

UNITED STATES DEPARTMENT OF THE INTERIOR
Walter J. Hickel, Secretary

DECISIONS

OF THE

UNITED STATES

DEPARTMENT OF THE INTERIOR

Edited by

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VOLUME 77

JANUARY-DECEMBER 1970

U.S. GOVERNMENT PRINTING OFFICE, WASHINGTON : 1971

PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1970 to December 31, 1970. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Walter J. Hickel served as Secretary of the Interior during the period covered by this volume; Mr. Russel E. Train served as Under Secretary; Messrs. Hollis M. Dole, Carl L. Klein, Harrison Loesch, James R. Smith and Dr. Leslie L. Glasgow served as Assistant Secretaries of the Interior; Mr. Lawrence H. Dunn served as Assistant Secretary for Administration; Mr. Mitchell Melich served as Solicitor of the Department of the Interior and Mr. Raymond C. Coulter as Deputy Solicitor. Mr. James M. Day, served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "77 I.D."



Secretary of the Interior.

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ERRATA

- Page 5—Correct Headnote, Line 2 to read 4582.
- Page 10—Topical Index 2d sub-heading, delete (s) from *Description*.
- Page 51—N. 2, delete *E* from *etc.*
- Page 92—N. 5, Line 6, Citation should read 43 CFR 257.3(b), (20 F.R. 366).
- Page 113—After sub-topical heading Criminal Jurisdiction insert main heading *Indians*.
- Page 122—Add (s) to topical Index Headings *Private Exchange* and Sub-Heading *Protest*.
- Page 125—Line 2 from bottom of page change Citation to read 30 U.S.C. secs. 211-214 (1964).
- Page 137—N. 38 should read Appellant's Brief (IBCA-790-7-69).
- Page 140—2d par. line 3 should read evidence that changed conditions in either the first or the second * * *.
- Page 141—Correct subject heading Administration to *Administrator*.
- Page 143—Last par; correct the word *second*.
- Page 146—N. 7 should read 16 U.S.C. 825s.
- Page 162—N. 5, Line 2, correct expiring to *expired*.
- Page 176—Line 10, citation should read 43 U.S.C. sec. 1771 (1964).
- Page 179—8 pt. par should read * * * to prevent the issuance of patent confirming the title to such lands * * *.
- Page 180—Line 10, correct bona fide to *bona fides*.
- Page 194—First par. line 7 insert *a* between the words *was* and *foreseeable*.
2d par. line 2 delete *the* and insert *that allowed* * * *.
2d par under Claim 3—line 6 delete *that* insert *than have been recognized*.
- Page 200—N. 61, line 3 should read 75 I.D. 41 * * *.
- Page 209—Par. 5, line 5—correct the word *to*.
- Page 221—Par. 1, line 1 add (s) to service.
- Page 253—N. 10 should read *Graybar* * * *.
- Page 291—Topical index heading should read Common *Varieties* of Minerals.
- Page 294—Qualified Applicant, par. 2, line 4 should read of qualifying is not lost * * *.
- Pages 294, 295—Oil & Gas Leases, sub-headings Cancellations & Termination, line 8 correct *extinguished*.
- Page 297—Add 2d subheading *Burden of Proof*—Continued.

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The table below sets out in alphabetical order, arranged according to the last name of the first party named in the Department's decision, all the departmental decisions published in the Interior Decisions, beginning with volume 61, judicial review of which was sought by one of the parties concerned. The name of the action is listed as it appears on the court docket in each court. Where the decision of the court has been published, the citation is given; if not, the docket number and date of final action taken by the court is set out. If the court issued an opinion in a nonreported case, that fact is indicated; otherwise no opinion was written. Unless otherwise indicated, all suits were commenced in the United States District Court for the District of Columbia and, if appealed, were appealed to the United States Court of Appeals for the District of Columbia Circuit. Finally, if judicial review resulted in a further departmental decision, the departmental decision is cited. Actions shown are those taken prior to the end of the year covered by this volume.

Adler Construction Co., 67 I.D. 21 (1960) (Reconsideration)

Adler Construction Co. v. U.S., Cong. 10-60. Dismissed, 423 F. 2d 1362 (1970); rehearing denied, July 15, 1970.

Estate of John J. Akers, 77 I.D. 268 (1970)

Dolly Custer Akers v. The Dept. of the Interior, Civil No. 907, D. Mont. Suit pending.

State of Alaska Andrew Kalerak, Jr., 73 I.D. 1 (1966)

Andrew J. Kalerak, Jr., et al. v. Stewart L. Udall, Civil No. A-35-66, D. Alas. Judgment for plaintiff, October 20, 1966; rev'd., 396 F. 2d 746 (9th Cir. 1968); cert. denied, 393 U.S. 1118 (1969).

Allied Contractors, Inc., 68 I.D. 145 (1961)

Allied Contractors, Inc. v. U.S., Ct. Cl. No. 163-63. Stipulation of settlement filed March 8, 1967; compromised.

Leslie N. Baker, et al., A-28454 (October 26, 1960). On reconsideration
Autrice C. Copeland, 69 I.D. 1 (1962)

Autrice Copeland Freeman v. Stewart L. Udall, Civil No. 1578, D. Ariz. Judgment for defendant, September 3, 1963 (opinion); aff'd., 336 F. 2d 706 (9th Cir. 1964); no petition.

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

Max Barash v. Douglas McKay, Civil No. 939-56. Judgment for defendant, June 13, 1957; rev'd. & remanded, 256 F. 2d 714 (1958); 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. U.S., Ct. Cl. 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 No. 5258, D. N.M. Judgment for defendant, January 8, 1964; rev'd., 335 F. 2d 828 (10th Cir. 1964); no petition.

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

Sam Bergesen v. U.S., Civil 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 No. 2109-63.

Consolidated Gas Supply Corp. v. Stewart L. Udall, et al., Civil No. 2109-63. Judgment for defendant, September 20, 1965; Per curiam decision, aff'd., April 28, 1966; no petition.

Lloyd W. Booth, 76 I.D. 73 (1969)

Lloyd W. Booth v. Walter J. Hickel, Civil No. 42-69, D. Alas. Judgment for defendant, June 30, 1970; no appeal.

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

Melvin A. Brown v. Stewart L. Udall, Civil No. 3352-62. Judgment for defendant, September 17, 1963; rev'd., 335 F. 2d 706 (1964); no petition.

R. C. Buch, 75 I.D. 140 (1968)

R. C. Buch v. Stewart L. Udall, Civil No. 68-1358-PH, C.D. Cal. Judgment for plaintiff, 298 F. Supp. 381 (1969); appeal docketed.

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

The California Co. v. Stewart L. Udall, Civil No. 980-59. Judgment for defendant, 187 F. Supp. 445 (1960); aff'd., 296 F. 2d 384 (1961).

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

Cameron Parish Police Jury v. Stewart L. Udall, et al., Civil No. 14,206, W.D. La. Judgment for plaintiff, 302 F. Supp. 689 (1969); order vacating prior order issued November 5, 1969.

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71 I.D. 337 (1964). *Shell Oil Co.*, A-30575 (October 31, 1966).

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

Bowen v. Chemi-Cote Perlite, No. 2 CA-Civ. 248, Ariz. Ct. App. Decision against the Dept. by the lower court aff'd., 423 P.2d 104 (1967); rev'd., 432 P.2d 435 (1967).

Stephen H. Clarkson, 72 I.D. 138 (1965)

Stephen H. Clarkson v. U.S., Cong. Ref. 5-68. Suit pending.

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

Hannah and Abram Cohen v. U.S., Civil No. 8158, D. R. I. Compromised.

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

Barney R. Colson, et al. v. Stewart L. Udall, Civil No. 63-26-Civ.-Oc, M.D. Fla. Dismissed with prejudice, 278 F. Supp. 826 (1968); aff'd., 428 F.2d 1046 (5th Cir. 1970); petition for cert. filed November 15, 1970.

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

Merwin E. Liss v. Fred A. Seaton, Civil 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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Appeal of Continental Oil Co., 68 I.D. 337 (1961)

Continental Oil Co. v. Stewart L. Udall, et al., Civil No. 366-62. Judgment for defendant, April 29, 1966; aff'd., February 10, 1967; cert. denied, 389 U.S. 839 (1967).

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

Patrick A. McKenna v. Clarence A. Davis, Civil No. 2125-56. Judgment for defendant, June 20, 1957; aff'd., 259 F.2d 780 (1958); cert. denied, 358 U.S. 835 (1958).

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The Dredge Corp. v. J. Russell Penny, Civil 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. denied, 371 U.S. 821 (1962).

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John J. Farrelly, et al., 62 I.D. 1 (1955)

John J. Farrelly & The Fifty-One Oil Co. v. Douglas McKay, Civil No. 3037-55. Judgment for plaintiff, October 11, 1955; no appeal.

T. Jack Foster, 75 I.D. 81 (1968)

Gladys H. Foster, Executrix of the estate of T. Jack Foster v. Stewart L. Udall, Boyd L. Rasmussen, Civil No. 7611, D. N.M. Judgment for plaintiff, June 2, 1969; no appeal.

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

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Stanley Garthofner, Duvall Bros., 67 I.D. 4 (1960)

Stanley Garthofner v. Stewart L. Udall, Civil No. 4194-60. Judgment for plaintiff, November 27, 1961; no appeal.

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

General Excavating Co. v. U.S., Ct. Cl. 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 No. 685-60. Judgment for defendant, June 20, 1961; motion for rehearing denied, August 3, 1961; aff'd., 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 No. 5246, D. N.M. Judgment for defendant, June 4, 1964; aff'd., 352 F. 2d 32 (10th Cir. 1965); no petition.

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Southwestern Petroleum Corp. v. Stewart L. Udall, Civil No. 2209-62. Judgment for defendant, October 19, 1962; aff'd., 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. U.S., Ct. Cl. No. 129-58. Stipulation of settlement filed September 11, 1958. Compromised offer accepted and case closed October 10, 1958.

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

Edwin Still, et al. v. U.S., Civil 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 No. 3902-60. Judgment for defendant, June 23, 1961; aff'd, 304 F. 2d 944 (1962); cert. denied, 371 U.S. 901 (1962).

Robert Schulein v. Stewart L. Udall, Civil No. 4131-60. Judgment for defendant, June 23, 1961; aff'd, 304 F. 2d 944 (1962); no petition.

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

Kenneth Holt, etc. v. U.S., Ct. Cl. No. 162-62. Stipulated judgment, July 2, 1965.

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

Consolidated Gas Supply Corp. v. Stewart L. Udall, et al., Civil No. 2109-63. Judgment for defendant, September 20, 1965; Per curiam decision. aff'd, 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 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. Dept. of the Interior, et al., Civil No. 1-65-86, D. Idaho. Order denying preliminary injunction, September 3, 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 No. 3089-63. Dismissed with prejudice, March 27, 1968.

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

J. A. Terteling & Sons v. U.S., Ct. Cl. No. 114-59. Judgment for defendant, 390 F. 2d 926 (1968); remaining aspects compromised.

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

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

L. B. Samford, Inc. v. U.S., Ct. Cl. No. 393-67. Dismissed, 410 F. 2d 782 (1969); no petition.

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

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Consolidated Gas Supply Corp. v. Stewart L. Udall, et al., Civil No. 2109-63. Judgment for defendant, September 20, 1965; per curiam dec., aff'd., April 28, 1966; no petition.

Bess May Lutey, 76 I.D. 37 (1969)

Bess May Lutey, et al. v. Dept. of Agriculture, BLM, et al., Civil No. 1817, D. Mont. Suit pending.

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 No. 2001-67. Judgment for defendant, February 14, 1968; aff'd., 418 F. 2d 1171 (1969); no petition.

Mrs. Elgin A. McKenna, Widow and Successor in Interest of Patrick A. McKenna, Deceased v. Walter J. Hickel, Secretary of the Interior, et al., Civil No. 2401, D. Ky. Dismissed with prejudice, May 11, 1970.

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

A. G. McKinnon v. U.S., Civil No. 9433, D. Ore. Judgment for plaintiff, 178 F. Supp. 913 (1959); rev'd., 289 F. 2d 908 (9th Cir. 1961).

Wade McNeil, et al., 64 I.D. 423 (1957)

Wade McNeil v. Fred A. Seaton, Civil No. 648-58. Judgment for defendant June 5, 1959 (opinion); rev'd., 281 F. 2d 931 (1960); no petition.

Wade McNeil v. Albert K. Leonard, et al., Civil No. 2226, D. Mont. Dismissed, 199 F. Supp. 671 (1961); order, April 16, 1962.

Wade McNeil v. Stewart L. Udall, Civil No. 678-62. Judgment for defendant, December 13, 1963 (opinion); aff'd., 340 F. 2d 801 (1964); cert. denied, 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 No. 468-58. Judgment for plaintiff, November 16, 1959; motion for reconsideration denied, December 2, 1959; no appeal.

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Louise Cuccia and Shell Oil Co. v. Stewart L. Udall, Civil No. 562-60. Judgment for defendant, June 27, 1961; no appeal.

Duncan Miller, 70 I.D. 1 (1963)

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

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

Gary Carson Lewis, etc., et al. v. General Services Administration, et al., Civil No. 3253 S.D. Cal. Judgment for defendant, April 12, 1965; aff'd, 377 F.2d 499 (9th Cir. 1967); no petition.

Henry S. Morgan, et al., 65 I.D. 369 (1958)

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

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Morrison-Knudsen Co. v. U.S., Ct. Cl. No. 239-61. Remanded to Trial Comm'r, 345 F.2d 883 (1965); Comm'r's report adverse to U.S. issued June 20, 1967; judgment for plaintiff, 397 F.2d 826 (1968); part remanded to the Board of Contract Appeals; stipulated dismissal on October 6, 1969; judgment for plaintiff, February 17, 1970.

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

Richard L. Oelschlaeger v. Stewart L. Udall, Civil No. 4181-60. Dismissed, November 15, 1963; case reinstated, February 19, 1964; remanded, April 4, 1967; rev'd. & remanded with directions to enter judgment for appellant, 389 F.2d 974 (1968); cert. denied, 392 U.S. 909 (1968).

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Mrs. Louise A. Pease v. Stewart L. Udall, Civil No. A-20-63, D. Alas. Dismissed, October 29, 1963 (oral opinion); aff'd., 332 F. 2d 62 (9th Cir. 1964); no petition.

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

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

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

Peter Kiewit Sons' Co. v. U.S., Ct. Cl. 129-66. Judgment for plaintiff, May 24, 1968.

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

Duncan Miller v. Stewart L. Udall, Civil No. 1351-62. Judgment for defendant, August 2, 1962; aff'd., 317 F. 2d 573 (1963); no petition.

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Richfield Oil Corp., 62 I.D. 269 (1955)

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

Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965)

Thomas M. Bunn v. Stewart L. Udall, Civil No. 2615-65. Suit pending.

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

James Houston Bowman v. Stewart L. Udall, Civil No. 105-63. Judgment for defendant, 243 F. Supp. 672 (1965); aff'd., sub nom. *S. Jack Hinton, et al. v. Stewart L. Udall*, 364 F. 2d 676 (1966); cert. denied, 385 U.S. 878 (1966); supplemented by M-36767, November 1, 1967.

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Southern Pacific Co., 76 I.D. 1 (1969)

Southern Pacific Co. v. Walter J. Hickel, Secretary of the Interior, Civil No. S-1274, D. Cal. Judgment for defendant, December 2, 1970.

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

Southwest Welding v. U.S., Civil No. 68-1658-CC, C.D. Cal. Judgment for plaintiff, January 14, 1970; appeal dismissed, April 6, 1970.

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

Southwestern Petroleum Corp. v. Stewart L. Udall, Civil No. 5773, D. N.M. Judgment for defendant, March 8, 1965; aff'd., 361 F. 2d 650 (10th Cir. 1966); no petition.

Standard Oil Co. of California, et al., 76 I.D. 271 (1969)

Standard Oil Co. of California v. Walter J. Hickel, et al., Civil No. A-159-69, D. Alas. Judgment for plaintiff, 317 F. Supp. 1192 (1970); appeal docketed November 19, 1970.

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California Oil Co. v. Secretary of the Interior, Civil No. 5729, D. N.M. Judgment for plaintiff, January 21, 1965; no appeal.

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

James K. Tallman, et al. v. Stewart L. Udall, Civil No. 1852-62. Judgment for defendant, November 1, 1962 (opinion); rev'd., 324 F. 2d 411 (1963); cert. granted, 376 U.S. 961 (1964); Dist. Ct. aff'd., 380 U.S. 1 (1965); rehearing denied, 380 U.S. 989 (1965).

Texaco, Inc., 75 I.D. 8 (1968)

Texaco, Inc., a Corp. v. Secretary of the Interior, Civil No. 446-68. Judgment for plaintiff, 295 F. Supp. 1297 (1969); remanded, August 19, 1970.

Texas Construction Co., 64 I.D. 97 (1957). Reconsideration denied, IBCA-73 (June 18, 1957)

Texas Construction Co. v. U.S., Ct. Cl. No. 224-58. Stipulated judgment for plaintiff, December 14, 1961.

Estate of John Thomas, Deceased Cayuse Allottee No. 223 and Estate of Joseph Thomas, Deceased, Umatilla Allottee No. 877, 64 I.D. 401 (1957).

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

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

See also:

Thor-Westcliffe Development, Inc. v. Stewart L. Udall, et al., Civil No. 2406-61. Judgment for defendant, March 22, 1962; aff'd., 314 F. 2d 257 (1963); cert. denied, 373 U.S. 951 (1963).

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

Bert F. Duesing v. Stewart L. Udall, Civil No. 290-62. Judgment for defendant, July 17, 1962, (oral opinion); aff'd., 350 F. 2d 748 (1965); cert. denied, 383 U.S. 912 (1966).

Atwood, et al. v. Stewart L. Udall, Civil Nos. 293-62—299-62, incl. Judgment for defendant, August 2, 1962; aff'd., 350 F. 2d 748 (1965); no petition.

Union Oil Co. Bid on Tract 228, Brazos Area, Texas Offshore Sale, 75 I.D. 147 (1968), 76 I.D. 69 (1969).

The Superior Oil Co., et al. v. Stewart L. Udall, Civil No. 1521-68. Judgment for plaintiff, July 29, 1968, modified, July 31, 1968; aff'd., 409 F. 2d 1115 (1969); dismissed as moot, June 4, 1969; no petition.

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

Union Oil Co. of California v. Stewart L. Udall, Civil No. 3042-58. Judgment for defendant, May 2, 1960 (opinion); aff'd., 289 F. 2d 790 (1961); no petition.

Union Oil Company of California, et al., 71 I.D. 169 (1964), 72 I.D. 313 (1965).

Penelope Chase Brown, et al. v. Stewart Udall, Civil No. 9202, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); cert. granted, 396 U.S. 817 (1969); rev'd. & remanded, December 8, 1970.

Equity Oil Co. v. Stewart L. Udall, Civil No. 9462, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

Gabbs Exploration Co. v. Stewart L. Udall, Civil No. 9464, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

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

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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 GUY F. ATKINSON COMPANY

IBCA-795-8-69 Decided January 6, 1970

**Contracts; Construction and Operation: Government-furnished Property—
Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice:
Appeals: Dismissal**

An appeal will be dismissed where the claim is founded upon a delay of the Government in delivery of Government-furnished property, pump-turbines and control units, for incorporation in a dam. The Board has no jurisdiction over claims for the costs effects of delay absent a contract provision so providing.

BOARD OF CONTRACT APPEALS

This timely appeal is from a decision of the contracting officer denying a claim for increased costs in the amount of \$98,975, the sum reserved in the release of claims on final payment. The contracting officer characterized the claim as for the consequential cost effects of delays in delivery of Government-furnished property.¹

This completed contract, on which payments totaling \$5,623,370.41, have been made, was let on February 7, 1964, for the construction of the Forebay Pumping Plant and appurtenant works, and Forebay Dam Spillway, San Luis Unit, Central Valley Project. Under it the Government was to furnish six pump-turbine units and associated control units to be installed by appellant. Appellant was to furnish six connecting motor generators.

Paragraph 204a of the specifications established the following schedule of delivery for the pump-turbines:

1st pump & control unit	October 28, 1964
2d pump & control unit	December 27, 1964
3d pump & control unit	February 25, 1965
4th pump & control unit	April 26, 1965
5th pump & control unit	June 24, 1965
6th pump & control unit	August 24, 1965

¹ Appeal file, Exhibit 13.

Paragraph 27a of the specification added a caveat as follows:

The scheduled delivery dates set forth in Paragraph 204 for the main pumps and control units are provided in order that bidders might develop a tentative construction program. These delivery dates are not guaranteed, however, and the Government obligates itself only to make delivery of Government-furnished materials at such times and in such sequence as to permit completion of the work within the time allowed under a reasonable and orderly construction program.

In paragraph 270j(2), it is stated that the first unit's shaft will be loaded on cars for movement to contractor's designated alignment shop by September 24, 1964, with other shafts to follow at 60-day intervals.

The contract did not contain a "Suspension of Work" or other pay-for-delay provision. The pump-turbines were delivered as follows:

1st Unit	September 28, 1965
2d Unit	October 20, 1965
3d Unit	November 25, 1965
4th Unit	November 12, 1965
5th Unit	December 16, 1965
6th Unit	January 4, 1966

The work was completed and accepted well within the contract time limits, including time extensions granted for various reasons apparently not related to the delay in delivery of the pump-turbines.² No liquidated damages have been assessed on any part of the work.

The gist of appellant's complaint is that change in the delivery dates of the pump-turbines was a change in the specifications which caused a "prolongation of the contract work with resultant increased costs to appellant."³ Further, the later delivery "caused corresponding changes in the motor-generators being furnished by appellant, and in the delivery schedule of such motor-generators."⁴ And, "As a direct consequence of this prolongation of the contract work, appellant incurred increased expenses as a result of having to perform portions of the work in a period of higher labor costs, and further incurred additional expenses for overhead and indirect costs for an additional period of six months. The total amount of such added costs and expenses for which claim is hereby made is \$114,950."⁵

In its presentation to the contracting officer⁶ appellant precisely indicated that its claimed additional costs are for prolongation of the job, calculated by taking the average monthly cost of indirect items

² Appeal file, Exhibit 3.

³ Complaint, paragraph 3.

⁴ Complaint, paragraph 7.

⁵ Complaint, paragraph 9.

⁶ Appeal file, Exhibit 9.

January 6, 1970

and multiplying by six months taken as the added time of contract performance. To this is added certain 1966 increases in wage rates, plus 5% "General indirect costs," and 10% "margin." No costs are specifically related to changes in the motor-generators furnished by appellant or to the delivery schedule of the motor-generators.

Appellant has very carefully phrased his complaint in terms of change in the delivery schedule, avoiding the term delay. His position is simply that the delivery schedule was a specification, constructively changed. However, the claim is clearly for consequential damages for delay in delivery of Government-furnished property, which this Board has consistently held to be without its jurisdiction.⁷

Appellant urges the Board to follow *Roscoe-Ajax & Knickerbocker*, GSBCA No. 1087 (December 7, 1967), 68-1 BCA par 6741, where the General Services Board refused to dismiss an appeal because it saw as a factual issue the question of whether there was constructive change cognizable under the Disputes clause. However, in that case the appellant did not claim it was delayed by the Government's lateness in supply of material, but that the specifications were constructively changed with regard to appellant's right to install lamps and fixtures in a single operation. Indeed, the appellant itself in *Roscoe-Ajax* characterized a delay claim as one in which a contractor seeks damages for extra costs incurred as a result of increased performance time. That description aptly covers the present case.

Moreover, it does not follow, as appellant seems to argue, that simply because there is a disputed question of fact that the Board should hear the claim. We have no doubt that breaches of contract claims involve disputes of fact, but the disputes to which our authority pertains are those redressable under some clause of the contract, not to any and all.⁸

Conclusion

The appeal is dismissed.

ROBERT L. FONNER, Member.

I CONCUR:

WILLIAM F. McGRAW, Member.

⁷ See e.g., *Electrical Builders, Inc.*, IBCA-406 (August 12, 1964), 1964 BCA par. 4377; *Martin K. Eby Construction Co., Inc.*, IBCA-355 (March 8, 1963), 1963 BCA par. 3672; *Christy Corporation*, IBCA-461-10-64 and IBCA-569-5-66 (June 20, 1966), 66-1 BCA par. 5630; *Tyce Construction Company*, IBCA-692-1-68 (June 30, 1969), 76 I.D. 118, 69-1 BCA par. 7748. This Board has never viewed delivery dates for Government-furnished material as a kind of "specification": subject to the doctrine of construction change.

⁸ *United States v. Utah Construction and Mining*, 384 U.S. 394, 404-413 (1966).

INDIAN ARTS AND CRAFTS BOARD TRADEMARK**Indian Economic Enterprises: Generally**

Unauthorized use of government trademark registered by Indian Arts and Crafts Board is illegal and is subject to criminal and civil sanctions under 18 U.S.C. 1158 and 15 U.S.C. 1116 and 1117.

M-36798*January 6, 1970*

To: ROBERT G. HART, GENERAL MANAGER
INDIAN ARTS AND CRAFTS BOARD.

SUBJECT: POSSIBLE TRADEMARK INFRINGEMENT.

We have reviewed the material transmitted to us relating to the use of the horned moon symbol by the Indian Art Center of California, 12666 Ventura Boulevard, Studio City (IAC). In order to determine whether all of the items recited in IAC's advertisement are covered by a registered trademark a search was made in the Patent Office. In addition to the two trademarks registration included in the material sent us (TM 407,345 and 808,325), we have found the following trademark registrations, all of which have been renewed:

Date

<i>Registered</i>	<i>Trademarks Similar to 407,345</i>
5/16/44 ----	407,120—Dolls—class 22.
5/23/44 ----	407,184—Hand-woven blankets and rugs—class 42.
5/23/44 ----	407,255—Tobacco pouches—class 8.
5/23/44 ----	407,256—Neckties and leather belts (plain leather, and leather ornamented with silver, or ornamented with silver and turquoise or other trimming, for personal wear)—class 39.
5/23/44 ----	407,257—Pillow tops of handwoven material—class 40.
5/30/44 ----	407,343—Horse bridles (ornamented with silver)—class 3.
5/30/44 ----	407,344—Bells, boxes, bracelets, cuff links, cups earrings, table flatware, lavalier pendants, mugs, necklaces, pins, rings, salt holders, and trays, all made of silver, or of silver combined with turquoise or petrified wood settings—class 28.
6/6/44 ----	407,502—Paintings (both oil and watercolor) and drawings—class 38.

It is apparent that of the items listed in the advertisement, jewelry, Navaho rugs, kachinas, fetishes and paintings fall directly within the scope of materials covered by the registered trademark, and that the other items, i.e., pottery and "pawn," are probably sufficiently

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closely related to items covered by the mark so that an unauthorized use would be deemed an infringement.

Assuming that the use by the IAC is unauthorized, it can be enjoined from using the symbol; 15 U.S.C. sec. 1116. Also, the statute provides for the recovery of (1) damages suffered by the owner of the trademark, (2) the defendant's profits arising from the use of the trademark, and (3) the costs of the action; 15 U.S.C. sec. 1117. However, in order to recover damages or the defendant's profits, notice that the mark was registered must have been given, as by use of the symbol R, or the legend "Reg. U.S. Patent Office," in conjunction with the mark.

Criminal penalties for the willful use of Indian Arts and Crafts Board trademarks are provided for in 18 U.S.C. sec. 1158. These penalties are a fine of up to \$500 or imprisonment for not more than six months, or both, and the defendant, if found guilty, is enjoined from further carrying out the acts complained of.

IAC is employing the mark without authorization, and had not used it before 1944 (the date of registration), IAC is an infringer. Accordingly, it should be promptly notified that it is infringing a trademark registered by the Indian Arts and Crafts Board and that use of such mark must cease forthwith. Failure to do so will make it subject to both civil and criminal proceedings.

ERNEST S. COHEN,
Assistant Solicitor.

LOUIS J. HOBBS

A-31051

Decided January 15, 1970

Contests and Protests: Preference Right of Contestant—Alaska: Homesteads—Homesteads (Ordinary): Preference Rights—Withdrawals and Reservations: Effect of—Words and Phrases

"*Valid Existing Rights.*" Since a withdrawal made by Public Land Order 4502 is subject to "valid existing rights," a successful contestant of a homestead entry may exercise the preference right he had earned upon the cancellation of the contested entry, although it had not been actually awarded prior to the withdrawal; however, an application filed by him prior to notation of the cancellation is premature and must be rejected.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Louis J. Hobbs has appealed to the Secretary of the Interior from a decision dated August 15, 1968, of the Office of Appeals and Hearings, Bureau of Land Management, affirming a decision of its Alaska State Office holding his preference right to a homestead entry in abeyance.

The appellant has earned a preference right of entry to 160 acres in secs. 4 and 5, T. 3 N., R. 11 W., Seward Meridian, Alaska, as a consequence of his having successfully contested an existing homestead entry for the same land. Act of May 14, 1880, 43 U.S.C. sec. 185 (1964).

Although the prior entry was canceled on August 12, 1966, Hobbs' preference right was not recognized until a conflict with a State of Alaska selection was resolved by a Bureau decision dated June 22, 1967, and the subsequent dismissal of the State's appeal to the Secretary on August 10, 1967 (A-30858).

It also appears that on February 7, 1967, the Kenaitze Indian Association and the Kenaitze Indian Tribe filed a claim, AA-714, for an area of land, including that covered by Hobbs' preference right, based upon aboriginal rights and use and occupancy from time immemorial and they objected to the allowance of entry or alienation of any of the land they claimed.

Hobbs, however, filed his application for entry on July 10, 1967. At that date, the cancellation of the prior entry had not been noted on the land office records and as far as the records show the cancellation still has not been entered on the records.

The land office rejected Hobbs' application on the grounds that an application to enter prior to the notation on the records of the cancellation of a prior entry is premature and held in abeyance the granting of his preference right pending resolution of the Kenaitze claim.

In its decision, the Bureau affirmed the suspension of appellant's preference right on the basis of a Departmental policy set out in a letter dated August 10, 1967, from the Secretary of the Interior to the Governor of Alaska, which stated that the Department would not allow title to public lands to pass into other hands in disregard of claims and protests filed by Alaska native groups against State selections and other dispositions under the public land laws.

In his brief on appeal, filed on October 10, 1968, the appellant contended that the Secretary has no authority to suspend his preference right of entry, particularly on the basis of a private letter.

While the appeal was pending, the Department's policy toward the disposition of public lands in Alaska was made more explicit. On January 17, 1969, the Secretary signed Public Land Order 4582, 34 F.R. 1025. The order withdrew, "[s]ubject to valid existing rights," all unreserved public lands from all forms of appropriation and disposition (except locations for metalliferous minerals) and reserved them for the determination and protection of the rights of the native Aleuts, Eskimos, and Indians of Alaska. The withdrawal and reservation created by the order were, as it said, to expire at 12 midnight on December 31, 1970. The order further provided that all applications for "land title transfers" which were pending before the Department

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on the effective date of the order would be suspended while it was in effect.

The public land order, as a formal statement of the Departmental policy set out in the earlier letter, controls the disposition of this appeal. Since it plainly requires that action on applications for homestead entries be suspended in accordance with its terms, Hobbs' application has to be so treated, unless there is some provision in the order to remove the entry from its scope.

The only possible relief available is the provision in the first paragraph of PLO 4582 making the withdrawal and reservation "subject to valid existing rights." The issue then becomes whether Hobbs had a "valid existing right" on the effective date of the withdrawal.

The Department has long recognized the importance of the right granted to a successful contestant. It has held: "The preference right of entry conferred by the act of May 14, 1880, * * * upon any person who 'has contested, paid the land office fees, and procured the cancellation' of a homestead entry is a statutory right which the land department is without authority to deny or disregard, by regulation or otherwise." *Edwards v. Bodkin*, 42 L.D. 172, 173 (1913). In *Wells v. Fisher*, 47 L.D. 288, 293, 294 (1919), it was held that a first form withdrawal under the reclamation act (sec. 3, act of June 17, 1902, 43 U.S.C. sec. 416 (1964)), did not extinguish the preference right but merely postponed its exercise until the land became available for disposition.¹

A few years later the Department considered the conflict between a contestant's preference right and another type of withdrawal. The Executive Order of December 8, 1924, withdrew all islands off the coast or in the coastal waters of the State of Florida subject to "any valid existing right." Prior to the withdrawal, a contest had been initiated against a homestead entry on land later subject to the withdrawal. The Department first rejected the contention that the withdrawal destroyed the prospective preference right that would accrue to the successful contestant upon the cancellation of the entry.

It then discussed the effect of the withdrawal on the contestant's exercise of his preference right, stating:

If this were an absolute and unconditional withdrawal the contestant would be entitled to a suspended preferred right which could be exercised in case of subsequent restoration of the land to entry. See *Wells v. Fisher* (47 L.D. 288), and numerous citations contained therein.

But the withdrawal here in question saved "any valid existing rights in and to" the lands so withdrawn, and a preferred right which had been earned, although not actually awarded, prior to the withdrawal is entitled to protection. The withdrawal was designed to prevent the initiation of new claims and not

¹ In *McLaren v. Fleischer*, 256 U.S. 477 (1921), the Supreme Court agreed with the ruling in the *Wells* case.

the destruction of rights theretofore fairly earned. *Williams v. Brening* (on Rehearing), 51 L.D. 225, 226 (1925).

When the Department again had to consider what survived the general withdrawal of lands made by Executive Order No. 6910 of November 26, 1934,² which was made subject to "existing valid rights," it said:

It is hardly practicable to give a precise and general definition of the meaning of "existing valid rights," as used in the saving clause of the said Executive order. The circumstances of each particular case will have to be considered in applying that provision. It is not a new expression, and it has been construed and applied in formal adjudication of the Department. It was contained in Executive order of December 8, 1924, which withdrew all islands off the coast or in the coastal waters of the State of Florida, and also in Executive order of July 3, 1925, withdrawing the mainland within three miles of the coast in certain States. In the case of *Williams v. Brening* (51 L.D. 225), it was said that these withdrawals were designed to prevent the initiation of new claims and not the destruction of rights theretofore fairly earned. And it was held therein that where a party had prosecuted a contest against a homestead entry and had done all that the law required to earn a preferred right of entry, such right was saved by the terms of the withdrawal orders, even though the contested entry had not been actually canceled and the preferred right, therefore, had not been awarded prior to the date of withdrawal. It was pointed out that the said withdrawals were not absolute and unconditional, but saved valid existing rights, and were to be distinguished from instances where the withdrawal does not make such exception.

Of course, all valid entries are protected, and I believe also that all prior valid applications for entry, selection, or location, which were substantially complete at the date of the withdrawal should be considered as constituting valid existing rights within the meaning of the saving clause of the withdrawal order. Claims under the color of title act of December 22, 1928 (45 Stat. 1069), should likewise be regarded as valid existing rights when bona fide and substantial rights thereunder existed at the date of the withdrawal. I believe this protective provision should be generously applied. The public interest in particular tracts within the confines of the broad expanse thus withdrawn is too inconsequential to justify the striking down of individual rights through technical construction or harsh application of the protective provision of the order. * * * 55 I.D. 210.

A few days later the Department applied the same concept to contests filed prior to the withdrawal made by Executive Order 6910. The General Land Office (now the Bureau of Land Management) set out the Department's view and its application in instructions to the land offices, Circular 1348*, March 7, 1935 (55 I.D. 226):

REGISTERS, UNITED STATES LAND OFFICES:

In response to an inquiry concerning the effect of the Executive order of November 26, 1934, withdrawing public lands in aid of the Taylor Grazing Act,

* See Circular No. 1352, at p. 244.³

² Set out in Solicitor's opinion, 55 I.D. 206 (1935).

³ Circular 1352, March 26, 1935, stated that Circular 1348 was directed to contests initiated prior to the withdrawal and that, as the preference right gained by one begun subsequent to the withdrawal would be suspended, contestants should be advised to that effect at the time their contest application was filed.

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on contests filed prior thereto, the Department, on February 19, 1935, said:

The Executive order states that: "The withdrawal hereby effected is subject to existing valid rights."

In the case of *Williams v. Brening* (51 L.D. 225), it was held, in connection with a similar withdrawal of December 8, 1924, involving lands off the coast of Florida, that the saving clause of the order protected, upon cancellation of the entry as the result of a contest, the preference right of the contestant which had been earned, although not actually awarded, prior to the withdrawal.

The contest was initiated and is being prosecuted as provided by law and in accordance with departmental regulations. The law provides that if a contestant is successful he shall be allowed thirty days from notice of cancellation of the contested entry to enter the land. There is here a right to carry the proceedings, which were begun prior to the withdrawal, to a conclusion, and if the contestant shall be successful he will be entitled to the statutory reward.

Undoubtedly the President could have made an absolute and unconditional withdrawal, but he did not do so. With reference to the expression, "existing valid rights," as used in the saving clause of the Executive order, the Secretary of the Interior has said (Solicitor's Opinion dated February 8, 1935, 55 L.D. 205, 210) :

"I believe this protective provision should be generously applied. The public interest in particular tracts within the confines of the broad expanse thus withdrawn is too inconsequential to justify the striking down of individual rights through technical construction or harsh application of the protective provision of the order."

If, after a hearing, or by default, judgment is rendered in favor of the contestant, he will be allowed a preference right to enter the land on cancellation of the present entry.

You will govern yourselves according to the foregoing and if any entry has been canceled since November 26, 1934, as the result of a contest initiated prior to that date, and no other obstacle to exercise of the preference right existed, you will now notify the successful contestant that he will be allowed thirty days within which to exercise his preference right of entry, notwithstanding notice, if any, which may have heretofore issued advising him that this preference right would be held in abeyance pending revocation or modification of the withdrawal.

FRED W. JOHNSON, Commissioner.

The withdrawal and reservation made by PLO 4582 is similar in all material aspects to those just cited. That is, it is not absolute or unconditional and it covers a huge area of land. The ruling in *Williams v. Brening, supra*, a case on all fours with this one, as adopted and applied to other comparable withdrawals, is controlling here.

Accordingly, it is concluded that the exercise of appellant's preference right is not barred by PLO 4582 and that he is to be permitted to exercise it.⁴

This conclusion, of course, does not purport to pass in any way on the merits of the Kenaitze protest.

⁴ It was earlier noted that it does not appear that the cancellation of the entry contested by the appellant has been noted on the land office records. This action should be taken before appellant is notified of his right to make his entry. *Carl R. Hawkins*, A-29773 (March 24, 1964). Appellant's application of July 10, 1967, was premature and must stand rejected for that reason. *Id.*

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 reversed and the case is remanded for further proceedings consistent with this opinion.

ERNEST F. HOM,
Assistant Solicitor.

FINLAY MacLENNAN

A-31068 *Decided January 16, 1970*

Oil and Gas Leases: Applications: Descriptions

Where an area sought to be excluded from a larger parcel of land in an oil and gas lease offer is described by metes and bounds in terms which do not satisfy the pertinent regulation, it makes the offer defective as to the parcel and subject to rejection to that extent.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Finlay MacLennan has appealed to the Secretary of the Interior from a decision dated September 10, 1968, of the Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, which affirmed the rejection by the Eastern States land office of his application to reinstate his noncompetitive lease offer BLM-A 070340 insofar as it pertained to a 12.72-acre tract in section 73, T. 6 N., R. 1 W., Wash. Mer., Mississippi, and dismissed his protest against the acceptance of pending lease offer ES 3383 for the described tract.

It appears that BLM-A 070340 was one of several offers filed simultaneously as of April 19, 1963, for lands in sections 71, 72, and 73, T. 6 N., R. 1 W., Wash. Mer., Miss. Lease offer BLM-A 070303, drawn first in the drawing held to determine priority among the offers, eventuated in a lease issued effective March 1, 1964, for certain lands in sections 71 and 72, but it was rejected as to the lands in section 73 for the reason that a metes and bounds description which sought to exclude a 40-acre tract was found inadequate.

BLM-A 070340 was rejected *in toto* much earlier, on May 2, 1963, because it was not the first-drawn offer. It was, however, subject to reinstatement in the event the lands applied for were not leased to an offeror with higher priority.¹

All of section 73, except for four tracts, was included in lease BLM-A 070464 issued effective September 1, 1967, in response to an

¹ Under the current regulation all offers other than that drawn first are rejected and in the event the first drawn is not issued a lease the land is again posted for simultaneous filing. 43 CFR 3123.9(c)(3).

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offer filed May 17, 1963.² One of the tracts in section 73 not included in lease BLM-A 070464 is the 12.72-acre tract covered by MacLennan's petition for reinstatement. Lease offer ES 3383 was filed on October 27, 1967, for 80 acres, more or less, including the 12.72-acre tract. On December 5, 1967, MacLennan filed his petition for reinstatement of his offer as to this tract and his protest against the issuance of a lease for it in response to lease offer ES 3383.

In pertinent part offer BLM-A 070340 originally described the land in section 73 exactly as it had been described in BLM-A 070303:

Sections * * * 73: All less * * *

AND less that 40.00 acre tract in Section 73 described as commencing from the Southeast corner of section 76 go North 43 degrees 45 minutes West along the Section line a distance of 1,707 feet, thence South 54 degrees 30 minutes West a distance of 1,490.00 feet more or less, thence North 35 degrees 30 minutes West a distance of 1,320 feet, thence South 54 degrees 30 minutes West a distance of 880.00 feet to the East line of Section 73 for a point of beginning, thence from said point of beginning go South 54 degrees 30 minutes West for a distance of 1,320 feet, thence Northwesterly along a line parallel to the East line of Section 73 for a distance of 1,320 feet, thence North 54 degrees 30 minutes East for a distance of 1,320 feet to the East line of Section 73, thence Southeasterly along the East line of said Section 73 to the point of beginning.

The land office and the Office of Appeals and Hearings found that the description did not satisfy the requirements of the regulation in effect at the time of filing. The Office said:

At the time offer BLM-A 070340 was filed, the pertinent regulation read:

"Each offer for a lease must contain * * * a complete and accurate description of the lands for which a lease * * * is desired. If the lands have been surveyed under the rectangular system of public land surveys, and the description can be conformed to such survey system, the lands must be described by legal subdivision, section, township, and range. Where the description cannot be conformed to the public land surveys, any boundaries which do not so conform must be described by metes and bounds, giving courses and distances between successive angle points with appropriate ties to established section corners. 43 CFR 200.5 (Circular 2017, 27 F.R. 4141, May 22, 1959)."

Examination of the land description given in offer BLM-A 070340, *supra*, shows that the metes and bounds description for the second exception from section 73 does not satisfy the requirements of the cited regulation. The traverse from the section corner of section 76 to the true point of beginning does not end on the section line of section 73, as indicated, but rather terminates at a point nearly 700 feet southwesterly from the said section line, as the final distance in the traverse should be 194.79 feet, instead of 880 feet shown in this offer. The assumed point of beginning thus cannot be considered to have an appropriate tie to an established corner. The second call for the exception shows the course only as "northwesterly along a line parallel to the east line of section 73" which does not satisfy the requirement for giving the actual course of the line followed on the ground. The fourth call shows the course to be southeasterly along

² It is not clear why the lands in section 73 denied to BLM-A 070303 were leased to a new offeror rather than to one who had qualified in the earlier drawing in accordance with the then current regulation.

the east line of section 73, an acceptable conformed line to the public land surveys, but the traverse from the actual point of beginning does not reach the east line of section 73, nor does this call give any distance traversed.

It concluded that offer BLM-A 070340 should have been reinstated when the first offer for section 73 did not mature in a lease and that it should then have been rejected for any land in section 73. Accordingly it rejected BLM-A 070340 for the land in section 73.

On appeal MacLennan does not deny that the metes and bounds exclusion in his description was inadequate. He contends, however, that an offer ought not to be rejected because it described land that was not available for leasing and he asserts that the rental he paid was sufficient under the regulation to sustain his offer for the entire area without exclusion. He cites *L. B. Smith et al.*, A-30447 (October 29, 1965), in support of his position.

In *Smith* an offeror had applied for certain described lands without excluding a railroad right-of-way that ran through them. The Department held that the description was not defective since the Department never required the rejection of an offer merely because it described land that was not available for leasing so long as the rental had been remitted for all the land described without any diminution for the land in the right-of-way.

The cases are not completely analogous. In *Smith* the offeror described the land he applied for properly, but made no mention of land within the area described that was not available for leasing. In the case on appeal the offer attempts to exclude from the land applied for an area which it describes defectively. To be comparable to *Smith* MacLennan would have had to apply for section 73 without attempting to exclude any of the land in it, which, of course, he did not do. In the one instance an offer asks for more than can be granted, but leaves to the Department the task of defining the land available, a burden which it usually accepts. In the other, the offer seeks to be more exact, but fails. The issue, then, is whether a defective exclusion by itself is enough to invalidate a description that would be adequate if no exclusion had been attempted.

The exact point does not appear to have been discussed by the Department. In *James P. Witmer*, A-30227 (July 10, 1964), the offer described the land applied for as "S $\frac{1}{2}$ SW $\frac{1}{4}$, except West 25 acres of SW $\frac{1}{4}$ SW $\frac{1}{4}$." The Department held that since the east boundary of the 25-acre parcel did not conform to the public land survey a metes and bounds description was necessary, and held the offer defective for the land in the SW $\frac{1}{4}$ SW $\frac{1}{4}$. Here, too, we cannot tell what the boundaries of the land applied are. We know only that it is section 73 less some unascertainable 40 acres.

As the Department has stated: * * * "The purpose of the regula-

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tion is to require an offeror to give a description which is at least sufficient on its face to delimit the land applied for," * * * *Charles J. Babington*, 71 I.D. 110, 112-113 (1964). MacLennan's description fails to meet this test.

We recognize that there is a difference between the tract applied for and an exclusion from it in that if a description for the first is bad the land sought cannot be positioned at all while if only the second is defective the question is limited to what portion of the tract the offeror intended to describe.

If the exclusion can be ignored, an acceptable description will remain, and, all else being regular, a lease could be issued. Yet, to do so would be to amend the description that the offeror submitted. In *Babington, supra*, it was further said: * * * "It is not for the Department to salvage from the description some land that may be considered properly described." * * * *Id.*, p. 113.

The Department has also held that it will not alter an erroneous description in order to make it a valid offer. *Joe Bart Moore*, A-29361 (July 1, 1963).

In the spirit of these holdings we conclude that a defect in a description of a tract sought to be excluded from the area applied for which makes it impossible to determine exactly what is the area applied for renders the offer defective as to that area and that the offer is properly rejected to that extent. It follows that as originally filed MacLennan's offer was defective so far as it described land in section 73 and it could properly have been rejected as to that land for that reason.

As we noted earlier, however, the offer was rejected simply for the reason that it was not the first offer drawn and it was stated that the offer could be reinstated if the land was not leased to an offeror having higher priority. No lease had been issued for the 12.72-acre tract in section 73 at the time when MacLennan filed his petition for reinstatement of his offer as to that tract and there does not appear to have been in existence any offer filed in the 1963 drawing which had priority over his offer for that tract. Accordingly the petition seems to have been properly filed from that standpoint. If then, the petition contained a proper description of the 12.72-acre tract in section 73, it would appear that the defective description of sec. 73 in the original offer could be deemed to have been corrected to that extent as of December 5, 1967, the date the petition for reinstatement was filed. However, prior to that time, offer ES 3383 had been filed on October 27, 1967, so it took precedence over MacLennan's amended offer for the 12.72-acre tract. Nonetheless MacLennan's amended offer should not be finally rejected as to that tract until a lease is issued pursuant to offer ES 3383.

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 as modified in the respect just discussed.

ERNEST F. HOM,
Assistant Solicitor.

FRANK O. and DOROTHY B. O'MEA

A-31084

Decided January 27, 1970

Mining Occupancy Act: Principal Place of Residence

The act of October 23, 1962, requires that an applicant and his predecessors must have occupied valuable improvements on a mining claim as a principal place of residence during the 7-year period immediately preceding July 23, 1962, and where there is no evidence as to the use made of a claim during the first 5 years of that period, and where the applicant indicates a desire to submit additional evidence relating to his own use of the claim during the last 2 years of the qualifying period, the case will be remanded to the Bureau of Land Management to permit the development of additional evidence.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Frank O. and Dorothy B. O'Mea have appealed to the Secretary of the Interior from a decision dated October 25, 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 662, filed pursuant to the Mining Claims Occupancy Act of October 23, 1962, 30 U.S.C. secs. 701-709 (1964), as amended (Supp. IV, 1969), to purchase a tract of land in the Chaparal¹ lode mining claim in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 33, T. 7 N., R. 14 E., M.D.M., Stanislaus National Forest, Calaveras County, California.

Appellants filed their application on June 13, 1967, stating therein that the Chaparal mining claim was located on August 28, 1947, that improvements consisting of a cabin, tool shed, and outbuilding had been completed on the claim between 1949 and 1953, that a residence has been on the claim since prior to July 23, 1955, that appellants purchased the claim and the improvements in April 1960 for the price of \$3,300, and that the claim has been their voting residence since that time.

By a decision dated August 16, 1968, the land office rejected appellants' application upon a finding that appellants' use of the improvements on the mining claim had been intermittent in nature and that the

¹ The spelling of the name of appellants' mining claim has been subjected to remarkable variation, at least five different spellings having appeared in the record. Because "Chaparal" was used in the deed to appellants, in appellants' relinquishment of the claim, and in their application under the Mining Claims Occupancy Act, we have adopted that spelling here.

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improvements had not been a principal place of residence for appellants. A report of field examination, the land office stated, disclosed that Mr. O'Mea has been continuously employed in San Francisco since 1941, that appellants' son, Douglass, had attended school from kindergarten through high school in San Francisco, that appellants have maintained a home at 240 Evelyn Way, San Francisco, from at least November 1946 to the present, and that the references given by appellants indicated that residential use of the mining claim was on weekends and vacations. Such circumstances, the land office determined, do not permit the applicants to claim that the cabin on their mining claim is a principal place of residence within the meaning of the act of October 23, 1962.

In appealing to the Director, Bureau of Land Management, appellants asserted that they are domiciled at the Chaparal mining claim and reside at the cabin located thereon, and, in support of that assertion, they submitted evidence that they have been registered voters in West Point precinct, Calaveras County, since August 10, 1960, that they have rented post office box No. 14 in West Point, Calaveras County, California, continuously since 1960, that they have registered all of their automobiles at West Point, and they had their dog licensed at West Point. Citing general principles of law relating to domicile, appellants argued that "it does not appear that the applicants could do anything more to indicate their desire and intention to establish their permanent residence at West Point, California," and they requested a hearing "on an issue of fact."

The Office of Appeals and Hearings, in sustaining the action of the land office, found that the "general law of domicile is not adequate to resolve the legal issue in this case." The appellants' own witnesses, the Office of Appeals and Hearings observed, stated that appellants were seen on the claim mostly on weekends. Citing the Department's decisions in the cases of *H. T. Crandell*, 72 I.D. 431 (1965), and *Herman C. and Edith O. Kampling*, A-30592 (September 26, 1966), it concluded that evidence of appellants' desire and intention to make their residence on the mining claim was insufficient to prove the fact of residence. The Office of Appeals and Hearings denied appellants' request for a hearing upon a determination that appellants had alleged no facts which, if proved, would entitle them to the relief which they sought, citing *Jack A. Walker*, A-30492 (April 28, 1966), *aff'd* in *United States v. Walker*, 409 F. 2d 477 (9th Cir. 1969).

In their current appeal to the Secretary, appellants contend that, of the three departmental decisions cited by the Office of Appeals and Hearings, only the *Walker* case, *supra*, bears any factual resemblance to the present case. In that case, appellants argue, the Department found that the Big Creek-Yellow Pine Area, in which the appellant was a registered voter, was "a principal area of residence" for him but

that, since he had spent more time at the town of Yellow Pine in the same voting district than at his mining claim cabin site, the cabin was not "a principal place of residence," thus differing materially from the present case. Appellants charge that the Office of Appeals and Hearings, "in brushing aside appellants' citations of California State court cases dealing with the general law of domicile (legally synonymous with residence), ignores the principles laid down in the Walker decision." Appellants further assert that they were given no opportunity to present any witnesses at any time in the proceedings below, that the only statements in the record are those gathered by the Forest Service during the course of its investigation, and that they were not served with a copy of the Forest Service investigative report, and they request that the decisions appealed from be set aside and the application granted upon the basis of the present record or, in the alternative, that appellants be granted a hearing "to present further facts and points of law to substantiate their position as qualified applicants." In addition to copies of documents previously submitted, appellants have submitted copies of motor vehicle registration cards for the years 1962 through 1964, of hunting licenses for 1961 and 1962, and of government correspondence in 1961, all showing their address to be P.O. Box 14, West Point, California.

The record shows that an investigation of appellants' use of their mining claim was conducted by the Forest Service, United States Department of Agriculture, in 1968, at which time at least eight residents of the West Point area, all but two of whose names were furnished by appellants, were interviewed. One of those witnesses, Alvin Turner of Turner's Shell Service, stated that he had known Frank O'Mea for around ten years and that he had "seen him every week end he comes thru on Friday nite & leaves on Sunday nite when working During his vacation 5 to 6 weeks a year he is in West Point (cabin)." Another witness, James F. Carson, who runs the lumber company in West Point and also serves as the local constable, stated that he has known Frank O'Mea since 1960, "that he votes in West Point, and that he lives at his place on Bald Mt. Rd. lengthy periods during each yr. & on most week ends, when not living there permently [sic]."² A third witness, Charles E. Betts, stated that O'Mea "has occupied his cabin 2 or 3 days every week & at times has been there for from 2-3 weeks to a month" since 1965. He had no knowledge of appellants' use of the cabin prior

² In their appeal to the Secretary appellants allege that, at the time of his interview with Forest Service investigators, Carson gave the investigators a handwritten statement, that he was subsequently asked by the Forest Service to fill out a mimeographed form submitted to other people who were interviewed, and that, although Carson had assured appellants that he had filled out the form and sent it to the Forest Service, the form was not attached to the investigative report of the Forest Service. In the absence of an allegation that Carson's statements on the mimeographed form differed materially from his handwritten statement, the alleged omission is of no perceivable significance.

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to that time. The testimony of other witnesses was generally to the same effect but less specific.

Although Betts' statement clearly cannot be accepted as evidence of appellants' use of the claim during the qualifying period, 1955 to 1962, his statement, when viewed against the background of the statements of witnesses who claimed familiarity with appellants' use of the land prior to October 23, 1962, suggests the continuation of an established pattern of use. The evidence, as a whole, tends to show that appellants utilized the mining claim, perhaps a third of the time, each year from the time of their acquisition of the property in 1960 to the time of the filing of their application in 1967, such use occurring on weekends and during vacations, while the remainder of the time was spent by appellants at their home in San Francisco. From this evidence, the lands officer, Stanislaus National Forest, found that:

1. The O'Meas have made as much use of their cabin as Mr. O'Mea's employment will permit.
2. Mr. O'Mea is employed in San Francisco and owns his home there.
3. Rejection of this application will cause some hardship since the cabin is important to the O'Meas for use on weekends and during periods when Mr. O'Mea can be away from his San Francisco job.

He concluded, however, that he could not, "in good conscience, state that the use made in the 1960-1962 period nor since then, was as a 'principal place of residence'."

Apart from the question of whether or not the O'Meas have used their mining claim as a principal place of residence since their acquisition of the property in 1960, there is a question of equal importance relating to use of the claim upon which no evidence appears in the record.

A "qualified applicant" for relief under the Mining Claims Occupancy Act is defined in section 2 of the act, 30 U.S.C. sec. 702 (1964), 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.

The act thus imposes two requirements, (1) that an applicant own and occupy valuable improvements on a mining claim as a principal place of residence as of October 23, 1962, and (2) that the applicant and his predecessors in interest must have been in possession of such improvements for not less than 7 years prior to July 23, 1962. The act does not explicitly state that the 7 years' possession prior to July 23, 1962, must have been coupled with physical occupancy as a principal place of residence. However, the Department has indicated in *Henry P. and Leoda M. Smith*, 74 I.D. 378 (1967), that such is the case, and,

indeed, that view of the meaning of the statute is strongly supported by the declarations of the drafters of the legislation.

In explaining the language used in section 2 of the act, the Senate Committee on Interior and Insular Affairs stated that:

Section 2 defines a qualified applicant. * * * He must be a residential occupant-owner as of July 23, 1962.³ This does not mean in actual physical residence on that date but rather that the residence must have been habitable and, as is explained below, *used during the preceding 7 years in a manner consistent with the purposes intended to be covered by the act.* S. Rep. No. 1984, 87th Cong., 2d Sess. 5 (1962); Italics added.

The committee then explained that the language used was intended to specify that an applicant must be one who uses his claim as one of his principal places of residence, that casual or intermittent use, such as for a hunting cabin or for weekend occupancy, was not intended to be covered, and that "the Secretary shall require applicants to submit proof of residence as a part of determining whether the applicant is qualified." *Id.* at 5, 6.

More recently, in recommending extension of the life of the act, the same Senate committee again indicated, even more emphatically, that the 7 years' possession prior to July 23, 1962, must have consisted of residential use of the property, stating that:

* * * In order to be qualified an applicant must have been the owner of valuable improvements on the mining claim on October 23, 1962, and the *improvements must have been a principal place of residence for him and his predecessors in interest for not less than 7 years before July 23, 1962.* * * * S. Rep. No. 593, 90th Cong., 1st Sess. 2 (1967); Italics added.

It is not enough, then, for an applicant for relief under the act to establish that, on October 23, 1962, he was a residential occupant-owner of improvements which had been erected on an unpatented mining claim prior to July 23, 1955, but he must show, as well, that during the intervening years the improvements constituted a principal place of residence for him or for his predecessors in interest.⁴

³ The determinative date was, subsequent to the committee's report, changed to October 23, 1962.

⁴ Additional support for this view is found in the explanation of the objectives of the legislation given by its drafters. The act was designed, according to the Senate Committee on Interior and Insular Affairs, "to aid those qualified people on whom a hardship would be visited were they to be required to move from their long-established homes" and to avoid the disturbance of "arrangements, sanctioned by time and custom, which can be regularized without injury to the public interest." S. Rep. No. 1984, *supra*, at 3, 4.

Residence commencing on October 23, 1962, in improvements which had been in existence since 1955 might appear to satisfy literally the language of section 2, but it could not convert those improvements into a "long-established home." Nor could it be characterized as an arrangement "sanctioned by time and custom." The act of July 23, 1955, 30 U.S.C. § 611 *et seq.* (1964), in prohibiting, as to mining claims located after that date, all uses not reasonably incident to prospecting, mining or processing operations, clearly put mining claimants on notice that the sole purpose of a mining location is the exploitation of mineral resources. Prior to the date of that act the conversion of unpatented mining property to residential use, although constituting, as the committee found, "an anomaly to the law," had the sanction of local custom. However, thereafter, there could be no sanction for it.

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Assuming, but not deciding, that appellants' use of the improvements on the Chaparal claim after April 1960 can be classed as residential occupancy within the meaning of the 1962 act, it must still be shown that the improvements had been used in a comparable manner by appellants' predecessors from 1955 to 1960. The record is altogether void of such evidence. Appellants stated in their application only that the owners of the claim, prior to April 1960, were Marion Davis from 1949 to 1957 and Arthur Heasley and others from 1957 to 1960. The report of the Forest Service was equally uninformative with respect to the nature of the use of the claim by appellants' predecessors.

After careful review of the record before use we are persuaded that a proper determination of appellants' qualifications as applicants cannot be made upon the basis of evidence relating only to the last 2 years of the 7-year qualifying period. Inasmuch as it does not appear that appellants have been previously informed of the necessity of showing qualifying use on the part of their predecessors in interest,⁵ they should now be afforded an opportunity to make that showing. In the event that they fail to make the necessary showing, it will be unnecessary to determine whether or not their own use of the claim was of a qualifying nature. Should it be determined that the improvements on the Chaparal claim were used as a principal place of residence by appellants' predecessors, it will, of course, become necessary to pass final judgment on the sufficiency of appellants' residence after April 1960.

Although appellants complain that they have been given no opportunity to present any witnesses of their own at any time, the fact is that they have not indicated for what purpose they would introduce the testimony of witnesses. As we have already observed, the evidence developed by the Forest Service tended to show that appellants used the claim every weekend, or nearly every weekend, throughout each year since acquiring the property, as well as during other periods, and the Forest Service found that appellants had made as much use of their cabin as Mr. O'Mea's employment would permit. Appellants have alleged no greater use, their most comprehensive explanation of their use of the claim consisting of a statement in a letter of May 29, 1968, to the lands officer, Stanislaus National Forest, that "the improvements on the claim were regularly and continuously used as a principal place of residence as defined in the Act." In the absence of the allegation of specific facts which are inconsistent with those reported

⁵ The application form published by the Bureau of Land Management calls for an applicant to indicate whether or not a residence has been on a mining claim for which application is made since prior to July 23, 1955, and to list all owners of the property during the period from July 23, 1955, to October 23, 1962. It does not explicitly call for the showing which we find here to be necessary before appellants' qualifications can be determined.

by the Forest Service and which, if accepted as true, would establish appellants' qualifications as applicants, there is no factual issue before us, and there is no basis for ordering a hearing. See *Jack A. Walker, supra*.

However, if appellants feel that the Forest Service has not accurately reported the facts relating to their use of the claim, they should file in the land office a statement setting forth in explicit detail the facts of their occupancy, together with the statements of witnesses which would tend to confirm the accuracy of the allegations. Upon the filing of such a statement, and upon the submission of evidence relating to use of the claim by appellants' predecessors, it can be determined whether or not there is occasion for a hearing or whether a new decision can then be issued without a hearing.

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 set aside, and the case is remanded to the Bureau of Land Management for further action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

REPAYMENT OF EXPERT ASSISTANCE LOANS

Indian Tribes: Judgment Funds—Act of November 4, 1963

When a tribe receives separate loans for expert assistance on several claims against the United States, repayment from an award on a claim is only required to the extent needed to repay the loan made for expert assistance on the particular claim on which the award was granted.

Indian Tribes: Judgment Funds—Appropriations

Under the Appropriation Act for the Department of the Interior for fiscal 1970, 88 Stat. 147, there may be paid out of an award of the Indian Claims Commission only the attorney fees and expenses of litigation incurred in obtaining the award, plus expenses for program planning, until other legislation authorizes other use of the award.

M-36800

February 20, 1970

To : COMMISSIONER OF INDIAN AFFAIRS.

SUBJECT: REPAYMENT OF EXPERT ASSISTANCE LOANS—THREE AFFILIATED TRIBES OF FORT BERTHOLD.

You have asked us whether an Indian tribe may "defer" repayment of expert assistance loans it has received in connection with cases not yet decided by the Indian Claims Commission, once the tribe has re-

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covered a judgment on at least one claim for which it received a loan, the judgment being large enough to enable the tribe to repay the loans it has received to assist it on all its claims. The answer is yes, because: (1) the Act of November 4, 1963, 77 Stat. 301, 25 U.S.C. sec. 70n-1 *et seq.*, established the policy that the repayment of a loan is contingent upon the tribe's recovery on the claim for which the loan was made; and (2) the Appropriation Act for the Department of the Interior for 1970 allows the use of judgment funds only for attorney fees and expenses of litigation incurred in obtaining the award, plus expenses of program planning, until other legislation authorizes other use.

The question arises from an award of \$1,850,000 recovered by the Three Affiliated Tribes of Fort Berthold on June 18, 1969, on its claims numbered 350-A, 350-E, and 350-H. The tribe received a \$15,000 expert assistance loan in 350-H, and stands ready to repay it with interest out of the proceeds appropriated to cover the award, Act of December 26, 1969 (83 Stat. 447). It protests the request of the Aberdeen Area Office, Bureau of Indian Affairs, dated January 9, 1970, that it also repay out of this judgment loans made for expert assistance in four separate claims, numbered 350-B, 350-C, 350-D, and 350-F. In a memorandum of January 14, 1970, while agreeing with the Aberdeen Area Director's interpretation of the law, the Deputy Assistant Commissioner states that the Bureau would not object to "deferring payment" of the other loans "if it is legally permissible to do so."

1. From the background to the bill, H.R. 11263, 87th Congress, that was the forerunner of the legislation that was finally passed the following year as the Act of November 4, 1963, it is clear that the reason for the bill was a decision by the Indian Claims Commission that contingent fee contracts for expert witnesses were against public policy (*see* letters from the Secretary to the Chairmen of the House and Senate Interior Committees dated July 12 and 13, 1962, and a memorandum on the Assistant Attorney General's testimony on the bill, dated June 20, 1962). That Congress intended the repayment of assistance loans to depend upon the contingency of recovery which had been the practice with respect to the payment of the fees of the expert witnesses is evident from the language of the 1963 act. For the Congress expressly made the replenishing of the revolving loan fund contingent upon the tribe's recovery on "its claim": "If no judgment is recovered or if the amount of the judgment recovered is inadequate to repay the loan and interest thereon, the unpaid amount may be declared nonrepayable by the Secretary." 25 U.S.C. sec. 70n-4. Consequently, the repayment of each expert witness loan depends upon a recovery on the claim for which the loan was made in an amount which is adequate to repay the loan.

2. This result is also required by the following provision in the Department of the Interior Appropriation Act for 1970, 83 Stat. 147, under "Bureau of Indian Affairs: Tribal Funds":

[N]othing contained in this paragraph or in any other provision of law shall be construed to authorize the expenditure of funds derived from appropriations in satisfaction of awards of the Indian Claims Commission and the Court of Claims, except for such amounts as may be necessary to pay attorney fees, expenses of litigation, and expenses of program planning, * * *. (Italics supplied)

There can be no question but that the attorney fees and expenses of litigation are those expenses which have been incurred in obtaining the award for which the judgment fund was appropriated and that the expenses of program planning are the subsequent administrative costs which will be incurred in deciding the use to be made of such judgment funds. Therefore, since the expert assistance rendered in 350-B, 350-C, 350-D, and 350-F cannot be considered an expense of litigation in 350-A, 350-E, or 350-H, the loans made for such assistance in the former claims cannot be repaid out of the award made on the latter three claims.

RAYMOND C. COULTER,
Deputy Solicitor.

APPEAL OF L. J. ROBINSON, INC.

IBCA-772-4-69 Decided February 25, 1970

Contracts: Construction and Operation: Drawings and Specifications—Contracts: Performance or Default: Excusable Delays

When there is a conflict between drawings, and the evidence shows that the conflict was not obvious or patent, a contractor is entitled to an equitable adjustment for the additional expense attributable to the Government's design and coordination failures and to an appropriate time extension.

BOARD OF CONTRACT APPEALS

This appeal stems from the construction of a cafeteria and training facility addition to the National Park Service Park Operations Building in East Potomac Park, Washington, D.C., under contract awarded on June 26, 1968, for an estimated contract price of \$257,246. By agreement of the parties the Board is to consider only the question of entitlement to an equitable adjustment and to additional time.

Appellant's claim is based upon two complementary theories (i) the design of certain structural beams was deficient, and (ii) the Government failed to coordinate the drawings in the design stage and thereafter. The relief requested is an equitable adjustment for

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time and money under the "Changes" clause, and a time extension under the "Termination for Default—Damages for Delay—Time Extensions" clause.¹

Sheet 24 of the drawings represented the structural grade beams for the building. The sheet contains a structural layout plan, a reinforcing schedule for each of 44 beams, and several detail drawings through sections. Sheet 26 contains additional details. The reinforcing schedule includes a column giving the top elevation of each beam. There is nothing on these drawings to indicate that any openings are to run through grade beams at any level. Sheets 24 and 26 were prepared by Fortune Engineering and Associates.

Specification Section 3.01, Portland Cement Concrete, paragraph 6A., states that the contractor must provide for installation of inserts, conduit, pipe sleeves, chains, hangars, metal ties, anchors, bolts, angle guards, and other fastening devices. There is no mention in this section of any requirement to provide for large openings in the structural grade beams for air tempering system duct work.

Sheet 17 represents the layout of the duct work for the air tempering system. The drawing contains no direct written expression showing that some duct work would have to pass through structural beams. There is a written note stating, "All supply ducts on this drawing shall be below f1. except run up to air units." Sheet 17 was prepared by Frank Williams, M. E.

Specification Section 15.02, Air Tempering System, does not contain any language indicating that some of the duct work would have to pass through structural grade beams.

All the structural beams were in place when the mechanical subcontractor, Mr. Merton, came on the job in mid-November 1968. When his crew were laying out 4-foot sections of duct in the crawl space before the slab floor was to go on (Tr. 127), it was then noticed for the first time that structural beams B-3, B-23 and B-38 did not provide for passage of duct work. The contractor and his job superintendent were informed. The Government inspector's log shows that the Government was informed on November 20, 1968.

The concrete reinforced grade beams involved are massive. Beams B-3 and B-38 measure 18 x 48 inches in cross section. B-23 is 12 x 36 inches. The openings which would have been required were also large. Two openings in B-3 would have had to accommodate ducts measuring 10 x 12 inches. In B-23, the duct work measured 10 x 11 inches. B-38 required passage of a duct measuring 22 x 36 inches.

The dilemma was obvious: the beams had been poured without providing passage for the duct work. The issue of entitlement turns upon

¹ General Provisions, Standard Form 23-A, June 1964 Edition, as modified to incorporate later revisions to certain of the Standard Clauses, e.g. Changes (See General Provision No. 55).

the question of who is responsible. As previously noted, neither drawings nor specifications expressly incorporate a requirement for structural beams being penetrated by large ducts. For the work it portrays, each drawing is complete and accurate.

There is no evidence that a careful comparison of all of the drawings was done at the bidding stage. Under pressure of time and competition, the contractor appears to have evaluated in detail only the documents involving his own "direct exposure." For subbed out work (e.g., mechanical), he solicited the bids of experts (Tr. 107). Only obvious errors were noted (Tr. 108). The mechanical subcontractor examined only sheets 18 and 19 (Tr. 126).

Nevertheless, the appellant has made out a compelling case of design deficiency, and a corresponding failure of the Government to coordinate the drawings. It is established in the record,² and not contested by the Government, that the structural beams in question were not designed in the first instance to accommodate large openings for duct work. It is also clear that Mr. Williams, the Government's mechanical engineer, was unaware of any grade beams being above grade (Tr. 127-128). The fact that the beams were not designed to be penetrated is also evidence of a lack of Government coordination of the two areas of work. In addition, the Government, in August of 1968, reviewed and approved shop drawings submitted by the contractor for the structural beams which made no provision for the passage of the duct work.

Although we do not view the Government's approval of the shop drawings as especially significant, such approval has at least some bearing upon the question of whether the conflict in the drawings was patent. It is also some evidence that the Government's failure to coordinate extended beyond the design stage into the construction stage.

The preponderance of the evidence leads the Board to conclude that the conflict between the two drawings was not obvious. First, neither the Government's structural engineer nor its mechanical engineer were aware of the problem. The structural engineer even had a second chance in reviewing the structural beam shop drawings. Second, the drawings and specifications are totally silent on penetration of the beams by duct work.³

Finally, appellant's uncontested evidence established that it was the custom of the industry to show by a detail drawing on the structural drawings the requirement for a penetration of a structural member by holes of sufficient size to accommodate the duct work.⁴ Under that practice the absence of detail may have caused the appellant to con-

² Tr. pp. 27-28, 33-34, 40-41, 171-172.

³ The phrase on the mechanical drawing stating that all duct work was to be below floor level is too cryptic to constitute a clear warning to the contractor, e.g., the duct work could go around and under, as well as through the beams.

⁴ Tr. pp. 19, 21, 23, 44, 46.

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clude that the structural beams were to be poured exactly as shown on the structural drawings. Such a trade practice lends additional support to the view that the failure to provide for large openings for duct work in the structural beams was not an obvious or patent omission.

On the basis of the record made in these proceedings, the Board finds (i) that structural beams B-3, B-23 and B-38 were not designed to accommodate passage of duct work for the air tempering system; (ii) that both contractor and the Government failed to coordinate the structural drawings and duct work drawings, and (iii) that such conflict as existed in the two sets of drawings was not so obvious or patent as to require the contractor to seek clarification of the discrepancies prior to bidding. In such circumstances the Government is responsible. *John McShain, Inc. v. United States*, 188 Ct. Cl. 830 (1969); *Guyler v. United States*, 161 Ct. Cl. 159 (1963); *J. W. Conway, Inc.*, ASBCA No. 5603 (February 11, 1960), 60-1 BCA par. 2527. Cf. *General Electric Company*, IBCA-451-8-64 (April 13, 1966), 73 I.D. 95, 66-1 BCA par. 5507.

In addition to stressing the contractor's failure to coordinate the two drawings, the Government has emphasized the contractual requirement that the contractor deliver an air tempering system complete. That is, the structural beams were satisfactory as designed and poured, and it was appellant's duty to provide an air tempering system.

This line of argument overlooks the fact that the predicament resulted initially from the Government's failure to provide a grade beam designed to accommodate the duct work. If the contractor were to perform the duct work as shown on sheet 17, he had to penetrate the beams. His only alternative was a rerouting of the duct work at substantially greater expense, which the Government refused to bear. At least some of the additional expense is clearly attributable to Government's design and coordination failures. Cf. *Blackhawk Heating and Plumbing Co., Inc.*, VACAB No. 781 (March 19, 1969), 69-1 BCA par. 7560.

Conclusion

The appeal is granted. Appellant is entitled to an equitable adjustment for the costs of providing a solution to the latent conflict in the drawings, and to an appropriate extension of time, under the provisions of both the "Changes" clause and the "Termination for Default—Damages for Delay—Time Extensions" clause.

ROBERT L. FONNER, Member.

I CONCUR:

WILLIAM F. McGRAW, Acting Chairman.

WILLIAM AND PAUL G. RAFFERTY**A-31085***Decided March 27, 1970***Mining Occupancy Act: Qualified Applicant**

The right or privilege to qualify as an applicant under the act of October 23, 1962, cannot be assigned, but it may pass through devise or descent in the same manner as that in which property customarily is transferred by those means and the transfer is not limited only to the first devisee.

Mining Occupancy Act: Qualified Applicant

If the occupant-owner of residential improvements on an unpatented mining claim could have qualified on October 23, 1962, as an applicant for relief under the act of that date, the right or privilege of qualifying is not lost or destroyed by the failure of his heirs or devisees, who seek the benefits of his eligibility, to reside upon the claim themselves.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

William and Paul G. Rafferty have appealed to the Secretary of the Interior from a decision dated October 11, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, modified and affirmed a decision of the Colorado land office rejecting their application, Colorado 2494, filed pursuant to the Mining Claims Occupancy Act of October 23, 1962, 30 U.S.C. secs. 701-709 (1964), as amended (Supp. IV, 1969), to purchase a portion of the land embraced in the Yellow Button lode mining claim in the NE $\frac{1}{4}$ sec. 36, T. 1 N., R. 72 W., 6th P.M., Roosevelt National Forest, Colorado.

Appellants filed their application on August 14, 1967, stating therein that the Yellow Button mining claim was located by Joseph Rafter on July 18, 1908, and that an amended notice of location was filed on April 18, 1928, that Rafter erected a home on the claim in about 1906 which remained the principal and sole legal residence of Rafter and his wife, Anna, until his death on January 30, 1963, that, shortly after the death of her husband, Anna Rafter moved to a nursing home in Boulder, Colorado, retaining the mining claim residence as her legal residence until her death on October 27, 1965, and that, by order of the district court for the County of Boulder, State of Colorado, all of the interest of Anna Rafter in the Yellow Button mining claim was transferred to appellants as tenants in common. On September 18, 1967, appellants filed a relinquishment of all right, title and interest in the mining claim.

At the request of the land office, the Forest Service conducted a field investigation which substantiated the basic facts alleged by appellants. The Forest Service found that Joseph and Anna Rafter resided together on the Yellow Button claim continuously from about 1906

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until the date of Joseph Rafter's death, but that neither William nor Paul G. Rafferty claimed to have resided on the claim at any time, that William resides in Chicago, Illinois, while Paul resides in Dallas, Texas, that the improvements on the claim are being rented and that it does not appear that either of the Rafferty brothers proposes to make his residence on the mining claim.

By a decision dated June 4, 1968, the land office rejected appellants' application upon the basis of an opinion of the Regional Solicitor, Denver Region, that appellants are not qualified applicants for relief under the act of October 23, 1962.¹ The Regional Solicitor's opinion was predicated upon his interpretation of section 8 of the act, 30 U.S.C. sec. 708 (1964), which provides that:

Rights and privileges to qualify as an applicant under this Act shall not be assignable, but may pass through devise or descent.

The Regional Solicitor interpreted section 8 as "granting to heirs and devisees the right to inherit the rights of decedents to qualify by tacking to the occupancy of the decedent the occupancy of the heir or devisee." Noting that the applicants "have never, and apparently do not intend, to use the improvements on the Yellow Button claim as a principal place of residence," the Regional Solicitor stated that the "fact that Joseph Rafter, upon his death, may have been a qualified occupant-owner does not lead to the conclusion that his matured qualifications may be subject to transfer to the present applicants through devise or descent."

In appealing to the Director, Bureau of Land Management, from the rejection of their application, appellants contended that it was error to find that "neither Applicant has ever resided on the Yellow Button Claim, and, apparently, neither intends to in the future." In fact, appellants asserted, "both of the Applicants, since the year 1917 at varying periods, have lived and resided on said Yellow Button Mining Claim; have made improvements and expended monies on said property; and intend to reside on said property in the future." Appellants stated that they are nephews of Anna Rafter, that on numerous occasions they resided with Joseph and Anna Rafter in the improvements located on the claim, and that one or more of the applicants, within the preceding 8 years, had lived on the claim and had made repairs on the improvements. They further asserted that it had always been their intention, upon retirement from their respective jobs, to make the Yellow Button their residence and that appellant

¹ Section 2 of the act, 30 U.S.C. § 702 (1964), 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."

Paul G. Rafferty has a son who intends to use the house as his residence while attending the University of Colorado.

The Office of Appeals and Hearings concurred in the determination of the land office that appellants cannot qualify as applicants under the Mining Claims Occupancy Act but upon a different ground. It held that section 8 of the act and the applicable Departmental regulation, 43 CFR 2215.0-5(a),² permit only a single devise from a mining claimant to his immediate devisee, stating that:

Mr. Rafter, the mining claimant, was the only person upon whose right to the mining claim the residential occupancy-ownership could be based, and only his devisee, Mrs. Anna Rafter, could acquire the right of *such* residential occupant-owner by devise (43 CFR 2215.0-5(a)(2)). There is no provision either in the 1962 act or the regulations thereunder which permits a transfer to devisees of the devisees, as contended by the appellants (Italics in original.)

In their appeal to the Secretary, appellants argue that the fact that Anna Rafter was not on the official records as one of the locators of the Yellow Button mining claim is only *prima facie* evidence that she was not one of the locators and residential occupant-owners, and they assert that "there is uncontradicted evidence to the effect that Anna Rafter was the joint owner of all the improvements upon the Yellow Button Mining Claim which were placed thereon through the joint work, effort and finances of both Mr. and Mrs. Rafter." They request that they be permitted to present further evidence, if it should be considered necessary, to show the rights and ownership of Anna Rafter as a residential occupant-owner of the claim. In short, appellants contend that there has been only a single devise, not two devises as the Office of Appeals and Hearings found.

It is undisputed that Joseph and Anna Rafter could have qualified on October 23, 1962, as applicants under the act of that date. It is also clear from their recitation of the facts, including the alleged residency with the Rafters, that appellants were not, on October 23, 1962, "residential occupant-owners" of the improvements on the Yellow Button claim and that appellants themselves are not "qualified applicants" as defined by the act. Thus, the only question before us is whether or not the unexercised right of Joseph Rafter to apply under the act of October 23, 1962, for the land occupied by his improvements could have devolved upon appellants at the death of Anna Rafter.

Whether Anna Rafter took whatever right or interest which she may have had in the Yellow Button claim at the time of her death as the devisee of Joseph Rafter or whether she was, in her own right, a residential occupant-owner of the improvements on the claim on

² Regulation 43 CFR 2215.0-5(a) provides in pertinent part that:

"The term 'qualified applicant' means (1) a residential occupant-owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim * * * or (2) the heirs or devisees of such a residential occupant-owner."

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October 23, 1962, is a question which we do not feel called upon to decide, for we are unable to accept the Bureau's view of the limitation placed upon devisees by section 8 of the act.

The Bureau's determination that rights and privileges under the Mining Claims Occupancy Act are subject to a single devise is predicated upon the summary finding that there is "no provision either in the 1962 Act or the regulations thereunder which permits a transfer to devisees of the devisees." However, it can be said with equal force that there is no provision in either the act or the regulations which precludes such a transfer. The statute provides simply that rights and privileges to qualify as an applicant under the act "may pass through devise or descent." No rule has been called to our attention, and we are not aware of one, that property, having once been devised, is not subject to further devise. In the absence of any express declaration to that effect,³ we can only conclude that the right or privilege to qualify as an applicant under the act may pass in the same manner as that in which property customarily passes, except that it cannot be conveyed. Accordingly, it was error to reject appellants' application on the grounds that they could not, as heirs of Anna Rafter, succeed to her rights under the Mining Claims Occupancy Act.

We turn then to consideration of the alternative ground given by the land office for rejection of appellants' application, that the right of a devisee to exercise the rights of a qualified applicant arises only when he has made residential use of the improvements on a mining claim subsequent to the devise. The Regional Solicitor's opinion that the rights of a devisee are so limited appears to have been based upon his observation that the stated purpose of the act was to aid those qualified people on whom a hardship would be visited were they to be required to move from their long established homes and that to extend the benefits to persons in the position of appellants would go beyond the stated objectives of the act. Such indeed was the declared purpose of the act, as the Department has pointed out on more than one occasion. See, e.g., *Jack A. Walker*, A-30492 (April 28, 1966), *aff'd* in *United States v. Walker*, 409 F. 2d 477 (9th Cir. 1969); *Coral V. Funderberg*, A-30514 (June 14, 1966), *aff'd* in *Funderberg v. Udall*, 396 F. 2d 638 (9th Cir. 1968).

We do not believe, however, that the broad objective of the act can be taken as a proper basis for reading into the language of section 8 a restriction which is not evident from the words employed. It is entirely reasonable that Congress believed that when a person qualified for relief under the act he should be able to pass his eligibility

³ In explaining the language used in section 8 of the act, the Senate Committee on Interior and Insular Affairs stated summarily that the section "provides that rights and privileges to qualify as an applicant under this act may pass only through devise or descent." S. Rep. No. 1984, 87th Cong., 2d Sess. 11 (1962).

to his heirs when he himself was unable for some reason to take advantage of it. That interpretation seems compelled by the plain language of section 8.

In fact, the interpretation of the Regional Solicitor would appear to create an inconsistency in the specific terms of the statute. Section 2 plainly requires a "qualified applicant" to be a residential occupant-owner of the mining claim property he seeks as of October 23, 1962, and not as of a later date. In a case such as the one before us, when a person (Joseph Rafter) has met this requirement, there is no later occupancy required of an heir seeking to come in under section 8. The only occupancy by an heir that would be required would be to make up the portion of the period between July 23, 1955, and October 23, 1962, that his ancestor could not complete. But section 2 permits residence during that period to be made up of the occupancy of the person seeking relief "and his predecessors." That provision has always been assumed by the Department to permit the tacking of possession by a grantee. But if section 8 applies only to the same period of time, i.e., July 23, 1955, to October 23, 1962, the Department's assumption would be in direct conflict with the prohibition in section 8 against the assignability of rights and privileges except by descent or devise. In other words, "predecessors" in section 2 would have to be read as "devisors or ancestors" and as excluding "grantors." We are unable to subscribe to a restrictive reading of section 8 which would require such a restrictive reading of section 2 which is at variance with the Departmental understanding of section 2 since the statute was enacted.

We conclude therefore that the matured qualifications of a residential occupant-owner are subject to transfer by devise or descent without regard to the use, or the lack thereof, made of the mining claim by the devisee or descendant and that there is nothing in the act which would preclude the devise by Anna Rafter of all rights and privileges which she had under the act, whether obtained as a residential occupant-owner or as the devisee of a residential occupant-owner, to appellants. Accordingly, it was error to reject appellants' application on the ground that they could not succeed to the matured right of Anna Rafter.

It does not necessarily follow, however, that appellants are entitled to the relief which they seek. The granting of relief to a qualified applicant under the act of October 23, 1962, is not mandatory, and where the lands for which an application has been made have been withdrawn in aid of another agency of the Government, the Secretary of the Interior is authorized to convey an interest in the land only with the consent of, and under such terms and conditions as may be deemed necessary by, the head of the administering agency. 30 U.S.C. sec. 703 (1964). Inasmuch as the land in question is under the administrative

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jurisdiction of the Forest Service, it is for that agency to determine what, if any relief, is appropriate in this instance. We find only that appellants, are not, as a matter of law, precluded from seeking to avail themselves of the benefits of the 1962 act.

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 set aside, and the case is remanded to the Bureau of Land Management for further action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF RAY D. BOLANDER COMPANY, INC.

IBCA-331

Decided March 30, 1970

Contracts: Disputes and Remedies: Equitable Adjustments—Rules of Practice: Evidence

In the absence of actual cost data for a large part of the claimed extra costs and in circumstances where estimates of such costs have been based primarily on formula cost of ownership figures for equipment for the time involved, formula calculations of fuel and oil costs, and a pro rata distribution of labor costs, the Board will use a jury verdict approach to determine the amount of an equitable adjustment for a changed condition to which the contractor is entitled.

BOARD OF CONTRACT APPEALS

In *Ray D. Bolander Company, Inc. v. United States*, 186 Ct. Cl. 398 (1968), the court held that appellant had experienced a first category changed condition involving unclassified excavation in the construction of 3.893 miles of road in the Great Smoky Mountains National Park, thereby reversing a previous decision of this Board.¹ Further proceedings in the Court of Claims were stayed to permit the Board to determine the equitable adjustment to which the appellant is entitled by reason of the changed conditions encountered.

The parties having failed to reach agreement on quantum, the contracting officer issued a decision on December 3, 1969, finding appellant to be entitled to the sum of \$132,060.07 as an equitable adjustment. In its amended complaint, appellant asserts a claim for an equitable adjustment in the amount of \$510,612.59, a substantial increase over its original claim of \$297,132.49, before this Board and in the Court of Claims.

¹ *Ray D. Bolander Company, Inc.*, IBCA-331 (November 16, 1965), 72 I.D. 449, 65-2 BCA par. 5224.

There is no dispute as to the basic approach used by the contracting officer in arriving at an adjustment. This approach was simply to attempt to reconstruct total costs for disputed unclassified excavation, add overhead and profit, and subtract amounts already paid. In view of the dearth of hard fact on costs in the record, there appears to be no alternative for the Board but to proceed in the same manner, with the help of additional evidence produced at the hearing held January 21-23, 1970.²

The cost categories as to which there are major disputes fall into four broad areas: (i) equipment costs (ii) repair and parts costs (iii) fuel and oil costs, and (iv) labor costs. There is a minor dispute over the manner in which overhead and profit should be calculated. There is no dispute over the allowance of \$5,245 of additional interest paid on a Small Business Administration loan.

Equipment Costs

Government and appellant concur for the most part on items of equipment and the time they were on the job. Appellant alleges, and has shown by testimony, that the Government list omitted a D8 Caterpillar tractor, a Caterpillar 80 scraper, a compressor, welder, dragline, Ford pickup and 3/4-ton jeep truck. The Board accepts the D8 tractor and 80 scraper. The 3/4-ton jeep was used by mechanics on the job in work related to unclassified excavation. The Ford pickup was used by the general job superintendent, but only part of its cost can be attributed to general excavation. According to the record, the dragline was used partly to dig ditches to drain the excessively wet fill. The compressor and welder were used for equipment maintenance.

Government and appellant agree that the so-called "Bolander Rates" should be used to estimate the cost of each piece of equipment. The Bolander Rates are the equipment rates presented by appellant in its claim letter of November 18, 1960. The rates theoretically reflect the cost of ownership. According to appellant's expert on equipment costs,

² Just prior to the hearing appellant moved to amend its complaint to add a sixth D8 tractor, approximately \$3,000 in added repair costs, and to make minor adjustments and conforming changes in its equipment list. The Government objected strenuously to the motion and to the admission of any evidence related to the matters raised in it. The Board reserved its ruling on the motion to amend and at the hearing allowed appellant to present all its evidence, admitting that evidence related to allegations in the original complaint of December 29, 1969, and reserving ruling on admission of evidence related to matters first raised in the motion to amend.

The Government was given until February 23, 1970, a month after the hearing, to supplement the record as to those matters first raised in appellant's motion to amend. The Government has not taken advantage of the time allowed it to raise questions as to the merits of the new matter and the related evidence. The Board accordingly grants the motion to amend the complaint and all evidence provisionally admitted has been considered by the Board as admitted without reservation.

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the monthly rate is calculated by adding together (i) the annual depreciation at 20 percent (for new equipment) (ii) an annual repair reserve of 90 percent of the annual depreciation (or 18 percent of original cost), and (iii) 11 percent of the original cost for insurance and finance charges. The total is then divided by 8, reflecting the fact that the piece of equipment usually must earn the annual costs of ownership in an 8-months' period.

Government and appellant part company, however, when it comes to determining the time to which the rate is to be applied. Briefly, the Government would subtract from the period between April 21, 1958 and October 29, 1960 (the agreed commencement and end of unclassified excavation), all idle time. For the Government idle time is any day on which *no* equipment was working on unclassified excavation. Thus, if even *one* piece of equipment was working on unclassified excavation, working credit was given for every piece.³

Appellant contends, however, that only idle days in excess of eight days per month should be deducted. In other words, eight idle days representing four weekends per month are included in the rate because the rate is a monthly rate. Days on which a contractor is not expected to work under a monthly rate should not be deducted from the total time. Under this view, only those idle days in the 22-day working month should be deducted. The appellant asserts that in using a monthly rate and a day-by-day idle time count, the Government is "comparing apples with oranges."⁴

There are several reasons why the Board cannot accept appellant's views on equipment costs. It appears from the record that the Government used the Bolander Rates simply because there was, and is, a total absence of hard proof on appellant's equipment costs for this contract (apart from repairs). Were it not apparent from Government records that equipment was on the job, the Board would be justified in minimizing equipment costs because of appellant's failure of proof of actual costs. Appellant's evidence on equipment costs is indirect, consisting of bid preparation work sheets for a contemporaneous road job in Northern Indiana, and the testimony of an expert witness on how an equipment dealer would advise purchasers to calculate their costs of ownership. Mr. Browning, a former officer of appellant, also testified that the Bolander Rates were generally used by appellant in bidding jobs in 1958. The Board is reluctant, however, to take the long leap from the bare fact that generally speaking certain rates were used to prepare bids, to the conclusion that those rates accurately reflect performance costs on this contract.

³ Tr. 288.

⁴ Appellant's Post Hearing Brief, p. 19.

Appellant's theory also proceeds upon a fictional basis. In arguing that eight days a month should not be counted as idle time, appellant treats the equipment used in unclassified excavation as rental equipment, and contends that the Bolander Rate should be applied as if it were a monthly rental rate. Appellant mixes what it presents as a cost of ownership figure with the working time allowable under a monthly equipment rental, in order to reach the most favorable position available to it. In our opinion, the rough similarity between calculated costs of ownership and rental rates does not warrant the application of rental rate working times to calculation of idle time for this contract. The mere fact that, in the absence of any other cost data, the Government accepted the Bolander Rates did not commit it to also accept and be bound by every inference therefrom favorable to the appellant.

Further, acceptance of appellant's treatment of idle time would appear to result in the Government paying for contractually non-compensable suspended time. Appellant has agreed to have its claim considered under the rules for contractual equitable adjustment.⁵ There is no provision in the contract authorizing compensation in money for suspensions of work ordered under paragraph 8.7 of FP-57.⁶ The contract time as extended was 636 days, figured according to FP-57, Article 8.6.⁷ Work was suspended, in whole or part, under Article 8.7 for approximately 561 days. Work suspension orders for many of these days were issued because of exceptionally heavy rains. Of the 561 days, somewhere between 369 to 451 occurred before October 29, 1960. Of these latter days, at least 152 involved a suspension of unclassified excavation.⁸

The Government has counted 388 actual idle days on unclassified excavation between April 8, 1958 and October 29, 1960. The appellant concurs in this figure.⁹ The correspondence between idle days and days when work was suspended is not entirely clear. For example, unclassified excavation was suspended from April 19, 1958 to May 25, 1958, yet according to the idle days count, appellant had some piece of equipment working on unclassified excavation on April 19, 20, 23, and 24, and on May 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24. There are also instances where the appellant did not work when work was not suspended. In any event, work was suspended for a longer period of time than appellant would have the Board accept as its maximum net idle time (144 days). The state of the record does not

⁵ 186 Ct. Cl. 398, 419 (1968).

⁶ See 186 Ct. Cl. 398, 407 (1968).

⁷ Contracting Officer's Findings of Fact, June 1, 1962, p. 5.

⁸ Appeal File, Set 1, Directives.

⁹ Appellant's Post Hearing Brief, p. 16.

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allow a detailed analysis of idle times for each piece of equipment, and a comparison of that idle time with periods when work was suspended. Suffice it to say that it appears to the Board that there is enough suspended time to raise a serious question that the appellant's net idle time approach would result in unallowable payment for suspended time.

Under appellant's approach excess equipment costs would amount to \$402,757.08, which reflects a credit of \$36,915.90 for nonclaim equipment uses.¹⁰ The Government's figure of \$286,278.60,¹¹ does not take into account the added pieces of equipment previously mentioned is allowable; nor does it appear to take into account any portion of the credit for nonclaim work admitted by appellant.

Repair Costs

The best evidence of costs is that offered for "field" repairs. The appellant has submitted invoices totaling \$106,532.04 for such repairs and parts. Each invoice has been examined by the Board. The examination revealed two problem areas (i) was the repair or part major or minor, and (ii) did it pertain to a piece of equipment related to disputed unclassified excavation.

The first problem arises from the fact that the Bolander equipment rate includes a repair reserve of 18 percent of the original cost of new equipment on an annual bases or 90 percent of annual depreciation for used equipment. Since for new equipment the annual ownership cost consists of the sum of 20 percent of investment for depreciation, 18 percent of investment for major repairs, and 11 percent of investment for finance and insurance, totaling 49 percent of investment, the major repair reserve actually reflects 36.7 percent of annual ownership cost. The percentages for annual depreciation, major repair, and finance closely follow those generally given as average in the AGC *Contractor's Equipment Ownership Expense* manual, 4th edition 1956,¹² which are 20 percent, 15 percent and 11 percent, respectively.

Appellant's witnesses defined the repair reserve as covering major overhauls, painting, cleaning.¹³ However, the record is not entirely clear with respect to this matter. Mr. Diehl (the expert who testified most extensively on this point) also testified that "maintenance" costs were figured on a basis of .9 of 1 percent of list price, divided by 1,000, to give an hourly repair rate.¹⁴ Extended to a year (2,000 hours), for

¹⁰ Appellant's Post Hearing Brief, pp. 22, 24.

¹¹ Contracting Officer's Decision, December 3, 1969, p. 14.

¹² Appellant's Exhibit 32.

¹³ Tr. 70, 102, 104.

¹⁴ Tr. 98.

a machine costing \$40,000, the hourly repair reserve adds up to \$7,200,¹⁵ exactly the same as an annual reserve of 18 percent of \$40,000. Appellant's counsel then refers to this reserve as for major overhaul and rebuilding.¹⁶

In the AGC manual,¹⁷ 15 percent of investment per year is generally used for repair reserve. The manual is explicit as to what kinds of repairs are included:

Major or shop repairs include those items of heavy repair which usually keep a machine idle for an extended period in contrast with minor or field repairs which entail comparatively little delay and which are necessary to keep the machine in operation. Such repairs include overhauling, painting and maintenance at the contractor's shop or yard, but do not include rebuilding. AGC manual, p. 2.

We have pointed out that the repair reserve component is 36.7 percent of the Bolander Rate (the monthly rate is 49 percent of investment divided by eight months, the repair reserve component of the monthly rate is 18 percent investment divided by eight months, the ratio of 18 to 49 is 36.7 percent). When applied against the \$402,757.08 in claimed equipment costs, the repair reserve amounts to approximately \$148,000. When applied to the Government's figure of \$286,278.60, the repair reserve is about \$105,000. Appellant's reserve is large enough to cover all invoiced field repairs, and leave \$57,000 for major overhauls, etc. The Government's reserve would cover all but \$1,500 of the invoices.

Examination of the invoices lends support to the Board's conclusion that some indeterminable but large part of the field repairs were, in fact, major repairs, including parts. Using the AGC criteria for distinguishing major and minor repairs, it is obvious on the face of many of the invoices that the machine for which the parts were ordered must have been idled for some length of time to effect the repairs. Overall, invoices totaling \$68,940.03 can roughly be so characterized. Similarly, at least \$7,000 in parts and repairs invoices cannot be identified to the equipment used in unclassified excavation. We note that the testimony with respect to many of the invoices simply identifies the cost as incurred "on the job"¹⁸ and not specifically as a cost of unclassified excavation only.

¹⁵ Tr. 100-101.

¹⁶ Tr. 102.

¹⁷ Appellant's Exhibit 32.

¹⁸ Tr. 215-224, 225.

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With respect to each set of invoices, the Board finds as follows:¹⁹

Q6a. Carolina Tractor and Equipment Co., Asheville, North Carolina, \$24,205.06 in major repairs, \$3,023.61 not relevant. As an example of major repair, these invoices show that from May 1, 1958 to October 17, 1958, at the very beginning of the work, \$5,863.86 was spent on repairs to tractor D8-2U11647. A duplication appears to be present in the inclusion of \$2,077.75 in rentals for a Tampo roller, apparently acquired on a hire-purchase plan. A Tampo roller is already included in the equipment list and an allowance made there.

Q7a. Manwaring Machinery Co., Inc., Indianapolis, Indiana. One invoice is for cable from Manwaring. The other two invoices are not from Manwaring, as testified,²⁰ but invoices duplicated in exhibit Q26a.

Q8a. R. L. Harris Co., Knoxville, Tennessee, \$2,063.39 in major repairs.

Q9a. Osborne Equipment Co., Knoxville, Tennessee, \$73.97 not relevant. The equipment list for unclassified excavation includes only an Ingersoll-Rand compressor. The invoices cover either a Continental or Yaeger compressor, or both.

Q10a. Nixon Machinery and Supply Company, Knoxville, Tennessee, \$876.04 for major repairs, \$543.01 not relevant.

Q11a. MacAllister Machinery Co., Indianapolis, Indiana, \$33,717.76 of major repairs; \$235.95 not apparently relevant. An example of major repair is invoice No. 298, for \$4,618.56 in parts and labor for overhauling the motor on tractor DA-15A1553.

Q12a. Power Equipment Company, Knoxville, Tennessee, \$275 not relevant. The invoice is for a Joy Compressor (see remarks under Q9a above).

Q13a. W. M. Hales Company, Danville, Illinois, \$8,012.80 of major repairs.

Q14a. McHan Motor Co., Bryson City, North Carolina, \$64.98 of major repairs, \$241.93 not relevant because the invoices lack any identification of the vehicle involved.

Q15a. Medford Motor Co., Bryson, North Carolina, \$45.01 considered not relevant because the invoices lack any identification of the vehicles involved.

Q16a. Equipment, Inc., Asheville, North Carolina, \$61.53 not relevant because the invoices lack any identification of the vehicle involved.

¹⁹ The invoice exhibits are identified as Q (for Quantum), a number, and then a for invoices, and b for summary sheets prepared by appellant. The Board has indicated on the summaries by a red pencil mark those invoices it considers more likely to be major repairs than minor, and by a blue pencil mark, those it considers not relevant to the claim.

²⁰ Tr. 221.

Q17a, Q18a, Q19a and Q20a, represent invoices for tires. Not all can be relevant to unclassified excavation but it is impossible to segregate the relevant from the non-relevant.

Q21a. Miscellaneous, North Carolina and Tennessee, \$940.20 considered as not relevant because there is no indication that the part or service was related to equipment used for unclassified excavation.

Q22a. Cash tickets, around North Carolina and Tennessee, \$328.29 considered not relevant. Generally there is no identification of the item to the claim. Tickets also include amounts for fuel, oil, etc.

Q23a. Reid Holcomb Co., Inc., Indianapolis, Indiana, \$762.21 considered not relevant to claim for unclassified excavation. Invoices include such overhead items as water coolers, flashing lights, batteries for lights, paper cups, etc.

Q24a. Seastrom and Co., Indianapolis, Indiana. The invoices include parts for the dragline which is only one-third allowable.

Q25a. Mitchell Distributing Co., Charlotte, North Carolina, all allowable.

Q26. Flesch-Miller Tractor Co., Indianapolis, Indiana, all allowable.

Fuel and Oil Costs

The rates for fuel, oil and lubrication have been stipulated.²¹ According to appellant's calculations, fuel and lubrication costs total \$39,989.82. The amount is the sum of the individual equipment item fuel costs arrived at by subtracting total idle time from time on job and multiplying by the stipulated rate for the piece of equipment. The Board is of the opinion that fuel and oil costs should be considered separately from the Bolander Rates since the record indicates that fuel and oil were not intended to be included in the Rates. The \$39,989.82 is considered to be ample since idle time represents only days when no piece of equipment was used on unclassified excavation.

Labor Costs

The basic costs data on labor is not disputed. It appears agreed as well that the allowance for labor should be some percentage of the payroll depending on the ratio of unclassified excavation in the disputed area to total unclassified excavation.

It is undisputed that unclassified excavation in the area where the changed condition was encountered amounted to 597,597 cubic yards. It also appears to be agreed that no unclassified excavation was performed in that area after October 29, 1960. It is also clear and undis-

²¹ Tr. 202.

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puted that total unclassified excavation amounted to 769,411 cubic yards. Of the difference of 171,814 cubic yards some was performed prior to October 29, 1960, and some after. The precise amounts are not clear. Mr. Bolander recollected that 90,000 yards remained after October 29, 1960,²² but his estimate was from memory.²³ Table XVIII to the contracting officer's determination of June 1, 1962, indicates that as of November 3, 1960, 701,522 cubic yards had been excavated, leaving about 68,000 cubic yards remaining. The same table shows this remaining amount to have been in the upper end (but lowest station numbers) where a major rock cut was to be completed.

The Board determines that labor should reflect the ratio of excavation in the disputed area to total unclassified excavation prior to October 29, 1960, applied to the pre-October 29, 1960 payroll, or about 83 percent of \$118,320.32 plus burden at 11 percent. Labor also includes an allowance for the salary of the general superintendent, computed at 77.67 percent (ratio of disputed excavation to total excavation) of 52 percent (ratio of excavation to total job) of \$22,490.

Overhead and Profit

Overhead at 10 percent is considered allowable. Profit of 6 percent on the total costs allowed is considered reasonable by the Board.

The Equitable Adjustment

Because of the factors previously commented upon, the Board has little choice but to determine the equitable adjustment to which the appellant is entitled under the jury verdict approach. As appellant so aptly noted in its post hearing brief, a jury verdict is a proper solution in the absence of exact figures.²⁴ As there admitted, neither contractor nor Government kept records anticipating a claim for changed conditions. This fact is most significant in consideration of the largest item of cost, equipment use. The record is totally devoid of any firm actual cost figures on equipment use, except as to parts and repairs. The excavation difficulties on this project have been described as requiring a change from rubber-tired equipment, which was first brought on to the project to perform the unclassified excavation work, to tracked equipment which operated more effectively but also more expensively and slowly in the earth conditions that were encountered as a changed condition. Actually, appellant intended from the beginning to utilize both tracked and rubber-tired equipment, with the latter equipment

²² Tr. 436.

²³ Tr. 446.

²⁴ Appellant's Post Hearing Brief, pp. 23-24.

being used on the more level areas, and on steep areas after having been leveled to some extent by the tracked equipment.²⁵ Unfortunately, a daily on-the-job assessment of extra work taking into account the steepness of grade of a project area under excavation at a given time was not made by either party. Labor costs are more reliable, being derived from payroll records. The jury verdict approach is therefore clearly indicated by the conditions present here.²⁶

On the record as a whole, and based upon the findings and conclusions set forth in this opinion, the Board finds that appellant is entitled to an equitable adjustment calculated as follows:

Costs of unclassified excavation in the disputed area	-----	\$458,100.00
Overhead at 10%	-----	45,810.00

		\$503,910.00
Profit at 6%	-----	30,234.60

		\$534,144.60
SBA loan interest	-----	5,245.00

		\$539,389.60
Less amount already paid for 597,597 cubic yards of unclassified excavation at \$.535 per yard	-----	319,714.90

Balance due	-----	\$219,674.70

Conclusion

The appeal is granted in the sum of \$219,674.70.

ROBERT L. FONNER, *Member.*

I CONCUR:

DEAN F. RATZMAN, *Alternate Member.*

I CONCUR:

WILLIAM F. McGRAW, *Acting Chairman.*

²⁵ Testimony of Mr. Bolander, Tr. 437-438.

²⁶ See *Webber Constructors, Inc.*, IBCA-721-6-68 (September 23, 1969), 76 I.D. 268, 69-2 BCA par. 7895.

April 2, 1970

UNITED STATES v. SOUTHERN PACIFIC COMPANY

A-31034

Decided April 2, 1970

Railroad Grant Lands

A vendee of land from a railroad is not an innocent purchaser for value of land excepted from the grant to the railroad as mineral land where the land had been extensively mined as a placer, the evidences of mining were plainly visible, a mineral location had been made on the land, and all these conditions were known or ought to have been known to the vendee at the time of the sale to it, particularly since the vendee itself was engaged in mining on adjacent lands.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The United States, through the Forest Service, United States Department of Agriculture, has appealed to the Secretary of the Interior from a decision dated July 17, 1968, of the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of a hearing examiner holding that the Southern Pacific Company is to be granted a patent for lot 2, section 9, T. 17 N., R. 11 E., M.D.M., California.

The Southern Pacific Company is the successor in interest to the Central Pacific Railroad Company of California which was entitled to certain lands under the Railroad Land Grant Act of July 1, 1862, 12 Stat. 489, as amended by the act of July 2, 1864, 13 Stat. 356. It is acting on behalf of Frank V. and Gertrude L. Amaral, the real parties in interest, who are successors in interest of the railroad company's vendee and who, the railroad asserts, are entitled to a patent for lot 2 pursuant to section 321(b) of the Transportation Act of 1940, 49 U.S.C. sec. 65(b) (1964).

The act of July 1, 1862, granted to appellant's predecessor the Central Pacific Railroad Company, land described as follows in section 3 of the act:

* * * every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States * * * at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act * * *. 12 Stat. 492.

Section 4 of the act of July 2, 1864, 13 Stat. 358, doubled the amount of land granted and provided additionally that

* * * any lands granted by this act, or the act to which this is an amendment, shall not * * * include any government reservation or mineral lands * * * or any lands returned and denominated as mineral lands * * *.

After the line of the railroad was definitely located, appellant's predecessor sold a portion of section 9 to a purchaser who is the prede-

cessor in interest of the real parties in interest in the pending appeal. The lands have never been patented to the railroad.

When the Transportation Act of 1940 was enacted, it was provided in section 321(b) that if any land grant railroad wished to take advantage of charging higher rates for carrying Government traffic, it must file a release of any claim it might have against the United States to lands granted to the railroad. It was provided, however, that nothing in section 321(b) should be construed

* * * to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value * * *.

Southern Pacific and its predecessor filed releases which specifically excepted lands sold to innocent purchasers for value prior to enactment of the Transportation Act of 1940. The releases were accompanied by lists of lands said to have been sold to innocent purchasers for value.

Thereafter, Southern Pacific filed the application for patent involved in this appeal, stating that the application was for lands sold to an innocent purchaser for value. The lands can be identified on the lists filed with the releases. The land office rejected the application on the ground that the tracts of land applied for are or were mineral in character and thus excluded from the grant made by the acts of July 1, 1862, and July 2, 1864. The Division of Appeals, Bureau of Land Management, affirmed.

On Southern Pacific's appeal from the Bureau's decision, the Department set aside the Bureau's decision. *Southern Pacific Company*, 71 I.D. 224 (1964). The Department noted that the land office had rejected Southern Pacific's application for lot 2 and 275 other acres of land in section 9 on the ground that the lands applied for were mineral in character at the time of the grant and that the Division of Appeals had affirmed on the grounds that the lands "are" mineral in character and that Southern Pacific had not shown that the lands were nonmineral at the time of the grant. The Department held that a patent may be issued under section 321(b), *supra*, for railroad grant lands sold by the railroad if it is determined either that the land was nonmineral in character at the time of sale and the purchaser was an innocent purchaser for value, even though the land is subsequently determined to be mineral in character, or that, although the land was mineral in character at the time of the sale, the purchaser was not chargeable with actual or constructive notice of that fact. It then stated that in accordance with departmental practice a hearing would be held to determine the mineral character of the land at the date of sale by the railroad and the bona fides of the original vendee from the railroad. The case was remanded for this purpose.

Upon reconsideration of the patent application in the light of an investigation, the land office issued a decision holding that all of the

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lands applied for in section 9 except lot 2 were nonmineral in character on the dates that they were purchased by the Washington Mineral Company, the original vendee, from the Central Pacific Railroad Company and that the Washington Mining Company was an innocent purchaser for value. As to lot 2, it stated that the investigation revealed that it was mineral in character or believed to be mineral in character on the date it was purchased by the Washington Mining Company and that both it and the railroad company had notice of that fact. It then directed that a hearing be held, as the Departmental decision required, to determine whether or not patent should issue for lot 2.

The notice setting the date for the hearing said that evidence would be received on the charges that:

1. That Lot 2, exclusive of patented Mineral Survey No. 5365 sec. 9, T. 17 N., R. 11 E., M.D.M., California, was known to be mineral in character on July 26, 1888, the date of sale by the Central Pacific Railroad Company to the Washington Mining Company of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 9, of which Lot 2 therein is the only remaining public land.
2. The Washington Mining Company was not an innocent purchaser for value of Lot 2, exclusive of patented Mineral Survey No. 5365 sec. 9, T. 17 N., R. 11 E., M.D.M., within the meaning of subsection (b) Section 321, Part II, Title III of the Transportation Act of 1940 (54 Stat. 954).

At the hearing, the United States Forest Service appeared and associated itself with the Department of the Interior in the conduct of the litigation, in recognition of its interest in the land which is a part of the Tahoe National Forest.

It appears from the testimony and exhibits offered at the hearing that lot 2 lies along the east bank of the South Yuba River except for a small triangular segment in the northwestern corner of the lot which lies across the river. The lot is bounded on the west by two patented mining claims and for about two-thirds of its eastern boundary by another. From examinations made by witnesses for both parties and from historical sources, it appears that there was extensive placer mining beginning about 1850 in the area and specifically in the bed and along the banks of the South Yuba River. Furthermore, there was evidence of extensive placer mining along the east bank of the river in lot 2. Samples taken by mining engineers failed to reveal significant values of gold in the material now on the land. Both parties sought to establish the date of the last mining in the area through the age of the trees found on the lot. The United States expert stated that trees in old placer mining workings along the banks of the river and a ditch which supplied water to these workings were mostly between 80 to 86 years old, which would indicate that mining had stopped about 1888 (Tr. 104-108). The railroad's expert on the other hand set the age of trees in the mined area at 92 to 114 years, which, in his opinion, meant that mining had been completed by 1870 (Tr. 131, 132). At some time prior to 1899 a townsite occupied part of the area of lot 2.

The hearing examiner found that the evidence based upon the age of the trees in lot 2 preponderated in favor of the proposition that placer operations had been abandoned prior to 1888 and that only the land near the river had been mined. He concluded that the history of the placer mining carried out along the river beds in the county, including that of the South Yuba, justified a finding that minable minerals had been exhausted and that lot 2 was in fact nonmineral in character prior to 1888. He then found that the railroad's vendee was a bona fide purchaser and held that a patent should issue for lot 2.¹

On appeal to the Director the United States contended that it had made a *prima facie* case that lot 2 was mineral in character at the crucial time and that the contestees had not met the burden of proof of showing that the land was not then mineral in character. It also asserted that the hearing examiner had erred in denying its motion to amend the complaint to include the portion of lot 5 and in failing to receive proof of a location notice filed by one J. W. O'Neill on January 2, 1913, which covered part of lot 5 and lot 2.

In affirming the hearing examiner the Bureau of Land Management reviewed the evidence presented by the United States and concluded that none of it showed that the railroad's vendee believed or had reason to believe from any known conditions that the land was of known mineral character on the date of the sale and that there was nothing to indicate that the land had higher mineral values in 1888 than it did in 1965 or 1967. It then held that the Washington Mining Company was an innocent purchaser for value.

On appeal to the Secretary, the United States contends that lot 2 is "mineral land" within the exclusion of the railroad land grant act of 1862, *supra*, that the railroad's vendee was not a bona fide purchaser within the meaning of the relief act of 1887² and that the Transportation Act of 1940 is inapplicable. It asserts that the land was excluded from the grant to the railroad because it had been mined after the completion of the railroad on May 10, 1869, by laborers who worked on it until then, that land found to be mineral at any time prior to patent to the railroad is excluded from the grant and that the "mining out" of a claim does not restore to the railroad land once removed from its grant.

¹ The hearing examiner also denied a motion by the United States to amend the issue to include lot 5, approximately 1.75 acres of land adjoining lot 2 to the south on the east bank of the river. The United States did not raise this issue in its appeal to the Secretary although it had in the appeal to the Bureau of Land Management.

² By the act of March 3, 1887, 24 Stat. 556, 43 U.S.C. §§ 894-899 (1958), the Secretary of the Interior was directed to adjust each of the railroad land grants. Section 5 of the act, 24 Stat. 557, 43 U.S.C. § 898 (1958), provided:

"That where any said [railroad] company shall have sold to citizens of the United States * * * as a part of its grant, lands not conveyed to or for the use of such company * * * and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands * * * and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns * * *."

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The railroad's vendee, it continues, can get no help from the 1887 act because the deed to it from the railroad did not convey any title, and that even if it were a "putative purchaser" the railroad excepted lot 2 from its deed. Further, it says, even if the vendee acquired title from the railroad, it did not acquire it in good faith because there were mine workings evident on the land then as there are now and because of the existence of an unchallenged mining claim filed in 1887. Finally, it urges that the permission to purchase granted by the 1887 act has been withdrawn by the lapse of time and the devotion of the land to Forest Service purposes.

The railroad answers that the issues left for determination by the Department's earlier decision did not include whether the land was mineral at the date of the grant to the railroad, that the earlier decision had left for resolution only whether lot 2 was mineral in 1888 and whether the vendee was an innocent purchaser for value.

In any event it says the land was mined out before 1862. Further it says the railroad's conveyance to its vendee was a quit claim deed. Finally it asserts that the existence of a placer claim covering lot 2 is no evidence that the claim is mineral in character.

Although there is some dispute as to the scope of the issues, both parties agree that one issue is whether the original vendee from the railroad was a bona fide purchaser or, as the 1940 act puts it, an innocent purchaser for value. If the vendee fails to meet this test, then a patent cannot be issued, and there would be no need to consider the other contentions raised by the appellant.

A bona fide purchaser is one who purchases property (1) in good faith (2) for a valuable consideration (3) without notice of a defect in the grantor's title. Of these three elements the one that seems most pertinent in this case is notice.

The only alleged defect in the railroad's title which has been explored is the possibility that lot 2 was mineral land or had been returned or denominated as mineral land, so that it was excepted from the grant to the railroad. As we have seen, the decisions below concluded that the evidence presented at the hearing did not establish that the land was mineral on the date on which the Washington Mining Company accrued its interest in it.

This finding, however, does not dispose of the issue. To be a bona fide purchaser, the mining company must not only have believed the land not to be mineral when it bought it, but it must also have been innocent of knowledge that it had been mineral at any time after the railroad's right to it could have vested. In other words, it must not have known that the land had been excepted from the grant at any time prior to its purchase. Under its grant the railroad's right to the land, all else being regular, accrued as of the date of the definite location of its line. If the

land were mineral then or was determined to be mineral at any time thereafter prior to patent, the railroad lost its right to the land.

The Department's earlier decision held that a purchaser was protected against a determination made after it had acquired the land, although the railroad remained vulnerable until a patent issued. It did not hold that a purchaser who knew that the land had been excepted from the grant to the railroad at some previous time could be a bona fide purchaser merely because he had no reason to know that the land as it was at the date of his purchase was not eligible to pass to the railroad.

In concrete terms, the situation may be put thus: Land which is mineral at the time that the railroad grant takes effect or which is determined to be mineral before a patent is issued to the railroad is excepted from the grant. Once land is excepted it remains so even though the mineral in the land is exhausted. (*Southern Pacific Company*, *supra*, 228). Can one who purchases from the railroad after the land has become nonmineral but who knows or ought to have known that the land had been mineral in the past and excepted from the grant be a bona fide purchaser?

The concept of a bona fide purchaser under the 1887 act, *supra*, was analyzed by the Supreme Court in two decisions decided on the same day. In the first, *United States v. Winona & St. Peter Railroad Company*, 165 U.S. 463 (1897), the lands in dispute had been certified to the railroad and sold to parties who bought in good faith believing the railroad had title which it would convey. After the certification and sale, it appears that, under a ruling of the Supreme Court made in 1885, lands which at the time of definite location of the railroad were within homestead or preemption entries were held to be excepted from the grant even though the lands were free from these entries at the time of certification of the lands to the railroad. Up to the 1885 decision, the court said, the Department had uniformly ruled that the fact that the lands were within such entries at the time the railroad grant would have attached did not defeat the grant if the entries were fraudulent or irregular or had been abandoned. The United States contended that the purchasers knew or ought to have known of the entries from the public land records and could not be purchasers without notice. The court held that the 1887 act did not use "bona fide purchaser" in its technical sense of one who purchased for value, without notice, and in good faith, but that it benefited one who may have been chargeable with constructive notice of the defect in the railroad's title so long as he had made an honest purchase in ignorance of the defect. It concluded:

* * * Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified

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or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims. *Id.*, p. 481.

In the next case, *Winona & St. Peter Railroad Company v. United States*, 165 U.S. 483 (1897), it appears that a preemption filing was placed on the land before the railroad's claim attached, that it remained on record until after certification to the State for the benefit of the railroad, and that the entryman continued in possession until after the construction of the railroad and the conveyance of the land by the railroad to the land company and remained in possession until a suit of ejectment was brought by the land company.

The court held that the land company would not be considered as one purchasing in good faith, that it took its conveyance with notice, from possession, of the rights of the party in possession. It said:

* * * That the land was erroneously certified is, under the prior decisions of this court, not open to question ; and the acts of 1887 and 1896 have, as indicated in the opinion in the prior case, the purpose of protecting only that party whose purchase from the railroad company must be considered one in good faith. It is essential to the protection of these statutes that the party purchasing from the railroad company has no notice by any fact subsequent to and independent of the certification of patent of any defect in title. Such a purchaser cannot claim to be one in good faith if he has notice of facts outside the records of the land department disclosing a prior right. The protection goes only to matters anterior to the certification and patent. The statute was not intended to cut off the rights of parties continuing after the certification, and of which at the time of his purchase the purchaser had notice. Only the purely technical claims of the government were waived.

Here the claimant Marshall was in possession ; had been in possession for twenty years ; the land was not wild and vacant land. His possession was under a recorded claim of title, and under such a claim as forbade the issue of a patent. In other words, the land was erroneously certified. There was, and continued to be, an individual claimant for the land. There was no cancellation on the records of the land department of his claim. He continued in possession, and was in possession not only when the certification was made but when the land company purchased. Its purchase, therefore, was not one made in good faith, and there is nothing disclosed to stay the mandate of the statute for the adjustment of the land grant, and a suit to set aside the certificate erroneously issued * * *.

The distinction between imparting constructive notice to a purchaser of matters that an examination of the land office records and construction of the law might have yielded and notice of facts outside the records of the Department and visible from an examination was adhered to in later decisions. In *Logan v. Davis*, 233 U.S. 613, 629 (1914), where the defect in the railroad's title arose out of the fact that though the land was within the grant it had not been certified to it and the railroad had received all the land it was entitled to in other certifications, the court held a purchaser to be in good faith under

section 4 of the act of 1887, *supra*, if he was in actual ignorance of the defects in the railroad's title and the transaction was an honest one on his part.

In *Manley v. Tow*, 110 Fed. 241, 253-254 (C.C. N.D. Iowa 1901), and in *Benner v. Lane*, 116 Fed. 407, 410, 416 (C.C. N.D. Iowa 1902), it was held that one who bought from the railroad could not be a bona fide purchaser under the 1887 act, *supra*, if he knew that another was in actual possession and occupancy of the land as a homestead claimant. In each case the court cited the statement in the second *Winona* case, *supra*, that "a purchaser cannot claim to be one in good faith if he has notice of facts outside the records of the land department disclosing a prior right."

In our earlier decision in discussing the rights of purchasers, we quoted from *United States v. Central Pacific R. Co.*, 84 Fed. 218, 221 (C.C. N.D. Cal. 1898). While this decision does not cite the *Winona* cases it, too, stresses the importance of facts ascertainable from an inspection of the land itself. The court said:

* * * The status of a bona fide purchaser is made up of three essential elements; (1) a valuable consideration; (2) absence of notice; and (3) the presence of good faith. * * * I am of the opinion that these defendants had notice, actual or constructive, of the character of the land in section 27 which they contracted to buy from the grantee company and its trustees. They were certainly chargeable with notice of the character of the land, for it had been occupied and known since 1850 as mineral land, and as being unfit for agricultural purposes. It was covered with evidences of mining claims and mining explorations. Notices of location affecting different portions of the section had been filed of record in the mining recorder's office of the Forks of the Butte mining district before the defendants entered into their contract to buy the land from the grantee company and its trustees, which was some time in 1885 and 1886. With respect to the defendants Jones and Gale, it appears further that the element of good faith is entirely wanting; for Jones had, before acquiring any interest in the land he contracted to purchase, owned and worked a claim in the same part of this section, while Gale had, with others, filed a mining location upon the same land which he contracted to buy. * * * I am of the opinion, from the evidence, * * * that the defendants, other than the grantee company and its trustees, are not bona fide purchasers. * * *

While the reference to "absence of notice" must be read in light of the *Winona* cases, the case is similar to this one in important aspects. We note, first, that lot 2 had been occupied and known since 1849 as mineral land. It too was covered with evidences of mining operations and a notice of location affecting it had also been filed a few years before the railroad sold it. The banks of the river had been mined and worked and reworked (Tr. 126, 127). The appellant's witness testified that the placer deposits in lot 2 were last worked by Chinese miners who came to the claims after the transcontinental railroad was completed on May 10, 1869 (Exhibit C-1, p. 8, Tr. 86, 127, 131).

It may then be taken as established that lot 2 was mineral land at

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the time that the line of the railroad was definitely located so that it was excepted from the grant to the railroad.

All of these are facts outside the record of which the railroad's vendee had or ought to have had notice, all the more since it was engaged in lode mining operations on adjacent lands some of which were subsequently patented to it.³ The condition of the land, the history of mining in the area and the existence of a mineral location on the land when added to the fact that the vendee was itself a mining concern are persuasive that the vendee at the time of the sale to it either knew or was chargeable with notice that lot 2 was mineral land which was excepted from the grant to the railroad so that it took nothing by its deed. In our view, then, the Washington Mining Company must be found not to be an innocent purchaser for value.

Thus the conclusion that the railroad is entitled to a patent for lot 2 is in error.

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 reversed and the application for a patent denied insofar as it pertains to lot 2, *supra*.

ERNEST F. HOM,
Assistant Solicitor.

AUTHORITY OF THE BUREAU OF INDIAN AFFAIRS TO TRANSFER
TO AN INDIAN TRIBE THE DIRECTION OF FEDERAL EMPLOYEES
PURSUANT TO THE PROVISIONS OF R. S. SEC. 2072, 25 U.S.C.
SEC. 48Federal Employees and Officers: Generally—Indian Tribes: Generally—
Statutes

The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), is that authority related to the direction of employees and within the general range of the duties of their employment.

Federal Employees and Officers: Appointment—Federal Employees and
Officers: Disciplinary Action—Federal Employees and Officers: Promotion—
Federal Employees and Officers: Qualifications—Federal Employees and
Officers: Separation—Federal Employees and Officers: Tenure—
Indian Tribes: Generally—Statutes

The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), is that authority related to the direction of employees and within the general range of the duties of their employment.

³ Certificate of Title accompanying appellant's application for patent.

sions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees; nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations.

Administrative Procedure Act: Public Information

Where a substantial change is made in the procedure which the public must follow in dealing with an agency as a result of delegation of direction of Federal employees pursuant to the provision of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), the provisions of the Administrative Procedure Act, 5 U.S.C. secs. 551-559 (Supp. IV, 1965-1968), requiring public notice of description of agency organization and channels through which public may deal with the agency must be complied with.

Opinion of the Solicitor, October 25, 1934, 55 I. D. 14, overruled so far as inconsistent, 77 I.D. 49 (1970)

M-36803

April 3, 1970

TO: COMMISSIONER OF INDIAN AFFAIRS.

SUBJECT: AUTHORITY OF THE BUREAU OF INDIAN AFFAIRS TO TRANSFER TO AN INDIAN TRIBE THE DIRECTION OF FEDERAL EMPLOYEES PURSUANT TO THE PROVISIONS OF R. S. SEC. 2072, 25 U.S.C. SEC. 48

You request an opinion as to whether the Bureau of Indian Affairs has legal authority under the provisions of R.S. sec. 2072 to "turn over" to the Mescalero Apache Tribe "supervising responsibility" over Federal employees on duty at the Mescalero Agency of the Bureau of Indian Affairs in New Mexico.

As codified in 25 U.S.C. sec. 48 (1964), R.S. sec. 2072 reads as follows:

Where any of the tribes are, in the opinion of the Secretary of the Interior, competent to direct the employment of their blacksmiths, mechanics, teachers, farmers, or other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe.

Despite the fact that the statute from which this provision derives—the Act of June 30, 1834, section 9, 4 Stat. 737—was enacted well over a century ago, the authority conferred evidently has been exercised very rarely, if indeed at all.¹ If this provision were employed during

¹ It is related in both *Handbook of Federal Indian Law*, United States Department of the Interior, 1941, p. 150, and *Federal Indian Law*, United States Department of the Interior, 1958, p. 453 that because this provision apparently was not "extensively used" a recommendation was made for its repeal but the recommendation was later withdrawn. The references given for this statement, i.e., "annotations to 25 U.S.C. 48" and "25 U.S.C. 48," provide no information supporting this statement, nor has any been found in notes or annotations in earlier editions of the U.S.C. and U.S.C.A.

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the era of its enactment, we have found no indication of it; nor did the contemporary regulations providing specifically for the implementation of the provisions of the 1834 Act reflect such a practice.² Those regulations provided, in part, for the employment by the War Department for persons for which "provision is made by treaty." Reference is made in other provisions of the 1834 Act to persons employed as "required by treaty stipulations." The subject provision does not, however, expressly limit its operation to persons employed pursuant to treaty and we do not so construe it. To do so would, of course, render the provision inoperative as we are aware of no instance where employment is now made specifically pursuant to a treaty or where such employment is recognized as currently obligatory on the Federal Government.

The earliest published comment on the scope of the provision, so far as we have been able to ascertain, appears almost exactly a hundred years after enactment in an October 25, 1934, opinion of the Solicitor of this Department. See 55 I.D. 14, 64-65. A paraphrased version of that opinion appears in *Handbook of Federal Indian Law*, United States Department of the Interior, 1941, pp. 149-150. The revised version of that work, *Federal Indian Law*, United States Department of the Interior, 1958, includes comments on the provision at pages 452-453 and calls it "[p]otentially the most important of these statutory tribal powers." The 1934 Solicitor's opinion, in commenting generally on powers of Indian tribes, notes specifically regarding this section:

Under the terms of this statute it is clearly within the discretionary authority of the Secretary of the Interior to grant to the proper authorities of an Indian tribe all powers of supervision and control over local employees which may now be exercised by the Secretary, e.g., the power to specify the duties, within a general range set by the nature of the employment, which the employee is to perform, the power to prescribe standards, for appointment, promotion, and continuance in office, the power to compel reports, from time to time, of work accomplished or begun.

The opinion concluded by summarizing the powers of an Indian tribe as including the power:

9. To prescribe the duties and to regulate the conduct of Federal employees, but only insofar as such powers of supervision may be expressly delegated by the Interior Department.³

² See *Laws, Regulations, Etc., of the Indian Bureau*, 1850, p. 21 *et seq.*, "Revised Regulations No. III, for the carrying into effect the Act of June 30, 1834, organizing the Department of Indian Affairs. (Adopted June 1, 1837)."

³ *Federal Indian Law, supra*, at page 452, adds to comments on § 48 this statement: "Various powers have been conferred on Indian tribes by Federal statute which are subject to constitutional doctrines applicable to the exercise or delegation of Federal governmental powers."

The reference here is, no doubt, to the general prohibition against delegation by Congress

In our view, the opinion overstates to some degree the permissible scope of the statute as it may be applied today, in that it does not recognize or accommodate the rights of Federal employees as employees. Civil Service laws were unheard of in 1834, and even when the Solicitor issued the 1934 opinion they had not developed to the degree of refinement and protection of employees' rights which now exists. Because the exercise of tribal power under the 1834 Act might impinge on the rights of employees assured by other laws, we will later in this memorandum suggest some limitations which must be imposed on the grant of supervisory authority to Indian tribes.

Your memorandum suggests that more than a delegation of direction over a group of Federal employees is contemplated: a transferred superintendent would not be replaced and "the Bureau would contract with the tribe to supervise the Agency." The authorities and responsibilities of the agency as carried out by the Federal agent—i.e., the superintendent—are, of course, a great deal more extensive than the supervision of an employee or employees. Such authorities and responsibilities are imposed or granted, in accordance with statute, by delegation from the Secretary of the Interior and, in some cases, by provisions of a tribal constitution. The problem, thus, is more complex than one which would be involved in the assignment, for example, of a mechanic to the direction of a tribe. Even, however, were the assignment of only a single employee contemplated, questions would be encountered. For example, might the delegation of authority to direct a social worker include authority to issue a United States Treasury check for disbursal of funds from an Individual Indian Money Account, or authority to issue a Federal purchase order, or authority to consider an appeal from that worker's denial of welfare assistance?

I shall undertake to provide some initial guidelines for your assistance in implementing this provision. It should be noted, however, that in absence of precedent, inevitably there will be circumstances and questions which are not herein contemplated. It would be advisable, therefore, should you definitely decide to make a delegation of direction to consider in more detail the circumstances involved at Mescalero Agency. Further, it would be desirable that this office review the documents stating specifically the action being taken.

The authority contained in 25 U.S.C. sec. 48 is presently in the Secretary of the Interior. Whether the authority shall be delegated to the Commission of Indian Affairs or exercised directly by the Secretary is, of course, an administrative decision. In this regard we note that by memorandum dated January 30, 1970, you wrote the Assistant Secretary, Public Land Management, requesting approval to "proceed within our delegated authority" in the exercise of the provisions

of legislative powers. See 16 Am. Jur. 2d *Constitutional Law* § 240 (1964). However, where an administrative power has been validly delegated, Congress may authorize the delegate to redelegate such powers. *O'Neal v. United States*, 140 F.2d 908 (6th Cir. 1944).

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of this section 48. Notation at the bottom of your memorandum indicates that approval was given. We are unable to find among the amendments to Secretarial Order 2508, section 30 a delegation of the authority of 25 U.S.C. sec. 48 to the Commissioner.

The intent of the provision is evident: viz., to permit the exercise of local autonomy in directing the performance of work for the tribe. It is also evident, from an analysis of the wording of the provision, that: (1) the employees involved are persons "engaged" by the Federal Government, i.e., the employment, promotion, etc. of such persons is made by the Federal Government, not by the tribe; and (2) the authority conferred on a tribe by the Secretary under authority of the provision must be related to the "direction" of an employee or employees.

In further delineating the extent of authority of a superintendent which may be delegated, it appears, as a practical matter, necessary to determine those authorities which by legal necessity are exercisable only by an official of the Federal Government. Further, the rights of employees and the rights of those dealing with the agency as well as such nontransferable authorities and obligations of the Federal Government must be correlated with the subject provision and would, in effect, circumscribe it. In striving to carry out the intent of the provision, therefore, some necessary considerations to be taken into account in stating guidelines are these:

Employee rights. The Civil Service Commission has developed procedures for the protection of employee rights. It is important in assuring employees of due process in the assertion and protection of rights that those procedures be available to them.

Trust obligations. The fiduciary obligations of the Federal Government cannot be delegated on the basis that authority to make such a delegation is impliedly included in the subject provision. The effect of such a delegation would, as it would relate to tribal lands, be an abdication of such trust obligation and would frustrate the purpose of the trust. The same reasons are applicable to trust obligations relating to individual Indian trust property.

Federal funds. The bond covering persons responsible for disbursal of Federal funds is provided pursuant to 6 U.S.C. sec. 14. It covers employees and officers of the Federal Government. Authority to disburse Federal funds is not necessary to the operation of the subject provision and therefore not included by implication as authority which might be delegated concomitantly with authority to direct an employee. Considering the nature of authority to disburse Federal funds, particularly the usual requirement that the exercise is conditioned

upon coverage by bond, we would sanction such direct access to the Federal treasury funds only upon express statutory authority.

Obligations of review and approval of tribal actions. By approval of tribal constitutions the Federal Government has undertaken the obligation of reviewing such actions of tribes as those regarding the expenditure of tribal funds, the enactment of ordinances, the adoption of tribal members, etc. The object of such review would be defeated were obligation delegated to the tribe. Further, it would appear necessary that the tribal constitution be amended in order to eliminate the review or approval requirement.

Public notice of change in authority. The contemplated action would represent a change in administrative procedure of which the general public (including, of course, the Indians of Mescalero Reservation) must be put on notice in order that they might deal with the agency accordingly.

General guidelines based on these considerations are:

1. Authority delegated must be necessarily related to the direction of an employee or employees; a tribe may not be regarded as standing in the place of a superintendent with all the prerogatives, obligations and authorities of that office. See in this regard attached letter of the General Counsel of the Civil Service Commission dated March 18, 1970, to Newell B. Terry, Department Director of Personnel.

2. A delegation of direction of employees cannot include authority of the superintendent to approve the alienation of any rights in trust property; nor may authority over funds in Individual Indian Money Accounts be delegated to the tribe.

3. A delegation of direction of employees cannot include authority which would abrogate any rights granted to such employees by law, Executive order, or regulation, including rights relating to union representation and rights of petition and appeal to the Department and the Civil Service Commission for redress of grievances.

4. Provision must be made for the rating of the performance of Federal employees by Federal employees (including acceptable level of competence and promotion potential); such procedures should conform as nearly as possible to those for other Bureau of Indian Affairs employees generally.

5. The direction delegated may not include authority to prescribe standards for appointment, promotion and continuance in office, although we see no objection to tribal recommendations in those respects.

6. An employee may be directed to perform only functions within the general range of duties prescribed for his employment. Appropriate revisions of position descriptions would be necessary to include tribal direction to which the employee would be subject.

7. A delegation of direction of employees cannot include authority to expend or encumber appropriated Federal funds.

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8. Where there is a substantial change in procedure which the public must follow in dealing with an agency (e.g., the elimination of the office of superintendent), the provisions of the Administrative Procedure Act, 5 U.S.C. secs. 551-559, must be complied with. This requires: (a) publication of the description of agency organization; (b) publication of a statement showing channels through which the public may obtain information, make submittals or requests, or obtain decisions.

9. Any provision for delegation should specifically state the extent of direction delegated and then only after careful study of the authorities and responsibilities of the superintendent generally, and specifically regarding that agency in order to provide a contingent means for the exercise of supervisory authority not transferred should the need arise.

10. Authority contained in Federal statutes, regulations or tribal constitutions to review or approve tribal action may not be delegated to the tribe.

11. No authority may be conferred on a tribe pursuant to this provision to issue, amend or waive Federal regulations.

12. Prerequisite to delegation of direction under this provision is a finding by the Secretary that the particular tribe to which a delegation is proposed is competent to exercise the direction delegated. Such a finding would include an identification and evaluation of the competence of "the proper authority of the tribe."

The foregoing are some general conclusions as to the scope of 25 U.S.C. sec. 48 for your assistance in further considering a delegation of direction. Expressions in the earlier Solicitor's opinion so far as inconsistent herewith are overruled.

RAYMOND C. COULTER,
Deputy Solicitor.

ATTACHMENT

March 18, 1970

Mr. NEWELL B. TERRY,
Director of Personnel,
Department of Interior,
Washington, D.C. 20240

DEAR MR. TERRY:

In accordance with your suggestion after our meeting on February 17, we are submitting to you in writing our views with respect to the

draft memorandum regarding the authority of the Bureau of Indian Affairs to transfer to the Mescalero Apache Tribe the direction of Federal employees on duty at the Mescalero Agency of the Bureau of Indian Affairs in New Mexico, pursuant to the provisions of section 48 of title 25, United States Code.

As we expressed to you at that meeting, our concern is that the Federal employees on duty at the Mescalero Agency will continue to be Federal employees under the criteria set out in section 2105 of title 5, United States Code. If, by transferring the direction of the present Federal employees at the Mescalero Agency to the Mescalero Apache Tribe, they could no longer meet all three criteria, they would cease to be Federal employees and thus would lose the benefits of Federal employment, such as job-protection rights, retirement, and health and life insurance coverage.

We, of course, do not wish to see Federal employees deprived of these benefits. As your draft does not contemplate turning over the appointment of employees to the tribe, and as the employees would still be engaged in the performance of a Federal function, the problem is whether they would continue to meet the third criterion—whether they would continue to be subject to the supervision of a Federal employee.

We are of the opinion that the employees at the Mescalero Agency would meet this criterion even if the tribe is given authority to direct the day-to-day activities of the employees, so long as the residual supervision of the employees remains in the Secretary of the Interior or an appropriate official of the Bureau of Indian Affairs. The Federal supervisors would thus retain such powers as the rights to reassign, discipline, promote, and evaluate the performance of these employees. At the job site, the tribe could (under the unique authority in 25 U.S.C. 48) direct the employee's daily on-the-job performance of the duties his Federal supervisors sent him there to accomplish. Thus, in the final analysis, the matter boils down to one involving the classic master-servant test of the right to, and degree of, control over these employees retained by the Government. In accommodation with 5 U.S.C. 2105, we view 25 U.S.C. 48 as statutory authority for a delegation of a part of the Government's supervisory authority; a delegation that when properly effected will neither disturb the basic supervisory right of control nor destroy the employer-employee relationship.

In line with the above discussion, we have marked the draft in such a way as to insure the preservation of the employer-employee relationship which we believe a most important consideration.

Sincerely yours,

/s/ ANTHONY L. MONDELLO,
General Counsel.

April 9, 1970

APPEAL OF BALDI CONSTRUCTION ENGINEERING, INC.
IBCA-679-10-67 Decided April 9, 1970

Contracts : Construction and Operation : Drawings and Specifications

Where the specifications are specific and complete as to the inclusion of the disputed work in the contract, a claim for an equitable adjustment for a constructive change, based upon omission of details in the drawings, is denied in accordance with Article 2 of Standard Form 23-A which states that anything mentioned in the specifications and not shown on the drawings shall be of like effect as if shown or mentioned in both.

Contracts : Disputes and Remedies : Jurisdiction—Rules of Practice : Appeals : Generally

The Board's jurisdiction being appellate only, a claim not previously submitted to the contracting officer will be remanded to him for his decision.

BOARD OF CONTRACT APPEALS

This appeal stems from the construction of the National Park Service's Visitor Center at Great Falls, Virginia. It involves the question of whether an exposed aggregate surface treatment ordered by the contracting officer for two concrete slab ramps, leading from the ground to two upper floor landing areas, and for the two landing areas, were changes, or whether the surface treatment was required under the contract as offered for bid. The matter has been presented to the Board for decision on entitlement only on a stipulated record without a hearing.

The pertinent facts are these: Contract specification 2.10C.3 states without equivocation "Exposed aggregate concrete: all exterior concrete slabs will receive an exposed aggregate surface treatment as follows:" then follows a description of how the surface treatment shall be applied.

Drawing sheets 7 and 8 portray the upper floor plans for wings A-B and B-C of the Visitor Center, respectively. These plans include the landing areas and the proximate 22 feet 4 inches of each ramp down to a match line.

Nowhere on any drawings, either plan or cross-section, is it indicated that either the landing areas or the ramps are to receive an exposed aggregate surface treatment. The only drawing reference to such a surface finish is with respect to the paved terrace between the two building wings.

Correspondence in the appeal file shows that, as far as this record is concerned, the question of finish on the ramps first came up on July 21, 1967, when appellant wrote to the contracting officer that, "The finish on the ramps is not specified, but we have assumed, for safety sake, you would require a hair broom finish, perpendicular to the lines of traffic." (Exhibit 20.) Kent Cooper and Associates, the

architect, advised the Government representative on August 3, 1967, that appellant's assumption about a broom finish was incorrect, pointing out that Section 2.10C of the specifications called for an exposed aggregate surface for all external slabs. By letter of August 8, 1967, the Government advised appellant that the specifications called for an exposed aggregate finish on the ramps (Exhibit 21). On August 18, 1967, appellant acknowledged the instruction and advised that a claim would be presented for installing the exposed aggregate finish on the ramps (Exhibit 22).

The contracting officer denied the claim in a decision dated September 12, 1967, citing the specification. On the face of the record, the claim and the decision appear to have related only to the ramp areas. The landing areas appear to have been brought into the dispute by appellant in a letter dated September 14, 1967, to the contracting officer, which states in part:

In reference to your Findings of Fact letter dated 12 September 1967, on reference project, we hereby request you direct us to do the following:

1. Install exposed aggregate concrete on Landing and Ramp slabs.
2. * * * * *

(Exhibit 63)

On September 19, 1967 (Exhibit 64), the Government informed appellant that the Government's prior letter of August 8, 1967, was clear concerning item 1 of appellant's request. However, by letter of October 4, 1967, appellant pointed out that the August 8 letter did not cover the landing areas (Exhibit 65).

The Government replied on October 11, 1967, stating that the specifications called for an exposed aggregate finish on all exterior slabs, and that the landing areas were exterior slabs (Exhibit 66). Finally, on November 27, 1967, appellant acknowledged the directive of October 11, 1967, as to an exposed aggregate finish for landing areas, and stated an intention "to make a claim for this change."

The Notice of Appeal, dated October 11, 1967, refers only to the decision as to exposed aggregate on the ramp areas, it makes no reference to landing areas. There is no evidence in the appeal file that the claim as to the landing area was ever pressed, nor does there appear to be a relevant contracting officer's decision. Under the Disputes Clause a contracting officer's decision and notice of appeal are essential.¹ The claim as to the landing areas, is, therefore, remanded² to the contracting officer for appropriate findings and decision. See, e.g., *Nelson Bros. Construction Co.*, IBCA-738-10-68 (October 22, 1969), 76 I.D. 281, 69-2 BCA par. 7954.

¹ There is nothing in the record to show that a claim relating to the landing areas was ever raised prior to the issuance of the Findings of Fact from which the appeal was taken. In such circumstances the fact that both counsel have treated this claim as within the Board's jurisdiction is not controlling.

² The claims relating to the ramp areas and landing areas present different factual situations involving different legal considerations and can be treated separately.

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As to the ramp areas, there is an express specification that all exterior slabs shall receive an exposed aggregate finish. There is no conflict between the specification and the drawings, or between drawings. The fault, if any, is one of omission of any words or details on the drawings to indicate any finish on the ramps. In this situation Article 2 of the General Provisions³ controls. The Article provides:

Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both.

Read in its entirety Specification 2.10C is complete. Its three subsections cover finishes for all concrete slabs; interior, roof and exterior. As to the ramp area this case is the factual obverse of *Unicon Management Corp. v. United States*, 179 Ct. Cl. 534 (1967), where the omission was in the specifications and not in the drawings. There the claim was also denied on the basis of the language from Article 2, quoted above.

Finally, the mere fact that the terrace area drawings clearly indicate an exposed aggregate finish for the terrace does not persuade us that the omission of such detail from the drawings covering ramp areas indicates an intention that no finish was required on the ramps.

Conclusion

The claim involving the ramp areas is denied. The claim for the landing areas is remanded to the contracting officer.

ROBERT L. FONNER, Member.

I CONCUR:

WILLIAM F. McGRAW, Chairman.

H. F. GERBAZ ET AL.

A-31039

Decided April 24, 1970

Color or Claim of Title: Description of Land

Deeds which describe by regular survey subdivisions lands which in a regular surveyed section would extend to the northernmost and westernmost boundaries of a section give color of title to lots in an irregular section which fall within the area normally described by such aliquot parts.

Color or Claim of Title: Good Faith

Where color of title to a narrow strip of land lying along the west and north boundaries of a section derives originally from a homestead patent and is based on deeds which describe the patented land in terms of regular sub-

³ Standard Form 28-A (June 1964 Edition).

divisions which would be expected to extend to the west and north boundaries of the section, the fact that a resurvey of the section, which divides it into lots, is susceptible of, but does not necessarily require, the interpretation that the homestead entry did not include the strip of land in question does not support the conclusion that the grantees of the strip did not hold it in good faith.

Color or Claim of Title: Generally

Where applicants for land under the Color of Title Act have shown deeds giving color of title to three lots back to 1890, and there is nothing in the deeds or Bureau records showing lack of good faith on the part of the holders in the chain of title, a Bureau decision rejecting the application on the ground that there was no good faith holding of the land under a claim or color of title will be reversed and the case remanded for further processing to ascertain whether the improvement or cultivation requirements for a class 1 claim have been met, or whether taxes have been paid back to January 1, 1901, to support a class 2 claim.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

H. F. Gerbaz and Orest A. Gerbaz have appealed to the Secretary of the Interior from a decision by the Chief, Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated July 2, 1968, affirming the decision of the Bureau's Denver office, dated March 12, 1968, rejecting their color of title application. The Office of Appeals and Hearings affirmed the rejection on the ground the appellants failed to show good faith occupancy of the land applied for under some claim or color of title beyond the mere occupancy and possession of known public land.

The color of title application was filed January 17, 1968, under the Color of Title Act, as amended, 43 U.S.C. sec. 1068 (1964), which authorizes the purchase of land held "in good faith and in peaceful adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years" (1) if it has been so held for 20 years and valuable improvements have been placed on the land or it has been cultivated in part, or (2) if it has been so held and State and local taxes levied on it have been paid for the period "commencing not later than January 1, 1901, to the date of application." Under the regulations claims of the first type depending on cultivation or improvement of land held 20 years are described as class 1 claims, and claims of the latter type requiring the showing of the payment of taxes for the period prescribed are designated as class 2 claims. 43 CFR 2214.1-1(b).

The decisions below did not question whether the requirements of cultivation or improvements for a class 1 claim or of the payment of taxes for a class 2 claim were met but rested the rejection of the application upon the conclusion that the lands were not held in good faith under any claim or color of title from a source other than the

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United States.¹ The issue presented by this appeal is whether the Bureau's conclusion in this respect is correct.

The application described the lands applied for as lots 2, 3, and 4², section 6, T. 9 S., R. 85 W., 6th P.M., saying "These lots have been conveyed as set for taxation, in other words considered as a part of the W $\frac{1}{2}$ NW $\frac{1}{4}$, the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 6 * * * for over sixty years." The application also stated that the basis for the claim stemmed from:

Contract of Sale dated November 30, 1894 between Charles L. Wilson and James M. Ashby, deed 1898 from Charles L. Wilson to J. T. Ashby * * * Deed James M. Ashby and Sarah T. Ashby to Jermie J. Gerbaz, 3-1-1917, No. 78520; (Jermie Gerbaz being a father of applicant) with subsequent transfers from Jermie J. Gerbaz to Mary C. Gerbaz (1943) and from Mary C. Gerbaz to applicants and other members of the family, all of whom have conveyed to applicants for the purpose of processing this application.³

The application further stated that the applicants first learned they did not have clear title to the land in 1963.

The decision below did not discuss any of the documents in applicants' chain of title submitted to prove their claim. Instead, the decision discussed in detail facts shown on Department of Interior records concerning surveys affecting the land, and legal principles involving resurveys and patents.

Both the facts shown on the Departmental records and the documents submitted by the applicants must be reviewed in order to determine if the decision was correct that there was no good faith occupancy of the land under color of title from some source other than the United States.

To understand the problems involved here we must first consider the surveys and the source of color of title in appellants' chain of title, as the decision below ruled that there could be no good faith occupancy and color of title because of the facts relating to the patent and the surveys.

Initially a homestead entry was allowed to Harvey Boyce on July 7,

¹ We note that the color of title application form signed by the two applicants shows the application as being for a class 2 claim and they submitted Form 2214-3 (May 1965) to show taxes paid for the lands. Payments, however, are shown only for the years beginning in 1942 and through 1966. For a class 2 claim payments would have to be shown of taxes levied back to January 1, 1901. However, a letter from the applicants' attorney accompanying the application stated that it was filed as a class 1 application, and in the appeals he insists that the requirements for both classes have been met. The application indicated that about 1/3 of a \$25,000 house built in 1962 is on part of the land and that about 6 acres were cleared, farmed and irrigated at a cost of about \$1,000. No date was given as to this cultivation.

² The letter from the attorney accompanying the application stated that he had learned that lot 4 had been patented and, therefore, the application was just for lots 2 and 3. However, the record does not indicate that lot 4 is patented; consequently the application will be considered as being for all three lots.

³ The deeds and other documents in the record give the spelling of J. J. Gerbaz's first name as Jeremie. The 1898 deed also gives the middle initial of Charles Wilson as "S." and the first initial of Ashby as "S."

1885, for the W $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ SW $\frac{1}{4}$ section 6, T. 9 S., R 85 W., 6th P.M. This entry was commuted to a cash certificate No. 142 dated September 13, 1886, describing lots 4, 5, 6 and SE $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 6, same township, as containing 172.33 acres. A patent issued under this cash certificate April 17, 1889, describing the lands and the acreage as in the cash certificate.⁴ The description in the cash certificate and the patent was apparently based upon a survey known as the Kimberly survey of the township approved June 19, 1882, which designated as lots IV, V and VI land which in a regular section would be the NW $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$, and NW $\frac{1}{4}$ SW $\frac{1}{4}$, respectively. The plat showed acreages of 44.06 (lot IV), 44.10 (lot V), and 44.17 (lot VI). The decision below pointed out that by letter "E" (97465/1886) of September 18, 1886, the Acting Commissioner, General Land Office, stated that this survey was reported as fictitious, and he directed that the disposal of lands in the township be suspended.

Prior to the issuance of Boyce's patent, another survey, the Cutshaw survey, was approved November 8, 1888. The plat of this survey designated Kimberly lots IV, V and VI of section 6 as lots II, III, and IV, but showed them to be in the same position as on the Kimberly plat. Furthermore, the Cutshaw plat showed each lot as containing 40 acres. The Bureau decision stated that this plat and two plats of survey approved after the patent issued are not governing. Our copy of one plat, the Withers survey approved November 16, 1889, is not legible enough to ascertain the lots, and the copy of the second plat, that of the Snell survey approved June 3, 1891, is also difficult to read, although it appears that most of the lot designations are similar to those in a special plat of survey approved on May 23, 1892, which stated that it was made for the purpose of correcting the location of Harvey W. Boyce's cash entry marked in pink on Snell's plat of the township.

The special plat outlines the W $\frac{1}{2}$ of section 6 as consisting of two quarter sections each of which is comprised entirely of varying sized and shaped lots. Harvey W. Boyce's name is written within two lots, lot 7, a large lot containing 102.90 acres covering most of what would be the W $\frac{1}{2}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$, and lot 11, containing 51.10 acres, covering much of the area of what would usually be the NW $\frac{1}{4}$ SW $\frac{1}{4}$. Two small lots in the NE $\frac{1}{4}$ of section 6 lie directly east of these two lots, namely, lot 8 containing 5.10 acres and lot 10 containing .90 acre. The acreage of the four lots would total 160 acres, the usual maximum acreage in a homestead entry or commuted cash entry.

The special plat of May 23, 1892, shows the west line of lots 7 and 11 as being separated from the west line of section 6 by a narrow strip

⁴ There is an error in the decision below in a statement that the record of the patent (Colorado Patent Volume 69, Page 31) describes the land patented to Boyce as lots 3, 4, 5, etc. This was a typographical error; the copies of the patent show that the lots were designated as lots 4, 5, and 6.

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of land and it shows the north boundary of lot 7 as being similarly separated from the north line of section 6. The strip adjoining the north boundary of lot 7 and running around the northwest corner of lot 7 and extending a short distance down the west line of section 6 is designated on the plat as lot 2, containing 11.10 acres. The next portion of the strip, running south to the south line of lot 7, is designated as lot 3, a 6-acre lot. The next section of the strip is designated as lot 4, containing 6 acres, lying directly south of lot 3 and between the west line of lot 11 and the west line of section 6. A subsequent Government resurvey approved December 11, 1917, shows the same lots as designated on the 1892 plat.

The decisions below concede that the Boyce patent included lots 7, 8, 10 and 11 but not lots 2, 3 and 4, the tracts in issue. For this reason they held that appellants have no color of title to the three lots.

The appellants contend that they and all of their predecessors believed that their title included all of the land in what in a regular section would be the W $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, and NW $\frac{1}{4}$ SW $\frac{1}{4}$, which would include the land in what is now designated as lots 2, 3, and 4. In other words, appellants contend that their title extended to the northernmost and westernmost boundaries of the section.

The decision below relied greatly on the 1892 plat and upon a statement in the field notes of the survey from which the plat was prepared that all parties had agreed upon a certain corner as a common corner, thus establishing the location of the Boyce entry as shown on the 1892 plat. It stated that the patent issued to Boyce describing lands in accordance with a fictitious survey was a nullity insofar as the lands were described in accordance with the Kimberly survey, and that the 1892 plat governs the land Boyce and his successors could claim under the Boyce patent.

The appellants contend that the decision below is in error in implying any infirmity in the patent as it has never been challenged by the Government, and in relying on the survey made after the issuance of the patent. They continue, however, to press their color of title application which, of course, subsumes that the lands involved here are public lands. We see no reason therefore to undertake any discussion of the legal arguments concerning the effectiveness of the patent but turn to the crucial issues as to whether there was sufficient color of title and whether the facts demonstrate a holding in good faith.

Our first inquiry is whether there was an adequate showing of a claim or color of title. For a class 1 claim there must have been a holding under claim or color of title in good faith for at least 20 years, for a class 2 claim a holding extending back at least to January 1, 1901. What color of title to lots 2, 3 and 4 is shown by the documents which appellants submitted to establish their chain of title?

As we have seen, the patent to Boyce, issued April 17, 1889, described the land conveyed as lots 4, 5, and 6 and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 6, containing 172.33 acres. This description could refer only to the Kimberly survey, although it had been suspended earlier in 1886. The plat of the Kimberly survey showed lots 4, 5, and 6 (IV, V and VI) as extending to the northern and western limits of section 6.

Boyce conveyed the land to Charles S. Wilson on December 30, 1890. The deed described the land as the NW $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, and NW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 6, containing 172 $\frac{1}{3}$ acres. The normal reading of this description would be that it embraced land extending to the northern and western limits of section 6.

By deed dated March 15, 1898, Wilson conveyed to S. T. Ashby, again describing the land as the NW $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, and NW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 6, containing 172 $\frac{1}{3}$ acres.

The next conveyance was from James N. and Sarah T. Ashby to Jeremie J. Gerbaz. The deed, dated March 1, 1917, continued to describe the lands as the W $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, and NW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 6 but additionally described it as lots 4, 5, and 6 and SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 6, containing 172.33 acres. This additional description was a throwback to the patent description.

On April 20, 1943, by a quit claim deed to himself and Mary C. Gerbaz, J. J. Gerbaz converted his holding into a joint tenancy. The deed described the land, among other lands, as lots 4, 5, and 6 and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 6. It also described the land, "according to a resurvey as shown by Certified Plat executed by Alonzo H. Adams, Registered Engineer, on April 24th, 1934," as lots 2, 3, 4, 7, 8, 10, and 11, section 6. A copy of the Adams plat shows a lotting of section 6 identical or practically identical with the lotting on the 1892 plat of survey. In terms of the 1892 survey, the description in the quit claim deed would include the four lots conceded to be in Boyce's patent, viz., lots 7, 8, 10, and 11, and also the three lots in issue.

After the death of J. J. Gerbaz on November 14, 1947, Mary C. Gerbaz by four separate deeds dated September 8, 1948, conveyed an undivided $\frac{1}{4}$ interest in the land to each of the two appellants and to Edmond O. Gerbaz and Auzel H. Gerbaz (and presumably their respective wives). The deeds identically described the land in terms of the Adams resurvey, that is, as lots 2, 3, 4, 7, 8, 10, and 11, sec. 6.

By subsequent conveyances, some after 1963, appellants succeeded to the interest of Edmond and Auzel Gerbaz. The description in each of these conveyances is consistent with that in the prior conveyances.

We think it is clear that the entire series of conveyances from Boyce ultimately to appellants gave the grantees color of title to lots 2, 3, and 4. Certainly the description in the deeds from the 1890 deed to Wilson to the 1917 deed to J. J. Gerbaz of the land as the NW $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, and NW $\frac{1}{4}$ SW $\frac{1}{4}$ section 6 was reasonably to be read as

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covering land extending to the west and north boundaries of section 6. The later explicit descriptions of lots 2, 3, 4, etc., although in reference to the Adams survey, plainly covered the tracts in issue.

In holding that the conveyances did not give color of title to lots 2, 3, and 4, the decisions below equated color of title with actual title. This, of course, was erroneous because a color of title claim arises only when there is failure to actual title.

The decision below did not specifically discuss any of the deeds, but simply stated that since 1892 lots 2, 3, and 4 have been shown on the Bureau of records as vacant public land, citing *Ingrid T. Allen*, A-28638 (May 24, 1962); *Lester J. Hamel*, A-28830 (September 17, 1962)⁵; and *Storm Brothers*, A-29023 (October 8, 1962).

Those cases are all distinguishable. In each of them color of title was sought to be based on a patent description which in terms described only legal subdivisions adjoining the subdivision in which the land sought was actually located. The applicants in those cases assumed, mistakenly, that the land applied for was situated within the subdivisions described in the patents. Here the tracts in question are within the legal subdivisions described in the deeds.

A much more pertinent case is *William F. Trachte*, A-29260 (June 7, 1963). In that case the original survey of the NW $\frac{1}{4}$ of a section showed it as consisting of lot 5 and a lake on which lot 5 fronted. A patent was issued to lot 5. Later a resurvey showed omitted land lying between the actual lake line and lot 5; it was surveyed as lot 10. The resurvey also found a tract on the opposite shore of the lake which fell within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of the section. It was surveyed as lot 12. The Department held that a deed which described the land conveyed as the N $\frac{1}{2}$ NW $\frac{1}{4}$ and SE $\frac{1}{4}$ NW $\frac{1}{4}$ gave color of title to lots 10 and 12. (See subsequent proceedings in *William F. Trachte*, A-30291 (June 8, 1965)).

Because the 1890, 1898 and 1917 deeds did describe lands which in a regular section would include land extending to northernmost and westernmost portions of the section, we believe that they adequately gave color of title to the lands shown on the 1892 plat as lots 2, 3, and 4, which fall within the area normally described by such aliquot parts of a section as the W $\frac{1}{2}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ SW $\frac{1}{4}$.

The next question is whether the facts of record show that lots 2, 3, and 4 have been held in good faith for the requisite time. The decision below apparently concluded that none of the parties in the chain of title could be in good faith because of the existence of the 1892 plat of survey. Among other statements it said in relation to the 1892 survey that the field notes of the survey of the adjoining Boyce and Foster entries stated that "all parties concerned have agreed upon this corner

⁵ This case was the subject of a court proceeding, *Lester J. Hamel v. Neal D. Nelson et al.*, Civil No. 8565, N.D. Cal., judgment for the defendant December 13, 1963. The plaintiff filed an appeal but later dismissed it.

as a common corner," referring to the northwest corner of the Foster entry shown on the 1892 plat. The decision then stated that as the parties in interest had agreed on the location of their entries on the ground as indicated on the 1892 plat, the successors in title cannot now be heard to object to the agreed upon locus of the Boyce entry.

Appellants have attacked the 1892 survey as being based on erroneous assumptions. However, it is unnecessary to reexamine the survey and the plat except to the extent necessary to determine the issue of good faith. The copy of the 1892 plat in the case record sets off the lot numbers by dashed lines. As previously indicated, the name of Harvey W. Boyce is written within the lines designating lots 7 and 11. The name does not extend within the limits of lots 2, 3, and 4 but neither does it extend to lots 8 and 10, although the Bureau has recognized that the Boyce entry included lots 8 and 10. It may be that the recognition is based on the statement on the 1892 plat that the survey was made for the purpose of correcting the Boyce entry as shown in pink on the Snell plat of survey. The original Snell plat may have a pink outline which is not shown on the copy in the case file but, in any event, the copy shows the Boyce entry as extending down into lot 16, which lies south of lot 11, and apparently not as extending into lot 2, which seems to be shown as a 40-acre subdivision in the position of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 6. Thus, it is not at all clear that the 1892 plat shows the Boyce entry as not including lots 2, 3, and 4.

The acreage shown on the 1892 plat as compared with the 172.33 acres stated in the 1890, 1898 and 1917 deeds also does not evidence a bad faith holding. The acreage of the lots (7, 8, 10 and 11) which the Bureau recognizes as patented to Boyce totals 160 acres. If we add lot 2 (11.10 acres), lot 3 (6 acres), and lot 4 (6 acres), totaling 23.10 acres, to the 160 acres, there would be 183.10 acres, which would be closer to the acreage given in the deeds than if those lots were excluded.

As for the statement in the field notes of the 1892 survey, which the decision below stressed, that all the parties agreed upon a corner as a common corner to the Boyce and Foster entries, we do not perceive much significance to it standing alone. This corner, which is located a short distance south of the mid-point of the line separating the NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ of section 6 and is therefore a point on a portion of the *east* boundary of the Boyce entry, does not necessarily show the location of the *west* boundary of the entry. It does not show the understanding of the parties that the west boundary of the entry was not coterminous with the west boundary of section 6. But even if it did, and Boyce or Wilson was chargeable with notice of this fact, there is nothing to indicate that this knowledge was passed on to Ashby in 1898 and to the subsequent grantees.

The remaining problem regarding good faith is the conclusion in the decision below that since 1934 the parties in interest have recog-

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nized the 1892 survey and have unlawfully attempted since then to include lots 2, 3, and 4 in their claim to the Boyce tract. This conclusion apparently was based upon the survey plat and affidavit in the record by Alonzo Adams, the private surveyor. Appellants contend that this conclusion is unwarranted, that the fact that the landowners chose to use the lot designations in the Adams survey as descriptive of the lands conveyed does not indicate a recognition that the land in question was vacant public land outside the Boyce entry, and that the contrary is true. Adams' affidavit was recorded in the county records in 1934, stating that he had personally made surveys of the lands in question and knew the locations and lines of the various surveys of the lands. He then stated:

That the land described in the U.S. Patent issued to H. W. Boyce as SE $\frac{1}{4}$ NW $\frac{1}{4}$ and Lots 4, 5 and 6 in Section 6 Township 9 South, Range 85 West 6th P.M. is now, under the latest survey properly described as Lots 2, 3, 4, 7, 8, 10 and 11 in Section 6, T. 9 S., R. 85 W. 6th P.M.

Adams' plat of survey is dated April 24, 1936. It is this plat to which subsequent deeds by the Gerbaz family relate. The record contains a cyanotype copy of the plat, which purports to show the lands of J. J. Gerbaz in sections 5, 6, 7 and 8, T. 9 S., R. 85 W., and sec. 1, T. 9 S., R. 86 W., 6 P.M. It indicates that the Gerbaz holdings are outlined in red. From our copy we, of course, cannot ascertain the red lines; however, we assume that the red line boundary included within it lots 2, 3, and 4 of section 6. The plat indicated that the portion of the Gerbaz lands relevant here was originally described as the W $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, and NW $\frac{1}{4}$ SW $\frac{1}{4}$, sec. 6, T. 8 S., R. 85 W., and also described as lots 4, 5, 6, and SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 6. It indicated that the description by resurvey plats was lots 2, 3, 4, 7, 8, 10 and 11, sec. 6, T. 9 S., R. 85 W., containing 188.91 acres, less right of way 16.25 acres. A note on the plat states as follows:

Under the first survey the West range of subdivisions in section 6, T. 9 S. R. 85 W. were lots numbered from the north as 4, 5, 6 and 7, and the claim first described above was located on lots 4, 5, and 6, and the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 6, showing an excess in area.

The survey was suspended. A later survey restored the N. and W. borders of Sec. 6 but did not protect the entryman. A metes and bounds survey also failed to define the lands as originally located: the subdivisions described as shown on the resurvey plats cover the lands actually improved and cultivated without invading other subdivisions but some confusion is caused by the use of lot numbers which were used in other positions under the first survey.

This map was compiled by reference to official plats, Public Records, and the notes and sketches of private surveys, executed May 24, 1933 and April 18 and 19, 1934.

Another note on the plat states:

Outlined in dotted blue will be found the theoretical positions of the fractional lots on the north and west borders of Sec. 6, with the regular lot numbers showing

in parentheses. Suspension of first survey and inadequate second and third surveys resulted in changes of description which are slightly confusing because of failure of the Surveyor General to discard every used lot number where the original configuration of the lot has been changed.

The question is whether Adams' affidavit and plat constituted a recognition of title to lots 2, 3, and 4 in the United States or gave notice of such recognition so that we must say that parties thereafter relying on the plat could not hold lots 2, 3, and 4 in good faith. We do not think so. The affidavit and plat show rather clearly that Adams was platting the lands as shown on the official surveys (presumably the 1892 and 1917 surveys) and that he assumed that the Boyce patent and subsequent conveyances included lots 2, 3, and 4. The only statement that sounded a possible caveat was that a later survey, after the first suspended [Kimberly] survey, "restored the N. and W. borders of Sec. 6 but did not protect the entryman." This rather cryptic statement, when read in the totality of the plat, is not sufficient in our view to charge a reader with notice that lots 2, 3, and 4 belonged to the United States.

In short, we believe that the deeds submitted by the appellants sufficiently show color of title to lots 2, 3 and 4 back to the 1890 deed from Boyce to Wilson, and also that there is nothing in them or in the factual circumstances presented by the resurveys of the land, so far as disclosed by the case file, which shows that prior to 1963 neither appellants nor their predecessors, at least back to 1898, held lots 2, 3, and 4 in good faith as lands owned by them.

The remaining problem is whether or not the other requirements of the color of title act have been satisfied. Although appellants have indicated that a house was placed on a portion of the land and that some of the land was cultivated, we believe that further information should be submitted to the Colorado land office, where this case will be returned, for determination as to whether cultivation or improvement of each of the three lots was adequately made to show a class 1 claim. Or the appellants, if they desire and are able, may submit further information concerning the payment of taxes back to January 1, 1901, to support a class 2 claim (see footnote 1). Also, if there is any question as to whether lot 4 has been patented (see footnote 2), its status should be ascertained.

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 reversed and the case is remanded for further processing of the color of title application.

ERNEST F. HOM,
Assistant Solicitor.

69] DONATION AND ACCEPTANCE OF "SCENIC EASEMENTS" 69
IN THE VICINITY OF THE CHESAPEAKE AND OHIO CANAL NATIONAL
MONUMENT

May 12, 1970

DONATION AND ACCEPTANCE OF "SCENIC EASEMENTS" IN THE
VICINITY OF THE CHESAPEAKE AND OHIO CANAL NATIONAL
MONUMENT

Secretary of the Interior—National Park Service Areas: Land: Acquisition

A statutory authorization is necessary to support the acquisition of land or an interest in land, including a scenic easement, regardless of whether the acquisition is by purchase or donation.

Act of August 8, 1953—Statutory Construction: Generally

A right-of-way within the meaning of section 1(7) of the act of August 8, 1953, 67 Stat. 495, 16 U.S.C. 1b(7) (1964) which authorizes the Secretary of the Interior to acquire lands and interests in lands, including scenic easements, in lands adjacent to a road right-of-way located within area of the National Park System, need not be limited to only roads open to vehicular motor traffic. The towpath of the Chesapeake and Ohio Canal National Monument is a road right-of-way within the meaning of that act.

M-36805

May 12, 1970

To: ASSISTANT SECRETARY, FISH AND WILDLIFE, PARKS, AND MARINE
RESOURCES.

SUBJECT: DONATION AND ACCEPTANCE OF "SCENIC EASEMENTS" IN THE
VICINITY OF THE CHESAPEAKE AND OHIO CANAL NATIONAL
MONUMENT.

In conjunction with your testimony before the Conservation and Natural Resources Subcommittee of the House Committee on Government Operations you were requested by letter of February 4, 1970, from the Subcommittee Chairman, to provide the Subcommittee with my views on the authority of the Department of the Interior to accept the donation of a scenic easement over certain privately owned lands located in West Virginia in the vicinity of and outside the boundaries of the Chesapeake and Ohio Canal National Monument.

The lands comprising the Chesapeake and Ohio Canal were acquired by the United States in 1938 under the provisions of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 201, and have been administered under the provisions of the Organic Act of the National Park Service, which is the act of August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. 1, 2-4 (1964). In order to give greater recognition to the historic values of the Chesapeake and Ohio Canal, it was designated a national monument on January 18, 1961, by Proclama-

77 I.D. No. 5

tion No. 3391, 26 F.R. 639, pursuant to the provisions of section 2 of the Antiquities Act, 34 Stat. 225 (1906), 16 U.S.C. 431 (1964).

It is my understanding that the issues which gave rise to this inquiry by the Subcommittee developed in the following manner.

In early 1967 the Department of the Interior became aware of the plans of the Potomac Edison Power Company to construct a 115-mile 500 KV transmission line, which would be located in the vicinity of the Antietam National Battlefield and the Chesapeake and Ohio Canal National Monument, which are areas of the National Park System administered by this Department. As a part of the proposed routing of the line, it would have been necessary for the Company to cross the Potomac River and the national monument in Maryland.

The Company, in order to implement its plans, applied to the Department in May of 1967 for the conveyance of a right-of-way across the monument under the provisions of the act of August 1, 1953, 67 Stat. 359. In considering this application the Assistant Secretary for Water and Power Development requested the views of this office on the extent of the authority of the Secretary to grant rights-of-way under the 1953 act. In an opinion of July 17, 1967, this office advised that under the provisions of section 4 of that act, the Secretary had discretionary authority to deny the pending application or, in the alternative, to condition any grant of a right-of-way to cross the monument upon a routing of the line which would not impair the various federal interests in the area, such as the historic, scenic and recreational values of the Antietam National Battlefield, the Chesapeake and Ohio Canal, and other federal areas, existing or proposed.

To fully evaluate the environmental and scenic impact of the line on the battlefield, the monument, and any other federal interests which might be affected, a Departmental task force was appointed. The task force was also under instructions to identify alternative routes for the transmission line, if it determined that the route proposed by the Company would have a significant adverse effect on federal interests in the region.

Acting on the advice of the Solicitor's Office with regard to the Department's discretionary authority under the 1953 Act and the findings by the task force that the route proposed by the Company would have an adverse impact on the battlefield, the monument, and the Potomac River Basin, the Department denied on October 17, 1967, the Company's request for a right-of-way to cross the monument. The Department and the Company then commenced negotiations with respect to relocating the proposed line along an acceptable route.

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In March 1968, the Department publicly announced that it and the Company had reached agreement on a new routing for the transmission line, and that the Department intended to implement this agreement once the engineering details were completed to the satisfaction of the Department. This agreement came only after the Department had completed extensive studies and analyses of the environmental and scenic factors, and was satisfied that all federal interests in the area were adequately protected.

The agreement was formalized, after approval of the engineering plans, on July 1, 1969, by the grant to the Company of a right-of-way easement to cross the monument, subject to the express condition that the route of the transmission line, over its entire length, conform to the alignment publicly agreed to by the Department in March 1968.

In April 1969, one of the landowners, whose lands would be crossed by the new route of the transmission line, offered the Department a scenic easement over his affected lands. Contrary to the findings of the task force, it was suggested that the new route, as it crossed this particular tract of land, would have an adverse impact on the scenic character of the monument and on the recreational values of the land, thereby justifying acceptance of the easement.

The lands which would be subject to the proposed scenic easement, however, were not within or contiguous to the boundaries of the monument, any other area of the national park system, or any other federal conservation area. Rather, the easement would have covered lands located across the Potomac River from the monument in West Virginia, just upstream from the proposed crossing location.

Acceptance of this scenic easement by the United States would have prevented the construction of the transmission line along the route previously agreed to by the Department, because federal interests in land may not be condemned by a state, its political subdivisions or a public utility acting under state authority. *United States v. City of Chicago*, 48 U.S. (7 How.) 185 (1848); *Utah Power and Light Co. v. United States*, 243 U.S. 389 (1917). Thus, the implementation of all elements of the Government's agreement with the Company would have been frustrated by acceptance of the easement, and construction of the line might well be further delayed until another alternate route within the general area of the lands in question had been restudied and renegotiated.

According to the testimony adduced at the hearing and the views expressed in your letter of July 28, 1969, the offer of the scenic ease-

ment was rejected by the Department on the basis that the alignment which was agreed upon met the Departmental objections with respect to the protection of scenic and recreational values of the areas affected and that it would be inappropriate at this time to take any scenic easement, if its effect might obstruct construction of the line according to the routing which had been agreed to. There was also a concern expressed by representatives of this office over the extent of your authority to accept scenic easements outside the boundaries of the Chesapeake and Ohio Canal National Monument. The purpose of this opinion is to discuss the latter issue in order that the circumstances under which scenic easements may be accepted by the Department in the vicinity of the national monument are fully understood, should it be determined administratively in the future to acquire such interests.

So-called "scenic easements" are interests in land. In the lexicon of some, a scenic easement is referred to as a "negative" easement because the landowner, depending upon the terms of the particular easement, is precluded from doing certain things, such as cutting trees, building structures, or undertaking other forms of improvement to the land. A scenic easement has also been defined by Congress in section 15(c) of the Wild and Scenic Rivers Act, 82 Stat. 906 (1968) 16 U.S.C. 1271, 1286(c) (Supp. IV, 1965-68), as "the right to control the use of land for purpose of protecting the scenic view." Therefore, it follows that the acceptance of a donation of an easement results in the acquisition of an interest in land by the United States. The landowner, in effect, conveys and the United States acquires certain property rights.

The law applicable to the land acquisition activities of the United States is well established. In the absence of a statutory authorization by Congress a federal department or agency may not acquire an interest in land. *United States v. Certain Parcels of Land in Fairfax County*, 345 U.S. 344 (1953); *Polson Logging Co. v. United States*, 160 F. 2d 712 (9th Cir., 1947); *Swan Lake Hunting Club v. United States*, 381 F. 2d 238 (5th Cir., 1967); *United States v. 121 Acres of Land*, 263 F. Supp. 737 (U.S.D.C., N.D. Calif. 1967). See also R.S. 3736, 41 U.S.C. 14 (1964). Congressional authorization may be implied, however, from Congressional action on a land acquisition appropriation. *United States v. Kennedy*, 278 F. 2d 121 (9th Cir., 1960); *Perati v. United States*, 352 F. 2d 788 (9th Cir., 1965).

This rule of law applies not only to the acquisition of land by purchase, but also the acquisition of land or an interest in land by donation. In this regard the Attorney General has advised:

A grant requires acceptance, and an administrative officer has no power to accept unless such power has been conferred by law. 39 Op. Atty Gen. 373, 377,

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rev'd, 21 Op. Atty Gen. 455; 28 Op. Atty Gen. 413. See also 39 Op. Atty Gen. 366;
30 Op. Atty Gen. 527.

This conclusion is consistent with numerous rulings of the Comptroller General which hold that the head of an agency or department must have express statutory authority to accept donations of property. See, e.g., 2 Comp Gen. 198, 16 Id. 911, 25 Id. 637, 36 Id. 268, 46 Id. 379.

Accordingly, we must inquire whether there is a statutory authority applicable to the National Park System which might sustain the acquisition of a scenic easement over lands in the vicinity of the Chesapeake and Ohio Canal National Monument.

In the various discussions concerning the authority of the Department to accept a scenic easement in the vicinity of the Chesapeake and Ohio Canal National Monument, it was suggested that the authority contained in section 1(7) of the Act of August 8, 1953, 67 Stat. 495, 16 U.S.C. 1b(7) (1964), could be utilized. This authority was used to acquire a scenic easement in the vicinity of the George Washington Memorial Parkway in the case of the Merrywood tract further downstream on the Potomac River. The relevant portions of this act provide as follows:

* * * In order to facilitate the administration of the National Park System and miscellaneous areas administered in connection therewith, the Secretary of the Interior is hereby authorized to carry out the following activities, and he may use applicable appropriations for the aforesaid system and miscellaneous areas for the following purposes:

* * * * *

(7) Acquiring such rights-of-way as may be necessary to construct, improve, and maintain *roads* within the authorized boundaries of any area of the said National Park System and miscellaneous areas; and the acquisition also of land and interests in land adjacent to such rights-of-way, when deemed necessary by the Secretary, * * *. (Italics added.)

While the monument does not contain a "road" open to the usual type of vehicular traffic such as automobiles, it does contain a towpath intended for an extensively utilized by pedestrian and bicycle traffic. Furthermore, the essential purpose of the towpath is the same as that of most other roads through the park system, i.e., to enable the public to traverse the scenic area in order to enjoy the view. We do not believe the statute was intended to be limited to only those roads open to vehicular motor traffic.

Consequently, it is our opinion that the right-of-way maintained as the towpath on the Chesapeake and Ohio Canal National Monument is a "road" within the meaning of section 1(7) of the Act of

August 8, 1953, 67 Stat. 495, 16 U.S.C. 1b(7) (1964) and the Secretary would therefore be authorized to acquire land and interests in land adjacent to it.

MITCHELL MELICH,
Solicitor.

APPEAL OF ALLIS-CHALMERS MANUFACTURING COMPANY

Decided May 13, 1970

IBCA-796-8-69

Contracts : Disputes and Remedies : Damages : Liquidated Damages

A provision for liquidated damages in a contract to supply six transformers for the sum of \$2,562, which called for liquidated damages to be imposed at a rate of \$50 a day for the first 15 days of delay in delivery and \$100 a day for each day thereafter, and which was the basis of an assessment of \$8,000 against the contractor, constitutes an unenforceable penalty since in the circumstances presented the Board found the damages assessable were not a reasonable forecast of just compensation for the harm caused by the breach.

BOARD OF CONTRACT APPEALS

Under attack in this appeal is an assessment of liquidated damages which is more than treble the total contract price. The appellant's position is that the provision pursuant to which the damages were imposed constitutes an unenforceable penalty¹ and that the assessment is therefore unauthorized.

The appellant undertook to supply the Government with six current transformers, identically described on the Invitation For Bids except that three were required to have a 2000-5 ampere ratio (designated as Item 16) and the other three a 4000-5 ampere ratio (designated as Item 17). Although some 17 other items (consisting of various types of potential and current transformers) were also solicited by means of the Invitation, the contract as awarded called only for the delivery of Item 16, at a unit price of \$373, and of Item 17, at a unit price of \$481, totaling \$2,562. Both items were to be delivered by July 22, 1968, "F.O.B. Offeror's Shipping Point—Pittsburgh, Pennsylvania—Freight Allowed."

Two of the three transformers comprising Item 16 were shipped on July 19, 1968. However, appellant thereafter discovered that they had not been tested and also lacked "the special terminal arrangement,"

¹ Notice of Appeal, dated August 20, 1969 (Exhibit 20). All exhibits referred to are contained in the Appeal File.

May 13, 1970

as required by the contract.² Consequently, at the appellant's request, they were returned to Pittsburgh. Following correction they were shipped back to the Government, together with the third unit on September 25, 1968.

The Item 17 transformers were shipped August 21, 1968. The delay in fabrication of those transformers, as well as the third unit of Item 16, resulted from the delay of appellant's supplier in furnishing porcelain, an essential constituent. However, the appellant has not seriously contended that the delay in delivery of either Item 16 or Item 17 was beyond the control and without the fault or negligence of itself or its supplier. Accordingly, there is present no evidence of any excusable cause of delay entitling appellant to an extension of time under the terms of the contract.³

In the absence of such an excuse the Government assessed liquidated damages amounting to \$8,000, pursuant to the following clause of the contract:

DELAYS—LIQUIDATED DAMAGES. A. In case of failure on the part of the Contractor to complete shipment (in case contract is awarded F.O.B. Shipping Point), or delivery (in case contract is awarded F.O.B. Destination) within the period stipulated above, plus any extension of time granted under the terms of the contract, he shall pay to the Government liquidated damages at the rate of \$50.00 for each calendar day of delay for each Schedule Item of equipment or any part thereof for the first 15 calendar days of delay, and thereafter at the rate of \$100.00 for each calendar day until shipment or delivery is completed. The above specified damages shall apply to each Schedule Item except Schedule Item Numbers two, three and eleven.

The assessment consisted of \$5,750 imposed for the delay of 65 days in shipping Item 16 and \$2,250 imposed for the delay of 30 days in delivery of Item 17. The total assessment thus exceeds the contract price by \$5,438. The appellant contends that "the amounts specified as liquidated damages * * * were not a reasonable estimate of probable damages the government would sustain if delivery was not made in accordance with the contract schedule."⁴

If the agreed damages are in fact disproportionate to the probable loss, a provision for liquidated damages is regarded as a penalty.⁵ To be enforceable the amount fixed as liquidated damages must be a reasonable forecast of just compensation for the harm caused by the

² Appellant's letters to Government, dated August 7, 1968 (Exhibit 3) and April 18, 1969 (Exhibit 11), respectively.

³ Article 11 of the General Provisions (Standard Form 32, June 1964 Edition), as supplemented on pp. 10 and 11 of the Invitation.

⁴ Appellant's Complaint, dated September 24, 1969, par. III, p. 2.

⁵ *Kothe v. R. C. Taylor Trust*, 280 U.S. 224, 226 (1930). A liquidated damages provision will also not be enforced if the damages anticipated from a breach are neither uncertain in nature or amount nor difficult of ascertainment. *Rex Trailer Co. v. United States*, 350 U.S. 148, 153 (1956). No such claim has been made here.

breach.⁶ The only evidence before us bearing on the question presented are the responses by Mr. Lee Gress, Scheduling and Expediting Engineer for Bonneville Power Administration, to interrogatories propounded by the appellant, and an affidavit accompanying the responses by Mr. E. J. Monaco, Chief of Bonneville's Branch of Supply.⁷ Mr. Gress recommended the specific amounts of liquidated damages provided for in the contract. Mr. Monaco reviewed and approved the recommendation.

According to Mr. Gress, the six transformers which the appellant agreed to furnish were to provide "a lower voltage for operating meters for measuring for revenue purposes, the amount of power and energy" to be delivered by Bonneville at two particular substations to two specific customers. The other transformers, which were listed on the solicitation but were not included in the award, were, with the exception of Items 2, 3 and 11,⁸ intended to provide "the requisite voltage for operating relays and meters on the BPA system" without which "deliveries of power cannot properly be made." These items, though excluded from the contract before us, are significant because the liquidated damages to be assessed were formulated with them in mind and were not thereafter modified to reflect their deletion.

The sums stipulated were therefore designed to cover damages for delay not alone in delivery of items 16 and 17, but also of the other transformers mentioned, except those to be used for warehouse stock. In Mr. Gress's words, "the damages that could be incurred * * * would be the loss of revenue due to the lack of metering equipment * * *. Other costs that might be incurred * * * could be the additional cost of having a construction contractor return to install the current transformers if their late delivery caused a suspension of work by the construction contractor, loss of revenue due to outages sustained during the installation, and such other costs that might be incurred by BPA in expediting shipment and installation beyond the contractual delivery date." According to him, the same considerations applied to the items not awarded as to those that were.

In "arriving at" the specific amounts to be assessed as liquidated damages the factors Mr. Gress considered were "substantially those" mentioned above, but these have not been further identified. Ultimately he concluded that "the damages from the inability to measure the energy delivered to customers could be expected to approximate \$375 per

⁶ *Wells Construction, IBCA-737-10-68* (September 11, 1969), 69-2 BCA par. 7866.

⁷ The responses were sworn to on October 21, 1969. The affidavit was sworn to on October 22, 1969.

⁸ Items 2, 3 and 11, which were specifically excluded from the application of the liquidated damages provision, were to be used for warehouse stock.

May 13, 1970

day for item 16 and \$3,750 per day for item 17." Wholly unexplained, however, is the method by which the Government settled upon a "rate of \$50 for each calendar day of delay * * * for the first 15 calendar days * * * and * * * \$100 for each calendar day" thereafter, applicable to all items.

Under the circumstances described, we find no correlation between the liquidated damages to be assessed and the actual damages likely to be sustained. It is clear that a failure to deliver item 17 was expected to cause a far greater daily loss than the failure to deliver item 16. The difference, however, is not reflected in the clause. On the contrary, the same rate—\$50 a day for the first 15 days and \$100 a day thereafter—is applicable to both items even though the probable actual loss from a breach of both is not comparable. When reaches of prospectively varying severity are lumped together in a liquidated damages clause, with the same payment provided for each, a genuine forecast of probable damage is considered not to have been intended.⁹ For this very reason we were obliged recently to strike down a clause similar to the one before us now because it failed to make allowance for partial deliveries.¹⁰

Moreover, in fixing the rate there must be some attempt to proportion the specified amount to the probable actual loss. If all eventualities are thrown together, as they presumably were here, in order to purport to cover the entire invitation quantity for which liquidated damages were provided, the result may well be a rate unrealistic to any of them. Thus, though the Government estimated potential damages of \$375 a day for item 16 and \$3,750 a day for item 17, the liquidated damages to be assessed of only \$50 daily for the first 15 days of non-delivery and \$100 thereafter reflects no distinction between the two items. These amounts appear quite arbitrary; we see no connection between them. The rationale behind doubling the amount to be assessed after 15 days of default has not been given; nor have we been shown why any such distinction should be drawn at all.

The assessment itself appears to be grossly excessive. This is largely because the Government failed to minimize the damages.¹¹ Apparently at some point the Government could have installed "temporary units

⁹ See Marathon Battery Co., ASBCA No. 9464 (July 14, 1964), 1964 BCA par. 4337; 22 Am. Jur. 2d, *Damages*, Sec. 225 (1965).

¹⁰ *Graybar Electric Company, Inc.*, IBCA-773-4-69 (February 12, 1970), 70-1 BCA par. 8121.

¹¹ The doctrine of mitigation of damages is as applicable to the running of liquidated damages as it is to ordinary damages. 11 Comp. Gen. 384 (1932). See, also Gantt & Brestauier, *Liquidated Damages In Federal Government Contracts*. 47 B.U.L. Rev. 71, 76 (1967), 4 Y.P.A. 565, 572.

* * * to energize the facilities" ¹² but the record is silent as to what consideration, if any, the Government gave to this course of action. The need to mitigate damages is particularly acute where, as here, the contract fails to provide a ceiling on the total amount of liquidated damages which could be imposed.¹³

For all of the foregoing reasons we find that the liquidated damages clause before us did not constitute a reasonable forecast of just compensation. We therefore hold that the provision is an unenforceable penalty and that the assessment thereunder is unauthorized.¹⁴

Conclusion

The appeal is sustained.

SHERMAN P. KIMBALL, Member.

I CONCUR:

WILLIAM F. McGRAW, Chairman.

APPEALS OF JOHN H. MOON & SONS, INC.

IBCA-814-12-69

IBCA-815-12-69

Decided May 14, 1970

Contracts: Construction and Operation: Notices—Rules of Practice: Appeals: Hearings—Rules of Practice: Evidence—Rules of Practice: Witnesses

Appellant's request to consolidate two appeals for purposes of hearing in Jackson, Mississippi, is granted, despite the Government's urging that a separate hearing be held for one of the appeals limited to issues related to lack of timely notice of the claims asserted, where the Board finds (i) that the two appeals are closely related (ii) that the issues involved in the appeal as to which the question of timeliness had been raised were relatively simple, and (iii) that from the standpoint of convenience to prospective witnesses the record clearly established that Jackson, Mississippi, was preferable to Washington, D.C. as the site for the hearing. A Government request for the issuance of interrogatories to the appellant directed to the issue of timeliness of notice of claim was granted, however, where the Board found that answers to the interrogatories propounded would narrow the issues in advance of hearing.

¹² On p. 2 of his affidavit, note 7, *supra*, Mr. Monaco stated that "late delivery can mean * * * that installation of temporary units may be necessary to energize the facilities."

¹³ Cf. *Instruments for Industry, Inc.*, ASBCA No. 10543 (August 25, 1965), 65-2 BCA par. 5097, at 24,004 and 24,011 (liquidated damages of \$50 per unit per day with maximum assessment limited to 20% of the contract unit price).

¹⁴ The Government, of course, is not precluded from seeking to recover its actual damages. 22 Am. Jur. 2d, *Damages*, Sec. 235 (1965).

May 14, 1970

BOARD OF CONTRACT APPEALS

The Government opposes the granting of the appellant's request that the above-captioned appeals be consolidated for the purpose of hearing, at least until resolution of the questions of whether the claims involved in IBCA-814-12-69 were timely presented to the Government, or, if not, whether the Government was prejudiced by reason of the lack of timely notice.¹ The Government also opposes the appellant's request that the consolidated hearing be held in Jackson, Mississippi.² In addition, the Government had submitted proposed interrogatories to the appellant related to the question of timeliness.

Generally speaking the Board favors the consolidation of related appeals for the purposes of hearing in the interest of the expeditious and inexpensive resolution of disputes. Only in rare cases³ have we refused a request for consolidation of clearly related appeals for purposes of hearing. In the absence of the timeliness question raised by the Government with respect to IBCA-814-12-69, there is little doubt but that in the circumstances present here the appellant's request to consolidate the appeals for the purpose of hearing would have been granted as a matter of course.

Before deciding the questions at issue, it is pertinent to furnish the background for the two contracts⁴ involved in the appeals. Contract No. NPS-WASO-NATR-V-63/22 (IBCA-814-12-69) was awarded on June 28, 1963 in the amount of \$688,254.15 for the construction of 0.945 miles of grading, drainage, aggregate base course, paving, bridges and other work in Madison County, Mississippi under Natchez Trace Parkway Project 3P2. The contract allowed 400 calendar days from the date of receipt of the notice to proceed for completion of the required work. The count of contract time began on August 3, 1963. The start of actual work was on August 5, 1963. The work covered by the contract was completed on November 11, 1965. The claims involved in

¹ Government counsel has requested that a separate hearing be held "out of turn on the docket schedule, to hear testimony and receive evidence from the parties solely on the point of timeliness of the notice of the claim and the results of receiving the notice when it was given." Government's Special Answer of February 27, 1970.

² In support of its position the Government asserts, *inter alia*, (i) that the project records are located in a Government office in Arlington, Virginia, (ii) that the Government's witnesses can be assembled in the Washington area as easily as in Jackson, Mississippi, and (iii) that the Government office which administered the projects involved has been closed. See Government memorandum to the Board of April 6, 1970.

³ E.g., *American Cement Corporation*, IBCA-496-5-65 (January 6, 1966), 65-2 BCA par. 5303. The two appeals over which the Board retained jurisdiction were later heard together. See *American Cement Corporation*, IBCA-496-5-65 and IBCA-578-7-66 (December 2, 1968), 75 I.D. 378, 68-2 BCA par. 7390.

⁴ Both contracts were entered into by the National Park Service but were administered by the Bureau of Public Roads which was then a part of the Department of Commerce.

the appeal comprise a claim for an equitable adjustment in the amount of \$19,963.75 predicated upon work performed by H. W. Caldwell & Son, Inc., a subcontractor, and a request for an extension in contract time sufficient to eliminate the liquidated damages assessed for delayed performance in the amount of \$1,950.⁵

Contract No. NPS-WASO NATR-V-63/17 (IBCA-815-12-69) was also awarded on June 28, 1963. The contract was in the amount of \$1,179,785.75 and provided for the construction of 2.735⁶ miles of grading, drainage, aggregate base course, bituminous surface treatment, four prestressed concrete girder bridges, one concrete slab bridge, one box-type bridge, and other work in Claiborne County, Mississippi under Natchez Trace Parkway Project 3T3. The contract allowed 500 calendar days from the date of receipt of the notice to proceed for completion of the required work. Contract time began to be counted on August 3, 1963, but work was not actually started until August 19, 1963. The contract work was completed on October 8, 1965. The claims for equitable adjustment under this contract total \$268,813.84, all of which are based upon work performed by the subcontractor H. W. Caldwell & Son, Inc. In addition, the contractor has requested an "extension of time sufficient to release the withheld liquidated damages, for the reasons stated" by such subcontractor.⁷

The foregoing comparison discloses that two contracts for substantially the same type of construction were awarded to the contractor on the same day; that the dates for actual commencement and completion of the work under the two contracts varied from only 2 to 5 weeks; that both contracts involve Natchez Trace Parkway projects; that the work was performed in the same State utilizing the services of the same subcontractor; and that except for the engineers assigned to the particular project, the same Government personnel appear to have administered both projects.⁸

According to appellant's counsel there are 21 persons who are potential witnesses for the appellant at the hearing requested on the consolidated appeals. Of this number, some 16 reside in the Jackson,

⁵ Findings of Fact and Decision of the Contracting Officer dated October 24, 1969 (Appeal File, IBCA 814-12-69); Appellant's Complaint, pp. 4, 5.

⁶ Appellant's Complaint refers to the project as totaling 3.049 miles in length.

⁷ Findings of Fact and Decision of the Contracting Officer dated October 29, 1969. See also contractor's letter of March 19, 1968 (Claim Letters and Collateral Correspondence, Appeal File Volume II, IBCA-815-12-69.) According to Appellant's Complaint the liquidated damages assessed are in the amount of \$13,600.

⁸ E.g., on both projects the notice to proceed letter was dated July 30, 1963, and was signed by R. R. Hair, Highway Engineer on behalf of G. A. Wilkins, Regional Engineer. (See Correspondence to the Contractor; Appeal Files, IBCA-814-12-69 and IBCA-815-12-69.)

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Mississippi, area with the remaining five, residing in areas to which Jackson is more convenient than is Washington, D.C.⁹ As to Government representatives who may be called upon to testify at the hearing, appellant's counsel states: "There are three former Government project engineers and inspectors who now reside in the Jackson area. Another Government inspector and the Government's office engineer also reside in the Jackson area. In addition, one of the Government engineers resides in Florence, Alabama, to which Jackson is more convenient than Washington."¹⁰ These assertions by appellant's counsel have not been controverted by the Government. The arguments advanced by the Government in support of its position that the hearing should be held in Washington, D.C.¹¹ are not regarded as sufficient to outweigh the uncontested fact that all of appellant's prospective witnesses—and a number of prospective witnesses for the Government as well—either reside in the Jackson area or in relative proximity thereto.¹² We find, therefore, that the appellant has made a compelling case for holding the hearings required in Jackson, Mississippi.

The question of a separate hearing for IBCA-814-12-69 limited to the issues of whether timely notice of the claim for extra work was given, and, if not, whether the Government was prejudiced thereby, is somewhat more troublesome. It is quite true that if a hearing were held limited to these issues and if subsequently a decision were rendered adverse to the interests of the appellant,¹³ there would be no reason to go into the merits of the claims asserted in IBCA-814-12-69. We cannot assume in advance, of course, that the limited hearing requested by the Government would result in a decision adverse to the appellant. If at the special hearing it were to be shown either that timely notice of its claims was given or that the Government was not prejudiced by the absence of timely notice, then all would have been

⁹ Letter to the Board of April 20, 1970. These five witnesses include (i) the subcontractor's president and grade foreman who reside in Nashville, Tennessee (ii) an equipment operator who resides in Central Alabama, and (iii) two other contractors who may be called as expert witnesses who reside in North Central Mississippi and Memphis, Tennessee, respectively.

¹⁰ Note 9, *supra*, p. 2.

¹¹ Note 2, *supra*.

¹² In the absence of a showing of hardship or special circumstances, we have always viewed the convenience to prospective witnesses as the principal consideration in determining the location of the hearing. We have attached comparatively little weight, therefore, to the fact (i) that the attorneys representing the Government are headquartered in Washington (ii) that the Board is located here, and (iii) that appellant's counsel is not located in the Jackson area. (See Government's memorandum of April 6, 1970).

¹³ "The disposition of this preliminary matter may well be dispositive of the case itself and obviate the additional expenditure of funds by both parties. * * *" (Government's Special Answer of February 27, 1970, p. 2).

seriously inconvenienced by the additional hearing and the attendant delay and expense.

We recognize, of course, that the considerations of the nature mentioned will always be present to some extent where one party or the other has requested a hearing limited in scope prior to the hearing on the merits. In the particular case with which we are concerned, however, it does not appear that hearing all issues involved in IBCA-814-12-69 will require the expenditure of an inordinate amount of effort or time. Insofar as the record discloses, the issues involved in hearing the case on the merits are relatively simple.¹⁴ They will be narrowed in advance of hearing by the proposed interrogatories filed with the Board on April 17, 1970, which the appellant is being directed to answer.¹⁵ The denial of the Government's request for a separate hearing on the question of timeliness of the claims presented in IBCA-814-12-69 is not to be regarded as any intimation of the decision the Board may ultimately reach with respect to these matters on the basis of a complete record.¹⁶

Conclusion

1. The Government's request for a separate hearing on the question of timeliness as it relates to IBCA-814-12-69 is denied.¹⁷
2. The appellant's requests to consolidate the claims involved in IBCA-814-12-69 and IBCA-815-12-69 for the purpose of hearing and to have the hearing on such appeals held in Jackson, Mississippi, are granted.
3. Within 20 days from the date of receipt of this decision, the appellant is directed to answer the interrogatories with respect to the question of timeliness of notice of the claims asserted under IBCA-

¹⁴ As appellant's counsel views the case the issues involved in IBCA-814-12-69 are: "1. Did the Government require the Contractor to grade to a one-fourth inch tolerance in the areas which were to receive topping material? 2. If so, was a one-fourth inch tolerance required under the contract or was it extra work? 3. Did the Government receive untimely notice of this claim and if so, was the Government prejudiced thereby?" (Letter to the Board of April 20, 1970, pp. 2, 3).

¹⁵ While the letter transmitting the proposed interrogatories indicates that they were submitted in anticipation of the Government's request for a separate hearing on the timeliness question being granted, the information sought in the interrogatories is equally germane to a hearing in which the question of the timeliness of the claims asserted in IBCA-814-12-69 will be only one of the issues to be resolved.

¹⁶ See *Meva Corporation*, IBCA-648-6-67 (August 18, 1969), 76 I.D. 205, 229-30, 69-2 BCA par. 7828, at 36,433-434 for a discussion of some of the cases in which timeliness of notice has been an issue.

¹⁷ *J. W. Bateson Company, Inc.*, VACAB No. 737 (October 4, 1968), 68-2 BCA par. 7279 ("* * * we will not limit the decision at this time by predetermining that we will not consider any evidence which we may find adequate to dispose of any issue raised by the appeal, and will make such a determination only after the record is closed. At that time, if the evidence is found adequate to dispose of the notice issue, entitlement on the merits, and any amounts which may be due, we will dispose of those issues. * * *").

814-12-69 which interrogatories were forwarded to appellant's counsel on or about April 17, 1970.

4. The Government is given 20 days from the date of receipt of this decision to supplement its Special Answer by addressing itself to the merits of the claims asserted by the appellant in its complaint pertaining to IBCA-814-12-69.

WILLIAM F. McGRAW, *Chairman.*

I CONCUR:

SHERMAN P. KIMBALL, *Member.*

UNITED STATES
v.
J. R. OSBORNE ET AL.

A-31030

Decided May 26, 1970

Mining Claims: Discovery: Marketability—Mining Claims: Common Varieties of Minerals: Generally

To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date; and where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim as of that date, the fact that the material on the claim is sufficient both as to quantity and quality, as is the abundant supply of similar material found in the area, and the fact that 11,607 yards of material were taken from the claim free of charge by two construction companies in 1961 for use as fill in the construction of a road in 1961, are insufficient to show that material from this particular claim could have been profitably removed and marketed on July 23, 1955, and the claim is properly declared null and void.

Mining Claims: Discovery: Marketability

To satisfy the requirement that deposits of minerals of widespread occurrence be "marketable" it is not enough that they are only theoretically 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: Contests—Mining Claims: Determination of Validity

Where a contest is brought against a mining claim on the ground of lack of discovery, after the Government has made a *prima facie* showing that there has not been a discovery, the burden of proof is upon the contestants to show by a preponderance of the evidence that a discovery has been made.

Mining Claims: Discovery: Marketability—Mining Claims: Location

To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.

Mining Claims: Discovery: Marketability

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 the deposit could have been extracted, removed, and marketed at a profit as of that date and not as of some prospective date and where claimants fail to make that showing the claim is properly declared null and void.

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.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

J. R. Osborne and others have appealed from a decision dated July 11, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of a hearing examiner dated August 3, 1965, declaring the Bradford No. 4 placer mining claim (hereinafter referred to as the No. 4 claim) invalid for the reason that the charges listed in a contest complaint against the claim were sustained by the evidence presented at the hearing.¹ The charges were:

1. Minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.
2. No discovery of valuable minerals has been made within the limits of the claim because the mineral material present cannot be marketed at a profit and it has not been shown that there existed an actual market for these materials prior to July 23, 1955—Public Law 167 (69 Stat. 367; 30 U.S.C., 1958 ed., sec. 601).

The No. 4 claim is in the Las Vegas Valley in Clark County, Nevada. It is 12½ air miles south of the center of the City of Las Vegas, Nevada

¹ Named as contestants in the complaint were: "J. R. Osborne, Agent for: R. B. Borders, Phyllis M. Borders, F. H. Rushton, A. F. Mauer, J. R. Osborne, L. D. Holberg, Everett Foster."

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(1964 Tr. 23).² The claim covers the SW $\frac{1}{4}$ sec. 32, T. 22 S., R. 61 E., M.D.M. (Ex. 6). It is composed almost exclusively of a common variety type of sand and gravel (1964 Tr. 41), as is the rest of section 32 (1964 Tr. 100), the area surrounding section 32 (1954 Tr. 71), and the Las Vegas Valley generally (1954 Tr. 49, 70). At the present time Interstate Highway No. 15 (which runs into the center of Las Vegas) runs north-south along the east boundary of the claim; a paved road, called the Industrial Road runs north-south through approximately the center of the east half of the claim; and a network of dirt roads covers the claim (Ex. 7).

The No. 4 claim was located on June 25, 1952, and three related claims, the Bradford Nos. 1, 2, and 3 placer claims (hereinafter referred to as the Nos. 1, 2, and 3 claims) were located on June 23, 1952. The four claims covered all of section 32. The No. 1 covered the NE $\frac{1}{4}$, the No. 2 the SE $\frac{1}{4}$ and the No. 3 the NW $\frac{1}{4}$. Each of the claims was located by eight claimants. Four persons, R. B. Borders, Phyllis M. Borders, Richard R. Strawn ("R. R. Strawn" on the No. 4 location notice)³ and J. R. Osborne were common locators of each of the four claims. The Nos. 1, 2, and 3 claims were also located for the common type sand and gravel which is just like that on the No. 4 claim (1964 Tr. 100). Highway No. 91 runs north-south along the east boundary of the Nos. 1 and 2 claims. This highway, which was constructed prior to 1953 (1964 Tr. 91-92), runs into the center of Las Vegas (Ex. A, 7).

On June 10, 1953, a contest complaint was filed against the No. 4 claim. The contestants duly filed an answer and requested a hearing, but subsequently, on October 4, 1954, the complaint was amended by the Government.

On April 1, 1957, the land office found that the contestants had failed to answer the charges set forth in the amended complaint and held that such failure constituted an admission of all charges and accordingly declared the No. 4 claim, as described in the amended complaint, null and void. The claimants appealed to the Director of the Bureau of Land Management, who, on August 25, 1958, for reasons not here pertinent, set aside the default decision and remanded the matter to the State Supervisor with instructions to proceed anew by issuing a new complaint. *United States v. R. B. Borders et al.*, Nevada Contest Nos. 2468, 2469.

² There are two complete transcripts in the record. Exhibit C is the complete transcript of an old hearing held in 1954 on a related contest. That case is explained *infra*. Exhibit C will hereinafter be referred to as "1954 Tr." The transcript of the hearing held on July 18, 1964, in the present case will be referred to as "1964 Tr." Exhibit references ("Ex.") are only to exhibits submitted at the 1964 hearing.

³ R. R. Strawn was not named as a contestant in the complaint. See footnote 1 *supra*.

On April 7, 1961, the complaint which initiated the present contest was filed in accordance with the remand. The contestants filed an answer denying the charges and a hearing was held on July 13, 1964. Before examining the evidence and the law applicable to this case a few words about certain related proceedings are in order.

At approximately the same time the original complaint was filed against the No. 4 claim, contests were instituted on July 10, 1953, against the Nos. 1, 2, and 3 charging that the claims were void for lack of a valid discovery and also void because the claims were nonmineral in character. Answers were filed, and a consolidated hearing was held on November 30, December 1, and December 2, 1954.

Meanwhile, in June 1954, the claimants filed an application for patent, Nevada 025248, on the four claims (Ex. E). Publication of notice of the application for patent, commencing January 26, 1955, led to the filing of an adverse claim for the parts of the Nos. 1 and 2 claims included in the E $\frac{1}{2}$ E $\frac{1}{2}$ sec. 32. The adverse claimants instituted a suit in a State court, which, on March 8, 1959, adjudged the adverse claimants to be the owners of the E $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 32 and the claimants to be the owners of the E $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 32.

Meanwhile, on April 1, 1955, J. R. Osborne, agent for the locators, filed proof of publication of the notice of patent application, and on April 4, 1955, the claimants paid \$1,600 to the Bureau of Land Management as the statutory purchase price for the four claims.

On April 7, 1955, the hearing examiner who heard the evidence as to the Nos. 1, 2, and 3 claims rendered his decision. First, he declared the No. 3 and the NW $\frac{1}{4}$ of the No. 1 claims to be void *ab initio* upon the ground that those areas were not open to mining location at the time claimants located the claims because of, *inter alia*, outstanding oil and gas leases. This ruling was affirmed throughout all subsequent appeals and reviews. *United States v. R. B. Borders et al.*, A-27493 (May 16, 1958); *Osborne v. Hammit*, Civil No. 414, in the United States District Court for the District of Nevada, August 19, 1964. Second, he declared that the No. 2 and the remaining three-fourths of No. 1 were valid claims under the established rules governing proof of discovery of valuable nonmetallic minerals.

The hearing examiner's decision was appealed to the Director of the Bureau of Land Management who suspended review of the second part of the hearing examiner's decision pending the outcome of the adverse suit in the State court. Thereafter the Director by a decision dated July 27, 1960, reversed the second part of the hearing examiner's decision. The Director ruled that "since the sand and gravel from these claims cannot be extracted, removed and presently marketed at a

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profit, the Bradford Nos. 1 and 2 Placer Mining Claims are null and void in their entireties. The Examiner's decision is reversed and mineral patent application Nevada 025248 is rejected." *United States v. R. B. Borders, etc.*, Nevada Contest Nos. 2476, 2478.

On October 23, 1961, the Director's decision was affirmed by the Department. *United States v. R. B. Borders et al.*, A-28624 (October 23, 1961). The Department said:

The evidence upon which the Director based his finding that the claims are without validity, set forth in the Director's decision, fully supports his finding. The locators of these two claims have not met the test of showing that these minerals of wide occurrence, because of the accessibility of the deposits, *bona fides* in development, proximity to market, and the existence of a present demand for the sand and gravel can be mined, removed, and disposed of at a profit. Without such a showing on the part of the locators, it was proper for the Director to declare the claims to be null and void. *Foster v. Seaton*, 271 F. 2d 836 (1959).

On August 19, 1964, the Department's decision was affirmed by the U.S. District Court. *Osborne v. Hammit*, *supra*. The District Court pointed out that the findings of the hearing examiner were premised upon the false notion that the burden was on the Government to sustain the invalidity of the claims. This decision was not appealed so it and the Department's decision of May 16, 1958 (*United States v. R. B. Borders et al.*, A-27493), which also was not appealed, are the final words on the validity of the Nos. 1, 2, and 3 claims.

At the hearing on July 13, 1964, the claimants presented as evidence, *inter alia*, Exhibit C, which is the entire 327-page transcript of the hearing held in 1954 on the validity of the Nos. 1, 2, and 3 claims (1964 Tr. 67). See footnote 2, *supra*.

The facts of this case as revealed by the evidence presented by both sides are generally not disputed; the dispute is largely over the legal effect which is to result from those facts.

The basic principles of law applicable to this case are now well-established and need no extensive elaboration. For a mining claim to be valid there must be discovered on the claim a valuable mineral deposit. A discovery exists

* * * [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 * * *. *Castle v. Womble*, 19 L.D. 455, 457 (1894); *United States v. Coleman*, 390 U.S. 599 (1968).

This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed, and presently marketed at a profit, the so-called marketability test. *United*

States v. Coleman, supra. This present 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. The marketability test has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. *Palmer v. Dredge Corporation*, 398 F. 2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959); *Osborne v. Hammit, supra*.

Furthermore, since Congress withdrew common varieties of sand and gravel from location under the mining laws on July 23, 1955 (30 U.S.C. sec. 611 (1964)), it is incumbent upon one who located a claim prior to that date for a common variety of sand and gravel to show that all the requirements for a discovery, including a showing that the materials could have been extracted, removed, and marketed at a profit, had been met by that date. *Palmer v. Dredge Corporation, supra; United States v. Barrows*, 404 F. 2d 749 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969).

There is no contention here that the No. 4 claim has an uncommon variety of sand and gravel and the evidence shows that it is ordinary (1964 Tr. 41-44). We therefore turn to a consideration of the evidence bearing on the marketability of the sand and gravel on the No. 4 as of July 23, 1955.

The evidence presented at the 1954 hearing (Exhibit C) showed that the material in section 32 is like that found on 100 to 175 other sections in the Las Vegas Valley (1954 Tr. 69, 84-85). The Las Vegas Valley or area is defined as the land within "roughly a radius of 15 miles from the center of Las Vegas" (1954 Tr. 51). There were 800 to 1,000 mining claims in this Las Vegas area spread over an area of 150 to 175 sections (1954 Tr. 66-67) and with 1 or 2 possible exceptions the 800 to 1,000 claims were located exclusively for sand and gravel (1954 Tr. 50). 75 percent of the Las Vegas area is estimated to be sand and gravel land (1954 Tr. 70). In short the Las Vegas area has an unlimited supply of sand and gravel of the type found in section 32 (1954 Tr. 67, 244). For example, one section of material 3 feet deep could have supplied the 1953-1954 level of demand for Las Vegas sand and gravel for approximately 3 years (1954 Tr. 80-81). Section 32 has material perhaps 15 feet deep (1964 Tr. 76). Thus at the time not more than 1 percent of the available sand and gravel in the Las Vegas area could have fully supplied the demand for all of the years in the reasonably foreseeable future (1954 Tr. 79-81).

As of 1954, the only uses that had been made of material from the Nos. 1, 2, and 3 claims were as follows:

1. Approximately 250 yards of material were sold for use as fill in 1952 to a person constructing a trailer court and motel $2\frac{1}{2}$ miles north of section 32 (1954 Tr. 176, 184, 186, 205).
2. The State took approximately 40,000 yards of material without charge from a pit on the No. 2 claim at various times between approximately 1926 and approximately 1951 for use in resurfacing and rebuilding Highway No. 91 (1954 Tr. 177, 230).

In the years 1953 and 1954 there was apparently no production from the Nos. 1, 2, and 3 claims and the market for Las Vegas Valley sand and gravel appeared to be adequately supplied by then active claims and producers (1954 Tr. 84, 121, 293). Some of the active claims were located close to section 32 and contained deposits "practically identical" with the material found in section 32 (1954 Tr. 215-216).

Because of these facts, William L. Shafer, a Government mining engineer, testified at the 1954 hearing that, based on his inspection of the claims and his knowledge of the sand and gravel market in the area, it was his opinion that the sand and gravel on the Nos. 1, 2, and 3 could not be extracted, removed, and marketed at a profit (1954 Tr. 83-84).

There was no showing at the 1954 hearing of any real attempt by the claimants to develop the claims into a commercial enterprise. Several witnesses for the claimants merely testified that in their opinion it would be profitable to operate the claims at a profit (1954 Tr. 182, 224-225, 233-234, 285-287).

In declaring that the three claims were properly held void the U.S. District Court in *Osborne v. Hammit, supra*, said:

* * * If we were to judge the case solely on the basis of the conflicting evidence bearing upon the theoretical marketability of the sand and gravel from the Bradford Claims, we would be inclined to agree with the Hearings Officer rather than the Secretary inasmuch as the government witness, William L. Shafer, although well qualified as a mining engineer, had few, if any qualifications in experience and knowledge to testify concerning the market for the material in the Las Vegas area, and the costs of extraction and processing. But the record discloses a situation where, if the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied upon by the plaintiffs, each of the claims in the valley comprising over 100,000 acres might be separately validated on the same sort of theoretical evidence. The end result would be that 100,000 acres of public lands would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably foreseeable future.

The mining laws of the United States are quite benifcent [sic]. A prospector may occupy public lands and mine and remove materials therefrom for his personal profit by his own ex parte action, without so much as a "by-your-leave" from any person or public official. If the locations of the Bradford sand and gravel claims were made in good faith under a genuine belief of the present profitable marketability of the product, there is no reason why plaintiffs should not have commenced the removal and processing of the material in 1952 and continued the profitable enterprise through 1954, when the hearing was held. If they had done so, their claims would, perforce of law, have been sustained. Their failure to do so beclouds the reliability and evidentiary weight of the case presented by them.

We do not discount the value of opinion evidence from qualified witnesses in cases dealing with fairly unique deposits of locatable minerals. This case is different. Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of *credible* evidence, and the trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June 1952, owners of other claims near Las Vegas had commenced to produce and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the Las Vegas market, rendering the Bradford Claims valueless. The plaintiffs failed to enter the race to supply the theoretical insufficiency of production of sand and gravel. If they had done so successfully, they would have satisfied the requirements of *Foster v. Seaton* (*supra*) by proving bona fides of development and present demand. Their failure so to act contradicts the speculative, hypothetical and theoretical testimony on which they rely.

Is there anything more than "speculative, hypothetical and theoretical" evidence which would warrant a more favorable conclusion with respect to the No. 4 claim than with respect to the Nos. 1, 2, and 3 claims? We think not.

The evidence at the 1964 hearing showed that nothing had been removed from the No. 4 claim as of that date except approximately 11,607 yards of material which two construction companies had removed from a pit in the southeast corner of the claim in 1961 for use as fill in the building of Interstate 15 (1964 Tr. 44, 46-48; Ex. 7). Apparently the material was taken without charge for there were no indications that anything had ever been sold from the claims (1964 Tr. 107, 114, 121, 123). Other than for the pit left by the removal of this material the only other evidence of any working on the claims consisted of six bulldozer cuts, twenty-two back-hoe trenches (1964 Tr. 25; Ex. 7), and some dirt road work (1964 Tr. 48, Ex. 7). The material from the cuts and trenches was apparently not removed from the claim (1964 Tr. 46-48) and these diggings appeared to be the result of exploratory or assessment work and not the result of any attempt to develop the claims (1964 Tr. 116).

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The free taking of the 11,607 yards of material in 1961 would obviously not show that the material on the claim was marketable at a profit as of July 23, 1955, six years earlier. This is evident from the fact that the "market" for that material, construction of the highway, did not materialize until 1961 and was a short-lived one.

The evidence at the 1964 hearing indicated that the demand for sand and gravel in the Las Vegas area has increased between 1950 and 1963 along with the population and other growth factors of Las Vegas (1964 Tr. 84-86; Ex. D) and that the supply available has perhaps decreased somewhat (1964 Tr. 88-90, 95, 104; Ex. B). But there was no suggestion that as of July 23, 1955, or even as late as 1964, the supply did not still vastly exceed demand or that the demand was not still being fully satisfied by the then active producers and claims. In fact despite the long term increase in demand between 1950 and 1963 it would appear that the demand for sand and gravel was no more, if not less, in 1955 and 1956 than in 1954 (1964 Tr. 83).

The claimants called as witnesses George C. Monahan, the Clark County Engineer for the past 13 years (1964 Tr. 97); Pat R. Cosgrove, the manager of a ready-mix concrete plant (1964 Tr. 108); John R. Osborne, one of the claimants (1964 Tr. 113); and Lloyd G. Fields, a map maker (1964 Tr. 93).

Monahan and Osborne testified that as of July 23, 1955, and as of 1964, there was a *general* demand in the Las Vegas area for sand and gravel of the type found on and in the general area of the No. 4 claim (1964 Tr. 99, 101-103, 107, 117-118). This testimony was insufficient to show a discovery because to satisfy the present marketability test the claimants must show the existence of a demand for the material on the specific claim and not simply a general demand for the type of material in question. *United States v. Harold Ladd Pierce*, 75 I.D. 270 (1968); *United States v. Everett Foster et al.*, 65 I.D. 1 (1958), *aff'd Foster v. Seaton, supra*; *United States v. Loyd Ramstad and Edith Ramstad*, A-30351 (September 24, 1965).

The claimants suggest by their evidence that since a large mining operation has been in existence on section 29, about 1 mile north of the No. 4 claim, sporadically since 1954 or 1955 (1964 Tr. 73, 76; Ex. L, K) and since the quality and quantity of the material in section 29 is similar to the material in section 32 (1964 Tr. 75-76), it follows that if the claimants had entered the business in 1955 (or 1964) they would have done as well. In connection with this evidence Monahan and Osborne testified that it was their opinion that the material on the claim could have been mined, removed, and marketed at a profit as of July 23, 1955 (1964 Tr. 103-104, 120), and Cosgrove and Osborne

testified that it was their opinion that this could be done at the time of the hearing (1964 Tr. 111, 120).

This is the same type of theoretical evidence which the court in *Osborne v. Hammit*, *supra*, found to be insufficient to satisfy the marketability test as to the Nos. 1, 2, and 3 claims. Thus this evidence must be rejected for the same reasons given there. See the further discussion of *Osborne v. Hammit* in *United States v. Loyd Ramstad and Edith Ramstad*, *supra*⁴, and *United States v. Keith J. Humphries*, A-30239 (April 16, 1965).

Obviously the claimants have failed to show that by reason of present demand, *bona fides* in development, proximity to market and accessibility and other factors that the deposit on the No. 4 claim was of such value that it could have been mined, removed, and disposed of at a profit as of July 23, 1955.⁵ Nevertheless, appellants argue on this appeal that the No. 4 claim should not be declared void for a number of reasons.

First they argue that the burden of proof, *i.e.* the risk of non-persuasion, as well as the burden of presenting enough evidence to make a *prima facie* case in the proceeding, was upon the contestant and that the contestant failed to prove by a preponderance of the evidence that the claims were invalid for lack of a discovery.

There is no merit to this contention, for it is well established that:

* * * when the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a *prima facie* case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. * * * *Foster v. Seaton*, *supra*, at 838.

⁴ We note also that the two sand and gravel claims held to be invalid in *Foster v. Seaton* were located in the E 1/2 NE 1/4 sec. 29 and that Monahan also testified in that case that the gravel on those claims was very good for road purposes. 65 I.D. 10-11.

⁵ Throughout this case we have referred to July 23, 1955, as the cut-off date as of which a discovery must be shown. Actually, the critical date appears to be October 2, 1953, at the earliest or January 15, 1955, at the latest. On the latter date there was published a regulation which provided that a classification under the Small Tract Act, 43 U.S.C. § 682a *et seq.* (1964), would segregate the land classified from all appropriations, including locations under the mining laws (43 CFR 257.3(b), 20 F.R. 336; now 43 CFR 2233.2(b)). On the earlier date there was issued Classification Order No. 95, published on October 8, 1953, 18 F.R. 6412, which classified the land in appellants' claims for small tract disposal (Ex. 5). In *Osborne v. Hammit*, *supra*, the court held that Order No. 95 was in effect a withdrawal of land which invalidated *ab initio* any mining claim located after the classification order, including one located prior to the adoption of the regulation. See also *Dredge Corp. v. Penny*, 362 F. 2d 889 (9th Cir. 1966). Under the *Osborne* ruling appellants would have to show that the material from their claims was marketable at a profit as of October 2, 1953. At the latest the showing would have to be made as of January 15, 1955, the date of publication of the regulation spelling out the effect of a small tract classification.

We do not, however, rest our decision on appellants' failure to make the required showing as of either date since it is clear that they failed to make the showing even as of July 23, 1955.

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Appellants do not cite this case in their argument on this point, although they cite it in other contexts.

Next appellants argue that section 3 of the act of July 23, 1955, as amended, 30 U.S.C. sec. 611 (1964) which reads

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 *hereinafter located* * * *. (emphasis added)

does not apply to these claims since the claims were "located," in the sense of being staked or posted, in 1929. Therefore they contend it is not essential to the validity of these claims that a discovery (including marketability) be shown on the claims prior to July 23, 1955. To hold that it *is* essential, they argue, is to give retrospective effect to a statute that contains no retrospective language.

As indicated earlier, the courts have ruled to the contrary. *United States v. Barrows, supra; Palmer v. Dredge Corp., supra* (affirming *Clear Gravel Enterprises, Inc.*, A-27967, A-27970 (December 29, 1959) where the issue is fully discussed).

Next appellants argue that since the Supreme Court decision in *United States v. Coleman, supra*, does not specifically mention "July 23, 1955," it is not authority for the proposition that the locator of claims containing a common variety of material must show that the material was marketable as of July 23, 1955. Moreover, appellants say that this case is authority for the proposition that such a locator need only show marketability as of the date of the contest hearing in order to validate his claim.

This argument is without merit. The Supreme Court in that case necessarily reviewed and affirmed a decision of the Secretary of the Interior (*United States v. Alfred Coleman, supra*) which stated that "the only issue in dispute at the hearing * * * was the existence of a market for profitable sales before July 23, 1955" and which held that the claims there involved were void because the mining claimant had failed to show that the common variety deposit, upon which his claim of discovery was based, could be mined, removed, and disposed of at a profit as of July 23, 1955.

Next appellants argue that it is wrong to interpret the pertinent mining statute (30 U.S.C. sec. 22 (1964)) as requiring a demonstration of present value or marketability. They contend that their claims can be sustained on the basis of prospective market value (which they contend they have shown). This argument was heard and dismissed in *Foster v. Seaton, supra*, where it was said:

Appellants' principal assignment of error is that the Secretary misinterpreted the statute by requiring a demonstration of present value. They earnestly contend that their claim can also be sustained on the basis of prospective market value.

* * * *

* * * The Government's expert witness testified that Las Vegas valley is almost entirely composed of sand and gravel of similar grade and quality. To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development. (P. 838.)

The present marketability test has been approved by the Supreme Court in *United States v. Coleman, supra*. See also *Palmer v. Dredge Corporation, supra*, which sustained Departmental decisions holding invalid 28 sand and gravel claims lying within 5 to 8 miles west of Las Vegas for a lack of showing of marketability at a profit as of July 23, 1955.

Claimants say that there is no requirement that to validate a mining claim a claimant must prove *certainty* of profit or *certainty* of future sales or actual sales. We agree. *United States v. Harold Ladd Pierce, supra*, at 283 and cases cited. Then claimants say that to require a showing of present marketability as opposed to prospective marketability is to require a showing of certainty of profit or certainty of future sales or actual sales and is, therefore, wrong. Accordingly, they say it must be considered sufficient to validate a claim merely to show prospective marketability.

The short answer to this argument is that the second premise is wrong. To require a showing of present marketability is merely to require a showing that profitable sales *could* presently be made, in a practical as opposed to a theoretical sense, from the claim and is not to require certainty of sales or certainty of profit or actual sales. *United States v. Harold Ladd Pierce, id.*

Next claimants argue that

The Department of Interior and its Secretary are estopped from denying the validity of the Bradford No. 4 placer mining claim here at issue, as locators have duly made application for and have paid the requisite fees for the issuance of a mineral patent thereon in patent application Nevada 025248, and said application was accepted and the fees have been retained by said Department since its filing date in April of 1955.

The short answer to this contention was given by the U.S. District Court in *Osborne v. Hammit, supra*, in answer to the very same argument advanced as to the Bradford Nos. 1, 2, and 3. The Court said:

* * * Plaintiffs argue that the publication of the application for patent and the acceptance of the money vested equitable title in plaintiffs as against the govern-

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ment, and in effect, compelled the issuance of a patent after other formal procedural requirements had been fulfilled. This is not the law. *Adams v. United States* (9 CCA 1963, 318 F. 2d 861). *Cameron v. United States*, 252 U.S. 450. Plaintiffs acquired no vested title, either legal or equitable, to the mining claims by virtue of the ordered publication in the patent proceedings and the provisional acceptance of the purchase price.

Fundamentally, there is no inconsistency in the public land regulations between the procedure to obtain a mining patent (43 C.F.R. Part 185, subpart D), and the general regulations governing government contests (43 C.F.R. Part 221: 221.67, et seq.). * * *

Next claimants argue that the Government is estopped to use the failure of the claimants to develop the claims as a basis for saying the claim is void because the Government "barred" the claimants from developing the claims, first by bringing a contest against the claim and maintaining the litigation for so long a time and perhaps second by sending a letter to the claimants in March 1962, which stated that if the claim is invalid "your removal of sand and gravel will be considered a willful trespass and damages will be assessed accordingly." (Ex. F.)

The short answer to this argument is that neither the letter nor the issuance of the contest complaint nor the litigation proceedings in general could per se and without more in any legal or physical way prevent the claimants from developing the claim at any time they chose to do so. The first contest complaint against the claim was filed on June 10, 1953, almost one year after the location of the claim on June 25, 1952. Thus appellants had almost an entire year in which to develop the claim and establish the existence of a discovery. Even after the complaint was filed, they could have proceeded with development, although it might have been attended with some risk. But one who locates a mining claim before making a discovery must assume the risk of a challenge to the validity of his claim, for the law does not give him a period of time after location in which to make a discovery.

As for the receipt of the letter in 1962, it could in no way have affected the decision of the claimants in regard to their developing the claim as of July 23, 1955.

Finally, appellants say that even if marketability as of July 23, 1955, is a proper standard for judging the validity of these claims, they were not given adequate notice that the claims were being contested on that basis. Therefore, they argue, if the case is going to be decided on the basis of that standard then due process of law would require a reopening of the case to allow them to present proof on that issue.

At first it is difficult to see how the appellants can make such an argument in view of the fact that the complaint said, and the appellants at page 18 of their statement of reasons for this appeal admit it said, that "it has not been shown that there existed an actual market for these materials prior to July 23, 1955." Apparently appellants say they are or were confused by the word "shown." Appellants say they interpret the complaint as charging that prior to the filing of the complaint, that is, prior to July 23, 1955, the claimants did not present evidence to someone somewhere at sometime showing that the material on the claim was marketable as of or before July 23, 1955, and appellants complain that they were not given an opportunity to appear at any such pre-complaint hearing.

Obviously the complaint was never intended to have the meaning which the claimants say they attribute to it and the claim was not declared void by the hearing examiner or the Chief, Office of Appeals and Hearings, for such a reason.

It would appear that claimants were aware of the true meaning of the words just quoted from the complaint at the time of the hearing or that they were aware that the true meaning was important to the resolution of the case, for they examined (1964 Tr. 102, 103-104, 120) and cross-examined (1964 Tr. 76, 81-82) witnesses extensively in relation to it.

Under these circumstances the appellants' contention is without merit. 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. *United States v. Harold Ladd Pierce, 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.

MARY D. STEVENS

May 26, 1970

UNITED STATES

v.

CLARENCE T. STEVENS AND MARY D. STEVENS

A-31088

Decided May 26, 1970

Mining Claims: Discovery: Generally—Mining Claims: Common Varieties of Minerals: Generally

There has been no discovery under the mining laws of a valuable deposit of silica and wollastonite where they are constituents of a quartzite building stone and cannot be economically mined, separated, and sold for other industrial or commercial purposes; and where the building stone of which they are a part has no unique property which gives it a special and distinct value for building stone above that of other common varieties of stone, mining claims for such material are subject to the act of July 23, 1955.

Mining Claims: Contests—Mining Claims: Hearings

Where a hearing examiner's decision that a mining claim was validated by a discovery of a valuable building stone deposit marketable prior to and subsequent to the act of July 23, 1955, is not supported by a preponderance of the evidence, the decision must be overturned in that respect and the claim declared invalid.

Mining Claims: Lode Claims—Mining Claims: Placer Claims

Lode claims cannot validly be located for deposits of quartzite building stone which under the act of August 4, 1892, can be located only as placer claims.

Mining Claims: Discovery: Generally

Evidence which shows only that further prospecting should be undertaken to determine the presence of uranium in mining claims fails to meet the test of discovery of a valuable mineral deposit under the mining laws, which, at the least, requires that sufficient mineralization be shown to warrant a prudent man in expending further time and money with the expectation of developing a profitable mine.

Mining Claims: Hearings—Rules of Practice: Hearings

A request for a further hearing in a mining claim contest will be denied where the Forest Service objects, the contestants fail to show any equitable basis for holding a further hearing, they fail to make a tender of proof which would tend to establish a valid discovery, and it appears that the request is simply for additional time to prospect and attempt to make a discovery of a valuable mineral deposit.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Clarence T. Stevens and Mary D. Stevens have appealed to the Secretary of the Interior from a decision by the Chief, Branch of

Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated October 23, 1968, which affirmed a hearing examiner's decision of July 25, 1967, declaring the Slab Sugar Granite Nos. 2 through 9, inclusive, lode mining claims to be invalid for lack of a discovery of a valuable mineral deposit. The decision also denied a request for a further hearing.

These claims are within the Payette National Forest in Valley County, Idaho, and lie in sections 15, 22, 26, 27 and 35, T. 19 N., R. 4 E., Boise Meridian. At the request of the Forest Service, United States Department of Agriculture, a contest complaint was served upon Mr. and Mrs. Stevens listing these claims and also the Slab Sugar Granite Lode (also referred to as the Slab Sugar Granite No. 1 during these proceedings, see Transcript 10) and the Slab Silica.¹ The complaint charged that the land within the claims is nonmineral in character, that mineral in place in sufficient quantity within the limits of the claims to sustain a valid discovery had not been demonstrated, and that no discovery of a valuable mineral has been made within the claims because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for the materials.

In their answer to the complaint, Mr. and Mrs. Stevens denied the charges and alleged that the claims contain valuable mineral deposits carrying a high percentage of silica, which then and since locating the claims could be mined and marketed at a profit and which were not common varieties but had special properties making them commercially valuable for use in building construction and other manufacturing, industrial and processing operations. They also alleged that the claims contained valuable deposits of uranium.

A hearing was held on October 12, 1966, at which time each party presented evidence. The hearing examiner found the Slab Sugar Granite Lode claim (No. 1) to be valid on the ground that excavation work had been done on the claim and building stone had been removed and sold at a profit from a large pit on the claim both prior and

¹ The complaint also listed Frances L. Greaves as a contestee. At the hearing it appeared that the only interest of Frances L. Greaves was in the Slab Silica claim in which Mr. and Mrs. Stevens had no interest. As no answer was filed pertaining to the Slab Silica claim and Frances L. Greaves did not appear at the hearing, the hearing examiner in his decision ruled that the allegations of the complaint were admitted as to that claim and it was declared invalid. Although appellants' attorney has listed this claim as one involved in the appeal, it is not involved and evidence presented at the hearing as to that claim was admitted only to the extent that the conditions on that claim related to the other claims.

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subsequent to July 23, 1955.² However, he found that there had been insufficient exploration work done on the other claims to establish the quantity and quality of material necessary to constitute a valuable mineral deposit. He also found that there was insufficient evidence to establish a discovery of a valuable deposit of uranium within the claims. By an earlier decision of November 22, 1966, the hearing examiner had denied a motion to reopen the hearing so that the contestants could present further evidence on uranium values in the claims.

The decision of the Office of Appeals and Hearings affirmed the examiner's findings and rulings in invalidating the Slab Sugar Granite Nos. 2 to 9 claims, and also affirmed the denial of a rehearing on the ground that the showing of one high grade uranium sample without any adequate explanation of the sample was meaningless and that the showing for a new hearing did not warrant the ordering of such a hearing.

The appellants contend that the decision is wrong in two respects. First, they contend that the claims declared invalid contain material similar to that found on the Slab Sugar Granite No. 1 claim, which was upheld, and that the material is found in a large quantity. They assert that though actual mining work was performed on the Slab Sugar Granite No. 1 claim, as distinguished from development work done on the other claims, "[t]he law is well settled that mining activity for the benefit of all claims, may be confined to only one claim." Second, they contend, in any event, a further hearing should be ordered to determine the nature and extent of new minerals discovered on the claims.

The record has been reviewed in light of appellant's contentions. Summaries of the evidence presented at the hearing have been given in the decision below and will not be repeated and discussed here except as necessary to resolve some of the issues raised by the appellants.

The first question is whether the decisions below were correct in concluding that the eight mining claims, Slab Sugar Granite Nos. 2 through 9, had not been validated by a proper discovery within the meaning of the mining laws. Since appellants have contended that

² This date is significant as section 3 of the act of July 23, 1955, 30 U.S.C. § 611 (1964), removed common varieties of sand, stone, gravel, etc. from location under the mining laws (30 U.S.C. §§ 22 *et seq.* (1964)). The Supreme Court has ruled that claims for common varieties of building stone had to be validated by showing that such stone was marketable at a profit as of the date of the July 23, 1955, act. *United States v. Coleman*, 390 U.S. 599 (1968).

these claims are similar to the Slab Sugar Granite (No. 1) claim, the correctness of the determination as to that claim has been placed in issue.³

The hearing examiner concluded that the claim was valid because "considerable discovery work has been done" on the claim. He seemed to base his determination upon a finding that excavation work had been done on the claim and that contestants' witnesses had testified that 500 to 600 tons of stone had been removed and sold from that claim "from 1953 to the date of the hearing," and used for building purposes.

The evidence indicated that the stone, a quartzite, was usable for building purposes as facing for walls, fireplaces, patios, etc. and would be desirable for such purposes because of its attractive white color. Some of the stone on the claims was also naturally cleavable, which would enhance its value for building purposes. The stone could also be crushed and used for roofing granules; however, the first sale for such purposes by one of contestants' witnesses had been made only two years prior to the hearing (Tr. 94), or some time in 1964.

One of the questions that arises in this case, which was not clearly resolved in the decisions below, is whether or not the material on the claims is a common or uncommon variety of stone within the meaning of the act of July 23, 1955, *supra*, footnote 2, so as to require a showing that the material was marketable at a profit as of that date as well as at the time of the hearing in order to validate the claim. The contestants tried to show that the material had special values because of the high silica content within the quartzite stone. However, the evidence showed that the silica content was not of metallurgical grade and was not of sufficient purity to make it suitable for glass making, and its use as a flux and for other industrial purposes was not considered feasible (Tr. 33). Thus, the material could not be considered valuable because of its silica content for uses other than for the building purposes.

The contestants also attempted to show that the stone has some special property making it valuable above common varieties of stone because it contains in part some wollastonite. The testimony indicated that in order to use the wollastonite for certain commercial and

³ The Office of Appeals and Hearings decision ignored this comparison of the claims by concluding that a consideration of that claim was not relevant as no appeal had been taken by the Forest Service from the hearing examiner's decision. Although the Forest Service did not timely appeal from that decision, in its answer to appellants' appeal to the Director it did challenge the correctness of the decision as to the claim and asked that the decision be reversed to that extent. The Secretary has the authority to review the entire proceedings in this case to determine if there was any error regardless of any appeal by a party, and, *a fortiori*, where as here, the appellants have posed the issue of the validity of the claim by comparing it to the other claims. Cf. *United States v. Clare Williamson*, 75 I.D. 338 (1968).

industrial purposes it would have to be separated from the quartzite. The Government witness doubted whether such a separation could be made, but even if it could the mining and shipping costs alone would exceed the price that could be received for the material even without considering the costs of machinery and milling equipment (Tr. 78, 79, 117, 118). The contestee's expert witness testified it would require an investment of \$2,000 or \$4,000 per ton of daily capacity for the milling process (Tr. 78). It also appears from this witness that he considered the wollastonite as giving the stone value only for use as building stone both for rubble siding and for roofing granules (see Tr. 66-71). There was no clear evidence that the wollastonite could be marketed for other purposes.

It appears that possible use of the wollastonite for other commercial purposes would clearly not be economically feasible, and that the wollastonite on these claims has no value except as a constituent of the building stone. Although contestants' witnesses testified that the wollastonite made the stone suitable for siding and for roofing granules, there was no showing that this gave the stone special properties giving it greater value for those purposes than other common varieties of stone. It is apparent that quartzite materials are materials occurring in wide abundance and that the qualities which make the stone on the claims suitable for roofing granules, such as its ability to reflect light, are also qualities found in other quartzite stones. The desirable qualities alleged by the contestants are the pleasing white color of the material, its hardness and strength, and neutral cleavability. There was little evidence comparing this stone with other stone used for the same purposes in the general marketing area. However, these qualities are qualities which are often found in common varieties of building stone used for the same purposes. There was no evidence that this material could command an appreciably higher price than for other common materials used for the same purposes.

The most optimistic estimate of the value of the stone was from one of contestants' witnesses who thought that the stone could be sold for \$20 a ton in place (Tr. 68), although there was nothing to support this optimism. Mr. Stevens testified that stone was sold from the Slab Sugar Granite claim (No. 1) two years prior to the hearing for \$2 a ton in place, which he indicated was a special introductory price (Tr. 85). He testified that 200 tons were removed at that time (Tr. 86). He also testified that he had a verbal contract with a contractor to sell the stone at an in place price of \$5 per ton for use as building materials but that this did not go through because of the contest proceedings.

(Tr. 89-91). Mr. Stevens' testimony showed that the highest price received for the stone was \$12 per ton for a sale of 32 tons 12 years prior to the hearing; this price apparently included removal and delivery and therefore does not reflect an in place value (Tr. 87).

Although some of the material found on the Slab Sugar Granite (No. 1) claim has qualities making it desirable for building purposes, the evidence fails to disclose that it has a unique physical property giving it a special and distinct value above that of common varieties of stone, as required by the act of July 23, 1955. The most significant physical property shown by the contestees was its pleasing white color. However, in *United States v. Coleman, supra*, footnote 1, a vari-colored building stone was found to be a common variety although it was alleged that the pleasing color gave it a special and distinct value. See also *United States v. Frank Melluzzo and Wanita Melluzzo et al.*, 76 I.D. 181 (1969). Even a letter submitted by the contestees as Exhibit B from the Assistant Director of the Idaho Bureau of Mines and Geology stated that the stone "could hardly be considered rare or unique" although one would not expect to find it in large amounts as ordinary country rock. We have considered all of the evidence but conclude that the stone is a common variety within the meaning of the act of July 23, 1955.

The hearing examiner recited all the testimony concerning removals and sales of stone from the Slab Sugar Granite (No. 1) claim and concluded that the contestees' testimony "reflects that the stone from the No. 1 claim was sold at a profit both prior and subsequent to July 23, 1955." He did not identify what particular evidence he relied on to support his finding as to sales prior to July 23, 1955. Most of the evidence was as to sales and use of the stone for building purposes subsequent to that date and primarily after 1960. At the most the testimony indicated the sale of 32 tons at \$12 a ton delivered was made in 1954 or 1955, and the testimony was vague but appeared to indicate that this sale was the biggest single sale prior to 1965 (see Tr. 94). None of the testimony concerning sales was corroborated with receipts. The Government witnesses' testimony indicated that there was little market for the stone at the time. Without more of a showing we cannot conclude that there was a market for this stone in 1955 so that a prudent man at that time could reasonably expect to mine and sell the materials at a profit.

Indeed, the evidence does not clearly show that such a market existed at the time of the hearing. Even the letter from the Idaho Bureau of Mines and Geology (Ex. B), which was dated August 19, 1966, stated that the stone "might have some potential as a decorative

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building stone, but as you know, developing a market and getting the material transported to the market are major obstacles here."

For these reasons we find that the hearing examiner's finding that the material from the Slab Sugar Granite (No. 1) had been marketed at a profit prior to July 23, 1955, was not supported by the preponderance of the evidence, and that that claim as well as the other eight claims should have been invalidated for lack of a valid discovery of a deposit of building stone locatable under the mining laws.

There is an additional reason, which was overlooked in the decisions below, for concluding that all of these claims, including the Slab Sugar Granite (No. 1) are invalid if they contain no other minerals than building stone. All of these claims were located as lode claims. However, building stone is subject to the act of August 4, 1892, 30 U.S.C. sec. 161 (1964), authorizing the location of mining claims for lands chiefly valuable for building stone "under the provisions of the law in relation to placer-mineral claims." Since the claims were not located as placer claims for the building stone, the deposits of building stone within the lode claims could not validate the claims.

The next question to be considered is whether the evidence showed any mineral value except for the building stone. As discussed previously, it is apparent that the silica and wollastonite within the claims have no independent commercial value; their value is only as constituents of the building stone. There were no showings of gold or silver or other metals of any significance.

The only other mineral discussed at the hearing was uranium. The contestants have alleged that the claims have valuable deposits of uranium. However, the evidence at the hearing did not establish the existence of a deposit of uranium within any of the claims. Contestants' witnesses failed to testify as to the presence of uranium on the claims, simply conjecturing as to the possibility of its existence because of fluorescent qualities in some rocks taken from certain of the claims, and they suggested that further prospecting should be undertaken (see, for example, Tr. 65). The principal Government witness stated that evidence of radioactivity as shown by the fluorescence of the stones under black light and readings of geiger counters did not establish the presence of uranium as the claims lie within the Idaho batholith and there are small amounts of radioactive materials common in that formation, partly thorium minerals. He thought that the fluorescence in some samples was caused by calcite rather than uranium (Tr. 37, 44). An assay of a fluorescent rock presented by contestants at the hearing showing only .004% uranium substantiated this.

At the most the evidence indicated that further prospecting should be done to determine if uranium exists within the claims. This, of course, clearly fails to meet the test of showing a discovery of a valuable deposit of uranium, which, at the least, requires a showing that sufficient mineralization has been found so that a prudent man could expect to develop a profitable mine if he expended further time and money. *Converse v. Udall*, 399 F. 2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025.

This leads to the question of whether or not appellants' request for a further hearing in this case should be granted to enable them to present further evidence concerning the existence of uranium within the claims. Appellants made an initial request for a further hearing to the hearing examiner following the hearing, alleging that evidence had since been obtained which through inadvertence and excusable neglect was not discovered prior to or during the hearing. They offered to submit evidence that samples were taken from certain of the mining claims, and that an assay report showed one sample as being 0.482 and another 0.021 percent of uranium oxide (U308). The assay report was submitted. The Forest Service objected to the holding of a further hearing, and the examiner denied the motion in a decision of November 22, 1966, which was appealed to the Director, Bureau of Land Management. The appeal was dismissed by decision of February 5, 1967, *United States v. Clarence T. Stevens et al.*, Contest No. 017081 (Idaho), as premature, being made from an unappealable interlocutory order.

The decision of the Office of Appeals and Hearings, in reviewing the subsequent decision of the examiner on the merits of the claims, also ruled that the tender of proof failed to show the method of obtaining the sample or from which mining claim it was taken and was meaningless without adequate explanation, that it was inconsistent with the results of the assay performed on a rock submitted at the hearing and with testimony of witnesses of both parties, and that the showing was not of a character to warrant the ordering of a further hearing.

The appellants challenge this denial of a new hearing. They contend that in these contest proceedings every reasonable opportunity should be provided to both parties to present competent evidence. In this appeal they now state that they have an assay of surface samples from claim No. 3 which run 0.013 percent in molybdenum. They state that the assayers have advised them that uranium oxide samples from the claims are richer in content than those turned in from the Charlie Stein claims from the Moab, Utah, area. They also state that 18 magnetometers employed in uranium exploration from airborne vehicles were found on the claims in May 1966 and that in September 1966 offi-

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cers of the United States Air Force gathered up the devices. They also state that since the hearing there have been gold samples taken from the silicate rock from the claims by a heating process. They assert that personnel from the Forest Service burned a toilet, picnic table and bench on Slab Sugar Granite and that the contestees' "Keep off" signs were torn down and thrown into the underbrush on that claim. They contend that for these reasons, "it is to the best interests of the government and the contestees to reopen the hearing to determine the nature and extent of new minerals discovered on such claims."

These assertions by appellants in the nature of testimony have been considered only to determine whether they sufficiently show that a further hearing should be granted. In order to warrant the ordering of a new hearing there should be reasons given to show that there is a substantial equitable basis for holding a second hearing, and also a tender of proof which would indicate that a further hearing would be productive of more conclusive evidence on the question of whether there has been a valid discovery. *United States v. Bess May Lutey et al.*, 76 I.D. 37 (1969).⁴

Much of what appellants have alleged has no relevancy to the question of whether or not a further hearing should be granted. They have shown no reason why evidence as to a discovery of uranium and minerals other than those in the building stone could not have been presented at the first hearing. They have failed to respond to the inadequacies pointed out by the Office of Appeals and Hearings concerning a tender of proof. There is no detail or specification as to what claims are involved, explanation of the sample taking, or any offer of evidence which would specifically delineate the existence of veins bearing uranium or other valuable mineral. We concur with the decision below that the showing of one high grade assay of uranium or any other mineral without any explanation as to the taking of the sample affords no basis for ordering a further hearing in this case. It appears from all of the appellants' statements and showings that their request is simply a request for further time to prospect the claims and to try to discover deposits of uranium (and now also molybdenum and some gold allegedly recoverable by some unexplained heat process). We do not believe, in view of the objections of the Forest Service, that a further hearing is warranted in this case to give appellants further time to try to make a discovery of a valuable mineral deposit. Therefore, their request for a further hearing is denied.

⁴ This decision is being challenged in the courts, *Bess May Lutey et al. v. The Department of Agriculture et al.*, Civil No. 1817, pending in the United States District Court for the District of Montana.

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 with the modification that the Slab Sugar Granite (No. 1) claim is also declared invalid.

ERNEST F. HOM,
Assistant Solicitor.

APPEALS OF CEN-VI-RO OF TEXAS, INC.

IBCA-718-5-68, and

IBCA-755-12-68 *Decided May 28, 1970*

Rules of Practice: Evidence—Rules of Practice: Witnesses—Contracts: Disputes and Remedies: Substantial Evidence

A motion by an appellant to expunge numerous exhibits from the appeal file predicated primarily upon the ground that their inclusion without affording an opportunity for cross-examination of the authors of the various documents would be violative of due process, was granted only to the extent that the record fails to indicate that the contracting officer had in fact considered the questioned exhibits in making the findings appealed from. In support of its ruling the Board notes that (i) the Board's rules specifically provide for the composition of the appeal file; (ii) comparable rules of other boards have been determined not to be violative of due process; (iii) where a hearing is held the probative value to be given to appeal file exhibits will be determined by the evidence offered in support by witnesses subject to cross-examination; (iv) expunging an exhibit from the appeal file is no indication of the ruling the Board may make if the exhibit is proffered at the hearing; and (v) as for summaries and other exhibits expunged from the appeal file the Government may wish to resort to discovery, where appropriate, to establish the accuracy of particular exhibits.

BOARD OF CONTRACT APPEALS

The appeals¹ involve claims totaling \$3,297,385.05 primarily related to the acceptability of pipe installed on 230 miles of pipeline. The appeal file consists of 117 exhibits. Appellant has filed a motion seeking to have 72 of them expunged from the appeal file in advance of the hearing. The general categories of exhibits involved in appellant's motion are:

¹ Contract No. 14-06-D-5028 was awarded to Cen-Vi-Ro of Texas, Inc., on November 12, 1963. Under the contract Cen-Vi-Ro assumed responsibility for manufacturing the pipe but responsibility for all other work including laying the pipe was subcontracted to R. H. Fulton. Contract No. 14-06-D-5244 was awarded to R. H. Fulton on August 18, 1964. Under the latter contract both parties retained the same functional roles, i.e., Cen-Vi-Ro undertook to manufacture and supply the pipe while R. H. Fulton undertook all other work. All parties have consistently referred to the Appeals of Cen-Vi-Ro, however, in apparent reliance upon a power of attorney from R. H. Fulton to Cen-Vi-Ro, dated November 24, 1967 (Exhibit No. 76).

CATEGORY	DESCRIPTION
I	Intra-office correspondence, memoranda, notes of conferences and travel reports written by personnel of the Bureau of Reclamation concerned with contract performance.
II	A letter from Department Counsel, dated December 13, 1967, to Mr. Robert L. Dragoo (formerly employed by appellant and former construction manager for R. H. Fulton), enclosing a proposed affidavit for Mr. Dragoo's signature.
	An undated statement signed by Mr. Dragoo, which although labeled an affidavit has not been notarized.
	A letter from the Canadian River Municipal Water Authority to the Project Construction Engineer, dated December 13, 1968, enclosing a copy of a letter from the Authority to R. H. Fulton concerning leakage in installed pipe.
III	Proposed production schedules, graphs, charts and summaries reflecting, <i>inter alia</i> , pipe accepted as compared with proposed pipe-laying schedules, pipe units downgraded by contractor, rejects, defective pipe manufactured, repaired and accepted, disposition of pipe, as well as various drawings of appellant's plant layout and particular facets of production.
IV	Excerpts of a speech to the Bureau of Reclamation Concrete School concerning the Cen-Vi-Ro plant, and production process.
V	Chronological summaries of inspector's diaries.
VI	Proposed or adopted specifications for concrete pipe (i) of American Society of Testing Materials, (ii) American Association of State Highway Officials, (iii) American Water Works Association and (iv) Office of Chief of Engineers, Department of the Army.
VII	Cen-Vi-Ro specifications, advertising and sales bulletins.
VIII	Photographs of manufactured pipe, including those depicting various defects, color slides, and a color-motion picture film of the Cen-Vi-Ro manufacturing process.

These appeals are governed by our rules as initially adopted (19 F.R. 9389, December 31, 1954), and as subsequently amended (31 F.R. 9866, July 21, 1966).² Rule 4.6 provides in pertinent part:

* * * The appeal file shall consist of the notice of appeal and the memorandum of arguments, if any, submitted therewith and of all documents on which the contracting officer has relied in making his findings of fact or decision, including the following:

- (a) The findings of fact or decision;
- (b) The contract, specifications, pertinent plans, amendments, and change orders; and
- (c) Correspondence and other data material to the appeal.

Appellant alleges that the challenged exhibits are incompetent, irrelevant and immaterial. More specifically, appellant asserts that the exhibits it seeks to have expunged constitute hearsay evidence and that their retention in the appeal file without affording an opportunity for cross-examination would deprive appellant of its fundamental right to a fair hearing. The Government contends that the challenged exhibits constitute evidence admissible by statute,³ or under well-recognized exceptions to the hearsay rules and that in any event, the exhibits are required to be in the appeal file by the Board's rule quoted above.⁴ The appellant does not appear to be contesting that a preponderance of the questioned exhibits⁵ are properly in the appeal file under the Board's rules.⁶ Rather, appellant's principal contention is that the Board's rules, insofar as they permit the inclusion of evidence into the record without an opportunity for cross-examination, are invalid as a violation of due process.

This contention is without merit. In the first place, the constitutionality of contract appeal board procedure in general has been specifically upheld against a contractor's attack that it violated procedural due process.⁷ In the second place, the appellant is laboring under a misapprehension as to the significance of appeal file exhibits in a case where a hearing will be held in which oral testimony will be offered by both parties through witnesses who will be available for cross-examination.

² Appeals docketed currently are subject to our rules set forth in 43 CFR 4.1 *et seq.*, effected June 25, 1969.

³ 28 U.S.C. secs. 1732-1733.

⁴ The Government alleges that the challenged exhibits were either considered by the contracting officer in reaching the disputed decision or that the relevancy of such exhibits will be demonstrated at the hearing or on brief.

⁵ Appellant alleges that Categories IV, VI and VII exhibits are totally irrelevant to the appeals.

⁶ It is evident that documents dated subsequent to the contracting officer's decisions could not have been considered in reaching the decisions appealed from.

⁷ *Malan Construction Corporation v. United States*, 217 F. Supp. 955 (S.D.N.Y. 1962), aff'd 318 F. 2d 709 (2d Cir. 1963).

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An appellant has, under our earlier rules, as under our current rules, an opportunity to be heard, and an opportunity to offer direct testimony and to cross-examine Government witnesses. Thus, the fact that material considered by the contracting officer in reaching his decision is retained in the record is not deemed to be prejudicial to the appellant. Indeed, the appeal file exhibits are frequently relied upon by appellants to impugn the validity of the findings by attacking the basis upon which they were reached. In the final analysis, how much weight, if any, is accorded an appeal file exhibit depends solely upon the evidence adduced by the parties at the hearing.⁸ Such an assessment lies "peculiarly within the province of the Board."⁹

Moreover, the technical rules for the exclusion of evidence have long been held to be inapplicable to administrative proceedings.¹⁰ The admission of hearsay evidence, for example, is not considered to impugn the validity of an administrative proceeding, provided the evidence upon which the decision is based is substantial and has probative value.¹¹ The question of whether a decision is based upon substantial evidence is distinct from the question of whether the evidence was properly admitted.¹²

Because of the conclusion we reach, we need not consider at length the other contentions of the parties. It may be true—as the Government asserts—that various exhibits questioned by the appellant qualify for admission into evidence as records kept in the ordinary course of business¹³ or as official Government documents,¹⁴ or as well-recognized exceptions to the hearsay rule. The question presently before us, however, is not whether an appeal file exhibit satisfies the formal tests for

⁸ *Kean Construction Company, Inc.*, IBCA-501-6-65 (April 4, 1967), 74 I.D. 106, 67-1 BCA par. 6255.

⁹ *Eggers & Higgins v. United States*, 185 Ct. Cl. 765 (1968).

¹⁰ E.g., *Ingram v. Gardner*, 295 F. Supp. 380 (N.D. Miss. 1969); *Wheatley v. Shields*, 292 F. Supp. 608 (S.D.N.Y. 1968).

¹¹ *Alfred F. Morelli v. United States*, 177 Ct. Cl. 848 (1966), and cases cited therein. *Southern Stevedoring Co., Inc. et al. v. Voris*, 190 F. 2d 275 (5th Cir. 1951) and *Glendening v. Ridicoff*, 213 F. Supp. 301 (W.D. Mo. 1962), cited by the appellant, are readily distinguishable in that in those cases the administrative decisions in question were supported only by hearsay which was not considered to be substantial evidence.

¹² See *Samuel Jacobowitz v. United States*, Ct. Cl. 134-68 (April 17, 1970).

¹³ It has been held that where a written record is offered under 28 U.S.C. 1732 as a substitute for a witness' testimony at the trial, there must go with the offer, as an implied qualification under the statute, the assurance that the written record is accurate and trustworthy. *Bowman v. Kaufman*, 387 F. 2d 582 (2d Cir. 1967). In *United States v. Hickey*, 360 F. 2d 127 (7th Cir. 1966), cert. denied, 385 U.S. 928, the Court stated that the admissibility of a memorandum under section 1732 did not depend on whether it constituted a precise reproduction of the act, occurrence or event of which it was evidence.

¹⁴ For admissibility under 28 U.S.C. section 1733 the facts stated in the official documents must have been within the personal knowledge and observation of the recording official or his subordinate. Reports based upon information gleaned second-hand from random sources must be excluded. *Olander v. United States*, 210 F. 2d 795 (9th Cir. 1954).

admissibility into evidence but is rather whether the present state of the record indicates that the contracting officer considered the questioned exhibits in reaching his decision. If he did so consider them, then the particular exhibits in question should be retained in the appeal file even though they may not (i) satisfy the tests prescribed for records maintained in the regular course of business (ii) qualify as official Government documents, or (iii) otherwise constitute a recognized exception to the hearsay rule. If he did not consider the questioned exhibits, however, they should be expunged from the appeal file even though it appears that they will be admissible into evidence if proffered at the hearing.¹⁵

Initially (the appellant's objection to the appeal file¹⁶ was centered upon Exhibit No. 40 (Master Photo Album), Exhibit No. 41 (excerpt from a talk by a Government employee to the Bureau of Reclamation Concrete School, and related color slides) and Exhibit No. 42 (16-mm Motion Picture Film). In addition to objecting to the inclusion of the Master Photo Album in the appeal file, the appellant has characterized the captions on various photographs as misleading, self-serving and inflammatory.¹⁷ At the pre-hearing conference on November 19, 1969,¹⁸ the appellant asserted that the relevance of Exhibit No. 41 to the issues involved in the appeal was extremely remote and that the 16-mm Motion Picture Film represented by Exhibit No. 42 was highly prejudicial to the appellant.

The appellant, however, has not contested the Government's flat assertion that Exhibit Nos. 40, 41 and 42 were considered by the contracting officer in reaching his findings.¹⁹ We conclude therefore that all three of these exhibits are properly in the appeal file. A sharp distinction must be made, though, between allowing unauthenticated photographs to remain in the appeal file and the probative value²⁰

¹⁵ E.g., there appears to be little doubt that the correspondence, notes of conference, memoranda and reports to superiors involved in Category I exhibits were written in the course of official duties by the personnel concerned.

¹⁶ These were the only appeal file exhibits to which specific objections were raised at the pre-hearing conference of November 19, 1969. At the time of the conference, however, appellant's counsel had not completed his review of the appeal file. See Memorandum to the Files (Conference) of November 20, 1969.

¹⁷ The same objection has been made to the photographs attached to the Government's Statement of Position of August 2, 1968.

¹⁸ Note 16, *supra*.

¹⁹ Response to Appellant's Motion to Expunge, Appendix A, Government's Comments on Specific Objections to Exhibits, pp. 3, 4.

²⁰ It is, of course, well settled "that the * * * photograph must first, to be admissible, be made part of some qualified person's testimony. Some one must stand forth as its testimonial sponsor, in other words (as is commonly said), it must be verified." 3 Wigmore,

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to be accorded to photographs for which no authentication is provided at the hearing.

The Board does not accept the appellant's argument that the graphs, charts and summaries constituting Category III exhibits should be expunged from the appeal file on the ground that they are not the original records. To do so would greatly increase the time and effort required for making the record upon which the decision will be based. Where, as here, the Government has offered to make the voluminous records from which the exhibits were compiled available to the appellant prior to the hearing,²¹ there is no reason to suppose that the appellant's rights would be prejudiced by including the documents in the appeal file. It does not appear, however, that a majority of the schedules, graphs, charts and summaries in question were in fact considered by the contracting officer in making his decision.²² In these circumstances the Government may wish to proceed by way of discovery, where appropriate,²³ as the only practicable way of making the contents of the voluminous records available to the trier of fact.

The appellant asserts that the proposed or adopted specifications for concrete pipe of other users of such pipe (Category VI) and Cen-Vi-Ro specifications, advertising and sales bulletins (Category VII) are utterly irrelevant to the appeals. This argument appears to overlook the fact that to support the claims asserted the appellant relies upon normal industry practice.²⁴ We also note that it is now well settled

Evidence, 3d Ed. Sec. 793. In this connection it has been held that testimony of the photographer is not necessary—all that is required is testimony that the photograph is a correct representation of the objects it portrays. *Adams v. City of San Jose*, 164 Cal. 2d 665, 330 P. 2d 840 (1958). Cf. *Sisk v. State*, 232 Md. 155, 192 Atl. 2d 108 (1963) (photo excluded because there was no evidence it was a fair representation of the scene it purported to represent).

²¹ See 4 Wigmore, *Evidence*, 3d Ed. Sec. 1230; *Augustine v. Bowles*, 149 F. 2d 93 (9th Cir. 1945). See also *Willapoint Oysters, Inc. v. Ewing*, 174 F. 2d 676 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1949), in which it was held not to be reversible error to admit into evidence in an administrative proceeding a summary tabulation but to exclude worksheets from which the tabulation was prepared where petitioner had adequate access to worksheets and used information thereby obtained for cross-examination. *Accord: McDaniel v. United States*, 343 F. 2d 785 (5th Cir. 1965), cert. denied, 382 U.S. 826 (1965) (summary of books and records held admissible provided cross-examination is allowed and original records are available).

²² There is nothing to show the dates upon which they were prepared. While the findings cover some of the same ground as do the exhibits in question, it cannot be said with any degree of certainty that the findings are based upon material obtained from the exhibits rather than from other sources.

²³ See *Allison & Haney, Inc.*, IBCA-587-9-66 (June 19, 1967), 74 I.D. 178, 67-2 BCA par. 6401.

²⁴ See Statement of Claim of October 13, 1966 (IBCA-718-5-68), p. A1 and Statement of Claim of November 7, 1966 (IBCA-755-12-68), p. C12.

that evidence of trade practice and custom is admissible to show the trade meaning of contract language, notwithstanding that the contract appears to be clear and unambiguous.²⁵ We cannot say, therefore, that the specifications utilized by other purchasers and users of concrete pipe are not relevant and material to these appeals. The same reasoning appears to be applicable to the Cen-Vi-Ro specifications, sales and advertising bulletins. Here, again, however, these records fail to show a nexus between the findings and the questioned exhibits.²⁶

Conclusion

1. Applying the foregoing tests to the questioned exhibits, the appellant's motion to expunge exhibits from the appeal file is granted²⁷ to the following extent:

A. Exhibits 62, 90 and 91 are expunged on the ground that they are dated (or were prepared) subsequent to the date of the contracting officer's findings.

B. Exhibits 52 through 59, 61, 63 through 68, 71 through 75, 92 through 94 and 109 through 115 are expunged on the ground that they are not referred to specifically in the findings and the dates of their preparation is not established by the record.

2. Exhibits 43 and 99 are expunged on the ground that the Government has admitted²⁸ that they summarized and are redundant of material included in other exhibits contained in the appeal file.

3. All of the exhibits expunged from the appeal file are being returned to Government counsel by letter of this date.

WILLIAM F. McGRAW, *Chairman.*

I CONCUR:

SPENCER T. NISSEN, *Member.*

I CONCUR:

SHERMAN P. KIMBALL, *Member.*

²⁵ *Gholson, Byars & Holmes Constr. Co. v. United States*, 173 Ct. Cl. 874 (1965), and cases cited.

²⁶ In advance of the hearing the Government may wish to establish the authenticity of such exhibits by resort to discovery, where appropriate.

²⁷ By this action we are not to be understood as intimating any opinion on the question of the admissibility of particular exhibits if they are proffered at the hearing.

²⁸ Response to Appellant's Motion to Expunge, Appendix A, Government's Comments on Specific Objections to Exhibits, p. 3.

*August 10, 1970***CRIMINAL JURISDICTION OF INDIAN TRIBES OVER NON-INDIANS****Indian Tribes: Generally—Indians: Criminal Jurisdiction: Law and Order—Statutes**

Indian tribes generally do not possess criminal jurisdiction over non-Indians unless there still remains in force a treaty provision whereby a tribe acquired "exclusive jurisdiction over such offenses" as provided by section 1152, Title 18, United States Code. While that reference to exclusive tribal jurisdiction still appears in section 1152, it is doubtful that any such jurisdiction has survived since, though initially some treaties may have granted criminal jurisdiction over non-Indians, later treaty provisions usually required the tribes to seize and surrender offenders to designated Federal officials.

M-36810*August 10, 1970***To: SECRETARY OF THE INTERIOR.****SUBJECT: CRIMINAL JURISDICTION OF INDIAN TRIBES OVER NON-INDIANS.**

You requested, by furnishing this office a copy of your memorandum of March 9, 1970, to the Vice President, that we review the problems of state taxation on Indian reservations and tribal jurisdiction over non-Indians. I have undertaken in this memorandum a review of tribal criminal jurisdiction over non-Indians.¹ We will consider the state taxation matter in a later memorandum.

The question of criminal jurisdiction of an Indian tribe over a non-Indian was ruled on in *Ex parte Kenyon*, 14 Fed. Cas. 353 (No. 7720) (C.C.W.D. Ark., 1878). The court in that case denied tribal jurisdiction of a Cherokee court over a non-Indian accused of theft. Citing Revised Statutes of 1873, section 2146, the Court in *Kenyon* stated in part:

* * * if there was any crime committed, at any time, it was committed not only beyond the place over which the Indian court had jurisdiction, but, at the time it was committed, by one over whose person such court did not have jurisdiction; because to give this court jurisdiction of the person of the offender, such offender

¹ It should be noted that the question of tribal jurisdiction discussed in this memorandum relates to action by tribes in the exercise of remaining sovereign authority and does not relate to Courts of Indian Offenses which are courts established by the Secretary and by the provision of 25 CFR Part 11 exercise jurisdiction over Indians only. See *United States v. Clapoz*, 35 Fed. 575 (D.C. Ore. 1888). Further, not all Indian groups organized under the Indian Reorganization Act, 48 Stat. 987, retained sovereign authority if they were not recognized as sovereign prior to being reorganized. See *Federal Indian Law*, Interior Department (1958), p. 411, fn. 36. In organizing under written constitutions most tribes have limited criminal jurisdiction of their laws and courts to Indians.

must be an Indian, and the one against whom the offense is committed must also be an Indian.²

Revised Statutes Section 2146, *supra*, provides:

Sec. 2146 The preceding section [extending the general laws of the United States to Indian country] shall not be construed to extend to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offense, is or may be secured to the Indian tribes respectively.

Section 2146 derived from section 25 of the Act of June 30, 1834, 4 Stat. 729, 733.³ Section 25 of the 1834 Act was construed by the Attorney General as excluding criminal jurisdiction over non-Indians. See 2 Op. Atty. Gen. 693 (1834) at page 695:

* * * the 25th section of the act of the 30th of June, 1834, declares that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country; with a proviso, that the same shall not extend to crimes committed by one Indian against the person and property of another: thus evidently proceeding on the supposition that, under the treaties in relation to the Indian/country west of the Mississippi, the Indian laws would only be applicable to Indians themselves.

See also 7 Op. Atty. Gen. 174 (1855) at page 179:

* * * the Choctaws express a wish in the treaty that Congress would grant to the Choctaws the right of punishing, by their own laws, "any white man" who shall come into the nation, and infringe any of their national regulations (Art. 4). But Congress did not accede to this request. On the contrary, it has made provision, by a series of laws, for the punishment of crimes affecting white men, committed by or on them in the Indian country, including that of the Choctaws, by the courts of the United States. (See act of June 30, 1834, iv Stat. at Large, p. 729, and act of June 17, 1844, v Stat. at Large p. 680.) These Acts cover, so far as they go, all crimes except those committed by Indian against Indian.

Section 2146 was incorporated in Section 1152 of Title 18, United States Code.⁴

² *Accord, Ex parte Morgan*, 20 Fed. 298, 308 (D.C.W.D.Ark. (1883)) also based upon construction of R.S. Sec. 2146. Though this and the 1855 opinion of the Attorney General, *infra*, suggest that Indian tribes do not have jurisdiction over members who commit offenses against non-Indians, the practice and interpretation given Section 1152, United States Code, Title 18, has been to recognize jurisdiction of tribes over offenses by tribal members against non-Indians. See *Federal Indian Law*, Interior Department (1958) pp. 447-448; 55 I.D. 14, 58.

³ That section reads as follows:

"Sec. 25. And be it further enacted; That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: Provided, That the same shall not extend to crimes committed by one Indian against the person or property of another Indian."

⁴ See reviser's note. Section 1152, Title 18, U.S. Code provides:

"Except as otherwise expressly provided by law, the general laws of the United States

NON-INDIANS

August 10, 1970

Where the provisions of a statute are carried forward and embodied in a codification in the same, or substantially the same words, the latter provision is considered a continuance of the former statute and of the policy and the interpretations given that statute. 82 C.J.S. *Statutes* sec. 276. It is my conclusion, therefore, that unless there still remains in force a treaty provision whereby a tribe acquired "*exclusive jurisdiction over such offense*" as provided by Section 1152, Indian tribes generally do not possess criminal jurisdiction over non-Indians.

Though the statute, 18 U.S.C. sec. 1152, retains that reference to exclusive tribal jurisdiction acquired by treaty it is doubtful that any such jurisdiction which may have been vested in a tribe has survived. It is interesting, in this regard, to note that the Cherokee treaty of 1791, 7 Stat. 39, included this provision:

If any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they may please.

That provision was amended by the treaty of February 27, 1819, 7 Stat. 195, which provided that "white intruders" were to be proceeded against by the United States in accordance with the provisions of the Trade and Intercourse Act of 1802, 2 Stat. 139. Similarly, though by the provisions of some early treaties criminal jurisdiction was granted Indian tribes, provisions in later treaties required tribes to seize and surrender trespassers or "badmen" to designated Federal officials. While we have not made an exhaustive survey of treaties with respect to provisions granting criminal jurisdiction over non-Indians, and therefore subject to the possibility that in a rare instance such jurisdiction may have survived, the answer to the question posed by the members of the National Council on Indian Opportunity must be that Indian tribes do not possess criminal jurisdiction over non-Indians, such jurisdiction lies in either the state or Federal governments.

MITCHELL MELICH,
Solicitor.

as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

*August 25, 1970***APPEAL BY THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, IN THE MATTER OF THE
ENROLLMENT OF MRS. ELVERNA Y. CLAIRMONT BACIARELLI****IA-1972-X-9***Decided August 25, 1970***Indian Tribes: Enrollment**

The enrollment actions of a tribal enrollment committee and a tribal council, acting under a duly adopted and approved tribal constitution that does not provide for review by the Secretary, and in the absence of an applicable act of Congress, are final insofar as they relate solely to tribal questions.

Indian Tribes: Enrollment Appeals—Secretary of the Interior

Once a tribal council acts to deny a person's application for enrollment, and there is no provision in the tribal constitution or in an applicable act of Congress for appeal of that determination to the Secretary, there exists jurisdiction in the Secretary to review only the effect of the council's action on the distribution of tribal assets over which the Secretary has been granted authority as trustee by the Congress.

*MR. FRED WHITWORTH, Chairman,
Confederated Salish and Kootenai Council,
Dixon, Montana 59831*

*August 25, 1970.***DEAR MR. WHITWORTH:**

The Confederated Salish and Kootenai Tribes of the Flathead Reservation appeal from a decision dated August 19, 1969, by the Acting Deputy Commissioner of Indian Affairs, upholding a decision of April 1, 1968, by the Area Director. Assuming jurisdiction for the Department and agreeing with Mrs. Baciarelli's interpretation of Article II of the Tribes' Constitution¹ and tribal ordinance

¹ Article II, as approved May 5, 1960:

Section 1. Confirmation of Rolls.—The membership of the Confederated Tribes of the Flathead Reservation is confirmed in accordance with the per capita rolls as from time to time prepared.

Section 2. Present Membership.—Membership in the Tribes on and after the date of the adoption of this amendment shall consist of all living persons whose names appear on the per capita roll of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, as prepared for the per capita distribution as shown on the per capita roll paid

116] APPEAL BY THE CONFEDERATED SALISH AND KOOTENAI 117
TRIBES OF THE FLATHEAD RESERVATION, IN THE MATTER OF THE
ENROLLMENT OF MRS. ELVERNA Y. CLAIRMONT BACIARELLI

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35-A,² the Area Director and the Acting Deputy Commissioner proceeded to a consideration of the facts in the case and ordered Mrs. Baciarelli's enrollment.

in February 1959 together with all children of such members, born too late to be included on such per capita roll and prior to the effective date of this section who possess one-fourth ($\frac{1}{4}$) or more Salish or Kootenai blood or both and are born to a member of the Confederated Tribes of the Flathead Indian Reservation. Subject to review by the Secretary of the Interior, the Tribal Council shall make any necessary corrections in this 1959 membership roll so that no one eligible for membership under prior constitutional provisions shall be excluded therefrom.

Section 3. Future Membership.—Future membership may be regulated from time to time by ordinance of the Confederated Tribes subject to review by the Secretary of the Interior. Until and unless an ordinance is adopted any person shall be enrolled as a member who shall (a) apply, or have application made on his behalf, establishing eligibility under this provision; (b) show that he is a natural child of a member of the Confederated Tribes; (c) that he possesses one-quarter ($\frac{1}{4}$) degree or more blood of the Salish or Kootenai Tribes or both, of the Flathead Indian Reservation, Montana; (d) is not enrolled on some other reservation.

Section 4. Adoption.—The Tribal Council shall have the power to enact and promulgate ordinances, subject to review by the Secretary of the Interior, governing the adoption of persons as members of the Confederated Salish and Kootenai Tribes.

* * * * *

Section 7. Current Membership Roll.—The membership roll of the Confederated Salish and Kootenai Tribes of the Flathead Reservation shall be kept current by striking therefrom the names of persons who have died or have lost membership pursuant to this Constitution and adding thereto the names of persons who shall have established eligibility or been adopted. The roll so prepared shall be the basis for determining the right of persons whose names appear thereon to share in annual per capita distribution of funds or in any other tribal property, subject to Secretarial approval.

Section 8. Rules of Procedure.—The Tribal Council shall have the authority to prescribe rules to be followed in compiling a membership roll in accordance with the provisions of this article, the completed roll to be approved by the Tribal Council of the Confederated Salish and Kootenai Tribes. In case of distribution of tribal assets, the roll shall be submitted to the Secretary of the Interior for final approval as may be provided by law.

² Ordinance 35-A, as approved November 24, 1961:

BE IT ENACTED BY the Council of the Confederated Salish and Kootenai Tribes, That this Ordinance is adopted for the purpose of establishing uniform procedures for enrollment (including enrollment by adoption) pursuant to the Constitution and Bylaws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, (henceforth referred to as the Constitution) as follows:

A. *Procedure for enrollment under Article II, Section 3 of the Constitution.*—The applicant, or the next friend of the applicant if applicant is too young to act on his own behalf, must:

1. Make formal application to the Tribal Council requesting enrollment as a member of the Confederated Tribes;
2. Show that he (or she) is a natural child of a member of the Confederated Tribes, giving necessary data on such parent;

Footnote continues on next page.

The case involves: (1) the authority of the Secretary to order the tribal enrollment of Mrs. Baciarelli; (2) the authority of the Secretary to consider Mrs. Baciarelli to be a member of the Tribes for the limited purpose of receiving tribal funds or property over which the Secretary

3. Show that he (or she) possesses one-quarter degree or more blood of the Salish or Kootenai Tribes, or both, of the Flathead Indian Reservation, Montana;

4. Show that he (or she) is not enrolled on some other reservation.

B. Procedure for enrollment by adoption under Article II, Section 4 of the Constitution.—The applicant must:

1. Make formal application to the Tribal Council requesting enrollment by adoption as a member of the Confederated Tribes;

2. Establish one of the following:

(a) Show that he (or she) was eligible at birth for enrollment under the provisions of Article II, Section 1(b) of the Constitution as it existed prior to amendment, and that he (or she) was born prior to May 4, 1960. That is, the applicant must show that he (or she) was born to a member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation who was a resident of the Reservation at the time of his (or her) birth. Residence means actual residence within the boundaries of the Flathead Reservation. A member who was, or is, merely temporarily away from the Reservation for the purpose of attending school or serving in the Armed Forces of the United States (Army, Navy, Air Force, Marine Corps, Coast Guard), provided he continues to maintain his home on the Reservation, shall be considered a resident. In the event the member does not return to the Reservation after completion of school or discharge from the Armed Forces, such member shall be considered a non-resident from the date of departure from the Reservation for school or the Armed Forces. Absence from the Reservation for work, including war work, does not constitute temporary absence under this provision.

(b) As an alternative to (a) above, show that he (or she) was eligible at birth for enrollment under the provisions of Tribal Ordinance 4A and was born during the period from October 4, 1946, to April 2, 1951; that is, he (or she) was born to an enrolled and recognized member of the Confederated Salish and Kootenai Tribes, and possesses no less than one-sixteenth degree of Salish or Kootenai blood, or both. Under this particular provision only, residence of the member parent on the Reservation at time of birth is not a requirement, except that those members who had continually resided away from the Flathead Reservation for a period of 10 years lost the right to enroll their children, unless such member was employed in government service, or in educational or public institutions, or was a non-resident because of ill health. When ill health was the reason, then a doctor's certificate stating the causes of ill health and the need for living away from the Reservation is necessary.

(c) As an alternative to (a) and (b) above, show that he (or she) was eligible at birth under the provisions of Tribal Ordinances 10A or 18A and was born during the period from April 3, 1951, to May 4, 1960; that is, he (or she) was born to a member regardless of residence and possesses no less than one-fourth degree of Salish or Kootenai blood, or both.

3. Show that because of neglect or error he (or she) was not enrolled when eligible under 2 (a), (b), or (c) above.

4. Show that he (or she) is not enrolled on some other reservation.

C. General Provisions

1. The Tribal Council must pass on adoptions before they are lawful, a majority of the quorum voting for the motion.

2. The rights of all enrollees are prospective only and enrollment as a member does not entitle the enrollee to retractive[sic] rights and privileges.

3. The applicant for enrollment, including enrollment by adoption, must assume the burden of proof on all matters incident to his enrollment.

* * * * *

TRIBES OF THE FLATHEAD RESERVATION, IN THE MATTER OF THE
ENROLLMENT OF MRS. ELVERNA Y. CLAIRMONT BACIARELLI

August 25, 1970

has been granted authority by the Congress; and (3) the interpretation of the tribal constitution and ordinance as they bear on the facts of Mrs. Baciarelli's petition. Each point will be considered in turn. Because of our determination of the legal issues and our interpretation of the tribal constitution and ordinance, it will be unnecessary to consider the questions of fact. Accordingly, the documents submitted as "additional information" by Mr. Richard A. Baenen on September 15, 1969, have played no part in the consideration of this appeal.

First. There exists in the Secretary of the Interior no jurisdiction to enroll Mrs. Baciarelli as a member of the Confederated Tribes.

Enrollment in the Tribes is governed by the tribal constitution and the tribal ordinances adopted thereunder. No provision is contained in them for secretarial action or review.

The enrollment actions of the enrollment committee and the tribal council, therefore, acting under a duly adopted and approved constitution that does not provide for review by the Secretary, and in the absence of an applicable act of Congress, are final insofar as they relate solely to tribal questions. Where, as here, there is no provision in the tribal constitution for review by the Secretary, and where, as here, there is no applicable act of Congress, the Secretary's authority becomes pertinent only where there is trust property under his supervision to disburse to the members of a tribe. Nowhere in Ordinance 35-A is the Secretary granted authority under the tribal constitution to order the enrollment of a person rejected by the Tribal Council; the Secretary's only power, recognized by Sections 7 and 8 of Article II, is to order that tribal assets under his supervision as trustee be distributed to someone not listed on the roll prepared by the Tribal Council. *Martinez v. Southern Ute Tribe of Southern Ute Reservation*, 249 F. 2d 915, 920 (10th Cir. 1957), cert. denied, 356 U.S. 960 (1958), states a tribe's power to determine its membership as follows:

[I]n absence of express legislation by Congress to the contrary, a tribe has the complete authority to determine all questions of its own membership, as a political entity. [Citations omitted.]

See also 55 I.D. 14, 33 (1934) :

The power of an Indian tribe to determine questions of its own membership arises necessarily from the character of an Indian tribe as a distinct political entity. * * *

Second. Once the Tribal Council acted to deny Mrs. Baciarelli's application for enrollment, there existed jurisdiction in the Secretary to review only the effect of the Council's action on the distribution of tribal assets over which the Secretary exercises authority for the United States.

See 58 I.D. 628 (1944), where the distribution of funds was at issue.

See also Martinez, supra:

* * * [I]t has been held that 25 U.S.C.A. sec. 163 and its predecessors qualify that power of an Indian tribe [to determine questions of tribal enrollment] where the question involved is the distribution of tribal funds and other property under the supervision and control of the federal government. [Citations omitted.] It appears that for purposes of which the tribe has complete control, the tribe conclusively determines membership; but where departmental action is authorized, the department may approve or disapprove the membership rolls of the tribe.

See also 55 I.D. 14, 39-40 (1934) :

The power of an Indian tribe to determine its membership is subject to the qualification, however, that in the distribution of tribal funds and other property under the supervision and control of the Federal Government, the action of the tribe is subject to the supervisory authority of the Secretary of the Interior. [Citations omitted.] The original power to determine membership, including the regulation of membership by adoption, nevertheless remains with the tribe, and in view of the broad provisions of the Wheeler-Howard Act, it is my opinion that the Secretary of the Interior may in the future define and confine his power of supervision in accordance with the terms of the constitution adopted by the tribe itself and approved by him.

Third. Though the Secretary may not order Mrs. Baciarelli's enrollment for tribal purposes, he may, if he disagrees with the Tribes' conclusion that she does not qualify for tribal membership under their constitution and ordinances, order a member's share of the tribal assets under his supervision as trustee to be paid to Mrs. Baciarelli. However, we find that the interpretation here made of Article II and Ordinance 35-A by the Council, upon which her right to tribal membership depends, is correct, and that the interpretation of them made by the Bureau of Indian Affairs is erroneous.

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The legislative history of Article II, adopted January 20, 1960, and approved by the Secretary on May 5, 1960, is pertinent. It followed a 1958 opinion by the Deputy Solicitor, 65 I.D. 97, that, in effect, invalidated tribal rolls prepared under previous enrollment ordinances. The Tribes were satisfied with their rolls, and so Section 1 of the new Article II settled the matter. Section 2 was intended only to bring up to the 1960 date of the new Article II the roll prepared in 1959. Section 4 provides that the Tribal Council shall have the power to enact and promulgate ordinances governing the adoption of persons into the Tribe. Section 3 is the one in question here, since the Area Director and the Acting Deputy Commissioner rely on it for their decision and find on the facts of the case that Mrs. Baciarelli meets the requirements there set forth.

The Area Director and the Acting Deputy Commissioner have read Section 3 to mean that after May 5, 1960, any applicant, regardless of age, meeting the requirements specified in the section, is entitled to enrollment. Such a reading would render meaningless the specific procedures set forth in Ordinance 35-A. Under Subparagraph 2(a) of Ordinance 35-A, establishing the procedures to be followed for adoption into membership under Article II, Section 4, of the tribal constitution, adoption is limited to persons born prior to May 4, 1960. The clear implication, therefore, is that unenrolled persons born before that date are not entitled to membership by right under Section 3, just as persons born after that date are not eligible for adoption under Section 4. The fact that adults as well as minors may apply for membership under the provisions of Ordinance 35-A governing Section 3 membership proves no more than that the Tribes expect the ordinance to be in effect at least long enough for persons born in 1960 and later to make their own applications if none is made on their behalf, while they are too young to act for themselves. Since Mrs. Baciarelli was born in 1936, she must be enrolled by adoption or not at all.

Although Mrs. Baciarelli may be able to meet the qualifications for adoption set out in Ordinance 35-A, that in itself is insufficient to win adoption into the tribes since one of the conditions for adoption is, as stated in C, 1 of the Ordinance:

The Tribal Council must pass on adoptions before they are lawful, a majority of the quorum voting for the motion.

Consequently, until the Tribal Council so acts to adopt Mrs. Baciarelli, she will not be a member of the Tribes either from the purely tribal point of view or as a person found eligible to share in Federal distributions of tribal property. The appeal of the Tribes in this case is accordingly sustained.

Sincerely yours,

HARRISON LOESCH,
Assistant Secretary of the Interior.

DePAOLI BROTHERS
NORTH AMERICAN ROCKWELL CORPORATION

IBLA-70-525 *Decided September 22, 1970*

Private Exchange: Protest—Private Exchange: Classification

Where, after a land office of the Bureau of Land Management dismissed a protest against a private exchange, the protestant shows that it had not been served properly with notice of the proposed classification of the public land for exchange, the decision will be set aside and the case remanded for compliance with the land classification procedures prescribed by the Department's regulations.

APPEAL FROM NEVADA LAND OFFICE,
BUREAU OF LAND MANAGEMENT

DePaoli Brothers have appealed to the Director, Bureau of Land Management, from a decision dated February 2, 1970, wherein the Bureau's land office at Reno, Nevada, dismissed a protest by DePaoli Brothers against a private exchange application filed by North American Rockwell Corporation, N-3476.¹

Among other contentions in their protest and appeal, DePaoli Brothers allege that they had not been served with notices of the proposed classification or of the classification of the lands involved in the exchange application, as required by 43 CFR 2411.1-2(b) (now

¹ Effective July 1, 1970, the Board of Land Appeals, Office of Hearings and Appeals, assumed jurisdiction over all appeals pending before the Director, Bureau of Land Management, in the exercise of supervisory jurisdiction of the Secretary of the Interior (35 F.R. 10012, June 18, 1970).

September 22, 1970

43 CFR 2462.1). The land office decision acknowledged that the Bureau had erred in not notifying DePaoli Brothers, a duly authorized user, under grazing permit, of some of the lands included in the proposed classification and in the classification for disposal by exchange.

The Department's regulations implementing the Classification and Multiple Use Act, 43 U.S.C. sec. 1412 (1964), provide that all authorized users of the public land, including grazing permittees or licensees, will be given notice of any proposed classification of the land, and the opportunity to be heard by the State Director, Bureau of Land Management, on the proposal. This provision is mandatory in its nature.

As the State Director did not follow the requirements of the Department's regulations in processing the Bureau-motion classification, N 2573, through failure to serve notice of the proposed classification on DePaoli Brothers, it must be held that the purported classification for disposal is ineffective. The published notice of the exchange application of North American Rockwell Corporation must be set aside as being premature for the reason that the selected land in the exchange application is not supported by proper classification for disposal by exchange. This, of course, makes the appeal by DePaoli Brothers moot.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 211.13.5; 35 F.R. 12081), the decision appealed from is set aside, and the case is remanded to the Bureau of Land Management for further action consistent with this decision.

NEWTON FRISHBERG, *Chairman.*

I CONCUR:

FRANCIS MAYHUE, *Member.*

I CONCUR:

EDWARD W. STUEBING, *Member.*

J. D. ARCHER

IBLA-70-35 *Decided September 23, 1970***Phosphate Leases and Permits: Permits**

An application for a phosphate prospecting permit is properly rejected upon the basis of a previous determination by the Geological Survey that the land applied for is subject to the leasing provisions of the Mineral Leasing Act, without a review of the evidence relied upon in the initial determination, where no evidence is submitted suggesting error in that determination.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

J. D. Archer has appealed to the Secretary of the Interior from a decision dated February 7, 1969, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Idaho land office rejecting his application Idaho 2181, filed pursuant to section 9(b) of the Mineral Leasing Act, as added by the act of March 18, 1960, 30 U.S.C. sec. 211(b) (1964), for a phosphate prospecting permit.

Appellant's application was filed on March 18, 1968, for 520 acres of land in the SE $\frac{1}{4}$ and N $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 4, SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 5, SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 8, and N $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{2}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 9, T. 9 S., R. 43 E., B.M., Idaho. The application was rejected by the land office on October 24, 1968, upon the basis of information contained in a report from the Geological Survey dated August 15, 1968. According to that report, the described lands were included in phosphate lease application Idaho 015984, filed on January 8, 1965, by Don L. Mount, and although the lease application was subsequently withdrawn, the lands were, at that time, determined to be subject to the leasing provisions of the Mineral Leasing Act. See *Don L. Mount, A-30682* (May 5, 1967).

Appellant challenged the action of the land office, arguing in an appeal to the Director, Bureau of Land Management, that the classification procedure prescribed by the law and the regulations was not followed and that no evidence was cited by the Geological Survey in its report which would show the lands to be subject to the leasing provisions of the Mineral Leasing Act.

The Office of Appeals and Hearings found, in its decision of February 7, 1969, that appellant had asserted, without substantiation,

that the lands applied for are subject to the prospecting provisions of the Mineral Leasing Act and that he had, in effect, suggested that a reclassification of the land was required to be made pursuant to his application. After pointing out that a prospecting permit may not be issued for land when information is available from which the existence and workability of phosphate deposits within that land can be determined or inferred, it held that the lands in question had been found to contain sufficient phosphate to warrant development under the leasing provisions of the act, that appellant's argument was not persuasive of error in the classification of the lands as suitable for leasing only and that appellant's application was, therefore, properly rejected.

In his current appeal, Archer again makes the bald assertion that the lands applied for are subject to the prospecting provisions of the Mineral Leasing Act for the reason that it is necessary to conduct exploration to determine the existence or workability of phosphate deposits. Again he fails to suggest why such exploration is necessary. The main thrust of his argument appears to be that his application cannot be rejected without a formal report, prepared in express response to his application, on the geology of the lands described in the application. He asserts that:

The Geological Surveys [sic] position is that once having reported on portions of lands they have no further obligation to adjudicate further cases on their merits.

There is no formal classification by the Survey, as required by the law and regulations. The application must be considered on its own merits as to the lands applied for.

The Survey has filed no report specifically showing why the lands should be subject to leasing. * * *

Undeniably, appellant's application "must be considered on its own merits." But what merits has the application which have not been considered?

Appellant does not explain what "law and regulations" have been violated or ignored in this case. The fact is that neither the statutes (43 U.S.C. secs. 211-214 (1964)) nor the Department's regulations (43 CFR Part 3160, 1970 Rev.)¹ prescribe the manner in which a

¹ The Department's regulations were revised on May 12, 1970, and the applicable regulations are now contained in 43 CFR Part 3500, 35 F.R. 9699 (June 13, 1970).

determination as to whether or not land is subject to the issuance of a phosphate prospecting permit is to be reported. As a matter of practice, it is customary for a land office, upon receipt of an application for such a permit, to request the Geological Survey to determine whether or not the lands described in the application are subject to the prospecting provisions of the leasing act. Generally, in response to such a request, the Geological Survey prepares a report in which it sets forth the results of any exploratory work which may have been performed in the area and incorporates, by reference, published mineral survey reports and other pertinent data shedding light on the mineral character of the lands described in the application and in which it sets forth its conclusions with respect to the known presence of workable deposits of phosphate. The substance of that report is then incorporated into the decision which the land office issues in acting upon the application for a permit.

But while the foregoing procedure is normally followed, the Department is not precluded from deviating from the pattern in some particulars. The Director of the Geological Survey has been expressly entrusted by Congress with the "classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain." 43 U.S.C. sec. 31 (1964). When the Geological Survey has concluded from the available geological data that further exploration is, or is not, needed to determine the existence or workability of phosphate deposits within a particular area, the Secretary may rely upon the reports of the Survey setting forth the conclusions reached without examining the technical date upon which those conclusions were based. See *Carl Nyman*, 59 I.D. 238 (1946); *Roland C. Townsend*, A-30142, A-30250 (September 14, 1965).

In this instance, the Geological Survey simply reported that it had previously found the lands described in appellant's application to be suitable for leasing, and, upon the basis of its earlier determination, it recommended the rejection of the application. The only question presented on this appeal is whether such a report is an adequate basis for action by the land office. We find that it is.

This is not to say, of course, that appellant has no right to know what facts support the conclusions of the Geological Survey or to challenge those conclusions. Appellant is entitled, upon proper inquiry of the Geological Survey, to be advised of the factual basis for the

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CONSTRUCTION COMPANY

September 30, 1970

Survey's conclusions and to question, for cogent reasons, the soundness of the Survey's determination. The record before us, however, contains no evidence of any attempt on the part of appellant to ascertain from the Geological Survey the basis for its initial determination that the lands now applied for are subject to leasing. In the absence of a showing that there was an abortive attempt to obtain additional information, we do not find that appellant has been denied fair consideration of his application. As no error has been shown in the determination that the lands are subject to leasing and are, therefore, not subject to the prospecting provisions of the Mineral Leasing Act, the application was properly rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 18.5; 35 F.R. 12081), the decision appealed from is affirmed.

MARTIN RITVO, *Member.*

I CONCUR:

EDWARD W. STEUBING, *Member.*

I CONCUR:

ANNE LEWIS, *Member.*

APPEALS OF AL JOHNSON CONSTRUCTION COMPANY AND
MORRISON-KNUDSEN COMPANY, INC., AL JOHNSON CONSTRUC-
TION COMPANY

IBCA-789-7-69 IBCA-790-7-69

Decided September 30, 1970

Contracts: Construction and Operation: Changed Conditions—Contracts:
Disputes and Remedies: Burden of Proof—Rules of Practice: Evi-
dence—Rules of Practice: Witnesses

A first category changed conditions claim is denied where, in a case decided upon the record without a hearing, the Board finds that the appellant has failed to show by a preponderance of evidence that the sand content of the designated borrow area differed materially from the representations made by the Government; or that information allegedly withheld by the Government affected the appellant's bid with respect to either the sand content

represented to be present or the pit recovery factor used. The Board notes (i) that the only testing performed by the appellant to determine sand content was done some eighteen months after contract completion (ii) that such testing involved three of twenty-three test borings for which information was shown by the Government in the invitation; and (iii) that the results of the appellant's testing (as contrasted with that of the Government) were stated as conclusions without any details being furnished as to the methods employed in testing or grading of the samples taken. In addition, the Board found that appellant had failed to offer any evidence to support its contention that the so-called total accountability approach was based upon an accepted trade practice.

Contracts: Construction and Operation: Changed Conditions—Contracts: Disputes and Remedies: Burden of Proof—Rules of Practice: Evidence—Rules of Practice: Witnesses

Claims of changed conditions in both the first and second category are denied, in a case decided upon the record without a hearing, where the Board finds that appellant has failed to show by a preponderance of evidence that changed conditions in either category were encountered. With respect to the first category changed conditions claim, the Board noted that the appellant's action in acknowledging the accuracy of information provided in the Government's test borings would appear to preclude appellant from relying upon the contention that the conditions represented by the Government's test borings were materially different than conditions encountered in actual excavation. Respecting the second category changed conditions claim, the Board found (i) that conditions encountered could not be said to be unknown where the appellant acknowledged that the physical conditions and characteristics of all materials tested throughout the Government's aggregate source were consistent with its prebid studies; and (ii) that conditions encountered could not be said to be unusual where the appellant acknowledged that prior to bid it had anticipated that conditions of the type encountered would be met and failed to show that the adverse conditions present were materially different than should have been expected.

BOARD OF CONTRACT APPEALS

These two appeals are similar in that each involves claims by the same subcontractor, L. G. Everist, Inc., for additional costs attributed to changed conditions in the quantities and quality of sand in different borrow pits, to be used in aggregate for concrete dams under separate prime contracts. The dams and borrow areas were at widely separated locations, the Morrow Point Dam and Powerplant being in Colorado, while the Swift Dam is in Montana.¹

¹ The two appeals will be discussed in order of their docket numbers with the first being referred to as the Morrow Point Appeal and the other as the Swift Appeal. The numbered exhibits for the Morrow Point Appeal and for the Swift Appeal will be prefixed by the letters "M" and "S", respectively.

Both claims were denied by the contracting officer in Findings of Fact dated June 24, 1969. Timely appeals were taken and oral hearings were requested. Thereafter, the Board denied the Government's Motions² to dismiss the appeals and scheduled them for hearing. The scheduled hearing was never held, however, as a result of counsel for the parties entering into a Stipulation of Fact under date of January 23, 1970, with respect to each appeal in which they agreed that the appeals should be decided by the Board on the basis of documentary evidence of record.

While the facts agreed to in the stipulations have been accepted, there are a number of matters that are not covered in the stipulations for which no satisfactory proof has been offered. In addition, the stipulations are subject to other limitations which preclude the satisfactory resolution of issues in several instances. One typical form of agreement contained in the stipulations is that the "appellant would testify" to a certain point. In a few instances that kind of agreement has been treated in appellant's briefs as if it were the equivalent of the Government having stipulated to the truth of the matters asserted. This is not, of course, the case. In referring to Everist or the Prime Contractor, the term appellant will at times be used to designate either. For both appeals it has been stipulated that the only issues presented relate to entitlement.

Morrow Point Appeal (IBCA-789-7-69)

The contract in this appeal provided for the construction of the Morrow Point Dam and Powerplant on the Gunnison River, and related work, for an estimated price of \$15,436,066. In addition to the specifications, drawings and other conditions, the contract contained Standard Form 23-A (April 1961 Edition), including Clause

² In opposing the Government's Motion to dismiss the appeals, the appellant adverted to the requests for a hearing and stated: "* * * No requirement exists to submit evidence in the Pleadings or Complaint. * * * Appellant intends to submit such relevant facts and data at the hearings as to establish the merits and value of his claim." (Appellant's answers to Government's Motions to dismiss appeals.)

4, Changed Conditions³ as a General Provision. Although all phases of the work were to have been completed by June 12, 1967, the time was extended for various reasons until May 24, 1968,⁴ when the work was accepted as substantially complete.

The firm of L. G. Everist, Inc., was the subcontractor employed to furnish the concrete aggregate consisting of gravel and sand to be obtained from a borrow pit located near Cimarron Creek and in the vicinity of the dam site.

Pre-bid information furnished to all bidders on Drawing No. 116 (622-D-392) included a table of percentages of sand for 23 test pits in the borrow area. These percentages ranged from 12.9 percent to 34.6 percent, the weighted average percentage shown being 23.2 percent. The sand in the North Area (excavated by appellant) was shown to contain 8.1 percent silt by weight passing a No. 200 screen. The contract specifications required that sand used in the concrete aggregate contain no more than 3 percent silt.

Appellant claims that its bid was based on an estimate of 89 percent recovery of usable material from the borrow pit; that changed conditions were encountered in the borrow area in that the percentage of sand that was available amounted to an average of only 17.2518 percent over the entire area instead of the weighted average of 23.2 percent,⁵ represented by the Government and that for this reason it was necessary to process 1,067,853 tons of borrow material in order to produce the required tonnage of sand, as compared with its original estimate for bid purposes of 815,000 tons of borrow material. The ad-

³ "4. CHANGED CONDITIONS

"The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; or unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions."

⁴ For a portion of the work the time for completion was extended only to May 15, 1968, but that segment of the work was accepted as substantially complete on that date.

⁵ In its letter, dated December 1, 1967, the appellant acknowledged that it could only expect to recover approximately 22.2% sand (M Exhibit No. 30; Findings, Exhibit A, p. 14).

ditional costs of processing the increased tonnage was claimed to be \$164,941.57. The amount claimed was reduced to \$160,000 in the exception to the release on contract.⁶

In the course of denying the claim, the contracting officer found (i) that the amount of available sand in the designated aggregate source did not differ materially from the amount indicated in the contract and (ii) that the contractor's claim for processing additional pit materials in the amount of 154,151 tons was due to plant inefficiency and not to changed conditions. The Government also contests the appellant's assertion that its bid was projected upon recovering 89 percent usable material from the borrow pit.⁷

In support of its contention that the information in the bidding documents was erroneous, the appellant relies principally upon (i) recent testing performed by it which allegedly revealed a major discrepancy in three test pits, insofar as the sand content represented to be present and the amount of sand actually available was concerned and (ii) the so-called total accountability approach,⁸ which the appellant contends is an acceptable trade practice by which one can determine the actual sand content by accounting for all the materials excavated.⁹ In addition, the appellant asserts that the Government withheld material information concerning the sand content of test pit areas to the prejudice of the appellant.¹⁰

⁶ See Stipulation of Fact (IBCA-789-7-69), paragraphs 7-8, 10.

⁷ The Government relies in part upon an article entitled "Production and Manufacture of Fine and Coarse Aggregate" by Nathan C. Rockwood, which was published in *Symposium on Mineral Aggregates 1948* by the American Society for Testing Materials (Special Technical Publication No. 83), and especially the following passage therefrom: "Ordinary commercial screening operations, day in and day out, probably average about 75 percent. Higher percentages are difficult to obtain. * * *" (Stipulation of Fact (IBCA-789-7-69), par. 6.)

⁸ In Appellant's Brief, at 15, counsel asserts: "* * * The Government at least tacitly agrees with this approach for on Page 6 of the Stipulation, the Government joins Appellant in stating 'Consequently the parties agree that the following two matters are in controversy, and are the primary factual issues in this appeal: A. Is the 42,600 tons of unrecovered minus No. 4 material in feed to gravel screening plant sand or degraded rock accumulated by breakage and dozing? B. Is the 9,100 tons, labeled by the Government as "sand in surge pile" (-No. 4) sand?'"

⁹ See Appellant's Brief, 14, 15.

¹⁰ "* * * had the Government furnished Appellant with all the pertinent information it possessed, Appellant may have expected the sand content to be less than 23% or would have used a different pit recovery factor." (Appellant's Brief, 12.)

To establish a changed condition of the first category an appellant must show by the preponderance of the evidence that the subsurface or latent physical conditions at the site differed materially from those indicated in the contract.¹¹ For the unqualified positive representation required for a first category changed condition,¹² the appellant is relying upon the alleged material difference between the weighted average shown in the contract for the percentage of sand available in the specified borrow area based upon logs of borings for 23 test pits and the amount of sand recovered from the area designated. In the past, the boards¹³ have questioned whether logs of exploration can be relied upon as positive representation of what the contractor could expect to encounter in the general area of excavation. This rationale was the basis for the denial of a contractor's claim of changed conditions in a very recent case.¹⁴

The contracting officer's finding that the amount of available sand in the designated aggregate source did not differ materially from the amount indicated by the contract was based upon tests conducted (i) during performance of the contract,¹⁵ and (ii) following its completion.¹⁶ In the Stipulation the appellant acknowledges that it performed no testing either in the aggregate pit or in the processing plant

¹¹ *Roger V. Burke*, IBCA-661-8-67 (February 6, 1969), 69-1 BCA par. 7493.

¹² *Morrison-Knudsen Co., Inc. v. United States*, 170 Ct. Cl. 712, 718 (1965).

¹³ *J. A. Terteling & Sons, Inc.*, IBCA-27 (December 31, 1957), 64 I.D. 466, 493, 57-2 BCA par. 1539, p. 5466 ("* * * In view of the diversity of the conditions revealed by the exploratory drilling, it could not reasonably be assumed that the zones of good, bad, or indifferent rock would be distributed in a consistent pattern. * * *") The Board's denial of the changed conditions claim was affirmed. *Patrick Harrison, Inc.*, NASA BCA No. 95 (February 15, 1966, 66-1 BCA par. 5369. See *J. A. Terteling & Sons, Inc. v. United States*, 182 Ct. Cl. 691 (1968).

¹⁴ *Maurice Mandel, Inc. v. United States*, 424 F. 2d 1252, 1255 (8th Cir., 1970). ("Soil borings are capable of disclosing only actual characteristics of the subsurface materials confined within the boring cylinder. Experience teaches that soil conditions within a reasonable area surrounding the bore are likely to possess characteristics substantially like the sample within the bore. See *Morrison-Knudsen Co. v. United States*, 345 F. 2d 535, 541, 170 Ct. Cl. 712 (1965). But such sampling procedures may fail to accurately demonstrate overall area soil conditions. See *T. F. Scholes, Inc. v. United States*, 357 F. 2d 963, 174 Ct. Cl. 1215 (1966); *Fehlhaber Corp. v. United States*, 151 F. 817, 138 Ct. Cl. 571, cert. denied, 355 U.S. 877, 78 S. Ct. 141, 2 L. Ed. 2d 108 (1957).")

¹⁵ "* * * reliable and accurate periodic samples of the raw feed into the plant would constitute the best method of evaluating the claimed changed condition. The contractor has provided no such data nor, in fact, any sampling data. * * * Prior to receipt of any notice in October of 1964, the Government requested the cooperation of the contractor in taking periodic belt feed samples. One such sample was taken (see Exhibit C attached). However, contractor cooperation for further samples was refused and the effort dropped. The one sample taken showed 24.5 percent sand. Accordingly, I have concluded that any inaccuracies in results caused by the lack of important raw feed factual data must be charged to the contractor. * * *" (M Exhibit No. 30; Findings, par. 13.)

¹⁶ "14. One of the most important factors which I have considered in reaching my decision is the result of some recent sampling. In an unexcavated area of the pit, specifications data for TP-171 showed 22.2 percent of sand. A grading analysis of the recently excavated pit outside the excavated area located close by TP-171, and identified as BHP-2, indicated 23.0 percent sand. If similar test data covering the entire pit were available as that in hand with respect to TP-171, a completely accurate determination as to the merits of the claim could be made; however, the one instance where such an analysis is possible confirms the reliability of the original data. * * *" (M Exhibit No. 30.)

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until after the job was completed.¹⁷ It has not disputed the contracting officer's assertion that it refused to cooperate with the Government in taking periodic belt feed samples.¹⁸

The appellant vigorously contests the accuracy of the Government's test pit data, however, on the basis of an affidavit submitted by William A. Conway, Chief Engineer of L. G. Everist, Inc., Mountain Division. In a comparative table set forth in the affidavit the Bureau's findings with respect to sand content for three test pits is shown to be overstated by 15 percent to 53 percent as shown below:

Test Pit	Percent Sand				
	1. USBR	2. LGE	3. LGE	Avg. 2 & 3	Net Change
TP-BHP-2(A)*	23.0	19.1	20.0	19.6	15%
TP-BHP-176(A)	26.0	16.8	16.0	16.4	37%
TP-BHP-180(A)	34.6	17.5	15.0	16.2	53%
Average	27.9	17.8	17.0	17.4	35%

"This test pit was relied upon heavily in the Final Decision (page 12) to validate all of the other test pit results."¹⁹

To vindicate the accuracy of its testing the Government relies principally upon an affidavit submitted by Frank J. Puk, Supervisory Materials Engineering Technician, Morrow Point Dam in which the testing procedures used in sampling and testing test hole BHP-2 are described in detail. As to the sampling procedures, Mr. Puk states (i) that accurate evaluation of the test pit required large samples; (ii) that one dry weight sample was taken on August 7, 1968, and another was taken on August 8, 1968; (iii) that the sample from the initial excavation to a depth of 5.0 feet weighed 1,315 lbs., while the sample from the excavation on the following day to a further depth of 6.5 feet weighed 906 lbs.; (iv) that the method employed involved open-face cut sampling with backhoe from a hole the dimensions of which was approximately 5' x 10'; (v) that in both instances the material obtained from the excavation was spread on a large tarpaulin and allowed to dry; and (vi) that the use of the tarpaulin was also dictated by the need to prevent any loss of fines.²⁰

¹⁷ Stipulation of Fact (IBCA-789-7-69), par. 5.

¹⁸ See note 15, *supra*.

¹⁹ See note 16, *supra*.

²⁰ With respect to grading Mr. Puk's affidavit dated February 6, 1970, states: "On August 9th, 1968, this total sample was then graded. Both the upper five foot sample and the lower 1.5 foot sample were graded in the field for the + #4 sizes, using a hopper and screens setup as pictured on Page 410 of the First Edition of the Bureau of Reclamation Earth Manual. After weighing of the minus #4 size portion, the minus #4 portion was then mixed thoroughly and a representative sample taken and oven dried for a gradation test in the laboratory on a Tyler 8" diameter Ro-tap sieve shaker. A sample for silt content was also obtained at this time. To analyze the test pit for content of the various sizes, the grading results for the whole were determined, by using 76.92% for the 5 foot top portion and 23.08% for the lower 1.5 foot portion, applied to the grading results of the individual size percentages and then adding the results for a final grading result of the whole pit."

By way of contrast the affidavit of Mr. Conway contains very little detailed information with respect to the manner in which either the sampling or the grading was performed on behalf of the appellant. From the affidavit we know that a sampling program involving three test pits was conducted on November 11, 1969, at the Cimarron Creek deposit; that the samples were analyzed at Montrose, California; and that they were later subjected to further gradation checks. While in his statement Mr. Conway asserts that the actual samples were taken in accordance with accepted ASTM methods (D75-59) at locations designated by him, no information has been furnished, for example, as to (i) the size of the samples taken or (ii) the measures employed to prevent the loss of fines. We are also without information as to the manner in which grading of the samples was performed.

The appellant does not rest its entire case, however, upon the results of testing conducted approximately a year and a half after the contract work was accepted as substantially complete. As previously noted, it also contends (i) that the sand content of the area in question can properly be determined by accounting for all the material excavated and (ii) that the invitation for bids failed to include information known to the Government which could have caused the appellant to expect the sand content to be less than 23 percent or to use a different pit recovery factor.

With respect to the first contention the appellant has offered no convincing evidence to show that the so-called total accountability approach is an acceptable practice in the trade. Statements by counsel not founded upon any evidence of record are not of probative value;²¹ nor are unsupported allegations by an appellant concerning the existence of a trade practice.²²

Moreover, the contracting officer specifically found that the appellant's claim for processing additional materials in the amount of 154,151 tons was not attributable to changed conditions but rather was due to plant inefficiency.²³ The contracting officer noted (i) that after a sand rake classifier became operative on September 18, 1966, the yield of sand increased to 18.47 percent or an increase of 3.16 percent over the yield previously obtained; (ii) that by that time 735,346 tons of raw material (68.5 percent of the total) had been processed to produce 112,607 tons (15.31 percent) and (iii) that if proper processing equipment had been installed for such raw materials

²¹ *Sunset Construction, Inc.*, IBCA-454-9-64 (October 29, 1965), 72 I.D. 440, 447, 65-2 BCA par. 5188, p. 24,396.

²² *General Electric Company*, IBCA-451-8-64 (April 13, 1966), 73 I.D. 95, 100, 66-1 BCA par. 5507, p. 25,789. Cf. *A. W. Smith Construction Co.*, ENG. BCA par. 2844 (March 6, 1968), 68-1 BCA par. 6921, p. 32,008 ("* * * A statement by appellant without factual evidence is insufficient to prove a changed condition.")

²³ M Exhibit No. 30; Findings, par. 5, pp. 5, 6.

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an increased yield of 23,237 tons of sand (3.16 percent) would have resulted. Based upon this analysis the contracting officer found: "For sand used in concrete in the amount of 167,864 tons at a pit yield of 18.47 percent, the total pit material required would have been in the amount of 908,847 tons or 159,006 tons less than processed. Accordingly, it is concluded the contractor's claim for processing additional pit material in the amount of 154,151 tons was due to plant inefficiency, and not to changed conditions as alleged."

The appellant does not contest the contracting officer's findings²⁴ with respect to the increased sand yield after the installation of the sand rake classifier. It contends, however, that the sand yield increased in 1966 and 1967, because "materials were being taken from pits in that period of time that the test pit data showed would have a higher sand yield * * *."²⁵ Review of the evidence of record does not support the appellant's contention. First, the appellant has not undertaken to controvert Exhibit E to the findings which shows that in September of 1966, and thereafter, the appellant was in the upstream half of the borrow area. Second, the appellant's present position is directly contrary to its assessment of the sand content of the upstream versus downstream areas of the deposit even after the contract was completed.²⁶ We also note in passing that the appellant gave some consideration to the installation of the sand rake classifier as a remedial measure in February of 1965,²⁷ or some 18 months prior to the time it was installed.

Remaining for consideration is the appellant's assertion that the Government withheld information which could have caused the appellant to expect the sand content to be less than 23 percent or to have used a different pit recovery factor.²⁸ Direct evidence to support either of these contentions is entirely lacking. The appellant failed to offer any bid back-up showing the sand content contemplated or the pit recovery factor reflected in the appellant's bid as submitted. Mr. Con-

²⁴ The findings refer to and are based upon a schedule captioned "Sand Production vs. Raw Feed by Month." (M Exhibit No. 30; Findings, Exhibit D.)

²⁵ See Appellant's Complaint (IBCA-789-7-69), p. 6.

²⁶ "* * * we would normally expect (and test data indicated) the material to contain a high percentage of sand at the downstream end of the deposit. Subsequent production did prove this fact and the percent of sand continually decreased to an overall job average of 17.9 %, as the pit excavation moved upstream." (M Exhibit No. 30; Findings, Exhibit A, letter of August 1, 1968, p. 4.)

²⁷ M Exhibit No. 397; Government letter dated March 1, 1965, p. 1.

²⁸ The difference in sand content revealed by a series of tests conducted by the Government were apparently resolved to the Government's satisfaction prior to the time the invitation for bids was issued. See affidavit of William A. Conway, Exhibits E to H, inclusive.

way's observations concerning pit recovery factor are based upon hearsay or related to his experience on other jobs.²⁹ The proffered proof is no substitute for the testimony or sworn statement of the person who prepared the appellant's bid on the instant contract.³⁰ The appellant has offered no explanation of the failure to offer such evidence.

The Board therefore finds that the appellant has failed to show by a preponderance of the evidence that a first category changed condition was encountered.³¹ We, therefore, do not reach the issues raised in paragraph 10 of the Stipulation of Fact concerning the presence of sand wasted in the screening of material or in the surge pile.³²

Even if the appellant had succeeded in establishing a changed condition, however, it would still not be entitled to recover since the evidence of record will not permit a finding that the additional costs for which claim has been made were attributable to the changed condition³³ encountered and not to the production practices it adhered to for almost 70 percent of the contract work.

Swift Appeal (IBCA-790-7-69)

The contract in this appeal provides for construction of a concrete dam on Birch Creek in Pondera County, Montana, for the estimated amount of \$2,870,689. It included the General Provisions,³⁴ set forth in Standard Form 23-A (June 1964 Edition), and numerous additional provisions, specifications and drawings. The work was substantially completed within the specified period as extended, on August 10, 1967.

The appellant claims that a changed condition was encountered in the borrow area for concrete aggregate. The claim was presented by the contractor on behalf of its subcontractor, L. G. Everist, Inc. (the same firm that had a similar subcontract in the Morrow Point Appeal

²⁹ "It is my understanding that L. G. Everist, Inc. based its bid for this project on 89% sand recovery. Based on my experience, such a recovery in the 90% range is often bid, and achieved. * * *" (Affidavit of William A. Conway, dated January 7, 1970, p. 1.)

³⁰ *Morrison-Knudsen Co., Inc. v. United States*, note 12, *supra*, 170 Ct. Cl. 719, 720. ("The official of the plaintiff corporation who was in charge of the work of preparing and submitting the plaintiff's bid on the contract did not testify at the trial. Consequently, the record is lacking in direct evidence with respect to the effect upon this official's subjective mental processes of the defendant's misrepresentations concerning the subsurface conditions that were encountered in drilling holes 260 and 261.")

³¹ *Roger V. Burke*, note 11, *supra*.

³² See note 8, *supra*.

³³ See *Ace Construction Company v. United States*, 185 Ct. Cl. 487, 501 (1968), in which, referring to the Changed Conditions clause, the Court of Claims stated: "As the above language indicates, an equitable adjustment will not be made unless the physical conditions in question are not only materially different, but are also the cause of the increased costs of performance. * * *"

³⁴ One of such provisions is Clause 4, Changed Conditions (note 3, *supra*).

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decided above). The subcontractor claims that it sustained a loss of \$154,429.81, because it relied upon Government representations in arriving at its estimated costs and subcontract price.

In the Notice of Claim dated August 24, 1966,³⁵ the subcontractor asserted that its experience to date showed a substantial difference between the test data furnished to prospective bidders in the specifications and the actual pit recovery. Work had begun about a year before the Notice of Claim. From subsequent letters it is apparent that both first category³⁶ and second category³⁷ changed conditions claims are involved.

In addition the appellant contends that the Government failed to reveal to bidders certain information as to the mineralogy of the gravel and sand.³⁸ More specifically, the appellant indicates that had such information been disclosed,³⁹ it would have adjusted the 75 percent recovery factor upon which the appellant's bid is said to have been based.

In support of the 75 percent recovery factor the appellant asserts the existence of an industrial practice,⁴⁰ and its experience under other contracts.⁴¹ It again relies upon the so-called total accountability ap-

³⁵ S Exhibit No. 6; Findings, Exhibit B. According to the letter approximately sixty-four percent (64%) of the usable requirements of concrete aggregate had been produced as of August 23, 1966.

³⁶ " * * * whereas the Government borings indicated a pit run material containing 82% Gravel and 18% Sand, we encountered in the actual performance of the work a material of a different character containing 90.2% Gravel and 9.8% Sand * * *." (S Exhibit No. 6; Findings, Exhibit F, L. G. Everist's Claim letter of June 1, 1967, p. 2.)

³⁷ "Our actual performance of the sand production has established that mineralogy and quality of the sand was such that it was impossible to obtain the contemplated results. These circumstances are clearly within the purview of Article 4, Changed Conditions—Part (b), 'Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract.'" (S Exhibit No. 6; Findings, Exhibit M, L. G. Everist's Claim letter of August 1, 1968, pp. 2, 3.)

³⁸ Appellant's Brief (IBCA-790-7-60), 3-4.

³⁹ " * * * had the Government communicated to Appellant through the bid documents the information of which it was obviously aware, the Appellant could and would have used this very pertinent information in determining a reasonable recovery factor. * * *" (Appellant's Brief (IBCA-790-7-69), 5.)

⁴⁰ " * * * Appellant would testify that it based its 75% recovery factor on the following: A. Sound industrial practices. B. Appellant's own experience in recovery of over 10,000,000 tons of sand and gravel. C. Previous Bureau of Reclamation contracts wherein Appellant based bid on at least 90% pit recovery * * * D. Based on gradations depicted in Government bid documents." (Stipulation of Fact (IBCA-790-7-69), 2, 3.)

⁴¹ This Board has had occasion in the past (i) to note variables in performance conditions for the same type of equipment covered by different contracts which made experience thereunder not comparable, *American Ligurian Co., Inc.*, IBCA-492-4-65 (January 21, 1966), 73 I.D. 15, at 19, n. 14, 68-1 BCA par. 5326, at 25,026; (ii) to refuse to permit the introduction of evidence pertaining to the rate of progress attained under other contracts where no proper foundation had been laid, *Power City Construction & Equipment, Inc.*, IBCA-490-4-65 (July 17, 1968), 75 I.D. 185 at 192, 68-2 BCA par. 7126, at 38,016-17; and (iii) to disparage the comparability of the same type of work performed under the same contract but under different conditions, *Hoel-Steffen Construction Co.*, IBCA-656-7-67 (March 18, 1968), 75 I.D. 41 at 62, 68-1 BCA par. 6922, at 32,025 ("* * * All in all,

proach to establish the material variation between the amount of sand represented to be present by the Government and the amount of sand meeting specifications obtained by the appellant after hauling and processing the material excavated from an approved borrow area. Lastly, it once more relies upon the arguments of counsel in its brief and an affidavit by an employee who is not identified as having anything to do with the preparation of its bid to show the significance of pertinent information allegedly withheld by the Government to the prejudice of the appellant.⁴²

The comments we made and the authorities we cited above with respect to the Morrow Point Appeal are considered to be dispositive of the issues raised in this appeal, insofar as (i) unsupported statements by counsel;⁴³ (ii) alleged industrial practices;⁴⁴ and (iii) the materiality and prejudicial effect of information withheld⁴⁵ are concerned.

This appeal is significantly different from the case presented in IBCA-789-7-69, however, in two major respects. First, the appellant has acknowledged that the borrow materials used in the Swift Dam project were obtained from excavations at varying distance—some over one-half mile away—from where the Government testing relied upon for the changed condition representations was performed. The stipulation states: "The developed borrow area ranges from 450 to 2,200 feet from the closest of the eight test pits, from approximately 1,300 to 3,050 feet from the farthest of the eight test pits, and from approximately 800 to 2,600 feet from the approximate center of the area encompassing the eight test pits. * * *"⁴⁶ Secondly, unlike the situation in the earlier docketed appeal, the appellant has specifically acknowledged the accuracy of the information reflected in the Government's test borings.⁴⁷

In these circumstances it appears that the appellant is precluded from claiming⁴⁸ that the conditions represented by the Government's

we view the requested comparison as one involving 'apples and oranges,' rather than one which is ideal, as the appellant suggests.")

⁴² According to his affidavit, Mr. Richard H. Tucker became associated with the Swift Dam project as plant superintendent on July 15, 1965, i.e., more than two months after the award of contract on May 7, 1965.

⁴³ See text accompanying note 21, *supra*.

⁴⁴ See note 22, *supra*, and accompanying text. With respect to the nature of the proof required, we make no distinction between trade practices and industrial practices.

⁴⁵ See text accompanying notes 29 and 30, *supra*, and note 30, *supra*.

⁴⁶ Stipulation of Fact (IBCA-790-7-69), par. 4, p. 2.

⁴⁷ S Exhibit No. 6; Findings, Exhibit F, L. G. Everist's claim letter of June 1, 1967, p. 4 ("* * * Our supervisory and engineering personnel performed further extensive investigations in an effort to locate the materials within the Government Aggregate Source which contained the highest percentage of sand. The results of these investigations did not vary from the data indicated by the Government's Borings. The physical conditions and characteristics of all of the materials tested throughout the Government's Aggregate Source was considered consistent with our prebid studies.")

⁴⁸ "* * * Tests run during Appellant's production do not reveal that the Government's test data as contained in the bid documents was in error. * * *" (Appellant's Brief (IBCA-790-7-69), p. 4.)

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test borings were substantially different than the conditions encountered in actual excavation.⁴⁹ If it were to be shown that the Government's test borings did not accurately portray the soil conditions even in the area tested, however, the appellant would not appear to be able to show the prerequisite reliance thereon for recovery where, as here, (i) the areas selected for excavation were substantial distances from the places at which the Government's test borings were made, and (ii) no evidence was offered to show the distances to which soil characteristics could reasonably be expected to be the same.⁵⁰

From the appellant's standpoint the difficulty with the second category changed conditions claim is that virtually no evidence has been offered⁵¹ to support its contentions that the conditions were unknown and unusual. If, as has been acknowledged by the appellant, the physical conditions and characteristics of all materials tested throughout the Government's aggregate source were consistent with the appellant's prebid studies, there is no basis for a finding that the soil conditions encountered were unknown to the appellant.

As to the conditions being unusual, the appellant acknowledges that prior to bid it had anticipated that conditions of the type encountered would be met.⁵² The appellant asserts, however, that the adverse conditions far exceeded its expectations.⁵³

⁴⁹ We do not intend to imply that the appellant has abandoned its claim of misrepresentation based upon the alleged withholding by the Government of material information. See *Humphrey Contracting Corporation*, IBCA-555-4-66 and IBCA-579-7-66 (January 24, 1968), 75 I.D. 23 at 29, 68-1 BCA par. 6820, at 31,516, where allegations of this nature were treated as a first category changed condition claim.

⁵⁰ *Mowrice Mandel, Inc. v. United States*, note 14, *supra*. Cf. *Morrison-Knudsen Co., Inc. v. United States*, note 12, *supra*, where the Court found that in the circumstances there present ground conditions could be expected to be similar for a radius of about ten feet from where a test boring was made.

In the circumstances present here the failure of Everist to excavate for borrow in closer proximity to the area where the Government's test borings were taken is considered to be fatal to reliance upon the so-called total accountability approach, even assuming arguendo that the approach was otherwise acceptable.

⁵¹ See *J. A. Terteling & Sons, Inc.*, note 13, *supra*, 64 I.D. at 484, 57-2 BCA par. 1539 at 5456 ("* * * The burden of proving a claim that falls in the second category of the article is a fairly heavy one, since the contractor must show not only that he encountered conditions that were unexpected to him but also that the conditions encountered would have been generally regarded as unexpected by others engaged in the same type of operations. Otherwise, as the Board has said, article 4 would become 'the Achilles heel of every construction contract.'") (Citation omitted.)

⁵² S Exhibit No. 6; Findings, Exhibit M, L. G. Everist's claim letter of August 1, 1968, p. 2 ("It was apparent from the prebid data that the sand test results on absorption and sodium sulphate indicated a sand of lesser quality than is normally accepted for concrete. * * * Although anticipating the problems of coarse grading and low sand ratio, we could not be reasonably expected to anticipate a sand recovery of one-half the indicated amount.")

⁵³ Cf. *Overland Electric Co., Inc.*, ASBCA No. 9096 (July 31, 1964), 1964 BCA par. 4359, at 21,066 ("* * * Mere unexpected difficulty is not sufficient. Evidence shows that appellee-

In an apparent effort to qualify the admission that the Government's test data was accurate, appellant's counsel refers to "disappearing sand" and stresses that—absent information in the possession of the Government—the appellant could not be expected to know that because of its characteristics the sand might simply "melt away" during processing.⁵⁴ These suppositions are contrary to the results of Government tests conducted in February of 1969 (Exhibit O of Findings of Fact)⁵⁵ comparing samples taken from Borrow Area A (used by Everist) with left-over stockpiled sand at the dam site. These tests demonstrated that the materials from these two sources were essentially the same and that there was no significant breakdown of the sand material during the time the sand was in the stockpile.⁵⁶ The report stated: "The similar petrographic features of the pit and stockpile samples eliminates mineralogy as a major factor in low sand recovery."⁵⁷

Based upon the record before us in these proceedings, the Board finds that the appellant has failed to show by a preponderance of the evidence that changed conditions in either the first or the second category were encountered in performing the work involved in the Swift Appeal.

Summary

- (1) Appellant's claim in the amount of \$160,000 under Contract No. 14-06-D-4839 (docketed as IBCA-789-7-69) is hereby denied.
- (2) Appellant's claim in the amount of \$154,429.81 under Contract No. 14-06-D-5588 (docketed as IBCA-790-7-69) is also denied.

WILLIAM F. McGRAW, *Chairman.*

I CONCUR:

SHERMAN KIMBALL, *Member.*

I CONCUR:

ROBERT L. FONNER, *Member.*

lant had such knowledge of general site characteristics from which the occurrence of rock could reasonably have been anticipated. *Alvin H. Leal v. United States* (1960), 149 C. Cls. 451. Difference in degree does not spell out a changed condition, nor simple variance in the detailed locations of occurrence. * * *") Compare *Penn York Construction Corp.*, ASBCA Nos. 11419-21, 11895 and 11921 (February 26, 1970), 70-1 BCA par. 8179, at 38,012.

⁵⁴ Appellant's Brief (IBCA-790-7-69), 5.

⁵⁵ S. Exhibit No. 6.

⁵⁶ The borrow area sand contained about 3% to 11% of unsound material, and it is possible that a small percentage of that might break down with time or in processing, according to the Government report.

⁵⁷ S. Exhibit No. 6; Findings, Exhibit O, Government memorandum, dated February 1969, from Chief Chemical Engineering Branch to Chief, Concrete and Structural Branch, p. 2.

BONNEVILLE POWER ADM. NET BILLING AGREEMENTS 141
RELATING TO THE HYDRO-THERMAL POWER PROGRAM
September 21, 1970

BONNEVILLE POWER ADMINISTRATION NET BILLING AGREEMENTS RELATING TO THE HYDRO-THERMAL POWER PROGRAM*

**Bonneville Power Administration: Generally—Power:
Purchase of for Resale**

The Bonneville Power Administrator has authority to enter into firm, long-term agreements with preference customer participants in the Trojan project and in other projects in the hydro-thermal power program under which BPA takes the participants' share of project output and agrees to pay the participants under net billing arrangements for their share of project costs from a date certain whether or not the project is operable.

M-36812

September 21, 1970

TO: ASSISTANT SECRETARY, WATER AND POWER DEVELOPMENT.

**SUBJECT: AUTHORITY OF BONNEVILLE POWER ADMINISTRATION To
ACQUIRE SHARE OF POWER OUTPUT FROM NON-FEDERAL PLANTS
IN THE HYDRO-THERMAL POWER PROGRAM FOR THE PACIFIC NORTH-
WEST.**

You have asked that the authority of the Bonneville Power Administrator to enter into and carry out certain contracts pertaining to the Trojan nuclear power project as described below be reexamined in the light of developments which have occurred since this office issued its opinion dated December 18, 1968. In my opinion the contracts submitted are in accordance with the hydro-thermal program and the Administrator has the legal authority to bind the government in accordance with their terms for the reasons set forth herein. The specific contracts involved are a two-party agreement, No. 14-03-09181, between BPA and the City of Eugene for the Trojan Project, plus three-party net billing contracts Nos. 14-03-09182 through 14-03-09194. Similar arrangements are anticipated for other thermal projects to be constructed as part of a regional hydro-thermal program discussed below.

Bonneville Power Administration and the principal nonfederal publicly and privately owned electric power utilities in the Pacific Northwest have jointly developed a long-range program for meeting the electric power needs of the Pacific Northwest on a regional basis. This program, known as the hydro-thermal program, is designed to meet anticipated electric power needs in a manner that will permit utilities to take advantage of the economies of large scale construction, permit power needs to be met with maximum protection for environmental quality, provide integration of base-load thermal capacity with the fluctuating but lower-cost hydroelectric capacity, allow sharing of

*Not in Chronological Order.

reserves and backup facilities, and provide for region-wide exchange and transmission over a unified regional transmission grid. The objective is to plan and provide facilities that will meet power needs on a regional rather than a separate individual utility basis. The consumers benefit from lower cost and greater reliability of service and the region and the nation benefit from lesser commitment of scarce land and water resources and greater protection of environmental quality.

Under the program the thermal projects, which will include both fossil and nuclear-fueled plants, will be constructed by nonfederal utilities, usually under arrangements for joint ownership interests by several utilities in a single plant. However, these nonfederal facilities will be closely interrelated with and dependent upon the federally owned hydroelectric facilities and regional transmission grid which comprise the Federal Columbia River Power System administered by the Bonneville Power Administration. Such interrelationship is necessary if the program is to produce a firm power supply and deliver it to load centers throughout the region at the most economical costs. Bulk transmission, peaking capacity, forced outage reserves, fuel displacement energy, and reserves for unanticipated regional load growth are required. These will be largely federal responsibilities to be borne jointly by the Army Corps of Engineers, the Bureau of Reclamation, and the Bonneville Power Administration.

The outlines and general scheme of the hydro-thermal program, including the contracts for BPA acquisition of project output from the Trojan project, have been approved by the Secretary of the Interior and the Bureau of the Budget and have also received the approval of Congress by means of a line item in the Public Works Appropriation Act for fiscal year 1970¹ (Public Law 91-144, 83 Stat. 323; S. Rept. No. 91-528, 91st Cong., 1st Sess. (1969); H. Rept. No. 91-697 (House Conference Rept.), 91st Cong., 1st Sess. (1969)).

The report entitled "A Ten Year Hydro-Thermal Power Program for the Pacific Northwest" published by BPA in January 1969, which served as the basis for the congressional consideration, review and approval of BPA's activities in implementing that program, lists as one of its recommendations that "the acquired thermal power will be pooled with that of the Federal Hydro-system, and the integrated product will be sold to BPA's customers at uniform rates." (p. 4)

¹ "For construction and acquisition of transmission lines, substations, and appurtenant facilities, as authorized by law, and purchase of two aircraft, of which one shall be for replacement only, \$96,500,000, to remain available until expended: *Provided*, That not more than \$100,000 of the funds appropriated herein shall be available for preliminary engineering required by the Bonneville Power Administration in connection with the proposed agreements with the Portland General Electric Company and the Eugene Water and Electric Board to acquire from preference customers and pay by net billing for generating capability from non-federally financed thermal generating plants in the manner described in the committee report." 83 Stat. 333.

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The report concludes:

Power from the public agency share of thermal generation would be integrated with the Federal system, BPA rates would be periodically adjusted to recognize the combined costs of power from the new publicly owned thermal plants or the public agency portions of thermal plants net-billed by BPA, existing and authorized Federal hydro projects, and the Federal transmission grid. Sufficient power would be provided to meet the total load growth of both the public agencies and BPA industrial customers. New Congressional legislation would not be required, since acquisition of power by BPA to firm up hydro peaking capacity is presently authorized. Payment for this power would be accomplished by offsetting the power cost against the obligations of the owners of the plant to BPA. This net billing procedure is now in use and an accounting is provided to Congress each year. All contracts under which BPA will acquire any substantial quantity of capacity or energy from a new thermal plant by net billing will be submitted to the Department of the Interior, Bureau of the Budget, and the Congressional Appropriations Committees for review prior to execution.

* * * * *

The proposed hydro-thermal program appears to be the most practicable method for developing an integrated power system in the Pacific Northwest under present conditions. It could be placed in operation immediately under present legal authority. It would provide a continuing source of power for preference customer load growth, allow individual public and private utilities to jointly construct the largest, most economical thermal powerplants, provide the lowest-cost bulk transmission for both hydro and thermal power, and provide for growth of the electroprocess industrial loads. It would make most effective use of the Federal investment in hydro-electric and transmission facilities and would be an important step toward continued economic growth of the Northwest.

* * * * *

The Federal investment in facilities to implement the hydro-thermal program will be controlled by BPA budget submissions, budgetary review by the Department of the Interior and the Bureau of the Budget, and annual appropriations from Congress. (pp. 4-5)

By 1981 the total Federal Columbia River Power System hydro resources will amount to 18,996 megawatts of peaking capacity and 7,892 average megawatts of energy capability. All but approximately 260 megawatts of this peaking capacity will be from projects now existing, under construction, or authorized.²

By 1980-81 Bonneville Power Administration proposes to buy approximately 2,340 average megawatts of energy from the first seven-plant package of thermal plants. This is the equivalent of the output of 2.2 of the seven plants and is but a portion of the hydro peaking capacity which could be firmed.

The second thermal generating plant proposed as a part of this hydro-thermal program is the Trojan project sponsored by the Portland General Electric Company. It will be a large nuclear project that

² Appendix to Administrator's opening statement, April 13, 1970, before a subcommittee of the House Committee on Appropriations, 91st Cong., 2d Sess., Public Works Appropriations 1971, Part 3, p. 831.

will be jointly owned by privately owned and publicly owned utilities.³ The City of Eugene, Oregon, acting through the Eugene Water and Electric Board, will be a part owner of this project.

The City proposes to reserve a share of its portion of the project output to itself and to dispose of the remainder to other publicly or cooperatively owned utilities (Participants), each of whom would then assign the Participant's share of that output to the Bonneville Power Administration. BPA would pay for such project output under net billing arrangements in which it sets off such payments against amounts due from such Participants to BPA under various of its obligations including the purchase of BPA power. In the event BPA is unable to pay the entire amount due by means of such net billing arrangements, it would be required to make cash payments subject to the availability of congressional appropriations for such purpose. If the appropriations are not forthcoming, the Participants would have no right to payment in cash but could withdraw the power for their own use or for resale.

Consideration of BPA's authority involves analysis of its authority to undertake the following actions or commitments:

1. Purchase on a firm, long-term basis, the City of Eugene's share of the Project Output from it and the respective Participants to whom that output has been transferred.
2. Include within the terms of the purchase a commitment to pay for such share from a date certain whether or not the project produces the energy at the times or in the amount contemplated.

3. Pay for such purchase by means of net billing arrangements.

The authority of the Secretary of the Interior (Reorganization Plan No. 3 of 1950, 64 Stat. 1262), delegated to the Bonneville Power Administrator (Secretary's Order No. 2860, 27 F.R. 591, as amended), to dispose of the output of federal hydroelectric projects in the Pacific Northwest and to engage in related electric power activities in that region is derived primarily from the Bonneville Project Act of 1937, as amended (16 U.S.C. 832-832⁷ (1964)) and supplemented, together with the Reclamation Laws, as amended and supplemented (particularly section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(c) (1964)), and section 5 of the Flood Control Act of 1944 (16 U.S.C. 825s (1964)). All of these acts have a common purpose and should be read in *pari materia* to ascertain the intent of Congress. 41 Ops. Att'y Gen. 236 (1955).

³The first project, a fossil fuel project, is already under construction by two private utilities near Centralia, Washington, with several other publicly and privately owned utilities having an option to participate in joint ownership of that project. BPA has acquired part of the output of that project on a short-term basis and expects to enter into arrangements, effective in 1982, with the publicly owned utilities either for acquisition of their portion of the project output or for furnishing peaking capacity, forced outage reserves, and transmission service to such utilities.

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BPA's authority to purchase power and energy has been extensively analyzed in an opinion of the Portland Regional Solicitor to the Bonneville Power Administrator dated February 19, 1962 (Purchase of energy from Hanford reactor), an opinion of the Assistant Solicitor, Power, to the Associate Solicitor, Reclamation and Power, dated January 2, 1968 (Contract to purchase power from Centralia coal-plant), and an opinion of the Solicitor to the Secretary of the Interior dated December 18, 1968 (M-36769)—Authority of Bonneville Power Administration to participate in an integrated hydro-thermal power program for the Pacific Northwest.

The nature and extent of BPA's undertakings to which those opinions were addressed, as well as the specific contracts for the power acquisitions, have been reviewed regularly by legislative or appropriations committees of the Congress without objection from them. The first two opinions dealt with specific instances in which BPA was acquiring or purchasing power as firming energy for its hydroelectric resource or under short-term emergency conditions. They discuss and confirm the threshold question that BPA has authority in appropriate instances to acquire power and energy from nonfederal sources by exchange or purchase. The third opinion discussed Bonneville's participation in the hydro-thermal power program in general terms. It spoke of the Secretary's authority to acquire thermal power and energy by purchase or exchange "in order more effectively to utilize the federal hydro capability to serve customer requirements in accordance with the mandate of these [power marketing] statutes." We believe that the principles stated in these opinions as well as those underlying the Solicitor's opinion and the court decision discussed below are applicable to sustain the Secretary's authority to make the purchases contemplated by the contracts here under consideration.

In Solicitor's Opinion M-36009, dated July 15, 1949, it was held that the Secretary had authority to purchase electric power for the purpose of firming up hydroelectric power marketed under Section 5 of the Flood Control Act of 1944. Such purchase was held to be a necessary means of carrying out the Secretary's duty under that act to market the hydroelectric power generated at Corps of Engineers projects "in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles . . .".

In *Kansas City Power & Light Co. et al. v. McKay*, 115 F. Supp. 402, 419 (D.D.C. 1953), judgment vacated for lack of standing to sue, 225 F. 2d 924 (D.C. Cir. 1955), the court held that:

* * * the purchase of thermal energy * * * which purchase is reasonably incidental to the integration of hydroelectric power generated at the [federal]

Reservoir Projects, is not prohibited by the provisions of the Flood Control Act [of 1944] but rather is within the scope of its provisions and in accord with its purpose.⁴

The Bonneville Power Administrator has statutory direction to use federal hydroelectric power in the Pacific Northwest in a manner which will best meet the electric power requirements of consumers in that region over the widest possible area and at the lowest possible cost to such consumers consistent with returning to the Government the cost of producing and delivering such power. To carry out these purposes the Bonneville Power Administrator is given broad authority under section 2(f) of the Bonneville Project Act.

* * * to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof, and the compromise or final settlement of any claims arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary. 16 U.S.C. 832a(f).

The Bonneville Power Administrator has determined that the hydro-thermal program as described in the previously cited report and the net billing contracts referred to herein are necessary in order to insure that the facilities for the generation of electric energy at the federal hydroelectric projects "shall be operated for the benefit of the general public,"⁵ to encourage "the widest possible diversified use of electric energy,"⁶ to make the power from federal hydroelectric projects available to the consumers of the region "in such manner as to encourage the most widespread use thereof at the lowest possible rates"⁷ and to carry out the other purposes of the federal power marketing acts.

In taking this course the Administrator is not assuming a responsibility to supply all of the electric needs of the consumers of the region. He is merely fulfilling his responsibility to see that the federal facilities are utilized in such a manner as to be of greatest benefit to the power consumers of the region consistently with the requirements of federal law. The proper disposition of the federal hydroelectric energy and the proper use of the federal facilities for producing and distributing such energy is still his primary responsibility and is the reason for which he is authorized to enter into contracts for the acquisition of nonfederal energy that will make the federal energy usable for fulfilling that purpose.

⁴ Although a divided Arkansas Supreme Court had previously reached a contrary conclusion in *Arkansas Elec. Co-op. Corp., et. al v. Arkansas-Missouri Power Co., et. al.*, 255 S.W. 2d 674 (Ark. 1953), involving substantially identical contract arrangements, we do not find that opinion persuasive in the situation involved here. The conclusion expressed was not necessary to a determination of the case and was apparently influenced in large measure by the legislative history of appropriation and other provisions applicable specifically to Southwestern Power Administration activities that is in marked contrast to the legislative treatment of Bonneville's program.

⁵ 16 U.S.C. 832c(a).

⁶ 16 U.S.C. 832e.

⁷ 16 U.S.C. 825e.

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It is in the light of all of these factors, including the prior expressions of this office supporting the Administrator's authority, the directives of legislation affecting the development of the power marketing program of BPA, the Administrator's determination of the manner in which he can best discharge his responsibilities, and the presentation of the program to the Congressional committees, that the congressional action in approving the Public Works Appropriation Act for fiscal year 1970 (Public Law 91-144) and the expressions of the House and Senate Committees in conjunction with the appropriation bill for 1971 must be viewed. In the 1970 act Congress approved funds for preliminary engineering in connection with proposed agreements with the Portland General Electric Company and the Eugene Water and Electric Board "to acquire from preference customers and pay by net billing for generating capability from nonfederally financed thermal generating plants * * *." The conference report (H. Rep. No. 91-697) states:

The conferees are in agreement that *approval of the implementation of the program* is limited at this time to the two proposed agreements pending an opportunity for detailed review by the committees on appropriations of the long-range hydrothermal plan. [Italics added.]⁸

The House Report on Public Works Appropriation Bill, 1971, contains the following comments:

Last year the Administration approved a 10-year hydrothermal power program for the Pacific Northwest, and the Congress approved initiating its implementation through proposed agreements between Bonneville Power Administration, Portland General Electric Co., and the Eugene Water & Electric Board.

The program includes the construction of seven thermal generating plants between 1971 and 1981. None will be federally constructed, financed or owned. The committee approves implementation of the remainder of the program by the use of net billing as the means of affecting payment by the Bonneville Power Administration for part or all of the generating capacity of nonfederally financed thermal plants, under suitable agreements between Bonneville Power Administration and preference customers to accomplish this purpose. Such agreements would provide that the Bonneville Power Administration will acquire from a date certain, on a cost basis, the preference customers' rights to the generating capability of nonfederally financed plants whether or not they are operable. Any costs or losses to the Bonneville Power Administration under these agreements will be borne by Bonneville Power Administration ratepayers through rate adjustments if necessary. The Committee requests that the proposed agreements be submitted to the House and Senate Appropriations Committees at least 60 days prior to their execution by the Administrator. (H. Rep. No. 91-1219 (p. 90)).

⁸ Subsequently one of the projects to which the quoted language referred has been indefinitely postponed as a result of action of the voters of the City of Eugene at the May 1970 election.

The Senate Committee concurred in the House action and included in its report the following language:

Last year the Administration approved a Ten-Year Hydrothermal Power Program for the Pacific Northwest. The Program provides for the construction of seven thermal generating plants between 1971 and 1981 by nonfederally financed companies, agencies, or public bodies.

In the Public Works Appropriation Act for fiscal year 1970 the Congress approved initiating its implementation through proposed agreements between Bonneville Power Administration, Portland General Electric Company, and the Eugene Water and Electric Board.

The Bill as passed by the House approves implementation of the remainder of the program by the use of net billing as the means of payment by the Bonneville Power Administration for part or all of the generating capacity of non-federally financed thermal plants under suitable agreements between Bonneville Power Administration and preference customers to accomplish this purpose. The Committee concurs in the action taken by the House.

The Committee notes that the proposed agreements would provide that the Bonneville Power Administration will acquire from a date certain, on a cost basis, the preference customers' rights to the generating capability of non-federally financed plants whether or not they are operable. Any costs or losses to the Bonneville Power Administration under these agreements will be borne by Bonneville Power Administration ratepayers through rate adjustments if necessary.

The House Committee in its report requested that the proposed agreements be submitted to the House and Senate Appropriations Committees at least 60 days prior to their execution by the Administrator. This procedure will provide the Committees ample time for review of the proposed contracts. (Senate Rep. No. 91-1118 (p. 56)).

The provisions of the Trojan net-billing contracts which obligate the Administrator to pay for Eugene's share of the project output from a date certain whether or not the project is producing energy does not detract from the validity of the contracts. These provisions express terms and conditions which the Administrator deemed necessary in the negotiation of the contract.⁹ BPA's obligation to deliver power to the Participants in the Hanford generating project from a date certain without regard to the capability of the project presents a similar contractual commitment which was approved by the Comptroller General.¹⁰ The import of the provisions in the Trojan contracts was recognized by the Congressional committees by specific reference to them in both the House and Senate Reports quoted above approving the hydro-thermal program and its implementation.

The "net-billing" method of payment by BPA for the project output contemplates that BPA will credit against the total amount owing to BPA by each of the Participants for power purchases and other services the purchase price owing from BPA to such Participant. The net billing concept has been used by BPA with the approval of the House and Senate Appropriations Committees for a number of years.

⁹ 16 U.S.C. 832a(f).

¹⁰ Dec. Comp. Gen. B-149016, B-149083 (July 16, 1962).

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The House and Senate Reports quoted above both contain specific reference to the application of this method of payment.

It is my opinion that the development of the specific contracts being reviewed and the Congressional action with reference thereto which has occurred since the prior opinion of this office dated December 18, 1968 have served to lend further support to the conclusion expressed in that opinion. I must, therefore, conclude that the Administrator has the authority to execute the contracts submitted and that when duly executed they will be binding and enforceable against the government in accordance with their terms.

MITCHELL MELICH,
Solicitor.

FREEMAN COAL MINING CORPORATION

VINC-70-145

VINC-70-146

Decided October 5, 1970

Federal Coal Mine Health and Safety Act: Appeals

A determination by the Bureau of Mines that an operator has totally abated an alleged violation of a mandatory health or safety standard is not reviewable by the Board of Mine Operations Appeals.

Federal Coal Mine Health and Safety Act: Generally

The Board of Mine Operations Appeals has not been delegated general supervisory authority over the entire spectrum of the Bureau's various enforcement responsibilities. The Secretary's delegation to the Board was intended primarily to create an independent adjudicatory forum for review of proceedings initiated, not by the Board, but by an appropriate interested party or by the Bureau.

Federal Coal Mine Health and Safety Act: Appeals

A document issued by the Bureau of Mines to an operator finding a violation of a mandatory health or safety standard constitutes a notice subject to review by the Board of Mine Operations Appeals. Such a document is a reviewable notice whether or not it contains a requirement that the operator abate the alleged violation within a definite time.

Federal Coal Mine Health and Safety Act: Appeals

In an unusual case, the meaning and effect of notices issued under section 104(b) was not sufficiently clear to permit the parties entitled to seek review thereof to fairly exercise that right. Consequently, the 30-day statutory period for filing applications for review did not begin to run until the Bureau of Mines clarified the notices by stating its position as to their meaning and effect.

Federal Coal Mine Health and Safety Act: Findings, Notices and Orders

Section 104(a) of the Act requires the Bureau of Mines to issue an immediate order of withdrawal upon a finding of imminent danger, whether or not equipment necessary to abate the condition causing such danger is available to the operator.

Federal Coal Mine Health and Safety Act: Findings, Notices and Orders

Where a condition which may lead to imminent danger exists, the Board of Mine Operations Appeals, in a proceeding under section 104(h) of the Act, may issue an order requiring withdrawal of miners, after public hearing, whether or not equipment necessary to abate the condition exists; but an order of withdrawal is not required as in the case of section 104(a).

Federal Coal Mine Health and Safety Act: Findings, Notices and Orders

Safety of miners is always a relevant consideration in determining a reasonable time for abatement of violations of mandatory standards. Other relevant considerations include the fact of violation and the availability of equipment. In certain circumstances, difficulty of abatement may be a relevant consideration.

Federal Coal Mine Health and Safety Act: Appeals

On review of a notice of violation issued pursuant to section 104(b), the scope of review does not include issues which bear solely on facts required to be found by the Bureau of Mines to issue a notice under section 104(h).

Federal Coal Mine Health and Safety Act: Appeals

The Board of Mine Operations Appeals may dismiss an application for review of a notice or order, with or without leave to submit an amended application, if the application fails to comply with the statute, with the Board's rules, or with an order of the Board or an Examiner.

Federal Coal Mine Health and Safety Act: Appeals

The Board of Mine Operations Appeals may dismiss an application for review of a notice or an order where the applicant fails to present evidence sufficient to support findings of fact in his favor.

Federal Coal Mine Health and Safety Act: Appeals

An applicant for review of a notice or order should be permitted to withdraw his application at any time.

BOARD OF MINE OPERATIONS APPEALS**MEMORANDUM OPINION AND ORDER**

These proceedings are a consolidation of separate applications by which Freeman Coal Mining Corporation ("Freeman") initially sought to have reviewed eight notices of violation issued to it by the Bureau of Mines pursuant to section 104(b) of the Federal Coal Mine Health and Safety Act of 1969. The matter is before the Board on interlocutory appeals by Freeman and the Bureau from rulings in which the Hearing Examiner declined to terminate the proceedings.

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The United Mine Workers of America ("UMWA") filed a brief and participated in argument before the Board in defense of the Examiner's rulings. The Bituminous Coal Operators' Association filed a brief and participated in argument before the Board in opposition to the Examiner's rulings.

The Factual and Procedural Setting in which These Appeals Arise

Between April 17 and April 28, 1970, an inspector of the Bureau delivered to Freeman eight "Notices of Violation." Each notice stated that in accordance with section 104(b) of the Act an inspection had been made of a named coal mine operated by Freeman and that a violation of a mandatory safety standard had been found.¹ Each alleged violation was the subject of a separate notice. Each notice ordered Freeman to abate the cited violation on or before a designated hour and day. The periods thus provided for abatement ranged from less than one day to twenty-nine days.

All eight violations were alleged to have occurred at two mines located in the southern part of Illinois and referred to in the notices as "Orient Mine No. 5" and "Orient Mine No. 6." Four violations at each mine were charged. One of the notices cited alleged use by Freeman of certain mechanical equipment without automatic fire-control devices. Two notices involved the grounding of electrical equipment. Three notices related to the splicing of electrical trailing cables. One was for alleged failure to use automatic circuit breakers, and another required Freeman to install certain high-voltage couplers.

It appears to be conceded by all parties that Freeman posted all eight of these notices of violation at the appropriate mine in accordance with section 107(a) of the Act and that the UMWA, as the assumed representative of miners in these cases, was mailed a copy of each notice by the Bureau in accordance with section 107(b) of the Act.

On May 18, 1970, Freeman applied for review of the eight notices. For this purpose Freeman employed a mimeographed form addressed to the Secretary of Interior. The form refers to the Act, states that it is an application to have reviewed the order or notice identified in its caption, demands a public hearing, and represents that the UMWA Safety Division is among the recipients of copies of the completed form. By a check near the left margin an applicant using the form may invoke one or more of six "reasons" for review set out in the form itself, or the applicant may invoke some other reason for review by an ad hoc articulation entered at a space following the word "other." In

¹ Three of the eight notices cited provisions in regulations promulgated by the Secretary pursuant to the Act on March 28, 1970. In each case the regulation was a verbatim reiteration of an interim statutory standard set forth in title III of the Act.

the case of six of the eight cited violations, Freeman checked as a reason for review the preprinted phrase "impossibility of compliance or abatement under present conditions." In two cases Freeman checked "unreasonable period of time for compliance or abatement." Other reasons invoked by Freeman appear to challenge the legal validity or factual basis for the finding of violation.

In one of the six instances in which Freeman's May 18 applications gave impossibility of abatement under present conditions as a reason for review, an inspection on April 23, 1970 (the date fixed for abatement in the notice) had resulted in a finding by the Bureau's inspector that the charged violation had in fact been "totally abated" (Orient Mine No. 6, Notice of Violation No. 2, dated April 22, 1970). In accordance with the Bureau's practice, this finding was communicated to the operator in a document dated April 23, 1970, entitled "Notice of Abatement or Extension."

In another such instance Freeman on May 18 asserted impossibility of abatement under present conditions although an inspection on April 29 had resulted in issuance by the Bureau of a Notice of Abatement or Extension in which the inspector stated that partial abatement had been achieved by replacing an electric cable and that other noncomplying equipment was being repaired (Orient Mine No. 6, Notice of Violation No. 1, dated April 28, 1970). On this basis Freeman was granted an additional sixteen days to achieve total abatement, and on May 14, 1970, a Bureau inspector found the violation to be "totally abated."

On May 8, 1970, the Bureau issued Freeman four documents entitled "Modification of Notice." These four documents purported to modify the four original notices charging violations at Freeman's Orient Mine No. 5. Freeman's applications for review filed ten days later made no mention of any modification. Nor does it appear that any of the four modifications of notice was attached to Freeman's applications, as would appear to be required by the Board's rules if review was sought by Freeman of the notice as modified. 30 C.F.R. sec. 301.12, 35 Fed. Reg. 5256 (Mar. 28, 1970). It appears, then, that Freeman regarded an application for review of an initial notice as necessarily placing in issue the terms of any modification thereof or that Freeman did not desire to challenge the notice as modified but was uncertain as to the meaning and effect of the May 8 documents on the original notices.

On May 14, 1970, the Bureau issued Freeman three additional documents entitled "Notice of Abatement or Extension." These May 14 notices were related by their terms to three of the four original notices charging violations at Freeman's Orient Mine No. 6. (Violation No. 2, found by the Bureau's inspector to be "totally abated" on April 23, 1970, was not the subject of any subsequent Bureau document). Freeman's applications for review filed on May 18 made no mention of the

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May 14 notices. Nor apparently were the May 14 notices attached to the May 18 applications. The same inference therefore arises that Freeman either regarded the May 14 notices as fully reviewable on application to challenge the original notices or was uncertain as to the meaning and effect of the May 14 notices.

The four modified notices issued by the Bureau on May 8 and the three May 14 notices all contain the following two paragraphs:

The foregoing violation exists because the equipment needed to abate it was not available to the operator prior to the inspection. Therefore, in compliance with the Restraining Order issued on April 23, 1970, in Civil Action No. 70-C-50-D, United States District Court for the Western District of Virginia at Abingdon, Virginia, this Notice is for information purposes only and no penalty will be assessed.

Except for said Temporary Restraining Order, an Order of Withdrawal would have been issued pursuant to section *** 104.(b) *** of the Federal Coal Mine Health and Safety Act of 1969.

All seven documents also state that "review of this Notice pursuant to Sec. 105(a) of the Act may be made upon application to the Board of Mine Operations Appeals."

In other respects the May 8 documents differ from the May 14 documents. All four of the "Modifications of Notice" issued on May 8 state that the violation cited in the original notice is "partially abated." Two of the May 14 "Notices of Abatement or Extension" similarly state that the violation is "not totally abated." The third states that the original violation (Orient Mine No. 6, Violation No. 1) had been "totally abated," and explains that abatement was achieved by replacing defective trailing cables, but the document also contains the language quoted above asserting that the violation in question "exists" and that, except for the temporary restraining order referred to, "an Order of Withdrawal would have been issued ***." All four of the modifications of notice issued on May 8 state that "except as herein modified" the original notice "shall remain in full force and effect." The three May 14 documents contain no such statement.

The parties are in dispute as to whether the UMWA received copies of the May 8 modifications of notice or the May 14 notices. There was a proffer of proof to the Examiner that the Bureau customarily mails all such notices to the UMWA Safety Division. (Applicant's Ex. 3, August 18, 1970.) Counsel for the UMWA informed the Examiner that a search of the Safety Division's files had failed to reveal any evidence of receipt of these documents. (Hearing Aug. 11, 1970, Tr. 12-13; Hearing Aug. 19, 1970, Tr. 65-66, 73.)

Between June 5 and June 9, 1970, the Bureau filed substantially identical Answers to each of Freeman's eight applications for review. The answer prays for dismissal of the application to which it is directed on the ground that the facts set forth in the notice sought to be re-

viewed "constitute a violation of the mandatory health and safety standards set forth in * * * the Federal Coal Mine Health and Safety Act of 1969 * * *." None of the Bureau's answers made any reference to the documents issued by the Bureau on May 8 and May 14 advising the applicant of the temporary restraining order referred to therein, informing the applicant that with respect to seven of the eight notices sought to be reviewed no penalty would be assessed, and stating that withdrawal orders would have been issued in those seven cases but for the restraining order. Each answer contains a certificate of service which states that a copy was served on Freeman.

On July 24, 1970 the Examiner consolidated the eight Freeman applications for hearing and the parties, including the UMWA Safety Division, were notified that a hearing would be held on August 11, 1970. Counsel for interested parties who had not theretofore filed an appearance and who desired to participate were directed by the Examiner to do so on or before August 3, 1970. On July 30, 1970, counsel filed an appearance on behalf of the UMWA "in intervention" by a letter addressed to the Examiner.

On August 3, 1970 the Bureau filed motions to dismiss all eight Freeman applications. In the case of the alleged violation which had been found by the Bureau to be "totally abated" on April 23, 1970 (Orient Mine No. 6, Violation No. 2), the Bureau's motion was based on the contention that the application had been rendered moot by the fact of abatement. In the case of the other seven notices sought to be reviewed by Freeman, the Bureau's motions stated that

The Notice of Violation issued in this cause was modified by a Notice, a copy of which is attached hereto * * *, granting an unlimited period of time to abate the said violation and advising applicant that no penalty would be assessed.

Attached to these seven motions was a copy of the document issued by the Bureau on May 14 or May 8 pertaining to the violation in question. Each motion argued that the attached

Notice effectively grants the applicant all the relief which could be granted by the Board and the issues raised by the Application are therefore moot.

The motions contain certificates of service stating that copies were served on Freeman.

At the hearing before the Examiner on August 11, Freeman offered no objection to the Bureau's motions to dismiss and filed with the Examiner its own written motions to withdraw "without prejudice" the eight applications upon which the proceedings were then predicated. Counsel for the UMWA opposed both sets of motions and sought leave to interject into the proceedings its own challenges to the eight notices of violation as modified by the various documents attached to the Bureau's motions.

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In a written decision the Examiner denied the Bureau's motions to dismiss and Freeman's motions to withdraw the applications. The decision states that these rulings were made without prejudice to renewal of the motions at a later stage in the proceedings. The Examiner "granted" the UMWA "status as an interested party herein * * *," and gave the UMWA "until, and including, August 21, 1970, to file herein an application for review of any modifications or changes of record concerning the notices of violation involved in these proceedings." The order of the Examiner directed the UMWA to file its application for review in compliance with section 301.10 *et seq.* of the Board's rules and section 105 of the Act. The Examiner's order specifically preserves "the rights of the Government or the Operator to raise any arguments or grounds of defense * * * including jurisdiction, date of service and the like," and states further that "the 10-day period * * * granted for filing an application for review (by the UMWA) simply means that these proceedings will be held open until August 21, 1970 * * *; it does not mean that the time for filing an application under section 105 of the Act, or under the Secretary's regulations, is tolled, enlarged or otherwise affected by this Order * * *." Finally, the Examiner's order states that "if an application for review is not filed herein on or before August 21, 1970, the Operator's Motions to Withdraw without prejudice will be granted forthwith."

In a second written decision dated August 20, 1970, the Examiner overruled motions by the Bureau and Freeman to reconsider and vacate the August 12 order.

On or about August 19, 1970, the UMWA filed with the Examiner a "Motion" the stated purpose of which was, in part, "to challenge the reasonableness of the time allowed by the Government to abate these violations under Notices, including the amendatory modifications thereof * * *."

These interlocutory appeals are taken by the Bureau and by Freeman by permission of the Board granted on August 21 and August 25, 1970.

Issues Presented for Review

I. Whether a notice issued pursuant to section 104(b) of the Act can be reviewed by the Board where the Bureau subsequently finds the violation charged in such notice to be "totally abated" and does not request the assessment of a penalty.

II. Whether documents of record in these proceedings issued by the Bureau on May 8 and May 14, 1970, constitute notices reviewable under section 105(a) of the Act.

III. Whether on the facts here presented the UMWA is precluded from filing applications to review notices issued by the Bureau more than 30 days prior to the UMWA's application.

IV. Whether the scope of review of a section 104(b) notice may include certain issues raised by the Examiner and the parties.

Rulings of the Board on the Issues Presented

I

We agree with the Bureau that, where the Bureau finds a violation charged in a notice issued under section 104(b) to be totally abated and does not seek the assessment of a penalty based on the violation charged in the notice, there is no issue appropriate for review by this Board. We hold therefore that in the case of Notice of Violation No. 2, Orient Mine No. 6 (Docket No. Vinc. 70-146), the Examiner erred in denying the Bureau's motion to dismiss Freeman's application for review and in authorizing the UMWA to file an application for review. We base this holding on our reading of the record to reflect an unequivocal finding by the Bureau of total abatement of the violation charged and a decision by the Bureau, implicit in its motion to dismiss, not to seek in these proceedings the assessment of a penalty based on the violation charged in the notice.

We further hold that the Examiner must similarly dismiss any application to review Notice of Violation No. 1, Orient Mine No. 6 (Docket No. Vinc. 70-146), and any subsequent notice with respect to that violation, if on remand the Bureau supplements the record with an unequivocal finding that the violation charged in the initial notice is now totally abated. In the case of Violation No. 1, a Notice of Abatement or Extension issued by the Bureau on May 14, 1970 makes it clear that the Bureau does not seek the assessment of a penalty. While a finding of total abatement appears in the May 14 document, the Bureau's assertion in the same document that the violation "exists," and that a withdrawal order "would have been issued" but for a temporary restraining order, is not fully consistent with a finding of total abatement. Hence, as to Notice of Violation No. 1, we believe that clarification of the record on remand is necessary.

We base these holdings on limitations which we believe to be inherent in the purpose of the delegation of authority by which this Board was created.

We do not understand the Secretary's delegation to the Board to confer upon the Board general supervisory authority over the entire spectrum of the Bureau's enforcement practices and policies. The Secretary's delegation to the Board of a variety of review and adjudicatory functions specifically provided for in the Act was intended, in our judgment, to create an administrative forum that would exercise

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these specific statutory functions independently of the Department's various enforcement arms. The Bureau exercises primary responsibility for initiating enforcement of the Act's mandatory health and safety standards by inspections and by the issuance of notices and orders under section 104 of the Act. The Board of course participates in enforcement of mandatory standards; but we believe the Board's authority is primarily that conferred by section 105 of the Act, which provides for review of orders and notices once issued, and by certain other provisions in the Act which provide for the assessment of penalties and the adjudication of other matters in proceedings initiated, not by the Board, but by an appropriate interested party or by the Bureau.

These same considerations, and the more limited scope of review of notices under section 105, militate against review by the Board of an unequivocal decision by the Bureau to terminate a notice issued under section 104(b). The Bureau may terminate a section 104(b) notice where it believes the initial finding of violation was mistaken or, as in this case, where the Bureau finds the violation charged to have been totally abated and seeks no penalty. In our judgment termination of a section 104(b) notice on either ground before a withdrawal order has been issued is essentially an enforcement decision that should not normally be reviewed by the Board. Thus, unless a withdrawal order has issued,² or unless there are issues pending before the Board relating to an application by the Bureau for the assessment of a penalty, we think that a pending proceeding to review a section 104(b) notice should be dismissed when the Bureau makes an unequivocal finding that the violation has been totally abated.

II

We hold that the seven documents issued by the Bureau on May 3 and May 14, 1970, constitute notices reviewable by the Board under section 105 of the Act.

We leave for later discussion herein the uncertainty which we believe all parties to varying degrees have exhibited over the meaning and effect of these seven documents. As to whether they constitute reviewable notices, we think it is sufficient that each document constitutes a

² In contrast to the limited review of notices, section 105 expressly provides for review of modifications or terminations of orders. Hence, issues which we have indicated should properly be regarded as matters of enforcement policy in the case of notices may or may not be reviewable by the Board in the case of orders.

We recognize that there may be circumstances in which a court would order the Bureau to issue a notice or initiate proceedings for the assessment of a penalty, but we do not believe that in most cases the exercise by the Board of power to compel the initiation or maintenance of enforcement proceedings is consistent with the independent review function contemplated by the delegation of authority under which the Board was created.

communication notifying an operator that a violation of a mandatory health or safety standard exists. We do not believe that reviewability should turn on the form adopted by the Bureau in issuing notices of this sort. Nor do we believe that lack of clarity in the language employed by the Bureau, or the use by the Bureau of a notice of violation to communicate additional information or advice to the operator, should affect reviewability, so long as the document in substance embodies a finding by the Bureau that a violation exists at the time the document is issued. We do not believe that the failure of the Bureau to fix a definite time for abatement in a notice of violation destroys its reviewability under section 105.³

The Bureau's own descriptions of the documents issued on May 8 and May 14 reflect a discernible evolution. The documents themselves, regardless of their differing captions and formats, all give notice to the operator that a violation described in an earlier notice "exists" and, with an exception already discussed, is either "not totally abated" or is only "partially abated." The Bureau's motions to dismiss, filed on August 3, 1970, describe each of the seven documents as "a Notice * * * granting an unlimited period of time to abate the said violation and advising * * * (the operator) that no penalty would be assessed." In its brief and argument to the Board the Bureau states that the documents were intended "to vacate a Notice of Violation previously issued * * *."

We do not understand the Bureau to argue that failure to fix a definite time for abatement insulates a notice from review under section 105. The Bureau's principal argument is that by virtue of certain temporary restraining orders issued in *Ratliff v. Hickel*, Civil Action No. 70-C-50-A (W.D., Va., filed April 23 and 30, 1970), the Department is prohibited from regarding as a violation a noncompliance with the Act's mandatory health and safety standards unless equipment needed to abate the violation was available to the operator when the Bureau's inspection revealed the noncompliance. This Board does not construe the temporary restraining orders in *Ratliff* to prohibit the issuance of a notice of violation under section 104(b) simply because equipment needed for abatement is not available at the time of inspection. We regard the *Ratliff* orders as enjoining the enforcement of section 104(b) by the assessment of a penalty or by the issuance of a withdrawal order for failure to abate a violation at a time when

³ We do not hold that an "informational" notice or warning which charges no violation of a mandatory standard and which carries no penalty is subject to review. But we do not believe the notices issued in these proceedings are of this character.

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equipment essential for abatement is not available to the operator on any terms.⁴

We first point out that the restraining orders in *Ratliff* appear to have been based on the Court's construction of section 104 of the Act, not on any claim that provisions in section 104 must be stricken from the Act as unconstitutional. A restraining order prohibiting *pendente lite* the enforcement of an Act of Congress on constitutional grounds would appear to require the convening of a federal district court of three judges. 28 U.S.C. sec. 2282 (1968).

We agree with the Court in *Ratliff* that the various subparagraphs of section 104 apply differently to operators who are in violation of the Act's mandatory health or safety standards but are unable to acquire equipment necessary to abate the violation. Where the violation creates an imminent danger to miners, we construe section 104(a) to require immediate issuance of an order compelling the operator to withdraw the endangered miners, whether or not equipment necessary to avoid or to abate the condition of imminent danger is available. Where the Bureau finds that a violation creates a condition which may lead to imminent danger but that such condition cannot be effectively abated through the use of existing technology, the Bureau may initiate a proceeding under section 104(h). We think it clear that section 104(h) authorizes issuance of an order of withdrawal after an opportunity for public hearing is afforded the interested parties, whether or not equipment needed to abate the condition exists, but does not require the issuance of such an order as under section 104(a). Section 104(b) applies to violations which do not create imminent danger and which do not involve the special factors required for the initiation of a proceeding under section 104(h).

We are in general agreement with the District Court in *Ratliff* that section 104(b) should not be enforced to require an operator to abate violations before the operator can obtain equipment essential for abatement. Otherwise, sections 104 (b) and (h) would be in mani-

⁴ We assume that the restraining orders in *Ratliff* limit the Department's enforcement of the Act in these proceedings involving different parties and the safety of miners at mines located in a different jurisdiction. We also assume that the orders are not in violation of the statutory command that no temporary relief be granted in the case of a notice issued under section 104(b) (see Act, sections 105(d) and 513) or of the general requirement that parties seeking judicial relief from administrative action shall first exhaust their administrative remedies.

We note that the Court in *Ratliff* enjoined the assessment of a penalty against an operator whose violation of a mandatory health or safety standard results from the fact that equipment essential for compliance was not available on any terms at the time of inspection. Since the Bureau is not in these proceedings seeking the assessment of any penalty, this other aspect of the *Ratliff* orders is not directly relevant.

fest disharmony. The remedial flexibility which we think section 104(h) clearly contemplates can be brought to bear by the Bureau only where it believes that no assurance can be given that the condition caused by the violation will not lead to imminent danger. If section 104(b) were construed to require withdrawal regardless of the availability of essential equipment, the possibility of relief under section 104(h) would exist only where the condition caused by noncompliance portended imminent danger. A rigid requirement of abatement under section 104(b) regardless of the availability of equipment would thus make little sense. Since we think there is ample authority in section 104 as a whole for the issuance of withdrawal orders where continued operations would be detrimental to the health and safety of miners, such a construction is not necessary to achieve the Act's safety objectives.

For these reasons we think that in fixing a reasonable time for abatement under section 104(b) the present and future availability of essential equipment is always a relevant consideration. We do not mean to suggest that the problem of fixing a reasonable time where essential equipment is arguably unavailable is a simple one. There may be degrees of danger to miners short of the conditions that would warrant proceedings pursuant to sections 104(a) or (h) but which would nevertheless require abatement at heavy cost to the operator. In such cases compliance might be achieved by requiring the operator to purchase necessary equipment at a premium which reflects special production costs of a supplier. There may also be situations where the operator's failure to order essential equipment has been in part the reason for its nonavailability, or has made prompt abatement following the Bureau's discovery of the violation impossible. We also believe there may be unusual situations in which section 104(b) could be enforced in a way intended to require the operator to seek the approval of alternate measures for achieving an equal degree of safety in accordance with section 301(c) of the Act.

We think that the *Ratliff* restraining orders reflect a construction of section 104 that is generally in accord with our own. The Bureau's argument that the *Ratliff* orders preclude review of the availability of equipment in part begs the factual issue upon which the claim that these orders are applicable rests and amounts to an argument that the Court in *Ratliff* has enjoined the process of administrative review within the Department by which such issues are resolved. For this Board to accept such a construction would impose an unnecessary and unwarranted limitation on the right of review specifically accorded the operator and the representative of miners by the Act.

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III.

On the particular facts of these proceedings we hold that the UMWA is not precluded by the Act from filing applications for review of the notices issued by the Bureau on May 8 and May 14, 1970.

The 30-day time limit prescribed in section 105(a) for the filing of an application for review constitutes a statutory limitation on our authority to review such an application and is in that sense "jurisdictional." See *Lichter v. United States*, 334 U.S. 742 (1948); *Weaver v. Blair*, 19 F. 2d 16 (3d Cir. 1927); *Hart Cherry Packers, Inc. v. Johnston Pie Co.*, 22 Agri. Dec. 733 (1963). On the facts of record in these proceedings, however, the documents as issued by the Bureau on May 8 and May 14 are not sufficiently clear in meaning or effect to cause the statutory period to begin to run.

The seven May notices literally inform the operator that because equipment necessary for abatement was not available at the time of inspection no penalty would be assessed and no withdrawal order was theretofore issued. None of the notices says anything about future abatement. Despite the reference in these later notices to the unavailability of equipment at the time of inspection, there was an indication by the Bureau that one of the seven violations was "totally abated" before the time previously fixed for abatement had expired. (See pp. 152, 156-157 above). Of the remaining six violations five were not required to be abated by the original notices until July 16, 1970; and four of the May notices relating to these five violations specifically stated that, except as therein modified, the original notice remained in "full force and effect." (See p. 153 above.) In these circumstances, for a recipient of the seven May notices to assume that the original requirement of abatement remained in effect would not, we think, be wholly unreasonable.

That Freeman filed applications to review all eight of the original notices on May 18, after receipt of the May notices, suggests just such confusion on the part of the operator. The Bureau's answers, filed on June 5 and 9, contained no indication that the abatement requirement in the notices sought to be reviewed by Freeman had been suspended or modified. (See pp. 153-154 above.) Thus, the applications for review, which indicate service on the UMWA, and the answers, which constituted the only Bureau response of record in the proceedings, strongly indicated that the original notices were regarded by both the operator and the Bureau as still in effect. Moreover, the assertion in the seven May notices that equipment necessary for abatement was unavailable prior to inspection, ambiguous in itself, was made more so by the fact that, as to six of the violations which the Bureau appeared to regard

as unabated, the operator cited impossibility of compliance as a reason for review of only four.

In these special circumstances we think that the 30-day statutory period for filing applications for review began to run when the Bureau first made known with reasonable clarity its position as to the meaning and effect of the May notices. In our judgment this did not occur until the Bureau in its motions to dismiss, filed herein on August 3, 1970, made it clear that the original notices had been rendered moot by the May notices and were of no further effect and that the May notices were intended to give the operator an unlimited time to abate the violations to which they related.

In reaching these conclusions we are aware of the extraordinary difficulties surrounding enforcement of the Act when these May notices were issued. The Bureau's administration of the Act and its attempts to train large numbers of enforcement personnel in a broadly applicable enforcement policy was in its early stages when the *Ratliff* restraining orders were issued. Nevertheless, while we are fully sympathetic with the problems facing the Bureau and its legal advisers, we do not believe that the statutory right of parties to seek review of notices issued under section 104(b) can be deemed to run with the issuance of notices too uncertain in meaning and effect to permit such parties to fairly exercise that right.

The UMWA's motion "to challenge the reasonableness of the time allowed by the Government to abate these violations under Notices, including the amendatory modifications thereof * * *" was filed with the Examiner on or about August 19, 1970. We hold only that on the particular facts of these proceedings the Examiner is not precluded by the 30-day time limit prescribed by the statute from accepting this document as a timely application for review of the seven May notices. Our holding on this interlocutory appeal should not be construed as foreclosing the Examiner from rejecting the document as an inadequate compliance with his August 12 order, with or without leave to make any later filing. At the very least we think the UMWA should be required to resubmit the document in a more appropriate form.⁵

⁵ Under our holding the 30-day statutory period for filing an application for review expiring September 3, 1970. The expiration of the statutory period does not prevent the Examiner from accepting an amendment to or substitution for an initial pleading where the subsequent document is intended to satisfy formal pleading requirements and does not embody an essentially different claim or position. See *Philip Carey Mfg. Co. v. NLRB*, 331 F. 2d 720, 731 (6th Cir. 1964); *Marsall v. Libby, McNeill & Libby*, 188 F. 2d 1013 (D.C. Cir. 1951); *Hart Cherry Packers, Inc. v. Johnston*, *supra*.

Our decision that the UMWA is not precluded by the Act from filing applications for review should not be interpreted as a general willingness on the part of this Board to accept less than complete compliance with the procedural requirements laid down in the Act, or in the Board's rules, or in any order issued by the Board or an Examiner. Strict compliance with procedural requirements is essential to the expedition which the Act itself requires of the review proceedings for which it provides. (See section 105(c).) Untimely appearance or filing by parties should not and will not be tolerated.

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Since we hold in these proceedings that the 30-day statutory period for filing applications for review began to run on August 3, 1970, regardless of whether the UMWA in fact received copies of the notices sought to be reviewed prior to that date, the taking of further evidence on remand as to the fact of receipt is unnecessary.

IV

We are in agreement with the Bureau that the scope of review of notices issued pursuant to section 104(b) must relate to determination of a reasonable time for abatement. In our judgment the language of section 105(a) and the Act's legislative history do not permit any other construction. See, e.g., H.R. Rept. No. 761, 91st Cong., 1st Sess. 69 (1969); 115 Cong. Rec. S17167 (Dec. 18, 1969).

A number of issues have been raised by the parties for consideration in these proceedings or were referred to as appropriate subjects for evidence by the Examiner in his decisions. We discuss some of these issues and certain pertinent procedural matters *seriatim*.

Burden of introducing evidence. In further proceedings before the Examiner the UMWA, as the applicant for review, is required to introduce evidence sufficient to support findings by the Examiner and the Board of the reasonableness of a time for abatement which the applicant contends should be fixed. In the absence of evidentiary support for the fixing of a time for abatement different from the time provided for in the notice sought to be reviewed, we think that an application for review may properly be dismissed.

The availability of equipment. As previously stated in this decision, evidence bearing on the availability of equipment necessary for abatement is always relevant in determining a reasonable time for abatement in a section 104(b) notice. Such evidence is not restricted to the availability of equipment at the time the notice was issued but may, and indeed should, include evidence of the availability of necessary equipment at the time of the hearing or at a future time. Exercising the power conferred upon the Secretary by section 105(b) of the Act, the Examiner and the Board may, at the conclusion of proceedings to review such a notice, issue "an order vacating, affirming, modifying, or terminating * * * the notice * * * complained of * * *." This broad remedial authority clearly permits issuance of a notice modified to require abatement at a future time based on findings that necessary equipment will then be available to the operator.

Safety of miners. The degree of danger to miners is another consideration that is always relevant in determining a reasonable time for abatement. Where a significant hazard to the health or safety of miners is created by the violation, abatement should be required in the shortest possible time. In such circumstances, countervailing con-

siderations such as the operator's desire to purchase necessary equipment from a particular supplier should never be permitted to delay abatement.

At the same time, the issuance of an immediate withdrawal order under section 104(a), based on an initial finding of "imminent danger," is primarily an enforcement responsibility of the Bureau. In accordance with conclusions reached in part I above, the Bureau's failure to issue such an order is not normally an appropriate issue for review in a proceeding based on an application to review a section 104(b) notice. To some extent these distinctions in this context may be largely formal, since a requirement of prompt abatement under section 104(b) based on a finding of significant hazard to the health or safety of miners would have effects similar to a section 104(a) order. However, we do not believe that the Bureau should be required by the Board to issue a section 104(a) order or that the hearing on review of notices should focus directly on the Bureau's failure to issue such an order.

Difficulty of abatement. Although difficulties which the operator may face in achieving total abatement must clearly be subordinate to the health and safety of miners, we think that difficulty of abatement may nevertheless be a relevant consideration in fixing the time for abatement. Thus, where a longer period for abatement will vastly reduce the cost of abatement or the operational disruption, without exposing the miners to significant danger, we think an order fixing the longer period would be reasonable. There may be other contexts in which consideration of the difficulty of abatement would be appropriate.

Fact of violation. We accept, at least for purposes of the issues presently before us, the proposition that any time for abatement is an unreasonable time if no violation exists. Hence, the truth of the Bureau's allegations of violation, and the legal sufficiency of the facts claimed to constitute a violation, may be challenged by an applicant seeking review of a section 104(b) notice. These same issues are, of course, fully reviewable in any proceeding in which the Bureau seeks the assessment of a penalty based on a section 104(b) violation. We note that the Act itself nowhere expressly precludes review of the fact of violation as an element of the reasonableness of time for abatement in a section 104(b) notice.

Initiation of proceedings under section 104(h). The issuance by the Examiner or the Board of an order requiring the Bureau to initiate proceedings under section 104(h) of the Act would normally not be appropriate on review of a section 104(b) notice. This ruling follows we think from the reasons given in support of our holdings in part I above. Hence, the scope of any further evidentiary hearing in these proceedings should not include matter that bears solely on the findings of fact required to be contained in a section 104(h) notice.

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Other considerations. Our foregoing discussion is not intended to include an exhaustive review of every factor that may be appropriate for consideration in determining a reasonable time for abatement of violations that are the subject of notices issued under section 104(b). Additional considerations, including certain considerations to which we have referred elsewhere in this decision (see e.g., pp. 159-160 above), may be relevant in particular cases.

Withdrawal of pleadings. As a general matter we think that a party should be permitted to withdraw an application for review at any time. We do not think that the Examiner's denial of Freeman's motions to withdraw the original applications for review was necessary to keep the proceedings open for the filing by another party of timely applications to review later notices related to the violations initially challenged by Freeman. Thus, if Freeman in these proceedings elects to withdraw its various challenges, including its claims that no violation in fact occurred, we think that motions to withdraw its applications should be granted as a matter of course.

Order

IT IS ORDERED that these proceedings are remanded to the Examiner for further hearing and an initial decision in accordance with this opinion.

C. E. ROGERS, JR.,

Chairman.

GEORGE V. ALLEN, JR.,

Member.

SEPARATE VIEWS OF MEMBER DAVID DOANE:

I concur in the conclusion reached by the majority but disagree with the reasoning used in arriving at the decision.

Section 105(b) of the Act provides in part that upon receiving the report of the investigation, "the Secretary * * * shall issue a written decision, incorporating therein an order vacating, affirming, modifying or terminating * * * the notice."

The Bureau's action, taken pursuant to the Ratliff decision, was based upon unavailability of equipment and material. In fact it was attempting to vacate the original notices by the issuance of the modifications.

I maintain under section 105(b) of the Act the question of availability is one to be determined before the notices may be vacated.

In light of this holding, I would instruct the examiner to treat the Bureau's petition to dismiss, based upon these modifications of notices, as a petition to vacate the original notices and to permit interested parties a reasonable time to file objections thereto but to limit the issue to the question of availability of the equipment.

DAVID DOANE,
Member.

BEARD OIL COMPANY

IBLA 70-19 *Decided October 7, 1970*

Accounts: Refunds—Oil and Gas Leases: Rentals

Where a noncompetitive oil and gas lease is canceled as having been erroneously issued in derogation of the rights of prior qualified applicants, this Department will order that a refund of the rentals paid for the lease be made to the lessee upon his application for repayment if the cancellation is in no way due to any fault of the lessee and provided there is no arrangement or agreement between lessee and other parties and there is no evidence of fraud or collusion.

L. N. Hagood, et al., 65 I. D. 405 (1958) is overruled.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Beard Oil Company 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 31, 1968, which affirmed as modified an Eastern States land office decision of June 4, 1968, canceling the company's oil and gas lease BLM-A 059146. The land office decision indicated that a refund would be made of rentals paid from November 1, 1966. The Office of Appeals and Hearings modified by ruling that the rentals were payable and earned up to and including June 3, 1968.

Appellant's oil and gas lease was canceled by the Bureau on the ground that prior-filed oil and gas lease offers BLM-A 057177 and BLM-A 057174 were the first qualified applications for the lands involved rather than appellant's offer and the lease was erroneously issued to appellant. The offerors of the conflicting offers filed protests on September 21, 1966, challenging the lease and the cancellation stemmed from these protests.

Appellant does not challenge the Bureau's action in canceling its lease. Instead, it agrees with this action, but requests a refund for the total rental of \$4,083 which represents annual rentals of \$680.50 paid from the issuance of the lease effective November 1, 1962, through October 31, 1968. Repayment application Form 1822.1, December 1964, has been tendered by appellant.

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Because no issue has been raised concerning the cancellation of appellant's lease and because of our conclusion, *infra*, concerning the rental refund, it is not necessary to discuss the merits of the lease cancellation or the difference between the amounts the land office and the Bureau's Appeals Office determined refundable.¹

The primary question raised on appeal is whether this Department should order a refund of the rentals where a lease has been canceled as having been issued erroneously in derogation of another's statutory preference right to the lease.

The decision below indicated that although the lease was voidable and subject to cancellation, the lessee had the quiet enjoyment of its leasehold and "was not deprived of any rights under the lease during the period for which it paid rental." It concluded that there was no authority in law or by regulation for excusing lessees from the obligation of paying rental pursuant to the terms of their leases, and thus there is no basis for a refund, citing *L. N. Hagood, et al.*, 65 I.D. 405 (1958).

Appellant contends that the rentals should be refunded because the lease was issued erroneously. He says, quoting from pages 102 and 103, *Oil and Gas Leasing on Federal Lands*, by Lewis E. Hoffman (1st revision, 1957), that under a long standing practice of the Bureau, rentals have been refunded to oil and gas lessees in such circumstances.

The statutory authority for a refund is provided by section 204(a) of the Public Land Administration Act of July 14, 1960, 43 U.S.C. sec. 1374 (1964), as follows:

In any case where it shall appear to the satisfaction of the Secretary of the Interior that any person has made a payment under any statute relating to the sale, entry, lease, use, or other disposition of the public lands which is not required, or is in excess of the amount required, by applicable law and the regulations issued by the Secretary, the Secretary, upon application or otherwise, may cause a refund to be made from applicable funds.

In *L. N. Hagood, supra*, this Department indicated that it was bound by a Comptroller General's opinion interpreting language in predecessor acts quite similar to the act of July 14, 1960.² The Comptroller General in the opinion in *L. N. Hagood*, ruled that annual rentals on a noncompetitive oil and gas lease conflicting with an existing mining claim should not be refunded for any period up to the time the mining claim was determined to be valid and mineral patent issued. He ruled, however, that payments made thereafter would be in excess of the payments required by law and would be refundable. The rationale of the Comptroller's opinion in *Hagood* and of the decision below appears to be that until the United States actually parts with legal title or

¹ However, see concurring opinion.

² The prior statutes were repealed by the act of July 14, 1960, P.L. 86-649, § 204(b), 74 Stat. 507.

until the oil and gas lease is canceled, rental payments are required by law and therefore no refund is authorized under the law. It is true that for the lease to be in good standing payment of rentals is required. Does this also mean that there is no difference between circumstances wherein a lease is in good standing and circumstances in which a lease must be canceled because it was issued in error resulting from mistake of law or fact? If the Bureau erred in issuing the lease and cancellation is necessary to rectify the error, must it follow that lease rentals paid on the erroneously issued lease be considered as "required" within the meaning of the act of July 14, 1960? We think not, and changes arising since the *Hagood* case support this conclusion.

We point out that the *Hagood* matter did not rest with the departmental decision. A suit was filed in 1963 by the oil and gas lessees in that case against the United States for a refund of the rentals paid, *Edwin Still et al. v. United States*, Civil No. 7897, in the United States District Court for the District of Colorado. The case was settled with the United States making a compromise payment of a sizeable portion of the rentals that had been paid. Although the settlement establishes no authority, the fact that a refund of most of the rental was made lessens the weight of the *Hagood* decision as precedent. Furthermore, this Department and the Department of Justice in reaching the settlement relied on a decision of the United States District Court for the District of Colorado. In a case somewhat similar to the *Hagood* case, *United States v. Ben. L. Abbott*, Civil No. 7326, that court on August 23, 1962, ruled that the defendant on his counterclaim was entitled to recover rentals paid for an oil and gas lease as to lands in conflict with mining claims. This ruling is contrary to the ruling of the Comptroller General in the *Hagood* case.

Since 1962, it appears that the Comptroller General has also taken a position contrary to the *Hagood* position. Its later ruling stems from factual circumstances in the departmental decision, *Max Barash, The Texas Company*, 63 I.D. 51 (1956), which was reversed by *Barash v. Seaton*, 256 F. 2d 714 (D.C. Cir. 1958), ordering the Secretary to issue a noncompetitive oil and gas lease to Barash. To comply, the Department was compelled to cancel a competitive lease which had been issued to the Texas Company. *Max Barash, The Texas Company*, 66 I.D. 11 (1959). In a subsequent decision which was cited below, *Max Barash, The Texas Company*, 66 I.D. 114 (1959), the Department held that the cancellation of Texas Company's oil and gas lease was not conditional upon but was independent of a refund of the rentals and other payments by Texas Company. On remand, the Bureau of Land Management referred the question of whether a refund could be paid Texas Company to the Comptroller General.

In an unpublished opinion dated May 31, 1961 (Comptroller General designation B-128712-O.M.) the Assistant Comptroller General indicated that the legislative history of section 204(a) of the

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Public Land Administration Act of July 14, 1960, *supra*, shows that the new provision was intended to grant more flexible authority to the Secretary to authorize repayments.

He concluded that:

Since the effect of the court decisions in this instance was that the Secretary had no legal authority to execute * * * [the leases issued to the Texas Company], it is reasonable to conclude that he had no legal authority to exact the payments provided for thereunder. *United States v. Ohio Oil Co.*, 163 F. 2d 633 [10th Cir. 1947], certiorari denied, [3] 33 U.S. 8[3] 3, [rehearing denied, 333 U.S. 865]. Accordingly, the claim of the Texas Company may be allowed in the full amount * * *.

While recognizing the factual distinctions between the instant case and the *Hagood* and *Barash, Texas Company* cases, we are of the opinion that the Secretary's authority to refund moneys paid under a lease which is canceled is now clear. Holding that a payment required under law to maintain a lease in good standing may not be returned in these circumstances would ignore the effect of the cancellation of the lease upon any benefit the lessee may have derived from it prior to its cancellation. The court's action in *United States v. Ben L. Abbott*, involving the earlier, supplanted statutes, ordering a refund of the rentals negates the logic and fairness of such a holding. Also, the ruling of the Assistant Comptroller General quoted above under the act of July 14, 1960, refutes that reasoning and supports our conclusion that Congress did not intend the act of July 14, 1960, be interpreted restrictively so as to preclude the repayment of rentals where a lease must be canceled as having been erroneously issued. Considering that the court's ruling in *United States v. Ben L. Abbott*, the enactment of the act of July 14, 1960, and the Assistant Comptroller General's opinion of May 31, 1961, have all transpired since the *L. N. Hagood* decision, we do not believe this Department need any longer consider itself bound to follow the Comptroller General's opinion quoted therein and that decision is overruled. Instead, we are of the opinion that the general practice of the Bureau of Land Management in refunding rentals where a lease has been erroneously issued is correct.

Although we conclude that there is authority under the act of July 14, 1960, to refund rentals where a lease must be canceled as having been issued under a mistake of law or fact not due to any fault of the lessee, we do not imply that this Department will ignore the possibilities of fraud upon the Government. We do not intimate that a refund will be made if the cancellation of the oil and gas lease is due to some fault of the lessee himself or if he stands to benefit through any kind of an arrangement with parties seeking the cancellation of the lease.³

³ The present regulations, 43 CFR subpart 1822, concerning repayments do not set forth any guidelines or safeguards concerning repayments and, indeed, fail to cite the act of July 14, 1960. This omission, however, does not preclude the Secretary, or his delegate, from granting the relief authorized by the statute or establishing guidelines.

Exceptional care must be taken when ordering the cancellation of a lease, especially in circumstances such as this where the protests of the third parties were not made for more than 3 years after issuance of the lease, to assure that there was justification for delay and absence of collusion among the parties.

This case is returned to the Eastern States land office for further action on the lessee's application for repayment. However, before a refund is authorized by that office, the lessee must, at least, first furnish written proof under oath that there is no arrangement or agreement by it with any party concerning the cancellation of the lease. That office may also take such other action as is deemed necessary to assure that the lessee is in good faith and that there is no reason to believe that a conspiracy might exist between appellant and protestants.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is set aside and this case is remanded to the Eastern States land office of the Bureau of Land Management to refund the rentals paid by the appellant providing the conditions discussed above are satisfied.

FRANCIS E. MAYHUE, *Member.*

I CONCUR:

EDWARD W. STUEBING, *Member.*

I CONCUR:

MARTIN RITVO, *Member.*

CONCURRING OPINION BY EDWARD W. STUEBING

Although in agreement with the majority opinion, I offer this separate concurring opinion for the purpose of touching on aspects of the matter not referred to elsewhere.

This case arises out of the fact that the land in question was posted for the filing of simultaneous oil and gas lease offers during the period from May 15, to May 22, 1961. Priority of consideration of offers so filed was determined by a subsequent drawing, at which one Huckaby's offer was first drawn. In accordance with the procedure then practiced, the other offers for the same land were then conditionally rejected pending adjudication of the Huckaby offer. However, Huckaby withdrew his offer on June 20, 1961, which should have signaled the reinstatement and adjudication of the next two offers in priority (BLM-A 057174 and BLM-A 057177; each for a different portion of the lands included in the Huckaby offer). Instead, the land office entertained the offer of Beard Oil Company (BLM-A 059146), to which the lease was issued October 15, 1962.

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On September 21, 1966, a protest was filed by Theodore Baker, the offeror under BLM-A 057174 and this was followed on September 26, 1966, by a protest filed on behalf of Fred A. Gottseman and the Estate of Edwin W. Stockmeyer. These protests asserted the priority earned by the protestants in the drawing and urged the cancellation of the Beard Oil Company lease so that leases might issue to the protestants, whereupon the land office canceled Beard's lease. Beard Oil Company appealed to the Director, but prior to perfecting its appeal it gave notice that it elected not to contest the cancellation of its lease provided that its rental payments were refunded. Because of this the cancellation was effected and leases covering the land were issued to the respective protestants, leaving only the issue of the rental refund to be resolved.

The easy acquiescence of the Bureau and the capitulation of Beard Oil Company form the crux of my concern. I am not at all sure that the cancellation of the Beard lease was enforceable at law. The protestants had slept on their rights until they suddenly appeared nearly four years after the lease was issued to Beard. Beard might well have invoked a defense of laches, with what success we can now only speculate. While admitting the statutory right of the first qualified offeror to receive a lease, even a statutory right may be lost through the dilatory conduct of one who fails to assert it in good time. Laches, estoppel, limitation of action and finality of administrative decisions are examples of defenses employed to bar tardy claims, although they are not all applicable to this situation.

If Beard Oil Company had successfully defended its lease, we would not be faced with a question of repayment. Similarly, if it could be established that Beard simply yielded a right it was lawfully entitled to retain, no repayment would be due it. Where a lessee simply relinquishes his leasehold without any legal obligation to do so he is not entitled to a refund. However, I cannot fault Beard Oil Company for accepting the Bureau's determination that the lease could not be preserved, since it was financially advantageous for it to do so. I merely wish to make the point that leases should not be canceled at the behest of a third party where any doubt exists regarding the respective rights of the protestant and the lessee, since the effect of cancellation will be a loss to the government of accumulated rentals.

One further point should be considered. Even assuming that the cancellation of the lease was legally enforceable, during the years when Beard Oil Company held the lease it had certain rights. It might have treated the lease as an article of commerce and sold it to an innocent purchaser for value, thereby putting it beyond the reach of the protestants. It had the right to explore the leasehold and gain geological data which could have influenced its decision to consent to the cancellation rather than resist it. If the company had completed a producing well, the very fact of production would have been fatal to

the noncompetitive application, and defeated any administrative cancellation of Beard's lease. There is nothing to suggest that the company had knowledge of the prior right of the protestants to receive the lease, but if it could be demonstrated that it took the lease with such knowledge for the purpose of exercising whatever rights the lease bestowed, then the company would have gotten what it bargained for and no refund would be due it.

For these reasons I suggest that extreme caution and thorough investigation of such cases is required in the future to protect the public interest.

UNITED STATES v. FRANK AND WANITA MELLUZZO, ET AL.

IBLA 70-149

Decided October 7, 1970

Mining Claims: Contests—Mining Claims: Hearings—Rules of Practice: Hearings

Where information developed after a Departmental decision holding a mining claim invalid indicates that it may have been based upon inaccurate evidence, the prior decision will be set aside and the case remanded for an administrative review of the patent application in the light of the actual situation.

**BOARD OF LAND APPEALS
PETITION FOR RECONSIDERATION**

Frank and Wanita Melluzzo and Salvatore and Concetta Melluzzo, for themselves, and Tognoni and Pugh, Attorneys-at-Law, for all other contestants have filed separate petitions for reconsideration of departmental decision *United States v. Frank and Wanita Melluzzo, et al.*, 76 I.D. 181 (1969).¹

The Melluzzo petition asks reconsideration of the decision only as to the three claims known as the North 7th Street Group, that is the Concetta, the Nita Jean and Nita Jean No. 2. The other petition asks reconsideration of the decision as to the claims constituting the Enterprise & Cram Groups (the latter being completely overlapped by the Enterprise claims).

The Enterprise & Cram petition has been carefully examined. It raises only general objections to the decision, asserting that it is mistaken in its interpretation of the evidence and the law. A similar petition for all the claims was denied by the Acting Solicitor in a letter dated February 3, 1970. We find nothing in the recent petition which would warrant a change in our decision as to the Enterprise & Cram claims. Therefore, the request is denied and the decision of July 29, 1969, will remain the final Departmental action in the matter as to them.

The Melluzzo petition is much more explicit. It is supported by statements of present and former personnel of the Bureau of Land Management and of Frank Melluzzo saying that the evidence presented at

¹ Frank Melluzzo has notified the Department informally that he and the other Melluzzos are no longer represented by Tognoni and Pugh in this proceeding.

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the hearing in the contests involving the North 7th Street Group did not describe accurately the amount of building stone removed from the claims or sold under firm contract, and later removed, prior to July 23, 1955, and that such amount is substantially more than that found by the hearing examiner and accepted upon appeal.

Pursuant to directions from the Solicitor's office, officials of the Phoenix land office conducted an investigation of the three claims in the North 7th Street group. Their investigation included an examination of various buildings erected in the period from 1951-1955 on which stone from the claims was used. The results of the investigation are set out in a stipulation signed by Frank and Wanita Melluzzo and the Acting Arizona State Director, BLM. It concludes that the production from the North 7th Street Group in 1954 was 298 tons, grossing \$3,526, and in 1955, 580 tons, grossing \$8,700.

While these total figures are substantially in excess of those found by the hearing examiner and accepted by the Department, as presented they do not provide a basis for redetermining the validity of each particular claim. The validity of each of the claims, all else being regular, must rest upon the sales and production it alone yielded. When the figures are offered only as a total for a group of claims, it is not possible to determine the validity of any particular claim, for all or none of the production could have come from it.

In our request for further information, we had asked that the Melluzzos sign a stipulation setting out, *as to each claim*, the amount produced and sold by them prior to July 23, 1955. We intended, by having statistics on which the United States and the claimants agreed, to put an end, if possible, to the confusion that has arisen from the vagueness and conflicts in Frank Melluzzo's testimony in this and other proceedings. The stipulation as presented is of little help, for it not only leaves uncertain the Melluzzo position as to these individual claims, but scarcely inhibits the use of some "floating" production in other contests.

There is, however, some indication of how the production was distributed among the three claims. The Chief, Branch of Minerals, Phoenix Land Office, who took part in the investigation, has submitted some comments on this point. Of the stone he observed in the various buildings he estimated that $\frac{2}{3}$ came from the quarries on the Nita Jean No. 2, $\frac{1}{3}$ from those on the north end of the Nita Jean and none came from the Concetta. He also observed no opened quarries on the Concetta.

While mining contests, in which a hearing has been held, are to be determined only on the basis of the record made at the hearing, 43 CFR 1840.0-8 (1970), we are now examining only a petition for reconsideration. The petition is addressed to the discretion of the Secretary. In considering it he (or his delegate) is not bound by the same rules

as those governing the decision on appeal. Therefore, the comments of the Chief, Branch of Minerals, may be used to evaluate the general statements in the stipulation in deciding whether the petition should be allowed. His remarks on the Concetta reinforces the conclusion reached in the Department's decision that it was properly found to be invalid. We see no reason to disturb the decision as to that claim, and the petition as to it is denied.

While the above observations suggest that the other two claims may be valid in whole or in part, the record before us, that is the record at the hearing even as amplified by the stipulation, affords no basis for making such a determination. As we have said, each claim must be adjudicated on the basis of the facts pertaining to it.

The land office has investigated the claims and perhaps has or can obtain the facts as to each claim. Instead of trying to prepare a more satisfactory stipulation covering the precise situation as to each claim, we believe it would be more practical in the circumstance for the land office to review the validity of the Nita Jean and Nita Jean No. 2.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5, 35 F.R. 12081), the Department's decision of July 29, 1969, and the decisions of the Bureau of Land Management and the hearing examiner as to these two claims are set aside and the case is remanded for further proceedings consistent herewith.

MARTIN RITVO, *Member.*

I CONCUR:

EDWARD W. STUEBING, *Member.*

I CONCUR:

NEWTON FRISHBERG, *Chairman.*

ESTATE OF LYLE K. GROSS

IBLA 70-38

Decided October 23, 1970

Small Tract Act: Generally

The mere filing of a small tract application does not create in the applicant any right or interest in the land, and the Secretary in his discretion may refuse to consummate a sale at any time prior to issuance of patent.

Small Tract Act: Classification

Public lands classified as disposable under the Act may be reclassified by the Secretary for retention by the Government.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This appeal to the Secretary of the Interior was perfected by the Estate of Lyle K. Gross, deceased. The appeal is from a decision ren-

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dered by the Branch of Land Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated February 17, 1969, which dismissed an appeal from the Bureau of Land Management's Nevada land office. The Nevada land office had rejected an application filed by Lyle K. Gross on December 22, 1958, to lease or purchase 5 acres under the Small Tract Act of June 1, 1938, 52 Stat. 609, 43 U.S.C. secs. 682a-e (1964).

After the application for lease or purchase was filed, the Bureau of Land Management made a small tract classification. In March of 1964 the district manager for the Bureau of Land Management classified the land for direct sale to the applicant at the appraised fair market value of \$500. However, the applicant had died in December 1963. Upon learning this the Nevada land office contacted his heirs and apprised them of its action.

Complications regarding the probate of the Estate of Lyle K. Gross and concerning claims to minerals underlying the subject 5-acre tract delayed the consummation of the sale for several years. During these delays, which were not occasioned by either party, the Nevada land office vacated its decision approving the small tract application and rejected the application in October 1968. The reason for the rejection of the application was the discovery of the only subspecies of a rare fish population in a spring known as School Spring located on the 5 acres. The species of fish is identified as *Cyprinodon nevadensis*, more commonly known as "pupfish." The subspecies, *pectoralis*, is listed among the rare and endangered fish of the United States by the U.S. Bureau of Sports Fisheries and Wildlife.

In September 1967 the Nevada Fish and Game Commission requested a protective withdrawal of the tract because it surrounded School Spring. The Nevada land office, in its October 1968 decision rejecting the application, found that it would be in the public interest to reclassify the tract for retention under the provisions of the Classification and Multiple Use Act, 78 Stat. 986, 43 U.S.C. secs. 1411-18 (1964).

The decisions of the Department are clear that the mere filing of an application pursuant to the Small Tract Act, *supra*, does not create in the applicant any right or interest in the land covered by the application. *Betty L. Sherman*, A-29901 (February 19, 1964). The Act authorizes the Secretary of the Interior, in his discretion, to sell or lease tracts of land not exceeding 5 acres which he may classify as chiefly valuable for certain purposes, under such rules and regulations as he may prescribe, at a price to be determined by him. The rules and regu-

lations applicable in the instant case are found at 43 CFR 2233.0-2 (1970 ed.), now 43 CFR 2730, 35 F.R. 9618 (1970). The "Objectives" section of said rules and regulations provides in substance that small tract activity shall promote the beneficial utilization of the public lands, safeguard the public interest in the lands and coordinate with interested local governmental agencies toward conservation of natural resources.

The discretion vested in the Secretary by the Small Tract Act, *supra*, is essentially the same as is vested in the Secretary by the Isolated Tracts Act, 43 U.S.C. sec. 1711 (1958). Decisions under the Isolated Tracts Act, *supra*, hold that the Secretary, in exercising the discretionary power granted him by Congress, may refuse to consummate a sale at any time prior to issuance of patent whenever he determines such action would be in the public interest. *Willcoxson v. United States*, 313 F. 2d 884 (D.C. Cir. 1963), cert. denied, 373 U.S. 932 (1963); *Ferry v. Udall*, 336 F. 2d 706 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965). In these cases the purchase price had already been deposited, while in the present case it was never tendered.

The classification of land as suitable for disposition under the Small Tract Act does not preclude a subsequent cancellation of that classification when a different classification is found to be in the public interest. *Cecil W. Hinshaw*, A-30006 (July 23, 1964). As was stated in the land office decision of October 21, 1968, rejection of the application was predicated upon the finding that the public interest required such action in order to protect and preserve the rare species of fish discovered in the spring located within the 5-acre tract. We find this to be well within the delegated authority of the land office manager.

Having determined that the land office action was proper, thereby making the subject tract no longer available for disposition under the Small Tract Act, *supra*, it becomes unnecessary to discuss the other reasons for appeal as set forth by the appellant.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision below is affirmed.

I CONCUR:

NEWTON FRISHBERG, *Chairman.*

FRANCIS E. MAYHUE, *Member.*

I CONCUR:

ANNE P. LEWIS, *Member.*

*October 7, 1970***SOUTHERN PACIFIC COMPANY
LOUIS G. WEDEKIND*****IBLA 70-90***Decided October 7, 1970***Railroad Grant Lands**

Where an application is filed under Section 321(b) of the Transportation Act of 1940 alleging a conveyance to an innocent purchaser for value by a railroad grantee, the application may not be rejected on its face solely for the reason that the lands applied for have been classified as mineral in character subsequent to the time of the conveyance. It must also be shown that the lands were of known mineral character at any time between the date the railroad line was definitely located and the date of the original sale by the railroad and that the purchaser knew or should have known at the time of his purchase that the lands were of this character.

Res Judicata

The doctrine of res judicata has long been accepted and applied by the Department. However, the doctrine is generally invoked as a bar to a claim for relief only where there has been a final adjudication of a matter before the Department and where it is clear that the same facts and issues are involved in a subsequent matter before the Department.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Louis G. Wedekind has appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated September 10, 1969, which dismissed his appeal from a decision of the Nevada Land Office holding for rejection the application of the Southern Pacific Company for patent to the SE $\frac{1}{4}$ of Section 29, T. 20 N., R. 20 E., M.D.M., Washoe County, Nevada.¹

This appeal concerns the disposition of a 160-acre tract of public land for which the Southern Pacific Railroad has applied as part of an odd-numbered section within the limits of the grant to its predecessor, the Central Pacific Railroad Company of California, by the act of July 1, 1862 (12 Stat. 489), and the act of July 2, 1864 (13 Stat. 356). The Southern Pacific Railroad filed its application, Nevada 058575, on July 1, 1962, on behalf of the real parties in interest, the heirs of

*Not in Chronological Order.

¹This appeal is being prosecuted by Louis J. Wedekind, one of the heirs of George H. Wedekind, deceased, and is prosecuted on behalf of all of his heirs.

George H. Wedekind, pursuant to Section 321(b) Part II, Title III, of the Transportation Act of 1940, 49 U.S.C. sec. 65(b) (1964).²

Under section 3 of the act of July 1, 1862, *supra*, the Central Pacific Railroad Company of California was granted every alternate section of public land, designated by odd numbers, up to five alternate sections per mile on each side of the railroad line, and within ten miles of each side of the line, if the land was not sold, reserved or otherwise disposed of at the time the line of the road was definitely fixed, and provided “* * * that all mineral lands shall be excepted from the operation of this act.” Section 4 of the act of July 2, 1864, *supra*, doubled the grant from five to ten sections per mile on each side of said line, and provided, among other things, that the term “mineral land” wherever used therein, or in the original act, should not be construed to include coal or iron land, and that no land granted by that or the original act should include any other mineral land.

The record shows that Central Pacific Railway Company selected the lands at issue, Section 29, T. 20 N., R. 20 E., M.D.M., Selection List No. 9 for lands in Nevada on June 28, 1895. However, before Central Pacific had received a patent for these lands, it issued a quit-claim deed to George H. Wedekind for the sum of \$800 on February 18, 1901, transferring its interest in the SE $\frac{1}{4}$ of Section 29. The Central Pacific’s selection of Section 29 was subsequently denied by the Department in 1916, pursuant to hearings completed in January 1912, *Central Pacific Railway Co.*, 45 L.D. 25 (1916), rehearing denied, 45 L.D. 27 (1916), affirmed, *Central Pacific Railway Co. v. Lane*, 46 App. D.C. 372 (D.C. Cir. 1917). The basis for the denial was that all the lands in the section were mineral in character and, therefore, excluded under the terms of the act of July 1, 1862 (Section 3), and the act of July 2, 1864 (Section 4).

The appellant filed its present application under the Transportation Act of 1940, *supra*, asserting that patent to the SE $\frac{1}{4}$ of Section 29 should issue to the Southern Pacific Railroad on behalf of the heirs of George H. Wedekind based on the quit-claim conveyance to Wedekind as an innocent purchaser for value from the railroad in 1901.³

Section 321(b) of the Transportation Act provides that if any land grant railroad wishes to take advantage of charging higher rates for

² Application by the railroad in behalf of its assignee is in accordance with established practice (see *Southern Pacific Land Co.*, 42 L.D. 522 (1913); *Santa Fe Pacific Railroad Company*, 58 I.D. 591 (1944)).

³ In support of this contention, appellant has submitted a copy of Central Pacific Railway Company Deed No. 8892, dated February 18, 1901, conveying the described land to George H. Wedekind.

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carrying Government traffic, it must file a release of any claim it might have against the United States to lands granted to the railroad. It is provided, however, that nothing in Section 321(b) should be construed

* * * to prevent the issuance of patents confirming the title of such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value * * *.

The Southern Pacific Company and its predecessor, the Central Pacific, filed such releases, specifically excepting lands sold to innocent purchasers for value.

By a decision of January 30, 1969, the Nevada Land Office rejected the application under the Transportation Act because the lands applied for had been determined to be mineral in character by the Department in 1916 and by the courts, citing *U.S. v. Central Pacific Railway Co.*, D-31706-B, List No. 9, Serial 01223, affirmed by the Supreme Court of the District of Columbia (Equity No. 34359) and the Court of Appeals of the District of Columbia in *Central Pacific Railway Co. v. Lane*, No. 3008, 46 App. Cases 372 (1917). It held that the lands in Section 29 were not subject to the original railroad grant, and in accordance with the regulations under the Transportation Act (43 CFR 2224.3-a, 1970 Rev.),⁴ rejected the application.

The Office of Appeals and Hearings dismissed the appeal from the Land Office decision on the ground that the doctrine of res judicata or its administrative law counterpart, the doctrine of finality of administrative action, applied to this case, preventing further consideration of an appeal by the Southern Pacific Company. The decision states:

In the present application, the Southern Pacific Company has presented the same issue as that decided in the case cited above [*Central Pacific Railway v. Lane*, *supra*]. It is therefore determined to be res judicata and a bar to any further claim for relief, and it is not proper again to consider on its merits an appeal on the same issue and for the same land.

Before a decision can be reached in this case, a determination must be made as to the character of the land from the date the railroad line was definitely located to the date of purchase and whether the purchaser from the railroad was an "innocent purchaser" for value. This has not been done. After a thorough review of the record before us we cannot say with certainty whether or not the departmental decision of 1916 and court decisions of 1917 specifically found that Section 29 lands were mineral in character as of February 18, 1901, the date of

⁴ Now 43 CFR 2631.0-8, 35 F.R. 9613 (1970).

purchase from the railroad, or prior thereto. It is elementary that res judicata cannot bar a claim unless the same issues and facts are involved in the subsequent proceeding. Therefore, the doctrine of res judicata does not apply in the instant case and the ruling below was in error.

Prior decisions of the Department provide that a patent may be issued under section 321 (b), *supra*, for railroad grant lands sold by the railroad if the land was nonmineral in character at the time of sale and the purchaser was an innocent purchaser for value, even though the land is subsequently determined to be mineral in character. *Southern Pacific Company*, 71 I.D. 224 (1964). The bona fide requirement where the land is nonmineral in character at the time of the purchase pertains to the absence of knowledge of its mineral character, if such were the case, between the time the railroad line was definitely located and the date of purchase, for its characterization as such during that period would except it from the grant to the railroad. *U.S. v. Southern Pacific Company*, 77 I.D. 41 (1970). Even if it is found that the land was mineral in character at or prior to the time of sale, a patent will issue if it is determined that the purchaser was not chargeable with actual or constructive notice of that fact. *Ibid.*

The concept of a bona fide purchaser or innocent purchaser for value has been analyzed by the Supreme Court under the act of March 3, 1887, 43 U.S.C. secs. 894-899 (1964) in the cases of *United States v. Winona & St. Peter RR*, 165 U.S. 463 (1897) and *Winona & St. Peter RR v. United States*, 165 U.S. 483 (1897). The same concepts apply under the Transportation Act of 1940 in the instant case. Generally, for a purchaser not to be bona fide the facts must show that he knew or should have known that the lands were mineral in character as of the date of his purchase or were of such character so as to have been excluded when the railroad line was definitely located or at any time prior to this purchase. *United States v. Southern Pacific Company*, *supra*. As was said in *United States v. Central Pacific Railroad Co.*, 84 Fed. 218, 221 (Cir. Ct., N.D. Cal. 1898):

* * * The status of a bona fide purchaser is made up of three essential elements: (1) a valuable consideration; (2) absence of notice; and (3) the presence of good faith. * * *

For the reasons set forth herein, the Bureau's decision is set aside and the case is remanded for the purpose of a hearing. At the hearing, competent evidence should be adduced as to the character of the lands from the time the railroad line was definitely located to and including the time of the purchase from the railroad. In the event it is determined

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that the land was mineral in character at any time during such period, evidence should be received relating to the bona fides of the purchaser.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), this case is remanded for further consideration and action consistent with this decision.

NEWTON FRISHBERG, *Chairman.*

I CONCUR:

MARTIN RITVO, *Member.*

FRANCIS MAYHUE, *Member.*

JOSEPH I. O'NEILL, JR.

MOBIL OIL CORPORATION*

IBLA 70-39

Decided October 9, 1970

Oil and Gas Leases: Extensions

The stationary and regulatory requirements that there must be a discovery of oil or gas in paying quantities on a segregated portion of a lease in order to qualify another segregated portion of the same lease for a two-year extension cannot be construed so as to require that in every instance there must be a fully completed well on the site which is physically capable of producing oil or gas in paying quantities prior to the date of expiration.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Joseph I. O'Neill, Jr. and Mobil Oil Corporation have each appealed from the February 28, 1969, decision of the Chief, Branch of Mineral Appeals, which affirmed the decision of the Santa Fe land office in declaring that appellants' oil and gas leases had expired and in rejecting their respective applications for two-year extensions pursuant to 30 U.S.C. 187a (1964).

The facts are that the original noncompetitive lease, NM 027994, was issued November 1, 1956, and included all of the lands herein-after discussed. The lease was segregated by various partial assignments creating leases NW 027994-A through NM 027994-F. The retained portion of the base lease (NM 027994) expired on October 31, 1966, as did NM 027994-B. Lease NM 027994-D was extended under

*Not in Chronological Order.

43 CFR 3128.5 (b)¹ to June 30, 1968, and further extended to June 30, 1970, pursuant to 43 CFR 3127.2² (diligent drilling operations being conducted on June 30, 1968). The remaining segregated leases were extended under 43 CFR 3128.5(b) to September 30, 1968.

Prior to the expiration date, Mr. O'Neill and Mobil Oil Corporation, lessees under NM 027994-A and NM 027994-C, respectively requested that their leases be extended for two years on the basis of a discovery of oil and gas in paying quantities on another segregated portion of the original leasehold, i.e., on NM 027994-D, as provided by 43 CFR 3128.5.³ Advance rentals for the following lease year were tendered by O'Neill and Mobil prior to the regular expiration date of their respective leases, and receipts therefor were issued by the land office.

O'Neill's application for extension stated the following:

United States lease NM 027994-D covering, among other lands, W/2 NE/4 Section 12, said township and range, is the subject of drilling operations by Pennzoil United, Inc., such well being called the Mobil Federal #12-1, Eddy County, New Mexico. This is a part of original parent lease NM-027994. Drillstem tests have been taken in said well in the Wolfcamp Formation, Strawn Formation and Atoka Formation, which definitely indicate a discovery of oil and gas in commercial quantities on August 12, August 13, August 19 and September 17, 1968.

Copy of affidavit of the drilling superintendent of Pennzoil United, Inc. is attached hereto and the logs referred to in said affidavit are furnished herewith to United States Geological Survey Office, Roswell, New Mexico, together with a copy of this letter and affidavit. It is requested that such logs remain confidential information available only to government personnel to the extent necessary to verify the discovery referred to above.

In reporting to the land office with reference to the alleged discovery, the Regional Oil and Gas Supervisor, Geological Survey, said:

This office does not disagree with the drillstem test data submitted by Mr. O'Neill * * *. We do not, however, agree with his claim that a discovery has been made in the well on the "D" lease prior to September 30, 1968, which would entitle [the other leases] to a two-year extension pursuant to 43 CFR 3128.5(a).

The pertinent regulation requires that in order for a segregated portion of a lease to qualify for a two-year extension as a result of a discovery on another segregated portion, such discovery must be a "discovery of oil or gas in paying quantities." Accordingly, there must be a well on one of the segregated portions

¹ Since renumbered 43 CFR 3107.8-3.

² Since renumbered 43 CFR 3107.2-3.

³ The request of Mobil Oil Corporation is not contained in the case record. However, the recitation of its receipt in the land office decision of November 1, 1968, plus the land office receipt for payment of advance rental for the following year, are adequate evidence that such a request was in fact received.

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of the lease that is capable of producing oil or gas in paying quantities on or before the expiration date of the other segregated portions. The Chief, Branch of Mineral Appeals, Division of Appeals, held in his decision of April 17, 1962, in the case of Texas-National Petroleum Company, lease New Mexico 021121, that a discovery means a well that is physically capable of producing oil or gas in paying quantities. Solicitor's Opinion A-30153 (Carl Losey *et al.*, dated December 4, 1964, involving leases Salt Lake City 071373 and 071374) states the following in the penultimate paragraph on page 3: "The Department has held that the phrase 'well capable of producing' means 'a well which is actually in a condition to produce at a particular time in question.' * * * An assertion that a well is commercially productive will not extend the lease when a lessee fails to submit satisfactory evidence that he has a well capable of present production in paying quantities."

As drilling operations are continuing at the well on the "D" lease, it is clear that the well is not a discovery which would serve to extend the other segregated leases because such a well was not physically completed so as to be capable of producing oil and gas in paying quantities on September 30, 1968.

The report continued with an expression of the Supervisor's opinion that although the drillstem test results indicated that the intervals tested "are possibly productive in paying quantities * * * sustained production might prove the well not to be capable of producing oil or gas in paying quantities," and concluded with the following:

In any case, the well was not physically capable of producing oil or gas in paying quantities on September 30, 1968. Accordingly, it is our opinion that leases New Mexico 027994-A, 027994-C, 027994-E, and 027994-F are not qualified for a two-year extension pursuant to 43 CFR 3128.5(a) and it is recommended that such leases be considered to have expired by their own terms as of September 30, 1968.

The land office decision of November 1, 1968, held that the leases in question had expired because in order to qualify for a two-year extension there must be a well on one of the segregated portions of the original lease that is capable of producing oil or gas in paying quantities on or before the expiration date of the other segregated portions.

On appeal to the Director, Bureau of Land Management, the land office decision was affirmed by the Chief, Branch of Mineral Appeals, who held that the statutory requirement for discovery of oil or gas in paying quantities is not met until there is on the lease a well capable of producing oil or gas in paying quantities after drilling has been completed, casing set and cemented, and perforations made into the appropriate horizon so that the well is physically capable of production, citing *United Manufacturing Co., et al.*, 65 I.D. 106 (1958) and *Joseph C. Sterge*, 70 I.D. 375 (1963).

On appeal to the Department from that decision appellants argue that neither the statute nor the regulation requires that there be a completed well fully capable of economic production on the segregated portion of the lease prior to the expiration date in order to effect a discovery. They aver that courts have held that the primary meaning of the word "discovery" does not include production, it merely means *to find*, citing *Continental Oil Company v. Boston Texas Land Trust*, 221 F. 2d 124 (5th Cir. 1955).

They further contend that the drillstem tests made in the four formations between August 12 and September 17, 1968, truly indicated a discovery of paying quantities of gas as evidenced by the daily drilling reports, the dual induction-laterolog, sidewall neutron porosity log, microlog, and borehole compensated sonic log-gamma ray (all of which were furnished to the Geological Survey). In support of this contention they offer the affidavits of the drilling superintendent, the manager of production for Pennzoil United, Inc. (a qualified production engineer), and an independent petroleum engineer, each of whom expressed his opinion that the drillstem tests constituted a discovery. Moreover, appellants have submitted a copy of the well completion report showing that the well was completed as a gas producer from the Atoka formation on November 25, 1968. With reference to the statement by the Regional Oil and Gas Supervisor that sustained production might prove the well incapable of producing in paying quantities, they contend that the same criticism could be leveled at the initial potential test (after well completion), which is accepted by the Geological Survey, saying that any well can become incapable of producing in paying quantities at any later date.

In summary, appellants say that the Bureau of Land Management and the Geological Survey have added to the statute a requirement which frustrates the law and the regulation and goes beyond the intention of the Congress by substituting the need for a completed well instead of discovery.

The term "discovery of oil or gas in paying quantities" did not originate with this legislation. On the contrary, it has long been employed in private leases and has been considered and defined in numerous judicial proceedings. See text and cases collected in 2 Summers, **THE LAW OF OIL AND GAS** § 300. In *Texas Pacific Coal and Oil Co. v. Bratton*, 239 S.W. 688 (Tex. Civ. App. 1921) the court said:

The predicate for a continuation of the lease * * * having been stated to be simply the discovery of oil during the five years' period, another predicate, namely "the production of oil in paying quantities," within the five years' period

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cannot be implied and read into the lease as a substitute for, or qualification of, the predicate stated, which is clear and unambiguous.

The primary meaning of the word "discover" being to find, and in this instance to find something not known before, this necessarily is the meaning of the term when used in connection with exploratory operations, since such operations are designed solely for the purpose of determining whether or not the land contains oil or gas in sufficient quantities for profitable production. The private lease usually provides that, if during the exploratory period oil or gas is found or discovered in paying quantities, thereafter the lease shall continue in full force and effect. *Bouldin v. Gulf Production Co.* 5 S.W. 2d 1019, 1023 (Tex. Civ. App. 1928); cited with approval in *Continental Oil Co. v. Boston Texas Land Trust, supra*.

The act of July 29, 1954, 68 Stat. 585; 30 U.S.C. 188(b), added the following, *inter alia*, to section 31 of the Mineral Leasing Act, as amended:

* * * upon failure of a lessee to pay rental on or before the anniversary date of the lease, *for any lease on which there is no well capable of producing oil or gas in paying quantities*, the lease shall automatically terminate * * *. (Italic added.)

As indicated, the foregoing imposes a specific statutory requirement for a well capable of producing oil or gas in paying quantities if the lease is to be spared automatic termination in consequence of nonpayment of rental. By contrast, however, the act of August 8, 1946, 60 Stat. 955; 30 U.S.C. 187a provides, in pertinent part, that

* * * Any partial assignment of any lease shall segregate the assigned and retained portions thereof, * * * and such segregated leases shall continue in full force and effect for the primary term of the original lease, but for not less than two years *after the date of discovery of oil or gas in paying quantities* upon any other segregated portion of the lands originally subject to such lease. * * * (Italics added.).

The last-quoted statute, of course, is the one with which this appeal is concerned, since it affords the benefit sought by the appellants. However, all of the authorities relied upon by the Bureau of Land Management and the Geological Survey to establish that a completed well is required involve cases arising out of nonpayment of rentals and the consequent termination of the leases pursuant to 30 U.S.C. 188(b). The conclusion is inescapable that BLM and the Survey have taken the requirement for a well capable of producing oil or gas in paying

quantities, which was written into 30 U.S.C. 188(b) as a saving clause, and superimposed it on 30 U.S.C. 187a, as the essential test of a discovery of oil or gas in paying quantities.

We think such interpretation is improper. There is no basis for believing that in 1946, when the Congress provided that discovery of oil or gas in paying quantities would qualify another segregated portion of the same lease for extension, it intended to impose a requirement not even articulated in the Mineral Leasing Act until eight years later in an amendment dealing with nonpayment of lease rental—an entirely different situation. Had it been the intent of Congress that there must be a completed well physically capable of economic production in order to qualify the extension it could easily have so provided. It did not. Only "discovery of oil and gas in paying quantities" is required.

This is not to say that in no event will it ever be necessary to complete a well in order to demonstrate a qualifying discovery. We recognize that situations may arise where adequate testing has not been accomplished or test results and other evidence are inconclusive and only the initial production test after completion of the well will demonstrate whether a discovery has been made. However, where all the evidence and expert opinion is reasonably persuasive of the fact of a discovery of paying quantities of oil or gas, as in this instance, it is error to hold that such evidence must be disregarded because the law and/or the regulations require a completed well, physically capable of oil or gas production in paying quantities.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the Bureau decision of February 28, 1969, is reversed, and the case records are remanded to the land office with instructions to grant the lessees two year extensions effective as of the date hereof.

NEWTON FRISHBERG, *Chairman.*

WE CONCUR:

EDWARD W. STUEBING, *Member.*

FRANCIS E. MAYHUE, *Member.*

October 16, 1970

APPEAL OF L. O. BRAYTON & COMPANY*

IBCA-641-5-67

Decided October 16, 1970

Contracts: Construction and Operation: Notices—Contracts: Performance or Default: Suspension of Work—Contracts: Disputes and Remedies: Equitable Adjustments

When unavailability of right-of-way results in an unreasonable delay in issuing a notice to proceed, there may result a constructive suspension of work requiring an adjustment for the increased costs necessarily caused by the delay. The costs may include both those incurred during the period of the delay and those incurred later as the direct consequence of the delay.

Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustments

The release of transmission line right-of-way in discontinuous lengths which seriously disrupts the right-of-way clearing operation results in a constructive change entitling the contractor to an equitable adjustment for the added costs of clearing due to the disruption of work.

Contracts: Performance or Default: Acceleration—Contracts: Disputes and Remedies: Equitable Adjustments

A written order to the contractor to complete work by the date fixed in the contract for completion is an order to accelerate constituting a change when at the time of issuance the contractor was admittedly entitled to extensions of time which had been requested but not yet granted, and the contractor in fact accelerates. The contractor is entitled to an equitable adjustment for the increased costs due to the accelerated effort.

BOARD OF CONTRACT APPEALS

On June 29, 1963, appellant, as low bidder, was awarded a contract by the Southwestern Power Administration (SPA), to construct approximately 84 miles of 154 KV transmission line from Jonesboro, Arkansas, to Greers Ferry Dam, under a small business set aside. The bid price was \$1,410,483.90. The transmission line was subdivided into two segments A and B. The A segment consisted of about 52 miles of line in hilly upland terrain. The B segment consisting of about 32 miles of line in flat and lowlying bottom lands commencing at Jonesboro and ending a few miles west of the Black River.

Appellant states three broad claims: (1) a claim for delay and associated costs, either as a constructive change, or under the contract's

* Not in Chronological Order.

Suspension of Work Clause;¹ (2) a claim for acceleration; and (3) a constructive change arising out of the alleged failures of the Government in furnishing wire-sagging information.

The Board assumes that appellant's broad statement of its claims includes all those more specific claims denied by the contracting officer in his decision dated May 1, 1967,² and not otherwise settled. As enumerated in that decision, the remaining disputed claims are as follows:

Claim 1—Delay in giving notice to proceed.

Claim 2—Delay in approving subcontractors.

Claim 3—Failure to provide adequate segments of continuous right-of-way.

Claim 4—Delay in staking structures and in furnishing structure schedules.

Claim 6—Failure to furnish sag tables, clipping offset charts, and Government direction of conductor sagging.

Claim 9—Delays caused by unusually severe weather, and mud and water conditions on right-of-way.

Claim 15—Acceleration of work.

By agreement the Board will limit itself to deciding questions of liability as to these issues. Dollar amounts are not before us at this time.

Claim 1—Delay in Giving Notice to Proceed

From the very outset appellant made known its desire to have a notice to proceed issued on or about September 1, 1963. Its letter dated July 22, 1963, to the contracting officer clearly indicates its position and understanding prior to bid opening that the notice to proceed

¹ "SC-12. PRICE ADJUSTMENT FOR SUSPENSION, DELAY, OR INTERRUPTION OF THE WORK.

"(a) The Contracting Officer may order the Contractor in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the 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 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 been 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."

² Appeal file folder No. 13.

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would issue on or about September 1, 1963.³ The reason given for an early September notice was that the critical period for construction in the lowland rice fields was between September and December.

Subsequent events are somewhat confused. However, a letter of appellant's dated August 20, 1963,⁴ indicates that the outcome of a meeting held July 30, 1963, was that a notice to proceed would not be issued earlier than October 15. This letter again stressed appellant's need for a September notice because of lowland field conditions and put SPA on notice that a later notice to proceed would very probably delay construction and increase costs. Appellant's chief officer testified that he interpreted the July 30 meeting as setting October 15, 1963, as the earliest possible firm date for a notice to proceed.⁵

At a second meeting on August 30, 1963, the tentative date for a notice to proceed apparently was moved back to between November 1 and 15. There is testimony that appellant suggested delaying the start of construction until April 1964, when it would commence at Greer's Ferry, and not reach the lowland area until the fall of 1964, as an alternative to working under a late notice to proceed.⁶

Underlying the delay in issuing a notice to proceed was the situation with regard to acquisition of right-of-way. SPA did not feel itself to be in a position to give a notice to proceed until it had available sufficient right-of-way for appellant to work on.⁷ The contracting officer testified that he was continually watching the situation and finally concluded toward the end of September 1963, that the best course of action would be to release what was available rather than to wait until all was available. He briefed the Administrator of the Southwestern Power Administration and received his approval.⁸ Accordingly, a notice to proceed, dated October 1, 1963,⁹ was mailed to appellant.

This notice was restricted to the B segment of the line and did not release all tracts in the B segment. Two basic consequences are al-

³ Exhibit 17.

⁴ Exhibit 18.

⁵ Curiously enough at this meeting of July 30, 1967, verbal approval was given to a progress schedule which was premised upon a notice to proceed being issued on September 1, 1963. Although this schedule was approved by the contracting officer it never was a meaningful operative document. It is at most an artifact of the appellant's intentions during the summer of 1963. On the basis of appellant's own evidence it was obsolete when submitted.

⁶ Tr. 59-60.

⁷ Tr. 869.

⁸ Tr. 880.

⁹ Exhibit 30.

leged by appellant to have resulted from this notice. First, being issued late it forced appellant to work in the B segment far beyond the best time for work in the lowlands. The central idea put forward by appellant is that the notice to proceed should have been issued a month earlier, or have been withheld until the following April, in order to avoid the difficult working conditions encountered. Second, the notice, being restricted and releasing discontinuous stretches of right-of-way, disrupted and delayed operations. This second effect is the subject of Claim 3, and will be discussed more fully there.

Because SPA did in fact order appellant to commence work in October, we must grapple with the question of whether the notice could have, and should have, been issued a month earlier as pressed for by the appellant. The precise issue is the reasonableness of the Government's holding off on the issuance of the notice until October 1, 1963. And the facts determine the reasonableness of that action.

The notice to proceed listed 60 tracts which were available in the B segment (two of these tracts, Nos. 317 and 334, were withdrawn and released again on a later date). The evidence shows that only five of these tracts were not available on September 1. Only one of these, No. 317, was not available by September 15. Two of the five tracts, Nos. 293 and 317, had substantial timber, and would not have been available until September 14 and 18, respectively, if a notice had been issued September 1. However, any disruptive effect these tracts would have had would have been minimal, since it is not likely that clearing would have commenced before September 15. We are thus led to conclude by a preponderance of the evidence as to right-of-way availability in the B segment that SPA was in only a slightly better position on October 1 than it was on September 1.

In view of the appellant's urgings for a notice to proceed on or about September 1, and in view of the known situation regarding rice cultivation, lack of evaporation in the winter, and flooding conditions in the lowlands, it is difficult to conceive a justification for the month's delay to achieve only a slightly better right-of-way posture. If problems in the right-of-way acquisition program had become such an overriding consideration for SPA that it was the only reason for delay in issuance of the notice to proceed, it had available to it as a remedy appellant's request to delay the work to April 1964, which would have given SPA ample time to secure all the needed right-of-way. This is not to indicate that the contracting officer's concern over lack of right-of-way was unfounded. However, since SPA was not willing to set the entire construction schedule back by one-half year, the time came in the fall of 1963 when he had to make the best of a bad situation.

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The evidence further shows that September 1 was not just a will-o'-the-wisp being pursued by appellant. Bearing in mind the construction difficulties faced by a contractor in the lowlands during late fall and the winter, it had proceeded diligently to order materials to fit a work schedule developed on a September 1 notice, and had potential subcontractors lined up who appeared to be ready, willing and able to proceed at that time.

On the record of this case, we believe that SPA unreasonably delayed in issuing a notice to proceed.¹⁰ In our opinion, such a delay creates a compensable suspension of work under paragraph SC-12, *Price Adjustment for Suspension, Delay, or Interruption of the Work*.¹¹ The contract provision expressly makes compensable delay in any or all of the work caused by a failure of the contracting officer to act in the time specified in the contract, or within a reasonable time if no time is specified. Although no time was specified in the contract for the issuance of the notice to proceed, we conclude that in the circumstances of this case any delay beyond September 1, 1963, was unreasonable.

The evidence indicates that appellant incurred extra costs in handling and storing of materials because of the delay. It also would appear to be beyond dispute on this record that the delayed notice to proceed pushed the work in the lowlands segment into the winter months of January, February and March, when field conditions in the lowlands were not as suitable as in the fall. SPA was aware of the appellant's strongly expressed feelings that the lowlands segment work had to be commenced early in the fall in order to avoid the inefficient and difficult conditions which ensued. In these circumstances appellant would also be entitled to a time extension.¹²

Claim 2—Delay in Approving Subcontractors

It was the initial intention of appellant to subcontract all construction phases of the work. Appellant would, however, provide some supervision and purchase all materials.¹³ By letter dated July 22, 1963,¹⁴ appellant gave SPA the names of its proposed subcontractor, House and House Construction Company, a small business, which would perform clearing operations, and Richards and Associates, a large business, which would do the remainder of the work. However,

¹⁰ *Ross Engineering Co. Inc. v. United States*, 92 Ct. Cl. 253 (1940); *Ralph Child Construction Co.*, IBCA-422-1-64 (November 17, 1965), 72 I.D. 475, 65-2 BCA par. 5222.

¹¹ *Lea County Construction Co.*, ASBCA No. 10093 (March 28, 1967), 67-1 BCA par. 6243.

¹² *Ralph Child Construction Co.*, *supra* note 10.

¹³ Tr. 40.

¹⁴ Exhibit 8.

certain information required by paragraph GC-4 of the contract as to appellant's efforts to secure small business subcontractors was not given to SPA until August 19, 1963.¹⁵

House and House executed a subcontract with appellant on August 19, 1963,¹⁶ subject to SPA's approval of House and House as a subcontractor. House and House was approved by SPA on August 30, 1963.¹⁷ Appellant in its turn executed the subcontract some time after September 4, 1963, but prior to October 14, 1963.¹⁸ As to House and House, we can find no delay in approval of any consequence. By August 30, appellant had approval and a firm commitment by House and House. Even if a notice to proceed had been issued on September 1, 1963, House and House was aboard.

Richards and Associates was not approved until September 10, 1963.¹⁹ The delay seems to have been due to the fact that Richards and Associates was not a small business, and approval would have to wait the decision of the SPA Administrator, or his deputy, neither of whom were available at the end of August.²⁰

Richards and Associates did not enter into a subcontract with appellant. However, the failure to do so does not appear to be related to the time it took SPA to approve them as subcontractors. The evidence establishes that the subcontract was not executed because Richards and Associates thought it would be impossible to build the project at the prices they had quoted and in the time allowed (the contract was initially to have been completed by July 10, 1964), due to the partial releases of right-of-way.²¹ It was also believed by Richards and Associates that the lowlands would be impassable (from the standpoint of making substantial progress with construction operations) after December 15, 1963.²² Richards and Associates also knew as of August 30, 1963, that right-of-way had become a serious problem.²³

A Richards and Associates Vice President, Mr. Rose, was present at the meeting of August 30, 1963, when SPA's intention of not issuing a notice to proceed until November was discussed. Yet, Mr. Rose informed appellant on September 9, 1963, that Richards and Associates would perform for the price initially quoted by it to appellant provided they were notified by October 1 that they could proceed by

¹⁵ Exhibit 9.

¹⁶ Exhibit 20.

¹⁷ Tr. 163-164.

¹⁸ Tr. 63, 65.

¹⁹ Exhibit 29.

²⁰ Memorandum of Meeting of August 30, 1963, Appeal File Folder No. 10.

²¹ Tr. 141.

²² Tr. 142.

²³ Tr. 145.

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October 15, and proceed without delays.²⁴ In view of SPA's expressed attitude on August 30, this was already an obviously impossible condition; therefore, Richards and Associates took little risk in giving this assurance. Appellant in turn, by letter of September 16, 1963, attempted to secure a firm contract with Richards and Associates on the basis of commencing work in April 1964.²⁵ Subsequently, after reviewing the notice to proceed of October 1, 1963, Richards and Associates offered to work with one crew until soil conditions prevented normal operations, then shut down and return in September 1964, all of this for a 75 percent increase in the price quoted for segment B.²⁶ On October 16, 1963,²⁷ appellant turned down this counter proposal. On October 18, Richards and Associates advised that it would not proceed with the subcontract.²⁸

There is no evidence that SPA was privy to the arrangements between appellant and its proposed subcontractors. With respect to subcontractor approval, we cannot say on the basis of this record that SPA's modest delay, if any, in approving Richards and Associates was instrumental, or even of significance, in the decision of Richards and Associates to forego the job. In addition, such hesitation as there was in approving Richards and Associates was concurrent with the delay in issuing the notice to proceed.

After Richards and Associates refused to undertake the subcontract, appellant secured another subcontractor, Knox Construction Company, a small business, to perform all the work subsequent to clearing, except hauling of materials and setting guy-wire anchors which would be performed by appellant. SPA was notified of the selection on November 11, 1963.²⁹ Approval was granted November 15, 1963.³⁰ The subcontract was executed November 21, 1963, six days after approval.

In the sequence of operations: clearing, hauling materials, framing and setting, and stringing, it seems that an ideal time interval between operations is about two weeks.³¹ Clearing operations commenced October 14, 1963.³² Ideally, hauling should then have commenced about November 1, 1963, but it did not begin until November 12, 1963. Framing

²⁴ Exhibit 28.

²⁵ Exhibit 42.

²⁶ Exhibit 32.

²⁷ Exhibit 38.

²⁸ Exhibit 34.

²⁹ Exhibit 37.

³⁰ Exhibit 40.

³¹ Exhibit 6.

³² Tr. 203.

and setting should have commenced about November 15, 1963. Knox commenced his first operation, pole framing, on December 6, 1963.³³

In our opinion the initial delays in construction operations (except clearing) which were due to subcontractor problems, are the direct consequence of the late and partial notice to proceed. Appellant lost Richards and Associates because of the Government's delay. With a notice to proceed issued in September, and a proper right-of-way situation, Richards and Associates would have been on the job. The loss of the subcontractor was foreseeable consequence of the unreasonable delay and partial notice, and for the delay SPA must be held responsible under the Suspension of Work provision in the contract.

We are in the dark, however, as to whether or not there was a cost consequence not duplicative of the allowed with respect to Claim 9, which also stems from the late and partial notice to proceed. We cannot see that Richards and Associates would be entitled to any compensation since it was not under contract. Nor would Knox be entitled to compensation for any delay costs associated with this phase since he was not yet under contract. House and House were not affected by this delay. There is no indication that appellant itself had any equipment and labor on standby (hauling was proceeding). Appellant is not, however, precluded from proving any costs it may have incurred due to the delay in securing its subcontractor in excess of the costs it would have normally incurred during the period prior to securing Knox.

Claim 3—Failure To Provide Adequate Segments of Continuous Right-of-Way

The notice to proceed, issued by SPA on October 1, 1963, restricted construction to segment B, and in that segment released only 60 of 85 right-of-way tracts. The tracts not released were scattered among the released tracts in such a manner as to preclude a continuous clearing operation. It is asserted by appellant that the disruption of work caused by the release of discontinuous right-of-way constituted a constructive change in the contract.

Liability is not really an issue here. The contracting officer has recognized, in awarding extra compensation in his decision for some instances of disruption of clearing operations, that serious disruption, if proved is compensable.³⁴ The appeal questions, therefore, the scope of the contracting officer's allowance, claiming that there were more instances of disruption than have been recognized. It also questions

³³ Tr. 493.

³⁴ Power City Construction & Equipment, Inc., IBCA-490-4-65 (July 17, 1968), 75 I.D. 185, 68-2 BCA par. 7126.

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the amount of compensation allowed for recognized instances of disruption.

Our examination of the record leads us to conclude that on several occasions the contractor's progress was blocked by unavailable right-of-way. We view as compensable disruptions, however, only those instances where the unavailable tract caused the clearing subcontractor to leave the right-of-way and take his clearing equipment and crews to another stretch of right-of-way. It is not considered that an instance of compensable disruption occurred each and every time the clearing operation was impeded by an unavailable tract. The record is not that conclusive. The clearing subcontractor testified almost exclusively from exhibits,³⁵ apparently with little reliance on recollection of actual happenings on the job. In some cases upon being blocked in one direction, the clearing subcontractor simply turned around and proceeded in the other direction along the right-of-way. Such cases did not entail skips in the work caused by discontinuous right-of-way on which the claim is based, hence, they are not considered to be compensable disruptions.

The Board finds the following to be compensable disruptions, in addition to those already so found by the contracting officer:

1. On October 18, 1963, House reached tract 307, coming from the east. Tract 307 was not available, being released on October 29. House backtracked to tract 313, and moved to tract 299, about 6-7 miles by road.³⁶

2. On October 23, 1963, tract 290 blocked clearing. House backtracked to tract 299, left the right-of-way and moved to tract 287. There is a dispute as to whether tract 290 was available. It is among those tracts listed in the notice to proceed of October 1, 1963.³⁷ It is also shown as being released to House as of October 29, 1963, in SPA's daily progress report of October 28, 1963.³⁸ Mr. Johnson, SPA's real estate acquisition manager, testified that it was released October 1, 1963, as shown on the notice to proceed. Johnson, however, dealt with real estate acquisition and had no personal knowledge as to when SPA construction people assigned to a separate operation, released tracts to House. We believe Exhibit 41D to be the best evidence as to the release date to House for tract 290.

³⁵ Tr. 299.

³⁶ Tr. 225.

³⁷ Exhibit 30.

³⁸ Exhibit 41D.

3. Tract 286 was released on November 12, 1963. On or about October 25, it blocked clearing operations from tract 287 and the crew moved to tract 330.

4. Tract 286 also blocked clearing coming from the west from tract 284, on or about October 31, 1963. The crew skipped over to tract 331, which had been released on October 29, 1963.

5. A long move was required from tract 315, at the Jonesboro end, to tract 74 in the uplands, when lowland clearing was substantially complete, because segment A tracts just west of the Black River were not then available.

6. On January 11, 1964, House was blocked by tract 11, moving westward. Part of tract 11 was actually cleared by mistake.³⁹ The crew had to move around tracts 18 and 19 which were also not available to work on tract 21. Tract 11 was released on March 13, 1964.

7. Tract 29 was released on March 13, 1964. In mid-January House cleared from tract 21 to tract 28, and then moved to tract 46 because of the unavailability of tract 29.

8. On January 21, 1964, House moved onto tract 120 and cleared through tract 122 by January 24, 1964. Being blocked by tract 123, which was not released until January 30, 1964, he had to skip around to tract 126.

9. On or about February 6, 1964, House was blocked by tract 89, coming from the east. Tract 89, which became available on March 13, 1964, was skipped, the crew moving around to tracts 86, 87 and 88.

Two periods of delay with respect to clearing seem to be claimed. It is asserted that the cutting operation was shut down from November 1 to November 11, 1963. This shutdown is said to have been incurred by the necessity to wait for the remainder of the right-of-way in the lowlands promised for November 15.⁴⁰ Upon cross-examination and again on redirect examination of Mr. House, however, it was established that cutting took place on November 1, 4 and 5, and other clearing operations on November 6, 7, 8, 9 and 10.⁴¹ On the basis of its review of tract releases, the testimony relating to this period, and the project diaries, the Board finds that the cutting operation was shut down for approximately six days due to unavailability of right-of-way. Since the facts show that House still worked some in the period of shutdown, compensation for partial suspension of work during this period should be limited to cutting operations standby, plus the cost

³⁹ Tr. 255-256.

⁴⁰ Tr. 283.

⁴¹ Tr. 314-319, 344.

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effect upon the remainder of the job to the extent established by appellant.

It is also asserted that House shut down from December 1 to December 5, 1963, while waiting for tracts west of the Black River to be made available.⁴² House eventually moved 75 miles into the uplands' tract 74 instead of waiting for the tracts just west of the Black River to become available.⁴³ He contends that before making this long move he awaited release of right-of-way immediately west of the Black River for five days, in order to make the shortest and least expensive move. We would not question the reasonableness of waiting several days for the next tract in sequence at this particular time to avoid moving to the far end of the project. Also, additional time would be required for accomplishing the move. We conclude, therefore, that the cutting operation was delayed by three days because of unreleased right-of-way in the Black River area.

The constructive change due to disruption of work because of discontinuous right-of-way is limited to the clearing operation. On November 6, 1963, or after the clearing commenced, SPA began to stake the locations for erection of poles. The staking commenced at the Jonesboro end. Hauling of poles and materials by appellant commenced at Jonesboro on or about November 12, 1963, and proceeded westward following the staking crew. The testimony of appellant's supervisor, Mr. Rosson, leaves little doubt but that appellant hauled materials in a continuous sequence.⁴⁴ Framing, setting and conductor stringing followed in that sequence as originally intended.

The evidence in this record is insufficient to support a finding that unavailable land tracts disrupted the performance of any aspect of the job other than clearing because of tract skipping, or caused additional work operations.⁴⁵ The job was delayed into later months, but the sequence of operations was not disrupted. Substantial extra expense undoubtedly resulted from delay of those later operations into a period

⁴² Tr. 285.

⁴³ Tr. 247-250.

⁴⁴ Tr. 454-455.

⁴⁵ There is much testimony in the record regarding the effort of SPA to acquire the real estate necessary for the transmission line. This testimony is material, however, only to the reasonableness of the SPA land acquisition effort, an issue which we believe to have no further relevance to the appeal since we have already found SPA to have delayed unreasonably in issuing the notice to proceed. SPA acquisition activity and effort on any particular tract has not been related by testimony to any delay or disruption of hauling or subsequent operations.

In actual performance of the contract the right-of-way was available when needed for each operation subsequent to clearing. There is no evidence to the contrary. Right-of-way was not always available for clearing as has been recognized in finding liability for a constructive change and suspension with respect to the clearing operation.

of bad field conditions. The cost consequences of this delay are discussed under Claim 9.

The equitable adjustment for clearing disruption poses some problems. House testified that SPA's figures were adequate on price per hour for equipment and number of men, but that no allowance was made for insurance, Social Security or Workman's Compensation, and for fuel and lubricants.⁴⁶ However, his own records were destroyed in a fire in his accountant's office.⁴⁷ Accordingly, we think that the adjustment should be calculated by the contracting officer on the same basis he used in calculating the costs of the six skips allowed by him, but with the addition of a reasonable amount for overhead and profit. To the extent it is possible at this date to verify such costs he should also augment labor costs by payroll burden. If the contracting officer's equipment cost figures do not include an allowance for fuel and oil, such costs to the extent verifiable or agreed upon should be added.⁴⁸

The appellant contends that an additional ten weeks were spent on the clearing phase of the job because of disruption to the clearing activity (which should ideally proceed on a "production-line" basis), and the cutting operation shutdowns. He contends that there was also loss of efficiency and extra expense associated with performing clearing work in the worst part of the year.

A determination that the Government was responsible for an additional ten weeks of clearing work on the project is unwarranted. The Board is convinced, however, that the appellant was necessarily occupied with clearing activities for an additional period of 15 working days in connection with delays caused by skips based upon unavailable right-of-way tracts. These 15 days of delay are in addition to the days of partial shutdown already commented on. Delay costs associated with these accumulated delays (as a separate item from the actual costs of the skips as a constructive change) are compensable as a constructive suspension of work.

Claim 4—Delay in Staking Structures and Furnishing Structure Schedule

This claim falls into two parts, one concerned with delay in furnishing structure schedules, the other concerned with delay due to SPA's staking procedures. The first part, delay in furnishing struc-

⁴⁶ Tr. 208-209.

⁴⁷ Tr. 299.

⁴⁸ See *Ray D. Bolander Company*, IBCA-331 (March 30, 1970), 77 I.D. 31, 70-1 BCA par. 8200.

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ture schedules, is totally without merit, and does not appear to be seriously pressed by appellant. There is no question that appellant received structure schedules either on July 30, 1963,⁴⁹ or August 6, 1963.⁵⁰ Even though these schedules did not show that they had been "formally approved," they were relied upon by appellant in placing orders for materials in the summer of 1963. There is no assertion or proof that the materials ordered and received were wrong in kind or quantity because of errors in the structure schedules, or that there was any delay in ordering materials because of defects in the schedules. Further, there is no evidence that the hauling of materials to the individual structure sites was disrupted or delayed by the schedules which generally instructed appellant as to what materials were required for each structure. Accordingly, this aspect of the claim is denied.

Appellant's supervisor, Mr. Rosson, testified that staking, i.e., the marking by stakes by SPA surveyors of the precise location of each pole, should commence within two or three weeks of clearing,⁵¹ and that staking should be two weeks ahead of hauling.⁵² Clearing commenced October 14, 1963, staking by SPA on or about November 6, 1963, and hauling by appellant on or about November 12, 1963, or approximately within the time frame established by Mr. Rosson. Both staking and hauling commenced at the Jonesboro end of the line and proceeded westward.

By December 1, 1963, the hauling crew had caught up to the Government staking crew and SPA put on a second staking crew.⁵³ The hauling operation crowded the staking crews again about December 20, 1963.⁵⁴ The evidence shows that SPA staked structure 410, on the east bank of the Black River on January 6, 1964.⁵⁵ SPA's staking crews by this time were substantially ahead of appellant's hauling since on January 23, 1964, appellant was only hauling up to structure 449, 39 structures to the east of the Black River.⁵⁶

⁴⁹ Tr. 178.

⁵⁰ Contracting Officer's decision of May 1, 1967, Appeal File Folder No. 12.

⁵¹ Tr. 360.

⁵² Tr. 362.

⁵³ Tr. 362. Apparently there was slow progress in hauling in November, which appellant attempts to attribute to slow staking. However, the testimony is that appellant "caught up" about December 1. Prior to that date appellant was "catching up" which to us indicates that in November appellant was moving faster than the staking crew, rather than being held up by it.

⁵⁴ Tr. 363.

⁵⁵ Tr. 367.

⁵⁶ See Exhibits 47A-H.

SPA commenced staking on the west side of the Black River about February 1, 1964. The testimony indicates that hauling was close to staking through February 20, 1964; however, about 100 structures were hauled in this period.⁵⁷ Exhibits 47N and 47O, two photographs, were offered as evidence that hauling had caught up with staking on February 8, 1964, at structure 366 west of the Black River. But an SPA witness, Mr. Hildebrandt, a member of the staking crew, pointed out that in Exhibit 47O structure stakes can be seen, but no off-loaded poles.⁵⁸ This witness did recall, however, that hauling did catch up to the staking crews "three or four" times.⁵⁹ We think the evidence supports, at the most, two or three days excusable delay in early December 1963, and one or two days excusable delay in February because of staking.

Under paragraph SC-12 of the contract, no costs associated with an unreasonable delay are allowable that were incurred more than 20 days before the contracting officer was notified in writing of the act or failure to act involved. Apart from the question of reasonableness of the delay, there is no evidence that the contracting officer was notified in writing by appellant of delays in hauling or any other operation, caused by SPA's progress in staking structures. The first written mention of this claim appears in appellant's Statement of Claim of November 15, 1965.⁶⁰ We, therefore, deny any increased costs associated with the four or five days of excusable delay due to SPA progress in staking structures.⁶¹ Suspension of Work compensation does not automatically follow excusable delay.⁶²

Claim 6—Failure to Furnish Sag Tables, Clipping Offset Charts, and Government Direction of Conductor Sagging

This claim covers three separate aspects of the conductor stringing operation presented as a constructive change. As to the first aspect, failure to furnish sag tables, the contract stated in paragraph C-11 that the conductor would be sagged in accordance with "sag tables"

⁵⁷ Tr. 370.

⁵⁸ Tr. 704.

⁵⁹ Tr. 705.

⁶⁰ Appeal File Folder No. 11.

⁶¹ *C. W. Regan, Inc., and Nager Electric Co., ASBCA Nos. 12064, 12146 and 12195* (October 9, 1968), 68-2 BCA par. 7313; *Hoel-Steffen Construction Co., IBCA-656-7-67* (March 18, 1968), 76 I.D. 41, 68-1 BCA par. 6922.

⁶² See e.g., *Carl M. Halvorsen, Inc., Eng. BCA No. 2784* (October 30, 1968), 68-2 BCA par. 7344.

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to be supplied by SPA. On February 24, 1964, appellant was furnished with "sag curves" by SPA.⁶³ These curves were asserted to be difficult for appellant's field people to use, and additional sagging information was requested on March 3, 1964.⁶⁴ On March 13, 1964, SPA supplied additional sagging charts and curves. Appellant noted inconsistencies between the February 24, 1964, curves and the March 13 data and was instructed by SPA to use the later data.⁶⁵ More tables were supplied by SPA on May 27, 1964, which did not agree with the earlier tables. However, the discrepancies were minor.⁶⁶

Appellant's subcontractor, Knox, commenced stringing conductor on February 24, 1964, at structure 423, near the Black River and proceeded easterly toward Jonesboro.⁶⁷ Between February 28, 1964 and March 7, 1964, stringing had been completed between structures 423 and 457, and sagged through structure 443.⁶⁸ Bad weather forced termination of stringing operations in segment B at this time.⁶⁹ Almost all of the conductor was subsequently strung and sagged from April to September 1964.⁷⁰ For example, the Government Diary for April 13, 1964, notes that conductor was sagged through structure 473. The diary entry for April 1, 1964, notes that conductor had been sagged through structure 465. By May 28, 1964, according to the Government Diary, conductor appears to have been strung from Black River toward Jonesboro to structure 633, but sagged only through structure 621.

Despite the inconsistencies between the curves and charts supplied on different dates it appears that conductor sagging proceeded in normal course in the stringing operation. Although there were differences of opinion as to the degree of sag required,⁷¹ there is no testimony or other evidence that the wire-stringing operation was delayed, or disrupted by the sagging data. Nor is there any evidence that appellant or its subcontractor, Knox, had to resag because of deficient sagging data. The evidence is only that SPA furnished curves which were hard to read for appellant's field people, and tables which showed minor discrepancies. The conductor appears to have been successfully and expeditiously sagged using the sagging data available at the time.

⁶³ Tr. 412.

⁶⁴ Tr. 413.

⁶⁵ Tr. 418-419.

⁶⁶ Tr. 420-422.

⁶⁷ Government Diary, February 24, 1964, Appeal File Folder No. 14.

⁶⁸ Government Diary, March 7, 1964, Appeal File Folder No. 14.

⁶⁹ Tr. 403.

⁷⁰ Tr. 826.

⁷¹ Tr. 421-422.

There is not enough evidence, in our opinion, to support a constructive change claim based upon the discrepancies in sagging data.

The second aspect of the claim, based upon SPA's failure to supply clipping offset charts, is also for a constructive change. It appears to be appellant's contention that in the hilly uplands of segment A the line should have had more dead-end structures, or SPA should have provided clipping offset data. The latter data were necessary, according to appellant, in order to sag the conductor and have the insulator string hang plumb with the pole (or vertical to the horizontal plane). SPA did not supply clipping offset charts or data,⁷² and apparently the conductor was sagged in segment A without their aid.

Contract paragraph C-11 states that conductor tension between successive sagging operations should be equalized so that the suspension insulator assemblies will assume the "proper position" when the conductor is clipped in. It does not state that insulators shall hang plumb in all instances. Government testimony indicates, without contradiction, that non-plumb insulator assemblies were accepted on final inspection, and that it was standard procedure to allow the insulators to hang out of plumb in the hilly areas.⁷³ Appellant's witness, Mr. Rosson, on cross-examination admitted that the insulators were not always left plumb with the structures.⁷⁴ In fact, the normal position for the insulator would be 90 degrees to the conductor, rather than plumb with the structure.⁷⁵

Further, we do not find on this record, either in testimony or documents, facts which support appellant's contention that SPA's insistence that insulators hang plumb (such "insistence" we find reflected only in the testimony of Mr. Rosson, appellant's supervisor, on rebuttal examination) resulted in "consequent loss in the productive rate of the stringing and sagging operation."⁷⁶ Even if we assume the "insistence," there is a failure of proof of conformity to that insistence with consequent loss in productive rate.

The third aspect of Claim 6 relates to Government direction of conductor sagging. There is no proof to support this aspect of the claim. Indeed, on questioning by the hearing official, Mr. Rosson, ap-

⁷² Tr. 425.

⁷³ Tr. 810-811.

⁷⁴ Tr. 453.

⁷⁵ Tr. 810.

⁷⁶ Appellant's Post-Hearing Brief, p. 84.

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pellant's supervisor, testified that the SPA had an inspector who had to be satisfied, but that the SPA representative just checked.⁷⁷ All the work of sagging was done by appellant. Paragraph C-11 of the contract provides for the contracting officer to check the sag, and the contractor to supply necessary men for climbing and signaling. Accordingly, Claim 6 is denied in its entirety.

Claim 9—Delays Caused by Weather and Mud and Water Conditions on the Right-Of-Way

In January, February and March of 1964, some aspects of clearing, hauling and stringing were slowed by either adverse field conditions, or adverse weather, or both. It appears clear from the record that field conditions were bad commencing in January. Even normal rainfall could create excessive mud in the lowlands.⁷⁸ After mid-January, the efficiency of labor and equipment involved in the clearing operation was materially affected. The hauling operation seems to have been primarily affected by muddy field conditions in late January.⁷⁹ However, the rate of framing and setting of poles, by Knox, does not appear to have been equally affected by the field conditions. Knox commenced framing on December 6, 1963. By February 7, 1964, the third from last lowland structure, No. 394, was framed, and by February 11, 1964, setting had been completed through structure No. 396.⁸⁰

Thus, within two months Knox had made better progress on framing and setting in the lowlands than had been intended by appellant on its progress schedule of July 30, 1963.⁸¹ The schedule shows completion of framing and setting from Jonesboro to the Black River (Structures 663 to 410), in two months' time commencing about the middle of October and ending about the middle of December 1963.

There was only a minimum amount of stringing during this period commencing on or about February 24, 1964, at Structure 423 and proceeding eastward toward Jonesboro. By March 7, 1964, sagging had been completed through Structure 443. Stringing then generally ceased due to excessive rain, not to commence again until about April 1, 1964.⁸² The commencement of stringing had been delayed two or three

⁷⁷ Tr. 425.

⁷⁸ Tr. 391.

⁷⁹ Tr. 374-380, Exhibits 47A-H.

⁸⁰ Government Diary entries, Appeal File Folder No. 14.

⁸¹ Exhibit 6.

⁸² See Government Diary, Appeal File Folder No. 14.

weeks by the subcontractor while he was waiting for delivery of tension stringing equipment which he deemed necessary because of the extremely muddy condition prevailing in the lowlands.⁸³ The record as a whole appears to support appellant's contention that securing and using tension stringing equipment was an exercise of good judgment based up on the prevailing field conditions.

There appears to have been little or no work on March 4, 5, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 21 and 24, due to excessive rain and mud. The contracting officer, in his decision, observes that during March 1964, the contractor encountered abnormal rain and mud, and that SPA records note 15 days in March when work was shut down. The March rainfall was almost double the normal for that period. Exhibits 48A-I confirm flooding in March. The contracting officer also notes five days lost in April due to rain of unusual intensity. Exhibits 49A-B, confirm flooding in April.

We have no doubt that appellant is entitled to 19 or 20 days time extension due to unusually severe weather and floods under paragraph 5 of the Standard Form 23A (April 1961 Edition), Termination for Default—Damages for Delay—Time Extensions. However, we do not think appellant is entitled to compensation for these lost days on the theory that the project work was halted because of unusually severe weather. Paragraph 5 does not provide for it, and paragraph GC-1⁸⁴ of the contract places on the contractor the risk of loss from causes not the responsibility of the Government. This is not to say that proper consideration cannot be given to instances when changes or suspensions of work forced project operations into periods when weather and ground conditions brought about a material reduction in the efficiency

⁸³ Tr. 474, 475, 499.

⁸⁴ "GC-1. CONTRACTOR'S OBLIGATIONS.—The Contractor shall complete all the work required by this contract within the time herein specified, in accordance with the provisions of this contract and said specifications, and in accordance with the directions of the Contracting Officer as given from time to time during the progress of the work. He shall furnish, erect, maintain, and remove the construction plant and such temporary works as may be required. He alone shall be responsible for the safety, efficiency, and adequacy of his plant, appliances, and methods, and for any damage which may result from their failure or their improper construction, maintenance, or operation. The performance of this contract and the work hereunder is at the risk of the Contractor until the final acceptance thereof. He shall take all responsibility for the work and shall bear all losses resulting to him on account of the amount or character of the work, or because the nature of the land in or on which the work is done is different from what is assumed or expected, or on account of the weather, floods, fire, and windstorms, or other action of the elements, or any cause or causes whatsoever for which the Government is not responsible. If the work of any part or parts thereof is destroyed or damaged from any of the aforesaid causes, the Contractor, at his own cost or expense, shall restore the same or remedy the damage."

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of equipment and labor actually working during the difficult periods, and not on standby because of unusually severe weather.

We are, accordingly, of the opinion that appellant is entitled to compensation based upon loss of efficiency and extra equipment costs for the clearing and hauling operation under the findings of this opinion. The liability here is predicated upon the late notice to proceed and discontinue right-of-way which pushed the lowland clearing and hauling into the winter period with its muddy field conditions in the lowland. We believe the increased costs due to the adverse field conditions prevalent in those months are proximately related, as far as compensation is concerned, to the constructive changes and constructive suspensions of work previously described.⁸⁵

Claim 15—Acceleration

On March 17, 1964, appellant forwarded to the contracting officer a telegraphic message it had received from its subcontractor. The message stated with respect to segment B of the line that because of soil conditions it looked impractical to continue and, regardless of equipment added or money spent, it was very doubtful that any progress could be made, and requested appellant's advice.⁸⁶

On March 18, 1964, the Administrator of SPA sent by airmail a Certified—Return Receipt Requested letter to appellant in which he acknowledged receipt of the telegram and expressed his concern over the apparent lack of progress on the job. The final paragraph of the letter reads:

In view of the foregoing, you are directed to take immediate steps to accelerate your construction activities in keeping with your obligation to complete the Greers-Ferry-Jonesboro transmission line in the time specified in your contract. Will you kindly be prepared when you meet with us in my office on March 24th to outline your plans in this regard.

Sincerely yours,

/s/ DOUGLAS G. WRIGHT,
Administrator.

The appeal file contains letters clearly indicating that prior to dispatch of the Administrator's letter of March 18, 1964, the appellant had requested time extensions on several occasions. In a letter dated

⁸⁵ B. J. Lucarelli & Co., Inc., ASBCA No. 8422 (November 19, 1964), 65-1 BCA par. 4523.

⁸⁶ Appeal File Folder No. 10.

October 8, 1963, appellant requested additional time because of the late and restricted notice to proceed. On January 23, 1964, appellant notified the contracting officer that a delay in completion would be encountered because of adverse weather, and referred to a revised construction schedule submitted to the contracting officer on December 11, 1963, which apparently projected the completion of the work five months beyond the contract date of July 10, 1964. On January 27, 1964, appellant's attorney referred to claims for compensation or extensions of time.

The contracting officer testified that he was not asked for his advice or counsel as to the acceleration letter of March 18, 1964.⁸⁷ He also acknowledged that requests for time extensions were pending before him as of March 18, 1964,⁸⁸ and that there was no question in his mind that appellant was entitled to some extensions of time.⁸⁹ The Administrator's letter dated March 18, 1964, in effect, denied all pending valid requests for time extensions and ordered the work to be completed by July 10, 1964. There can be no doubt that under these circumstances the acceleration ordered by the Administrator constituted a change compensable under the Changes article of the contract.⁹⁰

The questions of what operations were accelerated, and to what degree, are questions of quantum and not now before the Board. However, certain observations can be made on the basis of the present record. There was a period from about February 12, 1964 to April 13, 1964, when no pole setting was accomplished. According to appellant this was not because Knox's drilling rig had broken down, but because of mud and water.⁹¹ We observe that all setting east of the Black River in the lowlands had been finished when the rig broke down and that after February 12, 1964, setting would occur in the uplands.⁹² It is difficult for us on this record to conceive that setting would have been more difficult in the uplands in later February, parts of March and early April, then it was in January and early February in the extremely muddy lowlands. For example, apart from the March period of ex-

⁸⁷ Tr. 913.

⁸⁸ Tr. 914.

⁸⁹ Tr. 915.

⁹⁰ *Montgomery-Macri and Western Line Construction Co., Inc.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D., 242, 1963 BCA par. 3819; *Electronic & Missile Facilities, Inc.*, ASBCA No. 9081 (July 23, 1964), 1964 BCA par. 4338.

⁹¹ Tr. 465.

⁹² Tr. 470.

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cessive rainfall, we have no indication on the record that hauling was impeded during this period by mud and water in the uplands as it was in the lowlands. Noticeable acceleration in setting could simply be appellant's subcontractor making up for his own delay.

It is clear that appellant made an accelerated effort to complete conductor stringing in the lowland area B before May 17, 1964, when the rice farmers were planning to flood their fields.⁹³ Any other effort at acceleration would appear to relate to work on segment A, or in the uplands, since practically all lowlands poles were set by February 11, 1964.⁹⁴ The extent of the effort in both segments will have to be assessed by reference to payrolls and other records for the period in question. Finally, since acceleration is a change, an allowance for profit is proper.

Conclusions

The appeal is granted as to Claims 1, 3, 9 and 15. Claim 6 is denied. Claims 2 and 4 are denied in part and granted in part.

ROBERT L. FONNER, *Member.*

WE CONCUR:

WILLIAM F. McGRAW, *Chairman.*

DEAN F. RATZMAN, *Alternate Member.*

SARKEYS, INC.

IBLA 70-660 *Decided November 27, 1970*

Oil and Gas Leases: Cancellation—Oil and Gas Leases: Rentals—Oil and Gas Leases: Terminations

Where an oil and gas lease is considered to have been terminated pursuant to 30 U.S.C. sec. 188(b) and the rental payment to preclude such termination had been timely submitted to the land office but inadvertently applied to another lease account, and then refunded to the payor when the lease to which payment had been attributed was relinquished, who accepted the refund without question, it is correct to hold that the lessee's rights in the terminated lease have been extinguished, and that a new oil and gas lease, duly issued for such lands and thereafter assigned to a bona fide purchaser, is valid.

⁹³ Tr. 559-560.

⁹⁴ Government Diary entry for February 11, 1964, Appeal File Folder No. 14.

BOARD OF LAND APPEALS

Sarkeys, Inc., has appealed to the Director, Bureau of Land Management,¹ from a decision dated March 13, 1970, in which the Bureau's State Director for New Mexico canceled noncompetitive oil and gas lease NM 3298 (Okla), and vacated the New Mexico land office decision of March 4, 1970, which had purported to cancel oil and gas lease NM 8262 (Okla), and to reinstate lease NM 3298 (Okla).

Sarkeys contends that the decision of March 4 was correct and that the State Director's decision of March 13 is in error, as Sarkeys had tendered rental payments each year for the land included in lease NM 3298 (Okla), but the land office had incorrectly applied these rental payments to other lease accounts.

L. O. Ward, lessee of lease NM 8262 (Okla), following approval of an assignment of record title, has submitted a brief contending that he is entitled to protection as a bona fide purchaser of the lease, no matter who made the error which resulted in termination of the antecedent lease NM 3298 (Okla).

The facts surrounding this case are not in controversy, but as they are somewhat complicated, we set them forth in some detail. On September 1, 1968, Sarkeys held record title, after approval of assignments, to lease NM 520 (Okla), embracing SW $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$ section 1, T. 6 N., R. 26 W., I.M., Oklahoma, containing 80 acres, which had been issued effective October 1, 1966, and to lease NM 3298 (Okla), embracing W $\frac{1}{2}$ SE $\frac{1}{4}$ section 23, T. 23 N., R. 16 W., I.M., Oklahoma, containing 80 acres, which had been issued effective October 1, 1967. On September 20, 1968, Sarkeys tendered to the New Mexico land office its check No. 851 for \$40, indicating that it was in payment for rental from October 1, 1968, for the W $\frac{1}{2}$ SE $\frac{1}{4}$ section 23, T. 23 N., R. 16 W., I.M., but the check contained no reference to the serial number of the affected lease. The land office inadvertently applied this rental payment to the account for lease NM 520 (Okla), for the lease year commencing October 1, 1968. On September 27, 1968, Sarkeys filed a relinquishment of lease NM 520 (Okla), so the land office directed repayment of the prepaid rental of \$40 received September 20, 1968. Sarkeys accepted, without apparent question, the U.S. Treasury check for \$40, which indicated on its face that it was for "Repayment BLM NM 520 Okla O&G."

¹ The Secretary of the Interior in the exercise of his supervisory authority transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970. Circular 2273, 35 F.R. 10009, 10012.

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Meanwhile, as the lease account for NM 3298 (Okla) did not show payment of rental for the lease year commencing October 1, 1968, the land office considered this lease to have terminated by operation of law pursuant to 30 U.S.C. sec. 188(b) (1964), and so listed the land involved in the notice of lands available for the October 1968 simultaneous filing procedure. After drawing to determine priority, the drawing entry card lease offer of Mrs. Jill G. Thomas was accepted and lease NM 8262 (Okla) was issued effective December 1, 1968, for the said W $\frac{1}{2}$ SE $\frac{1}{4}$ section 23 T. 23 N., R. 16 W.

On September 22, 1969, Sarkeys tendered payment of \$40 by its check No. 1193, with indication that it was payment for rental on the W $\frac{1}{2}$ SE $\frac{1}{4}$ section 23, T. 23 N., R. 16 W., I.M. Further adding confusion, someone had noted on the Sarkeys check that the BLM lease identification was "NM 520." As there was no existing lease "NM 520," the land office applied the rental payment to the lease for the described land, namely, NM 8262 (Okla), and transmitted receipt for the payment to Mrs. Jill G. Thomas, the lessee of record, showing payment in advance for the lease commencing December 26, 1969. However, the land office decision of September 26, 1969, notified Mrs. Thomas that lease NM 8262 (Okla) had been determined to be within the known geologic structure, undefined, of a producing oil or gas field effective August 14, 1969, so the rental rate for the lease was increased to \$2 an acre commencing with the lease year beginning December 1, 1969.

Assignment of record title to lease NM 8262 (Okla) to L. O. Ward was approved effective December 1, 1969. Concurrent with the assignment to Ward, Mrs. Thomas notified the land office that the payment of \$40 by Sarkeys was erroneously applied to the account for NM 8262 (Okla), and submitted her own payment of \$160, to satisfy the increased rental charge caused by the KGS determination. At that time, the land office directed refund of the \$40 payment to Sarkeys, with the U.S. Treasury check being identified as "Repayment BLM NM 8262 O&G." Sarkeys also accepted this refund with no question.

In February 1970, the land office was made aware that both Sarkeys and Ward claimed title to the Federal oil and gas lease on the W $\frac{1}{2}$ SE $\frac{1}{4}$ section 23, T. 23 N., R. 16 W., I.M.

In its decision of March 4, 1970, the land office stated that as rental had been timely tendered for lease NM 3298 (Okla), although the payment was inadvertently credited to lease NM 520 (Okla), termination of lease NM 3298 (Okla) by operation of law was incorrect, so the decision purported to reinstate lease NM 3298 (Okla), and to cancel lease NM 8262 (Okla) as being improperly issued.

Before the aggrieved party responded, the State Director issued his decision of March 13, 1970, vacating the land office decision of March 4, and reinstating lease NM 8262 (Okla.). The State Director held that Sarkeys had not acted with due diligence in payment of the rental due on October 1, 1968, (the payment received in the land office on September 20, 1968), because Sarkeys gave only the land description with its check, and failed to identify the serial number of the lease involved. Although the land office erroneously applied this rental payment to lease NM 520 (Okla) instead of lease NM 3298 (Okla.), after Sarkeys had relinquished lease NM 520 (Okla.), it accepted repayment of \$40, without asking any questions. And again in 1969, after Sarkeys tendered its check for \$40 for the said W $\frac{1}{2}$ SE $\frac{1}{4}$ section 23, T. 23 N., R. 16 W., and repayment of \$40 subsequently was made under the identification of "NM 8262," Sarkeys accepted this repayment without question. So the State Director held that lease NM 3298 (Okla.) was correctly terminated by operation of law for failure to pay rental timely, and that lease NM 8262 (Okla.) was a valid lease, having been issued properly.

The State Director's decision cites *Shell Oil Company*, LC 062929-C (September 30, 1960), as precedential in overlooking the land office mistake in applying the first Sarkeys check to the wrong lease account. The decision cited is not applicable to this situation as it related to payment of a rental with which the wrong serial number was given, even though the payment referred correctly to the land for which the rental was intended. The *Shell* decision held that the land office correctly applied the rental money to the serial number given, and it was not obliged to verify that the described land was included in that lease. In this case, the check named no serial number for the lease but gave only the land description, which, if it had been checked by the land office, would have identified the rental payment as being for lease NM 3298 (Okla.), and not for lease NM 520 (Okla.). It should be noted that the billing notices sent by the land office to Sarkeys in advance of the remission of the rentals on the line beneath that indicating the amount to be paid, the following instruction is printed in large type, "RETURN THIS BILL WITH YOUR REMITTANCE OR SHOW SERIAL NUMBER ON REMITTANCE." The ensuing confusion might well have been avoided altogether had appellant not disregarded this instruction. Nevertheless, we cannot hold that the rental check having the correct land description of the area leased under release NM 3298 (Okla.) was improper, incomplete, or unacceptable for the purpose.

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indicated, or that the land office was without fault in applying the 1968 rental payment for lease NM 3298 (Okla) to lease NM 520 (Okla).

This does not mean that Sarkeys is now entitled to reinstatement of lease NM 3298 (Okla). The land was duly posted to a list of lands available for leasing under the simultaneous filing procedure. Pursuant to a lease offer which gained priority by drawing, a new oil and gas lease NM 8262 (Okla) was issued, and in point of time, issued after Sarkeys had accepted repayment of the \$40 tendered for payment of rental for the lease year commencing October 1, 1968, for lease NM 3298 (Okla), albeit the refund check indicated it was repayment for lease NM 520 (Okla). As Sarkeys had not made any payment in connection with lease NM 520 (Okla), it should have ascertained the reason for the repayment. It was incumbent upon Sarkeys to inquire of the purpose for which the repayment was made or suffer the consequences of the land office error which prompted the repayment. The cases cited by the State Director, *Duncan Miller*, A-27683 (November 10, 1958), and *Gwen Gaukel*, A-29017 (December 14, 1962), are not strictly in point as each related to a refund check correctly identified as to serial number of the case for which the repayment was being made. While it must be conceded that neither repayment to Sarkeys indicated the serial number of the lease that Sarkeys thought it was paying rental for, each having carried the number erroneously chosen by the land office, it must also be noted that Sarkeys did not question the propriety of either repayment, something it surely would have done in the exercise of due diligence.

When Sarkeys attempted to pay the rental it assumed was due on October 1, 1969, for the W $\frac{1}{2}$ SE $\frac{1}{4}$ section 23, T. 23 N., R. 16 W., it again gave the land description on the check rather than any serial number, although the identification "NM 520" apparently was added to the voucher after the check had been prepared. The addendum was typed on a different machine from that used in the preparation of the original check for the 1969 rental, but the type face bears a close resemblance to that exposed on the Sarkeys 1968 check. When the land office received the 1969 check from Sarkeys, and found that the lease account under "NM 520" had been closed when the lease NM 520 (Okla) was relinquished in September 1968, the land description on the voucher was checked against the land status records in the land office. It was ascertained that lease NM 8262 (Okla) was the existing lease, so the payment of \$40 was applied to that lease account, with receipt for the payment going to the lessee of record, Mrs. Jill G. Thomas.

Sarkeys did not inquire as to disposition of its payment when it did not receive a receipt, nor did it inquire after the subsequent repayment of the \$40, following payment of the correct amount of rental due for lease NM 8262 (Okla) by the lessee of record.

This case is easily distinguished from *H. E. Stuckenhoff, Clyde A. Breen*, 67 I.D. 285 (1960). In that case rental checks were erroneously returned by the land office to Messrs. Stuckenhoff and Breen, whereupon Breen wrote a letter of inquiry to the land office on the same day he received his check, and Stuckenhoff immediately filed an appeal after his check was returned. Moreover, that case involved no problems of identification.

Although within a reasonable time after October 1, 1968, a case might have been made that the lease NM 8262 (Okla) had been improperly issued and was subject to cancellation, because of the land office error in applying rental money intended for lease NM 3298 (Okla) and subsequent termination of that lease under 30 U.S.C. sec. 188(b), *supra*, the passage of time without any inquiry by Sarkeys concerning the refunds which it accepted has tended to eliminate effectively the rights of Sarkeys under lease NM 3298 (Okla).

With the approval of an assignment of the record title to the successor lease NM 8262 (Okla), from Mrs. Jill G. Thomas to L. O. Ward, effective December 1, 1969, any action to cancel lease NM 8262 (Okla) now for violation of any provision of the Mineral Leasing Act could be taken only within the ambit of 30 U.S.C. sec. 184(h)(2) (1964), which affords protection against cancellation of leases of bona fide purchasers of such oil and gas leases. *Southwestern Petroleum Corp.*, 71 I.D. 206 (1964), aff'd. *Southwestern Petroleum Corp. v. Stewart L. Udall*, 361 F.2d 650 (10th Cir. 1966). While it is regrettable that errors were made in connection with lease NM 3298 (Okla), there is no remedy available to Sarkeys to obtain reinstatement of this lease.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the State Director is affirmed.

EDWARD W. STUEBING, *Member.*

WE CONCUR:

FRANCIS MAYHUE, *Member.*

MARTIN RITVO, *Member.*

December 28, 1970

APPEAL OF FRANKLIN W. PETERS AND ASSOCIATES

IBCA-762-1-69 *Decided December 28, 1970*

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Allowable Costs—Contracts: Construction and Operation: Changes and Extras—Contracts: Formation and Validity: Merger of Preliminary Agreements

Where an RFP leading to the award of a cost-plus-a-fixed-fee construction contract included an item for "other presently undefinable work," and where throughout the period of contract performance the Government utilized this item to order work and services not covered by other contract items, the Board determined that the contractor was entitled to be compensated for the cost of engineering services so ordered even though the RFP was not referenced in or otherwise incorporated into the contract and notwithstanding the Government's contention that the services were not ordered or accepted by anyone having authority to do so.

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Allowable Costs—Contracts: Disputes and Remedies: Termination for Convenience

Where a cost-plus-a-fixed-fee construction contract was terminated in part for the convenience of the Government, the fee payable on terminated work was governed by the termination for convenience clause which provided that fee would be payable in proportion to work accomplished. The termination could not have the effect of converting payments the contractor agreed would be fee into costs.

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Allowable Costs—Contracts: Construction and Operation: Subcontractors and Suppliers

Where under West Virginia law an excise tax on motor fuel consumed in performance of a cost-plus-a-fixed-fee construction contract was refundable and where by reason of the contractor's conclusion that the tax did not apply because of the constitutional immunity of the Federal Government from a state tax the contractor failed to make timely application for a refund of the tax, the Board determined that the amount of the tax was not an allowable cost of the contract.

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Allowable Costs—Contracts: Formation and Validity: Construction Contracts

Where a contractor's initial proposal in response to an RFP leading to the award of a cost-plus-a-fixed-fee construction contract contained a fixed-fee of nine percent of estimated costs and in subsequent negotiations the estimated cost of the contract was raised while the amount of the fixed-fee remained unchanged, the percentage of fee to estimated costs was neces-

sarily reduced. The Board determined that it would be unreasonable and contrary to the contract for any substantial portion of the contract not to bear a pro-rata allocation of fee.

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Allowable Costs—Contracts: Construction and Operation: Estimated Quantities

Where excavation exceeding estimated quantities in a cost-plus-a-fixed-fee construction contract was attributable to design changes the Board holds that such changes entitled the contractor to additional fee. However, the Board determined that in the circumstances present here the contractor assumed the risk of the accuracy of estimates and overruns attributable to errors in the estimates could not be the basis of additional fee.

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Allowable Costs—Contracts: Formation and Validity: Cost-Type Contracts

Where the contracting officer determined to settle a cost-type construction contract on the basis of allowable, booked costs in preference to determining applicable overhead and G&A rates, the Government could not disallow bid and proposal expenses upon the ground they made no contribution to the contract. The Board determined that a regulation prohibiting bid and proposal expenses as an allowable cost of cost-type construction contracts became effective after the execution of the contract and thus was not applicable.

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Allowable Costs

Where a supervisory employee of a cost-plus-a-fixed-fee construction contractor was given a jeep as an inducement to remain in the contractor's employ and where the employee's compensation including the jeep was fair and reasonable, the Board determined that the cost of the jeep was an allowable cost of the contract.

Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Allowable Costs

Where a regulation in effect at the time of execution of a cost-plus-a-fixed-fee construction contract provided that the costs of storing records subsequent to contract completion were not allowable, the contractor's claim for such costs was denied.

Contracts: Construction and Operation: Allowable Costs—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal

A cost-type contractor's claim for interest because its vouchers were paid late was dismissed because it was a claim for breach of contract over which the Board has no jurisdiction.

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Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Allowable Costs—Contracts: Construction and Operation: Intent of Parties

Where a cost-plus-a-fixed-fee construction contract provided that the sole proprietor contractor would devote his full time to supervision of the work and contemplated that the contractor's compensation for such supervision would be from fee, the contractor's claim for management costs upon the ground contract performance was more onerous than anticipated was denied.

Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Generally

A cost-plus-a-fixed-fee construction contractor's claim for special termination costs which had not been passed upon by the contracting officer would be remanded since the Board's jurisdiction is appellate only.

BOARD OF CONTRACT APPEALS

This appeal arises out of a cost-plus-a-fixed-fee construction contract for the reclamation of strip mined areas on Roaring Creek and Grassy Run Watersheds in Randolph County, West Virginia, awarded to appellant¹ on June 30, 1966. The estimated cost of the contract was \$1,521,488 and the fixed fee was \$118,894 for a total of \$1,640,382. The contract included the General Provisions for Construction Contracts (Standard Form 23-A, June 1964 Edition) with certain deletions,² Clause 43 "Limitation of Cost," and Clause 24 "Allowable Cost, Fixed Fee and Payment."

The contract was awarded as a result of a Request for Proposals reissued by the Federal Water Pollution Control Administration (FWPCA) on June 7, 1966 (Appeal File, Flap A, Tab A). The initial RFP was issued on January 18, 1966, and along with three addenda scheduled for closing on March 7, 1966. In response to the first RFP appellant submitted an undated proposal (Flap A, Tab B), which included estimated costs of \$1,321,044.84 and a fixed fee of nine percent or \$118,894.03 for a total of \$1,439,938.87. This proposal was incorporated by reference into the appellant's initial response, dated June 15, 1966, to the RFP of June 7, 1966. Estimated costs including fixed fee

¹ There is some confusion as to whether appellant operated as an unincorporated association or as a sole proprietorship. For example, appellant's original undated proposal refers to biographies of principals of the associates and to other individuals and associates while at the same time stating that it operates as an individual trading as Franklin W. Peters and Associates. Messrs. C. W. Balling and George Mason testified that they were principals in the association. Mr. Franklin Peters testified that Franklin Peters & Associates is a sole proprietorship. "You're looking at Franklin Peters and Associates." (Tr. 363)

² Among the deletions were Clauses 4, 5 and 7, "Changed Conditions," "Termination for Default—Damages for Delay—Time Extensions," and "Payments to Contractor," respectively.

were the same as in the undated proposal. By letter, dated June 23, 1966, which referred to technical discussions concerning the project, appellant further amended its proposal. The letter referred to an estimate of 7,500 hours for the drainage of the large swamp at the mouth of Kittle Run and the swamp near the headwater of Grassy Run as Item 27 of the RFP.³ The letter also included a breakdown of costs comprising \$224,000 for "gob handling" shown on cost schedules under Item 29 accompanying the June 15 proposal.⁴ The letter concluded with a request to ignore the total figure furnished in the letter of June 15 and with the statement that our proposed fee remains at \$118,894.03. The effect of this letter was to add \$224,000 to appellant's proposal which after adjustments resulting from further negotiations resulted in the contract's estimated cost of \$1,521,488. Mr. Donald Hambric, Chief of the Contract Pricing Section, FWPCA, testified that the \$224,000 was added because this amount for gob handling on page 2 of the cost schedules accompanying the June 15 proposal "didn't appear to have gotten into the total cost of the contract [sic]" (Tr. 728).⁵ Mr. Peters testified that the Government unilaterally raised the estimated cost (Tr. 652; 686; 687 and 695), because they had some things they wanted to do and wanted to put more money into the contract (Tr. 647). As will appear hereinafter, this conflicting testimony concerns the dispute over the amount of appellant's fee.

The contract as executed did not refer to the proposal and did not expressly incorporate the 29 work items included in the RFP. Nevertheless, throughout the period of contract performance the parties referred to RFP item numbers, in particular Item 27, as though the RFP was incorporated into the contract. For example, the contracting officer's telegram dated April 7, 1967, terminating a portion of the

³ Item 27 did not refer to the drainage of swamps as such; however, it did include an estimate of 7,500 hours for unskilled labor. Because of the relationship of this item to matters in dispute, the pertinent portion is set forth in full: "27. *Estimated Additional Work For Reclamation:* Reclamation of Areas 32, 39, 40, 43 and possible additional excavation, compacted backfill, reconstruction of gob pile, construction of diversion ditches and stream beds, clearing, grubbing, cutting timber and placing in accessible locations and regrading of subsidence areas, and other presently undefinable work." The item also included a listing of the minimum equipment required for additional work as defined above.

⁴ Item 29 was the last item in the RFP of June 7, and concerned masonry seals for abandoned mines. The item was divided into four parts: "A. Handling of Gob and Debris; B. Estimated Equipment Required Per Major Area; C. Roof Supporting Timber; and D. Masonry Seals."

⁵ This testimony is inaccurate because it ignores (1) the fact that the estimated costs of \$1,090,550 on page 1 of the schedules accompanying the June 15 proposal covered only RFP Items 1 through 22 and (2) the fact that the estimated cost in the June 15 proposal (\$1,321,044.84) remained the same as in appellant's prior undated proposal. The Board notes that \$224,000 added to the above total of \$1,090,550 for RFP Items 1 through 22 equals \$1,314,550 or \$6,494.84 less than the estimated cost of \$1,321,044.84 reflected in the proposal.

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contract for convenience of the Government, directed the appellant to delete listed items from the proposal schedule.

The dispute involves both allowable costs and the amount of fee to which appellant is entitled. The contracting officer's final decision of December 20, 1968, as amended by letter dated January 6, 1969, determined that allowable costs totaled \$1,464,448.74^s and that the allowable fee was \$85,296.30 for a total of \$1,549,745.04. Stipulations reflecting settlement of various items read into the record at the hearing are as follows:

Costs:

(1) Legal	\$1,067.34
(2) Secretarial	1,300.00
(3) Field Office	843.75
(4) Start-Stop	850.00
(5) Auto	1,120.00
(6) Storage ⁷	
(7) Unrestricted Moving Out	400.00

Total ----- ^s 5,581.09

Fee:

(1) Original Contract Fee	⁹ 48,159.79
(2) Modification Nos. 3 and 5	9,600.00
(3) Equipment and Labor Differential, Item 27 ¹⁰	25,000.00

Total ----- 82,759.79

The Government has allowed a total of \$119,101.09 for contract fee.

The various claim items remaining before the Board will be referred to in the manner and in the order in which they appear on appellant's Exhibit 1.

⁶ At the hearing and on brief, the Government contends that the contracting officer erred in allowing \$8,771.36 for bidding expenses.

⁷ While Government liability for this item was stipulated, the parties did not agree that the amount claimed (\$600) was proper.

⁸ Costs allowed by the Government after adjustment for bidding expenses (Note 6, *supra*), total \$1,461,258.47 which is \$60,229.53 less than the estimated cost of the contract.

⁹ This claim was originally asserted in the amount of \$78,777.78 by Voucher No. 30, March 29, 1968 (fee and final voucher statement, page 18). The contracting officer determined that appellant was entitled to \$48,955 as fee for this item. The record does not reveal the reason for this item remaining in dispute.

¹⁰ So referred to in appellant's Exhibit 1 and the stipulation. However, the only apparent justification for settling this claim is on the theory that the amount is fee since there is obviously no basis for paying more than actual costs on a cost-type contract. *Airtech Services, Inc.*, DOT CAB No. 68-19 (September 30, 1968), 68-2 BCA par. 7290.

I Direct Cost

A. Engineering Field Party (Mason) ¹¹ \$7,490.00

This claim involves costs incurred by the contractor for surveying and engineering services performed by crews employed by George Mason.¹² The services involved surveying, staking and measurement (chaining) of areas worked by appellant during the course of performance of the contract.¹³ The work was required in order that FWPCA could prepare an appropriate solicitation for seeding and re-vegetation of work areas.¹⁴ For this reason, the work was referred to at the hearing and will be referred to herein as "seeding work" and the claim as the "seeding claim." The services were performed during the months of June, July, August and December 1967, and February and March 1968 (App's. Exs. 3, 5, 8; Tr. 23, 24). Appellant was paid \$5,810 of the amount claimed which was included in vouchers submitted by appellant for other engineering services performed by Mr. Mason's crews. However, this amount was recouped in April 1968 because it was considered that the contract did not provide for vegetation effort in reclamation areas (App's. Ex. 5; Tr. 833, 834). The contracting officer denied the claim for the reason that the services, if performed,¹⁵ were outside the scope of the contract.¹⁶ We do not understand this to mean that a change order could not properly have been issued for these services. The Government contends that the services are not compensable because they were volunteered and that the Government representatives involved with the acceptance of the services had no authority to effect changes to the contract.

Appellant's position is not that any provision of the contract expressly required the services in question, but that the seeding work was included in numerous engineering services and extra work effected under Item 27 of the RFP (Note 3). In short, appellant emphasizes the phrase "other presently undefinable work" and contends that Item

¹¹ The amount claimed in appellant's Exhibit 1 was \$8,400. However, the claim was reduced to the above figure during the hearing. (App. Ex. 8; Tr. 74).

¹² The services of these crews were billed to appellant at the rate of \$140 per field party day in accordance with page 2 of the letter accompanying appellant's undated proposal. A party consisted of three men. The claim is for 53½ days of such services.

¹³ Areas worked by appellant extended beyond areas reflected on the contract plans. (Tr. 25, 419, 597, 861). Such work was necessary in order to preserve the value of work accomplished within areas shown on the plans. Mr. Peters testified that reclamation areas shown on the drawings approximated 1,500 acres scattered over 20 square miles (Tr. 277).

¹⁴ It was also necessary to distinguish between areas requiring hydroseeding and conventional seeding. Hydroseeding involved the application of mulch on slopes to prevent the seed from washing away prior to germination.

¹⁵ The Government has since conceded that the services were performed and that it received the benefit thereof.

¹⁶ Contracting Officer's Decision of December 20, 1968, p. 6.

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27 operated, in effect, as another "changes" clause. While we have already pointed out that the contract as executed did not refer to the proposal and did not expressly incorporate the 29 work items included in the RFP, we have also found that throughout the period of contract performance the parties referred to various item numbers of the RFP as if the RFP constituted part of the contract.¹⁷ Therefore, we have no hesitation in determining the requirements of the contract by reference to the RFP including Item 27.¹⁸

Before discussing the work accomplished under Item 27, we take up the manner in which this "seeding work" came to be performed. The testimony in this respect is in direct conflict. Mr. Robert Scott, Project Engineer for FWPCA, testified that on May 23, 1967, while he and an assistant were on Reclamation Area 37 drawing soil samples,¹⁹ George Mason's Crew Chief, Mr. William L. Marsh, came upon the area and "offered to stake out this area for us"²⁰ (Tr. 768). However, Mr. Marsh testified that he was asked by Mr. Scott to do this work (staking) and that the question of measuring for acreage arose at a later date (Tr. 861). Mr. Marsh further testified that he informed Mr. Scott that it wasn't up to him to make the decision and that he (Marsh) would have to contact Mr. Mason. The excerpt from Mr. Scott's diary (Govt. Ex. B) confirms Mr. Marsh's testimony that the conversation involved only staking and that he would have to check with Mr. Mason. The Board finds that a conversation substantially as testified by Mr. Scott did take place with Mr. Marsh. However, this finding is not determinative of the compensability of this claim because the offer in-

¹⁷ Under these circumstances, the parol evidence rule and the concomitant doctrine of merger are not applicable. See 3 Corbin on Contracts, Sec. 573; 17 Am. Jur. 2d, Contracts, Sec. 260. The reason is, of course, that the circumstances make it unlikely that the parties' assent to the contract was adopted or intended as a final integration of the contract apart from the RFP.

¹⁸ See, e.g., *Brunswick Corporation*, ASBCA No. 12852 (December 9, 1968), 68-2 BCA par. 7403, holding that the rules of integration and of parol evidence do not preclude consideration of contemporaneous circumstances, including documents reflecting negotiation of the contract, for the purpose of discovering the meaning which one party knew or should have known would be given to contract language by the other party. *Oj. Inter*Helo, Inc.*, IBCA-713-5-68 (December 30, 1969), 69-2 BCA par. 8034, affirmed on Reconsideration (April 24, 1970), 70-1 BCA par. 8264.

¹⁹ Some of the staking services performed by appellant were for the purpose of enabling the Government to determine areas from which the samples were taken (Tr. 21, 771).

²⁰ Under cross-examination, Mr. Scott used the plural "areas" to describe this conversation thus indicating that the offer involved more than Area 37 (Tr. 775). The excerpt from Mr. Scott's diary, dated May 23, 1967 (Govt. Ex. B) states "Bill Marsh stopped by Area 37 and stated he and his crew would be willing to set stakes for us as they have to run the area for acreage and yardage. * * * He will check with George Mason (Engineering Firm) * * *." This language indicates the offer involved only Area 37.

volved only staking in Area 37,²¹ and Mr. Scott and Mr. Van Denberg²² were aware of Mr. Marsh's lack of authority to speak for appellant (Tr. 778, 779, 791).

Mr. George Mason testified that at a meeting in Coalton, West Virginia, in the latter part of May 1967,²³ attended by himself and Mr. Peters and among others, Messrs. Van Denberg, Findlay²⁴ and Krickovic²⁵ for the Government, it was stated that FWPCA was in the process of drawing up seeding contracts and that certain work would have to be done to assist in defining the contracts and in establishing sample points (Tr. 20-22, 43). Mr. Mason further testified that a heated discussion ensued between Mr. Findlay and Mr. Van Denberg as to whether this "seeding work" should be done as part of appellant's contract.²⁶ Mr. Mason stated that he left the meeting with the impression that the work should be done. When asked why he didn't request a separate contract for this work, Mr. Mason answered that he didn't feel appellant needed a separate contract inasmuch as they had a contract to provide field engineering whenever it was requested at a specified per diem rate, which was well known to the Government and all of its people at the job site (Tr. 40). He stated that appellant was frequently asked to do things which in his opinion would have constituted a change order and that appellant was always compensated therefor.

Mr. Peters confirmed Mr. Mason's testimony concerning the discussion of "seeding work" at the May 1967 meeting and testified that he was asked by Mr. Van Denberg to do the work as a matter of administrative convenience to the Government (Tr. 253). While Mr. Van Denberg denied that he wanted seeding work performed by appellant, his denial would be more convincing but for Mr. Scott's testimony that FWPCA didn't have the manpower to perform a big survey (Tr. 771). The Government's failure to call Mr. Findlay as a witness is

²¹ The claim involves services other than staking (surveying and chaining) in areas other than Area 37.

²² Mr. Van Denberg was in charge of field operations for the Acid Mine Demonstration Program, FWPCA and was Mr. Scott's supervisor. He testified that upon being informed by Mr. Scott of the offer to do stake-out work, he told Mr. Scott the arrangement was satisfactory as long as there was no change in contract or additional costs involved (Tr. 781).

²³ The evidence does not establish whether this meeting antedated May 23.

²⁴ Mr. Charles Findlay represented the Bureau of Mines and was the project officer's representative at the work site. Although present at the hearing (Tr. 585, 601, 604), he was not called as a witness.

²⁵ Mr. Stephen Krickovic was the project officer named in the contract. While he did not recall attending this meeting (Tr. 597) the Board finds that he was among those in attendance.

²⁶ Mr. Van Denberg is quoted as saying "Well, by golly, Federal Water Pollution Control Administration is paying for this job and we are going to get something out of it" (Tr. 22). Since a substantial portion of the contract had been terminated for convenience at this time, it is at least understandable that a question could have arisen as to what had been accomplished with money expended.

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significant. The Board finds that appellant's performance of the services involved in this claim was discussed at the May 1967 meeting and that the Government has not sustained its contention that there was an understanding the services were to be furnished without charge.²⁷

The Government's assertion that the service were not requested or accepted by anyone having authority to effect changes to the contract is plausible, but for the reasons stated hereinafter is not accepted. The Government's position is bolstered by the contracting officer's letter to appellant dated September 8, 1966 (Flap C, Tab A), which emphasized that the project officer had no authority to effect changes to the contract,²⁸ and by Modification No. 1, dated October 4, 1966, which incorporated a Technical Direction Clause into the Contract.²⁹ Appellant, by letter dated September 16, 1966 (Flap C, Tab A), consented to the Technical Direction Clause, but expressed reservations thereto, i.e., that the specifications were general in many respects, that the scope of the work in several areas could not be determined in advance of the work and that someone at the site with authority to make decisions was a practical necessity. The letter enclosed a list of 15 proposed change orders which, it was stated, had been informally discussed with the project officer.³⁰ By letter, dated October 4, 1966,

²⁷ Mr. Van Denberg's testimony that Mr. Mason indicated there would be no charge for the services (Tr. 785) is not convincing in view of the fact Mr. Mason regularly billed appellant therefor and was paid (App. Ex. 3; Tr. 34). Mr. Mason flatly denied making any such statement (Tr. 874).

²⁸ If the project officer lacked authority to effect changes to the contract, *a fortiori*, is this true of Messrs. Van Denberg and Scott. Each of these individuals denied having such authority (Tr. 777, 780).

²⁹ This clause was proposed by the contracting officer's letter of August 22, 1966, which urged appellant to contact the contracting officer if there was any doubt as to whether directed work was within the scope of the contract. The letter was prompted by the contracting officer's review of the Monthly Progress Report for July which apparently reflected that appellant may have performed or contemplated performing work not required by the contract. The Technical Direction Clause is as follows:

"The Project Officer named on the cover sheet of this contract is responsible for guiding the technical aspects of the project and for general surveillance of the work performed. The Project Officer shall not make any commitment or authorize any changes which constitute work not within the general scope of this contract, change the expressed terms and conditions or specifications incorporated into this contract, or constitute a basis for any increase in the contract cost or extension of the contract delivery schedule."

³⁰ Of particular significance is the following:

"4. Engineering services for the convenience of the Government (and not services for the contractors' convenience) over and above field crews now being paid by the Government: (Estimated)

"A. George Mason, Consultant—Soundings, profiles [sic] yardage analysis in Grassy Run Swamp : 2 days @100 per day = 200.00.

"B. George Mason, Consultant—Reconfiguring shaft lining is [sic] stripping air shaft area of #10. 2 days @100 per day = 200.00.

"C. George Mason, Consultant—Location verification analysis, Kimball Aerial Surveys 5 days @100 per day = 500.00. Note: (Estimate field party work for a, b, c, 10 days @140.00 per day)." Mr. Peters testified that these engineering services were among the work accomplished under Item 27 (Tr. 638, 637).

the contracting officer set forth the procedure for processing change orders through the program coordinator and the project officer, advised appellant that the proposed change orders attached to appellant's letter dated September 16, should be processed in that fashion and again cautioned appellant that questions as to whether work was within the scope of the contract should be submitted in writing to the contracting officer.³¹

Mr. Peters testified that he undertook to follow the procedures for the issuance of change orders set forth in the contracting officer's letter, that there were a number of recommended change orders approved by the project officer and forwarded to Washington, that at the time the change orders were submitted he did not know what their disposition would be, that repeated phone calls to the project officer elicited only the information that the proposed change orders had been approved and sent in, that in the meantime work had progressed to the point that it was necessary to proceed and that the work was accomplished and the cost accumulated under item 27³² (Tr. 383-392, 632-637, 660). While there were five modifications to the contract, Mr. Krickovic referred to ten change orders (Tr. 585). Mr. E. T. Rhodes, who negotiated the contract and was one of three successor contracting officers, testified that the proposed change orders did not reach the contracting activity apparently because they were never funded (Tr. 899, 900). While none of the proposed change orders involved engineering as such, at least two involved work outside areas shown on the plans.

³¹ Appellant by letter, dated September 21, 1966, informed the contracting officer that it had been directed to haul unburned carbonaceous gob of unknown quantity from a point near Kittle Run Swamp to points in Area 10 and perhaps Area 12. The letter stated that the contracting officer's local representatives considered that the work was part of Item 27. In a letter dated September 28, 1966, the contracting officer advised appellant that the work was clearly within the definition of Item 27 (Flap C, Tab A).

³² A listing of work charged to Item 27 appears on pages 33-35 of appellant's fee and final voucher statement (Flap D, Tab A). Asterisked items which appellant states were approved as change orders by the project officer's site representative are:

"1966

"*4. Swamps and Ditch drainage—various areas.

"*5. Hauling Carbonaceous material—various areas.

"*6. Mining coal for landowner's easement and reclamation.

"*7. Covering carbonaceous material.

"*8. Ditching outside specified areas.

"1967

"*2. Ditching, drilling and shooting for swamp control outside Items 1-22.

"*4. Special borrow pits.

"*10. Removing old building, railroad beds, tipples and bridges.

"11. Special Work on seals."

Items 5, 6, 7 (1966) and 10 and 11 (1967), appear to be covered by Items 1, 2, 7, 5, 8, 11, 12 and 13 of the list attached to appellant's letter of September 16. We note appellant admits that Modification (Change Order) No. 3, dated February 17, 1967, and Modification No. 5, executed by the contracting officer on September 15, and by the contractor on September 20, 1967, included some of the proposed changes (letter of September 20, 1967). The proposed change orders are not in the record.

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We have already found that areas worked by appellant extended beyond areas shown on the contract plans and that such work was necessary in order to preserve the value of the work accomplished within areas shown on the plans (Note 13). The Board finds that work outside areas reflected on contract plans was accomplished under Item 27 (Tr. 596, 597, 635 *et seq.*), and that this necessarily increased related engineering services such as surveying and staking.³³ The significance of the foregoing finding is that substantial engineering services (field party work),³⁴ were obtained under Item 27, thus making reasonable appellant's assertion that it had no reason to question the manner in which it was requested to perform the seeding work.³⁵

Appellant contends that although the Technical Direction Clause restricted the authority of the project officer, the project officer's authority was subsequently restored. The Board notes that Modification (Change Order) No. 3, dated February 17, 1967, states that seals will be specifically located by the contracting officer or his authorized representative and in 14 instances uses language such as "as directed by the Project Officer," "will be specified or determined by the Project Officer," or "shall be approved by the Project Officer." We further note that Modification No. 5 (Note 32, *supra*), uses similar language in six instances. The Board finds that the above language plus other actions of the Government³⁶ lend substance to appellant's contention that the Technical Direction Clause insofar as it restricted the authority of the project officer had been abrogated prior to the time the seeding work was performed.

³³ The contract paragraph 1.04 "Staking Out Work" of the Special Conditions, required appellant to establish lines and grades for proper execution of the work and to stake out such lines and grades. Mr. Peters testified that engineering field party work exceeded \$60,000 and that Mr. Krickovic suggested in a letter that this be included in Item 27 (Tr. 697). The Board notes that during examination of Mr. Krickovic, appellant's counsel referred to a memorandum dated December 23, 1969 (probably should be 1966), written by Mr. Krickovic to Mr. Findlay, which allegedly stated that "The change order on engineering is to be ignored because the item of engineering will be included in Item 27" (Tr. 598); however, counsel did not choose to offer the memorandum in evidence.

³⁴ The Report on Final Audit for the period January 1, 1967 through April 30, 1968 (Flap D, Tab B), reflects subcontracted engineering costs totaling \$62,962 including the "seeding claim" asserted herein. We conclude that this figure represents field party work. This compares with \$1,500 for "Engineers to Stake Out" included in overhead in appellant's original undated proposal which sum appellant states was increased to \$14,000 during final negotiations (page 6, fee and final voucher statement).

³⁵ Mr. Peters testified that notwithstanding the efforts to clarify and limit the authority of the project officer, he was not on notice of any limits to Mr. Van Denberg's authority (Tr. 304).

³⁶ A letter from the project officer to appellant, dated June 7, 1967 (App. Ex. 25), concerning technical direction in connection with the partial termination for convenience, referred to work without as well as within reclamation areas shown on the plans and clearly could not be accomplished without a substantial effect on costs. This, of course, serves to strengthen appellant's basic objection that the Technical Direction Clause was unrealistic. Copies of the letter were forwarded to the Project Coordinator in Washington, and the contracting officer can hardly disclaim knowledge thereof.

Mr. Krickovic, the Project Officer, admitted only to knowledge that appellant had accomplished a substantial amount of staking in the areas to be worked upon (Tr. 597, 598). However, we have found that Mr. Krickovic attended the May 1967 meeting (Note 25), which was the genesis of the seeding work and we hold that he had constructive, if not actual, notice that these services were being performed.³⁷ In view of the foregoing finding and the totality of the circumstances discussed above, we hold that the Government's reliance on the alleged lack of authority of the individuals who ordered and accepted the seeding services is misplaced.³⁸ The seeding claim is allowed.³⁹

B. Cost Engineering, Concrete (Balling) \$7,500.

This item concerns appellant's claim for reimbursement of \$7,500 paid to Mr. C. W. Balling for services rendered in preparing to construct concrete channels⁴⁰ or flumes for the drainage of surface water. In a chart accompanying appellant's undated proposal, Mr. Balling was listed as Chief of Construction under Senior Management. The biography submitted with the proposal reflects that Mr. Balling has had extensive experience in construction work. Mr. Balling testified that he was contacted by Mr. Peters for assistance in preparing estimates for the concrete work on the project, that he prepared such estimates and that after the contract was awarded his responsibility was to see that the flumes were constructed in accordance with the specifications (Tr. 78, 79, 86, 87 and 91). Mr. Balling further testified that all of the arrangements for the pouring of the flumes had been made, i.e., arrangements for necessary manpower, concrete, trucks, concrete pumps and floating forms, but that immediately before pouring was to begin a decision was made⁴¹ to postpone the pours until the follow-

³⁷ There is, of course, no doubt that Mr. Findlay, the project officer's site representative, knew that seeding work was being accomplished. In addition to attending the May 1967 meeting, he requested that Mr. Mason's invoices to appellant reflect seeding work separately from other engineering services (Tr. 32).

³⁸ A case quite similar on its facts is *M.S.I. Corporation*, GSBCA No. 2428 (September 25, 1968); 68-2 BCA par. 7262, wherein work beyond the requirements of a building contract was ordered by a representative of the Government's architect-engineer who had no authority to do so. However, it appeared that the contracting officer's representative at the work-site, whom the Government also alleged had no authority to effect changes, had knowledge that the work was being performed and that all work for which change orders were issued was accomplished prior to receipt of a written order from the contracting officer. The contractor's claim that it was entitled to be compensated for the work was sustained. Cf. *Orndorff Construction Company, Inc.*, IBCA-372 (October 25, 1967), 74 I.D. 305; 67-2 BCA par. 6665.

³⁹ The Government does not contend that the amount paid for other field party work is unreasonable. The Government's contention that appellant was required to survey work areas to determine the amount of earth moved for pay purposes would be more meaningful if the contract was for a fixed price.

⁴⁰ The channels were listed as Item Nos. 24, 25 and 26 of the RFP.

⁴¹ The actual pours were scheduled to commence on a Monday in the latter half of October 1966, while the decision to postpone was made on the preceding Saturday (Tr. 80).

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ing spring because of the Government's concern that settling of the fills might cause breakage of the flumes (Tr. 80, 81, 87, 89). Mr. Balling stated that his arrangement with Mr. Peters was that he would be paid \$7,500 for his services and that since he had done everything that the arrangement required except the actual pouring of the flumes,⁴² he considered that he was entitled to the \$7,500 (Tr. 82). The flumes were never constructed because these items were terminated.

Mr. Balling's testimony in the foregoing respects was corroborated by Mr. Peters (Tr. 96, 97) and is accepted by the Board as substantially accurate.⁴³ It is established that Mr. Balling was paid \$7,500 by appellant (Tr. 83, 98; App. Exs. 9 and 10). Appellant contends that by virtue of the termination this \$7,500 became a cost and that it should be reimbursed as such. The Government's position is that certain language in appellant's proposal and in the contract precludes appellant from treating this item as a cost and that it must be regarded as a distribution of fee.

Page 1 of the letter accompanying appellant's undated proposal contained the following:

All compensation and fees and expense personal to Mr. Peters and Mr. Balling and Mr. Mason are included in the fee.

Clause 47 entitled "Direction of Work" is set forth below:

During the performance of this contract, the work shall be under the full-time resident direction of the contractor, if an individual; of one or more principal partners if the Contractor is a partnership; or in case the Contractor is a corporation, association, or similar legal entity, one or more senior officers thereof; provided, however, that the Contractor whether an individual, a partnership, a corporation, or other legal entity, may be represented in the direction of the work by some person of a class other than those specified above, if the Contracting Officer gives his approval. In any event, the Contractor shall not be entitled to be reimbursed for any salary, wages or like compensation paid for such direction of the work, whether performed by an individual, a partner, a corporate officer or other representative.

Appellant, as it must, recognizes the quoted term of its offer and provision of the contract, but points out that the offer was made and the contract provision accepted on the basis of performing the contract as signed. Appellant states that Clause 47 contemplated that if

⁴² Actual pouring was to be under the supervision of a concrete superintendent. Mr. Balling was to make periodic visits to the sites in order to assure that the work was properly accomplished (Tr. 85, 98).

⁴³ A Projected Work Schedule (App. Ex. 11) reflects that appellant planned to construct concrete flumes in Work Area 44 in the latter half of October 1966, and in Work Area 10 during the period June through October 1967. Mr. Peters testified that this Schedule was prepared in September 1966 (Tr. 101).

preparation work were done performance would follow which would command a fee and points out that it would have received nearly \$9,000 in fee from which to compensate Mr. Balling if the concrete channels had not been terminated.

We think that appellant's arguments overlook the fact that the contract which it executed included a clause (Clause 23 entitled "Termination") specifically providing for termination of the contract in whole or from time to time in part:

* * * (ii) whenever for any reason the contracting officer shall determine that such termination is in the best interest of the Government.

Accordingly, appellant must be deemed to have accepted the possibility of termination,⁴⁴ and it is the clause covering this eventuality which governs any relief available to appellant. Paragraph (e) (i) (D) (1) of the Termination Clause provides that if the settlement includes cost and fee⁴⁵ there shall be included therein a portion of the fee determined as follows:

* * * there shall be paid a percentage of the fee equivalent to the percentage of the completion of the work contemplated by the contract, less fee payments previously made hereunder * * *.

We hold that the contract specifically provided for an adjustment in fee in instances where the contract was terminated in whole or in part for convenience of the Government and that such termination cannot have the effect of converting payments appellant agreed would be fee into costs. Appellant's claim for \$7,500 paid to Mr. Balling as a cost is denied.⁴⁶

C. Diesel Fuel Tax (West Virginia) \$8,699.67

This claim involves costs for excise tax imposed by the State of West Virginia at the rate of \$.07 per gallon on diesel fuel consumed by appellant during the course of contract performance. The claim arises because of the initial failure of Peters Fuel Corporation,⁴⁷ the supplier of the fuel, to include the amount of the tax in its invoices to appellant for the fuel and because of a subsequent denial by the State

⁴⁴ The Supreme Court long ago reached a similar conclusion with respect to a statute authorizing the cancellation of war contracts. *College Point Boat Corporation v. United States*, 267 U.S. 12 (1925).

⁴⁵ Provided, of course, the termination is for the convenience of the Government and not for default.

⁴⁶ In his final decision of December 20, 1968 (p. 3), the contracting officer allowed appellant \$2,849.30 as fee for work performed on the channels prior to termination. The sum allowed was computed by applying the Government's estimate of the percentage of work accomplished on the channels (30%) to the Government's determination of fee allocable to concrete channels (\$7,881) in appellant's proposal (Govt. Ex. C). Appellant's claim for fee on the channels is discussed *infra*.

⁴⁷ Mr. Peters testified that he was the owner of Peters Fuel Corporation of Oakland, Maryland (Tr. 251, 254).

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of West Virginia of the claim by Peters Fuel Corporation for refund of the tax. Appellant has not actually paid the tax, the amount of the tax being represented in its records by a bill, dated February 1, 1969, from Peters Fuel Corporation (App. Ex. 13), which was submitted after the claim of Peters Fuel for refund of the tax was denied by the State of West Virginia (Tr. 111, 112, 259).

Mr. Peters testified that at the time appellant submitted its first order for fuel to Peters Fuel Corporation he became concerned about the propriety of paying the tax⁴⁸ in view of the fact that the ultimate burden of the tax would be on the Federal Government. He testified that he called Mr. C. H. Williams, Head of the Gasoline Tax Division in the Tax Commissioner's Office in Charleston, West Virginia, and explained the circumstances to Mr. Williams. Mr. Peters stated that he was advised that the tax did not apply⁴⁹ (Tr. 255, 256, 316). The witness further stated that he then called the office manager of Peters Fuel Corporation and instructed him not to charge the tax on deliveries of fuel to appellant. He stated that as a consequence invoices for fuel delivered to appellant did not reflect the amount of the tax and that this situation continued until an audit of the books of Peters Fuel Corporation by the State of West Virginia in December⁵⁰ resulted in a deficiency ultimately totaling \$8,699.67.⁵¹ Mr. Peters testified that the claim for a refund upon the ground that the fuel was for off-highway use⁵² was denied because the 90-day period in which to file for a refund had expired and the expiration of the refund period was considered to extinguish not only the remedy but the right as well⁵³ (Tr. 257, 258, 309, 310). He further testified that the 90-day period in which to charge

⁴⁸ The West Virginia excise tax of \$.07 per gallon is imposed upon gasoline. However, gasoline for the purpose of the statute is defined, with exceptions not pertinent here, as any substance or combination of substances which is capable of use as a motor fuel in an internal combustion engine. West Virginia Code, Sec. 11-14-1, 11-14-3.

⁴⁹ This advice was apparently based on the constitutional immunity of the Federal Government from state taxation. While sales to the United States and to the State of West Virginia and its subdivisions are exempt from the West Virginia Consumers Sales Tax (West Virginia Code, Sec. 11-15-9), no similar exemption is available for the excise tax on gasoline.

⁵⁰ This was in 1966.

⁵¹ There is no dispute as to the amount involved. Voucher No. 15, dated June 2, 1967 (Flap D, Tab A, p. 70), reflects an amount for the tax of \$7,124.60 for the period June 2 through December 29, 1966. An additional assessment of \$1,575.07 is reflected on Voucher No. 36, dated March 29, 1968 (Flap D, Tab A, pp. 62-65). See Memorandum for the Record concerning meeting with Franklin W. Peters of July 1 and 2, 1968 (Flap D, Tab C).

⁵² The West Virginia excise tax of \$.07 per gallon is subject to refund if the purchase is of 25 gallons or more, the tax has previously been paid, the fuel is used, *inter alia*, as motor fuel in diesel engines not operated upon the public highway or streets and claim for refund is made within 90 days from the date of purchase or delivery of the fuel. West Virginia Code, Sec. 11-14-20.

⁵³ The statute expressly provides that any claim for refund not filed within the 90-day period shall not be construed as or constitute a moral obligation of the State for payment. West Virginia Code, Sec. 11-14-20.

the tax expired before "we" (apparently appellant and Peters Fuel Corporation) knew the tax was to be charged, that in hearings before the West Virginia Tax Commissioner on the claim⁵⁴ for refund the advice of Mr. Williams that the tax did not apply was not denied, but that the Commissioner ruled that assessment of the tax was proper and that there was no authority to waive the 90-day period in which to claim a refund. The Government makes the point that Mr. Peters' testimony concerning payment of the tax by Peters Fuel Corporation (Tr. 259), and the refund proceedings should not be accepted because no receipt or bill for the tax has been presented, and the claim documents and ruling of the Tax Commissioner, which are the best evidence thereof, are not in the record.⁵⁵ However, Mr. Peters' testimony has not been rebutted and the Board accepts it as accurate.

In a letter, dated September 11, 1967 (Flap C, Tab B), the contracting officer, after referring to appellant's Voucher No. 15 (Note 51), informed the appellant that the Solicitor's Office had ruled that the West Virginia excise tax could constitutionally be applied and that in future instances where appellant had paid the tax and the tax was not refundable under West Virginia law, the Government was liable for the amount of the tax.⁵⁶ The case of *Alabama v. King and Boozer*⁵⁷ was cited for the proposition that where the legal incidence of a state tax was on the vendor,⁵⁸ such a tax could validly be imposed notwithstanding that under the terms of a cost-plus-a-fixed-fee contract, the ultimate burden of the tax was on the Federal Government. The letter pointed out that there appeared to be no distinction between appellant's contract and the contract construed by the Court in *King and Boozer*. It also stated that the Government was not liable for the tax if the right to a refund was lost because of appellant's conclusion or understanding that sales of fuel were exempt from the tax because of sovereign immunity. The contracting officer's final decision rejected the tax claim for the same reason.

On brief, appellant contends (i) that it had a right to rely on what is characterized as the "ruling of the West Virginia State Tax Commission" that the tax did not apply, (ii) that had the ruling been

⁵⁴ Mr. Peters testified that the petitioner in the refund proceedings was recognized as appellant and Peters Fuel Corporation (Tr. 261).

⁵⁵ Documents concerning the claim submitted for the first time with appellant's Reply Brief dated May 26, 1970, have not been considered.

⁵⁶ Among the examples of allowable costs applicable to construction contracts set forth in FPR 1-15-403 (29 F.R. 10302, July 24, 1964), is: "* * * (1) Taxes, fees or charges, except those imposed upon or measured by the contractor's fee."

⁵⁷ 314 U.S. 1 (1941).

⁵⁸ We have no doubt that the vendor's liability for the West Virginia excise tax does not depend upon whether the tax is passed on to the purchaser. West Virginia Code, Secs. 11-14-3 to 11-14-6, inclusive.

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in writing it would not have aided the claim for a refund,⁵⁹ (iii) that the constitutional question of the validity of the tax is a close question of law and (iv) that it was not in any way negligent. Asserting that a reversal of the Tax Commissioner's position as to the applicability of the tax was not a risk which appellant assumed, appellant advances the contention that had it paid the tax when the Commissioner said that no tax was due, the contracting officer would properly have refused appellant reimbursement therefor. Lastly, the appellant contends that the 90-day period is not a bar to recovery but the basis of recovery since the refund period was never available to it.

The Government contends (1) that because of the relationship between appellant and Peters Fuel Corporation no consideration should be given to this claim until appellant has actually paid the tax, and (2) that under the provisions of Federal Procurement Regulations only reasonable costs are allowable and that it would be unreasonable and unconscionable to require the Government to bear the burden of a tax which was clearly refundable under West Virginia law had timely action been taken. The Government argues that no prudent businessman would have relied on the informal advice as to the applicability of thousands of dollars in taxes without requesting confirmation in writing or bringing the matter to the attention of the contracting officer.

The contract included as Clause 41 the standard Federal, State and Local Taxes Clause applicable to formally advertised supply contracts, to formally advertised construction contracts in excess of \$10,000 and to certain negotiated fixed-price contracts (FPR 1-11.401 *et seq.*, 29 F.R. 10260, July 24, 1964). However, we find nothing particularly helpful in this Clause as an aid in resolving the question before us. The Board considers Clause 46, entitled "Discounts" set forth in full below,⁶⁰ as pertinent because while not specifically applicable to taxes, it provides that if a benefit such as a discount or rebate is lost through no

⁵⁹ This contention is based upon the fact that the West Virginia authorities did not deny having advised that the tax did not apply, and upon Mr. Peters' testimony that the Fuel Corporation's monthly reports to the State of West Virginia (required by West Virginia Code, Sec. 11-14-6), reflected these sales as nontaxable.

⁶⁰ "Discounts

"The contractor shall to the extent of his ability, take all cash, and trade discounts, rebates, allowances, credits, salvage, commissions and bonifications, and when unable to take advantage of such benefits he shall promptly notify the contracting officer of the reason therefor. In determining the actual net cost of articles and materials of very [sic] kind required for the purpose of this contract, there shall be deducted from the gross cost thereof all cash and trade discounts, rebates, allowances, credits, commissions and bonifications which have accrued to the benefit of the contractor or would have so accrued but for the fault or neglect of the contractor. Such benefits lost through no fault or neglect on the part of the contractors, or lost through fault of the Government shall not be deducted from gross costs."

fault or neglect of the contractor, such benefit shall not be deducted from the gross costs. We note that "fault" has frequently been held to be synonymous with negligence⁶¹ and the word "neglect" has been held not to be synonymous with "omit" but to mean action or inaction that is either voluntary or inadvertent.⁶² Accordingly, if appellant had a right to rely on the informal advice that the tax did not apply, it would seem to follow that it was free from fault and that under the contract the amount of the tax should not be deducted from the gross cost of the fuel.

Before undertaking to resolve the question of the appellant's right to rely upon the informal advice received, however, we must first pass upon the Government's contention that the claim may not even be considered because appellant has not actually paid the tax. The Government recognizes that if liability exists, a cost can be incurred without payment therefor being effected. The Government's principal concern as stated on brief appears to be that because of the common ownership and control of appellant and Peters Fuel Corporation, appellant, for reasons of its own, may decide not to reimburse Peters Fuel Corporation for the amount of the tax, leaving the Government in the position of paying appellant for a cost it did not, in fact, incur. The Government is careful to point out that it is not alleging any impropriety in the transactions between appellant and Peters Fuel Corporation and indeed has not alleged that the price of the fuel was more than it would have been had it been obtained from other sources. We do not share the Government's concern in this respect and think this claim should be decided as if no common ownership or control of appellant and the supplier of the fuel existed. Nevertheless, appellant's failure to pay the tax is significant because such failure would appear to constitute an independent ground for West Virginia's denial of the refund claim.⁶³ However, in view of our conclusion on the issue of appellant's right to rely on the informal advice from the Tax Commissioner's Office, we consider it unnecessary to decide whether appellant's failure to pay the tax would in and of itself justify denial of the claim.

We are not persuaded by appellant's contention that obtaining the so-called "ruling" in writing would not have aided its claim. Mr. Peters testified that the Tax Commissioner reversed himself after obtaining a ruling from the West Virginia Attorney General (Tr.

⁶¹ 16 Words and Phrases, *Fault*.

⁶² *McArdle et al. v. School District of Omaha*, 179 Nebr. 122, 136 N.W.2d 422 (1965).

⁶³ It is clear that appellant not Peters Fuel Corporation was user of the fuel and the statute specifically provides that evidence of payment of the tax must accompany the claim for refund, that claims for refund are not assignable "... * * * Nor shall any payment be made to any person other than the original person entitled thereto using gasoline as hereinbefore in this section set forth: * * *." West Virginia Code, Sec. 11-14-20.

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260) and it is not unreasonable to suppose that such ruling might have been obtained at an earlier time had Mr. Peters requested confirmation in writing of the advice that the tax was not applicable. We, of course, would not be warranted in deciding the claim solely on any such supposition. However, the question turned on the constitutional immunity of the Federal Government from a state tax, not the interpretation of West Virginia's tax law in other contexts with which the Tax Commissioner's Office would presumably be more familiar. We, therefore, do not accept appellant's contention that there was nothing to refer to the contracting officer.⁶⁴ It is a general rule that misrepresentations as to matters of law are not actionable, the reason being that such representations are regarded as mere expressions of opinion and that everyone is presumed to know the law.⁶⁵ The same reasons lie behind the rule that misrepresentations of law will not ordinarily afford a basis for rescission or reformation of a contract.⁶⁶ While there are numerous exceptions to the rule, the exceptions generally concern situations where there is a confidential relationship between the parties, the representation is accompanied by inequitable or unconscionable conduct or the parties are otherwise not on equal terms.⁶⁷ We find no basis for application of any of the exceptions here.⁶⁸ Accordingly, we hold that appellant had no right to rely on the informal advice from the West Virginia Tax Commissioner's Office that by reason of the constitutional immunity of the Federal Government from a state tax, appellant was not liable for the West Virginia excise tax on motor fuel. Appellant is certainly chargeable with notice that its failure to pay the tax and its failure to apply for a refund within 90 days could result in a loss of the right to refund for tax paid on fuel for non-highway use.⁶⁹ Under all the circumstances we

⁶⁴ In his testimony, Mr. Peters acknowledged that the point at issue was regarded as an extremely close question of law (Tr. 259). This acknowledgment seriously impugns appellant's case.

⁶⁵ 37 Amer. Jur. 2d, *Fraud and Deceit*, Sec. 73; *Moore v. City of Nampa*, 276 U.S. 536 (1928) (recitals in local improvement bonds as to the legal effect of the bonds and of the statements therein held not actionable since plaintiff was charged with notice of the invalidating facts and held to know the law). See also *Bentley et al. v. Fayas et al.*, 260 Wis., 177, 50 N.W.2d 404 (1951).

⁶⁶ 17 C.J.S. *Contracts*, Sec. 158; *Hartley Realty Company v. Casady*, Mo. App., 332 S.W.2d 291 (1960). Cf. *Comp. Gen. Dec. B-169959* (August 3, 1970), unpublished.

⁶⁷ 37 Amer. Jur. 2d, *Fraud and Deceit*, Sec. 77; *Hartley Realty Company v. Casady* (Note 66, *supra*).

⁶⁸ Mr. Peters testified that he was a graduate of Virginia Polytechnic Institute and the University of Virginia Law School. His biography, accompanying appellant's proposal, reflects that in addition to being a registered professional engineer, he is a member of the bars of Virginia, West Virginia and Pennsylvania.

⁶⁹ We cannot overlook Mr. Peters' testimony on cross-examination (Tr. 311) that he was very short of working capital throughout the life of this job and that he had to do everything he could to preserve working capital. We also note that appellant's original undated proposal contained estimated costs of \$65,000 for fuel and included a notation that the West Virginia excise tax was refundable.

would not be warranted in placing the burden of this tax on the Government and must leave appellant to its remedies, if any, with the State of West Virginia.⁷⁰ The claim for excise tax on diesel fuel is denied.⁷¹

II. Original Contract Fee⁷²

C. Concrete—Field Flume \$980.31.

This claim is for fee computed at the rate of nine percent of appellant's cost of preparatory work, chiefly grading, for the concrete channels or flumes. As noted above in connection with the claim for reimbursement of \$7,500 paid to Mr. C. W. Balling, these flumes were never constructed but were terminated from the contract. The cost of this preparatory work, including down time, shown on Voucher No. 29 dated March 29, 1968 (Flap D, Tab A, pp. 28, 29), totaled \$6,001.40 for equipment rental and \$4,890.97 for labor. Mr. Peters testified that appellant had been reimbursed for these costs and that such costs had never been questioned (Tr. 441). Appellant's contention that it is entitled to fee at the rate of nine percent is based on the allegation that its proposal included and the contract was negotiated on the basis of a nine percent fee. This contention is discussed *infra* in connection with the fee claim on mine seals (Item II E, App. Ex. 1, RFP Item No. 29).

The Government says that computing allowable fee on the basis of costs incurred is a violation of the prohibition against cost-plus-a-percentage-of-cost contracting and that in accordance with Clause 23 entitled "Termination" the fee must be based on the percentage of work actually accomplished. Mr. Donald O'Brien, an engineer in the Office of the Coordinator of the Acid Mine Drainage Problem, FWPCA, testified that in his opinion about 15 percent of the actual construction work for the flumes had been accomplished and that planning and management work amounted to another 15 percent. He concluded that approximately 30 percent of the work had been accom-

⁷⁰ Mr. Peters testified that litigation to recover the amount of the tax had been instituted in the West Virginia Court of Claims (Tr. 309).

⁷¹ In *Kleinschmidt Laboratories, Inc.*, ASBCA Nos. 4484, 4485 and 4486 (June 25, 1958), 58-2 BCA par. 1830, the contractor had paid the Illinois Retailers' Occupation Tax and had been reimbursed therefor by the Federal Government. Subsequently the parties entered into supplemental agreements under price redetermination provisions of the contracts which had the effect of reducing the amount of tax due. The supplemental agreements provided that appellant would promptly file a claim for refund with the Revenue Department of the State of Illinois. However, appellant took no action to file a timely claim for refund because the statute provided that a refund could only be obtained by one who had borne the burden of the tax. The Board stated that if the loss of the right to refund was due to appellant's failure to file claim therefor within the required statutory period, appellant must bear the loss and uphold the contracting officer's decision denying appellant credit for the amount of the tax.

⁷² Claim Items II A and D, App. Ex. 1, were settled by stipulation of the parties at the hearing (Tr. 433, 677). Claim Item II B entitled "Drainage" did not include a specific amount.

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plished (Tr. 750). As stated previously (Note 46, *supra*), the contracting officer allowed the sum of \$2,349.30 as fee based on the application of this 30 percent to the amount of fee (\$7,831) allocated by the Government to concrete channels taking into account the appellant's proposal (Govt's Ex. C; Tr. 721, 722). While appellant insists that the contract was negotiated on the basis of a nine percent fee, it has not actively contested the accuracy of the foregoing figures. The Board upholds the contracting officer's determination that \$2,349.30 represents an appropriate fee for work accomplished on concrete channels.⁷³

E. Seals—\$22,636.

As stated above (Note 4), Item 29 of the RFP involved masonry seals in abandoned mines. The RFP stated that the estimated number of seals was 133 and the parties have stipulated that 100 of these seals were completed (Tr. 413). The record does not establish with certainty the reason for the difference.⁷⁴ In any event, the parties have stipulated that appellant is entitled to 100/133 of the fee in its proposal (contract) for this item. They disagree, however, as to the manner in which the amount of fee applicable to this item should be calculated.

Appellant asserts, and its initial undated proposal reflects a fee of nine percent of estimated costs of \$1,321,044.84. Notwithstanding the fact that the final negotiated cost of the contract was over \$200,000 in excess of this figure,⁷⁵ and the fact that the fixed fee of \$118,894.03 remained unchanged, appellant insists that its percentage of fee did not change. Appellant states that the fee in its proposal for seals is nine percent of estimated costs of the seals, \$334,513.26⁷⁶ or \$30,106.17 and that it is entitled to 100/133 of this amount or \$22,636. The Government's position is that the final negotiations which raised the estimated cost, while leaving the total fixed fee unchanged necessarily

⁷³ On brief, the Government asserts that since appellant is only claiming \$980.31, its recovery should not exceed this figure. However, it is clear that appellant's fee claim contemplates recovering as a cost the \$7,500 paid to Mr. Balling, which we have decided must be regarded as fee.

⁷⁴ Mr. Peters testified that the difference was attributable to changes at the job site and the termination (Tr. 440). However, Item No. 29 was not referred to in the termination wire of April 7, 1967.

⁷⁵ The actual increase was \$200,441.16. Mr. Donald Hambric, Chief of Contract Pricing, testified that the \$224,000 for gob handling referred to in appellant's letter of June 23, 1966, was decreased to \$203,669 because it included union costs which were considered inappropriate (Tr. 738). He stated that other deletions totaling \$19,157 and other additions totaling \$15,903 were effected during final negotiations which when added to estimated costs of \$1,321,046 (actual estimated costs were \$1,321,044.84) became the final estimated cost of \$1,521,488.

⁷⁶ The Board has been unable to compute this figure as the estimated cost of Item 29 from appellant's proposal. However, the Board notes that total costs allocated to Item 29 on Government's Exhibit C, a spread sheet dated June 24, 1966, prepared by Mr. Hambric,

Footnote continued on following page.

had the effect of reducing the percentage of fee in the contract to 7.971.⁷⁷ The Government therefore computes appellant's entitlement to fee for Item 29 as follows: $\$344,513 \times 7.971\text{ percent} = \$27,460$ ⁷⁸ $\times 100/133 = \$20,662$.⁷⁹

An understanding of appellant's position requires a discussion of Item 27 (Note 3), even though as previously stated appellant's claim for fee under this item has been settled. Appellant emphasizes the phrase "other presently undefinable work" in Item 27 and asserts that it could not and did not negotiate a fee for undefined work. Appellant contends that fee or profit for Item 27 work was intended to be derived from the difference between equipment and labor rates in its proposal and the actual rates paid for labor and equipment. Mr. Peters testified that during negotiations he was never informed that these rates were not acceptable (Tr. 694). Appellant insists that the fee of nine percent of estimated costs was only for defined items of work. Appellant further contends that the increase in the negotiated price of the contract was a unilateral action by the Government. We have previously alluded to Mr. Peters' testimony in this respect. On cross-examination, Mr. Peters maintained the position that the increase was unilateral in the face of appellant's letter of June 23, 1966, which contained the final revision to appellant's proposal because he said appellant was asked to request the increase by the Government (Tr. 694). We have previously indicated our disagreement with the Government's thesis that the estimated cost of the contract was revised upward because estimated costs for gob handling (Item 29 A) were not included in the total cost of the proposal (Note 5). On the other hand, we are not satisfied that the record supports appellant's contention that the increase was for

allocating costs in the proposal to the various items in the RFP, is \$344,513 broken down as follows:

- | | |
|----|--------------|
| 29 | A. \$226,903 |
| | B. 14,268 |
| | C. 56,033 |
| | D. 47,309 |
-

\$344,513

⁷⁷ This percentage was computed by deducting the West Virginia Business and Occupation Tax of \$29,833 which is applicable to appellant's gross including fee, from negotiated costs of the contract, and dividing the result into the total fee of \$118,894.03.

⁷⁸ Computed by applying the percentage of 7.971 to the components of Item 29 as shown above (*Note 76 supra*), rounded to the nearest dollar.

⁷⁹ This was the sum allowed by the contracting officer. However, the Board's computation of 100/133 of \$27,460, rounded to the nearest dollar is \$20,647.

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undefined work under Item 27. However, we do not find it necessary to resolve this conflict in order to decide this claim.

We do not think that appellant's position can be maintained. First, appellant's position that it had a fee or profit built into its labor and equipment rates on Item 27 is contrary to the concept of a cost-type contract (Note 10). Acceptance of appellant's contention in this respect would require the conclusion that Item 27 was negotiated on the basis of fixed prices for labor and equipment. Apart from Mr. Peters' testimony as to what he thought, there is no evidence to support such a conclusion.⁸⁰

Second, the problem concerning allocation of fee to undefined work in Item 27 did not arise because of the increase in the negotiated cost of the contract. We note in Mr. Peters' testimony that the language in Item 27 did not change between the time of submission of appellant's undated proposal and final negotiation of the contract (Tr. 667). We also note that the estimated cost attributable to Item 27 in the undated proposal (\$75,130) is reflected in the cost schedules accompanying the proposal of June 15, 1966, and that no change was made in these figures by the letter of June 23, 1966. Our examination of appellant's proposal has not enabled us to determine with any certainty that the estimated cost of \$75,130 is reflected in the total of either of appellant's proposals. If the foregoing estimate is reflected in total costs, however, appellant's theory requires the conclusion that it calculated a fee on the basis of costs which already included a profit or fee.⁸¹

The Board cannot ignore the fact that cost schedules accompanying the June 15 proposal reflect an allocation of \$12,000 in fee to Item 27. While Mr. Peters testified that this allocation did not mean anything, that it was not in conflict with the differentials in the equipment and labor rates quoted for Item 27, and that it was made merely because

⁸⁰ Obviously, Mr. Peters' undisclosed intentions cannot alter the clear provisions of the contract. In rebuttal testimony, Mr. Peters could not recall that there were any discussions concerning the percentage of costs that would represent the contractor's fee during negotiations leading to award of the contract (Tr. 889). Mr. Rhodes testified that the question of fee as a percentage did not arise during negotiations since the Government was only interested in total dollars (Tr. 905).

⁸¹ While we have not overlooked Mr. Peters' testimony that if he had given the matter any thought the nine percent fee would have been in addition to the labor and equipment differential (Tr. 655, 681), we are unwilling to ascribe any such intention to appellant. However, there is no doubt that estimated costs of \$80,644 attributable to Item 27 were included in the estimated cost of the contract (see Note 82 *infra*). We note the statement in appellant's Reply Brief, p. 48, that the failure to quote a total for Item 27 in the proposal was deliberate.

someone suggested that there should be a fee distribution (Tr. 680), we do not believe a formal submission to the Government during contract negotiations can so readily be stripped of all significance.

The Board has no reason to question Mr. Peters' sincerity or his testimony that throughout negotiations he considered a nine percent fee rate to be applicable (Tr. 655) and that he did not associate the dollars in fee referred to above on the schedules accompanying the June 15 proposal with Item 27 (Tr. 680). However, the Board determines that it would be unreasonable and contrary to the contract to conclude that any substantial segment of the work did not bear a pro-rata allocation of fee.⁸² The Board finds that whether appellant realized it or not the legal effect of the increase in the estimated cost of the contract, while total fee remained unchanged, was to reduce the percentage of the fee to be paid. The Board further finds that the formula used by the contracting officer in determining allocable fee is reasonable and that appellant is entitled to fee for mine seals in the amount of \$20,647.

III Modifications⁸³

A. I Excavation—\$11,831.83

This claim for fee is computed on all yardage in excess of estimated quantities for excavation in Work Areas 1 through 9, 23, 24, 27, 30, 28 and 44. While appellant contends that a variance in excess of 25 percent from estimated quantities constitutes a change justifying additional fee, it also asserts that the overrun arises principally from design changes such as converting pasture-type backfill to contour backfill. The sum claimed is computed by multiplying the amount of the overrun, 438,216 cubic yards, by \$.30 the estimated cost per cubic yard, times 9 percent, the percentage of fee to estimated costs appellant contends was in its proposal⁸⁴ and the contract. The Government has stipulated that excavation in the listed areas totaled 438,216 cubic yards in excess of estimates (Tr. 521).

Appellant emphasizes that determining fee on the basis of percentage of work performed was recognized as proper by the contracting

⁸² Costs allocated to Item 27 on Government's Exhibit C total \$80,644 to which was allocated fee of \$6,430. The fee computation was added to the spread sheet by Mr. Hambric at a date subsequent to execution of the contract (Tr. 723, 743).

⁸³ All claim items under this heading except for A.1 "overrun excavation" and A.2 "overrun subsidence" have been settled. A portion of the latter claim labeled "overrun adjacent" for fee on cubic yardage (186,095) attributable to work on areas outside the contract plans was settled as part of Item 27 (Tr. 762).

⁸⁴ This claim as originally asserted (Voucher No. 30, March 29, 1968, Flap D, Tab A, pp. 18-23) was computed only on yardage in excess of 25 percent of estimates.

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officer⁸⁵ and that the equity of its position was recognized in a memorandum, dated December 23, 1966, from the project officer.⁸⁶ The Government asserts that the very reason for using a cost-type contract was the difficulty of accurately defining the work, that the contract provides that quantities for excavation and subsidence were only estimates and that the fee must be deemed to have been negotiated with the possibility in mind that the estimates might prove erroneous.

Section II. "Construction work" of the specification provides in pertinent part:

2.01 Plans

* * * The estimated quantities of excavation, compacted backfill, and subsidence excavation are approximate, and as heretofore stated, the Government shall not be held liable for these quantities, and it shall be the responsibility of the bidders to examine the existing ground conditions and contours to verify approximately the amount and type of work required to achieve the desired extent of reclamation as shown on the plans and as specified herein.

Paragraph 1-3.405-5 of the applicable FPR (29 F.R. 10166, July 24, 1964) entitled "Cost-plus-a-fixed-fee contract" provides in part:

* * * The fixed fee once negotiated does not vary with actual cost, but may be adjusted as the result of any subsequent changes in the work or services to be performed under the contract. * * *

The Government's arguments would be correct if the overruns were attributable to errors in the estimates.⁸⁷ However, the thrust of appellant's claim for fee on excavation is not that the estimates were erroneous,⁸⁸ but that the overruns were attributable to design changes such as the change from pasture to contour-type backfill.⁸⁹

⁸⁵ In the memorandum "Detailed Data Supporting Contracting Officer's Determination" (Flap E, Tab E) it is pointed out that allowing fee on overruns could, in the event of a 100 percent overrun, result in appellant earning 100 percent of the fee even though only 50 percent of the work was accomplished because of the termination. The memorandum reflects that 65.97 percent of the excavation work had been completed.

⁸⁶ This apparently is the memorandum referred to previously (Note 33) which is not in the record.

⁸⁷ See *Perry, Dean, Hepburn and Stewart*, DOTCAB Nos. 67-24C, 67-24D (May 14, 1970), 70-1 BCA par. 8293 (architect-engineers not entitled to additional fee merely because performance period of related construction contract was extended or performance was otherwise delayed). See also *Comp. Gen. Dec. B-167951*, April 21, 1970, holding that mutual mistake as to estimated cost of related construction contract would afford no basis for reformation of architect-engineer contract so as to permit payment of additional fee. We think that the possibility that the estimates might prove erroneous was a risk appellant assumed.

⁸⁸ Mr. Mason testified that if he took the Government's drawings and ran the sections and computed the yards, he would have come very close to the Government's estimates (Tr. 549-551).

⁸⁹ Overruns attributable to changes for which change orders either were or should have been issued would provide a basis for additional fee. See *Martin-Marietta Corp.*, ASBCA No. 10062, (July 15, 1965), 65-2 BCA par. 4973, applying an ASPR provision identical with that from FPR quoted above.

The difference between pasture and contour backfill is illustrated by slides 11-4, 11-5, 2-6 and 27-7 of appellant's Exhibit 21 and by appellant's Exhibit 22. Basically pasture-type backfill involves filling with earth an abandoned strip mine or area at the toe of a highwall without any attempt being made to bring the grade of the fill to the top of the highwall. Contour backfill involves moving sufficient earth into the fill so that the grades of the fill meets the top of the highwall. Contour backfill will generally involve the movement of more earth and the operating of earth moving equipment on a steeper slope than pasture-type backfill.⁹⁰ Mr. Arnold, appellant's equipment supervisor, testified that since the object was to seal abandoned mines from air and water, it was necessary in some instances to change from pasture to contour backfill because the highwalls had fractured since the job was engineered⁹¹ (Tr. 495-498, 501-502). He estimated that a contour backfill would involve moving approximately four times as much earth as a pasture backfill (Tr. 519).

The areas originally designated for pasture backfill on which substantial changes to contour backfill were effected are reflected on the map of the work area (App's. Ex. 23).⁹² These areas coincide with the areas in which the overrun yardage is claimed. While it is clear that changes were effected, there is little evidence of probative value in the record as to how much of the overrun yardage is attributable to changes. Mr. Mason admitted that his statement that from 70 to 75 percent of the overrun yardage was attributable to the conversion from pasture to contour backfill was a guess and in answer to a specific question from the hearing member as to how much of the overrun was attributable to such changes he stated "Well, I don't have that figure." (Tr. 543) Notwithstanding this unsatisfactory state of the record, we are convinced that a portion of the overrun excavation yardage is attributable to changes from pasture to contour type backfill and that as to such portion appellant is entitled to additional fee. However, we accept neither the appellant's method of computing the yardage on which the additional fee is claimed nor its contention that the computation should be based on estimated costs of \$.30 per cubic yard. The Board determines by the jury verdict method⁹³ that because design

⁹⁰ Since appellant contends that operating on such slopes increased its costs, its claim for fee is based on an estimated cost of \$.30 per cubic yard rather than the \$.22 for which it was actually reimbursed for excavation.

⁹¹ The conversion to contour backfill was effected by technical directive rather than by change order (Tr. 542).

⁹² While the original plans are not in evidence, the Government has made no attempt to dispute the accuracy of this map. The Board accepts it as accurate.

⁹³ We have utilized the jury verdict method of determining an equitable adjustment in the absence of actual cost data. *Ray D. Bolander Company, Inc., IBCA-331* (March 30, 1970), 77 I.D. 31, 70-1 BCA par. 8200.

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changes were made which increased total excavation yardage, the appellant is entitled to additional fee in the amount of \$3,850.

2. Subsidence overrun—\$9,361.37

This fee claim involves 130,019 cubic yards of material in excess of estimates (Tr. 532). Appellant bases his claim on the contention that overruns in excess of 25 percent of estimates constitute a change or modification to the contract entitling it to additional fee.

Mr. Mason testified as to the origin of the 25 percent figure. He stated that “* * * somewhere you have to decide that it is an overrun and not just a normal variance from contract amount or contract quantity. And having gained the impression that this would at least be given some consideration, it is the figure that we used. It certainly seems reasonable to me.” (Tr. 535).

What we have said above in connection with the claim for fee on excavation overruns adequately disposes of this claim. We hold that the accuracy of the estimates was a risk that appellant assumed. Whether an overrun of several times estimated quantities would afford a basis for additional fee is a question which we do not find it necessary to decide. In response to specific questions by the hearing member, Mr. Mason testified that the overrun was attributable to a combination of more subsidence areas than estimated and subsidence areas being deeper and wider than anticipated (Tr. 545). It is therefore clear that the overrun on subsidence does not arise from design changes. Appellant's claim for fee on subsidence overrun is denied.

V. Indirect Cost⁹⁴

A. Bidding Expense—\$8,771.36

This claim involves costs incurred by appellant in submitting management and technical proposals (App's Exs. 14 and 15) to the Federal Water Pollution Control Administration for Black Creek Drainage on the Susquehanna River, Mocanaqua, Pennsylvania. Mr. Peters testified that preparation of the proposal involved design of a method for the abatement of mine acid and included the construction of two table models—reflecting how the project looked at present and would look after the work was accomplished (Tr. 266-269; App's Ex. 17). He further testified that a cost proposal of approximately \$2,250,000

⁹⁴ These claims concern costs that would normally be included in overhead. While Modification No. 5, effective October 5, 1967, provided for a provisional overhead rate of 75% of direct labor dollars and a G&A rate of 6% of total costs exclusive of G&A, the parties were unable to agree on final rates for overhead and G&A and it was determined that appellant would be paid actual, allowable booked costs without regard to whether the costs were direct or indirect. This was apparently because the instant contract was considered to be appellant's sole contract (Tr. 114).

was submitted (Tr. 269).⁹⁵ After the proposals were submitted, FWPCA decided not to proceed with the project and no contract was ever awarded. As noted above (Note 6) the contracting officer allowed the item as a cost under the contract.⁹⁶ The Government contends that the contracting officer erred apparently because the current FPR (41 CFR 1-15.403.5) prohibits bidding costs as an allowable cost under construction contracts. The Government also made the point at the hearing that since \$3,000 of the amount claimed represented compensation for the services of Messrs. Mason and Peters in preparation of the proposal this sum was not allowable under Clause 47 of the contract.

The Board finds that the FPR provision disallowing bid and proposal expenses as an allowable cost of cost-type construction contracts was added to FPR subsequent to the execution of the instant contract (33 F.R. 5456, April 6, 1968, effective June 1, 1968) and thus is not applicable. The Board further finds that Clause 47 "Direction of Work" is applicable only to work covered by the instant contract as awarded and may not serve as a basis for disallowance of the amount claimed for the services of Messrs. Mason and Peters in the circumstances present here. The Government, for reasons of its own, having chosen to proceed on the basis of "booked costs" (the Report on Final Audit, dated July 2, 1968, Flap D, Tab B, developed an overhead rate of 64.36 percent of direct labor and a G&A rate of 6.19 percent) may not refuse payment upon the ground these expenses made no contribution to the contract. There is no evidence to support the Government's assertion on brief that the proposal was unnecessarily elaborate or the implication therefrom that the costs are otherwise unreasonable. The contracting officer's decision allowing this claim as a cost under the contract was correct and we do not sustain the Government's attempt to repudiate that decision.

B. Supervisory Compensation—\$3,350.66

This claim involves the cost of a jeep the title of which was transferred to Mr. Oran Hartzel as part of his compensation. On brief, both parties have regarded this item as a bonus. In the management chart accompanying appellant's undated proposal, Mr. Hartzel is referred to as Chief of Underground Operations. His biography reflects that he has had over 40 years' mining experience with United States Steel Corporation.

⁹⁵ Although the management proposal (App's. Ex. 14) refers to FWPCA contract (solicitation) WA 67-119, the solicitation is not in the record. However, the Government has conceded that the costs were incurred in response to a solicitation issued by FWPCA.

⁹⁶ The items comprising this cost are detailed on Voucher No. 47, July 9, 1968 (Flap D, Tab A).

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Mr. Peters testified that he had known Mr. Hartzel for years and that at the time appellant submitted its proposal, Mr. Hartzel had only recently retired. Mr. Peters further testified that in addition to certain living expenses he agreed to pay Mr. Hartzel \$1,400 per month as compensation (Tr. 274). The witness stated that the Government subsequently refused appellant reimbursement for the living expenses. Mr. Peters stated that because of Mr. Hartzel's experience and capabilities Hartzel's duties were broadened to include responsibility for all of the work and he was made general superintendent (Tr. 274, 276). Mr. Hartzel's compensation was increased to \$1,500 per month (Tr. 392). Mr. Peters testified that because of confusion in the work and the fact that Mrs. Hartzel became ill, Mr. Hartzel within three or four months after the contract was executed (Tr. 330), indicated his intention to resign. He (Peters) explained that he considered Mr. Hartzel's leaving would be a tremendous loss in fulfilling appellant's obligations under the contract and that as an inducement for Mr. Hartzel remaining it was agreed that the latter would be given the jeep which had been recently purchased and used exclusively by Hartzel on the job (Tr. 275). Mr. Senko, a CPA employed by appellant, testified that appellant's records reflected the jeep was purchased and title transferred to Mr. Hartzel in September 1966 (Tr. 197, 198). Mr. Peters testified that as a consequence Mr. Hartzel stayed until the contract was completed.

The jeep was initially purchased by Peters Fuel Corporation (Tr. 196). However, Mr. Senko, verified the expenditure (Tr. 121, 122; App's. Ex. 12) and testified that the appellant's records reflected transfer of the jeep from Peters Fuel to appellant (Tr. 205). Mr. Senko's statement (App's. Ex. 12) reflects that title of the jeep was in Mr. Hartzel's name. Mr. Leonard, who performed the Government audit, testified that the cost of the jeep was not reflected in appellant's records as of April 30, 1968 (Tr. 148, 151). This claim was first referred to in Voucher No. 38, dated March 29, 1968 (Flap D, Tab A, pp. 73-76), and apparently included in the total of other sums therein claimed as overhead. The claim is not specifically referred to in the contracting officer's final decision. However, numbered paragraph 10 of the Detailed Supporting Data Pertaining to the Contracting Officer's determination (Flap E, Tab E) reflects that all costs claimed on Voucher 38 were considered to be reflected in booked costs and therefore considered in the final decision. The action of the hearing member in denying the Government's motion to dismiss this claim for the reason that it had not been presented to the contracting officer (Tr. 204) was therefore proper and is sustained.

The parties have treated FPR 1-15.205-6(c) concerning cash bonuses and incentive compensation under cost reimbursement type supply and research contracts as controlling the allowability of this claim. This is apparently because FPR 1-15.402-1 provides that except as otherwise provided in Subpart 1-15.4 the allowability of costs shall be determined in accordance with Subpart 1-15.2 of Part 1-15, except where clearly inappropriate. The Board finds that the controlling regulation applicable to cost-type construction contracts (29 F.R. 10302, July 24, 1964, effective October 1, 1964), did not contain the cited section or any comparable provision incorporating FPR 1-15.2 into FPR 1-15.4 and that the cited section was added to FPR subsequent to execution of the instant contract (33 F.R. 5455, April 6, 1968, effective June 1, 1968). However, concluding that FPR 1-15.206(c) represents a reasonable guide as to the allowability of this item, we will consider the claim under that section.

FPR 1-15.206 (29 F.R. 10290, July 24, 1964), provides in part:

(c) *Cash bonuses and incentive compensation.* Incentive compensation for management employees, cash bonuses, suggestion awards, safety awards, and incentive compensation based on production, cost reduction, or efficient performance are allowable to the extent that the overall compensation is determined to be reasonable and such costs are paid or accrued pursuant to an agreement entered into in good faith between the contractor and the employees before the services were rendered, or pursuant to an established plan followed by the contractor so consistently as to imply, in effect, an agreement to make such payment. * * *

Appellant insists that it has met all of the requirements of the quoted regulation. The Government asserts that appellant's evidence reflects that the bonus was not effected prior to rendering of the services or pursuant to any plan and is therefore unallowable. The Government has not asserted and the evidence would not support any contention that Mr. Hartzel's overall compensation including the jeep was other than fair and reasonable.

Implicit in the Government's position is the contention that the regulation must be construed as meaning that in order to be allowable the agreement for bonuses or incentive compensation must have been entered into with the employees in question prior to the rendition of *any* services. The problem with the Government's position is that the regulation does not so provide. This case is quite similar to *Martin-Marietta Corporation*,⁹⁷ wherein the contractor, in order to reduce employee turnover under contracts which required the furnishing of launch crews in connection with the Titan III and Gemini programs, inaugurated a bonus program designed to encourage its employees to

⁹⁷ ASBCA Nos. 12148 and 12371 (February 7, 1969), 69-1 BCA par. 7506.

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remain on the job. The Board rejected the Government's contention that an ASPR provision identical with the quoted FPR meant that the agreement for the bonuses must have been entered into prior to the execution of the contract. The Board ruled that the appellant's announcement " * * * " that bonuses would be paid under certain conditions relating to future services, followed up with written confirmation of the bonuses plan, meets the ASPR requirement that the bonus plan was an agreement entered into in good faith between the contractor and its employees."

Mr. Peters' testimony stands unrebutted on the record and there is no question but that the jeep was transferred to Mr. Hartzel as an inducement for Mr. Hartzel to remain on the job. It is also clear that the agreement for the transfer as well as the transfer itself was consummated prior to the rendition of a substantial portion of Mr. Hartzel's services and was therefore prior to the rendition of the services for which the jeep was additional compensation. We therefore hold that the cost of the jeep is allowable as a cost under the contract. Appellant's claim for this item is allowed.

C. Storage Expense—\$600

This claim is for the expense of storing records pertaining to the contract for a period of five years after contract completion. Mr. Senko testified that the claim was computed on the basis of the records requiring a 10 foot by 10 foot room and a rental rate of \$10 a month for 60 months (Tr. 124, 125). He stated that the principal portion of the records were stored in the Elkins, West Virginia office of appellant in a building owned by Peters Fuel Corporation. Mr. Peters testified that he considered the amount claimed to be reasonable (Tr. 281, 282). This claim was not presented to the contracting officer. However, the Government has waived this objection and has stipulated to some liability for this item (Tr. 248, 249), questioning only the amount.

The Board's review of the contract reveals that the contract (Clause 35 "Records" and Clause 52 "Audit and Records") basically requires the retention of records for a period of three years from the date of final payment. These clauses further provide that records with respect to work terminated shall be preserved for a period of three years from the date of final settlement and that records relating to appeal, litigation and claims or expenses and costs of the contract as to which exception has been taken by the Comptroller General shall be retained until such appeals, litigation or exceptions have been disposed of. It is immediately apparent that final payment under this contract has not

been made, that final settlement of work terminated has not taken place and that final disposition has not been made of the appeal. Since work under this contract was completed early in 1968, it is also apparent that the claim for storage of records based on a five-year period from contract completion has a reasonable basis in fact.

The Board recognizes that contract records cannot be stored without the incurrence of cost. However, the appellant is bound by the provisions of Federal Procurement Regulations in effect on the date of the contract, incorporated into the contract by Clause 24 "Allowable Cost, Fixed Fee and Payment" and we note that Section 1-15.404 (29 F.R. 10302, 10303, July 24, 1964) entitled "Examples of Items of Unallowable Costs" provides in pertinent part:

(n) Storage of contract records after completion of contract operations, irrespective of contractual or statutory requirements regarding the preservation of records * * *.

We find that the Government's stipulation of liability for this item was entered into under a misapprehension. The claim for costs of storage of contract records is denied.

D. Interest—\$3,275.92 ⁹⁸

This claim represents interest at the rate of 6 percent per annum on vouchers which appellant alleges were paid late. The sum is computed on all days in excess of 25 from the date of appellant's mailing the voucher or the beginning of a month, whichever is later, until appellant received a check. A schedule reflecting the amounts of the vouchers and appellant's computation of the number of days of delay in effecting payment is contained in appellant's Exhibit 12. Appellant contends that during contract negotiations a commitment was made that its vouchers would be paid within 20 days, that the contract may reasonably be so construed and that consequently, the statutory (28 U.S.C. 2516) and regulatory provisions prohibiting payment of interest are not applicable.

Mr. Peters testified that during negotiations when appellant was preparing its proposal, he was told by Mr. Rhodes, the Government's contract negotiator, that payment would be made in about 20 days after the month in which the work was done, upon submission of a proper voucher (Tr. 283, 284). At another point Mr. Peters stated "and I do not say that Mr. Rhodes said exactly 20 days. I think he indicated to me that it would be about 20 days." (Tr. 284). Mr. Rhodes testified

⁹⁸The total reflected in appellant's Exhibits 1 and 12. However, on brief this claim has been increased by \$12,536.64 to \$15,812.56 for interest on the amount claimed in this appeal.

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that FWPCA was very concerned about appellant's limited capital and that appellant was told that every effort would be made to pay appellant's vouchers within a 20-to-30 day period (Tr. 823, 824). However, he stated that he was not in a position to make an ironclad promise or to place a provision in the contract providing for payment within this time frame (Tr. 824). Mr. Rhodes testified that special provisions were made for the handling of appellant's vouchers.

With respect to payment, the contract (Clause 24, "Allowable Cost, Fixed Fee and Payment") provides in pertinent part:

(b) Once each month (or at more frequent intervals, if approved by the Contracting Officer), the Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as such representative may require, an invoice or public voucher supported by a statement of cost incurred by the Contractor in the performance of this contract and claimed to constitute allowable cost.

(c) Promptly after receipt of each invoice or voucher and statement of cost, the Government shall, except as otherwise provided in this contract, subject to the provisions of (d) below, [paragraph (d) concerns audit of costs] make payment thereon as approved by the contracting officer.***

The Board finds that neither the record nor the contract establishes that any binding commitment or promise to pay appellant's vouchers within 20 days was ever made. However, even if we could find such a commitment it would avail appellant nothing in this proceeding for the reason that it is well settled that the failure to pay a sum of money when due is a claim for breach of contract over which this Board has no jurisdiction.⁹⁹ Appellant's claim for interest is dismissed.

E. Management Costs—\$23,500

This claim is based on the contention that Mr. Peters was forced to act as general superintendent for the entire project in lieu of salaried personnel whose compensation would have been a reimbursable cost under the contract. Appellant contends that estimated costs for supervision were \$120,000, that the actual expenditure for supervision was \$94,505.68, and that this reduction is attributable to the services of Mr. Peters. The claim is computed at the rate of \$4,000 per month (based on Mr. Peters' income of approximately \$50,000 per year for the preceding five years, App's Ex. 12) for the period August through December 1966 and at 75 percent of nine months x \$4,000 for the period January through September 1967, less a credit of \$23,500 allocable to time Mr. Peters originally contemplated spending on the project.

⁹⁹ Refer *Construction Co., IBCA-267* (May 19, 1961), 68 I.D. 140, 61-1 BCA par. 3048; *Hans Schmoldt d/b/a Schmoldt Engineering Services Company*, ASBCA No. 12797 (September 27, 1968), 68-2 BCA par. 7318. We note Mr. Peters testified that he considered the Government's failure to pay vouchers on time a breach of contract (Tr. 286).

Probably the best way of explaining the basis of this claim is to quote Mr. Peters' testimony:

Well, it was my understanding when I signed this contract that I would provide the organization, and I did that. And that I would provide the capital, and I did that. And that I would arrange for such tools and equipment as were required, and I did that.

And that I would be available to the Government for planning and overall direction of my commitment to the Government.

* * * I think in general we had excellent supervision. Mr. Hartzel, Mr. Arnold are here with us. There were others.

But some of the things that developed—many of the things that developed on this job imposed a burden on me that I didn't anticipate. I feel I had no reason to anticipate, and they were not the type of things that you could delegate to anyone, because there were substantial financial impact with the behavior of the Government that demanded my total commitment to this project, and I believe that it is a fair statement to say that what was comprehended that I would provide was provided, but a great deal more was demanded of me, and to protect my own interests, as well as those of the Government, I had to do a number of things which were not anticipated and as a result of that I felt that the request for salary compensation, in spite of my statement in my proposal, in which there would be no salary for personal expense for Messrs. Mason, Balling, and Peters, that it was in order. (Tr. 292, 293)

We have alluded to the statement in appellant's proposal referred to by Mr. Peters and to Clause 47 of the contract in connection with Claim 1B, Cost Engineering, Concrete (Balling). We also note that in Article IX of the contract, "Key Personnel," Mr. Peters was listed as "Senior Associate" in accordance with Clause 51.

Clause 51 is entitled "Key Personnel and Facilities" and provides in essence that personnel and/or facilities specified in the schedule attached to the contract are considered to be essential to the work being performed thereunder and that no diversion of the specified individuals to other programs shall be made without the written consent of the contracting officer. While the clause does provide that the contracting officer may ratify in writing such diversions and that the schedule may be amended to delete or add personnel or facilities as appropriate, there is no evidence that any such diversion was ever requested or accomplished.

The opening sentence of Clause 47 requires that the work be under the full-time direction of the contractor, if an individual.¹⁰⁰ In view thereof and in view of the provisions of Clause 51 we must hold that the contract contemplated that Mr. Peters would devote his full time thereto¹⁰¹ and that the fact performance of the contract turned out to

¹⁰⁰ We believe that we are justified in accepting the written and oral statements that appellant is a sole proprietorship (Note 1, *supra*).

¹⁰¹ On cross-examination, Mr. Peters admitted stating during negotiations that he was prepared to spend as much time on the job site in the performance of the contract as necessary (Tr. 377).

be more onerous than Mr. Peters contemplated affords no basis for allowance of this claim as a cost.

However, on brief appellant asserts this claim alternatively as fee. At the hearing Mr. Peters testified that the item was claimed as a cost (Tr. 378) while his counsel insisted that it was fee (Tr. 380, 389). We have quoted above in connection with Item III (the claim for fee on modification), the provision of FPR providing that the fixed fee does not vary with actual cost but may be adjusted as the result of any subsequent changes in the work or services to be performed under the contract. In view of this provision, we consider the claim as fee only insofar as change orders providing for additional work were or should have been issued.

Appellant points out that the project officer testified that he had approved ten change orders whereas only five modifications to the contract were issued. However, appellant has admitted (Note 32) that work covered by some of the proposed change orders was included in Modification Nos. 3 and 5 to the contract. Appellant's claims for fee on these modifications have been settled. We have found that work outside areas shown on the contract plans was accomplished under Item 27 and appellant states without contradiction by the Government that the balance of the work covered by the proposed change orders (See Note 32) was also accomplished under Item 27. Here again, however, appellant's claim for additional fee under Item 27 has been settled. Accordingly, even if we could find that work covered by the proposed change orders which was accomplished under Item 27 should have been effected under change orders, there would be no basis for awarding appellant additional fee for such work.

We have carefully considered appellant's other contentions, i.e., that the Government's maladministration of the contract, confusion over the scope of Item 27, the lack of easements from some landowners required for continuous prosecution of the work,¹⁰² the frequent requests for estimates and planning in connection with proposed additional work and the termination, justify the award of additional fee. However, the fee allowed by the contracting officer and the settlement of fee claims read into the record plus the additional fee allowed by this decision totals \$122,951.09 which exceeds the fixed fee in the original contract. Since some fee must be allocated to terminated work, we are of the opinion that appellant is being amply compensated as to fee even if we accept appellant's contention that only 30 percent of the work was terminated and that work performed under Item 27 equaled that terminated.

¹⁰²This apparently is the item of start-stop expense which was settled along with other indirect cost claims.

Appellant's claim for management in the amount of \$23,500 is denied as a cost and also as a fee.

On brief appellant has asserted a claim for special termination costs in the amount of \$10,349.87.¹⁰³ While appellant's fee claim on Modification No. 5 has been settled, the contracting officer has not passed upon this special termination claim. It is, of course, well established that our jurisdiction is appellate only.¹⁰⁴ The special termination claim is remanded to the contracting officer. We think it appropriate to point out, however, that items such as briefing and transcript costs are expenses of litigation which are not allowable in a termination settlement.¹⁰⁵

Conclusion

The appeal is denied in part and sustained in part as follows (from Appellant's Exhibit 1) :

I Direct Cost:

- A. Engineering Field Party (Mason) Sustained in the amount of \$7,490.
- B. Cost Engineering Concrete (Balling). Denied
- C. Diesel Fuel Tax (West Virginia). Denied

II Original Contract Fee

- C. Concrete Field Flume—Sustained in amount of \$2,349.30.
- E. Seals—Denied—Fee allowed for this item is \$20,647.

III Modifications

- A. Overrun Exceeding 25 percent.
 - Excavation, Areas 1, 9, 23, 24, 27, 30, 28 and 44—Sustained in amount of \$3,850.
 - B. Subsidence—Denied

V Indirect Cost

- Bidding Expense—Sustained in Amount of \$8,771.36.
- Supervisory Compensation—Sustained in Amount of \$3,350.66.
- Storage Expenses—Denied
- Interest—Dismissed
- Management Costs—Denied
- Termination Settlement—Remanded to contracting officer.

SPENCER T. NISSEN, *Member*.

I CONCUR:

I CONCUR:

DEAN F. RATZMAN, *Alternate Member*.

WILLIAM F. McGRAW, *Chairman*.

¹⁰³ Increased by \$2,822.82 in the Reply Brief of May 26, 1970.

¹⁰⁴ *Baldi Construction Engineering, Inc.*, IBCA-679-10-67 (April 9, 1970), 70-1 BCA par. 8230.

¹⁰⁵ See *McBride and Wachtel, Government Contracts*, Secs. 24.230; 24.240.

*December 29, 1970***APPEAL OF FULTON SHIPYARD****IBCA-735-10-68***Decided December 29, 1970***Contracts: Disputes and Remedies: Damages: Liquidated Damages**

Since actual damage is not a prerequisite to the validity of a provision for liquidated damages, the Government's admission that it suffered no actual damage did not preclude enforcement of a liquidated damages clause.

Contracts: Construction and Operation: Subcontractors and Suppliers—**Contracts: Disputes and Remedies: Damages: Liquidated Damages—****Contracts: Performance or Default: Excusable Delays—Rules of Practice: Appeals: Burden of Proof**

A contractor's claims for excusable delay based upon an equipment breakdown and machining difficulties encountered by its first tier subcontractor were denied in view of the general rule that labor, plant, equipment and materials adequate for contract performance are the contractor's responsibility and that manufacturing difficulties are not *per se* a basis for excusable delay. While under the rule of *Schweigert v. United States*, 181 Ct. Cl. 1184, a contractor is entitled to be excused for delays attributable solely to a second tier subcontractor without a showing that the second tier subcontractor was free from fault or negligence, a contractor's claim for excusable delay based on the machining difficulties occasioned by the action of a second tier subcontractor in rolling the wrong material, the proper material being unavailable, was denied where the contractor's evidence reflected that the difficulties concerned only one of two gates, which the contract required be shipped concurrently.

Contracts: Disputes and Remedies: Burden of Proof—Contracts: Performance or Default: Excusable Delays

Where the Government admitted that rainfall 50 percent or more above normal occurred during certain months, but the contractor's evidence indicated that normal rainfall would also stop the work and did not distinguish between delays caused by normal and abnormal rainfall, its claim for excusable delay based on unusually severe weather was denied. A claim of excusable delay based on the operation of the priorities system under the Defense Production Act was granted.

BOARD OF CONTRACT APPEALS

This appeal is from the contracting officer's Findings of Fact of October 27, 1969, which denied in part appellant's request for an extension of the shipping date because of alleged excusable delay. The contracting officer's decision had the effect of holding appellant liable for liquidated damages in the amount of \$18,240.

The formally advertised supply contract awarded to appellant on December 23, 1964, required the delivery of two 13.5 by 16.07-foot fixed-wheel gates for the penstocks intake structure at Morrow Point

Dam, Colorado River Storage Project,¹ for a total consideration of \$68,330. The contract required that the gates be shipped within 360 days after date of receipt of notice of award. Appellant received the award on December 28, 1964, thus establishing December 23, 1965, as the required shipping date. Paragraph B-8 of the Special Conditions entitled "Delays—Liquidated Damages" provides for liquidated damages at the rate of \$60 per calendar day if the contractor fails to ship the materials, or any part thereof, within the time set forth in the schedule. Appellant shipped the first gate on August 8, 1967, and the second gate on December 11, 1967 (Appeal File, Items 14 and 16). The contracting officer determined that appellant had encountered excusable delays totaling 414 days and extended the shipping date to and including February 10, 1967 (Appeal File, Items 18 and 22).

Appellant asserts (1) that the assessment of liquidated damages constitutes an unenforceable penalty and (2) that the contracting officer erred in failing to find that an additional 269 days of the delay period were due to causes beyond the contractor's control and without its fault or negligence and thus excusable within the meaning of the contract.

Validity of Provision for Liquidated Damages

It is well settled that a provision for liquidated damages is valid and enforceable if viewed as of the time the contract was entered into:

(1) the harm that would be caused by a breach is very difficult to estimate accurately, and

(2) the amount fixed is a reasonable forecast of just compensation for the harm caused by the breach.²

With respect to (1) the Government emphasizes possible breach of contract claims by the construction contractor for the Morrow Point Dam, possible loss of anticipated revenues from the sale of electrical power which was to be generated at the power plant and increased overhead and inspection expenses attributable to the necessity of maintaining inspectors at appellant's plant and in the field longer than anticipated. The Government asserts that all of these factors are extremely variable and could not accurately be foretold when the invitation for the gates was issued in October of 1964. However, Mr.

¹ The contract for the Morrow Point Dam and Powerplant, awarded on May 14, 1963 (Gov't Ex. 27), listed the gates as among materials to be furnished by the Government. This contract was recently the subject of a Board decision, *Al Johnson Construction Company and Morrison Knudsen Company*, IBCA-789-7-69, IBCA-790-7-69 (September 30, 1970), 77 I.D. 127, 70-2 BCA par. 8486.

² *Zinsco Electrical Products*, IBCA-528-11-65 (April 22, 1966), 73 I.D. 140, 66-1 BCA par. 5526; *Graybar Electric Company Inc.*, IBCA-773-4-69 (February 12, 1970), 70-1 BCA par. 8121.

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Donald J. Searls, Chief of the Specifications and Procurement Branch of the Bureau of Reclamation, testified that it was standard procedure to include provisions for liquidated damages in Bureau contracts to cover estimated overhead (Tr. 83, 90, 93). He testified that the \$60 per day was intended to include the salary of inspectors as well as additional office expense in the field and a portion of the expense of the Bureau's offices in Denver. Mr. Searls further testified that it would be practically impossible to determine the actual loss (Tr. 93). While the determination made with respect to the amount of liquidated damages to be assessed for delayed performance of the instant contract appears to have been made principally with inspection and administrative costs in mind, we note that Mr. Searls' testimony that it was considered to be practically impossible to determine the amount of the loss is, at least, consistent with the Government's present position, i.e., there were other factors such as possible delay claims of the dam construction contractor which made the actual loss from the delayed delivery of the gates difficult or impossible to determine. We find, therefore, that the provision for the assessment of liquidated damages viewed as of the time of contract award, complies with (1) above.³

Appellant asserts that the amount fixed was not a reasonable forecast of just compensation resulting from the breach because (i) the Government suffered no actual damage, (ii) the Government could not reasonably expect to incur any damage until the construction of the dam had proceeded to a point that the gates could be installed, and (iii) the amount fixed is unreasonable and wholly disproportionate to amounts specified for liquidated damages in the construction contract.

Construction of the Morrow Point Dam had not proceeded to a point that the gates could be installed until approximately the time of shipment of the second gate⁴ and the Government admits that it suffered no actual damage. However, at the time the appellant's contract was advertised and awarded the construction schedule for the dam called for the gates to be installed during the months of February, March and April 1966 (Item 117, Govt's Ex. 28). The Government therefore asserts that the fact it may have suffered no actual damage is immaterial to the validity of a liquidated damages provision. We have so held on several occasions.⁵ Appellant cites *Southwest Welding*

³ *Graybar Electric Company Inc.*, note 2, *supra*.

⁴ Government's Answer, p. 9. However, we note that the affidavit of Robert J. Bowen, Project Office Manager for Al Johnson Construction Company (App's. Ex. A), states the project was not ready for the gates until August or September of 1967.

⁵ See, e.g., *Zinsco Electrical Products*, note 2, *supra*, citing among others, *Southwest Engineering Company v. United States*, 341 F.2d 998 (8th Cir.), cert. den., 382 U.S. 819 (1965).

& Manufacturing, et. al. v. United States,⁶ which reversed this Board's decision in *Southwest Welding & Manufacturing Division, Yuba Consolidated Industries, Inc.*⁷ The facts in that case are quite similar to the facts herein in that plaintiff's contract called for the delivery of material to the site of Trinity Dam then under construction as part of the Central Valley Project in California, the material was delivered late, but because of revisions to the schedule of the construction contractor, the material was not actually installed until 22 months after delivery. It was stipulated that the Government suffered no actual damage. While the Court did state as a conclusion of law that a provision for liquidated damages was not applicable where there has been no damage, we consider this to be *obiter dicta* since the Court was in a position to find and did find that under the circumstances there present the claimed liquidated damages were not a reasonable forecast of just compensation for the damage caused by a breach of contract. The circumstances cited, p. 2 of the Decision and Order for Findings of Fact, Conclusions of Law and Judgment, dated December 23, 1969, included a letter written by the project engineer prior to execution of plaintiff's contract which stated that the construction contractor's schedule was optimistic on the basis of past performance thus reflecting Government knowledge that it was unlikely that progress on the construction contract would have reached a point where the material required by plaintiff's contract could be installed at the time delivery was specified. We think *Southwest Engineering Company v. United States* (note 5), is supported by reason and by weight of authority. We hold that actual damage is not a prerequisite to the validity of a provision for liquidated damages.

More serious is appellant's contention in (ii) above since, although actual damage is not a prerequisite to the validity of a provision for liquidated damages, it is clear that there must be an anticipation of loss which bears a reasonable relationship to the liquidated damages sought to be imposed.⁸ As previously noted we think it clear that viewed as of the time appellant's contract was advertised and awarded, the Government could reasonably anticipate loss or damage from late delivery of the gates. While it is true that the anticipation of loss depended upon an assumption that construction of the Morrow Point Dam would proceed in accordance with the then existing schedule (Govt's Ex. 28), we think that this was a reasonable assumption under

⁶ D.C., Central District of California, Civil No. 68-1658-CC, January 14, 1970, unreported.

⁷ IBCA-281 (October 29, 1962), 69 I.D. 173, 1962 BCA par. 3364.

⁸ *Desert Sun Engineering Corporation*, IBCA-470-12-04 (October 25, 1968), 73 I.D. 316, 66-2 BCA par. 5916; *H. I. Homa Company*, Eng. BCA No. PCC-10 (March 14, 1968), 68-1 BCA par. 6978.

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the circumstances. In any event, there is no evidence to the contrary.⁹ Acceptance of appellant's contention would largely vitiate the rule that the validity of provisions for liquidated damages is to be determined as of the time the contract was entered into. We reject the contention that since no loss could have been anticipated until construction on the dam had proceeded to a point that the gates could be installed, the liquidated damages provision is for that reason a penalty.

We turn to the contention that the amount fixed as liquidated damages is unreasonable and wholly disproportionate to amounts specified as liquidated damages in the construction contract. The amount fixed (\$60 per day) is the same whether one or both gates are shipped late.¹⁰ Appellant points out the amount of its contract (\$68,330) is approximately 1/227 of the amount (\$15,436,066) of the construction contract,¹¹ while liquidated damages for Parts (2) and (4) of the construction contract were at the rate of \$200 per day or approximately three times the amount in appellant's contract. The Board finds that work under the construction contract was divided into four parts, that liquidated damages for delay in completion of Parts (1) and (3) were at the rate of \$600 per day for each part and that the amount assessable for delay in completion of Parts (2) and (4) was at the rate of \$200 per day for each part. Thus liquidated damages could be charged in the total amount of \$1,600 per day which is in excess of 26 times the amount specified in appellant's contract. We have previously alluded to Mr. Searls' testimony that the amount specified for liquidated damages was intended to cover the salary of inspectors and additional office expense. We have also referred to possible delay claims by the construction contractor and possible loss of revenue from sales of power. On this record we cannot say that the amount specified bears no reasonable relationship to damages that might have been incurred through delayed delivery of the gates. The fact that the delay was prolonged and that the liquidated damages are approximately 27 percent of the contract price cannot alter this conclusion.¹² The Board finds the liquidated damages clause herein is valid and enforceable.¹³

⁹ We note the letter from the project construction engineer, dated October 12, 1964 (Govt's Ex. 28A), which forwarded the proposed construction program, states in part: "The program appears optimistic but possible of accomplishment."

¹⁰ In *Garybar Electric Company Inc.* (note 2, *supra*), a provision that made no allowance for partial deliveries, i.e., the degree of the breach, was held to be an unenforceable penalty in the absence of a showing that the Government could be damaged as much by the late delivery of several items as of all items. However, that decision is not controlling here since Mr. Searls testified that the powerhouse could not be operated without both gates (Tr. 86, 87).

¹¹ Actually, \$68,330 more closely approximates being 1/226 of \$15,436,066.

¹² See *Suburban Magnesium Foundry, Inc.*, ASBCA No. 11237 (September 29, 1967), 67-2 BCA par. 6666.

¹³ We have not overlooked the contention that there is no proof that time was of the essence. However, it is well settled that whether time is of the essence is not determinative of the right to damages for breach including liquidated damages where specified. 17 Am. Jur. 2d, *Contracts* Sec. 387.

Excusable Delays

As previously noted the second gate was shipped on December 11, 1967, or 718 days after the scheduled time. By Findings of Fact, dated August 30, 1968 (Item 18), the contracting officer extended the shipping date by 87 days or until March 20, 1966, because of a machinists' strike in appellant's plant during the period July 2 to September 26, 1965, inclusive. The shipping date was extended an additional 327 days by Findings of Fact, dated October 27, 1969 (Item 22). The 327 calendar days was comprised of the following: 262 days consequential delay—the machinists' strike having prevented delivery of the gates to the subcontractor, W. R. Gunkel Company, for machining by the originally schedule time, the subcontractor having other commitments, and alternate sources with the capability of performing such work being unavailable;¹⁴ 60 days due to operation of the priorities system; and five days because of delay by the California Division of Highways in issuing a shipping permit. Appellant contends that it is entitled to an additional 197 days of excusable delay because of delays in the plant of its subcontractor, W. R. Gunkel Company, an additional 41 days because of delays in the plant of a second subcontractor, Todd shipyards, and an additional 31 days due to operation of the national priority system.

The claimed excusable delays in the plant of the subcontractor, W. R. Gunkel Company, are broken down into 14 days due to equipment preparation, 60 days due to equipment breakdown, 60 days due to unusually severe weather and 63 days because the steel in the gates was unexpectedly hard and difficult to machine.

Equipment Preparation

Mr. W. R. Gunkel testified that the gates arrived at his plant about mid-June of 1966 (Tr. 10). He stated that fixtures for holding the gates in position for machining, referred to in the industry as shop aids, had been completed prior to arrival of the gates. He stated, however, that after the gates arrived it was necessary to spend about two weeks altering the machine in order to accommodate the machining of the seal seats in an up-and-down position (Tr. 10, 11). This two weeks represents the basis for the claimed additional 14 days excusable delay in equipment preparation. Mr. Gunkel further testified that the direction to machine the gates in an upright position came not from the Government but from appellant and that a satisfactory re-

¹⁴This extension was computed from the end of the strike, September 26, 1965, to and including the arrival of the gates at the W. R. Gunkel Company plant on June 13, 1966.

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sult could have been obtained by machining the gates in a horizontal position (Tr. 34, 35).¹⁵ There is also an indication that the gates were machined in a vertical position because Mr. Gunkel considered that "It was much faster to do it that way" (Tr. 36). The evidence will not support a finding that the delay of 14 days in equipment preparation was due to causes beyond the control and without the fault or negligence of appellant and its subcontractor—a finding which is essential in order to support a determination of excusable delay under paragraph 11(c) of the General Provisions.

Equipment Breakdown

With respect to the equipment breakdown, Mr. Gunkel testified that the support on the feed gear of his milling machine broke on March 23, 1967, that this in turn bent the shaft that was supporting it and some additional supports were broken, that the machine was not repaired until May 15 and that the machine was back in operation about May 20 or 21, 1967 (Tr. 17, 18). He stated that the breakdown was due to extreme pressure caused by milling the gates in an upright position due to the cutter being over 20-foot high while the base of the machine was less than half of that height (Tr. 15). The witness further testified that the breakdown was not due to lack of maintenance and was not preventable other than by not doing the job.

It is a general rule that equipment breakdowns are not an excusable cause of delay.¹⁶ The reason for this rule is that it is the contractor's responsibility to have labor, plant, equipment, finances and material adequate for contract performance. This rule includes subcontractors, or, at least, those of the first tier. We note Mr. Gunkel's testimony that the primary cause of the breakdown appeared to be strains caused by machining the gates in an upright position. We have already found that the decision to machine the gates in an upright position was that of appellant and its subcontractor, W. R. Gunkel Company, and not that of the Government. The claim of excusable delay based on equipment breakdown is denied.

Unusually Severe Weather

Appellant alleges that it was delayed 60 days by unusually severe weather during the period June 15, 1966, when the gates arrived at the

¹⁵ The Board notes that paragraph D-5 entitled "Gate" of the specifications permits machining of seal baseplates in either the horizontal or vertical position.

¹⁶ *Ree Systems Corp.*, ASBCA No. 11327 (May 23, 1966), 66-1 BCA par. 5597; *William J. Gillespie*, IBCA-415 (April 1, 1965), 65-1 BCA par. 4756; *Meyer Machine, Inc.*, IBCA-593-10-66 (December 29, 1967), 68-1 BCA par. 6770.

W. R. Gunkel plant, to August 15, 1967, when the last gate left the Gunkel plant. Mr. Gunkel testified that his machine was enclosed on three sides, the open side being to the west (Tr. 42). He further testified that while prevailing winds were from the west, storms came from a southeasterly direction and the wind whipped rain into the enclosure. He stated that there were two months during which he was prevented from working because of the weather none of which included the period his machine was broken down (Tr. 18, 19). The contracting officer found that the period November 1 through the following April is normally the rainy season in the Sunnyvale, California area. Using weather records for the nearest official U.S. Weather Bureau Station (Santa Clara University), he determined precipitation for the period November 1966 through April 1967, totaled 20.21 inches as compared with a normal total of 12.77 inches or 58 percent above normal. He further determined that rainfall for the months of December 1966 and February 1967, totaled 2.94 inches as compared with a normal total of 5.60 or 90 percent below normal. Rainfall for April 1967 was 3.70 inches as compared with a norm of 1.11 inches or 233 percent above normal.¹⁷ However, the contracting officer denied any extension for unusually severe weather because of the absence of evidence that the work was thereby delayed. He also pointed out that no extension was allowable for the month of April since the Gunkel milling machine was out of service during that period due to an equipment breakdown. The Board has held that precipitation 50 percent or more above normal constitutes unusually severe weather within the meaning of the "Termination for Default—Damages for Delay—Time Extensions" Clause of Standard Form 23A applicable to construction contracts.¹⁸ However, it does not follow that appellant is entitled to a time extension in the absence of evidence that it was thereby delayed.¹⁹ Other than the testimony of Mr. Gunkel that they were prevented from working a total of 60 days because of rain, there is no evidence of specific days lost due to excessive rain, i.e., evidence that work was intended and otherwise ready to proceed, or of the amount of rainfall on those days. Also lacking is evidence of the number of days of delay that could reasonably be expected to occur under normal weather conditions.²⁰ Appellant has failed to establish entitlement

¹⁷ The accuracy of these findings is admitted by the Government's Answer and not controverted by appellant.

¹⁸ *J & B Construction Company, Inc.*, IBCA-667-9-67, IBCA-767-3-69 (April 17, 1970), 70-1 BCA par. 8240; *Herman H. Neumann*, IBCA-682-11-67 (April 8, 1970), 70-1 BCA par. 8216.

¹⁹ *J & B Construction Company, Inc.*, note 18, *supra*.

²⁰ We note Mr. Gunkel's testimony that $\frac{1}{2}$ -inch of rain in a day would be considered above normal and that $\frac{1}{4}$ -inch of rain accompanied by a .5 or 10 mile wind would saturate the job they were working on and stop the work (Tr. 44).

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to an extension of time due to unusually severe weather and its request for such an extension is denied.

Unexpected Hardness of Steel

Mr. Gunkel testified that the seal seats on the gates proved unexpectedly difficult to machine (Tr. 23). He testified that the milling machine cutters started burning up, that they had to slow the machine down and virtually wear the steel out in order to get it finished (Tr. 23, 24). He stated that machining the first gate required an additional three weeks and the second gate an additional seven weeks. This witness indicated that he anticipated that the seal seats would be carbon clad material whereas they turned out to be stainless steel bars (Tr. 39, 40). However, Mr. Gunkel was unable to state what material was specified for the seal seats in the specifications and his anticipation was apparently based on verbal discussions with appellant (Tr. 40). Appellant argues that the machining difficulties are attributable to a substitution of steel approved by the Bureau. However, Mr. Leslie Fulton testified that the substitution related to the stainless clad for wheel bores, which were machined by Todd Shipyards,²¹ and that no change was made on the stainless steel base bars (Tr. 67). This testimony is confirmed by Dwg Sk-1033-1 attached to the letter from appellant to the Bureau, dated June 23, 1965 (App's Ex. D.). The drawing reflects that the substitution of steel requested by appellant and approved by the Bureau's letter of July 8, 1965 (App's Ex. E), related to wheel mounting rings. The record will not support a finding that the difficulties of appellant's subcontractor, W. R. Gunkel Co., in machining the seal seats are a cause beyond the control and without the fault or negligence of appellant and its subcontractor. Appellant's claim for excusable delay based on these difficulties must be denied.²²

On brief appellant claims entitlement to an additional two weeks of excusable delay based on Mr. Gunkel's testimony that the work could not proceed for that period of time while a Government inspector was on vacation in 1966 (Tr. 45-47). However, the Board finds that any such delay was concurrent with other excusable delay recognized

²¹ The purchase order from appellant to W. R. Gunkel Co., dated June 7, 1965 (Ex A attached to the letter from appellant's attorneys, dated September 8, 1969, Item 22C), calls for Gunkel to machine Gate Seal Seats and Line Bore Wheel Holes per Dwgs 622-D-881 and 622-D-882. Machining of bore wheel holes was subcontracted to Todd Shipyards to speed up the work.

²² See *William J. Gillespie*, note 18, *supra*. (Manufacturing difficulties are not *per se* a proper basis for a finding of excusable delay.)

by the contracting officer and thus not a proper basis for an additional extension.

*Delay in Plant Todd Shipyards Corporation*²³

This claim involves 41 days of which 17 concern the first gate. The evidentiary basis for these claims is a letter from Todd Shipyards Corporation, dated May 29, 1970 (App's Ex. B). The letter states that 8 to 10 working days were lost on the first gate because areas at ends of wheel bores, built up with stainless steel weld deposit were too hard to machine with normal cutting tools and it was necessary to suspend work while special oil hardening steels were purchased, cut, hardened and ground to suit.

Mr. Fulton testified that Lukens Steel Co. rolled the wrong material and that appellant would not have been able to complete fabrication of the gates if they had waited for the material that was specified (Tr. 65).²⁴ He stated that the alternate suggested by appellant and approved by the Bureau required welding. A letter from Pacific Metals Company to appellant dated June 14, 1965 (App's Ex. C) refers to appellant's Order No. 5000-1033 (which is not in evidence) and states in part: "We have been unsuccessful in locating material covered by the above order." The letter further states that "the only alternate we can offer is the Grade A-212 steel produced by Lukens Steel Co." The error by Lukens Steel Co. in rolling the wrong material is the action of a second tier subcontractor and thus not chargeable to appellant under the rule of *Schweigert Inc. v. United States*.²⁵ However we note that the letter from appellant to the Bureau, dated December 20, 1965 (Encl. 3 to appellant's letter of October 1, 1968, Item 21), states that due to an error in machining Part No. 879-3, Dwg. No. 622-D-883, the wheel bores have been made oversize. One of the suggested methods of correcting the error is: "(a) Lay 1/8" thick welding bead with the wheel preheated to 450° F., and remachine to size." While the record does not indicate that the error was in fact corrected by the method suggested, the foregoing certainly casts doubt on the supposition that the welding deposit, which was the cause of Todd Shipyards' machining difficulties, can be attributed solely to the substitution of steel made

²³ The parties stipulated that Todd Shipyards was a subcontractor of appellant rather than of W. R. Gunkel Co. (Tr. 6).

²⁴ The letter from appellant to the Bureau, dated June 23, 1965 (App's. Ex. D), requesting approval of the substitution of steel for the wheel rings states that Pacific Metals Company has informed us that Lukens Steel Co. rolled the stainless steel clad plate with ASTM Grade A-212 in lieu of A-285 backing.

²⁵ 181 Ct. Cl. 1184, 388 F. 2d 697 (1967). See *Galland-Henning Manufacturing Company, IBCA-534-12-65* (March 29, 1968), 75 I.D. 721, 68-1 BCA par. 6970, in which relief was predicated upon *Schweigert*.

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necessary by Lukens' error and the fact that proper material was unavailable. Even if we resolved this issue in appellant's favor and determined that appellant had established entitlement to excusable delay because of the machining difficulties experienced by Todd Shipyards, appellant would not thereby be relieved of liquidated damages. This is so because under the contract liquidated damages were imposed for delay in the shipment of either gate and it is not even alleged that Todd Shipyards experienced machining difficulties on the second gate. Appellant's claim for excusable delay due to machining difficulties experienced by Todd Shipyards on the first gate is denied.

The remaining seven days of delay claimed on the first gate are attributed to vacations and unreplaced night-shift machinists. It is well settled that an adequate force of skilled labor is the contractor's responsibility and that an inability to obtain or maintain an adequate labor force may not generally be equated to a cause beyond the contractor's control and without its fault or negligence within the meaning of paragraph 11(c) of the General Provisions.²⁶ The foregoing reasoning is equally applicable to summer vacations which are now customary. We find no merit in this claim.

The second gate arrived in the Todd Shipyards' plant on August 15, 1967. The letter from Todd Shipyards stated that after the first gate was completed on July 13, 1967, its facilities remained open awaiting arrival of the second gate. The letter further states that because delivery of the second gate was delayed, it took on other commitments which occupied its tool time until late September. Consequently, the second gate was shipped from its plant on November 1, 1967, an estimated delay of 3½ weeks. We have found that delays in the plant of W. R. Gunkel Co., were not excusable. We cannot find that delays in the plant of Todd Shipyards Corporation due to prior commitments were due to causes beyond appellant's control and without its fault or negligence within the meaning of paragraph 11(c) of the General Provisions. The claim for excusable delays in the plant of Todd Shipyards is denied.

Delays in Plant of Fulton Shipyard

After machining operations on the gates had been completed, the gates were returned to appellant's plant (July 13 and November 1, 1967), for assembly and finishing operations. Mr. Leslie Fulton testified that operations on the first gate were delayed ten days and operations on the second gate were delayed 21 days by virtue of work on

²⁶ *Si Lite, Inc.*, GSBCA No. 2442 (May 7, 1968), 68-1 BCA par. 7032 and cases cited.

Contract No. NBY-78893 for a 55-ton gantry crane for the Navy which carried a higher priority rating than the Bureau's contract (Tr. 71-74). This was a separate contract than Contract No. NBY-67341 for which the contracting officer had determined that appellant was entitled to a 60-day extension of the shipping date since it also carried a higher priority rating under the Defense Materials System than the Bureau's contract. Paragraph B-7 of the Special Requirements of the contract entitled "Delivery-Urgency Of" provides in pertinent part:

b. Priorities. If performance under this invitation is delayed by operations of any United States national priorities or material allocation system, the time for shipment will be extended to compensate for such delay.

The Government has not actively contested appellant's claim for an extension because of the operation of the priorities system. The fact that the Navy contract was awarded subsequent to the Bureau contract (Tr. 73) is not determinative. However, operations on the first gate were completed prior to the return of the second gate to appellant's plant and shipment of the first gate ten days earlier would not have relieved appellant of liquidated damages. An extension of 21 days, the delay on the second gate attributable to operations of the priorities system under the Defense Production Act, is granted.

Conclusion

The shipping date as determined by the contracting officer is extended by 21 days from February 10, 1967, to and including March 3, 1967.²⁷ The appeal is otherwise denied.

SPENCER T. NISSEN, *Member.*

I CONCUR:

WILLIAM F. McGRAW, *Chairman.*

APPEAL OF THE BRANDON COMPANY

IBCA-758-1-69 Decided December 29, 1970

Contracts: Construction and Operation: General Rules of Construction—

Contracts: Construction and Operation: Changes and Extras

The contractor is entitled to compensation for a change for moving a transmission line tower approximately 80 feet from where it had been erected

²⁷ Appellant contends that a letter from the Bureau to appellant, dated March 3, 1967 (Item 10), which states in part that "The construction contractor's approved schedule provides for installation of these gates in August and September of this year" constitutes an amendment of appellant's contract. However, the letter includes the statement that it is to your advantage to minimize the assessment of liquidated damages and it is clear that the letter does not constitute a waiver of liquidated damages.

December 29, 1970

to where it should have been erected when the evidence shows that the contractor had initially erected the tower on a site staked by the Government as the tower site and contractor had made an adequate check of such site before erecting the tower.

BOARD OF CONTRACT APPEALS

In the construction of the Noxon-Conkelley 230 KV transmission Line No. 1, tower 4/2 was staked and erected in the wrong place, at station 5322, about 80 feet from where it should have been. In order to sag the conductor it was necessary to move the steel tower to its proper position at station 5322 + 80. At issue is who should bear the cost (stipulated at \$3,400), the Government or appellant, under specification paragraph 1-109.B.1, which reads as follows:

B. *Transmission Line Construction.* 1. The Government has placed a center hub marked with line stationing and elevation at each tower location. The contractor shall check the stationing and alignment of each center hub and shall make necessary corrections to line and grade. Missing or destroyed center hubs and bench marks shall be reestablished by the contractor from existing reference points or by rerunning the center line from existing hubs. Site data sheets and an abstract of bench marks, angle points, and points on tangent, giving station, description, and elevation, will be furnished the contractor. Stakes and hubs will be furnished the contractor.

The Government's position appears to be that the contractor's obligation to "check" the stationing and alignment of each center hub means that the contractor bears the total responsibility for the effect of any errors in staking, even if the errors were in staking tower center hubs by the Government (Tr. 37, 45). There is no evidence that this view of the contract was communicated to appellant before the dispute arose.

Appellant contends that its "check" was adequate and discharged its obligations making the subsequent order to relocate the tower a change. Further, appellant contends that it should be able to rely on the accuracy of the Government provided tower center hubs (Tr. 101, 103). Thus, in addition to deciding factual issues, the Board must resolve here a question of law—the meaning of paragraph 1-109.B.1 of the contract.¹ The Board must also decide, as a question of document interpretation, whether the plan and profile on Contract Drawing 181-14-D was adequate to have put appellant on early notice of the error in the staking and siting of tower 4/2.

As to factual issues, the Board finds that tower footings for tower 4/2 were staked, and the tower erected, on a site staked as the site for

¹ See e.g., *Rivers Constr. Corp. v. United States*, 159 Ct. Cl. 254, 262 (1962).

tower 4/2. This is the only conclusion which can be drawn from the evidence. The testimony of appellant's witnesses in this respect is confirmed by the testimony of Mr. Cheshire, a Bonneville Power Administration inspector, who in the early morning of June 18, 1968, went out to the tower site. There he found a 2x2 hub which was not disturbed, a guard stake lying on the ground and a guard stake standing appropriately marked for station 5322+80, exactly where the tower was supposed to be (Tr. 158). The tower center was apparently in proper alignment, if not on proper station.

Government Exhibit B is the only evidence possibly in conflict with the above finding. Exhibit B consists of a few pieces of a stake which it is alleged bears an inscription for the proper station of tower 4/2. It was found lying under debris at station 5322+80 when the Government relocated the site. A stake point was found embedded in the ground (Tr. 164-165). Apparently no hub was found at 5322+80. Even assuming that Exhibit B is what the Government asserts it to be, a guard stake for tower center hub for tower 4/2, it cannot contradict that a tower center for tower 4/2 was erroneously staked at station 5322. At the most we must simply accept the inexplicable fact that two tower centers were staked.

We also find for the purposes of this appeal that appellant's surveying subcontractor "checked" or confirmed the location of the center for tower 4/2 in the following manner: On finding an undisturbed hub with guard stakes showing the proper stationing and elevation for the tower center, the information on the guard stakes was "checked" against contract data in possession of the staking crew. The contract data consisted of the contract book, profile sheet, and cadastral sheet or tower study sheet. Leg extensions were compared, and the elevations on the stakes were compared to what was shown on the various data sheets (Tr. 50-52; 103, 104). The topography was also compared to the data sheets (Tr. 58, 104). More briefly put, if a stake marked tower center with right elevation and station were found undisturbed, and if the stake data checked out with contract data, then the tower footings were staked (Tr. 71-72). It was testified that the practice in the construction industry was to follow the stakes set by the owner, unless there appeared to be an obvious error, or a stake was missing (Tr. 85-86). That practice seems to have been followed here. We point out here that there is no issue or allegation of deficiency in the Government data made available to the survey party.

Tower 4/2 footings were staked on August 24, 1967, and no problems were noted in the field notes (Tr. 56-57).

It was the subcontractor's practice to use a chain or instrument to relocate and confirm a tower center from other points of reference only

December 29, 1970

if it appeared that the hub had been destroyed, displaced, or showed some evidence of being disturbed (Tr. 52, 83-86). This procedure followed the third sentence of paragraph 1-109.B.1.

We come now to the central issue, did the "check" as performed by appellant's subcontractor meet the requirements of the contract. Under the Government's view the answer would be no. Indeed, under the Government's view even the greatest amount of confirmatory work by appellant would not meet its obligation if the end result were a mistake in the stationing and alignment of the tower. Such a reading of the contract is, in our opinion, unreasonable.² Not only would it cast an unreasonable burden on the contractor, but also would relieve the Government of exercising any care in discharging its obligation to place tower center hubs. Accordingly, the Government's view is rejected.

We must decide whether the procedure used by appellant's subcontractor, as outlined above, was adequate and here our judgment must be guided by what in practicality is done.

Government witnesses testified that if the Government were staking tower footings it would "check" the stationing and alignment by doing, basically, all the things that appellant's subcontractor did, and in addition would, it seems, survey to some nearby established reference, such as a bench mark, point on tangent, or other established tower center even if the hub being checked were undisturbed (Tr. 134, 137).

Thus, it appears that the only difference in procedure between Government and appellant's contractor with respect to undisturbed hubs is the Government's additional step of confirming by some instrument to another reference. But even surveying to the nearest reference point, be it bench mark, point on tangent, or established tower center, would not necessarily guarantee an accurate "check" of stationing and alignment. An inaccuracy in establishment of a reference point would carry over into the confirmation of a tower center (Tr. 104, 119, 121).

In arriving at our conclusion that the appellant's subcontractor used adequate procedures we are influenced by the following facts: (i) appellant apparently was not supplied with lists of bench marks, and was not given complete lists of points on tangent locations³ (Tr. 61, 68, 134); (ii) error occurred as to only one tower out of 493 towers extending over 100 miles of bad terrain (Tr. 47); (iii) appellant's subcontractor was acknowledged to be a top performer in its field (Tr.

² Cf. *Allison & Haney, Inc.*, IBCA-587-9-66 (July 24, 1969), 76 I.D. 141, 69-2 BCA par. 7807.

³ This omission we view simply as an indication of what was reasonably expected of appellant at the time in confirming tower centers, and not as a deficiency on the part of the Government.

139); (iv) the mistakenly erected tower was in proper alignment if not at proper station; and (v) it was testified that the procedures used conformed to the practice in the industry (Tr. 85-86).

In its arguments, the Government has placed heavy emphasis on drawing 121-14-D, asserting that the plan therein should have alerted appellant to the fact that the tower had been displaced about 80 feet from where it should have been. The plan shows mile 4 on the Noxon-Conkelley No. 1 Line running parallel to a 230 KV Spokane-Hot Springs Line which had been erected some years earlier. The stationings on both lines appear to be parallel. The plan also shows tower 4/2 to be erected at station 5322+80, and tower No. 449 on the adjacent line at what would be about station 5322 on that line. This offset, asserts the Government, should have alerted appellant to the fact that when tower 4/2 was sited exactly opposite tower 449, something was wrong.

Appellant's subcontractor characterized the plan as merely a graphic illustration of the adjacent line (Tr. 106). His survey party chief stated that the adjacent line towers were usable only as a rough reference but not to determine exact location (Tr. 72-73). We agree and therefore must hold that the plan was not enough to alert appellant to the error. It is, in our opinion, fatally defective for such purpose because it does not give a station for tower 449, although it does for tower 4/2. Accordingly, we cannot interpret the plan as intended to give a true and accurate representation of the adjacent line suitable for use in confirming the stationing and alignment of towers on the Noxon-Conkelley No. 1 Line.

In arriving at our conclusion we have taken a view of what was required in this case by the sentence in specification paragraph 1-109.B.1 which simply required appellant to "check" stationing and alignment, but not to verify it.⁴ We have not read paragraph 1-109.B.1, in calling for reestablishing missing or destroyed hubs by survey, as either excluding the necessity of a survey as part of a check of an undisturbed hub, or as requiring such a survey for undisturbed hubs. We hold merely that under the facts of this case appellant discharged its obligation as to tower 4/2.

Conclusion

The appeal is sustained in the amount of \$3,400.

ROBERT L. FONNER, *Member.*

I CONCUR:

WILLIAM F. McGRAW, *Chairman.*

⁴ Cf. Hunt Contracting Company, IBCA-301 (December 27, 1963), 1963 BCA par. 3970.

YUMA PROJECT, CALIFORNIA (EL RANCHO DEL RIO, INC.)

December 30, 1970

EXCESS LAND OWNERSHIP, RESERVATION DIVISION—YUMA
PROJECT, CALIFORNIA (EL RANCHO DEL RIO, INC.)

Bureau of Reclamation: Excess Lands—Secretary of the Interior

Involving 319.3 acres of land covered by water right applications under sec. 5 of the 1902 Act (31 Stat. 790) and sec. 3 of the 1912 Act (37 Stat. 265); when full payout of construction charges has been made and when the Secretary determines that a general pattern of family sized ownership has been established in the area, then the Secretary must deliver water, if available, to the entire tract, including the 159.3 acres of "excess" lands.

M-36818

December 30, 1970

TO: REGIONAL SOLICITOR, LOS ANGELES.
SUBJECT: EXCESS LAND OWNERSHIP, RESERVATION
DIVISION—YUMA PROJECT, CALIFORNIA (EL
RANCHO DEL RIO, INC.).

The facts of the situation are as follows:

In 1969 El Rancho Del Rio, Inc. acquired ownership of 319.3 acres of land in the Reservation Division of the Yuma Project, California, from owners, husband and wife, in whose hands it was nonexcess. Under the corporation's ownership 159.3 acres of the total is in excess status. Reservation Division lands are served under individual water right applications, i.e., the lands are not covered under a water delivery and repayment contract with an irrigation district pursuant to section 46 of the Omnibus Adjustment Act of May 25, 1926, 44 Stat. 636. The 319.3 acres here involved are covered by eight separate water right applications under section 5 of the Act of June 17, 1902, 32 Stat. 388 and section 3 of the Act of August 9, 1912, 37 Stat. 265. Construction charges on six of the applications were fully paid through regular annual installments prior to 1962. Final construction charges on the other two applications were paid on an accelerated basis in 1965, prior to acquisition of the lands by either the corporation or its immediate predecessors in interest. With the exception of the 159.3 acres owned by the corporation and 31 acres owned by another party, none of the lands in the Reservation Division, which consists of approximately 15,000 acres, is in excess status.

The El Rancho Del Rio case again presents for consideration the extent of the Secretary's power and discretion under secs. 3 and 5 of the 1902 Act (32 Stat. 388), sec. 3 of the 1912 Act (37 Stat. 265), and sec.

12 of the 1914 Act (38 Stat. 686) with regard to private lands served under individual water right applications for which payment of all construction charges have been made. The precise question is whether such payment releases the lands from further application of the acreage provisions of Reclamation law?

In 1961, Solicitor Frank J. Barry issued a long and thorough opinion on this very point and concluded that

* * * The pertinent question here may be summarized as "when payout occurs, has a general pattern of family-size ownership been established?" If it has, then the release from further limitation would be within Secretarial discretion.
* * * 68 I.D. 372, 405 (1961)

Barry's conclusion was the result of an extensive review of the legislative histories of the 1902 Act (32 Stat. 388), the 1912 Act (37 Stat. 265), the 1914 Act (38 Stat. 686) and the 1926 Act (44 Stat. 636). In the end he opts for and advances the policy argument that the break up of large estates is a continuing and major goal of reclamation which is not affected by the completion of payment.

Professor Sax observed,

The view that ultimately swayed the Solicitor was the excess land law represents an economic policy rather than a device to protect the Federal investment [Water and Water Rights, Vol. 2, Sec. 120.10]

But to reach the conclusions he did, the Solicitor had to distinguish away the problems raised by the apparently contrary language in sec. 3 of the 1912 Act. That section says, in essence, "that no person shall * * * hold irrigable land * * * before final payment in full of all installments of building and betterment charges shall have been made * * * in excess of one farm unit * * *."

Given the legislative history surrounding this section and the strong and consistent acreage limitation policy found in previous and subsequent Reclamation acts, the Solicitor's conclusion seems appropriate. The point which deserves more consideration is the language in the Barry opinion which states, in effect, that after payment in full and the establishment of a general pattern of family sized ownership, the Secretary "may (but need not) permit the delivery of water under individual water-right applications for more than 160 acres." 68 I.D. 372, 383. The language quoted is from Barry's interpretation of the meaning of a 1914 opinion by Bureau of Reclamation General Counsel Will King on sec. 3 of the 1912 Act, yet it, nevertheless, reflects the former Solicitor's ultimate position on the subject at hand.

There is adequate justification for the conclusion that full payout alone on lands served under individual water-rights applications

YUMA PROJECT, CALIFORNIA (EL RANCHO DEL RIO, INC.)

December 30, 1970

obtained before the passage of the 1926 Omnibus Adjustment Act does not take what would be excess lands out of the acreage limitations imposed by reclamation law. As Barry said, when payout is made on such lands then the Secretary can deliver water to formerly excess lands if a pattern of family sized ownerships has been established, since this is one of the major policy goals of the Reclamation law. But what happens when an excess landowner, who has paid off all the construction charges, can also demonstrate that a pattern of family sized ownerships has been developed? Can the Secretary, in his discretion, still refuse to deliver water to such lands, or does the combination of full payout and the establishment of family sized ownerships automatically release the land from further application of the acreage limitation?

The Secretary has the ultimate authority to determine if such an ownership pattern has in fact been developed, but can he find that such a pattern has been established and still withhold water on the basis that the lands are "excess"? It is my opinion that he cannot. Mr. Barry himself pointed out that the crucial element of the 1914 and 1926 Acts was the resolve of the Congress, as a matter of deliberate policy, to prescribe by statute measures aimed specifically at the early breakup of pre-existing large holdings. The 1902 and 1912 acts manifested the same intent but had not been successful. [68 I.D. at 377] Once this crucial policy goal has been attained it is hard to understand why or under what authority the Secretary would not release the lands from excess status. This should be especially true in the present case where full payout was made on six of the eight water-right applications through regular installments since Barry noted that "* * * it is to be expected that in later years, as for example, after the usual 40-year payout period for a repayment contract, conditions would be such as to permit of such a determination compatibly with the underlying objectives of the reclamation law." (68 I.D. at 405). To permit the Secretary to refuse such a landowner would be to permit him to undermine the policy of the very Act he is supposed to be enforcing.

For these reasons, it is my opinion that full payout having been made, the Secretary must deliver water, if available, to the 159.3 acres of plaintiff now in question, if the evidence before him indicates that a general pattern of family sized ownership has been established in the area.

MITCHELL MELICH,
Solicitor.

ESTATE OF JOHN J. AKERS*

IBIA 70-4

Decided September 9, 1970

Indian Lands: Descent and Distribution: Generally

When an Indian dies leaving a will made pursuant to 25 U.S.C. 373, which meets Secretarial approval, State laws pertaining to dower or courtesy rights are not applicable and do not affect the manner in which he devises his trust property.

Indian Lands: Descent and Distribution: Generally

When the Board of Indian Appeals determines that the legal interpretation of a probate case is correct and that the case has been properly conducted, decided and reviewed, its decision is the final decision of the Department.

BOARD OF INDIAN APPEALS

Dolly C. Akers, by and through her attorneys, has appealed five times to the Secretary of the Interior from a decision of a hearing examiner, dated March 7, 1966, approving the will of her late husband, John J. Akers. In her last two petitions, the appellant has presented no new issues of law or fact. Ordinarily, this alone would be dispositive of this appeal. Notwithstanding, this brief opinion is being rendered in order to clarify the difference in the law pertaining to rights of dower and courtesy as it applies to the estate of an Indian who dies testate leaving restricted Indian lands and one who dies intestate; and to make plain the authority of the Secretary of the Interior and the Board of Indian Appeals in probate matters.

It is not necessary that we review all the facts at this time as they have been aptly stated in three previous decisions. See *Estate of John J. Akers*, IA D-18 (February 26, 1968), IA D-18 (Supp.) (June 23, 1968), and the Secretary's Opinion of June 1, 1970. In essence, Mrs. Akers claims she is entitled to a dower interest in her husband's estate even though he clearly chose to exclude her from taking under his will which provides:

Third: That I hereby give and bequeath unto my wife, Dolly C. Akers, the sum, and only the sum, of One Dollar (\$1.00), it being my intention and desire to hereby limit the inheritance rights of my said wife to the said sum of One Dollar (\$1.00) in the estate of which I die seized or possessed.

As authority for her claim, the appellant erroneously cites a departmental ruling recognizing dower in cases where an Indian dies without a will and his restricted Indian property is passed under the

*Not in Chronological Order.

intestate laws of the State. Solicitor's Opinion, 61 I.D. 307 (1954). Dower and courtesy are implied incidents of estates of inheritance and have always been treated by the Department as being part of the interests acquired as the result of the intestate distribution of restricted Indian lands.

On the other hand, when an Indian disposes of trust property by a will made pursuant to 25 U.S.C. 373, State laws which impose dower, courtesy, or other limitations on the property which a testator may devise do not apply. The act of Congress of February 14, 1913 (37 Stat. 678; 25 U.S.C. 373), was designed to give Indians the right to dispose of property by will free of State restrictions. The Supreme Court ruled that an Oklahoma statute limiting the disposition of property by will does not apply to restricted Indian lands and held, "that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this act of Congress, free from restrictions on the part of the State as to the portions to be conveyed or as to the objects of the testator's bounty * * *." *Blanset v. Cardin*, 256 U.S. 319 (1921).

Once again, the appellant has requested the Secretary to exercise his discretionary authority and overturn the wish of the decedent, expressed in a duly executed and approved will, that his wife should not share in the distribution of his restricted property. Despite the intent of the act of 1913, the appellant argues that the Department's ruling is manifestly unjust and works a hardship on her, and that the Secretary, in his discretion may recognize her dower interest under the principles of equity. While the Secretary has wide discretionary powers, he cannot and should not disapprove an Indian's will simply because the Secretary may believe that the disposition of the estate was not "just and equitable." This would be tantamount to holding that the Secretary could substitute his preference for that of an Indian testator. *Toohnippah v. Hickel*, 397 U.S. 598 (1970).

The fact that the appellant has made five appeals raises a serious question. Does an appellant have a right to have a case reconsidered after a final decision has been rendered by the Secretary or his delegate? The case in hand was first reviewed by the Secretary in 1968. Since then, the appellant has appealed, by petition for reconsideration or otherwise, on four different occasions. Each time, Mrs. Akers has failed to show any error and her last two petitions have alleged no new facts or issues. Although there is no regulation that provides the Secretary with authority to reconsider his decision approving or disapproving an examiner's decision, he has the inherent right to do

so on newly discovered evidence or fraud. *Estate of Ute*, IA-143 Arapaho Allottee No. 1070 (1955). However, if the petition for reconsideration merely reiterates arguments made on appeal, no consideration shall be given to the petition. *Estate of Sarah Bruner*, IA-2 (1950).

Under the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, it is determined that this matter has been properly conducted, decided, and reviewed and this decision is final for the Department. 35 F.R. 12081.

The Appellant's request for modification of the order determining heirs is denied and the hearing examiner's decision of March 7, 1966, is affirmed.

JAMES M. DAY, Director,
Office of Hearings and Appeals and
Member of the Board of Indian Appeals.

ESTATE OF LORETTA PEDERSON*

IBIA-70-1

Decided October 6, 1970

Indian Lands: Descent and Distribution: Wills

A State law which provides that a child who is not named or provided for in the will of his parent shall take as if the testator died intestate, is not applicable to Indian wills.

Indian Lands: Descent and Distribution: Wills

A State law providing that a child shall take as if the parent died intestate if the child is not named or provided for in his will does not apply to Indian wills executed pursuant to 25 U.S.C. 373.

BOARD OF INDIAN APPEALS

Edward Morgan, by and through his attorney, has appealed from a decision by the hearing examiner, dated January 22, 1970, denying his informal petition for rehearing of the within estate in which an order approving will was issued July 17, 1969.

The decedent, Loretta Lillian Garrard Morgan Pederson, died testate in February 1968, at the age of 55 years. She was survived by Edward J. Morgan, an adopted son, and four grandchildren, all of whom were the children of her natural daughter, Ilene Bridges Sampson.

*Not in Chronological Order.

October 6, 1970

After a notice of hearing to ascertain heirs at law was duly issued, a hearing was held on March 4, 1969, at which time the decedent's will executed on April 5, 1962, was approved. In this will the decedent devised her entire estate to her daughter, Ilene Bridges Sampson, with the provision that if Ilene Sampson predeceased her, the property would go to the children of Mrs. Sampson. Because Ilene Sampson had died on August 13, 1962, the hearing examiner awarded the estate to her four children.

The appellant, who had been present and had testified at the hearing, filed a letter alleging a claim against the estate with the hearing examiner on July 22, 1969. When no formal petition for rehearing was filed, the hearing examiner treated the above letter as an informal petition for rehearing.

In this letter the appellant contended, for the first time, that the will was not valid because a clause, "not being unmindful of my adopted son, Edward Morgan," had been inserted after the time of execution of the will and was, therefore, not a part of the will. He further contended that because he was not mentioned in the will, under State law he should be treated as a pretermitted heir and be entitled to inherit a portion of his mother's estate. On January 22, 1970, the examiner denied the petition for rehearing.

The appellant claims that the will is valid except for the interlineation which was not a part of the will at the time it was signed by the testatrix and attested by the witnesses. The clause including the insertion, reads as follows:

Not being unmindful of my adopted son, Edward Morgan, I hereby give, devise and bequeath all of my property, real, personal or mixed, wherever situated, unto my daughter, Ilene Bridges Sampson to be her sole and separate property and estate.

The clause does not change the meaning of the will. It appears that it was merely an afterthought added for the sake of emphasis or clarity. If omitted from the will, it would neither add nor detract from its construction. If a will contains unattested changes, these changes will be disregarded and the instrument admitted to probate when the original intention of the testator can be ascertained. 57 *Am. Jur. Wills* § 508 (1963).

The appellant cites Washington State Law RCW 11.12.090, pertaining to intestacy as to pretermitted heirs. He states that since he was not named or provided for in the valid portion of the will, the deceased is deemed to have died intestate as to him. The will of Mrs. Pederson, however, is not to be governed by State law, because the entire estate

consists of undivided interests in trust property administered by the Secretary of the Interior under 25 U.S.C. 373. Such a will is governed by Federal law and regulations promulgated by the Secretary of the Interior. The purpose of the February 14, 1913 Act of Congress, 37 Stat. 678, was to allow Indians the right to make a will disposing of trust property free of State restrictions as to the portions to be conveyed and as to the objects of the testator's bounty. *Blanset v. Cardin*, 256 U.S. 319 (1921). It is well settled that a State law which provides that when a child is not mentioned in a will he shall take an intestate share has no application to Indian wills. *Estate of Harry Shale*, IA-880 (November 21, 1958). The examiner is not bound to apply a State statute regarding pretermitted heirs. *Estate of Charles Clement Richard*, IA-1260 (July 15, 1963).

Pursuant to 25 CFR sec. 15.17 a petition for rehearing must be under oath and present a specific and concise statement of the grounds upon which it is based. If the petition presents newly discovered evidence, it must state a justifiable reason for failure to discover and present the evidence at the hearing, and must be accompanied by a sworn statement from at least one disinterested person who has knowledge of the facts. In the instant case, there was no petition under oath, no justification for the presentation of new evidence, and no sworn statement from the witness, Ethel Tough, concerning the alteration in the will. In order to maintain some form of compliance with the regulations, at least the essentials of legal procedure must be applied. We believe the hearing examiner was more than lenient in his treatment of the petition for rehearing. In light of the failure to meet the requirements set forth in the regulations for a petition for rehearing, the hearing examiner might well have dismissed the petition as improperly filed.

Under the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, this decision is final for the Department. 35 F.R. 12081. The Appellant's petition for rehearing is denied and the hearing examiner's decision of March 4, 1969, is affirmed.

JAMES M. DAY, Member,
Office of Hearings and Appeals,
Board of Indian Appeals.

I CONCUR:

DAVID MCKEE, Chairman.

and shall not be construed so as to impair or defeat the rights of bona fide lessees or other persons who may have an interest in the lands covered by the lease.

INDEX-DIGEST

(Note—See front of this volume for tables)

ACCOUNTS**REFUNDS**

Page

- Where a noncompetitive oil and gas lease is canceled as having been erroneously issued in derogation of the rights of prior qualified applicants, this Department will order that a refund of the rentals paid for the lease be made to the lessee upon his application for repayment if the cancellation is in no way due to any fault of the lessee and provided there is no arrangement or agreement between lessee and other parties and there is no evidence of fraud or collusion. 166

ACT OF AUGUST 8, 1953

- A right-of-way within the meaning of section 1(7) of the act of August 8, 1953, 67 Stat. 495, 16 U.S.C. 1b(7) (1964) which authorizes the Secretary of the Interior to acquire lands and interests in lands, including scenic easements, in lands adjacent to a road right-of-way located within area of the National Park System, need not be limited to only roads open to vehicular motor traffic. The towpath of the Chesapeake and Ohio Canal National Monument is a road right-of-way within the meaning of that act. 69

ACT OF NOVEMBER 4, 1963

- When a tribe receives separate loans for expert assistance on several claims against the United States, repayment from an award on a claim is only required to the extent needed to repay the loan made for expert assistance on the particular claim on which the award was granted. 20

ADMINISTRATIVE PROCEDURE ACT**PUBLIC INFORMATION**

- Where a substantial change is made in the procedure which the public must follow in dealing with an agency as a result of delegation of direction of Federal employees pursuant to the provision of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), the provisions of the Administrative Procedure Act, 5 U.S.C. secs. 551-559 (Supp. IV, 1965-1968), requiring public notice of description of agency organization and channels through which public may deal with the agency must be complied with. 50

ALASKA**HOMESTEADS**

- "Valid Existing Rights." Since a withdrawal made by Public Land Order 4502 is subject to "valid existing rights," a successful contestant of a homestead entry may exercise the preference right he had earned upon the cancellation of the contested entry; although it had not been actually awarded prior to the withdrawal; however, an application filed by him prior to notation of the cancellation is premature and must be rejected. 5

APPROPRIATIONS

1. Under the appropriation Act for the Department of the Interior for fiscal 1970, 83 Stat. 147, there may be paid out of an award of the Indian Claims Commission only the attorney fees and expenses of litigation incurred in obtaining the award, plus expenses for program planning, until other legislation authorizes other use of the award

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BONNEVILLE POWER ADMINISTRATION**GENERALLY**

1. The Bonneville Power Administrator has authority to enter into firm, long-term agreements with preference customer participants in the Trojan project and in other projects in the hydrothermal power program under which BPA takes the participants' share of project output and agrees to pay the participants under net billing arrangements for their share of project costs from a date certain whether or not the project is operable

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BUREAU OF RECLAMATION**EXCESS LANDS**

1. Involving 319.3 acres of land covered by water right applications under sec. 5 of the 1902 Act (31 Stat. 790) and sec. 3 of the 1912 Act (37 Stat. 265); when full payout of construction charges has been made and when the Secretary determines that a general pattern of family size ownership has been established in the area, then the Secretary must deliver water, if available, to the entire tract, including the 159.3 acres of "excess" lands

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COLOR OR CLAIM OF TITLE**GENERALLY**

1. Where applicants for land under the Color of Title Act have shown deeds giving color of title to three lots back to 1890, and there is nothing in the deeds or Bureau records showing lack of good faith on the part of the holders in the chain of title, a Bureau decision rejecting the application on the ground that there was no good faith holding of the land under a claim or color of title will be reversed and the case remanded for further processing to ascertain whether the improvement or cultivation requirements for a class 1 claim have been met, or whether taxes have been paid back to January 1, 1901, to support a class 2 claim

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DESCRIPTION OF LAND

1. Deeds which describe by regular survey subdivisions lands which in a regular survey section would extend to the northernmost and westernmost boundaries of a section give color of title to lots in an irregular section which fall within the area normally described by such aliquot parts

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GOOD FAITH

1. Where color of title to a narrow strip of land lying along the west and north boundaries of a section derives originally from a homestead patent and is based on deeds which describe the patented land in terms of regular sub-divisions which would be expected to extend to the west and north boundaries of the section, the fact that a resurvey of the section, which divides it into lots, is sus-

COLOR OR CLAIM OF TITLE—Continued**GOOD FAITH—Continued**

ceptible of, but does not necessarily require, the interpretation that the homestead entry did not include the strip of land in question does not support the conclusion that the grantees of the strip did not hold it in good faith

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CONTESTS AND PROTESTS**PREFERENCE RIGHT OF CONTESTANT**

1. *"Valid Existing Rights."* Since a withdrawal made by Public Land Order 4502 is subject to "valid existing rights," a successful contestant of a homestead entry may exercise the preference right he had earned upon the cancellation of the contested entry, although it had not been actually awarded prior to the withdrawal; however, an application filed by him prior to notation of the cancellation is premature and must be rejected

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CONTRACTS**CONSTRUCTION AND OPERATION****Actions of Parties**

1. Where an RFP leading to the award of a cost-plus-a-fixed-fee construction contract included an item for "other presently undefinable work," and where throughout the period of contract performance the Government utilized this item to order work and services not covered by other contract items, the Board determined that the contractor was entitled to be compensated for the cost of engineering services so ordered even though the RFP was not referenced in or otherwise incorporated into the contract and notwithstanding the Government's contention that the services were not ordered or accepted by anyone having authority to do so

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2. Where a cost-plus-a-fixed-fee construction contract was terminated in part for the convenience of the Government, the fee payable on terminated work was governed by the termination for convenience clause which provided that fee would be payable in proportion to work accomplished. The termination could not have the effect of converting payments the contractor agreed would be fee into costs

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3. Where under West Virginia law an excise tax on motor fuel consumed in performance of a cost-plus-a-fixed-fee construction contract was refundable and where by reason of the contractor's conclusion that the tax did not apply because of the constitutional immunity of the Federal Government from a state tax the contractor failed to make timely application for a refund of the tax, the Board determined that the amount of the tax was not an allowable cost of the contract

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4. Where a contractor's initial proposal in response to an RFP leading to the award of a cost-plus-a-fixed-fee construction contract contained a fixed-fee of nine percent of estimated costs and in subsequent negotiations the estimated cost of the contract was raised while the amount of the fixed-fee remained unchanged, the percentage of fee to estimated costs was necessarily reduced. The Board determined that it would be unreasonable and contrary to the contract for any substantial portion of the contract not to bear a pro-rata allocation of fee

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CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Action of Parties—Continued**

5. Where excavation exceeding estimated quantities in a cost-plus-a-fixed construction contract was attributable to design changes, the Board holds that such changes entitled the contractor to additional fee. However, the Board determined that in the circumstances present here the contractor assumed the risk of the accuracy of estimates and overruns attributable to errors in the estimates could not be the basis of additional fee. 214
6. Where the contracting officer determined to settle a cost-type construction contract on the basis of allowable, booked costs in preference to determining applicable overhead and G&A rates, the Government could not disallow bid and proposal expenses upon the ground they made no contribution to the contract. The Board determined that a regulation prohibiting bid and proposal expenses as an allowable cost of cost-type construction contracts became effective after the execution of the contract and thus was not applicable. 214
7. Where a supervisory employee of a cost-plus-a-fixed-fee construction contractor was given a jeep as an inducement to remain in the contractor's employ and where the employee's compensation including the jeep was fair and reasonable, the Board determined that the cost of the jeep was an allowable cost of the contract. 214
8. Where a regulation in effect at the time of execution of a cost-plus-a-fixed-fee construction contract provided that the costs of storing records subsequent to contract completion were not allowable, the contractor's claim for such costs was denied. 214
9. Where a cost-plus-a-fixed-fee construction contract provided that the sole proprietor contractor would devote his full time to supervision of the work and contemplated that the contractor's compensation for such supervision would be from fee, the contractor's claim for management costs upon the ground contract performance was more onerous than anticipated was denied. 215

Allowable Costs

1. Where an RFP leading to the award of a cost-plus-a-fixed-fee construction contract included an item for "other presently undefinable work," and where throughout the period of contract performance the Government utilized this item to order work and services not covered by other contract items, the Board determined that the contractor was entitled to be compensated for the cost of engineering services so ordered even though the RFP was not referenced in or otherwise incorporated into the contract and notwithstanding the Government's contention that the services were not ordered or accepted by anyone having authority to do so. 213
2. Where a cost-plus-a-fixed-fee construction contract was terminated in part for the convenience of the Government, the fee payable on terminated work was governed by the termination for convenience clause which provided that fee would be payable in proportion to work accomplished. The termination could not have the effect of converting payments the contractor agreed would be fee into costs. 213

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Allowable Costs—Continued**

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| 3. Where under West Virginia law an excise tax on motor fuel consumed in performance of a cost-plus-a-fixed-fee construction contract was refundable and where by reason of the contractor's conclusion that the tax did not apply because of the constitutional immunity of the Federal Government from a state tax the contractor failed to make timely application for a refund of the tax, the Board determined that the amount of the tax was not an allowable cost of the contract | 213 |
| 4. Where a contractor's initial proposal in response to an RFP leading to the award of a cost-plus-a-fixed-fee construction contract contained a fixed-fee of nine percent of estimated costs and in subsequent negotiations the estimated cost of the contract was raised while the amount of the fixed-fee remained unchanged, the percentage of fee to estimated costs was necessarily reduced. The Board determined that it would be unreasonable and contrary to the contract for any substantial portion of the contract not to bear a pro-rata allocation of fee | 213 |
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| 7. Where a supervisory employee of a cost-plus-a-fixed-fee construction contractor was given a jeep as an inducement to remain in the contractor's employ and where the employee's compensation including the jeep was fair and reasonable, the Board determined that the cost of the jeep was an allowable cost of the contract | 214 |
| 8. Where a regulation in effect at the time of execution of a cost-plus-a-fixed-fee construction contract provided that the costs of storing records subsequent to contract completion were not allowable, the contractor's claim for such costs was denied | 214 |
| 9. A cost-type contractor's claim for interest because its vouchers were paid late was dismissed because it was a claim for breach of contract over which the Board has no jurisdiction | 214 |
| 10. Where a cost-plus-a-fixed-fee construction contract provided that the sole proprietor contractor would devote his full time to supervision of the work and contemplated that the contractor's compensation for such supervision would be from fee, the contractor's claim for management costs upon the ground contract performance was more onerous than anticipated was denied | 215 |

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Changed Conditions**

1. A first category changed conditions claim is denied where, in a case decided upon the record without a hearing, the Board finds that the appellant has failed to show by a preponderance of evidence that the sand content of the designated borrow area differed materially from the representations made by the Government; or that information allegedly withheld by the Government affected the appellant's bid with respect to either the sand content represented to be present or the pit recovery factor used. The Board notes (i) that the only testing performed by the appellant to determine sand content was done some eighteen months after contract completion (ii) that such testing involved three of twenty-three test borings for which information was shown by the Government in the invitation; and (iii) that the results of the appellant's testing (as contrasted with that of the Government) were stated as conclusions without any details being furnished as to the method employed in testing or grading of the samples taken. In addition, the Board found that appellant had failed to offer any evidence to support its contention that the so-called total accountability approach was based upon an accepted trade practice

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2. Claims of changed conditions in both the first and second category are denied, in a case decided upon the record without a hearing, where the Board finds that appellant has failed to show by a preponderance of evidence that changed conditions in either category were encountered. With respect to the first category changed conditions claim, the Board noted that the appellant's action in acknowledging the accuracy of information provided in the Government's test borings would appear to preclude appellant from relying upon the contention that the conditions represented by the Government's test borings were materially different than conditions encountered in actual excavation. Respecting the second category changed conditions claim, the Board found (i) that conditions encountered could not be said to be unknown where the appellant acknowledged that the physical conditions and characteristics of all materials tested throughout the Government's aggregate source were consistent with its prebid studies; and (ii) that conditions encountered could not be said to be unusual where the appellant acknowledged that prior to bid it had anticipated that conditions of the type encountered would be met and failed to show that the adverse conditions present were materially different than should have been expected

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Changes and Extras

1. The release of transmission line right-of-way in discontinuous lengths which seriously disrupts the right-of-way clearing operation results in a constructive change entitling the contractor to an equitable adjustment for the added costs of clearing due to the disruption of work

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CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Changes and Extras—Continued**

2. Where an RFP leading to the award of a cost-plus-a-fixed-fee construction contract included an item for "other presently undefinable work," and where throughout the period of contract performance the Government utilized this item to order work and services not covered by other contract items, the Board determined that the contractor was entitled to be compensated for the cost of engineering services so ordered even though the RFP was not referenced in or otherwise incorporated into the contract and notwithstanding the Government's contention that the services were not ordered or accepted by anyone having authority to do so_____ 213
3. The contractor is entitled to compensation for a change for moving a transmission line tower approximately 80 feet from where it had been erected to where it should have been erected when the evidence shows that the contractor had initially erected the tower on a site staked by the Government as the tower site and contractor had made an adequate check of such site before erecting the tower_____ 260

Drawings and Specifications

1. When there is a conflict between drawings, and the evidence shows that the conflict was not obvious or patent, a contractor is entitled to an equitable adjustment for the additional expense attributable to the Government's design and coordination failures and to an appropriate time extension_____ 22
2. Where the specifications are specific and complete as to the inclusion of the disputed work in the contract, a claim for an equitable adjustment for a constructive change, based upon omission of details in the drawings, is denied in accordance with Article 2 of Standard Form 23-A which states that anything mentioned in the specifications and not shown on the drawings shall be of like effect as if shown or mentioned in both_____ 57

Estimated Quantities

1. Where excavation exceeding estimated quantities in a cost-plus-a-fixed-fee construction contract was attributable to design changes the Board holds that such changes entitled the contractor to additional fee. However, the Board determined that in the circumstances present here the contractor assumed the risk of the accuracy of estimates and overruns attributable to errors in the estimates could not be the basis of additional fee_____ 214

General Rules of Construction

1. The contractor is entitled to compensation for a change for moving a transmission line tower approximately 80 feet from where it had been erected to where it should have been erected when the evidence shows that the contractor had initially erected the tower on a site staked by the Government as the tower site and contractor had made an adequate check of such site before erecting the tower_____ 260

CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Government-Furnished Property**

1. An appeal will be dismissed where the claim is founded upon a delay of the Government in delivery of Government-furnished property, pump-turbines and control units, for incorporation in a dam. The Board has no jurisdiction over claims for the cost effects of delay absent a contract provision so providing-----

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Intent of Parties

1. Where a cost-plus-a-fixed-fee construction contract provided that the sole proprietor contractor would devote his full time to supervision of the work and contemplated that the contractor's compensation for such supervision would be from fee, the contractor's claim for management costs upon the ground contract performance was more onerous than anticipated was denied-----

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Notices

1. Appellant's request to consolidated two appeals for purposes of hearing in Jackson, Mississippi, is granted, despite the Government's urging that a separate hearing be held for one of the appeals limited to issues related to lack of timely notice of the claims asserted, where the Board finds (i) that the two appeals are closely related (ii) that the issues involved in the appeal as to which the question of timeliness had been raised were relatively simple, and (iii) that from the standpoint of convenience to prospective witnesses the record clearly established that Jackson, Mississippi, was preferable to Washington, D.C., as the site for the hearing. A Government request for the issuance of interrogatories to the appellant directed to the issue of timeliness of notice of claim was granted, however, where the Board found that answers to the interrogatories propounded would narrow the issues in advance of hearing-----

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2. When unavailability of right-of-way results in an unreasonable delay in issuing a notice to proceed, there may result a constructive suspension of work requiring an adjustment for the increased costs necessarily caused by the delay. The costs may include both those incurred during the period of the delay and those incurred later as the direct consequence of the delay-----

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Subcontractors and Suppliers

1. Where under West Virginia law an excise tax on motor fuel consumed in performance of a cost-plus-a-fixed-fee construction contract was refundable and where by reason of the contractor's conclusion that the tax did not apply because of the constitutional immunity of the Federal Government from a state tax the contractor failed to make timely application for a refund of the tax, the Board determined that the amount of the tax was not an allowable cost of the contract-----
2. A contractor's claims for excusable delay based upon an equipment breakdown and machining difficulty encountered by its first tier subcontractor were denied in view of the general rule that labor, plant, equipment and materials adequate for contract performance are the contractor's responsibility and that manufacturing difficulties are not *per se* a basis for excusable delay. While under the rule of *Schweigert v. United States*, 181 Ct. Cl. 1184, a contractor is

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CONTRACTS—Continued**CONSTRUCTION AND OPERATION—Continued****Subcontractors and Suppliers—Continued**

entitled to be excused for delays attributable solely to a second tier subcontractor without a showing that the second tier subcontractor was free from fault or negligence, a contractor's claim for excusable delay based on the machining difficulties occasioned by the action of a second tier subcontractor in rolling the wrong material, the proper material being unavailable, was denied where the contractor's evidence reflected that the difficulties concerned only one of two gates, which the contract required be shipped concurrently.

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DISPUTES AND REMEDIES**Burden of Proof**

1. A first category changed conditions claim is denied where, in a case decided upon the record without a hearing, the Board finds that the appellant has failed to show by a preponderance of evidence that the sand content of the designated borrow area differed materially from the representations made by the Government; or that information allegedly withheld by the Government affected the appellant's bid with respect to either the sand content represented to be present or the pit recovery factor used. The Board notes (i) that the only testing performed by the appellant to determine sand content was done some eighteen months after contract completion (ii) that such testing involved three of twenty-three test borings for which information was shown by the Government in the invitation; and (iii) that the results of the appellant's testing (as contrasted with that of the Government) were stated as conclusions without any details being furnished as to the method employed in testing or grading of the samples taken. In addition, the Board found that appellant had failed to offer any evidence to support its contention that the so-called total accountability approach was based upon an accepted trade practice

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2. Claims of changed conditions in both the first and second category are denied, in a case decided upon the record without a hearing, where the Board finds that appellant has failed to show by a preponderance of evidence that changed conditions in either category were encountered. With respect to the first category changed conditions claim, the Board noted that the appellant's action in acknowledging the accuracy of information provided in the Government's test borings would appear to preclude appellant from relying upon the contention that the conditions represented by the Government's test borings were materially different than conditions encountered in actual excavation. Respecting the second category changed conditions claim, the Board found (i) that conditions encountered could not be said to be unknown where the appellant acknowledged that the physical conditions and characteristics of all materials tested throughout the Government's aggregate source were consistent with its prebid studies; and (ii) that conditions encountered could not be said to be unusual where the appellant acknowledged that prior to bid it had anticipated that conditions of the type encountered would be met and failed to show that the adverse conditions present were materially different than should have been expected

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CONTRACTS—Continued**DISPUTES AND REMEDIES—Continued****Burden of Proof—Continued**

3. Where the Government admitted that rainfall 50 percent or more above normal occurred during certain months, but the contractor's evidence indicated that normal rainfall would also stop the work and did not distinguish between delays caused by normal and abnormal rainfall, its claim for excusable delay based on unusually severe weather was denied. A claim of excusable delay based on the operation of the priorities system under the Defense Production Act was granted-----

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DAMAGES**Liquidated Damages**

1. A provision for liquidated damages in a contract to supply six transformers for the sum of \$2,562, which called for liquidated damages to be imposed at a rate of \$50 a day for the first 15 days of delay in delivery and \$100 a day for each day thereafter, and which was the basis of an assessment of \$8000, against the contractor, constitutes an unenforceable penalty since in the circumstances presented the Board found the damages assessable were not a reasonable forecast of just compensation for the harm caused by the breach-----

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2. Since actual damage is not a prerequisite to the validity of a provision for liquidated damages, the Government's admission that it suffered no actual damage did not preclude enforcement of a liquidated damage clause-----

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3. A contractor's claims for excusable delay based upon an equipment breakdown and machining difficulties encountered by its first tier subcontractor were denied in view of the general rule that labor, plant, equipment and materials adequate for contract performance are the contractor's responsibility and that manufacturing difficulties are not *per se* a basis for excusable delay. While under the rule of *Schweigert v. United States*, 181 Ct. Cl. 1184, a contractor is entitled to be excused for delays attributable solely to a second tier subcontractor without a showing that the second tier subcontractor was free from fault or negligence, a contractor's claim for excusable delay based on the machining difficulties occasioned by the action of a second tier subcontractor in rolling the wrong material, the proper material being unavailable, was denied where contractor's evidence reflected that the difficulties concerned only one of two gates, which the contract required be shipped concurrently-----

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Equitable Adjustments

1. In the absence of actual cost data for a large part of the claimed extra costs and in circumstances where estimates of such costs have been based primarily on formula cost of ownership figures for equipment for the time involved, formula calculations of fuel and oil costs, and a pro rata distribution of labor costs, the Board will use a jury verdict approach to determine the amount of an equitable adjustment for a changed condition to which the contractor is entitled-----
2. When unavailability of right-of-way results in an unreasonable delay in issuing a notice to proceed, there may result a constructive

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CONTRACTS—Continued**DAMAGES—Continued****Equitable Adjustments—Continued**

suspension of work requiring an adjustment for the increased costs necessarily caused by the delay. The costs may include both those incurred during the period of the delay and those incurred later as the direct consequence of the delay_____

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3. The release of transmission line right-of-way in discontinuous lengths which seriously disrupts the right-of-way clearing operation results in a constructive change entitling the contractor to an equitable adjustment for the added costs of clearing due to the disruption of work_____

4. A written order to the contractor to complete work by the date fixed in the contract for completion is an order to accelerate constituting a change when at the time of issuance the contractor was admittedly entitled to extensions of time which had been requested but not yet granted, and the contractor in fact accelerates. The contractor is entitled to an equitable adjustment for the increased costs due to the accelerated effort_____

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DISPUTES AND REMEDIES**Jurisdiction**

1. An appeal will be dismissed where the claim is founded upon a delay of the Government in delivery of Government-furnished property, pump-turbines and control units, for incorporation in a dam. The Board has no jurisdiction over claims for the cost effects of delay absent a contract provision so providing_____

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2. The Board's jurisdiction being appellate only, a claim not previously submitted to the contracting officer will be remanded to him for his decision_____

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3. A cost-type contractor's claim for interest because its vouchers were paid late was dismissed because it was a claim for breach of contract over which the Board has no jurisdiction_____

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4. A cost-plus-a-fixed-fee construction contractor's claim for special termination costs which had not been passed upon by the contracting officer would be remanded since the Board's jurisdiction is appellate only_____

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Substantial Evidence

1. A motion by an appellant to expunge numerous exhibits from the appeal file predicated primarily upon the ground that their inclusion without affording an opportunity for cross-examination of the authors of the various documents would be violative of due process, was granted only to the extent that the record fails to indicate that the contracting officer had in fact considered the questioned exhibits in making the findings appealed from. In support of its ruling the Board notes that (1) the Board's rules specifically provide for the composition of the appeal file; (ii) comparable rules of other boards have been determined not to be violative of due process; (iii) where a hearing is held the probative value to be given to appeal file exhibits will be determined by the evidence offered in support by witnesses subject to cross-examination; (iv) expunging an exhibit from the appeal file is no indication of the ruling the Board may make if the exhibit is proffered at the hear-

CONTRACTS—Continued**DISPUTES AND REMEDIES—Continued****Substantial Evidence—Continued**

ing; and (v) as for summaries and other exhibits expunged from the appeal file the Government may wish to resort to discovery, where appropriate, to establish the accuracy of particular exhibits

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Termination for Convenience

1. Where a cost-plus-a-fixed-fee construction contract was terminated in part for the convenience of the Government, the fee payable on terminated work was governed by the termination for convenience clause which provided that fee would be payable in proportion to work accomplished. The termination could not have the effect of converting payments the contractor agreed would be fee into costs

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FORMATION AND VALIDITY**Construction Contracts**

1. Where a contractor's initial proposal in response to an RFP leading to the award of a cost-plus-a-fixed-fee construction contract contained a fixed-fee of nine percent of estimated costs and in subsequent negotiations the estimated cost of the the contract was raised while the amount of the fixed-fee reexamined unchanged, the percentage of fee to estimated costs was necessarily reduced. The Board determined that it would be unreasonable and contrary to the contract for any substantial portion of the contract not to bear a pro-rata allocation of fee

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Cost-Type Contracts

1. Where the contracting officer determined to settle a cost-type construction contract on the basis of allowable, booked costs in preference to determining applicable overhead and G&A rates, the Government could not disallow bid and proposal expenses upon the ground they made no contribution to the contract. The Board determined that a regulation prohibiting bid and proposal expenses as an allowable cost of cost-type construction contracts became effective after the execution of the contract and thus was not applicable

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Merger of Preliminary Agreements

1. Where an RFP leading to the award of a cost-plus-a-fixed-fee construction contract included an item for "other presently undefinable work," and where throughout the period of contract performance the Government utilized this item to order work and services not covered by other contract items, the Board determined that the contractor was entitled to be compensated for the cost of engineering services so ordered even though the RFP was not referenced in or otherwise incorporated into the contract and notwithstanding the Government's contention that the services were not ordered or accepted by anyone having authority to do so

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PERFORMANCE OR DEFAULT**Acceleration**

1. A written order to the contractor to complete work by the date fixed in the contract for completion is an order to accelerate constitut-

CONTRACTS—Continued**PERFORMANCE OR DEFAULT—Continued****Acceleration—Continued**

ing a change when at the time of issuance the contractor was admittedly entitled to extensions of time which had been requested but not yet granted, and the contractor in fact accelerates. The contractor is entitled to an equitable adjustment for the increased costs due to the accelerated effort.

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Excusable Delays

1. When there is a conflict between drawings, and the evidence shows that the conflict was not obvious or patent, a contractor is entitled to an equitable adjustment for the additional expense attributable to the Government's design and coordination failures and to an appropriate time extension.

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2. A contractor's claims for excusable delay based upon an equipment breakdown and machining difficulties encountered by its first tier subcontractor were denied in view of the general rule that labor, plant, equipment and materials adequate for contract performance are the contractor's responsibility and that manufacturing difficulties are not *per se* a basis for excusable delay. While under the rule of *Schweigert v. United States*, 181 Ct. Cl. 1184, a contractor is entitled to be excused for delays attributable solely to a second tier subcontractor without a showing that the second tier subcontractor's claim for excusable delay based on the machining difficulties occasioned by the action of a second tier subcontractor in rolling the wrong material, the proper material being unavailable, was denied where contractor's evidence reflected that the difficulties concerned only one of two gates, which the contract required be shipped concurrently.

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3. Where the Government admitted that rainfall 50 percent or more above normal occurred during certain months, but the contractor's evidence indicated that normal rainfall would also stop the work and did not distinguish between delays caused by normal and abnormal rainfall, its claim for excusable delay based on unusually severe weather was denied. A claim of excusable delay based on the operation of the priorities system under the Defense Production Act was granted.

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Suspension of Work

1. When unavailability of right-of-way results in an unreasonable delay in issuing a notice to proceed, there may result a constructive suspension of work requiring an adjustment for the increased costs necessarily caused by the delay. The costs may include both those incurred during the period of the delay and those incurred later as the direct consequence of the delay.

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**FEDERAL COAL MINE HEALTH AND SAFETY ACT
GENERALLY**

1. The Board of Mine Operations Appeals has not been delegated general supervisory authority over the entire spectrum of the Bureau's various enforcement responsibilities. The Secretary's delegation to the Board was intended primarily to create an independent judiciary forum for review of proceedings initiated, not by the Board, but by an appropriate interested party or by the Bureau--

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APPEALS

1. A determination by the Bureau of Mines that an operator has totally abated an alleged violation of a mandatory health or safety standard is not reviewable by the Board of Mine Operations Appeals--
2. A document issued by the Bureau of Mines to an operator finding a violation of a mandatory health or safety standard constitutes a notice subject to review by the Board of Mine Operations Appeals. Such a document is a reviewable notice whether or not it contains a requirement that the operator abate the alleged violation within a definite time--
3. In an unusual case, the meaning and effect of notices issued under section 104(b) was not sufficiently clear to permit the parties entitled to seek review thereof to fairly exercise that right. Consequently, the 30-day statutory period for filing applications for review did not begin to run until the Bureau of Mines clarified the notices by stating its position as to their meaning and effect--
4. On review of a notice of violation issued pursuant to section 104(b), the scope of review does not include issues which bear solely on facts required to be found by the Bureau of Mines to issue a notice under section 104(h)--
5. The Board of Mine Operations Appeals may dismiss an application for review of a notice or order, with or without leave to submit an amended application, if the application fails to comply with the statute, with the Board's rules, or with an order of the Board or an Examiner--
6. The Board of Mine Operations Appeals may dismiss an application for review of a notice or an order where the applicant fails to present evidence sufficient to support findings of fact in his favor--
7. An applicant for review of a notice or order should be permitted to withdraw his application at any time--

FINDINGS, NOTICES AND ORDERS

1. Section 104(a) of the Act requires the Bureau of Mines to issue an immediate order of withdrawal upon a finding of imminent danger; whether or not equipment necessary to abate the condition causing such danger is available to the operator--
2. Where a condition which may lead to imminent danger exists, the Board of Mine Operations Appeals, in a proceeding under section 104(h) of the Act, may issue an order requiring withdrawal of miners, after public hearing, whether or not equipment necessary to abate the condition exists; but an order of withdrawal is not required as in the case of section 104(a)--

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FEDERAL COAL MINE HEALTH AND SAFETY ACT—Continued
FINDINGS, NOTICES AND ORDERS—Continued

3. Safety of miners is always a relevant consideration in determining a reasonable time for abatement of violations of mandatory standards. Other relevant considerations include the fact of violation and the availability of equipment. In certain circumstances, difficulty of abatement may be a relevant consideration.

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**FEDERAL EMPLOYEES AND OFFICERS
GENERALLY**

1. The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R.S. sec. 2072, 25 U.S.C. sec. 48 (1964), is that authority related to the direction of employees and within the general range of the duties of their employment.

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APPOINTMENT

1. The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R.S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations.

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DISCIPLINARY ACTION

1. The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R.S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations.

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PROMOTION

1. The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R.S. sec 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations.

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FEDERAL EMPLOYEES AND OFFICERS**QUALIFICATIONS**

1. The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R.S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations-----

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SEPARATION

1. The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R.S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations-----

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TENURE

1. The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R.S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations-----

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HOMESTEADS (ORDINARY)**PREFERENCE RIGHTS**

1. "*Valid Existing Rights.*" Since a withdrawal made by Public Land Order 4502 is subject to "valid existing rights," a successful contestant of a homestead entry may exercise the preference right he had earned upon the cancellation of the contested entry, although it had not been actually awarded prior to the withdrawal; however, an application filed by him prior to notation of the cancellation is premature and must be rejected-----

5

INDIAN ECONOMIC ENTERPRISES**GENERALLY**

1. Unauthorized use of government trademark registered by Indian Arts and Crafts Board is illegal and is subject to criminal and civil sanctions under 18 U.S.C. 1158 and 15 U.S.C. 1116 and 1117-----

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INDIAN LANDS**DESCENT AND DISTRIBUTION****Generally**

1. When an Indian dies leaving a will made pursuant to 25 U.S.C. 373, which meets Secretarial approval State laws pertaining to dower or courtesy rights are not applicable and do not affect the matter in which he devises his trust property----- 268
2. When the Board of Indian Appeals determines that the legal interpretation of a probate case is correct and that the case has been properly conducted, decided and reviewed, its decision is the final decision of the Department----- 268

Wills

1. A State law which provides that a child who is not named or provided for in the will of his parent shall take as if the testator died intestate, is not applicable to Indian wills----- 270
2. A State law providing that a child shall take as if the parent died intestate if the child is not named or provided for in his will does not apply to Indian wills executed pursuant to 25 U.S.C. 373----- 270

INDIAN TRIBES**GENERALLY**

1. The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R.S. sec. 2072, 25 U.S.C. sec. 48 (1964), is that authority related to the direction of employees and within the general range of the duties of their employment----- 49
2. The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R.S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor authority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations----- 49
3. Indian tribes generally do not possess criminal jurisdiction over non-Indians unless there still remains in force a treaty provision whereby a tribe acquired "exclusive jurisdiction over such offenses" as provided by section 1152, Title 18, United States Code. While that reference to exclusive tribal jurisdiction still appears in section 1152, it is doubtful that any such jurisdiction has survived since, though initially some treaties may have granted criminal jurisdiction over non-Indians, later treaty provisions usually required the tribes to seize and surrender offenders to designated Federal officials----- 113

ENROLLMENT

1. The enrollment actions of a tribal enrollment committee and a tribal council, acting under a duly adopted and approved tribal constitution that does not provide for review by the Secretary, and in the absence of an applicable act of Congress, are final insofar as they relate solely to tribal questions----- 116

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INDIAN TRIBES—Continued**ENROLLMENT APPEALS**

1. Once a tribal council acts to deny a person's application for enrollment, and there is no provision in the tribal constitution or in an applicable act of Congress for appeal of that determination to the Secretary, there exists jurisdiction in the Secretary to review only the effect of the council's action on the distribution of tribal assets over which the Secretary has been granted authority as trustee by the Congress-----

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JUDGMENT FUNDS

1. When a tribe receives separate loans for expert assistance on several claims against the United States, repayment from an award on a claim is only required to the extent needed to repay the loan made for expert assistance on the particular claim on which the award was granted-----
2. Under the Appropriation Act for the Department of the Interior for fiscal 1970, 83 Stat. 147, there may be paid out of an award of the Indian Claims Commission only the attorney fees and expenses of litigation incurred in obtaining the award, plus expenses for program planning, until other legislation authorizes other use of the award-----

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INDIANS**CRIMINAL JURISDICTION**

1. Indian tribes generally do not possess criminal jurisdiction over non-Indians unless there still remains in force a treaty provision whereby a tribe acquired "exclusive jurisdiction over such offenses" as provided by section 1152, Title 18, United States Code. While that reference to exclusive tribal jurisdiction still appears in section 1152, it is doubtful that any such jurisdiction has survived since, though initially some treaties may have granted criminal jurisdiction over non-Indians, later treaty provisions usually required the tribes to seize and surrender offenders to designated Federal officials-----

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LAW AND ORDER

1. Indian tribes generally do not possess criminal jurisdiction over non-Indians unless there still remains in force a treaty provision whereby a tribe acquired "exclusive jurisdiction over such offenses" as provided by section 1152, Title 18, United States Code. While that reference to exclusive tribal jurisdiction still appears in section 1152, it is doubtful that any such jurisdiction has survived since, though initially some treaties may have granted criminal jurisdiction over non-Indians, later treaty provisions usually required the tribes to seize and surrender offenders to designated Federal officials-----

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MINING CLAIMS**COMMON VARIETIES OF MINERALS****Generally**

1. To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date; and where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the

MINING CLAIMS—Continued**COMMON VARIETIES OF MINERALS—Continued****Generally—Continued**

claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim as of that date, the fact that the material on the claim is sufficient both as to quantity and quality, as is the abundant supply of similar material found in the area, and the fact that 11,607 yards of material were taken from the claim free of charge by two construction companies in 1961 for use as fill in the construction of a road in 1961, are insufficient to show that material from this particular claim could have been profitably removed and marketed on July 23, 1955, and the claim is properly declared null and void.

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2. There has been no discovery under the mining laws of a valuable deposit of silica and wollastonite where they are constituents of a quartzite building stone and cannot be economically mined, separated, and sold for other industrial or commercial purposes; and where the building stone of which they are a part has no unique property which gives it a special and distinct value for building stone above that of other common varieties of stone, mining claims for such material are subject to the act of July 23, 1955

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CONTESTS

1. Where a contest is brought against a mining claim on the ground of lack of discovery, after the Government has made a *prima facie* showing that there has not been a discovery, the burden of proof is upon the contestants to show by a preponderance of the evidence that a discovery has been made.
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.
3. Where a hearing examiner's decision that a mining claim was validated by a discovery of a valuable building stone deposit marketable prior to and subsequent to the act of July 23, 1955, is not supported by a preponderance of the evidence, the decision must be overturned in that respect and the claim declared invalid.
4. Where information developed after a Departmental decision holding a mining claim invalid indicates that it may have been based upon inaccurate evidence, the prior decision will be set aside and the case remanded for an administrative review of the patent application in the light of the actual situation.

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DETERMINATION OF VALIDITY

1. Where a contest is brought against a mining claim on the ground of lack of discovery, after the Government has made a *prima facie* showing that there has not been a discovery, the burden of proof is upon the contestants to show by a preponderance of the evidence that a discovery has been made.

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MINING CLAIMS—Continued**DISCOVERY****Generally**

1. There has been no discovery under the mining laws of a valuable deposit of silica and wollastonite where they are constituents of a quartzite building stone and cannot be economically mined, separated, and sold for other industrial or commercial purposes; and where the building stone of which they are a part has no unique property which gives it a special and distinct value for building stone above that of other common varieties of stone, mining claims for such material are subject to the act of July 23, 1955.
2. Evidence which shows only that further prospecting should be undertaken to determine the presence of uranium in mining claims fails to meet the test of discovery of a valuable mineral deposit under the mining laws, which, at the least, requires that sufficient mineralization be shown to warrant a prudent man in expending further time and money with the expectation of developing a profitable mine.

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Marketability

1. To satisfy the requirements for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit as of that date; and where the evidence shows that there is an abundant supply of similar sand and gravel in the area of the claim, that sand and gravel was being produced and sold in the area on July 23, 1955, and that no sand and gravel had been or was being marketed from the claim as of that date, the fact that the material on the claim is sufficient both as to quantity and quality, as is the abundant supply of similar material found in the area, and the fact that 11,607 yards of material were taken from the claim free of charge by two construction companies in 1961 for use as fill in the construction of a road in 1961, are insufficient to show that material from this particular claim could have been profitably removed and marketed on July 23, 1955, and the claim is properly declared null and void.
2. To satisfy the requirement that deposits of minerals of widespread occurrence be "marketable" it is not enough that they are only theoretically 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.
3. To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel.
4. 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 the deposit could have been extracted, removed, and marketed

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MINING CLAIMS—Continued**DISCOVERY—Continued****Marketability—Continued**

at a profit as of that date and not as of some prospective date and where claimants fail to make that showing the claim is properly declared null and void-----

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HEARINGS

1. Where a hearing examiner's decision that a mining claim was validated by a discovery of a valuable building stone deposit marketable prior to and subsequent to the act of July 23, 1955, is not supported by a preponderance of the evidence, the decision must be overturned in that respect and the claim declared invalid-----

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2. A request for a further hearing in a mining claim contest will be denied where the forest Service objects, the contestants fail to show any equitable basis for holding a further hearing, they fail to make a tender of proof which would tend to establish a valid discovery, and it appears that the request is simply for additional time to prospect and attempt to make a discovery of a valuable mineral deposit-----

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3. Where information developed after a Departmental decision holding a mining claim invalid indicates that it may have been based upon inaccurate evidence, the prior decision will be set aside and the case remanded for an administrative review of the patent application in the light of the actual situation-----

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LOCATION

1. To hold that a mining claim located for a common variety of sand and gravel prior to July 23, 1955, must be perfected by a discovery (including marketability) made before that date is not to give retrospective application to the act of July 23, 1955, which bars locations thereafter made for common varieties of sand and gravel-----

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LODE CLAIMS

1. Lode claims cannot validly be located for deposits of quartzite building stone which under the act of August 4, 1892, can be located only as placer claims-----

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PLACER CLAIMS

1. Lode claims cannot validly be located for deposits of quartzite building stone which under the act of August 4, 1892, can be located only as placed claims-----

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MINING OCCUPANCY ACT**PRINCIPAL PLACE OF RESIDENCE**

1. The act of October 23, 1962, requires that an applicant and his predecessors must have occupied valuable improvements on a mining claim as a principal place of residence during the 7-year period immediately preceding July 23, 1962, and where there is no evidence as to the use made of a claim during the first 5 years of that period, and where the applicant indicates a desire to submit additional evidence relating to his own use of the claim during the last 2 years of the qualifying period, the case will be remanded to the Bureau of Land Management to permit the development of additional evidence-----

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QUALIFIED APPLICANT

1. The right or privilege to qualify as an applicant under the act of October 23, 1962, cannot be assigned, but it may pass through devise or descent in the same manner as that in which property customarily is transferred by those means and the transfer is not limited only to the first devisee.-----
2. If the occupant-owner of residential improvements on an unpatented mining claim could have qualified on October 23, 1962, as an applicant for relief under the act of that date, the right or privilege of qualifying its not lost or destroyed by the failure of his heirs or devisees, who seek the benefits of his eligibility, to reside upon the claim themselves.-----

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NATIONAL PARK SERVICE AREAS**LAND****Acquisition**

1. A statutory authorization is necessary to support the acquisition of land or an interest in land, including a scenic easement, regardless of whether the acquisition is by purchase or donation.-----

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OIL AND GAS LEASES**APPLICATIONS****Description**

1. Where an area sought to be excluded from a larger parcel of land in oil and gas lease offer is described by metes and bounds in terms which do not satisfy the pertinent regulation, it makes the offer defective as to the parcel and subject to rejection to that extent.-----

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CANCELLATION

1. Where an oil and gas lease is considered to have been terminated pursuant to 30 U.S.C. sec. 188(b) and the rental payment to preclude such termination had been timely submitted to the land office but inadvertently applied to another lease account, and then refunded to the payor when the lease to which payment had been attributed was relinquished, who accepted the refund without question, it is correct to hold that the lessee's rights in the terminated lease have been extinguished, and that a new oil and gas lease, duly issued for such lands and thereafter assigned to a bona fide purchaser, is valid.-----

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EXTENSIONS

1. The statutory and regulatory requirements that there must be a discovery of oil or gas in paying quantities on a segregated portion of a lease in order to qualify another segregated portion of the same lease for a two-year extension cannot be construed so as to require that in every instance there must be a fully completed well on the site which is physically capable of producing oil or gas in paying quantities prior to the date of expiration.-----

181

RENTALS

1. Where a noncompetitive oil and gas lease is canceled as having been erroneously issued in derogation of the rights of prior qualified applicants, this Department will order that a refund of the rentals paid for the lease be made to the lessee upon his application for repayment if the cancellation is in no way due to any fault of the

OIL AND GAS LEASES—Continued**RENTALS—Continued**

- lessee and provided there is no arrangement or agreement between lessee and other parties and there is no evidence of fraud or collusion _____
2. Where an oil and gas lease is considered to have been terminated pursuant to 30 U.S.C. sec. 188(b) and the rental payment to preclude such termination had been timely submitted to the land office but inadvertently applied to another lease account, and then refunded to the payor when the lease to which payment had been attributed was relinquished, who accepted the refund without question, it is correct to hold that the lessee's rights in the terminated lease have been extinguished, and that a new oil and gas lease, duly issued for such lands and thereafter assigned to a bona fide purchaser, is valid _____

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TERMINATION

1. Where an oil and gas lease is considered to have been terminated pursuant to 30 U.S.C. sec. 188(b) and the rental payment to preclude such termination had been timely submitted to the land office but inadvertently applied to another lease account, and then refunded to the payor when the lease to which payment had been attributed was relinquished, who accepted the refund without question, it is correct to hold that the lessee's rights in the terminated lease have been extinguished, and that a new oil and gas lease, duly issued for such lands and thereafter assigned to a bona fide purchaser, is valid _____

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PHOSPHATE LEASES AND PERMITS**PERMITS**

1. An application for a phosphate prospecting permit is properly rejected upon the basis of a previous determination by the Geological Survey that the land applied for is subject to the leasing provisions of the Mineral Leasing Act, without a review of the evidence relied upon in the initial determination, where no evidence is submitted suggesting error in that determination _____

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POWER**PURCHASE OF FOR RESALE**

1. The Bonneville Power Administrator has authority to enter into firm, long-term agreements with preference customer participants in the Trojan project and in other projects in the hydrothermal power program under which BPA takes the participants' share of project output and agrees to pay the participants under net billing arrangements for their share of project costs from a date certain whether or not the project is operable _____

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PRIVATE EXCHANGES**CLASSIFICATION**

1. Where, after a land office of the Bureau of Land Management dismissed a protest against a private exchange, the protestant shows that it had not been served properly with notice of the proposed classification of the public land for exchange, the decision will be set aside and the case remanded for compliance with the land classification procedures prescribed by the Department's regulations _____

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PRIVATE EXCHANGES—Continued**PROTESTS**

1. Where, after the land office of the Bureau of Land Management dismissed a protest against a private exchange, the protestant shows that it had not been served properly with notice of the proposed classification of the public land for exchange, the decision will be set aside and the case remanded for compliance with the land classification procedures prescribed by the Department's regulations

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RAILROAD GRANT LANDS

1. A vendee of land from a railroad is not an innocent purchaser for value of land excepted from the grant to the railroad as mineral land where the land had been extensively mined as a placer, the evidences of mining were plainly visible, a mineral location had been made on the land, and all these conditions were known or ought to have been known to the vendee at the time of the sale to it, particularly since the vendee itself was engaged in mining on adjacent lands
2. Where an application is filed under section 321 (b) of the Transportation Act of 1940 alleging a conveyance to an innocent purchaser for value by a railroad grantee, the application may not be rejected on its face solely for the reason that the lands applied for have been classified as mineral in character subsequent to the time of the conveyance. It must also be shown that the lands were of known mineral character at any time between the date the railroad line was definitely located and the date of the original sale by the railroad and that the purchaser knew or should have known at the time of his purchase that the lands were of this character

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RES JUDICATA

1. The doctrine of res judicata has long been accepted and applied by the Department. However, the doctrine is generally invoked as a bar to a claim for relief only where there has been a final adjudication of a matter before the Department and where it is clear that the same facts and issues are involved in a subsequent matter before the Department

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RULES OF PRACTICE**APPEALS****Generally**

1. The Board's jurisdiction being appellate only, a claim not previously submitted to the contracting officer will be remanded to him for his decision
2. A cost-plus-a-fixed-fee construction contractor's claim for special termination costs which had not been passed upon by the contracting officer would be remanded since the Board's jurisdiction is appellate only

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Burden of Proof

1. A contractor's claims for excusable delay based upon an equipment breakdown and machining difficulties encountered by its first tier subcontractor were denied in view of the general rule that labor, plant, equipment and materials adequate for contract performance are the contractor's responsibility and that manufacturing difficulties are not *per se* a basis for excusable delay. While

RULES OF PRACTICE—Continued**APPEALS—Continued**

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under the rule of *Schweigert v. United States*, 181 Ct. Cl. 1184, a contractor is entitled to be excused for delays attributable solely to a second tier subcontractor without a showing that the second tier subcontractor was free from fault or negligence; a contractor's claim for excusable delay based on the machining difficulties occasioned by the action of a second tier subcontractor in rolling the wrong material, the proper material being unavailable, was denied where the contractor's evidence reflected that the difficulties concerned only one of two gates, which the contract required be shipped concurrently.

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Dismissal

1. An appeal will be dismissed where the claim is founded upon a delay of the Government in delivery of Government-furnished property, pump-turbines and control units, for incorporation in a dam. The Board has no jurisdiction over claims for the cost effects of delay absent a contract provision so providing.
2. A cost-type contractor's claim for interest because its vouchers were paid late was dismissed because it was a claim for breach of contract over which the Board has no jurisdiction.

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Hearings

1. Appellant's request to consolidate two appeals for purposes of hearing in Jackson, Mississippi, is granted, despite the Government's urging that a separate hearing be held for one of the appeals limited to issues related to lack of timely notice of the claims asserted, where the Board finds (i) that the two appeals are closely related (ii) that the issues involved in the appeal as to which the question of timeliness had been raised were relatively simple, and (iii) that from the standpoint of convenience to prospective witnesses the record clearly established that Jackson, Mississippi, was preferable to Washington, D.C. as the site for the hearing. A Government request for the issuance of interrogatories to the appellant directed to the issue of timeliness of notice of claim was granted, however, where the Board found that answers to the interrogatories propounded would narrow the issues in advance of hearing.

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EVIDENCE

1. In the absence of actual cost data for a large part of the claimed extra costs and in circumstances where estimates of such costs have been based primarily on formula cost of ownership figures for equipment for the time involved, formula calculations of fuel and oil costs, and a pro rata distribution of labor costs, the Board will use a jury verdict approach to determine the amount of an equitable adjustment for a changed condition to which the contractor is entitled.
2. Appellant's request to consolidate two appeals for purposes of hearing in Jackson, Mississippi, is granted, despite the Government's urging that a separate hearing be held for one of the appeals limited to issues related to lack of timely notice of the claims asserted, where the Board finds (i) that the two appeals are

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RULES OF PRACTICE—Continued**EVIDENCE—Continued**

- closely related (ii) that the issues involved in the appeal as to which the question of timeliness had been raised were relatively simple, and (iii) that from the standpoint of convenience to prospective witnesses the record clearly established that Jackson, Mississippi, was preferable to Washington, D.C. as the site for the hearing. A Government request for the issuance of interrogatories to the appellant directed to the issue of timeliness of notice of claim was granted, however, where the Board found that answers to the interrogatories propounded would narrow the issues in advance of hearing.
3. A motion by an appellant to expunge numerous exhibits from the appeal file predicated primarily upon the ground that their inclusion without affording an opportunity for cross-examination of the authors of the various documents would be violative of due process, was granted only to the extent that the record fails to indicate that the contracting officer had in fact considered the questioned exhibits in making the findings appealed from. In support of its ruling the Board notes that (i) the Board's rules specifically provide for the composition of the appeal file; (ii) comparable rules of other boards have been determined not to be violative of due process; (iii) where a hearing is held the probative value to be given to appeal file exhibits will be determined by the evidence offered in support by witnesses subject to cross-examination; (iv) expunging an exhibit from the appeal file is no indication of the ruling the Board may make if the exhibit is proffered at the hearing; and (v) as for summaries and other exhibits expunged from the appeal file the Government may wish to resort to discovery, where appropriate, to establish the accuracy of particular exhibits
4. A first category changed conditions claim is denied where, in a case decided upon the record without a hearing, the Board finds that the appellant has failed to show by a preponderance of evidence that the sand content of the designated borrow area differed materially from the representations made by the Government; or that information allegedly withheld by the Government affected the appellant's bid with respect to either the sand content represented to be present or the pit recovery factor used. The Board notes (i) that the only testing performed by the appellant to determine sand content was done some eighteen months after contract completion; (ii) that such testing involved three of twenty-three test borings for which information was shown by the Government in the invitation; and (iii) that the results of the appellant's testing (as contrasted with that of the Government) were stated as conclusions without any details being furnished as to the method employed in testing or grading of the samples taken. In addition, the Board found that appellant had failed to offer any evidence to support its contention that the so-called total accountability approach was based upon an accepted trade practice

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RULES OF PRACTICE—Continued**EVIDENCE—Continued**

5. Claims of changed conditions in both the first and second category are denied, in a case decided upon the record without a hearing, where the Board finds that appellant has failed to show by a preponderance of evidence that changed conditions in either category were encountered. With respect to the first category changed conditions claim, the Board noted that the appellant's action in acknowledging the accuracy of information provided in the Government's test borings would appear to preclude appellant from relying upon the contention that the conditions represented by the Government's test borings were materially different than conditions encountered in actual excavation. Respecting the second category changed conditions claim, the Board found (i) that conditions encountered could not be said to be unknown where the appellant acknowledged that the physical conditions and characteristics of all materials tested throughout the Government's aggregate source were consistent with its prebid studies; and (ii) that conditions encountered could not be said to be unusual where the appellant acknowledged that prior to bid it had anticipated that conditions of the type encountered would be met and failed to show that the adverse conditions present were materially different than should have been expected.

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HEARINGS

1. A request for further hearing in a mining claim contest will be denied where the forest Service objects, the contestants fail to show any equitable basis for holding a further hearing, they fail to make a tender of proof which would tend to establish a valid discovery, and it appears that the request is simply for additional time to prospect and attempt to make a discovery of a valuable mineral deposit.
2. Where information developed after a Departmental decision holding a mining claim invalid indicates that it may have been based upon inaccurate evidence, the prior decision will be set aside and the case remanded for an administrative review of the patent application in the light of the actual situation.

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WITNESSES

1. Appellant's request to consolidate two appeals for purposes of hearing in Jackson, Mississippi, is granted, despite the Government's urging that a separate hearing be held for one of the appeals limited to issues related to lack of timely notice of the claims asserted, where the Board finds (i) that the two appeals are closely related (ii) that the issues involved in the appeal as to which the question of timeliness had been raised were relatively simple, and (iii) that from the standpoint of convenience to prospective witnesses the record clearly established that Jackson, Mississippi, was preferable to Washington, D.C. as the site for the hearing. A Government request for the issuance of interrogatories to the appellant directed to the issue of timeliness of notice of claim was granted, however, where the Board found that answers to the interrogatories propounded would narrow the issues in advance of hearing.

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RULES OF PRACTICE—Continued**WITNESSES—Continued**

2. A motion by an appellant to expunge numerous exhibits from the appeal file predicated primarily upon the ground that their inclusion without affording an opportunity for cross-examination of the authors of the various documents would be violative of due process, was granted only to the extent that the record fails to indicate that the contracting officer had in fact considered the questioned exhibits in making the findings appealed from. In support of its ruling the Board notes that (1) the Board's rules specifically provide for the composition of the appeal file; (ii) comparable rules of other boards have been determined not to be violative of due process; (iii) where a hearing is held the probative value to be given to appeal file exhibits will be determined by the evidence offered in support by witnesses subject to cross-examination; (iv) expunging an exhibit from the appeal file is no indication of the ruling the Board may make if the exhibit is proffered at the hearing; and (v) as for summaries and other exhibits expunged from the appealed file the Government may wish to resort to discovery, where appropriate, to establish the accuracy of particular exhibits.

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3. A first category changed conditions claim is denied where, in a case decided upon the record without a hearing, the Board finds that the appellant has failed to show by a preponderance of evidence that the sand content of the designated borrow area differed materially from the representations made by the Government; or that information allegedly withheld by the Government affected the appellant's bid with respect to either the sand content represented to be present or the pit recovery factor used. The Board notes (i) that the only testing performed by the appellant to determine sand content was done some eighteen months after contract completion (ii) that such testing involved three of twenty-three test borings for which information was shown by the Government in the invitation; and (iii) that the results of the appellant's testing (as contrasted with that of the Government) were stated as conclusions without any details being furnished as to the method employed in testing or grading of the samples taken. In addition, the Board found that appellant had failed to offer any evidence to support its contention that the so-called total accountability approach was based upon an accepted trade practice.

4. Claims of changed conditions in both the first and second category are denied, in a case decided upon the record without a hearing, where the Board finds that appellant has failed to show by a preponderance of evidence that changed conditions in either category were encountered. With respect to the first category changed conditions claim, the Board noted that the appellant's action in acknowledging the accuracy of information provided in the Government's test borings would appear to preclude appellant from relying upon the contention that the conditions represented by the Government's test borings were materially different than conditions encountered in actual excavation. Respecting the second category changed conditions claim, the Board found (i) that

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RULES OF PRACTICE—Continued**WITNESSES—Continued**

conditions encountered could not be said to be unknown where the appellant acknowledged that the physical conditions and characteristics of all materials tested throughout the Government's aggregate source were consistent with its prebid studies; and (ii) that conditions encountered could not be said to be unusual where the appellant acknowledged that prior to bid it had anticipated that conditions of the type encountered would be met and failed to show that the adverse conditions present were materially different than should have been expected.

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SECRETARY OF THE INTERIOR

1. A statutory authorization is necessary to support the acquisition of land or an interest in land, including a scenic easement, regardless of whether the acquisition is by purchase or donation.
2. Once a tribal council acts to deny a person's application for enrollment, and there is no provision in the tribal constitution or in an applicable act of Congress for appeal of that determination to the Secretary, there exists jurisdiction in the Secretary to review only the effect of the council's action on the distribution of tribal assets over which the Secretary has been granted authority as trustee by the Congress.
3. Involving 319.3 acres of land covered by water right applications under sec. 5 of the 1902 Act (31 Stat. 790) and sec. 3 of the 1912 Act (37 Stat. 265); when full payout of construction charges has been made and when the Secretary determines that a general pattern of family size ownership has been established in the area, then the Secretary must deliver water, if available, to the entire tract, including 159.3 acres of "excess" lands.

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SMALL TRACT ACT**GENERALLY**

1. The mere filing of a small tract application does not create in the applicant any right or interest in the land, and the Secretary in his discretion may refuse to consummate a sale at any time prior to issuance of patent.

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CLASSIFICATION

1. Public lands classified as disposable under the Act may be reclassified by the Secretary for retention by the Government.

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STATUTES

1. The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R. S. sec. 2072, 25 U.S.C. sec. 48 (1964), is that authority related to the direction of employees and within the general range of the duties of their employment.
2. The authority to direct the employment of Federal employees which the Secretary of the Interior may delegate to an Indian tribe pursuant to the provisions of R.S. sec. 2072, 25 U.S.C. sec. 48 (1964), may not include authority to employ, promote, or evaluate the performance of employees, nor authority to approve the alienation of rights in trust property, nor authority over Individual Indian Money accounts, nor authority to expend or encumber appropriated Federal funds; nor authority to review or approve tribal actions, nor au-

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STATUTES—Continued

thority which would abrogate employee rights granted by Executive order or regulation, nor authority to issue, amend, or waive Federal regulations.

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3. Indian tribes generally do not possess criminal jurisdiction over non-Indians unless there still remains in force a treaty provision whereby a tribe acquired "exclusive jurisdiction over such offenses" as provided by section 1152, Title 18, United States Code. While that reference to exclusive tribal jurisdiction still appears in section 1152, it is doubtful that any such jurisdiction has survived since, though initially some treaties may have granted criminal jurisdiction over non-Indians, later treaty provisions usually required the tribes to seize and surrender offenders to designated Federal officials.

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STATUTORY CONSTRUCTION**GENERALLY**

1. A right-of-way within the meaning of section 1(7) of the act of August 8, 1953, 67 Stat. 495, 16 U.S.C. 1(7) (1964) which authorizes the Secretary of the Interior to acquire lands and interests in lands, including scenic easements, in lands adjacent to a road right-of-way located within area of the National Park System, need not be limited to only roads open to vehicular motor traffic. The towpath of the Chesapeake and Ohio Canal National Monument is a road right-of-way within the meaning of that act.

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WITHDRAWALS AND RESERVATIONS**EFFECT OF**

1. "*Valid Existing Rights.*" Since a withdrawal made by Public Land Order 4502 is subject to "valid existing rights," a successful contestant of a homestead entry may exercise the preference right he had earned upon the cancellation of the contested entry, although it had not been actually awarded prior to the withdrawal; however, an application filed by him prior to notation of the cancellation is premature and must be rejected.

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WORDS AND PHRASES

1. "*Valid Existing Rights.*" Since a withdrawal made by Public Land Order 4502 is subject to "valid existing rights," a successful contestant of a homestead entry may exercise the preference right he had earned upon the cancellation of the contested entry, although it had not been actually awarded prior to the withdrawal; however, an application filed by him prior to notation to the cancellation is premature and must be rejected.

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