 19, 1961, after the project was completed, appellant proposed that it be compensated in the sum of \$2,204.83 (Exhibits 22, 23). However, in excepting this claim from its release, dated September 30, 1961, appellant reverted to the previous figure of \$2,821.83 (Exhibit A of Exhibit 24). On February 13, 1962, appellant submitted a revised figure of \$2,139.23,¹⁹ which it attempted to substantiate at the hearing.

The contracting officer allowed appellant a total amount of \$1,396.74 (Findings, par. 9i, p. 24). First, based upon an "examination of the contractor's payrolls in the Government audit file" (Exhibit 27), the contracting officer found that the appellant paid additional wages of \$1,144.87 as a result of the changed wage rates. He then awarded appellant 12 percent or \$137.38 for payroll taxes and insurance and 10 percent or \$114.49 for overhead and other costs.

The appellant disputes the quantum allowed to cover additional wages. It contends that it is entitled to the difference (\$241.26) between what it sought (\$1,386.13) and what the contracting officer allowed.

¹⁷ See *Blauner Construction Co.*, WDBCA No. 1815 (June 12, 1946), 4 CCF par. 60,114. At the time of issuance of the change order, the contracting officer's action was consistent with the views expressed in Dec. Comp. Gen. B-106987 (May 8, 1953), the facts of which closely parallel this case. The Comptroller General has since expressly limited the applicability of that decision to the circumstances of that case. 45 Comp. Gen. 325, 330 (1965); 42 Comp. Gen. 410, 413 (1963).

¹⁸ The contracting officer found that the "amended Wage Rates were higher for several crafts than the wage rates in the original decision." Findings of Fact and Decision, par. 9.b., p. 23.

¹⁹ Exhibits 25, 26. This amount was arrived at as follows: Wages for work in Arizona, as set forth in Exhibit 26, \$1,660.89 (consisting of \$1,386.13 for laborers and mechanics' wages and \$274.76 for supervisors' wages); payroll taxes and insurance, at 12%, amounting to \$199.31; plus "15% Overhead and Other Costs," amounting to \$279.03.

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(\$1,144.87). Appellant also objects to the Government's failure to include the increase in supervisors' wages, allegedly amounting to \$274.76. In addition, appellant questions the Government's reduction of its overhead rate from 15 percent to 10 percent.

Appellant, however, has failed to sustain its burden of proof. In so far as computation of the additional wages is concerned, Mr. Benton testified that the method it utilized was to determine the average wage increase of the laborers and mechanics and multiply the average increase by the total payroll.²⁰ On the other hand, examination of the data used by the contracting officer in arriving at his allowance (\$1,144.87) reveals not the use of an "average" but actual tabulation for each category of worker of the regular and overtime hours, original wage rates, original pay, difference in rate, amended wage rate, amended pay and difference in pay (Exhibit 27). Mr. Benton was unable to substantiate any higher degree of accuracy with respect to appellant's figures.²¹ Accordingly, appellant neither disproved the correctness of the Government's allowance nor established that its own figure was more acceptable.

Appellant also has not met its burden of proof in connection with the item for supervisors' wages.²² The wage determinations in question itemize the workers included, but omit any reference to supervisory personnel. Appellant was under no legal compulsion to raise the supervisors' wages.²³ Article 9.5(a) of FP-57, which could be construed as providing some contractual basis for this element of appellant's claim, was excluded from the contract.²⁴ The contracting officer was therefore correct in disallowing reimbursement for the increase in supervisors' wages.

We also uphold the contracting officer's reduction of the applicable overhead rate from 15 percent to 10 percent. The contract does not specify the overhead rate. The appellant did not establish that the policy of the Bureau of Indian Affairs to allow a rate of 10 percent

²⁰ Tr. 155. See, also, Exhibit 26.

²¹ At the hearing he testified (Tr. 172):

"Q. In any event, your record of \$1,386.13 is based on your actual gross payroll record?

"A. Yes, and I feel that it's low. We tried breaking this down in every way conceivable so that Mrs. Olson [Government contract specialist] could check it, and every time we broke it down we were higher than this. This was simple—based on total payroll, based on average increase, and it was the lowest figure we had come up with, so we used it."

²² By "supervisory personnel" appellant means "project superintendent, various foremen, grade foremen, foremen in charge of the crusher operations." Tr. 158.

²³ Tr. 163. *Cf. United States v. Binghamton Construction Co., Inc.*, 347 U.S. 171 (1954).

²⁴ Special Notice, Division I, General Requirements, p. 1.

for overhead is unreasonable. The fact that a rate of 15 percent is allowed by some agencies²⁵ does not render a rate of 10 percent *ipso facto* unreasonable. Moreover, Article 9.5(a) of FP-57, which provides for a 15 percent overhead rate, was, as we have seen, excluded from the contract.²⁶

Accordingly, no proof to the contrary appearing, the contracting officer's allowance of \$1,396.74 is affirmed. Appellant's claim for \$2,139.23 is denied.

*Claim No. 2—Costs Resulting from Changing
Asphalt Specifications—\$5,044.95*

Item No. 310(4) of the Bid Schedule called for RC (rapid cure) asphalt to be used on the prime cost. After appellant started to apply the RC asphalt, the Government, on April 25, 1961, decided to change the type used to MC (medium cure) asphalt.²⁷ The contracting officer requested appellant "to furnish a proposal" stating "the amount of increase in contract price" and any additional time requiring resulting from the change (Exhibit 29). In its response, on May 17, 1961, appellant proposed an increase to cover the additional cost of MC asphalt over RC asphalt as well as a claim for \$5,044.95, which included \$4,216.79 allegedly paid to appellant's asphalt supplier (Thunderhead Oil & Gas Co.) in connection with re-utilization of the RC asphalt returned, and \$828.26 lost due to delays.²⁸ Subsequently, on May 18, 1961, Change Order No. 7 was issued substituting asphalt Grade MC-1 or 2 for the RC asphalt and increasing the contract amount by \$1,048.68 to cover the difference in cost per ton between the MC grade and the RC grade.²⁹ The Change Order also provided as follows:

²⁵ Tr. 159. It has been said that a 10% overhead rate "is in accordance with generally accepted accounting principles and practices for the construction industry." *Bruce Construction Corp.*, ASBCA No. 5932 (August 30, 1960), 60-2 BCA par. 2797, at 14,388.

²⁶ Note 24, *supra*.

²⁷ Tr. 177. Memorandum of Government Supervisory Engineering Technician, dated April 25, 1961. Exhibit 28. Mr. Benton testified that appellant had protested the use of RC asphalt for prime coating before commencing that work. Tr. 178.

²⁸ Exhibit 32. Appellant also requested a time extension of three days as a result of the delay caused by the change. Inasmuch as the contract was completed within the specified time, as extended by Change Order No. 6 (Exhibit 13), the request for additional time poses a moot question. *Allison and Haney, Inc.*, IBCA-642-5-67 (February 7, 1968), 68-1 BCA par. 6842. The RC asphalt was "reduced" to penetration asphalt to make it more attractive commercially. Letter of Thunderhead to appellant, dated May 11, 1961. Exhibit 34.

²⁹ What is purported to be Change Order No. 7 is quoted in full in paragraph 10.g. of the Findings of Fact, pp. 32-33. Although Change Order No. 7 is referred to in 10.g. as Exhibit 14 and listed as such in the list of Exhibits the appeal file does not contain Exhibit 14.

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The additional time and compensation claimed in your proposal to cover return of the rejected shipment of RC-2 Asphalt, costs and time due to delays incurred because of the substitution, etc, are being given consideration and you will be notified as soon as a decision is made.

Ultimately the contracting officer allowed appellant \$1,168.85, consisting of appellant's freight costs in connection with the RC asphalt amounting to \$514.56, and idle labor and equipment charges amounting to \$654.29.³⁰

The contracting officer disallowed appellant's claims totaling \$3,876.10. Appellant contends that such disallowance was improper because the Government was "committed * * * to pay the actual cost of changing from RC to MC * * *."³¹ It is clear from the record that by "actual cost" appellant means all items of cost it submitted to the Government on May 17, 1961. Appellant claims the Government undertook to pay it for all such expenses.

However, we are unable to find any evidence in the record of any agreement by the Government governing all costs claimed by the appellant. The portion of Change Order No. 7 quoted *supra* makes clear that the matter was left undecided by the contracting officer. Had there been any understanding between the parties we think it would have been reflected in the change order issued one day after appellant's proposal. That the items were not covered but were left for future disposition does no evince a meeting of the minds. Similarly, the memorandum of the Government's resident engineer dated May 24, 1961, does not record any agreement beyond the Government's liability for the increase in unit price, haulage "both ways of the returned RC-2 and possibly handling and demurrage charges."³²

The testimony at the hearing also does not substantiate appellant's contention. Reliance is placed upon statements said to have been made by Mr. Kubitz, the Government's Assistant Area Road Engineer at the time of the contract. Since the Government did not call upon Mr. Kubitz to refute the testimony offered we may draw the inference that the statements attributed to him were his.³³ He was said to have

³⁰ Findings of Fact and Decision, par. 11-l., p. 40, and par. 11-m., p. 41.

³¹ Appellant's Post-Hearing Brief, p. 19.

³² Exhibit 35. The memorandum concluded: "It is recommended that we pay the Contractor at the original unit price for item 310(4) and all additional charges be determined after the Contractor presents his claim." This is not the language of a commitment.

³³ *Thermo Nuclear Wire Industries*, ASBCA No. 7806 (July 9, 1962), 1962 BCA par. 3427.

"agreed" that "the least expensive means of disposing of the" RC asphalt was through its reduction to penetration asphalt (Tr. 185, 193-94). But we do not regard this as a commitment by the Government to bear the expense of reduction. Neither do we consider statements by him that the Government "would have to pay for the actual cost of changing from RC to MC" (Tr. 188) as obligating the Government to reimburse appellant for all costs claimed by it.

The costs disallowed by the contracting officer are of two general categories. One relates to expenses in connection with the unused RC asphalt which was on hand at the site on April 25, 1961, when the Government decided to change the type of asphalt to be used, amounting to \$274.15. The second category, amounting to \$3,262.59, involved expenses relating to the storage and subsequent conversion at Thunderhead's facility of the excess RC asphalt to penetration asphalt which was done in an effort to mitigate damages. Also refused was reimbursement in the amount of (1) \$82.68 for New Mexico sales tax, and (2) \$256.68 representing a charge imposed on Thunderhead by the State of New Mexico and passed on to appellant. Lacking any agreement with respect to the allowability of the items of cost in dispute, the test we must employ is whether they are the direct, as distinct from remote, results of the change.

At the time of the change, 50.14 tons of RC asphalt were on hand at the site. As a consequence of the change it was not used and was returned to the supplier. As a further result of the change appellant sustained a labor and equipment standby loss. The contracting officer correctly allowed appellant to be reimbursed for the cost of transporting the asphalt to the site and back to Thunderhead, amounting to \$514.56. He denied, however, appellant's claim for \$100.28 to cover the cost of pumping the RC asphalt, at the rate of \$2 per ton, onto and off of the truck on which it was transported. With respect to rented equipment rendered idle while the change was effected, the contracting officer allowed the full amount claimed, \$593, for the distributor (truck and boot trailer) and 3-wheel steel roller, but disallowed a charge for \$15 for a pickup truck. He also allowed appellant reimbursement for only 16 hours of its bootman's idle time, instead of 24 hours, at the rate of \$3.14 per hour and denied an additional claim for the bootman's subsistence, for 3 days at \$6 a day, or \$18, and foreman's compensation for two days at \$40 per day amounting to \$80. The contracting officer also reduced the overhead rate claimed from 15 percent to 10 percent.

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We find that the pumping charge, in the sum of \$100.28 was a separate item not included in the cost of transportation and actually incurred as a necessary step in the hauling process without which transportation was impossible.³⁴ It directly flowed from the change and it is allowable. We also find on the basis of unrefuted testimony that appellant's bootman was idle for an additional eight hours for which appellant is entitled to be reimbursed in the sum of \$25.12. However, there is no contractual basis under which appellant may be compensated for the bootman's subsistence and the contracting officer properly disallowed this item. And, the appellant submitted no proof to contravene the contracting officer's finding that the foreman's time was covered in overhead.³⁵ As to the pickup truck, the appellant did not overcome the determination by the contracting officer that "such a vehicle serves numerous purposes on a project of this type and there is no evidence that the vehicle was, in fact, not in use as a result of the change in specifications."³⁶ Nor, for the reasons stated in the text accompanying notes 25 and 26, *supra*, did the contracting officer err in reducing appellant's overhead rate to 10 percent.³⁷

The other area of costs disallowed by the contracting officer relates to the excess RC-2 asphalt remaining after the change to MC asphalt as prime coat material. According to the contract (Item No. 310(4)), the prime coat required 810 tons of RC asphalt. Upon notification from the appellant that it was ready to commence application of the prime coat, its supplier procured the entire amount necessary from the refinery.³⁸ This was done in order to protect the price quoted appellant in 1960 to take advantage of the economies of bulk purchase, and also to be in a position to commence deliveries April 17, 1961.³⁹

³⁴ Tr. 183-84; Exhibit 34.

³⁵ Findings of Fact and Decision, p. 48. See *P. M. W. Construction, Ltd.*, ASBCA No. 11121 (October 14, 1966); 66-2 BCA par. 5901.

³⁶ Findings of Fact and Decision, p. 42. In contrast therewith, the contracting officer found that the distributor (truck and boot trailer), and 3-wheel roller were not in use during the shutdown.

³⁷ As a result of our determination herein, appellant is entitled to additional overhead in the amount of \$2.51 and additional compensation of \$8.01 to cover payroll tax and insurance at the rate of 12%, over and above the amounts of \$5.02 (overhead on labor) and \$6.03 (payroll tax and insurance), respectively, allowed by the contracting officer. Findings of Fact and Decision, p. 41. The 12% payroll tax and insurance rate is not in dispute.

³⁸ Tr. 192; Exhibit 34.

³⁹ Letter from appellant, dated April 25, 1961, to contracting officer, Exhibit 30; Exhibit 34; Tr. 186, 195-96.

John F. McGill, the manager of Thunderhead Oil & Gas Co., testified at the hearing that it was estimated appellant "would need fifty tons a day, which is two truckloads, and at that rate it would take six days to do this job."⁴⁰ The first load, consisting of from 49.64 to 60 tons, was delivered and applied on April 24.⁴¹ As we have seen, *supra*, 50.14 tons delivered on April 25, when appellant was notified of the impending change to MC asphalt, were returned to the supplier. As a result of the change, from 250 to 260.36 tons of RC-2 asphalt (depending on whose figures we accept) were left to be disposed of by the appellant's supplier. There was no market for it.⁴² The cost of returning it to the refinery in Oklahoma appears to have been prohibitive.⁴³ The question confronting us is whether the Government is liable to the appellant for any portion or all of the unused asphalt.

It is clear from the record that the RC asphalt proved unsatisfactory for priming.⁴⁴ As we noted previously, appellant had protested the use of RC asphalt for prime coating before commencing that work.⁴⁵ Having specified RC asphalt and having thereafter changed that specification, the Government is directly responsible for appellant's acquisition of and subsequent inability to dispose of the excess.⁴⁶ Our next inquiry is the extent of such responsibility, or put another way, was it reasonable of the appellant to have kept at hand the entire supply of RC asphalt required? Considering that RC asphalt is "rarely used" and not readily available (Tr. 186), and con-

⁴⁰ Tr. 185-6, 195. Mr. McGill further testified (Tr. 195); "We have an 84,000-gallon tank, about a 400-ton tank, that we put material into on a fast-moving item. We ordered this and had it there all at one time, so we could have it out there in those six days and it would be all over."

⁴¹ Exhibits 30, 32, 34. In Exhibit 30 appellant stated that "nearly 60 ton of RC asphalt [was] applied on April 24." But in its letter dated May 17, 1961, to the contracting officer (Exhibit 32) appellant states it "used 53.6 tons of RC asphalt" on April 24. However, in Exhibit 34, Mr. McGill, on behalf of appellant's supplier, stated that 49.64 tons were delivered April 24. Appellant has furnished no explanation of the discrepancy between the amount delivered and the varying amounts it claims to have applied.

⁴² Tr. 189, 194; Exhibit 34. In Exhibit 34 Mr. McGill stated: "We have tried several sources for an outlet for the RC-2 left in our storage and have been unsuccessful. There is one job in progress at this time that could use this material, however the price that they have used is prohibitive and we would lose a great deal of money by selling this account." Further amplification of Mr. McGill's statement does not appear in the record.

⁴³ Tr. 193. The basis for this conclusion was not given.

⁴⁴ Exhibit 28.

⁴⁵ Note 27, *supra*, referring to Tr. 178.

⁴⁶ *Lehigh Chemical Co.*, ASBCA No. 8427 (May 24, 1963), 1963 ECA par. 3749; *Roscoe Engineering Corp. and Associates*, ASBCA No. 4820 (January 16, 1961), 61-1 BCA par. 2919. See *R. M. Hollingshead Corporation v. United States*, 124 Ct. Cl. 681, 684 (1953), in which the Court said, "We see no justification for throwing upon the plaintiff a loss which is a direct result of faulty specifications promulgated by the Government."

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sidering further that the priming would only have taken six days, we hold that appellant acted reasonably in arranging to have its entire source standing by.

Thus, unable to dispose of the remaining RC-2 by economic return to the refiner or by prudent resale, appellant and its supplier, in consultation with the Government, decided to convert it into penetration asphalt, for which there was a ready market (Tr. 193-94). This was done by evaporating the naphtha from the RC-2 asphalt (Tr. 193-94). According to Mr. Benton's testimony, Mr. Kubitz "agreed * * * that this was * * * the least expensive means of disposing of the asphalt" (Tr. 185, 193). Although available, Mr. Kubitz was not called upon to offer any contrary evidence and we, therefore, draw the inference that Mr. Benton's statement is accurate.⁴⁷ Accordingly, we find that utilization of the procedure employed was reasonable. We consider it a direct result of the change, and sustain this element of appellant's claim.

At the hearing, Department Counsel stipulated that the amount Thunderhead charged appellant for converting the excess RC asphalt to penetration asphalt was reasonable (Tr. 195). While we have certain reservations with respect to the amounts involved and the procedures followed, to which we have alluded in part at notes 40 and 41 and the accompanying text, we hold that Thunderhead's charge, \$3,262.59, is not unreasonable. The Government is bound by the stipulation. Accordingly, appellant is allowed \$3,262.59 for the costs of conversion to penetration asphalt.

The charge of \$256.68 was imposed upon appellant's supplier by the State of New Mexico, when Thunderhead was unable to furnish MC asphalt to the State pursuant to agreement because its entire supply was exhausted by appellant in carrying out the change.⁴⁸ It represents the additional cost to the State of obtaining MC asphalt elsewhere and was passed on to appellant by Thunderhead. Such an expense is too remote.⁴⁹ And appellant's liability for New Mexico sales

⁴⁷ *Thermo Nuclear Wire Industries*, note 33, *supra*.

⁴⁸ Tr. 187; Exhibits 37 and 38. The amount is incorrectly stated in the transcript as "\$262.68."

⁴⁹ *Lehigh Chemical Co.*, note 46, *supra*, at 18,709. See *Ford-Fielding, Inc.*, IBCA-303 (July 2, 1962), 1962 BCA par. 3402. The recent decision (*No. 227-65*, May 10, 1968), by the Court of Claims, *Cornell Wrecking Company, Inc. v. United States*, is distinguishable. There a contractor whose equipment was idled by Government delay and kept from use on another job was held entitled to recover the actual cost it incurred in renting equipment similar to that idled for use on the other job. Here the cost was incurred, not by the contractor, but by its supplier.

tax in the amount of \$82.68 was unsubstantiated.⁵⁰ It appears to have been calculated by taking a straight 2 percent (the New Mexico rate) of Thunderhead's invoice (Exhibit 33) for \$4,131.11 without regard for its contents. This invoice covers the freight expenses, the cost of storing and converting the unused asphalt, and the charge of \$256.68, *supra*. Appellant has furnished no proof either of any legal authority making it liable for the tax or of payment of the tax. The charge is therefore disallowed, with the opportunity extended to the appellant, during the course of the contracting officer's consideration of the various matters remanded to him, to establish its validity by providing substantiating information to the contracting officer.

Claim No. 3—Additional Quantities of Excavation—\$13,109.97

This is a dispute over the amount of Unclassified Excavation (Item 102(1)), performed by the appellant. Appellant contends it should be compensated for 314,573 cubic yards, at the contract unit rate of 38 cents per cubic yard. The Government paid for 291,942 cubic yards.⁵¹ In his Findings of Fact and Decision the contracting officer held that the appellant is entitled to be paid \$3,413.54 for an additional 8,983 cubic yards found to have been performed.⁵² Appellant seeks to be compensated in the amount of \$5,186.24 for the remaining 13,648 cubic yards in controversy. It also requests reimbursement in the amount of \$4,510.19 to cover the cost of retaining the Whiteman Engineering Co. to measure the quantity of excavation it claims to have performed.

Under the bid schedule, Item 102(1) called for 243,251 cubic yards of unclassified excavation. Mr. Benton testified that appellant first became aware of an overrun as it was doing the excavation work in July or August 1960 (Tr. 200-201). Written notice to the Government was given by letter dated November 15, 1960 (Appellant's Exhibit No. 5). Appellant substantially completed excavation that month.⁵³ By letter dated February 9, 1961, the appellant requested

⁵⁰ Tr. 187; Exhibits 32 and 33. The amount is incorrectly stated in the transcript as "\$82.18."

⁵¹ In par. 13a, p. 52, of his Findings the contracting officer states that appellant was paid for 298,984 cubic yards of unclassified excavation, which includes Item 102(1) Unclassified Excavation, and Item 102(4), Borrow Excavation. The quantity of Item 102(4) excavation, 7,042 cubic yards, is not in dispute. Tr. 226-28, 231.

⁵² Par. 13a., p. 52. Appellant did not accept payment of this amount. Tr. 232.

⁵³ Tr. 201. The U.S. Department of Commerce, Bureau of Public Roads Intermediate Construction Inspection Report, attached as Exhibit A to Appellant's Post-Hearing Brief, shows that excavation was "100% complete" on December 19, 1960, the date of inspection. We note that the Report states that the resident engineer participated in the inspection.

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payment for the overrun (Appellant's Exhibit No. 7). Thereafter, by Change Order No. 5, dated February 22, 1961, the quantity of Unclassified Excavation was increased by 43,467 cubic yards, to 286,718 cubic yards (Exhibit 12). Appellant objected to this figure as too "low" (Tr. 204). Following discussions with the Government's resident engineer, appellant hired the Whiteman firm to compute the amount of excavation performed (Tr. 205-06, 234, 264). On July 27, 1961, by virtue of Change Order No. 8, the Government increased the quantity by an additional 5,224 cubic yards, to 291,942 cubic yards (Exhibit 15). Appellant filed its claim on August 7, 1961, based upon Whiteman's calculations (Exhibits 51-55). Subsequently, as we have seen, the contracting officer found that appellant was entitled to be compensated only for an additional 8,983 cubic yards. It is incumbent upon us to determine the amount of excavation performed.

In arriving at the over-all amount of its claim appellant considered the following quantities: (1) roadway and side borrow excavation, 270,759.15 cubic yards (2) channel changes and CMP inlet and outlet excavation, 33,912.43 cubic yards (3) ditch and dike excavation, 7,332 cubic yards (4) roadway excavation (not included in (1)), 1,369.50 cubic yards; and (5) side borrow excavation (not included in (1)), 1,200 cubic yards.⁵⁴ Only the first item was based upon actual field measurements by the Whiteman firm (Tr. 243-44, 324-25). The other figures were derived from the Government's data and the contract documents (Tr. 212-17, 244).

Mr. Whiteman testified at considerable length with respect to the measurements his firm made. His qualifications were not disputed by the Government.⁵⁵ The work was done under his supervision and control (Tr. 240). In computing the volume of excavation he used the average-end-area method required by article 9.1 of the General Requirements of the contract (Tr. 237). He first obtained from the Government its cross-sections for every station of the entire length of the project (Tr. 236). He had a cross-section taken wherever the Government had taken one (Tr. 237). The quantity of excavation that Mr. Whiteman "came up with" by this method was 270,759.15 cubic yards (Tr. 243; Exhibits 54 and 55). He made no, or only a small, allowance

⁵⁴ Exhibit 55. As will hereinafter appear, the figures shown for items (4) and (5) were not obtained in the same manner as the amounts set forth for items (1) through (3).

⁵⁵ Mr. Whiteman is a registered engineer and land surveyor in the State of New Mexico, experienced in making cross-sections of highways. Tr. 283, 250-51. Department Counsel stipulated "to the fact that Mr. Whiteman had credentials to be out there, and that he did perform this work ***." Tr. 235.

for a margin of error.⁵⁶ Rather, he "averaged" out differences (Tr. 264, 269).

The Government contended that Mr. Whiteman's figures are suspect because his firm's cross-sections were made after subbase material was in place.⁵⁷ Mr. Whiteman, however, explained that the increased thickness resulting from the presence of the subbase was taken into consideration (Tr. 255). According to him it is not more difficult to get an accurate cross-section after rolled and compacted material has been placed over the subgrade (Tr. 257, 268-69), but taking a cross-section on the subgrade is preferable (Tr. 261). In any event, Mr. Whiteman claimed that the Government also made cross-sections after the subbase was on.⁵⁸

Mr. Kubitz was the sole witness for the Government. When asked if the cross-sections taken by the Government were of "raw subgrade, before any material was dumped on top," he replied, "I believe they were, yes" (Tr. 278). He stated that it is Bureau of Indian Affairs' standard practice to take cross-sections on raw subgrade "insofar as possible" (Tr. 278). He criticized Mr. Whiteman's method for taking into account "theoretical thickness," as set forth in the specifications and not actual thickness (Tr. 280-81, 286-87). Mr. Kubitz also challenged Mr. Whiteman's figures because they were unsupported by any document which would show the appellant's computations broken down. He, on the other hand, relied on a Government worksheet, undated, entitled "Gallup Area Office Final Audit Excavation Quantities Proj. N12(5)" and "Gallup Area Office Final Audit Ditches and Dikes—Channel changes—Inlet and outlets and borrow Proj. N12(5)" (Government's Exhibit No. A). According to Mr. Kubitz, the worksheet "lists the quantities of materials found to be properly measured or actually audited" (Tr. 285). He testified that the worksheet showed roadway excavation in the amount of 260,965.6 cubic yards and "a total of 47,001.4 yards in the way of channels, which is borrow inlet and outlet ditches, ditches and dikes, and inlet and outlet ditches not measured, of a minor nature, in which we used the planned quantities as shown on the plans" (Tr. 288-89). The total amount set forth on the worksheet is 307,967.0 cubic yards (Tr. 289).

Mr. Kubitz testified that he believed the cross-sections shown were taken during November and December 1960, possibly between October 1960 and January 1961 (Tr. 290-291). He stated that the figures on

⁵⁶ Tr. 256, 262. Mr. Whiteman testified that a "normal" margin of error would be 1 or 1½ %. Tr. 244.

⁵⁷ Tr. 278, Government's Post-Hearing Brief, pp. 13-14.

⁵⁸ Tr. 261. He testified: "They were taking cross-sections at the same time we were out there."

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the worksheet were taken from computation sheets, but he did not recall if the computation sheets indicated any Government cross-sectioning after January.⁵⁹ He said that some cross-sectioning was done after Change Order No. 5, in order to correct an oversight (Tr. 295, 298). He did not know who performed or supervised the field work after February 22, 1961 (Tr. 298). He did not know if any field work was done after Change Order Number 8 was issued (Tr. 299).

We hold that by a preponderance of the evidence the appellant has established its claim in respect to the quantity of roadway and side borrow excavation in dispute. First, the appellant has demonstrated that the volume was computed by the average-end-area method provided for under the contract. There is no positive showing that the Government utilized this technique in arriving at its figure. While the Government has criticized appellant for taking cross-sections over subbase, it appears that the Government was itself not free of this practice. We recognize the possibility of error in appellant's figure, on account of the presence of the subbase, but in the circumstances the assumption that the Government inspectors required the installation of subgrade to a proper depth would seem to be warranted.

The Government's case is replete with miscalculation. For example, to explain why the Government's "figures went up with each change or change order, or audit," Mr. Kubitz testified:

As we pursued our audit we further analyzed what had been included, * * * and what had been provided for the roadway excavation, and *checking the plans to determine whether all quantities had been included* as indicated by the plans; either from plan quantities or actual measurements *determined that those additional quantities should have been incorporated* in this thing, and by the time the final audit was completed we had checked every item in the plans in order to determine that the measurements had been made or accounted for by plan quantities (Tr. 307). (Italics supplied.)

The foregoing explanation leaves us with doubts as to the accuracy and completeness of the Government's original approach to its obligation to measure the quantities.

Even more serious are our reservations concerning the Government's worksheet on which it has placed so much emphasis. Undated, of unknown authorship, and containing no station by station breakdown of the figures appearing thereon, it has little probative value. Moreover, the figures are written in pencil and are in part illegible.

⁵⁹ Tr. 291. The Government's Exhibit No. A does not indicate when the cross-sectioning was done.

But the most serious deficiency of the worksheet is the fact that the figures listed thereon do not actually add up to the amounts claimed by the Government. According to the Board's calculations, the Government's total of 260,965.6 is incorrect and should be 265,751.5, and the Government's total of 47,001.4 is also incorrect and should be 49,016.4.⁶⁰

In corroboration of our findings is the affidavit of Mr. Whiteman, sworn to August 20, 1965, and the attached exhibit (designated "B") which appellant submitted with its Post-Hearing Brief.⁶¹ The 25 sheets constituting the exhibit are said to be "true and exact copies of the computations, or results of computations, made by," or under the direction of Mr. Whiteman. The first 22 sheets "reflect the stations * * * where road excavation had been made which were cross-sectioned" and "the results of the actual cross-section." The subtotals shown at the bottom of each page in turn total 249,974.99 cubic yards. The remaining three sheets "show the revisions in the cross-section which were necessary because of the presence of [the] base course or topping material in place. The thickness * * * was determined from the Government's Engineers and records. * * *"⁶² The resulting adjustment, in the amount of 20,784.16 cubic yards (which is the total of the subtotals shown at the bottom of the last three pages), was added to the first amount to arrive at 270,759.15 cubic yards, the amount of appellant's claim for roadway and side borrow excavation.⁶³

The remainder of appellant's overrun claim relates to channel changes and CMP inlet and outlet excavation, amounting to 33,912.43 cubic yards; ditch and dike excavation, 7,332 cubic yards; roadway excavation (not included elsewhere), 1,369.50 cubic yards; and side borrow excavation (not included elsewhere), 1,200 cubic yards. In arriving at the first amount appellant accepted four quantities derived from cross-section by the Government, 150 cubic yards, 28,069.70, 638.60, and 1,104.80.⁶⁴ The balance is based upon "quantities shown on [the] plans" (Exhibit 55).

The volume of ditch and dike excavation was computed "from the lengths shown on the plan, and actually checked in the field." One

⁶⁰ Included in the Government total for channel changes, inlet and outlet and ditch and dike excavation is 7,041.6 cubic yards of borrow for which appellant was paid pursuant to Item 102(4) and is not in dispute. Tr. 227.

⁶¹ Testimony offered by affidavit in a case where a hearing is conducted is accorded extremely limited weight. See *Kean Construction Company, Inc.*, IBCA-501-6-65 (April 4, 1967), 74 I.D. 106, 108, 67-1 BCA par. 6255. We note that Department Counsel has not objected to consideration of the affidavit and exhibit.

⁶² Unfortunately, it is impossible to make a meaningful comparison between the sheets attached to Mr. Whiteman's affidavit and the Government's worksheet because of the absence of detail and breakdown on the latter.

⁶³ Exhibit 55, "CMP Inlet and Outlet Excav. and Channel Changes"; Tr. 213.

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ditch was cross-sectioned by the Government and the resulting figure, 2,943 cubic yards was accepted by appellant.⁶⁴

The volume of roadway excavation not otherwise included "represents material in a rock cut" (Tr. 215). It could not be measured by cross-section and was estimated by the appellant "on the basis of the approximate width, depth and length removed and replaced."⁶⁵ Lastly, the side borrow excavation figure, not included on the Whiteman cross-section, appears to be an accurate estimate "based on the approximate width, depth and length of the cut."⁶⁶

The Government has not furnished convincing proof casting doubt upon these figures. Accordingly, we hold that the appellant has established the foregoing amounts by a preponderance of the evidence. We find that as to this aspect of its claim the quantity of excavation is 43,813.93 cubic yards. Therefore, the total amount of excavation for which appellant is entitled to be compensated under Item 102(1) is 314,573 cubic yards. Deducting the previous payments made or allowed,⁶⁷ appellant is awarded an additional \$5,186.24.

However, we affirm the contracting officer's disallowance of the cost of retaining the Whiteman firm to make the measurements on appellant's behalf. This charge is an expense of preparing or prosecuting a claim of the type which we have denied above.⁶⁸

Claim No. 5—Additional Costs for Crushing and Reduction of Plasticity Index—\$33,012

Under section (a) of Article 6.1 of the General Requirements of the contract, the appellant was obligated to furnish all material required for performance except when "otherwise stated in the specifications." With respect to Bid Schedule Items No. 104(2), Special Subbase, Grading A; No. 200(4), Crushed Aggregate Base, Grading Special; and No. 317(1), Plant Mixture, the Fuzzy Mountain Pit was designated, pursuant to Sheet 4 (entitled "Material Pit Location and Classification") of the plans, as the source of much material. It is undisputed that adequate quantities of the material were not in fact available from the pit.⁶⁹ However, the contracting officer found "that

⁶⁴ Tr. 214; Exhibit 55, "Ditch and Dyke Excavation."

⁶⁵ Exhibit 55; Tr. 215-16.

⁶⁶ Exhibit 55; Tr. 216-17.

⁶⁷ See notes 51 and 52, *supra*, and accompanying text.

⁶⁸ See authorities cited in note 15, *supra*, and accompanying text.

⁶⁹ The contracting officer found that "adequate quantities of specification materials were not in fact available from the" Fuzzy Mountain Pit. Findings of Fact, par. 17.a., p. 61.

the Government fully discharged its obligation to the contractor regarding the matter of inadequate availability of specification materials from Designated Fuzzy Mountain Pit No. 2" (Findings, par. 17c, p. 62). The appellant, to the contrary, contends that the Government made only a partial equitable adjustment and failed to cover its "increased crushing costs which were necessary to modify the pit material" so as to comply with the specifications.⁷⁰ Such costs allegedly amount to \$33,012.

Appellant maintains that after beginning operations at the pit it became obvious that the pit did not contain material to meet the contract needs and that it thereupon became obligatory for the Government to designate another source and make an equitable adjustment in accordance with section (c) of Article 6.1 of the General Requirements.⁷¹ The problem appellant encountered was that the material obtained exceeded the plasticity index of three imposed by the contract (Tr. 345, 389-90). Instead of designating another source, however, the Government required appellant to blend the inadequate material with blow sand in order to reduce the plasticity index to the contractual standard.⁷² The addition of blow sand adversely affected compliance with the gradation requirements of the contract and appellant was caused to incur additional crushing costs.⁷³ The appellant arrived at the amount of its claim allegedly by comparing its production records for the items in question with its records for producing the same material from the same pit for a subsequent project (N12(5A)), and subtracting the difference.⁷⁴ Appellant maintains that its significantly

⁷⁰ Appellant's Post-Hearing Brief, p. 36.

⁷¹ Tr. 362-63. Article 6.1(c) reads:

"*Designated sources:* In case certain pits * * * are identified * * * as 'designated sources,' the Contractor is relieved of any * * * responsibility for the quantity of acceptable material therein. Should it develop that a designated source contains insufficient material to meet the contract needs, the Contracting Officer will designate another source, under Clause 3 General Provisions, Standard Form 23A [Changes], in which event an equitable adjustment will be made, if considered necessary in payment for materials furnished from the new source and in contract time." (Italics supplied.)

Appellant contends that its letter dated November 8, 1960 (Exhibit 61) constituted a request for a substitute pit. Tr. 383-84.

⁷² Tr. 349, 363-64, 387; letter of Contracting Officer to appellant, dated November 16, 1960, Exhibit 62. Appellant suggested the addition of sand in its letter of November 8, 1960 (Exhibit 61).

⁷³ Tr. 349-50, 364. Appellant's position is stated as follows at pp. 12-13 of its Brief: "* * * [T]he problem of production of the 3 types of materials from the inadequate [sic] designated source was not solved by the simple addition of blow sand. The addition of blow sand, which is extremely fine material, caused the compliance by the Contractor with the gradation requirements to become extremely difficult. In other words, a plasticity index of less than 3 was obtained at the expense of gradation. The only way to provide for the accommodation of the blow sand which was added to these materials was to waste in the crushing operation all of the fine materials which were plastic, in order to permit the physical addition of the fine blow sand which was relatively non-plastic and still comply with the gradation requirements."

⁷⁴ Tr. 352-53, 372-74; Appellant's letter, dated October 18, 1962, pp. 3-4, Exhibit 60.

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increased production in project N12(5A) was due to the Government's relaxation of the unduly restrictive plasticity and gradation requirements contained in this contract.⁷⁵

The following table shows how appellant arrived at its claim:⁷⁶

Bid Schedule Items	Project N12(5)		Project N12(5A)		Difference Cost/ Ton	Total Tonnage	Additional Cost
	Tons/ Day	Cost/ Ton	Tons/ Day	Cost/ Ton			
104(2)---	1673	\$0.86	2034	\$0.71	\$0.15	35,735	\$5,360.00
200(4)---	1457	\$1.28	2052	\$0.91	\$0.37	50,294	\$18,608.00
317(1)---	—	—	—	—	\$0.47	19,244	\$9,044.00
							\$33,012.00

The figures shown in the cost/ton columns are based upon appellant's alleged expenses in operating its "basic equipment," including labor, payroll taxes, insurance, fuels, lubricants and overhead, which total "approximately \$1,450 per day, and \$1,870 per day when certain additional equipment" is also used (Exhibit 60, p. 3).

According to the contracting officer, "provision was made to compensate the contractor for the additional operating costs of producing the blended blow sand and aggregate by payment for that material at full contract unit prices" for items 104(2), 200(4), and 317(1).⁷⁷ It appears that the Government at one point contended that it could have compensated appellant at the substantially lower unit rate for blow sand, which falls within the Selected Borrow, Topping Category of the contract.⁷⁸ Having, instead, paid appellant at the higher unit rates it is apparently the Government's position that appellant's crushing cost was reflected in such payment and appellant was therefore "fully compensated for [its] additional operating costs for producing the blended aggregate."⁷⁹

The contracting officer expressly recognized the inadequacy of the

⁷⁵ Tr. 438-39, 443-45. Appellant's contention is that the Government "[c]apriciously and arbitrarily ignored and failed to enforce gradation and P.I. [plasticity index] specifications on the next Project, N12(5A), in a transparent attempt to cover up their prior actions on this project and in order to avoid a similar claim on N12(5A). But the Government's representatives refused to officially make the changes in the gradation and P.I. requirements on N12(5A) which had been repeatedly requested on this project, N12(5), lest they admit that they were in error." Appellant's Post-Hearing Brief, pp. 37-38.

⁷⁶ Exhibit 60, pp. 3-4; Tr. 372-73.

⁷⁷ Findings of Fact, par. 17.c, p. 62. The unit prices are \$1.10/ton for Item 104(2), \$1.25/ton for Item 200(4), and \$3.20/ton for Item 317(1).

⁷⁸ Tr. 369-70. That item is 102(6a). Its unit rate is \$0.45/ton.

⁷⁹ Government's Statement of Position and Brief, p. 12.

designated pit.⁸⁰ Although no such contention was made, and any further discussion in that regard is unnecessary to this decision, it appears that the inadequacy of the pit constituted a changed condition,⁸¹ which required the blow sand to be utilized. In authorizing such utilization, the Government effected a constructive change for which appellant is entitled to an equitable adjustment.⁸² The Government, therefore, properly recognized that such an adjustment was due.

In our view, however, the additional compensation appellant received⁸³ was insufficient. Mr. Benton testified that customarily "any blended filler is paid for at the price of what it's added to" (Tr. 397). His testimony was unrefuted by the Government. Accordingly, we hold that the additional compensation at the contract unit rate for items 104(2), 200(4) and 317(1), rather than at the lower blow sand rate, covered only the addition of the sand and did not include reimbursement for any attendant difficulties arising therefrom. We find that the increased crushing and the resulting problem in meeting the gradation requirements are a direct consequence of the change for which appellant should be compensated by means of an equitable adjustment. We also hold that appellant gave reasonable notice to the Government of this claim first by its letter dated November 8, 1960 (Exhibit 61) and then by reserving it in its release and is not now barred from maintaining it.⁸⁴ In this connection, we note that even if appellant unreasonably delayed in giving formal notice of its claim, prompt notice is unnecessary where, as here, the contracting officer, in fact knew of the circumstances that form the basis of the claim, actually considered the claim on its merits without protesting appellant's lack of timeliness, and did not make a showing of ensuing prejudice to the Government.⁸⁵

Appellant, however, has established only that it is entitled to an additional equitable adjustment, without adequately substantiating the quantum thereof. In the first place, appellant has furnished us

⁸⁰ See note 69, *supra*.

⁸¹ See *Nielson, Incorporated*, IBCA-525-11-65 (October 30, 1967), 67-2 BCA par. 6667; *Harris Paving and Construction Co.*, IBCA-487-3-65 (July 31, 1967), 74 I.D. 218, 67-2 BCA par. 6468; *Walsh-Rivers*, FAACAP No. 66-27 (June 30, 1966), 66-1 BCA par. 5664; *Bregman Construction Corp.*, ASBCA No. 9000 (September 22, 1964), 1964 BCA par. 4426.

⁸² See *Bregman Construction Corp.* and *Harris Paving and Construction Co.*, note 81, *supra*.

⁸³ There is no showing in the record of the amount of such compensation paid appellant.

⁸⁴ Release of claims, dated September 30, 1961, Exhibit 24.

⁸⁵ *Korshoj Construction Company*, IBCA-321 (August 27, 1963), 70 I.D. 400, 402, 1963 BCA par. 3848.

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with bare conclusions devoid of proof.⁸⁶ There is no itemization or other reliable evidence in the record to support appellant's contention that its cost was \$1,450 or \$1,870 per day. We also do not know how much time was spent in performance of the work.

In the second place calculation of the additional adjustment on the basis of a comparison of costs of performing items 104(2), 200(4), and 317(1) under this contract and in subsequent performance of project N12(5A) using the same pit, should be resorted to only if there is no other equitable method. The specifications for both projects are similar but clearly not identical.⁸⁷ Comparison is therefore not a wholly reliable guide. With respect to item 104(2), the plasticity and gradation requirements differ. With respect to item 200(4), the plasticity indices are the same, but the gradation requirements differ, albeit slightly. Only with respect to item 317(1) are the plasticity and gradation requirements identical. In making a meaningful comparison allowance must be made for the differences in specifications and also for the possibility that special efforts were made to achieve efficiency in performing the subsequent work in order to heighten the differences. Moreover, if there was any unofficial relaxation of requirements by the Government in project N12(5A) (appellant has failed to so establish), the costs incurred in project N12(5A) are rendered even more irrelevant to appellant's costs here.

Accordingly, this appeal is sustained and remanded to the contracting officer to determine the equitable adjustment to which appellant is entitled. In the event of continued dispute, appellant may again invoke its rights before this Board.

Claim No. 6—Cost of Overtime Wages—\$7,000

At the hearing the parties offered no testimony and stipulated that our decision with respect to Claim No. 1 under Contract No. 14-20-0600-6327, *supra*, would also be determinative of this claim (Tr. 450). We dismissed the earlier claim. In accordance with the agreement of the parties we hereby dismiss this claim.

Claim No. 7—Deduction of \$1,717.61 From Final Payment

At the time of final acceptance of the work on June 29, 1961, complete agreement as to the quantities of certain items could not be

⁸⁶ See table and text accompanying note 76, *supra*.

⁸⁷ Tr. 419-22. See table in Findings of Fact, par. 17.d., p. 56.

reached between the parties.⁸⁸ Thereafter, on November 17, 1961, the Government issued its final audit report which had the effect of changing the quantities and monetary values of such items as they appeared on the final construction report, dated July 28, 1961.⁸⁹ As a consequence the monetary values of the quantities were reduced by a total of \$1,717.61. Accordingly, the contracting officer deducted that amount from the payment due appellant, pursuant to Article 7.13 of the General Requirements of the contract.⁹⁰

Appellant has not questioned the Government's authority to act under Article 7.13, nor do we. What appellant does contend is that the reduction is unjustified. Its emphasis is on items for 24-inch and 30-inch piping, which together account for a reduction of \$1,734.60. Appellant maintains that the Government required it to remove 30-inch pipe in one area as unwarranted by drainage conditions there and to use it elsewhere where 24-inch pipe is customary (Tr. 454-55). Thus, appellant speculates, in making a field audit for purposes of the final audit report the Government assumed that the 30-inch pipe was 24-inch pipe (Tr. 455). Appellant also claims that, at the Government's direction, it hauled 150 to 160 feet of 24-inch pipe to the BIA maintenance yard at Fort Defiance instead of installing it (Tr. 455-56). According to appellant, if the Government's final figures are based upon actual remeasurement in the field, the 150 to 160 feet of 24-inch pipe hauled to Fort Defiance would not then be included (Tr. 456).

The appellant, however, has not furnished any evidence to support the foregoing allegations. It is incumbent upon appellant to show why its calculations were more accurate and how the Government's were incorrect. It is not enough to assert that the Government should

⁸⁸ Findings of Fact, pars. 20-21, pp. 70-71; Final Audit Report, dated November 17, 1961, Exhibit 56.

⁸⁹ Final Construction Report, dated July 28, 1961, Exhibit 73. A list of the items affected appears in a table included in the Findings of Fact, par. 22, pp. 71-72.

⁹⁰ "Article 7.13 *No Waiver of Legal Rights*: The Government shall not be precluded or estopped by any measurement, estimate or certification made either before or after the completion and acceptance of the work and payment therefor from showing the true amount and character of the work performed and materials furnished by the Contractor, nor from showing that any such measurement, estimate or certificate is untrue or is incorrectly made, nor that the work or materials do not in fact conform to the contract. The Government shall not be precluded or estopped, notwithstanding any such measurement, estimate or certificate and payment in accordance therewith from recovering from the Contractor or his sureties or both such damages as it may sustain by reason of the Contractor's failure to comply with the terms of the contract. Neither the acceptance by the Contracting Officer, nor any payment for or acceptance of the whole or any part of the work, nor any extension of time, nor any possession taken by the Contracting Officer shall operate as a waiver of any portion of the contract or of any power herein reserved, or of any right to damages. A waiver of any breach of the contract shall not be held to be a waiver of any other or subsequent breach."

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not have modified the earlier figures, or to contend that those figures are more acceptable than the figures set forth in the final audit report. Because the appellant has not sustained its burden of proof, the claim is denied.

*Contract No. 14-20-0600-7004, Project N12S (2A) 2 & 4 Claim for
Excess Cover Aggregate—\$2,250*

This contract was in the original amount of \$458,851.35 and required the construction of 10.739 miles of roadway, on Route 12 and Round Rock Spur, from Round Rock to Lukachukai Creek Bridge, on the Navajo Indian Reservation, in Apache County, Arizona, about 150 miles northwest of Gallup, New Mexico. Only one claim was filed under this contract. It arose from an underrun of Cover Aggregate, Grading Special, Type 3, Seal Coat (Item 313(4) of the Bid Schedule).

Item 313(4) called for 2,230 tons of cover aggregate. The actual amount required by the Government was 1,272.7 tons, resulting in an underrun of 957.3 tons.⁹¹ Appellant's claim is based upon an additional 500 tons allegedly produced and stockpiled by it in excess of the Government's requirement.⁹² These 500 tons were, according to appellant, "left remaining on the project after" completion.⁹³ The compensation sought is \$2,250, computed at the rate of \$4.50 a ton.⁹⁴

At the hearing, Mr. Hamilton, appellant's president acknowledged that the Government notified it "that there would be an under-run on * * * Item 313(4)" (Tr. 484). Nevertheless, appellant contends, the Government is liable for the extra 500 tons produced because the Government required only "55 or 57 percent" of the quantity stated in Item 313(4) and should have been able to estimate the quantity

⁹¹ Change Order No. 2, dated December 4, 1962, Exhibit 5. The change order decreased the monetary amount for cover aggregate by \$7,275.48. However, the over-all effect of the change order was to increase the contract price by \$16,346.13. By Change Order No. 1, dated November 9, 1962, the contract price had been reduced to \$457,958.35. Exhibit 4.

⁹² Tr. 482. However, appellant's president testified that it produced 1,900 tons. Tr. 484-85. The difference between 1,900 and 1,272.7 is 627.3 tons and not 500 tons. The discrepancy was unexplained.

⁹³ Tr. 481. The contracting officer found that approximately 240 tons of non-specification cover aggregate was stockpiled on Government land. Findings of Fact and Decision dated June 13, 1963, par. 16(3) (a), p. 15.

⁹⁴ Notice of claim, dated December 10, 1962, Exhibit A-1. In the notice of claim the figure of \$4.50 per ton is represented as appellant's "cost of producing and stockpiling this material in its present condition." At the hearing, however, appellant's president testified that the actual cost per ton was several dollars higher. Tr. 482, 488.

required more closely (Tr. 484). Appellant maintains, in addition, that one official who served as contracting officer orally agreed to pay this claim (Tr. 487-89).

It is clear from the terms of the contract that the quantities stated in the Bid Schedule were only estimates and were not intended to be guaranteed. Article 9.2 of the General Requirements provides that payment "will be made only for the actual quantities of contract items performed."⁹⁵ Article 4.2 of the General Requirements constitutes an express recognition that quantities stated were subject to change.⁹⁶ It provides for an adjustment of contract price in the event of increase or decrease in quantity only if (1) a major item or the original contract amount is altered by 25 percent⁹⁷ (2) a substantial change is made in the plans and specifications affecting the character of the work to be performed under a pay item, or (3) the original length of the road is increased or decreased by 25 percent. However, these exceptions are not applicable here. Cover aggregate is not a major item under the terms of the contract.⁹⁸ It is unquestionably a minor item, constituting less than 4 percent of the total price. There is also no proof that the reduction of the quantity of cover aggregate resulted from a substantial change in the plans and specifications affecting the character of the work performed under that item.⁹⁹

⁹⁵ See also Article 313-4.1 of FP-61, incorporated by reference into this contract by means of Standard Form 23, dated February 16, 1962, Exhibit 1. Article 313-4.1 reads in pertinent part: "The quantities to be paid for shall be the number of * * * tons of cover aggregate used in the accepted work."

⁹⁶ "4.2 Changes in Drawings and Specifications—Adjustment in Quantities. It is mutually agreed that it is inherent in the nature of the type of construction work to be performed under this contract that minor changes in the plans and specifications may be necessary during the course of construction to adjust them to field conditions and that it is of the essence of the contract to recognize a normal and expected margin of change within the meaning of the Clause 3, 'Changes,' General Provisions, Standard Form 23A as not requiring or permitting any adjustment of contract prices, provided that any change or changes do not result in one of the following: [three exceptions outlined above in text].

"Any adjustment in contract time or compensation because of adjustments in quantities or changes resulting in one or more of the conditions described in (1), (2), and (3) of the foregoing paragraphs shall be made in accordance with the provisions of articles 8.6 and 9.3 respectively." Article 8.6 relates to extensions of time and is not relevant here.

⁹⁷ A "major item" is defined in Article 1.2 of the General Requirements as a "pay item" designated as a major item in the bid schedule. Article 9.3 of the General Requirements governs changes in quantities of major items of more than 25% of the original contract amount.

⁹⁸ Page 1, Bid Schedule, designates "major items."

⁹⁹ In addition to regulating payment for changes in major items (note 97, *supra*), Article 9.3 provides:

"An equitable adjustment shall be made in the basis of payment as provided in Article 4.2, if:

"The changes ordered by the Contracting Officer under Clause 3, Changes, General Provisions, Standard Form 23A, involves substantial changes in the plans and specifications or in the character of the work to be performed under the contract. The amount of any equitable adjustment and any adjustment in contract time shall be incorporated in

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Cover aggregate is merely a "wearing surface," consisting of very small rock, or chips, used to cover the surface of the road (Tr. 482). The reduction in quantity resulted only in a decrease in the weight of the cover aggregate applied per square yard of road (Tr. 486). Lastly, there is no allegation or other indication that the original length of the road was altered by 25 percent.

In giving effect to the provisions of Article 4.2 and the related clauses of the contract, we find no conflict with the position taken from time to time by the Court of Claims and most recently in *Morrison-Knudsen Company, Inc. v. United States* (Ct. Cl. No. 239-61, June 14, 1968). That position is that a clause such as Article 4.2 diminishes the scope of the Changes clause. In dealing with a provision such as Article 4.2 the Court "will construe the agreement, to the extent it is fairly possible to do so, so as not to eliminate the standard article [the Changes clause] or deprive it of most of its ordinary coverage" (Slip opinion, p. 2). The Court thereupon held that a contractor who sustained an overrun of less than 25 percent of an estimated bid quantity was nevertheless entitled under the Changes clause to an equitable adjustment, despite the presence of a provision in the nature of Article 4.2, because such provisions are not "the exclusive means for obtaining a changes adjustment" (Slip opinion, p. 24). That is to say, according to the Court, even with the limitation imposed by a provision such as Article 4.2, when a "contractor is required, because of unforeseen field conditions, to do, within the prescribed percentage limits, a greater or lesser quantity of work than could be originally estimated * * * a change in such circumstances is compensable under the Changes clause if the extra costs so incurred differ materially from the costs reimbursed through unit-price payments" (Slip opinion, p. 23). The Court allowed "a modification * * * separate and apart from a modification of the unit

the written change order, subject to the provisions of Clause 3, Changes, General Provisions, Standard Form 23A." This provision reads in the disjunctive. Unquestionably a reduction of 43 or 45% in the quantity of cover aggregate is a substantial change. In this respect Article 9.3 conflicts with Article 4.2 which refers to a "substantial change * * * affecting the character of the work to be performed under" item 313(4). We hold that Article 4.2 governs when an adjustment in quantity should be made and that Article 9.3 governs how it should be made. The quoted language in Article 9.3 should not be read in the disjunctive; otherwise the "substantial change * * * affecting the character of the work" clause in Article 4.2 would be rendered meaningless. As we said in *Lloyd E. Tull, Inc., IBCA-574-6-66* (February 15, 1967), 67-1 BCA par. 6137, at 28,456, "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, meaningless or inoperative. No portion of a contract should be construed as being in conflict with another unless no other reasonable reading is possible."

price—for the costs of extra work greatly differing from those compensable through unit-price payments."

In our view the result reached in *Morrison-Knudsen* is not appropriate here. The emphasis in *Morrison-Knudsen* is upon foreseeability. The Court (Slip opinion, p. 24) underscored the following quotation from a previous decision: "But we have held that clauses of this type do not control when the cost of doing the extra work greatly differs from the stated unit-price because of factors not foreseen by either party."¹⁰⁰ There is no factor of unforecastability present in this case. Mr. Hamilton acknowledged that the quantity of cover aggregate to be applied "can vary from 15 to 25 pounds per square yard" (Tr. 484). Thus, inherent in the nature of the item is the possibility of an extreme variation in quantity. In addition, appellant has made no showing that it actually incurred extra costs as a result of the underrun or that such extra costs differed materially from the costs reimbursed through the unit-price payment.

The gravamen of the claim is directed at the Government's responsibility in overestimating the quantity required. Appellant asserts that the Government should have estimated its actual needs for cover aggregate with greater precision. If there were support in the record for this contention appellant's point would be well-taken, provided appellant had relied on the estimate. The Court of Claims has recently held that the Government is liable on a breach theory for a negligent contract estimate, on which a contractor relied, even though the contract contained a "variation in quantity" clause which stated that all estimated quantities were subject to a 25 percent increase or decrease.¹⁰¹

But the appellant has failed to establish that the estimate by the Government was negligently made or that it relied on the estimate. The mere fact that only 55 or 57 percent of the quantity stated in the bid schedule was actually required does not in and of itself support a conclusion of Government negligence. According to Mr. Hamilton, the estimate was based on an application of 25 pounds of cover aggregate to every square yard of roadway, while in reality "just a shade over 14 pounds to the square yard" was used (Tr. 486). However, this standing alone does not constitute negligence either, for, as we have seen, Mr. Hamilton acknowledged that in the discretion of the contracting officer's representative on the job, the quantity of cover aggregate to be

¹⁰⁰ *United Contractors v. United States*, 177 Ct. Cl. 151, 171 (1966).

¹⁰¹ *Womack & Vorhies v. United States*, Ct. Cl. No. 269-62 (January 19, 1968), 389 F. 2d 793 (1968).

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applied "can vary from 15 to 25 pounds per square yard" (Tr. 484). In our view the Government's estimate would be negligent only if the actual quantity had seriously deviated from these limits.

Mr. Hamilton testified that appellant produced "only 1,900 tons," rather than 2,230 tons (the quantity stated in Item 313(4)) because "[w]e were notified that there would be an under-run on this" (Tr. 484-85). It appears that appellant's over-production was either entirely voluntary¹⁰² or else attributable to its own inability to control the quantity produced.¹⁰³ Pursuant to Article 4.4 of the General Requirements, the Government is not responsible for an overrun resulting from appellant's over-production.¹⁰⁴ It is also well established that a contractor is not entitled to payment for extra work volunteered.¹⁰⁵

Finally, we consider appellant's assertion that the contracting officer orally bound the Government to pay this claim. As to it, appellant has not sustained its burden of proof by a preponderance of the evidence.¹⁰⁶ In the first place, there is no evidence of any writing confirming such an understanding. Mr. Hamilton admitted that the contracting officer did not confirm the alleged commitment in writing (Tr. 489). Moreover, such an agreement would be in contravention of the provisions of Article 4.4. In addition, it appears to us that the appellant may have read too much into the contracting officer's statements. We do not regard this statement attributed to the contracting officer—"He said if I submitted the \$4.50 price on these chips he thought they would pay it on a claim basis" (Tr. 487)—or this statement—"he seemed to think the Government owed me something on it" (Tr. 489) as signifying an unequivocal commitment to pay this claim.

The claim for excess cover aggregate is denied.

¹⁰² Mr. Hamilton testified (Tr. 483) :

"Q. You try to produce just a little more than the Government tells you?

"A. Yes, sir, this is just like insurance—you try to have a little more so if it does overrun a little bit, you've got enough to take care of it."

¹⁰³ Mr. Hamilton testified that cover aggregate is "a small, very small item * * * almost like making gold, and you only get about 100 ton a day * * * and you try not to overrun this item at all, if possible." Tr. 482. He later described it as "a very hard item to make." Tr. 487.

¹⁰⁴ "In the event the contractor has produced or processed materials from lands of the Federal Government in excess of the quantities required for performance of this contract, the Contracting Officer may take possession of such excess materials, including any waste material produced as a by-product, without obligation to reimburse the contractor for the cost of their production, or may require the contractor to remove such materials and restore the premises to a satisfactory condition at the contractor's expense."

¹⁰⁵ See, e.g., *Ruscon Construction Co.*, ASBCA No. 9371 (December 22, 1964), 65-1 BCA par. 4599.

¹⁰⁶ See *R. E. Hall Construction Company*, note 15, *supra*.

*Summary and Conclusion**Contract No. 14-20-0600-6327*

1. Claim No. 1: dismissed.
2. Claim No. 2: (a) the standby time aspect of the claim is remanded to the contracting officer (b) appellant is allowed an equitable adjustment of \$1,649.50 for the cost of reprocessing (c) denied in all other respects.

Contract No. 14-20-0600-5880

3. Claim No. 1: (a) contracting officer's allowance of \$1,396.74 affirmed (b) denied in all other respects.
4. Claim No. 2: (a) contracting officer's allowance of \$514.56 affirmed (b) appellant is allowed an equitable adjustment of \$130.92 for pumping, bootman's services, overhead and payroll tax insurance (c) appellant is allowed \$3,262.59 for conversion of the excess RC-2 asphalt (d) denied in all other respects, except that during the course of the contracting officer's consideration of the matter remanded, appellant may seek to establish the charge for New Mexico sales tax.
5. Claim No. 3: (a) appellant is allowed an additional \$5,186.24 (b) denied in all other respects.
6. Claim No. 5: sustained and remanded to the contracting officer for determination of the equitable adjustment.
7. Claim No. 6: dismissed.
8. Claim No. 7: denied.

Contract No. 14-20-0600-7004

9. Claim denied.

SHERMAN P. KIMBALL, Member.

I CONCUR:

DEAN F. RATZMAN, Chairman.

CORPS OF ENGINEERS

August 21, 1968

**PROPOSED SALE OF WITHDRAWN LAND BY THE CORPS
OF ENGINEERS****Public Lands: Generally**

Withdrawn public domain lands cannot become "surplus" until after determination by the Secretary of the Interior that the lands are not suitable for return to the public domain.

Federal Property and Administrative Services Act—Surplus Property

Withdrawn public domain lands do not become "surplus" within the meaning of the Federal Property and Administrative Services Act, 40 U.S.C. sec. 471 *et seq.*, until after a determination by the Secretary of the Interior and concurred in by the Administrator of General Services, that the lands are not suitable for return to the public domain.

Act of July 14, 1960

Lands withdrawn for a harbor improvement project which are excess to the project are not "surplus property" subject to sale under section 108, Act of July 14, 1960, 33 U.S.C. sec. 578, until after the Secretary of the Interior determines that the lands are not suitable for return to the public domain.

M-36749

August 21, 1968

To: DIRECTOR, BUREAU OF LAND MANAGEMENT.

SUBJECT: PROPOSED SALE OF WITHDRAWN LAND BY THE CORPS OF
ENGINEERS.

Your memorandum of May 10, 1968, concerns certain lands at Coos Bay, Oregon, which were withdrawn by Executive order in 1889 for the improvement of Coos Bay and Harbor. The improvements contemplated by the withdrawal have been completed by the Corps of Engineers. The Corps now proposes to sell that portion of the withdrawn lands which are no longer necessary for harbor improvement purposes pursuant to section 108 of the Act of July 14, 1960, 74 Stat. 486; 33 U.S.C. sec. 578 (1964). In your memorandum you stated that:

It is our understanding that the Corps of Engineers can quitclaim land under the 1960 act only if it is surplus "property" within the meaning of the Federal Property and Administrative Services Act. If it is public domain land, even if surplus to the needs of the Corps, it is not subject to disposal by GSA, and thus is not subject to disposal by the Corps of Engineers. Public domain land reverts back to the Bureau of Land Management for administration and, if all

other requirements of the law are met, disposal. If we are correct in our reading of the law, the Corps of Engineers has no authority to quitclaim public domain land. The determination of whether land surplus to the needs of the Corps of Engineers is public domain rests with the Secretary of the Interior. And that determination must be made before the Corps can act.

We would appreciate your opinion.

We agree with your view. Absent an appropriate determination by the Secretary of the Interior under section 3 of the Federal Property and Administrative Services Act, 63 Stat. 378 (1949), as amended, 40 U.S.C. sec. 472(d) (1964), public domain land is not subject to sale under section 108 of the 1960 Act.

During the infancy of this country the Secretary of the Interior was designated as that officer vested with exclusive jurisdiction "appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands." Rev. Stat. 453, 43 U.S.C. sec. 2. (1964). The Secretary's authority was specifically extended over military reservations which had been reduced or abandoned. Act of July 5, 1884, 23 Stat. 103 (repealed 1951).

Partly as a result of the disposals necessitated as an aftermath of World War II, Congress provided a new machinery for the disposition of "surplus" property. This machinery is embodied in section 3 of the Federal Property and Administrative Services Act, *supra*. Specific provision is contained therein to avoid derogation of the Secretary's historic role concerning disposals of the public lands. "Property," defined in section 3, excludes the public domain, the minerals therein (also see 43 U.S.C. sec. 1074), as well as lands and minerals reserved or withdrawn unless

* * * the Secretary of the Interior * * * determines [they] are not suitable for return to the public domain for disposition under the general public-land laws because such lands are substantially changed in character by improvements or otherwise * * *. 40 U.S.C. § 472(d).

"Surplus property" is separately defined in the same section as
* * * any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator. 40 U.S.C. § 472(g).

Section 108 of the 1960 Act creates an additional disposal authority. It provides, in material part:

(a) That whenever the Secretary of the Army, upon the recommendation of the Chief of Engineers, determines that notwithstanding the provisions of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended, with respect to disposal of surplus real property, (1) the development of public

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port or industrial facilities on land which is part of a water resource development project under his jurisdiction will be in the public interest; (2) that such development will not interfere with the operation and maintenance of the project; and (3) that disposition of the property for these purposes under this section will serve the objectives of the project within which the land is located, he may convey the land by quitclaim deed to a State, political subdivision thereof, port district, port authority, or other body created by the State or through a compact between two or more States for the purpose of developing or encouraging the development of such facilities. * * *

The Senate Committee, reporting on this provision, stated that it had added section 108 to the River and Harbor bill "to authorize the Secretary of the Army to convey surplus lands at water resource development projects to a State, political subdivision thereof, port district, port authority, or other body created by a State * * * at the fair market value * * *." The report pointed out that, as of that time, the General Services Administration was not authorized to negotiate a sale of surplus property with an absolute priority as provided for by this provision. It seems to have been the intention of the Committee to substitute the Secretary of the Army for the Administrator of General Services to permit the sale of a certain class of "property" which had become "excess" to the needs of the Corps of Engineers.

The Committee believes that if real property at water resource projects is to be disposed of, in order to permit its use in furtherance of the development of port and industrial facilities by public bodies and agencies, adoption of section 108 as recommended by the committee is highly desirable. It is realized that the major portion of available land that might be used for the purposes of this section is located at reservoir projects, yet the provisions would be applicable to any navigation or water resource development where *surplus real property* is available. *River and Harbor, Beach Erosion Control, and Flood Control Projects*, S. Rep. No. 1524, 86th Cong., 2d Sess., June 6, 1960, to accompany H.R. 7634. [Italics added.]

Withdrawn public domain does not become "property," as defined in the Federal Property and Administrative Services Act, until *after* the required determination by the Secretary that the lands are not suitable for return to the public domain. Absent such a finding the lands remain part of the public domain and subject to restoration and management under the public land laws.

The only language in section 108 of the Act of July 14, 1960, by which the sale conceivably could be authorized without the required determination of the Secretary is the phrase which allows the disposal of lands "notwithstanding the provisions of the Federal Property and

Administrative Services Act of 1949 (63 Stat. 377), as amended, *with respect to disposal of surplus real property * * **" [Italics added.] That phrase, however, specifically did not intend section 108 to supersede all provisions of the Federal Property and Administrative Services Act, but only those "provisions * * * with respect to disposal of surplus real property * * *."

The section in the Federal Property and Administrative Services Act entitled "Disposal of Surplus Property," which was superseded by section 108, merely sets out the authority and procedures for the disposal of surplus property, 40 U.S.C. sec. 484 (1964). Nowhere in the provisions of that section is the term "surplus property" defined. Consequently, section 108 of the Act of July 14, 1960, in no way affected the definition of "surplus property" found in the Federal Property and Administrative Services Act, 40 U.S.C. secs. 472(d) and 472(g).

Neither, however, did section 108 provide its own definition of the "surplus property" which was to be disposed of by the Secretary of the Army. From an examination of the legislative history of section 108, it is apparent that the failure was intentional. Rather than providing a new definition in section 108, Congress adopted the definition of "surplus property" found in the Federal Property and Administrative Services Act. See H.R. Rep. No. 2064, 86th Cong., 2d Sess., 11, 12 (1960).

Since the definition of "surplus property" in the Federal Property and Administrative Services Act requires a determination by the Secretary of the Interior that "the lands are not suitable for return to the public domain," the Secretary of the Army is without authority to dispose of withdrawn public domain lands until such a determination has been made.

Insofar as it is inconsistent herewith, the memorandum of the Associate Solicitor, J-63-2071.10, dated November 5, 1963, entitled "Lands Subject to Disposition under Section 108" is overruled.

EDWARD WEINBERG,
Solicitor:

APPEAL OF SCHURR & FINLAY, INC.

IBCA-644-5-67 Decided August 27, 1968

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustments—Contracts: Performance or Default: Excusable Delays—Contracts: Disputes and Remedies: Damages: Liquidated Damages.

Where a contractor under a contract calling for the construction in 90 days of an underground electrical distribution system, promptly submitted

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its proposed equipment list to the Government for advance approval and conditioned its orders upon such approval, as required by the contract, and the Government, having knowledge that delivery in compliance with the contract performance period was uncertain (because the contractor's supplier would not commence production until all details were approved) delayed in acting on such list and instead issued a change order changing the switches on transformers to be installed, without changing the contract completion date, the burden of the uncertainty of delivery was shifted to the Government and the contractor was entitled to an equitable adjustment extending the time of performance which reflected the full consequences of the change, including an allowance for the ensuing delay in delivery of the equipment, no showing having been made that the equipment could have been obtained more expeditiously elsewhere.

BOARD OF CONTRACT APPEALS

This appeal involves an assessment of liquidated damages amounting to \$1,710 under a contract for the construction of an underground electrical distribution system on the campus of the Sherman Institute in Riverside, California.¹ In the decision appealed from the contracting officer granted appellant an extension of time of 35 days and assessed damages at the contract rate of \$30 a day for 57 days' delay found to be unexcusable. By the terms of the contract the work was required to be performed by October 31, 1965. The contracting officer found that the work was actually completed 92 days later on February 1, 1966.

The contract was awarded July 20, 1965. The notification of award contained the admonition: "Do not proceed with the work until specifically authorized to do so by this office." Work was to commence within 20 days after receipt of the notice to proceed and be completed within 90 days after receipt of the notice. Appellant acknowledged receipt of the notice to proceed on August 2, 1965.

The contract called upon appellant, *inter alia*, to furnish and install two 225-KVA and five 150-KVA transformers. It required appellant to "submit for approval within thirty days after receipt of notice to proceed and before any materials or equipment are purchased, a complete list of materials and equipment proposed for use on the project."² The specifications also gave the utility, the City of Riverside electric department "inspection privileges" and provided that "materials, construction, and installation" of the transformers and metering cubicle

¹ The original contract price of \$100,682 was increased to a minor extent by two change orders (Exhibit 6 and Exhibit 25). Exhibits referred to are contained in the appeal file.

² Par. 2, "Material Submittal," Technical Specifications, p. TS-1 (Exhibit A).

"conform to the standards and requirements of the Pacific Utilities Electric Service."³

On July 20, 1965, and July 25, 1965, appellant ordered the transformers and adjunctive switchgear (metering cubicle) from its supplier.⁴ The orders requested the supplier to provide shop drawings for submission to the Government for approval and expressly conditioned the purchase upon obtaining that approval (in accordance with the contract). Shipment was to occur "when approved." Appellant's supplier acknowledged receipt of the order on July 29, 1965, and noted that the transformers would be shipped "12 weeks after print approval."⁵ It appears that the fabricator of the switchgear acknowledged receipt and submitted drawings of the proposed switchgear on July 30, 1965.⁶ It also appears that the switchgear shipping schedule was 12 weeks "if it could be built locally (in Los Angeles), or 16 weeks if factory shipment (from Chicago) is required."⁷

The appellant, it next appears, on August 2, 1965, and on August 6, 1965, submitted certain "shop drawings and other data" to the Government.⁸ Neither the letters nor the materials accompanying them are contained in the appeal file, but we know that the documents included the original drawings of the proposed switchgear and new drawings, dated August 4, 1965, revised by the fabricator at the direction of the City of Riverside so as to "provide a pothead," on the "metering section."⁹ While certain drawings of the proposed transformers by appellant's supplier, issued July 30, 1965, are in the appeal file,¹⁰ it is unclear if they were part of appellant's submissions of August 2 and August 6. However, it is clear that at a preconstruction conference at the job site on August 19, 1965, appellant's supplier furnished shop

³ Addendum No. 2, dated June 22, 1965, p. A2-2, modifying Par. 1, Requirements, c. Inspection Technical Specifications, p. TS-1; Par. 3, Tests, p. TS-2; Par. 5, Pad-Mount Transformers, e(12) Construction, p. TS-14; Par. 6, Metering Structure, (a) General, p. TS-14.

⁴ Schurr & Finlay, Inc., purchase order No. 12949, dated July 20, 1965, and July 25, 1965 (Exhibits 16.1 and 16.2).

⁵ General Electric Company acknowledgment of order and shipping estimate, dated July 29, 1965 (Exhibit 16.6).

⁶ Letter of S&C Electric Company, c/o Randolph Industries, Inc., dated August 4, 1965 (Exhibit 16.14), referring to acknowledgment and submission on July 30, 1965.

⁷ Letter of General Electric Supply Company to appellant, dated May 11, 1967, attached to appellant's notice of appeal, dated May 12, 1967.

⁸ Letters of those dates are referred to in the Government's letter to appellant, dated September 20, 1965 (Exhibit 13), and in the Government's memorandum, dated September 14, 1965 (Exhibit 14). The Government's memorandum of Preconstruction Conference, dated August 25, 1965, mentions "shop drawings and other data submitted to date."

⁹ Letter of S&C, note 6, *supra* (Exhibit 16.14); Government memorandum, dated September 14, 1965, note 8, *supra* (Exhibit 14).

¹⁰ Exhibits 13.2 and 13.3.

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drawings for the proposed transformers.¹¹ These drawings provided for transformers equipped with 3-position switches "apparently after discussion with the utility."¹² But at the August 19 meeting, the City of Riverside did not approve the design as complying with its requirements and the matter was left for further discussions between the Government and the utility.¹³ As a result further processing of appellant's order by the supplier was suspended.¹⁴

On September 23, 1965, the Government issued Change Order No. 1, which changed the type of load breaker switch required to be furnished with respect to five of the transformers (two 225-KVA and three 150-KVA) intended to be fed from a loop system.¹⁵ Change Order No. 1 provided that these five transformers have 4-position switches, instead of the 3-position-type appellant had proposed to utilize. Appellant thereupon incorporated the changes in documents submitted to the Government, dated October 9, 1965.¹⁶ The Government approved the documents on October 12, 1965, and mailed them to appellant on October 18, 1965.¹⁷ Appellant received at the job site the last supply item affected by the change order on January 25, 1966. On February 2, 1966, appellant requested an extension of time of 120 days, which would fix February 28, 1966, as the completion date.¹⁸

The contracting officer found that appellant was entitled to an extension of time of 35 days to cover the period from August 19, 1965, when it submitted shop drawings of the transformers it planned to install, to September 23, 1965, when the change in the transformers was made. Accordingly, he established December 5, 1965, as the revised contractual completion date and denied the remainder of the time appellant requested, 85 days. He assessed liquidated damages for the 57-day period between December 6, 1965 and January 31, 1966.

¹¹ Government letter, note 8, *supra* (Exhibit 13); Government memorandum, note 8, *supra* (Exhibit 14); letter of General Electric Supply Company to appellant dated May 17, 1966 (Exhibit 16.4).

¹² Findings of Fact and Decision, dated April 20, 1967, note 1, p. 15.

¹³ Letters of General Electric Supply Company, note 11, *supra* (Exhibit 16.4) and note 7, *supra*.

¹⁴ Letter of General Electric Supply Company, note 7, *supra* ("I would like to point out that the entire order on the pad-mounted transformers was held up at this time as we cannot possibly determine which transformer, if any, are to be changed.").

¹⁵ Exhibit 6. At the foot of the change order appellant attached the following statement: "Completion date will have to be extended thirty (30) days, due to delivery of transformers and change in metering section." At the urging of the Government (by letter dated December 17, 1965 (Exhibit 8)), appellant withdrew this request (by letter dated December 24, 1965 (Exhibit 9)), and reserved its right to request an extension in the future.

¹⁶ Exhibits 17, 17.1, 17.2 and 17.3.

¹⁷ Par. 31, Findings of Fact, p. 21.

¹⁸ Letter to the Government, dated February 2, 1966 (Exhibit 11). Applicant does not explain how it arrived at the figure of 120 days.

The Government's position is that the delay in performance is not attributable entirely to the Government's action or inaction. The Government acknowledges that between August 19, 1965, and September 23, 1965, while it considered a change in the proposed equipment, appellant could not order the transformers and switching devices because the Government's approval was lacking. But thereafter, contends the Government, appellant was free to purchase the equipment approved and any delay incurred was appellant's responsibility and not the Government's fault. The Government maintains that despite the delay in commencing production occasioned by the change order, overall production itself was not delayed and that shipment to the appellant occurred in fact within a 12- to 16-week delivery schedule, as originally anticipated.

We believe the Government's view is too restrictive and fails to give sufficient weight to all the circumstances of this case. We are here concerned with a complicated project to be completed within a period of 90 days. It may well be that performance within this short span was an impossible undertaking, although no such contention has been made.¹⁹ In any event, from the outset and even before this contract was awarded, the Government was aware of the problems which might render performance in 90 days difficult if not out of the question. The Government knew as of June 2, 1965, that "delivery of pad mount transformers requires eleven weeks," at a minimum.²⁰ Before awarding this contract to appellant it had rejected the lower bid of another bidder who had indicated on its bid that switchgear "has a 16 week delivery schedule."²¹ Thus, the Government was forewarned not only that it was incumbent upon appellant to perform its obligations expeditiously, but also that the Government had to act with dispatch if the contract was to be completed in 90 days.

The contracting officer specifically found that "the Contractor's efforts to expedite submittal of shop drawings and his making the order

¹⁹ Compare *Ace Electronics Associates, Inc.*, ASBCA No. 10711 (August 3, 1966), 66-2 BCA par. 5750 (impossibility of delivering within specified period excused default) and Dec. Comp. Gen. B-157360 (August 11, 1965) (award canceled where invitation specified impossibly short performance period). Cf. *Ace Electronics Associates, Inc.*, ASBCA No. 11298 (August 3, 1966), 66-2 BCA par. 5743, holding that a contractor was negligent in not checking on the availability of supplies before agreeing to a delivery date. No suggestion of such negligence is warranted here.

²⁰ Letter of City of Riverside to Government, dated June 2, 1965 (Exhibit D.5).

²¹ Schedule of Proposal and Alternates attached to Standard Form 21 (Exhibit B.2). That bidder advised the Government that "the notation was * * * to reflect the delivery times quoted to the bidder by General Electric Co., Westinghouse Electric Corporation, RTE and Esco, all of which are manufacturers of the switchgear." Par. 3, Findings of Fact, p. 4, referring to Government memorandum dated July 1, 1965 (Exhibit B.3).

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contingent upon approval of those drawings was in keeping with subparagraph 2b, page GC-8, General Conditions of the specifications.”²² He also found that appellant “was diligent in placing its orders for the transformers.”²³ The logical consequence of these findings is that independent of the change, had the Government approved the proposed equipment expeditiously, appellant could have completed performance within 90 days, based upon the most favorable estimates of shipment. There is no proof to the contrary.

However, appellant’s supplier would not proceed with manufacture of the transformers until “all details” of the order were approved.²⁴ As a result, manufacture of the equipment commenced only after the shop drawings relating thereto were returned to the supplier on October 18, 1965, fully approved by the Government.²⁵ In addition, shortages of porcelain required for use on the potheads in the switchgear caused fabrication and shipment of the switchgear to be delayed.²⁶ For neither of these developments is appellant accountable. Commencement of production of the changed equipment was controlled by the supplier and not by the appellant. It appears that appellant used all available persuasion to get delivery as early as possible.²⁷ Beyond that it could do nothing.

No issue has been raised concerning either appellant’s choice of this supplier or the possibility that it failed to explore the prospect of securing the transformers and switchgear elsewhere. In this connection appellant’s supplier has asserted that no manufacturer will proceed with manufacture without first obtaining approval of all details of an order.²⁸ The Government has not questioned this contention and it stands unrefuted.

In justification of its position that appellant is not entitled to be excused for the delays in delivery of its supplier, the Government points to the fact that even after the change occurred delivery was

²² Par. 34, Findings of Fact, p. 24. The clause is incorrectly designated as “26” in par. 34.

²³ Par. 36, Findings of Fact, p. 25.

²⁴ Letter of General Electric Supply Company, note 7, *supra*. An investigation by the Government revealed that it is the supplier’s policy “* * * that none of the manufacturing process, i.e., engineering, acquisition of material, and production would commence prior to the receipt of approved shop drawings. Basically this is a protective device. In the event the equipment was manufactured without approved drawings and the purchaser changed his mind the company would have no recourse.” Memorandum of contract specialist, dated March 9, 1967 (Exhibit 20).

²⁵ *I.d.*

²⁶ Letter of Randolph Industries, Inc., to appellant, dated December 16, 1965 (Exhibit 16.15).

²⁷ Letter of General Electric Supply Company, note 11, *supra* (“Mr. Schurr was pushing us for delivery * * *”) (Exhibit 16.4).

²⁸ Letter of General Electric Supply Company, note 7, *supra*.

made no later than the 12 to 16 weeks originally estimated. This completely overlooks the *raison d'être* behind the change. According to the Government, "the prime purpose in writing Change Order No. 1 was for earlier delivery of equipment * * *."²⁹ It was anticipated by the supplier that "the changes would improve delivery on units changed."³⁰ The change was thus intended to affect the status quo. After the change was made, the situation was no longer the same as it was before the change occurred. The old delivery schedule lost its relevancy. However, overall delivery of the items was not significantly improved.³¹

We hold that the delay in performance was not caused by the appellant's fault or negligence. The entire posture of the contract was reconstituted by the change order. As a result of the change appellant was clearly entitled to an *equitable* adjustment in time under the Changes clause. The issuance of a change order with a reservation by the appellant of the right to request a time extension in the future shifted to the Government the delivery uncertainties associated with the orders for changed equipment. To be equitable the extension of time granted to the appellant must reflect the full consequences of the decision to change that equipment. We, therefore, find that in addition to the 35 days allowed by the contracting officer, appellant is entitled to an extension of time of 57 days which includes a reasonable time to install the equipment. February 1, 1966, is hereby established as the contract completion date.

Conclusion

A 57-calendar day extension of the period for contract performance is granted. To that extent the appeal is sustained.

SHERMAN P. KIMBALL, *Member.*

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

²⁹ Par. 24, Findings of Fact, p. 16, quoting Government's letter to appellant, dated December 17, 1965 (Exhibit 8).

³⁰ Letter of General Electric Company to appellant, dated December 20, 1965 (Exhibit 9.1). The Government was of the opinion that the change would "improve * * * transformer delivery by two weeks." Government memorandum, dated September 21, 1965 (Exhibit 15).

³¹ The transformers were actually shipped between December 11, 1965, and January 13, 1966, and delivered between December 30, 1965, and January 25, 1966 (General Electric Company invoices, Exhibits 16.11, 16.12 and 16.13; Daily Construction Report No. 81 (Exhibit 28)). Delivery of the switchgear occurred by January 17, 1966, before the last transformers arrived (Daily Construction Report No. 75, January 17, 1966, Exhibit 24; Par. 41, Findings of Fact, p. 29).

*August 30, 1968***UNITED STATES v. HAROLD LADD PIERCE****A-30537***Decided August 30, 1968***Mining Claims: Common Varieties of Minerals**

A deposit of limestone cannot be characterized as a deposit of an uncommon variety of limestone when the claimant fails to show what particular quality or use of the limestone makes it an uncommon variety.

Mining Claims: Common Varieties of Minerals

Even if a deposit of limestone meets all other requirements necessary to constitute it an uncommon variety of stone it is not a valuable mineral deposit within the mining laws if the claimant cannot show that it is marketable at a profit.

Mining Claims: Contests

Where a Government contest is brought against a limestone placer mining claim located prior to July 23, 1955, charging that no discovery has been made because the minerals cannot be marketed at a profit and that an actual market has not been shown to exist, the charges cannot be properly construed as raising the issue of whether a valid discovery of a common variety of limestone had been made prior to July 23, 1955, where no evidence was offered on that issue at the hearing, where that issue was not adverted to by either party, and where the contestee asserts that he can prove that the deposits could have then been marketed at a profit; however, where the contestee's offer of proof is insufficient to show that the materials could have been marketed at a profit as of July 23, 1955, the case will not be remanded for a further hearing on this issue in the absence of an offer of meaningful proof.

Mining Claims: Determination of Validity

The rejection of a state indemnity selection for a tract of land for the reason that a field report shows that the land is in an "apparently valid" mining claim does not constitute a binding determination as to the validity of the claim or foreclose a subsequent contest of the claim when the claimant later applies for a patent.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Harold Ladd Pierce has appealed to the Secretary of the Interior from a decision dated July 27, 1965, by the Chief, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of a hearing examiner declaring the P-1 Pierce placer mining claim null and void and the Millsite A mill site claim invalid and rejecting his application L.A. 0170645 seeking patents for them. The placer claim comprises the N $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 22, T. 3 S., R. 3 E., S.B.M., and the mill site the N $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 24, same township.

The appellant filed his patent application on July 17, 1961.

On January 21, 1963, the Riverside land office instituted proceedings against the claims, alleging in the complaint:

- a. Mineral materials have not been found within the limits of the P-1 PIERCE Placer Mining Claim in sufficient quantities [sic] to constitute a valid discovery.
- b. No discovery has been made within the limits of the P-1 PIERCE Placer Mining Claim because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials.
- c. The MILL SITE A claim has not been used or occupied for the purpose of mining, milling, beneficiation or other operation in connection with the P-1 PIERCE Placer Mining Claim.

A hearing was held on September 18 and 19, 1963, which covered both claims. In his subsequent decision of April 29, 1964, the hearing examiner held both claims invalid and rejected the application for patent. He found that the placer claim was located in 1948 for deposits of limestone and aplite, which are minerals of widespread occurrence; that there was no evidence that these deposits were marketable prior to the passage of the act of July 23, 1955, 30 U.S.C. sec. 601 *et seq.* (1964);¹ that consequently they were locatable only if the limestone and aplite were deposits other than a common variety within the meaning of that act; that the deposits, if "uncommon," must be shown to be currently marketable; and that present marketability is not established by showing marketability for uses which would not make the deposits an "uncommon variety." He therefore concluded that no discovery of a valuable mineral deposit had been made on the placer claim and declared it null and void. He then held the mill site claim null and void on the ground that the appellant had not shown any present occupation of it in connection with a placer claim.

On appeal, the Chief, Office of Appeals and Hearings, affirmed, holding that marketability was an issue at all times from the moment the placer claim was located; that after the United States had established a *prima facie* case, the burden of providing the validity of his claim was on the claimant; that the appellant had not offered any proof that the deposits on the claim were marketable in the past or now, but only the possibility of marketability based on future plans; that geological inference based on core drills in an adjoining patented claim was not a substitute for discovery of a valuable mineral deposit within the boundaries of appellant's claim; and that lack of development since 1948 was at least an indication that the appellant did not believe there was a present demand for the deposits on the claim. The placer claim associated with it being invalid, the decision went on, the mill site claim used in connection with it must also fall.

¹ Amended by the act of September 28, 1962, 76 Stat. 652, in details not material here.

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On appeal, the claimant alleges that the hearing examiner added an issue not included in the pleadings, i.e., the marketability of the aplite and limestone prior to July 23, 1955, and that as a result, after concluding that marketability was not shown as of that date, the examiner considered the claim only on basis of an "uncommon variety" of mineral; that the hearing examiner found that there is a sufficient quantity of limestone on the claim and a market for it for use for roof rock, chicken feed, fillers, and road mix so that if marketability prior to July 23, 1955, is not in issue the appellant has met the burden of proof; that the time of marketability not having been made an issue in the contest complaint, the contestee had the right to assume that it was not an issue at the hearing; and that a prior Departmental decision had in effect established the validity of the placer claim. Appellant offers to prove that the deposit of limestone was marketable on and prior to July 23, 1955. He states that the limestone is not a "common variety" and that he can prove that it has a distinct and special use and economic value above the general run of such deposits. He also contends that while geological inference may not be sufficient evidence to establish a discovery, it is enough to prove the quantity and quality of a deposit and that lack of development of a deposit does not indicate lack of present demand for the material in the deposit.

The placer claim, it appears, was attacked on two grounds: first, that the limestone is a "common variety," and, second, that the appellant had not demonstrated that a market for it existed prior to July 23, 1955.

If the limestone is not a "common variety," the deposit remains subject to mineral location and the validity of the mining claim depends upon current conditions, not upon the issue of marketability at a profit prior to July 23, 1955.

Public land containing limestone was long open to mineral location if certain conditions were satisfied. In order to meet the requirements for discovery of a mineral deposit of widespread occurrence, such as limestone, it was necessary to show that the deposit was capable of being extracted, removed and marketed at a profit, that is, that it was marketable at a profit. This showing required a demonstration as to the accessibility of the deposit, bona fides in development, proximity to market and the existence of a present demand.²

² In *United States v. Coleman*, 390 U.S. 599 (1968), the court approved the Department's requirement that to qualify as a valuable mineral deposit building stone must be shown to be capable of being "extracted, removed and marketed at a profit." It declared the marketability test to be a proper criterion in the determination of whether a mineral deposit is valuable and to be a logical complement of the "prudent man test."

The mining laws were amended by the act of July 23, 1955, *supra*, to remove common varieties of stone and other minerals from the categories of valuable mineral deposits which could be located under the mining laws. Section 3 provides:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however*, that nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such deposit. "Common varieties" as used in this Act, does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in this Act means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter. 30 U.S.C. § 611 (1964).

The pertinent regulation adds:

"Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties." This subsection does not relieve a claimant from any requirements of the mining laws.

43 CFR 3511.1(b)

It is not clear upon what basis appellant contends that the limestone on his claim is an uncommon variety. In the earlier proceedings and beginning with his application for patent he claimed that the limestone on the claim was predominantly suitable for use in manufacturing all types of cement. He also contended that it was suitable for roof rock and chick feed and that the fines from crushing it for various purposes could be used as a by-product as a filler for asphalt tile and paint. He said too that the limestone could be used to make hydraulic lime. He did not say directly, however, whether the suitability of the limestone for any particular use made it an uncommon variety. He only implied that limestone marketable as a chemical grade or for the making of

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cement is an uncommon variety and he suggested that limestone usable as roof rock and a filler for plastics and ceramics would be an uncommon variety (Brief on appeal to Director, pp. 20-21).

In his present appeal appellant says only that "the limestone used as fillers in the mastic tile industry requires definite chemical specifications and definite physical properties not commonly found and therefore a distinct and special use and economic value over and above the general run of such deposits" (Brief on appeal to Secretary, p. 8). He offers to prove this. He says nothing else concerning any other use so it appears that he may now be resting his uncommon variety argument solely upon the use of the limestone as a filler.

If this is so, his position is countered by his own evidence at the hearing. He talked then in terms of using fines as a by-product of crushing limestone for roof rock for filler purposes (Tr. 157, 165), and so did Clifford O. Fiedler, who recommended to a client company that it buy limestone from the claim for use as roof rock (Tr. 273). Appellant stated that a metallurgical grade limestone was not needed for that purpose (Tr. 219), and Fiedler said that limestone suitable for roof rock did not have to maintain a degree of chemical purity, only color and grain structure (Tr. 274). It follows that fines as a by-product of crushing for roof rock need no grade of chemical purity.

Appellant testified at the hearing that he believed that the claim had over 500,000 tons of limestone containing 98 percent calcium carbonate but that he had not been much concerned with that "because that is overdone. The market on that is limited" (Tr. 201). The contestant submitted evidence that a chemically pure limestone would contain higher than 97 percent calcium carbonate (Tr. 55) and that the limestone preferred for general chemical use was a rock running better than 99 percent (Tr. 86). While appellant produced an analysis of 10 samples from the claim showing that 5 samples had in excess of 97 percent calcium carbonate (Ex. 21), contestant's 3 samples showed only 81.0 percent, 92.44 percent, and 95.75 percent calcium carbonate (Ex. 26, 27, 28). There was also a conflict as to the uniformity of grade of the limestone deposit in the claim and as to the effect of intrusions or layers of aplite and other material on the extraction of high quality limestone. Thus, to the extent that the uncommon nature of the limestone deposit is deemed to rest upon the presence of chemical grade limestone, the appellant has not shown by a preponderance of the evidence that the limestone deposit has a distinct and special value by reason of the presence of some high grade limestone. Cf. *United States v. Frank Melluzzo et al.*, 70 I.D. 184 (1963).

Even though we assume that the deposit of limestone may be classified as an uncommon variety, the mining claim based upon it must satisfy the requirements of the mining law. One of these as we have seen, is that there must be a present profitable market for the deposit. It must be a market based either upon the use making the limestone an uncommon variety (*United States v. E. M. Johnson et al.*, A-30191 (April 2, 1965)) or upon the use of the limestone for the same purpose that a common variety of limestone would be used for, but in the latter event the limestone would have to possess a unique value for such use which would be reflected in a higher price for the limestone than a common variety would command (*United States v. U.S. Minerals Development Corporation*, 75 I.D. 127 (1968)). As the hearing examiner pointed out no showing has been made that limestone has been removed and marketed at a profit from the claim. The most the appellant has shown is that a market exists for the limestone principally for roof rock and other incidental uses for which a common variety of limestone could be used. At least, these are the only uses supported by any testimony other than appellant's.

Let us examine the evidence more closely.

In his application for a patent, dated July 13, 1961, appellant alleged that the limestone on the P-1 claim was valuable for four purposes:

1. Production of cement. Appellant said that his claim adjoined the Guiberson limestone claims to the north which were core-drilled to 500 feet in depth, with over 10,000,000 tons of limestone and aplite rock blocked out, for the purpose of appellant's locating a cement plant in 1946 for the Guiberson Whitewater Cement Company. Appellant said he proved the deposit to be commercially practical for the production of cement and that 14 types of cement were made in a model cement plant.

2. Use for slabs and facings. Appellant said 1,000 pounds of selected limestone in two-foot squares were shipped to a furniture company which cut and polished them as slabs for table, bathroom, and sink tops and fireplace facings. He said that as a result the company designed a cutting and polishing plant for location on property of the appellant to produce 1,000 square feet of polished marble a day under a budget of \$150,000 with an estimated profit of more than \$50,000 a year.

3. Use as filler. Appellant said a sample of 1,000 pounds had been shipped to the Fiedler Company in Los Angeles which manufactured a filler for floor tile use.

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4. Manufacture of hydraulic lime. Another 1,000-pound sample was processed by appellant and an acceptable hydraulic lime produced. The Durox Company tested the material and was willing to make a contract for 100 tons of silica feldspar sand and 40 tons per day of selected limestone for manufacturing hydraulic lime. Operations were held up because of incomplete financing of the Durox Company which had already spent more than \$1,000,000 in partially completing its plant in San Bernardino.

Subsequently, appellant submitted an affidavit dated May 1, 1962, supplementing his application for a patent. He said then that the material could be used for manufacturing cement, hydraulic lime, roof rock and chick feed, and filler for asphalt tile and paint. With respect to cement manufacture he attached reports or portions thereof made in 1947 and 1949 showing the suitability of the Guiberson deposit for making cement and the design of a plant for manufacturing 2,750 barrels of cement per day from that deposit. Cost estimates for the plant showed a profit in 1949 of 91 cents per barrel. Appellant estimated a profit in 1962 of \$1.13 per barrel.

Appellant then described plans for other products which, he said, had actually been made in pilot plants. He said installation of a crushing unit and a set of screens on the mill site or at San Bernardino would permit the sale of the following products at the following daily volumes and profits: limestone for hydraulic lime, 35 tons, \$157.50; roofing rock, 40 tons, \$20; chick feed, 10 tons, \$30; fines, 15 tons, \$45; a total of \$352.50 profit per day.

He said that as profits were made, additional plants could be built. He stated that a plant to make hydraulic lime would cost \$70,000 and would produce a profit of \$70,000 per year, operating at only 50 percent capacity for only 200 days.

Finally, he said that a plant for grinding limestone for use as a filler for tile and paints could be built for \$150,000 with an estimated daily profit of \$300 at 100 percent capacity.

After the contest was initiated, appellant asserted in his answer, filed on February 20, 1963, that he had 5,000,000 tons of cement rock on the P-1 claim suitable for various types of cement, that he was "presently negotiating a sale of the deposit for \$165,000," that he was offered 25 cents per ton in an agreement to take 1,200 tons per month for making hydraulic lime if he could guarantee title to the claim; and that in the crushing and screening of limestone "additional by-products" in roof rock, chick feed, and fines for asphalt tile could be sold for an average profit of \$3 per ton.

Later in a letter to the hearing examiner dated March 25, 1964, appellant attached a schedule of production using limestone and aplite from the P-1 claim to show that the materials could be profitably marketed. This schedule, however, also covered production from three other claims owned by Pierce which were the subject of a later contest, LA 0171256. Prepared by Fiedler it showed production from a projected \$200,000 plant using limestone and aplite from the P-1 claim and the same and other material from the 3 other claims involved in that contest. Net profits per month were shown as follows for the following items and tonnages: limestone roofing, \$8,344.88 (1,500 tons), sands, \$1,891.20 (400 tons), and fillers, \$1,891.20 (400 tons), and aplite crushed \$1,062.40 (800 tons) and filler, \$965.58 (200 tons), a total of \$14,155.26 per month.³

Then, on his appeal from the hearing examiner's decision, appellant submitted an affidavit dated June 19, 1964, by the president of the American Hydrocarbon Corporation stating that it owned land to the north and east of the P-1 claim, that a portion of the land was known as the Guiberson Limestone deposit, that the company was arranging financing for a \$20,000,000 cement plant to utilize the deposit, that when financing was arranged the company would be in a position to negotiate with appellant relative to his interest in the P-1 claim but that "its planned cement plant is not contingent upon such acquisition."

So much for documents filed in the case. Now let us consider the testimony and evidence submitted at the hearing. Pierce testified that he was the directing engineer for the Guiberson Whitewater Cement Co. from 1947 to 1951 (Tr. 149, 151), that a 4,500 barrel cement plant was designed for the Guiberson deposit (Tr. 153), that the RFC approved it for a \$3,500,000 loan, that such a plant could operate for 17 years on the estimated 6,000,000 tons of cement rock (limestone and aplite) on the P-1 claim (Tr. 154, 176) but that there were 40,000,000 tons when it was blocked out with 80 acres of the Guiberson deposit (Tr. 154).

He felt that more profitable products than cement could be made—roofing rock and filler—and that he could get \$5 per ton for use of the

³ One puzzling aspect of this production schedule is that it contains exactly the same figures as to costs, sales, profit, etc. as a production schedule prepared by Fiedler and introduced as an exhibit (Ex. V) in the later contest. However, the schedule submitted by Pierce here is typewritten whereas Exhibit V is handwritten. The puzzling aspect though is that the schedule here bears the notation that it covers not only the P-1 claim but also the three claims involved in the later contest whereas Fiedler indicated in the later contest that Exhibit V, which bore no notation, covered only the production from the two lode claims involved there. See the decision in that case, *United States v. Harold Ladd Pierce*, 75 I.D. 270 (A-20564), decided today, which will be referred to as the second Pierce case.

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limestone and aplite as road base (Tr. 157-158). In reference to roof rock he said he had negotiated with contractors to extract and move rock from the claim to the mill site or railroad for \$2 per ton at a 100-ton daily rate, that freight to Los Angeles would be \$2.20 per ton, that the selling price at Los Angeles was \$6 per ton and he was being offered a contract at that price on the basis of 30,000 tons per year, and that the only expense that he would incur would be \$5,000 for road work (Tr. 159-162).

On use of the limestone for hydraulic lime, appellant believed that when the Durox Co. straightened out its financing he would be able to supply the limestone at a cost of \$4.50 per ton on a 50-ton-a-day contract calling for a sale price of \$7 per ton (Tr. 162-164). However, in answer to the question whether "there [is] an existing demand for hydraulic lime," he replied that "[t]here has to be a developed market" (Tr. 163).

On use of the limestone as a filler for asphalt tile and paint, appellant testified that he had a company interested in contracting for 100 tons of material per day which it would sell to the roofing trade "for the aggregate size, and the fines would go to the tile floor tile business, which is in short supply now." He said the company figured it could make \$100,000 per year on 30,000 tons of material (Tr. 165).

In summation he said that he believed that he could make a profit on each product that he could produce and sell on the present market (Tr. 177).

On cross-examination appellant was asked to give the percentages of material that he would produce for the various products that he had mentioned. He gave a breakdown of 22,800 tons a year for roof rock (including chick feed), 6,000 tons a year for filler, and 6,000 tons a year "specialty ground," but then indicated the figures were for a plant to take care of roofing rock. His counsel objected that appellant had not said that he would produce all products at the same time (Tr. 212-125). Appellant said he had sold materials from the claim but primarily for test purposes; no sales were made before 1961 (Tr. 215-216). When asked whether his market was contingent upon the consummation of the contracts he had mentioned, he asked which of 4 pending contracts was meant but he stated that they were all contingent upon his securing title to the claim (Tr. 216-219).

Appellant mentioned that a loan of \$1,500,000 had been made by a bank for the Guiberson deposit (apparently at the time of the RFC loan), that that deposit had been sold "again" for a half million dol-

lars, and that he had been approached by the present owners of the deposit (American Hydrocarbon Corporation) to buy the P-1 claim when he acquired title (Tr. 239). He said that all his negotiations in connection with the claim were contingent upon his obtaining title (Tr. 251). When questioned whether any limestone had ever been removed and marketed from the Guiberson deposit, appellant said some had been shipped for testing purposes (Tr. 264).

Appellant's only witness, other than himself, was Fiedler. He testified that he was "presently" consultant to a company which purchased limestone for roof rock, that he had been consulted with reference to expanding facilities for producing the product and for the purpose of determining another source of raw material, that he had decided, on the basis of visiting the P-1 claim and seeing tests, to recommend that limestone be purchased from that claim, that his company for the "present time" contemplated using in excess of 30,000 tons a year, and that he would recommend either a contract to pay appellant \$1 per ton royalty, \$1,000 per month minimum, with his client to do all the mining and transportation or to pay \$6 a ton for the material delivered in Los Angeles (Tr. 268-272).

If all the data and figures that appellant has submitted seem bewildering, it is because they are. Appellant has offered one proposal after another for disposing of materials from his claim and these proposals are separate from each other or overlap or intertwine. They are based in some instances on appellant's doing the mining and transportation and in others on prospective purchasers doing this work and paying appellant a royalty. On top of all this appellant indicates that he may simply sell the claim. What it all boils down to is that development of the P-1 claim and the production of materials from it are matters of conjecture and speculation. This is not to imply that the materials cannot be used for the purposes claimed and that tests as to quality and quantity have not been made. However, the conclusions that have been drawn by appellant have not been tested in the market place and it is difficult to avoid the impression that they are tinted with the rosy optimism of a promoter.

For example, appellant said in his affidavit of May 1, 1962, that a plant for making hydraulic lime would cost \$70,000 and would make a profit of \$70,000 per year operating at only 50 percent capacity for only 200 days. It would seem that investors for such a lucrative proposition would have to be fought off instead of depending on the Durox company to straighten out its shaky finances. Perhaps the answer lies in appellant's testimony that a market for hydraulic lime would have to

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be developed (Tr. 163) and the testimony of Edward F. Cruskie, mining engineer witness for the Government, that hydraulic lime "has been to a great extent superseded [sic] by the portland cement and it is relatively obsolete" (Tr. 275).

For another example, in his patent application appellant said that a furniture company, after testing his limestone, designed a plant to produce 1,000 square feet of polished marble a day under a budget of \$150,000. The estimated profit was \$50,000. Nothing more was said of this in the subsequent proceedings although the estimated profit seems handsome indeed.

For a final example, appellant testified that he had been offered a contract for 30,000 tons of roof rock per year delivered at a price of \$6 per ton in Los Angeles. Presumably this is the proposed sale to Fiedler's client. Appellant testified that he could contract to have the rock extracted and shipped to Los Angeles for \$4.20 per ton, thus realizing a profit of \$54,000 a year. His only cost would be a \$5,000 investment in roads.

As we have noted, appellant testified that he believed he could make a profit on every product that he could produce from his claim although he admitted that he had no definite plan as to whether products would be produced separately or concurrently or in various combinations. There has already been mentioned the conflict in the evidence as to the uniformity of grade of the limestone and as to the effect of the presence of aplite on the manufacture of cement (Tr. 34, 207-211, Ex. 38, D). There is also a dispute as to whether the limestone must be selectively mined by underground methods, which would greatly increase costs (Tr. 12, 123-125). However, the appellant leaves the indelible impression that he will be able to simply mine down the whole mountainside of limestone and aplite on his claim and, through blending and selecting, dispose of everything at a profit.

As to why these profitable operations or even some of them have not materialized since 1948, when the claim was located, appellant's answer has been that everything was contingent on his securing title. The impression sought to be created is that once a patent is issued, profitable mining operations to supply a waiting market will begin at once. This, however, is belied by the experience with the Guiberson deposit of which the P-1 claim actually appears to be a part, perhaps one-fifth. The 100 acres adjoining the P-1 claim to the north were patented on August 3, 1922. Yet nothing was done with the Guiberson deposit until 25 years later. Then, in the late 1940's, with appellant

as directing engineer of the Guiberson Whitewater Cement Co., an RFC loan was obtained for a cement plant but the remaining private financing fell through. Although the property has been sold, as late as 1964, the present owner, the American Hydrocarbon Corporation, was attempting to arrange financing for a cement plant which, incidentally, was not contingent upon its purchase of the P-1 claim. We are led to wonder why, 42 years after the Guiberson deposit passed into private ownership, the profitable operations which appellant claims are practical certainties for the P-1 claim had not commenced on the Guiberson deposit, which has the same limestone on it and in far greater quantities and is even more favorably situated from the standpoint of proximity to the railroad. (It is on the side of the mountain facing the railroad whereas the P-1 claim is on the opposite side).

The market for use of the limestone from the claim in the production of cement is at best an uncertain one. Appellant would rely upon the general increase in the demand for cement, but he has not shown that he could reasonably expect to share in the market under the existing location of producing cement plants.⁴

We can draw only the conclusion that, at least to the time of the hearing in 1963, the market for limestone products had been adequately supplied by existing sources, that appellant might have entered the market to some extent but has not persuasively shown that he could have done so at a profit, and that on the contrary, the experience with the patented Guiberson deposit is more persuasive that prospects of profitable competition in the market were sufficiently doubtful so that investment money was not forthcoming for financing such an attempt.

Thus, appellant has fallen far short of showing by a preponderance of credible evidence that he has a valid claim for a valuable deposit of limestone under the mining law even assuming that it is an uncommon variety.

We now turn to the contention that the issue of marketability of the deposit as a common variety of limestone prior to July 23, 1955, was not properly raised by the pleadings and its corollary that the United States did not present any evidence on that point, even if it were an issue.

Three years ago the Department examined similar objections to

⁴ The economics of the industry require that plants ordinarily be located near a supply of limestone. Bureau of Mines, Bulletin 630, "Mineral Facts and Problems, Cement," p. 193 (1965 ed.). *U.S. v. Robert E. Anderson, Jr. et al.*, 74 I.D. 292 (1967).

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a contest complaint brought against several sand and gravel claims.⁵ The charges were essentially identical to those against the P-1 Pierce placer and the appellant asserted that, as they were worded, the issue of discovery prior to July 23, 1955, was outside the scope of the pleadings. While the Department agreed that the charges could have been more accurately worded, it said that there was nothing to show that the appellant was unaware of the essential nature of the charges, that he was presumed to know the law, and that the validity of the claim could not be established simply by proof that a valid discovery of a common variety of mineral existed on April 11, 1962, the date of the complaint. The decision then pointed out that at the hearing the Government had asserted that it was its position that a discovery of a common variety of mineral must be made prior to July 23, 1955, that the contestee had expressed neither surprise at nor disagreement with this assertion and that he had questioned witnesses concerning operations in 1955. It then held that the contestee had acquiesced in the understanding of the charge.

Moreover, the decision went on, since the contestee must prove discovery prior to July 23, 1955, to establish the validity of his claims, and since he did not allege that he was deprived of the opportunity to submit evidence on that issue or that he had any new evidence on it to produce at a new hearing, the Department could not conclude that the contestee was misled by the charges or that, if he were, he was prejudiced in any way.

The circumstances here are different from those in the *Humphries* case *supra*. The Government counsel did not point out at any time that a discovery of a common variety had to be made prior to July 23, 1955, the Government did not offer any evidence directed to the crucial date, and the contestee did not recognize the importance of the issue by examining or cross-examining witnesses on it. The importance of the time of discovery was apparently first adverted to by the hearing examiner in his decision. It does not appear to have been raised at all at the hearing.

Time of discovery is, of course, an essential part of a valid discovery of a "common variety" mineral, but a contestee need not establish the existence of all the requisites for a patent in a contest. It is enough that he meet the charges raised against his claim. For example, if there is no charge that he has not made the requisite expenditure for improvements, he need not offer testimony that he has. So here, the time

⁵ *United States v. Keith J. Humphries*, A-30289 (April 16, 1965).

of discovery not having been made an issue either in the charge or at the hearing, the claim cannot peremptorily be invalidated on the ground that the contestee has not proved that all the essentials of a valid discovery had been met prior to July 23, 1955.

It would appear in the circumstances that the case should be remanded for a further hearing in order to enable the appellant to submit evidence on the marketability of the limestone on the claim as of July 23, 1955. There is no point, however, in sending the case back unless the appellant has pertinent evidence to submit. The appellant claims that he can submit such evidence but let us analyze his offer of proof. In his appeal to the Director, appellant stated that his witness Fiedler was also a witness in a later hearing before the same hearing examiner in another case in which the attorneys and witnesses for both contestant and contestee in the immediate case were also present. Appellant stated that in the later case Fiedler testified that the markets for limestone used as roofing rock, chicken feed, and filler existed prior to July 23, 1955, and that the mineral from the area could have successfully competed in the market because of a favorable freight rate. Appellant therefore requested a rehearing.

In denying the request the Office of Appeals and Hearings simply said that appellant had not stated what further showing he could make and that he had not shown that he had been unable to present such evidence at the original hearing. Appellant disputes this statement, pointing out that he had referred to the evidence submitted in contest LA 0171256. He states specifically, however, that in that contest the examiner found that limestone found within 1½ miles of the P-1 claim and owned by appellant could be sold as roof rock in Los Angeles for \$6 a ton at a cost of \$4.70 a ton and that this market existed on or before July 23, 1925. Appellant alleges that the same evidence can be shown to be applicable to the limestone deposit on the P-1 claim.

In the present case appellant has submitted voluminous evidence to prove the present marketability at a profit of the material on the P-1 claim. In effect, what he is offering to prove is that he can relate this evidence back to July 23, 1955, to show profitable marketability as of that date. This is essentially what he did in contest LA 0171256. The showing, however, will be of significance only if the evidence that he would relate back is persuasive of present marketability, for if the evidence does not establish marketability of the material at this time it is not likely, if it is related back, to show marketability as of July 23, 1955, unless critical factors have changed.

We have analyzed in detail the evidence submitted by appellant and

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concluded that it is insufficient to show marketability at a profit at the time of the hearing. It would follow that this or similar evidence would not, in the absence of other considerations be sufficient to show profitable marketability as of July 23, 1955, assuming such evidence could be related back. In this connection, it seems clear that one item of evidence strongly relied upon by appellant could almost certainly not be related back to 1955. This is the testimony of Fiedler as to his recommendation for a contract to purchase material for roof rock from the claim. It seems plain from Fiedler's testimony that his client company was only then (around 1963) planning to expand its facilities and was only then seeking an additional source of material. There is no indication that this situation obtained as of July 23, 1955.

As for the evidence presented in contest LA 0171256, we have held in the second *Pierce* case, *supra* decided today, *supra* fn. 3, that that evidence, coupled with the evidence submitted here, does not show marketability at a profit as of July 23, 1955, of the common variety of limestone on the claims involved in that case. Relating that evidence to the P-1 claim would therefore not help the appellant.

Granting a hearing to the appellant as a matter of right on the basis of the evidence which he offers to prove would therefore be a futile act. Consequently a further hearing will not be ordered in the absence of an offer of meaningful proof.

Only one further point need be mentioned at this time, that is, that the validity of the P-1 *Pierce* claim was not sustained in the Director's decision of April 16, 1951 (Ex. E), or in the Department's decision of March 6, 1951 (A-25971), to which it was a sequel. The Department's decision, which was concerned with the propriety of the rejection of a state indemnity selection for all of section 22, T. 3 S., R. 3 E., S.B.M., except the E $\frac{1}{2}$ NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ SE $\frac{1}{4}$, did say that field examinations showed that the N $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ was included "in an apparently valid placer mining claim which was located for limestone" and rejected the State's application for that reason. However, the proceeding was not one between the United States and the mining claimant and the United States was not foreclosed from subsequently challenging the validity of the claim when appellant applied for a patent.

As for the Millsite A mill site claim, we believe that it was properly held invalid for the reasons given below.

Therefore, pursuant to the authority delegated to the Solicitor by

the Secretary of the Interior (210 DM 2.2A (4)(a); 24 F.R. 1348), the decision of the Chief, Office of Appeals and Hearings, is affirmed as modified herein.

ERNEST F. HOM,
Assistant Solicitor.

UNITED STATES v. HAROLD LADD PIERCE

A-30564

Decided August 30, 1968

Mining Claims: Contests

The fact that a charge in a mining contest complaint may not adequately raise an issue does not vitiate a decision which rests upon that issue where the contestee examined and cross-examined witnesses on it, the record demonstrates that he was aware that the issue was important to the resolution of the contest, and he has not demonstrated that he has been prejudiced by the inartistic allegations of the complaint.

Mining Claims: Discovery

To satisfy the requirement that deposits of minerals of widespread occurrence be "marketable" it is not enough that they are capable of being sold but it must be shown that the mineral from the particular deposit could have been extracted, sold, and marketed at a profit.

Mining Claims: Common Varieties of Minerals

The Act of July 23, 1955, excludes from mining location only common varieties of the materials enumerated in the Act, i.e., "sand, stone, gravel, pumice, pumicite, or cinders"; therefore, a material must fall within one of those categories before the issue of whether it is a common variety becomes pertinent.

Mining Claims: Common Varieties of Minerals

Where a stone containing mica can be ground and used as a whole rock for certain purposes, the issue may properly arise as to whether the particular stone is a common variety which is excluded from mining location by the act of July 23, 1955; but if the interest in the stone is simply for the mica to be extracted from the stone and value is claimed only for the mica, the issue presented is not whether the stone is a common variety of stone but whether the mica or feldspar constitute valuable minerals subject to location irrespective of the 1955 Act.

Mining Claims: Common Varieties of Minerals

Where a deposit of sand has an allegedly valuable mica and feldspar content, its locatability may depend upon either whether the sand is locatable as an uncommon variety of sand because of its mica and feldspar content or whether the mica or feldspar constitute valuable minerals subject to location as mica or feldspar.

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Mining Claims: Discovery—Mining Claims: Common Varieties of Minerals

Lack of discovery is properly found in the case of deposits of common varieties of limestone, aplite, and mica schist where credible evidence is lacking that materials from the deposits could have been marketed at a profit as of July 23, 1955; evidence that a general market for the materials existed as of that date and purely theoretical evidence as to profitable operations are not sufficient to show a discovery where the credibility of the evidence is open to question.

Mining Claims: Discovery—Mining Claims: Common Varieties of Minerals

Lack of discovery is properly found in the case of deposits of mica and feldspar where credible evidence is lacking to show that the minerals can be marketed at a profit.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Harold Ladd Pierce has appealed to the Secretary of the Interior from a decision dated September 20, 1965, by the Chief, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of a hearing examiner holding invalid the P-61-Pierce Group and the Z-81-Zemula-Pierce lode mining claims, the Jamie placer mining claim and the Pierce-PMS-No. 1 mill site claim, all located in sec. 24, T. 3 S., R. 3 E., S.B.M., California.¹

The United States instituted the contest action against the two lode claims and the mill site charging in a complaint dated February 21, 1963; that:

- a. The land embraced within the lode mining claims is non-mineral in character.
- b. Minerals have not been found within the limits of the lode mining claims in sufficient quantities to constitute a valid discovery.
- c. The Millsite claim is not being used or occupied for mining, milling, processing or beneficiation purposes.

In his answer Pierce denied the first two charges and asserted that the claims contained mica, feldspar, ferro-silicons, and rare earth and that these minerals were on the claims in quantity and quality sufficient to make them valid mining claims. He admitted the charge against the mill site, but contended that it would serve no useful purpose to hold it invalid until there was some application for a conflicting use.

At the hearing the complaint was amended by stipulation of the parties to include the Jamie placer claim. In addition to the charges made against the lode claims, the Jamie was also attacked on the

¹ Pierce did not appeal from the decision with respect to the Pierce-PMS-No. 1 mill site claim.

ground the minerals found within it are common varieties within the meaning of the act of July 23, 1955, 30 U.S.C. sec. 601 *et seq.*

The claims cover the whole of lot 8 (the NW $\frac{1}{4}$ SW $\frac{1}{4}$) of section 24. The lode claims cover all of lot 8 except for 5 acres in the southeast corner, which is the millsite, and triangular areas at the northeast and southwest corners, which are in the placer claim. The placer claim is described as including all of lot 8 not in known lodes or in the mill site. The lode claims contain deposits of mica schist or biotite gneiss, feldspar and aplite and the placer claim deposits of mica and feldspar silica sand. A ridge running northeasterly through the lode claim sand averaging about 400 feet in width and 800 feet in height is composed of interbedded limestone and biotite gneiss or mica schist in layers varying in thickness from 2 to more than 20 feet. The biotite gneiss or mica schist and limestone layers are cut by feldspar dikes and introfusion quartz.

The hearing examiner found that there are at least 4,500,000 tons of mica schist deposited on the P-6 and Z-8 claims, that recovery of a mica of 98 percent purity can be obtained from the mica schist in quantities ranging from 15 percent to 22 percent of the whole mica schist, that ground mica schist has been sold from an Ogilby, California, deposit to the roofing industry in Los Angeles at \$14 per ton plus \$11 per ton for freight at a cost of \$6.25 per ton at Ogilby, that the mica schist from the P-6 and Z-8 claims can be sold for some of the same purposes as the Ogilby deposit at the same or lesser cost, that the freight rate from the claims to Los Angeles would be approximately \$2.20 per ton, and that a general market for mica schist for roof rock and roofing backing existed on and prior to July 23, 1955, and exists now.

He next found that the P-6 and Z-8 claims contain approximately 2,800,000 tons of limestone suitable for roofing rock, limestone sands and fillers in the paint, plastic and mastic floor tile industries, that the limestone can be sold in Los Angeles for \$6 a ton as roof rock and can be mined, processed and transported to Los Angeles for approximately \$4.70 a ton, and that the Los Angeles market for limestone used for roof rock existed on or before July 23, 1955, and exists now.

He then found that the P-6 and Z-8 claims contain approximately 600,000 tons of feldspar, that the feldspar can be mined, processed and sold to the glass and ceramic industry at a profit, but that no market for feldspar existed on or before July 23, 1955, or exists now.

As to aplite, the hearing examiner found that these two claims contain at least 2,800,000 tons of aplite, that the aplite can be mined, proc-

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essed and sold to the roofing industry as material for road bases and for the manufacture of amber glass.

He also found that while mica and feldspar silica sand exist on the Jamie placer claim, the sand cannot be processed at a cost of 6½ cents per ton into a feldspar silica sand which would meet the specifications of the glass and ceramic industry. He rejected a proposed finding that like amounts of mica and feldspar silica sand cannot be obtained from ordinary types of sand that exist in Southern California.

The hearing examiner stated that if all the deposits on the claims were common varieties of minerals of widespread occurrence a mineral location based on them could be valid only if they were marketable at a profit on or before the passage of the act of July 23, 1955 (*supra*). He then held that the evidence did not establish or demonstrate that these particular deposits were marketable at that time although there was then a market for similar materials in Los Angeles. Therefore, he held, the validity of the claims must be based upon the discovery of valuable mineral deposits which are not excluded from location by the act of July 23, 1955, as a "common variety."

He then concluded that each of the deposits on the claims, limestone, feldspar, aplite, biotite gneiss or mica schist, and sand, was a common variety within the meaning of the act, that this being so, present marketability was immaterial, and that as a result all of the claims were null and void.

He also held that the mill site was invalid because it was not being used in conjunction with any mining operation.

Finally he found that since his rulings had disposed of all of the claims, it was not necessary for him to determine the mineral character of the land they cover.

On appeal to the Director, the contestee contended that the only issues in the contest as to the lode claims were the mineral character of the land and the quantity of mineral within the limits of the claims. He asserted that, as to the lode claims, marketability on or prior to July 23, 1955, was not an issue but that, even if it were, there was a market on or before that date and that, in any event, the United States had not made a *prima facie* case that the deposits were not then marketable. Furthermore, he contended that the deposits of mica schist, feldspar, and feldspar silica sands on the claims are not of widespread occurrence and that the minerals they contain are not common varieties. He also insisted that the mineral character of the land should have been decided.

In his decision the Chief, Office of Appeals and Hearings, Bureau of Land Management, held that a deposit of a widespread nonmetallic mineral is a valuable mineral deposit within the meaning of the mining laws only if the claimant can demonstrate that it can be mined, removed and disposed of at a profit. The contestant's evidence, he continued, established a *prima facie* case that this test had not been satisfied and that as a result there has been no discovery of a valuable mineral deposit on any of the claims. He then concluded that the contestee's evidence did not refute the testimony of the Government's mining engineers and that the fact that material from land in the same general area had been sold did not show that the particular deposits of materials on the P-6 and Z-8 claims could be disposed of in the same market. In the absence of a showing that a valuable mineral deposit existed within the mining claims, he said, there was no need to determine whether or not the deposits were of a "common variety." He agreed with the hearing examiner that it was not necessary to determine whether the lands in the claims were mineral in character once the claims had been held null and void. Finally, he pointed out that the appellant had not alleged any errors in the hearing examiner's decision holding the mill site invalid. Therefore, he affirmed the decision holding the mining claims and the mill site null and void.

In his appeal to the Secretary, Pierce first asserts that it was error to raise the "common varieties" issue with respect to the lode claims since the complaint did not attack those claims on that ground but only on the allegations that the land in the claims is nonmineral in character and that the quantity of minerals in the claims was not sufficient to constitute a valid discovery. Next he asks whether the contestant should not be required to present *prima facie* evidence on each matter in issue before the burden of proof passes to the contestee. Finally, he contends that the evidence does not support the conclusion in the decision that a *prima facie* case of lack of discovery of a valuable mineral deposit on each claim was established by the two government witnesses, who each expressed the opinion that the minerals found upon the claim could not be extracted, transported to market and sold at a profit. In support of this contention he argues that one government witness admitted, and the hearing examiner found, directly or by inference, that some of the materials on the claim could be marketed at a profit. Furthermore, he denies that evidence of the marketability of minerals removed from mining claims not in contest is only "speculation" as to the worth of the minerals on the subject claims and that absence of significant development work or the fact that no minerals

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from the claims have been sold indicates that the contestee did not believe in the existence of a market for the minerals. He also asserts that the fact that one government witness saw no evidence of discovery work on the placer claim is of no importance because the deposit is there and the wind-blown sand would cover up any work done in a relatively short time. Finally, he says that the failure of the Bureau's decision to consider the question of "common varieties" ignores the primary basis for the decision of the hearing examiner.

As we have seen, the decisions below while reaching the same result, came to their conclusions for different reasons. The Office of Appeals and Hearings' decision essentially held that the claims were invalid because there was no discovery under the general rule of discovery as applied to nonmetallic minerals of widespread occurrence, while the hearing examiner based his decision on the finding that the deposits were "common varieties" not subject to location under the mining laws so that the question of present marketability is not now pertinent.

We consider first appellant's contention that the decisions below disposed of the contest against the lode claims on issues not raised by the complaint and answer and that decisions based upon such issues are invalid.

In *United States v. Harold Ladd Pierce*, 75 I.D. 255 (A-30537), decided today and hereafter referred to as first *Pierce*, involving a contest against another of Pierce's mining claims, the P-1 Pierce placer mining claim, we considered a similar contention. There the complaint brought against a limestone placer mining claim located prior to July 23, 1955, charged that no discovery had been made because the minerals could not be marketed at a profit and that an actual market had not been shown to exist. We held that the charges could not be construed to raise the issue of whether a valid discovery of a common variety of limestone had been made prior to July 23, 1955, where no evidence was offered on that issue at the hearing and the issue had not been adverted to by either party.

We distinguished another case, *United States v. Keith J. Humphries*, A-30239 (April 16, 1965), in which the Department held that it was proper to rule on the pre-1955 marketability of deposits of sand and gravel on contested mining claims although the charges gave only lack of sufficient quantities and of present marketability as reasons for disputing the claim. The Department pointed out that the Government had made its position known at the hearing, that the contestee had not objected and that he had questioned witnesses concerning operations in 1955. Moreover, in the absence of allegations that the contestee had

been denied an opportunity to produce evidence at the hearing or that he could produce new evidence on the issue at a new hearing, the Department concluded that the contestee had not been misled by the charges or prejudiced in any way.

The case on appeal, in our view, is much more akin to *Humphries* than to first *Pierce*. The record demonstrates that at the hearing, held on December 11 and 12, 1963, and especially at the reopened hearing, held on June 16, 1964,² the contestee questioned his witnesses and cross-examined the contestant's witnesses about the "common variety" nature of the deposits and their marketability on or before July 23, 1955, and at the time of the hearings, and that the applicability of the ordinary rule of discovery to the deposits on the claim was raised.

It is true that the contestant offered no evidence that there had been no market for the minerals on the lode claims on or before July 23, 1955. The contestant did offer testimony that there was no current market for some of the products Pierce said he could produce from the claims (Tr. 23).³ When one of its witnesses, Tom H. W. Loomis, admitted that limestone from the claims could be sold in Los Angeles for use as roofing granules at a profit of 80 cents per ton, the witness also stated that in his opinion the existence of such a market would not establish a valid discovery of the claims because limestone located for sale as roofing granules was "a common usage, common variety" not locatable under the act of July 23, 1955 (Tr. 100). Loomis also testified that the deposits of mica schist, feldspar, and aplite could not "compete economically" (Tr. 110, 83) and that these minerals are common ingredients of most common rocks (Tr. 113). Pierce in his turn said that the mica schist and feldspar were not common varieties (Tr. 251). The hearing, however, closed without any further examination of the market status of the several lode deposits on or before July 23, 1955.

It was later reopened at the request of the contestee for the limited purpose of receiving additional testimony or evidence relative to the percentage of mica contained in, and recoverable from, the mica bearing rock exposed on the claims. The evidence offered at the reopened hearing held on June 16, 1964, covered many other aspects of the controversy. Pierce spoke of new uses for the mica deposit. He stated that after treatment of the mica by heat to expand it, a process described as exfoliation, it could be used as a substitute for vermiculite,

²In the first *Pierce* case the hearing was held on September 18 and 19, 1963.

³This and similar references are to the pages of the transcript of the proceedings at the original hearing. The transcript of the reopened hearing is referred to as "R. Tr."

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as a chemical carrier, as an absorbent, and as an insulating agent (R. Tr. 20-22). He also discussed how the mica could be processed to develop a product suitable for use in the paint industry (R. Tr. 23), and how the sand on the Jamie claim could be processed to produce a silspar sand for use in the ceramic industry (R. Tr. 29-31). He also explained in detail his estimated mining costs, selling prices, and other matters of economic interest (R. Tr. 33-38).

Clifford O. Fiedler, his next witness, who had testified at the first hearing as an expert in the machinery, manufacturing, and engineering business (Tr. 146), reviewed a production schedule (Ex. R-L) showing the feasibility and practicability of mining, milling and marketing the various products that are found on the claims (R. Tr. 41 *et seq.*).

As an introductory question the contestee's attorney asked:

Q. Now, the next question I have, Mr. Fiedler, in the procedure that you had in your first projection, which was Exhibit V, and the one you have in front of you at this time [Exhibit R-L], did a market exist for all of these products on or prior July 23rd, 1955?

A. Yes, they did.

Q. For all of them?

A. For each and everyone of them.

Q. All right.

A. I would like to make an exception to that, Mr. Bridges. The aplite section of this projection, I couldn't attest for the market prior to 1955.

Q. All but the aplite? (R. Tr. 41.)

A short while later, the contestee's attorney again asked the same witness.

Q. Now, on this projection, other than the aplite shown in the right-hand column, was there a market for the products prior to July 23rd, 1955?

A. Yes, for each and every one of them. (R. Tr. 46-47.)

Fiedler was also queried about the use of limestone for roofing rock by the Pyramid Rock Company on or prior to July 23, 1955 (R. Tr. 48-49), and about the ability of the silica feldspar sand from the claims to have competed with the Monterey Beach sand prior to July 23, 1955 (R. Tr. 49).

On cross-examination he asserted that a market for all the products, except aplite, existed at the time of the hearing (R. Tr. 60).

The hearing examiner asked Pierce several questions concerning the general occurrence of mica schist in the area of the claims (R. Tr. 92-93). Pierce's attorney also asked him why the mica schist was unique (R. Tr. 97-98).

In its presentation the contestant, too, was concerned with the current marketability of the products from the claim (R. Tr. 106). On cross-examination of one of the contestant's witnesses, the contestee asked whether the mica schist was a common type of product and whether there was a market for it prior to July 23, 1955. Later in the same cross-examination, contestee's attorney asked:

Q. * * * Mr. Loomis, is it your understanding a limestone deposit, which we will assume to be a common variety of limestone, which was located prior to July 23rd, 1955, and for which there existed a market on or prior to July 23rd, 1955, and from which this deposit could have competed; that this would constitute a valid discovery within the purview of the mining laws?

Would you like to have that question read back, Mr. Loomis?

A. I would state that the limestone would have to be shown to have been participating in the market in 1955 as well as today, not just in a possible competitive market, but actually participating in it.

Q. Is that what you would call "Loomis Regulation No. 1?"

A. No. (R. Tr. 132.)

This exchange illustrates how well the contestee understood the related issues of "common variety" and "pre-July 23, 1955, marketability."

It is our conclusion therefore that the contestee offered evidence on the issues on which the decisions below rested and that he has not demonstrated that he has been prejudiced by the inartistic allegations of the complaint. Moreover, he does not profess to have any additional evidence to submit on these issues. Therefore we conclude that despite the possible deficiency in the complaint, the issues on which the decisions rested are in the record in a manner consistent only with a recognition that they were important to the resolution of the contest and that the proceedings are not to be vitiated for any inadequacy in the complaint.

As we have seen, the hearing examiner rested his decision on the conclusion that the deposits for which the claims were located comprise common varieties of minerals which were not marketable on or prior to July 23, 1955, and which, if marketable now, do not possess some property giving them a special and distinct economic value so as to constitute them deposits locatable under the mining laws.

Pierce contends that the deposits were "marketable" prior to July 23, 1955, because they were in the dictionary sense of the word capable of being sold, or were "saleable" or "merchantable." For purposes of the mining law, "marketable" has a more specialized meaning. The Department has held that for a mineral deposit, especially one of a non-metallic mineral of widespread occurrence, to qualify as a "valuable mineral deposit" under the mining laws (30 U.S.C. sec. 22 (1964)) it

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must be shown that it can be "extracted, removed and marketed at a profit"—the marketability test. The Supreme Court has recently approved this standard and held that the marketability test is a logical complement to the "prudent man test" of discovery. *United States v. Coleman*, 390 U.S. 599 (1968).

We are faced then with a series of questions: First, do the deposits on the lode and placer claims constitute common varieties of minerals? If they do, then were the deposits on the lode claims marketable at a profit as of July 23, 1955? This question is not relevant to the placer claim, for it was located on June 28, 1963, long after common varieties were excluded from mining location. If the minerals on the lode claims are common varieties and were not marketable as of July 23, 1955, the claims are invalid. If the minerals on the claims, lode and placer, are not common varieties, the inquiry turns to whether they are marketable at a profit as of the present time. If they are not, the claims must be declared invalid.

The first issue is whether the deposits are "common varieties" within the meaning of the act of July 23, 1955. Section 3 of that act, as amended, 30 U.S.C. sec. 611 (1964), provides that

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: * * *. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

At the outset it is to be noted that the statute does not apply to common varieties of all minerals but only to common varieties of those enumerated, namely, "sand, stone, gravel, pumice, pumicite, or cinders." Some of these terms, e.g., sand, gravel, and stone, are broad in meaning and can encompass a wide range of materials. The term "stone," in particular, is extremely broad in meaning, including material of igneous, sedimentary, or metamorphic origin and material of variegated mineral composition, ranging, for example, from white limestone to dark basalt. This being the case, it is important not to confuse the material with the constituent elements that make it up. That is, in determining whether a particular material falls within the purview of the common varieties provision, it is necessary to determine whether the material as a totality has value or whether only a constituent element of the material has value.

An example will illustrate. Suppose we have a granitic rock which

is composed of quartz and the other minerals usually found in a granitic rock. The rock as such is suitable for use in constructing buildings. There is no doubt that the rock would constitute a "stone" within the meaning of the common varieties provision and the question would be whether the particular rock was a common variety of stone. If, however, the same rock carried gold and was located only for the supposed value of the gold, the question would not be whether the rock was a "stone" and whether it was an uncommon variety of stone because of its gold content. The question would simply be whether there was a valuable deposit of gold on the claim. In other words, the matrix in which the gold is embedded would be of no significance and no "common variety" question would be present.

With this in mind we turn to the question whether the mineral deposits on appellant's claims present a common varieties question. The materials claimed to be valuable on the lode claims are limestone, aplite, mica schist (or biotite gneiss), and feldspar. The materials of asserted value on the placer claim are mica and feldspar silica sand. The examiner held all these minerals to be common varieties.

There is little problem with the limestone and aplite. They occur in rock formation and are used in crushed or ground form. In his appeal to the Director, Pierce did not contend that the limestone and aplite deposits were uncommon varieties, nor does he do so on this appeal. There is no evidence in the record to indicate that the limestone and aplite are different from the limestone and aplite commonly found in the Southern California area. The findings of the hearing examiner that they are common varieties of stone therefore remain unchallenged. See the first *Pierce* case, decided today. The only issue then is whether the limestone and aplite were marketable as of July 23, 1955. We turn to that issue later.

The mica schist presents a different problem. Pierce contends strongly that it is an uncommon variety of stone. However, whether it is or not raises the question that we have just discussed. On the one hand, great value is claimed for use of the mica schist as backing on composition roofing. For that use the whole rock is simply ground and the pulverized rock applied. The mica content is of little significance—it averages 10 or 12 percent but can be as low as 1 or 2 percent—and other material can be used for the same purpose, such as beach sand (Tr. 73-74, 155, 163-164, R. Tr. 57, 119, 150-153). The mica schist then is properly considered to be a "stone" (Tr. 107) within the meaning of the common varieties provision and it seems clear that, used as a stone, it is a common variety having no unique or special value. If the validity of the lode claims depended upon value of the mica schist as a whole rock, a showing of the profitable marketability of the schist as of July 23, 1955, would be necessary.

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However, Pierce also claims value for the mica alone. This is the biotite mica which would be extracted or separated from the matrix in which it occurs. In this situation the value asserted for the claims would not be for the mica schist as a stone, but for the mica alone, which could not be characterized as a "stone." Therefore, no question could exist as to whether the mica is or is not a common variety; the validity of the claims would depend simply upon whether the mica can be marketed at a profit at the present time. This is a distinction which the hearing examiner did not draw.

The feldspar appears to be akin to the mica so far as the common varieties issue is concerned. While it is a common constituent of rocks, its value here is claimed to be for its chemical qualities. For such use the crystals of feldspar would be extracted from the matrix in which they occur. The feldspar therefore cannot properly be considered to be a "stone" within the purview of the common varieties provision. Like the mica, to sustain the validity of the claims based on it, the feldspar would have to satisfy the test of present marketability at a profit.

The Jamie placer claim presents another variant. Its claimed value is based upon material which is clearly "sand" within the meaning of the common varieties provision. However, since the claim was located after July 23, 1955, if its validity is based upon a discovery of "sand," its validity would have to be based upon the sand as an uncommon variety of sand. The uncommon nature of the sand is predicated upon its mica and feldspar content. But it may not be necessary to base validity of the claim upon the discovery of an uncommon variety of "sand." It may be based on a discovery of the minerals mica and feldspar. In this case it is immaterial that these minerals occur in the form of constituent elements of sand. Regardless of which basis is asserted however, the same showing must be made as to discovery, that the minerals can be marketed at a profit at the present time.

We turn then to a consideration of whether the evidence shows that the limestone, aplite, and mica schist were marketable at a profit as of July 23, 1955, so as to sustain the validity of the lode claims, or whether the evidence shows that the mica and feldspar are marketable at a profit at the present time so as to sustain the validity of both the lode and the placer claims.

First, as to the aplite there is no evidence that it was marketable at a profit as of July 23, 1955. Appellant's witness, Fiedler, prepared schedules of production for the claims in which he showed production of 1,000 tons of aplite per month at a net profit of over \$2,000 per month (Ex. V, R-L), but he testified frankly not only that he could not attest

to a market for the aplite prior to 1955 but that he was not aware of any existing market at the time of the hearing (Tr. 160, R. Tr. 41, 60). There was no other credible evidence of a market for the aplite as of July 23, 1955.

As for the limestone on the lode claims, the principal use claimed for it is as roof rock, pool sand, and filler (Tr. 174). It is not claimed to be as high a quality limestone as is the limestone deposit on the P-1 Pierce placer claim, situated a mile away, which is the subject of the first *Pierce* decision decided today. For the reasons stated in that decision, there is little basis for believing the broad statements made by appellant that a profitable market existed for the limestone on the P-6 and the Z-8 claims as of July 23, 1955. In fact, Fiedler's revised production schedule (Ex. R-L) lumped the materials from the P-1 placer claim together with those from the P-6 and Z-8 claims in projecting a profit. The reasons for doubting that a showing can be made as to the existence of a profitable market on July 23, 1955, for the limestone deposit on the P-1 placer claim apply with even greater force to the lower quality limestone on the P-6 and Z-8 lode claims.

Now for the mica schist, which is the principal deposit of value claimed for the lode claims. As we have seen, a principal use asserted for it is as coating for roofing paper. In fact, that was the major use asserted at the original hearing (Ex. V, Tr. 150, 158, 161, 163, 257). For that use the whole rock is simply ground; the mica is not separated and its percentage is not critical. The evidence as to its marketability as of July 23, 1955, consists of the testimony of Fiedler to that effect, based principally on the fact that mica schist from the Ogilby deposit, which he operated for 4 years (1956-1960), was sold in Los Angeles for that purpose and that the P-6 and Z-8 claims have a definite freight advantage (R. Tr. 41, 47, Tr. 147-149, 153-156).

However, although the evidence indicates that ground mica schist from the claims might have been sold as of July 23, 1955, the evidence is completely theoretical. It consists of estimates as to mining costs, grinding costs, transportation costs, etc., from which it is concluded that appellant's claims could have captured a share of the market. However, much of the evidence, such as Fiedler's plans (Ex. V, R-L), is projected on the basis of operations which would include the production of other materials such as limestone for roof rock and filler, pure mica, feldspar, and aplite. The figures also assume the production and sale of certain quantities without any hard evidence to support the assumptions. The result is that the economic feasibility of a mica schist operation for producing ground rock for roofing paper backing alone is considerably clouded.

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It is true that Fiedler observed that if it became necessary because of limited capital to install a single small plant it would be economically practical to put in a plant to process only the mica schist, that such a plant could be installed for \$60,000 to \$70,000 to process 300-500 tons of material a month with a single operator handling everything, that this was the type of operation at Ogilby. If Fiedler's estimates for a multi-product plant are accurate, such a one-product plant would be a success. In his first plan (Ex. V) Fiedler showed a monthly profit of \$1,650 on sales of 350 tons of mica schist. In his second study (Ex. R-L) he showed a monthly profit on the same tonnage of \$1,910. These add up to yearly profits of \$19,800 and \$22,920 which would appear to be attractive returns for an investment of \$60,000 to \$70,000. The question is why this relatively modest investment has not been made on the claims since they were located in 1948. Fiedler testified that the Ogilby deposit has been worked continuously since 1928 (R. Tr. 47). With the profitability of that operation established at that time and with the claimed advantages of the P-6 and Z-8 claims from the standpoint of freight costs and mining costs, why was no mica schist produced and sold from the claims by July 23, 1955?

The stock answer that Pierce has given is that he cannot proceed with development until he receives patent to the claims (Tr. 256, 267, R. Tr. 37). It may be true that loans may be difficult to secure on unpatented property. However, Pierce admitted that if he had the money he could operate it as an unpatented mining claim but said "it would be hazardous" (Tr. 267). The excuse that any production and sales must await the issuance of patent is too pat. If that standard were to be adopted, it could lead to the patenting of one claim after another simply upon a paper showing of a profitable operation.

This, of course, is not to say that the Department requires as an inflexible rule, or even a general rule, that actual profitable operations must be shown before a valid discovery will be recognized. The Department has disclaimed this to be the rule. *United States v. New Jersey Zinc Company*, 74 I.D. 191 (1967); *United States v. Robert E. Anderson, Jr. et al.*, 74 I.D. 292 (1967). All that we say here is that failure to demonstrate a discovery by the commencement of actual operations is not to be explained away in all cases simply on the ground that such operations must await the issuance of a patent. In the first *Pierce* case, no operations had begun on the patented Guiberson deposit adjoining the P-1 claim although patent had been issued for that deposit in 1922.

With respect then to the aplite, limestone, and mica schist, used as ground rock, we conclude that the appellant has not shown by

a preponderance of credible evidence that these materials could have been marketed at a profit as of July 23, 1955. There is no evidence as to the aplite and the evidence as to the limestone and mica schist is purely theoretical. Although theoretical evidence may be of probative value in certain circumstances involving certain minerals or mineral deposits, its value in the case of common varieties of minerals of widespread occurrence is extremely limited. *United States v. New Jersey Zinc Company, supra; United States v. Robert E. Anderson, Jr. et al., supra; Osborne v. Hammitt*, Civil Action No. 414 (D. Nev., August 19, 1964), discussed in *Anderson*.

This leaves for consideration the validity of the claims as based on a discovery of mica or feldspar (silica feldspar sand in the case of the Jamie placer). The question as to these minerals is whether they can be marketed at the present time at a profit.

There is no doubt that there is a substantial amount of feldspar on the lode claims, but the contestant's witnesses denied that it could be mined economically (Tr. 55, 83, 109). They pointed out that the feldspar found on the claims appear in narrow stringers which would make its extraction difficult and expensive (Tr. 109). Feldspar mined, successfully, they said, occurs in well defined zones in pegmatite deposits with large crystals of feldspar accumulated in lenses and pods (Tr. 60, 83). Fiedler, the contestee's witness, said his operational plan contemplated no processing of the feldspar other than selective mining and grinding (Tr. 168, 169, 177, 186). On cross-examination, he stated that his opinion that the feldspar deposit could be mined economically was based on information given him as to quantity and quality of the material at the mine site, that he was not a geologist and was not qualified to make an analysis of the material (Tr. 172). Loomis, the government witness, after pointing out that feldspar is a common constituent of rock and that there was not a large tonnage of rock on the claims with sizable feldspar crystals (Tr. 274), concluded that of the 30 to 50 feet of feldspar stringers on the lode claims, the largest one he saw was 5 to 6 feet in width, that they did not appear to be continuous, and that the selective mining of them would be expensive (Tr. 275).

Pierce, in his Exhibits O and Z, which roughly depict the position and relative size of the various deposits on the lode claims, shows the feldspar quartz lodes as quite narrow compared to the limestone and mica deposits. He referred to "some" feldspar dikes of 20 to 30 feet in width (Tr. 263), but this statement seems inconsistent with the references to a total width of 40 to 50 feet for all the feldspar dikes on the claims, the figure used by contestee in computing the volume of feldspar on the claims (Tr. 82, 136).

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Upon a careful consideration of the evidence, it is our conclusion that Fiedler based his opinion of the economic feasibility of producing feldspar from the lode claims on an assumption about the quantity and quality of the feldspar which is not supported by the evidence, that the feldspar as it exists on the lode claims is for purposes of extraction similar to the vast amounts of feldspar that exist in igneous rock in non-economic form, and that it has not been shown to be marketable at a profit at this time.

As for the mica in the mica schist, Pierce presented evidence that through flotation or electrostatic separation of the mica from the schist, which assays had shown to have over 29 percent mica, a 98 percent pure biotite mica could be recovered which would then be finely pulverized to 325 mesh. The resulting product could, he and Fiedler said, be sold in quantity at \$25 or \$57.50 per ton and yield a substantial profit (R. Tr. 25, 34, 43). While Fiedler admitted that finely ground mica was ordinarily produced from sericite or muscovite mica, he testified that he had been told by an official of a paint manufacturing company, a consumer of such material, that biotite type mica could be used as a replacement (R. Tr. 42). The contestee relies heavily on a pricing chart included in a government publication listing the prices of wet and dry ground mica in the United States in 1961 which gives as the price per pound of wet-ground biotite 6½ cents for carload and 7¼ cents for less than carload lots (Ex. R-I). Loomis, on the other hand, testified that his inquiries had produced only statements that there was no demand for biotite mica for use for anything other than in the roofing industry (R. Tr. 106, 120). Despite repeated cross-examination he was adamant that he had found no market in the Los Angeles area for use of biotite mica (Tr. 109, 110, 120, 123, 131, 143). Edward F. Cruskie, the other witness for the contestant, testified that a search of the literature had shown biotite mica to be used only as a novelty and that there was no significant tonnage produced (Tr. 54, 157-158).

The contestee offered no evidence of actual sales or probable sales to support his assertion that biotite mica from the lode claims can be sold at the prices set out in Exhibit R-I. We find contestant's evidence that no market could be found and that nothing could be found in the technical literature to indicate that any substantial tonnage of biotite mica was produced to be persuasive that there is no market for it in the volume and at the prices on which the contestee based his computations. It is concluded therefore that the mica on the lode claims does not satisfy the test of discovery.

There remains the contestee's contention that the sands upon the Jamie claims are not of widespread occurrence and are an uncommon

variety. He says they are unique and distinct in that the mica, feldspar silica sand and heavy mineral constituents can be easily separated and the products of such separation result in a pure biotite mica and a feldspar silica sand that can meet the chemical specifications of the glass and ceramic industry.

Cruskie said that there were about 50,000 tons of sand in the placer claim and a great deal more of similar sand on the lode claims and another placer claim to the north held by Pierce (Tr. 283, 284). He also said that there are other comparable sands in the general location of the claim and that the sand did not have any unique special characteristics which are not found in other sand (Tr. 36, 283). Loomis was of the same opinion and also stated that similar sands are found in the general area of the claims (Tr. 89).

Pierce, on the other hand, would not agree and stated that the sand was quite special because of its composition and its physical property of being rounded (Tr. 206). He was somewhat vague, however, in attributing any particular benefit that the roundness would add in the sale of the sand. He mentioned only use in foundries and as a filler, while the major market, he said, would be in glass and ceramics (Tr. 181, 196, R. Tr. 29). Pierce also stated that on three others of his nearby claims there were about 3 to 5 million tons of this same sand (R. Tr. 94).

In explaining his proposed method of processing the materials on the claims, Pierce said he was a registered professional engineer, his business was developing new products, new deposits, and that he held a number of process patents that he had developed which "have made profitable the utilization of waste materials or improved the quality of materials which were common materials but were where we had been able to improve quality costs of production and making standard products out of them" (Tr. 199).

We find that the contestee's statement that he applied new processes to common materials and his claim that there were 3 to 5 million tons of sand nearby, when coupled with the contestant's evidence that the sand was not unique and that similar sand was found wherever there is sand or sand concentrates in the general area, to be persuasive that the sand on the Jamie claim is a common variety of sand which does not possess any unique characteristics making it locatable under the act of July 23, 1955 (*supra*).

As indicated earlier, however, locatability of the Jamie placer may be based upon a claimed discovery of mica or feldspar instead of an uncommon variety of sand. So considered the mica is insufficient for the same reason as that given for the mica recoverable from the mica schist on the lode claims.

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The picture is a little different as to the feldspar. In the lode claims there are problems of costs in the selective mining and separation of the feldspar from the rock in which it is found. For the placer the problem of separation is somewhat different although Pierce said it could be done by flotation or electrostatic means (Tr. 144). But Fiedler did not include in his production plans processing of the Jamie sands for the purpose of producing silica feldspar, and he ran no tests to separate the feldspar (Tr. 158-159). There is no real evidence as to the economic feasibility of developing the Jamie claim alone for only the silica feldspar on the claim. Thus we are unable to conclude that the present marketability at a profit test has been shown to have been met as to the Jamie placer.

Our decision in this case, as in the first *Pierce* case, is founded to a considerable extent upon our inability to give full credence to all the evidence submitted by the appellant. As in that case, appellant has presented a mass of loosely coordinated data which, taken at face value, would show assured financial success in every conceivable operation of the claims whether it be for one product, several products, or all products. The trouble is that all the figures do not hang together nor do they jibe with much of the testimony. For example, Fiedler's first production study (Ex. V), submitted at the first hearing, was based on the material on the P-6 and Z-8 claims only. He estimated that a capital investment of \$200,000 was necessary for a plant to produce mica schist, three forms of limestone, feldspar, and two forms of aplite. The operation would produce a yearly profit on sales of \$208,861, after payment of \$49,800 in royalties to Pierce. As noted earlier no provision was made for producing pure mica, only ground mica schist (Tr. 149-152). At the reopened hearing, held 6 months later, Fiedler presented a second study (Ex. R-L). This one called for a \$300,000 plant investment and included the Jamie and the P-1 Pierce mining claim. It also added the production of pure mica. Net profit per year was estimated at \$440,000 after payment of \$76,200 in royalties to Pierce.

Despite the great emphasis placed in the testimony upon the mica schist as being the predominating important material, both production schedules showed that the bulk of the production and profit would come from the limestone. The first study showed a production of 2,300 tons of limestone materials per month at a profit of \$9,827.28 (after royalty) as against production of 350 tons of mica schist per month at a profit of \$1,300 (after royalty). The second study showed a production of limestone materials of 3,900 tons per month at a profit of \$16,866.25 (after royalty) as against production of 450 tons of mica schist and mica per month at a profit of \$6,006.94 (after royalty).

Pierce tossed off figures of his own for monthly production and profit from the P-6, Z-8, and Jamie claims: 350 tons of mica schist at a profit of \$2,500; 100 tons of pure mica at a profit of \$6,000; 100 tons of exfoliated mica at a profit of \$2,200; rockwool (no tonnage) at a profit of \$1,600; 100 tons of potash spar at a profit of \$1,200; 100 tons of mica from the Jamie sand, \$1,000 profit; 1,000 tons of silspar, \$8,000 profit; 1,000 tons of foundry sand, \$4,000 profit; 1,000 tons of filler for floor tile, \$7,000 profit; white pool limestone sand (no tonnage), \$2 per ton profit; 1,500 tons of limestone roof rock, \$3,000 profit (R. Tr. 33-37).

Fiedler also talked about a \$250,000 plant for the sole purpose of separating mica from crushed rock by the flotation process and a \$60,000 to \$70,000 plant to pulverize the recovered mica (Tr. 152-153, 165, 177-178). And, as we have noted earlier, he spoke also of a single \$60,000 to \$70,000 plant just to crush mica schist for use in the manufacture of roofing paper (Tr. 161).

It seems quite clear that appellant has no firm plans for developing the claims in issue. It appears that he has merely worked up sets of figures designed to entice others to make investments on his claims. In other words, his role is that of a promoter. There is, of course, nothing wrong with that. A mining claimant is not required to develop his own claim or to invest his own money in it. He can do so or he can sell it or lease it to another for development. However, the data developed for a promotional enterprise may be suspected of excessive optimism. It seems inconceivable that with so many alleged ironclad ways of making a profit from the claims, whether the investment be small or large, nothing has been done to commence a mining operation on the claims. It would certainly seem that in the long time that the lode claims have been held, since 1948, some small demonstration of the profitability of the claims could have been made.

For the reasons stated, we find the lode and placer claims to be invalid.

As a last word, we find it unnecessary to rule upon the mineral character of the land in this proceeding.⁴

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision of the Office of Appeals and Hearings is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

⁴ For a recent discussion of principles governing a determination of the mineral character of and see *State of California v. E. O. Rodeffer*, 75 I.D. 176 (A-30611 (June 28, 1968)).

289 IN THE MATTER OF CAMERON PARISH, LA., CAMERON 289
PARISH POLICE JURY AND CAMERON PARISH SCHOOL BD.

IN THE MATTER OF CAMERON PARISH, LOUISIANA, CAMERON
PARISH POLICE JURY AND CAMERON PARISH SCHOOL BOARD*

Decided June 3, 1968

Bureau of Sport Fisheries and Wildlife: Wildlife Refuges

The assistance of "public schools and roads" under the Refuge Revenue Sharing Act, 40 Stat. 383 (1935) as amended, 16 U.S.C. sec. 715s (1964), is a single Federal Assistance program.

Bureau of Sport Fisheries and Wildlife: Wildlife Refuges

Under the terms of the Refuge Revenue Sharing Act, by which the Secretary of the Interior is required to pay funds for "public schools and roads," he is without authority to pay funds for the use of roads alone.

Bureau of Sport Fisheries and Wildlife: Wildlife Refuges

The Secretary of the Interior, under the Refuge Revenue Sharing Act, is without authority to allocate funds between local agencies responsible for public schools and roads.

Bureau of Sport Fisheries and Wildlife: Wildlife Refuges—Act of July 2, 1964

The Department of the Interior was authorized to withhold funds accruing under the Refuge Revenue Sharing Act during the pendency of administrative compliance proceedings under the Civil Rights Act of 1964, 78 Stat. 252 (1964), 42 U.S.C. sec. 2000d (1964), particularly where the local agency responsible for public schools had failed to execute an assurance of compliance with the Civil Rights Act of 1964.

Bureau of Sport Fisheries and Wildlife: Wildlife Refuges—Act of July 2, 1964

Funds accruing under the Refuge Revenue Sharing Act must continue to be withheld from a county or parish until adequate assurance is received from both the local agency responsible for public schools and the local agency responsible for roads that they are in compliance with the Civil Rights Act of 1964.

DECISION OF THE DIRECTOR

This is a review of a recommended decision of the hearing examiner issued December 18, 1967.

The proceedings were initiated pursuant to Title VI of the Civil Rights Act of 1964, 78 Stat. 252 (1964), 42 U.S.C. sec. 2000d (1964), and the Departmental regulations which implemented that Act, 43 CFR 17. Title VI prohibits racial discrimination in "any program or activity receiving Federal financial assistance."

For a number of years Cameron Parish, Louisiana, received Federal assistance under the Refuge Revenue Sharing Act of 1935, 40 Stat. 383

*Not in Chronological Order.

(1935) as amended, 16 U.S.C. sec. 715s (1964).¹ The revenue was produced by authorized activities in Lacassine and Sabine National Wildlife Refuges, which are located in Cameron Parish. The Refuge Revenue Sharing Act provides that:

The Secretary, at the end of each fiscal year, shall pay, out of the net receipts in the fund (after payment of necessary expenses) for such fiscal year, which funds shall be expended solely for the benefit of public schools and roads as follows:

(1) to each county * * *.

Following enactment of the Civil Rights Act of 1964 Cameron Parish was requested to execute an assurance that it was in compliance with the Departmental regulations prohibiting discrimination.² The assurance is necessary to qualify for Federal assistance.³ On October 4, 1965, the President of the Cameron Parish Police Jury, the governing body of Cameron Parish, was authorized by the Police Jury to execute an assurance from which the words "public schools" were deleted. The assurance was found unacceptable. Subsequently, on February 4, 1966, another assurance was submitted by the Police Jury which met the form prescribed by the Department.

Notwithstanding this formal assurance, the Cameron Parish school system failed to comply with the requirements of the Civil Rights Act of 1964.⁴ Consequently, the Cameron Parish School Board was requested to execute an assurance of compliance on October 6, 1966. Their response was silence. At the inception of these proceedings, the School Board was served with a Notice of Opportunity for Hearing. There was neither an appearance nor an answer of the notice.

During this period, the Cameron Parish Police Jury repeatedly disclaimed its authority over the schools of Cameron Parish, explained

¹ The Refuge Revenue Sharing Act is included in the list of Federal Statutes to which Title VI is applicable. 43 CFR 17, Appendix A.

² The Departmental regulations became effective January 3, 1965.

³ 43 C.F.R. 17.4(b) *Continuing State programs*.

"(1) Every application by a State or any agency or political subdivision of a State to carry out a program involving continuing Federal financial assistance to which this regulation applies shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (i) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this part * * *."

"(2) With respect to some programs which are carried out by States or agencies or political subdivisions of States and which involve continuing Federal financial assistance administered by the Department, there has been no requirement that applications be filed by such recipients. From the effective date of this part no Federal financial assistance administered by this Department will be extended to a State or to an agency or a political subdivision of a State unless an application for such Federal financial assistance has been received from the State or State agency or political subdivision."

⁴ The Department of the Interior was informed of the noncompliance by the Department of Health, Education, and Welfare, to whom the responsibility for determining compliance of primary and secondary schools had been assigned. 43 CFR 17.11(c).

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that its assurance related only to roads, and asserted its compliance with the Civil Rights Act and Departmental regulations.

Funds produced from the wildlife refuges in Cameron Parish were withheld commencing in Fiscal Year 1965. The Cameron Parish share of the 1965 revenues amounted to \$5,996.06, the 1966 share was \$32,211.81, and the 1967 share amounted to \$32,210.67. On February 24, 1967, after the initiation of these proceedings, the funds withheld for Fiscal Year 1965 were authorized to be released to Cameron Parish by the Director of the Office for Equal Opportunity, Department of the Interior. Authorization for the release was based on the Department's asserted noncompliance with the Attorney General's guidelines for promptly conducting Title VI proceedings. The authorization for release of the 1965 funds did not reach the merits of the dispute which are in issue here. Its sole basis was the Department's delay in prosecuting the noncompliance proceedings. Therefore, the decision to release the 1965 funds cannot be determinative, indeed, is not relevant, to the question of legal entitlement to the funds. A check for the 1965 funds was delivered to Cameron Parish on June 22, 1967.

Notice of Opportunity for Hearing was issued by the Director, Bureau of Sport Fisheries and Wildlife on January 20, 1967. After filing of the answer by the Cameron Parish Police Jury, the case was set for hearing in June 1967. However, the parties thereafter agreed to a stipulation of facts and the matter was decided on briefs submitted to the hearing examiner.

On December 18, 1967, the hearing examiner issued his decision in which it was recommended that:

* * * payment of the funds withheld from Cameron Parish, Louisiana to date, and future funds which may accrue under the Refuge Revenue Sharing Act, be made, on condition that the Police Jury not pay, use or encumber any such funds for school purposes until a satisfactory assurance shall be filed by the school board with the appropriate agency as to compliance with the Act. Recommended Decision, pp. 9-10.

It is my conclusion that the decision recommends an act for which there is no legal authority, and therefore cannot be accepted.

The course of action contemplated by the recommended decision is unclear. There appear to be two possibilities. Either the Secretary would restrict the payment of funds on the condition that they not be used for schools, or he would pay the funds unconditionally and then attempt to exercise the power of distribution among the local agencies. In either case authority is absent. The Secretary cannot restrict the payment of funds to roads alone, since the Refuge Revenue Sharing Act demands that the allocations be made for "schools and roads."

By the same token, the Secretary cannot apportion the funds after unconditional payment since the Refuge Revenue Sharing Act leaves that responsibility with the Parish.

I.

In distributing revenues to the Parish, the Secretary is governed by the express provisions of the Refuge Revenue Sharing Act, which provide that the funds shall be paid for "public schools *and* roads." (Italics added.) In the absence of unusual circumstances, which do not arise in this case, the statutory language must be given its plain meaning. The language of the statute is clear and distinct, and there is no reason to resort to other means of statutory interpretation.

It must be concluded that the statute means what it says, and that the word "and" does not mean "or." In numerous cases the word "and" has been interpreted as conjunctive rather than disjunctive. *Dickinson Industrial Site v. Cowan*, 309 U.S. 382 (1940); *Texas Co. v. Maloney*, 44 P. 2d 903 (1935). Therefore, if the Secretary is commanded by the Act to distribute funds "for the benefit of public schools and roads," he is without authority to distribute revenues for roads alone.

Consequently, unless the Secretary has the authority to distribute the funds unconditionally and then exercise the power of allocation between the local agencies of Cameron Parish, the recommended decision of the hearing examiner cannot be accepted.

II.

The language, history, and purpose of the Refuge Revenue Sharing Act and other similar revenue sharing measures force the conclusion that the allocation of distributed funds among local agencies is the exclusive responsibility of local governmental units.

In a case involving the construction of a Federal statute which provided that revenues from forest reserves were "to be expended as the state * * * legislature may prescribe for the benefit of the public schools and public roads of the county * * *," the Supreme Court held the distribution of revenues to be a local function. The Court stated that:

When turned over to the State, the money belongs to it absolutely. There is no limitation upon the power of the legislature to prescribe how the expenditures shall be made for the purposes stated, though, by the act of Congress, "there is a sacred obligation imposed on its public faith." * * * *King County v. Seattle School District No. 1*, 263 U.S. 361, 364 (1923).

The Court continued:

* * * The public schools and public roads are provided and maintained by the State or its subdivisions, and the moneys granted by the United States are assets

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in the hands of the State, to be used for the specified purposes as it deems best.
Id. at 364-65.

From the quoted language, there is no doubt that Congress, in a revenue sharing measure similar to the one at hand, invested local authorities with exclusive jurisdiction for determining the allocation of Federal revenues between local agencies, and left the United States with only the power to assure that the money be used for the purposes set out in the legislation.⁵

Though the legislative history of the Refuge Revenue Sharing Act does not bear directly on this point, it is clear that Congress, in similar measures, has regarded the allocation of funds between local agencies as a local responsibility. For example, the legislative history of the National Forest revenue sharing measure, 35 Stat. 260 (1908), as amended, 16 U.S.C. sec. 500 (1964), which was interpreted in the *King County* decision, clearly indicates that revenues disbursed under that statute were to be apportioned only by the local recipients. Throughout the legislative debates, the indications were clear that the revenues were to be allocated at the local level. See, e.g., 42 Cong. Rec. 6055-6058 (1908). The *King County* decision confirms this Congressional intent.

Moreover, there is nothing in the provisions or legislative history of the revenue sharing sections of the Mineral Leasing Act, 30 U.S.C. sec. 191 (1964), or the Bankhead-Jones Farm Tenant Act, 50 Stat. 526 (1937), 7 U.S.C. sec. 1012 (1964), which contain similar revenue sharing measures, indicating that local revenues may be apportioned between local agencies at the Federal level.

While the National Forest Revenue Sharing Act and the Mineral Leasing Act, unlike the Refuge Revenue Sharing Act, specifically recognize the state legislature as the authority responsible for revenue allocation, the provision is irrelevant to the present case. The *King County* decision recognized that such a provision is relevant in determining the *latitude* which a state may exercise in distributing revenues for two purposes. It did not question the *existence* of the state's exclusive power to make such a distribution. Moreover, while the legislative history is silent, it is not unreasonable to assume that the failure to include such a provision in the Refuge Revenue Sharing Act was due to the fact that the revenues were to be paid to the county rather than the state. Consequently, a provision defining the discretion of the state

⁵ The purposes set out in the Refuge Revenue Sharing Act for which the funds are to be used include both schools and roads. The "sacred obligation" referred to in the *King County* decision, *supra*, is essentially a trust imposed upon revenue recipients, assuring that they use the distributed funds for both schools and roads. See also *Alabama v. Schmidt*, 232 U.S. 168 (1914); *Mills County v. Burlington and M. River R. Co.*, 107 U.S. 557 (1882).

legislature in the area of revenue distribution between schools and roads was unnecessary.

Regardless of the reason for the absence of such a provision, the absence is unimportant. The Refuge revenues are still "payments" to a county, to be distributed among the county schools and roads by the county authorities.

The payments made to counties under the Refuge Revenue Sharing Act are, at least to some extent, compensation for taxes which cannot be collected from the Federal lands.⁶ Contrary to the assumption of the hearing examiner, however, the compensatory nature of the payments weakens the foundation of the recommended decision. If the payments are compensatory in nature, they merely substitute for revenues which would otherwise be collected by the counties. Consequently, the fact that the payments are compensatory serves to confirm the conclusion that the counties were vested with exclusive authority to allocate the revenues between the two program purposes. The Secretary, on the other hand, is given authority only to "pay" the revenues and thereafter to enforce the purposes for which the money is paid.

In summary, then, we conclude that the revenue sharing provisions of the Refuge Revenue Sharing Act divorce the Federal Government from the responsibility for apportionment of revenues between local agencies.

On that basis, it is clear that once compliance with Title VI has been made, the funds may be apportioned between schools and roads in any manner prescribed by the Parish. Assertion of Departmental jurisdiction to prevent a distribution of funds to the local agency responsible for schools would be void since the Act leaves that responsibility with local officials.

Moreover, a Federal restriction on the use of funds to a single purpose by the Secretary would not only exceed the authority granted by the Refuge Revenue Sharing Act, but would be a direct contravention of its terms. When the Act commands a distribution of revenues for schools and roads, a distribution restricted to roads alone is a clear violation of the Congressional purpose, and an incursion into areas left to local government.

It is not inconceivable that the Parish would loudly have protested an attempt by Federal officials to direct a distribution of funds before the enactment of the Civil Rights Act of 1964. Yet now the Parish appears willing to acquiesce in a decision which usurps their right to

⁶ The revenues, however, are not payments in lieu of taxes. Senator Metcalf, who introduced S. 1363 which amended the Refuge Revenue Sharing Act in 1964, stated that "I want to make it clear that the purpose of this legislation is not to pay counties in lieu of taxes for the land that we take." Hearings on S. 1363 Before the Senate Commerce Committee, 88th Cong., 2d Sess., ser. 48, at 42 (1964).

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allocate their refuge revenues among local agencies. Nevertheless, jurisdiction cannot be conferred upon the Secretary by the acquiescence or approval of the local authorities when it is plainly lacking in the Act.

The Parish, in effect, argues that the Civil Rights Act of 1964 modified the Refuge Revenue Sharing Act to allow apportionment of funds by the Secretary among local agencies. Certainly it would not advance the position that Federal apportionment was allowed before 1964. The Parish relies on language in Title VI, which provides that:

* * * termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found * * *. 42 U.S.C. sec. 2000d-1 (1964) (Italic added.)⁷

In explaining the intent of the language, Senator Humphrey, the floor manager of the bill, stated that:

The title is designed to limit any termination of Federal assistance to the particular offenders in the particular area where the unlawful discrimination occurs * * *. This language provides that any termination of Federal assistance will be restricted to the particular political subdivision which is violating non-discrimination regulations established under Title VI. It further provides that the termination shall affect only the particular program, or part thereof, in which such a violation is taking place. 110 Cong. Rec. 12714-15, June 4, 1964.

The language was included because of the concern expressed by several Senators that discrimination in a single state agency might be used as a ground for cutting off all Federal assistance to the state. 110 Cong. Rec. 12714, June 4, 1964 (Remarks of Senator Humphrey).

There seems little question then, that Federal funds may generally be terminated for that part of a statewide Federally assisted program which fails to comply with the requirements of Title VI.

The "program" of Federal assistance under the Rufuge Revenue Sharing Act is the aid of "public schools and roads." The program, it is evident, consists of two parts—the assistance of "public schools" and the assistance of "roads." The terms of Section 602 set out above would tend to indicate that Federal funds could be terminated for that "part" of the program which is in noncompliance with Title VI. Upon this premise the recommended decision of the hearing examiner was based. (Recommended decision, p. 10). Without doubt, it is a correct interpretation of Section 602.

⁷ Departmental regulation 43 CFR 17.7(c) implements this statutory provision.

The provisions of Section 602, however, cannot be considered apart from the specific requirements of the Refuge Revenue Sharing Act. Under that Act, the Secretary of the Interior and his delegates are empowered to perform only those functions which the Act authorizes. In this case, the Refuge Revenue Sharing Act authorizes only that assistance be given for schools *and* roads, not that it be given for schools *or* roads.⁸ There is no doubt that where the Secretary is given a statutory mandate to distribute funds for the benefit of two purposes, the restriction of funds to one of those purposes is beyond his authority and contrary to the express terms of the statute.⁹

The situation thus presented is that the Secretary is commanded to distribute funds for both schools and roads, and is authorized to terminate those funds when the local agency or agencies have failed to comply with Title VI. Since the assistance program is an inseparable totality including schools and roads, rather than two separate programs, the Secretary cannot distribute funds for only one of the program purposes. It is unimportant that the Cameron Parish Police Jury may or may not have authority over the schools of Cameron Parish.¹⁰ Regardless of the local divisions of responsibility between schools and roads, it is the nature of the Federal assistance program itself which must be considered when determining compliance with Title VI. Since the Secretary has no power to apportion funds between the local agencies responsible for the two parts of the Federal program, and is commanded to distribute funds for both program purposes, the refuge funds must be withheld¹¹ until satisfactory assurance is received from

⁸ Even if the language were framed in the disjunctive, the authority of the Secretary and his delegates to apportion between local agencies would be questionable. In short, if apportionment is exclusively a local function, the language of the Federal act is immaterial.

⁹ While the question is not reached because of the express language of the Refuge Revenue Sharing Act, it is possible that if the statutory "program" were for the assistance of schools alone, the Bureau could refuse financial assistance to the "part thereof" which failed to comply with Title VI. In other words, if the program were a statewide program for the assistance of schools, the Bureau could limit its assistance to those counties which had executed valid assurances of compliance and refuse assistance to those which had not. However, the specific requirement in the Refuge Revenue Sharing Act that the funds be distributed for "schools and roads" precludes the Secretary and his delegates from limiting funds to a particular program purpose in this case.

¹⁰ That question need not be decided here. So far as the other findings and conclusions of the recommended decision are concerned, all may be accepted with the exception of the fifth conclusion of law, which is rejected.

¹¹ The funds have been withheld pursuant to the authority to refuse payment of funds during the pendency of compliance proceedings. 43 C.F.R. 17.7(b). Since the compliance proceedings include efforts to obtain voluntary compliance as well as formal administrative proceedings, 78 Stat. 253 (1964), 42 U.S.C. 2000d-1 (1964), the funds have been withheld properly for Fiscal Years 1966 and 1967. This is particularly the case where the local agency responsible for schools has refused to file an assurance and thereby has evidenced its intent to ignore the requirements of Title VI and the Departmental regulations.

September 10, 1968

the agency responsible for public schools in Cameron Parish that the requirements of Title VI and the Departmental regulations have been met.

JOHN S. GOTTSCHALK,

Director.

Approved:

STEWART L. UDALL,

Secretary of the Interior.

CHARLES H. SELLS
PATRICIA J. DAVENPORT

A-30613

Decided September 10, 1968

Alaska: Homesteads—Alaska: Land Grants and Selections: Applications—Applications and Entries: Segregative Effect—Homesteads (Ordinary): Lands Subject to

An application for a homestead entry in Alaska is properly rejected where it is filed after a selection by the State under its Statehood Act, although the selection application was originally filed while the selected lands were withdrawn but was subsequently reasserted by amendments to the application after revocation of the withdrawal, and where alleged acts of settlement were also subsequent to an amendment of the State's selection application which had the effect of segregating the land from appropriation by application or settlement and location.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Charles H. Sells and Patricia J. Davenport have each appealed to the Secretary of the Interior from a decision by the Chief, Office of Appeals and Hearings, Bureau of Land Management, dated February 23, 1966, which affirmed separate Anchorage district and land office decisions of September 16, 1965, rejecting their respective homestead applications, filed August 13, 1965, for the reason that the lands applied for are included in a valid selection application, Anchorage 062905, filed by the State of Alaska on July 29, 1965, under section 6(b) of the Alaska Statehood Act of July 7, 1958, 72 Stat. 340, 48 U.S.C. p. 9026 (1964).

That section provides that the State of Alaska is granted and shall be entitled to select:

* * * within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection * * *.

The Bureau decisions held that the lands were appropriated by the State's application at the time the homestead applications were filed, relying on 43 CFR 2222.9-5(b), which provides:

Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, * * * when the State files its application for selection in the appropriate land office properly describing the lands * * *.

On the appellants' similar appeals they first did not expressly contend that the decisions were erroneous in rejecting their applications, but simply posed questions which they stated had arisen because of their confusion over the rejection of their applications. However, they later filed identical additions to their appeals which specified the reasons why they believed that their applications were entitled to acceptance.

The lands covered by appellants' applications are part of those involved in an earlier State selection. This selection, Anchorage 058566, was filed by Alaska on July 8, 1963, at a time when the lands it described were still within an unrevoked withdrawal. The details of the land status and the history of the State's selection are fully discussed in a Departmental decision, *State of Alaska, Andrew J. Kalerak, Jr.*, 73 I.D. 1 (1966), and will not be repeated here except as is necessary to dispose of appellants' appeals.

The appellants assert that the State of Alaska claims a valid selection of the lands on the basis of its first selection and ask which is the valid State selection, the one filed July 8, 1963, or the one filed July 29, 1965. The appellants also assert that they were on the land and making improvements on July 25, 1965, prior to the State of Alaska's application of July 29, 1965. They also refer to court proceedings stemming from the *Kalerak* decision.

The Departmental decision ruled that, although the selection application filed by the State of Alaska on July 8, 1963, while a withdrawal of the selected land was in effect was premature, the application, nevertheless, could be considered after the withdrawal was revoked and that the application, which had been accepted and posted, had the effect of segregating the land from subsequently filed notices of settlement or occupancy claims. It also held that amendments to the premature application filed properly during the statutory preference period allowed for State filings after revocation of the withdrawal, or later, could be accepted as reaffirmations of the original filing and treated as though the State had refiled the original application at the time of the amendments. In a memorandum decision of October 20, 1966, the United States District Court for the District of Alaska, in *Kalerak v.*

September 10, 1968

Udall, Civil Action No. A-35-66, refused to accept either aspect of the Department's reasoning and reversed the Departmental decision.¹

The United States Court of Appeals for the Ninth Circuit, however, reversed the District Court. It held that the State's amendments were a "reassertion of the original land descriptions as well as applications for the selection of additional lands." It found it unnecessary to rule upon the other ground relied upon by the Department. *Udall v. Kalerak*, — F. 2d — (No. 21, 629, June 19, 1968).

The Circuit Court's decision establishes the validity of the earlier selection. Consequently the land it covered, including that sought by the appellants, has at all material times been segregated from appropriation by settlement or entry.

Alaska's second filing, which now appears to have been unnecessary, was filed as a protective measure after the Bureau of Land Management in a decision dated July 20, 1965, ruled that the earlier selection was invalid insofar as it covered lands which were still withdrawn on the date it was filed. The second filing was not an abandonment of the first and does not affect Alaska's rights under the first selection.²

We also note that the land status records show that on July 22, 1965, Alaska filed a request to select all the available lands in T. 12 N., R. 2 W., S. M. The request referred to the State's previous application, A-058566, and asked that it be amended to include all the available lands in T. 12 N., R. 2 W., S. M. The lands within appellants' homestead applications lie in sec. 29, same township and range.

Even if the Circuit Court had not upheld the segregative effect of the first selection, there would be no reason to deny the segregative effect of the amendment which was made after the land was restored to entry and before the appellants had either made settlement on the land, which they say they did on July 25, 1965, or filed their homestead applications on August 13, 1965.

While these conclusions dispose of the appeals and an extended discussion of the requirements of the homestead laws and regulations pertaining to Alaska is not necessary to decide this case, we wish to correct an erroneous impression that can be obtained from reading the decision of the Office of Appeals and Hearings, that is, that the only proper procedure for initiating a homestead claim in Alaska for surveyed lands is by the filing of an application for entry and not by the filing of a notice of settlement. Actually, the regulations permit the initiation of a claim by settlement and by allowance of an entry.

¹ Appellants cite the District Court's decision in their additions to their appeals as removing the State's original application as a bar to their applications.

² In their additions to their appeals, appellants attacked the validity of the second filing on the ground that it was not accompanied by a filing fee.

See 43 CFR 2211.9-1 and 2211.9-2. All that the notice of settlement does, however, is to give notice of settlement. It is used for administrative purposes and is required in order for credit to be given for residence and cultivation upon the homestead claim prior to the filing of an application for entry. It must be filed within 90 days of settlement in order to preserve that credit. See 43 CFR 2211.9-1(c) (2) and (4) and see the act of May 14, 1898, 30 Stat. 409, as amended, 48 U.S.C. sec. 371 (1958 ed.), extending the homestead laws to Alaska. Without actual settlement upon the land, the notices of settlement creates no rights in the person filing the notice which would be preserved if the lands are withdrawn or otherwise appropriated thereafter. *Cf. Anne V. Hestness, A-27096* (June 27, 1955). Upon allowance of a homestead application to enter, however, an entry is created which has the effect of appropriating the land until it is canceled. *John Robert Claus, Richard H. Yoder*, 60 I.D. 457, 461 (1951). A homestead claimant may well be advised to await approval of a homestead application before making improvements and expending money on land if he desires to be assured that the land is available for homestead entry. This is especially true if the lands are surveyed and apparent conflicts affecting the land's status may be more easily ascertained from the land office records.

We must conclude that at the time of the appellants' alleged settlement the lands were segregated from settlement and entry pursuant to 43 CFR 2222.9-5(b) by virtue of either the original selection application or the amended selection application filed July 22, 1965. The decisions below are modified to reflect this. The lands were also segregated at the time the appellants' homestead applications were filed.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed as modified above.

ERNEST F. HOM,
Assistant Solicitor.

UNITED STATES v. ALFRED N. VERRUE

A-30618 Decided September 17, 1968

Mining Claims: Discovery—Mining Claims: Common Varieties of Minerals

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, on land withdrawn from mining location after February 10, 1948, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit before the effective date of the withdrawal, and where the evidence shows that prior to that date no sales were made,

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that minor quantities of material were removed from the claim by the claimant for his own use and by others, with the claimant's consent and without any charge, and that no steps were taken before or after the withdrawal of the land to develop the claim as mining property, the fact that sand and gravel of similar quality were extracted and sold from other property in the vicinity of the claim is insufficient to show that material from the claim could have been profitably removed and marketed at the same time, and the claim is properly declared null and void.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Alfred N. Verrue has appealed to the Secretary of the Interior from a decision dated March 14, 1966, whereby the Office of Appeals and Hearings, Bureau of Land Management, reversed a decision of a hearing examiner dismissing the complaint in a contest against the Sandy No. 2 placer mining claim in sec. 29, T. 1 N., R. 2 E., G.S.R.M., Arizona, and declared the claim to be null and void.

The record shows that the appellant located the Sandy No. 2 claim on March 7, 1946, in the N $\frac{1}{2}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 29, T. 1 N., R. 2 E. On April 9, 1963, a contest complaint was filed by the Government in the Arizona land office in which it was charged that no discovery of valuable mineral had been made within the boundaries of the claim. A hearing on that issue was held at Phoenix, Arizona, on March 24, 1964.

At the outset of the hearing it was stipulated that the claim contained sand and gravel of such quality and quantity as to be suitable for building and construction purposes, that the sand and gravel were of a common variety found generally in the area of the Salt River, and that the land embraced in the claim was withdrawn on February 10, 1948, from all types of entry under a first-form reclamation withdrawal. It was not disputed that the withdrawal was a bar to mineral location after that date. Although there was not complete accord in their views, the parties to the contest agreed generally that the marketability of the sand and gravel found on the claim was the key issue in determining the validity of the claim (Tr. 2-7).¹

The facts attested to by witnesses for both parties are essentially undisputed. The appellant, according to his own estimate, manually removed approximately 200 cubic yards of sand and gravel from the claim prior to February 10, 1948, for use in the construction or improvement of three houses (Tr. 158-161; Ex. 7). In addition, during the same period, he permitted a subcontractor, identified only as a

¹ Appellant's attorney proposed that evidence presented at the hearing should be limited to that bearing upon the question of marketability of sand and gravel from the claim during the period between March 7, 1946, and February 10, 1948. Counsel for the contestant argued that there had to be a showing of marketability and actual bona fide development of the claim during that period, as well as during the remaining time until the hearing, that is, that it was necessary to show that a market existed for sand and gravel from the claim and that the claim was actually used in satisfying that market (Tr. 5-6).

war veteran, to remove approximately 400 yards of sand and gravel from the claim without charge (Tr. 110-11, 164-167; Ex. 7). At the time of the hearing substantial quantities of sand and gravel had been and were being removed from the area embraced by the claim by the Maricopa County Highway Department under a permit issued by the Bureau of Reclamation on November 2, 1955 (Tr. 29-31, 85-89; Ex. 5).

The Government's case was directed primarily toward showing that there was no development of the claim prior to February 10, 1948, and that the failure to develop the claim during that period warranted the conclusion that there was no market for sand and gravel from the claim at that time.

On behalf of the contestant, Creede J. George, Chief of the Lands Branch, Phoenix Development Office, Bureau of Reclamation, testified that aerial photos of the area embraced in the claim, taken in 1941 (Ex. 2) and 1949 (Ex. 3), revealed no evidence of excavations or workings of sand and gravel (Tr. 19-22, 24-25), while an aerial photo taken in 1958 (Ex. 4) disclosed a large excavation from which materials had been removed (Tr. 28-29).

Samuel F. Lanford, Maricopa County Engineer, testified that he first examined the land embraced in the claim for the County in late 1955 at which time he found the surface of the claim relatively undisturbed and that, while there were "spots where it was obvious people with small vehicles had backed up and taken a few loads of silt out," there were "no holes which exposed useful gravel that had been obviously removed with equipment" (Tr. 81-82, 84-85). He also stated that there was not a shortage in the area of the claim of sand and gravel materials to take care of the market at the time of the hearing, that he had "knowledge that there was no shortage of aggregate materials in the Salt River area" prior to 1955, and that he believed "there is enough there for the next 200 years or more" (Tr. 90-93).

Luther S. Clemmer, land and mineral specialist in the Phoenix district office, Bureau of Land Management, testified, after several objections on the part of appellant's counsel and some rephrasing of the question on the part of the Government's counsel, that the removal of 600 yards of material would not, in his opinion, constitute the development of a sand and gravel operation (Tr. 112-117).

Appellant attempted to show that a market for the sand and gravel on the claim did exist prior to 1948 through evidence of the general sand and gravel market in the area, of the sale of sand and gravel from nearby lands, of the removal of sand and gravel from appellant's claim and of the offering and the issuance of permits for removal of sand and gravel from lands administered by the Bureau of Reclamation.

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John Cahill, Jr., who had worked in the sand and gravel business with his father, testified that he and his father removed and sold sand and gravel from the general area of appellant's claim prior to and following World War II (Tr. 59-60). He stated that they purchased sand and gravel for 6 cents a yard from Mrs. Rodney C. MacDonald, whose land was a short distance north of, and on the opposite side of 51st Avenue from, appellant's claim, that they bought some sand in 1946 from a colored man who was living on the land embraced in appellant's claim, and that they also took gravel from Government-owned land on the west side of 51st Avenue (the same side as appellant's claim) for which they made no payment (Tr. 62-64, 66, 72-75). Evidence of the purchase of sand from Mrs. MacDonald was submitted in the form of checks written between May 2 and October 18, 1948, for amounts ranging between \$7.44 and \$11.76 (Tr. 68-69; Exs. A-1 through A-21). Cahill stated that there has always been competition in the sand and gravel business and that there was a shortage of suppliers of material "before these big plants went in" before and right after World War II (Tr. 73-74).

Hanen Williams, a consulting engineer, testified that he started Valley Concrete Products Company immediately after the war and manufactured concrete blocks until mid-summer in 1946, that, while in that business, he bought sand and gravel for his concrete products from commercial plants, that he could sell all the concrete blocks he could manufacture and that he closed down the block plant in 1946 because of a cement strike and a pending railroad strike (Tr. 132-133, 138-139). He stated that during the period in which he operated his block plant he staked a sand and gravel claim on 250 acres on the west side of 40th Street in the Salt River, that he tried unsuccessfully in March 1946 to have three parcels of land along the river restored to mineral entry, and that he considered any property in the Salt River from Buckeye to Mesa to be valuable as sand and gravel in 1946 (Tr. 139-140).

The appellant testified that he located his mining claim while he was attempting to obtain for sand and gravel removal from the Bureau of Reclamation in order to avoid what he considered unreasonable charges for sand and gravel and in order to "go ahead and better" himself (Tr. 148-153, 156-158, 173-174, Exs. 7, B-3).² He stated that he believed it was necessary for him to purchase the claim before he could go into business selling sand and gravel from it and that, with the exception of a small quantity of gravel which he carried out on his back in sacks,

² Appellant simultaneously located the Sandy No. 1 placer mining claim immediately to the south of the Sandy No. 2. He subsequently lost the Sandy No. 1 by means which he did not know and which he did not want to know (Tr. 153-155, 180-181).

he made no attempt to remove material from the claim after a makeshift fence and "no trespassing" signs were placed on the property in 1948 (Tr. 175-176, 181-182).

Appellant also introduced evidence, taken from Bureau records, that the Bureau of Reclamation offered to accept bids for the removal of sand and gravel from certain lands in the Salt River bed in 1947 (Exs. B-1, B-4, B-5), that John Cahill attempted to obtain a lease from the Bureau on October 6, 1948, for the removal of material from an area including that embraced by appellant's claim (Ex. B-6), that requests for permission to remove sand and gravel from the river bed, coupled with the anticipated needs of the Bureau for sand and gravel prompted the Bureau in 1946 to propose measures for the control and orderly disposition of lands under its jurisdiction containing sand and gravel deposits (Exs. B-8, B-9, B-12), that the Bureau did, in 1947, grant permission to the Arizona State Highway Department to remove material from sec. 30, T. 1 N., R. 2 E., without charge for use in connection with a Federal Aid Highway project (Ex. B-10), and that it issued a permit in the same year to the partnership of Morton & Conner for the removal of sand and gravel at a price of 10.5 cents per cubic yard from sec. 22, T. 2 N., R. 6 E. (Ex. B-11).

In a decision dated November 6, 1964, the hearing examiner found that evidence of the removal of several hundred yards of material from appellant's claim and of the removal of considerable amounts of sand and gravel from the MacDonald property and other adjacent areas prior to 1948 was not refuted, that the documentary evidence taken from Bureau of Reclamation files supported the contestee's evidence of the existence of a demand for sand and gravel found in the Salt River bed, that the unrefuted evidence clearly established the existence of a substantial demand for sand and gravel in the area prior to the effective date of the first form reclamation withdrawal, and that the deposit found on appellant's claim was easily accessible and was located in close proximity to the burgeoning Phoenix metropolitan area and adjacent to other deposits from which sand and gravel were removed and marketed at a profit before and after 1948. He found that the contestee admittedly had not sold any material from the claim but that this fact did not, in and of itself, establish that the deposit was not marketable, pointing out that the fact that the claimant failed, by reason of a misunderstanding of his right to sell material before receiving patent or because of lack of finances or business acumen, to commence a commercial operation on the claim did not render the deposit itself less valuable or marketable. Citing language in the decision of the Director, Bureau of Land Management, in the case of *United States v. Charles H. Henrikson et al.*, Sacramento Contest No. 5513 (December 2, 1960), to the effect that, absent a going operation, it

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is sufficient to show that the materials could at the critical times be extracted, removed and marketed at a profit, the hearing examiner concluded that the contestee had established by a preponderance of the evidence that the subject deposit could have been extracted, removed and marketed at a profit prior to 1948.

On appeal by the Government from the hearing examiner's determination, the Office of Appeals and Hearings reached an opposite conclusion. It found the hearing examiner to be in error in accepting evidence of the sale of sand and gravel from adjacent lands as evidence of the marketability of material from appellant's claim. Noting the hearing examiner's reliance on the Bureau's decision in the *Henrikson* case, *supra*, it pointed out that the Bureau's decision was reversed by the Department in *United States v. Charles H. Henrikson and Oliver M. Henrikson*, 70 I.D. 212 (1963), in which case the Department held that more is required to validate a claim for sand and gravel than merely to see or uncover sand and gravel on the public domain and file a claim thereon and that it must be shown, before a claim has any validity, that there is a present demand for the sand and gravel. It found the facts of the present case to be analogous with those of the case of *United Staes v. Loyd Ramstad and Edith Ramstad*, A-30351 (September 24, 1965), in which the Department found that, although there was a general market for sand and gravel in the area, there were many deposits of common varieties of sand and gravel throughout the area, that there was no reason to believe that the market demand was sufficient to require all available sand and gravel in the area, and that when the contestants failed to enter the race to supply the theoretical insufficiency in the production of sand and gravel, the failure contradicted the speculative, hypothetical and theoretical position of the claimants that because others developed pits and profitably sold material they could do so as well.

In his appeal to the Secretary the appellant challenges the Bureau's reliance upon the *Henrikson* and *Ramstad* cases, asserting that both are factually distinguishable from the present case. He argues that the Office of Appeals and Hearings erred in its failure to acknowledge that, regardless of the reason for appellant's failure to develop a commercial operation on the Sandy No. 2, it does not follow that the market demand for sand and gravel was being saturated by existing operations and that there is no evidence in the record that he could not have competed successfully in the market before the Bureau of Reclamation withdrew the land from entry. He further asserts that the Office of Appeals and Hearings has implied that there was merely a showing that "similar material has been sold from claims in the adjacent area" whereas the evidence shows that witness Cahill and his

father removed material from the area of the Sandy No. 2 and that the record clearly demonstrates an expanding market for sand and gravel in 1948, not the "limited market" found to exist by the Office of Appeals and Hearings.

The basic principles applicable to this case are well established, having been set forth in numerous Departmental decisions and sustained in the courts, notably in *United States v. Coleman*, 390 U.S. 599 (1968), and in *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959). In order to satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that, prior to that date or, in the case of land withdrawn from mining location before that date, prior to the effective date of the withdrawal, the deposit could be extracted, removed and marketed at a profit. This marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, *bona fides* in development, proximity to market, and the existence of a present demand for the sand and gravel, *i.e.*, that a demand existed when the deposit was subject to mining location. It is not enough to show that a market exists for sand and gravel and that a particular deposit is of such quality as to satisfy the standards of the market and that it occurs in such quantity as to make removal operations practicable, but it must be shown, as well, that the particular deposit itself can, and could at the critical date, be mined and marketed at a profit. See, *e.g.*, *United States v. Everett Foster et al.*, 65 I.D. 1 (1958), affirmed in *Foster v. Seaton*, *supra*; *United States v. Charles L. Seeley and Gerald F. Lopez*, A-28127 (January 28, 1960); *United States v. Keith J. Humphries*, A-30239 (April 16, 1965); *United States v. Gene DeZan et al.*, A-30515 (July 1, 1968).

We wish to emphasize two critical elements in this last statement. The first is that it is essential to show not only that the minerals in question could have been sold at the critical date but that they could have been sold *at a profit*. This was very recently confirmed by the Supreme Court in *United States v. Coleman*, *supra*:

* * * Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact. 390 U.S., at 602-603.

The second critical factor is that, especially where minerals are of widespread occurrence, it must be shown that minerals *from the particular deposit in question* could have been marketed at a profit. *United States v. Keith J. Humphries*, *supra*; *United States v. Loyd Ramstad and Edith Ramstad*, *supra*; *Osborne v. Hammitt*, Civil No. 414 (D. Nev., August 19, 1964).

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The sole question here relates to the application of these principles to the facts of this case.

The evidence of record falls considerably short of establishing conclusively the marketability or the nonmarketability of sand and gravel from appellant's claim prior to February 10, 1948. In support of the Government's contention that the sand and gravel were not marketable there is little shown beyond the fact that they were not sold. In support of appellant's position there is evidence that, under the proper conditions, sand and gravel might have been extracted and sold from anywhere along the Salt River in the vicinity of the claim prior to the date of the withdrawal. The hearing examiner found this evidence persuasive that the deposit could have been profitably mined. In reaching that conclusion he found, in substance, that appellant's failure to develop his claim was satisfactorily explained upon the basis of factors other than the lack of a market for the materials found thereon. The Office of Appeals and Hearings, in essence, found the hearing examiner's conclusion to rest upon too much theory and too little evidence.

The Department has never held that proof that minerals from a mining claim have actually been sold is an indispensable element in establishing their marketability. It has, however, recognized the difficulty of proving marketability without showing any sales, pointing out in *United States v. Everett Foster et al.*, *supra*, and in numerous other cases that, while the fact that no sale had been made at the critical time is not controlling in itself, yet it is persuasive that certain factors must have been involved which prevented the sale. In other words, the fact that nothing is done toward the development of a claim after its location may raise a presumption that the market value of the minerals found therein is not sufficient to justify the expenditure required to extract and market them.

The evidence in this case undeniably demonstrates the existence of a useful and accessible deposit of sand and gravel within the limits of the Sandy No. 2 claim, suitable for the same purposes for which sand and gravel are, and were at the date of location of the claim, removed and marketed in the area of the claim and situated in reasonable proximity to the local market. Thus, at least two of the criteria of marketability—accessibility and proximity to market—have been satisfied. A useful deposit, however, is not necessarily a marketable deposit, and the fact that a deposit is utilized by the removal of material at no cost to the remover beyond his operating expenses does not establish the marketability at a profit of the deposit. It is only when the material can be disposed of at a profit above the cost of removal and transportation that it can be said to be marketable at a profit. See *United States v. John C. Chapman et al.*, A-30581 (July 16, 1968). Thus, the fact that

appellant permitted a subcontractor to remove 400 yards of material without charge is of no weight insofar as showing the existence of a market for profitable disposition of the sand and gravel found on the claim. Nor is evidence that substantial quantities of sand and gravel were removed, without permission and without payment, from other lands administered by the Bureau of Reclamation proof of the marketability at a profit of the sand and gravel found either on those lands or on the land embraced in appellant's claim. It shows no more than some people preferred to get their own sand and gravel from the river bed rather than paying commercial suppliers for it.⁴ Moreover, neither the concern of the Bureau of Reclamation over reserving sand and gravel deposits for its own future needs, reflected in the recommendation which preceded the withdrawal of the land in question from entry (Ex. B-2), nor the subsequent utilization of the land by the County necessarily demonstrates the existence of a commercial market for this particular deposit, since the primary concern of both parties was the availability of sand and gravel which could be obtained without charge.

The record is void of evidence either that appellant attempted to sell sand and gravel from the Sandy No. 2 claim or that anyone attempted to purchase any from him.⁵ Appellant's explanation that he did not think he had any right to sell sand and gravel until he obtained patent to the claim does not seem fully consistent with his actions in removing material himself and in permitting further removal by someone else. However, accepting it as a true expression of his understanding of his rights, the void of evidence that he could have sold material from the claim at a profit if he had tried remains.

In attempting to show that the market was greater than the supply in 1946, appellant has relied upon the testimony of witnesses Cahill and Williams, respectively, that there was a shortage of suppliers of

⁴ This is not to deny appellant credit for the value of sand and gravel which he removed for his own building use and which could be recognized as possessing a monetary value to him in the same way in which sand and gravel extracted by a manufacturer of concrete products from his own property and utilized in his business would possess a definite economic value even though his profits were derived from the disposition of the ultimate product and not from the sale of sand and gravel. However, the value of 200 yards of sand and gravel at 6 cents per yard, \$12, over a period of two years, is a matter of no consequence in trying to establish the marketability of a mineral deposit. While the Department has never prescribed a level of profit which must be contemplated in order to demonstrate a valuable mine, it must be recognized that the sale of a load of sand and gravel does not constitute a mining operation or establish its feasibility. See *United States v. William M. Hinde et al.*, A-30634 (July 9, 1968).

⁵ Appellant did testify that an unidentified man with an unexplained purpose offered to purchase the claim for \$1,000 in 1947 and that he declined the offer. The reason for the offeror's interest in the claim, of course, could be a matter for almost limitless conjecture, and the fact that someone may have considered the potential value of the claim to justify an investment of \$1,000 at that time by no means establishes a profitable market for the sand and gravel found therein in 1947.

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material immediately after World War II and that there was a market for all of the concrete blocks that could be manufactured during the same period. We are unable to see wherein either of these facts is related to the question of the availability of sand and gravel.

There is no suggestion that the production of concrete block was ever limited by a scarcity of sand and gravel. There is evidence, however, that it was affected by a scarcity of cement, Williams having testified that he closed down his blockplant in 1946 because of a cement strike (Tr. 138-139). Similarly, Cahill's testimony that right after the war there was shortage of supplies of material in the area "before these big plants went in" (Tr. 74) reveals nothing with respect to the availability of sand and gravel to be processed in the "big plants," and it is solely the availability of the raw material with which we are concerned.

Appellant also places reliance upon evidence that the Bureau of Reclamation offered in 1947 to issue permits for the removal of sand and gravel from a number of tracts of land, not including the tract presently in question (Ex. B-1). This, too, fails to demonstrate that sand and gravel from the Sandy No. 2 claim could have been profitably extracted and marketed at that time. Apart from the fact that the sale of material from other land in the vicinity does not establish a demand for material from the particular claim in question (See *United States v. Keith J. Humphries, supra*), the mere fact that the Bureau of Reclamation offered to authorize the removal of sand and gravel from certain lands under its jurisdiction does not in itself prove the marketability at a profit of the proffered materials.⁶

Perhaps the most persuasive evidence of the commercial value of the Sandy No. 2 in 1948 is evidence that John Cahill, on October 6, 1948, applied to the Bureau of Reclamation for permission to remove material from the southerly side of the river channel in sec. 29, T. 1. N., R. 2 E., an area which included appellant's claim, bidding 5 cents per cubic yard for all material to be taken (Ex. B-6). Cahill's application,

⁶ The record shows, in fact, that only one bid was received for one tract of land of six that were offered after the Bureau, in addition to posting public notice of the auction, sent individual notices to nine parties, including appellant, who previously had requested permission to remove sand and gravel from Bureau lands (Exs. B-1, B-5). There is evidence that the small response to the Bureau's offer may have reflected an over-pricing of the materials on the part of the Bureau (see Ex. B-1). However that may be, the evidence falls far short of establishing the existence of a demand for sand and gravel so great that anyone owning a deposit of those minerals in the Salt River Valley could be assured of a market for his product.

It is interesting, although completely unexplained, that Cahill Sand and Gravel Company apparently removed sand and gravel from the west side of 51st Avenue without paying anyone for material removed while simultaneously purchasing sand and gravel from Mrs. MacDonald on the other side of the road (Tr. 66). The only inference to be drawn from this is that there are factors other than price which affect the selection of sites for sand and gravel removal. This does not, however, increase the evidence that material from appellant's claim was marketable at the same time.

however, was tied to a contemplated sand and rock plant, a development which, apparently, never materialized. Thus, the application affords no evidence that there was an existing market for material from the claim prior to February 10, 1948, evidence of a possible or likely future market not being sufficient to demonstrate marketability. See *United States v. Everett Foster et al., supra*, at 8; *United States v. William M. Hinde et al., supra*.

The crux of the problem here lies in recognition of the difference between evidence that *any* of the sand and gravel found within specified limits can be profitably extracted and marketed and evidence that *all* of such materials can be profitably extracted and marketed. Assuming the validity of the proposition that any property in the Salt River bed between Buckeye and Mesa was valuable for sand and gravel in 1946, it would appear, in theory at least, that a sand and gravel operator could have removed material from any point within those limits and marketed it at a profit. In other words, sand and gravel deposits occurring throughout that area satisfied all of the criteria of marketability with respect to quality, quantity and proximity to market. This, however, must be considered in the light of unrefuted testimony that those deposits are sufficient to meet the demand for the next 200 years or more.

It would appear that the sand and gravel deposit found within the limits of the Sandy No. 2 claim does not differ substantially in quality, quantity or proximity to market from other deposits that were being exploited during the period from 1946 to 1948. It would appear, as well, that it does not differ in these same characteristics from other deposits found along the river bed which have not yet been developed and some of which may not be developed for another 200 years. In these circumstances, it is difficult to distinguish between that which is presently marketable, or that which was marketable during a specified period of time, and that which is not presently marketable but may become marketable at a future date except upon the basis of what a mining claimant actually is doing or has done toward developing his mine as a source of sand and gravel. Thus, although the extent of the occurrence of sand and gravel is more limited here, we are unable to distinguish in principle between the showing of potential marketability made in this case and that made in the *Ramstad* case, *supra*, and other cases involving sand and gravel claims in the Las Vegas area in which we have held that the marketability of the sand and gravel in a particular deposit is not demonstrated by evidence that sand and gravel of like quality have been removed and marketed from other deposits in the same vicinity. See also the *Humphries* case involving sand and gravel deposits near Las Cruces, New Mexico.

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We come then to another point in the test of marketability—*bona fides* in development. Good faith in the development of a mining claim implies the performance of such acts as are calculated to comply with the requirements of the law and to utilize the mineral resources present on the claim. Before there can be *bona fides* in development there must be acts of development. This is not to say that the locator of a mining claim must immediately commence mining his claim in order to establish his good faith in locating the claim. He must, however, demonstrate by some means that the value of the claim is such as to induce men to expend money and effort in extracting the minerals from the earth, for it was never intended that a right to a patent could be founded upon nothing more than claiming and holding lands of conjectural mineral worth in the hope that they might some day prove to be of substantial value. See *Cole v. Ralph*, 252 U.S. 286, 307; *United States v. Evelyn M. Kiggins et al.*, A-30827 (July 12, 1968). In this case there is no evidence that anything was done toward the development of the claim. It is true that appellant did that which was necessary to facilitate the removal of minor quantities of sand and gravel for his own use, but this, as we have already pointed out, does not constitute the development of a mine. While appellant has offered an explanation for his failure to do anything toward developing the claim, the fact remains that *bona fides* in development can be demonstrated only by the performance of positive acts and that there has been a complete want of such acts in this case. Added to appellant's failure to take any significant steps toward developing the claim during the two years preceding the withdrawal of the land is the fact, which cannot escape unnoticed, that for thirteen years after the withdrawal he did not overtly assert any claim to the land until 1961, several years after the County had commenced to remove sand and gravel, when he asked the Bureau of Land Management about the validity of his claims (Tr. 182-183).

Viewing the evidence as a whole, in light of the concepts discussed above, we find that appellant has failed to demonstrate the marketability at a profit of sand and gravel from the Sandy No. 2 claim prior to February 10, 1948, by a preponderance of the evidence, that the evidence does suggest that, in different circumstances, under proper management, material from this claim might have been marketed instead of material from some other deposit but that this possibility does not prove either that appellant could have sold sand and gravel from the claim to those engaged in the sand and gravel business or that he would have been justified, solely by virtue of his possession of a source of raw material, in entering that business himself in competition with those already so engaged and that conjecture as to what

might have been done under somewhat different circumstances is not sufficient to rebut the presumption that the claim was not developed prior to February 10, 1948, because its development was not needed at that time to satisfy the demand for sand and gravel. Accordingly, we concur in the Bureau's conclusion that the Sandy No. 2 claim is null and void for lack of a discovery of a valuable mineral deposit.

One point remains to be discussed. Appellant challenges the authority of a reviewing officer to ignore the findings of fact of a hearing examiner except where there clearly are no facts to support the hearing examiner's findings.

Appellant errs in supposing, apparently, that a hearing examiner's findings of fact have the same degree of finality as those of a trial court in a judicial proceeding. Such is not the case. In assigning hearing examiners to make the initial factual determination the Secretary retains his authority to determine the facts, and it is well established that, upon appeal, the Director of the Bureau of Land Management, and in turn the Secretary, can make all findings of fact and law based upon the record necessary to decide the case just as though each were making the decision in the first instance. *United States v. T. C. Middle-swart et al.*, 67 I.D. 232 (1960); *United States v. Alvin M. May*, A-30675 (July 25, 1968). It should be pointed out, however, that our departure from the conclusions of the hearing examiner in this case reflects essentially a difference in the significance accorded some of the facts found by the hearing examiner as they relate to the ultimate question to be decided rather than a difference in finding as to the facts themselves.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

UNITED STATES v. THEODORE R. JENKINS

A-30786 Decided September 26, 1968

Mining Claims: Discovery—Mining Claims: Determination of Validity:

A prudent man could not reasonable expect to develop a profitable mine for manganese where the extent of the deposit within the mining claims is unknown, and it appears to contain only low grade ores for which there is no market, or reasonable prospect for a market, therefore, there has not been a discovery of a valuable mineral deposit within the meaning of the mining laws and the claims are properly declared null and void and a mineral patent application for the claims is properly rejected.

*September 26, 1968***Mining Claims: Determination of Validity—Mining Claims: Discovery**

There is no justification to issue a mineral patent for mining claims containing an unknown quantity of low grade manganese simply because some patents may have issued for similar-type of claims during World War II and during a period where an artificial market for low grade ores was created by a government stockpiling program giving an incentive price for ores, where there is now no market for such ores and no reasonable prospect of such a market.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Theodore R. Jenkins has appealed to the Secretary of the Interior from a decision by the Chief, Office of Appeals and Hearings, Bureau of Land Management, dated January 25, 1967, which affirmed a hearing examiner's decision of July 30, 1965, declaring the Jack's Ridge Nos. 1, 3, 4 and 8, and Bobby Nos. 1 and 2 lode mining claims located in sec. 16, T. 12 N., R. 13 E., G. & S.R. Mer., Arizona, to be null and void for lack of an existing discovery of a valuable mineral deposit within the claims.¹ The Office of Appeals and Hearings also rejected Jenkins' mineral patent application, Arizona 030936 (M.S. 4533), which the examiner had referred to the Bureau's State Director for action in light of the examiner's decision.

The application for mineral patent for the claims was filed by Jenkins on July 12, 1961. It described the improvements on the claims and stated with respect to the mineral value of the claims the following:

The veins and deposits in said lodes are well defined in a brecciated zone over a sandstone and granitic base, and contain values in minerals consisting chiefly of manganese imbedded in and near the surface and extending to a considerable depth below the surface.

The manganese veins, fractures and deposits are disclosed in the discovery cuts and other cuts and pits and show valuable mineral bearing rock in place and large deposits of commercial manganese. The claims are located in a known and proven manganese bearing belt. Practically all of the surface of said claims is covered by a manganese deposit containing manganese of a value of approximately 20%. The property is valuable for mining purposes, and the indications are that the values, chiefly manganese, will increase at depth and that large bodies of commercial ore will be encountered over the entire area of said claims. It is believed that some of the ore bodies continue across from canyon to canyon. The work which has been done disclosed that the mines can be worked profitably over a long period of time and the mining claims have a high value for mining purposes. * * *

¹ This case has been before this office before on a procedural question. The appeal to the Director, Bureau of Land Management, was dismissed by a decision of May 3, 1966, of the Office of Appeals and Hearings for failure to comply with the Department's rules of practice. However, by decision, *United States v. Theodore R. Jenkins*, A-30661 (December 13, 1966), the Bureau's decision was reversed and the case remanded for consideration on its merits. The present appeal is from the Bureau's decision on the merits.

The lands embraced by the mining claims are within the Sitgreaves National Forest in Coconino County, Arizona. At the request of the Regional Forester, a contest complaint was issued charging that there was not a valid discovery of mineral as required by the mining laws within the claims, and that the land within the claims is nonmineral in character. The hearing examiner and the Office of Appeals and Hearings sustained the complaint as to the charge of a lack of discovery, but made no ruling on the second charge that the land is non-mineral in character. The rulings were based upon evidence presented in a hearing before the hearing examiner on April 7 and 8, 1964, and depositions taken on May 29, 1964, relating to a joint examination and sampling of the claims by the parties as agreed upon at the hearing.

Generally, appellant contends that certain factors were not given proper consideration in the decisions below. His primary objection is that an improper test or standard was applied to determine whether there was a valuable mineral deposit. He requests that there be a thorough review of the entire record and that the decisions below be reversed.

A review of the record in this case has been made but we see no reason to change the decisions below and we adopt them generally as to their discussion of the facts and laws in this case. Therefore, an extended discussion of the evidence in this case will not be made. Basically, the evidence shows that workings have exposed some concentrations of manganese disseminated throughout these claims generally in discontinuous veinlets or stringers of varying sizes. From the descriptions of the mineralization that was exposed the Bureau's witnesses testified that there was not an adequate quantity of mineral to warrant developing a mine, and they did not believe that further workings would disclose larger and richer deposits of manganese. Appellant's witnesses testified to their belief that there might be richer and larger deposits revealed with deeper workings. Samples of the ore were taken from the claims and the assay tests were submitted in evidence. Of the 31 samples submitted by appellant the following manganese percentages were shown: 3 show values from 20-21 percent manganese; 13 from 15-20 percent; 5 from 10-15 percent; and the remaining 10 below 10 percent (Ex. C, D, E). The assay reports of 54 samples taken by a Forest Service witness show significantly lower manganese percentages: 33 show values lower than 5 percent; 11 show from 5-10 percent; 3 from 10-15 percent; 4 from 15-20 percent; 2 from 20-23 percent; and one shows 44.85 percent (Ex. 16-20). The last sample was a one-pound gram sample of nodules and concretions from a dump (Tr. 40). The appellant and the Forest Service also took two joint samples at one spot after the hearing which showed 43.56 percent and 45.21 per-

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cent manganese (Exs. D-1 and D-A). One of the samples taken was described as "a pick sample, picked only of the best material that we could find" (Dep. 8). The other sample was "identical" (Dep. 30).

The fact that 28 of 31 appellant's samples assayed at less than 20 percent manganese, discredits the assertion in appellant's patent application that the claims have a value of approximately 20 percent. Although one of appellant's witnesses said that he would draw the line between high grade and low grade manganese at between 15 and 20 percent, nothing submitted by the appellant supports this. It is apparent from the record that ore of such low grade is not being used in this country. Instead, most of the steel companies which use manganese in the manufacture of steel use higher grade manganese ore (usually above 40 percent) which is imported and is much cheaper than the domestic ore. There has never been any ore from these claims sold. Letters from steel companies submitted by the Forest Service showed that they were not interested in domestic manganese ores and did not purchase such ores because of the cheaper and higher quality imports (Ex. 24-31). The record shows that manganese ore which has been sold from claims having similar-type deposits in the area was sold to the United States Government under its stockpiling program established in 1950, which terminated in 1959. Other than such purchases by the Government, there is no showing that manganese ore in the area similar to that on these claims has ever been sold (except perhaps a little during the war), or that such ore has been used significantly, if at all, in industry.

A Forest Service witness also testified that the samples taken show a higher assay value than could actually be recovered in any milling operation of a washing type as the soft pyrolusite manganese when mixed with water floats off and is washed and lost in the tailings (Dep. 7). Although appellant contends that beneficiation processes have been and are being developed, none was shown which would solve the problem of saving the soft pyrolusite. Instead, only the hard nodules and the psilomelane type of manganese can be recovered under present beneficiation processes.

With respect to evidentiary factor mentioned by the Office of Appeals and Hearings, appellant contends that other factors were not given proper consideration. First, he refers to references in the decision to his testimony that he has never engaged in producing, shipping or selling ore (Tr. 142), and that he does not know the specifications for manganese required by the steel industry (Tr. 141). Appellant contends that a person of ordinary prudence need not be a skilled miner but should be considered in the light of an average person of ordinary prudence. He asserts that he had the advice of a competent geologist,

that his claims are located in the same mining district as those of other claimants, that some of the adjoining claims had been patented and/or profitably mined, and there was reason to believe, as he testified, that he would be justified "in continuing this through to a final determination" (Tr. 130).

It is true that the "prudent man" need not be a skilled miner and that he may well rely on the advice of competent geologists or mining engineers. Nevertheless, a prudent man would be expected to find out whether the ore he is mining or proposes to mine is marketable and meets the standards for sale on the market. It is apparent from appellant's discussion that he realizes that the test of whether there is a discovery of a valuable mineral deposit to be applied here is not a subjective one—what he, himself, believes will result—but is an objective test—what a prudent man may expect to result. A subjective inquiry may be necessary where there is a question of the claimant's good faith. Otherwise, his beliefs are not decisive. The primary difference between the Bureau's decisions and appellant's position in this case appears to be what criteria a prudent man should consider and how the prudent man test should be applied.

Appellant objects to a consideration of whether the ore from the claims is marketable. He contends that the decisions below erroneously equate marketability with profitability and distort the long-relied-on prudent man test of *Castle v. Womble*, 19 L. D. 445 (1894), by inferring that marketability, present or prospective, and profitability are one "in the same thing [sic]." He contends that these decisions and that of the Department in *United States v. Alvis F. Denison et al.*, 71 I.D. 144 (1964), relied on by the examiner,² are premised "upon a fallacious extrapolation on the 'prudent-man' rule to the effect that a person of ordinary prudence would not engage in a mining venture unless he can foresee a profit today" and that "without profit today, any venture is speculative, in the exploratory stages only, and offers no incentive for pursuit and must therefore be condemned," and that the premise of these rulings is "invalidity or loss of validity upon changing economic conditions, a denial of prospective value."

Let us examine the *Castle v. Womble* prudent man test in its context. As quoted by appellant in his brief, the test is as follows:

* * * 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

² The *Denison* case involved low-grade manganese ore deposits in this same area in Arizona. The Department found that any economic value such deposits might have had ceased with the cessation of the Government's stock-piling purchasing program in 1953, that there was no prospective market shown for the mineral, and consequently there was not a discovery of a valuable mineral deposit within the claims. In *Denison v. Udall*, 248 F. Supp. 942 (D. Ariz. 1965), the case was remanded to the Department for further evidentiary proceedings, and it is currently awaiting final Departmental action on those proceedings.

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of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in lands belonging to the United States * * * are * * * declared to be free and open to exploration and purchase." For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have the proper opportunity to do. 19 L.D. at 457.

Now upon what evidence is the test to be based? The decision states:

In the case of *Sullivan Iron Silver Mining Co.* (143 U.S. 431), it was commonly believed that underlying all the country in the immediate vicinity of land in controversy was a horizontal vein or deposit, called a blanket vein, and that the patent issued was obtained with a view to thereafter develop such underlying vein. The supreme court, however, said, page 435, that this was mere speculation and belief, not based on any discoveries or tracings, and did not meet the requirements of the statute, citing *Iron Silver and Mining Co. v. Reynolds* (124 U.S. 374).

In the last cited case the court, on page 384, says that the necessary knowledge of the existence of minerals may be obtained from the outcrop of the lode or vein, or from developments of a placer claim, previous to the application for patent, or perhaps in other ways; but hopes and beliefs cannot be accepted as the equivalent of such proper knowledge. In other words, it may be said that *the requirement relating to discovery refers to present facts, and not to the probabilities of the future.*

In this case the presence of mineral is not based upon probabilities, belief and speculation alone, but upon facts, which, in the judgment of the register and receiver and your office, show that with further work, a paying and valuable mine, so far as human foresight can determine, will be developed. (19 L.D. 456-457; italics added).

Thus, the test is one to be determined upon the basis of present facts and not future speculation or conjecture which has no basis in present facts.

In this connection we may first point out that the discussion in the quoted passage concerning a belief as to a valuable blanket vein underlying an area is similar to appellant's beliefs concerning the deposition of mineral within his claims. Although some surface mineralization has been shown, nothing has demonstrated that there is a large deposit of manganese ore of a higher grade lying deeper in the claims. Therefore, the evidence in this case concerning the probabilities of more valuable deposits is the mere speculation and belief rejected in *Castle v. Womble*.

Now, as to appellant's contention that it is improper to extend the prudent man test to include a consideration of present marketability at a profit, any doubts as to whether such considerations as to the marketability and price of minerals such as manganese may be considered un-

der the prudent-man test have clearly been resolved by the Supreme Court in the recent case of *United States v. Coleman*, 390 U.S. 599 (1968). In that case it was contended that a requirement that building stone be shown to be marketable at a profit was contrary to the mining laws. The Court rejected this, saying in language applicable to all minerals:

* * * The Secretary's determination that the quartzite deposits did not qualify as valuable mineral deposits because the stone could not be marketed at a profit does no violence to the statute. Indeed, the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is "valuable." It is a logical complement to the "prudent-man test" which the Secretary has been using to interpret the mining laws since 1894. * * * Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. * * * [footnote omitted] The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. *Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test*, and the marketability test which the Secretary has used here merely recognizes this fact.

* * * Finally, we think that the Court of Appeals' objection to the marketability test on the ground that it involves the imposition of a different and more onerous standard on claims for minerals of widespread occurrence than for rarer minerals which have generally been dealt with under the prudent-man test is unwarranted. As we have pointed out above, *the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former*. While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that *precious metals which are in small supply and for which there is a great demand, sell at a price so high as to leave little room for doubt that they can be extracted and marketed at a profit*. 390 U.S. 602-603 [Italics added].

This discussion by the Supreme Court thus makes it abundantly clear that the prudent man standard is a test based upon present economic facts which compare the costs with the expected returns for the product. The test is not whether there is an operating profitable mine, or whether a prudent man at some time in the future under more favorable circumstances might expect to develop a profitable mine, but whether under the circumstances *known at the time* a profitable mine might be expected to be developed. This expectation must be based upon present considerations as to the value of the deposit as determined by the extent of saleable mineral within it, and the market price for the mineral; and by comparing the expected costs of the mining operation.³

³ The applicability of the marketability test to such minerals as gold, silver, copper, lead, and zinc was expressly held in the recent case of *Converse v. Udall*, ____ F. 2d ____ (No. 21,697, 9th Cir., August 19, 1968).

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The evidence clearly shows that no prudent man would expend time and money to develop a mine at this time as there is no market for the low-grade ore on the claims. Is there thus justification to patent these mining claims pursuant to appellant's application when the deposits clearly have no present economic value? We think not, and the above-quoted language from the *Coleman* case clearly gives the reason for this. This is not the type of situation where there are regularly occurring periodic changes in the market price occurring over a short period of time where a prudent man would consider both the ups and downs of the market place and from such changes could make a rational prediction of future probable average market prices. Instead, the most that has been shown in this case is that ore of this type in the area was purchased from a few claims in this area under a special government program for marginal and submarginal ores (at a price much higher than the prevailing commercial rate for higher grade ores), and that there may have been a few sales from claims in the area during a time of national emergency during World War II. However, even then the use of the ores was insignificant. These circumstances could hardly be called normal ups and downs in the market place.⁴ We do not consider these circumstances facts upon which a reasonable prospect of a market can be based. If appellant's contentions were followed to their logical conclusion, any land containing low-grade minerals might be considered a valuable deposit if we assume that in the future foreign sources might be cut off by war or other reasons, or that the demand for the mineral might increase so significantly that the price will increase sufficiently so as to justify extraction and processing costs which now no prudent person would conceivably expend, or that Congress will provide for a large subsidy to mine such ores. The mining laws were not designed to enable individuals to obtain patents to large tracts of land to hold for future possible development (or for purposes other than mining) where the deposits have no present economic value. They were designed to promote mineral development not land speculation.

The other fact on which appellant relies is that some patents for manganese claims in the area were issued during the war years or during the period of government incentive-purchasing. This, however, does not compel us to do the same here where it is now abundantly clear that the mineral deposits on the claims have no economic value and it appears that whatever economic value they might have had was because of an artificially created market limited to the United States Government. Therefore, we see no reason to change the conclusions reached in the decisions below. Cf. *United States v. Theodore R. Jenkins*, A-30409 (March 1, 1966).

⁴ We take notice of an interesting case dealing with the value of manganese ore to be certified under commodity tariff rules, *Northern Pacific Railway Co. v. United States*,

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

UNITED STATES v. MT. PINOS DEVELOPMENT CORP.

A-30823 *Decided September 27, 1968*

Mining Claims: Common Varieties of Minerals—Mining Claims: Discovery

The marketability of sand and gravel from a claim located after the act of July 23, 1955, for sand and gravel is not sufficient to validate the claim if the deposit has no property giving it a distinct and special value since un-

355 F. 2d 601 (Ct. Cl. 1966). This case concerned freight rates chargeable to the Government for shipments of manganese ore in Montana in 1953, 1954, 1955 and 1958 under the same stockpiling program of the Government (under the Defense Production Act of 1950, 64 Stat. 798). As the Court said:

"* * * The stated purpose of the program was to obtain from marginal or submarginal sources manganese ore which would not be otherwise produced, with the reservation that the Government could exclude presently established production of manganese ore from participation in the program.

* * * * *
 "At all times pertinent in this case, there were no known major sources of high grade manganese ore in the United States. To obtain substantial amounts of manganese from domestic ores, such metal would have had to be extracted from low grade ores like those in the pertinent shipments. During the time of the shipments, the market value of commercial manganese ore varied from 60 to 65 cents per long ton unit, with the manganese content of such marketable ore ranging from 44 to 50 percent, as contrasted with the above-stated incentive price of \$2.30 per long ton unit, paid by the defendant for low grade ores which had an average manganese content of only 28.4 percent.

"The ores in the pertinent shipments had no market value and could not have been sold at any price other than to the defendant at incentive prices under the stockpiling program." 355 F. 2d 602-603.

The Court rejected the shipper's contention that the price paid by the Government for the ores was the value to be certified under the commodity tariff rules. The Government contended that the ores had no market value, so that it was entitled to the lowest commodity rate. On this question the Court's discussion of value has significance and relevance to the question of value here as it relates to deposits of minerals and their economic value under the mining laws:

"* * * The ordinary meaning of value is market value, or the fair price reached by a buyer and seller, both willing to act, and both informed about the open market. In the sale of ores, value contemplates the commercial price reasonably to be paid upon consideration of the costs which will be incurred to produce therefrom a metal which can be profitably used or marketed. Hard reality forces one to conclude that assays and other ore tests in the smelting industry are directed to such commercial determinations, and that the term "value" in the commodity tariff rules means the commercial or market value as determined by the "settlement between shipper and consignee * * * made on basis of return or assay by said smelter or industry." Reasonable construction of the term "value" requires rejection of the contention that the artificially created incentive prices under the stockpiling program constituted the values of the ores. Proper rules of construction should not permit the unusual facts of this case to bring about a result which is contrary to the ordinary meaning of the term value and to the basic principle of commodity tariffs to fix rates on the actual value of the article shipped." 355 F. 2d 605.

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der that act common varieties of sand and gravel must be disposed of under the Materials Act and are not locatable under the mining laws.

Mining Claims: Common Varieties of Minerals

A sand and gravel deposit which may have the necessary qualities for road, tunnel and dam construction projects nearby and is marketable but has no property giving it a distinct and special value for such purposes or for other purposes for which other commonly available deposits may be used is a common variety within the meaning of the act of July 23, 1955, and, therefore, is not locatable under the mining laws.

Mining Claims: Common Varieties of Minerals—Mining Claims: Discovery

Where a mining claim containing common varieties of sand and gravel not locatable under the mining laws also contains slight values of fine gold which the mining claimant alleges may profitably be extracted in connection with the removal and sale of sand and gravel from the claim, in order for the claim to be valid there must be sufficient gold of a quantity and quality to satisfy the prudent-man test of a discovery of a valuable mineral deposit independently of the value of the sand and gravel.

Mining Claims: Discovery

A showing of mineral values which might warrant further exploration for minerals within a mining claim but would not warrant development of a mine is insufficient to establish a discovery of a valuable mineral deposit under the mining laws.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Mt. Pinos Development Corporation has appealed to the Secretary of the Interior from a decision dated May 11, 1967, by the Chief, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a hearing examiner's decision of August 24, 1966, declaring the Dry Creek No. 1 placer mining claim located in secs. 4, 5 and 9, T. 7 N., P. 19 W., S.B.M., California, within the Los Padres National Forest, to be null and void for lack of a valid discovery of a valuable mineral deposit within the meaning of the mining laws.

The mining claim was originally located on November 8, 1963, and was conveyed by the original locators to the Mt. Pinos Development Corporation on January 23, 1964. At the instigation of the Forest Service a contest was brought against the claim with the complaint charging that a discovery of a locatable material has not been made and maintained and that the land is nonmineral in character. After a denial of these charges by the contestee, a hearing was held on March 15, 1966, for receiving evidence on the issues raised by the proceedings.

From our review of the entire record in this case it is apparent that the decisions of the hearing examiner and the Office of Appeals and Hearings are correct and that they sufficiently set forth the pertinent

law and facts involved. Repetition then shall be made only to set appellant's issues in perspective and for further emphasis.

The appellant has contended that the claim is a valid claim because it contains a valuable deposit of marketable sand and gravel and also because it contains gold. The decisions below found that the sand and gravel within the claim, although marketable, is a common variety not locatable under the mining laws, and that the gold values shown within the claim are insufficient to establish a discovery of a valuable mineral deposit.

With respect to the sand and gravel, appellant insists that the deposits of the sand and gravel within the claim are marketable and thus the claim is valid. It states that it has entered into a contract with the State of California to sell 3,000,000 tons of sand and gravel for use in a highway construction project (Contestant's Exhibit 14), and also that it has entered into another lease-contract with the Littlerock Aggregate Company whereby additional materials are to be used in construction of four water tunnels and a dam (Contestee's Exhibit B).¹ Appellant contends that the highway and water tunnels are under construction and there is a present need for the sand and gravel materials from the claim, that both operations are presently "being penalized" by the necessity of paying higher prices for hauling the required materials longer distances to points of use because of this contest.

In response, the Forest Service points out that under the Materials Act, 30 U.S.C. sec. 601 (1964), the sand and gravel would be available to the State of California for highway construction without charge. It contends that appellant's claim frustrated such disposition to the State and that the claim was filed only after the property had been shown to the State's agent and the State indicated its interest (Tr. 112-115). It also contends that the sand and gravel here is a material of "dreary ordinariness, suited only for the uses of the general run of deposits of this kind," and that the fact it may have commercial value does not mean it is an uncommon variety, as the Materials Act presupposes that common varieties may be valuable for they are subject to sale by the Secretary.

Appellant lays a great deal of stress upon the marketability of the sand and gravel and appears to take the position that if marketability is shown this is all that need be shown to validate the claim. It refers to a discussion of the "marketability rule" as applied to the law of discovery in a *Solicitor's Opinion*, 69 I.D. 145, 146 (1962), saying that

¹ It is noted that under section 5 of the contract with the Littlerock Aggregate Company, the lessor (appellant) agrees "to endeavor to obtain a cancellation of that certain agreement with the State of California for the extraction of sand and gravel from the leased premises."

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the following specifically applies to the deposit here under consideration:

* * * The extreme example is probably sand and gravel, but in many areas the available deposits far exceed the market. In such cases we must insist that the locator show that there is a market actually existing for his minerals. To validate any sand and gravel claim proof of present marketability must be clearly shown.

Obviously appellant has confused the issue here with the test as to what constitutes a valid discovery of a "valuable mineral deposit" within mining claims. It had nothing to do with the meaning of the term "common varieties" used in section 3 of the act of July 23, 1955, as amended, 30 U.S.C. sec. 611 (1964). Appellant seems to labor under the misconception that a common variety of minerals is one that is not marketable therefore, if a mineral is marketable it is not a common variety. This, of course, is completely wrong.

Under the mining laws, a valid mining claim exists only when the claimant has discovered a "valuable mineral deposit" within the limits of the claim, 30 U.S.C. secs. 22, 23 (1964). Over 73 years ago the Department defined what constitutes a discovery of a valuable mineral deposit:

* * * [w]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. *Castle v. Womble*, 19 L.D. 455, 457 (1894).

In this terse general form the prudent-man test sufficed for many years when the mineral involved consisted of gold or silver or some other intrinsically valuable mineral. But when discoveries were claimed for far more commonly occurring minerals, such as building stone, sand and gravel, an elaboration of the prudent-man rule to identify more precisely the factors that a prudent man would consider in determining whether to commence development of a mine was natural or inevitable. This elaboration or refinement became known as the marketability rule. Its essence was that no prudent man would be justified in expending his labor and means to develop a mineral deposit unless the mineral could be extracted, removed, and marketed at a profit.

The marketability test was attacked as an improper standard and as an unauthorized departure from the prudent-man test. It was to answer this attack that the *Solicitor's Opinion* of September 20, 1962, *supra*, was issued. The opinion pointed out that the marketability rule was merely one aspect of the prudent-man test. This view has recently been confirmed by the United States Supreme Court in *United States v. Coleman*, 390 U.S. 599 (1968).

The marketability rule, like the prudent-man rule, has nothing to do with the question of "common varieties." This is at once obvious in that the modern expression of the marketability test was enunciated in the sand and gravel case of *Layman et al. v. Ellis*, 52 L.D. 714 (1929), almost 26 years before enactment of the act of July 23, 1955, *supra*. Prior to the latter date there were deposits of ordinary sand and gravel which satisfied the marketability test and were therefore subject to valid mining location. There were probably many more deposits of ordinary sand and gravel which did not meet the marketability test and which therefore could not be validly located under the mining laws. No legislation was necessary to exclude from mining location deposits in the second category; legislation was needed only to exclude from location deposits in the first category, *i.e.*, deposits of ordinary sand and gravel which satisfied the marketability test. This was the purpose of section 3 of the act of July 23, 1955, 69 Stat. 368, which provided that—

A deposit of common varieties of sand, stone, gravel * * * shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * *.²

Thus the statute clearly barred from location after July 23, 1955, deposits of common varieties of sand and gravel which would satisfy the marketability test. It is not enough then for appellant to show that the material on its claim is marketable. See *United States v. E. M. Johnson et al.*, A-30191 (April 2, 1965).

Section 3 of the act of July 23, 1955, provides that common varieties do not include deposits of such materials "which are valuable because the deposit has some property giving it distinct and special value." Therefore, as to claims for sand and gravel located after this act, it is not only necessary to show marketability, but in addition that the deposit has a property which gives it a "distinct and special value."

In contending that the deposit is not a common variety of sand and gravel, appellant refers to its brief to the Director, Bureau of Land Management, and to testimony by its witnesses that the material within the claim meets the standards listed in the Department's regulation 43 CFR 3511.1(b). It emphasizes that portion of the regulation which reads as follows:

* * * Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements

² Amended without change in substance by the act of September 28, 1962, 30 U.S.C. § 611 (1964).

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for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. * * *

Appellant and its witnesses at the hearing particularly emphasized the facts regarding the location of the claim and proximity to a market and the fact that there is a sizable quantity of the sand and gravel as satisfying the requirements of this regulation. However, the regulation only indicates that these are factors which may be considered in determining *commercial value*. They are not the factors which determine whether the deposit "has distinct and special properties." In other words, the regulation speaks of two different things that are necessary to make a deposit locatable as an uncommon variety: (1) it must have distinct and special properties, and (2) those properties must make it commercially valuable. The factors of quality and quantity, proximity to market, accessibility to transportation, etc., merely go to establishing commercial value, and they are substantially the same factors that are to be considered in determining whether a deposit is marketable. The factors of marketability required to be shown by a claimant are set forth as follows in a *Solicitor's Opinion* of September 21, 1933:

* * * the mineral locator or applicant, to justify his possession, must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit. 54 I.D. 294, 296 (1933).

This is the language quoted in *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959), in the court's discussion and approval of the marketability test. The factors listed as pertinent to determine marketability are substantially identical with those enumerated in the regulation for determining commercial value.

Appellant mistakenly assumes that establishing commercial value *ipso facto* establishes the existence of special and distinct properties. Thus it argues that:

* * * commercial value implies trade and bargaining in market place for things of special value. The raw material such as sand and gravel acquires commercial value in the sale by the price paid by the buyer to the claim owner for the material acquired. It acquires additional commercial value when it is processed from its raw state through the sand and gravel equipment by washing it free of clay, separated into particular sizes required for special uses according to specifications for the various layers of aggregate and concrete in highway construction in accordance with adopted plans. It may be sold after processing to some industry for further processing or manufacturing. The variety of uses of the material is beyond his control and power to determine after the claim owner parts with its ownership. Contestee as owner of the mining claim cannot and is not required by the mining regulations to do the processing or the manufacturing for industrial uses of the sand and gravel materials.

To make it marketable, Contestee is not responsible for any use or misuse of the material after sale to a buyer, and the mining law cannot direct or dominate its use. It is his property to hold or sell or use as he will, whether in the raw state, processed, or manufactured into some other ultimate product.

It is true that the value of a raw material is determined in the market place by the price that it can command. However, the fact that it sells for a price does not necessarily establish that it has distinct and special properties. The pertinent criteria which must be considered were recently discussed in *United States v. U.S. Minerals Development Corp.*, 75 I.D. 127, 134 (1968), as follows:

* * * the Department interprets the 1955 act as requiring an uncommon variety of sand, stone, etc., to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. It must give the deposit a distinct and special value. The value may be for some use to which ordinary varieties of the mineral can not be put, or it may be for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. For example, suppose a deposit of gravel is found which has magnetic properties. If the gravel can be used for some purpose in which its magnetic properties are utilized, it would be classed as an uncommon variety. But if the gravel has no special use because of its magnetic properties and the gravel has no uses other than those to which ordinary nonmagnetic gravel is put, for example, in manufacturing concrete, then it is not an uncommon variety because its unique property gives it no special and distinct value for those uses.

The question is presented as to what is meant by special and distinct value. If a deposit of gravel is claimed to be an uncommon variety but it is used only for the same purposes as ordinary gravel, how is it to be determined whether the deposit in question has a distinct and special value? The only reasonably practical criterion would appear to be whether the material from the deposit commands a higher price in the market place. If the gravel has a unique characteristic but is used only in making concrete and no one is willing to pay more for it than for ordinary gravel, it would be difficult to say that the material has a special and distinct value.

Although appellant emphasizes evidence produced at the hearing showing that construction engineers (of the State of California) and its geologist took samples of the material and tested it, finding it suitable for the construction of highways, tunnels and dams, this evidence, considered with all of the evidence in the record, did not establish that the material on the claim had any special properties which gave the deposit a distinct and special value. Indeed, it is apparent that although it may be superior in some respects to some deposits in the area for certain uses in construction work, it may also be less desirable than other deposits for such work. Nothing was shown which established that it could be used for any purpose for which other commonly available sand and gravel could not be used.

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The weakness of appellant's case is demonstrated by its reliance at the hearing on a letter by the State of California right-of-way agent to a forest ranger dated July 10, 1964 (part of Contestee's Exhibit A, see Tr. 71-72), which stated in part that they:

intend to take principally aggregate base and concrete aggregates and obtain the more common varieties (i.e. aggregate subbage and imported borrow) from closer sites to minumize [sic] our haul costs.

From this appellant insisted at the hearing that the sand and gravel on the claim is not a common variety because of the references to "more common varieties" and because the material will be used for concrete aggregates (Tr. 305-306). The State's engineer's comparison of "more common varieties" certainly does not categorize this sand and gravel as being an uncommon variety, and in any event, even if it did, his opinion would not be binding when the facts demonstrate otherwise.

His remarks do point out one of the most important factors to a user of sand and gravel and that is its location with respect to the construction site. A closer location would reduce hauling costs. The proximity of appellant's claim to the construction project, together with the availability of a water supply which appellant has shown, should give an economic advantage in selling and processing the materials from the claim over sites which are further away and do not have water. However, no physical property of the material itself has been shown which demonstrates that it has a "special and distinct value." There is nothing to show that the material from the claim may be sold at a significantly higher price than other materials used for the same purposes, which is necessary to demonstrate that it has a property giving it a distinct and special value. *United States v. U.S. Minerals Development Corp., supra; United States v. R. W. Brubaker et al.*, A-30636 (July 24, 1968). Indeed, there is some evidence that it may receive a lower price as Contestant's Exhibit 14, which contains the contract with the State of California referred to by appellant, shows a then-agreed upon royalty of 10 cents per ton. It also contains a contract by the State with others for sand and gravel at a royalty of 50 cents per ton—some 5 times greater than that for appellant's material. In considering all of appellant's contentions with the evidence it is clear that the sand and gravel within this claim is a common variety within the meaning of the act of July 23, 1955, and, hence, the claim is invalid as to the sand and gravel.

The remaining discussion concerns appellant's allegations that because the claim contains some gold it is valid. In its notice of appeal appellant contends that the evidence at the hearing was uncontradict-

dicted that the gold on the claim could be mined profitably "if the huge quantities of sand and gravel could be removed from the claim site after processing rather than being stored on the claim which would unnecessarily obstruct the gold recovery operations of the yet unprocessed deposits." However, the "evidence" appellant relies on is the opinion of its witness, a geologist. In considering his testimony in its entirety, together with his report of the examination of the claim, it is apparent that his opinion as to the value of the gold apart from the sand and gravel is based upon unsupported theory as to a means of processing the gold economically from the claim, and further falls back upon a reliance on a sand and gravel operation. Appellant's own contentions are based upon the premise that the placer mining claim is valid for the gold when it is mined in conjunction with operations for the removal of sand and gravel. The information in the record shows, in appellant's words, that the "flour-fine," and also that its values are too low to warrant a mining operation for the gold alone. Appellant refers to testimony by a government witness regarding the value of placer material based upon a report by one of appellant's witnesses. (Tr. 300-301); however, this was simply a hypothetical response based upon hypothetical facts (Tr. 299). His evaluation and determination of the value of that witness' samples elsewhere indicated that the values of the gold are too low to warrant development of the claim (Tr. 282-286, 288-290, 298, Ex. 17, 18).

The question relating to the gold pertains to that part of section 3 of the act of July 23, 1955, which provides as follows:

That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit [of a common variety of sand, stone, etc.].

This provision refers to the discovery of some locatable mineral such as gold occurring in a deposit of a common variety sand and gravel, etc. Congress certainly did not intend that the presence of any gold within such a deposit would validate the claim, but that there must be a "discovery" of the gold within the meaning of the mining laws. That is, the deposit of gold itself must satisfy the prudent-man test of *Castle v. Womble, supra*. There is nothing in the legislative history of the act which would indicate that this rule would be altered at all. Instead, the fact that the mineral such as gold occurred in a non-locatable deposit of sand and gravel would not invalidate the claim if it was otherwise valid because of the discovery of gold under this standard. However, likewise, the value of the sand and gravel would not be considered in evaluating the value of the gold to determine if there was a valuable deposit of the gold. In other words, as indicated in *United States v. L. N. Basich*, A-30017 (September 23, 1964), and

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cases cited therein, there would have to be a discovery of gold which would validate the mining claims independently of the value of the sand and gravel.

It is apparent that the evidence in this case shows that there has not been a discovery of sufficient gold to warrant a prudent man in expending time and money to develop a mine, but at the most would warrant only further exploration in an attempt to locate sufficient gold for mining. A showing of mineral values that are only sufficient to warrant further exploration rather than development work is not sufficient to establish a discovery of a valuable mineral deposit. *Converse v. Udall*, — F. 2d — (No. 21, 697, 9th Cir., August 19, 1968); *C. F. Pruett, Executor v. Udall*, Civ. No. 67-167 (D. Oreg., June 25, 1968).

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

THELMA M. HOLBROOK ET AL.

A-30940

Decided September 30, 1968

Oil and Gas Leases: Extensions—Oil and Gas Leases: Drilling

The post-termination activities of a lessee who claims to have earned an extension of an oil and gas lease by diligently prosecuting actual drilling operations at the end of its primary term can be evaluated to determine whether his activities on the last day of the lease were undertaken in good faith to carry the well-drilling operations to a conclusion and, where it is determined that he was not proceeding in good faith, it is proper to hold that the lease terminated as of the expiration of the primary term.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Thelma M. Holbrook, Edward J. Smith, and Elmer J. Smith have appealed to the Secretary of the Interior from a decision dated December 14, 1967, of the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of the Wyoming land office holding that oil and gas lease Evanston 021058, of which they are the lessees, had not earned a right to a two-year extension and that as a result it had terminated on January 31, 1967.

The lessees had sought an extension under the provisions of section 4(d) of the act of September 2, 1960, the Mineral Leasing Act Revision of 1960, 74 Stat. 790, 30 U.S.C. sec. 226-1(d) (1964), and Departmental regulation 43 CFR 3127.2. For a lease to qualify for such an extension the statute requires that "actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time."¹

The regulation provides:

- (a) Any lease on which actual drilling operations, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time, shall be extended for 2 years and so long thereafter as oil or gas is produced in paying quantities.
- (b) Actual drilling operations must be conducted in such a way as to be an effort which one seriously looking for oil or gas could be expected to make in that particular area, given existing knowledge of geologic and other pertinent facts.
- (c) As used in this section (1) "actual drilling operations" shall include not only the physical drilling of a well but the testing, completing or equipping of such well for the production of oil or gas; (2) "primary term" means all periods in the life of the lease prior to its extension by reason of production of oil or gas in paying quantities. 43 CFR 3127.2.

The lessees' attempt to extend their lease began on January 11, 1967, with the filing of an application to drill a 700-foot well within the limits of the lease. The application, as amended, was approved on January 19, 1967, by the Geological Survey's district engineer.

In a memorandum dated February 1, 1967, the district engineer wrote the manager of the Wyoming land office:

Our records show that lease Evanston 021058 was due to expire on January 31, 1967. This is to advise you that drilling operations on the leasehold were commenced on January 31 and were being diligently conducted on the expiration date, therefore, the lease is entitled to a 2 year extension pursuant to provisions of 43 CFR 3127.2. This office is requesting that the extension of the lease due to drilling operations be held in abeyance until such time that it can be determined that the operator has made a bona fide effort to test for oil and/or gas production.

Despite the caveat, the land office issued a decision dated February 7, 1967, extending the lease for two years under the provisions of 43 CFR 3127.2, *supra*.

Although not commented upon by the district engineer in his memorandum to the land office, it appears that the well was drilled at a spot 170 feet west and 50 feet south of the site described in the approved application.

¹ The lease was originally issued on December 1, 1948, for a five-year term and thereafter its term had been extended under several provisions of the Mineral Leasing Act so that it expired on January 31, 1967. Among its previous extensions were two granted under the provisions of section 4(d), *supra*, for periods ending on January 31, 1965, and January 31, 1967. Thus this is the third drilling extension that the lessees are seeking.

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Drilling operations for a time were hampered by bad weather and illness and drilling ceased. After some exhortation from the district engineer drilling operations were resumed on May 25, 1967. The acting district engineer approved the drilling of well at its actual position on May 29, 1967.

In a memorandum dated June 27, 1967, the regional oil and gas supervisor set out these facts and concluded:

A brief summary of the actual drilling completed thus far is that the well was spudded on January 31 and as of June 12, the total depth of the well was 46 feet. The notice of intention to drill stated the well would be drilled to a total depth of 700 feet.

In conclusion, it is our opinion that the operator did not fulfill all his obligations as required under 43 CFR 3127.2. Therefore, it is recommended that action be taken to terminate the subject lease, the effective date of termination being January 31, 1967.

In its decision of July 3, 1967, the land office terminated the lease for the reasons given by the regional oil and gas supervisor.

The appellants say that they discontinued operations on or about June 12, 1967, because of difficulties with the Wyoming State Oil and Gas Commission. That Commission, it appears, upon learning from the acting district engineer, United States Geological Survey, that the well location had been changed, informed the operator, Harold W. Myers, that the new location was in violation of Rule 302 of its rules and regulations and that before drilling could be carried out at the new site he would have to submit an application for an exception to the well-spacing regulation. Shortly thereafter the Attorney General of Wyoming wrote to the operator, calling attention to the spacing regulation, the supporting statute and the penalties provided for its violation. Although the appellants began in early June 1967 to attempt to obtain an exception to the spacing regulation, it was not until December 15, 1967, that one was granted. They say that they are now willing and ready to complete their drilling plans in accordance with their submissions to the State and the Geological Survey.

The Office of Appeals and Hearings considered the appeal while the operator was attempting to obtain a well-spacing exception. It pointed out that the lessees could have obtained a timely exception if they had acted diligently and it refused to accept the warnings from the State regulatory commission as a justifiable reason for not drilling. It then concluded that the lessees were not diligently prosecuting their drilling operations and that the lease terminated as of January 31, 1967.

In their appeal to the Secretary, the appellants recite their drilling operations and refer to the expenditures, some \$15,000, made on two

earlier wells. They then contend that when the land office found in its decision of February 7, 1967, that they had commenced drilling operations prior to January 31, 1967, and that the operations were being diligently prosecuted at that time, the regulation (and statute) had been satisfied and the lease had earned its two-year extension. They also assert that their drilling plan and operations were consistent with the requirement of the regulation that the drilling operation must be a reasonable, serious, and prudent search for oil in the area, and that the delay should be excused in light of the facts.

Before considering whether the circumstances justify a delay by appellants in their prosecution of the drilling operations, we must first determine whether events occurring after the termination date of the lease are relevant and, if so, in what manner.

The statute and the regulation speak only of conditions existing at the time that the lease would otherwise terminate. They make no allusions to a continuing examination of the lessee's performance to judge whether he has carried on his operations diligently to a conclusion under penalty of having his lease held to have terminated retroactively.² There is nothing in the legislative history to indicate that an extension earned under this provision would be subject to a continuing assessment of performance.

The absence of a specific requirement that the lessee continue drilling does not, however, provide a final answer to the question of whether he must do so in order to save his lease. A leading authority in discussing the obligation of a lessee to continue drilling of a well once commenced states:

In addition to the provision of the drilling and rental clauses of a lease requiring the lessee to commence the drilling of a well within a stated time to escape the payment of delay rental or prevent termination of the lease, the lease may further expressly provide that the drilling be continued to completion with due diligence. [Footnote omitted.] In the absence of such express statement requiring due diligence in completion of the well such duty would be implied [footnote omitted], although it is not always necessary in reaching a proper result to do so. If the lessee has not continued the drilling with due diligence, this is evidence to show that the commencement of the well was not done in good faith, hence he may lose his lease or be forced to pay delay rental. There may

² It is interesting to note that the next paragraph of the oil and gas regulations, 43 CFR 3217.3, which deals with the continuation of a lease on termination of production, plainly requires a lessee who desires to avoid the termination of the lease to continue an activity begun on or before a fixed date. It reads:

"(a) A lease which is in its extended term because of production shall not terminate upon cessation of production if, within 60 days thereafter, reworking or drilling operations on the leasehold are commenced and are thereafter conducted with reasonable diligence during the period of nonproduction."

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of course be a good-faith commencement of a well coupled with a lack of due diligence in its completion. Where this is so, the matter of diligence is a question of fact to be determined from all of the circumstances. [Footnote omitted.] If the lessor has undertaken to terminate the lease before the lessee commenced operations, or afterwards, the operation of the requirement to commence drilling or to continue with due diligence, is postponed until the matter is settled. 2 Summers, Oil and Gas, Permanent Edition (1959), § 349, pp. 467-468.³

A common sense reading of section 4(d) makes it apparent that post-lease termination activities may properly be considered in determining whether the statutory requirements have been met. Indeed they may afford the only basis for making this determination. Section 4(d) requires that actual drilling operations be commenced prior to the end of the primary term. This means that a well can be spudded at any time prior to midnight of the last day of the lease term. Suppose that actual drilling of a well was begun at 11:45 p.m. and diligently continued for 20 minutes until 12:05 a.m. Then drilling was stopped and the rig removed. Could it rationally be said that the post-midnight activities could not be considered and that the lessee must be held to be entitled to an extension because he had commenced his drilling prior to midnight and was diligently drilling at midnight? The statute cannot be so literally—and blindly—read as permitting so obvious a sham and deception.

Applying these precepts to the facts of this case, we now consider whether the operator's activities on the last day of the lease constituted "actual drilling operations" within the spirit and intent of the statute. In resolving this question we examine not only the procedures he was following on that day but also his later performance to determine whether his "last day" activities were undertaken in good faith. The district engineer's memorandum of February 1, 1967, indicated that the operator's activities on the lease on January 31, 1967, were of a nature to earn the lease an extension, if they were carried to completion.⁴ The memorandum said as much, and only asked that the extension be held in abeyance until it could be determined whether the operator had made a bona fide effort to test for oil or gas. In other words, the district engineer wanted to evaluate the "last day" operations in the light of the operator's later performance.

³ Cited in *Butler v. Nepple*, 354 P. 2d 239 (Calif. 1960).

⁴ The Department has considered several cases arising under the same section of the Mineral Leasing Act Revision of 1960. They, however, were concerned with what physical activities amounted to actual drilling operations (*Carl Losey et al.*, A-30153 (December 4, 1964); *Michigan Oil Company*, 71 I.D. 263 (1964)), and with whether a lease was extended by diligent compliance with an approved drilling plan which the Department found could not be accepted as a serious attempt to find oil or gas (*Standard Oil Company of Texas*, 71 I.D. 257 (1964), reversed *California Oil Company v. Udall*, Civil No. 5729 (D. N. Mex., January 21, 1965); *Hondo Oil and Gas Company*, A-30216 (January 11, 1965)).

About five months later the regional oil and gas supervisor, as we have seen, notified the land office that after a warning and an extension the operator had resumed drilling on May 25, 1967, but had stopped again on June 12, 1967, and had not resumed drilling as of June 22, 1967. Since only 46 feet of a proposed 700-foot well had been drilled, the supervisor concluded that the operator had not fulfilled his obligations as required by the regulation, *supra*, and recommended that the lease be terminated as of January 31, 1967.

The decision of the Office of Appeals and Hearings, while recognizing that delay could be explained away, held that the lessees' attempt to excuse their failure to complete their drilling plan was not acceptable. It found that the appellants, if they had been diligent, would have been able to comply with the regulations of the State Commission in time to allow them to continue drilling.

There is much to be said for this conclusion. That the appellants' operator was aware of the well spacing requirements before the lease term expired is shown by the district engineer's letter dated January 9, 1967, to him and his letter dated January 16, 1967, to the State Commission indicating that he would like to apply for an exception to Rule 302. When it became apparent that there was not time enough before January 31, 1967, to process an exception, he changed his well location to an acceptable one. He then on the last day of the lease began to drill at a location other than the one described in his application for a permit to drill. However, he notified neither the Geological Survey nor the State Commission of his change in plans. Indeed it was only after repeated requests by the district engineer extending from at least February 28, 1967, to May 16, 1967, that the operator managed to file a notice with the Geological Survey showing his change of drilling plans.

Despite the several notices from the Geological Survey and his prior knowledge of Rule 302, the operator did not undertake to inform the State Commission of his actual well location or seek to obtain an exception until after the State Commission, having been informed of the new well location by the acting district engineer, had again written to him on June 1, 1967, about the limitation placed on drilling by Rule 302 and his duty to submit an application for an exception to it.

The prolonged delay in drilling, when combined with the absence of any attempt to satisfy the State law, well supports the conclusion that the operator was not pursuing his drilling plans with due diligence and had not intended to. He may indeed have been placed in a dilemma by the conflict between his necessity to drill at some location other than that described in his drilling permit and his obligation to obtain an exception from the State. He had, however, permitted four

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months to elapse without any attempt to resolve the problem and cannot proffer a conflict of his own making to relieve himself of the obligation imposed by a statute which was intended to grant extensions only to one whose drilling plans are threatened by the termination of his lease. It is difficult to conceive that the operator was drilling in good faith at the end of the lease term when, in the ensuing four months, he was able, and then only after admonitions by the Geological Survey, to drill sporadically to a depth of 46 feet and when, during the same period, he made no effort to secure State approval of his drilling plan.

Accordingly, we conclude that the operator was not drilling in good faith on the last day of the lease and that putative drilling operations, conducted without a good faith intent to carry them to a conclusion, do not constitute the actual drilling operations required to gain a lease extension.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a); 24 F.R. 1348), the decision of the Office of Appeals and Hearings is affirmed.

ERNEST F. HOM,

Assistant Solicitor.

160-ACRE WATER DELIVERY LIMITATIONS AS APPLIED TO PARENT
AND SUBSIDIARY CORPORATIONS

Bureau of Reclamation: Excess Lands

For the purpose of applying the excess land laws, a corporation which is a stockholder in another corporation is treated in the same manner as an individual stockholder. A parent corporation is the beneficial owner of all lands held by its wholly owned subsidiary and the two corporations are limited to 160 eligible acres in a water district. The fact that the land was transferred from subsidiary to parent for tax reasons rather than to avoid the excess land laws does not permit more than 160 acres to receive project water.

M-36755

October 7, 1968

Mr. ROBERT L. PIERCE, General Solicitor,

Southern Pacific Company

65 Market Street, San Francisco, California 94105

DEAR MR. PIERCE:

By your letters of July 22 and July 30, 1968, the Southern Pacific Company appealed a decision of the Bureau of Reclamation, Fresno, that Southern Pacific and its wholly owned subsidiary, Southern

Pacific Land Company, together are limited to a total of 160 non-excess acres in a water district. Your claim that each corporation is entitled to hold 160 acres is based on two points:

(1) You interpret the "third rule" set out in *Solicitor's Opinion*, 75 I.D. 115 (1968) as permitting both a parent and its subsidiary to hold 160 acres if the land was transferred for a legitimate business reason other than avoidance of the excess land laws. Here the justification given for the transfer from Land Company to Southern Pacific is the reduction of taxes.

(2) Estoppel is alleged because of the initial determination by the Bureau that each corporation could hold 160 non-excess acres. Relying on that decision, Southern Pacific entered into a contract involving the use of 40 acres owned by each company. According to your petition, Southern Pacific would be unable to fulfill this contract, which expires in 1979, if the Bureau's original determination is reversed.

After reviewing the appeal, we conclude that it must be denied because the beneficial ownership of Land Company must be attributed to Southern Pacific. As a single owner, Southern Pacific's total non-excess holdings in the district are by law limited to 160 acres.

This test is developed in the *Solicitor's Opinion, supra*:

* * * The second fundamental rule is that the corporate form can be disregarded and the land held in corporate ownership viewed as if held by its stockholders in order to determine whether any stockholder, as a beneficial owner of a pro rata share of the corporate land holding, is holding land in excess of 160 acres.

If Southern Pacific were a natural person, application of the second rule would attribute the holdings of Land Company to Southern Pacific because it is the sole stockholder. The question is whether Southern Pacific should be treated differently because it is a corporation. In view of the policies of the excess land law, the answer must be no. Historically the law was designed to promote the interests of the small landowner and to prevent federal subsidy of absentee owners. Corporations have been found eligible to receive project water but that right has sprung from the right of the individual. A corporation can obtain water "in the same manner as natural persons." *Acreage Limitations Policy* 14. If the beneficial ownership test is not applied to corporations as stockholders then corporations could receive a greater benefit than the individuals for whom the law was written. Pyramiding corporations could accomplish what an individual and his closed corporation cannot.

When a public corporation such as Southern Pacific is the stockholder of the land holding corporation, land is not further attributed

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to the individual stockholders of the parent company. The administrative difficulties of any such attempt are obvious. In such a case, the share of land attributed to any one individual and the amount of control he exercises over that parcel are generally so small that the stricture against large accumulations cannot be said to be violated. It is meaningless to attribute the beneficial ownership of Land Company to the stockholders of Southern Pacific rather than to Southern Pacific itself.

The end result of applying the beneficial ownership test to corporations is to limit a parent-subsidiary combination to eligible 160 acres in all cases. This is consistent with the plan of the excess land laws, i.e. to prevent the use of federally subsidized water on large tracts held by a single owner. Attributing all the land held by Southern Pacific and Land Company to one entity is to regard the two companies as they regard themselves by filing a consolidated tax return. As your petition readily admits, the land is held in different names only because tax law formerly would not treat the two as one.

Even if it were proper to assume that only the "third rule" applies, you have interpreted it too narrowly. Your analysis would permit any business reason—no matter how slight or how irrelevant to the present—to excuse a transfer of lands between parent and subsidiary. The proper analysis is whether the transaction, taken as a whole, is contrary to the policies of the excess land laws. Although in some instances such a balancing test might be difficult to apply, no such problems are presented by these facts. The *Solicitor's Opinion* makes it clear that the burden of proof is on the water used to show a present business purpose for the land transfer. In this case, you have shown an historical tax reason for the transfer of the property, i.e., to offset losses at a time when consolidated returns were not permitted. However, you have shown no justification for Southern Pacific's retention of the land today.

You also fail to prove your claim of estoppel. If beneficial ownership of all the property is attributed to Southern Pacific, Southern Pacific can designate the 80 acres involved in the Ciffen, Inc. lease as part of its 160 non-excess acres. In the alternative, a recordable contract will guarantee water to the leased land for ten years after its execution.

Sincerely yours,

EDWARD WEINBERG,
Solicitor.

UNITED STATES v. CLARE WILLIAMSONA-30640 *Decided October 23, 1968.***Mineral Lands: Determination of Character of—Mining Claims: Placer Claims**

To establish the mineral character of land, now closed to mining location, embraced in a placer mining claim, it must be shown that known conditions, as of a date when the land was open to mining location, were such as reasonably to engender the belief that the lands contain mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end.

Mining Claims: Determination of Validity—Rules of Practice: Generally

The Secretary of the Interior may inquire into all matters vital to the validity or regularity of a mining claim at any time before the passage of legal title, and the fact that the validity of a portion of a contested mining claim was not challenged in a proceeding initiated by the Forest Service does not preclude inquiry into the validity of that portion of the claim by this Department if, upon review of the record of the contest proceedings, the Department is not satisfied that the claim is regular in all respects.

Mineral Lands: Determination of Character of—Mining Claims: Determination of Validity—Rules of Practice: Generally

Where the validity of a portion of a contested placer mining claim located on land subsequently withdrawn from mining location is dependent upon a finding that, at the effective date of the withdrawal, the land was known to be mineral in character, but the contest complaint made no reference to the date of the determination of mineral character, and no evidence was introduced by either party to the contest bearing upon known conditions at the time of the withdrawal which related to the mineral character of the land, and where there is reason for doubting whether the allegations of the complaint accurately reflected the charges which the contestant proposed to substantiate, the proceeding will be set aside to permit the filing of a new complaint or amended complaint.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Clare Williamson has appealed to the Secretary of the Interior from a decision dated March 31, 1966, whereby the Office of Appeals and Hearings, Bureau of Land Management, set aside a decision of a hearing examiner dismissing the charges in adverse proceedings initiated against the unnamed placer mining claim in sec. 30, T. 21 S., R. 13 E., Willamette Mer., Deschutes National Forest, Oregon, and remanded the case for further hearing.

The record shows that the unnamed placer mining claim was located on July 2, 1945, embracing 157.48 acres of land comprising lots 3, 4, 5, 6 and 7, T. 21 S., R. 13 E. Subsequently, this land was included in an area withdrawn from mining location by the act of December 21, 1945,

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59 Stat. 622. On July 10, 1961, the appellant filed an application for patent to the mining claim, alleging therein that she was the widow and sole heir of Lloyd A. Williamson, one of the original locators of the claim, who was, at the time of his death on July 29, 1958, sole owner of the claim subject to the rights of the United States.

Upon the recommendation of the Forest Service, United States Department of Agriculture, a contest complaint was filed in the Oregon land office on June 26, 1963, in which it was charged that:

A. As to lots 3, 4, 5, 7 and the west half of lot 6.

1. Valuable minerals have not been found within the above-described portion of the claim so as to constitute a valid discovery within the meaning of the mining laws.

2. No discovery of a valuable mineral has been made within the above-described portion of the claim because the materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials.

3. The land within the above-described portion of the claim is nonmineral in character.

B. As to * * * [a] portion of the east half of lot 6:

* * * * *

At the time the mining claim was located, the * * * [described] portion of the east half of Lot 6 was not open for the location of a mining claim since it had been appropriated to another use by the issuance of a special-use permit to the Oregon State Game Commission dated December 6, 1932, which permit is still in effect.

The validity of the claim was not challenged as to the remaining portion of lot 6, and a hearing on the stated charges was held at Portland, Oregon, on June 17 and 18, 1964.

At the outset of the hearing the hearing examiner questioned the meaning of the first charge of the complaint. In response to the hearing examiner's query, counsel for the contestant stated:

I think when the Complaint was first prepared we weren't quite sure whether the minerals were common variety pumice or the lump pumice that it now turns out to be, and that accounts probably for the first two charges. I think we can agree the issue here is whether these lands that we are talking about are mineral in character. (Tr. 5.)

Thereafter the parties stipulated as to certain material facts, including (1) the amount of mineral produced from the claim (Tr. 14; Ex. 2) (2) the profitable nature of such production (Tr. 14), and (3) the issuance of a special use permit covering a portion of lot 6 to the State of Oregon prior to location of the mining claim and the method for determining the effect of that permit in the event a patent should issue (Tr. 15; Ex. 3).

It is undisputed that all of the legal subdivisions embraced in the claim contain lump pumice which is useful in a number of trades and industries and that pumice taken primarily from two pits on the uncontested portion of lot 6 has been successfully marketed.¹ The Government's evidence at the hearing was directed primarily toward showing that the uncontested portion of the claim (approximately 17 acres in the east half of lot 6) contains pumice in sufficient quantity to satisfy the demand for mineral from this particular deposit for a reasonable period in the future and that the remaining portions of the claim are not valuable for the mineral which they contain because there is no market for it. The Government also introduced evidence bearing upon the value of the land in the claim for recreational purposes. Appellant's evidence, on the other hand, was directed toward demonstrating the marketability of the mineral found on the claim and toward refuting the Government's showing of over-abundant reserves in the uncontested portion of lot 6.

By a decision dated January 6, 1965, the hearing examiner dismissed the complaint as to charge B upon the basis of the stipulation between the parties with respect to the area covered by the special use permit. He dismissed the complaint as to charge A.1 upon a finding that a discovery of a valuable mineral deposit in the east half of lot 6 was established by the evidence presented at the hearing, as well as by the admissions of the contestant, and that only one discovery was required to support a placer location whether of 20 acres or 160 acres. He found that charge No. A.2 was not supported by the evidence developed at the hearing, pointing to testimony relating to the profitable marketing of pumice taken from the claim, a small part of which was extracted from lot 7, to testimony that there is not only a present market for the material but that the market is expanding, to evidence that appellant had received repeat orders indicating that material from her claim was superior to pumice from other deposits, and to testimony, unrefuted by the Government, that there are large markets for the material for a variety of uses that have not been tapped by appellant. Finally, the hearing examiner found the testimony of witnesses for both parties to be conclusive that block pumice was found on each of the subdivisions of the claim in sufficient quantity to qualify the land as mineral in character, and he dismissed the complaint as to charge No. A.3, stating that he was not convinced by contestant's argument that there exists such a quantity of pumice within the claim that as a consequence there is no present or prospective market. He concluded that, since the contestee

¹ A small quantity of pumice, probably not exceeding 5 percent of total production, was taken from an area outside of the east half of lot 6 (Tr. 14, 250, 265-267).

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had shown by a preponderance of evidence that a discovery had been made on the claim, that the mineral exists on every legal subdivision of the claim, and that it can be mined and disposed of at a profit, and since the contestee had agreed that if a patent should be issued including the east half of lot 6 it would be issued in accordance with the Regulations contained in 44 L.D. 513, the complaint should be dismissed.

The Forest Service appealed to the Director, Bureau of Land Management, from the hearing examiner's decision, charging that the hearing examiner erred (1) in holding that the fact that mineral exists on each legal subdivision satisfies the legal requirements that each subdivision must be mineral in character (2) in assigning more weight to the testimony of mining engineers who testified for the appellant than he did to the testimony of the mining engineer who testified for the contestant with respect to the extent of mineralization present on the east half of lot 6, and (3) in applying a test of present or prospective marketability as of the date of the hearings rather than as of the date of the withdrawal in 1945, thereby failing to hold that the requirements of the mining laws of the United States must be satisfied in total prior to the withdrawal of the land from mining entry in order to vest a mining claimant with any rights against the United States.

The Forest Service noted in its brief to the Director that the east half of lot 6 was not contested because it was believed that the 30 tons of material removed from the land prior to its withdrawal from mineral entry were sufficient to satisfy the requirements of the mining laws. However, in view of testimony adduced at the hearing showing a very small tonnage removed and the fact that no material was removed from 1942 to 1946, it suggested that the failure to contest the entire claim may have been questionable.

In its decision of March 31, 1966, the Office of Appeals and Hearings found the evidence of record unconvincing that there was a discovery of valuable minerals on the claim prior to the withdrawal of December 21, 1945. Noting that only 30 tons of material from the claim were shipped prior to the withdrawal and that those 30 tons were shipped in 1940-1941, prior to the location of appellant's claim, by a stranger to the record, it found that there was no evidence that the locators of the claim had a market for the material prior to the withdrawal. This lack of evidence on the issue of discovery, it surmised, was possibly due to the failure of the contestant to charge lack of discovery on the east half of lot 6. It concluded that the complaint was erroneously drawn, inasmuch as a correct finding of fact and law with respect to a discovery on the east half of lot 6 was indispensable to a proper determination of the validity of the remaining portion

of the claim, and it set aside the hearing examiner's decision and remanded the case to the Office of the Hearing Examiners to schedule a further hearing on the issue of whether or not a discovery of valuable minerals was made on the claim prior to the 1945 withdrawal.

Appellant has appealed from the Bureau's decision, charging that mineral discovery on the uncontested half of lot 6 was not at issue on appeal before the Director, that mineral discovery on the contested portion of the claim was not an issue on appeal to the Director since one discovery on an association placer claim is sufficient, that the sole issue before the Director was the mineral character of the contested portion of the claim, that the hearing examiner's decision is supported by substantial evidence which the contestant did not deny, and that the Office of Appeals and Hearings, in reversing the hearing examiner, substituted its own false assumptions for the evidence of mining experts. In short, appellant is challenging the authority of the Bureau to direct a hearing on a question of fact not placed in issue by the charges of the complaint.

The authority of this Department to determine the validity of mining claims has been long recognized. The Department of the Interior has been granted plenary powers in the administration of the public lands, and, until the issuance of a patent, legal title to a mining claim remains in the Government, and the Department has the power, after proper notice and upon adequate hearing, to determine the validity of the claim. *Cameron v. United States*, 252 U.S. 450 (1920); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963). In the exercise of this power, the Department has held, the doctrine of res judicata has no application to proceedings in the Department relating to the disposition of public land until legal title passes, and, prior to that time, findings of fact and decisions by the Secretary or his subordinates are subject to reexamination and revision in proper cases. *United States v. United States Borax Company*, 58 I.D. 426 (1944); *United States v. Eleanor A. Gray*, A-28710 (Supp. II) (April 6, 1965). Moreover, the Department cannot recognize as binding upon it any stipulation entered into at a hearing by agents or attorneys for the parties in interest which may preclude the consideration in a mining claim contest of any question vital to the validity or regularity of the claim involved. *Stanislaus Electric Power Co.*, 41 L.D. 655, 661 (1912); *United States v. U.S. Minerals Development Corporation*, 75 I.D. 127, 136 (1968). Thus, it has been held that the fact that a question vital to the determination of the validity of a mining claim was not put in issue by the charges of a complaint does not preclude the Department from requiring proof or evidence of compliance with all of the requirements of the applicable laws and regulations (*Stanislaus Electric Power Co.*, *supra*), that a mineral examiner's determination that

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there has been a discovery or the issuance of a final certificate after approval of a mineral entry for patent does not preclude further inquiry into the validity of a mining claim (*United States v. Stephen B. Milisich*, A-30720 (April 13, 1967); *United States v. Consolidated Mines and Smelting Co., Ltd., et al.*, A-30760 (September 19, 1967)), and that a finding of validity by the Department itself after a hearing is not a bar to further inquiry into the validity of a claim or to reexamination of the conclusions previously reached (*United States v. United States Borax Company, supra*; *United States v. Eleanor A. Gray*, A-28710 (Supp.) (May 7, 1964) and (Supp. II), *supra*).

In light of the foregoing decisions we do not doubt that it is within the province of this Department to inquire into the validity of the uncontested portion of the claim now in question if the evidence presented in connection with the proceeding against the other portions of the claim creates any degree of incertitude with respect to the soundness of the underlying presumption that a discovery was made upon the east half of lot 6, or to inquire into any other matter which it deems pertinent to the ultimate question, whether or not such matter has been put in issue by the charges of the complaint. The plenary authority of the Department in this respect being well established, the question is whether the occasion for its exercise is presented in this case and, if it is, how the authority should be exercised. There is no doubt in our mind that exercise of the authority is required for the reason that, although both parties appeared to recognize the critical issue involved in the proceeding, neither party directed its proof to that issue.

As we have already noted, the unnamed placer claim was located on July 2, 1945, and the land embraced in the claim was withdrawn from mining location on December 21, 1945. Thus, it was incumbent upon the mining claimant, in order to establish the existence of a right to the land superior to that of the United States which would entitle her to a patent to show that, on December 21, 1945 (1) a valuable deposit of mineral had been discovered within the limits of the claim and (2) all of the land embraced in the claim was known to be mineral in character.

So far as the present proceeding is concerned, the issue of discovery was rendered moot by the failure of the Forest Service to contest the validity of the entire claim, in effect, an acknowledgement on the part of the Forest Service that it was satisfied with the evidence of a discovery on the uncontested portion of the claim. The parties to the contest were in apparent agreement at the hearing that the critical issue was the mineral character of the contested portions of the claim. However, while the parties were in outward harmony in their recognition

of the central issue, there seems to have been some disagreement as to what the test for determining mineral character is.

The test is that in order to establish the mineral character of land it must be shown that known conditions on the critical date (in this case, December 21, 1945) were such as reasonably to engender the belief that the land contained mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. If they were not, the lands were not then known to be mineral in character and were not excepted from the effect of a withdrawal removing them from operation of the mining laws. See *Diamond Coal and Coke Co. v. United States*, 233 U.S. 236 (1914); *United States v. Southern Pacific Company et al.*, 251 U.S. 1 (1919); *United States v. State of California et al.*, 55 I.D. 121 (1935); *Southern Pacific Company*, 71 I.D. 224 (1964).

The relationship of the issue of mineral discovery to that of the mineral or nonmineral character of land was recently discussed in *State of California v. E. O. Rodeffer*, 75 I.D. 176 (1968). In that case we pointed out that the test of discovery and that for determining the mineral character of land are very similar but are not identical, and, while the issue of that case was substantially different from that involved here, the discussion of the relationship of the tests in that case is pertinent now.

As we noted there, the accepted standard for proof of a discovery is whether minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. The most obvious difference between the two tests, we pointed out, lies in the fact that a discovery can be demonstrated only by the physical exposure, within the limits of a claim, of the mineral deposit on account of which the land is alleged to be valuable, whereas the mineral character of land may be determined from geologic inference or from other less conclusive evidence than is required to demonstrate a discovery. Beyond this difference in the degree of proof required to show the presence of a mineral deposit, there is little, if any, substantive difference in the two tests. That which is to be determined in either case is whether or not exploitation of the minerals is believed to be economically feasible. A review of early cases reveals that in many instances an identical test was employed whether the issue was discovery or mineral character. See, e.g., *John Downs*, 7 L.D. 71 (1888); *Walker v. Southern Pacific R.R. Co.*, 24 L.D. 172 (1897); *Cataract Gold Mining Co. et al.*, 43 L.D. 248 (1914), and cases cited.

Where the mineral character of land is in issue, however, it may not be sufficient merely to show that the land is mineral in character at the

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present time. As we have already indicated, if the land has been withdrawn or otherwise closed to mining location, it must be shown that the facts establishing its mineral character were known to exist prior to the effective date of the withdrawal of the land from the operation of the mining laws. Of course, failure to establish the mineral character of land embraced in a placer claim at the time of the filing of patent application would in any event preclude the issuance of patent. However, a showing that the land is presently mineral in character would be insufficient to except the land from the effect of the withdrawal if it could not be established that the land was known to be mineral in character at the date of the withdrawal. *Cf. Southern Pacific Company, supna*, at 228-229. In other words, so far as this case is concerned, appellant must show that she would have prevailed in an inquiry into the mineral character of the land had it been made in 1945.

As we have observed, both parties have appeared to recognize that the validity of appellant's claim is contingent upon a showing that everything required to vest title in the mining claimant was accomplished prior to December 21, 1945 (See Tr. 52-53). Moreover, the Government expressly charged in its appeal to the Director that the hearing examiner erred in not holding that the requirements of the mining laws of the United States must be satisfied in total prior to the withdrawal of the land from mining entry in order to vest a mining claimant with any rights against the United States. However, despite the manifestations of recognition of the importance of the date of the withdrawal, neither party directed its proofs toward showing whether the contested portions of the claim were known to be mineral in character as of that date.

Quite to the contrary. Contestant's efforts at the hearing were directed to showing that *at that time* the uncontested portion of lot 6 contained such a large tonnage of marketable lump pumice as to make the lump pumice on the contested portions of the claim valueless. Appellant, on the other hand, attempted to deprecate the amount of pumice on the uncontested portion of lot 6 so as to establish the marketability of the pumice on the contested portions of the claim. Neither party attempted to establish the existence or non-existence of lump pumice in each 10-acre subdivision of the claim *as of December 21, 1945*, in such quantity as would render its extraction profitable and justify expenditures to that end.

Milvoy M. Suchy, a mining engineer employed by the Forest Service, did give estimates of substantial quantities of lump pumice on lots 3, 4, 5, and the west half of lot 6 (Tr. 79-83). He had doubts as to the amount in lot 7 (Tr. 82-83). His estimates, however, were based upon conditions observed at the times of his examination of the claims,

practically all of which conditions were nonexistent in 1945. Suchy examined the claim on October 15 and 16, 1961, August 10, 13 and 14, 1962, August 14, 1963, and June 9, 1964 (Tr. 17). He stated that he found lump pumice in all of the ten-acre subdivisions within the claim, although he found the least on lot 7 and was not sure whether or not lot 7 could be developed commercially (Tr. 33-34). He further stated that at almost any point on the east half of lot 6 he could dig down and get lump pumice (Tr. 36). By the use of seismic methods of the west half of lot 6 he determined that uniform material continues from the surface of the claim downward to a depth of at least 40 feet (Tr. 36-38). Suchy estimated that there are 50,000 to 60,000 tons of workable pumice in an area of approximately 17 acres and a depth of 15 feet in the east half of lot 6, which excludes the area of a little more than an acre covered by two pits from which pumice has already been mined. His estimate was based upon a presumption that one third of the material to that depth could be salvaged.²

Suchy's opinion with respect to the mineral content of the land in the mining claim is pertinent to the inquiry into the conditions engendering belief in 1945 that the land was valuable for its mineral content only to the extent to which his opinion was based upon facts discernible in 1945. In part, his opinion was based upon his observation of lump pumice exposed on the surface of every ten-acre subdivision of the claim, an observation which in 1945 would have revealed the quality of the pumice present. But what of the quantity? His estimate of the quantity of usable pumice (limited to the east half of lot 6) was derived from a combination of (1) his observation of the surface (2) his examination of two pits which had been worked to a depth of approximately 15 feet (3) the statement of an operator of the mine that approximately one-third of the material removed after 1945 was usable pumice, and (4) the results of seismic testing which indicated the continuity of uniform material down to a depth of at least 40 feet.

On December 21, 1945, so far as the evidence of record shows, only 30 tons of pumice had been removed and sold from the claim. See Ex. 2. How much material was removed in order to get those 30 tons of pumice, how deep an excavation was made or whether the pumice was taken from the surface of the claim rather than from a pit are all questions left unanswered by the evidence of record. Most significantly, the evidence leaves wholly unanswered the question as to whether or not an estimate of the quantity of usable pumice on the claim could have been made upon the basis of evidence discernible in 1945. Suchy's testimony suggests such an estimate could not have been made. Thus, he said that there was doubt as to how much lump pumice there was on some of the

² An assumed workable depth of 15 feet was used, Suchy said, because that was the approximate depth of present workings, but he believed the deposit to continue to a depth of at least 40 feet (Tr. 39-40).

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10-acre subdivisions (Tr. 34); that, although “[y]ou can pick up an awful lot of pumice” on lot 4, he did not know how much tonnage to assign to the lot because he didn’t “have much exposed” (Tr. 80); that on lot 3 he didn’t “have any depths there exposed to say how much there is there” (Tr. 81).

Appellant did nothing to supply the want of evidence of a basis for any inference in 1945 of the quantity of usable pumice on the claim. Rather, the testimony of witnesses for the appellant was directed largely toward discrediting the Government’s estimate of quantity. Testimony of witnesses for the appellant on the question of the quantity of pumice present on the claim was to the effect that an accurate estimate cannot be made even upon the basis of presently available data. Thus, Leslie C. Richards, a consulting mining engineer who examined the claim between August 27 and 29, 1963, testified that he noted solid outcrops of obsidian in lots 3 and 4 and that there was an area of five or six acres south of lot 6 of solid rhyolite in place with no pumice on it (Tr. 144), that although lump pumice of similar physical characteristics to that now being selectively mined on lot 6 is found on every other lot that makes up the claim and that the ground in each lot is of mineral character, it is unrealistic to attempt to estimate the amount of marketable lump grade pumice minable from the claim (Tr. 149). To arrive at any estimate of the tonnage of suitable lump pumice, he stated, would require an extensive grid of test pitting (Tr. 150, 151-153). He said that on the basis of the present work on the claim he “could not and would not” make any “estimate of the tonnage of commercial lump pumice” in the contested portions of the claim (Tr. 158). Finally, when on cross-examination he was asked whether he felt

* * * that you could advise a person on each one of these lots as to whether or not they could operate the individual lot in such a way as to make money? Is there sufficient pumice available to open a pit in each one of these lots, or do you feel you still haven’t enough information to make that —,

He replied:

I would say you haven’t got enough information. You have the indications that there is lump pumice there, certainly, but as to the quantity of it, you would have to do some additional work. (Tr. 165.)

Elton M. Hattan, a consulting mining engineer who examined the claim on August 27 and 28, 1963, and on June 9, 1964 (Tr. 203), testified on behalf of the appellant that the percentage of lump pumice varied at different points along the face that was being mined and that an average of about 35 percent of the material removed was suitable lump pumice (Tr. 207-208). From his examination of the claim he concluded that pumice of the same value and quality as that occurring on lot 6 was found on all of the lots, with the possible exception of lot 3 which he did not examine (Tr. 223). On cross-examination, he esti-

mated that one portion of the east half of lot 6, consisting of approximately one acre lying between pit No. 2 and the "Toe of steep slope" contained reserves of approximately 5,700 tons of usable pumice (Tr. 229-231), but he declined to make any general estimate of the quantity of pumice found on the claim or the volume of material that has been mined or to say whether there is a reserve which would meet future demands over any particular number of years (Tr. 221-222, 225, 226).

Apart from its failure to show what conditions *known in 1945* would have engendered a belief *at that time* that the land in question contained pumice in such quantity as to render its extraction profitable and justify expenditures to that end, we are unable to see wherein appellant's evidence demonstrates the mineral character of the land even at this date. Appellant's argument that the land is mineral in character appears to be based upon the propositions (1) that lump pumice has been successfully mined and marketed from the claim for a period of years and (2) that lump pumice of similar physical characteristics to that now being mined is found on every other part of the claim. These two propositions, standing alone, could be interpreted as an opinion that all of the subdivisions of the claim contain lump pumice of similar quality *and in similar quantity* to that of the mined area. This, however, would be inconsistent with appellant's subsequent argument that the quantity of lump pumice on the contested portions of the claim cannot be estimated upon the basis of present data. The only alternative interpretation of those propositions is that the presence of any usable pumice on the contested area, regardless of its quality is sufficient to establish the mineral character of the land. Such a view, of course, represents a radical departure from the standard to which we have already referred as the proper test of mineral character.

Were we to decide this matter solely upon the basis of appellant's evidence, we would have to conclude that appellant has failed altogether to demonstrate that the contested land was known to be mineral in character on December 21, 1945, and that there is no validity to her claim to that land. However, for reasons which we shall now point out, we do not find that the present record affords a proper basis for that determination.

While appellant introduced no evidence bearing upon what we deem to be the critical issue of this contest, neither the testimony of Government witnesses nor the charges of the complaint were calculated to elicit such evidence. The complaint itself charged simply that the contested land "is nonmineral in character" without any reference to a point in time as of which the mineral or nonmineral character of the land was to be determined. This is not necessarily a defect in the complaint. If the contested land is not mineral in character, appellant's claim to it has no validity, and it makes no difference whether it was determined to be nonmineral in 1945 or at the present time. On the

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other hand, if the land should be determined to be mineral in character at the present time, appellant must still show that its mineral character was known in 1945 in order to establish the validity of her claim, in which event the stated charge would not reach the crucial issue. The wording of the complaint may reflect no more than an election on the part of the Forest Service to attempt to show the invalidity of the claim by demonstrating the nonmineral character of the land now rather than through inquiry into the knowledge that may have prevailed in 1945. However, in view of the allegation in the contestant's appeal to the Director that the contestee's inability to demonstrate that each legal subdivision of the claim was valuable for mineral prior to passage of the act of December 21, 1945, constituted failure to show compliance with the requirements of the mining laws, we cannot assume that such an election was intended. In short, we think that the charges of the complaint did not define the issues involved with sufficient clarity to facilitate full development of the available evidence bearing upon those issues and that there is reason to doubt whether they reflected accurately the facts which the Forest Service proposed to establish.

Additional reason to question the objective of the complaint is found in the treatment of the issue of discovery. As previously noted, the charge of lack of discovery was dismissed by the hearing examiner as being inconsistent with the admission of a discovery on lot 6. On appeal to the Director, the Forest Service suggested that the failure to contest the entire claim may have been questionable, and the Office of Appeals and Hearings, finding that it was questionable, remanded the case for a hearing on the issue of discovery on the uncontested portion of the claim. In its answering belief, submitted in connection with the present appeal to the Secretary, the Forest Service defends the propriety of the Director's action in remanding the case for further hearing, asserting that it appears that the Director is amending the complaint to conform to the proof and that the amended proceeding should be remanded to take additional evidence so that the Director will be placed in a position to make a proper decision in regard to the merits of the case. We are unable to tell, however, whether the Forest Service is now affirmatively charging that there was not a discovery on the east half of lot 6 prior to December 21, 1945, or whether it is merely arguing that the Director had authority to make that charge himself. We do not read the Bureau's decision as making the charge but, rather, as affording the Forest Service an opportunity to substantiate a charge already made.

However this may be, after careful examination of the hearing record and of the arguments of both parties in their appeal briefs, we believe that the present record is not a satisfactory basis for determin-

ing the validity of appellant's claim and that its deficiencies can best be remedied by permitting the parties to the contest to proceed anew. The appropriate procedure would appear to be to return the case to the Bureau of Land Management to notify the Forest Service that it will be allowed 60 days to recommend the amendment of its complaint or the filing of a new complaint with charges appropriate in the light of this decision; then the usual proceedings may ensue. In the event that no action is taken by the Forest Service within the time allowed, the Bureau of Land Management will act upon appellant's patent application in such a manner as it deems appropriate.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decisions of the hearing examiner and of the Office of Appeals and Hearings are set aside, and the case is remanded for further proceedings as directed by this decision.

ERNEST F. HOM,

Assistant Solicitor.

APPEAL OF McGRAW EDISON COMPANY

IBCA-699-2-68

Decided October 28, 1968

Contracts: Disputes and Remedies: Jurisdiction—Contracts: Performance or Default: Impossibility of Performance—Rules of Practice: Appeals: Dismissal

In a case where a contractor's claim for constructive change based upon practical impossibility had not been presented to the contracting officer prior to the filing of the notice of appeal, the Board denies a Government motion to dismiss such claim on the ground that in the circumstances presented a stay of proceedings pending the issuance of a finding and the taking of a timely appeal therefrom would facilitate the orderly presentation and consideration of the claims involved in the appeal. The Board also denies a Government motion to dismiss portions of the appeal on the ground of lack of specificity in the notice of appeal where it finds sufficient information in the record to apprise the Government of the essential allegations of the appellant's case and thereby permit the Government to adequately prepare its case for hearing.

Contracts: Disputes and Remedies: Jurisdiction—Contracts: Performance or Default: Excusable Delays—Rules of Practice: Appeals: Dismissal

Where there are fact questions common to the contractor's claims of excusable delay and practical impossibility on the one hand and the Government's claim of common law damages for late delivery on the other, the Board concludes that it will retain jurisdiction over the latter claim pending the development of a complete administrative record without prejudice, however, to the Government's right to file a motion to dismiss the claim for common law damages at the time its post-hearing brief is submitted.

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BOARD OF CONTRACT APPEALS

The Government has moved for dismissal of portions of the instant appeal on the grounds that the notice of appeal (i) lacks specificity,¹ and (ii) raises an issue as to practical impossibility, although that question had not previously been presented to nor ruled upon by the contracting officer.² In the Statement of Position which accompanied the Motion to Dismiss, the Government asserts that its claim for actual damages allegedly sustained when the appellant failed to make timely delivery of the autotransformers called for by the contract is not within the Disputes clause and is therefore not presently before the Board.³ No authority has been cited in support of the Government's position that the Board lacks jurisdiction over its claim for common law damages and presumably over the propriety of the withholding action related to such claim.

At the Board's request the appellant has filed a response to the Government's motions in which it states: " * * * appellant contends that the facts do not support the Government's claims, that it is justly entitled to the amounts specified in the contract 'Payment' provisions and that it is entitled to a hearing to present evidence in support of its contentions."⁴ In support of its position that the Board has jurisdiction to review the assessment of actual damages by the Government for late delivery, the appellant (i) invokes the provisions of the Disputes clause,⁵ (ii) calls attention to the contractual obligations assumed under the delivery provisions,⁶ and (iii) cites cases to show that the contracting officer's action is subject to review by the Board even if the Government's claim is for common law damages and even if it were to be assumed that the delay involved was not excusable.⁷

¹ The motion requests "an order dismissing so much of the subject appeal as purports to be * * * an appeal from each and every aspect of the Contracting Officer's final decision," on the grounds and for the reason that such a purported appeal lacks sufficient specificity and reasons to permit a response to be made."

² Department Counsel has also moved "for an order dismissing that part of the subject appeal which purports to be based on a 'constructive change for practical impossibility' on the grounds and for the reason that the Board of Contract Appeals lacks appellate jurisdiction because this issue was raised for the first time on appeal."

³ Statement of Government's Position, pp. 4, 6 and 9.

⁴ Memorandum In Opposition to the Government's Motion to Dismiss, p. 5.

⁵ "The 'Disputes' article grants appellant the right to a hearing to dispute the Government's factual contentions regarding any damages caused by appellant's alleged late delivery of the transformer units and the Government's right to refuse to make payment in accordance with the contract payment provisions." (Memorandum, note 4, *supra*, p. 9).

⁶ " * * * the Government's damage assessment is based upon appellant's alleged failure to fulfill the specific delivery obligations imposed upon appellant by the contract. * * * "(Memorandum, note 4, *supra*, p. 12).

⁷ * * * Even assuming, for the sake of argument, that appellant is not entitled to any extensions of the contract performance period, the Government bears the burden of establishing its entitlement to the amounts which the contract payments provisions state should be paid to appellant. * * * "(Memorandum, note 4, *supra*, pp. 2, 3).

Lack of Specificity in the Notice of Appeal

The notice of appeal⁸ clearly puts in issue the question of excusable delay as well as raising a question as to the appellant's right to a constructive change on the ground of practical impossibility. Subsequent to the filing of the Government's motion to dismiss, the appellant submitted a pre-hearing brief.⁹ This amplified to a considerable extent the allegations made in the notice of appeal and raised a further issue as to Government waiver of the contract delivery schedule.¹⁰ The information now available is considered to be sufficient to apprise the Government of the essential allegations of the appellant's case. With the additional information to which we have referred, the Government should be in a position to adequately prepare its own case for hearing, in so far as the general objection that it had raised is concerned. Accordingly, the Government's motion to dismiss the appeal for lack of specificity is denied.

Practical Impossibility

In contesting the Government's position that no issue as to practical impossibility is presently pending before the Board, the appellant asserts (i) that the motion to dismiss appears to be an attempt by the Government to prolong the adjudication and final disposition of the claim (citing *Norair Engineering Corporation*, GSBCA No. 2532, 68-1 BCA par. 6968), and (ii) that appeal boards do not require parties to perform vain and futile acts (citing *Imperial Van & Storage*, ASBCA No. 11462, 67-2 BCA par. 6621). Neither of the cited cases is apposite.

The question presented in *Norair* was whether an appeal should be entertained where the contracting officer had failed to notify the contractor that the decision was final but subject to appeal in accordance with the requirements of applicable regulations. In denying the Government's motion to dismiss in these circumstances, the General Services Board emphasized (i) that the contracting officer had delayed approximately seven months in issuing the decision despite repeated requests by the contractor for a final decision, and (ii) that the decision from which a timely appeal was taken had clearly denied the contractor's claim for additional compensation. The principal point at issue in *Imperial* was whether the issuance of a notice of termination for default was a prerequisite to sustaining an excess cost assessment where, as the Board found, the appellant had committed an anticipa-

⁸ Notice of Appeal of January 31, 1968 (Item 90, Appeal File).

⁹ The Department Counsel reserved the right to file a supplemental statement following receipt of appellant's brief (Statement of Government's Position, p. 11). No such statement, however, has been filed.

¹⁰ " * * * Bonneville waived the due dates originally specified in the contract, and appellant delivered the transformer units in accordance with the terms of the new delivery dates established pursuant to Bonneville's December 2, 1966 insistence upon a reasonable, enforceable delivery schedule." (Pre-Hearing Brief, p. 16).

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tory breach of its contract with the Government. In sustaining the assessment despite the absence of a termination notice, the Armed Services Board cited authority for the proposition that the law forces no one to do a vain and futile act.

Appellant's counsel seems to imply that because the contracting officer passed upon the question of impossibility of performance, he must also have considered the question of practical production impossibility. The language employed in the decision¹¹ is construed as negating any such inference. Assuming that the contracting officer in fact gave no consideration to the question of practical impossibility in reaching his decision, appellant's counsel apparently feels that he should have done so, for he asserts: "When the contracting officer rendered his January 9, 1968 final decision, he had available to him all the facts alleged in appellant's prehearing brief. * * *" ¹² It is clear from the record that the contracting officer was well aware that the contractor was encountering serious technical problems with respect to meeting the specification requirements for a corona-free transformer. It is not at all clear, however, why the contracting officer should have been expected to place a complexion upon the events which, in so far as the record discloses, had never been urged upon him by the contractor at any time prior to the taking of the instant appeal. It is noted that other claims the contractor had were asserted during the course of contract performance.¹³

As Department Counsel has shown by the numerous authorities cited, we have consistently adhered to the view that our jurisdiction is of an appellate nature.¹⁴ It appears, however, that a stay in the proceedings rather than the requested dismissal (note 2, *supra*) is the proper course where, as here, such action would facilitate the orderly presentation and consideration of the claims involved.¹⁵ Accordingly, the contracting officer is directed to issue a supplemental finding covering the question of whether on the basis of the facts of record (including such additional information as may be submitted), the appellant has established its right to a constructive change based upon practical impossibility. In the event that this question is answered in the affirmative, the finding shall also include a determination of the amount of the equitable adjustment in the delivery schedule and in the contract price, if any, to which the appellant is entitled. Proceeding

¹¹ " * * * this is not a situation of impossibility as you subsequently delivered acceptable equipment. * * *" (Item 89, Appeal File).

¹² Memorandum, note 4, *supra*, p. 16.

¹³ The contractor did present two claims for extension of the delivery schedule specified in the contract (see Items 71 and 84, Appeal File).

¹⁴ Other decisions by the Board on this question include *Crowder Construction Co.*, IBCA-570-5-66 (December 8, 1967), 67-2 BCA par. 6726 and authorities cited in footnote 16; and *E. R. McKee Construction Co.*, IBCA-502-6-65 (December 28, 1965), 65-2 BCA par. 5296.

¹⁵ Paul A. Teegarden, IBCA-419-1-64 (April 17, 1964), 1964 BCA par. 4189.

in this manner will permit all issues involved in the appeal to be presented at the same hearing.

Government Claim for Common Law Damages—\$908,262

In the decision of January 9, 1968, the contracting officer found (i) that the delay of over 22 months in the delivery of transformers called for by the contract was not excusable; (ii) that as a result of such delay the Government sustained revenue losses totaling \$899,414; and (iii) that in an effort to mitigate damages attributable to such delay the Government expended the sum of \$8,848. So computed, the Government's claim is in the aggregate amount of \$908,262 of which \$449,098¹⁶ has been withheld from moneys otherwise due to the appellant under the terms of the contract.

Subsequently, by letter written to the Comptroller General dated April 11, 1968, the authorized certifying officer at the Bonneville Power Administration forwarded a voucher in the amount of \$449,098 in favor of the appellant. After noting that the voucher represented the claim of the company for the balance of the purchase price for auto-transformers delivered to the Government in April of 1967 and after outlining the basis of the Government's claim for damages allegedly occasioned by the late delivery, the certifying officer requested the Comptroller General to advise whether a voucher in any amount could be properly certified until such time as the amount recoverable from the contractor was finally determined,¹⁷ and, if so, what amounts, if any, should be withheld.

In Decision No. B-164070 dated June 7, 1968, the Comptroller General stated in reference to the adverse finding by the contracting officer on the contractor's claim of excusable delay: "While that decision has been appealed by the contractor, we find no compelling reason in the record for the taking of administrative action not in consonance with the contracting officer's decision until such time as that decision is actually overruled or modified by the Department of the Interior Board of Contract Appeals or a court of competent jurisdiction." Pending a final decision on the instant appeal, the certifying officer was instructed to continue to withhold from the balance due under the contract such amount as was necessary to cover the Government's reasonable estimate of damages resulting from the delay. In addition, the Comptroller General (i) commented upon the foreseeability of the

¹⁶ The figure used corresponds to the amount reported in Dec. Comp. Gen. B-164070 (June 7, 1968), as involved in the withholding action. (The lesser figure of \$446,398 shown in the contracting officer's decision of January 9, 1968 apparently reflects the total amount withheld against contractor billings as of that date.)

¹⁷ According to the Comptroller General's decision (note 16, *supra*), the letter from the certifying officer had noted that none of the Government's claims is liquidated in the sense that it is for an amount certain, agreed to by the contractor or supported by final administrative decision or legal judgment.

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damages claimed for by the Government in this case,¹⁸ (ii) characterized the Government's claim as a claim for loss of profits,¹⁹ and (iii) noted that from the information available to him he was unable to determine with certainty whether the sum claimed by the Government as damages was the proper amount under the guidelines set forth in the decision.²⁰

Department Counsel make the following arguments in support of their position that the Government's claim for damages attributable to delayed deliveries is beyond the reach of the Board's jurisdiction: (i) the question of actual damages is not within the disputes clause of the contract;²¹ (ii) the Government's claim is not cognizable under any provision contained in the contract but arises by operation of law;²² and the contracting officer did not purport to assess damages against the contractor.²³

Central to the appellant's case are the following contentions: *** * * the Government's delay damages claim is precisely the type of Government damages claim which this Board, as well as the other major contract appeals boards, has consistently recognized as within their jurisdiction. * * * Appellant is entitled to a hearing on the factual issues involved in the dispute and to a review by this Board of the contracting officer's assessment of damages, even if the Government's characterization of its claim as one solely for common law damages were upheld."²⁴

Appellant's counsel calls attention to various cases in which the Armed Services Board of Contract Appeals has retained jurisdiction where Government claims for damages have been involved, even where it has acknowledged that the claims were not cognizable under any provision contained in the contract.²⁵ In so concluding the Armed

¹⁸ *** * * we believe that the Government's actual loss which would result from delay in delivery of the transformers is the kind of damage which was reasonably foreseeable and should be considered to have been contemplated by the parties." (Comptroller General Decision, note 16, *supra*).

¹⁹ *** * * the rule appears to be that the measure of damages for delay in furnishing machinery or equipment, in the absence of a rental value for the use of similar equipment if available, is the loss of profits during the period of delay. * * * " (Comptroller General Decision, note 16, *supra*).

²⁰ *** * * Since it is stated in your letter that (the Bonneville Power Administration). * * * suffered a loss in industrial sales in the amount of \$899,414, we are unable to judge whether that figure represents lost profits within the meaning of the rule set out above * * *." (Comptroller General Decision, note 16, *supra*).

²¹ Statement of Government's Position, p. 4.

²² Statement of Government's Position, p. 6.

²³ *** * * The contracting officer did not assess damages against the contractor nor did he make a finding that the contractor was obligated to pay such damages. The contracting officer did find that the Government had suffered damages and that such damages were a 'direct result of [Pennsylvania's] failure to timely deliver.' In any event the issue of damages itself * * * is not directly at issue in this appeal. The question of collection of these common law damages has been referred to the proper disbursing officer for appropriate action." (Statement of Government's Position, p. 9).

²⁴ Memorandum, note 4, *supra*, pp. 2, 15.

²⁵ Parkside Clothes, Inc., ASBCA No. 4148, 60-2 BCA pars. 2707 and 2760 at 14,140 ("* * * The contract contained no liquidated damages clause, nor any provision pro-

Services Board has had occasion to distinguish²⁶ the many cases in which a contractor's claim for breach had been dismissed because there was no contract provision under which the claim asserted was cognizable. The fact that some of the cases involving Government claims for damages against contractors were decided on the merits²⁷ precludes the view that the Board was merely assuming jurisdiction for the purpose of making findings not binding upon the parties under a special provision of its charter.²⁸ Despite the broad sweep of the language used in some of the cases, however, it appears that the boards make a serious effort to find a claim for damages by the Government to be cognizable under a contract provision whenever it is possible to use such a ground as the basis for assumption of jurisdiction.²⁹ Still other cases emphasize that resolution of the dispute in favor of the contractor under the terms of a particular contract may mean that the question of the Government's claim for damages will never be reached.³⁰

viding for an equitable adjustment in contract price in the event of late delivery. If the Government is entitled to the \$13,810.52 here claimed it is not by virtue of any provision of the contract, but by virtue of the general rule of law that an aggrieved contracting party is entitled to such damages as it can show were caused by a breach of the contract by the other. * * *"). *Accord: Houston-Fearless Corp.*, ASBCA No. 9160, 1964 BCA par. 4159; *Urban Construction Corp.*, ASBCA No. 10059, 65-1 BCA par. 4866 (Board sustains Government's claim for additional inspection costs attributable to delayed performance, even though the housing contract involved contained no provision requiring the payment of added inspection costs); and *Burroughs Corp.*, ASBCA No. 10065, 65-2 BCA par. 5086, at 23,973 ("* * * the Board will review for correctness a contracting officer's assessment of damages against a contractor"). Cf. *Frugal Company*, GSBCA No. 2219, 67-2 BCA par. 6581.

²⁶ See *Pace Corporation*, ASBCA No. 5954, 60-2 BCA par. 2698, at 13,607 ("* * * the cases cited by the Government in which we have held that this Board has no jurisdiction over claims for damages resulting from breach of contract involve situations in which a contractor is claiming damages for alleged breaches of contract by the Government. This is not such a case. All this appellant seeks is a review of the contracting officer's assessment of damages, alleging errors of fact and of law."). *Accord: Houston-Fearless Corp.*, note 25, *supra*; *The B. F. Goodrich Co.*, ASBCA No. 9982, 65-1 BCA par. 4522.

²⁷ *Parkside Clothes*, note 25, *supra* (Government claim denied as no showing that actual damages were sustained); *Houston-Fearless*, note 25, *supra* (portion of appeal sustained with balance remanded to contracting officer for determination of proper amount to be deducted, if any, from the contract price); and *Urban Construction*, note 25, *supra*.

²⁸ See *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 408-412 (1966), for a discussion of the manner in which the special charter provision has been utilized by the Armed Services Board.

²⁹ *L. R. Sommer*, ASBCA No. 5065, 55-2 BCA par. 2043, at 8561 ("We find that the determination, assessment and withholding by the contracting officer were made not outside the contract but on the basis of contractual authority and that the appeal presents a dispute concerning questions of fact arising under the contract within the contemplation of the 'Disputes' clause"). Other cases where the boards have relied upon contract provisions in passing upon Government claims for damages include *Pace Corporation*, note 26, *supra*; *B. F. Goodrich Co.*, note 26, *supra*; *Frugal Company*, note 25, *supra*; and *Markowitz Brothers, Inc.*, FAACAP No. 67-34, 68-1 BCA par. 6765.

³⁰ E.g., *Monsanto Chemical Co.*, ASBCA No. 6173, 61-1 BCA par. 3039, at 15,745 ("* * * It is conceivable that appellant may prevail in its appeal, in which event the problem of unliquidated damages arising from the breach will not be reached."); *Pace Corporation*, note 26, *supra*, at 13,606 ("* * * if after the termination of a contract for 'default,' it is determined that the failure to perform was 'excusable,' there is no legal liability for excess costs, or for 'common law damages' as a result of the failure to perform underlying the termination. * * *").

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Neither the cases cited by the appellant³¹ nor our own research has disclosed any instance where this Board has had occasion to pass upon a Government claim for damages in the absence of a specific contract provision or provisions under which it was considered to be cognizable. It is true that the contract clauses relied upon for the assertion of our jurisdiction did not expressly name the contracting officer as the one who would determine in the first instance whether the contractor was liable to the Government for the claims asserted thereunder; nor did they otherwise indicate by their terms that the disputes process would be invoked for the settlement of such claims. From an early date in the Board's history, however, we have considered that a provision for contractor liability to the Government in specified circumstances was sufficient warrant for us to assume jurisdiction.³² The assumption of jurisdiction in such cases would appear to be simply a concomitant of the fact that the clauses providing for liability to the Government in specified circumstances have been included in a contract expressly providing for the resolution of disputed questions of fact in accordance with the procedures prescribed in the Disputes clause.³³

The fact that the contract imposed specific delivery obligations upon the contractor and the fact that the Payments clause imposed certain obligations upon the Government are not regarded as equitable with the cases in which we have assumed jurisdiction. This is because none of the provisions relied upon cover or even purport to cover the consequences of the parties failing to discharge their respective obligations.³⁴ Contrary to what appears to be the appellant's position,³⁵ this seriously undermines any attempted analogy between monetary claims for delay asserted by the Government under the standard construction

³¹ *Farber & Pickett Contractors, Inc.*, IBCA-591-9-66 (March 15, 1967), 74 I.D. 70, 73, 67-1 BCA par. 6190, at 28,678 ("* * * Here the provisions of the contract clearly spell out the appellant's liability for damage to the Government's property. * * *"); *General Electric Co.*, IBCA-442-6-64 (July 16, 1965), 72 I.D. 278, 283, 65-2 BCA par. 4974, at 23,456 ("* * * We do not hesitate to conclude that the defect in the contract support bracket was 'latent' within the meaning of that word as used in the Inspection clause."); and *Paul C. Helmick Co.*, IBCA-39 (Supp.) (August 21, 1958), 65 I.D. 355, 356, 58-2 BCA par. 1887, at 7617-18 (contracting officer's determination that contractor liable for damages caused by forest fire "made pursuant to Paragraph 603A of the specifications * * * providing as follows: * * * The contractor shall pay * * * the suppression costs and damages resulting from any fires caused by his operations. * * *").

³² *Paul C. Helmick Co.*, IBCA-39 (July 31, 1956), 63 I.D. 209, 242-245, 56-2 BCA par. 1027, at 2221-24.

³³ *Paul C. Helmick Co.*, note 32, *supra*, 63 I.D. at 244, 56-2 BCA par. 1027, at 2223 ("* * * the Comptroller General took the position that the dispute was a subject for determination under Article 15, the disputes clause of the contract, and instructed the contracting officer to determine the question of fact whether the forest fire had been caused by the contractor's operations. * * *").

³⁴ The provisions of the Default clause are clearly inapplicable to the circumstances present here; i.e., the contractor completes the contract, although not within the time specified.

³⁵ Memorandum, note 4, *supra*, pp. 14, 15.

contract (Form 23A)³⁶ and those where, as here, the claim is made under a contract incorporating the standard supply contract form (Form 32). This distinction has been explicitly recognized by the Department of Transportation Contract Appeals Board in the recent case of *GMC Truck & Coach Division General Motors Corporation*,³⁷ involving a Government claim for damages for delayed performance under a supply contract.

The *GMC* case is also notable for the fact that despite the presence of specific contractual provisions establishing delivery obligations on the part of the contractor and payment obligations³⁸ on the part of the Government, the Transportation Board found that it had no authority under the contract to decide the dispute on the merits.³⁹ The Board concluded, however, that pending resolution of the dispute in a proper forum, the contracting officer had authority to withhold a reasonable amount as an offset against the Government's claim for damages and that incident to the general authority possessed by the Board as the representative of the Secretary of Transportation, it would examine into and pass upon the question of the reasonableness of the amounts so withheld from moneys otherwise due to the contractor.⁴⁰

As will be clear from the foregoing discussion, there are substantial differences among the major contract appeals boards with respect to the nature of their jurisdiction over Government claims for common law damages. This is true even in cases where the Government is withholding sums from moneys otherwise due the contractor as an offset against the amount of the Government's claim.

While our general authority as representative of the Secretary of the Interior may be a sufficient basis for determining in a particular case whether a withholding is warranted pending resolution of the dispute in a different forum, the need for such action appears to have been obviated in this case by submission of that question to the Compt-

³⁶ *Markowitz Brothers, Inc.*, note 29, *supra*; *B & B Constructors, Inc.*, IBCA-526-11-65 and IBCA-550-3-66 (March 30, 1967), 67-1 BCA par. 6239; *Vaca Construction, Inc.*, ASBCA No. 9666, 1964 BCA par. 4160; *J. W. Bateson Co., Inc.*, ASBCA No. 5300, 59-2 BCA par. 2281; *Samuel B. Harper, Jr. and Sigmund E. Florsheim*, ASBCA No. 4959, 59-1 BCA par. 2186.

³⁷ 68-2 BCA par. 7114, at 32,957 ("Moreover, it should be noted that this contract contained no provision for the assessment of either liquidated damages or actual damages in the event of a contractor's failure to complete in time. The absence of such a contractual remedy here stands in marked contrast to the provisions of the 'Termination for Default-Damages for Delay-Time Extensions' clause of the standard form construction contract (Standard Form 23(a), FPR 1-16.401, Article 5(a) * * *").

³⁸ *GMC Truck & Coach Division General Motors Corp.*, DOT CAB No. 67-16, 68-2 BCA par. 7114, at 32,958, footnote 10 ("* * * we do not consider the Payment clause to provide blanket authority to the Contracting Officer to adjudicate disputes not otherwise cognizable whenever a decision is tied to a withholding.").

³⁹ *GMC Truck & Coach Division*, note 38, *supra*, at 32,958 ("* * * It is well settled that the Contracting Officer's, and our authority to make final decisions under the Disputes clause is limited to controversies cognizable under some specific clause. * * *").

⁴⁰ *GMC Truck & Coach Division*, note 38, *supra*, at 32,958 ("Although this Board has no authority under the Disputes clause to adjudicate the matter, it will exercise its general authority as the Secretary's representative to take appropriate action if the withholding is clearly unwarranted or clearly excessive.").

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troller General.⁴¹ Since the Comptroller General's decision was made *ex parte*, however, we would not be precluded from deciding the Government's claim for damages on the basis of evidence introduced at the hearing,⁴² assuming, of course, that we were to find that such claim was within our jurisdiction.

There is an entirely different approach to the question presented, however, and one to which we think this case is particularly susceptible. Here the Government acknowledges, as did the Comptroller General, that the Board has jurisdiction over the contractor's claim of excusable delay; nor has the Government contested the fact that the Board has jurisdiction over the claim of constructive change based upon practical impossibility, so long as the contracting officer has been afforded an opportunity to pass upon the claim. Moreover, the Government admits that a determination favorable to the appellant on the excusable delay claim could directly affect the Government's claim for common law damages.⁴³ In short, there are questions of fact common to the several claims.

Even prior to the *Utah*⁴⁴ and *Grace*⁴⁵ decisions, this Board had determined that in a case where it unquestionably had jurisdiction over some claims and had doubts as to its jurisdiction over other claims, the mandate of *Bianchi*⁴⁶ required holding a hearing on the entire matter, irrespective of the manner in which the question of jurisdiction might ultimately be resolved.⁴⁷

The *Utah*⁴⁸ decision and the *Morrison-Knudsen*⁴⁹ decision cited

⁴¹ Notes 17-20, *supra*, and accompanying text.

⁴² *Richard J. Neutra and Robert E. Alexander*, IBCA-408 (October 16, 1964), 71 I.D. 375, 1964 BCA par. 4485; *Merritt-Chapman & Scott Corporation*, IBCA-240 (November 9, 1961); on reconsideration, 68 I.D. 363, 61-2 BCA par. 3194; considered by the Comptroller General in Dec. Comp. Gen. B-142040 (April 2, 1962). *Accord: Burroughs Corp.*, note 25, *supra*, at 23,971-972 ("* * * where the Comptroller General's authority is less precisely defined or not patently superior, this Board has not hesitated to act notwithstanding a position already taken by the General Accounting Office. * * *").

⁴³ Statement of Government's Position, p. 10 ("* * * if the Board's findings are that the delivery was 'timely' due to causes of delay excusable under the contract the basis for damages could disappear. * * *").

⁴⁴ Note 28, *supra*.

⁴⁵ *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966).

⁴⁶ *United States v. Bianchi*, 373 U.S. 709 (1963).

⁴⁷ *Peter Kiewit Sons' Co.*, IBCA-405 (March 18, 1964), 1964 BCA par. 4141, at 20,176 ("* * * since a hearing has been requested, the Bianchi decision requires, in cases such as the present one, the production of a full administrative record."). Cf. *American Cement Corporation*, IBCA-496-5-65 and IBCA-578-7-66 (September 21, 1966), 73 I.D. 266, 66-2 BCA par. 5849, on reconsideration, 74 I.D. 15, 66-2 BCA par. 6065.

⁴⁸ Note 28, *supra*, 384 U.S. 419 ("* * * It would disregard the parties' agreement to conclude * * * that because the court suit was one for breach of contract which the administrative agency had no authority to decide, the court need not accept administrative findings which were appropriately made and obviously relevant to another claim within the jurisdiction of the board.").

⁴⁹ *Morrison-Knudsen Company, Inc. v. United States*, 170 Ct. Cl. 757, 762 (1965) ("* * * in the *Bianchi* case, the Supreme Court has instructed us on at least one facet of the scope of trial, i.e., when an issue of fact has been administratively decided on a dispute arising under the contract and within the scope of the Disputes clause, a *de novo* trial may not be held on the facts thus determined. We believe that efficiency and economy dictate that a complete record be made before the administrative tribunal which, under the contract, is authorized to decide the particular dispute. * * *").

therein have underscored the crucial significance of findings by the Board on factual questions necessary to the decision reached. Findings of this nature affect not only claims over which the Board had jurisdiction but even claims clearly beyond the reach of its jurisdiction, in so far as the later claims involve common fact questions on which findings have properly been made.

For the reasons indicated, the Board concludes that the question of our jurisdiction over the Government's claim for common law damages can best be determined on the basis of a complete administrative record. It appears that such a record will greatly facilitate the presentation of the respective positions of the parties in their post-hearing briefs. If, following the hearing, we conclude that the Board has jurisdiction over the claim in question, we will be in a position to decide all phases of the case on the merits in reliance upon the record so made. On the other hand, if we conclude that we are without jurisdiction in the matter, the complete record will be available for use in any subsequent court proceedings which may ensue.

Summary

1. The Government's motion to dismiss a portion of the appeal on the general ground of lack of specificity is denied.
2. The appellant's claim for a constructive change based upon practical impossibility is remanded to the contracting officer for the issuance of a finding thereon within 45 days from the date hereof. Pending the issuance of such finding and the receipt of a timely appeal therefrom, further proceedings with respect to the instant appeal will be stayed.
3. All issues involving the Government's claim for common law damages because of delayed performance of the contract shall be presented to the Board when the oral hearing on the appeal is held, subject to any stipulation the parties may enter into respecting the question of quantum and without prejudice to the Government's right to file a motion for dismissal of the claim for common law damages at the time its post-hearing brief is submitted.

WILLIAM F. McGRAW, *Member.*

I CONCUR:

SHERMAN P. KIMBALL, *Member.*

Mr. Dean F. Ratzman, *Chairman*, disqualifed himself from consideration of this appeal, pursuant to 43 CFR 4.3.

ROBERT A. AND GEORGE C. JOHNSON**A-30951***Decided November 21, 1968***Mining Occupancy Act: Principal Place of Residence**

A cabin which is used intermittently or sporadically for brief periods while regular residence is concurrently maintained elsewhere does not constitute a principal place of residence within the meaning of section 2 of the act of October 23, 1962, and an application for the conveyance of land based upon such use is properly rejected.

Mining Occupancy Act: Qualified Applicant

In order to demonstrate his qualifications for relief, an applicant for the conveyance of land under the act of October 23, 1962, must show the existence of such facts as will warrant the conclusion that the improvements placed upon a mining claim constitute a principal place of residence for the applicant within the meaning of the act; broad statements that applicants have resided on a mining claim site for at least two months of each year, plus vacations and holidays, that the mining claim has been the applicants' "only place of residence" in a particular county, and that it has been used only as a "principal place of residence and mining claim" do not constitute statements of the facts sufficient for a determination that the applicants are qualified, especially where the application is filed jointly by two persons who maintain their respective separate residences in a different county from the one in which the mining claim is situated and whose individual residential use of the property is unexplained, where the only evidence of record indicates that use of the property has been casual or intermittent, and where the applicants own statements do not suggest otherwise.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Robert A. and George C. Johnson have appealed to the Secretary of the Interior from a decision dated January 30, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Sacramento, California, land office rejecting their application, Sacramento 967, filed pursuant to the Mining Claims Occupancy Act of October 23, 1962, as amended, 30 U.S.C. secs. 701-709 (1964), to purchase a portion of the Rifle Barrel placer mining claim described as the S $\frac{1}{2}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 1, T. 3 S., R. 15 E., M.D.M., Mariposa County, California.

The record shows that the Rifle Barrel mining claim was declared to be null and void on July 17, 1964, in a decision affirmed by the Department on October 25, 1966 (*United States v. George C. Johnson and Robert A. Johnson*, A-30606). It also shows that the appellants filed applications Sacramento 059501 and 059535, pursuant to the Small Tract Act of June 1, 1938, as amended, 43 U.S.C. secs. 682a-682e

(1964), for parts of the Rifle Barrel mining claim, including the tract now in question, which applications were rejected by the land office in a decision dated March 9, 1967.¹ On September 27, 1967, appellants filed their application for the conveyance of land under the Mining Claims Occupancy Act, alleging therein that they acquired the claim on April 7, 1951, that improvements (consisting of a house commenced prior to 1951 and finished in 1952 and two outhouses built prior to 1951) have been constructed upon the land and that there has been occupancy since 1951 and continuous mining. At the same time they filed a conditional relinquishment of the mining claim.²

By a decision dated November 7, 1967, the land office rejected appellants' application, stating that a field investigation had been made which showed that the applicants' use of the site had been limited to occasional weekends and vacation periods,³ and it concluded that such use did not qualify appellants as applicants for relief under the act.

In appealing to the Director, Bureau of Land Management, from the decision of the land office, appellants alleged in general terms that the premises applied for have been used as one of the principal residences of the applicants and have been so used since 1951, that appellants have resided on the claim for at least two months out of each year, plus vacations and holidays, and that appellant George C. Johnson is retired and spends larger portions of his time on the premises. Appellants did not elaborate on these allegations but requested a hearing to present their proofs.

The Office of Appeals and Hearings, after quoting the definitions of a "qualified applicant" and of "a principal place of residence," as

¹ An appeal from the rejection of appellants' small tract applications was dismissed by the Office of Appeals and Hearings on May 18, 1967, for failure to file a timely statement of reasons, and the dismissal was affirmed by the Department on July 25, 1967 (*Robert A. Johnson et al.*, A-30830).

² Inasmuch as the claim had previously been found invalid in appropriate Departmental proceedings, the filing of the relinquishment was without legal effect.

³ The report of field investigation, dated November 2, 1967, disclosed that both applicants have maintained residences in San Jose, California, at least since 1955, that both have voted in all elections and have maintained continuous registration in Santa Clara County at least since April 1958, that children of Robert A. Johnson, born in San Jose in 1943 and 1946, attended school continuously in San Jose and graduated from Del Mar High School in San Jose in 1961 and 1964, that the post office in San Jose reportedly has delivered mail to appellants' San Jose addresses since 1955 and has no record of orders for forwarding mail to the area of the claims, that local residents indicated that appellants occupied the mining claim site on periodic weekends and during vacation periods, and that an employee of the Pacific Gas and Electric Company, who has been reading appellants' meter at the claim for over 15 years, stated that the meter usually showed some consumption but the report stated that average monthly consumption of electricity was approximately 38 kilowatt hours, as compared with average monthly residential use in the area of approximately 340 kilowatt hours, which 38 kilowatt hours would be somewhat less than that required by a refrigerator alone.

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set forth in the statute and in the Department's regulations,⁴ found that, although they had had ample opportunity, appellants had provided no evidence to dispute field reports that they and members of their families had made only limited and periodic use of the claim site, their own statement that they "have resided on said premises for at least two (2) months out of each year, plus vacations and holidays," tending to confirm the conclusions of the report.

The objective of appellants' present appeal is not clear. Although this is an appeal to the Secretary from the Bureau's decision of January 30, 1968, affirming the rejection of appellants' mining claim occupancy application, the heading of the notice of appeal refers to the "Matter of the Application of Robert A. Johnson and D. Irene Johnson, under the Act of 1 June 1938," Sacramento 059501, and the "Matter of the Application of George C. Johnson and Nellie C. Johnson, under the Act of 1 June 1938," Sacramento 059535. From the argument which follows it is not entirely clear whether appellants are attempting to appeal jointly from the rejection of their mining claim occupancy application and from the earlier rejection of their small tract applications as well or whether they are contending that, because of the provisions of the Small Tract Act, they are entitled to relief under the Mining Claims Occupancy Act. Whatever may be the explanation for this unusual approach, the issues properly before us are not so broad as those which appellants seemingly seek to raise.

As previously noted, appellants' appeal to the Director from the rejection of their small tract applications was dismissed on procedural grounds. The Department's decision of July 25, 1967, affirming that dismissal represented the final administrative decision in the matter, from which there is no further appeal in the Department, although, as long as the Secretary of the Interior has jurisdiction over land he also retains supervisory authority over any case involving that land and may, where the circumstances warrant, reopen such case or reconsider any decision affecting the land. See *B.E. Burnaugh*, 67 I.D. 366 (1960).

⁴ Relief under the act is authorized only for qualified applicants, and the act defines a "qualified applicant" as

"* * * a residential occupant-owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962." 30 U.S.C. §§ 701, 702 (1964).

The Department's regulations define "a principal place of residence" as

"an improved site used by a qualified applicant as one of his principal places of residence except during periods when weather and topography may make it impracticable for use. The term does not mean a site given casual or intermittent residential use such as for a hunting cabin or for weekend occupancy." 43 CFR 2215.0-5(d).

Appellants do not, however, appear to seek reconsideration of the Department's decision of July 25, 1967, and they have not attempted to point out any error in that decision. Their apparent attempt to revive their defunct small tract applications is premised upon an entirely different concept, and they argue that:

On or about 1959, said Appellants, and each of them, applied for the respective parcels involved in this litigation under the said Small Tract Act. Said Act requires that their application be either rejected or affirmed within two years. It is respectfully submitted that no such action, required by the Government, has been forthcoming within the period allowed by said Act. The Appellants contend that the failure of the Government to take the current action within the time allowed by said Act, deprives the Government of its right to reject the Appellants' claim at this late date. * * *

The short answer to appellants' contention is that there is no such provision in the Small Tract Act as that upon which they rely.⁵ Moreover, the Government is not, "at this late date," rejecting appellants' small tract applications. The only question now before the Department is whether or not appellants are qualified applicants under the Mining Claims Occupancy Act. The provisions of the Small Tract Act and the fact that appellants previously filed applications under that act have no relevance in answering that question.

In challenging the Bureau's finding that appellants' mining claim cabin site has not been used as a principal place of residence, appellants assert that:

* * * The Rifle Barrel mining claim has been the *only place of residence of the Appellants* from the date the Rifle Barrel mining claim was instituted to the present time in the County of Mariposa, State of California. [Emphasis added.] It was certainly a principal place of residence in that regard. The opinion overlooks the fact that this mining claim has been actively worked for a number of years. This property was not limited to a site given casual or intermittent residential use, such as for hunting or weekend occupancy. Certainly it was used for those purposes, but for many others as well. The mining claim was not the only place of residence of the Appellants, because the Appellants had residences in Santa Clara County, California, but it was certainly a principal residence of Appellants at all times. The only use to which the land has ever been put during the past many years is that use given it by Appellants—that of principal residence and mining claim. * * *

⁵ Presumably, appellants refer to section 7 of the act of March 3, 1891 (26 Stat. 1095), as amended, 43 U.S.C. § 1165 (1964), which provides in part:

"* * * That after the lapse of two years from the date of the issuance of the * * * [receipt of such officer as the Secretary of the Interior may designate] upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

This provision, however, has no applicability to an application under the Small Tract Act.

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The fact that appellants have only one "place of residence" in Mariposa County does not establish that the claim is a principal place of residence within the meaning of the statute. Also, the mere fact that appellants may have "actively worked" the claim "for a number of years" does not establish that the claim is a principal place of residence. These statements fall far short of the showing of specific facts which would warrant the conclusion that the mining claim has been used by appellants as "a principal place of residence," a failure that is compounded by the fact that they have not related their concept of "a principal place of residence" to the meaning of that term as it is used in the act of October 23, 1962.

In the case of *Eveline and John Anthony Schaefer*, A-30901 (May 21, 1968), where applicants for relief under the Mining Claims Occupancy Act, in language similar to that employed by appellants here, stated that they "went into immediate occupancy of the premises" upon their acquisition of mining claim property and that they "have continuously occupied the residence as a principal residence" since that time, we found that such an allegation did not constitute a statement of the facts necessary for a determination of an applicant's qualifications. In pointing out what was required to be shown, we stated in that case:

What is "a principal place of residence"? As we recognized in * * *[*Ola N. McCulloch Sibley*, 73 I.D. 53 (1966)], the term has been given no precise meaning by judicial interpretation. The statute itself does not define it, and the definition can be found at this time only in the legislative history of the act, the regulations of this department, and the departmental decisions construing the statute. The essence of the Department's rulings in giving practical effect to this singular term has been that intermittent or sporadic use or occupancy for any purpose while concurrent residence is maintained at a regular place of residence or domicile, as distinguished from occupancy for at least a substantial part of each year to the exclusion of the maintenance of regular residence elsewhere during the same period, is not qualifying under the act. * * *

* * * * *

What facts must be known to determine the qualification of an applicant? At the minimum, it is necessary to know the approximate periods of time spent at the mining claim site during the qualifying period, the suitability of the improvements constructed on the claim for normal residential use, and climatic factors which might limit occupancy to certain seasons of the year. * * *

Appellants' statements fall far short of providing that minimum information. The only statement appellants have made concerning the nature or extent of their residence at the claim site is that they have resided there for "at least two (2) months out of each year, plus vacations and holidays."

What was the nature of the claimed residence? This is a joint application filed by the heads of two families who maintain their separate

regular residences in another county. Did both families, or did the two applicants, jointly occupy the mining claim property for a continuous period of two months during each year of the qualifying period,⁶ in addition to spending vacations and other brief periods there, or did just one of the applicants occupy the site for such periods while the other made occasional visits, or did each of the applicants, at different times, occupy the premises for a continuous two-month period, thus making a total of four months' use of the cabin per year, plus vacations and holidays, or did the two months' residence claimed each year represent a cumulation of the time spent by several different members of the two families at the claim throughout the year, consisting largely of weekends?⁷ Is the nature of the improvements constructed upon the claim site such as to accommodate normal, full-time residence throughout the year or during such portions of the year as access to the claim may be had, or is the cabin only suitable for occupancy during brief stays in mild weather?⁸ Are the short periods of occupancy claimed attributable to conditions of weather or topography which preclude residence for more than a few months each year, or must we look elsewhere for an explanation of the limited use of the cabin?

The failure of appellants to allege facts which would afford a basis for answering any of these questions is a failure to show that they are qualified applicants for the relief which they seek. Thus, while the report of field examination previously referred to is not a conclusive finding of fact and would not be relied upon in the face of a direct challenge without giving the challenging party an opportunity to establish the truthfulness of his assertions of fact, there is nothing in appellants' statements that specifically refutes any of the findings

⁶ Only the period from July 23, 1955, to October 23, 1962, will be considered in determining the qualifications of an applicant. If a mining claim site was not used as a principal place of residence during that period, an applicant cannot be aided by any use of the property prior to or subsequent to that time. See *H. T. Crandell*, 72 I.D. 431 (1965); *Coral V. Funderburg*, A-30514 (June 14, 1966), affirmed in *Funderberg v. Udall*, 396 F. 2d 638 (9th Cir. 1968); *Henry P. and Leoda M. Smith*, 74 I.D. 378 (1967).

⁷ In order to constitute "a principal place of residence" within the meaning of the act, a mining claim site must have been a principal place of residence for the applicant, and a site cannot qualify as a principal place of residence upon the cumulative use of a number of applicants, none of whom has used it as a principal place of residence. *Cora Pruett et al.*, A-30524 (April 28, 1966).

⁸ The file contains a copy of a letter dated December 5, 1966, from the Department of Housing and Community Development, State of California, to the district manager, Folsom District Office, Bureau of Land Management, in which reference is made to inspections of two dwellings described in a letter of November 3, 1966, from the district manager, with respect to which dwellings it was stated that:

"These inspections revealed both dwellings to be sub-standard to the extent they are not considered suitable for human habitation. All structural, electrical, plumbing and sanitary installations were found to be far below acceptable or minimum code standards."

Presumably, appellants' cabin is one of the dwellings referred to, although there is nothing more than the fact that the letter is contained in the case file to establish a relationship between the reported inspection and appellants' cabin.

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reported by the Bureau's field examiners, which findings constitute the only evidence in the record as to the nature of appellants' use of their cabin site. That evidence supports a finding that appellants' cabin was used only intermittently while regular residence was maintained elsewhere, and it affords no basis for concluding that the Rifle Barrel mining claim was, on October 23, 1962, or prior thereto, a principal place of residence for either of the appellants.

As a final word, it must be stressed again that the purpose of the 1962 act was to preserve *homes* for qualified occupants of mining claims, places where they have lived for years and from which their forced removal because of the invalidity of the claims would be a real hardship. As the court recently said in *Funderberg v. Udall*, *supra* fn. 6:

* * * The Hearings * * * show that the Act of October 23, 1962, was a statute to relieve the hardship which would be visited upon persons who were living on their unpatented claims, but would be evicted under the 1955 statute, *supra*, [30 U.S.C. §§ 601-615 (1964)], and would "have no place to go" if the relief proposed in the 1962 bill was not granted. (396 F.2d at 640.)

"Certainly appellants do not qualify on this score even if all their general allegations are accepted. The rejection of their application does not mean that they "have no place to go." They have their comfortable homes in San Jose where they have been living at least since 1955.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

UNITED STATES

v.

A. SPECKERT

A-30917

Decided November 29, 1968

Mining Claims: Surface Uses—Surface Resources Act: Generally

Since Congress limited the effect of a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine the rights of the Government and a mining claimant as to the surface resources of a mining claim, a claim is not declared null and void as a result of such a proceeding decided in favor of the Government, and the claimant may continue to engage in mining activities although he is not entitled to the use and management of the surface resources for other than mining purposes prior to issuance of patent for the claim.

Mining Claims: Surface Uses—Surface Resources Act: Generally

In a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine the rights of the Government and a mining claimant as to the surface resources of a mining claim prior to patent, the Government will prevail if it is shown that there was not a discovery of a valuable mineral deposit as of the date of the act even if such a discovery is subsequently made, and it will also prevail if a discovery existed as of the date of the act but it is determined that thereafter a valuable mineral deposit does not exist within the claims because of a change in conditions.

Surface Resources Act: Generally

A mining claimant is not prejudiced if in a proceeding under section 5 of the Surface Resources Act the only issue stated at the hearing is whether at the time of the hearing, rather than on July 23, 1955, a discovery has been made on his claim and he submits evidence on that issue.

Mining Claims: Discovery

In applying the prudent man test of discovery to determine whether there has been a discovery of a valuable mineral deposit within a mining claim, the marketability at a profit of low-grade deposits of manganese ore is a determinative factor.

Mining Claims: Discovery—Mining Claims: Surface Uses—Surface Resources Act: Generally

Mining claims containing an unknown quantity of low-grade manganese ore are properly declared subject to the limitations under section 4 of the Surface Resources Act of July 23, 1955, where the evidence shows that a prudent man could not now expect to develop a valuable mine because there is no market for the ore, regardless of whether under more favorable market conditions created primarily by a Government stockpiling program paying incentive prices prior to the date of that act the prudent man would have had more basis for anticipating that such ore could be mined and sold.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

A. Speckert has appealed to the Secretary of the Interior from a decision of the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated October 10, 1967, affirming a decision of a hearing examiner dated January 25, 1967, which declared the Sunset, Sunset Nos. 1-13, inclusive, and Alpha lode mining claims to be subject to the limitations and restrictions specified in section 4 of the Surface Resources Act of July 23, 1955, 30 U.S.C. sec. 612 (1964). The Office of Appeals and Hearings also denied Speckert's request for a further hearing on the grounds that there is no equitable basis for having a new hearing and that no error was found in the first proceeding.

Section 4 of the act of July 23, 1955, provides that any mining claim "hereafter located" shall not be used, prior to issuance of patent, for

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other than mining purposes and as to such claims reserves to the United States the right to manage and dispose of the surface resources. Section 5 of the act, 30 U.S.C. sec. 613 (1964), provides, as to claims located prior to the date of the act, a procedure whereby the right of the claimants to the use of the surface resources may be determined. All of the mining claims in this case were located prior to the act of July 23, 1955, and proceedings under section 5 of the act were instituted at the request of the Forest Service, United States Department of Agriculture, culminating in a hearing. As relevant to this appeal the notice of the hearing indicated two issues¹ upon which evidence would be submitted by the Government to prove that:

(a) The lands included within the claims, prior to patent, are subject to use and management by the United States in accordance with the provisions of section 4 of the act of July 23, 1955.

(b) A discovery of a valuable mineral deposit has not been made within the limits of any of the claims.

Basically, the hearing examiner ruled that there was not a discovery of a valuable mineral deposit as would justify or sustain a patent application and that therefore all of the claims prior to patent are subject to the provisions of section 4 of the act of July 23, 1955. He based this ruling upon an application of the prudent man test of discovery as set forth in *Castle v. Womble*, 19 L.D. 455 (1894), and *Chrismen v. Miller*, 197 U.S. 313 (1905), finding that the mineral for which the claims were located, manganese, had not been found within the claims in such quantity and quality that a prudent man would expend further time and effort with the hope of developing a paying mine, but that only further prospecting might be warranted, which is not sufficient under the prudent man test. He expressly stated that his ruling was not upon the validity or invalidity of the claims and that the mining claimant was free to explore and prospect the lands so long as they remain open under the mining laws.

In upholding the hearing examiner's decision, the Office of Appeals and Hearings stated that in a proceeding under section 5 to determine the rights of a mineral claimant to the surface resources of his mining claims, the claims are properly subject to the terms and limitations of section 4 of the act unless it is shown that there was a valid discovery within the meaning of the mining laws within the limits of each claim prior to the date of the act. The decision concluded that the evidence shows the presence of manganese ores on the claims but that "further

¹ Three other issues were listed in the notice and evidence bearing on them was submitted at the hearing. However, as the hearing examiner dismissed the charges without prejudice and as the Forest Service has not raised any issues on appeal as to that action and appellant was not injured by that action, no mention of them will be made in this decision.

exploration is required to determine whether a valuable deposit of manganese does exist within the limits of the claims, and that the values of the manganese shown do not demonstrate that there has been a discovery of a valuable mineral deposit prior to July 23, 1955, within the meaning of the mining laws." The decision emphasized that so long as the land is open to mining the appellant is free to engage in mining activities within the claims, but his use of the land is limited to mining and uses incidental to mining, and that until he obtains a patent under the mining laws the United States has the right to manage and dispose of surface resources of the claims.

Despite the express statements in both decisions that appellant could continue to engage in mining activities on the claims so long as the land remains open to mining, appellant contends that the decisions effectively declared his locations null and void contrary to the clear intent of the act of July 23, 1955. He reaches this conclusion by the following reasoning: First, he contends that the issue presented at the hearing by the hearing examiner was whether there was a discovery of a valuable mineral deposit measured at the present time and that evidence was offered on this issue. Next, he contends that the determinative issue was whether there was a discovery prior to the July 23, 1955, date of the act, and that he was not apprised that this was the determinative issue until the decision of the Office of Appeals and Hearings of October 10, 1967. He then contends that because the hearing examiner's decision and the issue at the hearing were based on an erroneous legal theory—that he must show a discovery measured as of the time of the hearing—he was "not put on notice that the proceedings would determine the entire validity of his claim, and was misled into believing himself secure to the contrary." Nevertheless, he contends further that under the proper application of the prudent man test of discovery there is a valid discovery within the claims, and that the evidence establishes such a discovery prior to July 23, 1955.

Appellant has admitted that he presented evidence to show that there was a discovery as of the time of the hearing; therefore, it is difficult to see how he could have been hurt in any way by the way the issue was posed at the hearing. In fact, as will be seen, if anything, appellant was helped rather than hurt by the way the issue was presented at the hearing. Appellant's brief on this appeal is predicated on the assumption that in a proceeding under section 5 of the act of July 23, 1955, the only question presented is whether there was a discovery of a valuable mineral deposit prior to the date of the act. However, this question is only one of two issues that may be involved in such a proceeding. Let us consider the entire act briefly. One of the purposes of Congress was to eliminate some of the abuses that had oc-

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curred under the mining laws whereby mining claims were located by claimants to acquire the timber thereon or to obtain the claims for recreational, business, or other purposes unrelated to mining activities. See *Converse v. Udall*, 399 F.2d 616 (9th Cir. 1968). Therefore, section 4 of the act reserved the right of the United States to manage and dispose of surface resources of claims located after the act, and section 5 established a procedure whereby United States governmental agencies could have a determination made as to the respective rights of the United States and of a mining claimant as to the surface resources of a mining claim located prior to the date of the act. Section 7 of the act, 30 U.S.C. sec. 615 (1964), expressly provided that nothing in the act would constitute a limitation of the existing rights of any claimant except as they were limited or restricted as a result of such a proceeding or of a waiver and relinquishment under section 6 of the act, and that the act would not limit the rights under any patent to be issued for a mining claim. Thus, this Department has emphasized that the only ultimate legal effect of such a proceeding is the limitation *prior* to patent as to the management and disposition of vegetative surface resources and management of other surface resources. *Arthur L. Rankin*, 73 I.D. 305 (1966). The proceeding cannot result in a declaration that the claims involved are null and void as the 1955 act strictly limits the effect of such a proceeding.

However, there is nothing in the 1955 act which would preclude the United States from contesting a mining claim after proceedings have been held under the 1955 act if it wishes to have the claims declared null and void. Or, a contest can be initiated to have the claims declared null and void in lieu of having a proceeding under section 5, which permits only a limited determination to be made. In either type of proceeding, the test is the same, namely, whether or not there has been a valid discovery of a valuable mineral deposit within the meaning of the mining laws. *Arthur L. Rankin, supra*; *United States v. Clarence E. Payne*, 68 I.D. 250 (1961).

In a proceeding under section 5 of the 1955 act, however, there is an additional factor. In order for the claimant to assert rights to the surface superior to those of the United States he must show at a minimum that there was a discovery as of the date of the act. *Converse v. Udall, supra*. The reason for this is that the limitations and restrictions of section 4 of the act are not applicable to valid mining claims located prior to the date of the act. However, the fact that a claim is valid on the date of the act does not mean that the claim, or the land in the claim, is forever freed of the limitations imposed by section 4 of the 1955 act. It is free from those restrictions only so long

as the claim remains valid. If the claim becomes invalid and thereafter a new claim arises in its stead, the new claim is subject to the limitations of section 4. It is therefore incumbent upon the holder of a claim located prior to July 23, 1955, when his rights to surface resources are challenged, to show that his claim was not only valid as of that date but has continuously remained valid since that date.

The Department so stated in *United States v. Independent Quick Silver Co.*, 72 I.D. 367 (1965), affirmed *Converse v. Udall*, 262 F. Supp. 583 (D. Ore. 1966).² In the Department's decision in that case it was pointed out that the two basic questions to be resolved in a 1955 act proceeding are, first, whether there was a discovery of a valuable mineral deposit as of the date of the act and, second, whether the mining claim is still valid when the verified statement is filed asserting a right superior to the United States. The decision emphasized that this latter question or test "must be considered if there is any doubt about the continuing validity of a claim for any reason such as having been worked out, or the mineral deposit becoming invaluable because of a change in economic conditions. See *United States v. Irving Rand and John M. Balliet*, A-30036 (October 19, 1964)." The second question, however, becomes pertinent only if the answer to the first question is determined or assumed to be in the affirmative.

Language in the court's decision at 262 F. Supp. 593 suggesting that the issue was whether there was a discovery prior to the date of the act rather than at the date of the hearing must be understood in the context in which the issue was raised. The plaintiffs (mining claimants) in that case had contended that the hearing examiner improperly allowed the Government to submit samples taken after the act, but not the plaintiffs. However, it is clear that the plaintiffs were attempting to show mineralization as of July 23, 1955, by evidence of mineralization which had not been exposed until after the date of the act whereas the Government was attempting to show the extent of the mineralization in workings exposed prior to the date of the act. The court simply emphasized in that context that the discovery of mineralization must have been made prior to the act and that it was not proper to consider evidence of workings made after the act.

In short, in a proceeding under the 1955 act, the question of whether there is a valuable mineral deposit at the time the surface rights are being determined may not be pertinent if it is shown that there was not a discovery of such a deposit prior to the 1955 act because even if

² This decision also affirmed the Departmental decision, *United States v. Ford M. Converse*, 72 I.D. 141 (1965). The Independent Quick Silver Company did not prosecute an appeal from the District Court's decision. However, Converse did, resulting in the *Converse v. Udall* decision by the United States Circuit Court for the 9th Circuit cited previously, which affirmed the District Court's decision in that respect.

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there was a discovery after the date of the act, the claim would be subject to the limitations of section 4 of the act. However, if it is shown or assumed that there was a valid discovery prior to the act, then the question of whether there is still a discovery of a valuable mineral deposit is crucial.

In this case, it appears that the evidence was not directed to any particular date but it was largely related to a period preceding the hearing and occurring after July 23, 1955. This was not prejudicial to the appellant if it is considered that it was assumed that a discovery existed as of July 23, 1955, thus answering the first, and primary, question in appellant's favor.

A procedural objection might be raised, that a proceeding under the 1955 act is limited to determining whether a discovery existed as of July 23, 1955 and that if it is determined that a discovery existed on that date but it is believed that the discovery was lost or disappeared after that date, this belief can be tested only in a subsequent contest brought under the general authority of the Secretary to determine the validity of mining claims and not under his 1955 act authority. But this would appear to be interposing form for substance. We cannot see how a claimant would be prejudiced by having the issue of a post-1955 discovery litigated in a 1955 act proceeding instead of under a regular contest proceeding.³ If anything, prejudice would more likely be visited on the claimant if he was subjected to two different proceedings to resolve the two issues of discovery.

In any event, appellant did not object to the issue raised at the hearing but presented evidence on that issue. It is too late for him to challenge the hearing now. See *Adams v. Witmer*, 271 F. 2d 29 (9th Cir. 1958), rehearing den. 271 F. 2d 37 (1959).

Appellant next contends that the Government failed to establish a *prima facie* case because its evidence was based upon an erroneous interpretation of the prudent man test and that the decisions below are erroneous because they are based upon a misconstruction of the prudent man rule. Appellant asserts that the decisions here require present marketability or that paying ore be exposed, both of which he contends are not proper, citing *Denison v. Udall*, 248 F. Supp. 942 (D. Ariz. 1965) and *Henault Mining Company v. Tysk*, 271 F. Supp. 474 (D. Mont. 1967). Although the *Denison* case questioned the Department's application of the marketability rule to metallic minerals, it

³ Particularly is this so in view of the provision in section 5 of the 1955 act that the "procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States;" 30 U.S.C. § 613(c) (1964).

did not make an express legal ruling on this point but remanded the case to this Department for further proceedings, which have not yet been finalized by Departmental action. The *Henault* case has been appealed to the United States Court of Appeals for the 10th Circuit; therefore, the District Court opinion does not represent a final ruling in that case.

In any event, the applicability of the marketability at a profit test to a mineral such as manganese has clearly been established by the 9th Circuit's ruling in *Converse v. Udall, supra*, and by application of the reasoning of the Supreme Court in *United States v. Coleman*, 390 U.S. 599 (1968). In the *Coleman* case the Supreme Court made it amply clear that consideration of the marketability of a mineral is a facet of the prudent man test with regard to all types of minerals locatable under the mining laws. See also *United States v. Theodore R. Jenkins*, A-30786 (September 26, 1968), which held that mining claims containing an unknown quantity of low grade manganese for which there is no market or reasonable prospect for a market are not valid simply because some patents may have issued for similar-type claims during World War II and during a period where an artificial market for low grade ores was created by a government stockpiling program giving an incentive price for ores. Since the test for determining whether there is a discovery of a valuable mineral deposit is the same in a proceeding under section 5 of the 1955 act as in contest proceedings challenging a mineral patent application or otherwise challenging the validity of a mining claim, there is no reason why the marketability of the mining product and other economic factors may not be considered in this case.

Appellant is aware that economic factors are relevant in this case as he contends that the Government's witnesses were not properly qualified because they had no special knowledge as to what a prospector of ordinary prudence would or would not do in developing a manganese mine in that area, and because they have no expert knowledge of or skill in economics. Appellant apparently would not accept any Government witness unless he was an "ordinary prospector" but he does not give the criteria as to the experience or training, if any, that such a prospector would have to have except perhaps some experience in mining in that particular area.⁴ Appellant would also insist, however, that the witness be qualified as an expert in economics, but he does not indicate what such qualifications must be. Appellant's contentions relate to the value of the witnesses' opinions. However, the decisions below do not rest upon their acceptance of the witnesses' opinions as

⁴ Appellant relies upon *Snyder v. Udall*, 267 F. Supp. 110 (D. Colo. 1967), but this decision was reversed on appeal, *Udall v. Snyder*, —— F. 2d —— (No. 9671, 10th Cir., May 24, 1968).

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much as upon their discussion of the relevant facts in this case. Both of the Government's witnesses have college degrees in mining geology or mining engineering and have experience as mining engineers. They were amply qualified to examine the claims and to testify as to the worth of the claims upon the basis of their observations of the mineralization exposed on the claims, their sampling, and their review of documentary evidence, such as a Bureau of Mines Bulletin on manganese generally and a report on manganese mining in California (Exs. 6 & 7).

The question to be determined now is whether the conclusion reached in the decisions below that there was not a discovery of a valuable mineral deposit is supported by the facts. Since the decisions below have rather extended discussions of much of the evidence presented in this case, it is not necessary to discuss it in any great detail and the discussions in the decisions below are adopted for this purpose. Only a few comments will be made in answer to appellant's contentions. Generally, this evidence shows that some low-grade manganese has been exposed on some of the claims.⁵ Some samples of ore show higher grades but these were generally handpicked or handcobbled pieces selectively chosen and not reflective of the general quality of the manganese throughout the claims which could be effectively mined (see Tr. 17, 18, 102, 116, 118, 153, and Ex. D, p. 7, report of appellant's expert witness which says that although such exploration work has been done it is still insufficient to determine accurately the extent of ore bodies and that selective mining with sorting of ore is necessary to produce a grade of 35% or better). It is apparent that in any mining operation where the ore is hand picked rather than mined by machine as necessary for any large scale operation, the handpicked ore which is selectively mined will contain a much higher percentage of manganese than the machine-mined ore. *Lenz v. United States*, 346 F. 2d 570, 574 (Ct. of Claims, 1965). The evidence also showed that most of the ore would have had to be upgraded in order to have been sold in the past and would require upgrading to be sold at this time and that the cost to do so is prohibitive (Tr. 48, 153, 154, Ex. D). The evidence also shows that there is no market for the manganese ore on these claims because higher-grade ore is being imported at lower prices than those at which the ore on the claims could economically be sold.

⁵ Even appellant's expert witness, J. F. Siegfried, appears to concede that there has not been adequate exposure of mineralization on the Sunset Numbers 5 through 8 claims to constitute a discovery (see Tr. 111-113). He also said that there were no locations where exploration work had been performed on Numbers 6, 7, 9, and 13 (Tr. 94).

Although appellant has attempted to discount the evidence submitted by the Government witnesses, he has failed to do so. Indeed, much of the testimony from his own witnesses demonstrates that the ore is of a low grade which requires beneficiation, that there is no mill in the area or economical processes to upgrade the ore, and that even the higher grade ores cannot be sold (see, e.g., the testimony of one of his witnesses who has a mine in the area which he insisted contains a high-grade ore, but who said that he can't find anyone who will purchase it and that there is not a beneficiating plant in the area, Tr. 143, 148). Appellant contends that the significance of the samples "is not whether they are economically marketable, but whether they disclose a valuable mineral deposit." He admits that his samples, if averaged, do not show a high manganese content but says that "they were taken for the purpose of indicating the structure of the mine, what was geologically disclosed." However, the point is that if there is not ore of a grade and quantity which can be mined and processed and sold in commerce then the value of the deposit is not a real value but is only speculative. A speculative value is not adequate. *United States v. Theodore R. Jenkins, supra.*

Appellant also attempts to make much of the fact that the Government witnesses did not examine other manganese mines in the area for comparison and he refers to the testimony concerning these mines by his witnesses. Even if his mining claims are comparable to the other mines, which has not been conclusively shown, it is significant that the ores from these mines cannot be sold as there is no market for them. Generally specific testimony as to those mines gave higher values for the ore in them than for the ore in appellant's claims.

Finally, appellant insists that a preponderance of the evidence demonstrates that a valid discovery had been made on the Sunset claims prior to 1955. The evidence is not clear as to which of the claims may have had workings exposed prior to the date of the 1955 act. Appellant's witnesses blame this upon logging activities authorized by the Forest Service on the claims which may have disrupted or covered workings. There is evidence in a Government publication, Bureau of Mines Report of Investigations 5579, Reconnaissance of California Manganese Deposits, by Russell R. Trengove (Ex. 7, p. 3), that a small quantity of low-grade manganese ore was shipped from the Sunset mine to the Columbia-Geneva Steel Division, United States Steel Corporation, under a purchase program it had from 1949 to 1955 when it accepted low-grade siliceous manganese ore. A Government witness testified that he had heard that approximately 222 tons averaging 18% manganese had been mined from the Sunset #2 around 1950 (Tr. 38). The Bureau of Mines report (at pages 12-13) described the

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Sunset claims in Plumas County and stated that the three known deposits were low grade, with a high silica and iron content, and that the narrow clay bands containing nodular material comprised a very small part of the deposits. The nodular material is generally the higher grade material. The report described some workings on the Sunset Extension and Sunset Nos. 2 and 3 claims. It also described work done on the claims by the Bureau of Mines in 1949 in its program of exploring mineral deposits. Workings were explored and cleaned out and new trenches were excavated with 22 samples being taken. The report concluded as follows:

This work was inadequate to determine the size of the ore bodies or to estimate the ore reserve. However, it indicated that selective mining, together with careful sorting and cobbing, is necessary to produce shipping-grade ore. Ex. 7, p. 13.

Appellant contends that this evidence plus the fact that there was a Government stockpiling program in existence from 1952 to 1959, demonstrating the Government's desire for the ore with a willingness to upgrade it, establishes that there was a discovery. This evidence at the most, however, discloses that there were some workings on three of the claims with an unknown quantity of manganese ore at a generally low grade, and that a very limited amount of ore was sold from one of the claims to a private company. Despite the fact that the Government did have a stockpiling program paying incentive prices at a much higher rate than the prevailing commercial prices for even lower grade manganese ores, there is no evidence that any ore from these claims was ever sold to the Government. Certainly as to most of the claims, there is not enough evidence to show that there was known to be sufficient mineral of sufficient quality so that a prudent man, even under the much more favorable market conditions existing immediately prior to the 1955 act, could anticipate that he could develop a valuable mine.

Furthermore, as has been discussed previously, even if one could agree with appellant that there might have been a discovery on one or, at the most, three of the claims prior to the 1955 act, this does not mean that the mining claimant must prevail where the Government shows that, under conditions existing at the time of the proceedings under section 5 of the act, the deposit is not a valuable mineral deposit under the prudent man test. This has been shown in this case and nothing that appellant has shown overcomes the Government's evidence in this respect; instead, most of the factual evidence supports it. Basically, what appellant's case relies on is the testimony of his witnesses that the claims should be held in the anticipation that in the event of an international emergency whereby the imports are cut off the ore from

these claims might be economically mined if more favorable processing methods are discovered. All concede that marketing the ore at a profit is impossible at this time and has been at least since the cessation of the Government stockpiling support program, and there is little to indicate that even during that time a prudent man could have expected to develop a valuable mine on these claims based on the higher prices created by the Government market. The mining laws were designed to promote mineral development not land speculation. They were not designed to enable individuals to hold large tracts of land for future possible development (or for purposes other than mining) where the deposits have no present economic value. Cf. *United States v. Theodore R. Jenkins, supra*. Here it is clear that the claims have no present value for mining. Should the United States be prevented from contracting timber sales and otherwise managing the surface resources, although the mining claimant may continue mining exploration effort in any event, simply because the claimant has the hope that a favorable market condition may exist in the unforeseeable future? We think not and contrary to appellant's contentions we believe that the evidence supports the findings below and that the claims were properly declared subject to the limitations and restrictions of section 4 of the act of July 23, 1955.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

APPEALS OF AMERICAN CEMENT CORPORATION

IBCA-496-5-65 and IBCA-578-7-66

Decided December 2, 1968

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Estimated Quantities—Contracts: Construction and Operation: Notices

Giving great weight to the practical construction the parties had placed upon the terms of a contract that the appellant acknowledged to be ambiguous and noting that approximately five years elapsed before the contractor advanced an interpretation of the contract at variance with what appeared to be the mutual understanding of the parties as to the nature of the contractual obligations assumed by them, the Board finds that the contract for delivery of cement for the Glen Canyon Dam was a requirements contract and that the appellant was not entitled to additional compensation for the 87,691 barrels

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of cement delivered in excess of the estimated requirement of 3,000,000 barrels.

Contracts: Construction and Operation: General Rules of Construction—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Equitable Adjustments

The Board denies a claim for "Unnecessary Accelerated Construction Costs" where it finds (i) that the appellant has failed to offer any convincing evidence to show that a particular letter from the contracting officer relied upon by the appellant could be properly construed as an order for the delivery of cement thereby furnishing a predicate for the recovery of the costs claimed under the "Suspension of Deliveries" clause when cement was not called for during 1959; and (ii) that the appellant also failed to show by a preponderance of the evidence that the action of the contracting officer in refusing to agree in advance to pay a portion of a suggested wage increase under a related contract (the prime contract for the construction of the dam) prolonged a strike needlessly and thereby resulted in the incurrence of a portion of the costs for which the claim was made.

Rules of Practice: Appeals: Hearings—Rules of Practice: Evidence—Rules of Practice: Witnesses

Noting the general rule that counsel representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided consonant with obtaining justice, the Board finds that the testimony of a Government witness who also participated in presenting the Government's case at the hearing should be treated as oral argument. Preparation by the same counsel of one of the findings of fact was not found to be a violation of the provisions of the Wunderlich Act where there was no showing that the decisions reflected in such findings were other than those of the contracting officer and where the Board noted (i) the absence of a request for a remand to the contracting officer, and (ii) the fact that in the circumstances of the particular case a remand would apparently serve no useful purpose.

BOARD OF CONTRACT APPEALS

On April 3, 1958, appellant was awarded a contract to supply cement for the construction of Glen Canyon Dam and Powerhouse at a site near Page, Arizona. Situated on the Colorado River in a remote and isolated area in the northern part of the state, this was one of the Bureau of Reclamation's largest dam projects.

The prime contract for the construction of the dam and powerhouse had previously, on April 9, 1957, been awarded to Merritt-Chapman & Scott Corporation. Construction commenced on June 12, 1957.

At the time of the award, appellant, one of the world's major cement producers, had no manufacturing facilities in the State of Arizona. Its nearest two plants were situated in southeastern California, of which the one at Oro Grande was a possible source of supply for this project. However, the appellant had previously made tentative plans

to construct a plant at Clarkdale, Arizona, and in the contract showed this as the shipping point.

Following the award of the contract, appellant revamped its tentative plans and got construction of its \$15,227,726.77¹ plant under way, with the aim of having the plant in production by the anticipated initial date for deliveries.² Deliveries did not commence for some months thereafter.

In a petition filed in the Court of Claims³ the contractor seeks recovery against the United States in the aggregate sum of \$3,677,488.88. The five claims, numbered and designated as in an earlier opinion,⁴ are as follows:

1. Cost of Idle Capacity	\$1,508,824.88
2. Loss from Delay in Payments	288,296.00
3. Amounts Not Heretofore Paid on Barrels in Ex-	
cess of 3,000,000	104,352.00
4. Unnecessary Accelerated Construction Costs	830,316.00
5. Loss of Commercial Business	945,700.00
 TOTAL	 \$3,677,488.88

In a complex proceeding involving two separate Findings of Fact and three prior opinions of this Board,⁵ the matters presently before the Board have been narrowed to Claim No. 3 (for decision on the merits) and Claim No. 4 (for decision on the merits if claim found to be cognizable under the contract). Oral testimony was taken on four occasions as follows:

1. February 28–March 2, 1967	Phoenix, Arizona
2. May 12, 1967	Camden, New Jersey
3. October 3, 1967	New York, N.Y.
4. November 8, 1967	Phoenix, Arizona

For convenience, the transcripts of these hearings will be identified as "Ariz. tr.," "N.J. tr.," "N.Y. tr.," and "2d Ariz. tr.," respectively.

Although both parties have continued to contest different portions of the Board's earlier decisions respecting the scope of its authority, the Board ruled at the commencement of the oral hearing, with at least tacit acquiescence by the parties, that no evidence would be introduced

¹ Appellant's Exhibit C.

² As late as May 18, 1959, this was still considered to be August 15, 1959 (Appellant's Exhibit D).

³ Petition No. 215–65, dated July 6, 1965.

⁴ *American Cement Corporation*, IBCA–496–5–65 and IBCA–578–7–66 (September 21, 1966), 73 I.D. 266, 66–2 BCA par. 5849, on reconsideration, 74 I.D. 15, 66–2 BCA par. 6065 (January 10, 1967).

⁵ *American Cement Corporation*, IBCA–496–5–65 (January 6, 1966), 65–2 BCA par. 5303; *American Cement Corporation*, note 4, *supra*.

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on Claim Nos. 1, 2 and 5, except as a necessary or proper incident to the proofs relating to Claim Nos. 3 and 4.⁶ Both parties expressly reserved the right to renew objections about the jurisdiction of the Board before the Court of Claims. In fact, the Government again has asked that we reconsider your prior opinions⁷ and accept jurisdiction of Claim No. 5. There is nothing in the testimony presented, however, which persuades us that our prior holdings were in error.

At the outset we are confronted with questions as to (i) the testimony of Mr. Palmer King, one of the counsel for the Government, and (ii) the consequences of Mr. King's having prepared the second of the findings of fact. Over the strenuous objections of appellant's counsel,⁸ the Board allowed Mr. King to testify, reserving for later decision the weight to be given to such testimony. As a general rule counsel representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided consonant with obtaining justice. This rule applies to Government attorneys.⁹ This is partly based upon ethical grounds, but such testimony also entails serious practical problems.

Although appeal boards are not required to adhere strictly to the rules of evidence, we permitted the Government counsel to testify principally because it appeared likely that this evidence could not be obtained elsewhere. The facts giving rise to these appeals cover many years in time, posing a serious problem to both sides in giving a coherent recital. Apparently for this reason, both parties have referred frequently to Mr. King's testimony in their post-hearing briefs.

Even though Mr. King was probably the Government employee in the best position to tell about the Government's actions from the beginning until the end, little was contained in his testimony that did not eventually appear elsewhere. At most, his testimony accomplished only two things: (1) a chronological organization of the Government's case, duplicating the purposes of briefs and argument, and (2) it afforded him an opportunity to offer evidence designed to prove that the actions of the responsible Government officers were in good faith. The evil of which appellant's counsel complained, however, became readily apparent—fact was irretrievably mingled with argument.

⁶ Ariz. tr. pp. 12-13.

⁷ Note 4, *supra*.

⁸ *** The Contractor contends that in a case such as this, in which the purported Contracting Officer is also the Interior Department's major witness, as well as the attorney in charge of the proceedings before the Board, it is absolutely impossible to suppose the Findings represent a fair and impartial evaluation of the circumstances. In short, as the terms are used in the Wunderlich Act, the Contractor contends the Findings to be fraudulent, capricious and arbitrary, and to have been prepared in bad faith. Thus, the Findings should not be accorded any evidentiary weight, much less considered binding on the Contractor." (Appellant's Post-Hearing Opening Brief, pp. 45, 46.)

⁹ *United States v. Alu*, 246 F. 2d 29 (2d Cir. 1957).

For this reason, we have treated Mr. King's testimony for what it was, an oral argument. Under these circumstances, appellant's counsel had an opportunity to cross-examine his opponent about his argument, and did so at great length, a privilege seldom afforded an attorney. It does not seem desirable to make a flat prohibition against counsel for either side testifying in matters where he is also trying the case, for situations may occur where it is justified. Nevertheless, such procedure should be avoided except in the most difficult or unusual circumstances and for the sole purpose of avoiding an unjust result.

This leads to the appellant's complaint concerning the related question of Mr. King's part in the preparation of the second Findings of Fact. Unlike *John A. Johnson Contracting Corp. v. United States*, 132 Ct. Cl. 645 (1955), the contracting officer's decisions were made before these Findings were put on paper.¹⁰ In *Johnson Contracting* the contracting officer first abdicated his responsibility to his superior, then failed to follow the course of action he had contemplated because of the advice received from Army lawyers. The Findings of Fact in question is a 48-page document with 20 exhibits attached and closely resembles a Statement of Position. Mr. King's part was that of scrivener and advocate on behalf of the chief engineer of the Bureau of Reclamation, who was the contracting officer. It might have been more desirable to have let the contracting officer speak in this own words but there is no indication that the decisions made were other than those of the contracting officer. Appellant had the opportunity to take the testimony of the present contracting officer,¹¹ but did not choose to do so. In any event, appellant has not asked for a remand to the contracting officer,¹² nor does it appear that any useful purpose would be served by remanding the case to him.

The Requirements Contract Question

Consideration of the third claim (Amounts Not Heretofore Paid on Barrels in Excess of 3,000,000) requires not only close scrutiny of the contract but also examination of the conduct of the parties with

¹⁰ This is brought out in the extended cross-examination of Mr. King (Ariz. tr. pp. 354-533). In any matter as complex as this, the contracting officer must rely in part on documents, file information, information from other Government employees, and information from the contractor (see Ariz. tr. p. 358). As successor contracting officer, Mr. Bellport obviously could not have had first-hand information on all that had transpired during the administration of his predecessor.

¹¹ Mr. B. P. Bellport (who succeeded the original contracting officer during the course of contract performance) issued the Findings from which the instant appeals were taken.

¹² "If the Board should be inclined to view the Findings as anything more than argument, then the Contractor contends that the Wunderlich Act should be considered. * * *" (Appellant's Post-Hearing Opening Brief, p. 45). Where, as here, a hearing is held, it is the evidence of record that will be relied upon by the Board in reaching its decision, in so far, at least, as contested issues are concerned. Cf. *Bendix Field Engineering Corporation*, ASBCA No. 10124 (November 8, 1966), 66-2 BCA par. 5959 at p. 27,570.

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relation to it. It was stipulated that the amount of cement delivered by appellant to the Government for use in the Glen Canyon Dam project was 3,087,691 barrels, or 87,691 barrels more than the "estimated" amount.¹³ The three millionth barrel was delivered during May 1963;¹⁴ after this, shipments continued through December 1964.¹⁵

The price established by the contract for the cement was \$3.2473 per barrel (\$2.2321 f.o.b. Clarkdale plant). The additional 87,691 barrels were paid for at the contract price, which had been escalated to \$2.26 per barrel, f.o.b. Clarkdale plant. Appellant's contention is undisputed that the open market commercial price in 1963-1964 was \$3.45 per barrel, f.o.b. Clarkdale plant.¹⁶

Asserting that the 87,691 barrels in question were not covered by the terms of the supply contract, the appellant contends that it is entitled to be compensated therefor at the fair market value of \$3.45 per barrel.¹⁷ Appellant acknowledges, however, that if the 87,691 barrels were found to come within the scope of the "Extras" clause, the amount payable therefor would be substantially reduced.¹⁸

The problem presented by Claim No. 3 has its inception in the fact that the contract never clearly designates the agreement as a requirements contract or otherwise, and it appears, as appellant claims, that it has some provisions that are not entirely consistent with such a contract. Although some pertinent provisions of the contract have been set out in prior opinions, it is necessary to refer to them again for an understanding of the problem. Paragraph B-1 provides:

B-1. The requirement. It is required that there be furnished and delivered in accordance with this invitation, an estimated total quantity of 3,000,000 barrels of portland cement in bulk, for the construction of Glen Canyon Dam, Glen Canyon Unit, Arizona-Utah, Middle River Division, Colorado River Storage Project.

All cement, of the type described and identified in this invitation, needed by the Government in connection with the construction of Glen Canyon Dam and Powerplant, Glen Canyon Unit, Middle River Division, Colorado River Storage Project, Arizona-Utah, to and including December 31, 1964, will be purchased

¹³ Ariz. tr. p. 4. This is appellant's figure which differs slightly from the amount shown by the Government.

¹⁴ Findings of Fact of March 19, 1965, Exhibit No. 1 (Claim letter of December 29, 1964).

¹⁵ The claim letter, note 14, *supra*, shows deliveries through October 1964. However, Mr. Lambert testified for appellant that another shipment was made about December 1964 (Ariz. tr. p. 36); this conforms to the Government tabulation (Appellant's Exhibit H) and to the Government's schedule of payments showing the last payment was made in January 1965 (Government's Exhibit III 47).

¹⁶ Ariz. tr. p. 73; p. 118.

¹⁷ Appellant's Post-Hearing Opening Brief, p. 23.

¹⁸ " * * * the existence of at least one extra clause is understandable in that it could be viewed as making it possible for the government to purchase in excess of 3,000,000 barrels and to do so in 1964. * * *. If the Contracting Office had concluded that the Contractor was entitled to only its costs plus 15%, the price that would have been payable for the extra cement sold in 1963 would have been \$2.78 per barrel and in 1964 the price would have been \$3.20 per barrel or \$86,507.78 and \$18,878.96, respectively, more than the escalated contract price." (Appellant's Post-Hearing Opening Brief, pp. 25, 26.)

and ordered in releases under the contract or contracts let pursuant to this invitation: *Provided*, That if the Government should at any time during the construction of the foregoing described work, require in excess of 120,000 barrels of cement per month, and if the contractor or contractors under this invitation cannot furnish cement in excess of the specified monthly quantity, the Government reserves the right to obtain from other sources any cement required in excess of the specified monthly quantity. No orders for releases will be placed subsequent to December 31, 1964. If the estimated quantities specified in this invitation have not been ordered by releases within the period above specified, the contract or contracts shall be considered as terminated without liability to the contractor or contractors or the Government.

Paragraph B-10 reads in part:

B-10. *Deliveries.* The estimated maximum monthly delivery of cement required under this invitation is 120,000 barrels. The following tabulation shows an estimated distribution, by calendar years, of the total estimated quantity required under the schedule and the total estimated maximum quantity that will be ordered for each year:

Year	Estimated requirements, barrels	Maximum requirements, barrels
1959	150,000	300,000
1960	960,000	1,440,000
1961	960,000	1,440,000
1962	900,000	1,300,000
1963	30,000	100,000

The contractor shall, if required by the contracting officer, ship at the rate of 20,000 barrels of cement per month for each unit of 500,000 barrels for which he has been awarded a contract. Deliveries will be ordered by the contracting officer at least 15 days before delivery at the site is required and will be ordered in not less than carload lots. Deliveries of cement will not be required prior to August 1, 1959.

The bidding schedule states in part:

* * * Award will be based on an estimated total quantity of 3,000,000 barrels of cement * * *.

The schedule shows the "Articles or Services" as follows:

Portland cement in bulk as needed for construction of Glen Canyon Dam and Powerplant * * * in accordance with this invitation * * *.

Standard Form 32, November 1949 Edition, is attached and contains the standard paragraphs including Clause 2, *Changes*, and Clause 3, *Extras*.

As noted in our opinion of September 21, 1966, the appellant views the contract as having been for a fixed amount of 3,000,000 barrels of cement and asserts that any cement ordered in excess of that amount or during 1964¹⁹ would be within the purview of Clause A-2, *Extras*, of the Special Conditions.²⁰ The contracting officer viewed the con-

¹⁹ Assuming the claim is one arising under the terms of the contract.

²⁰ See *American Cement Corporation*, IBCA-496-5-65 and IBCA-578-7-66. (September 21, 1966), 73 I.D. 266 at p. 274, fn. 28, 66-2 BCA par. 5849 at p. 27,154, for the terms of the clause.

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tract as a "requirements" contract and the Government has consistently adhered to this position.

Appellant does not dispute the Government's right and authority to enter into a requirements contract. Mr. Lambert, finance director and treasurer for appellant, testified that a requirements type of contract is the normal way of doing business between a cement manufacturer and a contractor on a long term construction job.²¹ He stated, however, that in his opinion an unusual method of doing business was justified in this instance, because an investment of the magnitude required for supplying such an enormous quantity of cement could be made only on a fixed price, fixed amount contract; moreover, as a result of such a contract the Government received a better price.²²

Both parties have cited a substantial number of decisions relating to requirements contracts, and the Board has considered many more.²³ Unfortunately, the cited cases do not resolve the question because each was determined largely upon its own facts and circumstances.

Paragraphs B-1, B-10, and some other sections of the contract indicate that the contractor was agreeing to supply, at the bid price, the cement requirements for the Glen Canyon Dam project. On the other hand, contracts often set forth the requirements nature of the obligation more clearly than did the instant contract.²⁴ As has been pointed out, the "Extras" clauses do seem to conflict with the basic concept of a requirements contract. The Government notes, however, that such clauses could conceivably have been used to cover the placement of orders in excess of the annual maximum requirements or after December 31, 1964.²⁵

Although the question is not entirely free from doubt, we believe it would be reasonable to construe the language employed as establishing a requirements contract. It is not necessary for us to base our decision on that ground, however, since the evidence is overwhelming that from

²¹ Ariz. tr. pp. 29-31, 71-72.

²² Ariz. tr. p. 91.

²³ Important decisions considered by the Board include, *inter alia*, *Brawley v. United States*, 96 U.S. 168 (1877); *Shader Contractors, Inc. v. United States*, 149 Ct. Cl. 535, 545 (1960) ("* * * The figures given as estimates were that and nothing more. They were not guarantees or warranties of quantity, but figures which the bidders might reasonably employ so as to make realistic quotations. * * *"); and *N. S. Sherman Machine & Iron Works v. Carey, Lombard, Young & Co.* (Okla. 1924), 227 Pac. 110, 112 ("* * * where the purchase is: * * * to be used for a certain and definite purpose, all of which facts are made known to the seller, and especially in contracts * * * wherein the purchasers agree to use no other brand of cement in the construction of the plant which he has agreed to build than that brand of cement manufactured or furnished by the seller, then the amount of material necessary to complete the job or contract of the purchaser becomes the essence of the contract, rather than the specification, wherein a certain amount of material is designated, more or less. * * *").

²⁴ Appellant's Exhibit No. S was introduced into evidence as an example of the clarity with which the obligation can be stated in a requirements type contract.

²⁵ Government's Post-Hearing Brief, p. 48.

1959 until December 29, 1964, both parties consistently treated the contract as a requirements contract.

Central to the appellant's case is its contention that the contract is for a fixed amount of 3,000,000 barrels with the schedules in paragraph B-10 constituting minimum and maximum amounts which could be ordered in any one year. This view requires reading the term "Estimated requirements" in paragraph B-10, *supra*, as being the equivalent of "minimum requirements."²⁶ Acknowledging that the contract is ambiguous, the appellant calls attention to the importance which should be ascribed to the conduct of the parties in determining their intent.²⁷ To establish such intent the appellant's case is largely dependent upon the testimony of its Mr. Lambert.

Initially, appellant's view runs headlong into two difficulties. For one, the warrant for reading the word "estimated" in paragraph B-10 as "minimum" is highly tenuous. For another, paragraph B-1 states "No orders for releases will be placed subsequent to December 31, 1964" (italic added), whereas the schedule in paragraph B-10 shows nothing beyond 1963. Mr. Lambert, on cross-examination, gave the following testimony:

Q. Mr. King: * * * This is what I had in mind, that you had difficulty in reconciling the difference between paragraph B-10, the schedule setting forth deliveries, and estimated and maximum quantities during specific years, and a provision that permitted the Government to order cement up until December 31, 1964.

A. I think I testified that I felt there was a conflict.

Q. Now, did American Cement Company attempt to resolve this conflict before the bids were opened?

A. Not to my knowledge.

Q. Do you know if any request was ever made to the Government during the life of the contract as to whether there was such a conflict?

A. I don't think we even recognized that the conflict existed until sometime in 1964, or later than that, perhaps.

Q. You did, in fact, deliver cement in 1964?

A. Yes, we did.²⁸

Later, called as a witness by the Government, Mr. Lambert testified:

I did state that I was aware of the conflict between the schedule which didn't call for any deliveries beyond 1963, and the language that indicated that the pos-

²⁶ " * * * The word 'estimated' was understood to mean that the actual amount of cement that the government might order in any particular year could be greater and, possibly, go all the way up to 1,440,000 barrels of cement but not that the government could order less than the minimum stated, Tr. 86, 87. * * * Also, the obligation to purchase cement was an annual obligation; nothing had to be purchased in any single month." (Appellant's Post-Hearing Opening Brief, pp. 6, 9.)

²⁷ " * * * The proper classification of the contract is a question of law, but the testimony and documentary evidence would seem of value since in construing an ambiguous contract the conduct of the parties is generally of great significance, e.g., *Topliff v. Topliff* (1887), 122 U.S. 121." (Appellant's Post-Hearing Opening Brief, p. 2.)

²⁸ Ariz. tr. p. 79.

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sibility of shipments in 1964, and I felt it was a conflict and I never did give any great deal of thought to what it meant.³⁰

As has already been noted, according to appellant's records the 3,000,000th barrel was delivered to the Government in May 1963. Thereafter, cement was delivered in every month through December 1964, except for October and November 1964.³¹ These deliveries were smaller than those in many prior months but were nevertheless substantial in amount, as more than two thousand barrels were delivered in 12 of the 19 months between May 1963, and December 1964. All of these deliveries were billed at the escalated contract price, and payment was made at this price. At no time during this period did appellant raise any question or voice any complaint. It cannot be said that appellant was not concerned with the contract, however, or that appellant was unaware of its contents. Mr. Lambert testified (i) that as early as the early part of 1960 appellant's officers were worried over and discussing the problems which had arisen under the contract during 1959 as to the timing of the Government's orders, and (ii) that each year thereafter until December 1964 the company realized new problems were developing under the contract.³² The lack of any complaints to the Government during a period of approximately five years was attributed by appellant's witnesses to a fear of jeopardizing its rights under the contract.³³

We find difficulty, however, in accepting this testimony at face value. In the Board's opinion men as competent and experienced as Mr. Lambert and the other officers of appellant who testified would scarcely have been unaware that the contract was a binding obligation on the Government regardless of anyone's personal feelings. That the reluctance to raise questions about the problems pertaining to the contract would extend to billing by the appellant at a price deemed improper by its officials strains credulity to the utmost.

According to the testimony offered by the appellant, the contractor was unaware of the date when the 3,000,000th barrel was shipped.³⁴ In view of the great concern reportedly felt by the contractor's officers since early 1960,³⁵ it would appear to be an anomaly for the appellant (i) to believe that this was not a requirements contract, and (ii) to fail to flag its records so as to be aware of when the 3,000,000th barrel of cement was shipped. Not only would such rudimentary precautions have insured the prompt submission of a demand for revised prices for all deliveries made in excess of 3,000,000 barrels, but some of the

³⁰ Ariz. tr. p. 327.

³¹ Appellant's Exhibit H.

³² Ariz. tr. pp. 32-33, 67-68.

³³ Ariz. tr. pp. 33, 47, 66.

³⁴ Ariz. tr. pp. 36-37.

³⁵ Ariz. tr. pp. 32-34, 67.

other claims totaling in excess of three and one-half million dollars could have been filed at a much earlier time.³⁵

Appellant also excuses its delay in making any complaint upon the ground that it had no house counsel until 1964, although it acknowledged that it employed attorneys in many cities.³⁶ Appellant's officers, however, were not without a high degree of business expertise. Mr. Lambert testified that the claim had developed in the following way:

Q. Do you recollect when you first started talking to lawyers about your claims?

A. My first recollection is I brought it up at lunch one day with a lawyer who was an expert on water law, and I think that was about 1963. I don't feel that I really was talking to him about this problem, but I think the first real consideration of this potential litigation matter arose through the fact that we hired a house counsel in 1964, and it became something of a matter of discussion with him and others at that time.³⁷

In ascertaining the manner in which the parties interpreted the contract during the course of contract performance,³⁸ we have also given consideration to the so-called "champagne letter." This letter,³⁹ dated July 19, 1961, was from Mr. R. R. Adams (the man then in charge of appellant's over-all operations at the Clarkdale plant) to Mr. Price, an official of the Bureau of Reclamation. The occasion for the letter was the shipment of the millionth barrel of cement at 10:30 a.m. on that date. The letter says in part:

* * * To me and to our organization this shipment of approximately one-third of our Dam requirements marks a milestone in the wonderful cooperative effort you have made with us. Because of your understanding of the little prob-

³⁵ The effect of a contractor's failure to give notice of its claim within a reasonable time has been discussed in numerous cases including *J. A. Ross & Company v. United States*, 126 Ct. Cl. 323, 329 (1953) ("* * * It is basic in all Government contracts that the plaintiff cannot do work which it is not required to do by the contract, without registering a protest against being required to do it, or securing an order for extra work, and then later make a claim against the Government for additional compensation"); *Universal Transistor Products Corp. v. United States* (D.C., N.Y. 1963), 214 F. Supp. 486, 488 ("* * * While delay alone is not sufficient to bar the claim, prejudice to the Government resulting from such delay may be a defense. * * *"); *Futuronics, Inc.*, DOT CAB No. 67-15 (June 17, 1968), 68-2 BCA par. 7079 at p. 32,759 ("In addition to the procedural question of timeliness, the continued failure to assert this claim reflects on its substantive validity"); and *Eggers & Higgins, et al.*, VACAB No. 537 (April 20, 1966), 66-1 BCA par. 5525, on reconsideration, 66-1 BCA par. 5673 (For lack of timely notice, Board upholds contracting officer's refusal to consider an acceleration claim filed five and one-half years after occurrence of events upon which claim was based).

³⁶ Ariz. tr. p. 80.

³⁷ Ariz. tr. p. 68.

³⁸ See *Futuronics, Inc.*, note 35, *supra* ("* * * The interpretation of a contract by the parties to it before it becomes the subject of controversy is deemed by the courts to be of great, if not controlling, weight. * * *"); and *Paul C. Helmick Co.*, IBCA-39 (July 31, 1956), 63 I.D. 209, 229, 56-2 BCA par. 1027 at p. 2205 ("* * * In view of the familiar canon that the practical construction which the parties to an ambiguous contract have given to its provisions is entitled to great weight, the Board is constrained to accept this construction.").

³⁹ A copy is attached as Exhibit 16 to Exhibit 39, Findings of Fact. Frequent reference was made to the letter by the witnesses.

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lems involved in the manufacture, testing and movement of this million barrels of cement, we were able to concentrate on our main problem of furnishing you with a dependable product.

Appellant's Mr. Cloninger, who during the pertinent years worked under Mr. Adams, explains this letter as a part of Mr. Adams' public relations efforts.⁴⁰ In terms, however, it not only directly conflicts with appellant's present position (e.g., that the contractor believed in early 1960 that the Government had materially breached the contract by failing to order any cement in 1959), it also indicates that Mr. Adams viewed the contract as one for the requirements of the dam. The specificity with which this particular shipment was identified (day and hour, as well as the make and license number of the truck involved) is in marked contrast to the appellant's claimed inability for more than a year and one-half to identify when the 3,000,000th barrel was shipped.

Upon the basis of the conduct of the parties, we find that they deemed this to be a requirements contract and that throughout virtually the entire period of contract performance they both treated it as one. Claim No. 3 for "Amounts not Heretofore Paid on Barrels in Excess of 3,000,000" is therefore denied.

Claim for Unnecessary Accelerated Construction Costs

Claim No. 4 in the amount of \$830,316⁴¹ is for "Unnecessary Accelerated Construction Costs." It is not an easy one to categorize. In our opinion of September 21, 1966,⁴² we stated that the claim is not one for acceleration of deliveries under the contract but rather for the failure of the Government to order any cement in 1959. The appellant considered this failure to be a breach of the contract rendering the Government liable for all the extra costs appellant incurred in accelerating construction of its Clarkdale plant to be ready to make deliveries in August 1959. From the record at the time of our prior opinion it was not possible to determine whether this claim was one for which a remedy was available under the contract. We noted that if the theory was that the contracting officer, with knowledge of the strike, insisted that the contractor adhere to the performance time specified in the contract, thereby increasing its costs over what they would have been if the contractor had been granted an appropriate

⁴⁰ Ariz. tr. 109-113, 177-179, 199-200.

⁴¹ This is the amount claimed for this item in the petition filed in the Court of Claims as reported in our decision of September 21, 1966, note 4, *supra*. Perhaps inadvertently the claim is elsewhere said to be in the amount of \$930,352.80. (Appellant's Post-Hearing Opening Brief, p. 15.)

⁴² Note 4, *supra*.

extension of time, then the wrong could be redressed under the contract.

The supposition specifically mentioned in connection with our retention of jurisdiction over Claim No. 4 turned out not to be supported by the evidence adduced at the hearing.⁴³ Testimony was offered at the hearing, however, which was designed to show that the Government's letter of May 18, 1959,⁴⁴ could be construed as an order for the delivery of cement in August of 1959 and that the contractor had so construed it.⁴⁵ In pertinent part the letter provides: "We have been advised by the Project Construction Engineer that the prime contractor for construction of Glen Canyon Dam and Powerplant expects to be ready to place the initial concrete by August 15, 1959. * * *" The appellant argues that "The government's subsequent failure to purchase cement at the indicated time would have required a suspension of delivery order, which, of course, was not given."⁴⁶ It is true, of course, that relief would be available under the contract for costs related to the suspension of deliveries occurring after the placement of orders pursuant to Paragraph B-10.⁴⁷

The insurmountable difficulties from the appellant's standpoint are twofold: (i) the language employed clearly shows the letter to be merely a report to the contractor of the expectations of the prime contractor for the dam respecting future operations with the Government serving merely as a conduit for the information passed on; and (ii) neither quantities nor times of shipment for the required cement are specified, as would almost certainly have been the case if the letter in question had been intended as an order.⁴⁸

We find, therefore, that the appellant has failed to show that the costs covered by Claim No. 4 are attributable to a suspension of deliveries—either actual or constructive—relating to an order or orders for cement previously placed, as would be required for the payment of costs incurred under the authority of Paragraph A-5, Suspension of Deliveries of the Special Conditions.

The appellant's principal argument for Government liability, how-

⁴³ There was no showing that during the period of the strike in the plant of the contractor, or following its termination, the contracting officer insisted upon the contractor adhering to the time for performance indicated in the contract or that he refused a request by the contractor for a time extension.

⁴⁴ Appellant's Exhibit D.

⁴⁵ Ariz. tr. 210.

⁴⁶ Appellant's Post-Hearing Opening Brief, pp. 22-23.

⁴⁷ See Paragraph A-5, "Suspension of Deliveries of the Special Conditions."

⁴⁸ Assuming *arguendo* that the appellant's position is correct, the Government could have ordered the shipment of between 150,000 barrels and 300,000 barrels of cement at any time during the year 1959, subject only to the limitation that the appellant could not be required to furnish more than 120,000 barrels in any one month. (See note 26, *supra*, and the provisions of Paragraphs B-1 and B-10 quoted in text.)

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ever, proceeds along the following lines: the supply contract was awarded April 3, 1958; the Government was authorized to order cement commencing August 1, 1959; the Government was aware that the contractor would construct a plant at Clarkdale for the purpose of supplying the cement; the Government was aware that an accelerated building program would be required for the contractor to get its plant completed in time to meet the August 1, 1959 delivery date; the Government did not order cement until early 1960 because of the strike against Merritt-Chapman & Scott (the prime contractor at the Dam); the Government failed to notify the contractor that no orders would be placed in 1959; and the contractor in fact incurred excess costs in overtime, standby and extra engineering costs and the necessity of issuing a cost-plus contract. As a corollary to its position, and one toward which most of the evidence was directed, contractor alleges that the strike against Merritt-Chapman & Scott was prolonged by the Government because the contracting officer declined to agree prior to a settlement of the strike that the Government would pay 85 percent of a wage increase proposed to be paid by Merritt-Chapman & Scott.⁴⁹

The damages claimed are arrived at primarily from the testimony of Mr. Fisher,⁵⁰ the head of the firm that built the Clarkdale plant, and from an estimate⁵¹ prepared by him, which showed that the excess cost incurred in attempting to meet the August 1, 1959 date instead of December 1959, was \$1,162,941. Because the most that the Government could order was 80 percent of the plant's capacity, appellant assesses 80 percent of the excess costs against the Government, or \$930,352.80.⁵²

The date the plant became operable is disputed. The contractor set it up on its depreciation schedules about October 1, 1959 (i.e., about two months after the August 1, target date), and appellant claims this was the date the plant was completed.⁵³ Whether it could at that time actually have delivered cement of a quality meeting the requirements of the Glen Canyon Dam project was not made clear, because some problems were encountered on initial operation, and appellant has not presented evidence from which it can be determined with any degree of certainty just when the initial problems were worked out.

The basic fallacy of appellant's position, however, is that there was never any agreement between appellant and the Government for the construction of the Clarkdale plant, and the timing of that con-

⁴⁹ Appellant's Closing Brief, p. 16.

⁵⁰ Ariz. tr. p. 157.

⁵¹ Findings of Fact of May 18, 1966, Exhibit No. 4, p. 15.

⁵² The figure used corresponds to the amount shown in Appellant's Post-Hearing Opening Brief at page 15. See, however, note 41, *supra*.

⁵³ Appellant's Post-Hearing Opening Brief, pp. 28-29.

struction was solely the responsibility of the contractor itself. The contractor could have supplied cement from its Oro Grande plant in California; in fact, had Government orders been placed in August and September 1959, it presumably would have done so. The contractor complains, nonetheless, that although the Government knew the contractor was building a plant at Clarkdale, the Government failed to give any notice when the strike began against Merritt-Chapman & Scott on July 6, 1959. Even if such notice had been given, the appellant concedes that the possibilities for mitigation of damages were only nominal, since most of the construction was already completed. No claim is made that the Government caused the strike or could have done anything to avoid it.

Considering that the contractor's construction of the Clarkdale plant was not the result of a direct contractual obligation owed to the Government and that this plant and the timing of it were its own idea (both to avoid the incurrence of transportation costs from Oro Grande and to have a modern plant in a new marketing area), it is difficult to see how the contractor can find any obligation, other than possibly a moral one, for the contracting officer to notify contractor of the work stoppage. Even a moral obligation fades when this strike is put into perspective.

The work stoppage against Merritt-Chapman & Scott was of tremendous economic consequence to the State of Arizona and all those in the construction business and their suppliers in that part of the country. There was a great deal of publicity attendant to it. Mr. Fisher stated that everybody in the construction industry knew about the strike.⁵⁴ There is no doubt that appellant's officers knew about it. There was certainly no element of deception. Moreover, in the early weeks of the strike, at least, any statement by the contracting officer as to the probable duration would have been purely conjecture and no better than appellant's guess.

This brings us to the point in the case which was the subject of the larger part of the testimony and of the exhibits from both parties: the length of time the strike against Merritt-Chapman & Scott by the five basic crafts unions continued, and why. Appellant bases a good part of its case upon the proposition that the Government, by its actions or failure to act, prolonged this strike needlessly. It contends that instead of ending on December 22, 1959, the strike could and should have been settled some months earlier by the contracting officer agreeing in advance to pay escalation for a suggested wage increase.⁵⁵

No useful purpose would be served by going into all the ramifica-

⁵⁴ Ariz. tr. pp. 162-163.

⁵⁵ Note 49, *supra*.

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tions of this matter. Based upon careful consideration of the entire record, we find that there is no evidence to show that the actions of the contracting officer were in bad faith or otherwise culpable. We further find that the appellant has failed to show by the preponderance of the evidence that the contracting officer's action in refusing to make an advance commitment on escalation actually prolonged the strike.

Briefly, the Merritt-Chapman & Scott contract provided that the Government would pay 85% of any wage increase on the project.⁵⁶ The strike occurred when Merritt-Chapman & Scott ceased paying subsistence at a specified rate per day to the workmen at Glen Canyon Dam as provided for by the statewide agreement between the unions and the construction industry. During the next several months there were varying wage proposals to settle the strike. The prime contractor was obviously concerned with whether the Government would pay a share of this increase, and from September on there were discussions and letters as to the portion of the increase, if any, that the Government would pay. Those discussions and the correspondence were only between the Government and Merritt-Chapman & Scott, however, and there is no evidence indicating that the Government had first-hand knowledge of the Union position at any time during the protracted and complex labor negotiations. The contracting officer declined to give an advance agreement concerning escalation, stating that the proposed increase (50 cents per hour for most employees) appeared to be a payment in lieu of subsistence rather than a wage increase. After the eventual settlement of the strike, the contracting officer again took the position that the 50 cents per hour wage increase finally agreed upon was not within the escalation clause. The Comptroller General concurred that the Government was not liable as a matter of law for escalation on the full amounts of the increases in the nominal wage rates, if in fact the increased rates included elements of subsistence or other items excluded from escalation under the applicable paragraph.⁵⁷ The effect of three Board opinions⁵⁸ was to

⁵⁶ Paragraph 19 provided in part: "The amounts due under the contract will be adjusted by the amount of eighty-five percent (85%) of the difference between the total amount of wages actually paid to laborers and mechanics employed under the contract or any construction subcontract, and the total amount of wages that would have been paid if computed at hourly base rates determined as follows: * * *

"In computing the adjustment in compensation to be made under this paragraph, * * * payments in the form of bonuses, incentive payments, or gratuities, subsistence payments, and travel allowances; * * * will not be considered."

⁵⁷ 39 Comp. Gen. 668.

⁵⁸ *Merritt-Chapman & Scott Corporation*, IBCA-240 (January 4, 1961), 68 I.D. 1, 61-2 BCA par. 3193; IBCA-240 (November 9, 1961), 68 I.D. 363, 61-2 BCA par. 3194; and IBCA-240 (March 15, 1962), 69 I.D. 11, 1962 BCA par. 3321.

overturn the findings of the contracting officer and to determine that the escalation must be paid, with some modification. The Comptroller General then accepted this Board's findings.⁵⁹ The matter was bitterly contested and there was substantial factual evidence presented for both positions.

It is true that five regular or alternate members of the Board were in agreement at the various stages of the *Merritt-Chapman & Scott* appeals that the contractor was entitled to reimbursement under the escalation provisions for the major portion of the disputed amounts; however, the Board rejected the contractor's assertion that all of the electricians' increase should have been treated as wages subject to escalation under paragraph 19 of the contract.⁶⁰ A similar reduction in the amounts claimed by the contractor was made in a later decision relating to increases received by four specialty crafts.⁶¹ In its partial reversal of the contracting officer's findings the Board was not implying that he acted other than in good faith.

On the basis of the record in these proceedings, we are unable to conclude that in September, October or November of 1959, there was a legal obligation upon the contracting officer to agree to accept escalation of a tentative wage offer on behalf of the Government. Obviously, the Government would have an obligation not to interfere with the performance of either contract by intentionally and unnecessarily prolonging the strike. It is equally obvious that the Government itself had a substantial economic interest in the termination of the strike because of the cost of the strike in administrative expenses and potential loss of power revenues.

The Government was not a party to the strike, nor was it privy to the negotiations. Its information came principally from *Merritt-Chapman & Scott* and from the press. From the information available to the contracting officer, there were other issues involved besides sharing a portion of the cost of escalation. Particularly difficult was the so-called "favored nation" clause in the Arizona Master Labor Agreements, to the effect that contractors would not be required to pay higher rates of wages or be subject to more unfavorable working rules than those established by the respective unions for any employer engaged in similar work in Arizona. The unions, as a condition of entering into a compromise agreement with *Merritt-Chapman & Scott*, insisted upon assurance from the Arizona Chapter of the Associated

⁵⁹ Decision No. B-142040, dated April 2, 1962 (unpublished).

⁶⁰ 68 I.D. 363, 367, 61-2 BCA par. 3194 at p. 16,559.

⁶¹ *Merritt-Chapman & Scott Corporation*, IBCA-365 (April 8, 1966), 73 I.D. 86, 94, 66-1 BCA par. 5502 at pp. 25, 774-775.

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General Contractors that the "favored nation" clause would not be invoked against them. The evidence as to whether this obstacle would have prevented a settlement regardless of the contracting officer's position on escalation is conflicting.

Only two witnesses who were directly involved in the strike negotiations, both Merritt-Chapman & Scott officers at the time of the strike, were called by either party in this matter. These were Claire Helmer⁶² and Richard Mynatt⁶³. Other witnesses, such as Richard Kleindienst⁶⁴ and Jack Grady,⁶⁵ add some light.

Mr. Mynatt and Mr. Helmer disagreed as to the extent to which the "favored nation" release and other issues may have held up the settlement of the strike. Mr. Mynatt's testimony indicates a belief that the "favored nation" clause was a serious stumbling block. Mr. Helmer stated that in his opinion money was the only major issue and that the other matters were more of a smoke screen than of substance. There is no reason to doubt the complete truthfulness of either man, although both were obviously at a disadvantaged in having to recall details many years after the fact.

It appears undisputed that initially the unions showed little interest in negotiation or compromise, as other employment for the craftsmen involved was readily available. Both witnesses agree that issues other than wages were negotiated and publicized; however, Mr. Helmer testified that he believed that at any time after about the middle of September 1959, if the wage issue had been settled, the strike would have ended.⁶⁶ He claims that events bore out his belief, although he does concede that two of the five unions were more reluctant to settle, for reasons that are subject only to conjecture.⁶⁷

A satisfactory resolution of this difference of opinion is impossible, as both men could only guess as to the state of mind of the union representatives involved in the labor negotiations. Neither side called a union member as a witness. The correspondence from Merritt-Chapman & Scott to the contracting officer⁶⁸ and the testimony of Mr. Grady⁶⁹ tend to support the testimony of Mr. Mynatt, as does the testimony of Mr. Kleindienst, in so far, at least, as the union representatives gave the impression that resolution of the "favored nation"

⁶² N.J. tr.

⁶³ N.Y. tr.

⁶⁴ 2d Ariz. tr.

⁶⁵ Ariz. tr. p. 273, *et seq.*

⁶⁶ N. J. tr. pp. 15, 70, 76.

⁶⁷ N. J. tr. p. 51.

⁶⁸ Letters dated October 28, 1959 and December 4, 1959.

⁶⁹ Ariz. tr. p. 274 *et seq.*

clause question involved an important issue.⁷⁰ In any event, it seems clear that as far as the contracting officer knew the union demands respecting the "favored nation" clause were of a substantive nature. While it is true that the contracting officer was asked for an advance commitment to escalation, there is nothing in the evidence to indicate that he was aware that this commitment was all that was needed for settlement of the strike, if, in fact, such was the case.

Moreover, it is clear and undisputed that the appellant was well informed about the strike, and that it could estimate the probable duration about as well as the Government could. Further, by the time the strike occurred, appellant's plant was virtually completed. Even if the appellant had been informed by the Government in August or September to slow down the construction of its plant, it would have made little difference.⁷¹ The nearest thing to acceleration by the contracting officer was the letter dated May 18, 1959,⁷² indicating that the first cement would be needed in August. After commencement of the strike in July, of which the appellant had actual knowledge, further communication would have been superfluous.⁷³

Conclusion

For the reasons set forth, Claims Nos. 3 and 4 are denied.

EDWARD E. GRANT, *Alternate Member.*

I CONCUR:

WILLIAM F. McGRAW, *Member.*

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

⁷⁰ 2d Ariz. tr. p. 7 *et seq.*

⁷¹ Ariz. tr. pp. 117-118, 121, 129.

⁷² Appellant's Exhibit D.

⁷³ The denial of Claim No. 4 could also have been predicated upon our finding that the instant contract was a requirements contract. The reason that we have not based our decision on that ground is that the claim is not regarded as meritorious even if a different conclusion had been reached on the requirements contract question.

MINING CLAIMS—RIGHTS TO LEASABLE MINERALS**Oil Shale: Mining Claims**

Mining claims located on lands known to be valuable for minerals subject to disposition under the Mineral Leasing Act convey no rights to Leasing Act minerals since those minerals are reserved to the United States by virtue of section 4 of the Multiple Mineral Development Act.

Oil Shale: Mining Claims

The Multiple Mineral Development Act, though allowing the location of mining claims on lands known to be valuable for Leasing Act minerals, did not authorize the location of claims for minerals whose mining or extraction would significantly damage or disturb Leasing Act minerals such as oil-shale or sodium.

M-38764.4357 December 4, 1968

To: SECRETARY OF THE INTERIOR.

SUBJECT: MINING CLAIMS—RIGHTS TO LEASABLE MINERALS.

The Department of the Interior has announced that three tracts of public land in Colorado containing deposits of oil shale and other minerals will be offered for lease on December 20, 1968, on a competitive basis. A number of mining claims allegedly were located in 1966 on portions of the three tracts involved.

Contests against all the claims filed on the tracts have now been initiated by the Bureau of Land Management. Based on the advice of this Office, the Department stated in its information release of September 10, 1968, that:

The existence of these claims, even if subsequently determined to be valid, need not interfere with the leasing of the lands for oil shale development. Under a 1954 act of Congress—the Multiple Mineral Development Act—mining claims located thereafter do not carry with them rights to leasable minerals including oil shale.

You have requested that I document the basis for that conclusion. This memorandum is responsive to that request.

At the outset let it be clear that I do not here examine the question of whether the alleged claims meet the requirements of the mining laws. This is the issue raised in the pending contests and I do not prejudge it here. It should also be noted that I have heretofore concluded that dawsonite, a carbonate of sodium, is subject to disposition exclusively under the Mineral Leasing Act and is therefore not subject to location under the mining laws. *Wolf Joint Venture et al.*, 75 I.D. 137 (1968). I deal here only with the question of whether and to what extent the individual claims, if valid, affect minerals subject to disposition ex-

75 I.D. No. 12

clusively under the Mineral Leasing Act of 1920, 41 Stat. 437 (1920), as amended, 30 U.S.C. secs. 181-287 (1964). Among those minerals are oil shale, and all carbonates of sodium, including dawsonite and nahcolite, another sodium carbonate.

Three premises underlie the conclusion expressed in the above-quoted statement from the September 10 information release.

First, between February 25, 1920, the effective date of the Mineral Leasing Act, and the enactment of the Multiple Mineral Development Act of 1954, 68 Stat. 708, 30 U.S.C. secs. 521-541 (1964) the lands in question, being known to be valuable for oil shale, a leasable mineral, were not subject to entry or location under the mining laws;

Second, the Multiple Mineral Development Act, while opening lands known to be valuable for leasable minerals to location under the mining laws, reserved the leasable minerals themselves from disposition under such locations; and

Third, only those deposits of locatable minerals found in lands known to be valuable for leasable minerals which are physically separate from the deposits of leasable minerals were opened to location and patent under the mining laws by the 1954 Act.

From the enactment of the Mineral Leasing Act, 41 Stat. 437 (1920), as amended, 30 U.S.C. secs. 181-287 (1964) on February 25, 1920, until the enactment of the Multiple Mineral Development Act on August 13, 1954, 68 Stat. 708 (1954), 30 U.S.C. secs. 521-541 (1964), public lands known to be valuable for minerals subject to disposition under the Mineral Leasing Act were not open to the location of mining claims.¹ All such claims were void *ab initio*. *Joseph E. McClory*, 50 L.D. 623 (1924). See also 50 L.D. 650 (1924). As explained in *Jebson v. Spencer*, 61 I.D. 161 (1953) :

Shortly after the passage of the Mineral Leasing Act, the Department held that there could be no room for the contemporaneous operation of the mining laws and the Mineral Leasing Act with respect to the same lands; and that if an attempt were made, after the enactment of the Mineral Leasing Act, to locate a mining claim on land * * * known at the time of the attempted location to be valuable for any of the minerals mentioned in the Mineral Leasing Act, the Department would not recognize the attempted location. * * * 61 I.D. at 164.

Thus, all lands known to be valuable for Leasing Act minerals were segregated from the operation of the mining laws by enactment of the Mineral Leasing Act. Not until significant deposits of locatable uranium were discovered on lands segregated from location did serious concern arise regarding the incompatibility of the Mineral Leasing Act and the mining laws. The need for uranium in the interest of na-

¹ A stopgap measure, Public Law 250, 67 Stat. 539 (1953), 30 U.S.C. §§ 501-505 (1964) had provided for the perfection of mining claims located between July 31, 1939, and Jan. 1, 1953, on public lands containing leasable minerals. However, unlike the Multiple Mineral Development Act, no provision was made for the location of future mining claims on such lands.

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tional security prompted the initiation of remedial legislation. The culmination of these efforts was the Multiple Mineral Development Act of 1954, which authorized the location of mining claims on public lands which previously had been segregated from mineral entry by the Mineral Leasing Act.

The principal concern which prompted passage of the Act was the fact that large areas of public domain known to contain oil and gas deposits or encompassed by oil and gas applications, permits or leases had been closed to mining location because of the segregative effect of the Mineral Leasing Act. See *Hearings on S. 3344 before a Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs*, 83d Cong., 2d Sess., May 17–18, 1954.

In order to facilitate the concurrent development of deposits such as uranium and oil and gas, section 5 of the Multiple Mineral Development Act authorized the location of mining claims on lands known to be valuable for Leasing Act minerals,² and section 4 specifically reserved all Leasing Act minerals in such lands to the United States. 68 Stat. 710 (1954), 30 U.S.C. secs. 524–525 (1964). The language of the reservation is absolute:

Every mining claim or millsite—

* * * * *

(2) located under the mining laws of the United States after August 13, 1954 shall be subject, prior to issuance of a patent therefor, to a reservation to the United States of all Leasing Act minerals and of the right (as limited in section 526 of this title of the United States, its lessees, permittees and licensees to enter upon the land covered by such mining claim or millsite and to prospect for, drill for, mine, treat, store, transport, and remove Leasing Act minerals and to use so much of the surface and subsurface of such mining claim or millsite as may be necessary for such purposes, and whenever reasonably necessary, for the purpose of prospecting for, drilling for, mining, treating, storing, transporting, and removing Leasing Act minerals on and from other lands; and any patent issued for any such mining claim or millsite shall contain such reservation as to, but only as to, such lands covered thereby which at the time of the issuance of such patent were—

- (a) included in a permit or lease issued under the mineral leasing laws; or
- (b) covered by an application or offer for a permit or lease filed under the mineral leasing laws; or
- (c) known to be valuable for minerals subject to disposition under the mineral leasing laws.

Throughout the consideration of S. 3344, which was to become the Multiple Mineral Development Act, and a companion measure, H.R. 8896, the focus of the legislative debates related solely to physically separate deposits of locatable and leasable minerals. See, e.g., 100 Cong. Rec. 10019–10030; 10938–10951 (1954).

It is apparent from the absolute reservation of leasable minerals

² As well as upon lands included in a permit or lease issued under the mineral leasing laws and upon lands covered by an application or offer for a permit or lease.

prescribed by section 4 that the Act could not have been intended to authorize the location of minerals contained in commingled deposits from which the locatable minerals could be removed only by removal of or significant damage to the leasable minerals. To read the Act as so intending would be to nullify the absolute and specific reservation of leasable minerals mandated by the Congress in section 4.

The few direct references in the legislative history of the Act to this specific issue confirm the conclusion that it did not terminate the segregative effect of the Mineral Leasing Act except as to deposits of locatable minerals separate and distinct from deposits of leasable minerals.

Senator Watkins, in commenting on S. 3344 and suggesting that locations be allowed on the Naval oil shale reserves as well as on the public lands stated that:

The closing to further public entry of public lands embraced within an oil shale reserve for the Navy, may preclude the discovery and development of an oil reservoir or uranium body *that may underlie the oil shale strata. Such exploration could be permitted and the other minerals removed from this area without affecting the reserved mineral deposit, just as we are providing for multiple use of mineral lands in S. 3344.* Hearings on S. 3344, before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 83d Cong., 2d Sess., May 17-18, 1954, at 54-55 (italics added).

In a legal brief prepared by Mr. William G. Waldeck, a Colorado attorney, at the request of Senator Johnson, one of the coauthors of S. 3344, and included as Appendix A to the Senate Hearings on the bill, it was stated that:

Although carnotite uranium ore and oil and gas probably exist in the same area, still the deposits of each are lying, undoubtedly, at widely separate stratigraphic levels. There accordingly seems to be no reason why the same land area cannot be operated and used simultaneously for the production of oil and gas, as well as for uranium. For that reason the oil and gas lessees have not opposed the exploration of their leaseholds by the uranium miners, nor have they contested the validity of the claims staked by the miners. The primary interest of such leaseholders remains that their rights under the respective oil and gas leases be not abridged or impaired. *Senate Hearings* at 118.

The conclusion that the Multiple Mineral Development Act does not authorize the location of mining claims for minerals which are physically associated with Leasing Act minerals, or which may be mined and extracted only by significantly damaging or disturbing the Leasing Act minerals is confirmed by the legislation subsequently enacted by Congress dealing with uraniferous lignite.

Shortly after the enactment of the Multiple Mineral Development Act, deposits of uranium were discovered in South Dakota. In numerous instances the uranium was found on public lands classified as valuable for lignite coal. Normally, therefore, the Multiple Mineral Development Act would have permitted the location of uranium

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claims on these lands. However, in many cases the uranium occurred not only on lands valuable for lignite coal, but also as intermixed or commingled deposits with the coal.

The latter situation presented directly the question whether uranium was subject to location in situations where its mining and extraction would also involve the extraction or disturbance of lignite coal, a mineral reserved to the United States by the Multiple Mineral Development Act. Senator Case of South Dakota, who introduced S. 2629, a companion measure to H.R. 6994 which was later enacted as the Uraniferous Lignite Act of 1955, 69 Stat. 679 (1955); 30 U.S.C. sec. 541 (1964), accepted the view that uranium was not subject to location in such situations. Quoting from the report on the bill presented by the Department of the Interior, Senator Case stated, "There is no statutory provision governing the mining of uranium-bearing lignite." *101 Cong. Rec. 12300* (1955) (remarks of Senator Case).

In its report on H.R. 6994 the Department of the Interior took the position that the Multiple Mineral Development Act did not authorize the location of mining claims for minerals which occurred in physical association with minerals reserved to the United States. The report stated that:

The Act of August 13, 1954, and the Atomic Energy Act of 1954 established a policy to promote the exploration of fissionable source materials. In certain areas, particularly in North and South Dakota, uranium has been found in deposits of lignite and, following those discoveries, there has been a rush to stake claims. Although the two statutes cited above did establish a general policy, there is no statutory provision governing the mining of uranium-bearing lignite. Since we understand that methods are being developed by which lignite can be economically processed for the recovery of uranium, and since there is a pressing national need for uranium, we believe it essential that H.R. 6994 be enacted * * *. *Report of the Department of the Interior on S. 2278*, 84th Cong., 1st Sess., July 26, 1955. See also, *Report of the Atomic Energy Commission on S. 2278*, 84th Cong., 1st Sess., July 30, 1955.

In reporting the legislation to the Congress the House Committee on Interior and Insular Affairs stated:

In the specific instance, valuable deposits of uranium have been discovered in deposits of lignite coal in the public lands of the United States classified as or known to be valuable for coal subject to disposition under the mineral leasing laws and which are open to location and entry subject to the conditions and provisions of the Act of August 13, 1954 (68 Stat. 708), also known as Public Law 585 (83d Cong.) [the Multiple Mineral Development Act]. H.R. Rep. No. 1478, 84th Cong., 1st Sess. 2 (1955).

The report then expressly adopted the position taken by the Department of the Interior, stating:

Neither the mining laws of the United States, as amended, nor the mineral leasing laws provide specific authority for the disposal of either mineral where one is host to the other. *Ibid.*

The bill reported was enacted as the Uraniferous Lignite Act of 1955, 69 Stat. 679 (1955); 30 U.S.C. sec. 541 (1964), and authorized the location of mining claims for uranium commingled with lignite coal, while requiring the mining claimant to pay a royalty of 10 cents per ton on all coal stripped or mined in conjunction with the mining of uranium. By authorizing the location of claims for uranium commingled with lignite coal, the Congress expressly approved this Department's conclusion that, absent such special legislation, valid locations could not be made for locatable minerals which are physically associated with leasable minerals.

The courts long have recognized the power of Congress to legislate by acquiescence or implication as well as by specific legislation. *Zemel v. Rusk*, 381 U.S. 1, 11 (1965); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313-315 (1933); *Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-473 (1915); *Brennan v. Udall*, 379 F. 2d 803, 806-807 (10th Cir. 1967). Indeed, in the present situation, Congress has not only acquiesced in the Departmental interpretation, but has enacted that interpretation in the Uraniferous Lignite Act.

No similar legislation has authorized the location of valid mining claims for locatable materials occurring in physical association with oil shale deposits; and the Department of the Interior has continued to hold the view that, without authorizing legislation similar to the Uraniferous Lignite Act, mining claims located for minerals in physical association with oil shale are invalid. Replying to a question posed by Senator Mansfield in 1958 regarding the locatability of uranium associated with oil shale, Mr. Edmund T. Fritz, then the Deputy Solicitor of the Department, answered that:

The act of August 13, 1954 [the Multiple Mineral Development Act], provides for the location of mining law minerals, including uranium, when they occur in lands which also contain leasable minerals. However, since it expressly authorizes both the location and the leasing of such lands to different persons and provides for concurrent development by locator and lessees and the settlement of disputes between them, it is and has been the Department's view that where the locatable minerals and leasable minerals are combined in a single deposit so that the mining of the one necessarily involves the mining of the other, that law does not apply. That was the position which the Department took and with which Congress agreed with respect to commingled lignite coal and uranium, as the result of which the act of August 11, 1955 (69 Stat. 679; 30 U.S.C. § 541), provided for the location of such deposits, the locator to pay the United States a royalty on all coal extracted in the uranium mining operations. (Letter of Deputy Solicitor Fritz to Senator Mansfield, October 30, 1958.)

The oil shale lease form to be used in the competitive lease sales authorizes the leasing of "oil shale" and "associated minerals." The lease form defines those terms as follows:

Oil Shale. As used herein the term Oil Shale means sedimentary rock containing organic matter which yields substantial amounts, as determined by the Sec-

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retary, of oil or gaseous products by destructive distillation. The term includes all the minerals which are components of the rock, but does not include: (1) deposits of minerals which may be interbedded with the said rock and which the Secretary determines can be mined (i) without removal of significant amounts of organic matter and (ii) without significant damage to or disturbance of Oil Shale; and (2) deposits subject to lease as oil and gas, asphaltic materials, or coal.

Associated Minerals. As used herein the term Associated Minerals means deposits of minerals which, while not Oil Shale as herein defined, are interbedded or closely physically associated with the Oil Shale, other than oil and gas, asphaltic materials, or coal, which the Secretary determines fall within the provisions of this lease. The term also includes those minerals which are components of Oil Shale as herein defined but are not Shale Oil as herein defined.

In summary, I conclude that the mining claims which have been purportedly located on the lease sites, even if their validity is assumed, convey no rights to leasable minerals nor to locatable minerals which cannot be mined without extracting or disturbing the leasable minerals. Consequently, future mining operations on the lease sites for locatable minerals need not interfere with the mining and processing operations being conducted on oil shale and associated minerals. To the extent that minor incompatibilities may arise because of the mining of physically separate deposits of locatable and leasable minerals, these may be resolved by the procedures prescribed in section 6 of the Multiple Mineral Development Act, 68 Stat. 710-711 (1954), 30 U.S.C. sec. 526 (1964).

EDWARD WEINBERG,
Solicitor.

BONNEVILLE POWER ADMINISTRATION
HYDRO-THERMAL POWER PROGRAM

Bonneville Power Administration: Generally—Power: Purchase of for Resale

In implementing an integrated hydro-thermal power program for the Pacific Northwest, the Bonneville Power Administrator may enter into contractual arrangements, including the acquisition by purchase or exchange of thermal power, which are reasonably related to the statutory objective of providing the most widespread use of and benefit from the existing and authorized Federal power investment at the lowest practical cost.

M-36769

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To: SECRETARY OF THE INTERIOR.

SUBJECT: AUTHORITY OF BONNEVILLE POWER ADMINISTRATION TO PARTICIPATE IN AN INTEGRATED HYDRO-THERMAL POWER PROGRAM FOR THE PACIFIC NORTHWEST.

On October 18, 1968, the Administrator, Bonneville Power Adminis-

tration, transmitted for your information a draft of "A Ten-Year Hydro-Thermal Power Program for the Pacific Northwest." The transmittal memorandum outlined the proposed role of the Bonneville Power Administration in the initial implementation of the program, and requested your approval, which you gave on October 22.

This will confirm and explain the oral advice which we furnished to you and the Administrator at that time that Bonneville's participation in the proposed hydro-thermal power program generally as outlined in the memorandum is within the authority conferred by existing law.

The Pacific Northwest is a region of abundant hydroelectric power resources. At the present time some 97 percent of its generating capability comes from this source. The region, like all other areas of the country, however, is experiencing a steadily increasing demand for electric power. In the next decade it is estimated that regional peak loads will double from about 15,000 mw in 1967-68 to more than 30,000 mw in 1977-78. This demand soon will outreach the supply from hydropower resources alone.

Today, a major coal-fired steam generating plant is under construction at Centralia, Washington, to meet the initial deficit. Power experts representing all of the major systems in the region, working through the Joint Power Planning Council, calculate that in the decade of the 1970's the region will also require about five 1,000-megawatt thermal plants, probably nuclear, to supplement existing and projected public and private hydro capability. These new thermal plants will be constructed and operated separately or jointly by private and nonfederal public utility systems utilizing financial and engineering resources available to them.

For more than thirty years the Federal Government has been the major producer of hydroelectric power in the region, and this relative position in the hydro field will continue. The Federal Government also maintains a high-voltage regional transmission grid which interconnects all of the principal public and private generating resources with the major load centers. The Administrator's memorandum is addressed to the manner in which this Federal Columbia River Power System will cooperate with other utility systems to integrate the new thermal generation into the regional power supply picture, having due regard for the proper roles of all segments of the power industry.

The hydro-thermal program is based on the fact that the most economic use of the region's hydropower and the thermal generation which will be developed, is by combining their operation, so that the large-scale thermal generating units are operated principally to supply base, or round-the-clock, loads, and the hydro units are operated to serve the variable or peak loads and to provide reserves for emergencies and scheduled outages. The program also recognizes the advantages that all participants derive from pooling needed increments in gen-

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erating capacity, pooling reserves to meet outages and unanticipated load growth, and pooling transmission requirements.

The Administrator's memorandum outlines a variety of contractual arrangements by Bonneville with the owners of the thermal plants, all such arrangements having the common objective of distributing widely throughout the region the benefits of the steam-hydro partnership.

Bonneville proposes to supply peaking, reserve and transmission services to privately owned steam plants, for which it would be compensated either in energy or money. It also proposes to acquire on a short-term, time exchange basis a declining percentage of the output of each such plant. This will enable the plants to be scheduled on the basis of regional needs rather than just the needs of the owners, thereby achieving a more economical regional power supply. Bonneville further expects to acquire on a long-term basis at cost the output of a plant or of portions of plants attributable to public agency ownership. It will meld all the acquired power with that produced by federal hydro plants and market this combined product to its customers at uniform rates.

The authority of the Bonneville Power Administrator, under the supervision and direction of the Secretary of the Interior, to dispose of the output of Federal hydroelectric projects in the Pacific Northwest derives primarily from the Bonneville Project Act of 1937, as amended, 16 U.S.C. secs. 832 *et seq.*, together with the Reclamation Laws as amended and supplemented (particularly section 9(c) of the Reclamation Act of 1939, 43 U.S.C. sec. 485h(c)) and section 5 of the Flood Control Act of 1944, 16 U.S.C. sec. 825s. All of these acts have a common purpose and should be read *in pari materia* to ascertain the intent of Congress. 41 Op. Atty. Gen. 236 (1955), *in re disposition of power from Clark Hill project; letter of Secretary Udall to Chairman Aspinwall, May 15, 1965, in re basis for establishing power rates for the Colorado River Storage Project.*

The authority of Interior's power marketing agencies to acquire thermal power and energy by purchase as well as exchange in order more effectively to utilize the Federal hydro capability to serve customer requirements in accordance with the mandate of these statutes, is well established. Such purchase programs have been carried on for many years by the Bureau of Reclamation as part of the Central Valley and Missouri River Basin Project operations, by the Southwestern Power Administration, and by the Southeastern Power Administration. Funds for such purchases are regularly appropriated to these agencies in annual appropriation acts. The precedents affirming this authority have most recently been discussed in the January 2, 1968 memorandum of the Assistant Solicitor, Power, reviewing the con-

tract by Bonneville and the Bureau of Reclamation to purchase power from the Centralia coal plant, and the February 19, 1962 memorandum of the Regional Solicitor, Portland, discussing the authority of the Bonneville Power Administration to purchase energy from the new production reactor at the Hanford project of the Atomic Energy Commission. There is no need to repeat here what was said in those memoranda.

The principal legal question posed by the Administrator's memorandum, therefore, is not whether the Bonneville Power Administration has authority to purchase power generated at nonfederal steam plants, but whether the contractual arrangements outlined therein for effecting such purchase constitute a proper exercise of this authority. For the reasons set forth herein, we conclude that they do.

The power marketing statutes under which Bonneville operates lay down a number of marketing policies to assure that the electric power and energy from the Federal projects will be used to enhance the economic welfare of the Pacific Northwest and the general public thereof. Thus section 5 of the Flood Control Act of 1944 directs the Secretary, subject to the requirements for repayment of Federal construction and operating costs, and giving preference to public bodies and cooperatives, to transmit and dispose of the power and energy of Federal reservoir projects "in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles." The Bonneville Project Act imposes a similar directive in a number of places: Section 2(b) authorizes the construction of transmission and interconnection facilities in order "to encourage the widest possible use of all electric energy that can be generated and marketed and to provide reasonable outlets therefor, and to prevent the monopolization thereof by limited groups;" section 4(a) directs that preference in the disposition of electric energy be given to public bodies and cooperatives in order "to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers;" and section 6 provides that rate schedules "shall be fixed and established with a view to encouraging the widest possible diversified use of electric energy" and to "encourage the equitable distribution" of Bonneville energy.

The Administrator has concluded that in the future the best use of the Federal hydro power generating facilities would be to operate them in concert with huge thermal base-load facilities in order that the total electric needs of the region can be supplied at the lowest possible cost to the ultimate consumer. The hydro power resource of the region is no longer adequate to meet the forecasted electric energy needs of the region. If these Federal facilities are to make their maximum contribution to the region's welfare and economy in the future,

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as they have in the past, then their method of operation will need to change with the changing conditions confronting the region. If the entire region is to benefit equitably from this Federal investment in facilities, these facilities must make their contribution to supplying the energy needs of the region in a manner which properly and economically blends their output and capacity with that of the proposed thermal plants. The Administrator has determined that the contractual arrangements outlined in the memorandum will accomplish these results.

There are many ways in which the output of the Federal system could be marketed. But within such limits as may be prescribed by Congress, the Administrator is free to select the various means which he believes will achieve Congressional objectives. This general rule of law is expressly confirmed in section 2(f) of the Bonneville Act, which confers upon the Administrator, subject to the provisions of the Act, broad authority to negotiate and enter into such contracts, agreements and arrangements as he finds necessary or appropriate to carry out the purposes of the Act.¹ Under this provision, the Administrator has wide discretion regarding the terms and purposes of contractual arrangements, similar to that necessary in the conduct of private business operations. See *Solicitor's Opinion*, M-35012 (Supp.) (December 17, 1947); Dec. Comp. Gen. B-105397 (September 21, 1951); Dec. Comp. Gen. B-149016, B-149083 (July 16, 1962).

The contractual arrangements proposed by the Administrator in the exercise of this broad discretion are reasonably related to the statutory objective of promoting the most widespread use of and benefit from the existing and authorized Federal power investment at the lowest practical cost. We conclude, therefore, that the program outlined in the memorandum is authorized by law.

EDWARD WEINBERG,
Solicitor.

I CONCUR:

STEWART L. UDALL, *Secretary of Interior.*

MARVEL MINING COMPANY V. SINCLAIR OIL AND GAS COMPANY
ET. AL. UNITED STATES V. MARVEL MINING COMPANY

A-30871

Decided December 30, 1968

Mining Claims: Discovery

To constitute a valid discovery upon a lode mining claim there must be exposed within the limits of the claim a lode or vein bearing mineral which

¹The authority of the Administrator under the act was transferred to the Secretary by Reorganization Plan No. 3 of 1950, 64 Stat. 1262, and has been delegated to the Administrator by Secretarial Order No. 2860, 27 F.R. 591, as amended.

would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is only a showing which would warrant further exploration in the hope of finding a valuable mineral deposit.

Mining Claims: Determination of Validity—Rules of Practice: Evidence

Where the validity of a mining claim as of a date prior to examination of the claim to determine its validity is at issue, the date of the exposure of a mineralized area, not the date of the sampling of the mineralization, is determinative of the admissibility of assay reports and other data as evidence that there was or was not a discovery upon the claim at the critical date; where a witness in a mining contest fails to distinguish between mineralization exposed prior to the crucial date and that exposed thereafter and to explain the significance of each as it relates to the vital issue, his opinion that there is a discovery at the present time is of little or no value in establishing the date of the alleged discovery.

Contests and Protests: Generally—Mining Claims: Contests—Rules of Practice: Private Contests

In a private contest initiated by a mining claimant to determine, as between himself and an oil and gas lessee, the right to leasable minerals within the limits of a mining claim, it is incumbent upon the mining claimant to show that a discovery was made upon the claim at a time when such discovery would vest in him a right to the leasable minerals, and if he is unable to sustain this burden, the contest is properly dismissed notwithstanding any acknowledgment on the part of the United States of a present discovery on the claim.

Mining Claims: Patent—Patents of Public Lands: Reservations—Multiple Mineral Development Act: Applicability

Where a discovery of a valuable mineral deposit within the limits of a mining claim prior to the filing of an oil and gas lease offer covering the land embraced in the claim is not established in a private contest instituted by the claimant for the purpose of determining his right to the leasable minerals, a patent to the mining claim issued after August 13, 1954, must contain a reservation to the United States of all leasing act minerals to the extent required by the act of August 13, 1954.

Mining Claims: Determination of Validity—Rules of Practice: Generally

The Secretary of the Interior may inquire into all matters vital to the validity or regularity of a mining claim at any time before the passage of legal title, and the failure of the Government to contest a mining claim after its mineral examiner has examined the claim in response to an application for patent and has recommended that the claim not be contested is not a bar to further inquiry into the validity of the claim if, upon further review of the case, it appears that there has not been a discovery.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Marvel Mining Company has appealed to the Secretary of the Interior from a decision dated July 20, 1967, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner dismissing its private contests Colorado 295, 296 and 297 against the record title holders of oil and gas leases Denver

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054529, Colorado 015656 and Colorado 050488, rejecting its patent application Colorado 065583 as to the Winner and Silvertone Nos. 1, 4, 5 and 6 lode mining claims in Ts. 44 N., Rs. 19 and 20 W., N.M.P.M., Colo., and declaring those claims null and void pursuant to Government contest Colorado 313.

The record shows that the Winner and Silvertone Nos. 1 through 6 lode mining claims, embracing portions of sec. 30, T. 44 N., R. 19 W., and secs. 25 and 26, T. 44 N., R. 20 W., were located on September 14, 1940, by George W. Snyder and John T. Dunning, predecessors in interest of the appellant, and that amended locations of the same claims were made by the appellant on August 20, 1960. Between the dates of the original and amended locations the lands covered by the mining claims were withdrawn from appropriation under the mining laws by Public Land Order No. 459 of March 25, 1948 (13 F.R. 1763), and were restored to entry by Public Land Order No. 698 of February 12, 1951 (16 F.R. 1638).

On June 20, 1961, appellant filed application Colorado 065583 for patent to the lands embraced in its claims, stating therein that the claims were valuable for copper, silver, vanadium and uranium.¹ By a decision dated June 29, 1962, the Colorado land office advised appellant that the portion of the Winner mining claim lying in the W $\frac{1}{2}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ sec. 26, T. 44 N., R. 20 W., conflicted with oil and gas lease Colorado 050488, issued as of February 1, 1956, pursuant to an offer filed on October 18, 1955, that the portions of the Winner and Silvertone Nos. 1 and 2 claims lying in the E $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 26 and W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 25, T. 44 N., R. 20 W., conflicted with oil and gas lease Colorado 015656, issued as of November 1, 1956, pursuant to an offer filed on October 15, 1956, that those portions of the Silvertone Nos. 2 to 6 claims lying in the E $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ sec. 25, T. 44 N., R. 20 W., and in sec. 30, T. 44 N., R. 19 W., conflicted with oil and gas lease Denver 054529, issued as of November 1, 1948, pursuant to an offer filed on October 30, 1946, that the records of the Geological Survey show that lease Denver 054529 contains valuable deposits of natural gas and that the mineral patent applicant would be required to resolve the conflict either by relinquishing all claim to any leasing act minerals within the limits of the claims or by establishing in itself inchoate rights to such minerals superior to the rights of the lessees by bringing private contests against the lessees.

Appellant elected to establish its right to the leasable minerals, and, on August 6, 1962, it initiated contest No. 295 against Sinclair Oil

¹ That is, according to the land office decision of June 29, 1962, the hearing examiner's decision, and the Bureau's decision of July 20, 1967, the appellant filed its application for patent on June 20, 1961. A copy of appellant's patent application contained in the record (Ex. 9) bears the date of July 28, 1961. The relationship between the two dates is not explained.

and Gas Company and Pan American Petroleum Corporation, co-owners of lease Colorado 015656, contest No. 296 against California Oil Company, owner of lease Colorado 050488, and contest No. 297 against Belco Petroleum Corporation, Reynolds Mining Corporation, Delhi-Taylor Oil Corporation, Western Natural Gas Company, John K. Schemmer, Roland Houck and Harold T. White, Jr., owners of lease Denver 054529. On April 11, 1963, while the private contests were still pending, the Government filed a contest complaint against the Winner and Silvertone Nos. 1, 4, 5 and 6 claims in which it charged that no valuable mineral deposits had been discovered on those claims. By a hearing examiner's order of July 5, 1963, all of the contests were consolidated for hearing purposes, and, on September 9, 10, and 11, 1963, a hearing was held at Salt Lake City, Utah, for the purpose of receiving evidence bearing upon the issues raised by the complaints.²

The testimony presented at the hearing has been summarized at considerable length in the decision of the hearing examiner and on a more modest scale in the decision of the Office of Appeals and Hearings. It will not be repeated here except to the extent to which reference to portions of the testimony may be useful in clarification of the points which are discussed.

At the outset of his decision dated May 10, 1965, the hearing examiner explained the basic requirements of the mining laws which were determinative of the rights of the respective parties, pointing out that the discovery of a valuable mineral deposit is essential to the validity of a mining claim, that prior to making a discovery any qualified person may enter on public lands to explore for a valuable deposit, that while he remains in possession, diligently working toward a discovery, he is entitled to be protected for a reasonable time against forcible, fraudulent and clandestine intrusions upon his possession but that, prior to discovery, the locator's right is limited to such rights as may be upheld against a mere intruder or against one having no higher or better right than his own and that he acquires neither a right of possession nor any other right which may be successfully asserted against the paramount title of the United States. He then set forth the elements of a discovery of a lode deposit as prescribed in *Castle v.*

² Belco Petroleum Corporation, Reynolds Mining Corporation, Western Natural Gas Company, John K. Schemmer, Roland Houck, and Harold T. White, Jr., named as contestants in contest No. 297, did not respond to the complaint, and, in a decision dated June 12, 1963, the hearing examiner took the allegations of the complaint as confessed as to each of those parties and closed the case to that extent. In the same decision the hearing examiner denied Delhi-Taylor's motion to dismiss that contest.

No appearance was made in behalf of Pan American Petroleum Corporation, it having been agreed by stipulation that the questions of law and fact in contest Nos. 296 and 313 were identical and that it should not be necessary for either the contestant or the contestee in No. 296 to make an appearance or to offer any evidence in that contest. Sinclair and Delhi-Taylor were represented at the hearing by counsel.

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Womble, 19 L.D. 455 (1894), and *Jefferson-Montana Copper Mines Company*, 41 L.D. 320 (1912).³

The hearing examiner considered first the respective rights of the parties to the private contests. As to such rights, the hearing examiner found that it was necessary for the mining claimant to show a discovery prior to October 30, 1946, the date of filing of lease offer Denver 054529, in order to establish the superiority of its claim to the leasable minerals in the land involved in contest No. 297 and that it was necessary to show a discovery prior to March 31, 1948, the effective date of Public Land Order No. 459, on each of the claims involved in contests Nos. 295 and 296 in order to demonstrate superior claim to the disputed minerals in the land embraced in those claims.⁴

With respect to contest No. 297 (Silvertone Nos. 2 through 6) the hearing examiner found that the only testimony relative to the period prior to October 30, 1946, was that of George W. Snyder, one of the two original locators of the claims. Snyder, he noted, testified to a discovery shaft on each claim where showings of copper, silver and vanadium and some small showings of uranium were found, but he stated that no samples of ore or rock were taken out of the discovery shafts, that, other than possibly an assay on the bedded deposit of vanadium on the Silvertone No. 3 claim, the claims were never assayed while he held them (from 1940 to 1953), and that he "really didn't know what was on the claim" (Tr. 285, 287, 289, 320-322). While Snyder testified that ore was shipped from the Silvertone No. 3 by his son-in-law, H. H. Rutledge, the hearing examiner observed, he did not see it shipped, and his estimate of the quantity of ore removed was based on his observation of the place from which it was taken. Moreover, whereas Snyder estimated that 800 tons of ore were removed, the identified shipments of ore, he found, aggregated less than 30 tons. The hearing examiner concluded that Snyder's testimony fell far short of establishing a discovery before October 30, 1946, that there was no

³ "[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met." 19 L.D. at 457; *Chrisman v. Miller*, 197 U.S. 313, 322 (1905); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963); *United States v. Coleman*, 390 U.S. 599, 602 (1968).

Where the location is of minerals in a lode or vein,

"1. There must be a vein or lode of quartz or other rock in place;

"2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;

"3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine." 41 L.D. at 323.

⁴ The hearing examiner explained that the withdrawal of the land under Public Land Order No. 459 had the effect of extinguishing all invalid mining claims within the withdrawn area and that the subsequent revocation of the withdrawal by Public Land Order No. 698 made possible the subsequent location of new mining claims but did not revive any rights under mining claims that were extinguished by the withdrawal by reason of lack of discovery on the effective date of the withdrawal.

probative evidence in the record that the claims involved in contest No. 297 were valid as of that date, and that the private contest must therefore be dismissed as to such claims.

For the same general reasons he concluded that no discovery was shown on the remaining claims prior to March 31, 1948.

In considering the merits of the Government's contest the hearing examiner outlined the testimony of each of the witnesses appearing at the hearing, from which testimony he concluded that it was clear that the evidence warranted nothing more than the further exploration of the contested mining claims for evidence of valuable mineralization. This, he held, was not enough to satisfy the requirements of a discovery. In reaching this conclusion he distinguished between exploration for minerals and the discovery of a valuable mineral deposit, pointing out that exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals, that where minerals are found it is often necessary to do further exploratory work to determine whether those minerals have value, that where the minerals are of low value there must be further exploration to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine, and that it is only when the exploratory work shows this that a prudent man would be justified in going ahead with his development work and that a discovery has been made.

Throughout the hearing, and in its appeals to both the Director, Bureau of Land Management, and the Secretary, appellant has challenged the propriety of the test of discovery imposed by the hearing examiner. In essence, appellant argues that there is no valid distinction between exploration and development as they relate to discovery under the mining laws, that proof of present economic feasibility is not a part of the prudent man test of *Castle v. Womble*, *supra*, and that all of the seven claims in question are on the same formation and comprise parts of a group which, for proper development, should be patented and developed as a unit.

In attacking the distinction between exploration and development, appellant has contended from the outset that no clear line can be drawn between that which constitutes exploration and that which constitutes development. If the present showing of mineralization does not justify a person in the expenditure of further money in a reasonable expectation of developing a valuable mine, appellant asks, how can it possibly be said to justify further exploration? Since the Government's expert witnesses concede that further exploration is justified, appellant argues, it must follow that there is a reasonable expectation that such exploration will lead to the development of a valuable mine.

Appellant's argument is not new, however, and the hearing examiner's distinction between exploration for minerals and the discovery

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of a valuable mineral deposit is in accord with a long line of Departmental decisions, recently affirmed by the courts, which have held that evidence of mineralization which may justify further exploration in the hope of finding a valuable mineral deposit is not synonymous with evidence of mineralization which will justify the expenditure of labor and money in attempting, with a reasonable prospect of success, to develop a valuable mine and that only the latter constitutes "discovery." See, e.g., *United States v. Amcol Mining and Milling Company*, A-28405 (June 27, 1960); *United States v. Clyde R. Altman and Charles M. Russell*, 68 I.D. 235 (1961); *United States v. Edgecumbe Exploration Company, Inc.*, A-29908 (May 25, 1964); *United States v. Ford M. Converse*, 72 I.D. 141 (1965), affirmed in *Converse v. Udall*, 399 F. 2d 616 (9th Cir. 1968); *United States v. Lucille Lundy*, A-30724 (June 30, 1967); *United States v. Kenneth O. Watkins and Harold E. L. Barton*, A-30659 (October 19, 1967); *United States v. Ralph Fairchild*, A-30803 (January 19, 1968); *United States v. Jesse W. Crawford*, A-30820 (January 29, 1968).

The propriety of this distinction was recently expressly recognized in *Converse v. Udall*, *supra*, in which the court stated:

Converse attacks the Secretary for drawing a distinction between "exploration," "discovery," and "development." But the authorities we have cited show that there is a difference between "exploration" and "discovery." * * * If the latter word were taken literally, then the finding of *any* mineral would be a "discovery." Webster, 2d Ed., defines "discover" as "to make known the identity of, * * * by laying open to view, as a thing hidden or covered, to expose; to disclose; to bring to light." But, as we have seen, that alone is not enough. On the other hand, Webster defines "explore" as "to seek for or after, to strive to attain by search." This is exactly what a prospector does, both before he finds the first "indications * * * of the existence of lodes or veins" (*United States v. Iron Silver Mining Co.*, *supra*, 128 U.S. at 683, 9 S. Ct. at 199) and thereafter until he finds enough mineralization to meet the legal test of a discovery. It is true that some of the cited cases say that "development" and "exploration" mean the same thing (*Charlton v. Kelly*, *supra*, 156 Fed. at 436), or speak of "exploration" after discovery (*Lange v. Robinson*, *supra*, 148 Fed. at 804). But in each of these cases, the court was talking about further work to be done after a sufficient discovery had been made, work which could be called "exploration" or "further exploration," or could also be called "development." They do not support the attack here made upon the distinction between the exploration work which must necessarily be done before a discovery, and the discovery itself, which is what the Secretary talks about when he distinguishes between "exploration" and "discovery." The real question here is not whether there is such a distinction, but whether Converse's exploration had resulted in a legal discovery. (399 F. 2d at 620-621; emphasis in original.)

We are not entirely sure what appellant means when it says that "proof of present economic feasibility" is not a competent condition which attaches to the prudent man test of discovery. If appellant means that the prudent man test does not require proof that actual

mining will positively result in a profitable operation, it is quite correct, and it will find nothing to the contrary in the decisions of this Department. If appellant means that the practical economics of a proposed mining venture are immaterial to the determination of the validity of a mining claim, it is plainly in error, for the prudent man test is, in essence, a test of economic feasibility. As the Supreme Court recently observed *United States v. Coleman*, *supra*, fn. 4.

* * * Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for any other purpose. [Footnote omitted.] The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the costs of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact. (390 U.S. at 602-603.)

That the test of profitability is applicable to all minerals, and not just to minerals of wide-spread occurrence has been expressly recognized in *Converse v. Udall*, *supra*, in which the court said:

We think it clear that the marketability test is applicable to all mining claims. We do not agree with Converse's argument that the last sentence that we have quoted [from *United States v. Coleman*, *supra*] means that marketability has no relevance in a case where the discovery is of precious metals. Such a holding would be contrary to Mr. Justice Field's rationale in *United States v. Iron Silver Mining Co.*, *supra* (128 U.S. at 683, 9 S. Ct. 195) and to the rationale of the prudent man test itself. It, too, concerns itself with whether minerals are "valuable in an economic sense." And that is the way that courts have long interpreted it. * * *

* * * Perhaps we could phrase the test this way: When the claimed discovery is of a lode or vein bearing one or more of the metals listed in 30 U.S.C. § 23, the fact finder, in applying the prudent man test, may consider evidence as to the cost of extraction and transportation as bearing on whether a person of ordinary prudence would be justified in the further expenditure of his labor and means. But this does not mean that the locator must prove that he will in fact develop a profitable mine. (399 F. 2d at 621-622.)

As we pointed out recently in *United States v. W. S. Pekovich*, A-38068 (September 27, 1968):

The Department does not require * * * a mining claimant to prove the discovery of a valuable mineral deposit by showing that he is actually engaged in profitable mining operations or even that profitable operations are assured. It does, however, require a showing of a prospect of profit which is sufficient to induce reasonable men to expend their means in attempting to reap that profit by extracting and marketing the mineral. In other words, a distinction is made between that evidence of value which will induce men to exploit the mineral wealth of land and that which will entice them to invest their money only in gaining control over land in the hope or expectation that at a future date the land will become valuable for the minerals which it contains. * * *

While appellant vigorously attacks the test of discovery that was employed by the hearing examiner, it does not appear to argue that under the criteria which we have determined to be the proper measure

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of discovery the hearing examiner should have found the claims valid. Indeed, it is difficult to see how the hearing examiner might have reached a different conclusion from that which he did reach upon the basis of the evidence of record.

Assay reports for 21 mineral samples taken from the claims by witnesses for the Government showed mineralization ranging from no measurable quantity to an isolated high of 7.70 ounces of silver per ton of material (the next highest sample being 3.30 ounces), from .01 to 1.15 percent copper, and from zero to 1.62 percent vanadium pentoxide, as well as insignificant amounts of uranium oxide (Exs. 13 and 25). Assay reports for 78 mineral samples taken by witnesses for the appellant disclosed mineral content ranging as high as 10 ounces of silver per ton, 5.45 percent copper and 2.58 percent vanadium pentoxide (Exs. E through M).⁵

What is the significance of the results obtained from this sampling? In *United States v. Frank Coston*, A-30835 (February 23, 1968), where witnesses for the mining claimant were far more explicit in explaining the economics of the mining venture which they supported than were appellant's witnesses in this case, we stated:

* * * In contemplating the removal of ore from a vein buried in the earth, * * * it will obviously be necessary to have some estimate of the extent and quality of the ore body before it can be determined that the commencement of mining operations is economically justifiable. Thus, where a vein bearing ore of a minable quality has been found, geologic inference may be relied upon to establish its extent and its likely potential value, but, where the quality of the vein exposed is erratic or uncertain, the quantity of the material contained therein is meaningless, and there is no basis for a reasonable estimate of its value.

The basic problem here lies in the failure of the claimant to establish the quality of any ore the quantity of which may be estimated. Appellant's expert witness believed that there are many thousands of tons of ore in the claim richer than the best sample thus far obtained, but he could not give any estimate as to the quantity of \$18.20-a-ton ore or of any other quality ore that may be contained in the exposed veins.

⁵ Twelve samples taken by the Government's witness, Daniel Y. Meschter (Ex. 13) showed generally higher values than did nine samples taken by the Government's witness, James McIntosh. Meschter's best sample, taken from the Silvertone No. 3 claim, had a silver content of 7.70 ounces per ton, while the highest silver content reported by McIntosh (for a sample taken from the Silvertone No. 4 claim) was 2 ounces. The difference between the values that they found may be attributed in some measure to the fact that Meschter was accompanied in his examination of the claims by Duncan E. Harrison, an officer of, and mining superintendent for, appellant Marvel Mining Company, who observed his sampling and had an opportunity to indicate points from which samples should be taken (Tr. 109-110, 161-162), whereas McIntosh was unaccompanied when he made his examination of the claims (Tr. 239).

Although appellant reported several samples assaying higher in copper values than any taken by the Government's witnesses, only two of sixty samples which appellant had assayed for silver and copper (Exs. F through K and M) showed higher silver values than Meschter's best sample, and appellant's next best sample contained approximately half as much silver as the first two. Analysis of the results of all of the sampling conducted by both parties reveals evidence of mineral values that is consistent within tolerable limits of variance.

The same problem exists here, perhaps more acutely. The following testimony of appellant's witness, Harrison, is illustrative of the difficulty encountered in attempting to make any determination of the economic feasibility of the development of these claims:

Q. [by Mr. Meach, counsel for the Government] Do you—does Marvel have any figures representing the average grade or the average values of a ton of this material that is going to be mined within the fault zone?

A. No.

Q. Now, I may—as with many of these questions, I may be off base, but how does Marvel or how would anyone reach any decision concerning the expenditure of time and money in an attempt to develop a paying mine without having some figures on the average grade or values of the materials that they were going to mine?

A. We just haven't progressed that far; we haven't started that phase of our study on the property yet.

Q. Would you do that—you would, I suppose, make that study before you actually started mining?

A. I'm—yes, of course we would, and I'm getting more and more convinced that it is very feasible to take these very low grade properties and make money on them.

Q. Then, of course, you wouldn't [sic] have any figures on the quantity of the material within these claims containing an average or representative grade or value.

A. No.

Q. And, again, I assume you would want to get those figures before you actually started mining?

A. No; I think those figures would come after we have developed the mine.

Q. * * * If a reasonable prudent man was going to spend some time and money in an effort to develop a paying ming [sic] on these properties, wouldn't he want to know the type of mining operation that could be used there?

A. No, I don't think so, not until he knows what—

Q. Until he knows what is there?

A. No, until he knows what his plans are, what he is going to do.

Q. And do you have any figures, does Marvel have any figures on the number of tons of material that will be mined per day from these claims?

A. Well, I'll say this is way far-fetched, way beyond—

Q. Well, can you actually say that "we haven't given it any consideration as yet"?

A. Why, no, we haven't given it any consideration as yet.

Q. All right. Then, of course, you wouldn't be able—or, you haven't given any consideration to the costs of mining, both direct and fixed, or costs of transportation, or costs of milling, I suppose?

A. No.

Q. That would be something that would follow after you considered the type of mining operation?

A. Well, can you tell me of any mine that has those figures before—at the stage we are at now? Tr. 92-96.

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The only testimony given at the hearing bearing directly upon the economic feasibility of development of appellant's claims was that of the Government's witnesses. The Government's witness, Meschter, estimated the cost of mining to be \$12 to \$15 per ton of raw material removed and the cost of hauling the material to the nearest railroad to be approximately \$4 per ton (Tr. 197), while his estimate of the value of the ore found on the claim, based upon the weighted average of 6 samples taken from the Silvertone vein was \$9.94 per ton (Ex. 14; Tr. 173-176). The Government's witness, McIntosh, estimated the value of the ore with a mineral content equivalent to that of his best sample to be \$10.11 per ton of material, and he estimated the cost of mining that material to be \$10 per ton (Tr. 257). This did not include transportation costs.

At the hearing appellant challenged the soundness of the Government's estimates of mining costs. Appellant's witness, Harrison, denied that the method of mineral extraction assumed by the Government's witnesses in their estimates of mining costs was contemplated. He stated that the proposed method of mining the claims would involve the use of a new leaching system which would yield a product having a higher value in copper than that envisioned by the Government's witnesses and which would also permit recovery of the silver and vanadium present without milling (Tr. 379-384). However, while quoting market prices for the end products of the leaching system, Harrison gave no estimate of the costs to be anticipated in obtaining those products.⁶ Thus, there is in the testimony of appellant's witnesses no refutation of the basic assertion of the Government that a basis has not been shown for contemplating the development of a mine on any of the claims contested by the Government.

It is axiomatic, we believe, that prudent men do not invest their money in attempting to develop a mine without an idea of the costs to be anticipated and without some evidence that the mineral which

⁶ In his most elaborate discussion of mining costs, Harrison testified as follows:

"Q. [by Mr. Waldeck, counsel for the mining claimant] From your knowledge of this technology for the recovery of values, mineral values on this property, from your knowledge of the deposits that are in evidence on these claims, from your knowledge of the costs of mining and the costs of doing these things, do you believe that you have a reasonably good prospect for success, economic success, in this venture?"

"A. I certainly do."

"Q. You are, are you not, acquainted with costs of mining in the area?

"A. Yes."

"Q. Do you know of transportation costs?

"A. Yes."

"Q. I presume you are acquainted with weather conditions, working conditions?

"A. Yes."

"Q. Have all of these factors been considered by you in reaching your opinion?

"A. Yes." Tr. 383-384.

Apart from the fact that the witness revealed nothing with respect to the costs and conditions with which he claimed familiarity, his testimony does not seem altogether consistent with earlier testimony, *supra*, which he gave as an adverse witness for the Government.

they seek to exploit exists in such quality and quantity as to permit the recovery of their capital outlay with a profit. Adventurous men, of course, do risk their resources in exploring for minerals with great hopes of an abundant return, even though the assurance may be nil. This initial risk is as vital to the continuity of the mining industry as any other step taken toward production, but, as we have already made clear, it is not until exploration has progressed to a point where a claimant is prepared to take steps which the appellant has indicated it has no present reason to contemplate that a discovery has been made and that the claimant acquires a right in the land superior to that of the United States.⁷ Thus, we find that the evidence fully supports the hearing examiner's finding that "the evidence presented by the contestee warrants nothing more than the further exploration for a valuable deposit," and we find the conclusion unavoidable that a discovery has not been demonstrated on the Silvertone Nos. 1, 4, 5 or 6 or the Winner mining claims⁸ so far as the Government contest is concerned.

⁷ When questioned with respect to proposed development of the claims, appellant's witness, Harrison, testified as follows:

"Q. [by Mr. Waldeck] What plan of development would you have for these—or, do you have for these claims?

"A. Well, as I explained here one day, I am a firm believer in going down underground and having a look to see what is there. My plan of development would be to sink a shaft.

"Q. And where would you sink the shaft?

"A. I would sink on Silvertone No. 3—it's—

"Q. Would you follow the vein in sinking the shaft?

"A. Yes.

"Q. Now, do you have mineral that you would follow from the time you started sinking the shaft?

"A. Yes. That is one of my philosophies of mining, following the mineral, stay with it. If it comes outside and goes up a tree, go after it.

"Q. Do you know of let's say this: Is there a showing of mineral on the No. 3 claim that you feel is worthwhile to follow?

"A. Yes, both copper and silver, a very—and vanadium, both of them.

"Q. Do you think that following this mineral will give you a reasonable expectation of developing pay ore?

"A. Yes.

* * * * *

"Q. All right. Now, after you sank the shaft to the depth on Silvertone No. 3—and I presume you would be going for the zone of secondary enrichment—

"A. Right.

"Q. —what would you do after you bottomed your shaft?

"A. We would drift. We would drift both directions, start driving drifts both directions from the bottom of that shaft.

"Q. If this drift was continued in both directions far enough, would it, following the vein and area of secondary enrichment, cover all or a portion of these claims?

"A. I would say the drift starting from No. 3 going in an easterly direction, that we wouldn't push that one too far, because it probably would be more advantageous to go over on Silvertone No. 5 and sink another shaft over there. Our drifting from the one on No. 3 would be mostly in a westerly direction. If at this time it looked encouraging, I would advocate going over and sinking another shaft on No. 5, and drifting westerly from it, and easterly under Silvertone No. 6." Tr. 376-378.

Although the witness described the proposed activity as "development" (Tr. 379), the purpose of such activity clearly would be to ascertain whether or not the vein traversing the claims contains mineral of such quality and in such quantity as to justify further expenditure in attempting to develop a valuable mine. This is exploration.

⁸ The Office of Appeals and Hearings properly held that there must be a discovery upon each mining claim for which patent is sought and that a discovery on one claim does not

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Since the Silvertone Nos. 2 and 3 claims were not included in the Government contest, they are of concern here only in connection with the private contests involving those claims, *i.e.*, Contests Nos. 295 and 297. Contest No. 295 involved the conflict of a portion of the Silvertone No. 2 with oil and gas lease Colorado 015656, applied for on October 15, 1956, and Contest No. 297 the conflict of the remaining portion of the Silvertone No. 2 and all of the Silvertone No. 3 with oil and gas lease Denver 054529, applied for on October 30, 1946. The issue in these contests was whether or not a discovery had been made upon the claim or portion thereof involved prior to removal of the land from the operation of the mining laws either by the withdrawal order of March 25, 1948, or by the earlier filing of oil and gas lease offer Denver 054529 on October 30, 1946, as the case might be.⁹ We turn to examination of the evidence bearing upon that question.

The hearing examiner's conclusion that a discovery on the Silvertone Nos. 2 and 3 claims prior to October 30, 1946, was not established appears to have been premised upon his finding that the only testimony relative to the period prior to the filing of oil and gas lease offer Denver 054529 on that date was that of George W. Snyder, previously cited, which testimony failed to reveal adequate knowledge of the mineral values found on the claims to sustain a finding that there had been a discovery. Because there is possibly some ambiguity in this finding, we deem it appropriate to elaborate somewhat more upon this point.

In *United States v. Ford M. Converse, supra*, we considered the problem which arises in determining the admissibility of evidence of a discovery where mineral samples are taken several years after the date as of which a discovery must be shown. In upholding the propriety of the hearing examiner's admission of assays of ore samples taken by the Government after July 23, 1955, the critical date in that case,

inure to the benefit of an adjoining claim. Thus, in the absence of the exposure on the Winner and Silvertone Nos. 1, 4, 5 and 6 claims of mineralization sufficient to satisfy the requirements of a discovery, it is immaterial, so far as those claims are concerned, whether or not there has been a discovery on the Silvertone No. 2 or No. 3 claim. See *United States v. Kenneth O. Watkins and Harold E. L. Barton, supra*; *United States v. Frank Coston, supra*; *United States v. George A. and Dorothy Relyea*, A-30909 (June 25, 1968).

⁹ All of the land in the Silvertone No. 3 and part of that in the Silvertone No. 2 were closed to mining location after October 30, 1946, as indicated earlier. The land in the remaining portion of the Silvertone No. 2 was closed to mining location after March 25, 1948; but was restored to such entry in 1951 by Public Land Order No. 698, and a valid location could have been made on that portion of the claim at any time thereafter. However, no new location of the Silvertone No. 2 was purportedly made until August 20, 1960. By that time the act of August 13, 1954, had been enacted, section 4 of which provided that every mining claim located thereafter should be, prior to issuance of a patent, subject to a reservation of all leasing act minerals to the United States. 30 U.S.C. § 524 (1964). The amended location of August 20, 1960, could therefore have had no effect on oil and gas lease Colorado 015656, aside from the fact that the lease had been issued before the amended location was made. Therefore, in order to vitiate the lease, a discovery must be shown to have been made on the Silvertone No. 2 prior to March 25, 1948.

from sources exposed prior to that date and his refusal to admit the assays of ore samples taken by the mining claimant from sources not exposed until after July 23, 1955, we stated that it is "the date of exposure of the source of the ore sample and not the date of the taking of the sample" that determines whether or not a sample is proper evidence. 72 I.D. at 146. The proper question here, then, is not whether the testimony of witnesses familiar with the claims in 1946 is sufficient to show a discovery, but it is whether, on the basis of mineralization exposed in 1946, it can now be determined that there was then a discovery of a valuable mineral deposit. It is appropriate, therefore, to consider not only the testimony of Snyder but that of expert witnesses who examined the claims long after the critical dates insofar as that testimony may relate to evidence of mineral values which could have been observed in 1946.

To the extent to which the assertion of discoveries on the Silvertone Nos. 2 and 3 claims is based upon evidence of the same character as that which we have held to be insufficient to demonstrate a discovery on the Silvertone Nos. 1, 4, 5 and 6 and Winner claims, we must similarly deny the adequacy of the showing with respect to the Nos. 2 and 3 claims.¹⁰ Appellant, however, places additional reliance upon two factors which distinguish the Silvertone Nos. 2 and 3 claims from the other claims. These are (1) the fact that vanadium ore was mined from the bedded deposit on the Silvertone No. 3 claim and marketed in about 1941 (Tr. 40, 45, 290-311; Exs. B, C and D) and (2) the fact that the Government's witness, Meschter, was satisfied that showings of minerals on the Silvertone Nos. 2 and 3 claims were "sufficient to meet the prudent man test." (Tr. 527).

Appellant finds more evidence of the disposition of minerals from the claims than we are able to discern,¹¹ and it accords that evidence

¹⁰ For example, Louis W. Cramer, a geologist who testified in behalf of the appellant, stated:

"The mineralization on the No. 2 is strung out a little longer and a little better than on the No. 1, and I believe that that justifies more development.

"No. 3 definitely justifies more development." Tr. 461.

Careful review of Cramer's testimony is persuasive that that which he termed "development" falls into the category of activities which we have previously found to constitute "exploration." See Tr. 466-472, 475-483.

¹¹ Appellant argues in its current appeal that:

*** At the time this Oil and Gas Lease offer [Denver 054529] was filed October 30, 1946, vanadium had been found in place on Winner and on Silvertone Nos. 1, 2, 3, 4; 5 and 6 (Exhibits J, K, L, M, N and 13) and within three to four years prior to that some 800 tons of ore had been shipped from Silvertone No. 3 with No. 2 included as the area was right on the line between No. 2 and No. 3, and 100 tons or so shipped from Silvertone No. 4 and something less than 100 tons from Silvertone No. 5. The excavations on these three claims, Silvertone Nos. 3, 4 and 5, stand as mute, irrefutable evidence of the shipment of approximately 1,000 to 1,200 tons of ore. These estimates are based on measurements, Silvertone No. 3 (Tr. 357) Silvertone Nos. 4 and 5. The ore was not shipped to dump at random, it was sold. There could have been no purpose or reason for mining it

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more significance than that to which it is entitled. There is no persuasive inference of discovery arising from the sale of some material from the Silvertone No. 3 claim more than 25 years ago. While the fact that, apparently, no mining has been done on the claims for more than a quarter of a century does not necessarily mean that the minerals which have been disclosed thereon do not justify the expense and effort required to extract and market them, it assuredly is not persuasive evidence that a prudent man would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in attempting to develop a valuable mine. The natural inference to be drawn is that the mining operations once commenced were abandoned because the evidence of mineralization did not induce men to expend further money and labor in extracting the minerals. See *United States v. Frank Coston, supra*. In the absence of other persuasive evidence, then, especially evidence of sales at a profit, we find no particular significance in the possible sale of some minerals from the Silvertone No. 3 claim.

Turning to the second factor distinguishing the Silvertone Nos. 2 and 3 from the other claims in question, the acknowledgment of a discovery by the Government's witness, Meschter, it is clear from the record that Meschter's opinion with respect to the validity of these claims was based solely upon his observation of the bedded deposits of vanadium exposed on the claims (Tr. 527). Meschter testified that he observed bedded deposits of vanadium on the Silvertone Nos. 2 and 3 and that he found a weak indication of a bedded deposit of vanadium on the Silvertone No. 5 (Tr. 152), that the bedded vanadium deposits are complete mineral deposits separate from the vein and fault zone which extend across the length of all of the claims (Tr. 155), and that

except to sell it and indeed the limited funds of those who mined it could not sustain or tolerate any other basis, and the ore has obviously been removed from the claims. * * *
(Brief, p. 6.)

Appellant's assertions embody conclusions which are not established by the evidence as facts, as well as some which are directly contradictory to the testimony of appellant's own witnesses.

The Government's witness, Meschter, stated that he found "several workings on the Silvertone No. 3 and the Silvertone No. 4 from which mining for minerals for marketing purposes *might have been done, and conceivably but not likely* on Silvertone No. 5," that if the entire volume of the workings on the Silvertone No. 4 had been shipped and marketed it "could not have amounted to more than 100 tons or so," and that the volume removed from the Silvertone No. 5 was, "probably even less." (Tr. 118; italics added.) Appellant's witness, Harrison, stated that, to the best of his knowledge, there had been no extraction of material from the ground and placing of the material in market since 1940 from any of the claims other than the bedded deposit of vanadium on the Silvertone No. 3 (Tr. 40, 42). Similarly, appellant's witness, Snyder, who estimated that approximately 800 tons of ore were shipped from the claims (Tr. 305), stated that he did not know of any ore shipped from a claim other than the Silvertone No. 3 (Tr. 320). The only purported evidence of actual sales of material from the claims consisted of settlement sheets for the sale of a little more than 18 tons of ore (Exs. B, C and D).

he did not believe the existence of bedded vanadium deposits on the other claims could be inferred (Tr. 155-158).

Why would a prudent man, upon the basis of the bedded vanadium deposits, be justified in the expenditure of his means in attempting to develop a mine on the Silvertone Nos. 2 and 3 claims? This is a question not easily answered upon the basis of information contained in the record.

What quality vanadium ore is required to sustain a profitable mining operation? How much ore of that quality is believed to exist within the limits of the Silvertone Nos. 2 and 3 claims? These questions, the answers to which are indispensable to an evaluation of the prospects for development of the claims, are left unanswered by Meschter's testimony, as well as by the testimony of appellant's witnesses. Moreover, Meschter's testimony with respect to the market for vanadium ore raises additional questions about the value of these deposits for mining purposes, questions which again are left unanswered.¹²

In opposition to the opinion of Meschter with respect to the validity of the Silvertone Nos. 2 and 3 claims was that of the Government's mineral examiner, McIntosh, who, as a witness for the contestants in the private contests, expressed his belief that a prudent man would not be justified in expending more time and effort in attempting to mine the bedded vanadium deposits disclosed on those claims. His opinion was based upon:

- (1) The small amount of mining which was done about 1942, coupled with the fact no further mining was done in the 20 or so years after that;
- (2) Consideration of the grade and quantity of the material removed from the claim and of the grade of what he believed to be the material remaining to be mined;
- (3) Probable mining costs;
- (4) The fact that extensive drilling had been done on the bedded deposits, coupled with the lack of assay results, implying to him that results of the drilling were negative; and
- (5) The known spotty, irregular and discontinuous nature of the uranium-vanadium bedded deposits on the Colorado Plateau (Tr. 512-515).

It is readily to be observed that the testimony of the foregoing witnesses pertains to the question of a present discovery, for neither witness attempted to distinguish between the evidence of mineral values disclosed in 1946 (or 1948) and that which may have been revealed as

¹² Meschter stated that his inquiries revealed that one potential purchaser of vanadium ore bought vanadium ores only as uranium ores with byproduct vanadium in them, that another bought ore principally valuable for vanadium only under special agreement, and that he knew of no smelting company that would pay for the vanadium in ore principally valuable for its silver and copper content (Tr. 187-188).

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a result of recent exploratory activities or to relate the evidence of values discernible in 1946 (or 1948) to the prospects of mineral development at that time. If this testimony leaves the fact of a present discovery on the Silvertone No. 2 or No. 3 claim in substantial doubt, and we find that it does, it fails altogether to establish a basis for concluding that there were discoveries on those claims prior to the actions which prevented the vesting of rights to the leasable minerals in the mining claimant.

The burden of proof was on appellant as the moving party in the private contests to show that discoveries were made upon the claims at the times when such discoveries would have precluded the subsequent issuance of oil and gas leases to the claimed land. *United States v. Ruddock*, 52 L.D. 313 (1927); *Minerva L. Jones Starks v. Frank P. Mackey*, 60 I.D. 309 (1949); *Ohio Oil Company et al. v. W. F. Kissinger et al.*, 60 I.D. 342 (1949); *Percy Field Jebson et al. v. Emmet F. Spencer et al.*, 61 I.D. 161 (1953). We cannot conclude from the record before us that appellant has sustained that burden. Accordingly, we concur in the dismissal of the private contests as to the Silvertone Nos. 2 and 3 claims.

We do not find it necessary at this time to determine whether or not there have been discoveries upon the Silvertone Nos. 2 and 3 claims which entitle appellant to a patent to the land embraced in those claims. Having concluded that appellant failed to show a discovery on either of those claims at a time when discovery would have vested title in it to the leasable minerals, we have disposed of the question that is before us. It should be understood, however, that the failure of the Government to contest those claims in this proceeding was not a determination of the validity of the claims. If, prior to the issuance of patent, the Bureau of Land Management is persuaded by the evidence of record or other evidence that no discovery has been shown on either claim, the previous failure to contest the claims is not a bar to further inquiry into their validity. See *United States v. Clare Williamson*, 75 I.D. 338. In the event, however, that adverse proceedings are not initiated against those claims by the Government, the patent issued in response to appellant's application must contain a reservation to the United States of all leasing act minerals to the extent required by section 4 of the act of August 13, 1954, *supra*.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF DESERT SUN ENGINEERING CORPORATIONIBCA-725-8-68 *Decided December 31, 1968***Contracts: Construction and Operation: Intent of Parties—Contracts: Disputes and Remedies: Damages: Liquidated Damages—Contracts: Performance or Default: Breach**

Where a negotiated contract for engineering services contained a liquidated damages provision that incorporated a schedule of amounts (per day) to be paid by the contractor if five designated parts of the contract were not completed within time periods fixed therein, the Board disapproved the Government's attempt to construe another general contract clause (relating to the contractor's responsibility for damages incurred because the contractor did not meet the requirements of the contract) as allowing the assessment of actual damages that allegedly were caused by inadequate or inaccurate surveying work which was (i) detected and corrected prior to completion of the project; (ii) accepted by the Government as its responsibility under an agreement which deleted work from the contract and established a substantial completion date, or (iii) a contributing cause of the contractor's failure to deliver one item on time, for which an assessment of liquidated damages was made (the contractor met its obligations under the other four parts of the liquidated damages provision). The Board based the disapproval upon its conclusion that, in the circumstances, the Government was improperly attempting to recover both actual and liquidated damages.

BOARD OF CONTRACT APPEALS

The Government and Desert Sun Engineering Corporation have continued the contest over the amount that should be paid in order to close out a negotiated contract for engineering services that was entered into in the fall of 1961. In an earlier appeal by Desert Sun, IBCA-470-12-64,¹ the Board increased the contracting officer's allowance for a contract change from \$55,161.08 to \$69,600 and reduced a liquidated damages assessment from \$46,400 to \$27,000. In findings issued on June 21, 1968,² the contracting officer listed the additional amounts due under the earlier Board decision, plus other increases in contract earnings that are conceded to be due by the Government, and determined that \$72,906.73 is the net amount due to the appellant. However, the contracting officer refused to pay this sum, asserting (i) that the Government's transmission line construction contractor filed a claim in excess of four million dollars against the Government; (ii) that certain unacceptable and useless surveying work performed under the Desert Sun contract *** had a substantial effect on the relationship between the Government and its construction contractor ***; (iii)

¹ Decided October 25, 1966, 73 I.D. 316, 66-2 BCA par. 5916.

² Exhibit 110, Appeal File.

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that the principal portion of a Government allowance of \$1,275,470 in settlement of the construction contractor's claim would be disregarded in the Government's effort to apply the charges over against Desert Sun (allowances for acceleration, out-of-sequence towers and footings, and wire stringing moves were not charged against Desert Sun); and (iv) that the construction contractor's claims which were based upon steel fabrication expense, increased transportation expense, and program disruption were caused by Desert Sun's failure to conduct the surveying operations in accordance with accuracy standards specified in the contract. The contracting officer concluded:

In reaching my decision in this case, I have given consideration to the fact that this contract contained liquidated damage provisions for the failure of the contractor to furnish data within the specified completion times under the contract. In addition, I have given consideration to the provisions of Order for Changes No. 4, wherein the Government took over and completed the work remaining as of June 15, 1968, for a stated consideration. However, I have concluded that the contractor did not comply with his responsibilities under Paragraph 5 of the invitation and that the Government is entitled to recover thereunder in addition to its other remedies under the contract, as amended by Order for Changes No. 4. I have further determined that the Government suffered damages and excess costs which were incurred incident to and arising out of the failure of the contractor to meet the requirements. These damages and excess costs consisted of the amounts paid to the construction contractor under the items for increased steel fabrication expense, increased transportation costs, and program disruption which are set out above in Paragraph 8 which total \$203,042 with the proportionate share of the overhead allowance, \$26,943, added. I therefore find that this sum is properly chargeable to Desert Sun Engineering Corporation under the provisions of Paragraph 5 of this contract and is due and owing the Government thereunder.

Clause 5 of the contract provides:

The Contractor shall be responsible to the Government for any damages or excess costs which may be incurred by it incident to or arising out of the failure of the Contractor to meet the requirements of this contract, including, but not limited to, the accuracy requirements specified herein.

The appellant in opposing the Government's attempt to obtain reimbursement from the appellant of part of the amount paid in settlement to the construction contractor, points to the Government's success before the Board in IBCA-420-12-64 in defending the survey contract's liquidated damages provisions and recovering a substantial sum that was calculated under those provisions. Desert Sun's counsel asserts that the Government is barred from withholding the remaining contract earnings either under the *res judicata* doctrine or under the

rule of law that both actual and liquidated damages cannot be recovered.³

We will not analyze the requirements of the *res judicata* doctrine, because we have concluded that the appellant is entirely correct in condemning the attempt to collect both actual and liquidated damages. The liquidated damages provision, tailored to the Government's requirements, reads as follows (unnumbered, in "Conditions of Performance," p. 16) :

Failure to complete within the contract time—If the contractor fails to complete any part of the contract within the contract time, he and his sureties shall be liable as follows for fixed, agreed, and liquidated damages for each calendar days of delay until the work under each part is completed and accepted:

	<i>Part</i>	<i>Liquidated Damages</i>
1. Furnishing prints of aerial photography-----		\$100
2. Furnishing punch cards of profile data, key maps, and plan-profile sheets-----		200
3. Furnishing ownership map and communication map-----		40
4. Furnishing right-of-way-plots and descriptions-----		200
5. Staking center of towers and determining leg extensions after plan-profile sheet with structure locations furnished to contractor-----		40

In addition, the Desert Sun contract contained a "Termination for default—Damages for delay—Time extensions" provision (Clause 9), that was patterned generally after the standard provision covering those areas contained in Standard Form 23A (April 1961 Edition), granting (i) a right in the Government to terminate for the contractor's failure to complete the work within the time specified in the contract, or the failure or refusal to prosecute it with such diligence as would have insured its completion within such time; (ii) a right in the Government to liquidated damages in the amount set in the Conditions of Performance (quoted above), such right to continue after a termination for default for "such reasonable time as may be required for the final completion of the work," and (iii) the contractor's right to extensions of time for unforeseeable causes beyond his control and without his fault or negligence. The contract references are to failure to "complete said work," and to failure to "complete any part of the contract" within the time allowed by the contract—the liquidated damages are tied to the described failures.

³ The Hornbook gives this rule as follows: "If the court finds that the clause in question is one which properly provides for liquidated damages, it fixes any recovery for damages at that amount. The injured party, though his actual damages may exceed the agreed sum, can recover no more, and his recovery cannot be diminished by showing his actual loss was less." McCormick, *Handbook of the Law of Damages*, p. 613 (1935). In urging the proposition that both actual and liquidated damages cannot be recovered, appellant's counsel refers to the plethora of cases supporting it in 25 *O.J.S. Damages*, sec. 116, p. 1104, and in McBride & Wachtel, *Government Contracts*, vol. 5, sec. 34.120, pp. 34-45 (1968).

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Many of the survey inadequacies and deficiencies that have led to the Government's withholding action were discovered in the fall of 1961, and the spring of 1962, as the result of Government office reviews of submittals by Desert Sun, or by a ground check in the summer of 1962.⁴

In the fall of 1962, a subcontractor, the American Engineering Company, agreed to complete the survey and engineering work that remained to be performed under the contract. Because the amount of work that had to be corrected exceeded American Engineering's original expectations, that concern in the late spring of 1963, indicated an unwillingness to proceed further. At that point, the Government and Desert Sun executed Order for Changes No. 4, under which the Bureau of Reclamation agreed "at the close of business on June 17, 1963, to take over and complete all remaining work to obtain correct data meeting the requirements of this contract." Reflecting this deletion of work, the amount due under the contract was decreased by \$10,000. The effect of that change order was to establish June 17, 1963 as the actual completion date for Item 1-B, "Punch cards for profile, key maps and plan and profile" (the item as to which the liquidated damages were assessed).⁵

References to the consequences of the erroneous and deficient surveying work, as they relate to the transmission line construction contract, are to be found in the Government's Statement of Position:

7. As a result of Desert Sun's failure to properly complete the surveying as was ascertained in August of 1962, the Government could not furnish [the construction contractor] with survey and quantity data for the completion of the southern half of the transmission line.
8. The construction contractor decided to commence his construction of the transmission line at Glen Canyon and proceed south toward Flagstaff.

* * * In addition, both the construction contractor * * * and its supplier (Anchor Metals) were demanding details for the southern portion of the line. These were eventually supplied in segments ending approximately October 7, 1963 [between three and four months after the Government took over the work and agreed to complete it under Order for Changes No. 4].

13. [The construction contractor] was required to both supply the steel towers and erect them. Anchor Metals * * * was their supplier for tower steel. Anchor Metals made several "runs" for each of the several different tower types because of the late and inaccurate transmittal of Desert Sun's information.

⁴ Page 3, Statement of Position filed by Department Counsel, November 27, 1968. * * * all of the contractor's plots were returned to it for redoing as they were checked and found to be deficient."

⁵ This finding, made in the earlier Desert Sun appeal, is cited in footnote 1. (the actual completion data for Item 1-b is discussed in 66-2 BCA par. 5916, pp. 27,440, 27,441).

14. Desert Sun's late and inaccurate data also caused a disruption of the on-site activities [of the construction contractor] in some parts of the Flagstaff-Pinnacle Peak portion of the line resulting in costly inefficiencies.

The Government counsel also explains in his Statement of Position:

It is to be emphasized at all times that the principal problem with *all* of Desert Sun's survey was not timely submission. The record in the previous case shows that submittals were nearly always on time. This is to say, pieces of paper containing survey information were sent to the Government. However, any resemblance between the topography shown thereon and the actual site conditions was a mere coincidence in a great many cases. Inaccurate survey data in most cases is worse than none at all. Thus the time when a particular bid item was substantially complete for liquidated damages purposes is largely irrelevant. If the data (even if it is purportedly all in) is inaccurate to any degree at all, it is unusable.

It is submitted it is plain that damages connected with "time" but unrelated to liability for liquidated damages under Paragraph 9 and page 16 of the "Conditions of Performance, or susceptibility to termination for default thereunder were obviously possible. Hence, the contract contained *both* Paragraph 5 and Paragraph 9 and Page 16 of the conditions of Performance."

Acceptance of the Department Counsel's argument would run contrary to practice and tradition in the field of Government contracts. In his Statement of Position in the earlier Desert Sun appeal, the Department Counsel advised the Board:

The second contention by the contractor is that the imposition of the liquidated damages in this case amounts to a penalty. * * * The contractor has introduced no evidence to substantiate his contention that the imposition of the \$200 per day liquidated damages was not a reasonable approximation of the damages the Government could suffer in the event of appellant's breach of the delivery requirements, judged as of the date of the contract. * * * As is evident to the Board from the fact that the transmission line was ultimately constructed on the alignment which the contractor attempted to survey, any delay in transmission of drawings and data from the contractor under this contract would have the effect of not only delaying the construction contractor (with the possibility of the claim for delays by the contractor) but also in the transmission of electrical energy. * * *

[Calculations follow showing that there was a potential \$28,560.00 per day minimum power revenue loss for each day of noncompletion of the transmission line.]

* * * The calculations above are based upon information which would have been readily available to the contractor when he submitted his prices in September of 1961. These are minimum figures and the actual loading is even higher.

The Board has held that rates of liquidated damages are enforced if they represent a good faith attempt to estimate the probable damages to be suffered on account of non-performance viewed from the date the contract was awarded. It does not matter that no damages were actually suffered by the Government or that the imposition thereof would cause a hardship to the appellant. * * * Here the potential delay to the construction contractor, the potential loss of

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power revenue, the increase in the length of time for Government inspection and superintendence are more than ample justification for the \$200 figure used.⁶

The Government strongly urges that its view of this matter should be adopted under the rule that a contract should be interpreted so as to give a reasonable meaning to all of its parts. However, Clause 5 extends a right to the Government in general terms, and could cover damages resulting from breaches other than those covered by liquidated damages, including improper survey or engineering work not discovered until after the Government's declaration of substantial completion and acceptance. The Board is aware of several instances under other contracts where the Government has made post-acceptance claims, asserting that because alleged improper engineering work was covered up or "fudged," it was not possible to detect such work until after the contract had been deemed to be complete, and liquidated damages were no longer running. Thus, there is an area in which Clause 5 can operate without the need to utilize it in the unprecedented manner urged by the Government.

In our decision in the earlier Desert Sun appeal,⁷ the Board found that even for the performance of work on the originally proposed alignment (which was not as rough and steep as the one eventually selected by the Government), Desert Sun "was underfinanced, ill-equipped and barely qualified." We are unable to conclude that the Government, in electing to award an important transmission line surveying contract to a small contracting organization, and Desert Sun in making its ill-fated attempt to "step up in class," intended Clause 5 to give the Government, in addition to the right to collect liquidated damages under the detailed five-part schedule of liquidated damages, the right to exact actual damages for "incompetent and unprofessional surveying accomplishments"⁸ which were detected and corrected prior to completion of the project (or by the Government under Order for Changes No. 4), or which were the principal causes of the appellant's failure to deliver Item 1-b on time (and the resulting liquidated damages assessment).

Desert Sun's identifiable breach, after all, is the delivery of Item 1-b 135 days late. The contract provides that \$200 per day will be assessed for such failure, which assessment has been made. The Government's withholding action, if it were approved, would be on the

⁶ Statement of Position, August 2, 1966, IBCA-470-12-64, pp. 14-16. At this point it should be noted that the Department Counsel in the earlier appeal is serving in that capacity in this appeal.

⁷ Cited in footnote No. 1.

⁸ Page 18, Statement of the Government's Position.

basis of an additional assessment amounting to more than \$1,500 per day.

The Government on the one hand attempts to separate the causes for failure to "complete said work" or for failure "to complete any part of the contract" within the established time and assess actual damages related to those causes (inadequacy, inaccuracy, etc.). On the other hand it has successfully maintained and enforced the plan providing for assessment of liquidated damages. To allow both actions would in the Board's opinion bring all concerned into a contract administration morass.⁹ A contractor ordinarily keeps his eye fixed upon the date or dates when his "free time" ends, and anticipates that errors or deficiencies discovered and corrected prior to a designated completion date will not subject him to the assessment of damages. A Government defense against a multitude of serious errors is not lacking, since if the contractor fails to prosecute the work, or a separable part thereof, with such diligence as will insure its completion within the specified time, the Government has the right under the contract to terminate and take over the work (or separable part) that has been terminated and assure its proper completion by other means.

The Board is aware that in a post-termination situation both liquidated damages and actual damages may be collected. The current forms incorporating "General Provisions" for both construction contracts and supply contracts do state in direct and unmistakable fashion that when a contractor's right to proceed has been terminated, the Government's damages will consist of liquidated damages that may have been specified for the reasonable period as is required for work completion plus any increased costs occasioned the Government in completing the work, or in obtaining similar replacement supplies or services. However, language is not to be found in Clause 5 of the Desert Sun contract that fairly could be said to place a contractor on notice of the interpretation advanced by the Government in this appeal. Instead, we believe, a contractor would have concluded that the Government had taken the traditional approach which currently is mirrored in an FPR instruction applicable to construction contracts:

- (c) The minimum amount of liquidated damages should be based on the estimated cost of inspection and superintendence for each day of delay in

⁹ The opposite side of the coin is, of course, a contractor's effort to deliver work or products that do not meet the contract requirements, seeking by such action to stop the accrual of liquidated damages. The Bureau of Reclamation recently established that, under a supply contract, a contractor had failed to perform under a liquidated damages clause when it had shipped goods that did not meet the specifications. Decision No. B-162057 (November 13, 1967), 47 Comp. Gen. 263. The Government has indicated that it recognizes that the damages now claimed from Desert Sun "may superficially resemble damages for delay since time is an important element therein" (Page 13, Statement of Government's Position). The elements being considered—adequacy of performance and timeliness of performance—cannot easily be separated, being necessarily interrelated in the accomplishment of a single undertaking.

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completion. Whenever the Government will suffer other specific losses due to the failure of the contractor to complete the work on time, such as the cost of substitute facilities, the rental of buildings, or the continued payment of quarters' allowances, an amount for such items should also be allowed.¹⁰

Desert Sun's subcontractor, American Engineering (supported by an assignee bank) agreed to continue the Desert Sun contract work in the fall of 1962 even though a great deal of the surveying that had been performed by the prime contractor's own forces had been determined by the Government to be unacceptable. American Engineering's decision to proceed with the investment of funds and labor came after it inquired concerning the amount of contract earnings remaining to be paid on the project. This was done at an October 5, 1962 meeting, in which officials of Desert Sun and the contracting officer's authorized representative participated and provided information to the subcontractor on the expected future contract "draw." An account of the October 5, 1962 meeting is given in the Board's earlier Desert Sun decision,¹¹ under the heading "Claims Arising From Alleged Misrepresentation or Concealment by a Government Representative." The subjects of (i) deficient Desert Sun work, (ii) anticipated contract earnings, (iii) issuance of additional invoices for payment under the contract, and (iv) the retention of liquidated damages were thoroughly considered at the October 5 meeting and in a letter dated October 8, 1962, in which the authorized representative provided revised information respecting status of payments, progress and acceptability of work.

The construction contract had been entered into on June 22, 1962, and the Government acknowledges that in early August it began to be aware that Desert Sun's work was inadequate.¹² Although written complaints relating to delay in receiving data and requesting additional compensation were not transmitted by the construction contractor until the following summer, the Government knew in the late summer and early fall of 1962 that it was not furnishing complete and accurate tower quantity details and leg extension quantities to that contractor. It is a common matter for construction contractors to assert claims against the Government for additional costs sustained because the latter has failed to provide necessary data on time. How-

¹⁰ FPR, Subsection 1-18-110(c), 2d Ed., FPR, Amendment 48 (September 1968). This subsection was taken from the Armed Services Procurement Regulations.

¹¹ IBCA-470-12-64 (cited in footnote 1).

¹² "Approximately at the same time that the [construction] contractor started work under the contract [August 7, 1962], the Government learned for the first time of the tremendous deficiencies in the Desert Sun Engineering. While the work submitted purported to be nearly complete, it was filled with errors of major consequence. * * *" From a Memorandum to the Files of the Bureau of Reclamation (providing details of the settlement with the construction contractor), dated September 6, 1967, Exhibit 109 in the Appeal File.

ever, the Government seems to have given no hint of its extreme interpretation of Clause 5 in October 1962. Instead, the authorize representative took into account only the anticipated liquidated damages assessment when he estimated what the contract "draw" would be. Almost certainly if at that time the interpretation now advanced by the Government (considering transitory pre-acceptance errors as individual breaches to which consequential losses claimed by the construction contractor would be tied) had been adopted and proclaimed by it, there would have been no further work by the subcontractor and no financing by the assignee bank.

The appellant has moved for a summary judgment in this proceeding, which has prompted the Department Counsel to cite our line of decisions holding that the Board will not entertain such motions.¹³ The motion for summary judgment as such will not be granted; however, neither will the Government's request for a hearing be approved. If every finding made by the contracting officer, and every conclusion or allegation made either by the contracting officer or the Department Counsel were to be substantiated at an oral hearing, the Government nonetheless would fail before the Board, because the Government is improperly attempting to collect both actual and liquidated damages.¹⁴

The question of the authority of a contract appeals board to assume jurisdiction over a dispute arising from the Government's withholding of contract earnings has been reviewed extensively in recent months.¹⁵ Neither of the parties to this dispute has taken issue with the Board's authority to review and rule upon it. The parties have been in disagreement for a long time, and there is an obvious need for a final disposition of the matter in this Department. For the reasons stated herein, the Board has reached the following conclusion:

The contracting officer's interpretation of Clause 5 of the contract is not tenable. Therefore, the withholding of \$72,906.73 of contract earnings, which is based upon that interpretation, is disapproved.

DEAN F. RATZMAN, *Chairman.*

I CONCUR:

WILLIAM F. McGRAW, *Member.*

¹³ *Ralph Child Construction Co.*, IBCA-481-2-65 (September 28, 1965), 65-2 BCA par. 5115; *Erie Controls, Inc.*, IBCA-350 (November 7, 1963), 1963 BCA par. 3924; *Baldwin-Lima-Hamilton Corporation*, IBCA-329 (September 20, 1963), 70 I.D. 426, 1963 BCA par. 3851; *Korshoj Construction Co.*, IBCA-321 (August 27, 1963), 1963 BCA par. 3848.

¹⁴ The Board will not set an appeal for hearing where no useful purpose will be served by such action. *Lloyd E. Tull, Inc.*, IBCA-574-6-66 (February 15, 1967), 67-1 BCA par. 6137; see *Bateson-Cheves Construction Co.*, IBCA-670-9-67 (Reconsideration October 8, 1968), 68-2 BCA par. 7289.

¹⁵ *McGraw-Edison Company*, IBCA-699-2-68 (October 28, 1968), 68-2 BCA par. 7335; *Lane, Administrative Resolution of Government Breaches—The Case for an All Breach Clause*, 28 Fed. B.J. 199, 227 (footnote 107), 1968.

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BONNEVILLE POWER ADMINISTRATION**GENERALLY**

1. In implementing an integrated hydro-thermal power program for the Pacific Northwest, the Bonneville Power Administrator may enter into contractual arrangements, including the acquisition by purchase or exchange of thermal power, which are reasonably related to the statutory objective of providing the most widespread use of and benefit from the existing and authorized Federal power investment at the lowest practical cost-----

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BUREAU OF RECLAMATION**EXCESS LANDS**

1. The excess land provisions of reclamation law place limitations on the delivery of project water to land owned by corporations. Corporate ownership of land may not be used as a device to avoid the excess land laws. The corporation land may also be attributed to stockholders for the purpose of ascertaining the amount of eligible land a stockholder may claim as an individual _____ 115, 119, 122
2. For the purpose of applying the excess land laws a corporation which is a stockholder in another corporation is treated in the same manner as an individual stockholder. A parent corporation is the beneficial owner of all lands held by its wholly owned subsidiary and the two corporations are limited to 160 eligible acres in a water district. The fact that the land was transferred from subsidiary to parent for tax reasons rather than to avoid the excess land laws does not permit more than 160 acres to receive project water _____ 335

BUREAU OF SPORT FISHERIES AND WILDLIFE**WILDLIFE REFUGES**

1. The assistance of "public schools and roads" under the Refuge Revenue Sharing Act, 40 Stat. 383 (1935) as amended, 16 U.S.C. sec. 715s (1964), is a single Federal assistance program _____ 289
2. Under the terms of the Refuge Revenue Sharing Act by which the Secretary of the Interior is required to pay funds for "public schools and roads," he is without authority to pay funds for the use of roads alone _____ 289
3. The Secretary of the Interior under the Refuge Revenue Sharing Act, is without authority to allocate funds between local agencies responsible for public schools and roads _____ 289
4. The Department of the Interior was authorized to withhold funds accruing under the Refuge Revenue Sharing Act during the pendency of Administrative compliance proceedings under the Civil Rights Act of 1964, 78 Stat. 252 (1964), 42 U.S.C. sec. 2000d (1964), particularly where the local agency responsible for public schools had failed to execute an assurance of compliance with the Civil Rights Act of 1964 _____ 289
5. Funds accruing under the Refuge Revenue Sharing Act must continue to be withheld from a county or parish until adequate assurance is received from both the local agency responsible for public schools and the local agency responsible for roads that they are in compliance with the Civil Rights Act of 1964 _____ 289

CONTESTS AND PROTESTS**GENERALLY**

1. In a private contest initiated by a mining claimant to determine, as between himself and an oil and gas lessee, the right to leasable minerals within the limits of a mining claim, it is incumbent upon the mining claimant to show that a discovery was made upon the claim at a time when such discovery would vest in him a right to the leasable minerals, and if he is unable to sustain this burden, the contest is properly dismissed notwithstanding any acknowledgment on the part of the United States of a present discovery on the claim _____ 408

CONTRACTS**CONSTRUCTION AND OPERATION****Actions of Parties**

1. Where under a contract for the erection of transmission line towers of a new type the specifications required that the guy lines supporting the towers be drawn "snug but not excessively tight" and that thereafter there should be "no visible deformation of the tower," and where early in contract performance the parties by their conduct evidenced agreement that bringing the guy lines to a tension of 7,000 pounds would satisfy the requirements imposed by the general language of the specifications but subsequently the Government increased the tension requirements to 12,000 pounds, the Board finds that the imposition of the latter requirement constituted a constructive change and, pursuant to a stipulation of the parties, remanded the case to the contracting officer for determination of the amount of the equitable adjustment-----1
2. Giving great weight to the practical construction the parties had placed upon the terms of a contract that the appellant acknowledged to be ambiguous and noting that approximately five years elapsed before the contractor advanced an interpretation of the contract at variance with what appeared to be the mutual understanding of the parties as to the nature of the contractual obligations assumed by them, the Board finds that the contract for delivery of cement for the Glen Canyon Dam was a requirements contract and that the appellant was not entitled to additional compensation for the 87,691 barrels of cement delivered in excess of the estimated requirement of 3,000,000 barrels-----378

Changed Conditions

1. A contractor under a contract to clear a reservoir of trees, brush and debris in connection with the construction of a dam in mountainous country who encountered heavy quantities of down and dead debris was not entitled to relief under section (a) of the Changed Conditions clause, on the ground that the material was concealed and constituted a latent condition, where the existence of such down and dead debris was clearly indicated in the contract and the Government had made no representation as to the amount thereof that might be found-----22
2. Where a reasonably careful pre-bid investigation by the contractor would have disclosed the existence of large quantities of down and dead debris, the presence of such quantities of down and dead debris at high elevations above the water where timber is no longer found standing was not uncommon in the area, and the contractor had seen some such debris in his investigation, the existence of such down and dead debris was not an unknown condition of an unusual nature within the meaning of section (b) of the Changed Conditions clause-----23

Changes and Extras

1. Where under a contract for the erection of transmission line towers of a new type the specifications required that the guy lines supporting the towers be drawn "snug but not excessively tight" and that thereafter there should be "no visible deformation of the

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Changes and Extras—Continued**

- “tower,” and where early in contract performance the parties by their conduct evidenced agreement that bringing the guy lines to a tension of 7,000 pounds would satisfy the requirements imposed by the general language of the specifications but subsequently the Government increased the tension requirements to 12,000 pounds, the Board finds that the imposition of the latter requirement constituted a constructive change and, pursuant to a stipulation of the parties, remanded the case to the contracting officer for determination of the amount of the equitable adjustment.
2. Under a contract to clear a reservoir of trees, brush, and debris in mountainous country at elevations (1) below 7,388 feet and (2) between 7,388 and 7,519.4 feet, by February 8, 1966, which provided that storage in the reservoir would begin “about November 1, 1965,” and which required operations to be conducted so that clearing was completed in advance of water being impounded by a dam, a contractor, who encountered abnormally high water from sources other than the dam but who proceeded by increasing the size of his crew and substituting manual labor for mechanical operations in order to comply with such provision, and who completed all work on November 19, 1965, was not entitled to additional compensation on the ground that his performance was accelerated, where (i) he did not request the Government to extend his time to perform or delay closing the dam; (ii) there is no proof of any Government conduct equivalent to an order to accelerate; (iii) he could have continued to perform some clearing both below and above 7,388 feet through February 8, 1966; and (iv) the contractor planned from the outset to complete all work by November
3. The Board denies the Government's motion to dismiss an appeal as beyond the purview of its jurisdiction where it finds: (i) that a delay of approximately 30 days in supplying a contractor with Government-furnished steel had no significant impact upon the overall performance of the contract; and (ii) that the Government's action in furnishing large quantities of misfabricated steel not only disrupted the contractor's assembly and erection program as had been recognized by the contracting officer in a proposed amendment to the contract but on a rather short schedule job necessarily disrupted the succeeding program of conductor stringing as well, with the result that the costs shown to be attributable to the Government's action were found in both instances to stem from a constructive change.
4. Under a contract for construction of a road, the Board finds that rejection by the contracting officer's representative of the subbase, following a visual inspection, after it was ready for application of the base course, and his direction to reprocess the subbase, were based upon an erroneous interpretation of the specifications and constituted a constructive change entitling the contractor to an equitable adjustment; but such adjustment may not include the contractor's cost of utilizing a commercial testing laboratory to

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CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Changes and Extras—Continued**

establish that the Government's rejection was unjustified, since such a charge is an expense for preparing and prosecuting a claim and is unauthorized

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5. Where a road construction contract called for 310 tons of RC asphalt, which is not readily available, to be used as prime coat, and the contractor procured the entire supply necessary in advance, and the contracting officer thereafter changed the type to MC asphalt, the contractor was entitled to recover the cost of converting the unused RC asphalt to penetration asphalt (the most economic means of disposing of the excess)

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6. Where a contractor under a road construction contract in which a certain pit was designated as the source of specified material was directed to blend the material produced with blow sand (it having been ascertained that the material produced did not comply with the specifications), an adjustment made by the Government to compensate the contractor therefor was inadequate in that the contractor was paid only at the unit price rate for the items blended and should also have received compensation for the cost of increased crushing and other difficulties in meeting the requirements of the specifications resulting from the blending

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7. Where the total amount of cover aggregate required by the Government was 1,272.7 tons, instead of the 2,230 tons estimated in the bid schedule, under a road construction contract providing for payment at unit prices only for work that was actually performed, and further providing for an adjustment of contract price in the event of increase or decrease in quantity only in several specified circumstances, in the absence of a showing that the exceptions are applicable, a contractor who overproduced cover aggregate was not entitled to be compensated therefor, since the possibility of an underrun was foreseeable and it appeared that the overproduction resulted from the contractor's inability to control production

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8. In a dispute over the quantity of unclassified excavation performed under a road construction contract, where the contractor's measurement was based upon the average-end-area method required by the contract, but was made after subbase material was in place, and the Government was unable to prove that it utilized that method, in the absence of a showing that the presence of the subbase resulted in an error in the contractor's calculation, the Board finds that the contractor established its claim by a preponderance of the evidence; however, contractor is not entitled to recover the cost of employing an independent engineering firm to perform the measurement, since such a charge is an expense of preparing and prosecuting a claim and is unauthorized

9. Where a contractor under a contract calling for the construction in 90 days of an underground electrical distribution system, promptly submitted its proposed equipment list to the Government for advance approval and conditioned its orders upon such approval, as required by the contract, and the Government, having knowledge that delivery in compliance with the contract performance

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CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Changes and Extras—Continued**

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period was uncertain (because the contractor's supplier would not commence production until all details were approved) delayed in acting on such list and instead issued a change order changing the switches on transformers to be installed, without changing the contract completion date, the burden of the uncertainty of delivery was shifted to the Government and the contractor was entitled to an equitable adjustment extending the time of performance which reflected the full consequences of the change, including an allowance for the ensuing delay in delivery of the equipment, no showing having been made that the equipment could have been obtained more expeditiously elsewhere-----

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10. Giving great weight to the practical construction the parties had placed upon the terms of a contract that the appellant acknowledge to be ambiguous and noting that approximately five years elapsed before the contractor advanced an interpretation of the contract at variance with what appeared to be the mutual understanding of the parties as to the nature of the contractual obligations assumed by them, the Board finds that the contract for delivery of cement for the Glen Canyon Dam was a requirements contract and that the appellant was not entitled to additional compensation for the 87,691 barrels of cement delivered in excess of the estimated requirement of 3,000,000 barrels-----

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Drawings and Specifications

1. Where under a contract for the erection of transmission line towers of a new type the specifications required that the guy lines supporting the towers be drawn "snug but not excessively tight" and that thereafter there should be "no visible deformation of the tower," and where early in contract performance the parties by their conduct evidenced agreement that bringing the guy lines to a tension of 7,000 pounds would satisfy the requirements imposed by the general language of the specifications but subsequently the Government increased the tension requirements to 12,000 pounds, the Board finds that the imposition of the latter requirement constituted a constructive change and, pursuant to a stipulation of the parties, remanded the case to the contracting officer for determination of the amount of the equitable adjustment-----

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2. Under a contract for construction of a building and an adjoining open plaza, where the specifications require the use of an asphaltic lightweight concrete insulating fill for the plaza and roof similar to a brand-name material conforming to specifications supplied by a producer of the brand-name product, followed by a list of the required properties and characteristics of the material, and method of application, the contractor must establish by a preponderance of the evidence that the contracting officer erroneously determined that a different brand-name material offered as a substitute was not substantially equal to the material named in the contract, as required by other provisions of the contract-----

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CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Drawings and Specifications—Continued**

3. Where the provisions of an invitation for bids clearly and explicitly require the bidder to furnish a material similar to a brand-name product, or a substitute material determined by the contracting officer to be equal thereto, the contractor, having remained silent during the bidding period without protest and having made no inquiry of the contracting officer as to the availability of such brand-name material, or of a material substantially equal to it, is not entitled after award to assert that the specification requirements are invalid for requiring the contractor to procure the material from a sole source (the contractor's post-award allegation being that it was unable to find a different source for a similar material)-----89
4. The use of a "brand name or equal" type of specification does not constitute a representation by the Government regarding the existence of acceptable substitutes for the brand-name product, nor does it constitute a representation that an existing substitute would receive approval prior to the submission by the contractor of data establishing the equality of such substitute-----89

Estimated Quantities

1. Where the total amount of cover aggregate required by the Government was 1,272.7 tons, instead of the 2,230 tons estimated in the bid schedule, under a road construction contract providing for payment at unit prices only for work that was actually performed, and further providing for an adjustment of contract price in the event of increase or decrease in quantity only in several specified circumstances, in the absence of a showing that the exceptions are applicable, a contractor who overproduced cover aggregate was not entitled to be compensated therefor, since the possibility of an underrun was foreseeable and it appeared that the overproduction resulted from the contractor's inability to control production-----208
2. Giving great weight to the practical construction the parties had placed upon the terms of a contract that the appellant acknowledged to be ambiguous and noting that approximately five years elapsed before the contractor advanced an interpretation of the contract at variance with what appeared to be the mutual understanding of the parties as to the nature of the contractual obligations assumed by them, the Board finds that the contract for delivery of cement for the Glen Canyon Dam was a requirements contract and that the appellant was not entitled to additional compensation for the 87,691 barrels of cement delivered in excess of the estimated requirement of 3,000,000 barrels-----378

General Rules of Construction

1. The use of a "brand name or equal" type of specification does not constitute a representation by the Government regarding the existence of acceptable substitutes for the brand-name product, nor does it constitute a representation that an existing substitute would receive approval prior to the submission by the contractor of data establishing the equality of such substitute-----89

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****General Rules of Construction—Continued**

2. The Board denies a claim for "Unnecessary Accelerated Construction Costs" where it finds (i) that the appellant has failed to offer any convincing evidence to show that a particular letter from the contracting officer relied upon by the appellant could be properly construed as an order for the delivery of cement thereby furnishing a predicate for the recovery of the costs claimed under the "Suspension of Deliveries" clause when cement was not called for during 1959; and (ii) that the appellant also failed to show by a preponderance of the evidence that the action of the contracting officer in refusing to agree in advance to pay a portion of a suggested wage increase under a related contract (the prime contract for the construction of the dam) prolonged a strike needlessly and thereby resulted in the incurrence of a portion of the costs for which the claim was made-----

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Intent of Parties

1. Where a negotiated contract for engineering services contained a liquidated damages provision that incorporated a schedule of accounts (per day) to be paid by the contractor if five designated parts of the contract were not completed within time periods fixed therein, the Board disapproved the Government's attempt to construe another general contract clause (relating to the contractor's responsibility for damages incurred because the contractor did not meet the requirements of the contract) as allowing the assessment of actual damages that allegedly were caused by inadequate or inaccurate surveying work which was (i) detected and corrected prior to completion of the project; (ii) accepted by the Government as its responsibility under an agreement which deleted work from the contract and established a substantial completion date, or (iii) a contributing cause of the contractor's failure to deliver one item on time, for which an assessment of liquidated damages was made (the contractor met its obligations under the other four parts of the liquidated damages provision). The Board based the disapproval upon its conclusion that, in the circumstances, the Government was improperly attempting to recover both actual and liquidated damages-----

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Labor Laws

1. Where a contract for the construction of a road required a contractor to "observe and comply with all Federal, State and local laws," but did not specifically provide for compliance with the Fair Labor Standards Act, and the contractor was ordered by the U.S. Labor Department to pay overtime wages under the FLSA, a claim by the contractor for reimbursement of such overtime wages paid, grounded upon an alleged misrepresentation by the procuring agency of the applicability of the FLSA to the work will be dismissed as outside the jurisdiction of the Board-----

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CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Notices**

1. A claim based upon an allegation that a Government project supervisor required the work force of a construction contractor to stand aside and give first priority to the activities of another Government contractor in a project area containing limited working space was denied because it was made for a claim period during which the appellant gave no notice that a constructive suspension of work had been caused by the acts of a Government representative—as to one portion of the claim period the appellant provided no notification of any kind as to alleged acts of the Government causing delays, hindrances, interferences or suspension, and as to the remainder it had requested time extensions only. Because a supplemental agreement provided for the acceleration of work during the claim period, it was of particular importance that the contracting officer be given notice, in order to afford him an opportunity to investigate whether a reasonable program of coordination of the activities of the two contractors had been worked out, and to attempt to remedy any unfair scheduling_____
2. Notification of a monetary claim that is given under a provision such as the Changes clause, Changed Conditions clause, or an Extra Work clause may in some circumstances be treated as a proper notice under the standard construction contract Suspension of Work clause (which clause bars claims for costs incurred more than 20 days prior to the contracting officer's receipt of notice of a constructive suspension of work); however, an appellant's notification of a claim for an extension of time based upon delays resulting from the operations of another contractor (or the Government's grant of such extension) will not constitute a notice under the Suspension of Work clause_____
3. Giving great weight to the practical construction the parties had placed upon the terms of a contract that the appellant acknowledged to be ambiguous and noting that approximately five years elapsed before the contractor advanced an interpretation of the contract at variance with what appeared to be the mutual understanding of the parties as to the nature of the contractual obligations assumed by them, the Board finds that the contract for delivery of cement for the Glen Canyon Dam was a requirements contract and that the appellant was not entitled to additional compensation for the 87,691 barrels of cement delivered in excess of the estimated requirement of 3,000,000 barrels_____

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Protests

1. Where the provisions of an invitation for bids clearly and explicitly require the bidder to furnish a material similar to a brand-name product, or a substitute material determined by the contracting officer to be equal thereto, the contractor, having remained silent during the bidding period without protest and having made no inquiry of the contracting officer as to the availability of such brand-name material, or of a material substantially equal to it, is not entitled after award to assert that the specification require-

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Protests—Continued**

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ments are invalid for requiring the contractor to procure the material from a sole source (the contractor's post-award allegation being that it was unable to find a different source for a similar material) _____

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Subcontractors and Suppliers

- Under a contract for supplying four gate hoists for a dam, and providing as to each hoist for assessment of liquidated damages for each day of delay, where the contractor and its first-tier subcontractor were tardy in ordering steel from a second-tier supplier, such delays in purchasing will be taken into account and deducted from extensions of time for performance that are otherwise allowable because of delays in delivery of steel due to the fault of the second-tier supplier (pursuant to the decision in *Schweigert, Inc. v. United States*, Ct. Cl. No. 26-66, December 15, 1967) _____

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Waiver and Estoppel

- Where the provisions of an invitation for bids clearly and explicitly require the bidder to furnish a material similar to a brand-name product, or a substitute material determined by the contracting officer to be equal thereto, the contractor, having remained silent during the bidding period without protest and having made no inquiry of the contracting officer as to the availability of such brand-name material, or of a material substantially equal to it, is not entitled after award to assert that the specification requirements are invalid for requiring the contractor to procure the material from a sole source (the contractor's post-award allegation being that it was unable to find a different source for a similar material) _____

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DISPUTES AND REMEDIES**Generally**

- Adhering to principles enunciated in a prior decision, the Board finds that a memorandum from a Government employee to his superior containing a recommendation as to settlement of a claim constituted a privileged communication to which the appellant was not entitled, insofar as the nonfactual portions of such memorandum are concerned _____

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Burden of Proof

- Under a contract for construction of a building and an adjoining open plaza, where the specifications require the use of an asphaltic light-weight concrete insulating fill for the plaza and roof similar to a brand-name material conforming to specifications supplied by a producer of the brand-name product, followed by a list of the required properties and characteristics of the material, and method of application, the contractor must establish by a preponderance of the evidence that the contracting officer erroneously determined that a different brand-name material offered as a substitute was not substantially equal to the material named in the contract, as required by other provisions of the contract _____

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CONTRACTS—Continued**DISPUTES AND REMEDIES—Continued****Burden of Proof—Continued**

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2. In a dispute over the quantity of unclassified excavation performed under a road construction contract, where the contractor's measurement was based upon the average-end-area method required by the contract, but was made after subbase material was in place, and the Government was unable to prove that it utilized that method, in the absence of a showing that the presence of the sub-base resulted in an error in the contractor's calculation, the Board finds that the contractor established its claim by a preponderance of the evidence; however, contractor is not entitled to recover the cost of employing an independent engineering firm to perform the measurement, since such a charge is an expense of preparing and prosecuting a claim and is unauthorized-----

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3. The Board denies a claim for "Unnecessary Accelerated Construction Costs" where it finds (i) that the appellant has failed to offer any convincing evidence to show that a particular letter from the contracting officer relied upon by the appellant could be properly construed as an order for the delivery of cement thereby furnishing a predicate for the recovery of the costs claimed under the "Suspension of Deliveries" clause when cement was not called for during 1959; and (ii) that the appellant also failed to show by a preponderance of the evidence that the action of the contracting officer in refusing to agree in advance to pay a portion of a suggested wage increase under a related contract (the prime contract for the construction of the dam) prolonged a strike needlessly and thereby resulted in the incurrence of a portion of the costs for which the claim was made-----

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DAMAGES**Liquidated Damages**

1. Under a contract for supplying four gate hoists for a dam, and providing as to each hoist for assessment of liquidated damages for each day of delay, where the contractor and its first-tier subcontractor were tardy in ordering steel from a second-tier supplier such delays in purchasing will be taken into account and deducted from extensions of time for performance that are otherwise allowable because of delays in delivery of steel due to the fault of the second-tier supplier (pursuant to the decision in *Schweigert, Inc. v. United States*, Ct. Cl. No. 26-66, December 15, 1967)-----
2. Where a contractor under a contract calling for the construction in 90 days of an underground electrical distribution system, promptly submitted its proposed equipment list to the Government for advance approval and conditioned its orders upon such approval, as required by the contract, and the Government, having knowledge that delivery in compliance with the contract performance period was uncertain (because the contractor's supplier would not commence production until all details were approved) delayed in acting on such list and instead issued a change order changing the switches on transformers to be installed, without changing the contract completion date, the burden of the uncertainty of delivery

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CONTRACTS—Continued**DISPUTES AND REMEDIES—Continued****Liquidated Damages—Continued**

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was shifted to the Government and the contractor was entitled to an equitable adjustment extending the time of performance which reflected the full consequence of the change, including an allowance for the ensuing delay in delivery of the equipment, no showing having been made that the equipment could have been obtained more expeditiously elsewhere.

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3. Where a negotiated contract for engineering services contained a liquidated damages provision that incorporated a schedule of accounts (per day) to be paid by the contractor if five designated parts of the contract were not completed within time periods fixed therein, the Board disapproved the Government's attempt to construe another general contract clause (relating to the contractor's responsibility for damages incurred because the contractor did not meet the requirements of the contract) as allowing the assessment of actual damages that allegedly were caused by inadequate or inaccurate surveying work which was (i) detected and corrected prior to completion of the project; (ii) accepted by the Government as its responsibility under an agreement which deleted work from the contract and established a substantial completion date, or (iii) a contributing cause of the contractor's failure to deliver one item on time, for which an assessment of liquidated damages was made (the contractor met its obligations under the other four parts of the liquidated damages provision). The Board based the disapproval upon its conclusion that, in the circumstances, the Government was improperly attempting to recover both actual and liquidated damages.

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Measurement

1. Finding that the claims involved had been submitted on a total-cost basis and that the record shows the contractor to have been responsible for a significant portion of the costs for which claims had been made, the Board determines the equitable adjustment to which the appellant is entitled by resort to the so-called "jury-verdict" approach.

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Equitable Adjustments

1. Finding that the claims involved had been submitted on a total-cost basis and that the record shows the contractor to have been responsible for a significant portion of the costs for which claims had been made, the Board determines the equitable adjustment to which the appellant is entitled by resort to the so-called "jury-verdict" approach.
2. Where a contract for the construction of a road required a contractor to "observe and comply with all Federal, State and local laws," but did not specifically provide for compliance with the Fair Labor Standards Act, and the contractor was ordered by the U.S. Labor Department to pay overtime wages under the FLSA, a claim by the contractor for reimbursement of such overtime wages paid, grounded upon an alleged misrepresentation by the procuring agency of the applicability of the FLSA to the work will be dismissed as outside the jurisdiction of the Board.

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CONTRACTS—Continued**DISPUTES AND REMEDIES—Continued****Equitable Adjustments—Continued**

3. Under a contract for construction of a road, the Board finds that rejection by the contracting officer's representative of the subbase, following a visual inspection, after it was ready for application of the base course, and his direction to reprocess the subbase, were based upon an erroneous interpretation of the specifications and constituted a constructive change entitling the contractor to an equitable adjustment; but such adjustment may not include the contractor's cost of utilizing a commercial testing laboratory to establish that the Government's rejection was unjustified, since such a charge is an expense for preparing and prosecuting a claim and is unauthorized. 207
4. Where a road construction contract called for 310 tons of RC asphalt, which is not readily available, to be used as prime coat, and the contractor procured the entire supply necessary in advance, and the contracting officer thereafter changed the type to MC asphalt, the contractor was entitled to recover the cost of converting the unused RC asphalt to penetration asphalt (the most economic means of disposing of the excess). 207
5. Where a contractor under a road construction contract in which a certain pit was designated as the source of specified material was directed to blend the material produced with blow sand (it having been ascertained that the material produced did not comply with the specifications), an adjustment made by the Government to compensate the contractor therefor was inadequate in that the contractor was paid only at the unit price rate for the items blended and should also have received compensation for the cost of increased crushing and other difficulties in meeting the requirements of the specifications resulting from the blending. 207
6. Where the total amount of cover aggregate required by the Government was 1,272.7 tons, instead of the 2,230 tons estimated in the bid schedule, under a road construction contract providing for payment at unit prices only for work that was actually performed, and further providing for an adjustment of contract price in the event of increase or decrease in quantity only in several specified circumstances, in the absence of a showing that the exceptions are applicable, a contractor who overproduced cover aggregate was not entitled to be compensated therefor, since the possibility of an underrun was foreseeable and it appeared that the overproduction resulted from the contractor's inability to control production. 208
7. In a dispute over the quantity of unclassified excavation performed under a road construction contract, where the contractor's measurement was based upon the average-end-area method required by the contract, but was made after subbase material was in place, and the Government was unable to prove that it utilized that method, in the absence of a showing that the presence of the subbase resulted in an error in the contractor's calculation, the Board finds that the contractor established its claim by a pre-

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CONTRACTS—Continued**DISPUTES AND REMEDIES—Continued****Equitable Adjustments—Continued**

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ponderance of the evidence; however, contractor is not entitled to recover the cost of employing an independent engineering firm to perform the measurement, since such a charge is an expense of preparing and prosecuting a claim and is unauthorized.

8. Where a contractor under a contract calling for the construction in 90 days of an underground electrical distribution system, promptly submitted its proposed equipment list to the Government for advance approval and conditioned its orders upon such approval, as required by the contract, and the Government, having knowledge that delivery in compliance with the contract performance period was uncertain (because the contractor's supplier would not commence production until all details were approved) delayed in acting on such list and instead issued a change order changing the switches on transformers to be installed, without changing the contract completion date, the burden of the uncertainty of delivery was shifted to the Government and the contractor was entitled to an equitable adjustment extending the time of performance which reflected the full consequences of the change, including an allowance for the ensuing delay in delivery of the equipment, no showing having been made that the equipment could have been obtained more expeditiously elsewhere.

208

9. The Board denies a claim for "Unnecessary Accelerated Construction Costs" where it finds (i) that the appellant has failed to offer any convincing evidence to show that a particular letter from the contracting officer relied upon by the appellant could be properly construed as an order for the delivery of cement thereby furnishing a predicate for the recovery of the costs claimed under the "Suspension of Deliveries" clause when cement was not called for during 1959; and (ii) that the appellant also failed to show by a preponderance of the evidence that the action of the contracting officer in refusing to agree in advance to pay a portion of a suggested wage increase under a related contract (the prime contract for the construction of the dam) prolonged a strike needlessly and thereby resulted in the incurrence of a portion of the costs for which the claim was made.

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Jurisdiction

1. The Board denies the Government's motion to dismiss an appeal as beyond the purview of its jurisdiction where it finds: (i) that a delay of approximately 30 days in supplying a contractor with Government-furnished steel had no significant impact upon the overall performance of the contract; and (ii) that the Government's action in furnishing large quantities of misfabricated steel not only disrupted the contractor's assembly and erection program as had been recognized by the contracting officer in a proposed amendment to the contract but on a rather short schedule job necessarily disrupted the succeeding program of conductor stringing as well, with the result that the costs shown to be attributable to the Government's action were found in both instances to stem from a constructive change.

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CONTRACTS—Continued**DISPUTES AND REMEDIES—Continued****Jurisdiction—Continued**

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2. Where a contract for the construction of a road required a contractor to "observe and comply with all Federal, State and local laws," but did not specifically provide for compliance with the Fair Labor Standards Act, and the contractor was ordered by the U.S. Labor Department to pay overtime wages under the FLSA, a claim by the contractor for reimbursement of such overtime wages paid, grounded upon an alleged misrepresentation by the procuring agency of the applicability of the FLSA to the work will be dismissed as outside the jurisdiction of the Board. 207
3. In a case where a contractor's claim for constructive change based upon practical impossibility had not been presented to the contracting officer prior to the filing of the notice of appeal, the Board denies a Government motion to dismiss such claim on the ground that in the circumstances presented a stay of proceedings pending the issuance of a finding and the taking of a timely appeal therefrom would facilitate the orderly presentation and consideration of the claims involved in the appeal. The Board also denies a Government motion to dismiss portions of the appeal on the ground of lack of specificity in the notice of appeal where it finds sufficient information in the record to apprise the Government of the essential allegations of the appellant's case and thereby permit the Government to adequately prepare its case for hearing. 350
4. Where there are fact questions common to the contractor's claims of excusable delay and practical impossibility on the one hand and the Government's claim of common law damages for late delivery on the other, the Board concludes that it will retain jurisdiction over the latter claim pending the development of a complete administrative record without prejudice, however, to the Government's right to file a motion to dismiss the claim for common law damages at the time its post-hearing brief is submitted. 350

FORMATION AND VALIDITY**Bid and Award**

1. Where the provisions of an invitation for bids clearly and explicitly require the bidder to furnish a material similar to a brand-name product, or a substitute material determined by the contracting officer to be equal thereto, the contractor, having remained silent during the bidding period without protest and having made no inquiry of the contracting officer as to the availability of such brand-name material, or of a material substantially equal to it, is not entitled after award to assert that the specification requirements are invalid for requiring the contractor to procure the material from a sole source (the contractor's post-award allegation being that it was unable to find a different source for a similar material). 89
2. A mere statement by a Departmental officer at an opening of bids for competitive leases that an unnamed bid is unacceptable because it is unsigned does not of itself constitute a rejection of that bid, binding on the United States. 147

CONTRACTS—Continued**FORMATION AND VALIDITY—Continued****Bid and Award—Continued**

3. An opening of bids for competitive leases is simply a public opening and reading of bids which have been submitted. Bids are not ordinarily subject to final acceptance or rejection at that time.
4. The cashing of a check, which has been submitted in conjunction with a bid for a competitive lease, and the placing of the funds in a suspense account do not in any way constitute an acceptance of the bid.
5. An unsigned bid for a competitive lease may be accepted when it is accompanied by documentary evidence of the intent to submit the bid.

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Implied and Constructive Contracts

1. Under a contract for construction of a road, the Board finds that rejection by the contracting officer's representative of the subbase, following a visual inspection, after it was ready for application of the base course, and his direction to reprocess the subbase, were based upon an erroneous interpretation of the specifications and constituted a constructive change entitling the contractor to an equitable adjustment; but such adjustment may not include the contractor's cost of utilizing a commercial testing laboratory to establish that the Government's rejection was unjustified, since such a charge is an expense for preparing and prosecuting a claim and is unauthorized.

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PERFORMANCE OR DEFAULT**Acceleration**

1. Under a contract to clear a reservoir of trees, brush and debris in mountainous country at elevations (1) below 7,388 feet and (2) between 7,388 and 7,519.4 feet, by February 8, 1966, which provided that storage in the reservoir would begin "about November 1, 1965," and which required operations to be conducted so that clearing was completed in advance of water being impounded by a dam, a contractor, who encountered abnormally high water from sources other than the dam but who proceeded by increasing the size of his crew and substituting manual labor for mechanical operations in order to comply with such provision, and who completed all work on November 19, 1965, was not entitled to additional compensation on the ground that his performance was accelerated, where (i) he did not request the Government to extend his time to perform or delay closing the dam; (ii) there is no proof of any Government conduct equivalent to an order to accelerate; (iii) he could have continued to perform some clearing both below and above 7,388 feet through February 8, 1966; and (iv) the contractor planned from the outset to complete all work by November.

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Breach

1. Where a negotiated contract for engineering services contained a liquidated damages provision that incorporated a schedule of accounts (per day) to be paid by the contractor if five designated

CONTRACTS—Continued.**PERFORMANCE OR DEFAULT—Continued****Breach—Continued**

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parts of the contract were not completed within time periods fixed therein, the Board disapproved the Government's attempt to construe another general contract clause (relating to the contractor's responsibility for damages incurred because the contractor did not meet the requirements of the contract (as allowing the assessment of actual damages that allegedly were caused by inadequate or inaccurate surveying work which was (i) detected and corrected prior to completion of the project; (ii) accepted by the Government as its responsibility under an agreement which deleted work from the contract and established a substantial completion date, or (iii) a contributing cause of the contractor's failure to deliver one item on time, for which an assessment of liquidated damages was made (the contractor met its obligations under the other four parts of the liquidated damages provision). The Board based the disapproval upon its conclusion that, in the circumstances, the Government was improperly attempting to recover both actual and liquidated damages-----

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Excusable Delays

1. Under a contract for supplying four gate hoists for a dam, and providing as to each hoist for assessment of liquidated damages for each day of delay, where the contractor and its first-tier subcontractor were tardy in ordering steel from a second-tier supplier, such delays in purchasing will be taken into account and deducted from extensions of time for performance that are otherwise allowable because of delays in delivery of steel due to the fault of the second-tier supplier (pursuant to the decision in *Schweigert, Inc. v. United States*, Ct. Cl. No. 26-66, December 15, 1967)-----
2. Where a contractor under a contract calling for the construction in 90 days of an underground electrical distribution system, promptly submitted its proposed equipment list to the Government for advance approval and conditioned its orders upon such approval, as required by the contract, and the Government, having knowledge that delivery in compliance with the contract performance period was uncertain (because the contractor's supplier would not commence production until all details were approved) delayed in acting on such list and instead issued a change order changing the switches on transformers to be installed, without changing the contract completion date, the burden of the uncertainty of delivery was shifted to the Government and the contractor was entitled to an equitable adjustment extending the time of performance which reflected the full consequences of the change, including an allowance for the ensuing delay in delivery of the equipment, no showing having been made that the equipment could have been obtained more expeditiously elsewhere-----
3. Where there are fact questions common to the contractor's claims of excusable delay and practical impossibility on the one hand and the Government's claim of common law damages for late delivery on the other, the Board concludes that it will retain jurisdiction

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CONTRACTS—Continued**PERFORMANCE OR DEFAULT—Continued****Excusable Delays—Continued**

over the latter claim pending the development of a complete administrative record without prejudice, however, to the Government's right to file a motion to dismiss the claim for common law damages at the time its post-hearing brief is submitted----- 350

Impossibility of Performance

1. In a case where a contractor's claim for constructive change based upon practical impossibility had not been presented to the contracting officer prior to the filing of the notice of appeal, the Board denies a Government motion to dismiss such claim on the ground that in the circumstances presented a stay of proceedings pending the issuance of a finding and the taking of a timely appeal therefrom would facilitate the orderly presentation and consideration of the claims involved in the appeal. The Board also denies a Government motion to dismiss portions of the appeal on the ground of lack of specificity in the notice of appeal where it finds sufficient information in the record to apprise the Government of the essential allegations of the appellant's case and thereby permit the Government to adequately prepare its case for hearing----- 350

Suspension of Work

1. A claim based upon an allegation that a Government project supervisor required the work force of a construction contractor to stand aside and give first priority to the activities of another Government contractor in a project area containing limited working space was denied because it was made for a claim period during which the appellant gave no notice that a constructive suspension of work had been caused by the acts of a Government representative—as to one portion of the claim period the appellant provided no notification of any kind as to alleged acts of the Government causing delays, hindrances, interferences or suspension, as to the remainder it had requested time extensions only. Because a supplemental agreement provided for the acceleration of work during the claim period, it was of particular importance that the contracting officer be given notice, in order to afford him an opportunity to investigate whether a reasonable program of coordination of the activities of the two contractors had been worked out, and to attempt to remedy any unfair scheduling----- 41
2. Notification of a monetary claim that is given under a provision such as the Changes clause, Changed Conditions clause, or an Extra Work clause may in some circumstances be treated as a proper notice under the standard construction contract Suspension of Work clause (which clause bars claims for costs incurred more than 20 days prior to the contracting officer's receipt of notice of a constructive suspension of work); however, an appellant's notification of a claim for an extension of time based upon delays resulting from the operations of another contractor (or the Government's grant of such extension) will not constitute a notice under the Suspension of Work clause----- 41

CONVEYANCES**GENERALLY**

1. Where a deed from the United States describes the land as being in a particular section and township, and there are, at the time of the conveyance, two tracts of land which have been designated by official surveys of the United States as constituting that section and township, but it is clear from the nature and the language of the deed that the description refers to the earlier survey, the deed will be interpreted by reference to that survey, even though the description of land in a conveyance from the United States is ordinarily governed by the latest official survey-----

Page
14**FEDERAL EMPLOYEES AND OFFICERS****AUTHORITY TO BIND GOVERNMENT**

1. A mere statement by a Departmental officer at an opening of bids for competitive leases that an unnamed bid is unacceptable because it is unsigned does not of itself constitute a rejection of that bid, binding on the United States-----
2. The United States cannot be deprived of its right to receive all of the royalty payments due under the terms of an oil and gas lease and the applicable statutory provisions by the unauthorized acts of its employees, and the failure of the Geological Survey to collect all the royalty due by tacit acceptance of the lessee's determination of its royalty obligation for 13 years does not waive the right of the United States to receive full royalty payment in accordance with the lease terms or estop it from demanding payment of the balance due under those terms-----

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FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT

1. Withdrawn public domain lands do not become "surplus" within the meaning of the Federal Property and Administrative Services Act, 40 U.S.C. sec. 471 *et seq.*, until after a determination by the Secretary of the Interior and concurred in by the Administrator of General Services, that the lands are not suitable for return to the public domain-----

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GRAZING PERMITS AND LICENSES**ADJUDICATION**

1. The applicability of regulation 43 CFR 4115.2-1(e)(13)(i) precluding the right of a licensee or other user of the range to demand a readjudication of grazing privileges after they have been held for a period of three years is not limited to situations where an adjudication of the unit has been made as set out in 43 CFR 4110.0-5(r), but is also applicable where adjudications of licenses in the unit have been made over a long period of time on the basis of information available and not challenged by other licensees-----
2. Although other licensees may have lost their right to have their or anyone else's license readjudicated, the Bureau of Land Management retains discretionary authority to make adjustments in a license at anytime when necessary to comply with the Federal Range Code for Grazing Districts, and the Bureau properly exercises that authority to cut licenses in a unit by 50% where such a reduction has been ordered by the Department for all users in the unit and only some of the users have suffered the reduction-----

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GRAZING PERMITS AND LICENSES—Continued**APPEALS**

1. An applicant for a grazing license or permit who, after proper notification, fails to protest or appeal a decision of a district manager within the period prescribed in the decision is barred thereafter from challenging the matters adjudicated in such decision, and an appeal to a hearing examiner from a district manager's partial rejection of an application for grazing privileges is properly dismissed where the appeal is, in fact, an appeal from an earlier adjudication which is no longer subject to appeal_____ 63
2. The applicability of regulation 43 CFR 4115.2-1(e)(1) precluding the right of a licensee or other user of the range to demand a readjudication of grazing privileges after they have been held for a period of three years is not limited to situations where an adjudication of the unit has been made as set out in 43 CFR 4110.0-5(r), but is also applicable where adjudications of licenses in the unit have been made over a long period of time on the basis of information available and not challenged by other licensees____ 63
3. Although other licensees may have lost their right to have their or anyone else's license readjudicated, the Bureau of Land Management retains discretionary authority to make adjustments in a license at anytime when necessary to comply with the Federal Range Code for Grazing Districts, and the Bureau properly exercises that authority to cut licenses in a unit by 50% where such a reduction has been ordered by the Department for all users in the unit and only some of the users have suffered the reduction____ 63

HOMESTEADS (ORDINARY)**LANDS SUBJECT TO**

1. An application for a homestead entry in Alaska is properly rejected where it is filed after a selection by the State under its Statehood Act, although the selection application was originally filed while the selected lands were withdrawn but was subsequently reasserted by amendments to the application after revocation of the withdrawal, and where alleged acts of settlement were also subsequent to an amendment of the State's selection application which had the effect of segregating the land from appropriation by application or settlement and location_____ 297

MINERAL LANDS**DETERMINATION OF CHARACTER OF**

1. To establish the mineral character of lands sought by a State, either in exchange for other lands or as indemnity for lost school lands, it must be shown that known conditions are such as reasonably to engender the belief that the lands contain mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end_____ 176
2. The mineral character of land may be established by inference without actual exposure of the mineral deposit for which the land is supposed to be valuable, but the inferred existence of a deposit of high-quality limestone at unknown depth does not establish the mineral character of land in the absence of evidence that extraction of the limestone is economically feasible, thereby giving the land a practical value for mining purposes_____ 176

MINERAL LANDS—Continued**DETERMINATION OF CHARACTER OF—Continued**

3. To establish the mineral character of land, now closed to mining location, embraced in a placer mining claim, it must be shown that known conditions, as of a date when the land was open to mining location, were such as reasonably to engender the belief that the lands contain mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end _____ 338
4. Where the validity of a portion of a contested placer mining claim located on land subsequently withdrawn from mining location is dependent upon a finding that, at the effective date of the withdrawal, the land was known to be mineral in character, but the contest complaint made no reference to the date of the determination of mineral character, and no evidence was introduced by either party to the contest bearing upon known conditions at the time of the withdrawal which related to the mineral character of the land, and where there is reason for doubting whether the allegations of the complaint accurately reflected the charges which the contestant proposed to substantiate, the proceeding will be set aside to permit the filing of a new complaint or amended complaint _____ 338

MINERAL LEASING ACT**APPLICABILITY**

1. Substances of sodium enumerated in section 23 of the Mineral Leasing Act, whether simple, double or complex compounds of sodium, are subject to disposition only under the provisions of the Mineral Leasing Act _____ 137

MINING CLAIMS**COMMON VARIETIES OF MINERALS**

1. The act of July 23, 1955, had the effect of excluding from the coverage of the mining laws "common varieties" of building stone, but left the act of August 4, 1892, authorizing the location of building stone placer mining claims effective as to building stone that has "some property giving it distinct and special value." _____ 127
2. To determine whether a deposit of building stone or other substance listed in the act of July 23, 1955, is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type minerals in order to ascertain whether the deposit has a property giving it a distinct and special value. If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use and that this value is reflected by the fact that the material commands a higher price in the market place. If, however, the stone or other mineral has some property making it useful for some purpose for which other commonly available materials cannot be used, this may adequately demonstrate that it has a distinct and special value _____ 127

MINING CLAIMS—Continued**COMMON VARIETIES OF MINERALS—Continued**

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3. A stipulation between the Government's attorney and the mining claimant's attorney at a hearing to determine whether a building stone is of a common or uncommon variety under the act of July 23, 1955, that the stone is marketable, does not preclude a further hearing to consider whether the facts relating to the marketability demonstrate that the stone has some property giving it a distinct and special value over other stones used for the same purposes which are also marketable but are considered to be of a common variety..... 127
4. A deposit of limestone cannot be characterized as a deposit of an uncommon variety of limestone when the claimant fails to show what particular quality or use of the limestone makes it an uncommon variety..... 255
5. Even if a deposit of limestone meets all other requirements necessary to constitute it an uncommon variety of stone it is not a valuable mineral deposit within the mining laws if the claimant cannot show that it is marketable at a profit..... 255
6. The act of July 23, 1955, excludes from mining location only common varieties of the materials enumerated in the Act, i.e., "sand, stone, gravel, pumice, pumicite, or cinders"; therefore, a material must fall within one of those categories before the issue of whether it is a common variety becomes pertinent..... 270
7. Where a stone containing mica can be ground and used as a whole rock for certain purposes, the issue may properly arise as to whether the particular stone is a common variety which is excluded from mining location by the act of July 23, 1955; but if the interest in the stone is simply for the mica to be extracted from the stone and value is claimed only for the mica, the issue presented is not whether the stone is a common variety of stone but whether the mica constitutes a valuable mineral deposit which is locatable irrespective of the 1955 Act..... 270
8. Where a deposit of sand has an allegedly valuable mica and feldspar content, its locatability may depend upon either whether the sand is locatable as an uncommon variety of sand because of its mica and feldspar content or whether the mica or feldspar constitute valuable minerals subject to location as mica or feldspar..... 270
9. Lack of discovery is properly found in the case of deposits of common varieties of limestone, aplite, and mica schist where credible evidence is lacking that materials from the deposits could have been marketed at a profit as of July 23, 1955; evidence that a general market for the materials existed as of that date and purely theoretical evidence as to profitable operations are not sufficient to show a discovery where the credibility of the evidence is open to question..... 271
10. Lack of discovery is properly found in the case of deposits of mica and feldspar where credible evidence is lacking to show that the minerals can be marketed at a profit..... 271

MINING CLAIMS—Continued**COMMON VARIETIES OF MINERALS—Continued**

11. To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, on land withdrawn from mining location after February 10, 1948, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit before the effective date of the withdrawal, and where the evidence shows that prior to that date no sales were made, the minor quantities of material were removed from the claim by the claimant for his own use and by others, with the claimant's consent and without any charge, and that no steps were taken before or after the withdrawal of the land to develop the claim as mining property, the fact that sand and gravel of similar quality were extracted and sold from other property in the vicinity of the claim is insufficient to show that material from the claim could have been profitably removed and marketed at the same time, and the claim is properly declared null and void.-----300
12. The marketability of sand and gravel from a claim located after the act of July 23, 1955, for sand and gravel is not sufficient to validate the claim if the deposit has no property giving it a distinct and special value since under that act common varieties of sand and gravel must be disposed of under the Materials Act and are not locatable under the mining laws.-----320
13. A sand and gravel deposit which may have the necessary qualities for road, tunnel, and dam construction projects nearby and is marketable but has no property giving it a distinct and special value for such purposes or for other purposes for which other commonly available deposits may be used is a common variety within the meaning of the act of July 23, 1955, and, therefore, is not locatable under the mining laws.-----321
14. Where a mining claim containing common varieties of sand and gravel not locatable under the mining laws also contains slight values of fine gold which the mining claimant alleges may profitably be extracted in connection with the removal and sale of sand and gravel from the claim, in order for the claim to be valid there must be sufficient gold of a quantity and quality to satisfy the prudent man test of a discovery of a valuable mineral deposit independently at the value of the sand and gravel.-----321

CONTESTS

1. Where a Government contest is brought against a limestone placer mining claim located prior to July 23, 1955, charging that no discovery has been made because the minerals cannot be marketed at a profit and that an actual market has not been shown to exist, the charges cannot be properly construed as raising the issue of whether a valid discovery of a common variety of limestone had been made prior to July 23, 1955, where no evidence was offered on that issue at the hearing, where that issue was not adverted to by either party, and where the contestee asserts that he can prove that the deposits could have been marketed at a profit; however, where the contestee's offer of proof is insufficient to

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MINING CLAIMS—Continued**CONTESTS—Continued**

- show that the materials could have been marketed at a profit as of July 23, 1955, the case will not be remanded for a further hearing on this issue in the absence of an offer of meaningful proof— 255
2. The fact that a charge in a mining contest complaint may not adequately raise an issue does not vitiate a decision which rests upon that issue where the contestee examined and cross-examined witnesses on it, the record demonstrates that he was aware that the issue was important to the resolution of the contest, and he has not demonstrated that he has been prejudiced by the inartistic allegations of the complaint 270
3. In a private contest initiated by a mining claimant to determine, as between himself and an oil and gas lessee, the right to leasable minerals within the limits of a mining claim, it is incumbent upon the mining claimant to show that a discovery was made upon the claim at a time when such discovery would vest in him a right to the leasable minerals, and if he is unable to sustain this burden, the contest is properly dismissed notwithstanding any acknowledgment on the part of the United States of a present discovery on the claim 408

DETERMINATION OF VALIDITY

1. Where a hearing examiner has declared a mining claim to be null and void for lack of a discovery, his determination of the invalidity of the claim is a reasonable interpretation of the evidence presented at the hearing, and the mining claimant makes no attempt to show error in that particular finding in subsequent appeals from the hearing examiner's decision, the hearing examiner's conclusions will not be disturbed 14
2. To determine whether a deposit of building stone or other substance listed in the act of July 23, 1955, is of a common or uncommon variety, there must be a comparison of the deposit with other deposits of similar type minerals in order to ascertain whether the deposit has a property giving it a distinct and special value. If the deposit is to be used for the same purposes as minerals of common occurrence, then there must be a showing that some property of the deposit gives it a special value for such use and that this value is reflected by the fact that the material commands a higher price in the market place. If, however, the stone or other mineral has some property making it useful for some purpose for which other commonly available materials cannot be used, this may adequately demonstrate that it has a distinct and special value 127
3. The rejection of a state indemnity selection for a tract of land for the reason that a field report shows that the land is in an "apparently valid" mining claim does not constitute a binding determination as to the validity of the claim or foreclose a subsequent contest of the claim when the claimant later applies for a patent 255

MINING CLAIMS—Continued**DETERMINATION OF VALIDITY—Continued**

4. A prudent man could not reasonably expect to develop a profitable mine for manganese where the deposit within the mining claims is unknown, and it appears to contain only low grade ores for which there is no market, or reasonable prospect for a market, therefore, there has not been a discovery of a valuable mineral deposit within the meaning of the mining laws and the claims are properly declared null and void and a mineral patent application for the claims is properly rejected----- Page 312
5. There is no justification to issue a mineral patent for mining claims containing an unknown quantity of low grade manganese simply because some patents may have issued for similar-type of claims during World War II and during a period where an artificial market for low grade ores was created by a government stockpiling program giving an incentive price for ores, where there is now no market for such ores and no reasonable prospect of such a market----- 313
6. The Secretary of the Interior may require into all matters vital to the validity or regularity of a mining claim at any time before the passage of legal title, and the fact that the validity of a portion of a contested mining claim was not challenged in a proceeding initiated by the Forest Service does not preclude inquiry into the validity of that portion of the claim by this Department if, upon review of the record of the contest proceedings, the Department is not satisfied that the claim is regular in all respects----- 338
7. Where the validity of a portion of a contested placer mining claim located on land subsequently withdrawn from mining location is dependent upon a finding that, at the effective date of the withdrawal, the land was known to be mineral in character, but the contest complaint made no reference to the date of the determination of mineral character, and no evidence was introduced by either party to the contest bearing upon known conditions at the time of the withdrawal which related to the mineral character of the land, and where there is reason for doubting whether the allegations of the complaint accurately reflected the charges which the contestant proposed to substantiate, the proceeding will be set aside to permit the filing of a new complaint or amended complaint ----- 338
8. Where the validity of a mining claim as of a date prior to examination of the claim to determine its validity is at issue, the date of the exposure of a mineralized area, not the date of the sampling of the mineralization, is determinative of the admissibility of assay reports and other data as evidence that there was or was not a discovery upon the claim at the critical date; where a witness in a mining contest fails to distinguish between mineralization exposed prior to the crucial date and that exposed thereafter and to explain the significance of each as it relates to the vital issue, his opinion that there is a discovery at the present time is of little or no value in establishing the date of the alleged discovery----- 408

MINING CLAIMS—Continued**DETERMINATION OF VALIDITY—Continued**

9. The Secretary of the Interior may inquire into all matters vital to the validity or regularity of a mining claim at any time before the passage of legal title, and the failure of the Government to contest a mining claim after its mineral examiner has examined the claim in response to an application for patent and has recommended that the claim not be contested is not a bar to further inquiry into the validity of the claim if, upon further review of the case, it appears that there has not been a discovery----- 408

DISCOVERY

1. To satisfy the requirement that deposits of minerals of widespread occurrence be "marketable" it is not enough that they are capable of being sold but it must be shown that the mineral from the particular deposit could have been extracted, sold, and marketed at a profit----- 270
2. Lack of discovery is properly found in the case of deposits of common varieties of limestone, aplite, and mica schist where credible evidence is lacking that materials from the deposits could have been marketed at a profit as of July 23, 1955; evidence that a general market for the materials existed as of that date and purely theoretical evidence as to profitable operations are not sufficient to show a discovery where the credibility of the evidence is open to question----- 271
3. Lack of discovery is properly found in the case of deposits of mica and feldspar where credible evidence is lacking to show that the minerals can be marketed at a profit----- 271
1. To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, on land withdrawn from mining location after February 10, 1948, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit before the effective date of the withdrawal, and where the evidence shows that prior to that date no sales were made, that minor quantities of material were removed from the claim by the claimant for his own use and by others, with the claimant's consent and without any charge, and that no steps were taken before or after the withdrawal of the land to develop the claim as mining property, the fact that sand and gravel of similar quality were extracted and sold from other property in the vicinity of the claim is insufficient to show that material from the claim could have been profitably removed and marketed at the same time, and the claim is properly declared null and void----- 300
5. A prudent man could not reasonably expect to develop a profitable mine for manganese where the deposit within the mining claims is unknown, and it appears to contain only low grade ores for which there is no market, or reasonable prospect for a market, therefore, there has not been a discovery of a valuable mineral deposit within the meaning of the mining laws and the claims are properly declared null and void and a mineral patent application for the claims is properly rejected----- 312

MINING CLAIMS—Continued**DISCOVERY—Continued**

- | 6. | There is no justification to issue a mineral patent for mining claims containing an unknown quantity of low grade manganese simply because some patents may have issued for similar-type of claims during World War II and during a period where an artificial market for low grade ores was created by a Government stockpiling program giving an incentive price for ores, where there is now no market for such ores and no reasonable prospect of such a market----- | 313 |
|-----|--|-----|
| 7. | The marketability of sand and gravel from a claim located after the act of July 23, 1955, for sand and gravel is not sufficient to validate the claim if the deposit has no property giving it a distinct and special value since under that act common varieties of sand and gravel must be disposed of under the Materials Act and are not locatable under the mining laws----- | 320 |
| 8. | Where a mining claim containing common varieties of sand and gravel not locatable under the mining laws also contains slight values of fine gold which the mining claimant alleges may profitably be extracted in connection with the removal and sale of sand and gravel from the claim, in order for the claim to be valid there must be sufficient gold of a quantity and quality to satisfy the prudent man test of a discovery of a valuable mineral deposit independently at the value of the sand and gravel----- | 321 |
| 9. | A showing of mineral values which might warrant further exploration for minerals within a mining claim but would not warrant development of a mine is insufficient to establish a discovery of a valuable mineral deposit under the mining laws----- | 321 |
| 10. | In applying the prudent man test of discovery to determine whether there has been a discovery of a valuable mineral deposit within a mining claim, the marketability at a profit of low-grade deposits of manganese ore is a determinative factor----- | 368 |
| 11. | Mining claims containing an unknown quantity of low-grade manganese ore are properly declared subject to the limitations under section 4 of the Surface Resources Act of July 23, 1955, where the evidence shows that a prudent man could not now expect to develop a valuable mine because there is no market for the ore, regardless of whether under more favorable market conditions created primarily by a Government stockpiling program paying incentive prices prior to the date of that act the prudent man would have had more basis for anticipating that such ore could be mined and sold----- | 368 |
| 12. | To constitute a valid discovery upon a lode mining claim there must be exposed within the limits of the claim a lode or vein bearing mineral which would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is only a showing which would warrant further exploration in the hope of finding a valuable mineral deposit----- | 407 |

HEARINGS

1. A stipulation between the Government's attorney and the mining claimant's attorney at a hearing to determine whether a building stone is of a common or uncommon variety under the act of July 23,

MINING CLAIMS—Continued**HEARINGS—Continued**

1955, that the stone is marketable, does not preclude a further hearing to consider whether the facts relating to the marketability demonstrate that the stone has some property giving it a distinct and special value over other stones used for the same purposes which are also marketable but are considered to be of a common variety

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LANDS SUBJECT TO

1. Lands which were reserved from mining location by reason of inclusion in an application for a power project filed prior to August 11, 1955, and which were opened to location by section 2 of the act of August 11, 1955, become closed to location thereafter if they come under examination and survey by a prospective licensee holding an uncancelle preliminary permit issued by the Federal Power Commission after August 11, 1955, and mining claims on such lands located thereafter are void *ab initio*

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2. Mining claims located on land in a first form reclamation withdrawal are properly declared to be null and void *ab initio*

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3. A classification of land by Bureau motion for disposition under the Recreation and Public Purposes Act segregates the land from mineral locations even if the classification is not published in newspapers or the *Federal Register* and is only noted on a land office supplemental plat, and it is proper for the Bureau of Land Management to declare a mining claim null and void *ab initio* because of the classification

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4. Although the Recreation and Public Purposes Act and regulations thereunder provide in effect that if no application is filed for lands classified on Bureau motion for disposition under that act within 18 months from the classification then the Secretary shall restore the land for appropriation under other public land laws, such a provision is not self-executing and the lands remain segregated from mineral location after the 18-month period where no action has been taken to restore the lands to appropriation under the mining laws

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PATENT

1. Where a discovery of a valuable mineral deposit within the limits of a mining claim prior to the filing of an oil and gas lease offer covering the land embraced in the claim is not established in a private contest instituted by the claimant for the purpose of determining his right to the leasable minerals, a patent to the mining claim issued after August 13, 1954, must contain a reservation to the United States of all leasing act minerals to the extent required by the act of August 13, 1954

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PLACER CLAIMS

1. To establish the mineral character of land, now closed to mining location, embraced in a placer mining claim, it must be shown that known conditions, as of a date when the land was open to mining location, were such as reasonably to engender the belief that the lands contain mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end

338

MINING CLAIMS—Continued**POWER SITE LANDS**

1. Lands which were reserved from mining location by reason of inclusion in an application for a power project filed prior to August 11, 1955, and which were opened to location by section 2 of the act of August 11, 1955, become closed to location thereafter if they come under examination and survey by a prospective licensee holding an uncanceled preliminary permit issued by the Federal Power Commission after August 11, 1955, and mining claims on such lands located thereafter are void *ab initio*-----
33

SPECIAL ACTS

1. The act of July 23, 1955, had the effect of excluding from the coverage of the mining laws "common varieties" of building stone, but left the act of August 4, 1892, authorizing the location of building stone placer mining claims effective as to building stone that has "some property giving it distinct and special value"-----
127

SURFACE USES

1. Since Congress limited the effect of a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine the rights of the Government and a mining claimant as to the surface resources of a mining claim, a claim is not declared null and void as a result of such a proceeding decided in favor of the Government, and the claimant may continue to engage in mining activities although he is not entitled to the use and management of the surface resources for other than mining purposes prior to issuance of patent for the claim-----
367
2. In a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine the rights of the Government and a mining claimant as to the surface resources of a mining claim prior to patent, the Government will prevail if it is shown that there was not a discovery of a valuable mineral deposit as of the date of the act even if such a discovery is subsequently made, and it will also prevail if a discovery existed as of the date of the act but it is determined that thereafter a valuable mineral deposit does not exist within the claims because of a change in conditions-----
368
3. Mining claims containing an unknown quantity of low-grade manganese ore are properly declared subject to the limitations under section 4 of the Surface Resources Act of July 23, 1955, where the evidence shows that a prudent man could not now expect to develop a valuable mine because there is no market for the ore, regardless of whether under more favorable market conditions created primarily by a Government stockpiling program paying incentive prices prior to the date of that act the prudent man would have had more basis for anticipating that such ore could be mined and sold-----
368

WITHDRAWN LAND

1. Lands which were reserved from mining location by reason of inclusion in an application for a power project filed prior to August 11, 1955, and which were opened to location by section 2 of the act of August 11, 1955, become closed to location thereafter if they come under examination and survey by a prospective licensee holding an uncanceled preliminary permit issued by the Federal Power Com-

MINING CLAIMS—Continued**WITHDRAWN LAND—Continued**

- mission after August 11, 1955, and mining claims on such lands located thereafter are void *ab initio*-----33
2. Mining claims located on land in a first form reclamation withdrawal are properly declared to be null and void *ab initio*-----33

MINING OCCUPANCY ACT**PRINCIPAL PLACE OF RESIDENCE**

1. A cabin which is used intermittently or sporadically for brief periods which regular residence is concurrently maintained elsewhere does not constitute a principal place of residence within the meaning of section 2 of the act of October 23, 1962, and an application for the conveyance of land based upon such use is properly rejected-----361

QUALIFIED APPLICANT

1. In order to demonstrate his qualifications for relief, an applicant for the conveyance of land under the act of October 23, 1962, must show the existence of such facts as will warrant the conclusion that the improvements placed upon a mining claim constitute a principal place of residence for the applicant within the meaning of the act; broad statements that applicants have resided on a mining claim site for at least two months of each year, plus vacations and holidays, that the mining claim has been the applicants' "only place of residence" in a particular county, and that it has been used only as a "principal place of residence and mining claim" do not constitute statements of the facts sufficient for a determination that the applicants are qualified, especially where the application is filed jointly by two persons who maintain their respective separate residences in a different county from the one in which the mining claim is situated and whose individual residential use of the property is unexplained, where the only evidence of record indicates that use of the property has been casual or intermittent, and where the applicants own statements do not suggest otherwise.-----361

MULTIPLE MINERAL DEVELOPMENT ACT**APPLICABILITY**

1. Where a discovery of a valuable mineral deposit within the limits of a mining claim prior to the filing of an oil and gas lease offer covering the land embraced in the claim is not established in a private contest instituted by the claimant for the purpose of determining his right to the leasable minerals, a patent to the mining claim issued after August 13, 1954, must contain a reservation to the United States of all leasing act minerals to the extent required by the act of August 13, 1954.-----408

NOTICE

1. A classification of land by Bureau motion for disposition under the Recreation and Public Purposes Act segregates the land from mineral locations even if the classification is not published in newspapers or the *Federal Register* and is only noted on a land office supplemental plat, and it is proper for the Bureau of Land Management to declare a mining claim null and void *ab initio* because of the classification-----140

OIL AND GAS LEASES**GENERALLY**

1. An application for a permit to drill a well on the outer continental shelf pursuant to a validated State oil and gas lease is properly rejected when it is determined that in validating the lease under section 6 of the Outer Continental Shelf Lands Act the extent of the lease into the Gulf of Mexico was measured from the shoreline of an island and the adjacent mainland, and the site of the proposed well is outside that area. The fact that another line had been adopted by the United States in other litigation to establish "the coast line" for purposes of the Submerged Lands Act does not vary the external boundaries of the lease as validated although it may affect the proportions of Federal and State lands included within those boundaries by changing the location of the State boundary, which separates those areas-----

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APPLICATIONS**Sole Party in Interest**

1. Where an oil and gas lease offeror's statement of interest and qualifications, addressed to the land office at its post office box address in Santa Fe, New Mexico, was postmarked in Cheyenne, Wyoming, on May 8, 1967, and it is established that in the ordinary course of mail it would have been delivered to the land office at its post office box prior to 4 p.m. on the following day, the last hour for the filing of such statement, but that mail placed in the box after 1 p.m. would not have been picked up by the land office until a day later, the statement of interest is presumed to have been filed on May 9 even though the date and time stamp of the land office indicates that it was not received until May 10-----

COMPETITIVE LEASES

1. A mere statement by a Departmental officer at an opening of bids for competitive leases that an unnamed bid is unacceptable because it is unsigned does not of itself constitute a rejection of that bid, binding on the United States-----
2. An opening of bids for competitive leases is simply a public opening and reading of bids which have been submitted. Bids are not ordinarily subject to final acceptance or rejection at that time-----
3. The cashing of a check, which has been submitted in conjunction with a bid for a competitive lease, and the placing of the funds in a suspense account do not in any way constitute an acceptance of the bid-----
4. An unsigned bid for a competitive lease may be accepted when it is accompanied by documentary evidence of the intent to submit the bid-----

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DRILLING

1. The post-termination activities of a lessee who claims to have earned an extension of an oil and gas lease by diligently prosecuting actual drilling operations at the end of its primary term can be evaluated to determine whether his activities on the last day of the lease were undertaken in good faith to carry the well-drilling operations to a conclusion and, where it is determined that he was not proceeding in good faith, it is proper to hold that the lease terminated as of the expiration of the primary term-----

329

OIL AND GAS LEASES—Continued**EXTENSIONS**

1. The post-termination activities of a lessee who claims to have earned an extension of an oil and gas lease by diligently prosecuting actual drilling operations at the end of its primary term can be evaluated to determine whether his activities on the last day of the lease were undertaken in good faith to carry the well-drilling operations to a conclusion and, where it is determined that he was not proceeding in good faith, it is proper to hold that the lease terminated as of the expiration of the primary term _____

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RENTALS

1. When a producing oil and gas lease is partially committed to a unit agreement, it is segregated into two leases—one covering the unitized portion and the other the nonunitized portion—and the rental obligations of each lease are those set by the statute, regulation and lease, even though there is no formal notification to the lessee of the segregation and the rentals due on each lease._____

81

2. When a producing lease is segregated into two leases upon partial commitment to a unit, the nonunitized portion, which does not contain a producing well, does not remain in a minimum royalty status but reverts to a rental basis which is determined by its own situation _____

81

3. The automatic termination provisions of the Mineral Leasing Act, as amended, do not apply to a lease issued prior to July 24, 1954, unless the lessee consents to have the lease made subject to them, and the consent cannot be made effective as of a date prior to its filing even though rentals have accrued on part of the lease as a result of the segregation of the lease into two leases by unitization by a procedure which the lessee says deprived him of a timely opportunity to prevent the accumulation of several years rental _____

81

4. Oil and gas lease rentals cannot be reduced or waived under section 39 of the Mineral Leasing Act where such action has no relation to encouraging production or the conservation of natural resources _____

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5. Where part of a unitized oil and gas lease is eliminated from a unit agreement it remains part of the unitized lease and the annual rental for that part is \$1 per acre if any portion of the lease is within the known geologic structure of a producing oil and gas field _____

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6. Where notice that part of a lease is on the known geologic structure of a producing field has been given while the lease was undivided, the fact that it is later segregated into two leases as a result of unitization does not require that a new notice be given before the increased rental applicable to leases which have lands on a known geologic structure becomes due _____

81

ROYALTIES

1. When a producing lease is segregated into two leases upon partial commitment to a unit, the nonunitized portion, which does not contain a producing well, does not remain in a minimum royalty status but reverts to a rental basis which is determined by its own situation _____

81

OIL AND GAS LEASES—Continued**ROYALTIES—Continued**

2. Where a portion of the land in an oil and gas lease lies within the horizontal limits of an oil or gas deposit which was known to be productive on Aug. 8, 1946, the lessee is not entitled under item (1) of section 12 of the act of Aug. 8, 1946, to a flat royalty rate of 12½ percent on production later obtained from deeper zones underlying the same horizontal limits, which deeper zones were discovered by wells drilled outside the lease boundaries subsequent to Aug. 8, 1946. _____ Page 155
3. The United States cannot be deprived of its right to receive all of the royalty payments due under the terms of an oil and gas lease and the applicable statutory provisions by the unauthorized acts of its employees, and the failure of the Geological Survey to collect all the royalty due by tacit acceptance of the lessee's determination of its royalty obligation for 13 years does not waive the right of the United States to receive full royalty payment in accordance with the lease terms or stop it from demanding payment of the balance due under those terms. _____ 155

TERMINATION

1. The automatic termination provisions of the Mineral Leasing Act, as amended, do not apply to a lease issued prior to July 24, 1954, unless the lessee consents to have the lease made subject to them, and the consent cannot be made effective as of a date prior to its filing even though rentals have accrued on part of the lease as a result of the segregation of the lease into two leases by unitization by a procedure which the lessee says deprived him of a timely opportunity to prevent the accumulation of several years rental. _____ 81

UNIT AND COOPERATIVE AGREEMENTS

1. When a producing oil and gas lease is partially committed to a unit agreement, it is segregated into two leases—one covering the unitized portion and the other the nonunitized portion—and the rental obligations of each lease are those set by the statute, regulation and lease, even though there is no formal notification to the lessee of the segregation and the rentals due on each lease. _____ 81
2. When a producing lease is segregated into two leases upon partial commitment to a unit, the nonunitized portion, which does not contain a producing well, does not remain in a minimum royalty status but reverts to a rental basis which is determined by its own situation. _____ 81
3. Where part of a unitized oil and gas lease is eliminated from a unit agreement it remains part of the unitized lease and the annual rental for that part is \$1 per acre if any portion of the lease is within the known geologic structure of a producing oil and gas field. _____ 81
4. Where notice that part of a lease is on the known geologic structure of a producing field has been given while the lease was undivided, the fact that it is later segregated into two leases as a result of unitization does not require that a new notice be given before the increased rental applicable to leases which have lands on a known geologic structure becomes due. _____ 81

OIL SHALE**MINING CLAIMS**

1. Mining claims located on lands known to be valuable for minerals subject to disposition under the Mineral Leasing Act convey no rights to Leasing Act minerals since those minerals are reserved to the United States by virtue of section 4 of the Multiple Mineral Development Act. 397
2. The Multiple Mineral Development Act, though allowing the location of mining claims on lands known to be valuable for Leasing Act minerals, did not authorize the location of claims for minerals whose mining or extraction would significantly damage or disturbed Leasing Act minerals such as oil shale or sodium. 397

OUTER CONTINENTAL SHELF LANDS ACT**BOUNDARIES**

1. An application for a permit to drill a well on the outer continental shelf pursuant to a validated State oil and gas lease is properly rejected when it is determined that in validating the lease under section 6 of the Outer Continental Shelf Lands Act the extent of the lease into the Gulf of Mexico was measured from the shore line of an island and the adjacent mainland, and the site of the proposed well is outside that area. The fact that another line had been adopted by the United States in other litigation to establish "the coast line" for purposes of the Submerged Lands Act does not vary the external boundaries of the lease as validated although it may affect the proportions of Federal and State lands included within those boundaries by changing the location of the State boundary, which separates those areas. 8

OIL AND GAS LEASES

1. A mere statement by a Departmental officer at an opening of bids for competitive leases that an unnamed bid is unacceptable because it is unsigned does not of itself constitute a rejection of that bid, binding on the United States. 147
2. An opening of bids for competitive leases is simply a public opening and reading of bids which have been submitted. Bids are not ordinarily subject to final acceptance or rejection at that time. 147
3. The cashing of a check, which has been submitted in conjunction with a bid for a competitive lease, and the placing of the funds in a suspense account do not in any way constitute an acceptance of the bid. 147
4. An unsigned bid for a competitive lease may be accepted when it is accompanied by documentary evidence of the intent to submit the bid. 147

STATE LEASES**Generally**

1. An application for a permit to drill a well on the outer continental shelf pursuant to a validated State oil and gas lease is properly rejected when it is determined that in validating the lease under section 6 of the Outer Continental Shelf Lands Act the extent of the lease into the Gulf of Mexico was measured from the shore line of an island and the adjacent mainland, and the site of the proposed well is outside that area. The fact that another line had

OUTER CONTINENTAL SHELF LANDS ACT—Continued**STATE LEASES—Continued****Generally—Continued**

been adopted by the United States in other litigation to establish "the coast line" for purposes of the Submerged Lands Act does not vary the external boundaries of the lease as validated although it may affect the proportions of Federal and State lands included within those boundaries by changing the location of the State boundary, which separates those areas

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PATENTS OF PUBLIC LANDS**GENERALLY**

1. Where, subsequent to the issuance of patent to sec. 33, T. 28 S., R. 34 E., a resurvey was made which resulted in a determination that the area so patented lay within the limits of a different township and in the designation of a different area as sec. 33, T. 28 S., R. 34 E., and where the jurisdiction of the United States over a part of the land now designated as section 33 is challenged on the premise that the title to the area in question passed from the United States by virtue of the patent, the lack of jurisdiction over the land can be demonstrated only by showing that the disputed area is within the limits of the original section 33 as it was surveyed on the ground, and any showing of error in either the original plat of survey or the plat of resurvey is immaterial if it fails to establish that fact
2. A patentee of public land takes according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground, and the Federal Government is without power to affect, by means of any subsequent survey, the property rights acquired under an official survey

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RESERVATIONS

1. Where a discovery of a valuable mineral deposit within the limits of a mining claim prior to the filing of an oil and gas lease offer covering the land embraced in the claim is not established in a private contest instituted by the claimant for the purpose of determining his right to the leasable minerals, a patent to the mining claim issued after August 13, 1954, must contain a reservation to the United States of all leasing act minerals to the extent required by the act of August 13, 1954.

408

POWER**PURCHASE OF FOR RESALE**

1. In implementing an integrated hydro-thermal power program for the Pacific Northwest, the Bonneville Power Administrator may enter into contractual arrangements, including the acquisition by purchase or exchange of thermal power, which are reasonably related to the statutory objective of providing the most widespread use of and benefit from the existing and authorized Federal power investment at the lowest practical cost

403

PUBLIC LANDS**GENERALLY**

1. Withdrawn public domain lands cannot become "surplus" until after determination by the Secretary of the Interior that the lands are not suitable for return to the public domain-----

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CLASSIFICATION

1. A classification of land by Bureau motion for disposition under the Recreation and Public Purposes Act segregates the land from mineral locations even if the classification is not published in newspapers or the *Federal Register* and is only noted on a land office supplemental plat, and it is proper for the Bureau of Land Management to declare a mining claim null and void *ab initio* because of the classification-----
2. Although the Recreation and Public Purposes Act and regulations thereunder provide in effect that if no application is filed for lands classified on Bureau motion for disposition under that act within 18 months from the classification then the Secretary shall restore the land for appropriation under other public land laws, such a provision is not self-executing and the lands remain segregated from mineral location after the 18-month period where no action has been taken to restore the lands to appropriation under the mining laws-----

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RECREATION AND PUBLIC PURPOSES ACT

1. A classification of land by Bureau motion for disposition under the Recreation and Public Purposes Act segregates the land from mineral locations even if the classification is not published in newspapers or the *Federal Register* and is only noted on a land office supplemental plat, and it is proper for the Bureau of Land Management to declare a mining claim null and void *ab initio* because of the classification-----
2. Although the Recreation and Public Purposes Act and regulations thereunder provide in effect that if no application is filed for lands classified on Bureau motion for disposition under that act within 18 months from the classification then the Secretary shall restore the land for appropriation under other public land laws, such a provision is not self-executing and the lands remain segregated from mineral location after the 18-month period where no action has been taken to restore the lands to appropriation under the mining laws-----

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RULES OF PRACTICE**GENERALLY**

1. The Secretary of the Interior may inquire into all matters vital to the validity or regularity of a mining claim at any time before the passage of legal title, and the fact that the validity of a portion of a contested mining claim was not challenged in a proceeding initiated by the Forest Service does not preclude inquiry into the validity of that portion of the claim by this Department if, upon review of the record of the contest proceedings, the Department is not satisfied that the claim is regular in all respects-----

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RULES OF PRACTICE—Continued**GENERALLY—Continued**

2. Where the validity of a portion of a contested placer mining claim located on land subsequently withdrawn from mining location is dependent upon a finding that, at the effective date of the withdrawal, the land was known to be mineral in character, but the contest complaint made no reference to the date of the determination of mineral character, and no evidence was introduced by either party to the contest bearing upon known conditions at the time of the withdrawal which related to the mineral character of the land, and where there is reason for doubting whether the allegations of the complaint accurately reflected the charges which the contestant proposed to substantiate, the proceeding will be set aside to permit the filing of a new complaint or amended complaint 338
3. The Secretary of the Interior may inquire into all matters vital to the validity or regularity of a mining claim at any time before the passage of legal title, and the failure of the Government to contest a mining claim after its mineral examiner has examined the claim in response to an application for patent and has recommended that the claim not be contested is not a bar to further inquiry into the validity of the claim if, upon further review of the case, it appears that there has not been a discovery 408

APPEALS**Dismissal**

1. The Board denies the Government's motion to dismiss an appeal as beyond the purview of its jurisdiction where it finds: (i) that a delay of approximately 30 days in supplying a contractor with Government-furnished steel had no significant impact upon the overall performance of the contract; and (ii) that the Government's action in furnishing large quantities of misfabricated steel not only disrupted the contractor's assembly and erection program as had been recognized by the contracting officer in a proposed amendment to the contract but on a rather short schedule job necessarily disrupted the succeeding program of conductor stringing as well, with the result that the costs shown to be attributable to the government's action were found in both instances to stem from a constructive change 185
2. Where a contract for the construction of a road required a contractor to "observe and comply with all Federal, State and local laws," but did not specifically provide for compliance with the Fair Labor Standards Act, and the contractor was ordered by the U.S. Labor Department to pay overtime wages under the FLSA, a claim by the contractor for reimbursement of such overtime wages paid, grounded upon an alleged misrepresentation by the procuring agency of the applicability of the FLSA to the work will be dismissed as outside the jurisdiction of the Board 207
3. In a case where a contractor's claim for constructive change based upon practical impossibility had not been presented to the contracting officer prior to the filing of the notice of appeal, the Board denies a Government motion to dismiss such claim on the ground

RULES OF PRACTICE—Continued**APPEALS—Continued****Dismissal—Continued**

that in the circumstances presented a stay of proceedings pending the issuance of a finding and the taking of a timely appeal therefrom would facilitate the orderly presentation and consideration of the claims involved in the appeal. The Board also denies a Government motion to dismiss portions of the appeal on the ground of lack of specificity in the notice of appeal where it finds sufficient information in the record to apprise the Government of the essential allegations of the appellant's case and thereby permit the Government to adequately prepare its case for hearing-----

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4. Where there are fact questions common to the contractor's claims of excusable delay and practical impossibility on the one hand and the Government's claim of common law damages for late delivery on the other, the Board concludes that it will retain jurisdiction over the latter claim pending the development of a complete administrative record without prejudice, however, to the Government's right to file a motion to dismiss the claim for common law damages at the time its post-hearing brief is submitted-----

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Hearings

1. Noting the general rule that counsel representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided consonant with obtaining justice, the Board finds that the testimony of a Government witness who also participated in presenting the Government's case at the hearing should be treated as oral argument. Preparation by the same counsel of one of the findings of fact was not found to be a violation of the provisions of the Wunderlich Act where there was no showing that the decisions reflected in such findings were other than those of the contracting officer and where the Board noted (i) the absence of a request for a remand to the contracting officer, and (ii) the fact that in the circumstances of the particular case a remand would apparently serve no useful purpose-----

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EVIDENCE

1. Adhering to principles enunciated in a prior decision, the Board finds that a memorandum from a Government employee to his superior containing a recommendation as to settlement of a claim constituted a privileged communication to which the appellant was not entitled, insofar as the nonfactual portions of such memorandum are concerned-----
2. Noting the general rule that counsel representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided consonant with obtaining justice, the Board finds that the testimony of a Government witness who also participated in presenting the Government's case at the hearing should be treated as oral argument. Preparation by the same counsel of one of the findings of fact was not found to be a violation of the provisions of the Wunderlich Act where there was no showing that the decisions reflected in such findings were other than-----

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RULES OF PRACTICE—Continued**EVIDENCE—Continued**

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those of the contracting officer and where the Board noted (i) the absence of a request for a remand to the contracting officer, and (ii) the fact that in the circumstances of the particular case a remand would apparently serve no useful purpose.

3. Where the validity of a mining claim as of a date prior to examination of the claim to determine its validity is at issue, the date of the exposure of a mineralized area, not the date of the sampling of the mineralization, is determinative of the admissibility of assay reports and other data as evidence that there was or was not a discovery upon the claim at the critical date; where a witness in a mining contest fails to distinguish between mineralization exposed prior to the crucial date and that exposed thereafter and to explain the significance of each as it relates to the vital issue, his opinion that there is a discovery at the present time is of little or no value in establishing the date of the alleged discovery.

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HEARINGS

1. A stipulation between the Government's attorney and the mining claimant's attorney at a hearing to determine whether a building stone is of a common or uncommon variety under the act of July 23, 1955, that the stone is marketable, does not preclude a further hearing to consider whether the facts relating to the marketability demonstrate that the stone has some property giving it a distinct and special value over other stones used for the same purposes which are also marketable but are considered to be of a common variety.
2. Applicants for sodium preference-right leases will be afforded an opportunity to present evidence at a hearing in accordance with the provisions of the Administrative Procedure Act where there may be questions of fact as to the extent and nature of the occurrence of the minerals in the deposits and as to the feasibility of the development of the deposits.

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PRIVATE CONTESTS

1. In a private contest initiated by a mining claimant to determine, as between himself and an oil and gas lessee, the right to leasable minerals within the limits of a mining claim, it is incumbent upon the mining claimant to show that a discovery was made upon the claim at a time when such discovery would vest in him a right to the leasable minerals, and if he is unable to sustain this burden, the contest is properly dismissed notwithstanding any acknowledgment on the part of the United States of a present discovery on the claim.

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WITNESSES

1. Noting the general rule that counsel representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided consonant with obtaining justice, the Board finds that the testimony of a Government witness who also participated in presenting the Government's case at the hearing should be treated as oral argument. Preparation by the same counsel of one of the findings of fact was not found to be a violation

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RULES OF PRACTICE—Continued**WITNESSES—Continued**

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of the provisions of the Wunderlich Act where there was no showing that the decisions reflected in such findings were other than those of the contracting officer and where the Board noted (i) the absence of a request for a remand to the contracting officer, and (ii) the fact that in the circumstances of the particular case a remand would apparently serve no useful purpose.....

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SCHOOL LANDS**MINERAL LANDS**

1. To establish the mineral character of lands sought by a State, either in exchange for other lands or as indemnity for lost school lands, it must be shown that known conditions are such as reasonably to engender the belief that the lands contain mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end.....
2. The mineral character of land may be established by inference without actual exposure of the mineral deposit for which the land is supposed to be valuable, but the inferred existence of a deposit of high-quality limestone at unknown depth does not establish the mineral character of land in the absence of evidence that extraction of the limestone is economically feasible, thereby giving the land a practical value for mining purposes.....

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SODIUM LEASES AND PERMITS**GENERALLY**

1. Substances of sodium enumerated in section 23 of the Mineral Leasing Act, whether simple, double or complex compounds of sodium, are subject to disposition only under the provisions of the Mineral Leasing Act.....
2. Applicants for sodium preference-rights leases will be afforded an opportunity to present evidence at a hearing in accordance with the provisions of the Administrative Procedure Act where there may be questions of facts as to the extent and nature of the occurrence of the minerals in the deposits and as to the feasibility of the development of the deposits.....

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STATE EXCHANGES**GENERALLY**

1. To establish the mineral character of lands sought by a State, either in exchange for other lands or as indemnity for lost school lands, it must be shown that known conditions are such as reasonably to engender the belief that the lands contain mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end.....

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STATE SELECTIONS

1. To establish the mineral character of lands sought by a State, either in exchange for other lands or as indemnity for lost school lands, it must be shown that known conditions are such as reasonably to engender the belief that the lands contain mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end.....

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SURPLUS PROPERTY

1. Withdrawn public domain lands do not become "surplus" within the meaning of the Federal Property and Administrative Services Act, 40 U.S.C. sec. 471 *et seq.*, until after a determination by the Secretary of the Interior and concurred in by the Administrator of General Services, that the lands are not suitable for return to the public domain.

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SURFACE RESOURCES ACT**GENERALLY**

1. Since Congress limited the effect of a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine the rights of the Government and a mining claimant as to the surface resources of a mining claim, a claim is not declared null and void as a result of such a proceeding decided in favor of the Government, and the claimant may continue to engage in mining activities although he is not entitled to the use and management of the surface resources for other than mining purposes prior to issuance of patent for the claim.
2. In a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine the rights of the Government and a mining claimant as to the surface resources of a mining claim prior to patent, the Government will prevail if it is shown that there was not a discovery of a valuable mineral deposit as of the date of the act even if such a discovery is subsequently made, and it will also prevail if a discovery existed as of the date of the act but it is determined that thereafter a valuable mineral deposit does not exist within the claims because of a change in conditions.
3. A mining claimant is not prejudiced if in a proceeding under section 5 of the Surface Resources Act the only issue stated at the hearing is whether at the time of the hearing, rather than on July 23, 1955, a discovery has been made on his claim and he submits evidence on that issue.
4. Mining claims containing an unknown quantity of low-grade manganese ore are properly declared subject to the limitations under section 4 of the Surface Resources Act of July 23, 1955, where the evidence shows that a prudent man could not now expect to develop a valuable mine because there is no market for the ore, regardless of whether under more favorable market conditions created primarily by a Government stockpiling program paying incentive prices prior to the date of that act the prudent man would have had more basis for anticipating that such ore could be mined and sold.

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SURVEYS OF PUBLIC LANDS**GENERALLY**

1. Where, subsequent to the issuance of patent to sec. 33, T. 28 S., R. 34 E., a resurvey was made which resulted in a determination that the area so patented lay within the limits of a different township and in the designation of a different area as sec. 33, T. 28 S., R. 34 E., and where the jurisdiction of the United States over a part of the land now designated as section 33 is challenged on

SURVEYS OF PUBLIC LANDS—Continued**GENERALLY—Continued**

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- the premise that title to the area in question passed from the United States by virtue of the patent, the lack of jurisdiction over the land can be demonstrated only by showing that the disputed area is within the limits of the original section 33 as it was surveyed on the ground, and any showing of error in either the original plat of survey or the plat of resurvey is immaterial if it fails to establish that fact----- 14
2. A survey of public lands creates, and does not merely identify, the boundaries of sections of land, and public land cannot be described or conveyed as sections or subdivisions of sections unless the land has been officially surveyed----- 14
3. When the locations of corners established by an official Government survey are identified, they are conclusive, and the corner of a Government subdivision is where the United States surveyors in fact established it, whether such location is right or wrong----- 14
4. A patentee of public land takes according to the actual survey on the ground, even though the official survey plat may not show the tract as it is located on the ground, and the Federal Government is without power to affect, by means of any subsequent survey, the property rights acquired under an official survey----- 14

WITHDRAWALS AND RESERVATIONS**POWER SITES**

1. Lands which were reserved from mining location by reason of inclusion in an application for a power project filed prior to August 11, 1955, and which were opened to location by section 2 of the act of August 11, 1955, become closed to location thereafter if they come under examination and survey by a prospective licensee holding an uncancelle preliminary permit issued by the Federal Power Commission after August 11, 1955, and mining claims on such lands located thereafter are void *ab initio*----- 33