

UNITED STATES DEPARTMENT OF THE INTERIOR

WASHINGTON, D.C. 20240

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

Office of Hearings and Appeals-----Pou T. Baird, Director

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

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

EDITED BY

RACHAEL CUBBAGE



VOLUME 94

JANUARY-DECEMBER 1987

U.S. GOVERNMENT PRINTING OFFICE, WASHINGTON: 1988

For sale by the Superintendent of Documents, U.S. Government Printing Office

Washington, D.C. 20402

PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1 to December 31, 1987. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during this period.

The Honorable Donald P. Hodel served as Secretary of the Interior; Messrs. J. Steven Griles, William P. Horn, Richard Montoya, Ross O. Swimmer, and James W. Ziglar served as Assistant Secretaries of the Interior; Mr. Ralph W. Tarr served as Solicitor; and Mr. Paul T. Baird served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as '94 I.D.'



Donald Paul Hodel
Secretary of the Interior

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Page 48—Column total on chart at the top of the page should be 27 days.

Page 177—'Mixed grassland' should be under the column entitled 'General Vegetative Cover' on the chart in fn. 7.

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- Hennig, Nellie J., 38 L.D. 443; recalled & vacated, 39 L.D. 211.
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- McMicken, Herbert, 10 L.D. 97; 11 L.D. 96; distinguished, 58 I.D. 257.
- McMurtrie, Nancy, 73 IBLA 247 (1983); overruled to extent inconsistent, 79 IBLA 153, 91 I.D. 122.
- McNamara v. California, 17 L.D. 296; overruled, 22 L.D. 666.
- McPeek v. Sullivan, 25 L.D. 281; overruled, 36 L.D. 26.
- Mead, Robert E., 62 I.D. 111; overruled, 85 I.D. 89.
- Mee v. Hughart, 23 L.D. 455; vacated, 28 L.D. 209; in effect reinstated, 44 L.D. 414; 46 L.D. 434; 48 L.D. 195; 49 L.D. 659.
- Meeboer v. Schut's Heirs, 35 L.D. 335; overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Mercer v. Buford Townsite, 35 I.D. 119; overruled, 35 L.D. 649.
- Meyer v. Brown, 15 L.D. 307 (See 39 L.D. 162).

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- Rankin, James E., 7 L.D. 411; overruled, 35 L.D. 32.
- Rankin, John M., 20 L.D. 272; *rev'd*, 21 L.D. 404.
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- Reliable Coal Corp., 1 IBMA 50, 78 I.D. 199; distinguished, 1 IBMA 71, 78 I.D. 362.
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- Rhonda Coal Co., 4 IBSMA 124, 89 I.D. 460; modified to extent inconsistent, 74 IBLA 170.
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- St. Paul, Minneapolis & Manitoba Ry. *v.* Hagen, 20 L.D. 249; overruled, 25 L.D. 86.
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- Shaw Resources, Inc., 73 IBLA 291 (1983); reconsidered & modified, 79 IBLA 153, 91 I.D. 122.
- Shillander, H. E., A-30279 (Jan. 26, 1965); overruled, 79 I.D. 416.
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- Silver Queen Lode, 16 L.D. 186; overruled, 57 I.D. 63.
- Simpson, Lawrence W., 35 L.D. 399; modified, 36 L.D. 205.

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- Tupper v. Schwarz, 2 L.D. 623; overruled, 6 L.D. 624.
- Turner v. Cartwright, 17 L.D. 414; modified, 21 L.D. 40.
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- Union Oil Co. of California (Supp.), 72 I.D. 313; overruled & rescinded in part, 74 IBLA 117 (1983).
- Union Pacific R.R., 33 L.D. 89; recalled, 33 L.D. 528.
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- U.S. v. Edeline, 39 IBLA 236 (1979); overruled to extent inconsistent, 74 IBLA 56, 90 I.D. 262.
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- U.S. v. Kosanke Sand Corp., 3 IBLA 189, 78 L.D. 285; set aside & remanded, 12 IBLA 282, 80 I.D. 538.
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NOTE—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, Vols. 1 and 2. "C.L.L." to Copp's Public Land Laws, 1875 edition, 1 volume; 1882 edition, 2 volumes; 1890 edition, 2 volumes. "C.L.O." to Copp's Land Owner, Vols. 1-18. "L. and R." to records of the former Division of Lands and Railroads. "L.D." to the Land Decisions of the Department of the Interior, Vols. 1-52. "I.D." to Decisions of the Department of the Interior, Vols. 53-current volume.—Editor.

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

CURTIS SAND & GRAVEL CO., ESTATE OF CLARE SCHWEITZER

95 IBLA 144

Decided January 12, 1987

Appeals from decisions of the District Manager, California Desert District, Bureau of Land Management, requesting settlement of trespass damages for unauthorized removal of mineral material. CA-060-4272.

Affirmed as modified in part; set aside in part and remanded.

1. Mineral Lands: Mineral Reservation--Patents of Public Lands: Reservations--Stock-Raising Homesteads--Trespass: Generally

Removal of sand and gravel for commercial purposes from land patented under the Stock-Raising Homestead Act, *as amended*, 43 U.S.C. § 291 (1970), constitutes a trespass because such material was reserved to the United States by the Act.

2. Appraisals--Trespass: Measure of Damages

BLM may, consistent with State law, establish trespass damages for a nonwillful trespass resulting from the unauthorized removal of sand and gravel reserved to the United States in accordance with the royalty value of the material removed set forth in a private lease of that material, as long as the lease was an arm's-length transaction. However, the royalty value must represent only the value of the privilege of mining and removing the material and such use of the surface reasonably incident to mining or removal, as that is the interest reserved.

3. Act of July 31, 1947--Materials Act--Trespass: Generally

When a party has been found to be in trespass as a result of having removed sand and gravel from lands patented under the Stock-Raising Homestead Act, *as amended*, 43 U.S.C. § 291 (1970), the party must comply with the provisions of 43 CFR 9239.0-9(c) in order to qualify for purchase of additional sand and gravel from the Government. If the party does comply, BLM has the discretion to sell additional sand and gravel to the trespasser pursuant to the provisions of sec. 1 of the Act of July 31, 1947, *as amended*, 30 U.S.C. § 601 (1982), and its implementing regulations.

4. Estoppel--Materials Act--Trespass: Generally

If, subsequent to giving notice that a party is in trespass when removing sand and gravel from lands in which the Government has retained all minerals, BLM agrees to allow the mining operations to continue while negotiating a settlement of the issue of trespass damages, the continued operations should not be considered as willful trespass unless and until the operator is given notice that the mining operations should cease.

APPEARANCES: Joseph C. Malpasuto, Esq., Glendale, California, for the Curtis Sand & Gravel Co.; Thomas G. Baggot, Esq., Torrance, California, for the Estate of Clare Schweitzer; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

The Curtis Sand & Gravel Co. (Curtis) and William P. Willman, Executor of the Estate of Clare Schweitzer (Willman), have appealed from two decisions of the District Manager, California Desert District, Bureau of Land Management (BLM), dated March 26, 1985, entitled Notices of Demand, requesting the settlement of trespass damages for the unauthorized removal of mineral material.

On October 9, 1984, BLM issued two Trespass Notices (CA-060-4272) to appellants regarding the unauthorized removal of "mineral material" from the SE 1/4 SE 1/4 sec. 9, T. 4 N., R. 14 W., San Bernardino Meridian, Los Angeles County, California, in Soledad Canyon. That land had been patented by the United States (Patent No. 1068545) on March 14, 1934, pursuant to section 1 of the Stock-Raising Homestead Act (SRHA), *as amended*, 43 U.S.C. § 291 (1970) (repealed effective October 21, 1976, by section 702 of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2787). The patent was made subject to a reservation of "all the coal and other minerals" to the United States, in accordance with section 1 of SRHA. The record indicates Willman, as executor of the estate of Clare Schweitzer, successor-in-interest of the original patentee, leased the land to Curtis pursuant to a 15-year lease dated November 21, 1983. Under the lease, Curtis has the right to conduct "rock, sand and gravel production and operations," subject to the payment of a minimum royalty of 20 cents per ton of "rock, sand and/or gravel material originating and excavated, and removed from the Leased Premises."¹ The lease also accorded Curtis the option to purchase the land upon the expiration of the lease term, at the price of \$1.2 million, and included an assignment of an April 16, 1982, "Easement Agreement" regarding the use of adjacent private land.

By memorandum dated February 4, 1985, the District Manager endorsed a Mineral Report, also dated February 4, 1985, which recommended initiation of steps to recover trespass damages for the period between July 22, 1983, and October 9, 1984, based on a royalty of 14.5 cents per ton of "sand and gravel" removed from the land

¹ The lease reserved to the lessor, "All minerals, oil, gas and other hydrocarbons (rock, sand and gravels not being minerals), and the right to explore for or mine and extract same" (Nov. 1983 Lease at 4). The attached land description represented that the SE 1/4 SE 1/4 sec. 9 "is subject to no other reservations other than oil or gas and is free and clear and unencumbered."

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during that time period.² The mineral report stated Curtis had reported the removal of a total of 377,947.35 tons. The report discounted the minimum royalty of 20 cents per ton under the November 1983 lease between Willman and Curtis. Rather, the report, in arriving at the royalty of 14.5 cents per ton, relied on a comparable sand and gravel operation (Gillibrand), Curtis' only competition in the Soledad Canyon area. The report took the 17 cents per ton royalty paid by Gillibrand and decreased that figure by factoring in either the lower price received or the longer hauling distance experienced by Curtis, when compared with Gillibrand.

An evaluation of the Mineral Report, dated February 26, 1985, which was adopted by the Deputy State Director, Mineral Resources, on March 12, 1985, concluded there was "no justification" for reducing the royalty below 20 cents per ton. The Deputy State Director, in a March 13, 1985, memorandum to the District Manager, stated trespass damages could be calculated using either the royalty value of minerals extracted or the value of the minerals less production costs, in accordance with the court's opinion in *United States v. Marin Rock & Asphalt Co.*, 296 F. Supp. 1213 (C.D. Cal. 1969). The Deputy State Director concluded trespass damages should be calculated using a royalty of 20 cents per ton unless the other approach would result in a "higher" figure.

In his March 1985 decisions, the District Manager requested appellants to settle trespass damages, "preliminarily estimated" at \$75,600 (378,000 tons times 20 cents per ton). The District Manager instructed appellants each to submit a "settlement offer [Form 9239-1 (July 1972)], including initial payment, within 30 days of your receipt of this notice."³ The District Manager also informed Curtis:

Following our acceptance of your offer, we will be prepared to issue you a non-competitive material sale [contract] to authorize the operation of the Soledad plant after October 9, 1984. Without such authorization the removal of material after October 9, 1984 must be considered willful trespass.⁴

Both appellants have appealed from the March 1985 BLM decisions, and have raised a number of issues. They do not contend that the land

² Pursuant to BLM Instruction Memorandum (IM) No. 84-183, dated Dec. 21, 1983, trespass damages were deemed actionable from and after July 21, 1983, 45 days after the June 6, 1983, Supreme Court decision in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), that "sand and gravel" were reserved minerals under a SRHA patent. With limited exceptions, trespass damages prior to this time period have been waived by BLM as an "exercise of prosecutorial discretion." IM No. 84-183 at 1; *Harney Rock & Paving Co.*, 91 IBLA 278, 282, 93 I.D. 179, 181 (1986).

³ The settlement offer form contains a sec. (B) where the trespasser can indicate that it is either paying trespass damages in full or in part, with certain installments to follow on or before specific dates, or submitting a promissory note.

⁴ In an Apr. 23, 1985, letter to Curtis' counsel, the District Manager stated a noncompetitive material sale contract would authorize the sale of only 100,000 cubic yards "at the appraised fair market value which has been determined to be 20 cents per ton," and that additional material could be offered "on a competitive basis." The District Manager further stated the contract would be offered after receipt of the settlement offer or the posting of a guarantee bond in the same amount in the case of an appeal. The record indicates appellants posted the necessary bond and by letter dated June 3, 1985, the District Manager offered a contract (No. CA-060-MP5-3) for the removal of 50,000 tons of sand and gravel at a "fair market value" of 18 cents per ton. This value had been calculated in a May 29, 1985, Mineral Report, approved by the Deputy State Director on May 31, 1985.

was patented under SRHA, with a mineral reservation in favor of the United States, however.

[1] Both appellants contend first that sand, which Curtis asserts is 50 percent of the material processed at the Soledad Canyon site, is not a mineral reserved to the United States under the SRHA patent, and thus its removal does not constitute a trespass. The Regional Solicitor, on behalf of BLM, argues that sand is a reserved mineral. We have already addressed this question in *Browne-Tankersley Trust*, 76 IBLA 48 (1983), in which we held that, to the extent they have independent commercial value, deposits of sand are reserved to the United States in a SRHA patent. As we stated in *Browne-Tankersley*, this holding is consistent with the Court's reasoning in *Watt v. Western Nuclear, Inc.*, *supra*, which concluded that commercial deposits of gravel are reserved. Cf. *Millsap v. Andrus*, 717 F.2d 1326 (10th Cir. 1983) (reservation of "other minerals" construed broadly to include limestone and dolomite); *Spurlock v. Santa Fe Pacific Railroad Co.*, 694 P.2d 299 (Ariz. Ct. App. 1984). There is no dispute the sand extracted and removed by Curtis has an independent commercial value. Between July 21, 1983, and October 9, 1984, Curtis mined 377,947 tons of sand, which was sold at an average price of \$3.18 per ton. Mineral Report, dated February 4, 1985, at 5. This deposit of sand must be deemed reserved to the United States. Cf. *Pacific Power & Light Co.*, 45 IBLA 127 (1980) (scoria reserved under SRHA patent), *aff'd*, *Pacific Power & Light Co. v. Watt*, Civ. No. C 80-073K (D. Wyo. June 17, 1983).

[2] Appellants next challenge the calculation of trespass damages. The measure of damages is defined by 43 CFR 9239.0-8 to be that "prescribed by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized." In *Harney Rock & Paving Co.*, *supra* at 287, 93 I.D. at 184 (quoting from *Knife River Coal Mining Co.*, 70 I.D. 16, 18 (1963)), we concluded that, under the regulation, "BLM should make damage determinations for Federal mineral trespass by the method most favorable to the trespass victim, unless it can be said 'with certainty' that state law requires a different method."

California law does prescribe a measure of damages, which in actuality is an "election of remedies." *United States v. Marin Rock & Asphalt Co.*, *supra* at 1219. In the case of an innocent or nonwillful trespass, the Government may elect to receive either the royalty value of the mineral material removed or the market value of the mineral material removed, less the costs of production. *Id.*

The District Manager in his March 1985 decisions has elected to recover the royalty value of the sand and gravel removed by appellants as damages for the trespass. BLM thereby recovers the value of the sand and gravel which would have otherwise been paid to the United States had BLM formally granted appellants the privilege of mining and removing the reserved mineral, including such use of the surface reasonably incident to mining or removal of the mineral. See 43 U.S.C. § 299 (1982). Appellants are permitted to retain whatever net profit

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they would have otherwise been entitled to under such an arrangement. See *United States v. Marin Rock & Asphalt Co.*, *supra* at 1219. Appellants do not dispute the royalty method of calculating trespass damages, but challenge the 20 cents per ton royalty established by BLM.

Appellants both contend the 20 cents per ton royalty is unjustified because the mineral deposit is not "economically viable" due to the lack of water, space for settling ponds, and vehicular access on the property. Curtis states the sand and gravel have "little, if any, value to the United States," and thus the trespass has resulted in no compensable loss. We are not persuaded that the profitability of mining the sand and gravel has any direct bearing on the requirement that there should be some payment for unauthorized removal. If the material were not removed it would remain in place and be available for removal at some later date when a profitable operation could be undertaken. The removal bars recovery at some future date. To hold otherwise would deny BLM recovery of any trespass damages despite the fact appellants admittedly extracted and removed a considerable amount of sand and gravel between July 21, 1983, and October 9, 1984, without payment to the owner.

In *United States v. Marin Rock & Asphalt Co.*, *supra* at 1219, the court recognized that the royalty method of calculating trespass damages is specifically designed to ensure some compensation to the United States "even where the trespasser's operations have proved unprofitable." Moreover, the royalty method is also designed to compensate an owner for the unauthorized removal of his minerals even in circumstances where the landowner could not himself have profitably removed the minerals at the time of removal. As the court stated in *Hughett v. Caldwell County*, 230 S.W.2d 92, 96 (Ky. Ct. App. 1950): "Where the owner could not extract the minerals himself in any practical or feasible way * * * the value is as it lay in the ground. All he could expect to receive is the usual and customary royalty." These holdings merely recognize that, at the very least, the United States has been denied the benefit of royalties it would have received had it granted appellants the privilege of mining the sand and gravel. These royalties are clearly a compensable loss.

We are aware, as Curtis points out, that, if Curtis is required to ultimately pay the trespass damages, this may constitute a double payment for the same 378,000 tons of sand and gravel, presuming Curtis is unable to recoup all or part of any royalty paid to Willman under the November 1983 lease. This will undoubtedly cause financial hardship. However, in his March 1985 decisions, the District Manager merely requested appellants to make an offer of settlement with regard to a trespass for which appellants "share responsibility." The District Manager intimated that appellants are jointly and severally liable for the trespass. We agree. The trespass consisted of the

unauthorized "extraction, severance, injury, or removal of * * * mineral materials from public lands" (43 CFR 9239.0-7) by Curtis, pursuant to a lease issued by Willman. *See* 54 Am. Jur. 2d "Mines and Minerals" § 220 (1971); 75 Am. Jur. 2d "Trespass", §§ 30-32 (1974). In view of this joint and several liability, BLM may properly proceed against both parties for the collection of trespass damages. However, this Department is not the proper forum for adjudication of any right of contribution which may exist. The Department is only concerned with the payment of damages. Thus, the submission of the "settlement offer" and payment by either appellant would satisfy the Government claim against the other. The offer may take the form of a cash payment, promissory note, or installment contract. 43 CFR 9239.0-9(b). Submission of an amount determined to be compensation for damages incurred by reason of the trespass by *one* of the appellants will constitute compliance, but the failure of either appellant to submit an offer and make payment or arrangements for payment would result in further administrative sanctions against either or both of the appellants.

Curtis next argues the 20 cents per ton royalty is "unreasonable" because it is higher than the royalty paid by Gillibrand under its lease with the Forest Service and higher than the "average royalty" paid to Willman. BLM argues that 20 cents per ton is in fact the minimum royalty set in section 9(a) of the November 1983 arm's-length lease between Willman and Curtis, which states "in no event shall the rate per ton ever be less than twenty cents (\$.20) per ton."

A royalty will be considered a "permissible measure of damages for extraction of sand and gravel by a good faith trespasser under California law" as long as the royalty is "reasonable." *United States v. Marin Rock & Asphalt Co.*, *supra* at 1218. It is also said that a landowner is "allowed the amount for which [it] could sell the privilege of mining and removing the minerals under the customary lease * * * of the mineral rights." Annot., 21 A.L.R. 2d 373, 384 (1952). The customary royalty may be judged by the royalty set in comparable leases of public or private land in the vicinity of the trespass land. However, in each case there is the problem of ensuring comparability. *See Western Nuclear, Inc.*, 35 IBLA 146, 166 (1978), *aff'd*, *Western Nuclear, Inc. v. Andrus*, 475 F. Supp. 654 (D. Wyo. 1979), *rev'd*, 664 F.2d 234 (10th Cir. 1981), *rev'd sub nom. Watt v. Western Nuclear, Inc.*, *supra*. Thus, generally where the trespass land is already the subject of a lease derived from an arm's-length transaction with an established royalty, that royalty will be considered the best evidence of the customary royalty. Cf. *Reed Z. Asay*, 55 IBLA 157 (1981) (trespass damages constitute the Government's share of income computed on the basis of the average price of severed crop, actually received by the trespasser).

In the present case, the 20 cents per ton is the minimum royalty set by appellants specifically with respect to the Soledad Canyon mining operation. There is no evidence the November 1983 lease was not an

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arm's-length transaction. In *Marin Rock*, the court upheld an assessment of trespass damages in favor of the United States using the royalty set by the defendants in a private lease of the Federal sand and gravel, implicitly adopting the royalty as "usual and customary." The court also relied on the conclusion that the Government, as the "true owner of the land," was "subrogated" to the contractual rights of the putative private lessor: "Among the true owner's rights is the right to affirm such a contract made by a trespasser and claim its profits." *Id.* at 1220; see also *Alaska Placer Co. v. Lee*, 553 P.2d 54, 61-2 (Alaska 1976).

Nevertheless, we must set aside the March 1985 BLM decisions and remand the case to BLM for a recalculation of the royalty rate used in the computation of trespass damages because we find sufficient evidence the royalty set forth in the November 1983 lease does not constitute the "usual and customary" royalty for the removal of the sand and gravel and incidental surface use. The royalty rate set forth in the lease and subsequently used by BLM was negotiated in the context of a private lease which grants more than just the right to remove sand and gravel and incidental surface use. Under that lease, Curtis is required to pay royalty "as consideration for the use and possession of the Leased Premises and the rights conferred upon Lessee hereunder." November 1983 Lease at 9. Such "rights" include assignment of the April 1982 easement agreement, an option to purchase the land at a fixed price, certain water rights deemed essential to processing the gravel (see letter, dated October 26, 1984, from Joseph C. Malpasuto to BLM at 3), and use of the land for processing and manufacturing operations. November 1983 Lease at 4, 6, 8-9, 20. There is no indication in the record if or how the parties to the lease took these factors into account in setting the royalty rate.⁵ However, these factors clearly represent more than the "usual and customary" rights granted for the removal of the sand and gravel and incidental surface use.

In essence, we are looking for the fair market royalty value, i.e., that value which would have been set by a willing buyer and seller through the "haggling of the market." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949). Moreover, that value should only reflect the value placed on the removal of the sand and gravel and incidental surface use. The aim, as noted *supra*, is to compensate the United States for the value of the sand and gravel had BLM formally granted appellants the privilege of mining and removing the reserved mineral, which privilege would have included use of the surface reasonably incidental to mining or removal. The United States is simply not entitled to be

⁵ It could logically be argued that a "premium" royalty would be paid for the use of the land for processing and manufacturing facilities. By paying an additional royalty, rather than "renting" the necessary additional surface lands, the operator avoids payment of rentals at such time or times when the market conditions do not warrant operating the facility. There would be no "rental" payment at a time when there is no cash flow.

compensated for the value of rights and privileges which it could not have granted. In determining trespass damages, BLM must factor out such private rights and privileges to the extent they affected the royalty rate set in the private lease BLM relies upon. Because determining if and how these factors were taken into account by the private parties is problematical, especially as it relies on the ex post facto opinions of the parties, the best approach may be to determine the fair market royalty value using the comparable sales approach. See Uniform Appraisal Standards for Federal Land Acquisitions, Interagency Land Acquisition Conference, 1973, at 9-11.

In a January 4, 1985, memorandum, the District Manager concluded the fair market royalty value was 14.5 cents per ton, and stated:

Some case might be made that FMV is 20 cents per ton. Our assessment of this, however, is that more rights were included such as reimbursement for destruction of the surface and an option to purchase the land in fee. It appears that the 14½ cent figure represents a fair return for the in-place value.

Likewise, the February 1985 Mineral Report recommended trespass damages be assessed at the rate of 14.5 cents per ton, calculated by using the comparable sales approach, and noted:

The current royalty rate, 20 cents per ton, that Curtis Sand and Gravel pays to the private landowner, obviously cannot represent the fair market value of the aggregate materials, because this royalty rate includes the option to purchase the land and the right to use the surface of the adjacent fee land.

Mineral Report at 6. Despite the conclusions of the appraiser and the District Manager, the Deputy State Director concluded, without any explanation, that there was "no justification" for a reduction in the assessed royalty value from 20 cents per ton. We cannot agree. The November 1983 lease obviously includes rights of use and occupancy that cannot be granted by the United States. We, therefore, must set aside the March 1985 BLM decisions and remand the case to BLM for a recalculation of the royalty rate used in the computation of trespass damages. We express no opinion on the adequacy of the valuation made in the February 1985 Mineral Report.⁶ Finally, in light of the remand, it is unnecessary to act on a request by Curtis for a hearing on the question of whether 20 cents per ton is a reasonable measure of damages. That evidence may be submitted to BLM on remand.

[3] Curtis also contends the proposed noncompetitive material sale contract is inadequate to meet its projected annual production and sales. Curtis argues BLM has the authority to enter into a "long-term material lease" sufficient to cover the projected production and sales. The Regional Solicitor argues that "any sales of sand and gravel by the Bureau must comply with the provisions of 43 CFR Part 3610."

In its March 1985 decision with respect to Curtis, BLM stated that it was prepared to issue a noncompetitive sale contract following

⁶ The 14.5 cents per ton royalty was based upon the Forest Service lease. Deductions were made for other usage granted in the Curtis lease. However, there is no evidence of consideration of other rights granted by the Forest Service which could not be granted to Curtis by BLM because of the split estate. Further, there is an indication the royalty on the Forest Service lease has been increased. Mineral Report of May 29, 1985, at 1.

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settlement of the trespass damages. Appellant essentially protested this proposed action in an April 10, 1985, letter. In its April 1985 letter to appellant's counsel, BLM effectively denied the protest, and stated that the sale would be limited to the "purchase of 100,000 tons of material." BLM also indicated that it was willing to "offer for sale on a competitive basis, tennage sufficient to meet your client's yearly requirements." Both proposed actions were made contingent on either settlement of the trespass damages or the posting of a guarantee bond. Appellant has posted the bond in accordance with 43 CFR 9239.0-9(b)(3), but continues to challenge the competitive sale.

Departmental regulation 43 CFR 9239.0-9 restricts the authority which BLM otherwise has to "sell" mineral materials to a trespasser. The regulation provides in subsection (b) that BLM "may refuse to sell to a trespasser * * * materials" if the trespasser fails to make a "satisfactory arrangement for payment of the debt due the United States" after demand for payment and there is reason to believe payment will not be made. 43 CFR 9239.0-9(b).⁷ Subsection (c) of the regulation provides that, "[n]otwithstanding the provisions of paragraph (b) of this section," BLM

may sell to a trespasser * * * materials * * * despite lack of a satisfactory arrangement for payment if [the authorized] officer establishes in writing that:

- (1) There is no other qualified bidder or no other qualified bidder will meet the high bid, and
- (2) The sale * * * to the trespasser is necessary to protect substantial interests of the United States either by preventing deterioration of, or damage to, resources of the United States or by accepting an advantageous offer, and
- (3) The * * * resource management program of the United States will not be adversely affected by the action.

43 CFR 9239.0-9(c).

Prior to the promulgation of the above regulation in 1970, BLM was expressly prohibited from selling materials to a trespasser unless specified conditions were satisfied: "No sale of * * * material will be made * * * to a trespasser who has not satisfied his liability to the United States, except where: * * *." 43 CFR 288.12(b) (18 FR 4913 (August 18, 1953)). The enumerated conditions included filing a guarantee bond and making the written finding now set forth in 43 CFR 9239.0-9(c). *Id.* The current regulation essentially retains the prohibition on sales to a trespasser unless one of the currently specified conditions is satisfied. However, BLM is not required to sell materials to a trespasser even though one of the specified conditions is met. The authority to sell is discretionary.

In addition to the sale of materials to a trespasser, 43 CFR 9239.0-9 provides for the "lease" of materials. However, mineral materials

⁷ Satisfactory arrangement is defined to include payment, execution of a satisfactory promissory note or installment agreement "so long as the agreed-upon payments are made on schedule," delivery of a guarantee bond, or discharge of the debt in bankruptcy. 43 CFR 9239.0-9(b).

subject to disposal under sections 1 and 2 of the Act of July 31, 1947, *as amended*, 30 U.S.C. §§ 601, 602 (1982), including "common varieties" of sand and gravel (30 U.S.C. § 601 (1982)), are not considered materials subject to leasing under the mineral leasing laws. *See* 30 U.S.C. §§ 181, 352 (1982). As the Deputy Solicitor observed in *Solicitor's Opinion*, M-36575 (Aug. 26, 1959), section 1 of the Act of July 31, 1947, *as amended*, 30 U.S.C. § 601 (1982), provides that such materials "may be disposed of only in accordance with the provisions of this Act." *See also* 43 CFR 3603.1 (unauthorized use of "mineral materials" except when authorized by "sale or permit"). Accordingly, BLM is only entitled to sell the sand and gravel involved herein to Curtis under 43 CFR 9239.0-9 (and under 43 CFR Part 3610). There is simply no statutory or regulatory authority to lease the sand and gravel pursuant to the Mineral Leasing Act.

[4] BLM may sell the sand and gravel to Curtis under 43 CFR 9239.0-9(c). However, there has been no written determination in accordance with that regulatory provision and appellants have presented no evidence supporting such a determination. Therefore, BLM properly offered to sell the sand and gravel to Curtis upon the delivery of a guarantee bond or settlement of the trespass damages under 43 CFR 9239.0-9(b). Curtis fulfilled the condition for a sale set forth in that regulation by delivering the guarantee bond.

However, satisfaction of the condition for a sale under 43 CFR 9239.0-9(b) only authorizes BLM to engage in a sale consistent with the provisions of the Act of July 31, 1947, and its implementing regulations. BLM may dispose of mineral materials pursuant to that Act by competitive or noncompetitive sale where disposal "would not be detrimental to the public interest." 30 U.S.C. § 601 (1982). Under the Act the Secretary is required to dispose of such materials to the "highest responsible qualified bidder," but is authorized to contract for the disposal of "property for which it is impracticable to obtain competition." 30 U.S.C. § 602(a) (1982).⁸

Competitive sales are governed by 43 CFR 3610.3 and noncompetitive sales by 43 CFR 3610.2. Assuming the statutory prerequisites of a noncompetitive sale have been met (*see* 43 CFR 3610.2-1(a)), under a noncompetitive sale contract, the permittee "[s]hall not remove mineral materials until advance payment is made." 43 CFR 3610.1-3(a)(1). The record is clear the removal of sand and gravel since October 9, 1984, has not been pursuant to a sale contract for which advance payment has been made. Such removal, which is not "authorized by law and the regulations of the Department," is technically a continuing "act of trespass." 43 CFR 9239.0-7; *see* 43 CFR 3603.1. Because of the condition leading to the trespass, including the belief that ownership of the sand and gravel had vested with the patent, BLM endeavored to provide retroactive approval for such

⁸ Any notice of competitive sale would necessarily contain a description of the limitations and restrictions which would arise as a result of the split estate.

January 12, 1987

trespass. However, there is no statutory or regulatory provision which authorizes BLM to issue a retroactive noncompetitive sale contract.⁹

Nevertheless, we conclude that under the circumstances BLM is precluded from claiming the continuing trespass is willful. The original October 9, 1984, trespass notices statod that the sand and gravel operations "*must stop immediatoly.*" (Italics in original.) However, the record contains an October 10, 1984, memorandum to the files by a BLM employee which refers to a conversation which took place at the time of delivery of the trespass notice to "Ben W. Curtis of Curtis Sand & Gravel":

I told him that our intent is to collect damages for removal of material since last July and for the sale of future material, even though the notice makes it sound like we're trying to shut them down.

I told him that if they (meaning he and Willman) cooperate we would be looking at no shutdown of the operation. This would mean giving us past records on tons removed and money paid to Willman, and paying us an initial amount of a promissory note for past damages and future sale.

During a meeting held on October 25, 1984, BLM received Curtis' records of sand and gravel sold between July 1983 and September 1984. Handwritten notes of the meeting indicate BLM was again attempting to make arrangements "to keep Curtis going."

Curtis' counsel summarized the meeting in an October 26, 1984, letter to BLM:

As evidence of Mr. Curtis' good faith in this matter, Canyon Country Enterprises, the present operator and lessee of the property, agreed to execute a promissory note in favor of the Government, the terms of which are to be agreed upon at a later date. Because of the complexity of this matter, the terms of the note will be flexible, as to both terms and amounts. You indicated that you would be seeing the Bureau of Land Management's attorney, Mr. Burt Stanley on Tuesday of next week and that, hopefully, sometime in the latter part of that week we could meet and work out the terms of the note.

You also were kind enough to indicate that in the meantime, Curtis can continue to operate its Soledad facility without being subject to a Government claim or charge for wilfull trespass. Canyon Country Enterprises will, as it and its predecessors in interest have over the last 17 or 18 years, continue to account for all material removed from the Soledad plant.

There is no evidence other than the initial notices that Curtis was ever ordered to halt the continued extraction and removal of sand and gravel, despite the fact BLM knew operations were continuing. On May 9, 1985, BLM received from Curtis an accounting of tons shipped "from our Soledad Canyon Plant from July 21, 1983 to the end of April 1985." Moreover, in a May 24, 1985, letter to Curtis, the District Manager refers to the October 1984 meeting with Curtis:

At that time we agreed to allow your operation to continue without charge for willful trespass until an appraisal of the value of the mineral material could be completed. Our intent was not to allow an unauthorized operation to continue indefinitely.

⁹In IM No. 84-183, the Director, BLM, instructed field offices "to strive to prevent the unnecessary shut down of operations," but only by issuing "use authorizations" to permit continued operations.

The record is unclear as to what conditions Curtis was to meet in order to continue its mining operations after October 9, 1984, but it seems clear BLM agreed to let operations continue. In such circumstances, we hold that in the interest of fundamental fairness, BLM is precluded from finding the continuing operations, which remained in trespass in the absence of prior formal authorization, constituted a willful trespass. *Cf. State of Oregon*, 78 IBLA 255, 91 I.D. 14 (1984), *appeal dismissed in part, State of Oregon v. Bureau of Land Management*, Civ. No. 85-646LE (D. Or. Apr. 17, 1986). Accordingly, trespass damages, for the period of time after October 9, 1984, should be calculated in the same fashion as those damages incurred between July 21, 1983, and October 9, 1984. As noted in footnote 3, the record indicates that for this period of time, the royalty was tentatively set at 18 cents per ton.¹⁰ While trespass damages chargeable for the period after October 9, 1984, were not the subject of the March 1985 BLM decisions appealed from, we find that calculation of a fair market value for the product in the manner described herein rather than retroactive approval of the material sale contract is the legally proper means of determining the trespass damages.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified in part and set aside in part and remanded to BLM for further action consistent herewith.

R. W. MULLEN
Administrative Judge

WE CONCUR:

W.M. PHILIP HORTON
Chief Administrative Judge

C. RANDALL GRANT, JR.
Administrative Judge

**PEABODY COAL CO. v. OFFICE OF SURFACE MINING
RECLAMATION & ENFORCEMENT**

95 IBLA 204

Decided January 14, 1987

Petition for a discretionary review of a decision of Administrative Law Judge Frederick A. Miller affirming Notice of Violation No. 84-3-38-9 issued by the Office of Surface Mining Reclamation and

¹⁰ Future sales of sand and gravel are subject to advance authorization pursuant to the Act of July 31, 1947, and its implementing regulations, either by means of a competitive or noncompetitive sale. Noncompetitive sales are limited as to volume under 43 CFR 3610.2-1, whereas competitive sales are not so limited. As previously noted, a noncompetitive sale may only be undertaken where disposal of the sand and gravel would constitute such disposal of property "for which it is impracticable to obtain competition." 30 U.S.C. § 602(a) (1982); see 43 CFR 3610.2-1(a). 43 CFR 3610.1-2 also provides: "No mineral materials shall be sold at less than fair market value as determined by appraisal."

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Enforcement and reducing the amount of the proposed civil penalty from \$4,400 to \$2,600. TU-4-12-P.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-day Notice to State

Where a 10-day notice to the state regulatory authority is issued in response to a violation found during a Federal oversight inspection, OSM may issue a notice of violation in accordance with 30 CFR 843.12(a), if the State fails to take "appropriate action" to abate the violation. A notice of violation issued by OSM will be upheld where it appears that the notices of violation issued by the State in response to the 10-day notice were either vacated by the State, prior to abatement of the conditions giving rise to the violation, or the period for abatement was extended beyond the 90-day limitation imposed by State law.

APPEARANCES: Michael A. Kafoury, Esq., St. Louis, Missouri, for petitioner; Angela F. O'Connell, Esq., and Harold P. Quinn, Jr., Esq., Office of the Solicitor, Washington, D.C., and Marshall C. Stranburg, Esq., Office of the Regional Solicitor, Tulsa, Oklahoma, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

Peabody Coal Co. (petitioner) has petitioned for discretionary review of a decision rendered on May 2, 1985, by Administrative Law Judge Frederick A. Miller which affirmed Notice of Violation (NOV) No. 83-3-38-9 and reduced the proposed civil penalty assessment from \$4,400 to \$2,600. In March 1984, following a 10-day notice to the State of Arkansas, the Office of Surface Mining Reclamation and Enforcement (OSM) issued the NOV for (1) failure to properly design and construct a permanent impoundment, and (2) failure to provide an adequate spillway in compliance with applicable Arkansas regulations. Judge Miller concluded that OSM properly issued the NOV in accordance with section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1982), and regulations promulgated thereunder. By order dated June 17, 1985, the Board granted the petition for discretionary review, and subsequently the parties filed briefs in support of their respective positions.

The substantive facts as outlined by Judge Miller in his decision are not in dispute and are set forth below:

Evidence introduced at the hearing included testimony and the introduction of documents by both parties. During a routine oversight inspection, on December 1, 1983,

OSM Reclamation Specialist Samuel M. Petitto found violative conditions on the petitioner's Ozark mine in Johnson County, Arkansas (state permit number P-270-M-CO). Inspector Petitto issued ten day notice (TDN) number 83-3-38-4 to the Arkansas Department of Pollution Control and Ecology (the State) on December 6, 1983. Violation No. 2 of TDN 83-3-38-4 cites petitioner for failure to properly design and construct an impoundment in violation of 30 CFR § 816.49. [] The state issued notice of violation FDS-014-83 citing the parallel section of the state permanent regulation on December 12, 1983. Violation No. 3 of TDN 83-3-38-4 cites petitioner for failure to provide a spillway adequate to discharge a one hundred year/24 hour event in violation of 30 CFR § 816.46(q). [See note 1, *supra*.] The state responded by issuing state notice of violation FDS-015-83 citing the parallel section of the state permanent regulations on December 12, 1983. The original abatement date was set for March 12, 1984. OSM sent the state a letter indicating that this initial response was appropriate.

However, as a result of the conference held on February 15, 1984, between the petitioner and the state, state notice of violation FDS-014-83 was vacated and the abatement date for state notice of violation FDS-015-83 was extended until May 14, 1984. On March 5, 1984, Inspector Petitto returned to the site for a follow-up inspection. He discussed the situation with state officials and determined that the violation had not been appropriately nor adequately addressed by the state because the first notice of violation was vacated without any remedial action and the abatement period for the second notice of violation was extended beyond the ninety day limitation of the state regulations. Inspector Petitto issued Notice of Violation No. 84-3-38-9 on March 12, 1984, citing the petitioner for (1) failure to provide a spillway adequate to discharge a 100 year/24 hour event and for (2) failure to properly design and construct an impoundment. An informal assessment conference was held on July 12, 1984, in Fort Smith, Arkansas and the assessment remained unchanged. Petitioner filed for review on August 3, 1984.

Decision at 1-2.

The sole issue presented for our review is whether Judge Miller's holding that OSM properly exercised its oversight jurisdiction under section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), is correct.² Petitioner's argument is as follows:

In the instant case, if the federal government is going to second guess or reverse state enforcement decisions, the result will be a barrier to State primacy. * * *

The clear intent of Congress was that the states are to be the primary enforcer and that the federal role is to be limited to oversight. The OSM's oversight role was accomplished by issuing the ten (10) day notice pursuant to Section 521(a) of the Act. The State accepted and properly handled the ten (10) day notice by issuing the violations. The federal government overstepped its boundary when it wrote the NOV.

Brief on Review at 7-8.

OSM argues, on the other hand, that Judge Miller's ruling was correct and should be affirmed, agreeing with the following analysis in his decision:

OSM asserts that the action by the State of Arkansas was inappropriate. Although OSM approved the initial [sic] response by the state in writing, the follow-up action was not appropriate. Congress did not say that the state regulatory authority could just take enforcement action. OSM correctly argues that the use of the word "appropriate" by Congress calls upon OSM to make a discretionary judgment concerning the quality of any action taken by the state. The mere issuance of a notice of violation does not insure follow through by the state regulatory authority. OSM states that in this case the state

¹ Judge Miller incorrectly referred to 30 CFR. The 10-day notice properly referenced the conditions as violations of Arkansas law.

² Although Peabody has sought review of Judge Miller's decision, it has not specifically challenged the civil penalty assessment which was reduced by Judge Miller from \$4,400 to \$2,600. Therefore, if we find that OSM properly issued the NOV, it follows that the \$2,600 civil penalty assessment must be affirmed.

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failed to take "appropriate" action even though it issued state notices of violation for the impoundment and the spillway. The enforcement action it took did not cause the violations to be corrected nor were the state's actions likely to lead to abatement of the violations within the ninety day period for abatement established by the Act and the state regulations. The state's actions had not resolved the design and construction problems of the impoundment, nor had they provided for an adequate emergency spillway. OSM has properly argued that mere paper enforcement is not appropriate action and therefore OSM has properly exercised jurisdiction under Section 521(a)(1) of the Act.

Decision at 5.

[1] The focus of this appeal is upon how section 521(a) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), generally, and the term "appropriate action" specifically, should be interpreted and applied. That section provides in pertinent part:

Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. *If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation.* [Italics added.]

30 U.S.C. § 1271(a)(1) (1982).

The phrase "appropriate action" also appears in the regulations promulgated by the Department to implement section 521. The relevant portion of 30 CFR 842.11(b)(1)(ii)(B) varies little from section 521, providing a Federal inspection shall be conducted when

[t]he authorized representative has notified the State regulatory authority of the possible violation and within 10 days after notification the State regulatory authority has failed to take appropriate action to have the violation abated and to inform the authorized representative that it has taken such action or has a valid reason for its inaction * * *.

30 CFR 842.11(b)(1)(ii)(B).

The regulation at 30 CFR 843.12(a)(2) governs the course of action to be pursued where the state regulatory authority fails to take "appropriate action":

When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued under § 843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that the appropriate enforcement action can be taken by the State. *Where the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate.* No additional notification to the State by

the Office is required before issuance of a notice of violation, if previous notification was given under § 842.11(b)(1)(ii)(B) of this chapter. [Italics added.]

Peabody's argument requires that we evaluate the response of the Arkansas Department of Pollution Control and Ecology (ADPCE) to OSM's 10-day notice in terms of whether that response amounted to "appropriate action" under section 521(a) of SMCRA and 30 CFR 843.12(a)(2). Under both the statute and the regulation, once OSM provides notice to the State that a violation exists, the State has 10 days "to take appropriate action to cause the violation to be corrected." If the State does not take such action, or fails to show cause for such failure, OSM may reinspect. Section 521(a) does not explicitly grant OSM the authority to issue an NOV when the violation does not pose an imminent danger, but 30 CFR 843.12(a)(2) provides such authority.

The Board had considered three cases in which the appellant has challenged OSM's jurisdiction to issue an NOV in accordance with section 521(a)(1) of the Act in a state which has obtained primacy. In two of those cases, *Shamrock Coal Co. v. Office of Surface Mining Reclamation and Enforcement*, 81 IBLA 374 (1984),³ and *Bannock Coal Co. v. Office of Surface Mining Reclamation and Enforcement*, 93 IBLA 225 (1986), the respective State regulatory authorities responded to OSM's 10-day notices by concluding that no enforcement action was necessary as a matter of State law. In each case, OSM found the response of the State was inappropriate, and it issued its own NOV's upon reinspecting the sites of the violations. This Board upheld OSM's authority to issue Federal NOV's in both cases.

In a third case, *Turner Brothers, Inc. v. Office of Surface Mining Reclamation and Enforcement*, 92 IBLA 320 (1986),⁴ the Board likewise upheld OSM's authority to issue an NOV for a violation found as a result of an oversight inspection, even though the Oklahoma Department of Mines (ODOM) had, in fact, issued an NOV in response to OSM's 10-day notice that a violation existed. The Board noted in this decision that ODOM had issued an NOV for the same violation over a year earlier, and concluded that the mere issuance of a second State NOV did not amount to "appropriate action to ensure abatement of [the] violation in response to a 10-day notice." 92 IBLA at 326.

The appellants in *Shamrock*, *Bannock*, and *Turner Brothers* all argued, as does Peabody in the instant case, that OSM lacks authority to issue an NOV in a state which has achieved primary responsibility for enforcement of its surface mining program. Those previous Board decisions stand for the proposition that OSM may properly issue NOV's in such a circumstance. However, this case presents the more specific question of whether OSM's oversight authority extends to the issuance of an NOV in a primacy State, when in response to OSM's 10-day notice that State has issued NOV's and either vacated them or extended the time for their abatement.

³ Appeal filed, *Shamrock Coal Co. v. Clark*, No. 84-238 (E.D. Ky. July 27, 1984).

⁴ Appeal filed, *Turner Brothers, Inc. v. Office of Surface Mining Reclamation and Enforcement*, No. 86-380-C (E.D. Okla. July 28, 1986).

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All these cases involve OSM's determination, upon reinspection, that the State involved had not taken "appropriate action to ensure abatement of the violation" under section 521(a) of SMCRA. We have previously noted that the meaning of the term "appropriate action" is neither defined in SMCRA nor in the regulations promulgated thereunder. *Turner Brothers*, 92 IBLA at 323. The Board's analysis of this issue rests in part upon the preamble to 30 CFR 843.12(a)(2), the regulation which confers upon OSM the authority to issue an NOV when the State fails to take "appropriate action" in response to a 10-day notice. OSM specifically rejected the suggestion that the term be "spelled out in detail," concluding rather that "[t]he crucial response of a State is to take whatever enforcement action is necessary to secure abatement of the violation." 47 FR 35627-28 (August 16, 1982). Moreover, the Department issued a "Statement of Policy" on this subject, signed by the Acting Assistant Secretary, Energy and Minerals, providing:

Statement of Policy

Upon examination of the issue, the Department has concluded that the regulation contained at 30 CFR 843.12(a)(2) was properly and lawfully promulgated; therefore there is no need to reconsider the issue.

It is the Department's opinion, as set forth in the original preamble to 30 CFR 843.12, that "Congress did (not) intend OSM to sit idly by while * * * violations ripen into imminent hazards." 44 FR 15302, March 13, 1979. Rather as the preamble stated, the legislative history indicates that when "an OSM inspector discovered a violation at the mine, he must report the violation to the operator and the state and give the state 10 days to take appropriate action to require the operator to correct the violation. If the State takes such action, OSM does nothing further." 44 FR 15303. However, if the state fails to take adequate action or show good cause for such failure, OSM under 30 CFR 843.12 shall issue a notice [of] violation.

48 FR 9199 (March 3, 1983).⁵

Section 521(a) of SMCRA, 30 CFR 843.12(a)(2), and even the above-quoted "Statement of Policy" all might be interpreted to restrict OSM's oversight authority to an examination of the State's action taken within the 10-day period, and an evaluation of that action in terms of whether it is "appropriate action." Thus, under such an interpretation, if the State issued an NOV requiring abatement of the violation within the period allowed by its law, OSM would have no further role, since, arguably, the State has taken appropriate action to require the operator to correct the violation. The problem with this interpretation, however, is brought to light by the instant appeal: the fact that the State issues an NOV does not necessarily result in the actual abatement of the violation. The conflict is inherent in the

⁵ In *Clinchfield Coal Co. v. Hodel*, No. 85-0118-A (W.D. Va. June 20, 1985), the district court ruled that 30 CFR 843.12(a)(2) expanded OSM's authority beyond that contemplated by the Act, and held that the Secretary had no authority to issue NOV's in states with approved programs, except where OSM found that a violation caused "imminent danger of environmental harm." However, in *Clinchfield Coal Co. v. Department of the Interior*, No. 85-2206 (Aug. 27, 1986), the Court of Appeals for the Fourth Circuit reversed and remanded the district court decision, stating the district court had no jurisdiction to consider the validity of the regulation. Challenges to surface mining regulations must be heard in the United States District Court for the District of Columbia.

timeframe established in section 521(a), since the abatement period allowed under Arkansas law extends potentially 90 days beyond issuance of the State NOV. Often, then, while State action may initially be "appropriate" under section 521(a) of SMCRA and 30 CFR 843.12(a)(2), whether the operator actually corrects the violation is a matter which cannot be determined until weeks or even months after the State NOV has issued.

Peabody would have us believe that once the State issues an NOV in response to a 10-day notice, the matter is ended as far as OSM is concerned. We reject that position. While the State's issuance of an NOV might constitute "appropriate action" as an initial matter, the State must engage in the follow-up necessary to determine that the abatement indicated in the NOV has been effected. Clearly, OSM's oversight role encompasses ensuring that the State has secured abatement of the violation. One manner in which it may do so is by reinspection. *Turner Brothers, Inc. v. Office of Surface Mining Reclamation and Enforcement*, 92 IBLA 23, 29, 93 I.D. 199, 202 (1986). In the instant case, upon reinspection, OSM discovered that the violations persisted, and it learned about the State's actions in the case. The final question for our consideration is what options were open to OSM in such a circumstance.

Regulation 30 CFR 843.12(a)(2) answers that OSM shall issue an NOV or a cessation order, as appropriate. Further, that regulation states clearly that "[n]o additional notification to the State by the Office is required before the issuance of a notice of violation, if previous notification was given under § 842.11(b)(1)(ii)(B) of this chapter." If the State has not secured the abatement, as specified in its NOV, then OSM shall issue its own NOV upon reinspection in accordance with 30 CFR 843.12(a)(2). To require OSM to repeat the ritual of issuing another 10-day notice, in response to which the State issues another NOV, which might or might not eventually result in abatement of the violation, would subject OSM to the sort of protracted efforts to secure abatement that were evident in *Turner Brothers*, 92 IBLA at 320.

In the present case, Inspector Petitto reinspected the Ozark Mine on March 5, 1984, and found that Peabody had taken no action to abate either of the violations, although he testified at the hearing that Peabody had complied with the State's requests (Tr. 31). On January 20, 1984, ADPCE vacated its NOV FDS-014-83 for failure to properly design and construct a permanent impoundment, on the grounds that Peabody had previously submitted a plan to ADPCE to correct deficiencies in the construction of the impoundment. OSM contends that Peabody's having submitted plans to the State for the correction of deficiencies in the construction of the impoundment is "irrelevant to the cited enforcement action which dealt only with the status of the impoundment at the time the enforcement action was cited" (Brief of OSM at 5). OSM argues that Peabody's improper construction of the impoundment violated Arkansas law and that the

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State's vacating the NOV prior to the abatement of that violation was not "appropriate action." Moreover, on February 15, 1984, ADPCE had extended the abatement time specified in its NOV FDS-015-83 for failure to provide a spillway to safely discharge the runoff resulting from a 100-year/24-hour precipitation event, to May 14, 1984. OSM argues that this extension was improper under Ark. Stat. Ann. § 843.12(c),⁶ which does not allow an abatement date to extend beyond 90 days from the date that the violation was discovered.

We agree with OSM that ADPCE failed to take appropriate action necessary to secure abatement of the violations noted in OSM's 10-day notices to ADPCE. Discovering those violations unabated upon reinspection, OSM, in issuing the NOV herein challenged, acted within the oversight authority conferred by Congress in section 521(a) and reflected in 30 CFR 843.12(a)(2).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Miller is affirmed.

BRUCE R. HARRIS
Administrative Judge

WE CONCUR:

C. RANDALL GRANT, JR.
Administrative Judge

WM. PHILIP HORTON
Chief Administrative Judge

⁶ Ark. Stat. Ann. § 843.12(c) provides:

"An authorized representative of the Director may extend the time set for abatement or for accomplishment of an interim step, if the failure to meet the time previously set was not caused by lack of diligence on the part of the person to whom it was issued. The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance."

February 24, 1987

APPEAL OF BLUELINE EXCAVATING CO.

IBCA-1990

Decided *February 24, 1987*

Contract No. 5-CC-10-02840, Bureau of Reclamation.

Motion to Dismiss granted.

1. Contracts: Generally--Contracts: Construction and Operation: Labor Laws--Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Generally--Contracts: Federal Procurement Regulations--Contracts: Formation and Validity: Construction Contracts--Contracts: Formation and Validity: Fixed-price Contracts--Contracts: Formation and Validity: Governing Law

Where by the terms of a Government contract the Board lacks authority over any dispute arising out of the contract's labor provisions, the Board has determined as a matter of policy that it will normally exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions.

2. Contracts: Generally--Contracts: Construction and Operation: Changes and Extras--Contracts: Construction and Operation: Contract Clauses--Contracts: Construction and Operation: Duty to Inquire--Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Generally--Contracts: Federal Procurement Regulations--Contracts: Formation and Validity: Construction Contracts--Contracts: Formation and Validity: Fixed-price Contracts--Contracts: Formation and Validity: Governing Law--Contracts: Formation and Validity: Mistakes

Where the Bureau of Reclamation, in a solicitation of bids for construction of pipelines and agricultural drain structures, and for enlarging an existing open channel wastewater, included in its solicitation and contract documents a photocopy of a general *Federal Register* wage determination, containing footnotes to the effect that 20-percent lower wage rates were permissible in connection with utility projects, and the contracting officer merely marked the footnotes with arrows properly indicating the textual paragraphs to which the notes applied, the contractor's conclusion that the agency was representing the project to be a utility project was a unilateral mistake on his part for which the agency was not responsible. To the extent that he believed that the footnotes were ambiguous, it was the contractor's responsibility to make inquiry of the Labor Department in order to clarify the matter before bidding, not after the contract was let.

3. Contracts: Generally--Contracts: Construction and Operation: Changes and Extras--Contracts: Construction and Operation: Contract Clauses--Contracts: Construction and Operation: Duty to Inquire--Contracts: Contract Disputes Act of 1978: Jurisdiction--Contracts: Disputes and Remedies: Generally--Contracts: Federal Procurement Regulations--Contracts: Formation and Validity: Construction Contracts--Contracts: Formation and Validity: Fixed-price Contracts--Contracts: Formation and Validity: Governing Law--Contracts: Formation and Validity: Mistakes

A Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage-rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of *Binghamton* and *Collins*, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

APPEARANCES: J. William Bennett, Esq., Attorney at Law, Portland, Oregon, for Appellant; William N. Dunlop, Esq., Department Counsel, Boise, Idaho, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

Facts

On April 30, 1985, Blueline Excavating Co. (contractor/appellant) appealed to the Board under 43 CFR 4.102(c) after an unsuccessful inquiry to the contracting officer (CO) in connection with Bureau of Reclamation (Bureau/Government) contract No. 5-CC-10-02840, awarded January 10, 1985, revealed that the CO did not intend to issue a final decision relating to the Government's previous withholding of contract earnings on the basis of the contractor's alleged underpayment of wages under the Davis-Bacon Act, 40 U.S.C. § 276a (1982). The contract work was part of the Columbia Basin Project. At the time of the appeal, it was still in progress.

We dismissed the appeal and remanded the case for a decision by the CO, which was rendered on July 28. The CO concluded that no wage rate representations had been made to prospective contractors in connection with the bid solicitation; that no inquiries on the subject of wage rates had ever been received by the Bureau; and that had such inquiries been made, the Bureau would have responded in the same manner as it did to appellant after the contract had been let. Thus, the contractor's claim was formally denied. This appeal followed, with a claim in the amount of \$19,443.97. Appellant has requested an oral hearing and accelerated disposition of the appeal.

The work involved construction of buried pipe farm drains, enlarging an open channel wastewater, and reestablishing a farm ditch. The contract specifications contained Wage Determination No. WA83-5110 which, in a footnote, provided that the minimum wage for laborers, power equipment operators, and truck drivers in connection with utility projects was 80 percent of the published basic hourly rates.

The contract contained labor standards provisions revised as of July 1983. Clause I.7.8 provided authority for termination of the contract and for debarment under 29 CFR 5.12 in the event of breach of the

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labor clauses. Clause I.7.9 provided that "*disputes arising out of the labor standards provisions * * * shall not be subject to the general disputes clause,*" but "shall be resolved in accordance with the procedures of the Labor Department set forth in 29 CFR Parts 5, 6, and 7." (Italics added.) Clause I.7.10 provided that all rulings and interpretations of Davis-Bacon and related acts contained in 29 CFR Parts 1, 3, and 5 were incorporated by reference in the contract.

Shortly after work was commenced, the contractor inquired whether the 80-percent wage rate applied to the contract, and the Bureau took the position that full rates applied. Nevertheless, on February 8, 1985, the Bureau construction engineer transmitted the inquiry to the Seattle regional office of the Labor Department's Wage and Hour Division; and on February 13 the Division replied that under local collective bargaining agreements, agricultural drainage fields did not qualify as utilities entitled to the 80-percent rate. However, the Division stated that if an authoritative ruling were needed, the Bureau should write to the Wage and Hour Division Administrator.

Meanwhile, on February 12, 1985, the construction engineer wrote to the contractor that its first payroll, for the period ending January 23, was not in compliance with the contract's labor provisions. On February 15, the contractor responded that it had bid the job on the basis that it was a utility project and that the 80-percent rates would apply. The letter noted that the drain lines were being constructed for an Irrigation District that assessed landowners a fixed fee for water usage and for maintenance and operating costs based on the acreage involved, whether the landowners used the water or not; so by definition it was a utility project. The contractor thus insisted that it was in compliance with the Davis Bacon Act.

On February 22, 1985, the Bureau construction engineer acknowledged the contractor's February 15 letter but wrote that Labor Department representatives did not agree that the 80-percent wage rates were applicable. Therefore, employees working on the project were entitled to full-wage rates. The letter pointed out that under the terms of the contract the CO could withhold contract earnings as necessary to pay employees the amount of wages required.

The contractor protested this decision by letter dated February 28, 1985, stating that the Bureau was previously aware of the Labor Department's position since the 80-percent rate was not allowed on another project involving another contractor, but that it nevertheless had inserted the 80-percent language in the disputed wage-rate specification, which "would mislead anyone bidding on this project." The letter further alleged that, "The Bureau willingly compiled these contract documents fully aware of the discrepancies. I, as a tax paying citizen, cannot believe that the Federal Government could write and enter into a contract as ambiguous and misleading as this one."

The next document in the appeal file is a March 21, 1985, letter from the Bureau to the Administrator of the Labor Department's Wage and Hour Division, enclosing the contractor's letter and requesting a determination concerning whether the 80-percent tables of Wage Decision WA-5110 were applicable to the Bureau's contracts for the construction of buried agricultural drains on the Columbia Basin Project in Washington State. This letter is followed by a notification to the CO from the Labor Department's regional office advising that they were conducting a concurrent Fair Labor Standards Act, Davis-Bacon, and Contract Work Hours and Safety Standards Act investigation of the contractor, and requesting that the Bureau withhold \$12,231.46 from contract funds for "DBA and/or CWHSSA violations." The letter suggests that the Bureau might want to withhold \$2,000 to provide for liquidated damages as well.

On June 21, 1985, the Bureau received a letter from the Wage and Hour Division in Washington, D.C., stating that the footnote in Davis-Bacon Wage Determination WA84-5040 [sic] was not applicable to the project. The letter stated that the "subject wage determination is based on negotiated rates," and that the question "must be resolved by an inquiry into the intent and practices of contractors signatory to the collective bargaining agreements which contain the 80-percent pay differentials." The letter further stated that since the signatory parties defined the term "utilities" to include "*underground storm and sanitary sewer work* and facilities that convey electricity, gas, communications, and domestic water," the construction of *agricultural drainage fields* was outside the scope of the definition. (Italics added.)

Arguments

Appellant's complaint states that the issue is whether the CO has directed the contractor to pay wages not called for in the contract, thus changing the cost of performance and entitling it to an equitable adjustment.

The complaint avers that the project was in fact a utility project, that the CO drew specific attention to the 80-percent provision in the bidding materials by the manner in which the material was included, and that the CO's subsequent direction to pay 100 percent of the basic wage constituted a change. Alternatively, appellant argues that the 80-percent provision was, because of the way it is included in the contract, latently ambiguous; and that since the contractor's understanding of the provision was reasonable, the CO's direction constituted a change in contract requirements.

Government counsel moved to dismiss the complaint on the ground that the Board has no jurisdiction over a wage determination by the Department of Labor, citing 54 Comp. Gen. 24; *Prime Roofing, Inc.*, ASBCA No. 25836, 82-1 BCA par. 15,667 and authorities cited; G. A. *Western Construction*, IBCA No. 1550-2-82, 82-2 BCA par. 15,895; and *Allied Painting & Decorating Co.*, ASBCA No. 25099, 80-1 BCA

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par. 14,710. The Government has made no mention of the recently revised labor standards provisions of the contract.

Appellant responded that since the sole issue is whether the term "utility" in the wage determination included the construction of agricultural drains, the issue before the Board does not strictly involve the wage matter itself but rather the classification of the job to be performed under the contract. Counsel stated:

Consequently, the resolution of the issue does not depend upon the provisions of the Davis-Bacon Act or its accompanying regulations issued by the Department of Labor, but rather the interpretation of the contract. Because the issue is one of contract interpretation, it is clearly within the jurisdiction of the Board. * * * "Certainly the mere fact a controversy relates to a labor provision does not in itself preclude contractors from obtaining relief under the Disputes clause," citing *Ventilation Cleaning Engineers, Inc.*, ASBCA No. 16704 (Aug. 3, 1973), 73-2 BCA ¶10,210. * * *

In support of its position, the Government relies on *Allied Painting and Decorating Co.* [supra]. This case is easily distinguishable from the instant case, however, because it involves the classification of employees rather than the classification of the job as in this instance. [Italics added.]

After the CO had issued his final decision on remand, Government counsel again moved to dismiss on the grounds that (1) there is no issue of fact outstanding and (2) the case involves the interpretation of a wage determination by the Department of Labor and is not within the jurisdiction of the Board, citing the affirmation of the Armed Services Board by both the Claims Court and the Federal Circuit Court of Appeals in *Collins International Service Co. v. United States*, 744 F.2d 812 (Fed. Cir. 1984). According to Government counsel, that case

involved a Navy pre-bid refusal to clarify Department of Labor wage classifications. The court held that the contracting agency owes no duty to clarify employee classifications for a contractor, "because Congress has vested in Labor the final authority to make such determinations." Dismissal on that point of law was appropriate "if the record had included nothing more than the contract document." Id at 816.

Counsel concluded that appellant's true conflict was with the Department of Labor, not the Department of the Interior.

On the basis of *Collins*, the Board issued an order for appellant to show cause why its appeal should not be dismissed, noting that the Department of Labor had changed its regulations in order to retain authority to make wage determinations rather than merely approve them, citing *Prime Roofing, Inc.*, ASBCA No. 25940, 84-1 BCA par. 16,997 (1983).

Appellant responded that the element that distinguishes *Collins* from the matter before the Board is that, in *Collins* the ambiguity or lack of clarity was in the wage rate published by the Department of Labor, whereas here it was in the ambiguity or lack of clarity caused by the manner in which the CO put the wage rate into his solicitation, thus specifically drawing special attention to the 80-percent provision.

Appellant further argued that there was no reason for the CO to highlight and draw attention to the 80-percent provision if he had not intended that it apply. Thus, "the dispute before the Board is that the [CO] represented a particular position in the contract, and the contractor reasonably relied on that representation."

Discussion

We must first note that the highlighting and drawing of attention to the 80-percent provision that appellant refers to appears to have come about when the CO photocopied the apparently applicable wage determination (actually, it appears in retrospect to have been a year out of date) from the *Federal Register*, superimposed the footnotes at the bottom of the tables, and then drew arrows from the footnotes to indicate the textual material to which they applied. That, coupled with appellant's owner's not-unreasonable assumption that the project was a utility project, was apparently sufficient for him to bid the project on the premise that the 80-percent rates would apply.

Appellant's arguments cannot, therefore, be described as merely specious since many a Davis-Bacon case, both before the courts and before the contract appeal boards, has turned on points equally tenuous. In fact, very little research is required to discover that there is case law to support virtually any proposition as to who should bear the burden of mistakes in the application of prevailing wage determinations, depending on who did what to whom under what circumstances.

Consequently, whenever a contract board judge is assigned a Davis-Bacon case, the assignment must almost inevitably be accompanied by a somewhat irresistible impulse to write a lengthy discussion of the history of the Act's implementation, since whether one is attacking the problem for the first time or merely refreshing past recollection, enough research is always required to decide the case that it seems a shame not to attempt to preserve the results. Fortunately, recent board decisions have outlined enough early history that we will not need to spend a great deal of time analyzing cases as such (provided the reader understands that there is not necessarily any one chain of cases that can always be relied on). See, e.g., *Dahlstrom & Ferrell Construction Co.*, ASBCA No. 30741, 85-3 BCA par. 18,371; *Western, supra*; and *Allied, supra*, for fairly detailed discussions of individual case holdings. However, it will still be necessary to evaluate the intent and effect of the new regulations, which for this Board are a matter of first impression.

Major variations in Davis-Bacon case outcomes appear to have occurred, in part, as a result of 1935 amendments to the Act; Exec. Order No. 9250 (Oct. 3, 1942), 3 CFR ch. 2 (1943), and World War II wartime conditions; bifurcation of Davis-Bacon administrative and enforcement responsibilities under the Labor Department's Reorganization Plan No. 14 of 1950 (5 U.S.C. App.) (1982); differences between the Labor Department and the Comptroller General on how

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that plan was to be interpreted (see, e.g., Appendix A to *Grannis & Sloan*, ASBCA No. 4968, 59-1 BCA par. 2,213; and 54 Comp. Gen. 24, July 15, 1974); the Supreme Court's 1954 decision in *United States v. Binghamton Construction Co.*, 347 U.S. 171; enactment of the Contract Disputes Act of 1978 (CDA); varying views by the Armed Services Board on the issue of its jurisdiction (see *Prime Roofing, Inc.*, ASBCA No. 25836, 82-1 BCA par. 15,667, in which the Board, on reconsideration, decided that Davis-Bacon enforcement did not involve "penalties" or "forfeitures" under the dictionary definitions of those words and thus was not excluded from board jurisdiction under the language of section 6(a) of the CDA); and, most recently, the amended regulations and procedures of the Labor Department, effective for most purposes on June 28, 1983. See 48 FR 19532 (April 29, 1983). To this list, we would also be inclined to add the Federal Circuit's 1984 decision in *Collins*, cited here by the Government, and decided under the Labor Department's old regulations. Our concern is that this case, in conjunction with the new regulations, would seem to demand a contract board policy of *laissez faire* at the very least, and perhaps even our total renunciation of jurisdiction, an approach favored by some boards.

In general terms, under the old regulations, 29 CFR Parts 1, 3, and 5, which were in effect in substantially the same form from 1965 until 1983, disputes arising under the labor standards provisions of procurement contracts were subject to the Disputes clause of the contract; were decided by contracting officers; and arguably could be appealed to the agencys' contract appeals boards, except to the extent that the disputes in question involved the meaning of classifications or wage rates contained in the Labor Department's wage determination, or the applicability of the labor provisions of the contract. These questions had to be referred to the Department of Labor, whose decisions as to classifications and wage rates were final and generally not subject to review, even by the courts. *United States v. Binghamton, supra*; *Morrison Knudsen*, IBCA No. 553, 66-2 BCA par. 5,967. However, disputes involving questions of fact (*Ventilation, supra*), or orders, approvals, or disapprovals by the CO (*Prime Roofing, Inc.*, ASBCA No. 25836, 84-1 BCA par. 16,946, and ASBCA No. 25940, 84-1 BCA par. 16,997; *Space Age Engineering, Inc.*, ASBCA No. 16588, 72-2 BCA par. 9,236), or patent errors in withholding requests by the Labor Department (*Western, supra*), among other rationales, were sometimes considered subject to contract board jurisdiction.

Where boards have taken jurisdiction of the dispute and found in favor of the contractor, one of the most common rationales given (particularly in the two decades after World War II) was that there had been a constructive change which warranted an equitable adjustment, inasmuch as the Government after the contract was let had ordered or induced the contractor to increase wages beyond those

specified in the contract. *See, e.g.*, Nash and Cibinic, *Federal Procurement Law*, Vol. II (1980) at 1222, Note 4, and cases cited. The authors state that the first case to make such use of the Changes clause was *Sunswick Corp. v. United States*, 109 Ct. Cl. 772, 75 F. Supp. 221, *cert. denied* 334 U.S. 827 (1948), a wartime case under Exec. Order No. 9250 in which the contract provided that wages could be neither increased nor decreased without the authority of the Wage Adjustment Board. After the contract was awarded, the WAJ issued a new ceiling, and the CO ordered the contractor to pay the higher wage, so the court permitted recovery.

"However," the authors conclude, "since the wage rates are not part of the work under the contract, it is questionable if such an order is within the bounds of the Changes clause." In their volume on the *Formation of Government Contracts*, 2d ed. (1986) at 990-91, the same authors state:

The purpose of [Davis-Bacon] is not to guarantee to contractors that specified wages will be applicable, but to protect their employees from substandard earnings by fixing a minimum wage on Government projects [citing *Binghamton, supra*]. Therefore, the contractor has no right under the Act for recovery if the wage that must be paid to obtain employees is higher than the prevailing wage rate set forth in the contract [noting the *Sunswick* exception]."

Under the Contract Disputes Act, serious questions could be, and often were, raised about the jurisdiction of contract appeals boards to entertain *any* dispute arising out of the labor standards provisions of Government contracts, since section 6(a) of the CDA, specifying procedures for all contract claims against the Government, provides in part that: "The authority of this subsection shall not extend to a claim or dispute *for penalties or forfeitures* prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine." 41 U.S.C. § 605(a) (1982) (italics added). As we have noted, the Labor Department, at least as early as 1959, took the position in a letter to the Navy that contract boards had no jurisdiction over "issues arising out of labor standards violations." The letter alleged that other Government agencies had reached the same conclusion. *Grannis, supra*, 59-1 BCA par. 2,213 at 9684.

As to section 6(a) of the CDA, Cibinic and Nash, in their book entitled, *Administration of Government Contracts*, 2d ed. (1985) at 908-09, state:

3. Penalties or Forfeitures Administered by Other Agencies

41 U.S.C. § 605 states in subsection (a) that "The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle or determine." While the legislative history is totally silent as to the meaning of this language, it appears that it is primarily intended to preserve the exclusion of certain labor related disputes from the scope of the disputes process. The boards historically refused to exercise jurisdiction over certain matters involving determinations as to the contractor's obligations under a variety of statutes establishing labor standards for contractors, including the Davis-Bacon Act, 40 U.S.C. § 276, the Service Contract Act, 41 U.S.C. § 351 and the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327. See, e.g., Federal Food Services, ASBCA 21877, 77-2 BCA ¶12,628 (1977).

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Prior to the adoption of the Contract Disputes Act of 1978 boards did take a limited role in the review of labor statute issues under a special Disputes clause concerning labor standards which was used in construction contracts. This clause, however, was replaced with a clause specifically excluding disputes arising under labor standards provisions from the disputes process, DAR 7-602.23(b)(ix) and FPR 1-18.703-1(i). With the adoption of the FAR, these clauses have been removed from the regulations.

In *Allied, supra*, the Armed Services Board considered the relationship between Reorganization Plan No. 14 and section 6(a) of the CDA and arrived at the conclusion that it had no jurisdiction over the Davis-Bacon portion of the dispute, on the basis of 54 Comp. Gen. 24 which preceded the CDA. Nevertheless, in the dispute before it, the Board decided that:

[T]he matter of the payments withheld under the Davis-Bacon provisions is subject to a question of classification, i.e., whether certain of appellant's employees must be classified as painters for each eight-hour working day, or whether an employee's classification may be split between "painter" and "laborer" during such period, dependent upon the nature of the work performed during separate periods of the working day and paid accordingly. Such matters, previously reserved for determination by the Secretary of Labor, are currently confirmed by the applicable provisions of section 6(a), Contract Disputes Act. [Italics added.]

(80-2 BCA at 72,542). Thus, it would appear that, at least in *Allied*, the Armed Services Board considered the exclusionary language of section 6(a) to refer to labor standards provisions' enforcement by the Labor Department in accordance with Reorganization Plan No. 14.

The General Services Board, like the Labor Department, has apparently never waivered in its view that, because of section 6(a), it has no jurisdiction over the labor provisions of Government contracts. See *Consolidated Security Services Corp.*, GSBCA No. 7602, 85-2 BCA par. 18,123, citing *Imperator Carpet & Interiors, Inc.*, GSBCA No. 6167, 81-2 BCA par. 15,266.

The Agriculture Board, in a contract payment withholding dispute, recently followed *Consolidated, supra*, expressly stating the same reasons. *Humphrey Logging Co.*, AGBCA No. 84-359-3, 85-3 BCA par. 18,433.

The Supreme Court has also referred to "penalties" in connection with the Davis-Bacon Act. See, e.g., *Binghamton, supra*, 347 U.S. at 173, and *Universities Research Association v. Couter*, 450 U.S. 754, 776 (1981).

However, in *Dahlstrom, supra*, a recent ASBCA decision, the Board, taking jurisdiction despite the CDA 6(a) language, granted the contractor an equitable adjustment where a CO retroactively ordered an increased minimum wage scale into effect after the Labor Department discovered it had made a clerical error in its initial determination.

There has been considerable recent debate about the economic merits of the Davis-Bacon Act. The Comptroller General, for example, has never been fond of it. See GAO Report: The Davis-Bacon Act

Should Be Repealed, B-146842, April 27, 1979. What no one disputes is that for a piece of legislation that is "relatively unknown" and "obscure," the Act has had a major impact on Government procurement, and that its administration will become increasingly complex in the future. See, e.g., Leader and Jenero, "Implied Private Right of Action under the Davis-Bacon Act: Closing Some Loopholes in Administrative Enforcement"--*McDaniel v. University of Chicago* and *Coutu v. Universities Research Association, Inc.*, *DePaul Law Review*, Vol. 29, No. 3 (Spring 1980); and Kenneth M. Roberts, "Lahor Law--The Davis-Bacon Act, Another Setback for Lahor"--*Building and Construction Trades' Department v. Donovan*; *Journal of Corporation Law*, Vol. 10, No. 1 (Fall 1984). One might quibble with the title of the last article, since it would seem that the *Donovan* case can equally be said to stand for the proposition that the Secretary of Labor is reasonably free to try new and innovative approaches to try to make the Act more effective. *Id.* 712 F.2d 611, 618-630 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069.

That the Secretary is determined to try new approaches at least with respect to contract disputes involving labor standards provisions is beyond question. When the new regulations were first proposed on December 28, 1979, the preamble to 29 CFR Part 5, relating to Government contract disputes, said simply: "This revision provides that *all* labor standards disputes would be resolved in accordance with the procedures set forth in 29 CFR Parts 5, 6, and 7." (44 FR 77080, item 8; *italics added*.) On the same date, the Secretary proposed to modify 29 CFR Part 1 to provide for the retroactivity of wage determination corrections, with a preamble stating in part the following:

From time to time problems have arisen because of use of wage rate schedules (e.g., building, heavy, highway, residential) not properly applicable to a project. Therefore a new subsection 1.6(f) is proposed which would provide that if the contract includes a schedule of rates which by its terms or the provisions of this part is not applicable to the work to be performed, or if an incorrect project wage determination is issued on the basis of an inaccurate description of the project or its location, the correct schedule is to be included in the contract by whatever means are appropriate (such as supplemental or change order). See Comptroller General Opinion No. B-179871 (April 1, 1975), 75-1 CPD ¶189. Similarly, if a wage determination is erroneously omitted, it is to be included. These types of errors can be corrected at any time, and the 10-day rule applicable to modifications of wage determinations is inapplicable to such errors.

This proposal apparently elicited some adverse reaction, particularly from contractors, so on August 14, 1981, at 46 FR 41444, the Secretary clarified his intention:

Section 1.6(f) would continue to require the agency to either terminate and resolicit or to incorporate a valid wage determination in the contract after award under the circumstances outlined. However, under this proposal, the requirement that a wage determination be incorporated after contract award would be limited to circumstances where the contractor will receive an appropriate adjustment in compensation if there are any increased costs resulting from incorporation of a valid wage determination. The regulation would further provide that the method of incorporation of the valid wage

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determination and adjustment in compensation where necessary should not be contrary to procurement regulations and statute.

After carefully reviewing this matter, it was decided that continuation of the requirement for insertion of a correct wage determination was proper under the circumstances outlined in § 1.6(f), namely where no wage determination has been included in the contract or where a clearly inapplicable wage determination has been incorporated from the Federal Register or issued and applied because DOL was incorrectly advised as to the nature of the project or its location. However, even under these circumstances, the Department believes that it would be inequitable to apply the regulation if the contractor would be harmed because of Government error. Of course, the procuring agencies should not be required to take any action which would be contrary to procurement law.

The revised comment apparently aroused the ire of the contracting agencies and others as well, so on May 28, 1982, at 47 FR 23646, the Secretary sought to ameliorate the situation with the following statement of intention:

Section 1.6(e) and (f)-Incorporation of Wage Determinations and Modifications After Contract Award

A few commentators questioned DOL's authority to require the incorporation of a new wage determination in a contract any time before award (or in some cases, after award) when the agency fails to include any wage determination or one that contains substantial errors. DOT, DOE, and NASA asserted that the contracting agency, not DOL, has authority to make determinations of coverage under the Davis-Bacon Act. ABC commented that the provisions in question are disruptive, and that the regulations should contain more specific criteria regarding the circumstances in which DOL would exercise its authority to incorporate new wage determinations.

The BCTD, several building trades unions, the Teamsters, and the UAW objected to the provision in § 1.6(f) that corrective action to include the proper wage determination after contract award would occur only if the contractor is compensated, in accordance with applicable procurement law, for any increase in wages resulting from such action, asserting that the agencies could use this provision to resist postaward amendment of any contract which contains an invalid wage determination.

Since the Davis-Bacon Act requires that all covered contracts contain an applicable wage determination, DOL must provide some mechanism for the incorporation of proper wage determinations in covered contracts after contract award. The Department's authority in this regard, including the authority to determine questions of coverage under the Act, is derived from the Act as well as from Reorganization Plan 14 of 1950.

With respect to the ABC comment, the Department agrees that the provision in § 1.6(e)(2) permitting withdrawal of wage determinations containing "substantial errors" without regard to the 10-day rule is not sufficiently specific. Accordingly, § 1.6(e)(2) is revised to permit such withdrawals only as a result of a decision by the Wage Appeals Board.

As to the comments from labor organizations, we believe it would be inequitable to require corrective action after contract award if the contractor would be financially harmed in rectifying a Government error. Nor should contracting agencies be placed in the position of contravening procurement law. The regulation contemplates that the agencies will find a method to incorporate a proper wage determination in a contract and compensate a contractor, where appropriate, which is in accord with procurement law. Accordingly, no changes are made in § 1.6(f).

That the Secretary ultimately won the war seems clear not only from the fact that the regulation at 29 CFR 1.6(f) was not further changed, but also from the fact that on November 3, 1986, at 51 FR 39965, the General Services Administration, on behalf of the

acquisition agencies, proposed a Federal Acquisition Regulation, FAR 48 CFR Part 22, to carry out the Secretary's prescribed procedures. Proposed FAR 22.404-5, concerning expiration of project wage determinations, for example, states at paragraph (b)(2)(i) that if a new wage determination changes any wage rates for classifications to be used in the contract after bid opening but before award, the CO will incorporate the new wage determination and equitably adjust the price for any increased or decreased cost of performance.

Similarly, FAR 22.404-6, dealing with modifications of wage determinations in the context of sealed bidding, proposes in paragraph (b)(5) that: "If an effective modification is received by the contracting officer after award, the contracting officer shall modify the contract to incorporate the wage modification retroactive to the date of award *and equitably adjust the contract price for any increased or decreased cost of performance * * *.*" (Italics added.)

One might think that the task of the contract appeals boards in deciding who should pay (*cf. Dahlstrom, supra*) would actually be easier once the new FAR's become effective, since the changes would provide express authority for CO's to make equitable adjustments under change orders where wage determinations have been changed; but the Labor Department has again made clear that, in its view, the boards are not intended to have a function in labor standards provisions disputes. In discussing the proposed regulation change at 29 CFR 5.5(a)(9), the Department stated at 47 FR 23660-61:

Section 5.5(a)(9)-Disputes Concerning Labor Standards

Several commentators objected to the portion of § 5.5(a)(9) which states that disputes arising out of the labor standards provisions of the contract are not subject to the general disputes clause of the contract, but rather to the provisions of Parts 5, 6, and 7 of this Title. Federal agencies commented that the provision conflicts with the authority of the contracting officer as set forth in the Contract Disputes Act of 1978 (Pub. L. 95-563, 41 U.S.C. Sec. 601 *et seq.*). Reorganization Plan No. 14 of 1950, as explained in the President's message accompanying the plan, invests in the Secretary of Labor the responsibility "to coordinate the administration of laws relating to wages and hours on Federally-financed or assisted projects by prescribing standards, regulations, and procedures to govern the enforcement activities of the various Federal agencies." With respect to the Contract Disputes Act of 1978, section 14 of that statute sets forth specific amendments to existing statutes. Significantly, no change, repeal, amendment, or other reference was made to the Davis-Bacon and Related Acts, the Contract Work Hours and Safety Standards Act, the Copeland Act, or Reorganization Plan No. 14 of 1950. Therefore, in our view, the Department's authority to resolve disputes under these statutus and Reorganization Plan No. 14 is not impinged by section 14 of the Contract Disputes Act. *This conclusion is corroborated by section 6(a) of the Contract Disputes Act,* which states in pertinent part, that "the authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine."

To insure effective and consistent administration, *the authority to resolve labor disputes should reside in the Department of Labor*, since it is the agency which has the primary responsibility for protecting labor standards and the expertise in the law and the regulations. It should be noted that the General Accounting Office stated previously that it had no objection to the adoption of this provision. Accordingly, this section is hereby adopted. [Italics added.]

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We conclude this discussion by noting that it was this revised labor standards disputes provision that ultimately found its way into the contract before us. We also note that of the three reported board cases that have considered the new language, the first granted the contractor's appeal (*Dahlstrom, supra*); and the second, which denied the appeal for lack of subject matter jurisdiction because it involved a change in wage rates, said that it would have arrived at the same result under the old language. *Sealtite Corp.*, VA BCA No. 2398, 86-3 BCA par. 19,173. The third case was decided on another issue. Thus, the long-run effect of the new regulatory language has yet to be determined.

Decision

For this reason, among others, the Board deems it fortuitous that the two courts whose decisions are most authoritative from the standpoint of precedent have already provided the boards with substantial guidance in this matter.

In *Binghamton, supra*, the U.S. Supreme Court stated unequivocally that the requirement of the Davis-Bacon Act

that the contractor pay "not less" than the specified minima presupposes the possibility that the contractor may have to pay higher rates. Under these circumstances, even assuming a representation by the Government as to the prevailing rate, [the contractor's] reliance on the representation in computing its bid cannot be said to have been justified.

347 U.S. at 178. Despite occasional criticism, this case has never been overruled, and we think it alone would be dispositive of the appeal before us if we had no other authoritative precedent.

However, in *Collins, supra*, the Court of Appeals for the Federal Circuit recently affirmed a Claims Court decision that had held that "regardless of any ambiguities, the [contracting agency] was under no legal duty to clarify for [the contractor] the meaning of wage determinations." 744 F.2d at 814. The court noted that, "[t]he contract," which had language similar to that before us, "while not explicitly resolving the question of who is to bear the burden of the higher wages here at issue, is clear that Labor has the final authority to settle wage disputes and that failure to abide by such final decision is a violation of the contract." The court went on to say that "the [contracting agency] did not possess the authority [to clarify the Labor Department's employee classifications]; Labor did. If the [contracting agency] had taken a position on the classifications, it could later have been accused of misleading the contractor * * *." *Id.* at 815.

In the case before us, appellant urges that it was not its employees but the job that was misclassified. But, based on the Labor Department's clear intention to substantially extend its jurisdiction under the new regulations, it is the assumption of this Board that if an issue is in doubt, the Labor Department must prevail. That was the

view of the Court of Appeals in *Collins*, and that normally will be our view in connection with whatever labor standards provisions disputes may come before us. We specifically decline to follow the rationale of *Dahlstrom*, which, in our view, fails to consider sufficiently the adjudicatory intent of the Labor Department's new regulations.

In light of *Collins*, we cannot completely concur with the view of the GSA Board that the boards have no *jurisdiction* over labor disputes. *Collins* notes that: "The Claims Court held that ASBCA erred regarding [its finding of lack of] *jurisdiction*, since [the contractor's] complaint was properly targeted at the [contracting agency's] actions, or lack thereof, but that as a matter of law the *authority* to make such wage determinations was vested in Labor, not [the contracting agency]." (Italics added.) The NASA Board similarly appears to distinguish between board jurisdiction and board authority. See *Mercury Consolidated, Inc.*, NASA No. 1285-16, 86-3 BCA par. 12,259.

We read the court's language in *Collins* as entirely consistent with the exclusionary language of section 6(a) of the CDA, which begins, "The *authority* of this subsection shall not extend to." (Italics added.) The wording does not suggest a lack of jurisdiction as such. How much substantive difference such a distinction will make in light of the Labor Department's new regulations, however, we do not know at this point. But the Claims Court and the Court of Appeals have preserved the distinction, and so shall we.

[1] Accordingly, it is our present view that whenever, by the terms of the contract before us, we generally appear to lack authority over disputes arising out of the contract's labor standards provisions, we will as a matter of policy exercise jurisdiction over other labor-related matters in the same contract only to the extent that they arise primarily from causes other than the labor standards provisions. That is not the situation in the case before us, and thus we lack authority to grant appellant the relief it seeks.

[2] The distinction urged by appellant as to job classification versus wage classification appears clearly to be one without a difference, for surely the resulting wages for appellant's employees are the same whether the *job* is considered to be a non-utility job or the *workers* are considered to be non-utility workers. In either case, the Labor Department has the sole authority to do the classifying. Moreover, here, the CO asserts in his decision that if he had ever been asked by the contractor, he would have said that he did not consider the job to be a utility project. So if he had inquired--for whatever the point is worth in light of *Binghamton*, *supra*--appellant's owner would not have been misled.

More significantly, in light of *Collins*, even if appellant's owner had inquired of the CO and been told that the CO in fact regarded the project as a utility project, the contractor still would have had to make inquiry of the Labor Department to verify the CO's position with respect to the wages that would have to be paid. Accordingly, appellant's erroneous conclusion that the Bureau was representing the

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project to be a utility project constituted a unilateral mistake on its part for which the Bureau was not responsible. To the extent that it believed that the footnotes in the solicitation were ambiguous, the contractor was required to make inquiry of the Labor Department to clarify the matter before bidding, not after the contract was let.

[3] In summary, we hold that a Government agency in its bid solicitation makes no representation as to the amount of wages a bidder will have to pay if it is awarded the contract. The job classification and wage rate information set forth in contract documents specify only minimum rates, not maxima; and a contractor is not entitled to assume that the rates set forth are all that he will have to pay. Moreover, if a contractor is mistaken in his interpretation of the job classification standards, or if he believes them to be in any way erroneous or ambiguous, his only recourse lies with the Labor Department. The contracting agency has no authority and little ability to clarify the Labor Department's wage determinations. The Board, on the basis of *Binghamton* and *Collins*, expressly rejects the notion that the contracting officer is primarily responsible for resolving job-classification, wage-cost, or other labor-related issues in response to bidders' concerns, even when such clarification is sought.

A hearing in this matter would serve no useful purpose. See *Grannis*, *supra*, 59-1 BCA at 9677. Accordingly, appellant's request for a hearing is denied, and the Government's motion to dismiss the appeal with prejudice is granted.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

WILLIAM F. McGRAW
Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

IDAHO NATURAL RESOURCES LEGAL FOUNDATION, INC.

96 IBLA 19

Decided: *February 26, 1987*

Appeal from the February 19, 1986, decision of the Jarbidge Resource Area Manager, Boise (Idaho) District Office, Bureau of Land Management, allowing construction of the Echo II (Amendment) Project, and finding no significant effects on the quality of the human environment. EA ID-01-86-47.

Affirmed.

1. Administrative Procedure: Administrative Review--Appeals-- Board of Land Appeals--Federal Land Policy and Management Act of 1976: Land Use Planning--Rules of Practice: Appeals: Generally

Approval or amendment of a resource management plan may only be reviewed by the Director, Bureau of Land Management, in accordance with 43 CFR 1610.5-2.

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

A range improvement project is subject to the requirement that an environmental assessment be prepared. If a salient aspect of a project has not been assessed and that aspect is within the Board's jurisdiction, it may not be implemented until an adequate analysis of all relevant factors has been prepared.

3. Rules of Practice: Appeals: Dismissal

Where a notice of appeal is not filed within 30 days after the person filing the notice has been served with a decision, the Board does not have jurisdiction to review that decision.

4. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

An environmental assessment must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts are not significant. A decision that a proposed action does not require preparation of an environmental impact statement will be affirmed if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance with established procedures, and is the reasonable result of the officer's study of such a record.

APPEARANCES: Edwin W. Stockly, Esq., Boise, Idaho, for appellants; Robert S. Burr, Esq., Office of the Field Solicitor, Boise, Idaho, for the Bureau of Land Management.

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

The Bureau of Land Management (BLM) has filed a motion under 43 CFR 4.21(a) to put into immediate effect its decision of February 19, 1986, allowing the construction of a pumping station and a sump pond near the East Fork of the Bruneau River in Owyee County, Idaho, and the installation of 1-1/2 miles of water pipeline from the pond to a reservoir. The effect of the decision was suspended by an appeal filed February 26, 1986, by the Idaho Natural Resources Legal Foundation.¹ Under the circumstances of this case it is appropriate to treat the motion as one to expedite a decision on the merits, and we have done so.²

¹ See 43 CFR 4.21(a). The statement of reasons lists as additional appellants Idaho Bird Hunters, Inc., Idaho Sportsmen's Coalition, Inc., Idaho Conservation League, Ada County Fish & Game League, & Idaho Wildlife Federation.

² BLM's State of Idaho permit to appropriate public waters provides that BLM shall commence construction within a year of issuance of the permit on Feb. 27, 1986.

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The system originally developed in 1970 for stock watering in this part of Owyhee County proved expensive to operate and maintain. When, in 1982, BLM announced the policy that responsibility for maintenance of such systems would be assigned to those deriving the primary benefit from them,³ the grazing permittees in the area proposed redesigning the system so that costs would be reduced. They formed the Echo Water Users Ass'n to cooperate with BLM in planning and executing the redesigned system and to bear its operation and maintenance costs. In June 1985, BLM approved the construction of a well, a 2-1/2-million-gallon reservoir, and 12 miles of pipeline to correct the deficiencies of the existing system.⁴ The construction was completed, but because the well did not produce enough water, BLM decided to allow construction of a pumping station, an L-shaped sump pond 150 feet long, 15 feet wide, and 6-to-10 feet deep, and 1-1/2 miles of pipeline from the sump pond to the reservoir constructed in 1985.⁵ It is this decision that has been appealed.

At the outset, we must define the scope of the appeal. Appellants complain that BLM decided as early as January 1984 to partially fund reconstruction of the Echo pipeline;⁶ that neither the August 1984 draft Resource Management Plan/Environmental Impact Statement outlining proposed management of more than 1,690,000 acres of public land in the Jarbridge Resource Area nor the September 1985 Proposed Jarbridge Resource Management Plan and Final Environmental Impact Statement discussed or evaluated the Echo pipeline project, as they should have; and that both the June 1985 Environmental Assessment (EA) for the well, reservoir, and 11 miles of pipeline and the February 1986 EA for the amendment of the project involving the pumping station, sump pond, and 1-1/2 miles of pipeline were after-the-fact rationales for decisions already made (and, in the latter case, partially implemented?) that did not explore the environmental impacts in a timely or adequate manner, as required by the National Environmental Policy Act and implementing regulations.

BLM responds that the Jarbridge Resource Management Plan was begun in 1981, when the Echo pipeline reconstruction project could not have been anticipated, and in any event is suited to consider broad

³ See Instruction Memorandum (IM) No. 83-27, "Final Rangeland Improvement Policy," dated Oct. 15, 1982, and IM No. ID-84-369, "Assignment of Range Improvement Maintenance Responsibility," dated July 30, 1984.

⁴ See Environmental Assessment EA #ID-01-85-89, dated June 6, 1985, for the Echo II project. "A secondary objective of the proposal is to develop the potential to distribute water outside of the current systems service area." *Id.* at 1. "Increasing distribution capabilities" is listed as one of the objectives in the discussion of alternatives. *Id.* at 6. Construction costs were divided equally between BLM and grazing permittees. *Id.* App. 7 at 1.

⁵ See Environmental Assessment EA No. ID-01-86-47 for the Echo II (Amendment) project, dated Feb. 19, 1986.

"Water for the pump station will be delivered directly from Clover Creek through an existing headgate and irrigation ditch." *Id.* at 1. (The East Fork of the Bruneau River is also known as Clover Creek.)

⁶ See Exhibit B, appellants' statement of reasons, which is a draft BLM IM dated Jan. 19, 1984, concerning the FY 1985 Annual Work Plan Directives and Operating Budget approval. It reads in part, under the heading 4322-Grazing Management: "II. Specific Directives. Your AWP [Annual Work Plan] cost target is increased by \$432,000 * * * of which * * * \$106,000 [is] for the Echo pipeline reconstruction * * *. [T]he \$106,000 is provided for the Bureau to make a good faith effort to assist in this as a cooperative project."

⁷ The 1-1/2 miles of pipeline from the site of the proposed sump pond and pump to the new reservoir were constructed in Oct. 1985, soon after it was apparent the well would not produce enough water.

land use allocations, not site-specific range improvement projects; that it is too late to appeal any aspect of the June 1985 decision; and that the February 1986 EA contains an adequate discussion of the environmental impacts of the diversion of water from the river, and the construction of the sump pond, pumping station, and pipeline to the new reservoir.

[1] We agree that the resource management plan is not the proper basis for us to review BLM's decision concerning the Echo pipeline project. Such a plan is "not a final implementation decision on actions." 43 CFR 1601.0-5(k). Rather, it is "designed to guide and control future management actions." 43 CFR 1601.0-2. In any event, the Board does not have jurisdiction over appeals from the approval or amendment of a resource management plan, but only over actions implementing such a plan. *Wilderness Society*, 90 IBLA 221, 224-25 (1986). Appellants may pursue their concerns about the Jarbidge Resource Management Plan via the protest they filed concerning it on November 1, 1985. 43 CFR 1610.5-2.

[2] BLM is required to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (1982), in carrying out range management projects such as the Echo pipeline reconstruction, however. Unless a project is categorically exempt, which this one is not claimed to be,⁸ an EA must be prepared. 40 CFR 1501.4(b). Such an assessment must take a hard look at the issues, as opposed to setting forth bald conclusions, identify the relevant areas of environmental concern, and make a convincing case that environmental impact is insignificant if its conclusion that an environmental impact statement (EIS) is not required is to be upheld. *Glacier-Two Medicine Alliance*, 88 IBLA 133, 141 (1985); *Sierra Club*, 57 IBLA 79, 83 (1981). If a salient aspect of a program or project has not been assessed, and that aspect is within the Board's jurisdiction, it may not be implemented until an adequate analysis of all relevant factors has been prepared. *SOCATS (On Reconsideration)*, 72 IBLA 9 (1983). In this case, even though developing "the potential to distribute water outside of the current systems [sic] service area" is acknowledged as an objective in the June 1985 EA, *see supra* note 4, and the EA evaluates the cost-benefit ratio on the basis of adding lateral pipelines within specified later periods (see EA App. 7 and Map I), the text of the EA spends only two sentences evaluating the impacts of this increased distribution.⁹ The consultant's discussion of the recommendation that was modified somewhat in the June 1985 decision names as one of its benefits "the ability to open up the entire range between the two reservoirs for stock usage with adequate water,"¹⁰ but, like the EA, does not discuss the effects of this consequence at all.

⁸ See 516 DM 2.3A, 45 FR 27544 (Apr. 23, 1980), 516 DM 2, Appendix 1.

⁹ "Increased distribution of water will have a long term effect of improved distribution of livestock. This should have a beneficial impact to the riparian zone, in that it will decrease the number of cattle which currently drink directly out of the creek." 1985 EA, *supra* note 4, at 10.

¹⁰ *Id.*, App. 1 at 5.

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[3] If the June 1985 decision were subject to our jurisdiction, we would be constrained to suspend it until an adequate environmental analysis was prepared. *SOCATS, supra* at 12. No timely appeal of this decision brought it within our jurisdiction, however. *See State of Alaska v. Heirs of Dinah Albert*, 90 IBLA 14 (1985). Further, the construction it authorized is complete, so requiring compliance with NEPA at this stage would substantially prejudice both BLM and the private parties who jointly financed the project. Cf. *Peshlakai v. Duncan*, 476 F. Supp. 1247, 1256-57 (D.D.C. 1979); Mandelker, *NEPA Law and Litigation*, § 4.27 (1984). Under the circumstances, we cannot provide appellants any relief from BLM's June 1985 decision.¹¹

[4] There remains the question whether the 1986 EA properly concluded an EIS was unnecessary for the amendment of the Echo pipeline project. The answer to this question is clouded by the fact that BLM proceeded with the construction of part of the project--1-1/2 miles of pipeline from the proposed diversion site to the new reservoir--in October 1985, 4 months before it prepared the 1986 EA. The only apparent explanation provided for doing so are the statements in the February 1986 EA that "[t]he existing environment is basically the same as that described in EA # ID-01-85-89" and that "[t]he 1-1/2 miles of pipeline required under this proposal will result in the same environmental impacts previously identified in EA # ID-01-85-89. Therefore, the same mitigating measures previously identified for the pipeline/roadway will be carried forward." It is not clear from the record that the environment surrounding the mile of the originally proposed pipeline from the well in section 15 east to the new reservoir in section 14 is "basically the same" as the 1-1/2 miles from the proposed new diversion site in section 23 north to the reservoir. In any event, for an analysis to apply to the same construction in a different location the environment would have to be the same, not just "basically" the same. Even if the new location were the same, however, an environmental analysis is to be prepared *before* construction of the project it analyzes; it cannot serve its function of assisting in determining whether to prepare an EIS if the project has already been completed. *See* 40 CFR 1501.4(c), 1508.9(a)(1).

We stated above the criteria for an EA: it must take a hard look at the issues, identify the relevant areas of environmental concern, and make a convincing case that environmental impact is not significant.

¹¹ BLM's answer states at page 2:

"Neither the Echo II Decision of June 6, 1985, or the Echo II Amendment Decision of February 1986 were [sic] concerned with the enlargement of the water distribution system located on the plateau. Both decisions were oriented towards upgrading the existing water system by constructing a more efficient pumping station and increasing water storage capacity." Its motion states at page 2:

"The watering areas for livestock are not being increased by this decision so the amount of water used to supply the needs of the domestic livestock and wildlife within this portion of the Sailer Creek Unit are not being increased. Neither are grazing areas for livestock being enlarged by the decision."

We assume these statements mean BLM plans to prepare an EA on the effects of increasing water distribution before it proceeds with this aspect of the project.

Sierra Club, supra. A decision that a proposed action does not require an EIS will be affirmed if it appears to have been made by an authorized officer, in good faith, based upon a proper and sufficient environmental analysis record compiled in accordance with established procedures, and is the reasonable result of his study of such a record. *Id.* at 84; *Southwest Resource Council*, 73 IBLA 39, 48 (1983). The party challenging the determination must show it was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and is supported by the record on appeal. *Glacier-Two Medicine Alliance, supra* at 141; *Sierra Club, Inc.*, 92 IBLA 290, 303 (1986).

Appellants contend the "1986 EA contained only a superficial discussion of the effects of taking water directly from the East Fork of the Bruneau River" (Statement of Reasons at 8, 12). They argue that if the effects of removing water from the stream on riparian zones and fisheries habitat are unknown, as the EA states, then a worst case analysis should be performed. *Id.* at 17. This criticism is based on the following statement from the 1986 EA at page 3:

In addition to surface disturbance, which is mitigated by the above measures, concern has been expressed over potential impacts to Clover Creek which may result from removing water directly from the stream. Reduced wator flows would have a negative effect on riparian zones and fisheries habitat. The significance of this effect is unknown at this time as there is not enough data available to make a quantifiable assessment. Under the existing Echo System approximately .23 cfs is being pumped out of Clover Creek on a continual basis. The proposed pumping system will have the capability to double this rate (to .43 cfs), but pumping on a continual basis should no longer be required. The new pump system will however, affect an additional 10 miles of stream.

The EA and BLM's answer explain that the increased pumping capacity and increased storage capacity will enable BLM to fill the reservoirs when the stream is not at low flow and to extend the periods when no pumping is needed at all to 5-to-7 weeks if the reservoirs were full beforehand. This would result in less impact on fisheries and riparian habitats than the present system, BLM argues, even though the amount of water diverted would be greater and the diversion site is 10 miles upstream. In its motion, BLM offers supporting data (stating it was analyzed during the EA process) that the .46 cubic feet/second to be diverted would have exceeded 10 percent of the mean flow of the stream during lowflow summer months in only 2 of 13 years of record during July, 3 of 13 years in August, and 5 of 13 years in September (Affidavit Accompanying Motion at 5-6). In such months, BLM states, "the Echo II system would have had to operate strictly with water stored in the reservoirs"; correspondingly, livestock could be watered away from the stream, thus reducing their direct impacts on riparian habitats by drinking from it. *Id.* In other months diverting up to 10 percent of mean flow "is not considered to be a significant effect on the water flow." *Id.* In times of low flow it is holders of water rights

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senior to BLM's whose uses "can and do dry up the river in certain stretches," BLM observes (Motion at 3; EA at 3).

The EA concludes:

From this information, preferred mitigation would be to develop a watershed management plan for Clover Creek which would improve the entire riparian zone of the stream and ultimately reduce its wide fluctuations in flow rates. The entire drainage would have a stable water discharge rate rather than the wide extremes of no flow or flood which currently exist. Improvement of the riparian condition would be accomplished by developing specific livestock grazing systems, gap fencing to restrict livestock access to stream banks or structural improvements to regulate waterflow.

The Resource Area Manager's rationale for his February 19, 1986, decision allowing construction of the amendment to the project and finding no significant effects on the quality of the human environment stated: "It will also be required that the storage systems be kept as full as possible during those periods when excess water is flowing through Clover Creek. A watershed management plan will be developed for Clover Creek in an attempt to lessen the wide fluctuations in stream flows which currently exist."

It is thus apparent that the BLM decision was based on an examination of relevant areas of environmental concern and incorporated appropriate provisions in response to those concerns. It is based on a sufficient (if not fulsome) environmental analysis record and is a reasonable result of a review of that record. Appellants have not identified any clear error of law or fact or shown that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the BLM decision of February 19, 1986, is affirmed.

WILL A. IRWIN
Administrative Judge

1 CONCUR:

JOHN H. KELLY
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

The instant case evidences a less than complete recognition by the Boise District Office of the obligations imposed by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1982).

Admittedly, this Board has had occasion to note in numerous prior decisions that the thrust of NEPA is primarily procedural rather than substantive. Thus, in *In re Otter Slide Timber Sale*, 75 IBLA 380 (1983), we quoted the decision of the United States Supreme Court in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978), that:

"NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well-considered decision." *Id.* at 383 n.3.

The fact that NEPA is primarily informational rather than action forcing, however, does not lessen its import. Rather, the Board has held that the opposite is true. In *State of Wyoming Game & Fish Commission*, 91 IBLA 364, 367 (1986), we noted that: "Precisely because the NEPA mandate is primarily procedural, it is absolutely incumbent upon agencies considering activities which may impact on the environment to assiduously fulfill the obligations imposed by NEPA." Under such a standard, the actions taken by the Boise District Office in the instant matter must be deemed clearly inadequate.

It is true, of course, that two environmental assessments (EA's) were prepared in this case. Each, however, suffers from infirmities. The 1985 EA (EA ID-01-85-89) involved consideration of the proposal to drill a water well, pump the water to a new 2-1/2-million-gallon reservoir and, from there, connect the new reservoir to an existing reservoir by means of 11 miles of buried pipeline. This proposal was derived from a private study commissioned by the Echo Water Users Association undertaken to ascertain how the irrigation system could be improved so that costs of operating and maintaining the system could be lowered. Five alternatives were examined. Preferred alternative number 5 involved the drilling of the well and creation of the new reservoir. The resultant costs of this alternative were not inconsiderable. Indeed, of the four alternatives for which cost estimates were provided, alternative number 5 involved the highest expenditures. This alternative was preferred, however, because it contemplated "development of new storage and new lands for stock usage" in addition to overall lowered operation and maintenance costs.

But, despite the fact that economic viability of this alternative was directly related to the fact that increased lands would be made available for grazing (see Appendix 7 to the EA), the 1985 EA is totally silent as to any environmental analysis of the effect of opening up new lands to grazing use. On appeal, counsel for BLM advises us that the EA was not concerned "with the enlargement of the water distribution system located on the plateau" (Answer at 2). Certainly, it does not analyze this aspect of the proposal. The EA, however, clearly states that "a secondary objective of the proposal is to develop the potential to distribute water outside of the current systems service area" (1985 EA at 2). It must be assumed, therefore, that it was the intention of the District Office to issue another EA prior to construction of the new laterals which would examine the impacts of increasing the lands open to grazing.

Had a proper appeal been filed at that time, I think it is clear that the Board would have set aside the EA as an improper bifurcation and piecemeal analysis of a project whose effects should be considered as a whole. Thus, courts have refused to allow segmentation of projects into discrete units for purposes of analysis since not only may synergistic

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effects be ignored under such an approach, but also the partial completion of a project may so prejudice the decisionmaker that subsequent recognition of adverse environmental impacts which might have convinced the agency not to proceed as an original matter may be overwhelmed by consideration of the time, efforts, and expenditures already made. Inasmuch as the economic viability of the Echo II pipeline system was dependent upon increased grazing capacity, it was clear error for BLM not to directly address this question in the 1985 EA.

Be that as it may, the majority correctly points out that no one appealed from the initial EA. Rather, action proceeded to implement the plan until September 1985, when it was determined that the well would not have sufficient flow for the system. This determination was made after construction of the new Clover Crossing Reservoir had already been completed. In October 1985, approximately 1-1/2 miles of pipeline was laid from the Clover Crossing Reservoir to a site on Clover Creek where a pumping station was now proposed. In February 1986, BLM issued the 1986 EA (EA ID-01-86-47), purportedly examining the impacts of both the pipeline and the pumping station, even though the pipeline had been constructed 4 months earlier.

One need not be steeped in the arcana of NEPA to recognize that the essential utility of an EA is vitiated where it is completed after the "proposed" action being analyzed has already been accomplished. The whole purpose of an EA is to develop a document which assesses the impact of a proposed action and allows the decisionmaker to consider environmental consequences and direct the adoption of measures which might mitigate any negative impacts *prior to* authorizing a project. An EA prepared after the fact can only be either an exercise in damage control or an *ex post facto* rationalization. This is simply not the way the process is supposed to work.

It is, therefore, with extreme reluctance that I concur in the disposition of this appeal. Two separate considerations impel me to this result. First, appeals do not arise in a vacuum. The pipeline to Clover Creek has already been constructed. Admittedly, the EA was prepared after the fact. But, at this point in time, there is nothing that the Board can do, no matter how strongly it may deplore the procedures followed in this case, which can erase this reality. Thus, I think we must limit ourselves to a review of the adequacy of the 1986 EA, ignoring the belated nature of its preparation. I must agree that the 1986 EA, which the majority charitably describes as "not fulsome," at least minimally analyzed the impact of the pumping station. On this limited question, appellants have failed to establish that BLM did not consider the environmental impacts of increased diversion from the river. Nor can I say that the decision to proceed with the project is not a reasonable result from a review of the record. Thus, insofar as the

pumping station and pipeline are concerned, I agree that appellants have not carried their burden on appeal.

The second and more critical consideration in my decision to concur is my understanding that *no* action with respect to the construction of new lateral lines (as opposed to the maintenance of existing ones) will be permitted until after an EA is prepared which fully analyzes the environmental impacts of increasing the areas open to grazing. Indeed, were this not the case, I would not hesitate to vote to reverse the decision of BLM and direct suspension of all activities under the 1986 EA until it was supplemented by such an analysis.

I realize that this still results in a piecemeal analysis of the Echo II pipeline's effects. However, both the pipeline and the Clover Crossing Reservoir have already been constructed. Appellants have failed to establish that the pumping facilities, with its attendant impacts on Clover Creek, have not been adequately considered by BLM. It would therefore appear to serve no useful purpose to require a halt in construction of those facilities or the impoundment of the spring runoff, pending an examination of the effect of increasing the areas open to grazing *provided* that these effects are examined before any resources are committed to expanding the system. With this understanding, I concur in the denial of the appeal.

JAMES L. BURSKI
Administrative Judge

March 6, 1987

APPEAL OF JAMES W. SPRAYBERRY CONSTRUCTION

IBCA-2130

Decided March 6, 1987

Contract No. C-5000-5-0027, National Park Service.

Appeal sustained.

1. Contracts: Disputes and Remedies: Termination for Default

The Board holds a termination for default, improper, as coming within the *defective specifications or right to await clarification* exception to the duty to proceed rule, upon finding that despite his many requests to do so, the Government project architect and contracting officer refused to clarify the technical method to be employed in installing roofing materials in order to comply with the specifications.

2. Contracts: Disputes and Remedies: Burden of Proof

Upon finding that the contractor's refusal to proceed was a conditional, rather than an unconditional, manifestation of nonperformance, when the contractor remained at the site awaiting clarification or direction on how to proceed under technical specifications, the Board holds that the Government failed to sustain its burden of proving alleged abandonment by not proving words or conduct on the part of the contractor manifesting a positive, unequivocal, and unconditional intent not to perform the contract in any event or at any time.

3. Contracts: Construction and Operation: Waiver and Estoppel

Upon finding that the contracting officer issued a change order granting a 27-day extension of time, which specifically included 3 days of delay caused by the cleaning up of rainwater damage resulting from roof leaks, and that the contracting officer based his change order on a determination that the contractor's request for the days of delay was "fair and reasonable," the Board holds that the Government waived its right to terminate the contract on the ground that the contractor breached the contract by not providing adequate protection to the building from rain damage during a reroofing project.

APPEARANCES: Martin R. Salzman, Attorney at Law, Hendrick, Spanos & Phillips, P.C., Atlanta, Georgia, for Appellant; Donald M. Spillman, Department Counsel, Atlanta, Georgia, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

By this appeal, the contractor seeks to have a termination for default converted to a termination for the convenience of the Government and requests an award in the amount of \$45,120.10 plus interest. For the reasons hereinafter set forth, we hold for the contractor and sustain the appeal.

Background

On August 28, 1985, James W. Sprayberry Construction (Sprayberry, contractor, or appellant) was awarded a contract by the National Park Service (NPS) for the purpose of reroofing the Visitor Center,

Ocmulgee National Monument, Macon, Georgia. Sprayberry's bid had been accepted in the amount of \$46,937. The Notice to Proceed, dated September 18, 1985, confirmed the arrangement made September 6, 1985, at the preconstruction conference that the beginning date of the contract would be September 11, 1985, and, without extensions, the work would be completed no later than the close of business on October 10, 1985.

The work to be performed under the contract was described in the Appeal File, Contract Section, page 10 (AF, Contract Section 10), to consist of furnishing all labor, equipment, and materials required for the satisfactory removal of all designated roofing, insulation, flashing, cants, and related components. Also, it included the installation of rigid insulation board and installation of a spray-applied foam roof system complete with protective coating. The specifications required, among many other things, that the contractor furnish a warranty from the coating manufacturer against a defective elastomeric-coated urethane foam roofing system for a period of 10 years; that the contractor submit shop drawings for the installation of tapered insulation and roof drains; and that the rigid insulation board be installed so as to provide a uniform tapered slope of one-eighth inch per lineal foot.

As required by the contract, the contractor submitted the manufacturer's shop drawings of the tapered insulation to the project architect (PA) for his approval prior to the commencement date, September 11, 1985. The PA, Mr. Bill Sowers, however, rejected the submitted shop drawings on September 10, 1985, because the tapered system as submitted did not meet the one-eighth inch per foot slope specification (AF, Contract Section 10; Supplement 5; Tr. 50-51). When the shop drawings were resubmitted as requested, Mr. Sowers approved them (October 3, 1985), but on the bottom of the approval noted: "1/8" per foot slope @ All locations!" (Tr. 59-60; AFS-11 (italics in original)). On September 13, 1985, Mr. Michael Smith, Marketing Manager for Apache Building Products Co. of Linden, New Jersey, appellant's supplier and manufacturer of the tapered insulation board, wrote a letter to Sprayberry concerning the project as follows:

A recent conversation with Mr. Bill Sowers of the National Park Service in Atlanta prompts APACHE to reconsider our participation in the above referenced project. Mr. Sowers has refused to deviate from his Tapered Insulation Layout, even though it was explained to him that his layout is impractical and creates an unnecessary amount of field fabrication. Therefore, APACHE BUILDING PRODUCTS COMPANY will not be providing your firm with a shop drawing on this project. We do not want the design responsibility for a project where our experience and knowledge of Tapered Insulation is ignored. If your firm wants to supply APACHE with a bill of materials we would provide that material at a specified price. Please do not hesitate to contact me.

The foregoing incidents made it clear to the contractor that Mr. Sowers would not deviate from his requiring a slope of one-eighth inch per foot at all locations (Tr. 54-60).

Soon after commencing the first phase of the work—removal of the existing roof—Sprayberry was confronted with a differing site condition

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discovered on levels 5, 3, and 2 of the five-level roof. The condition consisted of a layer of cementitious material of varying widths over the roof deck and beneath the old roofing. It was not evident from a visual site inspection and was not shown on the project roof plan. It gave considerable concern to the contractor because it meant extra work and interfered with a level surface upon which to install the tapered insulation board in order to comply with the slope specification. The Government officials involved were concerned because of the prospect of increased costs for the contract work.

After many telephone conversations between the contractor and the Government officials, primarily, the contracting officer (CO), the PA, and the contracting officer's technical representative (COTR), and, after considerable delay, procedures were developed for coping with the cementitious material and necessary change orders issued. The changes resulted in a contract amount revision summarized in Change Order No. 4 (dated October 23, 1985, and signed by the CO on November 1, 1985) substantially as follows:

Original Contract Amount	\$46,937.090
Change Order No. 2 (Level 5)	+100.00
Change Order No. 3 (Level 3)	+3,104.23
Change Order No. 4 (Level 2)	<u>+1,048.24</u>
Revised Contract Amount	\$51,189.47

We note that this revised contract amount does not include a disputed amount of \$3,239 claimed by the contractor for removal of cementitious material and preparation of the masonry deck on level 5, but which, according to Change Order No. 2, was to be negotiated by November 6, 1985 (AF, Contract Modifications 2).

The cementitious material problem had a significant disruptive impact on the contractor's schedule for the completion of the reroofing contract. In addition, the delays by the Government in deciding how to solve the problem, together with heavy rains and stormy weather, resulted in leaks occurring in the roof of levels 5 and 3. The leaks took place despite the efforts of the contractor to temporarily dry in the roof on level 3 with a two-ply felt vapor barrier and a flood coat of hot bitumin and to attempt to prevent leaks from the roof on level 5 by using visqueen sheeting. Considerable damage to the interior of the building occurred because of the leaks and 3 days were required to clean up after the damage which also contributed to the disruption of the work schedule. Consequently, on October 8, 1985, the contractor requested and received Change Order No. 1, dated October 10, 1985. This change order was based on the following findings and determination by the CO:

FINDINGS

Contractor requested a 27-calendar day extension of time based on the following:

- | | |
|---|--------|
| 1. Removing extra material on Level No. 5 | 4 days |
| 2. Bringing up Level No. 3 | 3 days |

3. Delay caused by rainwater damage (cleaning up)	3 days
4. Time lost because of work stoppage	7 days
5. Time delay caused by supplier of taper board which we were well aware	<u>10 days</u>

Extra work will involve costs which will follow on additional change orders.

DETERMINATION

Grant the Contractor the time requested as we believe it is fair and reasonable. This is in accordance with the FAR Clause entitled "Changes (Apr. 1984)."

The change order itself simply provided that "a time extension of 27 calendar days is granted to perform the remainder of reroofing the Visitor Center at Ocumlgee National Monument," and that "the expiration date for the contract is now November 6, 1985."

From October 8 to November 4, 1985, the contractor experienced additional delays caused by: (1) the inability of the manufacturer to provide the tapered insulation board at the time originally planned, and not until October 21, 1985; (2) the CO directing the contractor not to tear off additional existing roofing material until the tapered insulation board was on site to avoid any further interior leaking; and (3) continuous, unusual, and excessive rain preventing the performance of work on the project from October 21 to November 4, 1985 (Tr. 102-05; Tr. 107-08; AFS-1; AF-GG 13-19).

The contractor continued work on the project on November 4, 1985, and completed the removal and tear-off of the existing roof on level 2. Once again, cementitious material was encountered and on November 6, 1985, a telephone conference took place between Sprayberry and the three Government officials: the CO, the PA, and the COTR. In the course thereof, Sprayberry informed the NPS officials of the water ponding problems on levels 3 and 5 and of the new condition discovered on level 2. He again reminded them that the roof deck was not level and requested elevation checks in order to comply with the slope specification. His requests were dismissed, however, and the response was that such checks were not necessary and Sprayberry was directed to proceed with the roofing work in accordance with the specifications. According to Sprayberry, the PA, in fact, said, "You go ahead and make [sic] the roofing system down per the plans and specifications. Then, if it doesn't drain water properly, we'll make you tear it off and start all over again" (Tr. 113).

Sprayberry followed up the telephone conference with a letter dated, November 7, 1985, addressed to the COTR (AF-K4) delineating the elevation problems, requesting that he be provided with the correct elevations, and advising that he would not proceed with the work until NPS addressed the elevation problems.

On November 8, 1985, Sprayberry met with the COTR, the PA and a new CO at the job site. He was directed to proceed with the project in strict accordance with the project roof plan and specifications, and, in substance, was told that the elevation adjustments were not necessary and that the Government would not provide any elevation drawings. Sprayberry requested that if he would not be provided with such

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drawings, at least he be given a written statement that he would be relieved of any responsibility for the consequences resulting from the deck elevation or ponding problems (Tr. 123-28). Sprayberry testified that he was not told at the November 8 meeting that the Government would assume such responsibility (Tr. 128). The CO, on the other hand, testified that, in fact, Sprayberry was told at such meeting that if the Government was wrong (with regard to its position on the requested elevations) he would not be held accountable for the damage done, and would not be required to tear out and repair the roofing system without equitable compensation (Tr. 293). She also testified that she believed such statement was confirmed by the COTR, the PA, and Mr. Smith, the Park Superintendent (Tr. 293). At the November 8 meeting Sprayberry was handed a show cause notice giving him 10 days to present the reasons for not completing the project by November 6, 1985, and to present a proposed plan of action for completing the work (AF-N).

On November 14, 1985, the CO transmitted to Sprayberry a copy of the minutes of the November 8 meeting (AFS-19), but such copy did not have the footnote contained on the official NPS copy of the same document (AF-L). The footnote was as follows: "NOTE: Regarding contractor's concerns regarding elevation drawings, designing architect and Park were advised and agreed that if problems arise as a result of this decision, the National Park Service would be responsible. The Contractor is responsible for completing the contract work in accord with the contract." The CO explained at the hearing (Tr. 295) that she just did not think that the note was important for the contractor, that she did not realize the legal significance of the written notice, and that the note was "more intended for management than it was for a contractor or myself." When asked under cross-examination for the reason why she did not give Sprayberry the written exoneration he requested, the CO responded that she had no reason for it, "it was just an oversight" (Tr. 339). Furthermore, at the hearing, when the COTR, Mr. Leslie, was given the opportunity to corroborate the alleged verbal statement by the CO that Sprayberry would not be held accountable if the Government was wrong in not providing the requested deck elevations, he failed to do so (Tr. 407-09).

A result of an inspection and taking measurements with a line-level, string, and tape measure at the project site on November 13, 1985, Mr. Richard Marshall, Jr., of Domation, Inc., the approved applicator of the urethane foam roofing and protective coating system, concluded that the roof deck was not level, and in that condition would not allow the application of a urethane foam roofing system to meet the Government specification of one-eighth inch per foot slope (Tr. 135-36, 211-12; AFS-22). Mr. Marshall notified Sprayberry in a follow-up letter, dated November 23, 1985, that his company was withdrawing its commitment to apply the foam and coating to the subject roof because

of the conditions stated (AFS-22). He testified at the hearing that the withdrawal was because of the liability of the warranty his company would be required to furnish arising from the anticipated noncompliance with the Government specification (Tr. 216).

On November 15, 1985, Sprayberry responded by letter to the show cause letter received from the CO at the on-site meeting of November 8 (AFS-9; AFS-21). In such letter he reiterated the unlevel condition of the existing concrete roof deck and that it was, therefore, not compatible with the work called for by the contract plans and specifications. He stated that in order to proceed with the contract, he must have from the CO and the PA: (1) a written acceptance of the existing deck elevations, and (2) an acceptance of the resulting ponding water. He also stated that because of the failure of NPS to resolve the roof deck elevation problems by refusing to give him the design directives he needed, his work schedules had been disrupted, he had lost large amounts of time and money, and was continuing to do so (AF-F; AFS-21).

On November 19, 1985, Sprayberry arranged for the Lieck Surveying Service to come to the project site and survey the roof deck to determine the variances in elevation (Tr. 139-40). Mr. William Bailey was the surveyor for Lieck, who, with two men surveyed levels 2, 3, and 5 and made drawings and notes of the elevation measurements. He testified with respect to the procedure followed and concluded that the roof deck was not level (Tr. 224) and stated under cross-examination (Tr. 225) that the roof deck level varied from high and low extremes 2-1/2 inches.

Mr. Ross Andrews, the recipient of a B.A. in architecture from the University of Tennessee and an architect with over 12 years of professional experience, testified that at Mr. Sprayberry's request he analyzed the plans and specifications for the subject project, together with the notes and measurements made by the Lieck Surveying Service, and, among other things, concluded: That the elevation variances of the roof deck precluded Sprayberry from meeting the one-eighth inch slope per foot requirement of the specifications and roof plan; that to solve the ponding problem with which Sprayberry was confronted, any prudent architect would have required the elevation survey of the roof and the kind of analysis performed therefrom as he had done with the Lieck survey information; that it was obvious that the PA, in drafting the plans and specifications, assumed that the roof deck was level; that, in fact, it was not level; and, upon discovery of such fact, it was the responsibility of the architect, not that of the contractor, to come up with a solution (Tr. 240-67).

Pursuant to the default clause of the contractor, the CO, on November 20, 1985, issued a Notice of Termination to Sprayberry terminating his right to proceed under the subject contract. The grounds recited for the termination were: (1) failure to prosecute the work, (2) abandonment of the project, (3) failure to proceed as directed by the CO's verbal and written instructions, and (4) failure to respond

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to the show cause letter dated November 8, 1985 (AF-C). The return receipt associated with the notice shows that delivery was made to Sprayberry on November 22, 1985. Timely notice of appeal was filed by Sprayberry with the Board on February 5, 1986.

Appellant's Position

The position of the contractor/appellant in this appeal may be summarized as follows:

1. The project roof plan and the specifications represented that the existing roof deck was level and, therefore, if a tapered board insulation system was installed by the contractor in accordance therewith, a one-eighth inch per foot slope of the roof would result.
2. The evidence established, however, that because of large amounts of cementitious material underlying the roof to be replaced, the existing roof deck contained significant variances in elevation and therefore, was not level.
3. The roof plan and specifications became defective because of the discovery of the unlevel roof deck in that, if followed without correction, the result would be a roof out of conformation with the intransigent slope requirement of one-eighth inch per lineal foot.
4. That despite the many requests by the contractor that the Government correct the defective specifications or give direction or clarification on how to cope with the technical difficulties encountered, the Government failed to do so, and thus, breached the contract in two respects: (1) it breached its implied warranty that performance in accordance with the roof plan and specifications would achieve an acceptable roof; and (2) it breached its implied obligation to the contractor to do whatever is reasonably necessary to enable the contractor to perform.
5. Therefore, Sprayberry is entitled to a decision by the Board that the termination for default was improper and should be converted to a termination for the convenience of the Government and that Sprayberry be awarded damages in the amount of \$45,120.10 plus interest for its incurred costs and loss of profits.

The Government's Position

The Government's position as indicated in its posthearing brief may be summarized as follows:

1. The plans and specifications contained nothing to indicate that the deck would be level nor was there any other Government representation that the contractor could expect a level deck after taking off the old roofing material; therefore, there was no differing site condition upon which appellant can rely for recovery.
2. Assuming, *arguendo*, that the plans and specifications were in some way defective with regard to the condition of the concrete deck,

appellant's contention, that without a level deck, the specified requirement of a one-eighth inch slope per foot could not be met is not supported by the evidence, because of the testimony of Mr. Ron Polk, the president of the follow-on contractor, Lanier Construction, which was substantially that with the same plans and specifications, "Lanier encountered no difficulties in achieving the specified *minimum* slope by reason of the building elevations;" "Lanier achieved the specified *minimum* slope or greater using the same tapered board package as was submitted by appellant for the previous contract;" and that Lanier had no difficulty in obtaining the 10-year warranty required by the contract and no ponding occurred after the installation. (Italics supplied.)

3. Appellant did not incur any additional costs by reason of the allegedly defective specifications; he simply abandoned the project.

4. Despite the several verbal and written instructions of the NPS officials to the contractor that the roof elevation checks were not necessary and to proceed with the work, and despite the assurance given to the contractor that if the Government was wrong; he would not be held responsible for any resulting damage, the contractor refused to proceed with the work until he received the requested roof elevations. He was obligated to proceed with the work under these circumstances and seek any needed subsequent relief under the disputes or changes clauses of the contract.

5. One of the grounds for the default termination of the contract was Sprayberry's failure to adequately protect the building and its contents from leaks as required by the contract. The evidence shows unequivocally that leaks occurred and caused considerable damage, and appellant failed to meet its burden of proving that such failure of protection was excusable.

6. The appellant failed to respond to the show cause notice hand delivered to him by the CO at the on-site meeting of November 8, 1985, because the letter of November 15, 1985, purporting to so respond, only requested written acceptance of the existing roof deck elevations and acceptance of liability for any resulting ponding water, did not provide any reason for his failure to perform, and did not include a proposed work schedule.

7. For the foregoing reasons, the CO's default termination of appellant's contract should be upheld.

Discussion, Findings, and Conclusions

We observe that the project architect for the Government, Mr. Sowers, was conspicuously absent from the hearing. His expert testimony was not offered, either directly at the hearing or by deposition. Therefore, we find, primarily on the basis of the uncontradicted testimony of appellant's expert, architect Ross, that the roof deck, underlying the old roofing material required to be removed, was not level and needed to be level before installation of the tapered board to enable the contractor to comply with the precise

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specification of a "1/8 inch per lineal foot slope at all locations of the new roof." Based on the unrefuted testimony of Mr. Sprayberry and Mr. Michael Smith, *supra*, and on the resubmitted shop drawings (AFS-11) containing the PA's approval note with the slope requirement emphasis, we find that the one-eighth inch per lineal foot slope requirement was intransigent and did not permit a lesser or greater slope deviation of any kind. It follows, therefore, that item 2 of the Government's position, *supra*, becomes fallacious because it assumes by its own terms that the ultimate subject roof could comply with the specification even if the slope were greater than one-eighth inch per lineal foot. Mr. Polk's testimony, likewise, becomes ineffective (Tr. 363, 364) because when asked whether, as the follow-on contractor, he achieved the "*minimum* slope of 1/8 per square [sic] foot" he replied, "or greater." (Italics supplied.) Furthermore, according to the testimony of the COTR, Mr. Homer Leslie (Tr. 437), he did not, as the project inspector, measure or determine whether the follow-on contractor met the slope specification and did not know whether any one else on the part of the Government had done so.

[1] Based on the evidence of record, we find that despite the many requests of the contractor to do so, the PA and the CO refused to give specific instruction or clarification to him regarding the method to be employed for installing the roofing materials on the unlevel deck, and yet conform with the slope requirement. We also find that despite the request by the contractor that he be given a written release from liability for the consequences resulting from proceeding with the installation of the new roof without correction of the unlevel deck, the Government officials failed to do so. Instead of responding to these requests of the contractor, the Government, in item 4 of its position, *supra*, contends that the roof elevation checks were not necessary; that it so informed the contractor and directed him to proceed with the work; and that the contractor was thereupon obligated to proceed and could seek any needed subsequent relief under the disputes or changes of the contract. This position follows the general rule that failure to proceed in accordance with an order of the CO will permit the Government to terminate for default. However, it ignores the relatively recent developments in the law which provide exceptions to the duty to proceed. One such exception is where there are defective specifications and the Government has been notified thereof. *Robert Whalen Co., ASBCA 19720 (1978)*, 78-1 BCA par. 13087; *Switlik Parachute Co. v. United States*, 216 Ct. Cl. 362, 573 F.2d 1228 (1978). Another is where the Government has failed to give clarification to the specifications after a valid request from the contractor. See *G. W. Galloway Co., ASBCA 17436 (1977)*, 77-2 BCA par. 12640; *Stockwell Rubber Co., ASBCA 20952 (1976)*, 76-2 BCA par. 12130; *Pacific Devices, Inc., ASBCA 19379 (1976)*, 76-2 BCA par. 12179. After discussion of some of the above cases, Ralph C. Nash, Jr., in his 1981 *Supplement to*

Government Contract Changes, concludes Chapter 6 thereof with the following sentence: "Thus, the right to *wait clarification* of the specifications remains one of the major exceptions to the duty to proceed." To avoid termination here, all the Government officials needed have done was advise Sprayberry that he could exceed the slope requirement, just so the new roof drained properly (if that were the case), or to give him the written release he asked for, or, at least explain why the roof deck did not need to be level before installing the tapered board so as to meet the slope specification. But they did none of these things. In light of the foregoing authorities, therefore, we are bound to hold, and do hold, that the Sprayberry termination for default was improper as coming within either the *defective specification*, or *right to await clarification*, exception to the duty to proceed rule, or both.

[2] Item 3 of the Government's position charges Sprayberry with abandonment of the project, but the record is devoid of any proof of the elements required to establish abandonment. As we pointed out in *Milo Werner Co.*, IBCA-1202 (Mar. 22, 1982), 89 I.D. 100, 82-1 BCA par. 15698, and on the basis of the authorities cited therein, the general rule is that to prove abandonment, anticipatory breach, or repudiation of a contract, the alleged repudiator's words or conduct must manifest a positive, unequivocal, and unconditional intent not to perform the contract in any event, or at any time. Here, Sprayberry was working on the project substantially right up to the time he received the termination notice. He simply had refused to proceed until his requests for a release or clarification had been received. This was a conditional, not an unconditional, manifestation of nonperformance. The requirements for proof of abandonment were, therefore, not met.

[3] We conclude that the attempt, in item 5 of the Government's position, to justify the default termination on the basis of Sprayberry's failure to protect the building and its contents from leaks is likewise without merit. The Government claims that appellant failed to meet the burden of proving that the failure of such protection was excusable. The record is clear, however, that on or about October 3, 1985, as a result of heavy rains and wind, the damage from the leaks occurred; that on or about October 8, 1985, Sprayberry requested a change order for a 27-calendar-day extension which included, specifically, 3 days of delay caused by the cleaning up of the rainwater damage; that the requested change order was issued by the first CO on October 10, 1985, based upon a determination in the CO's own words as follows: "Grant the Contractor the time requested as we believe it is fair and reasonable." We find such action by the CO to be equivalent to a decision by him that any failure on the part of the contractor to adequately protect the building, as provided by the contract, was excusable. Otherwise, there would have been no reason for his including the 3 days within the 27-day extension allowed by the change order. We find that the issuance of that change order

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constituted an affirmative Government action indicating an intent that the contractor continue performance. In other words, it was an election to permit the contractor to continue under the contract, despite the leaks and the resulting damage. Such election by the Government is commonly referred to as a "waiver of the right to terminate." We find the waiver to have been perfected when the contractor, in reliance upon the change order, continued performance and incurred costs in the course thereof. See *Goslin-Birmingham, Inc.*, ENGBCA No. 2800 (June 16, 1967), 67-2 BCA par. 6402; *General Products Corp.*, ASBCA No. 16658 (Aug. 7, 1972), 72-2 BCA par. 9629; and *Franklin Instrument Co.*, IBCA-1270 (Feb. 26, 1981), 88 I.D. 326, 81-1 BCA par. 14,970.

Our holding that the termination for default was improper because of the application of either the *defective specifications or right to await clarification* exception to the duty to proceed rule renders moot our consideration of item 6 of the Government's position. Thus, we find the Government's position, with respect to all items alleged in its posthearing brief, contrary to the evidence and not in accord with current and prevailing legal authority. Accordingly, we conclude that Sprayberry is entitled to have the termination for default converted to a termination for the convenience of the Government and to an award for proven unpaid costs incurred in connection with work performed on the subject contract, plus an amount equal to a reasonable profit, and interest thereon.

Quantum

Appellant's final figure, presented at the hearing, for total unpaid costs incurred, plus 10-percent profit, was \$45,120. This amount was apparently accepted as accurate by the Government, since no attempt to challenge or contradict appellant's case on quantum was made by the Government in its posthearing brief. The supporting quantum evidence, adduced by appellant, consisted of appellant's exhibits 56 through 66 (each of which contained a number of copies of canceled checks, paid vouchers, or cash receipts), together with testimony by Mr. Sprayberry (Tr. 448-76). Having examined and studied this evidence, we find and conclude that the sum of \$45,120 does fairly represent the unpaid costs incurred by Sprayberry on the subject project, including a 10-percent profit.

Decision

Based upon the foregoing findings and conclusions, it is the decision of this Board that appellant's appeal herein is sustained, that the termination for default involved in this proceeding is converted to a termination for the convenience of the Government, and that appellant

be awarded \$45,120, together with interest thereon from May 9, 1986, the date that such claim was first presented to the CO.

DAVID DOANE
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

SOUTHWEST RESOURCE COUNCIL

96 IBLA 105

Decided *March 10, 1987*

Appeal from a decision of the District Manager, Arizona Strip District, Bureau of Land Management, approving a plan of operations for the Pinenut Project. AS 010-86-047.

Affirmed.

1. Mining Claims: Environment--National Environmental Policy Act of 1969: Environmental Statements

A finding that a proposed uranium mining operation will not have a significant impact on the human environment and, therefore, that no environmental impact statement is required, will be affirmed on appeal when the record establishes that relevant areas of environmental concern have been identified and the determination is the reasonable result of environmental analysis made in light of measures to minimize environmental impacts.

2. National Environmental Policy Act of 1969: Environmental Statements

A regional environmental impact statement is required in only two instances: (1) when there is a comprehensive Federal plan for the development of a region, and (2) when various Federal actions in a region have cumulative or synergistic impacts on a region.

3. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Snrface Uses

Application of the "unnecessary or undue degradation" standard presumes the validity of the use which is causing the impact and seeks to determine whether the impact is greater than should be expected to occur if the activity were conducted by a prudent operator in the usual, customary, and proficient conduct of similar operations.

4. Federal Land Policy and Management of 1976: Surface Management--Mining Claims: Surface Uses

When BLM determines, after such notice and opportunity for hearing as may be required by due process, that a mining claim is not supported by a discovery of a valuable mineral deposit, it may declare that mining claim null and void and reject a proposed plan of operations submitted for that claim.

APPEARANCES: Lori Potter, Esq., Denver, Colorado, and Mark Hughes, Esq., Denver, Colorado, for appellant; Patrick J. Garver, Esq., Salt Lake City, Utah, for Intervenor Energy Fuel Nuclear, Inc.;

March 10, 1987

**Fritz L. Goreham, Esq., Office of the Regional Solicitor, Phoenix,
Arizona, for the Bureau of Land Management.**

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Southwest Resource Council (SRC) has appealed from a decision of the District Manager, Arizona Strip District Office, Bureau of Land Management (BLM), dated April 25, 1986, approving a major modification of a plan of operations submitted by Energy Fuels Nuclear, Inc. (EFN), for the Pinenut Project (AS-010-86-10P). After receipt of initial pleadings, this Board granted appellant's motion for expedited consideration by Order of October 30, 1986. Subsequent filings having been made, this case is now ripe for a decision on its merits. For the reasons set forth below, we hereby affirm the decision of the District Manager. Initially, however, it will be helpful to briefly describe the Pinenut Project and its environs.

The Pinenut Project is one of a number of uranium properties being developed by EFN on the Arizona Strip. The Arizona Strip consists of those lands in Arizona lying north of the Colorado River as it descends to its outlet in the Gulf of California. Total acreage of the Arizona Strip is approximately 3,400,000 acres. Included in this figure, however, are substantial areas within Grand Canyon National Park, Grand Canyon National Game Preserve, various wilderness areas, and Indian reservations. Thus, the amount of land open to mineral exploration and development is substantially less than the total acreage in the Arizona Strip.

A total of five mines are presently being operated by EFN on the Arizona Strip. These five, together with the Pinenut mine, are all located within a 20-mile radius in an area north of the Grand Canyon National Park and west of the Kanab Creek wilderness area. The Pinenut mine, which is closest to the park boundaries, is roughly 3.6 miles from the north boundary of the park. In addition to these facilities, EFN has a considerable exploration program ongoing in the general area.

The uranium deposits in this area are typically found in structures known as "breccia pipes." These breccia pipes were created by the action of water dissolving parts of the deep Redwall Limestone formation millions of years ago. Over the passage of time, stratigraphically higher formations have collapsed forming narrow cylinders, which have been shown to be favorable areas for mineral deposition. One of the results of this phenomenon, however, is that while high-grade mineral deposits can often be found in these pipe structures, the mineralized body is normally quite small. This is borne out by the EFN experience in the area. Thus, all production from three mines, the Hack Nos. 1, 2, and 3, is scheduled to cease in 1987, at

which point reclamation will commence. Production at the Pigeon mine commenced in 1985 and is expected to end in 1989. Commercial production is not scheduled to begin at the Kanab North mine until 1988 and based on known ore reserves, it is estimated that mining will be completed in 5 years. The Pinenut mine, itself, is not projected to go on-line until 1989, with production anticipated to last approximately 5 years from that date. It is also important to note that the nature of the ore bodies resulting from the localized breccia pipe accumulations also results in limited surface disturbances. Thus, the total surface disturbance associated with mining the Pinenut deposit (exclusive of access improvement and provision of power) is 20.1 acres.

Topographically, the area is characterized by gently sloping plateaus and mesas abruptly separated by deep canyons. Climatically, the area is semi-arid, with cool winters, warm summers, and light precipitation. However, while annual precipitation ranges only between 8 to 20 inches, the area is subject to intense localized summer showers. Historically, the inaccessibility of the Arizona Strip, occasioned by the Grand Canyon, has resulted in the remote and isolated nature of the area. To a large extent, it still retains a fundamentally remote character, though increased activities, including those associated with mining, have had some impact.

The Pinenut Project was initiated in July 1984, when EFN filed a plan of operations for purposes of exploration. Under the plan, less than 5 acres were to be disturbed.¹ An Environmental Assessment (EA) was prepared at that time. Upon discovery of what EFN considered to be a commercially valuable uranium deposit, it submitted a major modification of the existing plan on January 10, 1986. Accordingly, BLM proceeded to examine the new proposal. In doing so, BLM prepared a new EA (EA No. AZ-010-86-015), based upon its own analysis and those submitted by EFN and interested third parties. The resulting document contains over 117 pages of text, including maps and charts. Particular attention was paid to possible air quality and acoustical impacts on Grand Canyon National Park, as well as any radiological effects which might result from the mining and transportation of the uranium ore. In addition, BLM examined the impacts that might occur as the result of upgrading 17 miles of existing access, including the possibility that this might lead to an increase in vandalism to cultural resources made more accessible. BLM also analyzed the visual impact that would result from the construction of a 8.3-mile power line running from Hack Canyon to the Pinenut site. BLM also consulted with the State Historic Preservation Officer (SHPO), who agreed that there would be no adverse impact on a recently discovered archaeological site, AZ B:6:44 (BLM), provided a recovery plan was implemented. Based on these analyses, BLM concluded that approval of the modified plan of operations, subject

¹ Since less than 5 acres were to be disturbed, EFN was not required to file a plan of operations. Under 43 CFR 3809.I-3, a "notice of intent" would have sufficed. See generally *Bruce W. Crawford*, 86 IBLA 350, 92 I.D. 208 (1985).

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to various mitigating measures,² would result in no significant impact to the environment. This finding of no significant impact (FONSI) made it unnecessary for BLM to prepare an environmental impact statement (EIS).

On April 25, 1986, BLM approved the plan of operations subject to the various modifications set forth in its Decision Record. Notification of this decision was sent to various interested parties including appellant. On May 22, 1986, appellant filed its notice of appeal.

Appellant presents three general arguments in seeking to have the Board reverse the decision of the District Manager. First, it argues that BLM failed to consider the cumulative and synergistic impacts of adding the Pinenut mine to other past, present, and reasonably foreseeable mining and exploration activities. Second, appellant contends that BLM must prepare a comprehensive regional EIS for uranium development in the Arizona Strip, pursuant to the mandate of section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1982). Finally, it argues that BLM failed to consider potential profitability of the Pinenut mine in determining that it would not result in undue or unnecessary degradation. We will discuss these contentions seriatim.

Appellant argues that BLM either failed to consider or inadequately considered cumulative and synergistic impacts of uranium mining, particularly those which might result from what appellant referred to as "reasonably foreseeable uranium actions." Appellant contends that BLM ignored EFN's stated development plans for the area³ as well as concerns expressed by the Park Service relating to the problems which were being generated as additional areas on the North Rim were being made more accessible. Appellant also claims BLM's analysis of cumulative impacts associated with access roads was "utterly inadequate" (Statement of Reasons at 9).

In its answer, BLM takes issue with all of appellant's arguments. BLM notes that its entire discussion of the existing environment necessarily included consideration of cumulative past activities and their effect on the environment. Concerning reasonably foreseen future impacts, BLM notes that, for both minesite activities and general exploration, no such cumulative or synergistic impacts could be identified. This was a result of both the limited area of surface disturbance, and the fact that as all of the studies BLM had performed or commissioned had shown, such impacts as did exist dissipated dramatically over very short distances. Thus, BLM argues, only the

² Among the many mitigating measures imposed were requirements that the workers be bussed to the site to avoid impacts that might be generated were they allowed to individually drive their cars, that the powerline be dismantled upon completion of mining at the request of the authorized officer, and that EFN institute a dust abatement program during any period of prolonged drought.

³ Appellant referred to a 1983 statement by the Vice-President of EFN declaring the company's hope of finding one new mine a year and also referenced a statement by the Park Service alluding to 30 to 40 additional ore deposits which EFN was said to have identified.

addition of a minesite extremely proximate to the Pinenut site could be shown to have any synergistic effect. A view of the terrain and EFN's past exploration activities convinced BLM that there was no reasonable possibility of development of such a minesite in any meaningful timeframe.⁴ Insofar as ongoing exploration activities were concerned, BLM noted in the EA that over 90 percent of those sites had already been rehabilitated.

BLM further points out that it considered the cumulative effects of upgrading and extension of existing roads in the area. It disagrees with appellant's characterization of its analysis as "utterly inadequate." Rather, BLM argues, it carefully analyzed this problem, and as a result, a number of mitigating measures were proposed to minimize impacts on the remote nature of the area. BLM states that, far from ignoring cumulative impacts, it added the discussion of such impacts to the final EA after various parties, including appellant, had criticized the draft EA for failing to address this possibility. BLM also notes that while the Park Service did, indeed, voice some objectives to the draft EA, BLM was able to satisfy its concerns by adopting numerous mitigating measures in the final EA.

EFN also filed an answer to appellant's statement of reasons challenging appellant's contention that the EA inadequately considered reasonably foreseeable future cumulative effects and generally reiterating the arguments advanced by BLM. Pointing to the scheduled closing and commencement of reclamation at the three Hack mines, EFN notes that, unless three new mining sites are identified by early 1987, the current mining levels will not be maintained, much less increased. EFN argues that rather than showing any synergistic effects emanating from the operation of the Pinenut mine and other existing or reasonably foreseeable mines, appellant has merely indulged in argument with no supporting factual data or technical analysis. EFN contends that appellant has clearly failed to meet its burden as delineated in prior Board decisions such as *Tulkisarmute Native Community*, 88 IBLA 210 (1985), and *John A. Nejedly*, 80 IBLA 14 (1984).

[1] At the outset of our review, it is useful to set forth the standard which the Board has developed for reviewing challenges to FONSI declarations. Thus, in *William E. Tucker*, 82 IBLA 324 (1984), this Board stated that:

The reasonableness of a finding of no significant impact has been upheld where the agency has identified and considered the environmental problems; identified relevant areas of environmental concern; and made a convincing case that the impact is insignificant, or if there is significant impact, that changes in the project have sufficiently minimized such impact. *Como-Falcon Coalition, Inc. v. United States Department of Labor*, 465 F. Supp. 850 (D. Minn. 1978), *aff'd as modified*, 609 F.2d 342

⁴ BLM noted in its EA that the lowest probabilities for additional mining occurred south and east because of the existence of Grand Canyon Park and Game Preserve and the Kanab Creek wilderness area, areas which are closed to mineral location. Other factors, such as past exploration activities, indicated that the closest possible mining facility would be at least 3 miles west of Pinenut, a distance substantially greater than the range of effects for impacts emanating from Pinenut.

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(8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980). In such circumstances, we will affirm a finding of no significant impact. *John A. Nejedly*, 80 IBLA 14 (1984).

Id. at 327.

In the instant case, appellant has failed to challenge any of the site-specific studies which served as a predicate for BLM's finding of no significant impact. Rather, it has relied solely upon what it perceives as a failure to include analysis of cumulative impacts resulting from existing and reasonably foreseeable future developments.⁵ Insofar as impacts related to the minesite are concerned, it is clear from the scientific studies that have been performed and which are uncontradicted by any submission from appellant that there are no synergistic effects from specific minesites unless they are located in close physical proximity to each other. Moreover, the small size of the minesites (aggregating total of less than 120 acres, including the Pinenut mine) strongly supports BLM's conclusion of insignificant impacts as a result of actual mining activities. Inasmuch as there is absolutely no indication of any likelihood that a minesite will be located sufficiently close to Pinenut to generate synergistic effects, it is feckless to contend that BLM failed to adequately consider such impacts relating to minesite activities.

The possible cumulative impacts of road construction and upgrading, however, are a different matter. Clearly, as more and more roads are either constructed or improved, the possibility of adverse impact on the relatively remote nature of the area might be expected to increase. But, contrary to appellant's allegations on appeal, BLM did consider the cumulative impacts of roads in the area. See EA at 54-55. In order to minimize possible depredations associated with road upgrading (no additional roads are to be constructed), the EA recommended requiring the Pinenut access road to be returned to its original "pre-disturbed" condition at the discretion of the authorized officer when operations terminated, and also provided that the first three-eighths of a mile of the access road would be upgraded only to the minimum necessary to meet safety standards to discourage visitor use of the area (EA at 96). In the opinion of BLM, the limited nature of the road upgrading, when viewed in conjunction with the mitigating measures adopted, resulted in no significant impact being created by the upgrading of access to the Pinenut mine. Appellant may disagree with the conclusions which BLM reached, but simple disagreement, absent a showing of error in

⁵ We recognize that appellant has also objected to the failure of BLM to consider the cumulative impact of five operating mines on surface water. The EA, however, noted that EFN had agreed to increase the capacity of its holding pond to withstand a 500-year event and further concluded that even if a discharge were to occur no significant impact could be expected because of the dilution of mineralized materials. Given the localized nature of a downpour necessary to trigger a 500-year event, the likelihood that one would occur simultaneously at all operating minesites must be considered extremely remote. Even should such a diluvial event come to pass, the dilution of minerals that would necessarily result underlines BLM's conclusion that no adverse cumulative impact will occur.

BLM's analysis, is insufficient to overcome BLM's determination.⁶ See *In re Otter Slide Timber Sale*, 75 IBLA 380, 384 (1983).

While appellant argues that BLM failed to adequately consider the effect of *future* roads, appellant has not advanced any means by which BLM could have attempted such an endeavor. In the absence of any indication as to the situs of future mines, it would be totally speculative and conjectural to attempt to estimate how roads to such mines might impact upon the environment. Any such analysis would be so speculative that it would serve no useful purpose, even if it could be attempted. See *Glacier-Two Medicine Alliance*, 88 IBLA 133, 143 (1985). In view of the above, we must reject appellant's assertions that BLM failed to adequately consider cumulative and synergistic effects of uranium mining in the area.

Appellant also argues that BLM is required to prepare a comprehensive EIS covering uranium development on the Arizona Strip,⁷ a position which appellant contends has been supported by the Park Service and members of BLM's staff. Appellant states that Federal courts have required regional EIS's in comparable situations, which it characterizes as one involving "a steady flood of similar activities in a well-defined area" marked by "the inadequacy of previous project-by-project environmental analyses" (Statement of Reasons at 23). In support for its position, appellant relies on the decisions in *National Wildlife Federation v. Benn*, 491 F. Supp. 1234 (S.D.N.Y. 1980), involving issuance of ocean dumping permits, and *Conner v. Burford*, 605 F. Supp. 107 (D. Mont. 1985), which concerned issuance of oil and gas leases in two national forests.

Both BLM and EFN contest appellant's factual predicates and legal analysis. They deny that there has been any "flood" of similar activities; EFN pointing out that only two new plans of operation were filed in 1986, one for the Pinenut and another which was subsequently withdrawn. See EFN's Response at 25-26. Both take exception to appellant's claim that the EA was inadequate. And both argue that appellant has misstated the applicable law which, they assert, clearly supports BLM's position that no regional EIS is required, citing *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), *Peshlakai v. Duncan*, 476 F. Supp. 1247 (D.D.C. 1979), and *LaRaza Unida v. United States*, No. 80-208HB (D.N.M. November 30, 1981).

[2] At the outset, we note that the controlling legal guidelines for determining when a regional EIS is required were established by the Supreme Court in *Kleppe v. Sierra Club, supra*. In *Peshlakai v.*

⁶ We also note that while any powerline would certainly constitute a visual intrusion, the powerline from Hacks Canyon to the Pinenut mine will not be visible from the Park. See EA at 48. Furthermore, as a mitigation measure, the plan of operations was amended to include a provision authorizing BLM to direct dismantling of the line upon completion of operations. See EA at 93. We are unable to discern any significant impact from this aspect of the plan of operations.

⁷ There is a clear inconsistency involved in appellant's delineation of the "region" for which it argues that an EIS is required. Thus, at times it argues that there is "a well-defined geographic area bordering the Park, Kaibab National Forest, Grand Canyon National Game Preserve and the Kanab Creek Wilderness Area" (Statement of Reasons at 19). This specific area, shown on its Exhibit C, embraces approximately one-tenth the total Arizona Strip. Yet, when it seeks to discuss impacts, it includes activities throughout the entire Arizona Strip. See Exh. L. It is by no means clear just what "region" appellant contends the EIS should cover.

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Duncan, supra, the district court summarized the Supreme Court's holding as follows: "[S]uch environmental impact statements are required in two and only two instances: (1) when there is a comprehensive federal plan for the development of a region, and (2) when various federal actions in a region have cumulative or synergistic environmental impacts on a region." *Id.* at 1258.

Clearly, there is no comprehensive Federal plan for the development of the uranium resources located on the Arizona Strip. Nor has appellant shown that various Federal actions have had cumulative or synergistic environmental impacts on the region. We have previously discussed why the nature of the uranium developments within the vicinity of the Pinenut mine have minimal cumulative and synergistic effects. We will not repeat that discussion here. What we will focus on, however, is the nature of the "federal action" which occurs in the context of approval of mining plans of operations for unpatented mining claims.

Insofar as the location of mining claims is concerned there is, quite simply, no Federal action. Since 1866, it has been the policy of the United States that its public domain mineral lands are generally open to the initiation of claims by its citizens. Over the years, of course, Congress has seen fit both to limit the minerals which are subject to appropriation, as well as to restrict the areas in which the mining laws operate. But, the essential nature of the mining laws has remained constant, viz. individual citizens initiate rights by the discovery of valuable mineral deposits.

Soon after the passage of NEPA, this Board examined the question whether issuance of a mineral patent could constitute a "major federal action" such as could necessitate the preparation of an EIS. In *United States v. Kosanke Sand Corp. (On Reconsideration)*, 12 IBLA 282, 80 I.D. 538 (1973), we decided that question in the negative. The Board first reviewed the applicable law:

The discovery of a valuable mineral deposit within its limits validates a mining claim located on public land in conformance with the statute, and its locator acquires an exclusive possessory interest in the claim, a form of property which can be sold, transferred, mortgaged, or inherited, without infringing the paramount title of the United States. * * * Such an interest may be asserted against the United States as well as against third parties, * * * and may not be taken from the claimant by the United States without due compensation. * * * The holder of a valid mining claim has the right, from the time of location, to extract, process and market the locatable mineral resources thereon.

Upon satisfaction of the requirements of the statute, the holder of a valid mining claim has an absolute right to a patent from the United States conveying fee title to the land within the claim, and the actions taken by the Secretary of the Interior in processing an application for patent by such claimant are not discretionary; issuance of a patent can be compelled by court order. * * * The patent may contain no conditions not authorized by law. * * * The claimant need not, however, apply for patent to preserve his property right in the claim, but may if he chooses continue to extract and freely dispose of the locatable minerals until the claim is exhausted, without ever having acquired full legal title to the land. * * * The patent, if issued, conveys fee simple title to

the land within the claim, but does nothing to enlarge or diminish the claimant's right to its locatable mineral resources. [Citations, footnotes omitted.]

Id. at 289-91, 80 I.D. at 542.

The Board then examined the statutory language of section 102 of NEPA and concluded that “[t]he plain meaning of the statutory language connotes an action proposed to be taken by a federal agency which is discretionary in character and to which there may exist a viable alternative.” *Id.* at 294, 80 I.D. at 544. Noting that the location, perfection, and maintenance of a mining claim were all acts performed by the mining claimant, none of which constituted Federal action, the Board declared that issuance of a patent in response to these activities (an action which admittedly was a Federal action) was not discretionary within the meaning of NEPA, and, thus, an EIS could not be required. The Board’s analysis was ultimately upheld in *South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir.), cert. denied 449 U.S. 822 (1980).

We have spent considerable time reviewing the *Kosanke* decision because it brings into focus two considerations which impinge upon the issue whether a regional EIS is required: the question of what “federal action” is involved and, assuming some Federal action can be delineated, the scope of discretion which may properly be exercised by the Department.

It is clear that no Federal action is involved in the act of prospecting for minerals or locating claims. These activities occur through the volition of private entities acting under statutory authority. Nor do we perceive that any “federal action” within the meaning of section 102 of NEPA occurs when BLM receives a “notice of intent” filed pursuant to 43 CFR 3809.1-3, where less than 5 acres of land are being disturbed in any calendar year.⁸ As we noted in *Bruce W. Crawford*, 86 IBLA 350, 391, 92 I.D. 208, 230-31 (1985), BLM neither approves nor disapproves a notice. *Accord, Sierra Club v. Penfold*, A-86-083 Civil (D. Alaska, Jan. 9, 1987). It may consult with a mining claimant over aspects of his activities but, under the present regulatory scheme, it may not bar his planned activities, absent a showing that unnecessary or undue degradation will occur.⁹ However, actions leading to unnecessary or undue degradation were never authorized under the mining laws. *Id.* at 366, 92 I.D. at 217-20.

When a mining claimant is required to file a plan of operations, however, BLM has considerably more leeway. It may make its approval contingent upon acceptance of various modifications designed to prevent or mitigate undesired impacts. Such modifications may make it more difficult or more expensive for the claimant to develop the

⁸ We note that a plan of operations rather than a notice of intent must be filed for any activities other than casual use involving certain categories of land, enumerated at 43 CFR 3809.1-4(b). The lands involved in the instant appeal are not such special category lands.

⁹ Contrary to appellant’s contentions, “unnecessary or undue degradation” assumes the validity of the use, such as actual mining operations, and relates only to the question whether the surface disturbance is greater than what would normally be expected when the activity was accomplished by a prudent operator performing customary and proficient operations. See 43 CFR 3809.0-5(k). This issue is explored in greater detail below.

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property. BLM may require design changes in plant operation or in the route of access. BLM may not, however, absolutely forbid mining or totally bar access to a valid mining claim.¹⁰ See *Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979). The reason, of course, is that such action would totally frustrate the congressional policy, as expressed in the mining laws, which accord a mining claimant rights, even against the Government, upon the discovery of a valuable mineral deposit. Thus, while BLM clearly has some discretion in the approval of mining plans of operations, there are parameters which establish the limits of its exercise. Nevertheless, because of BLM's ability to modify plans submitted, we agree that approval of a mining plan of operations is Federal action within the scope of 42 U.S.C. § 4332 (1982).

Whether or not such approval constitutes "major federal action significantly affecting the quality of the human environment," however, is a question of fact determinable only within the confines of a specific case. It is to be expected that some plans of operations might have impacts of such a nature so as to compel the preparation of an EIS, even given the fact that BLM lacks authority to totally prevent mining in the context of approving a plan of operations. Indeed, the regulations clearly contemplate such an eventuality. See 43 CFR 3809.1-6(a)(4). We agree with appellant that there may be situations in which Federal approval of discrete mining plans of operations ultimately necessitate the preparation of a regional EIS because the mining activities result in synergistic or cumulative impacts which are best considered in a unified document. However, under the guidelines established by the United States Supreme Court in *Kleppe v. Sierra Club*, *supra*, the existence of such impacts is the mechanism which triggers the necessity of filing a regional EIS, and it is on this issue that appellant has failed to carry the day. The record establishes that there is no realistic possibility of cumulative or synergistic effects related to the actual mining operations. And, insofar as access problems are concerned, BLM's imposition of mitigating measures clearly limits any short-term impacts and provides mechanisms for totally eliminating any long-term ones. It may be that, sometime in the future, the nature or pace of uranium mining on the Arizona Strip may change to such an extent that the cumulative or synergistic impacts of proposed plans of operations might be adequately examined only within the confines of a regional EIS. However, in view of the projects actually proposed at the present time, we agree with BLM's conclusion that a regional EIS is not *now* required.

¹⁰ This discussion presumes the validity of the mining claim. Thus, if the claim is located on lands not subject to the operation of the mining law or for minerals which have been removed from location, BLM may prohibit mining and declare the claim invalid after providing such notice and opportunity to be heard as may be required by the dictates of due process. See Discussion, *infra*.

Appellant's final challenge to BLM's decision is that BLM cannot determine whether "unnecessary or undue degradation" is occurring absent a determination that a valuable mineral deposit has been discovered. Thus, appellant argues that "any degradation of the federal lands caused by the development or extraction of minerals is necessarily undue and unnecessary if there exists no right to enter such lands" (Statement of Reasons at 28).

BLM responds by arguing that appellant has totally misinterpreted the thrust of the prohibition against unnecessary and undue degradation. BLM notes that the express purpose of 43 CFR Suhpart 3809 is "to establish procedures to prevent unnecessary or undue degradation of Federal lands which may result from operations authorized by the mining laws." 43 CFR 3809.0-1. Operations authorized by the mining laws run the full gambit from prospecting, discovery, and assessment work to the development, extracting, and processing of the mineral. See 43 CFR 3809.0-5(f). BLM asserts that "[i]n recognition of this fact, it is not the policy of the Bureau of Land Management to determine profitability or validity of mining claims before approving plans of operations" (BLM Answer at 35-36). While we agree that determination of the question whether unnecessary or undue degradation will occur necessarily assumes the validity of the use which is causing the impact, we do not agree with BLM that it is precluded from determining the validity of a claim and, upon a proper determination of invalidity, denying approval of a plan of operations therefor.

[3] Our decision in *Bruce W. Crawford, supra*, examined, at considerable length, the interrelationship between the determination whether a use was "reasonably incident" to mining and the determination that a use resulted in "unnecessary or undue degradation." Therein, we concluded:

The key distinction to keep in mind is that the "reasonably incident" standard resolves questions as to the permissibility of a use by determining whether or not the use is reasonably incident to the mining activities actually occurring. The "unnecessary or undue degradation" standard comes into play only upon a determination that degradation is occurring. Upon such an initial determination, the inquiry then becomes one of determining whether the degradation occurring is unnecessary or undue *assuming the validity of the use* which is causing the impact. For, if the use is, itself, not allowable, it is irrelevant whether or not any adverse impact is occurring since that use may be independently prohibited as not reasonably incident to mining. [Italics in original, footnote omitted.]

Id. at 396, 92 I.D. at 233. This analysis comports with the regulatory definition of "unnecessary or undue degradation," as being any surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations.

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43 CFR 3809.0-5(k). We reiterate our earlier conclusion that application of the "unnecessary or undue degradation" standard presumes the validity of the use.

[4] However, independent of any question of degradation, BLM always retains the authority to examine the validity of claims to Federal land and, if convinced that they are not well founded, to take steps to nullify them. As an example, if the claims involved in the instant case were determined to be null and void because they were located after the lands had been closed to mineral entry, BLM would not be required to approve the mining plan of operations simply because it did not result in any unnecessary or undue degradation. On the contrary, the correct course of action would be to declare the claims null and void *ab initio* and reject the plan of operations. Similarly, if BLM determined that the claims were not supported by a discovery, the proper course of action would be to initiate a contest as to the claims' validity and suspend consideration of the plan of operations pending the outcome of the proceedings.¹¹

In the instant case, appellant argues that BLM has not established that the operations will be profitable. This is not the test. The mining laws do not require a showing that a mine will be profitable but merely that there is a reasonable expectation of success in developing a paying mine. *See In re Pacific Coast Molybdenum Co.*, 75 IBLA 16, 28-30, 90 I.D. 352, 359-60 (1983). Moreover, appellant ignores the fact that, in this appeal, it is the party alleging that the claim is invalid. *See In re Pacific Coast Molybdenum Co., supra* at 22, 90 I.D. at 356. Thus, it is appellant's obligation to present evidence which, at a minimum, establishes a reasonable basis for a conclusion that the claims are not supported by a discovery. *Id.* Appellant has submitted no information, whatsoever, that would justify such a conclusion. Fanciful speculation will not suffice.

We conclude, therefore, that appellant has failed to show that any unnecessary or undue degradation, as defined by 43 CFR 3809.0-5(k), will occur, or to provide any evidence in support of its allegation that these claims are not supported by a discovery.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed for the reasons stated herein.

JAMES L. BURSKI
Administrative Judge

¹¹ During such a period, BLM would be required to allow the performance of any operations that are necessary (including assessment work) for timely compliance with the requirements of Federal and state laws. *See* 43 CFR 3809.1-6(d).

WE CONCUR:

GAIL M. FRAZIER
Administrative Judge

R. W. MULLEN
Administrative Judge

IDAHO MINING CORP. v. DEPUTY ASS'T SECRETARY--INDIAN AFFAIRS (OPERATIONS)

15 IBIA 132

Issued: *March 11, 1987*

Board of Indian Appeals: Generally

On Mar. 11, 1987, the Board of Indian Appeals entered an order in *Idaho Mining Corp. v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 15 IBIA 132 (1987). Although it is not a normal practice of Departmental appeals boards to publish in the I.D.'s any matter which is not a full opinion complete with headnotes, the *Idaho Mining* order is included for publication because it vacates a previous decision of the Board of Indian Appeals in *Idaho Mining Corp. v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 249, 90 I.D. 329 (1983).

ORDER

On July 29, 1983, the Board of Indian Appeals (Board) issued a decision in *Idaho Mining Corp. v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 249, 90 I.D. 329 (1983). The decision affirmed a May 21, 1982, decision of the Deputy Assistant Secretary-Indian Affairs (Operations) denying a request for the issuance of mining leases pursuant to the provisions of Mineral Prospecting Permit Contract No. 14-20-H53-313, between Idaho Mining and the Walker River Paiute Indian Tribe (tribe), of the Walker River Indian Reservation, Nevada.

W. L. Wilson *et al.*, appealed the Board's decision to the United States District Court for the District of Nevada. The district court reversed the Board's decision, holding that Idaho Mining was "entitled as a matter of law to the mineral leases * * * for which [it] has applied." *Wilson v. U.S. Department of the Interior*, No. CV-R-83-350-BRT (D. Nev. Aug. 7, 1985).

The Department appealed this decision to the Ninth Circuit Court of Appeals. On appeal the Department argued that the action was moot because on January 12, 1984, the tribal council resolved not to enter into mineral leases with Idaho Mining. The court held that the case was moot because "[n]either this court nor the district court can grant Idaho Mining relief in this action because the Tribe has not been named as a party. Only the Tribe has authority to lease its lands. The Secretary's authority extends only to approving or disapproving leases entered into by the Tribe." *Wilson v. U.S. Department of the Interior*, 799 F.2d 591, 592 (1986).

The court concluded:

SHELL OFFSHORE, INC.

[B]ecause the Tribe will not enter into a lease with Idaho Mining, the Secretary has no authority over Idaho Mining's lease application. * * * The action of the Secretary was premature and, thus, invalid. Because we can neither affirm the disapproval nor order the approval of a lease over which the Secretary had no authority, this action is moot. *[Id.]*

The court then vacated the district court's order and remanded the case to the district court for vacation of the Board's decision and remand to the Secretary. *Id.*

Pursuant to this remand, the district court vacated the Board's decision and remanded the case to the Secretary "to vacate the decision denying the appellant's request for a lease." *Wilson v. U.S. Department of the Interior*, No. CV-R-83-350-BRT (D. Nev. Oct. 9, 1986).

By memorandum dated February 13, 1987, the Board was informed by the Solicitor's Office of the courts' actions in this appeal. In order to avoid any possible confusion over the status of this case, the Board hereby vacates its July 29, 1983, decision and refers this matter to the Assistant Secretary-Indian Affairs for vacation of the earlier decisions of the Bureau of Indian Affairs.

KATHRYN A. LYNN
Administrative Judge

ANITA VOGT
Acting Chief Administrative Judge

SHELL OFFSHORE, INC.

96 IBLA 149

Decided March 17, 1987

Appeal from a decision of the Minerals Management Service denying Federal Energy Regulatory Commission order Nos. 93 and 93-A refund requests.

Affirmed in part; reversed in part.

1. Outer Continental Shelf Lands Act: Refunds

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), confers authority upon the Secretary of the Interior to approve refunds for overpayments arising from outer continental shelf leases and also authorizes the Secretary of the Treasury to make the payments.

2. Outer Continental Shelf Lands Act: Refunds

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), permits requests for refunds only within 2 years of the date payment is received by the appropriate office.

3. Administrative Procedure: Administrative Procedure Act--Regulations: Force and Effect as Law

"In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979). It must be based on a grant of power by Congress and be promulgated in accordance with the requirements of the Administrative Procedure Act.

4. Administrative Procedure: Administrative Procedure Act--Regulations: Force and Effect as Law

If a rule is substantive, it must be promulgated in accordance with the Administrative Procedure Act in order to have the force and effect of law. If, however, a rule is interpretive, the same proposition is true. "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 315 (1979).

5. Outer Continental Shelf Lands Act: Refunds

The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), requires requests for refunds be in writing, but does not specify the form the writing must take or its substantive contents. Requests arising after the date this opinion issues should be in writing, identify the claimant, the lease affected, and the reasons a refund is sought.

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SHELL OFFSHORE, INC.**OPINION BY ADMINISTRATIVE JUDGE ARNESS****INTERIOR BOARD OF LAND APPEALS**

This is a consolidated decision of 16 appeals¹ brought by oil and gas producing companies which hold leases issued under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (1982).² Pursuant to the Act, lessees are required to pay a royalty of not less than 12-1/2 percent of the "amount or value of the production saved, removed or sold" as fixed by the Secretary of the Interior. *Id.*

§ 1337(a). MMS carries out the duty of the Secretary to establish the value of production. Included in the factors considered in establishing the value is the regulated price. 30 CFR 206.150. The regulated price of natural gas is set by the Federal Energy Regulatory Commission (FERC) acting under authority of the Natural Gas Act, 15 U.S.C. §§ 717-717w (1982), and the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301-3432 (1982).

I.

The appeals under consideration arise from a "final order" issued by MMS November 23, 1984, which, among other things, denied "all FERC Orders 93/93A refund requests which seek refunds of royalty payments made before November 9, 1981 on Federal Outer Continental Shelf (OCS) leases." 49 FR 47120 (Nov. 30, 1984). The denial was "based on the 2-year statute of limitations for royalty refund requests mandated by section 10 of the Outer Continental Shelf

¹ The appellants, case numbers, and Minerals Management Service (MMS) file numbers of the appeals consolidated in this decision are:

IBLA 85-282	Shell Offshore, Inc.	MMS-84-0039-OCS
IBLA 85-283	Cities Service Oil and Gas Corp., <i>et al.</i>	MMS-84-0040-OCS
IBLA 85-284	Pogo Producing Company	MMS-84-0041-OCS
IBLA 85-285	Exxon Company, U.S.A.	MMS-84-0042-OCS
IBLA 85-286	Tenneco Oil Company, <i>et al.</i>	MMS-84-0043-OCS
IBLA 85-287	Pennzoil Oil & Gas, Inc., <i>et al.</i>	MMS-84-0044-OCS
IBLA 85-288	Amoco Production Company	MMS-84-0045-OCS
IBLA 85-289	American Petroleum Institute	MMS-84-0046-OCS
IBLA 85-290	Chevron U.S.A., Inc.	MMS-84-0051-OCS
IBLA 85-291	Gulf Oil Corporation	MMS-84-0074-OCS
IBLA 85-292	Columbia Gas Development Corp.	MMS-84-0075-OCS
IBLA 85-293	Mobile Oil Corp., <i>et al.</i>	MMS-84-0076-OCS
IBLA 85-294	Conoco, Inc.	MMS-84-0077-OCS
IBLA 85-295	Union Oil Company of California	MMS-84-0078-OCS
IBLA 85-296	Aminoil, Inc.	MMS-84-0079-OCS
IBLA 85-297	Phillips Petroleum Company	MMS-85-0001-OCS

By order of Feb. 7, 1985, these 16 appeals were consolidated with the appeal of Texaco, Inc., IBLA 85-281. On Apr. 5, 1985, Texaco, Inc., and the MMS entered into a Stipulation of Dismissal, and by order dated Apr. 15, 1985, IBLA 85-281 was segregated from the consolidated cases and dismissed with prejudice.

By order of Aug. 15, 1985, the appeal of Conoco Oil Co., Inc., IBLA 85-748, from a May 30, 1985, decision of the Director, MMS, denying royalty refund requests resulting from FPC opinion No. 598, was consolidated with similar cases for the purposes of briefing and decision. By order of Sept. 13, 1985, the appeals of Chevron U.S.A., Inc., and Gulf Exploration & Production Co., IBLA 85-795, Shell Offshore, Inc., IBLA 85-796, and Kerr-McGee Corp., IBLA 85-797, were also consolidated for the purposes of briefing and decision. Although the consolidated cases raise a common issue of law, because those consolidated by the subsequent orders arise from different procedural and factual backgrounds, they will be ruled upon in a separate opinion.

² The current statutes derived from the OCSLA, P.L. 212, 67 Stat. 462, and the OCSLA Amendments of 1978, P.L. 95-373, 92 Stat. 629.

Lands Act (OCSLA), 43 U.S.C. 1339(a)." The order stated that it did not apply "to any lessee who filed a proper notice with MMS which tolled the 2-year statute."

FERC Order No. 93 established final rules applying to the sale of natural gas regulated under the NGPA. 45 FR 49077 (July 22, 1980).³ Among the regulations promulgated was section 270.204 which established standard conditions for measuring the energy (Btu) content of natural gas for the purpose of determining its first sale ceiling price. Previously published interim rules had specified, as had regulations issued under the Natural Gas Act, that the measurement was to be made on gas "saturated with water vapor." 43 FR 56448, 56550 (Dec. 1, 1978); *cf.* 18 CFR 2.56a(c)(1)(iii), 2.56b(d)(1). The final rules retained this phrase, but the preface noted that the results obtained "must be converted to figures that reflect the actual condition of the gas on delivery in order to properly price the gas." 45 FR 49080 (July 22, 1980). The preface also stated that section 207.204 was effective 30 days from the date of issuance. *Id.* at 49081.

After issuing Order No. 93, FERC received a number of applications for rehearing, primarily from oil and gas pipeline and distribution companies. FERC denied the applications for rehearing but granted requests for clarification by Order No. 93-A. 46 FR 24537 (May 1, 1981). Included in the discussion of the effective date of Order No. 93 was the statement: "Because Order No. 93 is but a clarification of the interim rule, it is effective for all first sales of natural gas made on or after December 1, 1978, the effective date of the interim rule." 46 FR 24543. Additional petitions for rehearing were filed with FERC and further administrative proceedings not of consequence here ensued. The outcome was that FERC issued an order reaffirming the December 1, 1978, effective date and adding a new subsection (c) to section 270.204. 47 FR 614 (Jan. 6, 1982). It stated: "The maximum lawful price prescribed by the NGPA and this part for any first sale of natural gas applies to the Btu's actually delivered in that first sale." *Id.* at 615.

Although the history of FERC's orders appears to be concerned with little more than a regulatory definition, the consequences of the definition are significant. The Btu content of natural gas varies with the mixture of various combustible hydrocarbons it contains and also with its noncombustible ingredients, including water vapor. Measuring the Btu content of a sample of gas "saturated with water vapor" (commonly referred to as "the wet rule") tends to underestimate the actual Btu content of the gas from which the sample was taken because water is added to reach the saturation point. Since the NGPA requires that maximum first sale prices be set in terms of "per million Btu," *see* 15 U.S.C. §§ 3318, 3319 (1982), the understated energy content lowers

³ Because we are concerned only with the effect of FERC's rules on royalty payments made to MMS, we do not discuss the FERC's orders and their subsequent history in full detail. A more complete explanation may be found in *Interstate Natural Gas Ass'n of America v. Federal Energy Regulatory Comm'n*, 716 F.2d 1 (D.C.Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984).

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the price paid by pipeline and distribution companies to gas producers. Conversely, the language of the preface to the final regulations and subsequently adopted section 207.204(c) requiring adjustment of prices for the energy content of gas "actually delivered" (referred to as "the dry rule") raises the price paid to producers. Although the difference in the Btu content of gas measured under the wet and dry rules is usually small⁴ and the corresponding price difference minimal, given the large volumes of natural gas normally flowing from producers to pipeline and distribution companies, the difference quickly becomes measured in millions of dollars.

Aware of the significant effect of the dry rule, particularly the potential liability for additional royalties on gas purchased prior to the issuance of Order No. 93-A, gas pipeline and distribution companies sought judicial review of FERC's orders. In *Interstate Natural Gas Ass'n of America v. Federal Energy Regulatory Comm'n*, 716 F.2d 1 (D.C. Cir. 1983), the court found FERC's "dry rule to be inconsistent with the NGPA's language, structure, and legislative history," and "fundamentally at odds with the Btu measurement technique implicit in the NGPA." *Id.* at 14-15. Accordingly it vacated the "measurement of Btu content established in section 270.204." *Id.* at 16. The United States Supreme Court denied *certiorari* on March 19, 1984. 465 U.S. at 1108 (1984).

The significance of the content and history of FERC Orders Nos. 93 and 93-A for the present case is that they were used by MMS in calculating the value of production and consequently the royalties due on gas produced from leases held by appellants. Just as the higher Btu content resulting from measurements made using the dry rule would raise the maximum selling price producers could charge under the NGPA, so also it raised the amount of royalties due MMS. Conversely, recalculation of royalties due MMS under the wet rule will result in lower royalties due for gas produced or sold beginning December 1, 1978, and a refund to the producers. The consequence of MMS' final order under appeal is to deny refunds for royalty payments made prior to November 9, 1981, except for lessees who filed "proper notice."

II.

After receiving a number of requests for refunds from producers, on November 9, 1983, MMS issued a letter stating that because a final decision had not been rendered in the litigation, it would not accept "refund adjustments." See 49 FR 31779 (Aug. 8, 1984). The letter stated that FERC was seeking authority from the Department of Justice to file for *certiorari* and that MMS would establish "procedures for claiming refunds in the event that the lower court ruling is

⁴ The effect of the wet rule was to raise the heating value of gas sold by up to 1.74 percent. Sharples & Pannill, "Calculation of Gas Heating Value is Complicated by the Courts," *Oil & Gas Journal* 47 (July 2, 1984).

upheld." *Id.* It also advised producers who had "included FERC 93 or 93-A refund adjustments in prior MMS-2014 reports" to reverse the adjustments in their next monthly report. *Id.*

A month after the Supreme Court denied *certiorari*, MMS published procedures for applying for refunds. 49 FR 17824 (Apr. 25, 1984). Applicants were told to submit detailed information and documentation supporting their claims for refunds and, after receiving approval, submit revised MMS-2014's. Of importance to the present appeal, the instructions required a "showing that the payment for which a refund or credit is sought was made within 2 years of the request," and referred applicants to a Solicitor's opinion. See *Solicitor's Opinion*, "Refunds and Credits Under the Outer Continental Shelf Lands Act," 88 I.D. 1090 (1981) (hereinafter *Solicitor Op.*).

Over 8 months later MMS published revisions to its instructions, changing the information producers were to supply in applying for refunds and giving notice that MMS review would be conducted by audit procedures. 49 FR 31779 (Aug. 8, 1984). In a section entitled "Tolling Periods" MMS found

the 2-year statute of limitations mandated in section 10 of the Outer Continental Shelf Lands Act (OCSLA) was tolled for all payors on November 9, 1983, with a letter to all payors (see appendix below). For payors who submitted requests prior to that date that met the requirements of a section 10 claim under the OCSLA, the statute of limitations will be tolled as of the date the DOI [Department of the Interior] received the payor's request.

The Solicitor's opinion was again cited. The notice also set, based on a recently published FERC rule, separate dates for "the end of the tolling period" for large and small producers.⁵ Finally, noting that some producers had reduced their royalty payments by the amounts they claimed due as refunds, MMS ordered them to pay the amounts deducted within 60 days, and stated that failure to do so "will be considered to be done knowingly and willfully," citing 30 U.S.C. § 1719(c)(1) (1982) and 43 U.S.C. § 1350(c) (1982).

Four months after publishing its revised instructions MMS issued the "final order" which is the subject of the present appeal. 49 FR 47120 (Nov. 30, 1984). It stated that MMS had received appeals from its August 8, 1984, notice establishing refund procedures, but that the agency did not regard the notice "as a final order from which an appeal may be taken." Accordingly, MMS dismissed the appeals it had received as "procedurally defective," but stated that the current "final

⁵ The FERC publication referred to by MMS was notice of an interim rule under which FERC ordered large producers to make refunds to pipeline companies within 6 months and small producers to make refunds within a year. 49 FR 19293 (May 7, 1984). A producer was classified as large or small depending upon whether it had "sold a total of ten million Mcf (10 Bcf) or less of gas in both the intrastate and interstate markets in 1983." *Id.* at 19295. Using the times set by FERC, MMS stated that the end of the tolling period was Nov. 3, 1984, for large producers and May 3, 1985, for small producers.

FERC's interim rule led to issuance of a final rule as Order No. 399. 49 FR 37735 (Sept. 26, 1984). Petitions for rehearing led FERC to stay the order and extend the deadline for refunds pending rehearing. 49 FR 43543 (Oct. 30, 1984). As a result of the petitions on rehearing, FERC revised its order by Order No. 399-A. 49 FR 46353 (Nov. 26, 1984). It also extended the deadline for large producers to Dec. 31, 1984. These orders were reviewed by the Court of Appeals for the District of Columbia over the issue of offsets which is not relevant in the present case. See *Interstate Natural Gas Ass'n of America v. Federal Energy Regulatory Comm'n*, 756 F.2d 166 (D.C. Cir. 1985).

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order" could be appealed to this Board. As previously described, MMS then denied refund requests for royalty payments made before November 9, 1981. It noted that the order did not apply to lessees "who filed a proper notice with MMS which tolled the 2-year statute." "In order to have tolled the statute," MMS went on to state, "a payor must have given written notice to the Department of the challenge and of the approximate difference in amount should the challenge succeed," again citing the Solicitor's opinion. Finally, again based on FERC actions,⁶ MMS extended the "tolling period" for large producers, but noted that the extension and the "revisions of refund criteria are not final orders for purposes of appeal."

III.

The central issue for decision in this appeal is whether MMS was correct in finding that 43 U.S.C. § 1339(a) (1982) precludes requests for refunds of royalty payments made prior to November 9, 1981. As discussed below, this issue involves questions about the application of the statute and its requirements for making refund requests.

In relevant part, 43 U.S.C. § 1339(a) (1982) provides:

[W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after making of the payment * * *.

In general, appellants focus on the portion of the statute regarding payments "in excess of the amount * * * lawfully required to pay." They argue that their royalty payments were lawfully required at the time they were made and did not become excess until the Supreme Court denied *certiorari* in the *Interstate* case on March 19, 1984. For this reason, they assert, it was not possible to file for a refund within 2 years of the actual date of payment because no refund was due until the Supreme Court's order. Indeed, some appellants state it was contrary to their interest to object because they received more for their production under the dry rule. In fact, numerous producers, including some of the present appellants, intervened in support of the orders in the litigation brought against FERC. For these and other reasons, they conclude that this Board should find the 2-year period provided by the statute did not begin to run until the date of accrual of their right to a refund.

Appellants also raise other arguments. Several point to various events which they contend tolled the statute either for all producers or for their own leases. Some contend that MMS's exclusion of their claims is a taking of their property in violation of the fundamental

⁶ 49 FR 43543 (Oct. 30, 1984); see n.5 *supra*.

fairness requirements of the due process clause of the Fifth Amendment. A number of appellants also object to the manner in which MMS issued its notices, claiming violations of the rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559 (1982).

In its answer, MMS focuses on the portion of the statute allowing repayment "if a request for repayment * * * is filed * * * within two years after the making of the payment." It argues that under this language the 2-year period begins when payment is tendered and that the Act has the effect of barring requests made once the 2-year period has run. In reply to appellants, MMS points out that they could have notified the Department of the refunds which would be due had the challenge to the FERC orders succeeded. MMS acknowledges that its letter of November 9, 1983, tolled the statute, but denies that either administrative or judicial review of the FERC orders had the same effect.

In presenting their arguments the parties cite and discuss the Solicitor's opinion referred to in MMS's notices as well as other administrative interpretations of similar statutes. The parties also argue about the applicability of this Board's decision in *Phillips Petroleum Co.*, 39 IBLA 393 (1979), and, to a lesser extent, *Shell Oil Co.*, 52 IBLA 74 (1981). No court has addressed the application of the statute in detail.⁷ In considering the parties' arguments the Board has reviewed the Solicitor's opinion and examined OCSLA's legislative history.

IV.

[1] Section 1339 confers authority upon the Secretary of the Interior to approve refunds for overpayments made in regard to OCS leases and also authorizes the Secretary of the Treasury to make the payments. More precisely, it states that when the Secretary of the Interior is satisfied that an OCSLA lessee has made a payment "in excess of the amount he was lawfully required to pay," the excess "shall be repaid" if a request is filed "within two years after the making of the payment."

Such a statute as this is needed because the United States Constitution prohibits drawing from the U.S. Treasury "but in Consequence of Appropriations made by law." U.S. Const. Art. I, § 9, cl. 7; see *Reeside v. Walker*, 52 U.S. (11 Howard) 272 (1851); *Stizel-Weller Distillery v. Wickard*, 118 F.2d 19 (D.C. Cir. 1941). OCSLA requires that all sums paid on leases be deposited in the Treasury. 43 U.S.C. § 1338 (1982). Thus, absent express authority, the Secretary would be unable to order repayment of OCSLA funds deposited in the Treasury. The Department has recognized the constitutional

⁷ See *Pennzoil Offshore Gas Operators, Inc. v. Federal Power Comm'n*, 560 F.2d 1217, 1221 n.8 (5th Cir. 1977); *Placid Oil Co. v. U.S. Department of the Interior*, 491 F. Supp. 895, 900 (N.D. Tex. 1980).

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requirement on numerous occasions. *See Solicitor Op., supra* at 1093 and cases cited in notes 3 and 4.

In *Phillips Petroleum Co., supra* at 398, the Board recognized that one purpose of section 1339 is "to require lessees to promptly verify their accounts and ascertain the correctness of payments made within the time provided." Unfortunately, the legislative history of section 1339 reveals little else about its purpose other than to meet the obvious administrative need to provide authority to make refunds. While OCSLA's financial provisions generated considerable controversy, the debate focused more on Federal aid to education and the need to repay the national debt (proposed purposes to which income from leases would be dedicated) than the scope of the Secretary's refund authority. The summary sections of the relevant committee reports tend to paraphrase the statute rather than elucidate it. *See, e.g.*, H. Rep. No. 413, 83d Cong., 1st Sess., reprinted in *U.S. Code Cong. & Ad. News* 2177, 2182 (1953). The most helpful comment appears in the section of the Senate committee report discussing committee amendments. It states: "Section 10, providing for refunds is similar to provisions of Federal mineral leasing laws, with the additional requirement of notice to Congress in advance of repayment." S. Rep. No. 411, 83d Cong., 1st Sess. 26 (1953).

At the time OCSLA was enacted, Secretarial authority to refund payments made under the mineral leasing laws was provided by 43 U.S.C. § 98a (1954) (Act of June 27, 1930, ch. 642, 46 Stat. 822).⁸ This statute made the Act of December 11, 1919, ch. 5, 41 Stat. 366, "applicable to all payments in excess of lawful requirements." It was enacted in 1930 after the Comptroller General determined that existing statutes did not apply to mineral lease payments because the mineral leasing laws were not "public land laws." Dec. Comp. Gen. A-28366 (Sept. 5, 1929); cf. *Udall v. Tallman*, 380 U.S. 1, 19, *reh'g denied*, 380 U.S. 989 (1965). The 1919 Act permitted refunds under two provisions. First, for applications "to make any filing, location, selection, entry or proof" the Act permitted repayment of "purchase moneys and commissions" if a request was made "within two years from the rejection of such application." 41 Stat. 366 (1919). Second, the Act provided that "in all cases" a person making a payment "under the public land laws in excess of the amount he was lawfully required to pay" would be repaid provided he "file[d] a request for the repayment of such excess within two years after the patent has issued for the land embraced in such payment." *Id.* No change in wording was made by Congress in extending the statute to mineral leases. *See* 46 Stat. 822 (1930).

⁸ The statutes in effect were repealed by the Public Land Administration Act which contained a provision authorizing refunds. P.L. 86-649, § 204, 74 Stat. 506, 507 (1960) (codified at 43 U.S.C. § 1374 (1970)). This statute was in turn repealed by sec. 705(a) of the Federal Land Policy and Management Act of 1976, P.O. 94-579, 90 Stat. 2743, 2792-2793. The current statute is found at 43 U.S.C. § 1734(c) (1982).

The chief reason for enacting the 1919 legislation was that the existing statutes did not provide a time limitation for filing for refunds. *See Act of March 26, 1908, ch. 102, 35 Stat. 48.* It appears that a time limitation was deemed necessary because enterprising lawyers were searching Departmental records to find unrefunded payments and applying for refunds on behalf of those entitled to them, frequently many years after the event which gave rise to a claim. *See Solicitor Op., supra* at 1097-98 (quoting House debate).

Comparison of section 1339 with its predecessor reveals that the language relied on by appellants ("lawfully required to pay") was adopted unchanged while the language relied upon by MMS ("two years after the making of the payment") was substituted for the reference to the issuance of a patent. While this change received some attention at the time, *see S. Rep. No. 411, 83d Cong., 1st Sess. 37* (1953) (report of Department of the Interior) and 99 Cong. Rec. 10474 (July 30, 1953) (amendment), a review of the legislative history does not disclose that the change was intended to do more than substitute a term appropriate to mineral leasing. Nevertheless, as the present case dramatically points out, the change was significant.

The earlier statute used the date a patent issues as the date the statutory 2-year period began to run. Issuance of a patent is the final action of the Department on a public land entry and transfers title from the United States to the patentee. *Smelting Co. v. Kemp*, 104 U.S. 636 (1881). Until this event occurs, the land remains under the jurisdiction of the Department and the entry may be reviewed and cancelled. *Cameron v. United States*, 252 U.S. 450, 460 (1920); *Kirk v. Olson*, 245 U.S. 225 (1917); *Hawley v. Diller*, 178 U.S. 476, 488 (1900). For this reason, until a patent is issued (or the entry cancelled) it is not possible to determine whether a refund is due or, if so, its amount. Thus, the earlier statute based its time period on an event which necessarily corresponded to the date of accrual of a right to a refund. Cf. 20 Dec. Comp. Gen. 734, 736 (1941) (quoting letter from Secretary of the Interior).

[2] The wording "making of the payment" in section 1339, as the present case makes abundantly clear, does not identify an event which necessarily coincides with the event by which a right to a refund accrues. While Congress may have intended to merely substitute an equivalent term appropriate to the OCS leasing system in order to grant the Secretary sufficient authority to handle refunds, the language chosen was not adequate for the purpose. The statute conditions the authority of the Secretary to make repayment upon a request being filed "within two years after the making of the payment." A payment is made when it is tendered to the appropriate agency. *William E. Phalen*, 85 IBLA 151 (1985); *Mobil Oil Corp.*, 35 IBLA 265 (1978). There is no ambiguity in the wording of the statute; the terms of the Act cannot be varied simply because the appellants may for other reasons appear to deserve refunds. *See*

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2A Sutherland, *Statutes and Statutory Construction* § 46.01 (4th ed., rev. 1984).

Nor does the 1941 opinion of the Comptroller General require a contrary conclusion. The problem the Comptroller General confronted was that Congress, in extending existing statutes to mineral leasing, also extended them to grazing leases by its use of the term "leases," but grazing leases did not fall clearly within the language of the earlier statutes. The procedures by which grazing leases were issued did not involve the payment of "purchase moneys and commissions," the rejection of an "application, entry or proof," or the issuance of a patent. See 20 Dec. Comp. Gen. 734, 735-36 (1941). Thus, the intent of Congress to permit refunds of amounts paid for grazing leases created an ambiguity in the earlier statutes requiring interpretation to bring them within the scope of the 1930 legislation. In contrast, the wording chosen by Congress in enacting section 1339 is not ambiguous.

Because 43 U.S.C. § 1339 (1982) constitutes a grant of administrative authority, it is necessary to reject appellants' arguments that their 2-year period did not begin until they were aware a refund was due. The refunds at issue did not become due because of the *Interstate* ruling. Payments made by producers under the dry rule were always in excess of the lawful amount; the circuit court decision merely confirmed this fact. MMS is correct that, as the plain language of the statute indicates, the 2-year period for requesting refunds begins with the date of "the making of the payment." Accordingly, we affirm the result reached in *Phillips Petroleum Co., supra*, that under the statute a right to a refund must be asserted within 2 years of the date of payment.

Although repayment by the Secretary of the full amount of refunds sought by appellants is not possible under section 1339, this conclusion does not foreclose other remedies which may be available to them. In this regard, the Solicitor's opinion erred in applying Departmental interpretations of the 1919 refund statutes to section 1339. The Solicitor stated: "The Department interprets the limitation to be 'obviously against the claim and not merely against the remedy.'" The language quoted appeared in instructions issued by the Department, 49 L.D. 541, 544 (1923), and was quoted in a later decision, *Anthony, Legal Representatives of Middlebrook (On Rehearing)*, 51 L.D. 333, 335 (1926). While the statement may have been a correct interpretation of the 1919 Act because its time limitations ran from a date corresponding to the date a refund was due, such is not the case with section 1339. If applied to section 1339 and the present case, such an interpretation would dictate a finding that some of appellants' overpayment claims were extinguished prior to the date their payments became refundable following the circuit court's decision. Accordingly, section 1339 does not operate to extinguish any claims appellants may have. Nevertheless, as a practical matter, appellants may have little recourse but to petition Congress for relief.

V.

Next, the issue of the manner of making "a request for repayment" under section 1339 should be considered. Appellants raise both general and specific arguments as to the manner in which MMS has handled requests for refunds and issued the notices described in Part II. In general, they contend the notices impose substantive and procedural rules without benefit of the rulemaking procedures mandated by the APA. See 5 U.S.C. § 553 (1982). For this reason, they maintain the notices, particularly the "final order," are invalid. Appellants' specific arguments concern several matters stated in the notices. They object to the dismissal of their appeals as "procedurally defective" in the notice of August 8, 1984, and point out that MMS nevertheless addressed the substance of the arguments raised in those appeals. They argue that the "tolling" determination under which MMS denied refund requests for payments made prior to November 9, 1981, is a substantive rule affecting their right to obtain refunds. They also object to the use of notices to establish the specific information which must be submitted to MMS to obtain a refund.

An additional point raised by appellants is both part of their general argument and a specific objection. As was previously observed, MMS's notices referred to a Solicitor's opinion in regard to the 2-year time period for requests made under section 1339, and its "final order" again referred to the opinion in stating its decision did not apply "to any lessee who filed a proper notice with MMS which tolled the 2-year statute." 49 FR 47120 (Nov. 30, 1984). Appellants argue that through these references MMS has imposed a substantive requirement regarding requests for refunds without proper rulemaking under the APA. They point out that a Solicitor's opinion is simply a legal opinion given by the Solicitor to the Secretary and argue that the standards it states are not derived from the statute. Nevertheless, they claim, MMS is applying the standard established by the Solicitor not only to their requests but also to all refund requests made to MMS. They additionally argue that the standards so set cannot be applied without publication in the *Federal Register* as required by 5 U.S.C. § 552(a) (1982).

To substantiate their arguments, several appellants have submitted copies of documents which they maintain constitute valid requests to the agency. For example, by letter dated September 3, 1983, Union Oil Co. of California submitted to MMS reports for payment of its royalties due and enclosed a "Notice to Interest Owners."⁹ The letter also

⁹ The notice stated:

"The United States Court of Appeals for the District of Columbia Circuit (D.C. Court) issued a decision on August 9, 1983, vacating certain regulations established by the Federal Energy Regulatory Commission in Order No. 93 and Order No. 93-A. The D.C. Court's ruling, in effect, provides for a maximum lawful price slightly lower (under 2%) than that allowed pursuant to the above-mentioned Orders. Union Oil Company of California (Union) is in the process of appealing this decision.

"Union accounts to its royalty interest owners and other interest owners on the basis of actual proceeds received by Union. Subsequent to the issuance of Orders Nos. 93 and 93-A, some pipeline purchasers made additional payments in

Continued

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asserted Union's position that the notice met the statute's 2-year requirement. The Union notice referred to the circuit court ruling and noted that it would result in a lower maximum lawful price of under 2 percent. Contingent upon the circuit court decision being upheld, it also asserted Union's intent to recover "excess amounts previously paid to you." By letter dated December 28, 1983, Union sent a copy of the notice to MMS, again asserting that it met the 2-year requirement. By letter dated March 14, 1984, MMS replied that the notice did not meet the 2-year requirement of the statute "as it does not contain the data requested in paragraph three below." The third paragraph of the letter stated in part:

To satisfy the legal basis for tolling the Section 10 Statute of Limitations your refund request should contain; (1) an estimate of the amount of refund requested, (2) the basis for the refund, and (3) the time period involved. This data must be presented in sufficient detail to allow MMS to substantiate your request.

MMS has responded by arguing that its final order is not a rule as defined by the APA, and that even if it is, it is an interpretive rule excepted from notice and comment rulemaking under 5 U.S.C. § 553(b)(A) (1982).

In relevant part the APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *." 5 U.S.C. § 551(4) (1982). Applying this definition, it is clear that through its notices MMS sought to establish rules governing refund requests.¹⁰ MMS, however, correctly argues that the APA makes exceptions from its rulemaking requirements for "interpretive rules." 5 U.S.C. § 553(b)(B) (1982).¹¹ Traditionally, this exception has been treated as establishing a distinction between interpretive and substantive rules. The APA, however, does not define these terms and courts have made a variety of statements about the differences between the two types of rules. Of particular concern in judicial pronouncements has been the issue of whether the rule under review is binding on the court in the case before it.

[3] In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), Justice Rehnquist reviewed some of the Supreme Court's cases on the matter and outlined the steps under which judicial review proceeds. "In order for a regulation to have the 'force and effect of law,' it must have certain

accordance therewith while other pipelines refused to make payments in accordance therewith until such time as a final non-appealable decision was reached on such issue.

"In the event that the D.C. Court's decision is upheld and only to the extent that Union is compelled to make a refund to your pipeline purchaser, Union will recover from you any excess amounts previously paid to you, plus any interest thereon, which Union is legally required to refund and which is attributable to your interest."

¹⁰ Although MMS asserts as a defense that its final order is not a rule, it offers no analysis or argument in support of this position. It does quote in a footnote the definition of "order" at 5 U.S.C. § 551(6) (1982).

¹¹ Sec. 553 provides two exceptions for interpretive rules. First, under subsec. (b)(A) interpretive rules are excepted from the requirement to publish notice of proposed rulemaking. Second, under subsec. (d) an exception is provided to the requirement that publication of a rule occur 30 days prior to its effective date.

substantive characteristics and be the product of certain procedural requisites." *Id.* at 301. A substantive rule is one "affecting individual rights and obligations." *Id.* at 302 (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974)). Because the legislative power of the United States is vested in Congress, if a rule is substantive, it "must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Id.* In addition,

the promulgation of these regulations must conform with any procedural requirements imposed by Congress. *Morton v. Ruiz, supra*, at 232. For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). The pertinent procedural limitations in this case are those found in the APA.

Id. at 303.

[4] The Secretary of the Interior is given full authority to administer the provisions of OCSLA and to "prescribe such rules and regulations as may be necessary to carry out such provisions." 43 U.S.C. § 1334(a) (1982). MMS has not formally promulgated regulations governing refunds. See 30 CFR Part 230. Nevertheless, there is no need to determine whether MMS' notices constitute such rules and regulations within the authority of OCSLA or to delve into the complexities of the differences between substantive and interpretive rules and the concomitant questions about substantial impact. See generally 2 Davis, *Administrative Law Treatise* §§ 7.8 through 7.20 (2d ed. 1979 and Supp. 1982). If a rule is *substantive*, it must be promulgated in accordance with the APA in order to have the "force and effect of law." *Chrysler Corp. v. Brown, supra*. Nothing in the notices issued by MMS indicates that they were published pursuant to the notice and comment rulemaking procedures described by 5 U.S.C. § 553 (1982). Thus, they cannot have the force and effect of law. The same is true if, on the other hand, the notices are *interpretive* rules. "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law." *Id.* at 315.

If the question presented was whether MMS had authority to determine what information it needed in order to process refund requests, as in its notice of April 8, 1984, it is unlikely we would have difficulty concluding that it has such authority. If the next question was whether MMS could publish a list of the necessary information in the *Federal Register*, we would agree that it can and point out that such publication may be required by 5 U.S.C. § 552(a) (1982). Similarly, it would seem apparent that MMS may determine that it does not need all the information it first thought necessary, modify its list, perhaps adding different information, and publish a notice, as MMS did in its notice of August 8, 1984. Whether these decisions are to be termed administrative matters, procedural determinations, or interpretive rules is generally of little consequence. They do not have the force and

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effect of law in the sense that substantive rights of parties cannot be affected. An application for a refund need not be approved until sufficient information has been supplied, but the rejection of an application would not prejudice the substantive rights of the applicant to obtain a refund. It would simply need to submit the information needed to support its request. Of course, such procedures cannot be administered in a manner that is otherwise not in accord with the law, but such issues are of no concern here.

The gravamen of appellants' complaints is that MMS has viewed its notices and the Solicitor's opinion as having substantive effect on appellants' claims to refunds. From the example of Union Oil Co.'s letter and notice it is clear that MMS views the standards drawn from the Solicitor's opinion as substantive requirements governing requests for refunds even though MMS's response failed to state why the company's submission was deemed insufficient. MMS's notices are not a substitute for promulgated regulations; nor can the Solicitor's opinion be given such weight. By its notices MMS announced the manner in which it would review, and has reviewed, requests for refunds, but neither its notices nor the Solicitor's opinion can limit the rights of parties or control review by this Board. See 43 CFR 4.1; *Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 664-65 (D.C. Cir. 1978); *Northern California Power Agency v. Morton*, 396 F. Supp. 1187, 1191 (D.D.C. 1975), *aff'd*, 539 F.2d 243 (D.C. Cir. 1976). To the extent MMS has sought by the publication of its notices to impose substantive consequences upon appellants' claims to refunds, these determinations must be reexamined by the agency. Because MMS's final order did not address the specific requests raised by appellants, we do not consider these refund requests to be ripe for review. Since this matter must be remanded to MMS for further action, upon reconsideration by the agency and the issuance of specific decisions further appeal to this Board may be appropriate.

[5] Absent controlling regulations, the only standard which may be applied is that of the language of section 1339 itself. The Solicitor's opinion previously cited is correct in concluding that because section 1339 states a request is to be "filed," it must be made in writing. However, there is no language in the statute indicating the form the writing must take or specifying its substantive contents. The word "request" does not entail any substantive requirements. If Congress intended anything in adopting the term from the earlier statute, it is likely it had in mind overpayments resulting from computational errors and the use of estimates in making payments, and it assumed the Department would establish forms and promulgate procedures for supplying the accounting information necessary to obtain refunds. Cf. 43 CFR 217 (1949 and Supp. 1953). If Congress had wished, it could have written specific requirements into the statute. Instead, it appears

to have left the matter to the Department and the only affirmative requirement indicated by the statute is that some form of written request is required. Undoubtedly, to be effective a request must in some manner inform MMS of the subject of the refund rather than merely stating "I want a refund;" however, the statute does not limit the form a request may take. While in the normal course of business notice would likely be given by letter, the statute does not specify a particular type of document. Thus, in reviewing appellants' cases, MMS should consider whether other documents received from lessees provided notice that the submitting party desired a refund. In addition, we find that there should be minimum requirements for making refund requests; future requests arising after the date this opinion issues should, at a minimum, be written, identify the claimant, the leases affected, and the reasons a refund is sought.

The notice necessary to meet the 2-year provision of the statute must be distinguished from the proof necessary to substantiate a request. MMS has administrative and fiscal responsibilities to assure itself that a refund is permitted by law and that the applicant is in fact entitled to a refund. As stated in section 1339, MMS must be satisfied that a party has made payment "in excess of the amount he was lawfully required to pay." Clearly it is lawful to place on a claimant both the legal and evidentiary burdens of showing entitlement to a refund. It does not follow, however, that such a burden must be met at the outset by a request filed to meet the statute's 2-year limit. A request must timely notify MMS that a party seeks a refund. In contrast, proof of a valid claim must be sufficient to allow MMS to meet its responsibility to satisfy itself that a refund is due. As in the present case, such proof may ultimately require both resolution of legal issues and submission and review of detailed records on the payments made on production from numerous wells.

VI.

The Secretary's authority to administer the provisions of OCSLA and to "prescribe such rules and regulations as may be necessary to carry out such provisions," 43 U.S.C. § 1334(a) (1982), support the promulgation of regulations establishing procedures for filing refund requests. Fundamentally, it may be said, the present cases arise because MMS had not promulgated rules for filing notices and making applications for refunds. Nor has it since. Given the absence of any controlling regulations, it is necessary to specify the manner in which the parties should proceed upon remand. Because section 1339 states that requests must be filed "within two years after the making of the payment," it was clearly improper for MMS to attempt to prevent producers from filing refund requests by announcing it would not accept such requests. Apparently in recognition of the fact its letter of November 9, 1983, may have prejudiced producers' rights, MMS sought to remedy its error by finding the letter had "tolled" the statute. While "tolling" was not the proper term to use, because MMS does not deny

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that the producers may obtain refunds for overpayments made on or after November 9, 1981, we will construe its letter as an acknowledgement of notice that as a result of the circuit court decision in *Interstate* all producers would seek refunds. Accordingly, refunds may be obtained for overpayments made on or after November 9, 1981. Producers who believe they filed notice with MMS prior to November 9, 1983, and are therefore entitled to a refund for overpayments made prior to November 9, 1981, should submit to MMS documentation establishing the fact. The producer should also submit an application showing its entitlement to a refund by providing the data required by MMS in its published notices. MMS' determinations of producers' applications shall be made by written decisions appealable through the ordinary appeals process. In the future MMS should not attempt to foreclose lessees' attempts to file refund requests.

MMS' "final order" also stated that those appealing "should include with their notice of appeal a schedule of the royalty payments made after December 1, 1978, that they assert would be subject to refunds but for this decision." 49 FR 47120 (Nov. 30, 1984). Several appellants have objected to this language or made requests to be permitted to later supply additional information because of the limited time for gathering it within the deadline for filing a notice of appeal. It is unclear why the statement was included in the final order. The information described was not necessary to the resolution of the legal issues presented the Board by MMS's decision. It would seem beyond question that appellants paid royalties as required by MMS based on its calculations using FERC Orders Nos. 93 and 93-A. Nor is it clear what was meant by "a schedule of the royalty payments." Presumably this was intended to require more than just a list of the dates payments were made. In any event, it is not our task to conduct initial review of such information. After MMS has examined the data and documentation supplied by producers in support of their refund requests and has made a decision as to the amount a producer is entitled to receive, and after MMS appeal procedures have been followed, then an appeal may be brought to us. At that time we would review the information to resolve any issues presented to us. Because the requirement stated in the final order was unnecessary, appellants are not to be prejudiced by any information supplied or the absence of such information in presenting their appeals to this Board.

Accordingly, all other arguments of the parties having been considered, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part.

FRANKLIN D. ARNESS
Administrative Judge

I CONCUR:

Wm. PHILIP HORTON
Chief Administrative Judge

I CONCUR IN THE RESULT:

KATHRYN A. LYNN
Administrative Judge
Alternate Member

APPEAL OF RACO SERVICES, INC.

IBCA-2260

Decided: *March 18, 1987*

Contract No. CX-5000-6-0017, National Park Service.

Sustained.

Contracts: Generally--Contracts: Construction and Operation: Contracting Officer--Contracts: Disputes and Remedies: Termination for Default: Excess Costs--Contracts: Formation and Validity: Generally--Contracts: Formation and Validity: Bid Award--Contracts: Performance or Default: Breach

Where the apparent low bidder on a formally advertised paving contract, after receipt of the Government's letter seeking verification of its ability to perform, notifies the contracting officer that it is unable to undertake the work because it is in failing financial condition and under threat of bank foreclosure, the contracting officer under FAR 9.103(b) is on notice that the contractor may not be a responsible bidder and may not, without checking further, simply let the contract and subsequently attempt to assess excess procurement costs against the contractor after terminating its contract for default.

APPEARANCES: R. Dee Hobbs, Esq., Stophel & Stophel, Chattanooga, Tennessee, for Appellant; Douald M. Spillman, Esq., Government Counsel, Atlanta, Georgia.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

Facts

The facts in this appeal are essentially undisputed. On April 30, 1986, RACO Services, Inc. (RACO/company/appellant), submitted a bid in connection with an advertisement by the National Park Service (Government) for bids to reconstruct a parking lot at Point Park, Lookout Mountain, Chickamauga and Chattanooga National Military Park, Hamilton County, Tennessee. The procurement was a total small business set-aside. The bids were opened on May 1, and four were received. RACO was the apparent low bidder, so on May 16 the

APPEAL OF RACO SERVICES, INC.

Contracting Officer (CO) sent the company a pre-award notice seeking to verify appellant's ability to perform.

Meanwhile, RACO was encountering financial difficulties. Thus, on the basis of the statements in the CO's letter that it was Government policy to verify the ability of a bidder to perform before letting the contract, it delayed in responding to the CO's inquiry. Thereafter, on June 10, the First National Bank and Trust Co., one of RACO's creditors, notified the company that it would be allowed only 90 days to sell its business or liquidate its assets in order to avoid foreclosure. On June 15, appellant called the CO to notify the Government that because of its failing financial condition, it would not be able to perform and thus did not want to receive the contract.

Even though there were other bidders still outstanding to which the contract could have been awarded, the CO routinely awarded it to appellant on June 16, using as his justification the fact that he had by then received a Dun & Bradstreet report indicating that RACO was a responsible contractor. When RACO subsequently failed to perform, the CO terminated the contract for default and assessed the Government's excess procurement costs, in the amount of approximately \$3,300 (based on the CO's decision; however, Government counsel now claims a \$5,000 difference), against appellant.

Discussion

The issue here is essentially one of law. Government counsel contends that the contract was properly awarded because the Government was entitled to rely on the Dun & Bradstreet report and because appellant did not satisfy the requirements of FAR 52.214-7 for withdrawing its bid. That provision, in particular, requires that any such withdrawal take place not later than 5 days before the bid opening.

However, we do not get to the second issue because we do not agree that the contract was properly awarded.

Government counsel cites FAR 52.214-19(a) to the effect that contracts are awarded "to the *responsible* bidder whose bid, conforming to the solicitation, will be most advantageous to the Government, considering only price and the price-related factors specified elsewhere in the solicitation." (Italics added.) Counsel does not explain, however, exactly how the purposes of the solicitation or the needs of the agency will be served when the Government deliberately enters into a contract with a company that it knows in advance, by express previous notification, may be unable to perform.

In our view, appellant's June 15 telephone call to the CO, which took place before the contract was let, clearly put the Government on notice that RACO was claiming to be in dire financial straits. At that point, the Dun & Bradstreet report was just so much useless paper, regardless of how accurate it may have been when the information

upon which it was based was obtained. It was the CO's responsibility to investigate and to accurately determine the facts before it entered into a contract from which no one was able to benefit.

Lest there be any doubt concerning Government policy in this regard, FAR 9.103(b) and (c) state in part:

(a) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information *clearly indicating that the prospective contractor is responsible*, the contracting officer *shall* make a determination of nonresponsibility.

* * * * *

(c) The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. [Italics added.]

In our view, what is true of supply contracts is equally true of construction or repair contracts. See, e.g., *Don Simpson*, IBCA-2058, 22 IBCA 140, 93 I.D. 76, 86-2 BCA par. 18,768 (1986), in which, in connection with a situation where a contractor had erroneously or through bad judgment submitted what was clearly too low a bid, the Board noted:

Although it is well-established that an erroneous bid based upon a mistake in judgment does not entitle the contractor to reformation of its contract [citing case], *it is clear that rescission may be granted*, at least for some errors in judgment where the Government has, as in this case, failed in its bid verification responsibilities [citing case]. [Italics added.]

86-2 BCA at 94,534.

In the case before us, we are satisfied that appellant made it clear to the CO in advance of the award that it would not be financially able to perform the contract, regardless of its bid or its previous good financial reputation. Therefore, the CO had an affirmative duty to ascertain the accuracy of the allegation and, if it were true, to refrain from entering into a contract with a bidder that was nonresponsible.

Under the circumstances, where the CO failed to investigate further, there was a violation of FAR, no meeting of the minds, and the contract as awarded was a nullity.

Decision

The appeal is sustained. Appellant shall not be required to pay any excess procurement costs or other resulting costs.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

WILLIAM F. McGRAW
Administrative Judge

March 20, 1987

HAZEL KING

96 IBLA 216

Decided March 20, 1987

Appeal from a decision of the Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, not to take enforcement action in response to a citizen's complaint. Ten-Day Notice X-85-81-016-01 TV1.

Motion to dismiss denied; decision vacated; immediate re-inspection ordered.

1. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: Generally--Surface Mining Control and Reclamation Act of 1977: Permanent Regulatory Program: Generally
Informal review in accordance with 30 CFR 842.15 of a decision not to inspect or take enforcement action in response to a citizen's request for a Federal inspection under 30 CFR 842.12 may be conducted by any neutral person who is not an immediate supervisor of the inspector whose actions are being reviewed.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Imminent Danger

If, upon reinspection after a state has failed to take appropriate action in response to a 10-day notice or to show good cause for such failure, OSM determines there is a violation of the Act, the State program, or any condition of a permit which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harm, it shall issue a notice of violation or cessation order. If OSM determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water resources, it shall immediately order a cessation of operations or the portion of operations relevant to the condition or violation in accordance with 30 U.S.C. § 1271(a)(2) (1982). If OSM finds that the ordered cessation will not completely abate the imminent danger or the significant, imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm.

APPEARANCES: Thomas J. Fitzgerald, Esq., Frankfort, Kentucky, and L. Thomas Galloway, Esq., Washington, D.C., for appellant; Anne C. Sanders, Esq., Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN
INTERIOR BOARD OF LAND APPEALS

I. Factual and Procedural Background

On January 3, 1985, the London (Kentucky) Area Office of the Office of Surface Mining Reclamation and Enforcement (OSM) received a citizen's complaint from Hazel King. It inspected on January 9, 1985, and found evidence of subsidence occurring on the permanent program portion of the permit issued to Harlan-Cumberland Coal Co. for an underground mining operation in Harlan County, Kentucky.¹ "The subsidence cracks were fairly large (3 x 5 feet wide) and deep (40 feet) * * *. There is a possibility of someone or something falling into these cracks at several points along the breakline," the inspector wrote in his report.

On January 10, 1985, the London Area Office issued a 10-day notice (No. 85-81-061-01) to the regional office of the Kentucky Department for Surface Mining Reclamation and Enforcement (DSMRE) citing a violation of 405 Kentucky Administrative Regulation (KAR) 18.210.² The London Area Office granted Kentucky two extensions of time in which to respond. On February 14, 1985, Kentucky responded that, because there are at least two other seams that have been mined that overlie the seam being mined, "DSMRE cannot make a determination that Harlan Cumberland caused the subsidence." "DSMRE is not going to take enforcement action at this time," it said, but would "continue to gather information." "If such information indicates that the Harlan Cumberland [sic] is truly responsible for the subsidence, DSMRE will take appropriate action," the response concluded.

On February 19, 1985, the London Area Office asked the OSM Lexington Field Office to request the OSM Eastern Technical Center (ETC) (in Pittsburgh) to send a specified person familiar with a previous subsidence problem in the area to "join with us in making another field [inspection] and permit analysis for the purposes of determining Federal enforcement potential."³ Initially, ETC declined the Lexington Field Office's request for technical assistance, saying a review of the documents forwarded with the request "reveals that the

¹ The operator's state permit number is 648-5052.

² The notice stated:

"You are notified that as a result of '*a citizen complaint*' (e.g. a federal inspection, citizen information, etc.) the Secretary has reason to believe that the person described below is in violation of the Act or a permit condition required by the Act. If the State Regulatory Authority fails within ten days after receipt of this notice to take appropriate action to cause the violation(s) described herein to be corrected, or to show cause for such failure and transmit notice of your action to the Secretary through the originating office designated above, then a Federal inspection of the surface coal mining operation at which the alleged violation(s) is occurring will be conducted and appropriate enforcement action as required by Section 521(a)(1) of the Act will be taken."

See 30 CFR 842.11(b).

405 KAR 18.210, *Subsidence control*, provides in part:

"1. *General requirements.* (1) Underground mining activities shall be planned and conducted so as to prevent subsidence from causing material damage to the surface, to the extent technologically and economically feasible, and so as to maintain the value and reasonably foreseeable use of surface lands."

³ The London Area Office's request concluded: "Please make the request immediately as OSM's inspector reports subsidence cracking (in populated area) large enough for a person to easily fall into."

March 20, 1987

State's response is inadequate," but on May 23, 1985, the ETC forwarded to the Lexington Field Office a detailed report by its geologist and an evaluation by the Solicitor's Office of responsibility for the subsidence.⁴

On June 5, 1985, the Director of the OSM Lexington Field Office wrote the Commissioner of the Kentucky Department stating that, based on the ETC report, it had found that the large cracks were caused by Harlan-Cumberland Coal Co.'s current underground operation and requesting that Kentucky "review the situation again and advise us by June 14, 1985, of your position." The Commissioner initially responded that a report by that date was "probably unrealistic [sic]." On August 7 he responded, concluding that the Department "does not believe there is sufficient evidence to charge Harlan Cumberland with a violation of the regulations and no enforcement action will be taken at this time." The Commissioner also observed that there was no evidence to indicate the subsidence had caused "material damage to renewable resource lands."

The Commissioner's observation led the Director of the OSM Lexington Field Office on August 22, 1985, to request prompt clarification from the Acting Chief of OSM's Division of Regulation and Inspection in Washington "with respect to the operator's obligation to prevent subsidence not causing material damage to a renewable resource or affecting structures. * * * We * * * need clarification of

⁴ The geologist's report stated that the investigation was undertaken to determine "if a large crack reported on the upper part of the slope above the Harlan Cumberland coal mine near Closplint, Kentucky is mine related." It concludes:

"Conclusions"

1. The crack system identified and observed on the hillside is related to subsidence in the Harlan Cumberland mine for the following reasons:

* * * * *
d. The fractures are approximately over the barrier rib between the East Over Mine and the Harlan Cumberland Mine (see discussion below).

"Explanation of Expression of the Failure"

* * * * *
The MSHA inspector (verbal communication [sic]) said that the East Over Mine was closed down for a long period of time in 1982 due to a strike. When the mine was reopened it was discovered that a large area of the mine just south of the barrier had collapsed (Map 2). This failure would apply a heavy strain to the overburden, especially to the north where no mining had taken place.

"When the retreat mining took place in the Harlan Cumberland mine, a strain would have been transmitted to the overburden to the south of the retreat area as the pillar retreat is to the north. The combined stress of the two opposing strain systems breaking the overburden is the most likely explanation of the magnitude of the fracture system. The crack would have developed just from the retreat mining that is taking place, but it would probably have been smaller and less damaging to the surface."

The report notes as an "Additional Comment": "The Mine Permit Map (Map 1) shows the mining to stop just short of the houses in the bottom of the valley adjacent to the King property * * *."

The mine permit map is not included in the record.

By order dated Oct. 9, 1986, the Board directed OSM to provide a copy of the Solicitor's evaluation of responsibility for the subsidence as one of several items needed to complete the administrative record. OSM's response, filed Oct. 29, 1986, did not include the document, invoking "the attorney-client privilege [sic]." We assume that OSM had previously provided the document to the Kentucky DSMRE, since it is relied on in the Aug. 7, 1985, letter of the Commissioner of the DSMRE to the Director of OSM's Kentucky Field Office. It is therefore a public record of the Department and a matter of which the Board may take official notice. 43 CFR 4.24(b). Invocation of the attorney-client privilege in these circumstances is inappropriate.

the types of damage OSM considers as a violation.”⁵ Apparently there was no response to this request because on January 10, 1986, the London Area Office wrote the Lexington Field Office saying the 10-day notice to Kentucky was still unresolved and suggesting a follow-up request to Washington.

Washington's response eventually came in a March 13, 1986, memorandum from the Director of OSM.⁶ Based on the policy guidance it contained, the Director of the Kentucky Field Office wrote the Commissioner of the Kentucky DSMRE on April 3, 1986, stating that 405 KAR 18:210 “applies to material damage to all surface lands whether or not they involve renewable resources,” and citing several other regulations as potentially applicable to reclamation of subsidence damage. “Material damage,” insofar as performance standards were concerned, should be defined to include “a safety hazard now or in the future” and “if the economic value of the land has been adversely affected,” the letter advised, but “[i]ssuance of a violation may not be necessary to resolve subsidence impacts if you wish to work with the operator under the provisions of contemporaneous reclamation associated with backfilling and grading.” The April 3 letter concluded by modifying the January 10, 1985, 10-day notice to include these other regulations and requesting Kentucky DSMRE to “advise us by April 18 of State action taken.”

The Commissioner of the Kentucky DSMRE responded on May 23, 1986. “We are also concerned with the effects of subsidence when it causes a safety hazard or material damage,” the Commissioner wrote, but

the more difficult task is determining whether the underground mining operation caused the hazard or material damage. Since your Eastern Technical Center has just completed review of the Harlan Cumberland site on May 19, 1986, we would like the results of their investigation to assist us in determining the proper course of action in this matter. Upon receipt of that information from your office, we will re-open our investigation of the alleged subsidence at Harlan-Cumberland. [7]

⁵ “The Federal Regulations of 30 CFR 784.20 appear to require the operator to consider only renewable resources and structures in the permit preparation while 30 CFR 817.121 appears to be more broad in protecting the ‘value and reasonably foreseeable use of surface lands.’ The Kentucky regulations of 405 KAR 18:210 and 8:040 Section 26 are similar to OSM’s and contain the same conflict,” the Aug. 22, 1985, memorandum stated.

⁶ The Mar. 13 Director’s memorandum stated that “subsidence-caused material damage to all surface lands, whether or not they involve renewable resources, must be corrected to the extent technologically and economically feasible, pursuant to 30 CFR 817.121(c).” In view of the specific situation that prompted the original Aug. 22 request, the memorandum addressed “three other relevant issues”:

“First, OSMRE has not defined ‘material damage’ and it is up to the State regulatory authority in primacy states to determine whether a given incident of subsidence damage constitutes material damage. This deference to the regulatory authority is found in the preamble to the 1979 rules (44 FR 15075), and has not been modified through subsequent rulemakings.

“Second, the mere occurrence of material damage due to subsidence does not constitute a violation. A violation subject to enforcement procedures occurs only when there is failure to correct the damage pursuant to 817.121(c) or failure to obey any order issued under the authority of section 817.121.

“Third, the subsidence must be attributable to underground extraction occurring after eight months from the date of primacy in order to be subject to the performance standards of 817.121.”

This report, listed as item No. 5 in OSM’s Oct. 29, 1986, response to the Board (*see n.4, supra*) but labeled No. 6, is a “Report of Investigation of Subsidence Complaints Near the Harlan-Cumberland Coal Company Permit Number 648-5052” involving “seven residences that have incurred various degrees of structural damage in Black Bottom and Closplint, Harlan County, Kentucky (Figure 1). Other investigations have been conducted in this immediate area and are detailed in memoranda to W. H. Tipton dated Dec. 2, 1983, Oct. 22, 1984, Mar. 28, 1985 and May 23, 1985.”

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On May 28, 1986, counsel for Hazel King wrote the Director of the OSM Lexington Field Office

to respectfully demand that the Office of Surface Mining comply with the * * * mandatory duty under 30 CFR 843.12(a)(2) to take appropriate inspection and enforcement action against a violation of the federal Act and regulations when the state has failed, within *ten days* of receipt of a "Ten Day Notice," to take action reasonably calculated to abate the violation. It has been over *sixteen months* since the Commonwealth of Kentucky received the ten-day notice regarding this operation. [Italics in original.]

"Unless appropriate action pursuant to 30 CFR 817.121 is forthcoming within twenty (20) days, we will appeal this failure to take appropriate action to the Interior Board of Land Appeals," the letter concludes.

On June 4, 1986, the OSM Lexington Field Office wrote the Commissioner of the Kentucky Department concerning

the original ten-day notice, #85-81-061-01, which has been demonstrated to have resulted from subsidence. I am requesting that you reevaluate your previous responses regarding this complaint * * * in light of the options outlined in my letter of April 3, 1986. Further, I request that your review and response be forwarded no later than June 13, 1986, in order to expedite the resolution of these long-standing ten-day notices.

The OSM Lexington Field Office responded to appellant's counsel on July 1, 1986, that Kentucky "has advised us that they are going to reinvestigate the allegation of subsidence at the Harlan Cumberland mine permit number 648-5052 * * *. [¶] Although we realize there has been a long delay, we are going to allow them to complete this investigation prior to deciding on Federal action." Counsel for Hazel King replied on July 2, 1986, that this response was "entirely inadequate" and stated "we will appeal forthwith to the Interior Board of Land Appeals unless you provide a time certain for the state response, not to exceed ten (10) days, consistent with 30 CFR 843.12(a)(2) after which your agency will take direct inspection and enforcement action."

Stating that no inspection or enforcement action had taken place by August 18, 1986, and no response to the January 3, 1985, complaint had been received, counsel for Hazel King filed this appeal seeking

an Order directing the Office of Surface Mining Reclamation and Enforcement, Kentucky Field Office to conduct a federal inspection and take appropriate enforcement action pursuant to 30 CFR 842.11(b)(1), 842.12 and 843.12(a)(2) or to provide Appellant, as required by 30 CFR 842.12(d) a written explanation for failure to take inspection and/or enforcement action. Jurisdiction for this appeal is grounded upon 43 CFR 4.1280 et seq. and 30 CFR 842.15(d).

Figure 1 is not included in the record so the relationship of the crack discussed in the May 23, 1985, report (see n.4, *supra*) and the residences discussed in this report cannot be determined.

The report states that as of May 16, 1986, "[T]he complaint area has not been undermined," and that "all of the complainants' residences are more than 200 feet outside the calculated extent of potential surface disturbance."

The report concluded: "No evidence was found to link the structural damage to buildings in the complaint area to mine subsidence."

* The Board requested a copy of the Kentucky response referred to in the July 1 letter in its Oct. 9, 1986, order. See n.4, *supra*. Although OSM's response filed Oct. 29, 1976, lists the response as item No. 6, no copy of it was included in the documents submitted to the Board.

On September 10, 1986, the Commissioner of the Kentucky DSMRE wrote the Director of the Kentucky Field Office:

You will recall that the OSMRE Report by the Eastern Technical Center [dated May 23, 1985; *see n.4, supra*] failed to establish that Harlan-Cumberland's operation caused the subsidence. The more recent OSM Report [dated May 19, 1986; *see n.7, supra*] also fails to make a connection between subsidence and Harlan-Cumberland's current operations. Recently, the company has advised that any hazard related to the subsidence has been eliminated by filling the surface cracks. Our inspectors have also advised that a "No Trespassing" sign has been posted and fencing has been installed.

In view of the above, and especially the OSM reports, we do not feel that Harlan-Cumberland's current operations require enforcement action for causing material damage to renewable resource lands.

On October 29, 1986, OSM filed a copy of the following memorandum from the Chief of the Technical Assistance Division, Eastern Field Operations, OSM, to the Director of the Kentucky Field Office, dated October 22, 1986:

In response to your October 15, 1986 request for Technical Assistance, an investigation of the cause and severity of mine subsidence on and adjacent to the Harlan-Cumberland Coal Company, Permit No. 648-5052 was conducted by this office. The attached interim report discusses the analysis and recommendations. A final report, including maps showing the location of the subsidence cracks relative to the mine workings, and discussion of potential abatement measures will follow shortly.

In summary, pillar pulling during the retreat phase of mining in the Harlan-Cumberland Coal Company H-2 Mine has created an extensive system of subsidence cracks on the hillside south of Black Bottom and west of Closplint, Kentucky. The extremely large size of these cracks and their proximity to a hillside trail render them an extreme danger to the health and safety of the general public.

The attached interim report concluded:

The ETC recommends the following steps be taken:

Conducting a survey to more accurately map the location and orientation of the crack systems;

Immediately contacting all affected surface owners and advising them of the dangerous conditions on their property;

Clearly posting, fencing, barricading and otherwise marking all open cracks in order to restrict access by pedestrians and vehicles;

Immediate preparation of a reclamation plan to abate the hazard by filling the cracks and restoring the hillside to a safe condition. A method of delivering durable fill material should be selected which would minimize impacts to the existing terrain and vegetation. Upon approval by the state regulatory authority, the plan should be implemented immediately.

No more recent information has been provided for the record.

II. *The Governing Regulations*

Since it was originally adopted in 1979, 30 CFR 842.12 has provided what "an authorized representative of the Secretary" and "the Office" must do in response to a citizen's request for a Federal inspection.⁹ 30 CFR 842.15 originally provided that informal review of decisions under 842.12 was to be conducted by the "Regional Director."¹⁰ When

⁹ 44 FR 15457 (Mar. 13, 1979); 47 FR 35636 (Aug. 16, 1982).

¹⁰ 44 FR 15458 (Mar. 13, 1979). In 30 CFR 700.5, "Office" was defined to mean the "Office of Surface Mining Reclamation and Enforcement," "Regional Director" as "a Regional Director of the Office or a Regional Director's

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revisions of these regulations were proposed in December 1981, the preamble noted that all references to "Regional Director" in the then-existing rules were replaced with references to "Director," "to conform to the September 13, 1981, reorganization of OSM, which abolished the Office's previous regional structure."¹¹ In 30 CFR 842.15 "Regional Director" was in fact replaced with "Director or his or her designee."¹²

The preamble to the proposed revisions also noted the addition of 30 CFR 842.15(d) providing that "[a]ny determination made under paragraph (b) [of 30 CFR 842.15] shall contain a right of appeal to the Office of Hearings and Appeals"¹³ and described such a determination as "a 'Decision of OSM' within the scope of 43 CFR 4.1281."¹⁴ This description was included in the rule itself as finally adopted.¹⁵ The background of this revision was explained in *Donald St. Clair*, 77 IBLA 283, 294, 90 I.D. 496, 501-02 (1983):

In a settlement agreement in March 1980, concluding the dispute in a District of Columbia District Court case, *Council of the Southern Mountains, Inc. v. Andrus*, CA No. 79-1521, OSM agreed to allow the right of appeal from Director's decisions in citizens' complaint proceedings in accordance with a memorandum issued by the OSM Director to all Regional Directors on February 4, 1980. That memorandum instituted the policy of including the right of appeal language in each informal review decision based on a citizens' complaint.⁸

⁸ We are not unmindful that the memorandum referred only to 30 CFR 721.13, the interim program counterpart to 30 CFR 84.215. It is possible, however, to read the memorandum more broadly, given its multiple usage of "citizen complaint" without tying those words specifically to section 721.13. Whatever the proper view of that possibility, the regulatory amendment and the February 1980 memorandum and subsequent court action make manifest the Secretary's intent that *all* decisions on citizens' complaints be reviewable whether or not they contain the right to appeal and whether the complaint preceding them arose under Part 721 or Part 842.

Thus, the governing regulations currently provide:

§ 842.12 Requests for Federal inspections.

(a) A person may request a Federal inspection under § 842.11(b) by furnishing to an authorized representative of the Secretary a signed, written statement (or an oral report followed by a signed, written statement) giving the authorized representative reason to believe that a violation, condition or practice referred to in § 842.11(b)(1)(i) exists and that the State regulatory authority, if any, has been notified, in writing, of the existence of the violation, condition or practice. The statement shall set forth a phone number and address where the person can be contacted.

(b) The identity of any person supplying information to the Office relating to a possible violation or imminent danger or harm shall remain confidential with the Office, if requested by that person, unless that person elects to accompany the inspector on the inspection, or unless disclosure is required under the Freedom of Information Act (5 U.S.C. 552) or other Federal law.

(c) If a Federal inspection is conducted as a result of information provided to the Office by a person as described in paragraph (a) of this section, the person shall be notified as far in advance as practicable when the inspection is to occur and shall be allowed to

representative" and "Director" as the Director of the Office "or the Director's representative." 44 FR 15314 (Mar. 13, 1979).

¹¹ 46 FR 58464 (Dec. 1, 1981).

¹² 46 FR 58472 (Dec. 1, 1981); 47 FR 35636 (Aug. 16, 1982).

¹³ 46 FR 58472 (Dec. 1, 1981).

¹⁴ 46 FR 58467 (Dec. 1, 1981).

¹⁵ 47 FR 35629, 35636 (Aug. 16, 1982).

accompany the authorized representative of the Secretary during the inspection. Such person has a right of entry to, upon and through the coal exploration or surface coal mining and reclamation operation about which he or she supplied information, but only if he or she is in the presence of and is under the control, direction and supervision of the authorized representative while on the mine property. Such right of entry does not include a right to enter buildings without consent of the person in control of the building or without a search warrant.

(d) Within ten days of the Federal inspection, or, if there is no Federal inspection, within 15 days of receipt of the person's written statement, the Office shall send the person the following.

(1) If a Federal inspection was made, a description of the enforcement action taken, which may consist of copies of the Federal inspection report and all notices of violation and cessation orders issued as a result of the inspection, or an explanation of why no enforcement action was taken;

(2) If no Federal inspection was conducted, an explanation of the reason why; and

(3) An explanation of the person's right, if any, to informal review of the action or inaction of the Office under § 842.15.

(e) The Office shall give copies of all materials in paragraphs (d)(1) and (d)(2) of this section within the time limits specified in those paragraphs to the person alleged to be in violation, except that the name of the person supplying information shall be removed unless disclosure of his or her identity is permitted under paragraph (b) of this section.

* * * * *

§ 842.15 Review of decision not to inspect or enforce.

(a) Any person who is or may be adversely affected by a coal exploration or surface coal mining and reclamation operation may ask the Director or his or her designee to review informally an authorized representative's decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for Federal inspection under § 842.12. The request for review shall be in writing and include a statement of how the person is or may be adversely affected and why the decision merits review.

(b) The Director or his or her designee shall conduct the review and inform the person, in writing, of the results of the review within 30 days of his or her receipt of the request. The person alleged to be in violation shall also be given a copy of the results of the review, except that the name of the person who is or may be adversely affected shall not be disclosed unless confidentiality has been waived or disclosure is required under the Freedom of Information Act or other Federal law.

(c) Informal review under this section shall not affect any right to formal review under section 525 of the Act or to a citizen's suit under section 520 of the Act.

(d) Any determination made under paragraph (b) of this section shall constitute a decision of OSM within the meaning of 43 CFR 4.1281 and shall contain a right of appeal to the Office of Hearings and Appeals in accordance with 43 CFR Part 4.

III. OSM's Motion to Dismiss

On September 16, 1986, OSM filed a motion to dismiss this appeal for lack of jurisdiction. "Appellant filed a citizen's complaint with the Secretary's authorized representative, W. Hord Tipton, Director of the Lexington Field Office * * * for [OSM]," OSM asserts. Tipton's July 1, 1986, letter was "an explanation of why no enforcement action was taken" in accordance with 30 CFR 842.12(d)(1), OSM argues. Its motion continues:

Once this decision is made by the authorized representative of the Secretary, the person who made the request under Section 842.12 may ". . . ask the Director . . . to review informally [the] authorized representative's decision not to take appropriate enforcement action." 30 CFR 842.15(a). The Director then has thirty days from the receipt of a request for informal review under 30 C.F.R. 842.15 to render a review decision, in

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writing, regarding his authorized representative's decision not to take enforcement action. 30 CFR 842.15(b). The decision of the Director under 30 CFR 842.15(b) "constitute[s] a decision of OSM within the meaning of 43 CFR § 4.1281 and shall contain a right of appeal to the Office of Hearings and Appeals. . . ." (30 CFR 842.15(d)).[¹⁶]

Appellant responds that its complaint was filed with the London Area Office of OSM and that its May 1986 letter to the Lexington Field Office was a request for review of the failure of the London Area Office to provide an explanation of why no enforcement action was taken, as required by 30 CFR 842.12(d). Appellant points out that 30 CFR 842.15(a) and (b) provide for information review by "the Director or his or her designee," and argues that the Director of the Kentucky Field Office is that designee and a "delegate" of the Director under 43 CFR 4.1281. (Italics in original.) Appellant argues that 30 CFR 842.15(a) requires only one level of informal review prior to invoking the Board's jurisdiction and that appellant "has properly exhausted the informal review procedures of 30 CFR 842.15."¹⁷

OSM replies that the argument that the "field decision" by the Director of the Lexington Field Office is a review by the Director's designee is "untenable" and that a

reading of the plain language of Section 517(h)(1) of the Act in conjunction with [30 CFR] 842.12 and 842.15 * * * clearly indicates that Mr. Tipton's decision must be appealed to the Director under 30 CFR 842.15, and that the Director or his designee *at that level* must rule on the field decision before Appellant's case is ripe for appeal to the Board. [¹⁸] [Italics in original.]

In order to ascertain how OSM carries out its functions under these regulations, the Board, by order dated October 9, 1986, directed it to provide "an elaboration of the responsibilities of Field Offices and Area Offices outlined in 116 DM 5.1 * * * and the activities each kind of office actually performs in implementing these responsibilities." OSM responded that Area Offices

are managed by Area Managers who are under the direct supervision and direction of the Field Office Director. Each Area Office is responsible for a specific geographic area within its Field Office's jurisdiction. The Area Office conducts field inspections of coal mines and mining activities under approved oversight policies and procedures. The Area Office processes citizen complaint's [sic] and Congressional inquiries through State regulatory authority and monitors them to conclusion or takes Federal action in the absence of the State's satisfactory resolution; provides technical assistance to the State on regulatory issues; directs field investigations of abandoned mine lands emergencies and renders determinations of eligibility for OSMRE action or makes appropriate referral to State authorities for consideration in grants. The Area Office [sic] also directs

¹⁶ Motion to Dismiss Appeal at 2.

¹⁷ Response to Motion to Dismiss at 1, 4.

¹⁸ Appellees' Reply Brief at 2-3. Sec. 517(h)(1) of the Act, 30 U.S.C. § 1267(h)(1) (1982), provides:

"Any person who is or may be adversely affected by a surface mining operation may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Chapter which he has reason to believe exists at the surface mining site. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation. The Secretary shall furnish such persons requesting the review a written statement of the reasons for the Secretary's final disposition of the case."

inspections and/or investigations for special studies into problem areas as defined by OSMRE and/or the Field Office Director. [¹⁹]

Field offices are the next level of OSM and are responsible for one or more states (and, in the West, certain Indian tribes). OSM states that

[e]ach Field Office is headed by a Director who reports to the Assistant Director, Eastern Field Operations. The Director is responsible for administering OSMRE activities for the specific geographic areas under his area's supervision. The Field Offices administer the OSMRE reclamation and enforcement program established by the Surface Mining Act and as promulgated in State and Federal regulation. The Field Office reviews and monitors State permanent regulatory, abandoned mine land, and grant programs; recommends and approves grant actions, recommends to the Assistant Director the formulation and/or changes to policy and other OSMRE matters. The Field Offices also investigate abandoned mine lands emergency projects and recommend corrective action to the appropriate technical center or State regulatory authority. The Field Office monitors and directs the Area Offices in the performance of their duties; interacts with the Department's solicitor's [sic]; assures assistance to the State for all reclamation and enforcement issues as may be required; and develops annual evaluation reports of the States' performance under the permanent program for Congress. [²⁰]

As indicated, field office directors report to an Assistant Director for Field Operations, who is "responsible for the day-to-day management and policy direction of the * * * Field Offices * * * [and] provides overall programmatic, technical, and administrative support to" those offices.²¹

The Assistant Directors for Field Operations report in turn to the Deputy Director, Operations and Technical Services, who, among other responsibilities, "provides policy, procedures and guidance for * * * inspection and enforcement programs," and who is also responsible "through [the] Assistant Director * * * for overall management of * * * Field Offices."²²

At the head of OSM is the Director, who, "as chief executive for the Office, provides the leadership and direction of OSMRE activities * * * [and] formulates OSMRE policy within limits delegated by the Secretary."²³

A survey of the Board's opinions and pending appeals from informal review of decisions by OSM in response to requests for inspection indicates that OSM practice under the regulations varies. Sometimes, as in this case, the informal review is conducted by a field office (*see Fred D. Zerfoss*, 81 IBLA 14 (1984); *Tommy Carpenter*, 88 IBLA 286, 92 I.D. 383 (1985)), sometimes by the Director (*see Dennis Zaccagnini*, 96 IBLA 97 (1987), *Samuel M. Mullinax*, 92 IBLA 52 (1987); *Donald St. Clair, supra*), and sometimes by an Assistant Director for Field Operations (*see Paul Beers*, IBLA 87-283).²⁴

¹⁹ Appellees' Reply Brief at 5-6.

²⁰ *Id.* at 4-5.

²¹ 116 DM 4.3.

²² 116 DM 4.1.

²³ 116 DM 2.2.

²⁴ The Assistant Director's Jan. 26, 1987, decision in *Paul Beers* begins: "Jed Christensen, Director of the Office of Surface Mining Reclamation and Enforcement (OSMRE) has asked me to respond to your January 13, 1987, request for an informal review of an alleged failure to conduct a Federal inspection."

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In this case it is apparent that neither OSM nor appellant complied fully with the procedures set forth in 30 CFR 842.12 and 842.15. The record does not contain appellant's "signed, written statement [following her oral report] giving the authorized representative reason to believe that a violation, condition or practice referred to in § 842.11(b)(1)(i) exists and that the State regulatory authority, if any, has been notified, in writing, of the existence of violation, condition or practice," as required by 30 CFR 842.12(a). The London Area Office to which the request for inspection was made did not send appellant "a description of the enforcement action taken * * * or an explanation of why no enforcement action was taken" within 10 days of its January 9 inspection--or within 10 days of the response to its 10-day notice which it received on February 15 from the Kentucky DSMRE--or an explanation of appellant's right to informal review under 842.15, as required by 30 CFR 842.12(d). Nor, contrary to its assertion that its May 28, 1986, "letter clearly constituted a request for informal review," did appellant ask the Director or his designee to review informally the inaction of the London Area Office or include a "statement of how the person is or may be adversely affected and why the decision merits review," as required by 842.15(a).²⁵ Nor, finally, did the July 1, 1986, letter from the Director of the Kentucky Field Office to appellant's counsel contain a right of appeal to the Office of Hearings and Appeals, as required by 842.15(d).

[1] Nevertheless, we do not believe OSM's motion to dismiss is warranted, either for these defects²⁶ or for the reasons OSM offers in support of it. The Congress intended section 517(h), 30 U.S.C. § 1267(h) (1982), "to provide a speedy, efficient means for citizens who are or may be affected by a surface mining operation to obtain review of a failure to issue a notice or order or to conduct an adequate and complete inspection."²⁷ "This provision could be very useful in avoiding litigation," it observed.²⁸ As noted in *Donald St. Clair, supra*, the Department's actions indicate an intent that all decisions on citizens' complaints be reviewable. When the regulations were revised in 1982, no change was made to restrict the definition of Director in 30 CFR 700.5, nor was any limitation on who could be his or her designee under 30 CFR 842.15 suggested in the preamble to either the proposed or final revisions of the regulation.

The language of the regulations authorizes "an authorized representative of the Secretary" of "the Office" to respond in

²⁵ Response to Motion to Dismiss at 3. As for adverse effect, OSM's May 23, 1985, report refers to meeting "Ms. Hazel King at her home near the site [of the crack]" and states that the mining stops "just short of the houses in the bottom of the valley adjacent to the King property."

²⁶ The failure to specify a right to appeal in an informal review decision does not deprive the Board of jurisdiction. *Donald St. Clair, supra* at 294, 90 I.D. at 501-02. Appellant's May 28, 1986, letter did make clear why it believed action by OSM was required. In the absence of any decision in accordance with 842.12(d), such a statement is sufficient.

²⁷ S. Rep. No. 128, 95th Cong., 1st Sess. 86 (1977).

²⁸ *Id.*

accordance with 30 CFR 842.12 to a citizen's request for an inspection, without specifying any level of OSM. The language also authorizes either "the Director or his or her designee" to "review informally an authorized representative's decision not to inspect or take appropriate enforcement action" and to "conduct the review and inform the person, in writing, of the results of the review" in accordance with 30 CFR 842.15(a) and (b), again without specifying any level for either the "authorized representative" or the "designee." In sum, the regulations authorize decisions by any authorized representative and informal review by the Director or any designee.

Considering the history and language of the regulations and the organization and functions of OSM, we do not believe informal review under 842.15 must be conducted by "the Director or his designee at that level," as OSM suggests. Indeed, given the structure of OSM, it is unclear who a "designee at that level" could be. One instance of informal review is adequate before an appeal to the Board under 43 CFR 4.1281 for the "Secretary's final disposition," as provided in 30 U.S.C. § 1267(h)(1) (1982). Who may conduct that informal review depends—as it does under OSM's current practice under the regulations—on what authorized representative makes the decision under 842.12 and whether the Director has specifically designated anyone to conduct it. In the absence of a specific designation, it may be conducted by an "neutral person" who is "an immediate supervisor of the inspector whose actions are being reviewed."²⁹ We see no need for it to be OSM's chief executive or other policymaking person. OSM's motion to dismiss is therefore denied.

IV. Relief

[2] As of October 22, 1986, OSM reported that the "extremely large size of these cracks and their proximity to a hillside trail render them an extreme danger to the health and safety of the general public." The interim report of the October 16 1986, investigation stated "[t]hese cracks average 4 to 6 feet in width and the * * * deepest portion of the crack was estimated * * * to be in excess of 200 feet." This description and the recommendations that the cracks be fenced and that a reclamation plan to abate the hazard by filling the cracks and restoring the hillside to a safe condition be prepared immediately and implemented immediately upon approval by the State regulatory authority contradict the reasons offered by the Commissioner of the Kentucky DSMRE in his September 10, 1986, letter for not requiring enforcement action.

Based on the record before us, we find that Kentucky has failed to take appropriate action in response to the January 10, 1985, 10-day notice from OSM or to show good cause for such failure. 30 U.S.C. § 1271(a)(1); 30 CFR 843.12(a)(2). If OSM determines that there is a violation of the Act, the State program, or any condition of a permit

²⁹ *Id.*

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which does not create an imminent danger to the health or safety of the public, or cause significant, imminent environmental harms, it shall immediately issue a notice of violation or cessation order, as appropriate. 30 CFR 843.12(a); *see Peabody Coal Co. v. OSM*, 95 IBLA 204, 210-11, 94 I.D. 12, 16 (1987); *Bannock Coal Co. v. OSM*, 93 IBLA 225, 234-35 (1986); *Turner Brothers, Inc. v. OSM*, 92 IBLA 320, 325 (1986).

If it determines that any condition or violation exists which creates an imminent danger to the health or safety of the public, or is causing significant, imminent environmental harm to land, air, or water resources, OSM shall immediately order a cessation of operations or the portion thereof relevant to the condition. 30 U.S.C. § 1271(a)(2) (1982); 30 CFR 843.11(a)(1); *Mid-Mountain Mining, Inc. v. OSM*, 92 IBLA 4, 6 (1986). A condition or violation is an imminent danger to the health or safety of the public if it creates the possibility of substantial injury that a rational person, cognizant of the danger involved, would choose to avoid. 30 U.S.C. § 1291(8) (1982); *Carbon Fuel Co.*, 3 IBSMA 207, 212, 88 I.D. 660, 662 (1981). If OSM finds that the ordered cessation will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm, it shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps OSM deems necessary to abate the imminent danger or the significant environmental harm. 30 U.S.C. § 1271(a)(2) (1982); 30 CFR 843.11(a)(3).

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, OSM's motion to dismiss is denied; the July 1, 1986, decision of the Kentucky Field Office is vacated; and the matter is remanded to OSM for action consistent with the instructions above.

WILL A. IRWIN
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

WM. PHILIP HORTON
Chief Administrative Judge

APPEAL OF DEVIL'S LAKE SIOUX TRIBE

IBCA-1953

Decided: *March 25, 1987*

Contract No. AOOC14201568, Bureau of Indian Affairs.

Sustained.**1. Contracts: Indian Self-Determination and Education Assistance Act: Generally--Contracts: Indian Self-Determination and Education Assistance Act: Governing Law--Contracts: Indian Self-Determination and Education Assistance Act: Modification of Contracts--Contracts: Indian Self-Determination and Education Assistance Act: Regulations--Indians: Indian Self-Determination and Education Assistance Act: Generally**

An Indian tribe dealing with the Government under the Indian Self-Determination and Education Assistance Act is not required to be, or to become, expert in the Bureau of Indian Affairs' complex budgetary scheme. It is BIA's responsibility to see that its administrative requirements are satisfied, and it cannot properly shift that responsibility to the Indian contractor.

2. Contracts: Indian Self-Determination and Education Assistance Act: Contracting Officer--Contracts: Indian Self-Determination and Education Assistance Act: Generally--Contracts: Indian Self-Determination and Education Assistance Act: Governing Law--Contracts: Indian Self-Determination and Education Assistance Act: Modification of Contracts--Indians: Indian Self-Determination and Education Assistance Act: Generally

BIA regulations implementing the Indian Self-Determination and Education Assistance Act provide that proposed contract modifications by an Indian contractor are to be submitted to the contracting officer for approval. If he approves them, the contractor is entitled to rely on that approval, even if BIA later decides that the approval was improper, provided the approval was not clearly contrary to law.

3. Contracts: Indian Self-Determination and Education Assistance Act: Burden of Proof--Contracts: Indian Self-Determination and Education Assistance Act: Contracting Officer--Contracts: Indian Self-Determination and Education Assistance Act: Generally--Contracts: Indian Self-Determination and Education Assistance Act: Governing Law--Contracts: Indian Self-Determination and Education Assistance Act: Modification of Contracts--Indians: Indian Self-Determination and Education Assistance Act: Generally

Arguments by the Government that a contract modification under the Indian Self-Determination and Education Assistance Act was invalid because it was contrary to regulations and because the contractor knew or should have known that it was improper are without merit where the regulations themselves are unclear and where BIA's own contracting officer failed to recognize the impropriety, if any, of the modification. The burden of proving illegality was on the Government.

APPEARANCES: Carl R. McKay, Tribal Chairman, Devil's Lake Sioux Tribe, Fort Totten, North Dakota, for Appellants; Jean W. Sutton, Esq., Department Counsel, Twin Cities, Minnesota, for the Government.

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OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal by an Indian Tribe acting as a Federal contractor under Title I of the Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638, 88 Stat. 2203, Jan. 4, 1975), codified in relevant part at 25 U.S.C. § 450f to 450n (638/the Act). Under 41 CFR 14H-70.003 (1984), 638 contracts are not subject to general Government procurement regulations. The Department's procurement regulations also do not apply to 638 contracts except as specifically made applicable under Part 14H-70, which governs such contracts. Moreover, 638 contracts have been held not to be subject to the Contract Disputes Act of 1978 (41 U.S.C. § 601) (CDA). See *Busby School of the Northern Cheyenne Tribe*, 8 Cl. Ct. 596 (1985). Other Department regulatory provisions applicable to 638 contracts are set forth in 25 CFR, Part 271, particularly Subparts D and E. Decisions rendered by the Board in 638 cases have precedential effect only under the Act, and not with respect to CDA cases.

Disputes arising under 638 contracts awarded by the Bureau of Indian Affairs (BIA) are governed by a disputes clause placed in the contract in accordance with 41 CFR 14H-70.618, which generally provides for appeals to be taken to the Secretary or his duly authorized representative. Pursuant to a delegation of authority from the Secretary, published as FR Doc. 54-10452 in the *Federal Register*, Dec. 30, 1954, at 19 FR 9428, such appeals are decided by this Board. (See also 211 DM 13.4, rev. Feb. 21, 1986, and DM Release No. 2122, Oct. 20, 1978.) In some 638 contract disputes, however, such as here, the contracting officer (CO) notifies the contractor to appeal directly to the Board if it is dissatisfied with the BIA decision.

Not all 638 contract disputes are decided by this Board. If the dispute involves a contract modification that the contractor seeks to have inserted in its contract under 25 CFR 271, Subpart E, for example, and the CO does not agree, the contractor's recourse is an appeal to the Assistant Secretary-Indian Affairs pursuant to 25 CFR 271.81 and 271.82. The same is true of disputes under 25 CFR 271, Subpart F. However, if the Assistant Secretary, for any reason, does not promptly decide the appeal, then under 25 CFR 2.19 it might go to the Interior Board of Indian Appeals, the tribunal which would have had jurisdiction under 25 CFR 471.83 and 471.84 (1979) before BIA changed its regulations in 1980 (45 FR 13451, Feb. 29, 1980). The Board of Contract Appeals has no role in such disputes.

The appeal in this case, relating to a contract change approved by the CO, was timely filed with the Board by the Chairman of the Devil's Lake Sioux Tribe (Tribe/contractor/appellant) from an undated negative decision of the CO transmitted to the Tribe by the Director of the Aberdeen Area Office of the BIA in a letter dated February 14,

1985. The CO's decision denied a line item for \$7,500 claimed by the Tribe for administrative costs under a FY-1984 cost-reimbursable Tribal Work Experience Program contract (Contract No. AOOC 14201568). The costs were previously approved by the CO as part of contract modifications Nos. 4 and 5, dated July 25, 1984, and September 17, 1984, respectively. For the reasons stated below, the Board sustains the contractor's appeal.

Facts

Because of the importance of this case as one of first impression on the question involved, we reprint in full the decision of the CO, which states the facts upon which BIA relies. The appellant does not take issue with the Government's statement of facts, and we adopt it for the purposes of this decision.

Brief Statement of Contractor's Claim

1. The Contractor, by letter of December 10, 1984 (Exhibit 1), transmitted a letter to the Bureau of Indian Affairs, in which they expressed opposition to realignment of \$7,500 against FY-1984 Contract No. AOOC14201568 Tribal Work Experience Program, "Administrative Expense/Pass Through" budget line item.

Findings of Fact

2. The Contracting Officer, having considered the correspondence, Contract Documents, Specifications and other material, pertaining to the claim made by the Contractor, makes the following findings of fact.

1. The contract and its requirements

A. The contract

3. Contract No. AOOC14201568 - Tribal Work Experience Program, FY-1984, was entered into on November 1, 1983 on Standard Form 26 (July edition, Federal Procurement Regulations & (41 CFR) 1-16.101 in the amount of \$83,709.95 (Exhibit 2), with the Devils Lake Sioux Tribe, Fort Totten, North Dakota, hereinafter referred to as the Contractor, and the United States Government, represented by the Area Property and Supply Officer who signed the contract, hereinafter referred to as the Contracting Officer. The Tribal Work Experience Program provides the Indian people the opportunity to participate in community work projects designed by the Tribe, and benefiting the community in general. The participants receive an incentive allowance over and above what is normally allowed under general assistance.

B. Contract and amendments

4. Original Contract No. AOOC14201568 - Tribal Work Experience Program, FY-1984, awarded on November 1, 1983 in the amount of \$83,709.95, with a breakdown of costs as follows:

a. FY-1984 direct cost @ 75% of budget allotment:

EA05-01-3215-2262-25T	\$56,105.00
EA05-01-3215-2262-CAT-25T	6,000.00
EA05-01-3215-2261-25T	20,152.00

b. FY-1984 indirect cost applied @ 70% of 10.3% temporary rate:

EA05-01-3215-2664-25T	1,452.94
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c. Total contract amount

\$83,709.95

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5. Modification No. 1, completed on January 23, 1984, transferred FY-1983 direct cost savings-carryover from Contract No. AOOC14201172 - TWEPA, into FY-1984 Contract No. AOOC14201568 - TWEPA. Modification No. 1 also added FY-1984 negotiated indirect cost agreement and rate of 12.6%, with a breakdown of costs as follows:

a. FY-1984 direct cost @ 75% of budget allotment:

EA05-01-3215-2262-25T	\$56,105.00
EA05-01-3215-2262-CAT-25T	6,000.00
EA05-01-3215-2261-25T	20,152.00

b. FY-1984 indirect cost @ 70% of 12.6% negotiated rate:

EA05-01-3215-2664-25T	1,915.31
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c. FY-1983 Direct Cost Savings:

DA05-01-3215-2262-CAT-25T	1,563.64
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d. Total Contract Amount \$85,773.95

6. Modification No. 2, completed on July 18, 1984, corrected Modification No. 1 by transferring FY-1983 Direct Cost Savings in the amount of \$1,563.64 back to Contract No. AOOC14201172 and reduced FY-1984 Indirect Cost by \$137.91. Breakdown of costs as follows:

a. FY-1984 Direct Cost @ 75% of budget allotment:

EA05-01-3215-2261-25T	\$56,105.00
EA05-01-3215-2262-25T	6,000.00
EA05-01-3215-2262-CAT-25T	20,152.00

b. FY-1984 Indirect Cost @ 70% of 12.6% Negotiated Rate:

EA05-01-3215-2664-25T	\$1,777.40
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c. FY-1983 Direct Cost Savings 0.00

d. Total Contract Amount \$84,034.40

1. \$1,563.64 identified by Program as grant funds, therefore, the funds could not be carried over as savings. The result was to transfer \$1,563.64 back to FY-1983 Contract No. AOOC14201172.

7. Modification No. 3, completed on July 20, 1984, increased FY-1984 Direct Cost and increased FY-1984 Indirect Cost with a breakdown as follows:

a. FY-1984 Direct Cost:

EA05-01-3215-2261-25T	\$66,073.00
EA05-01-3215-2262-25T	7,000.00
EA05-01-3215-2262-CAT-25T	20,152.00

b. FY-1984 Indirect Cost @ 95% of 12.6 Negotiated Rate:

EA05-01-3215-2664-25T	2,412.19
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c. Total Contract amount \$95,637.19

8. Modification No. 4, completed on July 25, 1984 added four (4) new budget line items at the request of the contractor, they were: 1. Office Rent, 2. Telephone, 3. Copy/Postage, and 4. Administrative Expense/Pass through. The Modification request submitted by the contractor came directly to the Contracting Office and was processed as requested without consultation from Area Office Branch of Social Services, with a breakdown of costs as follows:

a. FY-1984 Direct Cost @ 100% Tentative Allocation:

EA05-01-3215-2261-25T	\$66,073.00
EA05-01-3215-2262-25T	7,000.00
EA05-01-3215-2262-CAT-25T	29,927.00

b. FY-1984 Indirect Cost @ 95% of 12.6% Negotiated Rate:

EA05-01-3215-2664-25T	3,582.26
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c. Total Contract amount \$106,582.26

9. Branch of Social Services, Aberdeen Area Office, on August 1, 1984 (Exhibit 3) questioned the appropriateness of "Administrative Expense/Pass through" budget line item added in Modification No. 4 under Direct Cost.

10. U.S. Government Memorandum dated August 3, 1984 from Contracting Officer (Exhibit 4) to Superintendent, Fort Totten Agency, requested the C.O.R. to have the Contractor prepare and submit specific programmatical narrative justification for budget line items added in Modification No. 4.

11. Modification No. 5, completed on September 17, 1984 increased FY-1984 Indirect Cost to 96% funding level and decreased un-used FY-1984 Direct Cost, with a breakdown as follows:

a. FY-1984 Direct Cost:

EA05-01-3215-2261-25T	\$62,073.00
EA05-01-3215-2262-25T	8,000.00
EA05-01-3215-2262-CAT-25T	29,427.00

b. FY-1984 Indirect Cost @ 96% of 12.6% Negotiated Rate:

EA05-01-3215-2664-25T	3,559.49
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c. Total Contract amount \$103,059.49

12. Letter from Contractor, dated September 25, 1984 (Exhibit 5) addressed programmatical narrative justification requested in U.S. Government memorandum dated August 3, 1984.

13. U.S. Government Memorandum, dated October 31, 1984 (Exhibit 6) from Assistant Area Director, Indian Program to the Contracting Officer, made reference to Contractor's letter dated September 25, 1984 with no objection to leaving the following in modification No. 4: 1. Office Rent/Utilities @ \$1,152.00. 2. Telephone @ \$600.00.

3. Copy/Postage @ \$150.00. However, the adding of \$7,500.00 to the contract administrative expense from welfare grant funds (3215-2262) was determined to be unacceptable in keeping with Central Office directive of May 18, 1983, and advised that \$7,500.00 in Modification No. 4 was unallowable and be withdrawn.

14. U.S. Government Memorandum from Area Director dated November 30, 1984 (Exhibit 7) to superintendent, Fort Totten Agency, made reference to Contractor's letter of September 25, 1984 and determined "administrative expense/pass through" budget line item to be disallowed in accordance with Central Office Directive of May 18, 1983, and directed to contractor to submit a modification request to delete "administrative expense/pass through" line item from the budget and submit a revised budget to be modified into the contract.

C. Contract Provisions

15. The provision of the contract on which the contractor bases his claim are contained in Part 300, General Provisions, Paragraph 300.14 - Disputes which in part states: "any dispute concerning a question of fact under this contract which is not disposed of by agreement shall be decided by the Contracting Officer who shall reduce his decision in writing and mail or otherwise furnish a copy thereof to the Contractor."

D. Specific Findings

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16. Central Office Memorandum of May 18, 1983 (Exhibit 8) signed by John Fritz, Deputy Assistant Secretary - Indian Affairs advised our office of the shortfall in contract support funds (Indirect Cost) and allowed tribes to supplement the contract support funds with other surplus program funds. Programs that could not use other surplus program funds to make up the shortfall of Contract Support Funds were: *Social Service Grants, Employment Assistance Grants and other Federal Assistance Grants.*
17. Contract Support Funds were included in the original contract at a temporary rate of 10.3% effective October 1, 1983, (10.3% applied against administrative portion only, 2262-CAT).
18. Modification No. 1, completed on January 23, 1984, changed the temporary rate of 10.3% to a fixed carry-forward rate of 12.6% for the period October 1, 1983 to September 30, 1984, (12.6% applied against administrative portion only, 2262-CAT).
19. Contractor's claim is based on fact that the Bureau approved Modification No. 4, allowing contractor to supplement shortfall of Contract Support funds (Indirect Cost) with Social Service Grant funds.

E. Decision

20. Based upon the findings of fact, above, it is determined that the contractor is responsible for expenditure of funds under the contract and that the contractor be made aware of any changes in regulation which restricts the contractor on how he can expend the funds. It is also determined that the Government erred in allowing the approval of Modification No. 4. Further, we find that the Contractor, on May 8, 1984 was issued a copy of Central Office memorandum dated May 18, 1983 prior to the initial request of Modification No. 4. Therefore, since the regulations set forth in Memorandum of May 18, 1983 prohibits the use of welfare funds to supplement Contract Support (Indirect Cost) funds, we find that the contractor must realign or correct the costs in the amount of \$7,500.00 to Contract No. AOOC14201538.

Arguments by the Tribe

The objection of the Tribe to BIA's proposed disallowance, which led to the CO's formal decision, was stated in a letter to the Area Director from the Tribal Chairman as follows:

I have reviewed all the correspondence regarding modification No. 4 to the TWEPP contract with the Tribal Comptroller. We are both in agreement that modification no. 4 was approved by the Contracting Officer, therefore we should not be required to realign the \$7,500.00 as prescribed in the letter from Wilson Barber, Jr. of November 30, 1984.

Furthermore, we have spent the entire \$7,500.00 as per our last 1034 submitted to the Bureau's financial office.

If you have any questions, please contact me.

After the CO's adverse decision, the Tribe appealed to the Board alleging the following:

The Devils Lake Sioux Tribe, in good faith, submitted a Modification #4, (Exhibit 4) on Contract AOOC14201568, Tribal Work Experience Program to the Bureau of Indian Affairs, Aberdeen Area Office, Aberdeen, South Dakota.

According to Title 25, Section 271.62, "Review and Action by Contracting Officer, upon receipt of the proposed revision or amendment from the Contractor, the Contracting Officer shall proceed as follows:

(B) Within 30 days after the Tribal Governing Body(s) received the notice, if no objections are received, review the proposed revision or amendment and the criteria for declination given in 271.15.

(1) If there are no declination issues, the Contracting Officer will notify the contractor and the Tribal Governing Body(s) in writing of this fact and revise or amend the contract within 30 days of issuing the notice or at their convenience."

The Tribe interprets Section 271.6, B., and (1) as follows:

The Contracting Officer had 30 days to approve or disapprove Modification #4. Especially since the Government has made policy changes in regulation to insure that the Government does not allow the Contractor to utilize Grant Funds for short fall in Contract Support Funds. Furthermore, the Contracting Officer has stated in Exhibit B, page 7, that the Government erred in allowing the approval of Modification #4.

Secondly, the Memorandum dated May 18, 1983 as illustrated in Exhibit B refers to FY 1983 Contract Support Fund Allotment and not to FY 1984 or FY 1985 funds. Furthermore, there has not been any revision to Title 25 which indicate that specific regulations have been changed to accommodate this reallocation policy and procedure.

Also, Title 25, Section 271.54 Contract Funds indicates that "the Tribal Organization shall be entitled to be funded for direct and indirect costs under the contract as follows:

(a) Direct Costs under Contracts for operation of program or parts shall *not* be less than the Bureau would have provided if the Bureau operated the program or part during the Contract."

The Tribe interprets this that it cost the Tribe funds to manage and operate all services contracted by the Bureau of Indian Affairs whether it's contract or social service grant funds. The Tribe still has to operate to pay for these costs.

Arguments by the Government

The Government's answers to appellant's allegations on appeal were as follows:

1. Respondent admits that in Fiscal Year 1984 it contracted with Appellant Tribe for provision of services under the Tribal Work Experience Program pursuant to P.L. 93-638, by Contract No. AOOC14201568.

2. Respondent admits that Appellant's "pass through" of administrative expenses in the amount of \$7,500 was questioned by the BIA Social Services Branch, and that justification for the modification was requested by the Contracting Officer. (See Appeal file, Exhibits 3 and 4.)

3. Respondent admits that in the findings and determinations dated February 14, 1985, the Contracting Officer denied the Tribe's request for acceptance of the \$7,500 "pass through" of administrative expenses as allowable costs under Contract AOOC14201568.

4. Respondent denies Appellant's argument that BIA must approve any contract modification requests without regard to reasonableness, or financial, or accounting requirements.

5. Respondent affirmatively alleges that the section of 25 C.F.R. § 271.54(a) quoted by Appellant, (see letter of April 1, 1985) supports BIA's position that the \$7,500 at issue must be used as *direct* costs, that is payment to contract "clients," and not as *indirect* costs to paid to the Tribe to cover administrative expenses in excess of the allowable percentage for indirect costs of contract support.

On September 10, 1986, the Board issued a call for additional information, noting that the contract modifications containing the administrative expense item had twice been approved by the CO, and that it was not until November 30, 1984, a month after the close of the contract (fiscal) year, that the Acting Superintendent of the Fort Totten Agency was first asked by the Area Director to "assist" the Tribe in preparing another modification request to "realign" the disputed funds.

Government counsel's arguments in response to the Board's questions were essentially the following:

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(1) Changes, especially increases, in contract funding levels cannot be *initiated* and consequently effected by the tribal contractor under 25 CFR 271.62 in contravention of the funding limitations of 41 CFR 14H-70.406 and 70.620(b). BIA's approval of a proposed contract modification by acquiescence or inaction under 25 CFR 271.62 cannot be binding against the Government if it would have the effect of violating an applicable statutory or regulatory limitation. (Italics in brief.)

(2) A mistake by the CO in approving the \$7,500 line item cannot bind the Government if the approval is contrary to 25 CFR 271.54(g) and (h).

(3) The fact that the CO's decision relied on a May 18, 1983, memorandum referring to the previous fiscal year is irrelevant because the source of the requirement in the memorandum is the regulations at 25 CFR 271.54(f), (g), and (h), and Appendix A of 25 CFR Part 276. The point of citing the memorandum in the CO's decision was to show that the Tribe had actual notice of BIA's policy before the funds were disallowed.

(4) 25 CFR 271.54(g) and (h) are determinative of the appeal because "even an official who otherwise has authority cannot approve an action in violation of the regulation relating to the use of program funds." BIA cannot be estopped from disavowing an erroneous decision by the CO (citing *Schweiker v. Hanson*, 450 U.S. 785 (1981), and similar cases).

(5) The contract audit clause at 41 CFR 14H-70.625(d) specifically reserves the right to disallow previously approved expenditures if they do not constitute an allowable cost.

(6) The dispute here relates to the applicability of a regulatory requirement, 25 CFR 271.54(g) and (h), and to the concern that the CO is without authority to allow expenditure of funds not authorized by the regulations, in contravention of a policy expressed by a BIA official with the authority to waive regulatory requirements.

General Legal Background

Some 3-1/2 centuries ago, Hugo Grotius, an eminent Dutch jurist and scholar, is reputed to have opined that the first principle of international law has very little to do with ethnic origins, related language, similar customs, mutual interests, common defense, or even territorial sovereignty.

Rather, the key principle, in Grotius' view, was simply that "Pacta servanda sunt!" *Pacta*, according to the Latin dictionary, meant treaties, pacts, agreements, bargains, and contracts. *Servanda sunt* imports necessity, and meant kept, honored, maintained, preserved. In Grotius' view, sovereign contracting parties acting in relation to each other must behave at least as honorably as private parties; in short, they must do no less than what they have committed themselves to do.

With respect to Indian treaty obligations, the U.S. Supreme Court has said that the Government is "something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286 (1942) at 296-97.

In *Choctaw Nation v. United States*, 318 U.S. 423, decided in 1943, the Supreme Court noted,

Of course, treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties (citing cases). Especially is this true in interpreting treaties and agreements with the Indians; *they are to be construed, so far as possible, in the sense in which the Indians understood them ...*" (Italics added.)

Also in 1942, in *Tulee v. State of Washington*, 315 U.S. 681 at 684-85, the Supreme Court said, "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, *in accordance with the meaning they were understood to have by the tribal representatives* at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people," citing *United States v. Kagama*, 118 U.S. 375, 384 (1885). (Italics added.)

The foregoing cases, as the Supreme Court indicated, did not represent new law. In *Winters v. United States*, 207 U.S. 564 (1908) at 576-77, the Court had said, "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. *And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.*" (Italics added.) Similarly, in *United States v. Nez Perce County, Idaho*, 95 F.2d 232 (1938) at 235-36, the Court of Appeals for the 9th Circuit stated that "Treaties with Indians and acts of Congress relative to their rights in property reserved to them have always been liberally construed by the courts. *The dependent condition of these wards of the Government makes it imperative that doubtful provisions in treaties and statutes be resolved in their favor.*" (Italics added.)

This Board has previously had occasion to recognize that Indian tribes are indeed acting in their sovereign capacities in performing 638 contracts. See *Papago Indian Tribe of Arizona*, 22 IBCA 191, 93 I.D. 136, 86-2 BCA par. 18,859 (1986). Moreover, in entering into contracts under the Act, Indian tribes are undertaking to perform functions that the Government (specifically BIA) might otherwise be required to perform. See, e.g., House Report No. 93-1600, Dec. 16, 1974, to accompany S. 1017, *rptd in 4 U.S. Code Cong. & Ad. News 1974, p. 7777, sec. 102(a).*

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The Office of Management and Budget, in OMB Circular A-87 (46 FR 9548, Jan. 28, 1981), Part X, Cost Principles for State and Local Governments, Item J, "Cost Allocation Plan," has recognized that, even with respect to grant programs, Indian Tribes are the equivalent of State governments (*cf.* par. J-4) and that they are entitled to rely on the Federal agency for proper cost determinations:

6. *Negotiation and approval of indirect cost proposals for federally recognized Indian tribal governments.* The *Federal agency* with the predominant interest in the work of the grantee department *will be responsible* for necessary negotiation, approval, and audit of the indirect cost proposal. [Italics in second sentence added.]

Further, as stated in Felix S. Cohen's *Handbook of Federal Indian Law* (1982 ed.) at 715:

The Indian Self-Determination Act of 1975 was enacted to lessen the Federal domination of Indian Services. It provides that Indian Tribes be allowed under specified circumstances to contract with the Secretaries of the Interior and Health and Human Services to deliver certain services to Indians. *More importantly, the Act seeks to remove many of the administrative and practical obstacles to tribal contracting that seemed to persist under previous legislation.* [Footnotes omitted; italics added.]

Even Cohen's revisers appear to underestimate somewhat the Congressional intent of the Self-Determination Act. On April 21, 1972, Interior Assistant Secretary Harrison Loesch wrote to the Chairman of the Interior and Insular Affairs Committee that S. 3157, then under consideration by the Committee, which *permitted* discretionary contracting by the Secretaries of HEW and Interior, fell "short of what Indians need and want in the way of legislation to enable them to assume control of their destinies." Senate Report No. 92-1001, 92d Congress, 2d Session, July 27, 1972 at 3-6.

The Congress compromised by making contracting mandatory and removing much of BIA's negotiating power over the terms and conditions of 638 contracts--primarily by specifying that the amount of funds provided thereunder should be "not less than the appropriate Secretary would have otherwise provided for his direct operation of the program or portions thereof for the period covered by the contract..." Sec. 106(h), P.L. 93-638; 25 U.S.C. § 450j(h). That section is apparently the statutory basis for the BIA regulation at 25 CFR 271.54(a), which was cited by appellant as relevant to this appeal.

Relevant legislative history, however, does not end here. In September 1982 the Department published draft regulations that would have provided for tribal operation of 688 programs under grant agreements rather than contracts. The proposal generated wide opposition from the Indian community, which saw the revisions as an attempt by the Department to abandon its contracting program and to impose primary financial responsibility for Indian social and welfare programs on the tribes rather than the Federal Government. Previous hearings before the Senate Select Committee on Indian Affairs in April 1982 had elicited the same reaction.

Ultimately, the Department withdrew its proposed regulations, convinced that they would result in fewer programs being operated by the tribes, contrary to the intention of the Act. *See House Report No. 98-611*, Mar. 1, 1984, to accompany S. 1530; *rptd in 2 U.S. Code Cong. & Ad. News*, 98th Cong., 2d Sess. (1984) at 319-22. Thereafter, the Congress enacted P.L. 98-250 (98 Stat. 118, Apr. 3, 1984), 25 U.S.C. § 450e-1, which required the use of contracts unless the Secretary and the tribal organization agreed otherwise.

To summarize, the legislative history of Pub.L. 98-250, in particular, seems to suggest that the Indians opposed the use of grants on the theory that their use would deprive the tribes of their status as independent contractors providing services to the Government under ordinary procurement relationships. On the other hand, the BIA, and the Claims Court in *Busby, supra*, apparently saw the Act merely as a means of assuring greater tribal involvement in the normal operation of Federal financial assistance programs, with all of the applicable Federal fiscal safeguards, including post-performance audits and discretionary funding reductions. *See, e.g.*, 25 CFR 271.1(a).

It is in this complicated historical and legislative context that the appeal before us has arisen.

BIA's Regulations

Illustrative of BIA's regulatory difficulties is the fact that although 41 CFR Part 14H-70, upon which BIA relies heavily in this case, was still contained in the 1984 CFR codification of Title 41, it cannot be found in the 1985 and 1986 CFR editions, even though the agency apparently still considers this regulation to be the primary one governing 638 contracts.

No one contends that the BIA regulations in CFR titles 25 and 41 are simple. While their nearly 900 pages are shorter in length than the Federal Acquisition Regulations (FAR) or the Internal Revenue Regulations, for example, their complexity appears to be greater than even FAR's. BIA makes some attempt at 25 CFR 271.4 to explain this complexity, though we need not set forth that subsection here. Nevertheless, we doubt that anyone could read these regulations for the first time and acquire even a rudimentary understanding of what they require procedurally. To illustrate, we set forth below the full text of a regulation that both parties agree is relevant, *viz.*, 25 CFR 271.54 (1984):

§ 271.54 Contract funds.

The tribal organization shall be entitled to be funded for direct and indirect costs under the contract as follows:

(a) Direct costs under contracts for operations of programs or parts shall not be less than the Bureau would have provided if the Bureau operated the program or part during the contract. Direct costs shall include the Bureau's direct costs for planning, administering, and evaluating the program or part and shall not be used to reduce indirect costs otherwise allowable to the tribal organization.

(b) Direct costs under contracts for operation of programs or parts operated by the Bureau before contract operations shall be not less than the funds that are programmed

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and available for the program or part at the time of the contract application, except as limited in paragraph (g) of this section.

(c) Direct costs under contracts for the operation of programs or parts authorized to be operated by the Bureau, but not operated by the Bureau, for the benefit of the Indians to be served under the contract shall be determined by mutual agreement based on a comparison of similar programs operated by the applicant, the requesting tribe, other tribes, the Bureau, other governmental, public or private organizations.

(d) Direct costs for programs or parts to be contracted at the Agency Office level shall be based on the funds available at that level.

(e) Direct costs for programs or parts to be contracted at the Area Office level shall be based on funds available at that level.

(f) Allowability of costs under contracts shall be determined under Appendix A of Part 276 of this chapter.

(g) Funds provided under contract for direct or indirect costs shall not cause a reduction in funds provided for other programs or parts not under contract, except as agreed to by the affected tribe(s) and within the existing authorities of the Bureau.

(h) Social services grant funds distributed through a contract under this part shall not be considered a direct cost for the purposes of this section.

We cite this regulation particularly because it is typical of those upon which the Government relies; yet it is not in any way either self-contained or self-explanatory. There is simply no apparent way for an Indian tribe relying on this regulation to know at any given time in the fiscal year what the current state of BIA's budget or appropriations might be, much less what increases or reductions might have been agreed to between BIA and any other Indian tribe or tribal contractor. Thus, the Board, like the appellant, cannot regard the authorities cited by the Government as determinative of this appeal.

To ascertain, for example, what BIA means by "direct" and "indirect" costs in § 271.54, one must look to Part 276, Appendix A, entitled "Principles for Determining Costs Applicable to *Grants*" (italics added). The definition of "Direct costs" in Part I, E.1., is reasonably straightforward. However, the definition of "Indirect costs" in Part I, F.1., reads in pertinent part as follows:

Indirect costs are those (a) incurred for a common or joint purpose benefiting more than one cost objective, and (b) not readily assignable to the cost objectives specifically benefited, *without effort disproportionate to the results achieved*.... [Italics added.]

The thrust of this definition would seem to be that if BIA agrees with the expenditure in question, it is an indirect cost. If BIA does not agree, then the cost is not an indirect cost, although the regulation does not make completely clear what it otherwise becomes.

Government counsel also relies on 41 CFR 14H-70.406, entitled Price Negotiation Policies. Since this regulation appears to deal with that precise subject, we fail to see how it helps the Government's case. The strongest provision in favor of the Government would seem to be subsection (c), which states that "When a program proposal is not based on a Bureau budget which has previously been established in the budget process for that program, unit costs and total costs will be subject to negotiation."

However, subsection (d) states emphatically that:

Nothing in this section is to be construed to mean that contracting officers and cognizant program officials are relieved from responsibility for assuring that elements of total contact amounts are reasonable as to unit prices, salary scales, and program requirements. Recognition will be given to the special and unique relationship between the Bureau and tribal organizations under this Act; however, acceptance of proposals, without review, discussion and resolution of differences by negotiation will not be made, except as provided in § 14H-70.408." (Italics added.)

Thus, read as a whole, this regulation places responsibility on BIA, and specifically on the CO, rather than on the tribal organization. Section 70.408 deals with pre-award and post-award audits, but their use is in the context of negotiation and is also the CO's responsibility. In the case before us, there appears to have been no negotiation; the CO simply accepted the tribal proposal as submitted.

Government counsel further relies on 41 CFR 14H-70.620, the changes clause of the contract, and on 70.625(d). The latter subsection has to do with audits and consequent reductions prior to final payment "to the extent that amounts included in the related invoice or vouchers and statement of cost are found by the contracting officer not to constitute allowable cost ..." We read that regulation as pertaining either to costs that were not previously approved by the CO or to funds that were improperly used after his approval. In this case, the CO twice gave prior approval to the administrative costs requested, and there is no indication or allegation that the Tribe did not use the money as it said it would.

Subsection 271.54(g), upon which Government counsel relies most specifically, also appears to be directed to the BIA employees administering the program. But, for someone not at the apex of the funding triangle, it contains little guidance and would seem to completely beg the question of cost allowability in relation to a particular funding request. Paragraph 25 CFR 271.22(c)(1), for example, states in part that, "*If funds are not available at the Agency to adequately finance the proposed contract without significantly reducing services under noncontracted programs or parts of programs, the Superintendent shall so notify the applicant in writing and offer alternative solutions to the funding problem.*" (Italics added.) The notification burden is on BIA, and it is the responsibility of the agency superintendent, not the CO, to make such notification.

Subparagraph (i) of the above paragraph adds that, "*The Bureau may make available additional funds resulting from savings in other Bureau programs, subject to established reallocation or reprogramming procedures.*" (Italics added.) Thus, even in situations where a BIA employee may know all the facts, he is not on safe ground in approving a funding request unless he also knows a great deal about BIA's allocation procedures. *A fortiori*, how is an applicant, which presumably does not know much about either one, to discover where it stands?

Contract revisions or amendments are treated in Part 271, Subpart E. Subsection 271.61(a) notes that any contract may be revised or amended as deemed necessary. Subsection (b) states that the

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contractor shall submit proposed revisions to the CO in the Area Office when the tribe is within the "jurisdiction" of that office. Section 271.62 says that, upon receipt of the proposed revision from a tribe, the CO will review the proposal and, if there are "no declination issues," notify the contractor in writing of the fact and "revise or amend the contract within 30 days..." On the other hand, if there are unresolved declination issues, the CO under Section 271.63 cannot simply refuse to amend the contract; rather, he must prepare a recommendation and send it to the Area Director for further action.

Does that mean that the contractor is entitled to rely at least on the CO's approvals, if not his declinations? The regulations are unclear. The FARs, at 48 CFR 2.101, forthrightly define a CO as "*a person with the authority* to enter into, administer, and/or terminate contracts and make related determinations and findings." (Italics added.) By contrast, BIA, at 41 CFR 14H-70.603(b), defines a CO as "*the person executing* this contract on behalf of the Government, and any other officer or civilian employee who is properly designated as a contracting officer..." (Italics added.) Does BIA's definition intend to suggest that it is the *act of signing a BIA contract* that makes the signer a CO? We do not know. Nor do we know how an Indian tribe would know.

To restate the ultimate question in this case: Is or is not an Indian tribe, acting as a 638 contractor, entitled to rely on a contract modification that has been approved by a CO, assuming that the CO's error, if any, in doing so was not patent? We think it is.

Discussion

Government counsel places great emphasis on cases stemming from the Supreme Court's decision in *Federal Crop Insurance v. Merrill*, 332 U.S. 380 (1947), which held that a person dealing with the Government is not entitled to rely on the oral misrepresentations of one of its agents who lacks actual authority or whose advice is contrary to regulations. The primary case counsel cites is *Schweiker v. Hansen*, 450 U.S. 785 (1981).

We think counsel's reliance is misplaced. These cases stand for the proposition that one cannot rely on the actions or advice of a Government representative who *does not have the authority to act*. They do not stand for the proposition that one cannot rely on the actions of a Government representative who, in law and fact, *does have authority to act for the Government*.

For example, a proper situation in which to rely upon *Federal Crop Insurance* was *Inter-Tribal Council of Nevada, Inc.*, IBCA 1234-12-78, 83-1 BCA par. 16,433 (1983). In that case, after an audit at the end of a Johnson-O'Malley Act education contract, the Tribe contended that it was allowed to retain \$9,030 in unused funds because the Assistant Area Director for Education had authorized it to carry over the funds to contracts in future fiscal years. The Government wanted the money

returned, and the Tribe appealed because it wanted to know on whom it had a right to rely. The Board found that, "The short answer to the question presented is that appellant's reliance on the authority of the Assistant Area Director was misplaced, and it must, therefore, return the unspent funds..." The Board went on to say:

[A]ppellant asserts that there has been no evidence to show that the Assistant Area Director is *not* a CO. The law, however, is that when a contractor relies on the actions of an individual purporting to represent the Government in the administration of a contract and that reliance is later challenged, it is the *contractor's* burden to show that that individual is a CO, not the Government's burden to show he is not.

* * * The facts that the Assistant Area Director for Education was the "boss" for Area education matters, that the CO sought his approval for a contract budget modification, and that he was named as the "contact person" for negotiations for an upcoming contract, are irrelevant in this context. The best that can be said about them is that they are probative of the fact and conclusion that the Assistant Area Director had *apparent* authority here, which we have already noted is insufficient authority for appellant's reliance under the *Federal Crop Insurance* rule. 88-1 BCA at 81,745. [Citations omitted; italics in original.]

Again, the Government's cases, and the Board case cited above, stand only for the proposition that a contractor cannot rely on someone other than the CO; they do not stand for the proposition that a contractor is not entitled to rely on a CO. The present case also involves the issue of an alleged CO mistake, a further question requiring exploration.

In *Broad Avenue Laundry v. United States*, 681 F.2d 746 (Ct. Cl. 1982), the court was faced with the issue of the authority of the CO to make a mistake in a situation where, after the Army had let a firm fixed-price contract, a union representative convinced the Labor Department to approve an increase in prevailing wages for the area involved; and the CO erroneously later agreed to a corresponding increase in the contract price. The CO was under the mistaken impression that a new prevailing wage determination effected a change in Government contracts "by operation of law." Government counsel in that case, as here, relied on the *Federal Crop Insurance* doctrine.

The court said, "We conclude that the act of [the CO], though erroneous, was within the scope of her authority. The Government can be estopped by the promises of an official within the scope of her authority [citing cases]." The court went on to say, "Of course, this cannot be carried too far. The [CO's action] must be within the officer's subject matter jurisdiction. * * * The [action] must not be contrary to any *express* authority limitation." 681 F.2d at 747-49. (Italics added.)

However, as to the Government's contention that the CO's approval was "palpably illegal," the court, in finding for the contractor, said (*ibid.* at 749-50):

* * * We have some doubt whether the palpable illegality of a contract modification would make the modification void, as in that event the requirement of the disputes article would be nullified and the contractor would not be required to continue performance, pending resolution of the dispute by appeal procedure under the contract.

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It may be doubted, therefore, whether a contractor must scrutinize an order for palpable illegality, refuse to perform if it sees palpable illegality, and perform subject to resolution of the dispute on appeal only if the illegality, in its eyes, is not palpable.

Professors Nash and Cibinic discuss this issue in their 1986 volume on Formation of Government Contracts, 2d ed. (Government Contracts Program, Geo. Washington Univ.), pp. 92-104, noting that Government personnel cannot be expected to act only in ways favorable to the United States, although: "In such cases, attempts may be made to avoid the consequences by repudiating or countermanding the agent's acts. There are two major concepts which are invoked to prevent the Government from disowning the agent's acts or agreements thereby making them binding on the Government. These concepts are finality and estoppel." *Ibid.* at 92. After discussing the sources of the doctrine of finality, the authors note that "*The clearest example of a legal rule creating finality is the binding effect on the Government of the acceptance of an offer,*" citing *United States v. Purcell Envelope Co.*, 249 U.S. 313 (1919). *Ibid.* at 94.

In the instant case, the \$7,500 cost in question arose in the context of a modification of the contract proposed by appellant, a proposal which constituted a legal offer in every sense of the word. From a contractual standpoint, it is immaterial that the proposal merely involved administrative expenses; the CO obviously thought that BIA would get some benefit in return for the expenses, or he could not logically or properly have approved them.

The General Services Board recently stated in *Maykat Enterprises*, GSBCA No. 7346, 84-3 BCA par. 17,510 at 87211-12:

It is time to dispel the notion, which GSA here shares with several well-known commentators * * * that the Government, by reason of its sovereign status, somehow enjoys a greater privilege to avoid improvident agreements than do private parties in similar situations.

The Government is bound by those agreements of its agents that are within the scope of their actual authority, even if those agreements were the result of a unilateral mistake of law or fact * * * [citing *Broad Avenue Laundry, supra.*]

* * * We do not afford relief for errors of judgment. *It must be clearly and convincingly established that the bargain the parties made was not the one the parties had intended.* [citing cases] We reform writings, not bargains. [Italics added.]

We think that enough has been said to make clear that what is at issue here does not really involve uncharted ground. Accordingly, it is time to summarize our conclusions with respect to the matter at hand.

Decision

BIA's regulations implementing the Act appear to intersperse various requirements, admonitions, conditions, and qualifications in a manner that is extremely difficult to unravel. It is not surprising if neither the CO nor the Tribe was fully able to adhere to them. Cf. *Broad Avenue Laundry*, 681 F.2d at 747. That fact, however, does not excuse the Government from its bargain; rather, under contract law

principles, the unclear language of the regulations must be construed against the drafters. Moreover, it was *BIA*'s responsibility to see that its administrative requirements were satisfied; it cannot properly shift that responsibility to the Indian contractor. In addition, anyone referring back to the five contract modification summaries in the CO's statement of facts cannot help but wonder if the Tribe was not already thoroughly confused by *BIA*'s first three modifications long before it ever got to the modification (No. 4) which first contained the disputed administrative expense item.

It is not evident to us, and the Government has not proved, that contract modification No. 4 constituted in any way a violation of the funding limitations of 25 CFR 271.54 or 41 CFR 14H-70.406 and 70.620(b). Neither has the Government proved that such expenditures cannot be an allowable cost under 70.625(d). The burden of proof rests with the Government as to both issues because the CO had previously approved the change.

Even if *BIA*'s regulations are crystal clear to the initiated, the issue is not whether *BIA*'s drafters and program people understand them; it is whether the Indians can follow them. In accordance with the unequivocal holdings of the Supreme Court on the subject, we conclude that the appellant cannot be held to such an obscure standard. An Indian tribe dealing with the Government under the Act is not required to be, or to become, expert in *BIA*'s complex budgetary scheme. The burden must be on *BIA* not to approve a particular contract modification that should not be approved. It is not clear, for example, why the notification procedure in 25 CFR 271.22(c)(1), relating to the initiation of contracts, cannot also be followed in connection with later contract modifications which involve funding problems.

Assuming *arguendo*, however, that appellant should be held strictly to the regulations, the clearest portion of those regulations was not 25 CFR 271.54, upon which the Government primarily relies, but 25 CFR 271, Subpart E, upon which appellant primarily relies. The regulations in that subpart state clearly that the CO has the authority to *approve* requested modifications, even though he may not have the authority to *disapprove* them. Where one regulation is both clear and specific, as 25 CFR 271.62(b)(1) is, a contractor is entitled to rely on it over one that is more general and, in this case, quite unclear—*viz.*, 25 CFR 271.54.

In light of the well-established body of law requiring sovereigns to honor agreements with other sovereigns (including "domestic dependent nations"), it is surprising that *BIA* did not consider itself bound by a contract modification that its authorized CO had twice previously approved. Even a private contractor is routinely entitled to rely on a change approved by a CO, provided the approval is not clearly contrary to law. *Broad Avenue Laundry, supra*. Obviously, then, a sovereign Tribe should be entitled to rely on a CO's approval.

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The legislative history of Pub.L. 98-250 (25 U.S.C. § 450e-1) strongly suggests that it would be unjust, if not contrary to the intent of the Congress, for the Indians, who fought vigorously for the right to remain contractors and not grantees, to be denied the right to rely on the one individual with whom all Government contractors are conclusively able to deal; namely, the contracting officer. BIA's own regulations seem to support that result; for 41 CFR 14H-70.620, which prescribes the changes clause to be incorporated into 638 contracts, states: "This contract may be modified or amended on the written request of the contractor to the contracting officer; or when recommended by the contracting officer and with the consent of the contractor..." The contract here *was* so amended, and we hold that BIA is bound by the amendment.

Both BIA and Government counsel make much of the allegation that the contractor knew, or should have known, on the basis of the Assistant Secretary's Memorandum of May 18, 1983, that the CO's approval of the \$7,500 in administrative expenses in connection with modification No. 4 was erroneous. The obvious answer to that allegation (not original with this Board) is that if the error was so obvious, then why didn't the Government's own representative—namely, the CO—recognize it as such? Why is the contractor bound by a standard that does not apply to BIA's own employee? The CO did not merely approve the modification once; he actually approved it twice. Therefore, the Board finds no merit in the Government's contention that the error was so obvious that the resulting contract modification cannot stand.

Accordingly, the appeal is sustained. Appellant is entitled to retain the \$7,500 claimed by the Government.

BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

WILLIAM F. McGRAW
Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

TOHONO O'ODHAM NATION (FORMERLY PAPAGO TRIBE OF ARIZONA) v. AREA DIRECTOR, PHOENIX AREA OFFICE, BUREAU OF INDIAN AFFAIRS¹

15 IBIA 147

Decided March 31, 1987

Appeal from a decision of the Area Director, Phoenix Area Office, Bureau of Indian Affairs, concerning the use of program funds to pay BIA's monitoring and technical assistance costs for a contract under the Indian Self-Determination Act.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

The Board of Indian Appeals has jurisdiction pursuant to 25 CFR Part 2 over some decisions rendered by Bureau of Indian Affairs officials in connection with contracts under the Indian Self-Determination Act, 25 U.S.C. §§ 450f-450n (1982), despite the special appeal procedure in 25 CFR Part 271.

2. Administrative Procedure: Administrative Review--Board of Indian Appeals: Generally

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review.

3. Appropriations--Bureau of Indian Affairs: Generally--Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

Sec. 106(h) of the Indian Self-Determination Act, 25 U.S.C. § 450j(h) (1982), does not preclude the use of program funds to pay costs incurred by the Bureau of Indian Affairs in monitoring and providing technical assistance for a contract under the Act.

APPEARANCES: Dabney R. Altaffer, Esq., Tucson, Arizona, for appellant; Robert Moeller, Esq., Office of the Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for appellee.

**OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE VOGT
INTERIOR BOARD OF INDIAN AFFAIRS**

Appellant Tohono O'odham Nation challenges a November 21, 1984, decision of the Area Director, Phoenix Area Office, Bureau of Indian Affairs (appellee; BIA) affirming the decision of the Papago Agency Superintendent (agency; Superintendent), to retain \$39,300 of the tentative amount of \$642,000 allocated to appellant's FY 1985 Indian Self-Determination Act (P.L. 638)² contract for social services. The

¹ In pleadings and previous orders in this case, the appellee has been identified as the Agency Superintendent, Papago Agency, Bureau of Indian Affairs. From the briefs and exhibits filed by the parties, it is apparent that the decision appealed to the Board was issued by the Phoenix Area Director.

² Title I, Indian Self-Determination and Education Assistance Act, Jan. 4, 1975, 88 Stat. 2203, 2206, P.L. 93-638, 25 U.S.C. §§ 450f-450n (1982). All references to the United States Code are to the 1982 edition.

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amount retained was to be used for contract monitoring and technical assistance. For the reasons discussed below, the Board affirms that decision.

Background

On May 2, 1984, the Superintendent wrote to appellant concerning deadlines for appellant's FY 1985 P.L. 638 contract and grant applications and the tentative funding levels for its FY 1985 P.L. 638 programs. An enclosure with the Superintendent's letter listed the programs and the funding levels for each. For the social services program, the enclosure stated that the tentative FY funding level was \$642,000, less a monitoring cost of \$39,300, for a revised funding level of \$602,700. Appellant states that it appealed this letter to appellee; the record does not disclose what became of this appeal.³

On October 2, 1984, the Superintendent again wrote to appellant concerning its social services program. That letter states in relevant part:

Please be advised that the Papago Agency tentative FY 1985 base for its Social Services Program is \$642,000.00. The Papago Agency is retaining \$39,300.00 of the above amount for contract monitoring and technical assistance. The remaining amount of \$602,700.00 is available for direct costs for the Tribe to recontract its Social Services Program for FY 1985. Please resubmit a new budget and budget justification in the amount of \$602,700.00 for direct administrative costs.

By letter dated November 1, 1984, appellant appealed to appellee, arguing that the retention of funds for monitoring and technical assistance violated section 106(h) of P.L. 638, 25 U.S.C § 450j(h), the intent of Congress, and directives of the Assistant Secretary-Indian Affairs.

On November 21, 1984, appellee affirmed the Superintendent's decision, stating, at page 2 of his letter, that "a portion of program funds are [sic] appropriately used in meeting the Superintendent's responsibility and function." By letter dated December 19, 1984, appellant appealed to the Deputy Assistant Secretary-Indian Affairs (Operations).

Although it disagreed with the Area Director's decision, appellant executed a P.L. 638 social services contract for FY 1985 on November 30, 1984. Section 103 of the contract provides in relevant part:

103. Non-Contracted Portion of Bureau Program(s)

The Government, through the Bureau of Indian Affairs, shall:

103.1 Provide all technical assistance monitoring services to ensure Contractor compliance with the terms of this contract and to ensure the proper delivery of services to individual Indian people.

³ As discussed below, the Board never received BIA's administrative record in this matter.

Appellant stated in both its November 1 and December 19 appeal letters that its acceptance of the contract was under protest.

On November 22, 1985, the Board received a motion from appellant requesting it to assume jurisdiction over the appeal pursuant to 25 CFR 2.19.⁴ On November 25, 1985, the Board made a preliminary determination that it had jurisdiction and requested the administrative record. On January 17 and April 11, 1986, the Board made subsequent requests for the record. Finally, on June 13, 1986, the Board docketed the appeal without the record, again requested BIA to forward the record, and advised the parties that, if the record was not forwarded, a decision or order would be rendered on the basis of the record created before the Board by the parties' filings.

The Board has never received the administrative record. It has, however, received briefs and exhibits from appellant and appellee.

Contentions of the Parties

Appellant's arguments before the Board are essentially the same as those it made in earlier stages of this appeal. It argues that BIA improperly withheld \$39,300 of program funds allocated to the agency for FY 1985 from appellant's P.L. 638 social services contract. It contends that BIA program funds may not be used to pay BIA's costs in monitoring performance of P.L. 638 contracts; rather, these costs must be paid from BIA's budget for administration. In support of its position, appellant relies on section 106(h) of P.L. 638, 25 U.S.C. § 450j(h), which provides:

The amount of funds provided under the terms of contracts entered into pursuant to sections 450f and 450g of this title [relating to contracts by the Secretary of the Interior and the Secretary of Health and Human Services] shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract: *Provided*, That any savings in operation under such contracts shall be utilized to provide additional services or benefits under the contract.

Appellant also cites statements from the legislative history of P.L. 638, appearing in S. Rep. No. 682 and H.R. Rep. No. 1600, 93rd Cong., 2nd Sess. (1974), which essentially reiterate the language of section 106(h), and a 1982 statement of the Deputy Assistant Secretary-Indian Affairs (Policy) acknowledging the responsibility of BIA employees to monitor P.L. 638 contract performance.⁵

⁴ 25 CFR 2.19 provides in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review functions or the Commissioner] shall:

(1) Render a written decision on the appeal, or

(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

⁵ "We think we are now in a position to have contract monitoring and compliance under control with existing staff levels by simply demanding that the COR's and GOR's do their job and that we are able to account for that. * * * If you are line office, you are a superintendent and line officer in this organization. You are responsible for making sure that those contracts and grants are monitored in your agency and under your jurisdiction and reporting in on a quarterly basis the program that they are having and/or the difficulties so that the proper technical assistance can go forward." (Italics supplied by appellant.) Appellant identifies the statement as having been made at hearings before the Senate Select Committee on Indian Affairs, but gives no citation.

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Appellant further submits a statement from the House report on Department of the Interior appropriations for FY 1985: "The [House] Committee [on Appropriations] notes that \$925,000 is included for 93-638 oversight/cost determination activities. The Committee intends that no additional funds be assessed from 93-638 contract funds for oversight or monitoring purposes." H.R. Rep. No. 886, 98th Cong., 2nd Sess. 51 (1984). Appellant states that the committee's remark was made in response to appellant's complaint to the committee regarding BIA's position on the matter at issue here.

Appellee argues that the Superintendent's decision was a tentative planning decision which was not implemented, and that the facts upon which the appeal is based are therefore obsolete, making the appeal moot. He states that the final funding for the agency social services program for FY 1985 was reduced from the tentative amount of \$642,000 to \$629,300, and that the amount finally contracted to appellant, after three modifications to the original contract, was \$631,189, almost \$2000 more than the agency program funding level. Appellee submits an affidavit from a Phoenix Area program analysis officer which states in relevant part:

The decision of the Superintendent to withhold \$39,300 from the Papago Agency tentative FY 1985 base for Social Services administration had no effect on the amount of \$629,300 which was finally allocated to the Papago Agency Social Services Program. In other words, the Superintendent's decision to withhold \$39,300 was a local decision based on tentative funding levels and was not a factor in the amount finally allocated for the agency's Social Services Program.

He argues therefore that no reduction in appellant's P.L. 638 contract funds actually occurred, despite the Superintendent's announced intent to retain funds for monitoring and technical assistance, and consequently the Board need not decide the legality of the Superintendent's decision to retain funds.

Appellee argues that the House Appropriations Committee report language relied upon by appellant, relating to FY 1985 appropriations for P.L. 638 oversight and cost determination activities, was not directed to the monitoring costs incurred in the day-to-day monitoring by BIA field personnel but, rather, concerned a newly established office in BIA. In support of this argument, he submits an excerpt from the BIA budget justification for FY 1985 describing the new program and requesting an appropriation of \$925,000 to fund it. Appellee further argues that \$925,000 would be insufficient to fund performance monitoring of hundreds of P.L. 638 contracts throughout the country.

Finally, appellee argues that retention of program funds for monitoring purposes is permissible. He states at page 5 of his brief:

In fact when the BIA operates a program the expense of monitoring performance is paid for by program funds. The fact that a tribe contracts a program should not require the BIA to go to other sources to pay for monitoring. Implicit in the BIA's responsibility to oversee the expenditure of program funds is the authority to retain moneys in order to do so.

In its reply brief, appellant argues that the controversy is not moot because appellee's decision and his filings in this appeal express his policy to continue to withhold program funds to cover BIA's monitoring costs. Appellant also repeats its argument that the House Appropriations Committee statement in H.R. Rep. No. 886, *supra*, precludes the withholding of program funds for monitoring purposes.

Jurisdiction

[1] Although no party has raised the issue, the Board must consider whether it has jurisdiction over this appeal in light of 25 CFR Part 271, Subpart G, which sets out an appeal procedure, not including appeals to the Board, for at least some P.L. 638 contracting decisions. 25 CFR 271.81 provides for appeal of Area Directors' decisions to the Commissioner,⁶ and for informal conferences and formal hearings if requested by a tribal organization. 25 CFR 271.82 provides for appeal of the Commissioner's decisions to the Assistant Secretary-Indian Affairs. Neither section specifies the kinds of decisions which are subject to this appeal procedure.⁷ Arguably, any Area Director's decision made during the contract negotiation process, including the decision on appeal here, is subject to the appeal procedure set out in 25 CFR Part 271, Subpart G, rather than 25 CFR Part 2, BIA's general appeal procedure.⁸ On the other hand, the procedure in Part 271, Subpart G, may have been intended to apply only to the specific decisions identified elsewhere in Part 271 as subject to the appeal procedure, e.g., decisions to decline to contract or amend a contract, to reassume, or to cancel a contract,⁹ leaving other decisions subject to Part 2.

The Board would normally be reluctant to interpret this regulation, with regard to the intended appeal procedure for decisions such as the one now before it, without briefing from the parties. However, while this appeal was pending, the Board received a copy of an October 22, 1986, decision of the Assistant Secretary-Indian Affairs, which involves the identical issue raised in this appeal and which states at page 1 that: "This decision is in accord with provisions of 25 CFR [Part] 2." The Assistant Secretary has thus construed his regulations to mean that appeals from decisions concerning the instant issue fall under Part 2 rather than under the appeal procedure in Part 271. The Board defers to the Assistant Secretary's interpretation of his regulations on this point and therefore finds that it has jurisdiction over this appeal pursuant to 25 CFR Part 2.

⁶ The office of Commissioner of Indian Affairs is presently vacant. Although new delegations of authority to officials entitled Deputies to the Assistant Secretary-Indian Affairs have recently been published in the Departmental Manual, the Board is uncertain as to whether one of these officials now performs the Commissioner's function under 25 CFR 271.81. See 230 DM 2.1 (Feb. 9, 1987).

⁷ Prior to amendment in 1980, Part 271 set out a special appeal procedure for decisions to decline to contract, to decline to amend a contract, and to cancel a contract for cause, and provided that any other decisions could be appealed pursuant to 25 CFR Part 2. 25 CFR 271.82-271.84 (1979).

⁸ Appeals from decisions of contracting officers under executed P.L. 638 contracts are within the jurisdiction of the Interior Board of Contract Appeals. 43 CFR 4.1(h)(1); *Papago Indian Tribe of Arizona*, 22 IBCA 191, 93 I.D. 136 (1986).

⁹ See 25 CFR 271.25, 271.64, 271.74, 271.75.

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Discussion and Conclusions

[2] Appellee argues that the Board should not decide this appeal because it is moot. The Board recently discussed the doctrine of mootness in *Estate of Peshlakai v. Navajo Area Director*, 15 IBIA 24, 32-34, 93 I.D. 409, 413-14 (1986). In deciding to address an issue arguably moot, the Board there invoked the recognized exception to the mootness doctrine which concerns potentially recurring questions raised by short-term orders, capable of repetition, yet evading review. See, e.g., *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). The issue here similarly falls within this exception to the doctrine which normally precludes consideration of moot issues. From the materials before the Board, it appears very likely that the issue will arise again in the Phoenix Area Office. The Assistant Secretary's decision referred to above, and discussed further below, demonstrates that the issue has arisen in at least one other BIA Area Office. Therefore, the Board will proceed to the merits of this case.

[3] Appellant does not contend that BIA may not monitor appellant's contract performance but only that it must do so using funds budgeted for administration rather than for programs. To use program funds for monitoring purposes, appellant argues, runs afoul of section 106(h) of P.L. 638, 25 U.S.C § 450j(h), which provides: "The amount of funds provided under the terms of [P.L. 638] contracts * * * shall not be less than the * * * Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract."

The issue raised in this appeal is, to a great extent, a budgetary issue not easily addressed in the context of an isolated contract.¹⁰ In view of this, the Board reviewed BIA budget justifications and Senate and House Appropriations Committee reports for a number of years, in an attempt to discover the budgetary practice and whether BIA may have made representations to Congress regarding its interpretation of the mandate of section 106(h).

The program entitled "638 Oversight/Cost Determination" appeared for the first time in the FY 1984 budget justification under the activity General Administration. The justification states: "The Assistant Secretary proposes to establish an organizational entity which would devote its total efforts to the oversight and evaluation of the Bureau's P.L. 93-638 contract and grant administration function to assure contract/grant fund accountability, proper delivery of services and

¹⁰ Appellant is the only tribe within the jurisdiction of the Papago Agency. Other agencies serve several tribes. It is easy to imagine an agency where some tribes contract a particular program and others do not, so that BIA program staff would be necessary to administer the program for the noncontracting tribes. If appellant is correct, these program personnel would be precluded from monitoring performance of the same program by the contracting tribes.

improved management control."¹¹ \$680,000 was sought for the program that year. \$925,000 was sought for FY 1985. The FY 1985 budget justification described the program thus:

The staff (professional and clerical support personnel) will be headquartered in Washington, DC, with some specialists duty stationed at Portland, OR; Minneapolis, MN; and Albuquerque, NM in order to identify problem areas early in the contract/grant administration process for which corrective actions can be taken to increase management effectiveness. The staff's oversight and monitoring efforts will permit the Bureau to focus on those aspects of contract/grant administration related to:

- fiscal accountability and control of contract support expenditures;
- proper and prompt preparation and submission of expenditure documents by tribes to meet Federal regulatory requirements;
- proper administration of contract/grant programs by Bureau and tribal field officials;
- the monitoring of expenditures for direct and/or indirect costs under P.L. 93-638 contracts and/or grants; and
- the implementation of GAO and OIG recommendation; and
- modifying, or improving contracting and grants administration;

Through its monitoring and evaluation activities, the staff will provide highly visible support to Bureau and Tribal field management officials in resolving existing problems as well as in identifying potential problem areas so that remedial action be expedited.

(1985 Hearings, Part 2 at 655).

In its FY 1986 budget justification, BIA stated: "In FY 1986, this specific effort will be merged into the total effort to improve all procurement action in the Bureau" (1986 Hearings, Part 2 at 536). The program does not appear in the FY 1987 budget justification.

It is this program which appellant contends was the sole source of funds for monitoring P.L. 638 contracts in FY 1985.¹² However, if this new program was intended to fund all monitoring of P.L. 638 contracts, some discussion of a transfer of the monitoring function should appear in the budget justifications or the congressional reports, since BIA's responsibility for monitoring P.L. 638 contracts clearly existed prior to the institution of this program in FY 1984. There is no such discussion. See, e.g., S. Rep. No. 184, H.R. Rep. No. 253, 98th Cong., 1st Sess. (1983); S. Rep. No. 578, H.R. Rep. No. 886, 98th Cong., 2d Sess. (1984). Rather, the budget justifications describe a program that was apparently intended to improve monitoring, *inter alia*, through establishment of a specialized office to lend assistance to BIA employees in the field as well as to tribes.

A program appearing consistently in the budget justifications since at least FY 1978 is entitled "Contract Support." This program is budgeted under Indian Services, Self-Determination Services, and apparently covers primarily "indirect cost" payments to tribes. The FY 1985 budget justification describes the objective of the program: "To

¹¹ BIA budget justification for FY 1984 at 221, reprinted in *Department of the Interior and Related Agencies Appropriations for 1984: Hearings Before the Subcomm. on the Department of the Interior and Related Agencies of the House Committee on Appropriations*, 98th Cong., 1st Sess., Part 2 at 522 (1983). Hereafter, budget justifications are cited only to the appropriate hearings.

¹² Appellant asserts that language concerning this program in H.R. Rep. No. 886, *supra*, i.e., "The Committee intends that no additional funds be assessed from 93-638 contract funds for oversight or monitoring purposes," resulted from its letter to the House Appropriations Committee concerning the subject of this appeal. Appellant also states that it is unable to locate a copy of its letter. There is no evidence in the record that the House report language did in fact result from appellant's contact with the committee.

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pay tribes and/or tribal organizations for tribal incremental costs incurred as a result of their contracting to operate Bureau programs, and to provide funding for costs such as severance pay and lump sum leave payments relative to displacement of Federal employees because of contracting with Indian tribes and/or tribal organizations." It further states:

The Bureau makes these funds available to tribal contractors in accord with Section 106 (h) of P.L. 93-638 * * * which requires that ". . . the amount of funds provided under the terms of the contracts entered into pursuant to Sections 102 and 108 shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the program"

(1985 Hearings, Part 2 at 531-32).

The FY 1986 budget justification contains similar language. In further discussion of the indirect cost rate, it continues:

For new [¹³] contracts, we project our budget request on the basis of a distribution rate of 15.5%, which is applied to a projected volume of new contracts. This is the Public Law 93-638, Section 106(h) rate. It is the percentage determined, through a FY 1984 study of the total Bureau budget, to be the equivalent of the Bureau's indirect costs and is used for the purpose of meeting the requirements of Section 106 (h). [Italics in original.]

(1986 Hearings, Part 2 at 423).

From these statements, it is apparent that BIA has represented to Congress that it considers the indirect cost payments to tribes to fulfill the mandate of section 106(h).¹⁴ Since Congress has continued to appropriate funds for contract support, it might be reasonable to assume that Congress has acquiesced in BIA's interpretation of the program as fulfilling the requirements of section 106(h). When Congress acquiesces in an interpretation of a statute by the agency charged with its execution, that interpretation normally acquires additional force. *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 381 (1969).

Moreover, except for the short-lived "638 Oversight/Cost Determination" program, no budget item specifically identified with monitoring appears in the budget justifications. Congress clearly expects BIA to monitor P.L. 638 contract performance, as evidenced by appellant's submissions, see n.5 and accompanying text, *supra*, and must be aware that funds to pay for monitoring are included in the BIA budget. Yet it has apparently never required BIA to identify specifically the activities under which it budgets monitoring costs, much less to budget those costs only under administration. From the

¹³ Beginning in FY 1985, at the direction of Congress, contract support funds for existing contracts were merged with program funds. This change was made in an effort to control escalating indirect cost payments. 1985 Hearings, Part 2 at 531-34, 1986 Hearings, Part 2 at 422-23; H.R. Rep. No. 978, 97th Cong., 2d Sess. 20 (1982); S. Rep. No. 184, 98th Cong., 1st Sess. 46 (1983).

¹⁴ Arguably, this representation is inconsistent with 25 CFR 271.54(a), which provides:

"Direct costs under contracts for operations of programs or parts shall not be less than the Bureau would have provided if the Bureau operated the program or part during the contract. Direct costs shall include the Bureau's direct costs for planning, administering, and evaluating the program or part and shall not be used to reduce indirect costs otherwise allowable to the tribal organization." Neither appellant nor appellee discusses this regulation.

materials it has reviewed, the Board believes it is reasonable to conclude that Congress has not, as a matter of course, interpreted section 106(h) to require that BIA budget all its costs for monitoring under administration rather than under the programs.

On October 22, 1986, the Assistant Secretary issued a decision in an appeal from the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) regarding its P.L. 638 contract, in which the issue now before the Board, *inter alia*, was raised.¹⁵ Stating that “[n]othing in P.L. 93-638 or in the FY 1986 Appropriations Bill language for the Bureau specifically precludes the Bureau from retaining a portion of funds appropriated for the GLIFWC for contract administration and monitoring purposes,” the Assistant Secretary found that “the Bureau has authority to withhold funds for program administration purposes, and that the [Minneapolis Area Office] decision to withhold \$19,918 of GLIFWC contract funds was not unreasonable.” The Assistant Secretary therefore affirmed the Minneapolis Area Office’s August 13, 1986, decision with respect to this issue. Because the instant appeal involves policy-related budgetary issues, it is particularly appropriate for the Board to give deference to a decision of the Assistant Secretary-Indian Affairs concerning the same issue. Cf. *Willie v. Commissioner of Indian Affairs*, 10 IBIA 135 (1982); *Kiowa Business Committee v. Anadarko Area Director*, 14 IBIA 196 (1986). Therefore, the Board will defer to the Assistant Secretary’s October 22, 1986, decision. The Board also finds that the Assistant Secretary’s decision is independently supported by the materials it has reviewed for this appeal.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 21, 1984, decision of the Phoenix Area Director is affirmed.

ANITA VOGT
Acting Chief Administrative Judge

I CONCUR:

KATHRYN A. LYNN
Administrative Judge

¹⁵ The decision was appealed to the Board but dismissed for lack of jurisdiction. *Great Lakes Indian Fish & Wildlife Commission v. Assistant Secretary-Indian Affairs*, 15 IBIA 77 (1986), reconsideration denied, 15 IBIA 87 (1987).

April 7, 1987

ANADARKO PRODUCTION CO.

96 IBLA 320

Decided: April 7, 1987

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, segregating noncompetitive oil and gas lease W-87881 and W-96448.

Reversed and remanded.

1. Oil and Gas Leases: Extensions--Oil and Gas Leases: Unit and Cooperative Agreements

Where a lease committed in part to a unit agreement is extended by reason of production at the time of commitment, the segregated nonunitized lease is extended for the life of such production but not less than 2 years from the date of segregation pursuant to sec. 17(j) of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 226(j) (1982).

APPEARANCES: Laura L. Payne, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Anadarko Production Co. (Anadarko) appeals from a September 27, 1985, decision of the Wyoming State Office, Bureau of Land Management (BLM). The BLM decision held (1) that 80 acres of land in oil and gas lease W-87881 had been committed to the Satori Unit Agreement (WY069P56-85U963) effective July 31, 1985, and (2) that the balance of the land in the lease had been segregated into lease W-96448, which will remain in effect until July 31, 1987, and so long thereafter as oil or gas is produced in paying quantities, citing the regulation at 43 CFR 3107.3-2.

In its statement of reasons for appeal, Anadarko contends that lease W-87881 was already in its extended term by virtue of production. Hence, appellant argues the term of lease W-96448 should be coextensive with the term of that lease, i.e., so long as oil and gas is produced in paying quantities but not less than 2 years from the date of segregation, and so long thereafter as oil or gas is produced in paying quantities on the nonunitized lease.

The facts underlying this appeal are straightforward. The lands embraced in lease W-96448 were originally included in lease W-17954, which issued effective May 1, 1969. A portion of the land in lease W-17954 was committed to the Powell II Unit effective November 19, 1974, and the lands outside the unit were segregated into nonunitized lease W-48869. Since this segregation occurred within the primary term of lease W-17954, the term of lease W-48869 remained the same as that of its parent lease, W-17954 (through April 30, 1979).

In 1977, the USA-Dilts #31-1 Well was drilled in the NE 1/4 SW 1/4 sec. 31, T. 40 N., R. 73 W., sixth principal meridian, embraced in lease W-48869, and this well remains in a producing status. The NE 1/4 SW 1/4 sec. 31, T. 40 N., R. 73 W. was committed to the Powell Pressure Maintenance Unit effective September 1, 1983. By decision dated March 7, 1984, the lessee was advised that the nonunitized lands were segregated into lease W-87881. Because the parent lease W-48869 had been extended by production, BLM's decision provided, in accordance with section 17(j) of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 226(j) (1982), and 43 CFR 3107.3-2:

[T]herefore, the non-unitized lease [W-87881] is extended for so long as oil or gas is produced in paying quantities under the unitized lease, or through September 1, 1985, if production ceases prior to that date on the unitized lease.

Thereafter, a portion of the land in lease W-87881 was committed to the Satori Unit effective July 31, 1985. The nonunitized lands were segregated into lease W-96448 and by decision dated September 27, 1985, Anadarko was advised that: "Lease W-96448 will continue in effect, unless relinquished, through July 31, 1987, and so long thereafter as oil and gas is produced in paying quantities." A typewritten notation on the page behind the decision in the case file contained the following analysis which was the apparent basis of the BLM decision: "W 87881 ext thru 9/1/85 and for so long thereafter as W 48869 is [held by production.] W 87881 segr by Satori Unit eff. 7/31/85 while still in definite term (9/1/85); therefore, *W 96448 is not held for so long as W 48869 or W 87881.*" (Italics in original.)

Anadarko argues that the September 27 decision "ignores the fact that the parent Lease is in its extended term by virtue of production and that, therefore, the term of lease W-96448 should be co-extensive with the term of Lease W-87881, but not less than two years from the date of segregation." We agree with Anadarko and reverse BLM's decision.

[1] Section 17(j) of the Mineral Leasing Act provides that where a portion of the land in a lease is committed to a unit agreement, the lease "shall be segregated into separate leases as to the lands committed and the lands not committed as of the effective date of unitization." See 43 CFR 3107.3-2. In addition, the statute provides that "any such lease as to the nonunitized portion shall continue in force and effect for *the term thereof* but for not less than two years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities." 30 U.S.C. § 226(j) (1982) (*italics added*); *see* 43 CFR 3107.3-2. Accordingly, the issue raised by this appeal is whether the term of lease W-87881 at the time of segregation was defined by the life of production or whether it was defined by the statutory minimum extension period generated by the prior segregation.

Appellant argues the statutory phrase "the term thereof" means the "term of the lease as it exists at the time of the segregation, whatever

April 7, 1987

that 'term' may then be," citing *Solicitor's Opinion*, 63 I.D. 246 (1956)¹ and that lease W-87881 was in its extended term by reason of production at such time, notwithstanding the fact the lease was entitled to a minimum statutory extension through September 1, 1985. Anadarko asserts this case is distinguishable from *Conoco, Inc.*, 80 IBLA 161, 91 I.D. 181 (1984).

In *Solicitor's Opinion*, M-36543 (Jan. 23, 1959), at page 1, the Solicitor reaffirmed that the period of extension of the nonunitized portion of a lease, "whether that was a term of years or 'so long as oil or gas [is] produced from the lease,'" would be determined, at the time of segregation, by "whether [the lease] is * * * within a term of years or whether the length of its present term is to be measured by the life of production." In that case, the Solicitor concluded that the lease, at the time of segregation, was within an extended 5-year term and, thus, the extension of the nonunitized portion of the lease was for that fixed term, despite the fact the lease was producing and might be held by production at the expiration of the 5-year term. The Solicitor stated that the production "[did] not convert the fixed term into an indefinite 'so long as' term." *Id.* at 2; see *Conoco, Inc., supra*. However, if the lease was in its extended term by reason of production at the time of segregation by partial commitment to a unit agreement, then both the unitized lease and the segregated nonunitized lease would be subject to extension for the duration of production. *Ann Guyer Lewis*, 66 I.D. 180 (1961); *Solicitor's Opinion*, M-36592 (Jan. 21, 1960); see *Solicitor's Opinion*, 63 I.D. at 246.

It appears from the record that, at the time of partial commitment to the Satori unit and consequent segregation on July 31, 1985, lease W-87881 was held by production, i.e., in its extended term by reason of production in paying quantities. Although the lease would not terminate for cessation of production prior to September 1, 1985, because the lease was entitled to an extension for 2 years from the date of the prior segregation, the fact remains that at the date of partial commitment to the Satori unit, W-87881 was extended by reason of production. In the absence of a cessation of production, the 2-year entitlement did not convert the lease to one with a fixed term. This case is, thus, distinguishable from *Conoco, Inc., supra*, where at the time of segregation by partial commitment to a unit the lease was in its 2-year extended term by reason of drilling over the lease termination date subject to further extension if production obtained as a result of drilling continued in paying quantities past the extended termination date of the lease. Thus, we held in *Conoco*:

¹ The headnote to the *Solicitor's Opinion*, entitled "Extension of the Portion of a Lease Outside of and Segregated as the Result of the Creation of a Unit Plan," explains that the term of the nonunitized lease shall be the "entire term of the lease or the period that the lease had to run, whether that period was definite or *indefinite*, as it existed on the date of the segregation." 63 I.D. at 246 (italics added).

Where production has been obtained on a lease which is in its primary or extended term (other than by reason of production) at the time of commitment of the non-producing portion of the lease to the unit, the lease is still a lease for a term of years and not a lease for an indefinite term governed by the life of production at the time of segregation by partial commitment. *Solicitor' Opinion*, M-36592 (Jan. 21, 1960).

80 IBLA at 166, 91 I.D. at 183-84. Since lease W-87881 was in its extended term by reason of production at the time of segregation by partial commitment to the Satori unit, the term of the segregated nonunitized lease is properly considered to be for the life of such production but not less than 2 years from the date of segregation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded to BLM for further action consistent herewith.

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

WILL A. IRWIN
Administrative Judge

R. W. MULLEN
Administrative Judge

JAMES C. MACKEY

96 IBLA 356

Decided April 10, 1987

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, permanently suspending appellant from employment connected with cultural resources permits on Federal lands.

Motion to strike denied; motion to dismiss denied; decision set aside; hearing ordered.

1. Administrative Procedure: Generally--Appeals: Generally--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Statement of Reasons--Rules of Practice: Appeals: Timely Filing

Unlike the failure to file a timely notice of appeal, failure to file or serve a timely statement of reasons or answer does not deprive the Board of Land Appeals of jurisdiction over an appeal. Under 43 CFR 4.402, failure to file and serve a statement of reasons within the time required only makes an appeal "subject to summary dismissal." The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party.

2. Administrative Authority: Generally--Board of Land Appeals--Bureau of Land Management--Delegation of Authority--Federal Employees and Officers: Generally

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The Bureau of Land Management has no authority to establish appeals procedures for the disposition of matters which are exclusively within the jurisdiction of the Board of Land Appeals, except by duly promulgated regulation.

3. Administrative Procedure: Generally--Appeals: Generally--Rules of Practice: Appeals: Notice of Appeal

It does not matter whether a document filed with the Bureau of Land Management characterizes itself as a request for reconsideration or an appeal. Even though an individual may not characterize the document as an appeal, if the submission challenges the findings of fact or conclusions made by an adverse decision, it must be treated as a notice of appeal.

4. Administrative Authority: Generally--Administrative Procedure: Generally--Appeals: Jurisdiction--Board of Land Appeals--Bureau of Land Management--Rules of Practice: Appeals: Effect of

When a notice of appeal is timely filed, the Bureau of Land Management loses jurisdiction over the case and has no further authority to take any action on the subject matter of the appeal. The relevant case files should then be transmitted to the Board of Land Appeals immediately.

5. Administrative Procedure: Hearings--Federal Land Policy and Management Act of 1976: Hearings--Federal Land Policy and Management Act of 1976: Permits--Rules of Practice: Hearings

BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands for a violation of any term or condition of the instrument only after notice and an opportunity for a hearing, unless BLM determines that an immediate temporary suspension is necessary to protect health or safety or the environment, or that other applicable law contains specific provisions for suspension, revocation, or cancellation of a particular land-use authorization.

APPEARANCES: Roger McDaniel, Esq., Cheyenne, Wyoming, for appellant; Glenn F. Tiedt, Esq., Office of Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

On July 17, 1986, the Wyoming State Office, Bureau of Land Management (BLM), issued a letter decision permanently excluding James C. Mackey "from being involved in any capacity with cultural resource permitted activities on lands administered by BLM in Wyoming." This action was prompted by Mackey's continuing failure to comply with extended deadlines for submitting reports and obtaining curatorial custody of materials pursuant to permit 83-WY-169. Since July 1985, appellant had been under suspension from permits 031-WY-C084 and 032-WY-AR84 for this reason. By letter dated August 11, 1986, Mackey appealed the July 17 decision. BLM acknowledged receipt of Mackey's appeal, but treated it as a request for a meeting between the parties which was scheduled for September. The record contains no document describing what occurred at this meeting, although it apparently took place as planned.

By letter dated November 13, 1986, counsel for appellant reported work required under permit 83-WY-169 had been completed except for the curation of certain items, and that the project was complete to the extent that a bond filed by appellant should be refunded. The letter also expressed the hope "that full permits could be issued to my clients [the several firms with which Mackey had been affiliated], particularly without a limitation that Jim Mackey not be allowed to research." By letter dated December 2, 1986, the State Office refunded appellant's bond, but adhered to its July 17 decision to permanently exclude appellant from work in any capacity with cultural resource permitted activities on lands administered by BLM in Wyoming. A notice of appeal from the December 2 decision, filed on December 23, 1986, contended that BLM's action was taken without "statutory or other lawful authority under the provisions of the Archaeological Resources Protection Act of 1979, [16 U.S.C. § 470aa (1982)] or otherwise." Appellant also requested a hearing pursuant to 43 CFR 4.415.

[1] BLM has moved to dismiss the appeal from the December 2 decision as untimely because the July 17 decision was the dispositive action in this matter. However, BLM now concedes that a timely notice of appeal from the July 17 decision was filed, but moves for dismissal because Mackey's statement of reasons was not filed within 30 days after the notice of that appeal. See 43 CFR 4.412. Appellant in turn has moved to strike BLM's motion as untimely. Both motions are denied. Since the notice of appeal from the July 17 decision was timely filed on August 15, the Board has jurisdiction over this matter. Unlike the failure to file a timely notice of appeal, failure to file and serve a timely statement of reasons or answer does not deprive this Board of jurisdiction. Under 43 CFR 4.402, failure to file a statement of reasons within the time required only makes an appeal "*subject to summary dismissal.*" (Italics added.) The Board avoids procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party. Indeed, in the absence of such a showing, dismissal of an appeal might be deemed an abuse of discretion. See *United States v. Rice*, No. CIV. 72-467, PHX WEC (D. Ariz. Feb. 1, 1974), reversing *United States v. Rice*, 2 IBLA 124 (1971).

Moreover, we regard BLM's motion with disfavor because BLM, not appellant, has failed to follow the Department's regulations or adhere to established practices for processing appeals. The confusion begins with the final paragraph of the State Director's July 17 letter:

Should you wish to dispute the decision made herein, steps for doing so are available in BLM procedures for cultural resource use permits (enclosure 5). Through these procedures, you may submit a letter setting out reasons why you believe our decision should be reconsidered. Alternatively, you may request a conference, to discuss our decision and its basis. Should you be dissatisfied with the outcome of either a review or conference you may request that our decision be reviewed at the next organizational level (i.e., the BLM Director in Washington, D.C.). The State Director's decision shall stand during the course of any higher level review. At any time, formal appeal may be filed with the Interior Board of Land Appeals by following the procedures in 43 CFR, Part 4, Subpart E (enclosure 6).

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What was appellant supposed to do after reading this paragraph and the referenced enclosures? Contrary to the State Director's statement that an appeal to IBLA may be filed "[a]t any time," the rules included in enclosure 6 require an appeal to be transmitted "in time to be filed * * * within 30 days after the date of service" of the decision. 43 CFR 4.411(a). Furthermore, enclosure 5, referred to in the Director's letter, sets forth an internal BLM disputes and appeals procedure which must be exhausted before an appeal to the Board may be taken. Appellant's response to BLM's motion suggests that the August appeal was intended to initiate the described disputes process rather than initiate an appeal to this Board. If the disputes and appeals provisions of enclosure 5 were valid, we would dismiss both the August and December appeals because the described procedures have not yet been exhausted.

[2] BLM, however, has not moved to dismiss the December appeal as premature; on the contrary, the attachment to the State Director's transmittal memorandum and BLM's motion to dismiss both attack the appeal because it comes too late.¹ One must necessarily conclude that BLM's motion to dismiss implicitly concedes the invalidity of the enclosure 5 disputes procedures. We need not rely on such a concession, however, to rule those procedures invalid. Those procedures are not established by regulation, and thus lack the force and effect of law. *See Shell Offshore, Inc.*, 96 IBLA 149, 94 I.D. 69 (1987). They can neither affect the substantive rights of the appellant nor bind this Board. *See Schweiker v. Hansen*, 450 U.S. 785, 789 (1981); *United States v. Kaycee Bentonite Corp.*, 64 IBLA 183, 214, 89 I.D. 262, 279 (1982). The procedures are invalid because they purport to give BLM officials continuing authority over matters which lie exclusively within this Board's jurisdiction under Departmental regulations and by delegation from the Secretary. 43 CFR 4.1, 4.410; 13 DM 111. By virtue of this delegation of authority by the Secretary to the Board, BLM has no authority to establish procedures for the disposition of matters which lie within the jurisdiction of the Board.

[3, 4] Of course, BLM may establish procedures under which it issues an interlocutory decision notifying a party of a *proposed* action which will be taken unless the party submits further information for BLM's consideration. Such a decision would not be subject to appeal to this Board under 43 CFR 4.410 because it would not have adversely affected the party at the time it was issued.² But when a BLM official

¹ The attachment to the transmittal memorandum is not merely a report on the status of the case but states "reasons why * * * the appeal should not be sustained," as provided in 43 CFR 4.414. Although this regulation required the State Director to serve a copy of the attachment upon appellant, the State Director failed to do so. This failure did not prejudice appellant, however. The Solicitor's motion to dismiss essentially incorporates the matter of the attachment, and the motion was served upon appellant.

² For a discussion of the distinction between interlocutory decisions and appealable ones, *see John R. Anderson*, 71 IBLA 172 (1983), especially the concurring opinion of Judge Stuebing at 176-77.

issues a decision which adversely affects a party to the case, as it did here in permanently excluding appellant from working in cultural resources activities on public land, the decision except in limited circumstances is subject to appeal to this Board. 43 CFR 4.410. BLM cannot dispute the fact that the July 17 decision adversely affected appellant.³ Appellant's letter filed on August 15 must be construed as a notice of appeal under 43 CFR 4.411, even though his August 11 letter was clearly intended to initiate the internal BLM disputes process. In *Buck Wilson*, 89 IBLA 143 (1985), we found that it does not matter whether a document filed with BLM characterizes itself as a request for reconsideration or an appeal. Even though an individual may not characterize the document as an appeal, if the suhmission challenges the conclusions or facts of an adverse decision, it should be treated as an appeal. There can be no doubt that Mackey's August 11 letter challenged the conclusion and factual basis of the July 17 decision. When this notice of appeal was filed, BLM lost jurisdiction over the case and had no further authority to take any action on the subject matter of the appeal. *Sierra Club*, 57 IBLA 288 (1981); *James T. Brown*, 46 IBLA 265 (1980); *Alaska v. Patterson*, 46 IBLA 56 (1980).⁴ BLM should have transmitted the relevant case files to this Board immediately upon receipt of tbat document. See *Mobil Oil Exploration & Producing Southeast, Inc.*, 90 IBLA 173, 177 (1986).

Thus, the disputes procedures are invalid because BLM has no authority to issue dispositive decisions which require resort to further review by any official within the Bureau unless otherwise provided by regulation. Under 43 CFR 4.410, any dispositive action by an authorized officer of BLM is subject to review only by this Board, except where a duly promulgated regulation provides otherwise. E.g., 43 CFR 4.470 (providing that appeals from grazing decisions go to an Administrative Law Judge).

[5] BLM has filed no substantive response to appellant's contention that the action taken in the July 17 decision has no basis under the Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa (1982), or other applicable law, nor has BLM filed a specific response to appellant's request for a hearing. Because the July 17 decision permanently excluded appellant from permitted activities on BLM lands, the effect of the decision was to revoke all his existing land use authorizations, and to further indicate BLM's intent to deny pending applications to the extent they involve appellant. Such action at least raises a question as to whether appellant was entitled, as a matter of

³ We note that BLM's disputes and appeals procedures attached to the July 17 decision provide: "The authorized officer's decision shall stand during the course of any higher level of review." This statement appears to conflict with the Department's rules of procedure. "Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal." 43 CFR 4.21(a).

⁴ While it is true that BLM lacks authority to modify a decision under appeal until jurisdiction has been restored by an order of this Board, BLM is not precluded from reconsidering the correctness of its original decision to determine whether to ask that the case be remanded. See *B. K. Killion*, 90 IBLA 378 (1986).

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procedural due process, to a hearing prior to BLM's decision, or at least shortly afterward. *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

We need not revolve this constitutional issue, however, because we hold that appellant had a statutory right to a hearing prior to the issuance of the July 17 decision under section 302(c) of FLPMA, 43 U.S.C. § 1732(c) (1982), which provides as follows:

The Secretary shall insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable State or Federal air or water quality standard or implementation plan: *Provided*, That such violation occurred on public lands covered by such instrument and occurred in connection with the exercise of rights and privileges granted by it: *Provided further*, That the Secretary shall terminate any such suspension no later than the date upon which he determines the cause of said violation has been rectified: *Provided further*, That the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or safety or the environment: *Provided further*, That, where other applicable law contains specific provisions for suspension, revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail.

The permits in this appeal were issued by a delegate of the Secretary and expressly authorized activity on public land administered by BLM. Although the permits in this case do not expressly include the provision required by this statute, this omission does not excuse BLM from adhering to the section 302(c) procedural requirements, if applicable.⁵

The requirements of section 1732(c) are not restricted to instruments issued by BLM under section 1732(b). Inclusion of the fourth proviso makes it clear that Congress intended this requirement to extend to all land use authorizations issued by the Department under any law for lands managed by BLM. Congress provided that the requirements of this section can be avoided only if the law under which the authorization was issued or other law contains *specific* provisions for the suspension, revocation, or cancellation of a land use authorization.

In 16 U.S.C. § 470cc(f) (1982), ARPA provides for the suspension or revocation of permits for certain prohibited acts listed in 16 U.S.C. § 470ee(a), (b), and (c) (1982). However, BLM's action in this appeal was not based on this provision, and ARPA contains no specific provision for suspension and revocation of permits under such circumstances as those cited in BLM's July 17 decision. Although provisions concerning

⁵ It should be noted that the notice and hearing requirement is incidental to the main purpose of the provision, which is to ensure that any land use authorization issued by the Department required compliance with laws including air and water quality standards or implementation plans. As one writer observed:

"It is most important to note that §§ 302(c) and 506 of FLPMA give the Interior Department the clear authority to suspend or revoke land use permits for violations of its regulations as well as those of other federal [and] state agencies, thus becoming a potent tool for the enforcement of pollution standards of other federal and state agencies." Sturgis, *Administrative & Judicial Review of Interior Department Decisions*, 31 Rocky Mtn. Min. L. Inst. § 3.07[1] at 3-47 (1985).

suspension are set forth at 43 CFR 7.10, no specific procedure is provided by the regulation for administrative conduct of permit suspensions or revocations. Nevertheless, contrary to appellant's contention that BLM's action was not specifically authorized by ARPA, this does not mean that BLM is precluded from suspending or revoking a permit if a term or condition is violated. But because ARPA contains no provision for the suspension or revocation of permits under such circumstances as are alleged in this appeal, BLM may take such action only in a manner consistent with the requirements of 43 U.S.C. § 1732(c) (1982), which requires a hearing before permit revocation or suspension. Because no hearing was held prior to the July 17 decision, that decision must be set aside.

The record originally received by this Board on January 5, 1987, consisted only of the case file for Western Research Archaeology's permit 031-WY-C085PR. A file related to permit 83-WY-169 was subsequently furnished the Board. The July 17 decision revokes Mackey's authority under all existing permits, but those case files were not transmitted with the appeal. The December 2 decision makes clear that BLM considered the July 17 decision to be a final disposition of Mackey's interest in pending applications as well. Although the hearing required by section 1732(c) does not pertain to the denial of an application for a new permit, the reasons for the denial are predicated on the revocation of the Mackey's existing permits, an action which could not become effective until after a hearing was held, a decision issued, and any appeal therefrom resolved. See 43 CFR 4.21(a). BLM shall therefore refrain from taking action on pending permit applications involving Mackey until issuance of a final Departmental decision in this matter.⁶

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the matter referred to the Hearings Division for assignment to an Administrative Law Judge, whose

⁶ Furthermore, BLM should note the effectiveness of its July 17 decision was automatically stayed by 43 CFR 4.21(a), the pertinent provisions of which are quoted at n.3, *supra*. BLM may not preclude appellant from continuing work under existing permits issued before the July 17 decision. This regulation does not require BLM to issue new permits to Mackey on pending applications. We recently noted in *Prima Exploration, Inc.*, 96 IBLA 80, 82 (1987):

"The provisions of [43 CFR 4.21(a)] implement 5 U.S.C. § 704 (1982), which provides that a decision constitutes final action for the purposes of judicial review unless the agency requires by rule that an appeal be taken to superior agency authority, and 'provides that the action meanwhile is inoperative.' See *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432 (9th Cir. 1971). As one authority has noted, however: 'The requirement that agency action be inoperative pending required appeals to the agency or to superior agency authority does not require the agency to take positive action for the benefit of an applicant.' *Attorney General's Manual on the Administrative Procedure Act* 105 (1947)." Thus, the fact the July 17 decision is suspended by 43 CFR 4.21(a) does not require BLM to issue new permits to appellant on pending applications.

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decision shall be final unless appealed to this Board pursuant to 43 CFR 4.410.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

GAIL M. FRAZIER
Administrative Judge

KATHRYN A. LYNN
Administrative Judge
Alternate Member

EXXON CORP.

97 IBLA 45

Decided *April 23, 1987*

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, issuing two separate right-of-way grants for the construction and operation of pipelines across Federal lands pursuant to section 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (1982), W-79531(F) and W-87686.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Oil and Gas: Pipelines: Rights-of-Way--Rights-of-Way: Act of February 25, 1920--Rights-of-Way: Oil and Gas Pipelines

Departmental precedent and regulations establish that sec. 28 of the Mineral Leasing Act of 1920, as amended, provides the proper authority for issuance of pipeline rights-of-way for transportation of gas produced from Federal oil and gas leases. Where the pipeline is constructed off-lease, this is true regardless of whether the pipeline facility is characterized as a gathering line or production facility on the one hand or a pipeline for transportation of gas to market on the other hand. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability of Federal oil and gas lessees to develop their leases and market the products of lease development.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Oil and Gas: Pipelines: Rights-of-Way--Rights-of-Way: Act of February 25, 1920--Rights-of-Way: Oil and Gas Pipelines

Sec. 28 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 185 (1982), authorizing rights-of-way for "natural gas" pipelines provides the proper statutory authority for a right-of-way for a pipeline to transport all component gases produced from a well on Federal oil and gas leases, including a pipeline exclusively devoted to transportation of carbon dioxide subsequently separated from the other components of the gas stream emanating from the wellhead. This interpretation of sec. 28 of the Mineral Leasing Act is consistent with the intent of that provision to ensure the ability

of Federal oil and gas lessees to develop their leases and market the products of lease development.

APPEARANCES: Quinn O'Connell, Esq., and Maryann Armbrust, Esq., Washington, D.C., for Exxon Corporation; R. Charles Gentry, Esq., Dallas, Texas, for Yates Petroleum Corporation; William R. Hoatson, Esq., Washington, D.C., for Howell Petroleum Corporation; John J. McHale, Esq., Division of Energy and Resources, Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

INTERIOR BOARD OF LAND APPEALS

Exxon Corp. (Exxon) appeals from separate decisions of the Wyoming State Office, Bureau of Land Management (BLM), concerning issuance of right-of-way grants to Exxon for the construction and operation of two pipelines across Federal lands under the authority of section 28 of the Mineral Leasing Act of 1920 (MLA), *as amended*, 30 U.S.C. § 185 (1982). Right-of-way W-79531(F), the subject of one appeal (IBLA 85-458), authorizes a 28-inch-diameter pipeline to transport "sour"¹ natural gas from a dehydration plant, located on privately owned lands, across intervening Federally owned lands for a distance of approximately 35 miles, to the Shute Creek processing plant that is partially located on Federal lands. At this processing plant, the sour gas will be separated into its various components, which are: 66.0 percent carbon dioxide, 22.0 percent methane, 7.0 percent nitrogen, 4.5 percent hydrogen sulfide, and 0.5 percent helium.

After separation, the methane component will be transported by pipeline for sale. The carbon dioxide separated from the raw gas will also be transported to the point of sale by separate pipeline, a segment of which will be constructed and operated by Exxon. Exxon applied for and was granted right-of-way W-87686 for this carbon dioxide pipeline, which is the subject of the second appeal (IBLA 85-721).

Exxon objects to BLM's issuance of these rights-of-way pursuant to section 28 of the MLA, arguing that the proper authority for both grants is Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1982). In view of the related factual context of these two appeals and the similar issue which they raise, we have consolidated these cases for review by the Board. Variations in the nature of the two pipelines and the consequent effects on the legal analysis required to resolve the issues make it appropriate to analyze each appeal in turn.

¹ "Sour" gas is defined as: "Natural gas contaminated with chemical impurities, notably hydrogen sulphide or other sulphur compounds, which impart to the gas a foul odor. Such compounds must be removed before the gas can be used for commercial and domestic purposes." H. Williams & C. Meyers, *Oil & Gas Terms*, 711 (5th ed. 1981).

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THE SOUR GAS PIPELINE RIGHT-OF-WAY (IBLA 85-458)

The LaBarge project was developed by Exxon to exploit the low-BTU natural gas reserves on its Federal leases located in Sublette County, Wyoming. The LaBarge project involves three Federal oil and gas units for which Exxon is the operator. Exxon, whose working interest ownership in each of the units ranges from 88 to 95 percent, operates the Lake Ridge, Fogarty Creek, and Graphite units for itself and other working interest owners, including Howell Petroleum Corp. (Howell) and Yates Petroleum Corp. (Yates).² As of April 1985, Exxon had drilled 11 wells into the Madison reservoir and was in the process of drilling 8 more, with plans to drill an eventual total of approximately 64 producing wells (Affidavit of Paul W. Henderson, Operations Manager, Appendix to Appellant's Brief at 3).

On September 5, 1984, Exxon filed an amended application for a right-of-way (W-79581(F)) for the construction and operation of a sour or raw gas pipeline which would transport the gas from Exxon's dehydration facility located near the units in Sublette County, Wyoming, to Exxon's Shute Creek gas processing plant located in Lincoln and Sweetwater Counties, Wyoming.³ Exxon states that facilities such as the Shute Creek facility, which is designed to separate the components of the raw gas stream, are normally located on the Federal lease area. However, in this case, consideration of access problems in winter caused by the mountainous topography and environmental impacts (including wildlife habitat and air dispersion characteristics) resulted in selection of the Shute Creek site, which is located 50 miles from the well-field units.

Appellant asserts in the statement of reasons for appeal that section 28 of the MLA only provides authorization for the "transportation of natural gas." Citing *Solicitor's Opinion*, 87 I.D. 291 (1980), Exxon argues that the pipeline at issue is essentially part of a production facility rather than a transportation facility authorized by section 28 of the MLA. Hence, appellant argues the relevant statutory authority must be found in the right-of-way provisions of Title V of FLPMA. Further, Exxon seeks to find support in the distinction drawn by the Federal Energy Regulatory Commission (FERC) (formerly Federal Power Commission (FPC)) between gathering facilities and transportation facilities in defining the term "transportation of natural gas" pursuant to the Natural Gas Act (NGA), 15 U.S.C. §§ 717-717w (1982).

In answer to appellant's statement of reasons, BLM contends the distinction between production and transportation facilities recognized

² According to Table 1 attached to appellant's statement of reasons, Howell and Yates each own an interest in the Fogarty Creek unit, amounting to 4.831 percent and 2.063 percent, respectively. The other units also have minority working interest owners other than Exxon.

³ The gas produced from wells on the units is first transferred by assorted feeder pipelines to the central dehydration plant where water is removed from the gas stream.

by the *Solicitor's Opinion, supra*, was limited to production facilities within Federal oil and gas leaseholds and does not apply to off-lease facilities. BLM cites *Frances R. Reay*, 60 I.D. 366 (1949), in support of its contention that section 28 of the MLA (rather than Title V of FLPMA) provides the appropriate statutory authority for off-lease pipeline rights-of-way without regard to any distinction between production and transportation facilities. The answer of BLM points out that the *Reay* case was discussed in *Solicitor's Opinion, supra*, but not overruled.

Further, BLM asserts that decisions of FERC or the FPC interpreting the NGA are irrelevant to a determination of the proper authority for a pipeline right-of-way grant. Finally, BLM argues the Board should apply the definition of "pipeline" and "production facilities" in the regulations at 43 CFR 2880.0-5(i) and (k) to find section 28 of the MLA provides the proper authority for this right-of-way grant.

Howell and Yates, minority working interest owners in the LaBarge project, have filed petitions to intervene in this appeal. Petitioners assert the fundamental issue is the common carrier status of the pipeline which is mandated by statute if the right-of-way is granted pursuant to the authority of section 28 of the MLA. Petitioners assert that if the pipeline is not operated as a common carrier, it is unlikely they will be able to transport their share of the sour natural gas to the Shute Creek processing plant and market their share of the processed gas and other plant products. Exxon has opposed the petitions. In light of the potential adverse effect of the decision in this case on Howell and Yates, the petitions to intervene are hereby granted.

Exxon was granted a right-of-way for its raw gas pipeline pursuant to section 28 of the MLA, *as amended*, which provides in part:

Rights-of-way through any Federal lands may be granted by the Secretary of the Interior or appropriate agency head for pipeline purposes for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom to any applicant possessing the qualifications provided in section 181 of this title in accordance with the provisions of this section.

30 U.S.C. § 185(a) (1982). Pipelines and related facilities authorized under the terms of section 28 of the MLA, *as amended*, must be operated as "common carriers." 30 U.S.C. § 185(r)(1) (1982). The statutory authorization for rights-of-way found in Title V of FLPMA does not establish such a requirement.

[1] A proper understanding of the *Solicitor's Opinion, supra*, as well as a proper resolution of the issue of the relevant statutory authority for appellant's right-of-way, requires that we examine earlier Departmental decisions. In *Frances R. Reay, supra*, the question of the statutory authority for a right-of-way for an oil pipeline constructed across public lands by an oil and gas lease operator was examined. The pipeline in that case crossed unleased Federal lands, connecting two parcels which were under lease. Appellant contended the pipelines were gathering lines necessary for proper movement of oil produced on

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one part of the lease to another part of the lease and, hence, not pipelines within the scope of section 28 of the MLA subject to common carrier requirements. In rejecting the distinction between gathering pipelines and transportation pipelines for purposes of application of section 28 of the MLA to rights-of-way for off-lease facilities the Department held:

Although the pipe lines involved in the present proceeding may be short in length and necessary to the operation of the lease, nevertheless, the requested right-of-way is "through the public lands," and it is proposed to be used "for the transportation of oil or natural gas." The case comes within the scope of the unambiguous language of section 28.

60 I.D. at 367.

The Department went a step further in *Continental Oil Co.*, 68 I.D. 186 (1961), in considering the authority for rights-of-way for pipelines to connect with an existing casinghead gas gathering line, for a residue gas fuel line, and for a gas collecting system. In this case the public lands which the lines would cross were under lease to appellant under the MLA. Notwithstanding appellant's contention the lines constituted a part of its gathering system, the decision held:

[T]he circumstances present in this case that the lines here under discussion cross only public lands under lease to the appellant and that the appellant contemplates their use only in production operations [do not] alter our conclusion [that section 28 applies]. * * * [Section 28] makes no distinction between lines which cross only lands under lease to the pipeline applicant and lines which may cross lands under lease to others or lines which may cross lands on which there may be no leases nor does it require that the lines be constructed, operated and maintained as common carriers only in the event the lines are to carry oil or natural gas to market.

68 I.D. at 189-90.

It was against this background that the Solicitor examined the applicability of the right-of-way regulations purportedly promulgated pursuant to the authority of section 28 of the MLA to gathering lines and other production facilities "located within the boundaries of oil and gas leases issued under sec. 17 of the [MLA]." *Solicitor's Opinion, supra* at 292. In holding that other provisions of the MLA (sections 187 and 189) give the Secretary broad authority to regulate all on-lease activities by lessees, the opinion held the Secretary had exercised that authority in the form of regulations governing applications for permits to drill and other permits for production and gathering facilities on the leasehold. See 43 CFR Part 3160 (onshore oil and gas operating regulations). This the Solicitor found that permits for on-lease production and gathering facilities were properly authorized pursuant to these regulations rather than regulations promulgated pursuant to section 28 of the MLA. In this context the Solicitor expressly distinguished on-lease production facilities including feeder lines and gathering lines from pipelines or facilities utilized in the transportation of oil and gas, whether located on-lease or off-lease. 87 I.D. at 297-99. In doing so, he necessarily overruled *Continental Oil Co., supra*, to the

extent that opinion had held that a section 28 right-of-way required of a lessee for on-lease production and gathering facilities. However, contrary to appellant's contention, we find nothing in the *Solicitor's Opinion, supra*, to support granting a right-of-way for off-lease oil or gas pipeline facilities, regardless of whether they are part of the production and gathering system, under any other authority than section 28 of the MLA. See *Gas Co. of New Mexico*, 88 IBLA 240 (1985). In this regard, it is important to note the *Solicitor's Opinion, supra*, discussed and followed the earlier decision in *Frances R. Reay, supra*. See *Solicitor's Opinion, supra*, at 299.

The distinction between on-lease and off-lease facilities is recognized in current Departmental regulations governing rights-of-way promulgated pursuant to section 28 of the MLA. Thus, the regulations at 43 CFR 2880.0-5 define the terms "pipeline" and "production facilities" as follows:

§ 2880.0-5 Definitions.

As used in this part, the term:

* * * * *

(i) "Pipeline" means a line of [sic] traversing Federal lands for transportation of oil or gas. The term includes feeder lines, trunk lines, and related facilities, but does not include a lessee's or lease operator's production facilities located on his lease.

* * * * *

(k) "Production facilities" means a lessee's or lease operator's pipes and equipment used on his lease solely to aid in his extraction, storage, and processing of oil and gas. The term includes storage tanks and processing equipment, and gathering lines upstream from such tanks and equipment, or in the case of gas, upstream from the point of delivery. The term also includes pipes and equipment, such as water and gas injection lines, used in the production process for purposes other than carrying oil and gas downstream from the wellhead.

This Board is bound by duly promulgated Departmental regulations. See *Garland Coal & Mining Co.*, 52 IBLA 60, 88 I.D. 24 (1981). Clearly, authority for rights-of-way for pipeline facilities located off-lease is provided by section 28 of the MLA, notwithstanding the pipeline facility is part of a gathering system. See 43 CFR 2882.1.

Further, we find nothing in the subsequently enacted Title V of FLPMA which indicates an intent to authorize rights-of-way for pipelines carrying oil and gas from Federal leases. Section 510(a) of FLPMA provides in pertinent part:

Effective on and after October 21, 1976, no right-of-way for the purposes listed in this subchapter shall be granted, issued, or renewed over, upon, under, or through [public lands and National Forest System lands] except under and subject to the provisions, limitations, and conditions of this subchapter * * *.

43 U.S.C. § 1770(a) (1982). The purposes of Title V are specified at 43 U.S.C. § 1761 (1982). That section provides that the Secretary of the Interior may grant, issue, or renew rights-of-way across public lands for, *inter alia*, "[p]ipelines and other systems for the transportation or distribution of liquids and gases, * * * other than oil, natural gas,

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synthetic liquid or gaseous fuels, or any refined product produced therefrom." (Italics added.)

We agree with counsel for BLM that Congress created two separate legal regimes for pipeline rights-of-way. The legislative history leaves no doubt about this conclusion. The report from the Interior Committee presented in discussion on the Senate floor describes the distinct coverage of the separate right-of-way provisions:

Title IV [of S. 507] provides uniform and comprehensive authority to the Secretary to grant rights-of-way on the national resource lands for such purposes as roads, trails, canals and powerlines. It is patterned after the Act of November 16, 1973 (87 Stat. 576) [amending section 28 of the MLA]; but *it does not provide new authority to grant rights-of-way for oil and gas pipelines as this authority is contained in that Act.* [¶] [Italics added.]

Accordingly, we conclude that right-of-way W-79531(F) for Exxon's off-lease raw gas pipeline over public lands between its dehydration plant and its Shute Creek processing plant was properly issued pursuant to the authority of section 28 of the MLA.

THE CARBON DIOXIDE PIPELINE RIGHT-OF-WAY (IBLA 85-721)

The second pipeline right-of-way appeal before us raises the issue of the proper statutory authority in a slightly different context. Exxon has appealed the issuance of its right-of-way for the carbon dioxide pipeline (W-87686) across Federal lands on the ground that carbon dioxide, a noncombustible gas, is distinguishable from natural gas, which latter substance is a proper subject of a right-of-way under section 28 of the MLA. The right-of-way in this case is exclusively devoted to the transportation of carbon dioxide from Exxon's Shute Creek processing plant to Colorado where the gas is sold to an oil exploration and development firm for use in tertiary recovery operations from a partially depleted oil field.

Appellant points out in its statement of reasons for appeal that section 28 of the MLA literally authorizes the grant of rights-of-way for pipeline purposes for the transportation of "natural gas" or "any refined product produced therefrom." 30 U.S.C. § 185(a) (1982). Title V of FLPMA, on the other hand, authorizes the grant of rights-of-way through such lands for purposes of pipelines for transportation of "gases, other than * * * natural gas." 43 U.S.C. § 1761(a)(2) (1982). Exxon contends "natural gas" is a term of art referring to combustible, hydrocarbon gas as contrasted with pure carbon dioxide which is neither a hydrocarbon nor combustible. Appellant cites the regulation defining "oil and gas" as "oil, natural gas, synthetic liquid or gaseous fuels or any refined product produced therefrom." 43 CFR 2880.0-5(g). Exxon contends the carbon dioxide is not a refined product of natural

* 122 Cong. Rec. 4046 (1976). Title IV of S. 507 corresponds to Title V of FLPMA, P.L. 94-579, enacted Oct. 21, 1976.

gas. It asserts refining refers solely to a process by which the chemical characteristics of petroleum products are changed.

The answer filed by BLM contends the term "natural gas" in section 28 of the MLA refers to gas of a natural origin as opposed to manufactured or artificial gas. Thus BLM contends section 28 of the MLA is applicable to the carbon dioxide pipeline. Counsel for BLM points out the inconsistency in appellant's position that carbon dioxide is gas for purposes of development under an oil and gas lease issued pursuant to the MLA (most of the carbon dioxide entering the pipeline was produced from Federal oil and gas leases) and yet not a natural gas for purposes of a transportation pipeline right-of-way under section 28 of the MLA. BLM asserts the modifier "natural" was added to the term gas in the section 28 right-of-way provisions to distinguish gases produced from oil and gas leases from artificial or manufactured gas. Further, BLM contends the carbon dioxide to be carried by the pipeline qualifies as a refined product produced from the gas generated by the wells. Counsel for BLM notes that although "refined product" is not defined in the statute, the word "refine" is commonly held to mean the removal of impurities, or making something pure.

Howell and Yates, intervenors in the prior appeal regarding the raw gas pipeline, have also petitioned to intervene in Exxon's appeal of the carbon dioxide pipeline right-of-way. Petitioners are the owners of working interests in one of the units from which the gas is developed that is subsequently separated into the carbon dioxide component for the pipeline. Both petitioners assert, in effect, that the real issue here is the applicability of the common carrier requirement of section 28 of the MLA. Petitioners contend they will be unable to transport and market their share of the carbon dioxide produced from the unit since Exxon will refuse to transport their share of the carbon dioxide if not compelled to operate the pipeline as a common carrier as mandated by section 28 of the MLA. In light of the potential adverse effect on petitioners, the petitions to intervene in this appeal are also granted.

[2] This Board has previously examined the question whether the term "gas" as embraced in a reservation of oil and gas under a patent issued pursuant to section 1 of the Act of July 17, 1914, *as amended*, 30 U.S.C. § 121 (1982), includes carbon dioxide as well as combustible, hydrocarbon gas. *See Robert D. Lanier*, 90 IBLA 293, 93 I.D. 66 (1986). In answering that question in the affirmative, the Board reviewed some of the cases cited by appellant in support of the asserted distinction between the terms "gas" and "natural gas."

The court in *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966), decided the question of whether a lease of oil and gas deposits conveyed the right to develop helium, a noncombustible, nonhydrocarbon gas. The court found that gases existing in nature do not fit into mutually exclusive categories such as hydrocarbon and nonhydrocarbon, but rather the various elements are commingled and the hydrocarbon content cannot be produced separately from the other components. *Id.* at 326. Although the court recognized the parties to

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the lease may have contemplated leasing only combustible hydrocarbon gases, the court found it "more realistic to presume that the grant included not only hydrocarbons but other gaseous elements as well." *Id.* at 326. Thus, the court concluded the lease embraced helium gas deposits. The *Navajo* court found significant the case of *Lone Star Gas Co. v. Stine*, 41 S.W.2d 48, 49 (Tex. Comm'n. App. 1931), holding that a grant of "all natural gas" included all substances emerging from the well as a gas.

In *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971), the issue was whether oil and gas leases in the gas fields of the Hugoton area conveyed the helium produced with the hydrocarbon gases. After quoting the district court's definition of gas as embracing any naturally formed aeriform substance indigenous to the underlying reservoir (including helium), *id.* at 711, the court found the issue to be one of intent. Accepting the district court finding that the lessors had no specific intent regarding helium and concluding that helium emerges as a component of the gas produced which necessarily comes from the wellhead and into the pipeline with all the gases which make up the entire stream, the court held general intent would include in the lease all components of the gas produced from the wells. *Id.* at 712-14. Further, in the absence of evidence of a specific intent to the contrary, the court found the general intent to be dispositive. *Id.* at 714.

The Board in *Lanier* found that at the time of passage of the Act of July 17, 1914, carbon dioxide was recognized as an element of natural gas but regarded as an impurity, thus making it unlikely Congress had any specific intent regarding reservation of carbon dioxide since it was not considered to have commercial value. After discussing the *Navajo* and *Northern* cases the Board found, in the absence of any evidence of specific congressional intent to exclude carbon dioxide from the gas reservation, the term "gas" must be construed to include all component parts of the gas produced from the wells and not only hydrocarbon gas. 90 IBLA at 306, 93 I.D. at 73-74.

Although the analysis provided in these cases is not conclusive regarding the intent of Congress in providing authority in section 28 of the MLA for rights-of-way for the transportation of natural gas, it supports a finding of intent to include in the term all components of the gas stream produced from a gas well in the absence of evidence of a specific intent to the contrary. Indeed, it is quite clear that at the time of passage of the MLA of 1920 the interest in gas conveyed by leases issued thereunder was considered to embrace nonhydrocarbon components of gas produced from wells. Section 1 of the MLA, which authorized the leasing of oil, gas, and other mineral deposits owned by the United States, expressly reserved to the United States the ownership of and right to extract helium from all gas produced from leased lands. MLA, ch. 85, § 1, 41 Stat. 437-38 (codified at 30 U.S.C.

§ 181 (1982)). As the Board noted in *Robert D. Lanier, supra* at 307-08, 93 I.D. at 74-75, it would have been unnecessary to exclude the right to extract helium (a nonhydrocarbon) under Federal oil and gas leases if nonhydrocarbons were not subject to the lease. *Solicitor's Opinion*, 88 I.D. 538 (1981).

Notwithstanding appellant's contention that natural gas is a term of art embracing only hydrocarbon gas, the legislative history indicates the intent of Congress in specifying natural gas in section 28 was to clarify the applicability of the right-of-way provision to gas produced from gas wells as distinguished from artificial or manufactured gas. See *Wilderness Society v. Morton*, 479 F.2d 842, 855 n.30 (D.C. Cir.), cert. denied, 411 U.S. 97 (1978). The court based its conclusion on the following dialogue which occurred between Representative Mann and Representative Ferris, the latter being the sponsor of the bill and Chairman of the Committee on the Public Lands:

Mr. Mann. * * * I should like to ask one more question. You do not limit what pipe lines are to carry?

Mr. Ferris. I do not quite get the gentleman's question.

Mr. Mann. You say "for all pipeline purposes." That includes not only oil, but water, and not only natural gas, but artificial gas. Is it not desirable to limit this permission to oil and natural gas pipe lines?

Mr. Ferris. The committee did not intend to do any more than that. Nothing more than that was considered.

Mr. Mann. I will offer an amendment to insert, after the words "pipe-line purposes," the words "for the transportation of oil and natural gas."

Mr. Ferris. The committee did not intend to go any further.

51 Cong. Rec. 15419 (1914), cited in 479 F.2d at 855 n.30.

Thus, the purposes of the addition of the qualifier "natural" to the term "gas" was to distinguish naturally occurring gas produced from the ground through a well from gas which was artificially manufactured. Indeed, this meaning of the term is compelled by the principle of statutory construction which dictates that a provision not be construed in a manner inconsistent with the purposes of the statute. The purpose of section 28 of the MLA was to authorize rights-of-way to ensure oil and gas lessees would be able to transport and market the products developed from Federal oil and gas leases. In concluding that these products include nonhydrocarbon gases such as carbon dioxide, it necessarily follows that the pipeline right-of-way authority must also embrace these gases. Accordingly, we must also affirm the decision of BLM with respect to right-of-way W-87686.

We note this result is also compelled by the language of the statute and the regulation making section 28 of the MLA applicable to rights-of-way for "oil, natural gas, * * * or *any refined product* produced therefrom." 30 U.S.C. § 185(a) (1982) (italics added.) We must reject appellant's attempt to place an extremely narrow definition on the term "refine." The term "refine" is properly stated to mean "to free from impurities." Bureau of Mines, U.S. Department of the Interior, *A Dictionary of Mining, Mineral, and Related Terms* 907 (1968) (definition

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of "refine"). Hence, the decision of BLM must also be affirmed on this ground.

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

C. RANDALL GRANT, JR.
Administrative Judge

WE CONCUR:

FRANKLIN D. ARNESS
Administrative Judge

JAMES L. BURSKI
Administrative Judge

May 6, 1987

ANGELINE GALBRAITH

97 IBLA 132

Decided May 6, 1987

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, rejecting Native allotment application F-14780.

Set aside and remanded; contest ordered.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

The right of an Alaska Native allotment applicant to amend the description on his application where it designates land other than that which the applicant intended to claim at the time of application provided by sec. 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1982), extends both to unsurveyed lands and those lands surveyed prior to enactment of sec. 905(c). This right, however, terminates upon the establishment, by the Secretary, after proper notice, of a date certain on which all requests for amendment must be received or by the adoption, after Dec. 2, 1980, of a plan of survey for either the originally described or the newly described land.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

A Native allotment applicant seeking to amend the description of land contained in his or her allotment application has the burden of establishing that the new description correctly describes the land for which he or she had intended to apply. In adjudicating such requests, BLM is required to consider all evidence in the case file and where such evidence does not clearly establish that the new description represents the original intent of the Native, BLM may not approve the amendment.

3. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Under the Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 to 270-3 (1970), and the implementing regulations, an allotment applicant must show substantially continuous use and occupancy potentially exclusive of others. Using land for a period of a few days each year does not constitute substantially continuous possession or use and is properly categorized as "intermittent use."

4. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Words and Phrases

"Potentially exclusive of others." As used in 43 CFR 2561.0-5, the phrase "potentially exclusive of others" means that the nature of the use must be such that any person on the land, under normal circumstances, knew or should have known that the land was subject to the claim of another. Under this standard, use of land solely for picking berries, without more, cannot be deemed potentially exclusive of others and, therefore, cannot establish a right to a Native allotment.

APPEARANCES: Colleen DuFour, Esq., Alaska Legal Services Corp., Anchorage, Alaska, for Angeline Galbraith; Lance B. Nelson, Esq., Assistant Attorney General, Department of Law, Anchorage, Alaska, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

Angeline Galbraith has appealed from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), dated December 7, 1974, rejecting her Native allotment application F-14780. Since resolution of this appeal requires analysis of an initial question of law, as well as application of the law to the specific facts of this case, we will first briefly sketch the facts to provide a framework for examining the legal question. Thereafter, we will explore the facts in greater detail since they are ultimately determinative of the result reached.

By an application signed August 11, 1971, and received by BLM December 16, 1971, Angeline Galbraith sought a preference right for the allotment of a parcel of land under the now repealed Native Allotment Act of 1906, 34 Stat. 197, *as amended*, 43 U.S.C. §§ 270-1 through 270-3 (1970). The Act granted the Secretary of the Interior authority to allot "in his discretion and under such rules as he may prescribe" up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo of full or mixed blood who resides in Alaska and is the head of a family or 21 years of age. *Id.* Under the Act and implementing regulations, entitlement to an allotment was dependent upon satisfactory proof of substantially continuous use and occupancy of the land for a 5-year period. *Id.*; see 43 CFR 2561.0-5(a); see also *United States v. Flynn*, 53 IBLA 208, 88 I.D. 373 (1981). 43 U.S.C. § 1617(a) (1982). The Native Allotment Act was repealed on December 18, 1971, by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 through 1624 (1982), but applications pending before the Department as of the date of repeal were allowed to proceed to patent.

In her application, appellant claimed seasonal use and occupancy of the land for berrypicking and rabbit snaring since 1955. Her application did not describe the land applied for, but a note dated December 13, 1971, submitted with the application reads as follows:

Angeline Galbraith

Fairbanks (D-3) Quadrangle

Fairbanks Meridian

Beginning at latitude 64°46'36" N., longitude 148°01'23" W., thence S. 20 chains to corner 1, thence W. 25 chains to corner 2, thence N. 20 chains to corner 3, thence E. 25 chains to point of beginning.

Appellant asserts that the description was prepared by an employee of the Bureau of Indian Affairs (BIA) based on her pointing out on a map the position of the land she wished to claim.

On November 22, 1972, BLM issued a decision rejecting appellant's application. The decision stated that the application was for "50 acres, situated in protracted Section 36, T. 3 S., R. 3 W., Fairbanks Meridian, and more particularly described as follows," giving the same

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metes and bounds description as the December 13 note. The reason stated for rejecting the application was that the office records showed the tract had been withdrawn and reserved for use by the War Department by Exec. Order No. 8847, filed August 8, 1941, and was not subject to the initiation of rights under the allotment laws.

By memorandum dated January 31, 1973, BIA informed the Fairbanks District Manager that the latitude and longitude given in its decision "does not lie within protracted section 36, T3N, R3W, Fairbanks Meridian * * * according to the USGS Fairbanks D-3 Quadrangle we have," but within "protracted section 6, T2S, R2W, Fairbanks Meridian." A second memorandum dated November 13, 1973, stated that Angeline Galbraith had come into the BIA office in Anchorage and furnished the following description for her Native allotment application: "Township 2 South, Range 2 West, Fairbanks Meridian, Section 6: W1/2SE1/4, NE1/4SW1/4 NE1/4, S1/2SW1/4NE1/4, E1/2 of Lot 2. (According to USGS Quadrangle Fairbanks D-3)." By decision dated November 21, 1973, BLM vacated its previous decision and reinstated appellant's application.

A field examination of the land described in the November 13 memorandum was conducted on August 31, 1977. Although both appellant and her husband lived in Anchorage at the time, they accompanied the examiner. The examiner found that "the applicant had little knowledge of the parcel location," and that she "did not show the examiner any evidence of use or occupancy." He concluded that she had not met the requirements which would entitle her to approval of her allotment application. No action was taken at that time, apparently because there were a number of conflicting applications for allotment of this parcel and BLM desired to simultaneously adjudicate them.

In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. 2371 (1980). Section 905(a)(1) provided that, with certain exceptions, Native allotment applications which were pending "on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve" were approved on the 180th day following the effective date of the Act. 43 U.S.C. § 1634(a)(1) (1982). Among the exceptions were those of section 905(a)(5) which provided that allotment applications were not approved but were to be adjudicated under the Native Allotment Act if within the 180 days a protest was filed by a Native corporation, the State of Alaska, or a person or entity claiming improvements on the land. 43 U.S.C. § 1634(a)(5) (1982).

Within the 180-day period two private parties filed protests against appellant's allotment application, alleging that appellant had never used the land. BLM notified them that their protests appeared to be proper under ANILCA's requirements. In addition, the State of Alaska

filed a protest claiming the allotment application was for land properly selected by the State prior to the passage of ANCSA and that, therefore, the application had to be adjudicated under the requirements of the Native Allotment Act. The State's protest was summarily dismissed on the grounds that it did not assert either ownership of improvements on the land or the necessity of using the land for access to Federal and State lands, resources located on them, or a public body of water used for transportation as required by section 905(a)(5). BLM also contended that ANILCA did not authorize protests based upon State selection applications.

A second field examination was conducted June 6, 1983. The parcel examined was not that reviewed in the first examination, but rather was lot 5, sec. 6, T. 2 S., R. 2 W., Fairbanks Meridian, a parcel of 30.92 acres located on the western boundary of the section. Appellant and her cousin, Mary McLean, were present. In his report, the examiner noted that the:

Original application was plotted and described in error by BIA--this error placed the parcel in conflict with allotments F-14546 (Vivian Titus) and F-14430 (Florence Keyse). Parcel has now been moved to location the applicant intended to apply for and is no longer in conflict with any adjacent allotments.

Based on his examination and statements by appellant and her cousin made during the examination, the examiner concluded that appellant had complied with the requirements of the Native Allotment Act.

Following the examination, the State of Alaska and the two private parties who had filed protests were notified of the change in the land description in appellant's application and were given 60 days to renew their protests. The private parties and the State filed new protests. The reasons noted by the State for its protest were that the land described in the application was used for an existing road, in particular that a 33-foot section-line easement existed along the western boundary of the parcel.

In response to one of the private protests filed with BLM, a supplemental field examination was conducted on January 13, 1984. As alleged by the protestant, the examiner found that a 60-foot-wide dirt and gravel runway extended approximately 250 feet into the southwest portion of the parcel. He also noted that from the end of the runway a dirt road ran approximately 300 feet to connect with an access road on private property. Additionally he found that the parcel was crossed by a 900-foot-long power transmission line running from the southwest corner of the parcel to its eastern boundary on a line roughly parallel to the runway. The examiner concluded that because the airstrip had been built on Federal lands without authorization and did not predate the Native allotment, the protest should be dismissed and the application processed to certification.

BLM issued an initial decision on June 13, 1984. It first found that, due to the protests which had been filed, the application was not legislatively approved under ANILCA but required adjudication under the Native Allotment Act. It noted that the State's claimed section-line

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easement was not a matter for adjudication by BLM but by State court. In regard to the airstrip, BLM found that although its construction and maintenance indicated less than exclusive use and occupancy of the land by appellant, the area of nonexclusive use was less than one-fourth of the parcel. Based on the provisions of 43 CFR 2561.0-8(b) which provides that substantially continuous use and occupancy of a significant portion of the smallest subdivision of the public land survey entitle an applicant to the full subdivision, BLM concluded that the airstrip would not prevent approval of the allotment. BLM concluded, however, that appellant had not met the requirements of the Native Allotment Act and, therefore, held her application for rejection.

BLM's decision was premised on two separate lines of analysis. First, the decision noted that on March 16, 1964, the State of Alaska had filed a general purposes selection application, F-031959, for all available lands within T. 2 S., R. 2 W., Fairbanks Meridian. The lands within lots 4 and 5 were not then available as they were included within an allowed homestead entry, F-026885. This entry was closed on April 13, 1967, notice of which was posted the following day. The State amended its application to include all available land on June 16, 1972. Since, as of this date, there was no Native allotment application describing the land in lots 4 and 5, the District Office concluded that the State selection properly attached to the land.

This fact was deemed of critical importance to appellant's application since the record indicated that her use and occupancy had been intermittent from 1968 (when she moved to Anchorage) to the present. The District Office noted that this Board had held in *United States v. Flynn, supra*, that the right to a Native allotment vests only upon the completion of 5-years' use and occupancy of the land and the filing of an application therefor. Thus, where qualifying use and occupancy of a parcel of land ceases prior to the filing of an allotment application, the right to the allotment also terminates, regardless of the subjective intent of the Native. Since intermittent use is, by definition, not qualifying use (see 43 CFR 2561.0-5(a)), the District Office held that the 1972 amendment of the State selection application segregated the land and prevented allowance of the allotment.

Independent of the above analysis, the District Office held the allotment application for rejection for another reason. The basis cited was the Board's decision in *Andrew Petla*, 43 IBLA 186 (1979),¹ which had held, in accord with Secretarial Instructions of October 18, 1973, that amendments of an allotment application which result in the relocation of the allotment will not be accepted "unless it appears that the original description arose from the inability to properly identify

¹ Actually, there was no majority opinion in the *Petla* case. The language cited in the text was from the lead opinion which represented the views of only a plurality of the Judges.

the site *on protraction diagrams.*" *Id.* at 193 (italics supplied). Emphasizing the underlined phrase, the District Office noted that, inasmuch as lot 5 had been surveyed in 1919, no amendment could be permitted, as any misdescription could not have resulted from the inability to properly locate the land sought *on a protraction diagram*.

While the decision held the allotment application for rejection, it also afforded appellant 60 days in which to dispute any material facts. Appellant submitted affidavits from herself, her former husband, Peter Galbraith, and her cousin, Mary McLean. Peter Galbraith's statement averred that he recalled that appellant "used to set snares for rabbits during the winter and pick berries during the late summer on the land. She continued to use the land in this manner while we were married and until the late 1970's."²

On December 16, 1984, BLM issued a notice declaring appellant's Native allotment application rejected. The notice again stated that due to the protests which had been filed, the application was not automatically approved under section 905(a)(1) of ANILCA but was required to be adjudicated under the Native Allotment Act. Based on its review of appellant's application, in light of the affidavits submitted, BLM found that she met the use and occupancy requirements of the Act.³ However, it found that the application for lot 5 could not be approved because the final proviso of section 905(c) of ANILCA, which stated that "no allotment application may be amended for location following adoption of a final plan of survey which includes the location of the allotment as described in the application or its location as desired by amendment" (43 U.S.C. § 1634(c) (1982)), limited amendments of allotment applications to unsurveyed lands. BLM also noted that, inasmuch as the lands claimed had been surveyed since 1919, appellant could not show that the error in the original description resulted from the inability to properly identify the site on a protraction diagram.

While the land status of lot 5, the history of appellant's application, as well as BLM's decision raise numerous legal questions and issues, our review is limited to those necessary to dispose of the case. On appeal, both appellant and the State of Alaska have addressed BLM's interpretation of the final proviso of section 905(c) as excluding amendments for surveyed lands. The second and third provisos of 43 U.S.C. § 1634(c) (1982) state:

Provided further, That the Secretary may require that all allotment applications designating land in a specified area be amended, if at all, prior to a date certain, which date shall be calculated to allow for orderly adoption of a plan of survey for the specified area, and the Secretary shall mail notification of the final date for amendment to each affected allotment applicant, and shall provide such other notice as the Secretary deems

² We would note that Peter Galbraith's statements with respect to the land actually used is necessarily secondhand information since appellant, in her affidavit, stated that "even while we were married, Peter did not go with me when I picked berries and gathered food on the land" (Exh. 12 to Statement of Reasons at 2).

³ Apparently, appellant's affidavits had convinced the District Office that her use of the land had not been intermittent during the period between 1968 and the date of her application, thus avoiding the *United States v. Flynn* rule. See discussion, *infra*.

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appropriate, at least sixty days prior to said date: *Provided further*, That no allotment application may be amended for location following adoption of a final plan of survey which includes the location of the allotment as described in the application or its location as desired by amendment. [Italics in original.]

In advancing an interpretation of this language, both sides have quoted portions of a passage of the House-Senate Conference Committee report on ANILCA. It states:

A significant percentage of Alaska Native allotment applications do not correctly describe the land for which the applicant intended to apply. Technical errors in land description, made either by the applicant or by the Department in computing a metes-and-bounds or survey description from diagrams, are subject to correction under authority of Section 905(c). In accordance with the Department's existing procedures for the amendment of applications, subsection (c) requires that the amended application describe the land the applicant originally intended to apply for and does not provide authority for the selection of other land. * * *

In the interest of finalizing plans of survey for Native village and regional corporations, the Secretary, following the required notice, may set a deadline for amendment of applications in a designated area. Allotment applications may not be amended for location following the adoption by the Department of a final plan of survey for the area in which the allotment as originally described or as it would be amended is located.

S. Rep. No. 413, 96th Cong. 2d Sess. 286, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5070, 5230.

In her statement of reasons, appellant contends that under subsection 905(c) an amendment is proper whenever the new description designates the land for which an applicant intended to apply, regardless whether the land newly described has been surveyed. She argues that the subsection's final proviso pertains to the second and preceding proviso permitting the Secretary of the Interior to set a deadline for amending applications in a designated area. The State of Alaska, on the other hand, argues that "diagrams" in the legislative history quoted above refers to protraction diagrams of unsurveyed townships and that "existing procedures" refers to an earlier Secretarial guideline limiting amendments to those based on an error arising from the inability of the applicant to properly identify land on a protraction diagram. Thus, the State supports BLM's conclusion that the final proviso of subsection 905(c) applies only to unsurveyed land.

We do not find the contentions of either party to be persuasive. Nothing in either subsection 905(c) or the legislative history cited to us supports appellant's conclusion that the final proviso pertains only to the preceding one. Indeed, such a reading makes the final proviso unnecessary. The second proviso grants the Secretary authority to set a deadline for amending all allotment applications in a designated area by notice mailed to them at least 60 days prior to the deadline. The purpose stated in the statute for this procedure is to allow orderly adoption of a plan of survey. The legislative history, in turn, indicates that the purpose of the survey would be to identify lands to be conveyed to Native village and regional corporations. Amendments to

allotment applications made after procedures for adoption of a plan of survey have been established would require changes in the plan and could necessitate additional survey work, thereby delaying conveyances, as well as causing additional expense for the Department. In order to expedite conveyances by promoting administrative efficiency, the Secretary was given authority to set a deadline cutting off the amendment rights of applicants for allotments within an area. In such a case, however, the third proviso would have no application because the right to amend would be terminated prior to the adoption of a final plan of survey.

[1] On the other hand, we are not persuaded that the right to amend recognized by the initial language of section 905(c) is limited to unsurveyed lands. No such restriction appears in the statute. As quoted above, Congress was aware that many applications did not correctly describe the land the applicants wished to acquire. The legislative history also indicates that correction of technical errors by amendments was to be permitted under the provision. While we agree that "diagrams" most likely refers to protraction diagrams, we do not believe that the reference, or the sentence of which it is part, indicates an intent to prohibit all amendments under subsection 905(c) where the land had been surveyed prior to the filing of the application. Indeed, if this were the standard, it is impossible to understand how BLM could have permitted Mary C. McLean, appellant's cousin, to amend her description to embrace lot 4, sec. 6, since that land was also surveyed prior to her application and the third proviso prohibits amendments following adoption of a final plan of survey "which includes the location of the allotment * * * as desired by amendment." Yet, as we shall show, *infra*, BLM correctly permitted the amendment and then proceeded to issue the certificate of allotment to McLean (see F-14796).⁴

We interpret section 905(c) as follows. First, an amendment of a Native allotment application describing different lands is permissible only where the new description embraces the lands originally sought. See *Tukle v. Hodel*, No. A85-373 (D. Alaska Apr. 7, 1987). Second, no amendment of an allotment application is allowable in a specific area beyond a date selected by the Secretary after giving at least 60 days notice, regardless of whether or not the application describes the lands originally sought, and independent of the actual adoption of a plan of

⁴ The fact that McLean filed her amendment prior to the passage of ANILCA is of no moment. As both the legislative history and the Fairbanks District Office noted, Congress was essentially ratifying the Department's existing procedures. While it is true that cases such as *Andrew Petta, supra*, spoke of difficulties in determining the precise location of land on protraction diagrams, we are aware of no cases in which the Department held, as a matter of law, that post-ANCSA amendments were prohibited, regardless of whether or not an applicant could show that an error had been made, if the land had been surveyed. While the decision in *Edith Szymy*, 50 IBLA 61 (1980), did note that because the land had been surveyed before the filing of the application the error in description could not have arisen because of an inability to properly identify the situs on a protraction diagram, the decision also noted that "[i]t has not been shown in either case that the reason new lands were applied for was an inability to properly identify the occupied parcel on the original application." *Id.* at 63. This formulation was the ultimate standard which determined the permissibility of an amendment. Obviously, where an applicant has applied for land which was surveyed and then seeks to change the location of that land, such an applicant may have a more difficult problem proving that there was an error in the original application. But, we do not believe that such attempts were totally foreclosed under pre-ANILCA procedures.

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survey. Third, where a plan of survey is adopted subsequent to the enactment of ANILCA, the adoption of such plan of survey cuts off the right to amend the application. In the instant case, since there has been no notice by the Secretary closing the area to further amendment, nor any plan of survey adopted subsequent to ANILCA, amendments to Native allotment applications may be permitted provided the allotment applicant establishes that the new description describes the land originally intended to be claimed. *Pedro Bay Corp.*, 78 IBLA 196, 201 (1984).

[2] That an applicant contends his amendment describes the land originally intended does not, of course, settle the matter. Rather, the question of intent must be determined based on the facts and circumstances reflected in the record. Relevant to the question of intent are the geographic positions of the land described in the original application and the proposed amendment, the relation of the parcels to each other and to any landmarks or improvements, the history of the legal status of the parcels, and the reasons why the original application did not correctly describe the intended land. See *Pedro Bay Corp.*, *supra*. Moreover, an applicant should show how his or her activities since filing the application have been consistent with the present claim that other land was intended. Such factors should clearly indicate a reasonable likelihood that the land described by the amendment was the land intended to be claimed at the time of the original application.

In the instant case, BLM determined that appellant had used and occupied the land in conformity with the 1906 Allotment Act, but did not make a specific finding that she had intended to file for lot 5. The State of Alaska argues that appellant has not shown that she originally intended to apply for lot 5 and, therefore, the amendment should be rejected. Appellant argues that BIA consistently misdescribed the parcel for which she intended to apply and breached its fiduciary duty to Alaskan Natives by failing to properly assist her in making her application. Our review of the record, as we shall show, convinces us that there is substantial room for doubt that appellant originally intended to apply for lot 5. Moreover, even if it is established that such was her original intent, we do not believe that the record as it presently exists justifies BLM's determination that her alleged use constitutes substantial use and occupancy. Accordingly, we will set aside not only BLM's rejection of the amendment but also its finding of compliance with the 1906 Act. On remand, BLM will initiate a contest of appellant's application, under the standards we delineate herein, to determine whether appellant can establish an original intent to apply for the land in lot 5 and, assuming the first question is answered in the affirmative, qualifying use and occupancy of that tract. See *Donald Peters*, 26 IBLA 235, 83 I.D. 308, *sustained on reconsideration*, 28 IBLA 153, 83 I.D. 564 (1976). See also *Pence v.*

Kleppe, 529 F.2d 135 (9th Cir. 1976). We turn now to a consideration of those facts which impel us to our determination.

When appellant originally filed her application with BIA, she was accompanied by her cousin, Mary C. McLean. Both have consistently insisted, and the record tends to support this assertion, that they had intended to apply for adjacent parcels of land. It is important, therefore, to examine both applications in tandem.

Appellant's application originally described a rectangular parcel of land as follows: "Beginning at latitude 64°46'36" N., longitude 148°01'23" W., thence S. 20 chains to corner 1, thence W. 25 chains to corner 2, thence N. 20 chains to corner 3, thence E. 25 chains to point of beginning." (Italics supplied). McLean's description was as follows: "Beginning at latitude 64°36'28" N., longitude 148°03'48" W., thence S. 20 chains to corner 1, thence W. 20 chains to corner 2, thence N. 20 chains to corner 3, thence E. 20 chains to point of beginning." (Italics supplied.) Given 10 minutes of separation, the applications could clearly not be adjacent. What obviously happened was that the BIA officer made a typographical error in the McLean description entering 36' instead of 46'. If this correction were made, the two parcels would abut along McLean's east line and appellant's west line.

This typographical error by BIA was subsequently exacerbated by a plotting error of BLM. In plotting the McLean description, BLM correctly noted that, as described, it embraced land in sec. 36, T. 3 S., R. 3 W. In plotting appellant's description, however, BLM erroneously plotted the land in sec. 30, T. 2 S., R. 2 W. Thus, because of a combination of misdescription by BIA of the McLean application and misplotting by BLM of the Galbraith description, both were placed in areas within a bombing and gunnery range, established in 1941. Accordingly, by decisions dated November 21 and 22, 1972, both applications were rejected.⁵

Subsequent to their rejections, BIA sent separate memoranda, both dated January 31, 1973, to BLM. These memoranda show that BIA recognized two different sources of error. Thus, with respect to appellant's application, BIA correctly noted that BLM had misplotted the allotment:

Subject application was to be rejected on November 22, 1972; however, we would like to point out the possibility of a description error. The Latitude of 64°46'36" N and Longitude 148°01'23" W does not lie within protracted section 36, T3N, R3W, Fairbanks Meridian, at least according to the USGS Fairbanks D-3 Quadrangle we have. *These latitude and longitude appear to be correct; however, we show the parcel as lying in protracted section 6, T2S, R2W, Fairbanks Meridian.* This area is on the Northwest side of the Tanana River. Please review this application. Thank you. [Italics supplied.]

Insofar as the McLean application was concerned, however, BIA recognized that its description was inaccurate. Accordingly, it requested that the description be amended to read as follows:

⁵ BLM compounded its original misplotting error with respect to the Galbraith application by misdescribing its own misplotting in its decision rejecting the Galbraith application. Thus, the decision erroneously stated that the Galbraith parcel was in sec. 36, T. 3 S., R. 3 W., which was where BLM had plotted McLean's parcel, not that of appellant.

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Beginning at a point which is corner no. 3 of the Angeline Galbraith tract and which point is at latitude 64°46'36" N, Longifude 148°02'01", thence south 20 chains to corner no. 1 of this tract; thence west 20 chains to corner no. 2, thence North 20 chains to corner no. 3, thence East 20 chains to the point of beginning. Said parcel containing 40 acres M/L.

Two subsequent notes to the McLean file by BLM officials noted that, since the land described in the amendment was surveyed, it would properly be described as lot 4, sec. 6, T. 2 S., R. 2 W., Fairbanks Meridian. By memorandum dated April 3, 1974, the BIA Realty Officer in Fairbanks concurred that this was the proper description of McLean's desired land. This memorandum also noted that there appeared to be a number of conflicts between Native allotments in the area and suggested that as many applicants as possible accompany the field investigator.

Had no further changes been made in appellant's application, her application would have remained adjacent to McLean's on the east. One problem, however, was that lot 3 (the easterly adjacent parcel) was, in fact, patented land. Whether this fact had any effect on what subsequently transpired is impossible to say. What is clear is that on November 16, 1973, the BIA Realty Office in Fairbanks received a memorandum from the BIA Realty Officer in Anchorage concerning the location of appellant's claim. In this memorandum, the Anchorage Realty Officer stated:

Angeline Galbraith came into our office today and furnished the following description for her Native allotment application:

Township 2 South, Range 2 West, Fairbanks Meridian
Section 6: W 1/2 SE 1/4, NE 1/4 SW 1/4 NE 1/4,
S 1/4 SW 1/4 NE 1/4, E 1/2 of Lot 2.
(According to USGS Quadrangle Fairbanks D-3).

This land is adjacent to Mary McLean's Native allotment according to Mrs. Galbraith.

We are pleased that we could help you on this case.

In transmitting this memorandum to BLM, the Fairbanks Realty Officer obliquely noted, "It appears, however, that there is a breakdown of communications between the individuals and the map plotting. We do not feel there are conflicts on the ground and recommend that the individuals be contacted when Bureau of Land Management makes a field check." The problem which the Realty Officer referenced was the fact that, as now described, appellant's allotment application totally conflicted with two other allotment applications (F-14430 (Florence Keyse) and F-14546 (Vivian Titus)). Moreover, appellant's "amendment" resulted in increasing the amount of land embraced from 40 acres to 130 acres, radically altering the shape of the land sought from a rectangle to an elongated polygon. Finally, while both McLean and Galbraith agreed that they had used adjacent land, their allotment applications no longer abutted, being

now separated by the patented lot 3 and the W 1/2 of lot 2, which was also patented.

As noted above, on August 31, 1977, a field examination of the "amended" claim was conducted. Both appellant and her husband were present. The field report notes that appellant denied ever seeing either of the other allotment applicants on the land when she was picking berries. In her original application, appellant had stated she used the land for berrypicking and rabbit snaring. In recommending that the application be rejected, the examiner noted:

In conclusion the examiner found the applicant had little knowledge of the parcel location, because her husband gave all directions, including walking over parcel. The applicant did not show the examiner any evidence of use or occupancy. Applicant claimed she had been out several days before and picked all of the berries. The berry picking area shown to the examiner had not been picked. The only area shown for berry picking was in a powerline Right of Way. These were high bush cranberries, which will grow after an area has been cleared. Other areas walked were or are not conducive to berry growing until cleared of the heavy Spruce growth, the applicant could not show evidence where she had snared rabbits. No trails for snaring rabbits were shown the examiner. No photographs were taken because there was nothing to photograph.

No further action was taken on this case until after the passage of ANILCA. As we noted earlier, various protests to allowance of this allotment were filed, thereby preventing automatic approval of the allotments pursuant to section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982). In response to these protests, appellant submitted three witness statements attesting to her use of the "amended" parcel. We must note that in describing the land which appellant used, all three individuals submitted a sketch which bears absolutely *no* resemblance to either the rectangle originally described, the elongated polygon described in the 1974 amendment, or the rectangular lot 5, which is presently being sought before this Board.

Appellant's claim was reexamined by a BLM realty specialist on June 7, 1983. This report, for the first time, located the land which appellant sought as lot 5, T. 2 S., R. 2 W. This report asserted that the "parcel was plotted in error by BIA." The report noted that in addition to berrypicking and rabbit snaring as alleged in the original application, appellant stated that she also used the land for firewood gathering and picking punk, as well as occasional hunting. The examiner noted that resources were present to support the applicant's claimed use. The report expressly noted that there were "no powerlines or pipelines on the parcel." The field examiner concluded that: "Based upon the evidence obtained during the field exam with the applicant present and the testimony of the applicant and her cousin - Mary McLean, I conclude that the applicant has complied with the Native Allotment Act of 1906, as amended."

On July 13, 1983, the District Officer provided the protestors with notice of the changed situs of appellant's allotment application as required by section 905(c) of ANILCA. Protests were filed with respect to the newly amended location, thereby necessitating adjudication under the 1906 Act. Moreover, one of the protestants alleged that part

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of lot 5 contained a portion of an airplane runway. A subsequent field examination, conducted on January 13, 1984, disclosed that the runway did, indeed, extend 250 feet onto lot 5. Additionally, a powerline, constructed in the 1950's, was also discovered, which crossed the entire allotment on an east-to-west route. The examiner concluded, however, that the protests should be rejected as the runway had been constructed on Federal land without authorization.

As noted above, the decision of June 13, 1984, held the allotment application for rejection based on two independent grounds. First, the District Office held that appellant's qualifying use had ceased 3 years prior to application and thus, the right to seek an allotment of that land ceased at that point. Second, it held that the amendment could not be allowed because the land was surveyed. BLM afforded appellant 60 days in which to submit additional information.

Three affidavits were submitted - one by appellant, one by her former husband, and one by her cousin, Mary McLean. Based on these three affidavits, BLM concluded both that appellant had originally intended to apply for lot 5 and that her use had been substantial and potentially exclusive of others. As we shall show, examination of these affidavits, in light of the other documentation in the file, supports neither of these conclusions.

Before examining these affidavits in detail, we wish to underline certain points. First, a Native allotment applicant, no less than any other public land claimant, is required to establish compliance with the applicable laws and regulations. *See United States v. Bennett*, 92 IBLA 174, 179 (1986); *Pedro Bay Corp.*, 88 IBLA 349, 354 (1985); *Mildred Sparks*, 42 IBLA 155 (1979). Thus, as an initial matter, it is the applicant's obligation to establish her entitlement to an allotment of the land. Where this is not done, BLM is required to provide an allotment applicant with notice and an opportunity for a hearing at which the applicant may attempt to show compliance. *See Donald Peters, supra*. In determining whether a contest is necessary, it is BLM's obligation to examine the *entire record* to ascertain whether an allotment applicant has shown entitlement to the land by a preponderance of the evidence. *See generally State of Alaska*, 85 IBLA 196 (1985). Where entitlement has not been established, a contest complaint properly issues. Viewed under these standards, the decision of the District Office is simply inadequate.

It is clear that the District Office gave credence only to appellant's most recent assertions of use and occupancy, virtually ignoring considerable conflicting evidence submitted both by third parties, as well as appellant herself. Moreover, the decision ignores inherent inconsistencies within the affidavits which appellant submitted. Finally, even if these affidavits are taken at face value, they clearly do not establish entitlement to an allotment.

Because of the obvious weight which the District Office accorded to these affidavits, we will closely analyze their contents. The affidavit of Angeline Galbraith consists of 11 numbered paragraphs. In paragraph 1, appellant avers that she was born in Koyukuk, Alaska, and has lived in Anchorage since 1964.⁶ Paragraph 2 provides:

2. I filed an application for a Native Allotment on August 11, 1971. The land which I used for subsistence is located south of Potter Creek Road off, what is now called Rosie Creek Road, near Fairbanks. At the time I began using the land the road was unnamed.

While it is true that lot 5 lies south of Potter Creek road, both the land originally described and the land described in the 1973 amendment are also south of Potter Creek road. Appellant next avers:

3. Over the years, after I filed my application, there has been a great deal of confusion about the location of the land that I intended to apply for. I believe that the BIA office made a mistake on the original description and I have been trying to correct it ever since.

While there is certainly evidence as to a continuing controversy as to the situs of the land which appellant desires, there is virtually no evidence that appellant had been trying to correct it "ever since." Indeed, as will be seen, appellant admits that when she went out on the 1976 field examination, she never informed the field examiner that they were looking at the wrong land, even though she now avers that she realized it was not the land which she used.

4. I first began using the land that I intended to file for in 1955. I picked high bush cranberries, salmon berries, and blueberries on the land. I set snares for rabbits and hunted spruce hen. I also gathered punk which grows on the trees, and is used by the old Indians for nose snuff. I would go up to the land every summer and stay several days. I never saw anyone else in the area except Mary McLean.

The import of the above statement seems clearly to have been lost in the District Office. Here, appellant apparently admits that she spent only several days each year on the land. Yet, the District Office found that she had shown substantially continuous use and occupancy potentially exclusive of others.⁷

5. At the time that I filed for my allotment I was married to Peter Galbraith. I married Peter Galbraith in 1964. Peter was not too familiar with the location of my land. I used my Native Allotment long before I met him. In fact, even while we were married, Peter did not go with me when I picked berries and gathered food on the land.

While that statement may serve to explain why her husband monumented the wrong lands in 1977, it also undercuts any reliance on her husband's affidavit corroborating her use of lot 5.

6. I recall that in 1971 I went to the BIA office in Fairbanks with my friend Mary McLean to file for a Native Allotment. We both had used land in the same area. The parcel of land which I used was near the land that Mary had used. There was a man at

⁶ We note that this date contradicts a statement in the June 1983 field report that appellant moved to Anchorage in 1968, but verifies a statement made in the September 1977 field report.

⁷ This statement may also clarify a consistent confusion as to exactly when appellant's claimed use and occupancy began. In her original application, the front side alleges use and occupancy commencing in July 1955, whereas the back side places the commencement of occupancy in July 1953. The 1953 date appears in all documents until the 1983 field examination, including the 1977 field report and the witness statements submitted on behalf of appellant in 1981. From the 1983 report onward, however, 1955 is given as the year that use and occupancy commenced.

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the BIA office who helped us fill out our applications. Neither Mary nor I could read maps so he pointed out the areas which were open. I remember telling him that the land that I wanted was off Rosie Creek Road.

As noted above, this really does not support a conclusion one way or the other since all of the parcels involved are "off Rosie Creek Road."

7. A short while later BIA moved my allotment because they said that they had mistakenly placed my allotment in an army gunnery range. I again explained that the land which I used and intended to apply for was located off Rosie Creek Road, next to Mary McLean's allotment.

The assertion that BIA moved her allotment is simply not supported by the record. It is clear BIA did not believe they had placed appellant's allotment in an army gunnery range. Unlike the McLean application in which there was a clear scrivener's error, the original description filed with appellant's application described land outside of the gunnery range. BLM made a mistake in plotting. The Fairbanks BIA office informed BLM of this BLM error in its memorandum of January 31, 1973. The change in the description of the allotment was apparently initiated by appellant in November 1973, when she went to the Anchorage BIA office. When the Anchorage office, BIA, transmitted the new description to the Fairbanks office, BIA, the Fairbanks office immediately realized that there was a problem in the description as it now described the same land sought in two other allotment applications. Because the Fairbanks office was concerned with this problem it requested that the applicants be contacted when BLM made its field examination.⁸

8. BIA then sent me a copy of a map showing the location of my allotment. The map placed my allotment in Lot 2 Section 6, T. 2S, R.2W. I still did not understand the map, so I was not sure whether it was the right land. I gave the BIA map to my husband so that he could post the corner markers; Peter just followed the map.

This statement is partially corroborated by a letter from one of the protestants, dated August 29, 1977, in which she recounted meeting Mr. Galbraith who was trying to identify the land claimed from a map, which the protestant noted "was not too accurate."

9. A couple days later a fellow from BLM contacted me and said that he was going to examine the land. When we got up there, I realized that this was not the land that I used, but I was afraid to tell him that it was wrong because I thought that I would never get any land after all this trouble. There had been so much confusion already about the land that I did not want to risk losing my allotment.

This is a particularly troubling admission by appellant. In this statement, she admits that from the date of the field examination onward, she knew that she had never used or occupied the land described in her application but declined to inform BLM of this fact because "she did not want to risk losing" her allotment. Moreover, the field report declares that appellant positively denied ever having seen

⁸ It is important to note that it was not until the July 30, 1974, policy statement by the Assistant Secretary that Native allotment applicants were routinely contacted prior to the performance of a field survey.

either of the other Native claimants using the land. While this was technically true, since by her own admission she had never used the land, the effect of such a declaration was to impugn assertions by the other claimants which, for all appellant knew, were accurate.

It is possible, of course, that the shock of her discovery that she had never used the land described in her application led to her silent acquiescence. But what is unexplained is why, later, after she had had time to reflect upon the fact that her claim was for land to which she had absolutely no right, she did not take steps to correct the record. On the contrary, in 1981, three witness statements were submitted in her behalf, one by Mary McLean, all asserting that they are aware of the land for which application was made and that appellant had used that land. At the time of the submission of these statements, appellant knew, as an irrefutable fact, that they were false. Yet no action was taken to apprise BLM of this until 1983, when the Fairbanks District Office was attempting to resolve a number of conflicting applications.

10. Last year another fellow from BLM contacted me. His name was Scott Eubanks. He said there were problems with several Native Allotments in that area. He asked me if my allotment was in the right place. I told him about the confusion regarding the location of my land and how I originally wanted land further south near Rosie Creek Road. I told him that I had intended to apply for my land next to Mary McLean. Mr. Eubanks informed me that my land was not adjacent to Mary's. I said that I never wanted the land where BIA and BLM put me. Mr. Eubanks corrected the location placing my allotment in Lot 5 next to Mary McLoan's. I showed Mr. Eubanks the areas where I picked berries and gathered food for many years. I walked all over that land and I am certain that it is the land that I originally intend to apply for.

While this statement is generally self-explanatory there are certain inconsistencies in it. Thus, lot 5 is not south of the land examined in 1977, but west. When appellant asserts that she had "never wanted the land where BIA and BLM put me," this is not really corroborated by her actions up to that point in time, since she was clearly willing to accept an allotment of the lands as described in the 1973 amendment. She also stated that she walked all over the allotment with the field examiner. Yet the record is quite clear that Eubanks failed to notice either the runway or the powerline.

Paragraph 11 merely states that the allotment is now in the right place, that she continues to use this land during the summer and presently has a garden on it.

An affidavit was also submitted by Peter Galbraith. This affidavit also consisted of 11 numbered paragraphs. In the first four, Peter Galbraith states that he married appellant in 1964 and since that year has lived in Anchorage, that they were presently separated and had filed for divorce, that he was aware that there was a controversy as to the location of the land for which appellant had applied, and that she had informed him, before they were married, that she had used the land. The affidavit continued:

5. I first met Angeline in 1961. She was using the land at that time. I recall that she used to set snares for rabbits during the winter and pick berries during the late summer

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on the land. She continued to use the land in this manner while we were married and until the late 1970's.

While this statement corroborates appellant's assertions that she picked berries and set snares for rabbits, it is clearly not probative of where appellant performed these activities since appellant's own affidavit asserts that Peter Galbraith never accompanied her to the land.

6. I was not present at the time that Angeline actually filled out her application for the land. All I remember that she and Mary McLean went together to file for land and that Angeline wanted to get land adjacent to Mary's land. Angeline stated that she and Mary had always used land near each other.

That this was the original intent does seem firmly established in the record.

7. Angeline indicated that the land description which BIA gave her was not the land that she actually used and wanted to apply for. I believe that Angeline was told that the land she originally intended to apply for was not available.

At this point, Peter Galbraith's affidavit begins to diverge from that of appellant. As further review of the other parts of the affidavit make clear, the placement of this paragraph indicates that appellant was aware that she had not used the land described in her allotment application *prior to* the 1977 field examination. Moreover, this statement implies that appellant agreed to the original amendment because the land which she intended to apply for was not available. This clearly contradicts appellant's assertion that BIA had moved the allotment because they had mistakenly placed it in an artillery range.

8. A couple of days before the field examination in 1977 I went up to the land with Angeline and posted corner markers according to the legal description which she got from BIA.

In this paragraph, Peter Galbraith asserts that appellant accompanied him when he monumented the claim. If this is true, it contradicts the clear inference from appellant's affidavit that she had not accompanied him (*see paragraph 8, supra*) and totally destroys appellant's assertion that she did not realize that the land described in her application was not the land she used until the field examination took place (*see paragraphs 8 and 9, supra*).

9. I went on the field exam and pointed out the corners which were marked. Neither Angeline nor I really said much to the examiner. At the time I understood that Angeline wanted to get the land but that the land she really used and wanted was not available.

This supports the fact that no attempt was made to apprise the field examiner of a mistake and actually supports the conclusion that appellant was willing to accept the land as described in the November 1973 amendment.

The last two paragraphs of the Peter Galbraith affidavit note that he was recently informed that appellant was attempting to correct the description and obtain the land she originally intended to apply for and that, to the best of his knowledge, this was lot 5. This last

statement, however, is worthy of no weight since it seems undisputed that Peter Galbraith was never actually on lot 5.

Another affidavit was filed by Mary McLean in which, after recounting some of the difficulties she had with her allotment application, she states that she knows that appellant's Native allotment should be lot 5, not lot 2. Any weight which might be accorded this assertion is clearly diminished by the fact that 3 years earlier, McLean had submitted an affidavit attesting to appellant's use of the land described in the 1973 amendment, including lot 2.

Even if this was the extent of the evidence, it would be difficult to fathom how BLM could conclude either that appellant had intended to apply for lot 5 or that the use and occupancy requirements of the 1906 Allotment Act had been met. Yet there are also a number of witness statements by the protestees claiming *never* to have seen appellant on the land. While clearly germane, it would appear that no credence whatsoever was accorded these statements. Why this was so is totally unexplained.

The conclusion most supportable by the record is that appellant sought to apply for the parcel immediately east of lot 4; i.e. lot 3; that she was subsequently informed (correctly) that the land was not available since it was patented; that she agreed to move her claim further east to the E 1/2 lot 2 and lands immediately south, lands which were not shown to be unavailable;⁹ and that it was not until 1983 when she was approached by the field examiner who was clearly interested in settling the many conflicts in the area, that she became aware of the fact that lot 5 was available¹⁰ and switched her intent from acquiring the land as described in the 1973 amendment to the land in lot 5.

It may be that the above scenario contains errors. What is impossible to understand is how BLM could, faced with all of the contradictions manifest in this record, blithely determine that the land in lot 5 was the land appellant always intended to apply for, without making an even minimal attempt to resolve the discrepancies. Counsel for appellant's assertion on appeal that "the incompetence or total lack of concern of the Department is demonstrated by the fact that the BIA consistently misdescribed Ms. Galbraith's allotment contrary to her intent and instruction that her land was located adjacent to Mary T. McLean" can only be viewed with incredulity given appellant's total failure for 6 years to even suggest that the land described was not land which she used, even though, she now alleges, she knew this to be the case during this entire period. BLM's plotting error in this case and BIA scrivener's error in the McLean allotment pale in comparison to the consistent pattern of disinformation on behalf of appellant disclosed by the present record. It may be that appellant might

⁹ Since this change occurred in the Anchorage BIA office, the officials there were probably not aware of the two existing Native allotment applications seeking the same parcel.

¹⁰ Indeed, by this time it was the only piece of land in all of sec. 6 that was neither patented nor claimed by a Native allotment applicant.

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adequately explain her actions and justify a decision that she had always intended to apply for lot 5. But she has clearly not done so at the present time. It was manifest error for the District Office based on the record before it, to find, as it did, that appellant had, at all times, intended to file on lot 5.

[3] Even if there were no question as to the situs of appellant's claim, if, indeed, she had, since her original application, consistently sought lot 5, we are still at a loss to understand how the District Office could approve this allotment under the 1906 Act. Appellant's own affidavit states that she would "go on the land every summer and stay several days."¹¹ As a matter of law, mere use of land for a few days each year, absent any physical improvements, does not constitute substantially continuous use and occupancy potentially exclusive of others. Indeed, in our recent decision styled *United States v. Estabrook*, 94 IBLA 38 (1986), the Board held that use of land as a base camp for hunting twice a year for periods of a few days to a week was not qualifying use "when the claimants failed to prove that their seasonal use of the land was undertaken so as to potentially exclude others who used the land for the same purpose." *Id.* at 53. *Accord Jack Gosuk*, 22 IBLA 392 (1975); *Gregory Anelon, Sr.*, 21 IBLA 230 (1975). The use alleged in the instant case is clearly inferior to that shown in *Estabrook* and, thus, the District Office's finding of qualifying use and occupancy cannot be sustained.

[4] More fundamentally, we note an apparent misinterpretation of the guidelines for adjudication issued by Assistant Secretary Horton on October 18, 1973. Because of the importance we attach to the proper implementation of these guidelines, we set them out in detail:

FIELD EXAMINATION GUIDELINES:

1. Field examinations should take into consideration Native traditional and customary occupancy of land and the way of life of the Native people.
2. Field examiners will accept affidavits from persons claiming knowledge of Native use and occupancy of land being examined and may seek BIA assistance in obtaining such information.
3. In making a determination that a Native has completed five years of substantial use and occupancy, the existence of any of the following evidence may be considered:
 - a. House or cabin.
 - b. Food cache.
 - c. Camp site—evidence of tont, tent frame or temporary shelter, fire pits, cleared area.
 - d. Fish wheel.
 - e. Dock or boat landing.
 - f. Evidence of fishing, hunting and trapping such as fish drying racks, etc.
 - g. Reindeer headquarters and corrals.
 - h. Evidence of berry picking, gathering of wild roots, greens and other wild foods.

¹¹ Once again, appellant's affidavit corroborates the initial field examination report and contradicts the favorable report. Thus, in the 1977 report, describing the history of land use by the applicant, the examiner stated, "Since 1953, used once a year since 1953 for picking berries." In the 1983 report under the same heading, no specific quantum of use is given, yet the clear inference is that appellant used the land numerous times in various seasons.

i. Other evidence of use should be considered such as animal bones, meat racks, fur caches, stretch hoards, sledge dog spots, any sheds or holes, and pits or spots that show human use and occupancy.

Substantial use and occupancy cannot be defined in any more detail than in the regulations.¹ It will depend largely upon the mode of living of the Native. Use and occupancy by an Aleut or an Indian may not be the same as by an Eskimo. Therefore, the customs of the applicant must be considered and applied to the findings to arrive at a conclusion as to whether the land is being used as claimed. Customs of the Natives must be correlated with the physical findings – improvements, vegetation, evidence of use, climate, and resources on the land, particularly with reference to the claimed use.

The field report must contain an adequate description of the land, its improvements, and observed uses to verify the claimed use. This description should be supported by sketch maps and photos. The field report should clearly describe the areas of use and occupancy.

¹ Section 2561.0-5(a) of the Regulations provides: The term "substantially continuous use and occupancy" contemplates the customary seasonal use and occupancy by the Applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

Contrary to the interpretation seemingly espoused in the decision below, these guidelines do not provide support for the conclusion that land used merely as a site for berrypicking, without more, ever qualifies for an allotment. What these standards do provide is that *evidence of berrypicking as well as evidence of fishing, hunting, and trapping may be considered* in determining the existence of substantially continuous use and occupancy such as would be at least potentially exclusive of others. Allegations of berrypicking and the observed presence of berrypicking areas do not constitute *evidence of berrypicking* within the meaning of these guidelines. Rather, as is made clear in the case of fishing, hunting, and trapping, where the example of fish-drying racks is provided, or campsites, where the guidelines mention tent, tent frame, temporary shelters, fire pits and cleared areas, it is *physical* evidence of berrypicking which is relevant.

The reason that physical evidence is required has nothing to do with the veracity of an applicant. Rather, the presence of physical evidence goes to the question of potential exclusivity. Physical evidence serves the purpose of alerting others that land is or might be under the claim of someone else. The mere fact that there are berries growing on a specific parcel of land could scarcely be said to give rise to a reasonable apperception in a third party that the land was claimed by another. But, physical evidence of berrypicking, such as a defined path to the bushes, could be a factor in such a determination. That is what the guideline provides. It states that *evidence of berrypicking may be considered* in making a determination of whether substantial use and occupancy has occurred.

It does not follow, however, that the mere existence of evidence of berrypicking, without more, justifies the conclusion that substantial use and occupancy potentially exclusive of others has occurred. Standing alone, we find it difficult to conjure up any circumstances in which such a conclusion would be appropriate. It is, however, a relevant factor, when conjoined with other physical indicia, in

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determining whether an individual on the ground could properly be said to be on notice that the land was claimed by another, and could also serve to delineate the extent of any such claim. Indeed, this is the essential meaning of the phrase "potentially exclusive of others." A claimant need not show that he or she actually excluded others from using the land sought; rather, a claimant must show that the nature of the use was such that, under normal circumstances, any person on the land knew or should have known it was subject to a prior claim. Thus, actual occupancy on the land, or the presence of physical structures and man-made artifacts, such as tent frames and fish-drying racks, might well engender a recognition that someone was appropriating the land. No reasonable person would come to a similar conclusion merely because berries had been picked in the area.

In the instant case, we note that, during the period in which appellant has alleged use and occupancy, two different homestead entries were allowed embracing both appellant's and Mary McLean's land. Land was apparently cleared under one of these entries. Not only were these entrymen seemingly unaware of appellant's claimed use of the land, there is no evidence that appellant ever protested these entries as infringing upon her use and occupancy of the land. Yet, appellant maintains that she picked berries on the land throughout this period. The failure of either to protest the other's actions highlights the fact that picking berries is generally not seen as an act of appropriation and fortifies our conclusion herein.¹²

In view of our conclusions set forth above that the District Office determinations that appellant had always intended to apply for lot 5 and that her use of the land constituted substantially continuous use and occupancy at least potentially exclusive of others are not supported by the record, we must remand the subject case to the District Office with instructions to issue a contest complaint. See *John Nusunginya*, 28 IBLA 83 (1976).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Fairbanks District Office is set aside and the case files are remanded with instructions to initiate a contest proceeding in accordance herewith.

JAMES L. BURSKI
Administrative Judge

¹² We are well aware that our conclusions herein may reflect adversely on actions taken by the Fairbanks District Office, BLM, with respect to other Native allotments in this area. Be that as it may, this Board may no more ignore the requirements of the law in this case simply because others may have improperly been granted allotments, than BLM can ignore the requirements of the 1906 Act in its adjudication of protested allotments, simply because Congress has, by its legislative approval of many unprotested allotments, authorized passage of title to others who might not qualify under the Act. It is the requirements of the law which must guide our and BLM's adjudications.

WE CONCUR:

C. RANDALL GRANT, JR.
Administrative Judge

FRANKLIN D. ARNESS
Administrative Judge

**NAVAJO NATION v. ACTING DEPUTY ASS'T SECRETARY--
INDIAN AFFAIRS (OPERATIONS)**

15 IBIA 179

Decided May 15, 1987

Appeal from a decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) determining the rental to be paid by the Navajo Nation to the Hopi Tribe for homesite and farming uses of Hopi partitioned land for the period 1978-1984.

Affirmed as modified.

1. Administrative Procedure: Administrative Review--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

Where the Acting Deputy Assistant Secretary--Indian Affairs (Operations) has characterized a decision as discretionary, the Board of Indian Appeals has jurisdiction to review the decision to the extent of the legal conclusions reached.

2. Appraisals--Indians: Lands: Fair Rental Value--Indians: Leases and Permits: Rental Rates

The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair rental value is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

3. Appraisals--Indians: Lands: Fair Rental Value--Indians: Leases and Permits: Rental Rates

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982) must be made in accordance with generally accepted principles governing the determination of market value.

4. Appraisals--Indians: Lands: Fair Rental Value--Indians: Leases and Permits: Rental Rates

A Bureau of Indian Affairs determination of fair rental value under 25 U.S.C. § 640d-15 (1982), which is supported by documentation in the administrative record, will not be overturned unless it is shown to be unreasonable.

APPEARANCES: Louis Denetsosie, Esq., Michael P. Upshaw, Esq., and Anthony Aguirre, Esq., Window Rock, Arizona, for appellant; Wayne C. Nordwall, Esq., Office of the Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for appellee; Scott C. Pugsley, Esq., Salt Lake City, Utah, Norton F. Tennille Jr., Esq., Washington, D.C., and Mark H. Boscoe, Esq., Denver, Colorado, for the Hopi Tribe.

May 15, 1987

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE VOGT***INTERIOR BOARD OF INDIAN APPEALS***

Appellant Navajo Nation challenges a November 26, 1985, decision of the Acting Deputy Assistant Secretary-Indian Affairs (Operations) which determined that appellant was required to pay the Hopi Tribe \$989,971.50 for homesite and farming uses, for the period 1978-1984, of lands partitioned to the Hopi Tribe pursuant to the Navajo-Hopi Settlement Act of 1974, *as amended*, 25 U.S.C. §§ 640d-640d-28 (Settlement Act).¹ For the reasons discussed below, the Board affirms that decision as modified.

Background

The Settlement Act established a procedure for the partition of the Navajo-Hopi Joint Use Area, pursuant to which the area has been partitioned. See *Sekaquaptewa v. McDonald*, 626 F.2d 113 (9th Cir. 1980). Section 16 of the Act, 25 U.S.C. § 640d-15, provides:

- (a) The Navajo Tribe shall pay to the Hopi Tribe the fair rental value as determined by the Secretary for all use by Navajo individuals of any lands partitioned to the Hopi Tribe pursuant to sections 640d-7 and 640d-2 or 640d-3 of this title subsequent to the date of the partition thereof.
- (b) The Hopi Tribe shall pay to the Navajo Tribe the fair rental value as determined by the Secretary for all use by Hopi individuals of any lands partitioned to the Navajo Tribe pursuant to sections 640d-7 and 640d-2 or 640d-3 of this title subsequent to the date of the partition thereof.

Under authority of this provision, Bureau of Indian Affairs (BIA) staff prepared appraisals for various uses of the Hopi partitioned land (HPL) by appellant.²

On November 25, 1985, appellee rendered the decision at issue here, concerning appellant's use of the HPL for homesite and farming purposes for the years 1978 through 1984. Appellee determined that the rental value for appellant's homesite use was \$751,143.45, and the value for farming use was \$238,828.05, making a total for both uses of \$989,971.50. Appellee's value determination adopted appraisal reports prepared by BIA's Chief Appraiser, dated November 22, 1985.

Appellee's decision states that it is based on the exercise of discretionary authority and is final for the Department of the Interior.

Appellant's appeal of this decision was received by the Board on January 8, 1986. On January 27, 1986, the Board received a filing from the Hopi Tribe suggesting that the Board lacked jurisdiction over the appeal because of the provisions of 25 CFR 2.19(c)(1) and 43 CFR

¹ All references to the United States Code are to the 1982 edition.

² Hopi tribal members residing on lands partitioned to appellant moved off those lands shortly after partition.

4.330(b)(2),³ and appellee's statement that her decision was based on the exercise of discretionary authority. On February 4, 1986, the Board issued an order stating that it would consider its jurisdiction over the appeal after receipt of the record and briefing by the parties.⁴

During a lengthy briefing period, appellant, appellee, and the Hopi Tribe filed briefs and various other pleadings. The Hopi Tribe filed a motion to require appellant to post an appeal bond in the amount of \$989,971.50. The motion was denied by Board order of January 7, 1987 (15 IBIA 81). By order of January 27, 1987, the Board allowed the filing of a supplemental brief by the Hopi Tribe and granted appellee's motion for expedited review. Both appellant and appellee responded to the Hopi Tribe's supplemental brief. Appellee requested the Board to reconsider its decision to allow the Hopi Tribe to file a supplemental brief, on the grounds that the Hopi Tribe attempts therein to raise issues outside the scope of the appeal.

Jurisdiction

[1] Appellee's decision states at page 3: "This decision is based on the exercise of discretionary authority and is, pursuant to 25 CFR 2.19(c)(1), final for the Department." In its February 4, 1986, order on jurisdiction, the Board stated:

The Board has held that BIA's characterization of a decision as discretionary constitutes a legal conclusion, subject to Board review. *Wray v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 12 IBIA 146, 91 I.D. 43 (1984); *Billings American Indian Council v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 142 (1983). A decision properly characterized as discretionary will, absent extraordinary circumstances such as a referral to the Board, not be reviewed. See 43 CFR 4.330(b)(2); *Billings American Indian Council, supra*; *Face v. Acting Assistant Secretary-Indian Affairs*, 11 IBIA 35 (1983). A decision improperly characterized as discretionary, however, will be reviewed to the extent of the legal conclusions reached. *Wishkeno v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 21, 89 I.D. 655 (1982).

Appellee's decision concludes at page 3 that "the values reached in the attached [BIA appraisal] reports constitute 'fair rental value' as specified by the statute [i.e., 25 U.S.C. § 640d-15]." This conclusion is legal in nature because it holds that the values meet the standard set by the statute. Therefore the Board finds that it has jurisdiction over this appeal because the decision at issue is based, at least in part, on an interpretation of law within the meaning of 25 CFR 2.19(c)(2).

³ 25 CFR 2.19(c)(1) provides: "If the decision [of the official exercising the review authority of the Commissioner of Indian Affairs] is based on the exercise of discretionary authority, it shall so state; and a statement shall be included that the decision is final for the Department."

43 CFR 4.330(b) provides in relevant part: "Except as otherwise permitted by the Secretary, the Assistant Secretary for Indian Affairs or the Commissioner of Indian Affairs by special delegation or request, the Board shall not adjudicate: * * * (2) matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority."

* Appellee does not challenge the Board's jurisdiction. Appellee's brief states at page 3: "[I]n order to provide a full and adequate hearing to [appellant], the Assistant Secretary[-Indian Affairs] concedes, for the purposes of this appeal, that the Board has jurisdiction to review [appellee's] decision."

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Standard of Review

[2] The Board has a well-established standard of review in cases concerning adjustments in rental rates for leases of Indian lands. It has held that its role in such cases is to determine whether the adjustment is reasonable; that is, whether it is supported in law and by substantial evidence. If it is reasonable, the Board will not substitute its judgment for BIA's. It will overturn an adjustment only if it is unreasonable. *Gamble v. Acting Deputy Assistant Secretary-Indian Affairs (Operations)*, 15 IBIA 101, 103-04 (1987); *Kelly Oil Co. v. Acting Deputy Assistant Secretary-Indian Affairs (Operations)*, 15 IBIA 5, 8 (1986); *Bien Mur Indian Market Center v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 14 IBIA 231, 235 (1986); *Fort Berthold Land & Livestock Ass'n v. Aberdeen Area Director*, 8 IBIA 230, 246-47, 88 I.D. 315, 324 (1981). The burden is on the appellant to show that BIA's action is unreasonable. *Fort Berthold Land & Livestock Ass'n*, 8 IBIA at 241, 88 I.D. at 321.

The rental adjustment cases concern the determination of "fair annual rental" or "fair annual return." This appeal, similarly, concerns the determination of "fair rental value." Such determinations require the exercise of judgment. Reasonable people, and experts, may differ in their calculation of "fair rental value." See, e.g., Interagency Land Acquisition Conference, *Uniform Appraisal Standards for Federal Land Acquisitions* 4 (1973).

The Board finds that the standard of review appropriate for this appeal is the standard developed in the rental adjustment cases. The Board's task, therefore, is to determine whether appellee's determination of fair rental value is reasonable or whether appellant has shown, to the contrary, that it is unreasonable.

Appellee's Motion to Reconsider Acceptance of Hopi Tribe's Supplemental Brief

Following the Board's order of January 27, 1987, granting the Hopi Tribe's motion to supplement its brief, appellee moved the Board to reconsider its acceptance of the supplemental brief, on the grounds that the Hopi Tribe improperly attempts therein to pursue its own challenge to appellee's decision even though it did not appeal that decision. Recognizing that the brief contains assertions that go beyond the scope of the instant appeal, the Board accepts the brief but considers it only to the extent that it addresses the appeal before the Board. Appellee's motion is therefore denied.

Discussion and Conclusions

Appellant makes three arguments: (1) the Board has jurisdiction over this appeal, (2) appellant is entitled to a hearing at which it may cross-examine BIA's experts, and (3) the BIA appraisal violates

appellant's right to a "fair rental value" valuation under 25 U.S.C. § 640d-15(a).

Appellant's first argument has already been addressed.

In its second argument, appellant seeks an evidentiary hearing. The Board may require a hearing where the record indicates a need for further inquiry to resolve a genuine issue of material fact. 43 CFR 4.337(a). However, the Board is an appellate forum, and appeals in which evidentiary hearings are ordered are the exception rather than the rule. Appellant's only stated reason for seeking a hearing is its wish to cross-examine BIA witnesses. The Board finds that appellant has not shown that an evidentiary hearing is needed to resolve a genuine issue of material fact and therefore denies appellant's request.

Appellant's principal argument is that the BIA appraisal is flawed. In support of this argument, it submits an appraisal prepared by Centerfire Property Co. (Centerfire) at appellant's request. The Centerfire report reaches valuations for appellant's uses of the HPL which are considerably lower than the BIA valuations.

The Hopi Tribe, which participates in this appeal as an interested party, argues essentially in support of the BIA appraisal. It submits a report prepared by Biber and Co., Inc., which reviews the appraisals prepared by BIA and Centerfire.

[3] All parties appear to agree that "fair rental value," within the meaning of 25 U.S.C. § 640d-15, must be determined by reference to generally accepted principles governing the determination of market value. Under these principles, market value, or fair market value, is based upon the "highest and best use"⁵ of the property. *United States v. Benning*, 330 F.2d 527, 531 (9th Cir. 1964); *United States v. 1,291.83 Acres of Land*, 411 F.2d 1081, 1084 (6th Cir. 1969); American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* 243 (8th ed. 1983). It seems obvious that only by applying principles governing the determination of market value can BIA arrive at a rental value that is fair to both tribes.

[4] The BIA homesite appraisal report,⁶ dated November 22, 1985, estimated rental values for 757 small tracts within the HPL, ranging in size from 1 to 42 acres. These tracts had been identified by BIA staff as occupied by Navajo tribal members. Many of the tracts were vacated during the period 1978-1984, so that in 1984 only 522 tracts were occupied.

Rental values were estimated by reference to sales of small tracts in the area (comparables), because BIA found no evidence of extensive leasing of such tracts but did find there was an active sales market.

⁵ "Highest and best use" is defined by BIA's Chief Appraiser as "the most profitable and likely use for a property." Attachment 1 to appellee's brief at 1. Other definitions are (1) "the reasonable and probable use that supports the highest present value, as defined, as of the effective date of the appraisal," and (2) "the use, from among reasonably probable and legal alternate uses, found to be physically possible, appropriately supported, financially feasible, and which results in the highest present land value." American Institute of Real Estate Appraisers, *The Appraisal of Rural Property* 19 (1983).

⁶ The report is titled *Estimated Annual Rental [for] 757 Small Rural Tracts on the Hopi Partitioned Land in Northern Arizona*.

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BIA collected sales data for 250 tracts in the area which were sold between 1977 and 1984. From these, it selected 129 sales which it found to be arm's-length transactions.

The comparables and the HPL tracts were categorized by climatic zone⁷ because BIA found there was a relationship between climate and vegetative cover and the marketability of small rural tracts. BIA also found a relationship between size of the comparables and price per acre, the price per acre being less for larger tracts. Further, it found that prices had increased during the period 1978-1984. BIA homesite appraisal at 7, 13. It found little correlation between price and distance of the comparables from water or paved roads. Adjustments to value were therefore made for climatic zone, size of tract, and date; but not for distance from water, roads, or other amenities. Attachment 1 to appellee's brief at 3-4.

The highest and best use of the HPL tracts was found to be development for such purposes as homesite and recreational uses. Annual rental was estimated at 10 percent of market value. BIA homesite appraisal at 10-11.

BIA summarized the rental estimates for small tracts on the HPL as follows:

YEAR	COUNT	TOTAL AC	AVE RENT/AC	TOTAL RENTAL
1978	756	1,916	\$56.58	\$108,408.50
1979	756	1,916	\$57.68	\$110,518.30
1980	744	1,878	\$59.30	\$111,361.80
1981	734	1,862	\$60.10	\$111,910.00
1982	683	1,754	\$62.15	\$109,019.80
1983	659	1,710	\$62.35	\$106,611.80
1984	522	1,491	\$62.58	\$93,313.25

TOTAL RENTAL FOR 7 YRS (1978-1984) \$751,143.45

BIA homesite appraisal at 13.

The BIA farmland appraisal report,⁸ also dated November 22, 1985, estimated rental values for 229 farmland tracts within the HPL. The report states that the tracts are small and used to produce commodities for subsistence and religious ceremonies, with very little sold to outside markets. Most are farmed by hand, making production costs very high. BIA found little evidence of cash rentals of such tracts and therefore

⁷ Three zones were identified, as follows:

"ZONE	Precipitation	Elevation	General Vegetative Cover
One	5-8 in	less than 5500 ft	Semi-desert grassland
Two	8-12 in	5500 to 6200 ft	Mixed grassland
Three	12-15 in	6200 to 7000 ft	Sagebrush grassland"

BIA homesite appraisal at 7.

⁸ Estimated Annual Rental [for] 229 Farmland Tracts on the Hopi Partitioned Land in Northern Arizona.

based its appraisal on an estimate of the rental income that would be produced from a crop-share lease arrangement for Indian corn, one of the main crops produced on the HPL. The appraisal report states that 20-25 percent is the common rental for high-cost crops and that Indian corn is a high-cost crop. Based on a survey of the Hopi farmers who farmed similar tracts, BIA estimated yield at 540 pounds per acre from fields located in the floodplain and 283 pounds per acre from dryland fields. The value of the crop was estimated from prices paid for shelled corn by a woman who processed it into corn meal for sale. Rental was estimated at 20 percent of the value of the crop. Using these figures, BIA estimated the total rental for the 229 tracts for 1978-1984 at \$238,828.04. BIA farmland appraisal report at 1-2.

Appellant advances ten objections to the BIA appraisal, based on the appraisal conducted by its own appraiser, Centerfire. Appellee has responded to each objection.

Objection 1. The BIA appraisal assigns each Navajo homesite a minimum use area of 1 acre, whereas appellant's appraiser, Centerfire, found the typical Navajo homesite to be one-tenth of an acre.

Appellee argues that the Centerfire estimate of one-tenth of an acre indicates that Centerfire counted only the land directly under the structures rather than the land actually in use, and that one-tenth of an acre is an unrealistically small estimate for Navajo homesites, given the lifestyle of the residents. Appellee also argues that, because the Settlement Act requires the Secretary to protect the rights and property of individuals until they have been relocated, 25 U.S.C. § 640d-9(c), it would be unrealistic to expect the Secretary to allow Hopi individuals to use land as close as one-tenth of an acre to Navajo homes. Appellee further argues that appellant itself has announced a policy that Navajo homesites should be 1 acre. Appellee attaches to her brief a letter of the former Navajo Tribal Chairman, which states at page 5: "The Navajo Nation as a policy matter has determined land use on the Navajo Reservation is best served by one-acre homesites."

Objections 2, 3, 4, 6, and 8. These objections concern alleged double billing, billing for abandoned sites, incorrect identification of uses, and billing for sites located on Navajo-partitioned lands. Appellee states that BIA will adjust the billing to correct any such errors identified by appellant and has already adjusted the billing to correct errors which BIA has itself identified.

Objection 5. Agricultural-use lands were assessed a higher annual rental than similar lands were selling for in 1984. Appellee responds that Centerfire offers no data supporting its assertion that similar lands were selling for \$46 per acre. Appellee also argues that any sales were not comparable because of the unique nature of the Navajo and Hopi garden plots.

Objection 7. No value adjustments were made for such characteristics as proximity to water, utilities, and other amenities. Appellee responds that BIA conducted correlation studies through which it discovered that distance from water, roads, and other

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improvements bore little relation to value but that climate was significant in determining value.

Objection 9. The crop-share estimate of rental for the farmland tracts was based on inadequate data because only one buyer of Indian corn supplied price data. Further, this estimate does not take into account different farming methods and crops grown by Navajo farmers, or the possibility of failed crops in some years.

Appellee responds that the woman who supplied the price data was in the business of selling corn meal made from purchased corn and so was not merely an isolated customer. Appellee also submits affidavits from three BIA employees concerning the sales prices of corn meal and shelled corn, which support the value assigned by BIA.

Appellee further argues that the highest and best use of the farmland tracts was determined to be labor-intensive specialty crops, in particular, Indian corn. It is therefore irrelevant whether Navajo farmers actually use the land for that purpose. Further, the fact that crops may vary from year to year is not relevant.

Objection 10. There are no floodplains on the HPL, for which BIA charged a rate higher than for dry lands.

Appellee explains that the term "floodplain," as used by BIA in the Southwest, does not mean an alluvial floodplain but rather an area with higher than normal rainfall runoff.

In its response to the Hopi Tribe's supplemental brief, appellant continues its objections to the BIA appraisals. With respect to the homesite appraisal, appellant objects to BIA's choice of comparables and argues that BIA failed to make proper adjustments. It again argues that BIA overestimated the acreage occupied by Navajos.⁹ It continues to object to the crop-share method for appraising farmland rental value, stating that cash rentals are more common in the Southwest. Further, it argues that BIA incorrectly used Indian corn as the crop by which rental was estimated, and that BIA overestimated the yield for Indian corn.

The review of appraisals prepared by the Hopi Tribe's appraiser, James R. Biber, states that both BIA and Centerfire employed acceptable appraisal techniques, but that BIA's appraisal is more accurate and better documented. Biber concluded that BIA's crop-share estimates are a better indication of rental value for the HPL farmland tracts than the commercial leases used analyzed by Centerfire. He concluded that BIA's estimate of acreage for the homesites is a more realistic calculation of land in actual use than Centerfire's estimate. Further, he concluded that BIA's choice of 129 sales as comparables for the homesite tracts is superior to Centerfire's choice of 24 sales.

⁹ The Hopi Tribe argues that BIA underestimated the acreage occupied by Navajos. As discussed above, since the Hopi Tribe did not appeal appellee's decision to the Board, its arguments are considered only to the extent they respond to appellant's arguments.

Upon review of the BIA appraisals and appellant's objections thereto, the Board finds that appellant has not established that BIA's appraisals are unreasonable.

BIA's documentation in support of its homesite appraisal is extensive. Although BIA has made some errors in site identification, a few errors in a project of such magnitude are to be expected, and appellee has indicated willingness to correct errors when found.

Appellant is not persuasive in its argument that BIA erred in assigning a minimum area of 1 acre to the Navajo homesites. Centerfire's estimate of one-tenth of an acre for the typical homesite, an estimate which apparently takes into account only the land underlying structures, is simply not realistic. BIA's estimate is more reasonably calculated to encompass land in actual use and possession of the Navajo tenants.

BIA's use of 129 sales as comparables for the homesite appraisal is likewise reasonable.¹⁰ On its face, BIA's broader selection would appear more likely to yield accurate results than the sample of 24 sales employed by Centerfire. Although the sales prices of BIA's comparables vary considerably, this fact does not invalidate the comparisons or require elimination of the higher-valued comparables. *Wooding v. Portland Area Director*, 9 IBIA at 162; (1982); *Fort Berthold Land & Livestock Ass'n, supra*, 8 IBIA at 243, 88 I.D. at 321-22.

BIA made adjustments for the factors which it found, through analysis of the comparables, to bear some relation to prices. These factors were climatic zone, tract size, and date of sale. BIA found little correlation between price and distance to water or paved roads; therefore, it reasonably chose not to make adjustments for these factors, even if, as appellant argues, these are factors generally considered to be indicators of value. With a large number of comparables to analyze, BIA reasonably made adjustments based on actual correlation of factors rather than on abstract principles.

For the reasons discussed, the Board finds that appellant has not shown that BIA's homesite appraisal is unreasonable.

BIA's documentation in support of its farmland appraisal is less extensive than its documentation for the homesite appraisal, evidently because little information was available. Appellant argues that BIA should have used cash rentals for commercial farming as comparables for purposes of appraising the farm tracts. However, since BIA found little evidence that farm tracts similar to the HPL tracts were leased for cash rental¹¹ and no evidence of commercial farming on the HPL, BIA reasonably selected the crop-share method for appraising the farm tracts.

Appellant argues that general appraisal principles preclude the use of Indian corn to estimate income potential because it is a specialty

¹⁰ The Board has upheld the use of sales data to determine rental value where no comparable rental date is available. *Wooding v. Portland Area Director*, 9 IBIA 158, 160 (1982).

¹¹ The commercial leases analyzed by appellant's appraiser are for considerably larger tracts than the HPL tracts. Most contain several hundred acres. Centerfire report, Volume 2.

May 18, 1987

crop. BIA found that Indian corn is one of the main crops grown on the HPL and the only one for which yield data was available. Even though Indian corn may be a specialty crop in general terms, it is evidently a typical crop for the HPL.¹² Under these circumstances, it was reasonable for BIA to select Indian corn as the crop by which to estimate rental. Further, although appellant alleges that BIA overestimated the yield per acre for Indian corn, BIA's data was collected from Hopi farmers who were farming tracts similar to the HPL tracts, whereas appellant's analysis was done using figures for areas removed from the HPL.¹³ BIA reasonably based its yield estimate on local data, and appellant has not shown that the estimate is unreasonable. Further, although more documentation of sales prices for Indian corn would have been desirable, appellant has not refuted the price used by BIA.

For the reasons discussed, the Board finds that appellant has not shown that BIA's farmland appraisal is unreasonable.

Appellee's decision should be modified to the extent necessary to correct errors in site and use identification, as discussed above.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 26, 1985, decision of the Acting Deputy Assistant Secretary-Indian Affairs (Operations) is affirmed as modified.

ANITA VOGL
Acting Chief Administrative Judge

I CONCUR:

KATHRYN A. LYNN
Administrative Judge

**BERNOS COAL CO. & EXCELLO LAND & MINERAL CORP. v.
OFFICE OF SURFACE MINING RECLAMATION &
ENFORCEMENT**

97 IBLA 285

Decided *May 18, 1987*

Petitions for discretionary review of a decision by Administrative Law Judge David Torbett sustaining Cessation Order No. 81-2-75-22 against both Bernos Coal Co. and Excello Land and Mineral Corp.,

¹² It is possible that appellant and BIA refer to different types of corn. The BIA appraisal report includes white, red and blue corn within its term "Indian corn." BIA farmland appraisal report at 2. Appellant's discussion of this issue indicates that it may object only to the inclusion of blue corn in the BIA analysis. Appellant states that Indian white corn is a common crop on the HPL. Appellant's response to the Hopi Tribe's supplemental brief at 12. See also Centerfire report on the Hopi Tribe's supplemental brief at 7-9.

¹³ In estimating crop yields, as well as determining typical crops, data from the area of the properties being appraised is the most relevant. See American Society of Farm Managers and Rural Appraisers, *Rural Appraisal Manual* 19 (5th ed. 1979).

and assessing a civil penalty in the amount of \$22,500 against Bernos Coal Co. only.

Affirmed as modified in part; affirmed in part; vacated in part; Petition for Discretionary Review filed by the Office of Surface Mining Reclamation and Enforcement dismissed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

When OSM issues a notice of violation and a cessation order during the initial regulatory program, and the State regulatory authority, after obtaining primacy, issues a notice of violation which is litigated before the State agency, the doctrines of res judicata and collateral estoppel will not preclude OSM from enforcing the cessation order and assessing penalties therefor, since the statutory scheme of the Surface Mining Control and Reclamation Act evidences a countervailing statutory policy against application of those doctrines in such a situation.

Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violation cited by OSM in its cessation order was not litigated before the State agency, and there was no privity between OSM and the State.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to backfill and grade previously mined lands to achieve the proper slope as required by 30 CFR 715.14(b) and the permit conditions based thereon, and the permittee defends the failure to do so on the basis that its operations had no adverse physical impact on those lands, the cessation order will be upheld when the evidence shows that the operations did, in fact, have an adverse physical impact on the lands.

3. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Hearings Procedure--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Where, under 30 CFR 723.17(b), OSM fails to issue a notice of proposed penalty assessment within 30 days of issuance of a cessation order, but the permittee does not show actual prejudice as a result of such failure, no relief is appropriate.

4. Administrative Procedure: Administrative Law Judges-- Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally

Where, in a decision, an Administrative Law Judge rules on the liability for a civil penalty even though liability was never an issue and the full amount of the civil penalty was prepaid prior to the hearing, any question of liability for the civil penalty was moot, and the Board will vacate the ruling.

May 18, 1987

APPEARANCES: Joseph N. Clark, Jr., Esq., Knoxville, Tennessee, for petitioners; R. Anthony Welch, Esq., Office of the Field Solicitor, Knoxville, Tennessee, U.S. Department of the Interior, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

INTERIOR BOARD OF LAND APPEALS

In a decision dated July 26, 1985, Administrative Law Judge David Torbett ruled that the Office of Surface Mining Reclamation and Enforcement (OSM) properly issued Cessation Order (CO) No. 81-2-75-22 to both Bernos Coal Co. (Bernos) and Excello Land and Mineral Corp. (Excello) (herein referred to together as "petitioners"), but that the \$22,500 civil penalty assessment should be imposed against Bernos only. Both Bernos and Excello have sought discretionary review of Judge Torbett's holding that OSM properly issued the CO and the underlying notice of violation (NOV), and OSM sought discretionary review of his ruling that the civil penalty should be assessed against Bernos only. The Board granted the petitions by order dated September 12, 1985.

Procedural Background

The Tennessee Division of Surface Mining and Reclamation (TDSM) issued permit No. 78-148 to Bernos on June 23, 1978. The land embraced by the permit had been previously mined. Excello was a contract miner for Bernos, with the right to extract coal from the site, and was responsible for all reclamation work on the site. Excello mined the property in late 1978 and early 1979.

On January 19, 1981, OSM Inspector Douglas Godesky issued NOV No. 81-275-4 to Bernos for seven violations of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C §§ 1201-1328 (1982), and the regulations promulgated thereto. On March 6, 1981, OSM amended the NOV to add Excello as the operator and to extend the time for abatement. On March 20, 1981, OSM issued CO No. 81-2-75-10 to Bernos and Excello for failure to abate the violations cited in the NOV. As a result of an informal hearing, the NOV was modified to extend the period for abatement, and the CO was vacated. On June 16, 1981, Inspector Godesky again inspected the site, and upon discovering that violation No. 6 of NOV No. 81-2-75-4 had not been abated, he issued CO No. 81-2-75-22. Violation No. 6 was for "failure to establish final graded slopes which do not exceed the approximate premining slopes and for failure to backfill and grade to the most moderate slope possible."

Applicants filed a joint application for review of CO No. 81-2-75-22 on July 17, 1981. On December 11, 1981, OSM issued a notice of proposed penalty assessment of \$22,500 for the CO, and after completion of an

assessment conference on February 24, 1982, OSM issued an assessment conference report affirming the assessment. On January 6, 1983, Bernos and Excello filed a petition for review of the assessment under 43 CFR 4.1150. Contemporaneous with the filing of this document, petitioners paid the amount of the disputed penalty into escrow pending final determination. In addition, on the same date, petitioners filed a motion to dismiss the assessment, alleging a failure by OSM to comply with certain deadlines for issuing assessments.

The application for review and the petition for review were consolidated for consideration by the Hearings Division. Following a hearing, on July 26, 1985, Judge Torbett issued his decision holding that the CO was validly issued to both Bernos and Excello. However, he also ruled that the civil penalty of \$22,500 should be assessed against Bernos only, and that no civil penalty should be assessed against Excello.

Petitioners challenge Judge Torbett's decision on three bases. First they argue that even if the underlying NOV were validly issued, "the doctrines of res judicata and/or collateral estoppel bar [OSM] from instituting further proceedings to enforce the corrective actions required in the subject NOV and CO" (Petitioners' Brief at 12). In making this argument, they invoke the disposition by the Tennessee Board of Reclamation (Tennessee Board) of two NOV's issued by TDSM in October and November 1983 for the minesite involved herein. One of the State NOV's, No. 014-09-83, was issued, *inter alia*, for failure to regrade to stabilize rills and gullies. The Tennessee Board vacated that violation, and subsequently issued an order declaring that "[t]he area permitted under Permit No. 78-148 is considered reclaimed and the bond securing reclamation under Permit No. 78-148 is hereby released." Judge Torbett ruled, for reasons discussed *infra*, that if the doctrines of res judicata and/or collateral estoppel were applicable in the context of SMCRA enforcement, the prerequisites for their application were absent in this specific case.

Second, petitioners assert that Judge Torbett improperly ruled that OSM carried its ultimate burden of persuasion as to the fact of the violation and as to the amount of the civil penalty, as required under 43 CFR 4.1155. Petitioners assert that they "conducted very limited coal extraction activities in the southeastern portion of the permit area in the vicinity where cross section B-B' * * * intersected the old east-west highwall" (Petitioners' Brief at 2). They state that they not only backgraded and reclaimed the B-B' section as marked on the permit map, but also that they "backgraded and initially reclaimed other areas which had been left by the previous operators, but upon which Excello had conducted no coal extraction activities." *Id.* at 3. In the process, Excello claims it eliminated "the old east-west highwall." In sum, according to petitioners, Excello's mining and reclamation activities had "no 'adverse physical impact' whatsoever on the old slopes, but, rather, had a beneficial impact on them." *Id.* at 3. Petitioners argue that Judge Torbett erred to the extent he "appears to

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have ruled that by initiating mining activities on a limited basis in the southeastern portion of the permit area, the applicants have become responsible for *all* of the permit area." *Id.* at 8 (italics in original). They assert that under *Cedar Coal Co.*, 1 IBSMA 145, 86 I.D. 250 (1979), since their operations had no adverse physical impact "upon a condition at the site caused by previous mining, [they] cannot be required to correct the condition resulting from the previous mining" (Petitioners' Brief at 11). "Thus, since no coal extracting or other mining related activities took place in the area of the remaining slopes in question, and, further, since the other slopes were only beneficially, rather than adversely, affected, the subject NOV and CO should be vacated." *Id.* at 12.

Petitioners' third argument is that Judge Torbett should have granted their motion to dismiss because they were prejudiced by OSM's failure to issue a notice of proposed penalty assessment until some 6 months after the CO was written. They maintain that OSM should have served a copy of the proposed assessment within 30 days of issuance of the NOV or CO in accordance with 30 CFR 723.17(b). Judge Torbett found that they made a timely request for an assessment conference, but before it was held, a fire consumed Excello's offices in Grundy, Virginia, destroying maps, photographs, and other documents which petitioners claim were vital to their defense. Judge Torbett ruled that under *Badger Coal Co.*, 2 IBSMA 147, 87 I.D. 319 (1980), petitioners did not show actual prejudice, since the question of whether the violation had occurred was resolved on the basis of the permit application submitted by Bernos.

OSM's petition for discretionary review took exception with Judge Torbett's ruling that the civil penalty of \$22,500 should not be assessed against Excello, but against Bernos only. Judge Torbett ruled that under section 518(f) of SMCRA, 30 U.S.C. § 1268(f) (1982), as Bernos' agent, Excello must have acted "willfully and knowingly" in order to be subject to the civil penalty. He concluded that there was insufficient evidence "to make a factual finding that Excello intentionally and consciously committed the violations in question" (ALJ Decision at 8). OSM maintains that Excello, as an "operator," failed to correct a violation, and is subject to civil penalties under section 518(h) of SMCRA, 30 U.S.C. § 1268(h) (1982). Thus, OSM concludes that whether Excello was Bernos' agent is irrelevant.

Discussion

Petitioners argue that collateral estoppel and/or res judicata bar efforts by OSM to enforce the corrective action required in the NOV and CO. They base this argument upon the fact that the Tennessee Board entered a final order resolving Excello's challenge to the State-issued NOV's, which declared that "[t]he area permitted under Permit

No. 78-148 is considered reclaimed and the bond securing reclamation under Permit No. 78-148 is hereby released."

In his decision, Judge Torbett noted that in *Excello Coal Corp. v. Clark*, No. Civ-3-84-902 (E.D. Tenn. Dec. 28, 1984) (hereinafter *Excello v. Clark*), the court addressed the same legal question in the context of related facts. At issue in *Excello v. Clark* was an NOV issued by OSM on July 20, 1984, which cited Excello for a violation of Tennessee regulation 0400-1-14-61,¹ charging that there was a "failure to prevent formation of rills and gullies deeper than nine (9) inches in regraded and top soil area" (Memorandum Opinion at 3). This was the same violation for which the State had found a State NOV to have been improperly issued. Excello sought judicial review of an October 22, 1984, decision of Judge Torbett denying temporary relief from the NOV issued by OSM. The parties consented to have the case decided by a United States Magistrate under 28 U.S.C. § 636(c) (1982). The Magistrate phrased the issue as follows: "Whether the state agency decision that the state 'rill and gully' NOV was improperly issued precludes the OSM, under the doctrine of collateral estoppel, from issuing its own NOV later for the same violation" (Memorandum Opinion at 4).

The Magistrate rejected OSM's argument that the traditional principles of res judicata and collateral estoppel do not apply to OSM's enforcement actions, and that even if those principles did apply, the requisite privity did not exist between OSM and TDSM. The Magistrate's statement of the doctrines of res judicata and collateral estoppel and their application in the administrative context is quoted below:

Under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979). Under collateral estoppel principles, once an issue is actually litigated and necessarily determined, the determination is conclusive in subsequent suits based on a different cause of action but involving a party or privy to the prior litigation. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5 (1979). It is now accepted that both res judicata and collateral estoppel can be applicable to decisions of administrative agencies acting in a judicial capacity. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545 (1966). In the absence of "countervailing statutory policy," collateral estoppel applies and bars relitigation of factual questions or mixed questions of law and fact. See *Brown v. Felsen*, 442 U.S. 127, 139 n. 10, 99 S.Ct. 2205, 2213 n. 10 (1979); *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980).

(Memorandum Opinion at 5-6).

¹ On Aug. 3, 1982, the Department granted conditional approval of Tennessee's permanent regulatory surface mining program, effective Aug. 10, 1982, pursuant to sec. 503 of SMCRA, 30 U.S.C. § 1253 (1982). 47 FR 34724, 34753 (Aug. 10, 1982). However, Tennessee subsequently failed to indicate to OSM's satisfaction its intent and capability to implement, maintain, and enforce its regulatory program. Consequently, on Apr. 5, 1984, the Department assumed direct Federal enforcement of the inspection and enforcement portions of the State's program pursuant to 30 CFR 733.12. 49 FR 15496 (Apr. 18, 1984). The Department withdrew approval of the State's permanent regulatory program in full, effective Oct. 1, 1984. As of that date, OSM began enforcing the provisions of the permanent program performance standards set forth in 30 CFR Part 816 that replaced those repealed effective the same date by the State. 30 CFR 942.816(a) (49 FR 38874, 38895 (Oct. 1, 1984)).

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The Magistrate reviewed SMCRA and its legislative history, particularly the provisions concerning the permanent regulatory program and OSM's oversight responsibility in primacy states, to conclude that there is no "countervailing statutory policy" embodied therein which would deny application of collateral estoppel and res judicata principles. He relied upon *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980), in which the Ninth Circuit ruled that the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1376 (1982), did not abrogate principles of res judicata and collateral estoppel. Under section 402 of FWPCA, 33 U.S.C. § 1342 (1982), a state agency, pursuant to an approved state program, may issue water pollution discharge permits. In *ITT Rayonier*, the State agency issued a compliance order against Rayonier after the United States Environmental Protection Agency (EPA) advised the State agency that if it did not take action, Rayonier would be a "candidato" for Federal enforcement. Rayonier successfully litigated the validity of the State compliance order in State proceedings. In March 1977, the EPA issued a notice of violation to Rayonier and the State agency pursuant to FWPCA, and in April 1977, EPA filed an enforcement action in Federal district court. The court ordered Rayonier to comply immediately with the permit. Rayonier appealed the district court ruling, arguing before the Ninth Circuit that the State judgment operated to preclude EPA's action.

The *ITT Rayonier* court noted the "dual" or "concurrent" enforcement authority under FWPCA. 627 F.2d at 1001. The fact that "[e]nforcement actions could have been filed concurrently in both state and federal courts * * * does not necessarily preclude the operation of collateral estoppel after one action reaches finality." *Id.* "[S]tate and federal enforcement actions under FWPCA are based on permits issued under a single system. The EPA retains authority to veto state-issued permits * * *. Further, it may revoke the permit issuing authority of the state agency." *Id.* at 1002. Moreover, "[a]lthough the NPDES [National Pollution Discharge Elimination System] state permit program is established under the state law and functions 'in lieu' of federal authority, the source of the federal/state 'partnership' can be traced to a single act of Congress (FWPCA)." *Id.* The Ninth Circuit concluded that FWPCA does not manifest a countervailing policy reason to abrogate the doctrine of res judicata.

It further ruled that the relationship between the State and EPA was such as to preclude relitigation of the issue resolved in the State court. The basis for that ruling was the court's conclusion that a nonparty may be bound if it "is so closely aligned with its interests as to be its 'virtual representative'" and its findings that

[t]he interests of [the Washington Department of Energy] and the EPA were identical and their involvement sufficiently similar. * * * It is undisputed that [the Washington Department of Energy] maintained the same position as the EPA before the state

hearings board and state courts. * * * The EPA does not contend that [the Washington Department of Energy] failed to assert vigorously its position in the state proceedings.

Id. at 1003.

In *Excello v. Clark*, the Federal Magistrate rejected OSM's argument that the legislative scheme embodied in SMCRA evinces the intent to preclude res judicata and collateral estoppel. He stated:

The fact that § 1271 gives the OSM authority to step in and take over the enforcement of a state program does not give it the authority to reopen enforcement decisions of the state agency which had already become final. Such an interpretation would allow the OSM to take over State programs and bring enforcement actions against mine operators for an unlimited time after the controlling state agency had found a mine to be sufficiently reclaimed. The undersigned is reluctant to recognize such an unlikely legislative intent without any clear evidence of it.

(Memorandum Opinion at 9). He conceded "that the relationship between the EPA and its corresponding state agencies is different from the relationship between the OSM and its corresponding state agencies. However, for purpose of collateral estoppel this appears to be a distinction without a difference" (Memorandum Opinion at 10). He concluded that the "dual" or "concurrent" enforcement scheme established under FWPCA is analogous to that established under SMCRA. "[T]he Tennessee DSM and the OSM were applying the identical state created and Federally approved guidelines to the appellant's mine site" (*Id.* at 11).

In applying the *ITT Rayonier* tests, the Magistrate concluded that the operative facts giving rise to the State-issued NOV and that issued by OSM were the same, and that the issue was actually and finally litigated in the State proceeding. "Of the prerequisites to the application of collateral estoppel only the identity of the parties is a challenged issue. The Secretary claims that he was neither a party nor privy to the state enforcement action" (Memorandum Opinion at 12). The Magistrate found as follows on this question:

[T]he interests of the DSM and OSM were so similar in this case that the OSM was a privy to the state enforcement action. Both agencies were participating in the same federal program, enforcing the same state environmental protection objectives. The OSM could have participated in the state enforcement action if it had desired. That DSM was OSM's "virtual representative" is evident by the fact that it stepped in and began operating exactly the same program that DSM had operated. The relationship between DSM and OSM is sufficiently close to preclude relitigation of the issue already determined in the DSM enforcement action.

(Memorandum Opinion at 12-13).

[1] Our analysis of the applicability of res judicata/collateral estoppel principles in this case leads to the conclusion, contrary to *Excello v. Clark*, that the unique Federal/State balance created under SMCRA manifests a "countervailing statutory policy" and renders those doctrines inapplicable to issues arising in the Federal/State context.²

² In *Oregon Portland Cement Co. (On Judicial Remand)*, 84 IBLA 186, 190 (1984), in expressly declining to follow the decision of the U.S. District Court for Alaska in *Oregon Portland Cement Co. v. U.S. Department of the Interior*, 590 F. Supp. 52 (D. Alaska 1984) the Board stated:

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That policy is placed into focus by examining OSM's responsibilities, as defined in key provisions of SMCRA and its legislative history, as well as the regulations promulgated to implement SMCRA. OSM, on behalf of the Secretary, is required to ensure compliance with the law regardless of the actions or inactions of the State regulatory authority.

The interim regulations provide that "[t]he States are responsible for issuing permits and inspection and enforcement on lands on which operations are regulated by a State to insure compliance with the initial performance standards * * *." 30 CFR 710.4. However, 30 CFR 710.3 directs the Secretary to "implement an initial regulatory program within six months after the date of enactment of the Act in each State which regulates any aspect of surface coal mining under one or more State laws until a State program has been approved or until a Federal program has been implemented." As part of this implementation responsibility, 30 CFR Part 721 requires the Secretary to "conduct inspections of surface coal mining and reclamation operations subject to regulation under the Act." See 30 CFR 721.11. When the Secretary discovers a violation of SMCRA during the interim program, both section 521(a)(3) of SMCRA, 30 U.S.C. § 1271(a)(3) (1982), and 30 CFR 722.12 require the issuance of an NOV. If the permittee fails to abate the violation in accordance with the time period specified in the NOV, OSM is required to issue a CO pursuant to section 521(a)(3) and 30 CFR 722.13. In turn, section 518(a) and (h) of SMCRA, 30 U.S.C. § 1268(a) and (h) (1982), mandates the imposition of civil penalties for the issuance of a CO issued under section 521(a)(3).

Congress specifically recognized the need for efficient enforcement under both the interim and permanent regulatory programs. The House specified the reasons:

Efficient enforcement is central to the success for the surface mining control program contemplated by H.R. 2. For a number of predictable reasons – including insufficient funding and the tendency for State agencies to be protective of local industry – State enforcement has in the past, often fallen short of the vigor necessary to assure adequate protection of the environment. The committee believes, however, that the implementation of minimal federal standards, the availability of federal funds, and the assistance of the expertise of the Office of Surface Mining Reclamation and Enforcement in the Department of Interior, will combine to greatly increase the effectiveness of State enforcement programs operating under the act.

H.R. Rep. No. 218, 95th Cong., 1st Sess. 129 (1977). During the interim program, "the Secretary's responsibility relates to the enforcement of Federal interim performance standards which are implemented during the interim period. *It is the Secretary's duty to respond to any reasonable evidence of violations of those Federal standards by using*

"The Board has declined to follow Federal court decisions primarily in those situations where the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion. In our view, both conditions obtain."

We respectfully decline to follow *Excello v. Clark* for those same reasons.

the authority vested in him to bring about compliance." *Id.* at 132 (italics added).

The Department has ruled that the Secretary's duty during the interim program is not diminished by the fact of possible dual enforcement action by OSM and a state. In *Kaiser Steel Corp.*, 2 IBSMA 158, 87 I.D. 324 (1980), the Board of Surface Mining and Reclamation Appeals stated at 2 IBSMA 162, 87 I.D. at 326: "OSM is required by 30 CFR 722.12(a) to issue a notice of violation during the initial regulatory program when a violation is discovered. *This power is in addition to state enforcement powers.*" (Italics added.) *Accord Rayle Coal Co.*, 3 IBSMA 111, 88 I.D. 492 (1981); *Eastover Mining Co.*, 2 IBSMA 5, 87 I.D. 9 (1980).

The Senate was also adamant about a strong Federal presence and enforcement role in a primacy state:

The Federal enforcement system contained in this section, while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal backup to reinforce and strengthen State regulation as necessary. Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program.

S. Rep. No. 128, 95th Cong., 1st. Sess. 88 (1977).

The legislative history, when read in conjunction with section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), which provides for Federal inspection and enforcement in states with primacy, requires the conclusion that a countervailing statutory policy warrants an exception to the preclusion doctrines. The applicability of those rules would be inconsistent with the statutory scheme set forth in section 521(a)(1). Under that section, when OSM inspects a surface coal mining operation located in a primacy state and discovers a violation, OSM must give notice to the state regulatory authority. See 30 CFR 843.12(a)(2). Whether OSM need take further action depends upon whether the state's response constitutes appropriate action. OSM determines whether the action taken is appropriate; such action must be calculated to secure abatement of the violation. *Peabody Coal Co. v. OSM*, 95 IBLA 204, 94 I.D. 12 (1987); *Turner Brothers, Inc. v. OSM*, 92 IBLA 23, 93 I.D. 199 (1986).

If, under section 521(a)(1), OSM issued a 10-day notice to the State informing the State of a violation at a particular minesite and the State's response was that an NOV had been issued for that violation, and that the violation had been challenged and subsequently vacated in State proceedings, OSM would not be precluded from taking further enforcement action. In fact, the regulations provide that "if the violation continues to exist, [OSM] shall issue a notice of violation or cessation order, as appropriate." 30 CFR 843.12(a)(2) (Italics added).

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Application of collateral estoppel and res judicata principles is inconsistent with OSM's enforcement responsibility during the interim and permanent regulatory periods. The availability of the rules of preclusion to permittees as a defense to OSM enforcement action during either period would divest OSM of the authority expressly conferred by Congress.

Even if there were no "countervailing statutory policy" in SMCRA, the preclusion doctrines would not apply in this case because the prerequisites for their application, as announced in *ITT Rayonier*, are missing. First, the same issue is not involved. As Judge Torbett stated in his decision:

One of the principles of res judicata and collateral estoppel is that the "question expressly and definitely presented in this suit must be the same as that definitely and actually litigated and adjudged adversely to the Government in the previous litigation." *United States v. Moser*, 266 U.S. 236, 242 (1924); *Montana v. United States*, 440 U.S. 147, 157 (1979). In this case, the Applicants/Petitioners were issued a violation for "failure to establish final grade slopes which do not exceed the approximate premining slopes and for failure to backfill and grade to the most moderate slope possible." This violation was not "definitely and actually litigated and adjudged adversely to the Government in the previous litigation." The State Board received no evidence on this violation. It was not litigated before them. The fact that the Board found the site fully reclaimed does not mean that all possible violations were litigated before them. Thus, the undersigned finds that the subject cessation order cannot be vacated on the grounds of res judicata and/or collateral estoppel.

(ALJ Decision at 3). We reject petitioners' argument that the Tennessee Board's "finding of full reclamation concerning a site is, of necessity, a finding that no violations exist" (Petitioners' Brief at 13). The issue of whether petitioners had met the requirements of 30 CFR 715.14 was not before the Tennessee Board. Moreover, in *OSM v. Calvert & Marsh Coal Co.*, 95 IBLA 182, 189 (1987), the Board held that release of a performance bond by the state regulatory authority does not affect OSM's authority to enforce the Act. See *Grafton Coal Co.*, 3 IBSMA 175, 88 I.D. 613 (1981).

Second, there is no privity between the State and OSM. TDSM was not OSM's virtual representative during the State proceeding, so that OSM was a "privy" to that action.³ In *United States v. Mendoza*, 464 U.S. 154 (1984), the United States Supreme Court reaffirmed its analysis in *Montana v. United States*, 440 U.S. 147 (1979), which established the degree of mutuality required of the Federal Government as a party litigant in the prior litigation, stating:

In *Montana* an individual contractor brought an initial action to challenge Montana's gross receipts tax in state court, and the Federal Government brought a second action in federal court raising the same challenge. The Government totally controlled and

³ Petitioners argued before Judge Torbett, and now argue to this Board, that *Westwood Chemical Co. v. Kulick*, 656 F.2d 1224 (6th Cir. 1981), renders irrelevant the fact that Judge Torbett acquired jurisdiction over the matter involved herein before Tennessee began its enforcement action against petitioners. Given our conclusion regarding the statutory policy of SMCRA and the inapplicability of res judicata and collateral estoppel principles in this case, the sequence in which jurisdiction was acquired is not decisive.

financed the state court action; thus for all practical purposes, there was a mutuality of parties in the two cases. “[T]he United States plainly had a sufficient ‘laboring oar’ in the conduct of the state-court litigation,” 440 U.S., at 155, to be constituted a “party” in all but a technical sense.

464 U.S. at 164 n.9. We agree with OSM that “the Secretary had no ‘laboring oar’ in the conduct of [TDSM’s] administrative litigation. The Secretary cannot in any sense be termed a ‘party’ to the proceedings before the Tennessee Board of Reclamation Review” (OSM Brief before Judge Torbett at 28).

For the above-stated reasons, we conclude that principles of res judicata and collateral estoppel do not bar OSM’s enforcement action in this case.

[2] Permit No. 78-148 was issued to Bernos on June 23, 1978, and, thus, was required to “contain terms that comply with the relevant performance standards of the initial regulatory program.” 30 CFR 710.11(a)(3)(i) and (ii). See sections 502(b) and (c) of SMCRA, 30 U.S.C. §§ 1252(b) and (c) (1982). A general performance obligation under the initial regulatory program, applicable to all surface coal mining and reclamation operations, was to “backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated.” Section 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1982). The Department’s initial program regulations include 30 CFR 715.14, which was adopted to implement section 515(b)(3) of SMCRA. This regulation, cited by OSM as authority for issuance of the NOV and CO in this case, provides in pertinent part:

In order to achieve the approximate original contour, the permittee shall, except as provided in this section, transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil material to eliminate all highwalls, spoil piles, and depressions. * * * The postmining graded slopes must approximate the premining natural slopes in the area as defined in paragraph (a).

(a) *Slope measurements.* (1) To determine the natural slopes of the area before mining, sufficient slopes to adequately represent the land surface configuration, and as approved by the regulatory authority in accordance with site conditions, must be accurately measured and recorded. * * * Where the area has been previously mined, the measurements shall extend at least 100 feet beyond the limits of mining disturbances as determined by the regulatory authority to be representative of the premining configuration of the land. * * *

* * * * *

(b) *Final graded slopes.* (1) The final graded slopes shall not exceed either the approximate premining slopes as determined according to paragraph (a)(1) and approved by the regulatory authority or any lesser slope specified by the regulatory authority based on consideration of soil, climate, or other characteristics of the surrounding area. [Italics added.]

The permit package prepared by Bernos and submitted to and approved by the State of Tennessee indicated the premining slopes in accordance with 30 CFR 715.14(a)(1). Those slopes ranged from 12 to 15 degrees (Tr. 15-16, 69-70; Exh. R-43). The package also shows, in

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accordance with 30 CFR 715.14(b), final graded slopes of 15 degrees (Tr. 102-04; Exh. R-46).⁴

OSM through its witnesses presented extensive testimony before Judge Torbett concerning whether petitioners violated 30 CFR 715.14 and the conditions of the permit based thereon. Judge Torbett's summary of this testimony is as follows:

Inspector Godesky testified on behalf of the Respondent and introduced photographs in support of his testimony. He testified that the southern end of the permitted area had slopes of 28 and 29 degrees based on measurements that he made with a Brunton compass (Tr. 19-24). Mr. Roland Harper, an expert surveyor, testified on behalf of the Respondent. His survey shows that the southern outslopes on subject site contain slopes that reach 26 degrees. The survey also shows negative slopes on the southern end of the permitted area.

The Respondent contends that the Applicants/Petitioners violated a condition of their permit. The permit map has two cross sections. The cross section marked B-B' is at issue in this case. The permit map requires the Applicants/Petitioners to return cross section B-B' to a 15 degree average slope with no negative slopes (Ex. R-43, R-46, A-3). The Applicants/Petitioners maintain that the permit map only requires that they return this particular cross section to a 15 degree average slope. The Respondent maintains that cross section B-B' is representative of an area on the subject site which includes the southern end of the permitted area. Thus, Respondent contends that cross section B-B' requires the Applicants/Petitioners to regrade the southern end of the permitted area to conform with this cross section.

* * * * *

In order to comply with [30 CFR 715.14], the regulatory authority and the Applicants/Petitioners must have found that cross section B-B' was a "sufficient slope to adequately represent the land surface configuration." Thus, the permit requires not only that cross section B-B' be regraded to a 15 degree average slope with no negative slopes but also that all other slopes that cross section B-B' represents be regraded to a 15 degree average slope with no negative slope. The only other slope given by the Applicants/Petitioners is cross section A-A', and this cross section runs east to west.^[5] Since cross section B-B' runs north to south, it is clear that cross section B-B' covers the southern end of the permitted area.

The evidence of the Respondent shows that the southern outslopes of the subject site reach 26 degrees. The site then slopes downward for 100 to 120 lateral feet before it starts to rise to the crown of the site at angles that reach 18 degrees (Ex. R-47). This land configuration does not conform to the proposed slope in the Applicants/Petitioners' permit. The undersigned concludes that the Applicants/Petitioners violated a condition of their permit. This conclusion is sufficient to find that the violation underlying the subject cessation order occurred.

(ALJ Decision at 5-6). Our review of the evidence in this case establishes the correctness of Judge Torbett's findings and his ruling.

Petitioners challenge Judge Torbett's ruling on the basis of *Cedar Coal, supra*, in which OSM had issued an NOV to Cedar for failure to eliminate completely an orphaned highwall in violation of 30 CFR

⁴ 30 CFR 715.14(b)(1) provides that the requirements of that paragraph may be modified by the regulatory authority where the mining is reaffecting previously mined lands that have not been returned to approximate original contour and sufficient spoil is not available to return to the slope determined according to paragraph (a)(1). There is no evidence Bernos sought such a modification of its performance obligations.

⁵ Section B-B' of Drawing No. 77-135-1 D (Exh. R-43) is the only cross-section relevant to the site in question. Section A-A' is a cross-sectional drawing for another site located north of the one in question.

715.14(b)(1)(ii). The Board ruled that “[t]here has been no showing that Cedar’s removal of overburden has resulted in any adverse physical impact on the orphaned highwall. Thus, we conclude that this activity has not triggered any obligation on the part of Cedar to eliminate the orphaned highwall.” 1 IBSMA at 155, 86 I.D. at 255-56.

The Department’s initial program regulations “apply to operations * * * on lands from which the coal has not yet been removed and to any other lands used, *disturbed*, or *redisturbed* in connection with or to facilitate mining or to comply with the requirements of the Act or these regulations.” 30 CFR 710.11(d)(1) (italics added). The initial regulations do not define “disturbed,” but the term “disturbed area” is defined at 30 CFR 710.5 to mean “those lands that have been affected by surface coal mining and reclamation operations.” In *Cedar Coal*, the Board rejected OSM’s argument that based upon this definition the terms “disturbed” and “affected” are synonymous, and “that since Cedar ‘affected’ the orphaned highwall by ‘touching’ it, the company must eliminate the entire highwall.” 1 IBSMA at 155, 86 I.D. at 255. Thus, an area may be “affected” by surface coal mining activities without being “disturbed.” The Board ruled that to be subject to SMCRA and the regulations during the initial program, the area in question must have been “disturbed,” i.e., the operator has to engage in activities which have an “adverse physical impact” on that area.

The term “adverse physical impact” is not defined in the interim program regulations.⁶ The Board in *Cedar Coal* did not define the term, but ruled that Cedar’s operations did not result in an adverse physical impact. Petitioners argue that under the *Cedar Coal* rationale, as extended by *Darmac Coal Co.*, 74 IBLA 100 (1983), they are excused from the backfilling and grading requirements of 30 CFR 715.14, since their remining operations did not result in an adverse physical impact upon the permit area. See *Mountain Enterprises Coal Co.*, 3 IBSMA 338, 88 I.D. 861 (1981) (orphan highwall subject to adverse physical impact). In *Darmac Coal*, *supra*, the Board addressed the issue of whether Darmac by disturbing a previously mined area became responsible for passing all surface water from the area through a sedimentation pond and meeting the applicable effluent standards. The Board ruled that there had been no showing that Darmac’s operations caused an adverse physical impact requiring it to bring a preexisting water quality violation into compliance with 30 CFR 715.17(a). The Board stated: “It has been held in a context also involving previously mined areas that absent adverse physical impact from the current mining on the condition remaining from the previous mining—in those cases, orphaned highwalls—no disturbance occurs that requires bringing that condition into compliance with presently applicable

⁶ We note that the permanent program regulations do provide a definition of the term, relating it specifically to the highwall situation.

“*Adverse physical impact* means, with respect to a highwall created or impacted by remining, conditions, such as sloughing of material, subsidence, instability, or increased erosion of highwalls, which occur or can reasonably be expected to occur as a result of remining and which pose threats to property, public health, safety, or the environment.” 30 CFR 701.5.

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standards." 74 IBLA at 104. The Board ruled that there had been no showing that Darmac's operations caused an adverse physical impact requiring it to bring the water quality violation into compliance with 30 CFR 715.17(a).

Our application of the *Cedar Coal* rationale is of no benefit to petitioners in this case, since the evidence establishes that their operations had an adverse physical impact upon the portions of the permit area subject to the OSM enforcement action. The violation was issued for the area of "graded outslopes on the southern end of the disturbed area with a slope measurement of approximately 28-29 degrees (*Cts [cuts] No. 1 and 2*)" (Exh. R-5). While Godesky did not see any ongoing coal extraction by petitioners, on a June 14, 1979, visit to the site he observed earth-moving equipment placing spoil along the slopes which he later referred to in the NOV (Tr. 8-9). On June 20, 1979, he observed that the entire southern portion of the minesite from its eastern to western limits was barren of vegetation and had been recently disturbed by mining equipment regrading spoil. He saw reclamation activity occurring on the southern end of the disturbed area where the company was modifying the outslope which he later cited (Tr. 9-12, 34, 72, 73, 81, 104; Exh. R-1, R-12). His later inspection in 1984 disclosed continued erosion and further dying off of vegetation (Tr. 67, 68).

During the mining operations on the site, Excello used the bench area of a preexisting highwall on which to store spoil material. The highwall was located north of the outslopes cited by OSM in the NOV (Exh. R-12, A-3 at 3). Prior to mining, the premining slope ran from the top of the highwall to the crest of the minesite area with an average slope of 15 degrees and no negative slopes. (Exh. A-3 at 3). While reclaiming the area, Excello backfilled the bench area of the highwall with spoil material and completely eliminated the highwall. However, in doing so Excello created a slope which begins to rise from the perimeter of the backfilled area at an angle of 26 degrees until it reaches a high point approximately 50 to 75 lateral feet north where it falls in a negative slope for approximately 100 to 125 lateral feet before rising to the crown of the minesite (Exh. R-47 at 2). The negative slope, in combination with a positive slope lying to the north of the orphaned highwall area, created a trough in the disturbed area. The troughing effect resulted in rills and gullies being created by erosion, as is evidenced by Exhibits R-12, 32, 33, and 34. Petitioners created another area of severe erosion on the southern tip of the disturbed area, where the spoil pile slopes equaled 26 to 29 degrees, as is seen on Exhibits R-6, 7, 12, and 33.

This record makes clear that areas cited by OSM in issuing the NOV and CO were "disturbed" by petitioners in conducting their operations within the rationale of *Cedar Coal*, since their operations resulted in an "adverse physical impact." Accordingly, Judge Torbett properly

sustained OSM's CO for failure to meet the requirements of 30 CFR 715.14(b) and the permit conditions based thereon.⁷

[3] Petitioners argue that Judge Torbett should have granted their motion to dismiss the CO on the basis that OSM did not issue the notice of proposed penalty until about 6 months after the CO was written. They state that “[t]his conduct on the part of [OSM] clearly flies in the face of the requirement of 30 C.F.R. § 723.17(b) which require that [OSM] shall serve a copy of a proposed assessment within thirty (30) days of the issuance of an NOV or CO” (Petitioners' Brief at 16). Before the assessment conference was held, there was a fire at the offices of Excello in Grundy, Virginia, which, according to petitioners “destroyed maps, photographs and other documents which were vital to the [petitioners] having a fair and full hearing before the assessment conference officer (and the ALJ).” *Id.* at 17. Those materials “would have been invaluable in helping to irrefutably establish facts concerning the prior condition of the slopes and the total lack of adverse physical impact upon the subject slopes.” *Id.*

Judge Torbett rejected petitioners' argument that OSM's delay in issuing the notice of proposed assessment prejudiced their position. He applied *Badger Coal Co.*, 2 IBSMA 147, 87 I.D. 319 (1980), in which the Board addressed the question of whether OSM's failure to hold an informal assessment conference within 60 days after a request “should result in the vacating of both a notice of violation or cessation order and the resulting civil penalty.” 2 IBSMA at 151, 87 I.D. at 321. The Board reasoned as follows:

If OSM fails to hold a conference within 60 days, and if the person assessed a civil penalty timely objects to this failure and can prove actual prejudice, some relief may be appropriate. * * * [A]n Administrative Law Judge should be free to exercise discretion in fashioning appropriate relief for failure to hold the conference within 60 days. However, the relief must address the prejudice shown. Therefore, appropriate relief would not include vacating a notice of violation or cessation order. It might be appropriate to reduce the civil penalty, but except in rare circumstances it seems unlikely that sufficient prejudice could be shown to justify vacating it.

2 IBSMA at 152, 87 I.D. at 321-22.

While Judge Torbett found that petitioners made a timely objection to OSM's delay in issuing the notice of proposed assessment, he rejected their argument that they had shown “actual prejudice.” He found that “[w]hile the maps and photographs in the burned Excello office may have helped to show the premining conteinur of the site, the evidence in that office could not change the permit conditions” (ALJ Decision at 7). He resolved the question of whether the violation underlying the CO occurred on the basis of the permit package filed by Bernos.⁸

⁷ Judge Torbett did not discuss the *Cedar Coal* line of cases; rather he applied 30 CFR 715.14 without reference to whether petitioners' operations resulted in an adverse physical impact on the previously mined area.

⁸ We find merit in OSM's contention that “all the necessary documents and photographs were available to [petitioner] from other sources, and it failed to show any effort to obtain replacement records. Excello could have acquired the records from Bernos or its prior counsel, or the engineering company that prepared the permit package” (OSM's Brief in Response at 12; footnote omitted).

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Petitioners also argue that OSM's failure to respond to their motion to dismiss should be construed as a waiver of objection to the motion. Regulation 43 CFR 4.1112(b) provides that "any party to a proceeding in which a motion is filed * * * shall have 15 days from service of the motion to file a statement in response." OSM counters that 43 CFR 4.1112(c) does not mandate that a failure to file a statement in response under subsection (b) be construed as a waiver of objection. Rather, "[F]ailure to make a timely motion or to file a statement in response *may be* construed as a waiver of objection." 43 CFR 4.1112(c) (italics added). OSM cites the preamble to 43 CFR 4.1112(c), which explains that suggestions that the waiver be mandatory were rejected by the Department as unduly harsh. 43 FR 34378 (Aug. 3, 1978). OSM points out that petitioners made no mention of their motion at the hearing, and it "was not resurrected by [petitioners] until [they] filed [their] post hearing brief" (OSM's Brief in Response at 10). We conclude that Judge Torbett correctly denied petitioners' motion to dismiss.

[4] Judge Torbett ruled that the \$22,500 civil penalty should be assessed against Bernos only, and not against Excello. He stated that "[t]he liability of Excello must be determined by its factual relationship with Bernos" (ALJ Decision at 7). He noted the following facts:

Bernos is the permittee, not Excello (Ex. A-3). The record shows that Excello was in complete charge of the operation of the subject mine. According to Mr. Powers, [Roger Powers, President of Excello] Excello leased the minesite from Bernos (Tr. 131), extracted coal from the site (Tr. 141), and performed all the reclamation work on the site (Tr. 142).

(ALJ Decision at 7). OSM argues that Judge Torbett erred and that liability for the civil penalty should extend to Excello also.

In reply, petitioners argue that OSM's attempt to have Judge Torbett's ruling reviewed should be dismissed. Petitioners claim that OSM issued the penalty assessment only to Bernos and that Excello prepaid the penalty in accordance with contractual obligations existing between Bernos and Excello. Petitioners claim liability was never an issue; it was not raised at the hearing or in the posthearing briefs. Petitioners register surprise that Judge Torbett made a ruling thereon. They claim that since liability was not an issue, the question was moot and any ruling by the Board would constitute nothing more than an advisory opinion, citing 5 CJS *Appeal and Error* § 1354(1) (1958).

Petitioners are correct that liability for the civil penalty in this case was never at issue. The total amount of the civil penalty was prepaid prior to the hearing. Neither party requested a ruling from the Administrative Law Judge on liability for the penalty. We find that any question of liability was moot. There was no reason for such a ruling. Therefore, that part of Judge Torbett's decision relating to liability is vacated and OSM's Petition for Discretionary Review is dismissed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we affirm as modified that part of Judge Torbett's decision ruling that the doctrines of res judicata and collateral estoppel do not bar OSM's enforcement action in this case; we affirm that part of the decision ruling that OSM's issuance of the CO was proper and that part of the decision denying petitioners' motion to dismiss; we vacate that part of the decision regarding liability for the civil penalty and dismiss OSM's Petition for Discretionary Review of that ruling.

BRUCE R. HARRIS
Administrative Judge

WE CONCUR:

JOHN H. KELLY
Administrative Judge

KATHRYN A. LYNN
Administrative Judge
Alternate Member

June 11, 1987

ESTATE OF MARY ANN SNOHOMISH CLADOOSBY

15 IBIA 203

Decided *June 11, 1987*

Appeal from an order denying reopening issued by Administrative Law Judge Robert C. Snashall in Indian Probate IP PO 164L 83-210.

Motion for continuance denied; orders affirmed; 13 IBIA 8 limited.

1. Indian Probate: Indian Reorganization Act of June 18, 1934: Construction of Section 4

For purposes of 25 U.S.C. § 464 (1982), in order for a tribe to have a property interest in a reservation based on treaty, the modern day "tribe" must be the continuation of a treaty tribe for which the particular reservation was established.

2. Indian Probate: Indian Reorganization Act of June 18, 1934: Construction of Section 4

A member of a non-Federally recognized Indian tribe, who is not an heir or lineal descendant of the decedent, and who has less than one-half Indian blood, is found ineligible to receive a devise of Indian trust land on a reservation organized under the Indian Reorganization Act.

APPEARANCES: Mary McDowell Hansen and Kenneth C. Hansen, for appellant; Harrietta Simmonds Kelly and Freda Simmonds Abrego, *pro se*; Colleen Kelley, Esq., Office of the Solicitor, Pacific Northwest Region, Portland, Oregon, as *amicus curiae*.

OPINION BY ADMINISTRATIVE JUDGE LYNN

INTERIOR BOARD OF INDIAN APPEALS

On September 18, 1985, the Board of Indian Appeals (Board) received a notice of appeal in the estate of Mary Ann Snohomish Cladoosby, deceased Skagit No. 130-3938 (decedent). The notice of appeal, which was filed with Administrative Law Judge Robert C. Snashall contemporaneously with a petition for reopening, was forwarded to the Board by Judge Snashall after he denied reopening. Judge Snashall's denial of reopening let stand March 22 and 29, 1985, orders in decedent's estate. For the reasons discussed below, the Board affirms the Judge's orders.

Background

Decedent was born on March 7, 1899, and died on May 9, 1982, in Anacortes, Washington. Judge Snashall held a hearing to probate her Indian trust estate on March 20 and November 29, 1984. Decedent's last will and testament, dated May 16, 1974, with a November 3, 1977, codicil, was introduced at the hearing. Under her will, most of

decedent's estate was left to Father Thomas McDowell (appellant),¹ her second cousin.

In an order dated March 22, 1985, as modified on March 29, 1985, Judge Snashall approved decedent's will, but found that 25 U.S.C. § 464 (1982)² made appellant, a member of the non-Federally recognized Samish Indian Tribe, ineligible to take decedent's trust interests on the Swinomish Indian Reservation. Because the Swinomish Tribe organized under the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479, the Judge found section 464 barred the devise to appellant, who was not a member of the tribe, an heir of decedent, or an Indian for whom the United States could hold land in trust status. Consequently, Judge Snashall ordered that decedent's trust interests on the Swinomish Reservation would descend to her heirs through intestate succession. In addition, Judge Snashall held that, although appellant could receive decedent's interests on the Lummi Indian Reservation, those interests passed to appellant out of trust status.

Appellant sought reopening,³ which was denied on May 30, 1985. Appellant and several individual appellees filed briefs with the Board on appeal. In addition, by order dated Augnst 18, 1986, the Board requested a brief from the Office of the Solicitor⁴ because of certain apparent similarities between this case and another case pending before the Board.⁵ The Solicitor's brief was received on September 29, 1986.

Motion for Continuance

As previously mentioned, Father McDowell was a member of the Samish Indian Tribe. This Indian group is not a Federally recognized tribe. While the present appeal was pending before the Board, a petition for Federal acknowledgment of the Samish Tribe was pending before BIA.

Because of the representation that BIA was close to publishing a determination on the Samish petition, by order dated December 19, 1986, appellant was given 15 days from receipt of BIA's determination in which to file a brief replying to whatever decision BIA reached. BIA's determination that the Samish Tribe does not exist as an Indian tribe within the meaning of Federal law was published in 52 FR 3709 (Feb. 5, 1987). Appellant did not file a brief within 15 days of

¹ Father McDowell died during the pendency of this proceeding. The appeal was continued with the substitution of his estate as appellant.

² All references to the United States Code are to the 1982 edition.

³ Appellant should properly have sought rehearing under 43 CFR 4.241, rather than reopening under 43 CFR 4.242. The Board assumes the Judge would also have denied rehearing, and considers the notice of appeal on the merits.

⁴ Appellant states it has requested "copies of all memos or other communications between [the Board] and the Central (or D.C.) Solicitor's Office to which the Western Regional Solicitor's Office responded." Filing dated Mar. 31, 1987, at 1. Appellant suggests that if such communications are not provided, a request for them may be filed under the Freedom of Information Act, 5 U.S.C. § 552. As a party to this appeal, appellant has already received copies of all Board communications with anyone in this case. The Board is harred by regulation from engaging in *ex parte* communications. 43 CFR 4.27(b). The only communications from the Board specifically addressed to the Department are its Aug. 18, 1986, request for briefing by the Solicitor's Office and a Dec. 19, 1986, order requesting, *inter alia*, the Bureau of Indian Affairs (BIA) to provide it with a copy of the decision concerning Federal acknowledgment of the Samish Tribe.

⁵ Briefing revealed that the cases did not involve the same issues.

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publication of this notice. On March 31, 1987, appellant filed an untimely request for a continuance, stating that an appeal from BIA's decision had been filed with the Secretary of the Interior and if the appeal was not resolved to its satisfaction, relief would probably be sought in Federal court. On May 7, 1987, the Secretary of the Interior declined to ask BIA to reconsider its decision.

This case has been pending for several years while appellant sought to show he could take decedent's trust property on an IRA reservation. An additional, indefinite continuance at this time is unfair to the other parties to this case. Appellant's motion for a continuance is denied. Because appellant failed to file a timely reply to BIA's determination as to Federal acknowledgment, this case is ripe for decision.

Discussion and Conclusions

The initial question raised in this appeal is whether appellant can take Indian trust property located on the reservation of an Indian tribe organized under the IRA. The applicable statutory provision is 25 U.S.C. § 464:

Except as provided in * * * [the IRA], no sale, devise, gift, exchange, or other transfer of restricted Indian lands * * * shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands * * * are located * * *; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located * * *, to any member of such tribe * * * or any heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior determines that the United States may hold [land] in trust: * * *

There is no dispute that the Swinomish Tribe is organized under the IRA. Thus, in order to receive a devise of trust land on that reservation, appellant must be: (1) the tribe in which the lands are located, (2) a member of that tribe, (3) an heir or lineal descendant of the decedent; or (4) an Indian for whom the United States may hold land in Indian trust or restricted status.⁶

[1] Appellant can receive this devise if he is a member of "the tribe in which the land is located." In *Williams v. Clark*, 742 F.2d 549, 553 (9th Cir. 1984), *cert. denied sub nom. Elvrum v. Williams*, 471 U.S. 1015 (1985), the court held that "[t]he IRA does not mandate that the tribe in which the lands are located be one tribe."⁷ Thus, it is

⁶ Because it is clear appellant is neither an Indian tribe nor an heir or lineal descendant of the decedent, these possible sources of rights under the IRA will not be discussed further.

⁷ See also 742 F.2d at 552.

"If Congress had intended that in areas in which multiple tribes having property rights had not formed a community, only one tribe would manage the property and thus be the tribe in which the lands are located under section 4, it must also have intended to divest the other tribes and designate that one tribe. Congress did not do so, or refer to tribes as being any other than those having property rights in an area. We therefore conclude that section 4 comprehends all tribes having property rights in an area. To hold otherwise would require courts to determine which tribes could manage land and which would be divested of their property rights in each reservation or area in which multiple tribes having property rights have not formed a community. We decline to do this. Although courts routinely determine property rights, Indian property rights are unique in that they are directly conferred and subject to

Continued

theoretically possible that a tribe other than the Swinomish might be "the tribe in which the lands are located" for purposes of 25 U.S.C. § 464. Tribal interests in real property are generally acquired in one of six ways: "(1) by action of a prior government; (2) by aboriginal possession; (3) by treaty; (4) by act of Congress; (5) by executive action; or (6) by purchase." See *Cohen's Handbook of Federal Indian Law*, 472 (1982 ed.). Appellant does not suggest the Samish Tribe may have acquired an interest in the Swinomish Reservation in any way other than through the treaty originally establishing the reservation. From the court's reasoning in *Williams*, and our own analysis, we conclude that, for purposes of 25 U.S.C. § 464, in order for a tribe to have a property interest in a reservation based on treaty, the modern day "tribe" must be the continuation of a treaty tribe for which the particular reservation was established. Whether or not a modern day "tribe" which is not concurrently recognized as an Indian tribe by the Department of the Interior is the continuation of an historic tribe is determined through the procedures for Federal acknowledgment as an Indian tribe set forth in 25 CFR Part 83.

Appellant is a member of the Samish Tribe, which has been determined not to be a continuation of an historic tribe following the Part 83 procedures. 52 FR 3709 (Feb. 5, 1987). In *United States v. Washington*, 476 F. Supp. 1101, 1104 (W.D. Wash. 1979), *aff'd* 641 F.2d 1368 (9th Cir. 1981), *cert. denied sub nom. Duwamish Indian Tribe v. Washington*, 454 U.S. 1143 (1982), the Samish Tribe was also found not to be "a political continuation of or political successor in interest to any of the tribes or bands of Indians with whom the United States treated in the treaties of Medicine Creek and Point Elliott." See especially 476 F. Supp. at 1105-06. We hold the Samish Tribe cannot be a "tribe in which the lands are located" for IRA purposes.

[2] Thus, appellant is entitled to receive this devise only if he is otherwise an Indian for whom the United States can hold land in Indian trust or restricted status. "Indian" is defined for IRA purposes in 25 U.S.C. § 479:

The term "Indian" as used in sections * * * 464 * * * of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Appellant is not a member of a recognized Indian tribe now under Federal jurisdiction. He makes no claim that he is a descendant of a member of a Federally recognized Indian tribe or that he or any of his ancestors were residing within the present boundaries of an Indian reservation on June 1, 1934. Finally, appellant claims only 1/8 Indian (Samish) blood.

comprehensive statutory and administrative regulation. Thus, we decline to hold that IRA divests Indian tribes of existing property rights absent some indication that Congress so intended."

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Appellant cites *Garrett v. Assistant Secretary for Indian Affairs*, 13 IBIA 8, 91 I.D. 262 (1984), for the proposition that he must show only United States citizenship and American Indian background to have land held in Indian trust or restricted status. The language upon which appellant relies appears in 13 IBIA at 18, 91 I.D. at 268: "Because Thomas Bokas was a citizen of the United States and an American Indian, he was a person for whom the United States could hold land in Indian trust status." Also, in footnote 7, 13 IBIA at 18, 91 I.D. at 268, the Board quoted a statement from the Assistant Secretary's brief which explained that there was a general policy to continue the trust or restricted status of inherited or devised land even though the heir or devisee might not be a tribal member or eligible for other Federal benefits to "Indians." The Board then stated: "The Federal trust responsibility runs to Indians, not merely to members of Indian tribes."

In *Garrett* there was no question that, if Bokas was an American citizen, he was otherwise an Indian for whom the United States could hold land in trust or restricted status. The record before the Board showed Bokas was 4/4 Indian, and at least 1/2 Yankton Sioux, a Federally recognized tribe. This fact led to the overly broad statements quoted above. To the extent those statements are overly broad, *Garrett* is hereby limited to its facts.⁸

Because appellant was not entitled under the IRA to receive a devise of real property on the Swinomish Reservation, Judge Snashall properly found the devise to appellant failed and ordered decedent's trust interests on that reservation to descend by intestate succession.

Furthermore, Judge Snashall also properly held that decedent's trust interests on the Lummi Reservation descended to appellant out of trust. Because the Lummi Indian Tribe has not organized under the IRA, appellant can receive a devise of interests on that reservation.

Again citing footnote 7 of the Board's *Garrett* decision, appellant argues, however, that because he is of Indian descent, the trust or restricted status of decedent's property on the Lummi Reservation should be continued. Departmental counsel clarifies the Assistant Secretary's statement quoted in footnote 7 of *Garrett* by explaining that the trust or restricted status of inherited or devised property is continued only when the heir or devisee is descended from a member of a Federally recognized Indian tribe, even though he or she may be ineligible for tribal membership or Federal services to "Indians."⁹

⁸ It remains true, however, that some persons of Indian descent who are not members of a recognized Indian tribe may still be eligible for certain Federal benefits to "Indians." See *Underwood v. Deputy Ass't Secretary-Indian Affairs (Operations)*, 14 IBIA 3, 14-15, 93 I.D. 13, 19-20 (1986), and statutes and regulations cited therein. But see, further discussion, *infra*.

⁹ The fact that a person of Indian descent may not be eligible to have land held in trust or restricted status is seen in 25 CFR 152.6:

"Whenever the Secretary determines that trust land, or any interest therein, has been acquired through inheritance or devise by a non-Indian, or by a person of Indian descent to whom the United States owes no trust responsibility, the Secretary may issue a patent in fee for the land or interest therein to such person without application." Italics added.

Again, the overly broad statement in *Garrett*, engendered by the knowledge that there was no question that the land at issue could be held in trust or restricted status for Thomas Bokas if American citizenship were found, must be limited. Cf. *Quiver v. Deputy Ass't Secretary-Indian Affairs (Operations)*, 13 IBIA 344, 92 I.D. 628 (1985), (members of the terminated Klamath Indian Tribe are not eligible to have land held in Indian trust or restricted status).

Therefore, because appellant is not an Indian for whom the United States can hold property in Indian trust status, the land must pass out of trust.¹⁰ *Bailess v. Paukune*, 344 U.S. 171 (1952); *Chemah v. Fodder*, 259 F. Supp. 910 (W.D. Okla. 1966); *Estate of Dana A. Knight*, 9 IBIA 82, 88 I.D. 987 (1981).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Snashall's orders in this estate are affirmed and *Garrett v. Ass't Secretary for Indian Affairs*, 13 IBIA 8, 91 I.D. 262 (1984), is limited as indicated in this opinion.

KATHRYN A. LYNN
Administrative Judge

I CONCUR:

ANITA VOGT
Acting Chief Administrative Judge

APPEAL OF HUMPHREY CONSTRUCTION, INC.

IBCA-2266 and 2267.

Decided June 11, 1987

Contract Nos. 6-CC-10-03140 and 5-CC-10-03030, Bureau of Reclamation.

Motion to Dismiss granted.

**1. Contracts: Construction and Operation: Contract Clauses--
Contracts: Formation and Validity: Fixed-price Contracts**

Under the Permits and Responsibilities clause of a firm, fixed-price standard construction contract, the contractor is liable for a tax imposed by an Indian tribe on a construction project where the tribe alleges that the project is within reservation boundaries and the contractor elects to pay the tax rather than contest it. A Government contracting agency is not required to determine the boundaries of the Indian reservation before soliciting bids on the project.

**2. Contracts: Construction and Operation: Contract Clauses--
Contracts: Formation and Validity: Fixed-price Contracts**

Regardless of the precise location of the boundary of an Indian reservation, a construction contractor under a firm, fixed-price contract is not entitled to additional

¹⁰ Appellant, furthermore, is not a person for whom the United States could acquire land in Indian trust or restricted status. 25 CFR 151.2(c).

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compensation where an Indian tribe, after the construction had commenced, imposed a tax on the project that the contractor had not anticipated when making its bid, in circumstances where the Government in its solicitation documents had called attention to the possibility that the tax might be imposed by the tribe.

APPEARANCES: Terry E. Miller, Esq., Taylor & Hintze, Richland, Washington, for Appellant; John J. Hockherger, Jr., Esq., Department Counsel, Boise, Idaho, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE

INTERIOR BOARD OF CONTRACT APPEALS

Facts

Humphrey Construction, Inc. (contractor/appellant), was awarded two fixed-price construction contracts, No. 6-CC-10-03140, dated September 9, 1985, in the amount of \$2,264,551, IBCA-2266 (Wapato Canal Contract), and No. 5-CC-10-03030, dated October 17, 1985, in the amount of \$1,154,659, IBCA-2267 (Sunnyside Dam Contract), by the Bureau of Reclamation (Bureau/Government) pursuant to sealed-bid formal advertising. Both solicitations were total small-business, labor-surplus area, set-asides. The former was for the purpose of constructing a fish-screen structure and bypass on the Wapato Canal, and the latter was for the purpose of constructing left-bank and center-fish passage facilities in the Sunnyside Diversion Dam. Both jobs were part of the Yakima project. Both were completed satisfactorily and on time.

The solicitation for the Wapato Canal/Contract was dated August 30, 1985. By modification No. 1, the bid opening date was rescheduled for October 1, 1985. On September 20, 1985, 10 days before the bid opening, the Bureau issued modification No. 2, notifying bidders, in pertinent part, that: "The work to be performed under this solicitation is located in Yakima County, Washington. Portions of this work may be located on the Yakima Indian Nation Reservation. The Yakima Indian Nation has enacted a Tribal Employment Rights Ordinance that may be applicable to this work."

The solicitation for the Sunnyside Dam contract was dated June 18, 1985. By modification No. 1, the bid opening date was rescheduled for July 18, 1985. On July 3, 1985, 14 days before the bid opening, the Bureau issued modification No. 2, containing the same notice that was contained in modification No. 2 of the Wapato Canal contract.

On December 17, 1985, approximately 3 months after the notice to proceed was issued, the contractor received, from the Coordination/Compliance Officer charged with the enforcement of the Tribal Employment Rights Ordinance (TERO) of the Yakima Indian Nation (Tribe), two assessments totalling \$17,096. The assessments were based on a tax, in the amount of 0.5 percent of the combined contract price of construction projects located on the Yakima Indian Reservation, that had been adopted by tribal ordinance to fund the operation of the

TERO office. Specifically, the tax was imposed on all employers that employed two or more employees on the reservation for an aggregate of 60 days or more in any 12-month period.

The contractor considered the tax improper, believing the projects were not located within the reservation's boundaries. However, after unsuccessful attempts to negotiate a compromise with the Tribe's Compliance Officer in order to reduce the amount of the tax, the contractor elected to pay it in full rather than challenge the tax in tribal court. It then claimed reimbursement from the contracting officer (CO) for the entire tax. The CO denied the claims on October 29, 1986. The CO's basis for the denial was that:

A contractor on a fixed price government contract is not entitled to additional compensation because of unexpected but foreseeable problems complying with local ordinances. The Permits and Responsibility clause of the contract, Section 1.2.5, required the contractor to obtain all necessary licenses and permits and to comply with any Federal, State, and Municipal laws, codes, and regulations applicable to the performance of the work. The ordinances of Indian tribes are equivalent, on Indian land, to these laws, codes, and regulations. The burden of complying with any tribal ordinance at a reservation worksite is the responsibility of the contractor. The Yakima Nation's TERO compliance plan is in essence a permit for conducting business on the Reservation.

The CO also noted in his decisions that the contractor did not make any inquiry to the Bureau concerning the TERO notice contained in the solicitation prior to the award; and that the contractor did, in fact, consider the application of the ordinance in making its bid. The contractor does not dispute these allegations.

The contractor appealed to the Board on November 12, 1986, requesting accelerated procedure and a hearing. On February 4, 1987, Government counsel moved to dismiss the appeals on the ground that, as a matter of law, the Bureau was not responsible for a tribal tax. On April 14, appellant filed its opposition to the Government's motion and moved for summary judgment on the ground that an equitable adjustment in a contract price is required where a contractor is damaged by the Government's failure to disclose to potential contractors essential information that was solely in its possession (citing *Helene Curtis Industries, Inc. v. United States*, 160 Ct. Cl. 437, 312 F.2d 774 (1963)). Appellant alleges that the lack of such information—specifically, the location of the project in relation to the boundary of the reservation—prevented it from accurately estimating the impact of TERO on its project construction costs.

Appellant contends that the inclusion of modification No. 2 in the solicitations for the two contracts did not absolve the Government from the responsibility for TERO costs, since the notice still left the contractor uncertain about the location of the project and the applicability of TERO.

Because we had not previously decided the issue of the incidence of the cost burden of an Indian tax ordinance which is subsequently applied to a fixed-price Government contract, the Board on April 20, 1987, submitted a request to the parties for additional briefing on the subject.

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In that request, the Board asked the parties specifically whether this appeal was legally distinguishable from the cases cited by the Government in its motion to dismiss, particularly *Morehouse Painting*, IBCA-2087, 86-3 BCA par. 19,014 (1986); *Browning Ferris*, VACAB No. 1665, 82-2 BCA par. 16,065 (1982); and *Gardner Construction*, DOT CAB No. 73-8, 74-1 BCA par. 10,406 (1974), each of which required the contractor to absorb the unanticipated costs resulting from compliance with local ordinances. The Government denied any material distinction, asserting that:

Adjudication of reservation boundaries involving navigable streams requires a complex judicial process. Precedential decisions turn on careful analysis of historical facts. See, Comment, The Determination of Title to Submerged Lands on Indian Reservations 61 Wash. L. Rev. 1185 (1986). The Department could not reasonably or economically undertake such proceedings routinely as an adjunct to all its contracting activities in the vicinity of Indian reservations. The Department's fiduciary duty to Indian tribes restricts the Department's ability to take any public position contrary to a tribal position except in the context of a comprehensive and conclusive judicial proceeding.

The Bureau of Reclamation's TERO notice clause in fact alerted Humphrey to all of the charges at issue in these appeals. Humphrey has admitted that it was aware of the TERO ordinances at the time it bid on the contract.

The Bureau of Reclamation was never in a position to conclusively interpret the tribal TERO Ordinance for Humphrey—the Tribe, not the Bureau of Reclamation, interprets and applies tribal ordinances. The situation is similar to that involving a state or local government. The state or local government is presumed to have the primary jurisdiction to interpret how its statutes and ordinances affect a private contractor for the United States.

Appellant disagreed strenuously, arguing that: "[T]he Government has missed the point. There was, in fact, no contingency involved in the Nation's enforcement of TERO. The only unknown was the boundary of the reservation which was within the sole knowledge and/or authority of the Government."

Similarly, appellant's project manager submitted an affidavit stating that, before bidding, he had directed one of appellant's secretaries to telephone the Tribe to discuss the application of TERO to Humphrey's work and that, based upon that conversation, Humphrey had not included the TERO fee in its bid on the two projects.

Appellant further states:

Humphrey is not objecting to its obligation to comply with local ordinances, including TERO. Humphrey is objecting to the Government's failure to provide adequate information to allow Humphrey, and other participants in the competitive bidding process, a fair and reasonable opportunity to bid the work. Without the basic information of location of the project, Humphrey and other bidders were unable to ascertain the full impact of TERO. Unlike the contractors in *Morehouse*, *Browning Ferris*, and *Gardiner*, where the Government was a non-participant in the application and enforcement of local ordinances, here the Government, as an active player, has foreclosed Humphrey's ability to determine the application and cost of TERO. The Government's active role sets this case apart from the local ordinance cases and requires an analysis of the implied duties and obligations of the contract. [Italics in original.]

As indicated by the CO's decision, the contracts in question at I.2.5 contain the standard Permits and Responsibilities clause. At H.6 they

also contain the standard clause requiring the contractor to acknowledge that it previously investigated local conditions, and disclaiming any Government responsibility for conclusions or interpretations made by the contractor with respect to Government information concerning those conditions.

Discussion

On the basis of a careful analysis of the entire record, we conclude that the factual allegations upon which appellant relies are either legally insufficient to distinguish the case, or else are misplaced, and that the cases cited by the Government remain controlling.

Accordingly, the Government's motion to dismiss must be granted.

First, the case law does not appear to support appellant's apparent view that the normal rules do not apply where the Government itself is involved in whatever action precipitated the contractor's problem. In *Morehouse*, for example, the contractor alleged that the reason the county began enforcing its road load-limit ordinance (causing additional expense to the contractor) was that, after it had submitted its bid but before commencing work, another Government contractor had damaged the road that appellant planned to use. Nevertheless, the contractor's claim for additional compensation was denied. *Morehouse* also cited the decision by this Board in *Central Colorado Contractors, Inc.*, IBCA-1203, 83-1 BCA par. 16,405 (1983), where the contractor was not granted relief even though the Government itself was responsible for a post-contract decision that safety precautions precluded the use of an existing bridge that the contractor had planned to use. The contractor was forced to build its own bridge, thus incurring unforeseen expense. The Board gave primary weight to the firm, fixed-price aspect of the contract.

Second, although the leading case of *Helene Curtis, supra*, cited by appellant, is unquestionably good law, it did not change—and, in fact, supports—the proposition that:

Where the Government has made no misrepresentations, has no duty to disclose information, and does not improperly interfere with performance, the fixed-price contractor of course bears the burden of unanticipated increases in cost (*Rolin v. United States*, 142 Ct.Cl. 78, 81-82, 160 F. Supp. 264, 268-69 (1958)); the Government can rightly rely on him to fulfill the agreement he chose to make.

Curtis, 160 Ct. Cl. at 443. In *Curtis*, however, there was "both a failure of the Government to tell what it should and a Government specification which in its context was actively misleading" *Ibid.* at 443-44. Thus, the contractor was permitted to recover.

Here, by contrast, we do not find either a failure of the Government to alert the contractor to the existence of the TERO ordinance (it did so at least 10 days before the solicitations for bids expired) or any withholding of information peculiarly within its possession as to the boundaries of the Yakima Reservation. As Government counsel has aptly pointed out, the precise location of the boundary of a tract of land reserved to the Tribe by an 1855 treaty is a matter for the courts

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to determine; and any attempt by the Bureau to do so would surely only culminate in litigation. We do not find any duty on the part of the Bureau to initially establish such boundaries in order to enter into a contract for work on a Government facility located on the Yakima River. Rather, we conclude that the Bureau acted properly in alerting prospective bidders to the existence of TERO and then relying upon them to determine the extent (if any) to which the ordinance applied.

As was stated last year by the U.S. Claims Court in *Bauunternehmung v. United States*, 10 Cl. Ct. 672, 679 (1986), *aff'd*, No. 87-1046 (Fed. Cir. June 4, 1987):

The Government's liability for failure to provide information arises from a conscious omission to share superior knowledge it possesses in circumstances where it permits a contractor to pursue a course of action known to be defective. The government is under no obligation to volunteer information that is reasonably accessible from another source [citing *H.N. Bailey & Assoc. v. United States*, 449 F.2d at 382-83].

In this case, the same information on reservation boundaries was available to the contractor that was available to the Government. That this information may not have been entirely precise or definitive is not a basis for imputing added liability to the Government under the contract.

The parties do not discuss, and we see no need to speculate on, what the effect on the work might have been if the Bureau had attempted to delineate the reservation boundaries for prospective bidders, and the Tribe had disagreed with the delineation.

It might be argued that the location of the project in relation to the reservation boundaries would be legally controlling from the Government's point of view only if the project were located entirely on a Federal enclave, exclusively under Government control. (See, e.g., *United States v. Cowboy*, 694 F.2d 1228, 1234 (1982), for the proposition that "Indian country is distinct from federal enclave lands.") There is no allegation of exclusive Federal control here. Since, from a jurisdictional standpoint, the Tribe is a totally independent entity, it was not up to the Government to determine whether the Tribe could or could not impose its tax upon the project in question. Thus, the question of the precise boundary of the Tribe's territory is essentially immaterial. If the Tribe chose to impose the tax, it was up to the contractor either to pay it or to work the matter out. But whether or not the contractor was able to do so, there is no basis in appellant's firm, fixed-price contract for imposing the additional expense upon the Government.

That is not to say that the contractor would have been required to bear the burden of the Tribe's tax without recompense if it had ascertained on the basis of an adequate investigation before bidding that the tax was going to be imposed. There is no legal reason why the tax, proper or improper, could not have been passed on to the Government in connection with a firm, fixed-price offer at the time of

bidding. (*See, e.g., Howell v. State Board of Equalization*, 731 F.2d 624, 627-28 (9th Cir. 1984), particularly the U.S. Supreme Court cases cited therein, with respect to the general allowability of state and local taxation affecting Federal activities.) But here, no such prior investigation was made. Here all appellant did, by its own admission, was to have a secretary make a telephone call to an unnamed source at "the Yakima Nation to discuss the application of TERO." That scarcely qualifies as a responsible or reliable inquiry. In any event, we do not find that appellant's diligence was sufficient to justify its belated attempt to transfer the burden of the tax to the Federal Government.

We are aware, as are the courts, that a contractor's uncertainty at the time of bidding can, and often does, lead to increased Government procurement costs. But sometimes that is unavoidable, such as in situations where a prospective contractor is required to pay prevailing wages under the Davis-Bacon Act but cannot determine in advance what the prevailing wages will be. In such cases, the contractor has no alternative but to go to the primary source of information concerning these probable costs and, if a satisfactory answer cannot be obtained, to factor in whatever contingency amount may be necessary to cover its anticipated outlays. *See, e.g.*, the Davis-Bacon discussion by the court in *Collins International Service Co. v. United States*, 744 F.2d 812, 815 (Fed. Cir. 1984). Similarly, if a prospective contractor thinks that it will be required to pay a tax under TERO, or some other governmental ordinance, it is up to the contractor to factor that tax into its calculations before bidding.

We think the relevant issue in this case was not where the boundary of the Yakima Reservation was but, rather, the probability that the Yakima Nation would actually impose its TERO tax on the project. That determination was for the contractor, not the Bureau, to make; and, once the Bureau had given prospective contractors notice of the possible applicability of the tax, the question of where the Bureau itself may have thought the reservation boundary to be, was, for all practical and legal purposes, immaterial.

In summary, we find the contractor's appeal to be without merit, since the Permits and Local Conditions clauses of the contracts imposed the burden upon the contractor to comply with various governmental regulations, including Indian tribal ordinances. In any event, the burden of increased costs in a firm, fixed-price contract normally falls upon the low-bidding contractor. We think it must do so here. *Day v. United States*, 245 U.S. 159 (1917); *ITT Arctic Services, Inc. v. United States*, 524 F.2d 680 (Ct. Cl. 1975); *McNamara Construction of Manitoba, Ltd. v. United States*, 509 F.2d 1166 (Ct. Cl. 1975); *Premier Electrical Construction Co. v. United States*, 473 F.2d 1372 (Ct. Cl. 1973); *Nielsons, Inc.*, IBCA-1536, 82-2 BCA par. 16,034 (1982).

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Decision

There are no material issues of fact that would necessitate a hearing. Appellant's request for hearing is therefore denied. Appellant's motion for summary judgment is denied, and the Government's motion to dismiss is granted. Accordingly, the appeal is hereby dismissed with prejudice.

BERNARD V. PARRETTE
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

APPEAL OF A & J CONSTRUCTION CO., INC.

IBCA-2269

Decided: June 29, 1987

Contract No. H50C14206113, Bureau of Indian Affairs.

Sustained.

1. Contracts: Contract Disputes Act of 1978: Interest--Contracts: Disputes and Remedies: Generally

On the basis of the legislative history of the Contract Disputes Act and controlling case law, the Board rejects the notion that interest is payable on contractor claims only when an underlying dispute exists, but concludes that something more than a simple invoice and the passage of time is required for interest to accrue on contract obligations. The claim must be a demand for payment in a specific amount, and the CO must be given an adequate basis for making a decision.

2. Contracts: Contract Disputes Act of 1978: Interest--Contracts: Disputes and Remedies: Generally--Contracts: Federal Procurement Regulations

The Board finds no fault with the definition of claim in the Disputes clause of the Federal Acquisition Regulations, since it is consistent with the dictionary definition of the word and thus can be presumed to be in accord with the intent of the Contract Disputes Act. However, because the FAR explanatory material and previous versions of the regulation have caused considerable confusion, the Board adopts the definition of claim recently set forth by the Federal Circuit Appeals Court in *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586 (Fed. Cir. 1987).

3. Contracts: Contract Disputes Act of 1978: Interest--Contracts: Disputes and Remedies: Generally

Interest, on contractor claims ultimately allowed, accrues from the date, subsequent to the date of the initial billing, when the CO receives a clear and unequivocal demand in writing for a specific amount that sets forth an adequate basis for the amount sought, provided that the CO has previously had a reasonable opportunity to act on the initial billing.

APPEARANCES: William L. Hintze, Esq., Taylor & Hintze, Attorneys, Seattle, Washington, for Appellant; Daniel L. Jackson, Esq., Department Counsel, Phoenix, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE
INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal by A & J Construction Co., Inc. (contractor/appellant), for interest on amounts ultimately paid to it by the contracting officer (CO) under a settlement agreement, after it had sought extra compensation for additional work in connection with Bureau of Indian Affairs (BIA/Government) Contract No. H50C14206113, dated December 19, 1985, in the initial amount of \$1,316,237.61. The contract provided for the construction of approximately 1.5 miles of concrete-lined canal, with related structures, on the Colorado River Indian Reservation near Parker, Arizona (project). The project was completed satisfactorily and on time.

The demand for interest was rejected by the Government. It contended that, because the matter had been amicably settled, no dispute existed as to the contractor's entitlement and therefore, as a matter of law, there was no "claim" upon which interest could be paid. The CO had previously denied the interest claim because it had not been certified by the contractor. On cross-motions for summary judgment, the Board rejects the Government's views and decides, for the reasons set forth in the decision, that the contractor is entitled to interest from the date it certified and the CO received its underlying claim.

Facts

Documents in the appeal file (AF) make clear that BIA considered this project to be urgently needed and of high priority, since the water from the canal was to be used for farm crop irrigation. Sealed bids were opened on December 5, 1985; the contract was entered into on December 19; and notice to proceed was issued and acknowledged on January 10, 1986. The contractor was given a completion time of only 90 days, ending on April 10, 1986 (AF 16-18).

The contractor encountered problems with the contract's terms and specifications almost immediately, and by letter dated January 22, 1986, it notified the CO of the need for further guidance because additional work was required. The CO orally requested a price for the additional work, and the contractor responded on February 11 with a \$251,220.12 cost estimate. It was apparently told to proceed, for on March 5 it submitted a related change order proposal (totalling \$294,102), noting that the work was "nearly 100% complete but entirely uncompensated at this time." On March 7, the contractor notified the CO of another quantity change amounting to \$87,404, for an overall contract increase of \$381,506. A certified copy of contract quantities as computed by an independent engineering firm

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accompanied the letter (Exhs. A-D, Appellant's Feb. 27, 1987, Affidavit).

[It should be pointed out that all references to exhibits accompanying appellant's affidavits involve documentation that was omitted from the official appeal file. There has been no contention by the Government that any of these exhibits are other than what they purport to be.]

On March 11, 1986, the contractor wrote to the CO expressing serious concern about whether and when it would be paid the \$251,220.12 for the extra work, stating in part (*ibid.*, Exh. E):

Although the work has been completed and A & J Construction has incurred the cost, we have not to date, received acceptance, or payment of the work.

We feel the government had prior knowledge and had intention to pay for this work because "canal excavation" was provided for in paragraph 3.2.4 of the specification. Additionally, we note the same pay item at issue here was in fact a pay item on our previous contract of the same canal.

We have notified the Contracting Officer, we have followed the government's direction in the field, we have given the government our prices but as yet have no reply to our request for payment. Therefore we hereby formally notify you of additional labor, material, equipment, and indirects, overhead and profit of \$251,220.12 (see attached copy of SL 004 and cost analysis sheet).

Thus we have no alternative, *we hereby invoke the Disputes Act. We respectfully [sic] request a Contracting Officer's decision pertaining to this matter.* [Italics added.]

On April 28, 1986, the contractor wrote two other letters to BIA. The first letter, setting forth time intervals between each invoice and its payment, complained that the Government had not complied with the requirements of the Prompt Payment Act (PPA) as to any progress payment (AF 11). The second letter noted that although the Government had taken beneficial use of the project about March 14 when it filled the canal and delivered water to the adjoining fields and waterways, the contractor to date had "not received a single response" to any of its six previous letters seeking the CO's guidance or his decisions relating to contract matters. The letter concluded by specifically requesting "payment and response from the Contracting Officer concerning the numerous contractual matters both mentioned here and by prior written request" (Appellant's Affidavit, Exh. F).

BIA responded to appellant's first April letter on May 5, noting that as a matter of policy it did not consider the PPA applicable to construction, and that it therefore did not pay interest on delayed payments. Meanwhile, on April 29, it sent the contractor its proposed modification to make adjustments in the contract in response to appellant's claim. The BIA modification proposed to compensate the contractor in the amount of \$58,884.56 for all changes, a reduction of more than 75 percent from the \$251,220.12 the contractor had claimed. The BIA letter also denied appellant's "proposed turnout design" of February 22 (AF 9), although the project by then had already been completed on the basis of BIA's specifications as written.

Although its letter has not been furnished to the Board, appellant apparently replied by letter on May 6, requesting a meeting on May 22, 1986; for the CO replied on May 12 that a meeting "to discuss disputed quantities" would not be scheduled until BIA had reviewed the contractor's response to its proposed modification (Appellant's Affidavit, Exhibit G; italics added.)

The contractor countered on May 20 with 25 pages of analysis, comment, and documentation, contending that BIA's figures on quantities could not have been based on any surveys but the appellant's, because BIA's two on-site inspectors had not been able to keep up with the work, and the contractor had had to hire outside consultants to perform its surveys. The contractor's letter concluded by saying that "[t]he enclosed listing of final quantities is to be considered our final payment estimate request, thereby invoking the Prompt Payment Act on all monies not paid to date" (AF 8).

The next item in the file is a June 6, 1986, letter from the contractor to the CO referring to their June 5 telephone conversation, in which BIA apparently said that it would need a month to review appellant's final quantity calculations before discussing them. The contractor objected that the contract work had been completed in early April and that contract quantities had been determinable at that time. The letter went on to say that the Government's non-payment was causing hardship for the contractor and that it was "unreasonable and unfair" for it to be penalized because the Government had failed to perform its responsibilities in a timely manner. The letter concluded by saying that the contractor now regarded the quantities to be in dispute, and it demanded a CO's decision in accordance with the Disputes clause of the contract. A claim certification meeting the requirements of section 6(c) of the Contract Disputes Act (CDA) (41 U.S.C. § 605(c)) as to the data and amounts contained in appellant's May 20 letter was also included (AF 7).

A meeting between the parties was initially held on July 2, but the minutes compiled by the contractor and mailed to the CO for comment on July 9 indicate that, during the meeting, BIA refused to discuss any of the issues raised by appellant. According to the contractor's minutes, the CO entered the room and asked what the contractor wished to discuss, and then stated that he was not prepared to answer any questions and did not want to meet with him (Appellant's Affidavit, Exh. H).

A subsequent meeting was held on July 23. It was acknowledged by the contractor in an August 1 letter which indicated that (1) the parties had agreed upon a settlement in a total amount slightly in excess of the amount claimed in the contractor's May 20 letter (\$1,577,207.90 versus \$1,528,083.91); (2) appellant was revoking its July 10 Freedom of Information request (this document does not appear in the appeal file or in the documents submitted by appellant); and (3) appellant was still claiming interest "in accordance with FAR

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33.208 and P. L. 95-563 (section 12) [i.e., 41 U.S.C. § 611]" on the amount agreed upon until payment was received (AF 6).

On August 14, BIA transmitted to the contractor for signature a Release of Claims and a Request for [final] Progress Payment in accordance with the oral settlement agreement. The letter instructed appellant to indicate any exceptions in the appropriate space before signing, but also stated that the transmittal letter constituted an "official denial" of the request for interest on the final payment amount because of the lack of claim certification (AF 5).

Appellant returned the documents to BIA by letter dated August 14, noting in the letter its disagreement as to the interest decision and enclosing copies of its original claim, its certification, and the delivery receipts. In the final release clause, it excepted from settlement "interest due Contractor on all amounts due since June 9, 1986, as provided for in the Disputes Act." The letter asked for prompt payment of the undisputed amounts so as to alleviate "the severe financial hardships this contract has put on this small company" (AF 4).

On November 12, the contractor again wrote to BIA concerning the "many phone calls and discussions" the parties had had about when the contractor would receive payment of the sums they had agreed to in July, again contending that because the contractor had certified its claims by its June 6 letter, interest was due under the CDA on the amounts owed. However, because the CO's August 14 letter could be construed to have finally denied any payment for interest, the contractor stated that it would have to file an immediate appeal with the Board, despite subsequent oral indications by the CO that he might still reconsider the interest question (AF 2).

On December 23, 1986, the CO wrote to the contractor that the final completion date for the project was determined to be March 28, 1986, and that final acceptance of the work was established (nearly 2 months later) as of May 22, with the 1-year warranty beginning on May 23. The letter advised: "Our paying office has been authorized to process your final request for progress payment. Pending settlement of your claim this contract will remain open" (Appellant's Affidavit, Exh. I). Appellant actually received this final payment, without interest, on December 30, 1986 (Affidavit of Appellant's Counsel, dated Feb. 2, 1987).

Arguments by Counsel

The pleadings of the parties became a virtual microcosm of the contradictions and confusion, largely generated by the boards and the courts themselves, that have engulfed the question of contractor entitlement to interest under the CDA during the past 8 years.

In these pleadings—which included Complaint, Answer, Government Motion to Dismiss with supporting memorandum, Appellant's Motion

for Summary Judgment with supporting memorandum, various affidavits, Government Memorandum in Opposition to Appellant's Motion for Summary Judgment, Appellant's Reply Memorandum, Government's Rebuttal Memorandum, and an appellant's letter objecting to the Government's characterization of *Hoffman, infra*, in its Rebuttal Memorandum—appellant's counsel asserted that interest was payable because of the literal language of section 12 of the CDA (41 U.S.C. § 611), because a dispute clearly existed between the parties, because appellant had properly certified its underlying claim and, finally, because appellant had expressly excepted its claim for interest from the parties' settlement agreement.

In short, in appellant's view, "There was dispute, certification, and demand for decision. There was, therefore, by definition, a 'claim.' Section 12 of the Contract Disputes Act (41 U.S.C. 610) [sic] dictates the payment of interest" (Appellant's Reply Memorandum at 2-3).

Government counsel was equally adamant that interest was not payable, citing numerous cases in support of his position, including particularly *Esprit Corp. v. United States*, 6 Ct. Cl. 546 (1984), *aff'd* 776 F.2d 1062 (1985); *Nab-Lord Associates*, PSBCA No. 714, 80-2 BCA par. 14,585; *aff'd sub nom., Nab-Lord v. United States*, 230 Ct. Cl. 694, 682 F.2d 940 (1982); *Hoffman Construction Co. v. United States*, 7 Ct. Cl. 518 (1985); *J.M.T. Machine Co.*, ASBCA No. 29,739, 86-1 BCA par. 18,684, *motion for recon. den.*, 86-2 BCA par. 18,917; *Fortec Constructors*, ASBCA No. 27,601, 83-1 BCA par. 16,402; and *Racquette River Construction, Inc.*, ASBCA No. 26,486, 82-1 BCA par. 15,769. Counsel also repeatedly asked us to compare the circumstances in the present case with those before this Board in *Mann Construction Co.*, IBCA No. 1280-7-79, 82-1 BCA par. 15,481, a case in which the contractor had never asked the CO for a decision and in which we denied the payment of interest in connection with a settlement agreement that made no mention of interest.

However, neither party has cited our more recent decision in *Power City Construction, Inc.*, IBCA-1839, 93 I.D. 131, 86-2 BCA par. 18,828, a case in which interest was awarded in connection with a settlement agreement that expressly did not include any interest payment as a part of the settlement.

Discussion

The omission of *Power City* is significant, because our decision in that case was not lightly arrived at, and, in our view, is controlling. *Power City* stands for the proposition that once a contractor claim is properly established, by certification if certification is required, interest accrues under the CDA while the Government makes up its mind as to the claim's merits, provided the parties do not meanwhile enter into a settlement agreement that makes no mention of, or which precludes, the payment of interest.

Here, appellant has clearly established that it formally submitted a claim to the CO on June 9 when its June 6, 1986, letter containing a

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proper certification of the underlying claim appears to have been received by the CO; that it continued to insist upon the payment of interest throughout the entire negotiation process; and that it expressly excepted interest when it released the Government from further liability under the contract. The appellant is therefore entitled to receive interest in accordance with the CDA from June 9 until whenever it received actual payment on its claim.

Power City does not conflict with the result in *Mann, supra*, because in *Mann* the parties made no mention of interest in their written settlement agreement and other contractor deficiencies were present that did not exist in *Power City* and do not exist here. Where *Power City* and the outcome in this case differ principally from *Mann* is that in *Power City*, and here, we align(ed) ourselves firmly with those courts and boards that do not require a dispute as such to exist in order for a CDA claim to be recognized. (Rather than "courts and boards," we perhaps should say, "court-and-board cases," since unfortunately, with the notable exception of the Engineers Board, the courts and boards have not been entirely consistent in their decisions on interest.)

Because the narrow issue before us in *Power City* did not require it, we did not discuss fully in that case the scope of our conclusions with respect to interest entitlement under the CDA. Therefore, we do so here.

[1] The two earliest cases representing the view that we now adopt were, coincidentally, decided just a week apart: *Paragon Energy Corp. v. United States*, 227 Ct. Cl. 176, 192, 645 F.2d 966, 976 (1981); and *Arlington Electrical Construction Co.*, ENG BCA No. 4440, 81-1 BCA par. 15,073. The latter case, in particular, discusses at length the legislative history of CDA section 12 and concludes that a letter which "fully explains Appellant's original interpretation of the drawings, asserts entitlement to extra compensation for additional work, and concludes by requesting a formal contract modification" is unquestionably a claim within the meaning of the CDA. (Italics added.) We agree. We do not find an adequate basis in the legislative history of the CDA for the contention that a dispute is necessary before a claim can exist.

The Engineers Board has taken a similar position—and has elaborated on its *Arlington* discussion—in *Luedtke Engineering Co.*, ENG BCA No. 4556, 82-2 BCA par. 15,851; *Western Contracting Co.*, ENG BCA No. 5066, 85-2 BCA par. 17,951 (both of which were cited with approval in *Power City*); and in, perhaps the best-known Engineers interest case, *R. G. Beer Corp.*, ENG BCA No. 4885, 85-2 BCA par. 18,162.

The Armed Services Board has taken positions similar or analogous to that of the Engineers Board in such cases as *Oxwell, Inc.*, ASBCA No. 25,703, 81-2 BCA par. 15,392 at 76,257; *Vepco, Inc.*, ASBCA No. 26,993, 82-2 BCA par. 15,824; *The Morrison Co.*, ASBCA

No. 26,746, 83-1 BCA par. 16,417; *B & A Electric*, ASBCA No. 27,689, 85-1 BCA par. 17,781; *Westinghouse Electric Corp.*, ASBCA No. 25,787, 85-1 BCA par. 17,910; and *Central Mechanical, Inc.*, ASBCA No. 29,193, 85-2 BCA par. 18,005.

However, ASBCA has taken much more restrictive positions in cases such as *Racquette River Construction, Inc., Fortec Constructors*, and *J.M.T Machine Co.* (cited by Government counsel, *supra*); and, most recently, in *Mayfair Construction Co.*, ASBCA No. 30,800, 87-1 BCA par. 19,542. In general, these cases require the same sort of "dispute" to justify interest under the CDA as was required before the Act, a result which (as the very strong dissent by Administrative Judge Duvall in *Mayfair* points out) seems entirely contrary to the legislative history and intent of the CDA.

In fairness, it appears that the majority in *Mayfair* felt constrained to adhere to an interim regulation then in effect (DAR 7-602.6) that required an actual dispute to exist before a CDA claim could be recognized, even though the regulation was in effect only from March 1979 until May 1980. The majority noted that the Board in *Racquette*, *supra*, which was faced with the identical clause, had reached a similar result. However, in arriving at its decision, the Board stated expressly that "we need not and do not decide whether, under the 'new' (1980) Disputes clause, a dispute is a precondition to entitlement to CDA interest." 87-1 BCA at 98,745. Thus, the issue of whether a dispute is required for a claim apparently remains open at ASBCA.

Nevertheless, since the Board in *Mayfair* felt it was acting properly, partly in light of two recent U.S. Claims Court cases, *Esprit* and *Hoffman*, cited by Government counsel, *supra*, those cases also deserve mention. In *Esprit*, as noted by a footnote in the dissent in *Mayfair* (87-1 BCA at 98,747) the U.S. Court of Appeals for the Federal Circuit (CAFC), in affirming the decision, noted that the "dispositive factor" was that the contractor had not submitted the types of claims called for by section 6(a) of CDA, inasmuch as its requests for contract modifications were not demands for specified sums of money and were not addressed to the CO for decision under the Act. Thus, the relevant facts in *Esprit* were not unlike those in *Mann*, which we decline to overrule.

In *Hoffman*, as counsel for the appellant has pointed out, the contractor certified only its claim for interest after having settled the underlying cost disputes (7 Ct. Cl. at 520); it never certified its underlying request for payment; and it never requested or demanded a decision by the CO (*ibid.* at 525). The court in *Hoffman* also noted that claims should be certified prior to, or during, negotiations, and that such procedure is intended to encourage settlements (*ibid.* at 523-24).

The claim in the case before us suffers from no such infirmitities. In fact, we expressly find in the present case that a dispute did exist at the time the claim was submitted, and we have already noted that it was properly certified. Thus, appellant here would have been entitled to interest even if we were to follow (which we do not) the more

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restrictive line of cases previously mentioned. That Government counsel argues so vigorously otherwise suggests either an excess of optimism or else the possibility that he, like this Board, may initially have been underinformed because of an overly selective and minimally adequate appeal file compiled by the CO. In fact, had appellant not provided us with some of the missing correspondence, the result in this case might well have been different.

In any event, having said that a dispute as such is not required for the filing of a claim, it might be helpful for us to provide some guidance as to what is required, from our standpoint.

[2] First, as the Disputes clause (48 CFR 52.233-1) makes clear, a claim for money is a written demand or assertion by a party to the contract seeking, as a matter of right, payment in a sum certain. We find no fault with the FAR definition, since it closely parallels the dictionary definition of "claim" and thus is presumably what the Congress intended by its use of the word. However, for a claim to meet that definition, in our view, it must, first of all, be specific as to both its basis and its amount. As the CAFC recently stated in connection with an unsuccessful effort by a contractor to except an unspecific claim from a settlement agreement release, "[I]f at the conclusion of a contract the contractor is left with the feeling that he has incurred unjustified costs, the contractor should investigate the existing facts before signing the required release, rather than merely listing on the release a vague intention to file a claim." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1395 (Fed. Cir. 1987).

[3] With respect to interest, we do not think that any computation of the interest amount itself is required; but the underlying claim upon which the interest claim is based should be definite and specific, and it should be accompanied by a demand for payment and by sufficient documentation and information to enable the CO to make an informed decision as to its merits.

In other words, we do not think that the Congress intended for interest to commence merely upon the receipt by the CO of a bill or invoice; rather, it commences only after the CO could have, and should have, prudently honored a normal payment request in the ordinary course of business, but where, for whatever reason, he failed to do so. That is the way interest commences after billing in the private sector; and that appears to be the approach taken by the Congress in the Prompt Payment Act (31 U.S.C. § 3901 (1982)), which permits a period of 15 days in which the Government can request additional information or seek resolution of an apparent defect or impropriety in an invoice, in order to toll the running of interest (*ibid.*, section 3903).

We think the foregoing is also what the Disputes clause seeks to accomplish (see 48 CFR 52.233-1(g)), and that the existence of a "dispute" is relevant only as an indication that one of the parties believes that the other party has unduly delayed payment or has

otherwise acted unreasonably. For example, the Government is clearly not entitled to delay the payment of a claim indefinitely under the guise of analyzing data or obtaining additional information. On the other hand, while the existence of a dispute may be a valid indication that a letter seeking the payment of an amount previously billed is intended as an unequivocal demand (and, thus, as a claim), such a demand certainly can be, and often is, made in the absence of such a dispute.

We note that, in its latest decision on the subject, the CAFC did not even consider whether a dispute existed in determining the existence of a claim. In *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987), the court simply said:

We know of no requirement in the Disputes Act that a "claim" must be submitted in any particular form or use any particular wording. All that is required is that the contractor submit in writing to the contracting officer a *clear and unequivocal statement* that gives the contracting officer *adequate* notice of the *basis* and *amount* of the claim. The letters the appellant wrote to the government satisfied that standard and constituted a claim under the Disputes Act * * *. The fact that in those letters the appellant frequently expressed the hope that the dispute could be settled and suggested meeting to accomplish that result does not mean that those letters did not constitute "claims." [Italics added; citations omitted.]

Because the history of FAR 52.233-1 is one of considerable confusion, we will follow the CAFC's construction of CDA section 12 as our standard.

In the case before us, appellant expressly invoked the Disputes Act as early as March 11, 1986, when it did not hear from the CO in response to its letters. That letter (omitted from the appeal file) included appellant's cost analysis sheet and a specific statement of the amount claimed. When the CO responded on April 29 with his proposed mod reflecting a 75-percent reduction in amount, appellant replied on May 20 with a 25-page, detailed justification of the original claim. When appellant was then informed on June 5 that BIA would require another month to review the submission before holding a meeting to discuss the matter, appellant promptly certified its claim the following day and demanded a CO's decision. It is hard to see what appellant could have done that it did not do, in order to meet the requirements for a valid claim.

Decision

There are no material issues of fact in this case that would require a hearing. Accordingly, the appeal is sustained. The case is remanded to the CO for the payment of interest on appellant's claim from June 9, 1986, until December 30, 1986, when payment was received, in accordance with the parties' settlement agreement and CDA section 12.

BERNARD V. PARRETTE
Administrative Judge

June 29, 1987

WE CONCUR:

WILLIAM F. McGRAW
Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

APPEAL OF VOLK CONSTRUCTION, INC.

IBCA-1419-1-81 et al.

Decided *June 29, 1987*

Contract No. C50-C1420-5245, Bureau of Indian Affairs.

Sustained in part.

1. Contracts: Disputes and Remedies: Burden of Proof--Evidence: Credibility of Witnesses--Evidence: Weight--Rules of Practice: Witnesses

In denying a request by appellant that the testimony of a project engineer on a Government project for the construction of a dam be disregarded as in conflict with an entry in the project diary made by an inspector, the Board noted that there appeared to be a reasonable basis for reconciling the purportedly conflicting evidence but that in any event there was an obligation to confront the project engineer with the diary entry at the hearing, if, after the record was closed, appellant was to rely upon the diary entry to discredit the testimony given by the project engineer.

2. Contracts: Disputes and Remedies: Burden of Proof--Contracts: Disputes and Remedies: Equitable Adjustments--Contracts: Formation and Validity: Construction Contracts

Serious deficiencies in the records maintained by appellant are found by the Board where: (i) amounts paid to personnel involved in general supervision were charged to direct costs rather than to overhead in accordance with generally accepted accounting principles; (ii) some of the time cards relied upon to support claimed labor costs were neither signed nor initialed by anyone in a supervisory capacity; (iii) there is no indication that the daily construction progress reports of the contract were kept in bound volumes; (iv) the records of the contractor failed to systematically distinguish between work required by the contract and claim work; and (v) overhead and profit are claimed on equipment costs even though presumably those items have been included in the equipment rates used by appellant in computing the amounts of the various claims. The Board also finds (i) that the entries of the project engineer in the project diary were recorded in bound volumes; (ii) that such diaries were superior in both content and form to the daily construction reports of the contractor; and (iii) that the records maintained by the project engineer in other areas (including those pertaining to quantity measurements) were superior to comparable records maintained by appellant.

3. Contracts: Construction and Operation: Actions of Parties--Contracts: Construction and Operation: Intent of Parties--Evidence: Credibility of Witnesses

A claim under a construction contract for diversion of a river around a construction site is denied, where the Board finds that prior to a dispute arising the parties had

interpreted the contract as requiring the contractor to do the work involving the diversion for which the claim was made.

4. Contracts: Disputes and Remedies: Burden of Proof--Evidence: Preponderance--Evidence: Weight

In an appeal involving the construction of a dam, a claim for the cost of modifying and repairing a return channel is denied, where the evidence shows that all of the costs involved would have been unnecessary if the return channel had been properly constructed in the first place.

5. Contracts: Construction and Operation: Actions of Parties--Contracts: Construction and Operation: Changes and Extras--Contracts: Construction and Operation: Drawings and Specifications--Contracts: Disputes and Remedies: Equitable Adjustments--Contracts: Formation and Validity: Construction Contracts

In a case where the Government admitted liability for the removal of timber cribbing below elevation 2317 in the construction of a dam and for its replacement with compacted backfill but where the parties disagree on both the amount of cribbing excavated and compacted backfill placed, as well as on the prices payable therefor, the Board substantially accepts the systematic measurements of the project engineer as to the quantities of cribbing excavated and backfill placed but finds that the unit prices to which the contractor is entitled by way of an equitable adjustment for the disputed items are much greater than the unit prices proposed by the contracting officer in a unilateral change order. The 101-day time extension requested by appellant for performance of the work is found by the Board to be greatly overstated, however, with the Board finding a 20-day time extension to be warranted by the evidence.

6. Contracts: Construction and Operation: Payments--Contracts: Disputes and Remedies: Burden of Proof

A dispute between the parties as to whether appellant has been paid the unit prices shown in a unilateral change order for the excavation of timber cribbing and the placement of compacted backfill is resolved by the Board finding that payment is an affirmative defense and that the Government has failed to carry its burden of showing that payment of the disputed sums were in fact made in this case.

7. Contracts: Formation and Validity: Construction Contracts--Contracts: Construction and Operation: Drawings and Specifications--Contracts: Construction and Operations: Duty to Inquire

Under a contract for the construction of a dam, a claim for the amount of dewatering said to have been directed in excess of contract requirements is denied where the Board finds that two of the specification provisions pertaining to the placement of concrete where water is present were directly conflicting and therefore patently ambiguous and that the failure of appellant to make inquiry of the contracting officer prior to bidding resulted in the ambiguous contract provisions being interpreted against appellant.

8. Contracts: Construction and Operations: Actions of Parties--Contracts: Disputes and Remedies: Burden . . . of Proof--Evidence: Preponderance--Evidence: Weight

A claim for the placement of sheet piling under a contract for the construction of a dam is denied, where the testimony of the project engineer that the contractor had proposed furnishing the sheet piling for its convenience is corroborated by a contemporaneous entry in the project diary and the testimony of appellant's vice president to the contrary is uncorroborated.

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**9. Contracts: Construction and Operation: Actions of Parties--
Contracts: Disputes and Remedies: Burden of Proof--Contracts:
Formation and Validity: Construction: Contracts--Evidence:
Credibility of Witnesses**

A claim for additional costs incurred in placing a clay seal and performing other work related to preparation of the upstream apron foundation is denied, where the Board finds that the work covered by the claim stemmed from the flouting by appellant of the specification requirement that where concrete is to be placed on any excavated surface special care shall be taken not to disturb the bottom of the excavation more than necessary and that faced with the prospect of being required to remove all of the disturbed material in the area of the upstream apron and replace the same with concrete to the planned grade at the contractor's expense, the contractor opted to accept the clay seal alternative and agreed to perform under such alternative at no additional cost to the Government.

**10. Contracts: Disputes and Remedies: Burden of Proof--Contracts:
Disptes and Remedies: Equitable Adjustments--Contracts:
Performance or Default: Compensable Delays**

Appellant's in monetary claim for winter heat and cover and a related claim for a time extension are denied where the principal contention advanced by appellant is that the claim resulted from the cumulative effect of delays attributable to the Government which pushed the actual construction work into the cold weather months but as to which the Board finds that the delays are concurrent and that the appellant has failed to show the delays attributed to the Government are apart from the delays for which the contractor was responsible.

**11. Contracts: Construction and Operation: Changes and Extras--
Contracts: Construction and Operation: Drawings and Specifications**

A claim for the costs involved in cutting and rewelding slide frames for four headgates under a contract for the construction of a dam is denied, where the cutting and rewelding performed were found to result from the contractor's choice of construction method for which it was not entitled to additional compensation.

**12. Contracts: Disputes and Remedies: Appeals--Contracts: Disputes
and Remedies: Jnrisdiction**

A Government counterclaim is found not to be before the Board for decision where the failure of the contracting officer to advise the contractor of the Government claims and afford the contractor an opportunity to respond to them before proceeding with the issuance of his decision was considered to deprive the decision of finality.

APPEARANCES: Neil Ugrin, Gary M. Zadick, Attorneys at Law,
Alexander and Baucus, Great Falls, Montana, for Appellant;
Gerald R. Moore, Department Counsel, Billings, Montana, for the
Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

Appellant has timely appealed decisions of the contracting officer under the instant contract to which seven docket numbers have been

assigned.¹ Exclusive of the claims for interest (Claims 12 and 13), the appellant's claims are in the total amount of \$578,286.08 for which time extensions totaling 262 calendar days have been requested (AX-A).² At the hearing it was stipulated that Government Exhibits 1 through 11 would be offered and received in evidence as a summary of usage of contractor labor and equipment as reflected in the project records³ in lieu of oral testimony from the project engineer (Mr. Robert Thomson) (GX 1-11; Tr. 8-9, 79-82). Also involved in this proceeding is a Government counterclaim in the amount of \$68,732.52 (Government Answer, Exh. 6).

PART I: Background

Some time prior to July 20, 1979, the Bureau of Indian Affairs (BIA) of the Department of the Interior decided to replace the Fort Belknap Indian Project Milk River Diversion Dam. The work would entail removing the old rockfilled timber crib structure and replacing it with a concrete diversion structure and headworks. Since construction of a dam in the Milk River would involve navigable waters of the United States, it was necessary for BIA to make application to the Army Corps of Engineers for a permit to place temporary and permanent fill material in conjunction with replacing an existing diversion structure in the Milk River near Harlem, Montana. The application for the permit⁴ was transmitted to the Corps of Engineers District Office in Omaha, Nebraska, by a letter dated July 20, 1979, signed by Mr. Roy Buffalo, Acting Area Director, BIA, Billings, Montana. The requested permit⁵ was not issued to BIA, however, until March 26, 1980.⁶

The permit was issued pursuant to section 404 of the Federal Water Pollution Control Act (86 Stat. 816; P.L. 92-500). Under the caption "Detailed Description of Authorized Work," the permit states:

¹ Throughout this opinion the following abbreviations will be used in referring to the record on which the decision is based: AF (Appeal File); SAF (Supplemental Appeal File); AX (Appellant's Exhibit); GX (Government Exhibit); Supp. GX 1-11 (Supplements to Government Exhibits 1 through 11); Tr. (transcript of hearing); Dep. (Deposition); AOB (Appellant's Opening Brief); GPHB (Government's Posthearing Brief); and ARB (Appellant's Reply Brief). Sometimes the abbreviations will be used in conjunction with references to claim numbers, tab identifications, page or paragraph citations, or the names of deponents.

² The total claim figure reflects the addition of the dollar figures shown in AX-A for individual claims. The total figure for time extensions was determined by adding together the time extensions requested for individual claims as shown in AX-A or in appellant's posthearing briefs.

³ The typed figures shown on GX 1-11 reflect those arrived at by Mr. Thomson based upon his review of the project records for days on which the contractor claims usage of labor, equipment, and other items. In some cases the typed figures have had a line drawn through them with handwritten figures next to the lined out figures. The handwritten figures were inserted by Government witness Mr. Deyle Dunkin based on a generally accepted guide for equipment rental rates in the industry and the use of a revised payroll burden cost to correspond to the payroll burden cost used in the Inspector General's audit report on the instant contract. The changes made by Mr. Dunkin to GX 1-11 were also covered by the stipulation referred to in the text (Tr. 8-9, 79-82).

⁴ The record indicates that the 404 application was prepared by Mr. John Vogel, a water specialist in the Billings Area Office of BIA. Mr. Vogel was the principal person to whom all inquiries or comments concerning the application were directed (SAF Claim 1, Tab 5 at 13-14, 18-19, 22). On deposition, Mr. Vogel testified (i) that he had prepared the sketch which accompanied the 404 application (see Dep. of E. Sangrey, Exh. C at 9), and (ii) that the two alternatives for doing the work were provided for in the application because it was not known how the contractor would do the work (Dep. of J. Vogel at 63-66; GPHB at 36).

⁵ Mr. Elmer Sangrey (Irrigation Project Manager, Fort Belknap Agency) signed the permit on the line above the word permittee and opposite the date Mar. 17, 1980 (SAF Claim 1, Tab 5a at 5).

⁶ On the same date, BIA contracted with the architect-engineering firm of Northern Testing Laboratories (NTL) to provide contract administration, construction inspection and quality control on this contract (Govt. Answer, Exh. 6).

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The work consists of diverting the entire stream flow into the existing Milk River Canal during construction and diverting the water back into the river a point 1,200 feet downstream, and close to the site of the new dam. A "cut" in the canal will be required to divert flows back into the river. Depending upon flow conditions and irrigation needs a second alternative may be used. This alternative consists of utilizing a cofferdam to divert the flow from one side of the channel and back to the other side as work progresses. The existing diversion structure will be removed, and a new concrete diversion structure with headworks and sluiceway will be constructed. [7]

(AF Contract File, Tab N at 7).

On December 28, 1979, the BIA Billings Area Office issued Invitation No. C50-79-2356 calling for bids on the placement of reinforced concrete to build the Milk River Diversion Dam with headworks, gates, irrigation canal, and all appurtenances thereto. Advertised as a small business set-aside with a bid opening date of January 31, 1980, the invitation called for the submission of bids on 19 items of work on a lump-sum or unit-price basis as specified. In response to the invitation Volk submitted a bid in the total amount of \$1,412,433.40 and was awarded the instant contract in that amount on March 20, 1980 (AF Contract File, Tabs A, B, and C).

Prepared on standard forms for construction contracts, the contract includes the General Provisions of Standard Form 23-A (Rev. 4-75) with modifications and additions thereto, together with the applicable Labor Standards Provisions (Standard Form 19-A (Rev. 1-79)). Also included in the contract were General Conditions and numerous technical specifications, some of which will be quoted or cited in connection with our discussion of individual claim items (AF Contract File, Tabs D, E, and F).

The contract provided that work was to be commenced within 15 calendar days after receipt of the Notice to Proceed and to be completed within 365 calendar days after receipt of such notice. The Notice to Proceed was received by the contractor on April 8, 1980, thereby establishing April 8, 1981, as the date for completion of the contract work (AF Contract File, Tab A at 2, 4-5). By modifications 5 and 6,⁸ the time for completion of the contract work was extended by 21 calendar days or to April 29, 1981 (AF Contract File, Tabs K and L). The contractor's work was accepted as substantially complete on June 19, 1981, 51 calendar days after the revised completion date pursuant to a negotiated partial termination agreement dated June 8, 1981 (AF Contract File, Tab Mc).

On April 8, 1980, a preconstruction conference was held at the Fort Belknap Agency attended by representatives of the contractor (Volk), BIA, and NTL. Among those attending were the following:

⁷ Among the permit provisions are special conditions from which the following is quoted: "... * * * close coordination shall be maintained by the contractor with downstream water users, advising them of any water quality changes to be caused by the construction" (SAF Claim 1, Tab 5a at 4).

⁸ The contracting officer also found that the contractor was entitled to \$1,600 for the costs incurred in assisting BIA to construct a temporary diversion structure prior to the contractor constructing a sheet piling coffer dam (AF Claim 1, Tabs E and F).

Mr. Denzel Davis, Volk, Great Falls, Vice President and Project Manager; Mr. Gene Sanders, Volk, Great Falls, Project Superintendent; Mr. Ed Venetz, Volk, Great Falls, Foreman; Mr. Boyd Johnson, BIA, Billings, Engineering; Mr. Cordell Ringel, BIA, Billings, Engineering; Mr. John Vogel, BIA, Billings, Irrigation Engineer; Mr. Don Boldt, BIA-Fort Belknap, Natural Resources Officer; Mr. Elmer Sangrey, BIA, Fort Belknap, Assistant Foreman; Mr. David Hummel, NTL, Billings, Project Manager; Mr. Robert Thomson, NTL, Great Falls, Project Engineer (AF, Claim 1, Tab G at 2).

After having been introduced by Mr. Art Rosander (BIA, Billings, Contracts), Mr. David Hummel (NTL) conducted the preconstruction conference meeting as project manager for contract administration. The purpose of the conference was to establish the project plan, to establish lines of authority⁹ and communication, and to answer questions pertaining to the project. By letter dated April 11, 1980,¹⁰ the minutes of the preconstruction conference were transmitted to the BIA Area Office in Billings with a copy shown to have been furnished to Mr. Denzel Davis, Vice President of Volk.

During the conference Mr. Hummel outlined the scope of NTL's involvement as the BIA representative for project administration and inspection, noting that he would be the project manager and that Mr. Robert Thomson would be the resident project engineer.¹¹ Mr. Davis of Volk stated (i) that he would be the project manager; (ii) that Mr. Gene Sanders would be the resident project superintendent; (iii) that all correspondence to the contractor on jobsite matters was to be directed to Gene Sanders; and (iv) that Mr. Sanders would have full authority to act for the contractor with the exception of change orders or contract modifications which would require approval by Mr. Davis or Mr. Roy Volk in Great Falls.

In the written summary of the conference prepared by him, Mr. Hummel states that the notice to proceed and a copy of the U.S. Army Corps of Engineers permit for construction had been presented to the contractor by BIA and that the contractor had announced his intention to begin work on April 14, 1980.¹² Other matters covered at the preconstruction conference will be discussed later in this opinion when the claims to which such other matters pertain are reached.

From shortly after beginning work on the project until nearly the end of May the contractor was involved in plans for or work related to

⁹The memorandum states: "All contract modifications, change orders, or supplemental agreements must be in writing and approved by the Contracting Officer" (AF Claim 1, Tab G at 5).

¹⁰The opening paragraph of the letter states: "Enclosed is a copy of the meeting notes from the Preconstruction Conference held on April 8, 1980. Please review and advise within 10 days if any additions or corrections are necessary. If no responses are received from you or other attendees, these minutes as written will be filed as part of the job records" (AF Claim 1, Tab G at 1).

¹¹The memorandum includes the following statement: "Mr. Dan Boldt, Fort Belknap Agency Natural Resources Officer was designated as the Local Project Representative for the BIA. Mr. Elmer Sangrey, Fort Belknap Agency Irrigation Foreman will assist Mr. Boldt on irrigation matters" (AF Claim 1, Tab G at 3).

¹²Apr. 14, 1980, was also the scheduled date for Mr. Robert Thomson (Project Engineer) to take up residence at the site (AF Claim 1, Tab G at 1).

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the diversion of the Milk River around the construction site¹³ including the return diversion from the irrigation canal to the river 900 feet down the canal from the main structure.¹⁴

During the last 9 days of April and the first week of May, BIA employees under Mr. Elmer Sangrey (irrigation foreman, Fort Belknap Agency) made several attempts to construct a dike across the Milk River and finally succeeded in doing so.¹⁵ Throughout that period and for some indefinite period thereafter, the BIA forces were engaged in widening the irrigation canal.¹⁶

At a meeting in Billings, Montana, on May 6, 1980, Volk's vice president proposed to the contracting officer and other attendees that the contractor construct a sheet piling coffer dam across the Milk River with the costs involved to be shared on a 50/50 basis. In the decision of March 6, 1981, the contracting officer notes that by May 7, 1980, the temporary water diversion structure BIA had constructed was adequate to divert water sufficient for irrigation needs but that BIA officials realized the structure was constructed in such a way that it would require periodic maintenance. Also noted was the fact that it was at this time that the contractor proposed constructing a sheet piling coffer dam mentioned above which would serve the dual purpose of diverting irrigation water and diverting the entire flow of the Milk River as required for construction of the diversion dam. Contract Modification No. 1¹⁷ provided for the equal sharing of the costs incurred in connection with the sheet piling coffer dam (AF Claim 1, Tab E at 3; Tah H at 2).

By June 20, 1980, NTL had become concerned about job progress. In a letter of that date the project manager (Mr. David Hummel) reminded Volk that performance of the contract within the specified time of 365 calendar days was a contractual obligation. The letter also stated that Volk was expected to furnish an updated schedule within 1 week.¹⁸ In a letter response of June 25, 1980, Mr. Davis states that

¹³ From Apr. 28 to May 5, 1980, the contractor was also performing work not related to the diversion including removal of the old dam structure, moving dirt, clearing and grubbing, and hauling waste materials (Supp. to GX 1-11, Tab 1 at 5).

¹⁴ For a portion of this period BIA forces were involved in widening the mouth of the irrigation canal and widening the canal downstream from the mouth of the canal, as is evidenced by entries in the project diary on Apr. 22 and 29, 1980 (Supp. to GX 1-11, Tab 1 at 5; SAF Claim 1, Tab 9). Appellant's witness Mr. Davis testified that BIA widened the canal for a distance of about 900 feet (Tr. 31). According to the testimony given by the project engineer, there was no need for Mr. Sangrey to widen the canal to carry the water required for Fort Belknap's irrigation needs (Tr. 85).

¹⁵ In a letter to Mr. Hummel (NTL Project Manager), under date of June 25, 1980, Mr. Davis (Vice President of Volk) states: "On April 21, the BIA started construction of the main stream diversion dam. Three dams and May 7, they had finally put a rock dam across the river" (AF Claim 1, Tab H at 2).

By Apr. 22, 1980, the contractor was working on river diversion at the location of the return diversion from canal to river 900 feet down canal from project (Supp. to GX 1-11, Tab 1 at 5).

¹⁶ The Semi-annual Irrigation Progress and Narrative Report from the Superintendent, Fort Belknap Agency, for the period Jan. 1 through June 30, 1980, states: "Devoted most of early part of Irrigation season diverting the Milk River around the present Dam so Volk Construction Company of Great Falls, Montana can construct the new Dam * * *" (SAF Claim 1, Tab 4 at 1, 4).

¹⁷ Contract Modification No. 1 is dated May 7, 1980. Volk's share of the costs incurred in performing the work covered by the modification was in the amount of \$14,991.67 (AF Contract File, Tab G at 1, 5).

¹⁸ A revised work schedule was submitted by the contractor under date of June 26, 1980 (GX-16). The contractor's original work schedule is also included in the record (GX-15). In his letter to Volk under date of Oct. 2, 1980, the

Continued

some of the delays involved had not been caused by Volk after which he referred to some of the problems that had arisen in connection with diversion of the river (AF Claim 1, Tab H at 1-2).

When Mr. Boyd Johnson (an engineer in the Billings Area Office and the contracting officer's representative (COR)) visited the site on July 24 and 25, 1980, dewatering was not complete on the south side and had not started on the north side. After noting that in his opinion placement of concrete could not begin before September 1980 (2 months behind the original schedule) and that completion of the job within the allotted time would be impossible, Mr. Johnson stated that a specific work schedule and a curative action plan should be obtained from the contractor immediately and that notice to the bonding company should also be given (AF Claim 1, Tab J at 3).

By letter under date of August 5, 1980, the contracting officer requested Volk to show cause within 10 calendar days after receipt of the letter why the contract should not be terminated for default. Responding by letter under date of August 18, 1980, Mr. Roy Volk (president of Volk) stated that the principal cause of the delay was the inability of BIA to cope with irrigation water control which was said to be clearly BIA's responsibility under the contract specifications. Mr. Volk also asserted that the dewatering requirement as apparently envisioned by NTL and BIA was over and above the contract requirements. The contracting officer wrote to Volk on October 2, 1980, to say that for the reasons outlined in the letter of that date the Government had decided not to terminate the contract for default at that time (AF Claim 1, Tab J).

Meanwhile, on August 11, 1980, Mr. Davis had written to NTL to request a 30-day time extension and a change order covering costs said to have been caused by delay. In his response of September 4, 1980, the contracting officer requested the contractor to clarify the nature of the claim and to present any information it had having a bearing on the subject (AF Claim 1, Tab I at 1-2).

The 30-day request for a time extension was made 2 weeks before the discovery by Volk on August 25, 1980, of a lattice or crib below grade when excavating for the south footing.¹⁹ The NTL project engineer was requested to make BIA aware of the problem and to notify the Bureau that Volk did not consider that removing the timber and rock involved was structural excavation or that it was otherwise covered by the contract. A meeting was held on the project site on August 28, 1980, to consider the problem. Participating in the meeting were Mr. Davis

contracting officer states: "Your original work schedule dated April 10, 1980, indicates an anticipated completion level of 55% by September 15. The revised work schedule dated June 26, 1980, indicates an anticipated completion level of 54% at September 15, 1980" (AF Claim 1, Tab J at 4).

¹⁹ Apropos the extensive nature of the problem, Volk's Mr. Davis states:

"On August 25th, unknown timbers and piling, *** were encountered in south footing at the far end of Ogee Sluiceway Section and continuing east in the south footing. This was part of an unknown subsurface condition that eventually developed into major removal of unsuitable material, driving of piling and placement of pit run gravel, in portions of the south footing, even larger areas in the north footing and the full length of the downstream Ogee footing area, plus portions of the upstream footing." (SAF Claim 7, Tab 3 at 21).

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(Volk), Mr. Boyd Johnson (BIA), and Messrs. Hummel and Thomson (NTL) (Supp. to GX-2 at 1-2; AF Claim 2, Tab T).

After looking at the conditions encountered and reviewing the old diversion dam plans, BIA agreed that Volk would be paid something extra for additional excavation and backfill required below elevation 2,317 feet (AF Claim 2, Tab V). For the extra work involved Contract Modification No. 3 dated September 19, 1980, was issued (AF Claim 2, Tab V). Subsequently, the contracting officer determined that for this work, Volk had been paid the sum of \$13,314.40 and granted a time extension of 4 days (AF Claim 2, Tab P at 3-4). Contract Modification No. 3 was never signed by Volk.

With the advent of cold weather the contractor was confronted with the problems associated with placement of concrete in such an environment. From October 16, 1980, through January 31, 1981, when the placement of concrete was suspended, Volk provided heat and cover for the concrete placed. Special measures were also undertaken for the storage of materials and the hauling of concrete. While the parties are apart on the question of who was primarily responsible for the delays encountered which materially increased the quantity of concrete required to be placed in cold weather, the contractor's work schedules show that placement of concrete under cold weather conditions was contemplated (GX-15 and GX-16).²⁰

On November 4, 1980, a meeting was held on the project site involving representatives of Volk, BIA, and NTL. The meeting was conducted by Mr. Gale Loomis (BIA) who expressed concern that the dam would not be completed in advance of spring 1981 high water and who noted that high water and ice jams can occur during a January chinook. Adjusted for materials in storage and mobilization, the project was reported to be 36 percent complete with 58 percent of the time expended and the good construction weather largely past. BIA stated that the apron areas must be protected from freezing and that no concrete could be placed on frozen ground. After noting that if the dam is caught at a critical time with key areas incomplete, the entire structure could be lost to flood, Mr. Loomis stated that it was expected that the contractor would take proper measures to avoid this exposure.

During the November 4 meeting, Volk's vice president stated that BIA had held up the contractor and that time extensions were due. In response Mr. Loomis stated that time extensions would be considered but that they would probably be part of the claim process. He also stated that BIA was more concerned with the upcoming high water rather than the completion date (SAF Claim 8, Tab 3 at 2-3).

The contractor requested the Bureau to grant a 45-day winter shutdown from February 1 through March 15, 1981. The request was

²⁰ In the course of denying Claim 7, the contracting officer states: "The work schedule delivered to BIA at the beginning of the contract indicates that cold weather concreting was scheduled through December 15, 1980" (AF Claim 7, Tab P at 2).

denied because BIA considered the structure in its then condition (something less than 55 percent complete through December 31, 1980, with no significant change in percentage by reason of January work) to be vulnerable to extensive damage from spring runoff in the river. In these circumstances the Bureau considered that the contractor should be proceeding with all diligence to complete the project and secure it against potential damage. An on-site review of the project was made on February 2 and 3. Contract personnel at the construction site consisted of three men who were maintaining pumps and heaters. All other equipment had been removed from the work area and there was no indication that any work was scheduled for the immediate future (SAF Miscellaneous File, Tab 1, Document 1). Work involving backfill, placement and compaction of pit run gravel, and the placement of concrete was resumed in March 1981 and continued throughout most of the month of April (SAF Claim 10, Tab 6 at 24-34).

During June 1982, an audit of the contractor's books was performed by an auditor of the Office of Inspector General, Department of the Interior, at the office of the contractor in Great Falls, Montana. The purpose of the audit was to determine the total costs incurred under the contract according to the contractor's accounting records and to determine if such costs were in accordance with the contract terms and the *Code of Federal Regulations* (CFR). No attempt was made to verify any of the qualitative matters related to the claims or the validity of any claim itself, as these were matters considered to be subject to technical determination by BIA.²¹

The adjustments made by the auditor included (i) the elimination of administrative salary costs improperly charged directly to the job;²² (ii) the elimination of bond costs of \$600 to reflect the fact that the revenue received under the contract was \$113,000 less than the contract price used to compute the bond premium, and (iii) the determination that properly computed the allocable labor burden costs is in the amount of \$129,000 (27.8 percent of total direct labor costs of \$465,000) (SAF Miscellaneous File, Tab 1, Document 13 at 2-3).

PART II: Common Questions of Law or Fact

In this section of the opinion we undertake to summarize legal principles applicable to more than one of the multiple claims before us.

A. Ambiguous contract provisions

Resolution of the question presented in two of the major claims will require application of the law governing construction of ambiguous contracts. In support of its position on Claim 1 (Diversion) and Claim 3

²¹ Concerning the claimed costs of \$571,254, the audit report states:

"In general, the claimed costs are based on estimates. The contractor's accounting records did not distinguish costs and supporting data as being related to work performed beyond the scope of the original contract, as amended, as to costs related to the claims. And, we could not, from a review of the accounting records, identify those costs specifically chargeable to the claim." (SAF Miscellaneous File, Tab 1, Document 13).

²² As ground for the elimination of such costs, the audit report states: "A cost allocable to a cost objective as an indirect cost cannot also be charged to that cost objective as a direct cost (41 CFR 1-15.202(a))" (SAF Miscellaneous File, Document 13 at 2).

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(Dewatering), appellant asks us to adopt the position that an ambiguity in a contract or a specification is to be charged to the author of the documents, citing the decision of this Board in *RHC Construction*, IBCA-1207-9-78 (June 26, 1979), 79-2 BCA par. 13,932 (AOB 39-40, 55). Although the *contra proferentem* rule has been invoked against the Government in a myriad of cases, it is not the only principle to be considered in the construction of ambiguous contract or specification provisions.

Throughout its long history, the Court of Claims frequently decided cases on the basis of the construction the parties themselves had placed upon an ambiguous contract or specification provision before a dispute arose (e.g., *Houston Ready-Cut House Co. v. United States*, 119 Ct. Cl. 120, 187-88 (1951)). The Court of Appeals for the Federal Circuit adheres to the same view. See that court's recent decision in *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (1986), from which the following is quoted:

Finally, we base our decision on the cardinal rule of contract construction that the joint intent of the parties is dominant if it can be ascertained. See *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 119, 27 S. Ct. 450, 455, 51 L. Ed. 731 (1907); *J. W. Bateson Co. v. United States*, 196 Ct. Cl. 531, 450 F.2d 896, 902 (1971). The Tenth Circuit in *United States v. Cross*, 477 F.2d 317, 318 (1973), stated another familiar rule thus: "It is the general law of contracts that in construing ambiguous and indefinite contracts, the courts will look to the construction the parties have given to the instrument by their conduct before a controversy arises."

B. Authority of Government agents

In a number of its claims appellant is relying upon directions or instructions allegedly received from the NTL project engineer or from BIA officials without undertaking to show either (i) that the particular person relied upon had any contractual authority to bind the Government or (ii) that the actions allegedly taken by such a person were ever ratified by anyone having contractual authority to do so. A leading case on the necessity of a Government agent having to have actual authority in order to bind the Government is the case of *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). In the 40 years that have transpired since the decision was rendered, the *Merrill* case has been regularly cited by both the courts and the boards.

Very recently, in *BudRho Energy Systems, Inc.*, VABC No. 2208 (Dec. 31, 1985), 86-1 BCA par. 18,657, the Veterans Administration Board of Contract Appeals noted that in that case there had been neither before-the-fact authorization nor after-the-fact ratification by the contracting officer of the unauthorized services ordered by the project coordinator. Thereafter, the Board stated:

It has long been a tenet of Federal contract law that an employee without actual authority cannot bind the Government. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). Closer to the facts in this particular appeal is the decision in *Woodcraft Corp. v. United States*, 146 Ct. Cl. 101, 173 F. Supp. 613 (1959). * * *

The Court of Claims, in *Woodcraft*, emphasized the duty of a contractor, when ordered by an unauthorized Government employee to perform work obviously beyond the contract requirements, to promptly register a protest with the Contracting Officer. See also, *J.A. Ross & Co. v. United States*, 126 Ct. Cl. 323, 115 F. Supp. 187 (1953).

(86-1 BCA par. 93,839).

C. Contract work not explicitly covered by pay items

In its briefs appellant implies that work admittedly necessary for performance of the contract is not the contractor's responsibility if there is no pay item for that work (AOB 35; ARB 28-29). Elsewhere, appellant appears to be saying that if work required for performance of the contract is not subject to inspection, then it is not work that the contractor is required to perform (ARB 41-42). With respect to the apparent position of appellant, the Board notes (i) that the contract with which we are here concerned involves a final product type specification rather than a detailed technical specification;²³ (ii) that many of the obligations assumed by a contractor are derived from the plans and specifications²⁴ rather than simply the pay items; and (iii) that some of the tasks a contractor is required to perform are based on necessary inferences from the plans and specifications or from the general purpose of the contract itself.²⁵

D. Costs incurred presumed to be reasonable

In support of its proof of damages, appellant cites and quotes from *Bruce Construction Co. v. United States*, 324 F.2d 516 (1963), as to which it states that "[t]he contractor's actual costs are cloaked with a presumption of reasonableness" (AOB 23-24, 60). This Board has often cited and relied upon *Bruce Construction* in support of the decision reached (e.g., *Husky Oil NPR Operations, Inc.*, IBCA-1792 (Nov. 20, 1985), 92 I.D. 589, 605, 86-1 BCA par. 18,568 at 93,248). In its multiple claims for equipment in this case, however, the contractor has used equipment rates rather than making claim for the actual costs incurred. Insofar as the record before us discloses, there has been no showing by appellant that its actual equipment costs were not available from its books so as to justify the use of equipment rates. See *Meva Corp. v. United States*, 206 Ct. Cl. 203, 221 (1975), in which the Court of Claims stated at note 10a:

[T]he burden is on the party seeking to substitute AGC costs for the contractor's own actual, booked costs to demonstrate that the contractor's own costs (as shown) are inadequate or incomplete or do not fairly represent the full costs rightly attributable to the particular contract * * *

²³ Queried as to the difference between the two types of specifications, the project engineer stated: "A final-product or end-product specification merely specifies that which you want as an end result. A detailed or procedural specification spells out the procedure by which a certain end is to be achieved" (Tr. 67).

²⁴ See *Ball, Ball & Brosamer, Inc., & Ball & Brosamer (JV)*, IBCA-1566-3-82 (Mar. 25, 1986); *L.A. Barton & Co.*, ASBCA No. 13,178 (Nov. 1, 1968), 68-2 BCA par. 7356 at 34,292.

²⁵ See *General Electric Co.*, IBCA-451-8-64 (Apr. 13, 1966), 73 I.D. 95, 109, 66-1 BCA par. 5507 at 25,794, where the Board states at footnote 36:

"The notion that a particular contractual obligation can be satisfied by providing means admittedly inadequate for the accomplishment of one of its specified functions is untenable. See *Commerce International Co. v. United States* (Ct. Cl. 1964), 338 F.2d 81 (Unless expressly negated, the duty of a contracting party to carry out its bargain reasonably and in good faith is read into all bargains)."

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The failure of appellant to submit actual costs for the equipment involved in the claims is particularly disadvantageous to the Government where, as here, some of the equipment used during the period in question was so old as to be apparently fully depreciated²⁶ with the result that under controlling regulations appellant would only be entitled to a use charge for such equipment rather than the full equipment rates for which claim has been made.²⁷ *Riverside General Construction Co.*, IBCA-1603-7-82 (Feb. 13, 1986), 93 I.D. 27, 38-41, 86-2 BCA par. 18,759 at 94,459-60. Even after the claims were filed, appellant failed to furnish price information pertaining to the Stang well-point system (a major piece of equipment), either at the time its vice president was deposed or months later when the hearing was held (Tr. 244).

Assuming the propriety of the use of equipment rates in the circumstances of this case (the apparent failure of the auditor or the contracting officer to object to the use of equipment rates), the claims as presented are overstated in that amounts claimed for equipment are included in the base to which overhead and profit rates are applied, even though the equipment rates already include amounts for overhead and profit. See, for example, GX-1 at 3, 10; GX-2 at 3, 16). Overcharging is also considered to be involved in the separate charging for the maintenance of equipment, miscellaneous expendables, and delivery of parts, as provision for such items are included in equipment rates (e.g., GX-1 at 8-9, 14, 17).

Other items improperly claimed involve (i) the inclusion in Claim 1 (Diversion) of charges for labor and equipment used for performing structural excavation (Bid Item No. 8) (GX-1 at 5-7); (ii) charging the Government for a change in the contractor's plans as to how to proceed with the work; and (iii) seeking reimbursement from the Government for repairs made necessary by the contractor's negligence (GX-1 at 7).

Serious overcharging is also involved in the manner in which costs of supervision were handled. Amounts paid to appellant's vice president for services rendered on and off the job were shown as separate claim items even though the services furnished clearly fall within the scope

²⁶ Appellant's vice president acknowledged upon cross-examination that a backhoe used in excavation was a 1964 model (i.e., 16 years old in 1980). He also estimated that the backhoe had cost about \$18,000 when purchased and that if such a backhoe were to be bought new it might cost "in the neighborhood of a hundred thousand plus depending on which model we bought" (Tr. 165-66).

²⁷ The \$95,708.84 claimed for phase 2 of Claim 1 includes a claim of \$26,000 for two 20 CY Steel Hobbs End Dump trailers - totally ruined bauling rock (two at \$13,000 each) and a claim of \$6,000 for two 10 CY dump boxes ruined hauling rock (two at \$3,000 each) (SAF Claim 1, Tab 2 at 1). The project engineer comments at length upon these two items of claim. After noting that the information provided by the contractor shows the dump trucks were 17 and 18 years old at the time and as such were no doubt totally depreciated, he states:

"[E]xcessive use was made of these dump trucks throughout the remaining year of the project following the time when the contractor claims they were totally ruined. Other contractor claims for this project also include very substantial charges for the use of these 'ruined' dump trucks, all of which charges are claimed at the full rental rate.

"The available information on the 20 CY end dump trailers does not show year of manufacture, but they appeared to be 10 or more years old and were well used prior to use on this project. Full depreciation on these units has probably occurred also." (GX-1 at 17-18).

of the vice president's general duties as the project manager of record and, as such, were chargeable to overhead (e.g., GX-1 at 8, 16). Subject to the same type of objection is the fact that general supervisory personnel in charge of all phases of work during the time Volk worked in a disputed area were charged to specific work items rather than being charged to overhead (e.g., GX-2 at 5-6). During the same time period, E. Haaby was charged as a supervisor of disputed work even though project records do not show him on the project on the dates in question (GX-2 at 5-6).

Overcharging also appears to be involved in appellant submitting two claims for backfill on October 24, 1980 (SAF Claim 2, Tab 1 at 23-24), as to which the project engineer states: "Contractor claim contains two separate lists of men and equipment for this date. Totals do not agree" (GX-2 at 25). All of appellant's claims have been inflated to a considerable extent by the use of a 39-percent figure for labor burden (e.g., SAF Claim 2, Tab 1 at 2, 14, 34), as contrasted with the 27.8-percent figure found to be proper by the auditor who examined contractor's books (SAF Misc. File, Tab 1, Document 13 at 3).

The foregoing summary is by no means inclusive of all the types of irregularities noted by the project engineer in his analysis of the costs included in Claim 1 (GX-1) and Claim 2 (GX-2). An examination of other exhibits reflecting review by the project engineer of other claims (GX-3 through GX-11) reveal similar irregularities some of which will be commented upon in connection with consideration of the individual claims.

E. Rules governing award of additional time or compensation for delays

The "proof" offered by appellant in support of its claims for time extensions totaling 262 calendar days consists largely of conclusory statements without any serious effort being made to show how the particular delays alleged affected overall performance.

It is well established, however, that a contractor must show the adverse effect of a claimed excusable cause of delay upon overall contract performance. See, for example, *Montgomery-Macri Co.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 304, 1963 BCA par. 3819 at 19,038 in which quoting with approval from one of its earlier decisions, this Board stated: "A contractor who seeks an extension of time on account of an excusable cause of delay has the burden of proving * * * the extent to which the orderly progress or ultimate completion of the contract work as a whole was delayed thereby * * *." (Footnote omitted.)

As to the nature of the burden of proof required to be carried by a contractor in order to establish an excusable cause of delay, the rule has been succinctly stated in the following terms: "Appellant bears the burden of establishing the fundamental facts of liability, causation, and resultant injury. *Electronic & Missile Facilities, Inc. v. United States*, 189 Ct. Cl. 237, 416 F.2d 1345 (1969)." *Santa Fe Engineers, Inc.*, ASBCA No. 25,549 (July 30, 1982), 82-2 BCA par. 15,982 at 79,253.

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Another question raised by this record is the application of the rule governing recovery of additional compensation or time in cases involving concurrent delays where no reasonable basis exists for apportioning the delays experienced between the parties. Addressing this question in *William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 809 (1984), the Court of Appeals for the Federal Circuit states:

The general rule is that “[w]here both parties contribute to the delay neither can recover damage(s), unless there is in the proof a clear apportionment of the delay and expense attributable to each party.” Blinderman, 695 F.2d at 559, quoting Coath & Goss, Inc. v. United States, 101 Ct. Cl. 702, 714-715 (1944). Courts will deny recovery where the delays are concurrent and the contractor has not established its delay apart from that attributable to the government.

Therefore, appellant can only recover if it can establish that the government delayed the work by requiring that the footings be changed to caissons and if it can prove how much of the delay was chargeable to the government.

See also *Wexler Construction Co.*, ASBCA No. 23,782 (May 25, 1984), 84-2 BCA par. 17,408 at 86,705.

F. Delay in giving notice of various claims

At a number of places in its posthearing brief the Government raises the defense of lack of timely notice to the claims asserted under one or more of the clauses contained in the General Provisions of Standard Form 23-A. In our decision in *Central Colorado Contractors, Inc.*, IBCA-1203-8-78 (Mar. 25, 1983), 90 I.D. 109, 138-39, 83-1 BCA par. 16,405 at 81,569-70, the Board noted that protracted delays in presenting claims have always involved the contractor in taking unnecessary risks, even if the denial of the claim was not specifically grounded upon the failure of the contractor to give timely notice of a claim as required by a particular equitable adjustment provision.

In its reply brief appellant undertakes to summarize the applicable standard which has evolved concerning notice. Among the cases included in the brief summary are *Schouten Construction Co.*, DOT CAB No. 78-14 (Nov. 14, 1978), 79-1 BCA par. 13,553, and *John H. Moon & Sons*, IBCA-815-12-69 (July 31, 1972), 79 I.D. 465, 72-2 BCA par. 9601 (consideration of claims on their merits has the effect of waiving the jurisdictional question presented by a contractor's failure to adhere to the notice requirements) (ARB 13-14).

Subsequent to the issuance of the decisions in *Schouten* and *Moon*, the Court of Claims granted the Government's motion for summary judgment in the case of *Schnip Building Co. v. United States*, 227 Ct. Cl. 148 (1981). In that case the Court found that substantial evidence supported the finding of the Armed Services Board that the Government had been prejudiced by the failure of the contractor to give timely notice of the claim asserted under the Differing Site Conditions Clause. The Court also found that consideration of the claim on the merits by the contracting officer did not waive the

defense of lack of timely notice since proceedings before the Board were de novo.²⁸

In the view we take of this case, it is unnecessary for the Board to reach some of the questions commonly associated with a contractor's failure to give timely notice of its claims. This is because except where we find the Government to have admitted liability, none of the claims are considered to be meritorious.

PART III: Credibility Determinations

In its posthearing brief (AOB 9-11; ARB 9-10), appellant seeks to impugn not only the credibility and integrity of the NTL project engineer (Mr. Robert Thomson) but that of the entire inspection and quantification work performed by NTL.²⁹ In support of its position appellant relies principally upon an entry made in the NTL project diary by Mr. Steve Thompson who assisted the project engineer (Mr. Thomson) in measurements taken of what is described as Change Order No. 3 work. The measurements so taken (SAF Claim 2, Tab 5) pertain to the disputed work involved in Claim No. 2 (Ogee Excavation).

The diary entry in question is dated February 26, 1981, and reads as follows:

Mr. Boyd Johnson called and discussed whether we'd given any quantities to the contractor on C.O. #3. None provided by us and informed him that no shots for elevation were taken during Mod. #3 work * * *. Also spoke with NTL proj. manager on above conversations.

(SAF Claim 2, Tab 5 at 10). Appellant also charges that the Government intentionally withheld calculations and survey notes despite repeated requests (AOB 10-11).

The record shows that by letter of December 31, 1980, Volk requested BIA to furnish the contractor with a copy of NTL's daily and weekly reports and copies of notes and surveys pertaining to additional excavation, backfill, etc. In her letter response of January 19, 1981, the contracting officer advised Volk that copies of survey notes were maintained on the project site; that NTL personnel would review with Volk any survey notes which pertain to additional backfill or excavation which has occurred; that the survey notes had not yet been rechecked and certified correct; and that copies of the notes would not be released by NTL until all surveys and quantity measurements were complete (SAF Misc. File, Tab 1 at 9, 11).

By letter dated February 6, 1981, Volk renewed the request contained in the letter of December 31, 1980, for copies of NTL's daily and weekly reports. The contracting officer responded by letter of

²⁸ The de novo nature of its jurisdiction under the Contract Disputes Act of 1978 was recognized by the Armed Services Board of Contract Appeals in *Space Age Engineering, Inc.*, ASBCA No. 26,028 (Apr. 22, 1982), 82-1 BCA par. 15,766 at 78,032 from which the following is quoted:

"[W]e are not bound by what the contracting officer found to be the facts or the law. For example, we may find that a claim has been denied for the wrong reason but still affirm the denial of the claim on the basis of the correct reason. We may deny in total, in the proper circumstances, a claim which has been granted by the contracting officer in part."

²⁹ For the Government's position on the credibility question, see GPHB at 2-4.

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February 27, 1981, in which she stated (i) that once an appeal was filed the reports submitted to BIA by NTL would be available under discovery procedures; (ii) that both the contractor and BIA may benefit from access to all records maintained by the parties; (iii) that at Volk's request, BIA could arrange for an exchange of the daily and weekly reports for equivalent records in the contractor's possession which seemed like an equitable arrangement; and (iv) that BIA would rely on its legal counsel to work out the details of an exchange (SAF Misc. File, Tab 1 at 10, 12). When on a visit to the project site on March 2, 1981, appellant's vice president talked about obtaining the first 2 months of NTL's weekly reports, he was told that the matter was still under discussion as to exchange of notes and were not then available (SAF Misc. File, Tab 1 at 4).

The foregoing summary does not support the charge by appellant that the Government refused to provide requested information related to NTL reports, survey notes, and quantity calculations. It rather appears that the Government was simply delaying furnishing requested information until survey notes could be checked for accuracy and an arrangement could be made for the exchange of information between the parties which apparently was done shortly after Mr. Davis' visit to the site on March 2, 1981.³⁰ It is clear, however, that the centerpiece of appellant's case in this area is the diary entry of February 26, 1981. We now turn to the consideration of such entry in light of the testimony of the project engineer and other pertinent evidence of record.

On direct examination the project engineer testified (i) that in the Ogee section he had taken measurements or made calculations as to the quantity of material that was removed in the process of excavating the horizontal cribbing; (ii) that in making such measurements he had used an engineer's level sighting on a reference benchmark as a backsight and then taking four sights at the bottom of the excavation at various points on the cross-section across the channel; and (iii) that separate cross-sections were taken as each section was dug out (Tr. 190-92).

Upon cross-examination the project engineer stated (i) that ordinarily when he took these surveys his project inspector Steve Thompson worked with him; (ii) that the measurements taken were recorded in a book kept on the job as a part of the job diary; (iii) that any corrections in the book were made by cross out, by strike out, and write over; and (iv) that the book shows the cross-sections to have been taken at various times since the excavation was performed at different times (Tr. 200, 215-18).

³⁰ Concerning the Mar. 2, 1981, visit to the site by Mr. Denzel Davis, the Government states: "At this point in the contract work, claims had been filed by the contractor, but little or no supporting information was being provided by the contractor. Legal counsel for the Government and for appellant negotiated an agreement whereunder the contractor and the Government would exchange all pertinent information—including diary notes, weekly reports and calculation notes." (GPHB at 8; underscoring in original).

After advertizing to the Government's argument to the effect that the diary entry was unclear and to its characterization of Mr. Steve Thompson as a "junior inspector," appellant's counsel states:

The government's argument is without merit and fails to address the issue squarely. The diary entry was made by the employee who was described as having measured this work. Further, the diary entry is crystal clear: no elevations were shot. Without elevations, measurements cannot be made under this method of calculation.

(ARB 10).

[1] Not addressed by appellant's counsel is the question of whether it is necessary to take shots for elevation where the measurements taken employ an established benchmark as a reference point for elevation. This appears to be the case here. Upon direct examination (Tr. 192) and again upon cross-examination (Tr. 215), the project engineer testified that in taking the measurements in question, he had relied upon a reference benchmark. The use of an established benchmark for elevation was agreed to before work on the project had even begun, as is evidenced by the material quoted below from the project diary for April 7, 1980:

The project engineer requested further information from the BIA regarding reference points and elevation data for layout of the new structure. BIA engineer Boyd Johnson stated that the elevation reference point would be the bench mark shown on the plans and located on the headworks structure of the existing canal.

(SAF Claim 2, Tab 5 at 9).

In the circumstances present here, the failure of appellant's counsel to confront Mr. Robert Thomson with the project diary entry for February 26, 1981 (quoted, *supra*), takes on added significance. If Mr. Thomson had been so confronted and asked to reconcile the diary entry with his testimony as to the measurements made of excavation in the Ogee section, he may have replied that "no shots for elevation were taken" because none were necessary in that his measurements reflected the use of cross-sections and an established benchmark for elevation. The answer that Mr. Thomson might have given to such a question is speculative, of course, but no speculation along this line would have been necessary if the diary entry had been brought to Mr. Thomson's attention and he had been asked to explain it in the light of the measurements to which he had testified. In the Board's view, appellant's counsel had an obligation to confront Mr. Robert Thomson with the diary entry (SAF Claim 2, Tab 5 at 10), if, after the evidentiary record was closed, he intended to rely on the diary entry to discredit the testimony offered by Mr. Thomson and the entire inspection and quantification work performed by NTL.

In concluding our discussion in this area, the Board notes that Mr. Robert Thomson was a principal witness for the Government on 8 of 11 substantive claims; that he is a registered professional engineer in the States of Montana and Wyoming (Tr. 61); that much of his testimony is corroborated by contemporaneous entries in the project diary; that no testimony was offered to show that he was other than a

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truthful witness; and that in the course of cross-examination no serious effort was made to show that his testimony was tainted in any way.

Based upon the above discussion and a review of the entire record in these proceedings, the Board finds that Mr. Robert Thomson was a credible witness; that the measurements he took of the amount of excavation from the Ogee section were performed with the assistance of Mr. Steve Thompson on the dates shown on the exhibit offered in evidence by appellant (SAF Claim 2, Tab 5); and that appellant has failed to show that such measurements were improperly performed. The Board further finds that there is no substantial evidence indicating that the inspection and quantification work performed by NTL was accomplished in other than an honest way. In view of these findings the Board will apply the normal rules of evidence in determining the weight to be given to the testimony offered by Mr. Robert Thomson and the other NTL personnel who testified with respect to inspection and quantification work (*i.e.*, opportunity to observe, capacity to recall, competence to judge, corroborative evidence such as is frequently supplied by contemporaneous diary entries, and strength of opposing testimony or other evidence).

PART IV: Reliability of Records Maintained by Parties

[2] One of the principal arguments advanced by appellant in support of the claims asserted is that the records, upon which the proof of damages are based, are vastly superior and inherently more accurate records than are the diary entries of the NTL project engineer. This is so because, according to appellant, its records account for each and every hour of labor expended on the project (AOB 12, 82-83). More specifically, appellant states that the coded time cards support each claim and that the costs claimed correlate with other material such as Volk's notes and daily reports, as explained by Volk's vice president at Tr. 21-22, 55-57, and 420 (ARB 15-16).

Apropos the appellant's position the Government states that while the time cards are coded to specific work items, the work-item codes do not distinguish claim work from regular contract work and that from the contractor's time cards and cost summary sheets, there is no way whatsoever to segregate claim work from regular contract work. In this connection, the Government notes the statement in the audit report that "[i]n general, the claimed costs are based on estimates" (GPHB 15, 28-29). Elsewhere in its brief, the Government refers to numerous examples of what it considered to be serious deficiencies in appellant's claim presentation and its underlying cost records (GPHB at 28-32, 46-52, 64-66).

Appellant's time cards and daily construction reports

Testifying at the hearing, Volk's vice president stated that the time cards were completed in the field by either the shift foreman or the

contractor's superintendent with code numbers also being assigned by the foreman. In their depositions appellant's president and vice president testified that in some instances the time cards distinguish between a contract item and an extra work item (Dep. of R. Volk at 38; Dep. of D. Davis at 38). None of the time cards in evidence make any such distinction, however, and the notes to which the vice president referred to in his testimony as a source for the claims presented do not appear to have been made a part of the record. The only superintendents who testified stated in their depositions that the time cards in use on the project make no distinction between claim work and contract work (Dep. of G. Sanders at 11; Dep. of E. Haaby at 13).

In his deposition the contractor's field superintendent (Gene Sanders) stated that he had not kept track of time and equipment that was being used on an item that was a claim, as opposed to a contract pay item. He had not distinguished claim work from contract work (Dep. of G. Sanders at 11). The record shows that Mr. Sanders was superintendent from the start of the project until about July 7, 1980 (AF Claim 1, Tab G at 2; GX-24 at 1), and that he continued on the project in the capacity of foreman throughout most of October 1980 (Supp. to GX-3 at 1; SAF Claim 7, Tab 1 at 31).

Upon deposition Mr. Earl Haaby (a later superintendent) testified that in the daily reports he sometimes distinguished between work on claim items and work on contract items (Dep. of E. Haaby at 14-15). None of the daily reports in which Mr. Haaby distinguished between claim work and contract work appear to have been offered in evidence by appellant, however, and none appear to be included in the record before us. The record shows that Mr. Earl Haaby came on the project on or about September 8, 1980 (SAF Claim 2, Tab 1 at 44; SAF Claim 3, Tab 1 at 134), and remained on the project as superintendent or foreman until the end of the project (SAF Claim 3, Tab 1 at 229).

The NTL project engineer's daily diary

Among his other duties the NTL project engineer was charged with responsibility for keeping the project diary for each work day. This showed the manpower (the number and type of craft people), the equipment in operating condition, and other items used in connection with each item of work. The diary also included a narrative account of the things happening on the project each work day (Tr. 62-63). Upon deposition, Mr. Thomson testified (i) that the diary indicates what type of work the people were doing and shows generally what people did all day; (ii) that the contractor never had so many people on the project that it was difficult to keep track of them; (iii) that the work in question was confined to a relatively small area; and (iv) that while Mr. Thomson could not keep track of every second of everybody's time, the contractor's employees were pretty much single minded on the tasks they performed on a particular day, as was natural in the type of construction involved (Dep. of R. Thomson at 39-40, 88). The record

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shows that Mr. Thomson took up residence on the project on April 14, 1980 (AF Claim 1, Tab G at 1). The record does not disclose when Mr. Thomson left the project but he was no longer there by February 26, 1981 (SAF Claim 2, Tab 5 at 10).

Quantity measurements of excavation and backfill in Ogee section

Appellant denies the validity of the measurements relied upon by the Government for the amount of timber cribbing removed in the course of excavation following the discovery of the horizontal cribbing in the Ogee section. As a corollary, appellant also disputes the Government's measurements of the amount of backfill placed. In support of its position, appellant relies principally upon the argument that NTL made no measurements of the disputed area, as is said to be shown by the NTL diary entry of February 26, 1981 (AOB at 47-48; ARB at 9-10). Appellant's reply brief states: "The government relies upon the survey measurements performed by NTL in calculating the amount of excavation and backfill in this claim. However, as has been previously pointed out, NTL failed to measure the excavation performed under contract modification Number 3 * * *" (ARB at 34-35).

In Part III, *supra*, of this opinion, the Board rejects the thesis so advanced by appellant for the reasons stated therein. There the Board stated that it would apply the normal rules of evidence in determining the weight to be given to the testimony offered by Mr. Robert Thomson or by the other NTL personnel who testified with respect to inspection and quantification work. Having so determined, the Board now turns to an examination of the evidence offered by the parties in support of their respective positions.

As to the amount of timber cribbing removed in the Ogee section, the NTL project engineer states (i) that the calculations involved were made in accordance with the contract measurement and payment sections which stipulated that they would be done by using survey cross-sections pursuant to the average-end-area method; (ii) that the method of measurement employed to determine the amount of excavation entailed the use of an engineer's level sighting on a reference benchmark as a back-sight and then taking four sights at the bottom of the excavation at various points; (iii) that each section was separately cross-sectioned as it was dug out; (iv) that the photographs introduced as Government Exhibit 20 do not show the final depth of the excavation; and (v) that the amount of excavation involved was supported by field notes recorded in a book kept on the job as part of the job diary (Tr. 177, 190-92; 201-03, 214-18).

The documentary evidence of record shows that the measurements to which the NTL project engineer refers were made between various stations in October 1980 by R. Thomson and S. Thompson; that a total of 1097.15 cubic yards of material was excavated; that deducting 385.46 cubic yards of material excavated above elevation 2317 results in a

total pay quantity of 711.69 cubic yards (i.e., 712 cubic yards); and that a document captioned "Contract Modification No. 3" states: "X-Sections for Extra Pay Quantities for Excavation and Compacted Backfill in Downstream Ogee Key Area Per Contract Mod. No. 3" (SAF Claim 2, Tab 5 at 1-5).

In support of Volk's measurements of the amount of horizontal cribbing excavated in the Ogee section and the amount of backfill used to replace the material excavated, appellant's vice president stated (i) that a drawing showing a cross-section view of the cribbing area (SAF Claim 2, Tab 4 at 14), indicates an approximate width of 24 feet plus or minus, gives the elevation of the top portion as at 2,320.33 feet, and contains a note saying that the crib pattern continues down to elevation 2310 plus or minus; (ii) that the depth of the cribbing area was determined to be just a little over 10 feet by taking an elevation on the top of the downstream apron and taping down to the bottom of the key; (iii) that appellant's only survey of the cribbing area was performed at the time the cross-sectional drawing was made; and (iv) that in determining the quantity of material excavated, Volk had not only relied on the survey figures reflected in the cross-sectional drawing but also upon a review of photographs by Volk of the area (Tr. 143-45; 167-69).

The documents relied upon by appellant to establish the amount of material excavated from the cribbing area are not dated; neither are they signed or initialed (SAF Claim 2, Tab 4 at 14; SAF Claim 2, Tab 6 at 1-2). Nor is the date of the survey to which Mr. Davis referred to in his testimony even alleged. Also noted by the Board is the fact that individual surveys of each section of the cribbing area as it was excavated were not made. The extent to which appellant relies upon its own measurements of the Ogee excavation is at least highly questionable in view of the rebuttal testimony of Mr. Davis in which he states that while there had been a lot of talk about depths and elevations and cubic yards, the claim was really based on a labor and equipment compilation which had been converted backwards into cubic yards (Tr. 219-20).

Deficiencies in claim presentation and in underlying cost records

Before undertaking to comment upon a few of the deficiencies in appellant's claim presentation cited by the Government, a few general observations by the Board would appear to be in order based on the record before us. In this regard the Board notes the manner in which appellant has consistently treated wages paid to Messrs. Gene Sanders, Earl Haaby, and Ed Venetz (described at various times as superintendent, shift foreman, carpenter foreman, or simply foreman) in its claim presentation. To the extent these men were involved in general supervision on the project, it would appear that under generally accepted accounting principles, the overhead rate should have included a factor for the compensation paid to them. Instead, however, the amounts claimed for the employees named were included

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as direct costs subject to the application of a claimed labor burden rate of 39 percent and a claimed overhead rate of 15 percent together with other add-ons. Allocating the amounts paid to general supervisory personnel to direct costs is considered to be contrary to the auditor's finding, that "[a] cost allocable to a cost objective as an indirect cost cannot also be charged to that cost objective as a direct cost" (note 22, *supra*).

Another area where the underlying cost records are considered to be deficient involves the number of instances where the time cards are neither signed nor initialed by anyone in the capacity of superintendent or foreman on the line opposite the word "foreman" on the time cards, even though appellant's vice president testified that the time cards were completed in the field by either the shift foreman or the superintendent and that the cost code numbers indicating the type of work being performed were added to the time cards in the field (Tr. 55). Examples of time cards submitted for Claims 1, 2, and 3 which are neither signed nor initialed are included in the record at the following places: SAF Claim 1, Tab 1 at 13-21; SAF Claim 2, Tab 1 at 42, 64-65, 67, 69-73, 75, 78-79, 110; and Claim 3, Tab 1 at 66, 71-73, 76-78, 80, 82, 85-89, 100, 107, 120, 128, 141-43, 164-66, 169-71. The absence of either a signature or initials on the time cards cited raises a question as to what responsible person, if any, reviewed these time cards for accuracy prior to submission. At the very least the absence of either a signature or initials on time cards is considered to reflect adversely upon the contractor's system of internal controls.

Still another area where the appellant's records are regarded as deficient is the absence of any evidence indicating that the appellant's daily construction reports were kept in bound volumes with pages marked in sequence where altering the records by changes of any sort other than by cross outs and write overs would be difficult to make.

In its posthearing brief, the Government says that perhaps the clearest example of the inaccuracy of appellant's timekeeping system and its failure to distinguish claim work from contract work is shown by comparing the testimony of Mr. George Sanders (Volk's first superintendent) on deposition with the amount claimed by appellant for Mr. Sanders' services in phase 1 of Claim 1. In the claim, as presented, the following is claimed for the services of Mr. Sanders pertaining to phase 1 of Claim 1 work:

<i>Date</i>	<i>Regular Time/</i> <i>Overtime</i>	<i>Labor Charges</i>
4/23/80	6/2	\$111.20
4/24/80	4/1	66.70
4/25/80	6/1	91.00
4/28/80	4/0	48.60
4/29/80	4/2	84.80
4/30/80	2/2	60.50
5/01/80	8/5	187.70

5/02/80	8/4	169.60
Total	42/17	\$820.10

(SAF Claim 1, Tab 1 at 1-6).

After noting that the above listing shows that Mr. Sanders worked a total of 59 hours on phase 1 of Claim 1 and that the total labor charge plus 39 percent for labor burden is included in the amount claimed and is a component of overhead, bonding, insurance, and profit, the Government calls attention to the fact that on page 52 of his deposition Mr. Sanders had testified that he had had nothing to do with excavating the return channel or putting culverts in (work included under phase 1 of Claim 1), as he was working someplace else at the time Claim 1 work was being performed. Thereafter, the Government states: "Despite the fact that Mr. Sanders testifies that he had nothing whatsoever to do with the work under Claim 1, Appellant claims 59 hours of his time under that claim" (GPHB at 30-31). Respecting the Government's position, appellant states that "a review of the transcript shows that Mr. Davis testified * * * that Gene Sanders was the superintendent and that the Contractor claims labor costs for part of his time supervising this portion of the work (Tr. p. 55-56)" (ARB at 31-32).

It is difficult to evaluate the extent to which the Government's objection to the costs claimed for Mr. Sanders' services on Claim 1 work is valid where, as here, the information provided by appellant is incomplete. Although Mr. Davis testified that time card backup was there for the total amount claimed for phase 1 of Claim 1 (Tr. 21-22), timecards were only furnished for April 23 and April 30, 1980, for that phase of Claim 1 work (SAF Claim 1, Tab 1 at 13-21). The claim summary sheets show amounts claimed for services rendered by Mr. Sanders during phase 1 work, however, as involving April 23, 24, 25, 28, 29, 30, and May 1 and 2, 1980 (SAF Claim 1, Tab 1 at 2-6).

The record shows that the number of hours claimed for Mr. Sanders' services on May 1, 1980, were 13 hours (8 regular and 5 overtime) and that an additional 12 hours (8 regular and 4 overtime) were claimed for his services on May 2, 1980. In the absence of any time cards for these dates showing the work-code numbers for these service, it is not possible to verify that all of the hours in question were devoted to supervision of the river diversion work. The fact that in 2 days Mr. Sanders ostensibly spent 25 hours supervising work comprised in phase 1 of Claim 1 hardly seems reconcilable, however, with his testimony on deposition that he was not involved in the diversion work (Dep. of G. Sanders at 52-54). In this regard the Board notes that neither Mr. Sanders (then the superintendent) nor any shift foreman either signed or initialed any of the timecards furnished in support of the amount claimed for phase 1, Claim 1 work.

Another objection raised by the Government is to the \$5,425 (\$6,889.75 with add-ons) claimed by appellant for the disposal of material (SAF Claim 2, Tab 1 at 2) on the ground that the contractor had agreed in the Supplemental Agreement for Partial Termination

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(AF Contract File, Tab Mc at 3)³¹ that the contractor would dispose of the excess material from the structural removal at no cost to the Government (GPHB at 47). Interrogated about this item at the hearing, Mr. Davis was unable to say whether this particular item was covered in the convenience termination agreement (Tr. 219-21).

Still another objection to the claim presentation raised by the Government concerns the fact that overhead and profit are being claimed on equipment and that claiming for such items on equipment probably constitutes double charging since these items are normally included in the equipment rates (GPHB at 49). This objection by the Government has not been addressed by appellant in its reply brief.

Also objected to by the Government was the \$3,060.92 included in Claim 3 for driving sheet piling on the ground that although Mr. Davis had testified (Tr. 232, 235) that the cost of sheet piling was not included in the claim, the contractor's backup data (SAF Claim 3, Tab 1 at 14, 16-19, 52) shows that costs for sheet piling had been included in Claim 3 (GPHB at 64-65). Appellant has admitted that it erred in the inclusion of damages in the amount of \$3,060.92³² in Claim 3 and concedes that amount (ARB at 45).

Findings and Determinations

Based upon the foregoing analysis and discussion, the Board finds (i) that none of the source materials (time cards, daily construction reports, notes of Mr. Davis) relied upon by appellant for its recordkeeping were maintained in such a way that it was possible to segregate claim work from contract work on any systematic basis; (ii) that in the absence of such segregation, the various claims of appellant were necessarily based upon estimates; (iii) that the measurements made by the NTL project engineer and the NTL project inspector of the amount of horizontal cribbing removed from the Ogee section in the course of excavation and the amount of backfill used in replacement are superior to the measurements made by appellant of the quantity of horizontal cribbing excavated from the Ogee section and the amount of backfill used to replace the cribbing so removed; and (iv) that the daily diaries kept by the NTL project engineer are superior in both content and form to the daily construction reports maintained by Volk. So finding, the Board further finds and determines that the records maintained by the NTL project engineer as a representative of BIA were superior to the project records kept by appellant.

³¹ The portion of the supplemental agreement relied upon by the Government reads as follows:

"2. As a part of this Supplemental Agreement, the Contractor shall perform the following work at no additional cost to the Government: * * *

"(b) Remove the temporary diversion dike upstream from the diversion dam, and remove all sheet piling from this dike. The sheet piling removed shall become the property of the Contractor." (AF Contract File, Tab Mc at 3).

³² With add-ons from the application of surcharges for bond, insurance, overhead, and profit, the Government calculates the overcharge to be in the amount of \$3,887.37 (GPHB at 65).

PART V: Claims for Compensation and for Time Extensions**A. Claim No. 1: Diversion (IBCA-1456-5-81) - \$156,392.36**

In this revised claim, appellant seeks compensation in the amount of \$156,392.36 and time extensions totaling 40 calendar days (AX "A"; Tr. 27-28). The work for which the claim is made is divided into three phases: Phase 1 (construction of main by-pass irrigation canal including installation of culverts); phase 2 (repair of by-pass canal including construction of rock and concrete weirs and dams to stop erosion of by-pass canal, as well as the use of riprap); and phase 3 (repair of the main irrigation canal) (AF Claim 1, Tab D at 2-3). For assistance rendered to Mr. Sangrey and the BIA forces in the construction of a temporary diversion structure, the contracting officer found the contractor entitled to the sum of \$1,600 and a time extension of 17 calendar days³³ (AF Claim 1, Tabs E at 5, and F).

1. Background

Once the plan was adopted to divert the entire Milk River around the project (*i.e.*, the location of the dam to be constructed) by utilizing the existing irrigation canal,³⁴ it was necessary (i) to build a dike or dam across the river to divert the entire flow of the river into the irrigation canal; (ii) to widen the irrigation canal to take such flow; and (iii) to cut a channel for return of the diverted waters to the river some 900 feet plus or minus below the project. This required the work involved to be coordinated so that, when the diversion was accomplished, the irrigation canal and the return channel would be large enough and strong enough to handle the diverted river waters.

At the preconstruction conference on April 8, 1980, a question was raised by the contractor as to how the water would be diverted from the river to the existing headworks and ditch for irrigation purposes during the 1980 irrigation season (*see GX-17*). In response BIA stated (i) that the local irrigation people would be responsible for doing whatever was necessary to divert the water required for irrigation;³⁵ (ii) that the contractor would be required to handle any river flow bypassing the existing headworks; (iii) that it would be responsible for maintaining the ditch from the irrigation canal below the project back to the river; (iv) that all water in excess of irrigation requirements would be diverted and controlled by the contractor as necessary for its construction operations; and (v) that the contractor would also be

³³ In her decision, the contracting officer noted that the time extension granted allowed for all the time required by BIA to divert the irrigation flow into the canal and that during that time the contractor was building the river by-pass diversion and also performing other work which was not deducted from the time allowance (AF Claim 1, Tab E at 5).

³⁴ Depending upon flow conditions and irrigation needs, the 404 permit authorized the use of a second alternative. See "Detailed Description of Authorized Work" provision quoted in text (Part I: Background).

³⁵ In the decision from which the instant appeal was taken, the contracting officer noted that the flow normally diverted from the Milk River through the existing headworks and into the irrigation canal to meet the needs of the Fort Belknap Irrigation System was 140 cubic feet per second (c.f.s.), after which the following statement is made:

"As recorded in the minutes of the preconstruction conference, the Bureau of Indian Affairs (BIA) assumed responsibility for diversion of the 140 c.f.s. required for irrigation. It was the responsibility of the contractor to maintain minimum river flows, to control sediment, turbidity and pollution, and to divert and control all water in excess of the 140 c.f.s. as necessary for his construction operations." (AF Claim 1, Tab E at 1-2).

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responsible for controlling sediment, turbidity, and pollution in water passed through the project or returned to the river through diversions around the project. The contractor stated that it would work with the irrigation personnel and provide aid if requested (AF Claim 1, Tab G at 3).

In a meeting on the project on April 17, 1980, the appellant's vice president informed the project engineer that he planned to divert the entire flow of the river around the project by using the existing irrigation canal.³⁶ The plan as presented contemplated that the canal would be widened as necessary to carry the maximum river flow, as determined from BIA irrigation records; (ii) that BIA forces would construct a dike across the river near the existing canal headworks to close off the river channel with the temporary headworks being used to control flow into the canal for downstream use; (iii) that flow in the canal would be diverted around the project with a dike and culverts being installed across the canal 900 feet plus or minus below the main structure; and (iv) that a new canal and sediment basin would be constructed from the canal to the river to return excess flow to the river channel.

The project engineer presented the contractor's plan for diverting the entire Milk River around the project to Mr. Boyd Johnson (the contracting officer's representative (COR) in the Billings Area Office) who tentatively approved the plan pending submission of a written plan and drawing for approval. The contractor was so informed and reminded that all conditions of the 404 permit remained in effect³⁷ (Supp. to GX-1 at 1).

On April 21, 1980, the BIA forces commenced work on water diversion to the canal above the project by moving dirt to the river to build a dike across the channel at the existing canal headworks (Supp. to GX-1 at 3). The next day the local BIA forces commenced work on diversion of water to the canal and on widening the mouth of the irrigation canal. On the same day (April 22, 1980),³⁸ Mr. Davis went over the diversion plan with the project engineer and began work on the river diversion items at the location of the return diversion from

³⁶ Concerning the Apr. 17, 1980, meeting, the contractor's first superintendent states in the daily construction progress report for that date: "Denny was at the site this morning. We decided to try to run all the river through the old canal to completely bypass the dam" (Dep. of G. Sanders at 18).

³⁷ There is no evidence that the oral plan presented by Mr. Davis was ever submitted to BIA for approval. The project manager states:

"On April 17 the contractor requested and was given tentative approval to use the canal for a diversion. This tentative approval called for a written plan for final review and compliance with the 404 permit. The contractor did not comply with either of these requirements. He proceeded with the work in spite of warnings that his diversion discharge facilities were inadequate. The failure of the discharge canal resulted in massive 404 permit violations." (AF Claim 1, Tab K at 1).

³⁸ An NTL project diary entry for Apr. 22, 1980, reads:

"Contractor D. Davis on site most of shift working with crew. Went over diversion plan with project engineer. . . . Culverts for river diversion being provided by local BIA irrigation district with contractor installing. Plan is to be able to handle 900 to 1,000 cfs of flow in combined irrigation canal and diversion ditch. BIA irrigation personnel stated flow should not exceed this amount." (Supp. to GX-1 at 5).

the canal to the river 900 feet plus or minus down the canal from the project (Supp. to GX-1 at 5).

The BIA forces continued work on the mouth of the irrigation canal and widening of canal downstream from the mouth. By April 29, 1980,³⁹ the dike being constructed by BIA had been pushed completely across the river diverting flow down the canal (SAF Claim 1, Tab 9). On April 30, 1980, the first dam built by BIA washed out. Two additional attempts were made by BIA to divert the river with earth-filled dams which failed on May 4 (AF Claim 1, Tab L at 3). By May 7, 1980, however, BIA had succeeded in putting a rock dam across the river (AF Claim 1, Tab H at 2).

On May 6 or 7, 1980, Mr. Davis attended a meeting in Billings in which he proposed that Volk construct a sheet piling coffer dam across the main stream diversion. Pile driving was started on May 12, and completed on May 16, 1980. The same day the coffer dam was completed and diversion of the river effected, the contractor lost the return channel from the irrigation canal to the river which it had commenced constructing on April 22, 1980 (AF Claim 1, Tab H at 2; Supp. to GX-1 at 5). Working 7 days, 15 to 20 hours per day, the necessary repairs were completed on May 23 (AF Claim 1, Tab L at 3).

Included among the General Conditions of the contract and considered relevant to the resolution of the dispute involved in Claim 1 are the following provisions:

GC-2 Scope: Contractor is to furnish all equipment, labor, materials, tools, supplies and services, except as stated in the Technical Specifications, to construct and install the Milk River Diversion Dam and all appurtenances thereto in accordance with the plans, drawings, and specifications.

* * * * *

GC-21 Use of Irrigation Water: Irrigation water will be diverted during the 1980 irrigation season at the same time construction of the dam is being carried out

(AF Contract File, Tab E at 1, 5).

2. The Testimony

A. Testimony of Denzel C. Davis

Mr. Denzel C. Davis (Vice President of Volk) testified extensively with respect to Claim 1. During his time with Volk, Mr. Davis had been involved in from 12 to 14 contracts with the Federal Government (Tr. 41-42).

After reviewing the specifications prior to bidding, Mr. Davis concluded that the only indication with regard to diversion was included in GC-21 (quoted, *supra*) which refers to irrigation water.

³⁹ The following is quoted from the NTL project diary for Apr. 29, 1980:

"BIA personnel looked at work being done by BIA forces at mouth of existing canal and at contractor's diversion ditch. Mr. Johnson expressed reservations concerning stability of ditch exit from irrigation canal to river and discussed it with D. Davis of Volk. Mr. Davis stated he thought it would remain stable and would be workable for water diversion around the project. The work is nonspecification, off-site work and is under control of the contractor. The contractor was again reminded that provisions of the 404 permit are in force." (SAF Claim 1, Tab 9).

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Thereafter, he contacted Mr. Robert Greene (an employee of the Bureau of Reclamation) who was in charge of all irrigation on the Milk River and who controlled irrigation releases on the river that would affect the flow of water at the project. Asked about the makeup of the river, Mr. Greene said the primary source of flow for the river was irrigation water but that the river would also include normal or minimum river flow which could be any water added to the tributaries by snow or rain.

From his review of the General Conditions prior to bidding, Mr. Davis also concluded that the owner of the project was responsible for the diversion of irrigation water. As defined by Mr. Davis, "Irrigation water is any water released from Fresno Reservoir for downstream irrigation use" (Tr. 33). Under this definition Volk would only be responsible for minimum river flows and flows from tributaries (Tr. 23-26). Taking into account the known snow pack in the mountains in 1980 and the availability of the watershed that year, Mr. Davis estimated that there would be little, if any, inflows from the tributaries in question. With the help of information obtained from Mr. Greene, the amount of water for which Volk would be responsible for diverting was quantified by Mr. Davis as being in the neighborhood of from 3 to 5 percent of the total flow of the Milk River.⁴⁰ It was contemplated that the portion of river flows for which the contractor was responsible would be handled by using the existing irrigation canal (Tr. 32-34).

Acknowledged by Mr. Davis was the fact that if the contractor was to have a dry place to work, it would be necessary to divert not only what he had characterized as "irrigation water" but also to divert the total flow in the river (Tr. 27). As to the timing of the diversion, Mr. Davis stated that both Mr. Sangrey and he had recognized that the river should be diverted when the flow was around 75 c.f.s. (i.e., prior to the release of "irrigation water" from the Fresno reservoir) rather than when the river flow had increased to 1,000 c.f.s. (Tr. 50-51). According to Mr. Davis, even if BIA had been successful in diverting the Milk River into the irrigation canal, it would not have been in a position to perform the necessary work on the return channel since it had to be completed at the same time as the dam on the upper diversion was being completed and BIA did not have the forces to do all that (Tr. 58).

Mr. Davis testified (i) that the BIA forces under Mr. Sangrey did all the work involved in widening the original canal to take the entire river flow by removing dirt from the north side of the canal⁴¹ (Tr. 29-

⁴⁰ Quantified in terms of cubic feet per second, the amount of water involved could be as low as 35 c.f.s. and as high as maybe 110 c.f.s. (Tr. 36). Mr. Davis estimated that for the portion of the diversion for which the contractor recognized responsibility the contractor had expended in the neighborhood of \$15,000 to \$20,000 for which no claim had been made (Tr. 26).

⁴¹ Mr. Davis estimated (i) that the amount of soil removed from the north side of the old irrigation canal was probably 5 to 6 feet wide; (ii) that it was removed to approximately the bottom of the canal, which would have been 8 to 10 feet; and (iii) that soil was removed for a distance of about 900 feet (Tr. 31).

31) and (ii) that the work involved in constructing the return channel from the irrigation canal to the river was performed primarily by Volk (Tr. 48). After the return channel was constructed, the area from the Milk River canal back to the river washed out (Tr. 49).

Throughout his testimony Mr. Davis consistently cited Mr. Elmer Sangrey (an irrigation foreman at the Fort Belknap Agency) as the authority upon whom he had relied in performing work included in phases 1 and 2 of Claim 1. According to Mr. Davis, at the preconstruction conference it was indicated that Mr. Sangrey had the authority to act for the Government. The authority was said to have been indicated by the fact that at the conference Mr. Sangrey had been introduced as a subordinate of Mr. Don Boldt (BIA - Fort Belknap natural resource officer) and it had been stated that they would be in charge of diversion of the river. Mr. Sangrey was regarded as in charge of the work and Mr. Davis never dealt with any other person in regard to diversion (Tr. 42-43, 48-52).

It was Mr. Sangrey who "ordered" the contractor to install culverts and to cut the return channel from the canal back to the river which Volk ended up doing (Tr. 48-50). The "order" referred to by Mr. Davis was later characterized by him as a request by Mr. Sangrey that the contractor help him which it did. When the contractor first started to render assistance it did not expect to get paid at that time but it did not know what the extent of its involvement would be. The initial agreement was to install the culverts and move the headgates. It later became apparent, however, that the work to be done would involve the contractor in performing work beyond what would be required to discharge its limited responsibility with respect to diversion and would also be beyond the contractor's offer of aid to BIA made at the preconstruction conference. At this juncture Mr. Davis went to Mr. Sangrey and stated that the contractor would expect compensation for the additional work involved in constructing the return channel and repairing the erosion (Tr. 51-52).

In his testimony Mr. Davis acknowledged (i) that he had never received any written notification as to the authority of Mr. Sangrey in contract administration (Tr. 42); (ii) that there was no indication Mr. Sangrey was authorized to modify contracts or to issue change orders (Tr. 43-44); and (iii) that the contacting officer was never told of Volk's expectations with regard to payment (Tr. 52).

B. *Testimony of Robert Thomson*

Mr. Robert Thomson (NTL project engineer) gave extensive testimony at the hearing in support of the Government's position with respect to Claim 1. As previously noted, Mr. Thomson is a registered professional engineer in the States of Montana and Wyoming (Tr. 61).

Prior to coming on the project site, Mr. Thomson had reviewed the contract and specifications and had concluded that the contractor was going to be responsible for diverting the water. The conclusion was based upon the fact that there was nothing to the contrary and the contractor had to get the river out of the channel to build the project

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(Tr. 68). Mr. Thomson recalled that at the preconstruction conference the contractor had asked a question about diversion of irrigation water and that the local BIA had stated that they would take care of diverting the water they needed under GC 21. The contractor had no plan for diversion but was requested to submit one (Tr. 69-70).

At a meeting on April 17, 1980, Mr. Davis told the project engineer that the contractor had decided that it would use the existing canal to divert the entire flow of the river around the project. The contractor's plan was relayed to Mr. Johnson (the COR in Billings) who tentatively approved the plan pending the submittal of a written plan and drawing for approval. The results of this conversation were relayed to Mr. Davis. Insofar as Mr. Thomson was aware, no plan for diversion of the river around the project was ever submitted (Tr. 69-71).

While no design details for the return channel were provided by the contractor, Mr. Thomson recalled Mr. Johnson (BIA engineer) telling the contractor at one point that he did not believe the diversion ditch would sufficiently handle the flow without washing out and Mr. Davis responding that he believed it would remain stable under the amount of flow (Tr. 73-74). Mr. Thomson's testimony in this regard is confirmed by an entry in the NTL project diary on April 29, 1980 (note 39, *supra*).

Mr. Thomson also testified that all of the costs involved in phase 2 were for repair of the return channel and that such costs would have been unnecessary if the return channel had been properly constructed the first time. Amplifying upon this testimony Mr. Thomson stated (i) that the contractor had not built the return channel so that it would handle the amount of flow that it had to carry; (ii) that the contractor should have known that the return channel would have to carry a flow of from 900 to 1,000 c.f.s. as an entry in his diary shows (see note 38, *supra*); and (iii) that the contractor should have anticipated such a flow prior to the time they put the water into the return ditch (Tr. 92-94).

In response to questions posed by appellant's counsel concerning what advice or directions had been given to the contractor at the time the return channel was being constructed, Mr. Thomson stated that the BIA engineers had told the contractor that it would not work at that time and he (Mr. Davis) had stated that he was confident that it would work. The BIA engineers had not given any directions to the contractor, however, as the method of construction was believed to be up to the contractor. Mr. Thomson also stated that he was unaware of any plans, specifications, or directions given by the Government with regard to construction of the return channel that were not followed (Tr. 95-97).

As entries in the NTL project diaries on April 22 (Supp. to GX-1 at 5) and April 29, 1980 (SAF Claim 1 at Tab 9) show, the BIA forces were involved in widening the mouth of the irrigation canal and

widening the canal downstream from the mouth of the canal (*see also* Tr. 72). As to this matter, Mr. Thomson acknowledged that there was no need for Mr. Sangrey to widen the irrigation canal to carry irrigation water sufficient to satisfy Fort Belknap's needs (Tr. 85).

With respect to phase 3 work, Mr. Thomson testified that the work was performed on a Saturday when he was not on the project and consequently did not observe⁴² the work being performed (Tr. 75-79). The calculations set forth on GX-1 with respect to phase 3 work were based upon information reported to him by the contractor's project superintendent on the following Monday (Tr. 87-89).

C. Testimony of Elmer Sangrey

In the listing of those who attended the preconstruction conference Mr. Elmer Sangrey is identified as "BIA-Fort Belknap Irr. Assistant Foreman" (AF Claim 1, Tab G at 2). All of the testimony given by Mr. Sangrey was by deposition. At the hearing it was stipulated that only the portions of depositions referred to by counsel in their posthearing briefs would be considered to be record evidence (Tr. 4-5). Effect will be given to the terms of this stipulation in reaching our decision on this claim and on all other claims as well.

In the early stages of his deposition, Mr. Sangrey stated: (i) that BIA was cleaning out the canal and at the same time widening the canal to take additional water; (ii) that in widening the canal he was trying to help the contractor out; (iii) that he did not know how much soil had been removed from each side of the canal as he had not kept track but it was a lot; (iv) that his purpose in putting a coffer dam across the river was not to divert the entire river into the main canal but was to build the coffer dam high enough to get 140 feet of irrigation water (Dep. of E. Sangrey at 27-31). Mr. Sangrey acknowledged, however, that there was no need for him to widen the irrigation canal if he was only concerned with diverting 140 feet of water (Dep. of E. Sangrey at 31-32).

Later in his deposition Mr. Sangrey testified that when the first attempt was made to build a dike of earth, the intent was to block off the river and send it down the canal just like the 404 says (Dep. of E. Sangrey at 60).

With respect to the 404 permit, Mr. Sangrey acknowledged that he had signed the permit as permittee. He stated, however, that he had had nothing to do with preparing the application for the permit (Dep. of E. Sangrey at 13-14).⁴³ Shown a copy of a drawing or map attached to the application for the permit (Dep. of E. Sangrey, Exh. C at 9), Mr. Sangrey stated that he had no recollection of having prepared such a drawing or map but he admitted that the writing looked like his writing (Dep. of E. Sangrey at 33-37).

⁴² During construction of the project, Mr. Thomson was not aware of any problem with erosion in the canal bank or inside the canal other than some erosion right after the contractor's return diversion washed out when there was some erosion at that point which was some 900 feet downstream from the main body of work in the irrigation canal (Tr. 77). The Board notes that the washout of the return diversion occurred on May 16, 1980, and that the phase 3 claim is for work performed on Aug. 16, 1980.

⁴³ This testimony is corroborated by Mr. John Vogel on deposition (note 4, *supra*).

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During the course of his deposition, Mr. Sangrey stated that as of the 20th⁴⁴ he had changed projects and beginning on that date he was being paid for dam construction under a coding designation of 5531. Prior to that date, the work being performed by Mr. Sangrey and his crew appears to have been chargeable to operations and maintenance under a coding designation of 0800 (Dep. of E. Sangrey at 51-52).

Examined by Government counsel upon the nature of his responsibilities and the extent of his authority over contractual matters, Mr. Sangrey stated (i) that his responsibility was to give people irrigation water and to keep up all machinery; (ii) that he had had no authority in contract administration; (iii) that he had never told the contractor that he had any administration authority; (iv) that the contractor had never asked him if he had any administration authority; and (v) that he had never had any communication with the contracting officer and did not know who the contracting officer was (Dep. of E. Sangrey at 80-81).

3. Discussion

Except for a small fraction of the total river flow (estimated by Mr. Davis to be in the neighborhood of from 3 to 5 percent), the appellant's position is that the Government was responsible for diverting the entire Milk River around the construction site and that it contemplated doing so by using an existing irrigation canal as shown on a drawing or map which had accompanied the 404 application (Dep. of E. Sangrey, Exh. C, at 9).⁴⁵ To support its position, appellant relies principally upon (i) the provisions of GC-21; (ii) the absence from the contract of any definition of the term irrigation water; (iii) the failure to include a pay item in the contract covering diversion;⁴⁶ (iv) the fact that the 404 permit was applied for by and was issued to BlA; and (v) actions taken by Mr. Elmer Sangrey contrary to the Government's present position (ARB 31-36, ARB 27-29).

After quoting the language of GC-21 ("Irrigation water will be diverted during the 1980 irrigation season at the same time construction of the dam is being carried out"), appellant notes that GC-21 does not include the mandatory language employed in the General Conditions which impose requirements upon the contractor (AOB 31-

⁴⁴ As Mr. Sangrey testified that the change in coding to 5531 occurred on the 20th at the time he changed projects and as the record shows that a BIA crew under Mr. Sangrey's direction began moving dirt to the river to construct a dike across the river on Apr. 21, 1980, and commenced work on the upper diversion on the following day (Tr. 71; text accompanying note 38, *supra*), the Board infers from the available evidence that the "20th" in Mr. Sangrey's testimony refers to Apr. 20, 1980.

⁴⁵ The sketch which accompanied the 404 application was prepared by Mr. John Vogel (a water specialist in the Billings area office) who testified that two alternatives for doing the work were provided for in the application because it was not known how the contractor would do the work (note 4, *supra*).

⁴⁶ The work called for by the instant contract was performed under a final-product-type specification (note 23, *supra*). Where, as here, the work in question (getting the river out of its channel) had to be done in order for the contractor to satisfy its contractual obligation to construct a diversion dam in the Milk River, the absence of a pay item from the contract covering diversion does not warrant a finding that by reason of such absence the contract was ambiguous and that the contractor is entitled to additional compensation. See cases cited in Part II C, *supra*.

32). After pointing out that GC-21 is the only contract reference to diversion, appellant asserts that such reference is inadequate and ambiguous at best. Thereafter, appellant states that GC-21 either requires the Government to perform the diversion or it is ambiguous and that any ambiguity is charged to the Government as the author of the specification (citing *RHC Construction*, IBCA-1207-9-78 (June 26, 1979), 79-2 BCA par. 13,932) (AOB 39).

The Government also quotes GC-21 in its entirety and states that the title of the section implies that water for use as irrigation will be diverted. After noting that language imposing the duty to divert upon a particular party is absent, the Government states that the contract section, entitled "General Conditions" contains instructions for and imposes duties only relating to performance by the contractor and that it is therefore reasonable to assume that the duty to divert is a part of the contract to be performed by the contractor. This conclusion is supported by quoting GC-2: "Contractor is to furnish all equipment, labor, materials, tools, supplies and services, except as stated in the Technical Specifications, to construct and install the Milk River Diversion Dam and all appurtenances thereto in accordance with the plans, drawings, and specifications." Concluding its interpretation argument, the Government states: "As it would be impossible to construct the dam without diverting the river, and since the Technical Specifications do not specifically assign the duty to divert, diversion is the responsibility of the Contractor under the contract" (GPHB at 18).

Appellant's reliance upon *RHC Construction* is misplaced. The circumstances involved in that case are significantly different from those present here. In undertaking to determine which party was responsible for diverting the Milk River around the project, we shall base our decision "on the cardinal rule of contract construction that the joint intent of the parties is dominant if it can be ascertained" and that "in construing ambiguous and indefinite contracts, the courts will look to the construction the parties have given to the instrument by their conduct before a controversy arises." *Edward R. Marden Corp. v. United States*, and the other cases cited in Part II A, *supra*.

Applying this test first to appellant, there are fundamental contradictions between the testimony given by appellant's vice president (Mr. Davis) and the actions taken or not taken by him during the first 4 months of contract performance, as disclosed by contemporaneous records and as testified to by the NTL project engineer (Mr. Thomson).

In view of appellant's present position that the Government was responsible for diverting virtually the entire river around the project, then why, at the preconstruction conference, did Mr. Davis acquiesce in the position of BIA (i) that under GC-21 its local irrigation people would only be responsible for doing whatever was necessary to divert the water required for irrigation; (ii) that the contractor would be required to handle any river flow bypassing the existing headworks (see GX-17); (iii) that the contractor would be responsible for

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maintaining the ditch from the irrigation canal below the project back to the river; and (iv) that water in excess of irrigation requirements would be diverted and controlled by the contractor as necessary for its construction operations (AF Claim 1, Tab G at 3; Tr. 69-70)?

Continuing in the same vein, why, if the preconstruction conference minutes did not accurately reflect what had transpired at the meeting, did Mr. Davis fail to file a protest or otherwise register an objection when he received a copy of the minutos (note 10, *supra*, and accompanying text)?

And why, too, if the contractor's position was that the Government was responsible for the diversion of the river, did Mr. Davis adopt the Government's position as the contractor's own by advising the project engineer on April 17, 1980, that the contractor planned to use the existing irrigation canal to divert the entire flow of the Milk River around the project? That such a plan was submitted is confirmed not only by an entry in the NTL project diary on that date but also by a notation in the contractor's daily construction progress report (note 36, *supra*).

No attempt was made by appellant to controvert the extremely damaging testimony offered by the project engineer in regard to the preconstruction conference or with respect to the contractor's April 17, 1980, diversion plan, even though such testimony was corroborated by contemporaneous records of the project manager (AF Claim 1, Tab G at 3) and of the project engineer (Supp. to GX-1 at 1-2). Mr. Thomson was not cross-examined in either area and no testimony was adduced from Mr. Davis to contradict the testimony given by the project engineer. In these circumstances, the Board accepts the uncontradicted and corroborated testimony of Mr. Thomson⁴⁷ and will rely upon such testimony in resolving the issues presented by phases 1 and 2 of Claim 1. As a corollary of the acceptance of such testimony, the Board finds the testimony offered by Mr. Davis as to the construction he placed upon the advertised contract prior to bidding and during performance of the diversion work not to be credible.

All costs included in phase 2 of Claim 1 are costs involved in repairing the return channel after the washout. Mr. Thomson testified that all of such repair costs would have been unnecessary if the return channel had been properly constructed in the first place. Noted by Mr. Thomson was the fact that the return channel had not been constructed so that it would handle the flow anticipated and the fact that prior to the washout of the return channel the contractor had been told that it would not work. This position was maintained by Mr. Thomson upon cross-examination (Tr. 92-97). No rebuttal testimony in this area was offered by appellant.

⁴⁷ Earlier in this opinion the Board found Mr. Thomson to be a credible witness (Part III, *supra*) and the project records maintained by NTL on behalf of BIA to be superior to the contractor's project records (Part IV, *supra*).

As to phase 3 of the instant claim, appellant failed to offer any evidence in support of the allegations made in its letter of November 3, 1980, in which this aspect of the claim is described as involving “[r]epair of Main Canal where irrigation water deteriorated and eroded away the bank between the canal and the new dam location where men were working” (AF Claim 1, Tab D at 3).

In its brief appellant states that the third phase of Claim 1 involved emergency repairs to the return channel over a weekend when it was in danger of washing out (citing Tr. 49-58) and that Elmer Sangrey had requested that Volk perform the modification and repairs to the canal which comprise phases 2 and 3 of Claim 1 (AOB 37-38). On the pages of the transcript cited Mr. Davis does not refer to phase 3 work. Elsewhere in his testimony only passing references are made to phase 3 work. Nowhere does Mr. Davis testify that Mr. Sangrey requested Volk to perform the work involved in phase 3 of Claim 1. The absence of such testimony is not surprising since the record clearly shows that the work involved in phase 3 of the claim (characterized as emergency repair work) was performed on a Saturday when no one from either NTL or BIA were at the project (GX-1 at 20).

One of the principal deficiencies in the Government's defense to the instant claim was its failure to make any serious effort to reconcile the contradictory testimony elicited from Mr. Elmer Sangrey at the time his deposition was taken. If, as the Government says, “It was never the intent of the local BIA personnel to divert the entire flow in the river down the canal” (GPHB 20-21), then, why did Mr. Sangrey widen the main irrigation canal for some 900 feet by removing a lot of soil from its banks (Tr. 31; Dep. of E. Sangrey at 27-28), when, according to the project engineer, it was not necessary to widen the canal in order for it to carry irrigation water sufficient for Fort Belknap's needs (Tr. 85)? And what was the rationale for Mr. Sangrey denying that his job was to divert the entire river into the main irrigation canal by putting a coffer dam across the river (Dep. of E. Sangrey at 29), if he was later to admit (as he did) that the intent of building the dirt coffer dam was to block off the river and send it down the canal just like the 404 says (Dep. of E. Sangrey at 60)?

The Board does not consider that Mr. Sangrey's testimony in the areas noted can be reconciled and therefore finds his testimony in such areas not to be credible.

Another area where the Government has failed to confront evidence germane to the resolution of the dispute involves the question of whether BIA had budgeted funds for the diversion of the river around the project. In its opening brief appellant asserts that the BIA irrigation forces had a separate internal budget to perform this work (AOB 35). Responding to this contention the Government states that the record is void of documentation of any such budget and goes on to deny that any such budget existed (GPHB 26). Addressing this issue in its reply brief appellant states: “During his deposition, Elmer Sangrey, reading from his own records, identified the separate budget (coded

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5531) which was established for diversion of the Milk River under the 404 permit prior to construction (Depo. of E. Sangrey, pp. 50-53)" (ARB 7). Nowhere in the cited testimony does Mr. Sangrey even refer to the 404 permit. Consequently, attempting to relate the establishment of a budget for diversion to the 404 permit has no foundation in the evidence and is of no probative value. Mr. Sangrey did testify, however, that when he changed projects on the 20th the coding for the work he was involved in doing changed from 0800 (operation and maintenance) to 5531 (construction of the dam). While the reference to "the 20th" in the cited portion of Mr. Sangrey's deposition fails to specify either the month or the year, we have inferred from the available evidence that the 20th in Mr. Sangrey's testimony refers to April 20, 1980 (note 44, *supra*).⁴⁸

Another argument advanced by appellant is that BIA made three unsuccessful attempts to divert the river and that Volk had to step in and perform or else the project could not proceed (AOB 35-36). Although BIA did make three unsuccessful attempts to divert the river, appellant has either overlooked or chosen to ignore the chronology of these events. As previously noted the contractor proposed diverting the entire river around the project on April 17, 1980, while the first failure of the temporary diversion dam constructed by BIA forces did not occur until April 30, 1980, or almost 2 weeks after the contractor's plan for diversion of the river was submitted.

Still another argument made by appellant is that NTL personnel Bob Thomson and Dave Hummel admitted that diversion was outside the scope of the contract (ARB 29). In referring to diversion as outside the scope of the contract, it appears that the project engineer and the project manager only intended to say that it was nonspecification work (*i.e.*, there was no specification governing how the work was to be performed) and that it involved work outside the scope of NTL's inspection function. To the extent, however, that either or both of the NTL personnel intended to express an opinion on the rights and obligations of the parties under the contract, they would be undertaking to exercise a prerogative reserved to the Board in the first instance and ultimately to the courts.

One of the principal weaknesses in appellant's case concerns the question of why without an order, request, or instruction of any kind from the contracting officer (or COR) it constructed the return channel from the irrigation canal to the river and reconstructed the return channel after the washout, if, as is its present position, BIA was responsible for diverting the entire river around the project. In an

⁴⁸ No showing has been made as to how much of the work in issue was covered by what is referred to as "a separate internal budget" for the BIA irrigation forces; nor has it been shown that any funds for construction work by BIA forces were available prior to Apr. 20, 1980 (*i.e.*, 3 days after the contractor submitted its diversion plan of Apr. 17, 1980).

apparent effort to avoid the problem posed by this question, appellant asserts that all of the work involving the return channel (phases 1 and 2) was performed on "orders" received from Mr. Elmer Sangrey.

At the hearing, Mr. Davis testified that he considered that Mr. Sangrey had this authority because at the preconstruction conference Mr. Sangrey had been introduced as a subordinate to Mr. Don Boldt who were said to be in charge of diversion of the river (Tr. 42-43). Not addressed by Mr. Davis in his testimony is the question of why he should perceive Mr. Sangrey to have any authority in contractual matters by reason of having been introduced as an assistant to Mr. Boldt on irrigation matters when at the same preconstruction conference he was specifically told that all contract change orders had to be in writing and approved by the contracting officer (note 9, *supra*).

In his deposition, Mr. Sangrey stated (i) that he had no authority in contract administration; (ii) that he had never told the contractor that he had any administration authority; and (iii) the contractor had never asked him if he had any administration authority (Dep. of E. Sangrey at 80-81). Mr. Davis acknowledged that no one had indicated to him that Mr. Sangrey had any authority to modify the contract or to issue change orders (Tr. 43-44). As to the "orders" allegedly received from Mr. Sangrey, the Board notes that appellant has made no serious effort to show either that Mr. Sangrey had any contractual authority to bind the Government or that the actions he allegedly took were ever ratified by anyone with contractual authority to do so. Absent such a showing, there is no basis for a finding of constructive change even if it were to be assumed *arguendo* that Mr. Sangrey had ordered the contractor to perform the work involving the return channel as alleged. *BudRho Energy Systems, Inc.*, VABC No. 2208 and other cases cited in Part II B, *supra*.

Before making findings it would perhaps be advisable to briefly summarize some of the evidence of record pertaining to the obligations of the parties with respect to diversion. At the preconstruction conference the only obligation recognized by the Government in this matter was that the local irrigation people would be responsible for doing whatever was necessary to divert the water required for irrigation (AF Claim 1, Tab G at 3). By April 17, 1980, however, when the contractor announced its plan to use the existing irrigation canal to divert the entire flow of the river around the project, it was clear that local BIA irrigation forces would construct a dike across the river near the existing canal headworks to close off the river channel (Supp. to GX-1 at 1). Although by May 7, 1980, BIA had constructed a temporary water diversion structure sufficient to satisfy its irrigation needs, it was recognized by BIA that the structure had been constructed in such a way that it would require periodic maintenance. It was at this time that the contractor proposed constructing a sheet piling coffer dam which would serve the dual purpose of diverting irrigation water and diverting the entire flow of the Milk River as

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required for construction of the diversion dam under the contract. The sheet piling coffer dam was completed by the contractor on May 16, 1980 (AF Claim 1, Tab E at 2-3; note 17, *supra*).

Under the plan as presented to the project engineer on April 17, 1980, the contractor would be responsible for widening the canal as necessary to carry maximum river flows as determined from BIA irrigation records and would also be responsible for the construction of the return channel some 900 feet plus or minus below the main structure (Supp. to GX-1 at 1). Sometime between April 17 and April 22, 1980, it appears that Mr. Sangrey and perhaps others in BIA had decided to assume responsibility for the widening of the irrigation canal. In any event, the widening of the main irrigation canal by BIA forces commenced on April 22, 1980 (Supp. to GX-1 at 5) and was still going forward on April 29, 1980 (SAF Claim 1, Tab 9). According to the uncontradicted testimony of Mr. Davis, BIA forces under Mr. Sangrey did all of the work required for widening of the main irrigation canal (Tr. 29-31). While Mr. Sangrey did not know the amount of soil removed in the course of widening the canal, he did know it was a lot (Dep. of E. Sangrey at 27-28). Mr. Sangrey also testified that his bosses were aware that the widening of the canal work by BIA forces was proceeding and that nobody told him that he should not be doing the work (Dep. of E. Sangrey at 28-29). Mr. Sangrey's testimony is corroborated by an entry in the NTL project diary for April 29, 1980, in which it is noted that Billings Area Office personnel (among whom was Mr. Boyd Johnson (COR)) visited the project and that they "looked at work being done by BIA forces at mouth of existing canal and at contractor's diversion ditch" (SAF Claim 1, Tab 9).

Based upon the evidence recited above, the Board finds (i) that the sheet piling coffer dam completed by the contractor on May 16, 1980, was sufficient for diverting the entire flow of the Milk River around the project and for such work the contractor was reimbursed in accordance with the terms of Modification No. 1; (ii) that all of the work involved in widening of the irrigation canal sufficiently to handle the entire river flow was performed by BIA forces under the direction of Mr. Sangrey; (iii) that the widening work was commenced on April 22, 1980; and completed sometime between April 29 and May 16, 1980; (iv) that the work involving the widening of the canal was either authorized by BIA personnel having contractual authority to do so or was ratified by personnel having such authority; (v) that except for emergency assistance rendered to the contractor by BIA immediately prior to the washout on May 16, 1980, all of the work involved in the construction of the return channel and in the modification and repair of the return channel following the washout was performed by the contractor.

4. Decision

A. Phase 1 of Claim 1 - \$53,019.32

For this aspect of the claim (construction of a return channel from the irrigation canal to the river during the period from April 23 to May 5, 1980), appellant is seeking the sum of \$53,019.32 and an indeterminate portion of the 40-day time extension requested for all three phases of Claim 1 (AX-A; Tr. 27-28).

[3] In the Discussion section, *supra*, the Board has addressed in considerable detail the many arguments marshalled by appellant in support of its position that, properly construed, GC-21 either required the Government to divert virtually the entire Milk River around the project or is ambiguous. We have rejected appellant's argument that any ambiguity in a contract must be construed against the author of the instrument and instead have found that in the circumstances present here the rule of construction to be invoked is the construction the parties themselves have placed upon the contract before any controversy arose.

We return again to some of the arguments advanced by appellant only for the purpose of highlighting the difference between the stance assumed by appellant throughout the performance of phases 1 and 2 work and the position taken by appellant in its Claim 1 presentation. Among the arguments put forward by appellant in support of its position are the following: (i) the provisions of GC-21 either required the Government to do the diversion work in issue or are ambiguous; (ii) BIA applied for a 404 permit and represented to the Corp of Engineers that the entire flow of the river would be diverted around the project;⁴⁹ (iii) that there was no bid item for diversion; (iv) that the contract contains no definition of irrigation water; and (v) that the contract lacks any specifications directing the contractor to perform the work (AOB 35-36; ARB 28-29).

All of the above listed arguments founder upon the fact (i) that at the preconstruction conference the contractor acquiesced in the Government's position with respect to responsibility for diversion including its position that water in excess of BIA's irrigation requirements would be diverted and controlled by the contractor as necessary for its construction operations and (ii) that on April 17, 1980, the appellant's vice president (Mr. Davis) advised the project engineer that the contractor planned to divert the entire Milk River around the project using the existing irrigation canal.

At the time Mr. Davis submitted the contractor's diversion plan on April 17, 1980, he not only knew the provisions of GC-21, he also knew that BIA had applied for and obtained a 404 permit as to which he was chargeable with knowledge of its contents, since a copy of the permit had been furnished to him at the preconstruction conference some 9 days before. In addition, on April 17, 1980, Mr. Davis knew that the

⁴⁹ There is no evidence that BIA made such a representation. One of the two alternatives authorized by the permit would not involve diverting the river around the project (text accompanying note 7, *supra*).

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contract did not contain (i) a bid item for diversion, (ii) a definition of irrigation water, or (iii) a specification directing the contractor to perform the work.

Based upon the portions of the record cited or quoted from in Part V A of this opinion, the Board finds that at all times prior to the completion of the diversion work, appellant manifested by its actions that the diversion of the Milk River around the project using the existing irrigation canal, together with the construction of a return channel some 900 feet below the project, was work for which the contractor was responsible. So finding, the Board further finds that prior to a dispute arising both parties construed the contract in the same manner and that under the rule enunciated in *Edward R. Marden Corp.* and in earlier cases (see Part II A, *supra*) appellant is not entitled to recover for the work involved in constructing the return channel from the irrigation canal to the river.

For the reasons stated and on the basis of the authorities cited, phase 1 of Claim 1 is denied except for the sum of \$1,600 allowed by the contracting officer.⁵⁰

B. *Phase 2 of Claim 1 - \$95,708.84*

[4] For phase 2 work (modification and repair of the return channel during the period from May 16 to May 23, 1980), appellant is claiming the sum of \$95,708.84 and an indeterminate portion of the 40-day time extension requested for all three phases of Claim 1 (AX-A; Tr. 27-28).

In the Discussion section, *supra*, we referred to and commented upon the testimony of the project engineer with respect to the phase 2 portion of Claim 1. We find that testimony is dispositive of the question involved in this aspect of Claim 1. To recapitulate, it was Mr. Thomson's testimony (i) that all costs involved in phase 2 were for repair of the return channel and that all of such costs⁵¹ would have been unnecessary if the return channel had been constructed properly the first time and (ii) that prior to putting the water in the return channel, the contractor had been told that it would not work but that Mr. Davis had said that he thought the return channel would remain stable. This testimony is supported by contemporaneous entries in the NTL project diaries. No rebuttal testimony was offered by appellant.

Based upon the corroborated testimony of the project engineer, phase 2 of Claim 1 (including the money claim and the request for time extension) is denied.

⁵⁰ While the contracting officer also granted the contractor a 17-day time extension, there is no evidence showing that the assistance rendered to BIA in the construction of the temporary diversion structure delayed overall contract performance, as the contracting officer appears to have recognized (note 33, *supra*). In the absence of such evidence, the contractor is not entitled to a time extension and the Board so finds (note 28, *supra*).

⁵¹ The \$95,708.84 claimed for phase 2 includes claims totaling \$32,000 for what appears to be fully depreciated assets (note 27, *supra*). For fully depreciated assets, the appellant would only be entitled to a use charge. *Riverside General Construction Co.* (cited in Part II D, *supra*).

C. Phase 3 of Claim 1 - \$7,664.20

For phase 3 (emergency repair of main irrigation canal), appellant requests the sum of \$7,664.20) and an indeterminate portion of the 40-day time extension requested for all three phases of Claim 1 (AX-A; Tr. 27-28).

From the record before us, it is not possible to tell the location of where the work included in phase 3 of Claim 1 was performed. In the claim letter of November 3, 1980 (AF Claim 1, Tab D at 3), phase 3 work is described as emergency repair work in the main canal. On brief, however, the work for which claim is made in phase 3 is said to have involved emergency repairs to the return channel over a weekend when it was in danger of washing out (AOB 37-38). As noted in the Discussion section, *supra*, this statement is not supported by the pages of the transcript to which reference is made.

An appellant has the burden of proving a claim for additional compensation or a claim for a time extension by a preponderance of the evidence. *Montgomery Macri Co.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 263, 1963 BCA par. 3819 at 19,015 and other cases cited in Part II E, *supra*. This burden has not been carried by appellant. Accordingly, phase 3 of Claim 1 (including the money claim and the request for time extension) is denied.

B. Claim 2: Ogee Excavation (IBCA-1553-2-82(A)⁵² - \$98,427.29

In its revised claim appellant requests an equitable adjustment in the amount of \$98,427.29 and a time extension of 101 calendar days (AX-A). The claim is divided into three categories: (i) excavation to remove horizontal timber cribbing; (ii) backfilling of the area from which the timber cribbing was removed; and (iii) pumping to remove water from the excavation (SAF Claim 2, Tab 1 at 1).

1. Background

During excavation for the right-wall-footing key downstream from the Ogee section on August 25, 1980, the contractor encountered horizontal timber cribbing (SAF Claim 2, Tab 4 at 18; Tr. 144-45, 184-85). The project engineer was promptly notified of the problem of the cribbing,⁵³ as was BIA (SAF Claim 2, Tab 4 at 8; Supp. to GX-2 at 2). A conference to discuss the cribbing problem was held at the project on August 28, 1980, with Messrs. David Hummel and Robert Thomson (NTL), Mr. Boyd Johnson (BIA), and Mr. Denzel Davis (Volk) in attendance. After reviewing plans of the old dam (AX-B), the parties agreed that timbers and debris above elevation 2317.0 were the responsibility of the contractor and that any removal required below

⁵² The Ogee excavation claim was initially docketed as IBCA-1419-1-81. The contracting officer had not issued a formal decision on the claim before the appeal was taken. The appellant later requested a formal decision and took a timely appeal therefrom which was docketed as IBCA-1553-2-82. As the later appeal covers the same claim as the earlier appeal, the appeal docketed as IBCA-1419-1-81 is hereby dismissed with prejudice as duplicative of IBCA-1553-2-82 (see AF Claim 2, Tab M at 1-2).

⁵³ An entry in the NTL diary for Aug. 26, 1980, reads as follows:

"Engineer discussed matter further with D. Davis, Contractor Supt. Mr. Davis stated that he expected to encounter structural elements from the old structure to a depth of about 2 feet and expected to remove these as a part of his contract but felt that anything removed deeper than that was beyond the scope of his contract." (Supp. to GX-2 at 2).

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elevation 2317 would be considered extra to the contract for which the contractor should be compensated at the appropriate prices for the excavation and backfill involved (Tr. 187-88; AF Claim 2, Tah S at 3 and Tab T at 1).

The area in which the timber cribbing was said to be present was outlined in red by Mr. Davis on AX-C (an overview of the dam) and on GX-14 (a cross-section view of the dam). According to Mr. Davis the dimensions of the lattice timber cribbing encountered were 24 feet plus or minus in width and 181 feet in length from the edge of the footing to the edge of the footing and continuing 10 to 15 feet either side of that. Mr. Davis also testified that he was unaware of this site condition at the time Volk bid the project and that NTL personnel (Messrs. Thomson and Hummel) had no idea that the timber cribbing was there (Tr. 138-44).

As to the size of the obstacle involved in the site condition (SAF Claim 2, Tab 4 at 14), Mr. Davis stated that the cited exhibit is a cross-sectional view of the cribbing area encountered which gives an elevation for the top portion of 2320.33 and contains a note which says the crib pattern continues down to elevation 2310 plus or minus. A survey was made to determine the top elevation and then Volk just taped down from the top deck to the bottom of the timbers. The timbers involved in the cribbing were 10 by 12 inches in size and were fastened to each other by large steel pins of 1-1/2 to 2 feet (Tr. 144-46).

Prior to bidding the project, Volk had attended a meeting at which Mr. Elmer Sangrey (BIA) had shown all bidders the plans of the old dam (AX-B). In preparing Volk's bid, Mr. Davis had looked at such plans to determine the extent and size of the existing dam. The old plans indicated that the timbers extended into the earth 12 inches as contrasted with the bottom of the cribbing going down to elevation 2310 (SAF Claim 2, Tab 4 at 14) which was plus or minus 10 feet from the top of the deck. After testifying that the timber cribbing was uniform across the bottom of the dam and after encircling in red on the old plans (AX-B) the section which shows the depth of the timber, Mr. Davis testified that he had arrived at a 1-foot depth by referring to the scale of 1/4 inch equals 1 foot as shown on AX-B and by using an engineer's scale and measuring from the top down to the bottom of the timbers, it had scaled out to be 1 foot (Tr. 146-50).

After asserting that as a minimum Volk would have to go down to elevation 2310 to remove the timber cribbing, Mr. Davis stated (i) that excavation of the timbers had been accomplished by a 3-cubic-yard backhoe; (ii) that the timbers were in good condition and had to be broken and shattered with a backhoe; (iii) that in the course of removing the timbers, Volk broke three separate yokes of the backhoe; (iv) that having to remove the timber cribbing changed Volk's construction schedule; (v) that the fact Volk was pouring concrete when the cribbing was discovered made the logistics difficult; (vi) that

the cribbing had to be taken out in sections and replaced in sections because Volk did not want to tear out the whole bottom of the dam as that was its work area and because if too large a section was opened up the contractor could not control the backfill operation; and (vii) that after the timber cribbing was removed it had to be replaced with compacted pit-run gravel (Tr. 152-54).

Based on the difficulties encountered in removing the cribbing, Mr. Davis concluded that there was not any unit price in the contract that would adequately compensate Volk for removing that kind of material and that the unit price of \$6.95 per cubic yard set forth in Modification No. 3 for removal of timber cribbing was not anywhere close to being adequate (Tr. 157-58).

According to Mr. Davis costs for Claim 2 had been calculated on the same basis as he had outlined for Claim 1. Noting that Volk had also relied upon the time cards for Claim 1, he stated that the contractor had computed the total costs for removal of the timber cribbing and for placement of compacted backfill, as well as the costs for pumping incurred while Volk was doing the operation (Tr. 158). Upon rebuttal Mr. Davis testified that while he had talked a lot about depths and elevation and cubic yards, the real basis for the claim was a labor and equipment compilation. He also testified that the claim included an item for the disposal of material taken out of the cribbing area for which Volk was claiming at the rate of \$2.50-per-cubic yard (SAF Claim 2, Tab 1 at 2). He was unable to say, however, whether the disposal costs claimed had been covered in the convenience termination settlement (Tr. 219-21).

As to the 101-calendar-day time extension requested, Mr. Davis stated that from the time the cribbing was discovered until Volk actually received the modification involved a delay of 20 days; that it took 31 shifts plus 4 days of hauling gravel to complete the work; that adverse weather conditions experienced in October and November resulted in another 10 days of delay; and that an additional 5 days of delay was attributable to the fact that Volk had not been able to install the key at the time contemplated which precluded the contractor from being able to work in the area to expand the job (Tr. 159-60).

Upon cross-examination Mr. Davis testified that pumping had been performed nearly continuously. As to how the quantity of material claimed for as excavation had been measured, Mr. Davis stated (i) that he had used the dimensions and elevations on a drawing and then had gone back and reviewed Volk's photographs in the area; (ii) that the area had only been surveyed at the time the drawing was made; (iii) that depth had been determined on the basis of taking an elevation on the top of the downstream apron and then taping down to the bottom of the key. Width was determined on the basis of running a tape from the extremities. Backfill was measured by computing the area. Mr. Davis acknowledged that Volk had been paid something for

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Claim 2 work and that any payments made under Modification No. 3 had not been deducted from the amount claimed (Tr. 167-69).

Another Volk witness was Mr. Ed Venetz (a project shift foreman) who had generally been in charge of excavation in the Ogee section. According to Mr. Venetz, NTL required excavation to be dug from 1 to 2 feet below the bottom of the timber crib. Mr. Venetz testified (i) that as Volk broke up the timbers to pull the crib apart, there were a lot of splintered pieces of wood (basic debris) to be removed; (ii) that when Volk broke a section apart (the length of a section was determined by the length of the boom on Volk's backhoe, which was about 24 feet), there was still the problem of the water flowing in and the soil that had been saturated during the time the timbers were being removed; (iii) that the limits of Volk's excavation were between 10 and 12 feet below the top of the upstream apron deck; and (iv) that removing a timber cribbing section was much more difficult than structural excavation which involved digging dirt with a machine. As to the backfill operation, Mr. Venetz testified that the operation would be kept going until it was above the level where the water was coming in which was 4 to 5 feet from the bottom of the excavation (Tr. 171-73).

Called by appellant as an adverse witness was Mr. Boyd Johnson (BIA engineer in Billings Area Office) who had been generally in charge of the project from an engineering standpoint. It was Mr. Johnson's testimony (i) that he had known there was timber cribbing in the Old Milk River dam; (ii) that the depth to which the cribbing went had not surprised him; (iii) that the plans showed the depth to which the timber cribbing extended into the ground; (iv) that while he knew the timber cribbing was down there, he did not know specifically where the cribbing was going to fall in relation to the new key; and (v) that as the person in charge of the project he had not undertaken to determine whether the Ogee was going to be placed in the earth or in the timber cribbing because the old structure was supposedly to be removed so that would not have been a consideration (Tr. 205-09).

Mr. Robert Thomson testified extensively with respect to Claim 2 both as an adverse witness called by appellant and as the Government's only witness on the claim. In his testimony, Mr. Thomson stated that GX-13 shows Volk to have been paid the sum of \$13,314.40 for work done in the Ogee area in removing timber cribbing and replacing it with compacted backfill. He also acknowledged that in a note to Pay Estimate No. 12 (AF Contract File, Tab 00) he had shown the work to consist of 712 cubic yards of structural excavation (Item 8) and 712 cubic yards of compacted backfill (Item 9), as covered by Modification No. 3 (Tr. 175-78).

Testifying with respect to the drawing of the old dam (AX-B) and with particular reference to two sets of jagged broken lines shown about fivesixths of the way down toward the bottom of page 3,

Mr. Thomson stated that the jagged broken lines indicate there is a gap in the drawing between what is shown above the broken lines and what is shown below and that the part below the broken line does not contain anything to indicate the elevation to which the lower part of the structure extends (Tr. 182-83). Concerning the discovery of timber cribbing, Mr. Thomson testified (i) that neither Volk nor he had anticipated finding the cribbing there; (ii) that at a meeting on the project on August 28, 1980 (attended by representatives of NTL, BIA, and Volk), Mr. Davis (Volk's superintendent) had indicated (on the basis of his review of the old plans) that any timbers and debris above elevation 2317.0⁵⁴ were the responsibility of Volk and anything below that elevation was not the responsibility of the contractor (Tr. 187-88); and (iii) that between the time of the late August meeting and the issuance of Contract Modification No. 3 (AF Contract File, Tab I) on September 19, 1980, Volk was told that it could proceed with the work based on time and equipment⁵⁵ but that if the contractor did so proceed prior to a modification being issued it would be at its discretion (Tr. 184-90).

Concerning the measurements made of the quantity of material removed in the process of excavating the timber cribbing, Mr. Thomson stated that the measurements had been made in accordance with the project measurements and payments section which stipulates that they would be done by using survey cross-sections pursuant to the average-end-area method.⁵⁶ In calculating the amount of material excavated, Mr. Thomson used an engineer's level sighting on a reference benchmark as a back-sight and then taking four sights at the bottom of the excavation at various points on the cross-section across the channel. Each section was cross-sectioned as it was dug out (Tr. 192). Addressing the question of the reason for the difference between the parties as to the quantity of timber cribbing excavated, Mr. Thomson stated (i) that one part of the difference would have to do with the 2317 elevation; (ii) that according to his measurements the cribbing extended down to about another 5 feet to somewhere around 2312; (iii) that his original calculations started at 2319.5 (the bottom elevation to which Volk was obligated to excavate to build the new structure) and continued down to whatever he cross-sectioned at the bottom; (iv) that based on the agreement and the contract modification that Volk would be paid only for the portion below 2317, he had deducted the area between 2317 and 2319.5; (v) that the depth was

⁵⁴ In response to a question from Government counsel as to why elevation 2317 had been used, the project engineer stated: "I believe that that was the elevation that Mr. Davis believed that he was responsible for excavating to after his review of the old plans and felt that anything below that elevation was not his responsibility and was beyond the scope of the original contract" (Tr. 188).

⁵⁵ It was not stated that the contractor would be paid on that basis, however, because the method of payment was to be settled later (Tr. 203-04).

⁵⁶ The average-end-area method is specified in the contract as the method of measurement to be used for channel excavation (AF Contract File, Tab F, section 01020, Item 7). Modification No. 3 provides for Volk to be paid for excavation below elevation 2317 at the price for structural excavation (Item 8) of \$6.95 per cubic yard (AF Contract File, Tab I). Measurement for structural excavation is to be made by reference to neat lines (AF Contract File, Tab F, section 01020, Item 8). In his testimony Mr. Thomson acknowledged that measurement for structural excavation was done a little differently from the average-end-area method prescribed for channel excavation (Tr. 190-91).

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determined by cross-sectioning; and (vi) that the depth of five feet was just a measurement made to the bottom of the timbers⁵⁷ which the contractor had said were uniform across the bottom (Tr. 212-14).

Immediately following this testimony, Mr. Thomson stated:

I believe the contractor said * * * the cribbing extended some ten to fifteen feet beyond the footing location. My recollection was that the timber did not extend past the footing, past the inside or center-line portion of the dam site of the footing key on either side and, in fact, probably stopped somewhat short, and I think that may be demonstrated by the photo we have introduced as evidence also, so if he used a longer section across the transverse width of the dam that would account for part of it. If he used a higher top number and a lower bottom number that would account for part of it, and my calculations were based on notes that we have in the book and we could introduce those if that would be helpful.

(Tr. 214).

In support of GX-2 Mr. Thomson stated that it represented a report he had put together in which he compared the contractor's claim and back-up data with the information in the NTL project diaries as to the amount of time Volk's personnel and equipment had been used in connection with this item as claimed. Noted in this regard was the fact that the typewritten figures on GX-2 were Mr. Thomson's figures.

As to the claim for pumping, Mr. Thomson stated (i) that there were numerous times when the pumps were shut down; (ii) that when the compacted backfill got above the level of the water in whichever section Volk was working on and until another section was opened up, there was no way the contractor could pump because there was nothing to pump (*i.e.*, until such time as he got another section torn out, there was no water to pump because there was no open excavation) (Tr. 195-97).

2. Discussion

[5] In support of its position appellant advances a number of contentions including, *inter alia*, the following: (i) the discovery of the horizontal timber cribbing was a differing site condition; (ii) BIA in the person of Mr. Boyd Johnson intentionally withheld information from bidders as to the depth of the cribbing; (iii) the testimony offered by Mr. Robert Thomson was neither reliable nor credible; (iv) the work involved in removal of the cribbing differs substantially from structural or channel excavation which is essentially dirt work; (iv) the unit prices applied in Modification No. 3 are wholly inadequate due to the substantially different and greater degree of difficulty encountered; and (v) the time consumed in removing the timber cribbing,

⁵⁷ Responding to a question on cross-examination as to whether his measurements had stopped at the bottom of the bottom timber, Mr. Thomson stated:

"No, I made a measurement early on before the excavation was done to see where the bottom of the timber was based on a survey from an established benchmark. After the excavation was carried to where there were no more timbers, I just took a shot down there to see generally what that elevation was and recorded that in my field notes. As the excavation was made we cross sectioned each portion of it individually by the standards * * *." (Tr. 215).

performing the necessary pumping, and replacing the material removed with compacted backfill warrant the granting of the time extension requested of 101 calendar days (AOB 43-49).

For its part the Government denies all of the contentions of appellant and asserts that Modification No. 3 adequately compensates Volk in terms of both money and time for the work involved. In addition, the Government asserts that if appellant prevails on its claims, the Government is entitled to have credited against any amount found due the \$13,314.40 heretofore paid to Volk under Modification No. 3. The Government also asserts that no reimbursement should be provided for the \$6,889.75 claimed by Volk for disposal of the cribbing materials removed in the course of excavation (GPHB 42-47, 52-55).

In denying the claim of differing site conditions, the Government states (i) that appellant had knowledge of the cribbing and work beneath the Ogee section of the old dam by reason of AX-B; (ii) that the disagreement between the parties is to the extent to which the rocks and cribbing encountered exceeded the amount shown on the old plans (AX-B); (iii) that the old plans were not made a part of the contract or bid invitation; (iv) that the contract gave no indication of subsurface conditions below the Ogee section of the old structure; and (v) that the facts so disclosed do not support either a type 1 or a type 2 differing site condition (GPHB 53-54). As the Board views the case, it is not necessary to determine whether the presence of the timber cribbing involved here was a differing site condition. This is so because from the time of the conference on the project on August 28, 1980, until the present time, the Government has consistently admitted liability with the only question open being whether the compensation provided in Modification No. 3 is an adequate equitable adjustment. In this regard the Board notes (i) that at a conference on August 28, 1980, the parties agreed that any cribbing removed below elevation 2317 would be considered to be beyond the scope of the contract; (ii) that Modification No. 3 dated September 19, 1980, reflected this understanding; (iii) that when the Government filed its answer, it did not contest liability;⁵⁸ and (iv) that in its posthearing brief the Government asks that any amount to which appellant is found to be entitled be credited with the payments made under Modification No. 3 (GPHB 47).

Concerning the alleged intentional withholding of information as to the depth of the timber cribbing, appellant quotes from the testimony of Mr. Boyd Johnson at the time he was deposed (Dep. of B. Johnson at 88-89; AOB 44). Not quoted by appellant from the pages cited was the following exchange between appellant's counsel and Mr. Johnson: "Q. So it's fair to say that it was extensive and you knew that, but you didn't know just how extensive it was? A. Right. And I think the old plans more or less bear out to how extensive it was * * *" (Dep. of

⁵⁸ Cf. *Weeks Dredging & Contracting, Inc. v. United States*, Cl. Ct. (Sept. 26, 1986), 33 CCF par. 74,614.

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B. Johnson at 89). A similar interrogation and result was obtained at the hearing (Tr. 208).

Based upon the above-cited testimony of Mr. Johnson and that given by him elsewhere (Dep. of B. Johnson at 93-94), the Board finds that Mr. Johnson considered the information shown on the plans sufficiently alerted bidders not only to the presence of cribbing but to the approximate depth to which it extended. This view of the matter by Mr. Johnson may not have been an accurate assessment but his testimony and that of Mr. Thomson⁵⁹ are considered to be sufficient to preclude a finding that Mr. Johnson intentionally withheld from bidders information he considered crucial to determining the depth to which the cribbing went.

Respecting the charge of appellant that the testimony offered by Mr. Robert Thomson was neither reliable nor credible (AOB 47-48), the Board has found otherwise (Part III, *supra*). The Board also has found that the records maintained by NTL (including those pertaining to measurement of quantities of excavation and backfill covered by Claim 2) were superior to Volk's project records (Part IV, *supra*).

As to the difficulty of excavating the timber cribbing, appellant states that the work involved in such excavation differs substantially from either channel or structural excavation which is essentially dirt work (AOB 45-46). This statement by appellant is supported by the testimony offered by Messrs. Davis and Venetz as summarized above and is not contradicted by the testimony given by Mr. Thomson. Mr. Venetz also testified to the difficulties involved in placing the backfill due to the splintered pieces of wood and other debris floating around after Volk had broken up the timbers to pull the crib apart (Tr. 172-73).

The parties are also apart on the question of whether the unit prices specified in Modification No. 3 of \$6.95 per cubic yard for excavating cribbing (the price for Item 8 in the Bid Schedule) and of \$11.75 per cubic yard for compacted backfill (the price for Item 9 in the Bid Schedule) are adequate. Appellant denies that these prices are at all adequate but fails to indicate unit prices which it would find acceptable. Instead, it relies on a total cost approach (SAF Claim 2, Tab 1 at 1-34; Tr. 158, 219-21).

In his testimony, Mr. Thomson evidenced some confusion as to the price the Government recognized as payable for excavation of the cribbing. Initially he thought that the price payable was that specified in the contract for channel excavation (\$9.85 per cubic yard). After being referred to GX-13 and Modification No. 3, however, Mr. Thomson confirmed that the unit price payable for the removal of timber cribbing was the unit price for structural excavation of \$6.95

⁵⁹ The testimony of Mr. Johnson appears to be partially corroborated by the testimony of Mr. Thomson concerning what is indicated by the jagged broken lines on page 3 of AX-B (Tr. 182-83).

per cubic yard (Tr. 175-78). The Government made no serious effort to show that the \$6.95 per cubic yard for structural excavation and \$11.75 per cubic yard for compacted backfill were adequate for the removal of the timber cribbing and placing the compacted backfill. Instead, the Government appears to have proceeded upon the assumption that in making any adjustment it would be necessary to rely upon the unit prices already specified in the contract for excavation and for compacted backfill. In so proceeding, the Government appears to have overlooked the fact that Contract Modification No. 3 (AF Contract File, Tab I) cites as its authority General Provision No. 3, Changes of SF 23-A. The following is quoted from the Changes clause:

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required, for the performance of any part of the work under the contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly.

(AF Contract File, Tab D at 1).

Here the task of determining the proper amount of an equitable adjustment is made more difficult by the fact that while the Government has measured the quantity of cribbing excavation in a systematic manner, Volk appears to have abandoned any serious reliance upon the measurements it took in favor of the total cost approach now adopted (SAF Claim 2, Tab 1) (Tr. 219-21). Since the contract contemplates that pay items will be measured, we now turn to the measurements made by NTL in the Ogee section in question. The Board has previously found that the records maintained by NTL (including records as to quantity measurements) were superior to Volk's project records. The Board now makes a further finding that at a conference on the project on August 28, 1980, the contractor's superintendent Mr. Davis interpreted AX-B to show that any timber cribbing above elevation 2317 would be the contractor's responsibility and that any such cribbing encountered below that excavation would be beyond the scope of the contract. In addition, except as hereinafter modified, the Board accepts the measurement of the NTL project engineer as to the dimensions of the excavation (length, width, and depth) in the Ogee section in question.

The determination of the NTL project engineer that 1,097.15 cubic yards of timber cribbing were excavated must be adjusted in two respects. First, in taking the measurements, the project engineer used the average-end-area method prescribed for channel excavation even though as Modification No. 3 shows the price proposed by the Government for the cribbing excavated was that for structural excavation, for which the contract contemplates the measurement would be made by reference to the neat lines. Asked whether measurement for structure excavation was the same as for channel excavation, Mr. Thomson acknowledged that it was done a little differently. No testimony was elicited from Mr. Thomson or from any other witness as to what would be the effect of measuring excavation by one method rather than by the other. In the absence of any such

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testimony, the Board considers that appellant should not be adversely affected by the failure of the project engineer to adhere to the contract terms in measuring structural excavation and that the amount of cribbing excavated and backfill placed should be increased by 200 cubic yards.

Another adjustment required results from the fact that the last cross-section taken by the project engineer of the timber cribbing excavated was made on October 21, 1980 (SAF Claim 2, Tab 5 at 3) but excavation continued in that area and was recognized as continuing by the project engineer on three dates thereafter (GX-2 at 13-15). Based upon the fact that excavation apparently continued in the disputed area for a brief time after the date of the last cross-section on October 21, 1980, the Board estimates that the amount of cribbing excavated and backfill placed should be increased by some 225 cubic yards.

Remaining for consideration is the 101-calendar-day time extension requested by appellant. Mr. Davis gave the only specific testimony offered by appellant in support of the time extension request. For the most part the testimony of Mr. Davis in this area was of a conclusory nature, as is evidenced by the manner in which the 101 days were computed. Mr. Davis testified (i) that the time between the discovery of the cribbing and the receipt of Modification No. 3 involved a total of 20 days, (ii) that adverse weather conditions experienced in October and November resulted in another 10 days of delay; (iii) that the inability of Volk to install the key when contemplated delayed the job another 5 days; and (iv) that it took 31 shifts plus 4 days of hauling to complete the work (Tr. 159-60).

Each category of claimed excusable cause of delay is considered to be overstated. With respect to item (i) *supra*, the Board notes that the cribbing was discovered on August 25, 1980, and that at a conference on the project on August 28, 1980, it was agreed that any cribbing encountered below elevation 2317 would be beyond the scope of the contract. The 3 days that elapsed between the discovery of the cribbing and the reaching of an agreement upon everything but the price to be paid and the time extension to be granted was not an unreasonable period of time for reaching a decision. The fact that Volk chose not to begin excavating the cribbing until September 8, 1980, and discontinued such work after a couple of days until October 6, 1980 (SAF Claim 2, Tab 1 at 3-5), are not delays for which the Government was responsible.

As to item (ii) *supra*, appellant has made no effort to show that the weather conditions encountered in October and November were "unusually severe" within the meaning of Clause 5 "Termination for Default-Damages for Delay-Time Extensions of SF 23-A" (AF Contract File, Tab D at 1). Concerning item (iii), *supra*, appellant has furnished no details as to the circumstances surrounding the delay (*i.e.*, when

was it contemplated that the key would be installed; when was it installed; and what other work was going forward during the period of the alleged delay).

Addressing the delay claimed for item (iv), *supra*, the Government says that the contractor performed some work on excavation or backfill in the disputed area on a total of 29 separate days, as verified by the project records (GX-2). If it were to be found that Volk was entitled to a time extension for each of such 29 days and the 4 days time extension granted by Modification No. 3 were to be deducted from the 29-day figure, Volk would be entitled to an additional time extension of 25 days. For a time extension computed on the basis of a formula involving man hours worked in the disputed area to total man hours worked during the 29-day period, however, Volk would only be entitled to a time extension of 6.82 days or 7 days (GPHB at 52-53).

The guiding principle in all of these cases is that appellant has the burden of showing the adverse effect of a delay upon overall contract performance. *Montgomery-Macri Co.* and other cases cited in Part II E, *supra*. While appellant has failed to make such a showing, there is no doubt that encountering the timber cribbing did delay Volk by more than the 4 days granted by the contracting officer in Modification No. 3. In the absence of any persuasive evidence being offered by Volk in support of the 101-day time extension requested, the Board finds appellant is entitled to a time extension of 20 days which figure includes the 4-day time extension granted by the contracting officer.

[6] Turning now to the question of whether a deduction is to be made from any amount found to be due Volk for performing the disputed work, the specific question to be considered is whether the contractor was paid \$13,314.40 pursuant to Modification No. 3 as contended by the Government (GPHB 47).

Although the contracting officer found that the contractor had been paid the sum of \$13,314.40 pursuant to Modification No. 3 (AF Claim 2, Tab P at 3-4), the evidence offered by the Government in support of this finding lacked specificity and was of a conclusory nature. When at the end of the hearing, appellant specifically raised the question as to what payment, if any, had been made under Modification No. 3 (Tr. 570-76), the Government failed to recall the project engineer to the witness stand to support its position that the contractor had in fact been paid the sum here in issue. Instead, the Government offered in evidence GX-23, entitled "Determination of Final Quantities Per Pay Estimate No. 15." No testimony was offered by the Government with respect to GX-23 and it was received in evidence under an agreement between the parties that it represented the Government's position but that appellant would not stipulate as to its accuracy (Tr. 576).

Earlier in the hearing Mr. Davis stated that Volk had been paid something for the work involved in Claim 2 and that any payment made under Contract Modification No. 3 had not been deducted from the amount claimed (Tr. 169). Testifying with respect to the same

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subject, the project engineer stated that GX-13 shows the amount of \$13,314.40 to have been paid to Volk under Contract Modification No. 3 (Tr. 175-78). Apropos the testimony so offered, the Board notes that in both instances the testimony was given before the attention of the parties was specifically focused on the question of what payments, if any, had been made to the appellant under Modification No. 3. In view of the inconclusive nature of the evidence, the Board considers that resolution of the question presented will turn on the question of where the burden of proof lies. It is clear that payment is an affirmative defense, *Desjardins v. Desjardins*, 308 F.2d 111, 116 (1962), and that the burden of establishing an affirmative defense rests upon the defendant, *Capitol Indemnity Corp. v. St. Paul Fire & Marine Insurance Co.*, 357 F. Supp. 399, 410 (1972). The Board therefore finds that the Government is not entitled to have credited against any amount found due appellant by way of an equitable adjustment the sum of \$13,314.40 purportedly paid to appellant pursuant to Contract Modification No. 3.

Remaining for consideration is the question of whether the amount awarded to appellant should be reduced by the \$6,889.75 claimed by appellant for the disposal of material (GPHB 47). According to the Government, this reduction should be made because Volk agreed in the supplemental agreement for partial termination (AF Contract File, Tab Mc at 3) that the contractor would dispose of the excess material from structural removal at no cost to the Government. At the hearing Mr. Davis testified that he was not certain as to whether the cost of the disposal of material was covered in the termination settlement (Tr. 220-21). The provision of the supplemental agreement relied upon by the Government (note 31, *supra*) does not support its position since it refers to the removal of the temporary diversion dike upstream and the removal of all sheet piling from such dike without any mention being made of the disposal of timber cribbing removed from the old dam. The absence of any such mention is considered to be dispositive of the question presented. The Government is not entitled therefore to have the amount claimed for disposal costs excluded from any equitable adjustment to which Volk is found to be entitled.

3. Decision

A. Claim 2 - Excavation - \$26,028.42 (SAF Claim 2, Tab 1 at 1)

For this aspect of the claim (excavation of horizontal timber cribbing from the Ogee section during the period from September 8 to November 20, 1980), appellant is requesting an equitable adjustment in the amount of \$26,028.42 and an indeterminate portion of the 101-day time extension requested (SAF Claim 2, Tab 1 at 1-13, 35).

Most of the testimony offered at the hearing was designed to show the formidable difficulties involved in excavating the horizontal timber cribbing. The Board has previously found that by reason of the

Government's admission of liability and the authority cited for Modification No. 3, Volk is entitled to an equitable adjustment under the Changes clause. Since appellant has failed to segregate costs, the equitable adjustment must necessarily be determined on the basis of a jury verdict approach.

As noted in Part IV, *supra*, Volk has often included employees involved in general supervision in direct costs subject to the application of a labor burden rate of 39 percent, a claimed overhead rate of 15 percent, and other add-ons. Also noted there is the fact that overhead and profit are being claimed on equipment even though these items are normally included in equipment rates. The costs claimed for excavation of the cribbing are all subject to the objections so noted in Part IV. In addition, the Board notes that included in the claimed costs for excavation are amounts claimed for subsistence on equipment items.

According to the records maintained by the project engineer, the cribbing excavated from the Ogee section was in the total amount of 1,097.15 cubic yards. The Board has previously determined that this quantity should be increased by 200 cubic yards to compensate for the measurements taken having been made by use of the average-end-area method prescribed for channel excavation rather than by measuring by reference to the neat lines specified for structural excavation. In addition, the Board has determined that the quantity excavated should be further increased by 225 cubic yards in recognition of the fact that the last cross-section taken of the cribbing excavation was on October 21, 1980, and that excavation continued in the area in question for another 3 days. Giving effect to these additions, the total quantity of cribbing excavated is found to be 1,522.15 cubic yards. From this figure must be deducted the 385.46 cubic yards found by the project engineer to represent excavation above elevation 2317.0 for which Volk had recognized responsibility. The total quantity of cribbing excavation subject to equitable adjustment is therefore 1,136.69 cubic yards or 1,137 cubic yards.

The testimony offered by Messrs. Davis and Venetz was to the effect that the work of excavating the timber cribbing was vastly different than the type of work covered by the unit prices provided in the contract for either structural excavation or channel excavation. No testimony was elicited from Mr. Thomson showing that this was an inaccurate assessment of the difficulties involved in performing the work. Based on this evidence the Board finds that a proper unit price for such excavation would be in the amount of \$16 per cubic yard as contrasted with the \$6.95 per cubic yard established in contract Modification No. 3, the contract unit price for structure excavation. Taking into account the amount claimed as disposal costs for cribbing excavated, the equitable adjustment to which appellant is entitled for cribbing excavation is found to be in the amount of \$21,787.77, computed as follows:

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1137 c.y. of cribbing excavation @ 16.00 a c.y.	= \$18,192.00
Disposal of excavated cribbing material:	
1137 c.y. at \$2.50 per c.y. plus overhead & profit	= 3,595.77
	<u>\$21,787.77</u>

Claim 2: Backfill - \$58,377.87

For this item of claim (backfill in the Ogee section during the period from October 8 to November 25, 1980), appellant requests an equitable adjustment in the amount of \$58,377.87 and an indeterminate portion of the 101-day time extension requested (SAF Claim 2, Tab 1 at 1, 14-33, 35).

From the testimony offered by Mr. Venetz at the hearing, it is clear that following the breaking up of the cribbing there was a substantial amount of splintered timber and other debris which made the task of compacting the backfill substantially more difficult than would be the case ordinarily.

Here again none of the costs were segregated and all of the objections to the manner in which Volk computed its claim for excavation apply with the same force to the claim for backfill. Since the quantity of backfill required to be compacted is directly related to the quantity of cribbing excavated, the adjustments made with respect to excavation are equally applicable to the quantity of backfill subject to an equitable adjustment.

While placing the compacted backfill in the circumstances present was difficult, the difficulties were not of the same magnitude as were those involved in the removal of the timber cribbing. Consequently, the increase in unit price from that allowed in Modification No. 3 for compacted backfill (\$11.75 per cubic yard) is not comparable to the percentage increase to which Volk was found to be entitled for cribbing excavation.

Based upon the foregoing analysis, the Board finds that for placing the compacted backfill, appellant is entitled to an equitable adjustment in the amount of \$25,014, computed as follows:

1,137 cubic yards compacted backfill @ \$22 per cubic yard = \$25,014.

Claim 2: Pumping - \$14,081.00

For this item of claim (pumping in the Ogee section during a claimed period from September 9 to December 2, 1980), appellant seeks an equitable adjustment in the amount of \$14,081 and an indeterminate portion of the 101-day time extension requested (SAF Claim 2, Tab 1 at 1, 34-35).

The appellant's claim shows that appellant was involved in pumping on all days from September 9 until December 2, 1980, a total of 85 days. Based on NTL project records, the project engineer found Volk was only involved in pumping for removal of ground water in the timber cribbing area during excavation and backfill on 16 days from the time excavation resumed on October 6, 1980, until pumping ceased

in the work area with which we are concerned on November 21, 1980 (GX-2 at 32, 35).

For the 16 days of pumping involved the project engineer concluded that the contractor's cost for pumping including overhead and profit were in the amount of \$2,294.40 (GX-2 at 36). In view of the paucity of evidence supporting the pumping costs claimed, the limited time in which they were incurred, and the superiority of the NTL project records to the records maintained by Volk, the Board adopts the project engineer's figures for pumping and therefore finds that the equitable adjustments to which appellant is entitled for pumping in connection with Claim 2 is in the amount of \$2,294.40.

Claim 2: Summary of Equitable Adjustment and Time Extension

Excavation of timber cribbing	\$21,787.77
Placement of compacted backfill	25,014.00
Pumping costs for excavation and backfill	2,294.40
Amount of equitable adjustment	\$49,096.17

For performing the work involved in Claim No. 2, appellant is also entitled to a time extension of 20 calendar days.

Claim 3: Dewatering (IBCA-1554-2-82(C)) - \$140,300.86

In this claim appellant seeks an equitable adjustment under the Changes Clause in the amount of \$140,300.86 (AX-A)⁶⁰ and a time extension of 22 days (AOB 56). The claim as originally presented was in the amount of \$90,916 (AF Tab 0 at 3).

Background

At the preconstruction conference on April 8, 1980, the subject of dewatering was discussed. The memorandum of the conference states:

The Contractor gave a brief description of his construction plan and discussed dewatering systems. Tentative plan for dewatering includes driving sheet pile and temporarily leaving them higher than specified, using a well point system, and pumping. The Contractor was asked to submit a plan for dewatering, including water pollution prevention provisions.

(AF Claim 1, Tab G at 3).

In a letter under date of June 20, 1980, NTL expressed its concern over schedule slippage and advised Volk that it expected an updated progress schedule. After noting that the details of a proper dewatering system had not been addressed by Volk and after requesting advice as to Volk's current dewatering plans, the letter states: "In order to properly found this concrete structure, the subgrade soils must remain undisturbed. A functional dewatering system must be in place before final grading can take place" (AF Claim 3, Tab Q at 1).

⁶⁰ The manner in which Claim 3 has been computed is subject to many of the same objections as have been made with respect to Claims 1 and 2 (e.g., the overstatement of costs by including employees involved in general supervision in the direct labor base for computing labor burden, overhead, and profit; claiming overhead and profit on total equipment costs shown even though both overhead and profit are included in the equipment rates used to determine equipment costs (see Part IV, *supra*, and GX-3 for additional details and for other deficiencies in the claim presentation)).

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By letter of June 25, 1980, to the NTL project engineer, Mr. Davis advised (i) that the dewatering equipment was being shipped from St. Paul, Minnesota, on that date; (ii) that Volk would be installing two 10-inch Stang dewatering pumps and assorted piping; (iii) that the equipment should arrive at the site on July 6 or 7 and would take 5 to 6 days to install; (iv) that Volk planned to put one line in on the north side and one on the south side but the exact location had not been determined; and (v) that Mr. Davis hoped to complete the layout next week and to pass the drawing on to the NTL project engineer (AF Claim 3, Tab R at 1).

On August 5, 1980, the contracting officer addressed a letter to Volk's vice president in which the contractor was given 10 days in which to show cause why the contract should not be terminated for default (AF Claim 1, Tab J). Thereafter, in a letter to the NTL project manager under date of August 11, 1980, Mr. Davis inquired as to the authority for the statements in NTL's letter of June 20, 1980, to the effect that in order to properly found the concrete structure, the subgrade must remain undisturbed and that a functional dewatering system must be in place before final grading could take place (AF Claim 3, Tab U). In his response of August 18, 1980, Mr. Hummel said that the purpose of the statements made in the June 20 letter as to dewatering and undisturbed soils was to advise Volk that unless the excavation was pumped out and water removed, unnecessary disturbance of the bottom would take place, citing section 02222 of the specifications (particularly subsections 1.0, 4.0 and 5.0). Also noted was the fact that specification section 03365, Concrete Construction, subsection 3.0 addresses the approvals needed before foundation concrete could be placed and that the NTL project engineer has the authority to make the necessary approvals of each foundation area whenever these areas are prepared by the contractor (AF Claim 3, Tab V). In his letter response of August 18, 1980, to the show cause letter, Mr. Volk asserted that the dewatering requirements, as apparently envisioned by NTL and BIA, were over and above the contract requirements (AF Claim 1, Tab J at 1).

In especially pertinent part, the contract provisions considered relevant to the resolution of the dispute read as follows:

SECTION 02222

STRUCTURE EXCAVATION

1.0 GENERAL:

This item shall consist of the removal and satisfactory disposal of all debris and other unacceptable material; the excavation for foundations; and the backfilling to the level of the original ground. This work shall also include all necessary bailing, pumping, drainage and other work required in connection with the structural excavation. * * *

* * * * *

4.0 TREATMENT OF FOUNDATION MATERIALS:

Where concrete is to be placed on any excavated surface, special care shall be taken not to disturb the bottom of the excavation more than necessary, and the final removal of the material to grade shall not be made until just before the concrete is placed. All seams or crevices shall be cleaned out and filled with concrete mortar. When the excavation is at the required depth; water if present shall be pumped out, if possible for cleaning the foundation bed for inspection. The natural ground adjacent to the structure shall not be disturbed without permission of the Engineer.

* * * * *

5.0 INSPECTION:

After each excavation is completed, the Contractor shall notify the Engineer. No footing shall be placed until after the Engineer has approved the depth of the excavation and the character of the foundation material.

(AF Contract File, Tab F at 22-23).

SECTION 03365**CONCRETE CONSTRUCTION****3.0 CONSTRUCTION METHODS**

A. GENERAL. All construction, other than concrete, shall conform to the requirements prescribed in other sections for the several items of work entering into the completed structure.

B. FOUNDATIONS. All excavation for foundations shall be prepared as specified under Section 02222 and they will be inspected and approved by the Engineer before placing any concrete. The elevations of the bottoms of footings as shown on the plans are approximate only and the Engineer may order, in writing, such changes in dimensions or elevations of footings as may be necessary to obtain satisfactory foundations and will revise the plans accordingly.

* * * * *

F. DEPOSITING CONCRETE UNDER WATER. Concrete shall not be exposed to the action of water before setting, or deposited in water, except with the approval of the Engineer and under his immediate supervision. When concrete is so deposited, the method and manner of placing shall be as hereinafter designated.

* * * * *

Concrete deposited under water shall be carefully placed in a compact mass in its final position by means of a tremie or other approved methods and shall not be disturbed after being deposited. Special care shall be exercised to maintain still water at the point of deposit. No concrete shall be placed in running water and all form work designed to retain concrete under water shall be water-tight.

(AF Contract File, Tab F at 46, 49-50)

Some time prior to the issuance of the Invitation for Bids, the Northern Testing Laboratories had been requested to make an investigation of subsurface foundation soil conditions at the site of the proposed new irrigation diversion dams across the Milk River and White Bear Creek, on the Fort Belknap Reservation (SAF Claim 3, Tab 2 at 2). The especially pertinent portions of the Report of Foundation Investigation in question are quoted below:

Construction

Construction of the dams will be difficult due to the high groundwater level. Dewatering of the foundations should be anticipated so that concrete can be placed in the dry. Construction of the structural keys with concrete would be difficult, and a cutoff

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using sheetpiling may be desirable to avoid dewatering. The cutoff chosen should be structurally designed to resist sliding, and watertight to increase flow path lengths.

PRELIMINARY RECOMMENDATIONS

* * * * *

General

* * * * *

3. The dams and other associated structures should be constructed in the dry.

(SAF Claim 3, Tab 2 at 10).

Testifying at the hearing Mr. Davis stated that prior to bidding he had requested but had been refused a copy of the Report of Foundation Investigation from which we have quoted *supra*. Mr. Davis was given a copy of the Appendix to the foundation report which included the boring logs. Noted in particular by Mr. Davis was the warning in the report that construction of the dam would be difficult due to high groundwater level and that dewatering of the foundation should be anticipated so that concrete can be placed in the dry. After interpreting "construction in the dry" to mean that "the subfoundation will be dry," Mr. Davis stated that if he had had the foundation report he would have included more money in Volk's bid to place the concrete structure in the dry (Tr. 223-26).

Mr. Davis also testified that what he considered the Government wanted in terms of dewatering on the project was what was stated in paragraphs 1 and 4 of section 02222 (quoted, *supra* and particularly the language from paragraph 4 reading: "When the excavation is at the required depth; water if present shall be pumped out, if possible for cleaning the foundation bed for inspection." In the field, however, the standard imposed on Volk was that "the foundation area will have a functional dewatering system placed in-in the dry." Amplifying upon this testimony, Mr. Davis stated that prior to receiving NTL's letter requiring Volk to have a functional dewatering system, he had been told orally that such a system was required. Noted by him in this regard was that he was not saying that what was required was unnecessary but that it was beyond the specifications (Tr. 227-28).

In his testimony Mr. Davis took exception to what was described as NTL's position that it was only inspecting and that it was not directing Volk as to the methodology of the work. According to Mr. Davis, the NTL project engineer directed Volk as to the actual depth in feet or inches that it wanted Volk to pull the water below the subgrade (Tr. 228-29).

In apparent recognition of the fact that Volk was responsible for some water removal (*e.g.*, that accomplished by bailing and pumping), the revised claim was prepared on the basis of determining the total

cost for dewatering⁶¹ and then making a claim against the Government for 60 percent of the costs so determined⁶² (Tr. 230-34).

Upon cross-examination Mr. Davis testified that he had planned to dewater by using surface pumps and that Volk had included between \$25,000 and \$30,000 in its bid based on that plan (Tr. 244). Mr. Davis acknowledged that a drawing which had accompanied the NTL foundation investigation report and which had been furnished to him prior to bidding indicated groundwater level. He also acknowledged that prior to the instant contract, he had never installed and maintained a Stang well-point system or any other type of well-point system (Tr. 245-46). As to what he had anticipated encountering, Mr. Davis stated that he had expected to encounter what was shown on the drawing (GX-21; Tr. 269-71) but that he had not expected having to put the north and south footing structures in the dry. As to his conclusion that the work would not be difficult, Mr. Davis said that that was based upon the specification which taken literally says that you will pump the water out if possible (Tr. 250-51).⁶³

Interrogated as to whether he was contending that removal of water from the excavation was impossible, Mr. Davis admitted (i) that not all surface water could be removed by bailing and pumping and (ii) that by using the well-point system you could not only remove the surface water but you could also draw the water table down (Tr. 252). Upon redirect Mr. Davis stated that the nub of the claim was the requirement that the soil be dewatered to such an extent that it was placed in the dry (Tr. 255).

Appellant's witness Mr. Ed Venetz testified that he had basically handled the dewatering systems, installed them, and broke them down. It was his testimony (i) that the NTL project engineer required Volk to draw the water below the surface of the excavation to a minimum depth of 1 foot below the subgrade and to a maximum depth of up to 5 or 6 feet; (ii) that in many cases Mr. Thomson gave specific directions as to where to put the contractor's manifold, how deep its

⁶¹ The 53-percent increase in the original claim from \$90,916 (AF Claim 3, Tab 0 at 3) to \$140,300.86 (SAF Claim 3, Tab 1 at 1) was said to have resulted from Volk having gone back to its time cards which contain a record of the amount spent on dewatering as they are coded (Tr. 237). The coded time cards did not preclude including in the claim the costs of driving sheet piling for which Mr. Davis testified no claim was being made (Tr. 232, 235) but as to which appellant's counsel concedes were included in the claim (ARB 45). With add-ons the claimed costs for driving sheet piling are in the amount of \$3,887.37 (GPHB 64-65). Nor does reliance on the time cards account for appellant's failure to provide the Government with information concerning the price of the Stang well-point system (Tr. 244).

⁶² If liability on Claim 3 were found to exist, the project engineer determined from the project record that Volk's total costs of dewatering did not exceed \$111,250.50 (GX-3 at 2). If Volk's allocation of 60 percent of dewatering costs to the Government were to be accepted, then the maximum amount of the Government's liability would be \$66,750.30 (GPHB 63-64).

If the documented use of 179-system days for both systems (i.e., 3 months rather than the 5 months claimed by Volk) is employed in the claim computation and if the costs for the dewatering systems are calculated on the basis of the current costs data contained in the 1982 guidelines for construction costs published by construction consultants R. S. Means as adjusted for 1980 (rather than the unsubstantiated claimed cost of \$4,200 per month per system), then the total equipment cost for the well-point dewatering system would be in the amount of \$12,760 (GX-3 at 39).

⁶³ The following exchange occurred between Mr. Davis and Government counsel:

"Q. Well, was the difficulty because of the high ground-water level or was the difficulty because of the extent to which you were expected or the preparation of your foundations that was required?"

A. It was difficulty [sic] to do the preparation of the foundations.

Q. So we are not really talking about a—that the ground-water level being something different from what you may have expected beforehand?

A. I believe that is correct." (Tr. 251).

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well heads were going to have to be in order to get the draw down required; and (iii) that Mr. Thomson would not allow Volk to simply bail or pump the surface water off the soils, if possible, so that the foundation bed could be viewed, as he did not consider that would be suitable subgrade for placing the concrete (Tr. 256-57).

Upon cross-examination Mr. Venetz stated (i) that in some instances, Mr. Thomson directed him as to where to install the well points; (ii) that originally when Volk started, Mr. Thomson had many suggestions as to how the contractor should place its manifold and get its points down; (iii) that while made as suggestions, they came out as orders; (iv) that the suggestions were not as to how Venetz might dewater in such a way as to prepare the foundations so that they would be approved but were rather suggestions as to how to set up Volk's system; and (v) that Mr. Venetz believed that if Mr. Thomson's suggestions were not followed, the work would not pass inspection (Tr. 257-59).

Mr. Venetz acknowledged that prior to the instant contract he had had no experience involving the installation and maintenance of well-point systems. Although testifying that the well-point system had worked "real good" after its initial installation, Mr. Venetz admitted that when the system was first installed the water was not drawn down far enough to meet with the inspector's approval which was only forthcoming after another complete system was installed at a lower elevation. Also admitted by Mr. Venetz was the fact that Volk had called in an outside consultant⁶⁴ for 4 or 5 days to assist the contractor's dewatering efforts. The outside consultant was seen by Mr. Venetz as having a little more experience with well-point systems than did Mr. Thomson (Tr. 259-62).

The NTL project engineer (Mr. Thomson) testified that he had not ordered (i) the installation of a particular well-point system; (ii) the placement of well points by any of Volk's employees; or (iii) the water table to be drawn down to a depth of 1 foot or 5 feet below the surface. Mr. Thomson acknowledged, however, that Volk had been required to comply with the provisions in the structural excavation specifications for preparation of the subgrade (Tr. 296-97). Earlier in his testimony, Mr. Thomson stated (i) that the advice given in the construction paragraph of the Foundation Investigation Report prepared by NTL (SAF Claim 3, Tab 2 at 10) was considered to be good advice; (ii) that substantial dewatering had been done in both the north and south footing areas; and (iii) that by and large the soil (sic) was placed in the dry (Tr. 262-67).

Testifying as an expert for the Government was Mr. Dennis Williams, chief construction engineer for NTL, a registered

⁶⁴ GX-3 contains the following note for July 17, 1980, at page 8: "Contractor had expert dewatering consultant at project this date. Expert stated that dewatering to date has not been properly done and is not effective. Also stated that equipment is not in good shape and pump is not operating properly."

professional engineer in the State of Montana, and a man with extensive experience in dewatering. Asked about the drawing included with the NTL Foundation Investigation Report which had been furnished to Volk prior to bidding, Mr. Williams stated (i) that the drawing contains the location and the drill logs for all of the test borings done in the foundation investigation for both the Milk River diversion dam site and the White Bear Creek diversion dam site on the Fort Belknap reservation; (ii) that the drawing includes information pertaining to soil classification, blow counts, moisture contents, and groundwater levels (*i.e.*, foundation conditions at both dam sites). The area generally to the left on the drawing (GX-21) deals with the Milk River diversion dam site while the area generally to the right on the drawing involves the White Bear Creek diversion (Tr. 267-73).

Concerning the test borings shown on the drawing (GX-21), Mr. Williams testified that they each are to bedrock and that they vary in depth from 22-4/10 feet at the shallowest to 53-1/2 feet at the deepest. Four borings are shown for the Milk River diversion dam site at several locations. Mr. Williams also gave as his expert opinion (i) that the soil conditions encountered by Volk were substantially the same as what is shown on the drawing (GX-21); (ii) that based on what is shown in the test borings, an experienced contractor could anticipate that all but the top 4 or 5 feet of the excavation for the structure would take place at depths below the water table (Tr. 275-78).

Mr. Williams stated that when used in construction the term "dewatering" simply means drawing the static water level down to some depth so that the soil at the excavation floor is not subject to flowing water or the action of flowing water. Later Mr. Williams stated that the term "in the dry" is the foundation engineer's jargon for meaning that you do not place the concrete under water. He also stated that the terminology is used that way in the Highway Department and everywhere there is a design engineer, a geotechnical engineer playing the game and "in the dry" means you do not have standing water. Elaborating, Mr. Williams stated that what is communicated by the term "in the dry" is that no special requirement would be necessary for the concrete because it would not be placed under water and that the foundation soil could be seen at the time the concrete was placed. In response to a question from the hearing member, Mr. Williams confirmed that "in the dry" means that at the time you place the concrete there is no standing water on the foundation (Tr. 281-84).

Questioned about the relationship of the terms "dewatering" and "in the dry" to section 02222 of the specifications (AF Contract File, Tab F at 22-23), Mr. Williams stated that the specification is an end-result specification and that subsection 5 of the specification describes the condition the soil should be in prior to the time it is inspected by the engineer to determine the character of the soil and prior to the placement of the concrete. In this regard Mr. Williams stated that he could not inspect and determine the character of the foundation

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material if it has standing water on top of it or if it is submerged (Tr. 284-86).

Affirming in his testimony that the contract did require dewatering, Mr. Williams stated that the amount of dewatering required is dependent upon the construction procedures selected by the contractor. After noting the statement from the specification about "special care shall be taken not to disturb the bottom of the excavation more than necessary," Mr. Williams stated: "[T]he degree to which he would dewater would be dependent upon the construction method, the excavation method, he selected. The heavier the piece of equipment that went out on the soil to perform the excavation the greater the depth of the required dewatering" (Tr. 288). Mr. Williams also gave as his opinion that the project had been successfully dewatered (Tr. 289).

Upon cross-examination Mr. Williams confirmed that "in the dry" means no standing water but that the soil can be wet. Even if the terms "dewatering" and "in the dry" are combined, it can still be true that the standard is met if you just remove standing water. Asked to state whether requiring a contractor to draw down water not just to the point where standing water was removed but where the ground was dewatered, dried out, 1 to 5 feet below the ground could be reconciled with the view that "in the dry" means removing standing water, Mr. Williams stated that that would be dependent upon what happened when the excavation equipment went out on the foundation. If when this occurred, the equipment sunk and disturbed the material, it obviously was not dewatered enough (Tr. 290).

In response to a question posed by appellant's counsel, Mr. Williams stated that the words used in the foundation report involve a jargon that has a very specific meaning and that "in the dry" means that you construct it with no standing water. Thereafter, Mr. Williams added that the designer understood that and had spoken to it in the concrete section also (Tr. 291-92).

DISCUSSION

Resolution of the merits of the instant claim turns upon a question of contract interpretation. Before finally resolving the question, however, it perhaps would be well to consider various positions taken by the parties in their pleadings or briefs or in the testimony offered at the hearing or on deposition.

According to appellant the contract is void of any reference to any requirement to place concrete in the dry (AOB 53). This statement by appellant fails to take into account the requirement of paragraph F of section 03365 of the specifications (*text, supra*) that "[c]oncrete shall not be exposed to the action of water before setting, or deposited in water, except with the approval of the Engineer and under his immediate supervision" and testimony of the Government's expert witness, Mr. Dennis Williams, that the term "in the dry" is engineer's

jargon which means you do not place the concrete under water (Tr. 282-83). While the language employed is not the same, there is no substantive difference between telling bidders that concrete shall be placed in the dry and telling them that concrete shall not be exposed to the action of water before setting or deposited in water. The latter expression is couched in plain English, however, and therefore is not susceptible to the charge that you need to be an engineer to understand it.

Another contortion advanced by appellant concerns the contractor's anticipation as to the removal of surface water as is indicated by section 02222 and that anything further was beyond the scope of the contract (ARB 38). While Mr. Davis testified that at the time Volk's bid was submitted he had anticipated that dewatering would be accomplished by using surface pumps (Tr. 244), the Government's expert witness Mr. Williams testified that from the drawing furnished to Volk prior to bidding an experienced contractor could anticipate that in excavating for the structure all but the top 4 or 5 feet would be below the water table (Tr. 277-78). Upon cross-examination Mr. Davis acknowledged that all surface water could not be removed by bailing and pumping (Tr. 252).

Concerning the construction to be placed upon the various specification provisions to which we have referred or quoted above, it is clear that both the project manager and the project engineer considered that the project engineer was vested with the authority and the responsibility to determine the character of the foundation material before any concrete was placed upon it. This view of the matter is reflected in the project manager's letter of June 20, 1980, to Volk in which after requesting advice as to the contractor's current dewatering plans, Mr. Hummel stated: "In order to properly found this concrete structure, the subgrade soils must remain undisturbed. A functional dewatering system must be in place before fine grading can take place" (AF Claim 3, Tab Q). The project engineer was of the same view, as is to be seen from Mr. Thomson's testimony that the only directions he had given to the contractor in regard to dewatering was to comply with the provisions in the structural excavation specifications for preparation of the sub-grade (Tr. 296-97).

The record fails to disclose any written⁶⁵ objection to the interpretation that Messrs. Hummel and Thomson had placed upon the specifications applicable to dewatering until Mr. Davis wrote to Mr. Hummel on August 11, 1980, to inquire where in the contract the requirements set forth in the portion of the June 20, 1980, letter quoted above were to be found (AF Claim 3, Tab U). The letter of August 11, 1980, was written 6 days after the date of the contracting officer's show cause letter of August 5, 1980, and over 7 weeks after the date of Mr. Hummel's letter to Mr. Volk of June 20, 1980.

⁶⁵ It does not appear that any oral protest of the NTL project engineer's position with respect to dewatering was made until Aug. 8, 1980 (SAF Claim 3, Tab 3 at 4).

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Perhaps concerned about the effect of the contractor's failure to file a written protest or even register an oral objection for so long a time, the contractor relies upon the letter of June 20, 1980, and the orders allegedly received from Mr. Thomson to establish a constructive change (AOB 54, 57).⁶⁶ Mr. Davis testified that Mr. Thomson directed Volk as to the depth in feet or inches that the contractor was to pull the water below the subgrade (Tr. 228-29). In his testimony, Mr. Venetz stated that there were variations in the depth to which Volk would be required to remove water from the soil to a point where water was below the surface of the excavation but that the minimum required depth was approximately 1 foot below the subgrade and the maximum required depth was 5 or 6 feet. According to Mr. Venetz, there were many cases where Mr. Thomson specifically directed the contractor as to where to put the manifold and as to how deep Volk's well heads were going to have to be in order to get the draw-down desired (Tr. 256-57). Mr. Thomson denied that he had given any orders to Volk involving the placements of well points or with respect to drawing the water table down to a specific depth below the surface of the excavation (Tr. 296-97).

In assessing the conflict in testimony offered by Messrs. Davis and Venetz on the one hand and Mr. Thomson on the other, a natural question arises as to why it would have been necessary for Mr. Thomson to issue "orders" to Mr. Venetz as to the number of feet the water table was to be drawn down below the surface of the excavation or to issue specific directions as to where the well-points were to be placed, when all he had to do to accomplish the same objective would be to rely upon his authority under paragraph 5 of section 02222 of the specifications not to approve the placement of a footing until he was satisfied with the depth of the excavation and the character of the foundation material (AF Contract File, Tab F at 23). The Board does not need to finally resolve this question, however, since appellant has failed to show or even allege that either Mr. Hummel or Mr. Thomson had any authority to bind the Government by ordering a change in the contract (*see* cases cited in Part II B *supra*) and the Board finds that neither of them had any such authority (note 9, *supra*, and accompanying text).

[7] Remaining for consideration is the question of whether the specification provisions governing dewatering were patently ambiguous so as to require Volk to seek clarification from the contracting officer before it bid. Very recently in the case of *J. B. Steel, Inc. v. United States*, 810 F.2d 1139 (1987), the Court of Appeals for the Federal

⁶⁶ See *The Jordan Co.*, ASBCA No. 10874 (Dec. 15, 1966), 66-2 BCA par. 6030, in which in the course of denying one of the claims presented, the Armed Services Board stated at 27,869:

"Where instructions given or requirements imposed orally by the Government representative are an expression of that representative's concept of the requirements of the contract, the contractor must protest these instructions, if he expects to claim successfully that these oral instructions and/or impositions amount to a constructive change order (citations omitted)."

Circuit had occasion to consider this question in a case where it found that the contractor's bid preparation had slighted most of the actual provisions of the contract, after which it is stated:

This lack of proper scrutiny was important because the contract was far from a model of drafting, and careful examination would have revealed the inconsistencies and patent ambiguities in the contract provisions. Bidders should not assume either that Government contracts are models of articulation or that the bidders can rely on the Board of Contract Appeals or the courts to save them from their own failure to help themselves by careful reading of the contract papers. [Footnote omitted.]

(810 F.2d at 1141).

From what has been stated above it will be seen that there are inconsistencies and ambiguities among the various paragraphs of section 02222 of the specifications and sometimes within the same paragraph of that specification (e.g., paragraph 4). Particularly germane to the present inquiry, however, are the following excerpts from the technical specifications:

Section 02222, par. 4.0

Where concrete is to be placed on any excavated surface, special care shall be taken not to disturb the bottom of the excavation more than necessary, and the final removal of the material to grade shall not be made until just before the concrete is placed. * * * When the excavation is at the required depth; water if present shall be pumped out, if possible for cleaning the foundation bed for inspection.

(AF Contract File, Tab F at 22).

Section 03365, par. F

Concrete shall not be exposed to the action of water before setting, or deposited in water, except with the approval of the Engineer and under his immediate supervision.

(AF Contract File, Tab F at 49).

When the above-quoted provisions pertaining to the placement of concrete are compared, it will be seen (i) that under paragraph 4 of section 02222 of the specifications water if present at the required depth of the excavation need only be pumped out if possible and (ii) that under paragraph F of section 03365 concrete is not to be exposed to the action of water before setting or deposited in water. The work covered by the instant contract is described as involving the "[p]lacement of reinforced concrete to build Milk River Diversion Dam" (AF Contract File, Tab B at 3). It is clear therefore that placement of concrete is a sine qua non for the accomplishment of the contract work. It is also clear that the portions of section 02222 and section 03365 quoted above cannot be reconciled. Based upon these considerations, the Board finds as follows:

1. Insofar as the portions of the specifications quoted above are concerned, the requirements of paragraph 4 of section 02222 for the placement of concrete and the requirements of paragraph F of section 03365 with respect to such placement are directly conflicting and therefore patently ambiguous.

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2. A reasonably prudent review by the contractor of the specifications would have disclosed the conflict between the provisions cited in finding 1 above and the resulting patent ambiguity.

3. At no time prior to the opening of bids did Volk call the contracting officer's attention to the patent ambiguity in the specification provisions governing dewatering cited *supra*.

Having so found, the Board further finds that where, as here, no inquiry was made of the contracting officer prior to bidding, the patent ambiguity is to be interpreted against the contractor. *Beacon Construction Co. v. United States*, 161 Ct. Cl. 1, 7 (1968), even if the contractor's interpretation were determined to be reasonable. *Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985).

Decision

For the reasons stated and on the basis of the authorities cited, the Board finds and determines that the dewatering work covered by the instant claim was required by the contract specifications. Claim 3 in the amount of \$140,300.86, together with the related time extension claim of 22 calendar days, is therefore denied.

D. Claim 4: Sheet Piling and Footings (IBCA-1472-6-81) - \$3,266.41

In its revised claim appellant is requesting the sum of \$3,266.41 and a time extension of 3 days under the Differing Site Conditions clause for sheet piling used in forming the north and south footings and for additional concrete used in the construction of those footings (AX-A; AF Claim 4, Tab D at 2).

Before undertaking to assess the merits of the claim, the Board notes the apparent failure of appellant in the claim presentation to adhere to its own criteria for cost substantiation (e.g., see ARB at 16) in that there is no correlation between the dates for which costs are claimed in the cost summary and the time cards submitted purporting to substantiate the claimed costs. More specifically, the summary shows costs being claimed for work performed in the footing areas in question on August 26, September 28, and September 29, 1980 (SAF Claim 4, Tab 1 at 3-5), while the time cards submitted are for August 27, September 2, September 3, and October 1, 1980 (SAF Claim 4, Tab 1 at 6-21).

Background

The NTL diary for August 25, 1980, states (i) that the contractor's first shift was devoted mostly to preparing to place concrete in right wall footing; and that (ii) that five laborers using hand tools worked full shift cleaning out loose material from the subexcavated area and excavating footing during first shift. The diary for that date also contains the following entry:

Contractor requested that for his own convenience [⁶⁷] that he be allowed to form inside of footing key in subexcavated area by driving sheet pile instead of setting forms. This was OK'd by the engineer and no additional cost is to be charged to the owner. Pitrur gravel will be brought to bottom of concrete grade behind piling and paid at unit price for compacted backfill.

(Supp. to GX-4 at 4-5).

The appellant's vice president testified that Claim 4 arose because some of the Ogee cribbing protruded back into the north and south footing areas as shown on AX-D. Prior to putting the footings in, Volk was required to excavate some unsuitable material from the subgrade area and replace the material so removed with compacted gravel. While not actually testing to see the slope at which the gravel would stand, Mr. Davis concluded that it would not stand at the required slope and that if Volk could only place the gravel at that repose, it would be necessary to rectify the perceived problem by the use of concrete. In this regard, Mr. Davis noted that Volk's contract price included forming and placement costs plus the cost of concrete. Also noted by Mr. Davis was the fact that Volk had some leftover sheet piling from the upstream cut off wall (Tr. 298-301).

Mr. Davis proposed as a cost savings to the Government that the contractor be authorized to drive the sheet piling into the ground in the footing areas involved thereby permitting Volk to compact the gravel up tight against the piling eliminating the placing of concrete in those areas. After observing that it appeared the cost of installing the piling and being able to fill the areas in question with gravel instead of concrete would be a cost saving to the Government, Mr. Davis stated: "We talked about that with Mr. Thomson. We agreed that that was the proper thing to do, it appeared to be the proper thing to do, and we placed the sheet piling" (Tr. 301-02).

According to Mr. Davis the basis for the claim is that the contractor would like to be paid for the labor and equipment costs to install the piling⁶⁸ since the contractor would have been paid for the concrete. Concerning the placement of compacted gravel in the footings, Mr. Davis noted that that had come about from having to dig out the natural soil because it was full of trash and junk or from having the timbers protruding back into the footing areas involved with the result that when they were ripped out, it tore up the material (i.e., the natural soil) so it was then deemed unsuitable or disturbed (Tr. 302-03).

The project engineer testified that he had no objection to the way AX-D had been drawn by Mr. Davis. Mr. Thomson took exception, however, to the details of the claim as given by Mr. Davis with respect to cost reimbursement. In support of this exception Mr. Thomson referred to the portion of the NTL project diary for August 25, 1980

⁶⁷ The diary entries for Aug. 26 and Sept. 29, 1980, also refer to the sheet piling work involved in the claim as being done at the contractor's option and for its convenience (GX-4 at 5, 6).

⁶⁸ Although the claim includes \$580 for what is termed "Extra Conc." (SAF Claim 4, Tah 1 at 2), Mr. Davis gave no testimony with respect to the extra concrete for which claim has been made. From the record it is not possible to say whether under section 01020, paragraph 2.0 (Measurement and Payment) of the Specifications, payment for any extra concrete would be precluded by the fact that the concrete used was in excess of the dimensions required by the plans (AF Contract File, Tah F at 1, 3).

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(quoted, *supra*), in which he had noted (i) that the contractor had requested for its own convenience that it be allowed to form the inside of the footing key in the subexcavated area by driving sheet piling instead of setting forms; (ii) that this had been approved by him as project engineer; and (iii) that no additional costs were to be charged to the owner (Tr. 304-05).

Mr. Thomson also testified (i) that the use of sheet piling was a method of forming the concrete; (ii) that Volk had an option to form the concrete in the manner best suited to the contractor; (iii) that forming costs are part of the unit price of concrete; and (iv) that it would have been possible for the gravel used in the footings to have been placed roughly in the shape of the key if the moisture content had been approximately optimum and if the gravel had been properly compacted.⁶⁹ Mr. Thomson acknowledged that the areas involved in the claim had been over-excavated at his direction because of the presence of unsuitable material for which the contractor had been paid (Tr. 304-07).

Discussion and Decision

There is no dispute in this case about the fact that the project engineer directed the excavation of unsuitable material from the footings involved in the claim and the replacement of the excavated materials with compacted gravel. Nor is there any dispute about payment for the materials excavated and the gravel placed. The parties are apart on the question of whether the gravel would stand at the required slope with Mr. Davis indicating it would not have and Mr. Thomson giving as his opinion that it would have if the moisture content in the gravel was approximately optimum and if the gravel had been properly compacted. Admittedly, no effort was made to determine whether the gravel would stand on the required slope. Instead, Mr. Davis proposed that Volk be authorized to drive sheet piling in the ground in the areas involved in the dispute with a view to permitting the contractor to compact gravel up tight against the piling thereby eliminating the need to place concrete in those areas. The parties agree that such a proposal was made but they disagree on the terms of the proposal.

The appellant's position is that the proposal represented a cost savings to the Government and that the sheet piling was placed only after the matter had been talked over with Mr. Thomson and an agreement had been reached that that was the proper thing to do. The Government's position is that the proposal had been presented as for

⁶⁹ Government witness Doyle Duncan referred to the testimony given by Mr. Davis on deposition in which he had stated that the most difficult pile driving on the project was the piling driven for the temporary diversion dam in the river. After deducting material costs, Mr. Duncan made a comparison between the amount claimed for driving sheet piling in the construction of the temporary diversion dam in the river (\$4.14 per square foot) and the amount included in Claim 4 for driving sheet piling of \$11.43 per square foot. Based on the comparison so made, Mr. Duncan concluded that appellant was making an unreasonable charge for driving the piling included in Claim 4 (Tr. 308-15).

the contractor's convenience and that the project engineer had only agreed to the proposal upon the understanding that there would be no additional charge to the Government.

[8] Thus, the question becomes whether the Board should accept the testimony of the appellant's vice president or that of the project engineer. Since the record is devoid of any corroboration for the testimony offered by Mr. Davis and since the testimony of Mr. Thomson is corroborated by contemporaneous entries in the NTL project diaries to which we have referred above, the Board accepts the testimony of the project engineer as determinative of the question presented. *See Riverside General Construction Co., IBCA-1603-7-82* (February 13, 1986), 93 I.D. 27, 42, 86-2 BCA par. 18,759 at 94,461.

In making its claim appellant has cited the Differing Site Conditions clause as authority for granting the relief requested. The appellant's reliance upon that clause is negated by appellant's proposal that sheet piling involved in the claim be installed for its convenience and without charge to the Government.

For the reasons stated and on the basis of the authority cited, Claim 4 in the amount of \$3,266.41, together with a related time extension request of 3 days, is denied.

E. Claim 6: Work in the upstream apron (IBCA-15555-2-82) - \$67,723.76

In its revised claim, appellant is requesting the sum of \$67,723.76 and a time extension of 36 days (AX-A). The claim, as revised, is comprised of (i) a claim for excavation, backfill, concrete, and forming for upstream apron in the amount of \$37,453.56 (SAF Claim 6, Tab 1 at 2) and (ii) a claim for winter heat and cover (upstream apron) in the amount of \$30,270.20 (SAF Claim 6, Tab 1 at 38).

1. Background

At about 11 a.m. on November 12, 1980, the project engineer and the project inspector reviewed the site with Mr. Davis to obtain some idea of schedule and procedure. When looking at the upstream apron area right of centerline, Mr. Davis asked how much excavation would be required. The project engineer stated that excavation only to plan grade would be required, provided the subgrade is acceptable. He also stated, however, that if unsuitable material is present, the limits of overexcavation must be determined. Noting that the presence of a layer of brush and organics in the area of a sump near the center of the apron area indicated the possible presence of unsuitable material in some areas of the upstream apron, Mr. Thomson requested Mr. Davis to have his crew excavate holes at several locations to determine the character of the foundation material. As to the condition of the subgrade required in the upstream apron area prior to the placing of the concrete slabs, Mr. Davis was told that the condition of the subgrade under the slabs should be essentially the same as the subgrade under the wall footings previously constructed under his direction (SAF Claim 6, Tab 2 at 4-5; Supp. to GX-6 at 7-8).

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During the discussion, Mr. Davis asked the project engineer if it would be all right if he spread a thin lift of pitrun gravel over the headworks apron area after excavation was completed and approved in order to minimize problems with snow and surface water until they were ready to place concrete. The engineer told Mr. Davis that a couple of inches of pitrun gravel on top would be acceptable if excavation was made to that depth below grade and the subgrade was prepared in accordance with the specifications (SAF Claim 6, Tab 2 at 2; Supp. to GX-6 at 5).

At 12:45 p.m. on the same day the inspector informed the project engineer that Mr. Davis was personally operating heavy equipment in the upstream apron area and causing massive disturbance of the subgrade. The disturbed areas were then being indiscriminately filled with pitrun gravel without approval from either the inspector or the engineer.⁷⁰ The engineer went immediately to the work area and observed Mr. Davis dumping pitrun gravel in ruts caused by equipment, in disturbed areas, and in standing water. He stopped Mr. Davis who was operating a track-mounted loader and informed him that his current procedure was not in accordance with the specifications. The engineer directed Mr. Davis to remove disturbed subgrade materials before proceeding and reminded Mr. Davis that specifications require inspection of subgrade by the engineer and subsequent approval before any gravel or concrete is placed. The engineer also told Mr. Davis that dewatering apparently would be the best way to achieve a stable base (SAF Claim 6, Tab 2 at 6; Supp. to GX-6 at 9). The response of Mr. Davis to this "intervention" by the project engineer is set forth in the NTL diary for November 12, 1980, from which the following is quoted:

Mr. Davis told engineer that dewatering is impossible and that engineer could point out all the unsuitable or disturbed areas he wished, but that he, Mr. Davis, had no intention of trying to remove disturbed and saturated material or standing water. Mr. Davis stated that it makes no difference to him if subgrade material is disturbed and that mixing of gravel, mud, and saturated material should be no business of the engineer; he doesn't care what the engineer's opinion is until he has prepared the subgrade to his own satisfaction by his own method. Mr. Davis stated he wanted no further input or interference from the engineer until he, Mr. Davis, was done with what he was doing. Mr. Davis stated "You don't have to look at it until I'm done, and then if you don't like the end result, you can direct me what to do." Engineer again reminded Mr. Davis that the work was not in accordance with the specifications and would be considered unauthorized work. [71]

⁷⁰ The NTL diary for Nov. 12, 1980, states:

"Inspector observed flat loader getting stuck in the area to a point where tires were buried almost to top . . . and then Mr. Davis filling in ruts with gravel. Also, organic matter such as branches and roots were being covered up. Large puddles of water were also being covered with gravel. Inspector stood by outside the work area and took photographs as work proceeded." (SAF Claim 6, Tab 2 at 3; Supp. to GX-6 at 6).

⁷¹ As to the extent of the unauthorized work so performed, the NTL diary notes that approximately one-half of the upstream apron area was brought up to grade with uncompacted pitrun gravel by the end of second shift (SAF Claim 6, Tab 2 at 4; Supp. to GX-6 at 7).

(SAF Claim 6, Tab 2 at 6-7; Supp. to GX-6 at 9-10).

The following day (November 13, 1980), Messrs. Cordell Ringel and Boyd Johnson (BIA engineers in the Billings area office) came to the project site by plane. After discussing with the project engineer the options available to the Government, Messrs. Ringel and Johnson made a review of the work in the upstream apron area in the company of Mr. Davis and the project engineer. Mr. Davis was told by Mr. Ringel that the work did not meet the specifications but that some means of accepting the work would not immediately be ruled out. Mr. Davis stated that he had gambled on having the work accepted. During the review of the work numerous wet and soft spots were pointed out to Mr. Davis who stated he would like to let the area sit for a few days. After consultation between the BIA engineers and the NTL project engineer, it was decided that the area in question would be allowed to sit until November 17, 1980, at which time the work would be inspected by BIA engineers and the NTL chief construction engineer and a decision would be made on acceptance, partial acceptance, or rejection of the work (Supp. to GX-6 at 14-15).

When informed of the decision reached concerning approximately the south half of the upstream apron, Mr. Davis asked about the remaining portion (approximately the left one-half) of the upstream apron area. Mr. Ringel told Mr. Davis that it should be dewatered and stabilized as the specifications indicate. In the discussion which followed, Mr. Davis asserted that dewatering would be difficult or impossible and that he felt a gravel replacement in the top 1 to 1-1/2 feet of the apron area would be preferable. The position of Mr. Davis was discussed at length along with costs and specification implications after which Mr. Ringel told Mr. Davis

that gravel for top portion would be acceptable to the Government for the left 1/2+ of the upstream apron area under the following conditions:

1. The work will be done at no additional cost to the government.
2. All excavation to be observed by NTL personnel. Subgrade material must be acceptable to the project engineer prior to placing any gravel.
3. Heavy equipment to be kept off excavated areas until gravel is laid down.
4. No mixing of subgrade soils with the gravel or contamination of gravel to be permitted.
5. Gravel to be compacted to such degree as practicable after being laid. Compaction to be by roller and to be observed by engineer. No density requirement will be made but compaction must be satisfactory to the engineer. Unstable or wet areas where adequate compaction is not obtained shall be dug out and reworked to obtain stable fill acceptable to the engineer.

Mr. Davis stated the conditions were acceptable to him and work on the rest of the upstream apron would be done tomorrow during the first shift.

(Supp. to GX-6 at 15-16).

During the first shift on November 14, 1980, the contractor excavated the left side of the upstream apron area and spread gravel in the excavated areas, with excavation being completed all the way to the left wall but gravel being spread on only about three-quarters of the area by the end of the shift. No rolling was done during the shift.

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The project engineer observed excavation and spreading of gravel in headworks apron area and inspected the subgrade periodically. The subgrade was in reasonably good condition throughout and mostly 1 to 1-1/2 feet below the concrete grade. Several times during the first shift, the project engineer reminded Mr. Davis of his agreement to compact gravel but no rolling or compaction was done. Mr. Davis stated that backfilling would be completed by the night shift and that rolling would be done by the night shift. Mr. Davis also stated that the night shift would cover the entire headworks apron area to prevent freezing but none of this was done.

The staff engineer observed the contractor's operation during the second shift and reminded the night shift foreman of what Mr. Davis had said would be done about backfill areas but the night shift did not undertake any of the items Mr. Davis had told the engineer would be done by that shift (Supp. to GX-6 at 17-19).

On November 17, 1980, Mr. Dennis Williams, NTL chief construction engineer and Messrs. Cordell Ringel and Boyd Johnson, BIA engineers, were on the site and met with NTL project personnel to review the nonspecification work which had been performed in the upstream apron area and headworks apron area. Upon inspection of the nonspecification backfill placed in the upstream apron area, Mr. Williams determined that the area did not meet the specifications or the design intent. Mr. Williams stated that either the backfill could be removed and replaced with concrete to undisturbed soils per specifications or some method of modification of the existing nonspecification work could possibly be undertaken to ensure that the design intent is met. Bearing capacity of the subsoils in the upstream apron area is secondary to hydraulic characteristics of the subgrade below the concrete, and any construction should provide hydraulic characteristics equal to or better than the design intent (Supp. to GX-6 at 21).

Mr. Davis did not arrive at the site until after 4 p.m. by which time the BIA personnel had left the site to return to Billings. The NTL chief construction engineer remained at the site to meet with Mr. Davis and NTL project personnel. Mr. Earl Haaby, Volk project superintendent, also attended the meeting. After an on-the-spot review of the upstream apron area, Mr. Williams told Mr. Davis that the work in the upstream apron area was not in accordance with his contract. Thereafter, Mr. Williams discussed options for making the work acceptable. In that discussion it was made very clear to Mr. Davis that the work must be made acceptable, and that in so doing no additional cost to the Government would accrue since the work was unacceptable in its current state due to the contractor's refusal to abide by the specifications.

Following the on-the-spot review and discussion, the meeting continued in the NTL field office. The following is quoted from the NTL diary:

The first item of business was modification of non-specification work in the headworks apron area. Mr. Davis agreed that the work was not in accordance with the specifications and agreed to undertake the following scope of work to put the upstream apron area into an acceptable condition:

1. Remove all frost and frozen material from the apron areas.
2. Complete backfill near left wall to approximate grade with gravel.
3. Use large Bros Vibratory Roller (or equivalent) and roll entire apron area to compact and drive gravel down and pump silt up into gravel. Run compactor until area is in a dilutent condition if possible. Compaction to continue until the engineer okays the area.
4. Place and compact a top lift with a minimum of thickness of 4 inches. Top lift material to be relatively impermeable, have 30 to 50 percent passing a No. 200 sieve, have a liquid limit of 30 minimum, and a plasticity index of 15 minimum.
5. Modify design of upstream cutoff key to extend to a depth of 4.5 feet below top of slab and have concrete thickness of 1 foot minimum upstream from the sheet piling.
- 6. Realize that this scope of work is a substantial change to specifications and agree to sign a change order [⁷²] providing the work will be done at no additional cost to the government. Also agree to all of these conditions as a precondition to beginning work in the area.

(Supp. to GX-6 at 21-22).

2. The Testimony

A. Testimony of Denzel C. Davis

At the hearing, the only witness to testify on behalf of appellant with respect to Claim 6 was Denzel C. Davis, vice president of Volk. After using AX-C to show the area involved in Claim 6, Mr. Davis stated (i) that one element of the claim is for the removal of unsuitable material with the other element being for putting a clay seal on the surface of the upstream apron; (ii) that the costs involved in placing the clay seal represented about 65 percent of the claim with the remainder of the claim being for the removal of the unsuitable materials; (iii) that on November 12, 1980, Mr. Thomson had approved placing the concrete upstream apron on gravel; (iv) that after Mr. Thomson and BIA had approved placing gravel on the upstream apron, Mr. Williams developed a modification for the Government to install a clay seal on top of the gravel, together with some additional work on the gravel in place prior to placement of the seal; (v) that there is not anything in the specifications requiring the use of a clay

⁷² In the letter of Dec. 1, 1980, by which Modification No. 4 was transmitted, the contracting officer refers to the agreement reached between the parties on Nov. 13 and Nov. 17, 1980 (AF Claim 6, Tab G at 1). Modification No. 4 refers to the subgrade condition beneath the *upstream apron slab* created by the contractor's activities and the fact that Section 02222 structure excavation was being modified for this subgrade only. The change order added a new paragraph 8 to section 02222 of the specifications. The new paragraph provided for the contractor (i) to compact all disturbed and/or imported soils using a vibratory compactor capable of providing a dynamic force of at least 25,000 pounds and having an adjustable frequency; (ii) to furnish and place a final, uniform 4-inch layer of compacted impervious soil with specified characteristics; (iii) to seal the sheet piling wall below the elevation of soil disturbance with the result that the design upstream of the sheet piling must be modified to provide for concrete placement to a depth of 4 feet below the slab surface and a minimum width of 1 foot; and (iv) to complete the work required to accomplish the technical specification change at no additional cost to the Government (AF Claim 6, Tab G at 3-4).

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seal; (vi) that he had not agreed to the placement of the clay seal at no cost to the Government;⁷³ and (vii) that the principal problem in placing the clay seal was the time of year in which it was being done (Tr. 321-25).

Elaborating upon his testimony with respect to the clay seal, Mr. Davis stated that by this time it was getting cold with nighttime temperatures generally well below the freezing level. Mr. Davis noted (i) that the whole area had to be put under a tent covering; (ii) that the area under the tent had to be heated; (iii) that placing the tent over the area gave Volk a limited access; (iv) that the clay seal required a change in the contractor's operations involving the use of smaller equipment and placing quite a bit by hand; (v) that both the subsurface material upon which the clay was being placed and the clay itself had to be kept from freezing; (vi) that by reason of the clay seal requirement, Volk is requesting a time extension of 20 days; and (vii) that the costs involved in Claim 6 were arrived at in the same fashion as the first claim and were supported by the same type of documentation.⁷⁴

B. Testimony of Robert Thomson

Many of the events to which the project engineer testified are reported in greater detail in the NTL diary entries for November 12, 13, 14, and 17 to which we have referred in the background statement. Preparation for starting work in the upstream and headwork apron areas was the subject of discussion between the project engineer and Volk's superintendent on November 11, 1980. Noted in this discussion was the fact that the specification requirements for preparation of the upstream apron foundation were the same as for the wall footing areas. In a conversation on the site between the project engineer and Volk's vice president on November 12, 1980, Mr. Davis asked if it would be all right if he spread a thin layer of pitrun gravel over the headworks apron area after excavation was completed and approved in order to minimize problems with snow and surface water until Volk was ready to place concrete. The project engineer told Mr. Davis that a couple of inches of pitrun gravel would be acceptable if the excavation was made to that depth and the subgrade was prepared in accordance with the specifications (Tr. 333-38).

⁷³ Upon cross-examination Mr. Davis stated that the only agreement reached was that a contract modification would be prepared and sent to the contractor (Tr. 328).

⁷⁴ Claim 6 involves many of the same type of deficiencies in claim presentation and documentation upon which we commented in Part IV, *supra*. With respect to the \$37,453.56 claimed for excavation, backfill, concrete, and forming for the upstream apron (SAF Claim 6, Tab 1 at 2), the Board notes that Volk is claiming for work performed on 30 days in November and December 1980 and in January 1981 (SAF Claim 6, Tab 1 at 5-37). In reviewing the claimed cost in the light of the project records, the NTL project engineer determined (i) that on 5 days, no work involving excavation or backfill was performed in the area claimed; (ii) that on 6 days the men and equipment claimed were working in whole or in part on items for which Volk had been paid; (iii) that for 6 days all of the claimed costs were for the removal of defective work (frozen or saturated materials); and (iv) that for another 4 days Volk was partially involved in the removal of defective work but was also engaged in other work (placement of clay seal or cleanup work) for which the costs claimed had not been segregated (GX-6 at 3-15). Lastly, the Board notes that there were 6 days when no work was performed in the south half of the upstream apron area as a result of Volk's request on Nov. 12, 1980, that the work in that area be allowed to sit for a few days.

The large equipment employed by Volk on November 12, 1980, for excavating and spreading gravel in the south half of the upstream apron area significantly disturbed the subgrade soil. Referring to eight photographs taken of that area on that date, Mr. Thomson stated that the photographs (GX-22) demonstrate that the area was not prepared in accordance with the specifications and that significant disturbance of the subgrade soils was occurring when the photographs were taken to the point that a large loader used by Volk was sunk nearly to the top of the tires. After affirming that some ruts shown in the photographs indicate the type of soil disturbance present, Mr. Thomson characterized the photographs as typifying what happened throughout the area at that time. As soon as the project engineer was informed of the manner in which the work in the south half of the upstream apron area was being performed, he promptly notified Mr. Davis it was not in accordance with the specifications (Tr. 338-45).

The next day (November 13, 1980), Messrs. Cordell Ringel and Boyd Johnson (BIA engineers in the Billing area office) came to the site. Accompanied by Mr. Davis and Mr. Thomson, Messrs. Ringel and Johnson reviewed the work area (south half of the upstream apron), after which Mr. Ringel told Mr. Davis that the work did not meet the specifications. Mr. Davis responded by stating that he understood and that he had gambled on having the work accepted. In response to a question from the hearing member, Mr. Thomson stated that in the context in which used not meeting specifications meant "the improper preparation of the sub-grade soils to receive concrete foundation" (Tr. 347). Mr. Davis requested that the area in question be allowed to sit for a few days. The decision was reached to let the area in question sit until November 17, 1980, when it would again be inspected.

In response to a question from Mr. Davis about the north one-half of the upstream apron, Mr. Ringel said that the area should be dewatered and stabilized as the specifications indicate. Following discussion, BIA agreed to a proposal submitted by Mr. Davis that gravel be placed in the top 1 to 1-1/2 feet of the apron area, subject to five conditions (read into the record by Mr. Thomson from the NTL diary for November 13, 1980, and quoted verbatim in the background statement, *supra*) (Tr. 346-50).

A meeting was also held on the site on November 17, 1980. On that date all of the work done up until that time in the upstream apron was reviewed by Mr. Dennis Williams (chief construction engineer, NTL) in the company of Messrs. Davis and Haaby (Volk) and Mr. Thomson. Following the review, Mr. Davis was told by Mr. Williams (i) that the work performed was not acceptable; (ii) that the work must be made acceptable; and (iii) that in making the work acceptable, no additional cost would accrue to the Government since the work as performed was unacceptable.⁷⁵ Mr. Thomson testified that by November 17, 1980,

⁷⁵ The conditions outlined by Mr. Williams for making the work acceptable are set out in the NTL diary entry for Nov. 17, 1980, and are quoted verbatim from the diary entry for that date in the background statement, *supra*.

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some of the previously installed work had frozen and that frozen materials would be defective work since the specifications provide that no concrete is to be placed on frozen ground. Mr. Thomson also stated that work in the upstream apron area could have been performed according to the specifications since the specifications provide that if the foundation soils are disturbed by the contractor they shall be excavated to undisturbed soils and replaced by concrete at the contractor's expense (Tr. 351-59).

Upon cross-examination, Mr. Thomson acknowledged that unsuitable material was visible in the area of a sump hole which was in the approximate center of the upstream apron area and that removal of such material would constitute an additional payout if it was a directed removal. Mr. Thomson also acknowledged that at the November 13, 1980, meeting, BIA had agreed to the placement of concrete on compacted gravel. He denied, however, that at the time of the November 17, 1980, meeting, all of the terms of the November 13, 1980, stipulation involving the north half of the upstream apron had been met since (i) one of the terms was that there would be no additional cost claim; (ii) the work in the area in question was not entirely complete; and (iii) the subgrade had not been compacted and protected with the result that it had frozen and was therefore unacceptable (Tr. 359-366).

On redirect Mr. Thomson stated that after the contractor had gone out with the loader and dumped gravel over the upstream apron area (south half), it was not possible to make an inspection of the area to determine the extent to which unsuitable material was present. He also stated that it would have been possible to excavate material in such a fashion as not to disturb the bottom of the excavation as had been done in the area of the north and south wall footings where all of the excavation had been done with a clam bucket on a crane (*i.e.*, no heavy equipment in the area being excavated) (Tr. 367). On recross, Mr. Thomson declined to express an opinion on the engineering rationale for having the same specification requirements for the wall footings (characterized as massive concrete structures) and the upstream apron (1-foot slab of concrete) on the ground that the question involved geotechnical and design engineering which matters were not within his province (Tr. 368-71).

C. Testimony of Dennis Williams

NTL's chief construction engineer (Dennis Williams) testified extensively with respect to the issues involved in Claim 6. At the time of his visit to the site on November 17, 1980, all of the upstream apron except for about one-third of the north half had a gravel cover on it which was frozen on the surface. Mr. Williams dug holes in the gravel to see how deep the gravel was and what was underneath it. He also sampled some of the gravel. Based upon his own observations at the site, Mr. Williams testified as to the conclusions he had reached

concerning the preparation of the upstream apron foundation. It was his testimony that the manner in which the foundation preparation had taken place—with the gravel continuum from the upstream to the downstream under the apron—would create a hydraulic condition different from the soils that were there when NTL did the foundation investigation (SAF Claim 3, Tab 2) and upon which the slab was to be placed in a relatively undisturbed condition. After noting that he had tested the gradations of the gravel sampled, Mr. Williams stated that the gravel would have about two orders of magnitude greater permeability than the natural soils (Tr. 371-77).

According to Mr. Williams, placing the gravel immediately below the concrete slab would be likely to affect the stability of the dam (Tr. 378-80, 388-92). If there is a gravel continuum (soil that has a high permeability) under the upstream apron, more water can enter the region beneath the Ogee section (the principal portion of the gravity dam) than can be reasonably picked up and exit under the downstream apron, so the specification says that the concrete shall be placed on relatively undisturbed material (Tr. 379-80). While acknowledging that the requirements of section 02222 of the specifications were the same for the foundation for the upstream apron as for the wing walls in terms of preparation of the subgrade, Mr. Williams stated that the rationale from a foundation engineer's standpoint is considerably different in that the rationale for undisturbed material under the footing is one of bearing capacity while the rationale for relatively undisturbed material under the upstream apron is one of perineability (Tr. 380-81, 387).

After viewing the work performed in the upstream area, Messrs. Davis and Haaby (Volk) and Messrs. Thomson, Thompson, and Williams (NTL) all went to the NTL trailer house where they discussed a method by which the upstream apron foundation could be prepared that would render it approximately equal to what was envisioned in the specifications by doing the least amount of additional work, the least amount of removal, and replacement. Agreement was reached on the construction procedure, the inaterials to be used, and the final construction of the upstream apron and foundation. The specific terms of the agreement reached as recounted in the NTL diary for November 17, 1980, are quoted in the background statement, *supra* (Tr. 381-88).

Interrogated by the hearing member with respect to any agreement reached at the meeting concerning how the contract price would be affected, Mr. Williams stated (i) that at the end of the discussion, he explained the hydraulics involved to Mr. Davis and went through the revised method of construction which would be entailed; (ii) that when Mr. Davis wanted to know if he could proceed with the procedure as outlined, Mr. Williains said that he could if Mr. Davis agreed that it would be at no cost to the Government; and (iii) that Mr. Davis assured Mr. Williams that the work involved would be at no cost to the Government. Present when the agreement was reached were

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Messrs. Davis and Haaby (Volk) and Messrs. Thomson, Thompson, and Williams (NTL) (Tr. 384-85).

In the course of his testimony, Mr. Williams stated that the Government had the right to order removal of defective work since one of the alternatives spelled out in the specifications covers the removal of defective work and replacement of all of it with concrete (Tr. 385). He also testified that proceeding on the basis of the clay seal alternative would cost less than the removal of all of the defective work and replacement with concrete. Another factor considered in proposing the clay seal alternative was that it was November 17, 1980, and adoption of the alternative would expedite construction (Tr. 386-87).

Mr. Williams acknowledged that throughout the construction of the north and south footings NTL had continually approved the placement of concrete foundation upon compacted gravel, although sometimes the wing wall footings were placed on natural soil (Tr. 388, 393-94). Noted by him in this connection was the fact that there is a difference hydraulically speaking between the way water would move underneath the wing wall footings as opposed to the way it would move through the gravel underneath the apron because there was a whole drain system directly behind the wing walls hydraulically very closely connected to the footing in the exterior portion of the dam.

Questioned about the 4-inch clay seal involved in the alternative method of construction, Mr. Williams stated (i) that the seal is directly below the concrete; (ii) that adherence to the construction procedure outlined in the alternative would result in the gravel having the same permeability as the natural soil had to start with; (iii) that the whole subgrade could not be given the same permeability as the natural soil had because the surface of the gravel cannot be sealed against the concrete and get the same hydraulic characteristic as placing it on the natural soil; and (iv) that the only purpose the clay serves is to seal off the gravel (Tr. 388-89, 392).

Asked about the approval by BIA engineers on November 13 of the placement of gravel directly under the concrete slab in approximately the north half of the upstream apron, Mr. Williams stated that the selection of placing clean gravel to produce a foundation condition equal to the specifications was in error (Tr. 395).

3. Discussion

a. Preparation of subgrade under upstream apron; use of additional concrete; placement of clay seal - \$37,453.56.

In their respective briefs both parties have referred to the provisions of section 02222 (structure excavation) of the technical specifications. The portion of the specification considered especially important to the resolution of the dispute are quoted below:

4.0 TREATMENT OF FOUNDATION MATERIALS

Where concrete is to be placed on any excavated surface, special care shall be taken not to disturb the bottom of the excavation more than necessary and final removal of the material to grade shall not be made until just before the concrete is placed * * *.

* * * * *

If, at any point in rock or foundation materials, the natural foundation material is disturbed or loosened under the structure concrete foundations, it shall be removed and replaced with concrete.

5.0 INSPECTION

After each excavation is completed, the Contractor shall notify the Engineer. No footing shall be placed until after the Engineer has approved the depth of the excavation and the character of the foundation material. [76] When required by the Engineer, the Contractor shall drill holes or drive rods in the bottom of the footings to ascertain the quality of the material.

(AF Contract File, Tab F at 22-23).

Also germane to the resolution of the dispute is Clause 10 (Inspection and Acceptance of the General Provisions of Standard Form 23-A)⁷⁷ and the portions of section 01020 (Measurement and Payment) of the technical specifications quoted below:

ITEM 12 - CONCRETE, CLASS AD. The yardage to be paid for shall be the number of cubic yards of concrete, complete in place and accepted. In computing the concrete yardage for payment, the dimensions used shall be those shown on plans or ordered in writing by the Engineer * * *. Footing concrete used in excess of the dimensions required by the plans will not be measured for payment.

(AF Contract File, Tab F at 3).

According to appellant, the crux of the contractor's claim for extra compensation is that the project engineer was not capable of distinguishing between preparation of the foundation for a relatively thin slab of concrete for the upstream apron as compared to the preparation of the foundation for 20-foot-high wing walls (citing Tr. 323, 343-44) (ARB 48). As to the testimony reported at page 323 of the transcript, the Board notes that the prerequisites for the placement of a couple of inches of pitrun gravel on top of the subgrade (see reference to November 12, 1980, diary entry in background statement, *supra*) were not met in that Mr. Davis failed to present the completed excavation to the project engineer for approval before proceeding with the placement of pitrun gravel, as Mr. Davis had agreed to do (Tr. 337). At pages 368-70 of the transcript, Mr. Thomson did refuse to express an opinion as to whether there were different engineering rationales for the foundation requirements under a 1-foot concrete slab as opposed to a 26-foot concrete wall, grounding his refusal upon the

⁷⁶ Item 9 of Section 01020 (Measurement and Payment) of the technical specifications provides in part:

"If the Contracting Officer's representative on the project determines that some of the material in the original ground does not conform to the specifications for foundation material, it shall be removed and this quantity, measured by the same average-end-area method, will be paid for under the item of channel excavation * * *." (AF Contract File, Tab F at 2).

⁷⁷ Paragraph (b) of this clause was cited by the project engineer as the contract provision governing nonspecification or defective work (Tr. 354-55). Under the cited paragraph, the contractor is required to correct without charge any workmanship found by the Government not to conform to the contract requirements, unless in the public interest the Government determines that the workmanship should be accepted at an appropriate adjustment in contract price (AF Contract File, Tab D at 3).

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fact that he could not speak for the designer as to what his intent was and upon the fact that the specifications were no different.

Elsewhere, appellant asserts that the Government's expert witness Dennis Williams testified that his employee, Robert Thomson, erred when he approved the placement of gravel in the north half of the upstream apron (citing Tr. 395) (ARB 50-51). The testimony quoted by appellant (ARB 51) involves a question about the placement of gravel directly underneath the north half of the upstream apron slab in which Mr. Thomson and the BIA engineers are joined together in the question but in which the answer given by Mr. Williams only referred to "my good client" (*i.e.*, BIA). Irrespective of the construction to be placed upon the testimony given by Mr. Williams in this matter, however, a contemporaneous entry in the NTL diary for November 13, 1980, shows that it was Mr. Davis who requested authority to place pitrun gravel in the top 1 to 1-1/2 feet of the excavation and that it was Mr. Cordell Ringel (a BIA engineer in the Billings area office) who gave Mr. Davis permission to do so as a deviation from the specification requirements, with one of the conditions imposed being that there would be no additional cost to the Government (background statement, *supra*).

Assuming *arguendo* that the project engineer did not know the reason for having the same specifications for the upstream apron as for the wing wall footings and assuming further that he was without any precise knowledge as to the design intent for the two different structures, appellant has failed to show how the absence of such knowledge would have impaired the project engineer in the performance of his inspection function which was to see that the requirements of the specifications were satisfied; nor has appellant shown that the project engineer was unreasonable in his interpretation of the requirements of Specification 02222 that "[w]here concrete is to be placed on any excavated surface, special care shall be taken not to disturb the bottom of the excavation more than necessary * * *" (text, *supra*).

[9] The claim with which we are here concerned is an outgrowth of the flouting by Mr. Davis of the specification requirements for the preparation of the subgrade for approximately the south half of the upstream apron which occurred on November 12, 1980 (*see* background statement; Tr. 337-47). While recognizing that the specification requirements for the preparation of the subgrade were the same for the upstream apron (involving a 1-foot concrete slab) as they were for the wing wall footings (involving 26-foot-high concrete walls), appellant appears to have proceeded on the assumption that it was unnecessary to adhere to the specification requirements for the preparation of the subgrade for the upstream apron. Even if this assessment by appellant had been warranted (the expert testimony given by NTL's chief construction engineer, Mr. Dennis Williams, shows that it was not), it

would not be up to appellant to determine what was required to meet the Government's needs. See *Maxwell Dynamometer Co. v. United States*, 181 Ct. Cl. 607, 628 (1967), in which the Court of Claims stated: "Regardless of the technical soundness of the Government's requirements, a contractor must comply with them and cannot substitute its own views for those of the Government" (citations omitted).

According to the NTL diary entry for November 13, 1980, Mr. Davis agreed to perform the work in approximately the north half of the upstream apron in conformance with the conditions outlined to him by BIA engineer Mr. Cordell Ringel, one of which was that the work would be performed at no additional cost to the Government. In reference to these in-the-field agreements, a natural question arises as to why Mr. Davis would agree to perform the work involved in these agreements at no additional cost to the Government (and particularly the substantial work involved in placing the clay seal and the other work specified by Mr. Williams including the placement of concrete).

The answer suggested by the record is that based upon his conversations with Mr. Ringel and later with Mr. Williams, Mr. Davis realized the serious consequences to the contractor of having to meet the requirements of the specifications with respect to preparation of the subgrade for the upstream apron especially with respect to approximately the south half of the upstream apron where the flagrant violation of the specification requirements had greatly disturbed the foundation soils (GX-22; Tr. 343). As evidenced by the provisions of the specifications quoted, *supra*, it is clear that where the bottom of an excavation upon which concrete is to be placed is disturbed more than necessary, the Government has the right to require the disturbed material to be removed and replaced with concrete and that when that occurs concrete used in excess of the dimensions required by the plans or ordered in writing by the engineer will not be measured for payment. It is against this background that the Board views the actions of Mr. Davis in agreeing to perform additional work in the upstream apron area at no additional cost to the Government in lieu of complying with the specification requirements for preparation of the subgrade in that area.

Remaining for consideration is the question of what agreements, if any, were made in the field by the parties to this proceeding with respect to matters now in dispute and the effect, if any, to be given to any such agreements.

The NTL diary entry for November 13, 1980, shows that in response to a question from Mr. Davis about work in approximately the left (north) one-half of the upstream apron, Mr. Cordell Ringel (BIA engineer) told Mr. Davis that it should be dewatered and stabilized as the specifications indicate. After asserting that dewatering would be difficult, if not impossible, Mr. Davis stated that he felt a gravel replacement in the top 1 to 1-1/2 feet of the apron would be preferable. Following a considerable amount of discussion, Mr. Ringel agreed that

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gravel for the top portion of the left half of the upstream apron would be acceptable to the Government provided that Volk agreed to five stated conditions one of which was that "1. The work will be done at no additional cost to the government." Mr. Davis is said to have agreed to the stated conditions (background statement, *supra*).

Appellant denies that it agreed to perform the work covered by the November 13, 1980, agreement at no cost to the Government and in support of its denial cites the testimony of Mr. Thomson at transcript 355 in which Mr. Thomson stated that condition one was not settled at that point (ARB 50). While Mr. Thomson did so testify, the Board notes that this testimony is contrary to the contemporaneous diary entry of November 13, 1980, and to Mr. Thomson's own testimony later upon cross-examination (Tr. 363). This question need not be resolved, however, since the Board finds that the terms of the November 13, 1980, agreement were subsumed in the agreement reached between the parties in the field on November 17, 1980.

The NTL diary entry for November 17, 1980, shows that in a meeting attended by Messrs. Denzel Davis and Earl Haaby (Volk) and Messrs. Dennis Williams, Robert Thomson, and Steve Thompson (NTL), Mr. Williams outlined to Mr. Davis the conditions for proceeding with the work in the entire upstream apron area as an alternative to complying with the specification requirements for preparation of the subgrade (*see* background statement, *supra*). In his testimony, Mr. Thomson stated that during the meeting Mr. Williams told Mr. Davis that the work in the upstream apron as it then existed was not acceptable and that any modification of the work to make it acceptable would have to be done at no additional cost to the Government (Tr. 357). Mr. Williams testified (i) that after he had outlined the revised method of construction to Mr. Davis, he (Mr. Davis) wanted to know whether he could proceed with it; (ii) that Mr. Davis was told that he could proceed with the work as outlined provided he agreed that it was to be at no cost to the Government; and (iii) that Mr. Davis agreed that it would be done at no cost to the Government (Tr. 385).

In denying that Volk agreed to perform the work covered by Modification No. 4 (issued in implementation of the agreement reached on November 17, 1980), at no additional cost to the Government, appellant relies principally upon the fact that Volk returned the modification unsigned with a lengthy letter explaining its position. In his testimony, Mr. Davis stated that he believed the only agreement reached was that a modification would be written and forwarded to the contractor (Tr. 328).

The testimony of Mr. Davis as to the nature of the agreement reached by the parties at the November 17, 1980, meeting is contradicted by the unequivocal testimony of Mr. Dennis Williams and Mr. Robert Thomson whose testimony is corroborated by a

contemporaneous entry in the NTL diary for November 17, 1980 (background statement, *supra*). In these circumstances, the Board finds that the agreement reached between the parties on November 17, 1980, is that set forth in the NTL diary entry for that date (background statement, *supra*) as was testified to by Messrs. Thomson and Williams and that the testimony of Mr. Davis to the contrary is not credible.

Based upon the testimony offered at the hearing, contemporaneous entries in the NTL project diary and other evidence of record, the Board finds (i) that in proceeding with the work in approximately the south half of the upstream apron on November 12, 1980, Volk made no effort to comply with the requirements of specification 02222 for the preparation of the subgrade but instead greatly disturbed the natural soils by the use of heavy equipment and by the indiscriminate mixing of saturated materials, mud, water, organic materials, and pitrun gravel; (ii) that on November 13, 1980, Volk was given permission to place pitrun gravel in the top 1 to 1-1/2 feet of approximately the north half of the upstream apron, provided the subgrade was prepared, as outlined by a BIA engineer in the Billings area office including the compaction of the pitrun gravel; and (iii) that during the first shift on November 14, 1980, Volk prepared the subgrade in approximately two-thirds of the north half of the upstream apron but during the night shift failed to prepare the remainder of the subgrade in that area, failed to roll or compact the pitrun gravel placed, and failed to take measures to protect the work with the result that an inspection on November 17, 1980, disclosed that the entire area was frozen on the surface.

The Board also finds (i) that on November 17, 1980—as an alternative to complying with the specific terms of specification 02222 for the preparation of the subgrade in the entire upstream apron area—Volk agreed to perform the work outlined by Mr. Dennis Williams (NTL chief construction engineer) at no cost to the Government; (ii) that two of the stipulations to which Volk agreed as a condition for proceeding with the alternative work was its agreement to sign a change order “providing the work will be done at no additional cost to the government” and its agreement to “all of these conditions as a precondition to beginning work in the area”; (iii) that commencing on November 18, 1980, and continuing thereafter Volk proceeded with the work in the upstream apron under the alternative method of construction outlined by Mr. Williams (SAF Claim 6, Tab 1 at 9-37); (iv) that on December 1, 1980, the contract was modified to reflect the agreement reached in the field on November 17, 1980 (AF Claim 6, Tab G at 1-4); and (v) that the agreement in the field reached on November 17, 1980, and ratified by the contracting officer on December 1, 1980, is binding on the parties. *Riverside General Construction Co.*, IBCA-1603-7-82 (February 13, 1986), 93 I.D. 27, 61, 86-2 BCA par. 18,759 at 94,473.

b. *Winter heat and cover (upstream apron)* - \$30,270.20.

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In the briefs of the parties there is virtually no separate discussion of the merits of the claim for winter heat and cover in the upstream apron. Appellant's position is that if the clay seal was properly required, it was solely as a remedy for the error of Mr. Williams' associate, Mr. Thomson, and the error (if it was an error) by the BIA's own engineers. This view of the matter embarrasses not only the cost and time required for placing the clay seal and related work but also the cost and time involved in tenting and heating the entire area while placing the clay seal (AOB 63, 65).

As the Government views the matter, however, the clay seal and other work offered as an alternative in Contract Specification No. 4 was a remedy for the contractor's error and refusal to comply with the original specifications. In support of its position the Government notes that the contractor's vice president agreed to perform the work as specified in Contract Modification No. 4 when it was proposed in the field (Tr. 382, 384-85) and the contractor then proceeded with the work as outlined by Mr. Williams with an oral agreement that there would be no additional cost to the Government (GPHB 90).

Appellant requests additional compensation for having to tent the whole upstream apron area with a tent covering and having to heat the area after it had been covered (Tr. 325). In support of its claim, appellant states:

The essence of the claim is therefore that the placement of the gravel upon the entire apron surface was a proper remedy in Mr. Thomson's opinion for the "unnecessary disturbance" and "unsuitable material" concerns of the BIA and NTL, and then four days later the gravel layer became unacceptable according to Mr. Williams. After the involvement of Mr. Williams, an expensive clay seal was required to be placed over the gravel.

(AOB 63).

The record clearly shows, however, that when on November 12, 1980, Mr. Thomson approved the placement of a couple of inches of pitrun gravel on the surface of the subgrade in approximately the south half of the upstream apron, the approval was based upon the representations of Mr. Davis that the pitrun gravel would only be placed *after* the completed excavation had been approved by the project engineer. The action of Mr. Davis in seeking approval for the placement of gravel on the basis of his representations appears to have been only a ruse for the purpose of obtaining such approval, however, for less than 2 hours later he proceeded to excavate and place pitrun gravel in the area in question without regard to the stated condition for the approval given, while proclaiming his indifference to disturbed subgrade material or the mixing of gravel, mud, and saturated material (background statement, *supra*). The Board therefore finds that the action of the project engineer in approving the placement of a couple of inches of pitrun gravel in approximately the south half of the upstream apron had no effect upon either the manner in which

Mr. Davis proceeded with excavation and placement of pitrun gravel in that area or the time required for performance of the contract work.

Also for consideration is the effect upon contract performance of Mr. Cordell Ringel (BIA engineer) having approved the request of Mr. Davis for placement of compacted gravel in the top 1 to 1-1/2 feet of the subgrade in approximately the north half of the upstream apron. The record shows that only during the first shift on November 14, 1980, did Volk proceed with work in this area on the basis of the approval given by Mr. Ringel before the meeting on November 17, 1980, in which Mr. Williams proposed to Mr. Davis an alternative approach to making the work in the entire upstream apron equal to the standard set forth in Specification 02222 insofar as design intent is concerned. Since the alternative proposed by Mr. Williams and accepted by Mr. Davis contemplated using gravel already in place, the Board finds that the action of Mr. Ringel in approving the placement of compacted gravel on the surface of the subgrade in approximately the north half of the upstream apron neither increased the cost of performing the work under the alternative proposed by Mr. Williams nor increased the time required for the performance of such work.

As has been previously noted Claim 6 is an outgrowth of the flouting by Mr. Davis of the specification requirements for the preparation of the subgrade for approximately the south half of the upstream apron which occurred on November 12, 1980 (background statement, *supra*). It was the flouting of the specification requirements in this area which apparently accounted for Volk agreeing to placing the clay seal and performing other work outlined by Mr. Williams at no cost to the Government, rather than opting to correct the work by complying with the specific terms of the specifications. This would have entailed excavating the subgrade to relatively undisturbed material and replacing with concrete at the contractor's expense below the grade established by the plans (text, *supra*).

4. Decision

a. *Excavation, backfill, concrete, and forming for upstream apron - \$37,453.56*

This portion of the claim is for replacement of some unsuitable material and for placement of a clay seal upon the surface of the upstream apron, together with other specified work related to the placement of the clay seal. The placement of the clay seal is said to constitute about 65 percent of this aspect of the claim with replacement of unsuitable materials constituting the remainder (Tr. 321-23).

The Board notes the absence from the record of any evidence indicating that purportedly unsuitable material in the upstream apron area was presented to the project engineer for inspection prior to removal or that the area involving the allegedly unsuitable material was measured for payment as contemplated by the specifications (note 76, *supra*).

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As to the placement of the clay seal and related work, the record shows that Volk proceeded with the preparation of the subgrade in approximately the south half of the upstream apron without any regard to the requirements of Specification 02222 (text, *supra*) apparently on the ground that the specifications required more than the Government needed. When confronted with a demand that the specification requirement be met or that without cost to the Government an alternative method of construction as outlined be followed to meet the design intent of the specifications, the contractor chose the latter course but now seeks to recover the costs involved in placing the clay seal and other work required by the alternative method of construction.

It has long been held that the Government (as any other purchaser) has the right to insist upon strict compliance with the terms of the specifications. *Maxwell Dynamometer Co. v. United States, supra*. In this case the specifications have not been shown to be ambiguous and impossibility of performance has not been even alleged. While appellant has denied that it agreed to perform the work involved in placement of the clay seal and related work at no cost to the Government, the Board has found otherwise. *Riverside General Construction Co., supra*.

For the reasons stated and on the basis of the authorities cited, this aspect of Claim 6 in the amount of \$37,453.56 and a related time extension claim are both denied.

b. *Claim for winter heat and cover in upstream apron - \$30,270.20*

Appellant seeks a substantial sum for winter heat and cover provided in the upstream apron area but it has failed to establish a nexus between the actions of the Government of which it complains and the costs and the extension of time claimed. In the absence of such a nexus, there is no basis for recovery. *Electronic & Missile Facilities, Inc. v. United States*, and other cases cited in Part II E, *supra*.

For the reasons stated and on the basis of the authorities cited, the claim for winter heat and cover in the upstream apron area in the amount of \$30,270.20 and a related time extension claim are denied.

[10] F. *Claim 7: Winter Heat and Cover (IBCA-1478-6-81) - \$36,266.59*

In its revised claim appellant requests additional compensation in the amount of \$36,266.59 and a time extension of 20 days (AX-A).⁷⁸ At the hearing, Mr. Davis stated that the period covered by the claim is from October through December 31, 1980 (Tr. 413). The revised claim, however, shows the period of the claim to be from October 14, 1980, through February 19, 1981 (SAF Claim 7, Tab 1 at 2-10).

⁷⁸ Claim 7 is subject to many of the same type of deficiencies in claim presentation and documentation as were commented upon in Part IV, *supra*. In GX-7 it is noted that the costs summarized therein do not address the merits of the claim. Based upon his review of the project records and using rates reflected in Volk's backup data, however, the project engineer concluded that verifiable costs were in the amount of \$19,822.86 (GX-7 at 2).

Discussion

The instant claim is for the cost of tenting and heating concrete pour areas during cold weather. The principal contention advanced by appellant is that the claim resulted from the cumulative effect of previous delays attributable to the Government, which pushed the actual construction work into the cold weather months (AOB 67). Rebar design and quantity estimates by the Government are also said to have contributed to the delays experienced (AOB 68).

Appellant's vice president Mr. Davis testified (i) that appellant's bid included \$21,600 for winter heat and cover (Dep. of D. Davis at 122); (ii) that if Volk had not been delayed on the Ogee section, on diverting the river and in connection with dewatering over and above the specification requirements, nearly all of the concrete work would have been performed in August, September, and early October 1980 (Tr. 416-17); and (iii) that the contractor's original construction schedule (GX-15) shows that Volk contemplated placing 95 percent of Class AD concrete by December 15, 1980, with 35 percent of the total AD concrete being placed between October 1 and December 15, 1980 (Tr. 420-23).

The parties are apart on a number of issues, one of which is the significance to be attached to the contractor's original construction schedule (GX-15) submitted at about the time of the award of contract (Tr. 420-23) and the contractor's revised construction schedule (GX-16) dated June 26, 1980 (Tr. 436-39), both of which show that Volk contemplated placing 95 percent of Class AD concrete by December 15, 1980. Concerning these schedules, the Government states: "The fact that the revised construction schedule was submitted after all work under Claim 1 was completed ["] demonstrated that there was no delay under Claim 1 which resulted in the contractor having to provide additional winter heat and cover" (GPHB 91). In denying the significance of the June 26, 1980, construction schedule, appellant states (i) that the schedule is nothing more than an estimate of what was anticipated at that time; (ii) that by the time the effect of these delays was known, the June 26 schedule was known to be no longer accurate by all parties; and (iii) that Volk's letter of December 19, 1980 (SAF Claim 7, Tab 3 at 16)⁸⁰ clearly informed the Government that the June 26 schedule was no longer valid due to delays caused by the Government (ARB 55).

⁷⁹ As is clear from Mr. Thomson's testimony everthing except phase 3 of the delay claimed with respect to the diversion (*i.e.*, in claim 1) had been taken care of by June 26, 1980 (Tr. 439). Phase 3 of Claim 1 (*text, supra*) involves work performed on 1 day (Aug. 16, 1980), for which a claim of \$7,664.20 was submitted (SAF Claim 1, Tab 3 at 1-2; GX-1 at 19-20).

⁸⁰ In the Dec. 19, 1980, letter, Mr. Volk states: "The inability of the BIA to divert the river at the beginning of the project caused the first major delay. It then became obvious that the first schedule became unrepresentative because of this unplanned event."

Apparently it was not obvious to Volk's vice president, however, for more than a month after the completion of phases 1 and 2 of the diversion work (claimed costs of \$148,728.16 of the \$156,392.36 of costs included in Claim 1), Mr. Davis submitted a revised construction schedule showing no delay in the placement of concrete from the time shown in the original construction schedule submitted at about the time of the award of contract (*text, supra*).

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The Board finds (i) that the work involved in phase 1 (\$53,019.32) and in phase 2 (\$95,708.84) of Claim 1 had been completed by May 23, 1980; (ii) that more than a month later, the contractor's revised schedule of June 26, 1980, was submitted; and (iii) that the assessment of the status of contract performance reflected in the revised construction schedule of June 26, 1980, was made at a time when no dispute existed between the parties and as such is entitled to greater weight as evidence than a self-serving letter written by Mr. Volk after a number of disputes between the parties had arisen.

The record shows that on at least two occasions subsequent to the submission of an updated construction schedule on June 26, 1980, Mr. Davis gave his assessment of job progress. On October 1, 1980, Mr. Davis stated that Volk was 3 weeks behind schedule (Supp. to GX-3 at 3). Approximately a month later, Mr. Davis was reported to be of the opinion that the project could be completed on schedule, weather permitting (SAF Claim 7, Tab 2 at 3).

While appellant has charged that it was seriously delayed by the actions taken or not taken by the Government, it has not made any serious effort to show a clear apportionment of the delay and expense attributable to each party. *Klingensmith v. United States* (Part II E, *supra*). As we have previously found, the contractor was clearly responsible for the time and expense involved in modifying and repairing the return channel from the irrigation canal to the river (text accompanying note 51 *supra*). Delays for which it appears to have been responsible and for which no adequate explanation has been furnished include the delays associated with obtaining, installing, and properly utilizing a dewatering system.

At the preconstruction conference on April 8, 1980, Volk discussed dewatering systems and referred to tentative plans for dewatering including the possible use of a well-point system. Although at that time the contractor was requested to submit a plan for dewatering (AF Claim 1, Tab G at 3), there is no evidence that it ever did so. Nor is there any evidence that Volk made any effort to obtain a dewatering system until after Mr. Hummel's letter of June 20, 1980, referring to a functional dewatering system was received (AF Claim 3, Tabs Q and R).

According to Mr. Davis, the contractor had intended to dewater using surface pumps (Tr. 244). No plan for dewatering reflecting this approach, however, was submitted to NTL and BlA for approval. This is not surprising since upon cross-examination, Mr. Davis admitted that not all surface water could be removed by bailing and pumping after which he stated that by using the well-point system, you could not only remove the surface water but you could also draw the water table down (Tr. 252).

Volk did not begin installation of the Stang well-point systems until July 7, 1980 (90 days after the preconstruction conference). Ten days

later an expert dewatering consultant retained by Volk found (i) that dewatering up until that time had not been properly done and was not effective; (ii) that the equipment was not in good shape; and (iii) that the pump was not operating properly (GX-3 at 3, 8).

Although Volk's foreman, Mr. Venetz, testified that the Stang well-point system had worked "real good" after some initial problems were overcome (Tr. 259-62) and although claim has been made for use of the well-point systems for a 5-month period (SAF Claim 3, Tab 1 at 2), all of the Stang well-point systems had been dismantled by November 11, 1980 (GX-3 at 3, 32), and were not used on the project thereafter.

The following day, Volk began excavation of the upstream apron area (SAF Claim 6, Tab 2). In discussions with Mr. Davis on November 12, 1980, the project engineer stated that dewatering would apparently be the best way to achieve a stable base. In response, Mr. Davis told the project engineer that dewatering was impossible (SAF Claim 6, Tab 2 at 6). In the course of a visit to the project site on the following day in which preparation of the subgrade for approximately the left (north) one-half of the upstream apron was discussed, Mr. Ringel (Engineering, Billings Area Office) told Mr. Davis that the area should be dewatered and stabilized as the specifications indicate. Mr. Davis responded by stating that dewatering would be difficult or impossible (Supp. to GX-6 at 15). In neither area of the upstream apron was dewatering accomplished.

Appellant offered no evidence to support the stance taken by Mr. Davis in November 1980 that it would be difficult if not impossible to dewater the upstream apron. At that time both of the Stang well-point systems were available for use and in claim 3 appellant charges the Government for the use of both systems during November 1980. The fact that with the well-point system all of the surface water could be removed and the water table could be drawn down militates against accepting the position advanced by Mr. Davis to Messrs. Thomson and Ringel in November 1980 that dewatering of the upstream apron would be difficult if not impossible.

According to appellant, an August 13, 1980, inspection of the footing area by NTL and BIA personnel prior to the placing of footing concrete resulted in a broad interpretation of the specifications by BIA and NTL with regard to dewatering and structural soil conditions which would have to be met by the contractor before it was acceptable to place concrete (SAF Claim 7, Tab 3 at 21). Assuming *arguendo*, that the interpretation placed upon the specifications in question by BIA and NTL were broader than warranted by the terms of the specifications, it is clear that the mid-August interpretation could have had nothing to do with (i) Volk's failure to submit a dewatering plan as requested at the April 8, 1980, preconstruction conference; (ii) Volk's failure to place an order for the Stang well-point systems or any well-point system until after receipt of the project manager's letter of June 20, 1980 (AF Claim 3, Tabs Q and R); and (iii) the problems encountered

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in the installation of the Stang well-point system on July 7, 1980, and for some time thereafter (GX-3 at 3, 8).

Lastly, the broad interpretation of the specification requirements attributed to NTL and BIA in August 1980 does not explain Volk's failure to use the Stang well-point system to dewater the upstream apron area. In this regard the Board notes that Volk had successfully used the Stang well-point systems to dewater the wall footings by drawing the water table down in the subgrade area below the bottom of the footing grade, thereby providing a subgrade that was drained and stable (AF Claim 6, Tab I at 3).

It has long been recognized that a contractor will be denied recovery where the delays are concurrent and the contractor has not shown that the delays attributed to the Government are apart from the delays for which the contractor is responsible. *Klingensmith v. United States* and other cases cited in Part II E, *supra*. That is the case here.

Decision

For the reasons stated and on the basis of the authorities cited, Claim 7 in the amount of \$36,266.59 and a related claim for a 20-day time extension are both denied.

G. *Claim 8: Remove and replace unsuitable material in Ogee (IBCA-1554-2-82 B) - \$27,697.66*

Appellant's revised claim in the amount of \$27,697.66⁸¹ (AX-A) is for removing unsuitable material under sections 1, 2, 3, and 5 of the Ogee⁸² and replacing the material so removed with compacted pitrun gravel (AF Claim 8, Tab U at 1-2).

Background

The claim is for the removal of unsuitable material and replacement with compacted pitrun gravel. The unsuitable material was pitrun gravel properly placed, compacted, and accepted after the removal of the Ogee cribbing but later determined to be unsuitable because it had frozen and under the specifications concrete could not be placed on frozen ground (Tr. 460-62, 471-72). Because the material had frozen, NTL directed Volk to thaw out the area or otherwise make it suitable for the placement of concrete. Volk elected to use a hot-water-heat method of thawing and in the process ended up with quite a bit of standing water on the surface of the gravel, as well as saturating it

⁸¹ The claim as presented to the contracting officer for decision in the claim letter of July 23, 1981, and as stated in the complaint (AF Claim 8, Tab U at 1-3) was in the amount of \$13,489. No explanation has been offered for doubling the amount claimed to \$27,697.66 (AX-A). In the absence of an explanation, the great increase in the amount claimed would appear to be indicative of deficiencies in the contractor's records. See *Central Colorado Contractors, Inc.*, IBCA-1203-8-78 (Mar. 25, 1983), 90 I.D. 109, 145, 83-1 BCA par. 16,405 at 81,573.

⁸² Mr. Davis testified that Claim 8 is for work done on the Ogee, sections 4, 5, and 6 (Tr. 444). Elsewhere, Mr. Davis stated that at the time of the Nov. 4, 1980, meeting (identified at one point as a Nov. 14 meeting), the upstream apron was in place (Tr. 445-49). In fact, excavation and backfill in the upstream apron did not begin until Nov. 12, 1980, and was not completed until Jan. 5, 1981 (SAF Claim 6, Tab 1 at 5-37).

and making it very mushy. The determination that the material was unsuitable was due both to the fact that it had been frozen and then when thawed became saturated (Tr. 471-74).

When the parties met at the Fort Belknap Indian agency on November 4, 1980, Mr. Gale Loomis (BIA) who presided at the meeting stated (i) that the meeting had been called to discuss the job and job progress; (ii) that BIA did not want to get into any conversation about disputes, claims, or time extensions at that time; (iii) that BIA was concerned that the dam would not be completed by the time of the late winter or early spring runoff and ice jams which could happen from late February on; (iv) that the good construction weather was past; and (v) that the contractor would not be allowed to pour on frozen ground. In response to a question from Mr. Loomis as to whether the job could be completed by high water, Mr. Davis stated that the job could be reasonably completed if the winter is reasonably mild. It was agreed that to facilitate the paving of the concrete apron, Volk would be allowed to thicken the slabs where they abut the Ogee Key. Volk was also to be allowed to place a section of concrete over the Ogee Key with a view to facilitating the placement of the concrete Ogee section (SAF Claim 8, Tab 2 at 5, 8).

According to the minutes of the November 4, 1980, meeting (prepared by Mr. David Hummel (NTL) and forwarded to Volk by the contracting officer), BIA (i) expressed concern over winter weather which was expected within a few days;⁸³ (ii) stated that apron areas must be protected from freezing; and (iii) noted that no concrete is to be placed on frozen ground. Mr. Loomis spelled out the hazards of a partially completed dam under high water noting that if the dam is caught at a critical time with Key areas incomplete, the entire structure could be lost to flood. The minutes also record that the contractor is expected to take proper measures to avoid this exposure (SAF Claim 8, Tab 3 at 3).

Upon cross-examination Mr. Hummel was requested to read the portion of the minutes to which we have referred above, after which he was asked if the gist of those minutes is not that the Government wanted concrete placed over the Ogee area and that they wanted it placed prior to the time any potential spring thaw or flood might arrive. Mr. Hummel responded by stating: "The way I see the gist is we were attempting to warn the contractor of the risks to the partially-completed structure" (Tr. 476-77). A short time later Mr. Hummel was questioned about the contractor not having to remove unsuitable material if it had been in a position to avoid pouring the concrete in the extreme cold conditions with the ground frozen. In his response, Mr. Hummel stated that if the contractor had placed some concrete in those areas at an earlier time the problem of the frozen ground would not have occurred (Tr. 479-80).

⁸³ The minutes also state: "Mr. Loomis expressed the concern of the BIA that the dam would not be completed in advance of Spring 1981 high water. In many years high water and ice jams can occur during a January chinook wind period. High water is also common in March during low land runoffs" (SAF Claim 8, Tab 3 at 2).

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In a letter dated November 25, 1980, the contractor objected to a number of items in the minutes of the November 4, 1980, meeting which had been transmitted to Volk by the contracting officer. Enclosed with the letter were minutes of the same meeting which had been prepared by Mr. Volk (SAF Claim 8, Tab 2 at 2-9). In a separate letter carrying the same date, Mr. Volk stated that after analyzing the conversation at the November 4 meeting, the contractor was in a state of confusion because although the contract calls for completion of the project by April 4, 1981, it had been advised that BIA wanted the dam basically completed by January 1, 1981. The reasons given for this at the meeting were said to be "a. fear of January chinooks with or without ice jams, abnormally high run off and loss of the dam." After noting that Volk was always willing to do what BIA directs the contractor to do and after requesting express written directions as to the actions BIA wished Volk to take with regard to the concerns expressed at the November 4, 1980, meeting, the letter states: "Of course, you will be charged appropriately for the costs incurred [sic] by this Contractor substantially completing the dam by this time" (SAF Claim 8, Tab 2 at 10-11). In her response to Volk's request for express written directions, the contracting officer stated that it was expected that the contractor would proceed with the completion of the project in a fashion that meets the contract requirements in accordance with the terms and specifications (SAF Claim 8, Tab 3 at 5).

Discussion and Decision

It is undisputed that Claim 8 is before us only because costs were incurred in performing the work involved under winter weather conditions (Tr. 456-57, 479-80). Also undisputed is the fact that under the specifications it was not permissible to place concrete on frozen ground (Tr. 462); nor is there any dispute about the fact that at the time of the November 4, 1980, meeting, there was cause for real concern over potential damage to the partially completed structure from winter ice jams or spring floods (Tr. 450; 477-78). The question then is not whether there was a sound reason for having the work performed in the winter weather but is rather who should bear the expense of having the work done at that time. In answering that question the Board will have occasion to consider clause 12 (Permits and Responsibilities) of the general provisions from which the following is quoted: "The Contractor shall * * * also be responsible for all * * * work performed until completion and acceptance of the entire construction work * * *" (AF Contract File, Tab D at 3).

That the contractor shared the concern of the Government over potential damage to the structure is evidenced by Mr. Volk's question about whether there was anything they could do, design wise, to facilitate the paving of the concrete aprons and his question about whether the slabs could be thickened where they abut the Ogee Key

(SAF Claim 8, Tab 2 at 8). Since under the specifications concrete could not be placed on frozen ground, it is clear that the concrete work Volk sought permission to do could not be done unless the frozen compacted gravel was thawed and replaced. In this regard, the Board notes the absence from the record of any specific objection to the removal of the unsuitable material or its replacement with compacted gravel until at the time the claim was filed (*see* SAF Claim 8, Tab 2 at 2-15; SAF Claim 8, Tab 3 at 1-4; Tr. 475-76). The Board also notes that while the January chinook winds and winter or spring flooding never materialized, it appears to be clear that if damage to the dam attributable to such conditions had occurred, Volk would almost certainly have been confronted with a demand by the Government under the Permits and Responsibilities clause for the contractor to repair the damage or replace the structure at its own expense.

Before undertaking to assess responsibility for delays experienced in performing the contract work, we must first determine whether any action BIA took at the November 4 meeting or thereafter could properly be construed as an order to basically complete the dam by January 1, 1981, as is indicated to be the case in Volk's serial letter No. 25 of November 25, 1980 (SAF Claim 8, Tab 2 at 10). At the outset we note that the letter itself is vague as to the source of the January 1, 1981, completion date, stating: "[A]s partially set forth in the above noted meeting, we have been advised that you want the dam basically complete by Jan. 1, 1981" (SAF Claim 8, Tab 2 at 10). Neither Volk's minutes of the November 4, 1980, meeting (SAF Claim 8, Tab 2 at 5-9) nor the minutes of that meeting prepared by Mr. Hummel (SAF Claim 8, Tab 3 at 2-4) contain any reference to a January 1, 1981, completion date. The testimony of Mr. Davis is devoid of any reference to a January 1, 1981, completion date. The record shows that the work involved in Claim 8 did not commence until January 12, 1981, and was not completed until February 17, 1981 (SAF Claim 8, Tab 1 at 2-21). The Board finds that neither the BIA nor NTL issued any order or made any request to Volk to basically complete the dam by January 1, 1981.

It is undisputed that NTL made no measurements of the amount of unsuitable material removed and compacted gravel placed in the area covered by Claim 8. According to Mr. Hummel, the failure to measure the volume of material removed was because NTL had no indication that there would be any request for compensation and because NTL considered the work involved to be a redo of work the contractor had done which became unacceptable as a result of being allowed to freeze and consequently not being in accordance with the specifications (Tr. 472).

As previously noted it is appellant's burden to establish the fundamental facts of liability, causation, and resultant injury. *Electronic & Missile Facilities, Inc. v. United States*, and other cases cited in Part II E, *supra*. The Board finds that appellant has failed to show by a preponderance of the evidence that actions of the

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Government were the primary cause of Volk having to remove unsuitable materials and replace the same with compacted gravel in sections 1, 2, 3, and 5 of the Ogee during winter weather. *Klingensmith v. United States*, 731 F.2d 805, 809 (1984), and other cases cited in Part II E, *supra*.

Based upon the record made in these proceedings, the Board finds (i) that under the Permits and Responsibilities clause, the contractor is responsible for all work performed until completion and acceptance; (ii) that on November 4, 1980, BIA voiced its concerns to the contractor about potential damage to the partially completed structure (including a possible washout of the dam) from ice jams or flooding during the winter or early spring; (iii) that the contractor shared these concerns, as is evidenced by its requests relative to the placement of concrete; (iv) that under the specifications it was not permissible to place concrete on frozen ground; and (v) that once the decision was reached to proceed with the placement of concrete, the action of the NTL inspector in directing the removal of unsuitable material and its replacement with compacted gravel was simply a matter of requiring the contractor to adhere to the specifications and consequently could not be a basis for a finding of a constructive change.

For the reasons stated and on the basis of the authorities cited, Claim 8 in the amount of \$27,697.66 is denied.

H. *Claim 9: Cut and reweld headwork gates (IBCA-1554-2-82(A)) - \$1,156.16*

The appellant's revised claim in the amount of \$1,156.16 (AX-A) is for the cost of labor, equipment, and material required to cut and reweld the slide frames for the four headgates used to control the amount of water that would be let out of the structure into the irrigation canal (AF Claim 9, Tab D; SAF Claim 9, Tab 1 at 1; Tr. 482-83).

Background

In denying the claim from which the instant appeal was taken, the contracting officer found (i) that the technical specifications (section 15125, par. 2.0) required that the slide gates and equipment shall be of ARMCO Fabricated Steel Slide Gates Model 10-00 or their equivalent; (ii) that Volk elected to order Waterman Model QR-10SB slide gates in lieu of the ARMCO gates specified; and (iii) that the Waterman model slide gate frame had an additional outside angle protruding which made installation into the standard opening impossible (AF Claim 9, Tab E at 3). The Government has made no effort to sustain the position taken by the contracting officer, stating: "The contractor installed four gates, which were approved as a substitution for the gates called for in the specifications" (GPHB 103).

According to appellant, "[T]he specifications were defective in that it was not possible to install the gates after the concrete had been poured

(as directed by the plans) since the access to the opening was tapered and of smaller dimension than the gates (Tr., pp. 483-84)" (ARB 64). After taking note of the Government's position that the specifications were not defective because the gates could have been placed before the concrete was poured (Tr. 496), appellant states: "[T]he government's new position was unsupportable since the government's specifications showed that the gates were to be bolted into place and grouted after the concrete was poured, which Mr. Hummel was unable to explain or rebut (Tr., p. 496)" (ARB 63). In the cited testimony, the following exchange took place between appellant's counsel and Mr. Hummel:

Q. I have been asked to ask you whether the plans did not indicate that this frame would be bolted in place and grouted?

A. That's right.

Q. And if that's the case that means it was not intended to be placed, to have the concrete poured around it, because you then wouldn't be bolting and grouting, would you?

A. No. I have to clarify that. You could have set the gate in place in the frame and done the belting and grouting as a separate operation after the basic concrete was placed and done that alignment at a later date.

(Tr. 496).

Discussion and Decision

[11] As is clear from the evidence offered in the case, all concerned contemplated that the frames for the gates were to be bolted in place and grouted after the concrete was placed. Mr. Hummel testified, however, (i) that the frame as well as the gate could have been set in place at the time the forms for the concrete were set in place; (ii) that the concrete could have been placed subsequent to setting the gate and no cutting or rewelding would have been required; (iii) that the contractor chose to put the gates in later instead of earlier and this is what required the cutting and rewelding; and (iv) that the cutting and rewelding was a contractor construction method (Tr. 495-96).

The appellant has not cited any provision from the specifications prohibiting the contractor from setting the frames and the gates in place before the concrete was poured (or establishing a sequence in which these operations were to occur). No testimony was adduced from Mr. Davis as to any such specification provision. From the testimony of Mr. Hummel quoted or cited above, it is clear that he considered that there was no such bar.

With this the state of the evidence, the Board finds (i) that the specifications were not defective; (ii) that the decision of Volk to place the gate together with the frames after the concrete was poured represented a choice by the contractor of a construction method; (iii) that this was a choice the contractor was empowered to make but for which it is not entitled to additional compensation. *A&J Construction Co.*, IBCA-1142-2-77 (Dec. 28, 1978), 85 I.D. 468, 498-500, 79-1 BCA par. 13,621 at 66,798.

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For the reasons stated and on the basis of the authority cited, Claim 9 in the amount of \$1,156.16 is denied.

I. *Claims 5 and 10 (pitrun gravel), IBCA-1553-2-82(B) and IBCA-1554-2-82(D) - \$30,805.36*

In its revised claim, appellant seeks additional compensation in the amount of \$30,805.36 for the removal of unsuitable material and its replacement with compacted pitrun gravel in areas not considered to be covered by other claims (SAF Claim 10, Tab 1 at 1; Tr. 499-501). For the consolidated claim, appellant is also seeking a time extension of 20 working days (AX-A; AF Claim 5, Tab K at 1-2).

Background

The claim is for unsuitable material removed and replaced with compacted backfill in various areas of the project during the period from August 20, 1980, to April 27, 1981 (SAF Claim 10, Tab 6 at 1-34), for which appellant is requesting reimbursement at the contract unit prices for Item 7 (Channel Excavation) and Item 9 (Compacted Backfill) (AF Contract File, Section C at 1). Summarized below is the claim as presented to the Board for decision:

1255.44 c.y. of channel excavation (Item 7) @ \$9.85/c.y.	\$12,366.08
1569.30 c.y. of compacted backfill (Item 9) @ 11.75/c.y.	<u>18,439.28</u>
	\$30,805.36

The difference of 313.86 cubic yards between the amount claimed for excavation and the amount claimed for backfill reflects the addition by appellant of a 25-percent shrinkage factor for backfill (SAF Claim 10, Tab 1 at 1).

At the time the invitation for bids was issued, the Government estimated that 1,300 cubic yards of Item 9 (compacted backfill) would be required for completion of the project (AF Contract File, Section C at 1; Tr. 501). Partial termination of the contract for the convenience of the Government was effected by a supplemental agreement entered into under date of June 8, 1981. Under the terms of the supplemental agreement work described therein and in exhibit A as work to be continued was specifically assigned to the contractor or to the Government for completion as shown therein (AF Contract File, Tab Mc at 1-13). Pay Estimate 15 (the last pay estimate) refers to the terminated contract and shows Volk to have placed 1,286 cubic yards of Item 9 (compacted backfill). The same pay estimate shows that 712 cubic yards of compacted backfill (Claim 2: Ogee Excavation) is included in the 1,286 cubic yards of compacted backfill figure (AF Contract File, Tab RR at 1-3; Tr. 501). Giving effect to these figures, a total of 574 cubic yards of compacted backfill was placed in portions of the project not involving the compacted backfill included in claim 2 (Ogee Excavation) (Tr. 502, 536).

The number of cubic yards claimed by appellant for excavation and compacted backfill was determined by Mr. Ed Venetz (a shift foreman for Volk) who had been on the job from the day it started until the day it was completed and who was more familiar with the work performed in this area than was Mr. Davis (Tr. 508, 511). According to appellant's witnesses, the areas from which unsuitable materials were to be removed and replaced with compacted backfill were determined by the project engineer or the onsite inspectors and the work was performed at their direction (Tr. 503-04, 515).

Mr. Venetz testified (i) that in measuring the quantities in all areas for which claim was being made, he had used the dimensions shown in the plans for width and length; (ii) that in determining the depth of the excavation he had used his notes, the notes of the other shift foreman, Volk's daily construction reports, drawings, and sketches that he had made which appear on the daily construction reports and in instances where he could not say how much material had been taken out, he had used NTL's notes; (iii) that measurements he had made himself had been done with a tape measure; (iv) that on occasion but not as a general rule, he had determined the depth of a particular hole by shooting with an instrument; (v) that Volk had had a book of field notes in which calculations for elevations were recorded but he did not know where the book of field notes went after the job was completed; (vi) that he was not an engineer and had not had anyone who was an engineer assist him in making the measurements; (vii) that if you have a square hole which is so wide and so long and so deep, it is not difficult to find the measurements; and (viii) that it was not considered necessary to cross-section the areas with an engineer's level (Tr. 514-20).

Mr. Venetz acknowledged that at no point in his measurements or in his calculations had he used the average-end-area method⁸⁴ specified in the contract. He asserted, however, that if you have the hole dimensions from the plans as a square and went down a foot deep through the hole that that would be the average-end-area method when you add it up. Mr. Venetz also acknowledged that in making the calculations for the claim (SAF Claim 10, Tab 1 at 1-16), he had included everything including the material for which Volk had been paid (Tr. 520-23).

The project engineer testified (i) that he was familiar with the areas involved in the claim; (ii) that only one of the claim areas was essentially square; (iii) that he could not say that any of the other areas had all vertical sides but mostly were very irregularly shaped areas; (iv) that in each area where Volk was directed to overexcavate and backfill, measurements were made by NTL using the average-end-area method as specified in the contract; (v) that his calculation notes

⁸⁴ The contract specifies that both Item 7 (Channel Excavation) and Item 9 (Compacted Backfill) are to be measured by the average-end-area method. The contract also provides that compacted backfill shall be measured compacted in place (AF Contract File, Tab F at 2).

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are in Project Field Notebook No. 10, pages 1 through 23,⁸⁵ (vi) that in making the measurements as a general rule an engineer's level and an engineer's rod were used and cross-sections were taken as recorded in the field notes; (vii) that calculation of the amount of excavation was based on the things that had been surveyed; (viii) that the calculations were kept onsite and were available for inspection by the contractor; and (ix) that Progress Pay Estimate No. 15 (the final pay estimate) included all the ordered excavation and backfill (Tr. 524-29).

Mr. Thomson also testified (i) that in the areas involved in the claim, he observed excavation being performed and backfill being placed by Volk which was not paid for; (ii) that the reason that it had not been paid for was because it was not excavation and backfill that NTL had directed; (iii) that one of the instances where the contractor had not been paid for backfill placed involved a case where Volk had covered up unsuitable material which had to be removed and replaced with compacted backfill; and (iv) that any material Volk was directed to dig out and replace was cross-sectioned, measured, and paid for (Tr. 529-32).

Upon cross-examination, Mr. Thomson confirmed that some excavation was directed by NTL in the downstream apron, in the north and south footings and in the headworks area. He stated, however, that all of the quantities directed to be removed were included in NTL quantity notes (Tr. 537-39).

Discussion and Decision

Before proceeding to consideration of the merits, the Board notes that the claim is overstated in two important respects. The contractor is claiming for 313.86 cubic yards of compacted backfill (at the contract unit price of \$11.75 a cubic yard) on the basis of applying a 25-percent shrinkage factor (SAF Claim 10, Tab 1 at 1). The contract provides, however, that compacted backfill is to be measured compacted in-place (note 84, *supra*). The claim as presented also includes a claim for 574 cubic yards of channel excavation and 574 cubic yards of compacted backfill for which the contractor has acknowledged it was paid (Tr. 522-23). Properly computed to reflect these downward adjustments, the claim is in the amount of \$14,709.60 (*see* GPHB at 111-12).

In this claim, as in some of the earlier claims, appellant asserts that serious doubt is cast upon measurements made by NTL by its own diary admission that it failed to measure the Ogee excavation (AOB at 77-78; ARB at 65, 67-68). Earlier in this opinion the Board considered in detail the evidence upon which these assertions and related assertions were based, after which it found that Mr. Robert Thomson was a credible witness and that there was no substantial

⁸⁵ The field notes and calculations made by the project engineer or other NTL project personnel for overexcavation are included in the supplement to GX-10. The field notes and calculations for compacted backfill made by the project engineer or other NTL project personnel are included in SAF Claim 10, Tab 2.

evidence indicating that the inspection and quantification work performed by NTL personnel was accomplished in other than an honest way (*see Part III, supra*).

Other important questions raised by this record include the following: (1) Whether the work for which the instant claim is being made was directed by the project engineer or other NTL project personnel, (2) the accuracy of the disparate measurements made by the parties, (3) the significance to be attached to the fact that exclusive of the 712 cubic yards of unanticipated backfill placed in the Ogee excavation (claim 2), only 574 cubic yards of compacted backfill was placed for the entire project, as compared to the invitation for bid estimate for that item of 1,300 cubic yards.

As to question 1, the Board notes that while both Mr. Davis and Mr. Venetz testified that all the work involved in the instant claim was directed work, Mr. Davis appears to have had little firsthand knowledge in this regard and that the daily construction reports of Volk to which Mr. Venetz referred to in his testimony make only a few references to the work involving excavation and backfill having been directed. The Board also notes a number of references in the daily construction reports to the material having been excavated and replaced because it had frozen or had become saturated (*i.e.*, appellant was redoing work to meet the requirements of the specifications rather than performing extra work). In his testimony, the project engineer stated unqualifiedly that Volk had been paid for all directed excavation and backfill. He also testified, however, that he had observed the contractor performing excavation and placing backfill for which no direction by NTL personnel had been given.

The Board now turns to the question of the accuracy of the measurements taken by the parties. In the Board's view, the opinion expressed by Mr. Venetz to the effect that the method of measurement employed by him satisfied the contract requirements for measuring channel excavation and compacted backfill was an *ipse dixit* and as such is not entitled to serious consideration. The conclusion reached by Mr. Venetz appears to have been predicated in large measure upon his assumption that the holes could be properly measured as if they were square. Mr. Thomson testified, however, that only one of the areas involved was essentially square; that none of the rest of the areas were vertical on all sides; and that mostly the rest were very irregular in shape. In his testimony, Mr. Venetz also indicated that the measurements he had taken were supported by field notes. The field notes were not available to him at the time of the hearing, however, and are not part of the record in this case.

As to question 3, the Board notes that while appellant attaches considerable importance to the disparity between the 1,300 cubic yards of compacted backfill estimated by the Government at the time bids were requested and the 574 cubic yards of compacted backfill used for the entire project (exclusive of the 712 cubic yards of compacted backfill used in the Ogee section), appellant has not undertaken to

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assess the effect upon estimated quantities of the contract having been partially terminated for the convenience of the Government. In connection with Claim 7 (winter heat and cover), appellant recognized that apparently as a result of the termination, some of the concrete work was eliminated from the contract and was later performed by the Government (AOB 67; ARB 55-57). To the extent the concrete work so eliminated involved placing concrete upon compacted hackfill, it appears that the amount of compacted backfill required to be placed by appellant under the contract would be correspondingly reduced.

Based upon the foregoing considerations, the Board finds that appellant has failed to show by a preponderance of the evidence⁸⁶ that it is entitled to additional compensation for excavating unsuitable material or for placing compacted backfill over and above the 574 cubic yards of channel excavation and the 574 cubic yards of compacted backfill for which appellant acknowledges it has been paid.

Claim 10 in the amount of \$30,805.36 and Claim 5 for a related time extension of 20 working days are both denied.

J. Claim No. 11: Cold Weather Concrete (IBCA-1554-2-82(G)) - \$16,250

For the instant claim, appellant is requesting an additional sum of \$16,250 and a 20-day time extension (AX-A; AOB 80).

Background

The claim as presented by Volk on behalf of its concrete supplier, Baltrusch, Inc., was in the amount of \$16,249.99 for the purchase and placement of 1,413 cubic yards of concrete during the period of October, November, and December 1980 and January 1981 at an extra charge of \$11.50 per cubic yard for the cold weather concrete (SAF Claim 11, Tab 1 at 1-2). The claim as presented by Baltrusch to Volk involved an extra charge of \$17,871 for 1,554 cubic yards of concrete at \$11.50 per cubic yard and covered the months of November and December 1980 and January, February, and part of March 1981 (SAF Claim 11, Tab 2). According to the NTL records only 1,016.68 cubic yards of concrete were placed to the dimensions shown in the plans during the months of October, November, and December 1980 and January 1981. Of this quantity, a total of 415.22 cubic yards placed in October were not subject to the specification provisions (AF Contract File, Section F at 51), requiring the heating of water, aggregates, and concrete during freezing weather, leaving 601.46 cubic yards subject to the special preparations required for cold weather concrete (GX-11 at 1-3).

Appellant's witness Davis stated (i) that if Baltrusch had been granted delays on prior claims, the amount of concrete here in question would not have been placed during the period covered by the

⁸⁶ See *Montgomery-Macri Co.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 263, 1963 BCA par. 3819 at 19,015, in which the Board stated: "And in making our determinations we have perforce applied the rule that appellants have the burden of proving both the validity and the quantum of their claims."

claim and additional costs would not have been incurred; (ii) that the additional costs incurred were considered reasonable and included the costs of the measures required to protect the sand and gravel ingredients of concrete from freezing, as well as those involved in preparing or producing hot water mixed with aggregates; (iii) that Volk's review of the yardage was based on the concrete delivery tickets for the period covered by the claim; and (iv) that in determining the quantity for which an extra was to be claimed, Volk added up the total amount of concrete delivered during that period. Upon cross-examination, Mr. Davis stated that the supplier's claim is sort of piggybacked on Claim 7 (Volk's own claim for winter heat and cover) (Tr. 543-49).

The project engineer testified (i) that under the specifications (cited, *supra*) certain measures had to be taken to provide concrete for use during winter months; (ii) that the cold-weather concrete requirements came into effect on October 29, 1980 (GX-11 at 2-3); (iii) that on that date neither Volk nor its concrete supplier were ready to provide winter concrete in accordance with the specifications at their local batching facility at Harlem (the approved source for supplying winter concrete and only 3 miles from the dam); (iv) that they were not prepared in that they had not made provision to heat their aggregates as called for by the specifications; (v) that in the absence of the proper facilities being available to heat the aggregates at the Harlem plant, it was necessary to resort to a two-part system involving the use of the supplier's main plant at Havre (some 50 miles from the dam) for batching portions of the concrete with completion of the operation (adding cement, the entraining agent, and about one-third of the mix-water) being effected at the Harlem plant; and (vi) that the delay of a month in the placement of concrete was due to the supplier having had difficulty in preparing their Harlem batching facility to heat the aggregates in order to meet the specification requirements governing the preparation and placement of cold-weather concrete (Tr. 550-54).

Upon being recalled as a witness, Mr. Thomson testified to a meeting at the project on October 1, 1980, attended by Mr. Davis (Volk) and Messrs. Thomson, Hummel, and Dennis Williams (NTL). During discussion of job progress, Mr. Williams asked Mr. Davis as to where in his opinion he currently stood in regard to schedule. Mr. Davis stated that at that point in time, he was 3 weeks behind schedule (Supp. to GX-11 at 33; Tr. 560-63). Mr. Thomson also stated (i) that NTL records show (a) the total amount of concrete delivered to the project, (b) the quantity for which payment was made, and (c) the quantity wasted or otherwise used; (ii) that the specifications (AF Contract File, Tab F at 3) provide for the contractor to be paid for the concrete in place to the dimensions shown in the plans basically; (iii) that NTL had copies of all concrete delivery tickets, as a copy of each ticket was collected at delivery time; (iv) that payment to Volk for concrete was calculated in accordance with the measurements and payment section of the contract and all the information reflected in

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NTL's field notes; (v) that the notes were kept on a daily basis; (vi) that the notes show the cubic yards of concrete batched (the cumulative total of the delivery tickets) that were delivered to the project for use; (vii) that sometimes the amount of concrete placed in footing areas was significantly higher than the amount shown in the plans because the contractor had chosen not to form them but to use extra concrete which was its option; and (viii) that generally speaking, the amount of concrete the contractor brought to the site was pretty close to the amount placed as there was not a great deal of waste (Tr. 563-68).

The project manager (Mr. David Hummel) stated that the specifications governing winter concrete were waived when with the approach of the colder weather it became apparent that Volk was having some problems getting the plant at Harlem organized in such a way that concrete could be produced in accordance with the specifications. Under the waiver, Volk was allowed to place concrete at lower temperatures than what the specifications called for as long as the weather did not get really cold. The waiver was granted to expedite the project (Tr. 554-56). Mr. Hummel also testified that he had made the analysis of the claim found in GX-11. In making that analysis, he had taken Volk's claim which listed by month (October, November, December, and January) the total amount of concrete claimed as requiring winter concrete preparation and compared it with what was shown on NTL diaries and quantity calculations for that period of time. After noting the quantity calculations show each concrete placement by date and the number of cubic yards to be paid for each such placement, Mr. Hummel stated that when the figures from the quantity notebooks were tabulated month-by-month, it was disclosed that there was in fact some fairly large differences in quantities between what Volk claimed during that period and what NTL notes showed (Tr. 557-58).

Commenting upon the nature of the differences so revealed, Mr. Hummel noted that for the period in question Volk was claiming extra compensation for 1,413 cubic yards of concrete (SAF Claim 11, Tab 1 at 2), as compared to 1,016 cubic yards of concrete placed to the dimensions shown in the plans during the same period according to NTL's records. Since under the specifications the procedures required for cold weather concrete did not become operative until October 29, 1980, however, only 601 cubic yards of this total would have necessitated special preparations of the concrete for the specified cold weather conditions (GX-11 at 1-3; Tr. 558). Apropos the October 29, 1980, date, Mr. Hummel stated that there was a tendency to confuse Claims 7 and 11. In this regard he noted that it became necessary to provide winter heat and cover (Claim 7) perhaps a couple of weeks before the concrete supplier was required to prepare the concrete in

accordance with the specification provisions governing cold weather concrete (Tr. 558-59).

Discussion and Decision

As noted by Mr. Davis in his testimony and by appellant's counsel in his brief (AOB 79), this claim is closely related to Claim 7. In reference to that claim, the Board found that there were concurrent delays and that the contractor had failed to show that the delays attributed to the Government were apart from the delays for which the contractor was responsible. The same is true of the instant claims.⁸⁷

Even if the instant claim had been found to be meritorious, however, the amount of recovery would have had to be drastically reduced to reflect the fact that appellant has failed to show (i) that any special measures involving preparation of the concrete for cold weather were required to be put into effect prior to October 29, 1980 (GX-11 at 2-3); (ii) that reliance upon concrete delivery tickets to establish quantities for payment is warranted where, as here, the contract specifies that in computing concrete yardage for payment, the dimensions used for concrete placed shall be those shown on the plans (AF Contract File, Tab F at 3); and (iii) that the price claimed of \$11.50 per cubic yard can be considered to be reasonable when an industry survey made by NTL indicates a unit cost of \$5 per cubic yard (GX-11 at 1).

Claim 11 in the amount of \$16,250 and a related time extension requested of 20 days are both denied.

K. Claims 12 and 13: Interest (IBCA-1554-2-82 (E & F) - \$57,990.59

Background

By serial letter No. 58 dated July 24, 1981, Volk submitted a claim for interest in the amount of \$57,990.59 on monies as of July 31, 1981, and a claim for interest after July 31, 1981, in the amount of \$6,990.59 per month. By serial letter No. 60 dated August 3, 1981, Volk filed a claim for any and all interest allowed by law on all claims made (AF Claims 12 and 13, Tab D at 2-5).

It is clear that the interest presently being claimed is the interest which attaches by law to the claims found to be meritorious (Tr. 568-69). At the hearing, counsel for the parties agreed to enter into a stipulation as to the date each of the claims would be considered to be filed (Tr. 570). The stipulated dates for the filing of the claims are set forth below:

<i>Claim</i>	<i>Docket No.</i>	<i>Date Presented</i>
1	1456-5-81	November 3, 1980
2	1553-2-82(A)	May 1, 1981
3	1554-2-82(C)	July 24, 1981
4	1472-6-81	February 16, 1981

⁸⁷ Note 86, *supra*.

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5	1553-2-82(B) (merged with Claim 10)	May 1, 1981
6	1555-2-82	May 1, 1981
7	1478-6-81	May 1, 1981
8	1554-2-82(B)	July 23, 1981
9	1554-2-82(A)	July 23, 1981
10	1554-2-82(D)	July 24, 1981
11	1554-2-82	July 24, 1981

(AOB 81).

Decision

The Board has found that appellant is entitled to be paid the sum of \$1,600 on Claim 1 and the sum of \$49,096.17 on Claim 2 and has denied all other claims. In accordance with the stipulation of the parties, the Board finds that interest (computed as provided for in the Contract Disputes Act of 1978 (41 U.S.C. § 611)) shall be payable on the \$1,600 found due on Claim 1 from November 3, 1980, and on the \$49,096.17 found due on Claim 2 from May 1, 1981, until payment of the respective sums specified has been made. Except as specifically found herein, all other claims for interest are denied.⁸⁸

PART VI: Government Counterclaim - \$68,732.52

Resolution of a question raised by the Government in its brief will require the Board to determine whether it has jurisdiction over a counterclaim asserted against appellant by the Government under a contracting officer's decision from which no appeal was taken.

Background

In a decision under date of July 2, 1982, the contracting officer found appellant liable to the Government on three claims in the aggregate amount of \$68,732.52. Claim 1 in the amount of \$17,559.16 is for liquidated damages assessed against the contractor under section GC-3 (Liquidated Damages) of the General conditions. Claim 2 in the amount of \$25,980.63 is for work performed and equipment provided by BIA to assist the contractor in diverting the Milk River around the construction site. Claim 3 in the amount of \$25,192.73 represents assessments made under section 10(d) of the General Provisions of the contract for additional costs of inspection and testing when material or workmanship was not ready at the time specified by the contractor for inspection or test and for reinspection and retest required by prior

⁸⁸ Appellant also seeks attorney fees pursuant to the Equal Access to Justice Act (5 U.S.C. § 504) (AOB 82). An application for attorney fees at the present time is premature and is dismissed without prejudice to the right of resubmission to the Board in accordance with the statute within 30 days after its decision is final. *Yazzie Construction Co., IBCA-2104* (Apr. 30, 1986), 93 I.D. 191, 197-98, 86-2 BCA par. 18,964 at 95,756.

rejection (Government Answer at 18; Government Answer, Exh. 6). *See also* SAF Miscellaneous File, Documents 2 and 3.

Discussion

[12] It is clear that under the Contract Disputes Act of 1978, boards of contract appeals have jurisdiction over Government counterclaims provided the counterclaim was the subject of a contracting officer's decision (41 U.S.C. § 605(a)) and provided a timely appeal is taken therefrom (41 U.S.C. § 606). In this case, the Government says the Board is without jurisdiction over the Government's counterclaim because the final decision of the contracting officer has never been appealed (GPHB at 5). Appellant advances a number of arguments in support of its position that the Board clearly has jurisdiction over the counterclaim. In support of one of the arguments so made, appellant states (i) that the findings were issued without any notice that the Government was asserting a claim against the contractor; (ii) that no notice of claim was provided; and (iii) that no opportunity to present any information or rebut the Government's claim was afforded to the contractor (ARB at 24).

To support its position that the Board has no jurisdiction in this matter, the Government cites the case of *Jackson Lumber Co.*, AGBCA No. 80-160-1 (March 17, 1981), 81-1 BCA par. 14,998. The *Jackson* case is readily distinguishable from the situation here, however, since in that case the Board dismissed the Government's counterclaims asserted in its answer as premature as they had not been the subject of a contracting officer's final decision. Here it is undisputed that the three Government claims included in the counterclaim were the subject of what purported to be a final decision by the contracting officer from which no appeal to this Board was taken. In this case the question to be decided is whether the circumstances antecedent to the issuance of the contracting officer's decision impugn its finality.

The record is entirely devoid of any evidence indicating that any of the three claims included in the Government's counterclaim were presented to the contractor at any time prior to the time the contracting officer's decision of July 2, 1982, was issued. The failure of the contracting officer to advise the contractor of the Government's claims and afford the contractor an opportunity to respond to them before proceeding with the issuance of the decision is considered to deprive the decision of finality. This view of finality was true before the enactment of the Contract Disputes Act (*see Keystone Coat & Apron Mfg. Corp. v. United States*, 150 Ct. Cl. 277, 281-82 (1960), and is still true under the Act. *See E. C. Morris & Son, Inc.*, ASBCA No. 30385 (February 18, 1986), 86-2 BCA par. 18,785 at 94,652-53 from which the following is quoted:

There is nothing in the record to indicate that the contracting officer discussed the basis for the counterclaim with appellant before issuing the final decision. We have no way of discerning whether such discussion may have led to a resolution of the issues there involved. As was held in *Woods Hole Oceanographics Institution v. United States*,

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677 F.2d 149 (1st Cir. 1982), the mere failure by the contracting officer to hear a contractor before rendering judgment "deprives the decision of any efficacy." See also, Space Age Engineering, Inc., ASBCA No. 26028, 82-1 BCA ¶ 15,766. Accordingly, we do not perceive the Government's counterclaim to be embraced by the instant appeal.

Decision

For the reasons stated and on the basis of the authorities cited, the Board finds the Government's counterclaim is not presently before us for decision.

WILLIAM F. McGRAW
Administrative Judge

WE CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

DAVID DOANE
Administrative Judge

July 2, 1987

EXXON CO.,U.S.A., ET AL.

98 IBLA 218

Decided July 2, 1987

Appeals from decisions of the Director, Minerals Management Service, affirming amendment of Notice to Lessees and Operators regarding royalty payments for Outer Continental Shelf oil and gas leases, dismissing with prejudice appeal of requirement for certification in connection with royalty refund request, and affirming denial of a request for refund of royalties paid for gas used off-lease. MMS-82-0402-OCS et al.

Referred for hearing.

1. Oil and Gas Leases: Royalties--Outer Continental Shelf Lands Act: Oil and Gas Leases--Regulations: Generally

A hearing will be ordered where the record is not clear whether before 1974 the Department exempted oil or gas produced from leases on the Outer Continental Shelf from royalty if it was used for production or operations outside the lease or unit from which it was produced.

APPEARANCES: Salvatore J. Casamassima, Esq., Houston, Texas, for Exxon Co., U.S.A.; Milton L. Duvieilh, Esq., New Orleans, Louisiana, for Gulf Oil Corp.; Holly H. Clement, Esq., New Orleans, Louisiana, for Texaco, Inc.; Robert J. Fritz, Esq., New Orleans, Louisiana, for Mobil Oil Corp., Mobil Producing Texas and New Mexico, Inc., and Mobil Oil Exploration and Producing Southeast, Inc.; J. Berry St. John, Jr., Esq., New Orleans, Louisiana, for Mobil Oil Exploration and Producing Southeast, Inc.; Charles R. Shockley, Esq., Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., and Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

Exxon Co., U.S.A. and others have appealed from decisions of the Director, Minerals Management Service (MMS), dated December 10, 1984, March 15 and April 16, 1985, and December 23, 1986, affirming an amendment of a Notice to Lessees and Operators (NTL) regarding royalty payments for Outer Continental Shelf (OCS) oil and gas leases, dismissing with prejudice an appeal of a requirement for certification in connection with a royalty refund request, and affirming the denial of a request for a refund of royalties paid for gas used off-lease.¹ These

¹ The appellants are: Exxon Co., U.S.A. (Exxon), IBLA 85-306 (MMS-82-0402-OCS) and IBLA 87-321 (MMS-85-0178-OCS); Gulf Oil Corp. (Gulf), IBLA 85-612 (MMS-82-0404-OCS); Texaco, Inc. (Texaco), IBLA 85-704 (MMS-82-0402-OCS); Mobil Oil Corp., Mobil Producing Texas & New Mexico, Inc., and Mobil Oil Exploration and Producing Southeast, Inc. (MOEPSI), IBLA 85-705 (MMS-82-0403-OCS); and MOEPSI, IBLA 85-730 (MMS-83-0032-OCS). Appellants are all holders

Continued

appeals present the common issue whether the holder of an OCS oil and gas lease is required to pay royalty on oil and gas produced from the lease but used for purposes of production from or operations *outside* the lease or unit area.

Section 8(a) of the Outer Continental Shelf Lands Act (the Act), *as amended*, 43 U.S.C. § 1337(a)(1)(A) (1982), has, since its enactment on August 7, 1953, provided authority for the Secretary of the Interior to set a royalty of not less than 12-1/2 percent "in amount or value of the production *saved, removed, or sold.*" (Italics added.) See 67 Stat. 468 (1953). The statute does not itself define, for purposes of royalty computation, what oil and gas will be considered "saved, removed, or sold." This has been largely a matter of Departmental interpretation, as set forth below.

In NTL 74-14, dated June 28, 1974, the Acting Oil and Gas Supervisor, Gulf of Mexico Area, Geological Survey (Survey), stated that, effective June 1, 1974, royalty would be due "on the value of all oil and gas * * * lost in spills, blow outs, and fires, and on the value of all gas * * * flared and vented." The only "lease use" gas excepted by this Notice from the payment of royalty was gas "reinjected * * * in a manner which will render [it] reasonably subject to extraction again."

NTL 74-14 was superseded by NTL 74-20, dated October 25, 1974, which provided that, effective June 1, 1974, royalty would be due "on all oil and gas produced from all OCS leases [in the Gulf of Mexico area], except gas production as provided in paragraph 3 of this Notice." 39 FR 38685 (Nov. 1, 1974). Paragraph 3.A.(2), entitled "Other Lease Use," provided that for certain leases issued pursuant to section 8 of the Act:

Gas produced pursuant to a lease or unit agreement and *used for operations or production activities pursuant to that same lease or unit agreement* as a fuel or otherwise in the operation of machinery or equipment shall not be subject to royalty, unless it is a use which the Supervisor has prohibited. [Italics added.]

The preamble to the Notice stated that this permission for "use of gas for lease purposes without the payment of royalty" applied only to "those leases which provide that 'gas used for purposes of production from and operations upon the leased area or unavoidably lost' is not subject to royalty." "However," the preamble noted, "this is subject to possible change after review of this provision by the Comptroller General."

On October 4, 1976, in *Response to February 17, 1976, Request from the General Accounting Office: Interpretation of Mineral Leasing Act of 1920, and Outer Continental Shelf Lands Act Royalty Clause*, 84 I.D. 54, 60 (1976), the Solicitor, in an opinion approved by the Secretary, concluded that under the Act the Department "must collect royalty on

of OCS oil and gas leases in the Gulf of Mexico, issued pursuant to sec. 8 of the Outer Continental Shelf Lands Act, *as amended*, 43 U.S.C. § 1337 (1982). Because of the substantial similarity of legal and factual issues involved, these cases were consolidated by orders dated July 17 and 18, 1985, and May 15, 1987, at the parties' request.

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all substances withdrawn from the reservoir." The Solicitor defined the statutory term "removed" as including oil or gas

which is physically transported from the lease, as well as oil or gas, which is reinjected into a formation under the lease or which, through an action or failure to act by the lessee, is lost from the lease by escape through venting or leakage, *through consumption* in a flare or *as fuel for leasehold production equipment*. [Italics added.]

The Solicitor recommended that this interpretation of the Act only have prospective effect "beginning June 28, 1974," because of past reliance by lessees on Departmental regulations and lease forms. *Id.* at 55, 63-64. The Solicitor's opinion was incorporated into NTL 78-5, dated March 20, 1978, which superseded NTL 74-20.²

Effective January 12, 1981, the Department promulgated amended regulations dealing with royalty payable on oil and unprocessed gas whose purpose was to "delete the language that currently indicates that royalty is due on all oil and gas removed from the reservoir." 45 FR 81563 (Dec. 11, 1980).³ These amended regulations specifically provided that "royalty is due" on all oil and gas which is "produced from a reservoir and used by the lessee for purposes of production from and operations upon the lease or unit area, or operations outside the lease or unit area, *unless otherwise provided for in the lease*." 30 CFR 250.65(b) and 30 CFR 250.66 (45 FR 81563 (Dec. 11, 1980)) (italics added).⁴

Effective on the same date, MMS⁵ published an NTL dated November 19, 1980, "that implements the regulations." 45 FR 81563 (Dec. 11, 1980). However, the NTL distinguished between leases issued prior to and after July 1, 1974. The NTL provided, for leases issued on or before July 1, 1974: "[R]oyalty is *not* due on gas used for purposes of production from and operations within or outside the lease or unit area. Royalty is due on all other oil and gas production * * *." (Italics added.) 45 FR 81670 (Dec. 11, 1980). For leases issued after July 1, 1974, the NTL provided that "royalty is due on all other oil and gas

² NTL 78-5 stated in part:

"Effective June 28, 1974, royalty is due and payable in amount or value of all oil or gas, or both, that is withdrawn from a reservoir which is subject to an OCS oil and gas lease. More specifically, royalty is due on vented and flared gas, and gas or oil, or both, leaked, spilled or used in producing operations. * * * Gas produced pursuant to a lease or unit agreement and used for operations or production activities as a fuel or otherwise in the operation of machinery or equipment shall also be subject to royalty."

³ This language had been added as the first part of 30 CFR 250.65(b) and 250.66 effective Dec. 13, 1979, with the following explanation:

"Several respondents objected to including oil used as fuel in the computation of royalty. Since this question currently is the subject of litigation [*Amoco Production Co. v. Andrus*, No. 77-3351-C (E.D. La.)], they recommended that the language in the existing regulations not be changed pending a decision by the court. Since regulations implement administration policy as well as statutory mandates, we believe it is appropriate for the language of the final rule to be consistent with the Department's policy on this matter, and have, therefore, rejected this recommendation." 44 FR 61891 (Oct. 26, 1979).

⁴ The regulations were redesignated as 30 CFR 202.150(b) and 206.151 respectively effective Aug. 5, 1983. 48 FR 35641 (Aug. 5, 1983).

⁵ By Secretarial Order No. 3071 of Jan. 19, 1982, amended May 10, 1982, the minerals management functions previously carried out by the Survey were transferred to the MMS. See 47 FR 4751 (Feb. 2, 1982).

production, including * * * oil or gas used for purposes of production from and operations within or outside the lease or unit area." *Id.*⁶

In *Amoco Production Co. v. Andrus*, 527 F. Supp. 790, 791 (E.D. La. 1981), decided November 27, 1981, the U.S. District Court concluded that the Department could not, consistent with the Act, require a lessee to pay a royalty on oil and gas "which are vented or flared, *used in leasehold operations*, or unavoidably lost." (Italics added.) The court took note of the 1974 NTL's, as well as the Solicitor's opinion, but held that they were a departure from a "long-standing policy and practice of not collecting royalties" on oil and gas used in leasehold operations with respect to the offshore production of oil and gas, which policy and practice Congress implicitly approved in enacting section 8 of the Act. *Id.* at 792, 794. The court, therefore, declared the 1974 NTL's "invalid" and dismissed Departmental decisions which had upheld the notices. *Id.* at 796.

In an effort to reflect the court's ruling in *Amoco*, the Acting Associate Chief, Offshore Minerals Management Division, MMS, issued an NTL, dated May 5, 1982, which superseded the January 1981 NTL. 47 FR 20672 (May 13, 1982). This NTL, which was effective June 1, 1982, provided that: "Effective June 1, 1974, royalty is not due on * * * oil and gas used for purposes of production from and operations within or outside the lease or unit area." *Id.* (Italics added). However, on July 26, 1986, the Acting Associate Director for Offshore Minerals Management, MMS, amended the NTL to delete the language "or outside" effective September 22, 1982. 47 FR 36717 (Aug. 23, 1982). MMS explained:

It was not intended to exclude such oil or gas used outside the lease or unit area from royalty obligation. We are aware of no usual provision or custom which permits the transfer of a hydrocarbon product outside a lease or unit area without royalty considerations.

The purpose of the proposed change is to remove this unintentional exclusion. [7]

⁶ These provisions were prefaced by the following comment:

"Several commenters stated that oil or gas used in lease operations should not be subject to royalty payment regardless of when the lease was issued, and cited the Mineral Leasing Act as support. We do not agree. The OCS Lends Act, as amended, does not specifically exempt from being subject to royalty, oil or gas produced from and used on the lease for production purposes, as do Sections 18 and 19 of the Mineral Leasing Act. In addition, with regard to OCS leases, we are not attempting to collect royalty on gas in contravention of a specific lease term, but only on gas used from production purposes on leases which do not exempt such gas from royalty payments. The Department having reconsidered the royalty requirements of lessees [sic] of OCS leases has determined that it is legally correct to collect royalty on oil and gas used for production purposes unless the lease terms exempt such oil and gas from royalty." 45 FR 61670 (Dec. 11, 1980). Comments on the proposed notice had been requested on Aug. 18, 1980, 45 FR 58877 (Aug. 18, 1980).

⁷ In Apr. 1981, the Geological Survey made a similar deletion concerning the exemption from royalties of gas or liquids reinjected into a reservoir provided in 30 CFR 250.66 and the implementing notice effective in Jan. 1981. The second sentence of the regulation originally read: "Royalty is not due on gas or liquids produced from and reinjected to a reservoir, *either within or outside* the same lease or unit, until such time as they are finally produced from a reservoir." See 45 FR 81568 (Dec. 11, 1980). (Italics added.) The emphasized words were deleted from the regulation and the notice. See 46 FR 19985 (Apr. 2, 1981); 46 FR 22468 (Apr. 17, 1981). The revision of the notice was explained as follows:

"A final NTL concerning produced oil and gas that is to be exempt from royalty requirements was published in the Federal Register on Dec. 11, 1980, (Vol. 45 No. 240). Subsequent to the publication of this NTL it was discovered that language was inadvertently included that indicated that gas or liquids to be used for reinjection or other lease use could be used for such purposes *outside* the lease or unit area. The NTL as written could conceivably lead to the transfer to custody of such gas or liquids and could thus create accounting problems, i.e., accountability if the injected gas or liquids are not recovered. We are aware of no usual provision or custom which permits transfer of custody of a

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In September 1982, Exxon, Gulf, Texaco, and Mobil Oil challenged the July 1982 MMS decision. These challenges constituted appeals to the Director, MMS, pursuant to 30 CFR 250.81 and Part 290.

Appellants challenged the July 1982 MMS decision on the basis that it constituted a substantive change from past accepted practice by the Department that no royalty would be charged for oil and gas used outside a lease or unit area but for the benefit of that lease or unit, which change was promulgated without complying with the procedural requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982), and was inconsistent with the court's ruling in *Amoco Production Co. v. Andrus, supra*. Mobil Oil, for example, explained in its September 21, 1982, notice of appeal, at page 2:

It is the custom in the Gulf of Mexico and elsewhere for appellants and other operators to construct central platform facilities, which house separation and other equipment used to gather production from satellite wells either within or outside of the leased premises on which the central facility is located. Current royalty payment practice allocates back to the several separate leases the share of fuel use gas and oil actually used on one lease block where the central facility is sited. No royalty is paid on any fuel use oil or gas allocated to any lease served by the facilities regardless of the location of the facilities. A strict interpretation of the NTL change of August 23, 1982 would result in the oil or gas used outside the boundaries of the producing lease being subject to royalty.

Gulf, in its September 20, 1982, notice of appeal, at page 6, also argued that: "The change published on August 23, 1982, would literally mean that while no royalty would be due on fuel gas used for the lease where the platform was located, royalty would be due on fuel gas used for the other lease."

In his December 1984 and March 1985 decisions, the Director, MMS, affirmed the July 1982 decision deleting the royalty exclusion for oil and gas used for purposes of production from and operations outside the lease or unit area. The Director acknowledged that royalties had not been collected on oil or gas used by the lessee or operator for production purposes "on the same lease or within an approved unit encompassing such lease" until 1974. He also acknowledged that the *Amoco* decision held that the Department's 1974 policy change subjecting such oil and gas to royalties was unlawful, and that the term "removed" in 30 U.S.C. § 1337(a) (1982) was to be construed as it traditionally had been under the Mineral Lands Leasing Act. Accordingly, he stated, the Department "consistently required that section 8 [i.e., 30 U.S.C. § 1337] lessees and operators pay royalties on all OCS oil or gas removed from the lease for purposes of production outside the producing lease or outside a unit area encompassing such

hydrocarbon product outside a lease or unit area without royalty consideration. The language that would allow such action was inadvertent and did not appear in the proposed NTL published for comment (see Federal Register publication, August 13, 1980, Vol. 45, No. 158) and was not in the discussion of comments in the *Federal Register* issue that published the final NTL." 46 FR 22468 (Apr. 17, 1981). [Italics in original].

lease" until 1981.⁸ The NTL that became effective in January 1981 "purport[ing] to exempt from royalty requirements gas produced under section 8 leases issued on or before July 1, 1974, and used for purposes of production from and operations outside the producing lease or unit area" was based on a "clearly erroneous" determination that such leases expressly exempted such gas from royalties, the decision stated.⁹ Both the May 1982 notice implementing the *Amoco* decision and the July 1982 notice deleting the "outside" language from the May 1982 notice were not subject to the notice-and-comment rulemaking provisions of the APA, 5 U.S.C. § 553 (1982), the decision stated, because both were notices interpreting the existing rules at 30 CFR 202.150 and 206.151 rather than legislative rules. Those existing rules, the Director pointed out, "expressly require that royalty be paid on all oil and gas produced from a reservoir and used for operations outside the lease or unit area unless 'otherwise' provided for in the lease. No section 8 leases have been issued providing 'otherwise'." The May 1982 notice excluding such oil and gas from royalty was a nullity, and MMS is not estopped from correcting the error in its July 1982 notice, which simply "reaffirm[ed] the lessees' existing obligations under the regulations," the Director concluded. The four appellants filed timely notices of appeal.¹⁰

[1] Appellants request a hearing on issues of fact in accordance with 43 CFR 4.415. They do so because they dispute the statement in the decision of the Director, MMS, that "until 1981" the Department had a "longstanding practice" of requiring that "section 8 lessees and operators pay royalties on all OCS oil or gas removed from the lease for purposes of production outside the producing lease or outside a unit area encompassing such lease."¹¹ "From the time of adoption of [the]

⁸ The Department's practice reflects an established custom of the industry that "if [natural gas] were to be used off the premises or sold, then such gas had value and royalties were due," the decision states, citing *Butler v. Exxon Corp.*, 559 S.W.2d 410, 415 (Tex. Ct. App. (El Paso) 1977), and *Lackey v. Ohio Oil Co.*, 188 F.2d 449, 451 (10th Cir. 1943). The decision in *Butler* was apparently later set aside, *Exxon Corp. v. Butler*, 619 S.W.2d 399 (Tex. 1981), and its interpretation of the royalty clause disapproved in *Exxon Corp. v. Middleton*, 613 S.W.2d 240 (Tex. 1981). See *Williams & Meyers, 8 Oil & Gas Law* 831-32 (1984). *Lackey* involved an Oklahoma oil and gas lease that required lessee to pay lessor for gas produced from any oil well and used off the premises.

⁹ Decision at 4-5. In fact, such leases only exempted "gas used for purposes of production from and operations upon the leased area," the decision stated.

¹⁰ See note 1, *supra*. In IBLA 85-730, MOEPSI appeals from an April 1985 decision of the Director, MMS, which dismissed with prejudice an appeal from an Oct. 7, 1983, decision of the Acting Regional Supervisor for Royalty Management. In December 1982, appellant had submitted a request for a refund for royalties paid on gas produced from various OCS oil and gas leases in the Gulf of Mexico, including sec. 8 leases. By letter dated July 20, 1983, the Acting Regional Supervisor required appellant to certify that its refund request was in accordance with the July 1982 amended NTL, i.e., does not include "royalties paid on gas used outside the lease or unit area from which produced." (Italics in original.) Appellant responded in a Sept. 8, 1983, letter, referring to its earlier appeal of the amended NTL: "This is to certify that Mobil's refund request for royalties paid on lease use gas produced on Sec. 8 leases covers only produced gas that was used for the purpose of production from and operations for the benefit of the lease or unit area." The Acting Regional Supervisor then, in his Oct. 1983 decision, concluded: "The substitute certification provided by your letter dated September 8, 1983, does not show conformity to the cited NTL. Therefore, the issuance of your refund check has been suspended pending the outcome of your appeal of the NTL." Appellant filed a "protective" appeal to the Director, MMS, from this decision, noting that the issues raised therein would be resolved by a decision on its earlier appeal. In his Apr. 1985 decision, the Director, noting that he had already upheld the validity of the amended NTL in his Mar. 1985 decision, dismissed appellant's appeal "with prejudice."

In IBLA 87-321, Exxon Co., U.S.A. appeals the portion of a Dec. 23, 1986, MMS decision that affirmed the denial of a request for a refund of royalty payments made for gas from sec. 8 leases that was used off-lease or off-unit. The MMS decision was based on the July 1982 notice that such gas was not excluded from royalties.

¹¹ See, e.g., Decision of Mar. 15, 1985, in MMS-82-0403-OCS *et al.* at 3.

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Act in 1953 until the issuance of the First Notice to Lessees on the subject in 1974, the government and, to appellant's knowledge, all of its lessees had interpreted ["production saved, removed, or sold"] as excluding lost and used hydrocarbons on and outside the lease or unit area from royalty obligations," states Gulf.¹² The July 1982 notice "represented a substantive change to existing royalty payment practices associated with gas fuel usage," Exxon states.¹³ "The [July 1982] NTL * * * violates * * * the longstanding interpretation, practices and construction that the department charged with the execution of the statute had given it over the years," states Texaco.¹⁴ "From 1953 to 1974 both the government as lessor and Mobil as lessee interpreted the statutory and lease royalty provisions as exempting from the royalty obligation oil and gas used on central platform facilities and allocated lease use fuel back to producing wells located inside or outside the lease in which the central platform facility was situated," according to Mobil Oil Corp.¹⁵ Mobil submits and interoffice memorandum of a telephone conversation with the person listed as the principal author of the May and July 1982 notices as evidence of the Department's historic practice. The memorandum states that the elimination of the words "or outside" from the May 1982 notice "was not meant to exclude oil & gas used in producing operations on central facilities, gathering stations, and the like from the royalty exempt status. It *was* meant to prohibit one operator from selling oil & gas to be used in producing operations to another operation without paying MMS royalty on that oil & gas."¹⁶ (Italics in original.)

Mobil proposes that oral testimony from this person as well as accountants and officials from MMS and lessees who have been involved in OCS royalty accounting functions should be presented at a hearing to establish past agency practice on collecting royalties for lease fuel consumed on central platform facilities.¹⁷ Exxon argues that the information in the Mobil memorandum casts doubt on whether the inclusion of the words "or outside" in the May 1982 was in fact "unintentional," as MMS claimed in explaining its July 1982 deletion

¹² Statement of Reasons of Gulf Oil Corp. at 8. "[A]ppellant, and other lessees, in contesting the subject notice and decision of the Director merely are seeking to maintain a long standing customary method of computing royalty and not attempting to reap benefits from that notice." *Id.* at 7.

¹³ Notice of Appeal of Exxon Co., U.S.A., at 1.

¹⁴ Statement of Reasons of Texaco, Inc., at 4.

¹⁵ Statement of Reasons for Appeal of Mobil Oil Corp., Mobil Producing Texas & New Mexico Inc., and Mobil Oil Exploration & Producing Southeast Inc., at 10. Mobil explains further:

"Mobil's custom, like that of other producers, is to construct in the OCS waters central platform facilities, which house separation and other equipment used to gather production from satellite wells located either within or outside the lease in which the central facility is located. Traditional royalty payment practice allocated oil and gas used as fuel on central platform facilities to each well feeding into the central facility, and those wells could be located within or outside the lease block in which is situated the central platform or facility." *Id.* at 2-3. See also Sept. 17, 1982, letter from Offshore Operators Committee to Acting Associate Director for Offshore Minerals Management, Exh. B, Statement of Reasons for Appeal of Mobil Oil Corp.

¹⁶ Exh. C, Statement of Reasons for Appeal for Mobil Oil Corp., *supra* note 15.

¹⁷ Statement of Reasons for Appeal for Mobil Oil Corp., *supra* note 15 at 5-6.

of those words, and suggests that documents and testimony on MMS' reasons for the change are necessary.¹⁸

In its Answer, MMS argues the Board can resolve the legal issues presented by these appeals¹⁹ without a hearing. MMS points to a memorandum in the record that states that before 1974 gas used as fuel outside the lease or unit area from which it was produced was subject to royalty payment.²⁰ However, MMS acknowledges that "factual issues may exist as to past royalty accounting industry and agency practice for off-lease-use gas,"²¹ and also points to a memorandum stating that "there still was a question as to whether Exxon and others were correct that the USGS [Survey] past practice exempted off-lease use" and that the MMS Assistant Director for Program Review had "spent several unsuccessful weeks trying to determine if past practice exempting such off-lease use production actually occurred."²² MMS states it does not believe such practice is determinative, because "the issue is the scope of the legal requirements established under section 8(a) of the OCSLA," but suggests that if the Board does order a hearing, then it should address how lessees and MMS have accounted for all off-lease-use gas in actual practice, not just gas used as fuel at central platform facilities.²³

Under 43 CFR 4.415, the Board has discretion whether to refer a case to an Administrative Law Judge for a hearing on an issue of fact. We have held, in response to a request for a hearing, that

[a] hearing is not necessary in the absence of a material issue of fact, which if proven, would alter the disposition of the appeal. * * * This Board "should grant a hearing when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them." * * * [T]his Board has refused to grant a hearing where Geological Survey had reviewed the same information submitted to this Board and the dispute did not involve facts, but involves the proper application and interpretation of those facts.

Woods Petroleum Co., 86 IBLA 46, 55 (1985). See also *Patricia C. Alker*, 70 IBLA 211, 213 (1983). "A hearing is necessary only where there is a material issue of fact requiring resolution through the introduction of testimony and other evidence. In the absence of such an issue, no hearing is required." *KernCo Drilling Co.*, 71 IBLA 53, 56 (1983). If a hearing is ordered, the Board will specify the issues upon which the hearing is to be held. *Norman G. Lavery*, 96 IBLA 294, 299 (1987).

A hearing is necessary to resolve these appeals because "[i]n deciding to use the phrase 'saved, removed or sold' in the royalty provision of the OCS Lands Act, Congress was aware of, and is presumed to have intended that the language be defined consistently with, the

¹⁸ Notice of Appeal of Exxon Co., U.S.A., *supra* note 13 at 3, 6. See text at note 7, *supra*.

¹⁹ These issues are (1) whether the July 1982 notice is valid in light of *Amoco Production Co.*, *supra*; (2) whether the notice may be regarded as an interpretive rule not subject to notice-and-comment rulemaking procedures under 5 U.S.C. 553; and (3) whether the policy of requiring payment of royalties for off-lease-use gas is rational (Answer of Minerals Management Service at 2).

²⁰ Answer of MMS, *supra* note 19; Attachment D. The memo is dated Oct. 15, 1982, i.e., after the appeals to the Director of MMS from the July 1982 notice were filed.

²¹ *Id.* at 26.

²² *Id.*, Attachment C.

²³ *Id.* at 26-27.

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longstanding Interior Department interpretation of the 'removed or sold' language used in the royalty provision of its predecessor statute [the Mineral Lands Leasing Act, 30 U.S.C. § 181 *et seq.* (1982)]." *Amoco Production Co. v. Andrus, supra* at 794. The "pre-1974 interpretation of the OCS Lands Act" concerning whether gas or oil used for production off the lease was subject to royalty is important because courts reviewing the Department's oil and gas royalty decisions have regarded that interpretation as one with "implied legislative approval, * * * since [the OCS Lands Act] was enacted with an awareness by Congress of the administrative interpretation of the Mineral Lands Leasing Act excluding Lost and Used Hydrocarbons from royalty obligations." *Id.* The pre-1974 interpretation is also of significance where the administrative practice at issue "involves a contemporaneous construction of a statute by the men charged with setting its machinery in motion" and where the "prior long standing" interpretation differs from "the more recent *ad hoc* contention of how the OCS Lands Act should be interpreted." *Id.* at 795-96. See *Sutherland, Statutory Construction* (1984 Revision), ch. 49. Cf. *Placid Oil Co. v. U.S. Department of the Interior*, 491 F. Supp. 895 (N. D. Texas 1980); *Mesa Petroleum Co. v. U.S. Department of the Interior*, 647 F. Supp. 1350 (W.D. La. 1986).

The records of these appeals, however, do not make clear what the Department's practices regarding royalty payments for oil or gas used off the lease were under the Mineral Lands Leasing Act - or whether the Congress was aware of that practice - or under the OCS Act before 1974 and our own research has not provided any satisfactory answer.²⁴ Nor do we regard it as clear that the decision in *Amoco Production Co., supra*, governs the question of whether royalty is payable for off-lease-use gas. As Gulf states, although the parties' pleadings in the case included the "within or outside" language in discussing whether royalty payments were due for oil and gas used in leasehold operations,

²⁴ See, e.g., Williams, 3 *Oil and Gas Law* 644.5. No comments accompanied the publication of 30 CFR 250.65 and 250.66 in proposed form (19 FR 790, 799, Feb. 11, 1954) or as finally adopted (19 FR 2659, May 11, 1954). These regulations were amended only once (in 1969), to add the language underlined below, before the amendments discussed in note 3, *supra*. After the 1969 amendments these regulations provided:

"§ 250.65 Royalty on oil.

"(a) The royalty on crude oil, *including condensates separated from gas without the necessity of a manufacturing process*, shall be the percentage of the value or amount of the crude oil produced from the leased lands established by law, regulation, or the provisions of the lease. No deduction shall be made for actual or theoretical transportation losses.

"(b) Royalty shall be based on production removed from the lease except that, when conditions so warrant, the supervisor may require such royalty to be based on actual monthly production. Evidence of all shipments shall be filed with the supervisor within five days (or such longer period as the supervisor may approve) after the oil has been run by pipeline or by other means of transportation. Such evidence shall be signed by representatives of the lessee and of the purchaser or the transporter who have witnessed the measurements reported, and the determinations of gravity, temperature, and the percentage of impurities contained in the oil shall be shown.

"§ 250.66 Royalty on unprocessed gas.

"If gas, either gas-well gas or casinghead gas, is sold without processing for the recovery of constituent products, the royalty thereon shall be the percentage established by the terms of the lease of the value or amount of the gas produced."

its significance was not focused on.²⁵ The court's opinion quotes the royalty provisions excepting "gas used for purposes of production from and operations *upon the leased area*" from royalties and characterizes the 1974 notices it deemed invalid as requiring lessees "to pay a royalty on oil and gas which are * * * used in leasehold operations,"²⁶ but does not indicate whether it considered off-lease-use to be covered by those notices. Exxon argues the July 1982 notice "was an attempt to limit the scope of *Amoco* to the facts in that case rather than concede to the broader applicability indicated by the reasoning of the court in *Amoco* which was reflected in the May 1982 NTL."²⁷ That may be so, but before we can decide whether that was proper or whether *Amoco* should apply to these appeals we must know the facts about whether and under what circumstances use of oil or gas for production or operations off the lease or unit from which it was produced was exempted from royalties by the Department, and whether the Congress was aware of that practice so that it may be presumed to have intended that it continue to be followed.²⁸

Therefore, these appeals are referred to the Hearings Division for assignment to an Administrative Law Judge in accordance with 43 CFR 4.415. The parties are requested to present evidence on whether oil or gas (or both) was exempted by the Department before July 1, 1974, from the payment of royalties if used for production or operations outside the lease or unit area from which it was produced, and, if so, for what purposes and outside of what kinds of units it was exempt and whether the Congress was aware of the exemptions.²⁹ The Administrative Law Judge shall make findings of fact and conclusions of law as necessary in order to decide under what circumstances, if any, oil or gas produced under section 8 leases may be exempted from the payment of royalties. Absent timely appeal to the Board, the Administrative Law Judge's decision shall be final for the Department.

WILL A. IRWIN
Administrative Judge

²⁵ "The 'within or outside' language, then, is not new language 'unintentionally' added in the NTL published May 13, 1982. The language was present in the 1980 notice which ultimately was the only notice at issue in the *Amoco v. Andrus* case. See *Memorandum in Support of Plaintiffs' Motion for Summary Judgment*, pp. 1, 3, 9, 10; *Memorandum in Support of Defendants' Motion for Summary Judgment*, p. 8. Interestingly enough, nowhere in either plaintiffs' or defendants' brief was there any discussion of the meaning or significance of the words 'within or outside.' Instead, they were merely quoted, with no reflection concerning their import. Plaintiffs argued, for instance, that 'the government still insists, erroneously, that under leases issued subsequent to July 1, 1974, "royalty is due on oil and gas used for purposes of production from and operations within or outside the lease unit area." Plaintiffs contend that this requirement is unlawful.'" Statement of Reasons of Gulf Oil Corp., *supra* note 12 at 9-10. See also, the Answer of MMS at 32-34 discussing the language used in the parties' pleadings in *Amoco Production Co.*, *supra*.

²⁶ *Amoco Production Co. v. Andrus*, *supra* at 791. (Italics added.)

²⁷ Notice of Appeal of Exxon Corp., *supra* note 13 at 3.

²⁸ Documentary evidence of the practice and of Congressional awareness of it is, of course, preferred. Cf. *Amoco Production Co.*, *supra* at 793.

If there was no established practice, or if it cannot be said that the Congress intended to perpetuate it, then the question of whether offlease use gas should be subject to royalty will be a matter of first impression that will be resolved by the Administrative Law Judge or the Board. See *Peabody Coal Co.*, 93 IBLA 317, 323-24, 93 I.D. 394, 397-98 (1986). We would not be bound by a practice if it were not a matter that the Congress adopted. *Id.*

²⁹ For examples of kinds of purposes and kinds of units that could be involved, see NTL-4A, 44 FR 76600 (Dec. 27, 1979).

*October 2, 1986***WE CONCUR:****C. RANDALL GRANT, JR.**
*Administrative Judge***WM. PHILIP HORTON**
*Chief Administrative Judge***APPEALS OF THE U.S. FISH & WILDLIFE SERVICE, ANCAB G-
80-3, and OSCAR R. HAYNES, JR., ANCAB G-80-4*****Decided October 2, 1986****On Remand from the U.S. States District Court for the District of
Alaska, No. A-83-529 Civil. (From Decision of BLM AA-8585.)****Decision of reconsideration by the Secretary.**

APPEARANCES: Keith A. Goltz, Esq., Office of the Regional
Solicitor, Alaska Region, Anchorage, Alaska, U.S. Department of the
Interior, for the U.S. Fish and Wildlife Service; Fred A.
Slimp II, Esq., Ronald A. Zumbrun, Esq., and Robin L. Rivett, Esq.,
Pacific Legal Foundation, Sacramento, California, for Oscar R.
Haynes, Jr., *et al.*

This matter is before me on remand from the U.S. District Court for the District of Alaska. In his order of remand dated November 15, 1985, U.S. District Judge H. Russell Holland directed that: "The Secretary shall reconsider his decision herein on the extant administrative record." The court expressed the hope that these further administrative proceedings "will resolve some or all of plaintiffs' claims." (The plaintiffs in the court action are referred to as the "heirs" herein. See note 2, *infra*.)

By memorandum dated May 19, 1986, I referred the matter to the Director, Office of Hearings and Appeals, for review and preparation of a recommended decision for my signature. I requested the Director to solicit briefs from the parties as to the relevant law and facts, indicating that such briefs "may include argument and reference to the 'extant administrative record' and to any published or available material on which I could take official notice."¹ The Director established a concurrent briefing schedule. Briefing was completed on August 11, 1986.

*Not in chronological order.

¹That language was subsequently challenged in the Federal district court by the heirs, but was found by Judge Holland not to "violate the spirit of the Court's remand order." (Order dated June 30, 1986, Exh. 4 to the heirs' opening brief.)

Background

The genesis of this matter is a primary place of residence application (AA-8585) filed by Elizabeth Haynes on November 26, 1973, pursuant to section 14(h)(5) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(h)(5) (1982). The application described 160 acres on Chisik Island.² Chisik Island is one of two islands reserved and set aside by President Theodore Roosevelt in Exec. Order No. 1039 (February 27, 1909) as a preserve and breeding ground for native birds to be known as Tuxedni Reservation.³ By Proclamation No. 2416, dated July 25, 1940, Tuxedni Reservation was renamed the Tuxedni National Wildlife Refuge. Subsequently, on October 23, 1970, Congress designated the refuge as a wilderness area. 16 U.S.C. § 1132 (1982).⁴

On July 2 and 3, 1975, two Bureau of Indian Affairs (BIA) employees conducted an investigation of the lands described in the Haynes' application. On August 8, 1975, BIA issued its report on the field examination stating that Elizabeth Haynes, her husband, and four of their children were present during the examination and explaining that:

An extensive search for evidence of use and occupancy was conducted on the ground. Improvements found consisted of a 20 foot by 24 foot frame house with a 4 foot by 8 foot enclosed porch. The upper level of the house contained a kitchen, living area and two bedrooms. The lower level had six feet clear head room and a dirt floor. The lower level is used for storage and as a work shop. Also found was an eight foot by twelve foot frame cabin used as a sleeping cabin by employees who assist the Haynes family in their commercial fishing. In addition, there was a four foot by four foot smoke house and a four foot by four foot outhouse and net drying racks.

In addition to the improvements, the family has a jeep for transporation [sic] along the shore of the island, a private airplane for transportation to and from the island and several fishing boats and motors.

Evidence of use was found throughout the area applied for. A small, though unproductive garden was situated next to the house. A well worn path leads from the back of the house to the Collins cabin on the other side of the peninsula [sic].

* * * * *

The Haynes application lies within the Tuxedni National Wildlife Refuge which was established primarily to protect colonies of sea birds nesting along its shoreline cliffs. The nesting areas are so far removed from the lands used and applied for that we were unable to observe any sign of the bird colonies during the field inspection. Approval of the application could not possibly have any adverse effect on the distant nesting area. The conveyance of lands out of the National Wildlife Refuge System as a Primary Place of Residence is provided for in Section 14(h)(7) of Public Law 92-208. [Section 14(h)(7) of ANCSA, 43 U.S.C. § 1613(h)(7) (1982).]

² Her application states that in Mar. 1970 a main house, bunkhouse, smokehouse, and outhouse were purchased on the island. Elizabeth Haynes died in Anchorage, Alaska, on Jan. 2, 1978. The application has been pursued by her husband, Oscar R. Haynes, Jr., and her other heirs.

³ In the Executive order the name of the island was spelled Chisick. The other island, described as Egg Island, is now known as Duck Island. Chisik Island covers approximately 6,439 acres, while Duck Island is only 6 acres (U.S. Fish & Wildlife Service opening brief, Exh. 4 at 4).

⁴ Congress excepted from the wilderness designation approximately 50 acres below the 100-foot-contour elevation on the northern tip of Chisik Island. *Edd J. Perry*, D 88-6 (Jan. 2, 1986). The Haynes' improvements were apparently located in that area. In addition, on Dec. 2, 1980, Tuxedni National Wildlife Refuge was included in the National Wildlife Refuge System as part of the Gulf of Alaska Unit of the Alaska Maritime National Wildlife Refuge. Sec. 303(1)(A)(v) of the Alaska National Interest Lands Conservation Act, 94 Stat. 2371, 2389 (1980).

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Occupancy of the subject land by the Haynes' prior to the August 31, 1971 deadline is not in question. James B. Monnie, Refuge Manager, has entered a statement into the Bureau of Land Management case file of Elizabeth M. Haynes, AA-8585 stating that on July 29, 1971, an on the ground inspection located the improvements of the applicant. Additional verification is supplied in affidavits in the attachment section of this report.

(Field Report at 2). The report recommended approval of the application and conveyance of the entire 160 acres.

In a memorandum dated December 22, 1975, from the Acting Area Director, BIA, Juneau, to the Bureau of Land Management (BLM), Alaska State Director, the Acting Area Director stated he had reviewed the field report and supporting documents and concluded that Haynes had complied with the primary place of residence requirements. He also enclosed a Certificate of Eligibility and requested that BLM issue title to Haynes to the surface estate of the 160 acres.

On October 16, 1980, BLM issued a decision approving application AA-8585 for approximately 160 acres. Both the U.S. Fish and Wildlife Service (FWS) and Oscar R. Haynes, Jr., filed timely appeals.⁵ On January 14, 1981, Secretary of the Interior Cecil D. Andrus took jurisdiction of those appeals pursuant to 43 CFR 4.5 and issued a decision (Andrus decision). Therein, he stated that his purpose in exercising jurisdiction was to establish Departmental policy concerning the interpretation of section 14(h)(7) of ANCSA, 43 U.S.C. § 1613(h)(7) (1982), and to "adjudicate the appeal as quickly and fairly as possible under the Alaska Native Claims Settlement Act" (Andrus decision at 3). He further stated that because section 14(h)(7), 43 U.S.C. § 1613(h)(7) (1982), involved Secretarial discretion he intended the decision to "provide important and needed guidance on how to implement the section" (Andrus decision at 3).

Secretary Andrus then stated:

For purposes of this decision only, I accept both the application of Elizabeth Haynes (noting the proposed modifications of the legal description submitted by Oscar Haynes in his appeal), and the facts found in the BIA field examination report. The basis of this decision does not involve any factual disputes, rather, it involves only the establishment of policy regarding the interpretation and application of § 14(h)(7) of the Alaska Native Claims Settlement Act. The Appeal Board's discretionary authority to order hearings in cases containing factual disputes, therefore, will not be necessary. 43 CFR 4.911.

(a) It is the Department's view that when land within a National Wildlife Refuge is applied for under § 14(h)(5), as a primary place of residence, the Secretary has discretion to consider the importance of the applied for lands to the integrity, management, and use of the refuge in deciding how much land and what type of property interest to withdraw and convey out of the refuge.

(b) In exercising this discretion, the Secretary must also consider the uses described in the 14(h)(5) application and the BIA field report and determine the extent to which the applicant's uses require conveyance of refuge lands to him in fee and the extent to which such uses can be accommodated by conveying less than fee interest in all or part of the remaining applied for land.

⁵ The Haynes' appeal sought an amendment of the land description and certain other clarification of the BLM decision.

(Andrus decision at 4).

Secretary Andrus applied that policy and decided to grant fee simple title to a tract of land containing 4 acres encompassing the applicant's improvements and to grant an annual special use permit to use for personal and family reasons the balance of the applied for lands.

Subsequently, the heirs of Elizabeth Haynes sought reconsideration of the Andrus decision. BLM also sought clarification of it. On April 1, 1982, as Acting Secretary, I issued a decision (Hodel decision) reconsidering the Andrus decision and affirming it, as clarified, affirming the policy that when considering a section 14(h)(5) application: (1) "the Secretary has discretion to consider the importance of the lands to the integrity, management and use of the refuge in deciding how much land and what type of property interest to withdraw and convey out of the refuge" and (2) the Secretary is "required to consider the uses described in the section 14(h)(5) application and determine the extent to which the applicant's uses require conveyance of refuge land to her in fee" (Hodel decision at 2).

I concluded that "[a]s a matter of fact and law, it is wholly within the Secretary's discretion to withdraw and convey any amount of land from less than an acre to 160 acres for a Native primary place of residence" (Hodel decision at 3). Thus, I affirmed the decision of Secretary Andrus to convey fee simple title to 4 acres and to issue an annual special use permit for the remaining 156 acres. I clarified the Andrus decision by vacating the October 16, 1980, BLM decision, by remanding the matter to BIA for the purpose of providing a metes and bounds description of the 4-acre tract, by remanding to BLM for conveyance of the surface estate of the 4 acres to the heirs of Elizabeth Haynes with a provision that pursuant to section 22(g) of ANCSA, 43 U.S.C. § 1621(g) (1982), such lands would remain subject to the laws and regulations governing the use and development of the refuge, and by remanding the case to FWS for issuance of the annual special use permit.

On October 18, 1983, the heirs of Elizabeth Haynes filed suit in the Federal District Court for the District of Alaska challenging both secretarial decisions. The heirs subsequently moved for summary judgment. The remand order resulted from consideration of that motion.

Discussion

The principal substantive legal issue presented in this judicial remand is whether the Secretary has discretion under section 14(h)(5), 43 U.S.C. § 1613(h)(5) (1982), to convey title to less than 160 acres of land where a Native has established occupancy of the entire 160 acres.⁶

⁶ The heirs state at p. 11 of their reply brief that they are not arguing a lack of Secretarial discretion under section 14(h)(5), but that his discretion is limited to determining the amount of land used and occupied. They assert he has no discretion to reduce the amount of entitlement which is based upon proven use and occupancy.

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A subsidiary legal issue, assuming the Secretary has such discretion, is whether it is appropriate to exercise that discretion to reduce the size of the fee conveyance in this case.

The heirs have also alleged that they have been denied procedural due process by the manner in which this appeal was handled by Secretary Andrus and that his decision is so tainted that it must be declared void. (See Exh. 1 to heirs' opening brief, Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 35-39.) Surely, Judge Holland had those allegations as well as the substantive legal issues in mind when he expressed hope that these administrative proceedings would resolve some or all of the heirs' claims. It is unfortunate that Secretary Andrus took jurisdiction of this case and issued a decision without giving prior notice to the parties and without obtaining the record from the Alaska Native Claims Appeals Board.⁷ Any "taint" which may have resulted from that procedure, however, should have been removed by the procedures which have been followed in this reconsideration, which were designed to afford the heirs full administrative due process. The parties were given the opportunity to brief whatever they considered to be relevant law and fact. Extensive opening and reply briefs were filed by both sides. The matter was then reviewed by and a recommended decision prepared by the Director, Office of Hearings and Appeals, a quasi-judicial official of the Department who was not an employee of the Department when this matter was previously reviewed administratively.⁸ I have adopted the Director's recommended decision in its entirety.

I am persuaded that the policy announced at page 4 of the Andrus decision and affirmed at page 2 of my earlier decision is sound and is consistent with sections 14(h)(5) and 14(h)(7) of ANCSA. I reaffirm that policy statement.

Section 14(h)(5) of ANCSA, 43 U.S.C. § 1613(h)(5) (1982), provides:

The Secretary is authorized to withdraw and convey 2 million acres of unreserved and unappropriated public lands located outside the areas withdrawn by sections 1610 and 1615 of this title, and [sic] follows:

* * * * *

(5) The Secretary *may convey* to a Native, upon application within two years from December 18, 1971, the surface estate in not to exceed 160 acres of land occupied by the Native as a primary place of residence on August 31, 1971. Determination of occupancy shall be made by the Secretary, whose decision shall be final. The subsurface estate in

⁷ On Oct. 29, 1985, the Department, sensitive to the need that all levels of its administrative review process be perceived by the public as fair, amended 43 CFR 4.5 to provide that if the Secretary assumes jurisdiction of a case the parties will be advised in writing of that action and the administrative record will be requested before a written decision is issued. 50 FR 43705.

⁸ Departmental counsel previously offered the heirs the opportunity for a full administrative hearing. That offer was rejected. (See Exh. 3 to heirs' opening brief, Memorandum in Opposition to "Motion for Order Clarifying Scope of Remand for Reconsideration based on Extant Administrative Record and for Expedited Consideration by the Court," at 3 and 5.)

such lands shall be conveyed to the appropriate Regional Corporations unless the lands are located in a Wildlife Refuge * * *. [Italics added.]

Section 14(h)(7) of ANCSA, 43 U.S.C. § 1613(h)(7) (1982), states: "The Secretary *may* withdraw and convey lands out of the National Wildlife Refuge System and out of the National Forests, for the purposes set forth in paragraphs (1), (2), (3), and (5) of this subsection * * *." (Italics added.)

As a general rule, the word "may" is permissive, not mandatory. *Farmers and Merchants Bank v. Federal Reserve Bank*, 262 U.S. 649, 662 (1923), *Bennett v. Panama Canal Co.*, 475 F.2d 1280, 1282 (D.C. Cir. 1973). However, as pointed out by the heirs, that rule has exceptions. The heirs direct attention to *Thompson v. Clifford*, 408 F.2d 154, 158 (D.C. Cir. 1968), which states that:

"May" ordinarily connotes discretion, but neither in law nor legal understanding is the result inexorable. Rather, the conclusion to be reached "depends on the context of the statute, and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty." [Footnotes omitted.]

The heirs argue that the legislative history of section 14(h)(5) of ANCSA supports their position that "may" should be construed as mandatory.

The legislative history cited by the heirs at pages 27-29 of exhibit 1 of their opening brief is not persuasive of their contention.⁹ Counsel for FWS points out at page 9 of his responding brief that two of the heirs' references, the April 27, 1971, letter and the September 28, 1971, House Report, relate to section 11(f) of H.R. 10367 which on October 21, 1971, provided:

Upon application prior to June 20, 1992, the Secretary *shall* issue a patent to the surface estate of not to exceed one hundred and sixty acres of land withdrawn by section 9(c) to any Native whom the Secretary determines occupied the land as a primary place of residence on the dates of this Act. [Italics added.]

(FWS responding brief, Exh. 10 at 33-34). The fact that as of December 18, 1971, the date of enactment of ANCSA, that language had been modified to provide that the "Secretary *may* convey" is evidence that Congress was aware of the distinction between "shall" and "may" and intended that they be accorded their common meanings. Further support for this position is found by comparing the various provisions of section 14(h) of ANCSA. Thus, in subsections (1), (2), (3), (5), and (7) of that section Congress used the term "may," while in subsections (4), (6), and (8), the word "shall" is used to mandate Secretarial actions. The courts have stated that the contrasting use of

⁹ Those documents are: (1) Conference Report No. 92-746, cited at 1971 U.S. Code Cong. & Ad. News 2248; (2) Letter of then-Secretary of the Interior Rogers C. B. Morton, dated Apr. 27, 1971, to Honorable Wayne N. Aspinall, Chairman, House Committee on Interior and Insular Affairs, cited at 1971 U.S. Code Cong. & Ad. News 2204; (3) Letter of then-Secretary of the Interior Morton, dated Apr. 5, 1971, to Honorable Carl Albert, Speaker of the House of Representatives, outlining the Department's proposed Alaska Native Claims Settlement Act legislation, cited at 1971 U.S. Code Cong. & Ad. News 2218; and (4) House Report No. 92-523, dated Sept. 28, 1971, the Report of the House Committee on Interior and Insular Affairs on H.R. 10367 which eventually passed as ANCSA, cited at 1971 U.S. Code Cong. & Ad. News 2197.

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"shall" and "may" in the same statute is generally significant, indicating an intent to distinguish between the meaning of those two terms. *Bennett v. Panama Canal Co.*, *supra*. Neither the legislative history nor the context of the statute supports the position espoused by the heirs.¹⁰ Moreover, the acreage available for conveyance under all of section 14(h) of ANCSA was expressly limited to 2 million acres. The potential for overselection was very real. Therefore, it is not unreasonable to assume that Congress, recognizing this potential, intentionally provided the Secretary with the flexibility necessary to address such a problem.¹¹

The heirs assert that ANCSA is a statute intended to benefit Natives and, thus, is entitled to a liberal construction favoring Native interests. Such an assertion does not dictate the result the heirs seek. To the extent that there is less land available for selection than those making selections might show "entitlement" to, the ultimate competition will be between competing Native interests, not between Natives and non-Natives. See Andrus decision at 6, 1st par.

The heirs also argue that conveyances of land are to be in fee, citing 1971 U.S. Code Cong. & Ad. News 2199, and that the Secretary cannot convey a determinable fee subject to a condition subsequent with right of reentry.¹² The cited legislative history refers to conveyances to village and regional corporations, not to primary place of residence conveyances. Thus, it does not compel the result for which the heirs argue. However, the Secretarial action in this case is not inconsistent with the heirs' assertion. In the exercise of his discretion Secretary Andrus determined to grant to the heirs a primary place of residence of 4 acres. The granting of an annual special use permit for 156 acres was not an action taken pursuant to section 14(h)(5) of ANCSA. Rather it was a discretionary action taken in accordance with the Secretary's authority under 16 U.S.C. § 668dd(d)(1)(A) (1982), to allow the use of areas within the National Wildlife Refuge System. Also section 1302 of ANILCA, 16 U.S.C. § 3192 (1982), provides a statutory basis for

¹⁰ ANCSA repealed the Alaska Native Allotment Act of 1906, 34 Stat. 197 (1906), 43 U.S.C. § 1617(a) (1982). The principal place of residence provisions of ANCSA were to some extent intended to provide qualifying Alaska Natives who did not have an allotment application filed by the date of enactment of ANCSA two additional years within which to establish a claim for an existing place of residence. See *Rose Perley Miller*, 93 IBLA 147, 153 (1986). The 1906 Act specifically authorized the Secretary to grant allotments "in his discretion and under such rules as he may prescribe." (Italics added.)

¹¹ Where there is a limited public resource and a high potential for overselection, giving the controller of the resource discretion in distributing it seems to be more equitable than a first-come, first-served alternative.

¹² This reference by the heirs is to the statement in the Andrus decision at p. 7 that conveyance of the 4 acres would be subject to the condition that

"if at any time the lands are used for purposes other than as a primary place of residence, the Secretary shall have the power to reacquire these lands for the fair market value of such lands as a primary place of residence, and terminate the interests described in paragraph (2) below [special use permit]."

However, that statement was modified in the Hodel decision when at page 4 it was stated: "Under section 1302(a) of the Alaska National Interest Lands Act [sic], 16 U.S.C. § 3192, the Secretary retains the authority to reacquire the surface estate conveyed should the Secretary determine that the lands are no longer occupied for the purpose described in section 14(h) of ANCSA."

retaining authority to reacquire lands within the National Wildlife Refuge System.¹³

The heirs have made other arguments relating to legislative history and statutory construction which were effectively rebutted by FWS in its briefs. While I have not specifically addressed those arguments, I have considered and rejected them.

Having concluded that the Secretary has discretion under section 14(h)(5) of ANCSA to convey title to less than 160 acres of land where a Native has established occupancy of the entire 160 acres, it is necessary to determine whether such discretion has been appropriately exercised in this case. The Secretary of the Interior is daily faced with making decisions wherein there are significant competing interests, not just between the Department of the Interior and other governmental agencies or private groups or individuals, but within the Department itself. The Department is composed of bureaus and agencies which share in common an interest in public and/or trust lands, but whose responsibilities and duties with respect to those lands are widely divergent. Interests vary from preservation to development. Statutory mandates impose on the Secretary management responsibilities which range from one end of the spectrum to the other.¹⁴ With such mandates, choosing between conflicting and competing interests is a significant inherent responsibility of any Secretary of the Interior. How does a Secretary make such choices? By bringing to bear on an issue all of his accumulated knowledge and by applying to that knowledge his best judgment. That this is a necessary and proper part of policymaking is recognized by Professor Kenneth Davis in his treatise on administrative law:

In all adjudication by courts and agencies, judicial notice and official notice are ever-present, for no judge or administrator can possibly think about any questions of fact, law, policy, or discretion without using extrarecord facts. * * * Anyone's thinking involves his previous understanding and experience, necessarily including not only

¹³ That section reads in pertinent part:

"(a) General authority

Except as provided in subsections (b) and (c) of this section, the Secretary is authorized, consistent with other applicable law in order to carry out the purposes of this Act, to acquire by purchase, donation, exchange, or otherwise any lands within the boundaries of any conservation system unit other than National Forest Wilderness.

"(b) Restrictions

Lands located within the boundaries of a conservation system unit which are owned by—

* * * * *

"(C) the actual occupant of a tract, title to the surface estate of which was on, before, or after December 2, 1980, conveyed to such occupant pursuant to section 1613(c)(1) and (h)(5) of Title 43, unless the Secretary determines that the tract is no longer occupied for the purpose described in section 1613(c)(1) or (h)(5) of Title 43 for which the tract was conveyed and that activities on the tract are or will be detrimental to the purposes of the unit in which the tract is located; or

"(D) a spouse or lineal descendant of the actual occupant of a tract described in subparagraph (C), unless the Secretary determines that activities on the tract are or will be detrimental to the purposes of the unit in which the tract is located—may not be acquired by the Secretary without the consent of the owner."

¹⁴ For example, sec. 302(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(a) (1982) provides: "The Secretary shall manage public lands under principles of multiple use and sustained yield * * *." The 26-line definition of "multiple use" at 43 U.S.C. § 1702(c) (1982) begins: "The term 'multiple use' means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people," and includes "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values; * * *."

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mental equipment but also knowledge of general facts and often knowledge of specific facts. * * * Facts in the mind of a judge or administrator merges with understanding and with thinking processes; one who has to exercise judgment necessarily uses the facts he knows and deems relevant, whether or not the facts are in the record of the particular case.

3 K. Davis, *Administrative Law Treatise*, § 15.1 at 133. Professor Davis continues at section 15.2, page 139:

[W]hen a court is confronted with a question of law or policy on which it needs facts to guide its judgment, the judicial custom over the centuries has been that the court may go anywhere for its facts. A court must bring wisdom to bear on issues of law and policy, but the needed wisdom is made up of multifarious ingredients—that often defy identification and usually defy separation from other ingredients—knowledge of specific facts, understanding of general facts, prior experience in trying to solve similar problems, scientific information, mental processes such as logic or reasoning, mental processes such as appraising or estimating or guessing, formulation of notions about policy, imagination or inventiveness, intuition, controlled emotional reactions. Because of the intrinsic nature of the human mind, no possibility exists for creating law or policy without using mixtures of such ingredients, and no possibility exists of putting all of them into a party-prepared record of evidence. Judges who think creatively cannot confine their thoughts to facts that parties have prepared in a formal record of evidence. [15]

Professor Davis states that the “practice of using extrarecord facts for deciding questions of law and policy is deeply established” and “has been accepted by the legal profession without challenge.” *Id.* at 141.

The heirs claim in essence that none of this applies when the competing interests include the property rights of Native Alaskans, that the fiduciary responsibility of the Secretary to the Native Alaskans in such cases is paramount and must take precedence over all other interests. In dealing with the same statute, the U.S. District Court for the District of Alaska had this to say about the Secretary’s fiduciary responsibility:

In the context of this statute, the Court finds that the Secretary was obliged, in a broad sense, to act in the nature of a trustee, which required him, at the least, not to disadvantage the Natives without good cause. This does not resolve the question, however. It must be recognized that under the statute and regulations the Secretary occupied a position as a quasi-judicial officer, and whatever trust responsibility he may have had did not extend so far as to require him to abandon his role as a neutral, impartial and disinterested decisionmaker. Clearly, Congress did not intend for all issues to be decided in favor of the Natives regardless of the underlying situation. This is particularly true where the interest competing with the Natives’ was that of the public, to whom the Secretary as a governmental servant also had a solemn responsibility.

Koniag, Inc. v. Kleppe, 405 F. Supp. 1360, 1373 (D. Alaska 1975), *aff’d in part and rev’d in part sub nom. Koniag, Inc. v. Andrus*, 580 F.2d 601 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978).

The heirs assert that the Secretary acted arbitrarily and capriciously in exercising his discretion because the extant administrative record

¹⁵ While Professor Davis refers in this excerpt only to courts, it is clear from the context that he believes that the same principles apply to policymaking at the administrative level.

does not support the action taken. The heirs cite four findings in the Andrus decision which "purportedly justify the exercise of discretion" (Heirs opening brief at 12).¹⁶ These findings, they claim, are not based on evidence contained in the record and, in fact, contradict the BIA field report which concluded that approval of the application "could not possibly have any adverse effect on the distant nesting area" (Field report at 2). The heirs charge that the Secretarial decisions are without evidentiary support in the extant administrative record.

In exercising his discretion, Secretary Andrus was not limited by a specific finding in the record as to where certain bird nesting areas were located. The record does contain a memorandum dated June 20, 1979, from BLM Area Wildlife Biologist Larry S. Mangan to the BLM Area Manager which states: "Although the parcel itself contains no sea bird colonies, there is a real danger of domestic animals (dogs, cats, and other potential avian predators) being introduced on the island and depredating some of the colonies." The writer of the memorandum recommended that the application be rejected "[b]ecause the refuge was created to protect the wildlife resources and because issuance of a patent could indirectly diminish these resources." The entire island is part of a wildlife refuge and nearly all of it is part of the wilderness preservation system. The Secretary's responsibility is to the island as a whole, not to any specific nesting areas.

There are documents in the record which support the "four findings." There are topographical maps and ground and aerial photographs which demonstrate the flatness of the area applied for by Haynes and the relative steepness of most of the island. There is a letter dated December 4, 1979, addressed to Secretary Andrus from James K. Barrett, Chairman, Alaska Chapter Sierra Club, which states in part: "[T]he north end of Chisik Island covered by the application is an important public use area for refuge visitors. It contains the only level area for camping on the island, including the sole source of fresh water, and is the most suitable landing place for persons visiting the refuge by boat, given the otherwise steep topography of Chisik Island." The heirs complain about the findings, but have made no effort to refute them.

So, while Secretary Andrus did not cite a source or sources for his findings, there is support in the record for them. In the final analysis, however, the sustainability of his decision does not require reliance upon those findings. The importance of Chisik Island as a sea bird

¹⁶ Those findings, as listed by the heirs, are:

"1. 'The public will be, for all practical purposes, eliminated from use of the Island for wilderness biking, camping and study if they cannot have access to and across the northern tip of the Island.' Plaintiffs' Memorandum, Exh. I at 6.

"2. 'The northern section is the only suitable flat area on the island that offers safe operation for beach tent camps. *Id.*

"3. '[F]resh water sources are extremely limited on the Island; the only practical one for public use would be lost with removal of this area from the refuge.' *Id.* at 7.

"4. '[I]t is critical that the northern tip of the Island not be entirely or substantially withdrawn and conveyed in fee.' *Id.*"

(Heirs opening brief at 11-12).

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sanctuary cannot be denied (FWS opening brief, Exh. 4 at 3). In addition, Chisik Island is not only part of the National Wildlife Refuge System, but it is also, except for a small area, designated as a wilderness area. Section 4(b) of the Wilderness Act of September 3, 1964, 16 U.S.C. § 1133(b) (1982), provides:

[E]ach agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.

See also FWS opening brief, Exh. 4. Thus, the Secretary of the Interior is under statutory mandates to not only administer the National Wildlife Refuge System (16 U.S.C. § 668dd(a)(1) (1982)) and ANCSA, but also to administer wilderness areas so as to preserve wilderness values.

The decision by Secretary Andrus to limit conveyance of a fee interest to 4 acres encompassing the Haynes' improvements on the basis of the Secretary's discretion represented a balancing of all the competing interests involved in this case. The decision is adequately supported on the basis of the Secretary's mandated responsibilities alone, without regard to specific factual findings, and is one with which I continue to agree. As Secretary Andrus stated in his January 14, 1981, decision:

Thus, three goals are met by this decision. First, the dwelling structures constituting the applicant's primary place of residence are secured for the sole use of the applicant's heirs as are 4 acres surrounding the structures. Second, the public use and enjoyment of the refuge is assured as are certain management options in accordance with Congressional wilderness mandates. Third, the applicant's heirs can continue using the public land surrounding their property for those purposes described in the 14(h)(5) application and in the BIA field report.

(Andrus decision at 8).

Accordingly, the Andrus decision is affirmed as clarified by my decision of April 1, 1982.

DONALD PAUL HODEL
Secretary

In Re L.W. OVERLY COAL CO.*

Decided June 29, 1987

Cessation Order No. 80-1-69-1.

Decision by the Secretary in a civil penalty proceeding, reversing an Order of Dismissal by an administrative law judge and remanding for hearing.

*Not in chronological order.

This matter is before me on a letter of "appeal" from counsel for L.W. Overly Coal Co. (Petitioner) to me dated October 2, 1986, from an Order of Dismissal entered by Administrative Law Judge Joseph E. McGuire on August 16, 1984. Petitioner filed a petition for discretionary review with the Interior Board of Land Appeals (IBLA) on August 30, 1984. That petition was denied by order dated December 6, 1984.

There is no right of appeal to the Secretary from decisions of members of the Office of Hearings and Appeals. Under 43 CFR 4.1270(f), if a petition for discretionary review of an order or decision by an administrative law judge disposing of a civil penalty proceeding brought pursuant to the Surface Mining Control and Reclamation Act is denied by IBLA, the decision of the administrative law judge is final for the Department. The Secretary has, however, in 43 CFR 4.5(a), reserved the authority to review decisions of administrative law judges.

Petitioner's October 2, 1986 letter was referred to the Director, Office of Hearings and Appeals (Director) for review and appropriate action. The Director determined that the letter should be treated as a request for Secretarial review and, by order dated November 6, 1986, granted the request for review and established briefing deadlines. The final brief was filed on January 21, 1987.

Although the Director's delegated authority to review IBLA decisions under 43 CFR 4.5 is coextensive with the Secretary's reserved authority, the Director does not have authority to review decisions of administrative law judges. Since IBLA merely denied the petition for discretionary review, it is the substantive decision of the administrative law judge which is being questioned. Therefore, the Director referred the matter back to me for decision.

Petitioner seeks "either the return of the [\$22,500 paid by L.W. Overly to the Department in connection with the captioned matter] or . . . a hearing . . . to determine the reasonableness and legality of the assessment.

The petitioner was issued a notice of violation on February 12, 1980 for, among other things, failing to pass all surface drainage from the area disturbed by its mining operation through a sedimentation pond or series of ponds as required by 30 CFR 715.17(a). Petitioner was assessed a proposed penalty of \$3,080 for the violation. On July 17, 1980, petitioner filed a petition for review of the assessment with the Office of Hearings and Appeals (OHA). The Office of Surface Mining Reclamation and Enforcement (OSMRE) moved to dismiss the petition on the grounds that petitioner had failed to pay the amount of the proposed penalty into escrow as required by 43 CFR 4.1152(b) and 30 CFR 723.18(a). Without explanation, the administrative law judge to whom the case was assigned did not grant the motion to dismiss; instead, he directed petitioner to file an amended petition "which fulfills the requirements of" the regulations. On September 26, 1980, petitioner filed an amended petition, including payment into escrow of \$3,080. OSMRE filed an amended answer joining in the request for a

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hearing. Subsequently, in June 1981, the matter was settled for the sum of \$460 by mutual consent.

In the meantime, on May 13, 1980, the captioned cessation order was issued against petitioner for failing to abate the aforementioned violation. In due course, petitioner was assessed a proposed civil penalty of \$22,500 (\$750 per day for 30 days) pursuant to 30 U.S.C. § 1268(h) (1982). Following an assessment conference, petitioner was notified on May 30, 1984, that the proposed assessment was affirmed at \$22,500. Under 30 CFR 723.19(a), petitioner had 15 days following notice within which to contest the assessment by filing a petition with OHA and depositing in escrow a check in the amount of the assessment.¹ As before, petitioner filed a timely petition for review on June 4, 1984, but failed to include the required payment.

After the 15-day appeal period had expired, Lloyd A. Cook, the attorney in the Field Solicitor's Office in Pittsburgh who was handling the case for OSMRE (and who had not received the file from OHA until June 14, 1984), telephoned petitioner's attorney and advised him that since petitioner had not prepaid the civil penalty, it was his intent to file a motion to dismiss. While the full extent of the telephone conversation is unknown, it was followed by petitioner's submitting a check to OHA in the required amount. The check was received on June 29, 1984. On that same day, Mr. Cook prepared an answer to the petition joining in petitioner's request for a hearing. The answer was received at OHA on July 2, 1984. On July 24, 1984, Judge McGuire noticed up a hearing for August 24, 1984.

During July, the case was transferred to another staff attorney in the Pittsburgh field office who, unaware of the prior telephone conversation, prepared and filed a motion to dismiss, which was granted by Administrative Law Judge McGuire on August 16, 1984.

While the petition for discretionary review was pending before IBLA, counsel for OSMRE, apparently having become aware of the June telephone conversation between Mr. Cook and petitioner's counsel, moved IBLA to remand the case to the administrative law judge for reconsideration and hearing on the motion to dismiss for the reason that "certain factual matters with regard to the pre-payment issue are either in dispute or not part of the record." Later, in response to a request for further information from IBLA, the OSMRE attorney filed an affidavit with IBLA, which stated in part:

As the Solicitor's Office informed L.W. Overly of the prepayment requirement after the 15 day time period set forth in 43 CFR 4.1151(b) had passed; as it would appear that L.W. Overly relied upon the statements of the Solicitor's Office by promptly prepaying the amount of the civil penalty; and as the Solicitor's Office joined in L.W. Overly's request for hearing on June 29, 1984, the Office of the Solicitor is of the opinion that the

¹ The letter by which petitioner was notified of the affirmed assessment stated that "[y]our petition must be accompanied by a check or money order...." It went on to state that if the payment was not made with the petition, "you may forfeit your right to a hearing." (Italics in original.) By this time it was well-established in law that prepayment of the penalty was jurisdictional and that failure to prepay would result in dismissal of the petition without hearing. *Graham v. Office of Surface Mining Reclamation & Enforcement*, 722 F.2d 1106 (3rd Cir. 1983); *Blackhawk Mining Co., Inc. v. Andrus*, 711 F.2d 753 (6th Cir. 1983); *B & M Coal Corp. v. Office of Surface Mining & Enforcement*, 699 F.2d 381 (7th Cir. 1983).

Motion to Remand should be granted in accordance with the principles of fairness and equity.

In its order denying the petition for discretionary review, IBLA noted:

However regrettable the statements made by the Office of the Field Solicitor, reliance on them by petitioner cannot operate to vest any right not authorized by law. Prepayment of a proposed civil penalty assessment is required by 30 U.S.C. § 1268(c), 30 CFR 723.19(a) and 43 CFR 4.1152(b) and failure to timely prepay results in a waiver of all rights to contest the penalty and deprives the Office of Hearings and Appeals of jurisdiction.

By petition filed with IBLA on June 24, 1985, petitioner sought refund of the escrow payment, stating that the "money was forwarded at the direction of the Field Solicitor's Office for the purpose of obtaining an administrative review of the proposed civil penalty, and for no other purpose. Since no administrative review was provided, on the grounds of lack of jurisdiction, this money should be forthwith remitted and returned." IBLA, treating the petition as a request for reconsideration, rejected that argument: "[A]lthough petitioner intended his payment to be for the purpose of securing administrative review, because it was late there was no jurisdiction to conduct such review and the payment served the purpose of paying the penalty for the cessation order." (IBLA order dated September 30, 1985.)

As a matter of general policy, if a person seeking administrative review of a proposed assessment of a civil penalty under SMCRA tenders prepayment of the penalty and if administrative review is subsequently denied because the payment was late or in an inadequate amount, then the amount tendered should be returned to such person and collection should be pursued through normal collection channels. It is inappropriate for the Department to retain the funds when the purpose for which they were remitted is not accomplished. In the unique circumstances of this case, where petitioner's first instance of late payment was excused by the administrative law judge and where the second instance of late payment may have been encouraged by a member of the Solicitor's office, principles of fairness and equity provide sufficient grounds for affording petitioner an opportunity for hearing.

Therefore, the Order of Dismissal dated August 16, 1984, is reversed and the matter is remanded to OHA for a hearing and a decision on the merits.

DONALD PAUL HODEL
Secretary

July 10, 1987

**STAR LAKE RAILROAD CO. v. NAVAJO AREA DIRECTOR,
BUREAU OF INDIAN AFFAIRS, & NAVAJO TRIBE OF INDIANS**

15 IBIA 220

Decided July 10, 1987

Appeal from a decision of the Area Director, Navajo Area Office, Bureau of Indian Affairs, terminating a right-of-way over Navajo tribal trust lands.

Affirmed.

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

Upon the expiration of the 30-day time period established by 25 CFR 2.19(b), any party to an appeal pending before the Bureau of Indian Affairs official exercising the review authority of the Commissioner of Indian Affairs may invoke the jurisdiction of the Board of Indian Appeals.

2. Indians: Lands: Rights-of-Way--Indians: Lands: Tribal Lands--Statutory Construction: Indians

Federal statutes concerning rights-of-way over tribal lands, and concerning tribal lands generally, evidence congressional intent to vest Indian tribes with power to control the use of their own lands.

3. Indians: Lands: Rights-of-Way--Indians: Lands: Tribal Lands--Regulations: Interpretation--Statutory Construction: Indians

25 CFR 169.20, providing for the termination of rights-of-way over Indian lands, is subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

4. Indians: Land: Rights-of-Way--Indians: Lands: Tribal Lands--Regulations: Interpretation--Statutory Construction: Indians

Where 25 CFR 169.20 provides for the termination of a right-of-way for nonuse for a consecutive 2-year period for the purpose for which the right-of-way was granted, no provision of statute, regulation, or the right-of-way documents authorized the Bureau of Indian Affairs to excuse involuntary nonuse without the consent of the tribe.

APPEARANCES: Jerome C. Muys, Esq., and John F. Shepherd, Esq., Washington, D.C., and Jeffrey T. Williams, Esq., Chicago, Illinois, for appellant; Arthur Arguedas, Esq., Office of the Solicitor, U.S. Department of the Interior, Window Rock, Arizona, for appellant; Paul E. Frye, Esq., Albuquerque, New Mexico, for the Navajo Tribe.

***OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE VOGT
INTERIOR BOARD OF INDIAN APPEALS***

Appellant Star Lake Railroad Co. challenges a February 12, 1986, decision of the Area Director, Navajo Area Office, Bureau of Indian Affairs (appellee; BIA) to terminate appellant's 2.726-mile right-of-way

over Navajo tribe trust lands in McKinley and San Juan Counties, New Mexico. For the reasons discussed below, the Board affirms that decision.

Background

In 1974, appellant, a wholly owned subsidiary of the Atchison, Topeka and Santa Fe Railway Co. (Santa Fe), announced plans to construct a railroad line into the San Juan Basin in northwestern New Mexico to provide transportation for coal to be mined in the Star Lake-Bisti area. The proposed line was to run from a connection on the existing line of the Santa Fe Railway near Baca (Prewitt), New Mexico, northeasterly through Hospah to Pueblo Pintado, a distance of about 62 miles, at which point the line was to branch off eastward some 10 miles to Star Lake with an additional 44 miles northwestward through Gallo Wash. The total length of the proposed line was approximately 114 miles. It was to cross Federal, State, tribal trust, trust allotted, and private lands.

In December 1979, pursuant to approval given by the Secretary of the Interior in August 1979, the Bureau of Land Management (BLM) granted a right-of-way to appellant over 12 miles of public lands. The Secretary's approval stipulated that construction would not begin until BIA approved a right-of-way across Indian lands.

On January 15, 1981, the Assistant Secretary-Indian Affairs authorized and directed appellee to approve, on or before January 16, 1981, a right-of-way for appellant over Navajo tribal trust lands. The Assistant Secretary specified that the right-of-way was to incorporate an agreement dated January 12, 1981, between the Navajo Tribe (tribe), appellant, and Santa Fe. On January 16, 1981, appellee granted an easement for a 2.726-mile right-of-way, containing approximately 58.384 acres, to appellant. The right-of-way grant incorporated the January 12 agreement. It also contained the following proviso:

PROVIDED, that this right-of-way shall be terminable in whole or in part by the Grantor for any of the following causes upon 30 days' written notice and failure of the Grantee within said notice period to correct the basis for termination (25 CFR 161.20): [¹]

A. Failure to comply with any term or condition of the grant or the applicable regulations, including but not limited to requirement for archaeological clearance prior to construction.

B. A nonuse of the right-of-way for a consecutive two-year period for the purpose for which it was granted.

¹ 25 CFR Part 161 was redesignated Part 169 at 47 FR 13327 (Mar. 30, 1982). Sec. 169.20 provides:

"All rights-of-way granted under the regulations in this part may be terminated in whole or in part upon 30 days written notice from the Secretary mailed to the grantee at its latest address furnished in accordance with § 169.5(j) for any of the following causes:

"(a) Failure to comply with any term or condition of the grant or the applicable regulations;
"(b) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted;
"(c) An abandonment of the right-of-way.

"If within the 30-day notice period the grantee fails to correct the basis for termination, the Secretary shall issue an appropriate instrument terminating the right-of-way. Such instrument shall be transmitted by the Secretary to the office of record mentioned in § 169.15 for recording and filing."

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- C. An abandonment of the right-of-way.
- D. Failure of the Grantee, upon the completion of construction, to file with the Grantor an affidavit of completion pursuant to 25 CFR 161.16.

Consideration for the right-of-way was \$11,672.80.²

Sometime prior to October 24, 1984, the tribe notified appellee that it wanted the right-of-way terminated.³ On October 24, 1984, appellee wrote to appellant stating that the tribe had requested termination, and that certain bases for termination of the right-of-way existed:

1. Failure to use the right-of-way for a consecutive two-year period for the purpose for which it was intended.

Field inspection of the tracts of land cited in the easement reveal that construction of the railroad has not commenced, and therefore, that the Star Lake Railroad Company could not have used the right-of-way for the purpose for which it was intended; i.e., operation of a line of rail. Our records further show that supplemental archaeological clearance reports have not been filed.

2. Failure to comply with various terms, conditions and stipulations contained in the January 12, 1981 agreement between the Navajo Nation, Star Lake Railroad, and Atchison, Topeka and Santa Fe Railroad, in that:

[a] The Star Lake Railroad Company failed to submit to the Navajo Land Administration Department, Window Rock, Arizona, a proposed handbook concerning damage claims, policies and procedures by February 11, 1981 as required by Paragraph 4 of Agreement.

[b] Star Lake Railroad Company failed to submit [to] the Navajo Nation a proposed handbook concerning employee conduct as required by Paragraphs 8 and 10 of the Agreement.

Appellee's letter concluded:

You have thirty [30] days to correct the deficiencies cited in this letter to demonstrate to our satisfaction that the above factual allegations are not correct. If you fail to do so within the 30-day period, the January 16, 1981 Grant of Easement for Right-of-Way shall be terminated in whole.

Appellant responded by letter of November 20, 1984, stating in relevant part:

Star Lake has intended and still intends to construct a line of railroad across the right-of-way easement, as evidenced by its application to the Interstate Commerce Commission and continued prosecution thereof against the opposition thereto generated through the DNA-People's Legal Services, Inc. However, despite these efforts of Star Lake, the Interstate Commerce Commission has yet to issue its final decision approving such construction, thus rendering the inability of Star Lake to exercise further use of its easement through actual construction of the rail line involuntary on its part.

Appellant also stated that it had furnished the handbooks required by the agreement to the tribal attorney and a tribal employee.

² The Jan. 12 agreement also provided that appellant would furnish certain benefits to the tribe and its members. These benefits included construction of sidetracks and other facilities for use by Navajos, employment preference and training for Navajos, and contribution to a college scholarship program for Navajo students (Agreement at secs. 12, 13, 14, and 15).

³ The record contains an undated memorandum addressed to appellee and entitled, "Notification of Termination of Right-of-Way to Star Lake Railroad and Request for Action by Navajo Area Director." It is signed by the tribe's Attorney General. Appellee's Oct. 24 letter and the Attorney General's memorandum both refer to a Nov. 8, 1983, resolution of the Advisory Committee of the Navajo Tribal Council requesting appellee to notify appellant that the right-of-way was terminated.

On December 21, 1984, appellee terminated appellant's right-of-way on the grounds that appellant had failed to show it had in any way used the right-of-way for the purpose for which it was intended. Appellee noted that BIA's records contained no status report from appellant or requests for extension of the 2-year period in which to begin construction.⁴

Appellant appealed the termination to the Acting Deputy Assistant Secretary-Indian Affairs who, on August 29, 1985, remanded the matter to appellee for further consideration. The Acting Assistant Secretary concluded that appellee had not adequately explained his decision and that he should have analyzed the issue with respect to the best interests of the tribe. The decision concluded:

Because the decision to terminate is a discretionary one and one which rests with the Area Director, and because it is apparent from a review of his December 21, 1984, decision that his reasoning was not adequately explained, I am hereby remanding the matter for his consideration. In the process of considering whether the termination is in the best interests of the tribe, questions to be addressed include, but are not limited to, the following: 1) have any of the factual conditions surrounding the grant of easement changed since the December 21, 1984, decision, 2) was the Navajo Tribe being hurt by continuation of the grant, and 3) will any benefits accrue to the tribe from any extension that Star Lake might seek?

(Aug. 29, 1985, Decision at 3).

In his February 12, 1986, decision on remand, appellee discussed the points required by the Acting Deputy Assistant Secretary and concluded:

I hereby affirm the December 21, 1984 decision to terminate the January 16, 1981, Grant of Easement for Right-of-way on the following grounds:

1) Grantee Star Lake failed to demonstrate that it had in any way sued the right-of-way for the purpose for which it was intended or to otherwise cure the default including a timely filing of a request for an extension of time. The term of the grant of easement makes it mandatory that the easement be terminated; therefore, no extension of time can be granted.

2) There is substantial evidence that the reinstatement or extension of the grant of easement would not be in the best interest of the Navajo Tribe.

3) To extend the grant of easement at this time would only be based upon the "intentions" of the grantee to use the right-of-way sometime in the future and such "use" is purely based upon "speculations" for the future development and marketing of coal leases held by Star Lake sometime in the future.

(Feb. 12, 1986, Decision at 8). By letter dated March 4, 1986, appellant appealed this decision to the Assistant Secretary-Indian Affairs. The tribe filed answer briefs.

[1] On June 6, 1986, the Board received a motion from the tribe stating that the appeal has been ripe for decision for more than 30 days and that no decision had been rendered. The tribe requested the Board to assume jurisdiction over the appeal pursuant to 25 CFR 2.19.⁵

⁴ Appellee's letter also stated that both the attorney and the employee to whom appellant stated it furnished the required handbooks had left tribal employment, and that although the tribe was unable to locate the handbooks in its files, appellee would assume they had been delivered as stated by appellant.

⁵ 25 CFR 2.19 provides in relevant part:

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By order of June 11, 1986, the Board made a preliminary determination that it had jurisdiction over the appeal. Appellant objected to the Board's determination, contending that parties to an appeal other than the appellant did not have the right to request the Board to assume jurisdiction pursuant to 25 CFR 2.19. The Board, and ultimately the Director, Office of Hearings and Appeals, in an order dated August 21, 1986, concluded that, contrary to appellant's contention, 25 CFR 2.19 is more than a choice of forum provision for appellants, but is, rather, a jurisdictional provision which may be invoked by any party to an appeal. Therefore, appellant's motions seeking to divest the Board of jurisdiction were denied.

The appeal was docketed by the Board on August 28, 1986. Appellant, appellee, and the tribe filed briefs.

Related Proceedings

In addition to the right-of-way over tribal trust lands, which is the subject of this appeal, appellant has sought a right-of-way over allotted lands held in trust by the United States for individual Navajo Indians. The proceedings concerning this matter, which have been long and involved, are discussed extensively by both appellant and the tribe in this appeal. Therefore, a brief summary of these proceedings is set out.

As proposed, appellant's railroad line would cross 61 allotments. In 1977, appellant obtained over 600 consents from owners of these allotments. Subsequently, some of the allottees withdrew their consents, stating that they misunderstood the consent form. In November 1979, appellee rejected appellant's right-of-way application for allotments whose owners had revoked their consents. The Acting Deputy Commissioner of Indian Affairs affirmed appellee's decision on May 30, 1980, holding that the allottees' consent was a prerequisite to the granting of a right-of-way, and that the allottees could revoke their consent at any time prior to the grant. The Acting Deputy Commissioner directed appellee to approve the rights-of-way over allotments where the requisite consents had been obtained and other conditions had been met.

An appeal⁶ was taken from this decision by the New Mexico Navajo Ranchers Ass'n, the Pueblo Pintado Chapter of the tribe, and 54 individual Navajos, who contended that, for a number of reasons, all the rights-of-way should have been disapproved as a matter of law. The appeal was referred to Administrative Law Judge L. K. Luoma, who

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review functions of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Affairs for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

⁶The appeal was originally made to the Board, *New Mexico Navajo Ranchers Ass'n v. Comm'r of Indian Affairs*, BIA 80-47-A. By memorandum of Oct. 31, 1980, the Acting Secretary of the Interior assumed jurisdiction over the appeal pursuant to 43 CFR 4.5(a) and transferred it to the Ass't Secretary-Indian Affairs for decision.

held an evidentiary hearing in December 1980, and issued a recommended decision on June 29, 1981. Judge Luoma agreed with the Acting Deputy Commissioner as to the necessity of the allottees' consent and their right to revoke their consent prior to the grant of a right-of-way. He found that appellant had shown good faith in its efforts to obtain a right-of-way but that there was a question as to whether some or many of the allottees have made knowledgeable consents. He also found there was a lack of appraisal data to support the assessment of fair market value for the right-of-way. He recommended that the right-of-way application be returned to appellee with instructions to "review all consents to determine which ones if any truly reflect the allottees' intent to grant rights-of-way under conditions now prevailing; [r]equire new fair market value appraisals, * * * and [r]equire new consents after appraisals, as appropriate" (Recommended Decision at 9).

On April 6, 1982, the Assistant Secretary returned the right-of-way application to appellee with the instructions recommended by Judge Luoma.

On April 16, 1982, appellant filed suit to condemn rights-of-way over allotments whose owners had revoked their consents. *Star Lake Railroad Co. v. Fourteen Rights of Way, etc.*, Civ. No. 82-392-JB (D.N. Mex.). Both appellant and the tribe state that this action was made moot by the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *New Mexico Navajo Ranchers Ass'n v. Interstate Commerce Comm'n*, 702 F.2d 227 (D.C. Cir. 1983). This decision concerned a challenge to the Interstate Commerce Commission's (ICC's) grant of authority to appellant and Santa Fe to construct the rail line here concerned. The court remanded the matter to the ICC for further proceedings with respect to the financial viability of the proposed line and for findings as to whether appellant acted in bad faith in soliciting consents from the allottees.

On remand,⁷ the ICC found, *inter alia*, that the proposed line was financially viable and that appellant "did not reveal a pattern of bad faith or misconduct such as would cast doubt upon the credibility of applicants' undertaking to comply with the environmental conditions imposed in this and previous decisions." *Star Lake Railroad Co.*, Finance Docket Nos. 28272, 29036, 29228, and 29602 (Nov. 13, 1984, Decision at 29).

The ICC reopened the proceeding in December 1985, to consider updated data submitted by the protestants (New Mexico Navajo Ranchers Ass'n *et al.*) concerning the financial viability of the proposed line. In April 1987, it reaffirmed its earlier decisions. It took official notice of appellee's February 12, 1986, termination of appellant's right-of-way over tribal lands and stated:

Taking into consideration the termination of the easement and the BIA's analysis, we find that they are not a sufficient reason to modify our earlier finding that the

⁷ The tribe intervened in the ICC proceeding on remand (Nov. 13, 1984, ICC Decision at 4).

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construction and operation of the line is in the public interest. Our authorization is permissive; applicants will have to obtain the easement or make some other acceptable arrangement before they can construct the line.

Star Lake Railroad Co., Finance Docket No. 28272 (Apr. 10, 1987, Decision at 6).

Contentions of the Parties

Appellant argues that appellee should not have terminated its right-of-way for nonuse because it was prevented from using the right-of-way during the 2-year period by circumstances beyond its control. It argues that principles of common law, and provisions of statutory law governing rights-of-way over public lands,⁸ favor the rule that rights-of-way should not be terminated for nonuse when the nonuse is beyond the control of the grantee. Appellant argues that appellee's authority under 25 CFR 169.20 is discretionary and that he should have exercised that authority in a manner consistent with Federal policy concerning public lands. In August 1984, pursuant to appellant's request, BLM granted appellant an extension of time in which to file proof of construction on its right-of-way over public lands. Appellant states: "It would clearly be arbitrary and capricious for the Secretary not to apply the same rule to the portion of the right-of-way he has approved over tribal trust lands, since there is no basis in fact or law for a different treatment" (Appellant's Opening Brief at 20).

Appellant also argues that, as a matter of contract law, its inability to perform should be excused as long as the events frustrating performance continue, and that the tribe's past and present opposition to the right-of-way is a defense to the tribe's invocation of the termination provisions of the 1981 agreement between appellant and the tribe.

Appellant further argues that, if its nonuse is not excused as a matter of law, it is entitled to an adjudicatory hearing on certain factual issues: (1) appellant's alleged fault in causing the Navajo objectors' litigation, (2) the role of the tribe in the litigation, and (3) whether termination of the right-of-way is in the tribe's best interest.⁹

Finally, appellant argues that the issue of the 1908 boundary of the Navajo reservation,¹⁰ which was discussed at pages 4-5 of appellee's

⁸ Appellant quotes 30 U.S.C. § 185(o)(3) concerning pipeline rights-of-way, and 43 U.S.C. § 1766, derived from § 506 of the Federal Land Policy and Management Act of 1976. 43 U.S.C. § 1766 provides in relevant part:

"Failure of the holder of the right-of-way to use the right-of-way for the purpose for which it was granted, issued, or renewed, for any continuous five-year period, shall constitute a rebuttable presumption of abandonment of the right-of-way for the purpose for which it was granted, issued, or renewed for any continuous five-year period is due to circumstances not within the holder's control, the Secretary concerned is not required to commence proceedings to suspend or terminate the right-of-way." All references to the *United States Code* are to the 1982 edition.

⁹ Appellant states that the issue of the tribe's best interest is largely irrelevant to the termination issue but, to the extent it is relevant, contends that construction of the railroad is in the tribe's best interest.

¹⁰ This issue concerns the continued existence of the boundary of the Navajo reservation established in various Executive Orders and referred to in sec. 25 of the Act of May 29, 1908, 35 Stat. 444, 457.

February 12, 1986, decision, is not relevant to the matter on appeal and should not be decided by the Board.

Appellee argues that 25 CFR 169.20 provides a basis for the termination of a right-of-way as a matter of discretion but requires termination once the grantee has been given the 30-days' notice specified in the regulation and fails to take corrective action. Appellee states that appellant did not take corrective action, did not apply for an extension of time in which to begin construction, and offered no legal arguments or substantial factual explanation for its failure to use the right-of-way.

Appellee also argues that the right-of-way was terminable under the January 12, 1981, agreement between appellant and the tribe.

Appellee agrees with appellant that an analysis of the best interest of the tribe is not necessary to the resolution of this appeal. He also agrees with appellant that the reservation boundary issue is not relevant and should not be decided by the Board.

Finally, appellee argues that appellant is not entitled to an adjudicatory hearing because the basis for appellee's decision, nonuse of the right-of-way for a 2-year period, does not involve a disputed issue of fact.

The tribe contends that, because appellant's failure to use the right-of-way is unrebutted, and because the tribe had no part in causing appellant's failure, appellee correctly terminated the right-of-way as a matter of law. It states that, contrary to appellant's contentions, principles of public land law and contract law are not relevant to Indian lands, which are subject to special statutory provisions. The statutory provision governing forfeiture of railroad rights-of-way, 25 U.S.C. § 315,¹¹ does not contain a provision similar to those contained in the public land laws, which allow for excuse of nonuse caused by events beyond the control of the grantee. Neither does the regulatory provision at 25 CFR 169.20. These provisions, under rules of statutory construction developed in the courts, should be construed in favor of the Indians for whose benefit they were enacted. The tribe notes that this principle of construction was incorporated into the January 12, 1981, agreement between appellant and the tribe.

The tribe also argues that various alternative grounds, in addition to the grounds relied on by appellee, compel affirmance of appellee's decision: (1) BIA's grant of the right-of-way was void *ab initio* for violation of 25 U.S.C §§ 312 and 313, and 25 CFR 169.23(b), (f), and (g), concerning construction of passenger and freight stations, right-of-way width limitations, and other matters; (2) the right-of-way has been

¹¹ 25 U.S.C. § 315, derived from sec. 4 of the Act of Mar. 2, 1899, 30 Stat. 990, provides:

"If any such [railroad] company shall fail to construct and put in operation one-tenth of its entire line in one year, or to complete its road within three years after the approval of its map of location by the Secretary of the Interior, the right of way granted shall be deemed forfeited and abandoned ipso facto as to that portion of the road not then constructed and in operation: *Provided*, That the Secretary may, when he deems proper, extend, for a period not exceeding two years, the time for the completion of any road for which right of way has been granted and a part of which shall have been built."

Appellant contends that the 1899 Act is not applicable to its right-of-way. Given its disposition of this appeal, the Board finds it unnecessary to address this issue.

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forfeited by appellant under the provisions of 25 U.S.C. § 315; (3) the right-of-way was void *ab initio* because it was granted in violation of the trust duty, and failure to terminate it would be a breach of trust. The tribe contends that approval of the right-of-way violated the trust duty because it was given over the objection of the tribe and because consideration for the grant was insufficient.¹²

The tribe, like appellee, contends that appellant is not entitled to an evidentiary hearing.

Finally, the tribe contends that the rail line would fall primarily within the Navajo reservation, and that the Board is an appropriate forum to address the issue of the 1908 reservation boundary.

Request for Evidentiary Hearing

As discussed below, the Board concludes that this appeal is properly decided on the law and that appellant has shown no reason why an evidentiary hearing is required. It therefore denies appellant's request for a hearing.

Discussion and Conclusions

Although the parties have raised a number of issues, and appellee's decision also addressed several issues, the Board finds that this appeal must be decided with reference to the applicable statutes and regulations, the January 16, 1981, grant of easement for right-of-way, and the January 12, 1981, agreement between appellant and the tribe, which was incorporated into the grant of easement.

Initially, there is disagreement among the parties as to whether appellee's termination of appellant's right-of-way was mandatory or discretionary. Appellee and the tribe argue that termination was mandatory under the circumstances. Appellant contends that appellee's authority to terminate the right-of-way was discretionary¹³ and allowed appellee to exercise his discretion in a manner consistent with Federal law and policy governing public lands.

The regulation at 25 CFR 169.20, in providing that rights-of-way "may be terminated" under certain circumstance, allows for the exercise of some discretion.¹⁴ However, that discretion is subject to

¹² The tribe cites an Aug. 21, 1979, letter from appellant to the Secretary of the Interior, which states that it would have cost appellant \$11.1 million to route the rail line around the tribal land. The tribe contends that BIA breached its trust duty to maximize return on the trust property by approving the right-of-way for a consideration of \$11,672.80, one one-thousandth of the amount it would have cost appellant to avoid the tribal property.

¹³ The Acting Deputy Ass't Secretary-Indian Affairs also concluded that the authority to terminate the right-of-way was discretionary and, therefore, that an analysis of the best interest of the tribe was necessary. Under the Board's disposition of this appeal, such an analysis is not required. Therefore, an evidentiary hearing on this issue is not appropriate.

¹⁴ The Board does not address the question of how broad this discretion is, or under what circumstances, if any, BIA could decline to terminate a right-of-way where one of the regulatory grounds for termination was present and termination was requested by the Indian landowner.

To the extent that the termination of a right-of-way is based on the exercise of discretion, it is not reviewable by this Board. 48 CFR 4.330(b); *Simmons v. Deputy Ass't Secretary-Indian Affairs (Operations)*, 14 IBIA 243 (1986).

limitation by Federal statutory and case law and, in this case, also by the provisions of the grant of easement and the agreement incorporated therein. Having approved these documents, appellee was bound by their terms, to the extent they were not in conflict with Federal law or regulation.¹⁵ Cf. *Patencio v. Deputy Ass't Secretary--Indian Affairs (Operations)*, 14 IBIA 92, 98 (1986).

The fundamental issue in this appeal is simply stated: Was appellee authorized by any provision of Federal statute or regulation, by the grant of easement, or by the agreement between appellant and the tribe, to excuse appellant's nonuse of the right-of-way over the objection of the tribe?

Appellant first argues that the Federal policy governing termination of rights-of-way over public lands, which provides that nonuse of a right-of-way may be excused if it results from circumstances beyond the control of the grantee, should be extended to Navajo tribal lands, regardless of the tribe's wishes.

The Federal policy concerning termination of rights-of-way over public lands is embodied in Federal statutes, which specifically include an excuse provision. 30 U.S.C. § 185(o)(3); 43 U.S.C. § 1766. Federal policy concerning rights-of-way over Indian lands is also embodied in Federal statutes, none of which contain a provision analogous to the excuse provision in the public land laws. See 25 U.S.C. §§ 311-328. The failure of Congress to include such a provision in the Indian right-of-way statutes, when it has included one in the public land statutes, is reasonably construed, under rules of statutory construction, as an indication of intent on the part of Congress to deal differently with these two different types of land. See 2A N. Singer, *Sutherland Statutory Construction* § 53.05 (4th ed. 1984).

[2] In fact, the general body of statutory law governing tribal lands reflects a policy quite different from the policy which guides the management of the public lands. One critical distinction lies in the clear expression in the Indian statutes of a congressional intent to vest Indian tribes with power to control use of their own lands. For instance, 25 U.S.C. § 324 provides: "No grant of a right-of-way over and across any lands belonging to a tribe organized under [the Indian Reorganization Act, 25 U.S.C. §§ 461-479, or the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501-510] shall be made without the consent of the proper tribal officials." See also, e.g., 25 U.S.C. §§ 396a, 415, 476, 2102, 2203. The judicial and executive branches have also recognized the policy favoring tribal control of tribal lands and resources. E.g., *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir.), cert. denied, 464 U.S. 960 (1983); *Wilson v. U.S. Department of the Interior*, 799 F.2d 591 (9th Cir. 1986); President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 100 (Jan. 24, 1983); *Conway v. Acting Billings Area Director*,

¹⁵The tribe asserts that the waiver of certain regulatory provisions in the grant of easement was in violation of law. The Board does not address this contention.

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10 IBIA 25, 28, 89 I.D. 382, 384 (1982); *Hawley Lake Homeowners' Ass'n v. Deputy Ass't Secretary-Indian Affairs (Operations)*, 13 IBIA 276, 288 (1985); *Redfield v. Billings Area Director*, 13 IBIA 356, 360 (1985).

The regulations concerning rights-of-way over tribal lands further this Federal policy. *See Disposal of Rights in Indian Tribal Lands Without Tribal Consent*, H.R. Rep No. 78, 91st Cong., 1st Sess. (1969). 25 CFR 169.3 requires consent of tribal landowners for all rights-of-way, although tribal consent is not required by statute in all cases.¹⁶ To construe the Federal statutes and regulations governing rights-of-way over tribal land as amenable to the interpretation advanced by appellant would clearly appear to run counter to this policy.

[3] The Indian right-of-way statutes are, moreover, subject to the rule of statutory construction that enactments intended to benefit Indians are to be construed liberally in their favor. *E.g., Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). This rule of construction applies as well to regulations. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982). *See also Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1569 (10th Cir. 1984), *dissenting opinion adopted as majority opinion by the court en banc*, 782 F.2d 855 (10th Cir. 1986), cert. denied, ____ U.S. ____, 107 S. Ct. 471 (1986), holding, *inter alia*, that where the regulations governing tribal oil and gas royalties may reasonably be interpreted in two ways, the Secretary is required by the trust responsibility to interpret them in the way most favorable to the tribe.

Moreover, section 18 of the January 12, 1981, agreement between appellant and the tribe provides:

Where consistent with its terms, this document is to be construed to the benefit of the Navajo people and Tribal government, with the purpose in mind of fostering understanding of and respect for the land, environment, culture and religion of the Navajo Nation in the greater eastern part of the Navajo Indian Country in these United States. Also, where consistent with its terms, this document is to be construed with the history of Navajo and Indian relationships with railroads and the Federal Government in mind. Such history includes the conditioning of the release of Navajo people from Bosque Redondo on the promise that Navajos would not interfere with railroads then being built; with the taking of vast tracts of unceded Indian lands by the railroads with the condoning or knowing inaction of the Department of the Interior; with the assertion of Navajo Tribal sovereignty and jurisdiction in Eastern Navajo; with the present intentions of our Congressman/trustee who will not consider Navajo (public) needs until private rights are granted to the Railroad Companies; and with the expressed intention of the Secretary of Interior to grant a private right-of-way over the considered objections of the Navajo Nation. [¹⁷]

¹⁶ This provision has been held valid as applied to rights-of-way granted under the Act of Mar. 2, 1899, 30 Stat. 990, 25 U.S.C. §§ 312-318, which does not contain a tribal consent provision. *Southern Pacific Transportation Co. v. Watt*, *supra*. *See also Transwestern Pipeline Co. v. Acting Deputy Ass't Secretary-Indian Affairs (Operations)*, 12 IBIA 49, 57-58, 90 I.D. 474, 479 (1983) (concerning the applicability of the consent provision to tribes, like the Navajo Tribe, which are not organized under the Indian Reorganization Act); *Northern Natural Gas v. Minneapolis Area Director*, 15 IBIA 124, 126-27 (1987).

¹⁷ The tribe's concern that the right-of-way might be granted without its consent was apparently not without foundation. Correspondence between Santa Fe, Departmental officials, and the tribe evidence an attempt on the part of Santa Fe to secure the right-of-way without the tribe's consent, and a willingness on the part of Departmental officials to consider that course of action. Santa Fe's letters to the Secretary, Aug. 21 and Oct. 31, 1979; Solicitor's letters to Santa Fe, Nov. 1, 1979, and tribe, Dec. 5, 1979; Secretary's letter to the tribe, Dec. 14, 1979. *See also* Solicitor's letters to members of Congress, Nov. 18 and Dec. 5, 1979.

This provision incorporates the rule of construction just discussed. Thus the agreement is, by its own terms, subject to that rule.

Appellant correctly notes that the rule of construction may not be invoked in derogation of the plain language of statutes or regulations. *E.g., Andrus, v. Glover Construction Co.*, 446 U.S. 608, 619 (1980). Appellant's proposed construction of the statutes and regulations, however, is not limited to their plain language but, rather, seeks to embellish upon that language to the disadvantage of the Indians.

The Board rejects appellant's argument that the termination provisions of the public land laws should be read into the laws and regulations governing tribal lands and finds, to the contrary, that 25 CFR 169.20 and the January 12, 1981, agreement must be interpreted to the benefit of the tribe and in accord with the Federal policy favoring tribal control over tribal lands.

Appellant next argues that general principles of contract law support its position that its nonuse of the right-of-way must be excused under the January 12, 1981, agreement with the tribe. It thus invokes the Restatement rule concerning frustration of performance:

Temporary Impracticability or Frustration

Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.

Restatement (Second) of Contracts § 269 (1981). It also argues that the tribe acted in derogation of its implied contractual duty not to hinder appellant's efforts to obtain authorization to build the rail line.

The tribe counters, *inter alia*, with the obligation of a contractor, under ordinary circumstances, to secure a necessary Government license:

Ordinarily, when one contracts to render a performance for which a government license or permit is required, it is his duty to get the license or permit so that he can perform. The risk of inability to obtain it is on him; and its refusal by the government is no defense in a suit for breach of his contract. [¹⁸]

6 A. Corbin, *Corbin on Contracts* § 1347 (1962).

These principles of contract law, while perhaps of some relevance to the January 12 agreement, cannot control interpretation of the Federal regulation involved here. Moreover, the agreement itself must be interpreted primarily by reference to its own provisions, including the rule of construction incorporated in the agreement and discussed above.

Section 9 of the agreement provides: "This Agreement shall be effective on the date hereof and shall terminate in accordance with the provisions of 25 C.F.R. [Part 169] and the Interstate Commerce Act." Neither this section nor any other provision of the agreement indicates

¹⁸ Appellant disputes the relevance of this rule, arguing that the tribe prevented it from obtaining the license. See discussion *infra*.

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an intent to limit or expand upon the regulatory provisions for termination of rights-of-way. Specifically, the agreement does not contain a *force majeure* provision, in contrast to many leases of Indian trust lands. See, e.g., *Sunny Cove Development Corp. v. Cruz*, 3 IBIA 33, 40, 81 I.D. 465, 469 (1974); *Racquet Drive Estates, Inc. v. Deputy Ass't Secretary—Indian Affairs (Operations)*, 11 IBIA 184, 196, 90 I.D. 243, 249 (1983); *Franks v. Acting Deputy Assistant Secretary—Indian Affairs (Operations)*, 13 IBIA 231, 236 (1985). Therefore, the Board finds that the parties to the January 12, 1981, agreement did not intend therein to vest any party with additional rights of obligations regarding termination beyond those provided in the regulations.

The provisions for termination in the grant of easement, quoted above, are also substantially identical to the regulatory provisions. In *Administrative Appeal of Brown County, Wisconsin*, 2 IBIA 320 (1974), the Board upheld the termination of a right-of-way for nonuse for a 2-year period. Noting that the regulatory provisions for termination had been incorporated into the right-of-way grant, the Board stated: "The * * * limitations contained in the regulations are clearly and expressly set forth in the grant and consequently not subject to interpretation because of ambiguity. The appellant accepted the Grant and by so doing becomes bound by all its restrictions, reservations, and exceptions." 2 IBIA at 323. In *Whatcom County Park Board v. Portland Area Director*, 6 IBIA 196, 84 I.D. 938 (1977), upholding termination of a right-of-way over tidelands belonging to the Lummi Tribe, the Board similarly found that the parties were bound by the terms of the right-of-way grant, including a tribal resolution incorporated therein. The Board found that termination was proper because the grantee had breached conditions of the grant.¹⁹

[4] 25 CFR 169.20 does not expressly provide for excuse of nonuse of the right-of-way for any reason. No provision of statute or regulation expressly authorizes excuse under the circumstances present here.²⁰ In providing that a right-of-way "may be terminated," the regulation allows for the exercise of some discretion. For instance, it would undoubtedly allow for excuse of involuntary nonuse with Indian landowner's consent. However, as previously discussed, congressional policy expressed in statutes governing rights-of-way over tribal land and the management of tribal lands generally, and the judicially developed rule of construction applicable to these enactments, clearly disfavor dispositions of tribal land without the consent of the tribe. The

¹⁹ The Lummi Tribe had initially favored the right-of-way, but ultimately changed its mind and requested termination. The Board noted:

"While there is ample support for appellant's claim that the Lummi Indian Tribe unilaterally decided in 1972 that it did not want to go ahead with plans for a park on Portage Island, the record is convincing that this change of attitude occurred only after the appellant breached important conditions of the right-of-way grant." 6 IBIA at 224, 84 I.D. at 951. Similarly, the record here indicates that the tribe sought termination only after the 2-year period had expired. See discussion *infra*.

²⁰ 25 U.S.C. § 315, quoted at note 11, *supra*, authorizes excuse under certain circumstances not present here. The Board's disposition of this appeal would be the same whether or not the Act of Mar. 2, 1899, 30 Stat. 990, from which sec. 315 is derived, applies to the right-of-way at issue here.

Board finds that appellee correctly concluded termination was mandated by the regulation and the right-of-way documents, because no provision of statute, regulation, or the right-of-way documents authorized him to excuse the nonuse without the consent of the tribe.

Finally, appellant argues that, if its nonuse of the right-of-way is not excused as matter of law, it is entitled to an evidentiary hearing. It also argues that it is entitled to have the 2-year period in which it was required to begin use of the right-of-way tolled under authority of the decision of the U.S. Court of Appeals for the Tenth Circuit in *Jicarilla Apache Tribe v. Andrus, supra*. In that case, the Jicarilla Apache Tribe brought suit to cancel certain of its oil and gas leases. The district court tolled the 10-year primary terms of the leases from the date the lessees were served with process in the lawsuit, and the court of appeals affirmed. In tolling the term of the leases, the court invoked an equitable doctrine against the plaintiff tribe, which, by initiating the lawsuit, had impeded the lessees' ability to perform under the leases. 687 F.2d at 1340-41.

Appellant suggests that, like the Jicarilla Apache Tribe, the tribe here impeded appellant's ability to begin use of the right-of-way. This interference, appellant alleges, was the tribe's covert encouragement of, and perhaps assistance in, the ICC protest and related proceedings initiated by individual Navajos, the New Mexico Navajo Ranchers Ass'n, and the Pueblo Pintado Chapter. In support of this allegation of tribal involvement, appellant cites only the fact that the tribe's present counsel also represented individual Navajos in the earlier suit. Appellant argues that it is entitled to an evidentiary hearing to elicit evidence of the tribe's covert actions. Presumably, appellant believes a hearing would show that this case falls squarely under the holding in *Jicarilla Apache*.

The tribe and its counsel emphatically deny appellant's allegations. They state that the first action by the tribe against appellant was the tribe's motion to intervene in the ICC proceeding, which it filed in June 1983, more than 2 years after the initial grant of the right-of-way.

This argument places appellant's speculations against the tribe's counsel's denial of earlier involvement by the tribe. The question before the Board is whether appellant has shown that the Board should exercise its discretion to order an evidentiary hearing on this issue. 43 CFR 4.337(a).

As an attorney and officer of the court, counsel for the tribe is bound by the rules adopted by the legal profession to govern itself. Rule 3.3 of the Model Rules of Professional Conduct, adopted by the American Bar Ass'n on August 2, 1983, provides:

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a tribunal;

* * * * *

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(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

The comment on this rule states:

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. * * * *However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.* [Italics added.]

Tribal counsel is, accordingly, potentially subject to disciplinary proceedings, both by his state bar association and by the Department of the Interior (see 43 CFR 1.6), if he knowingly made a false statement concerning the tribe's involvement in the earlier proceedings in this case. On the record here, the Board is unwilling to assume that he may have done so.

Under these circumstances, the Board does not find appellant's speculations persuasive of the necessity for an evidentiary hearing on this issue. There is nothing in the record to indicate the tribe took any action to impede appellant's use of the right-of-way during the first 2 years of its existence. The tribe and its counsel deny any such action. Other than the identity of counsel, appellant offers nothing to suggest that its assertion of tribal involvement has merit. See *General Motors Corp. v. Federal Energy Regulatory Comm'n*, 656 F.2d 791, 798 n.20 (D.D. Cir. 1981) ("[W]here a party requesting an evidentiary hearing merely offers allegations or speculations without an adequate proffer to support them, the Commission may properly disregard them"). Therefore, the Board finds no grounds for ordering an evidentiary hearing or invoking the equitable tolling doctrine of *Jicarilla Apache* against the tribe.

While the Board is not prepared to hold that there are no circumstances in which involuntary nonuse of a right-of-way may be excused without the consent of the tribe, it concludes that, under the circumstances of this case, termination was mandated by the regulation and the right-of-way documents, because no provision of statute, regulation, or the right-of-way documents authorized him to excuse the nonuse without the consent of the tribe.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 12, 1986, decision of the Navajo Area Director is affirmed.²¹

ANITA VOGL
Acting Chief Administrative Judge

²¹ Other issues raised by the parties are found not to be relevant and are not addressed.

I CONCUR:

KATHRYN A. LYNN
Administrative Judge

APPEAL OF QUALITY SEEDING, INC.

IBCA-2297

Decided: July 21, 1987

Contract No. 5-CS-5D-04180, Bureau of Reclamation.

Government Motion for Summary Judgment denied.

Contracts: Construction and Operation: Contract Clauses--Contracts: Construction and Operation: Contracting Officer--Contracts: Disputes and Remedies: Termination for Convenience--Rules of Practice: Appeals: Motions

A Government's Motion for Summary Judgment is denied where the Board finds that determining a fair and reasonable profit under a contract terminated for the convenience of the Government involves the exercise of judgment by the contracting officer whose determinations are subject to de novo review by the Board which may sustain, modify, or overturn the decision reached by the contracting officer.

APPEARANCES: Peter N. Ralston, Attorney at Law, Oles, Morrison, Rinker, Stanislaw & Ashhaugh, Seattle, Washington, for Appellant; Emmett M. Rice, Department Counsel, Amarillo, Texas, for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved for summary judgment with respect to the instant appeal on the ground that the Bureau of Reclamation (Reclamation) has computed a fair and equitable settlement for the partial termination for convenience of the above-captioned contract and on the further ground that there are no controverted facts in the case (Answer at 5-6). None of the cases for which citations were provided by the Government involved a motion for summary judgment. In all of the cases cited, the board concerned simply determined the amount of a "fair and reasonable" profit in a termination settlement in the light of the circumstances present.

In its response to the motion for summary judgment, the appellant Quality Seeding Inc. (QSI), states (i) that the Government has failed to establish that there are uncontested facts upon which it is entitled to judgment as a matter of law and (ii) that there are many contested material facts between QSI and Reclamation. Noted by QSI was the fact that it had requested a hearing (Response of Appellant at 10).

Before turning to the case at hand, it would perhaps be well to make reference to several principles governing "Summary Judgment Motion

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Practice." In *Briles Wing & Helicopter, Inc.*, IBCA-1158-7-77 (Apr. 14, 1978), 85 I.D. 77, 78-1 BCA par. 13,136, this Board noted that the boards of contract appeals do have authority to grant summary judgment but that, in cases in which a hearing had been requested, it is an authority rarely exercised because the effect of granting summary judgment is to deprive the parties of a hearing on the facts. Motions for summary judgment have been granted in some cases involving requests for hearing, however, where no genuine triable issue of material fact was found to exist. See *Lee Roofing Co.*, IBCA-1506-8-81 (May 11, 1982), 89 I.D. 233, 237, 82-1 BCA par. 15,789 at 78,179. To prevail on a motion for summary judgment, "The moving party has the burden of showing the absence of genuine issues of material fact and the matters it presents to make this showing must be viewed in the light most favorable to the opposing party, even if the opposing party presents nothing in opposition." *McDonnell Douglas Corp.*, NASA BCA No. 1180-20 (Feb. 12, 1982), 82-1 BCA par. 15,652 at 77,304.

The instant contract was awarded to QSI on April 11, 1985, in the estimated amount of \$198,110. The contract covers 198 acres and includes three items: (a) seedbed preparation, seeding, fertilizing, and mulching; (b) furnishing, installing, pumping, and removing temporary irrigation systems; and (c) watering seeded areas. The area to be seeded was known as Reach B (AF 36, 48). The contract was modified on June 6, 1985, to add an additional 65 acres (known as Reach A) and to provide for an increase in the contract price of \$96,682.50 (AF 49). All work on Reach A was completed in a timely manner. As a result of Reach B being inaccessible due to the delay of another contractor in completing the construction work, the contract was partially terminated for the convenience of the Government on June 26, 1985 (AF 7; Answer at Pars. 4-5, 7).

Because the parties were unable to achieve a negotiated settlement of the termination claim submitted by QSI, the amount to be paid to appellant by reason of the termination was unilaterally determined by the contracting officer. The amount claimed by QSI in its last settlement proposal and the amount determined to be due by the contracting officer on the termination claims are set forth below:

<i>Items of Claim</i>	<i>QSI</i> [AF 42 at 2]	<i>Reclamation</i> [AF 45 at 14]	<i>Difference</i>
Direct Costs	\$183,656	\$173,825	\$9,831
Profit	\$71,138 (38.7%)	\$20,860 (12%)	\$50,278
Settlement Expense	\$17,015	\$17,015	—0—
Interest on Retainage	\$6,299	—0—	\$6,299

This case clearly involves a number of disputed facts. For example, the Government contends that the only work performed by QSI on Reach B apparently occurred on Sunday, June 16, 1985, without any notification to the Government (Answer at Par. 6). QSI asserts, however, (i) that during the week beginning June 10, 1980, it was

directed by Don Martin (Chief of the O & M Branch of Reclamation) to begin work on Reach B; (ii) that pursuant to those directions, it did begin prewatering work on Reach B on June 16, 1985; and (iii) that it had substantial time and money investments in performing work on Reach B aside from work performed on June 16, 1985 (Affidavit of Ron Leep at Pars. 4, 7).

Another disputed item concerns the question of whether QSI is entitled to interest on amounts retained by the Government. In the decision from which the instant appeal was taken, the contracting officer states (i) that progress payments were made during the course of the contract; (ii) that interest on progress payments and the retention of a percentage of progress payments are excluded from the Prompt Payment Act; and (iii) that the contractor is not entitled to interest on retention (AF 45 at 14). Disputing the accuracy of this assessment, appellant states that the contract prohibited progress payments (AF 48 at 50); that no progress payments were made; and that the contract did permit partial payments (AF 48 at 25). Thereafter, appellant puts in issue the validity of Reclamation's assumption (reflected in its settlement by determination and in paragraph 10 at its Answer) that the Prompt Payment Act is not applicable to the instant contract (Response at 6).

For the purpose of ruling upon the Government's motion, it is not necessary for the Board to determine which party is correct with respect to the particular questions noted above or in regard to other questions which the record shows to be also in issue. This is so because, as shown by the comparisons set forth above, the amount of profit to be allowed is by far the most important question in the case and determining a "fair and reasonable" profit¹ involves the exercise of judgment² by the contracting officer whose determinations are subject to a de novo review by this Board which may sustain, modify, or overturn, in whole or in part, the decision reached by the contracting officer.³ See *Schnip Building Co. v. United States*, 227 Ct. Cl. 148, 165 (1981); *Space Age Engineering*, ASBCA No. 26,028 (Apr. 22, 1982), 82-1 BCA par. 15,766 at 78,032-34.

For the reasons stated and on the basis of the authorities cited, the Board finds that the Government has failed to show that it is entitled

¹ The contract includes the Termination For Convenience of the Government clause (Fixed-Price) prescribed by Federal Acquisition Regulation (FAR) 52.249-2. Paragraph (f) of that clause provides that if the parties fail to agree upon the whole amount to be paid because of the termination of work, the contractor shall be paid, *inter alia*, a "fair and reasonable profit" on the costs incurred in performance of the work terminated, as determined by the contracting officer under FAR 49.202 (AF 48 at 17-19).

² The regulations applicable to fixed-price contracts terminated for convenience include the following provision:

"A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment and cannot be measured exactly. . . . The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement." (FAR 49.201 General (a)).

³ Determining what is a "fair and reasonable" profit in a termination settlement would appear to be largely a matter of applying the contract terms and the applicable regulations to the established facts. See, e.g., *Fil-Coil Co.*, ASBCA No. 23137 (Jan. 18, 1979), 79-1 BCA par. 13,683 at 67,110 in which the Armed Services Board stated: "The record fails to support appellant's contention of 65% contract completion and we so found in our first opinion. Moreover, the contract limits profit to a reasonable return on costs incurred, not some theoretical percentage of completion. The 20% profit rate is liberal."

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to summary judgment as a matter of law simply because the contracting officer has exercised his judgment and rendered a decision on a matter within his jurisdiction. So finding, the Government motion for summary judgment is denied.

WILLIAM F. McGRAW
Administrative Judge

I CONCUR:

G. HERBERT PACKWOOD
Administrative Judge

August 31, 1987

APPEAL OF SALISBURY & DIETZ, INC.

IBCA-2090

Decided *August 31, 1987*

Contract No. SO 134031, Bureau of Mines.

Sustained in part.

1. Contracts: Construction and Operation: Allowable Costs

Where the Government defended against an appeal seeking additional costs for performance on the ground that the contractor had followed an unpermitted change in its accounting system in reaching the amount of the costs sought, the Board noted that a change in a contractor's accounting system is no bar to recovery unless it has a prejudicial effect on the Government and, having determined that the Government had shown no such prejudice, held that the accounting system change was no bar to recovery in this case.

2. Contracts: Construction and Operation: Allowable Costs

Where the contracting officer, being aware that the contractor had incurred costs up to or beyond the ceiling of the contract's limitation of costs clause, nevertheless communicated his urgent desire that the contractor continue to perform, the Board held that the limitation clause had been waived and that it could not be used to bar recovery of reasonable, allowable costs above the limit incurred in performing the contract.

APPEARANCES: William Perry Pendley, Comiskey & Hunt, Fairfax, Virginia, for Appellant; Alton E. Woods, Department Counsel, Washington, D.C., for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from the final decision of the contracting officer (CO) dated July 29, 1985, under a cost-plus-fixed-fee (CPFF) contract (Appeal File (hereinafter AF), Tab 7). In his decision, the CO denied appellant Salisbury & Dietz's (S&D) claim for \$162,954. The stated reason for the denial was that payment of the amount claimed would violate the contract's Limitation of Costs Clause (LOCC); the CO nevertheless awarded \$64,848 to S&D in the decision (AF, Tab 7, at 3). S&D now requests that the Board also award it \$270,345.80 above the amount claimed for a total of \$433,299.80.

Background

The operative genesis for the contract first appeared in the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487. A portion thereof mandates a study and report evaluating the resources, including minerals, of the Kantishna Hills and Dunkle Mine areas, within Denali National Park. The law was enacted on December 7, 1980, and required the report to be delivered to the Congress by 3 years from that date, or December 7, 1983.

Acting in response to the statutory direction, the Bureau of Mines (Bureau) issued a competitive request for proposal for a contract to accomplish the study and the report, but not until March 22, 1983, because Congress had theretofore failed to appropriate funds for the project. (Earlier, S&D, along with two other companies, had submitted to the Bureau, a joint unsolicited proposal for the contract for which the proposal was ultimately requested. Appellants Exhibit (hereinafter App. Exh.) 4.)

On May 5, 1983, S&D submitted its proposal for the CPFF contract in response to the request, and on May 20, 1983, after some negotiations which resulted in S&D's estimated CPFF figures being lowered to \$1,199,222, the Bureau awarded the contract to S&D (Hearing Transcript (hereinafter (Tr.) 25-32).

Within a month of the award, S&D had begun the preliminary report required by the contract and presented the completed preliminary report, had mobilized a base camp in the field, and had completed the establishment of a fully operative field camp which was conducting the work necessary for the project (Tr. 33-35).

On July 27, 1983, S&D requested additional funds to conduct cable tool sampling. (The Bureau, through the Solicitor, had interpreted ANILCA to prohibit drilling in the study area. The contract terms contemplated that some of the work would be done by drilling, so the Bureau was forced to find a means for coordinating the contract terms with the law while still accomplishing the contract's purposes.) The Bureau response was to issue Modification I effective August 8, 1983, which effected a contract change which allowed for cable tool sampling and included an equitable adjustment of \$66,761 to cover the additional cost of the new work. Of the \$66,761, most was for estimated additional costs. That amount was \$63,582. The remainder, \$3,179, was an addition to the contractor's fixed fee and was 5 percent of the added costs. (Of the \$1,199,222 CPFF of the contract as originally written, \$1,090,202 represented estimated costs and \$109,020 was for the fixed fee portion of the total, the fee being 10 percent of the costs.) Of the other two modifications to the contract, neither was in the nature of a change; both were for the purpose of extending the costs-limitation figure (AF, Tab 10).

Meanwhile, the Bureau had requested the Defense Contract Audit Agency (DCAA) to conduct a post-award audit (because the abbreviated award process and the urgent need to start performance had made a pre-award audit so unreasonable of accomplishment that the Bureau waived the necessity of one). The purpose of the audit was to establish that S&D had in place an accounting system that could reasonably be expected to allow tracking and controlling costs throughout performance. The DCAA report on that audit is dated August 11, 1983, and was received by the CO on August 19, 1983, although the CO was aware of the results of the audit as early as August 3, 1983, by reason of a telephone conversation between the CO and the DCAA. The audit report stated that there was no significant questioned cost proposed by

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S&D (although that statement had some qualifications not considered germane at the moment). Nevertheless, the report made a number of notations about S&D's accounting system that indicated that the DCAA found that system to be less than ideal for totally accurate cost control. For instance, the DCAA found that job costs for the instant contract were being maintained on a memorandum basis not under general ledger control and recommended that such control be implemented; for allocation of certain indirect expenses, it also found two S&D practices to be inequitable: first, certain expenses in two overhead pools that were allocated to S&D's professional services operation (the principal operation from which total expenses were allocated to the contract) did not have a "causal or benefitting relation to the operation" and therefore should not have been allocated to it; and second, the allocation of certain salary expenses in the General and Administrative (G&A) pool to the professional services operation and the other two operation components to which G&A (and overhead) expenses were allocated in S&D's system on the basis of those operations' relative payroll labor costs is inequitable, because it fails to take account of the fact that the appropriate causal/benefitting measure of the administrative salary expenses to be allocated to the three operations is reached by following a ratio that is inconsistent with the ratio of the direct costs of each of the three operations to one another. DCAA recommended allocation of these salaries by use of *total* costs of the three operations as a base (App. Exh. 10).

In the field the work proceeded, S&D discovering that there were far more mineral deposits in the study area than either party had contemplated as the contract was formed. It was necessary for S&D to treat the additional deposits in accordance with the contract terms, resulting in increased costs beyond those anticipated. Thus, S&D requested an extension of the costs limitation on September 21, 1983, and the Bureau responded with Modification II on September 30, 1983. Modification II extended the limitation by \$125,000.

On November 1, 1983, S&D notified the CO that it would require additional funds to complete performance and anticipated terminating efforts in the absence of funding. Although the CO's response was to deny funding for the moment, he made it clear, in a letter communicating that denial dated November 17, 1983, that he expected S&D to go on with its efforts, regardless of the incursion of additional costs, and that the current denial might be only temporary, depending on the results of the final audit (AF, Tab 2B). (In January 1984, S&D, having been informed that the initiation of the audit process would be put off until much later in the year, requested funding relief because of an apparent cash-flow problem and promised a timely completion of the report if such were received. The Bureau response was Modification III, which added \$108,394 to the estimated cost. (Appellant's Supplemental Appeal File (hereinafter App. Supp. AF),

Tab V; AF Tab 10). When S&D wrote the CO on April 3, 1984, to ask for costs predicted in its January letter that was the antecedent for Modification III, the CO's response was to deny the increase (App. Supp AF, Tab Z; AF, Tab 2B). In the CO's May 2, 1984, letter denying an increase (which was addressed to S&D (AF, Tab 2B)) and in his negotiation memorandum accompanying Modification III (which was not addressed to S&D but a copy of which was provided to S&D (App. Supp. AF, Tab W1)) the CO made clear that the extension of the limitation in the one case and the denial in the other were not closed matters—that the final resolution of the proper amount of funding depended on the findings of the prospective audit.)

S&D delivered the final report on May 4, 1984. There is an indication in the record that the original deadline date for submission of the report to Congress had been extended, and Modification II had extended the contract deadline to March 16, 1984 (AF, Tab 10). In any event, there is now no significant issue over any tardiness in submitting the report or in the timing or quality of any submissions of the interim, preliminary, for approval versions of the report. Similarly, there is no significant argument on the substance of S&D's performance, many witnesses and documents attesting to the extremely high regard in which the report was held in the Bureau and in its private sector constituency, especially given the necessarily brief performance period and the unexpected increases in the work encountered during performance (*i.e.*, App. Supp. AF, Tab KK; AF, Tab 1A; Tr. 128, 131-32).

The initial efforts at conducting the final audit took place as early as 1983 (*see, i.e.*, App. Supp. AF, Tab P). Because S&D's fiscal year ended August 31, 1983, it was necessary to conduct an audit for that portion of the contract work done on or before that date. Although the contract performance period was less than a year in duration, there were 3 fiscal years to cover, because the period extended over the end of S&D's fiscal year as that date stood at the beginning of the contract period in any event, and because S&D changed its fiscal year during the performance to November 30, the first such new year ending November 30, 1983. Because of certain delays encountered during the audit process, the final audit covered all 3 fiscal years together. S&D presented its first proposal of costs incurred to DCAA auditors in January 1984 (Tr. 252; App. Exh. 14). The DCAA found the proposal's underlying system for accounting for and allocating costs to be inadequate for DCAA to conduct a meaningful audit and made suggestions to S&D for revising the proposal so that DCAA could work with it. Some of the areas of inadequacy were identical to those identified in the earlier costs-proposal audit discussed above. There followed a series of proposals in which S&D attempted to state matters so as to resolve DCAA's concerns, each coming progressively closer to DCAA's requirements and suggestions but nevertheless falling short until the sixth proposal in the series which DCAA received in January 1985 (Tr. 266-68, 284-85). Using the figures and system of that proposal,

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the DCAA completed its final audit and published a report thereon dated April 8, 1985. Therein, the DCAA concluded, among other things, that S&D had incurred \$162,954 of allowable expenses that were nevertheless questioned because they exceeded the limit of the Limitation of Costs Clause (LOCC). (The figure appearing in the report was \$162,454, but it has been agreed that that number resulted in part from the use of a constituent number that was \$500 too low because of a transcription error) (App. Exh. 14).

Although S&D believed that its allowable costs exceeded that amount, apparently for its own fiscal reasons it filed its claim with the CO for that amount "to expedite the payment process" (Appellant's Amended Complaint at 6). In his final decision dated July 29, 1985, the CO denied the claim for \$162,954, apparently because the Government had already paid S&D in an amount equal to the contract ceiling of the LOCC and because "S&D never gave the Bureau [the proper notice] that 75 percent of the funds were expected to be expended within the next 60 days." Nevertheless, the CO decided to award S&D \$64,848 (which was the amount by which S&D's voucher of July 16, 1984, if paid, would have exceeded the LOCC amount) (AF, Tab 7). It is that decision which S&D has appealed. Other facts of importance to one or another of the legal issues in the Discussion which follows will appear in the appropriate places there.

DISCUSSION

I. The Bureau's Arguments

The Bureau raises a number of arguments, some of which appear to apply both to entitlement and to quantum. Following is a list of the issues raised by the Bureau's arguments expressed in our terminology: A. Whether the change of S&D's accounting system is improper; B. Whether the accounting change is an attempt at an unpermitted amendment to the contract; C. Whether failure to notify the CO of the change is a contract violation; D. Whether S&D's failure to give notice of cost overruns mandates a denial of the appeal; E. Whether S&D's failure to maintain an adequate system for tracking costs mandates a denial of the appeal; and F. Whether the LOCC was violated so that no funds above the contract ceiling may be awarded. We treat each in turn.

- A. Whether the change of S&D's accounting system is improper.
- B. Whether the accounting change is an attempt at an unpermitted amendment to the contract.
- C. Whether failure to notify the CO of the change is a contract violation.

Although the Bureau presents three separate arguments on the subject of an accounting change, the most logical and efficient way for us to treat them is together. First, we must identify what the Bureau

means by the change. When the DCAA reported its findings on the proposed costs audit in 1983, it described some features of S&D's accounting system, the implementation of which would yield inequitable results regarding the allocation of certain indirect costs. The record makes clear that it was the same features that formed a large part of the DCAA concern over the S&D cost proposals submitted to advance the final audit in 1984 and 1985, as discussed in the Background section. It is also clear that S&D made the various changes to its proposals in response to the DCAA expressions of that concern. The result of that process is what the Bureau now calls a change in S&D's "entire accounting method for allocating indirect costs" (Bureau Brief at 12).

The contract contains Appendix A, standard form General Provisions for Research and Development Contracts. Therein, clauses 10, 11, and 12 relate to cost accounting standards, consistency of cost accounting standards, and the procedure required to administer those standards (AF, Tab 10). All speak to the requirement that a contractor must notify the CO of a prospective change in its cost accounting system. We gather, however, that these clauses do not apply to the instant contract. All refer to those parts of the Cost Accounting Standards (CAS) which require such consistency, namely, those contained in 4 CFR Parts 401 and 402. Those parts, however, refer to 4 CFR 331.30 for their applicability. That section exempts from coverage "[a]ny contract * * * awarded to a small business concern." 4 CFR 331.30(b)(1).

The small business exemption of 4 CFR 331.30(b)(1) must have been what the DCAA auditor had in mind when he testified that CAS "doesn't apply" (Tr. 294). Indeed, although the Bureau has contended that the asserted change was a violation of the contract, it has not cited the CAS-related clauses as the contract's repository for the notification and CO-approval requirement. According to the Bureau, the contract clause that contains the notice-of-accounting-change requirement is the LOCC (Bureau Brief at 16-18). There is no explicit provision of this type in the LOCC, and only a strained reading of that clause could result in a determination that somehow supports the concept of consistency in accounting such as would mandate the notice and approval requirements championed by the Bureau, given the absence of a clear and explicit provision therefor. (In his testimony, the DCAA auditor mentioned that the Federal Acquisition Regulation (FAR) "contains essentially the same implication" as the CAS consistency standards "but it's nebulous." (Tr. 294). Nevertheless, the Bureau has not directed us to an applicable FAR provision and our search of the FAR and its conceptual predecessor, the Federal Procurement Regulations (FPR), which is made applicable to the contract by Special Provisions Clause 5, among others, failed to disclose any.)

By determining and concluding that there is no contract clause prohibiting an accounting system change, we intend no blanket

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approval for such. We note only that in the absence of a specific contract sanction against such a change, we are freer to investigate the circumstances to determine the true effect of what has happened. In fact, even if the CAS-related clauses applied, it is apparent that the failure to obtain advance CO approval for a change would not result in a denial of entitlement, as the Bureau seems to believe. It would result in the Government's being liable, but for not more than it would have been liable in the absence of the change, all other issues of allowability being decided in the contractor's favor. See, i.e., Clauses 10(a)(4), 11(a)(1). To be sure, standard accounting practices would, as a general matter, prohibit such a change, and the Bureau has cited a number of cases that support that proposition.

The Bureau, however, has taken the position that those cases stand for something more, namely that they support the notion that a change in accounting practices is absolutely prohibited in all circumstances. For instance, the Bureau relies on the case of *Hurd-Darbee, Inc.*, ASBCA No. 12,928, 68-2 BCA par. 7402, and draws attention to this language therein: "[C]ontractors are entitled to adopt their own accounting systems provided they conform to generally applicable accounting principles and are consistently applied." 68-2 BCA par. 7402 at 34,418. That such a notion is generally accepted and that that language appears in the case are undeniable. The Board there, however, did not rely on a contract term that prohibited a change without notification and approval and indeed did not couch its decision in the terms of an accounting system change. Moreover, we note this language: "It was too late eighteen months after the end of contract performance to reopen the payments made thereunder in order to reverse the contractual basis on which they rested, *in the absence of any compelling reason therefor*" (68-2 BCA par. 7402 at 418-19) (*italics supplied*).

Similarly, the Bureau cites *Reynolds Metals Co.*, ASBCA No. 7686, 1964 BCA par. 4312, for the "well established" proposition that "once a contractor has chosen a method of allocation of indirect costs, he cannot change it during or after contract performance without the [CO's] approval" (Bureau Brief at 14). Again, there was no citation to a contract provision which prohibited the practice which the CO there and the Board ultimately disallowed. Instead, the Board relied on generally accepted accounting principles in disallowing the practice which amounted to a change in the contractor's accounting system but made clear that an equitable result was as much a touchstone for reaching the proper conclusion as was slavish adherence to an accounting system. The Board stated in dictum: "It might under some circumstances be proper to make exceptions to appellant's ordinary accounting methods in order to meet special circumstances and more accurately reflect the costs of performing a particular contract, and we have frequently so held," 1964 BCA par. 4312 at 20,856, and "[w]e are

not convinced that a more equitable distribution of costs would result than if appellant's established accounting system were followed."

1964 BCA par. 4312 at 20,857.

The last case on which the Bureau places significant reliance is *Blue Cross & Blue Shield Ass'n*, ASBCA No. 26,529, 86-2 BCA par. 18,751. Besides the distinction from the instant case that the accounting system change decried by the Board in that case was the result of the contractor's own unaided efforts and not reached after the recommendations, suggestions, proddings, and urgings of the audit agency, there are some items of interest in the very language the Bureau quotes from the decision:

Although the revised method [of accounting, proposed retroactively] if it had been adopted initially might well have been acceptable and proper, *no justification exists for selecting this particular item of cost on an ex post facto basis for special treatment*. To do so would be inconsistent with [the subcontractor's] accounting system and not in conformity with generally accepted accounting principles. Neither appellant nor the Government (*in the absence of some possible peculiar circumstance not present here*) may retrospectively change the accounting treatment of an item of cost *to the prejudice of the other*. [Italics added.]

86-2 BCA par. 18,751 at 94,427. The Board also noted: "No change of circumstances is presented to justify the retroactive modification of this established accounting practice as proposed by appellant." 86-2 BCA par. 18,751 at 94,428.

To review our analysis of the Bureau's argument, we begin with the Bureau's failure to direct us to a contract provision that explicitly prohibits an accounting system change. We then searched on our own for some such and found three clauses which would appear to require consistency and advance approval of a change, but we concluded that those did not apply in this contract because of the exemption therefrom accorded S&D as a small business, and we noted that in any event the remedy for failure to comply with those provisions appeared not to be denial of all costs figured under the changed method but only so much as exceeded the amount determined under the superseded method. We then considered the notion that generally accepted accounting principles prohibited a change and reviewed the authorities cited by the Bureau as support therefor. (Besides the cases mentioned in the text, we looked at a number of cases cited by the ASBCA and listed by the Bureau at the end of a quote from the *Blue Cross & Blue Shield Ass'n* case analyzed in detail above; none of those cases added anything to the discussion.) Although the cases indeed stand for that proposition as a general matter, the excerpts from the cases presented above lead us to two conclusions: First, that there is no absolute prohibition against a change, that a "compelling reason," "special circumstances," or "possible peculiar circumstance," might justify a change regardless of a failure to notify and secure approval; and, second, that in any event, existence of an unapproved change is not grounds for denying all costs, but that tribunals should give consideration to the equities in such situation and investigate whether

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giving effect to the change would result in the allowance of "an item of cost to the prejudice of the other" party. We believe the foregoing to be a correct statement of the law and judge this case according to it.

Although the Bureau's view of the law differs from ours, largely as a matter of apparently believing that the prohibition against an unapproved change is absolute and that the proper remedy for such a violation is a denial of all costs figured under the changed method, we believe that the Bureau would take the same stand on this issue even if it agreed with our view of the law, but that is a result of a number of Bureau assumptions on the facts. The most significant of those assumptions is expressed in the Bureau's assertion that "[t]his change allowed [S&D] to charge more of its company's indirect expenses to this Government contract, retroactively" (Bureau Brief at 12). The Bureau cites pages 252 through 268 of the transcript as support for this position. There is nothing in those pages that can be fairly read to support that notion. Further, we have found nothing in the record of the case through the hearing which fairly supports that notion. To the contrary, our reading of the record leads us to conclude that the accounting system change should result in lower allocated indirect costs to this contract. The initial (post-award) audit in discussing the accounting system's methods for allocating certain G&A pool costs to the three operating divisions of S&D's accounting system (retail store, drilling, and professional services, of which only the last two allocated any costs to this contract, and disproportionately from the professional services division), suggested that S&D's method for allocating indirect expenses "is not considered to be equitable to the professional services * * * operations and subsequently to the Government contract" (App. Exh. 10 at 12). Although this sentence includes in its net of inequity the S&D "professional services operations," we took its meaning to be that under the proposed (original) system of allocation, the contract would be charged more dollars of indirect expenses than would be equitable. In reaching that conclusion, we found persuasive the language of the audit report's suggestion for remedying the inequity: "This allocation base [salary expense of the G&A pool allocated to S&D's three operating divisions on the basis of payroll labor costs] is inequitable as it does not recognize the causal/benefitting differences in the composition of direct costs of the three operations. We recommend a total cost input base for the allocation of administrative salaries" (App. Exh. 10 at 12). The implication is that the payroll labor costs of the professional services division is a greater percentage of the total of all payroll labor costs of the three divisions than is the *total* costs of the professional services operation to the *total* costs of the three operations and therefore that allocating the expenses considered along the lines of total costs results in a lower number of dollars allocated through the professional services division to the contract. That implication is borne out by figures in a letter from the DCAA to

S&D explaining the suggestion and dated August 9, 1983. Therein appear historical cost data which when used in the two ways just explained disclose a percentage for the allocation to professional services of 28.32 percent when using S&D's proposed payroll labor method of allocation and 19.1 percent when using the DCAA's suggested total cost basis of allocation. (A similar, although less marked, phenomenon occurs when the drilling operation figures are used, the allocation rate being 55.75 percent under the payroll labor approach and 53.57 percent under the total costs approach) (Bureau Brief, Appendix III, at 3-4).

To recap, nothing the Bureau cited before the end of the hearing establishes that any accounting change caused prejudice to the Government, and our analysis of the DCAA recommendations indicates that the change (which the DCAA, the Bureau's representative, suggested to begin with) should have been to the Bureau's benefit.¹

The Bureau nevertheless has raised the conclusions of yet another audit document, this one addressed to counsel for the Bureau and dated October 31, 1986 (Bureau Brief, Appendix II). Therein, the Branch Manager of the Seattle office of DCAA undertakes to explain the final audit report in terms of the excess expenses generated by the asserted change. The document indicates that the change accounts for \$74,010 of expenses beyond those figured under the "basic contract proposal." We have several problems with following the implications of this "evidence," however. First, following the numbers of Schedule A, we discovered that even taking the \$74,010 difference into account, the figures represent a \$143,145 excess above the previously determined cost-limitation amount. This does not take into account a \$7,950

¹ A question that arises naturally from our consideration is how much money we are talking about. Of the two suggestions in the initial audit report concerning S&D's accounting system, the one regarding shop and manufacturing O/H, being related to allocability and not an accounting system change, did not, we are convinced, affect the numbers in the final audit report. We have just discussed in the text the second suggestion, dealing with the allocation of certain G&A salary expenses to the professional services operation on the basis of payroll costs of the three operations divisions rather than the DCAA-preferred basis of total costs of the three divisions, but the differences attributable to the use of one method rather than the other are not obvious from the record.

To determine the differences, we used the apparent G&A payroll figures from appellant's Exh. 14 at p. 9, applied thereto the difference in the rates determined in accordance with the text's discussion thereof, then applied to the result the allocation rates to the contract contained in Schedule A-2 of the final audit report for "geology." (The term "geology" appears in the final report which is devoid of the term "professional services" which appeared in the initial report. We have taken the view that "geology" is either synonymous with or so closely connected with what we have meant by "professional services" that we can use the "geology" contract allocation percentages found in the final report to determine the amount of the subject expenses already allocated to professional services that should be allocated to the contract.) The result of our calculations is \$22,050, a not unimpressive figure but far from \$162,954.

We therefore conclude that even if we shared the Bureau's view about the change in the accounting system, we would be concerned only over approximately \$22,000. This figure, however, is for the difference in allocation figures; if our analysis is correct, application of the "changed" method would result in savings to the contract and to the Bureau of this amount. (Of course, the current analysis relies on the correctness of a great number of assumptions, like the contract allocation percentages, the applicability of the historical percentages for total cost and payroll costs among the three operations divisions, the amount of those G&A payroll costs, etc. We determined all of the figures through our unsupervised reading of the various audit documents. The important thing to note is that the Bureau did not instruct us in any of these matters. S&D made its *prima facie* case by presenting all of its costs evidence to the auditors and presenting the auditors' conclusions thereon in the form of the final audit report. As the Board views the case, it was the Bureau's burden to show that the report's results caused an inequity to the Bureau. This it has failed to do.

The central purpose of this note, however, is to emphasize that the asserted change involved a relatively small amount of money in any event, and probably none at all if our reading of the DCAA's concerns and suggestions is correct. That is one reason inclining us to accept S&D's position that even assuming that the change in accounting system is a valid issue, there was no harm to the Bureau resulting from the change and no part of the \$162,954 determined to be allowable by the audit report and questioned only because of the LOCC is made up of excess expenses resulting from the asserted change.

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element that the final audit report apparently found allowable, which would raise the excess figure to \$151,095, less than \$12,000 below the \$162,954 figure of the final audit report. Second, for comparison purposes in determining the \$74,010 excess, this latest audit document apparently used the allocation of O/H and G&A expenses rate of 75 percent of direct labor that was used for provisional billing purposes (and which, being provisional, was subject to change). The record indicates that S&D had timely represented that the rate had changed, and therefore using an allocation based on the provisional rates to compare with the allocation under the changed method, while perhaps instructive for some purposes, is essentially meaningless for showing savings or losses when using the changed method over the original allocation method if based on the data of experience.

Another way of explaining this is to consider the possibility that the actual allocable indirect expenses, using S&D's original system for identifying proper costs, exceeded the amount produced by multiplying the provisional rate by the allocation base, namely direct labor. In that case, which S&D has consistently asserted is the fact, then the proper amount of indirect dollars allocable to the contract under the original method could well be, and probably would be, higher than the amount resulting from application of the changed method which in turn could be higher than the provisional-rate times-direct-labor amount. Thus by comparing the provisional rate amount with the changed system amount, we cannot necessarily conclude anything on the effect on cost to the Bureau resulting from the use of the changed system, because the provisional rate is an ephemeral device subject to being changed in the period after the close of the respective fiscal years on the basis of experienced indirect costs. Discussion on S&D's position that it experienced indirect costs greater than the provisional-rate method amount and on the issue of negotiated overhead rates appears later herein. A third problem is that there are computational errors in this latest document that undermine its aura of reliability and a failure of the Bureau to explain those errors and to explain the document's conclusions and their relation to the final audit report in a fashion we find meaningful.

Having concluded that (1) the law does not absolutely prohibit the institution of a changed method of accounting, so as to deny all costs, even absent notification and approval and (2) that the proper sanction for such an unauthorized change is to deny all costs resulting from the changed method to the extent that they exceed the costs that would have resulted from application of the original system, we attempted to identify what excess costs of that description are in the amount deemed allowable in the final audit report. Although the Bureau has advanced many statements supportive of the conclusion that all or at least most of that amount was comprised of such excess costs, those statements (the major one of which we have discussed) are

unsubstantiated in themselves or are based on its questionable interpretations of the facts. The Bureau has pointed us to nothing reliable in the audit documents or elsewhere in the record that aids us in coming to the conclusion it wishes. In our deliberations we have also found nothing reliable of that description on our own. Also, the Bureau's characterization of the practice under discussion as an attempt to modify the contract unilaterally is not in meaningful contact with the facts and therefore does not help in advancing resolution of the issue.

We have not treated the Bureau's perceptions of the deliberateness and voluntariness of S&D's conduct leading to what we have called the accounting system change and the part played in that by the Bureau's agent, the DCAA. Although we believe that the DCAA's suggestions and urgings, which we incidentally take to be innocent and responsible, might constitute the "peculiar circumstances" that the cases indicate would permit an otherwise unauthorized accounting system change, it is unnecessary to treat that issue because we have concluded that any such change has worked no prejudice to the Bureau. As may be inferable from the foregoing discussion, we are convinced that the final audit report properly accounted for difficulties presented by S&D's proposed system for allocation of indirect expense. The accounting system change involved in this case has not been shown to have prejudiced the Bureau in any way.

Another issue that is closely connected to the one just discussed is whether the parties' failure to negotiate indirect-cost rates has an effect on S&D's recoverability. Through the hearing, the Bureau appeared to be most concerned about that failure, implying that it was S&D's duty to initiate the process and, having failed to do so, S&D apparently must either abide by the provisional rates or recover no indirect costs at all. We have been aware from an early point that S&D was not an experienced and sophisticated *Government* contractor and that the DCAA, in a letter purportedly written at the behest of the CO, advised S&D that the Government would schedule a meeting for negotiation of the rates (App. Supp. AF, Tab P). We had a preliminary inclination toward dismissing the failure-to-negotiate issue as a bar to recovery, because although the contract provision requiring negotiation contemplates that the contractor initiate the process, the S&D lack of experience, the misleading statement of the Bureau's audit agency and the passage of a great deal of time both before and after the final audit during which the CO directed no communication to S&D regarding the rates (the CO also making no mention of the rates in his final decision) together led us to the position that the CO had enough of an obligation at least to question S&D about its negotiated rates proposal that the Bureau should not be allowed to complain now of S&D's failure to initiate the process on its own. When we discovered that S&D had communicated not only to the DCAA (App. Supp. AF, Tab CC) but also to the CO himself (App. Supp. AF, Tab V) about the indirect expense rates for at least some of the fiscal periods, our inclination became

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stronger. Apparently, the Bureau has come to the same conclusion, presumably for the same reasons, for it has not raised the issue in its brief. It is now beyond time and practicality to require negotiation of indirect costs rates which are normally a prerequisite to closeout. Instead, we accept the rates that would support the final audit report figures, assuming, as we have for other matters, that those figures are reasonable and equitable and arrived at only after a process that, according to various of the report's own terms, took proper account of any applicable deficiencies existing in S&D's accounting system.

D. Whether S&D's failure to give notice of cost overruns mandates a denial of the appeal.

E. Whether S&D's failure to maintain an adequate system for tracking costs mandates a denial of the appeal.

F. Whether the LOCC was violated so that no funds above the contract ceiling may be awarded.

As was the case with the three issues relating to the accounting system change, the discussion of these three issues, all relating to the LOCC, present the best chance for comprehension if considered together. Like its position on the accounting issues, the Bureau's arguments here are colored by its perception of the facts.

The Bureau argues that S&D's system for controlling and tracking costs was inadequate and wants us to deny the appeal on that basis. The reason for having an adequate system for tracking costs is so the Government can know whether and when costs are nearing the LOCC limit so that the provisions of that clause may be referenced in deciding how to proceed. We believe the asserted inadequacy of S&D's system for tracking costs is no bar to its recovery for a number of reasons.

First, we conclude that the CO waived the requirement of an adequate tracking system and the Bureau's right to complain about any inadequacy just as he did the LOCC limitation and notice provisions. These three requirements are closely interrelated, and our discussion of the CO's waiver of the LOCC provisions, appearing later herein, covers this issue as well.

Moreover, we conclude that the CO waived any inadequacy in another way. The DCAA auditor testified that if the initial audit had been a *pre-award* audit, then the DCAA would have recommended that S&D's "accounting system was not adequate for a cost type contract" (Tr. 241). (Although the auditor's statement is rather clear, the context, namely his descriptive testimony on that potential recommendation (Tr. 238-41), makes it seem not as definitive as when taken out of context. For the most part, that testimony dealt with the allocation and other accounting practices that we have already discussed.)

Although problematic for other reasons, those have nothing to do with tracking and reporting costs. The major problem the auditor noted that has anything to do with tracking and reporting was S&D's lack of

general ledger control for many of the contract costs. That lack affects tracking and reporting of costs only as to proving them.) If such a recommendation had been made, then the CO could have declined to award the contract on anything other than a fixed-price basis, according to the auditor (Tr. 242). Essentially, however, the auditor *made* that recommendation or at least reported its constituent elements to the CO. At that point, of course, the CO did not have the option of awarding the contract on a fixed-price basis because it had already been awarded. The exigencies that led to the award before audit are the single most important facet of our discussion of all of the LOCC-related issues, but all of these matters were in the Government's control and beyond the capability of S&D to affect. In any event, the CO also did not require any correction of any inadequacies in the cost control and tracking system after the audit other than occasionally to request greater efforts in controlling and reporting expenditures, which we presume he would have done even if the system had received the auditor's imprimatur as adequate. Having created the circumstances leading to contract award prior to an audit and having done essentially nothing about the reported inadequacies, the Government has got what it paid for and is deemed to have waived any remedy it might otherwise have had because of an inadequate system.

Also, we are not sure that S&D's system was as inadequate as the Bureau suggests in any event. The Bureau contends, for instance, that S&D "failed to maintain adequate cost controls at the job site which invariably resulted in its inability to give the CO sufficient notices of * * * overruns and facilitated the constant need for additional funding under the contract" (Bureau Brief at 31). The proof of that, according to the Bureau is testimony that the project manager did the cost tracking on site and that he was not an accountant, and that the two full-time people at S&D's home office in Spokane who were also responsible for tracking contract costs were not accountants and had other duties (Bureau Brief at 32-33 citing Tr. 47-48, 111). (Although the Bureau statement (Bureau Brief at 32) that a project manager trained in geology "may not do as effective a job at cost accounting as an accountant" has a certain logical appeal, the Bureau has not cited any legal requirement, nor are we aware of any, that in order to have an adequate tracking system a contractor must use accountants who work full-time on such endeavors. We are not, after all, concerned with "cost accounting," as that term is generally understood, at this point, but with tracking costs. Even conceding that an accountant would do a better job at tracking costs than a project manager or other business functionary, we must keep in mind that we are measuring the tracking system not against an ideal or cost accountant-level standard but against an "adequate" standard. S&D's Mr. Salisbury testified to a system of tracking costs that has all the earmarks of being adequate (Tr. 47-50) and the only alleged fault the Bureau can present is that the personnel implementing the system were not accountants, a

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circumstance that we have deemed to be no fault at all for performance of this contract.)

Although the Bureau failed to substantiate its contention, quoted above, that the alleged tracking inadequacies resulted in insufficient notice of cost overruns and the need for additional funding, we feel constrained to note that on the basis of the entire record (1) any insufficiency in notice of overruns resulted at least as much from the nature of the contract performance and the abbreviated period permissible therefor as from any other reason including the tracking system and (2) it appears that the need for additional funding resulted from legitimately incurred additional costs to complete performance of a project whose scope (a) was not definitive in either party's institutional mind from the beginning for a variety of reasons and (b) was changed during performance based on actual experience in the field as compared to a rather nebulous expectation thereof at the outset.

Based on the foregoing analysis, we cannot agree that any asserted inadequacy in S&D's tracking system accords the Bureau any basis for not paying the contractor's costs that are otherwise allowable.

Regarding the Bureau's defense on the basis of the LOCC and S&D's failure to comply with the notice provisions for cost overruns, we conclude that the CO waived the ceiling provisions of the LOCC and waived any right to complain of noncompliance with the notice provisions. The waiver of the latter largely follows from the waiver of the former.

The Bureau bases its LOCC defense on the contentions (1) that it is not estopped from raising the LOCC limitation by virtue of granting earlier extensions of the limitation apparently including some after the limit had already been exceeded, (2) that S&D's Mr. Salisbury admitted that the Government was not obligated to pay for costs incurred over the ceiling, and (3) that S&D relied on expressions that the Government would pay S&D's costs, made by an official other than the only person with the authority so to commit the Government, the CO, who consistently urged S&D to stay within budget.

Taking the second of these notions first, we note that the Bureau has taken Mr. Salisbury's testimony totally out of context. As quoted by the Bureau, Mr. Salisbury said, "We had had conversations [with the CO] along through the course of the project about costs above ceiling" and "[w]e understood that the Government was not obligated to pay [if S&D went above ceiling]" (Bureau Brief at 36; Tr. 67). Disregarding for the purposes of discussion our disinclination to accept a lay witness's pronouncements on the law, especially where we must apply it to facts not assumed in the witness's response, we note that the context of the transcript passage is completed sufficiently by the next question and response for us to reject the Bureau notion based on its selective quotation:

Q Was that your concern on the 1st of November [1983]?

A That was my concern as early as the 1st of October and expressed in a number of conversations with [the CO] that we needed—I didn't want to spend money until we'd had some authorization that there would be found [sic] to pay for it.

(Tr. 67). There is ample other evidence in the record to conclude that Mr. Salisbury had a reasonably competent understanding of and healthy respect for the LOCC including that its ceiling could be raised and S&D's efforts terminated in the absence of such a raise, but the juxtaposition of the quoted colloquy with the passage quoted by the Bureau points out how misleading out of context that passage is for purposes of supporting the notion for which it is cited. Except for the foregoing comments we disregard the Bureau's argument based thereon.

Regarding the other two notions, we note that apparently the Bureau has missed the point. S&D does not rely on estoppel from raising the LOCC because of the funding of prior overruns nor (except as a matter of corroboration) on expressions of acquiescence in the incurring of excess costs made by officials other than the CO.

Indeed, this case presents almost a classic instance of a waiver of the LOCC. Simply put, S&D informed the CO of expectations of or the fact of overruns and indeed expressed its intention to stop work as was its right under the LOCC having reached or exceeded the limitation thereof; the CO's response was to urge continued performance making clear that to the extent that he denied further funding, that denial was temporary, the continuing nature thereof to be halted upon audit of S&D's costs by the DCAA. The funding of prior overruns has nothing to do with S&D's position on this now and as far as we can tell from the record it never has.

To be sure, S&D did not provide the CO with the 60-day/75-percent notice required by the LOCC, but as we have already determined, that resulted more from the nature of the undertaking, its ambiguity in terms of scope, the scope's modification based on field experience and the abbreviated period available for performance than it did from a spendthrift attitude and a lax regard for the notice provision on the part of S&D. (See, i.e., Tr. 72-73, regarding Mr. Salisbury's trouble with complying with the notice provision in this context). Moreover, although as the Bureau contends, the CO on a number of occasions reminded S&D of his desire and need for funding requests to be timely, he never denied funding on the basis of the notice provisions nor even hinted that he would until the final decision which occurred long after the communications which induced additional expenditures. By failing to enforce the notice provisions, the CO waived them; it is now too late to raise a deficiency in notice after detrimental conduct entered into on the basis of what amounts to a waiver thereof—just as it is too late to complain about a deficient accounting system after the system has been used to identify and track costs throughout the performance of a contract without a rehabilitatory suggestion or threat from the CO. As the Bureau has pointed out, the CO was aware of the problems created

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by the very nature of the contract in terms of S&D's ability to predict overruns (Tr. 196-98), but the CO's after-the-fact hearing statements to the effect that with greater notice he would have reduced the scope of the contract do not convince us that that was indeed his state of mind when the funding requests came in, because his comments are internally inconsistent, the expressed solutions are nonspecific, the items he contends he would have cut (relating to the scope and extent of field work) were precisely the ones that he acknowledged were so difficult to provide timely notice on, and he made no mention of the lately expressed possible cost-saving solutions at the time of the funding requests despite his continuing general admonitions about cost tracking and timely notification (Tr. 226-28). We believe that the CO's state of mind on the notice provisions of the LOCC was similar to his state of mind on the fund limitation provisions, that the completion of the contract as contemplated and modified was absolutely necessary and more important than any other aspect of performance including cost, at least to a considerable extent.

Though we have concluded that the CO waived the notice provisions independently, a waiver of notice also is a necessary corollary of and follows from a waiver of the limitation provisions. To reach our determination that the limitation provision was waived we considered a number of record incidents. First, in replying to S&D's November 1, 1983, communications requesting a funding increase and advising of a termination of performance, the CO sent a letter dated November 17, 1983, expressing his concern over the funds problem (and mentioning a number of aspects thereof that he found "disturbing," including noncompliance with the LOCC's notice provisions) but containing the following language:

It is impossible to determine at the present time the reasonableness of your claim without the final audit and we must defer any decision on your claim until after the audit report has been received, reviewed, and evaluation is completed.

It is the Bureau's intent to be as fair as possible to its contractors, however, we must also keep in mind our responsibilities to the taxpayers. We will proceed with the evaluation of your claim as soon as the information necessary to do so is made available to us.

We must urgently ask you to deliver the draft final report which is more than two weeks overdue. As we have discussed so often, time is indeed of the essence in this matter. The Congress and the Secretary urgently need this information in order to make descisions [sic] that may greatly influence the future course of the Nation in mineral policy matters. The high degree of professionalism that you and your subcontractors have shown in the fieldwork is greatly appreciated by the Bureau, however your efforts may have been to no avail if we cannot present the fruits of your labor to the Congress and the Secretary in a timely fashion.

(AF, Tab 2B). In a letter dated November 21, 1983, the CO followed up those sentiments in a statement reading, in part: "[T]he final audit may have an important impact on the final negotiated price of the contract" (App. Exh. 13).

These are not words upon which a reasonable contractor would rely in deciding that the Government had not approved prior expenditures of funds; nor does the language employed indicate that in the future such expenditures in pursuit of contract performance would not be approved. On these communications alone, we would determine that the CO expected continued performance and, being aware that S&D had already exceeded the limitation, necessarily intended a waiver of the limitation provision of the LOCC. The CO's expressions along that line did not end there. In response to further requests for funding, the CO in a letter dated May 2, 1984, urging delivery of the final contract report, stated "additional claims will be considered only after receipt of the final audit report from DCAA. This report is scheduled for completion later this month and we will give your claim every consideration at that time" (AF, Tab 2B). Insofar as S&D had earlier circulated a draft final report and in the letter (dated January 24, 1984 (App. Supp. AF, Tab U)) covering delivery thereof to the Bureau's Mr. Jansons (with copy thereof to the CO) had communicated a proprietary interest in the report, it seems reasonable to conclude that the CO's May 2, 1984, letter, was intended to induce delivery of the final report. S&D delivered the final report on May 4, 1984. Reading the November and May letters together, it seems reasonable that S&D could conclude that the CO was promising to pay all of its reasonable costs even in excess of the limitation if S&D would continue to perform (November) and deliver the completed report (May).

S&D contends that this is the precise situation in which a conclusion of LOCC waiver is inescapable and cites *Hughes Aircraft Corp.*, ASBCA No. 24,601, 83-1 BCA par. 16,396 for its expression of the test to determine whether the Government is estopped from raising the LOCC. This Board expressed approval of the *Hughes Aircraft* estoppel formula in *MTL Systems, Inc.*, IBCA-1648, 84-3 BCA par. 17,618. Although this Board in that case denied the appeal because the appellant there clearly did not fall within the estoppel guidelines, it is clear that the CO's conduct there was far different from the CO's conduct here. In *MTL Systems*, the CO was careful to warn the contractor not to exceed the limitation and to the extent that he urged further (*i.e.*, not necessarily complete) performance, he did so with the admonition that the limitation not be exceeded and on the basis of his reasonable expectation that there were some funds remaining for that purpose at the time that the contractor asserted that there were not. The CO's communications were not so expressed in this case. To the extent that they were directory, they were to the effect of completing performance, not to the effect of not exceeding the limitation and there is no indication that the CO had a reasonable expectation that the limitation was not already or about to be exceeded. Whether this situation is measured against "waiver" (*i.e.*, *Thiokol Chemical Corp.*, ASBCA No. 5726, 60-2 BCA par. 2852) or "estoppel," as in *MTL, supra*, and *Hughes Aircraft, supra*, we believe the result should be the same: clearly, the CO wanted the contract performance completed and,

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expressing that at a time when he knew that the limitation had been or was in jeopardy of being exceeded, he waived the requirement that S&D observe the LOCC as to its limitation provisions on reasonably incurred, allowable costs. (Logically, the waiver of the limitation provision implies waiver of the notice provisions for earlier funds requests, at least in this case.)

In making its arguments against waiver, the Bureau raises only the issue of lack of authority for relying on prior overrun findings, already mentioned, and the issue of "duress" on the CO occasioned by S&D's conduct (Bureau Brief at 23-24). Our answer to the latter argument is that "duress" is no more a factor of S&D's making than it is in any other case where the Government wants the product of the contract performance so much that it is willing to advance expressions that a tribunal later deems to be the constituent elements of waiver. See *Thiokol, supra*. To guard against fraudulent conduct by a contractor intent on taking advantage of a CO so driven to obtain the results of a contract that he encourages performance to that end with intemperate expressions that allow a disregard of the LOCC limitation, each Government contract provides that the only costs that a contractor may recover are those that are reasonable to the contract's purpose, among other qualifications. This contract so provides. We have already seen that such reasonable costs have been identified, namely in the final audit report. The conclusions of that report were reasonable on their face and, although the Bureau advanced a number of arguments on why we should not accept them as such, it did not convince us, as discussed above. That left only the LOCC and its constituent parts as a reason for denying the appeal. We have now examined the LOCC arguments and similarly found no reason to bar recovery based thereon. Therefore, we conclude that S&D is entitled to recover \$162,954 as reasonable, audited excess costs above the LOCC limitation which was waived.

II

Additional Items Requested by S&D

As noted in this decision's introductory paragraph, S&D has requested reimbursement for a number of items of cost other than those covered in the final audit report's conclusion that \$162,954 was allowable. Among the theories advanced in support of these requests are that S&D is entitled to an equitable adjustment and a reformation.

S&D seems to believe that it would be equitable to reimburse it for the additional costs because of the additional work occasioned by the discovery of greater mineralization in the study area than expected and cites our decision in *Environmental Consultants, Inc., IBCA No. 1192-5-78, 79-2 BCA par. 13,937* in support of that belief. The problem is that "equitable adjustment" is a term of art and is a

remedy available in certain circumstances that are beyond the question of whether reimbursement is "equitable." Specifically, there must be found that the Government required the performance of an extra (as in *Environmental Consultants, Inc., supra*) or otherwise required an item of performance that amounted to a change or constructive change. The only such circumstances in this case pertain to the cable tool sampling for which a change order, Modification I, was issued. That Modification included a provision for equitable adjustment to cover the greater expense of following the cable tool sampling method rather than drilling as originally contemplated. Our earlier discussion of expanded scope of the contract referred to an expansion of the parties' expectation of how much work had to be done but still within the "scope" of the contract as originally intended. We conclude therefore that no circumstances arose (other than that already covered by Modification I) which amounted to constructive change. The contractor is protected in a CPFF contract from incurring additional expenses caused by an 'expansion' of the work by the LOCC, as this decision proves.

Similarly, the greater work than originally contemplated in this case does not demonstrate that the parties failed to have a meeting of the minds at the outset such as would allow reformation of the contract. Again, the procedures and rights available to the contractor through the LOCC protect it from incurring greater costs than allowed by the contract when the amount of the work, necessarily being less than definite in a study contract of this type, proves to be greater than originally estimated.

Having concluded that neither of S&D's theories for recovery of the entire amount of the excess is applicable, we look at the allowability of each of the constituent cost elements thereof.

(S&D's configuration of total costs above the audited allowable amount and the amount of certain elements thereof changed between amended complaint and brief. The total, including the \$162,954 allowable audited amount, in the amended complaint was \$433,299.80; in the brief, that total was \$415,014.64. Rather than delineate the changes and the various cost figures, we treat the costs by category and do not mention amounts.)

The first element we consider is bid and proposal costs. These costs are those associated with the proposal S&D and its allied companies submitted to the Bureau without having been solicited therefor and those for the bid S&D submitted in response to the Bureau RFP. In the absence of a prior agreement with the CO, bid and proposal costs are unallowable as a direct charge to the contract with which they are associated. S&D has not proved the existence of any such agreement, so these costs should receive normal treatment according to generally accepted accounting principles and the FPR which means they should be part of the indirect cost pool from which costs are ultimately allocated to the contract. Presumably, that has already happened as part of the proposed costs/audit procedure, and if it has not, then S&D

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has waived its opportunity at this late date to have the appropriate part of these costs reimbursed. (See 41 CFR 1-15.205-3; 41 CFR 1-15.107(g)(2) (1984).) We deny the appeal as to bid and proposal costs.

The next element we consider is what S&D calculates is its entitlement to "profit" or fixed fee associated with the amounts added to the contract by the Modifications. In the case of Modification I, S&D wants 5 percent of the cost portion of funds added thereby, consonant with the 10-percent fixed fee of the original contract, the modification having added 5 percent for fee. Modifications II and III added nothing for fixed fee, and S&D therefore wants 10 percent of the amounts added thereby. When an amount is added to a CPFF contract so as to increase the limitation, the added amount is for costs only and not for fee. That is why we modify the "fee" term in the CPFF formulation with the adjective "fixed." Adding a fee when the limitation is raised to account for unexpected costs is not only logically contrary to the "fixed fee" notion, it is also illegal by reason of the statutory prohibition against cost-plus-a-percentage-of-cost contracting. In the case of Modification I, the raise in the limit was occasioned because of a change in the work, not merely because greater than expected costs were being encountered doing the work as originally contemplated. In the context of a change, an addition to the fee is permissible, but the amount thereof is a matter of negotiation and not a matter of right based on a percentage formula used to determine the fee in the basic contract. By signing the modification form and accepting the terms thereof, S&D waived any objection to the amount of the fee included in Modification I. We deny the appeal in respect of fees.

We group the next two elements, "direct labor and fringe costs" and "cost of capital equipment," together. By their description and the amounts stated, we see these are the same items which the DCAA questioned in the final audit report. In the case of the former category, the audit report said the total amount was attributable to two parts, one questioned because the rate proposed by S&D for allocating indirect costs was higher than that calculated by the auditor and the other questioned because the rate was applied to catalog-priced amounts which appeared to duplicate costs stated elsewhere. On the latter category, the audit report questioned the amount as not being allowable under Clause 13 of the contract's general provisions. S&D has merely stated that it is entitled to recover these costs but by those statements and the record citations it makes to support them it has not shown how the audit report's conclusions are incorrect. We deny the appeal on excess costs in these two categories described above.

The final element is for certain indirect labor costs. In its brief, S&D describes these as "costs associated with the completion of the contract given the specific dedication of named employees to contract responsibilities not otherwise required in the normal course of business—particularly the supplying to the DCAA of audit materials

requested by the DCAA from approximately September 1983 through April 1985" (App. Brief at 67). In the transcript citation to which the brief directs us, Mr. Salisbury describes this element as resulting from certain employees having "their time * * * disproportionately spent on this contract" (Tr. 92). We gather from these two sources that S&D means that the usual allocation bases and rates used in the audit did not take account of the unusual amount of salaried time spent by S&D employees in directly benefitting the work of this contract. If that were the case, then S&D should have made a proposal to the auditor that would take account of this circumstance so that it could be proved at that time. We believe that it is too late to raise the issue now, and in any event we have a good deal of trouble in relying on the uncorroborated proof thereof offered (Tr. 92). We deny the appeal with respect to these costs.

To summarize, we have examined the Bureau's arguments against S&D's recovery of the amount found by the DCAA to be allowable costs and have found those arguments lacking in merit; we have examined S&D's case in favor of that recovery and found it meritorious; we have examined the audit report's findings in detail and have concluded that the amount stated as allowable costs therein to be a fair and reasonable calculation of such costs, no reason appearing for us to conclude the contrary; and we have examined S&D's arguments in favor of other costs above those identified by the audit report as allowable and have found those arguments not to be persuasive.

Therefore, the appeal is sustained in the amount of \$162,954, plus interest from the time of submission of the claim in accordance with the Contract Disputes Act of 1978. The appeal is denied in all other respects. All outstanding motions are denied.

WILLIAM F. McGRAW
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

CELSIUS ENERGY CO., SOUTHLAND ROYALTY CO.

99 IBLA 53

Decided September 8, 1987

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, holding that oil and gas leases W-87871, W-87875, W-92981, and W-92982 were continued in effect for a 2-year term and so long thereafter as oil or gas is produced in paying quantities.

Reversed and remanded.

1. Oil and Gas Leases: Unit and Cooperative Agreements

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Under 30 U.S.C. § 226(j) (1982), the Department is without authority to create separate leases out of a single lease upon its partial elimination from a unit plan by contraction of the unit area. Thus, partial elimination of a lease has no effect on its tenure.

2. Oil and Gas Leases: Extensions--Oil and Gas Leases: Unit and Cooperative Agreements

Under 30 U.S.C. § 226(j) (1982), any lease partially committed to a unit plan shall be segregated into separate leases as to the lands committed and the lands not committed. Thereafter, they are distinct leases, and are administered independently of each other. The statute does not give the segregated nonunitized portion of a lease a new term, but provides that the lease shall continue in force and effect for the term thereof, but for not less than 2 years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities. The word "term" here refers to the entire term of the lease, *i.e.*, the period the lease has to run, whether that period were definite or indefinite, as it existed on the date of segregation.

3. Oil and Gas Leases: Unit and Cooperative Agreements

When a lease is segregated upon partial commitment to a unit agreement pursuant to 30 U.S.C. § 226(j) (1982), production on one segregated lease can extend the term of the other segregated lease only if the segregation occurs when the base lease is in an extended term because of production and not in a fixed term of years.

4. Oil and Gas Leases: Extensions--Oil and Gas Leases: Unit and Cooperative Agreements

Under 30 U.S.C. § 226(j) (1982), any lease which shall be eliminated from any approved unit plan and any lease which shall be in effect at the termination of such a plan shall continue in effect for the original term thereof, but for not less than 2 years, and so long thereafter as oil or gas is produced in paying quantities. This provision is mandatory and leaves no room for the exercise of discretion. It applies to any lease eliminated from a unit plan without exception.

5. Oil and Gas Leases: Extensions--Oil and Gas Leases: Unit and Cooperative Agreements

If a lease is no longer in its original term, but is held by production at the time of its elimination from a unit, it continues under 30 U.S.C. § 226(j) (1982), for a fixed term of 2 years and so long thereafter as oil or gas is produced in paying quantities.

6. Oil and Gas Leases: Unit and Cooperative Agreements

The legislative history of the provision of the Mineral Leasing Act covering unitization of Federal leases, 30 U.S.C. § 226(j) (1982), contains clear and specific evidence of legislative intent that the provisions concerning elimination of leases from units and segregation of leases were intended to benefit lessees by encouraging the separate development of nonunitized lands. These provisions were not intended to allow such land to be held by production from other leases.

Conoco, Inc., 90 IBLA 388 (1986), and *Wexpro Co.*, 90 IBLA 394 (1986), *overruled* prospectively; *Anadarko Production Co.*, 92 IBLA 212, 93 I.D. 246 (1986), and *Bass Enterprises Production Co.*, 47 IBLA 53 (1980), *modified and distinguished*.

APPEARANCES: Laura L. Payne, Esq., Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE ARNESS
INTERIOR BOARD OF LAND APPEALS

Celsius Energy Co. (Celsius) and Southland Royalty Co. (Southland) have appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated April 12, 1985, holding that leases W-87871, W-87875, W-92981, and W-92982 were to continue in effect through September 1, 1985, and so long thereafter as oil or gas was produced in paying quantities. Appellants contend that these leases should be deemed to be held by production from the base leases from which they were segregated, W-9389 and W-32235.

I.

The decision regarding these leases was made after the elimination of certain land from the Spearhead Ranch Unit on September 1, 1983, and the creation of the Powell Pressure Maintenance (PPM) Unit, effective September 1, 1983. The tenure of these leases involves the application of the following provisions of the Mineral Leasing Act, 30 U.S.C. § 226(j) (1982):

Any * * * lease * * * which has heretofore or may hereafter be committed to any such [unit] plan that contains a general provision for allocation of oil or gas shall continue in force and effect as to the land committed so long as the lease remains subject to the plan: *Provided*, That production is had in paying quantities under the plan prior to the expiration date of the term of the lease. Any lease heretofore or hereafter committed to any such plan embracing lands that are in part within and in part outside of the area covered by any such plan shall be segregated into separate leases as to the lands committed and the lands not committed as of the effective date of unitization: *Provided, however*, That any such lease as to the nonunitized portion shall continue in force and effect for the term thereof but for not less than two years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities.

* * * Any lease which shall be eliminated from any such approved or prescribed plan * * * and any lease which shall be in effect at the termination of any such approved or prescribed plan * * * shall continue in effect for the original term thereof, but for not less than two years, and so long thereafter as oil or gas is produced in paying quantities. [Italics supplied.]

Although somewhat complex, the foregoing provisions do not lack precision. They are comprehensive and contain specific language governing the tenure of leases upon (1) commitment to a unit plan, (2) partial commitment to a unit plan, and (3) elimination from a unit plan.

In order to provide the maximum assurance that our disposition of this appeal is consistent with the will of Congress, our first task is necessarily to state the history of these leases and identify the portion of the statute quoted above that pertains to a particular event. As the discussion which follows will make clear, the tenure of the various leases is not governed by the same provision of 30 U.S.C. § 226(j) (1982). Accordingly, we first discuss the history of lease W-9389 and the leases which were segregated from it, W-87871 and W-92981.

September 8, 1987

II. A.

Oil and gas lease W-9389 was issued for a primary term of 10 years beginning December 1, 1967. Effective August 9, 1974, this lease was partially committed to the Spearhead Ranch Unit. The nonunitized portion was segregated into lease W-47594, which is not subject to this appeal. The unitized portion, which included the lands involved in this appeal, retained serial number W-9389. Under 30 U.S.C. § 226(j) (1982), lease W-9389 would "continue in force and effect as to the land committed so long as the lease remained subject to the plan: *Provided*, That production is had in paying quantities under the plan prior to the expiration date of the term of such lease." (Italics in original.) Although no production was had prior to the end of the primary term, the lease was extended for 2 years beyond the end of its primary term by diligent drilling operations under the unit plan, pursuant to 30 U.S.C. § 226(e) (1982). Thereafter, the lease was held by unit production.

[1] The Spearhead Ranch Unit terminated with respect to some, but not all of the land in W-9389, effective September 1, 1983. When a lease is eliminated from a plan, the statute provides that it "shall continue in effect for the original term thereof, but for not less than two years, and so long thereafter as oil or gas is produced in paying quantities." 30 U.S.C. § 226(j) (1982). However, lease W-9389 was not completely eliminated from the Spearhead Ranch Unit. Thus, the partial elimination of W-9389 from the Spearhead Ranch Unit had no effect on the tenure of the lease because segregation takes place only when part of a lease is placed in a unit, not when a part of the lease is eliminated from the unit. *Solicitor's Opinion*, M-36592 (Jan. 21, 1960); *accord*, *Marathon Oil Co.*, 78 IBLA 102 (1983).

II. B.

[2] On September 1, 1983, the Powell Pressure Maintenance Unit (PPM Unit) was approved. Lease W-9389 was partially committed to this new unit. The land in the PPM Unit retained lease number W-9389 and the land not unitized was segregated into lease W-87871. The new lease, W-87871, included land still committed to the producing Spearhead Ranch Unit. When a lease is partially committed to a unit plan, it is "segregated into separate leases." 30 U.S.C. § 226(j) (1982). "Thereafter, they are distinct leases and are administered independent of each other." *Solicitor's Opinion*, M-36592 (Jan. 21, 1960). It logically follows that events which occur on one portion subsequent to segregation can have no effect on the tenure of the other portion. Indeed, any linkage between two segregated leases would tend to negate the fact that segregation had occurred. How, then, is it possible for leases to be truly segregated if, as appellants contend, one lease can be extended by production from another lease? To answer this

question, we must give close examination to the statutory provisions which govern the terms of those leases.

The following proviso of 30 U.S.C. § 226(j) (1982) governs the tenure of W-87871: "That any such lease as to the nonunitized portion shall continue in force and effect for the *term* thereof but for not less than two years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities." (Italics supplied.) The statute does not give the segregated, nonunitized lease a new term at the time of segregation; it continues the term of the lease as it was prior to segregation, but for at least 2 years.

Congress' use of the word "term" is important not only because it defines the tenure of the nonunitized portion but also because it can define the tenure of the unitized portion. A unitized lease is extended by its commitment to a unit agreement only if "production is had in paying quantities under the plan prior to the expiration date of the term of the lease." 30 U.S.C. § 226(j) (1982).

If segregation occurs when a lease is in a fixed term of years, the term of each segregated lease is the remainder of that term, but no less than 2 years, and so long thereafter as oil or gas is produced in paying quantities. Subsequent production on one lease cannot extend the other lease; to hold otherwise would negate the segregation. Even if the lease already is producing during its fixed term of years when segregation occurs, the lease is still considered to be in a fixed term of years. *Conoco Inc.*, 80 IBLA 161, 91 I.D. 181 (1984); *Solicitor's Opinion*, M-36543 (Jan. 23, 1959). At the end of that term, production beyond the lease term on one part of the segregated lease will not extend the term of the nonproducing part of the lease. *Id.* This result is consistent with the fact that segregation creates two independent leases.

However, W-9389 was not in a fixed term in 1983 when segregation occurred. Its term had been extended for an indefinite period by production from the Spearhead Ranch Unit. On one hand, it may be suggested that segregation requires independent administration, with the result that production on one segregated portion of the lease will no longer extend the life of the other portion to which it was once joined. The determination reached by BLM is consistent with this approach. On the other hand, the statute literally assigns each nonunitized portion the "term thereof," which at the time of segregation was an indefinite term, because the lease was extended by production. This suggests that each segregated lease was continued under the same indefinite term, with the result that production on one lease would continue to extend the term of the other. This constitutes a limited exception to the principle that segregated leases must be administered independently of one another. Is there any valid basis in the statute for such an exception?

If Congress had intended the word "term" to mean "primary term," BLM would have been correct in holding that lease W-87871 would continue in effect for 2 years and so long thereafter as the lease produced oil or gas on its own. Lease W-9389 was no longer in its

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primary term when segregation occurred. But when one looks elsewhere in § 226(j), it becomes clear that this is not what Congress meant. In other portions of § 226(j) and elsewhere in the Act, Congress has modified the word "term" with words like "primary" or "original" when it wanted to refer to a fixed period of time. Shortly after the enactment of the 1954 amendments, the Solicitor compiled a list of most, if not all, of the uses of the word "term" in the Mineral Leasing Act, either by itself or modified, and discerned

a consistent purpose to distinguish between the entire term and segments thereof and to expressly define the latter by the use of words of limitation. Thus, where Congress has wanted the law to apply to different fixed periods only, to wit, to 20-year and 5-year terms, it has used the words 'the original term.'

Solicitor's Opinion, 63 I.D. 246, 247 (1956). Citing specific evidence from the legislative history of the Act,¹ the Solicitor concluded "that the word 'term' was intentionally used in this connection without modification to mean the period for which the lease was to run as of the crucial date and not as definitive of any particular period or periods of years." (Italics in original.) *Id.* Thus, when 30 U.S.C. § 226(j) (1982), provides that the nonunitized portion "shall continue in force and effect for the term thereof but for not less than two years," it means the entire term of the lease or period that the lease had to run, whether that period was definite or indefinite, as it existed on the date of the segregation.

[3] In accordance with the construction set forth in *Solicitor's Opinion*, 63 I.D. 246 (1956), the Department has ruled that production on one segregated lease can extend the term of the other segregated lease, but only if the segregation occurs when the base lease is in an extended term because of production and not in a fixed term of years. *Ann Guyer Lewis*, 68 I.D. 180 (1961); see also *Solicitor's Opinion*, M-36758 (Oct. 25, 1968); cf. *Conoco, Inc.*, 80 IBLA 161, 91 I.D. 181 (1984) (because segregation occurred during fixed term, production on the base lease did not extend the nonproducing nonunitized segregated lease.)

Therefore, the term of W-87871 is the same as that of W-9389 when it was partially committed to the PPM Unit. W-9389 was in an extended term held by its own production, as well as by production under the Spearhead Ranch Unit, so W-87871 is held by the same production that had extended W-9389 when W-87871 was segregated from it. Because part of W-87871 remained committed to the Spearhead Ranch Unit, production from that unit also extended the lease.

By decision dated March 15, 1985, BLM approved the first expansion of the PPM Unit, although this action was also made effective

¹ The particular item of legislative history upon which the Solicitor relied is set forth and discussed at the beginning of Part IV. D. of this opinion, *infra*.

September 1, 1983. Lease W-87871 was partially committed to this expansion; the land not committed was segregated and assigned serial No. W-92981. That lease was to continue in force and effect for the term of the lease from which it was segregated, W-87871, which in turn was to continue in force and effect for the term of the lease from which it was segregated, W-9389, both of which were in terms extended by production. At the time of this commitment, lease W-87871 was still held by production from the Spearhead Ranch Unit. Upon its partial commitment to the PPM Unit, lease W-87871 would continue in force and effect as to the land committed so long as the lease remained subject to the PPM Unit plan, provided that production was had in paying quantities under the PPM Unit plan prior to the expiration date of the term of the lease, *i.e.*, prior to the cessation of production under the Spearhead Ranch Unit. The lease that was not committed to the PPM Unit, W-92981, still contained land that was included in the Spearhead Ranch Unit and was in an extended term because of production from that unit. Because these leases were in their extended term by reason of production at a time when the segregations became effective, the segregated leases are continued by the production on the base leases from which they were segregated. BLM's decision with respect to lease numbers W-87871 and W-92981 finding that they were continued for 2 years and so long as oil and gas is produced in paying quantities is therefore incorrect, and must be reversed.

III. A.

We now turn to consideration of lease W-32235 and the leases segregated from it, W-87875 and W-92982. Oil and gas lease W-32235 was issued for a 10-year term which began on January 1, 1972. Effective August 7, 1974, this lease was partially committed to the Spearhead Ranch Unit. The nonunitized portion was segregated into lease W-47599, which is not now in issue. The unitized portion retained serial No. W-32235 and included the land at issue here. Under 30 U.S.C. § 226(j) (1982), this lease would "continue in force and effect as to the land committed so long as the lease remains subject to the plan: *Provided*, That production is had in paying quantities under the plan prior to the expiration date of the term of such lease." (Italics in original.) A producing unit well on lease W-32235 extended the lease beyond its primary term.

III. B.

[4] Effective September 1, 1983, all of lease W-32235, a producing lease, was eliminated from the unit. Unlike the situation with W-9389, this was not a partial elimination. When a lease is entirely eliminated from a unit, its tenure is governed by the following provisions of 30 U.S.C. § 226(j) (1982): "Any lease which shall be eliminated from any * * * plan * * * shall continue in effect for the *original term* thereof, but for not less than two years, and so long thereafter as oil or

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gas is produced in paying quantities." (Italics supplied.) Because the lease was not in its *original term* at the time of its elimination from the unit, it was extended for "two years, and so long thereafter as oil or gas is produced in paying quantities." Several observations may be made about this provision. First, its use of the word "shall" makes it mandatory, so it leaves no room for the exercise of discretion. Second, it applies to *any* lease eliminated from a plan, so there are no exceptions. Third, its meaning is clear, so there is no room for the exercise of interpretation.

[5] Thus, even though lease W-32235 may have been held by production prior to its elimination from the Spearhead Ranch Unit, it would continue to be held by production immediately after its elimination only if Congress in 1954 had also deleted the word "original" from this provision just as Congress deleted the word "primary" from the provision pertaining to the tenure of a lease when it is committed to a unit. (See discussion at the beginning of Part IV. D. of this opinion *below*.) Congress did not amend this provision, so we have no authority to do anything else but to apply it, with the result that when W-32235 was eliminated from the Spearhead Ranch Unit, it was not held by production from the Spearhead Ranch Unit, but was held for a fixed term of 2 years and so long thereafter as oil or gas is produced in paying quantities.

III. C.

On the same day that lease W-32235 was eliminated from the Spearhead Ranch Unit, September 1, 1983, the lease was partially committed to the PPM Unit. The unitized portion included the producing well. The unitized portion would "continue in force and effect as to the land committed so long as the lease remains subject to the plan: *Provided*, That production is had in paying quantities under the plan prior to the expiration date of the term of such lease." As explained above, this lease obtained an expiration date of September 1, 1985, after its elimination from the Spearhead Ranch Unit. Lease W-32235 could be extended beyond that date by its own production, or by production under the unit.

The portion of W-32235 not placed in the PPM Unit was segregated into lease W-87875. Lease W-87875 was then further segregated by the first expansion of the PPM Unit. That portion within the first expansion of the PPM Unit retained lease number W-87875 and the portion segregated was identified as lease W-92982, which "shall continue in force and effect *for the term thereof* but for not less than two years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities." 30 U.S.C. § 226(j) (1982) (italics supplied).

As observed in Part II. B. of this decision, the word "term" here is not modified by the words "original" or "primary," so the segregated

lease continues under the term of the base lease as it was before segregation. If the base lease is held by production, the segregated lease is held by that same production; if the base lease is in a fixed term, the segregated lease has that same term (but no less than 2 years) and so long thereafter as it produces on its own. *See Conoco, Inc.*, 80 IBLA 161, 91 I.D. 181 (1984); *Solicitor's Opinion*, M-36543 (Jan. 23, 1959). Because base lease W-32235 was assigned a fixed term of 2 years by 30 U.S.C. § 226(j) upon its elimination from the Spearhead Ranch Unit, upon such segregation leases W-87875 and W-98982 also had a fixed term of 2 years and so long thereafter as oil or gas is produced therefrom in paying quantities. The segregated leases could not be extended by production elsewhere.

Appellants, however, stress that segregation did not occur *after* the elimination of W-32235 from the Spearhead Ranch Unit, but *simultaneously* with it, and rely upon our decisions in *Conoco, Inc.*, 90 IBLA 388 (1986), and *Wexpro Co.*, 90 IBLA 394 (1986), as authority for the proposition that a "simultaneous" elimination and recommitment to a unit would extend the nonunitized leases for the life of the unitized leases. This argument assumes that because lease W-32235 was held by production before its elimination from the Spearhead Ranch Unit, the segregated leases would be continued by the same production if segregation occurred prior to the elimination of these leases from the Spearhead Ranch Unit. Because we now overrule our decisions in *Conoco* and *Wexpro*, this opinion will examine the legislative history of section 226(j) to show why this argument must now be rejected.

IV. A.

Appellants contend that BLM's decision is contrary to "the consistent policy of the Department and of Congress since the enactment in 1981 of the first unit operation legislation to encourage unitization," citing *Solicitor's Opinion*, M-36518 (July 29, 1958). Appellants state that "extremely favorable" treatment has been accorded to the segregated nonunitized portion, "mean[ing] in many cases that the extension [of the nonunitized portion] is for the life of production from the unitized portion." *Id.*

The quoted remark occurs as an aside in the context of a completely different issue: whether a segregation occurs if a lease is only partly committed to the unit plan, even though the lease is entirely within the unit area as described in the unit agreement. (There is no segregation.) Moreover, as we have shown above, the tenure of these leases does not arise from some discretionary choice of policy, but is governed by mandatory statutory provisions, the mechanical effect of which devolves upon a lease by operation of a law when a lease is partially committed to a unit or completely eliminated from a unit. Moreover, the policy to which appellants refer and which the *Conoco* and *Wexpro* decisions purport to follow had previously been applied only in cases involving the partial commitment of a lease to a unit.

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Any need for such a policy under the 1931 Act disappeared in 1935 and 1946 when the Secretary was given the power to compel lessees to unitize if they did not voluntarily do so.² There was absolutely no valid precedent for extending that policy to a lease which was eliminated from a unit, as the tenure of such a lease is governed by a different sentence of the statute.

The danger of looking to this rather indefinite policy statement for guidance, rather than to the statute and its legislative history is illustrated by a line of Departmental decisions involving unitized 20-year leases. In *Texaco, Inc.*, 76 I.D. 196 (1969), the Department held that a 20-year lease that was in a unit at the end of its term was extended by § 226(j) and was not eligible for a 10-year-renewal term. In later cases involving different facts, Board members nevertheless criticized *Texaco* as being contrary to the policy in favor of unitization. *Omaha National Bank*, 11 IBLA 174, 186 (1973) (Frishberg, Chairman, concurring specially); *id.* at 187-90 (Henriques, Member, dissenting.) One decision even stated that *Texaco* "is open to some question." *Marathon Oil Co.*, 19 IBLA 1, 3 (1975).

When the facts of *Texaco* arose again in *Anne Burnett Tandy*, 33 IBLA 106 (1977), the Board did not overrule *Texaco*. Instead, the Board examined the legislative history of the Mineral Leasing Act and found that although Congress intended to promote unitization, the critics of *Texaco* had completely misconceived how Congress intended to promote unitization. Thus, *Tandy* established that there can be no departure from the text of the statute in order to apply "the policy in favor of unitization" without careful examination of what Congress intended when it enacted the specific provision pertaining to a particular event affecting the tenure of a lease. Our failure to consider legislative intent in the *Wexpro* and *Conoco* decisions makes it necessary to do so here, in order that we may determine whether there is an intent contrary to the wording of the statute supporting the rationale of those decisions.

IV. B.

Initially, leases issued under the Mineral Leasing Act could not be held by production. Under section 17 of that Act, 41 Stat. 437, 443, leases were to be issued for a period of 20 years, with the preferential right in the lessee to renew the same for successive periods of 10 years. In *Anne Burnett Tandy*, *supra* at 109, we described the circumstances which impelled Congress to amend the Act to provide for unitization of leases.

² "The Secretary may provide that oil and gas leases hereafter issued under this chapter shall contain a provision requiring the lessee to operate under such a reasonable cooperative or unit plan, and he may prescribe such a plan under which such lessee shall operate, which shall adequately protect the rights of all parties in interest, including the United States." 30 U.S.C. § 226(j) (1982).

The ensuing decade [after enactment of the Mineral Leasing Act in 1920] was highlighted by the overproduction and wastage of oil and gas, and the need for some conservation measures became clear. Often, a pool would be carved into several leases. Each lessee would sink as many wells as possible to maximize short-term recovery to compete with his neighbor and prevent his lease from being drained. These competitive incentives resulted in overdrilling which lowered the pressure of the fields so that much oil was no longer recoverable. Unit agreements would allow lessees to combine for the more orderly exploitation of an oil or gas field. By eliminating the competition among lessees sharing a field, wasteful offset drilling would be curtailed and drilling patterns would be developed to maximize the long-term potential of a field.

Temporary authority for approving unit agreements was first established by the Act of July 3, 1930, 46 Stat. 1007. With slight modification, that provision was made a permanent amendment to the Mineral Leasing Act by the Act of March 4, 1931, 46 Stat. 1523-24.

That statute had only one provision concerning lease tenure: that any lease committed to a plan of unitization "shall continue in force beyond said period of 20 years until the termination of such plan." The statute contained no provision for lease tenure after termination of a unit plan. Congress considered this provision to be adequate incentive to unitize. Congress believed that development of a field would take much longer than the 20-year term of a lease, and expressed its concern that a mere preferential right of renewal was not sufficient to ensure continued lease tenure. "Necessarily, a longer life of the field being promoted, it is essential that the Government lessees have the assurance of a tenure beyond 20 years; hence the amendment to section 17 is absolutely necessary." Report of the Senate Committee on Public Lands and Surveys, S. Rep. No. 1087, 71st Cong., 2nd Sess. at 2 (1931), *quoted in Tandy, supra* at 110. Congress evidently felt no need to assure continued tenure beyond the date of plan termination, since it believed that a field then would be depleted.

Congressional dissatisfaction with 20-year leases, which could not be extended by production, prompted an amendment to the Mineral Leasing Act eliminating further issuance of those leases (except for outstanding permits) and establishing leases with 5- and 10-year terms with the proviso that the leases would continue beyond their term so long as oil or gas were produced in paying quantities. Act of August 21, 1935, ch. 599, 49 Stat. 674. The 1935 amendments retained the unitization provisions of the 1931 amendments, but only 20-year leases could be extended beyond their terms for the life of the unit. Although the 5- and 10-year leases could not be extended pursuant to this provision, such leases could be extended independently by production, and such leases as were included in producing units were considered to be extended by production under the provisions of the individual lease rather than by reason of the statutory provision relating to unitized leases. *See General Petroleum Corp.*, 59 I.D. 383, 387 (1947). Even so, the 1935 amendments made no provision for extending a lease beyond the time of its elimination from a plan. A 20-year lease would continue to the end of its term, and would still be eligible for renewal. *See H. Leslie Parker*, 62 I.D. 88 (1955).

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IV. C.

There was no statutory provision for extension of the lease after its elimination from a unit plan until 1946 when Congress added the following statutory language and extended the unitization provisions to the 5- and 10-year leases: "Any lease which shall be eliminated from any such approved or prescribed plan * * * shall continue in effect for the original term thereof, but for not less than two years, and so long thereafter as oil or gas is produced in paying quantities." Act of August 8, 1946, ch. 916, § 5, 60 Stat. 953. Although appellants consider BLM's application of this provision to exact a penalty, Congress actually considered such application to be an additional incentive to unitize. In its report on this provision at the time it was proposed, the Department commented that it "gives the lessee who surrenders his exclusive right to drill in the interest of conserving the oil and gas deposit an opportunity to drill his lease before it expires where, for any reason, it is excluded from the unit area." Report of the Department of the Interior to the Senate Committee on Public Lands and Surveys. S. Rep. No. 1322, 79th Cong., 2nd Sess. at 7-8 (1946). Because the intended benefit consisted solely of the opportunity to drill on the eliminated parcel, Congress clearly did not contemplate the extension of such a lease by production elsewhere. The 2-year-extension provision was expressly intended to assure the lessee adequate time to drill on the eliminated parcel.³

IV. D.

Further amendments were made to this Act by the Act of July 29, 1954, ch. 644, § 1(1)-(3), 68 Stat. 583. Under the 1946 provisions, any lease other than a 20-year lease would be extended by commitment to a unit agreement only if oil or gas were discovered under the plan "prior to the expiration date of the *primary* term of such lease." (Italics added.) The 1954 amendments required production in paying quantities instead of discovery to extend a lease, and deleted the word "primary." The stated reason for the change was:

Under present law, leases committed to an approved unit plan of operation are extended beyond the 5-year term and coextensive with the life of the unit plan if oil or gas is discovered under the plan. This extension is limited to leases in their first 5-year period. If discovery is made beyond the 5-year period, such leases do not get the benefit of being committed to a unit plan and a discovery in such unit plan. The proposed amendment would extend all leases, whether in their primary term or secondary term, or of whatever nature they are committed to an approved unit plan of operation, upon discovery of oil or gas anywhere within the boundaries of such plan.

³ Of course, it may be suggested that a lease in producing status at the time of its elimination from a plan would not have required the protection afforded by this provision. However, under the statute as it existed prior to the 1954 amendments, the lease would terminate upon cessation of production if actual drilling operations were not in effect when production ceased, because the law then contained no provision allowing a lease a 60-day period in which to commence production. The provision for a fixed term of 2 years after plan termination therefore, conferred a benefit upon any lease eliminated from a unit plan, regardless whether the lease was producing or nonproducing.

H.R. Rep. No. 2238, *reprinted in* 1954 U.S. Code Cong. and Ad. News at 2698. The reader should note that Congress did not delete the word "original" from the provision which governs tenure of a lease eliminated from a unit plan.⁴

The 1954 amendments also added the provision for segregation of a lease upon partial commitment to a unit plan:

Also, this amendment would provide for segregation of any portion of a lease not committed to the plan, and such segregated portion would be extended for at least 2 years after segregation to enable the lessee for the lands outside the unit plan to drill and, if he discovers oil or gas in paying quantities, it would continue indefinitely as long as oil or gas is produced.

Id. at 2698.

[6] Again, the intended benefit of segregation was the opportunity for separate development. The nonunitized segregated portion of lease would benefit because the lessee would no longer be subject to the drilling restrictions of the unit plan. As this Department explained in a report which was appended to the House Report:

Since the rights of individual leaseholders to drill on leases committed to a plan are severely curtailed, none of them should be penalized because of necessary delays in obtaining production from the unit area. The enactment of this legislation would not delay development since unit plans have their own development requirements. In fact, these requirements are intended to be substituted for, and they customarily are far more rigorous than those contained in the individual leases. The amendment proposed in this report would provide for segregation of any portion of a lease not committed to the plan and for continuance of such a segregated lease for at least 2 years after segregation and so long thereafter as oil or gas is produced in paying quantities on the segregated portion of the lease.

Id. at 2701. In conclusion, Congress saw these provisions as advantageous because they free lands outside of unit areas for independent development.⁵ Congress, however, established a limitation on this privilege, by providing that production had to occur on the eliminated or segregated lease, by the end of its term, but no less than 2 years after the date of segregation or elimination from the plan.

Thus, it is clear that Congress did not intend for these eliminated leases to be extended by production within the unit, and, further, the policy favoring unitization of leases can exist only to the extent that

⁴ In making a distinction based on the use of a modifier such as "primary," we are not grasping at some obscure technicality. The effect of this modifier was keenly understood by the oil and gas industry, whose spokesmen supported its deletion from the portion of the statute to which we referred above, because the presence of the word

"resulted in great operating difficulties when you had, for example, a 5-year noncompetitive lease in its secondary term and you attempted to unitize that lease and you found you couldn't keep it alive by unitization."

"It is a technical problem, but it is one we have encountered many times in the Rocky Mountains."

"That amendment is designed to remedy that inequity which now exists between those two classes of leases." *To Amend the Mineral Leasing Act: Hearing before the Subcomm. on Public Lands of the Senate Comm. on Interior & Insular Affairs on S. 2380, S. 2381, and S. 2382, 83rd Cong., 2d Sess. 22* (1954) (statement of Howard M. Gullickson, Chairman, Legal Committee, Rocky Mountain Oil & Gas Ass'n) (hereinafter cited at *Hearing*).

⁵ This intent is further clarified by an explanation of the consolidated bills by BLM's Chief of the Division of Minerals:

"[T]his amendment would provide for segregation of any portion of a lease not committed to the plan, and such segregated portion would be extended for at least 2 years after segregation to enable the lessee for the lands outside the unit plan to drill and if he discovers oil or gas in paying quantities, it would continue indefinitely as long as oil or gas is produced." *Hearing, supra* n.4 at 40 (italics added).

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Congress specifically provided for certain benefits.⁶ In resolving the perceived ambiguities, we must remember that the 1954 amendments to § 226(j) were among several changes in the Mineral Leasing Act made by Congress at that time. The general intent of those amendments was "to close all possible loopholes in the administration of the law * * *, such as, for example, a possibility that lessee might avoid production requirements * * *." H.R. Rep. No. 2238, *supra*, reprinted in 1954 U.S. Code Cong. and Ad. News, *supra* at 2696. Contrary to the general purpose of the legislation to close all possible loopholes by which a lessee might avoid production requirements, our *Conoco* and *Wexpro* decisions allow a lessee to avoid production requirements for the segregated portion of a lease by imputing production from the unitized portion. Such result is clearly inconsistent with both the language of the statute and the stated legislative intent.

IV. E.

The Department's report included in the legislative history contemplates that the nonunitized portion of a segregated lease would continue "for at least 2 years after segregation and so long thereafter as oil or gas is produced in paying quantities *on the segregated portion of the lease.*" H.R. Rep. No. 2238, reprinted in 1954 U.S. Cong. and Ad. News, *supra* at 2701. Although the emphasized language was not part of the statutory text proposed by the Department, it nevertheless describes the intended meaning and effect of the proposed statutory language which Congress adopted *verbatim* when it enacted the statute into law. The emphasized language of the House Report cited above suggests that the views expressed in *Solicitor's Opinion*, M-36518 (July 29, 1958), are contrary to the legislative intent to the extent that they suggest there are circumstances under which a nonunitized segregated portion of a lease can be extended by production on the unitized portion. Indeed, if taken literally this language would cast doubt upon the correctness of our analysis in Part II. B. of this opinion concerning the leases segregated from W-9389, and support the result reached by BLM. Although the emphasized language appears

⁶ The policy to encourage unitization is not open-ended. By 1954, one specific benefit of unitization, the exemption from acreage limitations, encouraged too much unitization, as one industry spokesman complained:

"Leased or optioned acreage which is committed to a unit agreement, in a form recommended or approved by the Secretary of the Interior, is exempt from the acreage limitations now contained in the Mineral Leasing Act. Unit agreements are designed to aid conservation, and the oil and gas industry has been quick to recognize the value of such agreements, as promoting orderly and efficient development of a field. However, because of the exemption in acreage limitations afforded by the Mineral Leasing Act, it is only reasonable to assume that a number of the unit agreements, which have been flooding the Department of the Interior, are prompted, at least in part, by desire on the part of the operator to reduce his chargeable acreage. This flood of unit agreements has made the work of the Department of the Interior much more difficult, and it is believed that a liberalization of the acreage limitations will result in a reduction of the number of unit agreements submitted. Under no circumstances, however, does the industry recommend that the exemption, presently afforded by the Mineral leasing Act as to unitized land, be taken away. Conversely, it is recommended that the exemption be retained." (Letter from H. B. Grenert, President, Rocky Mountain Oil & Gas Ass'n, Hearing, *supra* n.4 at 50.) Of course, the industry did not recommend repeal of this benefit of unitization; rather, it was felt that increasing the acreage limitation would discourage this abuse of unitization.

only in the Interior Department's report, this report was appended to the House Report, and courts have generally accepted such appended reports and letters from officials of this Department as evidence of legislative intent. See e.g., *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 50, 55-56 (1983); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 407 n.1 (1917); *United States v. Union Oil Co.*, 549 F.2d 1271, 1277 (9th Cir.), cert. denied sub nom. *Ottoboni v. United States*, 434 U.S. 930 (1977). So has this Board. E.g., *Western Nuclear, Inc.*, 35 IBLA 146, 157, 85 I.D. 129, 135 (1978), aff'd, *Watt v. Western Nuclear, Inc.*, *supra*; *Cecil A. Walker*, 26 IBLA 71, 76 (1976). Inasmuch as such reports represent views of senior officials of this Department which served as the basis for legislative action, this Board is not generally disposed to apply enacted legislation in a manner inconsistent with such statements. *Id.* Such a conclusion is especially compelling where, as here, Congress enacted *verbatim* the statutory language proposed by the agency.

In *Anne Guyer Lewis*, *supra*, the issue was whether a unitized lease could be extended by production on the nonunitized portion. The Department suggested that the statute did not specifically cover the facts in that case; however, the conclusion reached was in accord with a mechanical application of the language of the statute, as we demonstrated in Part II. B. It did not really involve a policy choice. The holding in *Lewis* was predicated on the fact that Congress consciously employed the word "term" when it wished to refer to an indefinite period, but modified "term" with words such as "original" or "primary" when it wanted to refer to a fixed period. We follow this construction of the statute not only because it most closely corresponds to the exact text of the Act, but because this construction is also supported by the legislative history. See *Solicitor's Opinion*, 63 I.D. 246 (1956).

V.

In Part III of this opinion, we showed how the results declared by the *Conoco* and *Wexpro* decisions were contrary to express provisions of the statute. In Part IV, we established that those results were contrary to the legislative intent. Although this provides sufficient basis for overruling those decisions, it is important to examine the rationale of those cases to see how it led to incorrect results.

As we indicated before, we held in *Wexpro* that our decision was controlled by *Conoco*. After quoting the statutory language, which applies without exception whenever a lease is eliminated from a unit plan, we held: "Although the statute offers considerable guidance, it does not say what happens when unit termination and partial commitment occur simultaneously after the conclusion of the primary term, as here." *Conoco*, *supra* at 390 (italics in original). We now recognize there was no need for Congress to address this circumstance specifically because the statute dictates the result required when a lease is totally eliminated from a unit. As we hold here, regardless

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whether or not a lease is held by production when it is totally eliminated from a unit plan, it is not held by production during the first 2 years after such elimination. Whether the PPM Unit was created before, after, or simultaneously with the total elimination of lease W-32235 from the Spearhead Ranch Unit is irrelevant to the applicability of this provision. The sole fact of relevance is the fact that such elimination occurred.

In *Conoco* we found that the statute offered no guidance on the question of what happens when unit termination and partial commitment occur simultaneously. We next considered the effects of BLM's decision:

BLM's decision granting only a 2-year term to lease W-87877 unless oil or gas is produced in paying quantities encourages prompt development of the 680 acres in this lease. See *Conoco, Inc.*, 80 IBLA 161, 166, 91 I.D. 181, 184 (1984). In the absence of production in paying quantities on lease W-87877 or further unitization, the term of this lease is limited to 2 years. No production from outside this lease will affect its term, assuming the lease is not itself unitized.

Conoco, supra at 390-91. Although the legislative history suggests that these results were exactly what Congress intended, we reasoned that giving the nonunitized lease a term coextensive with the unitized lease somehow encourages unitization, and we further observed that "the segregation of a lease does not necessarily cause the resultant two leases to have independent terms." *Id.* at 392. In support of this proposition, we cited *Bass Enterprises Production Co.*, 47 IBLA 53, 55 (1980); *Ann Guyer Lewis, supra*; and *Solicitor's Opinion*, M-36592 (Jan. 21, 1960).

Dictum in a footnote in the *Bass* decision appears to be one source of this error. In that opinion, the Board noted that a lease which had been totally eliminated from a unit agreement was nevertheless extended by production of another unit which included the lease with which the lease in question had been previously joined. *Bass Enterprises, supra* at 54-55. This observation made no difference to the outcome of the *Bass* appeal, and constituted dictum. In support of this dictum, the Board stated:

While not precisely on point, *Solicitor's Opinion*, M-36592 (Jan. 21, 1960), is helpful in understanding what the "original term" of lease NM 15092, as that phrase is used in 30 U.S.C. § 226(j) (1976) and 43 CFR 3107.5, might be. When lease NM 15092 was created by the segregation of lease NM 024368-A on September 30, 1971, lease NM 024368-A was in its extended term by reason of production within the Red Hills Unit. The original term of lease NM 15092 included the entire, though indefinite, period which lease NM 024368-A had to run as of the date of segregation. See also *Ann Guyer Lewis*, 68 I.D. 180 (1961), and *Solicitor's Opinion*, M-36758 (Oct. 25, 1968).

Bass Enterprises, supra at 55 n.5. By suggesting that a segregated lease gets a new original term, *Bass* is in direct conflict with the statute, which does not assign such leases new terms but continues them for the term of the base lease. In *Bass* the Board suggested that an "original term" can include an indefinite period. However, this

suggestion is totally inconsistent with the usage of that expression in the Mineral Leasing Act, a fact which was noted in *Solicitor's Opinion*, 63 I.D. 246 (1956), cited earlier in this opinion for the proposition that the phrase "the original term" can only refer to a fixed period of a lease term.

Moreover, the authorities cited by the *Bass* footnote provide no support for the conclusion in *Bass*. Indeed, they did not even address themselves to the issue for which *Bass* cited them as authority. The 1960 *Solicitor's Opinion* was not concerned with total elimination of a lease from a unit plan, but only with partial elimination of such a lease, and did not purport to construe the meaning of "original term." Instead, it construed the meaning of the word "term" in the context of a partial commitment of a lease. The 1968 *Solicitor's Opinion* did not involve a total elimination of a lease from a unit and did not purport to construe the meaning of the phrase "original term." Similarly, the *Lewis* case also involves the "term" of a lease segregated upon partial commitment to a unit plan, not the "original term." Thus, none of these cases provide support by authority or dictum for the proposition for which they are cited in *Bass*. Therefore, the 1956 *Solicitor's Opinion* cited earlier is still the authority which governs the interpretation of the expression "original term" in this provision of the Mineral Leasing Act. Its rationale has not been overruled or even questioned. Indeed, the cases *Bass* cites rely on that 1956 *Solicitor's Opinion* to support their conclusions. Accordingly, *Bass* is modified to the extent that it is inconsistent with this opinion.

In *Conoco* and *Wexpro* we held that the simultaneous elimination of a lease from one unit and its partial commitment to a new unit constituted a circumstance for which the statute made no provision. We believed that the transaction was intended to achieve the same result as if only a partial elimination of the lease had occurred, so that the nonunitized lands could be indefinitely extended by production from the unitized lands. Closer examination of the legislative history has convinced us that structuring the transaction in such a manner is not in harmony with the legislative intent. Accordingly, these two decisions must be overruled prospectively. Because we applied the rationale announced in *Conoco* and *Wexpro* in *Anadarko Production Co.*, 92 IBLA 212, 93 I.D. 246 (1986), that decision must also be modified, although the result in that case may have been correct to the extent the decision fails to state whether the base lease was partly eliminated, like W-9789, or totally eliminated, like W-32235. Taken by itself, the headnote in *Anadarko* does not misstate the law.

Therefore, applying the rules announced in this case, upon the elimination of lease W-32235 from the Spearhead Ranch Unit on September 1, 1983, that lease had a fixed term of 2 years and so long thereafter as oil or gas was produced in paying quantities. Upon elimination from the Unit, lease W-32235 could not be held by production until September 1, 1985. See *Conoco, Inc.*, 80 IBLA 161, 91 I.D. 181 (1984). When lease W-32235 was partially committed to the

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PPM Unit, the nonunitized portion was extended for the fixed term of the base lease (but not less than 2 years) and so long thereafter as oil and gas were produced in paying quantities. It makes no difference that partial commitment to one unit and total elimination from another unit occurred simultaneously. If the partial commitment occurred first, the lease would have been segregated into two leases, with that portion of the lease subject to both units keeping serial no. W-32235 and the lease subject to a single unit being designated W-87875. Upon total elimination of W-87875 from the unit, lease W-87875 would have a fixed term of 2 years and so long thereafter as oil or gas was produced in paying quantities on that lease. When lease W-87875 was partly committed to the PPM Unit, the unitized portion would continue in force and effect so long as the lease remained subject to the plan, because production was had in paying quantities under the plan prior to September 1, 1985. See BLM decision dated March 15, 1983. The nonunitized portion, W-92982, continues in force and effect for the term of the base lease, but for not less than 2 years from the date of segregation. Again, at the time of segregation the base lease was not held by production; therefore, if we were to apply the rules set out in this case to the facts concerning W-32235, we would conclude that BLM correctly determined that lease W-92982 had a fixed term of 2 years and so long thereafter as oil or gas was produced in paying quantities from the effective date of segregation of the lease. However, it is the sense of the Board that, because of possible reliance by BLM and appellants upon this Board's prior decisions in *Conoco* and *Wexpro*, the rules announced by this opinion should have prospective effect only. Accordingly, we reverse BLM's decision with respect to leases W-87875 and W-92982.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed. For lease extensions made following the date of the issuance of this opinion, however, in cases similar to those involving leases W-32235, W-87875, and W-92982, the rules described by this opinion shall be applied, and whether a lease may be said to be "simultaneously" eliminated from one unit while being partially committed to another shall be immaterial to the terms of the resulting extension of the lease.

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

R. W. MULLEN
Administrative Judge

BRUCE R. HARRIS
Administrative Judge

October 14, 1987

APPEAL OF TOM WARR

IBCA-2360

Decided: *October 14, 1987*

Contract No. YA-551-CT6-340082, Bureau of Land Management.

Government Motion to Dismiss denied.

Contracts: Disputes and Remedies: Termination for Default: Generally—Contracts: Disputes and Remedies: Termination for Default: Excess Costs

Where a contractor timely appeals a default termination by the Government and the Government subsequently assesses its excess reprocurement costs against the contractor, the Board decides, in light of the *Fulford* doctrine, that the entire matter has already been put before the Board by the contractor's original appeal, and that a second appeal is not necessary for the contractor to challenge the contracting officer's assessment of excess reprocurement costs, provided that the contractor expressly rebuts the CO's excess reprocurement cost determination by evidence timely presented to the Board before the closing of the record in the case.

APPEARANCES: Tom Warr, *pro se*, Las Vegas, Nevada; Gerald D. O'Nan, Esq., Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PARRETTE INTERIOR BOARD OF CONTRACT APPEALS

On December 30, 1986, the Board received and docketed, as IBCA-2277, an appeal from Tom Warr (contractor/appellant) from an October 23, 1986, final decision of a Bureau of Land Management (BLM/Government) contracting officer (CO) terminating his contract for default. The BLM contract, No. YA-551-CT6-340082, was for the capture and removal of wild horses from the Cherry Creek, Goshute, and Antelope areas of Elko and White Pine Counties, Nevada.

On March 20, 1987, the CO issued a second final decision in the matter, assessing excess reprocurement costs against the contractor in the amount of \$9,074.75. The contractor belatedly appealed that decision in a letter received by the Board on July 22, 1987, some 120 days after his receipt of the decision. On August 17, Department counsel moved to dismiss the second appeal on the ground that the 90-day-appeal period specified in the Contract Disputes Act (41 U.S.C. §§ 606, 607) (CDA) is mandatory and jurisdictional for the Board, and cannot be waived. We deny the Government's motion for the reasons set forth below.

Background

Inasmuch as appellant was not represented by counsel, the Board on August 27, 1987, asked Government counsel to provide it with specific authority in support of its motion, particularly in light of the *Fulford*

doctrine to the effect that a contractor is not required to appeal a default termination within the specified time after the CO's decision but may wait until excess reprocurement costs have been assessed. See *Fulford Manufacturing Co.*, ASBCA Nos. 2143, 2144 (May 20, 1955), 6 CCF par. 61,815. We received the Government's brief on September 21.

Government counsel argues strongly, and accurately, that the statutory 90-day-appeal period is part of a statute waiving the Government's sovereign immunity and thus must be construed strictly (citing *Cosmic Construction Co. v. United States*, ASBCA No. 26537, 82-1 BCA par. 15,541 (1981), *aff'd*, 697 F.2d 1389 (Fed. Cir. 1982)). He goes on to assert that the subject matter of the appeal is irrelevant. With this, we are forced to disagree.

Counsel acknowledges that in *El-Tronics, Inc.*, ASBCA No. 5457, 61-1 BCA par. 2961, long before the passage of the CDA, the Armed Services Board "seemed to allow the issue of excess reprocurement costs to be combined into the appeal of the termination for default even though the excess reprocurement costs appeal had been untimely by the contractor" (Government Response (GR) at 8). He also states that this Board later followed *El-Tronics* in *Timothy Mason*, IBCA No. 1076, 76-2 BCA par. 12,014 (GR at 9).

However, he argues that the courts have given no indication that the *Fulford* doctrine should be expanded; that it may have questionable applicability itself under the CDA; and that "The mere fact that *Fulford* supports the position that the default issue is an integral part of the excess cost issue does not mean that the reverse is true" (GR at 8).

In fact, counsel suggests, "To further expand the *Fulford* doctrine [to allow] a contractor to have excess reprocurement costs heard at the time of the [Board's] final decision [on the default termination] would essentially create a nullity out of the contracting officer's final decision. It would place us back to the time of the *El-Tronics* decision when the boards of contract appeals on their own volition could hear matters that had not yet been determined in a final decision by the contracting officer" (GR at 10). Counsel also notes that the CO's decision on the excess reprocurement costs, if not timely appealed to the board, could nevertheless still be appealed to the Claims Court (GR at 11).

Discussion

It is hard to disagree with Government counsel that the *Fulford* doctrine seems to be a horse of a different color. It represents a real anomaly in the strict body of law relating to the timeliness of appeals. Nevertheless, it appears to be too firmly entrenched to be challenged as such. Counsel recognizes this fact in his discussion of *D. Moody & Co. v. United States*, 5 Cl. Ct. 70 (1984), but urges the Board not to expand the doctrine any further (GR at 6-8).

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If, however, we accept the rationale for the *Fulford* doctrine as set forth in *Moody*, plus the fact that the *Fulford* doctrine is now widely accepted, as we do, then it is difficult to see why the *El-Tronics* doctrine should not also survive the advent of the CDA.

Specifically, if a timely appeal from a CO's subsequent decision assessing excess reprocurement costs can legitimately and retroactively call into question the fundamental legal propriety of the CO's underlying default decision, upon which the reprocurement cost assessment is ultimately based, then it makes no sense for us to say—regardless of a timely appeal from the CO's initial and principal decision; namely, a decision that the contractor is formally and legally in default—that the contractor, in order to preserve his rights and his purse in the context of the Government's subsequent actions, must also timely appeal the resulting and directly dependent reprocurement cost decision within a 90-day period. One appeal, in our view, should suffice to put the entire matter before the board, particularly when that appeal inevitably raises all of the issues that need to be raised in order to resolve the dispute between the parties, monetary and otherwise.

In short, having swallowed the camel of *Fulford*, we think it would be foolhardy and somewhat petty for this Board to strain the gnat of *El-Tronics*.

The logic of this approach, of course, is substantially strengthened by the jealous manner in which the courts and the boards have always guarded the rights of a contractor in the context of a default termination. The burden of proving the default, and of virtually everything else that relates to it, is now and has always been, not on the contractor, but on the Government—since it is the Government that (depending on whether or not it ultimately prevails) either has breached the contractor's most basic rights or else has properly applied its ultimate sanction. See, e.g., the burden of proof discussion by the Court of Appeals for the Federal Circuit in *Lisbon Contractors, Inc. v. United States*, Appeal No. 86-1461 (September 9, 1987).

Put another way, we do not know how we would decide the issues in *Fulford* if they were before us for the first time in this appeal. But those issues have already been decided, and the post-CDA courts and boards have generally followed the precedent. Given the decision in *Fulford*, therefore, we see no merit in subjecting a contractor to another arbitrary time constraint in appealing his cost assessment, once he has duly and properly challenged the CO's decision to terminate the contract.

However, it should be clearly understood that we do not conclude that there is no need for the contractor to challenge the CO's second decision, or that he need not present evidence on the issue of reprocurement costs, if he also disagrees with that decision. On the contrary, if the contractor is ultimately found to have been properly terminated for default, and there has been no challenge or rebuttal of

the excess reprocurement costs involved, he may well be found to have acquiesced in the CO's determination on that issue. To avoid such a result, and in order for the parties to timely frame the issues involved in the excess cost assessment, the contractor today, like the one in *El-Tronics*, must also formally challenge the reprocurement cost determination. In fact, it is obviously necessary for the contractor to fully rebut the amount of the excess reprocurement assessment before the Board begins its deliberations on the issue of the default termination; that is, before the closing of the record.

Decision

Thus, we decide that a contractor's timely appeal of a default termination is sufficient to preserve his right to also challenge the CO's subsequent decision on excess reprocurement costs, even though no appeal on the excess reprocurement cost issue as such is filed within 90 days of that decision's issuance, provided the reprocurement cost rebuttal is timely and properly presented to the Board before the closing of the record in the case.

Accordingly, the Government's motion to dismiss is denied.

FOR THE BOARD:
BERNARD V. PARRETTE
Administrative Judge

WE CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

DAVID DOANE
Administrative Judge

WILLIAM F. McGRAW
Administrative Judge

G. HERBERT PACKWOOD
Administrative Judge

APPEAL OF TROY AIR, INC.

IBCA-2238

Decided: November 3, 1987

Contract No. 81-0346, Bureau of Land Management.

Sustained.

**Contracts: Disputes and Remedies: Termination for Default—
Contracts: Disputes and Remedies: Termination for Convenience**

Where a prolonged period of unavailability of a contractor-furnished airplane, the subject of the contract, was the basis for a default termination and it was shown that the

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cause of that portion of the period which prompted the contracting officer to issue the termination notice was Government conduct and was beyond the control and without the fault and negligence of the contractor, the Board finds the delay relied upon for the default to be excusable with the result that the default termination is converted into a termination for the convenience of the Government.

APPEARANCES: Clark Reed Nichols, Perkins Coie, Anchorage, Alaska, for Appellant; Bruce E. Schultheis, Department Counsel, Anchorage, Alaska, for the Government.

OPINION BY ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from the decision of the contracting officer (CO) dated August 7, 1986, which terminated the contract for default (Appeal File (hereinafter "AF"), Tab 47).

Background

The contract involved provided for the exclusive use of an airplane by the Bureau of Land Management's (BLM), Office of Aircraft Services, for the purpose of detection and support of fighting fires on the public lands, through the device of rental thereof from the appellant Troy Air, Inc. (Troy). The basic contract term was 120 days, from May 5 until August 31, 1986. On May 9, BLM issued a start-work notice designating May 14, 1986, as the commencement date for operations. (There were other notices from BLM that were of the start-work type (AF Tabs 2 and 3), and a written acceptance of Troy's offer dated May 15, 1986, (AF, Tab 1)). Troy points out that the contract (Part I, ¶ F4.02-02) requires a 10-day notice for a change in the start date from that specified in Part I, ¶ B2. Thus, Troy argues, the operations period began May 19, and the 120-day period therefore ended September 15, 1986. BLM has not taken exception to this reasoning, and the facts and contract provisions appearing to support it, we therefore accept the Troy position that the proper release date for the contract was September 15, 1986 (Contract, AF, Tab 1; AF, Tab 4).

The aircraft's availability during the early part of the performance period was somewhat spotty. From the time that BLM accepted the airplane for service in May until July 31, it was unavailable for 19.4 days and had had a number of other relatively minor problems affecting the aircraft's performance but not its availability (Hearing Transcript (hereinafter "Tr.") at 8). Although under the contract BLM was entitled to terminate the contract for default based on that record, it had consistently waived its right to do so. Concerned about the continuing inconsistent pattern of availability, however, the CO sent a letter to Troy dated August 1, 1986, in which she notified Troy essentially that prior waivers notwithstanding, Troy would thenceforth

be held to strict compliance with the availability requirements of the contract and that any future independent failure of compliance therewith would constitute grounds for termination (AF, Tab 42).

The synopsis of the subsequent events relevant to this decision is that the airplane became unavailable for use by BLM from August 2 to August 7, 1986 (Tr. 11-12). Because of that unavailability, the CO issued a stop-work order on August 6 and a decision terminating the contract for default on August 7, 1986 (AF, Tabs 46 and 47), and Troy appealed. The events constituting this synopsis appear where relevant in the Discussion section which follows.

Discussion

There are four contract provisions which are of particular relevance to this appeal. The first is Part I, paragraph F9.03 which reads:

"Default. Failure to perform in excess of three full consecutive calendar days, or in excess of an accumulated seven percent of the exclusive use period [120 days], shall constitute grounds for termination in accordance with the Default clause, Section I."

The second is paragraph C5 of Part I which requires Troy to maintain the aircraft during the performance period, apparently including unscheduled aircraft maintenance (See Part I, §§ C5.01 and C5.09-02). In particular, paragraph C5.09-02(a) of Part I requires BLM to notify Troy orally of any need for unscheduled maintenance and implies that BLM may not take the aircraft out of service until it accomplishes that notification.

Connected to the prior two contract passages is Part I, paragraph 5, "Availability," which deems that a period of unavailability begins "[i]mmediately after the first attempt to notify the Contractor" of the need for unscheduled maintenance (Part I, ¶ F5.02-02(b)).

The final contract provision of importance is Part II, Section I which incorporates into the contract by reference a number of Federal Acquisition Regulations Clauses, in particular (by Contract Section II.46) the Default clause appearing at 48 CFR 52.249-8 (1984). After providing that the contract may be terminated for default, that clause also provides: "(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government."

The facts leading to the termination are as follows:

On July 31, 1986, after Troy had completed some unscheduled maintenance on the aircraft, it presented the airplane to BLM for approval. At 5:00 p.m. on that date a BLM inspector inspected, test flew, and approved the aircraft. Troy flew the aircraft, which had been in Anchorage, to its primary station in Fairbanks where BLM accepted it for service that same evening (Tr. 24-25; 87-88). On the following morning, BLM conducted another inspection and noted no discrepancies (Tr. 88). Later that same day (August 1), BLM through its fuel contractor fueled the aircraft. Thereafter a fuel leak was

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detected by Government personnel (Tr. 25-26). BLM did not notify Troy of the leak until 4:16 p.m. the next day, Saturday, August 2 (Tr. 27-28).

Troy then flew the airplane to its primary maintenance facility in Anchorage and set about trying to find the cause of the leak (Tr. 30-31). The Troy mechanics began to troubleshoot by removing wing panels above fuel cells that are located in the wing. Judging by the location of the drip, they started with the panel that covered the cell closest thereto. When they removed and tested that fuel cell (hereinafter referred to as the "inboard cell") they discovered that it indeed leaked (Tr. 44-45). (All of the fuel cells in the airplane had been replaced earlier that summer (about 40-50 days previously) and could be expected to function properly for a long period of time measured in years (Tr. 46, 50)). Because fuel cells are not routine replacement parts that would in normal circumstances be stocked locally (Tr. 92), Troy was forced to order a replacement cell from the manufacturer located in the lower 48 states, accomplishing this after considerable difficulty on Sunday, August 3. The manufacturer shipped the replacement on Monday the 4th and after a delay attributable to the shipper, it arrived around 11:00 a.m. on Tuesday the 5th (Tr. 55-56). The Troy people went to work on the problem immediately and had the inboard cell replaced and the aircraft reassembled by approximately 3:00 p.m., that afternoon Tuesday, August 5, less than 72 hours after BLM delivered the notice for unscheduled maintenance at 4:16 p.m. on August 2 (Tr. 56).

The airplane continued to leak fuel, but the Troy people thought that the continuing drip resulted from the presence of residual fuel in the wing and not from a leak. Nevertheless, they understandably did not want to present the aircraft for approval until the drip stopped so waited until about 9:00 p.m. that evening to call in the BLM inspector. The inspector arrived, inspected the aircraft and flew it, and was apparently poised to approve it when the leak reappeared, the tanks having been refilled after the test flight (Tr. 63).

The Troy mechanics then set to finding the source of this leak and ultimately discovered that there was a hole in the most outboard fuel cell (hereinafter referred to as the "outboard cell") which is the same cell where the filler nozzle for fueling the entire fuel system is located (Tr. 57). Troy obtained the services of a contractor to repair the hole by use of a compound which was applied on Wednesday, August 6. The repair took 24 hours to cure properly, so the outboard cell was not replaced until Thursday, August 7 (Tr. 57-58). The aircraft thus was ready to be returned to service at approximately 7:00 a.m. August 7 and departed Anchorage for Fairbanks around 10:00 a.m. to be available for continued performance (Tr. 61). August 7 was also the date of the CO's notice of termination which was delivered to Troy on that date but shortly after the aircraft had been reassembled and was presumably fit for return to duty. The CO was unaware of that status,

however, at the time she delivered the termination notice (Tr. 12, 33-35).

A preponderance of the evidence leads to the conclusion that the hole in the outboard cell was caused by BLM, and we so find. After Troy completed unscheduled maintenance at its Anchorage facility on Thursday, July 31, BLM conducted an inspection and approved the aircraft (Tr. 24-25). Troy then flew the airplane to Fairbanks and BLM accepted it for service (Tr. 25). The BLM pilot gave the aircraft a daily inspection early on August 1 (Tr. 87-88). From the time that Troy first tendered the aircraft to BLM for approval in Anchorage on July 31 through the pilot's daily inspection on August 1 there is no evidence of the existence of fuel leaks despite what appears to have been a number of opportunities for thorough scrutiny. After the August 1 daily inspection, the BLM fuel contractor in Fairbanks refueled the airplane and thereafter evidence of a leak appeared for the first time (Tr. 25-26). The shape of the hole in the bottom of the bladder and its location made it very probable that it was caused by the insertion of a fuel pump nozzle too far into the filler neck part of the outboard cell which was an unusually shallow part in any event (Tr. 59-60). There had been no evidence of a leak after Troy completed its last fueling, but the leak became evident after BLM's (contractor's) fueling, and in any event the Troy fuel pump was incapable of causing the damage found because its pump nozzle was unusually short (Tr. 68; 109).

We now attempt to put together the various facts found with a proper construction of the pertinent contract clauses and the law to reach a congruent solution to the dispute. Troy argues that both defects which were the source of leaks were the responsibility of BLM, the leak in the inboard cell because it occurred while the aircraft was in the exclusive control of BLM and the leak in the outboard cell because the evidence shows that BLM caused the hole which was the source thereof.

[1] Since the CO terminated the contract not because of the unavailability connected to the inboard cell damage but because of the extended period of unavailability connected to the outboard cell damage, we need consider only the latter contention. Although the aircraft would have been ready for delivery to BLM no later than 9:00 p.m. August 5 but for the ("second") outboard cell leak, the CO did not issue the stop-work notice until August 6. In fact, the CO testified that if the aircraft had passed inspection on the evening of August 5, she would have accepted the aircraft back for service, and termination for default would not be an issue (Tr. 31-34). It becomes undeniable that even though unavailability caused by the inboard cell defect exceeded 3 days in length, at least in BLM's view, it was not that circumstance that triggered the CO's default termination but the prolonged unavailability that is logically more closely connected to the defect in the outboard cell. The default clause does not inandate that the CO terminate a contract whenever circumstances constituting a default present themselves; the clause instead requires only that the

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CO exercise her discretion in deciding whether or not to terminate. A proper exercise of that discretion necessarily includes consideration of whether the contractor was at fault in causing the problem leading to the default. *See Sol O. Schlesinger v. United States*, 182 Ct. Cl. 571, 390 F.2d 702 (1968). The contract allows the CO to exercise her discretion not to terminate based on the August 2 to August 5 unavailability, and this she clearly did, thus putting that default, as it stood independent of any prolongation, beyond consideration for purposes of a default termination. Then, however, the CO decided to terminate for default because of the extended period of unavailability without consideration of whether or not Troy was at fault in causing the unavailability (Tr. 83-39). That failure to exercise discretion properly by not considering the fault aspect would stand as grounds for remanding the case to the CO for her independent evaluation of what effect fault or lack thereof would make on her final determination.

A remand for that purpose would be superfluous, however, because the case presented to the Board contains ample evidence on fault so that we can answer the question presented in a remand. Our answer is that outboard cell unavailability occurred clearly by reasons beyond Troy's control and without its fault or negligence and thus was excusable under the Default clause. Unlike the situation involving the inboard cell, we have found that the fault for the outboard cell unavailability lay with BLM. This situation thus falls within the ambit of excusability as described in the Default clause and that leads us to the remedy for default termination when the default is excusable, namely conversion into a termination for convenience.

The parties have agreed that the proper measure of entitlement, should the appeal be sustained, is the daily rental rate (\$680) times the number of days remaining in the contract period. Although there has not been a showing of the more usual elements to which a contractor claims entitlement as termination costs, this measure does not seem an unreasonable approximation thereof, and we therefore accept it.

We have accepted Troy's calculation of the number of days remaining in the contract period based on the contractually mandated starting date of May 19 rather than May 14 as demanded by BLM. We note, however, that the record (AF, Tab 6) suggests that the aircraft was available for BLM use each of the days between May 14 and May 19. If that also means that BLM paid for that availability, then the last 5 days of the Troy-calculated period should be cut, regardless of Troy's right not to start performance until May 19. We thus sustain the appeal in the amount of \$25,231.40 subject to a reduction of \$680 per day for each day starting May 14, 1986, but not later than May 18, 1986, for which BLM has already made payment, plus interest as

computed in accordance with the Contract Disputes Act of 1978 on the proper amount so calculated.*

WILLIAM F. McGRAW
Administrative Judge

I CONCUR:

RUSSELL C. LYNCH
Chief Administrative Judge

COOK INLET REGION, INC., ET AL. (ON RECONSIDERATION)

100 IBLA 50

Decided November 24, 1987

Petition for reconsideration in part of *Cook Inlet Region, Inc.*,
90 IBLA 135, 92 I.D. 620 (1985).

Petition granted; prior decision overruled in part.

1. Constitutional Law: Generally—Conveyances: Generally—Patents of Public Lands: Effect—Public Lands: Jurisdiction Over—Statutes—Statutory Construction: Generally

Legislation concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment. A well-established principle of statutory construction suggests avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality.

2. Alaska: Land Grants and Selections—Alaska: Navigable Waters: Generally—Alaska: Statehood Act—Navigable Waters—State Grants—State Lands—Submerged Lands

Lands under navigable waters were held for the benefit of future states, and a state's title to such land cannot be defeated in the absence of legislation making it very plain that the land was not to be granted to the state.

3. Act of January 2, 1976—Alaska: Alaska Native Claims Settlement Act—Alaska: Land Grants and Selections—Alaska: Navigable Waters: Generally—Alaska: Statehood Act—Alaska Native Claims Settlement Act: Conveyances: Regional Conveyances—Alaska Native Claims Settlement Act: Native Land Selections: Regional Selections: Generally—Alaska Native Claims Settlement Act: Navigable Waters—Indians: Alaska Natives: Generally—Navigable Waters—State Grants—State Lands—Submerged Lands

* Troy has determined that the number of days from Aug. 7, 1986, to Sept. 15, 1986, is 39. To this should be added the 2 days in the August unavailability period reviewed in this decision which are attributable to BLM causes. To take account of unavailability experience, the parties have agreed that any amount so determined to be due should be decreased by the 9.5 percent of Troy's historic unavailability record. The figure in the text is 90.5 percent of 41 days at \$680 per day. See App. Br. at 14, Tr. 21-22, 37.

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Sec. 12(e) of the Act of Jan. 2, 1976, P.L. 94-204, authorizes conveyance to Native corporations of all lands within Power Site Classification 443, but did not include lands beneath navigable portions of the Susitna River because such lands had previously passed to the State pursuant to the Alaska Statehood Act.

APPEARANCES: Elizabeth J. Barry, Esq., Michael W. Sewright, Esq., and M. Francis Neville, Esq., Office of the Attorney General, Anchorage, Alaska, for the State of Alaska; Russell L. Winner, Esq., Anchorage, Alaska, for Cook Inlet Region, Inc.; F. Christopher Bockmon, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

INTERIOR BOARD OF LAND APPEALS

On September 30, 1983, the Alaska State Office, Bureau of Land Management (BLM), issued a decision approving for conveyance in part, rejecting in part, and reserving certain easements in land for which Cook Inlet Region, Inc. (CIRI), had applied pursuant to the Alaska Native Claims Settlement Act (ANCSA), *as amended*, 43 U.S.C. § 1601 (1982). CIRI, the State of Alaska, and Silver Dome Mining Co. filed appeals from that decision, in response to which this Board granted BLM authority to amend its decision to exclude lands encompassed by the Silver Dome Mining Co. claims and referred the case to the Hearings Division for determination as to major waterways. The Board affirmed BLM's decision in all other respects. *Cook Inlet Region, Inc.*, 90 IBLA 135, 92 I.D. 620 (1985).

Our decision also held that the conveyance included land beneath navigable portions¹ of the Susitna River inside the boundaries of Power Site Classification 443.² The State of Alaska has filed a petition for reconsideration of this particular holding by challenging the following determinations of our decision: (1) that the September 30, 1983, decision of BLM did not exclude the bed of navigable portions of the Susitna River; (2) that such submerged lands were properly conveyed to CIRI pursuant to section 12(e) of P.L. 94-204; and (3) our statement

¹ As we noted in our decision, CIRI objects to BLM's determination that the upper portion of the Susitna River is navigable but, in accordance with *Bristol Bay Native Corp.*, 71 IBLA 318 (1983), and sec. 901(b) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1681(b) (1982), reserves its right to appeal BLM's navigability determination in Federal court after issuance of an interim conveyance of the lands.

² The classification was issued by the Director of Geological Survey on Feb. 13, 1958, and stated:

"Pursuant to authority vested in me by the act of March 8, 1879 (20 Stat. 394; 48 U.S.C. 81) and by Departmental Order No. 2333 of June 10, 1947 (43 C.F.R. 4.628; 12 F.R. 4025), the following described lands are hereby classified as power sites insofar as title thereto remains in the United States and subject to valid existing rights; and this classification shall have full force and effect under the provisions of section 24 of the Act of June 10, 1920, as amended by section 211 of the Act of August 26, 1935 (16 U.S.C. § 818)." 23 FR 1124 (Feb. 21, 1958).

16 U.S.C. § 818 (1982) provides, in pertinent part:

"Any lands of the United States included in any proposed projection [sic] under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress."

that the September 30, 1983, decision constituted a conveyance of the submerged lands.

The State contends that reconsideration is necessary because of the Board's reliance upon the consideration of issues which appellant did not raise and which the State did not have a meaningful opportunity to address before issuance of the Board's decision. CIRI opposes reconsideration, contending that CIRI had raised these issues several times in its pleadings before the Board. BLM's response to the petition for reconsideration referred to BLM's use of the term "excluding" in decisions to issue a conveyance to indicate it does not intend to convey specific lands, including the bed of navigable water bodies. BLM's response went on to state that BLM "does wish to clarify that it intended to withhold from conveyance the submerged lands underlying the Susitna River."³

We reject the State's contention that the issues were not raised in the appeal before the Board. Our prior decision quotes statements filed by CIRI and the State in the appeal which make it clear that the State could not have been surprised by this issue. 90 IBLA at 138, 92 I.D. at 622. Nevertheless, we grant reconsideration because we did not decide an issue presented by the parties, namely, whether the power site classification prior to the enactment of the Alaska Statehood Act prevented the passage of title to the beds beneath navigable portions of the Susitna River to the State pursuant to section 6(m) of the Alaska Statehood Act and the Submerged Lands Act.⁴ Instead, we held that CIRI was entitled to select land including the beds beneath navigable portions of the Susitna River pursuant to section 12(e) of P.L. 94-204, 89 Stat. 1153, 43 U.S.C. § 1611 note (1982), enacted on January 2, 1976. That subsection provides:

The Secretary may, notwithstanding any other provision of law to the contrary, convey title to lands and interests in lands selected by Native corporations within the exterior boundaries of Power Site Classification 443, February 13, 1958, to such corporations, subject to the reservations required by section 24 of the Federal Power Act. This conveyance shall be considered and treated as a conveyance under the Settlement Act.

In holding that this provision authorized conveyance to CIRI of land beneath navigable portions of the Susitna River within the power site withdrawal, we focused on the fact that the authority was granted "notwithstanding any other provision of law" and that the statute made no express exception for lands beneath navigable waters. 90 IBLA at 141, 92 I.D. at 623. Thus, we construed section 12(e) as authorizing the conveyance to CIRI of land that may have passed to the State of Alaska.

³ BLM's response to the petition for reconsideration states: "The submerged lands were not conveyed because the land was the subject of a classification instead of a withdrawal." The Sept. 30, 1983, BLM decision contained no language excluding the bed of the Susitna River within the boundaries of Power Site Classification 443. See *Cook Inlet Region, Inc.*, *supra* at 138, 92 I.D. at 622, text at note 5.

⁴ Sec. 6(m) of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 343, 48 U.S.C. note preceding sec. 21 (1982), provides: "The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder." The provisions of the Submerged Lands Act are codified at 43 U.S.C. §§ 1301, 1311-1315 (1982).

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[1] This Board has recently observed that legislation passed by Congress concerning disposition of the public lands cannot generally be construed as authorizing the transfer of title to lands previously conveyed out of Federal ownership and which are no longer part of the public domain. *Heirs of Doreen Itta*, 97 IBLA 261 (1987); *Matilda Titus*, 92 IBLA 340, 351 (1986) (Grant, A.J., concurring). "To hold otherwise would pose serious constitutional problems concerning deprivation of property without due process of law in violation of the Fifth Amendment." *Id.* A well-established principle of statutory construction counsels avoidance of an interpretation of a statute that would raise a serious doubt of its constitutionality. *See Califano v. Yamasaki*, 442 U.S. 682, 692-93 (1979); *see also United States v. Clark*, 445 U.S. 23, 27 (1980); 2A *Sutherland Stat. Const.* § 45.11 (4th ed. 1984). By interpreting section 12(e) to authorize the conveyance to CIRI of land beneath navigable portions of the Susitna River that may have passed to the State, we did not focus upon this principle.

Under the circumstances it is proper to grant reconsideration of this matter in order to decide whether land beneath the navigable portions of the Susitna River within the exterior boundaries of the power site classification passed to the State of Alaska upon statehood or whether the classification had the effect of reserving those lands so as to make them available to CIRI under section 12(e). In our prior decision, we noted BLM's view that a withdrawal of the land would have precluded such a conveyance to the State, but a classification would not. 90 IBLA at 138-39 n.8, 92 I.D. at 625-26 n.8. BLM's response to the State's petition acknowledged the distinction between a classification and a withdrawal, *see note 3, supra*, but noted that one court had held that a classification precluded State ownership. *See State of Utah v. United States*, 780 F.2d 1515 (10th Cir. 1985).

[3] Any doubt arising from that Court of Appeals opinion was erased when the Court of Appeals was reversed by the Supreme Court. *Utah Division of State Lands v. United States*, ____ U.S. ____, 107 S. Ct. 2318 (1987). The Court held that title to the bed of Utah Lake passed to Utah upon that State's admission to the Union in 1896, notwithstanding the reservation of the lake as a reservoir site prior to statehood. In reaching this holding, the Court stated certain principles that must be followed when determining whether a state has title to land beneath navigable waters:

[W]e do not lightly infer a congressional intent to defeat a State's title to land under navigable waters:

"[T]he United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or

otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926).

We have stated that "[a] court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream." *Montana v. United States*, 450 U.S. 544, 552, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493 (1981) (internal quotations and citations omitted). Indeed, in only a single case—*Choctaw Nation v. Oklahoma*, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970)—have we concluded that Congress intended to grant sovereign lands to a private party. The holding in *Choctaw Nation*, moreover, rested on the unusual history behind the Indian treaties at issue in that case, and indispensable to the holding was a promise to the Indian Tribe that no part of the reservation would become part of a state. *Montana v. United States*, *supra*, 450 U.S., at 555, n. 5, 101 S.Ct., at 1253, n. 5. *Choctaw Nation* was thus literally a "singular exception," in which the result depended "on very peculiar circumstances." *Ibid.*

107 S. Ct. at 2321.

After setting forth the foregoing principles which apply to conveyances made prior to statehood, the Court extended them to reservations:

Given the longstanding policy of holding land under navigable waters for the ultimate benefit of the States, therefore, we would not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself. Assuming *arguendo* that a reservation of land could be effective to overcome the strong presumption against the defeat of state title, the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land.

107 S. Ct. at 2323-24. Although the Court acknowledged references to the lakebed in material submitted to Congress, it found "no unambiguous evidence that members of Congress actually understood these references as pointing to a reservation of the bed of Utah Lake." *Id.* at 2326.

The instant case involves the effect of a power site classification, not a treaty entered prior to statehood as in *Choctaw Nation, supra*. Neither the statute authorizing the power site classification nor section 12(e) of P.L. 94-204 authorizing selection of the land by CIRI makes it "very plain" or states in "clear and especial words" that the Congress intended that the State of Alaska was not to obtain title to land beneath navigable portions of the Susitna River.

[3] Applying the principles set forth in the Supreme Court's decision, we conclude that our holding that section 12(e) authorized conveyance of land beneath navigable portions of the Susitna River to CIRI was in error. We now hold that section 12(e) authorized conveyance of all land within Power Site Classification 443, but did not authorize conveyance of the land beneath navigable portions of the Susitna River (because such land had previously passed to the State pursuant to the Alaska Statehood Act), and that BLM's September 30, 1983, decision is properly interpreted as excluding the lands beneath the navigable portions of the Susitna River from conveyance. Our resolution of this

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matter on the basis of the principles announced in the Supreme Court's decision makes it unnecessary for us to discuss other points raised in the petition for reconsideration, the responses, or the other documents filed in this matter.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, our decision in *Cook Inlet Region, Inc., supra*, is overruled in part and the matter is remanded to BLM to clarify its decision to issue conveyance, dated September 30, 1983, by expressly excluding land beneath navigable portions of the Susitna River.

WILL A. IRWIN
Administrative Judge

WE CONCUR:

R. W. MULLEN
Administrative Judge

GAIL M. FRAZIER
Administrative Judge

December 2, 1987

SCOTT BURNHAM

100 IBLA 94

Decided *December 2, 1987*

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, dismissing protest of mineral patent application (W-80886) and declaring mining claims null and void (WMC-225789 through WMC-225806).

Reversed and remanded.

1. Applications and Entries: Generally--Mining Claims: Lands Subject to--Segregation

A mineral patent application does not segregate land from the acquisition of competing rights.

2. Contests and Protests: Generally--Evidence: Presumptions--Rules of Practice: Generally--Statutes

The assumption required by 30 U.S.C. § 29 (1982), "that no adverse claim exists" does not apply to claims which did not exist at the time of publication of notice of a patent application and for which no adverse claim could have been filed.

3. Contests and Protests: Generally--Evidence: Presumptions--Rules of Practice: Generally--Statutes

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), operates as a presumption that the patent applicant holds superior possessory title so that the Department may proceed to determine the question of whether his mining claim is valid under the mining laws. If the Department determines that the applicant's claim is valid and issues a patent, a rival claim becomes a nullity because there is no longer any Federal land to which it can attach as a location under the mining laws. If the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for land or apply for a patent himself.

4. Contests and Protests: Generally--Rules of Practice: Protests

A locator who fails to file an adverse claim against an application for patent may file a protest on the grounds that the applicant has failed to comply with the mining laws.

5. Administrative Procedure: Standing--Rules of Practice: Appeals: Standing to Appeal

Under 43 CFR 4.410(a), there are two separate and distinct prerequisites to prosecution of an appeal to the Board of Land Appeals: (1) the appellant must be a "party to the case," and (2) the appellant must be "adversely affected" by the decision below.

6. Administrative Procedure: Standing--Rules of Practice: Appeals: Standing to Appeal

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982), does not extend to preclude a mining claim for which no adverse claim was filed during publication of notice of patent proceedings from serving as a foundation for finding standing to appeal.

7. Applications and Entries: Generally--Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Patent

The issue of the validity of a mining claim is the ultimate concern of the Department when a patent application has been made, and the Department necessarily has the power to inquire into and determine whether the location is valid under both Federal and state law.

8. Applications and Entries: Generally--Courts--Contests and Protests: Generally--Mining Claims: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Litigation--State Courts

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

9. Applications and Entries: Generally--Courts--Contests and Protests: Generally--Mining Claims: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Litigation--State Courts

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

10. Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Location--Words and Phrases

"Good faith." Good faith in the location of mining claims is widely recognized as an implicit requirement of the mining laws. When a question of good faith concerns a locator's knowledge of prior claims and his purposes in locating rival claims, the issue is appropriately left to resolution by judicial proceedings between the locators. However, "good faith" may also concern a locator's knowledge and purposes in attempting to obtain rights to Federal lands by establishing mining claims.

APPEARANCES: William N. Heiss, Esq., Casper, Wyoming, for appellant; Arthur H. Nielsen, Esq., Jonathan L. Reid, Esq., Thomas C. Jepperson, Esq., Salt Lake City, Utah, for American Colloid; Lyle K. Rising, Esq., Office of the Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF LAND APPEALS

Scott Burnham has appealed a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated December 12, 1984, which dismissed a protest filed by him and declared the Foxx Nos. 1 through 18 placer mining claims null and void ab initio. Appellant's Foxx claims were located December 11, 1983, recorded with Big Horn County, Wyoming, December 13, 1983, and filed with BLM December 29, 1983. They are within secs. 3, 4, and 5 of T. 57 N.,

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R. 96 W., sixth principal meridian, Big Horn County, Wyoming. Appellant's protest was filed February 16, 1984, against a patent application made by American Colloid Company for the Sho Nos. 4, 5, and 16 placer claims (W-80886). The Foxx No. 18 and the Sho No. 4 both occupy approximately the north half of lot 5, sec. 5, T. 57 N., R. 96 W., sixth principal meridian.

I.

This case plays a part in a drama for which the stage was set by the partial revocation of a withdrawal of land which had been in effect since 1903 under authority of the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified in various portions of 43 U.S.C. §§ 371-498 (1982)). By notice published in the *Federal Register*, BLM announced that 2,367.16 acres of land in the Shoshone Reclamation Project in Big Horn County, Wyoming, were to be restored to operation of the public land laws. 46 FR 46134 (Sept. 17, 1981). The notice stated in part that "[a]t 10 a.m. on October 10, 1981, the lands will be open to location under the United States mining laws." *Id.*

On the morning the area was opened, a number of locators were present on the land and located blocks of mining claims. It appears that American Colloid located 92 mining claims, blanketing most of the restored area. By application received by BLM June 22, 1982, the company sought patent for seven of its claims. During the period of publication of notice of the patent application, other parties who had located claims on the morning of October 10, filed adverse claims as required to preserve their rights. See 30 U.S.C. §§ 29, 30 (1982); 43 CFR Subpart 3871. BLM advised each of the adverse claimants that they were required to commence proceedings in a court of competent jurisdiction. Information in the case file suggests that at least some of the land encompassed by American Colloid's seven claims was already subject to a patent application filed by Carl E. Fischer *et al.* (W-78411) which had been adverced (contested) by American Colloid along with others, with judicial proceedings pending in the U.S. District Court for the District of Wyoming. Although the procedural mechanism is not revealed by the case file, the adverse claims filed against American Colloid's patent application were consolidated with the pending litigation to the Fischer group application. The outcome of the litigation was that notices of abandonment of mining claims were filed with BLM by various parties, and on September 9, 1983, Judge Brimmer issued a final order of dismissal pursuant to stipulations made among the parties.

By letter dated August 1, 1983, American Colloid withdrew four claims from its patent application. On March 7, 1984, the company made payment to BLM for the three remaining claims and was issued a receipt. Scott Burnham, appellant herein, filed a location notice for his Foxx No. 18 claim in December 1983, covering the lands embraced

by American Colloid's Sho No. 4 claim. Appellant filed a protest against American Colloid's patent application on February 16, 1984.

Appellant's protest did not assert that American Colloid's claims were improperly located or void, though clearly this was its purpose. Rather, Burnham provided three reasons for his protest, each of which indicated that the claims had been improperly located: (1) The testimony of Myron Durtsche, Jr., as to the manner of the location of the Sho No. 4 as contained in a deposition submitted with the protest; (2) the statement in BLM Instruction Memorandum (IM) No. 83-241 that "[a]ppropriations of lands under the general mining laws prior to the date and time of restoration is unauthorized"; and (3) legal briefs submitted with the protest, addressing "the adoption issue," which "were written in regard to another lawsuit, but the same issue applies." The briefs are captioned as being "In Support of Joint Motion for Summary Judgment Against Plaintiff, American Colloid Company, by Defendants Fischer Association, Sage Creek Minerals, Blue Wash Company, Wilson Group, and Davis Group" and were filed in Federal district court as part of the litigation of the adverse claims. The deposition of Durtsche was taken as part of the same litigation.¹

The documents submitted by Burnham with his protest indicate that American Colloid went onto the land sometime prior to the withdrawal revocation and positioned at regular intervals throughout the area unmarked 4x4 wood posts as "survey markers." American Colloid later "adopted" these "survey markers" as corner posts for alternate rows of claims. For the other claims located by the company, it seems that there were sufficient personnel on the land on October 10, 1981, to post location notices and additional 4x4 posts at approximately 10 a.m. These posts were painted and numbered and had iron rods placed in their bases for quick insertion into the ground. They were placed next to the unpainted "survey markers" to serve as corner monuments for the adjoining claims. If carried out as planned, no claim would have both unpainted "survey markers" and painted corner posts as corner monuments, and alternate rows of claims would have either adopted "survey markers" or painted corner posts.

The documents submitted by Burnham also indicate that prior to the revocation of the withdrawal, American Colloid took drilling equipment onto the land and drilled a number of exploratory test holes for the purpose of disclosing mineral deposits. The company's mining claims were located for bentonite. The record suggests that numerous exposures of bentonite were readily visible within the area. The drilling was apparently conducted on planned locations, indicated by "survey markers," which did not contain exposures of mineral.

By letter dated July 18, 1984, BLM acknowledged receipt of appellant's protest, stating that due to questions raised by the protest and by BLM's review of the patent application file, the agency was requesting advice from the Regional Solicitor. BLM's decision

¹ The copy of the deposition contained in the record before the Board is labeled Volume II and begins with p. 124.

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dismissing appellant's protest recited that advice from the Regional Solicitor had been obtained and enclosed a copy of a Solicitor's memorandum addressing the matter. Following the Solicitor's advice, BLM rejected appellant's protest, stating in relevant part as to each of appellant's reasons:

[1.] * * * [T]he issue of prestaking and adoption goes entirely to the issue of possession and good faith. Any locator who places stakes or other monuments on withdrawn lands assumes the risk that good faith location will be addressed and possibly resolved against him in an adverse proceeding to determine possession. Such a proceeding was initiated in this case, and because the issue of prestaking and adoption was raised in the proceedings, we must conclude that the parties took that issue into consideration in reaching their settlement. To that end, the sworn testimony as to the prestaking and adoption issue, as well as the implications and inferences, have been determined to have been disposed of by virtue of Judge Brimmer's decision of September 9, 1983.

* * * * *

[2.] * * * [IM No. 83-241] clearly states that rights to possession shall be decided between the parties by State or Federal Courts applying State law and the Bureau of Land Management will not intervene. In essence, this memorandum, issued after the Opening Order in this case, requires that Opening Orders inform people what the law is regarding location and possession of mining claims. We cannot agree that it supports your position.

[3.] * * * Our review * * * revealed that these briefs were indeed included in the adverse claim consolidated cases involving mineral patent application, W-80886; consequently, we conclude they were considered in the negotiated settlement between the parties and in Judge Brimmer's Decision.

BLM's decision also stated that a review of both the documents submitted with appellant's protest and the case file for W-80886 had disclosed "no additional evidence apart from that considered by the Court, and specifically, no evidence that the applicant has not complied with the requirements of the law for obtaining a patent" (Decision at 3). Accordingly, BLM dismissed appellant's protest "based on the September 9, 1983 Decision of the Court, and for failure to show that the applicant has not complied with the requirements of the law for obtaining a patent." *Id.* Finally, BLM found appellant's Foxx mining claims to be null and void ab initio for lack of title "by virtue of being located on lands segregated from entry by virtue of a mineral patent application." *Id.* at 4.

In his statement of reasons, appellant renews the basic assertion of his protest that acts of location performed on land which has been withdrawn from the location of mining claims may not be "adopted" after the withdrawal has been revoked as acts essential to the location of a valid mining claim (Statement of Reasons at 8). This assertion concerns primarily the "survey monuments" established by American Colloid prior to the revocation of the withdrawal, but also concerns the exploratory drilling conducted prior to the revocation of the withdrawal.

While the issue appellant raises is relevant, it is not the issue directly raised by the actions taken in the BLM decision which is the

subject of our review. BLM's decision dismissed appellant's protest because, as proposed by the Solicitor's memorandum enclosed with the decision, BLM found the issue of prestaking to concern only the good faith and possessory rights of a locator and to be a matter for judicial determination in proceedings between rival locators. Because BLM also found the issue of prestaking had been considered and disposed of by the litigation of the adverse claims, it concluded that the Durtsche deposition and legal briefs submitted with Burnham's protest were not subject to its consideration and dismissed appellant's protest for failure to present "evidence that the applicant has not complied with the requirements of the law for obtaining a patent" (Decision at 3). In addition, BLM declared appellant's mining claims to be null and void ab initio because they were located on land segregated from the location of mining claims by American Colloid's patent application. The correctness of these determinations are the immediate subject of this appeal.

American Colloid has entered an appearance to respond to appellant's arguments. It asserts that its manner of locating its claims by adoption of "survey markers" as corner posts was legally proper. In addition, the company argues that Burnham lacks standing to appeal the dismissal of his protest. Appellant has replied by arguing that his mining claims give him sufficient interest to have standing to appeal. The Office of the Solicitor has appeared on behalf of BLM, asserting, as in its memorandum to BLM, that the issue of prestaking and adoption is primarily an issue of good faith and is a matter for determination by state courts.

In the proper course of review, prior to addressing the substantive issues raised by the appeal of BLM's decision, we should consider American Colloid's contention that appellant lacks standing to appeal. However, in this case, the issue of standing is not independent of the other issues raised by the appeal. American Colloid contends that Burnham lacks standing because he has no interest in the land due to the location of his mining claims "on ground previously segregated from entry by the SHO #4 mineral patent application and publication thereof" (Answer at 6). This assertion simply repeats the basis on which BLM held appellant's claims to be null and void, raising the same issue of correctness that Burnham raises by appealing BLM's decision. American Colloid also argues that because appellant's claims were not located until after the conclusion of the adverse proceedings brought in Federal district court pursuant to 30 U.S.C. §§ 29 and 30 (1982), Burnham is conclusively presumed to have no interest by virtue of his location. This assertion is also substantive, raising an issue as to whether the statutes providing for adversary proceedings preclude the subsequent location of mining claims.

Because American Colloid's arguments as to standing raise substantive issues which are related to the other issues on appeal, we shall begin with them. After reviewing the substantive foundation upon which the company argues that appellant lacks standing to

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appeal, we will be better able to consider the procedural issue and the manner in which it arises under the mining laws. Because we conclude that appellant may prosecute his present appeal, we will next review the grounds on which BLM dismissed his protest. Because BLM's decision was based on advice given in the Solicitor's memorandum which was enclosed with the decision, we will also discuss the memorandum in relation to the issues raised by BLM's decision.

II.

In declaring appellant's mining claims null and void, BLM stated: "It has been held that land in a patent application is segregated from entry." No authority was cited for this proposition. In reaching its conclusion, BLM followed the advice of the Regional Solicitor's Office. The Solicitor's memorandum to BLM advised the agency that "the claims are null and void from the beginning, as the land in the patent application is segregated from entry" (Memorandum at 7). The memorandum subsequently repeated this advice citing *Belk v. Meagher*, 104 U.S. 279, 284-86 (1881).² In adopting this proposition as part of its argument as to standing, American Colloid cites *Belk*, BLM's decision, and a portion of appellant's statement of reasons discussing the validity of mineral locations on withdrawn lands.

Nothing in *Belk* supports the rule. The Supreme Court's opinion answers four sequential questions. *Id.* at 281. The Court first finds that the original locator, by renewing work on their claim in June 1875, held exclusive rights of possession and enjoyment of the ground at issue through December 31, 1876. *Id.* at 283. The Court next concludes that when Belk located his claim on December 19, 1876, it was invalid since "a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done." *Id.* at 284. The third question was whether Belk's invalid location became operative when the original location lapsed on January 1, 1877. The Court concluded it did not:

A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. As in this case, all these things were done when the law did not allow it; they are as if they had never been done. On the 19th of December *the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or pre-emption entry.* [Italics supplied.]

Id. at 284-85.

² BLM's decision stated: "Thus, the Foxx Nos. 1 thru 18 placer mining claims would be null and void ab initio (from the beginning) as never having any legal effect; 'claims are null and void in any event for location on land segregated from entry.' *Belk vs. Meagher*, 104 U.S. 279, 284-86 (1881)." The language quoted by BLM appears in the Solicitor's memorandum, not the case cited.

The language quoted from *Belk* clearly indicates that if American Colloid held valid claims at the time of appellant's locations, his claims are necessarily invalid.³ As stated by the Court, a valid location effectively withdraws land from the location of rival mining claims, segregating it from the acquisition of competing rights. See also *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 655 (1898); *Gwillim v. Donnellan*, 115 U.S. 45, 49 (1885). This principle, however, is far different from that stated in the Solicitor's memorandum, adopted by BLM in its decision, and cited by American Colloid. The Court in *Belk* is not concerned with the effect of an application for patent, an issue most likely to arise in Departmental rather than judicial proceedings.

[1] Our review of Departmental decisions has found only one instance supporting the assertion that a mineral patent application segregates land. In 1895 Secretary Smith announced a prospective rule that "a mineral application, properly filed and duly followed by notice thereof by publication and pesting, as required by Sec. 2325 (R.S.U.S.) is *per se* a segregation of the land covered thereby * * *." *Andrew J. Gibson*, 21 L.D. 219 (1895). Whether this instruction was ever implemented by local offices is not clear as no subsequent decision has been found applying the rule, but for the case before us. In 1914, in *Bay City Oil Co. v. Alvarado Oil Co.*, 43 L.D. 397 (1914), a patent application for oil placer claims had been rejected for lack of a discovery prior to the date of the application. On appeal it was argued that a subsequent discovery would validate the location if no adverse rights had attached and that, citing *Gibson*, adverse rights could not attach because the land was segregated. *Id.* at 398. The Department's opinion did not directly address this argument, deeming only the matter of discovery to be relevant. Finding there had been no discovery, and therefore no valid location when the patent application was filed, the Department concluded that the posted and published notices of the application for patent "were without force and effect" and that "[t]he rights of possible adverse claimants were not affected or concluded by such ineffectual proceedings * * *." *Id.* at 400.

The implicit rejection of the *Gibson* instruction in *Bay City* points to one of several problems such a principle entails. As established by

³ In *Lavagnino v. Uhlig*, 198 U.S. 443 (1905), the Supreme Court found that a mining claim by a junior locator succeeded to a senior claim forfeited by failure to perform assessment work so that the junior prevailed over a third location made after the forfeiture. Although the decision concerned overlapping locations rather than mining claims covering identical ground, the finding implied that a subsequent location of the same land is not invalid but merely second in priority. The Court reached its conclusion based on an interpretation of 30 U.S.C. § 30 (1902), which found that under the statute a junior locator who applied for patent would benefit from the assumption required by the statute if the senior locator did not adverse and thereby receive patent to the ground. *Id.* at 455-56. The decision presented considerable difficulty to courts analyzing the legal status of conflicting locations. See *Bergquist v. West Virginia-Wyoming Copper Co.*, 18 Wyo. 234, 106 P. 673, 682-84 (1910) (discussion of decisions). One such case was appealed to the Court and it retreated from its decision in *Lavagnino*, qualifying that decision on the basis that a claim may be abandoned before it becomes forfeited. *Farrell v. Lockhart*, 210 U.S. 142, 147 (1908), *rev'd* 31 Utah 155, 86 P. 1077 (1906). In *Swanson v. Sears*, 224 U.S. 180 (1912), the Court reached a conclusion contrary to *Lavagnino*, apparently overruling that decision. See 2 *Lindley on Mines*, § 339 (3d ed. 1914). Whatever the status of *Lavagnino*, the issue remains a serious difficulty in mining law. As a matter of principle, the rule stated in *Belk* controls and a location made over a prior valid claim is necessarily invalid; yet, under the mineral patenting procedures, it remains possible for a junior locator to obtain a patent if the senior does not adverse. See *Bowen v. Chemi-Cote Perlite Corp.*, 102 Ariz. 423, 432 P.2d 435 (1967).

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Belk, it is undisputably the law that a valid mining claim segregates the area it encompasses from the acquisition of competing rights. To attribute the same effect to a patent application would permit an *invalid* location to have the same effect as a valid location. By staking and recording mining claims and then filing an application for patent, a locator could tie up large portions of the public domain without the necessity of making a discovery or even diligently searching for one. A valid location does not need a rule giving segregative effect to a patent application to defeat rival locations and an invalid claim does not deserve such protection.

Apart from practical considerations, allowing invalid locations to segregate land would also be inconsistent with two provisions of the mining laws. First, the statutory language that "locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," 30 U.S.C. § 26 (1982), would be violated if exclusive rights of possession were recognized for those who had not made a mineral discovery. Cf. *Belk v. Meagher*, *supra* at 284 ("[t]he right to the possession comes only from a valid location"). Additionally, as recognized by the Secretary in *Gibson*, any segregative effect attributed to a patent application could not be absolute. The mining laws permit the relocation of a mining claim by a rival locator when a claim has been abandoned by failure to perform annual assessment work. 30 U.S.C. § 28 (1982). The paper record of a patent application could not defeat this statutory right.⁴ The possibility of a claim being relocated is not foreclosed until the patent application has been approved, the purchase price paid, and a receipt issued, thereby resulting in issuance of a Final Certificate of mineral entry. *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428, 430, 434 (1892); 43 CFR 3851.5. With issuance of a Final Certificate of mineral entry, the land encompassed by the mining claim is segregated from the location of other claims and may not be located by another. *Union Oil Co. of California*, 65 I.D. 245, 253 (1958); *McCormack v. Night Hawk & Nightingale Gold Mining Co.*, 29 L.D. 373, 377 (1899); *Leary v. Manuel*, 12 L.D. 345 (1891); *F. P. Harrison*, 2 L.D. 767 (1882).

Accordingly, we find BLM erred in ruling appellant's Foxx mining claims to be null and void due to their location on land segregated by a patent application.⁵ For the same reason, we reject American Colloid's first argument as to appellant's standing to appeal.

⁴ The suggestion made by the Secretary in *Gibson* that a relocator first establish abandonment of the prior location before locating his own would be contrary to the view subsequently expressed by the Supreme Court in *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55, 77 (1898).

⁵ In finding all 18 of appellant's claims null and void, BLM's decision also goes beyond the record on appeal. The record contains the documents for American Colloid's patent application and shows that appellant's Foxx No. 18 was located on the same land as the company's Sho No. 4. Nothing in the case file indicates that the company has applied for patent for any other of its claims. Thus, there is no indication that other of appellant's claims conflict with any claim contained in a patent application.

American Colloid's second argument as to appellant's standing to appeal is that the adverse proceedings in Federal district court initiated under 30 U.S.C. §§ 29 and 30 (1982) precluded appellant from locating his claims (Answer at 3). This argument is similar to the company's first argument, but places the time of segregation sometime after publication of notice of American Colloid's patent application. To the extent this argument is similar, it must be rejected as both potentially giving improper effect to invalid claims and precluding exercise of the statutory right to relocate abandoned claims. Nor is appellant's argument supported by the statutes calling for adverse proceedings.

Under the procedures established by 30 U.S.C. § 29 (1982), after an application for patent has been filed and an initial review made by BLM, the agency will direct publication of notice of the application pursuant to arrangements made by the applicant and approved by BLM. *See generally 2 American Law of Mining* § 51.06[5] (2nd ed. 1984). The notice is published for a period of 60 days and the statute requires that adverse claims be filed during this time. *See id.* § 52.02[3]. The statute additionally provides:

If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent * * * and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

R.S. 2325; 30 U.S.C. § 29 (1982).⁶ A companion statute then requires that when an adverse claim has been filed with the Department during the period of publication, all proceedings by the Department on the patent application "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." 30 U.S.C. § 30 (1982). The adverse claimant is required to commence judicial proceedings "to determine the question of the right of possession" within 30 days after filing his adverse claim with the Department, and he must prosecute his suit with reasonable diligence or be deemed to have waived his suit. *Id.* The statute also provides that:

After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, * * * and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess.

On their face, the statutes seem to provide a simple and efficient procedure for resolving conflicts between mineral locators so that patent may be issued. If no adverse claim is filed during the period of publication of notice of a patent application, it is assumed "that the

⁶ The original reference in the Mining Law of 1872 was to "this act." Act of May 10, 1872, ch. 152, 17 Stat. 91, 93. The reference was changed in the *Revised Statutes of 1875* to "this chapter." R.S. 2325. *See United States v. Bowen*, 100 U.S. 508, 513 (1879). The *United States Code* lists the specific statutes originally found in Title XXXII, Chapter 6, of the *Revised Statutes*.

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applicant is entitled to a patent * * * and that no adverse claim exists." If an adverse claim is filed, patent proceedings within the Department are stayed. If the adverse claim is not pursued in court and diligently prosecuted, it is deemed waived. If prosecuted to completion, the successful party may go to the Department with the judgment "and a patent shall issue."

While the prohibitions expressed in the statutes are sometimes said to be absolute, their application is a matter of interpretation rather than strict construction. By its terms, the portion of 30 U.S.C. § 29 (1982), requiring the assumption "that no adverse claim exists" addresses only the situation in which no adverse claim is filed against a patent application. Similarly, the portion of 30 U.S.C. § 30 (1982), providing for the waiver of an adverse claim refers only to a locator who files an adverse claim but fails to either timely commence judicial proceedings or prosecute them with reasonable diligence. The statutes, however, have never been understood to apply in only these circumstances, but rather to be the relevant provisions for all situations arising with patenting proceedings. Likewise, the provision that upon presentation of a judgment to the Department "a patent shall issue" does not preclude Departmental review of the validity of a claim. *Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220, 224 (1904).

[2] The portion of the statute requiring an assumption "that no adverse claim exists" was addressed by the Department in a series of cases in which, after adverse proceedings had been concluded, the judgment was not immediately filed with the Department and entry was not obtained until sometime later. Subsequent to the entry, protests were filed alleging there had been an abandonment by failure to perform annual assessment work and a subsequent relocation of the ground by the protestant. The first such case was *Cain v. Addenda Mining Co. (On Review)*, 29 L.D. 62 (1899). A patent application had been made for the Addenda claim in 1879, and adverse proceedings were completed in 1882 with judgment in favor of the adverse claimant for a portion of the ground. No action was taken to patent the remainder of the claim until 1894 when the company obtained entry. In 1895, a protest was filed based on a judgment obtained in a quiet title suit instigated prior to the entry. Based on language appearing in *Gillis v. Downey*, 85 F. 483, 489 (8th Cir. 1898), the Department rejected the notion that 30 U.S.C. §§ 29 and 30 (1982), precluded consideration of the protest, finding instead that "[t]he mining laws contemplate that proceedings under an application for patent should be prosecuted to completion within a reasonable time after the required publication, or after the termination of proceedings on adverse claims, if any are filed * * *." *Cain v. Addenda Mining Co. (On Review)*, *supra* at 66. This rule was deemed necessary because otherwise, by simply posting notice of a patent application a locator

could "project indefinitely into the future" the assumption that no adverse claim exists, contrary to the statute requiring performance of assessment work. *Id.* Subsequently, in *P. Wolenberg*, 29 L.D. 302 (1899), (*On Review*), 29 L.D. 488 (1900), a more formal rule was adopted:

The assumption, declared in section 2325 of the Revised Statutes, that no adverse claim exists in those instances where no adverse claim is filed in the local office during the period of publication, relates to the time of the expiration of the period of publication and to adverse claims which might have been made known at the local office before that time. It has nothing to do with adverse claims which are initiated subsequent to that time and which could not therefore have been made known at the local office during the period of publication.

P. Wolenberg, supra at 305. These rules were applied by the Department in numerous cases. See *Lucky Find Placer Claim*, 32 L.D. 200 (1903), and cases cited therein. See also *Sweeney v. Wilson*, 10 L.D. 157 (1890); *Little Pauline v. Leadville Lode*, 7 L.D. 506 (1888).

The same understanding of the statute was adopted by the Supreme Court in *Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co.*, 167 U.S. 108 (1897). At issue was ownership of ore within the overlap of the Vestal and Jumbo No. 2 lode claims. The first issue was seniority of location. Although the Vestal had been located first, the Jumbo No. 2 was located following discovery of a vein in a tunnel site which had been commenced a number of months prior to the location of the Vestal. The Court held that the right to the vein in the Jumbo No. 2 related back to the date of location of the tunnel site. *Id.* at 113. The second issue was whether the failure to adverse a patent application for the Vestal claim limited the rights of the owner of the Jumbo No. 2. The fact complicating the issue was that no discovery had been made in the tunnel prior to or during the period of publication when an adverse claim was required to be filed. The Court concluded:

[A]s the defendant could not, in any suit which it might institute, establish a certain adverse right, and as litigation in the courts is based upon facts and not upon possibilities, it seems to us that nothing was to be gained by instituting adverse proceedings, and, therefore, nothing lost by a failure so to do.

Id. at 116. See also *Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co.*, 66 F. 200, 208-10 (8th Cir. 1895). Other courts have similarly found the statute not to apply to subsequent locations. *Poore v. Kaufman*, 44 Mont. 248, 119 P. 785 (1911); *Champion Mining Co. v. Consolidated Wyoming Gold Mining Co.*, 75 Cal. 78, 16 P. 513, 514-15 (1888).

[3] The fundamental error of American Colloid's argument is to confuse the language of the statute with the effect it may have in a given case. Similar to service by publication, posting and publishing notice of a patent application alerts all who may hold an interest in the land applied for that they should take steps to protect their interests. If they do, the statute designates the courts as the proper forum for resolving disputes as to the right of possession. If they do not, the Department may proceed to determine whether the applicant

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is entitled to a patent. The statute requires an *assumption* by the Department that no adverse claim exists. This assumption operates to effect a presumption that the patent applicant holds superior possessory title so that the Department may proceed to determine the question of whether his mining claim is valid under the mining laws.⁷ Rival locators may still have competing claims, and one may be superior in title,⁸ but their claims are of no concern to the Department. If rival locators wish to pursue their claims, they must find a forum elsewhere.⁹ If the Department determines that the applicant's claim is valid and issues a patent, a rival claim becomes a nullity because there is no longer any Federal land to which it can attach as a location under the mining laws. However, if for any reason the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for the land or apply for patent himself. Thus, while the result of a locator's failure to adverse is that his claim becomes nullified when patent is issued, this effect is a result of the issuance of the patent, not the assumption that no adverse claim exists as required by 30 U.S.C. § 29 (1982). That assumption concerns Departmental review of patent applications, not the validity of mining locations whether made prior to or after the date of the patent application, publication of notice, or any adverse proceedings resulting from it.

In the present case, appellant located his Foxx claims after notice was posted and published and the adverse suit concluded. It is not reasonable to say that he received notice to defend an interest which did not exist at the time an adverse claim could have been filed. Nor is there any need to apply the assumption to an interest arising subsequent to the period of publication of notice. In reviewing American Colloid's patent application, BLM is still required to regard the company has having superior possessory title. There is no legal basis on which appellant's subsequently located claims can affect BLM's conclusions as to the validity of the company's locations. However, there is nothing about the statute which requires a conclusion that appellant's claims are invalid or makes them invalid due to their location subsequent to the period of publication of notice

⁷ A problem can arise when two patent applications for the same land are before the Department. A number of early Departmental decisions held that acceptance of a patent application precluded acceptance of a second application for the same land, although when the matter was raised by a third party it was frequently determined that the irregularity of accepting a second application could be waived by the Department. See *International Asbestos Mills & Power Co.*, 45 L.D. 158, 161 (1916), and cases cited therein; *Stemmons v. Hess*, 32 L.D. 220 (1903); *Rocky Lode*, 15 L.D. 571 (1892); *Hall v. Street*, 3 L.D. 40 (1884); *Rebellion Mining Co.*, 1 L.D. 542 (1881). Although not recently applied, the rule appears to have continued in effect. See *Union Oil Co. of California*, *supra* at 253. We note that in the present case there appears to have been a patent application pending for some of the claims included in American Colloid's application which was the subject of appellant's protest.

⁸ See note 3, *supra*.

⁹ Whether and when a court has jurisdiction to consider such a claim is, of course, to be determined by the courts. The point of the decision in *Wight v. Dubois*, 21 F. 693 (C.C.D. Colo. 1884), would seem to be that a locator who fails to adverse cannot pursue his claim in court. See *Neilson v. Champagne Mining & Milling Co.*, 119 F. 123 (8th Cir. 1902). However, *Poore v. Kaufman*, *supra*, understood *Wight* to permit such suits. See also, *Bowen v. Chemi-Cote Perlite Corp.*, *supra*.

of the company's patent application. *See Poore v. Kaufman, supra; cf. Norris v. United Mineral Products Co.*, 61 Wyo. 386, 158 P.2d 679, 684 (1945) (quiet title action did not bar locations). Accordingly, we reject American Colloid's second argument that under 30 U.S.C. §§ 29 and 30 (1982), publication of notice of its patent application and the adverse proceedings barred appellant's locations.

Our conclusions about the language of the statute and its effect do not bestow any legitimacy upon appellant's claims which they do not have by virtue of their location under the mining laws. We find only that they are not invalid due to their location subsequent to the adverse proceedings between American Colloid and other locaters of the land. As previously stated, whether the claims could properly be located depends, among other matters, upon whether the land was available for their location. *See Belk v. Meagher, supra*. It also does not follow from our conclusion about the effect of the statute that, following the location of his claims, appellant would have been entitled to file an adverse claim with the Department or that he is now entitled to bring one. *See Healey v. Rupp*, 37 Colo. 25, 86 P. 1015 (1906). The statute provides for adverse claims to be filed only "during the period of publication" and makes no provision for their submission at any other time. 30 U.S.C. § 30 (1982).

III.

[4] The course of action open to Burnham was the one he took. He was entitled to object to American Colloid's patent application on the grounds that the company failed to comply with the terms of the mining laws. 30 U.S.C. § 29 (1982); *United States v. Grosso*, 53 I.D. 115, 120-21 (1930). The mechanism which has long been provided by the Department for bringing such allegations to its attention, filing a protest, is that taken by Burnham in the present case. "[A]ny objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances." 43 CFR 4.450-2. Burnham filed his protest and has now appealed its dismissal to this Board. Whether he has standing to appeal is an issue which was properly raised by American Colloid and to which we now turn.

[5] As with other matters, the right to appeal to the Board from the denial of a protest is governed by 43 CFR 4.410(a). The right is more restricted than the right to file a protest. The parties properly argue that the leading decision describing the qualifications for standing incorporated into the regulation is *In Re Pacific Coast Molybdenum Co.*, 68 IBLA 325 (1982). As stated there and frequently repeated since, under the regulation there are two separate and distinct prerequisites to prosecution of an appeal: (1) the appellant must be a "party to the case," and (2) the appellant must be "adversely affected" by the decision below. *Id.* at 331. Denial of a protest makes an individual a

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party to a case, but such a denial does not necessarily establish that the party will be adversely affected. *Id.*

In order to be adversely affected, a protestant must have an "interest" in the land which is the subject of the protested action. The "interest" necessary for standing to appeal is not the same as the "interest" necessary to bring a contest. A contest requires "title to or an interest in land," which generally must be grounded on a statutory grant. *Alaska v. Sarakovichoff*, 50 IBLA 284, 287 (1980); *United States v. United States Pumice Co.*, 37 IBLA 153, 158-59 (1978). In contrast, the interest necessary to appeal denial of a protest is neither limited to legal interests in the specific land at issue, *In Re Pacific Coast Molybdenum Co.*, *supra* at 331, nor limited to economic or property rights, *Sharon Long*, 83 IBLA 304, 308 (1984). It must be a legally recognizable interest, but ownership of adjoining land or past usage of the land in dispute have been recognized as giving sufficient interest. *Id.* Although judicial standing and administrative standing do not turn on the same considerations, the Board has found court cases discussing judicial standing to be useful guides to the types of interests which are properly considered in adjudicating administrative appeals. *Id.*; *In Re Pacific Coast Molybdenum Co.*, *supra* at 332. Cf. *State of Alaska*, 41 IBLA 315, 324-27, 86 I.D. 361, 365-67 (discussing and applying *Koniag, Inc. v. Andrus*, 580 F.2d 601 (D.C. Cir.), cert. denied, 439 U.S. 1052 (1978)).

[6] Whether a mining claim constitutes a sufficient interest on which to base standing to appeal is not in issue. Rather, the question is whether the assumption "that no adverse claim exists" extends to preclude consideration of appellant's claims as an interest on which to base standing to appeal. In a sense, we have already answered this question. In that the assumption required by the statute pertains to Departmental review of patent applications and does not operate to invalidate mining claims, we cannot say appellant's claim is invalid. As a mining claim, it is sufficient to give standing to appeal. This conclusion is also required by early Departmental cases addressing standing to appeal the dismissal of protests.

The rule that a party without an interest is not entitled to an appeal to the Secretary has long been followed by the Department. See *Santa Rita Mines*, 1 L.D. 579 (1883) (rev. ed. 1887); *Cedar Hill Mining Co.*, 1 L.D. 628 (1881) (rev. ed. 1887). At the time, protestants were considered to be parties without an interest and therefore not entitled to an appeal; nevertheless, their appeals were reviewed under Departmental rules of practice. See *Cedar Hill Mining Co.*, *supra*. Whatever the formal status of mining claimants who had failed to adverse, hearings were frequently held to allow them to support their allegations and their appeals were commonly reviewed. See *Wight v. Tabor*, 2 L.D. 738, (*On Review*), 2 L.D. 743 (1884); *Branagan v. Dulaney*, 2 L.D. 744, 749 (1884).

One reason for the apparently incongruous treatment of appeals in the early cases seems to be that no distinction was made between protestants who had no interest in the land in dispute and those who did. The first case clearly addressing "whether in any case a protestant may be entitled to the right of appeal" was *Bright v. Elkhorn Mining Co.*, 8 L.D. 122 (1889). Following a hearing and dismissal of a protest, the General Land Office declined to transmit the protestant's appeal to the Secretary on the grounds that there was no right of appeal. The Secretary agreed that a person "who stands solely in the relation of *amicus curiae*, and who alleges no interest in the result of the application, cannot question the judgment of the land office in passing upon said application and protest, and is not entitled to the right of appeal from such decision." *Id.* However, he found that a different result was required when

a protestant shows possession of an interest, either present or prospective, * * * and shows that the claimant has failed to comply with the terms of the statute * * * whereby the limitation of the statute ought not to operate against the protestant, he is entitled to the right of appeal upon said protest, although no adverse claim was filed within the period prescribed by the statute.

Id. at 123. Accordingly, the opinion concluded:

[A] protestant who alleges an interest adverse to a mining claimant, and further alleges a failure on the part of said claimant to comply with the mining laws, is not a mere friend of the court, but a protestant, acting in his own interest, and asking the judgment of the Department upon the question raised by his protest, that the mineral claimant may be required to comply with the law, and thus enable the protestant to assert his claim in the proper tribunal. A protestant of this character is entitled to the right of appeal.

Id. at 126.

The rule established in *Bright* became the governing standard and was consistently followed in numerous cases without regard to the time of location of the asserted conflicting claim. See *Rupp v. Heirs of Healey*, 38 L.D. 387, 391-92 (1910); *Opie v. Auburn Gold Mining & Milling Co.*, 29 L.D. 230, 231 (1899) ("appeal as a matter of right"); *Parsons v. Ellis*, 23 L.D. 69 (1896); *Aspen Consolidated Mining Co.*, 22 L.D. 8 (1896); *Smuggler Mining Co. v. Trueworthy Lode Claim*, 19 L.D. 356 (1894); *Nevada Lode*, 16 L.D. 532, 533-34 (1893); *Weinstein v. Granite Mountain Mining Co.*, 14 L.D. 68, 70 (1892). See also *Gray v. Milner Corp.*, 64 I.D. 337, 341 (1957). It is important to note that while the rule permits standing to appeal dismissal of a protest, it does not permit the adverse claim to be asserted or considered as the basis for substantive argument as to the invalidity of the claim in the protested patent application. See 43 CFR 3872.1. For example, a protestant cannot argue that the applicant's location was invalid because the discovery was made in the protestant's prior location. *Langwith v. Nevada Mining Co.*, 49 L.D. 629, 633 (1923); *Mutual Mining & Milling Co. v. Currency Co.*, 27 L.D. 191, 193 (1898). See *Chemi-Cote Perlite Corp. v. Bowen*, 72 I.D. 403, 407 (1965).

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American Colloid argues that *Wight v. Dubois*, 21 F. 693 (C.C.D. Colo. 1884), precludes recognition of appellant's standing to appeal. The relevant passage is the statement: "Such a protest can be made only before the land department, and, if there rejected, the protestant has no further standing to be heard anywhere." *Id.* at 696. It is clear that the sentence is not a comment on standing within the Department; nor could a court limit Departmental standing. We see no conflict between Justice Brewer's understanding of the statutes and our own. His opinion clearly states that a locator who fails to adverse may bring a protest within the Department, though he may not assert his own title or rights as the basis for the protest. His only hope is that "if the protest or objection is sustained, the proceedings will be set aside, new ones must be commenced, and then the objector may be in a position to assert his rights * * *." *Id.* Thus, the opinion contemplates the same possible outcome to a protest as has long been recognized by the Department. See *Branagan v. Dulaney*, *supra* at 752. The case is also in accord with the conclusion reached above that the statute requires a factual assumption in reviewing a patent application and does not render claims void per se. For this reason, we reject the advice based on *Wight* given BLM in the Solicitor's memorandum that "[e]ven if a protestant succeeded in preventing the issuance of patent, his claims would be null and void for his lack of title which would be conclusively presumed due to *his* failure to file an adverse claim when he had the opportunity" (Solicitor's Memorandum at 7, italics in original). We also conclude that the appellant has standing to appeal the dismissal of his protest.

IV.

We turn next to the issues raised by BLM's decision dismissing appellant's protest. As previously quoted, BLM concluded that the issue of prestaking was a matter related to the good faith of a locator and his possessory rights which had been disposed of by Judge Brimner's decision. Consequently, it found that the documents submitted by appellant provided no evidence not considered by the court and dismissed the protest for failure to show that American Colloid had not complied with the law. BLM's conclusions followed advice given in the Solicitor's memorandum which was enclosed with the decision. BLM's decision raises issues as to whether prestaking (and pre-revocation exploratory drilling) concerns solely the good faith and possessory rights of a locator, whether issues of good faith are solely matters which concern rival locators involved in judicial proceedings for possession of mining claims, and whether the litigation of the adverse claims disposed of the issue of prestaking as to American Colloid's claims. Because BLM's conclusions were drawn from the Solicitor's memorandum, the issues are best approached by reviewing the conclusions stated there.

Prior to answering the specific questions asked by BLM, the memorandum states what purports to be a general description of the relevant law. Only a few points need be mentioned. First, the memorandum states that under the mining laws “[s]ome things are made requirements of federal law, e.g., discovery, while other things are made requirements of state law, e.g., possession” (Memorandum at 2). Second, the memorandum states: “Possession of mining claims is considered a matter of state law; *i.e.*, within the jurisdiction of state courts or federal courts applying state law.” *Id.* at 3. Third, the memorandum concludes that: “As to those matters going mostly to possession, such as compliance with state requirements for staking and especially matters of good faith, the Department always accepts the judgment and should, unless it would have some very cogent reason to do otherwise.” *Id.* at 4. As to the allegation of the protest that the Department should not issue a patent due to prestaking of the claims, the memorandum advises BLM: “You should reject that reason as one already dealt with and determined by the court and one which goes almost exclusively to possession – that is, a matter for state law.” *Id.* This advice is repeated several times in varying forms. For instance, after stating that “no harm has been done to any federal interest by the so-called prestaking,” the memorandum explains this by stating that the issue of prestaking “goes entirely to the issue of possession, as it concerns the claimants’ good faith (*or bona fides*),” and that for this reason “the application of state law as to possession should be taken as conclusive in this case.” *Id.* at 5. No authority is cited in the memorandum for the analysis presented.

The Mining Law of 1872, Act of May 10, 1872, ch. 152, 17 Stat. 91, 30 U.S.C. §§ 22-24, 26-28, 29-30, 33-35, 37, 39-42, and 47 (1982), establishes the relation between state and Federal laws governing the location of mining claims. It first provides that

all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase * * * under regulations prescribed by law, and according to the local customs or rules of miners in the several districts, so far as the same are applicable and not inconsistent with the laws of the United States.

30 U.S.C. § 22 (1982). Similarly, the statute governing the location of lode claims provides that such claims may be located “so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title.” 30 U.S.C. § 26 (1982). The statute for placer claims provides that they “shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims.” 30 U.S.C. § 35 (1982); *see Clipper Mining Co. v. Eli Mining & Land Co.*, *supra* at 222. Subject to specific stated requirements, mining districts are explicitly authorized to “make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work

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necessary to hold possession of a mining claim * * *. 30 U.S.C. § 28 (1982).

As a practical matter, local customs and the rules of mining districts have now been replaced by state laws. See *American Law of Mining* § 33.01[4] (2d ed. 1984). The statutory provisions nevertheless apply to preclude states from establishing location requirements contrary to Federal law, as would the supremacy and property clauses, Art. IV, § 3, cl. 2; Art. VI, cl. 2. See 2 *American Law of Mining* § 33.01[2] (2d ed. 1984).

While the statutory provisions permit states to set requirements for locating mining claims on Federal lands, they do not distinguish between matters governed by Federal law and matters governed by state law. Rather, the Federal statutes establish basic requirements governing the location of mining claims and permit them to be supplemented by local laws which are not inconsistent with Federal law. See *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905). The difference is important. It means that a valid mining claim is not the result of complying with either Federal or state law, but complying with an intermixture of state and Federal laws. See, e.g., *Roberts v. Morton*, 389 F. Supp. 87, 94 (D. Colo. 1975), aff'd, 549 F.2d 158 (10th Cir. 1976), cert. denied, 434 U.S. 834 (1977), aff'g *United States v. Zweifel*, 11 IBLA 53, 80 I.D. 323 (1973). This feature of mining law is explicitly stated in 30 U.S.C. § 26 (1982), in regard to "the exclusive right of possession and enjoyment" provided by that statute.

The interrelation of state and Federal location requirements is easily illustrated. State statutes commonly specify the contents of recorded location notices, see, e.g., Wyo. Stat. §§ 30-1-101, 30-1-110 (Supp. 1983), but regardless of whether required by state law, the record must contain "the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." 30 U.S.C. § 28 (1982); see *Deeney v. Mineral Creek Milling Co.*, 11 N.M. 279, 67 P. 724 (1902). Similarly, whatever requirements a state may impose as to the manner for marking a claim's boundaries, it "must be distinctly marked on the ground so that its boundaries can be readily traced," 30 U.S.C. § 28 (1982), and placer claims located on surveyed lands must "conform to the legal subdivisions of the public lands." 30 U.S.C. § 35 (1982); see *Charlton v. Kelly*, 156 F. 433, 435 (9th Cir. 1907); *Parker v. Jones*, 281 Or. 3, 572 P.2d 1034 (1978).

[7] A consequence of the interrelation of Federal and state requirements for establishing mining claims is that judicial proceedings between locators may raise a variety of issues under state or Federal law or both. Determinations as to "the right of possession" are, of course, solely for decision by local courts, 30 U.S.C. § 30 (1982), but the assignment of possessory disputes to local courts does not mean that they are resolved solely on the basis of state law. See *Shoshone*

Mining Co. v. Rutter, 177 U.S. 505 (1900). A dispute may turn on a simple factual issue such as priority or sufficiency of discovery. See, e.g., *Johanson v. White*, 160 F. 901 (9th Cir. 1908); *Granlick v. Johnston*, 29 Wyo. 849, 213 P. 98 (1923). A dispute may also raise a mixture of factual and legal issues entailing questions as to priority and validity of mining claims under both state and Federal law. See, e.g., *White v. Ames Mining Co.*, 82 Idaho 71, 349 P.2d 550 (1960); *Dripps v. Allison's Mines Co.*, 45 Cal. App. 95, 187 P. 448 (1919). The intermixture of location requirements may even require an interpretation of the relation of local and Federal requirements. See, e.g., *Norris v. United Mineral Products*, *supra* at 689; *Wagner v. Holland*, 10 Alaska 40 (1941). It may also be that, due to the failure of the complainant to sustain the validity of his location, judgment is issued without reaching the validity of the defendant's claims. See, e.g., *Ledoux v. Forester*, 94 F. 600 (C.C.D. Wash. 1899). In any event, the issue of the validity of a mining claim is also the ultimate concern of the Department when a patent application has been made, and it necessarily has the power to inquire into and determine whether the location is valid under both Federal and state law. *Cameron v. United States*, 252 U.S. 450, 460, 463-64 (1920); *Steel v. Smelting Co.*, 106 U.S. 447, 451 (1882); *Work Mining & Milling Co. v. Doctor Jack Pot Mining Co.*, 194 F. 620, 625 (8th Cir. 1912). See *J. B. Nichols & Cy Smith (On Rehearing)*, 46 L.D. 20 (1917) (reaffirming *H. H. Yard*, 38 L.D. 59 (1909)).

Because judicial proceedings between locator^s may raise a variety of issues bearing upon the validity of mining claims and the Department must also determine the validity of a claim, questions can arise as to the effect judicial proceedings have upon Departmental review. The statute provides that upon filing a certified copy of the judgment with the Department, "a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess." 30 U.S.C. § 30 (1982).

Language appearing in some early decisions tends to equate the determination as to possessory rights made in adverse proceedings with entitlement to a patent. See, e.g., *Wolverton v. Nichols*, 119 U.S. 485, 490 (1886); *Burke v. Bunker Hill & S. Mining & Concentrating Co.*, 46 F. 644 (C.C.D. Idaho 1891). It was subsequently recognized, however, "that it is 'the question of the right of possession' which is to be determined by the courts, and that the United States is not a party to the proceedings." *Perego v. Dodge*, 163 U.S. 160, 168 (1896). In *Clipper Mining Co. v. Eli Mining & Land Co.*, *supra* at 232-34, the Supreme Court stated in the context of a case concerning lodes in placers:

We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of inquiry by the government, or that the judgment necessarily gives them the lodes in controversy. * * *

* * * * *

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*** The land office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against the placer location and set it aside, and in that event all rights resting upon such location will fall with it.

See also Doe v. Waterloo Mining Co., 70 F. 455, 462 (9th Cir. 1895); *Upton v. Santa Rita Mining Co.*, 14 N.M. 96, 89 P. 275 (1907).

The Department has long held a similar view. In *Alice Placer Mine*, 4 L.D. 314, 317 (1886), it was held: "The judgment roll proves the right of possession only. The applicant must still make the proof required by law to entitle him to patent. Branagan *et al. v. Dulaney*, (2 L.D. 744). The sufficiency of that proof is a matter for the determination of the Land Department." *See also United States v. Grosso, supra* at 119-21; *Clipper Mining Co. v. Eli Mining & Land Co. (On Review)*, 34 L.D. 401 (1906); *Apple Blossom Placer v. Cora Lee Lode*, 14 L.D. 641 (1892). The Department's decisions were quoted and approved in *Perego v. Dodge, supra*, and *Clipper Mining Co., supra*, effectively rejecting any implication of the earlier decisions that judicial proceedings left nothing to be determined by the Department.

[8] Despite the potential for conflict suggested by the dual authority of courts and the Department to determine the validity of mining claims, few cases have considered the matter except as to specific issues. *See, e.g., Estate of Bowen*, 14 IBLA 201, 81 I.D. 30 (1974). It is not questioned that the findings of a court as to determinative facts in the proceedings before it may be binding upon the Department. The question, however, is when and to what extent the Department must accept factual issues as having been conclusively settled by a court. The most obvious rule, of course, is that a judgment is not conclusive "as to matters which might have been decided, but only as to matters which were in fact decided." *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683, 687 (1895).

During a trial, however, a large volume of evidence may be introduced by the parties in support of various facts they assert to be true, and numerous issues may be raised by the parties. Unless addressed by the court in its written judgment, there may be no basis on which to conclude that a matter was disposed of by the court. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. 30 U.S.C. § 30 (1982); *Clipper Mining Co. v. Eli Mining & Land Co., supra* at 232-34; *Perego v. Dodge, supra* at 168; *Upton v. Santa Rita Mining Co., supra* at 278-80; *United States v. Grosso, supra*. To the extent evidence introduced at trial establishes a fact to be true, a successful litigant may simply provide it to the Department in support of his patent application. When a successful litigant argues that a fact was necessarily found by the court in reaching its judgment, the Department must consider whether such an argument must be true under the mining laws. By their nature, such arguments entail either an inference from the written judgment or an interpretation of it, as

well as a conclusion as to the relation of the judgment to the record of the proceedings. The trial record is not before the Department, and it is not the task of the Department to review the judicial record. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made any determination as to a fact argued for by a party in introducing evidence.

[9] Turning to the judgment issued by the court in the proceedings in which American Colloid participated, we find that no part of it addresses the issue of prestaking. Rather, it establishes a division of the contested lands, awarding exclusive possession of some tracts to each of the parties. No portion of the judgment addresses the validity of the claims or makes findings of fact as to the locators' compliance with the mining laws. Thus, we cannot conclude that the judgment of the court was dispositive as to the issue of prestaking. Nor does the probable fact that the parties took the issue into consideration in reaching a settlement, as observed by BLM in its decision, have any relevance. Any effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court to find facts and rule upon applicable law. The district court's judgment issued as a consequence of a settlement agreed upon by the parties. In reaching a settlement the parties are indeed likely to be influenced by the advice of their attorneys as to the probability of success on the merits, but they may settle for any number of reasons. The terms of the settlement must be reviewed and approved by the court, but if it approves, there is no need to decide the factual and legal issues upon which it otherwise would have based its decision.

With its Answer, American Colloid has submitted a copy of an "Order Denying Motions for Summary Judgment" issued by Judge Brimmer on June 16, 1983, as part of the litigation of the adverse claims. It appears that both sides moved for summary judgment. The basis on which American Colloid argued that the case presented "no genuine issue as to any material fact," Fed. R. Civ. P. 56(c), is not stated in the court's order. It does state that the motion was made "with respect to certain claims of American Colloid using the technique of 'adoption' of already completed discovery and monumentation" (Order at 4). The relevant portion of the order discusses *Noonan v. Caledonia Gold Mining Co.*, 121 U.S. 393 (1887), and several other cases. Following this discussion, the order states:

American Collid [sic] purports to have adopted discovery monuments and/or corner posts for various of the disputed claims through the posting of new location notices at exactly 10:00 a.m. on October 10, 1981 and the filing of location certificates with the applicable agencies. Such adoption if done timely could be proper under *Noonan*. Issues of fact still remain as to whether American Colloid or some other party actually completed location and recorded first. The facts bearing on this question must be elicited at trial.

(Order at 6). Accordingly, the court denied the motion.

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We do not believe the quoted paragraph makes any determination as to whether American Colloid properly adopted monuments for its claims. It notes that adoption, as purportedly done by the company, could be proper under *Noonan*. The court dismissed the motion for summary judgment. Its order makes no finding of fact as to the performance of any act of location, but simply recites that issues of fact remained as to when locations were completed. Absent a finding as to the fact of adoption, it is not possible to conclude that the court found that as a matter of law it was proper for the company to do so in the circumstances presented by the case. The court recognizes that *Noonan* approves of adoption as a doctrine of mining law and that the case might apply to an adoption made by American Colloid. Without a determination as to the facts, the court's statement cannot be regarded as ruling on the issue of prestaking and adoption or approval of adoption in regard to American Colloid's claims. Otherwise stated, if the parties had gone to trial, it remained possible for the court to rule against the company on the issue.

Accordingly, we find BLM improperly concluded that the documents submitted by appellant could not be considered as to American Colloid's patent application because they had been part of the litigation of the adverse suits leading to the settlement by the parties and the court's judgment. It is also clear that the Solicitor's memorandum improperly advised BLM to reject appellant's argument that American Colloid's claims were invalid because the issue of prestaking had been determined by the court. See *2 American Law of Mining*, § 52.03[3] (2d ed. 1984). Equally, the memorandum erred in reaching this conclusion on the basis that possessory disputes are governed by state law. To the extent such disputes raise issues as to the validity of mining claims, either Federal or state law or both may apply.

[10] Nor is the Solicitor's memorandum correct in concluding that good faith relates solely to the issue of possession and therefore state law. Good faith in the location of mining claims has widely been recognized as an implicit requirement of the mining laws. See, e.g., *Bagg v. New Jersey Loan Co.*, 88 Ariz. 182, 354 P.2d 40, 45 (1960). "Good faith," of course, is not a precise term and a finding as to a lack of good faith has been used to condemn a variety of evils. See *1 American Law of Mining*, § 31.08 (2d ed. 1984). When the question of good faith concerns a locator's knowledge of prior claims and his purposes in locating rival claims as in *Columbia Standard Corp. v. Ranchers Exploration & Development, Inc.*, 468 F.2d 547 (10th Cir. 1972), the issue of good faith is appropriately left to resolution by judicial proceedings between the locators. See also *Ranchers Exploration & Development Co. v. Anaconda Co.*, 248 F. Supp. 708, 728-31 (D. Utah 1965). However, good faith may also concern a locator's

knowledge and purposes in attempting to obtain rights to Federal lands by establishing mining claims.

Departmental decisions have commonly addressed the issue of good faith in examining whether claims have been located for the purpose of mineral development. *See, e.g., United States v. Moorehead*, 59 I.D. 192, 194-95 (1946); *United States v. Langmade & Mistler*, 52 I.D. 700, 704-05 (1929) (millsite); *Grand Canyon Railway Co. v. Cameron*, 36 L.D. 66 (1907). The authority of the Department to inquire into a locator's good faith in regard to such matters has been noted by the courts. *See United States v. Lavenson*, 206 F. 755, 765 (W.D. Wash. 1913); *cf. United States v. Zweifel*, 508 F.2d 1150, 1156 (10th Cir. 1975). On occasion this Board has also recognized that bad faith may serve as the basis for invalidating a claim through administrative proceedings, *see In Re Pacific Coast Molybdenum Co.*, 75 IBLA 16, 35, 90 I.D. 352, 363 (1983); *United States v. Dillman*, 36 IBLA 358 (1978), and lack of good faith is frequently one of the grounds on which BLM contests mining claims, *see, e.g., United States v. Prowell*, 52 IBLA 256, 257 (1981). Four months prior to the date of the Solicitor's memorandum under consideration here the Board issued *United States v. Zimmers*, 81 IBLA 41 (1984), finding mining claims to be invalid on the basis that they had not been located in good faith for the purpose of developing a mining operation.

We therefore reject the fundamental premise of the Solicitor's memorandum that prestaking concerns only the good faith and possessory rights of a locator and can be reviewed only under state law applied by a local court. Because BLM followed the Solicitor's advice in issuing its decision, it erred as to the grounds stated for dismissing appellant's protest. Accordingly, we must reverse its decision and remand the case for further consideration.

V.

In summary, we hold that BLM erred in finding appellant's Foxx mining claims to be null and void. We find that they are not invalid under 30 U.S.C. §§ 29 and 30 (1982), by reason of their location after publication of notice of American Colloid's patent application, and we find that appellant has standing to appeal. In addition, we find that BLM's rejection of appellant's protest is not sustainable on the mere basis of the settlement agreement between American Colloid and other private parties. It is incumbent on the agency to independently decide whether the subject claims satisfy all legal requirements in response to the protest filed, and that has not been done.

Accordingly, on remand BLM is to ascertain the facts as to American Colloid's activities on the land prior to the revocation of the withdrawal as they pertain to the company's location of its mining claims. Thereafter, BLM shall issue a new decision on the protest filed by Scott Burnham disposing of all factual and legal questions raised thereby. If a genuine dispute as to the facts should arise, the agency may deem it necessary to hold an informal hearing to resolve such

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dispute. Any party to the case adversely affected by BLM's decision shall have a right of appeal to the Board pursuant to 43 CFR 4.410.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case file remanded to BLM.¹⁰

FRANKLIN D. ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

JOHN H. KELLY
Administrative Judge

UNITED STATES v. HARLAN H. FORESYTH ET AL.

100 IBLA 185

Decided December 8, 1987

Decision after review of a recommended decision by Administrative Law Judge John R. Rampton, Jr., dismissing a mineral contest with respect to the Avenger Nos. 7, 8, 9, 10, 11, and 13 lode mining claims and finding the Avenger No. 12 lode mining claim null and void for lack of a discovery.

Recommended decision adopted as modified.

1. Mining Claims: Discovery: Generally--Mining Claims: Determination of Validity--Mining Claims: Lode Claims--Mining Claims: Withdrawn Land

For a lode mining claim there must be an exposure of mineral in place within the boundaries of the claim. Without an exposure of mineral in place there can be no discovery on a lode mining claim even though all other elements of discovery have been satisfied. If the land is withdrawn from mineral entry, it must be shown that the mineral in place had been exposed prior to the date of withdrawal.

2. Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

In order to have a valid mining claim, a mining claimant must have found a mineral deposit of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a valuable mine.

¹⁰ In the proceedings on remand, BLM should keep in mind the possible effect of *Nat'l Wildlife Federation v. Burford*, No. 85-2238 (D.D.C. Feb. 10, 1985), order published 51 FR 5809 (Feb. 18, 1986), (termination of withdrawals in effect on Jan. 1, 1981, enjoined) upon this appeal. See also Solicitor's memorandum, *Nat'l Wildlife Federation v. Robert F. Burford, Donald P. Hodel, & U.S. Department of the Interior* (Mar. 10, 1986).

3. Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

The prudent man standard is an objective standard which requires a claimant to submit proof that a prudent man would develop a mine. It is not enough that a claimant desires to do so if the evidence leads to a conclusion that a prudent man would not. This proof can be made using the testimony of expert witnesses who examine the property and express their expert opinion that the evidence supports a determination that a prudent man would be justified in the expenditure of his time and means with the reasonable prospect of success in the development of a valuable mine.

4. Mining Claims: Generally--Mining Claims: Discovery: Generally--Mining Claims: Discovery: Marketability

The issues of quantity and quality of mineral present on a mining claim are issues of fact. Once the evidence of quantity and quality has been presented, it must also be shown there is a reasonable prospect that those minerals can be removed and rendered suitable for sale at a cost which is less than the sales price of the product.

5. Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

Final proof of actual mining costs can only be ascertained after the conduct of an actual mining operation. However, a claimant may demonstrate the reasonably anticipated cost of mining, by use of reliable cost-analysis systems or by use of a comparison to an operative mine. These anticipated costs are a reasonable basis for a determination by a person of ordinary prudence regarding whether the further expenditure of his time and means is justified.

6. Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

The law of discovery does not require a guaranteed success, but only requires a reasonable prospect of success in developing a valuable mine.

7. Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability--Mining Claims: Marketability

The obvious intent of Congress when making public lands available to people for the purpose of mining valuable mineral deposits was to reward and encourage the discovery of minerals that are valuable in the economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. There must, therefore, be a showing of the existence of potential buyers of the product and the price they would be willing to pay.

8. Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Marketability--Mining Claims: Marketability

A mining claimant has satisfied the marketability test if it is shown that a market for the product presently exists, that there is a ready and willing buyer, and that the claimant can mine and sell the locatable material from the claims in the marketplace at a competitive or lower price than the present suppliers. A claimant need not have a firm commitment for the purchase and sale of his mine product.

9. Mining Claims: Generally--Mining Claims: Common Varieties of Mineral: Specific Value--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

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The common varieties legislation (30 U.S.C. § 611 (1982)), removed "common varieties" of sand, stone, gravel, and the like from the operation of the general mining laws. In determining whether there is a discovery of locatable mineral, the uncommon (locatable) mineral must support the mining operation on its own, and the sale of other minerals from the claim may not be considered when predicting profitability. Sales of an allegedly uncommon variety of limestone must reflect the limestone's special value. This special value can be demonstrated either by sales for uses which require particular characteristics or by an increase in the marketplace price. If the limestone is sold for "common variety" use and as a result does not command a premium price, the income and/or reduced cost resulting from such sales should be disregarded when projecting profitability.

10. Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

When an exposure of valuable locatable mineral in place has been shown to exist within the boundaries of each mining claim, a group of contiguous mining claims can be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in the development of a mine. The concept of developing a "mine" can reasonably contemplate operations on a series of contiguous claims.

11. Mining Claims: Generally--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

In the early stages of development of any mine it is rare for the miner to have an assured market for his product or an assurance that when the mine is developed the price paid for his product will be equal to or higher than the market price in existence on the date he commences development. This fact does not render the claim invalid for lack of a discovery. A claimant need only demonstrate by a preponderance of the evidence that there is a reasonable prospect that when developed he will possess a profitable mine.

12. Administrative Practice--Mining Claims: Contests--Mining Claims: Hearings

A Government contest complaint which asserts the invalidity of a claim because of insufficient quantity and quality of the located mineral within the limits of the claim does not put into issue the existence of excess reserves within the limits of the claim.

APPEARANCES: Charles B. Lennahan, Esq., Office of the General Counsel, U.S. Department of Agriculture, Denver, Colorado, for the Forest Service; Kenneth E. Barnhill, Jr., Esq., Ernest W. Lohf, Esq., and David G. Ebner, Esq., Denver, Colorado, for the claimants.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

INTERIOR BOARD OF LAND APPEALS

Before addressing the issues, we deem it appropriate to comment regarding the manner and extent we are accepting and adopting the recommended decision submitted by Judge Rampton. Although 17 exceptions to the decision were filed, much of the 33-page recommended decision was found to be acceptable by both parties. To

the extent possible, we have adopted the language of that decision.¹ However, in those instances where we deem it necessary, we will expand upon or modify that decision in order to address the exceptions registered.²

History of the Case

The mining claims involved in this proceeding were located for limestone in 1966 on public lands open to mining location within the Pike National Forest, Colorado. This proceeding was instituted by the filing of a complaint dated August 2, 1967, alleging, *inter alia*, that no valuable mineral deposit had been discovered within the claims, and that the Avenger Nos. 1 through 25 mining claims were located for a common variety of mineral no longer locatable pursuant to the Act of July 23, 1955.

At a prehearing conference held on May 7, 1968, the parties agreed that joint sampling and additional core drilling would be done on the claims prior to a hearing. Pursuant to an order issued as a result of that conference, the joint examination was commenced in May 1968, continued during September, October, and November of that year, and into 1969. Four holes were drilled and the cores jointly sampled. On July 17, 1968, the Forest Service, without the knowledge of their counsel, filed with the Bureau of Land Management (BLM) office in Denver, a request for withdrawal of the lands upon which the claims are situated from the effect of the mining laws. Such withdrawal was noted on the official BLM land status records.

In November 1969, in accordance with the prehearing agreement, claimants were prepared to remove 2,000 tons of limestone for testing by a sugar factory, but were prevented from doing so, and from performing any further activities on the claims by a temporary restraining order issued by the U.S. District Court for Colorado at the request of the Forest Service. That injunction presently continues in effect. Work subsequently performed by the claimants has been and can now only be performed after grant of a specific modification of the injunction upon joint request by the parties.

The initial hearing was held during November and December 1968, and January 1970. After a decision was issued by the U.S. District Court in the injunctive proceedings, the record was reopened and further evidence and testimony received. During the proceedings, a Forest Service motion to exclude all data obtained after the filing of the application for withdrawal was taken under advisement pending receipt of evidence and briefs on the issue. The claimants were allowed to present all evidence obtained as a result of a stipulation made at the

¹ In most instances the citations to the text of Judge Rampton's recommended decision have been eliminated for clarity. In many places a word or phrase was altered, and to quote and bracket these changes would be distracting and, in some instances, confusing.

² We commend Judge Rampton for the manner in which he handled this case. It is very evident from the file and the transcript that he was faced with a difficult case and that the parties were represented by capable and competent counsel well versed in the intricacies of a trial, both with respect to presentation of evidence and examination of witnesses and the procedural aspects of trial practice.

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prehearing conference. The Forest Service was granted a continuing objection to the ruling but elected to introduce, as part of its case in chief, parallel evidence obtained by it after the request for withdrawal filing date.

By decision issued by Admininistrative Law Judge Rampton, dated September 18, 1972, it was held that the application for withdrawal was fatally defective because of a failure to comply with the mandatory regulations. All of the evidence in the record was considered in determining all issues concerning whether or not the contestees had perfected a discovery. Of the original 25 Avenger claims challenged in the complaint, 16 claims were held to be void for lack of discovery of a locatable deposit of limestone. The complaint was dismissed as to Claim Nos. 1, 2, and 7 through 12 based upon findings that surface outcroppings and the limited drilling completed had shown the existence of high-grade locatable limestone found in a continuous bed throughout the claims which could be marketed at a profit.

On appeal, by decision dated February 28, 1974, *United States v. Foresyth*, 15 IBLA 43 (1974), this Board set aside Judge Rampton's decision and remanded the case for further hearing and a recommended decision. As to the issue of the validity of the request for withdrawal, the Board held that although the mandatory requirements had not yet been satisfied, all such omissions could be corrected at any time prior to the final adjudication of the application. Thus, on the date the withdrawal was noted on the land office records, i.e., July 18, 1968, the application to withdraw effected a segregation of the land from further mineral location. However, the Board also held that information obtained after the date of segregation was admissible, and could be considered to the extent that such evidence confirms and corroborates exposures of a valuable mineral deposit made prior to segregation.

The issue (raised at the first evidentiary hearing) of the locatability of the limestone deposit in question was decided pursuant to the Department's findings in *United States v. Chas. Pfizer & Co.*, 76 I.D. 331, 342-43 (1969). The *Pfizer* decision held that limestone containing 95 percent or more calcium and magnesium carbonates is an uncommon variety of limestone which remains subject to location under the mining laws.

The Board's remand decision in this case directed the parties to present, in far greater detail than had thus far been presented, evidence sufficient to show a discovery on each claim and to show marketability as of July 18, 1968. The Board directed the Forest Service attorneys to move to have the restraining order dissolved to the extont it prevented claimants from entering upon the land and removing material for testing.

A prehearing conference was held on May 30, 1974, to determine the procedures to be followed when carrying out the directions contained

in the *Foresyth* decision. The order subsequently entered by Judge Rampton provided that, for purposes of testing the material for its use and suitability in manufacturing sugar, the claimants would be allowed to remove 1,000 tons of representative material from an existing quarry with as little damage to the environment as possible. However, when the claimants entered upon the claims for the purpose of removing the bulk sample, a Forest Service representative ordered them to cease operations. Therefore, a second prehearing was held on the claimants' proposed implementation procedures.

Concurrently and pursuant to the Board's decision, the claimants resurveyed the claims and prepared maps delineating with more certainty the claim boundaries and the location of the outcrops and drill holes. Testimony was received for the primary purpose of determining the type of further drilling that would be permitted. Both parties were able to agree that a single map (Exh. R-1) showed with accuracy the exposed outcroppings of locatable limestone and the proposed additional drilling sites. Claimants voluntarily conceded the invalidity of the Avenger Nos. 18 through 25 claims.

At the second prehearing, the Forest Service did not object per se to the removal of a large tonnage of ore for testing at a sugar factory, but did oppose any further drilling as being a type of sampling not contemplated by the Board. After several attempts to remove a bulk sample for testing were forestalled by representatives of the Forest Service, claimants were ultimately permitted, in the fall of 1974, to remove approximately 1,000 tons of material from the existing quarry on the Avenger No. 10 claim. This material was shipped to a sugar factory at Rocky Ford, Colorado. Representatives of the Forest Service were present at all times during the removal and testing.

By Prehearing Order dated March 10, 1975, the claimants' proposed drilling program was approved. An interlocutory appeal was taken by the Forest Service. By Order dated October 30, 1975, the Board held, *inter alia*, that inasmuch as the contificant had conceded that post-segregation removal of limestone from the quarry would help to establish whether the Avenger limestone was commercial grade and marketable, there was no theoretical or practical justification for the position that additional samples taken by drilling to establish quantity and quality must be excluded. The Board held that to the extent core samples may aid in establishing the quantity and continuous quality of an exposed outcropping, they are clearly within the scope of the remand. The Board agreed, however, that a number of proposed drill sites were located on claims for which the evidence showed no prewithdrawal exposures of mineral to exist. Referring to the testimony of Maynard Ayler, contestants' consulting geologist, the Board held the Avenger claims Nos. 1 through 6 and 14 through 25 void for lack of a mineral discovery because they contained no outcroppings or exposures of locatable limestone. The Board noted Ayler's testimony concerning the existence of high-grade outcrops on claims Nos. 7, 8, 9, 10, and 13, and conflicting testimony concerning

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outcrops on claims Nos. 11 and 12. Specifically, proposed drill holes Nos. 5, 6, 7, and 8 were permitted. Vertical drill hole No. 17 was allowed to establish the quantity and quality on claims Nos. 13 and 12 if an exposure or outcropping had already been discovered on claim No. 12. Vertical drill hole No. 11 was permitted to establish quantity and quality on the Avenger No. 11 claim. The allowance of vertical drill holes Nos. 9 and 10 was reversed.

The Forest Service failed to move to dissolve the injunction as directed by the Board and the claimants were required to bring an action before the U.S. District Court to compel compliance. That order was issued by the court on July 18, 1978.

Further delay was encountered when the Planning Commission for El Paso County denied claimants' request for a permit to perform the authorized drilling. Hearings were held before the Board of County Commissioners and the Colorado District Court for El Paso County. The decisions rendered by those bodies were adverse to claimants. An appeal was taken to the Supreme Court of Colorado, which held, on September 13, 1982, that the county was without authority to prohibit or prevent drilling by contestants on public lands of the United States. *Brubaker v. Board of County Commissioners*, 652 P.2d 1050 (1982).

Core drilling was finally performed in 1982-1983 pursuant to and in accordance with the provisions and procedures prescribed in a plan of operations filed with and approved by the Forest Service. Holes were drilled, core recovered and logged, core intervals analyzed and selected for assay, samples prepared for assay, and assays were obtained by each of the parties acting separately, but with the knowledge and participation of the other. Neither party has taken any exception to the procedures followed, the assays obtained, or the integrity and correctness (within reasonable industry limits) of assay results obtained.

Additional delay was encountered before the parties were able to agree to a resumption of the administrative hearings. During the drilling of hole No. 7 (as designated on map R-1), the claimants lost circulation and were unable to complete the hole. The Forest Service refused to allow a substitute hole (7A on claim No. 11) to be drilled on the grounds that this drilling would constitute post-withdrawal exploration. The contestants brought an action before the U.S. District Court for a modification of the temporary injunction to allow the substitute hole. A hearing was held on March 21, 1983 (Exh. 86-34). However, when no decision was forthcoming from the court, the claimants elected not to pursue the possibility of further drilling. On June 17, 1985, they filed a petition to reopen the administrative proceeding and requested a prehearing conference. In that request, claimants admitted that no discovery of an outcrop had been made on claim No. 12 prior to the application for withdrawal.

Discovery proceedings in the form of comprehensive interrogatories were instituted by the Forest Service and objected to by claimants. In a prehearing conference held on January 7, 1986, responses satisfactory to the Forest Service were provided. The parties also agreed to a schedule for complete exchange of proposed exhibits prior to hearing. Finally, some 16 years after the record was completed in the first hearing, the hearing on remand commenced on March 20. Briefs were submitted by both parties, with the final brief filed on August 18, 1986.

On February 25, 1987, Judge Rampton issued his recommended decision that the "Avenger Nos. 7, 8, 9, 10, 11, and 13 are valid claims" and that, with respect to these claims, the complaint should be dismissed. The case record and recommended decision were then forwarded to this Board.

By order dated March 13, 1987, the recommended decision was served on the parties. The order also provided that if no exceptions to the recommended decision were filed within 30 days from the date of receipt of the order, the recommended decision would be adopted by the Board. On April 20, 1987, the Forest Service filed 17 exceptions to the decision. An answer was filed on behalf of the claim owners on May 16, 1987, and a reply was filed on behalf of the Forest Service on June 2, 1987.

The Issues

In order to frame the issues presented in this case, one must review the holdings in previous decisions and orders. The issues originally presented were:

- (A) The existence of a valuable mineral deposit within the limits of each claim.
- (B) If there is a valuable mineral deposit within the limits of the claim, is that mineral deposit a common variety mineral, and thus not subject to location.

These were the issues framed by the original complaint filed on August 2, 1967. Normally, if the land remains subject to location, the chronological time for determination as to the existence of a valuable mineral deposit is the time of the hearing. However, subsequent to filing the complaint, the Forest Service undertook steps to withdraw the lands from mineral entry.³

The issues framed in the complaint were addressed in *United States v. Foresyth, supra*. That decision further refined the issues and made a finding regarding certain elements of the issues. An appeal was not taken from that decision. Therefore, to the extent that decision was final, it is binding upon the parties. In *Foresyth* the Board made the following findings applicable to the issues in this case. In the determination of whether a discovery existed prior to the withdrawal of the land from mineral entry, the issue is whether a valuable deposit of minerals had been physically disclosed within the boundaries of each claim prior to the date of withdrawal. Evidence obtained after

³ See *United States v. Foresyth, supra* at 45, 47-48, and 51-55 for a discussion of the withdrawal and its effect upon the issues of this case.

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withdrawal may be used to support a claimant's allegation of discovery if it can be shown that the date of exposure of the valuable mineral predated the withdrawal.

At page 59 of the *Foresyth* decision the Board noted:

The claims were located for limestone. The applicable regulation, 43 CFR 3711.1(b) provides, *inter alia*, that: "[l]imestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not 'common varieties'." Thus, in order for a claim located for limestone after July 23, 1955, to be valid, the limestone must be either chemical grade, metallurgical grade or of a grade suitable for the production of cement. The obvious question is what qualities are necessary within a limestone deposit to make it of a grade sufficiently high to remove it from the proscriptions of the Act.

As regards chemical grade, this Department wrestled with this problem on a number of occasions and in *United States v. Chas. Pfizer & Co., Inc.*, *supra*, at 342-43, held that "limestone containing 95 percent or more calcium and magnesium carbonates is an uncommon variety of limestone which remains subject to location under the mining laws."

Based upon this determination, the Board found limestone having 95-percent or richer carbonate content on the Avenger Nos. 9 and 10 claims and limestone containing carbonate material of sufficient grade on the Avenger Nos. 7, 8, 11, 12, and 13 claims, but noted that, because of the conflicting evidence regarding the location of the claims on the ground, there was some question as to the exact location of the high-grade mineralization with respect to the latter group of claims.

The Board recognized that a question regarding the marketability of the product still existed, noting that the "mere fact that the deposit is an uncommon variety of stone does not make it *per-se* marketable." The Board then charged the mineral claimants with the responsibility to show "that the deposit within each claim is marketable at a profit." *Id.* at 60. In doing so, the Board noted that in making a determination regarding marketability, profits from common and uncommon varieties of minerals cannot be aggregated. The common variety mineral must be treated as waste material with no value, even if it is essential that it be mined in order to reach the uncommon variety minerals.

The Board concluded that claimants had failed to show marketability, but that in light of actions taken by the Forest Service to restrain them from doing those things necessary to prove marketability, sufficient justification existed to cause the Board to not rule finally on the case. The judgment was then vacated as to all claims to allow claimants to present further evidence as to marketability and discovery after being permitted to remove rock for sampling. The Board set aside the administrative law judge decision and the case was remanded for a further hearing.

Following the Board decision, one of the remaining issues, the location of the claims in relation to the surface geology, was resolved by stipulation of the parties that a map submitted as Exhibit K-1 was a true and correct representation of the boundaries of the Avenger claims 1 through 25 inclusive as such claims appear on the ground; of the location of the points of sampling

and of prior drilling designated thereon * * *; of the surface contours and surface geology as determined by visual observation and surface mapping; and that such map may be received in evidence as a true and correct reflection of the data and material appearing thereon.

(Stipulation - Exhibit R-1).

Following a prehearing conference held on November 14, 1974, Judge Rampton issued an order, dated March 10, 1975, designed to implement the sampling program called for in the Board's decision. This order called for the removal of 1,000 tons of material for testing, the map submitted with the stipulation was accepted, and a core-drilling program proposed by claimants was deemed to be within the scope of permissible testing, as outlined by this Board.

The Forest Service then filed a motion for certification of the record to this Board, alleging that the March 10, 1975, order was controversial, that it involved controlling questions of law, and that an immediate appeal to the Board would advance the final decision. On May 16, 1975, Judge Rampton denied the Forest Service motion, and the Forest Service sought relief from this Board. Following briefing by both parties, on October 30, 1975, the Board issued an order granting the Forest Service petition for review and ruled upon the petition.

In its October 30, 1975, order the Board found Judge Rampton's order could not be considered a ruling on the merits of the case and was thus not a basis for appeal. However, the Board also found that the real issue presented was the proper interpretation of the Board's decision. The petition was treated as a petition for clarification of the Board's *Foresyth* decision.

As clarification of its prior decision, the Board held that evidence obtained after the date of withdrawal was admissible to the extent that it confirmed and corroborated pre-existing exposures of a valuable mineral deposit, and that core samples taken after withdrawal could be used to the extent that they aid in establishing the quantity and continuous quality of mineral shown to be present in an exposed outcropping.

When rendering the *Foresyth* decision, the Board noted that it was uncertain where, as a physical matter, various outcroppings of chemical grade, metallurgical grade, or limestone suitable for making cement were located in relation to the claims. After examining testimony regarding the proposed drilling program, the map designated as Exhibit K-1, and statements made by claimants in their brief, the Board determined that 18 of the Avenger claims must be declared null and void for lack of a discovery of a mineral deposit.⁴ Following that determination, the Board held that there was an exposure of a valuable mineral in place on the Avenger Nos. 7 through 10 and 13 prior to withdrawal, but that a question remained as to the existence of a prewithdrawal exposure of a valuable mineral in place on the Avenger Nos. 11 and 12. The case was remanded for a hearing.

⁴The claims deemed null and void were the Avenger Nos. 1 through 6 and Avenger Nos. 14 through 25.

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On June 17, 1985, following drilling and testing, counsel for claimants advised Judge Rampton that it had been determined that no exposure of a valuable mineral existed on the Avenger No. 12 lode mining claim prior to withdrawal, and the parties stipulated during a prehearing conference, held on January 7, 1986, that the Avenger No. 12 was null and void and no longer the subject of the contest.

In summary, the issues to be considered by Judge Rampton at the time of the hearing were:

1. The existence of an exposure of mineral in place on the Avenger No. 11 lode mining claim containing 95 percent or more calcium and magnesium carbonate on July 18, 1968.⁵
2. Whether the deposit of locatable limestone found to exist on the Avenger Nos. 7 through 11 and 13 lode mining claims existed in such quantity and quality that a man of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in developing a valuable mine.⁶

3. The existence of a market for the locatable minerals at a price higher than the cost of extracting the minerals and transporting them to the market.⁷

As previously noted, the first issue applies only to July 18, 1968. The other two issues are framed as to both that date and the time of the hearing.

Exposure of Locatable Mineral on the Avenger No. 11 Claim on or before July 18, 1968

[1] For a lode mining claim there must be a disclosure of mineral in place within the boundaries of the claim. *Cameron v. United States*, 252 U.S. 450 (1920); *Chrisman v. Miller*, 197 U.S. 313 (1905). In its Order dated October 30, 1975, the Board invalidated certain claims for which the evidence adduced at the prehearing conferences disclosed no exposures or outcrops of a valuable mineral deposit prior to withdrawal of the land from mineral entry. The Board specifically referred to conflicting testimony related to the existence of an outcrop on Avenger No. 11 and permitted drill hole No. 11 to establish quantity and quality within that claim if the evidence indicated that an exposed and examined outcrop did in fact exist on that claim prior to segregation.

On this issue, Maynard Ayler, a consulting mining engineer and geologist who testified at the earlier hearings and whose expert qualifications have never been questioned, testified that he found outcrops of locatable limestone on claim No. 11 both during his visits

⁵ The claimants have been restrained from conducting any mining operations on the claims other than the testing described above. This being the case, if an exposure of a valuable mineral in place existed in 1968, it still existed at the time of the hearing.

⁶ This is commonly referred to as the "prudent man" test.

⁷ We recognize this is a simplified statement of the marketability test. However, this issue is discussed in greater detail later in this decision.

to the claim group in 1967 and during the joint sampling done (May 1968) by himself and the Government's mining engineer and mineral examiner, Warren Roberts (Tr. 116).

In response to a direct question regarding whether or not he had found an outcrop on each claim, Ayler stated:

Q: (By Barnhill) * * * Did you find an outcrop on each one of the claims which are still a matter of this proceeding?

A: * * * Down on Claim #11, approximately the middle of the claim, there's two dip strike symbols and one of them, incidentally, shows a 42 degrees to the east dip which would be quite unusual. That was confirmed later by Hole #7, much to my surprise. Then, a little further on down the line on Claim #11, I have four more dip strike symbols along the south end. Two of them both a 85 and 88%, is a quite prominent outcrop of limestone right above the road * * *.

Q: So, you found an outcrop on each one of the claims?

A: Yes.

Q: Now, with respect to Claim 11, particularly with respect to Claim 11, I think you testified earlier that your visits to the claims were in 1967 and you gave the exact date[,] and early in 1968?

A: That's correct.

Q: Did you find the outcrops indicated on that map at that time?

A: I did find - I know I found this major outcrop or strong outcrop right above the road on the south end of Claim 11 and, also, another one that was up by the collar of Hole #17 which is not shown on this map, as such * * *

(Tr. 122-23).

Ayler was referring to various locations marked with a "T" on Exhibit 86-3 which he circled in red. These "T" markings are universally used by geologists as dip-strike symbols and indicate the vertical and horizontal trends of the rock layers at their point of exposure. The long line of the "T" represents the strike of the bed and the short line the direction in which the beds are dipping. Each "T" was accompanied by a notation indicating the degree of measurement of the dip. Ayler stated that no geologist can determine such a dip measurement without observing the exposure of the bed and therefore, all of the dip-strike symbols appearing on Exhibit 86-3 were based on visual observations of surface exposures. Such observations, according to Ayler, took place prior to and including May 1968.

Ayler also testified that the existence of the outcrops, as first observed by him in 1967 and examined by Roberts in 1968, was confirmed by subsequent drilling (Tr. 125-29), and that although the bed of limestone is overturned on a portion of claim No. 11, the bed is continuous from north to south through the claims (Tr. 129-30). The evidence of the overturn on claim No. 11 was confirmed by John S. Dersch, the Forest Service's expert witness, who participated in the joint sampling and drilling program conducted after the remand (Tr. 1006).

The "T" markings on Exhibit 86-3 were either inserted by Dersch or were already on that map when Dersch modified it on August 31, 1983. The legend indicates that the map was initially prepared by Ayler in October 1978, and modified by Dersch on August 31, 1983. The location and placement of the dip-strike symbols, based upon Ayler's

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observations of these outcrops in 1967 or 1968, was shown to Roberts and Dersch by Ayler. Dersch stated that the limestone outcrops on claim No. 11 (Tr. 1021) and the outcrops shown on Exhibit 86-3 are fair representations of the outcrops observed by him on the claims (Tr. 1035). The existence of the beds of high-grade limestone and the location of the surface expression of the beds on claim No. 11 are shown on cross-sections B-B and C-C (part of Contestant's Exh. 86-GG).

Ayler's testimony concerning what he found on claim No. 11 in 1967, and while in the company of Warren Roberts, an employee of the Forest Service, in May 1968, stands unchallenged even though Roberts was present during the entire hearing and did testify.

Irrespective of Ayler's testimony, it is the Forest Service's position that no exposure of locatable mineral was found on claim No. 11 prior to segregation from mineral entry because no assays were obtained from these outcrops.⁸

Ayler's latest testimony has clarified his previous testimony concerning the exact location of the limestone outcrops and has identified the position of those exposures on new maps which show the claim boundary with specificity. The evidence is clear that the outcroppings depicted on Exhibit 86-3 were found and examined by Ayler in his initial examination. Locatable high-grade limestone was exposed in drill hole No. 11, drilled through the same limestone bed as the outcrops on claim No. 11. Whether or not Ayler specifically sampled the outcrops is not the issue. The existence of the exposure of mineral prior to the segregation was established and the quality and quantity of the bed outcropping on claim No. 11 was confirmed by subsequently approved drilling.

If we were to accept the Forest Service arguments, a mining claimant could not have a discovery until the minerals on the claim had been sampled and assayed and the assay results had been returned. Rather, the acts of sampling and assaying are acts which either confirm or disprove the existence of a discovery. Thus, if there was a disclosure of mineral at the date of withdrawal from mineral entry, that disclosure is a discovery of valuable mineral if subsequent sampling, assaying, and testing confirm the fact that the disclosed mineral is valuable. Thus, assay results from diamond-drill intercepts of the mineralized zone will support a conclusion that there was an exposure of valuable mineral if reasonable geologic projection leads to a conclusion that the intercept and the exposure are from the same mineralized structure.⁹

⁸ These outcrops have been exposed for 20 years. If, during that period the Forest Service had sampled and assayed them and the assays indicated less than 95-percent total carbonate, we might be more inclined to listen to this line of argument.

⁹ The Forest Service argues that no locatable mineral was found within the Avenger No. 11 claim because appellant did not show that the outcrop contained high carbonate or total carbonate mineralization of sufficient quality to qualify as a discovery. However, the surface exposure of limestone on that claim was not contested. See Exceptions to Recommended Decision (Exceptions) at 29 where the Forest Service states: "These surface outcroppings do not provide

Continued

As noted previously in the 1974 *Foresyth* decision, the Board was unable to determine whether the mineral in place would support a discovery, *and*, whether there was an exposure of mineral in place. In its subsequent 1975 order, the Board noted that there was an exposure of mineral on the Avenger Nos. 7 through 10 and 13 prior to withdrawal, but that there was a question as to the existence of a disclosure of mineral in place on the Avenger Nos. 11 and 12.

Appellants admitted the lack of an exposure of mineral in place on the Avenger No. 12 and it is clear from the pleadings and transcript that the Forest Service recognizes the existence of a surface exposure of mineral in place on the Avenger No. 11 on the date of withdrawal. This being the case, we will now address the issue of whether these exposures of mineral in place support a discovery on the various claims subject to the contest.

The Existence of a Discovery

[2] In order to have a valid mining claim, a mining claimant must have found a mineral deposit of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his time and means with a reasonable prospect of success in developing a valuable mine. This is the prudent man rule, first expressed in *Castle v. Womble*, 19 L.D. 455 (1894), and approved by the Supreme Court in *Chrisman v. Miller, supra*.

There is no question that the claimants have any motive in the location of the claims in issue other than to develop a profitable mining operation. Earl J. Brubaker, the Chairman of the Board, CEO, and major shareholder of VALCO, Inc., the present owner of the claims, is an established businessman and mine operator who has the necessary capitalization, equipment, and resources to develop these claims. He has relied upon the advice and expertise of a competent, experienced, and respected mining engineer who testified in detail about the methods he used to arrive at his calculations of the extent of the deposits and the feasibility of mining. The initial studies based upon limited data have been confirmed, insofar as possible, by additional data. In addition, Brubaker has owned and operated a number of businesses, including a ready-mix sand and gravel company, a construction company, and a concrete ditch line company. He also was in charge of Valley Paving Co., which performed heavy highway construction and utility work such as underground pipelines. At one time, he operated a hard-rock silica sand operation which used a drill and shoot mining method. The machinery and equipment used in his businesses are similar to the equipment used in a typical open pit mining operation. As the executive manager of these companies, he kept current with the cost factors in his various operations and

any evidence of [high carbonate] or [total carbonate] being present on claim 11 either in 1968 or 1986." Having thus admitted that there was an outcropping on Avenger No. 11 in 1968, the issue of exposure of mineral on the claim is not in question. Whether this exposure would constitute a discovery is a separate but related question, which will be discussed at length later in this opinion.

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analyzed the general economic and business growth conditions in the areas where his businesses operated.

[3] In its exceptions to the proposed decisions the Forest Service has noted that the prudent man standard is an objective standard. This observation is correct. The prudent man rule requires the claimant to submit proof that a prudent man would develop a mine. It is not enough that a claimant himself desires to do so if the evidence leads to the conclusion that a prudent man would not. See *Fresh v. Udall*, 228 F. Supp. 738 (D. Colo. 1964); *United States v. White*, 72 I.D. 522 (1965). One of the most common means of demonstrating what a "prudent man" would do is through the testimony of expert witnesses who have examined the property and express their opinions, as experts, that the evidence supports a determination that further development is warranted. To have an expert in the field examine the property and render a decision is, itself, an exercise of prudence.¹⁰

In order to ascertain whether there is a discovery on the various claims, the evidence regarding the claims and the mineral contained therein must be examined and a conclusion reached by application of the prudent man rule. We will first examine the mineral deposit to determine whether there is sufficient quantity and quality to justify further expenditure of time and means with a reasonable prospect of success.

Quantity and Quality of the Deposit

[4] Extensive testimony concerning the quality and quantity of the Avenger limestone was given by Ayler, an expert retained by claimants, and Dersch, a geologist employed by the Forest Service. Their testimony was derived from data obtained from the property including the additional cores drilled in February through June 1983, in accordance with Section 8 of the operating plan signed by Brubaker on November 12, 1982. In that plan, it was agreed that as the drill holes were completed or at times mutually agreeable to the parties, core intervals would be jointly selected for sampling and assaying by the representatives of both parties. Ayler and Dersch individually logged the cores from each hole, prepared their own records, and jointly split those sections of the limestone cores deemed by them to warrant assaying. Each sample was assayed for calcium carbonate, magnesium carbonate, silicon dioxide, and iron. The samples were delivered to Skylines Lab Inc., Wheatridge, Colorado, for sample preparation and splitting. The claimants' splits were assayed by

¹⁰ The Forest Service alleges in its exceptions that, under Judge Rampton's interpretation, "a person receiving bad advice could be a prudent man" (Exceptions at 11). This is a correct statement. Any prudent investor could receive bad advice, whether the investment is mining properties, stocks, Government securities, or hog bellies. By placing the expert on the stand and allowing cross-examination, the Forest Service is afforded an opportunity to convince an administrative law judge that, considering the facts known at the time, the advice given was recognizably bad, and therefore a prudent investor would have rejected it. To hold otherwise would place the Forest Service in the untenable position of requiring the Secretary of Agriculture to make the determination regarding whether to challenge a mining claim based solely upon his own observation, rather than relying upon the advice of his experts in the field. Even the Forest Service exports sometimes give bad advice.

Skylines Lab Inc., and the contestant's splits were assayed by the Colorado Assaying Co., Denver, Colorado.

Each expert then prepared maps and cross-sections reflecting his interpretation of the existence, thickness, continuity, approximate dip and strike, and course and extent of the mineral deposit. Exhibits 86-3, 86-6, and 86-W reflect the experts' projections of the deposits between the drill holes. The dip and strike, as well as the extent of the deposits, are shown in Exhibits 86-12 and 86-GG. The total quantities of the plus 95-percent carbonate material (locatable limestone) as calculated by Dersch are reflected in Exhibit 7 of his mineral report (86-BB), and as calculated by Ayler are in Exhibit 86-13.

Limestone is deposited in beds in a marine environment over a period of ages. Its chemical composition is governed by the physical, chemical, and climatic conditions existing at the time of deposition. Although limestone is generally found in widespread deposits, variations and gradations of its physical and chemical properties may exist within a specific deposit. Generally speaking, however, a degree of predictable continuity of chemical composition will be found within and through the course and extent of such beds, subject to the factors of erosion and interruption by faulting (Tr. 131-35).

Neither expert was aware of any significant erosion. They agreed on the existence of a fault near drill hole No. 11 (Exhibits 86-3 and 86-W), but were not in agreement regarding the existence of a minor fault Dersch had placed near drill hole No. 6 in the course of his geologic projection (Exhibit 86-Y).

For the purpose of calculating volumes and grades of the samples taken, the Forest Service's expert witness, Dersch, prepared the following table in which volumes are calculated in unit numbers. The table is a compilation of those intervals (given in feet) in each drill hole assaying 95-percent or greater total carbonates except for three zones ranging in thickness from 2 to 5 feet, and which because of their thinness could not, in his opinion, be economically mined.

Unit	Drill Hole	Thickness	Wgt. Avg. Percent Carbon- ates	Wgt. Avg. Percent CaCO ₃	Wgt. Avg. Percent MgCO ₃
1	4	16.0	95.85	95.05	0.80
2	3	7.0	97.30	59.50	37.80
	2	33.0	95.30	61.70	33.60
	4	36.0	99.56	67.55	31.92
3	3	9.5	98.10	89.15	8.95
	2	36.0	98.78	95.04	3.74
	6	13.0	94.53	93.14	1.39
	5	32.0	95.67	91.05	4.62
4	6	4.0	95.18	77.86	17.32
	5	28.0	90.31	65.23	24.68
5	6	4.5	92.32	62.69	29.63
	5	17.0	97.56	66.99	30.56
6	6	24.25	98.00	84.90	13.10

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Unit	Drill Hole	Thickness	Wgt. Avg. Percent Carbon- ates	Wgt. Avg. Percent CaCO_3	Wgt. Avg. Percent MgCO_3
7	8	37.5	96.78	57.61	39.07
	11	4.5	95.46	77.81	17.65
8	8	10.0	97.58	96.56	1.02
	11	18.5	90.18	89.26	0.92

Using a conversion factor of 150 pounds per cubic foot, Dersch compiled the following table of tonnage calculations for each unit.

Unit	Tonnage
1	42,405
2	609,754
3	1,540,899
4	652,942
5	463,318
6	506,879
7	567,084
8	166,501
Total	4,583,223 or, about 4.5 million tons averaging 95-percent or more total carbonate rock

Ayler, claimant's expert witness, used the same data but a somewhat different approach when making his correlation. He first utilized all assays, rather than limiting his analysis to assays of plus 95-percent limestone, in an effort to determine the existence of a chemical stratification of the carbonates in the limestone deposit. As a result of this examination, he determined the contact point between depositional beds based upon changes in the magnesium content of the limestone.

After determining that sufficient stratification existed to warrant a conclusion regarding reasonable predictability of the existence of locatable limestone containing plus 95-percent carbonate, he prepared Exhibit 86-4, which shows total content of the locatable limestone which can be mined by open pit methods on each claim, as follows:

Claim No.	+95% CaCO ₃ "HC"	+95% CaMgCO ₃ "TC"
7.....	41,500	244,200
8.....	112,500	234,800
9.....	91,600	391,300
10.....	300,600	329,000
11.....	94,100	551,500
13.....	37,750	157,750
14.....	3,250	22,850
Total.....	676,300	1,931,300

The evidence submitted by either witness allows a reasonable conclusion that a continuous deposit of locatable limestone exists, but is not necessarily of uniform thickness throughout the claims.¹¹ The Dersch estimate (significantly higher than Ayler's) took into consideration only the limestone between the surface and the total depth of the drill holes. Although he did not attempt any calculation of the tonnage or grade of the limestone below the level of the drill holes, he admitted the limestone did not end at those points and might well extend to a depth of 776 feet throughout the claims (Tr. 1027).

The claimants' calculations reflect a total deposit of locatable limestone of 2.6 million tons minable by open pit methods plus an unknown quantity which may be minable by underground methods. While the difference in the estimates may be due in part to the approach taken by each expert, in the last analysis, each stated that the differences were minor, and they were generally in agreement as to both the extent of the deposits and the quality (Tr. 1498-1503). For purposes of this decision, it is immaterial whether there are 2.6 million, 4.5 million, or more tons of chemical-grade limestone on the claims in issue, for it is undisputed that the lowest-estimated amount would supply the presently projected market need for a number of years.¹²

The determination that a valuable mineral exists on a property is only the first step in the "prudent man" determination. One analysis of the earth's crust noted that the gold contained in seawater represents the largest known "reserve" of gold in the world. However, the cost of extracting gold from seawater is far greater than the value of the gold that would be recovered. A prudent man, therefore, would not expend his time and means to evaporate seawater and process the solids to recover the gold. A mineral deposit becomes an ore deposit only if the cost of removal and rendering the minerals contained in the deposit suitable for sale is less than the sales price. Cost of extraction must, therefore, be examined.

¹¹ The disagreement between the experts regarding continuity of the deposit resulted from a disagreement regarding the ability to project between exposure and existence of offsetting faults, but there was no apparent disagreement as to the general continuity of deposition.

¹² A more detailed discussion of market projections is found later in this decision.

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Feasibility and Costs of Mining

The claimants presented a detailed but relatively simple open pit mine plan consisting of a rip and strip operation by which the plus 95-percent limestone would be removed in segments from a series of benches constructed along the strike of the limestone beds extending north and south from the existing quarry on claim No. 10. The materials removed would be crushed and screened to specification and stockpiled for removal by the buyer. The covering of light-density brush, and if necessary, the overburden, would be removed, stockpiled, or used to construct the benches and a bench road. A road would be constructed for access to the first operating bench, from the existing county road that crosses the claims. All waste material (less than 95-percent total carbonates) would also be pushed off the benches and used to construct work areas and roads.

Under the mining plan presented by the claimants, the open pit mine operation would be in full operation only a few months of the year and the need for equipment is limited. There is no foreseeable need for permanent installations such as electric power or natural gas lines. In the plan, a single bulldozer with ripper attachments would clean the overburden from the outcrops and push that material downhill to construct the original crushing plant site and access roads to the upper quarry benches. The bulldozer would then operate along the strike of the limestone outcrop with the ripper depressed to selectively break and loosen the limestone beds to a depth of about 3 feet. Plus 95-percent material would be pushed to the north end of the bench and stockpiled for later removal to the crusher level. The waste zones, loosened by the same process, would be pushed to the south end of the quarry and stockpiled for future use or removal. All quarry development could be accomplished by repetition of this same sequence.

Ayler admitted that high calcium limestone cannot be distinguished from the high total carbonate limestone or the waste solely on a visual basis. Assay control would be needed (Tr. 324). Quality control would be maintained by channel sampling across the benches during the mining process and, to a limited extent, by blending the material (Tr. 324-27, 554-55).

The other mobile unit at the quarry site would be a tire-mounted frontend loader which would transport the high-grade material from the stockpile to the crusher. The same loader would be used to feed the crusher and load the trucks carrying the crushed products to market.

The mine plan envisions a portable crushing and stacking plant unit with conveyors. This plant would initially be located on the developed 8,550-foot-elevation work area. If the plant is diesel powered, a diesel storage tank would be required onsite for fuel. This tank would also be used for ripper and loader fuel. All needed electricity would be generated onsite by a small diesel-electric portable generator.

An onsite office, if needed, would consist of a portable office-house trailer. No need was seen in the foreseeable future for an onsite repair shop (Exh. 86-11).

The costs of such an operation were calculated by Reed Jones, Vice President - Finance for VALCO, Inc. Jones used his past experience as an accountant for limestone open pit mining and crushed stone operations and a document published by the U.S. Bureau of Mines entitled "*Capital and Operating Cost Estimating System Manual for Mining and Beneficiation of Metallic and Nonmetallic Minerals Except Fossil Fuels in the United States and Canada*" (Exh. 86-19) as the basis for his calculations. This publication is customarily consulted by the mining industry when determining costs prior to commencement of mining and in the preparation of mining plans (Tr. 244-45).

Jones is a CPA with extensive experience in mine cost accounting and management information computer systems. He used the data from Exhibit 86-19 together with the cross-sections, production figures, and strip ratios (of locatable limestone to waste) prepared by Ayler to determine the costs for each category of the open pit operation even though, based on his own experience, he believed that some of the cost data selected by him was too high (Tr. 585-90). For example, he used the rental cost figure for a D-9 caterpillar, which is \$7,000 a month higher than the rental of a D-8 caterpillar, even though he and Ayler believed the D-8 was fully capable of doing the work. He also used the monthly rental figures stated in Exhibit 19 even though based upon his cost-accounting experience for equipment at similar projects operated by the company and others, he was of the opinion that the company would find it cheaper to use equipment it already owned.

The mining costs calculated by claimants were \$3.92 per ton for an open pit operation extracting and processing 60,000 tons of end product of saleable locatable limestone per year and \$3.56 per ton for a total operation extracting and processing 100,000 tons per year (Tr. 590-91).

As an alternative to an open pit quarry, or for use when the stripping ratio or other physical constraints rendered an open pit mining operation less economic, claimants presented a plan whereby the locatable ore could be mined underground by a vertical crater retreat (VCR) system. The method and costs of mining the Avenger claims by the VCR system were set forth in a detailed report prepared by Ayler (Exh. 86-21). Simply stated, a 15-foot adit would be excavated within the plus 95-percent limestone. Holes would be drilled from the old quarry floor above the adit tunnel and a blasting pattern would be used to break the ore which would then drop onto the floor of the adit, where it would be removed by a front-end loader and placed into trucks. According to this mining plan, claimant believed that all of this material would be considered saleable and production could begin as the face of the tunnel is advanced and truck turnouts are developed (Tr. 261-66).

Ayler concluded that the plus 95-percent carbonate limestone could be mined by the VCR method for a cost of approximately \$1.57 per ton,

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which is comparable to the cost of surface mining (Tr. 272). Additional crushing, transportation, and overhead costs would be approximately \$2 a ton, for a total of \$3.60 per ton (Tr. 272).

The Forest Service challenges the feasibility of both of the proposed operations. The primary basis for the challenge was the fact that its experts disagree with Ayler's conclusions about the continuity and thickness of the locatable grade limestone. Dersch testified that, in his opinion, the 95-percent carbonate material may not be consistent from drill hole to drill hole, that it pinches and swells from point to point, and in some cases may pinch out entirely (Tr. 917). From the same data base used by Ayler, he prepared plan views and cross-sections of the chemical grade limestone which take a much more conservative view of possible projections of the thickness of the locatable beds (Exhs. 86-Z, 86-Y, 86-AA). As an example, Ayler projects the bed of high calcium carbonate exposed in drill hole No. 5 (on claim 8) into claim No. 7, pinching out at a point just north of drill hole No. 1 which encountered no high calcium carbonate, only high total carbonate. In contrast, Dersch was unwilling to project the high calcium carbonate encountered in drill hole No. 5 more than 100 feet beyond and south of that drill hole.

Further, in Dersch's opinion, mining would be difficult because of the need to maintain a very good assay program to prevent dilution of the locatable limestone with material of lesser quality (Tr. 920). Dersch initially stated that channel assays would need to be taken across the exposed ore at 100-foot intervals until the situation is better understood. Although the exhibits prepared both by Dersch and Ayler necessarily show the projections as straight lines, Dersch stated that in actuality the mineable zones on each bench could vary as much as 10 feet and therefore additional drilling might be necessary to establish sufficient grade control (Tr. 921).

Although Dersch testified in extensive detail concerning points of agreement and disagreement with Ayler's projections, Dersch's conclusions as to the viability of the proposed mining operation are necessarily general and made from the viewpoint of a geologist, because he made no cost estimates. His conclusions as to the cost of mining and processing the mineral product are best summarized from his Mineral Report, Exh. 86-BB at 14, as follows:

Production of chemical grade or high calcium limestone does not appear to be economically viable for the following reasons:

The limestone units are highly variable in thickness, grade, continuity, and uniformity.

Underground mining does not appear to be economically feasible.

Because of the local topography, steeply dipping limestone beds, and variable thicknesses and grades, surface mining would be difficult at best.

The experts are in agreement as to the quality and thickness of the limestone beds at the drill holes. The disagreement occurs as a result of differences in each expert's projection of continuity, thickness, and

homogeneity of beds between the drill holes, which projections are, of course, the heart of the estimation process. If Dersch's projections are more accurate, the mining costs which would be incurred under each of the proposed mining plans would be greater because the waste-to-ore ratio would be higher than that estimated by Ayler. Short of a more extensive drilling program, which is not permitted, or short of an actual test operation, to which the Forest Service will not agree, there can be no proof positive as to which of the projections is more correct. The data on which the projections are based is limited to that which has been permitted throughout these proceedings.

The Forest Service was provided a copy of claimant's production cross-sections and mine plan, and submitted its own analysis for a rip and strip operation in a prehearing exchange of documents (Exh. 86-36). In that analysis, it was estimated that for an ideal operation where no overburden or waste was involved, the total cost for mining the chemical-grade limestone, including reclamation, administration, and overhead, would be \$4.19 per ton. The estimated cost of removing the waste rock was \$1.72 per ton. The analysis calculated a waste-to-ore ratio on a claim-by-claim basis and arrived at the total cost per ton to mine each claim: No. 7, \$6.59; No. 8, \$6.65; No. 9, \$7.11; No. 10, \$6.92; and No. 11, \$9.92. No estimate was made for No. 13.

The Forest Service elected not to submit the above-described prepared analysis as one of its exhibits. Instead, it was offered by the claimants, because, under cross-examination, Frederick B. Mullin, the mining engineer who prepared the analysis, admitted that it contained many errors. Specifically, he stated that if he were advising a mine operator, he would not advise commencement of operations in an area where the stripping ratio was the highest, but that he used those figures in calculating his stripping ratio (Tr. 1303). He admitted he would not expect an operator to use the largest possible piece of equipment rented at the highest hourly rate (instead of a monthly rate), but that in each instance he used precisely those figures to make his calculations (Tr. 1289). He admitted that he used two crushers in his cost calculations, even though he knew that contestants would only use one (Tr. 1342). He admitted that he had erroneously used the wrong tonnage of rip per bulldozer pass and per shift (Tr. 1333-36). And finally, he admitted that after utilizing the wrong stripping ratio, he reduced the amount of product by 20 percent twice instead of only once as he should have done (Tr. 1336). As a result of these errors, Mullin's original cost estimate of mining was almost three times the contestant's. After adjustment to correct these errors, Mullin's estimate reflected an average mining cost of \$2.49 per ton (Exh. 86-37).

[5, 6] Although final proof of actual mining costs can only be ascertained after the conduct of an actual mine operation, a comparison can be made between the estimated costs of mining the Avenger limestone and the proven costs of mining the Monarch Mine limestone, an open pit limestone mine located in Colorado and operating at the time of the hearing. Dennis Sheehan testified that

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Calco, the prospective purchaser of products from the Avenger claims, pays the contractor operating the Monarch Mine \$5 per ton for drilling, shooting, screening, and loading the material into Calco's trucks. Sheehan testified that the Monarch Mine limestone is more expensive to mine than the softer Avenger limestone because it requires drilling and blasting. In addition, Sheehan was of the opinion that the proposed mining operations at the Avenger claims would be more efficient and would be less costly than the mining operations at Monarch. Thus, although Sheehan admitted that the Monarch limestone and the Avenger limestone are intrinsically "totally different animals" (Tr. 711), the methods of mining the two deposits are comparable and confer legitimacy upon claimants' cost calculations.

From the earliest days of location of the claims in issue, the Forest Service has actively opposed any activity on the claims which would result in a disturbance of the surface resources.¹³ This opposition definitely made it more difficult for claimants to develop the information necessary to incontrovertibly establish the feasibility of developing the mining claims. At the first hearing, Ayler necessarily based his projections solely on data obtained from sampling the outcrops and from the cores of the four drill holes drilled prior to the date the claimants were enjoined from further activities on the claims. At the first hearing he admitted that, had the claimant's not been prohibited from further work, additional holes would have been drilled to obtain data which would either verify or disprove his projections. Since the first hearing, six additional drill holes have been allowed. A bulk sample consisting of 1,000 tons of ore was extracted from the old quarry site and sold at a profit. It is significant to note that the additional drilling, sampling, and testing program, which was undertaken pursuant to a court order directing Forest Service to allow the work, has generally confirmed rather than disproved Ayler's earlier projections as to the quantity, quality, and continuity of the mineralized structure located in the Avenger claim group.

Ayler's proposed operation would logically begin on the Avenger No. 10, at the old quarry site and proceed in either a north or south direction, or both. However, Ayler also testified that an operation could just as easily be initiated on any claim with a cost per ton of locatable limestone being at or near that estimated by Jones.

We agree with Judge Rampton's finding that the preponderance of the evidence supported a determination that the claimants have established, by use of a reliable cost-analysis system, by use of the Forest Service cost analysis (as corrected), and by use of a comparison to an operative mine, that the cost of mining and producing saleable

¹³ We do not deem it to be necessary for this Board to make a finding whether the opposition was warranted or excessive.

plus 95-percent limestone from the Avenger claims is reasonably anticipated to be in the range of \$2.49 to \$3.92 per ton. After a review of the transcript and evidence, we find Judge Rampton's findings to be reasonable and supported by the record. Judge Rampton stated:

In view of the honest and carefully considered differences of opinion expressed by the experts as to the feasibility of mining the limestone deposit, based upon the data available, no finding can be made that the contestants are assured of a successful operation. But the law does not require a guaranteed success to validate a mining claim. Rather, the law only requires * * * a reasonable prospect of success in developing a valuable mine.

(Recommended Decision at 24).

Much of the argument advanced by the Forest Service in its statement of exceptions and briefs submitted to this Board following issuance of Judge Rampton's recommended decision is directed to the determination that there is a reasonable prospect that the mineral could be mined at a cost at or near that projected by claimants. For example, the Forest Service argues that extensive sampling and chemical analysis would be necessary to maintain grade control, as there is no means by which a visual determination could be made. However, they did not advance any evidence that grade control could not be achieved with experience. Grade control will be critical. However, this problem is not unique to claimants.¹⁴ It is common to the industry and many methods of initiating grade control have been developed. There is a reasonable prospect that grade control can be developed by claimants. We also recognize that the claimants' ability to blend the mined product to maintain grade is limited. Because of the high purity standard for the final product, a limited blending tolerance exists.

We agree that the method of underground mining proposed by claimants poses problems which render the application of this method much more speculative. If this were the only method proposed we would have a much more difficult case.¹⁵ However, if claimants' projections are reasonable, as we believe them to be, the property will support an open pit operation at a cost at or near those presented at the hearing. Thus, the success of claimants' operations is not dependent upon the success of this underground mining method. In fact, as noted previously, the reserves, as calculated by claimants, did not take into consideration any of the materials that would be mined underground.

Having made a determination regarding the quality and quantity of the mineralized material at the property, and a determination as to mining costs that may be incurred, it is now appropriate to turn to what a reasonable person might be able to expect to be a selling price

¹⁴ For example, the disseminated gold mining industry has a similar grade control problem, as in most cases the grade cannot be determined visually and must be controlled by sampling and chemical analysis. The Forest Service states that "in metal mining you can separate the 'good stuff' from the 'bad stuff.'" This is true only if there is enough "good stuff" in the rock to justify extracting it.

¹⁵ There is, for example, a much more serious question regarding the ability to maintain grade using the mining method proposed by claimants.

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for the product. Again, applying the prudent man test, if the cost of producing a product is greater than the price one would receive, a prudent man would not invest his time and means to produce the product. This test must be tempered, however, by the actual language of the "prudent man" rule. That is, it is not necessary for a prudent man to know exactly the cost of producing the product or the exact price he might receive. Rather, based upon a reasonable and rational estimate of the cost of production and a reasonable and rational estimate of the market price for the product, there is a reasonable probability of success in the development of a valuable mine.

Marketability of the Mined Product

[7] Much of the testimony submitted by the claimants was tendered to prove that there was a reasonable probability that the product could be marketed. The landmark case for marketability is *United States v. Coleman*, 390 U.S. 599 (1968). In this case the Supreme Court expressed a logical refinement of the prudent man rule. In that case the Supreme Court stated:

Under this "prudent-man test" in order to qualify as "valuable mineral deposits," the discovered deposits must be 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). This Court has approved the prudent-man formulation and interpretation on numerous occasions. See, for example, *Chrisman v. Miller*, 197 U.S. 313, 322; *Cameron v. United States*, 252 U.S. 450, 459; *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335-336. Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. (Italics added; cite omitted).

Id. at 602.

The primary impact of the *Coleman* case upon this and similar cases is to place a burden upon a claimant to submit additional proof regarding the ability to mine at a profit. To illustrate that burden, we set forth the following example:

If a claimant were to possess a mining claim containing an uncommon variety of building stone, and the claimant submits proof that the particular stone sold at a price greater than the cost he would incur when quarrying the stone, he must demonstrate that there is a reasonable prospect that if quarried, someone would buy his stone. If he was only able to show that in the past 10 years one ton of the stone had been sold as ornamental building stone at the price he would propose to sell his product and was unable to demonstrate that an additional market for his product could be developed, it could reasonably be stated that the claimant had not demonstrated that there was a demand for his product at a price higher than the cost of extraction.

With this in mind, we will examine the evidence regarding the existence of potential buyers of the product and the price they would be willing to pay. As previously noted, we must examine the potential market existing in 1968 and at the time of the hearing.

1968 Markets

Brubaker first became interested in the Avenger claims in 1966. After determining that locatable high calcium limestone was used by the American Crystal Sugar Co. in Rocky Ford, Colorado, he contacted the people in charge and was informed that the company had always had difficulties acquiring good grade limestone which would work in their sugar manufacturing process. American Crystal stated they were buying limestone from various sources located in a broad geographic area because of the difficulty in guaranteeing a dependable supply of good quality rock (Tr. 35).

Because Brubaker knew little about limestone, he went to a commercial testing laboratory to have the deposit evaluated. He also employed Ayler, who had previously worked for him in evaluating a silica sand deposit. On Ayler's recommendation, Brubaker entered into a contract with the Boyles Brothers Drilling Co. to drill core holes to further determine the quantity and quality of the material exposed upon the claim and the feasibility of mining. Although he was particularly interested in the sugar market, he was, at the time, also purchasing considerable quantities of hydrated lime from a Rapid City, South Dakota, seller for use in highway construction and needed a closer source of supply for these needs. In addition to the sugar and construction market, he made preliminary inquiries about supplying limestone to the Adolph Coors Co. (Coors) for a future glass-manufacturing plant to be built near Denver, and to Colorado Fuel and Iron (CF&I) in Pueblo, Colorado, which was also a large user of limestone (Tr. 42). From the investigative work done, and based upon the recommendations of Ayler, he determined that it would be prudent to invest further money in developing the claims.

Core drill samples were delivered to American Crystal Sugar in 1968, but since the sugar company needed a large (bulk) sample run through its kiln to determine if the material worked properly within its particular operation, no contract for the purchase of limestone from the Avenger claims could be given. Because of the opposition of the Forest Service, Brubaker was unable to ship the required bulk sample until 1974. In the interim, he was contacted at least once or twice a year by representatives of the sugar company. Through conversations with the representative, he determined that they were paying within 4 or 5 cents of \$8 a ton for their material. Based upon his experience and an analysis of the mining and shipping costs, he determined he could have sold the material from the claims at a substantial profit. As a successful businessman, he was ready in 1968 to invest the necessary funds to develop and mine the deposit.

Earnest Visconti, a superintendent of the American Crystal Sugar Co. Rocky Ford plant from 1972 to 1980 who is intimately familiar with the sugar manufacturing process, testified that he purchased approximately 1,000 tons of high calcium limestone from the Avenger claims in 1974. At the time, his company used approximately 60 tons of

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limestone per day of operation, or 7,200 tons per year.¹⁶ All of the limestone purchased from the Avenger claims was tested in American Crystal's sugar-manufacturing process, and was found to be satisfactory in all respects (Tr. 284-90). The Avenger limestone was superior to the limestone the company was purchasing from the Fort Collins source because it was a more uniform size and contained less waste or unusable small particles (Tr. 292, 310). Further, the Avenger limestone could be delivered by truck as needed, resulting in a lower total cost. The Fort Collins source of supply was delivered by rail and required additional handling. There was also loss by reason of breakage and frequent additional demurrage charges when the rail cars sat idle on the siding (Tr. 291-92).

Visconti testified that the company was anxious to enter into a contract to purchase a continuing supply of limestone from the Avenger claims. He paid \$9 per ton for the Avenger limestone in 1974, and that price reflected a savings over the price paid by the company to other suppliers (Tr. 293, 297). Visconti stated the company's usage of limestone did not vary from year to year, that the problems with an adequate source of supply of quality limestone had been the same in 1968 as in 1974, and that he had wanted to buy from Brubaker at \$9 per ton in 1968, for they were then paying \$9.70 per ton for a less satisfactory source of supply (Tr. 293).

The material sold to American Crystal was drilled, shot, and loaded for \$2 a ton. Castle Concrete transported the material to its crushing plant about 4 miles away, and sized and screened the material for \$1 a ton. The transportation to the sugar plant at Rocky Ford cost \$3.50 a ton and 25 cents a ton was added for incidentals (Tr. 48). The total cost of mining, crushing, screening, and transportation for the 1974 operation was \$7.25 a ton. That material was sold for \$9 a ton, the price that had been negotiated in 1968 (Tr. 48).

The Forest Service offered no countervailing evidence at the 1986 hearing and could only rely on the testimony concerning the 1968 market given in the 1970 hearings by Sydney F. Adams, a mining engineer. Adams testified that the price of crushed and sized limestone suitable for sugar beet plants ranged from as low as \$1.25 per ton in Texas to \$4.25 per ton in Fort Collins, and was around \$3 per ton in Glenwood Springs. Adams was of the opinion that \$3 per ton was a reasonable price f.o.b. Woodland Park for the sugar beet limestone, and that transportation costs would be about 5 cents per ton mile for a delivery cost of \$7 or \$8 to Rocky Ford.

Brubaker's cost figures for transportation were 3.5 cents per ton mile based upon his company's actual cost figures for transportation of bulk material. The best evidence as to the costs of mining, processing, and

¹⁶ The American Crystal Sugar Co. specifications called for plus 95-percent limestone. Visconti was not sure whether this represented high calcium or total carbonate limestone. Either way the company required locatable limestone for their process.

transportation of the limestone suitable for manufacture of sugar in 1968 is that derived from the actual cost of mining shipment and sale in 1974. Obviously, Adam's cost estimates were high and his market prices were low.¹⁷

The evidence is conclusive that there was a market in 1968 for the high calcium material from the claims. If he had been allowed to mine, Brubaker could have made a profit by selling locatable limestone to the sugar company at a price lower than that the sugar company was paying other suppliers. In addition to the lower delivery price, the sugar company would have preferred to purchase the limestone from Brubaker because the material would be delivered by trucks, thus eliminating the demurrage charges and extra handling costs incurred by purchasing the material from suppliers who delivered by rail. Visconti estimated the sugar company would save \$2.50 to \$3 a ton by purchasing the Avenger limestone at \$9 per ton.

The Forest Service's position is that the costs of mining the representative sample does not include the costs of waste removal or handling and are, therefore, incomplete. This argument ignores the fact that Brubaker's cost figures were based on the actual expenses incurred. Admittedly, no expenses were incurred in waste removal because the material was removed from the old quarry on claim No. 10, which was already exposed. However, if overburden removal had been necessary, the operation would probably still have been profitable because in 1974 the sugar plant was purchasing limestone from other suppliers for \$11.50 per ton (Tr. 290-91). This represents an allowance of more than \$2 per ton of ore for overburden removal.

We find the claimants have established by a clear preponderance of the evidence that a market for the high calcium limestone existed in 1968 and at least through 1974. The American Crystal sugar plant is now closed and there is no longer a market for locatable limestone for the sugar industry (Tr. 1109). There were, however, in 1968, and through 1974, other markets for chemical grade limestone, and these markets still exist today. The Coors bottling plant had not been built in 1968, so at that point that market was not available. However, Herbert Hendricks, the vice president and general manager of Calco, Inc., in 1970, and former general manager for Colorado Lime Co., testified at the first hearing concerning the 1968-71 limestone market. He stated that in 1970, Calco made high calcium quicklime, hydrated lime, and high calcium carbonates. Calco sold plus 95-percent high calcium limestone to the Columbine Glass Co. in Denver, to Climax Molybdenum for road work, and to others for rock dust in coal mines and mineral supplement in cattle feed (1st Hearing Tr. 1467, 1416). Even though Calco's needs were fully supplied in 1968, the market for plus 95-percent limestone described above was not a captive market, and there was a reasonable prospect that sales could be made in that

¹⁷ Fuel costs increased markedly in the interim, and thus, transportation costs would be higher in 1974.

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market by anyone who could supply the demand at a lower price than was currently being paid to others.

1986 Market

The claimants presented evidence of a present market for chemical grade limestone through several witnesses. John Warren LaFollet, the chief executive of Tusco, the parent company of Calco, Inc., testified that his company sells all types of limestone products, such as filler material, rock dust, scrubbing dust, and scrubbing lime. Calco now sells about 300,000 to 400,000 tons per year, of which 100,000 tons is high-grade or chemical limestone. Calco has sold approximately the same amount for the past several years and expects that quantity to increase (Tr. 678, 689). LaFollet was previously involved in the planning stages for a glass-manufacturing plant which was built and is presently operated by Coors Glass Division.

Until 1985, Calco's source of limestone was from the CF&I quarry at Monarch Pass.¹⁸ CF&I has ceased operations and its quarry operation has been shut down. Calco is presently working from a stockpile at Salida, Colorado, where its crushing facility is located, and it has been searching for a new source of supply of such material in the Salida area. If none is to be found, the plant will have to be moved. Calco operates the only calcining kiln in Colorado, and sells about 30,000 tons of quicklime (calcium oxide) each year. This requires the burning of 60,000 tons of high calcium limestone in its kiln (Tr. 674-84). Quicklime is sold to CF&I, to Climax Molybdenum for water purification, and to the highway department and real estate developers for soil stabilization. It sells the remainder of the limestone used annually to Owens Corning Fiberglass and Georgia Pacific for filler in the manufacture of shingles, and to various coal mines where it is used as rock dust (Tr. 699-701).

Calco shares the limestone market in Colorado with Colorado Lien of Fort Collins (which presently supplies the Coors glass plant) on approximately a 50-50 basis. Since Colorado Lien has no calcining kiln in Colorado, all quicklime sold by it comes from Rapid City, South Dakota, or from Utah (Tr. 740).

John Remigio, the critical materials administrator for the glass division of Coors who is in charge of purchasing raw materials for the glass plant, testified that the plant uses roughly 86 tons per day of limestone or 30,000 plus tons per year. He identified Exh. 86-15 as Coors' limestone specifications, which require limestone of a calcium carbonate content of approximately 95 percent or better. Presently, his plant is paying in excess of \$20 a ton f.o.b. from its supplier at Fort Collins, and absorbs the cost of trucking the limestone to its plant in Wheatridge. The plant is presently testing limestone from other

¹⁸This mine was previously discussed in the analysis of mining costs.

suppliers located as far away as Iowa, Illinois, and Texas, but is primarily interested in finding another supplier along the Front Range. Provided limestone from the Avenger claims can meet Coors' specifications, he would purchase it.

Dennis Sheehan, vice president of Calco, Inc., was previously the plant engineer for the Columbine Glass Co. plant now operated by Coors. He designed and is presently responsible for the operation of the Calco plant at Salida. Sheehan has visited the Avenger claim site and has examined the outcrops and the core assay data. He has no doubts that the Avenger limestone could meet Coors' specifications. He verified Remigio's statement that Coors presently pays over \$20 plus a ton for limestone f.o.b. the minesite and that shipping costs are approximately \$8.50 a ton from the minesite in Fort Collins to the Coors plant. If the Avenger limestone is available, he was certain that his company could process and sell 60,000 to 100,000 tons per year of high calcium carbonate to Coors for less than Coors is now paying (Tr. 652-62). Sheehan testified that if ore from the Avenger claims were available, Calco's operating plant would be moved to a site nearer the Avenger claims to reduce freight cost from the mine to the plant and from the plant to Calco's market.

Sheehan testified that Calco's present source of supply at Monarch is less desirable than limestone from the Avenger claims for several reasons. The Monarch pit is located in a snow channel at a 10,000-foot elevation and can be operated only from mid-June through October. All the rock must be taken to Salida and stored. He also noted additional problems between Calco and CF&I, the present owners of the Monarch mine, which cause Calco to seek another source for its material. Further, he noted that the silica content of the ore from Monarch is on the high side for use as rock dust. Limestone having a total carbonate content of 95-percent or better qualifies for the rock dust market, but rock dust can contain no more than 4-percent silica, free and/or combined (Tr. 687, Exh. 86-29).

Sheehan was cross-examined extensively on whether or not the various grades of limestone found in the drill holes would meet certain specifications for either rock dust or glass manufacture. He admitted that the material would have to be selectively mined and a good quality control program be maintained because all locatable limestone cannot be used in the manufacture of glass, and limestone containing greater than 4-percent silica cannot be used for mine rock dust. He also noted that limestone having clay content cannot be used in Calco's processing plant. He stated, however, that very little of the material would have to be separated out or blended during the mining process because his company is primarily interested in the bands of plus 95-percent material (Tr. 703).

In sum, Sheehan testified that Calco would purchase 60,000 to 100,000 tons of limestone crushed to a 2-inch size per year from the Avenger claims at a price of \$7 to \$7.50 per ton f.o.b. minesite and bear the expenses of trucking the crushed ore to its mill (Tr. 692). Based

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upon Calco's survey of the Front Range, Sheehan believes the Avenger deposit to be the only alternative to the present supplier. Based upon his experience at Salida, he was confident the company could obtain the necessary permits to move its mill to a site close to the Avenger claims.

The Forest Service offered no rebuttal testimony to the evidence as adduced by the contestees. In its brief, however, it argues that the prospective market to Calco is highly speculative in that there are no firm commitments and negotiations are in the very early stages. The Forest Service also argues that sales to Calco are solely dependent on the move of Calco's plant from its present location at Salida to a site near the Avenger claims and that much of the limestone on the claims is unacceptable to Calco's customers.

[8] This argument goes beyond the scope of the question, i.e., what evidence of a present market is required? Certainly the negotiations are preliminary, for until a final determination of the validity of the claims is made, no contracts or final commitments can be executed. What the claimants' evidence demonstrates is that a market for the limestone presently exists, that there is a ready and willing buyer, and that they can mine and sell the material from the claims in the market place at a competitive or lower price than the present suppliers of that market. This situation can hardly be classified as conjectural guesswork subject to chance, and thus speculative.

The testimony of Messrs. LaFollet, Sheehan, and Remigio with respect to the existing market for the material from the Avenger claims must be accepted at face value. Calco has been actively looking for a new source of supply and has found none other than the Avenger limestone. It annually sells 60,000 tons of high calcium carbonate and 30,000 tons of locatable limestone. The witnesses expressed an opinion that Calco can obtain all the necessary permits and will move the plant at its own expense from its present location at Salida to a site close to the Avenger claims. It will pay \$7 to \$7.50 per ton f.o.b. the mine for all the material, not just the high-grade material¹⁹ (Tr. 742-44). It will truck the material from the minesite to the plant at its own expense.

It is also found that there is a reasonable prospect that the present market demand would increase. Because of a favorable location on the Front Range, Calco has reason to believe that it could secure the Coors' 60,000- to 100,000-ton market for high calcium limestone. Coors has indicated a strong interest and Sheehan is certain that he could beat the price Coors is presently paying for that product.

¹⁹ It is significant to note that the Bureau of Mines yearbooks state the average value of crushed limestone sold or used in Colorado for all purposes, including aggregate, rip-rap, and other common variety uses was \$3.88 per ton in 1981 (Exh. 86-BB at 10) and \$3.41 per ton in 1982 (Exh. 86-RR at 17).

Market Price of the Locatable Product

[9] Claimants' proposed mining plan and profitability figures are based upon initial sales of 60,000 to 100,000 tons per year (at \$7-\$7.50 per ton) to Calco, Inc. Calco sells 300,000 to 400,000 tons of limestone products per year, of which approximately 100,000 tons is chemical grade limestone. Calco sells to various parties, who use the limestone in various ways, including quicklime uses, water purification, soil stabilization, shingle filler, and rock dust.

The Forest Service alleges that all sales for so-called "common variety uses" may not be considered when determining the estimated profitability of the proposed mine. The Forest Service contends that: "In satisfying the 'prudent man' and 'marketability rules,' proposed sales from the contested claims may not be used to show projected profitability, unless the contemplated use requires 95% or more of carbonate content." (Trial Brief at 1; italics deleted.) The Forest Service contends that the actual use of the material is the key, and that only sales to parties whose actual use of limestone demands 95-percent or greater carbonate content may be considered when calculating estimated profitability.

The common varieties legislation (30 U.S.C. § 611 (1982)) removed "common varieties" of sand, stone, gravel, and the like from the operation of the general mining laws. Common varieties of sand and stone are no longer locatable, but must be leased pursuant to the Materials Disposal Act, 30 U.S.C. § 601 (1982). However, the term "common varieties" "does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value" 30 U.S.C. § 611 (1982). Therefore, as the Forest Service correctly states, the mineral must be "valuable" because of this special property or quality. Nonetheless, it does not follow, as contestant states, that such a special property can be "valued" only by virtue of particular uses. Under certain circumstances, it may be that the value of the rock's special property may result in the rock commanding a premium price, over and above the price which would be paid for a "common variety" of the same stone.

The concern we must face, and which the Forest Service specifically recognizes, is that the mining claimants will bootstrap themselves into a profitable operation by considering the value of sales of nonlocatable substances in the proposed operation thereby rendering the overall operation profitable, even though the price paid for the "uncommon variety" alone would not be profitable. The three cases cited by the Government, *United States v. Chas. Pfizer & Co.*, *supra* at 331; *United States v. Lease*, 6 IBLA 11, 79 I.D. 379 (1972); and *United States v. Husman*, 81 IBLA 271 (1984), *aff'd*, 616 F. Supp. 344 (D. Wyo. 1985), all stand for the proposition that bootstrapping is impermissible. That is, the uncommon (locatable) variety cannot "ride piggyback, as it were, on the shoulders of a common variety," but must support a mining operation on its own merits. *Pfizer*, *supra* at 348. This rationale

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is similar to the concept that a locatable mineral must support a mining operation on its own, and that the sale of other materials on the claim, such as timber or sand and gravel, may not be considered when predicting profitability.²⁰ *Lease*, 6 IBLA at 25, 79 I.D. at 385.

The relevant legal standards applicable to this case are relatively easy to state. This particular type of limestone (95 percent or greater in calcium and magnesium carbonates) is an uncommon variety of limestone and is therefore locatable. *Pfizer, supra* at 342-43. However, as any mining claim must, in order to be declared valid, contain a valuable mineral deposit, the contained limestone must meet the requirement of the "prudent man" and "marketability" tests. These tests require testimony which demonstrates that the deposit can be extracted, removed, and marketed at a profit, which implies that a prudent person would invest his or her money and time with the reasonable expectation of developing a profitable mine. Such estimates of profitability must be based upon anticipated sales of the locatable mineral. Sales of "common variety" minerals and/or other materials found on the claims may not be considered. The questions are, what types of sales may be considered and to whom may the claimants sell?

In *United States v. U.S. Minerals Development Corp.*, 75 I.D. 127, 134 (1968), it was stated:

[A]n uncommon variety of sand, stone, etc. [must] meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property * * * give the deposit a distinct and special value. Possession of a unique property alone is not sufficient. It must give the deposit a distinct and special value. The value may be for some use to which ordinary varieties of the mineral cannot be put, or it may be for uses to which ordinary varieties of the mineral can be or are put; however, in the latter case, the deposit must have some distinct and special value for such use. * * *

The question is presented as to what is meant by special and distinct value. If a deposit of gravel is claimed to be an uncommon variety but it is used only for the same purposes as ordinary gravel, how is it to be determined whether the deposit in question has a distinct and special value? *The only reasonably practical criterion would appear to be whether the material from the deposit commands a higher price in the market place.* If the gravel has a unique characteristic but is used only in making concrete and no one is willing to pay more for it than for ordinary gravel, it would be difficult to say that the material has a special and distinct value. [Italics added].

The above statement of the test to determine an uncommon variety was expressly upheld in *McClarty v. Secretary of Interior*, 408 F.2d 907 (9th Cir. 1969), with the modification that a premium retail price cannot by itself be the exclusive criterion of "distinct value," but that a special value may also be shown through other economic factors such as reduced costs or overhead.

²⁰ The most common instance of this "bootstrapping" application is a placer gold operation. It may well be that by recovering the gold and selling the sand and gravel processed during a gold recovery operation, the operation as a whole would be profitable. However, in order to support a discovery, the operation must be shown to have a reasonable prospect of success as a gold mining operation, with the sand and gravel treated as a waste product.

The concepts developed in the *Minerals Development* case were used to support the following statement from *United States v. Pierce*, 75 I.D. 255, 260 (1968):

Even though we assume that the deposit of limestone may be classified as an uncommon variety, the mining claim based upon it must satisfy the requirements of the mining law. One of these as we have seen, is that there must be a present profitable market for the deposit. It must be a market based either upon the use making the limestone an uncommon variety * * * or upon the use of the limestone for the same purpose that a common variety of limestone would be used for, but in the latter event the limestone would have to possess a unique value for such use which would be reflected in a higher price for the limestone than a common variety would command * * *. [Italics added].

The above quote from *Pierce* was used to support the following statement from *United States v. Lease*, 6 IBLA at 26, 79 I.D. at 386:

[I]f a deposit of an uncommon variety of material may not be profitably sold for the uses for which it allegedly has a special value, we conclude that it may not be deemed to be a valuable mineral deposit under the mining laws although it may be sold for common variety uses * * *.

However, the *Lease* case also states:

Ordinarily if a mineral product can only be used for the same purposes for which widely available common varieties of sand, stone, gravel, etc. may be used, it must also be considered a common variety unless it can be shown to have a unique property giving it a special and distinct value as reflected by a substantially higher commercial value for the product. *United States v. Norman Rogers*, A-31049 (March 3, 1970); *United States v. Paul M. Thomas, et al.*, 78 I.D. 5, 1 IBLA 209 (1971). There is no evidence in this case that the dolomite has any unique property giving it a special and distinct value for use as aggregate in road construction, ground cover, leach lines, and the other purposes for which common varieties of sand, stone, etc. may be used. It does not meet the test of being an uncommon variety for those uses.

A deposit of stone may also be considered an uncommon variety within the meaning of the Act of July 23, 1955, if it has physical properties giving it a special and distinct value for uses for which common varieties of sand, stone, etc. may not be used. (Italics added).

(6 IBLA at 17-18, 79 I.D. at 381-82).

Combining the above concepts, sales of an allegedly uncommon variety of limestone must reflect the limestone's special value in order that the limestone may be considered in a determination regarding the existence of a valuable mineral deposit of locatable mineral. This special value can be demonstrated either by sales for uses which require particular characteristics or by an increase in marketplace price if sold for "common variety" uses. If the stone is sold for a "common variety" use and as a result does not command a premium price, the income and/or reduced cost resulting from such sales should be disregarded when projecting profitability.²¹

The facts of the *Lease*, *Pfizer*, and *Husman* cases cited by the Government do not contradict the above concepts. In each of those

²¹ An example of cost reduction would be if, rather than moving and reclaiming sand and gravel, a placer gold operator were to deliver the product with no charge to a party who transports it from the property and uses it for land fill. The operation would properly be examined in a value determination by calculating the transportation and reclamation costs of the common variety product as a proper cost of operation.

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cases, the mining claimants failed to prove by a preponderance of the evidence that there was either a sufficient market for the peculiar characteristics of the deposit in question, or a premium price for sales when those prices were compared to prices received for "common" uses.

It is true that the issue in the *Lease* case was described as

whether in applying the [marketability/prudent person] test * * * we must consider those profits which have been or may be attained from selling the material for the purposes for which common varieties of materials concededly may be used in order to determine the value of the deposit as a locatable uncommon variety material.

Lease, 6 IBLA at 19, 79 I.D. at 382-83. However, in view of the dual standard for determining special value expressed in *Minerals Development*, *McClarty*, and *Lease* itself, and the lack of testimony in *Lease* concerning premium price or other factors, the above statement from *Lease* is inapplicable to the current case. The *Lease* case was a true "piggyback" or "bootstrap" case, i.e., the mining claimants attempted to make use of sales of uncommon variety materials for common variety uses at common variety prices in their profitability calculations, which is not allowed. See also *United States v. Smith*, 66 IBLA 182 (1982), which makes use of the *McClarty/Minerals Development* standards.

Further precedent for the idea that the proposed final product is not the key to a determination of the profitability of a proposed mining operation is found in the Ninth Circuit's holding in the *McClarty* case that: "It should be noted that the common varieties statute (30 U.S.C. § 611 [1982]) refers to a 'deposit' which has 'some property giving it distinct and special value' and not to the fabricated or marketed product of the deposit." *McClarty v. Secretary of Interior, supra* at 909.

After a review of the record and transcript, we do not find the mining plan proposed by the claimants in the current case is a piggyback situation. Claimants do not make use of any sales of common variety materials or sales of locatable minerals at common variety prices in their profitability estimates. All estimates are based upon sales of plus 95-percent limestone. It is true that some of this limestone may be used by the ultimate purchaser of the product for what is customarily deemed to be a common variety use. However, all of the plus 95-percent limestone will be sold at a premium price which reflects its special value. Calco proposes to buy the Avenger plus 95-percent total carbonate limestone at a price of \$7.50 per ton. The average value of crushed limestone sold or used in Colorado, taken from the Bureau of Mines yearbooks, for all purposes, including aggregate, rip-rap, and other common variety uses was \$3.38 per ton in 1981 (Exh. 86-BB at 10) and \$3.41 per ton in 1982 (Exh. 86-RR at 17).²²

²² See also the testimony given by Forest Service witness Mullin at Tr. 1365 - 75.

It is therefore found that claimants would receive a premium price for their limestone, which price reflects sales which make use of the special value of the Avenger limestone, i.e., purity.

It is also found, independently of the above finding, that Calco makes sufficient sales of limestone for uncommon "uses" (under the other definition of the correct type of sales) to make use of the entire proposed high carbonate output of the Avenger claims. Sheehan testified that of the 30,000 tons of total carbonate limestone sold by Calco each year approximately 45-percent was used for rock dust (Tr. 741). The miners to whom Calco supplies rock dust prefer limestone (Tr. 700). It has been established that rock dust may not contain more than 4-percent silica and 1-percent combustibles. By definition then, limestone used for rock dust must contain plus 95-percent carbonate or greater. Although rock dust can be made from materials other than limestone, that fact alone does not convert an otherwise locatable mineral into a nonlocatable waste product. Calco has used total carbonate for rock dust for many years and also supplies the needs of several different high-total carbonate users. A present market for both total carbonate limestone and high calcium limestone has been established.²³

Independent Mine Requirement

[10] In its posthearing brief and in its exceptions the Forest Service states its position that "each claim must independently support a discovery" (Exceptions at 35). However, the issue in this case has been clouded by the dual meaning of the term "discover," as used in mining. The first use is synonymous with the term "find," and the second is the term which describes the "discovery rule" legal requirement for a valid mining claim. As noted in *Schlosser v. Pierce*, 92 IBLA 109, 93 I.D. 211 (1986), the issue of common discovery among group claims was addressed by the Board in *United States v. Foresyth, supra*, when it stated:

Both contestants and contestees contend that if any of the claims are valid, all of the claims are valid. We expressly reject such a theory of bulk validation. In order for any claim to be valid, it must be shown that not only a mineral deposit has been found on a claim, but that the deposit on *that* [italics in original] claim is reasonably perceived as marketable at a profit. To put it more plainly, each claim must independently support a discovery.

Id. at 58. In *Schlosser*, the Board recognized that, unless carefully examined, this statement could logically lead to the conclusion reached by the Forest Service, and stated that "review of the Department's

²³ We find the argument advanced by the Forest Service to be interesting but question whether it is truly in point. The locatable total carbonate limestone would be purchased by Calco without reference to the differentiation between high calcium limestone and high magnesium limestone. As noted the price paid for plus 95-percent total carbonate limestone is a premium price, a fact established by the testimony of the Forest Service witness. To make a distinction based upon calcium carbonates versus magnesium carbonate clouds the issue. By way of illustration, if a metal miner were able to show that, based upon projected net smelter returns, the property would be operated at a profit because he is producing and shipping silica flux concentrates, it matters not that the smelter might sell the silica-rich slag produced at the smelter as a road sanding product (a common variety use) in order to cut smelting costs.

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practice illustrates development of the law of discovery has been contrary to [the] independent mine requirement." *Schlosser v. Pierce*, 92 IBLA at 129; 93 I.D. at 222. After discussing the development of the mining law as it applies to analysis of a group of claims, the Board stated in *Schlosser*: "A logical inference to be drawn from these precedents is that * * * mining claims may be considered together as a group for the purpose of ascertaining the validity of individual claims, so long as valuable mineral is shown to exist on each claim." 92 IBLA at 130; 93 I.D. at 223. The Board concluded that:

[I]t is apparent the practice of the Department has been to allow the consideration of a group of claims as a mining unit where the issue of profitability is at stake. Moreover, decisions where the Department restricted the rules of discovery to a showing of the profitability of each claim in a group as a potentially viable independent mine do not appear to exist. In most instances, decisions deal with the concept of developing a "mining operation" or "mine" from a series of contiguous or nearby claims, although specific information is not directly elaborated upon that point. (Citations omitted).

92 IBLA at 132; 93 I.D. at 224. With the principles set forth in *Schlosser* in mind, we turn to the concurrence in *Cactus Mines, Ltd.*, 79 IBLA 20 (1984), to apply the term "discovery" to individual claims and a group:

While the proof of quantity and quality are often interrelated, a claimant must prove that a valuable mineral is actually present on each of the claims. Once mineral is demonstrated to be present, the proof of sufficient quality and quantity of mineral to warrant development can take into consideration the overall mining operation. There is little question that circumstances exist in which a group of mining claims containing low grade ore can support a mining operation, and thus demonstrate a discovery [as applied in the "discovery rule"] on each claim, even though taken individually the claims might not contain sufficient quantity of ore of sufficient quality to support discovery.

Id. at 32-33 n.2.

Applying the law of discovery to the present case, we agree with Judge Rampton's finding that claimants have proven by a preponderance of the evidence that they have "found" locatable mineral on each of the claims; i.e., locatable mineral was known to be present on each of the claims on the date of withdrawal and at the time of the hearing. We also agree with Judge Rampton that claimants have established by a preponderance of the evidence that the quality and quantity of the mineral present on the claims is sufficient to warrant development.

Reasonable Prospect of Success

[11] The Forest Service argues that the claimants' evidence of a market was "speculative." To a degree, this is true in the present case. The same can be said with respect to all mining operations, whether they be for precious metals, or, as in this case, high-grade limestone. It is rare that in the early stages of development of any mine a miner has an assured buyer for his product, unless the mine is captive. Even in the case of a captive mine, there is no assurance that when the

mine has been brought on stream the market price for the end product will be the same.

In the present case, the claimants have demonstrated by a preponderance of the evidence that a market could be developed if they are capable of demonstrating to a prospective purchaser that sufficient quantity of quality material is present to justify a long-term commitment to claimants as the supplier of the product. This need for sufficient reserves to justify moving Calco's plant to a site near the mine places the mine in a similar position to a low-grade large-tonnage mine. Claimants' witness Visconti testified that a market existed in 1968 which was still in existence in 1974. It is entirely conceivable that, had claimants been able to deliver the product from the mine during that period, a long-term contract may have been available.

For the market at the time of the hearing, claimants established that Calco would be willing to move their plant from Salida, Colorado, to a site closer to the mine if claimants were capable of delivering the product. This move would necessitate a considerable cost, which could be justified only if there were sufficient tonnage to operate the Calco plant for a number of years. The facts in this case are not the same as those in *United States v. Husman, supra*. In that case appellant presented a mining plan showing the operation to be viable if operated at a projected mining rate of 100,000 tons per year, but could demonstrate a reasonably foreseeable market of only 4,000 to 10,000 tons per year. Thus, the limited market for his product rendered Husman's mining plan infeasible. In the present case appellants have demonstrated by a preponderance of the evidence that a mining plan exists for the production of 60,000 tons per year and a reasonable prospect that there will be a market for that quantity of the product.²⁴ They have also demonstrated that the market has expanded since 1963 and that there is a reasonable expectation of an additional market.

Excess Reserves

[12] The Forest Service argues at length that there is insufficient quantity of locatable limestone of a quality that can be mined and sold at a profit. There can be no doubt from the record and the documents filed by the Forest Service on appeal that this is their contention. However, on appeal the Forest Service states, as one of its exceptions to the proposed decision that Judge Rampton erred when he failed to find that the total volume of locatable limestone on the contested claims is far in excess of any market and cannot support a mine. We reject this argument. A Government contest complaint which asserts the invalidity of a claim because of insufficient quantity and quality of the located mineral within the limits of the claim does not put into issue the existence of excess reserves within the limits of the claim. *United States v. McElwaine*, 26 IBLA 20 (1976).

²⁴ They also demonstrated a similar, scaled-down operation would have been viable in 1963 and 1974.

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Preponderance of the Evidence

Many of the arguments made by the Forest Service in its statement of exceptions to the recommended decision and brief are directed to the weight Judge Rampton gave to the evidence when making a determination as to whether the preponderance of the evidence presented by the parties supported a finding that there had been a discovery on the various claims. We note that had there been no dispute regarding the interpretation of data, the meaning of geologic evidence, and the existence of a market for the mined product, there would have been no need for a hearing before an administrative law judge. There is also no question that the parties continue to disagree regarding these issues. There are a few things that both parties will agree upon, however. Each side had ample time to prepare for the hearing. Each was well represented by competent counsel. Each had an opportunity to present evidence and vigorously cross-examine the opponent's witnesses. Each was afforded an opportunity to convince Administrative Law Judge Rampton that their respective arguments were correct and supported by the facts and that the opponents' were not. Neither party has alleged that the presiding Judge was predisposed or otherwise biased. Judge Rampton made his determination regarding the evidence as it applied to each element of a discovery. Our review of the exhibits and the transcript of the hearing leaves little doubt that the determinations of fact made by him are amply supported by the evidence and that his determinations were neither arbitrary nor capricious. Without taking into consideration the elements of a hearing which are not reflected in the written record, such as demeanor of the witnesses, the overall benefit of having been personally present at the time of the hearing, and the general "flow" of the hearing, we have no difficulty understanding how Judge Rampton reached his conclusions regarding the weight and preponderance of the evidence. Thus, even though the Forest Service continues to object to Judge Rampton's findings regarding which of the factual contentions were supported by the preponderance of the evidence presented to him, we do not find that these arguments overcome his findings.

Judge Rampton's recommended decision was 33 pages in length. The statement of exceptions filed by the Forest Service was four pages longer than the recommended decision. As can be seen from the length of this decision, the final decision of this Board was expanded as a result of the Forest Service's statement of exceptions. Without further belaboring this decision with additional references to contentions regarding errors and omissions in the preparation of the recommended decision, and other errors of fact and law, except to the extent they have been expressly or impliedly addressed in this decision, they are rejected on the ground they are, in whole or in part, contrary to the facts and law or are immaterial. *National Labor Relations Board v. Sharples Chemicals, Inc.*, 209 F.2d 645 (6th Cir. 1954).

Summary

1. Claimants have established by a preponderance of the evidence that there was a limestone outcropping on the Avenger Nos. 7, 8, 9, 10, 11, and 13 lode mining claims known to them to exist on or before July 13, 1968, the date the lands were withdrawn from mineral entry.

2. Based upon samples taken both before and after the date of withdrawal either from the surface or by means of diamond drilling conducted for the purpose of obtaining samples of the materials shown to exist in the surface outcroppings, claimants have demonstrated the existence of locatable grade limestone within the vertical boundaries of the Avenger Nos. 7, 8, 9, 10, 11, and 13 lode mining claims by a preponderance of the evidence.

3. Through actual exposure and reasonable projection, claimants have demonstrated by a preponderance of the evidence that the locatable limestone exists in sufficient quantity 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.

4. Claimants have established by a preponderance of the evidence that there is sufficient demand for the locatable limestone present on the claims that it could be sold at a price sufficient in an economic sense to cause a person of ordinary prudence to be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine, considering the anticipated cost of extraction and transportation of locatable limestone to the existing and reasonably anticipated markets.

5. The above conclusion is based upon the existence of high calcium limestone as well as total carbonate limestone. There is sufficient evidence that, if claimant were only able to establish a market for high calcium limestone, the existence of that mineral on each of the claims is of sufficient quantity that the ore body lying within the claims as a group is sufficient to support a discovery on each of the claims.

6. Claimants have not shown a discovery to exist on the Avenger No. 12 lode mining claim and that claim is deemed to be null and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the complaint is dismissed as to the Avenger Nos. 7, 8, 9, 10, 11, and 13 lode mining claims and the Avenger No. 12 lode mining claim is deemed to be null and void.

R. W. MULLEN
Administrative Judge

WE CONCUR:

C. RANDALL GRANT, JR.
Administrative Judge

KATHRYN A. LYNN
Administrative Judge
Alternate Member