

UNITED STATES DEPARTMENT OF THE INTERIOR

Fred A. Seaton, *Secretary*  
Theodore F. Stevens, *Solicitor*

**DECISIONS  
OF THE  
DEPARTMENT OF THE INTERIOR**

Edited by  
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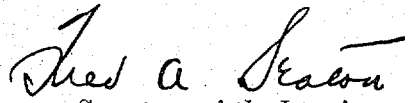
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## PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1960, to December 31, 1960. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Fred A. Seaton served as Secretary of the Interior during the period covered by this volume; Mr. Elmer F. Bennett served as Under Secretary; Messrs. Fred G. Aandahl, George W. Abbott, Roger C. Ernst, Royce A. Hardy, and Ross L. Leffler served as Assistant Secretaries of the Interior; Mr. D. Otis Beasley served as Administrative Assistant Secretary; Mr. George W. Abbott and Mr. Theodore F. Stevens\* served successively as Solicitor of the Department of the Interior. Mr. Edmund T. Fritz served as Deputy Solicitor.

This volume will be cited within the Department of the Interior as "67 I.D."

  
*Secretary of the Interior.*

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\*Mr. Theodore F. Stevens was appointed Solicitor on September 20, 1960, and this volume is published under his direction.



## ERRATA

- Page 18—Index-Digest, Second Entry, No. 13, *page 295* should read *page 296*.
- Page 21—First paragraph, lines 5-6, *56 I.D. 300, 344, June 5, 1938* should read *56 I.D. 330, 334, June 15, 1938*.
- Page 33—Bottom of page, *67 I.P., No. 2*, should read *67 I.D., No. 2*.
- Page 48—Last paragraph, last line, *The stakes set in the field<sup>2</sup>*, should read *The stakes set in the field<sup>3</sup>*.
- Page 65—Line 5, 231 F. 2d 836 (1952) should read 271 F. 2d 836 (1959).
- Page 71—Line 2, *foreoing* should read *foregoing*.
- Page 147—Footnote 2, line 3, *199 F. 2d 923 (528 Cir.)* should read *199 F. 2d 923 (5th Cir.)*.
- Page 162—Line 26, *Ickes v. Virginia-Colorado Development Corp.*, 295 U.C. 639 (1935) should read 295 U.S. 639 (1935).
- Page 162—Citation, line 26, *295 U.C. 639 (1955)* should read *295 U.S. 639 (1955)*.
- Page 168—Second paragraph, line 1, *is effectual to transfer title to a vester* should read, *is ineffectual to transfer title to a vested*.
- Page 168—Footnote 4, line 9, *contiguous*, should read *continuous*.
- Page 168—Footnote 4, line 15, *35 Am. Decsions*, should read *35 Am. Decisions*.
- Page 170—Footnote 5, line 10, *abandonment* should read *abandoned*.
- Page 211—Footnote 1, line 1, *43 CFA*, should read *43 CFR*.

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# DECISIONS OF THE DEPARTMENT OF THE INTERIOR

CHESTER GORDON ET AL.

A-28126

*Decided January 12, 1960*

## Oil and Gas Leases: Extensions—Applications and Entries: Filing

When the last day for filing an application for a 5-year extension of a noncompetitive oil and gas lease falls on a day on which the land office is not open to the public for the filing of documents for all of the normal hours pursuant to an executive order permitting Federal employees to be excused from duty for half a day, the application is timely filed if it is received in the land office on the next day the office is open to the public.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Chester Gordon, Bert Gordon, Donald Gordon, doing business as the Entrada Oil and Gas Company, and Harry Royster have appealed to the Secretary of the Interior from a decision dated March 25, 1959, of the Acting Director of the Bureau of Land Management which, reversing decisions by the manager of the Salt Lake City land office, denied their applications for the extension of several noncompetitive oil and gas leases on the ground that the applications had not been timely filed.

The appellants are assignees of the major portion of the interest in noncompetitive oil and gas leases Utah 08277 and 08278, issued pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226), and effective as of January 1, 1953, for a period of 5 years. On January 2, 1958, they, along with the owners of the other interests, filed an application for a 5-year extension of each lease.<sup>1</sup> On April 15, 1958, the manager approved the extension of

<sup>1</sup>The applications for the extensions are not in the records. It appears that at the time they were filed that the partial assignment of Royster's 87½ percent interest in each lease to Entrada had not been approved. In two decisions dated February 5, 1958, the partial assignments were approved and the assigned leases given separate serial numbers, Utah 08277-A and 08278-A, respectively. Thereafter, in decisions dated February 27, 1958, the manager stated that he was returning the applications for extension

Utah 08277 and 08278 and the leases created by partial assignment of each of them, Utah 08277-A and 08278-A.

Meanwhile, at 10 a.m. on January 2, 1958, Pearson-Sibert Oil Company of Texas filed an offer, Utah 027054, to lease all the lands in Utah 08277, and at the same time Barbara M. Smoot and Caldwell J. Saunders each filed an offer, Utah 027091 and Utah 027103, respectively, to lease all the land in Utah 08278. In decisions dated February 17 and 20, 1958, the manager rejected each of these offers on the ground that—

Lands applied for are not available for leasing since they were within existing oil and gas lease 08277 [or 08278] at the time your [the] lease offer was filed.

Upon appeal by Pearson-Sibert, Smoot and Saunders, the Acting Director reversed the manager on the ground that the applications for extension were not timely filed.<sup>2</sup>

The statute (30 U.S.C., 1958 ed., sec. 226) and the regulation (43 CFR, 1954 rev., 192.120(b)),<sup>3</sup> governing 5-year extensions of leases require that an application for a 5-year extension of a noncompetitive oil and gas lease be filed before the expiration date of the lease. If one is not filed within the specified period, the lease expires at the end of its primary term and the lands become subject to new filings of offers to lease. 43 CFR, 1954 rev., 1958 Supp., 192.120(g).

However, another regulation provides that—

Any document required by law, regulation or decision to be filed within a stated period, the last day of which falls on a day the land office or the Washington Office is officially closed, shall be deemed to be timely filed if it is received in the appropriate office on the next day the office is open to the public. 43 CFR, 1954 rev., 1958 Supp., 101.20(c).

On December 10, 1957, the President issued Executive Order No. 10744 which excused Federal employees from duty for one-half day on December 31, 1957. As a result on that day, the last day for filing an application for extension, the land office was closed at 12 noon instead of remaining open until 3 p.m., its normal closing hour for receiving filings (43 CFR, 1954 rev., 1958 Supp., 101.20(a)).

The Director held that the regulation extends the time for filing documents only when the land office is closed the whole of the last day.

because of the approval of the assignments and asked that separate applications for each of four leases be filed. It appears that the applications in the form desired by the manager were filed on March 21, 1958.

<sup>2</sup>In his decision, the Acting Director listed leases Utah 08277, 08278 and 08278-A as the leases adversely affected by his decision. Since Utah 027054 conflicted with all of Utah 08277, it also is in conflict with Utah 08277-A. The reasoning of this decision applies to the latter lease as well as to the others.

<sup>3</sup>Now 43 CFR, 1954 rev., 1958 Supp., 192.120(b).



January 12, 1960

The appellants, on the contrary, urge that it applies in any case in which the land office is closed for part of a day.

The regulation itself furnishes no clear answer to the problem raised by the appeal. This is obviously a situation which was not considered when the regulation was drafted and it is of little use to attempt to rationalize the regulation to fit the circumstances.

It is more profitable to examine the situation which led to the regulation in its present form and the Department's purpose in adopting it.

After the amendment of section 17 of the Mineral Leasing Act (*supra*) to provide for 5-year extensions of noncompetitive oil and gas leases, the Department held that the expiration date of an oil and gas lease could not be extended by departmental action and that the time for filing an application for the extension of an oil and gas lease could not be extended administratively beyond the expiration date of the base lease even when the lease expired on a nonbusiness day. *John J. Farrelly et al.*, 62 I.D. 1 (1955). However, upon judicial review of this decision, the United States District Court held that an application for the extension of a noncompetitive lease may be timely filed on the first business day following a Sunday or a legal holiday on which the primary term of the lease expires. *Farrelly et al. v. McKay*, C.A. No. 3037-55 (D.D.C.), decided October 11, 1955.

Although an appeal was taken from the district court's decision, it was not prosecuted by the United States and was dismissed. Thereafter, the Department amended its regulation (43 CFR, 1954 rev., 1958 Supp., 101.20) so that its computation of the final day for filing documents would be in accordance with the *Farrelly* decision.

While that decision and the regulation do not deal specifically with the problem of a half holiday, they both are based upon the proposition that the Department is not bound by the literal words of the statute that an application for extension of an oil and gas lease must be filed prior to the expiration of the lease.

If it is within the Department's authority, and indeed if it is bound, to accept a filing on the first business day following a Sunday or legal holiday on which a lease expires, it follows that it is within its authority to accept the filing when the expiration date is a half holiday. I cannot see that a matter of such consequence to a lessee should depend on whether he had 89 days for filing as opposed to  $89\frac{1}{4}$  or  $89\frac{1}{2}$  or  $89\frac{3}{4}$ . In other words, so long as the land office is not available to the applicant for the normal period on the expiration date of the lease,

the Secretary can, or must, accept as timely a filing made on the next business day.<sup>4</sup>

Since the Department is not prohibited in all cases by the language of the statute from accepting applications after the expiration date of the leases, the appellants' filings ought to be accepted as timely in this case unless the regulation requires a different result. As we have seen, the regulation is ambiguous on this point. In the absence of a clear requirement in the regulation, an applicant is not to be deprived of a statutory preference right for failure to comply with it. *Madison Oils, Inc., et al.*, 62 I.D. 478 (1955).

Therefore, the applications for the extension of leases Utah 08277 and 08278 are to be considered as timely filed and the leases were properly extended. It follows that the offers Utah 027054, 027091 and 027103 must be rejected.<sup>5</sup>

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is reversed.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

STANLEY GARTHOFNER  
DUVALL BROTHERS

A-28052

*Decided January 12, 1960*

Grazing Permits and Licenses: Appeals—Grazing Permits and Licenses:  
Federal Range Code—Rules of Practice: Appeals: Dismissal

An appeal to the Director of the Bureau of Land Management under the Federal Range Code for Grazing Districts is properly dismissed where the appeal is not filed in the Office of the Director within 30 days after service of the hearing examiner's decision on the appellant.

<sup>4</sup> The Department's rules of practice had at one time followed this view in computing time allowed for service of documents.

"In computing time for service of papers under the rules in this part the first day shall be excluded and the last day included: *Provided*, That where the last day is a Sunday, a legal holiday, or half holiday such time shall include the next full business day." 43 CFR, 1949 ed., 221.90(b).

<sup>5</sup> Since no applications for extension were filed prior to the expiration date of the outstanding leases, the offers in conflict with them were properly filed (*Malcolm C. Petrie*, 66 I.D. 288 (1959)), but upon the approval of the applications for extension properly filed after the expiration date of the base lease, the conflicting offers must be rejected.

January 12, 1960

## Grazing Permits and Licenses: Appeals—Rules of Practice: Appeals: Timely Filing

The provision of the general rules of practice of the Department, 43 CFR, 1954 rev., 1958 Supp., 221.92(b), permitting a waiver of the late filing of a document required to be filed within a certain time provided the document is shown to have been transmitted within that period of time and received within 10 days after the filing was required, does not apply to appeals to the Director arising under the Federal Range Code for Grazing Districts.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Stanley Garthofner and Duvall Brothers<sup>1</sup> have appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated March 10, 1959, which dismissed their appeals to him from decisions of a hearing examiner dated December 8, 1958.

In his decision the Acting Director stated that notice of the hearing examiner's decisions was served upon counsel for both appellants on December 12, 1958; that notices of intention to appeal to the Director were timely filed in accordance with the pertinent provisions of the Federal Range Code (43 CFR, 1954 rev., 1958 Supp., 161.10(f)); that since no request for a transcript of the hearings was filed, the appeals were required to be filed in the Office of the Director in Washington, D.C., within 30 days from the date of receipt of the hearing examiner's decisions, but that briefs on the appeals<sup>2</sup> were not filed in the office of the Director until January 14, 1959, and were, therefore, not timely filed. Consequently, the Acting Director dismissed the appeals.

The appellants do not dispute any of the facts related above. However, they state that their briefs on appeal were deposited in the mails in Glasgow, Montana, on January 9, 1959, and in the ordinary course of delivery should have been received in the Washington, D.C., post office for delivery on the morning of January 11, 1959; that having deposited the documents in the mails with ample time for regular delivery to the Director before the deadline, the appellants performed all the duties imposed upon them under the appeals procedure; and that if the documents did not arrive ahead of the deadline the failure could only have been caused by either the failure "of the United States Government, the adverse party herein, through its Post Office Department to properly deliver the mail," or the failure of the Bureau of Land Management, through its authorized officer, to make

<sup>1</sup> It appears from the record that Duvall Brothers is a family corporation consisting of Ted Duvall, Walter Duvall and their mother, Edna L. Duvall.

<sup>2</sup> A single brief was written for both appeals.

tively acceptance of the mail sent to its Washington office. The appellants contend that in either of such events the fault is that of the United States Government and not of the appellants, and it constitutes no ground for the rejection of the appeal.

In addition to the above contentions the appellants allege that their appeal is governed by the provisions of the rules of practice, 43 CFR, 1954 rev., 1958 Supp., Part 221, and that under section 221.92(b) the late filing of their appeal should be waived.

The appellants' contentions are without merit.

The pertinent provision of the Federal Range Code is as follows:

(g) *Appeals to Director.* An appeal from any decision of the examiner shall be filed in the office of the Director, Bureau of Land Management, Washington 25, D.C., together with any brief in support thereof, within thirty days after date of receipt of the transcript of testimony, or, if the transcript is not requested, within thirty days after receipt of the examiner's decision. A copy of the appeal and of any brief must be served on each party, including the State supervisor either personally or by registered mail. \* \* \* The appeal in other respects shall be made in accordance with rules of practice (Part 221 of this chapter). (43 CFR, 1954 rev., 1958 Supp., 161.10; emphasis supplied.)

Thus, the Federal Range Code clearly requires that an appeal be filed in the office of the Director, in Washington, D.C., within 30 days after receipt of the transcript, or within 30 days after receipt of the examiner's decision where, as in this case, the transcript is not requested. It is fundamental that a document is not "filed" until such time as it is received in the office where the filing is required and that deposit in the mails does not amount to "filing." *H. P. Saunders*, 59 I.D. 41 (1945); *Willis H. Morris*, A-26783 (November 10, 1953); *John J. Farrelly et al.*, 62 I.D. 1 (1955); *August A. Frymark*, A-27162 (September 12, 1955).

When an appellant deposits a document in the mails he thereby constitutes the postal service as his agent for the delivery of the document. The appellants have cited no authority, nor is any known to exist, which states that the postal service is the agent of the government for the receipt of documents addressed to a specific agency of that government. See *H. P. Saunders, Jr., supra*; *Virginia I. Gail*, A-27670 (September 25, 1958).<sup>3</sup>

On the contrary, the Federal Range Code provides that the appeal must be filed "in the office of the Director, Bureau of Land Management, Washington 25, D.C." Deposit of the appeal documents in the mail in Glasgow, Montana, is not filing them in Washington, D.C.

<sup>3</sup> *Of. Wilbert Phillips et al.*, 64 I.D. 385 (1957), holding that even the manager of a land office is not the agent of the Director of the Bureau of Land Management for the purpose of receiving an appeal document required to be filed in the Director's office.

January 12, 1960

The Department's rules of practice, 43 CFR, 1954 rev., 1958 Supp., Part 221, which are applicable to other than grazing cases, provide:

(b) Whenever a document is required *under this part* to be filed within a certain time and it is not received in the proper office, as provided in paragraph (a) of this section, during that time, the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. \* \* \* (43 CFR, 1954 rev., 1958 Supp., 221.92.)

Since the appeal was deposited in the mails on January 9, 1959, and received on January 13, 1959,<sup>4</sup> it was filed within the 10-day grace period and if the provisions of 43 CFR 221.92(b) are applicable to this appeal the late filing with the Director would be waived. However, this provision does not apply in this case.

The appellants contend that 43 CFR 221.92(b), which was added to the rules of practice by an amendment dated March 18, 1958 (23 F.R. 1930), "specifically modified" the provisions of the Federal Range Code, 43 CFR 161.10. Just where the specific modification occurs is not stated, nor can any statement of an intention to so modify the range code be found. To the contrary, the provision specifically states that whenever a document is required to be filed "under this part," that is, the rules of practice, Part 221, the late filing may be waived. No reference is made to indicate any intention to modify the Federal Range Code, comprising Part 161, which was last amended effective as of January 22, 1956.

The last sentence of 161.10(g) states that the appeal "in other respects" shall be made in accordance with Part 221 of the Department's rules of practice. Part 221, as amended, establishes a different procedure for perfecting an appeal to the Director. Under this procedure the appellant is required to file, within 30 days after receiving the decision appealed from, a notice of appeal with the officer from whose decision the appeal is taken (43 CFR, 1954 rev., 1958 Supp., 221.2). Later, within 30 days after filing the notice of appeal, a statement of the reasons for the appeal must be filed with the Director unless such statement is filed with the notice of appeal (43 CFR, 1954 rev., 1958 Supp., 221.3). The range code first requires an appellant to file a

<sup>4</sup>The record shows that the appeal was received in the Secretary's Mail Center on January 13, 1959. The Department has held that since the Secretary's Mail Center acts as agent for all bureaus of the Department, except the Geological Survey, for the receipt of all registered documents, a registered document delivered to the Mail Center is deemed to be filed in the office to which it is addressed on the date delivery is made to the Mail Center. *Duncan Miller A-27466* (September 24, 1957). Therefore, the appellants' appeal must be considered to have been filed on January 13, 1959, rather than on January 14 when it was physically received in the Director's office.

notice of intention to appeal within 10 days after receipt of the examiner's decision (43 CFR, 1954 rev., 1958 Supp., 161.10(f)). Then, within 30 days after receipt of the decision or receipt of the transcript, he must file an appeal in the office of the Director. Thus two documents must be filed to perfect any appeal to the Director under the range code whereas only one is required to perfect an appeal to the Director under Part 221 (that is, if the notice of appeal contains a statement of reasons for the appeal). The time periods required for filing are not the same and they run from different points of time. Inasmuch as the procedure under 161.10(g) is quite different from that followed in appeals under Part 221, an intention to modify this procedure in grazing cases would have been clearly manifested by a statement to that effect.

Finally, in a recent decision, *William S. Young et al.*, 66 I.D. 113 (1959), which involved the late filing of a notice of intention to appeal to the Director under 43 CFR 161.10(f), although the facts indicate that the notice was filed within the 10-day grace period provided by 43 CFR, 1954 rev., 1958 Supp., 221.92(b), the Department's decision was that the notice of intention was filed late and no discussion was made of the possibility that the 10-day grace period applied. Thus, impliedly, the Department considered the question and rejected the idea that the grace period was applicable to cases arising under the Federal Range Code.

The sentence that the appellants rely on, that "in other respects" an appeal shall be made in accordance with Part 221, appears only in 161.10(g). It does not appear in the preceding paragraph, 161.10(f), governing notices of intention to appeal. There would therefore be no basis for holding that the 10-day grace period provision in 221.92(b) applies to 161.10(f). To hold that it applies to 161.10(g) would create the strange and illogical result that an appellant cannot benefit from the grace period provision in filing his notice of intention to appeal but can benefit from it in filing the appeal itself.

It thus appears that the appellants' appeal was filed late, that there was no error in the Acting Director's decision, and that the appeal was properly dismissed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,  
Deputy Solicitor.

## CLAIMS OF RALPH E. STANDLEY AND OSCAR LINDEN

TA-191 (Ir.)

*Decided January 14, 1960*

Irrigation Claims: Damages—Practice before the Department: Generally  
Where claimants are not represented by counsel, every opportunity should be afforded them to make whatever presentation they may deem appropriate.

## APPEAL FROM ADMINISTRATIVE DETERMINATION

Ralph E. Standley and Oscar Linden, both of Courtland, Kansas, have appealed from an adverse administrative determination (T-D-138 (Ir.)), dated June 30, 1959, and made by the Regional Solicitor, Denver Region. In this determination the claims of the appellants<sup>1</sup> for damage to their property were denied.

The Regional Solicitor found that the claims were not cognizable under the Public Works Appropriation Act, 1959 (72 Stat. 1572, 1577),<sup>2</sup> because the damage sought was not based on a factual finding that the damage complained of was the direct result of some non-tortious activity of the Bureau of Reclamation, as required for recovery under that statute.<sup>3</sup>

In the appeal letter of July 27, 1959, appellant stated that all the facts had not been presented or "at least not forwarded" and that there were available six reliable witnesses. On July 29, 1959, the office of the Regional Solicitor advised one of the appellants (Ralph E. Standley) to write another letter, or furnish an affidavit, setting forth the facts which were not before the Regional Solicitor when he made his determination. In a letter of August 29, 1959, Mr. Standley said that he could furnish witnesses who "will swear under oath to this claim," and requested a response to his letter if additional information were needed. The record fails to disclose an acknowledgment of this letter; consequently, it must be assumed that these witnesses of appellants were not interrogated.

Especially where claimants are not represented by counsel, every opportunity should be afforded them to make whatever presentation

<sup>1</sup> Although two claims in like amounts were submitted, it is obvious that they are identical claims.

<sup>2</sup> The current statute is the Public Works Appropriation Act, 1960 (73 Stat. 491, 496).

<sup>3</sup> *Northern Pac. Ry. Co.*, T-560 (Ir.) (May 10, 1954), and administrative determinations cited therein.

they may deem appropriate.<sup>4</sup> It is believed that because of the apparent failure to respond to the letter of August 29, 1959, Mr. Standley concluded that no additional information would be considered by the Regional Solicitor and, therefore, submitted none to him.

Accordingly, I conclude that, in the circumstances, the appellants should be advised by the Regional Solicitor that they may submit to him any evidence which they deem necessary for a proper determination of their claims. They should be informed that such proof may be submitted within 30 days of the date of receipt of the Regional Solicitor's communication.

Hence, the original determination is vacated and the Regional Solicitor should make a supplemental determination on the basis of any additional information which may be submitted to him by the appellants. If the appellants should be dissatisfied with such determination they may file a further appeal to the Solicitor within 30 days of the date of its receipt.

#### CONCLUSION

Therefore, the matter is remanded to the Regional Solicitor who is directed to proceed as outlined above.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

### STATUS OF TITLE TO LANDS RESERVED FOR SCHOOL AND AGENCY PURPOSES ON THE FORMER KIOWA, COMANCHE, AND APACHE INDIAN RESERVATION, WESTERN OKLAHOMA

#### Indian Lands: Ceded Lands—Withdrawals and Reservations: Effect of— Statutory Construction: Generally

A statute which purports to ratify a cession agreement by which Indian tribes "\* \* \* hereby cede, convey, transfer, relinquish and surrender forever without any reservation, express or implied, \* \* \*" operates to ex-

<sup>4</sup>My approach in this respect parallels that taken by Mr. Thomas G. Meeker, General Counsel of the SEC, in an article on *Legal Assistance Available to the General Practitioner*, which appeared in 3 *Prac. Law.* 42-49 (1957), where he said, in part, at p. 43: "The statutes and rules administered by the Commission \* \* \* may, at times, be a little difficult to grasp for the general practitioner who is not versed in the field of securities regulation. Indeed, there are times when even the specialists and the SEC lawyers struggle with interpretative problems presented in particular cases. Whether the problem be simple or difficult, however, the Commission's staff is always available to assist in its solution—not because of any legal requirement to do so, but as a matter of sound administrative policy." (Emphasis supplied.)



January 15, 1960

tinguish completely the Indian title to the lands involved; and a subsequent reservation of a portion of those lands by the Secretary of the Interior for school and agency purposes for the benefit of the Indians does not revest title in the tribes.

### Indian Reorganization Act—Withdrawals and Reservations: Revocation and Restoration

The authority provided by section 3 of the Indian Reorganization Act to restore lands to tribal ownership extends to former tribal lands of an Indian reservation where, by legislation enacted subsequent to the extinguishment of Indian title, a tribal interest has been created in the proceeds derived from the sale of such lands.

M-36510

January 15, 1960

#### TO THE COMMISSIONER OF INDIAN AFFAIRS

You have requested an opinion on the title status of school and agency lands located within the former Kiowa, Comanche, and Apache Indian Reservation in Western Oklahoma. The lands in question are listed in a schedule upon which the Secretary of the Interior endorsed his approval June 20, 1901. This schedule appears in *Volume 4, p. 2, Schedule of Allotments, Kiowa, Comanche & Apache, Oklahoma*, of the land records of the Indian Bureau. The schedule shows that the lands were set aside to meet the administrative needs of the Department for agency, school, cemetery and like purposes. We understand that the need for certain of the school and agency sites no longer exists and the Bureau of Indian Affairs now wishes to dispose of them. In our analysis of this matter, the administrative sites set aside for school, school-farm, cemetery, agency and other similar uses are categorically referred to as school and agency lands.

For the reasons set forth below, we conclude:

I. The United States is vested with a fee simple title to the school and agency lands under consideration by virtue of section 6, act of June 6, 1900, 31 Stat. 672, 676.

II. (a) The sale of the school and agency lands no longer needed for administrative purposes is governed solely by the provisions of section 17, act of June 30, 1913, 38 Stat. 77, 92, and sales may be made only in the manner prescribed therein.

(b) This act did not divest the United States of its fee simple title to these lands but merely provided that the Indians receive the benefits of any proceeds in excess of \$1.25 an acre.

III. The title status of the school and agency lands was not judicially determined for the purpose of deciding the claim filed before the Indian Claims Commission in *Kiowa, Comanche, and Apache Tribes v.*

*United States*, Docket No. 32. Additional compensation was awarded the tribes for the lands acquired by the United States under the act of June 6, 1900, but no further payment for the school and agency lands was considered because the petition filed on behalf of the tribe before the Indian Claims Commission did not request compensation for those lands.

IV. Title to the school and agency lands that are no longer needed for the purpose for which they were reserved may be restored to tribal ownership in accordance with the provisions of section 3 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C., 1958 ed., sec. 463.

## I

The United States, pursuant to section 6, act of June 6, 1900, in terms of cession, acquired title to the lands upon which the school and agency sites were established from the Kiowa, Comanche, and Apache Tribes. Article I of section 6 provides that the tribes " \* \* \* hereby cede, convey, transfer, relinquish and surrender forever \* \* \* without any reservation, expressed or implied \* \* \*."

To determine the title status of these ceded lands involves the question of whether the extinguishment of Indian title was total and absolute or whether an equitable interest was retained by the tribes. In other cases involving the extinguishment of Indian title the courts have observed that the question whether the United States acquired an absolute fee title or became a trustee for the Indians as a consequence of the tribe's retained interest in the lands must depend in each case upon the express provisions contained in the instruments evidencing the terms of the cession or transfer. *Minnesota v. Hitchcock*, 185 U.S. 373 (1902); *Mille Lac Band of Chippewa Indians v. United States*, 229 U.S. 498 (1913); *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920); *Gila River Pima-Maricopa Indian Com. v. United States*, 140 F. Supp. 776 (Ct. Cl. 1956); and see 42 C.J.S. 710, sec. 37.

The Supreme Court had occasion to consider the act of June 6, 1900, in the case of *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). It was there decided that the United States had technically acquired title from the Kiowa, Comanche, and Apache Tribes by the legislation itself because that legislation, although purporting to ratify a cession agreement, had substantially changed the agreement which had been negotiated by the so-called Jerome Commission (25 Stat. 980, 1005), and tribal representatives in October 1892 (see *United States v. Kiowa, Comanche, and Apache Tribes*, 163 F. Supp. 603, 607 (1958) for description of those changes), and for the further reason that the requirements of Article XII of the Medicine Lodge

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Treaty of 1867 (15 Stat. 581, 585) were not met. The Court ruled that the plenary power of Congress over the Indian tribes and tribal property could not be limited by treaties or subsequent agreement so as to prevent repeal or amendment by a later statute.

The principle is now well established that Indian tribes are regarded as dependent nations, and that treaties and agreements with them have been looked upon not as contracts but as public laws which could be changed at the will of the United States. *Choate v. Trapp*, 224 U.S. 665, 671 (1912); *United States v. Seminole Nation*, 299 U.S. 417, 428 (1937). Thus, in the act of June 6, 1900, the United States acquired these lands upon its own terms and conditions without the consent of the Indians.

In *Lone Wolf v. Hitchcock*, *supra*, the act of June 6, 1900, was held to be constitutional and it was observed that the statute dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted the Indians or reserved for their benefit. The nature of the relationship existing between the Indians and the Government was described by the Court as a guardian-ward relationship, but in the absence of some language in the act of June 6, 1900, spelling out that relationship such appellation would appear to mean only that the relationship between the Indians and the Government is similar to or resembles such a legal relationship. See *Gila River Pima-Maricopa Indian Com. v. United States*, *supra*; *The Sioux Tribe of Indians v. United States*, 146 F. Supp. 229 (Ct. Cl. 1956).

By the terms of the act of June 6, 1900, the United States covenanted to pay to the tribes the sum of \$2,000,000 as the cash consideration for the cession of territory and relinquishment of Indian title and such payment was not contingent upon the sale of the ceded lands (Article VI). A provision for an allotment in severalty to each individual tribal member (Article II), and a provision to select and set aside 480,000 acres of grazing land to be used in common by the tribes (Article III), and the aforementioned cash consideration, represented the entire consideration to be paid to the Indian tribes under the act. See *Oklahoma v. Texas*, 258 U.S. 574, 592 (1921). No specific provision in the act required that these school and agency lands be set aside for the benefit of the Indians whereas, in contrast thereto, it was expressly provided that the 480,000 acres of grazing land be set aside for tribal use (Article III). The act contains no special procedure for setting apart of lands to be used for Indian school and agency purposes, and the only reference to such lands is a provision to the effect that school and agency lands would be

unavailable for allotment (Article III). The ceded lands of the Kiowa, Comanche, and Apache Reservation were to be opened to entry under the homestead and townsite laws of the United States (Article XI).

The ceded lands were opened by Presidential Proclamation [No. 6] of July 4, 1901 (32 Stat. 1975, 1977, Part II), save and except for certain lands including the lands set aside for grazing purposes, the allotted lands and the school and agency lands. In three subsequent proclamations (June 23, 1902, 32 Stat. 2007; Sept. 4, 1902, 32 Stat. 2026; Mar. 29, 1904, 33 Stat. 2340) portions of the school and agency lands reserved from entry under the Presidential Proclamation of July 4, 1901, were restored to the public domain because they were no longer required for administrative use. These three latter actions definitely show that the ceded lands reserved for school and agency purposes were considered to be Government-owned lands of the public domain under the terms of the act of June 6, 1900, and that by appropriate Presidential Proclamation they could be restored to the public domain for disposition under the appropriate public land laws.

As stated in *United States v. Myers*, 206 Fed. 387, 391 (1913), holding that the Rainy Mountain Boarding School (a school site listed in the schedule of lands set aside for administrative purposes and approved by the Secretary of the Interior on June 20, 1901) was not Indian country:

Was there any reservation, express or implied, incidental to the cession and relinquishment by these Indians by which their title to the lands in question was extinguished, that this or any other land conveyed should be devoted to these purposes? We can find none. The treaty of October 31, 1892, confirmed by act of Congress of June 6, 1900, specified explicitly the conditions and considerations subject to which the conveyance and cession was made. They are the allotment of land in severalty, the setting apart of 480,000 acres as grazing land, and the payment of \$2,000,000 in the manner provided. For these considerations the Indians "ceded, conveyed, transferred, relinquished and surrendered forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest of every kind and character." It would be impossible to select words operating more completely to extinguish every vestige of Indian title, and releasing the government more absolutely from every obligation, moral as well as legal. In Article 6 this purpose is made still more apparent. It is there said: "as a further and only additional consideration for the cession of territory and relinquishment of title, claim, and interest in and to the lands as aforesaid," the United States agrees to pay the \$2,000,000 nor do we find throughout the body of the act any provisions which operate to modify these positive and emphatic declarations.

More recently, in *Tooisgah v. United States*, 186 F. 2d 93, 99, 104 (1950), it was again observed that the act of June 6, 1900, operated to extinguish the Indian tribal title.

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In the case of the *Pawnee Indian Tribe of Oklahoma v. United States*, 109 F. Supp. 860, 906, 910 (Ct. Cl. 1953), it was contended by the Pawnee Tribe that lands reserved for school and agency purposes remained tribal property not subject to allotment and not ceded to the United States. Language contained in the provisions under which the United States acquired title from the Pawnee Tribe, the act of March 3, 1893, 27 Stat. 612, 644, 1 Kapp. 496, is much the same as the language appearing in the act of June 6, 1900. The Court of Claims in the *Pawnee* case noted, by way of comparison, that in an agreement with the Nez Perce Indians and the United States (28 Stat. 327), it was especially provided that all of the unallotted lands pass to the United States save certain portions excepted from the cession and reserved for the common use of the tribe and that it was further provided in that agreement that any of the ceded lands occupied and used under proper authority for religious or educational work among the members of the tribe might be patented to the religious organization for \$3 an acre. The Court remarked that—

The absence of any such provision in the Pawnee agreement tends to indicate that all unallotted lands not *previously* set apart for tribal use passed to the United States under the 1892 agreement and that the *subsequent* setting apart of the 755-acre tract was the setting apart of lands belonging to the United States so that it was not open to settlement but was reserved for the use of the tribe. (Emphasis added.)

Although the tract is referred to as "being reserved for the use of the tribe" the Court definitely decided that the land was Government-owned and obviously did not intend the aforequoted phrase to mean that a tribal interest existed in the title to the tract.

At times some difficulties in interpretation may be encountered because administrative sites have been variously referred to as reserves for the benefit of Indians, or, as in the Pawnee case, reserves for the use of Indian tribes. The reference is apparently made because the property was reserved from allotment, settlement, and sale to be used by the Government while performing Federal services for Indians, which use is one devoted largely to the benefit of the Indians. In this regard, tracts used for a particular purpose of Indian welfare have been set apart on tribal as well as Government-owned lands. It is quite clear, however, that the mode of use or the purpose thereof does not affect the title status of the lands. In the case of *Pawnee Indian Tribe of Oklahoma v. United States*, *supra*, the Court of Claims held that the title to the tract set aside for school and agency purposes had been ceded to the United States by the Pawnee Tribe, and that the subsequent reservation or setting apart of the lands for

school and agency purposes merely withdraws such lands from settlement and sale and does not revest title in the tribe.

This comparatively recent decision is an important aid in clarifying title questions concerning ceded Indian lands, since earlier views on the subject of the title status of school and agency reserves on ceded lands were doubtlessly influenced by an earlier decision in the Court of Claims, 56 Ct. Cl. 1 (1920), which observed that the 755-acre tract was tribally owned. (See Solicitor's memorandum of January 30, 1958, to the Secretary of the Interior on the subject of the status of title to Pawnee School and Agency lands.)

An interpretation of the provisions of the act of June 6, 1900, applying the logic used by the Court in the *Pawnee* case, reveals that none of the Kiowa, Comanche, and Apache Reservation lands affected by Article I were excepted from the cession, and that any lands occupied by a religious society or other organization for religious and educational work among the Indians might be patented to the organization so long as it is occupied and used for such purposes (Article III). Special provision was made to allot each individual member of the tribe 160 acres out of the lands ceded and conveyed (Article II), and to select and set aside from the ceded land for the use in common of said Indian tribes four hundred eighty thousand acres of grazing land (Article III). The school and agency lands were not to be set aside in accordance with any provision of the act. Therefore, under the principle advanced by the Court of Claims in the *Pawnee* case, it follows that an unrestricted title to the unallotted land not set aside for the common use of the tribes passed to the United States, and the establishment of school and agency sites on those lands operated as a setting apart of land belonging to the United States.

It seems clear from the judicial decisions hereinbefore discussed and from the express provisions of section 6 of the act of June 6, 1900, that the Indian title was completely extinguished and that the Kiowa, Comanche, and Apache Tribes did not retain an equitable interest in the title to the school and agency lands. Further, the setting aside of lands for school and agency purposes did not affect the title to the property. We therefore conclude that by virtue of the provisions of section 6 of the act of June 6, 1900, the title acquired by the United States to the school and agency lands is unqualified, unconditional, and not in trust.

## II

Legislation affecting all of the Government-owned school and agency sites was enacted when, by section 17 of the act of June 30, 1913,

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the Secretary of the Interior was authorized to sell those portions of the school and agency lands no longer needed for administrative purposes upon condition that if there were any proceeds in excess of \$1.25 per acre, the excess was to be deposited in the United States Treasury to the credit of the Kiowa Agency Hospital 4% Fund.

The enactment reads as follows:

That the Secretary of the Interior, in his discretion, is authorized to sell upon such terms and under such rules and regulations as he may prescribe the unused, unallotted, unreserved, and such portions of the school and agency lands that are no longer needed for administrative purposes, in the Kiowa, Comanche, Apache, and Wichita Tribes of Indians in Oklahoma, the proceeds therefrom, less \$1.25 per acre, to be deposited to the credit of said Indians in the United States Treasury, to draw until further provided by Congress four per centum interest, and to be known as the Kiowa Agency Hospital Fund, to be used only for maintenance of said hospital: \* \* \*

The record of the Senate hearings on this legislation (Hearings on H.R. 1917, the Indian Appropriation Bill for 1914, Pt. 1, p. 246, Before the Senate Committee on Indian Affairs, 63d Cong., 1st sess. 1913) contains an Interior Department report at page 251, dated January 30, 1912, stating that these school and agency lands were the property of the United States and had comprised approximately 10,313 acres, but 858.7 acres had already been disposed of or provision for sale made under the authority of various acts of Congress. The report emphasized that the Kiowa, Comanche, and Apache Tribes had received a nominal sum, approximating \$1.25 per acre, as consideration for ceding title to these lands and consequently the policy of the Department of the Interior was to provide that the original owner be benefited when the land was sold. The record shows that this legislation was not intended by the Congress to have the effect of a treaty stipulation or compact with the tribes but was in the nature of a gratuity. It would seem that Congress in enacting the legislation recognized that the United States was not in a position to profit at the expense of the Indians. We conclude, therefore, that the statute did not alter the title status of the school and agency lands but merely bestowed a gratuity on the Indians if these lands were sold for more than \$1.25 an acre.

Section 17 of the act of June 30, 1913, has not been amended or repealed by subsequent legislation and consequently is still in effect with respect to sale of the school and agency lands no longer needed for administrative purposes. Thus, Congress would have to enact further legislation to authorize the Secretary of the Interior to sell these lands

in any manner other than that provided for in said act. An example of such legislation is found in the act of July 1, 1946, 60 Stat. 348, 356, which provided for the sale of 320 acres excess to the needs of the Ft. Sill Indian School, with the net proceeds of sale being deposited to the credit of the tribes.

### III

On July 18, 1957, the Indian Claims Commission rendered its decision on the claim presented in *Kiowa, Comanche and Apache Tribes of Indians v. United States* (Docket No. 32). The decision was made upon a rehearing of its final order entered March 12, 1957 (5 Ind. Cl. Comm. 96). The tribes sued to obtain additional compensation for the lands which had been ceded to the United States in the act of June 6, 1900. The Commission held that the Indians were entitled to recover the difference between the value of the land acquired on June 6, 1900, and the purchase price paid thereof on that date. It was found that the lands acquired were worth \$2 an acre, whereas the Indians were only paid about 98.3 cents an acre. In the petition filed on behalf of the tribes, it was alleged that the school and agency lands had never been acquired by the United States under the act of June 6, 1900. During the litigation the parties stipulated that the United States acquired 2,033,583 acres by the act of June 6, 1900, and this stipulation was accepted by the Commission as representing the acreage upon which the tribes based their claim for additional compensation. The record shows the stipulation as follows: (Agreed to and admitted as Petitioner's Exhibit 102, June 30, 1953, Transcript p. 577).

\* \* \* The petitioner proposed the following stipulation with respect to the acreage involved in the litigation: Gross acreage in the Kiowa, Comanche, and Apache reservation, 2,991,933 acres; acreage not acquired by the United States under the Act of June 6, 1900; 1, allotments to individual Indians, 445,000 acres; 2, pasture lands, 480,000 acres; Number 3, reserved for agency, school, religious and other purposes, 10,319 acres; Number 4, wood preserve, 23,040 acres; making in all total acreage not acquired by the United States 958,350 acres. The result leaves a net acreage acquired by the United States under the Act of June 6, 1900, of 2,033,583 acres. It is further stipulated that the area of 2,991,933 acres includes acreage of the original Fort Sill Reservation of 23,040 acres.

Although the Commission accepted the stipulation of the parties and incorporated it verbatim in its opinion, the title status of the school and agency lands was not judicially determined thereby since these lands were not involved in the tribal claim presented to the Indian Claims Commission for adjudication. Consequently, the In-



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dian Claims Commission was not petitioned to decide nor did it purport to decide whether further payment for the school and agency lands was required by law. (The Indian Claims Commission Act, 60 Stat. 1049, as amended 25 U.S.C., 1958 ed., sec. 70-70w). As for the pleadings and stipulation of the parties, they manifestly have no legal significance in regard to matters dehors the litigation. We, therefore, conclude that the title status of the school and agency lands was not affected by the claims litigation before the Indian Claims Commission in Docket No. 32. See *United States v. Kiowa, Comanche, and Apache Tribes*, 163 F. Supp. 603 (Ct. Cl. 1958), wherein, upon appeal, the above-described award made to the tribes by the Indian Claims Commission was affirmed.

#### IV

The final question to be considered is whether section 3 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984; 25 U.S.C., 1958 ed., sec. 463 (also known as the Wheeler-Howard Act), authorizes restoration of title to these school and agency lands to the Kiowa, Comanche, and Apache Tribes. The restoration provision reads as follows:

\* \* \* The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: \* \* \*

On September 19, 1934, the Secretary of the Interior approved a recommendation by the Commissioner of Indian Affairs thereby directing a temporary withdrawal of lands on certain Indian reservations until the matter of their permanent restoration under section 3 of the Indian Reorganization Act could be given appropriate consideration. 54 I.D. 559; *Restoration of Lands, Formerly Indian, To Tribal Ownership*. (See Solicitor's memorandum to the Secretary of the Interior, September 17, 1934, advising that it is doubtful as to the authority of the Secretary to make a temporary withdrawal under section 3 of the Wheeler-Howard Act, and that other authority could be cited for withdrawal if the recommendation of the Commissioner is approved. See also, Sol. Op. M-35049, May 24, 1949.)

No specific reference in the order of temporary withdrawal is made to the subject school and agency lands, but a statement appears in the portion of the order containing the recommendation of the Commissioner of Indian Affairs, 54 I.D. 559, 563, to this effect:

If there are lands on any of the reservations named, other than the areas covered by the said citations, that were "opened", and for which the Indians

receive the proceeds when disposed of, it is intended that they be included in the withdrawal. Areas within regularly authorized reclamation projects are to be excepted.

[The citation concerning the Kiowa, Comanche, and Apache Reservation is the act of June 5, 1906, 34 Stat. 213, which repeals Article III of the act of June 6, 1900, to the extent that it was required to set aside 480,000 acres of grazing land for tribal use and provides for the sale of that acreage plus a 23,000-acre wood reserve (see 41 L. D. 263 for origin of this tract) with the money accruing therefrom to be placed to the credit of the tribes in the United States Treasury.]

It is, therefore, recommended that all undisposed-of lands of the Indian reservations named above that have been "opened", or authorized to be "opened" to sale, entry or any other form of disposal under the public land laws, or which are subject to mineral entry and disposal under the mining laws of the United States, with the exception of areas included in reclamation projects, be temporarily withdrawn from disposal of any kind, subject to any and all existing valid rights, until the matter of their permanent restoration to tribal ownership, as authorized by section 3 of the Act of June 18, 1934, *supra*, can be given appropriate consideration. The intention is to withdraw only lands the proceeds of which, if sold, would be deposited in the Treasury of the United States for the benefit of the Indians. In the event it is found that there are lands of other reservations that should have been included in this proposed withdrawal, appropriate recommendation will be made to have the withdrawal extended to embrace such lands.

By Secretarial Order of December 16, 1946, certain land susceptible to sale under the act of June 30, 1913 (an unused, unallotted, and unreserved tract, rather than school and agency lands) was restored to ownership of the Kiowa, Comanche, and Apache Tribes. The Solicitor had advised the Secretary on October 9, 1945 (M-36735) that the title to the land which was acquired by the United States in an unrestricted status under section 6 of the act of June 6, 1900, could be restored to the tribes for the reason that:

The 1934 order of withdrawal speaks of an "intention to withdraw only land the proceeds of which, if sold, would be deposited in the Treasury of the United States for the benefit of the Indians \* \* \*". The 1913 act, *supra*, provides for the allocation to the Indians, not of the entire proceeds of sale, but only the excess above \$1.25 per acre. Whether land, part of the proceeds of whose sale may accrue to the benefit of the Indians, is as a matter of law encompassed within the language quoted from the order is a difficult question to decide.<sup>13</sup>

However, I do not believe it is necessary now to decide that question. Under section 3 of the Wheeler-Howard Act, *supra*, the Secretary has the power to withdraw this lot and any other lands in the same category. Consequently, the problem is really one of policy. If it is determined as a matter of policy that this or any other such land should be withdrawn, then an unambiguous order or

<sup>13</sup> This excludes the "military, agency, school" and similar lands referred to at the beginning of this opinion which qualify as "remaining surplus lands" of an Indian reservation within the meaning of section 3 of the Wheeler-Howard Act, *supra*, and were unquestionably included in the said withdrawal.

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orders of withdrawal should be promulgated. If a contrary determination is made, then the entire question of the status of this land with reference to the public land laws may be resubmitted for consideration by this office.

The lands that have been restored to tribal ownership under section 3 of the 1934 act have generally been lands which had theretofore been ceded by Indian tribes under trust arrangements whereby the United States was to sell the lands and hold the proceeds of sale for the benefit of the tribes. (See Sol. Op. M-27878, May 20, 1936; 56 I.D. 300, 344, June 5, 1938; Sol. Op. M-29616, February 19, 1938.) However, as demonstrated by the restoration order of December 16, 1946, and the former Solicitor's opinion M-33936 (October 9, 1945), mentioned above, section 3 of the 1934 act has also been construed to authorize the restoration to the Kiowa, Comanche and Apache Tribes of their former lands which are subject to the sale provisions of section 17 of the act of June 30, 1913. The rationale of the interpretations and the administration by the Department of section 3 of the 1934 act is that the significant and controlling factor under this legislation is the existence of a tribal right to proceeds from the sale of the lands and not the narrower question of the existence or absence of a trust title. This interpretation is in harmony with the language of the act and its broad purpose to augment the tribal land base. Accordingly, it is our conclusion that the title to any of the school and agency lands which are found to be surplus to the needs for which they were reserved may be restored to tribal ownership in accordance with the provisions of section 3 of the act of June 18, 1934.

EDMUND T. FRITZ,  
Deputy Solicitor.

### APPEAL OF ADLER CONSTRUCTION COMPANY

IBCA-156 *Reconsideration denied January 20, 1960*

**Rules of Practice: Generally**  
Board of Contract Appeals decisions are final for the Department. Hence, request for reconsideration is unnecessary to exhaust administrative remedies.

#### PETITION FOR RECONSIDERATION

Appellant has filed a request for reconsideration of the decision, dated January 4, 1960, dismissing the appeal for lack of jurisdiction, "for the reason that such decision is contrary to the evidence and contrary to law."

The briefness of appellant's request and statements made at the pre-hearing conference of November 19, 1959, indicate that the request is taken primarily for the purpose to make sure that appellant has exhausted its administrative remedies.

43 CFR, 1954 rev., 4.15, relating to the making of requests for reconsideration of decisions of the Board, provides:

A request for reconsideration may be filed within 30 days after the date of the decision. Reconsideration of a decision, which may include a hearing or rehearing, may be granted if, in the judgment of the Board, sufficient reason therefor appears.

The making of a request for reconsideration is not mandatory. Hence, even in the absence of a request for reconsideration, and a decision thereon, decisions "of the Board on \* \* \* appeals are final for the Department," as provided in 43 CFR, 1954 rev., 4.4.

The request for reconsideration does not add anything which was not in the record before the hearing official nor alleges any specific error in the decision. Hence, the request for reconsideration is denied.

PAUL H. GANTT, ACTING CHAIRMAN

I concur:

HERBERT J. SLAUGHTER, MEMBER

#### APPEAL OF FOSTER WHEELER CORPORATION

IBCA-61

*Decided January 26, 1960*

#### Contracts: Generally—Contracts: Suspension and Termination

Even in absence of a termination provision in the contract, the contracting officer may terminate a contract for the convenience of the Government.

Whether or not the public interest requires a termination for the convenience of the Government is a matter for administrative determination.

#### BOARD OF CONTRACT APPEALS

This case has been pending on the Board's docket since November 4, 1955. In an effort to expedite the disposition of this appeal, a hearing-conference was held in Pittsburgh, Pennsylvania, on December 17, 1959. The contracting officer testified on the precise issue as to whether the termination for default issued on July 9, 1953, should remain in full force and effect or whether the termination for default should be set aside and converted into one for the convenience of the Government.

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In order to expedite the eventual disposition of this matter by the Comptroller General,<sup>1</sup> the parties stipulated "that the Hearing Official, Mr. Gantt, is authorized to hear, consider, and determine this matter alone. The parties waive any objections on their part that he decides the issues by himself."

At the end of the hearing, Mr. Gantt dictated a tentative opinion into the record, but stated that additional research would be necessary, and additional data would have to be produced through a cooperative effort of the parties. The research having been completed, and the data having been furnished by the parties, and audited by the contracting officer,<sup>2</sup> this opinion then represents the final opinion and decision for the Department of the Interior in this matter.

It would be repetitious and uneconomical to restate the basic facts and circumstances in this matter. They are precisely stated in the letter of the Comptroller General of the United States to the Secretary of the Interior dated April 19, 1954, B-119159. These facts and circumstances have been established by the stipulation of the parties and are supported by thirteen exhibits which are enumerated and summarized in the "Summary Transcript [of the] Pre-Hearing Conference and Hearing, December 17, 1959." For convenience, and to avoid repetition, that summary transcript is hereby made a part of this opinion and designated "Appendix A."

Especially the circumstances and facts relating to Change Order No. 1 and the revision in drawings approved on November 25, 1952, are pertinent to the issue stated above.

An examination of Change Order No. 1 of November 12, 1952 (Exhibit No. 3) shows that the parties specifically agreed to pre-

<sup>1</sup>The Comptroller General transmitted the matter to the Secretary of the Interior on April 19, 1954, B-119159 (Exhibit No. 10). In that letter the Comptroller General stated on page 6: "In view of the possibility that a court might hold that the delivery time fixed by change order No. 1 to the contract was still subject to the qualification with respect to the availability of a priority rating for critical materials made in the contractor's bid, the contracting officer's decision should contain an appropriate finding of fact relative to the contractor's contention that the delay was caused, in part, by priority difficulties. Also, it should contain a finding of fact relative to the contractor's contention that the last of the drawings required to be submitted for approval under the contract was not finally approved until November 25, 1952. As pointed out in the referred-to memorandum of the contracting officer, change order No. 1, which bears the written acceptance of the contractor, contains the statement that the final approved drawings were released on April 11, 1952."

Pursuant to his contractual right the contractor appealed from the Finding of Fact and Decision of the Contracting Officer dated October 4, 1955 (Exhibit No. 11), on November 4, 1955 (Exhibit No. 12). The Comptroller General (page 4) retained the matter "for settlement as a claim." This retention of jurisdiction does not, of course, extend to the disposal of "any dispute concerning a question of fact" under the contract.

<sup>2</sup>Additional Finding of Fact and Determination by the Contracting Officer of January 14, 1960, Contract Im-6678.

serve, in addition to the changes made in the order, all other terms and conditions of the contract. It was further provided that these terms and conditions "shall remain in full force and effect." Hence, this reservation of the parties, in its ultimate effect, kept in full force and effect that provision of the initial contract which provided for a flexible delivery period. That provision reads as follows:

Shipment—10-12 Months after receipt of order and approval of drawings based on receipt of priority rating.

As pointed out on page 6 of the Comptroller General's letter cited above, one of the cardinal issues in this matter is whether or not "the last of the drawings required to be submitted for approval under the contract was not finally approved until November 25, 1952." The Comptroller requested that a finding of fact should be made on this precise issue. As will be seen below, the establishment of a finding of fact on this precise point will be dispositive in this dispute as far as the Board is concerned. Hence, no other issue has been made the subject of inquiry by the hearing official.

The allegations by the contractor-appellant and the counter allegations by the Government are completely conflicting on this point. It thus became necessary for the hearing official to call the contracting officer as a witness. The summary transcript, in its pertinent part, reads as follows:

Mr. GANTT: I am handing you a copy of the letter of November 25, 1952, Exhibit No. 4. Would you please describe the circumstances leading up to the writing of this letter?

Mr. SHOUB: The letter of November 25, 1952, was written by Mr. J. T. Donovan, a Mechanical Engineer in the employ of the Bureau of Mines. Mr. Donovan was at that time responsible for following the progress of the work under Contract No. Im-6678 and was charged with the responsibility of reviewing and approving drawings and other engineering matters provided by the contractor. This letter and Drawing No. H-33629-F were sent the contractor to indicate Mr. Donovan's official acceptance of the drawing made by the contractor. Mr. Donovan had been assigned by the Contracting Officer to perform this duty.

Mr. GANTT: Mr. Shoub, I am handing you a copy of a letter addressed by J. W. Ogden, of the Industrial Division of appellant, addressed to the Bureau of Mines, Attention: Mr. J. T. Donovan, dated October 23, 1952, which reads as follows:

"During the recent visit of your inspector to our Carteret Plant, we were informed that these units are to be arranged so that the shell flanges are to be bolted directly together. This will mean very close tolerance being maintained on the position of the shell nozzles.

"In view of the fact that this close tolerance was not previously mentioned on your drawings or specifications, we were proceeding on the assumption that a standard tolerance would be acceptable. Since this is not the case special provisions must be made in fabricating these units to maintain correct alignment of the nozzles.

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"We have reviewed the increased cost for making these provisions and find that it will be necessary to request an additional charge of TWO HUNDRED DOLLARS (\$200.00) per unit, or a total of TWELVE HUNDRED DOLLARS (\$1,200.00) for the six (6) units.

"There will be no charge for the increased stress relieving temperature.

"We would appreciate having your change order in the above amount in order to cover our increased costs."

Does this letter appear in your official files?

Mr. SHOUB: Yes.

Mr. GANTT: The letter is admitted as Exhibit No. 12-A. Does the second paragraph of this letter represent the true state of facts from an engineering and process standpoint?

Mr. SHOUB: Yes.

Mr. GANTT: Could you give us the background of this provision and particularly discuss whether the change approved on November 12, 1952, was caused by an anticipated Government need regarding the future installation of the equipment, or was merely for the convenience of the contractor?

Mr. SHOUB: Although it had always been the plan of the Bureau of Mines to install these heat exchangers in a series arrangement, it was not until a Government inspector in the course of his observance of production at appellant's plant, realized the specifications did not provide sufficient precision in the placement and arrangement of some of the parts. Hence, the contractor was instructed by the Government to maintain certain more critical tolerances in the fabrication of the heat exchangers. These changes were requested in order to facilitate installation after delivery, and also to make it possible to design in advance the piping and supporting framework from which the heat exchangers would be suspended. The changes were caused entirely by the needs of the Government.

Mr. GANTT: Could you, in layman's language, explain the significance of the approval which appears in the letter of November 25, 1952, Exhibit No. 4?

Mr. SHOUB: The purpose of the change was to modify the specifications so that the Government would be assured that when the heat exchangers were delivered they could be connected together and to prefabricated piping without either having to modify the heat exchangers or piping or provide any special adapters.

Mr. WENTWORTH: Did the dollar amount reflect the importance of the change?

Mr. SHOUB: No. It would have very probably cost the Government significantly more in the final installation if this change had not been made before fabrication.

Mr. GANTT: Mr. Wentworth, are there any further questions?

Mr. WENTWORTH: No. No further questions.

Mr. GANTT: Is there anything you want to add, Mr. Shoub?

Mr. SHOUB: No.

This testimony establishes the following facts and circumstances:

1. The pertinent drawing was finally approved on November 25, 1952.
2. The need for the drawing and its approval on November 25, 1952 was prompted by the need of the Government to fill a void in the contract specifications and to facilitate the subsequent installation of the equipment by the Government either by contract or by force-account work, after the delivery of the equipment by the contractor-appellant.

3. The additional work provided for in the approved drawing was for the benefit of the Government. It was not merely for the convenience of the contractor.

The parties anticipated in the type of contract involved here<sup>3</sup> that delivery would be made 10 to 12 months after the approval of drawings. Hence, the approval of Drawing No. H-33629-F on November 26, 1952, extended automatically the delivery period under the contract for at least 10 months after that date. It follows that the contractor-appellant was not in default on July 9, 1953. Hence, a termination for default could not be validly made by the contracting officer on that date and cannot be allowed to stand.

The Comptroller General has repeatedly held that "when the public interest requires such action, the Government may terminate a contract notwithstanding the fact that the contract does not provide for the termination thereof."<sup>4</sup>

In the landmark decision of 18 Comp. Gen. 826 (1939), the Comptroller General states, in its pertinent part, as follows:

It has been held that when the public interest requires such action, a contracting officer may terminate a contract which he was authorized to make and that he may, by supplemental contract, agree with a contractor upon the compensation to be paid for work already performed, etc., provided the amount agreed upon is proper and just and the contractor will accept such amount in full and final settlement of all rights incident to or arising out of the original and supplemental contracts. See *United States v. Cortiss Steam Engine Co.*, 91 U.S. 321; 14 Comp. Dec. 589; 15 *id.* 439; 21 *id.* 134; 26 *id.* 170; and 4 Comp. Gen. 526. The determination as to whether the public interest requires such termination

<sup>3</sup> The parties stipulated "regarding the background of this procurement that it concerns a process and manufacturing which before the date had not been undertaken in the United States insofar as the particular pressures and materials of construction are concerned.

"The parties further stipulate that the contract provides for the manufacturing of six identical heat exchangers. The parties stipulate that after completion of these heat exchangers it was intended that the Bureau of Mines would install them by a follow-up contract or through force account work. It is further stipulated that of these six heat exchangers at least two had reached a stage of near completion by July 9, 1953. Regarding all heat exchangers the Bureau of Mines provided the basic conceptual design and layout and overall dimensions; the mechanical and fabricating details had to be provided and performed by the contractor.

"The parties further stipulate that the state of art and the particular division of responsibility between the Bureau of Mines and the contractor was partially in the nature of a research and development cooperative undertaking and so understood by the parties.

"The parties further stipulate that there existed no actual experience regarding the type of pressure and materials involved in this contract, but that some experience gained by German industry was available.

"The parties further stipulate that in view of this background the end-product has to be considered as a custom built product to be manufactured in a special manner."

These stipulations explain the rationale for the rather inconcise and unlegant, yet extremely flexible, delivery provision of this contract. The unpreciseness of the delivery provision led, of course, to the dispute and the appeal.

<sup>4</sup> Dec. Comp. Gen. B-137327, February 12, 1959; 29 Comp. Gen. 36 (1949); 18 Comp. Gen. 826 (1939).



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is a matter for administrative decision and does not rest with this office which is concerned primarily with the availability of the appropriation for any expenditure resulting from the termination.

In an unpublished decision of February 12, 1959, *B-137827*, the Comptroller General sets forth concisely the following procedures for application as in the instant case:

If on the other hand the default termination be found to have been not justified, it would appear (assuming that it would not be feasible or desirable to continue or resume performance under the contract) that the contractor would have some claim against the Government for compensation for work already performed, etc. The effect of treating the contract as having been terminated for the convenience of the Government is ordinarily to bring into play contractual provisions fixing the method of settling and adjusting the contractor's claims. In the absence of any such provisions in the subject contract, the settlement of the contractor's claims in this case would necessarily be for handling under normal claims procedures, whether the termination be characterized as one for the convenience of the Government or by mutual consent, or as a breach by the Government.

#### CONCLUSION

In view of the facts and circumstances established and recited above, the Board finds that the termination for default by the contracting officer of July 9, 1953, was not valid. Hence, the decision of the contracting officer of October 4, 1955, is reversed, and Contract No. Im-6678 should be treated as having been terminated for the convenience of the Government.

The Comptroller General by his letter of April 19, 1954, cited above, retained the subject matter of the contract "for settlement as a claim." Consequently, the Contracting Officer is directed to transmit to the Comptroller General for direct settlement the pertinent documents including a copy of this opinion and decision together with Appendix A and thirteen exhibits enumerated therein, and accompanied by a copy of the "Additional Finding of Fact and Determination by the Contracting Officer, Contract Im-6678," of January 14, 1960.

PAUL H. GANTT,  
*Acting Chairman.*

SUMMARY TRANSCRIPT PRE-HEARING CONFERENCE AND HEARING  
DECEMBER 17, 1959, APPEAL OF FOSTER WHEELER CORPORATION,  
TBCA-61

Appearance for Appellant: E. F. Wentworth, Jr. and C. F. Denny, both of  
New York City, New York.

Appearance for the Government: Earle P. Shoub and Edward J. Stelle, both  
of Pittsburgh, Pennsylvania.

Mr. Gantt, Acting Chairman of the Board of Contract Appeals, announces that he has been duly designated as the Hearing Official in this matter.

At the request of both parties he has called this Pre-Hearing Conference in order to simplify the issues; for the purpose of introduction of documents; for the admission of facts; for the purpose of obtaining stipulations; and for the purpose of obtaining any other materials which would help in the disposition of this case.

Mr. GANTT: I am confronted in this matter with a mountain of paper weighing approximately 18½ pounds. Further, this matter has been on the docket of the Board since 1955. In order to dispose of this matter now within a reasonable time, it is obvious that the evidentiary material must be streamlined. Issues must be simplified. This matter is complicated by the fact that witnesses have become unavailable. Even a tape record faded out. Consequently, it may become necessary to establish certain facts by the taking of testimony. Lastly, in a matter of such complexity, aggravated by the time factors involved, it would seem advisable to establish as much of the basic, underlying events by stipulation, if obtainable from the parties.

The parties stipulate as follows:

The invitation for bid for the furnishing of six identical heat exchangers for the Bureau of Mines, Coal-to-Oil Demonstration Plant at Louisiana, Missouri, was issued on March 2, 1951. Bid opening was held on April 2, 1951. Award was made on June 13, 1951; notice to proceed was given and received on the same day. The estimated contract price amounted to \$109,380.00 plus escalation for actual increase for labor and materials not to exceed ten percent of the contract price. The standard forms utilized were U.S. Standard Forms No. 32 (Nov. 1949 ed.), 33 and 36.

The parties stipulate regarding the background of this procurement that it concerns a process and manufacturing which before the date had not been undertaken in the United States insofar as the particular pressures and materials of construction are concerned.

The parties further stipulate that the contract provides for the manufacturing of six identical heat exchangers. The parties stipulate that after completion of these heat exchangers it was intended that the Bureau of Mines would install them by a follow-up contract or through force account work. It is further stipulated that of these six heat exchangers at least two had reached a stage of near completion by July 9, 1953. Regarding all heat exchangers the Bureau of Mines provided the basic conceptual design and layout and overall dimensions; the mechanical and fabricating details had to be provided and performed by the contractor.

The parties further stipulate that the state of art and the particular division of responsibility between the Bureau of Mines and the contractor was partially in the nature of a research and development cooperative undertaking and so understood by the parties.

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The parties further stipulate that there existed no actual experience regarding the type of pressure and materials involved in this contract, but that some experience gained by German industry was available.

The parties further stipulate that in view of this background the end-product has to be considered as a custom built product to be manufactured in a special manner.

Prior to the invitation for bids on March 2, 1951, there had been issued another invitation for bids. All bids then received were rejected because they did not meet the Bureau of Mines requirements price wise. Hence, changes were made by the Bureau in the specifications in order to enable the submission of lower bids. At the bid opening of March 2, 1951, only one bid, that of appellant, was received.

The parties stipulate that the contract involved is Im-6678 of June 13, 1951 and appears as Exhibit No. 1.

Part of Standard Form No. 36 entitled "Standard Government Form of Continuation Schedule for Standard Form 31 or 33 (Supplies)," contains following agreement regarding delivery which is part of the contract:

"Shipment—10-12 Months after receipt of order and approval of drawings based on receipt of priority rating."

Standard Form No. 36 is admitted as Exhibit No. 2.

The parties stipulate that the delivery schedule set forth there constitutes the delivery schedule contemplated in the initial contract. The parties further stipulate that the "order" referred therein is Purchase Order No. LA-51-2594 of June 13, 1951.

The parties further stipulate that Dr. L. L. Hirst was the Contracting Officer from March 2, 1951 until July 8, 1953, inclusive. Mr. Earle P. Shoub was appointed Contracting Officer on July 9, 1953 and continues as such regarding Contract Im-6678.

The parties further stipulate that Change Order No. 1 of Contract Im-6678 was issued by Dr. L. L. Hirst on November 12, 1952. Change Order No. 1 is admitted as Exhibit No. 3.

The parties further stipulate that on November 25, 1952, Mr. J. T. Donovan addressed a letter to the Foster Wheeler Corporation, Attention: Mr. W. F. Keegan, with reference to approval of the revised drawing No. H-33629-F. This letter is admitted in evidence as Exhibit No. 4.

The parties further stipulate that drawing No. H-33629-F bears the following legend:

"Apprd

JD 11/25/52"

Drawing H-33629-F is admitted as Exhibit No. 5. The parties stipulate that the initials of Mr. Donovan are genuine and that he approved the drawing on November 25, 1952.

Mr. Shoub, as successor Contracting Officer, sent a teletype to Foster Wheeler on July 9, 1953, which reads as follows:

'You are advised that because of your failure to deliver (sic) within the contract period the shell and tube type exchangers called for under Bureau of Mines Contract No. Im-6678, dated June 13, 1951, /Purchase Order LA-51-2594/, the contract is cancelled by the Government.'

This teletype is admitted as Exhibit No. 6.

The parties further stipulate that on July 13, 1953, Mr. Shoub sent a letter to the Foster Wheeler Corporation, which contains on page 2 a statement as to the understanding of the Contracting Officer as to the extent of completion of the six units as of that date. This letter is admitted as Exhibit No. 7.

The parties agree that Exhibit No. 7 with one exception represents the actual extent of completion of work on the part of the appellant. The parties further agree regarding Unit No. 5 as follows: All materials were on hand; fabrication of all the parts had been completed, but assembly of the components had not been started.

The parties further stipulate that in answer to the teletype of July 9, 1953, appellant sent a letter dated July 13, 1953, addressed to the Contracting Officer.

This letter is admitted as Exhibit No. 8.

The parties stipulate that in an effort to dispose of this matter fairly and equitably but in view of doubt as to the extent of the authority of the Contracting Officer to settle or compromise, it was submitted to the Comptroller General of the United States for direct settlement. The parties stipulate further that by letter of November 13, 1953, the Administrative Assistant Secretary of the Department of the Interior transmitted the matter to the Comptroller General for direct settlement. This letter is admitted as Exhibit No. 9.

The parties stipulate that on April 19, 1954, the Comptroller General addressed a letter (B-119159) to the Secretary of the Interior, which was received on April 21, 1954. This letter is admitted as Exhibit No. 10.

The parties stipulate that pursuant to the request contained in that letter Contracting Officer Shoub issued Finding of Fact and Decision on October 4, 1955. This document is admitted as Exhibit No. 11.

The contractor appealed from that Finding of Fact on November 4, 1955, received November 7, 1955. The appeal is admitted as Exhibit No. 12.

The parties further stipulate that on May 2, 1956, a Pre-Hearing Conference was held in which the late Chairman of the Interior Board of Contract Appeals, Haas; members of the Board Seagle and Slaughter; Contracting Officer Shoub; Department Counsel Indritz; and Messrs. Wentworth, Denny, and Longworth of appellant attended.

The parties further agree that no provision had been made for reporter services for this meeting by either the Board or Department Counsel, and that, as a makeshift agreement, a wire recorder was on the spur of the moment provided by Department Counsel.

The parties further stipulate that an agreement as to the contents of the Pre-Hearing Conference has not been reached as yet because during transcribing from the wire, the recording was eradicated. The parties further stipulate that no agreement could be reached on the exact happenings of events at that meeting.

The Hearing Official announces that an examination of the appeal file reveals no action on the part of the Board from May 2, 1956 until the death of former Chairman Haas in June 1959.

He further states that he was appointed Acting Chairman of the Board on September 1, 1959. In view of these circumstances the Hearing Official, on his own motion, feels it incumbent to establish certain facts and data by the taking of testimony from Contracting Officer Shoub. The parties do not inter-

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pose any objection to the use of such procedure. Counsel for appellant reserves the right to cross-examine witnesses.

The Hearing Official calls to the attention of the witness the provisions of 18 USC 1001. After reading the pertinent Code provision, the witness states that he understands them and is familiar with the Code provision.

Mr. GANTT: What is your full name?

Mr. SHOUB: Earle P. Shoub.

Mr. GANTT: What is your address?

Mr. SHOUB: 2943 Norwood Avenue, Pittsburgh 14, Pennsylvania.

Mr. GANTT: What is your official title?

Mr. SHOUB: Regional Director, Bureau of Mines.

Mr. GANTT: Do I understand correctly that you have been Contracting Officer from July 9, 1953 until the present time on this Contract No. Im-6678?

Mr. SHOUB: Yes.

Mr. GANTT: I am handing you a copy of the letter of November 25, 1952, Exhibit No. 4. Would you please describe the circumstances leading up to the writing of this letter?

Mr. SHOUB: The letter of November 25, 1952, was written by Mr. J. T. Donovan, a Mechanical Engineer in the employ of the Bureau of Mines. Mr. Donovan was at that time responsible for following the progress of the work under contract No. Im-6678 and was charged with the responsibility of reviewing and approving drawings and other engineering matters provided by the contractor. This letter and Drawing No. H-33629-F were sent the contractor to indicate Mr. Donovan's official acceptance of the drawing made by the contractor. Mr. Donovan had been assigned by the Contracting Officer to perform this duty.

Mr. GANTT: Mr. Shoub, I am handing you a copy of a letter addressed by J. W. Ogden, of the Industrial Division of appellant, addressed to the Bureau of Mines, Attention: Mr. J. T. Donovan, dated October 23, 1952, which reads as follows:

"During the recent visit of your inspector to our Carteret Plant we were informed that these units are to be arranged so that the shell flanges are to be bolted directly together. This will mean very close tolerance being maintained on the position of the shell nozzles.

"In view of the fact that this close tolerance was not previously mentioned on your drawings or specifications, we were proceeding on the assumption that a standard tolerance would be acceptable. Since this is not the case special provisions must be made in fabricating these units to maintain correct alignment of the nozzles.

"We have reviewed the increased cost for making these provisions and find that it will be necessary to request an additional charge of TWO HUNDRED DOLLARS (\$200.00) per unit, or a total of TWELVE HUNDRED DOLLARS (\$1,200.00) for the six (6) units.

"There will be no charge for the increased stress relieving temperature.

"We would appreciate having your change order in the above amount in order to cover our increased costs."

Does this letter appear in your official files?

Mr. SHOUB: Yes.

Mr. GANTT: The letter is admitted as Exhibit No. 12-A. Does the second paragraph of this letter represent the true state of facts from an engineering and process standpoint?

Mr. SHOUB: Yes.

Mr. GANTT: Could you give us the background of this provision and particularly discuss whether the change approved on November 12, 1952, was caused by an anticipated Government need regarding the future installation of the equipment, or was merely for the convenience of the contractor?

Mr. SHOUB: Although it had always been the plan of the Bureau of Mines to install these heat exchangers in a series arrangement, it was not until a Government inspector in the course of his observance of production at appellant's plant, realized the specifications did not provide sufficient precision in the placement and arrangement of some of the parts. Hence, the contractor was instructed by the Government to maintain certain more critical tolerances in the fabrication of the heat exchangers. These changes were requested in order to facilitate installation after delivery, and also to make it possible to design in advance the piping and supporting framework from which the heat exchangers would be suspended. The changes were caused entirely by the needs of the Government.

Mr. GANTT: Could you, in layman's language, explain the significance of the approval which appears in the letter of November 25, 1952, Exhibit No. 4?

Mr. SHOUB: The purpose of the change was to modify the specifications so that the Government would be assured that when the heat exchangers were delivered they could be connected together and to prefabricated piping without either having to modify the heat exchangers or piping or provide any special adapters.

Mr. WENTWORTH: Did the dollar amount reflect the importance of the change?

Mr. SHOUB: No. It would have very probably cost the Government significantly more in the final installation if this change had not been made before fabrication.

Mr. GANTT: Mr. Wentworth, are there any further questions?

Mr. WENTWORTH: No. No further questions.

Mr. GANTT: Is there anything you want to add, Mr. Shoub?

Mr. SHOUB: No.

Mr. GANTT: Gentlemen, I believe we have our 18½ pounds of material reduced to manageable proportions and to a simplified issue. For the record, I would like to ask the parties whether they agree that the following three issues have now been joined. However, I caution that it may not be necessary to dispose all three issues.

The first issue as I see it concerns the effect of the approval of the drawing of November 25, 1952 in the light of the delivery terms of the contract.

The second issue concerns the effect of the steel strike on the instant procurement.

The third issue concerns the effect of higher priority orders on the instant procurement.

In fact, gentlemen, as I have studied the record and have now the pertinent facts established, which previously did not appear from the record and the appeal file, I am now ready to rule on the issues.

The parties stipulate that in order to expedite the eventual disposition of this matter by the Comptroller General, that the Hearing Official, Mr. Gantt, is authorized to hear, consider, and determine this matter alone. The parties waive any objections on their part that he decides the issues by himself.

Mr. Gantt states that he is able to render his decision and opinion immediately subject to such corrections and research as may be necessary due to the unavailability of legal materials.

\* \* \* \* \*

## APPEAL OF PETROLEUM OWNERSHIP MAP COMPANY

IBCA-169

*Decided January 19, 1960\**

**Contracts: Additional Compensation—Contracts: Changes and Extras—  
Contracts: Contracting Officer**

When a tract book inspection made in connection with the preparation of public lands records was expanded from its limited purpose of checking missing documents into a more comprehensive inspection of the accuracy and completeness of the contractor's work, the contractor is not entitled to extra costs of supplying additional services and equipment in connection with the expanded inspection when the contracting officer found that the expanded inspection included the performance of functions that were the contractor's responsibility and were of greater value to the contractor than the amount of its claim, and the contractor during the long period of the expanded inspection never requested payment for the additional services and equipment.

### BOARD OF CONTRACT APPEALS

The Petroleum Ownership Map Company, of Casper, Wyoming (hereinafter referred to as POMCO), has filed a timely appeal from the findings of fact and decision of the contracting officer dated June 20, 1958, denying its claim for additional compensation in the amount of \$7,420.56 under Contract No. 14-11-006-8, with the Bureau of Land Management (hereinafter designated as the Bureau).

The contract, which was dated September 28, 1956, was executed on U.S. Standard Form 33 for supply contracts (revised June 1955), and incorporated the general provisions of U.S. Standard Form 32 (Nov. 1949 edition).

The contract, which was for the lump sum price of \$181,636.50, was part of the program of the Bureau for improving the public lands records of the United States. The execution of this program also involved a considerable number of other contracts, two of which have led to appeals already decided by the Board. The contract involved in York Tabulating Service, Inc.<sup>1</sup> provided for the establishment of an index controlling the ownership and use status of the public lands and resources of the United States, known as the control document index.<sup>2</sup> The contract involved in the present appeal was also involved in a prior appeal of POMCO.<sup>3</sup> The contract required POMCO

\*Not in chronological order.

<sup>1</sup> 65 I.D. 120 (1958).

<sup>2</sup> This index was in the form of tabulating cards, and the data used in its compilation was in the form of positive microphotographic film images of the public land records of the United States. The microfilms were mounted on cards which were known as "aperture cards" because the film was set in apertures cut in the cards.

<sup>3</sup> 65 I.D. 261 (1958).

to make use of the control document index to prepare new land records for the public domain lands of the United States and their resources for the State of Utah. These land records were to include a master title plat for each township; one or more use status plats for each township; an historical index for each township, which was to be in the form of a narrative summary of all actions affecting the public lands; and, finally, copies of the master title plat and the historical index for each township. The specifications required the work to be performed with 100 percent of accuracy and completeness, and it was made subject at all times to inspection by representatives of the Bureau "at their convenience and option."<sup>4</sup>

The previous appeal of POMCO was based on an overrun of estimated quantities of aperture cards, cross-reference cards, and irregular townships which it had to process or prepare in the course of the performance of the contract. The present appeal has arisen out of an inspection procedure to which the POMCO and the Bureau agreed during the performance of the contract, and which was formalized in a change order.

In all, five change orders were entered and accepted by POMCO. By virtue of the provisions of Change Orders for Extra Work Nos. 2, 3, and 4, the time for completion of all work under the contract was extended from the original completion date, which was June 30, 1957, to March 15, 1958. Some of the change orders made provision for the performance of various items of extra work<sup>5</sup> but the only one directly involved in the present appeal is Change Order for Extra Work No. 1, which was accepted by POMCO on March 5, 1957.

The change order grew out of a conference between representatives of POMCO and the Bureau, the results of which were recorded in a letter dated January 10, 1957, from the former to the latter. The change order which was the ultimate result of this conference provided for the payment to POMCO of an additional \$15,768.54, for extra work consisting, principally, of the correction by POMCO of errors and omissions in the control document index and of the indexing of mineral patents.

At the conference it was agreed that a tract book inspection or check by Government inspectors would be an appropriate means of determining what essential documents were missing from the control document index which the Government had furnished. However, the contract required appellant to include in the historical index and master title plats certain information to be obtained by appellant

<sup>4</sup>As provided in paragraph 57 of the specifications, and in paragraph 2 of the General Requirements and Conditions.

<sup>5</sup>The additional compensation to POMCO provided for in the five change orders totaled \$71,940.71, which thus increased its earnings to \$253,577.21.



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from the land office serial registers, and as a step in its own internal procedure for carrying on the contract work appellant had already made provision for a tract book check by its own employees as a means of ascertaining what essential documents in the serial registers were missing from the historical index as initially compiled by appellant. At the conference it was agreed to combine the two inspections or checks. In the numbered paragraph 5 of the January 10 letter, the situation was described as follows:

No provision has elsewhere been made for the increased amount of time necessary to complete the check of the tract books resulting from the errors and omissions in the Document Control Index.

It was agreed that the tract book check would be an excellent way for the government inspectors to verify (sic) completeness and accuracy of the Historical Index and that this portion of the work would be performed by government inspectors, Pomco furnishing the necessary microfilms of the tract book which would be reasonably legible, two clerks to assist the inspectors, and two microfilm readers. No additional compensation to Pomco or to the government would be necessary, and that portion of Pomco's procedure necessitating the check of the tract books would be eliminated.

The agreement was subsequently formalized in paragraph 5 of Change Order for Extra Work No. 1 as follows:

Government inspectors will perform the tract book check together with the Contractor. The Contractor, without cost to the Government, will furnish the necessary microfilms of the tract book, two microfilm readers and two clerks to assist the inspectors. This provision does not relieve the contractor from the responsibility for the accuracy and completeness of the records.

The tract book inspection proceeded from about the time of the acceptance of the change order by POMCO until about the end of January 1958, and not long thereafter POMCO completed all of its work under the contract.<sup>6</sup> However, the tract book inspection was expanded in the course of its performance far beyond the scope that had been contemplated when the change order providing for it had been entered. It developed from a relatively simple review to determine what documents were missing into an elaborate and extensive inspection for the purpose of verifying the accuracy and completeness of POMCO's work as a whole. For this type of inspection procedure, the two microfilm readers and the two clerks contemplated by the change order proved to be wholly insufficient, for the number of the Bureau's inspectors had to be increased, and the increased number of inspectors required an increased number of POMCO clerks to assist the inspectors, and an increased number of microfilm readers. POMCO did not object to this increased use of its clerks and equipment. Indeed, since a more rapid pace of inspection would insure

<sup>6</sup> On March 14, 1958, POMCO notified the Bureau that all work under the contract had been completed, and final payment was made on March 26, 1958.

earlier payment for its work, it urged that the inspection be expedited. As the number of inspectors increased, they requested more clerks and microfilm readers than had been expressly provided for, and the additional clerks and equipment were supplied by POMCO.

Under date of April 9, 1958, which was after the completion of all the work under the contract, POMCO formally asserted the claim for supplying the additional clerks and microfilm readers, which is involved in the present appeal.<sup>7</sup>

The contracting officer rejected POMCO's claim upon three grounds: (1) that it had not complied with the "extras" provision of the contract (clause 3 of the General Provisions of the contract) which prohibited payment for extras "unless such extras and the price therefor have been authorized in writing by the contracting officer"; (2) that it had also failed to comply with the "changes" provision of the contract (clause 2 of the same provisions) which required the contractor to notify the contracting officer of a claim for an equitable adjustment by reason of a change in the work within 30 days of its notification of the change; and (3) that there was no equitable basis for the exercise by the contracting officer of his discretionary authority under clause 2 of the contract to allow a claim based upon this clause, "at any time prior to final payment" under the contract, notwithstanding the failure to give the required notice.

The contracting officer considered that the lack of equity in POMCO's claim lay basically in the circumstance that the value of the services performed for it by the Government's inspectors was greater than the amount claimed by it. He found that the Government inspectors, in verifying entries which were *not* missing from the control document index and in reviewing the annotations and delineations on the master title plats prepared by the POMCO, were performing functions that should have been performed by the contractor "at a point in its operations *prior* to the tract book check being performed cooperatively by the Government inspectors and clerks furnished by the Contractor," and thus he concluded that "the Government inspectors were, in part, performing certain of the duties and responsibilities of the contractor under the original contract specifications at no cost to the Contractor." He also found that it was POMCO which had requested the assignment of the additional inspectors, and that, in doing so, it had fully understood that this would require the furnishing by it of additional clerks and microfilm readers. He concluded by pointing out that if POMCO had notified him that a claim would be filed by it, he would have been able to evaluate the services per-

<sup>7</sup>The claim had been informally submitted on March 5, 1958, to the Acting Manager of the Record Improvement Project.

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formed by the Government inspectors, and to decide whether the tract book inspection should be confined to its original purpose.

The appellant does not really challenge the contracting officer's basic findings of fact.<sup>8</sup> Indeed, it specifically admits that it favored the expediting of the Government's inspection, since this would result in its receiving earlier payment for the work, and did not object to the increase in the number of inspectors. It also specifically concedes that the tract book inspection was a mutual arrangement or joint undertaking which involved the performance of functions which were partly its own responsibility, and partly the responsibility of the Government, but it denies that it ever agreed to furnish more than two clerks and microfilm readers. It takes the position, moreover, that since the inspection and acceptance of its work was a responsibility of the Government, which the latter could have performed at any stage in the operations, it could not be said to have received any "services" from the Government through the expansion of the scope of the tract book inspection. As for its failure to notify the contracting officer that it would expect to be paid for the services of the additional clerks and the furnishing of the additional microfilm readers, or to request an extra work order, it pleads that throughout the performance of the contract it had a sort of tacit agreement with the technical personnel of the Bureau who were familiar with the technical requirements of the contract that it would do whatever extra work was agreed on, and that its claims for the extra work would be equitably adjusted after the work had been performed, and that, therefore, the requirements of a written order or notice should be deemed to have been waived.

The Board can find no material error in the findings and conclusions of the contracting officer in rejecting the appellant's belated claim.

It is not entirely clear whether the appellant is contending that the contracting officer had delegated his authority to make changes or allow extras to his technical personnel, or merely that the contracting officer in person or through an authorized representative had waived the formal requirements of the contract. Either contention would be, however, contrary to the record of the manner in which the contract was performed. Although every one of the five change orders entered in this case may have been negotiated with the appellant by

<sup>8</sup> In a letter to the contracting officer dated July 10, 1958, in which POMCO requested that he reconsider his decision, it stated that it did not "generally" dispute his findings of fact. While this specific statement is not included in POMCO's notice of appeal dated July 20, 1958, it is apparent from the whole tenor of the observations in this document that the facts were as found by the contracting officer. Even when one of the contracting officer's findings is called "a misstatement of fact," it is apparent that what POMCO is really disputing is the interpretation put by the contracting officer on the underlying fact.

the contracting officer's subordinates,<sup>9</sup> each and every one of them was submitted to the contracting officer for his approval, a course of conduct obviously inconsistent with the idea that he had abdicated his functions, and there is nothing in the record to show that he had waived the technical requirements of the contract. The timing of the negotiations between the parties indicates clearly that it was the appellant's practice to give the technical personnel, if not the contracting officer, notice that it would be making a claim whenever it considered that it was entitled to additional compensation, and it did not do so in this instance.

In any event, the contracting officer himself recognized that the appellant's claim should not be rejected merely because of its failure to comply with the notice requirement of the "changes" clause of the contract, and he specifically considered the equitable aspects of the contractor's claim. He concluded, however, that it was lacking in equity, and the Board cannot say that there was no basis for his conclusion.

In essence the contracting officer regarded the appellant's claim as unmeritorious because the Government was performing functions which, in his opinion, were the responsibility of the contractor under the terms of the contract. It is not entirely clear from the findings whether the value which he considered the expanded inspection to have for the appellant lay basically in the timing of the Government's inspection work and its performance as a cooperative endeavor, rather than in the performance by the Bureau's inspectors of work that may have been the appellant's responsibility. But, whatever the precise basis for the contracting officer's findings and the conclusion to which they led him, that the work performed by the Bureau for the appellant was of greater value to it than the amount of its claim, the Board finds no basis in the record for rejecting the conclusion itself because the appellant, in supplying the additional services and equipment over a period of more than 10 months without requesting payment therefor, plainly must have acted in the belief that it was not entitled to payment. It would be entirely unreasonable to suppose that appellant's officers would have supplied the additional clerical services and equipment gratuitously unless they considered that the expanded inspection was an adequate *quid pro quo* for so doing. If the record, which shows the negotiation of no less than four change orders providing additional compensation for a considerable variety of items of extra work in the amount of no less than \$71,940.71, indicates anything, it is that the appellant's officers were not accustomed

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<sup>9</sup> However, in so far as Change Order For Extra Work No. 1 is concerned, the letter of January 10, 1957, shows that the contracting officer himself participated in the conference which preceded the entry of the order.

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to sleep on their rights. The Court of Claims has consistently rejected claims for additional compensation under such circumstances.<sup>10</sup>

The appellant's claim, moreover, includes some items of expense that, in any event, it would be chargeable with under clause 5(c) of the General Provisions of the contract, which declared:

If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties.

The furnishing of the additional clerks and microfilm readers came within the scope of this provision unless, indeed, the requests made by the Bureau inspectors were unreasonable. It can hardly be contended that an unreasonable expense was imposed upon the appellant when it was requested to furnish the additional microfilm readers, which, the contracting officer found, represented an additional cost to the appellant of \$330. With respect to the clerks, the record shows that the appellant furnished, over a period of 231 working days of 8 hours a day, 6,158 manhours of clerical assistance at a cost to it of \$2.88 per hour, which would amount to a total cost of \$17,735.04. As the appellant had agreed to furnish gratuitously 3,696 manhours of clerical assistance, it had agreed to \$10,644.48 of this cost. The clerical assistance included in its claim is thus based on furnishing 2,462 manhours of clerical assistance at a total cost of \$7,090.56. The total inspection cost to the appellant was thus approximately 7 percent of the total contract earnings of \$253,577.21 and its claim represents approximately 2.9 percent of the contract earnings. In terms of additional clerks working full time, the appellant furnished 1.3 additional clerks. The record before us leaves it open to serious question whether the whole of the additional clerical cost could be considered as a reasonable inspection expense for the purposes of clause 5(c). But considering the magnitude of the contract and its requirements, the appellant could certainly be charged under that clause with a part of the additional clerical cost.

#### CONCLUSION

Therefore, the findings of fact and decision of the contracting officer, rejecting the claim of the appellant, are affirmed.

WILLIAM SEAGLE, *Acting Chairman.*

I concur:

HERBERT J. SLAUGHTER, *Member.*

<sup>10</sup> See, for instance, *Russ Mitchell et al. v. United States*, 121 Ct. Cl. 532, 603 (1952); *Warren Brothers Roads Company v. United States*, 123 Ct. Cl. 48, 78-80 (1952); *J. A. Ross & Company v. United States*, 126 Ct. Cl. 323, 330 (1953).

**BETTY KETCHUM**

A-28132

*Decided January 21, 1960\****Rules of Practice: Appeals: Failure to Appeal—Oil and Gas Leases: Applications**

One who fails to appeal from the rejection of an oil and gas lease offer is not entitled to reinstatement of the application with priority over an intervening applicant, even though the rejection was erroneous.

**Rules of Practice: Generally**

Where notice of a decision of the manager of a land office is sent by certified mail to the address of record of the party adversely affected by the decision and the notice is returned marked "Unknown," the party is considered to have been constructively served with notice of the decision where the address of record was a post office box and the Department is informed that the party was not known at that address or authorized by the renter of the box to receive mail therein.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Betty Ketchum has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated March 20, 1959, which affirmed a decision of the manager of the Salt Lake City, Utah, land office, dated December 23, 1957, dismissing her protest against the issuance of a lease pursuant to oil and gas lease offer, Utah 026093, filed October 8, 1957, and denying her request for reinstatement of her oil and gas lease offer Utah 023196.

The record shows that the appellant's application and another, Utah 028195, were filed simultaneously on April 22, 1957. As a result of a drawing held to determine priority (43 CFR, 1954 rev., 295.8), Utah 028195 received first priority. A lease was issued to William L. Bloom, the applicant under Utah 028195, effective as of September 1, 1957, and on August 19, 1957, the manager issued a decision rejecting the appellant's offer.

The manager's decision was sent by certified mail to the appellant's record address—P.O. Box 3213, Terminal Annex, Los Angeles, California, on August 23, 1957.<sup>1</sup> The letter containing the copy of the decision was returned to the Salt Lake City land office on August 27, 1957, marked "Unknown."

The manager then posted the decision on the public bulletin board in the land office for a period of 30 days.

Following issuance of the lease to Bloom, it was discovered that he

\* Not in chronological order.

<sup>1</sup> The records show that William L. Bloom also gave P.O. Box 3213, Terminal Annex, Los Angeles, as his address as did the two witnesses on his offer and Mrs. Ketchum's two witnesses. In other words, six different individuals gave the same address on two offers filed simultaneously for the same land.

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had requested that his offer be withdrawn. This letter was received before the drawing was held, but was overlooked. Thereafter the manager canceled the lease issued to Bloom on September 24, 1957.<sup>2</sup> Thus, had the appellant appealed the manager's decision and thereby preserved her rights under her application, she would have been entitled to a lease of the land as the first qualified person filing an application, all else being regular.

The appellant claims that the notice of the manager's decision should have reached her at her address of record and that the postal authorities were wrong in sending the certified letter back to the land office marked "Unknown." To support her contention she has submitted three letters from the Los Angeles Post Office. One of the letters dated February 6, 1958, stated that:

We did inform you on January 20, 1958, that Betty Ketchum was receiving mail at Post Office Box 3212, Los Angeles 54, California.

We may further state that it is noted that Betty Ketchum is listed as having been holder of Post Office Box 3212 on August 21, 1957.

Another letter from the Los Angeles Post Office, dated February 27, 1958, stated the box number in the letter quoted above was a typographical error, and that P. O. Box 3213 was the number intended.

Subsequent to the receipt of this information, the Bureau wrote to the Postmaster of the Los Angeles Post Office requesting him to supply whatever information was available as to the reason for the "Unknown" stamp being placed on the envelope and whether a notice was placed in the Ketchum box with respect to the certified letter. A reply was received on August 1, 1958, signed by W. H. Green, General Superintendent of Mails, stating that any record concerning the certified letter in question would have been destroyed after 6 months from the date of handling; that the normal course would have been to place a notice in the box advising the addressee that a certified letter was being held and requesting her to call for it; that if the letter was not claimed in 5 days a second notice would be placed in the box for a period of 10 days, and if the addressee did not call for the letter at the end of 15 days it would be returned endorsed "Unclaimed." The General Superintendent said that he could not advise why the letter was returned marked "Unknown," and invited the Bureau to send a photostatic copy of the face and reverse sides of the envelope and he would interpret the endorsements thereon. This was done by the Bureau.

A second letter was received by the Bureau on December 24, 1958, from General Superintendent Green which stated, in pertinent part:

<sup>2</sup> A copy of this decision mailed to Bloom at his recorded address was returned marked "Unknown."

Thorough investigation which has been made in this case discloses that at the time the certified letter was addressed to Miss Ketchum at P.O. Box 3213 she was not receiving mail through the box, nor had she been authorized to use this address. The certified letter therefore was properly endorsed. It was not until December 13, 1957, that the original renter of the box authorized the delivery of mail directed to Miss Ketchum in its care.

The Director stated in his decision that the Department has held that service of notice may be either actual or constructive, and that the transmission of a copy of the decision by registered mail to the address given in an application and the unsuccessful attempt by the postal service to deliver the document constitutes constructive service upon the party concerned.

The appellant's reply to the statement in the Director's decision that he had been informed that the appellant was not receiving mail at P.O. Box 3213 on August 27, 1957, and had not been authorized to use this box by the renter of the box, is to refer to the letters presented by her to the Director and to state:

In view of these communications from the Postmaster to appellant's counsel it is apparent that the Betty Ketchum was not "unknown" on August 26th, 1957 at the time the Manager's decision was received at the Los Angeles postoffice and conclusively refutes the statements in the Director's decision above quoted relating to a communication from the Postmaster in Los Angeles.

The letter from the Postmaster, relied on by the Director, in addition to stating unequivocally that Mrs. Ketchum was not authorized to receive mail at Box 3213 until December 13, 1957, said:

\* \* \* You questioned the endorsement "Unknown", inasmuch as an employee of this office had improperly advised Mr. Emerson Cannon Willey, Salt Lake City, Utah, that Betty Ketchum had used the post office box as a business address.

\* \* \* This office regrets exceedingly the confusion which has arisen from the improper procedure followed by an employee in connection with originating inquiries of Mr. Willey. (Emphasis supplied.)

In face of this letter, the last received from the Los Angeles Post Office, it is specious for the appellant to claim that it is refuted by the earlier letters sent to appellant's counsel. Moreover, it is noted that in her appeal the appellant does not claim that she was the renter of the box on August 27, 1957, nor does she contend that she was authorized by the renter of the box to receive mail at Box 3213 at the time the certified letter was delivered to the Los Angeles Post Office. I have been informed by postal authorities in Washington, D.C., that renters of post office boxes are supplied with a form upon which they may designate the individuals they authorize to receive mail at the box address. Normal procedure, when a registered or certified article is addressed to a person at a box address who is not



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indicated to be authorized to use the box as an address, is to return the article to the addressor immediately without holding it in the post office since holding the article would serve no useful purpose. This is the routine procedure which was followed in this case.

There is nothing in the record to indicate that the appellant ever gave to the land office any address other than the post office box address given in her oil and gas lease application. Thus, the appellant chose the address and must be responsible for seeing to it that mail addressed to her at that address is deliverable there. I find no error on the part of the postal authorities in returning the manager's decision to the land office.

The Department's rule of practice governing service of documents provides in part:

\* \* \* Service by registered or certified mail may be proved by a post-office return receipt showing that the document was delivered at the person's record address or showing that the document could not be delivered to such person at his record address because he had moved therefrom without leaving a forwarding address or because delivery was refused at that address or because no such address exists. \* \* \* (43 CFR, 1954 rev., 221.95 (b) (Supp.).)

The appellant contends that nondelivery of the manager's decision to her was not because of any of the three reasons specified in the regulation. I think it is clear that the failure to deliver came under the third category, "because no such address exists." For a person to give an address at which he is not authorized to receive registered or certified mail is equivalent to giving a fictitious address, even though it may be an address at which some other person can receive mail. No such address as P.O. Box 3213 existed so far as mail to the appellant was concerned.

The Department has long held that notice of an adverse decision, or any other notice, which is mailed to an address of record is constructively served on the party involved when delivery is attempted at that address, and this particularly so where failure to complete delivery is through the fault of the appellant. *John P. Drake*, 11 L.D. 574 (1890); *Smith v. Fitts*, 13 L.D. 670 (1891); *Dreesen v. Porter*, 19 L.D. 195 (1894). The appellant's error appears to have been in not being certain that she was authorized to receive registered or certified mail, which must be delivered to the addressee or his agent, at the address designated in her application. Moreover, by electing to give only a postoffice box address the appellant thereby restricted the means of communication with her concerning her application entirely to that address, and when the land office manager mailed the notice of his decision to that address he did all that could be done to serve the appellant.

It is concluded that the appellant was constructively served with notice of the manager's decision rejecting her oil and gas application, and that, having failed to appeal from the rejection within the 30-day period prescribed by the rules of practice (43 CFR, 1954 rev. 221.2 (Supp.)), she lost whatever rights she had under the lease offer, *Edward Christman et al.*, 62 I.D. 127 (1955). Consequently, rejection of her application for the reinstatement of her lease offer in the face of an intervening applicant was proper. (*Id.*)

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,  
Deputy Solicitor.

### APPEAL OF HENLY CONSTRUCTION COMPANY

IBCA-185

*Decided February 23, 1960*

**Contracts: Additional Compensation—Contracts: Changes and Extras—  
Contracts: Specifications—Rules of Practice: Evidence**

When specifications for the construction of laterals and wasteways did not provide for the construction of the same by the so-called economic grade method and the Government has failed to bear the burden of proving by a preponderance of the evidence that the contractor voluntarily adopted this method as its own, the contractor is entitled to additional compensation to offset the increased costs of any reexcavation or lateral shoulder excavation which was involved in the construction of the laterals and wasteways by the economic grade method.

**Contracts: Specifications—Contracts: Performance**

When the specifications provided for the classification of excavated material as either "common," "intermediate" or "rock," and the contractor challenges the relative amounts of the intermediate and rock classifications made by the Government, the Government's classifications, which could not be made with exactitude but necessarily involved the exercise of judgment, will not be disturbed in the absence of a convincing showing by the contractor of error or bad faith on the part of the Government.

### BOARD OF CONTRACT APPEALS

Henly Construction Company, of Yakima, Washington, has filed a timely appeal from the findings of fact and decision of the contracting officer dated October 7, 1958, denying its claims for additional compensation in the total amount of \$124,096.60, arising out of the performance of Contract No. 14-06-D-2193, with the Bureau of Reclamation.

The contract, which was dated October 25, 1956, and incorporated the General Provisions of U.S. Standard Form 23A (March 1953),

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provided for construction and completion of the earthwork and structures for the Block 79 laterals and wasteways, West Canal Laterals, of the Columbia Basin Project, at an estimated contract price of \$437,864.

Under the terms of paragraph 16 of the specifications the work was required to be completed by February 23, 1958. Notice to proceed with the work was received by the contractor on November 10, 1956, after clearing of the right-of-way had already been commenced. All work under the contract was completed by January 29, 1958.

Under date of June 18, 1958, the appellant submitted five claims to the contracting officer. These claims were summarized by the appellant as follows:

1.	115,965	c. y.	Excavation, common for laterals and wasteways	-----	at	40¢	<sup>1</sup> \$46,386.00
2.	49,980	c. y.	additional Excavation, common, for laterals and wasteways (for building the Econ-grade)	-----	at	40¢	<sup>2</sup> 19,920.00
3.	10,361	c. y.	additional Excavation, intermediate, for laterals and wasteways (for building the Econ-grade)	-----	at	\$1.00	10,361.00
4.	14,143.2	c. y.	additional Excavation, rock for laterals and wasteways	-----	at	\$3.00	42,429.60
5.	2,500		additional Excavation, for rock in structures	-----	at	\$4.00	5,000.00
			less payment made as intermediate				
			for structure	-----	at	\$2.00	
			Total payment due	-----			124,096.60

<sup>1</sup> The excavation figure given in the summary was actually 111,965 cubic yards but this was manifestly an error, as can be seen from the June 18, 1958, claims letter itself.

<sup>2</sup> Although included in the summary, the details of this claim are not discussed in the June 18, 1958, claims letter. They are set forth in a separate letter to the contracting officer dated February 7, 1958.

The appellant's five claims thus fall into two categories, one based on the alleged failure of the Government to pay for all of the excavation which it had performed, and the other based upon the alleged failure of the Government to classify the excavated material in accordance with the requirements of the specifications. Each of the two categories of claims will be separately considered.

A hearing for the purpose of taking testimony with respect to the appellant's claims was held by the undersigned at Ephrata, Washington, on November 9 and 10, 1959. George P. Henly, Sr., the chief officer of the appellant,<sup>1</sup> and his son, George P. Henly, Jr., as well as Robert John Lzicar, their superintendent on the job, testified in behalf of the appellant, while the Government's witnesses were Byron Boston, the assistant field engineer in charge of the construction, and Chief Inspector Loyd L. Milliken. The day following the conclusion

<sup>1</sup> Subsequent references herein will be to him, unless otherwise indicated.

of the hearing the undersigned viewed the work which had been constructed under the contract.

The phases of the work that are involved in the appellant's claims are to be found in the first eight items of the schedule. These items, together with the estimated and actual quantities performed in the case of each item, may be represented in tabular form as follows:

Item No.	Nature of the work	Estimated quantity	Actual quantity
1	Excavation, common, for laterals and wasteways.....	260,000 cu. yds.....	238,397 cu yds.
2	Excavation, intermediate, for laterals and wasteways.....	16,000 cu. yds.....	13,166 cu. yds.
3	Excavation, rock, for laterals and wasteways..	3,000 cu. yds.....	3,334 cu. yds.
4	Excavation from borrow.....	10,000 cu. yds.....	25,521 cu. yds.
5	Overhaul.....	10,000 mile cu. yds.....	6,147 mile cu. yds.
6	Excavation, common, for structures.....	33,000 cu. yds.....	29,636 cu. yds.
7	Excavation, intermediate, for structures.....	2,700 cu. yds.....	3,064 cu. yds.
8	Excavation, rock, for structures.....	400 cu. yds.....	1,046 cu. yds.

Paragraph 37 of the specifications provided for the classification of excavation as either "rock," "intermediate" or "common" excavation. Rock excavation was defined as boulders or detached pieces of solid rock more than 1 cubic yard in volume and all solid rock in place which could not be removed until loosened by blasting, barring, wedging, or rooting in a certain manner; intermediate excavation was defined as all hard and compact material other than solid rock, which could not be removed by excavating machinery until loosened by blasting, barring, or rooting in a certain manner; and common excavation was defined so as to include all boulders and detached pieces of solid rock not exceeding 1 cubic yard in volume, and all other materials except such as could be classified as rock or intermediate excavation. Provision was also made in this paragraph of the specifications for the presence of representatives of the Government and the contractor during classification of excavated material, and for the furnishing of statements of quantities and classification of excavation upon the contractor's request made within 10 days of the receipt of a monthly estimate, and for according finality to such statements unless the contractor filed written objections within 10 days of the receipt of the statements.

Paragraph 38 of the specifications, entitled "Excavation for laterals and wasteways," required laterals and wasteways to be excavated to the full depths and widths shown on the drawings and to be finished to prescribed lines and grades but the contracting officer was given authority to vary the slopes of excavations or embankments, and the dimensions dependent thereon, to compensate for the instability or porosity of the material. Measurement for payment of excavation for laterals and wasteways was to be made "to the lines shown on

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the drawings or as established by the contracting officer." It was also specifically provided that the unit price bid in the schedule for excavation of laterals and wasteways should include the costs of "placing the material in embankment," except that "required overhaul" was to be separately paid for, the free haul distance allowed under paragraph 51 of the specifications being 500 feet.

Paragraph 49 of the specifications entitled "Disposal of excavated materials," contained the following provision:

All suitable materials removed in excavation or as much thereof as may be needed, shall be used in the construction of lateral and wasteway embankments, roadway embankments, or for backfill about structures. If there is an excess of material in the excavation, it shall be used to strengthen the embankment on either side of the laterals and wasteways as may be directed. Where the lateral or wasteway is in thorough cut,<sup>2</sup> the material taken from the excavation shall, unless needed to strengthen embankments at the ends of the cut, generally be wasted on one or both sides of the lateral or wasteway, as directed.

It was also provided in this paragraph that any material removed in excavation and not suitable for embankment construction and any suitable material not required for embankments should be deposited on the Government's right-of-way at points directed by the contracting officer, subject to payment for overhaul. The paragraph concluded with the following provision:

Except as specifically provided in these specifications for payment for hauling or placing of individual items of excavated materials, the cost of all work described in this paragraph shall be included in the unit prices in the schedule for excavation.

Paragraph 50 of the specifications which dealt with excavation from borrow provided, in pertinent part, as follows:

Where the lateral or wasteway excavation at any location does not furnish sufficient suitable material for embankments, the contracting officer will designate where additional material shall be procured.

### *1. The Excavation Claims*

To understand the details of the excavation claims, it is necessary to describe first the economic grade method that was adopted in the construction of the laterals (more briefly referred to in the contracting officer's findings of fact and at the hearing as the "econ-grade" method of construction). In his findings the contracting officer thus described this method:

In this method of construction, the material excavated in one reach of canal is moved along the canal to adjacent areas where embankment is required. The embankment is built with a flat top to an elevation such that the material removed in excavating the lateral prism in the top of the embankment will be just enough to complete the necessary banks on each side of the lateral.

<sup>2</sup> A lateral is in thorough cut when both banks of the canal are below the natural ground level.

The embankment is generally constructed using carryalls or scrapers, and the lateral prism is excavated in the top of the embankment using draglines, back hoes, or specially constructed ditching machines. This method of construction of small laterals has been used quite extensively because, although rehandling some of the material is necessary in performing the work in this manner, the construction can be carried out very readily using normal and usual construction equipment and methods.

The construction of the Block 79 laterals involved earthwork for approximately 40 miles. The bottom widths of sections of the laterals were to vary from 8 to 2 feet, and one side of the laterals was to be a berm or roadway. As the laterals were to run through country which was characterized by predominantly flat terrain, the construction of the laterals was a rather tight job. Very little, if any, excavated material could be wasted, and the cuts and fills had to be nicely balanced. The econ-grade had to be precisely constructed to within one-tenth of a foot of the computed grade. When completed in July 1957, it was, Henly testified, virtually a highway at least 30 feet in width that ran, except in the areas of thorough cuts, for a distance of approximately 40 miles.

It is obvious, therefore, that if the economic grade was to be properly constructed considerable assistance and cooperation on the part of the Government's engineers would have to be extended to the contractor in making the nice calculations which would be necessary. This was especially so because neither Henly nor his superintendent ever came to grasp fully all the engineering refinements that went into the construction of the econ-grade. Thus it came about that the Government engineers furnished the mass diagrams showing the amounts of excavated materials that would have to be moved from cuts to adjacent fills, the location of the material to be hauled, and the locations where it was to be placed. To simplify the data obtainable from the mass diagrams, the Government engineers prepared "haul sheets," which were to indicate to the contractor the stations between which the material was to be excavated for the construction of fills, and the stations between which the material was to be deposited. For each width and depth of lateral, the Government engineers also furnished the contractor with figures for "hold up on cuts" and "hold down on fills." The contracting officer thus explained the nature and purpose of these figures:

The "hold down on fills" figure was determined by computing where the top of the fill section would have to be so that the material excavated out of the top of the fill to make the bottom of the ditch section would be just sufficient to construct the required banks on either side. The "hold down" distance was the distance from the designed top of the lateral banks down to the top of the economic grade. The stakes set in the field<sup>9</sup> were marked to show the

<sup>9</sup> These were set either by the Government engineers or by the contractor's employees under their supervision.

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fill to the top of the lateral banks, and this "hold down" distance was subtracted from the amount shown for fill height on the stakes to determine when sufficient material had been moved into the fill \* \* \* The "hold up on cuts" applied to sidehill sections where the upper side of the lateral prism was in cut and the lower side was in fill. It was established as the distance the econ-grade had to be above the bottom of the designed lateral so that the excavation of the remaining material would just complete the bank on the lower side \* \* \* The stakes were set at regular intervals indicating the cut from original ground to the designed bottom of the laterals and/or the fill to the designed top of embankment.

It is apparent that the econ-grade method of construction necessarily involved a very considerable amount of reexcavation of material. Payment was made to the appellant for all lateral and wasteway excavation below original ground and within the designed lateral prism but the appellant claimed that this accounted for only 16,883 cubic yards of the 132,848 cubic yards of excavation which was performed in the lateral prism in the econ-grade. Thus, the appellant's Claim No. 1 was for payment for 115,965 cubic yards of excavation involved in the rehandling of the material to construct the lateral prism after it had once been moved to form the econ-grade. Claim No. 2 was for the excavation of material which was alleged to have been taken by the appellant from outside the lateral prism in order to supply sufficient material to balance shortage areas. According to the appellant, the amount of this material was 75,500 cubic yards. As the Government has paid for 25,520 cubic yards of this material as borrow, the claim was for 49,980 cubic yards.\*

The contracting officer made a finding that "the contractor was not required by the contract nor was he directed to construct the laterals and wasteways using the 'econ-grade' method. This method of construction has long been used by contractors on Bureau of Reclamation projects, at their option, but it is not the only method used." Reasoning that the econ-grade method of construction was the contractor's own chosen method of operation; that the reexcavation of material in the econ-grade was necessarily involved in that method of operation; and that the provisions of paragraphs 38 and 49 of the

\*At the hearing, Government counsel made statements which cast doubt upon the accuracy of the quantities included in each one of the excavation claims. He commented that he found it difficult to understand how the appellant could claim that more than 110,000 cubic yards of canal prism could have been excavated in only 75,000 cubic yards of fill material, especially when it was considered that the roadway sides of the laterals did not have to be reexcavated. He also seemed to imply that since the Government's figures showed that the total quantity of 75,500 cubic yards of material was moved to construct fills, of which 25,520 came from borrow, and that since the appellant had stated in its claim letter of February 7, 1958, that only 8,880 cubic yards was taken from the shoulders of the lateral prism, just outside the pay lines, most of the 49,980 cubic yards involved in the claim must have come from inside the lateral prism. These considerations would affect the quantities in the appellant's excavation claims, but counsel agreed that discrepancies would have to be resolved by the contracting officer if the claims themselves were found to be valid.

specifications did not permit payment for reexcavation of material placed in embankment, the contracting officer rejected Claim No. 1.

The contracting officer also found that the material included in Claim No. 2, which was excavated outside the lateral prism, was excavated by the contractor "without order or directions of the Government" entirely for its own convenience. He pointed out that in order to make the final lateral prism excavation "a continuous operation regardless of whether the prism was being excavated in cut or in fill," the contractor, as it proceeded with the excavation had to balance the material in the cut and fill areas but because its tractors and scrapers were too wide for the laterals, which had narrow bottom widths, it could not excavate down to grade in the cut areas. It, therefore, excavated only down to the balance lines in the ditch and, in order to compensate for the material which it had temporarily allowed to remain in the bottom of the ditch, it excavated outside the lateral prism to secure enough material to balance. Subsequently, when the material in the bottom of the laterals was finally excavated with back hoes or draglines, it was sidecast into the areas excavated outside the lateral prism in order to refill them to the approximate lines and grades specified initially. As he had concluded that this substitution of material occurred because of the limitations of the contractor's own equipment, the contracting officer held that the excavation involved was not compensable under the provisions of the specifications, and also rejected Claim No. 2.

As outlined in its post-hearing brief, the position of the Government seems to be not only that the directions given to the appellant were limited to the use and disposition of material from required excavation but also that these directions did not include control of its methods of construction. These propositions cannot be accepted without considerable qualifications.

It must be realized at the outset that, with the exception of a few provisions of a limited nature, of which the most important was the provision for control of material from excavation, the specifications did not prescribe *how* the laterals and wasteways were to be constructed. There were a number of methods by which they could have been constructed, and the econ-grade method of construction was one of them. No particular method of construction, however, was prescribed by or even mentioned in the specifications. It follows as a matter of simple logic that any direction which required the contractor to employ only one method, namely the econ-grade method of construction, would constitute a change in the specifications and the requirements of the contract. Indeed, this logic seems to have been accepted by the contracting officer, whose rejection of the excavation claims was based on the assumption that the contractor chose to con-



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struct the laterals and wasteways by the econ-grade method of construction.

It is true, as the Government contends, that the specifications gave it the right to direct the longitudinal movement of *excavated material* along the lines of the laterals from the point of excavation to construct fills at some other point, subject to payment for overhaul. The Government engineers were, apparently, in the habit of denominating the excavated material as "required excavation,"<sup>5</sup> but strictly speaking it could not be so described. There was no provision for any exact amount of excavation, and hence there was no "required excavation" in the sense that the material had to come from a particular location, or that it had to be excavated in a particular order. Before there could be any excavated material, the movement of which could be directed by the Government engineers, it had, to put it in the most simple terms, to be first excavated, and it was entirely up to the contractor to determine from *where* the material was to come. Any directions as to *how* the excavated material was to be produced would also not be in harmony with the specifications. Moreover, it is not too clear from the specifications whether the Government had absolute control of the wasting of excavated material when it came from thorough cuts. The more reasonable construction of the last sentence of paragraph 49 of the specifications would seem to be that if material from thorough cuts was not needed "to strengthen embankments at the ends of the cut," the contractor could decide to waste it, and that the authority of the construction engineer would be limited to determining on which side of the lateral or wasteway it could be deposited. Finally, it is necessary to point out that the borrowing of material was not subject to the discretion of the construction engineer. Paragraph 50 of the specifications laid down an objective test for determining when borrowing was permissible, which was whether suitable material for embankments was available at any location. The construction engineer did have discretion, of course, in designating the source of the borrow.

It would seem to follow, therefore, that the contracting officer's disallowance of the excavation claims cannot be upheld unless the appellant did voluntarily adopt the econ-grade method of construction as its own. There is no written evidence of such adoption. But a construction contract may be modified orally by the parties. The

<sup>5</sup> In a letter which the contracting officer wrote to the appellant under date of January 16, 1958, he stated: "We have found that our costs are lower for jobs where the excavation is held very closely to the material required for embankments. Consequently, we have followed the practice of using *required excavation* to the maximum practicable extent to construct embankments rather than waste materials where an excess occurs and borrow where insufficient material is available from the lateral prism." The term "required excavation" also occurs frequently in the Government's post-hearing brief.

Government contends that it was so modified. Although the general burden of establishing its claims is on the appellant, the Government has the burden of establishing the oral modification by a preponderance of the evidence.<sup>6</sup>

The record shows that the Henly Construction Company had performed in the past some half dozen excavation jobs for the Bureau of Reclamation, of which one was performed as early as 1936. None of them had been performed by the econ-grade method of construction. In the case of the Block 79 laterals, it was his intention, Henly testified, to construct the laterals by building the roadway sides of the embankments up to finished grade with a bench at a lower elevation on one side from which the lateral prism could ultimately be excavated with a dragline operating from the bench, the elevation of the bench being established so as to furnish the precise amount of material needed to construct the embankments opposite the roadway to the required height. According to Henly's testimony, however, he never got beyond the initial stage of this operation. After clearing the right-of-way, he started, early in December 1956, to rough out with his scrapers a roadway along the center line of the lateral on which he was working. He was interrupted, however, by Boston who told him that the way they proposed to do the work was not in accordance with the plans and specifications, and that they were wasting their time to go on with it before they had the mass diagrams and haul sheets. There then ensued a discussion as to how the work was to be done, and Boston told Henly that his way of doing the work would not work, and that "the job had to be done" by the econ-grade method. When cross-examined Henly was asked whether the econ-grade method was not explained to him merely as a method by which "use of required excavation in fills could be accomplished," and as "an alternative method rather than a direction from the Government," and he replied, "Well, it is possible." He was then further asked: "You wouldn't testify flatly that they ordered you to build the econ-grades?" and he replied: "Well, I testified that it amounted to that." When pressed again to say whether the econ-grade method was not put up to him as one method of construction, Henly replied emphatically: "No, I would say more than that, I would say they indicated their method was the only way it could be done \* \* \* I couldn't even understand what they were talking about \* \* \*."

Boston testified that when he observed Henly's leveling off of the center line, more or less building a roadway, he asked the contractor what he expected to do about fills, and that the latter explained that

<sup>6</sup> *United Steel Co. v. Casey*, 262 Fed. 889 (6th Cir., 1920); *Teal v. Bilby*, 123 U.S. 572, 578 (1887); *Warren Brothers Roads Company v. United States*, 123 Ct. Cl. 48, 80 (1952).

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"if he happened to be a *little short*, he would reach out and get some of it." Boston then told Henly that "we could tell him *where* we wanted to get the fill material and where it would be deposited," (emphasis supplied). Boston thus related the subsequent conversation:

"Well, just how would you build this?" (Henly asked) and I said 'Well, that is something the contractor has to make up his own mind on,' and he says, 'Well, how have the other contractors around this area been doing it?' and I says, 'Well, they usually use the econ grade, hold up and hold downs.' And he said, 'Well, if they have been doing that, that is apparently the way to do it,' and I told him *where* to get his dirt and where to place it." (Emphasis supplied.)

Asked whether there had been further discussions about the econ-grade method of construction, Boston replied: "We discussed it, I think, until the job ended." Asked whether he had specifically discussed with Henly his own "roadway" method of construction, Boston replied: "I don't recall its being brought up." Finally, when asked directly whether he had ever instructed Henly to build the laterals by the econ-grade method or any other method, he repeated: "We told him we would tell him *where* to get the dirt and where it was supposed to go." A little later when asked whether at the time the econ-grade method was discussed with Henly any question had been raised "how payment would be made," Boston replied that at first the question had not been discussed, but that later on he had brought the question up himself and told Henly that "he wouldn't get paid for excavating the prism through fill section."

Boston's testimony on cross-examination makes it clear that he knew that Henly's method would be "borrowing dirt with a dragline to make his fills," and that he told Henly that he could not follow that method. He put this in emphatic form when he testified: "Borrowing promiscuously up and down the sides, yes, that was out." Boston's testimony on cross-examination also indicates that he knew in general what method Henly intended to follow in constructing the laterals. He conceded at least twice during his cross-examination that when he attempted to explain to Henly the econ-grade method of construction, the contractor showed little if any comprehension of what he was talking about. In his cross-examination, he also fixed the time when he had first told Henly that he would not be paid for rehandling the material in the fills. It was "a couple of months" after the work of excavating the laterals had commenced, and, of course, after some of the economic grades had been constructed.<sup>7</sup>

<sup>7</sup> Boston's testimony in this respect is in direct contradiction to a statement he made in an affidavit, which was dated September 8, 1958, and which was included in the appeal file as Exhibit 17B attached to the contracting officer's findings of fact. In this affidavit,

Milliken, who was present during the conversation between Henly and Boston, was called as a witness to corroborate the latter's testimony. But, while he did so in a general way, there were significant discrepancies. The chief inspector's testimony makes it clear that Boston knew that Henly intended to use the "roadway" method of construction,<sup>8</sup> and that he told the latter that sidecasting with the dragline would not be allowed.<sup>9</sup> Perhaps even more interesting are the differing versions Milliken gave, on direct and cross-examination, respectively, with reference to the way Henly reacted after the econ-grade method had been explained to him. On direct examination, Milliken testified that Henly exclaimed: "What is good enough for the other contractors is good enough for me." On cross-examination, however, Milliken testified that Henly remarked: "If we *have* to do it, we will go and get the job done." (Emphasis supplied.)<sup>10</sup>

The Board has no doubt that Boston truthfully testified that he never in so many words "directed" Henly to construct the laterals by the econ-grade method. It is convinced, however, that what he said and did "amounted to that." The issue whether Henly voluntarily agreed to do what Boston wanted him to do must be determined in terms of the realities of the situation rather than in terms of a formula. The Government undoubtedly *wanted* the appellant to adopt the econ-grade method of construction, which under the circumstances of the particular job was the most efficient and the cheapest from its point of view, as the contracting officer expressly found, and it is easy to perceive how in his zeal to achieve the desired objective the Government engineer overstepped the line between persuasion and instruction. He assumed too readily that Henly intended to engage in extensive and promiscuous side-borrowing when all that the contractor had in mind was actually to "steal" an occasional shovelful of dirt and, alarmed by his own erroneous assessment of the situation, he gave him instructions, before the excavation had really gotten under way, which could not be entirely squared with the provisions of the specifications, such as by telling him that he would determine from where he was to get his material. It should certainly require the most convincing proof to establish that Henly, who had only an

Boston deposed as follows: "I told Mr. Henly *at the start of the job* that the way he got paid for making fills was either overhaul of lateral excavation or borrow or both and *no payment would be made for excavating fills above original ground.*" (Emphasis supplied.)

<sup>8</sup> Thus, he testified that "we told him (Henly) that we would not permit the borrowing of the material outside of the right of way and as far as leveling off the ground, making the roadway section through there and disturbing the center line stakes that we had, this brought Mr. Henly into the office to ask about it."

<sup>9</sup> His testimony on this point was as follows: "And when Mr. Boston asked him what he was going to do in a deficiency section, he said he would reach out and side cast with the drag line; and Mr. Boston told him that was not permitted \* \* \*"

<sup>10</sup> It is true that this remark was included in counsel's question to the witness but the latter affirmed its correctness.

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imperfect idea of the econ-grade method of construction, readily accepted what he did not comprehend. Moreover, the Government would have to show further that it was distinctly understood that, if Henly agreed to do what the Government obviously wanted him to do, he could not claim additional compensation to offset any extra costs which might be involved in the Government's method. This, the record shows with absolute clarity, is precisely what was not understood. It was not until construction by the econ-grade method was well under way that Boston told Henly that he would not be paid for rehandling material.

The Board must conclude that the Government has not borne the burden of proving that appellant voluntarily accepted the econ-grade method of construction. Therefore, the appellant is entitled to additional compensation to cover the increased costs of excavation which may have been attributable to this method.<sup>11</sup>

The Government takes the position, to be sure, that before the excavation claims can be allowed the appellant must show by substantial evidence that the econ-grade method of construction was more expensive than the method which the appellant intended to follow, and argues that the record indicates the contrary. This argument is based on testimony of Boston that 90 percent of the canal excavation on the Columbia Basin Project was performed by contractors by the econ-grade method. This sort of statistic is, however, far from conclusive, for there is no positive testimony concerning the motives that may have led various contractors to adopt the econ-grade method voluntarily, and they may have done so, for instance, because their unit bid prices for excavation were considerably higher than the appellant's, or even because they did not fully realize that the econ-grade method of construction was more expensive. Moreover, Boston himself also testified that he did not know whether the "roadway" method was any cheaper than the econ-grade method of construction, and it is of some significance that, although the contracting officer found that the econ-grade method was more economical for the Government, he refrained from finding also that it was more economical for the contractor. The fact remains that Henly testified that he thought that if he had been allowed to follow his own method of construction only about 5 percent of the material in the fills would have had to be rehandled, and the Government did not attempt to rebut this testimony.

<sup>11</sup> In such cases as *Korshof Construction Co., Inc.* 63 I.D. 129 (1956); *Osberg Construction Co.*, 63 I.D. 180 (1956); and *McWaters and Bartlett*, IBCA-56 (October 31, 1956), the Board disallowed claims based on reexcavation of material but in all these cases the reexcavation was involved in the contractor's own chosen method of operation.

So far as concerns the excavation outside the shoulders of the lateral prisms that is involved in Claim No. 2, the Government argues that since the replacement of this material was due to the limitations of the appellant's equipment rather than to the econ-grade method of construction, and since the appellant has not suggested any more economical method by which the problem could have been solved, it has failed to establish a basis for additional compensation. The basic difficulty with this argument is that the shoulder excavation was also made necessary by the econ-grade method of construction which must, therefore, be regarded as the primary factor in increasing the appellant's costs. Moreover, at the conclusion of the hearing, Henly took the stand to assert that he could get into the bottom of the ditches with his equipment, and that he believed that the Government wanted the shoulder excavation because the material so obtained was better than the material in the canal prism. Again, the Government made no attempt to rebut this testimony.

The Board must hold that the appellant is entitled to additional compensation under Claims Nos. 1 and 2. The parties agreed at the hearing that the contracting officer should make findings with respect to the quantities on the basis of which the additional compensation would be determined if the appellant prevailed, and he is directed to make such findings. In arriving at the quantity of rehandled material involved in Claim No. 1, he may deduct, however, the 5 percent which in any event would have been rehandled under the appellant's chosen method of operation. Since it is apparent that it is easier to rehandle material that has once been excavated,<sup>12</sup> the contracting officer need not be bound by the unit prices for excavation provided in the schedule, and may fix a lesser price in determining the amount of additional compensation under Claim No. 1. If the appellant is dissatisfied with the contracting officer's determinations, it may appeal again to the Board pursuant to the "disputes" clause of the contract.

## *2. The Classification Claims*

All three of the appellant's excavation claims involve the contention that a very great amount of material was wrongly classified by the Government. The extreme divergence between the Government's classification and the contractor's claims can readily be seen in the following table in which they are compared percentagewise:

<sup>12</sup> In paragraph 14 of the findings, the contracting officer commented on the ease with which the material could be reexcavated.

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Classification	Amount as classified by the Government	Additional amount claimed by the contractor	Percentage increase represented by contractor's claim
			<i>Percent</i>
Intermediate, in laterals and wasteways.....	13,166	10,361	78.7
Rock, in laterals and wasteways.....	3,334	14,132.2	424
Rock, in structures.....	1,046	2,500	230

Except for some basalt rock found in the 53.1D wasteway, and some brown or "rotten" caliche, found mostly in the lower part of the pipe chutes, the hard material encountered in excavating was white caliche. Caliche is a calcium rock which, although usually very hard, tends to disintegrate when subjected to weathering, and it is, therefore, found also in forms so soft that pieces of it can be broken with one's hands.

Where found on the present project, the caliche was generally covered by earth material. It lay in planes which varied, however, in depth. As it was usually pure white, there was little difficulty in determining the point of contact between a layer of caliche and the overlying earth. The elevation at which the caliche lay having been established, all the material in the prism below that elevation was classified as either intermediate or rock excavation, except in a few instances where there was material below the caliche so soft that it could be dug with a dragline.<sup>13</sup> Although the excavation was observed by Government personnel, and the elevations at which the caliche lay were determined by them as the work progressed, the material was not classified until a particular "reach"<sup>14</sup> had been completed.

The appellant is not contending that any of the earth overlying the caliche was intermediate material. What the appellant challenges is the relative amount of intermediate and rock material in the caliche. It must be apparent that this could not be determined with exactitude, and that the making of the determination involved the exercise of judgment based on observation of the material and the operation of the excavating equipment, mainly the rippers. Material which could not even be ripped was classified as rock. How much of the material was intermediate and how much of it was rock was determined in terms of percentages. The upper layer of basalt rock in the 53.1D wasteway was paid for as rock but lower down the basalt was found to be shattered,<sup>15</sup> and to be intermingled with earth,

<sup>13</sup> Milliken testified that such soft material was encountered in several of the pipe drops in the structures, and that the largest quantity was found in excavating for the 53.1D wasteway between Stations 272+00 and 276+00. The caliche layer there extended only from about six-tenths of a foot to about 2 feet below the ground surface.

<sup>14</sup> This term appears to be of rather indeterminate nature.

<sup>15</sup> This was denominated "dice rock" by the project personnel. It was usually found in 6-inch cubes.

and most of it was paid for as intermediate excavation, since it did not require loosening in advance of the use of the dragline. Since the brown caliche for the most part required ripping, it was paid for as intermediate excavation, except for the small part that was classified as common.

It must be obvious that where judgment is such an important element in the classification of material the Government's classifications should not be upset unless tangible and convincing evidence of error or bad faith has been presented. The evidence offered by the appellant is far too vague and insubstantial to challenge seriously the Government's classifications. Indeed, it is a rather curious aspect of the present case that the appellant persists in making the challenge, although Lzicar, its superintendent and chief witness on the classification issues, conceded at the hearing that how material should be classified was "a matter of opinion"; that the Government was liberal in applying the classification tests, and did not exhaust every last one of them before classifying material; and that during the progress of the work, which would be the best time for threshing out any issues of classification, he never made any objection which could be described as "vociferous."

Indeed, although paragraph 37 of the specifications provided that representatives of the contractor should be present when excavated material was classified, and although the appellant was afforded the opportunity to be present, its representatives did not bother to participate in the classification of material except on a few occasions. They decided early, apparently, that it would be useless to argue, and that it would be best to rely on the reasonableness of the Government in making the classifications, although they did attempt to preserve their rights by protesting against some of the Government's progress payments. It was only after all the work had been completed that the appellant asserted the classification claims.

The only evidence of any consequence submitted by the appellant in support of its excavation claims was a document consisting of photographs with accompanying descriptions and comments supposed to represent the result of a spot check of the Government's classification made at 70 points along the laterals and wasteways by Lzicar after completion of the work. Lzicar testified that in taking the photographs of the laterals he was able to locate particular stations because the stakes were still there, and it was possible to observe at the sides where the original ground was. However, where the shoulder excavations had been refilled, he had to go outside the banks. Moreover, he did not actually survey each location, and his photographs do not show where he had dug back into the canal banks to expose the point of contact between the overlying ground and the caliche. Furthermore,



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although the caliche did not lie at a uniform depth with reference to the ground surface, he took his photographs at locations which were extremely far apart, and projected his averages for these extremely long distances.<sup>16</sup> Shortly before the hearing the Government made a spot check of Lzicar's survey, selecting at random five locations where there were wide discrepancies between the grades at which the appellant was contending that the caliche was encountered, and the Government had found the caliche. The spot check showed that the discrepancies were marked, indeed, and confirmed the Government's original determinations within a very close range. Another spot check made by the Government at some 24 or 25 random locations after completion of the work also confirmed within extremely narrow margins of error the Government's original determinations of the elevations at which caliche had been encountered. Considering that Lzicar chose not to participate in the classification of material while the excavations were in progress; that his survey after the work was completed was wholly an *ex parte* affair; and finally that it has been shown to be inaccurate in serious respects, the Board must conclude that it is insufficient to establish that the Government improperly classified the material in the excavations for the laterals and wasteways. As there is no other satisfactory proof, and the burden of proof is on the appellant, Claim No. 3 and Claim No. 4 must be rejected.

The Board must reach the same conclusion with respect to Claim No. 5, involving the alleged additional rock excavation in the structures. The contracting officer invoked the protest requirements of paragraph 37 of the specifications, as well as paragraph 9 of the General Conditions of the specifications, against the allowance of this claim. As the structure sites have either been covered with concrete or backfilled, and it would now be extremely difficult, if not impossible, to establish either the caliche elevations or the relative volumes of intermediate and rock material, there would seem to be good reason for enforcing the protest requirements. Quite apart from this consideration, however, the record fails to establish the validity of the claim. To distinguish between intermediate and rock excavation in the structure sites was even more difficult than in the case of the laterals and wasteways. Because the structure sites had either vertical sides or very steep slopes, the respective amounts of intermediate and rock material could be determined only by picking on the material or shoveling it. After this had been done, the percentages of the respective materials were estimated. The appellant has simply arbitrarily adopted a higher percentage ratio for the rock excavation

<sup>16</sup> The distance between some of these locations was considerably more than 2,000 feet. It should be noted that the Government in classifying material took shots at 100-foot intervals.

than the Government did on the theory that since the structure excavations went deeper, the caliche encountered must have become harder. This theory seems to be a wholly inadequate basis for rejecting the more informed judgments of the Government personnel who actually made the classifications.

#### CONCLUSION

Therefore, the findings of fact and conclusions of the contracting officer, dated October 7, 1958, are reversed in part and affirmed in part, and he is directed to proceed as outlined in the last paragraph of the discussion of Claims Nos. 1 and 2.

WILLIAM SEAGLE, *Member.*

I concur:

PAUL H. GANTT, *Chairman.*

### APPEAL OF SEAL AND COMPANY

IBCA-181

*Decided February 24, 1960*

#### Contracts: Appeals

A notice of appeal that is filed in advance of a decision by the contracting officer will not be dismissed as premature where both parties have treated the notice as being an appeal from the subsequent decision, and where the Government does not take a contrary position until after the time for filing a new notice has expired.

#### BOARD OF CONTRACT APPEALS

The Government has filed a statement of position concerning this appeal which contains what is, in substance, a motion to dismiss the appeal for lack of jurisdiction on the ground that it was not taken within the 30 days allowed by the "disputes" clause (clause 6) of the contract. In this opinion the Board will determine only the jurisdictional issue thus presented.

The appeal arises under a contract with the National Capital Parks of the National Park Service for floodlighting at the Washington Monument, which incorporated the General Provisions of Standard Form 23A (March 1953). The appeal involves five claims for extra compensation in the total amount of \$10,706.71.

The five claims in controversy were formally submitted to the National Capital Parks by a letter of June 30, 1958, in which, after referring to prior discussions concerning them, appellant stated:

Inasmuch as we have already been denied this claim once we request a hearing before the Appeals Board.

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The contracting officer replied by a letter of July 18, 1958, in which he stated that appellant would be advised when a decision had been reached.

Under date of November 4, 1958, appellant wrote a letter to the Secretary of the Interior about the five claims. This letter outlined their basis, and then went on to say:

The Government owes us \$20,847.53 in retainages and authorized change-orders.<sup>1</sup> In addition to the above amount, we have never been afforded a hearing as provided in the contract on our claims for extra compensation in the approximate amount of \$10,000.00.

\* \* \* \* \*

We ask, therefore, that steps be taken, as soon as possible, to release the money which is due us, and to arrange the hearing allowed us under Par. 6 of the General provisions of the specifications.

Under date of November 5, 1958, the contracting officer issued a formal decision denying the five claims. This decision recited that it was issued "in order that your appeal may be properly presented." It also stated:

In order to expedite this matter, we are forwarding a copy of this letter, together with your letter of June 30, 1958, with its enclosures, to the Chairman of the Board of Contract Appeals, calling his attention to the request contained in your letter of June 30 for a hearing before that Board. Any further data which you may wish to submit or any comment on the procedure we are following should be promptly communicated to me by letter addressed to the Secretary of the Interior \* \* \*.

On November 10, 1958, the contracting officer transmitted his decision, together with appellant's letter of June 30, to the Chairman of the Board. The memorandum of transmittal stated that he would assemble "an appeal file of pertinent documents" when informed of the designation of a Department Counsel.

On December 12, 1958, the Administrative Assistant Secretary of the Interior informed appellant, in response to its letter of November 4, that:

Your claim for extra compensation in the amount of \$10,000 has been forwarded to the Board of Contract Appeals. It is on the docket of the Board and you may be assured of equitable action. You will be advised by the Board regarding the hearing on your claim.

Appellant submitted a more detailed explanation of the basis for its claims to the Office of the Secretary on February 19, 1959, and followed the matter up in a letter of April 10 to the Administrative Assistant Secretary. The latter in his reply of April 23 stated:

I have asked that counsel for this appeal be appointed promptly. When you are notified of his appointment and have received a statement of the Government's position, you and Department Counsel will be in a position to arrange

<sup>1</sup> This sum was subsequently paid and is not involved in the appeal.

with the Board of Contract Appeals for a time when an informal conference, or, if desired, a hearing for the taking of testimony, may be held.

On May 20, 1959, counsel for appellant inquired whether a Department Counsel had been appointed. The Administrative Assistant Secretary replied by a letter of June 3 which, among other things, called attention to the fact that "a brief supporting the appeal" had not yet been submitted by appellant.

The Board is of the opinion that the letter of November 4, 1958, was a sufficient appeal from the rulings embodied in the contracting officer's decision of November 5. The letter plainly expressed a present intent to appeal to higher authority. Had it followed by 1 day, instead of preceding by 1 day, that decision, there could be no doubt but that it would have been a timely notice of appeal from the decision. As the Board's jurisdiction is appellate, it is the general rule that there must be a decision by the contracting officer before there can be an appeal, and that a notice of appeal prematurely filed is not validated merely by the subsequent rendition of a decision on the same subject as that covered by the notice.<sup>2</sup> This rule, however, is not so inflexible as to admit of no exceptions for cases where the parties have actually treated the notice as relating forward to the decision or the decision as relating backward to the notice, and where a refusal to give effect to the practical construction placed upon the transaction by them would be contrary to reason and equity.<sup>3</sup>

Ample ground for the recognition of such an exception exists in the present case. The contracting officer clearly intended his decision of November 5, 1958, to serve as a step in perfecting an appeal which, he considered, had been already initiated by appellant's letter of June 30, 1958. The Administrative Assistant Secretary likewise treated the case as involving an outstanding appeal, rather than a decision from which no appeal had yet been taken. It would be unreasonable and inequitable for the Board to adopt a different theory, now that the time for filing has expired.

We conclude, therefore, that the letter of November 4, 1958, was not made ineffective by prematureness, and that the decision of November 5, 1958, was validly appealed.

#### CONCLUSION

The motion to dismiss for want of jurisdiction is denied.

HERBERT J. SLAUGHTER, *Member.*

I concur:

PAUL H. GANTT, *Chairman.*

<sup>2</sup> *Westinghouse Electric Supply Co.*, IBCA-107, 57-2 BCA par. 1365 (1957).

<sup>3</sup> See *B. W. Hovermill Company*, ASBCA No. 5570, 59-2 BCA par. 2439 (1959).

## UNITED STATES V. MARY A. MATTEY

A-28009

*Decided February 29, 1960***Mining Claims: Discovery—Mining Claims: Common Varieties of Minerals**

To satisfy the requirements for discovery on a placer mining claim located for a deposit of clay, it must be shown that the clay is not only marketable at a profit but that it is not a common clay suitable only for the manufacture of ordinary brick, tile, pottery, and similar products.

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

A deposit of clay which contains impurities useful as flux material in the manufacture of sewer pipe but which is not of an unusual or exceptional nature is a common clay where it is clear that all common clays possess the same substances and in more or less the same degree.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

The United States has appealed to the Secretary of the Interior from a decision dated December 22, 1958, of the Director of the Bureau of Land Management which affirmed a decision by a hearing examiner dismissing its protest against a placer mining claim patent application filed by Mary A. Mattey for lands situated in the Cleveland National Forest, California.

In its protest the United States, through the Forest Service, United States Department of Agriculture,<sup>1</sup> alleged that no discovery of mineral had been made and that the land is nonmineral in character.

The patent applicant filed an answer in which she stated that the claim, the Grape Vine Placer Mining Claim, contained a deposit of clay of commercial value, estimated to contain more than 250,000 tons, which has been and is being used in the manufacture of various clay products, including sewer pipe.

Thereafter, on January 29, 1957, a hearing was held before a hearing examiner on the charges made by the Forest Service. The basic facts adduced at the hearing are not in dispute.

The claim, which is near Corona, California, contains a deposit of sedimentary shale or clay used by the Tillotson Refractory Company in the manufacture of vitrified sewer pipe at its plant in Corona. It appears that, after several years of experimentation, the company began to use the clay in substantial amounts in October 1956 and in the 3 months preceding the hearing had used a total of about 4,300 tons (Transcript of Hearing, p. 46). The shale is combined with better quality and rarer clays to produce a mix with certain desired characteristics. The shale constitutes 65 percent of the mixture, a local

<sup>1</sup> 43 CFR, 1954 ed., 205.6; as revised 43 CFR, 1958 Supp., 205.2.

residual clay from adjoining land owned by Tillotson 20 percent, and a purchased ball clay 15 percent. (Tr. 48-49.) The shale clay is used as the bulk substance (Tr. 107). While ordinary earth could be used in its place, to do so would require a much higher proportion of the better clays in the mix (Tr. 107-8). In addition, the shale contains "impurities" which are essential to the production of a good grade of sewer pipe at a reasonable cost. These "impurities" are chiefly iron oxide and sodium and potassium oxide, the first of which gives the product a desirable red color and the latter makes possible the vitrification of the clay at lower temperatures. (Tr. 53, 55-56, 132-133.)

There are several other similar deposits of shale in privately owned lands in the vicinity, which are controlled either by Tillotson or other manufacturers (Tr. 52). There are also extensive deposits of shale nearby higher up in the forest (Tr. 53, 109-111, 120, 134-135).

The hearing examiner dismissed the protest, holding that there was a market for the shale deposit; that, because of the flux materials in it, the shale is usable for purposes other than making common brick; and that as a result there has been discovery of a valuable mineral and the land is mineral in character.

The Director affirmed the hearing examiner's decision on the ground that the shale is peculiarly valuable for the manufacture of sewer tile because of the chemical composition of the clay and the flux materials contained in it. The Director stated that common or ordinary deposits of clay would not constitute minerals subject to location under the mining laws.

The United States has appealed on the grounds that a shale deposit of the nature of the one found on the claim is not and never has been subject to location under the mining laws, and that, even if it once was, it no longer is because of the enactment of section 3 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 611), which states that common varieties of certain minerals shall not be deemed a valuable mineral deposit under the United States mining laws.

Under the mining laws all valuable mineral deposits in the public lands are open to exploration and purchase and the lands in which they are found are open to occupation and purchase except as they may have been withdrawn or reserved for other disposition (30 U.S.C., 1958 ed., sec. 22). While the lands remain open and until other rights have attached to them, the discovery of a valuable mineral deposit within the limits of the claim will validate the claim (30 U.S.C., 1958 ed., secs. 23, 25) if other requirements of the law have been met. In order to satisfy the requirements of discovery on a mining claim located for a deposit of one of the mineral substances of wide occurrence, such as clay, it must be shown that the deposit can be extracted and

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removed at a profit. This includes a favorable showing as to the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. *United States v. Everett Foster et al.*, 65 I.D. 1 (1958), and cases cited, affirmed *Foster v. Seaton*, 231 F. 2d 836 (1959); *United States v. John B. Kathe, Jr.*, A-27744 (November 19, 1958).

However, not every deposit of clay for which a market exists can serve as the basis for the validation of a mining claim. The Department has never recognized marketability as the sole test of the validity of a mining claim of this nature. In *Dunluce Placer Mine*, 6 L.D. 761 (1888), and *King et al. v. Bradford*, 31 L.D. 108 (1901), the Department held that a deposit of ordinary brick clay could not be entered under the mining laws. In *Holman et al. v. State of Utah*, 41 L.D. 314 (1912), the Department said:

It is not the understanding of the Department that Congress has intended that lands shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. It might pay to use any particular portion of these deposits on account of a temporary local demand for lime or for brick. If, on account of such use or possibilities of use, lands containing them are to be classified as mineral, a very large portion of the public domain would, on this account, be excluded from homestead and other agricultural entry. \* \* \* It is not intended hereby to rule that there may not be deposits of clay and limestone of such exceptional nature as to warrant entry of the lands containing such deposits under the mining law. (P. 315.)<sup>2</sup>

The Department made clear to Congress its view that marketability alone is not sufficient to validate a mining claim based on a deposit of clay. In commenting on the bill which became the Materials Act of July 31, 1947 (30 U.S.C., 1958 ed., sec. 601 *et seq.*), which authorizes the Secretary to sell certain materials on public lands of the United States, the Under Secretary of this Department stated:

There are on the public lands many materials and resources which can be used profitably for the benefit of local industries and communities and to the disposition of which there is no real objection. There is, however, no permanent legislation under which these may be utilized. \* \* \*

Included in the materials to which it is contemplated the proposed bill would apply are:

\* \* \* \* \*

2. Sand, stone, and gravel not of such quality and quantity as to be subject to the mining laws but which are desired by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements.

\* \* \* \* \*

<sup>2</sup> See also *Mrs. A. T. Van Dolah*, A-26443 (October 14, 1952).

4. Common earth to be used for road fills, earth dams, stock-watering reservoirs and similar uses.

5. Clay to be used for the manufacture of bricks, tile, pottery, and similar products. (S. Rept. No. 204, 80th Cong., 1st sess.)

The Department has restated its position several times. *Mrs. A. T. Van Dolah, supra*, fn. 2; cf. *United States v. Everett Foster et al.*; *United States v. P. D. Proctor et al.*, A-27899 (May 4, 1959).

Thus, the Department has long construed the mining laws as not validating a mineral location based upon a deposit of sand and gravel merely because there is some market for it. A long continued and uniform administrative interpretation of a statute is entitled to great weight in its construction. *United States v. Wyoming*, 331 U.S. 440, 454 (1947); *Lykes v. United States*, 343 U.S. 118, 126-127 (1952); *United States et al v. American Trucking Associations, Inc., et al.*, 310 U.S. 534, 549 (1940). Particularly is this so where Congress has accepted and acted upon the basis of the administrative interpretation. *Brooks v. Dewar et al.*, 313 U.S. 354, 360, 361 (1941).

On the other hand, the Department has held that lands containing deposits of clay of an exceptional nature may be entered under the mining laws. *United States v. Barngrover et al. (On Rehearing)*, 57 I.D. 533 (1942); *Fred B. Ortman*, 52 L.D. 467, 469 (1928); see also *Mrs. A. T. Van Dolah, supra*; *Holman et al. v. State of Utah, supra*.

The contestee's position on the law is not too clear. On the one hand, she seems to contend that even common clay is subject to location under the mining law so long as it is marketable. On the other hand, particularly in answer to the contestant's present appeal, she asserts that the clay deposit in question has a distinct and special value, as the Director found. Of course, if the first proposition is true, it would be unnecessary to determine whether the Matthey clay or shale possessed an uncommon value. All that would have to be ascertained is whether the clay is in present demand and is marketable.

For the first proposition, the contestee relies heavily upon *Layman et al. v. Ellis*, 52 L.D. 714 (1929), which overruled *Zimmerman v. Brunson*, 39 L.D. 310 (1910). In the *Zimmerman* case, the Department held that sand and gravel, which had no peculiar property or characteristic but had been used in making concrete for building purposes and whose chief value derived from its proximity to town, were not minerals subject to mining location. The decision cited, among other cases, *Dunbruce Placer Mine and King et al. v. Bradford, supra*. *Layman et al. v. Ellis* also involved gravel deposits which had been sold for use in road and building construction on the State highway system. Holding that the deposits were subject to mining location, the Department pointed to the pronounced and widespread economic value of gravel and the fact that it is definitely classified



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as a mineral product in trade and commerce. However, the *Layman* case did not rely upon marketability alone. The Department said:

Good reason also exists for questioning the statement [in the *Zimmerman* case] that gravel has no special properties or characteristics giving it special value. While the distinguishing special characteristics of gravel are purely physical, notably, small bulk, rounded surfaces, hardness, these characteristics render gravel readily distinguishable by any one from other rock and fragments of rock and are the very characteristics or properties that long have been recognized as imparting to it utility and value in its natural state. (52 L.D., at 720.)

In other words, the Department seemed to be indicating that gravel is a rock of special and distinct value because of its physical characteristics, and, therefore, that as a rock of peculiar value it is subject to mining location just as rock of special value for building purposes is subject to mining location.

However this may be, *Layman et al. v. Ellis* was confined to gravel and considerations pertaining to gravel. It did not in terms or by necessary implication overrule *King et al. v. Bradford* or *Holman et al. v. State of Utah*. In fact, in *Mrs. A. T. Van Dolah, supra*, decided many years after the *Layman* case, the *Holman* case was cited in support of the proposition that common clay cannot be located under the mining laws although clay of an exceptional nature may be.

In addition, it is clear from the terms of the Materials Act of July 31, 1947, its legislative history, and the Department's construction of the act, that common clay is not subject to disposition under the mining laws. It only remains then to determine whether the clay and shale deposit on which the appellant's claim is founded is a common clay or a clay of exceptional nature.

The only unusual qualities attributed to the deposit are that it contains certain "impurities" and is used in the manufacture of vitrified sewer pipe. The impurities, or flux materials, however, are merely the ordinary substances found in common clay. Indeed, it is their presence in appreciable amounts which differentiates the common clays from the less common clays (Tr. 119).<sup>3</sup> There is nothing in the record to indicate that the Matthey shale contains flux materials in unusual combinations or that it is different in composition from any other common clay. The only comparison made was between the shale and common dirt as a bulk material for the clay mixture used in manufacturing the sewer pipe. The fact that there the advantages are in favor of using shale over common earth is hardly sufficient to warrant classifying the shale as uncommon.

Turning now to its use in the manufacture of sewer pipe, we must first note that sewer pipe is generally classified as a heavy clay product

<sup>3</sup> See "Mineral Commodities of California," Bulletin 176, Division of Mines, Department of Natural Resources, State of California, 1957, pp. 143-148.

along with brick and drain tile; the clay used for such a purpose may well fall within the uses of clay which the discussion above demonstrated would not validate a mining claim. However, it is not necessary to rest on this ground because if the deposit is in itself of the type of clay not subject to location under mining laws, the fact that it is used in combination with purer clays cannot remove it from the proscribed category. In other words, the use to which a common clay is put cannot make the lands in which it is found subject to location under the mining laws, if the use is not dependent upon any unusual characteristics of the clay itself. It would be different if a clay with unusual characteristics which could be used in the manufacture of ordinary brick were used to make a product for which its unusual characteristics were essential. In this case the Matthey shale has no qualities that it does not share with other common clays and it is used only as any other common clay could be used.

Consequently, I cannot find that it is a mineral subject to location under the mining laws or that the land in which it is found is, because of it, mineral in character. Accordingly, I conclude that there has been no discovery of a valuable mineral on the claim, that the protest against the patent application was improperly dismissed, and that the patent application should be rejected and the claim held null and void.

This conclusion makes it unnecessary to consider the contestant's allegations that under the act of July 23, 1955, *supra*, common clay is not a locatable mineral.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is reversed and the case is remanded for further proceedings consistent herewith.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

## ALUMINA DEVELOPMENT CORPORATION OF UTAH ET AL.

A-28171

*Decided February 29, 1960*

### Multiple Mineral Development Act: Verified Statement

The verified statement filed by a mining claimant pursuant to section 7 of the act of August 13, 1954, must be under oath.

### Multiple Mineral Development Act: Verified Statement

Where an officer of a corporation filing a statement pursuant to section 7 of the act of August 13, 1954, subscribes his signature to a statement that he is making the statement under oath and a notary public signs and seals an acknowledgment of the officer's signature, the statement is considered to have been made under oath and thus verified.

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### Multiple Mineral Development Act: Verified Statement

Where a statement filed pursuant to section 7 of the act of August 13, 1954, does not on its face show that it was sworn to, yet in fact it was sworn to, the fact that the oath was administered may be shown by evidence outside the record.

### Multiple Mineral Development Act: Verified Statement

The signature of a corporate officer to a verification of a statement filed pursuant to section 7 of the act of August 13, 1954, or the corporate seal stamped on each page of the statement is a sufficient signature to the statement, if a signature is necessary.

### Mining Claims: Lands Subject to—Mining Claims: Special Acts

Mining claims are null and void where the claims are located after December 31, 1952, and prior to February 10, 1954, on lands then in outstanding oil and gas leases and the requirements of the act of August 13, 1954, under which the claims might have been validated, were not met.

### Mining Claims: Lands Subject to

Land embraced in an oil and gas prospecting permit becomes subject to mineral location, all else being regular, as soon as the permit expires and not only when the notation of the expiration of the permit is made.

### Mining Claims: Determination of Validity

Mining claims whose invalidity is demonstrated by matters of record are to be declared null and void by the manager of the land office without the necessity of further proceedings.

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Alumina Development Corporation has appealed to the Secretary of the Interior from a decision dated May 21, 1959, of the Acting Director of the Bureau of Land Management which rejected in its entirety a "verified statement" filed by it pursuant to section 7 of the act of August 13, 1954 (68 Stat. 711; 30 U.S.C., 1958 ed., sec. 527).

The act was intended to relieve persons holding or seeking leases or permits of public lands under the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*) from the possibility that at some time in the future a mineral claimant might assert a prior valid mining claim to the same land which would deprive the lessee of his rights to the land covered by the mining claim. It provides, among other things, that at the request of a lessee, the Secretary, or his designated representative, shall have published a notice describing the public lands covered by the lease and that, upon the failure of any person claiming any interest in any leasing act minerals in the lands described in the published notice to file, within the time allowed, "a verified statement" setting out certain matters relating to his claim—

\* \* \* such failure shall be conclusively deemed, \* \* \* (i) to constitute a waiver and relinquishment by such mining claimant of any and all right, title, and interest under such mining claim as to, but only as to, Leasing Act minerals, and \* \* \*, (iii) to preclude thereafter any assertion by such mining claimant of any right or title to or interest in any Leasing Act mineral by reason of such mining claim. 30 U.S.C., 1958 ed., sec. 527 (b).

Proceedings under section 7 were initiated by the Nicholas G. Morgan, Sr., Charitable Foundation, Inc., O. Preston Robinson, Seneca Oil Company, Ray L. Taylor, and Croff Oil Company, lessees of oil and gas leases Utah 07297, 08096, 09024, 09030, and 09040, respectively, and first publication was made in October 1956. It appears that in November 1956 Alumina submitted a letter and enclosures to the manager of the Salt Lake land office. In a letter dated November 26, 1956, the manager returned the enclosures to Alumina and said that if it was Alumina's intention to assert surface rights to the lands affected by its claims, it would have to comply with the provisions of the pertinent regulations, 43 CFR, 1954 rev., Part 186 (Supp.), a copy of which was enclosed. Alumina's attention was drawn to section 186.16 and to form 5 which, respectively, state the consequences of the failure of a mining claimant to file a verified statement and set out a form of verified statement.

On or about February 10, 1957, Alumina filed a document entitled "Verified Statement of Mining Claimant Pursuant to section 7 of the act of August 13, 1954 (68 Stat. 708)" in which it listed 33 mining claims in Ts. 17 and 18 S., Rs. 13 and 14 E., S.L.M., in conflict with 10 oil and gas leases, including those involved in this appeal.

The statement follows the form set out in the regulation. The paragraph numbered "1" states:

Under and by virtue of the hereinafter mentioned mining claims located prior to enactment of the act of August 13, 1954 (68 Stat. 708) the undersigned Alumina Development Corporatio[n] of Utah whose address is Price, Utah, 212 E. 1st N. St. claims rights in Leasing Act minerals defined in said act. There is, however, no signature to the statement as such. Following the statement itself, there is a separate page which reads as follows:

#### VERIFICATION

State of Utah

County of Carbon. ss:

Joseph E. Forrester being duly sworn, deposes and says that he is an officer, to-wit: President of ALUMINA DEVELOPMENT CORP. 212 E. 1st N. St. Price, Utah the corporation, named in and whose name is subscribed to the foregoing Verified Statement of Mining Claim-

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ant, and makes this verification for and on behalf of said corporation; that (sic) he has read the foregoing Verified Statement of Mining Claimant and that the same is true of his own knowledge.

[Signed] JOSEPH E. FORRESTER  
President.

State of Utah,

County of Carbon. On this 9 day of February, 1957, personally appeared before me the above signer who duly acknowledged to me that he executed the same.

S/DRUCILLA J. POWELL  
Notary Public, in and for  
Carbon County, Price, Utah.

My commission expires:

October 8, 1958

(Seal)

On May 2, 1958, Morgan Foundation filed a document denying the validity of the mining claims listed by Alumina as conflicting with its lease Utah 07297 and asking for certain prehearing procedures.

On May 8, 1958, the manager held the verified statement for rejection as to 29 of the mining claims on the ground that the claimant had not complied with section 1(a) of the act of August 13, 1954 (30 U.S.C., 1958 ed., sec. 521), and held 4 invalid because they were located between February 10, 1954, and August 13, 1954, on lands covered by valid oil and gas leases.

On June 4, 1958, the manager issued an amended decision in which he rejected the verified statement in part, suspended it in part, and held the balance of the claims for hearing before a hearing examiner.

In a letter to the manager, received on June 5, 1958, Morgan Foundation again attacked the validity of Alumina's claims in conflict with lease Utah 07297 and also alleged that Alumina's statement was not properly executed or verified and that, as a result, Alumina had not complied with the filing requirements within the 150 days allowed. Similar contentions were made by the lessees of Utah 09030 and 08096.

On June 23, 1958, the manager issued a supplement to his decision of June 4, 1958, which rejected the verified statement as to part of one mining claim and held the rest of that claim and four others for hearing. The manager made no reference to the charges made by the oil and gas lessees against the validity of the verified statement filed by Alumina.

Alumina appealed to the Director, Bureau of Land Management, and served the oil and gas lessees with a copy of its notice of appeal. Its appeal was restricted to 10 claims, or parts of claims, which the manager had held invalid.

The oil and gas lessees submitted an answering brief in which they contended that the manager had ruled correctly on the validity of the mining claims in conflict with their respective leases and repeated their assertion that the statement filed by Alumina did not satisfy the requirements of the statute.

The Acting Director held that the "verified statement" required by the statute must be under oath, that Alumina's statement was not executed under oath, but was merely acknowledged, and rejected the "verified statement" in its entirety. In disposing of the appeal on this ground, the Acting Director did not find it necessary to rule upon the manager's finding that some of Alumina's mining claims were invalid.

In its appeal Alumina asserts that its statement was in compliance with the pertinent statute and regulations, and that, even if it were not, extrinsic evidence can be introduced to show compliance.

As an attachment to its appeal, Alumina has appended an affidavit, dated July 19, 1959, of Drucilla J. Powell, the notary before whom Forrester appeared, in which she swears that she administered and Forrester took an oath as to the truth of the matters in Alumina's statement, but that she mistakenly used the form for an acknowledgment instead of for a sworn statement.

The oil and gas lessees have filed a reply brief in which they contend that Alumina's statement was not executed in the corporate name, that it was merely acknowledged, that extrinsic evidence may not be used now to remedy the defect in the jurat, and that a verified statement was not filed within the time allowed by the statute.

The Department has ruled that the "verified statement" which section 5 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 613), requires a miner to file if he desires to retain all of his rights to the use of the surface of his claim must be under oath. Solicitor's opinion M-36419 (February 25, 1957). Since the language of this act and of the act of August 13, 1954, is identical in all material aspects, the interpretation given the former controls the latter. Therefore, a statement filed under section 7 must also be a statement made under oath.

The appellant's first contention is that its statement as filed is a verified statement within the meaning of section 7. It urges that the verification and acknowledgement must be taken together and, if so taken, they show that the verification was taken under oath.

In a recent case the Supreme Court of Iowa considered an identical situation and held the statement to be a "verified statement." There a statute required that " \* \* \* every person who wishes to avail himself of a mechanics' lien shall file \* \* \* a verified statement \* \* \* of the demand due him \* \* \*."

The Court held:

\* \* \* It will also be observed that the notary certificate did not state that the person who had signed the statement as to the correctness of the mechanic's lien

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had subscribed his signature and that it had been sworn to before a notary. The form used by the notary was to the effect that the person who signed the statement "executed the foregoing instrument and acknowledged that he executed the same as his voluntary act and deed." The signature of the notary and her seal was attached to what may be referred to as an acknowledgement form. Under these circumstances was the mechanic's lien verified? It is our conclusion that the affiant, Robert T. Dalbey, in signing his name to the statement as to the correctness of the lien and account filed was, as is shown by the certificate itself, conscious of the fact that he was swearing to the correctness of the lien and account, and that the lien should not be held invalid because of the statement of the notary before whom the affiant appeared. This conclusion finds support in the statement in 1 Am. Jur., par. 13, p. 942, Affidavits, where it is stated: "\* \* \* If the attention of the person making the affidavit is called to the fact that it must be sworn to and, in recognition of this, he is asked to do some corporal act and he does it, the instrument constitutes a statement under oath, irrespective of any other formalities." *Dalbey Bros. Lumber Co. v. Crispin et al.*, 12 N.W. 2d 277, 279 (Iowa, 1943).<sup>1</sup>

The oil and gas lessees rely upon *Gossard v. Vawter*, 21 N.E. 2d 416 (Ind., 1939), for the proposition that a verification must have both an actual swearing and a jurat. However in that case there was neither a jurat nor a certificate signed by a notary. One of the justices in *Dalbey Bros.* (*supra*), in a special concurring opinion, discussed *Gossard v. Vawter* and distinguished it on this basis. *Dalbey Bros. Lumber Co. v. Crispin, supra*, 281.<sup>2</sup>

Therefore, the statement submitted by Alumina was under oath and is not defective for lack of an oath.

Furthermore, if this ground were not sufficient to validate Alumina's verified statement, it would be necessary to consider whether evidence other than that appearing in the statement could now be submitted to prove that the statement had in fact been verified. Although the authorities are divided on this point, I believe that for the purposes of the statute involved, it is better to follow the general rule which allows such evidence to be presented.<sup>3</sup>

The consequences to the mineral claimant of a holding that, for some technical reason, his statement is not a proper one under section 7 can be serious, if not fatal, to his mining claims.

Where a miner has made an honest effort to file a proper statement and has in fact complied with all the requirements of section 7, there does not appear to be any reason to deny him the opportunity to protect the unity of his claim merely because the notary public before

<sup>1</sup> To the same effect: *Swanson v. Pontralo et al.*, 27 N.W. 2d 21 (Iowa, 1947).

<sup>2</sup> In a later case, the Iowa Supreme Court held that the mere signing of a statement that the signer was under oath did not satisfy a statute requiring an oath where the evidence was insufficient to show that an oath had been administered. *Miller v. Palo Alto Board of Supervisors*, 84 N.W. 2d 38 (Iowa, 1957). Although two dissenting judges referred to the *Dalbey Bros.* case, the majority did not overrule or even discuss it.

<sup>3</sup> For a collection of cases, see 1 A.L.R. 1571 and 116 A.L.R. 589; 67 C.J.S., Oaths and Affirmations § 7; *Barthelmues v. Ives*, 85 N.Y.S. 2d 35 (1948).

whom he appeared has inadvertently omitted the jurat or used an inappropriate form. The purpose of section 7 has been fulfilled because the miner has come forward within the time allowed and asserted and described his claim. The mineral lessee has not suffered any delay or hindrance not contemplated by section 7.

The Department has allowed affidavits incorrect upon their face to be corrected without prejudice to the party filing them. In *Kelly v. Bott*, 42 L.D. 325 (1913), a contestant was allowed to correct a contest affidavit where the notary before whom it was acknowledged mistakenly gave the time of expiration of his commission as prior to the date of the acknowledgement. In *Allen v. Pilcher*, 51 L.D. 285 (1925), the Department held that, as a general rule, where a statute prescribes no specific form of affidavit in proceedings or pleadings that have been verified by oath, the fact that the oath has been administered may be shown by extrinsic evidence if no rights are prejudiced thereby. The facts appear to be identical to those in the case on appeal. Pilcher submitted an application for a prospecting permit to which was affixed only an acknowledgement before a notary public, although the application was required to be verified by oath. The First Assistant Secretary held:

\* \* \* The requirement of an oath to an application is, therefore, mandatory and no application is properly allowable unless it is verified by oath and so shown to be. An application under this act is not, however, a nullity or fatally defective because the evidence that it was sworn to does not appear thereon, if the oath was administered and that fact is later satisfactorily shown. The liberal policy of the several States in respect to amendments in judicial proceedings is followed by the Department in so far as amendments do not affect rights (*Hiram T. Hunter*, 2 L.D. 39). As a general rule where a statute prescribes no specific form of affidavit in proceedings or pleadings that have to be verified by oath, the fact that the oath was administered may be shown by extrinsic evidence and an affidavit, if in fact sworn to at the proper time and before the proper officer, is generally admitted by the courts where no rights are prejudiced. See *Corpus Juris*, Vol. 2, p. 260, note 52, and *American Digest*, Century Edition, Vol. 2, p. 45, for cases in point. The omission may have been due to an oversight or inadvertence on the part of a notary public to whom the paper was presented for certification. It is, therefore, within the sound discretion of the Department to permit the same to be shown if such was the fact. No rights of Allen would be prejudiced thereby. His statement that the filing of his application was due to the fact that Pilcher's application was not verified is not acceptable in the light of the record, which discloses that there were nine other applicants, each with a chance of success at the drawing, and that his application was filed at 9 a.m., whereas Pilcher's was filed at 9:10 a.m.

\* \* \* \* \*

If in fact Pilcher made oath to his application before the officer and upon the date stated in the certificate of acknowledgement to his application, he will have the privilege of so showing before disposition is made of the protest. He should accordingly be permitted, if such was the fact, to file an affidavit cor-



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roborated by George M. Cook, the notary public who affixed the certificate to his application, setting forth an explanation for the omission of the oath and stating that an oath thereto was administered to him by said notary at the time shown in said certificate of acknowledgement. If he shall fail to make the showing required within a period prescribed by the Commissioner his application will be finally rejected and Allen will be accorded the preferred right under the drawing held, if otherwise regular, his application being next in order for consideration.

The case is accordingly remanded to the Commissioner for appropriate action, due notice thereof to be given to the protestant.<sup>4</sup>

Thus, even if the verification were held to have been improperly executed, the mining claimant would be permitted to introduce evidence that its statement had been sworn to, and to correct the form of the verification to reflect what actually took place. In fact it has submitted the affidavit of the notary public who administered the oath.

The oil and gas lessees also contend that Alumina did not sign its statement. Although there does not appear to be any corporate signature in the usual manner, each page of the statement, including the verification, bears the imprint of the corporate seal which includes the name of the corporation. Furthermore, the verification is signed by Joseph E. Forrester as "President." These acts are sufficient to constitute a signature to the statement,<sup>5</sup> if one is necessary.<sup>6</sup>

Having disposed of the technical objections to the verified statement, we may now consider Alumina's objections to the manager's decision holding that all or part of some claims were invalid on their face and refusing to refer them to a hearing examiner.

The claims as to which Alumina appealed fall into three groups: First come those claims which the manager held not subject to mineral location because the land had been earlier disposed of by the United States without a mineral reservation. Alumina, in its brief to the Director, agrees that, if the facts are as stated by the manager, a mineral location would be invalid, but it asks that the matter be referred to the hearing examiner for determination by him. It has, however, offered nothing to indicate that the manager's

<sup>4</sup> In later cases involving priority among applicants for oil and gas permits, the Department has applied a stricter rule because it felt that the mere existence of a defective application would be enough to discourage other filings and thus permit applicants who have not complied with the regulation to gain a priority they ought not have. *Sour v. McMahon*, 51 L.D. 587 (1926); *Edwina S. Elliott, On Rehearing*, 56 I.D. 1 (1936); *Mary I. Chapman, Harry M. Kirchner*, 60 I.D. 376 (1949). See also *Witbeck v. Hardeman*, 51 F. 2d 450, 453, 454 (5th Cir. 1931), affirmed *Hardeman v. Witbeck*, 286 U.S. 444 (1932).

<sup>5</sup> See 7 Fletcher, *Cyclopedia Corporations*, §§ 3026, 3027 (Perm. ed.).

<sup>6</sup> See 1 Am. Jur., Affidavits § 17: "In the absence of a statute or rule of court to the contrary, it is not necessary to the validity of an affidavit that it have the signature of the affiant subscribed thereto, although all the authorities and general custom recommend as the better practice that it be signed by the affiant." (P. 944.)

determination is incorrect. If a claim, or part of it, is invalid for reasons appearing on the face of the record, the manager can declare it invalid to that extent without referring the question to a hearing. *Clear Gravel Enterprises, Inc.*, 64 I.D. 210 (1957). Accordingly the manager correctly refused to refer parts of claims Brown Dyke Nos. 3, 28, 29, and 30 to the hearing examiner and properly declared them null and void.

There is only one claim in the second group, Brown Dyke No. 43, which was held invalid in its entirety by the manager because on the date it was located, February 21, 1953, the land it covered was included in an outstanding oil and gas lease, Utah 08096, and there is no evidence that the mineral claimant had complied with the provisions of the act of August 12, 1953 (30 U.S.C., 1958 ed., sec. 501), or the act of August 13, 1954 (30 U.S.C., 1958 ed., sec. 521).

In a recent decision the Department held:

\* \* \* when the attempted locations were made, the lands were not open to mining entry since all of the lands were included in oil and gas leases issued under the Mineral Leasing Act, and such lands were not subject to location under the United States mining laws (*United States v. U.S. Borax Co.*, 58 I.D. 426 (1943); *Monolith Portland Cement Company et al.*, 61 I.D. 43 (1952)). Although these claims might have been validated under the act of August 13, 1954 (30 U.S.C., 1958 ed., secs. 521-523), if the requirements in that act as to posting notices and filing amended location notices had been met, the record indicates that there has been no attempt to so validate the claims. Accordingly, the decisions holding the claims null and void appear to be correct (see *R. L. Greene et al.*, A-27181 (May 11, 1955); *Clear Gravel Enterprises, Inc.*, A-27287 (March 27, 1956); *United States v. R. B. Borders, et al.*, A-27493 (May 16, 1958)).

*Mesilla Valley Construction Company et al.*, A-28102 (November 20, 1959).

Therefore the manager properly held Brown Dyke No. 43 null and void.<sup>7</sup>

The third group of claims (Brown Dyke Nos. 1, 2, 7, and 8 and parts of 3, 4, and 28) are those which were located on September 1, 1939 (or, as the appellant claims, in 1925). The manager held that the land covered by these claims was part of oil and gas prospecting permit Salt Lake 050390 and invalid for lack of compliance with the act of August 12, 1953 (*supra*).

If the claims were validly located in 1925, a permit or lease issued later would not make them null and void. *Union Oil Company of California, Ramon P. Colvert*, 65 I.D. 245 (1958). The appellees, however, point out that in its verified statement Alumina said these claims were located in 1939 and contend that it is bound by that state-

<sup>7</sup> Alumina alleges that Brown Dyke No. 43 is in conflict with lease Utah 08096 only in part. However, an examination of the records indicated that the conflict is total. The mining claim covered the SW $\frac{1}{4}$  sec. 18, T. 17 S., R. 14 E., S. L. M., and the lease covers, among other lands, lots 3, 4, E $\frac{1}{2}$ SW $\frac{1}{4}$  of the same section—which is all of the SW $\frac{1}{4}$  since lots 3 and 4 constitute the W $\frac{1}{2}$ SW $\frac{1}{4}$ .

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ment. Alumina argues that in 1939 it only relocated the 1925 locations and that it may rely upon them.

Since, for reasons set out below, I feel that the land was open to mineral location in 1939, it is not necessary to determine this question.

Oil and gas permit Salt Lake 050390 was issued to Clarence I. Justheim on October 17, 1932, for a term of 2 years. Although there is no indication in the record of any action taken to extend the permit, it was presumably extended pursuant to several acts which either authorized the Secretary to extend such permits or extended them by statute. See *Jebson et al. v. Spencer et al.*, 61 I.D. 161, 164, 165 (1953). In any event the record contains a memorandum from the Commissioner of the General Land Office (now the Director, Bureau of Land Management) dated June 9, 1938, stating that the permit was unconditionally extended to December 31, 1938, pursuant to the Secretary's Order of December 23, 1937 (Order No. 1240; 43 CFR, 1940 ed., 192.7); that the permit could not be extended beyond December 31, 1938, but that the right to prospect the land could be continued under lease by the filing on or before December 31, 1958, of an application to exchange the permit for a lease under the provisions of the act of August 21, 1935 (49 Stat. 674). There is no indication that an application to exchange the permit was filed before December 31, 1938.

The next notation in the record refers to a letter "N" of March 26, 1940, terminating the permit as of April 25, 1940.

In the *Jebson* case (*supra*), the Department considered whether under identical facts the land covered by the permit was open to mineral location between December 31, 1938, and the notation of the termination of the permit. It held that the permit terminated by operation of law on December 31, 1938, that the lands it covered became available to mineral location upon the expiration of the permit, and that the notation was made only to determine the date on which the lands became subject to application for oil and gas.

It concluded:

It is a well-established rule of the Department that no application will be received and no rights will be recognized as initiated by the tender of an application for a tract of land embraced in an entry of record until such entry has been canceled and the cancellation noted on the records of the local land office. Circular, 29 L.D. 29 (1890). However, a mining claim is not initiated by application made at the local land office. A right in a mining claim is established by a series of acts including discovery of valuable mineral deposits within the limits of the claim, marking the boundaries of the claim, posting notice on the claim, and recording the claim in the manner required by the regulations of the mining district. 30 U.S.C., 1946 ed., secs. 22-28. There is no requirement under the mining laws that application for the land must be made at the local land office or that notice of the claim must be filed with the United States, either at the local land office or else-

where. Thus, this rule is not applicable to the initiation of rights under the mining laws on lands subject to such laws.

It follows that the action of the General Land Office in declaring that the cancellation of the permit was not to be effective until March 25, 1940, did not preclude the initiation of a mining claim on the land on February 2, 1940. *Cf. Griffith et al. v. Noonan et al.*, 133 P. 2d 375 (Wyo., 1943).

Accordingly, it was error to hold that the land was not open to mining location on February 2, 1940. (Pp. 166-167.)

Thus it follows that the land formerly in Salt Lake 050390 was open to mining location on September 1, 1939, and that, all else being regular, it was error to reject Alumina's verified statement as to the claims in the third group and to hold them null and void. These claims are to be held for hearing before the hearing examiner along with the other claims which the manager determined qualified for that proceeding.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director is reversed and the case is remanded for further proceedings consistent herewith.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

### LEWISTON LIME COMPANY

IA-1077

*Decided March 1, 1960*

#### Indian Lands: Leases and Permits: Minerals

A provision in a tribal limestone lease permitting the lessee to deduct costs of "transportation and treatment" in determining the net value of its production is limited to those items and does not give operator of the lease the right to deduct all of its general mining or quarrying costs.

#### Indian Lands: Leases and Permits: Generally

The fact that the Government over a long period of time accepted without objection lesser royalties than it later finds are due under the terms of a tribal mineral lease does not estop it from asserting a claim for additional royalties.

### APPEAL FROM THE BUREAU OF INDIAN AFFAIRS

The Lewiston Lime Company of Seattle, Washington, has appealed to the Secretary of the Interior from a decision of the Acting Commissioner of Indian Affairs dated July 17, 1958, holding that the Company is indebted to the Nez Perce Indian Tribe of Idaho in the amount of \$42,586.13 for back royalties under Nez Perce Tribe Limestone Lease No. 724, Contract I-18-Ind. 3130.

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Appellant is operating the lease on which Bert H. Richardson is lessee. By its terms the lease, originally executed in 1938, expires March 31, 1960. Its royalty provision reads:

\* \* \* The lessee hereby agree to pay or cause to be paid to the officer in charge for the lessor as royalty *10 per cent of the net value of the output of rock or stone at the mine, which is to be ascertained by deducting from the gross value of the rock or stone the cost of transportation and treatment necessary for the sale of such rock or stone; said royalty to be not less than 5 cents a ton for the output of rock or stone at the mine, or not less than 5 cents a cubic foot for cut stone.*

The claim for back royalties is for the years 1951 to 1956, inclusive, and was arrived at through an audit conducted by the Bureau of Indian Affairs. It is based on the fact that appellant, in determining the net value of its production on which royalties were to be paid, deducted its general mining costs whereas the Indian Bureau claims that the only costs allowable under the terms of the lease are those of "transportation and treatment." In so interpreting the lease, the Bureau concedes that treatment costs included such post-mining items as crushing, washing, sizing, pulverizing, and bagging the material. It objects, however, to the inclusion of such costs as drilling, shooting, loading, hauling, "or any other operation connected with the operation of quarrying or mining."

Appellant's position is that the royalty provision of the lease must be interpreted as it contends, or, at the very least, that the provision is ambiguous. In support of this position appellant points to acceptance by the Bureau of Indian Affairs until 1957 of royalty payments which were computed on the basis of the inclusion of mining costs. This practice, it claims, if the meaning of the royalty provision were doubtful, establishes the meaning of the provision, especially since it should be construed against the Bureau, which prepared the lease. Further, the Government, having accepted royalty payments for many years with general mining or quarrying costs deducted, the applicant contends, is now estopped from asserting claims for additional royalties.

As indicated, much of the controversy is centered around the meaning of the word "treatment" and both appellant and counsel for the tribe cite numerous technical authorities in support of their respective viewpoints. We believe the phrase "cost of transportation and treatment" is a limiting one and cannot be enlarged to include all general operating costs of production.<sup>1</sup> The case of *State*

<sup>1</sup>The monthly royalty report forms which appellant submitted to the Bureau are said by the appellant to have included the following definition of "operating costs," which it computed as being its deductible costs: "Operating costs include the cost of producing and milling ore at the mine, but shall not include prospecting, buildings, machinery, foundations and other capital expenditures, nor transportation and railroad charges for disposal of the product."

v. *Northwest Magnesite Co.*, 182 P. 2d 643 (Washington, 1947), interpreting the identical phrase in a magnesite lease, we think disposes of the question. There the court said:

We infer from these sources of information, and from the definitions previously quoted, that "treatment", generally, is distinct from *extraction* of ore from the earth \* \* \*." 182 P. 2d 643, 661.

In applying this construction to the phrase "cost of transportation and treatment," the court ruled that costs of development were not covered. It continued:

As to the expense of blasting, reblasting, and ore and waste handling at the quarry, we likewise have little doubt that it is not a part of the cost of transportation and treatment, but is rather a cost of mining, exploitation, or extraction. Mr. Sargent did testify that blasting was treatment, or "a type of treatment", because it was selective, but he conceded that, generally, separation of mineral from the earth was mining, and certainly his first statement was inconsistent with his definition of treatment.<sup>2</sup>

We conclude the Bureau of Indian Affairs is correct in its contention that such costs as drilling, shooting, loading, hauling, "or any other operation connected with the operation of quarrying or mining" may not be included as part of the "cost of transportation and treatment" allowed by Nez Perce Tribe Limestone Lease No. 724 under which appellant is operating.

The fact that the Government for a long period of time accepted without objection the royalty payments made by appellant is unfortunate, but we are convinced that there is no estoppel against the United States in this situation, especially since it is acting as trustee for an Indian tribe. See *Utah Power and Light Co. v. United States*, 243 U.S. 389 (1917); *American Security Co. of New York v. United States*, 112 F. 2d 903 (10th Cir. 1940); and *United States v. West*, 232 F. 2d 694 (9th Cir. 1956) cert. denied 352 U.S. 834 (1956).

Therefore, the decision of the Acting Commissioner of Indian Affairs, holding that the Government is entitled to collect \$42,586.13 in additional royalties on behalf of the Nez Perce Indian Tribe, is affirmed and the appeal is dismissed.

ROGER ERNST,  
*Assistant Secretary.*

<sup>2</sup> Mining expert C. A. Sargent testifying at the trial for the defendant stated that, generally, "separation of mineral from the earth is mining"; "the removal of a mineral from its place of rest where nature put it, is termed mining"; "mining is a very broad term, and it takes in dredging, placer mining, any means by which you extract the mineral from its natural resting place \* \* \*. As such it includes quarrying." 182 P. 2d 643, 654. Mr. Sargent also testified that: "Treatment is that process by which a mineral or ore is placed in proper chemical and physical condition to be of marketable value." 182 P. 2d 660.

## MCGREGGAR LAND COMPANY ET AL.

A-28170

*Decided February 26, 1960\****Rules of Practice: Appeals: Statement of Reasons**

An appeal to the Secretary of the Interior will be dismissed where the appellant fails to file a statement of reasons for his appeal.

**Alaska: Oil and Gas Leases—Alaska: Tidelands**

Tidelands along the Alaska coast are not subject to leasing under the Mineral Leasing Act or the act of July 3, 1958.

**Alaska: Oil and Gas Leases—Oil and Gas Leases: Preference Right Leases**

The exercise, prior to January 3, 1959, of the preference right accorded by section 6 of the act of July 3, 1958, is effective to include in outstanding oil and gas leases all land beneath nontidal navigable waters in Alaska embraced within the boundaries of such leases.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

McGreggar Land Company, Charles V. Ecclestone, Jr., Dr. Albert H. Jamentz, and J. E. Dawson, Jr., have taken separate appeals to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated May 21, 1959, which affirmed a decision of the manager of the land office at Anchorage, Alaska, dated October 20, 1958, that the appellants are not entitled to lease certain lands in Alaska for oil and gas purposes pursuant to the provisions of section 6 of the act of July 3, 1958 (72 Stat. 322).

The appeal of the McGregor Land Company, involving Anchorage 029556, must be and is hereby dismissed. Although the company filed its notice of appeal from the decision of the Acting Director and paid the filing fee (43 CFR, 1954 rev., 221.32 (Supp.)), it has not filed any statement of reasons for its appeal (43 CFR, 1954 rev., 221.33 (Supp.)). Under the rules of practice of the Department (43 CFR, 1954 rev., Part 221 (Supp.)), the failure to file such a statement within the time permitted subjects an appeal to summary dismissal (43 CFR, 1954 rev., 221.98 (Supp.)).

The offers of the remaining appellants to lease lands in Alaska pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226), were filed during the year 1955 and subsequently leases were issued to the applicants covering upland portions of the areas described in the offers. Each of the offers involved in these appeals was rejected as to "any land below the mean high water mark

\*Not in chronological order.

of any navigable stream or body of water and any land below mean high tide." The offerors prosecuted appeals to the Director of the Bureau of Land Management from the partial rejection of their offers and the Acting Director, in a decision dated April 24, 1958 (*Duncan Miller et al.*, Anchorage 028941, etc.), held that the tidelands off the coast of Alaska and lands lying under the inland navigable waters in Alaska were not subject to leasing under the Mineral Leasing Act.

The present appellants and others adversely affected by the Acting Director's decision appealed to the Secretary of the Interior, requesting that final action on their appeals be deferred until the enactment of pending legislation which the appellants believed might confer a preference right on their offers. No action was taken on those appeals until after the passage of the act of July 3, 1958—AN ACT To provide for the leasing of oil and gas deposits in lands beneath nontidal navigable waters in the Territory of Alaska, and for other purposes. [72 Stat. 322.]

With an exception not here pertinent, section 6 conferred upon holders of oil and gas leases embracing within the boundaries of such leases any lands beneath nontidal navigable waters in the Territory a preference right to have those lands included within their leases, if the lessees, while the leases were still in effect but not more than 1 year after the date of approval of the act, made application to have those lands included within their leases. The section provided further:

\* \* \* an area shall be considered to be within the boundaries described in the lease (or application or offer) even though it is excluded from such description by general terms which exclude all described lands that are or may be situated beneath navigable waters.

On August 6, 1958, 50 offers, including the 6 offers of the present appellants, were remanded to the Bureau of Land Management—

\* \* \* [w]ithout expressing any opinion as to the applicability of the act of July 3, 1958, to the particular lands covered by the individual offers listed in the schedule attached to this decision, but merely to facilitate the administration of the act, should it be found to be applicable to the lands covered by these offers \* \* \*.<sup>1</sup>

In his decision of October 20, 1958, covering the offers of the present appellants and others remanded by the departmental decision of August 6, 1958, the manager stated that the lands covered by the rejected portions of the offers are submerged lands lying in Cook

<sup>1</sup> *Eleanor C. Beritzhoff et al.*, A-27612, etc.



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Inlet. He held that since none of the land described in those offers is land beneath nontidal navigable waters the offerors are not entitled to the benefits of section 6 of the act of July 3, 1958, as to such lands.

Nonetheless, the manager said:

In those instances where a lease has been issued in part, a preference right form will be attached for the lessee's convenience, should there be inland navigable waters embraced within the lease boundaries.<sup>2</sup>

The Acting Director affirmed the manager and denied the request of the appellants that their offers, insofar as they may cover tidelands, be suspended until such time as the State of Alaska decided whether it would recognize such offers.

In their appeals to the Secretary of the Interior, two of the appellants allege that there are lands beneath nontidal navigable waters included within the boundaries of their present leases<sup>3</sup> and the third urges that his leases be recognized as including such lands if any be found within the boundaries of his leases. All allege that they filed timely applications for the preference right conferred by section 6. They renewed the request made to the Director that their offers insofar as they cover tidelands be held in abeyance.

It seems obvious that the manager's decision of October 20, 1958, although ineptly worded, was directed only to those portions of the offers which cover tidelands off the coast of Cook Inlet. It also seems obvious that the decision was rendered as the result of the departmental decision of August 6, 1958, with no determination having been made as to whether the parties qualified for the benefits of the act of July 3, 1958, by filing timely applications to have their outstanding leases include land beneath nontidal navigable waters. This is borne out by the fact that the manager offered those who held outstanding leases the opportunity to submit preference-right applications.

<sup>2</sup> The preference-right form referred to is the form prescribed by the Bureau of Land Management, transmitted to the managers of the land offices in Alaska by memorandum of July 25, 1958. The form notified the holders of outstanding oil and gas leases of the preference right conferred by the act of July 3, 1958, and stated:

"\* \* \* In order to protect your preference right in the event your lease embraces such water areas, the form on the reverse side should be completed and returned promptly to this office. Upon receipt, it will be placed with your lease file record and the lease will be considered as embracing the entire area described therein, including nontidal navigable waters."

Under the instructions contained in the memorandum of July 25, 1958, upon receipt of the executed form of application to have a lease include any lands beneath nontidal navigable waters, the managers were to place the application with the record of the outstanding lease, "which will be considered as embracing the entire area included therein including nontidal navigable waters."

<sup>3</sup> Ecclestone states that his offer covers a substantial part of the bed of the Theodore River, and Dawson claims that his offers encompass an area in the mouth of the Little Susitna River, upstream from the line connecting the headlands at the mouth.

The record indicates that preference-right applications covering all of the offers of the present appellants may have been submitted prior to January 3, 1959,<sup>4</sup> the date on which Alaska was admitted into the Union. If such applications were so filed, presumably the manager acted in accordance with instructions and considered such outstanding leases to include any and all land beneath nontidal navigable waters embraced in the descriptions given in the offers.

If, in fact, such applications were filed prior to January 3, 1959, the holding in *Pewco, Inc., et al.*, 66 I.D. 152 (1959), that upon the admission of Alaska into the Union all authority of the Secretary of the Interior to lease lands under the act of July 3, 1958, terminated, is not applicable to these applications, since the applicants exercised their preference rights prior to that date and their leases, on that date, were considered to include the nontidal navigable waters embraced within the boundaries of their outstanding leases. The records in the Anchorage land office should be so noted.

In the circumstances, that part of the manager's decision of October 20, 1958, which denied the preference right accorded by the act of July 3, 1958, to the present appellants is vacated. His holding that neither the Mineral Leasing Act nor the act of July 3, 1958, authorizes the leasing of tide or submerged lands off the coast of Alaska is correct and, insofar as he rejected the offers of the present appellants for such tide or submerged lands, his decision is affirmed.

The request of the appellants that their offers, insofar as they may cover tidelands, be held in abeyance must be rejected. As stated in the *Pewco* case, there is no merit in such a request because Alaska may recognize a preference right to offers previously filed with this Department on such terms as it desires, whether or not such offers have been rejected by this Department.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the case is remanded to the Bureau of Land Management for appropriate action consistent with this decision.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

<sup>4</sup> The files relating to the Dawson leases (Anchorage 030357, 030358, and 030364) show that applications covering those leases were filed in the Anchorage land office on October 10, 1958. Ecclestone (Anchorage 029647), in his appeal to the Director dated December 2, 1958, stated that he had filed such an application and Jamentz (Anchorage 029656 and 029657), in his appeal to the Secretary, states that his applications were filed with the Anchorage land office on November 26, 1958.

## STATE OF CALIFORNIA

A-27752 (Supp.) *Decided February 29, 1960\****School Lands: Indemnity Selections**

The filing by a State of a school indemnity selection does not vest in the State an interest in the selected lands which deprives the Secretary of his authority to classify the land as not suitable for State selection.

**School Lands: Indemnity Selections—Taylor Grazing Act: Classification—Public Lands: Classification**

The authority conferred upon the Secretary of the Interior by section 7 of the Taylor Grazing Act to classify public lands as proper for disposition imposes upon him the responsibility of determining whether the public interest would be served by classifying certain land as suitable for disposition pursuant to a State school indemnity selection.

**RECONSIDERATION**

The State of California has filed a petition for reconsideration of the Department's decision of January 7, 1959 (A-27752), which affirmed the Bureau of Land Management's rejection of selections by the State of California of certain timbered lands as indemnity for school lands on the ground that the lands in question are not proper for State acquisition in satisfaction of lieu selection rights.

At the time when the State filed its selections, section 2275 of the Revised Statutes, as amended (43 U.S.C., 1952 ed., sec. 851), permitted the State to select public lands of equal acreage as indemnity for public lands granted for school purposes which were included within any Indian, military, or other reservation of the United States or which were fractional in quantity or wanting because of fractional townships or any other natural cause. However, on appeal to the Secretary and in the petition for reconsideration, the State contends that it is entitled to the specific sections of land enumerated in its selection lists, and that the Secretary of the Interior in the exercise of the authority granted to him by the Taylor Grazing Act may not deny its right to these specific sections. This seems to assume that the filing of its application for such indemnity land vests in the State an interest in the particular sections of land listed in the application.

It has long been recognized that the filing of an application to select entitles the applicant to nothing more than to have the application considered. See Solicitor's opinion M-36178 (Supp.), 61 I.D.

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\*Not in chronological order.

277 (1954); *Nelson A. Gerttula*, 64 I.D. 225 (1957). The Department has expressly so held with respect to school indemnity selections by the State of California. *State of California*, 59 I.D. 451 (1947). The reason, of course, is that by section 7 of the Taylor Grazing Act, as amended (43 U.S.C., 1952 ed., sec. 315f), the Secretary of the Interior is authorized in his discretion to determine whether public land, which was withdrawn by the Executive Order of November 26, 1934 (No. 6910), and others, and subsequently included in a selection list, is proper for acquisition in satisfaction of an outstanding State lieu, exchange, or script right or land grant. Until this determination has been made favorable to the State's application, the application cannot be allowed.

In this instance the State of California seems to be suggesting that the Secretary's discretionary authority to classify lands included in its selection list is in derogation of its selection rights. Necessarily, the Secretary's power to determine whether an indemnity selection is proper for State acquisition in satisfaction of a land grant cannot be used to destroy the right of a State to indemnity for the loss of school lands, but it may, upon occasion, result in denial of a State's application for specific tracts of land if and when the Secretary finds that the tracts indicated for selection by a State should be retained in Federal ownership in furtherance of Federal conservation or land use programs. Thus the rejection of the five tracts to which this appeal relates was predicated upon the Secretary's determination under section 7 of the Taylor Grazing Act that this land should be retained by the United States in its sustained timber yield management program.

If the State were correct in its contention that the filing of a selection list vests an interest in public land in the State, the provision of section 7 of the Taylor Grazing Act which requires the Secretary to make an affirmative finding that public land sought by a State as indemnity for granted land may properly be acquired by the State in satisfaction of its grant would become a nullity. If a State could acquire any land which it desires in satisfaction of its school indemnity rights, without regard to Federal conservation and land use programs, there would be no occasion to require the Secretary of the Interior to classify any land included in a State selection list. But the whole tenor of the Taylor Grazing Act indicates that its primary purpose is to promote the highest and best use of public land after adequate consideration of Federal conservation and land use programs. Hence, it is necessary to conclude that the authority to clas-

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sify land according to its suitability for various uses which section 7 vests in the Secretary of the Interior was intended to impose upon him the responsibility of deciding whether the public interest will best be served by retention in Federal ownership or disposal to a State or private person. The discharge of such responsibility does not operate to deny indemnity to a State; it merely requires that, if the Secretary's determination in a specific instance is adverse to the State, the State must make a new selection, repeating that process as often as may be necessary to locate land it is willing to accept which is not needed for retention in Federal ownership. Otherwise, the Taylor Grazing Act has no meaning.

In *Nelson A. Gerttula*, A-22716 (July 12, 1941), the Department said:

In large part the national policy of conservation and development of the public domain and its natural resources is implemented by the Taylor Grazing Act and in particular as to classification by its section 7 and by the Executive orders mentioned therein. In order that no additional claims may attach to the lands pending the Secretary's ultimate determination of their highest usefulness, the public lands have all been withdrawn from settlement, location, sale or entry. The withdrawal has been effected either by administrative proceedings had as authorized in section 2 of the Taylor Grazing Act or by the Executive orders mentioned in section 7, namely, Numbers 6910 and 6964 of November 26, 1934, and February 5, 1935, respectively. Thereby the withdrawn lands are in terms reserved for the Secretary's classification of them in furtherance of: (1) the several purposes of the Taylor Grazing Act; (2) a comprehensive land program; and (3) conservation and development of natural resources.

This withdrawal and reservation may however be terminated by the Secretary in his discretion. Upon examination and appropriate classification of any of these withdrawn lands which the Secretary finds are less valuable for grazing than for some other of the uses described in section 7, the Secretary has authority under this section to restore them to entry, selection or location for disposal in accordance with his classification under applicable public-land laws.

The authority here given the Secretary to examine, classify and restore to public disposition the lands described is discretionary. The discretion conferred on him is of course not absolute, to be exercised arbitrarily or willfully, but instead a sound, impartial discretion guided and controlled by a due regard for all the facts in a particular case, among them all facts bearing on the public interest, and for the established principles of law applicable thereto. Words and Phrases, v. 12, Discretion. When therefore the Secretary finds that lands sought by a particular application are affected by an interest of the people as a whole and that the classification requested by an individual applicant would injure that interest and be inconsistent with the purposes to further which the lands have been reserved, the Secretary has not merely the power but the duty to maintain the reservation and to refuse to release the lands from it for the disposal desired.

In the instant case the Commissioner of the General Land Office in rendering the decision from which this appeal has been taken assumed no unauthorized powers but, acting under the direction of the Secretary, performed the executive duty required by the applicable law as above set forth. The timber land selected by appellant is affected by a public interest. As described by the Commissioner, it is located within the Columbia Gorge area for which certain planning agencies of the Government contemplate coordinated treatment, including protection of the forest lands. In addition, a fact not mentioned by the Commissioner is that the tract is within an area so important to forest, timber and watershed protection that it is marked for forest land acquisition by both the Federal Forest Service and the State of Washington. The Commissioner properly found that to turn this tract over to applicant for logging would mean immediate liquidation of an exhaustible resource, would be inconsistent with the purpose of the reservation made by the Executive order of February 5, 1935, and would injure an interest of the whole people. It follows that he was correct also in holding that the selected tract was not proper for acquisition by applicant in satisfaction of his lieu selection right.

In *J. C. Aldrich*, A-24041 (February 26, 1947), the Department said, in denying Aldrich's motion for exercise of supervisory authority :

Aldrich secondly contends that the Secretary cannot refuse to classify land as suitable for Valentine scrip application if it is "unoccupied, and unappropriated [except for Order No. 6910] public lands of the United States, not mineral," the only criteria expressed in the Valentine scrip act for land subject to scrip location. He denies that the Secretary may refuse classification on the ground that the land sought is in an incorporated city and is beach land used by the public for recreational purposes.

This argument also was considered and rejected by the Department in its decision of January 4. It was there pointed out that while section 7 of the Taylor Grazing Act requires the Secretary to act upon applications for classification, nothing in the section requires him to grant the classification requested. On the contrary, in authorizing him "to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910) \* \* \* which are \* \* \* proper for acquisition in satisfaction of any outstanding lieu, exchange or scrip rights or land grant \* \* \*," section 7 clearly vests the Secretary with discretion to consider broad factors of public interest in determining whether land is "proper" for scrip application.

To take the narrow view espoused by Aldrich would be in effect to nullify the concept of classification, for of what avail would it be to withdraw land from disposition under the public land laws and to provide for their classification if upon application the land must automatically be classified as suitable for the purpose sought and restored to disposition? To take this case, prior to Order No. 6910, Valentine scrip could be located upon any unappropriated, unoccupied, nonmineral public land. What purpose would be served by the withdrawal order issued by the President and by the classification procedure enacted by the Congress if the Department must now, upon Aldrich's application, open the land to him merely upon determining that it is unoccupied, unappropriated, and nonmineral public land? That field of inquiry was open to the Secretary prior to Order No. 6910

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and section 7 of the Taylor Grazing Act. To hold that it is the only scope of inquiry left to him after the promulgation of the order and the enactment of the statute would be to impart no meaning whatsoever to them.

See also *J. A. Allison et al.*, 58 I.D. 227 (1943); *M. N. Young et al.*, A-24329-30, etc. (February 26, 1947).

In a meeting to discuss the State's petition on January 13, 1960, officials of the State expressed concern over statements in the decision of May 15, 1958, by the Acting Director of the Bureau of Land Management referring to State exchanges under Section 8(c) of the Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., sec. 315g(c)). That section authorizes the exchange of public lands for State lands on an equal value or an equal acreage basis, but, as the Acting Director pointed out, the Department's policy is to allow exchanges only on an equal value basis (43 CFR 147.2(b)). The concern of the State of California is that the State selections under consideration here have been treated as exchanges with equal value as the sole criterion for adjudicating the selections.

This, of course, is not so. The Department's decision of January 7, 1959, considered the selections solely as indemnity selections and not as exchanges and acted upon them in accordance with the criteria governing selections which have just been set forth.

Since the Secretary has ample authority to refuse the classification requested by the State of California and that authority was properly exercised on the basis of the fact that the lands listed in the State's selection lists are needed in a Federal timber management plan, the petition for reconsideration is denied.

ROGER ERNST,  
*Assistant Secretary.*

**APPLICATION OF IRENE KOHPAY, NOW CORNELL, FOR ENROLLMENT ON THE ROLL OF THE OSAGE TRIBE OF INDIANS**

IA-873

*Decided March 8, 1960*

**Indian Tribes: Enrollment**

The membership roll of the Osage Tribe approved in 1908 by the Secretary of the Interior pursuant to the act of June 28, 1906 (34 Stat. 539) constitutes the final roll of members of the Osage Tribe among whom the tribal estate was divided and thereafter persons can not be added to that roll and, in the absence of enrollment, can not share in the division of the tribal estate.

## APPEAL FROM THE SUPERINTENDENT OF THE OSAGE INDIAN AGENCY

Irene Kohpay, now Cornell, through her attorney, Paul A. Comstock, has appealed to the Commissioner of Indian Affairs from the report of the Superintendent of the Osage Indian Agency, containing his findings of fact, conclusions, and recommendations after taking testimony and receiving documentary evidence at a hearing upon the application of Irene Kohpay, now Cornell, for enrollment on the final roll of the Osage Tribe of Indians.

On or about December 4, 1952, Irene Kohpay, now Cornell, filed with the Secretary of the Interior her application and request that the Secretary place her name on the roll of legal members of the Osage Tribe of Indians in Oklahoma, in accordance with the act of June 28, 1906 (34 Stat. 539), and that she participate in the division of the lands, and that she be paid her pro rata share of the funds, mineral interests, and all other property rights and interests of a legal member of the Osage Tribe of Indians, from the date of her birth. She predicates her claim of right to be enrolled upon her parentage and the date of her birth. Her application recites that she is the daughter of Harry Kohpay, a duly enrolled member of the Osage Tribe, and that she was born January 27, 1906. In further allegations the applicant states that her mother was one Lela Thompson, a sister of the former wife of Harry Kohpay, in whose family said Lela Thompson resided; that under the Osage Indian custom an Osage Indian had the right to have plural wives, provided they be sisters; that Harry Kohpay, for more than 3 years prior to and at the time of the birth of applicant and afterwards, lived with applicant's mother and her mother's oldest sister as plural wives in a single family; that Harry Kohpay gave applicant the surname of Kohpay, at the time of her birth, raised her as one of his family, sent her to school at the Osage Indian Boarding School at Pawhuska, Oklahoma, and the Chiloco Indian U.S. Government School, under the name of Kohpay, and kept, supported and maintained her in his home as a member of his family until she was married in 1922.

By a letter dated January 15, 1953, from the Assistant Secretary of the Interior, the Superintendent of the Osage Indian Agency, Pawhuska, Oklahoma, was instructed to conduct a hearing on the application. Irene Kohpay Cornell was to be afforded full opportunity to present such evidence as she might desire, in support of her application, and the Osage Tribe acting through its Council, was to be afforded full opportunity to present such evidence as it might desire



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in opposition to the application. The Assistant Secretary further instructed the Superintendent that at the conclusion of the hearing he should transmit to the Commissioner of Indian Affairs, findings of fact, conclusions, and a recommendation prepared by him, together with the original application and a transcript of the hearing. Copies of the Superintendent's findings, conclusions and recommendations were to be furnished Mrs. Cornell and the Osage Tribal Council. The letter further stated that an appeal might be taken by either party to the Commissioner of Indian Affairs and from the Commissioner to the Secretary of the Interior.

The applicant, from the time the hearing was ordered, has objected to the appearance and participation therein of the Osage Tribal Council on the grounds that the application involves no adverse parties and that neither the Council nor the Osages, as a community, is a body politic or legal entity, and has no authority or capacity to appear for or represent themselves, or the Osages as a community, and that the Secretary of the Interior, or his agents, are the only ones having authority or capacity to appear for or to represent either the Council or the Osages, as a community, or as a tribe of Indians. The Secretary, in recognition of the need for an investigation to ascertain pertinent facts and law, ordered the hearing in which the applicant was to be afforded full opportunity to present her case in support of the application and the tribe was to be given similar opportunity to present any opposition thereto. In doing so, the Secretary had recognized that the Osage Tribe had an interest in the application since approval of it would materially deplete the financial resources of the tribe. Therefore, when the applicant formally objected to the participation of the Osage Tribe, the Secretary affirmed his order that the Tribal Council should be afforded an opportunity to present evidence and arguments in opposition to the application on the ground that the Osage Tribe is an indispensable party to the proceedings on the application.<sup>1</sup>

<sup>1</sup>See opinion of the Assistant Attorney General for the Department of the Interior dated January 9, 1907 (11790-1906 Ind. Div.) which shows the receipt by the Commissioner of Indian Affairs of the adverse views of the Osage Tribe on the application of an illegitimate child of an Osage Indian for enrollment as a member of the tribe. The application was rejected. See also the testimony at the hearing of George Beaulieu, former clerk at the Osage agency, in regard to the procedure required for enrollment of a minor child born between January 1, 1906, and July 1, 1907, which reads as follows:

"The Indian Agent thereafter would submit that [application] to the tribal council at one of their meetings, and the council acted upon it and made recommendations, and thereafter it was returned to the Agent and submitted to the Commissioner of Indian Affairs, who would direct the enrollment of the applicant, if they found that everything was proper." P. 348 of the Transcript.

An extended hearing was thereafter held by the Superintendent, following which the report ordered by the Assistant Secretary was made. The Superintendent of the Osage Agency recommended therein that the application of Irene Kohpay Cornell for enrollment as a member of the Osage Tribe be dismissed. This appeal followed. To avoid a multiplicity of appeals and for administrative reasons, the Commissioner of Indian Affairs has referred the present appeal directly to the Secretary of the Interior for action.

The final membership roll of the Osage Tribe of Indians is a creature of statute. The basic statute is commonly known and referred to as the Osage Allotment Act approved June 28, 1906 (34 Stat. 539). Section 1 of that act provides:

\* \* \* the roll of the Osage Tribe of Indians, as shown by the records of the United States in the Office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, is hereby declared to be the roll of said tribe and to constitute the legal membership thereof: *Provided*, That the principal chief of the Osages shall, within three months from and after the approval of this Act, file with the Secretary of the Interior a list of the names which the tribe claims were placed upon the roll by fraud, but no name shall be included in said list of any person or his descendants that was placed on said roll prior to the thirty-first day of December, eighteen hundred and eighty-one, the date of the adoption of the Osage constitution, and the Secretary of the Interior, as early as practicable, shall carefully investigate such cases and shall determine which of said persons, if any, are entitled to enrollment; but the tribe must affirmatively show what names have been placed upon said roll by fraud; but where the rights of persons to enrollment to the Osage roll have been investigated by the Interior Department and it has been determined by the Secretary of the Interior that such persons were entitled to enrollment, their names shall not be stricken from the roll for fraud except upon newly discovered evidence; and the Secretary of the Interior shall have authority to place on the Osage roll the names of all persons found by him, after investigation, to be so entitled, whose applications were pending on the date of the approval of this Act; and the said Secretary of the Interior is hereby authorized to strike from the said roll the names of persons or their descendants which he finds were placed thereon by or through fraud, and the said roll as above provided, after the revision and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the action of the Secretary in the revision of the roll as herein provided shall be final, and the provisions of the Act of Congress of August fifteenth, eighteen hundred and ninety-four, Twenty-eight

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Statutes at Large, page three hundred and five, granting persons of Indian blood who have been denied allotments the right to appeal to the courts, are hereby repealed as far as the same relate to the Osage Indians; and the tribal lands and tribal funds of said tribe shall be equally divided among the members of said tribe as hereinafter provided.

Other sections of the act, which was designed to provide for the complete and final division of the property of the tribe among the enrolled members, provided for the retention of the minerals in tribal ownership and prescribed the ways in which the surface of the lands was divided among the enrollees. Still other sections of the act controlled the division to the members of then existing tribal funds and provided for the distribution to the members of funds which would thereafter accrue to the tribe, including royalty received from oil, gas, coal, and other tribal mineral leases of the lands divided among the members.

The applicant alleges that she is the daughter of Harry Kohpay, who was an enrolled member of the Osage Tribe since a date prior to January 1, 1881, to the date of his death on or about July 19, 1946, and that she was born January 27, 1906, which would place her in the category of those described in the 1906 act as:

\* \* \* all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, \* \* \*

From the evidence contained in the transcript there can be no clear determination of the date of the applicant's birth. Testimony of several witnesses and many exhibits were presented both by the applicant and the contestants regarding this question. Annual school census reports, quarterly attendance reports of St. Louis Boarding School, and quarterly reports of the Osage Boarding School all within the period 1914 through 1922 indicate various years in which the applicant might have been born. The burden of proof of her date of birth is upon the applicant, and we are of the opinion that she has failed to sustain that burden and has not established the date of her birth.

The applicant alleges that she is the daughter of Harry Kohpay, an Osage Indian born on or about January 1, 1871, and who died on or about July 19, 1946. Harry Kohpay was an enrolled member of the Osage Tribe of Indians on January 1, 1906, and his name had been on the roll of said tribe since prior to January 1, 1881. From the evidence adduced at the hearing it appears that Harry Kohpay was

married to one Dovie Thompson, a non-Indian, by whom he had three children. Lela Thompson, an unmarried sister of his wife, Dovie, made her home with the Kohpays and while there gave birth to the applicant, Irene. It further appears that Lela Thompson later married and died during a childbirth. Irene was taken into the Kohpay home where she remained, except when away at school, until she married. During her stay in the Kohpay home her aunt Dovie Kohpay died and Harry Kohpay remarried. While in the home of Harry Kohpay, the applicant was treated as part of the family and used the name Irene Kohpay. Harry Kohpay provided Irene with food and clothing and arranged and paid for her attendance at various schools.

There does not appear to have been any evidence introduced at the hearing that Harry Kohpay ever acknowledged Irene as his daughter. He acted as interpreter and clerk at the Osage Agency during the enrollment of members of the Osage Tribe. He was very familiar with the requirements for eligibility for such enrollment but took no action to enroll Irene. He died in 1946 leaving a will which named his wife and children but made no mention of Irene.

Applicant relies heavily upon the purported findings of the County Court of Osage County and the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia that she is the illegitimate daughter of Harry Kohpay. Irene Kohpay, now Cornell, and the representatives of the estate of Harry Kohpay, deceased, by their respective attorneys agreed to the wording of the decree determining heirs and a distribution of assets entered in settlement of a claim Irene filed against his estate. The decree filed April 11, 1949, in the County Court of Osage County, Oklahoma, contains the following language:

9. That the court finds that Irene Kohpay, now Cornell, is the illegitimate daughter of said Harry Kohpay, deceased, and claims that she is entitled to inherit a child's part of the estate of said decedent for the reason she was not mentioned in, or excluded by, the will of said decedent; but the court finds that she is the blood daughter of said Harry Kohpay by Lela Thompson, a single white woman, to whom the decedent was never married, a sister of the wife of said decedent, born out of wedlock, and was born January 27, 1906. That the said Harry Kohpay never acknowledged in writing before a competent witness that he was the father of said Irene Kohpay, now Cornell, and never in any other manner recognized or acknowledged her as his daughter, and never adopted her as such, and she is not a legal heir of said Harry Kohpay and does not inherit any portion of his estate.

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13. That Irene Kohpay, now Cornell, has been paid the sum of \$1,500.00 in full and complete satisfaction of any and all claims which she has or might have as an heir or otherwise to any part of the estate of said Harry Kohpay, deceased, and that she has accepted the same in full and complete satisfaction of such claim which she has or may have or might have had against the estate of decedent.

Irene Kohpay, now Cornell, in her application further recites that the United States District Court for the District of Columbia in the case of *Irene Kohpay, now Cornell v. Chapman, Secretary of the Interior*, Civil No. 5118-49, in its findings of fact and conclusion of law, also found specifically that she was the illegitimate daughter of Harry Kohpay, an enrolled Osage. She also recites that the Department of Justice of the United States, by reason of its motion for summary judgment in the same case admitted all facts well pleaded and thus conceded that Irene Kohpay was the illegitimate daughter of Harry Kohpay, an enrolled Osage. She further recites that the United States Court of Appeals for the District of Columbia in its review of the case,<sup>2</sup> recognized the aforesaid alleged facts.

The act of April 18, 1912 (37 Stat. 86) provides that the property of deceased allottees of the Osage Tribe, shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma, and certain responsibilities are given to the Superintendent of the Osage Agency in connection with such proceedings. However, the act pertains only to probate proceedings and determinations or findings of the county courts in that regard cannot be deemed applicable or binding in the determination of the rights of individuals for enrollment on the approved roll of the Osage Tribe.<sup>3</sup> Furthermore, the transcript of the testimony adduced at the hearing before the Superintendent on the application for enrollment of Irene Kohpay, now Cornell, discloses that the decree of the County Court of Osage County, Oklahoma, was one prepared by stipulation and agreement of the attorneys and thus not a finding of the court resulting from the

<sup>2</sup> *United States ex. rel. Kohpay v. Chapman*, 190 F. 2d 666 (D.C. Cir., 1951).

<sup>3</sup> Compare letter dated August 19, 1916 (Indian Bureau file: Land-Contracts 63725-16 and 85031-16) from the Assistant Commissioner of Indian Affairs in which, referring to the disallowed application of an illegitimate child mentioned in footnote 1, *supra*, it is stated:

"One of the cases pending at the date of the passage of the said Act of June 28, 1906, was that of Pearl Callahan, the illegitimate child of a white woman, and a full blood member of the Osage Tribe. The Department held that the child was not entitled to enrollment and upon review affirmed its previous adverse finding. Subsequently the child was declared by the local courts to be the sole heir of the Osage Indian father, She-She, and entitled to his individual property." (Emphasis supplied.) Contestant's Exhibit No. 21.

presentation of evidence. It was designed for the purposes of settling the claim that Irene Kohpay, now Cornell, filed against the estate of Harry Kohpay, deceased, and saving further litigation of it. In the light of the foregoing, it is clearly impossible for the 1949 county court decree to have any effect upon the final roll of the Osage Tribe approved by the Secretary of the Interior in 1908 under the 1906 act which vested him with the exclusive power to approve the roll.

In both the United States District Court and the United States Court of Appeals the facts were not at issue since only legal questions were contested. In the opinion of the United States Court of Appeals it was stated: "For the purposes of this appeal it can be stated that there is no dispute on the facts." Thus, the facts as presented by the pleadings of the applicant in the case before the United States District Court, which was reviewed by the United States Court of Appeals, do not represent judicial determinations of disputed facts which could possibly be binding upon the Secretary of the Interior in determining the applicant's right to enrollment.

From the transcript of testimony and the exhibits presented at the hearing, as heretofore indicated, it appears that the applicant used the name of Kohpay until the time of her marriage and was treated as a member of the Kohpay family. However, it further appears that Harry Kohpay never in any manner acknowledged her as his daughter, by his utterances or writings. In applications to the schools he was designated either as "uncle" or "parent or guardian" and never as parent alone or as father. He was thoroughly familiar with the enrollment requirements but did not enroll Irene nor did he name her in his will.<sup>4</sup> It is contended by the applicant that the sisters Dovie and Lela were his plural wives in accordance with the custom of the Osage Indians. While it is said to have been the custom for an Osage Indian to have sisters who were Indians as plural wives, it is disputed that this custom did ever prevail when the wife of an Osage Indian was non-Indian. Moreover, there is no showing that Harry regarded Lela as a wife or that she was regarded as his wife by the community wherein they resided. Significant evidence that Irene was not re-

<sup>4</sup> In his will executed November 3, 1944, Harry Kohpay declared:

"I declare that on the date of the execution of this instrument I am married, my wife being Mary Elizabeth Kohpay; that I have two children, namely Elsie May Shelton, nee Elsie May Kohpay, age 45 years, residing at Long Beach, California; and Harry Hugh Kohpay a son, age 43 years, residing at Pawhuska, Oklahoma. That I have no other children or any adopted children, and that I have one grandson, Franklin Eugene Kohpay, age 3 years, living at Pawhuska, Oklahoma." Contestant's Exhibit No. 19.

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garded as a daughter of Harry Kohpay is contained in the marriage license of Irene wherein her name is given as Irene Thompson. Due to her minority Irene was accompanied by Harry Kohpay to secure the marriage license. At this solemn act it was recognized by Harry Kohpay that it would not be true and proper to apply for the license for Irene other than by the name, Irene Thompson, the use of which name apparently did not cause Irene any question.

After a careful review of all the evidence adduced at the hearing, we find it does not prove that Harry Kohpay was the father of the applicant, nor can we in any manner assume that such was the case.<sup>5</sup>

It appears that the application of Irene Kohpay, now Cornell, was filed approximately 25 years after she reached her majority, and after the death of Harry Kohpay and others who could establish with certainty the questions of parentage and the date of birth of the applicant. In her testimony the applicant stated that she always thought she was the daughter of Harry Kohpay, as far back as she could remember, and knew that she was born on January 27, 1906. It is inconceivable that she was not familiar with the approved roll of the Osage Tribe of Indians and the benefits accruing to those who were enrolled thereon as members of the tribe. An inexcusable delay in asserting a right or a claim may be deemed an implied waiver arising from knowledge of existing conditions and an acquiescence in them.<sup>6</sup> Courts of equity will not grant aid to a litigant who without excuse has slept on his rights and suffered his demand to become stale where injustice would be done by granting the relief asked. It is a general rule that laches or staleness of demand constitutes a defense to the enforcement of the right or demand so neglected.<sup>7</sup> When because of delay in asserting a right there results a loss of evidence, and death of parties or witnesses which obscure the pertinent facts, relief may

<sup>5</sup> Applicant contends that it was the statutory duty of the Secretary of the Interior to have enrolled her as the daughter of Harry Kohpay at the time the Osage roll was being prepared. But as Harry Kohpay did not then, nor never afterwards, claim parentage of Irene, there certainly was no basis for the Secretary to have attempted her enrollment as Harry's daughter, particularly in view of Harry's exclusion of her from his applications for enrollment of his family. Furthermore, the procedure followed in the preparation of the final roll of the Osage Tribe did not encompass, because of obvious lack of necessity and the impracticabilities involved, the filing of applications by officials of the Department on behalf of children thought to be entitled to enrollment. Referring again to the testimony of Mr. Beaulieu mentioned in footnote 1, *supra*, he testified as follows in regard to the enrollment of a minor child born between January 1, 1906, and July 1, 1907: "A written application was prepared upon the statement of a parent or parents of the new-born child, which showed the place of birth, date, sex." p. 348 of the Transcript.

<sup>6</sup> *Parks v. Classen Co.*, 156 Okla. 43, 9 P. (2d) 432 (1932).

<sup>7</sup> *Penn Mutual Life Ins. Co. v. Austin*, 168 U.S. 685 (1897).

be denied by laches, though the claimant may have been entitled to relief in the beginning.<sup>8</sup> Since the final roll of members of the Osage Tribe determined the division of the real estate and trust funds of the tribe which in many cases has been dissipated and spent, the approval of the application would create an impossible situation for this Department, precluding the granting of the relief requested by the applicant. We find that the applicant is guilty of laches to such a degree that her application has to be denied on that ground, if on no other.

Finally, and most importantly, we find, apart from the factual questions of the date of birth and parentage of the applicant and the question of laches, the application must be denied because the Secretary of the Interior has no authority to add to or revise the final roll of members of the Osage Tribe of Indians. The Osage Allotment Act, *supra*, authorized the Secretary to revise the 1906 roll by (a) striking names found by him to have been placed on said roll by fraud, (b) entering on said roll the names of persons found to be eligible for enrollment, "whose applications were pending at the date of the approval of this act," and (c) entering on said roll the names of such children as were by him found to be eligible for enrollment pursuant to the standards of eligibility prescribed in the Osage Allotment Act. It is apparent that this authority was given to the Secretary in the course of revising the 1906 roll and not thereafter. It is expressly stated in the act (sec. 1) :

"\* \* \* the said roll as above provided, after revision and approval by the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final, \* \* \*"

The final roll of the members of the Osage Tribe of Indians was approved by the Secretary of the Interior on April 11, 1908. There is no language in the act to indicate that it was the purpose of the Congress to authorize or permit the names of persons to be added to the revised 1906 roll or that any further revision be made subsequent to its approval by the Secretary of the Interior. Through the years since the roll was approved, it has been the consistent interpretation of this statute by the Department that the Secretary could not add

<sup>8</sup> *Baker et al. v. Deichman et al.*, 185 Okla. 452 (1939) 94 P. (2d) 246.

*Hanner v. Moulton*, 138 U.S. 486 (1891).

*Hammond v. Hopkins*, 143 U.S. 224 (1892).



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to the roll.<sup>9</sup> The Secretary in both *Ickes v. Pattison*<sup>10</sup> et al. and *United States ex rel. Jump et al. v. Ickes*<sup>11</sup> contended that additions cannot be made to the final roll of the Osage Tribe. The United States District Court for the Northern District of Oklahoma has said, with respect to the finality of the approved roll of the Osage Tribe:

The Allotment Act makes the roll, as finally approved by the Secretary of the Interior, final and conclusive. If a mistake was made in omitting the name of Bennie Strikeaxe [whose name claimant sought to have included on the final roll of the Osage Tribe] therefrom, or if error was made in noting the death of Bennie Strikeaxe, or if the officials of the Osage Agency improperly concluded that Bennie Strikeaxe's name should not have been included upon the Roll because of his death, no relief can be afforded plaintiffs because, under the terms of the statute, such mistakes cannot be questioned here \* \* \*.<sup>12</sup>

The applicant also requests that she be paid such amounts as she would be entitled to as an enrollee from the alleged date of her birth. In the case of *United States ex rel., Irene Kohpay, now Cornell v. Chapman, supra*, the United States Court of Appeals affirmed the action of the court below, dismissing the complaint of Irene Kohpay, now Cornell, in a mandamus proceeding against the Secretary of the Interior, to compel him to pay her a certain sum of money with interest from the tribal funds of the Osage Tribe. The Court of Appeals held that the relatrix could not compel the Secretary of the Interior by mandamus to distribute the tribal funds and property to her, where her name was not on the approved roll of the Osage Tribe.

From the facts presented, the applicant has not proved that she is now or ever was eligible for enrollment as a member of the Osage Tribe of Indians, and even if found eligible, she could not now be placed by the Secretary of the Interior on the final roll of the Osage Tribe provided by the Osage Allotment Act. Not being enrolled, she is not entitled to the property she requests.

<sup>9</sup> In disposing adversely of the claim for enrollment referred to in footnote 3, *supra*, the Assistant Commissioner of Indian Affairs as early as August 19, 1916, stated:

"In view of the Act cited [Act of June 28, 1906, 34 Stat. 539], which closed the Osage tribal rolls at the date mentioned, and specifically provided that no appeal should be taken to the courts from the action of the Secretary of the Interior in declaring the legal tribal membership roll, there is no way even though the case had merit by which the application could under existing law now receive consideration \* \* \*". Contestant's Exhibit No. 21.

<sup>10</sup> 80 F. 2d 708 (D.C. Cir. 1935), *cert. denied*, 297 U.S. 713. (1936).

<sup>11</sup> 117 F. 2d 769 (D.C. Cir. 1940), *cert. denied*, 313 U.S. 575 (1941).

<sup>12</sup> *Jump et al. v. Ellis*, 22 F. Supp. 380, 382 (N.D. Oklahoma, 1938), affirmed 100 F. 2d 130 (10th Cir., 1938), *cert. denied*, 306 U.S. 645 (1939).

Therefore, the application of Irene Kohpay, now Cornell, to be enrolled as a member of the Osage Tribe of Indians is denied and her appeal from the report of the Superintendent of the Osage Indian Agency is dismissed.

ROGER ERNST,  
*Assistant Secretary.*

## APPEAL OF WESTINGHOUSE ELECTRIC CORPORATION

IBCA-182

*Decided March 16, 1960*

### Rules of Practice: Evidence—Contracts: Contractor—Contracts: Acts of Government—Contracts: Specifications

A manufacturer of a shunt reactor which failed upon being energized after installation has the burden of proving that the failure was attributable to a fault of the Government which was the purchaser, when the preliminary tests of the reactor at the factory were not made entirely as required by the specifications, and final acceptance of the reactor was under the specifications subject to further testing and a period of satisfactory operation after installation. However, even if the Government has the burden of proving the probable cause of the failure of the reactor, this need be established only by a clear preponderance of the evidence, and the Government has succeeded in showing that the most probable cause of the reactor's failure was a defective weld.

### BOARD OF CONTRACT APPEALS

Westinghouse Electric Corporation, of Pittsburgh, Pennsylvania,<sup>1</sup> has filed a timely appeal from a decision of the contracting officer in the form of a letter dated October 9, 1958, directing it to replace a defective shunt reactor which had been furnished by it under Contract No. 14-06-D-2664, with the Bureau of Reclamation.

The contract, which was dated May 6, 1957, and incorporated the General Provisions of U.S. Standard Form 32 (Nov. 1949 edition), provided that the appellant furnish to the Bureau three 5,000-kva, 13,200 wye/7,620-volt (15,000-volt insulation to ground), single-phase, 60-cycle, class AA, outdoor shunt reactors for the Granite Falls Substation, Transmission Division, South Dakota, Missouri River Basin Project, Bureau of Reclamation.

The reactors furnished under the contract were circular in shape, about 5 feet in diameter, about 5 feet high, and supported on a base insulated from the ground. The interior windings of the reactors

<sup>1</sup>The local office of Westinghouse involved in the present case is at Denver, Colorado.

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consisted of coils of stranded aluminum cable in horizontal layers with eight turns or loops in each layer. As the reactors were large, several reels of cable had to be used in manufacturing them, and the cable thus contained welds. The welding was done by the heliarc process. The turns of the coil were air-insulated ( $\frac{5}{16}$ " of air) but in addition were covered by glass tape and varnish.

The reactors were manufactured in the Sharon, Pennsylvania, plant of the appellant. After being inspected and tested there on November 4 and 5, 1957, the reactors were crated and shipped by the appellant on December 3, 1957, and arrived at the Granite Falls Substation on December 10, 1957. It took a considerable time to install the reactors, and they were not energized until June 25, 1958. Upon being energized, one of the reactors failed within 2 to 5 seconds. The burnt-out area of the reactor, which was about the size of a man's fist, was located about halfway up the reactor. The failure cut out four turns of the windings completely and damaged eight others. Most of the insulation covering was also burned off.

Having determined that the failure of the reactor was not due to causes attributable to the Government, the contracting officer directed the appellant either to replace it or to restore it to satisfactory operating condition. The appellant replaced the reactor at a cost of \$6,593.33. It was also charged by the Bureau with removal and reinstallation costs in the amount of \$550.34. Thus, the total amount of its claim is \$7,143.67.

On December 14, 1959, the undersigned held a hearing at Denver, Colorado, for the purpose of taking testimony with respect to the cause of the failure of the reactor. The only witness on behalf of the appellant was Elder Paul Nason, the manager of its substation and reactor section. On behalf of the Government, there testified John Parmakian, a mechanical and civil engineer, who is the chief of the Bureau's Technical Engineering Analysis Branch of the Division of Design; Donald C. Millard, an electrical engineer, who is the chief of the Bureau's Transmission Plant Design Section; and John E. Skuderna, an electrical engineer in the Bureau's power system technical section.

The test of the reactors made at the factory were required by paragraph C-5 of the specifications, which provided that the reactors should be completely assembled at the factory and should be subjected at the expense of the contractor to the following tests at 60

cycles, in accordance with the standards of the American Standards Association: (1) applied potential tests; (2) a total loss test to be measured by applying a voltage, at rated frequency, sufficient to produce rated current in the windings; (3) a temperature rise test; and (4) an inductive reactance test.

The applied potential test was made at 60,000 volts to ground, which was almost more than double than what the A.S.A. standards required. Some of the tests were made, however, at one-fourth rated current and voltage and for this reason the Bureau made a deduction of \$111 from what was owing to the appellant. In performing the temperature rise test, only one of the reactors was subjected to the test but this was in accordance with A.S.A. standards. Thus, it came about that the reactor that failed was not tested at full current and voltage, nor was it subjected to the temperature test at all.

The tests were made in the presence of a Bureau inspector by the name of Walter J. Richeson, who, in his report, dated November 9, 1957, characterized the workmanship on the reactors as "good" (the other two possible ratings being "excellent" and "fair"), and made, in the space provided for "Remarks," the following statement:

I believe these reactors meet the requirements of the specification but I have enclosed one copy of the test report for the Electrical Div to review. If the test report is not satisfactory, please notify Westinghouse, Sharon, Pa. by wire. I have accepted the material and the reactors will probably be shipped on Nov. 13 or 14.<sup>2</sup>

The Bureau did not send a telegram to the Sharon factory but under date of November 21, 1957, wrote to the Denver office of the appellant to inquire what current and voltage were applied in performing the impedance test. The reactors were shipped by the appellant, however, without making any reply to this inquiry.

However, the factory tests were not the only tests for which provision was made in the specifications, which contemplated that after the reactors had been delivered and installed, they would be tested and operated for a period of 60 calendar days and approved by the contracting officer before final payment was made, provided that if the Government were delayed for more than 6 months in installing, testing, and operating the equipment, final payment would be made at the end of the 6-month period. This provision was made in paragraph B-8, of the specifications headed "Payments," which included two provisions that should be quoted in full.

<sup>2</sup> Paragraph C-5 of the specifications provided: "The reactors shall not be shipped until after the inspector has approved the tests."

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In subparagraph (b) (3) it was provided:

In the event final payment for any part of the equipment is made in advance of the acceptance tests, such payment shall not relieve the contractor of full responsibility for the equipment meeting all of the performance warranties and requirements of the invitation, nor shall such payment relieve the contractor of the obligation for the above 60-day operating period after installation and correction of all defects.

In subparagraph (b) (4) it was also provided:

All materials, work and drawings covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made of the restoration of any work damaged from any cause, while in the possession of or under the control of the contractor, or its subcontractor, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract: *Provided*, That the contractor shall not be responsible for damage resulting from improper care during storage while under the control of the Government.<sup>3</sup>

The performance warranty was contained in paragraph B-12 of the specifications. Subparagraph (1) thereof, headed "Defects disclosed prior to acceptance," provided in pertinent part as follows:

Any defects in materials or workmanship or other failure to meet requirements of the invitation, including errors or omissions on the part of the contractor which are disclosed prior to final payment or prior to acceptance by the Government after completion of all tests or expiration of the operating period as provided for in Paragraph B-8, which ever occurs at the later date, shall, if so directed by the Government, be corrected entirely at the expense of the contractor, including costs of required tests of corrected equipment \* \* \*.

In subparagraph (2) of the same paragraph provision was also made for the correction of latent defects discovered within 1 year after the equipment had been placed in use.

Both the appellant and the Government are agreed that it is not possible to establish with absolute certainty the cause of the failure of the reactor. In this situation, the question naturally arises: which of the parties has the burden of proof? This question is always a difficult one because, as Wigmore points out, there is no simple and universal rule by which this question may be resolved, and even the rule that the burden rests normally on the party advancing the affirmative of a proposition, has its exceptions. All that can be said in gen-

<sup>3</sup> The provisions of this paragraph obviously replaced Article 6 of the General Provisions, which declared that "the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection \* \* \*."

eral terms is that the burden of proof should rest with the party on whom, in the light of experience and considerations of fairness applicable in the circumstances of the particular case, it should be placed.<sup>4</sup>

The appellant advances a variety of arguments in support of its contention that the burden of proving the cause of the failure of the reactor should be placed upon the Government. These arguments are that the reactor had been delivered to and had been under the control of the Government for more than 6 months before it failed; that the appellant under the terms of the contract was not in effect made an insurer of the equipment but only made responsible for the correction of defects which must be shown to exist; and that the provisions for the test period and for approval and acceptance by the contracting officer are merely for the purpose of determining whether the equipment met the requirements of the specifications.

These arguments are valid enough as far as they go but the appellant has confused the question of the requirements of the contract with respect to the correction of defects with the question of the burden of proof. If the one question were necessarily determinative of the other, the provisions of the contract designed for the protection of the Government would be largely nullified. The appellant also seems to confuse the existence of a defect with its cause. There is, of course, no doubt but that one of the reactors was defective; the only question is whether the burden is on the Government to establish its cause. In view of the provisions of the contract not only for testing the equipment at the factory but also for testing it for a 60-day period at the site of installation *prior* to its *final* acceptance, it would be neither fair nor logical to put the burden of proof on the Government merely because the equipment had been in its possession for some time before the failure of the reactor occurred. If the appellant is asserting that the Government did something to damage the equipment while it was in its possession, it should be required to prove the affirmative of this proposition. This should be required especially in view of the fact that the record does not establish conclusively that the testing of the equipment at the factory and its subsequent shipment was strictly in accordance with the requirements of the contract and regular in all respects. It is not too clear from the record that *all* of the tests made at the factory were in accordance with A.S.A. standards. The fact that the bureau subsequently made a deduction from pay-

<sup>4</sup> Wigmore on Evidence (Third Edition), section 2486.

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ments to the appellant because of savings to it in the performance of the tests did not constitute, of course, a waiver of any of the requirements of the contract, especially when it is considered that it would have served little, if any, purpose, to return the reactors to the appellant once they had been shipped. As for the "acceptance" of the reactor by the factory inspector, the fact that he sent the test report to the Bureau for review, would seem to raise the question whether his acceptance was not contingent.

The appellant also asks that the Board apply the general rule in the law of sales that the burden of proving a breach of warranty of kind, quality, or title is on the buyer.<sup>5</sup> It is true that both at common law and under the Uniform Sales Act that this burden is imposed on the buyer but such is the case only when the buyer has paid for and accepted the goods,<sup>6</sup> which was not true in the present case. The factory inspection had been only preliminary, and in addition to the final inspection at the site of installation, acceptance was subject to a test period. Moreover, there is ample authority for the proposition that while the buyer must establish the breach of the warranty or show the defect in the article sold, he need not show the specific cause of the defect,<sup>7</sup> especially when the subject of the sale was complex machinery.<sup>8</sup> If the seller is contending that the equipment was the subject of the sale failed because of some fault or factor attributable to the buyer, the burden of proving this contention is on him.<sup>9</sup>

Under the terms of the contract in this case, the appellant would be entitled to prevail only if it could show that the reactor failed because of some fault on the part of the Government. Having the burden

<sup>5</sup> 46 Amer. Juris., Title Sales, sec. 309, p. 490; *John A. Johnson & Sons Inc. et al. v. United States*, 153 F. 2d 534 (4th Cir., 1946).

<sup>6</sup> *J. N. Bray & Son et al. v. Southern Iron & Equipment Co.*, 113 S.E. 55 (Ga., 1922); *Christian & Brough Co. v. Goodman & Garrett*, 96 So. 692 (Miss. 1923); *Burton & Class v. Connell*, 65 S.E. 2d 620 (Ga., 1951); *Resolute Paper Products Corp.*, ASBCA Nos. 3961 and 4053 (September 30, 1957), 58-1 BCA Paragraph 1738; *Hercules Engineering & Manufacturing Co.*, ASBCA No. 4979 (December 9, 1959), 59-2 BCA Paragraph 2426. Where there is a trial or test period, the seller also has the burden of proving acceptance within the period allowed: *McMillan v. Jaeger Manufacturing Co.*, 159 N.W. 208 (Iowa, 1916); *Newcomb et al. v. York Ice Machinery Corporation*, 56 F. 2d 576 (5th Cir., 1932).

<sup>7</sup> *Standard Motor Car Co. v. St. Amant*, 134 So. 279 (La., 1931); *Hemenway, Inc. v. Rouch*, 175 So. 892 (La., 1937); *Fleamir, Inc. v. Lindeman & Co.*, 73 Atl. 2d 243 (N.J., 1950); *McCabe v. L. K. Liggett Drug Co.*, 112 N.E. 2d 254 (Mass., 1953); *Ricci v. Barscheski*, 116 Atl. 2d 273 (Pa., 1955).

<sup>8</sup> *J. B. Beaird Co. Inc. v. Burris Bros. Ltd.*, 44 So. 2d 693 (La., 1949); *A. J. Bartolotta v. Mike Gambino*, 78 So. 2d 208 (La., 1955).

<sup>9</sup> *Montague Compressed Air Co. v. City of Fulton et al.*, 148 S.W. 422 (Mo., 1912); *J. B. Colt Co. v. Berry* (Ky., 1927); *United States Rubber Products, Inc. v. Clark*, 200 So. 385 (Fla., 1941). *Hales-Mullaly, Inc. v. Cannon*, 119 Pac. 2d 46 (Okla., 1941).

of establishing this cause of this failure, and having failed to do so, its claim must be denied.

However, even if the burden of proof be assumed to rest on the Government, the Board is also of the opinion that it has established the probable cause of the failure of the reactor by a clear preponderance of the evidence. To make out even a case of express or implied breach of warranty, the buyer need not prove the cause of failure with absolute certainty. As the court said in *Murphy Bradford v. Moore Brothers Feed and Grocery*, 105 So. 2d 825, 829 (Alabama, 1958):

No absolutely positive causal connection is required. In the very nature of things no direct proof of the cause of the trouble can be given. Direct proof is not necessary and circumstantial evidence may be resorted to. The requirements of the law are satisfied if the existence of this fact is made the more probable hypothesis, when considered with reference to the possibility of other hypotheses.<sup>10</sup>

The appellant has contended that the reactor failed because of one of only two possible causes. The first cause alleged is a voltage surge inducing a ferroresonant condition in the power system at the time the reactor was energized. The circuit upon which the reactor that failed was located took off from the tertiary winding of an auto-transformer bank, and the reactor was energized by closing the breaker from a control on the switchboard. On December 9 and 10, 1958, the Bureau conducted field tests in the presence of a representative of the appellant in order to determine whether a voltage surge could have been caused by malfunction of the breaker, or by any other equipment on the circuit. The tests showed that there was no malfunction of the breaker. As the reactor had failed in summer and the tests were being made in the winter, the breaker was pre-heated in one of the tests. Moreover, the record shows that the breaker had not been modified in any way or repaired between the time of the failure of the reactor and the time of the tests. The tests also showed that it was extremely unlikely that a surge causing a resonant condition in the circuit could have entered the bus, although this was theoretically possible. It is highly significant that at the time the reactor failed no other equipment on the tertiary bus failed. If there had been a voltage surge, other components of the circuit should also have failed. It is also significant that the bus was protected by a

<sup>10</sup> To the same effect: *Peckham v. Eastern States Farmers' Exchange, Inc.*, 134 F. Supp. 950 (U.S. Dist. Co., Dist. R. L., 1955); *Flynn v. Growers Outlet, Inc.*, 30 N. E. 2d 250 (Mass., 1940); *Heimsoth v. Falstaff Brewing Corp.*, 116 N.E. 2d 193 (Ill., 1953); *Simon v. Graham Bakery*, 111 Atl. 2d 884 (N.J., 1955).



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set of 15-kva lightning arresters designed to control surge voltages that might enter the bus, and that the closest lightning arrester was approximately 40 feet from the reactor which failed. It was, thus, closer than any other lightning arrester to any of the other shunt reactors. The appellant seeks to discredit the oscillographs taken by the Bureau of the various currents and voltages which might have affected the reactor on the ground that a magnetic rather than a cathode ray oscillograph was used in obtaining the data. However, while a cathode ray oscillograph is more sensitive than a magnetic one, the latter was entirely adequate for the purposes for which it was used.

The alternative contention of the appellant, which is that the failure of the reactor may have been caused by foreign material in the windings, seems to be even less convincing than its voltage-surge theory. Since the failure occurred in the interior windings of the reactor, it is difficult to perceive how the foreign material could have entered. Moreover, the foreign material would not only have to enter the interior windings but also would have to pierce the insulation and establish a conductive path between two turns of the reactor. Such a result would have required the operation of a series of unusual coincidences. The contracting officer in a letter to the appellant, dated September 4, 1958, stated that "the reactor was carefully examined before being energized," and if there had then been foreign material in the reactor it should have been detected. After the reactor failed, it was examined for indications of the presence of foreign material, and no such indications were found. Assuming that the factory tests of the reactor that failed would have revealed the presence of foreign material, such material could, conceivably, have entered the reactor while it was being crated by the appellant for shipment. The appellant has suggested that the foreign material was possibly a nail or nails, but these would be more likely to get into the reactor during the process of shipment, and it is in any event most unlikely that nails would puncture the insulation. At the hearing the appellant's witness suggested that the foreign object in the windings may have been a mouse which chewed on the insulation and thus perished in the reactor. But the mouse would also have had to prepare itself for its own cremation by draping itself across the windings exactly where they were bare.

It is the Government's position that the only probable cause of the failure of the reactor was a faulty weld, and the evidence produced in

support of this contention, which rests upon sound expert opinion, is very persuasive.

The heliarc welding process, which was involved in the manufacture of the reactors, is very exacting. In this process the molten aluminum must be shielded by helium, an inert gas, which is made to flow over the arc. To achieve an effective electrical joint, the contact surfaces must be clean, and there must be intimate contact between the weld and the wires comprising the cable. Because aluminum has high thermal and electrical conductivity, higher values of welding current have to be employed, and the welding time must be relatively short. Extreme care is necessary to prevent oxidation of the aluminum to be joined, especially when strands of individual wire are to be joined, since air-leakage from the voids between them can contaminate the inert gas shield, and result in imperfect joining of the strands.

The heliarc welding process is a development of the last decade. Aluminum could not be welded at all until inert gas came to be used. While the appellant has been making reactors since 1929, it has been using stranded aluminum cable in their manufacture only since 1949 or 1950, and it had built, prior to those involved in the present case, only three to six reactors of the same capacity, and these had been constructed for the Bonneville Power Administration.

In view of the exacting nature of the heliarc welding process, and the limited experience with its use, it is easy to perceive how there could have been faults in the welding, although this is not to say, of course, that they were inevitable, for then all three of the reactors would have failed. It is of some significance that the failure in the reactor occurred in the vicinity of two welds and, if there were two, there may also have been a third. John Parmakian, who has had a quarter of a century of experience in welding, gave it as his expert opinion that the failure of the reactor was due to a defective weld, and the appellant called no welding expert of its own to challenge this opinion. Nason, the appellant's only witness, conceded that he was not a welding expert but he was, nevertheless, of the opinion that it was possible that welds could occur on two parallel cables at the same point. Indeed, if the occurrence of a high voltage surge, and the presence of foreign magnetic material, are ruled out as causes of the failure, as they must be, a faulty weld seems to be the only likely cause of the failure. It would be necessary to conclude, if all three of the alleged causes are ruled out, that the failure is wholly inexplicable.

To be sure, Nason testified also that in his opinion the resistance measurements obtained in the course of testing the reactors at the

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factory would have revealed a defective weld, notwithstanding the fact that there was involved a long length of cable with a short high resistance area. However, Parmakian was of a contrary opinion and testified that there would be no substantial difference in resistance measurements in a long length of cable whether or not it contained a defective weld. Moreover, Skuderna also testified that where the resistance in two parallel windings was substantially equal both windings would conduct substantially the same current until the point of complete failure.

There is another crucial objection, however, to accepting Nason's contention that the resistance measurements would necessarily have revealed the existence of a defective weld. This objection is based on the fact that the test was made at only one-fourth rated current and voltage. That this reduction in current and voltage would affect the results of the test was convincingly demonstrated by Parmakian with a model which was constructed under his supervision. The model consisted of a 90-foot coil of nichrome 16-gage wire wrapped around four insulators. A small 6-watt lamp was connected in parallel. A weld or joint was simulated in the model by means of a 1-inch gap, in the prongs of which there could be inserted nichrome wire of the same diameter as the adjacent coil, which was about 50-thousandths of an inch, and also nichrome wire of about 10-thousandths of an inch, which since it was only one-fifth the diameter of the adjacent coil would simulate a defective weld. The resistance readings in ohms were substantially the same with the heavier wire, and the entire coil also carried full current and voltage with this heavier wire. However, with the lighter wire inserted in the gap, the wire carried the current and voltage satisfactorily at one-fourth and one-half current and voltage, but at three-fourths current and voltage it failed. Moreover, when full current and voltage were applied, the reduced section failed in approximately 2 seconds, or in about the same time that failure occurred in the reactor. The appellant objects that there are differences between the reactors and the model, which is, of course, obvious, but these differences were structural and would not affect the operation of the electrical laws which were involved.

The Government in its brief expressly repudiates any implication that the appellant habitually produces defective electrical equipment. It concedes indeed that an occasional failure of equipment is simply inevitable. Convinced that the Government has succeeded in estab-

lishing by a clear preponderance of the evidence that the cause of the failure of the reactor was a defective weld in its manufacture, the claim of the appellant must be denied.

#### Conclusion

Therefore, the decision of the contracting officer rejecting the claim of the appellant is affirmed.

WILLIAM SEAGLE, *Member*.

WE CONCUR:

PAUL H. GANTT, *Chairman*.

GEORGE W. TOMAN, *Alternate Member*.

#### PURVIS C. VICKERS ET AL.

A-28255

*Decided March 29, 1960*

#### Color or Claim of Title: Good Faith

An occupant of public land who knows that title to the land is in the United States at the time he purchases the land cannot be regarded as holding the land in good faith under claim or color of title, within the meaning of the Color of Title Act.

#### Color or Claim of Title: Good Faith

One cannot be said to be holding land in good faith under claim or color of title after he has filed a homestead entry application on the land or located mining claims on the land.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Purvis C. Vickers, Robert I. Vickers, and Joseph M. Vickers, a copartnership known as Vickers Brothers, have appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated August 26, 1959, which affirmed, as modified, a decision of the acting manager of the Denver, Colorado, land office, dated December 30, 1958, rejecting their color of title application, Colorado 023688, to purchase certain land located in T. 43 N., R. 4 W., N.M.P.M., Colorado, under the act of December 22, 1928, as amended (43 U.S.C., 1958 ed., sec. 1068). The application was rejected on the ground that the appellants and their parents, their predecessors

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in title, knew at the time they acquired their title to the land that the title was in the United States.

The records of the Department show that the appellants' father, John W. Vickers, prior to the conveyance of the land to him in 1926, acquired in 1922 a mining claim within the limits of the land applied for which had been located in 1917. The records also show that the appellants or their father located other mining claims on the land since 1934. On August 8, 1945, Purvis C. Vickers filed a homestead application for parts of the land, which was rejected for the reason that the land applied for was withdrawn for powersite purposes.

The Color of Title Act, as amended (*supra*), provides that—

The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation \* \* \* issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than \$1.25 per acre \* \* \*.

It is well established that the fact that land may have been held by other persons in good faith for more than 20 years under color of title does not justify the issuance of a patent under the Color of Title Act to one who thereafter purchases the land with knowledge that title was in the United States. *Anthony S. Enos*, 60 I.D. 106, 108, 329, 331 (1949). The act requires that occupancy under claim or color of title be in good faith in order to authorize a purchaser thereunder. *Henshaw v. Elmaker*, 56 I.D. 241, (1937). And "there can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation." *Deffebach v. Hawke*, 115 U.S. 392, 407 (1885). Consequently, the application for purchase under the act of a person who acquires it or occupies it after he purchases the land with knowledge that he has no title and that title is in the United States is lacking in the element of good faith and must be rejected. *Clyde A. Phillebaum* A-25933. (November 8, 1950); *Ephraim R. Nelson* A-25865 (June 6, 1950); *William Benton*, A-23258 (January 11, 1943); *Wesley W. Gletty*, A-25819 (May 23, 1950).<sup>1</sup>

<sup>1</sup> It should be noted that the Departmental decisions cited were rendered prior to the amendment of the Color of Title Act (45 Stat. 1069) by the act of July 28, 1953 (67 Stat. 227). Yet Congress made no change in the language of the act which would indicate disapproval of the Department's interpretation of the act.

The record indicates that the subject land has been operated as a ranch and dude ranch and substantial improvements in the form of buildings, corrals, sewer system, butane gas system, and electrical system, etc., have been made on the land. The Director properly stated that the appellants should be allowed a reasonable time within which to remove those improvements which can be removed without substantial damage to the improvements or to the land, and that if any other disposition of the land should be made, as a condition precedent to anyone else acquiring title, such person be required to compensate the appellants for the value of improvements which cannot be removed and which will be of value to the person acquiring the land.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

## L. E. LINCK

A-28190

*Decided April 1, 1960***Oil and Gas Leases: Description of Land**

An oil and gas lease offer is properly rejected as to surveyed lands which are designated in the offer as unsurveyed lands and described by metes and bounds, even though the offer gives what probably will be the description of the lands when they are surveyed.

**Oil and Gas Leases: 640-acre Limitation**

An oil and gas lease offer which includes less than 640 acres because some of the land is improperly described is properly rejected as a violation of the departmental regulation requiring that an offer be for not less than 640 acres.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

L. E. Linck has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated May 21, 1959, which modified and affirmed a decision of the manager of the land office at Anchorage, Alaska, dated April 17, 1958, rejecting his noncompetitive oil and gas lease offer, Anchorage 023789, filed April 14, 1953, under section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226).

The appellant's offer described by metes and bounds 2,560 acres of land designated by him as "Unsurveyed lands." It also gave the probable description of the land when surveyed. The manager rejected the offer in its entirety, pointing out that all of the land designated above the high water mark was surveyed and thus was improperly described by metes and bounds. The remainder, he said, constitutes tide land or submerged land in Wide Bay not subject to leasing under the Mineral Leasing Act.

On appeal, the Acting Director agreed that surveyed land cannot be leased in response to an offer describing it by metes and bounds and that tide lands and submerged lands are not leasable under the Mineral Leasing Act. He found, however, that 320 acres of the upland included in the offer were unsurveyed and available for leasing. Nevertheless, he concluded that this land could not be leased because it is not isolated or otherwise within an exception to the rule requiring oil and gas lease offers to include at least 640 acres of land (43 CFR, 1954 Rev., 192.42(d)).

In his appeal to the Secretary, the appellant contends that his offer covered 696.32 acres of land available for leasing exclusive of the tide land and submerged land and thus meets the 640-acre requirement. He observes that even land covered by another lease

offer is regarded as available for leasing in determining whether an offer complies with the 640-acre requirement and that rejection of a portion of an offer does not ordinarily invalidate the entire offer. He concludes that the rejection of the portion of his offer which related to surveyed land should not, therefore, require rejection of the offer in its entirety.

The appellant stated in his offer that it covers land which, when surveyed, probably will be the E $\frac{1}{2}$  of sections 3 and 10 and all of sections 14, 15, and 22, T. 33 S., R. 45 W., Seward Meridian. His metes and bounds description commences with a point of beginning at the northeast corner of section 3, runs 2 miles south, 1 mile east, 1 mile south, 1 mile west, 1 mile south, 1 mile west, 2 miles north,  $\frac{1}{2}$  mile east, 2 miles north, and finally  $\frac{1}{2}$  mile east. The plat of survey approved August 19, 1922, shows all of this land is surveyed, except the land in section 3. Most of the land in sections 14, 15, and 22 is beneath the waters of Wide Bay.

The land subject to the ebb and flow of the tide and the land fully submerged by the waters of the Bay are not available for leasing under the Mineral Leasing Act (*Pewco, Inc., et al.*, 66 I.D. 152 (1959)), but all of the upland, both the surveyed and the unsurveyed land, is available for leasing in response to a proper offer.

At the time this offer was filed, the applicable departmental regulation provided:

\* \* \* Each offer must describe the lands by legal subdivision, section, township, and range, if the lands are surveyed, and if not surveyed, by a metes and bounds description connected with a corner of the public land surveys by course and distance and must cover only lands entirely within a six-mile square. Each offer must be for an area of not more than 2,560 acres except where the rule of approximation applies, and may not be for less than 640 acres except in any one of the following instances:

(1) Where the offer is accompanied by a showing that the lands are in an approved unit or cooperative plan of operation or such a plan which has been approved as to form by the Director of the Geological Survey.

(2) Where the land is surrounded by lands not available for leasing under the act, except that where the tract was isolated as the result of a partial relinquishment of a lease, no lease offer will be received for the relinquished land other than one filed under the conditions prescribed in subparagraph (1) of this paragraph for a period of 60 days from and after the date of filing of the partial relinquishment. (43 CFR, 1953 Supp., 192.42(d)).

The portion of the appellant's description of the land to be leased which related to surveyed land was defective because such land was not properly described by subdivision, section, township, and range. Because the requirement of the regulation for the legal description of surveyed land is mandatory, the offer was properly rejected as to this land. 43 CFR, 1953 Supp., 192.42(g).

The appellant contends that he "described the lands by sections, township, range, and meridian, as well as by a metes and bounds



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description, because both types of land were included in the offer." Hence he holds he has complied with 43 CFR 192.42(d).

As stated earlier, appellant's offer designated the land applied for as "Unsurveyed lands" and then gave a metes and bounds description of all the land. Following this description was the statement: "Probably will be E.  $\frac{1}{2}$  Secs. 3 & 10, and Secs. 14, 15, 22 T. 33 S., R. 45 W., S. M." It is obvious from this that appellant thought all the land was unsurveyed, not just that a portion was unsurveyed; and that the metes and bounds description was intended to fix the limits of the land sought, not his closing reference to what the legal subdivisions probably would be when the land was surveyed. He cannot now say that the metes and bounds description was intended to describe only the unsurveyed E $\frac{1}{2}$  of section 3 and that his reference to legal subdivisions was intended as the description of the remaining surveyed land.

Because sections are not always regular in size, a metes and bounds description of surveyed land, based upon regular-sized sections, may not coincide with the land as actually surveyed.<sup>1</sup> In the event of a discrepancy, the question would arise whether the offeror is entitled to the land covered by his "probable" surveyed description when it does not fall within his metes and bounds description. To prevent uncertainty of administration and in fairness to other offerors, the answer must be in the negative. It is certainly not unfair to hold an offeror to what he obviously intended.

I conclude, therefore, that appellant's offer did not describe the surveyed land in the offer as required by the pertinent regulation and that the offer was properly rejected as to that land for this reason.

This leaves in the appellant's offer only 320 acres of unsurveyed land, one-half of the minimum acreage required to be included in an offer. As to this the appellant asserts that rejection of part of an offer should not invalidate the entire offer and that his offer, if rejected as to the surveyed land, should be allowed as to the unsurveyed land. The purpose of the 640-acre rule was set forth in *Annie Dell Wheatly et al.*, 62 I.D. 292 (1955). The Department has been alert to attempts to circumvent the rule and has indicated plainly that it will not permit practices which could lead to evasion of the rule. *Natalie Z. Shell*, 62 I.D. 417, 419 (1955); *Halvor F. Holbeck*, 63 I.D. 102 (1956); *Janis M. Koslosky*, 66 I.D. 384 (1959).

If the argument of appellant were accepted, the door would be opened to a simple way of evading the 640-acre rule. An offeror could apply for the land he wants (less than 640 acres) and then in-

<sup>1</sup>For example, in this case, the north-south length of sec. 3 is not the normal 80 chains (1 mile) but 79.87 chains (8.58 feet short of a mile). Therefore, the metes and bounds given for the surveyed sections do not coincide exactly with the boundaries of the sections as actually surveyed.

clude in his offer sufficient additional land to make a total of 640 or more acres but deliberately misdescribe the additional land so that his offer would be rejected as to that land. The misdescription could take the form of describing surveyed lands by metes and bounds or unsurveyed lands by metes and bounds that do not close, etc. The Department cannot allow any such practices (which, of course, do not comport with the regulations) even though there is no intent to evade the 640-acre rule.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

EUGENE MILLER

A-28212

*Decided April 5, 1960*

Grazing Permits and Licenses: Cancellation and Reductions—Trespass:  
Measure of Damages

A grazing licensee who repeatedly and willfully grazes his cattle and horses in trespass upon the public domain is properly subjected to disciplinary action consisting of assessment of damages and suspension of the grazing privileges of his base property.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Eugene Miller has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management affirming a decision of a hearing examiner dated January 31, 1958, requiring him to respond in damages and authorizing the manager to deny Miller further grazing privileges for violations of the terms of his grazing license and of the Federal Range Code. The hearing examiner presided at a hearing held on August 29, 30, 31, 1957, on an order to show cause issued by the State supervisor on July 23, 1957, and issued his decision sustaining a portion of the trespasses alleged and all of the penalties proposed by the State supervisor.

In the show cause order, the State supervisor charged Miller with:

1. overgrazing the Federal range by 144 cattle from April 1 to July 15, 1955, to the extent of 504 AUM's<sup>1</sup> at an estimated damage to the United States of \$1,260 by allowing a larger number of cattle than permitted by license to be upon the range for a portion of the 1955 grazing season;

<sup>1</sup> An AUM is the symbol for animal unit month which measures the forage required to support one cow for one month. An AUM is also the measure of forage support required for one horse or five sheep or goats.

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2. unauthorized use of the Federal range by permitting 12 horses to graze thereon from August 8, 1956, to January 4, 1957, to the extent of 58.8 AUM's at an estimated value of \$176.40;

3. unauthorized use of the Federal range by permitting 24 horses to graze thereon from March 26 to July 18, 1957, to the extent of 90.4 AUM's at an estimated value of \$271.20;

4. unauthorized use of the Federal range by permitting 14 cattle to graze thereon from April 6 to July 18, 1957, and 73 cattle, from April 29 to July 18, 1957, to the extent of 242.7 AUM's at an estimated value of \$606.75.

The total estimated damage listed in the charges is \$2,314.35.

In his decision of January 31, 1958, the hearing examiner found that there was overgrazing by Miller's cattle in 1955 to the extent of 47 AUM's at a probable damage to the United States of \$94 and unauthorized grazing in 1956 and 1957 by his horses to the extent of 124.8 AUM's at a probable damage of \$312. The total amount of damages Miller was thus required to pay is \$406. The hearing examiner also found that Miller's conduct which gave rise to the damage which had been proved constitutes willful trespass in violation of the Federal Range Code. He specified 43 CFR, 1954 Rev., 1958 Supp., 161.11 (a)(1) which forbids grazing without an appropriate license and 43 CFR, 1954 Rev., 1958 Supp., 161.11(a)(2) which forbids grazing in excess of the number of livestock permitted. The hearing examiner ruled that charge 4 as to cattle trespass in 1957 had not been sustained.

The Director of the Bureau of Land Management differed with the hearing examiner as to the proper basis for his conclusion that Miller was authorized to graze cattle upon the Federal range in 1957 without formal issuance of a license, but he affirmed the examiner's findings as to the cattle trespass in 1955 and the horse trespasses in 1956 and 1957, and the further conclusion that Miller's conduct warrants the disciplinary action authorized by the examiner.

In his appeal to the Secretary, Miller assigns as error the Director's finding that he was willfully in trespass with his cattle in 1955 and with his horses in 1956 and 1957. However, his entire argument is concerned with the horse trespasses in the 2 years mentioned, and he concludes:

\* \* \* if he was in trespass because these horses carried his brand that the decisive element of willfulness was not present. If this is the case, it leaves only the one charge of trespass to his cattle to justify the revocation of his grazing license. The remedy invoked is too harsh to be justified by one charge, and for that reason the decision of the Director should be modified to fit the facts.

Miller's lack of argument as to the cattle trespass seems to indicate that he no longer seriously contends that he was not in willful trespass with his cattle in 1955. In any event, the findings below on that point are clearly substantiated by the record.

I believe too that the horse trespasses in 1956 and 1957 were willful, although they appear to be part of a general problem in the grazing district (Transcript of hearing, pp. 49, 75-76).

The cattle trespasses, although limited to 1 year, were flagrant violations of Miller's license. He not only made no attempt to remove the trespassing cattle when first notified of the violation (Tr. 277-279) but the number of cattle in trespass increased with each inspection from 23 to 75 to 144. The payment of damages limited to the value of the forage consumed would not be sufficient penalty for so deliberate an offense. On the other hand, while the permanent deprivation of grazing privileges seems to me to be too severe, I believe that some deprivation of privileges is proper and I conclude that the grazing privileges attached to Miller's base properties should be suspended for a period of 2 years.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director is modified as above stated and as modified is affirmed.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

### APPEAL OF RICHEY CONSTRUCTION COMPANY

IBCA-187

*Decided April 8, 1960*

**Contracts: Suspension and Termination—Contracts: Performance—Contracts: Specifications—Contracts: Acts of Government**

When experience with the operations of a roadway contractor for a period of over a month showed that its equipment and methods of operation were hopelessly inadequate to work long stretches of roadway, and the specifications expressly permitted the construction engineer in charge of the work to restrain the contractor from undertaking new work to the prejudice of work already started, he did not exceed his authority by limiting the span of roadway on which the contractor might work to a designated number of feet. The imposition of this operational limitation cannot be successfully advanced by the contractor as an "act of Government," converting the termination for default into a termination for the convenience of the Government.

**Contracts: Delays of Contractor**

Despite the fact that the replacement of a broken bridge pile was delayed by a teamsters' strike, the contractor is not entitled to an extension of time for performance of the contract when the record shows that the contractor was at fault in breaking the pile, was able to perform other work on the bridge during the period of delay, and was grossly in default in the performance of the contract as a whole.

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BOARD OF CONTRACT APPEALS

Richey Construction Company, of St. Johns, Arizona, a copartnership consisting of Hugh Richey and his son, Philip N. Richey,<sup>1</sup> has filed a timely appeal from a decision of the contracting officer in the form of a letter dated November 15, 1958, terminating its right to proceed with the performance of the work under Contract No. 14-20-600-4215, with the Bureau of Indian Affairs, hereinafter referred to as the Bureau.

The contract, which was dated April 9, 1958, and incorporated the General Provisions of U.S. Standard Form 23A (March 1953), provided for the construction of 9.977 miles of highway on the Navajo Indian Reservation in the vicinity of Chinle, Arizona. The construction work was to include grading, drainage, base course and bituminous surfacing, and the erection of two bridges, the Nazlini Wash Bridge and the Cottonwood Wash Bridge. The estimated contract price for the units of work to be performed under the contract was \$374,915.15.

Under the terms of the contract, the work was to be commenced within 10 days of the receipt of notice to proceed, and to be completed within 210 calendar days after the date of receipt thereof, subject to the payment of liquidated damages at the rate of \$100 a day for each calendar day of delay in the completion of the work. As the appellant received notice to proceed on April 25, 1958, the time for completion of all work under the contract was fixed as November 21, 1958.

The specifications governing the performance of the work, which will be hereinafter referred to as the Special Provisions, incorporated the "Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, FP-57, January 1957," except for Division 1 thereof. In effect, this deleted the General Requirements of FP-57 (as the standard specifications will hereinafter be referred to) but left in effect the construction details prescribed therein, unless expressly modified by the Special Provisions.

Clause 5 of the general provisions, the "delays-damages" clause, provided, insofar as pertinent, that the right of the contractor to proceed with the work might be terminated for failure to prosecute the work with such diligence as would insure its completion within the time specified or any extension thereof, except that the right to proceed was not to be terminated "because of any delays in the completion of the work due to unforeseeable causes beyond the control and

<sup>1</sup> While this is the name given in typewritten copies of the contractor's performance and payment bonds, it appears as Philip H. Richey in the construction contract executed by him.

without the fault or negligence of the Contractor," including but not restricted to certain named causes, among which were "acts of the Government," and "strikes."

The appellant commenced operations on May 7, 1958, but almost from their very inception the supervisory employees of the Government were dissatisfied with the kind and quality of the appellant's equipment and its methods of operation. The slow progress made by the appellant is indicated in the following table in which the percentage of work completed is shown in relation to the contract time elapsed as of various dates in 1958:

Date	Percentage of work completed	Percentage of contract time elapsed
4/26-5/31.....	6	16
6/30.....	11	31
7/31.....	20	46
8/31.....	30	61
9/30.....	42	75
10/31.....	53	90

Thus, at the end of October 1958, the appellant had completed only 53 percent of the contract work, although 90 percent of the contract time had elapsed. Indeed, the contract completion date was only 3 weeks away. Moreover, in the latter part of October, the area officers of the Bureau in Gallup, New Mexico, received communications indicating that the appellant was in financial difficulties. On October 28, 1958, they received a communication from the Treasury Department that the appellant's bonding company, the Maryland Casualty Company, had requested the withholding of payments to the appellant because a considerable amount of unpaid claims against it had been received. On the same date, they received a telegram from the bonding company stating that there were loans not connected with the contract which were outstanding against the appellant in the amount of \$31,243.66, and that the unpaid accounts under the contract exceeded \$25,000. A day later they received another telegram, informing them that the Maryland Casualty Company was canceling the appellant's general and automobile liability policy for non-payment of premiums. Shortly thereafter the Maryland Casualty Company also requested that a payment to the appellant in the amount of \$41,683.28 be withheld.

Thereupon, the contracting officer sent a registered letter to the appellant dated October 30, 1958, directing it to show cause within 10 days from the date of the receipt of the letter why its right to proceed under the contract should not be terminated. As a result of requests made by the appellant and its bonding company, the con-

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tracting officer extended the period allowed until November 14, 1958. Under date of November 12, 1958, the appellant addressed a letter to the contracting officer advancing six reasons why its right to proceed under the contract should not be terminated. There followed the contracting officer's letter of November 15, 1958, terminating the appellant's right to proceed under the contract. Under date of December 10, 1958, the appellant filed its notice of appeal from this action, which incorporated by reference the contents of its letter of November 12, 1958. Under date of March 20, 1959, the contracting officer issued detailed findings of fact, setting forth the history of the administration of the contract and the evidence supporting his decision to terminate the appellant's right to proceed thereunder.<sup>2</sup>

On December 7, 8, and 9, 1959, the undersigned held a hearing at Phoenix, Arizona, with reference to the justification for the termination of the appellant's right to proceed under the contract. The principal witnesses for the appellant were the Richeys, father and son, and the principal witnesses for the Government were Joseph H. Knighton, the highway construction engineer who, as authorized representative of the contracting officer, supervised the contract work, and Harold E. Johnson, who was area road engineer for the Bureau, headquartered at Gallup, New Mexico.

At the hearing, the appellant did not attempt to prove its termination costs or anticipated profits, stating that its costs would depend on the outcome of litigation in which it was then still involved.

The six reasons against the termination of the contract that were set forth by the appellant in its letter of November 12, 1958, were as follows:

(1) That the contracting officer's representative had limited to an unreasonably short distance the stretch of roadway which could be worked by the appellant, thus idling much of its equipment.

(2) That the contracting officer's representative had required the application of approximately three times the amount of water reasonably needed for compaction, thus oversaturating the material, and requiring excessive compaction.

(3) That the contractor had been delayed for approximately 30 days by a teamsters' strike which interfered with the shipment of a pile which was needed to replace a defective one which had been broken in driving the piles in constructing the Nazlini Wash Bridge.

(4) That the contracting officer's representative had required the contractor to lay approximately 1,500 feet of road grade three times

<sup>2</sup> The findings ran to 47 pages, and there were attached to them no less than 246 exhibits. Of particular importance are Exhibits 67 to 202, inclusive, consisting of the daily reports of John T. Roberts, who was apparently the chief inspector on the job, and Exhibits 207 to 237, consisting of the diary of Joseph H. Knighton, the construction engineer in charge of the work.

"at the junction of Chinle to Chinle Junction Route 7 and Chinle Junction South on Route 8," for which no additional payment or time allowance had been made.

(5) That the contracting officer's representative required the contractor to complete fills adjoining the abutments of the Nazlini Wash Bridge before doing any other work, thus idling the items of equipment not involved in the completion of the fill.

(6) That throughout the period of construction the Government did not have a sufficient engineering force to set stakes for grade finishing on time, so that the contractor was usually ahead of the staking, and had to return to finish the grade, and that, in general, much of the engineering for the appellant's work was done during the weekends on a part-time basis by a Government engineering crew from another project.

These diverse excuses of the appellant may, with a single exception, all be subsumed under the category "acts of the Government." There can hardly be any question but that at the time of the termination of the contract it was utterly impossible for the appellant to have completed the work within the allotted time, and also that it was in great financial difficulties. The appellant is, therefore, attempting to shift to the Government the whole blame for the situation in an effort to convert the termination for default into a termination for the convenience of the Government. However, the attempt cannot be regarded as successful. Indeed, the only serious question presented by the record is represented by the appellant's first excuse that the construction engineer unreasonably limited the span of roadway which might be worked by it at one time.

This operational limitation, as it will hereinafter be referred to, was imposed by Knighton as the authorized representative of the contracting officer in charge of the work pursuant to Article 8.2, headed "Prosecution of Work" which required that the contractor (1) file with the contracting officer within 20 days of receipt of notice to proceed a chart or schedule of proposed progress; (2) conduct the work "in such manner and with sufficient materials, equipment and labor as are considered necessary to insure its completion";<sup>3</sup> and (3) notify the contracting officer if the work was temporarily discontinued for any reason. The second paragraph of the article also contained a provision which read as follows:

The contractor shall not open up work to the prejudice of work already started, and the contracting officer may require the contractor to finish a section on which work is in progress before work is started on any additional section.

<sup>3</sup> This provision was reinforced, insofar as equipment was concerned, by Article 8.5 of the Special Provisions, the first sentence of which read: "All equipment used on the work shall be of sufficient size and in such mechanical condition as to meet with the requirements of the work and to produce a satisfactory quality of work."



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The evidence with reference both to the time when the operational limitation was imposed and its precise scope and effect is conflicting. The elder Richey maintained at the hearing that the operational limitation was imposed on May 7, or within a few days thereafter, which would be at the very commencement of the grading operations. He also maintained that the operational limitation was 200 or 250 feet until June 25, when at a conference with representatives of the Bureau it was increased to 500 feet. He testified, moreover, that this increase in the distance on June 25 was indicated by an entry in his diary. On the other hand, Knighton testified that he imposed the operational limitation on June 9 to become effective the next day, and that the distance was at all times 300 feet for the whole width of the roadway, and 600 feet for half-sections of the roadway. Knighton's testimony is fully supported by his own contemporaneous reports and diary, and by contemporaneous reports also made by Harold E. Johnson, the area road engineer, who with Jack C. Baker, the agency road engineer, was present at the June 25th meeting.<sup>4</sup> In view of the contemporaneous reports and the fact that both of the Richeys gave testimony on many points which was obviously contrary to many facts conclusively established by the record, the Board cannot credit their testimony that the operational limitation was imposed on May 7, and that the operational distance was from 200 or 250 to 500 feet. The testimony of the elder Richey that the operational limitation was imposed on May 7 is, moreover, inherently incredible. A road construction engineer of Knighton's experience—he had been engaged in road construction since 1922—would hardly have limited a contractor's operations before he had had an opportunity to become acquainted with the capacity of his equipment and methods of operation. The Board must find, therefore, that the operational limitation was imposed on June 9, and that it was 300 feet for the whole width of the roadway, and 600 feet for half-sections of the roadway.

Knighton imposed the operational limitation because he deemed the appellant's compaction equipment to be inadequate to take care of the material which was being spread, and also because the water supply was inadequate to carry on an extensive operation. However, the evidence is particularly conflicting with reference to the effect of the operational limitation on the appellant's grading operations. The elder Richey testified that it was impractical to operate on a length of roadway which was less than about 1,500 feet, and he was supported in this position by two other witnesses, Otis Kelly Bruce, a grading foreman working in the Phoenix area, and John Henry

<sup>4</sup> In appeal of *W & W Company*, IBCA-54 (August 4, 1958), the Board emphasized the importance to be accorded to the contemporaneous reports of supervisory project personnel made in the regular course of the work before controversy had arisen.

Tanner, a civil engineer, called to testify as expert witnesses. They both testified that they had never heard of the imposition of an operational limitation in road construction work, and it can hardly be disputed that it was an extraordinary measure. Knighton himself admitted that during the whole of his long career as a road construction engineer he had never imposed any limitation on the operations of a road construction contractor. But he insisted, nevertheless, that it was justified in the present instance. Johnson, who was also a road construction engineer of very long experience, gave it as his opinion that the operational limitation imposed by Knighton was wholly practicable in the circumstances of the case. Tanner made a special point of the importance of the balance points between cuts and fills in roadway construction, and insisted that a shorter distance than that between balance points could not be worked successfully. But Johnson testified that the operational limitation was not imposed in areas where there were cuts and fills, which was from a hill to the south end of the job, and that except for this stretch the terrain where the appellant was working was rather flat, so that the appellant merely had to pick up the material in the ditch and put it in the roadway, an operation that was entirely practical even within a short distance. As the Bureau's road engineers were men of extremely long and varied experience, and the appellant's witnesses were imperfectly acquainted, if at all, with its equipment and methods of operation, and testified really as to what would be desirable under ideal conditions, the Board must find that the operational limitation imposed by Knighton was not unreasonable when it is considered that both the appellant's equipment and its methods of operation were woefully inadequate and faulty. Indeed, in one of his reports to the area director, Johnson felt impelled to declare: "This is probably the worst highway construction operation that we have ever had in the Gallup Area."

There was even difficulty at the very outset, for example, in getting the appellant to submit to the contracting officer the progress schedule required by Article 8.2 of the Special Provisions. Although the schedule should have been furnished by May 15, it was not actually furnished until nearly the end of the month.<sup>5</sup> But far worse than this initial delay was the utterly incomprehensible nature of the schedule which was submitted by the appellant. It was indeed a schedule of

<sup>5</sup> The elder Richey testified during his direct examination that he transmitted the schedule "in the first week or ten days of the job" but during his cross examination he testified that the schedule was furnished "in its proper time or approximately so, which would be after May 15." Actually, it was furnished much later than this. Knighton testified that it was submitted approximately May 27, and this is in accordance with his diary entry for May 29, in which he noted: "Delivered to Mr. Richey, letter from contracting officer, requesting chart of proposed progress that should have been submitted a week ago."

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impossible accomplishments. It scheduled the completion of the watering on August 26th, although the excavation was not to be finished until November 26th! This would have meant, of course, that 55 percent of the excavation would have been put in without watering. The schedule also indicated that 100 percent of the rolling would be finished when only 85 percent of the excavation had been done! There were other similar curiosities of roadway construction, and the schedule was returned to the appellant for correction. The corrected schedule was delivered by the elder Richey to Knighton sometime in June,<sup>6</sup> but the latter mislaid it in his office until August 5.

The contretemps of the progress schedule is more symptomatic than important. But there can be no doubt of the importance of the appellant's equipment insufficiencies and failures. It is established by the elder Richey's own testimony that a considerable number of items of necessary equipment were lacking at the time operations were commenced. These items and the precise or approximate dates on which they were subsequently acquired were as follows:

1—AD 6 Motor Grader.....	September 1
2—Woolridge Motor Scrapers 20 yd.....	June 18
1—HD 16 Allis Chalmers Tractor with Dozer...	About September 1
1—24-inch B. Kolean Screen 7036.....	About middle of July
2—G.M.C. 18 Ton Tandum Dump Trucks.....	About middle of July
1—G.M.C. Tandum Truck with Semi-Trailer, 3,500 gallon tank.....	About middle of July
1—Sheepsfoot roller (meeting specification requirements) .....	June 24
1—60 Ton Scale.....	About July 1

Some of the other equipment which the appellant had did not meet specification requirements, or was too old and worn-out to be used effectively. The lack in the early stages of the operations of a sheepsfoot roller meeting specification requirements was particularly serious. Among the old, worn-out items of equipment were some of the scrapers and most of the water trucks which were constantly breaking down. For a considerable time, the appellant also got along with a rather makeshift contraption for screening material, and for driving bridge piles it lacked a piledriver but made use of a crane with a jackhammer attachment. In general, it may be said that a good deal of the equipment was frequently breaking down. Needless to say the appellant had little or no standby equipment to replace temporarily equipment that had broken down.

The nature of the defects of the appellant's watering equipment was a particularly serious problem. Under the terms of Section 108

<sup>6</sup> Again, Richey testified that the corrected schedule was delivered to Knighton on May 30 but, since the original schedule was not submitted until nearly the end of the month, it is in the highest degree unlikely that the corrected schedule could have been handed to Knighton on May 30.

of the standard specifications, as modified by the Special Provisions, water was to be applied as directed by the engineer in charge but the contractor had the responsibility for obtaining the water supply.<sup>7</sup> In the arid country in which the road was being constructed water was difficult to obtain.<sup>8</sup> As it was, therefore, in short supply, it was particularly important that it should not be wasted. However, not only did the appellant's water trucks break down with great frequency,<sup>9</sup> but the valves on the water trucks did not close automatically, as they should have closed, and a very considerable amount of water was wasted, and in addition the roadway was muddied to such an extent that the operation of the appellant's equipment was seriously impeded. As the adobe soil in which the appellant was operating would absorb only small quantities of water at a time, moreover, it had to be applied frequently, and this condition, of course, only compounded the appellant's difficulties in operating the watering equipment.

Such was the combination of conditions that finally led Knighton to impose the operational limitation. The record shows that it had the approval of all of his superiors, including the contracting officer. Now, there can be no doubt that if the limitation had been imposed at the very commencement of the appellant's operations, it could not have been justified under the provision of Article 8.2, which prohibited the opening up of a new section of work until the section on which work had already been started had been completed. But a wholly different situation was presented when after more than a month's experience with the appellant's operations it became only too apparent that it was constantly overreaching itself. It is true that Article 8.2 did not literally authorize a limitation of operations in terms of a specified span of roadway. But it has been said that desperate situations sometimes require desperate remedies, and as soon as it had become manifest that the nature of the appellant's equipment and his methods of operation were such that he could not in fact work a greater span of roadway than was comprised in a particular maximum span, it would be to elevate form above substance to insist that no general operational limitation could be imposed.

The problem may be approached from a somewhat different angle, moreover, by conceding for the sake of argument that Article 8.2 did not in so many words authorize the type of operational limitation that was actually imposed. Surely, the appellant must then be in a posi-

<sup>7</sup> The Government paid for the water at \$2 a thousand gallons.

<sup>8</sup> At the beginning of the job, the appellant obtained his water from a sewage pond at Chinle, and then from the Nazini Wash. The appellant was even finally compelled to use water from Indian water tanks and the Bureau's water tanks.

<sup>9</sup> Although the appellant at times had five water trucks on the job, there were numerous occasions when not more than one or two of them were in a condition to operate.

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tion to show at least that if the operational limitation had not been imposed, it would have been able, with the equipment and organization at its command, to work a greater span of roadway than was comprised within the limitation. But, since the record establishes so clearly that the appellant's equipment and organization were hopeless, it is difficult to perceive how the appellant was actually prejudiced by the imposition of the operational limitation.

The record shows, moreover, that the operational limitation was to a large extent ignored and evaded by the appellant. Speaking of the operational limitation, Knighton testified: "In most instances, Mr. Richey exceeded that length," and there is nothing to cast doubt on the correctness of this testimony.<sup>10</sup> Indeed, both of the Richeys admitted in their testimony to activities that were inconsistent with their observance of the operational limitation. At one point in his testimony the elder Richey admitted that he had watered a 700-foot area in July, and in the course of his testimony his son boasted that on one occasion after he had been put in charge of the grading,<sup>11</sup> he put in a 1,500-foot stretch of roadway from Chinle to Nazlini Bridge in 4 days. There then ensued the following colloquy between him and his own lawyer:

Q Now, were you permitted to put in 1,500 feet at that time?

A Yes. We were working 1,500 feet at that stretch.

Q I thought you were never permitted to \* \* \*

A We worked it without his knowledge when he wasn't there (referring to Knighton).

The Board must conclude that the appellant was not prejudiced by the imposition of the roadway limitation.

As for the appellant's other excuses, it must be obvious from what has already been said about the character of the appellant's watering equipment that, if indeed there were any spots where three times the amount of water reasonably needed for compaction was applied, it must have resulted from the failure of the valves of the water trucks to close when sufficient water had already been applied, or from other mechanical causes for which the appellant itself was responsible. Indeed, the contention of the Richeys that Knighton perversely directed them to apply excessive quantities of water strains credulity, for it is difficult to understand why the construction engineer would want the appellant to apply unneeded water for which the Bureau

<sup>10</sup> The following entry is contained in Knighton's diary under date of June 26, 1958: "Passing through the job, I found that Mr. Richey had again stretched out his work over about half a mile. Mr. Rousseau (he was one of the inspectors) was allowing him to continue in this manner. I stopped the spread out operation and had him move his equipment back into a workable area."

<sup>11</sup> He testified that this occurred about the middle of July but Knighton's diary entry for August 14 and his report of August 18 indicate that it was about the middle of August.

would have to pay, especially when there was such a shortage of water. The contracting officer found that, using accepted engineering estimates of 25 gallons of water per ton in constructing the base and sub-base and 30 gallons of water per cubic yard of embankment, the appellant should have used in handling the material involved 5,526 M. gallons of water. Actually, the appellant used 5,291.5 M. gallons of water. These figures, upon which no doubt is cast by the record, are hardly consistent with the appellant's second excuse based upon the contention that it was required to apply excessive amounts of water.

The contracting officer somewhat misunderstood the appellant's third excuse based upon the contention that it was entitled to an extension of time of 30 days because a teamsters' strike had delayed the replacement of a broken pile on the Nazlini Bridge. He reasoned that since the pile had been broken on August 14, 1958, and had been replaced on August 19, 1958, there could not have been a delay of 30 days due to the teamsters' strike which began on August 11, 1958, in the Western States and ended on September 17, 1958. While it is true that the broken pile was replaced within 5 days, the appellant had only the precise number of piles which it needed, and hence had to order another pile to replace the one that was driven on August 19, and it was the delivery of this substitute pile that was delayed by the strike. The contracting officer also found, however, that the breaking of the pile on August 14 had no effect in delaying the appellant's operations in constructing the Nazlini Bridge, the cause of the delay being attributed by him rather to the inadequacy of the appellant's equipment.

It was Philip Richey who testified at the hearing with respect to the incident of the broken pile, since he was at the time also in charge of the bridge work. According to him, the cause of the breaking of the pile, as determined by an examination made by him and the inspector, was "a ridge of small knots about half an inch in diameter mathed around." It is not apparent how, if the appellant's supplier furnished it with a defective pile, it could be said to be free of fault. In any event, the testimony of the witness must be rejected because it is contrary to contemporaneous entries in the inspector's report and in Knighton's diary,<sup>12</sup> which indicate that the appellant was at fault in driving the pile.

Philip Richey also testified that the substitute pile was ordered as soon as the pile broke on August 14, and that it was driven the day

<sup>12</sup> It is true that the inspector's report is merely negative; although the breaking of the pile is mentioned in his report, nothing is said of any examination of the pile by him and Richey, nor is any opinion expressed concerning the cause of the breakage. However, in Knighton's memorandum to Baker, dated August 18 (Exhibit 54), the breaking of the pile is attributed to the failure of the contractor to predrill holes for the piling in the fill, and to proceed to drive it from there.

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after it was received on September 26. The supplier's invoice for the pile indicates that it was shipped by rail from Alameda, California, on September 9 but it was, presumably, held up by the teamsters' strike. It would have taken some time, of course, even in the absence of any strike, to obtain the substitute pile from California but the record does not show how much time would have been necessary for this purpose. It is also very doubtful that the substitute pile was actually installed on September 27. Inspector Roberts' report for September 29 mentions the driving of the last pile on the Nazlini Bridge on that day. Thus the appellant allowed 2 days to elapse after receiving the substitute pile before driving it, although it was far behind in all of its work.

It must be apparent that 30 days were not lost in obtaining the substitute pile. Indeed, in testifying at the hearing, Philip Richey scaled down the time claimed to have been lost to about 3 weeks. But his own testimony, as well as the record as a whole, fails to establish that the appellant lost any appreciable amount of time as a result of the broken pile. While the lack of a single pile would, of course, prevent the completion of the last bent of the Nazlini Bridge, it did not, of course, prevent in general the erection of steel, and the performance of concrete work on the bridge, quite apart from the doing of many other items of work under the contract. Among these was the construction of the Cottonwood Bridge. As the appellant had only one crane that could be used for pile driving, moreover, the crane had to be moved from one bridge to the other, which was itself a factor that was productive of delay. Inspector Roberts' reports show that piles were being driven on the Cottonwood Bridge on September 4, 5, 6, and 8, and that some time after this the crane was moved back to a point on the west abutment of the Nazlini Bridge. But the same inspector's reports also show that no work at all was done on the Cottonwood Bridge on September 15, 16, 17, 18, 22, and 23, and that there was no work at either the Nazlini or Cottonwood Bridge on September 13 and 24. Even if it be assumed for the sake of argument that, despite the fact that the broken pile was attributable to the appellant's own carelessness, the appellant was entitled to an extension of time as a result of the strike to compensate for the delay—whatever its duration—in securing the substitute pile, the Board cannot conclude from the record as a whole that the delay was a material factor in the appellant's operations, and contributed substantially to its default.

The appellant's fourth excuse based upon the contention that it was required to rework a stretch of roadway three times is true in point of fact but ignores the provisions of the specifications that justified

the actions taken by Knighton. This stretch of roadway was at a point where the two projects on which the appellant was working met, and the road curved there. The grade was raised at this point but Article 5.3 of the Special Provisions, which dealt with allowable deviations, provided: "On curves or at other places, where deemed necessary by the Contracting Officer, the Contractor will be required to widen and to superelevate the road bed or surface as staked." After the roadway here had been built to the first stakes, Knighton discovered, however, that the survey crew, which had come from another project, had set some of the stakes incorrectly, and changed them. Restaking was also allowable under the terms of Article 5.5 of the Special Provisions, and, insofar as it involved the movement of additional material, Knighton directed that the appellant be paid for the same. He also testified at the hearing that the appellant did not lose more than several hours as a result of these adjustments. The third time that the appellant had to rework material in this stretch of roadway, it had nobody to blame but itself. The material which it spread here was too fine to meet specification requirements for screening, and the Bureau engineers by allowing the appellant to mix the fine material, which they could have rejected altogether, with a coarser aggregate were actually making a concession to the appellant.

The record does not support the appellant's fifth excuse based upon the contention that it was not permitted to do any other work and that most of its equipment was idled while it was completing the fills adjoining the abutments of the Nazlini Bridge. What happened was that on July 26, 1958, the appellant moved his equipment from the intersection of the two projects covered by the contract without finishing the work at the intersection, and when Knighton learned from the appellant's foreman that it intended to stop work on the bridge abutment fill and go to work on the section of road between the bridge and Chinle, he merely invoked the provision of Article 8.2 which prohibited the commencement of work on a new section of roadway to the prejudice of work already started. If the appellant's operations were at all disrupted during this period, or if a good deal of its equipment was rendered idle, it was due to the usual lack of water and breakdown of equipment. At the hearing the elder Richey seemed to complain also that Knighton made them get material for the fills from the bottom of the Nazlini Wash but the designation of the source of borrow was clearly a prerogative of the construction engineer.

There is no more merit in the appellant's sixth excuse based upon the contention that the Government's engineering services were insufficient. The mere fact that the same engineering crew was used on several adjoining jobs is without significance. There was nothing in the specifications that required a separate engineering crew to be



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made available to the appellant. It is customary, moreover, to make use of the same engineering crew on several adjoining projects, and none of the other contractors who had to share the engineering services complained. As for the appellant's specific complaint that the staking lagged behind its work, Knighton's diary and reports show that the opposite was true. There was one occasion when the survey crew had some 2,000 feet of bluetops ahead of the appellant's operations, and another occasion when the appellant delayed operations for a month after bluetops were set. There were two occasions also when the appellant requested slope stakes, and then did virtually no work, or no work at all, for approximately a month. There were also times when the appellant's own forces set stakes incorrectly.

In testifying at the hearing, the appellant's witnesses also referred to a number of complaints which were not mentioned in its show-cause letter to the contracting officer.

One of these complaints related to an alleged delay in making grade compaction tests. Under date of June 11, 1958, Hugh Richey wrote to the contracting officer, requesting that grade compaction tests be made for several thousand feet of roadway (which, it stated, had been completed) before the material dried out. The contracting officer replied to this letter under date of June 24, stating that several compaction tests had been made on June 12 and 14, and that, since these tests had been made in the layer of material at least 8 inches below the top, the possible drying of material in the upper layer could not affect the results of the tests. The contracting officer also called the attention of the contractor to its use of an illegal roller in compacting the material,<sup>13</sup> and intimated that its complaint was only a smoke screen to divert attention from the shortcomings of its own equipment. He concluded by stating: "It is not practical for the Government to maintain compaction test equipment on your project when the progress is so slow that these tests could only be made at two or three week intervals." The record does not support the contention that the grade compaction tests were improperly made, or unreasonably delayed. At the hearing Philip Richey testified that it was his recollection that the grade compaction tests were not made until about July 10 but Knighton testified that the tests were made in June, and it is apparent from the contracting officer's letter of June 24 that such was indeed the case.

Another complaint made by the appellant's witnesses at the hearing was that the contracting officer ignored a request made by the appellant to put on two shifts a day. This request was made by letter to the Bureau dated September 17. Almost at the very commencement

<sup>13</sup> The roller was illegal because it did not conform to the weight and speed requirements of the specifications.

of operations, the contracting officer had granted permission to the appellant to work 9 hours a day, 6 days a week, and knowing how inadequate its operations had been, it requested additional information concerning its plan to work two shifts in a letter dated September 29. Characteristically, the appellant never answered this letter, nor supplied the requested information. It is needless to add, of course, that the contracting officer was not bound to accede to the appellant's request, since under Article 21.1 of the Special Provisions work was limited to not more than 8 hours a day.

Finally, the appellant's witnesses contended that they would have been able to meet all of their financial obligations and to complete the project without more than a month or two of delay if only the Bureau had made prompt payments under the September and October estimates. The processing of the estimates required, of course, a certain amount of time. If there was any delay, it was caused by the fact that the appellant was late in submitting its payrolls. Even in such a matter as securing payment for its work, the appellant could not avoid delay! Nothing could better illustrate how massive and total were the appellant's shortcomings as a contractor.

#### CONCLUSION

Therefore, the decision of the contracting officer, terminating the appellant's right to proceed under the contract because of its default in prosecuting the work, is affirmed.

WILLIAM SEAGLE, *Member.*

I concur:

PAUL H. GANTT, *Chairman.*

CARL F. MURRAY AND CLINTON D. COKER

A-28188

*Decided April 13, 1960*

#### Mining Claims: Lands Subject to

Notices of the location of mining claims on lands covered by lease issued under the Recreation and Public Purposes Act are properly rejected because such lands are not subject to mining location until the Secretary of the Interior has adopted regulations permitting disposition of minerals under the mining laws on such lands.

#### Recreation and Public Purposes Act

Land included in a reclamation withdrawal is subject to disposal under the Recreation and Public Purposes Act.

*April 13, 1960*

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Carl F. Murray and Clinton D. Coker have appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated June 16, 1959, affirming a decision of the manager of the land office at Sacramento, California, dated November 8, 1959, rejecting notices of the location of certain lode mining claims in Placer County, California, which were offered for filing pursuant to the act of August 11, 1955 (30 U.S.C., 1958 ed., sec. 621 *et seq.*).

The four claims were located in the N $\frac{1}{2}$  sec. 24, T. 13 N., R. 9 E., Mt. Diablo Meridian, for gold and other minerals on August 18, 1958, and copies of the location notices were offered for filing in the land office on August 25, 1958, in attempted compliance with section 4 of the act of August 11, 1955, which reads as follows:

The owner of any unpatented mining claim located on land described in section 2 of this Act [public land withdrawn or reserved for power development or power sites] shall file for record in the United States district land office of the land district in which the claim is situated \* \* \* within sixty days of location as to locations hereafter made, a copy of the notice of location of the claim \* \* \*. (69 Stat. 683; 30 U.S.C., 1958 ed., sec. 623.)

The N $\frac{1}{2}$ NE $\frac{1}{4}$  and NE $\frac{1}{4}$ NW $\frac{1}{4}$  sec. 24, T. 13 N., R. 9 E., Mt. Diablo Meridian, were withdrawn for Power Project No. 866 on January 11, 1928, and for Project No. 1964 on January 24, 1947. Notwithstanding the withdrawals, the land became open to mining location on August 11, 1955, subject to the provisions of the authorizing act of that date. Both withdrawals were vacated by order of the Federal Power Commission (DA-919) on February 18, 1957, as to the NW $\frac{1}{4}$ NE $\frac{1}{4}$  only; subject, however, to section 24 of the Federal Power Act (16 U.S.C., 1958 ed., sec. 818).

On September 19, 1942, the NE $\frac{1}{4}$ NW $\frac{1}{4}$  and the N $\frac{1}{2}$ NE $\frac{1}{4}$  sec. 24, T. 13 N., R. 9 E., Mt. Diablo Meridian, were withdrawn, with other land, for the Central Valley Project, American River Division. This withdrawal was revoked on March 11, 1958 (23 F.R. 1705). The revocation order provided an order of priority for applying for the restored land, giving first consideration to preference-right claims, second consideration to applications filed by persons entitled to veterans' preference before 10 a.m. on April 11, 1958, and third, to valid applications and selections under the nonmineral public land laws filed before 10 a.m. on July 11, 1958. The order specifically provided that the land would be open to location under the mining laws beginning at 10 a.m. on July 11, 1958.

The manager rejected the appellants' notices of mining location because the land had been classified as suitable for recreational and public purposes pursuant to the act of June 14, 1926, as amended (43

U.S.C., 1958 ed., sec. 869 *et seq.*), on May 23, 1958, and on May 29, 1958, was leased to Western State Trail Ride, Inc., in response to its application filed on February 10, 1958. He pointed out that departmental regulations, 43 CFR, 1954 Rev., 254.5(e), provide that leases and patents issued under the act shall reserve to the United States all minerals and the right to mine and remove them under applicable law and regulations to be established by the Secretary of the Interior and stated that the Secretary had not formulated such regulations. The appellants contended on appeal to the Director of the Bureau of Land Management that the recreational lease was a nullity because the order of restoration of March 11, 1958, did not provide for such leasing, but the Director answered this contention by pointing out that such leases may be issued for withdrawn land, as well as land not subject to withdrawal, so that it was not necessary that the priorities established by the revocation order be observed in the leasing of the land.

On appeal to the Secretary, the appellants contend that the issuance of the lease was improper because it was done in response to an application which was filed before the reclamation withdrawal was revoked and in derogation of the rights of those entitled to veterans' preference.

In thus contending, the appellants are still assuming that public land withdrawn for a particular purpose is unavailable for sale or leasing under the Recreation and Public Purposes Act. The provisions of section 2 of the act, which authorize the Secretary of the Interior to sell or lease land "after due consideration as to the power value of the land, whether or not withdrawn therefor" (43 U.S.C., 1958 ed., sec. 869-1) indicate clearly the intent of the Congress that at least some withdrawn lands are to be subject to the terms of the act. In addition, section 1 specifically provides for disposal by sale or lease of lands withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior, or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency with the consent of such agency (43 U.S.C., 1958 ed., sec. 869(c)).

The exception in section 1 of land withdrawn in aid of a function of the Department of the Interior is not to be interpreted as indicating that lands withdrawn in aid of a function of this Department are not subject to disposal under the act. There is no basis in reason or in the legislative history of the act for concluding that Congress intended that all lands withdrawn for other agencies should, with their consent, be subject to disposal under the act but that lands withdrawn for this Department should not be subject to disposal. It is readily apparent that Congress excepted in section 1 lands withdrawn for this De-

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partment simply because disposals under the act are to be made by the Secretary of the Interior and there would be no point in saying that he could make such disposals only with his own consent.

As a matter of departmental policy, the Bureau of Land Management does not proceed with recreational or public purpose sales or leases without the consent of the Interior agency having jurisdiction of the land to be affected thereby. Accordingly, in this instance, the Bureau of Land Management consulted both the Bureau of Reclamation and Federal Power Commission. The Bureau of Reclamation gave its consent by letter dated March 6, 1958; the Federal Power Commission, by letter dated May 14, 1958. Thus the Bureau of Land Management was fully empowered to issue the lease and its action in doing so would have been proper had the reclamation withdrawal remained in effect. The appellants are correct in assuming that an application filed before the revocation of a reclamation withdrawal could not have been considered if the revocation had been necessary to make the land available for leasing but incorrect in assuming that the revocation of a withdrawal is necessary before an application for sale or lease under the Recreation and Public Purposes Act can be allowed.

The lease was issued before the provision of the revocation order for opening of the land to mining location on July 11, 1958, became effective. The lease reserved to the United States all mineral deposits in the leased lands and the right to mine and remove the same under applicable laws and regulations to be established by the Secretary of the Interior, as required by the statute (43 U.S.C., 1958 ed., sec. 869-1). In filing their location notices, the appellants were charged with notice of the departmental regulation which provides:

Any minerals subject to the leasing laws reserved to the United States in the lands patented or leases [sic] under the terms of the act may be disposed of to any qualified person under applicable laws and regulations. Until rules and regulations are issued, other minerals are not subject to disposition or to prospecting except by an authorized Federal agency. (43 CFR, 1954 Rev., 254.14.)

Thus they might have applied for mineral rights in the land under the mineral leasing laws. But they did not attempt to acquire such rights; they filed notices of the location of mining claims valuable for gold, which is not a leasable mineral, and thus brought themselves within the requirement of the regulation for issuance of rules and regulations as a condition precedent to disposition of the mineral claimed by them. Under a regulation with substantially identical provisions (43 CFR, 1954 Rev., 1958 Supp., 257.16), the Department held that land under lease issued pursuant to the Small Tract Act (43 U.S.C., 1958 ed., secs. 682a-682e) is not open to mining location. *The Dredge Corporation*, 64 I.D. 368 (1957). The same conclusion is required in this case.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

**FREDERICK J. ZILLIG v. VERNON M. MILBURN**

**A-28334**

*Decided April 13, 1960*

**Applications and Entries: Relinquishment—Homesteads (Ordinary): Relinquishment—Rules of Practice: Private Contests—Contests and Protests**

Where a relinquishment of a homestead entry and an affidavit of contest against the same entry are filed simultaneously, the latter must be dismissed because the relinquishment takes effect immediately, extinguishes the entry, and leaves the contest nothing upon which to act.

**Applications and Entries: Relinquishment—Homesteads (Ordinary): Relinquishment—Rules of Practice: Private Contests—Contests and Protests**

Where a relinquishment of an entry is filed after an affidavit of contest has been filed against the same entry but before the entryman has been given actual or constructive notice of the contest, it is to be conclusively presumed that the relinquishment was caused by the contest unless it can be shown that the affidavit of contest was not good and sufficient, that the contest charge was not true, that the contestant was not a qualified applicant, or that the land is not subject to the contestant's application.

**Applications and Entries: Relinquishment—Homesteads (Ordinary): Relinquishment**

A telegram filed in the land office stating that the entryman relinquishes his entry is a "written relinquishment" within the meaning of the section 1 of the act of May 14, 1880.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Frederick J. Zillig has appealed to the Secretary of the Interior from a decision dated November 19, 1959, of the Acting Director of the Bureau of Land Management which affirmed the rejection by the manager of the Boise land office of his private contest against reclamation homestead entry, Idaho 08931, of Vernon M. Milburn.

Milburn's homestead entry was allowed on January 28, 1958. On May 20, 1958, the manager extended to January 28, 1959, the time within which the entryman was required to establish residence on his entry (43 U.S.C., 1958 ed., sec. 169). On January 28, 1958, Milburn sent a telegram to the project superintendent, United States Bureau of Reclamation, Burley, Idaho, which stated:

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Please be advised that by my own free will I hereby relinquish my right to a farm unit under public notice No. 48 Minidoka Project to US Bureau of Reclamation. Letter confirming this follows.

Upon receipt of the telegram the project superintendent telephoned the manager and informed him of the relinquishment. On the same day he mailed the telegram to the Boise land office. It arrived the following morning and was stamped as having been received at 10 a.m., January 29, 1959. At exactly the same time Zillig and two other persons filed contest complaints against the entry.

On February 5, 1959, the land office received a letter from the entryman restating the language of his telegram. This letter, too, had been sent to the project superintendent and by him to the land office.

In a decision dated March 24, 1959, the manager summarily dismissed all the contests on the ground that it was established by departmental decisions that where a relinquishment and contest are filed simultaneously, the entry expires at the same time the affidavit of contest is filed, so that the latter finds no entry to contest.

Upon appeal, the Acting Director held that the act of May 14, 1880, as amended (43 U.S.C., 1958 ed., sec. 185), gives a preference right only to a contestant who has procured the cancellation of the entry; that the contestants had not procured the cancellation of the entry; and that the contests were properly dismissed because none of the contestants had earned a statutory preference right by procuring the cancellation of the entry.

Of the three contestants, Zillig alone appealed to the Secretary. The other two, by failing to appeal, are deemed to have acquiesced in the decision of the Acting Director and have lost whatever rights their contest affidavits gave them. *Charles D. Edmonson et al.*, 61 I.D. 355 (1954).

In his appeal, Zillig contends that the entry was not relinquished until February 5, 1959, when the letter from the entryman was received at the land office, that the relinquishment was filed because the entryman had learned that the contest was to be filed, that the contest was filed before the entry was relinquished, and that it was, therefore, error to dismiss the contest.

The act of May 14, 1880, *supra*, which gives a successful contestant a preference right of entry, provides:

In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any \* \* \* homestead \* \* \* entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: \* \* \*. [21 Stat. 141.]

The Acting Director held that there was no evidence that Zillig's contest had procured the cancellation of the entry and that he could not therefore avail himself of the right granted by the statute.

The Acting Director's ruling is concerned with the situation where a relinquishment is filed *after* a contest has been filed, which is not the case here. Even so, the Acting Director's ruling is not in accord with previous rulings of the Department. After the passage of the act of May 14, 1880, the Department considered many cases involving the rights of a contestant where a relinquishment was filed after a contest had been brought. After a series of decisions in which several aspects of the problem were considered,<sup>1</sup> the Commissioner of the General Land Office, with the approval of the Assistant Secretary, in Circular 225, dated April 1, 1913 (43 L.D. 71), set out the rules to be followed in adjudicating such conflicts in the future. Upon codification of the departmental regulations, the circular appeared in the regulations as sections 220.1-220.6 of 43 CFR, Part 220. The paragraph pertinent to the facts in this appeal read as follows:

(a) Where a good and sufficient affidavit of contest has been filed against an entry and no notice of contest has issued on such affidavit, or, if issued, there is no evidence of service of such notice upon the contestee, if the entry should be relinquished the manager will immediately note the cancellation of the entry upon the records of his office. In such cases for purposes of administration a presumption will obtain that the contest induced the relinquishment and the manager will at once so notify the contestant and that he will be allowed to make entry accordingly. If the relinquishment is accompanied by the application of another than the contestant, the manager will at once advise the applicant of the pending contest and of the presumptive preference right thereunder, and that should the contestant in the exercise of such right make timely application for the land, showing himself duly qualified, said right can only be avoided on a showing that the contest charge was not true, or that the contestant is not a qualified applicant, or that the land is not subject to his application. Should the contestant apply for the lands, showing himself duly qualified, within the preference-right period, and the intervening applicant file request for a hearing, with his corroborated affidavit as to the facts above stated in avoidance of a preference right in the contestant, within 20 days after the filing of the contestant's application, hearing will be had, after at least 30 days' notice to all interested parties, upon the issues thus presented, the intervening applicant having the burden of proof. The contestant must pay all costs of the testimony as to the truth or falsity of the contest charge, and upon any other issue each party must pay the cost of taking the direct examination of his own witnesses and the cross-examination on his behalf of other witnesses. 43 CFR, 1954 ed., 220.3(a).

This paragraph makes it clear that where a relinquishment is filed after a contest has been filed, it is to be conclusively presumed that the relinquishment was caused by the contest unless it can be shown that the affidavit of contest was not "good and sufficient," or that the contest charge was not true, or that the contestant was not a qualified applicant, or that the land is not subject to his application. In other words, if a contest has been filed before the relinquishment, the former cannot be dismissed solely on the ground that it did not induce the latter.

<sup>1</sup> *Crook v. Carroll*, 37 L.D. 513 (1909); *Stock v. Herman et al.*, 39 L.D. 165 (1910); *Instructions*, 39 L.D. 217 (1910); *Smith v. Woodford*, 41 L.D. 606 (1913).



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*Green v. Rochelle; Villnave, Intervener*, 55 I.D. 105 (1934); *Day v. Cutshall*, 48 L.D. 365 (1921).

Part 220 was revoked by Circular 1950 (21 F.R. 1860) as part of the revision of the Department's regulations on practice, and the regulations which originated in Circular 225, *supra*, were omitted in the revision. However, the fact that there is no longer a regulation dealing with conflicts between contests and relinquishments does not mean that the rules the Department worked out in its decisions over so long a period and adhered to for over 40 years are no longer to be followed. They represent a fair and reasonable solution to what was once a common problem and although the occasions for applying them have declined, their soundness has not.

Therefore, Zillig's appeal should not have been disposed of on the ground that his contest had not induced the filing of Milburn's relinquishment and the cancellation of his entry.

However, the manager's rejection of Zillig's affidavit of contest should have been affirmed for the reasons stated in his decision. As the manager pointed out, it is well established that where a relinquishment is filed simultaneously with a contest, the relinquishment takes effect immediately, extinguishes the entry, and leaves the contest nothing upon which to act. *Weatherspoon v. Doyle et al.*; 42 L.D. 117 (1913); *Giltner v. Huestis et al.* 14 L.D. 144 (1892); *Lee v. Goodmanson*, 4 L.D. 363 (1886).

The appellant contends that the telegram was an insufficient relinquishment. The statute requires only that the homesteader shall file a "written relinquishment" (sec. 1 of act of May 14, 1880, as amended; 43 U.S.C., 1958 ed., sec. 202). A telegram is a "written document" (*Snyder & Blankford Co. v. Farmers Bank of Tifton*, 16 A. 2d 837, 840 (Md. 1940)) and it is filed when received at the land office (*Earl C. Hartley et al.*, 65 I.D. 12 (1958)).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director is affirmed, as modified.

EDMUND T. FRITZ,  
Deputy Solicitor.

BLANCHE W. SWEENEY

A-28202

Decided April 14, 1960

**Oil and Gas Leases: Applications—Oil and Gas Leases: Lands Subject to**  
An oil and gas lease offer is properly rejected where the land applied for is covered by outstanding leases even though such leases may have been improperly extended.

### Administrative Practice

A decision of a land office manager is presumed to be operative during the entire day on which it is rendered and fractions or parts of days are not considered in determining the effective time of such a decision since the hour of day the decision is rendered is not noted or made a matter of record.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Blanche W. Sweeney has appealed to the Secretary of the Interior from a decision of June 16, 1959, by the Acting Director of the Bureau of Land Management affirming a decision of August 18, 1958, by the manager of the Cheyenne land office rejecting Mrs. Sweeney's oil and gas lease offer, Wyoming 067796, covering 1,920 acres of land in Carbon County, Wyoming (30 U.S.C., 1958 ed., sec. 226).

The appellant's offer, filed on August 1, 1958, was rejected because all of the lands applied for were covered by outstanding oil and gas leases.<sup>1</sup> The outstanding leases had their origin in leases Cheyenne 073217 and 073217(B) and Wyoming 032751, the terms of which would have expired on July 31, 1958. As a result of partial assignments of undivided record title interests in each of the three leases, filed on July 28 and 29, 1958, all of the leases were extended by the manager for a 2-year term from August 1, 1958, and so long thereafter as oil or gas is produced in paying quantities pursuant to section 30(a) of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 187a).<sup>2</sup>

The Acting Director's decision agreed with the appellant's contention that the leases were improperly extended for the reason that the assignments of July 28 and July 29, 1958, did not segregate the leases since less than a full interest in a portion of the land covered by the leases was assigned. However, the Acting Director held that even though the extension of these leases was improper, the fact that outstanding leases covered the land and when the appellant's offer was filed required the rejection of the offer (*R. M. Young, Jr., Mary R. Sivley, A-27640* (January 30, 1959), and cases there cited).

The partial assignment of Cheyenne 073217(D) from 073217(B) (see footnote 2) was approved and both leases were continued by a

<sup>1</sup>The leases were listed as Cheyenne 073217, Cheyenne 073217(B), Cheyenne 073217(C), and Wyoming 032751(A).

<sup>2</sup>Wyoming 032751(A) was created by an assignment filed July 28, 1958, of all the assignor's undivided interest in part of the land included in Wyoming 032751.

Cheyenne 073217(C) was created by an assignment filed July 28, 1958, of all the assignor's undivided interest in part of the land included in Cheyenne 073217.

Cheyenne 073217(B) had been created by an assignment from Cheyenne 073217(A), effective June 1, 1956. On July 29, 1958, an assignment was filed of an undivided interest in part of the land in Cheyenne 073217(B) and the assigned interest was designated as Cheyenne 073217(D). The manager's decision of August 18, 1958, thus should have listed 073217(D) as being in conflict with appellant's offer as well as 073217(B).

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decision of August 1, 1958, the date on which the appellant's offer was filed. It is presumably this decision to which the appellant refers in asserting that the manager's decisions purporting to continue the leases were rendered after the filing of her application at 10 a.m. on the same day and that, consequently, the lands in those leases were available for leasing when her application was filed.<sup>3</sup>

As a matter of administrative practice, the hour or the time of day when decisions in the land office are rendered is not noted or made a matter of record. In such circumstances, fractions or parts of days are not considered and a decision is regarded as effective during the entire day upon which it is rendered (cf. *Humble Oil & Refining Company*, 64 I.D. 5 (1957); *Ralph T. Richards*, 52 I.D. 336 (1928)). There is no reason for following a different rule in this case. Accordingly, the manager's decision of August 1, 1958, is presumed to have been effective prior to the filing of the appellant's offer at 10:00 a.m., and the rejection of the appellant's offer was required because the lands were included in outstanding leases during all of August 1, 1958 (*Joyce A. Cabot et al*, 63 I.D. 122 (1956)).

None of the other matters asserted on this appeal presents a basis for modifying the decisions rejecting the appellant's offer.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

UNITED STATES v. S.M.P. MINING COMPANY

A-28220

*Decided April 19, 1960*

**Mining Claims: Mill Sites**

A millsite claim is properly declared invalid where the claim is not occupied or used for mining or milling purposes.

**Mining Claims: Mill Sites**

A vague intention to use or occupy land embraced in a millsite claim for mining or milling purposes at some time in the future is not sufficient to comply with the requirements of section 2337 of the Revised Statutes for obtaining a millsite.

<sup>3</sup>The remaining assignments were approved by decisions of July 29, 1958, which clearly antedate the filing of the appellant's offer.

**Mining Claims: Mill Sites**

Where land located as a millsite is not being used for mining and milling purposes at the time a patent for it is applied for, the applicant must show occupation by improvement or otherwise sufficient to evidence an intended use of the claim in good faith for mining and milling purposes and where the only improvement on a claim is an excavation useful only if a projected mill is built on adjoining claim, the requirement of the statute has not been met.

**Mining Claims: Mill Sites—Mining Claims: Determination of Validity**

Where the Government brings charges against a millsite claim alleging that no present use or occupation of the claim for mining purposes is being made, and a *prima facie* case is established in support of the charge, the burden shifts to the claimant to show compliance with the provisions of the statute.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Pursuant to a protest brought by the Forest Service, United States Department of Agriculture, in July, 1957, contest proceedings were brought against the Roy C Mill Site (or Roy C Dump Mill Site) for which patent application Washington 01331 had been filed. The charge was that the millsite was not presently being used for mining or milling purposes. The mining company answered the complaint, denied the charge, and asked that the contest be dismissed.

A hearing on the contest was held before a hearing examiner of the Bureau on October 8, 1957. By a decision dated November 19, 1957, the hearing examiner held the millsite claim to be null and void for the reason that use and occupancy of the claim for mining and milling purposes had not been demonstrated. The company thereupon appealed to the Director of the Bureau of Land Management, who, through the Acting Director, affirmed the hearing examiner in a decision dated June 16, 1959. The company has now appealed to the Secretary of the Interior.

At the hearing the testimony developed that the millsite claim contains no buildings other than a latrine used in connection with a cabin located just outside the boundary of the millsite (Tr. 5);<sup>1</sup> that in 1954 an excavation consisting of bulldozed cut approximately 100 feet long, 40 feet wide, and 10 feet deep was dug on the millsite (Tr. 34); that the millsite was located in 1953 (Tr. 39) in connection with the Roy C. Lode Claim, a claim located on October 30, 1918 (Tr. 30); that at the time of the hearing mining operations were not being conducted on the mining claims for which the company plans to use the millsite (Tr. 43); and that the company's plan was to use the millsite as a dump for tailings from a mill to be located on the Independence Mill Site, an adjoining patented millsite location also owned by the company (Tr. 47, 65-67).

<sup>1</sup> The reference is to the transcript of the hearing on October 8, 1957.

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On the basis of these facts the Acting Director concluded that the Roy C Mill Site was null and void.

Section 2337 of the Revised Statutes (30 U.S.C., 1958 ed., sec. 42) provides:

Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by sections 21-24, 26-28, 29, 30, 33-48, 50-52, and 71-76 of this title for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his millsite, as provided in this section.

In *Charles Lennig*, 5 L.D. 190 (1886), the Department stated that—

The second clause of this section manifestly makes the right to patent a mill site dependent upon the existence on the land of a quartz-mill or reduction-works. But the terms of the first clause are more comprehensive. Under them it is not necessary that the land be actually a "mill-site." They make the use or occupation of it for mining or milling purposes the only prerequisite to a patent. The proprietor of a lode undoubtedly "uses" non-contiguous land "for mining or milling purposes" when he has a quartz-mill or reduction-works upon it, or when in any other manner he employs it in connection with mining or milling operations. For example, if he uses it for depositing "tailings" or storing ores, or for shops or houses for his workmen, or for collecting water to run his quartz-mill, I think it clear that he would be *using* it for mining or milling purposes. I am also of opinion that "occupation" for mining or milling purposes, so far as it may be distinguished from "use" is something more than mere naked possession, and that it must be evidenced by outward and visible signs of the applicant's good faith. The manifest purpose of Congress was to grant an additional tract to a person who required or expected to require it for use in connection with his lode; that is, to one who needed more land for working his lode or reducing the ores than custom or law gave him with it. *Therefore, when an applicant is not actually using the land, he must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining or milling purposes.* [Emphasis added.]

The only evidence offered by the appellant to substantiate the validity of its claim are statements made at the hearing to the effect that the millsite claim *will* be used in connection with a mill *to be* erected on the Independence Mill Site for the storage of tailings and residue from the mill *when* ore is removed from the nearby claims. Thus, all of the testimony refers solely to prospective use of the tract. But the facts are that the plan to which the appellant refers has never been acted upon, no mill has been constructed on the Independence Mill Site and the necessary drillings on the millsite to determine whether or not the site is suitable for the erection of a mill have never been

made. The only work done has been to make some borings to determine where the top soil is (Tr. 72).

The appellant has not satisfied the requirement of either use or occupation of the millsite as set out in the *Lennig* case. Since none of the mining claims are being operated, it is clear that the appellant is not using the land for mining and milling purposes. The only evidence of its occupation of the land is the excavation. However, the excavation is useful only in conjunction with a mill, which the appellant intends to locate on the adjoining millsite. At the time of the hearing, the mill had neither been built nor its position fixed. In the circumstances, I cannot find that there is anything more than a vague intention to use the land at some time in the future. This is not enough to satisfy the statute. *United States v. William Herron and John Herron*, A-27414 (March 18, 1957).

As stated in *Lindley On Mines*, 3d ed., sec. 523:

A millsite is required to be used or occupied distinctly for *mining* or *milling* purposes in connection with the lode claim with which it is associated. The requirement of the statute plainly contemplates a function or utility intimately associated with the removal, handling or treatment of the ore from the vein or lode. Some step in or directly connected with the process of *mining* or some feature of *milling* must be performed upon, or some recognized agency of operative mining or milling must occupy, the millsite at the time the patent therefor is applied for to come within the purview of the statute.<sup>27</sup>

<sup>27</sup> *Alaska Copper Co.*, 32 L.D. 128, 131; *Hard Cash Millsite*, 34 L.D. 325.

In *Hudson Mining Company*, 14 L.D. 544 (1892), the Department stated:

The act clearly contemplates that at the time the application for patent is made, and the entry allowed, the land in question is used or occupied for mining or milling purposes. The act does not contemplate the performance of conditions subsequent, or the future compliance with law. No mill site entry should be allowed unless it is shown that the conditions of the law have been complied with.<sup>2</sup>

The appellant, as the party seeking a gratuity from the Government, must assume the burden of showing that it has complied with the terms of applicable mining laws, and where, as here, the appellant's compliance with the applicable law is challenged by the Government and a *prima facie* showing is made that the claim is invalid, the burden then shifts to the appellant to show that the claim is valid. *Foster v. Seaton*, 271 F. 2d 836 (1959).

It is my conclusion that the appellant has failed to sustain the burden of showing such present occupation or use of the millsite claim at the time of the application for patent as would satisfy the requirements of section 2337 of the Revised Statutes, *supra*, and that the claim is therefore invalid.

<sup>2</sup> See also: *United States v. Langmade and Mistler*, 52 L.D. 700 (1929); *United States v. Arnold J. Reinartz*, A-25808 (April 25, 1950); Solicitor's opinion M-36451 (July 22, 1957).

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The appellant has raised other objections to the Acting Director's decision, which are effectively answered by it and need not be repeated here.

Accordingly, the appellant's patent application was properly rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

CLARENCE S. MILLER

A-28215

*Decided April 20, 1960*

**Grazing Permits and Licenses: Cancellation and Reductions—Trespass:  
Measure of Damages**

A grazing licensee who repeatedly and willfully grazes his cattle and horses in trespass upon the public domain is properly subjected to disciplinary action consisting of assessment of damages and reduction of the grazing privileges of his base property.

**Grazing Permits and Licenses: Cancellation and Reductions—Trespass:  
Generally**

Where grazing privileges are reduced for grazing trespass, the reduction attaches to the base property and not only to the trespasser's grazing privileges.

**Grazing Permits and Licenses: Cancellation and Reductions—Rules of Prac-  
tice: Evidence—Trespass: Generally**

The fact that a grazing licensee has repeatedly been assessed and has paid damages for prior grazing trespasses may be considered in determining whether the most recent trespass was willful.

**Grazing Permits and Licenses: Generally—Rules of Practice: Hearings—  
Public Records**

Where a party desiring to inspect departmental records neither follows the procedure set up in the applicable regulation nor requests the hearing examiner to issue a subpoena for them, it is proper for the hearing examiner to refuse to dismiss grazing trespass charges on the ground that the party was denied an opportunity to inspect the records.

**Grazing Permits and Licenses: Cancellation and Reductions—Trespass:  
Measure of Damages**

An offer to pay monetary damages in lieu of a reduction of grazing privileges imposed for a willful trespass will be rejected because the Federal Range Code does not provide for monetary penalties and the reduction of grazing privileges is a more suitable punishment for the willful trespass committed.

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Clarence S. Miller has appealed to the Secretary of the Interior from a decision dated June 23, 1959, of the Director of the Bureau of Land Management which affirmed a decision of a hearing examiner finding that Miller had grazed certain cattle and horses on the Federal range in trespass and reducing by 20 percent the grazing privileges attributable to Miller's base property pursuant to section 3 of the Taylor Grazing Act (43 U.S.C., 1958 ed., sec. 315b). The hearing examiner also ordered that no grazing license or permit be issued to Miller until he paid the sum of \$596, the commercial value of the forage consumed by Miller's animals in trespass computed at the rate of \$2 per animal unit month for 298 AUM's. Miller did not set out this finding as an error in either his appeal to the Director or to the Secretary, nor did he direct any portion of his briefs to it.

The facts are fully stated in the hearing examiner's opinion and need not be repeated. It is sufficient to say that the hearing examiner found that Miller had willfully permitted 256 cattle to graze in trespass upon the Federal range from February 1, 1958, to March 4, 1958, and 8 horses from February 1, 1958, to February 28, 1958.

On March 17, 1958, Miller was served with a notice requiring him to appear before a hearing examiner on April 22, 1958, to show cause why his license should not be reduced or revoked or renewal denied and satisfaction of damages made for violation of the Federal Range Code for Grazing Districts. 43 CFR, 1958 Supp., 161.12 (b), (c), and (e).<sup>1</sup>

Miller contends that the Director erred in refusing to dismiss the proceedings because of the refusal of the Bureau to make available to him portions of its records in accordance with a request made by his counsel on the afternoon before the trial.

As the Director pointed out, Miller did not attempt to follow the Department's regulation, 43 CFR 2.2 (a) and (b), which sets out the procedure for determining whether departmental records are to be made available to persons outside the Department. Therefore he cannot complain that the documents were not made available to him before the hearing. At the hearing the hearing examiner informed his counsel that a subpoena would be issued, on counsel's request, for the files he desired. (Transcript p. 5.) It appears that Miller did not apply for a subpoena.

In somewhat similar circumstances it has been held that where a party appearing before an administrative agency does not contest the validity of the agency's rule relating to the production of documents and makes no effort to follow the procedure set out in the rules, although there is sufficient time to do so, it is not error for the hearing

<sup>1</sup>43 CFR 161.12(e) was slightly amended by Circular 2010, 24 F.R. 363.



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examiner to refuse to direct that the documents be produced. *National Labor Relations Board v. Adhesive Products Corporation*, 258 F. 2d 403, 406 (2d Cir. 1958); *Mohawk Refining Corporation v. Federal Trade Commission*, 263 F. 2d 818 (3d Cir. 1959).

Here Miller had a period of 5 weeks between notice and hearing to obtain access to whatever departmental files he desired. He made no attempt to inspect them until the afternoon before the hearing and then at the hearing did not adopt the hearing examiner's suggestion that he ask for a subpoena.

Accordingly, it was not error for the hearing examiner to deny Miller's motion that he dismiss the proceedings against him.

Furthermore it appears that the documents Miller desired were reports made by grazing officers of the Bureau of Land Management on the count they had made of the number and location of the animals in trespass (Tr. 5). These officers testified at the hearing and were subject to thorough cross-examination. The only purpose of their testimony was to establish the fact and amount of the trespass. Miller made little or no attempt to deny either of these matters and, indeed, has not directed any of his appeals to the amount of the trespass damages computed by the hearing examiner. Therefore the refusal to allow him to see the range officers' preliminary reports dealing with matters as to which there is no real conflict cannot be deemed to have been prejudicial to Miller.

Miller next urges that it was error to find the trespass willful and to hold that it was not necessary for the hearing examiner to find it willful in order to justify a reduction in grazing privileges.

Since the hearing examiner plainly found the trespass willful, it is not necessary to consider the second contention. As to the first, I find that, although Miller offered evidence that the trespass was not willful, the record as a whole amply supports the conclusion that it was.

For example, the testimony of Miller and his witnesses demonstrates at the very least that no determined effort was made to control the number of cattle on the range (Tr. 132, 152, 154, 183). In addition, Miller had been served with one or more notices of trespass and paid damages in 1950, 1952, 1953, 1955, 1957. In 1955 and 1957 the charges alleged 200 or more cattle had been grazed in trespass. It is well established that, where willfulness is an issue, evidence of other similar transactions is admissible as bearing on knowledge or intent.<sup>2</sup>

Finally Miller argues that it was error to reduce his grazing privileges by 20 percent and to hold that reduction applied to his base property rather than to his individual license.

<sup>2</sup> *Federal Trade Commission v. Cement Institute et al.*, 333 U.S. 683, 704-706 (1948); *Williams et al. v. United States*, 199 F. 2d 921 (5th Cir.); *Stroud v. United States*, 199 F. 2d 923 (528 Cir.); *United States v. Stirone*, 262 F. 2d 571, 575-577 (3d Cir. 1958); 2 Wigmore Evidence (3d ed.) § 300-302, 367.

Considering the frequency and extent of Miller's trespass, a 20 percent reduction in his grazing privileges is plainly warranted.

As to the remaining contention, as the Director pointed out, the regulation provides for reduction in grazing privileges for violations of its terms (43 CFR, 1958 Supp., 161.12, 161.12(e)(2)).<sup>3</sup> To make this penalty effective it must be imposed on the privileges attached to the base property (43 CFR, 1958 Supp., 161.6(e)(12)).

However, I believe that it is unnecessary to reduce permanently the privileges attached to Miller's base property and that adherence to the grazing code can be achieved by a less severe penalty. Accordingly, the grazing privileges attached to Miller's base properties will be reduced by 20 percent for a period of 5 years. *Cf. J. Leonard Neal*, 66 I.D. 215 (1959).

While the appeal was pending, the appellant submitted an offer to pay monetary damages in lieu of the damages assessed and the reduction of grazing privileges. This offer is rejected, first, because the Federal Range Code does not now provide for the assessment of a monetary penalty for willful trespass (43 CFR, 1958 Supp., 161.12(e)(2)) and, secondly, because a reduction in grazing privileges is deemed to be a more suitable punishment for the offense committed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed as modified.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

## APPEAL OF WESTINGHOUSE ELECTRIC CORPORATION

IBCA-182

*Decided April 20, 1960*

### Contracts: Appeals

A request for reconsideration will be denied when it raises immaterial questions, or merely challenges inferences which were reasonably drawn from the evidence by the Board.

### BOARD OF CONTRACT APPEALS

Counsel for the appellant has filed a motion requesting reconsideration by the Board of its decision of March 16, 1960, rejecting its claim in the amount of \$7,143.67, based upon its replacement of a shunt reactor which failed upon being energized. The reactor was one of three which had been purchased for the Granite Falls Substation of the Missouri River Basin Project, Bureau of Reclamation.

<sup>3</sup> See fn. 1, *supra*.

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In its decision, the Board held that the appellant had the burden of proving that the failure of the reactor was attributable to a fault of the Government. It also held, however, that even if the burden of proving the probable cause of the failure of the reactor was on the Government, it had succeeded in establishing by a clear preponderance of the evidence that the most probable cause of the failure of the reactor was a defective weld.

The request for reconsideration is based on three grounds. The first ground appears to be that the Board has misconceived the substantive question presented by the appeal. The argument with reference to this ground is rather difficult to follow, and it has been made, apparently, into a framework for a more elaborate discussion of the conditions of the sale than the appellant originally undertook. The arguments are, however, essentially the same as those originally advanced, and have already been considered and rejected by the Board. The appellant seems to think that the substantive question on which the rights of the parties have been made to depend by the Board is what caused the reactor to burn when the real question is whether the reactor was defective when it was delivered. The appellant goes so far as to imply even that what the Board referred to in its decision as a defect is the damaged condition which resulted from the burning at the time the reactor was energized. There is no foundation for this supposition. In discussing the causes of the failure of the reactor, the Board was necessarily considering causes which must have existed prior to the failure of the reactor, which would include causes existing prior to delivery. Since the appellant concedes that it would be responsible for the failure of the reactor if it was defective when delivered, and the Board has found that it had a defective weld when delivered, the appellant's theoretical conceptions of the requirements of the contract would hardly seem to be material.

The second ground on which reconsideration is requested is that the Board wrongly held that the burden of proof was on the appellant. The appellant here argues at length that its conclusion is not supported by the cases on which it is supposed to rest. The Board does not propose to undertake a reanalysis of the cases because it would be pointless, and for two reasons. In the first place, the cases are only guidelines; none of them is precisely in point, and the question of the burden of proof, which is always admittedly difficult, must be resolved in terms of general principle rather than by matching precedents. In the second place, the Board's decision did not rest only on the ground that the appellant had the burden of proof. The Board also held that the Government must prevail even if it had the burden of proof. Thus the only crucial question is whether the Government sustained the burden of proof, and the Board held in its decision that it had sustained the burden.

The third ground on which the appellant seeks reconsideration is, to be sure, that the Board's conclusion that the Government proved by a preponderance of the evidence that cause of the failure of the reactor was a defective weld is not supported by substantial evidence. But, as the appellant expressly admits "the inferences to be drawn from the evidence must, at least within reasonable limits be left to the Board," and the same goes for the weight to be accorded to the evidence. The appellant offers no new evidence but merely reiterates, for the most part, the contentions in its post-hearing brief. It even refuses to abandon its "mouse" theory, although, clearly, it was virtually abandoned by its own expert at the hearing. If there is any novelty in the appellant's present argument it is the great stress which is now put on the report of the Bureau's factory inspector who denominated the appellant's workmanship as "good," and sent his report to the Bureau for review. Considering that there was also an "excellent" rating, the qualified "good" rating can hardly be regarded as very enthusiastic. The appellant seems to entertain the wholly unfounded conviction that the inspector was an eyewitness who was present during every minute of the manufacturing process, and could see even within the helium shield as the welding was done, and that his report is better evidence than the opinions of the Bureau's highly qualified engineers. The appellant has converted the factory inspector's rather diffident opinion into the only "direct evidence" in the case—this characterization appears at least four times in the course of the argument—even though it conceded prior to the hearing with full knowledge of the contents of the factory inspector's report that there was no direct evidence in the case. Thus, it declared in its reply to the statement of the Government's position: "It appears, both from the outcome of these tests (tests of the circuit breaker and examination of the damage) and from the *absence* of any other *direct evidence* that any determination of the cause of the failure will have to be based mainly on circumstantial evidence" (emphasis supplied).

Accordingly, the request for reconsideration is denied.

WILLIAM SEAGLE, *Member.*

PAUL H. GANTT, *Chairman.*

### APPEAL OF STUDER CONSTRUCTION COMPANY

IBCA-117

*Decided April 21, 1960*

#### Contracts: Delays of Contractor

A contractor engaged in clearing and grading a recreational area in Yellowstone National Park was not entitled to an extension of time for performance by reason of additional clearing and other work when it breached its contract by not completing all of the work in the scheduled construction

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season and hence, encountered other contractors which increased the difficulties of its work, and the contracting officer did allow a 30 days' extension of the time which may have been intended to cover additional clearing work.

### Contracts: Additional Compensation—Contracts: Protests

A contractor engaged in clearing and grading a recreational area in the Yellowstone National Park was not entitled to additional compensation for alleged extra moves in connection with its operations when the evidence is conflicting as to the number of the moves; the circumstances under which they were made are not clear; the moves may have been necessary because of the failure of the contractor to coordinate his operations with those of other contractors; and the contractor failed to protest against the actions requiring the additional moves.

### BOARD OF CONTRACT APPEALS

The Studer Construction Company of Billings, Montana, has filed a timely appeal from a decision of the contracting officer in the form of a letter dated February 1, 1957,<sup>1</sup> denying its request for an extension of time and additional compensation in connection with its performance of Contract No. 14-10-243-186 with the National Park Service, hereinafter designated as the Service.

The contract, which was dated August 1, 1955, and incorporated the General Provisions of U.S. Standard Form 23A (March 1953), provided for the grading and drainage of roads, parking areas, and walks at Canyon Cabin Area, Yellowstone National Park, Wyoming. The work was somewhat more particularly described in Section IV, paragraph 1, of the specifications as follows:

The work to be performed under these specifications shall consist of clearing (where required) and grading of roadways, parking areas and walks and the installation of CMP pipe drains with metal end sections or drop inlets as shown on the drawings.

There were 15 separate items of work listed in the contract bid schedule, and on the basis of the estimated quantities stated therein the contract price was \$79,397.<sup>2</sup>

<sup>1</sup> No reasons were given by the contracting officer for his decision in this letter, nor were any findings of fact made by him. In a memorandum dated October 31, 1957, the Board requested, therefore, that such findings be made by him, and they were duly issued by him under date of March 4, 1958. In making the request, the Board allowed the appellant a period of 30 days from the receipt by it of the findings to file exceptions thereto, and to request a hearing for the purpose of taking testimony, if a hearing was desired. Under date of April 2, 1958, the appellant filed a second notice of appeal from the findings, which the Board will consider as its exceptions. However, although the appellant filed a brief in support of its second appeal, it did not request a hearing for the purpose of taking testimony, contenting itself with attaching to its brief affidavits of its clearing subcontractor and surveyor.

<sup>2</sup> However, the contracting officer was expressly empowered to increase or decrease the quantities, or omit any listed item entirely, provided that the total cost of the work was not increased or decreased by more than 25 percent.

It was provided in Section III, paragraph 1, of the specifications, that the contractor was to commence the contract work within 15 days of receipt of notice to proceed, and was to complete the entire work within 90 calendar days thereof. Paragraph 2 of the same section of the specifications made provision for the payment of liquidated damages in the amount of \$50 per calendar day in the event that the contractor should fail to complete the work within the allotted time. Paragraph 6 of the same section of the specifications required that before beginning any work the contractor submit to the contracting officer a written program of construction in sufficient detail to enable the contracting officer to judge the adequacy of the contractor's operations, and to anticipate conditions which might retard the progress of the work, and the contractor was not to commence work until the program of construction had been approved in writing by the contracting officer.

To emphasize further the importance of the time element, Section IV, paragraph 2 of the specifications also provided as follows:

The Contractor shall program his work so as to complete the project within the 1955 construction season. A contract for water and sewer utility lines to serve this area will be awarded at approximately the same time as this road contract. It will be the responsibility of the successful bidders to cooperate and program their work in such a manner that both contracts can be accomplished this construction season.<sup>3</sup>

Thus, it was not only contemplated that all of the contract work would be completed within 90 days of receipt of notice to proceed but that it would be completed within the 1955 construction season.

Notice to proceed was received by the contractor on August 27, 1955, and the final date for completion of all work under the contract became November 25, 1955. Due to the onset of adverse weather conditions, however, all work was suspended for a period of 242 days from October 26, 1955, to June 25, 1956,<sup>4</sup> and this suspension postponed the final date of completion to July 24, 1956. The time for completion was further extended by a period of 30 days to August 23, 1956, by Change Order No. 2, dated September 1, 1956. The work was finally completed on October 24, 1956, and because of the 62 days' delay in completing the work the contractor was assessed liquidated damages at the contract rate in the amount of \$3,100.

The appellant appears to have been rather slow and vacillating in advancing claims against the Government, and to have behaved in an

<sup>3</sup> This provision of the specifications only particularized the general obligation imposed on the contractor by Clause 11 of the General Provisions of the Contract, headed "Other Contracts," to cooperate with any other contractors who might hold contracts for additional work.

<sup>4</sup> The right to suspend the work because of conditions unfavorable to its prosecution or because of the failure of the contractor to perform any provisions of the contract was expressly reserved to the contracting officer by Section III, paragraph 6 of the specifications.

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anomalous fashion in negotiating change orders. On August 9, 1956, it accepted Change Order No. 1, dated August 6, 1956. This change order made only a very minor adjustment in the work—the lowering of a steel water line at an estimated cost of \$100—and it was accepted by the appellant, although it expressly provided that no additional time for performance of the contract work would be allowed. Yet under date of September 1, 1956, the appellant's office manager wrote to the Service as follows:

Reference change order No. 1, Mr. Studer requested that I write you concerning the change order and notify you that he intends to ask for an extension and change order No. 1 will be included in that request for extension of time along with the other reasons for the delay in finishing the job.

Change Order No. 2 was also dated September 1, 1956, but it was not actually transmitted to the appellant until October 2, 1956. It increased item 1 (Unclassified Excavation), item 10 (6" Perforated Corrugated Metal Pipe), item 11 (Trench Excavation for 6" Perforated Corrugated Metal Pipe), and item 12 (Trench Backfill for 6" Perforated Corrugated Metal Pipe); it also increased the total contract amount by \$14,470. The justification for the change order was stated as follows:

Due to unforeseen circumstances the "A" and "C" Cabin Area roads required extra excavation, backfill and drainage to provide a stable road bed. A large portion of the "A" and "C" *Cabin Areas* are in wet swampy ground, *the extent of which was greater than planned*. The grade set for the roads and parking areas would have been impossible to construct without this extra work, also, *changes in cabin locations* and grades required adjustment of grade, which also increased the excavation quantities. (Emphasis supplied.)

The extension of time granted by Change Order No. 2 was couched as follows: "An allowance of 30 days will be made *on account of the changes ordered* and your completion date is changed accordingly from July 24, 1956, as stated in our letter of July 6, 1956, to August 23, 1956." (Emphasis supplied.)

The appellant's chief officer also accepted Change Order No. 2 but attached to it the following note:

I am signing this change order No. 2, with the reservation to amend the amount on a later order to take care of backfill of trenches which has been overlooked. Our Superintendent has taken this matter up with Mr. Huebner but never came to a definite agreement. I do not anticipate any serious trouble, but do want to be on record as having called it to your attention for possible later consideration.

What, if anything, was ever done about increasing the amount of compensation for backfilling trenches is not shown by the record but it is apparent that the reservation did not relate to the extension of time granted by the change order.

Each of the appellant's claims was set forth in a separate letter. The appellant's claim for an additional extension of time was formulated in a letter, dated October 29, 1956, to the contracting officer. Although it had been assessed liquidated damages for only 62 days, it now requested an extension of time of 70 days for five enumerated reasons, to the first four of which a particular number of days of delay were assigned which totaled 81 days. The reasons assigned, with the number of days allocated to each were as follows: (1) requests made by Government engineers to clear and grub numerous building sites for other contractors (20 days); (2) the additional clearing of 12 acres outside of mapped clearing area (40 days); (3) changes in culvert locations and grades, requiring culverts to be dug up and replaced (6 days); (4) the placing of sewer lines throughout the appellant's unfinished work, materially delaying its finishing work (15 days); (5) loss of time attributable to the operations and equipment of other contractors, hampering appellant's own operations (number of days not specified). In the penultimate paragraph of the letter the appellant explained that, although it was required to request extensions of time for performance attributable to causes of delay within 10 days of the occurrence of the delays, it had refrained from making the requests because it could not tell at the time just how much additional time it would need to complete the work.

The appellant's claim for additional compensation was formulated in a letter, dated November 26, 1956, to the contracting officer. This claim, which was in the amount of \$6,096.15, was not for additional work done but for time lost in moving to and from "repeat work" allegedly required while the appellant was completing the timber clearing in the Canyon Area, the time being lost because of restaking and changes in motel, dormitory sites, and parking areas which resulted in extra clearing in the "A" and "C" areas. No less than 25 separate moves were listed in the itemization of the claim which was based on the loss of 93 equipment and man hours at the rate of \$57 per hour.<sup>5</sup>

The contracting officer predicated his denial of both of the appellant's claims on reports to him by his subordinates. In a memorandum dated December 13, 1956, the acting supervisory engineer, Western Office, Division of Design and Construction, commented on the appellant's "repeat work" claim, and in a memorandum dated January 16, 1957, the supervisory engineer in the same office commented on the appellant's claim for an extension of time. Each of

<sup>5</sup> This would total \$5,301. The appellant added 15 percent of this amount, or \$795.15, to cover profit, indirect costs, etc., making a total of \$6,096.15.



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them recommended against the allowance of the claim which was the subject of his memorandum.

In the December 13 memorandum, the acting supervisory engineer could find no basis for allowing any part of the "repeat work" claim, the accuracy of which he generally questioned. Although the appellant had listed 10 moves as due to changes in parking areas, the engineer specifically denied that any orders had been given to it to move back to clear parking areas, and asserted that if such moves were made to complete clearing, they were attributable to the appellant's own method of operation. He also asserted that the motel sites had all been staked and marked for clearing at one time, except for a few minor adjustments, and that the appellant had been called back only two or three times for the purpose of removing dangerous trees. Finally, he pointed out that the moves listed as due to the restaking of dormitories were actually due to the failure of the appellant to clear the area of all the trees that had been marked for clearing, the dormitory sites having been slope-staked at one time and the trees marked for removal. Conceding that the clearing for the motel sites did necessitate a few extra moves, he stated that they had not involved the appellant's entire crew, and that it had in effect been compensated for these moves when it was paid for clearing the areas as if all timber had been removed, although in several places the smaller timber was left, making the operation much easier.

In the January 16 memorandum, the supervisory engineer pointed out that most of the additional time claimed by the appellant was in connection with clearing and grubbing but he commented: "The clearing operation was a slow one, however, the slowness stemmed more from the inefficiency of Mr. Studer's clearing operations than from the extra area to be cleared. *We realized that the additional clearing prolonged the contract and as a result of a conference with Mr. Hamilton and Mr. Rowe, 30 days extension was granted.*" (Emphasis supplied.) While he admitted that cabin site clearing was added during the 1956 construction season, he questioned the appellant's assertions that the Service's engineers had requested that certain cabin sites be cleared in preference to road right-of-way clearing, since the need for the completed roads was usually more urgent than for the cleared sites. As for changes in culvert locations, he conceded that two culverts were relocated due to changes in cabin location but took the position that the extension of 30 days which had been granted should have taken care of this, and so far as the location of utility lines in the roadway were concerned, he pointed out that if the contract had been completed as scheduled on July 19 this difficulty would not have been encountered, for the utility contractor did not commence work in the area until that date. In addition, he observed that the diffi-

culty could have been avoided by finishing the road in sections, since separate sections were accepted as they were completed. In general, he commented that the appellant's employees were too few, and that supervision and general planning were poor and sometimes nonexistent.

Various other circumstances are to be gathered from the contracting officer's findings of fact. He found that the appellant never submitted a construction program to the contracting officer as required by Section III, paragraph 6, of the specifications, although it knew that a contract for water and sewer utility lines would be awarded at approximately the same time as its contract. He also found that at no time did the appellant have adequate equipment and crews on the job, and that when operations under the contract were suspended on October 26, 1955, due to adverse weather conditions, the project was only 35.04 percent complete, although 66 $\frac{2}{3}$  percent of the time allowed for performance had expired.

It appears also from the contracting officer's findings that after the appellant had expressed concern that it would not get to do all the clearing contemplated by the specifications and plans, it had entered into an agreement with the project supervisor which was expressed in a letter from the latter to the appellant under date of July 19, 1956. This letter expressed an understanding that clearing of the dormitory sites and cabin sites was to be deemed to have been included in the contract, and that payment for this clearing work was to be made at the unit price per acre provided in the contract. In his letter, the project supervisor also stressed the importance of accelerating the clearing operations, as well as the grading of roads and parking areas, because of the short construction season ahead, and the fact that the building contractor would be held up if the cabin sites were not ready.

In general, it may be said that the basis of the contracting officer's denial of the appellant's claims on the merits was his conviction that the appellant's delay in the completion of the work and its additional costs were due to its failure to plan the work properly, and to carry it forward with sufficient men and equipment, so as to complete it during the 1955 construction season before the presence of other contractors on the project site had complicated its problems. In addition, however, the contracting officer expressly invoked as a bar to the allowance of the appellant's "repeat work" claim its failure to comply with the provision of Section 1, paragraph 19, of the General Provisions of the specifications which required the contractor to file timely written protest against work which it deemed to be outside of the requirements of the contract, or against any ruling of inspectors that it deemed to be unfair. The contracting officer also indicated that he was invoking the protest requirement because the Government had not

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had an opportunity to observe the conditions of which the appellant complained when they were in evidence.

The appellant attempts to dismiss its failures to file a construction program, to cooperate with other contractors, and to complete all of the work before the end of the 1955 construction season as wholly immaterial on the ground that the Government, within the last 30 days of the contract period, added clearing work not originally contemplated by the contract; namely, the clearing of the cabin sites. Even if the clearing of the cabin sites was actually additional work outside of the scope of the contract as written, the appellant's contentions must be regarded as fallacies. The contract plainly required that all of the work be so planned that it could be completed during the 1955 construction season, and the failure of the appellant to comply with the requirements of the contract was a breach of contract for which the Government was entitled to such actual damages as could be proven, in addition to the liquidated damages for which provision had also been made. The fact that when the appellant had failed to complete the work during the 1955 construction season the Government may have decided to request the contractor to perform additional work in no way excused the appellant's previous breach of contract, or terminated its previous liability for damages, and the Board is bound to take this liability into consideration in evaluating the claims against the Government which the appellant has made.

Actually, it is doubtful that in a technical sense the increase in the amount of clearing represented additional work amounting, technically, to a change in the requirements of the contract. It is true that the estimate for the clearing work given in the bid schedule was 24 acres, and that the appellant cleared 35.63 acres, which represented an increase of almost 49 percent in this estimate. But the contract provision was simply to do clearing "where required," and the bid schedule itself reserved to the contracting officer the right, as already noted, to increase the estimated quantities within a 25 percent limitation of the total cost of the work. If this 25 percent is to be calculated on the basis of the original estimated contract amount, then the 25 percent limitation was considerably exceeded. But if, on the other hand, the 25 percent is to be calculated on the original estimated contract amount, plus the amounts added by change orders, then the additional clearing would be within the 25 percent limitation.<sup>6</sup>

<sup>6</sup> The original contract amount was \$79,397, to which \$144.65 was added by Change Order No. 1 and \$14,470 by Change Order No. 2, making a total of \$94,011.65. If 25 percent of this amount, which is \$23,502.91 were added to the \$94,011.65, the total would be \$117,514.56. As the total bid items paid for under the final estimate was \$113,572.04, the 25 percent limitation would not have been exceeded. However, if 25 percent of the original contract amount, which is \$19,849.25, were added to it, the total would be \$99,246.25, and the 25 percent limitation would have been considerably exceeded.

Assuming for the sake of argument that the 25 percent limitation was exceeded, and that the appellant was clearly entitled to an extension of time for the additional clearing, despite the facts, apparently, that this work was added to alleviate the appellant's own concern that the clearing might fall short of the estimate, and that the appellant agreed to perform this work at unit prices without then specifically requesting an extension of time for the performance of the additional work, the Board is faced by the insistence of the Service's supervisory personnel that the extension of time of 30 days subsequently allowed under Change Order No. 2 was intended to cover the additional clearing work. The appellant strenuously argues, to be sure, that there is nothing in the change order that refers to the clearing work, pointing to the fact that it provided only for increases in the work under items 1, 10, 11, and 12 which are not expressly clearing items. It is true that there is a separate clearing item—item 9—but the difficulty is that clearing is also involved in excavation and grading, and that in the justification for the change order there is a mention of the fact that the extent of the cabin areas, which were also involved in the clearing, was greater than planned, and that they consisted of wet, swampy ground, which presumably might slow down the appellant's operations. The situation with respect to the additional clearing is, to be sure, obscure, as are, indeed, many phases of the performance of the present contract, but the burden of establishment that it is entitled to an extension of time is on the appellant, and by failing to request a hearing, it has not made it possible to eliminate the obscurities. So far as the other elements of this claim are concerned, the obscurity is even greater. If the appellant did clearing work for other contractors, at their request, there is nothing to show that the work was authorized by appropriate officers of the Government. Insofar as the appellant was delayed by factors attributable to the presence of other contractors, the indications in the record are that its own failure to program its operations better and complete them during the 1955 construction season were responsible for its difficulties. While there may be some element of merit in the appellant's claim for some additional extension of time, the Board must conclude that it has not been adequately established, either in nature or amount, and the claim must, therefore, be denied.

The appellant's "repeat work" claim suffers even more obviously from the fact that there has been no hearing in the present case. In the affidavits of the appellant's subcontractor and surveyor many assertions are made which are directly in conflict with the statements made in the December 13 and January 16 memoranda of the supervisory personnel of the Service. Thus, the appellant's subcontractor deposes that at the time he was clearing roadways and parking areas in the "C" area, he was requested to clear the cabin sites in the "A"

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area as they were staked, which necessarily involved additional time in moving equipment from the "C" area to the "A" area; that after certain cabin sites had been cleared in the "A" area they would be restaked for slope, and he would be called back to clear additional area within the site already done; that the moves were made as claimed by the appellant, and that none of the moves were for the purpose of removing trees missed on the original clearing of the site. So, too, the appellant's surveyor deposes that, although he had no record of the number of times it occurred, the contractor was called back to rework the cabin sites in the "A" area that had been restaked and that final designation of the parking areas in the contract was not delivered until July 19, 1956. Some force must, to be sure, be accorded to statements in affidavits but they are not conclusive, because there has been no opportunity to cross-examine the affiants in the present case, and the contracting officer denied the "repeat work" claim with knowledge of the contents of the affidavits, his findings having been made subsequent to the time that they were filed.<sup>7</sup> Moreover, even if, in view of the affidavits, the number of moves claimed to have been made by the appellant were accepted as substantially correct, it would still be necessary to know under what circumstances and for what reasons the moves were made, and as to these circumstances and reasons, the affidavits are almost entirely silent. The moves may have been made almost entirely because of the problems caused by the presence of the other contractors during the 1956 construction season, and for this situation the appellant was responsible. Finally, since the appellant appears to have been paid for the work which was performed in connection with each move, it is not clear from the record whether this compensation was not adequate to take care also of the movements of the equipment.

In view of the unsatisfactory nature of the record, and the difficulties which would be involved in undertaking to resolve at this late date the conflicting contentions of the parties, this would seem to be an appropriate case for sustaining the action of the contracting officer in invoking the failure of the appellant to file timely written protests against the additional moves. The "repeat work" claim is also denied, therefore, for failure to protest, as required by the contract.

<sup>7</sup> The affidavits were attached to the brief on appeal from the contracting officer's letter decision of February 1, 1957, which was routed through the contracting officer. The brief on appeal was dated March 20, 1957.

## CONCLUSION

Therefore, the decision of the contracting officer, dated February 1, 1957, and his subsequent findings of fact, dated March 4, 1958, denying the claims of the appellant, are affirmed.

WILLIAM SEAGLE, *Member.*

I concur:

PAUL H. GANTT, *Chairman.*

## GABBS EXPLORATION COMPANY

A-28139

*Decided April 25, 1960*

## Mining Claims: Generally

A mining location may be terminated by abandonment and if a valid mining claim is abandoned, the land reverts to the public domain.

Mining Claims: Determination of Validity—Mining Claims: Contests—  
Rules of Practice: Failure to Appeal

Mining claims may be declared null and void if the claimant, who received notice of adverse charges against his claims, fails to answer the charges as required and fails to appeal from a decision holding his claim null and void, and where the claimant takes no action with respect to the claims for 25 years, the decision declaring the claims null and void is conclusive and will not be reopened if the interest of other parties under oil and gas leases issued by the United States have intervened, in the absence of a legal or equitable basis warranting reconsideration.

Mining Claims: Determination of Validity—Mining Claims: Withdrawn  
Land

This Department may declare mining claims null and void after a determination that the claims are abandoned has become final, and if, at that time, an Executive Order attaches to the land covered by the abandoned claims withdrawing it from the operation of the public land laws, further assertions of property rights in such land, except in accordance with the withdrawal order, are precluded.

## Administrative Practice: Generally—Mining Claims: Hearings

A hearing is not required by departmental practice or by the requirements of due process on the rejection of an application for a patent on mining claims which, 26 years before the application was filed, were declared null and void by a default decision after notice of charges against the claims, including a charge that the claims were abandoned, and an opportunity for a hearing thereon were given the record title owner of the claims.

## Mining Claims: Title

An applicant for patent to mining claims can hardly claim to be a bona fide purchaser for value of the claims when prior to and at the time of his purchase the public records of the Department show that the claims had

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been declared null and void and the applicant's own abstract of title shows entries on the county records of issuance by the United States of an oil and gas lease on part of the land in the claims and of a patent on another part of the land.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Gabbs Exploration Company, a Colorado corporation, has appealed to the Secretary of the Interior from a decision of April 20, 1959, by the Director of the Bureau of Land Management which affirmed a decision by the manager of the Denver land office rejecting the appellant's application for patent and declaring null and void the mining claims included in the patent application. The claims for which patent is sought comprise 18 oil shale placers known as the Sibbald Nos. 1 through 12, inclusive, and the Coral Nos. 3 through 8, inclusive, covering approximately 2,880 acres of land in secs. 28, 29, 31, 32, and 33, T. 4 S., R. 99 W., 6th P.M., Garfield County, Colorado. The claims were located in December 1917 and February 1918. Effective August 1, 1951, and September 1, 1952, oil and gas leases were issued on all except 640 acres of the land covered by the patent application, and on December 1, 1955, a lease was issued on the remaining 640 acres here involved.

The appellant's application for patent, filed on August 29, 1956, was rejected by the manager's decision of February 14, 1958, on the ground that the claims were declared null and void by a letter of instructions, dated May 19, 1930, of the Commissioner of the General Land Office (predecessor of the Director, Bureau of Land Management), and approved by the Secretary. The letter directed the closing of contest 12111, *United States v. Walter L. Dwyer*, in which the United States brought adverse proceedings against a number of claims including all of the placers covered by the appellant's application.

Departmental records indicate that on January 13, 1930, Walter L. Dwyer, as record titleholder of these claims, received by registered mail, notice of contest 12111 stating that charges were brought by this Department against the validity of oil shale locations Sibbald Nos. 1 to 12, inclusive, and Coral Nos. 1 to 8, inclusive. The charges against the claims were:

1. That there has been no assessment work performed upon any of the above described placer mining claims for the assessment years ending July 1, 1921, up to and including July 1, 1929.
2. That each and every one of said claims has been abandoned.

The notice of adverse proceedings indicated plainly that an answer to the charges was required but Dwyer made no reply and took no action in response to the notice. The Commissioner's letter of May 19,

1930, gave the following instructions to the register at Denver regarding the contest:

The default of the claimant, in failing to file answer denying the charge, is taken as an admission by him of the truth thereof, in view of which the Sibbald Nos. 1 to 12 inclusive and Coral Nos. 1 to 8 inclusive, oil shale placers are declared null and void and the United States has taken possession of the lands within the claims for its own uses and purposes. The case is closed.

Advise the claimant by ordinary mail.

Dwyer did not appeal from or respond to notice that the claims were declared null and void and it does not appear that he took any action with respect to the claims until almost 25 years after the case was closed, when he conveyed by a quitclaim deed of April 29, 1955, all of the claims here involved to the Comanche Oil Company. Under quitclaim deed of March 21, 1956, the Comanche Oil Company conveyed these claims to the Gabbs Exploration Company.

In affirming the manager's rejection of the appellant's patent application, the Director's decision pointed out that the charge, in the adverse proceedings brought against these claims in 1930, of failure to perform assessment work could not serve as a basis for declaring the claims null and void, citing *Wilbur v. Krushnic*, 280 U.S. 306 (1930), and *Shale Oil Company*, 55 I.D. 287 (1935). The decision held, however, that since the 1930 contest proceedings included the charge that each of the claims had been abandoned, the claims were properly declared null and void in a default judgment of abandonment of these claims. *Ickes v. Virginia-Colorado Development Corp.*, 295 U.C. 639 (1935).

On this appeal, objection is taken to the adverse proceedings against these claims which resulted in the default decision in 1930 holding that the claims were null and void. The appeal asserts that the notice of charges against the claims did not comply with the applicable departmental instructions (Circ. 460, 44 L.D. 572, 573 (1916)) which required, *inter alia*, that the notice state that the charges would be accepted as true unless the claimant filed in the local office, within 30 days from receipt of notice, a written denial, under oath, of said charges, with an application for a hearing, or submitted a statement of facts rendering the charges immaterial, or if he failed to appear at any hearing that might be ordered in the case. The assertion is incorrect. On the reverse side of the contest notice is a reprint of Circular 460 (*supra*) containing the departmental instructions governing proceedings in contests of this type. Paragraph 10 in the circular sets forth the provision that if the claimant fails to deny the charges and apply for a hearing, or to submit a statement of facts rendering the charges immaterial, or to appear at a hearing ordered, without showing good cause, such failure will be taken as an admission



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of the truth of the charges and will obviate the necessity for the Government submitting evidence in support thereof. The same paragraph also states that in cases finally closed upon default of the claimant, if application to reopen any case is filed with the register and receiver, they will forward it with recommendation to the General Land Office. Thus, Dwyer had actual notice that a failure to deny the charges would be taken as an admission of the truth of the charges, and he also had notice that if the contest case were finally closed upon default of the claimant, further action thereon was possible if he filed an application to reopen the case. Dwyer not only defaulted with respect to the contest charges; he took no appeal from or other action with respect to the notice declaring the claims null and void and closing the case.

The 1930 contest proceeding is also objected to on the ground that the register was told to notify Dwyer by regular mail rather than by registered mail of the final action of the Department declaring the claims null and void and closing the case. The instructions of May 19, 1930, to the register from the Commissioner, approved by the Secretary, which declared the claims null and void, directed that the contestee be notified of the Department's final action by ordinary mail. This direction was in accordance with the rules of practice which were in effect when the case was closed.<sup>1</sup> The record shows that Dwyer was served with notice by registered mail of the contest complaint, that in accordance with the departmental rule in effect in 1930, he was notified by ordinary mail that the case was being forwarded to the General Land Office after his failure to answer the contest charges.

<sup>1</sup> Paragraph 10 in Circular No. 460 provided:

"If the entryman or claimant fails to deny the charges under oath and apply for a hearing, or to submit a statement of facts rendering the charges immaterial, or fails to appear at the hearing ordered without showing good cause therefor, such failure will be taken as an admission of the truth of the charges and will obviate the necessity for the Government submitting evidence in support thereof, and the register and receiver will forthwith forward the case with recommendation thereon to the General Land Office and notify the parties by registered mail of the action taken. In cases finally closed upon default of claimant, if application to reopen any case is filed with the register and receiver, they will forthwith forward same with recommendations to the General Land Office."

Paragraph 14 in Circular No. 460 provided in relevant part:

"The above proceedings will be governed by the rules of practice. \* \* \*"

Notice to a contestee who defaulted after service of notice was governed by paragraph 10 of Circular No. 460 as modified by rule 14 of the departmental rules of practice in effect at the time of the contest proceedings. Rule 14, as amended, provided (51 L.D. 550 (1926)):

"Upon failure to serve and file answer as herein provided, the allegations of the contest will be taken as confessed, and the register will forthwith forward the case, with recommendation thereon, to the General Land Office, and notify the parties by ordinary mail of the action taken."

In a letter dated June 22, 1931, to the Register, Carson City, Nevada, the Commissioner of the General Land Office said that the amendment of paragraph 14 of the rules of practice on April 17, 1926, to read as quoted also amended paragraph 10 of Circular No. 460. 16 Land Service Bulletin 146.

By Circular No. 449 of December 11, 1915 ("Circulars and Regulations of the General Land Office," January 1930, p. 1098), notice of closing of cases was required to be sent by ordinary mail.

The instruction in the letter of May 19, 1930, that Dwyer be informed by ordinary mail of the Department's final action closing the case was also in accordance with Bureau practice. There is no evidence that any of the Department's procedural requirements governing action by the land office and the Department in default cases was not complied with in Contest 12111. Moreover, the appellant does not contend that Dwyer was not notified of the Department's final action in the case.

The appeal asserts further that by a letter of July 29, 1935, the Commissioner of the General Land Office issued instructions to close all cases of adverse proceedings against mineral locations or entries where the charge was failure to perform annual assessment work and that pursuant to those instructions the register of the land office at Denver, Colorado, dismissed and closed Contest No. 11736 in which one of the charges was failure to perform annual assessment work. According to the appeal the case was closed despite the fact that another charge was pending against the claims involved in that contest; namely, that the claims were not valid on the date of the Leasing Act. It is contended for the appellant that if failure to perform assessment work was charged in a contest against a mining claim pending on July 29, 1935, the entire proceeding was vitiated and that the policy of the Department, as demonstrated by the register's action in dismissing Contest No. 11736, was to dismiss any additional charges which might also have been brought in such a contest.

The contention is incorrect. An instruction by the Commissioner to close all cases of adverse proceedings against mining claims where the charge was failure to perform annual assessment work did not authorize closing adverse proceedings against mining claims with respect to any charge other than that stated in the instruction. If Contest No. 11736 was closed as to a charge other than failure to do assessment work, the action was not in accordance with or authorized by the Commissioner's instruction of July 29, 1935, as that instruction is stated in the register's letter, quoted on appeal, closing Contest No. 11736.

The appellant also contends that the charge of abandonment in the 1930 contest is insufficient because the charge, without supporting facts, amounts merely to a conclusion of law. The appellant's reliance on departmental decisions involving appeal rules and private contest charges is not applicable to the determination of the adequacy of a contest charge in proceedings instituted pursuant to Circular No. 460 (*supra*). The first three paragraphs in that circular are, in applicable part, as follows:

1. The purpose hereof is to secure speedy action upon claims to the public lands, and to allow claimant, entryman, or other claimant of record, opportunity to file a denial of the charges against the entry or claim, and to be heard thereon if he so desires.

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2. Upon receipt of a report this office will consider the same and determine therefrom whether the facts stated, if true, would warrant the rejection or cancellation of the entry or claim.

3. Should the charges, if not disputed, justify the rejection or cancellation of the entry or claim the local officers will be duly notified thereof and directed to issue notice of such charges in the manner and form hereinafter provided for \* \* \*.

These provisions indicate that before a contest based on a report by a representative of the General Land Office was initiated, a determination was made that the facts reported concerning an entry or claim, if true, would warrant the cancellation of the entry or claim as would the failure to dispute the charges. The issuance of the notice to Dwyer of the charges against his claims necessarily implies that the Commissioner of the General Land Office had determined, in accordance with Circular No. 460, the sufficiency of those charges, including the charge of abandonment.

Furthermore, the rule that a contest charge is bad if it alleges only a conclusion of law and not the facts upon which the charge is based rests upon the premise that the contestant has not shown that he is familiar with the requirements of law (*Raber v. Smith, Leight, Intervenor* 51 L.D. 46, 48 (1925)). This premise cannot apply to the Department. In addition, under the rules of practice in effect when the charge was filed against Dwyer an objection to the sufficiency of a contest charge could be raised only by timely demurrer. *Fosdick v. Shackelford*, 47 L.D. 558 (1920). Since Dwyer did not file any objection, timely or otherwise, to the contest charge, the default judgment is not now open to attack on the ground that the charge was insufficient.

A review of the record indicates that the assertions on this appeal to the effect that the default decision declaring the claims null and void amounted to a denial of due process are without merit. Dwyer had notice and an opportunity to be heard and to defend his interest within the requirements of due process and the consequence of his failure to participate in a determination of the validity of the claims cannot now be avoided by asserting lack of due process in the 1930 proceedings (*American Surety Co. v. Baldwin et al.*, 287 U.S. 156, 169 (1932); see *Cameron v. United States*, 252 U.S. 450, 460, 461 (1920)).

Dwyer's failure to appeal from the ruling that his claims were null and void, even if the decision was erroneous, bars him, or anyone claiming under him, from questioning the correctness of the decision almost 30 years after the right to appeal therefrom expired (see *Charles D. Edmonson et al.*, 61 I.D. 355 (1954), and cases cited therein). And where there is no showing that the decision holding these claims null and void was unauthorized, the interests of other

parties under a patent and oil and gas leases issued by the United States (see *infra*) have intervened, and there are no equitable considerations justifying reconsideration of the question, a decision which has remained unchallenged and was acquiesced in by the record titleholder of the claims for 25 years will not be reopened by the Department (see *Edward Christman et al.*, 62 I.D. 127 (1955); *H. W. Rowley*, 58 I.D. 550 (1943)). The cited departmental decisions, principles of orderly administration, and the doctrine of the finality of administrative action preclude reconsideration in 1960 of adverse proceedings concluded in 1930 resulting in the decision that the claims here involved were null and void by reason of abandonment.

It is also contended on appeal that a charge of abandonment may not be asserted by the United States as a ground for adverse proceedings against mining claims and that the contest proceedings in 1930 against the instant claims contain no charge which supports a decision declaring the Sibbald and Coral claims null and void. The charge of abandonment in the 1930 contest proceedings, it is argued, is not a valid basis for declaring the claims null and void because abandonment is only a repetition of and amounts to no more than giving a different name to the charge of failure to perform assessment work. There is nothing in the record to support a conclusion that the charge of abandonment is the equivalent of and inseparable from the charge that assessment work was not performed. The charge that the claims were abandoned was set out in the notice of adverse proceedings as separate and distinct from the charge of failure to perform assessment work. Moreover, in view of the fact that default in assessment work which subjects a claim to forfeiture and relocation is clearly distinguished from abandonment in decisions involving mining claims,<sup>2</sup> the unsupported assertion that the two charges are one and the same thing is not persuasive (see *Farrell v. Lockhart* and *McKay v. McDougall*, both *supra*, fn. 2). Accordingly,

<sup>2</sup> Abandonment is frequently mentioned in mining cases in connection with forfeiture resulting from default in assessment work, but abandonment is not synonymous with default in assessment work which subjects a claim to forfeiture. A forfeiture takes place by operation of law, without regard to the intention of the appropriator, whenever he neglects to preserve his right by making the required annual expenditures upon the claim within the time allowed, and upon relocation of the claim adversely to the original locator before the latter resumes work, the right of the original locator is terminated. *McKay v. McDougall*, 64 Pac. 669, 670 (Montana 1901).

But where a valid claim has been abandoned by the original locator, the ground covered by the claim becomes a part of the public domain and is subject to another location before the expiration of the statutory period for performing annual labor. *Farrell v. Lockhart*, 210 U.S. 142 (1908).

The distinction between abandonment of a mining claim and forfeiture after default in assessment work is clearly demonstrated by comparing *McKay v. McDougall* (*supra*), which discusses the differences between the abandonment and forfeiture of mining claims, with *Vaicalda et al. v. Silver Peak Mines*, 86 Fed. 90, 95 (9th Cir. 1898), which involved determination of the issue of abandonment of a mill site. The latter decision discusses abandonment without reference to forfeiture of mining claims.

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the contention that the charge of abandonment in the 1930 proceedings amounted only to the charge of failure to perform assessment work is rejected.

Regardless of the determination of the matters thus far considered, the appeal asserts that the abandonment of mining claims does not authorize a declaration by the United States that the claims are null and void, and that abandonment is not available to the United States as a basis for declaring a claim invalid. The assertions require consideration of the meaning and effect of a determination that mining claims are abandoned.

The statement in *Ickes v. Development Corporation, supra*, that the Secretary of the Interior, by appropriate proceedings, may determine that a mining claim is subject to cancellation by reason of abandonment is relied upon in the Director's decision as authorizing this Department to declare an unpatented mining claim null and void upon a finding that it is abandoned. The statement in *Ickes v. Development Corporation* cited cases involving suits between adverse mining claimants (*Brown v. Gurney*, 201 U.S. 184, 192, 193 (1906); *Farrell v. Lockhart, supra*, 147). To the extent that the cases authorized cancellation of a mineral entry they are not analogous to the question here raised since, at the time of the proceedings against Dwyer's claim, no application for patent had been filed and there was nothing which this Department could cancel. However, the decisions in *Brown v. Gurney (supra)*, *Farrell v. Lockhart (supra)*, and *Ickes v. Development Corporation (supra)* clearly imply that a claim is null and void if it is abandoned. Nonetheless, although this is not denied on appeal, it is contended that the United States may not take advantage of an abandonment. The authorities referred to in support of this position will be considered after certain general matters regarding abandonment are clarified.

The doctrine of abandonment with respect to property rights refers to the voluntary relinquishment of property with the intention of not reclaiming it or resuming its ownership or enjoyment. Abandonment is a matter of intention which consists in giving up a right or rights in property without reference to a particular person or purpose, and, as applied to mining claims held only by location, an abandonment is the intentional renouncement of the rights of possession and enjoyment such as occurs if a locator voluntarily leaves the claim to be appropriated by the next comer without any intention of retaking it or claiming it again.<sup>3</sup> *Shank et al. v. Holmes*, 137 Pac. 871 (Arizona 1914); *McKay v. McDougall, supra*.

<sup>3</sup> See *Conn et al. v. Overto*, 76 Pac. 369 (Colorado 1904), holding that permission given to another to relocate operates as an abandonment and note on "Abandonment and Forfeiture of Mining Claims," 87 American State Reports 403 (1902), which cites the following examples of abandonment of a mining claim: a locator's leaving his claim after

It has long been recognized that a mining location may be terminated by abandonment, and cases involving the abandonment of unpatented mining claims uniformly hold that upon actual abandonment of a claim, the land covered thereby becomes a part of the public domain (*Farrell v. Lockhart (supra)*; *Brown v. Gurney et al. (supra)*; see *Belk v. Meagher*, 104 U.S. 279 (1881); and *State of South Dakota v. Madill et al.*, 53 I.D. 195, 199 (1930)). Thus, when a valid claim is abandoned, the land formerly included therein becomes vacant, unoccupied public land subject to sale and disposition by the Government and open to location by other persons (*Harkrader v. Carroll*, 76 Fed. 474 (D. Alaska 1896)).

Abandonment, without more, is effectual to transfer title to a vester estate in real property,<sup>4</sup> and it has been held that once a valid mining claim is located, it continues to belong to the claimant until his property interest (right to exclusive possession and enjoyment) is divested in some manner known to law such as grant, descent, adverse possession, or by operation of law such as escheat or forfeiture (*Sharkey et al. v. Candiani et al.*, 85 Pac. 219 (Oregon 1906); see *Valcalda v. Silver Peak Mines, supra*). However, the ruling of the courts that, upon abandonment of a valid claim the land reverts to the public domain, disposes of any question regarding the divestment of possessory title which prior to abandonment of a valid mining claim is the

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2 years with a declaration that he has abandoned it and will not return to it to work amounts to an abandonment (*Trevaskis v. Peard et al.*, 44 Pac. 246 (Calif. 1896); a locator's permitting an adjoining occupant to patent that part of his claim on which his discovery shaft is located results in the reversion of the remaining portion of the claim to the public domain (*Miller et al. v. Girard et al.*, 33 Pac. 69 (Colo. 1893)).

Whenever the intention and the actual surrender of a claim unite, the abandonment is complete and operates immediately. Lapse of time is not essential, though it may be a circumstance, with others, to prove an intent to abandon. But lapse of time, nonuse, or absence from the claim, alone, do not amount to abandonment. *Justice Mining Co. v. Barclay et al.*, 82 Fed. 554 (Nevada 1897); *McCarthy v. Speed et al.*, 77 N.W. 590, 593 (S. Dak. 1898), 80 N.W. 135 (S. Dak. 1899); *Valcalda v. Silver Peak Mines (supra)*.

<sup>4</sup> Ordinarily, an interest in real property is not lost merely by failure to assert it. In *Belk v. Meagher, supra* (1881), the Court, in discussing the right to exclusive possession of a mining claim stated (at p. 283):

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent . . . There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant from the United States."

However, interests in real property may be lost by contiguous possession in one claiming and occupying property adversely to and inconsistently with the rights of the owner. Equitable rights obtained without writing may be abandoned and an abandonment combined with sufficiently long, inconsistent, and adverse possession by another party destroys the rights of the owner. Adverse use for 20 years is commonly evidence of a prescriptive right and is presumptive evidence of a grant (see *Williams v. Nelson et al.*, 34 Am. Decisions 45 (Mass. 1839); *Arnold et al. v. Stevens*, 35 Am. Decisions, 305, 310-311 and note (Mass. 1839)).

A provision of the mining laws is related to the doctrine of grants by prescription. If a junior locator applies for a patent on land claimed by a senior locator, the senior locator must bring an adverse suit against the patent applicant and prosecute it with reasonable diligence or lose all rights under his senior location. *Lavagnino v. Uhlig*, 198 U.S. 443 (1905); 30 U.S.C., 1958 ed., sec. 30.

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property of the owner of the claim. The courts have held, in effect, that when a valid mining claim is abandoned, possessory title to the land reverts to the United States by operation of law, a result not unlike escheat.

Accordingly, in the instant case, when the default decision of 1930 declaring the mining claims here under consideration null and void became final and the determination of abandonment was conclusive, the land included in the claims, in the absence of other facts, would have become vacant public land, subject to entry under the public land laws including the mining laws, as modified since the location of these claims by the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*). The Mineral Leasing Act precluded any new location of these lands under the mining laws for minerals subject to disposition under the leasing act, such as oil and oil shale (*United States v. U.S. Borax Co.*, 58 I.D. 426, 432 (1943)).

Moreover, the withdrawal of the land here involved from the public domain prevented the operation of any of the public land laws in connection with it, except in accordance with the terms of the withdrawal. The Commissioner's instructions of May 19, 1930, declaring these mining claims null and void stated that the United States "\* \* \* has taken possession of the lands within the claims for its own uses and purposes." On April 15, 1930, pursuant to Executive Order No. 5327, all oil shale deposits and lands containing such deposits owned by the United States were withdrawn, subject to valid existing rights, from lease or other disposal, except for application for patent under the mining laws for metalliferous mining claims or application based on claims initiated prior to the date of the withdrawal. The withdrawn lands were reserved for purposes of investigation, examination, and classification (Circular No. 1220, 53 I.D. 127 (1930)). Among the lands included in the withdrawal are all of the lands in the abandoned mining claims here under consideration, as indicated in the instructions, dated April 22, 1931, from the Commissioner of the General Land Office to the register, Denver, Colorado, which listed among the subdivisions in Colorado covered by Executive Order No. 5327 all of secs. 7 to 36, T. 4 S., R. 99 W., 6th P.M.

Executive Order No. 5327 attached to the lands here under consideration as a secondary claim and operated to withdraw them from the public domain when the determination that the mining claims were abandoned became final, since, on the termination of the mining locations, possessory title to the lands reverted to the United States (Solicitor's opinion, 55 I.D. 205, 208 (1935); see *Vanadium Corporation of America et al.*, A-26914 (September 8, 1954)). As a consequence of the decision of May 19, 1930, declaring these claims null and

void and asserting that the United States took possession of the lands, Executive Order No. 5327 attached to the lands to exclude all subsequent entries thereon, except as permitted by the order, and prevented the assertion of any rights to this land under the abandoned locations.<sup>5</sup> On February 6, 1933, Executive Order No. 5327 was modified by Executive Order No. 6016 authorizing the issuance of oil and gas permits and leases under the Mineral Leasing Act on lands withdrawn by Executive Order No. 5327 (43 CFR, 1940 ed., 297.10). It has already been noted that oil and gas leases were issued on all of these lands; they were issued in 1951, 1952, and 1955. The abstract of title submitted by the appellant as Exhibit C of the patent application for these claims shows the issuance of one of the leases on August 1, 1951, covering, among other land, secs. 29 and 33, T. 4 S., R. 99 W., 6th P.M. (Entry No. 42).

Entry No. 30 in the abstract also shows that all of sec. 28, T. 4 S., R. 99 W., 6th P.M., was granted by the United States to Burton McKee under Patent No. 1108148, dated May 6, 1940, and that the conveyance was filed for record on March 7, 1945. Four of the claims included in the patent application (Sibbald Nos. 1, 2, 7, and 8) cover the above-described sec. 28. The McKee entry was allowed on March 16, 1934, and departmental tract books contain a notation showing the allowance of the entry and the patenting of sec. 28 under the Stockraising Homestead Act (43 U.S.C., 1958 ed., sec. 291 *et seq.*)<sup>6</sup> The allowance of the entry and the issuance of Patent No. 1108148 are clear evidence that from 1934 through 1940 the United States considered that it owned the land in sec. 28.

The record indicates that for a period of 25 years after this Department declared Dwyer's mining claims null and void, during which time exclusive control over the land (except for sec. 28) was exercised

<sup>5</sup> When the decision declaring these claims null and void as a consequence of abandonment became final, there remained no possibility that the claims could be considered valid existing claims which would prevent the attachment of Executive Order No. 5327. This follows from the fact that land covered by abandoned mining claims reverts to the public domain. *Cf. Robbins et al. v. Elk Basin Consol. Petroleum Co.*, 285 Fed. 179 (D. Wyo. 1922), holding that where this Department refused to grant a lease under the Mineral Leasing Act to applicants who had asserted prior location of a mineral claim on the lands for which a lease was sought, this Department's refusal being based on the ground that the applicants had abandoned their claim, the determination that the claim was abandonment is binding in a possessory suit between the applicants and an adverse claimant under the placer mining law.

<sup>6</sup> Before and at the time of the appellant's purchase of these mining claims, both the departmental and land office tract books showed the allowance and patenting of the homestead entry on sec. 28. The tract books are official records showing land status. Since 1948, full and complete land status is shown on the land office tract books.

In addition to the record notice of this claim which was available to the appellant and its grantors, the entryman's residence and improvements on the land (including a log cabin, a corral, and barbed wire fencing) were actual notice to the world of the entryman's claim. Moreover, notice of McKee's intention to make final proof on his entry was published for 5 weeks (from November 3, 1938, to December 1, 1938) in the Grand Valley News, Colorado.



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by the United States, Dwyer took no action whatsoever with respect to the claims. In view of these facts, the assertion on appeal that, following the decision in *Ickes v. Development Corporation (supra)* in 1935 until the manager's decision in February 1958 rejecting the appellant's application, the United States recognized the validity of the subject mining claims is without foundation.

In a Solicitor's opinion (53 I.D. 491 (1931)) relied on by the appellant, the Department held that there is doubt whether a departmental decision that a mining claim in a national park has been abandoned has the same conclusive legal effect on the claimant's rights as an adjudication would have that it is void on the ground that the land was nonmineral in character or that there was a lack of discovery. The ruling is based in part on the fact that the termination of a valid mining location by abandonment does not invalidate the discovery on the claim. However, the opinion did not mention the reversion to the United States of the property rights which vested when a valid discovery was made and which are divested by operation of law upon abandonment of a valid claim. Although a determination that claims are abandoned necessarily implies that they are null and void, the land included therein having become part of the vacant public domain is subject to relocation and to acquisition under other public land laws in the absence of occupancy or possession by the United States. If the United States prevents relocation of abandoned mining claims by taking possession of the land for its own uses upon a final determination that the claims are null and void by abandonment, the conclusiveness of the action seems no less binding than did the determination of the invalidity, due to lack of discovery, on the claim involved in *Cameron v. United States (supra)*. The only distinction between the *Cameron* case and the situation here under consideration as regards possessory title based upon discovery is that possessory title never vested in the claimant in the *Cameron* case because of lack of discovery whereas here, assuming the validity of the original locations, possessory title which vested in the locators was divested by abandonment and reverted to the United States. Accordingly, the doubt expressed in the above-cited Solicitor's opinion is not regarded as determinative of the instant appeal.

In support of the contention that abandonment is not available to the United States as a basis for declaring a claim null and void, the appeal also cites Lindley on Mines (section 642) to the effect that the abandonment of a mining claim does not become effectual except in the presence of a relocater and that abandonment inures to the benefit of no individual except a relocater. The statements are not necessarily inconsistent with the conclusion that if a mining claim is actually abandoned, the United States may take possession of the

land covered by the abandoned claim, which has become a part of the public domain, and exclude the initiation of further possessory rights in the land; that is, prevent relocation of the claim. In any event, if a relocater can acquire possessory rights to land which, as a result of the abandonment of a valid mining claim, has reverted to the United States, *a fortiori*, the United States may assert possession of the land by withdrawing it from the public domain and may prevent acquisition of possessory rights therein by a relocater.

For the reasons discussed herein, the contention on appeal that this Department's decision that the mining claims here involved were null and void because of abandonment is unauthorized is not sustained.

The appeal asserts also that the appellant and its grantor had no notice of the 1930 decision holding these mining claims null and void, and that appellant is a bona fide purchaser for value, having paid a substantial amount to purchase the claims. The assertion has no merit. The allowance of the stockraising homestead entry in sec. 28 and the patenting of that land are matters of public record (see note 6). Moreover, a note in the tract books under secs. 28, 29, 30, 31, and 32, T. 4 S., R. 99 W., 6th P.M., Colorado, refers to sec. 33 under which the following notation occurs:

Sibbald Nos. 1 to 12 Coral Nos. 1 to 8 (secs. 28 to 33) oil shale placer locations null and void case closed "N" May 19, 1930—1360877

The appellant and its grantors are chargeable with notice of the contents of public records, specifically with notice that the claims were declared null and void in 1930, and that thereafter the United States claimed ownership of the land.<sup>7</sup>

In addition, one of the oil and gas leases issued on August 1, 1951, on the lands here involved appears in the abstract of title which was submitted with the appellant's patent application. Also, the patenting by the United States of sec. 28 is plainly shown by the appellant's own abstract. The issuance of the lease and the patent would be clear notice to anyone purchasing presumably valid mining claims on the land leased and patented that something was wrong with the title to the claims and would put him on notice that title to other claims deraigned from the same source might be defective. I am unable to see how the appellant can claim to be a bona fide purchaser in these circumstances. In any event, the appellant's remedy is against its grantor since, if a sale and conveyance of a mining claim take place

<sup>7</sup> A purchaser is chargeable with notice of the contents of the records of the land office, and when a purchaser cannot make out his title but through a deed which leads to a fact, he has notice of the fact. Such purchasers are purchasers with notice (see *Brush v. Ware et al.*, 40 U.S. (15 Peters) 93, 107-114 (1841)).

Constructive notice of matters of public record is equivalent to actual notice (*W. A. H. Church, Inc. v. Holmes et al.*, 46 F. 2d 608, 611 (D.C. Cir. 1931); *Butte & Superior Copper Company, LTD. v. Clark-Montana Realty Company et al.*, 249 U.S. 12, 27 (1919)).

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after abandonment of the claim, the grantee takes no title (*Harkrader v. Carroll (supra)*; see *Moses v. Long-Bell Lumber Co.*, 206 Fed. 51 (5th Cir. 1913), holding that a grantee of an equitable interest in public lands takes only such title as his grantor had).

A hearing on the rejection of the patent application is requested for the appellant on the ground that the denial of such a hearing is tantamount to an attempt to invalidate the claims without a hearing of any kind. The basis of the request is not meritorious. The essential elements of due process are notice and an opportunity to defend (*Simon v. Craft*, 182 U.S. 427 (1901); *Cameron v. United States, supra*). Dwyer's failure to participate in the 1930 contest proceedings of which he had notice and in which he had an opportunity to defend the validity of the claims at a hearing does not entitle the appellant to another opportunity for a hearing on the same question. Neither the requirements of due process nor the departmental decisions and rules of practice cited on appeal require that this Department give an opportunity for a hearing on the rejection of a patent application for claims which were properly declared invalid many years ago. The fact that an opportunity for a hearing was lost by Dwyer's default does not furnish the basis for a claim that due process of law has been denied (*American Surety Co. v. Baldwin, supra*, 169; see *Opp Cotton Mills, Inc., et al. v. Administrator of the Wage and Hour Division of the Department of Labor*, 312 U.S. 126, 152 (1941)). In any event it would not benefit the appellant were a hearing on the rejection of the appellant's application to be held now. Nothing that contradicts the record in the 1930 proceeding in *United States v. Walter E. Dwyer* terminating with the default decision declaring the claim null and void could be alleged at any hearing on the patent application, since the record of those proceedings is binding on the appellant, the decision being no less conclusive because rendered by default (*Harshman v. Knox County*, 122 U.S. 306, 318 (1887)).

As the mining claims for which the appellant filed application for patent were properly declared null and void almost 30 years ago, the decision rejecting the application was correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,  
Deputy Solicitor.

**APPEAL OF SKAGGS LANDSCAPE GARDENS, INC.**

IBCA-166

*Decided April 25, 1960*

**Contracts: Additional Compensation—Contracts: Interpretation**

Under a grading contract which provides that the unit price for "excavation and borrow" is to cover the "furnishing" of subsoil, a contractor who is on notice that off-site material will be needed is not entitled to additional compensation for hauling in such material.

**Contracts: Interpretation—Contracts: Payments**

Where the schedule of a unit-price contract fails to include a bidding item for work which the specifications indicate is to be paid for as a separate item, the contractor is entitled to a fair and reasonable unit price for such work.

**BOARD OF CONTRACT APPEALS**

A timely appeal was taken under Contract No. 14-10-131-378 of March 4, 1958, against a letter decision of the Assistant Regional Director of May 29, 1958, and against the subsequent decision and findings of fact of the contracting officer of August 5, 1958.

The contract incorporated Standard Form 23A and required the appellant-contractor to furnish all materials, labor, equipment, and incidental supplies required for the planting, fine grading, and topsoiling of designated areas at the Visitor Center and Residence-Utility area, at Fort Frederica National Monument, St. Simons Island, Georgia. Appellant claims (1) \$1,042.50 for fill dirt, and (2) \$168.48 for two street washers. Appellant originally asked for a hearing but notified the Board by letter of October 9, 1959, in part, as follows:

We do not see any point for a long drawn out hearing and we do not believe witnesses would help us substantiate our claim. Therefore, we want to leave it entirely to the Board of Contract Appeals for their decision.

*Claim No. 1: Fill Dirt*

The amount of \$1,042.50 is claimed for 695 cubic yards of fill dirt that appellant-contractor brought to the job site in order to complete the project subgrade to the lines and grades shown on the plans. Appellant in letter of May 19, 1958, claims that:

\* \* \* we were instructed to haul into the job rather than move or borrow on the job. This item #22 in the Bid List called for "Excavation and Borrow" which does not mean furnish. There were 125 cubic yards of the 820 yards billed that were moved on the job that should be figured at \$1.00. The balance of this dirt that was necessary to haul in we feel like we are entitled to the additional \$1.50 per cubic yard, which just about takes care of the cost.

In its letter of October 9, 1959, appellant adds:

The item for top soil was the additional cost to us to have it hauled in as your specifications called for excavation and borrowing item No. 22, which was the same as a contract we had previously done at Fort Caroline in Jacksonville.

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On that job it was meant only to move the existing dirt. We took this job to mean the same. You can easily see that the price in our bid of \$1.00 per cubic yard could not possibly be enough to haul dirt in and grade.

Appellant attached to the letter a form entitled "UNIT PRICE SCHEDULE" for construction of SAC Airfield Paving-FY-58-Robins Air Force Base-Houston County, Georgia, which contains under Item No. 10, Clearing and Grading, sub-item e "Unclassified Borrow, Including Material and Haul (Off Site)," shows the "Estimated Quantity" as 910,000 C.Y. and includes space for "Unit Price" and for "Estimated Amount" of the item.

In the instant contract the relevant part of the "Item Bid Form" is item No. 22, which is entitled "Excavation and Borrow." The quantity was estimated by the National Park Service as 600 cubic yards and the bidder inserted \$1 as the unit price and the sum of \$600 under the total column.

The basis of payment for subgrade work is specified in paragraph 1 D of Section III of the Construction Provisions:

Payments shall be made at the contract unit price per cubic yard for "Excavation and Borrow" which price shall constitute full compensation for furnishing, excavating, loading, handling, depositing and spreading the subsoil, and for all labor, equipment, tools, and incidentals necessary to complete the item.

The progress schedule submitted by appellant-contractor under date of March 26, 1958, indicates an awareness that the furnishing and hauling in of some fill dirt would be required for the sub-grading. As the work had not then commenced, it would seem that this understanding must have been based on the contract drawings, the surface contours of the site, or other information available at the time of bidding.

The above cited provisions and circumstances are deemed sufficient to have put the appellant-contractor on notice that it was required by the contract to provide all fill material needed for the subgrading, and that it would be paid therefor only the unit price stated in item No. 22. This being so, it is immaterial that a like intention was expressed in different—and perhaps clearer—terms by the cited airfield paving contract. Hence, Claim No. 1 is denied.

*Claim No. 2: Two Street Washers*

Appellant-contractor claims the sum of \$168.48 for two street washers, which, it states, were not included in its contract price because they were not shown on the bid list. Appellant's letter of October 9, 1959, states:

Our claim was for one street washer<sup>1</sup> that according to our contract, you can easily see, was not in the bid items. It was plainly stated that no payment will be made except as indicated in the unit bid price. This item was not included.

An examination of the contract documents reveals beyond any doubt that the furnishing and installation of two street washers was a part of the contract requirements.

The portion of the specifications having to do with street washers included a provision (Paragraph 2E of Section III) which specifically states:

*Basis of Payment:* Payment shall be made at the contract unit price per street washer, furnished and installed, which price is to include all adaptors, fittings, equipment, labor, tools, and all other incidentals necessary to complete this item.

The "Item Bid Form," however, contained no item for street washers. Hence, in filling out that form appellant could not, and did not, insert a unit price for street washers. All other work to be performed under the contract was covered by unit price items in the bid form.

Thus, what we have here is a case where the Government, by drawing up a bid form at variance with the basis of payment specifically stated in the specifications, has created an ambiguity in the terms of the contract. Considering that the contract as a whole is on a unit-price basis, the interpretation that most comports with its spirit is that a fair and reasonable unit price was intended to be paid for the street washers. As aptly stated in another case where like rulings were made with respect to similar ambiguities:

This is a unit price contract and since the work was called for by the plans some means of compensation, under such a contract, should have been provided.<sup>2</sup>

This claim, therefore, is remanded to the contracting officer for the determination and allowance of a fair and reasonable unit price on account of each of the street washers furnished and installed by the appellant-contractor.

#### CONCLUSION

The appeal is denied as to Claim No. 1 and sustained as to Claim No. 2.

HERBERT J. SLAUGHTER, *Member.*

I concur:

PAUL H. GANTT, *Chairman.*

<sup>1</sup> The reference to one street washer is an obvious error since appellant furnished two street washers and asserted its claim for that number in the notice of appeal.

<sup>2</sup> *G. Hinteregger & Sons*, ASBCA Nos. 2583 and 2584 (November 4, 1955) (Claims Nos. 19 and 21).

## JOHN M. DEBEVOISE

A-28099

*Decided April 15, 1960\****Homesteads (Ordinary): Classification**

Where a report of field examination does not contain information upon which a determination can be made as to the suitability for agricultural purposes of land applied for under the homestead laws, the case will be remanded for further field examination.

**Mineral Lands: Determination of Character of—Homesteads (Ordinary): Mineral Lands**

Where land is shown to contain minerals in such limited quantities that their extraction would not justify the cost thereof, the land is not mineral in character so as to remove it from the operation of the nonmineral land laws.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

John M. DeBevoise has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated April 14, 1959, affirming the rejection by the manager of the land office at Los Angeles, California, of DeBevoise's application, filed on November 29, 1957, to make homestead entry on the NW $\frac{1}{4}$  sec. 5, T. 14 S., R. 2 W., S.B.M., California. The application was rejected because the land was found to be mineral in character and thus, under sec. 2302 of the Revised Statutes (43 U.S.C., 1958 ed., sec. 201), not subject to entry under the homestead laws (43 U.S.C., 1958 ed., sec. 161 *et seq.*).

DeBevoise disputes the classification of the land as mineral land. He concedes that there are minerals present in the land but contends that the land is not valuable for its mineral deposits. He recounts the history of mining activity on the land and states that, despite numerous attempts, no one has been able to develop a paying mine on the land. He attributes this to the low price paid for both gold and arsenic and the high cost of recovering either mineral due to its limited occurrence in the land.

In the light of the report of the field examination and the showing made by DeBevoise, I am not convinced that a mineral classification of this quarter section of land is warranted.

Prior to the receipt of the homestead application, the Geological Survey had been called upon for a report as to the value of this and adjacent land for minerals. In his report of September 20, 1956, the Director, Geological Survey, reported that the land "may be valuable" for arsenic and gold. The Director stated that the information at hand was not conclusive concerning the occurrence of those minerals

\*Not in chronological order.

and recommended that the Bureau of Land Management examine the land to determine whether the land is known to be valuable for minerals within the meaning of the public land laws. An examination of the land was made on October 14, 1957, in connection with a public sale application (Los Angeles 0140356). The examiner reported:

*Geologic and Mineral Character*

The rock formation on the land is composed of dark basic igneous rocks grading from fine grained basalt to coarse grained diorite. A mineralized zone is located on the E $\frac{1}{2}$  of the NW $\frac{1}{4}$  of Sec. 5. At least two vein structures consisting of veins of very hard silica strike north westerly and dip southerly. The vein appears to be from 6 to 8 feet in thickness. Scattered through the silica in irregular stringers without any apparent symmetry of direction or thickness are small seams containing arsenopyrite. The arsenopyrite contains values in gold and silver. There is no evidence of well defined fault action so it is assumed that mineral replacement took place along a weakened zone in the diorite. The mineral zones appear to be strong but there is insufficient development work to prove the extent of mineralization.

*Mine Workings and Sampling*

Mine workings consists of a drift southerly from the canyon level about 100 feet in length, a drift northerly from the same location 60 feet and a shaft of unknown depth located at the portal of the south drift. The workings are all in the mineralized zone.

A chip composite sample was taken across the vein in the south drift and the north drift. This sample assayed \$1.62 in gold and silver and 2.17% arsenic. A grab sample was taken from the ore in the old ore bin. This material assayed \$1.95 in gold and silver and 3.82% in arsenic. Based on the present price of arsenic oxide and 100% recovery the ore would have a value of about \$7.00 a ton.

No estimate was given as to the cost of recovering the ore but the statement was made that the land contains "significant quantities of arsenic." The opinion was expressed that it would probably be uneconomical to mine and process the ore at the present time.

The manager held that the arsenopyrite was found to contain deposits of gold, silver, and arsenic "in such quantities as to render such land mineral in character." In this, I believe the manager erred. The report of the field examination states only that there are irregular stringers containing small seams of arsenopyrite showing values in gold and silver. This, I believe, is not a sufficient showing upon which to remove the land from the operation of the nonmineral land laws, particularly where, as here, there is shown to have been rather extensive, but unsuccessful, mining operations on the land and the exposed minerals give no indication of substantial value.

This Department and the courts have long recognized that there are vast tracts of public lands in which minerals are found but not in such quantity as to justify expenditure in an effort to extract



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them. "It is not to such lands that the term 'mineral' in the sense of the statute [the homestead law] is applicable." *Diamond Coal and Coke Co. v. United States*, 233 U.S. 236 (1914), at p. 240.

In its determinations as to whether land is mineral or nonmineral in character, the Department has followed the standard set forth by the United States Supreme Court in *Davis's Administrator v. Weibbold*, 139 U.S. 507 (1891), at p. 519:

\* \* \* The exceptions of mineral lands from preemption and settlement and from grants to States for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant.

Thus, in *Cataract Gold Mining Co. et al.*, 43 L.D. 248 (1914), wherein the Department reviewed several previous decisions of the Department and of the courts, it was said:

In the case at bar you [Commissioner of the General Land Office] are, therefore, advised that if the evidence now before you, or such additional evidence as you may find desirable to secure, convinces you that the placer mining claims in question contain deposits of gold of such quantity, quality, and value as would warrant a prudent man in the expenditure of labor and means with a reasonable prospect of success in developing valuable mines, you are warranted in disposing of the lands under the mining laws, notwithstanding their possible or probable value for or in connection with the development of electrical power. (P. 254.)

And, where it has found that the mineral values shown to exist on the land "could not be worked at a cost which would warrant mining operation" it has held that the land is not subject to disposal under the mining laws. *United States v. Bullington (On Rehearing)*, 51 L.D. 604 (1926), at p. 607.

It is not believed that the showing made by the examination of the land in question meets the time-honored test that the known conditions must be "plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end." *Diamond Coal and Coke Co. v. United States*, *supra*, at p. 240.

The Department has not, to my knowledge, classified land as mineral land, subject only to disposition under the mining laws, merely because the land contained minerals, where, in the opinion of the examiner, those minerals could not be extracted at a profit.

In *United States v. State of Utah*, 51 L.D. 432 (1926), cited by the Director, the State contended that the land there in question was not mineral in character because no iron ore had even been mined or

shipped from the land and because there was no local market for the ore at the date when the State grant would have attached had the land been nonmineral. The Department said that to accept the circumstances pointed out by the State as criteria for determining the mineral character of land would be to make the determination of the character of the land dependent upon local economic and industrial conditions. However, nothing in that case suggests that land is properly classified as mineral land, and thus excepted from the operation of the nonmineral land laws, upon a mere showing that minerals are present in the land. There, large beds of ore were disclosed and the testimony showed that the same type of deposit was mined and shipped from nearby lands and manufactured into various articles of commerce and that the existence of the deposit on the land in question, its mineable quality, and vast extent were known in the community before the State's right could have attached.

Nor do I believe that *Freeman v. Summers, United States, Intervener (On Rehearing)*, 52 L.D. 201 (1927), cited by the Director for the proposition that evidence that at the present time the land cannot be mined profitably does not establish that the classification of land as mineral is erroneous, is applicable to the present situation. No question of classification was involved in that case. There, protests were filed against homestead entries by mining claimants, who established that they had made discoveries of valuable mineral deposits within the limits of their claims prior to the allowance of the homestead entries. While the case turned on whether a discovery of a valuable deposit of oil shale had been made within the limits of the claims, the Department said (at p. 206) :

It is not necessary, in order to constitute a valid discovery under the general mining laws sufficient to support an application for patent, that the mineral in its present situation can be immediately disposed of at a profit. \* \* \*

The evidence in this case shows that in this particular area of Colorado the lands contain the Green River formation, and that this formation carries oil shales in large and valuable quantities; that while the beds vary in the richness of their content, the formation is one upon which the miner may rely as carrying oil shale which, while yielding at places comparatively small quantities of oil, in other places yields larger and richer quantities of this valuable mineral.

Therefore, while the Department has held that the determination of the mineral character of land is not dependent upon local economic and industrial conditions and that in the case of oil shale one may be entitled to a mineral patent even though unable to show that the mineral in its present situation can be immediately disposed of at a profit, those factors, taken alone, are not sufficient to establish the mineral character of land.

Accordingly, on the basis of the present record, I find that the

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NW $\frac{1}{4}$  sec. 5, T. 14 S., R. 2 W., S.B.M., California, was improperly classified as mineral land.

However, the fact that the information contained in the present record will not support a classification of the land as mineral land does not mean that DeBevoise's homestead application is subject to allowance. The land for which he applied was, with all other vacant, unreserved, and unappropriated land in the State of California, withdrawn from settlement, location, sale or entry and reserved for classification pending determination of the most useful purpose to which the land might be put and for conservation and development of natural resources by Executive Order No. 6910 of November 26, 1934. Before the withdrawn land may be entered under the homestead law, it must be classified as suitable for disposition under that law and opened to homestead entry (sec. 7 of the Taylor Grazing Act, as amended; 43 U.S.C., 1958 ed., sec. 315f).

While it seems unlikely that the land is suitable for agricultural purposes in view of its geologic formation, and while it may be that the land should be retained in Federal ownership (cf. *Nelson A. Geritula*, 64 I.D. 225 (1957)), there is no basis in the present record for the exercise of the discretion vested in the Secretary of the Interior to classify the land as being unsuitable for homestead entry. Although there is an indication in the present record that three previous homestead applications for the land have been rejected,<sup>1</sup> there is nothing to indicate the basis on which those actions were taken, since the reports of field examination are not included with the present record. If those reports show that the land is not suitable for agricultural entry, DeBevoise's homestead application should be rejected. Otherwise, there must be another field examination made of the land to determine whether the land is such as should be disposed of under the homestead laws.

Accordingly, the decision of the Director of the Bureau of Land Management that the land is mineral in character is reversed and the case is remanded to the Bureau for further action consistent with this decision.

ROGER ERNST,  
*Assistant Secretary.*

JOHN D. ARCHER, STEPHEN P. SMOOT

A-28174

*Decided May 3, 1960*

#### Mining Claims: Power Site Lands

A notice of location of a placer mining claim filed pursuant to section 4 of the Mining Claims Rights Restoration Act is not to be rejected because the

<sup>1</sup> Los Angeles 0184507, 0109553, and 0125229.

person filing it has not submitted proof of ownership of the claim since neither the statute nor regulations require that such proof be submitted at the time of filing; but before the filing is accepted the person may be required to submit a showing that he is the owner of the claims or authorized to make the filing on behalf of the owner.

### Rules of Practice: Appeals: Standing to Appeal

Persons who file notices of location of placer mining claims within a powersite and who are named in the manager's decision may appeal the rejection of the notices because they have been aggrieved by the rejection, even though they have not presented proof of ownership of the claims.

### Mining Claims: Withdrawn Land—Mining Claims: Hearings

Mining claimants who assert that placer claims within the boundaries of the Navajo reservation are not on Indian land because they are relocations of old locations which were excluded from the reservation will be afforded an opportunity to present evidence of the facts upon which they rely to exclude the claims from the reservation.

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

John D. Archer and Stephen P. Smoot have appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated May 21, 1959, which dismissed their appeals from several decisions of the manager of the land office at Salt Lake City, Utah, rejecting their notices of location of placer mining claims within powersites in San Juan County, Utah, filed pursuant to the Mining Claims Rights Restoration Act of 1955 (30 U.S.C., 1958 ed., secs. 621-625).

On April 1, August 19, September 9, and October 16, 1958, Archer and Smoot severally presented at the land office notices showing the location of 14 placer mining claims on February 5 and 6, July 1 and 2, and August 14 and 26, 1958. They stated that the claims for which they filed copies of location notices are relocations of certain original mining claims designated by name. Neither alleged that the claims are within a powersite but both stated that the "claims are being filed pursuant to Public Law 359." Each of the notices lists eight locators none of which are the same as the persons who filed the notices.

The Mining Claims Restoration Act of 1955, which is Public Law 359 of the 84th Congress, provides in applicable part:

Sec. 2. All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes \* \* \*. (30 U.S.C., 1958 ed., sec. 621 (a).)

\* \* \* \* \*

Sec. 4. The owner of any unpatented mining claim located on land described in section 2 of this Act shall file for record in the United States district land office of the land district in which the claim is situated (1) within one year after the effective date of this Act [August 11, 1955], as to any or all locations heretofore

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made, or within sixty days of location as to locations hereafter made, a copy of the notice of location of the claim \* \* \*. (30 U.S.C., 1958 ed., sec. 623.)

It is apparent that Archer and Smoot filed their notices of location within the period permitted for that purpose.

The manager found that all of the claims are within the boundaries of the Navajo Indian Reservation as established by Executive Order No. 324A dated May 15, 1905, and therefore not opened to mineral location by the statute relied upon. He held the four claims described in the notices designated as 1588, 1589, 1590, and 1591 to be null and void. As to the remaining 10 claims, he merely rejected the notices on the ground that land within an Indian reservation is not public land of the United States and not subject to mining location.

On appeal to the Director of the Bureau of Land Management, Archer and Smoot alleged that their claims are valid because located on lands upon which placer mining claims had been located before the establishment of the Indian reservation and which were excluded from the reservation by operation of law but which have since become subject to relocation because of the failure of the original locators to comply with the requirements for assessment work. They contended that the manager was without authority to adjudicate title to the claims because the statute gives the Secretary of the Interior authority to inquire into the claims only for the purpose of determining matters of conflicting use of the land.

The Acting Director stated that Archer and Smoot had failed to establish that they are locators, purchasers, or attorneys for the mining claimants in whose names the claims were located and that because they had thus failed to show that they were adversely affected by the manager's decisions or were representing persons so affected their appeals could not be sustained. He, therefore, dismissed the appeals.

In their appeal to the Secretary, Archer and Smoot allege that they are the purchasers of the mining claims and that they have fully complied with the Mining Claims Rights Restoration Act of 1955 by filing copies of the notices of location. They also assert the same basis for the alleged validity of their claims as on their appeal to the Director of the Bureau of Land Management. The Navajo Tribe of Indians has intervened and filed a brief contending that the claims are on Indian land; that Indian land is not subject to mining location under the mining laws; and that Archer and Smoot have not proved the validity of their claims as they are required to do under the public land laws.

I think that the Acting Director erred in dismissing the appeals to him. The effect of the dismissal, if it became final, would be to leave the manager's decisions in effect. Yet the ground upon which the

Acting Director based his dismissal, that the appellants had not shown or established that they are the owners of the mining claims or authorized to act for such owners, went not only to the taking of the appeals to the Director but also to the filing of the notices of location. If the appellants had no standing to appeal from the manager's decisions for the reason assigned, they necessarily had no standing to file the notices of location for the same reason. To be consistent, therefore, the Acting Director should not only have dismissed the appeals but also modified the manager's decisions to hold that the notices of location were rejected for the reason that they were not shown to have been filed by the owners of the claims or by persons authorized by the owners to do so.

The fact is, however, that the manager assumed that Smoot and Archer had authority to file the notices, either as the owners of the claims or as agents for the owners. He named either Smoot or Archer in each of his decisions as the one who had filed the notices and the decisions bear one or the other of their names. They were, therefore, parties aggrieved by the manager's decisions and had a right of appeal to the Director. 43 CFR, 1958 Supp., 221.1.

As stated above, if the Director had determined that one who files a notice pursuant to the Mining Claims Rights Restoration Act must submit evidence of his ownership of the claim, he should have so found and rejected the filing on that basis. However, since neither the statute nor the pertinent regulations (43 CFR, 1958 Supp., 185.172-185.186) require that proof of ownership must be filed with the notice of location, the failure to submit such proof cannot be held to deprive a purchaser of a mining claim of his right to file under the act. If there is doubt that the one who files is the owner of the mining claim described in the notice of location, the Secretary, or his delegate, may call upon him to submit proof of his qualifications. Not until an opportunity has been given to make a submission should his notice of location be rejected. Such a step was not taken here; consequently, it was error for the Acting Director to dismiss the appeals.

In this situation, the normal procedure would be to remand the case to the Director for consideration of the merits of the appeals from the manager's decision. However, a consideration of the case files convinces me that a more expeditious and effective disposition of the case can be made by exercising the supervisory authority of the Secretary and considering the correctness of the manager's decisions at this time. The basis of those decisions was that the notices of location should be rejected (and in four cases the claims declared null and void) because the lands involved are within the exterior boundaries of the Navajo reservation.

By Executive order of May 17, 1884, certain public land in Arizona

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was set apart as an Indian reservation and added to the Navajo reservation. Executive Order 324A of May 15, 1905, which superseded Executive Order No. 302A of March 10, 1905, added further land to the reservation. Each of the Executive orders contained a proviso as follows:

*Provided*, That any tract or tracts within the region of country described as aforesaid which are settled upon or occupied, or to which valid rights have attached under existing laws of the United States prior to the date of this order, are hereby excluded from this reservation.

In an opinion dated March 8, 1901 (*Navajo Indian Reservation*, 30 L.D. 515), Assistant Attorney General Van Devanter stated that as a result of the proviso lands included in valid mining locations at the date of the Executive order of May 17, 1884, never became part of the reservation, but remained part of the public domain, subject to the operation of the laws affecting or providing for the disposal of public lands. The same proviso in the 1905 Executive order, would, of course, have the same effect.

One of the consequences of land being in a valid mining claim at the date the reservation was extended and thus excluded from the reservation is that it is subject to relocation if the original locator has failed to perform the annual assessment work. 30 U.S.C., 1958 ed., sec. 28. The appellants apparently base their rights to the land on the allegation that they are purchasers of claims relocated by their grantors upon lands which were in valid mining claims on May 15, 1905.

Thus, the fact that the lands were within the exterior boundaries of the Navajo reservation is not of itself sufficient to invalidate the claims. To find the claims invalid because of their location in the reservation, it would be necessary to hold either that the original mining claims were invalid or that, having been valid, they were abandoned either before or after the extension of the reservation and thereupon fell into the reservation. Although the opinion of the Assistant Attorney General, *supra*, stated that land covered by valid mining claims on the date the reservation was extended was excluded from it, it is not necessary to examine that question now (see Director's decision, approved by the Under Secretary, in *Marilyn H. Smoot*, Utah 025716, January 7, 1958), because under the view most favorable to the appellants, the validity of the original claims must be established.

Accordingly, the manager's decisions which were based upon the concept that lands within the Navajo reservation are not open to mineral entry are vacated.

This leaves the question as to what should be done with the appellants' notices of location. As we have seen, section 4 of the Mining

Claims Rights Restoration Act calls for the filing of notices by the "owner" of a claim. When the notices of location were filed by the appellants, it was not clear whether some of them were filed by them as agents for the locators named in the notices or as transferees of the claims. The appellants have now asserted that they are purchasers of all the claims. Before the notices are accepted for filing, they should be called upon to submit satisfactory evidence of their complete ownership of all the claims.

Assuming such evidence is filed, the question then is whether the mining claims are valid in view of their location within the Navajo reservation. As we have seen, the answer depends upon whether the land in the claims was open to mineral location when the claims were located, which in turn depends upon the validity of the original claims which the appellants allege have been relocated.

The appellants, however, contend that this question is not before the Secretary and that he should consider, in accordance with section 2(b) of the act of August 11, 1955 (30 U.S.C., 1958 ed., sec. 621(b)), only whether placer mining operations would substantially interfere with other uses of the land in the placer mining claims. While neither the statute nor regulations provide for determining the validity of a mining claim before the Secretary proceeds under section 2(b), I think it is clear that the entire act is directed at *valid* mining claims. Certainly there can be no notices of location without regard to the status of the land covered by the mining locations. For example, if the public land records indicated that the land had been patented or otherwise disposed of it would be pointless for the Secretary to make a determination under the act of August 11, 1955.

In this case the lands described in appellants' notices of location are within the limits of the Navajo reservation and would not be available for mineral location unless they were excluded from the reservation. In other words, the possibility exists that the land has been removed from location under the mining laws.

The Navajo Tribe of Indians, in its brief as intervenor alleges that some of the lands described in the notices of locations were never in a powersite withdrawal, that the old claims are so vaguely described that they cannot be located on the ground, that the new locations do not coincide with the old locations, and that the appellants have adduced no evidence that the old claims were valid on May 10, 1905.

While the first objection, if accurate, would obviate the necessity for proceedings under the act of August 11, 1955, it would not, of itself, impair the validity of the appellants' relocations. The other issues are also factual ones.

In their brief to the Director the appellants asked that they be given an opportunity at a hearing to prove the validity of both the



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old claims and their relocations. The Navajo Tribe has also indicated its willingness to appear at a hearing.

Accordingly, it is directed that, if the appellants prove their ownership of the claims, contest proceedings be instituted against the placer mining claims involved in this appeal on the ground that they were located on land not open to location under the mining laws of the United States on the date of location because the land had been withdrawn from mineral location and set apart as an Indian reservation. The Navajo Tribe is to be given notice of contest and permitted to intervene in the proceedings.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is reversed and the case is remanded for further proceedings consistent herewith.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

**RICHARD M. HATCH ET AL.**

**A-28209**

*Decided May 4, 1960*

**Public Sales: Preference Rights**

The assertion by a group of individuals of a single preference right to purchase land offered at public sale is not entitled to recognition where it is shown that one member of the group does not own contiguous land and another member failed to submit timely proof of ownership of contiguous land.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Richard M. Hatch, Blanche K. Moore, Walter M. Kennedy, Pearl Kennedy, and Troy P. Kennedy have appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated June 18, 1959, affirming the rejection by the manager of the Santa Fe, New Mexico, land office, of their preference-right claim to purchase land offered for public sale pursuant to section 2455 of the Revised Statutes, as amended (43 U.S.C., 1958 ed., sec. 1171).

The sale was held on September 26, 1957, at which time three sealed bids were received: that of Robert B. Foutz, the applicant for the sale, for \$2,550, the appraised price of the property; that of the appellants, also for the appraised price of the property; and that of Roy Owen, for \$5,697. On October 1, 1957, the manager declared Owen to be the high bidder and suspended action for 30 days, pursuant to that provision of the public sale law which provides:

That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants  
\* \* \*

In his decision of October 1, 1957, the manager called to the attention of the bidders the necessity for submitting timely proof of ownership of contiguous land should they desire to exercise preference rights in connection with their bids. 43 CFR, 1954 Rev., 250.11.

On October 9, 1957, the appellants claimed their preference right and submitted individual certificates of ownership of land and a check which, together with the check they had submitted with their original bid, equaled the high bid for the land. Foutz asserted his preference right, submitted a certificate of ownership of land, and met the high bid on October 23, 1957. Owen did not assert a preference right.

By decision dated February 24, 1958, the manager rejected the Owen bid and considered the two preference-right claims asserted within the 30-day period; the one by Foutz and the other by the Hatch-Kennedy group. He found that Foutz had submitted a certificate of ownership of contiguous land and that while Richard M. Hatch, Blanche K. Moore, and Pearl Kennedy had likewise submitted certificates of ownership of individual tracts contiguous to the land offered for sale the certificates of ownership submitted by Walter M. Kennedy and Troy P. Kennedy did not show ownership of contiguous land. He held that, since the preference right had been asserted by the Hatch-Kennedy group under a single bid and as there was no showing of common ownership of any of the land contiguous to the land offered for sale, the ownership of individual tracts by three members of the group would not support the single bid of the five individuals.

In their appeal to the Director, the Hatch-Kennedy group, admitting that Troy P. Kennedy does not own contiguous land, stated that through inadvertence proof of ownership of contiguous land by Walter M. Kennedy had not been submitted within the 30-day period but that Walter M. Kennedy had owned property contiguous to the land offered for sale at all material times, and that such proof had later been submitted. They stated that, with the exception of Richard M. Hatch, the appellants are members of the same family and that prior to the date of sale, Hatch, Blanche K. Moore, Pearl Kennedy, and Troy P. Kennedy had executed assignments to Walter M. Kennedy, authorizing him to submit a single bid.<sup>1</sup> They admitted,

<sup>1</sup> The appellants submitted the so-called assignments. That signed by Hatch, and titled "Agreement," after reciting that Hatch is the owner in fee simple of land adjoining that to be sold on September 26, 1957, reads:

"Hereby agree to assign my priority to Walter M. Kennedy, in order that he may

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however, that the bid submitted was a joint bid and that the assertion of the preference right was a joint assertion.<sup>2</sup> They contended that the land owned by the group adjoins the land offered for sale over an area approximately 10 times more than the area by which the property of Foutz adjoins that land and that it would be inequitable and contrary to the law and regulations to award the land to the applicant Foutz. They stressed the fact that Walter M. Kennedy had an assignment from the other applicants and appellants at the time of sale and took occasion to question some of the statements in the Foutz application with respect to his need for the land and his use of his adjoining land. They submitted affidavits in support of their contentions. They contended that under that provision in the departmental regulation (43 CFR, 1954 rev., 250.11(b)(3)):

\* \* \* If equitable considerations dictate, all of the subdivisions may be awarded to one of the claimants.

the entire tract should be awarded to them. At a later date, after Foutz had answered their appeal and also submitted affidavits respecting his use of his adjoining land, the Hatch-Kennedy group requested that a hearing be held in the matter. They asserted their belief that there is a substantial controversy as to the factual situation involved which should be presented at a hearing.

The Acting Director found it unnecessary to determine whether the appellants were acting individually or as a group in the assertion of the preference right, holding that the United States and other preference-right claimants must not be prejudiced by ambiguous and conflicting assertions as to in what capacity the appellants were in fact asserting a preference right to purchase at the public sale. He denied their request for a hearing on the ground that there was little likelihood that a hearing would develop facts decisive of the issues involved.

In its present appeal the Hatch-Kennedy group repeats its attack on the assertions made by Foutz as to his need for the land and his use of his contiguous land and urge that equitable considerations, which they argue are all in their favor, govern the final award of the land.

Before the Hatch-Kennedy group is entitled to equitable consideration in the award of the land, it must first be determined that the group is a proper preference-right applicant. This involves a con-

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submit a single unit bid on the above described land. Title from Government to be in the name of Walter M Kennedy, who is putting up money for bid."

The "Agreement" signed by Blanche K. Moore, Pearl Kennedy, and Troy Kennedy is similar, although there is no statement that Walter M. Kennedy is supplying the money. The statement is made therein:

"\* \* \* Title in any land awarded to be invested in Walter M Kennedy."

<sup>2</sup> The bid submitted was signed by the five individuals and the assertion of preference right was made in the name of the five individuals and signed by their attorney.

sideration of whether the group claim is entitled to recognition under the statute where it is shown that one of the members of the group is not entitled to any preference right because he owns noncontiguous land and another member of the group forfeited any claim which he may have had by his failure to submit timely proof of his ownership of contiguous land. Essentially, the question is whether a single preference-right claim can be jointly made by an owner of contiguous land and an owner of noncontiguous land.<sup>3</sup>

In my opinion, such a claim is not within the contemplation of the statute. The public sale law grants a preference right of purchase only to owners of land contiguous to that offered for sale. An owner of noncontiguous land has no preference right. To honor a joint bid made by an owner of contiguous land and an owner of noncontiguous land would be to confer upon the latter a benefit to which he is not entitled under the statute. It is no answer to say that to reject such a bid would be to deprive the owner of the contiguous land of his preference right. He would be deprived but only because he voluntarily chose to associate with him one who is not entitled to a preference right. Thus, the three members of the Hatch-Kennedy group who do own adjoining land and who timely filed their proof of such ownership could have applied individually to exercise their rights and such rights could not have been denied. But they did not choose to assert their preference rights as individual owners of contiguous land; rather, they waived their rights in favor of a single assertion of a preference right by the group, one member of which admittedly did not own adjoining land.<sup>4</sup>

Therefore, it must be held that the preference right asserted by the Hatch-Kennedy group is not entitled to recognition.

This conclusion is not to be taken as a ruling that, if each member of the Hatch-Kennedy group had individually owned contiguous land and had submitted timely proof of such ownership, a single joint bid by the group would have been acceptable under the public sale law. This question is not before me and no view on it is expressed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

<sup>3</sup> One who owns contiguous land but fails to submit timely proof of ownership may be considered as occupying the same status as one who owns noncontiguous land.

<sup>4</sup> Probably each owner of contiguous land did not submit an individual claim because he would have had to submit the amount of the high bid. With the joint offer only one payment was submitted.

## CLAIM OF HOWARD D. GALLENTINE

T-980 (Ir.)

*Decided May 5, 1960*

### Irrigation Claims: Water and Water Rights: Seepage

Where seepage water from sources other than Bureau of Reclamation facilities was sufficient alone to cause damage to property, the owner thereof cannot be reimbursed from funds made available under the Public Works Appropriation Act, 1960.

#### ADMINISTRATIVE DETERMINATION

Howard D. Gallentine,<sup>1</sup> Buffalo Gap, South Dakota, has filed a claim against the United States in the amount of \$5,100<sup>2</sup> for compensation because of damage to his lands in the E $\frac{1}{2}$  sec. 7, and the NW $\frac{1}{4}$ NW $\frac{1}{4}$  sec. 8, all in T. 6 S., R. 9 E., Black Hills Meridian, County of Custer, State of South Dakota, allegedly caused by seepage conditions in the Angostura Unit, Missouri River Basin Project, Bureau of Reclamation, and because of damage to his cattle, which either slipped or fell upon ice in the above areas formed as a result of such seepage conditions during unspecified winter seasons.

The claim exceeds the jurisdictional limitation of \$2,500 in the Federal Tort Claims Act (28 U.S.C., 1958 ed., sec. 2671 *et seq.*). Hence, it can be considered only under the provisions of the Public Works Appropriation Act, 1960 (73 Stat. 491, 496), which authorizes the payment of claims for damage to or loss of property arising out of activities of the Bureau of Reclamation.

In letter of March 25, 1958, addressed to the Bureau of Reclamation, the claimant states that he is the owner of the above-described lands; that for some time prior thereto there had been seepage from canals and ditches of the Angostura Irrigation District onto and under such lands, causing damage thereto; that because of the seepage he would be required to drain the lands; and that in his opinion "these damages to my [his] land have been caused entirely by the Angostura Irrigation District and the Bureau of Reclamation."

Additionally, the claimant, in the affidavit which accompanied his counsel's letter of July 22, 1959,<sup>3</sup> stated in part:

\* \* \* since a date immediately subsequent to the development of the Angostura Irrigation facilities and the supplying of irrigation water to those units within said Project that a portion of deponent's property, and in particular the South-

<sup>1</sup>Although he is sometimes referred to as Howard D. Gallentine, his correct name appears to be Howard D. Gallentine.

<sup>2</sup>Although the two items of \$4,200 and \$900, comprising the claim, total \$5,100, the letter of claimant's counsel to the Project Manager, Huron, South Dakota, dated July 22, 1959, refers to it as a claim in the amount of \$5,300. In his letter of April 7, 1960, addressed to this office, he, however, refers to the claim as being one in the amount of \$5,100.

<sup>3</sup>See note 2 *supra*.

east Quarter (SE $\frac{1}{4}$ ) of Section Seven (7),<sup>4</sup> has continuously been subjected to seepage from irrigation facilities of Units of the said Project to an extent of approximately four and one-half feet per second from not less than four sources of seepage, which said seepage and irrigation waters have rendered useless approximately forty (40) acres of grazing land<sup>5</sup> as above described; that the area affected by said seepage is of little use to your affiant during the grazing season in that same is continually boggy and portions thereof are at times under approximately one foot of water, and said area during the winter season is frozen and remains in an icy [sic] and dangerous condition;

That your affiant has suffered damage to cattle slipping or falling upon the ice \* \* \* in the approximate amount of Nine Hundred Dollars (\$900.00), and has otherwise been damaged in the amount of Four Thousand Two Hundred Dollars (\$4,200.00) through loss of the use of said area, and as cost of reclaiming same;

That your affiant \* \* \* verily believes that in order to correct the said situation and reclaim the above mentioned grazing lands, that it will be necessary to construct approximately three-quarters of a mile of ditch or three-quarters of a mile of two foot drainage tile in order to convey said seepage water to existing natural drainage \* \* \*.

However, the record discloses that during the early part of August 1959, Bureau of Reclamation engineers inspected the areas here involved, which had been used for pasture, and observed that a good growth of grass and clover "was established in the upper portion of the seeped area located in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ , Sec. 7, and that a crop of hay was cut on the lower portion of the seep."<sup>6</sup>

In a memorandum dated October 7, 1959, the Bureau's Regional Director at Billings, Montana, advanced several reasons for the denial of the claim, including the following: (1) the deep percolation of rain falling on lands situated on the terrace above the seepage areas and the application of irrigation water to such lands; (2) the existence of at least two springs in a portion of such areas, as shown on Plate 1 of United States Geological Survey Circular No. 54 entitled "Geology and Ground-Water Hydrology of the Angostura Irrigation Project, South Dakota" (July 1949); and (3) when the increased flows and seepage were first reported to Bureau employees, irrigated lands within the Angostura Irrigation District then owned by the claimant

<sup>4</sup> The Acting Project Manager of the Missouri-Oahe Projects Office at Huron, South Dakota, had a search made of the land records in the Office of the Register of Deeds in and for Custer County, South Dakota, for the purpose of determining ownership of the lands allegedly damaged. His memorandum to the Bureau's Regional Director at Billings, Montana, dated September 14, 1959, would indicate that title to the E $\frac{1}{2}$  sec. 7, T. 6 S., R. 9 E., Black Hills Meridian, is vested in Howard D. Gallentine and Anita M. Gallentine, presumably his wife. In view of my decision in this matter, it is deemed unnecessary to resolve the interest of Anita M. Gallentine in the property.

<sup>5</sup> The Project Manager in a memorandum dated October 13, 1958, to the Regional Director states, however, that the "ponded" area consists of 7 acres which lie within the irrigation district and 3.8 acres which lie outside of it and that they lie lower than the irrigated lands on farm units 76, 78, and 107.

<sup>6</sup> The Board of Directors of the Angostura Irrigation District, in a letter to the Project Manager dated August 8, 1959, expressed the opinion that "the benefits derived from such seepage are in excess of any damages that may have occurred."

May 5, 1960

were the closest lands to the seeped areas and represented a large proportion of the lands contributing to the seepage flows.

The following table summarizes the available hydrological data relating to the following-numbered farm units *adjacent* to claimant's seeped areas for the calendar years 1957 and 1958, and the greater part of the calendar year 1959:<sup>7</sup>

	Farm Unit 76 (108.41 irri- gated acres)	Farm Unit 107 (25.68 irri- gated acres)	Farm Unit 78 (136.02 irri- gated acres)
1957			
Irrigation water delivered.....	<i>Acre feet</i> 317.2	<i>Acre feet</i> 66.8	<i>Acre feet</i> 404.0
Rainfall.....	188.3	44.6	236.2
Total.....	505.5	111.4	640.2
Estimated consumptive use <sup>1</sup> .....	238.5	56.5	299.2
Excess water.....	267.0	54.9	341.0
1958			
Irrigation water delivered.....	70.0	94.0	245.8
Rainfall.....	179.2	42.5	224.9
Total.....	249.2	136.5	470.7
Estimated consumptive use <sup>1</sup> .....	238.5	56.5	299.2
Excess water.....	10.7	80.0	171.5
1959			
Irrigation water delivered <sup>2</sup> .....	368.0	109.8	389.4
Rainfall <sup>3</sup> .....	134.8	31.9	169.1
Total.....	502.8	141.7	558.5
Estimated consumptive use <sup>1</sup> .....	238.5	50.0	272.0
Excess water.....	264.3	91.7	286.5

<sup>1</sup> Computed by Lowry-Johnson method.

<sup>2</sup> Through August 31.

<sup>3</sup> Through October 1 as recorded by the United States Weather Bureau Station at Buffalo Gap, South Dakota.

The foregoing summarization shows quite clearly that, during the periods above mentioned, after allowing for contributions by irrigation and rainfall, and depletions by consumptive use, there remained

<sup>7</sup> As the formal claim was received by the Bureau on July 23, 1959, it has been determined that an analysis of available hydrological data for these periods would afford an appropriate basis for this determination.

excess water aggregating approximately 1,567.6<sup>8</sup> acre feet from the three farm units *adjacent* to the seeped areas, without taking into consideration excess water from other farm units. Hence, I conclude that such quantity of excess water would have been sufficient to cause the seepage conditions on claimant's lands without contributions of water from other sources.

Favorable consideration of a claim under an appropriation act such as the one here involved is dependent upon a finding that the damages complained of were the direct result of some non-tortious action on the part of personnel of the Bureau of Reclamation.<sup>9</sup> Consequently, the record must show that seepage water from project facilities alone, without contribution from other sources, was sufficient to cause the damages. If, however, water from sources other than such facilities was sufficient alone to cause the damages, any seepage contribution from canals or laterals must be considered as an indirect cause thereof.<sup>10</sup>

Based on the record, I conclude that the damages have not been established as being the direct result of non-tortious activities of employees of the Bureau of Reclamation. Accordingly, the claim is not cognizable under the Public Works Appropriation Act, 1960.

#### DETERMINATION

Therefore, I determine that

- (a) Howard D. Gallentine has suffered no damage for which he is entitled to compensation under the provisions of the Public Works Appropriation Act, 1960 (73 Stat. 491, 496); and
- (b) the claim of Howard D. Gallentine must be denied.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

FRANK M. MCGINLEY

A-28244

*Decided May 12, 1960*

#### Oil and Gas Leases: Lands Subject to

Lands withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and reserved for use by the Department of the Air Force, are not available for leasing under the Mineral Leasing Act of 1920, and an oil and gas lease offer for such lands is properly rejected.

<sup>8</sup> This amount was arrived at by adding the nine items of excess water shown in the table.

<sup>9</sup> *Northern Pac. Ry. Co.*, T-560 (Ir.) (May 10, 1954), and administrative determinations cited therein.

<sup>10</sup> *Ralph E. Osborne*, T-832 (Ir.) (September 17, 1959); *Walter S. Stimpson*, T-933 (Ir.) (April 7, 1959).



May 12, 1960

### Secretary of the Interior—Withdrawals and Reservations: Authority to Make

Section 6 of the act of February 28, 1958, did not diminish the authority of the Secretary of the Interior to withdraw public lands under his control and jurisdiction from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, for the benefit of the Department of Defense.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Frank M. McGinley has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated August 3, 1959, which affirmed a decision of the Chief, Minerals Adjudication Unit, Anchorage land office, dated January 15, 1959, rejecting in part his noncompetitive oil and gas lease offer, Anchorage 024368, filed June 23, 1953.

In a decision dated February 12, 1957, the manager of the Anchorage land office suspended action on the appellant's application insofar as it pertained to the SW $\frac{1}{4}$ NE $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$  and NW $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 29, T. 5 S., R. 13 W., Seward Meridian, Alaska, a total of 320 acres, for the reason that on December 28, 1954, the United States Army had filed a request for withdrawal of this land for military purposes. The manager stated that the withdrawal application specifically requested that the lands be withdrawn from mineral leasing. Subsequently, the decision of the Chief, Minerals Adjudication Unit, rejected the appellant's application as to the land described on the ground that Public Land Order No. 1752, signed November 12, 1958,<sup>1</sup> had withdrawn the land from all forms of disposition, including the mineral leasing laws, pursuant to the Army's request.

In his appeal the appellant contends that the suspended portion of his lease offer was subject to the provisions of section 6 of the act of February 28, 1958 (43 U.S.C., 1958 ed., sec. 158), which provides:

All withdrawals or reservations of public lands for the use of any agency of the Department of Defense, except lands withdrawn or reserved specifically as naval petroleum, naval oil shale, or naval coal reserves, heretofore or hereafter made by the United States, shall be deemed to be subject to the condition that all minerals, including oil and gas, in the lands so withdrawn or reserved are under the jurisdiction of the Secretary of the Interior and there shall be no disposition of, or exploration for, any minerals in such lands except under the applicable public land mining and mineral leasing laws: *Provided*, That no disposition of, or exploration for, any minerals in such lands shall be made where the Secretary of Defense, after consultation with the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved.

The appellant contends that the effect of the proviso is that exploration for or disposition of minerals will be disallowed only in instances

<sup>1</sup> 23 F.R. 8982 (November 19, 1958).

where the Secretary of Defense, after consultation with the Secretary of Interior, determines that such exploration or disposition would be inconsistent with the military use of the withdrawn lands. He states that the clear implication is that a military withdrawal will not be allowed to "interfere" with mineral leasing by the Secretary of the Interior unless the Secretary of Defense has consulted with the Secretary of the Interior with regard to the matter and unless after such consultation the Secretary of Defense has determined that mineral leasing is inconsistent with the military use of the lands.

If the appellant's argument is correct it is necessary to conclude that the intent of Congress in enacting section 6 of the act of February 28, 1958, was to open to mineral leasing all lands "heretofore or hereafter" withdrawn for the use of the Department of Defense, except where the Secretary of Defense conferred with the Secretary of Interior and determined that mineral leasing would be inconsistent with its military use or in other words, that the Secretary of the Interior can no longer withdraw lands in a military reservation from appropriation under the mineral leasing laws.

I see no logical basis for such a conclusion, nor does it appear that the intent of Congress in enacting section 6 of the act was to so limit the authority to make withdrawals.

The purpose of section 6 is clearly set forth in the report of the Senate Committee On Interior and Insular Affairs on H.R. 5538, 85th Congress, which became the act of February 28, 1958, wherein it is stated at pages 72-73:

6. Section 6: Finally, the reported measure provides, in section 6, that all minerals in withdrawn or reserved public lands—except lands withdrawn or reserved specifically as naval petroleum, naval oil shale, or naval coal reserves—are under the jurisdiction of the Secretary of the Interior, and that no disposition thereof shall be made except under—

\* \* \* the applicable public land mining and mineral leasing laws.

Read together with the committee findings above respecting the Defense position on petroleum reserves, the object and purpose of this section are clear. Until presentation by Defense witnesses on petroleum reserves, and the effect of the prospective airspace withdrawal on pending applications for restriction of outer Continental Shelf lands, committee members had believed there was universal agreement that responsibility for disposition of minerals in withdrawn or reserved public lands was exclusively vested in the Secretary of the Interior.

Enactment of this section into law actually constitutes a restatement of the law as it is today, in the view of the committee and the Department of the Interior. In short, as declared above, the provisions of section 6 of the reported bill will serve to remove whatever doubts may exist, if any, as to the laws which govern the disposal of or exploration for, any and all minerals, including oil and gas, in public lands of the United States heretofore or hereafter withdrawn or reserved by the United States for the use of defense agencies. (S. Rept. 857, 85th Cong.)

On the basis of this legislative history it can only be concluded that Congress clearly intended that lands withdrawn for military use

May 12, 1960

should *not* be available to mining and mineral leasing activities unless the Secretary of Defense makes the determination set out in the proviso. It did not mean that a military withdrawal could not provide that the withdrawn lands were not open to appropriation under the mineral leasing laws, if the Secretary of the Interior deemed it in the public interest to do so.

In a recent case the Department considered the effect of section 6 of the act of February 28, 1958, upon a military withdrawal, made prior to the date of the act, which prohibited mineral leasing. It held:

It is thus clear beyond doubt that Congress had no intention other than to affirm the fact that mineral leasing of some areas withdrawn for defense purposes, with certain exceptions, was under the jurisdiction of the Secretary of the Interior and that such leasing was to be in accordance with the mineral leasing acts. There is no evidence that Congress intended to strip the President, or his delegate, of his power to withdraw lands absolutely from mineral leasing.

In this case, the withdrawal order specifically provides that the land is withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral leasing laws. Thus the Secretary of the Interior has no authority to lease for oil and gas purposes, entirely without regard to the attitude of the Secretary of Defense on the question whether such leasing would be inconsistent with the military use of the land. Accordingly, the appellant's contention that the Secretary of the Interior must accept offers unless the Secretary of Defense objects is without substance. *B. L. Havaside, Jr.*, 66 I.D. 271, 275 (1959).

Furthermore, the Secretary, acting under the authority delegated to him by the President in Executive Order 10355 of May 26, 1952, can withdraw public land from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, at the request of the heads of Federal agencies and instrumentalities other than the Department of Defense. 43 CFR, 1959 Supp., 295.9 *et seq.* I find nothing in the provisions of the act of February 28, 1958, or its legislative history to indicate that the Secretary was to have less authority to withdraw land on behalf of the Department of Defense (except for the limitation on the size of the withdrawal) than he has to withdraw land for other agencies.

Therefore, it is my conclusion that the Secretary of the Interior can, since the act of February 28, 1958, continue to withdraw public lands under his control and jurisdiction from all forms of appropriation under the public land laws, including the mineral leasing act, for the use of the Department of Defense, so long as the extent of the withdrawal does not exceed the acreage limitations of section 2 of the act.

The appellant also contends that the second paragraph of Public Land Order No. 1752 which provides:

2. The Department of the Interior retains jurisdiction over the management of the surface and subsurface resources including mineral resources of the

lands. No disposal of such resources will be made except under applicable public land laws with the concurrence of the Department of the Air Force and, where necessary, only after appropriate modification of the provisions of this order. 23 F.R. 8982.

is inconsistent with the requirement of section 6. However that may be, the appellant's offer is controlled by the withdrawal accomplished in paragraph 1 of PLO No. 1752, not by the terms of paragraph 2, which would become material in this case only if the order were to be modified.

Finally, the appellant asks, if his lease offer for the withdrawn land is rejected, that he be given permission to conduct operations on that land by slant drilling from wells surfaced on adjoining lands leased to him. This request overlooks the plain fact that the withdrawn lands are withdrawn from all forms of appropriation under the mineral leasing act. The withdrawal applies as well to subsurface as to surface operations and so long as it remains in effect all offers to exploit the mineral resources in the withdrawn lands must be rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director, Bureau of Land Management, is affirmed.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

### APPEAL OF MONARCH LUMBER COMPANY

IBCA-217

*Decided May 18, 1960*

#### Contracts: Notice

Appeal will not be dismissed on motion in case of substantial compliance with notice requirements of "changed conditions" and "delays-damages" clauses and in absence of a showing that failure to comply with notice requirements would be injurious to the interests of the Government.

#### Contracts: Release—Contracts: Damages: Liquidated Damages

It is well settled that the failure to except an item from settlement has the effect of barring any claim based on such item. Therefore, a contractor who, in executing a release, fails to include a claim for extension of time is barred, and claim may be dismissed on motion.

### BOARD OF CONTRACT APPEALS

The Government has moved to dismiss an appeal from the contracting officer's findings of fact and decision<sup>1</sup> which denied the appellant's

<sup>1</sup>The "Findings of Fact and Decision" of the contracting officer is undated. However, the appeal file supports the conclusion that it was sent on August 17, 1959, by the contracting officer and received by the contractor-appellant on August 18, 1959. The appeal, although dated August 25, 1959, was delivered to the contracting officer on September 15, 1959. Hence, the appeal is timely.

May 18, 1960

request for an extension of time for the performance of its contract to the extent of 30 days<sup>2</sup> and denied the contractor's claim for additional compensation in the amount of \$1,905.12.<sup>3</sup>

The contract, as identified in the caption, provided for the insulation of various quarters on the Blackfeet Reservation, Browning, Montana. It was written on U.S. Standard Form 23 (Rev. March 1953) and incorporated the General Provisions of U.S. Standard Form 23A (March 1953) for construction contracts. The contract price amounted to \$9,089.46.

### *Claim No. 1: Remission of Liquidated Damages*

The Department counsel seeks to have this claim dismissed on the ground, among others, that the contractor did not reserve the claim in the release on the contract given by it on June 30, 1959.

Counsel for appellant states its position as follows:

Appellee's principal argument for denial of remission of liquidated damages to Appellant is embodied in the fact that in the release executed by Appellant, these liquidated damages were not excepted. Other than this it appears that there can be absolutely no argument against remission of these damages to Appellant. See *Snare & Triest Co. v. US* (1920) 55 Ct. Cl. 386; *Morris v. US* 50 Ct. Cl. 154 (1915); Relief could also be granted under 41 U.S.C. 256A and see *Salomon v. US Ct. Cl.* (1873) 19 Wall. 17 with respect to verbal agreements for extension. Appellant submits that this being so, Appellee now holds money in the amount of \$100.00 which rightfully belongs to Appellant. Failure of Appellant to specifically exclude this amount from the release executed and which dealt with construction items on the various buildings clearly cannot entitle Appellee to retain money due and owing Appellant. The authority which Appellee cites is inapplicable to this situation and does not prohibit the remission of these liquidated damages.<sup>4</sup>

We read into this statement by appellant's counsel an admission that the claim was not reserved in the release on the contract, and we can

<sup>2</sup> In his appeal of August 25, 1959, contractor-appellant asks for the release of liquidated damages in the amount of \$100. At the contract per diem rate of \$5 (par. 3, General Conditions), this would amount only to a remission of liquidated damages for 20 days. However, the job was substantially completed 20 days after the date fixed by the contract and, therefore, the amount actually assessed as liquidated damages was limited to \$100.

<sup>3</sup> Appellant's appeal, signed on August 25, 1959, by its "Sales Manager" (who, incidentally, also signed the release on the contract) describes the claim as being brought under "General Provisions Paragraph 4 under 'Change [sic] conditions' subparagraph (2) \* \* \*". The further description of the claim establishes the reference as being to clause 4, "Changed Conditions," of SF 23A. Appellant's counsel in "Appellant's reply to statement of position of appellee" of December 31, 1959, particularizes the claim, in addition to the remission of liquidated damages in the amount of \$100, as follows:

"A. Additional compensation for work performed upon the log buildings where the actual site conditions deviated materially from the representations which had been made in the written specifications and where the Appellant placed good faith and reasonable reliance upon said specifications.

"B. Additional compensation for work performed on frame structures which were of strange, uncommon, unforeseeable and unusual construction. Appellant submits that this claim is also justified by the written specifications."

<sup>4</sup> The cases cited by appellant have no bearing on the issue as to whether or not a claim for extension of time or remission of liquidated damages can be barred by failure

find in the release no language expressive of an intention to reserve this claim. It is indeed well settled, as Department counsel has pointed out, that the failure to except an item from settlement in a release has the effect of barring a claim based on such item.<sup>5</sup>

There are, of course, exceptions to this rule as the Court of Claims,<sup>6</sup> the Comptroller General,<sup>7</sup> this Board,<sup>8</sup> and other Appeal Boards<sup>9</sup> have recognized. But no circumstances or facts are apparent in the appeal file, nor have any circumstances or facts been alleged which would bring the instant claim within any of these exceptions.

Consequently, the Board considers the claim for remission of liquidated damages in the amount of \$100 barred by the operation of the release, and it is hereby dismissed.

It is true that 41 U.S.C., 1958 ed., sec. 256a, authorizes the Comptroller General of the United States, on the recommendation of an agency head, to remit liquidated damages in whole or in part "as in his discretion may be just and equitable."<sup>10</sup> However, the Board is aware of no precedent for the exercise of this authority in the case of a claim that has been discharged by a release, and, in any event, the function of making recommendations to the Comptroller General for its exercise is vested solely in the Solicitor of this Department.<sup>11</sup>

*Claim No. 2: Additional Compensation in the Amount of \$1,905.12*

Under date of May 28, 1959, the contractor-appellant sent to the office of the contracting officer a letter in which it was stated that the construction of some of the buildings to be insulated did not conform to what appellant had been "led to believe" prior to the award of the

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to except it from the operation of a release. In *Snare & Triest Company v. U.S.*, 55 Ct. Cl. 386 (1920), the Court stated at page 395 regarding the remission of liquidated damages: "Upon what theory the plaintiff was chargeable with liquidated damages for delay in completing the work that was not even included in the contract, or the supplement thereto, is not made plain." However, the Court specifically stated at page 395 that the question as to "whether the plaintiff was chargeable with liquidated damages" was "reserved in the release." In *W. G. Morris, v. U.S.*, 50 Ct. Cl. 154 (1915), no release was involved. *Salomon v. U.S.*, 19 Wall. (86 U.S.) 17 (1873) is correctly cited for the position stated above, but immaterial to the issue here involved.

<sup>5</sup> *S. J. Groves & Sons Co.*, 62 I.D. 145, 151; IBCA-8; 6 CCF par. 61,649 (1955); *P. J. Carlin Construction Co. v. U.S.*, 92 Ct. Cl. 280, 303, 305 (1940); *Eastern Contracting Co. v. U.S.*, 97 Ct. Cl. 341, 355 (1942); *Bein v. U.S.*, 101 Ct. Cl. 144, 160 (1943); *W. C. Shepherd v. U.S.*, 125 Ct. Cl. 724, 741 (1953); *Torres v. U.S.*, 126 Ct. Cl. 76, 78 (1953).

<sup>6</sup> *Nippon Hodo Company, Ltd. v. U.S.*, Ct. Cl. No. 479-54 (April 2, 1958); *L. W. Packard & Co. v. U.S.*, 66 Ct. Cl. 184, 192 (1928).

<sup>7</sup> 35 Comp. Gen. 14 (1955).

<sup>8</sup> *United Concrete Pipe Corporation*, 63 I.D. 153, 160; IBCA-42; 6 CCF par. 61,870 (1956). Without reforming the instrument, the Board disregarded a release which was given under circumstances which made its acceptance inequitable.

<sup>9</sup> *Parkside Clothes, Inc.*, ASBCA No. 261, 4 CCF par. 60,856 (January 4, 1950).

<sup>10</sup> Officials of this Department do not have authority to waive the imposition of liquidated damages on equitable grounds. See *Royal Indemnity Co. v. U.S.*, 313 U.S. 289, 294 (1941); *McCann Construction Co.*, 61 I.D. 342, 345; CA-204 (1954).

<sup>11</sup> "The Board is \* \* \* not authorized to make such recommendations to the Comptroller General." *S. J. Groves & Sons Company*, 62 I.D. 145, 158; IBCA-8; 6 CCF par. 61,649 (1955).

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contract, and in which an extension of time on this account was requested. In a letter of June 4, 1959, the contractor-appellant stated that the construction of a number of the buildings, including those mentioned in the prior letter, did not conform to what had been anticipated, and asked for additional compensation on account of "these unknown conditions \* \* \* under paragraph 4 of the General Provisions" of the contract. Finally, by letter dated June 30, 1959, the contractor submitted a claim for reimbursement in the amount of \$1,905.12 for the extra costs alleged to have been incurred in insulating the buildings.

The claim was denied by the contracting officer primarily on the ground that—

there is no record of its [contractor's] having filed timely written notice, as required by Articles 4<sup>12</sup> and 5(c)<sup>13</sup> of the General Provisions of the Contract; hence there is no proper basis for allowance of the Contractor's claims or any part thereof and they are therefore denied.

Additionally, the contracting officer appears to have based his denial on Article 5 of the General Conditions entitled "Visit to Site and Site Conditions."<sup>14</sup>

<sup>12</sup> Clause 4 of Standard Form 23A, "Changed Conditions," requires "prompt" notice to the contracting officer in writing but the "Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract." The record establishes that the claim was made prior to the final settlement.

In considering the above dates of May 28, 1959, June 4, 1959, and June 30, 1959, it must be kept in mind that the appellant asserts that the conditions for which claim is made were first encountered on or about April 15, 1959, and that the contracting officer found that the contract was substantially completed on June 20, 1959.

The notice requirement of Clause 3, "Changes," may also become pertinent if the true nature of the claim should prove to be in the nature of a "change" or "extra work" rather than in the nature of changed conditions.

The Board's attitude regarding notice requirements generally parallels that of the Court of Claims which stated on May 4, 1960, in *Allied Contractors, Inc. v. United States*, Ct. Cl. No. 195-58, as follows: "As to the question of written notice, the contracting officer or his designated representative was thoroughly familiar with the written requests of the plaintiff for payment of the excess cost \* \* \*. They discussed these claims from time to time and when the final adverse decision was made plaintiff appealed that decision. It had filed a written notice originally and we do not construe that it must file an additional claim for excess cost every time a new rock was discovered. \* \* \*"

<sup>13</sup> Clause 5(c) provides for written notice "within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract," but the consideration of that clause is not pertinent to the disposition of Claim No. 2.

<sup>14</sup> Article 5 differs materially from the "warranty type" of "Site Investigation" clauses used by some other Government construction contracting agencies. Article 5 merely seems to parallel clause 2 of Standard Form 22 entitled "Conditions at Site of Work." It is noteworthy that Standard Form 22 describes its contents merely as "instructions" and specifically provides that the instructions "are not to be incorporated in the contract." Article 5 used in the instant contract provides as follows:

"Bidders are requested to visit the site and to inform themselves concerning all the conditions under which the work is to be done. Failure to visit the site will in no way relieve the contractor from the necessity of furnishing any materials and performing any work that may be required to complete the contract in strict accordance with the true intent and meaning of the drawings and specifications without additional cost to the Government.

"Information contained in the specifications or shown on any plot plan or draw-

In *Studer Construction Company*,<sup>15</sup> the Board denied a motion to dismiss in a case where there had been substantial compliance with the notice requirement of clause 5 of Standard Form 23A, the "delays-damages" clause. The reasoning in that opinion applies with equal force to the notice requirement of clause 4. Furthermore, both clauses affirmatively confer on the contracting officer authority to waive lack of compliance with the notice provision, and, under the "disputes" clause of the contract, the propriety of a determination by the contracting officer not to exercise this authority is subject to review by the Board.<sup>16</sup> With respect to the circumstances in which a waiver should be granted, we quote with approval, as furnishing a proper guide in contract administration, and as stating a principle that will be applied by the Board, the following language from the holding in *Sanders*:<sup>17</sup>

\* \* \* the Board is justified in ignoring the contracting officer's ruling based upon the 10-day rule *as an adherence merely to the letter but not the reason of the rule*. In other words, even though the contractor is late in notifying the contracting officer of the error of which he complains *it is not intended that the Government should take advantage of the 10-day limitation merely for the sake of applying the rule. Its true purpose is for protection against delays that are injurious to the Government's interest*. If not injurious then, of course, there is no object in applying the rule. (Italic supplied.)

Hence, where the record establishes, or where the contractor requests a hearing in order to prove, either substantial compliance with the notice requirement or circumstances justifying a waiver of lack of compliance, we follow the rule of declining to sustain motions for dismissal, based solely on the absence of formal notice.<sup>18</sup>

The contractor-appellant has alleged that "we have fully complied" with the notice requirements and that "proper notice was given to the Contracting Officer." It has alleged that the conditions at the

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ings as it relates to conditions at the site is believed to be reliable but such information is furnished for the convenience of the bidders and no guarantee of the accuracy of the information is made or implied."

Assuming (but not so holding) that Article 5 contains contractual duties which can be enforced, its provisions would not enable the Board to dispose of this claim on motion in the face of appellant's allegations that before bidding appellant "made a very close inspection of the work to be done, but there was no way to determine the hidden causes that developed in this job without materially damaging the property," that the resident officers of the Government would not permit the latter type of investigation, and that in some particulars "the actual site conditions deviated materially from the representations which had been made in the written specifications." Cf. the statement of the Court of Claims in *Arcote Midwest Corporation v. United States*, 125 Ct. Cl. 818, 822 (1953) that "the rule is well established that where the Government makes positive statements in the specifications or drawings for the guidance of bidders, that a contractor has a right to rely on them regardless of contractual provisions requiring the contractor to make investigations." See also Judge Madden's statements in *John K. Ruff v. U.S.*, 96 Ct. Cl. 148, 164 (1942).

<sup>15</sup> *Studer Construction Company*, 66 I.D. 414; IBCA-95; 59-2 BCA par. 2438 (1959).

<sup>16</sup> *Toad Shipyard Corporation*, ASBCA Nos. 2911 and 2912, 57-1 BCA par. 1185 (1957).

<sup>17</sup> *Sanders*, W.D., BCA No. 955, 3 CCF 862, 866 (1945); cf. Buford, *Notice Requirements under Government Construction Contracts*, 44 Minn. L. Rev. 275, 280 (December 1959).

<sup>18</sup> *Raylaine Worstedts, Inc.*, ASBCA No. 1842, 6 CCF par. 61,728 (1955).



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site were brought to "the attention of Mr. Andrus, Government site representative, who had issued instructions to continue with the work rather than stopping."

These allegations present pertinent issues of fact on which the appellant is entitled to an opportunity to submit proof. A factual determination of their correctness, either on the record, should the case be so submitted by the parties, or by hearing, would seem necessary to dispose of these factual questions.

On the other hand, the Government will not be barred from establishing by competent evidence that there was no substantial compliance with the contractual notice requirements, or that a consideration of the claim on its merits in the absence of such compliance would be injurious to the Government's interest.

As the Board has clear jurisdiction to dispose of the questions discussed above, the motion to dismiss Claim No. 2 is denied.

PAUL H. GANTT, *Chairman.*

I concur:

HERBERT J. SLAUGHTER, *Member.*

BERT WHEELER

A-28253

*Decided May 23, 1960*

**Regulations: Applicability—Regulations: Interpretation**

When a regulatory provision governing public land oil and gas lease offers is amended by adding requirements in a new subsection to the provision, and the provision to which the subsection is added is not applicable to acquired lands oil and gas lease offers, but the additional requirements included in the amendment of the public land regulation are intended to be applicable to both public and acquired lands oil and gas lease offers, then not only the public land regulation, but also the corresponding acquired lands regulation should be expressly amended by adding the same requirements to the acquired lands regulation.

**Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Applications—Regulations: Applicability**

Acquired lands oil and gas lease applications will not be rejected for failure to comply with a requirement added to the public land leasing regulations if it is doubtful whether the amendment of the public land leasing regulations which added the requirement also applied to acquired lands applications.

**Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Applications**

An application for an acquired lands oil and gas lease is improperly rejected where the applicant does not accompany his application with a statement

as to whether he is the sole party in interest, as required for a public land lease offer.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Bert Wheeler has appealed to the Secretary of the Interior from a decision of August 14, 1959, by the Director, Bureau of Land Management, affirming separate decisions by the Chief, Minerals Adjudication Section, Eastern States land office, rejecting Wheeler's fractional interest oil and gas lease applications filed under the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1958, ed., secs. 351-359). The offers, filed on April 30, 1959, cover 164 acres of land in Pope County, Arkansas. The United States owns a 50 percent mineral interest in the lands applied for and evidence was submitted with the applications showing that the appellant controls the remaining 50 percent mineral interest in these lands.

Each of the appellant's applications was rejected by a decision of June 25, 1959, by the Chief, Minerals Adjudication Section, Eastern States land office, for failure to submit with the application a statement showing whether the offeror was the sole party in interest in the offer and the lease if issued. Such a statement is required by one of a number of amendments of the regulations governing oil and gas lease offers on public lands which were adopted primarily to assure adequate enforcement of the law with regard to acreage holdings under oil and gas leases. The amendment, which was approved January 8, 1959 (24 F.R. 281-282), and became effective February 12, 1959, provides as follows:

Subparagraph (3) of paragraph (e) of section 192.42 is amended and subdivided to read as follows:

(e) Each offer, when first filed, shall be accompanied by:

\* \* \* \* \*

(3) (i) \* \* \*

(ii) \* \* \*

(iii) A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names and the nature and extent of the interest therein of the other interested parties, the nature of the agreement between them, if oral, and a copy of such agreement, if written. Such statement must be signed by all of the interested parties including the offeror, and all interested parties must furnish evidence of their qualifications to hold such lease interests. Such statement must be filed not later than 15 days after the filing of the lease offer.

On July 7, 1959, 8 days after receipt of the land office decisions, Wheeler filed the statement required by 192.42(e) (3) (iii) indicating that he was the sole party in interest in the offers and the prospective leases.

The Director's decision affirming the rejection of the offers held that the failure of the land office to inform the appellant of the necessity of filing the statement required by 43 CFR 192.42(e) (3) (iii), in

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response to his inquiry as to the requirements for filing oil and gas lease offers, was no basis for allowing the applications and that the filing for publication of the requirement in the Federal Register was constructive notice of its contents as provided by section 7 of the Federal Register Act (44 U.S.C., 1958 ed., sec. 307). Moreover, effective June 16, 1959, the lands for which the appellant applied were found to be within the undefined known geologic structure of the Dover field by reason of the completion on that date of a well drilled by the appellant on land in a section adjoining that here applied for. The Director's decision held, in effect, that the lands applied for must be leased competitively since land situated on a known geological structure is subject to lease by competitive-bidding and a noncompetitive application therefor must be rejected (*Ernest A. Hanson, A-26375* (May 29, 1952), and cases cited therein).

On this appeal it is contended that since Wheeler fully complied with all of the instructions for filing proper lease applications furnished by the Eastern States land office more than 2 months after the promulgation of 192.42(e) (3) (iii) and more than a month after the effective date of the regulation; and since none of the material furnished by the land office mentioned the requirement in 192.42(e) (3) (iii), his offers were improperly rejected for failure to submit the statement required by 192.42(e) (3) (iii).<sup>1</sup> It is unnecessary to answer this contention since the appeal can be disposed of on another ground.

The appeal raises the question whether the amendment of 192.42(e) (3), which added new requirements for filing *public land* oil and gas lease offers, is properly applied to *acquired lands* lease offers. There appears to be no reason for differentiating between public and acquired lands applicants in the requirements pertaining to acreage holdings (see footnote 4, *infra*), but according to its numbering in Title 43 of the Code of Federal Regulations, 192.42(e) (3) (iii) applies only to public land lease offers. Wheeler's offers for acquired lands leases were properly rejected only if the requirements of 192.42(e) (3) (iii) are also applicable to acquired lands lease offers.

For a number of years after the enactment of the Mineral Leasing Act for Acquired Lands on August 7, 1947, the oil and gas leasing regulations issued under the act, 43 CFR, 1949 ed., 200-200.10, contained special requirements affecting acquired lands oil and gas lease offers which varied from the provisions of the Mineral Leasing Act of

<sup>1</sup> In response to a request, addressed to the Eastern States land office by Wheeler, for advice as to the procedure to be followed in acquiring oil and gas leases on these lands, copies of Form 1196 (acquired lands noncompetitive oil and gas offer to lease and lease) and of Circular 1890 (containing acquired lands oil and gas leasing regulations 43 CFR 200.3-200.11, effective January 31, 1955), were sent to Wheeler under letter of March 31, 1959, without reference to the requirement in 192.42(e) (3) (iii).

1920, as amended (30 U.S.C., 1958 ed., sec. 181 *et seq.*).<sup>2</sup> Most of the detailed requirements governing the filing of oil and gas lease offers were not set forth separately for acquired lands lease offers, but, by regulation, the public land leasing regulations, unless inconsistent with the provisions of the Acquired Lands Act, have been, and are now, applicable to acquired lands offers and leases except as otherwise specifically provided in the acquired lands leasing regulations.<sup>3</sup> In general, from 1947 until January 31, 1955, secs. 200-200.10 of 43 CFR contained those provisions relating to filing oil and gas lease offers for acquired lands which differed from the provisions governing the filing of public land oil and gas lease offers because of special provisions of the Mineral Leasing Act for Acquired Lands as to which no provision of the 1920 Mineral Leasing Act corresponded.

Effective January 31, 1955, however, the acquired lands oil and gas leasing regulations (secs. 200.1-200.11) were amended to set forth not only the specific provisions which were applicable only to acquired lands, but also the detailed provisions previously contained only in Part 192 of the regulations governing public land oil and gas offers and leases, but applicable under 200.4 to acquired lands oil and gas lease offers (see footnote 3). Consequently, almost none of the provisions in Part 192 of 43 CFR were applicable to acquired lands offers after January 31, 1955, because since that date, the acquired lands regulations contain what amounts to a duplicate set of detailed provisions which replaces and makes inapplicable the corresponding set of provisions in Part 192. That is, 200.1-200.11 now contain many provisions which are almost identical with the provisions in Part 192 and these provisions amount to a duplicate set of detailed regulations governing oil and gas leasing on acquired lands. Most of the provisions in 200.1-200.11 are specific provisions within the excepting clause of 200.4 (see footnote 3), and to the extent that this is so, the corresponding provisions in Part 192 governing public land oil and gas lease offers are not applicable to acquired lands offers and leases (43 CFR 200.4, *supra*).

For example, 43 CFR 200.8, entitled "Offer to lease and issuance of lease" (for acquired lands), contains 40 paragraphs which correspond very closely to the 43 paragraphs in 192.42, also entitled "Offer to lease and issuance of lease," which are applicable to public

<sup>2</sup> Section 10 of the Mineral Leasing Act for Acquired Lands (*supra*, sec. 359) provides that the rules and regulations which the Secretary may prescribe under the act shall be the same as those prescribed under the mineral leasing laws to the extent that the latter are applicable to the former.

<sup>3</sup> 43 CFR 200.4 (25 F.R. 500) was amended on January 15, 1960, but has remained almost unchanged since 1947 with regard to extending the provisions governing the filing of public land oil and gas offers and issuance of leases on public lands to acquired lands offers and leases. 200.4 states:

"Except as otherwise specifically provided in §§ 200.1 to 200.11, inclusive, the regulations prescribed under the mineral leasing laws, and contained in Parts 70, 71, and 191 to 198, inclusive, of this chapter, shall govern the disposal and development of minerals under the act to the extent that they are not inconsistent with the provisions of the act. \* \* \*

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lands. 192.42(e) (3) and 200.8(e) (3) are corresponding provisions governing public and acquired lands lease offers, respectively. Before the recent amendment of 192.42(e) (3), the regulation required, *inter alia*, that an individual offeror whose offer was signed by an attorney in fact or an agent, file a statement as to whether his direct and indirect interests in oil and gas leases, applications, and offers therefor exceed 46,080 chargeable acres in the same State, or 100,000 acres in the Territory of Alaska (emphasis added). The amendment subdivided the requirements of 192.42(e) (3) into two subsections (numbered (i) and (ii)) and added one new subsection (numbered (iii)) which is the sole party in interest provision quoted above. 200.8(e) (3) requires the offeror, if an individual whose offer is signed by an attorney in fact or an agent, to submit a statement showing whether his direct and indirect interests in oil and gas leases, applications, and offers for *acquired* lands in the same State exceed 46,080 chargeable acres (emphasis added). It is evident that before the recent amendment of 192.42(e) (3) it was not applicable to acquired lands lease offers since the public land interests of an acquired lands offeror do not affect his qualification to hold an acquired lands lease,<sup>4</sup> and also because the almost identical corresponding provision in 200.8(e) (3), which expressly refers to acreage interests in acquired lands, is a specific provision governing acquired lands offers within the excepting clause of 200.4. For the same reasons, 192.42(e) (3) (i) and (ii) are not applicable to acquired lands offers as the latter provisions and 192.42(e) (3) before its amendment are identical.

Inasmuch as 192.42(e) (3) prior to its amendment was not applicable to acquired lands offers, it is doubtful whether the amendment here under consideration, which divided the provisions into subsections and added a new subsection, should be regarded as governing acquired lands offers. In holding that the sole party in interest provision (192.42(e) (3) (iii)) was applicable to acquired lands offers, the Director's decision referred to the language of 200.4 which imposes a duty on an offeror to examine the regulations in Part 192 and to seek to comply with any and all of their provisions found to be applicable.

But the detailed provisions of 200.8(e) (3), the substance of which correspond very closely to the provisions of 192.42(e) (3), clearly exclude the applicability of 192.42(e) (3), before its recent amendment, to offers for acquired lands leases. To the extent that there is any variance between the two regulations, 192.42(e) (3) and 200.8(e) (3), it is reasonable to conclude that the difference is intentional and that

<sup>4</sup> By administrative interpretation, interests in leases on acquired lands are accounted for separately from those on public lands and any applicant is permitted to hold leases covering the maximum acreage in a State on both public lands and acquired lands. Accordingly, the extent and interest of an acquired lands applicant in public land leases and offers are irrelevant in determining whether he has complied with the acreage limitation for acquired lands.

the provisions of 200.8(e) (3) govern the filing of acquired lands lease offers whereas the corresponding provisions of 192.42(e) (3) refer exclusively to public land filings. Such a conclusion is warranted because of the detailed and particularized provisions of the respective regulations, and is consistent with the provisions of 200.4.

In these circumstances, when a provision of the public land oil and gas leasing regulations is amended by adding a new subsection to the provision, and the provision to which the subsection is added is not applicable to acquired lands offers (there being a separate and corresponding provision governing acquired lands offers) and when the amendment of the public land regulations is intended to be applicable to both public and acquired lands oil and gas lease offers, then not only the public land regulation but also the corresponding acquired lands regulation should be expressly amended by adding the same requirements to the acquired lands regulation. The Director's reliance on the provisions of 200.4 as amounting to notice that the requirement in 192.42(e) (3) (iii) is applicable to acquired lands lease offers is not persuasive because even though the new requirement in 192.42(e) (3) (iii) is not inconsistent with the Mineral Leasing Act for Acquired Lands, 192.42(e) (3), the provision to which the new requirement was added, was not applicable to acquired lands offers because the equivalent provision governing acquired lands offers, 200.8(e) (3), is a specific provision within the excepting clause of 200.4. It seems at best confusing and anomalous to hold that the amendment of a regulation is applicable to acquired lands offers, although the provision which is amended is clearly inapplicable to such offers.<sup>5</sup> In any event, publication of the amendment of 192.42(e) (3) without any references to 200.8(e) (3) unnecessarily obscures the Bureau's intention that an acquired lands applicant must file the statement showing whether he is sole party in interest in the offer and the lease if issued.<sup>6</sup>

Because it is doubtful whether the amendment of the public lands leasing regulation, 192.42(e) (3), is correctly interpreted as resulting in adding a mandatory requirement to filing acquired lands oil and

<sup>5</sup> In *Tobin v. Edward S. Wagner Co., Inc.*, 187 F. 2d 977 (2d Cir. 1951), a case involving the interpretation of a regulation which did not by its terms cover a situation which the administrative agency argued was meant to be covered, the court refused to interpret the regulation as broadly as would be done if a statute were interpreted and stated (at p. 979):

"\* \* \* regulations, precisely because they particularize, ought not be as generously interpreted as the statute. In fairness to the regulated, the provisions of the regulations should not be deemed to include what the administrator, exercising his delegated power, might have covered but did not cover. True, in deciding what they do cover, we must not regard their literal terms merely, but must also give much weight to administrative interpretive rulings which have been published and of which the regulated are thus on notice. \* \* \*"

The court did not extend the regulation beyond its literal terms in this case.

<sup>6</sup> The Bureau's interpretation of the effect of 192.42(e) (3) (iii) as to acquired lands offers is similar to its position in another case involving the amendment of a public lands leasing regulation when the corresponding and specific acquired lands leasing regulation was not amended at the same time (*S. J. Hooper* (Supp.), 61 I.D. 350 (1954)).

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gas lease offers, absent the amendment of the equivalent acquired lands regulation, 200.8(e)(3), the decision that publication of 192.43(e)(3)(iii) in the Federal Register gave notice to acquired lands applicants of the necessity of filing the sole party in interest statement will not be followed.<sup>7</sup> Accordingly, the appellant's applications should be reinstated and allowed, if all else is regular, as of the date of filing.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is set aside, and the case is remanded for action in accordance with this decision.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

**JOHN H. ANDERSON, T. K. AND EVELYN H. STERLING**

**A-28218**

*Decided May 23, 1960*

**Oil and Gas Leases: Applications**

When an oil and gas lease offer is improperly excluded from a drawing to determine the priority of conflicting, simultaneously-filed offers, a new drawing must be held.

**Oil and Gas Leases: Applications—Oil and Gas Leases: Acreage Limitations**

Under the former departmental regulation governing acreage limitations, an offeror holding excess acreage at the time of filing an offer was entitled to 30 days within which to reduce his holdings and if he did so within that time his offer did not lose priority as of the time of filing.

**Oil and Gas Leases: Applications**

An offeror who files less than the required five copies of his offer retains priority of filing if he files the requisite number of copies within 30 days.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

John H. Anderson has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated June 9, 1959, which reversed a decision of the manager of the land office at Santa Fe, New Mexico, dated June 24, 1958, denying the request of T. K. Sterling and Evelyn H. Sterling for the inclusion of their joint oil and gas lease offers, New Mexico 044463, 044487, and 044499, in drawings to determine the order of consideration of conflicting, simultaneously-filed, noncompetitive oil and gas lease offers filed

<sup>7</sup>In several recent cases the Department has held that when an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, the regulation should be spelled out so clearly that there is no basis for disregarding his noncompliance. *Donald C. Ingersoll*, 63 I.D. 397 (1956); *Madison Oils, Inc., T. F. Hodge*, 62 I.D. 478 (1955).

on April 1, 1958, pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). Anderson's offer, New Mexico 044796, was awarded first priority as a result of one of the drawings which was held on April 9, 1958, after the Sterling offer, New Mexico 044499, had been excluded from that drawing. The Sterling offers, New Mexico 044463 and 044487, had likewise been excluded from other drawings held on the same date.

The manager held that the Sterling offers were not entitled to participate in the drawings because on April 1, 1958, when the Sterlings filed the 3 offers in question, they also filed 39 other offers which, including the 3 offers in question, covered over 87,000 acres of land in New Mexico. Those 42 offers, with the leases which T. K. Sterling already held and the offers which he was maintaining, brought him over the limit of 46,080 acres in any one State, which is the statutory limit for oil and gas leases and which the Department has adopted as the limit which may be held in leases and lease offers. The manager held that it was not until April 28, 1958, when the Sterlings withdrew some of their offers, that their acreage in leases and offers was reduced to such an extent that the offers in question were within the limit and therefore acceptable.

The Director held that, although the Sterlings had submitted only one copy each of the three offers at the time of filing, they had submitted the required additional copies within 30 days and, therefore, their offers were entitled to priority of filing as of April 1, 1958 (43 CFR 192.42(b)), all else being regular. The Director held, further, that while the filing of the Sterling offers on April 1, 1958, caused the Sterling offers to exceed the limitation on acreage prescribed by the Department for leases and lease offers, the Sterlings had reduced that acreage to below the maximum within 30 days after the determination was made that they held excess acreage (43 CFR 192.3(c)); that, therefore, their three offers were entitled to priority as of the date of filing; and that the Sterlings were entitled to have their offers entered in drawings with other conflicting, simultaneously-filed offers. He therefore vacated the drawings held on April 9, 1958, and ordered new drawings in which the Sterling offers should be included.

In this appeal to the Secretary, Anderson contends that both T. K. Sterling and Evelyn H. Sterling filed many additional offers during the months of May, June, and August, 1958, none of which was apparently withdrawn until February or April, 1959. He argues that those additional offers brought the Sterlings well above the maximum acreage limitation and contends that since the Sterlings were not qualified as offerors during a part of the time in which they were prosecuting their appeal to the Director a drawing held at a time when the Sterlings were maintaining offers above the maximum permitted by the Department in which the Sterlings drew first priority could not result in issuance of a lease to them.



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We are not concerned here, however, with any offers which the Sterlings may have filed after April 1, 1958, or with their qualifications to hold leases at subsequent times. The only question for consideration is whether the Director was correct in vacating drawings from which the Sterling offers were excluded.

The Director found that the three Sterling offers had priority of filing as of April 1, 1958, notwithstanding the fact that only one copy each of the offers was filed on that date. The regulation cited by the Director provides that if less than five copies of an offer are filed, the offer will not be rejected, if not otherwise subject to rejection, until 30 days from filing have elapsed. If during that 30-day period the remaining copies are filed, the offeror's priority will date from the date of the first filing. As the remaining copies of the Sterling offers were filed during the 30-day period, their offers did not lose their priority of filing as of April 1, 1958, because of their failure to submit five copies of each offer on that date.

The other regulation cited by the Director, in effect when the Sterling offers were filed, provided:

No lease will be issued and no transfer will be approved until it has been shown pursuant to the requirement of § 192.42(e) (4) that the lessee or transferee is entitled to hold the acreage. Any party found to hold or control accountable acreage computed in accordance with the principles above set forth in excess of the prescribed limitations shall be given thirty days within which to file proof of the reduction of the holdings or control so as to conform with the prescribed limitation.<sup>1</sup>

The Department has held that under that regulation the 30-day period must be accorded to the offeror (*Yakutat Development Company*, 63 I.D. 97 (1956)) and that if the offeror reduced his excess holdings within that period, the priority of his filing was not lost. *Albert C. Massa et al.*, 62 I.D. 339 (1955).

Although the offers which the Sterlings filed on April 1, 1958, brought them over the acreage limitation prescribed by the Department, they had 30 days within which to reduce their holdings without loss of priority of their remaining offers. They reduced their holdings in leases and offers by withdrawing sufficient offers on April 28, 1958, to bring them within the prescribed limit. The three offers here in question thus were entitled to priority of filing as of April 1, 1958.

The three offers involved in this appeal are in conflict with other offers simultaneously filed on April 1, 1958. Under another departmental regulation (43 CFR 191.10), when such a conflict occurs, a public drawing must be held to fix the order in which such offers will be processed.

As the Sterling offers had priority of filing as of April 1, 1958, and

<sup>1</sup> 43 CFA 192.3 was amended on January 3, 1959 (43 CFR, 1959 Supp., 192.3). The amended regulation does not afford offerors 30 days within which to reduce their holdings without loss of priority.

as they conflicted with other offers simultaneously filed on that date, those offers should have been included in any drawings held to determine the order of consideration of conflicting offers simultaneously filed.

As the Sterling offers were deprived of that opportunity, in violation of the regulation governing conflicting simultaneously-filed offers, it was proper for the Director to vacate the drawings from which those offers were excluded and to order new drawings in which the offers would participate.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

**BOYD L. HULSE v. WILLIAM H. GRIGGS**

A-28288

*Decided May 23, 1960*

**Homesteads (Ordinary): Residence—Reclamation Homesteads: Generally**

The requirement of the homestead law that the entryman must establish residence on his entry within a maximum period of 12 months from the allowance of his entry is not satisfied by clearing and leveling the land and cultivating it, where the entryman has lived with his family in rented premises in the vicinity of the entry and has never eaten, slept, or kept any possessions on the entry.

**Homesteads (Ordinary): Cancellation of Entry—Reclamation Homesteads: Cancellation**

Where an entryman fails to establish residence on his entry within 12 months from the allowance of his entry, the entry must be canceled.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Boyd L. Hulse has appealed to the Secretary of the Interior from a decision dated October 16, 1959, of the Director of the Bureau of Land Management which dismissed a contest he had instituted against reclamation homestead entry Idaho 07614 of William H. Griggs and reversed a hearing examiner's decision holding the entry for cancellation.

Griggs' entry on Farm Unit E, Tract E, sec. 9, T. 10 S., R. 21 E., B. M., Idaho, was allowed on October 11, 1956. On November 25, 1957, Hulse instituted contest proceedings against the entry on the ground that the Griggses had not established residence on the entry prior to that date. Griggs answered that he "has in good faith sought to establish residence on said entry and otherwise fully comply with the Homestead Laws of the United States of America and the Act of June 17th, 1902 [the reclamation law]."

A hearing was held on May 16, 1958, before a hearing examiner

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pursuant to the Department's rules of practice (43 CFR, 1958 Supp., 221.51 *et seq.*).

Hulse's contest is based upon section 2297 of the Revised Statutes, as amended (43 U.S.C., 1958 ed., sec. 169), which states in pertinent part:

If, at any time after the filing of the affidavit as required in section twenty-two hundred and ninety and before the expiration of the three years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the Secretary of the Interior or such officer as he may designate that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then, and in that event, the land so entered shall revert to the Government \* \* \*. *And provided further*, That where there may be climatic reasons, sickness, or other unavoidable cause, the Secretary of the Interior or such officer as he may designate may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe.

There is little dispute as to the facts concerning Griggs' relationship to the entry. At the time the entry was allowed Griggs and his wife and two children lived in a rented house in Twin Falls, Idaho. During the winter of 1956-1957, Griggs made plans to build a house and loafing shed on the entry, but abandoned them when the Farmers Home Administration, on which he was relying for financing, rejected his loan application in March 1957. Shortly thereafter, another plan to move a one-room house onto the entry was abandoned because the house was too small. Then inquiry was made as to another house but it was not purchased at the time because of lack of funds. It does not appear that Griggs made any other attempt to place living quarters on the entry until the fall of 1957. In October of that year, he purchased the house that he had inquired about and moved it onto the entry on October 14, 1957. The house rested on a few cinder blocks, the floor sagged, and some windows and part of the roof were missing. In January 1958, Griggs placed a cot and oil heater in the house but slept there few, if any, nights and did not eat in the house because it was too cold and there was no range. In October 1957, Griggs had applied for a loan to construct a basement. Although it was granted in December 1957, construction was delayed because of the pending contest. In March 1958, the basement and foundation were built and the house moved onto it. Electricity was connected shortly thereafter and on April 1, 1958, Griggs moved his family and furniture onto the entry.

Meanwhile, in April and May of 1957, Griggs had the entry cleared of sagebrush and other debris and the land leveled at a cost of about \$1,700. He entered into an agreement with the Pool brothers who furnished seed potatoes, planted, cultivated, irrigated, and harvested 80 acres of the entry. A crop of over 1,300,000 pounds of potatoes

was sold. Between 75 to 80 percent of the proceeds went to the Pool brothers and Griggs received as his share \$2,226.69. During the summer, Griggs and his wife were employed at work off the entry, but Griggs was on the land practically every day, working at improving it. His wife gave him some slight assistance and they testified they sometimes remained on the entry until the early hours of the morning with the children sleeping in their automobile.

The hearing examiner found that while the entryman probably intended to make the entry his home he never occupied or lived on the entry, that both act and intent are necessary for residence, and that the entryman's good faith was in doubt and, as a result, he canceled the entry. The Director reversed the examiner and dismissed the contest on the ground that the existence of a habitable house was not essential to determining whether residence had been established within the time required, that lack of a habitable house is not indicative of lack of good faith, that under all the circumstances Griggs could not be charged with bad faith, and that the contestant had not made a showing necessary for canceling the entry.

Upon appeal the contestant alleges that the law as to the establishment of residence is mandatory, except for the 6-month extension which the Secretary may grant in his discretion; that the entryman had not attempted to live on the entry until January 10, 1958, at the earliest; that residence cannot be established without the entryman occupying the homestead; and that intent to make the entry a home without living on it is not enough.

In reply, the contestee says that the evidence sufficient to support the establishment of residence need not be of the character required for final proof, that a double residence is not conclusive of bad faith and that the entryman has acted in good faith.

The requirement that an entryman establish residence upon the entry within 6 months (or 12 months in certain circumstances) has been part of the homestead law for many years, first having arisen as a consequence of the Department's interpretation of the original homestead act (act of May 20, 1862; 12 Stat. 393) and then having been incorporated into the statute by the amendment of Revised Statutes sec. 2297, *supra*, by act of June 6, 1912. *Bertram C. Noble*, 43 L.D. 75 (1914). The Department has considered in many cases whether an entryman has established residence within the meaning of the homestead law and has often defined the demands of the statute. In *United States v. Cooke*, 59 I.D. 489, 501-502 (1947), the Department stated:

\* \* \* The actual residence, or bodily presence, must be accompanied by a certain intent if the place of new sojourn or physical habitancy is to be converted into such a home as makes the basis of legal domicile. In other words, a domicile of choice can be established only by intent and by act, *animo et facto*. It is not otherwise with homestead entry. These same principles underlie the

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terms of the homestead law. Under sections 2290, 2291, and 2297, Revised Statutes, the homestead applicant is required to swear that his "purpose," or intent, is "in good faith to obtain a home for himself," and besides making sworn declaration of that *intent*, he is required to perform the *act*, namely, to establish actual permanent residence upon the land within 6 months from the date of entry.

The chief rules implementing these common principles, here phrased with particular reference to homestead rather than domicile, are as follows: First, there must be *intent* to make the desired public lands the applicant's home, or fixed abode. This intent is called the *animus manendi*, the *intent to remain*, and implicit in it, of course, is the *intent no longer to have a home at the former residence*, or domicile; second, there must be *actual bodily presence* on the lands entered, this act of inhabitaney of the entry being called the *factum*. Moreover, these two elements must coexist. The mere intent to acquire a new home on the desired lands, if unaccompanied by the *factum* of bodily removal to the entry and bodily presence there, avails nothing; nor does the fact of removal and presence if those acts be not animated by intent.

In *Whaley v. Northern Pacific Railway Company*, 167 Fed. 664, 670 (C.C.D. Mont. 1908), it was stated:

To establish a residence under the homestead laws, there must be a combination of act and intent, the act of occupying and living upon the claim and the intention of making the place a home to the exclusion of a home elsewhere. \* \* \*

While an entryman must establish residence within the time allowed by the statute, the initial residence need not be of the character necessary to satisfy the requirements for final proof (*Orisp v. Maine*, 59 I.D. 406 (1947); *Slette v. Hill*, 47 L.D. 108 (1919); *George D. Parker v. Fred L. Richardson*, A-26254 (January 10, 1952)), which demands actual residence. *Harold Paul*, 54 I.D. 426 (1934).

However, the fact that the entryman need do less to "establish residence" than to "actually reside" on the entry does not mean that either of the two essentials of residence, the act and the intent, can be omitted.

The requirement that both aspects of residence be present was made clear in a recent case, in which in the first entry year, the entryman had cleared 6 acres, built 2 ramps from the highway, sunk a 20-foot well, and poured 6 concrete piles to set a house upon. He also alleged that he had built a house on skids but was unable to move it upon the entry because of soft ground. At the hearing the entryman admitted that he had not established any residence on the entry or even stayed overnight on it at any time prior to the expiration of 1 year from the date of the allowance of his entry. Upon these facts, the Department held that "Acts done 'in preparation to establish a residence' cannot be regarded as the establishment of residence" and affirmed the cancellation of the entry. *Henry J. Ernst*, A-27196 (November 7, 1955).

<sup>1</sup> To the same effect: *West v. Owen*, 4 L.D. 412 (1886); 8 L.D. 576 (1889).

With this case in mind, an examination of Griggs' relation to his entry demonstrates that the most that can be said is that although he was preparing to establish a residence on his entry, he failed to do so until well after the expiration of the 6-month period, the 12-month extended period, and the initiation of the contest.

Griggs did not eat, sleep, or keep any possessions on the entry until January 10, 1958, at the earliest. Whatever may have been his intention, his acts fall far short of constituting the act of occupying and living upon his entry and without a sufficient act residence cannot be established.

The entryman relies heavily upon *Crisp v. Maine, supra*, to support his contention that he has satisfied the requirements of the statute. In that case, besides cultivating some of the entry, Maine, the entryman, applied for a 6-month extension, spent a good many nights with his family on the entry in the first entry year, and was seriously hampered in his efforts to get a well drilled on the entry and a home built because of the shortages caused by World War II. The Department found that although Maine's residence on the land was brief and intermittent, it was sufficient in the circumstances to show that the entryman could not fairly be charged with bad faith.

While Maine barely met the requirements of the statute, Griggs did not even do as much as Maine did and the circumstances are far less compelling in this case. I am convinced that if Griggs had seriously intended to establish his residence on the entry he could have done so within the time allowed, although it may have inconvenienced him to do so. He and his wife were both employed and in good health, he had to have assets of at least \$4,500 to qualify as an applicant for the land, and he spent \$1,700 in his first entry year preparing the land for cultivation.

As the Department said long ago—

\* \* \* it was fully in his [the entryman's] power to have complied with the requirements of the law, in the matter of establishing residence, if he had earnestly endeavored to do so. Residence may be commenced in a very cheap structure, but there must be inhabitancy. \* \* \* *Renshaw v. Holcomb*, 27 L.D. 131, 133 (1898).

The homestead act does not require the entryman to cultivate in the first year, but it does require that he establish his residence on the entry in that year. Griggs, apparently, chose to devote his resources to cultivation rather than to establishing a residence.

Accordingly, it is concluded that Griggs failed to establish residence on the land within the time prescribed by law and that, as a result, his entry must be canceled. *William M. Below*, A-25882 (July 19, 1950); *Henry J. Ernst, supra*.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental

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Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is reversed and the examiner's decision is affirmed.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

**P & G MINING COMPANY**

**A-27829**

*Decided May 24, 1960*

**Withdrawals and Reservations: Authority to Make**

The President of the United States has inherent authority to withdraw public lands for public purposes apart from the statutory authority vested in him by the act of June 25, 1910, and such inherent authority is not subject to the restrictions which attend his statutory authority.

**Withdrawals and Reservations: Effect of**

A withdrawal of public land made pursuant to the inherent authority vested in the President is a complete bar to mining location in the absence of express consent to mining location, whereas a withdrawal made pursuant to the authority bestowed upon the President by the act of June 25, 1910, is subject to mining location, entry, and patent for metalliferous minerals.

**Withdrawals and Reservations: Revocation and Restoration—Withdrawals and Reservations: Reclamation Withdrawals**

A petition for the restoration to mineral entry of land withdrawn for reclamation purposes and as a part of the Imperial National Wildlife Refuge is properly denied even though the Bureau of Reclamation has no objections to such restoration when mining operations would interfere with the purpose for which the wildlife refuge was established.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

The P & G Mining Company, a partnership, has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated June 25, 1958, which affirmed a decision of the manager of the land office at Los Angeles, California, dated August 9, 1957, rejecting its application, filed pursuant to the act of April 25, 1932 (43 U.S.C., 1958 ed., sec. 154), for the restoration to mining location and entry of sec. 29, T. 13 S., R. 23 E., S. B. M., in Imperial County, California. The applicant subsequently narrowed its request for restoration to the  $S\frac{1}{2}SW\frac{1}{4}NE\frac{1}{4}$ ,  $S\frac{1}{2}SE\frac{1}{4}NE\frac{1}{4}$ ,  $N\frac{1}{2}NW\frac{1}{4}SE\frac{1}{4}$ ,  $N\frac{1}{2}NE\frac{1}{4}SE\frac{1}{2}$ , and  $NW\frac{1}{4}SW\frac{1}{4}$  of sec. 29.

The land is presently included in a first form reclamation withdrawal for the Colorado River Storage Project made on October 20, 1931, under section 3 of the act of June 17, 1902 (43 U.S.C., 1958 ed., sec. 416), and a reservation for the Imperial National Wildlife Refuge established under the authority of the President of the United States and the act of June 25, 1910, as amended August 24, 1912 (43 U.S.C., 1958 ed., secs. 141, 142) by Executive Order 8685 dated February 14, 1941 (6 F.R. 1016). The Bureau of Reclamation indicated that it

would offer no objection to a mineral restoration of the restricted area in section 29, but the Bureau of Sport Fisheries and Wildlife of the Fish and Wildlife Service opposed opening of this land to mineral entry because it would create an island of privately owned land within the wildlife refuge which would interfere with the proper administration of the refuge. On appeal to the Director of the Bureau of Land Management, the Acting Director of that bureau noted the willingness of the Bureau of Reclamation to permit mineral location, but held that Executive Order 8586, establishing the wildlife refuge, does not allow mining location so that the land would remain unavailable to the applicant even if its application should be granted. Accordingly, he declared that the restoration order would not be issued.

On appeal to the Secretary, the applicant has renewed the contentions previously advanced in support of its desire to undertake the mining of uranium as a consequence of a discovery made while prospecting upon what it thought was unappropriated or unwithdrawn public land. It has also attacked the Acting Director's statement that Executive Order 8685 does not allow mining location, entry, and patent. In doing so, it denies that *Clyde A. Morgan, Walter F. Sager, A-27489* (October 24, 1957), a previous decision of the Department also issued in response to a request for restoration to mineral location, entry, and patent of certain lands in Arizona within the Imperial National Wildlife Refuge, has any relevance because, in that case, both the Bureau of Reclamation and the Fish and Wildlife Service objected to such action whereas, in this case, the Bureau of Reclamation does not object so that the wildlife reservation is the only impediment and, under the act of June 25, 1910, metalliferous mining is specifically allowed in areas withdrawn or reserved under that act.

All that the appellant has contended for the act of June 25, 1910, may be conceded in this case without changing the conclusion reached by the manager and the Acting Director because the order which established the Imperial National Wildlife Refuge invokes, as authority, first, the general or inherent authority vested in the President of the United States by virtue of his office and, second, that conferred upon him by the act of June 25, 1910.

It has long been recognized that the President of the United States, acting directly or through the heads of departments, may cause a particular portion of the public domain to be appropriated to public use, and, whenever a tract of land has been so appropriated, it is severed from the public domain so that laws which permit the acquisition of private rights in public land do not apply. *Wilcox v. Jackson*, 13 Pet. 497 (1839). Such authority remained unimpaired by the adoption of the act of June 25, 1910, which authorizes temporary withdrawals from settlement, location, sale, or entry for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, which withdrawals remain in



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force until revoked by the President or by an act of Congress. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915); *Wilbur v. United States*, 46 F. 2d 217, 220 (D.C. Cir. 1930). It is not limited by the terms of section 2 of the 1910 act, as amended, which provides that lands withdrawn under the act "shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals." *Mason v. United States*, 260 U.S. 545 (1923). In 1941, the Attorney General said:

When lands are withdrawn temporarily for a purpose coming within the 1910 Act, those lands are subject to the terms of that act and accordingly said mining laws apply. If, however, the lands are not withdrawn temporarily for a purpose within the 1910 Act, but for permanent use by the Government for other and authorized uses, the mining laws made applicable to lands withdrawn under the 1910 Act do not apply. (40 Ops. Atty. Gen. 73, 81.)

He added:

There should be considered also the practical results of an interpretation that the act of 1910 was intended to be all-inclusive. Such interpretation would mean that land withdrawn by the President since 1910 for military or naval reservations would in many instances be open to exploration, discovery, occupation and purchase under the mining laws. This would be true also of land withdrawn for other essential Federal uses. In the absence of compelling considerations it may not be assumed that the Congress intended this result. (*Id.* 83.)

It is also well established that a wildlife refuge is a purpose for which the President may exercise his inherent power to withdraw public lands (37 Ops. Atty. Gen. 415 (1934); 37 Ops. Atty. Gen. 502 (1934) see sec. 10 of Migratory Bird Conservation Act of February 18, 1929 (16 U.S.C., 1952 ed., sec. 715i), and one for which such power may be exercised notwithstanding the earlier reclamation withdrawal. See memorandum dated July 30, 1940, from Acting Solicitor to Secretary relating to proposed draft of an Executive order to establish the Havasu Lake National Wildlife Refuge.

In this instance, the withdrawal was made in the exercise of the President's inherent power, as evidenced by the fact that a permanent refuge was established, although the authority conferred by the statute is also cited. This seems to have been a fairly common practice for a number of years.<sup>1</sup> It is significant that in some instances wherein

<sup>1</sup> Over a period of about 3 years immediately preceding the date of the order which established the Imperial National Wildlife Refuge, the following Executive orders establishing or enlarging wildlife refuges which invoke both the President's inherent authority and the authority bestowed upon him by the act of June 25, 1910, were issued:

Number	Date	Name of refuge
7923	July 2, 1938	Ruby Lake Migratory Waterfowl Refuge.
7925	July 5, 1938	Salt Plains Wildlife Refuge.
7957	Aug. 19, 1938	Cape Mearns Migratory Bird Refuge.
7983	Oct. 4, 1938	Breton Bird Refuge.
7993	Oct. 27, 1938	Great White Heron Refuge.
8038*	Jan. 23, 1939	Cabeza Prieta Game Range.
8039*	Jan. 25, 1939	Kofa Game Range.

both the President's inherent authority and the statutory authority are relied upon there is a specific provision that mining activities shall not be prohibited. This indicates clearly that a full exercise of Presidential authority was intended in every instance wherein such language was not included in the withdrawal order. Accordingly, it cannot be supposed that a reference to the act of June 25, 1910, in the withdrawal order was intended to effect or has effected consent or acquiescence in the continuation of mining activities in the lands included in the Imperial National Wildlife Refuge.

It thus appears that the Acting Director was correct in his conclusion that mining activities are not permitted on the land covered by the application for restoration, even without regard to the reclamation withdrawal. Since the restoration sanctioned by the act of April 25, 1932, would not result in the accomplishment of the purpose sought by the appellant, the Acting Director properly denied its request for such restoration.

On this appeal, the request for restoration of the land in question to mining location has again been considered from the standpoint of possible detriment to the wildlife refuge. It has again been concluded that mining operations and possible future private ownership of the land would interfere with the wildlife objectives of the refuge.

Therefore, the decision appealed from is affirmed.

ROGER ERNST,  
*Assistant Secretary.*

**MALCOLM C. PETRIE**

A-28229

*Decided May 25, 1960*

**Rules of Practice: Appeals: Timely Filing**

An appeal to the Director of the Bureau of Land Management is properly dismissed when the statement of reasons for the appeal is not filed with the notice of appeal and is later filed in the land office within the extension of time granted by the Director, but is forwarded to the Director after the expiration of such time and is received in the office of the Director within the period allowed by the grace provision of the rules of practice, since the deposit of the document in the manager's office cannot be construed as a transmission of the document to the Director.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Malcolm C. Petrie has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management,

<i>Number</i>	<i>Date</i>	<i>Name of refuge</i>
8081*	Apr. 5, 1939	Anclote Migratory Bird Refuge.
8153	June 12, 1939	Lake George Migratory Waterfowl Refuge.
8158	June 12, 1939	Lake Zahl Migratory Waterfowl Refuge.
8289	Nov. 22, 1939	Bosque del Apache Wildlife Refuge.
8575	Oct. 22, 1940	Thief Valley National Wildlife Refuge.

The starred orders provide specifically that mining activities shall not be prohibited within the area set apart.

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dated July 9, 1959, which dismissed his appeal from a decision of the manager of the land office at Salt Lake City, Utah, rejecting his non-competitive oil and gas lease offer filed under section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The Director's reason for dismissal was Petrie's failure to file a statement of reasons for his appeal within the time designated by the Department's rules of practice.

The manager's decision was received by Petrie on January 26, 1959. Petrie's appeal, accompanied by the filing fee, was filed in the land office at Salt Lake City on February 24, 1959. It contained this statement:

It is my intention to appeal from the Manager's decision on the above case and hereby request a sixty day extension from February 24, 1959 in order to have adequate time to prepare a brief and submit reasons for the appeal.

There was no statement of reasons included in the appeal document or filed with it. The file was transmitted to the Director of the Bureau of Land Management with a memorandum which called to the Director's attention the request for a 60-day extension of time to file reasons in support of the appeal and on March 13, 1959, the Director wrote Petrie that he would have to and including April 24, 1959, to submit his statement of reasons for the appeal.

At 3 p.m. on April 24, 1959, Petrie filed his statement of reasons in the Salt Lake land office. It was forwarded to the Director by the State Supervisor on April 27, 1959, and received in the Director's office on May 4, 1959, 10 days after it was filed in the land office.

The Department's rules of practice provide that an appeal to the Director be filed in the office of the officer who made the decision appealed from (43 CFR, 1958 Supp., 221.2), but that a statement of reasons for the appeal, if not submitted with the notice of appeal, must be filed in the office of the Director. The applicable portion of 43 CFR, 1958 Supp., 221.3 reads:

If the notice of appeal did not include a statement of the reasons for the appeal, such a statement must be filed in the office of the Director (address: Director, Bureau of Land Management, Washington 25, D.C.) within 30 days after the notice of appeal was filed. Failure to file the statement of reasons within the time required will subject the appeal to summary dismissal as provided in § 221.98, unless the delay in filing is waived as provided in § 221.92.

Petrie concedes that his statement of reasons was not filed within the period for filing specified by the rules of practice, as extended by the Director, but he points out in his appeal to the Secretary that it was received in the Director's office within the 10-day period allowed by the grace provision of 43 CFR, 1958 Supp., 221.92(b) and, therefore, should be considered as properly filed. The receipt of the document in the Director's office within the grace period may be conceded but this alone is not sufficient to bring the matter within the grace provision which reads:

\* \* \* the delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed *and* it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. (Emphasis supplied.)

Because Petrie met the first of these requirements, the sole question presented by this appeal is whether the presentation to the manager of the document required to be filed with the Director constitutes "transmission" to the Director.

The Department has many times been confronted with cases under the rules of practice where the appellant erroneously filed in the land office a document which was required by the rules to be filed in the office of the Director and by the time the document was forwarded to and received in the Director's office the time for filing had expired. The appellant in such cases has frequently argued that filing with the manager constitutes filing with the Director. In *Wilbert Phillips et al.*, 64 I.D. 385, 387 (1957), the Department said:

The short answer to the appellant's contention that the manager acted as the Director's agent in receiving the statement of reasons is that the manager is not designated under the rules of practice to act as the Director's agent. If he is to be considered anyone's agent, he merely acted as the appellants' agent in forwarding the document to the office in which it was required to be filed. *Cf. C. B. Eaton et al.*, A-26762 (August 11, 1953).

In the *Eaton* case, the Department said:

Where an appeal is so filed [with the manager], the appellant has in effect merely requested the Manager to be his agent to forward the appeal to the Director.

When, in this case, Petrie erroneously and in disregard of the very specific language of section 221.3 of the rules of practice, filed his statement of reasons in the land office, it could hardly be said that he had "transmitted" his statement to the Director's office. That the State Supervisor, as a matter of grace, forwarded the statement can be construed only as an act of favor for Petrie. Certainly there was no obligation on the State Supervisor to do so. At the most, he could only be characterized as Petrie's agent in forwarding the statement. But the transmittal did not occur until April 27, 1959, 3 days after transmittal was required under the grace provision. Petrie would be bound by the act of the State Supervisor as his agent. Thus it must be concluded that Petrie's late filing of his statement of reasons was not saved by the grace provision.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the Director's decision is affirmed.

EDMUND T. FRITZ,  
Deputy Solicitor.

**AL WARDEN, LAWRENCE T. EASTES****A-28262***Decided May 31, 1960***Oil and Gas Leases: Applications**

A joint oil and gas lease offer signed by only one of the offerors is incomplete and must be rejected in its entirety; it cannot be considered as the individual offer of the one signing.

**Oil and Gas Leases: Applications**

The manager of a land office has no duty or authority to ignore any portion of an oil and gas lease offer in order to regard it as a valid offer.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Al Warden and Lawrence T. Eastes have appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated September 4, 1959, which affirmed a decision of the chief of the minerals adjudication unit of the land office at Santa Fe, New Mexico, dated November 20, 1958, rejecting their noncompetitive oil and gas lease offer filed pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226).

The land office rejected the lease offer because it was prepared as the joint offer of two persons but signed by only one of them; therefore, it was incomplete as the one not signing had not complied with certain requirements. On appeal, the Director held that an offer submitted by two or more persons raises a presumption that one signed for himself and as agent for the other. He found that the proofs of agency required by the regulations had not been filed and that, consequently, the offer should be rejected in its entirety.

In their subsequent appeal, the appellants contend that there was no agency; that they had intended to act as co-tenants but that Eastes inadvertently failed to sign so that he did not become an offeror. They assert, however, that his name is mere surplusage and that the offer is valid as the lease offer of Warden as an individual whose name appears as one of the offerors in the proper place on the form and who also signed the offer as lessee.

There is no doubt that the offer was prepared as the joint offer of both Warden and Eastes. Both their names are typed as offerors in the appropriate place at the top of the form. In the center of the page (item 5), in the space provided for certifying that the offeror or offerors are citizens, native born or naturalized, the words "yes both" (emphasis added) appear in the blank space following "Native born." The receipt indicates that both paid the filing fee and the first year's rental. Further evidence of the offerors' state of mind is contained in a letter from Eastes to the manager of the land office before the rejection of the offer in which Eastes indicated that the offer had been assigned and that early issuance of the lease was desired in order that drilling might commence promptly. Eastes enclosed a letter

from the assignee to him, instructing Eastes that he and Warden and their wives should sign the assignment instrument. Thus, as the appellants contend, there is no doubt that their offer was intended to be a joint offer.

The question then is whether a joint offer by two persons which is signed by only one can or must be accepted as the individual offer of the one signing. I do not see how it can be.

In *W. H. Burnett et al.*, 64 I.D. 230 (1957), the Department considered a similar question and said:

In their present appeal the appellants admit that their application was defective as to Weinberg, but contend that because the application as to Burnett was in all respects regular, the application should have been accepted and acted upon as though Burnett were the sole offeror.

Basically this argument resolves itself into the proposition that where two or more persons have made a joint offer, a lease should be issued to one or more of them who would have been entitled to a lease if he or they had applied in his or their own right, regardless of the fact that others of the applicants have not complied with the pertinent regulations. In other words, it contends that a joint offer should be considered as a series of individual offers and that a lease should be issued to any of the offerors who have qualified for a lease.

However, the offerors have not acted as separate individuals. For reasons of their own they chose to act as a unit, as a single entity. See *Edward Lee et al.*, 51 L.D. 299 (1925). They filed one offer and paid one filing fee and one year's advance rental, and the offer was assigned one number. Consequently, their offer ought to be judged by the same standards that are applied to any other offer. (P. 231.)

In contending that there was filed a complete offer of Warden only, the appellants are not only requesting the Department to ignore their own obvious intent to file a joint offer; they are also insisting that the manager should have changed the paper that was filed so that it became a complete offer on the part of Warden alone. The Department has held that a manager of a land office has no duty and no authority to alter lease offers that are presented to him for the purpose of making them valid. His only duty is to determine whether such offers as are presented to him can be accepted *W. H. Burnett et al.*, A-28037 (August 20, 1959).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,  
Deputy Solicitor.

## APPLICABILITY OF THE MINERAL LEASING ACT TO MINERALS IN RIGHTS-OF-WAY

### Rights-of-Way: Nature of Interest Granted

Rights-of-way granted by or under authority of Congress constitute either easements or "limited fees." Grants of "limited fee" railroad rights-of-way do not include a grant of the minerals in the lands.

### Mineral Leasing Act: Applicability—Rights-of-Way: Generally

The Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. 1958 ed., sec. 181 *et seq.*), applies to lands within rights-of-way granted by the United States whether they be easements or "limited fees" granted with a reservation of the minerals to the United States, except to the extent that that act has been superseded by a special leasing law applicable to such rights-of-way.

M-36597

JUNE 3, 1960

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT.

You have submitted for review and endorsement by this office a proposed memorandum to the State Supervisor, Cheyenne, Wyoming, which would instruct him, pursuant to his inquiry, that sodium permits and leases for public lands need not exclude those portions of the lands that are within rights-of-way.

This question, because of the prevalence of rights-of-way on the public lands, it appears might have been presented earlier in view of the doubt that, until recent years, has existed as to the kind of estate conveyed in certain rights-of-way grants. As indicated in *United States v. Union Pacific R. Co.*, 353 U.S. 112 (1957), most railroad rights-of-way grants, including the general act of March 3, 1875 (18 Stat. 482; 43 U.S.C. 1958 ed., sec. 934), as well as certain rights-of-way for reservoir purposes under the act of March 3, 1891 (39 Stat. 1197; 43 U.S.C., 1958 ed., sec. 946), were deemed to be limited fees, conveying for the life of the fee, full title, in the land and minerals even though because of the express limitations on the right of user the right-of-way owner could not mine and remove any minerals from the granted lands. See *Northern Pacific Ry. v. Townsend*, 190 U.S. 267 (1903), in relation to the nature of railroad right-of-way grants. The limited fee doctrine was narrowed considerably by *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942), which limited its application as to railroad rights-of-way to those made to the so-called land grant railroads prior to the year 1871. Since the reservoir right-of-way act of March 3, 1891, is comparable to railroad right-of-way acts passed subsequent to 1871, they too are now regarded as easements.

The final blow was dealt to the limited fee doctrine so far as it applied to minerals in rights-of-way by *United States v. Union Pacific*

*R. Co., supra*, wherein it was held that the land right-of-way grant there under consideration (act of July 1, 1862; 12 Stat. 489), did not convey the minerals in the right-of-way but, whatever the nature of the grant it related only to "all surface rights to the right-of-way and all rights incident to a use for railroad purposes."

Since it is the general rule that right-of-way easements on the public lands do not bar the owner of minerals in the land affected from enjoying them subject to his obligation to support the surface and not to interfere with the use of the right-of-way for the purpose for which it was granted, 2 *Lindley on Mines*, 3d Ed., sec. 530, and cases cited, it would appear, at least as to *such* rights-of-way the answer to the State Supervisor's question would necessarily be in the affirmative. However, during the period immediately following enactment of the Mineral Leasing Act, while the "limited fee" doctrine prevailed, the Department became concerned over its apparent lack of authority to lease oil and gas deposits underneath railroad and certain other rights-of-way. In an effort to remedy that situation it submitted to Congress on December 27, 1929, a draft of a proposed bill which it said would provide for the leasing of oil and gas from "easement and right-of-way lands." It pointed to the railroad and reservoir right-of-way acts of March 3, 1875, and March 3, 1891, respectively, as examples of "limited fee" rights-of-way. The Congress enacted the proposed legislation as the act of May 21, 1930 (46 Stat. 373; 30 U.S.C., 1958 ed., sec. 301), to provide for leasing the oil and gas deposits to the owner of the right-of-way "whether the same be a base fee or mere easement," but also to provide that an adjoining owner or oil and gas lessee could submit, competitively with the right-of-way owner's offer to lease, an offer of the amount of compensatory royalty he would pay for the privilege of extracting the oil and gas through wells on the adjoining land.

Subsequent to the *Great Northern* decision, *supra*, a case arose under the 1930 act in which a lessee of land crossed by a railroad right-of-way protested an application to lease filed by the right-of-way owner, alleging that its Mineral Leasing Act lease included the right-of-way. *Phillips Petroleum Co.*; 61 I.D. 93. The Department held against that contention and that the act of May 21, 1930, provides the exclusive authority for leasing oil and gas deposits underlying rights-of-way. If the decision had been limited strictly to these conclusions there would be no reason why the general rule applicable to easements should not be applied to easement rights-of-way nor that the rule (also firmly established) that the owner of reserved minerals may re-enter and remove them should not be applied to the so-called "limited fee" railroad rights-of-way. But in its discussion of the case the Department took occasion to say:



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\* \* \* The legislative history of the 1930 act shows that its enactment constituted an acceptance and confirmation by Congress of the Department's construction of the Mineral Leasing Act as inapplicable to oil and gas deposits underlying railroad rights-of-way granted under the 1875 act. The Department could not now overthrow this legislatively approved construction of the scope of the Mineral Leasing Act, merely upon the basis of the Supreme Court's change of view respecting the nature of the right enjoyed by the holder of a railroad right-of-way acquired under the 1875 act. (Pp. 98-99.)

The above quoted language, considered out of context, might possibly be construed to stand for the proposition that an acceptance by one Congress of a departmental interpretation of a law passed by a prior Congress binds the Department to that interpretation. That, of course, is not so and a consideration of the whole decision shows that a much more limited meaning—and one wholly consistent with sound legal principles—was meant. Earlier the Department had pointed out that:

The appellant's basic contention is that the Mineral Leasing Act of 1920 and the act of May 21, 1930, confer overlapping or concurrent authority upon the Secretary of the Interior to issue leases covering oil and gas deposits underlying railroad rights-of-way granted under the 1875 act, and that, as the Secretary has already leased the oil and gas underlying the right-of-way in question to the appellant pursuant to the Mineral Leasing Act of 1920, he no longer has authority to issue a lease for the same deposits pursuant to the 1930 act. (P. 95.)

The language from the decision first above quoted was directed solely to the "basic contention" set forth in the last above quotation. After expressing its views as quoted the Department went on to say that "It must be concluded, therefore, that [in 1945] the 1930 act was the only statute [applicable to the facts in the case]." In a word all that was meant was that the Congress that enacted the 1930 act did so in acceptance of the Department's view that the 1920 act did not apply to rights-of-way and consequently the 1930 act was intended by that Congress to be and it must be deemed to be the only law authorizing the issuance of leases for oil and gas deposits under rights-of-way. I believe that there can be no quarrel with that reasoning. It is the general rule that special legislation will be deemed to supersede prior general legislation especially where there is reasonable evidence of that intent.

It is a different matter to say that acceptance by one Congress of the Department's interpretation of a law enacted by another Congress means that that interpretation is binding and cannot be changed. I am unable to find any evidence, at least that the Department has adopted the attitude that, except for the 1930 act as to oil and gas, leasable minerals under easement rights-of-way and (since *United States v. Union Pacific R. Co.*, *supra*) reserved minerals under

"limited fee" rights-of-way may not be leased under the Mineral Leasing Act. To the contrary, in A24101, *E. A. Wight*, November 5, 1945, the Department said that without an examination of all pertinent facts (as to possible interference with right-of-way activities) the refusal to grant a lease should not rest on the ground that the grant of an easement necessarily precludes the leasing of minerals but it said that the application there filed under the Mineral Leasing Act for an oil and gas lease would have to be denied because the 1930 act prescribes the exclusive method of leasing oil and gas under public land rights-of-way. It is to be noted also that in considering in 1931 the alleged rights of the lessee of lands crossed by a right-of-way whose lease was issued prior to 1930, the Department did not give the same reason it later gave in *Phillips, supra*, for saying the lease did not include deposits under the right-of-way but rested its conclusion on the, then, valid reason that the (1875) railroad right-of-way was a "limited fee" right-of-way. *Charles A. Son et al*, 53 I.D. 270.

As shown by the cases cited in *Lindley on Mines*, sec. 530, *supra*, the Department has long recognized that mining claims may be located over and across easements and, subject to the obligation to support the surface, may take the minerals from beneath it. I find nothing to indicate that the rule as to mining claims has changed, nor anything to show that the Department has ever held that the mineral leasing laws (including the 1930 act) do not apply to "easement" rights-of-way. The difficulties that have arisen have been due to the uncertainty as to what were "easements" and what were "fees." Thus *A. Otis Birch and M. Estelle C. Birch*, 53 I.D. 339, held a mining claimant acquired no title to land or minerals in a March 3, 1875, railroad right-of-way because it constituted a "limited fee," but *Healy River Coal Company*, 48 L.D. 443, called the Alaska Railroad right-of-way an easement and recognized the right of a coal lessee to mine coal under the right-of-way if it did not endanger surface use of the right-of-way. It also seems reasonably clear that the Department's statement to Congress in 1930 that it had refrained from leasing reservoir sites "in the nature of easements" was on the ground that the entire area was needed for reservoir purposes, and the same as to railroad rights-of-way. If this is so refusal to lease may have been justified both as a matter of law and policy for it is not believed that Congress intended any interference with necessary uses of rights-of-way granted by it or under its authority. No such objection can reasonably be urged against mining from off sites subject to the obligation to support the surface. In the past, I am informed, the Geological Survey has refused to approve plans of operation where

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the evidence showed that operations would make dangerous the surface use of the right-of-way owner.

EDMUND T. FRITZ,  
*Acting Solicitor.*

EDWIN G. GIBBS ET AL.<sup>1</sup>

A-28261

*Decided June 8, 1960.*

**Oil and Gas Leases: Applications—Oil and Gas Leases: Lands Subject to**

Land included in an outstanding oil and gas lease is not available for leasing to others and an application for such land must be rejected.

**Oil and Gas Leases: Assignments or Transfers**

Where three original executed counterparts of an instrument assigning to the same parties separate parcels of land or interests therein out of a single oil and gas lease are filed, the assignment may be approved, all else being regular, and it is improper to require a separate instrument of assignment as to each parcel being assigned.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

On November 24, 1958, the manager of the land office at Salt Lake City, Utah, rejected the offer, Utah 031899, filed by Edwin G. Gibbs on November 3, 1958, to lease 1,920 acres of land in Utah pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The rejection was on the ground that the land applied for was on the date of the offer in existing leases. Gibbs appealed to the Director of the Bureau of Land Management, who, on July 9, 1959, affirmed the rejection of the Gibbs offer.

Gibbs has appealed to the Secretary of the Interior. He attacks the rule of the Department relied on by the Director that the land included in outstanding leases is not available for leasing to others and that offers to lease such land must be rejected. The rule has been followed by the Department since the beginning of adjudications under the Mineral Leasing Act (*Martin Judge*, 49 L.D. 171 (1922); *Stephen P. Dillon, Martha M. Roderick*, 66 I.D. 148 (1959)), and nothing which Gibbs has presented against the rule or its application to his offer is convincing. Accordingly, it must be held that it was proper to reject the Gibbs offer.

The Director, in the same decision, held that the leases in conflict with the Gibbs offer had been improperly segregated and extended.

<sup>1</sup> The other appellants are: Three States South Bluff, Ltd.; Renwar Oil Corporation; William H. Hawn, John D. Hawn, and George S. Hawn, dba Hawn Brothers; and Gulf Oil Corporation.

He found that only one copy of partial assignments out of oil and gas lease Utah 012264 had been filed on September 25, 1958, and that the other two original executed counterparts thereof together with statements of citizenship and holdings for several of the assignees were not filed until October 16, 1958, during the last month of the extended term of Utah 012264. He held that since all of the required papers were not filed prior to the last month of the lease term the partial assignments did not become effective to extend the leases.

Three States South Bluff, Ltd., the assignor, and Renwar Oil Corporation and others, the assignees under the assignments which the Director held to be ineffective to extend the segregated leases, as well as Gulf Oil Corporation, which claims to be a subsequent assignee of an interest in segregated lease Utah 012264,<sup>2</sup> have taken separate appeals from the Director's decision insofar as it affects their interests in the segregated leases.

The assignor contends that the filing of the partial assignments was completed during the 11th month of the 10th year of the term of Utah 012264. If this be so, the other arguments made by it and the other appellants against the Director's decision to vacate the manager's action in extending the leases need not be considered.

The record shows that oil and gas lease Salt Lake 067711, covering 2,560 acres, was issued to Madge Jones, effective November 1, 1948. That lease was in its extended 5-year term when, on March 3, 1954, 640 acres of the land in that lease were committed to the Bluff Bench Unit Agreement. Under the terms of that agreement, the Jones lease was segregated into two separate leases, the one covering the 640 acres within the unitized area and the other covering that portion outside of the unit area. The lease covering the 1,920 acres outside of the unit area was assigned the new serial number Utah 012264. Madge Jones assigned Utah 012264 in its entirety to Three States Natural Gas Company, effective December 1, 1956. That company assigned the lease in toto to Three States South Bluff, Ltd. By decision dated January 31, 1958, the latter assignment was approved, effective January 1, 1958.

On July 7, 1958, Renwar Oil Corporation filed in the Salt Lake City land office a partial assignment from Three States South Bluff, Ltd., to itself and others of interests in two separate parcels of land included in Utah 012264.<sup>3</sup>

By decision dated August 29, 1958, the manager returned the partial assignment, which had been submitted in triplicate. He stated

<sup>2</sup> This assignment is not included in the record on appeal.

<sup>3</sup> By that instrument Three States South Bluff, Ltd., assigned to Renwar Oil Corporation; Hawn Brothers, a Texas partnership composed of Wm. H. Hawn, John D. Hawn, and George S. Hawn; and Cyrus L. Heard an undivided one-half interest in the lease insofar as the lease covered the SW  $\frac{1}{4}$  sec. 13, T. 40 S., R. 22 W., S.L.M., Utah, and the entire interest in the lease insofar as it covered the E  $\frac{1}{2}$  SE  $\frac{1}{4}$  of the same section.

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that the assignment appeared to convey two separate parcels of land. He held, in effect, that the instrument was two assignments, requiring the payment of two filing fees and the submission of six counterparts. He gave the parties the alternative of filing three additional copies of the instrument or filing amended assignments covering the separate parcels. He also called for a statement as to the citizenship and holdings of certain of the assignees.

On September 25, 1958, three executed originals of the same instrument were filed, together with three photostat copies thereof and the additional filing fee. At the same time, the statements of citizenship and holdings of the assignees, called for by the manager, were filed. By decision dated October 6, 1958, the parties were informed that photostat copies were not acceptable and that the regulations of the Department required three originally-signed counterparts to be filed for each assignment. Thereafter, on October 16, 1958, three additional originally-signed counterparts of the partial assignments out of Utah 012264 were filed. By decision dated October 27, 1958, the manager approved the assignments, effective October 1, 1958, and segregated the leases as Utah 012264, Utah 012264-A, and Utah 012264-B.

Thus it appears that the holding of the Director that the statements of the citizenship and holdings of certain of the assignors were not filed until October 16, 1958, is incorrect.

This review of the record shows that three executed counterparts of the instrument were filed on September 25, 1958, and unless it be held, as the manager did in his decision of August 29, 1958, that six original counterparts were required to be filed, since the instrument submitted assigned interests in two separate parcels of land, it must be found that the filing was completed on September 25, 1958, and that the assignments became effective on October 1, 1958, to extend the segregated leases, if the lands were undeveloped, for two years, or until September 30, 1960. *Franco Western Oil Company et al.*, 65 I.D. 316 (1958).

I find no justification in either section 30(a) of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 187a); or in the pertinent regulations of the Department (43 CFR, 192.140-192.145) for holding that when an assignment to the same parties affecting two separate parcels of land in the same lease is filed, six original counterparts of the instrument must be filed.

Section 30(a) provides that any oil and gas lease may be assigned as to all or part of the acreage included therein and as to either a divided or undivided interest therein and that such assignment shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof, together with any required bond and proof of the

qualification under the act of the assignee to take or hold such lease or interest therein.

Nothing in section 30(a) seems to prohibit the assignment of more than one tract of land or interest therein out of the same lease to the same parties by the same instrument or to require that when more than one tract of land is assigned three original executed counterparts of the assignment must be filed for each separate parcel.

Nor do the regulations spell out any such requirement. While 43 CFR 192.142 requires separate instruments of assignment for each oil and gas lease, that regulation cannot be read to require separate instruments covering two parcels of land embraced in one lease.

Therefore, since the record shows that three original counterparts of the partial assignments out of lease Utah 012264 were filed on September 25, 1958, and that at that time proof of the qualifications of the assignees to hold the interests assigned to them were also filed, the assignments became effective on October 1, 1958, and served to extend the segregated leases for a period of two years, or until September 30, 1960, all else being regular.

Accordingly, that part of the decision of the Director which held those leases to have been improperly segregated and extended is reversed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management dated July 9, 1959, is affirmed in part and reversed in part.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

#### UNITED STATES v. T. C. MIDDLESWART ET AL.

A-28286

*Decided June 9, 1960*

**Administrative Procedure Act: Hearing Examiners—Mining Claims: Contests—Rules of Practice: Appeals: Generally—Rules of Practice: Government Contests**

Upon appeal from a decision of a hearing examiner in a contest against a mining claim, the Director of the Bureau of Land Management, and in turn the Secretary, can make all findings of fact and law based upon the record just as though each were making the decision in the first instance.

#### **Mining Claims: Discovery**

A mining claim is properly held null and void in the absence of evidence showing the discovery of a valuable mineral deposit which would justify a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in an effort to develop a valuable mine.

June 8, 1960

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. T. C. Middleswart, as heir of L. E. Smith, Byron Branson, and C. Newton Clemens have appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated September 25, 1959, which reversed a decision of a hearing examiner dated November 17, 1958, dismissing charges against their Mercury placer mining claim located in lot 10, sec. 5, and lot 8, sec. 6, T. 44 N., R. 114 W., 6th P. M., Wyoming, containing approximately 62 acres.<sup>1</sup>

The claim was originally located on July 5, 1939, and relocated on September 17, 1942, at the site of earlier locations made in 1902 and in 1905. The land was included within the boundaries of Jackson Hole National Monument by Presidential Proclamation No. 2578 of March 15, 1943 (57 Stat. 731). By act of Congress on September 14, 1950, a portion of Jackson Hole National Monument, including this land, was made a part of Grand Teton National Park (64 Stat. 849). The proclamation of March 15, 1943, provided that the lands affected thereby, "subject to all valid existing rights, \* \* \* are reserved from all forms of appropriation under the public land laws and set apart as a national monument \* \* \*"

At the request of the National Park Service, the contest was initiated on the charges that—

(1) a valid discovery of minerals sufficient to support a location is not shown to exist within the limits of said claim;

(2) the lands involved are essentially nonmineral in character;

(3) the mining location was not made and is not now being held in good faith for mining purposes.

A hearing conducted as an ordinary adversary proceeding was held at which the Government presented the evidence of two mining engineers who examined the claims and took samples which they panned and further processed for gold. Some of these samples were taken at locations pointed out by the claimants or their representatives; others were taken at a number of points thought to be collectively representative of the entire area of the claim. Branson and Clemens and Mrs. Middleswart's husband testified in behalf of the validity of the claim and they also offered the testimony of a mining engineer who made a cursory examination of the claim. Both parties intro-

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<sup>1</sup> The contest was brought against T. C. Middleswart, Mrs. T. C. Middleswart, Mrs. George Day, Mrs. George Maher, L. E. Smith, J. L. Graham, Byron Branson, and C. N. Clemens, as owners of record. It was established at the hearing that only the three persons who have appealed to the Secretary have a present interest in the claim. Branson and Clemens claim a one-third interest each and Mrs. Middleswart claims a one-third interest as heir of L. E. Smith.

duced in evidence maps, photographs, and assay certificates and the claimants introduced samples of gold and concentrate of sand from which they expected to extract gold.

The hearing examiner dismissed all the charges against the claim on the ground that the claimants had demonstrated by a preponderance of the evidence that a valid discovery had been made on the claim; that the mineral values remaining on the claim are of sufficient quantity and quality to warrant a prudent man in investing means and effort in an attempt to develop a paying mine; and that no evidence was presented to indicate that the claim was used for any purposes other than mining and mineral development. The United States appealed and the Director of the Bureau of Land Management reversed on the ground that a discovery of mineral within the claim as required by the mining laws had not been shown. Since this issue was decisive of the case, he did not examine the evidence on the other charges but held the claim null and void for want of a discovery.

In their appeal to the Secretary, the claimants challenge the Director's right to consider the evidence *de novo* and dispute the correctness of his application of the legal rule of discovery to the evidence in this case.

First, the appellants mistake the nature of the review given to the record upon this appeal. A mining contest must be conducted in accordance with the provisions of the Administrative Procedure Act (5 U.S.C., 1958 ed., sec. 1001 *et seq.*), *United States v. Keith V. O'Leary et al.*, 63 I.D. 341 (1956).

Section 8(a) of that act (5 U.S.C., 1958 ed., sec. 1007(a)) provides:

\* \* \* On appeal from or review of the initial decisions of \* \* \* [the hearing examiner] the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision \* \* \*

In discussing this provision and the general problem of the weight to be given to the examiner's finding of fact by a reviewing court, a leading textbook concludes:

The final distillation from the case law is that the primary fact-finder is the agency, not the examiner; that the agency retains "the power of ruling on facts . . . in the first instance"; that the agency still has "all the powers which it would have in making the initial decision"; that the examiner is a subordinate whose findings do not have the weight of the findings of a district judge; that the relation between examiner and agency is not the same as or even closely similar to the relation between agency and reviewing court; that the examiner's findings are nevertheless to be taken into account by the reviewing court and given special weight when they depend upon demeanor of witnesses; and that the examiner's findings probably have greater weight than



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they did before adoption of the APA. 2 Davis, Administrative Law Treatise (1958), sec. 10.04.<sup>2</sup>

Therefore, upon appeal the Director, and in turn the Secretary, can make all findings of fact and law based upon the record necessary to decide the case just as though each were making the decision in the first instance.

Under the mining law of the United States, a valid location of a mining claim requires discovery of a valuable mineral deposit within the limits of the claim (30 U.S.C., 1958 ed., secs. 22, 23, and 35). Since in this case the establishment of the national monument withdrew the land in the claim from all forms of appropriation under the public land laws, subject only to valid existing rights in 1943, it is essential to the validity of the claim that the land be mineral in character and that there be an adequate mineral discovery within the limits of the claim before the establishment of the monument in order to bring the claim within the saving clause. *Cameron v. United States*, 252 U.S. 450, 456 (1920). Finally, although the Department requires the Government, as the party advancing the challenge to the validity of a mining claim, to establish a prima facie case, the mining claimants are required to sustain the burden of showing by a preponderance of the evidence that there has been compliance with the applicable mining law. *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959).

The appellants have not disputed the correctness of the rule recognized by the Director that a discovery which will validate the location of a mining claim is one which justifies a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in an effort to develop a valuable mine. *Castle v. Womble*, 19 L.D. 455 (1894); *Chrisman v. Miller*, 197 U.S. 313 (1905); *United States v. Strauss et al.*, 59 I.D. 129 (1945); *United States v. Black*, 64 I.D. 93 (1957); *United States v. Duwall & Russell*, 65 I.D. 458 (1958); *Foster v. Seaton*, *supra*. Tested by these standards, it is abundantly clear that the Director did not err in concluding that the appellants had not shown that a discovery which validated their claim was made before the withdrawal of the land in 1943, or at any time.

Without repeating the evidence which has been extensively summarized in the prior decision and briefs, it is enough to point out that two of the contestant's witnesses, who were qualified mining

<sup>2</sup> See *F.O.C. v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951); *International Woodworkers of America, AFL-CIO v. N.L.R.B.*, 262 F. 2d 233 (D.C. Cir. 1958).

engineers, examined the claim. They took samples in the area in which the locators said they thought the values were good. In addition, they examined the entire area of the claim and familiarized themselves with the geology, the mining history of area, and the costs of mining. Then they concluded that the claim did not satisfy the accepted test for discovery under the mining laws. The evidence submitted on behalf of the contestant clearly establishes a prima facie case that the claim is invalid.

To overcome this evidence, the contestees offered the testimony of a mining engineer who took three samples from the same area as had the Government witnesses. Two of his samples were in the same low range as the others. One, however, showed values more than four times higher than the best of the other samples. It not only was higher than the other samples, but it was taken in an area, 2 to 5 feet below the surface, in which the Government's witnesses and other witnesses for the contestees had found diminishing values. Despite these two abnormalities, the contestees offered nothing else to explain or substantiate this unusual sample. In the circumstances, no great reliance can be placed upon it.

Other witnesses for the contestees testified about the amount of gold they had recovered in the past. The amounts were not large, but were important when related to the yardage processed to obtain them. The most recent operations on the claim were conducted in 1957, when the contestees said they recovered 50 pounds of concentrate from 30 or 40 yards of gravel. However, they offered no assays based upon this gravel. Since the contestees have not conducted extensive operations on the claim, whatever values were in it should still be there and should still be capable of demonstration. After almost 20 years on the claim, the best evidence the contestees could offer was only approximations and estimates of gold sold, gravel processed, and values obtained. There is no reason apparent in the record why if values are still in the land the contestees were not able to prove them. The careful, detailed evidence of the Government's witnesses cannot be overcome by vague, uncertain testimony or by one high sample which is unsupported either as to value or location by any other sample.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

*June 27, 1960*

## RICHARD L. OELSCHLAEGER

A-28299

*Decided June 27, 1960***Surveys of Public Lands: Generally—Boundaries**

When an order withdrawing a tract of unsurveyed land from entry gives the line of mean high tide of a branch of an inlet as one of the boundaries of the withdrawn area, the meander line which is run in surveying the area in accordance with the mean high water line is to be regarded as the equivalent of the line of mean high tide in establishing the littoral boundary of the withdrawn area.

**Homesteads (Ordinary): Lands Subject To**

Land which is withdrawn from entry under the public land laws is not subject to settlement or to the initiation of any claim under the homestead laws even though other land in the same withdrawal may have erroneously been patented under the homestead law.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Richard L. Oelschlaeger has appealed to the Secretary of the Interior from a decision of October 23, 1959, by the Director of the Bureau of Land Management<sup>1</sup> affirming a decision by the manager of the Anchorage land office rejecting the appellant's settlement location notice, his application for homestead entry, and his final proof papers on 100 acres of land in secs. 3 and 10, T. 11 N., R. 3 W., S.M., Alaska.<sup>2</sup> The plat of survey of this land was accepted on October 28, and filed on December 22, 1954, but when the appellant filed his settlement location notice on April 21, 1954, an official plat of survey had not yet been filed and the land was therefore classified as unsurveyed.

By decision of November 19, 1956, the manager rejected the appellant's settlement location notice, his homestead entry application filed on January 31, 1955, and final proof papers filed on April 20 and June 14, 1955, for the reason that when the appellant initiated settlement on the land, it was withdrawn from entry under the public land laws in accordance with Public Land Order 576 of March 29, 1949 (43 CFR, 1953 Supp., p. 258; 14 F.R. 1614). Public Land Order 576, in part here material, withdrew from all forms of appropriation under the public land laws and reserved, under the jurisdiction of the Secretary of the

<sup>1</sup> The Director's decision also involved an entry by one other person who did not appeal to the Secretary.

<sup>2</sup> A settler on Alaskan land is required by statute to file, in the district land office where the land is situated, notice of settlement within 90 days after settlement (48 U.S.C., 1958 ed., sec. 371 *et seq.*; 43 CFR, 1954 ed., 64.3).

Interior pending relocation of a portion of the Anchorage-Seward highway, the "public lands" within the following described area:

Beginning at the southeast corner of sec. 33, T. 12 N., R. 3 W., S.M., thence by metes and bounds,

Southeasterly, 10 miles parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm, to the west boundary of Chugach National Forest;

South, 1 mile, along west boundary of the Forest to the line of mean high tide of Turnagain Arm;

Northwesterly, 11 miles along line of mean high tide of Turnagain Arm to meander corner on south boundary of sec. 32, T. 12 N., R. 3 W.

East,  $1\frac{1}{4}$  miles along south boundary of secs. 32 and 33 to point of beginning.

The tract of public land, ten miles in length, withdrawn by this order is bounded on the west by the "line of mean high tide" of Turnagain Arm, a cove branching off Cook Inlet, and the eastern boundary of the withdrawn area is a line one mile inland from and parallel to the mean high tide line of Turnagain Arm. Between the upland and the line of low tide of Turnagain Arm, broad level mud flats extend for a distance estimated at from three to five miles, and these flats, covered and uncovered by the flow and ebb of the tide, are tidelands. As tidelands are not public lands, they are excluded from the area withdrawn by P.L.O. 576 (*Shively v. Bowlby*, 152 U.S. 1 (1894), *Mann v. Tacoma Land Company*, 153 U.S. 273 (1894)).

The exact boundaries of the withdrawn area could not be determined and adjusted to the lines of legal subdivisions until after the land was surveyed (see instructions, "Survey of Lands Withdrawn While Unsurveyed", 42 L.D. 318 (1913)). In a memorandum of November 8, 1954, from the Director to the Area Administrator, Area 4, Anchorage, with respect to the adjustment of P.L.O. 576 (and of another reserve not here relevant) to the lines of legal subdivision in T. 11 N., R. 3 W., S.M., Alaska, as shown by plats of the survey of this township accepted on October 28, 1954, the public land in the above-quoted portion of P.L.O. 576 was described by legal subdivisions. The manager's rejection of the appellant's homestead claim was based upon the memorandum of November 8, 1954, which indicated that the land for which the appellant applied was withdrawn by P.L.O. 576.

On this appeal it is contended, in effect, that the location of the western boundary of the land withdrawn by P.L.O. 576 was improperly determined and, as a consequence, the entire area withdrawn by the order is incorrectly described in the Director's memorandum of November 8, 1954. In support of this contention it is argued that the plat of survey of the area upon which the memorandum of November 8, 1954, is based does not indicate the line of mean high tide of Turnagain Arm, but only the meander line along Turnagain Arm and that

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the determination of the boundaries of the withdrawn area improperly used the meander line rather than the line of mean high tide as required by the order in establishing the western boundary of the withdrawn area.

The Director's decision discussed in detail the reasons for concluding that the phrase "line of mean high tide" in P.L.O. 576 is used in the same way and as the equivalent of the phrase "ordinary high tide," "high water mark," "high water line" and similar phrases which, in public land orders, signify that line which is meandered by the cadastral engineers in accordance with practices developed in the survey of areas bordering water and in establishing boundary lines of unsurveyed areas over a long period of time. In running the meander line it has been the practice of the cadastral engineers to find the mean high water elevation by evidence of the water's action on the soil.<sup>3</sup> The Director's decision held that the meander line is equivalent to the line of mean high tide for determining the extent and the boundaries of the withdrawal. This ruling in the Director's decision is amply supported by examples of a similar administrative interpretation of comparable phrases in land descriptions used both by Congress and by this Department over a period of many years, and nothing on this appeal provides any basis for modifying the ruling.

The principal argument in support of this appeal is that two entries have been patented under the homestead laws on lands portions of which were withdrawn by P.L.O. 576 as described in the Director's memorandum of November 8, 1954. These two entries were initiated by settlement on the land shortly after the withdrawal order was issued and approximately five years before the plat of survey was accepted and filed. The entries referred to are Anchorage 015927 by Thomas N. Mely, whose settlement dated from May 7, 1949, and whose entry was patented on April 27, 1955, and Anchorage 018722 by Louis Oelschlaeger, father of the appellant, who settled on August 4, 1949, on land for which he received homestead patent on October 10, 1955. Since these two entries in large part appear to be within the area withdrawn by P.L.O. 576 from entry under the public land laws, and were

<sup>3</sup> Manual of Instructions For the Survey of The Public Lands of the United States (Washington, 1947), pp. 231-232.

On appeal it is argued, *inter alia*, that the use of the phrase "mean high tide line" requires that the line be determined by proper scientific measurements although there is no indication of what constitutes such measurements. The Director's decision mentions a number of reasons why the Bureau, in interpreting the phrase "mean high tide line," is not bound by one of the methods formerly used by the Coast and Geodetic Survey and approved by the Supreme Court in *Borax Consolidated Ltd. v. Los Angeles*, 296 U.S. 10, 26-27 (1935). This method consisted in finding the average height of all the high waters at a given place over an average period of 18.6 years.

initiated after the withdrawal order was issued, the appellant contends that the United States is estopped from rejecting the appellant's applications.

The contention is without merit. The Director's decision pointed out that the Mely entry was allowed as a result of a decision of September 3, 1953, by the acting manager which antedated the acceptance and filing of the plat of survey and which concluded that Mely's entry was made on land subject to homestead settlement. In the decision of September 3, 1953, after a hearing involving the validity of the Mely entry, the acting manager stated as a finding of fact that:

\* \* \* the evidence shows that the Thomas N. Mely homestead, as described in his petition filed under Anchorage Serial No. 015927, does not lie, either in whole or in part, within a distance of one mile from the line of mean high tide of Turnagain Arm, and hence is not in conflict with P.L.O. 576 \* \* \*.

This finding may have represented the opinion of the acting manager as to where the line of mean high tide, and consequently the inland boundary of the withdrawn land, lay but it could not bind or affect the Director of the Bureau in his determination of November 8, 1954, describing by legal subdivisions, the land so withdrawn since the approved plat of survey is the official and binding determination thereof (*Knight v. U.S. Land Association*, 142 U.S. 161, 176 (1891)). The Director's determination of November 8, 1954, indicated that the acting manager's decision of September 3, 1953, was erroneous insofar as it concluded that Mely's entry did not include lands withdrawn from entry under the public land laws. Likewise, the records on this appeal indicate that the allowance and patenting of the Louis Oelschlaeger entry, a portion of which is within the withdrawn area as described on November 8, 1954, appears to have been plainly erroneous to the extent that the entry covers land withdrawn under P.L.O. 576.

The allowance and patenting of a substantial portion of the two entries just referred to, while improper, could create no rights in the appellant to the land on which he attempted to settle at a time when it was not open to settlement. Land which is withdrawn from entry under the public land laws is not subject to settlement or to the initiation of any claims under the homestead laws (*Catherine Blankenburg*, A-25947 (December 7, 1950); *Rafael D. Tobar*, A-27008 (December 13, 1954); *Anne V. Hestness*, A-27096 (June 27, 1955); *Lewis Sanford Cass*, A-27742 (January 14, 1959)). As the record in this case indicates clearly that the land for which the appellant seeks homestead patent was withdrawn from entry when he attempted to settle there, the rejection of his settlement location notice, his application for homestead entry, and his final proof papers was correct.

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The request on behalf of the appellant for a hearing on a number of matters relating to the propriety of P.L.O. 576 is denied. The assertions on appeal do not raise issues of fact which require a hearing for determination (see *Lewis Sanford Cass, supra*). Furthermore the Department has held that even where a withdrawal is erroneously made to include land not intended to be embraced therein, it is nevertheless effective as to such land, and unless and until the land is released from withdrawal no rights inconsistent therewith will be recognized as attaching to any of the land actually withdrawn (*Ira J. Newton*, 36 L.D. 271 (1908)).

For the reasons mentioned herein and in the Director's decision, the rejection of the appellant's settlement location notice, his application for homestead entry, and final proof papers was correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

GEORGE W. ABBOTT, *Solicitor*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

WARING BRADLEY, JAMES M. SNOWDEN

A-28294

A-28318

*Decided June 28, 1960*

Oil and Gas Leases: Applications—Oil and Gas Leases: Cancellation—Oil and Gas Leases: Description of Land—Oil and Gas Leases: Lands Subject to

The partial rejection of an oil and gas lease application and the partial cancellation of oil and gas leases are proper as to unsurveyed lands which, according to determinations of the Cadastral Engineering Officer based upon the applicants' descriptions of the land, conflict with leases issued pursuant to prior offers.

Oil and Gas Leases: Applications—Oil and Gas Leases: Description of Land

Where a lease is issued on unsurveyed land pursuant to an application which partially conflicted with a prior lease and the subsequent lease omitted part of the land applied for which did not conflict with the prior lease, thus creating a hiatus between the two leases, and where the hiatus can be closed by adding to the description in the subsequent lease a metes and bounds description of the land in the hiatus, the subsequent lease will be so

amended. Where leases for unsurveyed land partially conflict with outstanding leases based upon prior offers and the conflicts can be eliminated by excepting the areas in conflict from the descriptions in the subsequent leases, the subsequent leases are properly canceled as to the area in conflict by excepting that area from the lands included in the subsequent leases.

#### Oil and Gas Leases: Applications—Oil and Gas Leases: Description of Land—Applications and Entries: Generally

Oil and gas lease applications for unsurveyed lands will not be suspended pending actual survey to establish whether a portion of the lands applied for conflicts with prior offers where determinations based upon the applicants' descriptions of the land show such conflict and there is no evidence that the conflict does not exist.

#### APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Waring Bradley has appealed to the Secretary of the Interior from a decision of October 23, 1959, by the Director of the Bureau of Land Management which, in effect, affirmed the partial rejection of Bradley's oil and gas lease offer Fairbanks 017909 and remanded the case to the Fairbanks land office for adjustment of the lands to be included in a lease issued pursuant to the offer. James M. Snowden has appealed to the Secretary from a decision of November 20, 1959, by the Acting Director of the Bureau which affirmed, with modification, the partial cancellation of Snowden's oil and gas leases, Fairbanks 017423 and 017427. Bradley's offer and Snowden's leases cover unsurveyed lands in Alaska which were described by metes and bounds in their applications. The appeals are being decided together because they require determination of the same questions regarding descriptions of unsurveyed lands.

Bradley's application was rejected by the manager for partial conflict with an outstanding lease, Fairbanks 017352, issued to James Noel as of March 1, 1958. A lease was issued to Bradley effective February 1, 1959, for the lands not in conflict with Noel's lease, which lands, according to the manager, amounted to approximately 1,920 acres of the 2,560 acres for which Bradley applied.

Snowden's leases, each covering 2,560 acres, were issued as of March 1, 1958. By decisions of January 20, 1959, the manager of the Fairbanks office held each of the leases for cancellation as to 640 acres because of conflict with prior lease offers filed by J. G. Taylor pursuant to which leases Fairbanks 017340 and 017334 were issued.

The manager's partial rejection of Bradley's offer and partial cancellation of Snowden's leases were modified by the Director's and Acting Director's decisions by amending the amount of land for which Bradley's application was rejected and the amount of land for which



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Snowden's leases were canceled. The Director and Acting Director found that the manager had rejected Bradley's offer and canceled Snowden's leases for more than the areas in conflict, thus leaving a hiatus between the conflicting offer and leases. The Director and Acting Director remanded the cases for adjustment of the Bradley and Snowden leases to include the areas not in conflict.

Bradley and Snowden contend that the determination of the areas between their offers and the conflicting leases is the result of a theoretical calculation based upon an unsound assumption that the location of the lands can be established without an actual survey on the ground. They point to the fact that the descriptions in their offers are tied to a monument which is over 200 miles distant from the monument to which the descriptions in the conflicting leases are tied and assert that the question of whether there is an actual conflict between their offers and the Noel and Taylor leases can only be established by actual survey. They conclude that action on their offers and leases should be suspended as to the parts claimed to be in conflict until an actual survey is made on the ground which will determine the precise areas, if any, in conflict.

Oil and gas leases on unsurveyed public lands cover only that area of land which is identifiable by the metes and bounds description in each lease. The boundaries of the lands described in the appellants' offers and in the conflicting leases are, of course, determined by courses and distances from the permanent monuments named in the respective offers or leases, and the extent of conflict between offers is established by delineating the land described in each offer after plotting its location in relation to the permanent monument to which the description is tied. The position for the starting points of the land described in each of the appellants' offers is based upon Triangulation Station "hook". The land descriptions in each of the conflicting leases give starting points based upon Border Monument 106.

The cases have again been reviewed by the Cadastral Engineering Office of the Bureau of Land Management. That office is of the opinion that the precise areas of conflict between the offers and leases involved can be accurately described without the necessity of an actual survey on the ground. In a memorandum of June 3, 1960, the Cadastral Engineering Staff Officer describes the hiatus between Bradley's and Noel's leases with reference to the initial point in the description of the land covered by Bradley's lease as follows:

Thence North 2 miles to a point, thence East 2415 feet to a point, thence South 130 feet to a point on north boundary of O and G 017352, thence West

along said boundary 1290 feet to a point, thence South along said boundary 10430 feet to a point, thence West 1125 feet to the initial point. Area, 276.58 acres.

If this description is added to the description of the land leased to Bradley, his lease will include all of the land described in his offer which was available for leasing when the offer was filed and there will be neither an overlap nor a gap between his and Noel's leases as defined by the metes and bounds descriptions in the respective leases.

A memorandum of June 13, 1960, by the Cadastral Engineering Staff Officer identifies the areas in conflict between Snowden's and Taylor's leases (which areas are to be eliminated from Snowden's leases) by metes and bounds descriptions tied to the descriptions in Snowden's offers. The memorandum of June 13 indicates that the conflict between Fairbanks 017423 and 017340 will be eliminated by excepting from the area described in Fairbanks 017423 the following tract of land:

Beginning at the initial point described in this lease offer, thence west 960 feet to the west boundary of Lease 017340, thence north 10,350 feet along the west boundary of Lease 017340, thence east 960 feet, thence south 10,350 feet, to the point of beginning, containing 228 acres.

Likewise, the conflict between 017427 and 017334 will be eliminated by excepting from tract 1 of the area described in offer 017427 the following parcel:

Beginning at a point on the west boundary of Lease 017334 which is 4,320 feet east of the initial point described in this lease offer, thence north 10,350 feet along the west boundary of Lease 017334, thence east 960 feet, thence south 10,350 feet, thence west 960 feet to the point of beginning, containing 228 acres.

Since these descriptions of the areas in conflict are tied to boundaries of the conflicting leases, the appellants cannot complain of the omission of any areas to which they are entitled under their offers. Accordingly there is no reason to suspend any action on their offers and leases to await indefinitely a survey of the leased areas on the ground. The cases can and will be remanded for appropriate action to give the appellants all the lands included in their offers except as to the areas in conflict.

In Bradley's case, the gap which was left between Bradley's lease as issued and Noel's lease will be closed if the 276.58 acres described by metes and bounds with reference to the initial point in the description in Bradley's lease and quoted herein as added to Bradley's lease. The description is contained in the memorandum of June 3, 1960, by the Cadastral Engineering Staff Officer and the case will be remanded for including the 276.58 acres in Bradley's lease.

*June 14, 1960*

In Snowden's case, the two 228-acre tracts described with reference to the initial points in Snowden's offers 017423 and 017427 and quoted herein are excepted from the land descriptions in those offers, the conflict between Snowden's and Taylor's leases will be eliminated. The description of the land to be excepted from Snowden's leases is set forth in the memorandum of June 13, 1960, by the Cadastral Engineering Staff Officer and the cases will be remanded for excepting from Snowden's lease offers only the areas which conflict with Taylor's leases.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decisions by the Director and the Acting Director of the Bureau of Land Management are affirmed and the cases are remanded to the Bureau for further action in accordance with this decision.

**GEORGE W. ABBOTT, *Solicitor***

**BY: EDMUND T. FRITZ,**  
*Deputy Solicitor.*

**MAGNOLIA LUMBER CORPORATION, INC.**

**A-28312**

*Decided June 14, 1960*

**Timber Sales and Disposals—Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales**

A corporation whose president is also the president of another corporation which has been found guilty of timber trespass is properly required to post the bond of the president and the trespassing corporation as a condition precedent to the execution by the United States of a contract for the sale of timber on Oregon and California Railroad lands to the first corporation.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

The Magnolia Lumber Corporation, Inc., has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated October 28, 1959, which affirmed the determination of the Oregon state supervisor on September 29, 1958, that, as a condition precedent to the execution of a timber sale contract by the United States covering certain timber on O. & C. lands in Jackson County, Oregon, the Magnolia Motor & Logging Company and R. Drew Lamb, its president, must post bond in the amount of

\$77,600 because of certain timber trespass in California for which the amount of damages has not been ascertained.

Magnolia Lumber Corporation, Inc., hereinafter referred to as Magnolia Lumber, offered the high bid for a timber sale on O. & C. lands in Oregon. Magnolia Motor & Logging Company, also a Mississippi corporation, hereinafter referred to as Magnolia Logging, and R. Drew Lamb, president of both corporations, were earlier indicted, tried and Magnolia Logging was convicted in federal court of timber trespass in Humboldt County, California and the conviction was affirmed on appeal (*Magnolia Motor & Logging Company v. United States*, 264 F. 2d 950 (9th Cir. 1959); *cert. denied* 361 U.S. 815 (1959)).

The requirement for bond in the amount of the damages demanded by the United States for the Magnolia Logging trespass to be posted by Lamb and Magnolia Logging as an incident of the execution of the sales contract with Magnolia Lumber was predicated upon the departmental regulation, 43 CFR, 1954 ed., 288.12, which reads in applicable part:

(a) For the purpose of this section, a trespasser is a person who is responsible for the unlawful use of or injury to property of the United States.

(b) No sale of timber or material will be made, and no permit or license will be issued, to a trespasser who has not satisfied his liability to the United States, except where:

\* \* \* \* \*

(3) The authorized officer finds in writing that there is a legitimate dispute as to the fact of the alleged trespasser's liability, or as to the extent of liability, or that the extent of the damages has not yet been determined, and the trespasser files a bond guaranteeing payment of the amount found by a court of competent jurisdiction to be due the United States \* \* \*.

In its appeal to the Secretary, Magnolia Lumber contends that the regulation requires the posting of a bond only when an individual is a trespasser and subsequently organizes a corporation for further dealings with the United States. It then concludes that because the United States has had other contracts with Magnolia Lumber over a period of years before the alleged trespass of Lamb, it cannot be said that Lamb used the corporate device as a subterfuge dealing with the United States to avoid an alleged trespass obligation.

There is nothing in the language of the regulation or the circumstances surrounding its adoption which tends to confirm the validity of the appellant's suggestion. The regulation says only that an alleged trespasser must satisfy his liability to the United States or file a bond guaranteeing payment of the amount found to be due the United States in order to obtain a sale of timber.

June 14, 1960

The question, then, is whether Lamb and Magnolia Logging fall within the category of "alleged trespassers" in relation to this contract. It seems to me that the only reasonable conclusion is that they do.

First, the manager of the district forestry office stated that the bond was required because of the close association between Magnolia Lumber and Magnolia Logging, an alleged trespasser, and then the Director remarked that the two corporations are controlled by the same individual (R. Drew Lamb). Since neither in its appeal to the Director nor in its appeal to the Secretary has the appellant denied the validity of these statements, their accuracy may be assumed. Thus Lamb is in a position to have profited from the unsatisfied trespass and to profit from the pending contract. This alone is sufficient to justify the required bond.

Furthermore, the fiction of separate corporate entities cannot prevent an administrative agency from assessing the realities of the situation and acting accordingly. As the Department has said, it "is entitled to proceed upon the basis of a complete awareness respecting the relationship between corporations and their stockholders." *Annie L. Hill et al. v. E. A. Culbertson*, A-26150-A-26157 (August 13, 1951),<sup>1</sup> reversed on other grounds, *McKay v. Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955), which cites the statement quoted, *id.* 40-41.

In view of the undisputed relationship between the two corporations and Lamb, he and Magnolia Logging are deemed "alleged trespassers" within the meaning of the regulation and the imposition of the bond requirement is proper.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a); Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

EDMUND T. FRITZ,  
Deputy Solicitor.

<sup>1</sup> See also, *Illinois Packing Co. v. Henderson*, 156 F. 2d 1000 (U.S.E.C.A. 1946); *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939); *State of Washington v. Kitsap County Bank*, 117 P. 2d 228, 233 (Wash. 1941); *Pacific Gas & Elec. Co. v. Securities & Exchange Commission*, 127 F. 2d 378 (9th Cir. 1942), affirmed by equally-divided court, 324 U.S. 826; *Koppers United Co. v. Securities & Exchange Commission*, 138 F. 2d 577 (D.C. Cir. 1943). See Timberg, "Corporate Fictions," 46 Col. L. R. 533, 561, 562, for other cases.

## APPEALS OF UTAH CONSTRUCTION COMPANY

IBCA-133

IBCA-140

*Decided June 10, 1960*

### Contracts: Changes and Extras

A claim for additional compensation based upon hindrances to the performance of the contract work caused by failure of the Government to discharge its own contractual obligations, or upon postponement by the Government of the time for performance of the contract work as a result of such failure is not cognizable under the "changes" clause of standard-form construction contracts.

### Contracts: Changes and Extras

A claim for additional compensation based upon instructions by the Government to restore portions of the contract work damaged as a result of its own wrongful acts or omissions, or upon acceleration by the Government of the time for performance of the contract work is cognizable under the "changes" clause of standard-form construction contracts.

### Contracts: Appeals

An appeal from findings of a contracting officer granting an extension of time which is taken solely on the ground that the findings state an erroneous reason for granting the extension will be dismissed where it appears that the challenged statement will have no relevancy or effect in the adjudication of any ungranted claim of the appellant.

### BOARD OF CONTRACT APPEALS

Utah Construction Company, of Salt Lake City, Utah, has appealed from the contracting officer's letter decision dated August 30, 1957, which dismissed for lack of jurisdiction a claim for additional compensation, and from his findings of fact and decision dated October 11, 1957, which granted a 365 calendar day extension of time; the latter appeal being taken on the ground that the factual basis stated for the cause of the delay is incorrect.

Both appeals arise under a contract which incorporates Standard Forms 23 (Revised March 1953) and 23A (March 1953). It was entered into on June 30, 1955, in the estimated amount of \$1,372,172, for the construction and completion of the Pineview Dam enlargement and highway relocation under the Schedule of Specifications No. DC-4424. The work was subdivided into 10 parts, with optional periods during which certain subdivisions of the work could be performed. Differing rates for daily charge of liquidated damages were specified for the various subdivisions of work. All work under the contract was completed and accepted on September 5, 1957.

June 10, 1960

IBCA-133

The contractor filed a claim by letter dated June 24, 1957, for a total of \$37,124.97, and a request for an extension of time of 365 calendar days. The claim was divided into four parts and 26 items.

The basis for the claim is succinctly stated in the opening and second paragraphs of the contractor's letter of June 24, 1957.<sup>1</sup> The methods to be used in storage of water in the Pineview Reservoir and in the operations of the reservoir during the construction period, as outlined in paragraph 38 of the specifications,<sup>2</sup> form an essential part of that basis.

Alternative performance periods, designated as options, were scheduled in Table I of Paragraph 19(a) of the specifications. Generally speaking, these options were designed to provide for the performance of those parts of the work that would interfere with, or be affected by, reservoir operations during either the winter of 1955-56 or the winter of 1956-57, as elected by the contractor in its construction program. Appellant alleges that it elected the earlier options and, in particular, that for subdivisions 1 through 6 of the work it elected

<sup>1</sup> "Following the instructions in your letter of July 26, 1956, we herewith submit our claim for increased costs incurred as a result of the Government's failure to regulate the water level of the reservoir in accordance with the provisions of Article 38 of the Specifications and the Government's further failure to shut off the flow of water through the 60" outlet as provided in Table I, Article 19, of the specifications.

"Since most of the work performed under this contract had to be accomplished during the periods designated by the Government, as shown in Table I, Page 9, and described in Articles 38 and 39 of the Specifications, the repeated failure of the Government to fulfill its contractual obligations in these respects delayed our construction program and caused us to incur substantial increased costs. The inability of the Government to control the actions of the reservoir operating agency, or to achieve that agency's cooperation in the Pineview Dam Enlargement construction program also hindered the economical prosecution of our work. Because of these changes and the changed conditions we have encountered as a result of these factors, we respectfully request that an equitable adjustment be made in our contract to reflect the following increased costs. A detailed explanation of each of the component parts of our claim appears on the attached sheets."

<sup>2</sup> "38. Storage of Water and operation of reservoir during construction.

"(a) General.—The Pineview Reservoir will be operated, as described in this paragraph, to meet storage and construction requirements and to furnish necessary releases. To accomplish construction for the spillway and for modifications of existing wells in reservoir area, the reservoir will be evacuated as described in (c) and (d) below, during one continuous construction period only, the choice of year being at the option of the contractor.

"(b) Except as provided under (c) below, the reservoir during the irrigation season (approximately April 1 to October 31) will be operated as best serves the interest of the Government. Releases into the spillway stilling basin to meet irrigation requirements will be required at all times during the irrigation season. Drawing No. 4(526-D-713) shows reservoir water surface elevations for years of operation 1938 to 1953, inclusive.

"(c) By September 10 of either 1955 or 1956 at the option of the contractor as exercised in his construction program, the reservoir water surface will be lowered to the lip of the existing spillway (elevation 4855).

"(d) By November 1 of either 1955 or 1956 at the option of the contractor as exercised in his construction program, the reservoir water surface will be lowered to approximately elevation 4821 in order to perform work on the wells and distribution system located in

option "A," in lieu of option "B," and that for subdivision 8 it elected option "F," in lieu of option "G."<sup>3</sup> Under options "A" and "F," the three subdivisions of the work about which this appeal centers were to be performed during the following periods:

Subdivision 2, relating to spillway construction, from July 15, 1955 through February 29, 1956.

Subdivision 6, relating to modifications to wells, from November 1, 1955 through January 31, 1956.

Subdivision 8, relating to installations of outlet works, from February 1, 1956 through March 20, 1956.<sup>4</sup>

No finding of fact were prepared regarding the contractor's claim since the contracting officer concluded it was a claim for unliquidated damages which he had no authority to adjust under the terms of the

the reservoir area. The reservoir water surface will be maintained at approximately elevation 4821 for 90 days after November 1.

"(e) During the nonirrigation season (November 1 through March 31) the contractor shall not interfere with the full stream in flow up to 200 cubic feet per second through the 72-inch outlet in order to provide releases required for operation of the Pioneer Power Plant: *Provided*, That releases through the 72-inch outlet will be shut off by the Government for 2 periods only as follows:

"(1) One period of 8 days immediately before the beginning of the irrigation season in the year the reservoir is drawn down to elevation 4821, to permit contractor to make pipe connections for the 72-inch outlet and for painting.

"(2) One period not to exceed 24 hours, at a time designated by the contracting officer which may occur on a Sunday or other time of low water and power demand, to facilitate removal of any temporary bulkhead in the 72-inch outlet.

"During the irrigation season the contractor shall not interfere with the full stream inflow up to 280 cubic feet per second through the 72-inch outlet for power and irrigation requirements. \* \* \*

<sup>3</sup> The descriptions of these subdivisions and the performance periods for them under options "A" and "F," as scheduled in Table I, were as follows:

1. Spillway construction upstream from station 7+52.11, except installation of radial gates, from July 15, 1955 through February 29, 1956.

2. Spillway construction downstream from station 7+52.11, from July 15, 1955 through February 29, 1956.

3. Installation of radial gates, from January 1, 1956 through April 30, 1956, subject to the limitation that the gates "shall be operable by March 1, to avoid any obstruction to spillway discharges."

4. Placement of embankment material in dam, from July 15, 1955 through March 31, 1956.

5. Installation of 72' Outlet Branch shown on Dwg. 526-D-661, from March 24, 1956 through March 31, 1956.

6. Modifications to wells, from November 1, 1955 through January 31, 1956.

8. Installation of 60-inch steel pipe, 4' x 5' H.P. gate, and all concrete for 60-inch steel pipe downstream from station 7+05.31 and below EL. 4826.50, and installation of 42-inch steel pipe, 42-inch butterfly valve, and all concrete between Cr. of the 60-inch outlet pipe and face of spillway right wall, from February 1, 1956 through March 20, 1956.

<sup>4</sup> Table I of Paragraph 19(a) contained the following additional provisions with respect to reservoir operations and performance time for the subdivision 8 work:

"The Government will shut off the flow through the existing 60-inch pipe line between February 20 and March 20 of either 1956 or 1957.

"In addition to periods F and G, and if irrigation requirements can be met by discharges through the spillway, the contractor will be permitted to perform work required under subdivision 8 at any time between April 1, to June 20 of either 1956 or 1957."



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contract. Consequently, there is not a great deal of factual data before the Board to assist in the disposition of the appeal. However, from the record before the Board it is evident, and both parties appear to be in agreement on this matter, that the claim for additional compensation is based on two series of events, the first of which comprised high water in the reservoir during the period elected by appellant for the performance of the subdivision 6 work, and the second of which comprised actual or threatened discharges of water into the spillway stilling basin during the periods elected for the performance of the work under subdivisions 2 and 8.

The wells involved in the subdivision 6 work were under-water wells within the reservoir. Hence, provision was made in paragraph 38 of the specifications for evacuating the reservoir to elevation 4821 during the period scheduled for the modification of the wells. From the limited information contained in the record, it would appear that control of the storage of water in the reservoir was under the direction of the Ogden River Water Users' Association. It is admitted by the Government, through the Department counsel, that when the construction contract was let, negotiations were pending looking toward an agreement in connection with which the Government contemplated it could secure such an evacuation of the reservoir, but that an agreement with the association was not reached in time for the water to be drawn down to elevation 4821 by November 1, 1955. However, evacuation was commenced on November 18, 1955. By December 14, 1955, the water in the reservoir had been drawn down to about elevation 4824.70. That permitted appellant to enter the reservoir area and commence preparatory work for the modification of the wells.

A rise in the reservoir, however, began on December 23, 1955, and continued throughout the last week of the year. The rise was sufficiently rapid and great for both parties to characterize it as a flood, and the Government ascribes its cause to unseasonable and extremely heavy rainfall. The inflow of water forced appellant to abandon work in the reservoir area. Such work was not resumed until November 1956, when the water was, for the first time subsequent to the flood, drawn down to a level approaching elevation 4821.

Appellant contends that the Government through its conduct in the foregoing matters changed the contract specifications by altering their requirements with respect to the water level to be maintained during the option "A" performance period, and by ultimately postponing the subdivision 6 work to the option "B" performance period. In this connection appellant asserts that had the reservoir been drawn down

to elevation 4821 by November 1, 1955, the well modifications would have been completed by December 23 of that year, so that the flood would have had no effect on its operations. It claims that certain items of equipment were submerged by the rising waters in the reservoir and remained submerged until the water was drawn down sufficiently to permit their removal; that some of the items of submerged equipment were never recovered; that materials to be incorporated in the well modifications were also lost; that much of the work performed in the reservoir area before the flood had to be done a second time when operations were resumed approximately a year later; and that in the meantime wage increases occurred which also added to the cost of the well modifications. For all of these items an equitable adjustment in money is asked.

Appellant further contends that following the rise in the reservoir the Government regulated, or threatened to regulate, discharges from the reservoir in a manner that affected other parts of the job, notably, subdivision 2, relating to spillway construction, and subdivision 8, relating to installation of outlet works. The existing outlet works included a 60-inch pipe which discharged into the spillway stilling basin, and the making of certain alterations to this pipe formed a part of the subdivision 8 work. It appears to be appellant's interpretation of the contract provisions relating to management of the reservoir, as previously quoted,<sup>5</sup> that the 60-inch pipe was not to be used for discharges into the stilling basin at any time between November 1, 1955, and March 20, 1956.

Appellant alleges that on or about December 28, 1955, it was informed that the 60-inch pipe would be used to drain the reservoir, and was urged by the Bureau of Reclamation to complete before draining started the pouring of a segment of the spillway for which forms and reinforcements had already been set. On the basis of this information, appellant says, it advanced the pour in question to completion by January 4, 1956, and thereupon shifted its forces and equipment to excavation operations for the outlet works, only to be advised on January 7 that the reservoir would not be drained. Appellant states that it was next advised by a letter from the Bureau of Reclamation, dated January 11, 1956, that concrete work in the spillway should be completed before it became necessary to drain the reservoir by releasing water into the stilling basin. According to appellant, it thereupon shifted its forces and equipment back to spillway construction, and, in order to comply with the Government's desire that releases through the 60-inch pipe be made at the earliest possible date, so expedited this work that such releases were begun on February 21, 1956. Appellant claims

<sup>5</sup> See footnotes 2 and 4.

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that the foregoing events necessitated expenditures for equipment moves, for pumping of the stilling basin, for protection of completed work, for overtime pay, and for other items connected with subdivision 2 of the job that would not have been incurred had the Government adhered to the contract provisions with respect to performance time and reservoir management.

It is also alleged that these events, and particularly the commencement of use of the 60-inch pipe on February 21, 1956, entailed a year's delay in completion of the outlet works, and amounted to a further change in the contract specifications by postponing the installation of the outlet works until the option "G" performance period. Such postponement, it is claimed, necessitated expenditures for additional earth-moving operations, for increased wage rates, and for other items connected with subdivision 8 of the job that otherwise would not have been incurred.

The validity of the contracting officer's dismissal of the claim for additional compensation turns, as appellants' counsel has recognized, upon the issue of whether the claim is one for which no adjustment in the contract price would be allowable under clause 3, "change," of the General Provisions of the contract, even if the pertinent facts were fully proved. The first two sentences of that clause, which are the significant ones for the purposes of the present appeal, read as follows:

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly.

Clause 3 was not designed as a mechanism for the adjustment of claims for breach of contract.<sup>6</sup> It follows, therefore, that in order to bring successfully a claim within it, something more must be shown than a mere failure to perform a promise, covenant, warranty, or other obligation undertaken by the party against whom the claim is asserted. Furthermore, the clause is written in a form that provides for changes for which price adjustments may be made and changes for which only extensions of time may be allowed. Upon analysis of appellant's allegations, as outlined above, we find that, with certain exceptions, they fail to state circumstances which would admit of an adjustment in the contract price being made under clause 3.

<sup>6</sup> *Weardeco Construction Corp.*, 64 I.D. 376, EBCA-48, 57-2 BCA par. 1440 (1957) and cases there cited; *Norair Engineering Corp.*, ASBCA 3527, 57-1 BCA par. 1283 (1957) and cases there cited.

The alleged failure of the Government to perform its contractual obligations with respect to either the reservoir level or the reservoir discharges was not a change, for this failure did not itself alter the characteristics or amounts, as defined by the specifications and drawings, of the performance required by the contract from either appellant or the Government.<sup>7</sup> The equipment losses for which appellant makes claim, and the other hindrances or interferences which such alleged failure may have produced were, for the same reason, also not a change.<sup>8</sup> Nor can a right to additional compensation be predicated on the theory that the Government postponed subdivisions 6 and 8 of the work to the option "B" and "G" periods, respectively, since under the form of contract here used the only equitable adjustment allowable for a postponement of otherwise unchanged work is an extension of time.<sup>9</sup>

The Board has reviewed the cases<sup>10</sup> which appellant's counsel cites as precedents for his contention that the contracting officer had authority to make, and should have made, an equitable adjustment in money on account of the circumstances just mentioned. Summarized generally, those cases involved situations where the Government authorized the contractor to render a performance which differed substantially in characteristics or amounts from that defined in the specifications and drawings, or where the Government took action that evinced an intention to amend the provisions of the specifications and drawings defining the performance to be rendered on its part. In those instances where a postponement of the time for performance of otherwise unchanged work was involved, such postponement was recognized as ground for an extension of time, but not for an equitable adjustment in money. None of the cited cases can properly be viewed as precedents for administrative consideration of appellants' claim in its entirety.<sup>11</sup>

<sup>7</sup> *Appeal of Flora Construction Company*, 66 I.D. 315, 322-25, IBCA-101, 59-2 BCA par. 2312 (1959); *Paul Jarvis, Inc.*, 64 I.D. 285, IBCA-115, 57-2 BCA par. 1361 (1957); see *Ideler Construction Co.*, 64 I.D. 388, IBCA-124, 57-2 BCA par. 1441 (1957).

<sup>8</sup> *J. D. Armstrong Co., Inc.*, 63 I.D. 289, 311-12, IBCA-40, 56-2 BCA par. 1043 (1956); *Teller Construction Co., Inc.*, IBCA-30, 6 CCF par. 61,688 (1955); *Goodfellow Bros., Inc.*, IBCA-17, 6 CCF par. 61,626 (1955).

<sup>9</sup> *United States v. Rice*, 317 U.S. 61 (1942).

<sup>10</sup> *A. S. Horner Construction Co.*, 63 I.D. 401, IBCA-75, 56-2 BCA par. 1115 (1956); *Guthrie Electrical Construction*, 62 I.D. 280, IBCA-22, 6 CCF par. 61,687 (1955); *Farnsworth & Chambers Co.*, ASBCA 3602, 57-1 BCA par. 1323 (1957); *Cal-Tex Co.*, ASBCA 3398, 57-1 BCA par. 1255 (1957); *Aero-Fab Corp.*, ASBCA 3837, 57-1 BCA par. 1243 (1957); *Vector Manufacturing Co.*, ASBCA 396, 4 CCF par. 61,032 (1950); *Southeastern Decorating Co.*, Army BCA 1870, 4 CCF par. 60,674 (1949); *Gonzalez Seijo & Tewidor*, W.D. BCA 1320, 4 CCF par. 60,257 (1947); *Guest t/a C. M. Guest & Sons*, W.D. BCA 593, 2 CCF 1015 (1944); *Chalker & Lund Co.*, W.D. BCA 226, 1 CCF 689 (1943); *Plugrad Co.*, W.D. BCA 199, 1 CCF 335 (1943).

<sup>11</sup> The contention of appellant's counsel that the Government's conduct in delaying the work amounted to a change of the contract performance dates, as previously elected by appellant, for which a price adjustment should be made is essentially the same as a contention that was rejected in *Chas. H. Tompkins Co.*, ASBCA 570 (April 27, 1950), on the following line of reasoning: "If it could validly be said that the Government's breach of a promise to furnish equipment by a certain date is tantamount to a change order setting a new date for the furnishing of such equipment, it could be said with equal validity that the Government's act of issuing a change order whereby the unchanged work is delayed is

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Parts of the claim, however, are supported by allegations of additional circumstances which, if established by competent proof, would afford a basis for administrative consideration of their merits.

First, there is a group of items which involve the restoration of damaged elements of the contract work. The items designated in appellant's claim letter of June 24, 1957, as I 1 through I 5 and as IV 58 through IV 64, aggregating \$9,717.72, would appear to fall, wholly or in part, within this group. If wrongful acts or omissions of the Government in connection with the operation of the reservoir resulted in damage to contract work already properly done or to materials properly stored on the site pending incorporation in the contract work, and if the contracting officer expressly or impliedly instructed that such work or materials be restored, a basis would exist for the allowance of an equitable adjustment on account of the restoration costs.<sup>12</sup> The obligation of a contractor to redo or replace damaged work or materials does not extend to damage caused by fault of the Government or its agents.<sup>13</sup>

Second, there is a group of items which involve acceleration of performance of elements of the contract work. The items designated in appellant's claim letter of June 24, 1957, as I 6 through I 8, aggregating \$3,310.33, would appear to fall, wholly or in part, within this group. If in an effort to mitigate the consequences of high water in the reservoir, or for other reasons, the contracting officer expressly or impliedly instructed that a part of the work be performed in advance of the time when its performance otherwise would be necessary under the applicable performance option, as elected by appellant, a basis would exist for the allowance of an equitable adjustment on account of the costs of such acceleration,<sup>14</sup> since this, too, is something that the contract did not require appellant to do. Instructions to work overtime for the purpose of accelerating performance would fall in the same category.<sup>15</sup>

The facts alleged by appellant are insufficient to justify a holding that all parts of the claim for additional compensation were within the contracting officer's jurisdiction to consider and determine. Ap-

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tantamount to the issuance of a change order setting a new date for performance of the unchanged work, and that the increased costs of the unchanged work resulting from such a delay must be taken into consideration in determining the equitable adjustment required. In view of the decisions in such cases as *United States v. Rice, et al.*, 317 U.S. 61 (1942) the latter statement cannot validly be made."

<sup>12</sup> *Appeal of Flora Construction Company*, 66 I.D. 315, 329, IBCA-101, 59-2 BCA par. 2312 (1959); *G. Hinteregger & Sons*, ASBCA 2583 and 2584, Claim No. 31 (November 4, 1955); *Walter J. Harding, Jr.*, ASBCA 2477 (February 2, 1955); *Guntert & Zimmerman Construction Division, Inc.*, ASBCA 1544, Claim No. C-4 (June 11, 1954).

<sup>13</sup> *George F. Horton v. The United States*, 58 Ct. Cl. 148 (1923).

<sup>14</sup> *General Electric Co.*, ASBCA 2458, 56-2 BCA par. 1093 (1956); *Leo Sanders, Army* BCA 1468 (June 14, 1948); see *A. S. Horner Construction Co.*, 63 I.D. 401, IBCA-75, 56-2 BCA par. 1115 (1956).

<sup>15</sup> *Ullman Bros., Inc.*, W.D. BCA 1215 (August 20, 1946); *C. H. Everitt, Inc.*, W.D. BCA 385, 2 CCF 629 (1944).

pellant's allegations, on the other hand, state on their face a case which would be within the contracting officer's jurisdiction insofar as the restoration and acceleration groups of items are concerned. Whether, and to what extent, the individual items of these groups are in fact claims that the contracting officer could consider and settle cannot be determined on the present record. Nor would it be appropriate for the Board to attempt to do so in the absence of findings of fact by the contracting officer, for the "disputes" clause of the contract intends that issues of fact shall be resolved in the first instance either by agreement of the parties or by determination of the contracting officer.

With respect to these items, therefore, the appeal file will be returned to the contracting officer for further proceedings under that clause consistent with the views expressed in this opinion. Unless the dispute is disposed of by mutual agreement, the contracting officer should make findings upon the facts that are described in the preceding paragraphs as being facts which, if true, would afford a basis for allowance of an equitable adjustment on account of the restoration and acceleration costs, and upon such other facts as he considers pertinent to the claims for these costs. If appellant is dissatisfied with such findings, it may appeal anew to the Board within the period of 30 days stated in the "disputes" clause.

With respect to the remaining items, that is, those designated in the claim letter of June 24, 1957, as items II, III, IV 4 through IV 50, and IV 65 through IV 83, the appeal is dismissed.

#### IBCA-140

The contractor's request for an extension of time of 365 days, contained in his letter of June 24, 1957, was considered by the contracting officer in his findings of fact and decision dated October 11, 1957. The contracting officer found that the contractor was delayed in the completion of subdivisions 1 through 6 of the work during the option "A" period because of a flood,<sup>16</sup> and extended the contract completion time for these subdivisions by 365 calendar days. The contracting officer's decision was appealed, not on the ground that the extension of time granted was inadequate, but on the ground that the reason assigned by him for granting it, was erroneous.<sup>17</sup>

<sup>16</sup> Paragraph 4 of the Findings of Fact states:

"It is found that the contractor was delayed 365 days in the completion of his work under performance period Option A because of a flood caused by a highly unusual continuous rainfall. This delay was due to an unforeseeable cause beyond the control and without the fault or negligence of the contractor and is, therefore, excusable under the provisions of Clause 5 of the General Provisions of the contract."

<sup>17</sup> The fourth paragraph of the Notice of Appeal dated November 20, 1957, reads as follows:

"We most strenuously protest and object to the alleged facts contained in paragraph 4 of the findings. This paragraph erroneously states that the contractor was delayed 365

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In his statement of the Government's position, Department counsel contends:

The contractor having been granted an extension of time in the full amount requested and the contract having been completely performed without the assessment of liquidated damages, it is submitted that the contractor has no standing to appeal the contracting officer's Findings of Fact and Decision of October 11, 1957. The contractor has cited no authority for the very unusual proposition that notwithstanding his having received full relief from assessment of liquidated damages he is nevertheless entitled to appeal the grounds upon which the relief was granted.

\* \* \* \* \*

It seems clear that before a "dispute" can be said to exist within the meaning of Clause 6 of the General Provisions of the contract, the contractor must have suffered some sort of damage or injury.

Counsel for appellant, in opposing the Department Counsel's position, contends:

We are not contending that a greater allowance of time should have been made but that the allowance already made should be made for different reasons than stated in the contracting officer's Findings of Fact.

The damage or injury suffered by this contractor which is present in this case and which is, according to Department Counsel, a prerequisite to the "dispute" involved in this Appeal and in the Appeal designated IBCA-133, is the increased costs, in the amount of \$37,124.97, incurred because of the changes made by the Government in the specifications relating to the water level in the reservoir on and subsequent to November 1, 1955.

The statements of appellant's counsel make it apparent that this appeal was taken solely because of appellant's fear that its claim for additional compensation might be prejudiced unless it challenged the contracting officer's findings that the delay in the completion of the job was caused by a flood. This fear is not well grounded. The findings in question have to do solely with the question of whether the delay in completion was excusable under clause 5, "Termination for Default—Damages for Delay—Time Extensions," of the General Provisions of the contract. They have nothing to do with the question of whether the delay was one for which additional compensation would be allowable. Prior to the making of such findings, the contracting officer, in his letter decision of August 30, 1957, had disclaimed any jurisdiction to consider appellant's claim for additional compensation. Hence, it is obvious that he could not have intended that the findings with respect to the cause of the delay in completion should apply to the latter claim.

days because of the flood. The true facts are stated in paragraph 3 of the findings where the Contracting Officer states that the draining of the reservoir by the Government did not commence until November 18, 1955 and that " \* \* \* the reservoir was not drawn down and kept down for a sufficient period to permit the well modifications in accordance with the requirements of Option A of Table 1, Paragraph 19 of the specifications \* \* \*," as a result of which the Government postponed this work until the following year."

In view of the foregoing the Board holds that the findings challenged in IBCA-140 will have no relevancy and no effect in such further proceedings as may be had before the contracting officer or the Board for the adjudication of those additional compensation items that are subject to administrative determination, as provided for in the portion of this opinion dealing with IBCA-133. With respect to those additional compensation items that are not subject to administrative determination, the following statement of the Court of Claims would seem to be pertinent:

\* \* \* On the question of the assessment of liquidated damages the findings of the contracting officer as to the facts and the extent of the delay were made final and conclusive, subject to appeal to the head of the department; but on the question of whether or not the defendant had caused a delay for which it should be mulcted in damages, they have not agreed that his findings of fact should be final and conclusive.<sup>18</sup>

It must be concluded that the appeal in IBCA-140 presents no justiciable issue of law or fact. The only relief asked for by appellant is a declaration that the contracting officer should have granted the 365-day extension of time for a reason other than the one he assigned for granting such extension. As appellant does not want us to shorten, lengthen, or otherwise alter the extension of time, it is evident that the making of the requested declaration would involve the determination of a purely hypothetical question insofar as the extension itself is concerned. Furthermore, since the various parts of appellant's claim for additional compensation must be adjudicated on the basis of their own merits, and not on the basis of the reason assigned by the contracting officer for granting the time extension, the requested declaration would also involve the determination of a purely hypothetical question insofar as the matters that form the subject of the appeal in IBCA-133 are concerned.

Accordingly, IBCA-140 is dismissed.

#### Conclusion

The appeal in IBCA-133 is sustained to the extent indicated in this opinion and is otherwise dismissed.

The appeal in IBCA-140 is dismissed.

HERBERT J. SLAUGHTER, *Member.*

ARTHUR O. ALLEN, *Alternate Member.*

PAUL H. GANTT, *Chairman.*

<sup>18</sup> *Arthur W. Langevin v. United States*, 100 Ct. Cl. 15, 30 (1943). *Accord: Continental Illinois Nat. Bank & Trust Co. v. United States*, 126 Ct. Cl. 631, 640-41 (1953); *Anthony P. Miller, Inc. v. United States*, 111 Ct. Cl. 252, 330 (1948).



## LAS VEGAS SAND AND GRAVEL CO., INC.

A-27761

*Decided June 16, 1960***Mining Claims: Lands Subject to—Small Tract Act: Classification**

In view of the Department's regulation that lands classified as suitable for disposition under the Small Tract Act shall be segregated from all appropriation, including locations under the mining laws, mining claims located on lands earlier classified as suitable for disposition as small tracts are invalid.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Las Vegas Sand and Gravel Co., Inc., has appealed in part to the Secretary of the Interior from a decision dated May 16, 1958, of the Acting Director of the Bureau of Land Management which affirmed the action of the manager of the Reno land office rejecting its application for a mineral patent for the Last Chance Nos. 1 through 16 placer mining claims and holding the claims to be null and void. The appeal is limited to Last Chance Nos. 7, 8, 9, 15, and 16 situated in secs. 14, 15, 20 and 21, T. 21 S., R. 60 E., M.D.B. & M., Nevada, a short distance southeast of Las Vegas.

According to documents filed by the appellant in support of its application for patent, the claims were located in June 1955, and the location certificates were recorded on June 30, 1955.<sup>1</sup>

Prior to these locations, the lands involved, together with other lands, were classified pursuant to the act of June 1, 1938, as amended (43 U.S.C., 1958 ed., sec. 682a *et seq.*), for small tract purposes under classification orders No. 95 (18 F.R. 6413), effective October 2, 1953, and No. 106 (20 F.R. 1704), effective March 11, 1955.

The Acting Director affirmed the manager's decision on the ground that a classification of lands for small tract purposes constitutes, in effect, a withdrawal of the lands from location under the mining laws, and mining locations made on such lands are null and void.

In its statement of reasons in support of its appeal, the appellant says that it has made a discovery of gravel deposits valuable for building and construction materials and that the land at the time the claims were located was chiefly valuable for the mining of gravel for construction purposes.<sup>2</sup> It makes no attempt to refute the basis of

<sup>1</sup> Prior mining claims for the same lands located in 1946 were held to be null and void because at the time the location was made the lands were included in an oil and gas lease issued under the Mineral Leasing Act and were not subject to mining location. *Clear Gravel Enterprises, Inc.*, A-27287 (March 27, 1956); *Clear Gravel Enterprises, Inc.*, 64 I.D. 210 (1957). It appears that the appellant is the successor in title to Clear Gravel Enterprises, Inc.

<sup>2</sup> It also makes several statements relating to oil and gas leases on the land which do not appear to be pertinent here.

the decision of May 16, 1958, or to point out how its contentions demonstrate error in it.

Before the mining claims were located, a regulation of the Department read in part as follows:

(b) Lands classified under the act of June 1, 1938, as amended, will be segregated from all appropriations, including locations under the mining laws, except as provided in the order of classification or in any modification or revision thereof. 43 CFR, 1959 Supp., 257.3(b) (Circular 1899, 20 F.R. 366, January 15, 1955).

The Acting Director relied upon this provision to buttress his conclusion that a small tract classification by itself removed the lands from the operation of the mining laws.

In *The Dredge Corporation*, 64 I. D. 368, 372 (1957), the Department said that it was unnecessary to determine the correctness of the Director's ruling on that point, nor is it necessary to rule on it here.

It is to be noted that at the time the Dredge Corporation's mining claims were located the regulation did not specify the effect of a small tract classification upon a future mining location.

In this case, classification order No. 106 (affecting land in Last Chance No. 9) was issued after the regulation had been amended as set out above, and while classification order No. 95 (affecting Last Chance Nos. 7, 8, 15 and 16) was issued prior to the amendment, the mining claims were located after it. Thus, at the time all the mining claims were located the regulation plainly stated that lands classified for disposition as small tracts were not opened to mineral location.

In a recent case the Department considered a similar situation and held that a regulation can properly provide that the notation of the filing of an application for the withdrawal of public lands shall segregate that land from disposal under the public land laws to the extent that the withdrawal would and that if the withdrawal would remove the land from mineral location, a mineral location made after the notation of the application is invalid. *Marion Q. Kaiser et al.*, 65 I.D. 485 (1958); see *Mrs. Ethel H. Myers*, 65 I.D. 207 (1958). As the *Kaiser* case pointed out, it is not unusual for the Department's regulations to provide that an application will, until it is disposed of, segregate the land from other types of application or entry.<sup>3</sup>

It may also be noted that section 7 of the Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., sec. 315f), which also authorizes the

<sup>3</sup> 43 CFR 285.21, application to purchase land under the Timber and Stone Act (43 U.S.C., 1952 ed., secs. 311-313, repealed by the act of August 1, 1955 (69 Stat. 434)); 43 CFR 295.7 (a), (b), and (c), reservation of lands containing waterholes and lands for stock driveways; 43 CFR 105.2, segregative effect of application for reinstatement of canceled entry.

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Secretary to classify land prior to opening it to entry under a public land law, specifically states that locations and entries under the mining laws may be made upon lands subject to the act without regard to classification. In contrast, the Small Tract Act does not have a comparable provision, an indication that the Congress did not necessarily intend that lands classified as suitable for disposition as small tracts remain open to mineral entry and location in the same way as lands classified for disposition under section 7 of the Taylor Grazing Act.

Therefore, since the Secretary has determined that lands classified for disposition as small tracts would not be open to mineral location, a subsequent mineral location made on lands so classified would be invalid. *Cf. Marion Q. Kaiser et al., supra.* As has been stated above, the appellant's mining locations were made well after the classification of the lands they cover as suitable for disposition as small tracts and the pertinent regulation bars mineral location of such lands. Accordingly, the mining claims, having been located on lands segregated from such location, were invalid.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director is affirmed.

GEORGE W. ABBOTT, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

MARTIN H. SHULER, WALTER Y. WENTZ

A—28296

*Decided June 13, 1960*

#### Public Sales: Preference Rights

Where a decision of the local land office and departmental regulations under the public sale law clearly set forth the requirements for establishing a preference right to purchase land, the fact that a preference-right claimant misconstrued a form sent to him by the local office and inserted a wrong date therein as to his ownership of contiguous land is not sufficient justification for vacating the sale.

#### Public Sales: Award of Lands

Where acceptable evidence of ownership of land contiguous to a tract of land offered at public sale at or after the date of sale is not submitted by a preference-right claimant within 30 days after the sale, the land is properly awarded to the highest bidder at the sale.

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Martin H. Shuler has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated October 30, 1959, wherein the Director vacated the sale of a tract of public land under the public sale law (43 U.S.C., 1958 ed., sec. 1171).

On January 7, 1959, two tracts of public land were offered for sale, Parcel No. 1, consisting of 200 acres in sec. 21, T. 18 S., R. 3 E., S.B.M., California, and the other, Parcel No. 2, consisting of 27.10 acres, being lot 2, sec. 26, T. 18 S., R. 3 E., S.B.M., California, the tract involved in this appeal. Both parcels had been ordered into market for sale under the second proviso of the public sale law which authorizes the sale of tracts of public land which are not isolated but the greater part of which is mountainous and too rough for cultivation only upon applications of parties owning land adjoining the public land. Application for the sale of both parcels had been made by Walter Y. Wentz, who on January 7, 1959, bid the appraised value of each tract. Several other bids were made for each parcel and by decision dated January 8, 1959, Shuler was declared to be the high bidder for lot 2. All bidders at the sale were informed by that decision that, pursuant to the provisions of 43 CFR 250.11, the declaration of a purchaser for each parcel would be suspended for a period of 30 days from the date of sale to afford owners of contiguous land an opportunity to assert preference rights to purchase.

On January 13, 1959, Wentz asserted a preference right to purchase both parcels and submitted a certificate of ownership of adjoining land in both sections 21 and 26, as of December 8, 1953. Wentz was declared to be the purchaser of both parcels by decision dated February 12, 1959. Shuler appealed to the Director of the Bureau of Land Management on the ground that Wentz had not shown compliance with the requirements of the applicable regulation in that he had not submitted satisfactory proof of ownership of land contiguous to lot 2 at any time after the sale and prior to the decision of February 12, 1959. In answer, Wentz asserted that the instructions on the printed form "Certificate of Ownership" supplied to him by the local land office called for the showing of ownership as of the date of his application to have the land ordered into market.

The Director found the form, the pertinent part of which is set out in his decision, to be ambiguous and, for this reason, vacated the sale.

In the circumstances of this case, I do not feel that the Director's decision is justified.

In the first place, even if the form called for the date of the application for the sale of the tract in question, the date given in the certifi-

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cate is not the date of that application. The record shows that Wentz applied for the public sale of land in sec. 21 on December 8, 1953. It was not until March 29, 1954, that he made application for the public sale of lot 2 in sec. 26. At that time he also made application for other land in secs. 21 and 26 and for land in sec. 23, all under the second proviso of the public sale law. Later he relinquished his application as to the land in sec. 23, and the land in sec. 26 except lot 2. Thus, even under Wentz's construction of the form, it cannot be said that he submitted satisfactory proof of ownership of land contiguous to lot 2 at the date of his application to have that land ordered into market.

In the second place, while the form in question, if considered alone, may possibly lend itself to the interpretation which Wentz says he placed on it, that form, when considered with the decision with which the form was transmitted to Wentz and the regulation of the Department (43 CFR 250.11(b)) relating to the assertion of preference rights by owners of contiguous land after the highest bidder for the land is declared, can only be construed as calling for proof of ownership of contiguous land by the person asserting the preference right at or after the date of the sale.

The decision of January 8, 1959, specifically stated that "applications for preference rights to purchase must be accompanied by proof of ownership *at or after the date of sale*" (emphasis added). It not only referred to the applicable public sale regulation which included this requirement but transmitted copies of the regulation to all parties who had bid at the sale, including Wentz. It also transmitted to such parties copies of the form in question "for use by the above named persons in asserting a preference right to the land sold, should they be owners of land contiguous thereto, and desire to make a preference right claim." The decision also held that in the absence of preference right claims to purchase by owners of contiguous land, the high bidders for the separate parcels would receive the land.

It would appear that any one who was a bidder at the sale and who received a copy of the decision of January 8, 1959, with its enclosures should have understood that the date called for on the form was that specified for a bidder and not that of an applicant for a sale of land mountainous or too rough for cultivation, particularly where the land had already been ordered into market. Here the tract had already been offered and bids received. In accordance with the statute final action was deferred to give contiguous landowners the opportunity to acquire the offered land at the highest bid price or at three times the appraised value of the land.

*Donald C. Ingersoll*, 63 I.D. 397 (1956), cited by the Director, is not applicable to the present situation. In the situation dealt with therein there was no clear directive in the regulations as to where an application must be filed for an extension of an oil and gas lease. The Department held that where an applicant is to be deprived of a statutory preference right because of his failure to comply with the requirements of a regulation, that regulation should be so clear that there is no basis for the applicant's noncompliance therewith.

Here, both the regulation and the decision of January 8, 1959, clearly informed Wentz that, in order to purchase the land at the highest bid price or at three times the appraised price if three times such appraised price were less than the highest bid price, proof of his ownership of adjoining land "at or after the date of sale" must be submitted within the 30-day period. The plain and explicit language in both the regulation and the decision was sufficient to resolve any ambiguity that might be present in the ownership form when considered by itself.

That Wentz, no stranger to the public sale law and its requirements,<sup>1</sup> disregarded the directions in the decision and in the regulation and chose to construe the form as calling for a date other than that specified in both the decision and the regulation does not give rise to the protection afforded to applicants by the *Ingersoll* decision.

Clearly, the certificate of ownership submitted by Wentz showing ownership of land contiguous to lot 2 as of December 8, 1953, does not comply with the regulation.

As no preference right claim to lot 2 has been established, the tract must be awarded to Shuler. *Lawrence V. Lindbloom*, A-27993 (August 4, 1959); *Elizabeth A. Tallon, Oscar Jones*, A-27910 (May 18, 1959); *Don C. Shafer, Thomas A. Miller*, A-27645 (September 15, 1958).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, vacating the sale of lot 2, sec. 26, T. 18 S., R. 3 E., S.B.M., California, is reversed and the case is remanded to the Bureau for appropriate action looking toward the completion of the sale of the tract to Martin H. Shuler, all else being regular.

EDMUND T. FRITZ,  
*Acting Solicitor.*

<sup>1</sup> The case record indicates that Wentz has previously applied for or purchased land offered at public sale.

**APPEAL OF MONARCH LUMBER COMPANY**

IBCA-217

*Decided June 21, 1960***Contracts: Appeals**

In cases where no reason appears for any objection to a stipulation agreement of the parties settling a dispute, the Board of Contract Appeals will accept the stipulation to the extent reflected by the settlement agreement and sustain the appeal to that extent.

**BOARD OF CONTRACT APPEALS**

1. On May 18, 1960, the Board held that appellant's Claim No. 1 for the remission of liquidated damages in the amount of \$100 was barred by the operation of the release on contract, and sustained the Government's motion to dismiss Claim No. 1.

2. On the same date the Board denied the motion to dismiss Claim No. 2.<sup>1</sup> That claim, in the final form as submitted by the contractor-appellant on June 30, 1959, was for extra costs in the amount of \$1,905.12 alleged to have been incurred in insulating the buildings under the above-captioned contract.

3. On June 13, 1960, the following stipulation and settlement agreement dated June 9, 1960, was filed with the Board:

**STIPULATION OF FACTS**

and

**FOR SUBMISSION**

Subject to the approval of the above entitled Board, COMES NOW the United States of America by and through its counsel of record, Leonard B. Desmul, and Monarch Lumber Company, a corporation, by and through its counsel of record, Charles C. Lovell, and said parties hereto do hereby agree and stipulate as follows:

**I.**

That the allegations contained in the Appellants Reply to Statement of Position of Appellee are true and correct insofar as, and only insofar as, appellant's claim for additional compensation for labor and materials supplied in the insulation of nine log houses, in amount of \$879.76, is concerned, save and except any portion wherein the same may be inconsistent with anything hereinafter contained.

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<sup>1</sup> 67 I.D. 198 (May 18, 1960).

## II.

That as to the claim aforementioned appellant, Monarch Lumber Company, performed additional labor and materials doing an excellent job of construction; that the amount of \$879.76 is a reasonable amount to be paid to Monarch Lumber Company as and for said additional services and that Monarch Lumber Company has a valid and subsisting equitable claim against appellee in the amount aforementioned.

## III.

That insofar as the claim aforementioned is concerned the government suffered no injury or prejudice by any lack of written notice, and the government benefited substantially by the work as completed. The delay in completion of the subject contract was caused by conditions beyond the control of appellant and the government suffered no injury or prejudice by said delay.

## IV.

That insofar as the aforementioned claim is concerned, substantial compliance was had with the contract provisions with reference to notice; that the government had actual knowledge and notice of the changed condition from their first discovery by appellant; that an agent of the government, being the Project Engineer, was aware of, and given personal notice of, all difficulties encountered from the outset. That the additional services which were performed with reference to the claim aforementioned, and the furnishing of labor and materials thereunder, were inspected in progress by the government Project Engineer; that an excellent and workmanlike job was performed in all respects by the appellant.

## V.

That as to the remaining portion of appellant's claim, other than and excluding the foregoing claim for services performed on the nine log buildings in the amount of \$879.76, none of the foregoing is true. That as to the remainder of said claim there was not substantial compliance with the notice provisions of the contract, and the other facts are such that the government would suffer an inequity should this claim be allowed.

That under all of the circumstances herein a moral, equitable and legal claim exists in favor of appellant and against appellee in the amount of \$879.76 for services performed with respect to the log buildings as aforesaid; that it is the purpose of the parties hereto by and through their respective counsel of record to arrange for the equitable settlement and disposal of all of said claims of appellant by consenting to the compensation of appellant in the amount aforesaid, and consenting to the denial of each, all, and every claim other than the said mentioned claim of appellant in connection with the above appeal. And the parties hereto concede that the relief and judgment as set forth herein should be granted.

## VII.

Nothing in this Stipulation is intended to be, nor shall be construed as, an invasion of any function of the above entitled Board or of any other court of



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the United States of America which may at any time have this matter before it.

Dated this 9th day of June, 1960.

CHARLES C. LOVELL

By: (Sgd.) Charles C. Lovell

*Counsel for Appellant, Monarch Lumber Company.*

LEONARD B. DESMUL

By: (Sgd.) Leonard B. Desmul

*Counsel for Appellee, United States of America.*

4. The Board has considered the stipulation. Since there appears to be no objection to the acceptance of it, the Board sustains the appeal to the extent of the allowance of the payment of \$879.76 to the contractor-appellant, as reflected by the settlement agreement of the parties.

There appearing no reason for any objection to the stipulation, it is hereby found that the appeal is concluded and should be stricken from the docket of the Board.

It is so ordered.

PAUL H. GANTT, *Chairman.*

HERBERT J. SLAUGHTER, *Member.*

### APPEAL OF PIONEER ELECTRIC COMPANY, INC.

IBCA-222

*Decided June 23, 1960*

#### Contracts: Drawings—Contracts: Interpretation

Where a contract contains an ambiguity in the form of a discrepancy between two drawings, which the contractor before submitting his bid orally called to the attention of the contracting officer, the contractor is bound by an interpretation of the drawings that was orally communicated to him by the contracting officer before the bid was submitted.

#### Contracts: Substantial Evidence—Rules of Practice: Evidence

Allegations of fact made by a contractor that are contrary to findings of fact made by the contracting officer cannot be accepted as proof of the facts thus put in dispute.

#### BOARD OF CONTRACT APPEALS

Pioneer Electric Company, Inc., of Phoenix, Arizona, has filed a timely appeal from the decision of the contracting officer of September 8, 1959, denying its claim for additional compensation in the amount of \$1,079.64.

Contract No. 14-10-333-488 dated March 31, 1959, incorporated Standard Forms 23 and 23A (March 1953). It provided for the furnishing of all labor and materials and the performance of all work required for the construction of an electrical system extension for the lump sum price of \$9,643.

The work was to be commenced within 15 days of the receipt of notice to proceed and it was to be completed within 60 calendar days after receipt thereof. The contractor acknowledged notice to proceed on April 13, 1959; hence, the completion date was determined to be July 12, 1959.

Section IV, paragraph 3, of the specifications provided:

Drawing No. NM-OPC-3020-A (Sheets 1 to 8) forms a part of, and is supplementary to these specifications. The contract drawings and these specifications are intended to be mutually explanatory and complete. Should any error or ambiguity be discovered in the plans or in the specifications, the Contractor shall report the same to the Contracting Officer before starting the work and the Contracting Officer will make or approve the necessary corrections. In the event of a disagreement arising as the true intent and meaning of the drawings or details and specifications, the specifications shall take precedence over the drawings, the details over general drawings, the figures over scaled measurements, but all work called for by one, even if not by the other, shall be fully executed.

The work was accepted as completed on July 9, 1959, three days prior to the established completion date of July 12, 1959. Five days after acceptance, the contractor by letter of July 14, 1959 filed a written claim for additional compensation for the construction of underground power circuits in excess of the quantity shown in the drawings. The contractor's letter, in part, explains the claim as follows:

We wish to call your attention to a discrepancy between the drawings on the subject job and the actual measurement after installation. The tabulation on Sheet #8 drawing NM-OPC-3020-A shows the total distance for the underground circuits, including the ten per cent allowances, to be 1940'. The actual distance after careful measuring is 2325'. We therefore feel that the additional 385' should be considered as extra work and entitled to additional compensation.

The contracting officer in a letter of July 16, 1959, deferred a decision on the contractor's claim and invited the contractor's attention to specific provisions of the contract, quoted below. The letter reads, in part, as follows:

Your attention is invited to *Section I, General Provisions* which supplement U.S. Standard Form No. 23A, General Provisions, Construction Contracts. On page 3, paragraph 10 states "The Contractor shall, immediately upon his discovery of any statement or detail which is discrepenat [sic] or which otherwise

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appears to be in error, bring the same to the attention of the Contracting Officer for decision or correction."

Further, your attention is invited to Section IV of the General Provisions. On Page 16, paragraph 3 states in part "In the event of a disagreement arising as to the true intent and meaning of the drawings or the details and specifications, the specifications shall take precedence over the drawings, the details over general drawings, the figures over scaled measurements, but all work called for by one, even if not by the other, shall be fully executed."

Finally, your attention is invited to paragraph 4 page 1 of the General Provisions which states "All bidders are expected to visit the site of the work and inform themselves as to all existing conditions. Failure to do so will in no way relieve the successful bidder from the necessity of furnishing all equipment and materials and performing all work required for the completion of the contract in conformity with the specifications.—No allowance will be made for the failure of the bidder correctly to estimate the difficulties attending the execution of the work.

In reply the contractor by letter of July 17, 1959, alleged that the discrepancy was called to the attention of the contracting officer as soon as possible, and that "the exact length and routing was not fully established until the last week of our work. The contractor further stated that since the specifications declared that figures should take precedence over scaled measurements, it had used the figure of 1,940 feet shown on Sheet #8 of the drawings in computing its bid for the underground circuits, and that in compliance with contract terms an official of the appellant company had visited the site of the work. It also contended that the Government, which prepared the drawings and specifications, should be held responsible for the error.

In his Findings of Fact No. 1 of September 8, 1959, the contracting officer found that the footage table on Sheet #8 of the drawings did show 1,940 feet as the length of each of the underground circuits, but that a scaling of the plan of these circuits on Sheet #4 showed their length to be 2,325 feet. The contracting officer further found that the contractor was aware of this discrepancy prior to bid opening, and denied the claim.

The contracting officer based his findings on a memorandum of August 6, 1959, written by a predecessor contracting officer who stated that Mr. Merrell, the president of appellant's company, visited the job site prior to submission of its bid and that they discussed, among other things, the discrepancy which is the subject of this claim. The memorandum reads, in part, as follows:

1. Mr. Merrell, and another man whose name I do not recall, visited the job site prior to submission of Pioneer Electric's bid. During this visit, Mr. Merrell called at the Monument headquarters and among other things, discussed with me the discrepancy that is now made a point of discussion.

2. There was not sufficient time between Mr. Merrell's visit and the bid opening date to permit preparation and distribution of an addendum to the plans and specifications.

3. Provisions of the specifications requiring the Contractor to install a complete and workable distribution system regardless of errors, omissions or conflicts that the plans and specifications might contain were pointed out to Mr. Merrell and he was advised to bid accordingly.

Since Mr. Merrell was aware of the discrepancy prior to submission of his bid and since he had been informed as to what would be required, I do not feel that he is entitled to additional compensation for the project.

The contractor, through its president, Mr. Merrell, in a letter of September 10, 1959, to the contracting officer, denied that the subject of discussion at this meeting was as set forth in the Findings of Fact No. 1, but rather that it involved another discrepancy in Sheet #8 of the drawings. Specifically, Sheet #8 shows 1,940 feet of bare neutral wire and 1,940 feet of insulated cable, but, since this was a three-wire system, the insulated cable should have been shown as being double the length of the neutral conductor.

The assertion that the pre-bid discussion with the contracting officer was confined to this latter discrepancy was repeated by the contractor in its notice of appeal of October 1, 1957. Department counsel by letter of October 23, 1959, informed the contractor of his appointment and also invited the submission of further evidence in support of the appeal. In reply the contractor by letter of October 25, 1959, reiterated its position concerning the pre-bid discussion. No brief has been filed by the contractor, nor has it requested a hearing. On the other hand, Department counsel submitted a brief consisting of 23 pages. The contractor under date of April 6, 1960, filed a reply to this brief in which it again denied the correctness of the findings of the contracting officer, but did not ask for an opportunity to present evidence to refute them.

The contractor has only made allegations in its various communications, and has not submitted proof which is sufficient to overcome the findings and the decision of the contracting officer. Mere statements in claim letters are not sufficient proof of essential facts which are disputed.<sup>1</sup> Such allegations cannot be accepted as proof where they are disputed by the Government. We quote from *Duncan Construction Company*:<sup>2</sup>

\* \* \* In the absence of such proof the Board must accept the record, together with any testimony submitted by the Government, as being correct, unless it,

<sup>1</sup> *AAA Construction Company*, 64 I.D. 440, 448, 57-2 BCA par. 1510 (1957); *Pappin Construction Company*, Eng. C&A No. 1120 (1957); *Precision Scientific Company*, ASBCA No. 2804 (1955).

<sup>2</sup> 65 I.D. 135, 139, 58-1 BCA par. 1675 (1958).

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on its face, shows error or that it is unbelievable. While the record pertaining to this item of the claim stems from oral understandings on both sides, and, as such, is not of any great value to the Board in reaching its decision, *the findings of the contracting officer must be presumed to be correct in the absence of proof to the contrary.* (Emphasis supplied.)

In the instant case, the contracting officer's findings state that:

The record shows that the Contractor was aware of the discrepancies in the Drawing, and his attention was called to the provision of specifications requiring a complete and workable system regardless of errors, omissions or conflicts between the plans and specifications and advised to bid accordingly.

The contractor merely alleges that the discrepancy mentioned in the findings was not the same one that was actually discussed. Following the well-established rule, the Board must accept the contracting officer's account as set forth in his findings of fact, there being no proof to the contrary. It has been held that where a contractor is fully aware of an ambiguity before submitting its bid, it cannot have the ambiguity resolved in its favor.<sup>3</sup>

The Board is not insensitive to the fact that the actions taken by the predecessor contracting officer were not in conformity with paragraph 1 of Standard Form 22, entitled "Instructions to Bidders," which reads:

Any explanation desired by bidders regarding the meaning or interpretation of the drawings and specifications must be requested in writing and with sufficient time allowed for a reply to reach them before the submission of their bids. Oral explanations or instructions given before the award of the contract will not be binding. Any interpretation made will be in the form of an addendum to the specifications or drawings and will be furnished to all bidders and its receipt by the bidder shall be acknowledged.

The predecessor contracting officer attempted to justify his actions on the ground that because of the short time available prior to bid opening he had no other alternative except to provide appellant with an oral interpretation. Obviously, however, he could have delayed the date of bid opening and issued a modification or an addendum.<sup>4</sup> On the other hand, the contractor also disregarded the provision that any explanation "must be requested in writing" and "with sufficient time allowed for a reply to reach them before the submission of their

<sup>3</sup> *Ring Construction Corporation v. United States*, 162 F. Supp. 190 (Ct. Cl. 1958); *Wisner & Becker Electric, Inc.*, 65 I.D. 388, 392, 58-2 BCA par. 1911 (1958).

<sup>4</sup> It does not appear that the oral interpretation given by the predecessor contracting officer was prejudicial to the interest of other bidders. However, this fortuitous circumstance may not be present in other situations and we agree with the holding in *Carl Myers*, Eng. BCA No. 585 (1959), in which it was stated: "An addendum should have been issued, prior to the bid opening so as to amend the specifications to show the true facts."

bids." The failure of both parties to act in accordance with terms of the quoted paragraph has the effect of leaving the record completely barren of contemporaneous documentary evidence concerning the subject matter of the pre-bid discussion.

This case is distinguishable from the holding in *Peckham Road Corporation*,<sup>5</sup> in which when the contractor, before bidding, questioned the accuracy of a quantity stated in the invitation, the contracting officer insisted that there was no error in the figure there stated. In the instant case the predecessor contracting officer, on the contrary, told the contractor that it would be expected to provide "a complete and workable system regardless of errors, omissions or conflicts" and specifically cautioned it to "bid accordingly." Thus, on the basis of the facts as found by the contracting officer, it must be concluded that the contractor submitted its bid not only with full knowledge of the discrepancy between Sheet #8 and Sheet #4, but also with the understanding that the Government interpreted the contract as calling for "a complete and workable" electric system irrespective of any errors in the quantities stated in the footage table on Sheet #8. Under these circumstances, if it did not provide in its bid for such a contingency, it is bound by the consequences.<sup>6</sup>

In view of the information which the contractor had concerning the Government's interpretation of the contract, it is unnecessary to consider whether in the absence of such information the figures in the footage table would take precedence over the measurements scaled from Sheet #4.

This appeal illustrates the difficulties inherent in a claim involving an issue of fact that is presented for decision on a record which contains no convincing evidence by which such issue could be properly resolved. Despite reservations by the Board as to the propriety of certain contract administration procedures employed by the contracting officer, there is no evidence in the record that he erred in denying the contractor's claim.

The appeal, therefore, is denied.

HERBERT J. SLAUGHTER, *Member*.  
PAUL H. GANTT, *Chairman*.

<sup>5</sup> ASBCA No. 2042 (1954).

<sup>6</sup> In *Ross Engineering Company, Inc. v. United States*, 118 Ct. Cl. 527 (1951), a contractor was held to be bound by the interpretation which the representatives of the Government placed upon the contract where the contractor was informed of this interpretation at a pre-award conference, and subsequently signed the contract without reservation or exception thereto. *Cf. Korshoj Construction Co., Inc.*, 63 I.D. 129, 6 CCF par. 61,686 (1956).

## APPEAL OF WITZIG CONSTRUCTION COMPANY

IBCA-92

*Decided July 11, 1960*

### Contracts: Additional Compensation—Contracts: Delays of Government— Contracts: Interpretation

Under a contract which provides that the Government will make "every reasonable effort" to deliver material in time to avoid delay in the progress of the contractor's work "as outlined in his construction program," and which also provides that no additional compensation will be paid should the Government fail to make timely deliveries, the contractor is not entitled to additional compensation on account of delay in the delivery of material unless the Government has failed to make every reasonable effort to furnish such material in time to be installed in the ordinary and economical course of the performance of the contract.

### Contracts: Additional Compensation—Contracts: Acts of Government

Under Clause 12 of the standard form of General Provisions for Government construction contracts a contractor is not entitled to additional compensation for hindrances to performance of the contract work that are caused by the Government, or by persons acting under authorization from it, unless such hindrances exceed those that are necessary for the reasonable exercise of the Government's right, as reserved in Clause 12, to have additional work performed at the job site concurrently with the contract work.

#### BOARD OF CONTRACT APPEALS

Witzig Construction Company, of Corvallis, Oregon, has filed timely appeals from the denial by the contracting officer, in a decision dated November 7, 1956, of a claim for an extension of time, and from his denial, in a decision dated March 29, 1957, of two claims for additional compensation. The total amount in dispute is approximately \$76,000.

These claims arise under a contract with the Bonneville Power Administration (hereinafter referred to as "Bonneville") for the construction of Schedule II of the Reston-McKinley 230 KV Transmission Line in Coos County, Oregon. The contract, which was designated No. 14-03-001-11796 and dated June 23, 1955, was on Standard Form 23 (Revised March 1953) and incorporated the General Provisions of Standard Form 23A (March 1953) for construction contracts. It was a unit-price contract in the estimated amount of \$76,402.

#### *Claim No. 1*

#### *Additional Compensation for Delays in Receiving Material*

The principal claim asserted is for the extra costs to which appellant alleges it was put by reason of late delivery of steel by the Gov-

ernment. The transmission line to be constructed by appellant was approximately six miles long, and comprised 20 steel tower structures and 11 wood pole structures. Under the terms of the contract, the steel grillages for the footings of the towers, the steel bodies for the towers, the poles for the wood pole structures, the conductor to be strung between the structures, and sundry other items of material were to be furnished by the Government. The contract specified Fairview, Oregon, as the point where the material was to be made available to appellant, and, subsequent to the award of the contract, a material yard was established at that point by Bonneville.

The notice to proceed, which was dated June 29, 1955, provided that it should be effective July 11, 1955, and it was received and accepted by appellant before that date. Establishment of July 11, 1955, as the effective date of the notice to proceed was consistent with the contract, which allowed 45 days from June 8, 1955, the bid opening date, for the issuance and receipt of such notice. Since the contract fixed the performance period at 110 days, the date for completion of the contract work was October 29, 1955. Appellant began work on July 12, 1955, but did not substantially complete the job until February 10, 1956.

There was an important practical reason for completing the contract work by as early in October as possible. The area to be traversed by the transmission line was in a mountainous region characterized by dry summers and wet winters. Normally October was a transitional month, at some time during which the rainy season could be expected to begin. The first storms would not be apt to create serious impediments to construction operations, but once enough storms had occurred for the ground to become thoroughly saturated with water, the movement of trucks and other equipment to and between the structure sites could hardly fail to become a laborious and expensive matter. Wind, rain, snow and cold would also tend to cut down the efficiency of the labor force, and might even compel a suspension of operations. In testifying on this subject appellant's manager expressed the view that the costs of work performed during the winter would run from three to five times greater than for work done in the summer. When the contract was made both appellant and Bonneville were aware of the climatic pattern of the area, and cognizant of the difficulties that might be expected if the job was not finished before the rains came.

Appellant was unsuccessful in meeting this deadline, as has been indicated, by a wide margin. It blames its failure to do so upon delays by the Government in furnishing material. It asserts that these delays greatly increased the costs of the job, particularly, but not entirely, because of the prolongation of the work into the winter. It computes the increased costs by taking the total of its expenditures under the contract, inclusive of overhead, but exclusive of profit, and



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by deducting from them the amounts received under the contract. On this basis appellant asserts that the Government owes it additional compensation in the amount of \$73,461.33, less certain minor adjustments.

The alleged delays on which this claim is founded relate to steel for the tower footings and to steel for the tower bodies.

A carload of footing steel had reached the Fairview material yard established by Bonneville by the time appellant was ready to start work on July 12. Other shipments followed. Appellant moved expeditiously to assemble the steel into grillages, beginning on July 12 or 13. In performing this work it encountered some problems because of lack of material, mainly in the form of missing bolts and washers. In some instances the bolts or washers were actually in the yard, but were not immediately found; in others they were of the wrong size or type, but were promptly replaced from Bonneville's warehouse stores. There were also a few instances of misfabricated pieces of steel that required longer to replace because of the necessity of obtaining correctly fabricated pieces from Bonneville's steel supplier. Occasional errors in fabrication by a steel supplier are, however, a common hazard of transmission line work, of which appellant was put on notice by provisions in the contract that prescribed what should be done when such errors were discovered.<sup>1</sup> Moreover, it was possible for appellant to complete the bulk of the grillage assembly without having the corrected pieces. All in all, the evidence indicates that any problems due to lack of footing steel were minor in nature and, indeed, appellant's manager so testified.

Tower steel was a more serious matter. Of the 20 towers erected, the steel for two was furnished by Bonneville from its warehouse stock, and the steel for the remaining 18 was made up for this particular job by a steel supplier under contract with Bonneville. The two towers furnished from stock reached the Fairview material yard by July 26. The remaining 18 towers were shipped from the supplier's plant in Seattle, Washington, in three carload lots. The first carload was loaded on July 14, the second on July 19, and the third on July 29. The first and second cars appeared to have reached Fairview within about a week after their respective loading dates. The third car arrived on August 3, and by August 5 the steel from it had been unloaded by Bonneville and made available for use by appellant. The first and second cars did not contain all the pieces requisite for the assembly of any one of the 18 towers and, therefore, it was not until the unloading of the third car that the steel for a complete tower, other than the two furnished from stock, was available to appellant. On August 5 appellant commenced the work of

<sup>1</sup> Sections 1-102-G, 7-505, 7-506-D, 8-107, and 8-112-N of the specifications.

hauling the tower steel to the tower sites, where it would be assembled on the ground into sections as large as could be conveniently lifted by a crane, and where each tower would ultimately be erected by lifting these sections into place on the footings and fastening them together. A few missing pieces were delivered after August 5, and some replacements for misfabricated pieces had to be obtained after that date, but, as in the case of the similar occurrences with respect to footing steel, these were clearly normal hazards, forecast by the terms of the contract itself, that had no significant effect on the progress of the job.

The record is somewhat sketchy as to the date when the fabrication of the 18 towers was finished. It would seem, however, that most of the pieces were ready by at least July 1, and could have been shipped from Seattle at that time had Bonneville requested its steel supplier to do so. One reason why Bonneville did not make such a request was because the material yard at Fairview was not yet ready. The yard was on privately-owned land and in the course of arranging for a lease Bonneville was confronted with an unexpected problem through its discovery that the apparent owner did not have title to all the land. This so set back work on the yard that the railroad spur into it was still only partially complete when the footing steel began to arrive on July 12. Another reason why Bonneville did not seek to expedite shipment of tower steel in early July was that, as will subsequently appear, it was under the impression that appellant would not need such steel until towards the middle of August.

Appellant asserts that the Government should have provided tower steel in such order and such amounts that the steel for complete towers could have been moved from the Fairview yard to the tower sites at the rate of one or two towers per day, beginning on approximately July 15. To the failure to meet this schedule, it ascribes the major portion of its difficulties in performing the job and, especially, its inability to complete the work by the contract date of October 29.

This brings us to the legal questions of what were the obligations which the Government undertook when it entered into the contract as to, first, the timing of material deliveries, and, second, the reimbursement of costs incurred by the contractor in consequence of a failure to make deliveries on time, should such a failure occur.

With respect to the first of these questions, the contract itself contains no governing provisions, for it leaves entirely unspecified the particular dates upon which either footing steel or tower steel were to be delivered. The Court of Claims in a series of decisions has laid down the principle that where no date is specified in the con-

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tract, the Government should deliver material "in time to be installed in the ordinary and economical course of the performance of the contract."<sup>2</sup> This principle is applicable to the instant case.

With respect to the second question, the contract states:<sup>3</sup>

The Government will make every reasonable effort to secure delivery of construction materials, tools, and equipment which the Government is to furnish so as to avoid any delay in the progress of the contractor's work as outlined in his construction program. However, should the contractor be delayed because of failure of the Government to make such deliveries, the contractor shall be entitled to no additional compensation or damages on account of such delay. The only adjustment will be the granting of an appropriate extension of time within the provisions of Clause 5 of this contract.

The Board interpreted in *Appeal of Paul C. Kelmick Co.*<sup>4</sup> a provision in a Bonneville transmission line contract which used language substantially identical with that above quoted to define the duties of the Government, and the rights of the contractor, as related to delays in providing the right-of-way for the contract work.<sup>5</sup> The Board interpreted the provision as meaning that the Government would make *every reasonable effort* to provide the right-of-way in advance of the time when it was needed for the contract work, rather than as meaning that the right-of-way would be made available *within a reasonable time*. The Board further held that if the Government did make every reasonable effort to provide the right-of-way, the contractor would not be entitled to additional compensation for delays brought about by its unavailability; but that if the Government did not make such an effort, then the contractor would be entitled to additional compensation for such delays. We consider that the same interpretation should be placed on the contract provision relating to material deliveries that is here involved.

In applying the foregoing principles to the facts of this appeal a problem is presented because the evidence reveals that there were two different sequences of work—both seemingly reasonable—which could have been employed to do the job.

One sequence would have been to concentrate initially upon the various operations involved in building the footings, and to move the tower steel from the material yard to the tower sites only when and as the footings at a substantial proportion of the sites had been completed. Bonneville's construction experts testified that this was the customary practice, and the one they anticipated appellant would employ. Had it been followed, tower steel would not have been needed until August 5, 1955, or later.

The other sequence would have been to start the operations of moving and assembling the tower steel concurrently with the com-

<sup>2</sup> *Peter Kiewit Sons' Co. v. United States*, 138 Ct. Cl. 668, 674-75 (1957); *Thompson v. United States*, 130 Ct. Cl. 1, 7 (1954); *Chalender v. United States*, 127 Ct. Cl. 557, 563 (1954); *Walsh v. United States*, 121 Ct. Cl. 546, 555 (1952).

<sup>3</sup> Section 3-102-F of the specifications.

<sup>4</sup> IBCA-39, 63 I.D. 209, 215, 223-231, 56-2 BCA par. 1027 (1956).

<sup>5</sup> A like right-of-way provision appears in section 3-104-B of the specifications of the instant contract.

mencement of work on the footings. This was the procedure which appellant actually intended to employ. At the hearing appellant's manager presented some cogent reasons in its favor, predicated on the facts that the building of the six miles of transmission line here in issue called for as many separate crafts and skills as would the construction of a much longer line, that serious recruiting problems were posed because each of these crafts and skills would be needed for only a relatively small space of time, and that the work of all of them was required to be fitted into a performance period much shorter than the time usually allowed for constructing the longer lines in connection with which the customary practice testified to by the Bonneville experts had been developed. There were enough tower sites with sufficient room for concurrent operations to admit of appellant's intended sequence of work being attempted, provided the work were skillfully organized so as to insure completion of the footings at the smaller sites, where there was not enough room to build the footings and assemble the tower sections at the same time, while the steel for the larger sites was being moved and assembled. And, of course, in order to admit of this sequence being successfully pursued, it would have been necessary for the steel for complete towers to have been available at the material yard on July 12 or shortly thereafter.

The key to the solution of the problem thus presented is, we consider, to be found in the fact that Bonneville believed, and justifiably so, that the first of the two sequences of work we have mentioned was the one which appellant proposed to follow, until it was too late for a successful shift to the second. On June 23, 1955, the day the contract was awarded, Bonneville construction and supply officials met with appellant's manager for a general discussion of the performance of the contract. The minutes of this meeting reveal that, while the contractor's manager spoke briefly of how he planned to do the job, nothing was said which might have alerted the Bonneville officials to the possibility that appellant would want tower steel during the first month or so of performance. Appellant's manager testified, moreover, that he was unable to recall any occasion, prior to the series of letters that will be discussed later, on which this possibility was mentioned to Bonneville personnel.

At the meeting on June 23 the manager agreed to furnish a construction program within approximately one week's time<sup>6</sup> Bonne-

<sup>6</sup> Section 2-102 of the specifications provided: "Immediately following award of contract, the contractor shall furnish the contracting officer a written program outlining in reasonable detail his proposed sequence of operations. The contractor shall at no time change his program without the approval of the contracting officer. The contracting officer shall have the right to require changes in the program at any time to meet requirements of timely completion of the work. The contracting officer will inform the contractor in writing as the work proceeds of the status of deliveries of materials to be furnished by the Government, or the status of right-of-way availability, or both. Approval of the contractor's program shall in no event be construed as relieving the contractor of any responsibility in connection with his performance of the work in the time specified."

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vill's Chief of Construction, in calling for the program, stated:

\* \* \* within a week's time, we would like to have you present us a construction schedule of how you are going to start, when you are going to put up wood pole and steel structures and when you are going to string. This is the first job you have had on lines. If you stay on schedule we are one happy family and if you get behind we get in your hair. With your cooperation we will make out all right. We definitely want that construction schedule in here. Would a week from today be an unreasonable time?

The construction program was submitted to Bonneville on or before July 5, 1955. It was in the form of a graph that showed anticipated progress by three curves, one marked "Footings," another "Towers," and the third "Conductor." The approximate starting dates shown by the graph were July 11 for "Footings," August 19 for "Towers," and September 17 for "Conductor." There can be no question but that the curve for "Towers," beginning at approximately August 19, was intended to comprehend the operation of assembling the tower sections on the ground as well as the operation of erecting the towers after the sections had been assembled, for appellant's manager conceded this much. It is unnecessary to consider whether this curve was also intended to comprehend the operation of moving the tower steel to the tower sites, for appellant had sufficient trucks and men to move enough steel on and after August 5 to admit of an efficient assembly operation being initiated by August 19. That date fell on a Friday and assembly of the tower sections was actually commenced on the ensuing Monday. Hence, it must be concluded that the Government's deliveries of tower steel were timely if the construction program be accepted as the criterion of "the ordinary and economical course of the performance of the contract."

Appellant contends, however, that it was led to believe substantially all of the tower steel would be delivered at the Fairview yard in mid-July by reason of a "Material Availability Survey" that was handed its manager at the meeting on June 23. This document indicated that some of the footing steel was due to arrive at Seattle on June 23, that the balance of the footing steel was available "now," that part of the tower steel was available "now," and that the remainder would be available on July 15. The minutes of the meeting contain statements by the Bonneville officials that the material "is not on the job, it is in Seattle and scattered around" and other statements which should have made it clear to appellant's manager that the references to availability in the document handed him were to availability at some point on the Bonneville system or at the supplier's plant in Seattle, and not to availability at Fairview.<sup>7</sup> They should

<sup>7</sup> The "Material Availability Survey" was written in terms which themselves suggested that these references were not to availability at the Fairview yard, for the date of availability given for most of the items listed was "now," whereas the only mention made of the yard, which had not yet been established, was a statement "*Yard expected to be at Fairview, Oregon*" (italics supplied).

also have made it clear to him that the July 15 date was merely the date when, so far as Bonneville could then estimate, the supplier would have the tower steel ready for shipment. Nor was there anything in the "Material Availability Survey" to indicate that shipment would be made to Fairview as soon as the tower steel was ready, even if the construction program submitted should indicate, as was here the case, that shipment at a later date would be in time to meet appellant's needs.

Appellant also contends that in a series of letters, written subsequent to the submission of the construction program, it made known to Bonneville the immediacy of its needs for tower steel. These letters were dated, respectively, July 14, July 20, and July 30, 1955, and each appears to have been received about two days after its date. The first letter was very general, and merely stated that appellant did not have enough "material." The second enumerated various classes of footing and wood pile material as lacking at the Fairview yard, and included a statement that according to the "Material Availability Survey" given appellant "all of the material should be available at this time." The third letter was the first one in which tower steel was specifically mentioned. The two earlier letters were understood by Bonneville as being directed to footing steel and wood poles, and in response to them efforts were made to expedite deliveries of those items. When the third letter was received only one carload of tower steel had not yet reached Fairview, and that was already on its way there.

The contract provision requiring the Government to make "every reasonable effort" to deliver material in time to avoid delay in the progress of the contractor's work uses the phrase "as outlined in his construction program" to describe the progress to which this requirement is directed. In view of this phrase, the Board considers that the construction program submitted by appellant must be accepted as the criterion of what would constitute "the ordinary and economical course of the performance of the contract," rather than the undisclosed sequence of work which appellant's manager actually had in mind. Neither the "Material Availability Survey," nor the series of letters in July, nor any other circumstance revealed by the record calls for a different conclusion, since in none of them was there anything to cause Bonneville to question the correctness of the construction program until the letter of July 30, 1955, was received. By then the final carload of tower steel was already in transit.

With respect to footing steel, the case is somewhat difficult. The construction program indicated that the need for footing steel would commence as soon as appellant got on the job, and the Bonneville officials fully understood the urgency of this need even before they

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received the program. Whether they made "every reasonable effort" to satisfy it is a question that need not be decided, for the evidence is to the effect that the delays in delivering bolts, washers, and other items for the footing grillages caused no pecuniary loss to appellant. Assembly of the grillages was a task of small proportions that, according to appellant's manager, could be performed by two linemen in about one week's time. Notwithstanding the delays in receipt of material, this task was actually completed, with immaterial exceptions, before August 5, 1955.

There is nothing to suggest that the timing of the deliveries of footing steel made the assembly of the grillages more expensive than would otherwise have been the case. There is likewise no evidence that it hampered timely completion of the footings. This is indicated by the fact that other operations, such as staking of the tower sites and digging of excavations for the grillages, which had to be performed before the footings could be set, progressed more slowly than did assembly of the grillages. Appellant's manager testified that throughout the period from July 12 to August 5, 1955, it was difficult for him to find enough work to do keep his crew busy, even though the grillages were being assembled during this period at a rate that resulted in their substantial completion before its end, and that he considered it would be inexpedient to enlarge the crew until tower steel was at hand. Unquestionably, the slow progress of the job as a whole up to August 5 was due to the fact that appellant was waiting for tower steel, rather than to the lateness of some of the footing steel. For these reasons, it is hard to see how acceleration of deliveries of the latter would have saved appellant any money.

In view of the foregoing the Board finds that the tower steel was delivered in time to be installed in the ordinary and economical course of the performance of the contract, and that the Government made every reasonable effort to deliver it in time to be so installed. The Board further finds that appellant incurred no extra costs or other damage by reason of late delivery of footing steel.

Accordingly, the claim for additional compensation for delays in receiving material is denied.

#### *Claim No. 2*

##### *Extension of Time for Delays in Receiving Material*

The contract work was, as has been mentioned, substantially completed on February 10, 1956, which was 104 days after the completion date of October 29, 1955, stipulated in the contract. By Change Order "A" dated September 29, 1955, an extension of time in the amount of 16 days was granted on account of sundry "acts of the Government," one of which was delay in furnishing certain pieces

of footing steel. Subsequently, extensions of time aggregating 45 days were granted on account of delay caused by unusually severe weather during October 1955, and subsequent months. In addition, an extension of time of 9 days was allowed on account of a mistake by the Government in furnishing replacements for certain pieces of tower steel damaged by appellant. There remain 34 days of unexcused delay in completion, for which appellant has been assessed liquidated damages at the rate of \$100 per day specified in the contract, or a total of \$3,400.

The claim here asserted is that the extension of time granted by Change Order "A" should have encompassed 46 days, instead of only 16, thereby entitling appellant to remission of \$3,000 out of the liquidated damages assessed.

The 16 days actually granted were computed by the contracting officer in the following manner: appellant was considered to have lost by reason of acts of the Government approximately one-third of the 23 days which elapsed between July 12 and August 5; the normal weather during the period immediately following the contract completion date of October 29 was considered to be sufficiently unfavorable for transmission line construction as to require approximately two days for the attainment of the same amount of progress that could be achieved in one day under normal summer weather conditions; and, hence, 8 days were taken as the measure of the time lost and twice that amount as the measure of the extension of time that should be granted to compensate for the time lost. Appellant, on the other hand, contends that the unavailability of steel for complete towers caused it to lose all of the 23 days in question, and, therefore, that an extension of time of at least 46 days should have been allowed.

The evidence fails to support this contention. It is obvious that appellant did not lose all of the time that elapsed between July 12 and August 5, for during this period it assembled grillages for the footings, made excavations for the footings, and performed other items of work. A graph prepared by Bonneville on the basis of its inspectors' reports indicates that as of August 5, 1955, the job as a whole was about 10% complete. It is also clear that appellant could reasonably have made more progress prior to that date than it actually achieved. For example, the work done on the footings was substantially less than it would have been practicable to do, notwithstanding the delays in delivering footing steel. We find that the time lost by reason of "unforeseeable causes beyond the control and without the fault or negligence of the Contractor," within the meaning of Clause 5 of the General Provisions of the contract, that arose before August 5, 1955, did not exceed 8 calendar days in the aggregate.

Nor does the record justify a conclusion that the two-for-one ratio



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employed by the contracting officer in calculating the amount of the extension of time included in Change Order "A" was too small. The periods of unusually severe weather that occurred during the winter have been excluded from the liquidated damages computation by virtue of the other extensions of time subsequently granted. The remainder of the rainy season is not shown to have been so unfavorable for transmission line construction as to support a higher ratio than was used by the contracting officer. We find that an extension of time in the amount of 16 calendar days was sufficient to fully compensate appellant for the time lost by reason of excusable causes that arose before August 5, 1955.

This being so, the contention of the Government that appellant's acceptance of Change Order "A" precludes allowance of any further extension of time on account of either tower steel or footing steel need not be examined.

The claim for an additional extension of time for delays in receiving material, therefore, is denied.

*Claim No. 3*

*Additional Compensation for Hindrances Caused by Slash Burning*

This claim is for extra costs alleged to have been incurred through the burning of slash on the right-of-way for the transmission line while appellant was engaged in stringing the conductor. The amount claimed is \$961.47.

The right-of-way traversed a forested area in which private landholdings were intermingled with Federally-owned lands, administered in part by the Bureau of Land Management of this Department, and in part by the Forest Service of the Department of Agriculture. Burning within the area was subjected to strict legal controls imposed by these agencies and also by the State of Oregon.

Appellant's manager made a pre-bid investigation of the right-of-way a short time before the bid opening date of June 8, 1955. Logging operations were then in progress on the lands traversed by the right-of-way, and a contractor with Bonneville was engaged in clearing the right-of-way preliminary to construction of the transmission line. Appellant's manager noticed these activities. He should have been aware, if he was not, that the slash resulting from the logging and the clearing would ultimately have to be burned in order to eliminate it as a potential fire hazard, but that, as the dry season was at hand, the burning would not be permitted until October or thereabouts.

After the contract with appellant had been made, a plan for burning the slash was worked out under the leadership of the Forest Service and the Bureau of Land Management. Appellant had no part in

the formulation of this plan, but was advised of its existence by Bonneville. The plan contemplated that the slash would be burned as it lay scattered on the ground in a coordinated burning operation that encompassed the whole area. Such a burning operation is feasible of accomplishment, it would appear, only during a very short period in the autumn when enough rain has fallen to forestall a forest fire, but yet not enough to prevent thorough combustion of the brush, limbs and other timber debris. Appellant's manager was given advance information of the approximate date when the slash burning would begin, but not of the exact date, which, being dependent upon the progress of the rainy season, was determined only a short time before the operation was started.

While the burning was still in progress, appellant started the work of stringing the conductor between the structures. The stringing appears to have begun on October 20, 1955, a Thursday, and the fires appear to have been extinguished by October 25, a Tuesday. During the interval it was necessary at times for the stringing crew to move the conductor out of the path of the fires, and on two nights the conductor was hauled up into the air to forestall any possibility of its being burned, should the fires flare up while the crew was absent. In addition, the fires destroyed a number of logs which appellant had piled up in a small canyon on the right-of-way to serve as a bridge for its equipment. The sum claimed represents the extra costs entailed by reason of these events.

Situations such as this where a contractor, when submitting his bid, had good reason to anticipate that the Government might authorize other persons to perform work at the same time and place as the work to be performed by the contractor, have customarily been resolved through application of the rule of reasonableness to the conduct of each party. Thus, it has been held that if such other persons use methods that do not make the contractor's situation more difficult than is necessary for the accomplishment of the jobs they have been authorized to do, the Government is not answerable to the contractor for inconvenience or harm resulting from their operations, but that if such other persons do their jobs by methods that fail to give due regard to the contractor's operations, then the Government is answerable.<sup>8</sup>

Clause 12 of the General Provisions of the contract here involved states:

The Government may undertake or award other contracts for additional work, and the Contractor shall fully cooperate with such other contractors and Government employees and carefully fit his own work to such additional work as may be directed by the Contracting Officer. The Contractor shall not commit

<sup>8</sup> *Anthony P. Miller, Inc. v. United States*, 111 Ct. Cl. 252, 335 (1948); *Walsh Brothers v. United States*, 107 Ct. Cl. 627, 644-45 (1947); *Schmoll v. United States*, 91 Ct. Cl. 1, 32 (1940); cf. *Appeal of Barnard-Curtiss Co.*, IBCA-82, 64 I.D. 312, 321, 57-2 BCA par. 1373 (1957).

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or permit any act which will interfere with the performance of work by any other contractor or by Government employees.

In view of this express stipulation, any contention that the Government should have given the conduct of appellant's stringing operation a complete and absolute priority over the conduct of the burning operation would be clearly untenable.

From the circumstances of this case, as outlined above, the Board is satisfied that the extra costs incurred by appellant in moving the conductor and hauling it up at night were merely necessary consequences of a reasonable exercise of the rights reserved by the Government in Clause 12 of the General Provisions. Removal of the slash would have been incomplete unless the fires were permitted to traverse the center line strip of the right-of-way where stringing was in progress. The burning of the temporary bridge, on the other hand, was not necessary for removal of the slash and, it would seem, could easily have been avoided. Certainly, if there had been, for example, a ranger cottage or a transmission line structure at the same point, the Government would have taken measures to protect it from the fires. The Board considers that appellant is entitled to additional compensation for the extra costs incurred through the destruction of the bridge.

The record contains an itemization of the costs included in this claim which was checked by Bonneville employees familiar with the slash burning, and considered by them to be correct. The itemization shows that these costs are based on a total of 8 crew hours, of which 4 crew hours are allocated to the destruction of the bridge. Using this ratio, we find that the extra costs attributable to the latter event are \$480.74.

#### CONCLUSION

The appeals are sustained to the extent of \$480.74, as stated above, and are otherwise denied.

HERBERT J. SLAUGHTER, *Member.*

PAUL H. GANTT, *Chairman.*

H. E. STUCKENHOFF, CLYDE A. BREEN

A-28335

*Decided July 12, 1960*

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

An oil and gas lease does not automatically terminate on its anniversary date for failure to pay rental on or before that date where the rent was paid before the anniversary date but, due to an oversight on the part of the land office, it was erroneously returned to the lessee and was not physically in the land office on the anniversary date.

## APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by H. E. Stuckenhoff and Clyde A. Breen from a decision of the Director, Bureau of Land Management, dated December 15, 1959, dismissing their appeal from a decision of the land office at Cheyenne, Wyoming, dated August 31, 1959, returning, unapproved, a partial assignment out of oil and gas lease Cheyenne 077873 and the eleventh year's rental tendered by the assignor and the assignee.

The Director held that the assignment was in proper form for approval and that although the decision of August 31, 1959, was erroneous in returning the advance rental it would serve no purpose to approve the assignment since the lease terminated by operation of law on September 1, 1959, for failure to pay the rental on or before that date. He stated that while the rental had been tendered in August 1959, it had been returned and "was not on hand in the office on the anniversary date of the eleventh year, September 1, 1959." He held further that the appellants should have returned the rentals if they intended to maintain the lease but that the rentals could not be accepted if tendered because acceptance of the rental on an expired lease cannot serve to continue the lease.

Cheyenne 077873 was issued as of September 1, 1949, pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). It was extended for an additional 5-year term at the end of its primary term and at that time (September 1, 1954) became subject to the provisions of the amendatory act of July 29, 1954 (68 Stat. 583). The latter act authorizes the partial assignment of leases which are in their extended term and provides that the segregated leases of undeveloped lands shall continue in full force and effect for 2 years and so long thereafter as oil or gas is produced in paying quantities (30 U.S.C., 1958 ed., sec. 187a). It also provides that upon the failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law (30 U.S.C., 1958 ed., sec. 188).

On July 22, 1959, a partial assignment of the lease from Stuckenhoff to Breen was filed. On the same date, Stuckenhoff and Breen were notified that a recent amendment of the oil and gas leasing regulations required a statement from a party seeking to acquire acreage under the Mineral Leasing Act as to whether he is the sole party in interest.<sup>1</sup> They were informed further that the information called for must be filed prior to July 31, 1959, in order for the lease to be extended for an additional 2 years; otherwise the lease would expire on August 31, 1959.

<sup>1</sup> That decision and the later one, of August 31, 1959, cited 43 CFR 192.42(e)(3)(iii), relating to lease offers. The correct citation for the regulation governing the showing to be made by assignees is 43 CFR 192.140, as amended by Circular 2019 (24 F.R. 4630); 43 CFR, 1959 Supp., 192.140.

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Breen filed the statement called for on July 24, 1959. On August 13, 1959, Stuckenhoff paid the eleventh year's rent on his retained portion of the lease and, on August 24, 1959, Breen paid the rent for the assigned portion.

The land office decision of August 31, 1959, held that, since Breen had failed to submit the statement called for, the partial assignment never became effective. It held that the lease expired by operation of law on August 31, 1959, and, as noted above, returned the checks submitted by Stuckenhoff and Breen for the eleventh year's rent.

The record shows that Breen received the land office decision on September 4, 1959, and that on the same date he wrote a letter to the land office requesting that the file relating to the assignment be re-examined for the statement. This letter was received in the land office on September 8, 1959. There is nothing in the record to show when Stuckenhoff received the decision of August 31, 1959. However, his notice of appeal dated September 5, 1959, was received in the land office on September 9, 1959.

While we agree with the Director that the decision of August 31, 1959, was wrong in refusing to recognize the effectiveness of the partial assignment to extend the segregated portions of the lease and in returning the rental payments, we cannot agree, in the circumstances of this case, that the appeal should have been dismissed for the reasons given.

The land office evidently overlooked the fact that Breen had submitted the required statement in the month of July and that therefore, upon approval, the assignment would become effective as of the first day of the following month, August 1, 1959, and, all else being regular, operate to extend both portions of the lease for an additional 2-year period.

However, the parties cannot be penalized because the rent was not in the land office on September 1, 1959. The parties had paid the rent before the anniversary date of the lease and had thus saved themselves from the penalty of automatic termination provided for in the act of July 29, 1954. It was through no fault of theirs that their checks were returned to them. The checks were evidently in transit on September 1, 1959, and it was not until after that date that the parties learned that the lease was considered to have terminated on August 31, 1959.

To hold, as the Director did, that the rent must be physically in the land office on the anniversary date of the lease, notwithstanding the fact that the action of the land office made this impossible, and to hold, at the same time, that notwithstanding the error of the land office a return of the payments at a later date could avail the parties nothing is to hold that the parties lost their rights under the lease

even though they had complied in every respect with the requirements of the Mineral Leasing Act. Such holdings obviously cannot stand.

The situation is not at all comparable with *Duncan Miller*, A-27683 (November 10, 1958), cited by the Director. There, Miller, over a year after his oil and gas lease offer had been rejected, accepted a refund of the advance rental submitted with his offer while his appeal from the rejection of his offer was pending. The Department pointed out that the pertinent regulation made it mandatory that an offer to lease must be accompanied by the first year's rental and that an offer not accompanied by the rental would be rejected. It held:

\* \* \* From the time that Miller accepted the refund of the rental, his offer was no longer in compliance with the regulation and earned him no priority over later qualified applicants. \* \* \*

See also *Duncan Miller*, A-27693 (December 3, 1958).

Here, the land office refused to accept payment of the eleventh year's rental under the erroneous view that no payment was due because the lease expired by operation of law on August 31, 1959. The appellants appealed immediately.

It having been established that the lease could have been extended by the partial assignment and that the appellants had paid the rent before the anniversary date of the lease, resubmission of the rent for the eleventh year of the lease will be accepted.<sup>2</sup>

Therefore, it is concluded that the Director was in error in dismissing the appeal and in holding that the lease expired by operation of law on September 1, 1959, for the failure of the appellants to pay the eleventh year's rent.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is reversed.

GEORGE W. ABBOTT, *The Solicitor*.

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

PAUL J. HINKEY

A-28345

*Decided July 12, 1960*

**Mining Claims: Surface Uses—Surface Resources Act: Verified Statement**

A verified statement required under the act of July 23, 1955, is properly rejected and the use of the surface resources denied to a mining claimant who files such statement after the termination of the period of 150 days prescribed by the statute for such filing.

<sup>2</sup>The appellants must also resubmit the assignment returned to them with the decision of August 31, 1959.

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**Mining Claims: Surface Uses—Surface Resources Act: Verified Statement—  
Notice**

The statutory requirement for mailing by registered mail of a copy of the published notice described in section 5 of the act of July 23, 1955, to a mining claimant is met by the mailing of the notice by registered mail to his address of record and it is immaterial that he may not have personally received the notice because he did not live at the address.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Paul J. Hinkey has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated November 10, 1959, which affirmed a decision of the manager of the land office at Boise, Idaho, dated August 8, 1958, rejecting his statement filed on July 14, 1958, in purported compliance with section 5(a) of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 613(a)), for the reason that it was not filed within 150 days from February 5, 1958, as required by the statute.

Hinkey admits that he did not file the verified statement required to protect his rights to surface resources on his mining claims in Boise County, Idaho, within the 150-day period following the first publication of notice of proceedings to determine rights of mining claimants to the use of surface resources on mining claims within the Boise Basin Area of Boise National Forest. He attempts to excuse his failure to do so by asserting that the notice was published in "an obscure, very limitedly read paper at Idaho City, Idaho" instead of Idaho's most widely read newspaper, the Daily Statesman, and that he was never personally notified of the publication of the notice.

It is sufficient answer to Hinkey's assertions to observe that the statute which requires that the notice be published is explicit in its directive that such notice be published "in a newspaper having general circulation in the county in which the lands involved are situated" and that the statute merely requires that a copy of the notice be mailed by registered mail addressed to each person found to be in possession of or engaged in working the claim or whose name and address is set forth in the title or abstract company's or title abstractor's or attorney's certificate as having an interest in the claims. The notice was published in the newspaper published at the county seat of Boise County and a copy of it was properly mailed to Hinkey at the address found on examination of the claims. Thus the requirements of the statute were fully met. It is immaterial that he did not actually receive the copy. *William Kuhn*, 66 I.D. 268 (1959).

Because Hinkey's verified statement was filed after the termination of the 150-day period prescribed by the statute, it was properly rejected and use of the surface resources on his mining claims was prop-

erly denied to him. *Hines Gilbert Gold Mines Company*, 65 I.D. 481 (1958); *James H. Marsh*, A-28322 (June 13, 1960).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2..2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

GEORGE W. ABBOTT, *The Solicitor*.

BY: EDMUND T. FRITZ,  
*Deputy Solicitor*.

### APPEAL OF THE EAGLE CONSTRUCTION CORPORATION

IBCA-230

*Decided July 18, 1960*

#### Contracts: Subcontractors and Suppliers

In order to be entitled to an extension of time based on an excusable delay under Clause 5(c) of U. S. Standard Form 23A, the contractor must allege or prove specific facts that the failure to complete the contract work on time was due to causes that were unforeseeable by, beyond the control of, and without the fault or negligence of, the contractor and its supplier.

#### Contracts: Changes and Extras—Contracts: Unforeseeable Causes

A contractor who is directed to perform extra work after the completion date of the contract has passed is entitled to an extension of time equal to the number of days from the date the work was directed until the date when it is completed, provided the contractor has not delayed the extra work unnecessarily.

#### BOARD OF CONTRACT APPEALS

The Eagle Construction Corporation, P. O. Box 181, Loveland, Colorado, filed a timely appeal from a letter findings of fact and decision of the contracting officer, dated November 16, 1959, which denied appellant's requests for an extension of time on account of delays in completing the performance of Contract No. 14-10-235-396, dated September 19, 1958, with the National Park Service.

The contract provided for the construction of extensions of water and sewer systems and a sewage treatment plant at the Headquarters and Utility Area in Rocky Mountain National Park, Colorado. It was on U. S. Standard Form 23 (Revised March 1953) and incorporated the General Provisions of U. S. Standard Form 23A (March 1953). The contract was on a unit price basis, the total estimated contract price being \$70,440.50.<sup>1</sup>

<sup>1</sup>Change Order No. 1, dated June 26, 1959, reduced the contract consideration in the amount of \$450. However, Change Orders Nos. 3 and 4, dated July 9 and August 10, 1959, respectively, increased it in the respective amounts of \$3826 and \$290. Consequently, the final contract price was \$74,106.50.



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The contract stipulated that the work should be started within 15 days after the date of receipt of notice to proceed, and should be completed within 120 calendar days from the same date. Appellant acknowledged receipt of notice to proceed on October 2, 1958, thus establishing the date for completion of the work as January 30, 1959.

The General Provisions of the contract included the usual "delays-damages" provision (Clause 5), under which the contractor was not to be charged with liquidated damages because of "any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor," including, but not restricted to certain named causes, or because of "delays of subcontractors or suppliers due to such causes." Paragraph 2 of Section III of the General Provisions of the specifications provided for the assessment of liquidated damages at the rate of \$50 a day for each calendar day of inexcusable delay in the completion of the contract work.

In letter of January 6, 1959, the contracting officer directed the appellant to suspend all work under the contract due to adverse weather as of the close of business on December 31, 1958, and informed it that the remainder of the work would be resumed upon his written notice. By letter of May 15, 1959, he notified the appellant that it should resume the work as of June 1, 1959, thus extending the date for its completion to June 30, 1959. Change Order No. 3, dated July 9, 1959, granted an extension of time of 10 calendar days on account of certain extra work provided for in the order, thus establishing the date for completion of the work as July 10, 1959.

The work, however, was not substantially completed until August 7, 1959.

By Change Order No. 4, dated August 10, 1959, appellant was directed to perform additional items of extra work.<sup>2</sup> The concluding paragraph of the order stated:

As these extra items of work are ordered following the completion of work specified in your original contract and in Change Orders No. 1, 2 and 3, it is agreed procurement and installation of these extra items shall be completed within 30 days, or not later than September 10, 1959.

Appellant accepted Change Order No. 4, and completed the work provided for therein by September 7, 1959.

The appellant, in letter of July 1, 1959, requested an extension of time in the performance of work under the contract, without specifying any period of time. It pointed out, however, that the job was complete except "for the rock in the Rotary Distributor Basin, the Rotary Distributor, and completion of the electrical hook up of the component

<sup>2</sup> These comprised the procurement and installation of a solenoid valve, a metal overflow weir, and a sewer manhole connection, at the lump sum price of \$290.

parts of the Sewage Plant." It asserted that the placing of rock in the Rotary Distributor Basin was delayed approximately 30 days by a combination of circumstances beyond its control, in that its supplier, INFILCO Incorporated, of Tucson, Arizona, "assured us by letter [dated May 15, 1959] that the 7½ Hi-Cap tile would be shipped on that day and would be about one week enroute." A quantity of tile, it stated, was actually received on June 17, 1959, but the supplier had shipped 4" tile instead of 7½" tile. The appellant declared that the Government thereupon accepted the 4" tile "on a Change Order."<sup>3</sup>

In the letter of July 1, 1959, the appellant also stated:

*The Rotary Distributor for this job was ordered September 25th, 1958, with a promised delivery of four months. The last six months have been spent by us in a frantic effort to get delivery of this unit. We have called Infilco time after time and have had any and all varieties of stories presented to us that an active imagination could bring up. We do not know to this date what the actual delay was but the shipping date on the Center Column, now is July 15th, 1959, from Tucson and the shipping date on the Rotary Arm, the week of July 24th, 1959 from Salem, Missouri. We assure you that we will install this equipment immediately upon its arrival. (Italics supplied.)*

In letter of August 18, 1959, the appellant again referred to its request for an extension of time and stated that at the time its bid was prepared it had two quotations for the rotary distributor<sup>4</sup> and that the quotation from INFILCO Incorporated was accepted because of "price advantage and earliest promised delivery date." It also stated that its supplier was requested to proceed with the fabrication of the rotary distributor in January, 1959, prior to the approval of the plans, "because they were not getting the plans to us."<sup>5</sup>

The appellant, in letter of September 1, 1959, said in part:

It is our feeling that since we have no control over the manufacturer, some consideration for an extension of time could be given for the late delivery of the rotary distributor supplied by Infilco.

In letter of October 22, 1959, the appellant presented the further contention that the issuance of Change Order No. 4 had "the effect of holding the entire contract open until the completion date of the extra work," and thereby precluded any assessment of liquidated damages

<sup>3</sup> Presumably, the order referred to was Change Order No. 1, dated June 26, 1959, in which the appellant was directed to install 4½" minimum height (standard size) tile filter block in lieu of 5" minimum height (high capacity) filter block. This order provided for a reduction of the contract consideration in the amount of \$450. Obviously, the appellant erred in stating that the Government had accepted 4" tile, since the order provided for the installation of 4½" minimum height tile filter block.

<sup>4</sup> One was from INFILCO Incorporated, and the other was from "Dorr's."

<sup>5</sup> Appellant stated: "In an effort to obtain the plans to be presented for approval, two letters were written and several telephone calls were made. Advertising sketches and prints for the foundation were presented pending receipt of the complete plans which were not received until April 29, 1959. On June 9, 1959, tentative approval was given by the Park Service with exceptions relating to the seal." The letter by which appellant transmitted the plans to the National Park Service is dated May 14, 1959.

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on account of the failure to complete the original contract work until August 7, 1959.

The contracting officer, in the decision appealed from, expressly rejected this latter contention. He also rejected, in effect, the contentions advanced in the earlier letters, by holding that appellant was chargeable with liquidated damages for a period of 27 days. This period represents the 28 days that elapsed from July 10, 1959—the contract completion date as established prior to the issuance of Change Order No. 4—until August 7, 1959—the actual completion date of the original contract work—less the one day by which he considered the work provided for in that order had been finished ahead of time.

There is, in our opinion, no merit to the contention that the issuance of Change Order No. 4 relieved appellant from liquidated damages for delays that had occurred prior to its issuance. A contractor who is directed to perform extra work after the completion date of the contract has passed is entitled to an extension of time equal to the number of days from the date the work was directed until the date when it is completed, provided the contractor has not delayed the extra work unnecessarily.<sup>6</sup> The time allowed by the terms of Change Order No. 4 fully met this test. It is difficult to find either logic or equity in the view that the order also entitled appellant to an extension of time on account of delays that preceded, and had no connection with, either its issuance or its fulfillment.

The principal issue that remains is whether the unexplained failure of the appellant's supplier to make timely delivery of the rotary distributor can be considered sufficient to establish an excusable cause of delay under Clause 5 of the General Provisions of the contract.

The record does not justify a conclusion that this delay was an excusable one. It is not alleged or proven that it was caused by any extraordinary event which was unforeseeable by the supplier, nor is it alleged or proven that it was beyond the control and without the fault or negligence of the supplier. The allegations on the part of the appellant imply instead that it was caused largely by the supplier's dilatoriness in the manufacture of the rotary distributor. The appellant seeks relief upon the theory that the delay of the supplier was unforeseeable by the appellant, and beyond the control and without the fault or negligence of the appellant; and that this meets all the conditions of excusability required by Clause 5(c) of the General Provisions of the contract.<sup>7</sup> Its own allegations, however, do not support this theory.

<sup>6</sup> *Urban Plumbing & Heating Co.*, IBCA-43, 63 I.D. 381, 390, 56-2 BCA par. 1102 (1956); 34 Comp. Gen. 230 (1954).

<sup>7</sup> Under this clause, the contracting officer, upon receipt of written notice from the contractor of the causes of delay in the performance of a contract, shall ascertain the facts and extent of the delay and, if in his judgment the facts so justify, he shall extend the time for completing the work commensurate with the period of excusable delay.

Appellant's notice of appeal dated November 30, 1959, states, in part, that:

\* \* \* according to Infileo's quotation for supplying the rotary distributor to be installed as part of the contract, the required drawings would be furnished within six to eight weeks from the date they received the order, and the equipment delivered within 14 to 16 weeks from the date of receipt of approved prints.

Other portions of appellant's correspondence with the Government indicate that the order for the rotary distributor was placed with INFILCO Incorporated on September 25, 1958,<sup>8</sup> that the distributor was received by appellant on July 30, 1959, and that its installation was accomplished in a period of eight days. As the contract provided that drawings of the distributor should be submitted to the Government for approval before manufacture commenced, a reasonable time would necessarily have to be allowed for the consideration of such drawings in determining a probable delivery date from the quotation.

It is apparent from the foregoing that appellant could not have completed the job within the 120 days stipulated in the contract even if its supplier had adhered strictly to the time schedule included in the quotation furnished appellant. Had the supplier performed in accordance with the minimum, rather than the maximum, periods stated in the quotation, and had no more than two weeks been consumed in the transmittal, consideration, approval and return of the drawings, approximately 162 days would still have elapsed between the date when the order was received by the supplier and the date when installation of the distributor was completed by appellant. Using the maximum periods stated in the quotation, approximately 190 days would have elapsed.<sup>9</sup> As appellant states that the quotation was received before its bid was prepared, its own allegations would seem to prove that a delay in completion, at least equal to the 27 days for which liquidated damages were assessed, was clearly foreseeable by appellant at the time when its bid was submitted.

It should also be noted that by reason of the suspension of work that was in effect from December 31, 1958 to June 1, 1959, appellant has received the benefits of what amounts to a five months' extension of time. The total time that elapsed between the date when the order for the distributor was placed and the date when it was received amounted to slightly over ten months. The delivery schedule in INFILCO Incorporated's quotation was 20 to 24 weeks, exclusive of

<sup>8</sup> This is the date given in appellant's letters of July 1, 1959, and August 18, 1959. While the notice of appeal states that the order was placed on September 9, 1958, this could hardly have been the case, for the bids were not opened until September 10, 1958, and the award was not made until about ten days later. Furthermore, appellant gives October 8, 1958, as the date when the order was acknowledged by the supplier.

<sup>9</sup> The 162 days would consist of 42 for preparation of the drawings, 14 for their approval, 98 for manufacture of the distributor, and 8 for its installation. The 190 days would consist of 56 for preparation of the drawings, 14 for their approval, 112 for manufacture of the distributor, and 8 for its installation.

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time consumed in obtaining approval of the drawings, or from five to six months, if an additional two weeks or so be assumed as the minimum time within which such approval could reasonably be expected to be obtained. On this basis, it must be concluded that any dilatoriness of the supplier has been fully compensated for through the time extension incident to the suspension of work.

The delay in the shipping of the tile was concurrent with that in the shipping of the distributor, and is not shown to have been a factor that contributed in any way to the failure of appellant to complete the job by July 10, 1959.

The Board finds, from its review of the appeal file, that appellant has not alleged or proven specific facts which would establish that the failure to complete the contract work on time was due to causes that were unforeseeable by, beyond the control of, and without the fault or negligence of, the appellant and its supplier.<sup>10</sup>

#### CONCLUSION

Therefore, the appeal is denied. Such denial disposes of the motion made by the Department Counsel.

PAUL H. GANTT, *Chairman.*

I concur:

HERBERT J. SLAUGHTER, *Member.*

### FRANK G. COUNTRYMAN v. EDNA V. FRANK

A-28313

Decided July 19, 1960

#### Homesteads (Ordinary): Residence—Homesteads (Ordinary): Cancellation of Entry

Where an entryman fails to live on his entry for at least five months in each of the first three years of the entry, the entry must be canceled.

#### Homesteads (Ordinary): Second Entry

Where an entryman is qualified to make a second entry, the fact that his first entry is still of record does not deprive him of his right to a second entry.

<sup>10</sup> Cf. *Truax Mach. & Tool Co.*, IBCA-195, 59-2 BCA par. 2280, 1 G.C. par. 563 (1959); *Appeal of C. H. Wheeler Mfg. Co.*, IBCA-127, 65 I.D. 382, 58-2 BCA par. 1903 (1958); *Zinsco Elec. Products*, IBCA-104, 57-1 BCA par. 1266 (1957); *Carl W. Pistor*, IBCA-81, 56-2 BCA par. 1125 (1956); *Schmitt Steel Co.*, IBCA-29, 6 CCF par. 61,719 (1955); *Appeal of Pelton Water Wheel Co., and Byron Jackson Co.*, IBCA-16, 62 I.D. 385 6 CCF par. 61,705 (1955); *Accord*, 39 Comp. Gen. 343, 348 (1959). In that decision the Comptroller General states that "clause 5(c) of Standard Form 23A should be construed as evidencing an intention to hold the contractor responsible for delays of subcontractors or suppliers unless the delays were due to causes which could not have been foreseen by either the contractor or the subcontractor or supplier."

**Homesteads (Ordinary): Second Entry**

Where an application for what appears to be an original homestead entry is allowed to an entryman who should have filed for a second entry for which he was qualified and who later satisfies the requirements for a second entry, the entry remains in effect as of the day it was allowed and his obligations under the homestead law are measured from that date.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Mrs. Edna V. Frank has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated October 13, 1959, which affirmed a decision of a hearing examiner dated January 15, 1958, canceling her homestead entry, Fairbanks 010891, for lack of residence.

Mrs. Frank's entry was allowed on March 19, 1954, as an original homestead entry pursuant to section 2289 of the Revised Statutes (43 U.S.C., 1958 ed., sec. 161). Subsequently, it was learned that she had made a previous homestead entry, Anchorage 012907, which had been allowed on March 30, 1949. She had in fact abandoned this entry before she applied at the Fairbanks land office. However, at the request of the Fairbanks land office she filed a formal relinquishment of the Anchorage entry and a second application for the Fairbanks homestead pursuant to the act of September 5, 1914 (43 U.S.C., 1958 ed., sec. 182). This was allowed as a second entry on August 31, 1955. Later, she was granted an extension of six months terminating on August 31, 1956, to establish residence on the entry.

Countryman brought a contest on February 6, 1957, charging that Mrs. Frank had not satisfied the homestead laws and regulations relating to establishment and maintenance of residence upon the land and improvement and cultivation of the land comprising the entry. Mrs. Frank denied the charges and a hearing was held on August 20, 1957, at which both parties to the contest were represented by counsel and submitted testimony in their own behalf. The contestant's evidence as to residence was indefinite and sketchy, but the contestee testified freely as to the dates when she went to and left her homestead entry and there is no reason to discredit any of her testimony.

The hearing examiner considered that Mrs. Frank's homestead application was allowed as a second entry on August 31, 1955, and used that date as the one from which to measure her obligation to comply with the requirements of the homestead law. He held that whether her residence was established in August of 1955 or August of 1956 she had not maintained residence on the entry in accordance with the statutory requirement and declared the entry null and void.

In view of this finding he did not consider lack of cultivation or the effectiveness of the allowance of the second entry on August 31, 1955.

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On appeal the Director held that Mrs. Frank's entry on March 19, 1954, was valid as a second entry; that the allowance of the second entry on August 31, 1955, was of no effect since the March 19, 1954, entry was subsisting; and, consequently, that her compliance with the requirements of the homestead law must be measured from March 19, 1954. He then found that the entrywoman had not maintained her residence on the entry for the period required by law and held that her entry was properly canceled.

Upon appeal to the Secretary, Mrs. Frank contends she has in good faith attempted to comply with the residence and other requirements of the homestead law. She does not, however, point out in what way the Director's decision is incorrect.

As the decision held, the fact that her homestead entry was allowed on March 19, 1954, after she had abandoned but before she relinquished her first (Anchorage) entry did not disqualify her from making a second entry. See *William H. Archer*, 41 L.D. 336 (1912); *Arouni v. Vance*, 48 L.D. 543, 545 (1922). Therefore, the allowance of her application on March 19, 1954, was proper and her obligations under the homestead law began on that date. The fact that at that time she did not make the showing required by the act of September 5, 1914 (*supra*), as to the circumstances of her loss of her first entry and that she did not make such showing until September 27, 1954, did not authorize the manager to recompute the date on which her entry began.<sup>1</sup>

As the Director stated, Mrs. Frank's testimony demonstrated that she had not lived on the entry for 5 months in any of the first three entry years, a period ending on March 19, 1957. The homestead law requires that an entryman establish residence on his entry not later than one year from the date the entry is allowed (43 U.S.C., 1958 ed., sec. 169) and that he live on it for not less than 7 months for 3 years (43 U.S.C., 1958 ed., secs. 164, 231).<sup>2</sup>

Thus it is clear that the appellant has not complied with the residence requirements of the homestead law and could not comply with them within the statutory life of the entry. Accordingly, the Director correctly held that the entry was properly canceled.

<sup>1</sup> Mrs. Frank apparently did not think the date would be changed. In her appeal she describes how high waters prevented her return to the entry in the spring of 1955 and states that this would have resulted in her relinquishment of the entry at the end of 1955 "if we had not received the belated Notice of Allowance dated August 31, 1955. Provided with this unexpected second chance to obtain a farm, I renewed by efforts to fulfill the requirements." In a letter dated March 31, 1959, to the manager she made the same statement.

<sup>2</sup> In certain circumstances, the annual residence may be reduced to 6 months for 4 years or 5 months for 5 years. *Id.*

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

GEORGE W. ABBOTT, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

### SUN OIL COMPANY

A-28354

*Decided July 22, 1960*

#### Oil and Gas Leases: Discretion to Lease—Oil and Gas Leases: Future and Fractional Interest Leases

In the exercise of his judgment on how the public interest will be best served, the Secretary of the Interior may properly determine that a fractional mineral interest in acquired land may be leased for oil and gas purposes to an offeror who does not own any operating rights in the fractional mineral interest not owned by the United States but who holds all of the operating rights in adjoining land by virtue of a lease from the United States.

#### Oil and Gas Leases: Generally—Notice

A junior offeror for an oil and gas lease is not entitled as a matter of right to notice of actions taken on a prior offer.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Sun Oil Company has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated December 29, 1959, which affirmed a decision of the Eastern States land office dated April 20, 1959, rejecting its oil and gas lease offer, BLM-A 034451, for certain land in the De Soto National Forest in Mississippi, filed June 26, 1953, under the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1958 ed., secs. 351-359). The offer was rejected because the land had been leased to Henry S. Morgan in response to his prior offer, BLM-A 031058, filed on April 8, 1952.

The Mineral Leasing Act for Acquired Lands provides, in section 3, that mineral deposits within lands acquired by the United States may be leased by the Secretary of the Interior under the same conditions as contained in the leasing provisions of the mineral leasing laws "subject to the provisions hereof." Section 5 authorizes leasing of fractional interests in mineral deposits when "in the judgment of the Secretary, the public interest will be best served thereby \* \* \*." It is thus discretionary with the Secretary whether to lease fractional interests at all. See Solicitor's opinion, 60 I.D. 238 (1948); Solicitor's opinion, 60 I.D. 441 (1950). The only requirement imposed by the



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statute is that when the Secretary leases a fractional interest, he must find that it is in the public interest to do so.

Departmental regulation 43 CFR 200.7(d) requires an offeror for a fractional interest lease to file a statement showing whether he owns the entire operating rights to the fractional mineral interest not owned by the United States in the land covered by his offer and, if he does not, the extent of his ownership in the operating rights and the names of other persons who own operating rights. The regulation continues with this statement of policy:

\* \* \* Ordinarily, the issuance of a lease to one who, upon such issuance, would own less than a majority interest of the operating rights in any such tract, will not be regarded as in the public interest, and an offer leading to such result will be rejected.

It is upon this statutory and regulatory foundation that the appellant contends that the Secretary of the Interior had a mandatory duty to disregard the Morgan offer which was filed first because it showed that the offeror owned none of the operating rights to the fractional interest not owned by the United States and to award the lease in response to the appellant's subsequently filed offer which showed that it owned all but one quarter of the operating rights in the outstanding mineral interest and, if awarded the lease, would then own seven-eighths of all operating rights in the leased land. The appellant recognizes that the Department has previously held that the requirement in the regulation that a prospective lessee be able to show a majority working interest in the entire mineral deposit is qualified by the word "ordinarily" so that it may properly be disregarded in a case of drainage or in a case of a binding agreement between a prospective lessee and the holder of a non-Federal fractional mineral interest. Solicitor's opinion, M-36570 (August 10, 1959). Nevertheless, it denies that it is proper for the Secretary to hold that it is in the public interest to issue a lease for a 50 percent fractional interest to an offeror who owns no part of the remaining 50 percent interest when there is pending a junior offer for the Government's 50 percent interest by an offeror who owns three-quarters of the remaining 50 percent interest.

The fact is that even in the circumstances described, the regulation does not make it mandatory that the lease be issued to the junior offeror. Ordinarily, it will be, but not necessarily in all cases. It may be assumed that the ordinary rule will be followed unless the circumstances in a particular case make it apparent that it will be equally or more in the public interest not to follow the rule.

In this case, the land in controversy consists of five separate tracts (three of which are cornering), comprising a total of 480.93 acres. These tracts are interspersed in an almost solid block of other land, comprising 1282.08 acres, in which the United States owns 100 percent

of the minerals. These 1282.08 acres are included in Morgan's lease along with the 480.93 acres, making a total of 1763.01 acres in a single block. Morgan thus has a lease for all the Government's oil and gas rights in the block. It seems apparent that having unified development of the Government's oil and gas rights in the entire block is more in the public interest than permitting divergent ownership of the rights. Certainly there is no showing by the appellant that would warrant cancellation of the Morgan lease in these circumstances.

The appellant by reference to its earlier briefs complains that it was not, as an adverse party, notified of actions taken on the Morgan application. As a junior applicant, it was not entitled as a matter of right to such notice. *Dorothy Bassie et al.*, 59 I.D. 235 (1946); *Mary C. Hagood et al.*, A-23687 (October 9, 1943).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4) (a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

GEORGE W. ABBOTT, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

### BERT AND PAUL SMITH

A-28376

*Decided July 25, 1960*

#### Grazing Permits and Licenses: Appeals

An appeal to a hearing examiner from a decision of a district manager under the Federal Range Code for Grazing Districts is properly dismissed where the appeal is not filed within 30 days after receipt of notice of the district manager's decision.

#### Grazing Permits and Licenses: Appeals

An appeal to a hearing examiner from a decision of a district manager dismissing a request for a dependent property survey is properly dismissed where the issues raised have been previously adjudicated in a proceeding involving the same privileges, the same parties, and the same property.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Bert and Paul Smith have appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated December 29, 1959, which affirmed a decision of a hearing examiner, dated August 13, 1959, granting a motion of the Acting State Supervisor for Nevada that an appeal from a decision of the district manager, dated May 15, 1959, be dismissed. The motion was based

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on the grounds that the appeal was filed late and that the issues raised had been previously adjudicated.

The appellants are the owners of the base property known as the OX Ranch. In a recent decision, *Bert and Paul Smith, Roger Smith*, 66 I.D. 1 (1959), the Department affirmed a division of the grazing rights, to which the appellants had objected, between the OX Ranch and another base property, known as the North Ranch, which had together been operated as a unit before the appellants purchased the OX Ranch. The class 1 demand of the combined operation was allocated in proportion to the total forage production of each ranch, with the OX Ranch getting 57 percent and the North Ranch 43 percent.

While the appeal to the Secretary was pending, the appellants applied for grazing privileges for the 1959-1960 grazing year. After the appellants protested the initial allocation several times, the district manager in a decision dated May 15, 1959, reviewed the matters at issue and concurred in the advisory board's recommendations with which the appellants were dissatisfied. In closing, the manager stated:

If you wish to appeal from this decision for the purpose of a hearing before an Examiner in accordance with Sec. 161.10 of the Federal Range Code for Grazing Districts, you are allowed thirty (30) days from receipt of this notice within which to file such appeal with the District Manager, Bureau of Land Management, Elko, Nevada. \* \* \*

Notice of this decision was served upon the appellants on May 18, 1959, by certified mail, and on June 18, 1959, a notice of appeal was filed with the district manager.

The Federal Range Code, as amended (43 CFR, 1959 Supp., 161.10 (a) (1)), provides that a person desiring to appeal a final decision of a range (district) manager may appeal by filing his appeal in the office of the manager within 30 days after receipt of the decision. The record clearly shows that the appellant's notice of appeal was not filed until June 18, which was the 31st day after receipt of the district manager's decision. The Department has held that failure to file an appeal within the time allowed by the provisions of the governing regulation warrants the dismissal of the appeal. *John Macpherson et al.*, A-26329 (May 12, 1952), Interior Grazing Decisions 566; *Stanley Garthofner, Duwall Brothers*, 67 I.D. 4 (1960); *Dr. S. T. Clark*, A-28187 (February 11, 1960). Accordingly, under the facts presented by the record, the appeal was properly dismissed because it was not timely filed.

Moreover, even if the appeal had not been procedurally defective, it was also properly dismissed for the reason that all of the issues

raised had previously been adjudicated by the Secretary in *Bert and Paul Smith, Roger Smith, supra*. The Department has held that an appeal from a decision of a range manager is properly dismissed where all of the issues raised have been previously adjudicated in a proceeding involving the same grazing privileges, the same parties and the same property. *Clegg Livestock Company, A-26571* (January 23, 1953).

The appellants have offered no proof that their appeal was timely filed or that it did not involve the identical issues previously adjudicated.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director, Bureau of Land Management, is affirmed.

GEORGE W. ABBOTT, *The Solicitor*.

BY: EDMUND T. FRITZ,  
*Deputy Solicitor*.

**JAMES S. HOLMBERG, ROBERT SCHULEIN**

**A-28364**

*Decided July 28, 1960*

**Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Relinquishments**

The assignor of an oil and gas lease may, after the filing of an assignment but prior to its approval, relinquish the lease without the concurrence of the assignee.

**Oil and Gas Leases: Relinquishments**

Under the regulation in effect on January 27, 1959, lands in a relinquished oil and gas lease became available for further filing of oil and gas offers immediately upon notation of the relinquishment on the tract book.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

James S. Holmberg and Robert Schulein have appealed to the Secretary of the Interior from a decision dated December 31, 1959, of the Acting Director of the Bureau of Land Management which affirmed a decision of the manager of the Salt Lake City land office dismissing their protests against the issuance of leases in response to oil and gas offers Utah 033669 and 033667 which conflict with and were filed prior to Holmberg's offer Utah 033862 and Schulein's offer Utah 033864, respectively.

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Shortly before these offers were filed, the lands in conflict in both sets of offers were covered by leases<sup>1</sup> held by the Big Horn-Powder River Corporation and were in their extended five year terms which were to expire January 31, 1959. On January 5, 1959, Big Horn-Powder River Corporation filed partial assignments of each of its leases. Before a decision was rendered on the assignments, it relinquished all its leases by relinquishments filed at 11:03 A.M. on January 26, 1959. The relinquishments were noted in the tract book at 4:00 P.M. that day. At 10:00 A.M. on January 27, 1959, the next day, thirteen offers were filed simultaneously for the relinquished acreage. Later that day, at a drawing held to determine priority, offers Utah 033667 and 033669 were the first ones drawn for all the lands relinquished.

A few days later the manager in a decision dated February 2, 1959, denied approval to the assignments on the ground that having been filed in the 12th month of the 10th year of the leases, they did not segregate the leases and earn them an extension.<sup>2</sup> The decision also stated that relinquishments had been filed covering all the lands and that the cases were closed.

At 10:00 A.M. on February 2, 1959, Holmberg, Schulein and one other person each filed two offers for all the lands in the prior leases. A drawing was held to determine priority. Holmberg's offer 033862 was drawn first for lands in conflict with Utah 033669 and Schulein's offer 033864 first for those in conflict with 033667.

The appellants then protested the issuance of leases on the conflicting offers on the ground that the relinquishments of the prior leases were of no force because the assignees did not join in them. From the manager's rejection of their protests and the Acting Director's affirmance of that action, the appellants have taken this appeal.

The appellants contend that after a lessee has assigned a lease and the assignment has been filed for approval, the assignor cannot relinquish the lease without the joinder of the assignee. They also contend that the fact that the relinquishments were noted at 4:00 P.M. when the land office was closed and that the prior offers were filed at 10:00 A.M. the next day deprived the public of an opportunity to participate in a drawing for the land on the expiration of the leases.

On this point, as the Acting Director stated, the Department has held in many cases arising under the regulation in effect when the relinquishments were filed (43 CFR, 1958 Supp., 192.43(a))<sup>3</sup> that

<sup>1</sup> Salt Lake 067360, 067361, 067361-C, 067362, 067362-A.

<sup>2</sup> *Franco-Western Oil Co. et al.*, 65 I.D. 316, 427 (1958).

<sup>3</sup> The regulation as amended by Circular 2032, 24 F.R. 9846, now requires a period after notation before lands in a relinquished lease become available for further leasing.

lands in relinquished leases became available for leasing immediately after the relinquishment was noted on the tract book. *Duncan Miller*, A-27620 (July 28, 1958); *Duncan Miller*, A-28293, A-28456 (June 7, 1960). It has followed that rule even where the first qualified offeror is the lessee who has himself relinquished the lease. *Id.* In this case the former lessees were among those who filed on January 27, 1959, but they were not successful in the drawing. Thus, the relinquishments having been noted at 4:00 P.M. on January 26, 1959, the lands in question were available for leasing at the opening of business on January 27, 1959, and the manager properly processed the offers filed then.

There remains the appellants' other contention that after assignment an assignor should not be permitted to relinquish the lease without the consent of the assignee. In a recent decision the Department examined the relationship of assignor and assignee prior to the approval of an assignment. *Champlin Oil and Refining Co.*, 66 I.D. 26 (1959). It pointed out that, prior to approval, the statute holds an assignor responsible for the performance of any and all obligations under the lease as if no assignment or sublease had been executed (30 U.S.C., 1958 ed., sec. 187 (a)); that the assignor can apply for an extension of the lease (*id.*, sec. 226); and that the assignee cannot relinquish the lease.<sup>4</sup> It held that an assignor may elect to subject the lease to the automatic termination provision of section 31 of the Mineral Leasing Act, as amended by the act of July 29, 1954 (30 U.S.C., 1958 ed., sec. 188). Champlin argued that the assignor should not be left in control of the lease after an assignment is filed for approval. The decision, however, held that since the assignor remains solely liable for the performance of any and all obligations under the lease, he ought to be able to protect himself by relinquishing the lease if he desires. *Champlin Oil and Refining Co.*, *supra*, (31).

Thus the Acting Director correctly concluded that a relinquishment filed by an assignor prior to approval is valid and becomes effective as soon as it is filed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

GEORGE W. ABBOTT, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

<sup>4</sup> *Lester C. Hotchkiss et al.*, A-27342 (August 14, 1956).

**KEWANEE OIL COMPANY**

A-28325

*Decided July 28, 1960***Oil and Gas Leases: First Qualified Applicant—Oil and Gas Leases: Extensions**

Land not within a known geologic structure of a producing oil and gas field should be leased, if at all, to the first qualified applicant, and if a lease has been issued to a subsequent applicant an extension of the lease at the expiration of the original term is properly denied if it is established that the first applicant is still qualified and desirous of obtaining a lease.

**Oil and Gas Leases: Applications—Applications and Entries: Generally—Oil and Gas Leases: Generally**

An applicant for an oil and gas lease has the duty of keeping the Department informed of an address at which communications from the Department concerning the offer will reach him and if he fails to do so, rendering it impossible for the Department to send him a lease, he will be considered to have abandoned his offer.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Kewanee Oil Company has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated November 20, 1959, which affirmed a decision of the manager of the land office at Cheyenne, Wyoming, denying its application for extension of its noncompetitive oil and gas lease, Wyoming 020722, as to 80 acres (W $\frac{1}{2}$ SE $\frac{1}{4}$  sec. 22, T. 48 N., R. 68 W., 6th P.M.).

The appellant concedes that an offer to lease the 80 acres in question was filed by Samuel Heller and Elizabeth Miller on June 6, 1952. This offer (Wyoming 016489) was rejected on August 12, 1952, for the reason that it did not meet the requirement of the departmental regulation, 43 CFR, 1954 rev., 192.42(d), as amended on June 17, 1952, that an offer include a minimum acreage of 640 acres except in certain circumstances. Subsequently, L. H. Pearson filed an offer to lease 1953.06 acres of land, including this 80-acre tract, on March 17, 1953, and a lease was issued effective May 1, 1953. The lease was later assigned to Kewanee Oil Company and on February 28, 1958, Kewanee applied for a 5-year extension of the lease. On October 1, 1958, the manager denied Kewanee's application as to the 80 acres on the ground that it had been determined that the Heller-Miller offer had been improperly rejected. It is from the affirmance of this decision by the Acting Director that Kewanee has appealed.

The appellant contends that it had no reason to suppose that Heller and Miller had any rights in the land because of the absence of any indication in the record that they appealed from the manager's rejection of their lease offer and the appellant has been permitted to as-

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sume that the lease granted to Pearson was valid for the period of the lease term and, accordingly, the lease should not be adjudged to be partially invalid at this time.

An examination of the record discloses that Heller and Miller did appeal within the period allowed for taking an appeal after the rejection of their offer in 1952. On November 13, 1952, the Assistant Director dismissed this and a large number of other appeals from the rejection of oil and gas lease offers on the ground that there was no relationship of attorney and client between the oil and gas lease offerors and the persons prosecuting the appeals. On May 12, 1953, the Department reversed the Assistant Director's ruling and remanded the cases for consideration on the merits. *Philip L. Boyer et al.*, A-26614 (May 12, 1953). Most of the appeals were reconsidered soon thereafter and the manager's rejection of the offers was reversed in each case. However, the Heller and Miller case was not decided until August 15, 1958, at which time the Acting Director reversed the manager's rejection of the Heller-Miller offer and remanded the case to the land office for further processing of the offer. It was subsequent to this decision that the manager denied Kewanee's application for extension as to the 80-acre tract in the Heller-Miller offer.

In light of these facts it seems plain that the 80 acres should not have been leased to Pearson in view of the pendency of the Heller-Miller offer for the same land. In this situation the normal procedure would be to complete processing of the Heller-Miller offer and to issue a lease, if all is found to be regular. Upon the issuance of the lease, the rejection of the appellant's application would have to stand.

It does not appear, however, that the normal procedure can be followed in this case because Heller and Miller have made it impossible for the Department to communicate with them. The Director's office mailed a copy of the favorable decision of August 15, 1958, to them at their address of record on August 21, 1958. It was subsequently returned with a notation that the addressees had moved and left no forwarding address. Heller and Miller have not communicated with the Bureau of Land Management since January 1953. In its appeals to the Director and the Secretary, Kewanee Oil Company has attempted to serve Heller and Miller with the papers filed with the reviewing officers by mailing copies to them. All of these papers have been returned with the notation "Removed." Likewise, the Bureau of Land Management sent a copy of the Acting Director's decision of November 20, 1959, affirming the manager's denial of Kewanee's right to extension of its lease on the 80 acres, to Heller and Miller and it was returned with a notation that the addressees had moved. The unsuccessful attempts to serve them at their address of



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record range over the period from August 1958 to February 1960. In the circumstances, further attempts to reach Heller and Miller at their record address would seem fruitless.

One who deals with the Department has an obligation to keep the Department informed of an address at which communications from the Department will reach him. If the address given by him is faulty, he must bear the consequences. See *Betty Ketchum*, 67 I.D. 40 (1960); *John W. Southard et al.*, A-27627 (August 15, 1958). Heller and Miller having failed to change their address of record, a lease cannot be sent to them at their record address because it would simply be returned undelivered. The Department then would be left with an issued lease on its hands of which the lessees, wherever they are, have no knowledge. The Department would be unable to enforce compliance with lease terms and would have to institute proceedings to cancel the lease for any default, unless it be failure to pay rental, in which event the lease would terminate automatically. However, after issuance of the lease, rental would not become due and payable until the beginning of the fourth lease year. Practically, then, this means that until three years have elapsed, the lease would remain in effect, thus tying up the leased land and preventing its development.

In the circumstances presented, I think it is proper to conclude that Heller and Miller have abandoned their lease offer. However, before declaring the abandonment, a copy of this decision will be sent by certified mail, return receipt requested, to them at their address of record on the chance that since the beginning of the year they may have communicated with the post office and left a forwarding address. If the mail is returned undelivered, it will be considered that they have abandoned their offer and Kewanee's application for extension will be allowed as to the 80-acre tract embraced in the offer, all else being regular. If the mail is delivered, Heller and Miller will be allowed 30 days from delivery to notify this office whether they still desire to maintain their offer. If they do not answer within the 30-day period, the offer will be deemed to be abandoned. If they do answer within the 30-day period and say they still wish the lease, then their offer will be finally processed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the case is remanded to the Bureau of Land Management for the taking of the action instructed in this decision depending upon the outcome of service of this decision upon Heller and Miller.

GEORGE W. ABBOTT, *The Solicitor*.

By: EDMUND T. FRITZ,

*Deputy Solicitor.*

**APPEAL OF INDUSTRIAL SERVICE & ENGINEERING COMPANY****IBCA-235***Decided July 28, 1960***Contracts: Subcontractors and Suppliers**

In order to be entitled to an extension of time based on an excusable delay under Clause 5 of U.S. Standard Form 23A (March 1953), the contractor must establish by specific facts that the failure to complete the contract work on time was due to causes that were unforeseeable by, beyond the control of, and without the fault or negligence of, the contractor and its subcontractor.

**Contracts: Subcontractors and Suppliers**

Delays by a subcontractor resulting from a normal business hazard, such as failure of a supplier selected by the subcontractor to perform its obligation, will not excuse the prime contractor from making timely performance.

**BOARD OF CONTRACT APPEALS**

The Industrial Service & Engineering Company, 5750 Pecos Street, Denver, Colorado, has filed a timely appeal from the findings of fact and decision of the contracting officer dated February 2, 1960, which denied its requests for an extension of time for the performance of Contract No. 14-20-150-239, dated June 27, 1958, with the Bureau of Indian Affairs.

The contract provided for the demolition and removal of an existing steel smokestack and furnishing and erecting in its place a new steel smokestack and for the installation of oil-burning equipment together with fuel-storage and preheating facilities at Sequoyah Indian School, Tahlequah, Oklahoma. It was on U.S. Standard Form 23 (Revised March 1953) and incorporated the General Provisions of U.S. Standard Form 23A (March 1953). The contract was on a lump sum basis, the consideration being \$33,848. Two change orders, however, increased the total contract price to \$37,220.90.

The contract stipulated that the work should be started within 20 calendar days after the date of receipt of notice to proceed, and that work on the smokestack and work on the boilers should be completed within 45 calendar days and 120 calendar days, respectively, from the same date. Appellant acknowledged receipt of notice to proceed on July 16, 1958,<sup>1</sup> thus establishing the date for completion of the work on the smokestack as August 30, 1958, and for the com-

<sup>1</sup> By letter of July 14, 1958, the contracting officer notified the appellant to proceed with the work and requested it to acknowledge receipt of the notice "by completing the endorsement below on the two copies enclosed and returning these to this office." The notation at the bottom of the letter shows the receipt of the notice as July 17, 1958. The letter was sent by certified mail which was accompanied by a return receipt card. This card indicates that the notice was received by an employee of the appellant on July 16, 1958. In letter of July 30, 1958, the appellant was so notified by the contracting officer.

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pletion of the work on the boilers as November 13, 1958. The request and claim for the extension of time, however, relates only to the performance of work on the smokestack.

The General Provisions of the contract included the usual "delays-damages" provisions (Clause 5), under which the contractor was not to be charged with liquidated damages because of "any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor," including, but not restricted to, certain named causes, or because of "delays of subcontractors or suppliers due to such causes." Paragraph 2 of the General Conditions of the specifications provided for the assessment of liquidated damages at the per diem rate of \$15.

The appellant, in letter of August 13, 1958, requested an extension of 10 days in the performance of work on the smokestack. This request was based upon the delay incident to the "shipment of raw material necessary for fabrication of the subject Smoke Stack." In letter of October 13, 1958, the appellant again requested a 40-day extension in the performance of work on the smokestack "due to the late delivery of the steel required for the Smoke Stack."

The record discloses that the appellant issued a purchase order for the smokestack on July 22, 1958, which was received by the fabricator, The Southwest Factory, Inc., Oklahoma City, Oklahoma, on July 25, 1958. The purchase order did not specify a definite delivery date, but did refer to the fabricator's quotation of July 9, 1958, which contained the statement "Three weeks delivery."<sup>2</sup> Thereupon, the subcontractor forwarded an order to the Tennessee Coal & Iron Division, United States Steel Corporation, Fairfield, Alabama, on August 1, 1958, for the steel needed in the fabrication of the smokestack. That steel was shipped on August 21, 1958, and was received and unloaded on August 30, 1958. Thus, it appears that shipment of the steel was made 20 calendar days from the date of the transmittal of the order and unloaded in Oklahoma City, Oklahoma, 29 calendar days from the same date.

Also, the record discloses that the contracting officer determined that the work on the smokestack was substantially complete on Sep-

<sup>2</sup> In letter of July 21, 1959, addressed to this Department, The Southwest Factory, Inc., stated that "The three weeks delivery promise was based on our stock of steel plate on hand at time of job estimate" and that from two to six months has been our average delivery for the past two years. Also, it stated that "We want to assure you that U.S.S. delivery of this special quality steel in a matter of 30 days represents an unusually short time (the last two carloads of A-7 Steel we just unloaded prior to the strike were ordered in early March 1959). As the mills only roll plates once a month, you can see that even with no backlog of orders, *the delivery could be as long as 60 days.*" (Italics supplied.)

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tember 30, 1958. As the appellant was required to complete this work by August 30, 1958, there resulted a delay of 31 days for which liquidated damages were assessed in the amount of \$465.

In his findings of fact and decision, the contracting officer reviewed the entire correspondence between the parties, and the causes of the delay advanced therein. He pointed out that there was no delay in the delivery of the steel required for the fabrication of the smokestack. He determined that the delay in the completion of the work on the smokestack was not due to unforeseeable causes beyond the control and without the fault or negligence of the appellant or delays of its subcontractor due to such causes.

In its appeal letter of February 19, 1960, the appellant states that at the time of submitting its bid "our sales and estimating personnel" relied upon The Southwest Factory, Inc., to effect delivery of the smokestack within a period of three weeks.

Although appellant on June 27, 1958 was notified by telegram of the award of the contract, and although prior to submitting its bid it had obtained an oral quotation for the smokestack which was confirmed in writing on July 9, 1958, it did not issue a purchase order to the subcontractor until July 22, 1958. The record indicates that had appellant placed the purchase order promptly upon award of the contract, steel could probably have been obtained in time for the fabricator to deliver the smokestack within three weeks after receipt of the purchase order. There is no showing of any justification for appellant's delay in placing that order.

The Board concludes that the evidence of record supports the decision of the contracting officer, denying the appellant's requests for an extension of time and remission of liquidated damages assessed for the period of the delay attributed to the alleged failure of the subcontractor's supplier to make timely delivery of steel needed for the fabrication of the smokestack. The failure of the supplier selected by the subcontractor to perform its obligation, assuming it did default, was a normal business hazard which a contractor assumes. It, accordingly, falls within the rule that delays by a subcontractor for this reason will not excuse the prime contractor from timely performance unless the difficulty resulted from an excusable cause under the contract.<sup>3</sup> Such cause has not been established.

The Board finds that appellant has not alleged or proven specific facts which would establish that the failure to complete the work on the smokestack on time was due to causes that were unforeseeable

<sup>3</sup> See *J. F. White Eng'g Corp.*, CA-176, 61 I.D. 201, 209 (1953), and cases cited there.

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by, beyond the control of, and without the fault or negligence of, the appellant and its subcontractor.<sup>4</sup>

Therefore, the appeal is hereby denied.

PAUL H. GANTT, *Chairman.*

HERBERT J. SLAUGHTER, *Member.*

THOMAS M. DURSTON, *Member.*

UNITED STATES v. J. HUBERT SMITH

A-28387

Decided August 1, 1960

Mining Claims: Contests—Rules of Practice: Government Contests—Regulations: Waiver

Under the Department's rules governing Government contests against mining claims, where an answer to a complaint is filed late the allegations of the complaint will be taken as admitted by the contestee and the case decided without a hearing by the manager, and the Secretary is without authority to waive the rules to permit the late filing of the answer.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

J. Hubert Smith has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated February 2, 1960, which affirmed a decision of the manager of the Denver, Colorado, land office, dated May 29, 1959, declaring his lode mining claim, The Blue Sky Lode Mining Claim, to be null and void for the reason that an answer to the complaint against the claim was not timely filed.

The facts are that a complaint was served on the appellant on March 4, 1959, in a contest which was initiated by the United States Forest Service of the Department of Agriculture. The complaint alleged that no discovery of valuable deposits of mineral had been made within the limits of the claim and that the lands comprising the claim are nonmineral in character.

The rules of practice of the Department governing private contests provide that a contestee "must" file an answer within 30 days

<sup>4</sup> Cf. *The Eagle Constr. Corp.*, IBCA-230 (July 18, 1960); *Truax Mach. & Tool Co.*, IBCA-195, 59-2 BCA par. 2280, 1 C.C. par. 563 (1959); *C. H. Wheeler Mfg. Co.*, IBCA-127, 65 I.D. 382, 58-2 BCA par. 1903 (1958); *Zinsco Elec. Products*, IBCA-104, 57-1 BCA par. 1266 (1957); *Carl W. Pistor*, IBCA-81, 56-2 BCA par. 1125 (1956); *Schmitt Steel Co.*, IBCA-29, 6 CCF par. 61,719 (1955); *The Pelton Water Wheel Co.*, IBCA-16, 62 I.D. 385, 6 CCF par. 61,705 (1955). *Accord*, 39 Comp. Gen. 343, 348 (1959). In that decision the Comptroller General states that "clause 5(c) of Standard Form 23A should be construed as evidencing an intention to hold the contractor responsible for delays of subcontractors or suppliers unless the delays were due to causes which could not have been foreseen by either the contractor or the subcontractor or supplier."

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after service of a complaint upon him and that if an answer is not filed as required "the allegations of the complaint will be taken as admitted by the contestee" and the case decided without a hearing. 43 CFR, 1959 Supp., 221.64, 221.65. Another rule provides that proceedings in Government contests "shall be governed" by the rules relating to private contests, with exceptions not material here. 43 CFR, 1959 Supp., 221.68.

Thus, the appellant was required to file an answer to the complaint within 30 days after March 4, 1959. The appellant's answer was not filed until April 16, 1959, thirteen days late, although the complaint served on him expressly warned him that if he did not file an answer within 30 days the complaint would be taken as admitted and the case decided without a hearing. A copy of the rules of practice was attached to the complaint.

In his appeal the appellant states that he employed an attorney in Alamosa, Colorado, to answer the complaint, whereas he resides in Manassa, Colorado; that although the answer was prepared, the appellant was not in Alamosa until April 15, 1959, at which time the answer was mailed; and that failure to file the answer was due to inadvertence and oversight on the part of his attorney.

In a recent decision, *Earl D. Deater v. John C. Slagle*, A-28121 (May 24, 1960), the Department held that under the rules of practice where an answer to a complaint in a private contest is filed one day late the allegations of the complaint must be taken as admitted by the contestee and the case decided without a hearing, and that the Secretary is without authority to waive the rules to permit the late filing of the answer since the Secretary is without authority to disregard the plain and unambiguous provisions of his own regulations. *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955); *Chapman v. Sheridan-Wyoming Coal Company*, 338 U.S. 621 (1950).

Under the rule announced in the *Slagle* case, the appellant's mining claim was properly declared to be null and void.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

GEORGE W. ABBOTT, *The Solicitor*.

By: EDMUND T. FRITZ,  
*Deputy Solicitor*.

## J. EDWIN SWAPP ESTATE, PRESTON J. SWAPP, ADMINISTRATOR

A-28448

*Decided August 2, 1960***Grazing Permits and Licenses: Appeals**

Where, in an appeal to the Secretary of the Interior from the dismissal by the Director, Bureau of Land Management, of a grazing appeal under the Federal Range Code for the reason that the appellant failed to serve the State Supervisor and intervenors by registered or certified mail, the appellant alleges that he did in fact serve the State Supervisor and intervenors by registered or certified mail, the case will be remanded to the Bureau to allow the appellant an opportunity to submit proof of such service.

**Grazing Permits and Licenses: Appeals**

The Federal Range Code provides that an appellant in an appeal to the Director, Bureau of Land Management, must serve a copy of the appeal and any brief on each party, including the State Supervisor, either personally or by registered mail, and an appeal is subject to summary dismissal where this is not done.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Preston J. Swapp, as administrator of the estate of J. Edwin Swapp, has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated February 4, 1960, dismissing an appeal to him from a decision of a hearing examiner of the Bureau, dated July 27, 1959.

The Acting Director dismissed the appeal for the reason that the appellant failed to comply with section 161.10(g) of the Federal Range Code (43 CFR, 1959 Supp., 161.10(g)), which provides:

(g) *Appeals to the Director.* An appeal from any decision of the examiner shall be filed in the office of the Director, Bureau of Land Management, Washington 25, D. C., together with any brief in support thereof, within thirty days after date of receipt of the transcript of testimony, or, if the transcript is not requested, within thirty days after receipt of the examiner's decision. *A copy of the appeal and of any brief must be served on each party, including the State supervisor either personally or by registered mail.* Any party, including the State supervisor, opposing the appeal, will be allowed twenty days from date of receipt of the copy of the appeal and brief within which to file in the office of the Director a reply brief, a copy of which must be served upon the appellant in the same manner. The appeal in other respects shall be made in accordance with the rules of practice (Part 221 of this chapter). (Emphasis added.)

**The Acting Director stated:**

The appeal brief submitted by the appellant contains a statement that copies have been served "on all parties by First Class United States Mail, in accordance with the rules of practice." Apparently the appellant has not served the Bureau's State Supervisor personally or by registered mail as specified by the

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regulation. In addition, no showing has been made that proper service was made on the intervenors in this proceeding.

In his appeal to the Secretary the appellant states that all parties were timely served by certified or registered mail; that all of the rules of practice according to section 161.10(g) were complied with; and that the Acting Director's decision was based upon a misunderstanding as to the meaning of the appellant's expression "First Class United States Mail," by which he meant registered or certified mail.

Of course, section 161.10(g) does require that the parties to the hearing, including the State Supervisor, be served with a copy of the appeal and of appellant's brief, and the purpose of requiring service by registered or certified mail is to assure that service will be accomplished with a greater degree of certainty than would be the case if ordinary mail were utilized. A second purpose in requiring service by registered mail is to provide a reliable means whereby the appellant can show proof of such service through submission of a return receipt which identifies the party receiving the document and the date of delivery. However, at the time of the hearing examiner's decision and the present time, the Federal Range Code did not and does not require that proof of service be submitted within any prescribed time limit. 43 CFR, 1959 Supp., 161.10(k). Accordingly, if the appellant did in fact serve the parties by registered or certified mail and can furnish the proof of service required by section 161.10(k), his appeal should not be dismissed.

The appellant has not submitted with his appeal to the Secretary the return receipt cards showing service on the other parties to the hearing and the State Supervisor of copies of his notice of appeal and brief from the examiner's decision. Until such evidence of service is submitted showing proper service by registered or certified mail, the appeal remains subject to dismissal.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348, the decision of the Acting Director is affirmed subject to submission to the Director by the appellant within 30 days from the date of this decision of proof of service on the State Supervisor and the intervenors of his notice of appeal and brief. If the appellant fails to submit proof of service to the Director within the time allowed, the dismissal of his appeal will become final. If proof of service is timely submitted to the Director, the case should be considered by the Director on its merits.

GEORGE W. ABBOTT, *The Solicitor.*

By: EDMUND T. FRITZ,  
*Deputy Solicitor.*



**DENVER R. WILLIAMS**

A-28162

*Decided August 9, 1960***Withdrawals and Reservations: Authority to Make**

The President of the United States has inherent authority to withdraw public land for public purposes apart from the statutory authority vested in him by the act of June 25, 1910.

**Oil and Gas Leases: Discretion to Lease**

The amendment of section 17 of the Mineral Leasing Act by the act of August 8, 1946, did not affect the discretion of the Secretary of the Interior to lease or not to lease public land for oil and gas purposes; the Secretary is required to issue a lease to the person first making application for a lease who is qualified to hold a lease only in the event that he decides to lease the land.

**Oil and Gas Leases: Applications**

The first applicant for an oil and gas lease acquires no vested right to have a lease issued to him but only a right to be preferred over other applicants if a lease is to be issued, and his offer is properly rejected if the land applied for is subsequently withdrawn from mineral leasing.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Denver R. Williams has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated May 21, 1959, which affirmed a decision of the manager of the land office at Anchorage, Alaska, dated September 30, 1958, rejecting his noncompetitive oil and gas lease offer, Anchorage 028088, filed October 15, 1954, under section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226), as to a portion of the land described therein because such land was withdrawn by Public Land Order 1316 dated July 23, 1956 (21 F.R. 5640), from all forms of appropriation, including mineral leasing, as an administrative site for the Soil Conservation Service.

The appellant contends that the partial rejection of his lease offer was erroneous because the withdrawal of the land did not make it unavailable for mineral leasing and that, in any event, he had a vested right to a lease because of his offer which was prior in time and right to the withdrawal. He said he is willing to accept a lease which excepts the surface of the land and 1,000 feet below the surface. In the alternative, he requests that he be declared the holder of first priority entitled to the issuance of a lease over other applicants at such future time as the land may be leased.

The appellant's case is predicated upon his assumption that the withdrawal of the land in question was accomplished under authority

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of the act of June 25, 1910 (43 U.S.C., 1958 ed., sec. 141). This act empowers the President to "temporarily withdraw" public land of the United States from "settlement, location, sale, or entry" for water-power sites, irrigation, classification or other public purposes to be specified in the orders of withdrawal, which withdrawals shall remain in force until revoked by the President or by an act of Congress. The appellant contends that a mineral lease is not a "settlement, location, sale, or entry" and that Public Land Order 1316 is not a temporary but a permanent withdrawal.

We need not consider this contention because the withdrawal in this case was not made under authority of the act of June 25, 1910. Public Land Order 1316 specifies that it is made "By virtue of the authority vested in the President" and pursuant to Executive Order No. 10355 of May 26, 1952. There is no mention of reliance on the act of June 25, 1910. Since the President has general or inherent authority by virtue of his office to withdraw public land as well as the authority conferred upon him by the act of June 25, 1910, there is no basis for assuming that this act is the source of his authority in this instance. See *P & G Mining Co.*, 67 I.D. 217 (1960); *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915); *Wilbur v. United States*, 46 F. 2d 217, 220 (D.C. Cir. 1930). Section 1 of Executive Order No. 10355 (17 F.R. 4831) not only delegates to the Secretary of the Interior the authority vested in the President by section 1 of the act of June 25, 1910, but also "the authority otherwise vested in him to withdraw or reserve lands of the public domain \* \* \*."

The appellant's further contention that he has a vested right to an oil and gas lease by reason of the filing of his noncompetitive offer is, likewise, without foundation. The appellant concedes that, before 1946, the Secretary of the Interior had discretion to lease or not to lease in response to a noncompetitive oil and gas lease offer. He contends, however, that the amendment of section 17 of the Mineral Leasing Act by the act of August 8, 1946 (60 Stat. 950), imposed a mandatory duty to issue a lease to the person first making application for a lease who is qualified to hold a lease. The United States Court of Appeals for the District of Columbia very recently considered this contention in *Haley v. Seaton*, No. 15,565, decided June 23, 1960, and rejected it as unsound. The court said:

Prior to the amendment of § 17 by the Act of August 8, 1946, this court had held that the Secretary of the Interior had discretionary power to accept or reject an application for a noncompetitive oil and gas lease under § 17. \* \* \*

This court, in *United States v. Ickes*, 79 U.S. App. D.C. 114, 143 F. 2d 152, c. d. 320 U.S. 801, 823 U.S. 759, held that it was not the intent of Congress by the amendatory Act of August 21, 1935, to deprive the Secretary of the Interior of such discretion accorded him under the original Act, except as to a

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very limited group of applications filed 90 days prior to the effective date of the amendment.

We are of the opinion that the 1946 amendment in nowise limited such power in the Secretary of the Interior and continued his discretionary power either to grant or reject applications for leases. As observed above, the phrase in § 17 of the Mineral Leasing Act of 1920, as originally enacted, reading "may be leased by the Secretary of the Interior" was not changed by the Amendment of August 8, 1946. It was carried into the amendatory Act. The provision for the leasing of lands within a known geological structure and lands not within any known geological structure applies only to lands "to be leased," plainly implying that the Secretary of the Interior was to determine what lands were to be leased. Accordingly, we conclude that the acceptance or rejection of the applications to lease here involved was a matter resting within the discretion of the Secretary of the Interior.

Because the Secretary of the Interior retains his discretion to lease or not to lease, an offeror does not, by the filing of his offer, acquire a vested right to a lease which will be excepted from a subsequent withdrawal of the land. The filing of his offer gave the appellant nothing more than a right to be preferred over later offerors for the same land in the event that the land was then available for leasing and the Secretary should decide to lease it. See *Warwick M. Downing*, 60 I.D. 433, 435 (1950); *United Manufacturing Company et al.*, 65 I.D. 106, 110 (1958). He is not entitled either to a lease of the land or to be declared the holder of priority which can be recognized in the event that the land should become available for leasing and a decision to lease it should be made in the future.

Because the land is not available for leasing, there is no basis for leasing any portion of it, whether at the surface or at a distance below the surface.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

GEORGE W. ABBOTT, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

## APPEAL OF J. G. SHOTWELL

IBCA-234

*Decided August 15, 1960***Contracts: Suspension and Termination**

A "Suspension of deliveries (or services)" clause, which is part of a supply contract, and which reserves to the Government, in general terms, the right to suspend the delivery of materials or performance of services and states that "such right of suspension shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension" does not grant the contracting officer, either expressly or by necessary implication, the authority to make an equitable adjustment in the contract price.

**BOARD OF CONTRACT APPEALS**

The Government has moved to dismiss this appeal on the ground that it concerns "a claim for unliquidated damages which the Board has no jurisdiction to consider or adjust."

The circumstances referring to this claim, and the language of contract article A-5 entitled "*Suspension of deliveries (or services)*," on which the claim is based, are contained in the brief of appellant's counsel of February 29, 1960, as follows:

J. G. Shotwell was awarded the contract for supply of pozzolan in the construction of Glen Canyon Dam and Powerplant, per Invitation No. DS-5053, Readvertisement of Invitation No. DS-5012, Department of the Interior, Bureau of Reclamation, contract number 14-06-D-2872, under date of June 30, 1958.

The contract calls for 220,000 tons of bulk pozzolan delivered f.o.b. Glen Canyon Dam. Section B-1 of the Special Requirements states that no orders will be placed after December 31, 1964. Section B-10 declares the "estimated maximum monthly delivery" to be 11,500 tons, and sets up a table of estimated and of maximum quantities to be ordered in each year, 1959 through 1964. The contractor is directed to be ready for delivery at a rate of 11,500 tons per month from August 1, 1959.

In reliance on this contract and as directed by its terms, J. G. Shotwell erected a plant, contracted for sources of raw material supply, and arranged for truck shipment. The cost of the plant is substantial, and is itemized in the claim documents.

Under date of May 28, 1959 the contracting officer, Grant Bloodgood, Assistant Commissioner and Chief Engineer, wrote to Mr. Shotwell, stating that placing of initial concrete in the Dam would be ready in August, 1959, and that Mr. Shotwell would receive "the specific pozzolan requirements for the August 15 placement." This was construed by Mr. Shotwell as confirmation that deliveries would begin on or about August 15, 1959. He accordingly employed personnel and was on a standby basis, ready to perform, from that date. Actual delivery orders however were not received until February 3, 1960, directing deliveries beginning March 2, 1960, six and one-half months later. As no time was he advised to hold himself other than on a ready basis.

August 15, 1960

There is of course no mystery about the Government's motives for this change of progress—the contractor constructing the Glen Canyon Dam and Powerhouse was shut down due to a strike during most of this period. But Mr. Shotwell was not shut down and was at all times ready to perform.

On November 24, 1959 Mr. Shotwell hand-delivered to the contracting officer a claim under the suspension of work clause, Special Condition A-5, which reads as follows:

*"Suspension of deliveries (or services).* The Government may at any time suspend, in whole or in part, delivery of materials or performance of service to be supplied by the contractor hereunder but such right of suspension shall not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension, it being understood that expenses will not be allowed for such suspension when ordered or authorized by the Government on account of the failure of Congress to make the necessary appropriations for expenditures under this contract."

This claim shows direct monthly costs of stand-by at \$3,200.00. The cost of the plant is documented at \$375,862.65. \* \* \*

The Board has considered the data and arguments presented in appellant's letters of November 20 and 25, 1959, December 2 and 3, 1959, and the additional brief of counsel for the appellant dated July 13, 1960<sup>1</sup> together with all documents appearing in the appeal file and the statement of Department Counsel of April 1, 1960.<sup>2</sup>

Even assuming that all statements made by appellant are factually correct and that the Government should have issued a "suspension" order, the Board still would not have jurisdiction to consider or settle appellant's claim as the authority of the Board is identical with that of the contracting officer and the Secretary of the Interior under the contract. The contract, which forms the subject matter of the appeal, does not contain a provision which authorizes the making of an equitable adjustment for appellant's claim.

The Board's decision in *J. A. Jones Construction Company and Charles H. Thompkins Company*, IBCA-233 (June 17, 1960) is dispositive of the instant appeal. We held that a "suspension of work" provision which reserves to the Government, in general terms, the right to suspend the work and states that the right to suspend "shall

<sup>1</sup> Appellant's counsel addressed to the Board a reply brief dated July 13, 1960 and mailed it to the office of the contracting officer in Denver, Colorado. The Department Counsel returned the brief as it evidently was filed late and because he felt that he would "be without authority to transmit to the Board a brief in the contractor's behalf." As the brief was addressed to the Board, we cannot perceive why there should be any objection on the part of either the Department Counsel or the contracting officer as to forwarding the brief or other misdirected or even mis-addressed statements to the Board. In each instance the Board will rule on the admissibility of the instrument involved. In the instant case the Board has decided to accept the late brief in view of its discretionary authority under 43 CFR 4.16 and the statement of the Department Counsel that he "will file no motion with the Board that \* \* \* [appellant's] reply be disregarded for this reason."

<sup>2</sup> "Statement of the Government's position and brief in support of Motion to dismiss" was submitted in accordance with 43 CFR 4.7(b). The filing of a reply brief is discretionary with appellant (43 CFR 4.7(c)).

August 15, 1960

not be construed as denying the contractor actual, reasonable, and necessary expenses due to delays, caused by such suspension" does not grant the contracting officer, either expressly or by necessary implication, the authority to make an equitable adjustment in the contract price. The language of article A-5, quoted above, is almost identical to the language of the "suspension of work" clause considered in the *Jones-Thompkins* appeal. The reasons assigned in that decision, and in the prior decisions cited therein, for holding that such language does not authorize the contracting officer or the Board to entertain claims for additional compensation on account of "suspensions" are as applicable to supply contracts as to construction contracts.

Neither Standard Form 23A (rev. March 1953) nor Standard Form 32 (1957 ed.)<sup>3</sup> authorizes, as appellant's counsel argues, an administrative adjustment in the contract price because of unreasonable delays on the part of the Government.<sup>4</sup> Decisions of the Armed Services Board of Contract Appeals cited by appellant's counsel, granting relief in cases where provisions such as "GC-11, Suspension of Work," for example, were present in the contract are not controlling here. Actually, absent such provision, the Armed Services Board of Contract Appeals has reached the same result as we do.<sup>5</sup>

This Board stated in *Electric Engineering and Construction Service, Inc.*<sup>6</sup> as follows:

The modern trend is to provide by contract for the administrative determination of claims for additional compensation. The Board believes that this trend is a good one, and, therefore, if the precedents in regard to the suspension provision referred to in an earlier part of this decision were not so clearly established, it would be inclined to favor a liberal construction of the provision. A broad interpretation would permit in proper cases an administrative remedy, and, thereby, not compel the contractor to have recourse to the courts. However, under the circumstances, the Board feels that it should adhere to the result reached in the *Parker-Schram Company decision*<sup>7</sup> and in subsequent decisions of the Board.

For the reason stated above, the appeal is dismissed.

PAUL H. GANTT, CHAIRMAN.

I concur:

THOMAS M. DURSTON, MEMBER.

HERBERT J. SLAUGHTER, MEMBER.

<sup>3</sup> The instant contract was executed on Standard Form 33 (Oct. 1957 ed.) and contained Standard Form 32 (1957 ed.).

<sup>4</sup> Cf. 36 Comp. Gen. 302 (1956).

<sup>5</sup> *Blount Brothers Construction Company*, ASBCA No. 5842, 60-1 BCA par. 2634 (1960).

<sup>6</sup> 63 I.D. 75, 78; IBCA-58 (1956).

<sup>7</sup> CA-152 (March 5, 1952).

August 4, 1960

BEN P. GLEICHNER\*

A-28379

Decided August 4, 1960

**Rules of Practice: Appeals: Dismissal—Practice before the Department:  
Generally**

An appeal to the Director is properly dismissed where the statement of reasons needed to perfect the appeal was filed by one who is not authorized to practice before the Department.

**Rules of Practice: Appeals: Dismissal—Practice before the Department:  
Generally**

Where a person who is not authorized to practice before the Department takes an appeal to the Secretary on behalf of another and both have been informed in the decision appealed from of the requirements for practice before the Department, the appeal will be dismissed.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

On April 8, 1959, the land office at Anchorage, Alaska, rejected Ben P. Gleichner's noncompetitive oil and gas lease offer filed under section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226).

Gleichner filed a timely notice of appeal from the land office decision and paid the filing fee. Since he did not include in his notice a statement of reasons for the appeal, he was required to file such statement within 30 days after the notice of appeal was filed (43 CFR, 1959 Supp., 221.3). He did not file such statement. However, there was later received on stationery bearing the letterhead "Thomas F. Bailey and Associates, Oil Producers \* \* \*" a letter signed by Bailey in which he said "I am herewith filing an appeal pursuant to the denial of the above lease on behalf of E. L. Gleichner and Ben P. Gleichner \* \* \*." Bailey continued with a statement of reasons for the appeal.

The Acting Director dismissed the appeal by Bailey on the ground that a relationship between Bailey and Gleichner which would permit Bailey to act in behalf of Gleichner in the appeal under the Department's rules governing practice before the Department had not been shown. The Acting Director pointed out the specific rules on practice which enumerate the categories of persons who may practice before the Department (43 CFR, 1.3(b)). Then the Acting Director,

\*Out of chronological order.

treating Gleichner's appeal as a separate appeal, dismissed it for the reason that it was not perfected by the filing of a statement of reasons.

Gleichner did not appeal to the Secretary in his own behalf but Bailey filed a notice of appeal and paid the filing fee, stating that his relationship in the matter was that he was acting as agent for Gleichner.

It appears from the record that there were not two separate appeals from the manager's decision, one by Gleichner and one by Bailey, but that there was a single appeal by Gleichner which Bailey attempted to perfect by his "appeal." That is, Bailey's "appeal" was intended as the statement of reasons for Gleichner's appeal. It could however, be properly accepted as such only if Bailey were authorized to practice before the Department. He has not shown that he is qualified to practice. Consequently, it was proper to dismiss Gleichner's appeal. See *Lily L. Pearson et al.* (November 15, 1957).

As previously noted, Gleichner has not filed any appeal from the Acting Director's decision. The only appeal received is the one filed by Bailey. If this appeal is intended, as it appears to be, as an appeal on behalf of Gleichner, it is again subject to the deficiency that it has been filed by one unauthorized to practice before the Department. After the Acting Director called attention to the Department's rules governing practice before the Department, there is no excuse for filing an appeal by one who is not authorized to practice. Consequently the appeal filed by Bailey cannot be accepted as an appeal for Gleichner.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a) Departmental Manual; 24 F.R. 1348), the appeal is dismissed.

GEORGE W. ABBOTT, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

## CITY AND COUNTY OF SAN FRANCISCO—RAKER ACT APPLICATION FOR CHANGE IN LOCATION OF RIGHT-OF-WAY

### Rights-of-Way

A change in the location of a right-of-way in Yosemite National Park and Stanislaus National Forest for a tunnel aqueduct granted to the City and County of San Francisco in 1914 under the Raker Act (38 Stat. 242 (1913)), may be made at any time under Section 2 of the Act prior to the completion of the water-power system permitted by the Act.



September 8, 1960

### National Park Service Areas: Land: Use

In determining the question of delay, or excuse for delay, by the City and County of San Francisco in its construction of the water-power system permitted by the Raker Act in Yosemite National Park and Stanislaus National Forest, the City's operations since the passage of the Act must be examined because the United States is not bound by laches or neglect of duty on the part of its officers and agents.

### Statutory Construction: Generally

Assuming, without deciding, that the Canyon Tunnel Aqueduct is an integral and essential part of the system, the fact that the City and County of San Francisco caused no work to be done on the aqueduct, and intended to do none for many years subsequent to passage of the Act, does not permit a declaration of forfeiture, by reason of the three-year cessation rule, unless there was a cessation of construction on every integral and essential part of the system, at the same time, for a period of three consecutive years.

### Statutory Construction: Generally

Assuming, without deciding, that the Canyon Tunnel Aqueduct is an integral and essential part of the system, Section 5 of the Raker Act permits a declaration of forfeiture even if there has been no consecutive three-year break in the construction of the whole system, if the facts show that the delay in constructing a particular integral and essential part of the system is not reasonable under all the circumstances.

### Rules of Practice: Appeals: Hearings

It is recommended that a hearing be held to ascertain all the facts in regard to delay, or excuse for any delay, by the City and County of San Francisco in constructing the system permitted by the Raker Act. Two questions to be considered at the hearing are whether any delay caused by (1) the fact of eight unsuccessful bond issues; or (2) by the events culminating in the decision of the United States Supreme Court in *United States v. San Francisco*, 310 U.S. 16 (1940), and in *City and County of San Francisco v. United States*, 223 F. 2d 737 (9 Cir. 1955), can be considered as excusing, as the case may be, (a) cessation of construction of every integral and essential part of the system for three consecutive years—the "3 year rule;" or (b) delay in constructing any integral and essential part of the system—the "diligence rule." The City and other participants in the hearing will be expected to direct themselves to these issues in their briefs or comments made after the hearing.

M-36603

SEPTEMBER 8, 1960.

TO THE SECRETARY OF THE INTERIOR.

The City and County of San Francisco refused to agree to a condition imposed on the granting of its application, filed pursuant to the Raker Act (38 Stat. 242 (1913)), for a change in the location of a previously approved right-of-way for a tunnel aqueduct in Yosemite

ite National Park and the Stanislaus National Forest.<sup>1</sup> It appealed to the Bureau of Land Management. At my request, you assumed direct jurisdiction of the appeal on May 27, 1960 because of the importance of the case, the multi-bureau interest in its outcome, and the inevitability of an appeal to you in any event.

After you assumed jurisdiction of the appeal it was determined that the granting of the application depended not only upon reaching an agreement as to the water release requirement but also upon answers to three other questions. The application, therefore, presents the following four issues:

### I

The amount of water which must be released into the Tuolumne River from the O'Shaughnessy Dam. An agreement as to this matter has been reached with the City.

### II

Whether the City in view of its past difficulty in complying with the power requirements of the Raker Act, can dispose of the increased power developed by the Canyon Tunnel Aqueduct System in compliance with the Act. The Hetch Hetchy Power Operation Review Group of the Department has rendered a report not inconsistent with the granting of the application.

### III

Assuming the City has been diligent in constructing this system, is the present application for the new right-of-way a change of location within the meaning of Section 2 of the Raker Act? In my opinion it is such a change of location.

### IV

Whether or not the City has been diligent in the construction of the system. If it has not, and is not excused by some provision in the Act, you may declare a forfeiture of all parts of the system not completed, and request the Attorney General to commence suit for the purpose of procuring a judgment declaring the works not completed to be forfeited to the United States. A hearing should be held to ascertain the facts upon which to base a decision in regard

<sup>1</sup>The condition was imposed by the Manager, Land Office, Bureau of Land Management, Sacramento, California and related to the amount of water which the City should release into the Tuolumne River from the O'Shaughnessy Dam in Yosemite National Park.

September 8, 1960

to diligence or excuse for lack of diligence. Once the facts have been ascertained the interpretations of the Raker Act set forth hereinbelow should govern the decision on the diligence issue.

The City's application for the change in location of the previously approved right-of-way was filed on February 26, 1958. The present right-of-way location (the aqueduct has not been built) was approved and amended in 1914 and 1917, respectively, pursuant to the Raker Act. It is on the South side of the Tuolumne River and in general follows the course of the river between the O'Shaughnessy Dam, at the Hetch Hetchy reservoir, and the Early Intake twelve miles downstream. The change in location is for a straight line tunnel aqueduct on the North side of the Tuolumne River between the Dam and the Early Intake. At the present time, and since the construction of the O'Shaughnessy Dam in 1928, the waters from the Hetch Hetchy reservoir flow to the Early Intake down the natural river bed of the Tuolumne River. At Early Intake the water enters the aqueduct system and eventually reaches San Francisco. The tunnel on the South side of the river has not been built because it was not until 1955 that the City felt that power requirements warranted its construction. The City states that the change of location is needed because "further engineering studies" have shown the necessity for the change.<sup>2</sup>

By letter dated July 9, 1959, the Manager, Land Office, Bureau of Land Management, Sacramento, California, informed the City and County of San Francisco that its application for the change in location of the right-of-way would be approved if the City agreed to the conditions proposed by the National Park Service and by the Forest Service, Department of Agriculture. The City refused to agree to the condition which related to the amount of water which the City was to release into the Tuolumne River from the O'Shaughnessy Dam and, on August 7, 1959, appealed the Land Office decision to the Bureau of Land Management pursuant to Title 43, Code of Federal Regulations, Part 221.<sup>3</sup>

<sup>2</sup> Letter dated February 24, 1958, forwarding the change in location map to the Bureau of Land Management.

<sup>3</sup> The condition was as follows:

"Applicant will release water to stream flow from O'Shaughnessy Dam according to the following schedule:

Period	Release from O'Shaughnessy Dam in Sec. Ft.	
	Normal Yr.	Dry Yr.
May 1 through September 15.....	80	40
September 16 through April 30.....	40	25

"Provided that releases shall be measured at the existing gauging station located

## I

## RELEASE OF WATER

At a meeting in my office on June 21, 1960 the City Attorney for the City and County of San Francisco agreed that the United States can condition a right-of-way grant on the amount of water that should be discharged into the river. No legal question remains as to this matter.

As a result of negotiations with the City it is expected that the following condition concerning water-release requirements will be agreed upon:

14. Applicant will release water to stream flow from O'Shaughnessy Dam during the first full twenty-four (24) month period of operation according to the following schedule:

<i>Period</i>	<i>Release from O'Shaughnessy Dam in Sec. Ft.</i>
May through September 15	Minimum of 75 c.f.s.
September 16 through April 30	Minimum of 35 c.f.s.

PROVIDED that releases shall be measured at the existing gauging station located approximately three-fourths mile below O'Shaughnessy Dam;

PROVIDED FURTHER that during the first full twenty-four (24) months of operation a fishery study will be conducted jointly by the United States Fish and Wildlife Service, the National Park Service, the United States Forest Service, and the California Department of Fish and Game, in cooperation with the City; and that during the course of this study the City will make such adjustments of flow as may be required as a basis for making observations and determination of an appropriate minimum flow ceiling; and

PROVIDED FURTHER that at the conclusion of the two year study as aforesaid and based upon such studies, the Commissioner, Fish and Wildlife Service, shall propose a minimum flow ceiling for the period May 1 through September 15 and file the proposal with the Secretary; the proposal shall become a part of these conditions unless the City files objections to the proposal within 30 days, and the City may, upon request, have a hearing before a Special Hearing Officer who will render proposed findings of fact; upon receipt and study of the proposed findings of fact, and the record, the Secretary shall determine a minimum flow ceiling for the period May 1 through September 15.

approximately three-fourths mile below O'Shaughnessy Dam; and provided that the terms 'normal' and 'dry' as used in the above schedules, shall be based upon the forecasted April-July runoff of the Tuolumne River near Hetch Hetchy as given by the California Department of Water Resources April 1 forecast; and provided further that within the meaning of the above schedules the normal year shall be one in which such April-July runoff is forecasted to be at least 450,000 acre feet while the dry year shall be one in which such runoff is forecasted at less than 450,000 acre feet."

September 8, 1960

## II

## POWER COMPLIANCE

The report to the Assistant Secretary, Water and Power Development, on the "Hetch Hetchy Power Operation for 1958," dated July 20, 1960, states that in the opinion of the Hetch Hetchy Power Operation Review Group the City and County of San Francisco was in "reasonable compliance \* \* \* with the provisions of section 6 of the Raker Act." The aforesaid Review Group considered the issue in regard to *future compliance* with Section 6 of the Raker Act in the light of the proposed Canyon Tunnel Aqueduct and stated as follows:

With reference to future expansion in the City's power operations, to which Mr. Holm refers, construction of the Canyon powerhouse will, of course, turn on issues presented by the City's pending application for modification of the right-of-way. However, the future contractual arrangements for disposal and/or use of additional power generated by the City and the annual power operations must be carefully reviewed from the point-of-view of consistency with the Act. Mr. Holm states that the new contractual arrangements will be submitted to you for review.

In my opinion, this report is consistent with the granting of the application. It also effectively places the City on notice that its future power operations will be reviewed carefully by this Department.

## III

## CHANGE IN LOCATIONS

If the City has not delayed in constructing the system, the present application for the new right-of-way location is a "change of location" within the meaning of Section 2 of the Raker Act because (1) the whole system has not been completed and, in such a case, the Act places no time limit on filing a change in location; and (2) all the possible reasons for the change fall within the intent expressed by Congress in passing the Raker Act.<sup>4</sup>

<sup>4</sup> Section 2 of the Raker Act, in pertinent part, provides as follows:

"That within three years after the passage of this Act said grantee shall file with the registers of the United States land offices, in the districts where said rights of way or lands are located, a map or maps showing the boundaries, locations, and extent of said proposed rights of way and lands required for the purposes stated in section one of this Act; but no permanent construction work shall be commenced on said land until such map or maps shall have been filed as herein provided and approved by the Secretary of the Interior: *Provided, however, That any changes of location of any of said rights*

On May 29, 1913, in rendering a report on H.R. 4319, predecessor of H.R. 7207, Congressman Raker stated that there was not to be a time limit on filing a change in location. He did so in comparing the Raker Act with a prior right-of-way grant made to the City of Los Angeles for its municipal water supply. (See 34 Stat. 801 (1907)). The Los Angeles statute stated that a change of location in rights-of-way must be made within two years. Congressman Raker in commenting on the Raker Act, which eliminated the two year provision, stated as follows:

Changes in location may be made at any time before final completion of the works instead of within two years.

It may be that a change of location may be desired by the City subject to the approval of the Secretary of Interior, at a time subsequent to two years after the filing of an additional map. So long as this is prior to the completion of the works and is approved by the Secretary of the Interior it is desired that the City have permission to make such changes. (50 Cong. Rec. 1825, 1828 (1913).)

In its application the City stated that the change in location was necessitated by further "engineering studies." It is not necessary, for the reasons set forth hereinbelow, to decide if necessitated by "engineering studies" means (1) some engineering problem connected with the construction of the tunnel, such as composition of the rock; (2) the increased utility of the new tunnel due to the larger residual power drop; or (3) the savings and costs of constructing a straight-line tunnel. All of the foregoing reasons are included within the intent expressed by Congress to give the City

the right to put that 300 foot dam on a piece of government land, the right to furnish pure water to the City, and the right to sell to its inhabitants its electric energy (50 Cong. Rec. 4105 (1913))<sup>5</sup>

The Act, therefore, permits a change of location for any of the three reasons listed hereinabove. This view is supported by the terms of the Act.<sup>6</sup>

*of way or lands may be made by said grantee before the final completion of any of said work permitted in section one hereof, by filing such additional map or maps as may be necessary to show such changes of location, said additional map or maps to be filed in the same manner as the original map or maps, but no change of location shall become valid until approved by the Secretary of the Interior, and the approval by the Secretary of the Interior of said map or maps showing changes of location of said rights of way or lands shall operate as an abandonment by the city and county of San Francisco to the extent of such change or changes of any of the rights of way or lands indicated on the original maps; \* \* \* (italics supplied).*

<sup>5</sup> Remarks of Mr. Taylor of Colorado as a member of the majority group who successfully prevented the inclusion of a drastic forfeiture provision in the Act. See footnote 13, *infra*.

<sup>6</sup> It is also supported by a prior decision of this department which held that an application by the City for additional watershed land area was a change in location because the "area needed determines the grant." *City and County of San Francisco*, 46 L.D. 377, 380 (1918).

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The Act by its terms does not limit the reasons for which a change in location may be had so long as the change is requested prior to completion of the system. The legislative history is ambiguous. It can be interpreted to mean either (1) that one permissible reason for making a change is when engineering problems are met; or (2) that a change can be permitted *only* when engineering problems are met.<sup>7</sup> No legislative history was found which would indicate that changes of location were to be permitted "only" when engineering problems were met. Accordingly, the history itself is ambiguous and cannot, therefore, be a basis for adding language to the Act by statutory interpretation. *United States v. Dickerson*, 310 U.S. 554, 561-562 (1940).

In fact, even if the legislative history were clear, there is considerable doubt whether words could be added to the statute limiting the reasons for permitting a change of location to engineering reasons only. As stated by Mr. Justice Brandeis:

What the Government asks is not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function \* \* \* (*Iselin v. United States*, 270 U.S. 245, 251 (1926)).

From the foregoing it is my opinion that so long as the change is consistent with the intent of Congress it will be deemed a change in location under the Act.

The problem which remains is to determine whether or not the City has been diligent in the construction of the system. (Where the terms "diligent" and "diligence" are used in this memorandum, without qualifying language, they are meant to include the following two requirements set forth in Section 5 of the Act: (1) that "the construction of [all the works permitted by the Act] shall be prosecuted diligently" and (2) that "no cessation of such construction shall continue for a period of three consecutive years.")

<sup>7</sup> In presenting to the House on August 29, 1913, an analysis of the provisions of the bill that became law, Congressman Raker stated that

"Section 2. This section requires the grantee to file with the Registers of the United States Land Offices within 3 years all maps showing boundaries or locations, and prohibits permanent construction work until maps shall have been filed and approved. *Proviso I permits changes and location by approval when engineering problems are met and such changes are advisable.*" (Italics supplied) (50 Cong. Rec. 3909; see also 50 Cong. Rec. 3921)

## IV

## DILIGENCE

The present right-of-way location was granted in 1914, and amended in 1917, pursuant to authorization contained in the Raker Act (38 Stat. 242 (1913)). The City admits that no work on the tunnel ever has been undertaken. (In 1955, however, a \$54,000,000 bond issue was approved by the voters of San Francisco for the construction of two power projects, the said tunnel being a part of what the City calls the Canyon Power Project.) The Department has received several letters urging that the application be denied on the ground, among others, that the right-of-way approved in 1914 and 1917 is, and has been for some time, subject to forfeiture because of the City's failure to do any work on the tunnel for, in the language of Section 5 of the Act, "a period of three consecutive years."<sup>8</sup>

It is my opinion that the Act does not require that work be done on each separate part of the system every three years. It does, however, require that work be done on *some* integral and essential part of the system every three years—what I term the "3 year rule." In addition, the Act requires that construction of each integral and essential part of the system be prosecuted diligently—what I term the "diligence rule." In my opinion, Congress meant for these two rules to operate in the following manner: One integral and essential part of the system after another was to be constructed without a break of

<sup>8</sup> Sec. 5 of the Act is as follows:

"That all lands over which the rights of way mentioned in this act shall pass shall be disposed of only subject to such easements: *Provided, however,* That the construction of the aforesaid works shall be prosecuted diligently, and no cessation of such construction shall continue for a period of three consecutive years, and in the event that the Secretary of the Interior shall find and determine that there has not been diligent prosecution of the work or of some integral and essential part thereof, or that there has been a cessation of such construction for a period of three consecutive years, then he may declare forfeited all rights of the grantee herein as to that part of the works not constructed, and request the Attorney General, on behalf of the United States, to commence suit in the United States District Court for the Northern District of California for the purpose of procuring a judgment declaring all such rights to that part of the works not constructed to be forfeited to the United States, and upon such request it shall be the duty of the said Attorney General to cause to be commenced and prosecuted to a final judgment such suit: *Provided further,* That the Secretary of the Interior shall make no such finding and take no such action if he shall find that the construction or progress of the works has been delayed or prevented by the act of God or the public enemy, or by engineering or other difficulties that could not have been reasonably foreseen and overcome, or by other special or peculiar difficulties beyond the control of the said grantee: *Provided further,* That, in the exercise of the rights granted by this Act, the grantee shall at all times comply with the regulations herein authorized, and in the event of any material departure therefrom the Secretary of the Interior or the Secretary of Agriculture, respectively, may take such action as may be necessary in the courts or otherwise to enforce such regulations."



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three consecutive years, unless excused by some difficulty within the terms of the Second Proviso of Section 5 of the Act, until the whole system was completed. The City was to have the right to decide the order in which the various parts were to be constructed, except for the O'Shaughnessy Dam itself (Section 9(k) of the Act) and perhaps the roads and trails provided for in Section 9(p) of the Act. In 1912, 1914, 1917 and 1921 the City stated that the tunnel aqueduct was not to be constructed for many years to come and that during this time the stream bed of the Tuolumne River would be used as the conduit to carry the waters from the Hetch Hetchy Reservoir to the Early Intake. (The 1912 statement is found in a book that was presented to each member of Congress at that time.)<sup>9</sup> If, therefore, there was no consecutive three-year break in the construction of the whole system, and if the Canyon Tunnel Aqueduct is an integral and essential part of the system, the query is then whether the "diligence rule" has been satisfied, that is, whether the City had reasonable grounds to postpone the construction of the tunnel aqueduct until the present time.

<sup>9</sup> In the report by John R. Freeman called "The Hetch-Hetchy Water Supply of San Francisco 1912," the following is stated in regard to the Canyon Tunnel:

"This portion of the aqueduct does not become an essential feature of the project of delivering Hetch Hetchy waters to San Francisco until such time as the objections to the occasional turbidity due to heavy rainfalls on the Canyon slopes by the Hetch Hetchy dam and the Early Intake shall make it worth the cost to keep the water continuously under cover from the time it leaves the reservoir until it reaches the receiving reservoir in San Francisco. Since the demand for this improvement and the quality of water is not likely to develop for many years, it is scarcely necessary to consider the cost of this division and to charge it in the present estimate. . . ." (p. 284)

A copy of Mr. Freeman's book was presented to each Congressman and Senator prior to the passage of the Raker Act. (See "Hetch Hetchy, its Origin and History" by M. M. O'Shaughnessy (1934), at page 40.)

In a pamphlet written by Mr. M. M. O'Shaughnessy dated January, 1920, which was sent to the then Secretary of the Interior by letter dated January 26, 1921 pursuant to the Secretary's request for information in regard to the extent of use of the Hetch Hetchy project, it is stated at page 9 that

"From Hetch Hetchy reservoir to Early Intake, a distance of 12 miles, the river bed of the Tuolumne will serve as a conduit for the waters released from the Hetch Hetchy reservoir, until such time as the necessity for the generation of additional power would justify the construction of a tunnel from Hetch Hetchy Dam site to the forebay above Early Intake."

To the same effect see *The City and County of San Francisco v. Yosemite Power Company*, (46 L.D. 89, 93 (1917)); and 1914 protests by the City and County of San Francisco against (1) the "Application of the National Park Electric Power Company for rights of way on Cherry Creek and on the main Tuolumne River in the Stanislaus National Forest;" and "Granting of Sacramento Serial No. 02843, Application by Tuolumne Power and Light Company of July 21, 1909 for dam and reservoir site in the Poopenaut Valley, Yosemite National Park." In the protest numbered "one" above the City also stated that "Investigations were made \* \* \* which indicate that possibly the preferable location for the aforesaid tunnel aqueduct of the City would be along the right bank rather than the left bank of the Tuolumne River."

From the information furnished by the City and County of San Francisco, it is not clear whether there has been construction during each three consecutive years. It is noted, however, that there does not appear to have been any work done on any part of the system between the years 1940 and 1943. ("Chronology of Hetch Hetchy Project 1901-1960") Also, it is not clear whether the construction in the other years was in regard to integral and essential parts of the system, and whether the delay in constructing the tunnel aqueduct was reasonable under all the circumstances. The Department files do not aid in resolving the matter. In the 47 years since the passage of the Act neither the courts nor this Department have decided whether the City has "reasonably" complied with the provisions of the Act requiring that the construction work on the system be prosecuted diligently and without a three-year break. (Sec. 9(u) of the Act.) Inaction by the Department during this period does not estop the United States from bringing a forfeiture action. The cases are in accord in holding that the United States is not bound by laches or neglect of duty on the part of its officers and agents. *United States v. San Francisco*, 310 U.S. 16, 32 (1940); *Utah Power and Light Co. v. United States*, 243 U.S. 389, 409 (1917); *City and County of San Francisco v. United States*, 223 F. 2d 737, 739 (9 Cir. 1955). Accordingly, it will be necessary to examine the entire history of the City's operation under the Raker Act in order to determine if the City has complied with the "diligence" and "three-year" rules and, if not, whether its delay is excused under the exculpatory provisions of the Act.

A hearing before a Special Hearing Officer should be held in San Francisco to ascertain all the facts in regard to delay or excuse for delay. After the Special Hearing Officer has submitted to me the record and proposed findings of fact, and the comments of the parties, I will submit my recommendations to you. Sufficient information will then be before you upon which to make one of the following determinations: (1) "find and determine [whether] there has not been diligent prosecution of the work or of some integral and essential part thereof, or [whether] there has been a cessation of such construction for a period of three consecutive years;" or (2) "find that the construction or progress of the work has been delayed or prevented by the Act of God or the public enemy or by engineering or by other difficulties which could not have been reasonably foreseen or overcome, or by other special or peculiar difficulties beyond the control of [the City]." (Raker Act, Section 5.)

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The reasons in support of the foregoing follow:

A.

*Integral and Essential Part*

The following excerpts from the various bills introduced prior to the passage of the final bill in 1913 (H.R. 7207) show that the work done during any three-year period must relate to an integral and essential part of the system. Stated differently, work only on some unessential part of the project does not stop the running of the three-year period.

The bill which finally became the Raker Act was H.R. 7207, 63rd Congress, 1st Session. Other bills in the same Congress were H.R. 112, H.R. 4319, H.R. 6281, and H.R. 6914.

Neither H.R. 112 nor H.R. 4319 contained the phrase "integral and essential part."

*H.R. 112*

Section 5 of H.R. 112 provided as follows:

That if no essential steps be taken to avail itself of the rights or provisions granted by this act within five years from the date of approval of this act, or if after such period of five years there shall be a cessation of such construction for a period of three years before such work is completed, then all rights herein granted may \* \* \* be forfeited to the United States: \* \* \*

*H.R. 4319*

Section 5 of H.R. 4319 stated:

That the construction of the aforesaid works shall be diligently prosecuted to completion; and if there shall be a cessation of such construction for a period of three consecutive years, then all rights hereunder shall be forfeited \* \* \*.

By letter dated May 24, 1913, to the Department of the Interior the Commissioner of the General Land Office objected to Section 5 of H.R. 4319 because

there is no provision which specifies the amount of construction to be done within the three year periods and no provision for a forfeiture of the works not completed within a specified time after commencement. I am of the opinion that the bill should be made specific on these points and that it should provide for a forfeiture of all rights conferred by it, without further declaration or action on the part of the government, if the construction work is not entirely completed within such specific time as Congress deems wise to prescribe. *Under the bill as now worded, the rights granted may be maintained indefinitely by the performance of some part of the construction during each period of three years of the commencement.* (Italic supplied.)

*H.R. 6281*

On June 23, 1913, one month subsequent to the letter from the Commissioner of the General Land Office, H.R. 6281 was introduced and added the phrase "integral part thereof." Section 5 of H.R. 6281 stated:

That the construction of the aforesaid works shall be diligently prosecuted without cessation of such construction for a period of three years; and in the event that the Secretary of the Interior shall find and determine that there has not been diligent prosecution of the works *or of some integral part thereof*, or that there has been a cessation of such construction for a period of three consecutive years, then he may declare forfeited. \* \* \*

*H.R. 6914*

Section 5 of H.R. 6914 added the word "essential." The bill was introduced on July 18, 1913. No legislative history was found explaining why the word was added. Section 5 follows:

That the construction of the aforesaid works shall be diligently prosecuted without cessation of such construction for a period of three consecutive years, and in the event that the Secretary of the Interior shall find and determine that there has not been diligent prosecution of the work *or of some integral and essential part thereof*, or that there has been a cessation of such construction for a period of three consecutive years, then he may declare forfeited. \* \* \* (Italics supplied.)

*H.R. 7207*

Section 5 of H.R. 7207, the bill that was enacted into law, is the same as the above-quoted portion of Section 5 of H.R. 6914.

*Section 5 of the Raker Act: (38 Stat. 242 (1913))*

Section 5 of the Act, as finally approved on December 19, 1913, is the same as in H.R. 7207, except for certain language changes made to clarify its meaning. It is as follows:

That the construction of the aforesaid works shall be prosecuted diligently, and no cessation of such construction shall continue for a period of three consecutive years, and in the event that the Secretary of Interior shall find and determine that there has not been diligent prosecution of the work *or of some integral and essential part thereof*, or that there has been cessation of such construction for a period of three consecutive years then he may declare forfeited all right \* \* \*. (Italics supplied.)

It is my opinion that the foregoing clearly shows that the work done during any three-year period must relate to an integral and essential part of the system.

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## B.

*Lack of Construction as to One Essential Part is Not, Without More, Grounds for Forfeiture*

In 1955 a bill was introduced to substitute the Tuolumne County Water District No. 2, a public agency in California, for the City of San Francisco in the right to construct a powerhouse along the aforesaid twelve mile stretch of the Tuolumne River. (H.R. 2388, 84th Cong., 1st sess.) In support of the bill it was stated that

Now our position is that the City of San Francisco has defaulted and failed to exercise the privilege [given to it under the Raker Act to construct the Canyon Tunnel Aqueduct] and, therefore, the Congress of the United States has the power to give that privilege to us. (*Hearings Before the Subcommittee on Irrigation and Reclamation of the House Committee on Interior and Insular Affairs, 84th Cong., 1st Sess., ser. 6, at 12 (1955)*)

The bill did not become law.

There were many references made at the aforesaid Hearings to the fact that no construction work had been undertaken on the Canyon Tunnel Aqueduct for some 40 years. In fact, the City admitted that in over 40 years there had never, prior to 1955, been offered a bond issue to develop the Canyon Tunnel Aqueduct power drops. (*Hearings, supra, p. 80*).<sup>10</sup>

Assuming that the Canyon Tunnel Aqueduct is an integral and essential part of the system, the mere fact that the City did no work on the tunnel, and intended to do none for many years subsequent to the passage of the Act, does not permit a declaration of forfeiture, by reason of the three-year requirement, unless there was a cessation of construction on every integral and essential part of the system, at

<sup>10</sup> The impetus for the desire of the City to now construct the Canyon Tunnel Aqueduct was provided by the aforesaid 1955 bill (which was not enacted into law). (H.R. 2388, 84th Cong., 1st Sess.) When hearings were had on the bill the City had resolved to incur a bonded debt in the amount of \$54 million to provide construction of powerplants at Early Intake and Cherry River. (The voters later approved the bond issue.) At the hearings the City representative was asked by Representative Engle to state the relationship between the City's resolution to incur a debt of \$54 million and the proposed H.R. 2388. The following answer and colloquy occurred (*Hearings Before the Subcommittee on Irrigation and Reclamation of the House Committee on Interior and Insular Affairs, 84th Cong., 1st Sess., ser. 6, at 79 (1955)*):

"Mr. TURNER. The relationship is this: San Francisco has been planning on building powerplants at Early Intake and Cherry Valley. However, we did not plan on doing that this year, but since this legislation before you is a threat that the city would lose one of those powerplant sites, it was recommended by myself and the staff, and the resolution was passed by the commission, to make the earliest possible attempt to protect the city against the loss of that powersite.

"Mr. ENGLE. In other words, this legislation was a hotfoot to San Francisco; is that right?

"Mr. TURNER. This legislation was one of the greatest aids that could be given to the city and county of San Francisco (sic) that is possible. Thank You, Mr. Engle."

the same time, for a period of three consecutive years. In short, the system as a whole must be considered. To reason otherwise would lead to absurd results. For instance: The City could have been working all its available men on the O'Shaughnessy Dam and doing nothing for three years on the Cherry Valley Dam. Under separate part theory the Secretary could have declared a forfeiture and submitted the matter to the Attorney General for court action. I do not think Congress intended any such result. In fact, when Congress passed the Raker Act, it was aware that the "construction of the Tuolumne system as proposed by the City of San Francisco, [was] to be extended over about 50 years, 77 million [dollars]." (50 Cong. Rec. 3901, 3992 (1913); also H. R. Rep. No. 41, 63rd Cong. 1st Sess., p. 23 (1913)).

Congressman Raker was also of the view that work must cease on *the whole plan* before there could be a declaration of forfeiture under the three-year cessation provision. This is shown by the following colloquy appearing at 50 Cong. Rec. 3993:

MR. DAVIS. You think the forfeiture would be limited to that only or would it take in whole thing.

MR. RAKER. Only those works that are not complete.

MR. DAVIS. I have wanted to have it understood.

MR. RAKER. That is the purpose. If they had completed most of it and say with respect to one branch of it that they did not need to finish it right away—

MR. DAVIS. It might be a branch that they needed absolutely, and still it would be forfeited, and the whole thing would be useless to the City of San Francisco.

MR. RAKER. If they ceased work for three years *on the whole plan*, then that part that was not completed would be forfeited. Otherwise they could continue this indefinitely. They should start in under this bill and keep busy right along all the time. That is the law of the State of California in regard to water rights. (Italics supplied.)

In my opinion, therefore, the fact that the City did no work on the Canyon Tunnel Aqueduct, assuming it to be an integral and essential part of the system, and intended to do none for many years subsequent to the passage of the act, does not permit a declaration of forfeiture, by reason of the three-year requirement, unless there was a cessation of construction on every integral and essential part of the system, at the same time, for a period of three consecutive years. As previously stated, however, the act permits a declaration of forfeiture even if there has been no consecutive three-year break in the construction of the whole system, if the facts show that the delay in constructing a particular integral and essential part of the system is not reasonable under all the circumstances.

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## C.

*Lack of Diligence Excused*

If there was no work on any integral and essential part of the system for three consecutive years, a forfeiture still may not be declared if the City's delay is excused by some circumstance falling within the exculpatory language in the Second Proviso of Section 5 of the Act.

I understand that since 1927 the City has undertaken on eight different occasions to bond itself for the purpose of transmitting the power from the Hetch Hetchy Dam into San Francisco,<sup>11</sup> and none has been successful.

Two of the questions to be considered are whether or not any delay caused by (1) the fact of the eight unsuccessful bond issues; or (2) the events culminating in the decision of the United States Supreme Court in *United States v. San Francisco*, 310 U.S. 16 (1940), and in *City and County of San Francisco v. United States*, 223 F. 2d. 737 (9 Cir. 1955), can be considered as excusing, as the case may be, (a) cessation of construction of every integral and essential part of the system for three consecutive years—the “three-year rule;” or (b) delay in constructing any particular integral and essential part of the system—the “diligence rule”. The City and other participants in the hearing will be expected to direct themselves to these issues in their briefs or comments made after the hearing. In this connection, and in order that all participants may have the benefit of the Department's research, there is set forth hereinbelow material in regard to (1) the exculpatory language of the Act; (2) the “reasonable” compliance section of the Act; and (3) a statement concerning the rule that forfeitures are not favored.

<sup>11</sup> “In 1927 the city of San Francisco undertook to extend that transmission line into San Francisco with a bond issue of \$2 million, which failed.

“In 1928 a revenue bond issue was proposed, which only required a majority vote, and that failed.

“In 1930 the city of San Francisco sought to bond itself for \$68 million in order to take over the distribution system of the Pacific Gas & Electric Co. in San Francisco and distribute that power according to the Raker Act, which failed.

“In 1933 another bond issue in the amount of \$6.3 million was rejected by the people of San Francisco.

“In 1935 another bond issue failed.

“In 1937 a \$50 million bond issue for the same purpose failed.

“In 1939 a \$55 million bond issue to take over the distribution system failed.

“In 1941 after this Supreme Court decision and during the course of these negotiations, and on the basis of a settlement which had been proposed by Mr. Ickes, a bond issue in the sum of \$66,500,000 failed of passage.”

(Hearings Before the Subcommittee on Irrigation and Reclamation of the House Committee on Interior and Insular Affairs, 84th Cong., 1st Sess., Ser. 6, at pp. 6-7 (1955))

1. *Exculpatory Language of the Act*

Under Section 5 of the Act no declaration of forfeiture can be made

if [the Secretary] shall find that the construction or progress of the works has been delayed or prevented by the Act of God or the public enemy, or by engineering or other difficulties that could not have been reasonably foreseen and overcome, or by other special or peculiar difficulties beyond the control of the said grantee.

Congressman Raker, in commenting on H.R. 4319 (a predecessor to the bill that became law), stated that there was to be no time limit on beginning construction of the project because "it is impractical to specify exact dates when there is always a possibility of delay on account of litigation, etc." (50 Cong. Rec. 1828 (1913); The "etc." is in the quotation.)

No further reference to "litigation" was found in the legislative history except the following statements by supporters of the bill:

We believe that after this bill is passed we may have litigation. I do not doubt that the owners of riparian rights will take us into the courts, and we will have to fight for everything we get. That litigation may take years. Every year's delay means additional cost to our taxpayers. We are preparing for the future; we are looking ahead a hundred years, which is none too far, because, in my judgment, after the opening of the Panama Canal those cities around the Bay of San Francisco will increase in population by leaps and bounds. (50 Cong. Rec. 3981 (1913));

\* \* \* \* \*

But the fact has been accomplished. Now here is a provision that certain rights shall be granted to certain irrigation districts. In all probability it is not improbable there will be some litigation between these districts and San Francisco as to what those rights are. It would be strange if a bill should be passed out of which litigation could not arise, and the courts would enforce those rights in those irrigation districts under the act without attempting to destroy the rights which have been granted. (50 Cong. Rec. 4104 (1913)).

Congressman Raker, again in commenting on H.R. 4319, stated as follows:

Secretary of the Interior may waive forfeiture for non-compliance with conditions of grant if he finds that the City is prevented from continuing construction by unforeseen engineering difficulties or special and peculiar causes:

This is manifestly a just and proper provision. See "The National Forest Manual", issued by the Secretary of Agriculture, to take effect February 24, 1913, Regulation L, 16, and Form No. 61, page 35, the aforesaid "The National Forest Manual", Article 6, Article 7. (50 Cong. Rec. 1828 (1913))

The National Forest Manual referred to by Congressman Raker was probably the source for the exculpatory proviso in Section 5 of the



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Raker Act. The applicable provisions in the manual referred to by Congressman Raker are set forth in the footnote hereinbelow.<sup>12</sup>

## 2. Reasonable Compliance

The Second Proviso of Section 9 (u) of the Act states as follows:

That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not *reasonably* complied with and carried out by the grantee \* \* \* . (Italics supplied.)

The above-quoted proviso of Section 9 (u) of the Act was not in the final bill, H.R. 7207, as presented to Congress by Chairman Raker in 1913. It was inserted as an amendment on the floor of the House by Chairman Raker. The circumstances of its passage show that it was the intention of Congress not to "jeopardize [the City's] rights by drastic and unnecessary conditions." (50 Cong. Rec. 4104-4105 (1913)).

The "drastic and unnecessary conditions" referred to were contained in the language of an amendment offered by Mr. Murray of California as follows:

And upon the violation of the grantee of any of said conditions all the title, easements, and franchises, together with all appurtenances thereto belonging, granted by this act, shall revert to the United States. (50 Cong. Rec. 4103 (1913)).

<sup>12</sup> "Art. 6. That it is understood, if at the date of the termination of any one of the periods specified in article 4 hereof, unless such period is extended by the written approval of the Secretary, after a showing by the permittee satisfactory to the Secretary that such beginning of construction of that part of the project works required to have been begun within such period has been prevented by the Act of God, or by the public enemy, or by engineering difficulties that could not reasonably have been foreseen, or by other special and peculiar cause beyond the control of the permittee, that thereupon the permission to occupy and use National Forest lands for all parts of said project works, the construction of which has not been begun on said date shall terminate and become void; and that the permit, insofar as such parts of said project works are concerned, shall become of no effect.

"Art. 7. That it is understood that the periods specified in article 5 hereof for the completion of construction and the beginning of operation of the several parts of the project works will be extended only upon the written approval of the Secretary, after a showing by the permittee satisfactory to the Secretary, that the completion of construction and beginning of operation has been prevented by the Act of God, or the public enemy, or by engineering difficulties that could not reasonably have been foreseen, or by other special and peculiar cause beyond the control of the permittee; and if such extension be not approved, that thereupon the permission to occupy and use National Forest lands for such parts of said project works shall terminate and become void; and that the permit, insofar only as such parts of said project works are concerned, shall become of no effect.

"Reg. L-16. An extension of the periods stipulated in the permit for beginning or completing construction and for beginning operation will be granted only by the written approval of the Secretary after a showing by the permittee satisfactory to the Secretary that beginning or completing construction and beginning operation, has been prevented by engineering difficulties that could not reasonably have been foreseen or by other special and peculiar causes beyond the control of the permittee."

The purpose of this amendment was to "make the forfeiture provision a little more stringent." (50 Cong. Rec. 4093 (1913)).

A majority of the members of Congress felt that the aforesaid amendment was too drastic and refused to adopt it. In its place Congress adopted the amendment offered by Mr. Raker, which contained the phrase "reasonably complied with and carried out."<sup>13</sup>

The following quotation from *Bonnett v. Vallier*, 136 Wis. 193, 116 N. W. 885, 888 (1908), expresses the usual meaning to be accorded to the word "reasonable."

*Reasonable as applied to a law is manifestly not what extremists on one side or the other would deem, in the light of the principles referred to and the*

<sup>13</sup> Set forth in this footnote are certain of the statements made by members of Congress in defeating the stringent amendment and in adopting the more lenient amendment containing the phrase "reasonably."

"MR. KENT. Mr. Chairman, it seems to me that this amendment which means well, is altogether too severe. We know perfectly well that a city government may or may not be corrupt. Under as drastic an amendment as that proposed one rotten administration lasting two years in San Francisco might forfeit all those rights. San Francisco has just passed through an administration that would have wrecked the town for the purpose of boosting the present local water company, and I do not think the amendment should be so drastic. I think that all public rights are properly safeguarded in the bill as it now stands." (50 Cong. Rec. 4103)

"MR. MURRAY of Oklahoma. It is the object of the court to make performance when it is expressed in general terms. I will suggest to the gentleman from Illinois [Mr. Mann] that he would not write a contract, or would not hesitate to write a contract for a client that did not put a condition of forfeiture upon the grantee." (Id. at 4104).

"MR. MANN. If the gentleman will permit, as attorney for municipalities I have written a good many contracts, and never endeavored to give the other fellow the slightest show on earth. I never did. But we are dealing with a municipal corporation now, and ought to deal on different terms than we would with a private party." (Id. at 4104)

"MR. TAYLOR of Colorado. Mr. Chairman, we ought to consider that we are not dealing with a private corporation that might try to speculate in and abuse the rights granted. We are dealing with a large number of people of this country, 8 or 10 large and growing cities, and why should we jeopardise their rights by drastic and unnecessary conditions? Why should anyone want to permit some little technicality to forfeit those very important rights? Why should Uncle Sam want to even jeopardise them?

"Why should we put a cloud on the title and bring about such a condition that the city could not float their bonds? It seems to me that we ought not to insert a needless possibility of forfeiting the property of those people. It seems to me that section 6 is broad enough, and with the amendment put in by the gentleman from Arkansas [Mr. Taylor] the other day we have gotten San Francisco hedged about now as much as it is reasonably possible for us to do in any degree of fairness. If they do not diligently construct the work, they forfeit everything. We do not want to hand San Francisco a gold brick, something they cannot handle or get anything out of without coming back to Congress again. Let us treat them in good faith.

"When we provide that any attempt to sell or alienate or speculate in any way shall work a forfeiture, for heaven's sake, let us not add a clause so that if a horse takes a drink out of the creek or some one uses a little water or does something it may afford an excuse for some superserviceable United States attorney to jump in and declare forfeiture. I want to give San Francisco in good faith a good waterworks system, a good title to it. We want to give them as near as possible a fee simple title to the lands and rights of way. We want to give them the right to put that 300-foot dam on a piece of Government land, the right to furnish pure water to the city, and a right to sell to its inhabitants this electric energy.

"I feel that while any ordinary forfeiture in preventing any sale, transfer, or 'skulduggery', or anything of that kind is all right, the conditions imposed by this amendment are not fair to San Francisco. And I think if the gentleman from Oklahoma [Mr. Murray] will stop and look at it he will see that he is endeavoring to enact a proposition here which, if carried out, would or might render this whole act a nullity and useless. (Id. at 4104-05)."

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situation to be dealt with, fit or fair. It is what "from the calm sea level" so to speak, of common sense, applied to the whole situation, is not illegitimate in view of the end to be attained. In determining that, the court must look to the language of the statute and to all of the facts bearing on the situation of which it may properly be said to judicially know because of their common nature or otherwise. (Italics supplied.)

As shown above, the general test of forfeiture under the Act is "reasonable" compliance. Such a reading of the statute is further supported by the general principle that forfeitures are not favored by the courts.

In the case of *Rush v. Kirk*, 127 F. 2d, 368, 370 (1942), which involved an assignment of a Government oil and gas prospecting permit, the court stated that "Forfeiture is a harsh rule and will be decreed only in a clear case or when required by the express provisions of a contract." In *Mammoth Cave National Park Association v. State Highway Commission*, 261 Ky. 769, 88 S.W. 2d 931 (1935), the Court stated the general rule as follows:

Forfeiture of easements like other forfeitures are not favored by courts, and mere nonuse or temporary suspension of use without adverse possession is not alone sufficient to establish abandonment. (88 S.W. 2d at 934)

In that case a railroad company conveyed its easement to a park association "in trust for the United States of America for National Park purposes."

In a suit by the Association to quiet title the court held that the railroad easement was abandoned because the railroad tore up and removed the tracks and attempted to convey the land to others to be dedicated for other than railroad use.

The courts have applied the same rule in the case of certain grants by governmental authority. In *Gonzales v. Ross*, 120 U.S. 605, 622 (1887), a case involving a Mexican grant, the court stated that "All favorable presumptions will be made against the forfeiture of a grant." In *Oregon & California Railroad Company v. United States*, 238 U. S. 393 (1915), the lower court had decreed the forfeiture of a public land grant made to a railroad, the grant being forfeited because the railroad sold properties for prices above the maximum provided by law and in violation of other conditions of the grant. The United States Supreme Court reversed the decree holding that certain provisions in the law were covenants and not conditions subsequent. The court stated that:

And it is a general principle that a court of equity is reluctant to (some authorities say never will) lend its aid to enforce a forfeiture. (238 U.S. 393, 420) (Parenthesis supplied by the court.)

The court also stated that the sense of a law or terms of an instru-

ment may be found in the intention of the grantor if "the intention is made clear." (238 U. S. 393, 415)

Under the Raker Act it was the clear intention of Congress to deal with the City and County of San Francisco "on different terms than we would with a private party." (50 Cong. Rec. 4104 (1913)). Accordingly, the view found in some cases that there is a difference in the rigor of the application of a forfeiture provision where the grantor is the United States and the grantee a private party has no application in the instant matter.

GEORGE W. ABBOTT, *The Solicitor.*

### APPEAL OF MORGAN CONSTRUCTION COMPANY

IBCA—253      *Decided September 20, 1960*

#### Contracts: Appeals

Contractor-appellant has a contractual right to "be afforded an opportunity to be heard and to offer evidence in support of its appeal." This right must be honored even if amount of claim involved is small. Parties may stipulate to submit appeal "on the record."

#### BOARD OF CONTRACT APPEALS

Department Counsel has moved on September 9, 1960, that the Board should

dismiss Claim No. 2 of the Contractor, and permit sworn statements to be supplied the Board by both parties in lieu of conducting a formal hearing in this case on Claims Nos. 1 and 3, following a statement of *factual issues* by the contractor and accompanied by a supplement to this statement when such information is supplied by the contractor.

Appellant's appeal dated July 22, 1960, sets forth three reasons why the Findings of Fact and Decision of the contracting officer of June 16, 1960, should be deemed to be erroneous. These reasons are, in summary, as follows:

1. frost conditions which existed prior to January 6, 1960 which "were beyond the control of the contractor and which caused a delay in the work."
2. "unnecessary supervision."
3. failure of the contracting officer to consider the effects of a cancelled, "premature" resumption of work order.

These are all factual issues regarding which the contractor-appellant has a contractual right to "be afforded an opportunity to be heard and to offer evidence in support of its appeal."<sup>1</sup> As appellant

<sup>1</sup> Clause 6, "Disputes," Standard Form 28A.

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has specifically requested a hearing, and as his claims seemingly fall into the category of disputes "concerning a question of fact," the motion to dismiss Claim No. 2 is denied.

It is noted in connection with this denial that proceedings before the Board on appeals are *de novo*.<sup>2</sup> Further, should it appear during the proceedings that the contracting officer has not passed in a decision on a particular fact, then the matter will be remanded to the contracting officer.<sup>3</sup>

Department Counsel also alleges that the amount in dispute is \$1,400 and that the

Government would prefer in view of the small amount involved to have submitted sworn statements on behalf of the Government and appellant, respectively, thus avoiding the cost both to the Government and appellant of a formal hearing. The Government does not make this recommendation in any spirit of denying the contractor a full opportunity to present his case but rather makes it for the reason that expense to both parties can be minimized by this procedure. \* \* \*

This course of action seems to be desirable, indeed. However, the Board has no power to compel the appellant to follow this course of action as it has a contractual right to a hearing, regardless of the amount of the claim involved. Hence, the Board denies the motion in so far as it concerns further procedures concerning Claims Nos. 1 and 3.

However, nothing prevents Department Counsel from obtaining approval of the appellant or his attorney to the course of action, which he proposes.

A copy of the statement of the Government's position, including Department Counsel's arguments on this point, has been served on the appellant. Hence, in view of the small claim involved and the expenses connected with the holding of a hearing, the Department Counsel should contact appellant, or his attorney, with a view to negotiate, if possible, a stipulation to the effect that the matter may be considered by the Board solely on the record. However, during the negotiations, it should be made clear to the appellant that full opportunity will be given to him to present his case on the record by means of written statements and affidavits, if he so desires. No formal appearance has been noted as to appellant's counsel, mentioned in the Statement of Government's Position, as being Martin J. Andrews, Esq., Denver, Colorado, and as having participated in proceedings before the contracting officer.

If appellant is not represented by counsel, Department Counsel

<sup>2</sup> Cf. *James Lumber Company*, ASBCA No. 1991 (March 31, 1954).

<sup>3</sup> *Utah Construction Company*, IBCA-133, 140, 67 I.D. 248, 256 (1960); *Francis O. Day Company, Inc.*, IBCA-178 (December 4, 1959); *General Excavating Company*, IBCA-150 (May 25, 1959); *Economy Pumps, Inc., Division of O. H. Wheeler Manufacturing Company*, IBCA-94 (February 13, 1957).

should offer to assist the appellant in the solution of problems connected with procedures involved in the submission of statements and affidavits "on the record" not "because of any legal requirement to do so, but as a matter of sound administrative policy."<sup>4</sup> It is the opinion of the Board that such assistance in procedural matters is not violative of the statute prohibiting assistance by a Government employee in the prosecution or support of a claim against the United States "*otherwise than in the proper discharge of his official duties \* \* \**"<sup>5</sup> (Emphasis added.)

PAUL H. GANTT, *Chairman.*

THOMAS M. DURSTON, *Member.*

JOHN J. HYNES, *Member.*

### APPEAL OF GENERAL EXCAVATING COMPANY

IBCA-188

*Decided September 21, 1960*

#### Contracts: Appeals—Contracts: Contracting Officer

A communication from a contracting officer to a contractor, in order to constitute a decision which will start the running of the appeal period under a "Disputes" clause, must be so worded as fairly and reasonably to inform the contractor that a decision under the "Disputes" clause is intended.

#### Contracts: Delays of Contractor—Contracts: Subcontractors and Suppliers— Rules of Practice: Evidence

Where a contractor claims that, absent a strike, supplies would have been delivered to it on a certain date by its subcontractor or supplier, but no evidence is submitted showing that supplies could have been so delivered, the hypothetical delivery date alleged by the contractor will be disregarded for the purpose of establishing the commencement of the period of excusable delay caused by the strike.

#### Contracts: Delays of Contractor

Where the required period for completion of the contract has expired, the contractor is not entitled to further extension of time for performance by reason of allegedly "unusually severe weather," occurring after expiration of the required period for completion.

#### BOARD OF CONTRACT APPEALS

General Excavating Company, a partnership consisting of Fred C. Knauser and William F. Hense, located in Beltsville, Maryland, has appealed timely on December 22, 1958, from a decision of the Con-

<sup>4</sup> *Ralph E. Standley and Oscar Linden, TA-191 (Ir.), January 14, 1960; cf. Thomas G. Meeker, Legal Assistance Available to the General Practitioner, 3 Prac. Law. 42-49 (1957).*

<sup>5</sup> 18 U.S.C., 1958 ed., 233.

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tracting Officer, dated November 26, 1958. The appellant had requested, by its letter of October 3, 1958, additional extensions of time related to delays by another contractor, strikes of concrete truck drivers and cement manufacturers, and for delays due to unusually severe weather. The contracting officer has withheld as liquidated damages the sum of \$7,650.00, representing 153 days of unexcusable delay in completion of the contract, at the prescribed contract rate of \$50.00 per day. The appellant has alleged that all of the 153 days of delay were excusable. No hearing was requested by either party. The appellant's several claims of excusable delay will be described and numbered, *infra*.

Contract No. 14-10-028-1037, out of which these disputes arise, was awarded to appellant on October 17, 1956. The total estimated contract price was \$298,469.20, later increased, by four change orders for additional work, to \$302,880.38. The contract was executed on Standard Form 23, (rev. March 1953) and contained Standard Form 23A (March 1953). The location of the work was Rock Creek Park, Washington, D.C. The appellant was required to construct one prestressed concrete bridge over Rock Creek at Broad Branch, one reinforced concrete box culvert over Broad Branch at Beach Drive, and certain approach roads for these structures. The work was to start within 10 days after receipt of notice to proceed and was to be completed within 330 days from date of receipt of the notice to proceed. The acknowledged date of receipt of such notice was November 1, 1956, making the required completion date September 27, 1957. As a result of several extensions of time granted by the Contracting Officer, the revised date required for completion of performance became January 19, 1958. The work was actually completed June 21, 1958, constituting a delay of 153 days.

Clause 5, "Termination for Default—Damages for Delay—Time Extensions," of Standard Form 23A, provides in paragraph (b) thereof for assessment of liquidated damages for failure to complete the work within the time specified, where the Government does not terminate the contract for default. Paragraph 4-2, "Liquidated damages," in Section 4 of the contract, fixes the amount of liquidated damages at \$50.00 per day. Paragraph 4-11, "Maintenance of Traffic" of the same Section, states that due to relocation of sewer lines under another contract, the "Bridge Contractor" (appellant) will be required to coordinate his work with the "Sewer Contractor."

On July 22, 1960, Department Counsel moved for dismissal of the appeal for "failure of Appellant to properly prosecute same under Title 43 CFR, Part 4, Section 4.5(a)(b)." This motion was denied by the Board on August 15, 1960.<sup>1</sup>

<sup>1</sup> On the ground that " \* \* \* the statement of the claim is sufficient to enable the

Department Counsel's "Statement of The Government's Position and Brief in Support Thereof," in addition to controverting the claims in the appeal on their merits, raises certain legal questions concerning the long delay on the part of the appellant, before giving notice of the additional delays, connected with the time extensions granted by the Contracting Officer in his letter of September 6, 1957. The appellant apparently acquiesced in these time extensions as being equitable, until its letter of October 3, 1958, by which it attempted to justify increases in the periods of excusable delay allowed by the Contracting Officer. Also, in the same letter, the appellant set up an entirely new claim for excusable delay based on adverse weather conditions during the winter of 1957-1958. No prior notice had been given by appellant as to this period of allegedly bad weather, as required by the contract.

Clause 5(c) of the General Provisions of the contract provides in pertinent part that "the Contractor shall within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of delay."

At the time of appellant's letter of October 3, 1958, final settlement of the contract had not been made.

Department Counsel contends that the contractor's objections, to the amounts of time previously allowed by the Contracting Officer, were not timely, and should be dismissed; also that no explanation was given for the delay and that the claim of excusable delay for unusually severe weather may not be considered, because of failure to notify Contracting Officer of the delay within 10 days, pursuant to the contract clause quoted *supra*.

However, the Board considers that the Contracting Officer, in his decision dated November 26, 1958, has waived the delays of appellant in notifying him of the additional periods of delay, related to the extensions of time previously allowed, as well as appellant's delay in asserting the claim of unusually severe weather. In his decision, the Contracting Officer considered the appellant's claims on the merits, without deciding whether additional time would be allowed (as he was empowered to determine under Clause 5(c), *supra*). In a similar case, where the contractor filed requests for further extensions of time after the work was completed, and the Contracting Officer considered such claims on their merits, the court held that the delays in making protests had been waived.<sup>2</sup>

Government to reach issue with the appellant. \* \* \* (The appellant had not submitted any statement to the Board except the appeal letter of December 22, 1956.)

<sup>2</sup> *Samuel S. Palumbo v. United States*, 125 Ct. Cl. 678, 689 (1953).



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Also, it is urged by Department Counsel that the extensions of time previously fixed by the Contracting Officer, in his letter of September 6, 1957, were final unless formally appealed pursuant to the Disputes Clause. However, there is nothing in the Contracting Officer's letter of September 6, 1957 to indicate that it amounted to a decision on a disputed matter. Moreover, that letter contained no *caveat* to put the appellant on notice that he must appeal in the event of disagreement.<sup>3</sup> The facts in the instant case are distinguishable from a ruling in the Palumbo decision, cited *supra*, with respect to the necessity of appeal within 30 days after a decision. In the Palumbo case, the contractor had immediately protested the issuance of a stop order, and was given a further extension of one week. Thereafter he acquiesced in the resident engineer's ruling to begin work and did not appeal within 30 days as required. It would be manifestly improper to place on a contractor the burden of filing premature notices of appeal as to all contracting officer communications which are not clearly decisions resulting from disputes.

Department Counsel's further argument, that the Board has no authority to modify the extensions of time allowed by the Contracting Officer, for the reason that such modification would amount to remission of liquidated damages, is not well taken.<sup>4</sup> By logical extension, such an assertion would be tantamount to charging that the Contracting Officer has no authority to grant extensions of time due to excusable delays. The plain language of the contract gives such authority to the Contracting Officer, subject to appeal to the head of the department, and subject to decision by the Board as the authorized representative of the Secretary of the Interior (43 CFR, Part 4, Section 4.4).

However, the appellant has not sustained its burden of proof in support of its claims for additional time for performance, as will be discussed, *infra*. No brief was filed by appellant, and no hearing was requested for the purpose of presenting evidence.

#### Claim No. 1

At some unstated time in the performance of the contract, there was a delay of approximately 60 days in the work of the "Sewer Contractor." The Contracting Officer allowed an extension of 30 days for performance of appellant's work because of that delay. This extension was granted by letter of September 6, 1957, and was not

<sup>3</sup> *Central Wrecking Corporation*, IBCA-69, 64 I.D. 145, 149 (1957).

<sup>4</sup> It is correct that the Board does not have jurisdiction to remit liquidated damages, nor to make a recommendation to the Comptroller General for such remission, under 41 U.S.C. 256a (*Monarch Lumber Company*, IBCA-217 (May 18, 1960)). However, this type of remission is not involved here, as the instant case concerns only the normal extensions of time under Clause 5.

objected to by appellant until its letter of October 3, 1958. Appellant then asserted, for the first time, that an extension of 60 days should have been granted.

No proof has been offered by appellant to support this claim. The original extension of 30 days was granted on the basis of "evidence at hand" (Contracting Officer's findings of November 26, 1958), indicating, apparently, that the appellant was able to proceed with certain portions of its own work during the 60 day period. Although the facts constituting the "evidence at hand" are not before the Board, the appellant has not furnished any evidence whatever that the extension should have been for any period in excess of 30 days.

Accordingly, the Board must deny appellant's Claim No. 1.

#### Claim No. 2

A strike of concrete truck drivers began May 18, 1957, and was settled June 7, 1957. In his letter of September 6, 1957, the Contracting Officer allowed 21 days as an excusable delay by reason of this strike. The contractor-appellant has protested this extension as being insufficient, claiming that it was prevented by the strike from obtaining concrete for 24 days, beginning on May 17, 1957 and ending "June 19 [sic] 1957." (We assume that the appellant intended to indicate June 9 as the latter date would result in a computation of 24 days.) Appellant's statement, that its records show it was unable to obtain concrete on the day before the strike began, cannot be accepted at face value in the absence of evidence that the unavailability of concrete on the day preceding the strike was due to the strike or some other excusable cause. A mere assertion is not sufficient. Although it appears that the strike was settled on Friday, June 7, 1957, and appellant claims that concrete was not available until the Monday following, there is no evidence before the Board to support the appellant's bare inference, that its inability to secure concrete on Saturday, June 8, 1957, was, in some manner, related to the strike. No showing of excusable delay has been made as to any period in excess of the Contracting Officer's allowance of 21 days. Therefore, this claim is denied.

#### Claim No. 3

Another strike, on the part of the workers in cement manufacturing plants, began on July 10, 1957 and was settled on July 30, 1957. Using these dates, the Contracting Officer granted an extension of 21 days for performance of the contract, in his letter of September

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6, 1957. Again the appellant did not protest until October 3, 1958, when it pointed out that due to the threat of this strike, its supplier would not stock the "High Early Strength" type of cement (which was not in popular demand) in the two-week period just prior to the strike. As a result, appellant claims that it was unable to procure this cement beginning with June 28, 1957. Also, after the strike was settled, appellant alleges that the manufacturer did not ship this special type of cement until the larger demands for more popular kinds had been satisfied. As a result, the appellant says it was unable to obtain concrete until August 13, 1957.

Appellant has not established by competent proof that it could have received its requirements for "High Early Strength" cement beginning June 28, 1957, had it not been for the strike. This Board has held, in a recent decision, that such a hypothetical date may not be considered as the commencement of an excusable delay period, in the absence of convincing proof.<sup>5</sup> Also, there does not appear to be any reason why the appellant was obliged to use "High Early Strength" type of cement. That type of cement was not required by the specifications nor by any other contract provision. In fact, the specific approval of the Contracting Officer was required by Section 6-2 of the contract, for use of "High Early Strength" cement. Such approval was requested by appellant's letter of July 29, 1957 and was granted on July 31, 1957.

Thus, it seems that the abnormal delays, which occurred before and after the actual period of the strike, resulted from the independent choice, by the appellant, to use in the performance of the contract, a special type of cement which could not be obtained with ordinary promptness. The consent of the Contracting Officer for the use of the "High Early Strength" cement does not permit the appellant to prolong an excusable delay, through use of his own choice of material.

#### Claim No. 4

The belated claim of the appellant, for extension of time due to unusually severe weather, is not properly documented by the list which it presented, consisting of Department of Commerce weather reports concerning the amount of sunshine and the number of days of precipitation for each month from September 1957 through March 1958. Nor does appellant specify what days, if any, it was unable to work, because of unusually severe weather. It is stated in the Contracting Officer's decision of November 26, 1958 (and not controverted by appellant), that appellant's weekly payrolls and inspectors' daily logs

<sup>5</sup> *Arizona Plumbing and Heating Company, Inc.*, IBCA-123 (August 18, 1960).

indicate that there was no more delay that would be normal for such time of year. Moreover, it has been held that delays projecting work into an unfavorable season of the year, which impede the progress of the work, do not give rise to further excusable delays.<sup>6</sup>

In any event, it has been held that even where a contract provides that the contractor was not required to carry on winter operations, this applied only to the winter season within the period required for completion of performance and not to the following winter, which was subsequent to the required completion date.<sup>7</sup> We follow this rule, which is dispositive of the appellant's contention. Therefore, the appellant could in no event be excused for any reason whatever, for delays occurring after January 19, 1958, the extended completion date.

#### CONCLUSION

Accordingly, the appeal is denied as to all of appellant's claims, numbered 1 through 4, inclusive.

THOMAS M. DURSTON, *Member*.

I concur:

PAUL H. GANTT, *Chairman*.

I concur:

JOHN J. HYNES, *Member*.

#### LAUREN W. GIBBS

A-28384

*Decided September 21, 1960*

#### Oil and Gas Leases: Applications—Applications and Entries: Generally

A withdrawal of an oil and gas lease offer received over the signature of the applicant takes effect from the moment it is filed and all rights and obligations under the offer are at an end *eo instante* and this is so even though the withdrawal might have been filed by mistake.

#### Agency

A principal is liable for the acts of his agent within his express authority even where by mistake the agent acts contrary to the principal's directions.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Lauren W. Gibbs has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated December 31, 1959, which affirmed a decision of the Salt Lake City,

<sup>6</sup> *Bryne & Forward v. United States*, 85 Ct. Cl. 536, 544, 547 (1937). *J. A. Terteling & Sons, Inc., IBCA-27*, 64 I.D., 466, 500-1 (1957). *Cf. Oondon-Cunningham Co. and Paul B. Reis, ABSCA No. 1355* (winter season held not changed conditions).

<sup>7</sup> *Trimount Dredging Company v. United States*, 80 Ct. Cl. 559, 578-9 (1935).

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Utah, land office, denying his request that his oil and gas lease offer, Utah 028195, be reinstated.

The facts are that the appellant's offer was filed on March 11, 1958, and was rejected in its entirety on March 19, 1959, for the reason that at the time of its filing the lands applied for were embraced in an existing oil and gas lease, Utah 022398. On March 26, 1959, a letter was received in the land office, signed by the appellant, which stated that his lease offer was thereby withdrawn. The letter, in addition to referring to the serial number of the offer, described the lands for which application had been made. Upon receipt of this letter the land office accepted the withdrawal and closed the case.

Thereafter, on April 1, 1959, another letter from the appellant was received by the land office stating that the letter of March 25 was sent in error; that he meant to file a withdrawal of his lease offer Utah 033225, which had also been rejected by the manager; that there had been no intention on his part to withdraw his offer Utah 028195, and that this was done because of an error on the part of his secretary, who, without instruction to do so, changed the application number and legal description on a letter he had signed in blank after he had left his office. He requested the land office to consider as canceled his withdrawal letter.

By a decision dated April 9, 1959, the acting manager rejected the appellant's request on the ground that there was no authority for reinstating a lease offer after it had been withdrawn. The appellant filed notices of appeal from this decision and the decision of March 19, 1959, rejecting his lease offer.

The Acting Director held that Gibbs' withdrawal must be accepted at its face value, that the Department cannot be expected to know the authority of each person in Gibbs' office, and that it was proper to accept the withdrawal and close the case.

The appellant contends that he did not intend to withdraw offer Utah 028195, that the action of his secretary cannot bind him, and that the withdrawal was "spurious." He further says that he can be bound only if his carelessness and inadvertence set in motion a chain of circumstances that caused an innocent person to be damaged, that he acted promptly to notify the land office of the error, that no one has been injured by the erroneous withdrawal, and that, as a result, there is no reason to impose upon him the consequence of his secretary's mistake.

A withdrawal of a lease offer is effective from the moment it is filed without any further action by the Secretary. *Paul D. Haynes*, 66 I.D. 332 (1959). While Gibbs admits the rule, he argues that it does not apply to him in the circumstances.

First, he says that the action of his secretary cannot bind him. According to the affidavits submitted by Gibbs, he had authorized his secretary to withdraw one oil and gas lease offer, but she withdrew another instead. There can be no question but that the secretary was at least a special agent for the purpose of withdrawing the proper offer. The problem is whether her authority to act on the one offer extended to the other.

In general, a principal is liable for the acts of his agent within his express authority even where the agent through mistake acts contrary to the principal's directions. 3 C.J.S. Agency § 231.<sup>1</sup> Therefore the erroneous withdrawal must be considered the act of the appellant.

However, since Gibbs' secretary withdrew the offer only through mistake, the real issue is whether Gibbs would be bound if he had made the mistake himself.

The mistake, of course, was solely that of Gibbs or his agent, the land office having no part in the events leading to the preparation of the letter withdrawing the offer. It is, therefore, a unilateral mistake. The general rule is that a contract is not made voidable by the mistake of only one party. Restatement, Contracts § 503; 3 Corbin on Contracts § 608.

While this appeal is not concerned with the formation of a contract, but only with the much less consequential problem of whether an offer remains alive, the principle is the same. Thus the unilateral mistake of an oil and gas lease offeror in withdrawing his offer does not relieve him of the consequences of the withdrawal, which are that the withdrawal is effective as soon as it is filed and that the offeror must refile to gain any priority for a lease. *Paul D. Haynes, supra.*

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

THEODORE F. STEVENS, *The Solicitor.*

By: EDMUND T. FRITZ,

*Deputy Solicitor.*

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<sup>1</sup> The Restatement of Agency says:

"Interpreters and amanuenses are agents for those who have employed them to interpret or to write; \* \* \*

"Comment:

a. One employed by another to interpret his words, to write what he dictates or to copy his writing, is an agent of the other for this purpose. He is not a mechanism, even though his authority is limited to translating or to transcribing or to transcribing and delivering the words of his principal. As such an agent, he binds his principal by an erroneous statement or transcription in commercial transactions entered into with persons who do not know of the error and to whom he is held out by the principal as one to speak for him." (Restatement of Agency 2d § 14E.)

## APPEAL OF IRVIN PRICKETT & SONS, INC.

IBCA-203

*Decided September 23, 1960*

### Contracts: Changes and Extras—Contracts: Additional Compensation

The amount of equitable adjustment, in a construction contract pursuant to a change order requiring extra work, is encompassed within the "Extra Work" clause when this clause sets forth the cost items to be considered, and the percentage of profit permissible.

### Contracts: Changes and Extras—Contracts: Additional Compensation— Contracts: Subcontractors and Suppliers

Where a prime contractor subcontracts extra work to another during performance of a construction contract, pursuant to a change article, and pays such subcontractor profit and overhead in excess of the limitations defined in the "Extra Work" clause of the prime contract for profit and overhead on extra work, the prime contractor may not recover the excess payments. The subcontractor must look to the prime contractor for payment thereof since the same must be regarded as coming out of, or as part of, the percentage of profit to which the prime contractor is entitled.

#### BOARD OF CONTRACT APPEALS

The timeliness of this appeal was heretofore decided by this Board.<sup>1</sup> The appeal arises from the issuance of a change order pertaining to the above-captioned contract for the construction of a new roof over the Lincoln Memorial, Washington, D.C. The change order with which we are concerned involved, primarily, plumbing work; that is, the replacement of defective drain pipes from roof drains. The work was performed by a subcontractor. The amount to be awarded the appellant for this extra work, by way of equitable adjustment, is in dispute.

Contractor-appellant was awarded subject contract on September 4, 1958. It called for the construction of a new roof over the Lincoln Memorial, Washington, D.C., for the sum of \$23,258.00. The contract contained the General Provisions for construction contracts, Standard Form 23A (March 1953) which included Clause 3 "Changes," which authorized an equitable adjustment in the contract price in the event of the issuance of change orders. It also contained "General Conditions" which included a pertinent provision for the methods of payment of additional compensation by way of equitable adjustment resulting from modification of the contract specifications. It is quoted as follows:

<sup>1</sup> The Board denied a motion to dismiss for lack of timeliness of the appeal on December 5, 1959.

## 2-9. EXTRA WORK:

The Contractor shall perform all extra work not covered by these specifications which, in the judgment of the Contracting Officer may be necessary or expedient to carry out the intent of the contract or incidental in any way to the work of the contract, and which is ordered in writing by the Contracting Officer.

The cost of the respective items of extra work carried out under the provisions of this paragraph will be paid for by one or the other of the following methods, at the election of the Contracting Officer.

(a) On the basis of a stated lump sum price, or other consideration fixed and agreed upon by negotiation between the Contracting Officer and the Contractor in advance, or

(b) On the basis of the actual cost of the extra work (including the hire or rental of such plant as may be used exclusively for such extra work and including workman's compensation insurance, social security and unemployment and all applicable taxes, *but excluding overhead*), plus fifteen (15) percent of that cost to cover profit and all indirect charges against such extra work.

In either case an appropriate extension of the working time if such be determined will also be fixed and agreed upon and stated in the written order in which the extra work is ordered in writing. (*Italics supplied.*)

The prime contractor, the appellant herein, is a general roofing and sheet metal contractor. On November 14, 1958, appellant, by Change Order was required to replace certain defective drainage piping. This work, which involved primarily plumbing work, was performed by a subcontractor engaged in that business. The subcontractor was approved by the Government in accordance with the provisions of GC 2-4 and all work was satisfactorily performed.

The contracting officer determined on March 31, 1959, that the total sum of \$4,914.87 was due appellant as an equitable adjustment by reason of the construction modification performed by the subcontractor. Appellant claims that an increase of \$1,050.89<sup>2</sup> more accurately reflects the total costs of performance and moves for summary judgment in that amount.

Although the contracting officer awarded appellant 15% pursuant to GC 2-9 to cover profit and all indirect costs in his computation of an equitable adjustment as set forth in the extra work clause, the appellant claims an equitable adjustment should be computed on the basis of an allowance of 10% for overhead and 10% for profit on the subcontractor's costs, in addition to the allowance of 15% to the contractor-appellant for profit and all indirect charges.

Appellant concedes that the contract fails to set forth any definitive percentage other than the 15% allowance set forth in GC 2-9 "Extra Work," but argues that in cost work for the District of Columbia, a subcontractor is entitled to receive 20% of direct costs for labor and

<sup>2</sup> This amount (\$1,050.89) represents the difference between \$4,914.87 awarded the Appellant and \$5,965.76 claimed. It is undisputed that the latter amount includes an allowance to the subcontractor of 10% for Overhead and 10% for Profit.



September 23, 1960

material, and the prime contractor receives 15% above that amount for its own overhead and profit. It claims that the Government interpretation of GC 2-9 is not realistic. It maintains that in the light of the prevailing practice in the District of Columbia area and the allowances made by other Government agencies for similar work, a reasonable allowance of 10% overhead and 10% for profit should be awarded by way of equitable adjustment to the subcontractor, in addition to the 15% allowable to the prime contractor.

Appellant vigorously contends that the Government's computation of an equitable adjustment on the basis of a total allowance of only 15% to the prime contractor for both overhead and profit, without an allowance to the subcontractor for these items is erroneous and not contemplated within the terms of the contract.

The Government just as strenuously maintains that total allowance for all overhead and profit are encompassed within the purview of the "Extra Work" provision of GC 2-9, since subject contract does not provide for the subcontractor's allowance for overhead or profit and is limited thereby to 15% to the prime contractor. In support thereof, 24 Comp. Gen. 917 (1945) is cited. The Comptroller General there held, in a contract involving also work performed in the District of Columbia, that overhead and profit paid by the prime contractor to its subcontractor must come out of, or be regarded as a part of the 15% to which the prime contractor was entitled by a provision (Article 4(b)4) almost identical to its limitations with the "Extra Work" provision GC 2-9, *supra*, in the instant contract.

The Government avers that there is no contractual relationship, or privity between the Government and the subcontractor, and that, consequently, this Board is without authority to decide the issues involved herein.

The legal authorities cited by Department Counsel in substantiation of the Government's allegation of lack of jurisdiction of this Board to decide the instant appeal as a matter of law by reason of lack of privity between the Government and the subcontractor is untenable, since it is well settled that the rule in the *Severin* case cited by the Government (*Severin v. United States*, 99 Ct. Cl. 435 (1943), *cert. denied* 322 U.S. 733 (1944)) is not applicable to those cases where the subcontractor does not absolve the prime contractor from liability.<sup>3</sup>

<sup>3</sup> *Warren Bros. Roads Co. v. United States*, Ct. Cl. 1952, 105 F. Supp. 826, 831 (distinguishing the *Severin*, the first and second *Continental* cases). The *Warren Bros.* case follows the rule set out in *United States v. Blair* (1944) 321 U.S. 730 (1944). *Wiscombe Painting Co.*, IBCA-78, 56-2 BCA 1106 (1956), wherein the Board stated as follows: "The fact that the contractor is prosecuting the present appeal for the benefit of the Dunne Company, its supplier, does not alter the case. The established principle is that a contractor may prosecute a claim against the United States for the contract price of work performed or materials furnished by a subcontractor, irrespective of whether the con-

The record is devoid of any evidence that might be construed as a waiver or release by the subcontractor of claims against the appellant, the prime contractor for increased costs of performance. Just as the appellant is entitled to be paid the contract price whether the work is performed by the appellant or by its approved subcontractor, so it is entitled to be paid for increased costs attributable to changes whether the increased costs were incurred by the appellant or by the subcontractor.

No oral hearing took place before the Board. At a conference of February 15, 1960, however, the parties stipulated that the only issue involved herein was whether an equitable adjustment should be computed on the basis set forth above by the appellant. It was also mutually agreed that the additional sum of \$1,050.89 claimed by appellant should be equally attributable to profit and overhead in the amount of \$525 for each item.

In order to resolve this dispute it is necessary to decide whether appellant's concept of an equitable adjustment and the proffered evidence established to the Board's satisfaction that the additional allowance, over and above the actual cost of labor, material, etc., that is a 10% allowance for overhead and a 10% allowance for profit as computed by the subcontractor, constitutes cost items payable as an equitable adjustment for extra work performed pursuant to a change order.

The "Changes" clause authorizes an equitable adjustment in the contract price for increased costs of performance reasonably and necessarily arising from the Change Order.<sup>4</sup> The "Extra Work" provision (Par. 2.9) sets forth the method of computing an equitable adjustment. The latter provision enumerates insurance, taxes, social security, etc., as costs to be considered as items of actual cost, but it specifically excludes an allowance for overhead.

Under the terms of the subject contract we find no provision for the allowance of overhead or profit to the subcontractor. Its only provision provides for 15% to cover profit and all indirect charges against such extra work for the prime contractor.

The mere fact that other contractors, engaged in construction work in the District of Columbia, where subject contract was performed, may have recovered their subcontractor's overhead costs and profit as items of compensable expense, clearly does not warrant or authorize

tractor is liable to the subcontractor for such work or material, but the subcontractor may not prosecute such a claim against the United States because there is no express or implied contract between the subcontractor and the Government." See recent decision in *Appeal of Patti-MacDonald and Associates*, ASBCA No. 5817 (July 28, 1960).

<sup>4</sup> Clause 3 "Changes" of Standard Form 23A states specifically: "Except as otherwise herein provided, no charge for any extra work or material will be allowed." Prior to March 1953 Standard Form 23, the predecessor of Standard Form 23A, contained a separate article on Extras.

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this Board granting the same. We must determine what constitutes an equitable adjustment under the terms and conditions of the contract as written, particularly under the limitations of the "Extra Work" provision of GC 2-9, which undoubtedly guided the contracting officer in his computation of allowable costs.

The determination of an equitable adjustment is a question of fact to be determined by the contracting officer. Appellant has failed to convince us that the contracting officer erred in his findings and decision.

We find no legal authority contrary to the holding of the Comptroller General in 24 Comp. Gen. 917 (1945), and none has been cited by the appellant. Consequently, we are compelled to deny appellant's motion for summary judgment, harsh as the result may be.

## CONCLUSION

The appeal is therefore denied.

JOHN J. HYNES, *Member*.

I concur:

I concur:

PAUL H. GANTT, *Chairman*.

THOMAS N. DURSTON, *Member*.

"PRIMARY TERM" AS USED IN THE MINERAL LEASING ACT  
REVISION OF 1960, DEFINED

Oil and Gas Leases: Generally

Although the term "primary term" used in the Mineral Leasing Act to apply to a non-competitive oil and gas lease ordinarily means the initial term of years as set forth in the lease, the legislative history of section 4(d) of the Mineral Leasing Act Revision of 1960, is such as to require the conclusion that, as there used, it means all periods in the life of the lease prior to its extension by reason of the production of oil and gas in paying quantities.

M-36605

SEPTEMBER 23, 1960.

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT:

Does the extension of a lease authorized by section 4(d) of the Mineral Leasing Act Revision of 1960, enacted September 2, 1960 (74 Stat. 781), apply to a lease in its extended term for a reason other than production of oil or gas in paying quantities?

You ask the above question in your memorandum of September 21. You also ask whether commencement of actual drilling "would operate *ipso facto* to extend the lease?"

Section 4(d) of the act reads as follows:

(d) Any lease issued prior to the enactment of the Mineral Leasing Act Revision of 1960 which has been maintained in accordance with applicable statutory requirements and regulations and which pertains to land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.

The act also contains in section 17(e) as amended by section 2, the following provision applicable only to leases issued on or after the date of the act:

Any lease issued under this section for land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.

The answer to your first question depends upon the meaning of the phrase "primary term" as used in section 4(d) and that meaning will normally be the one given to it by the courts or the Department or both unless there is good reason because of other language in the act, or because such a construction would be contrary to the intent of Congress or perhaps because it would render this part of the statute nugatory, to believe that it was used in a different sense than in other cases where the phrase has been defined.

The phrase made its first appearance in section 17 of the Mineral Leasing Act amendment of August 8, 1946: "Leases \* \* \* shall be for a *primary* term of five years and shall continue so long thereafter as oil or gas is produced in paying quantities," and "*Upon the expiration of the primary term* \* \* \* the record titleholder thereof shall be entitled to a single extension of the *lease* \* \* \*." Also " \* \* \* the *primary* term of any lease for which compensatory royalty is being paid shall be extended by adding thereto a period equal to the period during which such compensatory royalty is paid." (Emphasis added.) On April 9, 1947, the Solicitor gave it as his opinion that the phrase as used in the above quotations "means the initial 5-year term of the lease," and specifically that the extension granted for periods during which compensatory royalty is paid inures only for payments made during the initial 5-year term of the lease. Definition of Primary Terms of Oil and Gas Leases, 59 I.D. 517. No decision of the Department nor opinion of the Solicitor since then has changed or modified this definition in any way. Instead it has been consistently relied upon and followed. Further, when the 83d Congress was considering the bill S. 2380, to amend section 17, *inter alia*, of the Mineral Leasing

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Act of February 25, 1920, as amended, the Department in its report on the bill of April 20, 1954, itself suggested that the bill be amended to include an expansion of the right to an extension because of payment of compensatory royalty to include payments made not only during the primary term but also "any extensions thereof" and for an additional year and pointed out that the law then provided for extension of the primary term and that the proposed amendment would also extend the lease "whether the lease is in its primary or extended term." Senate Report No. 1609 of the bill in part reads: "The present law provides for adding to the period of the 5-year term of the lease the period for which compensatory royalty was paid. If a lessee ceases to pay compensatory royalty beyond its first 5 years, no provisions is made for extending the lease." House Report No. 2238, contains the same language. The Department's report and its proposed amendment are incorporated in both committee reports. It is thus apparent that prior to 1960, Congress not only was informed of the Department's interpretation of the phrase but that it amended the Mineral Leasing Act in direct relation to that definition. It did not, however, use "primary term" in any different sense but accepted the definition and provided that the extension should also apply to any extended term of the lease.

It has been suggested that the phrase "primary term" has long been used by the oil and gas industry in reference to leases of privately owned land to define the period prior to what is generally known as the extended term because of production whether that period be limited to the initial term of years specified in the lease or to any extensions of that term for any reason other than production. No cases or texts have been found to support this. Two cases which purport to define "primary term" as used in such leases both deal with leases which obtained production before the expiration of the initial term of years prescribed in the lease. In *Cow v. Acme Land and Investment Company*, 192 Ia. 688; 188 So. 742, the question was whether the existence of the lease, issued for a term of 5 years and so long thereafter as oil or gas is produced in paying quantities prevented the termination of a mineral servitude which under Louisiana law was proscribed unless development was undertaken within 10 years after its creation. The servitude was created September 1, 1922. The lease issued November 15, 1926. By partial conveyances subsequent to 1922, the servitude was divided into two, the two tracts, however, being contiguous. A producing well was drilled on one tract in 1927, and it was argued that this development served to extend the servitude as to both tracts. The Court held that the primary term of the lease

expired November 5, 1931, one year prior to the expiration by prescription of the mineral rights and that "[t]he fact that the life of the \* \* \* lease was extended by production on one of the servitudes \* \* \* did not relieve the owners of the other servitude of their obligation to exercise their rights thereunder."

In *King v. Swanson* (Texas); 291 S.W. 2d 773, the Court said that "\* \* \* the expression 'primary term' as used in the oil payment contract means that period of time in which the oil and gas lease might be kept alive by the payment of delay rentals without actual production." It pointed out that the lease issued September 27, 1937, and was for a period of ten years and as long thereafter as oil or gas is produced from said land in commercial quantities. The question was whether a stipulation in the contract giving one Swanson a 60-day option of a surrender of the lease "during the primary term" before surrendering the lease. In 1950 the lessee executed a release without offering to assign to Swanson. The Court said that "the release \* \* \* was executed two and a half years after the expiration of the primary term."

Considered wholly apart from the 1960 act, I find no basis for saying that "primary term" includes anything more than the initial term of years specified in the lease. Turning now to the act; it is clear that the phrase as used in section 17(e) means the initial 10-year term of a noncompetitive lease and the initial 5-year term of a competitive lease and no more or less. Because of the amendment of section 30(a) of the Mineral Leasing Act to deny an extension of the undeveloped, segregated portions of a lease for two years from the date of any partial assignment made during extension periods for reasons other than production, it appears that Congress intended at least as to future leases, that no lease should continue in being for more than 12 years without production either on the lease or in a unit to which it was committed. This of course has some bearing on the question before us. It is not conclusive, however, because leases issued prior to the act were expressly excluded.

The legislative history of the subsection (4)(d) under consideration is that the bill as introduced in the House of Representatives used the word "term" rather than "primary term." It was passed without change. The Senate Committee on Interior and Insular Affairs amended it by substituting "fixed term" for "term." It was passed by the Senate and went to conference. There it was changed to "primary term." The Managers on the part of the House in their statement said: "\* \* \* and the Senate reference to the 'fixed' term of a lease was changed to 'primary term,' it being the understanding that the expression 'primary term' does not include any period of time

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when the lease is held by production." Nothing else pertinent to this issue has been found in the records which recount the legislative history of the bill.

The word "term" as used without qualification in the bill as it was introduced means the entire term of the lease, or the period the lease has to run including both the fixed period and the indefinite period. Cf. Solicitor's Opinion M-36349, 63 I.D. 246. In fact the "fixed period" itself may well be considered to include the "production" period as well as any term or terms of years, in the light of the fact that coal leases under the same act are to be issued for "indeterminate" periods. 30 U.S.C. sec. 207. Indeed the statement by the Managers of the House strongly indicates that the conferees were of that view and also that they were of the opinion that "primary term" meant the period of time that the lease could be kept alive without production but that to make sure that it should be so defined the House members of the Committee in their report recorded the Committee's understanding that "primary term" which they settled upon did *not* include the period of the extended term of the lease by reason of production. I am inclined to this view also because if the scope of the subsection is limited to the initial 5-year term of a lease it will be totally useless and nugatory. In truth I believe that it would never become effective unless a lessee so far lost sight of the imminent termination of the initial term as to fail to apply for a *five* year extension and also began drilling a well just before the happening of that event. It is reasonable to suppose that Congress intended at least to be as generous toward the holders of existing leases as to future leases and that it did not intend with one hand to reward one lessee's diligence, after nearly ten years of tenure without doing any drilling, while on the other hand requiring another to act within five years if he wished to be rewarded in the same way. The general policy of Congress in its several amendments of the act is to permit prior lessees to enjoy all the privileges they have with the *further* right to any new ones available under the amendments. Section 2, Act of August 21, 1935 (49 Stat. 674); Section 15, Act of August 8, 1946 (60 Stat. 950) and Act of July 29, 1954 (68 Stat. 583).

The Solicitor in 1947 in construing "primary term" as used in section 17 of the act of August 8, 1946, found it necessary to hold as he did because of the clear language of the law limiting its meaning to the initial 5-year term and the provision for "a single extension of the lease" rather than for an extension of the "primary term" and the language there was clearly effective to accomplish the purpose which it indicated Congress had. Here we are dealing with a pro-

vision which if the same definition applies is wholly without present or prospective effect, and the legislative history supports a broader definition which will be effective.

The extension provided for, unlike the one provided for by the former section 30(a), which is dropped in the new law, is one that must be earned.

It is my conclusion that the intent of Congress in the enactment of section 4(d) was that the words "primary term" as there used covers the entire period in the life of the lease prior to the period of extension because of production.

The answer to your second question is that the act of the lessee in commencing and continuing drilling operations is all that is necessary to cause the extension to become effective. The law makes the grant.

THEODORE F. STEVENS, *The Solicitor*.

BY: EDMUND T. FRETZ,  
*Deputy Solicitor.*

RAYMOND J. HANSEN ET AL.

A-28489, etc. *Decided September 29, 1960*

**Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions**

The departmental ruling (62 I. D. 216 (1955), 64 I. D. 127 (1957) and 135 (1956)) that the partial assignment of oil and gas leases during their extended 5-year term has the effect of continuing in force all segregated leases of undeveloped lands is adhered to.

**Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions**

The Department's supplemental decision in *Franco-Western Oil Company et al.*, 65 I. D. 427, is adhered to.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

Raymond J. Hansen, Louise Safarik, Duncan Miller, Richard M. Ferguson, Robert Schulein, and Ernest G. Erickson have taken appeals to the Secretary of the Interior from decisions of the Director and the Acting Director, Bureau of Land Management, affirming decisions of land offices in Colorado, New Mexico, and California rejecting their offers to lease lands for oil and gas purposes pursuant to section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1958 ed., sec. 226), because the lands were included in outstanding leases at the time the offers were filed.



September 29, 1960

The appellants contend that the outstanding leases were improperly extended.

The Department has considered and rejected many times the arguments presented by the present appellants against its ruling that the partial assignment of oil and gas leases during their extended 5-year term has the effect of continuing in force all segregated leases of undeveloped lands (62 I.D. 216 (1955), 64 I.D. 127 (1957) and 135 (1956))<sup>1</sup> and against its ruling in the supplemental decision in *Franco Western Oil Company et al.*, 65 I.D. 427 (1958), that where the Department places a different interpretation on an act of Congress from that previously adopted, its decision announcing the new interpretation of the statute is to be given prospective application only and that action previously taken in extending oil and gas leases under the overruled interpretation of the statute will not be disturbed.<sup>2</sup>

Raymond J. Hansen, one of the present appellants, was one of those whose offers the Department, by the first *Franco Western* decision of August 11, 1958 (65 I.D. 316), held should not have been rejected on the ground that the land embraced in the offer was, when the offers were filed, embraced in an outstanding oil and gas lease. It overruled a previous construction of section 30(a) of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 187a), and held that the partial assignment of the lease covering the land for which Hansen and others had applied was ineffective to extend the outstanding lease.

Thereafter, by the supplemental decision in that case, the Department determined that its August 11, 1958, decision was to have prospective application only and held that partial assignments of leases in the twelfth month of their tenth year in August 1958, filed on or before August 29, 1958, would be recognized. It vacated its August 11, 1958, decision insofar as it held that the land involved in that decision was available for oil and gas leasing on July 1, 1957, when the offers of Franco Western Oil Company and Raymond J. Hansen were filed and the offers of Franco Western and Hansen were rejected.

Hansen then brought an action against Fred A. Seaton, the Secretary of the Interior, in the United States District Court for the District of Columbia (Civil Action No. 2810-59), seeking to have the departmental rulings that partial assignments under section 30(a) of the Mineral Leasing Act extend the retained as well as the assigned

<sup>1</sup> *Raymond J. and Harold J. Hansen et al.*, A-27503 (January 3, 1958); *Richard P. DeSmet et al.*, A-27837 (October 29, 1958).

<sup>2</sup> *Duncan Miller*, A-28093, etc. (October 30, 1959); *M. Blaine Peterson*, A-28111 (November 23, 1959); *Louise Safarik et al.*, A-28307, etc. (April 22, 1960).

portions of oil and gas leases overruled and the supplemental decision in *Franco Western* set aside. Hansen prayed that the court order the Secretary to issue a lease to him pursuant to his offer.

On July 19, 1960, Judge Luther W. Youngdahl rendered a memorandum opinion in which he expressed the opinion of the court that the Secretary had "correctly interpreted sec. 30(a) of the Mineral Leasing Act, as amended, 30 U.S.C., sec. 187(a) (1958 ed.)." The memorandum continued:

However, the Court is also of the opinion that the September 30, 1958 opinion in *Franco Western Oil Company* is incorrect in extending the prospective nature of the Department's August 11, 1958 opinion to the plaintiff. That is to say, while economic and administrative practicalities made it necessary for the defendant to declare that the August 11, 1958 decision was prospective, in that it would apply only to assignments after August 29, 1958, the Hagood-Savoy Petroleum assignment should not have been included. This assignment—but only this one—should have been declared of no effect even though it was made before August 29, 1958. See the next-to-last paragraph of the August 11, 1958 opinion.

Counsel are requested to submit an order. [Emphasis added.]

Thereafter, on August 2, 1960, the court ordered:

1. That the partial assignment of federal oil and gas lease Los Angeles 087429, from L. N. Hagood to Savoy Petroleum Corporation, filed June 17, 1957, was ineffective, and that the said lease terminated on June 30, 1957, by operation of law.
2. That the plaintiff's offer to lease the SE/4 Sec. 3, Township 11 North, Range 24 West, S.B.M. should not have been rejected on the ground that said land was, on July 1, 1957, embraced in an outstanding oil and gas lease, and the defendant is hereby directed not to refuse to grant plaintiff's offer on that ground.

Thus both the Department's construction of section 30(a) of the Mineral Leasing Act and its action in recognizing partial assignments of oil and gas leases in the twelfth month of their tenth year in August 1958 filed on or before August 29, 1958, have the approval of the court.

In the circumstances, it was proper to reject the appellants' offers.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decisions of the Director and the Acting Director of the Bureau of Land Management are affirmed.

THEODORE F. STEVENS, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

## APPEAL OF TRIANGLE CONSTRUCTION COMPANY

IBCA-232

*Decided October 3, 1960*

### Rules of Practice: Appeals: Hearings

Where the parties to an appeal agree to submit the matter in dispute for decision by the IBCA on depositions and without a hearing, the Board will normally grant an order permitting such submission with depositions, pursuant to Appendix A of the Rules of the Armed Services Board of Contract Appeals, since the IBCA does not have express formal rules on such matters.

#### ORDER

In its Notice of Appeal dated February 23, 1960, appellant requested a hearing. Because of the comparatively small amount of the claim, the Board suggested to both counsel in letter of September 21, 1960 that in lieu of a hearing, the appeal be decided on the record, with leave to the parties to present additional evidence by depositions and exhibits, pursuant to Appendix A of the Rules of the Armed Services Board of Contract Appeals. The use of those rules as to depositions is acceptable to this Board since the Board does not have express formal rules on such matters.

Appellant through its counsel, has agreed to the foregoing procedure in a letter dated September 26, 1960.

Accordingly, no objection thereto having been filed by Department Counsel, it is

**ORDERED**, that the parties hereto file with the Board such depositions and documents as may be desired to be considered in the determination of this appeal, pursuant to Appendix A of the Rules of the ASBCA, on or before December 31, 1960, in lieu of oral testimony, with leave to either party to move for an extension of time for the submission of such evidence.

PAUL H. GANTT, *Chairman.*

THOMAS M. DURSTON, *Member.*

JOHN J. HYNES, *Member.*

B. E. BURNAUGH

A-28340 (Supp.) Decided October 4, 1960

**Rules of Practice: Appeals: Generally**

There is no further right of appeal to the Secretary from a decision of the Solicitor or Deputy Solicitor issued pursuant to a delegation of authority from the Secretary to decide appeals to the Secretary.

**Rules of Practice: Supervisory Authority of Secretary**

In the exercise of his supervisory authority, the Secretary of the Interior may reopen any case affecting public lands so long as the land remains under his jurisdiction.

**Mining Claims: Power Site Lands—Mining Claims: Special Acts**

The Department accepts the decision of the United States District Court in *MacDonald v. Best* holding that the Mining Claims Rights Restoration Act of 1955 does not provide for, or authorize, the forfeiture of mining claims located on powersite lands for failure of the claimant to file a copy of his notice of location in the land office within the time specified in the act.

Solicitor's Opinion, 64 I.D. 393 (1957), no longer followed.

**RECONSIDERATION**

B. E. Burnaugh has filed a notice of appeal to the Secretary from a decision signed by the Deputy Solicitor on July 12, 1960, affirming a decision by the Acting Director of the Bureau of Land Management holding four mining claims of Burnaugh to be null and void.

There is no right of appeal in the Department from a decision signed by the Solicitor or Deputy Solicitor pursuant to the authority delegated to him by the Secretary, cited in the decision of July 12, 1960. Consequently Burnaugh's purported appeal could be summarily dismissed for this reason. However, the Secretary of the Interior retains supervisory authority over all cases involving public lands so long as the lands remain under his jurisdiction, and he may reopen or reconsider any decision affecting such lands where the circumstances warrant. *United States v. United States Borax Company*, 58 I. D. 426, 430 (1943). For the reasons to follow it seems necessary to reconsider the decision of July 12, 1960.

The land on which Burnaugh located his mining claims was reserved as a powersite on January 24, 1921, and under the law then in effect became unavailable for "entry, location or other disposal under the laws of the United States" without affirmative action by the Federal Power Commission or by the Congress. The land remained unavailable for the location of mining claims until the adoption of the Mining Claims Rights Restoration Act of 1955 on August 11, 1955 (30 U.S.C., 1958 ed., secs. 621-625). That act opened powersite lands to mining

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location but requires the owner of any claim located on such land to file in the land office within 60 days after location a copy of the notice of location of the claim (30 U.S.C., 1958 ed., sec. 623). Burnaugh relocated his four claims (which had originally been located in 1954) on July 2, 1956, but failed to file copies of the notices of relocation in the land office within the 60-day period. The decision of July 12, 1960, held his claims void for that reason, following the Solicitor's opinion of October 30, 1957 (64 I.D. 393), and other departmental rulings.

Two days later, in the case of *Frank MacDonald v. Raymond R. Best et al.*, Civil No. 7858, the United States District Court for the Northern District of California, Northern Division, held that the act of August 11, 1955, does not provide for, or authorize, the forfeiture of mining claims for failure of the claimant to file notices of location in the land office. The court discussed and disagreed with the Solicitor's opinion of October 30, 1957.

Although this Department does not agree with the court's interpretation of the 1955 act, the Department is accepting the court's decision because the question presented has been determined not to be of great administrative importance. In view thereof, the Solicitor's opinion of October 30, 1957, will no longer be followed.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental Manual; 24 F.R. 1348), the Department's decision of July 12, 1960, is vacated, the decisions of the Bureau of Land Management declaring Burnaugh's claims to be void for his failure to record his locations in the land office are reversed, and the case is remanded to the Bureau of Land Management for such further action as may be necessary consistent with this decision.

THEODORE F. STEVENS, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

JOHN P. DEVER

A-28388

*Decided October 4, 1960*

#### Oil and Gas Leases: Known Geological Structure

Where the facts on which a determination that land is within the known geological structure of a producing oil and gas field are known prior to the date on which a noncompetitive offer to lease for oil and gas is filed, it is the date of the ascertainment of the facts and not the announcement of it that determines whether lands are to be leased competitively or noncompetitively.

**Oil and Gas Leases: Known Geological Structure**

Where the Director of the Geological Survey has determined that lands are within the known geological structure of a producing oil or gas field, and has filed a diagram in the land office showing the limits of the field, lands found to be within such a structure may be leased only competitively after the date on which the facts on which the determination of the structure is based are known and a noncompetitive offer covering lands within the structure filed before the pronouncement of the definition of the structure but after the date on which the facts were ascertained must be rejected.

**Oil and Gas Leases: Known Geological Structure**

Where the Geological Survey reports that land in an offer is within the known geologic structure of a producing field, that report is not to be disregarded or deemed overruled by a later statement of the Survey in filing a map of the revision of the field that the date to be considered in any action affecting land in the field is the date of promulgation of the definition, a date subsequent to the filing of the offer.

**Oil and Gas Leases: Known Geological Structure**

In making a determination of a geologic structure "undefined," the Department has never prepared maps or diagrams and the regulation governing definitions of known geologic structures has never required the preparation of maps or diagrams of the undefined structures.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

John P. Dever has appealed to the Secretary of the Interior from a decision dated December 31, 1959, of the Acting Director of the Bureau of Land Management which affirmed the rejection by the Cheyenne land office of his noncompetitive oil and gas lease offer, Wyoming 066369, as to the S $\frac{1}{2}$  (lots 13, 14, SW $\frac{1}{4}$ , W $\frac{1}{2}$ SE $\frac{1}{4}$ ) sec. 2 and the SW $\frac{1}{4}$ NW $\frac{1}{4}$  sec. 11, T. 26 N., R. 113 W., 6th P.M., Wyoming.

Dever filed his offer on June 9, 1958, for these lands and the S $\frac{1}{2}$  sec. 15, same township and range. In accordance with the usual practice, the manager asked the Director of the Geological Survey for a report on the land described in the offer, and in a memorandum dated June 24, 1958, the latter stated:

The land described in secs. 2 and 11 is in an undefined addition to the known geologic structure of the La Barge field, *effective prior to date of this application*. The remainder of the land is not within the known geologic structure of a producing oil or gas field. [Emphasis added.]

Thereupon, on June 30, 1958, the manager issued Dever a lease effective July 1, 1958, for the S $\frac{1}{2}$  sec. 15 and on May 15, 1959, the offer was rejected as to the land in sections 2 and 11.

In a memorandum dated July 9, 1958, and received in the land office on July 14, 1958, the Director of the Geological Survey announced the revision and consolidation of the Big Piney-La Barge field, and placed

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on file in the land office a plat of the known geologic structure of the field. The plat stated that the field included areas previously within the known geologic structure of five fields, that it added 76,031 acres to the previously defined 49,993 acres for a total of 126,024 acres and that "In accordance with sec. 192.6, 43 CFR, I define the known geologic structure of the Big Piney-La Barge field as indicated hereon, revision and consolidation effective June 24, 1958."

The memorandum said that

The date to be considered in connection with any action affecting the land involved is June 24, 1958, the date of promulgation of this definition.

Sections 2 and 11, T. 26 N., were among the land added to the combined field.

In his appeal to the Director, Dever asserted that his offer ought to be allowed in its entirety because it was filed before the effective date set by the Geological Survey. The Acting Director replied that the Geological Survey informed him that the date of June 24, 1958, was determined to be the controlling date for the consolidation of the previously defined five fields, that actions prior to that date would be judged on an individual basis depending on the facts in each case, that the facts upon which sections 2 and 11 were placed in a known geologic structure were ascertained as early as February 28, 1958, and that, as a result, they were in a known geologic structure as of that date.

In his appeal to the Secretary, Dever advances a number of contentions which are not entirely clear. First, he agrees that it has been the well established rule that it is the fact that the land applied for is in a known geologic structure of a producing field "and not the fact whether notice of designation has been given by the filing of maps and diagrams in the local land office" which determines the allowability of an application. He concedes that "there must necessarily be a lapse of time between the time it is first determined that certain land is in a known geologic structure and the time the plat is prepared and filed in the land office." If this is so, then the only question in this case would be whether it was determined that the land in question was in the known geologic structure of the Big Piney-La-Barge Field on or prior to June 4, 1958, when Dever filed his offer, notwithstanding the fact that the plat of the field was not filed until July 14, 1958.

On this point Dever relies wholly on the statement in the Survey's memorandum of July 9, 1958, that "[t]he date to be considered in connection with any action affecting the land involved is June 24,

1958, the date of promulgation of this definition." This language admittedly could be interpreted the way Dever interprets it. However, on the plat itself it is stated that the "revision and consolidation [was] effective June 24, 1958." Moreover, and this is decisive, in the Survey's earlier memorandum of June 24, 1958, which was directed specifically to Dever's offer, the Survey stated flatly that the land in question "is" in an undefined addition to the known geologic structure of the LaBarge field, "effective prior to date of this application." This first plain unequivocal statement directed specifically to Dever's offer is not to be considered contradicted by a later general statement accompanying a revision and consolidation of the Big Piney-LaBarge fields.

Dever mentions the memorandum of June 24, 1958, but ignores it in his argument. Seemingly he regards it as of no effect. Why, he does not make clear, but apparently it is on the basis of his further argument that although the effective date of a definition may precede the filing of a plat, nevertheless a plat must be filed. Consequently, only the plat is to be looked at for the purpose of determining the effective date of the definition. In this case, the effective date is June 24, 1958, because of the statement in the memorandum of July 9, 1958 (completely ignoring the more explicit statement on the plat itself).

This presents the question whether a determination that land is in a known geologic structure, as was made in the Survey's memorandum of June 24, 1958, can be made without then or later making a plat defining the structure. The answer to this question appears upon an examination of the pertinent provisions of the Mineral Leasing Act and the Department's regulations and practice under that act.

The provisions of the Mineral Leasing Act pertinent to this appeal are found in sections 17 and 32 (30 U.S.C., 1958 ed., secs. 226, 189). At the time when Dever filed his offer, section 17 stated in part:

\* \* \* When the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations \* \* \*. When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. \* \* \*

Section 32 reads:

\* \* \* the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine



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the boundary lines of any structure, or oil or gas field, for the purposes of this Act \* \* \*.

At the time Dever filed his offer the pertinent regulation provided:

The Director of the Geological Survey will determine the boundaries of the known geologic structures of producing oil or gas fields \* \* \*. Maps or diagrams showing the boundaries of known geologic structures of producing oil or gas fields \* \* \* will be placed on file in the appropriate district land office, and office of the oil and gas supervisor. 43 CFR 192.6.<sup>1</sup>

The original regulation, adopted shortly after enactment of the Mineral Leasing Act in 1920, provided:

The boundaries of the geological structures of producing oil or gas fields will be determined by the United States Geological Survey, under the supervision of the Secretary of the Interior, and maps or diagrams showing same will be placed on file in local United States land offices. Circular 672, par. 2, 47 L.D. 437, 438 (1920).

In an Appendix printed with the regulations entitled "Digest of Decisions and Opinions in connection with the Administration of the Act of February 25, 1920, as Applied to Oil and Gas," the following paragraph appeared:

Where after application under section 13 for a permit and before permit is granted the land is designated as within the structure of a producing oil or gas field, permit can not be allowed. 47 L.D. 466.

Shortly, thereafter, the Secretary reconsidered this statement and directed that—

\* \* \* qualified persons who filed proper applications for oil or gas prospecting permits under the act of February 25, 1920, can not and should not be deprived of their rights if, because of delay in action upon the applications so filed, there intervenes a designation by this Department of the lands as being within the geological structure of a producing oil or gas field *occasioned by a discovery of oil or gas subsequent to the filing of the application in the local land office*. Accordingly, said regulation is hereby revoked, and in future applications will be adjudicated in accordance with the views herein expressed.

The statute, however, specifically forbids the allowance and approval of a prospecting permit upon lands within a "known geological structure of a producing oil or gas field" (section 13), and in section 17 provision is made for the disposition of unappropriated lands in such structures by competitive bidding. Therefore, nothing in this opinion shall be construed as modifying or affecting previous decisions of this Department to the effect that prospecting permits can not be allowed within the geological structure of a producing oil or gas field, so known and existing at and prior to the filing of the application for the prospecting permit. Instructions, April 23, 1921, 48 L.D. 98 (1921). [Emphasis added.]

<sup>1</sup> The regulation was amended by Circular 2039, March 17, 1960 (25 F.R. 2421), discussed later.

A few months later, in *Charles R. Haupt*, 48 L.D. 355 (1921), where the facts were that the land applied for became productive on February 19, 1920, Haupt filed his application for a prospecting permit on March 5, 1920, and the land was designated on April 15, 1920, as being on a known geologic structure of a producing field, it was held:

\* \* \* The application for a permit was filed subsequently to the date (February 19, 1920) when the field embracing the land became productive. Only the extent of that field was determined subsequently—necessarily always a determination some time following the beginning of production, as determination of the limits of the geological structure, like other steps in the classification and administration of the public lands, requires time for investigation. When the limits of a producing field are determined, the determination must necessarily relate back to the time when the production began. Those who during that interval apply for permits under section 13 of the leasing act, covering lands in the neighborhood of where production was begun, are unavoidably at risk of rejection of their applications by reason of the belated inclusion of the lands sought within the field of production. (Pp. 357-358.)

The Department adhered to the principles laid down in these decisions in many later cases. *H. A. Hopkins*, 50 L.D. 213, 216 (1923); *Mountain States Development Company v. Taylor et al.*, 50 L. D. 348, 353 (1924); *Harry Wann et al.*, A-19657 (November 25, 1935), aff'd *Wann v. Ickes*, 92 F. 2d 215 (D.C. Cir., 1937); *George C. Vournas*, 56 I.D. 390, 393 (1938); *Sun-Tex Petroleum Company*, A-24453 (April 4, 1947); *The Texas Company*, A-26214 (July 27, 1951); *H. E. Christenson*, A-26221 (August 31, 1951); *Ernest A. Hanson*, A-26375 (May 29, 1952); *Max Barash*, *The Texas Company*, 63 I.D. 51 (1956), reversed, *Barash v. Seaton*, 256 F. 2d 714 (D. C. Cir., 1958).

In the *Wann* case, *supra*, in which Wann's application for a noncompetitive oil and gas lease was rejected, the First Assistant Secretary, after citing section 17 of the Mineral Leasing Act, as originally enacted (41 Stat. 443) and as amended by the act of August 21, 1935 (49 Stat. 676), and section 32 (*supra*), stated:

But that [sec. 32] cannot be taken to mean that unless there has been a formal definition of structure which has been noted on the records of the Land Department oil and gas deposits belonging to the United States, and not otherwise reserved, must be held subject to prospecting permit, or to lease without competitive bidding.

Wann then filed a bill of complaint in the Supreme Court of the District of Columbia seeking to compel the Secretary to issue him an oil and gas lease. From a decision dismissing his bill, Wann appealed to the United States Court of Appeals for the District of Columbia. In his brief, the appellant contended that it was error for the lower court to fail to hold that lands are not within the known geologic structure of a producing oil and gas field within the meaning of the

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Mineral Leasing Act, as amended, until the boundary lines of such structure are determined by the Secretary of the Interior. The Secretary, on his part, argued that he could make the required determination after an application had been filed on the basis of the facts known to exist at the time of the filing of the particular application.

In affirming the order of the lower court, the Circuit Court held:

Plaintiff's complaint that the Secretary's determination of the location of these lands was made after the filing of plaintiff's application is without merit. The Secretary's determination was that the lands involved were known to be within the geologic structure of a producing oil and gas field, both when the posting was made and when the application was filed, and in making this determination he relied upon the fact that it had been known since 1931 that these lands were within the geologic structure of the Rodessa oil and gas field. It does not appear that the Secretary took into consideration facts not known until after the date of the application. \* \* \*

Nor is there anything mandatory in the statutory provision authorizing the Secretary to fix and determine the boundaries of all oil and gas field structures. Section 32 of the Act of February 25, 1920 (41 Stat. 450; 30 U.S.C. § 189 [30 U.S.C.A. § 189]), upon which plaintiff relies, provides, in part, as follows:

"The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act [sections 181 to 194, 201 to 208, 211 to 214, 221, 223 to 229, 241, 251, and 261 to 263 of this title], also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act [thereof]."

It will be observed that the language of this section is permissive. But, even if it were to be considered mandatory, plaintiff's position would not be improved, since there is nothing which necessarily requires that boundaries be fixed prior to an application. In the instant case the Secretary determined the location of the lands in question, as being within the known geologic structure of a producing oil field, as of the time when the application was filed, not basing his determination upon facts subsequent to such filing. This was sufficient. *Wann v. Ickes, supra*, p. 217.

It is important to note that section 32 of the Mineral Leasing Act has never been amended and that, until recently, the provision of the oil and gas regulation relating to the definition of producing structures and the filing of maps and diagrams has remained essentially the same since the first regulation was issued March 11, 1920.<sup>2</sup>

Furthermore, the Congress several times extensively amended section 17 of the Mineral Leasing Act without indicating any dissent from the Department's practice. Act of August 21, 1935 (49 Stat. 676); act of August 8, 1946 (60 Stat. 950); act of July 29, 1954 (30 U.S.C., 1958 ed., sec. 226). The Department's opinion in *Max*

<sup>2</sup> Oil and Gas Regulations, par. 2, 47 L.D. 437, 438; 43 CFR, 1940 ed., 192.3; 43 CFR, 1949 ed., 192.6; 43 CFR, 1954 ed., 192.6.

*Barash, The Texas Company, supra*, reviewed the legislative history of the 1954 amendments and pointed out how specifically the Department's practice, as it related to extensions of oil and gas leases, had been called to Congress' attention. It then concluded:

Thus, it is apparent that under both the 1946 and 1954 amendments to the Mineral Leasing Act the Department made clear its position that rights depending upon whether land was in the known geologic structure of a producing oil and gas field were to be determined, as of the date of the ascertainment of the fact and not the date of its pronouncement and that the Congress, in adopting the 1954 amendment, accepted and acted upon that position. (P. 60)

Thus, the Department's practice has behind it administrative, judicial, and legislative sanction. In addition, it is based upon sound technical and administrative reasons.

In a recent circular,<sup>3</sup> the Geological Survey has explained carefully the procedure followed in making determinations of known geologic structures and demonstrated why most determinations must be made without maps:

The boundaries of known geologic structures are determined by the Director, U.S. Geological Survey, by delegated authority from the Secretary of the Interior, as prescribed by 43 CFR 192.6. Plats (fig. 1) approved by the Director, Geological Survey, showing defined boundaries are placed on file in the local land offices of the Bureau of Land Management and in offices of the Oil and Gas Supervisors and Regional Geologists, Conservation Division, Geological Survey.

Known geologic structures are determined on a defined and undefined basis. The difference between them and procedures followed in determining each is discussed below.

\* \* \* \* \*

## PROCEDURE

Under the authority delegated by 43 CFR 192.6, the Director of the Geological Survey determines whether lands are or are not within any known geologic structure of a producing oil or gas field. In making these determinations it is recognized that the extent and position of any oil and gas accumulation in a known geologic structure, though primarily influenced by structure, is also influenced by such factors as stratigraphy, porosity, permeability, and by water and gas pressure in the reservoir. Evaluation of the net effect of these several factors is the result sought by the determination of definition of the known geologic structure. These determinations are for all purposes required by the provisions of the Mineral Leasing Act and the pertinent regulations, particularly,

1. For appropriate determination of the competitive and noncompetitive leasing provisions under Section 17 of the Mineral Leasing Act and 43 CFR 192.50, of the applicable regulations.
2. For appropriate application of the rental waiver provisions under Section 17 of the Act, and of the rental provisions of 43 CFR 192.80.

<sup>3</sup> Emmett A. Finley, "The Definition of Known Geologic Structures of Producing Oil and Gas Fields," Geological Survey Circular 419 (1959).

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3. For appropriate application of the rental waiver provisions under Section 17 of the Act, and of the rental provisions of 43 CFR 192.80.

The Director's determinations require one of two procedures, namely, the procedure used in the determination of a geologic structure *defined* and the procedure used in the determination of a geologic structure *undefined*.

*Procedure for structure defined.*

The geology of the structure is reviewed by a board of Survey geologists; their findings are submitted to the Director with a plat depicting the lands determined to be within the boundaries of the structure. Upon approval by the Director, copies of the plat are distributed to appropriate Bureau of Land Management and Geological Survey offices as mentioned in the Introduction. A notice stating that the determination has been made, and the effective date thereof, is published in the "Notices" section of the Federal Register.

*Procedure for structure undefined.*

Inasmuch as definitions are required for purposes of administration immediately after the initial discovery is made in a new field, or extensions are made by outpost drilling, when knowledge both of the productive limits of the field and of the physical factors which determine such limits is at a minimum, known geologic structures undefined are established as an administrative expedient for appropriate action on the three regulations stated above.

The essential difference between defined and undefined known geologic structure definitions, and the reason therefor, is that the formality and detail in the defined procedure does not permit the necessary day-to-day determinations needed by the Bureau of Land Management in current administration of the leases and lease applications.

Undefined known geologic structures are of two types, namely:

1. An area where discovery necessitates the defining of a new productive area, and revisions thereof.
2. An area where development around a previously established defined structure warrants an extension of the established known geologic structure.

In connection with undefined geologic structures, available information, generally consisting of data relating to a single well or a few wells, together with available geologic information, is reviewed by geologists; and a memorandum is sent to the manager of the appropriate land office making a determination that certain lands are as of a certain date "on structure" or within an undefined addition to a previously defined structure. Although the lands determined to be on this structure are outlined on a work map, no plat is prepared for distribution or for filing in the Land Office, and notice of the determination is not published in the Federal Register because of its temporary nature.

Generally, the undefined structure procedure applies when there is a discovery on or near a Federal lease and an immediate determination is needed for guidance of the manager in administering the rental and extension provisions of the particular lease or leases in the vicinity of the discovery. It is also applied in areas where the scope and pace of development are rapid, and where the preparation and publication of a map would be misleading because, in a matter of a day or days after publication, or even on the date of publication, the boundaries are subject to change.

The undefined structure procedure is also used with respect to a field or area where there are but one or two tracts of Federal lands, and a determination

can be made as to such tracts without the necessity of outlining the entire structure. This is especially true of the oil-producing States (Alabama, Arkansas, Florida, Illinois, Indiana, Kentucky, Louisiana, Mississippi, New York, Ohio, Pennsylvania, Texas, and West Virginia) where Federal acreage holdings are few and generally consist of widely scattered small parcels of lands.

As to the relative use of the two procedures, the undefined structure procedure is by far the more common practice. Consequently, in a great majority of determinations that certain lands are situated within the known geologic structure of a producing field, the determination is made without the preparation and filing of a plat of the structure.

As the quoted portions of the circular illustrate, any practice other than that followed by the Department would inevitably result in the disposition of lands noncompetitively which under the statute are required to be leased competitively, for it is administratively impossible to prepare and file maps rapidly enough to keep them current with developments in an active field. In a race between applicants and the Geological Survey the applicants will always have their offers on file before the Survey can evaluate the latest information and prepare its maps.<sup>4</sup> Thus, the Department's practice was the only one consistent with the requirements of the one statute and administrative realities.

In view of the extensive support for the Department's practice under the statute, which has never been amended, and regulation in effect until recently,<sup>5</sup> a lengthy restatement of the administrative

<sup>4</sup>The Director of the Geological Survey in a memorandum to the Solicitor of June 5, 1958, gave a graphic illustration of the problem. He said:

"As an example of the need for the *undefined* procedure, the Blanco gas field in New Mexico, as originally formally defined on March 21, 1946, contained 360 acres. Following publication and before a revision of the definition, hundreds of determinations under the *undefined* procedure were made as new wells were completed almost daily. The first revised published definition, effective March 1, 1952, increased the total to 360,647 acres, and the next consolidated Blanco with three other fields to form the San Juan field with a total of 707,834 acres. Five more revisions have increased the field to 1,652,366 acres. This illustrates the rate of growth during development of a field and emphasizes the task of keeping formal definitions current. We are aware of no lessees, or applicants for leases or lease extensions, who have placed reliance on the published maps as a currently controlling determination. Between each published definition, as additional lands were determined to be on structure, discovery letters describing the undefined additions were provided the land office. Thus, there were both *undefined* and *defined* known geologic structures in effect in the same field. Almost 10 years later this same condition prevails in this field. This is common procedure in the development stages of all fields."

<sup>5</sup>As stated in fn. 1, 43 CFR 192.6 was amended on March 17, 1960, to state in detail the Departmental practice which has been outlined at length. Sec. 192.6, as amended, reads as follows:

"Boundaries of known geologic structures and productive limits of producing oil or gas fields and deposits.

"(a) The Director of the Geological Survey will determine the boundaries of the known geologic structures of producing oil or gas fields, and where necessary to effectuate the purposes of the act, the productive limits of producing oil or gas deposits as such limits existed on August 8, 1946.

"(b) Determinations of 'structures defined' will be followed, as soon as practicable, by the filing in the appropriate land office of maps or diagrams showing the structure

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and legal basis for it would not have been necessary here were it not for the recent court decision in *Barash v. Seaton, supra*, upon which the appellant heavily relies.

That case involved certain lands which had been acquired by the United States for the Soil Conservation Service of the Department of Agriculture and which lie on the southern edge of the Panhandle Field in Texas. On June 12, 1952, the Director of the Geological Survey, as a result of an inquiry by the Soil Conservation Service as to whether it was in the best interests of the United States to offer the land for competitive lease, sent a memorandum to the Director of the Bureau of Land Management that the lands might be subject to drainage of its oil and gas content and recommended that "the oil and gas rights owned by the United States \* \* \* be offered for lease in accordance with the competitive leasing provision of the Mineral Leasing Act, as amended." After other correspondence between the three agencies, the Bureau of Land Management mailed out notices on June 2, 1953, to various officials of the Department, to certain elected public officials, to various private persons, to a trade magazine and a newspaper announcing that the lands were to be leased competitively and setting out the date of the sale as July 22, 1953. On June 5, 1953, Barash filed a noncompetitive offer to lease for oil and gas for the same lands. The sale was held on the appointed day and leases issued to the high bidders, effective September 1, 1953, and October 1, 1953. On September 24, 1954, Barash protested the issuance of the leases. At the request of the Bureau of Land Management, the Geological Survey, on February 11, 1955, submitted a supplemental report that as of the date of its first report no deter-

boundaries, and by publication in the FEDERAL REGISTER of notices that the determinations have been made. Because determinations of 'structures undefined' are usually of a more temporary nature, maps or diagrams thereof will not be filed and notices thereof will not be published; however, a memorandum of each such determination will be filed in the appropriate land office and will be available for public inspection. Additional information concerning the procedures used in making the determinations may be obtained from the Geological Survey, Washington 25, D.C.

"(c) In accordance with long-standing rulings of the Department, if the producing character of a structure underlying a tract of land is actually known prior to the date of the Department's official pronouncement on that subject, it is the date of the ascertainment of the fact, and not the date of the pronouncement, that is determinative of rights which depend upon whether the land is or is not situated within a known geologic structure of a producing oil or gas field. Ernest A. Hanson, A-26375 (May 29, 1952), and cases cited therein. All determinations are subject to change at any time upon receipt of further information through the drilling of wells and other sources. Accordingly, lessees or applicants for leases should not rely upon the maps, diagrams, determinations or notices thereof, as currently controlling documents.

"(d) Any lessee or his operator may apply to the Director of the Geological Survey for a determination whether the land in his lease is inside or outside the productive limits of a producing oil or gas deposit as such limits existed on August 8, 1946."

mination had been made as to whether all of the lands were or were not within a known geologic structure, that a review of structural aspects of the land showed that part of the lands were not within a known geologic structure on June 5, 1953, and that part of the lands were "believed" to be within a known geologic structure.

The Director canceled the leases as to the lands reported not to be in a structure and rejected Barash's offer as to the land "believed" to be in a structure. On appeal, the Secretary held that Barash's offer must be rejected in its entirety.

In a suit to review the Secretary's decision, the District Court entered judgment for the Secretary and dismissed the suit. On appeal, the Circuit Court reversed and remanded the case for further proceedings.

The Court held that the provisions of the law and the regulations require—

\* \* \* (1) a determination by the Survey that the lands 'are' within a known structure, and (2) the filing of a map reflecting this determination in the definition of the structure. These requirements were not observed in respect of either \* \* \* parcel \* \* \*

In this case the Secretary does not claim, as he did in *McKenna v. Seaton*, 103 U.S. App. D.C. , F. 2d [259 F. 2d 780 (D.C. Cir 1958)], that his construction of the law and regulations is consistent with established practices of the Department.

The requirements of law involved here do not rest upon technical considerations. They are designed to assure fairness in leasing publicly owned lands. This case makes that plain. Appellant relying on the absence of any filing of a map showing the definition of a structure pursuant to a determination, applied for a noncompetitive lease. He had every reason to believe that the lands were subject to noncompetitive leasing. He had no reason to question it from the time he filed his application until the Secretary advised him that the lands had been leased competitively, after the application had been filed. Thus, by the Secretary's failure either to take the prescribed steps or to give appellant actual notice that the lands were subject to competitive leasing before such leasing was accomplished, appellant was deprived of the opportunity of acquiring any kind of lease. (256 F. 2d 717-718.)

The court's holding that the provisions of the "law and regulations" require the filing of a map is open to challenge for a number of reasons. In the first place, section 32 of the Mineral Leasing Act, *supra*, simply provides that the Secretary "is authorized" to fix and determine the boundaries of any structure or field. This language is permissive, not mandatory; as the court squarely held in *Wann v. Ickes*, where the issue was raised. The court in *Barash* apparently overlooked its ruling in the *Wann* case, for it did not even cite it. As a consequence, the Department will not accept *Barash*, where the issue was not argued, as overruling *Wann v. Ickes*.



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In the second place, so far as the interpretation of the regulation is concerned, it appears that the court misconstrued the concession of the Secretary that a map was not filed under the regulation as an admission that the regulation *required* the filing of a map in the case of *all* definitions. What the Secretary meant to say, of course, was that no map was filed under the regulation because, under the long standing practice of the Department since 1920, maps of *undefined* structures are not prepared and filed. In other words, as the long standing practice of the Department shows, the regulation has been administratively construed as constituting, first, a delegation of authority to the Director of the Geological Survey to define boundaries and, secondly, a statement that maps or diagrams *when prepared* will be filed in the appropriate land office. This administrative construction is perfectly consistent with the language of the regulation. The court's reading of the regulation would require the interpolation of language that the boundaries of all structures will be defined on maps or diagrams which will be filed in the land offices. Presumably the court was misled into its interpretation because its attention was not directed to the clear distinction in the procedure followed by the Department in making defined and undefined structural determinations.

Accordingly, I conclude that the decision in *Barash v. Seaton*, does not control the disposition of this appeal and that under the long-established practice of the Department the offer was properly rejected in part as being within the known geologic structure of a producing oil and gas field when the offer was filed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F. R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

THEODORE F. STEVENS, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

APPEAL OF CHARLES I. CUNNINGHAM CO.

IBCA-242

*Decided October 13, 1960*

Contracts: Damages: Liquidated Damages

Under the Damages for Delay provision, Clause 5(c) of Standard Form 23A, which provided that the contractor shall not be charged with liquidated

damages because of delays due to unforeseeable causes, including strikes, the remission of liquidated damages is not warranted, where the strike was in existence, and known to the contracting parties, at the time of submission of the contractor's bid and award of the contract.

**Contracts: Unforeseeable Causes—Contracts: Subcontractors and Suppliers**

Contractor's inability to purchase steel pipe from its supplier due to a national steel strike in existence at the time of submission of bid and award is not considered an unforeseeable cause of delay, within the meaning of Clause 5(c) of U.S. Standard Form 23A, where the cause of the delay, that is the strike, was known to the contracting parties.

**BOARD OF CONTRACT APPEALS**

This is an appeal from the findings of fact of the Regional Director,<sup>1</sup> Region 2, Bureau of Reclamation, Sacramento, California, which denied appellant's request for an extension of time for performance of subject contract. Neither the Government nor appellant requested a hearing, and, therefore, the appeal will be decided on the basis of the record.

The dispute arises under the above-captioned contract, which called for the construction of an irrigation crossing of the Delta-Mendota Canal, near Firebaugh, Fresno County, California.

The contract was on Standard Form 23 (Revised March 1953) and incorporated the General Provisions of Standard Form 23A (March 1953).<sup>2</sup> It was dated September 10, 1959 and the contract price was \$14,725.00.

The work was to begin within five (5) days after receipt of notice to proceed and was to be completed within sixty (60) days from the date of receipt of such notice. The time allowed for completion of the work began on September 19, 1959, the date of receipt of notice to proceed, and ended sixty (60) days thereafter, or on November 18, 1959. The work, however, was not accepted as complete until 94 days later, that is on February 20, 1960. Under the terms of the contract, appellant was chargeable with liquidated damages, at the rate of \$25 per day, for each of these days, unless the delay in completion of the work was excusable.<sup>3</sup>

We are concerned here only with one of the five phases of construction, that is the furnishing and installation of approximately 285 feet of 18 inch diameter, 12 gage welded steel pipe for siphoning.

<sup>1</sup> Hereinafter referred to as the contracting officer.

<sup>2</sup> Clause 5(c) General Provisions, entitled "Termination for Default-Damages for Delay-Time Extensions" was modified to further provide "That the Contractor shall be excused for delays of supplies only if the Contracting Officer shall determine that the materials or supplies to be furnished are not procurable in the open market."

<sup>3</sup> Clause 5—General Provisions as modified and Par. 17 Special Conditions entitled "Liquidated Damages."

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The original date for opening of bids for the project was June 4, 1959. On May 26, 1959 this date was extended to September 1, 1959. The contract was entered into on September 10, 1959. Almost two months prior thereto, a national steel strike began on July 14, 1959. The two other major producing steel companies went on strike on July 15 and 17. The strike was not settled until 116 days thereafter on November 7, 1959. At the time of bid opening on September 1, at the time of award of the contract on September 10, and at the time of notice to proceed on September 19, 1959, the nation-wide steel strike was in existence.

Appellant acknowledged receipt of notice to proceed on September 19, 1959, and in a letter of the same date indicated that the supply of 18 inch steel pipe was currently affected by the steel strike, that definite commitments had not been arranged, that it was hopeful steel pipe could be purchased from a source not affected by the strike and that it would proceed with other phases of the required work.

Shortly thereafter on September 23, 1959, appellant advised the Government that it was unable to secure the required steel pipe until settlement of the strike, that a purchase order for the pipe had been issued to its supplier for delivery within 30 days of strike settlement. Appellant thereafter on October 2, 1959 was advised by the Project Engineer that no particular make of steel was required, that delivery of the same thirty (30) days following the strike did not meet with his approval, that appellant would be excused for delays of suppliers only if it was determined that steel pipe was not procurable in the open market, and that formal notice pursuant to Clause 5(c) of the General Provisions should be forwarded. Timely notice as required by the above provision was subsequently received by the Government on October 26, 1959. A few days later, the Project Engineer again advised appellant that it would be excused for delays of suppliers only if it is determined that the steel pipe was not procurable on the open market.

The available evidence discloses that appellant diligently proceeded with other phases of the project where the non-available steel was not required from the inception of the contract until its definite notice to the Government on October 21, 1959 that steel pipe would not be available until four (4) weeks following the strike settlement. Despite the handicap of inclement weather following delivery of the required steel pipe on January 6, 1960, the project was successfully completed on February 20, 1960.

By letter dated March 8, 1959 appellant requested an extension of 94 days, based on the fact that steel pipe was unobtainable at the time the contract was awarded due to the steel strike. Copies of correspondence with various suppliers indicating an intensive effort to procure the steel pipe was enclosed therein.

On April 25, 1960, the contracting officer denied appellant's request for 94 days extension of time for performance on the ground that, first, appellant's bid was entered during the steel strike, secondly, although the duration of the strike was not foreseen at that time, the delay in completion was not attributable to unforeseeable causes within the meaning of the Damages for Delay-Time Extension Provision, Clause 5(c) of Standard Form 23A.

Appellant contends the contracting officer's decision disallowing its request for an extension of time for performance is erroneous for reasons as follows: (1) The Government also was aware of the existence of the strike at the time of opening of bids, and award of the contract. (2) Neither the Government nor appellant were foresighted to the extent that either knew the duration of the strike. (3) Performance under strike conditions was impossible. (4) Failure to make a finding that the steel pipe was not procurable in the open market.<sup>4</sup>

The Government argues the appellant should have foreseen and prepared for a market shortage of the steel pipe since it was aware of the steel strike; consequently the unavailability of steel was foreseeable, and not without its fault or negligence which is a necessary requisite for excusability for delay in performance as encompassed by Clause 5(c) of Standard Form 23A. Appellant's allegations of impossibility of performance is considered untenable by Department Counsel for want of proof thereof. The contracting officer's failure to make a finding that steel pipe was not obtainable on the open market is considered by Government counsel not germane, since the unavailability of steel pipe in the open market would not constitute excusable delay in performance under the circumstances herein, and would have been necessary only in the event the contracting officer had found that the inability of the appellant to secure delivery, in adequate time from its supplier was an unforeseeable cause of delay beyond the control and without the fault or negligence of the appellant or its suppliers.<sup>5</sup>

The Board must decide, in order to resolve this dispute whether the provision entitled "Termination for Default—Damages for Delay—

<sup>4</sup> Appellant places great emphasis on this point in its brief.

<sup>5</sup> 39 Comp. Gen. 473 (1959); *General Electric Co.*, CA-130, 61 I.D. 4 (1952); cf. *Finaco Electrical Products*, IBCA-104, 57-1 BCA par. 1266 (1957).

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Time Extension" (Clause 5(c)) General Provisions of Standard Form 23A (March 1953) as modified by Paragraph 27, Supplement to Standard Form 23A, Bureau of Reclamation,<sup>6</sup> which provides that appellant shall not be charged with liquidated damages because of delays due to unforeseeable causes beyond the control and without the fault of appellant, including strikes, requires the remission of liquidated damages for delay caused by a nationwide steel strike found to have been in existence at the time of submission of bid,<sup>7</sup> opening of bids and award of the contract. (As amended this proviso further provides that appellant shall be excused for delays of suppliers only if the contracting officer shall determine that the materials to be furnished are not procurable in the open market.)

It is plain that the portion of Clause 5(c) in referring to "unforeseeable causes" speaks of the future. Here the condition complained of is a strike, which was already in existence at the time appellant submitted its bid, and, of course, at the time of opening of bids and award of the contract. In order to avoid a narrow construction of the term "unforeseeable causes," the above provision sets forth some illustrations of unforeseeable interferences. It describes, as including but not restricted to, acts of God and of the Government, fires, floods, strikes, and so forth. The purpose of the proviso is to protect the appellant against the unexpected, and in its grammatical sense, militates against holding that the listed events are always to be regarded as unforeseeable, no matter what the attendant circumstances. The word "unforeseeable" must in our opinion qualify each event set out in the including phase, which includes "strikes."

<sup>6</sup>The full text of this provision as amended is quoted: "(c) The right of the Contractor to proceed shall not be terminated, as provided in paragraph (a) hereof, nor the Contractor charged with liquidated or actual damages, as provided in paragraph (b) hereof because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God or of the public enemy, acts of the Government, in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors or suppliers due to such causes: *Provided*, That the Contractor shall within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of delay: *Provided further*, That the Contractor shall be excused for delays of suppliers only if the Contracting Officer shall determine that the materials or supplies to be furnished are not procurable in the open market. The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal as provided in Clause 6 hereof."

<sup>7</sup>Letter dated October 29, 1959 from Acting Regional Director, Sacramento, California/ states appellants' bid was submitted well after the strike began.

Under the circumstances presented in this appeal, the steel strike and its attendant complications clearly cannot be regarded as coming within the category of "unforeseeable" causes of delay, within the meaning of the quoted term as used in clause 5(c) of Standard Form 23A. Appellant should have considered all existing circumstances at the time of submission of its bid. Appellant's knowledge of the strike at the time of submission of its bid is established by the record. It is true that appellant was not prescient to the extent that it could determine the length of the steel strike, and it is reasonable to assume that if the strike was not prolonged, the contract would have been performed within the time required, with no assessment of liquidated damages.

The national steel strike, which began on July 14, 1959, was, however, in existence at the time appellant submitted its bid, at the time of bid opening, and award of the contract. It can hardly be said it was unforeseeable. It is well settled by our highest court that causes of delay must be unforeseeable.<sup>8</sup> We must perforce sustain the contracting officer's denial of appellant's request for an extension of time for performance and remission of liquidated damages.

The appeal is therefore denied.

JOHN J. HYNES, *Member.*

THOMAS M. DURSTON, *Member.*

PAUL H. GANTT, *Chairman.*

<sup>8</sup> See Judge Madden's dissenting opinion in *Brooks-Callaway v. United States*, 97 Ct. Cl. 689, 700 (1942), quoted by the Supreme Court with approval in *United States v. Brooks-Callaway*, 318 U.S. 120 (1943), which is quoted, in part, as follows: "\* \* \* Not every fire or quarantine or strike or freight embargo should be an excuse for delay under the proviso. \* \* \* A strike may be an old and chronic one whose settlement within an early period is not expected. In any of these situations there would be no possible reason why the contractor, who of course anticipated these obstacles in his estimate of time and cost, should have his time extended because of them." 39 Comp. Gen. 343, 348 (1959), 39 Comp. Gen. 478 (1959), wherein the Comptroller General referring to the same steel strike with which we are concerned here states: "If the cause of the delay was in existence at the time the contract was awarded and the contracting parties were aware of its existence, it is not an 'unforeseeable cause' within the meaning of that term as used in Standard Form 23A." *Elmer A. Roman*, IBCA-57, 57-1 BCA par. 1320 (1957); *General Electric Company*, CA-130, 61 I.D. 4 (1952).

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## MERWIN E. LISS

## CUMBERLAND AND ALLEGHENY GAS CO.

A-28393

*Decided October 19, 1960***Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Future and Fractional Interest Leases**

An acquired lands lease offer for land in which the United States owns only a fractional interest in the minerals is defective if it is not accompanied by a statement as to ownership of operating rights in the interest not owned by the United States, and the offer confers no priority upon the applicant until such time as the statement is filed.

**Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Future and Fractional Interest Leases—Oil and Gas Leases: Acreage Limitations**

An acquired lands lease offer for land in which the United States owns only a fractional interest in the minerals may be allowed where the acreage applied for exceeds 2,560 acres but the excess is not more than 10 percent over 2,560 acres.

**Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Future and Fractional Interest Leases**

An offer to lease lands for oil and gas which covers lands in excess of 2,560 acres by less than 10 percent will not be rejected with loss of priority where the offeror mistakenly thought that his offer was within the acreage limitation because the United States owned only a 75 percent interest in the oil and gas.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Merwin E. Liss has appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated December 29, 1959, which affirmed the decision of the Chief, Lands Adjudication Section, of the Eastern States land office, dated May 5, 1959, holding that acquired lands oil and gas lease offer BLM-A 046863, filed by the Cumberland and Allegheny Gas Company on May 15, 1958, had priority over his application, BLM-A 041283, filed on October 21, 1955.

Both offers are for the 75 percent undivided interest in the oil and gas deposits in certain lands acquired by the United States of which the surface and 25 percent undivided interest in the oil and gas deposits have been conveyed by the United States to the State of Maryland.

The pertinent regulation (43 CFR, 1954 ed., rev., 200.7) provides:

(d) *Offers for fractional interest oil and gas leases other than future fractional interests.* An offer for a fractional present interest noncompetitive lease

must be executed on Form 4-1196 and must be accompanied by a statement showing whether the offeror owns the entire operating rights to the fractional mineral interest not owned by the United States in each tract covered by the offer to lease, and if not, the extent of the offeror's ownership in the operating rights in each tract, and the names of other parties who own operating rights in such fractional interests. Ordinarily, the issuance of a lease to one who, upon such issuance, would own less than a majority interest of the operating rights in any such tract, will not be regarded as in the public interest, and an offer leading to such result will be rejected.

In addition, item 2 of the Special Instructions on the reverse side of form 4-1196, which both offerors filed, states:

\* \* \* In instances where the United States does not own a 100-percent interest in the oil and gas deposits in any particular tract, the offeror should indicate the percentage of Government ownership. In such cases the offeror must also furnish the information required by 43 CFR 200.7 (d).

The facts of the case, which are undisputed, are that on October 21, 1955, the appellant filed his offer to lease the undivided 75 percent mineral interest owned by the United States in nine tracts of land located in Garrett County, Maryland. In an attachment to his application the appellant stated:

2. Land requested.

The lands desired are identified in accordance with a survey made by the United States prior to the acquisition of each such tract of land as shown on the official status map for the project, LU-Md.-38-2, Garrett County, Maryland, on file with the Forest Service, Department of Agriculture, Washington, D.C. These lands, which are part of the Savage River State Forest, and in which the United States has only reserved a 75% interest in the mineral deposits, total approximately 2491.25 acres, and are described as follows:

\* \* \* \* \*

5. (b) The United States no longer owns the surface of the land, but see answer to 2. for other details.

Subsequently, on August 15, 1958, a letter was received from the appellant which he requested be made a part of his original offer, stating—

To clarify the statements in the offer, the following information is furnished: The State of Maryland owns, by conveyance from the United States, the fee title to the surface and to 25% of the minerals. It has issued no lease for the oil and gas deposits in any of the tracts covered by the offer. It is understood that it will issue such a lease only to the holder of the lease issued by the United States for the same tracts.

This information is being supplied pursuant to 43 CFR 200.7(d), to show the offeror's interest in the operating rights to the mineral interest in the various tracts, other than that of the United States.

Meanwhile on May 15, 1958, the Cumberland and Allegheny Gas Company filed a lease offer, BLM-A 046863, for the three-quarter oil and gas interest owned by the United States in four of the tracts em-



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braced in the appellant's offer and in one other tract. Cumberland's offer stated that the surface and a one-quarter undivided interest had been conveyed to the State of Maryland by a deed dated December 24, 1954. It also filed as part of its offer, a letter dated May 6, 1958, from Cumberland to the Chief, Forest Service, United States Department of Agriculture, which, in part, read:

4. The surface and an undivided  $\frac{1}{4}$  interest in the oil and gas underlying the premises in the attached offer to lease agreement, to the best of my knowledge and belief, is presently owned by the State of Maryland for the use of the Department of Forests and Parks, subject to certain rights of the United States of America as reserved in a deed dated December 20, 1954, from the United States of America acting by and through the Assistant Secretary of Agriculture given to the aforesaid State of Maryland for the use of the Department of Forests and Parks.

The remaining  $\frac{3}{4}$  undivided interest in the minerals and mining rights reserved by the United States of America in the above deed insofar as they may affect the surface in connection with only mining, saving and removing of the same therefrom are administered by the Forest Service of the United States Department of Agriculture as part of the Garrett County Land Utilization Project.

On October 6, 1959, while Liss' appeal was pending before the Director, Cumberland filed a letter designated as a "Clarifying Statement" which read in part:

The offeror in BLM-A 046863 respectfully submits, subject to the conditions set out above, the following clarifying statement to supplement the original statements made in Item 2, Supplements 1 and 2, and for numbered paragraph 4 of the corporate statement attached to BLM-A 046863.

"The ownership of the operating rights to all the undivided one-fourth part of all the oil and gas owned by the State of Maryland underlying the acreage included in this Offer to Lease, is also vested in the State of Maryland, expressly subject, however, to any and all rights of every kind and nature that were and are later determined to have been reserved by the United States in that certain deed from the State of Maryland, referred to in the statement made in Item 2, on page 2 of Supplement 1 of this offer as originally filed.

"This clarifying statement above as to operating rights is made expressly subject to any later determination being made that the actual legal effect of all the language contained in the above deed, when read as a whole with the reservations and determinable fee created thereby, would be to vest any part or all of the above operating rights to the undivided one-fourth part of all the oil and gas minerals underlying the acreage described in such offer, in the United States."

In its decision the Eastern States Office pointed out that the regulations in effect at the time both offers were filed provided that a statement must be filed concerning the ownership of the operating rights to the fractional mineral interest not owned by the United States and that inasmuch as the appellant did not file the required statement until August 15, 1958, and the company had attached the required statement to its offer filed May 5, 1958, the company's offer had priority.

On appeal the Director held that Liss' original statement was defective because it did not state who held the present operating rights in the State's fractional interest, that Liss' statement of August 15, 1958, corrected the deficiency, but that Cumberland's offer was entitled to priority from May 15, 1958, its date of filing.

In his appeal to the Secretary, Liss contends Cumberland's offer as originally filed did not meet the requirements of the regulation, that if it did, his original offer also did, and that in any event, his offer, as clarified by the statement of August 15, 1958, is the first offer to satisfy the regulation.

In reply, Cumberland asserts that its original offer was proper, but that, if it is not so held, its statement of October 6, 1959, was the first statement to comply with the regulation.

The regulation, 43 CFR, 1954 ed., 200.7(d), which provides that an application for fractional interest "must" be on form 4-1196 and "must" be accompanied by a statement of ownership of the outstanding mineral interest in others, is clearly mandatory and the Department has so held. *Celia R. Kammerman et al.*, 66 I.D. 255 (1959); *Duncan Miller*, A-28168 (February 2, 1960). The Secretary is without authority to disregard the plain and unambiguous provisions of his own mandatory regulations where the rights of third parties have intervened. *McKay v. Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955); *Chapman v. Sheridan-Wyoming Coal Company*, 338 U.S. 621 (1950).

What does the regulation require? It demands only several simple direct statements from an offeror: that he does or does not own the entire operating rights to the fractional mineral interest not owned by the United States, and if he does not, the extent of his ownership in such operating rights and the names of other parties who own such operating rights. It does not ask for information as to ownership of the surface of the tract applied for or as to who the owner or lessee of the fractional mineral interest not owned by the United States may be. It does not ask for references to deeds or statutes or other documents in which some of the information may be set out; nor does it intimate that the offeror may submit statements as to the ownership of interests in the lands from which the Department may infer the information the regulation requires. It asks only for information concerning operating rights and the response should be direct and specific.

The issue then is to determine which of the offerors first complied with the pertinent regulation. Liss' original offer merely stated that the United States no longer owned the surface of the land, but had reserved a 75-percent interest in the mineral deposits. It did not state whether he owned any operating rights in the fractional interest

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not owned by the United States or give the names of other parties owning such operating rights. Therefore it did not comply with one of the mandatory requirements of the regulation and earned Liss no priority.

Cumberland's original offer, which is next in time, said that the surface and an undivided one-quarter interest in the oil and gas had been conveyed to and are presently owned by the State of Maryland. However, it made no direct assertion that Maryland still owned the operating rights. Since a mineral owner can divest himself of operating rights without conveying his mineral interest, this statement also failed to satisfy the regulation and did not earn the offeror priority.

The third attempt to submit the required information was Liss' "clarifying statement" in which he said that Maryland "owns \* \* \* the fee title to \* \* \* 25% of the minerals" and that "It has issued no lease for the oil and gas deposits in any of the tracts covered by the offer." Here again the offeror has not made a direct assertion that the operating rights are owned by the State of Maryland. Instead he leaves it to the Department to draw such an inference from the information he provided. It, however, fails for the same reason that Cumberland's offer fell short, that is, an owner of a fractional interest in oil and gas deposits underlying certain tracts of land may dispose of the operating rights through some device other than a lease.

There remains only Cumberland's final "clarification" in which it made the direct statement that the ownership of the operating rights to all of the undivided one-fourth part of all the oil and gas deposits owned by Maryland " \* \* \* is also vested in the State of Maryland \* \* \* ." This, of course, is a direct statement in terms of the regulation which meets the requirements of the regulation, and, all else being regular, earns the offeror priority as of October 6, 1959, the date on which it was filed. If a lease is to be issued, it must be issued to it. *R. S. Prows*, 66 I.D. 19, 22 (1959).

The appellant, however, also asserts that the company's offer is defective because it covers more than 2,560 acres.

At the time Cumberland filed its offer the Department's regulation, 43 CFR, 1954 rev., 200.8, provided in pertinent part:

(d) \* \* \* The offer must cover only lands entirely within a six-mile square, and must be for an area of not more than 2,560 acres, except where the rule of approximation applies.<sup>1</sup>

\* \* \* \* \*

<sup>1</sup> Paragraph (d) of the regulation was amended without material change by Circular 2017 (43 CFR, 1959 Supp., 200.8(d)).

(g) (1) Except as provided in subparagraph (2) of this paragraph an offer will be rejected and returned to the offeror and will afford the applicant no priority if:

\* \* \* \* \*

(ii) The total acreage exceeds 2,560 acres, except where the rule of approximation applies.

\* \* \* \* \*

(2) An offer to lease containing any of the following deficiencies will be approved by the signing officer provided all other requirements are met:

\* \* \* \* \*

(ii) An offer covering not more than 10 percent over the maximum allowable acreage of 2,560 acres. The lease will be approved for 2,560 acres in the discretion of the signing officer or so much over that amount as may be included under the rule of approximation.

The company's application, under Item 2 of the lease form headed "Land requested," stated that the "Total area" applied for was 2,785 $\frac{1}{4}$  acres. The supplemental information attached to the application listed 5 tracts of land and the acreage of each tract. The total acreage of the tracts so listed was 2,785 $\frac{1}{4}$  acres. At the conclusion of the statement relative to the ownership of the operating rights appeared the words "Total Area 2,088.94 acres (or  $\frac{3}{4}$  of 2,785 $\frac{1}{4}$  acres)." The amount of advance rental paid when the application was filed was \$1,044.47, which at 50 cents an acre is the required amount of advance rental for 2,088.94 acres. The appellant contends that the company's offer exceeded the maximum permissible acreage allowed in 200.8(d) by a total of 225 $\frac{1}{4}$  acres.

In answer to the appellant's charge, the Acting Director said in his decision:

Although the appellant contends that the Cumberland offer must be rejected because it describes more than 2,560 acres (43 CFR 200.8(g) (1) (ii)) and for that reason is not subject to approval under 43 CFR 200.8(g) (2) (ii), the fact remains that "where the United States owns only a fractional interest in the mineral resources of the lands involved, only that part of the total acreage involved in the lease which is proportionate to the ownership by the United States of the mineral resources therein shall be charged as acreage holdings." It follows that the offer, albeit describing approximately 2,785 $\frac{1}{4}$  acres, embraces a fractional interest area chargeable only as  $\frac{3}{4}$  thereof, a total acreage of but approximately 2,089 acres. This applied for acreage is properly described and included in the offer. \* \* \*

The language quoted above in the Acting Director's decision is taken from 43 CFR, 1954 rev., 200.6. In pertinent part this regulation provides that the amount of acquired lands acreage that may be held under lease, either directly or indirectly, by an individual as a member of an association or corporation "may not be in excess of the amount

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of public domain acreage for the same minerals permitted to be held under the mineral leasing laws.”<sup>2</sup>

Acreage limitations, which are found in section 27 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed. sec. 184), and as further amended (Public Law 86-705, 74 Stat. 785), were imposed to prevent monopolistic control over oil and gas deposits in the public lands. Solicitor's opinion, 59 I.D. 4, 6(1945). The restriction of the size of a lease to not more than 2,560 acres, however, has no existing statutory basis although its origin may be traced to section 13 of the Mineral Leasing Act, which as originally enacted (41 Stat. 441) authorized the Secretary to issue prospecting permits covering not more than 2,560 acres of public land. When the act of August 21, 1935 (49 Stat. 674, 676), amended section 17 of the Mineral Leasing Act to substitute noncompetitive leasing for permits as the method of developing lands not within the known geologic structure of a producing oil and gas field, it did not impose a limitation on the acreage to be included in one lease. The Secretary by regulation first set a limit of 640 acres (55 I.D. 339, 341 (1935)), which was soon enlarged to 2,560 acres (*id.* 502, 507 (1935)), where it has remained ever since (43 CFR, 1959 Supp., 192.42(d)). In addition to limiting the amount of acreage, the same regulation has always controlled the area over which the permitted acreage could be spread. At first the land applied for was required to be reasonably compact in form, but later the restriction was modified to require only that the lands be entirely within an area 6 miles square. The purpose of this regulation is to confine the physical extent of leases for purposes of administration.

Thus it does not follow that the fact that the method of computing the maximum permissible holdings in a State or the apportionment of rentals when the United States owns only a fractional interest in the leased land is equally applicable to the maximum acreage that may be included in one lease. In fact, the intent of the 2,560-acre limitation would seem to favor its application to all offers without regard to whether the United States owns the whole or only part of the interest in the oil and gas deposits in the land.

However, another provision of the regulation makes it unnecessary to decide that question now.

The company contends that even if its application was defective because it exceeded the maximum permissible acreage, this defect is

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<sup>2</sup> Section 3 of the act of August 7, 1947 (30 U.S.C., 1958 ed., sec. 352), which authorizes the leasing of mineral deposits in lands acquired by the United States, provides that such deposits may be leased by the Secretary of the Interior under the same conditions as contained in the leasing provisions of the mineral leasing laws.

excusable under the provisions of 43 CFR 200.8(g)(2)(ii) which, as we have seen, provides that in the case of an offer covering not more than 10 percent over the maximum allowable acreage of 2,560 acres, the offer will be approved for 2,560 acres or so much over that amount as may be included under the rule of approximation. It urges that since its offer is not in excess of 10 percent over the maximum allowable acreage the defect should be waived and its application given priority.

The appellant contends that in this situation 200.8(g)(2)(ii) is not applicable. His argument is based on paragraph 8 of the General Instructions on the lease form which states that :

The offer will be rejected and returned to the offeror and will afford the applicant no priority if: \* \* \* (b) the total acreage exceeds 2,560 acres \* \* \*. This does not apply where the total acreage is *in error* by not more than 10 percent. (Emphasis supplied.)

He contends that this is an interpretation of the regulation (which says nothing about error) that it is not enough to have an *excess* of not more than 10 percent, that there must also be an *error* of not more than 10 percent to obtain the benefits of 200.8(g)(2)(ii) and that the company made no *error* in "determining the acreage in this case."

The appellant cites no authority for his interpretation of 200.8(g)(a)(ii), nor am I able to discover any Departmental interpretation of this provision. However, it is my conclusion the use of the word "error" in the general instructions on the lease form does not require the conclusion reached by the appellant. "Error" can import any inaccuracy in a statement, not only one made inadvertently. It can be reasonably concluded that a mistaken belief that an applicant could apply for more than 2,560 acres and be charged with only 2,560 acres since the mineral interest of the United States amounted to 75 percent is an "error."

Thus, since the excess acreage applied for is not more than 10 percent over 2,560 acres the regulation waives this defect and a lease may be issued to the company for not to exceed 2,560 acres, except where an excess is permissible under the rule of approximation.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director, Bureau of Land Management, is affirmed.

THEODORE F. STEVENS, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

November 14, 1960

## M. FINELL ET AL.

A-28544

*Decided November 14, 1960*

A-28552

A-28555

**Oil and Gas Leases: Applications**

Land included in an outstanding oil and gas lease is not available for leasing to others and an application to lease such land must be rejected.

**Oil and Gas Leases: Assignments or Transfers**

Where at the time a partial assignment of the record title of an oil and gas lease was filed the regulations governing assignments did not require a statement by an assignee that he is the sole party in interest; similar to that required at the time of an offeror, the assignment is not to be refused recognition.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

M. Finell, Barbara Ann Harnish, Robert V. Sibert, Douglas Bryden, and Richard H. P. Padon have appealed to the Secretary of the Interior from decisions of the Director, Bureau of Land Management, dated May 20 and June 3, 1960, in each of which the Director affirmed the action taken by the Wyoming land office in rejecting their several offers, filed on April 1, 1959, to lease lands in Wyoming for oil and gas purposes pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226).

The six offers cover lands included in various leases, all of which were issued on April 1, 1949, and all of which, absent production or effective partial assignments, would have expired on March 31, 1959.

On February 24, 1959, partial assignments of the leases to Frank M. Carr were filed. Thereafter, on March 2, 1959, Carr submitted statements that he was the only party having an interest in the partial assignments. On the same date, the Wyoming land office returned the assignments unapproved. Attention was called to a recent amendment of 43 CFR 192.42(e) (3), effective February 12, 1959, requiring a statement from each offeror for an oil and gas lease that he is the sole party in interest in the offer, or, if the offeror is not the sole party in interest, a statement as to who the other interested parties are (43 CFR, 1959 Supp., 192.42(e) (3) (iii)).

The March 2, 1959, decision held that as the "required statements" were not filed until after the twelfth month of the tenth year of the leases had commenced the partial assignments were not effective to extend the leases for an additional two years. Carr appealed to the Director of the Bureau of Land Management, who, in a decision dated September 25, 1959, held that since the cited regulation does not specifically mention assignments and since a similar regulation making

the same requirement with respect to assignees was not adopted until later,<sup>1</sup> the partial assignments to Carr should be approved, if all else were regular. The partial assignments were thereafter approved, effective as of March 1, 1959. Thereafter, the offers filed on April 1, 1959, were rejected.

The appellants contend that 43 CFR, 1959 Supp., 192.42(e) (3) (iii) applied equally to offers and assignments from its effective date; that since Carr did not submit the statements as to his interest in the assigned acreage until March 2, 1959, the assignments were not completed in time to be effective to extend the leases; and that, therefore, the lands covered by their offers were not in outstanding leases on April 1, 1959. They contend further that compliance with the requirement of 43 CFR 192.42(e) (3) (iii) was mandatory on assignees after February 12, 1959, and that the Secretary of the Interior is without authority to waive the regulation, which, they argue, is incorporated by reference in the regulations relating to assignments (43 CFR, 1959 Supp., 192.140-192.142).

While it may be admitted that the Secretary may not disregard the plain and unambiguous provisions of his own regulations, I find nothing in the regulations in effect when these partial assignments were filed which required that an assignment affecting the record title of an oil and gas lease had to be accompanied by the statement called for by the amendment of 43 CFR 192.42(e) (3) effective February 12, 1959.

When the assignments in question were filed, sec. 192.140, paraphrasing the provisions of section 30(a) of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 187a), provided that assignments would take effect as of the first day of the lease month following the date of filing in the proper land office "of all the papers required by §§ 192.141 and 192.142."

Sec. 192.141 (which has not been amended) sets forth the requirements for filing transfers.

Subparagraph (a) (1) thereof provides:

Except as to assignments of record title, all instruments of transfer of a lease or of an interest therein, \* \* \* must be filed for approval within 90 days from the date of final execution and must contain all of the terms and conditions agreed upon by the parties thereto, together with a statement over the transferee's own signature with respect to citizenship and interests held, similar to that required of an offeror under § 192.42(e) (3), (4) and (f).

Subparagraph (a) (2) provides that to obtain approval of a transfer "affecting the record title" of an oil and gas lease, a request for such approval must be made within 90 days from the date of the execution of the assignment by the parties. It designates the form to be

<sup>1</sup> June 1, 1959, 24 F.R. 4630; 43 CFR, 1959 Supp., 192.140.



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used—"Assignment affecting Record Title to Oil and Gas Lease" (Form 4-1175)—and authorizes the use of unofficial copies thereof.

Subparagraph (a) (3) requires that an application for approval of any instrument of transfer of a lease or interest therein be accompanied by a fee of \$10.

Paragraph (b) requires evidence of the authority of an attorney in fact to execute an assignment or application for the approval of an assignment and, in addition, the statement required by sec. 192.42(e) (3).

The remaining paragraphs in sec. 192.141 pertain to matters not relevant to the question involved in these appeals.

Section 192.142 requires a separate instrument of assignment for each oil and gas lease when transfers involve record title. However, when transfers to the same party involving more than one oil and gas lease are filed at the same time, only one request for approval and one showing as to the qualifications of the assignee is required.

Thus it is evident that while an assignee is called upon, in certain instances, to make the same showing as that required of an offeror and while an assignment will not be approved if the assignee is not qualified to take and hold a lease, nothing in the regulations governing assignments affecting the record title of oil and gas leases refers the potential assignor or assignee to section 192.42(e) (3) except in those instances where attorneys in fact are employed.

To hold that the statement required of offerors after February 12, 1959, was required of assignees prior to the date on which the regulation relating to assignments was amended to include the same requirement would be to deprive, by implication, holders of outstanding oil and gas leases of the statutory right accorded to them to make partial assignments of their leases and thus gain a two-year extension of the retained portions of their leases. Nothing in the regulations governing assignments put potential assignors on notice that, to be complete, the statement required of offerors must be filed by the assignees.

It has been held repeatedly that where a party is to be deprived of a statutory preference right because of his failure to comply with the requirement of a regulation, that requirement should be spelled out so clearly that there is no basis for disregarding his noncompliance. *Donald C. Ingersoll*, 63 I.D. 397 (1956); *Madison Oils, Inc., T. F. Hodge*, 62 I.D. 478 (1955).

It has also been held that it is improper to reject an offer to lease acquired lands for oil and gas purposes because the offeror failed to accompany his offer with a statement<sup>2</sup> required by the public land

<sup>2</sup> The sole party in interest statement involved here (43 CFR, 1959 Supp., 192.42(e) (3) (iii)).

leasing regulations. *Bert Wheeler*, 67 I.D. 203 (1960); *Arthur J. Boeve*, A-28445 (October 13, 1960). The same reasoning which led to the decisions in those cases is applicable to the present appeals.

In the circumstances, it must be held that the Director was correct in his holding that the partial assignments filed on February 24, 1959, were effective to extend the leases and in affirming the subsequent action taken by the Wyoming land office in rejecting the appellants' offers because at the time the offers were filed the lands covered thereby were in outstanding oil and gas leases.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decisions of the Director of the Bureau of Land Management are affirmed.

THEODORE F. STEVENS, *The Solicitor*.

BY: EDMUND T. FRITZ,  
*Deputy Solicitor*.

#### APPEAL OF CHENEY-CHERF AND ASSOCIATES

IBCA-250

*Decided November 14, 1960*

Rules of Practice: Appeals: Dismissal—Contracts: Contracting Officer—  
Contracts: Notices

A motion by the Government for dismissal of an appeal on the grounds that the contractor failed to give timely written notices of protests as required by the contract, will be denied, where the appellant has raised issues of fact as to timeliness of such notices, and as to prior actual knowledge of the protested matters and partial action thereon by the contracting officer's representative.

#### BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the timely appeal of the contractor from the findings of fact and decision of the contracting officer dated June 2, 1960, denying the contractor's several claims totaling \$326,254.20, for additional compensation.

The contracting officer's decision denied the contractor-appellant's claims on three (3) procedural grounds, i.e., that it had not complied with the contract requirements, by (1) failure to make timely written protests concerning allegedly erroneous instructions by the Government, (2) failure to request written instructions as to certain additional work alleged to have been requested by the Government, and

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(3) failure to give timely written notice of alleged changed conditions.<sup>1</sup>

This motion is grounded on the same objections as those advanced by the contracting officer in his decision.

Contract No. 14-06-D-2684, carrying an estimated price of \$2,894,330.00, was entered into apparently in the Fall of 1957, after advertised bidding.<sup>2</sup> It was executed on Standard Form 23 (revised March 1953) and contained Standard Form 23A (March 1953) (with certain modifications to that form not material to this dispute), and some 167 paragraphs under the heading "Specifications" and subheadings "General Conditions" and "Special Conditions."

The scope of the work included the excavation of two (2) tunnels known as the Cascade Divide Tunnel and the Green Springs Tunnel, and the construction of wood and steel supports and concrete linings for the tunnels, which were respectively 0.4 and 0.92 of a mile in length. Each was to be 6 feet in finished inside diameter. These portions of the work were performed by a subcontractor, A. J. Cheff Construction Co. However, the term "contractor" will be used here for the sake of uniformity.

Omitting considerable detail, the contractor's claims, although intermingled and amended from time to time, may be summarized as follows:

1. That despite the contractor's attempts to use wood lagging and steel supports at more frequent intervals, because of loose earth conditions generally prevailing, the Government inspectors refused to permit the contractor to install such lagging for support purposes, or steel supports, except on a "skeleton" basis of maximum intervals, suitable only for conditions of hard or solid rock formations. That this caused considerable fall-out of loose material (sometimes damaging fresh concrete), which had to be excavated in both tunnels almost constantly; causing expensive delays and loss of construction time, as well as the expense of numerous repairs to the supports, shoring, etc.

2. That as a result of the excessive fall-out of loose material caused by the Government's orders for insufficient lagging and supports, the contractor was obliged to enlarge the perimeter of the tunnels beyond the "B" lines prescribed by the drawings, and was obliged to use addi-

<sup>1</sup> The contracting officer also discussed the merits of the claims, indicating that had the contractor made timely written protests, notices and requests, the claims would have been denied on their merits.

<sup>2</sup> The copy of the contract before the Board is not dated, nor is there found any reference to the contract date, either in the contracting officer's findings of fact and decision, or in the other appeal file documents. However, it appears that certain notices to prospective bidders were acknowledged by appellant on September 10, 1957, and that Notice to Proceed was received by the contractor on October 21, 1957. The contract work was completed and accepted, after extensions for excusable delay caused by strikes, on August 14, 1959, the required completion date.

tional quantities of concrete to fill these areas of enlargement of the tunnels. As a part of this claim, the contractor alleges that the Government inspectors required the contractor to remove lagging and to re-excavate material which had been used for back-fill by the contractor in the enlarged areas.

The contractor has alleged that it made numerous and frequent complaints to the contracting officer and his representatives on the job sites, concerning the faulty instructions of Government inspectors preventing sufficient use of lagging and excessive spacing of permanent steel supports. The record presently before the Board does not disclose that any written complaints or written protests were made, until its letter of July 28, 1958.<sup>3</sup> The contractor states that this protest was made “\* \* \* when the facts were known to him, beyond a doubt, and that he was sure that the Bureau of Reclamation representatives were wrong in its directives and the Contractor was suffering severe damages \* \* \*” (Appellant’s letter brief of July 26, 1950). Also, as to the Cascade tunnel, it is claimed by appellant that during an inspection trip and conference (date not stated),<sup>4</sup> the situations complained of were called to the personal attention of Mr. Callan (Construction Engineer), Mr. O’Connor (his assistant), and others from the Boise Field Office. On this occasion, it is asserted by appellant, Mr. Callan “pointedly told Mr. Johnson, in the presence of A. J. Cheff, that the tunnel was insufficiently lagged and that it should be properly lagged.” However, in spite of these alleged instructions, the appellant claims:

As a result of that conference and inspection trip, we did not see any change in the directives or inspections by the Bureau Inspectors and Engineers. (Appellant’s letter of December 14, 1959, Exhibit 8.)

The decision of the contracting officer, in so far as it is related to the motion before us, relies entirely upon the allegations that timely, written protests were not made, or that written requests for instructions as to additional work were not made, or that timely, written notices of changed conditions were not given. As to the last, the appellant may have had an erroneous conception of the contractual basis for his claims. In his letter of March 25, 1959, he refers to practically all of the claims concerning the Cascade tunnel as being filed in “con-

<sup>3</sup> This letter states in part: “Since the beginning of the construction of the Cascade and Green Springs Tunnels, we have made considerable complaints to the Bureau of Reclamation \* \* \*.” Otherwise the letter is devoted solely to the Cascade Tunnel (Exhibit 2). The contracting officer concludes that this letter does not constitute a protest as to the Green Springs Tunnel, the excavation of which was about 50% complete on July 28, 1958. Such a conclusion seems dubious, at best. See *Overly v. United States*, 87 Ct. Cl. 231, 239-40 (1938).

<sup>4</sup> Excavation of the Cascade Tunnel was completed April 18, 1958 (Contracting Officer’s Finding No. 8).

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formance with Article 9 of General Conditions of the specifications,<sup>5</sup> and under General Provisions of the contract, paragraph [sic] 6<sup>6</sup> and paragraph [sic] 4,"<sup>7</sup> incurred by "unknown physical conditions at the work site which was not determined by the contracting officer at the beginning of the work but which later caused the subcontractor to be burdened by these excessive costs."

It would appear that appellant had in mind, in describing "unknown conditions at the worksite which was not determined by the contracting officer at the beginning of the work," the alleged failure or refusal of the Government inspectors, or the representatives of the contracting officer, to recognize the conditions of loose and unstable ground as requiring additional lagging and more closely spaced supports. But mere impedance of the work, caused by the Government's action, is not a "changed condition."<sup>8</sup>

It appears to us that there have been presented questions of material fact concerning timeliness of notice, and possible actual knowledge on the part of the contracting officer,<sup>9</sup> as to at least a portion of the mat-

<sup>5</sup> "9. *Protests.* If the contractor considers any work demanded of him to be outside of the requirements of the contract, or considers any record or ruling of the contracting officer or of the inspectors to be unfair, he shall immediately upon such work being demanded or such record or ruling being made, ask, in writing, for written instructions or decision, whereupon he shall proceed without delay to perform the work or to conform to the record or ruling, and, within thirty (30) calendar days after date of receipt of the written instructions or decision (unless the contracting officer shall grant a further period of time prior to commencement of the work affected) he shall file a written protest with the contracting officer, stating clearly and in detail the basis of his protest. Except for such protests as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive. Instructions and/or decisions of the contracting officer contained in letters transmitting drawings to the contractor shall be considered as written instructions or decisions subject to protest as herein provided."

<sup>6</sup> This refers to the Disputes clause, which is not relevant to the foundations of the claims.

<sup>7</sup> "4. *CHANGED CONDITIONS.* The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 hereof."

<sup>8</sup> *Flora Construction Company*, 66 I.D. 315, 324, IBCA-101 (September 4, 1959).

<sup>9</sup> *Cf. Sanders*, BCA No. 955, 3 CCF 862, 866, 923 (1945): "In other words, even though the contractor is late in notifying the contracting officer of the error of which he complains it is not intended that the Government should take advantage of the 10-day limitation merely for the sake of applying the rule. Its true purpose is for protection against delays that are injurious to the Government interest. If not injurious then, of course, there is no object to applying the rule." *Algonquin-Missouri Chemical Corpora-*

ters complained of by the appellant. The Board is reluctant to dismiss an appeal upon motion, without a hearing, if any useful purpose may be served by permitting the submission of evidence by the appellant in support of his contentions that he has furnished timely notices and protests,<sup>10</sup> or that actual knowledge of the matters was had by the contracting officer.

The cases cited by Department Counsel, in his brief of October 25, 1960, involve appeals which were decided on the entire record, and not upon motion to dismiss. *McWaters and Bartlett*, IBCA-56 (October 31, 1960), was a decision after a hearing. *Korshoj Construction Co., Inc.*, 63 I.D. 129, IBCA-9 (May 2, 1956), was decided after a pre-hearing conference in which the appellant admitted that there was no timely written notice. In *R. V. Lloyd and Company*, IBCA-143 (February 12, 1958), the appellant did not deny or controvert the findings of the contracting officer, and the appeal was dismissed after consideration of the entire record. No hearing had been requested. Therefore, while these citations are persuasive as to the rules generally followed by the Board in cases which embrace all of the evidence, or after hearings, they are not controlling in the motion practice of the Board, to deprive an appellant of the right to a hearing.

#### *Conclusion*

Accordingly, it is ordered that the motion be denied. A hearing will be scheduled in due course.

THOMAS M. DURSTON, *Member*.

I concur:

I concur:

PAUL H. GANTT, *Chairman*.

JOHN J. HYNES, *Member*.

#### GENIA BEN EZRA ET AL.

A-28397

*Decided November 16, 1960*

A-28484

#### Oil and Gas Leases: Applications—Regulations: Publication

Oil and gas lease offers which do not comply with the mandatory requirements of the regulations must be rejected without priority, and an offeror's unfamiliarity with new requirements which are not referred to in the oil and gas lease offer form required to be used by applicants is no basis for allowing oil and gas lease offers which do not comply with a recently adopted regulation for filing an offer.

*tion*, ASBCA No. 2010 (1954), citing *Harvey Radio Laboratories, Inc. v. United States*, Ct. Cl. No. 49870, 126 Ct. Cl. 383, 391-2 (1953).

<sup>10</sup> *Monarch Lumber Company*, 67 I.D. 198, IBCA-217 (May 18, 1960). *Cf. Henkle and Company*, 66 I.D. 331, IBCA-212 (September 15, 1959): "The Board will jealously watch that substantive rights of the parties are not defeated by mere technicalities."

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### Oil and Gas Leases: Applications—Oil and Gas Leases: First Qualified Applicant

The regulatory provisions permitting approval of a lease offer which meets all other requirements for filing except that it is on a lease form not currently in use or on a form not correctly reproduced (providing it contains the statement that the offeror agrees to be bound by the terms and conditions of the lease form in effect at the date of filing) do not warrant allowance of offers which do not comply with a recently adopted requirement for filing, and where information as to whether an offeror is the sole party in interest is required by regulation an offer which does not include that information is defective, regardless of the form on which the offer is filed.

#### APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Genia and Leon Ben Ezra have appealed to the Secretary of the Interior from a decision of December 17, 1959, amended March 11, 1960, by the Director of the Bureau of Land Management, affirming the rejection by the Wyoming land office of their applications filed on June 1, 1959, for oil and gas leases on lands in Wyoming. Mrs. Faye N. Saunders has appealed to the Secretary from a decision of April 7, 1960, by the Director affirming the rejection by the Santa Fe, New Mexico, land office of Mrs. Saunders' application for an oil and gas lease on lands in New Mexico. Mrs. Saunders' application was filed on November 2, 1959. The appeals are being decided together as the outcome of each depends upon determination of the same issues.

The applications were rejected because the appellants did not submit with their offers information required by a departmental regulation, 43 CFR, 1959 Supp., 192.42(e) (3) (iii). The regulation, as amended on January 8, 1959 (24 F.R. 282), effective February 12, 1959, is as follows:

(e) Each offer, when first filed, shall be accompanied by:

\* \* \* \* \*

(3) \* \* \*

(iii) A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names and the nature and extent of the interest therein of the other interested parties, the nature of the agreement between them, if oral, and a copy of such agreement, if written. Such statement must be signed by all of the interested parties including the offeror, and all interested parties must furnish evidence of their qualifications to hold such lease interests. Such statement must be filed not later than 15 days after the filing of the lease offer.

By regulation (43 CFR 192.42 (a) and (b)) lease offers are required to be filed on Form 4-1158 or valid reproductions thereof. Each of the applications involved in this appeal was filed on Form No. 4-1158, Sixth Edition (April 1957). No question or statement relating to

the sole party in interest requirement (192.42(e) (3) (iii)) is contained on that form.<sup>1</sup>

On appeal Mrs. Saunders states that she is the sole party in interest in her offer and lease, if issued; that the statement did not accompany the offer for the reason that she did not know of the requirement until after she received the manager's decision at which time it was too late to comply with it. The Ben Ezras also contend that they filed the forms given them by the Bureau of Land Management employees, on which forms no reference was made to a new requirement, and that the use of the form was mandatory.

An offeror's unfamiliarity with the requirements for filing an offer is not a valid reason for waiving the requirements. The appellants had legal notice of the requirement relating to the sole party in interest statement as it was published in the Federal Register, and the new requirement is binding on all who come within its terms without regard to their innocent ignorance or misinformation given by Government employees. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). Moreover, the Department must reject without priority lease offers which do not comply with the mandatory provisions of the regulations (*McKay v. Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955)). Accordingly, the assertion of unfamiliarity with the new requirement is not a proper basis for allowing the offers here involved.

The Ben Ezras also contend that the failure to file a sole party in interest statement is not a fatal defect and that the regulation contains no language which makes it mandatory that an offer be dismissed if it is deficient in that respect.

However, it has recently been held that an offeror who does not comply with a mandatory requirement of a regulation is not a qualified applicant until the defect is cured, whether or not the particular regulation spells out the consequences of noncompliance. *Celia R. Kammerman*, 66 I.D. 255, 263 (1959).

The Ben Ezras also suggest that since the use of Form 4-1158 was mandatory, all the requirements for filing a proper offer must be contained in it. This suggestion is not well founded. There is nothing in the use of a form which prevents the Department from requiring additional statements from an applicant. Here the applicants were given ample notice of the new requirement by the publication of the amended regulation in the Federal Register. *Federal Crop Insurance v. Merrill (supra)*.

<sup>1</sup> A seventh edition of Form 4-1158 dated June 1959 contains a new item 6 as follows: "Offeror  is  is not the sole party in interest in this offer and lease, if issued. (If not the sole party in interest, a statement should be filed as prescribed in 43 CFR 192.42(e)(3)(iii).)"



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Finally, the Ben Ezras call attention to the regulation which provides:

(2) An offer to lease containing any of the following deficiencies will be approved by the signing officer provided all other requirements are met:

\* \* \* \* \*

(iv) An offer on a lease form not currently in use.

(v) An offer on a form not correctly reproduced provided it contains the statement that the offeror agrees to be bound by the terms and conditions of the lease form in effect at the date of filing. 43 CFR 192.42(g).

They also refer to item numbered 7 on the form they filed which reads:

If this lease form does not contain all the terms and conditions of the lease form in effect at the date of filing, the offeror further agrees to be bound by the terms and conditions contained in that form.

They argue that the regulations cited and item 7 require the Department to accept their offers.

At the time the Ben Ezras filed their offers, the form they used was the form in current use, the seventh edition of Form 4-1158 not having been issued until later. Thus, subparagraph (iv) is of no help.

Since the form they used was not incorrectly reproduced, but was an official lease form, subparagraph (v) is not pertinent either. Item 7 cannot aid them because an agreement to be bound by other terms and conditions is not a substitute for a statement that must be furnished with an offer.

Thus, the Bureau's interpretation of the sole party in interest requirement as mandatory is consistent with the language of the regulation and is in conformity with departmental decisions involving comparable requirements. (See *Celia R. Kammerman et al. (supra)*; *Clifford Thorp Woodward*, A-25905 (Supp.) (June 15, 1951). For the reasons discussed herein, the appellants' argument that the rejection of their offers is not mandatory cannot be sustained. Since the offers do not satisfy the mandatory provisions of the regulations, they must be rejected without priority (*McKay v. Wahlenmaier, supra*). There was no error in the rejection of these offers.<sup>2</sup>

<sup>2</sup> Mrs. Saunders' offer was also subject to rejection for another reason. The State Supervisor states that the land embraced in Mrs. Saunders' offer was covered by lease LC 069289 issued to Caldwell J. Saunders on November 1, 1951, that this lease terminated by operation of law for failure to pay rental due on November 1, 1959 (30 U.S.C., 1958 ed., sec. 188), and that the land has not been listed on the tract book as available for new leasing. Until the termination of the lease is noted on the tract book, the land included in that lease is not available for leasing. In such circumstances, an offer filed for lands included in the terminated lease must be rejected. *W. V. Moore*, 64 I.D. 419 (1957); 43 CFR, 1958 Supp., 192.161(a), amended without material change by circular 2032, 43 CFR, 1959 Supp., 192.161(a).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2,2A(4)(a), Departmental Manual; 24 F.R. 1348), the decisions of the Director, Bureau of Land Management, are affirmed.

THEODORE F. STEVENS, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

### KIRBY PETROLEUM COMPANY ET AL.

A-28414

*Decided Nov. 17, 1960*

#### Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions—Oil and Gas Leases: Termination

An assignment of less than the whole interest in a portion of the acreage included in an oil and gas lease at one time is not a partial assignment of the lease within the meaning of section 30(a) of the Mineral Leasing Act and does not segregate the lease into separate leases.

#### Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions—Oil and Gas Leases: Termination

Where the holder of an undivided interest in an oil and gas lease which is in its extended term by reason of production assigns his interest as to a portion of the leased land, the lease is not segregated into separate leases with the consequence that the lease as to the assigned portion is deemed terminated because it does not include a producing well.

#### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Kirby Petroleum Company and Rorick and Malcolm Cravens have appealed to the Secretary of the Interior from a decision of the Acting Director, Bureau of Land Management, dated December 31, 1959, which affirmed a decision of the Cheyenne, Wyoming, land office dated April 21, 1959, holding that oil and gas lease Wyoming 05038(A) terminated on March 30, 1959.

Oil and gas lease Wyoming 05038, covering 1,840 acres of land in secs. 22, 23, 24, 25, and 26, T. 55 N., R. 97 W., 6th P. M., Wyoming, was issued to Stanolind Oil and Gas Company as of April 1, 1951, for a period of 5 years and so long thereafter as oil or gas is produced in paying quantities. A discovery of oil was made on the lease on April 14, 1953, with the completion of a productive well on the SE $\frac{1}{4}$ NE $\frac{1}{4}$  sec. 22. On July 20, 1953, an assignment of the lease from Stanolind to George J. Greer was filed. Thereafter, on May 9, 1955, Greer assigned an undivided 25 percent interest in the lease to B. F. Allison and an undivided 37 $\frac{1}{2}$  percent interest in the lease to Delhi-Taylor

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Oil Corporation, retaining a 37½ percent interest. After the approval of these assignments, the lease was held by three parties, each of whom owned an undivided interest in all of the acreage embraced within the lease. Thereafter, while the lease was in its extended term by virtue of production, by assignment effective April 1, 1957, Greer assigned his 37½ percent interest in the lease to Kirby Vensyn Petroleum Company. Thereafter that company's name was changed to Kirby Petroleum Company. Thus Wyoming 05038, a producing lease, was held in the following undivided interests:

Kirby Petroleum Company-----	37½%
B. F. Allison-----	25%
Delhi-Taylor Oil Corporation-----	37½%

On September 16, 1958, an assignment by Delhi-Taylor Oil Corporation and B. F. Allison of all of the assignors' interests (62½%) in a portion of the lands embraced in the lease in favor of Rorick Cravens and Malcolm Cravens was filed. That assignment was approved effective February 1, 1959, after the parties, on January 30, 1959, filed the required bond. The decision of February 25, 1959, approving the assignment, stated that the 880 acres covered by the assignment of the assignors' undivided 62½-percent interest would be carried under serial Wyoming 05038(A) and that there remained under the original lease (Wyoming 05038) 960 acres. Included in the land said to remain in the original lease was the SE¼NE¼ sec. 22, on which the producing well is located.

By decision dated April 21, 1959, the land office held that oil and gas lease Wyoming 05038(A) had terminated on March 30, 1959, because the assignment which created Wyoming 05038(A) was of an undivided interest and because, to be entitled to an extension of a lease, there must be an assignment of the entire record title interest in the land assigned.<sup>1</sup> That decision was affirmed by the Acting Director on the ground that the 2-year extension provision of section 30(a) of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 187a), applied only to assignments of complete, or 100%, record title interests in definitely described portions of the leased lands.

While I agree with the Acting Director that where less than the whole interest in a portion of the acreage covered by an existing oil and gas lease is assigned at one time the lease is not entitled to any extension under section 30(a) of the Mineral Leasing Act, I do not agree that such an assignment results in the segregation of a lease or

<sup>1</sup> It is not apparent why the land office selected March 30, 1959, as the date of termination, but it is unnecessary to inquire into this point.

*Natural Gas Act 54 Stat. 17*

the termination of any portion thereof. Such is the effect of the Acting Director's decision.

Section 30(a) authorizes the assignment of oil and gas leases "as to all or part of the acreage included therein" and "as to either a divided or undivided interest therein." It deals with partial assignments in the following language:

Any partial assignment of any lease shall segregate the assigned and retained portions thereof, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned lands; and such segregated leases shall continue in full force and effect for the primary term of the original lease, but for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease. Assignments under this section may also be made of parts of leases which are in their extended term because of any provision of this Act. The segregated leases of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities.<sup>2</sup>

Thus the statute sets forth the results which will flow from any partial assignment "of any lease," including the segregation of the "assigned and retained portions thereof" (the lease). It speaks of the "assigned lands," permits assignments of "parts of leases," and provides for the continuation of the "segregated leases of any undeveloped lands." Nothing in this language suggests that the assignment of less than the whole interest in a portion of the acreage embraced in a lease shall be considered as a partial assignment of a lease or shall result in the segregation of a lease into two separate leases. The only reasonable construction of the above-quoted language is that only where the entire interest in a portion of a lease is assigned at one time shall there be a segregation and a continuation of both portions of the original lease.

This being so, it follows that where less than the entire interest in a portion of a lease is assigned at one time there is no segregation of the lease into two separate leases and no occasion to consider whether either portion thereof is entitled to extension.

Accordingly it must be held that the land office should not have segregated the land embraced in Wyoming 05038 into two separate leases or held that part of the lease, which it designated as Wyoming 05038(A), terminated on March 30, 1959. The entire lease should have been regarded as a lease extended by production despite the assignment made to the Cravens.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental

<sup>2</sup> The last sentence was recently amended on September 2, 1960, by section 6 of the Mineral Leasing Act Revision of 1960 (Public Law 86-705), but the amendment has no effect upon this case.

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Manual; 24 F.R. 1348), the decision of the Acting Director is reversed and the case is remanded to the Bureau of Land Management for appropriate action consistent with this decision.

THEODORE F. STEVENS, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

SAMUEL A. WANNER

A-28435

*Decided November 21, 1960*

**Homesteads (Ordinary): Applications—Homesteads (Ordinary) Amendment—Applications and Entries: Amendments**

When a valid application for a homestead entry is filed and an amended application is later filed for the same and additional land, which amended application is invalid because it contains excess acreage, the applicant loses his priority over an intervening applicant as to land included in his original application and in the intervening application.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Samuel A. Wanner has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated February 23, 1960, affirming a decision of the land office at Anchorage, Alaska, rejecting his additional homestead application, Anchorage 048921, because the land is included in another homestead entry.

The record shows that Wanner held a previous homestead entry, Anchorage 025646, including lots 1 and 2, sec. 30, T. 25 N., R. 4 W., and lots 1 and 2, sec. 25, T. 25 N., R. 5 W., Seward Meridian, in Alaska, for which he submitted final proof on November 5, 1958, after relinquishing lot 2 in section 30 on October 7, 1958, and lot 2 in section 25 on the same day he filed his final proof, in an attempt to reduce the acreage of the entry so that the cultivated area would comply with the minimum requirement of the homestead law.

Thereafter, on November 26, 1958, John A. Horning filed his application for homestead entry, Anchorage 046688, on the two relinquished lots, comprising 90.47 acres. On May 22, 1959, Horning filed an amended application describing the same land and adding lot 3 in the same section 30 and lot 3 in the same section 25, the two new lots comprising 89.96 acres. On June 30, 1959, the land office informed him that since a homestead is limited to 160 acres his application covering 180.43 acres could not be allowed but that it would be sus-

pending to permit him to amend it to more nearly approximate 160 acres. On July 23, 1959, Horning relinquished lot 3 in section 30 and filed another amended application covering lots 2, 3 and 4 in sec. 25, T. N., R. 5 W., and lot 2 in sec. 30, T. 25 N., R. 4 W., Seward Meridian, containing 167.96 acres. On August 30, 1959, this application was allowed.

Meanwhile, on May 19, 1959, Wanner filed his application, Anchorage 048921, for additional homestead covering the two lots that he had relinquished and that Horning had applied for. His application was rejected on September 16, 1959, on the ground that the land described therein was included in the Horning entry.

Wanner contends on appeal that his application was the first valid homestead application for the land described therein that was filed after his relinquishment. He reasons that Horning applied for land in excess of the 160 acres permitted by the homestead law and that the two amendments required to remove the defect in Horning's application were filed after his application.

To the extent that Wanner implies that Horning's original application filed on November 26, 1958, was defective, he is in error. Horning's original application did not include the maximum acreage that may be acquired under the homestead law but its limited coverage was not a factor that impaired its validity or created any necessity for rejection. The homestead law expressly permits applications for a quarter section or a lesser quantity of public land (43 U.S.C., 1958 ed., sec. 161). Because Horning's was the first application filed after the land to which it applied became available for homesteading following Wanner's relinquishment, it was entitled to priority over any homestead applications for the same land that might be filed later. Thus Wanner's application filed on May 19, 1959, was not entitled to consideration until Horning's prior application had been disposed of.

Had the situation remained in this posture, there would be no problem. But the situation was changed when on May 22, 1959, after Wanner's application had been filed, Horning filed an amended application which included not only the original two lots but an additional two lots, the four lots comprising a total of 180.43 acres. Clearly the amended application was a defective application as it included 20.43 acres more than the 160 acres permitted to be included in a homestead entry and the excess could not be allowed under the rule of approximation.<sup>1</sup> The question presented then is whether Horning's original application, which was valid when filed and had

<sup>1</sup> This rule provides that if the excess above 160 acres is less than the deficiency would be should a subdivision be excluded from the entry, the excess may be included, and the contrary if the excess is greater than the deficiency. See *Natalie Z. Shell*, 62 I.D. 417, 421 (1955).

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priority over Wanner's subsequent application, lost its priority because it was converted by the amendment into an invalid application. Or, to phrase the question differently, is Horning's amended application to be considered defective only as to the lots added and not as to the two lots included in the original valid application?

I think the answer must be that Horning lost all rights under his original application when he filed an invalid amended application including some of the same land. In effect, the situation is the same as though Horning had withdrawn his original application and filed a new one including additional land. To conclude otherwise would be to say, in effect, that Horning could maintain two applications at one time, the original one and the amended one, and that the invalidity of the amended application would have no effect upon the original application. This would be, to say the least, a novel doctrine. In my opinion, the only tenable view of the amended application is that it swallowed up the original application, leaving only one application on file.

The question then is whether the amended application can be separated as to the original two lots applied for and the additional two lots and held valid as to the former and invalid only as to the latter. I think not. The vice of the amended application lies in the totality of the acreage applied for. It cannot be restricted to any one or two or more of the individual lots applied for. In other words, the result must be the same as if the Horning applications had been filed in reverse order, i.e., an original application for the four lots and then an amended application for the two lots. In that situation it could not be said that the original application was valid from its time of filing for the two lots later included in the amended application and invalid only as to the two lots later excluded from the amended application. In other words, in the situation just posed and in the actual situation presented in this case, the application for the four lots cannot be separated into valid and invalid parts. The whole application fails because the whole acreage is excessive.

This conclusion is not unfair to Horning. He was not required to file the amended application seeking more acreage; he did so of his volition. That being the case, he must suffer the consequence of any error that he made in filing the amended application. There seems to be no excuse for the error that he made. He specified in his amended application the exact acreage of each of the four lots. He did not put down the total acreage but simple addition would have shown that the total acreage was 180.43 acres. To hold his amended application to be invalid is therefore to visit upon him only the consequences of his own mistake.

This conclusion, of course, does not extend beyond the land in conflict between Horning and Wanner. On July 23, 1959, Horning filed a second amended application covering the two lots in conflict and two other lots, the total comprising an acceptable 167.96 acres under the rule of approximation. Horning's second amended application, therefore, was properly allowed as to the two lots not in conflict with Wanner's application. His entry must be cancelled only as to the two lots in conflict in the event Wanner's application is allowed for those two lots.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is reversed and these cases are remanded for suspension of Horning's entry as to the land in conflict to permit consideration of Wanner's application and to cancel Horning's entry as to such land in the event Wanner's application is allowed.

THEODORE F. STEVENS, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

HERBERT H. HILSCHER

A-28396

*Decided November 29, 1960*

**Soldiers' Additional Homesteads: Generally—Alaska: Indian and Native Affairs—Indian Allotments on Public Domain: Generally**

There is no requirement that an application for soldiers' additional homestead entry be rejected on the ground that an Alaskan Indian claimed the land under an allotment application which was filed after the soldiers' additional application was filed where it appears that when the soldiers' additional application was filed, the land was not occupied either by the allotment applicant or by other Alaskan Indians, Aleuts, or Eskimos; and a decision improperly rejecting a soldiers' additional application in such circumstances will be set aside.

**Words and Phrases**

*Occupied.* The word "occupied," as used in the Alaskan Allotment Act granting a preference right of allotment of lands occupied in good faith by Alaskan Indians, Aleuts, or Eskimos, and also as used in the regulation (43 CFR, 1954 ed., 67.11) precluding entry on lands occupied in good faith by Alaskan Indians, Aleuts, or Eskimos, means actual possession and use of land in something more than a slight and sporadic manner.



*November 29, 1960***APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Herbert H. Hilscher has appealed to the Secretary of the Interior from a decision of January 28, 1960, by the Acting Director of the Bureau of Land Management which affirmed a decision by the manager of the Anchorage land office holding Hilscher's application for soldiers' additional homestead entry for rejection (sec. 2306 Revised Statutes; 43 U.S.C., 1958 ed., sec. 274). Hilscher's application was filed on June 1, 1954, for approximately 2 acres of unsurveyed land on the southwest shore of Eyak Lake about 1 mile from Cordova, Alaska. The land has since been surveyed under plat of survey filed September 4, 1958, and is identified as U. S. Survey No. 3521, containing 1.25 acres.

On May 24, 1956, almost 2 years after the appellant's application was filed, Mrs. Maria M. Smith, an Eyak Indian, filed an application to have the land for which Hilscher applied allotted to her under the act of May 17, 1906 (48 U.S.C., 1958 ed., sec. 357). In part here material, the act of May 17, 1906, authorizes the Secretary, in his discretion, to allot not more than 160 acres of unappropriated public land in Alaska to any Indian, Aleut, or Eskimo of full or mixed blood who resides in and is a native of Alaska, and who is the head of a family or 21 years of age. The act provides that the land so allotted shall be deemed the homestead of the allottee and his heirs, and any person qualified for an allotment under the act has a preference right to secure by allotment nonmineral land occupied by him not exceeding 160 acres.

The material submitted in support of Mrs. Smith's application asserts that she lived with her parents on the land covered by Hilscher's application between 1918 and 1938, about which time her parents moved from the land, but Mrs. Smith continued living there with her sister until perhaps 1944 or 1945; that her parents kept a small boat on the tract until about 1948; that she [Mrs. Smith] kept a small boat on the land from 1948 and thereafter and also kept a boatways on the tract between 1957 and 1959. The manager's decision held, in effect, that when Hilscher's application was filed, the tract was "occupied" by Indians or Eskimos and so not subject to entry or appropriation by others. The decision relied on the departmental regulation (43 CFR, 1954 ed., 67.11) which provides that lands occupied in good faith by Indians and Eskimos are not subject to entry or appropriation by others.<sup>1</sup>

<sup>1</sup> The regulation was amended on December 2, 1958, to include Aleuts (43 CFR, 1959 Supp., 67.11).

See section 8 of the act of May 17, 1884 (23 Stat. 24) which provided that Indians or other persons in Alaska should not be disturbed in the possession of lands actually

Thereafter, on July 25, 1957, Hilscher filed an affidavit stating that at the time of filing his application and a number of times afterwards, he carefully examined the land and at no time found any traces of present or recent human habitation on any portion of it and no evidence of occupancy or use; that there were some old ruins of what was perhaps a smokehouse located on adjacent land beyond the boundary of the property line of the land for which he applied; that the property was fully overgrown and must have remained untouched for at least 10 years; that he was advised that no one lived on the land for at least 15 years; that after questioning many residents of Cordova, none could recall any Indian occupancy of the area within the past 10 to 15 years; that there is no evidence of possible boatways or moorage except on land 30 feet north of the surveyed property line of the tract.

Information in the record on this appeal indicates that before 1910 an Eyak Indian village was situated at the western end of Eyak Lake, approximately 1,000 yards west of the land here involved. This was a "part-time" village, used by the Eyaks for trading, fishing, and similar activities, but generally not for permanent homes. During the years 1906-10, the Copper River and Northwestern Railway was built and the railroad wanted the level lands occupied by the Eyaks before 1910. The railroad moved the Indians to the land here applied for and constructed a roundhouse, shops, and office buildings on the lands vacated by the Indians. In all, five Indian families resided on this tract for a number of years thereafter, and when an adjoining tract was surveyed in 1922, a notation on the survey plat showed that six buildings, designated "native habitations" were situated on this tract. One of the families then residing on this tract, and the last to vacate it, was that of Skar Stevens, an Eyak Indian chief and father of Mrs. Smith, the allotment applicant in this case. Skar Stevens lived with his family on the tract from sometime between 1906-10 until sometime between 1938 and 1944 when he moved elsewhere permanently. He was said to have occasionally returned to the tract for fishing and may have kept a boat on the tract. Since about 1950 a small part of the beach area bordering the tract allegedly has been used by Mrs. Smith for landing and storing a boat and in recent years persons living in or near Cordova have used the beach along the tract to some extent as a community beach. However, it appears that when the appellant's application was filed no one had lived on the tract for approximately 10 years, the only evidence of former occupancy being fallen timber

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in their use or occupation or then claimed by them but that the terms under which such persons might acquire title to such lands is reserved for future legislation, and section 14 of the act of March 3, 1891, 26 Stat. 1100, which reserves or excludes from purchase and entry all lands to which the natives of Alaska have prior rights by virtue of actual occupation.

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crossbars and pieces of roofing from cabins, rusty tins, and similar debris in several places on the ground overgrown with brush.

In affirming the rejection of Hilscher's application, the Acting Director did not rely primarily on the conclusion that the tract was occupied but referred to another regulation, 43 CFR, 1954 ed., 61.7, which is applicable to soldiers' additional applications and provides in pertinent part that:

An application on the prescribed form must be accompanied by a duly corroborated statement showing:

(a) That no portion of the land is occupied or reserved for any purpose by the United States or occupied or claimed by natives of Alaska; that the land is unoccupied, unimproved, and unappropriated by any person claiming the same other than the applicant.

\* \* \* \* \*

The appellant's application included corroborated statements that the land applied for is not occupied and improved by any Indian and that the land is unoccupied, unimproved, and unappropriated by any person claiming the same other than the applicant.

However, the Acting Director held that Hilscher's application must be rejected because Mrs. Smith "claimed" the land within the meaning of the above quoted regulation (43 CFR, 1954 ed., 61.7(a)). Contrary to this ruling in the Acting Director's decision, there is nothing in 61.7(a) or any other departmental regulation which requires the rejection of a soldier's additional homestead application if the land applied for should be "claimed" by a native Alaskan. The regulation requires only that an applicant state whether land is so claimed and does not require the rejection of an application if such a claim is asserted, particularly where, as here, the application for allotment was not filed until 2 years after the filing of the soldiers' additional application.<sup>2</sup> Accordingly, to the extent that the Acting Director rejected Hilscher's application on the ground that a native Alaskan claimed the land, the decision was incorrect.

<sup>2</sup> Without purporting to define the meaning of the word "claimed" in 43 CFR, 1954, ed., 61.7(a), there is reason to suppose that the word may have reference only to claims which existed on the date of the statutes granting to natives of Alaska a right to hold lands claimed by them. For example, the following provision for a special affidavit, required for many years of applicants for Alaskan land, suggests such a limitation (45 L.D. 227, 263 (1916)):

"The register and receiver will require each person applying to enter or in any manner acquire title to any of the lands in Alaska, under any law of the United States, to file a corroborated affidavit to the effect that none of the lands covered by his application are embraced in any pending application for an allotment under the act of May 17, 1906 (34 Stat. 197), or in any pending allotment; that no part of said land was at the date of the location of the land claimed under the mining law occupied or claimed by any Indian, whose occupancy or claim existed on the date of the acts granting to natives of Alaska the right to hold land used, occupied, or claimed by them (acts of Congress of May 17, 1884, 23 Stat., 24, and June 6, 1900, 31 Stat., 330), and had been continued down to

At this point, one matter should be mentioned which is important in deciding whether the appellant's application was properly rejected on the basis of Mrs. Smith's filing an allotment application but which was not discussed in the Acting Director's decision. This is the question whether Mrs. Smith, a married woman who, according to the record, is not the head of a family, is a proper applicant for an Alaskan allotment. The act of May 17, 1906, provides that land allotted thereunder shall be deemed the homestead of the allottee and departmental decisions and rules regarding allotment rights are very similar to those governing settlement and homestead rights (see Associate Solicitor's opinion M-36352 of June 27, 1956, holding that the allotment right of an Alaskan Indian, Aleut, or Eskimo under the act of May 17, 1906, is limited to a single entry and may not include contiguous tracts of public land; *Lacey v. Grondorf et al.*, 38 L.D. 553 (1910), *Frank St. Clair*, 52 L.D. 597 (1929), as modified by *Frank St. Clair (On Petition)*, 53 L.D. 194 (1930)). When Mrs. Smith's application was filed, a departmental regulation (43 CFR, 1954 ed., 67.5) required that if the applicant were a married woman, she must submit a statement of the facts constituting her head of the family. This requirement has been substantially the same since regulations under the act of May 17, 1906, were first issued (35 L.D. 437, 438 (1907)), and for many years the provision also contained the statement that only in exceptional cases was a married woman entitled to an allotment under this act (see Instructions, 48 L.D. 70, 71 (1921); cf. 43 CFR 166.5 setting forth the conditions under which a married woman may make homestead entry). 43 CFR, Part 67, governing allotments in Alaska to Indians, Aleuts, and Eskimos, was revised on December 2, 1958 (43 CFR, 1959 Supp., Part 67). As so revised, the regulations provide for the use of a form of application and therefore do not specify in detail the information to be included in an application. It is thus not clear whether Mrs. Smith, who is a married woman and not the head of a family, is a qualified allotment applicant.

However, if Mrs. Smith is a qualified allotment applicant, her application is entitled to preference ahead of the appellant's application only if it is determined that when the appellant's application was filed in 1954, Mrs. Smith was occupying the tract within the mean-

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and including date of location; that such land is in the *bona fide* legal possession of the applicant; and that no part of such land is in the *bona fide* legal possession of or is occupied by any Indian or native."

After 1923, the affidavit remained unchanged but it was not required of Alaskan homestead applicants as the rights of Indians were protected by the statement in the regular homestead affidavit that the lands are not occupied or improved by any Indian (50 L.D. 48-54 (1923)).

See also *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 291-294 (1955); *Naval Reservation*, 25 L.D. 212 (1897).

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ing of the provision in the Alaskan Allotment Act which grants to qualified applicants a preference right to the allotment of land "occupied" by such applicants. If Mrs. Smith is not a qualified preference applicant, the appellant's application is required to be rejected only if the tract was "occupied" within the meaning of 43 CFR, 1954 ed., 67.11 (see footnote 1).<sup>3</sup>

The Acting Director's decision did not hold that the tract was "occupied" under either of these provisions, but in support of the rejection of the appellant's application the Acting Director referred to the fact that the tract was formerly occupied by Mrs. Smith's parents and to some extent by Mrs. Smith. However, former occupancy of land is not the present occupancy which must be found to warrant a decision that land is "occupied" within the statutory and regulatory provisions here relevant, as privileges or rights arising from occupancy terminate when occupancy ceases. Thus, the Department recognizes that occupancy of land may be abandoned (43 CFR, 1959 Supp., 67.6; see paragraph 2, Instructions under the act of May 17, 1906, 50 L.D. 49 (1923)), and has held that actual occupancy and use are necessary to satisfy the requirement that land be occupied under the preference right provision of the Alaskan Allotment Act (see *Frank St. Clair (On Petition) supra*). In the instant case, the preference right for an allotment resulting from occupancy on a portion of this tract by Mrs. Smith's family was presumably extinguished when, sometime between 1938 and 1944, the family left the tract with the intention of permanently residing elsewhere.<sup>4</sup> Consequently, any implication in the Acting Director's decision that residence on the land by Mrs. Smith and her parents many years before the appellant's application was filed amounted to occupancy of the land by Mrs. Smith in 1954 is not sustained.

<sup>3</sup> Under 67.11, the appellant's application must be rejected if the tract was occupied in good faith by any Alaskan Indian, Aleut, or Eskimo.

<sup>4</sup> In this connection it is noted that the word "occupied" as used in the preference provision of the allotment statute is equated with residence under the pertinent regulation in effect when Mrs. Smith's application was filed (43 CFR, 1954 ed., 67.5). Another regulation, 43 CFR, 1954 ed., 67.10, provided that an allotment application will not be approved until after submission of satisfactory proof of 5 years' use and occupancy of the land, and in addition to residence, lists cultivation, placing improvements on, and use of the land for fishing or trapping as evidence of use and occupancy of the land. Substantially the same provisions are contained in the regulations as amended December 2, 1958 (43 CFR, 1959 Supp., 67.7).

It seems doubtful that the period of time during which Mrs. Smith lived on this tract as a minor or as a dependent of her father could be properly regarded as residence thereon by Mrs. Smith. As long as her father was the head of the family, he was the person who would have been the qualified allotment applicant in the household for the land which the family was occupying as a family unit (see *Vivian Anderson Pace Feemster*, 41 L.D. 509 (1912)). Sometime before filing her allotment application Mrs. Smith was married at which time she presumably took the residence of her husband.

There is no reason for concluding that the meaning of the word "occupied" in 43 CFR, 1954, 67.11 differs materially from its meaning in the Alaskan Allotment Act. Moreover, the courts have held that rights arising from a claim based on occupancy are confined to the limits of actual occupancy, and that possession alone, without title or color of title, confers no right beyond the limits of actual possession (*Cramer v. United States*, 261 U.S. 219, 235, 236 (1923)); see *Tee-Hit-Ton Indians v. United States*, *supra*).

Occupancy implies some substantial actual possession and use of land, at least potentially exclusive of others, such as necessarily results from residence on or cultivation of land.<sup>5</sup> Such slight and sporadic use of land as shown by the allotment applicant's storing a boat thereon is neither exclusive nor substantial, and, by itself, amounts to actual occupancy of no larger an area than is required for depositing a boat (about 15 feet long) on the ground. In the instant case there is evidence that no one has resided on the land for many years and that only a small area along the beach on this tract has been even casually used or occupied for at least 15 years. This evidence will not support a conclusion that in 1954 the tract was occupied, within the meaning of the provisions here relevant, either by the Indian families who formerly resided on it, or by Mrs. Smith, with the exception of that small area on the beach on which she allegedly stored her boat since approximately 1948. Consequently, to the extent that the decisions of the Acting Director and the manager held that the appellant's application must be rejected because the tract was occupied by an Alaskan Indian or natives, the decisions were erroneous.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is set aside and the case is remanded to the Bureau for action consistent with this decision.

THEODORE F. STEVENS, *The Solicitor*.

BY: EDMUND T. FRITZ,  
*Deputy Solicitor*.

<sup>5</sup> See *United States v. 10.95 Acres of Land in Juneau*, 75 F. Supp., 841, 844 (D.C. Alaska 1948).

## UNITED STATES v. KENNETH F. AND GEORGE A. CARLILE\*

A-28012

*Decided June 10, 1960***Mining Claims: Discovery**

A discovery of appreciable mineral values in a small exposure which is unrelated to other mineralization is insufficient to constitute a valid discovery of a valuable mineral deposit where other exposures on the claim show no mineral values.

**Surface Resources Act: Applicability**

Section 4 of the Surface Resources Act of July 23, 1955, is applicable to land included in a mining claim located prior to that date but not perfected by discovery prior to that date.

**Mining Claims: Possessory Right**

After location of a mining claim but prior to discovery, a mining claimant has no rights as against the United States but is a mere licensee or tenant at will; he acquires a right of exclusive possession as against the United States, which is property in the fullest sense of the word, only after making a discovery.

**Mining Claims: Determination of Validity—Mining Claims: Discovery—  
Mining Claims: Patent**

Where in a contest brought on an application for a mining patent it is determined that no discovery has been made on the claim, the necessary result of this determination is that the mining claim is invalid, even though the Department purports only to reject the application for patent.

**Mining Claims: Determination of Validity**

There is no reasonable or logical basis for the Department's practice in some mining contests involving applications for patent to reject the application for lack of discovery on the claim but to regard the claim as being valid.

*Clipper Mining Company, 22 L.D. 527 (1896); The Clipper Mining Co. v. The Eli Mining and Land Co., et al., 33 L.D. 660 (1905), no longer followed in part.*

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

On January 28, 1954, the Forest Service, Department of Agriculture, protested the application, Oregon 02133, of Kenneth F. and George A. Carlile for patent covering eight lode mining claims situated within the Umpqua National Forest, Oregon. A contest against the claims was initiated on February 1, 1954, and on May 6, 1954, a hearing was held on the charges brought by the Forest Service. In a decision dated October 24, 1955, the hearings officer found that the contestant had not sustained the charge brought against one of the claims (the Maine), that the land is nonmineral in character, but

\*Not in chronological order. The decision was the subject of a motion for reconsideration which was denied.

that, as to the seven other claims, it had sustained its charge that minerals had not been found within the limits of the claims in sufficient quantities to constitute a discovery under the mining laws (30 U.S.C., 1958 ed., sec. 21 *et seq.*). The Carliles appealed to the Director of the Bureau of Land Management.

Thereafter, by agreement, a further examination of four of the claims was made. As the result of this examination, made in 1956, the Forest Service agreed that a discovery had been made on two of the claims, the Albany and the Faber, but it contended that the supplemental examination had failed to reveal a discovery on the Dirigo and the Golden Curry claims.

By decision dated November 14, 1958, the Acting Director, Bureau of Land Management, held that the evidence presented at the hearing with respect to the seven claims had been correctly appraised by the hearings officer but that the supplemental evidence submitted thereafter showed that there have been sufficient discoveries on the Albany, the Faber, and the Dirigo claims to support the issuance of patents. He held that although the Teddy, Harris, Fairview, and Golden Curry claims contain veins and fissures which give mineral indications, there has not been such a discovery of valuable mineral deposits on any of them as will support the issuance of a patent. The Acting Director denied the application for patent covering those claims but, apparently because the protest made by the Forest Service went only to the issuance of patent, he stated that the Carliles "may continue in possession of these claims so long as the lands remain unappropriated for other purposes and there is persistent and diligent prosecution of work leading to the discovery of valuable mineral deposits."

The Forest Service has appealed to the Secretary of the Interior from the decision of the Acting Director insofar as that decision held, on the basis of the new evidence presented after the hearing, that patent should be allowed on the Dirigo claim. It also requests clarification of the decision insofar as it permits the claimants to remain in possession of the other claims.

Turning first to the new evidence presented with respect to the Dirigo claim, we find that, although additional work was done on the claim after the hearings officer's decision, the claimants have not yet shown that a discovery of a valuable mineral deposit has been made within the limits of the claim. Until such discovery is made, the applicants are not entitled to a patent.

The supplemental evidence presented is that of an examination of the claim made by two mineral examiners of the Forest Service in company with the claimants. That examination revealed that additional cuts had been made on the claim which exposed some vein material in place. The applicants contend that the vein material can be traced to the LeRoy claim, northwest of the Dirigo, but the exami-



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ners felt that the LeRoy vein would have to change strike considerably to enter the Dirigo claim at that point. The examiners felt that the vein material found on the Dirigo was possibly a split from the LeRoy structure but not the LeRoy vein itself. The vein material exposed by the new cuts was badly oxidized and leached, appearing to the mineral examiners to be barren of mineralization. The claimants could not find any exposure which they felt justified sampling within those cuts. However, a sample was taken from another cut on the claim, which cut had not previously been sampled. Additional work had been done at that cut which exposed a fracture zone approximately 26 inches wide for a distance of 4 feet. The report states:

The wallrock is a volcanic tuff, the structure itself is a fissure filled with about 8 inches of soft clayey, badly iron-stained, material and 18 inches of quartz carrying some galena, a little chalcOPYrite, and some sphalerite. Sample 888-301 was cut across the full width, 26 inches, of the structure. The assay results are shown on Report of Assay by Abbot A. Hanks, Inc., dated December 31, 1956 (a copy is attached) and shows as follows:

The cut, which exposes the structure, is about 8 feet long, 4 feet wide, and has an average of about a 3-foot face. The working is very minor and shows only a very short distance of the structure. No other workings were found on the projection of the strike of the structure from this cut, in either direction. It is believed this is the only exposure of the structure within this group of claims.

The claimant has based his discovery on this small exposure of a structure that has not been explored within the group of claims or the known vicinity of the claims. It is felt that this one small exposure of the structure, although showing an appreciable mineral value, is not sufficient for a discovery. Nothing is known as to the continuity of this structure or its mineral characteristics. It is possible the structure is a split from a wider and continuous structure, and this split is not in itself continuous over any appreciable distance. It is not believed a valid discovery has been demonstrated on the Dirigo claim.

The claimants submitted a "Description of Veins Sampled on Albany, Faber, Golden Curry and Dirigo Mining Claims, Bohemia District, Ore.," in which the statement is made that the vein found on the Albany claim can be traced through the Dirigo claim. The claimants state that the LeRoy vein runs into the Dirigo claim and that the Albany vein runs through the Dirigo claim into the LeRoy claim. They submitted nothing, however, to back up their statements.

Thus all that can be said for the new showing with respect to the Dirigo claim is that the claimants have found some vein material, without value, and that they now have exposed a fracture zone which does show some value. However, they have not shown that the exposure is a vein containing valuable mineral deposits as required by the mining laws. The discovery, to satisfy the requirements of the law, means more than a showing only of isolated bits of mineral, not connected with or leading to substantial values. *United States v. Frank J. Miller*, 59 I.D. 446 (1947); *United States v. Josephine Lode Mining and Development Company*, A-27090 (May 11, 1955).

Accordingly, the Acting Director's decision that the patent application covering the Dirigo claim should be allowed must be reversed.

We turn now to a consideration of the request of the Forest Service for a clarification of the portion of the Acting Director's decision which reads as follows:

It is evident from the complete record that although the Teddy, Harris, Fairview and Golden Curry lode claims contain veins and fissures which give mineral indications, there has not been such a discovery of valuable mineral deposits on them as will support the issuance of a patent. The charges against the claims by the Forest Service representing a protest to the application for patent, are considered as having a bearing only with respect to the issuance of mineral patent for the claims. Therefore, although the evidence of mineralization on the Teddy, Harris, Fairview and Golden Curry lode claims is insufficient to sustain the issuance of patent, the contestees may continue in possession of these claims so long as the lands remain unappropriated for other purposes and there is persistent and diligent prosecution of work leading to the discovery of valuable mineral deposits. Cf. *United States v. Josephine Lode Mining and Development Company*, A-27090 (May 11, 1955); *United States v. Margherita Logomarcini, supra*.

The Forest Service states that this wording makes it difficult to determine whether or not the claims as to which patent has been refused are subject to the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 601 *et seq.*).

Section 4 of that act (30 U.S.C., 1958 ed., sec. 612) provides that any mining claim "hereafter located" shall not be used, prior to issuance of patent, for other than mining purposes and reserves as to such claims the right of the United States to manage and dispose of the surface resources. Section 5 of the act (30 U.S.C., 1958 ed., sec. 613) provides, as to claims located prior to the date of the act, a procedure whereby the right of the claimants to the use of surface resources may be determined. Since the claims involved in this proceeding were located prior to the date of the act, the question of the Forest Service is whether a further proceeding under section 5 must be brought against the claims as to which patent has been refused before the United States may make use of the surface resources.

The answer to the Forest Service question necessitates a consideration of the basic law governing mining claims. The mining law specifies two requirements for a valid mining claim: (1) discovery of a valuable mineral deposit and (2) location by distinct marking of the claim on the ground. 30 U.S.C., 1958 ed., secs. 28, 23; *United States v. Hurlbman*, 51 L.D. 258, 262 (1926). Discovery normally precedes location but discovery may follow location and give validity to the claim as of the time of discovery, provided no rights of third parties have intervened. *Union Oil Co. v. Smith*, 249 U.S. 337, 347 (1919); *Cole v. Ralph*, 252 U.S. 286, 296 (1920). The rights of a mining claimant prior to discovery are clearly spelled out in *Union Oil Co. v. Smith*:

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\* \* \* it is clear that in order to create valid rights or initiate a title *as against the United States* [emphasis added] a discovery of mineral is essential. \* \* \* Nevertheless, § 2319 (30 U.S.C., 1958 ed., sec. 22) extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits, and this and the following sections hold out to one who succeeds in making discovery the promise of a full reward. Those who, being qualified, proceed in good faith to make such explorations and enter peaceably upon vacant lands of the United States for that purpose are not treated as mere trespassers, but as licensees or tenants at will. For since, as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the *pedis possessio* of a *bona fide* and qualified prospector is universally regarded as a necessity. It is held that upon the public domain a miner may hold the place in which he may be working against all others having no better right, and while he remains in possession, diligently working towards discovery, is entitled—at least for a reasonable time—to be protected against forcible, fraudulent, and clandestine intrusions upon his possession. \* \* \* (Pp. 346-47.)

And it has come to be generally recognized that while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential in the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after location and give validity to the claim as of the time of discovery, provided no rights of third parties have intervened. \* \* \* (P. 347.)

\* \* \* Whatever the nature and extent of a possessory right before discovery, all authorities agree that such possession may be maintained only by continued actual occupancy by a qualified locator or his representatives engaged in persistent and diligent prosecution of work looking to the discovery of mineral.

But, by the provisions of the Revised Statutes above cited, a discovery of mineral by a qualified locator upon unappropriated public land initiates rights much more substantial as against the United States and all the world. If he locates, marks, and records his claim in accordance with § 2324 and the pertinent local laws and regulations, he has, by the terms of § 2322, an exclusive right of possession to the extent of his claim as located, with the right to extract the minerals, even to exhaustion, without paying any royalty to the United States as owner, and without ever applying for a patent or seeking to obtain title to the fee; \* \* \* (Pp. 348-49.)

But, even without patent, the possessory right of a qualified locator after discovery of minerals upon the claim is a property right in the full sense, unaffected by the fact that the paramount title to the land is in the United States (Rev. Stats., § 910), and it is capable of transfer by conveyance, inheritance, or devise. \* \* \* (P. 349.)

It is clear from these statements that even though a location has been made a mining claimant acquires no rights as against the United States until he makes a discovery. Until that time, he is a mere licensee or tenant at will. Upon discovery, and only upon discovery, he acquires as against the United States and all the world an exclusive right of possession to the claim which is property in the fullest sense of the word. See also *Cole v. Ralph*, *supra*, at p. 295. The property right that the holder of a valid claim has does not depend upon issuance of a patent to him. He need never apply for a patent.

The foregoing states the substantive law on mining. We next consider the procedure that must be followed where the United States believes that a valid discovery has not been made on a mining claim. In *Cameron v. United States*, 252 U.S. 450 (1920), the Court said:

A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.

Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. \* \* \* (P. 460.)

In line with this ruling, the established procedure of the Department, where it is thought that a valid discovery has not been made on a claim, has been to institute adverse proceedings against the claim and to hold a hearing for the purpose of receiving evidence on this issue. *The Dredge Corporation*, 65 I.D. 336 (1958). Upon the basis of such evidence, a determination is made as to whether or not a discovery has been made.

If it is determined that a valid discovery has not been made, the mining claim is declared invalid, or null and void. As was said in the *Cameron* case, supra, the Government has power, if a claim is found invalid, "to declare it null and void." Also,

Accepting the Secretary's findings that the tract was not mineral and that there had been no discovery, it is plain that the location was invalid, as was declared by the Secretary and held by the courts below. (P. 464.)

What is the effect of a declaration of invalidity? It is that the mining claimant has acquired no rights against the United States; he has no exclusive right of possession to the land in his claim which is property in the fullest sense of the word. If the United States wishes to withdraw the land in the invalidated claim or otherwise dispose of it under the public land laws, it can do so. If the land has already been included in a withdrawal or some other form of disposition, the withdrawal will attach to the land or the prior disposal will remain unimpaired.<sup>1</sup> No further notice to the claimant or further proceedings against the claim are necessary to achieve these results.

If, however, at the time of invalidation of the claim for lack of

<sup>1</sup> In the *Cameron* case, the land in the mining claim was, subsequent to its location, included in the Grand Canyon National Monument. The withdrawal for the monument saved from the withdrawal any valid mining claims theretofore acquired. The Court sustained the Secretary's ruling that upon the invalidation of the mining claim the land became part of the monument as though the location had not been attempted.

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discovery the land has not been withdrawn or otherwise disposed of, the claimant may resume occupation of the land, or remain in occupation, and so long as he is engaged in persistent and diligent prosecution of work looking to a discovery have *pedis possessio*. But until he makes a discovery, he had no rights against the United States and the United States can withdraw or otherwise dispose of the land without giving him further notice. In other words, he has the same status as anyone seeking to make a mining location on land open to mining.

What has just been said is true with respect to a mining claim for which no application for patent has been filed. Is it equally true as to claim for which a patent application has been filed?

The Acting Director found that there had not been such a discovery of a valuable mineral deposit on the claims in issue "as will support the issuance of a patent." He concluded that although the evidence was insufficient "to sustain the issuance of patent, the contestees may continue in possession of these claims so long as the lands remain unappropriated for other purposes and there is persistent and diligent prosecution of work leading to the discovery of valuable mineral deposits."

On its face, this language comports with the views just expressed as to the effect of the invalidation of a claim for lack of discovery. Doubt, however, is cast upon this view of the Acting Director's decision by the fact that he refrained from declaring the claims invalid, adverted to testimony by the Forest Service mineral examiner that the validity of the claims was not being challenged except with respect to their eligibility for patent, and said that the Forest Service charges "are considered as having a bearing only with respect to the issuance of mineral patent." The Acting Director cited *United States v. Josephine Lode Mining and Development Company*, A-27090 (May 11, 1955), and *United States v. Margherita Logomarcini*, 60 I.D. 371 (1949).

An examination of these cases and of other cases shows that over a period of years the Department has followed the practice in some mining contests involving applications for patents, where the issue of discovery was raised, of simply rejecting the applications for patent and not declaring the claims to be invalid. *Park-Premier Mining Company*, A-20241 (May 23, 1936). The customary statement in most of those cases is the same as in the Acting Director's decision here, that is, that the claimant may remain in possession so long as he is looking for a discovery.<sup>2</sup> The status of the claim, whether valid or invalid, has not been clearly defined except that in the *Vincent* case,

<sup>2</sup> *United States v. Margherita Logomarcini*, *supra*; *United States v. Josephine Lode Mining and Development Company*, *supra*; *United States v. Vincent Creek Gold and Copper Company*, A-27703 (November 5, 1958).

fn. 2, the view was indicated that to declare the claims invalid another hearing (in addition to the one on the patent application) would be necessary. In the *Park-Premier Mining Company* case and more recent cases<sup>3</sup> the Department has said that rejection of the patent application would leave the claims in the status they occupied prior to the application for patent. Presumably in those cases, before the claims could be declared invalid, another contest would have to be brought and hearing held before the claims could be invalidated.

During the same time that the Department has restricted itself in some cases in denying only the patent application, the Department has in many more cases not only denied the patent but gone on in the same proceeding to declare the claims void.<sup>4</sup>

In some cases involving a patent application for a number of claims, the Department has denied the application as to some claims without declaring them void and as to the remaining claims has declared them void.<sup>5</sup>

This summary of departmental actions shows that the Department has considered that in mining contests involving patent applications it has authority not only to reject the patent application but also to declare the claims invalid for lack of discovery, but that the Department need not do so but may simply reject the patent application for lack of discovery without declaring the claim invalid. When the first course of action is taken, there is no problem. When the second is taken, a question arises as to the status of the claim—is it invalid or valid? The departmental decisions have not been clear on this point.

The difficulty can be traced back to what apparently is the foundation for the practice of not invalidating claims although a patent application is rejected. The origin is the series of what may be termed the *Clipper Mining Company* cases. An application for patent to the Searl (or Searle) placer claim was filed on July 5, 1879. Subsequently a hearing was ordered by the Department to ascertain the character of the land. The Department concluded that the testimony "establishes the fact that continued prospecting for several years failed to disclose in any appreciable quantity, the presence of valuable placer mineral in the claim \* \* \*" and rejected the patent application. *Searle Placer*, 11 L.D. 441, 442 (1890).

<sup>3</sup> *United States v. Lem A. and Elizabeth D. Houston*, 66 I.D. 161 (1959); *United States v. Julius R. Guglielmetti*, A-27871 (May 13, 1959); see *United States v. John R. and Pearl S. Dodson*, A-27905 (July 31, 1959).

<sup>4</sup> For example, *United States v. Frank J. Miller*, 59 I.D. 443 (1947); *United States v. Black*, 64 I.D. 93 (1957); *United States v. J. R. Clements*, A-27751 (December 15, 1958); *United States v. Bert Lee Doane*, A-28094 (October 30, 1959); *United States v. Jesse Edwards*, A-28145, (January 20, 1960). In *United States v. Estate of Richard R. Lakin*, A-27572 (June 12, 1958), the Department modified a decision by the Director which had simply rejected a patent application without declaring the claim void. The Department held the claim to be void.

<sup>5</sup> *United States v. Albert Basil Capt et ux.*, A-27749 (December 17, 1958); *United States v. John R. and Pearl S. Dodson*, *supra*, fn. 3.

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After the Department's decision, dated November 13, 1890, lode claims were located within the boundaries of the Searl placer and the lode claimants later applied for patent and published notice. Thereupon the placer claimants filed an adverse claim and commenced proceedings in the Colorado courts to have their right of possession determined. The lode claimants, whose mineral entry was disallowed because of the pendency of the suit, contended that the Department should not have received the adverse claim because it was based on the Searl placer which had been adjudicated by the Department as not being on placer ground. The Department held that the court action ousted the Department of jurisdiction until it was decided and said:

The judgment of the Department in the *Searl Placer* case went only to the extent of rejecting the application for patent. The Department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it. *Copper Mining Company*, 22 L.D. 527, 528 (1896).

The adverse suit in the Colorado courts proceeded to the United States Supreme Court which affirmed the judgment of the State courts for the placer claimants. *Copper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220 (1904). Before the United States Supreme Court the lode claimants again contended that the Department had held that the ground in the Searl location was not placer ground or subject to entry as a placer claim. The Court adverted to the Department's decisions, quoting the portion just quoted from 22 L.D., and said:

Undoubtedly when the department rejected the application for a patent it could have gone further and set aside the placer location, and it can now, by direct proceedings upon notice, set it aside and restore the land to the public domain. But it has not done so, and therefore it is useless to consider what rights other parties might then have. 194 U.S. at p. 223.

Upon return of the case to the Department, the effect of the Department's decision rejecting the placer application was again raised and answered as follows:

\* \* \* It is insisted by petitioner (lode claimants) that, notwithstanding the concluding expression of the Department, above quoted, in its decision of May 13, 1896, respecting the effect of the decision of November 13, 1890, rejecting the placer application, the earlier decision was unavoidably a determination of the invalidity of the placer location, since a valid location of that character can not be made on non-placer ground.

The conclusion thus drawn is unsound. In order to comprehend the effect of the decision in question it must be borne in mind that the direct object of attack, in the proceedings which the decision closed, was the application [sic] for placer patent, with the defeat of which the protestants rested. The rejection of the application, which fully answered the controlling issue involved, was based upon the conclusion, drawn from the evidence submitted at the hearing theretofore had, that the placer claimant (Searl) had failed to establish, as

a then present fact, the presence in the claim of placer mineral deposits of such extent and value as to justify the issuance of patent: not upon a definitive finding of the non-placer character of the ground and of the total absence of discovery requisite to location. The Department did not undertake, in any sense, and it was wholly unnecessary under the issue presented that it should undertake, to determine the validity or invalidity of the placer *location*. The application for placer patent, and the proofs submitted to support it, formed the subject of inquiry, and beyond this the issue did not go. The expression in the departmental decision of May 13, 1896, referred to by petitioner and above quoted, therefore correctly states the scope of the earlier decision. No rights in his adversaries having supervened, the placer claimant was merely remitted to the position he occupied immediately prior to filing his application, with no apparent obstacle to the enjoyment of the benefits of further efforts to develop the extent and value of mineral deposits in the land; and whatever rights may now subsist are represented in the present claimants. *The Clipper Mining Co. v. The Eli Mining and Land Co. et al.*, 33 L.D. 660, 665-666 (1905).

The Department then ordered a hearing to determine whether the land in the Searl placer was patentably placer or not as of the date of the application for lode patent.

It seems impossible to avoid the conclusion from the *Clipper Mining Company* cases that the mere rejection of a patent application for lack of discovery does not, by itself, invalidate the mining claim and that it is within the authority of the Secretary, in a patent proceeding, to decide just how far to go, whether to invalidate the claim as well as to reject the patent application or only do the latter.

It appears equally impossible, however, to reconcile the *Clipper* ruling with the later pronouncements by the Supreme Court in *Union Oil Co. v. Smith*, *supra*, decided 15 years after the Court's decision in the *Clipper* case. The *Union Oil* case plainly states that until discovery a mining claimant has no rights against the United States or in the land in the claim. If, then, in a direct proceeding against a patent application the Department finds that no discovery has been made, it is impossible to see how the claim can survive as a valid mining claim despite the fact that the Department purports only to reject the patent application. I am not aware that, save for such implication as may exist in the *Clipper* cases, any different standard of discovery has been required to sustain the validity of a claim merely because a patent is applied for. A claimant cannot rely upon a lesser discovery to sustain the validity of his claim than is necessary to entitle him to a patent.

To put it another way, in order, as in this case, to reject an application for patent on the ground of lack of discovery, the Department must find that there has not been found a valuable mineral deposit of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with the reasonable prospect of success in developing a valuable mine. But if the Department so finds with respect to a claim, it seems it has necessarily found that there is no discovery to give the claim validity.



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A mining claimant has the ultimate burden of establishing by a preponderance of the evidence that his claim is valid. *Foster v. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959). If upon application for patent he is unable to prove that he has made a valid discovery, there seems to be no logical basis for holding that, although he must be refused a patent because of lack of discovery, nevertheless his claim will still be considered to be a valid claim.

It is my conclusion, therefore, that the ruling in the *Clipper Mining Company* cases should no longer be regarded as sustainable, in view of the decision in *Union Oil Co. v. Smith* and the numerous later cases that clearly and unequivocally hold that a claim has no validity in the absence of a discovery, and should no longer be followed.

It should be understood that this discussion has been concerned solely with the situation where discovery is the issue in the patent proceedings. If the issue is one that does not necessarily go to the validity of the claim, rejection of the patent application would not invalidate the claim. For example, if a discovery has been made but the necessary \$500 worth of labor and improvements has not been made, the patent application must be rejected but the validity of the claim would not be impaired. See *United States v. C. F. Smith*, 66 I.D. 169 (1959).

To summarize up to this point, it is my opinion that where in a contest against a mining claim it is found that a valid discovery has not been made, it necessarily follows that the claim is invalid, or null and void, without regard to whether the contest was brought as the result of an application for patent or in the absence of an application for patent. The consequences of the invalidation are as described earlier.

Turning finally to the specific question of the Forest Service—whether the act of July 23, 1955, *supra*, is applicable to the claims for which no valid discovery has been found—the answer becomes clear. The claimants having been found to have no rights against the United States, section 4 of the act, which describes the extent of the rights of the United States in claims located after the date of the act, is applicable. Section 5 of the act, which provides a procedure for determining the rights to the use of surface resources of holders of claims located prior to the date of the act, is inapplicable.

This conclusion affects the Dirigo, Teddy, Harris, Fairview, and Golden Curry claims. So long as the land in those claims remains available for mining location, the claimants, like anyone else, are free to attempt to make a discovery on the land. Until discovery, they have no more than the right of *pedis possessio* enunciated in *Union Oil Co. v. Smith, supra*. Any claims perfected by discovery made after July 23, 1955, will be subject to section 4 of the act of that date.

Therefore, pursuant to the authority delegated to the Solicitor by

the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director is reversed in part and modified in accordance with this decision.

EDMUND T. FRITZ,  
*Deputy Solicitor.*

**HAROLD LADD PIERCE**

A-28495

*Decided November 22, 1960*

**Oil and Gas Leases: Applications**

An oil and gas lease offer filed while an outstanding lease of the same land remains effective is properly rejected; an offer simultaneously filed with other offers to lease the same land is properly included in a drawing and rejected when the lease is awarded in response to an offer which acquired priority in the drawing.

**Oil and Gas Leases: Relinquishment**

One of two joint lessees cannot relinquish an oil and gas lease without submitting proof of his authority to act for the other lessee.

**Oil and Gas Leases: Applications—Applications and Entries: Filing**

The time of filing oil and gas offers is determined by the time stamp on the offers; sequence of filing is not necessarily reflected by the serial number assigned to the offers.

**APPEAL FROM THE BUREAU OF LAND MANAGEMENT**

Harold Ladd Pierce has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated April 18, 1960, that affirmed a decision of the land office at Los Angeles, California, dated October 20, 1959, rejecting his noncompetitive oil and gas lease offer filed pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226), because the offer was filed simultaneously with seven others and did not acquire priority as a result of a drawing held on April 2, 1959.

The record shows that the appellant owns surface rights in the land which he wishes to lease and that he had an oil and gas lease effective from January 1, 1949, for a term of 5 years which was extended for a second 5-year term on January 1, 1954 (Los Angeles 074178). He mailed a relinquishment of that lease to the land office on December 16, 1958. On December 17, 1958, at 10:00 a.m. he filed his offer (Los Angeles 0161948) to lease the same land. On December 18, 1958, at 10:00 a.m., he filed a second offer (Los Angeles 0161969). Also, on that day he received a letter from the land office informing him that the relinquishment of the earlier lease was insufficient because, although the lease was originally issued to him only, it had been assigned to General Petroleum and reassigned to him and his wife so that the relinquishment of his wife was necessary. On that same day, Decem-

November 22, 1960

ber 18, 1958, he mailed a new relinquishment to the land office. On December 19, 1958, he mailed his daughter's offer to lease the same land. This offer was subsequently designated Los Angeles 0162023 and stamped as filed on December 22, 1958, at 11:54 a.m. He filed his third lease offer (Los Angeles 0162016) on December 22, 1958, at 10:00 a.m.

Subsequently, the appellant's first two offers filed on December 17 and 18, 1958, were rejected on the ground that the mineral interest in the land was then included in his outstanding oil and gas lease Los Angeles 074178. He was notified that his third offer was one of seven simultaneously-filed offers for which a drawing would be held to determine the right of priority. Later, this offer was rejected because a lease had been issued in response to another offer which acquired priority in the drawing.

In his appeals, the appellant contends that his relinquishment without the concurring action of his wife should have been accepted as sufficient so that either of his first two offers would have been acceptable and prior to that of Eleanor R. Smith to whom the lease was awarded. He also states that he believes that there were irregularities in the handling of the relinquishments and offers and that Mrs. Smith is not qualified to hold a lease because she is not the sole owner of her lease despite her certification that she was the sole party in interest in her offer. As proof of irregularity, he points out that an offer filed by R. G. Bates was stamped as filed at 10:04 a.m. on December 22, 1958, and assigned the serial number Los Angeles 0162002 while the offers simultaneously filed at 10:00 a.m. bear numbers running from 0162014 to 0162022. As proof of his charge against Mrs. Smith's qualifications, he cites her statement to him in response to his offer to purchase her lease made while her attorney was out of town that she could not make a decision until she had talked "to some other friends of mine who know more about these things than I do."

It is clear from the foregoing that the appellant's offers to lease were properly rejected and a lease properly awarded in response to one of the competing offers which acquired priority in the drawing. Since his wife had an undivided interest in the original lease, as extended, it is clear that the appellant could not relinquish title to the entire lease and thus bind her without submitting proof of his authority to act for her. This he did not attempt to do.

There is no proof of irregularity in the land office procedures merely because the serial number of one document is lower than others which were filed earlier. Priority of filing is determined by the time stamp on each offer and the sequence of serial numbers assigned to offers does not necessarily reflect the order of filing. *C. A. Fleetwood*, A-28250 (June 3, 1960). In the absence of other evidence which the appellant

has not supplied, his suggestion of irregularity in land office procedure is without any support.

Likewise, Mrs. Smith's unwillingness to accept the appellant's offer to purchase her lease without the advice of some friends of hers "who know more about these things than I do" is not proof that she was acting for someone other than herself in seeking to acquire a lease. Certainly it does not warrant the holding of a hearing to determine whether she was qualified to hold an oil and gas lease.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

THEODORE F. STEVENS, *The Solicitor.*

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

#### APPEAL OF JOHN A. QUINN, INC.

IBCA-174

*Decided November 29, 1960*

#### Contracts: Additional Compensation—Contracts: Changed Conditions

A contractor who, in excavating for the construction of a sanitary sewer, encounters an active sewer at such a location below the surface that it could not be detected through a reasonable site examination, is entitled to an equitable adjustment based on "unexpected or unanticipated" conditions of the "Changed Conditions" clause of Standard Form 23A (March 1953).

#### BOARD OF CONTRACT APPEALS

John A. Quinn, Inc., has filed a timely appeal from the decision of the contracting officer in the form of a letter dated July 18, 1958, which denied its claim for additional compensation in the amount of \$2,577.93 under the above-identified contract dated July 18, 1957.

The contract provided for the construction of a sanitary sewer system at the Little Hatchet Tavern, Mount Vernon, Va. It was executed on Standard Form 23 (Rev. March 1953) and incorporated Standard Form 23A (March 1953). The contracting officer was the Superintendent of National Capital Parks, National Park Service. The contract was on a lump-sum basis, the consideration being \$33,810. Three change orders increased the contract price to \$34,959.30.

Prehearing conferences on the appeal were held on April 4, 1960 and June 6, 1960. The parties agreed that the following issues should be determined: (1) whether the presentation of the claim was timely or untimely; (2) whether Change Order No. 1, dated January

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1, 1958, was accepted by the appellant in full payment of the instant claim; and (3) whether the instant claim falls within the provision of the "Changed Conditions" clause of Standard Form 23A.

A tentative claim was first presented by the appellant to the contracting officer in a letter dated October 31, 1957. In it appellant stated that it had encountered two sewerlines—one, a 15-inch storm sewer, and the other, an 8-inch sewer<sup>1</sup>—during the course of excavating for the pumphouse substructure.<sup>2</sup> Appellant further argued that the "latent existence of these sewers has already been the cause of considerable additional expense in excavation and stabilization of sidewalls, for which expense we are preparing claims for extra work."

In letter of November 15, 1957, the appellant was directed to seal the inactive 15-inch terra cotta pipe exposed in the excavation and to proceed with reconstruction of the 8-inch storm water sewer encountered in excavating for the ejector pit. Thereafter, Change Order No. 1, dated January 8, 1958, was issued by the contracting officer and accepted by the appellant on January 9, 1958, which authorized the appellant to seal the 15-inch pipe and to "furnish all material and labor and reconstruct 8-inch cast iron storm sewer removed during construction of the ejector pit." The contract price was thereby increased in the amount of \$638.05.

In submitting its claim in the amount of \$2,577.93 in the letter of May 12, 1958, the appellant stated that when the excavation reached a point approximately 4 feet from the final grade of the excavation for the pumphouse substructure,<sup>3</sup> the operator of a crane with a clamshell bucket unexpectedly struck and broke the active 8-inch terra cotta sewer, above referred to,<sup>4</sup> and the "existence of this sewer was not indicated by the contract drawings and could not have been determined by field inspection."

The three issues will be discussed *seriatim*.

<sup>1</sup> The Government admits that the drawings NCP 117-5-419-1 and -2 do not show the location of these sewerlines. It further admits that there were two lines: "one was a 15-inch line, which was a deadline, and the other was an 8-inch, which was a live one. \* \* \* The live one was at the bottom of the pit, the 8-inch, at the bottom of the excavation." (Tr. p. 23.) The 15-inch line was "dead, and about half way down." (Tr. p. 23.) These admissions are corroborated by the photographs which have been introduced in evidence as Board Exhibit No. 2.

<sup>2</sup> Mr. Frank Thompson was employed as an estimator and engineer by the appellant from July 1957, to May 1959. He testified that he visited the jobsite from time to time to inspect the progress of construction. He also testified that on one of such visits on October 15, 1957, "we encountered two storm sewers which were not shown on the original plans or indicated on this outside drawing, which is National Capital Parks 117-5-419-1 inset."

<sup>3</sup> Mr. Richard W. Whyte, of the Whyte Construction Co., the subcontractor, testified: "I contracted to build this ejector building, including the foundations and superstructure."

<sup>4</sup> Mr. Whyte also testified that "it was broken by the clam digging the excavation for the pit." When he was asked to describe a "clam" he said: "It is a hydrocrane with a bucket on cables, operated by cables."

### 1. *Timeliness of Claim*

The issue as to whether the presentation of the claim was timely or untimely requires a determination as to whether there has been compliance with the notice requirement of clause 4 of the General Provisions of the contract. The Department Counsel, in his statement of position and brief, contends that the claim of May 12, 1958, is not timely because "it complains of a condition on the site present months before." Although he has moved that the appeal be dismissed, he has not assigned as one of the reasons for its dismissal the failure of the appellant to give prompt written notice to the contracting officer of changed conditions as required by the contract.

The Government's contention overlooks the appellant's letter of October 31, 1957, wherein it notified the contracting officer that it had encountered the two sewerlines above described during the course of excavating for the pumphouse substructure and that their latent existence "has already been the cause of considerable additional expense in excavation and stabilization of sidewalls." Also, it was stated in the letter that: "It has been determined by NCP (National Capital Parks) inspectors that the 15-inch storm sewer is not in use. We propose to close it off with masonry as we have already been directed verbally by your Mr. Utz."<sup>5</sup> We find, therefore, since the Government was aware of the conditions at the site, the written notice to the contracting officer of the changed conditions contained in the letter of October 31, 1957, was entirely sufficient.<sup>6</sup> In any event, written notice was given within the period of normal contract administration.<sup>7</sup> Hence, we conclude that there was a timely presentation of the claim. The motion of the Government to dismiss the appeal is denied.

### 2. *Change Order No. 1*

The contracting officer's representative, in letter of November 15, 1957, to the appellant, confirmed oral instructions in respect to the reconstruction of the 8-inch storm sewer encountered in the course of excavating for the ejector pit. In letter of December 27, 1957, addressed to the contracting officer, the appellant submitted an itemized statement showing the costs of material and labor, as well as equipment rental for the reconstruction of the 8-inch sewer. In this letter, it also included an item of \$30 as the cost of sealing the 15-inch storm sewer also encountered in excavating for the ejector pit. There

<sup>5</sup> Mr. Fred N. Utz testified that he is employed as a construction engineer by National Capital Parks and that he acted as the "Government superintendent of the Quinn job down at Mt. Vernon" during the life of the contract.

<sup>6</sup> *Peter Kiewit Sons' Co.*, ASBCA No. 5600, 60-1 BCA par. 2580, 2 G.C. par. 275 (1960). Cf. *Allied Contractors, Inc. v. United States*, 277 F. 2d 464, 466 (Ct. Cl. 1960); *Studer Constr. Co.*, IBCA-85, 66 I.D. 414, 59-2 BCA par. 2458, 2 G.C. par. 25 (1959).

<sup>7</sup> Cf. *Specialty Assembling & Packing Company*, ASBCA Nos. 4253 through 4532 (September 29, 1959), 59-2 BCA par. 2370 (1959).

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was added a profit of 15 percent on the amount of \$554.83, which made the total sum \$638.05. The change order was dated January 8, 1958, and was accepted by the appellant on January 9, 1958. It directed the appellant to furnish all labor and material and to "reconstruct 8-inch cast iron storm sewer removed during construction of the ejector pit." It also included payment for the sealing of the 15-inch sewer. The cost items set out in the appellant's letter of December 27, 1957, were embodied in the order. Moreover, specific reference to this letter was made therein. The Government contends that "all proper charges for the extra work done in October 1957 on the excavation and sewer at the ejector pit were included in Change Order No. 1." Since it is very clear that Change Order No. 1 related only to the reconstruction of the 8-inch sewer<sup>8</sup> and to the sealing of the 15-inch sewer, the Board finds that the Government's contention is without merit.

### 3. *Changed Conditions*

The claim is based on Clause 4 of Standard Form 23A, "Changed Conditions." The appellant asserts that the amount claimed is for costs of an emergency nature, which were incurred by it in order to protect the Government as well as itself from further substantial costs in completing the contract work.

Clause 4 refers to two different categories of changed conditions: (1) subsurface or latent physical conditions at the site differing materially from those indicated in the contract, and (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. The first category contemplates a variance between the conditions actually encountered and those represented in the specifications and drawings, in summary "misrepresented conditions," while the second category contemplates, in summary "unexpected or unanticipated" conditions.<sup>9</sup>

The contracting officer, in his findings of fact and decision, stated that the conditions which caused additional expense in excavating for the ejector pit were not due to the presence of the sewers but to the failure of the contractor to take precautions to prevent caving in the sides of the excavation as required by section 5 of the specifications and, hence, there was no basis for the allowance of additional compensation. This contention is not supported by the evidence.<sup>10</sup> Spe-

<sup>8</sup> Mr. Everett O'Brien, the Chief of the Construction Branch, Division of Design and Construction, National Capital Parks, admitted on cross-examination that the change order covered the "re-routing of the sewer" and that to his knowledge it was not intended to include any other work.

<sup>9</sup> *Cf. Wasberg Constr. Co.*, IBCA-144, 66 I.D. 123, 124, 59-1 BCA par. 2122, 1 G.C. par. 280 (1959).

<sup>10</sup> *Cf. Duncan Constr. Co.*, IBCA-91, 65 I.D. 135, 53-1 BCA par. 1675 (1958); 444 *Constr. Co.*, IBCA-55, 64 I.D. 440, 57-2 BCA par. 1510 (1957).

cifically, the photographic evidence submitted to the Board negatives this contention.

In respect to the 8-inch sewer encountered during the course of excavating for the ejector pit, the following facts have been established by competent evidence: first, the sewer was not one that could be detected through a visual examination of the surface of the land beneath which the sewer was concealed; second, its presence was not disclosed by the specifications or the drawings; third, the specifications and drawings did not purport to disprove the possibility of its presence; and, fourth, the appellant and the subcontractor were unaware of the existence of the sewer<sup>11</sup> until it was actually encountered. Moreover, the evidence justifies the conclusion that neither the contracting officer nor any of his authorized representatives was aware of the existence of the sewer when the contract was let. No evidence was offered as to any efforts of the contracting officer or his representatives to investigate the conditions on the site prior to formal advertising.

Under a contract such as the one here under consideration the entitlement of a contractor to additional compensation on account of the encountering of an unexpected or unanticipated subsurface obstruction is ordinarily dependent upon the making of a satisfactory showing that the obstruction constitutes "Changed Conditions" within either the first or the second category of Clause 4.

In the light of the evidence, the Board finds that the location of the 8-inch sewer was out-of-the-ordinary to such a degree as to constitute a changed condition of the second category.<sup>12</sup> We doubt that a contractor would or could have been expected to encounter a live 8-inch storm sewer at a considerable distance below the surface of the ground in performing the requisite excavation for the pumphouse substructure. We find, therefore, that the appellant is entitled to an equitable adjustment for the changed conditions.<sup>13</sup>

The appeal is sustained and remanded to the contracting officer for an equitable adjustment of the price of all the work which was made necessary by the encountering of the 8-inch storm sewer.

The term "equitable adjustment" in itself precludes the idea of there being any one cut and dried method of arriving at the end

<sup>11</sup> Mr. Thompson testified, he presumed, that it was "close to 13 feet" below grade. Department Counsel, however, stated, in a question propounded to Mr. Fred N. Utz, Construction Engineer for National Capital Parks, that it was encountered after 17 or 18 feet of excavation had been completed. Mr. Utz made no comment on the depth of the excavation at that time. He did, however, state in response to a question propounded later by Mr. Gantt, the hearing official, that the depth of the hole was 17 feet. The photographic evidence seems to indicate that the latter figure is correct, and that the 8-inch sewer was about 13 feet below grade.

<sup>12</sup> Cf. *Carl Myers, Eng.*, BCA No. 585 (August 25, 1959) (active sewer encountered).

<sup>13</sup> *General Casualty Co. v. United States*, 180 Ct. Cl. 520, 532, cert. denied, 349 U.S. 938 (1955); *M. A. Bongiovanni, Inc.*, ASBCA No. 5712, 60-1 BCA par. 2537, 2 G.C. par. 185 (1960); *Caribbean Constr. Corp.*, IBCA-90, '64 I.D. 254, 57-1 BCA par. 1315 (1957); *Cf. Adrian L. Roberson*, ASBCA No. 5939 (July 20, 1960).



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desired.<sup>14</sup> However, the following test which has been developed by the Armed Services Board of Contract Appeals seems to be best suited for situations of the type encountered here. In *Ensign-Bickford Company*,<sup>15</sup> that Board, in part, stated:

\* \* \* that a proper equitable adjustment is the difference between what it would have reasonably cost to perform the work as originally required and what it reasonably cost to perform the work as changed. \* \* \* In computing the work required by a change order, the costs that will be reasonably experienced by the contractor should be used and not necessarily those of the most efficient producer. \* \* \* We have selected the above case for quotation because of the reference in the second sentence to the costs reasonably to be experienced by the contractor as opposed to the costs that were, or might have been, experienced by someone else. \* \* \*

The term "equitable adjustment" appears in Standard Form 23A (Rev. March 1953) in both Clause 3, "Changes," and in Clause 4, "Changed Conditions." Clause 4 contains "the same machinery of adjustment" as that specified in Clause 3.<sup>16</sup> Hence, the above-quoted test is equally applicable to adjustments under Clause 4.

The contracting officer, therefore, should proceed to settle the amount of the equitable adjustment in conformity with the rulings made thereon in this opinion.<sup>17</sup> This would be done by agreement with the appellant,<sup>18</sup> or, if the parties cannot agree on an amicable disposition of this claim, by a determination under the "Disputes" clause of the contract.

PAUL H. GANTT, *Chairman*.

I concur:

I concur:

THOMAS M. DURSTON, *Member*.

JOHN J. HYNES, *Member*.

### APPEAL OF SEAL AND COMPANY

IBCA-181

*Decided December 23, 1960*

Contracts: Acts of Government—Contracts: Damages: Unliquidated Damages

A claim for additional expense, allegedly due to the Government's failure to close off the circular approach to the site of construction work to vehicular traffic, is based on a breach of contract, and may not be administratively determined.

<sup>14</sup> *S. N. Nielsen Company*, ASBCA No. 1990 (October 1, 1954).

<sup>15</sup> ASBCA No. 6214 (October 31, 1960) citing *Modern Foods, Inc.*, ASBCA No. 2090 (March 26, 1957), 57-1 BCA par. 1229; *S. N. Nielsen, supra*; *Dibs Production & Engineering Company*, ASBCA No. 1438 (March 26, 1954); *Air-A-Plane Corporation*, ASBCA No. 3842 (February 29, 1960), 60-1 BCA par. 2547; and *Bruce Construction Corp.*, ASBCA No. 5932 (August 30, 1960).

<sup>16</sup> *United States v. Rice*, 317 U.S. 61, 67 (1942).

<sup>17</sup> *Dane Construction Corporation*, IBCA-135 (February 15, 1960), 60-1 BCA par. 2549.

<sup>18</sup> "It would appear that as a matter of policy the law ought to encourage the parties to reach amicable settlement of disputes \* \* \*." *Kostelac v. United States*, 247 F. 2d 723, 728 (9th Cir. 1957).

**Contracts: Additional Compensation—Contracts: Changed Conditions**

In excavating for construction of 4 caissons as a foundation for an underground guard room, contractor encountered large undisclosed rocks which prevented machine drilling and necessitated removal by hand labor at extra costs. Since the drawings indicated only stone fill at two caissons and no encumbrance at the other two, where rocks were encountered, a changed condition under Category I of the Changed Condition clause existed which warranted extra compensation.

**Contracts: Changes and Extras—Contracts: Additional Compensation**

The amount of equitable adjustments, in a construction contract pursuant to a change order requiring extra work, is encompassed within the "Extra Work" clause when this clause sets forth the cost items to be considered, and the percentage of profit permissible.

**Contracts: Changes and Extras—Contracts: Additional Compensation—  
Contracts: Subcontractors and Suppliers**

Where a prime contractor subcontracts extra work to another, pursuant to an authorized change order and pays such subcontractor profit and overhead in excess of the limitations defined in the "Extra Work" clause, the prime contractor may not recover the excess payments from the Government. The subcontractor must look to the prime contractor for payment thereof.

**BOARD OF CONTRACT APPEALS**

The timeliness of this appeal was heretofore decided by this Board.<sup>1</sup> The appeal arises under the above identified contract with the National Capital Parks of the National Park Service, for floodlighting and electrical service at the Washington Monument, Washington, D.C.

This appeal is from the contracting officer's denial of appellant-contractor's five claims for additional compensation for a total sum of \$10,706.71.

The first claim is for \$6,109.18 for extra work allegedly caused by the Government's failure to close vehicular traffic on the Monument circle and the Government's refusal to permit simultaneous construction work.

The second claim is for extra compensation of \$2,589.80 for the removal of unforeseen subterranean rock encountered, while excavating for the placing of four caissons, during construction of a new underground guardroom office.

The other three claims are for the allowance of \$2,007.72 as overhead and profit allegedly due for extra work performed by appellant's subcontractors and sub-subcontractors pursuant to authorized change orders.

The contract was on Standard Form 23 (Rev. March 1953) and in-

<sup>1</sup> On February 24, 1960, the Board denied the Government's motion to dismiss for lack of jurisdiction on the ground that the appeal letter of November 4, 1958 "was not made ineffective by prematureness," and that the contracting officer's decision of November 5, 1958 "was validly appealed." *Westinghouse Electric Supply Co.*, IBCA-107, 57-2 BCA par. 1365 (1957). See *B. W. Hoovermill Company*, ASBCA No. 5570, 59-2 BCA par. 2439 (1959).

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incorporated the General Provisions of Standard Form 23A (March 1953) which included the standard "Changes" and "Changed Conditions" provisions, Clauses 3 and 4, respectively. It also contained "General Conditions" which include a pertinent provision for the method of payment of additional compensation by way of equitable adjustment resulting from modification of the contract specifications. It is quoted as follows:

**EXTRA WORK:**

The Contractor shall perform all extra work not covered by these specifications which, in the judgment of the Contracting Officer may be necessary or expedient to carry out the intent of the contract or incidental in any way to the work of the contract, and which is ordered in writing by the Contracting Officer.

The cost of the respective items of extra work carried out under the provisions of this paragraph will be paid for by one or the other of the following methods, at the election the Contracting Officer.

(a) On the basis of a stated lump sum price, or other consideration fixed and agreed upon by negotiation between the Contracting Officer and the Contractor in advance, or

(b) On the basis of the actual cost of the extra work (including the hire or rental of such plant as may be used exclusively for such extra work and including workman's compensation insurance, social security and unemployment and all applicable taxes, *but excluding overhead*), plus fifteen (15) percent of that cost to cover profit and all indirect charges against such extra work. [Under-scoring supplied.]

In either case an appropriate extension of the working time if such be determined will also be fixed and agreed upon and stated in the written order in which the extra work is ordered in writing.

Subject contract was entered into on June 25, 1957, and called for the Floodlighting and Electric Service for the Washington Monument, Washington, D.C., for the sum of \$205,000.<sup>2</sup> The work was to begin within ten days after receipt of notice to proceed and was to be completed within 180 days thereafter. Actual construction work began on July 24, 1957. The contract was satisfactorily completed on July 15, 1958. Since the time for performance was extended by change orders, the question of delay in performances is not in issue.<sup>3</sup>

An oral hearing took place on June 28 to 30 and July 6, 1960, at Washington, D.C., at which time the testimony of witnesses and other evidence was proffered by appellant and the Government.

Appellant was a partnership at the time of award of subject contract. It is now incorporated under the laws of the District of Columbia and is engaged in electrical construction work. The contract obligated appellant to furnish all labor, equipment and materials

<sup>2</sup> The contract price was increased to \$227,710.53 by change orders.

<sup>3</sup> The original contract time expired January 7, 1958. Change Order No. 1, 4, and 5 extended the time for performance seven, thirty, and fourteen days, respectively. Change Order No. 8 extended the contract time to July 15, 1958, which was the date of final completion of the contract.

for floodlighting the Washington Monument. Since more than half of the work to be performed involved construction work other than electrical, that is concrete and masonry, structural and plumbing, the building of a guardroom, and even rearrangement of the roadway, walks and curbs; numerous subcontractors and sub-subcontractors were employed by appellant.

We are concerned here principally with work performed by appellant's subcontractors, and sub-subcontractors in the construction of four underground floodlight vaults, 14 feet by 20 feet, on each of the four sides of the Monument, at the edge of the circular drive around the Monument, and the construction of a new underground guardroom with four supporting caissons, contiguous to an old underground guardroom.<sup>4</sup>

The five claims will be considered separately.

#### *Claim No. 1*

Appellant's first claim, that is "for failure to close the circle to vehicular traffic and for Government prevention of simultaneous work," is subdivided as follows:

- (a) Pay for employees caused by stoppage of work on July 24, 1957.
- (b) Pay of additional wages for a flagman to guide vehicular traffic on the circular plaza.
- (c) Extra costs of supervision due to extended time of performance, caused by the Government's alleged interference with appellant's coordinated plan of construction.

#### *Stoppage of Work*

Since the monument, a landmark 555 feet in height, dedicated as a memorial to our first President, is the main sight-seeing attraction in the Nation's Capital, thousands of tourists are attracted thereto, particularly during the month of July, when construction work here began. At that time vehicular traffic, which has since been prohibited, was permitted on the drive encircling the monument.

The feasibility of closing off this circular approach to automobile traffic, as distinguished from pedestrian traffic which was permitted, was discussed by appellant, its subcontractors and Government representatives at a preconstruction conference on July 15, 1957. At another conference, 2 days later on July 17, the Government advised appellant that the circular approach would not be closed to vehicular traffic until September 15, or almost 2 months later. (It was presumed apparently that there would be less automobile traffic at that time.) Appellant's president stated that the failure to close the circle would

<sup>4</sup> Although constructed ten feet underground, the vaults projected approximately two feet from the ground surface. Large aluminum covered closed doors rest on top of the vaults. The doors are opened only during operative periods. The powerful floodlights which are focused at various points on the Monument are then exposed.

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not seriously impair his efficiency or scheduling of the work to be done, and agreed to proceed to "work the stations individually, closing off 12 parking spaces." He did not, however, agree that the circle remain open to vehicular traffic without the payment of additional compensation. The Government promised a commensurate extension of time for performance if the non-closing of the circle warranted a delay; but all Government witnesses emphatically deny any agreement for the payment of extra compensation. All were anxious, particularly appellant's subcontractors, to proceed during the summer months and before inclement weather set in.

On the same day of the conference of July 17, 1957, appellant advised the Government by letter, of its program of construction as follows:

(1) Excavation would begin on July 22 on the guardroom first, down to the top of the caissons. (2) Excavation for the caissons and vaults would commence 2 days later beginning with the *south vault*. (3) Excavation for the caissons would be by hand labor due to anticipated rock fill and would be completed within an estimated 15 working days.

One week later, on July 24, 1957, the Acting Chief, Division of Design and Construction (contracting officer) advised appellant in pertinent part as follows:

As a result of our mutual agreement that all work in connection with the project that would interfere with the normal flow of vehicular traffic around the monument be confined to the west side of the monument until after September 15 it will be necessary to revise your program.

In order to provide working space while maintaining the normal flow of traffic, approximately 12 parking spaces west of the monument will be eliminated. You will be required to maintain effective barricades at all times satisfactory to the Contracting Officer to insure the free movement of traffic through this area.

When the work on the guardroom has progressed sufficiently you may proceed with the work on the west floodlight vault, shifting the open traffic lane to the inner half of the road.

All other work outside the circular road and approach road, except the other 3 floodlight vaults, may proceed at this time.

Please submit a revised program incorporating the sequence of work outlined above.

On the same morning as the date of the foregoing letter, July 24, 1957, the appellant's subcontractor began excavating for the *south vault*. At 1:30 p.m. work was stopped by the Government on the ground that appellant was instructed to proceed *first* with excavation for the *west vault*.

Later, that same day (July 24), appellant entered its written protest to the Government, claiming that the stoppage of work was in violation of General Conditions 2.14 "Temporary Suspension of

Work" provision of the contract,<sup>5</sup> and of Par. 4-13c of Section 4, "Work, Drawings, Special Conditions," which is quoted as follows:

Access roads up to the Monument Plaza may be closed to all but construction and emergency vehicles during the period of construction, but facilities for safe foot-traffic by visitors must be maintained. Section 2-28.<sup>6</sup>

The evidence discloses however that appellant was orally instructed to proceed initially with excavation for the *west vault* prior to instructions contained in the Government's letter of July 24, 1957.

In the absence of a Suspension of Work clause authorizing an equitable adjustment for suspension of work, appellant's claim for payment of wages to its subcontractor's employees for July 24, 1957, in the amount of \$157 is denied.

#### *Claim for Flagman's Wages*

The second element of appellant's claim No. 1 is for additional compensation for the payment of wages of a flagman to direct traffic on the circle, in the amount of \$262.61. This part of the claim is denied since Section 2.28 General Conditions specifically called for appellant to "provide and maintain all temporary roadways, walks, barriers, colored lights, danger signals and other devices necessary to provide for safety of the public and traffic." This contract provision enumerated exactly what measures the contractor was obligated to take. The employment of a flagman is not contained among these measures. In the absence of an order by the Government, appellant must be deemed to have acted as a volunteer.

#### *Prevention of Simultaneous Work*

The third element of appellant's claim No. 1 is predicated on the theory that the non-closing of the circle to vehicular traffic and the Government's requirement that appellant proceed progressively to excavate for the construction of one vault, and then another, and not simultaneously, as contemplated by appellant at the time of submission of its bid, interfered with its coordinated work schedule, and thereby increased its costs of performance, for which it is entitled to an equitable adjustment pursuant to the Changes or Changed Condition clauses of the contract.

Following the Government stoppage of work on the south vault on July 24, 1957, appellant's work schedule (all dates 1957) was as follows:

<sup>5</sup> This provision authorized the contracting officer to suspend work for failure of the contractor to carry out orders. It did not however authorize payment of additional compensation or provide for an equitable adjustment of the contract price.

<sup>6</sup> Section 2.28 General Conditions provided as follows: Traffic Provisions: Except as otherwise provided in these specifications, the Contractor shall so conduct his operations as not to interfere with the ordinary use of roads, walks, etc. He shall provide and maintain all temporary roadways, walks, barriers, colored lights, danger signals, and other devices necessary to provide for safety of the public and traffic.

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	Started	Completed	Working days
West vault	Aug. 5	Aug. 28	18
South vault	Sept. 4	Sept. 19	12
North vault	Sept. 5	Sept. 20	12
East vault	Sept. 19	Oct. 1	9
Total			51

Appellant complains that if it had been permitted to close the circle to vehicular traffic, as it was led to believe by Par. 4-13C of Section 4 "Work, Drawings, Special Conditions" (supra), which stated that access roads to the Monument Plaza *may* be closed during construction; it could have constructed the four vaults, and the guardroom in 7 weeks' time, computed on the basis of an 8-hour, 5-day-week, or 280 hours.

Appellant contends that 847½ hours of supervision costs were required by reason of the Government's action, or three times the estimated time. ( $847\frac{1}{2} \div 40$  hrs. per week = 21 weeks.) From the total of 847 hours, appellant has deducted 280 hours as originally estimated, and 125 hours permitted by the Government by change order, which leaves a balance of 442 additional hours of supervision costs for itself as prime contractor and the same additional hours of supervision costs for its subcontractor ( $847 - (280 + 125) = 442$ ).

The contract contained *no* provision for the payment of extra compensation for suspension of work. It contained a provision authorizing Government suspension of work, without however authorizing an equitable adjustment or extra compensation.<sup>7</sup> As indicated before, the contract contained the usual "Changes" and "Changed Conditions" clauses 3 and 4, respectively, of Standard Form 23A. No change order, however, was issued by the contracting officer, who denied each item of appellant's entire claim on November 5, 1958.

The jurisdiction of this Board to determine whether extra compensation is warranted or authorized under the facts set forth herein is in issue.

The claim was originally predicated on the theory of damages for breach of contract since the Government failed in an alleged obliga-

<sup>7</sup> Clause 2.14, Section 2 General Conditions, *Temporary Suspension of Work* is quoted as follows: "The Contracting Officer shall have the authority to suspend the work, wholly or in part for such period as he may deem to the best interest of the Government due to conditions which are considered unfavorable to the suitable prosecution of the work, or for failure on the part of the Contractor to carry out orders given or to perform any provisions of the contract. The Contractor shall immediately respect the written order of the Contracting Officer to suspend the work wholly or in part. The Contractor shall not suspend work without such written authority, and shall immediately resume work when conditions are favorable or when methods have been corrected, as approved by the Contracting Officer in writing."

tion to close the circle to vehicular traffic, and thereby interfered with work progress, giving rise to the Government's alleged prohibition of simultaneous construction, making necessary the hiring of a flagman to direct vehicular traffic and for the suspension of work on July 24, 1957. Appellant subsequently avers that construction costs as originally anticipated were increased, and are accordingly compensable pursuant to the "Changes" or "Changed Conditions" clause since a change or changed condition was created by the Government.

There is a conflict of testimony as to whether appellant was promised additional compensation by reason of the failure of the Government to close the circle to vehicular traffic. All Government witnesses testified that no such promise was made. The Board finds that no promise of extra compensation was made and that appellant agreed to proceed with the work provided 12 parking spaces were made available. The Government admittedly promised a commensurate extension of time for performance, if the non-closing of the circle warranted a delay and the same was requested by appellant. Although other time extensions were granted, due to change orders issued by the Government, no request for an extension of time was requested or consequently granted, for the particular phase of the work involved in Claim No. 1. The contract requirements remained the same following the non-closing of the circle.

It has been held that the Government is not liable for delays in making work available to a contractor.<sup>8</sup> Nor is there any doubt that there is an implied obligation of the Government, as in every contract, not to interfere with appellant's performance of its contract.<sup>9</sup>

Appellant's claim under the facts presented here possesses all the elements of a claim for breach of contract. Appellant has failed to present any applicable authority which would permit our assuming jurisdiction to decide this issue. Nor has the Board in its legal research been able to discover such authorization.

We find nothing in the record substantiating appellant's characterization of Claim No. 1 as a change or changed condition within the meaning of the Changes or Changed Conditions clauses, or any other provision within the contract contained, which would authorize this Board to decide the appellant's Claim No. 1 on its merits, since we lack the jurisdiction to do so.<sup>10</sup>

<sup>8</sup> *United States v. Foley* 329, U.S. 64 (1946); *United States v. Rice*, 317 U.S. 61 (1942).

<sup>9</sup> *Chalender v. United States*, 127 Ct. Cl. 557 (1954); *Fuller v. United States*, 108 Ct. Cl. 70 (1947).

<sup>10</sup> *J. A. Jones Construction Company and Charles H. Thompkins Company*, IBCA-23 (June 17, 1960); *J. G. Shotwell*, IBCA-234 (August 15, 1960) 60-2 BCA par. 2736; *Electric Engineering and Construction Service, Inc.*, IBCA-58, 63 I.D. 75 (1956); *Paul Jarvis*, IBCA-115, 57-2 BCA par. 1361 (1957). *Blount Brothers Construction Co.*, ASBCA 5842, 60-1 BCA par. 2634 and cases cited therein, 2 G.C. par. 324 (1960); *Chicora Construction Co., Inc.*, ASBCA 6295, 60-2 BCA par. 2779 (1960).



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It is true that the Changes and Changed Conditions clauses provide for an equitable adjustment in the contract price, but in the case of a breach of contract, which we find here, in the absence of a contract remedy, the Board does not have jurisdiction.

We must, therefore, dismiss for lack of jurisdiction, appellant's claim for additional compensation for extra work, allegedly caused by the Government's failure to close the monument circle to vehicular traffic, and for alleged refusal to permit simultaneous work.

### *Claim No. 2*

#### *Cost of Removing Unforeseen Subterranean Rock in Caissons*

Appellant's second claim is for an equitable adjustment pursuant to the "Changed Conditions" clause, *supra*, in the amount of \$2,589.80, allegedly due for extra work necessitated by its encountering and removing by hand labor, unforeseen and undisclosed rocks, during excavation for construction of four caissons while building a new underground guardroom office.

The new guardroom office was constructed contiguous to and as an addition to an existing underground guardroom, beneath the circular highway, next to the west side of the monument itself.<sup>11</sup>

Sheet 6 of 15 Contract Drawings called for the construction of five caissons as a foundation for the new guardroom office. Only four caissons were built. Sheet 6 indicated "rock fill" at the site of caisson No. 5 which was eliminated for that reason. It indicated "possible stone fill" at caissons No. 3 and 4.

Excavation for the four caissons was at a depth of from 24 to 35 feet below the street level. Caisson No. 1 was relocated and shifted 1 or 2 feet, thereby making it possible to machine dig it completely. At the other three caissons, however, rock was encountered. At caisson No. 2, it was possible to machine dig only the first 4 feet, the next 9 feet had to be dug out by hand labor. At caisson No. 3, appellant was able to machine dig only the first 5 feet, the remainder consisted of rock boulders. At caisson No. 4, rock was struck in the bell of the caisson necessitating hand drilling.<sup>12</sup> A total of 15 feet of rock was encountered in the drilling of all four caissons. The encountered rocks were as large as 3 feet, wider even than the 2 feet diameter of the caissons. It was necessary to break up the rocks by rock busters

<sup>11</sup> The old guardroom is now being used as an equipment room and is connected with the new guardroom office. Entrance is by steps downward from the circular highway.

<sup>12</sup> Testimony discloses that a rock wall was encountered here. All rocks appeared to be from an old abandoned structure.

in order to remove them out of the caissons by the use of a tripod hoist and a well wheel.

Caisson construction took place during the period from July 26 to August 2, 1957, the presence of rocks was immediately called to the attention of the Government, and a record of the alleged extra work was kept by appellant's subcontractor. On November 4, 1957, appellant requested additional compensation for the extra work of removing the unanticipated rock by hand. The request was denied by the contracting officer on December 19, 1957, on the ground that the contract drawings indicated the existence of stone fill and should have been anticipated, particularly since appellant indicated in its letter of July 17, 1957, that excavation would be by hand labor due to anticipated rock fill.

The Government contends that appellant knew of the rock condition by its admission in its letter of July 17, 1957, that Sheet No. 6 of the contract drawings indicated the existence of stone fill, and that the physical conditions encountered did not differ materially from those indicated in the contract.<sup>13</sup>

The caisson construction phase of the contract was awarded by appellant, an engineering contractor, to a sub-subcontractor experienced in difficult and unusual foundation construction work. Prior to submission of its bid to appellant, it consulted a booklet entitled "Configuration of the District of Columbia and Vicinity," being Geological Survey Professional Paper 217, United States Department of the Interior,<sup>14</sup> and a book written by appellant's sub-subcontractor, entitled "Underpinning—Its Practice and Applications."<sup>15</sup> Neither of these books indicated rock at the caissons to be constructed.

In order to resolve the dispute involved in Claim No. 2, it is necessary for the Board to determine whether subsurface conditions at the site of the four caissons was materially different from those shown in the drawings and specifications.

<sup>13</sup> Page 8, Government Brief, March 31, 1960.

<sup>14</sup> This report embodied subsurface data at the Washington Monument at pages 22 and 23. Borehole 3 of 15 test boreholes was within 100 feet west of the monument. It disclosed "partly petrified wood" in a thin layer 47 feet below sea level, and a thin layer of decayed vegetal matter 4 feet below lying in a foot of white sand. Next below was blue clay, 12 feet thick lying on soft bedrock at 62¾ feet. The boreholes were made by the Washington Monument Committee, 1930-31. Published by United States Government Printing Office, 1950.

<sup>15</sup> Pages 146-148, Second Edition—Revised and Enlarged by Edmund Astley Prentis and Lazarus White, Columbia University Press (1950), discloses that construction of the monument was begun in 1848, and was stopped at the height of 150 feet because of lack of funds. When construction was resumed in 1873, it was discovered that the foundation was inadequate. The monument was then underpinned and completed to 555 feet in height. The new foundation was increased from 6,400 square feet to 18,000 square feet of bearing surface.

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Sheet 6 of the contract drawings unquestionably alerted the appellant to the fact that "stone fill" existed at caisson No. 5. This caisson was, however, omitted. This drawing indicated "possible stone fill" at caisson Nos. 3 and 4. No stone fill was indicated at the site of the other caissons. The words "stone fill" in our opinion did not adequately describe the 15 feet of rocks removed from the caissons by appellant.

Section 5-1, General Conditions, entitled "Excavation—Scope of Work," required excavation of all earth, rock, boulders, debris, etc., from the area necessary to permit the construction of the building wall and other footings, etc. This provision, in our opinion, is not an indication that rocks as large as 3 feet, wider even than the diameter of the caissons, requiring that they be broken up for removal would be encountered, nor did it require the removal of an abandoned foundation encountered by appellant.

The changed condition clause refers to two different categories of changed conditions: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

This Board has held that the first category comprises "misrepresented conditions, while the second comprises unexpected or unanticipated conditions."<sup>16</sup> To find that appellant encountered changed conditions in the first category, we must conclude that the information given in the drawings and specifications amounted to definite representations of conditions which the appellant would encounter.<sup>17</sup> We further held it was necessary to conclude that the specifications contained an unqualified representation.<sup>18</sup>

Paragraph 2.2 of the General Conditions, entitled "Bidders to Visit Site," stated that all bidders were expected to visit the site of the work and inform themselves as to all existing conditions; and that no allowance will be made for the failure of a bidder correctly to estimate the difficulties attending the execution of the work.

The Geological Survey by the United States Department of the Interior and a book written by appellant's subcontractors, who did the caisson construction, failed to mention a rock condition at the

<sup>16</sup> *John A. Quinn, Inc.*, IBCA-174 (November 29, 1960).

<sup>17</sup> *Wazberg Construction Co.*, 66 I.D. 123, 133 (1959).

<sup>18</sup> *Hirsch v. United States*, 94 Ct. Cl. 602, 637 (1941); *Inter-City Sand and Gravel Co.*, 66 I.D. 179, 190, 59-2 BCA par. 2310 (1959); 1 G.C. par. 578.

site of the caissons. We do not think it was the duty of appellant to further inquire into the history of the locality.<sup>19</sup>

Appellant had the right to rely on the Government's specifications and drawings. It has been repeatedly held that the specifications cannot alter the effect of the specific language of the changed conditions clause of the contract.<sup>20</sup> Specifically, we hold, therefore, that the changed conditions clause was not restricted in any sense by the General Conditions provision (Par. 2.2) "that no allowance will be made for the failure of a bidder correctly to estimate the difficulties attending the execution of the work."

We do not think there can be any question but that there was an unknown subsurface condition differing materially from that shown by the drawings and specifications, and one which could not have been reasonably anticipated from a study of the same, or on examination of the site above the caissons, which were covered over by a paved highway.<sup>21</sup>

The conditions encountered by appellant were materially different from those represented by the Government, and that this is exactly the type of situation covered by the changed condition clause.<sup>22</sup> It is, therefore, unnecessary to discuss the alternate basis for a changed condition, that is category 2, above.<sup>23</sup>

Appellant's claim is in the amount of \$2,589.80, which includes allowances for profit and overhead for appellant's subcontractor and sub-subcontractor. The statement of extra work computed from time sheets submitted by the sub-subcontractor who actually performed the caisson excavation work, is in the amount of \$1,617.81. To this sum we have added 15 percent as authorized by the Extra Work provision—Par. 2—General Conditions for reasons hereinafter set forth in this opinion pertaining to appellant's Claims Nos. 3, 4, and 5. We hold, therefore, that appellant is entitled to additional compensation in the amount of \$1,860.48 as an equitable adjustment for extra work.

#### *Claims 3, 4 and 5*

The same issue is involved in Claims Nos. 3, 4, and 5. Consequently, they will be considered jointly.

<sup>19</sup> *United States v. Spearin*, 248 U.S. 132, 137 (1918).

<sup>20</sup> *Vade P. Loftis v. United States*, 110 Ct. Cl. 551 (1948); *Peter Kiewit Sons' Co. v. United States*, 109 Ct. Cl. 517 (1947); *Walsh Brothers v. United States*, 107 Ct. Cl. 627 (1947); *Gustav Hirsch v. United States*, 94 Ct. Cl. 602 (1941).

<sup>21</sup> *General Casualty Company et al. v. United States*, 130 Ct. Cl. 520, 528 (1955).

<sup>22</sup> *Fehlhaber Corporation v. United States*, 138 Ct. Cl. 571, 585 (1957).

<sup>23</sup> *Calvada, Inc.*, ASBCA 2062, 56-2 BCA 1033 (1956); Motion for reconsideration denied 57-1 BCA 1245 (1957).

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Each claim arises from the issuance of a change order authorizing additional work during performance of the instant contract. By Change Order No. 8, issued on September 26, 1958, appellant was paid the sums of \$2,710.71, \$2,574.50 and \$325.25, respectively. It now claims additional compensation in the amounts of \$951.03, \$1,007.91 and \$48.79 in Claim Nos. 3, 4, and 5, as an equitable adjustment pursuant to the changes clause, *supra*, for payment of overhead and profit to its subcontractors and sub-subcontractors for work performed by them in compliance with the change orders. Each of three claims was denied by the contracting officer in his written decision and findings of fact, dated November 5, 1958.

The "Changes" clause, *supra*, authorizes an equitable adjustment in the contract price for increased costs of performance necessarily arising from change orders. The "Extra Work" provision (Par. 2.9) sets forth the method of computing an equitable adjustment. It has been heretofore quoted in this opinion.

The above-quoted provision enumerates insurance, taxes, social security, etc., as costs to be considered as items of actual cost, but it specifically excludes an allowance for overhead. We find no provision in the contract authorizing the allowance of overhead or profit to subcontractors. Its only provision provides for 15 percent and is intended to cover profit and all indirect charges against such work for the prime contractor which was allowed by the contracting officer. Appellant's subcontractors and sub-subcontractors must look to the prime contractor for payment thereof since the same must be regarded as coming out of, or as part of, the percentage of profit to which the prime contractor is entitled.<sup>24</sup>

The same issue involved in Claims Nos. 3, 4, and 5 was decided recently by this Board, in *Irvin Prickett & Sons, Inc.*, IBCA-203 (September 23, 1960), 60-2 BCA 2747, 2 G.C. par. 555 (1960). Consequently, we must, perforce, deny all three claims.

### Conclusion

In summary, appellant's Claim No. 1 is in part denied and in part dismissed. Claim No. 2 is sustained to the extent indicated herein, that is, that appellant is entitled to additional compensation in the amount of \$1,860.48. Claims Nos. 3, 4, and 5 are denied.

JOHN J. HYNES, Member.

<sup>24</sup> 24 Comp. Gen. 917 (1945).

I concur:

THOMAS M. DURSTON, *Member*.

I concur in the disposition of Claims Nos. 2, 3, 4, and 5.

I dissent regarding Claim No. 1. The Board has jurisdiction to determine the claim under Clause 3 "Changes." The closing of the access roads constituted a change of the specification authorization contained in Sec. 4-13c of the contract. Admittedly the question is close, but the holding in *Ray Millis*, Eng C & A Decision No. 781 (August 25, 1955) supports this view. *Cf.* Dec. Comp. Gen. A-41761, April 21, 1932, cited in 12 Comp. Gen. 179 (1932).

PAUL H. GANTT, *Chairman*.

ROY W. SWENSON ET AL.

A-28488, ETC. *Decided December 28, 1960*

**Potassium Leases and Permits: Permits**

The filing of an application for a prospecting permit under the act of February 7, 1927, does not vest in the applicant any rights which preclude the Department from considering his application under regulations adopted after such filing.

**Potassium Leases and Permits: Rentals—Potassium Leases and Permits: Permits**

An applicant for a potash permit is properly required to comply with requirements for paying rental and submitting a bond although the requirements were not in effect at the time he filed his application, and a permittee whose application was filed before the adoption of such requirements but who was issued a permit thereafter without compliance with the requirements is properly required to comply with the requirements or suffer cancellation of his permit.

**APPEALS FROM THE BUREAU OF LAND MANAGEMENT**

Roy W. Swenson and 4 others have separately appealed to the Secretary of the Interior from decisions of the Director of the Bureau of Land Management affirming land office decisions requiring them to comply with additional requirements imposed by revised departmental regulations, effective October 5, 1959, as conditions precedent to the issuance of potash prospecting permits in response to applications filed before the effective date of the revised regulations. A tabulation of the applications and the Bureau's actions thereon are set out in the attached appendix.

The applications in question were filed pursuant to the act of February 7, 1927 (30 U.S.C., 1958 ed., sec. 281 *et seq.*), which authorizes

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the Secretary of the Interior "under such rules and regulations as he may prescribe" to grant permits to prospect for potassium in public lands of the United States. The applications were filed and remained on file for different periods varying from almost 9 months to less than a week under departmental regulations which required (1) a filing fee of \$10 (43 CFR, 1958 Supp., 194.8) and (2) a bond in the amount of \$1,000 when the land covered by the permit was entered or patented with a reservation of minerals to the United States or was in a reclamation project or when deemed necessary in any case (43 CFR, 1958 Supp., 194.10). On October 5, 1959, new regulations became effective which required, in addition to the \$10 filing fee, payment of an annual rental of 25 cents per acre (43 CFR, 1959 Supp., 194.8) and a bond in the amount of \$1,000 in all cases (43 CFR, 1959 Supp., 194.10).

None of the appellants' applications had been allowed and a permit issued when the revised regulations became effective. In two cases (Utah 035026, 035358), permits were thereafter issued under the terms of the regulations as they were before the revision but, in all other cases, the land offices required the applicants to meet the requirements of the revised regulations by paying the required rental for the first year and furnishing the \$1,000 bond.<sup>1</sup> The permittees whose permits did not reflect the revised regulations were also notified that their permits would be canceled unless the rental was paid and the bond furnished.

The applicants contend that their applications were properly filed under the old regulations before the new regulations took effect and with the understanding that the permits they sought would be issued in conformity with the terms of the then existing regulations and that they have been subjected to discrimination in being required to conform to the new regulations in the absence of language in the revised regulations indicating that they were to be retroactive in effect. The permittees made the same argument against the cancellation of their permits.

The act of February 7, 1927, gives the Secretary discretion to issue permits under such rules and regulations as he may prescribe. Hence, it was within the scope of his authority to increase the obligations of applicants for potash permits by requiring the payment of rental and the furnishing of bond in all cases as a condition precedent to the

<sup>1</sup> It is not entirely clear whether the land offices did or did not contemplate the furnishing of two bonds in some cases in which bond to protect surface owners had been required under the terms of the regulations before the revision. Inasmuch, however, as the revised requirement for a bond in all cases is a substitute for the requirement for a bond to protect owners of surface interests, reclamation projects and such other interests as the Department may deem necessary, it seems necessary to conclude that only one bond, with the wider coverage, is required.

issuance of a permit. Since the revised regulations describe the conditions which are to attend the issuance of permits in all cases and thus govern land office action in response to all applications considered after the revised regulations become effective, specific language indicating the applicability of the revised regulations to pending applications is not needed. The only question presented by these appeals is whether the appellants suffered an invasion of their legal rights in being required to meet the more stringent requirements of the regulations in force at the time their applications were acted upon.

The appellants could sustain an invasion of their rights only if they had rights which were created by the filing of their applications for permits. The language of the statute is plain. It provides only that the Secretary "is authorized" to issue prospecting permits. This imports that the Secretary has discretion to determine the conditions upon which permits are to be granted. There is no indication that the mere filing of an application vests in the applicant any rights in the lands described therein or in the minerals in those lands; it is a request that a license be granted and nothing more. The Department has held that the discretion of the Secretary of the Interior under the act of February 7, 1927 is the same as that granted by section 13 of the Mineral Leasing Act, as originally enacted (41 Stat. 441). In *Utah Magnesium Corporation*, 59 I.D. 289 (1946), the Department said:

Section 1 of the act of February 7, 1927, *supra*, states that "the Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit \* \* \*" (30 U.S.C. sec. 281.) This language is practically identical with section 13 of the Mineral Leasing Act, as originally enacted. It has been repeatedly held that the issuance of an oil and gas permit under section 13 is a matter confided to the discretion of the Secretary. The potash act, being in a real sense a part of the Mineral Leasing Act, must be given the same construction. \* \* \* (Pp. 289-290; footnote reference omitted.)

See also *James M. Conlon*, A-24498 (December 31, 1946).

Reference to departmental decisions relating to applications for oil and gas prospecting permits discloses a consistent denial that such applications vested in the applicants any rights in the lands described therein or in the minerals in such lands. To such effect are *Charles West*, 50 L.D. 534, 538 (1924); *Voeltzel v. Wright*, 51 L.D. 38, 41 (1925); *L. N. Hagood*, 52 L.D. 630, 631 (1929); *Joseph C. Sampson*, 52 L.D. 637 (1929). In *Charles West*, *supra*, at page 538, the Department held explicitly that the applicant did not gain such right by the presentation of his application as would prevent allowance or rejection of the application from being controlled by circumstances arising



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after its presentation. The Supreme Court of the United States sustained the position of the Department, saying in *United States v. Wilbur*, 283 U.S. 414, 419 (1931):

The answers aver "that under the Act (1920) the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety as the facts may be deemed to warrant." Having examined the Act we cannot say that by any clear and indisputable language it refutes his position. \* \* \*

\* \* \* Looking only at its words one may interpret § 13 as the Secretary says he did. And this conclusion is aided by consideration of his general powers over the public lands as guardian of the people. \* \* \*

Because the appellants had no rights which accrued as a consequence of the filing of their applications, the Bureau was correct in requiring the land offices to conform their procedures from the time of the revision of the regulations to the revised regulations without regard to the time when the appellants' applications were filed. And since the land offices were under a duty to apply the revised regulations from October 5, 1959, it is clear that the two permits issued after that date in conformity with the old regulations were improperly issued without the authorization of the Secretary of the Interior. They were thus subject to cancellation.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decisions appealed from are affirmed.

THEODORE F. STEVENS, *The Solicitor*.

BY: EDMUND T. FRITZ,  
*Deputy Solicitor.*

### Appendix

Appeal	Name of applicant	Serial number of application	Date of application	Date of land office decision	Date of Director's decision
A-28488.....	Roy W. Swenson.....	Utah 035559.....	7-15-59	12- 9-59	4- 7-60
A-28570.....	do.....	Utah 035557.....	5-28-59	2-12-60	6-22-60
A-28512.....	Helen M. Perry.....	Utah 035026.....	4-21-59	12- 2-59	5-12-60
A-28536.....	Majorie M. Gray.....	Utah 035358.....	5- 7-59	12- 3-59	5-16-60
A-28629.....	do.....	Utah 034559.....	3-19-59	1-25-60	8- 1-60
A-28539.....	Audrey H. Peterson.....	Colo. 026978.....	1-16-59	11-3-59	5-16-60
A-28573.....	do.....	Colo. 026974.....	1-16-59	2-25-60	6-17-60
A-28601.....	Amalgamated Chemicals, Inc.....	Utah 037663.....	9-29-59	2- 2-60	7- 8-60

<sup>2</sup> Brackets in original.

**STATUS OF UNITED STATES SAVINGS BONDS OWNED BY THE ESTATE OF ABNER BATTIEST, JR., A DECEASED CHOCTAW INDIAN**

**Indians: Fiscal and Financial Affairs—Secretary of the Interior**

Pursuant to conveyances of restricted Indian lands approved conditionally by county courts in Oklahoma under a trust agreement, the Secretary of the Interior or his authorized representative can suspend temporarily, during the term of the trust, supervision over the collections made of income from the restricted lands.

**Indians: Fiscal and Financial Affairs—Secretary of the Interior**

Upon termination of the trust, which had transferred only the legal title to lands and the future income therefrom to a trustee, leaving the beneficial title in the Indian creator of the trust, the suspension of supervision by the Secretary of the Interior or his authorized representative over the trust property is lifted and such supervision resumes as though the trust had never been made.

**Indians: Fiscal and Financial Affairs—Secretary of the Interior**

United States Savings Bonds purchased with the income accruing from restricted Indian lands during the term of a trust agreement continue under the supervision and control of the Secretary of the Interior or his authorized representative upon termination of the trust.

**M-36608**

DECEMBER 28, 1960.

**TO: COMMISSIONER OF INDIAN AFFAIRS.**

You have referred, for our opinion, the question whether certain United States Savings Bonds, in the face value of \$160,000, belonging to the above estate, constitute restricted or trust property subject to the supervision or control of this Department. You apparently wish to have that question resolved before action is continued looking to the reissuance of the bonds by the Department of the Treasury, in trust, for the estate of Abner Battiest, Jr. All of the apparent beneficiaries of that estate, who are the decedent's widow and three minor children, appear to be of one-half or more Choctaw Indian Blood.<sup>1</sup>

It is our view that the bonds are restricted, and subject to this Department's supervision. There is of direct pertinence in the present matter a trust agreement, dated December 2, 1947, whereby the said Abner Battiest, Jr., an unenrolled fifteen-sixteenths blood Choctaw Indian, joined by his wife, Catherine Battiest, now Brown, conveyed to J. G. Weddington, as trustee, certain lands inherited by

<sup>1</sup> Pending a definite determination of the question whether the bonds are restricted, the Area Director has accepted the voluntary deposit by the widow of those securities under 25 CFR 104.6.

December 28, 1960

the creator of the trust from or through his deceased father and mother, who were Choctaw Indian allottees of the Five Civilized Tribes. The trust was to be carried out on behalf of Abner Battiest, Jr., as the beneficiary. The term of the trust agreement was 10 years, but it appears that prior to such expiration date, i.e., on August 21, 1956, the trustee relinquished the above savings bonds to the Area Director (Muskogee, Okla.) of your Bureau, taking appropriate receipts for such disposition. The exact date of the death of the Indian trustor, Abner Battiest, Jr., does not appear, but, based on correspondence in the file, both the trustee and the beneficiary appear to have died before the trust expired by its own time limitation on December 3, 1957.

A memorandum in the file, prepared by the Field Solicitor, Muskogee, Okla., is to the effect that the lands included within the trust agreement had been unrestricted prior to the passage of the Act of August 4, 1947,<sup>2</sup> but by reason of that legislation restrictions were imposed. While the Field Solicitor apparently did not regard it essential to state with specificity the basis upon which he concluded that the lands were unrestricted prior to August 4, 1947, which may be unimportant for our present purposes, it is essential that the restricted character of the lands under the 1947 act be established. Here again, the Field Solicitor did not show or state positively that the lands were restricted in the hands of that person from whom Abner Battiest, Jr., acquired his interest therein. However, since such a finding is basic to the effective operation of Section 1 of the 1947 act upon lands which had theretofore been unrestricted,<sup>3</sup> the factual premise in that respect will be assumed in the light of the statement by the Field Solicitor that the 1947 act imposed restrictions. Moreover, to proceed on such an assumption appears reasonable in this particular instance since it was regarded as essential that the conveyances of lands included in the trust agreement of December 2, 1947, be approved by the courts of the four counties in Oklahoma in which the lands in question are situated.

It should be noted that only restricted lands apparently were covered by the trust agreement upon the date of its execution on December 2, 1947. While any restricted funds which the creator of

<sup>2</sup> 61 Stat. 731.

<sup>3</sup> " \* \* \* no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated \* \* \*".

the trust then may have had on deposit with the Superintendent (Area Director) for the Five Civilized Tribes were specifically excepted from the application of the trust agreement, any profits or income from the included restricted lands were to be administered under the trust agreement. Restricted funds then in the custody of an officer of this Department were excepted, no doubt, to avoid any possible conflict with those unrepealed provisions of the Act of January 27, 1933,<sup>4</sup> which require that a trust created by an Indian of the Five Civilized Tribes out of "restricted funds or other property subject to the supervision of the Secretary of the Interior," was subject to approval by the Secretary. In approving the transfer of the inherited restricted Indian lands under the trust agreement of December 2, 1947, the four county courts in Oklahoma were performing a function continued in them by the Act of August 4, 1947, *supra*. In exercising this function the county courts were acting as Federal agencies or instrumentalities, and the restrictions were merely relaxed or qualified to the extent of sanctioning such conveyances as receive the county courts' approval.<sup>5</sup>

When acting as a Federal agency, it should be observed that approval by a county court does not, perforce, remove restrictions from the lands, but restrictions may be, and often are, continued. Thus, in the present trust agreement, a specific provision therein (Section 2) states that in no event shall the trustee sell any land or interest in land included in the trust agreement without the written consent of the County Judge of the county in which the land is located. Section 16 of the trust agreement contains the additional provision:

This agreement is executed upon the express condition that upon the termination thereof for any reason, the lands herein conveyed shall become subject to the same restrictions to which they would be subject if this trust agreement had never been executed, that is to say, the restrictions applicable at the time of the execution of this agreement or such modifications thereof as may hereafter be enacted or made applicable.

The conditions just mentioned and quoted above constitute continuing restrictions, and obviously were inserted in the trust agreement for the protection of the Indian creator of the trust. Those provisions assured the inalienability of the lands included within the trust, except on the same basis as that prescribed by Section 1 of the 1947 act,

<sup>4</sup> 47 Stat. 777, Section 12 of the act of August 4, 1947, repealed only sections 1 and 8 of the Act of January 27, 1933, leaving the other provisions of the latter act in full operation as to trusts created by Indians of the Five Civilized Tribes.

<sup>5</sup> See *Parker v. Richard et al.*, 250 U.S. 235 (1919); *United States v. Goldfeder*, 112 F. 2d 615 (CCA, 10th, 1940).

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*supra*. Having the power under that act to withhold approval of a conveyance of restricted Indian lands, the county court likewise had the power to impose as a condition to its approval certain protective measures such as those described.<sup>6</sup> Thus, by the terms of the approved trust agreement, the restricted lands included within the agreement were, during the continuance of the trust, restricted, and now appear subject to the same restriction that they cannot be sold except with the approval of the appropriate county court of Oklahoma.

The file attached to your request for our views in this matter shows that the saving bonds in question were purchased with income derived from the restricted lands constituting the original corpus of the above trust. Moreover, based upon the Area Director's teletype of April 24, 1959, such income had as its source "oil produced under Departmental leases upon restricted lands." Except for the period when the lands were unrestricted, which apparently represented an interval beginning some time after the execution of the Departmental mineral leases on the lands and up to the imposition of restrictions by the Act of August 4, 1947, *supra*, the income from the restricted lands likewise was restricted, and therefore subject to the jurisdiction or supervision of the Secretary of the Interior.<sup>7</sup>

We do not believe that the restricted character of the above bonds is changed by the fact that for a prescribed period of time during the operation of the trust the trustee had certain powers over the income derived from the restricted corpus of the trust, and which resulted in the bond investment. As stated heretofore,<sup>8</sup> the required approval of the county courts to the conveyancing of the lands under the trust agreement merely relaxed the restrictions upon the lands to the extent of sanctioning the temporary transfer of such lands to the trustee for the limited purposes of the trust. Of course, by the terms of the trust, the trustee was permitted to utilize a portion of the trust income for certain stated purposes, which, if properly administered or expended during the trust, is not within the scope of this memorandum. Nevertheless, with respect to the unused income from the restricted lands, now embodied in the form of the bonds, the governmental interest is clear, based upon the continuance of Federal restrictions.

<sup>6</sup> *Goldfeder v. United States*, 112 F. 2d 615, *supra*.

<sup>7</sup> *Sunderland v. United States*, 266 U.S. 226, 235; *Parker v. Richard*, *supra*; *United States v. Brown et al.*, 8 F. (2d) 564 (CCA, 8th 1925) cert. denied 270 U.S. 644; Sec. 1, Act of January 27, 1933, *supra*; Section 5 Act of August 4, 1947, *supra*.

<sup>8</sup> *Ante*, fn. 5.

The restrictions upon the lands included within the trust, as well as upon the income from such lands, merely were suspended during the term of the trust agreement for the specific purposes and uses recited in that agreement. This is adequately demonstrated by the actions of officials in the Area Director's office, taken contemporaneously with the execution of the trust and the approval of that agreement by the county courts. For instance, the supervision of collections by the Superintendent or the Area Office of restricted income accruing from the Departmental mining leases on the lands was relinquished conditionally to the trustee, since it was recognized that upon termination of the trust officials of this Department again would have to assume complete supervision in the matter.

In fact, it is manifest that at all times, whether before, during, or after the termination of the trust, the beneficial interest in the lands, and to the income therefrom, remained in the Indian creator of the trust, Abner Battiest, Jr. In this respect it should be added that the execution of the trust was only a partial alienation, affecting only the bare legal title to the restricted property covered by the trust. Thus, when the conditions upon which the trust operated came to an end, the situation essentially is the same as if the trust had never been made, thereby restoring to the Secretary of the Interior or his representative the supervision which merely had been suspended with respect to the property included within the trust.<sup>9</sup>

On the basis of our conclusion that the savings bonds are restricted property, and to be held under the supervision of this Department, it is suggested that you issue instructions to the Area Director so as to enable him to obtain from the Treasury Department an appropriate transfer of ownership, compatible with this opinion, of the bonds in question.

EDMUND T. FRITZ, *Deputy Solicitor.*

<sup>9</sup> *Brown et al. v. United States*, 27 F. (2d) 274 (CCA, 8th, 1928); *Timothy v. Sessions et al., United States of America, Intervener*, No. 3568 Civil (U.S.D.C.E.D., Okla. 1954); *Of. Smith v. McCullough et al.*, 270 U.S. 456, 463 (1926); *Davis v. Jones, Administratrix*, 254 F. (2d) 696 (CCA, 10th, 1958), cert. denied 358 U.S. 865.

## APPEAL OF REFER CONSTRUCTION COMPANY ★

IBCA-209

*Decided, October 20, 1960***Contracts: Appeals—Contracts: Contracting Officer**

Contracting Officer may validly grant a request for extension of time for taking an appeal, if such a request is received and acted upon before the appeal period has elapsed.

**BOARD OF CONTRACT APPEALS**

The Government has moved to dismiss the appeal of July 15, 1959

for the reason that the contractor failed to give notice of appeal within the 30 days allowed by the contract and the Board is, therefore, without jurisdiction in the matter.

The subject contract was for the installation of steel outlet pipe liner, Willow Creek Dam, Crow Indian Irrigation Project, Montana.

Notice to proceed was received by the contractor-appellant on September 24, 1958, and established March 28, 1959 as the contract completion date.<sup>1</sup> The work under the contract was accepted by the Government as substantially complete as of May 1, 1959.

The contracting officer found that the contractor "failed to complete the contract in accordance with the contract terms for a total of 34 days" and assessed liquidated damages in the total amount of \$1,700.00 at the contract *per diem* liquidated damages rate of \$50.00.

The contractor requested an extension of time and consequent remission of liquidated damages in two letters dated March 17 and March 24, 1959, which appear quoted in full below.

The contracting officer replied to these letters on May 28, 1959. Since the text of this letter plays an important role in the disposition of this motion, it is quoted in full:

**Refer Construction Company**

Box 449

Miles City, Montana

Dear Mr. Refer:

Reference is made to your letter to the Superintendent, Crow Agency dated March 17, 1959, and also to subsequent letter to the Area Director dated March 24, 1959, both of which constitute a request for extension of time on the subject contract.

The reasons you have given for requesting an extension of time, as furnished in the above referenced letters, are . . . [sic]

*March 17 letter:* "We are requesting a 15-day extension of time on subject project as the spring thawing has made the road impassable for hauling the necessary materials.

★ Not in chronological order.

<sup>1</sup> The performance period amounted to 185 days.

"This job is virtually completed with the exception of the pressure grouting which should not require more than three or four days. However, we are unable to haul material over the road in its present condition; so we must wait for it to dry up or freeze again.

"We are in hopes this condition will improve and that we will not require this additional time."

*March 24 letter:* "In our letter of March 17, 1959, to Mr. Poitras requesting a time extension on subject contract, we failed to mention the excessive variance in temperatures that have existed since the first of November, 1958.

"These temperatures varied so as to make it impossible for us to carry on the work in accordance with specifications.

"Now that temperatures are within the requirements, the spring thawing has made the roads impassable for hauling the necessary materials.

"We would appreciate your taking all of these facts into consideration in adjudging the merits of a time extension."

There is no indication in the above referenced material, nor do our files establish, when the delays complained of were first encountered. Your attention is called, in this respect, to Clause 5(c) of the General Provisions of the subject contract, which states in part:

"... the contractor shall within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of delay . . ."

By failing to comply with the above quoted provision of the contract, viz. by your failure to give timely written notice of delay, the claim is denied.

Please accept our appreciation of the efforts you have exerted in completing the work on this contract. We have received copies of the final inspection and completion reports, and are ready to process final payment and effect your release from further contractual obligations. Unless additional evidence is furnished indicating that you have complied with Clause 5(c), liquidated damages will be charged in the amount of \$50.00 for each day's delay, or a total of \$1,700 for the period from March 28 to May 1, inclusive.

Sincerely yours,

(Sgd) Reinholt Brust  
Assistant Area Director

The contractor-appellant replied under date of June 8, 1959, as follows:

US Department of the Interior  
Bureau of Indian Affairs  
804 North 29th Street  
Billings, Montana

RE: Land Operations Irrigation  
280  
Contract No. 14-20-250-  
1533

ATT: Assistant Area Director

Gentlemen:

Reference is made to your letter of 28 May 1959 in which you propose to make excessive and arbitrary liquidated damages in the amount of \$1700 against our contract. This amount is entirely unacceptable to us and we will not make acceptance of this without exhausting every other channel of negotiation prior to acceptance of any liquidated damages to subject contract.

Your office has based its sole claim in subject damages on Clause 5(c) of the General Provisions of the contract. We cannot concur in this whatsoever, as you people made such liberal interpretation of the contract by arbitrarily



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splitting the contract and forcing us to bid primarily a labor contract which is not in keeping with the original proposal whatsoever. Also your notification of the award of this contract was extremely delayed. The date of commencing this project necessarily forced us to proceed with this work under adverse weather conditions and at such time of the year when normal working weather is not expected.

Also we encountered obstacles of weather and of other natural causes which made the completion of this job impracticable, at which time we notified your engineers of these obstacles and our inability to complete the contract within the specified time, and requested an extension of time.

This extension was neither granted nor denied until your letter of 28 May 1959, which is certainly not in keeping with good contractual relations. Also according to our contract we were not permitted to utilize the full seven days per week, which you are contemplating assessing liquidated damages. You have based your entire cause of liquidated damages on the assumption that you were not given timely notice, which we contend you were, and we do not consider your critique of our letter as being evidence that we are not entitled to consideration because of the obstacles encountered on this job.

We would like to bring to your attention the fact that these liquidated damages are collectible only if damages are incurred, and on subject project there were no damages incurred due to the job not being completed within the specified time limit. This project will be practically unusable during the ensuing season because of other construction work, and our inability to get this contract completed has not held up the utilization of this project.

Also there were no damages whatsoever incurred by your organization because of the request for an extension of time on subject contract. Your interpretation and proposed enforcement of this Clause of the contract is without question a direct attempt to apply this as a penalty only to extract money due us.

We shall expect the payment of such money due us, and not in controversy, in the very near future; namely, the money in excess due us other than the \$1700 that you are arbitrarily assessing against us.

We are expecting a reply in the near future as we anticipate the collection of all moneys due under subject contract, and if this contract requires litigation we shall certainly seek money and damages due to the above mentioned errors in contractual relation previously incurred by us.

Very truly yours,  
REFER CONSTRUCTION CO.  
Duane K. Rafer, President

DKR/1

On June 15, 1959, the Contracting Officer dispatched the following letter to the contractor:

Refer Construction Company  
P.O. Box 449  
Miles City, Montana  
Gentlemen:

Reference is made to your letter dated June 8, 1959, regarding your objection to our assessing liquidated damages against Contract No. 14-20-250-1533.

The above referenced letter does not establish that timely notice was given of delay in construction work due to unusual weather conditions, as provided for in Clause 5(c) of the General Provisions, of the contract. We can see no reason, therefore, for changing our decision of May 28, 1959, viz. that liquidated

damages will be charged by reason of the fact that timely notice had not been given.

Your attention is called to Paragraph 29 of the General Requirements of the contract, regarding disputes, and also to the attached copy of an excerpt taken from the Code of Federal Regulations, Title 43, concerning the functions and rules of procedure of the Board of Contract Appeals. Particular attention is called to Section 4.9 of the above, containing instructions on the filing of a notice of appeal. If you feel such notice is in order, it should be prepared and presented in accordance with those instructions.

Final acceptance of work and request for release from further contractual obligations is being made by separate letter.

Sincerely yours,

(sgd) Reinholt Brust  
Assistant Area Director

The contractor appealed in writing from both of these letters by letter dated July 15, 1959, which, according to the record, was received by the Billings office of the Bureau of Indian Affairs on July 16, 1959.

On July 21, 1959, the Contracting Officer sent the following air mail letter directly to the Board:

Chairman, Board of Contract Appeals  
Department of the Interior  
Office of the Solicitor  
Washington 25, D.C.

"Dear Sir:

This will advise that a NOTICE OF APPEAL dated July 15, 1959 has been received by this office in regard to the work recently completed on the Willow Creek Dam, Crow Indian Reservation, under Contract No. 14-20-250-1533.

*Such notice was received within the prescribed time limit, and should be processed accordingly.* (Underscoring supplied.)

The APPEAL and all related material will be retained in our files until departmental counsel is appointed, and requests same.

Sincerely yours,

(sgd) Reinholt Brust  
Assistant Area Director"

In support of the motion to dismiss, the Department Counsel argues that the contractor failed to take an appeal from the decision of the contracting officer within the time allowed by the contract. The running of the 30-day appeal period commenced with receipt of the May 28, 1959, decision of the contracting officer denying the claim of the contractor and was not tolled by the contracting officer's letter of June 15, 1959, which, in response to the June 8, 1959, letter of the contractor, advised that no reason existed for changing his May 28, 1959, decision. An amendatory or substitute decision is in no manner herein involved. Actual date of receipt of the contracting officer's denial of the contractor's request for a time extension is not disclosed by the file although the fact of receipt, presumably in the ordinary course of the mails, is established by the contractor's response of June 8, 1959, to the same. It is, therefore, apparent that the contractor's Notice of Appeal, dated July 15, 1959, was mailed to the contracting officer after a minimum delay of 38 days after its receipt of the contracting officer's decision. The period of 30 days allowed for the taking

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of an appeal from the contracting officer's decision was established by the provisions of Paragraph 29 of the General Conditions of the contract.

Recognition must be given to the fact that the contracting officer, upon receipt of the contractor's Notice of Appeal on July 16, 1959, advised the Board, by letter dated July 21, 1959, of the fact of receipt of such Notice and that the same was received within the prescribed time limit and should be processed accordingly. It is submitted that such a representation cannot change the rights of the parties in a jurisdictional matter as is herein involved. Indeed, the Board itself is without authority to grant an extension of time with respect to the filing of a notice of appeal as evidenced by the provisions of 43 CFR, Section 4.16, which give recognition to a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction of subject matter of which it would otherwise not have jurisdiction.

It is, of course, correct as the Department Counsel contends, that provisions of the nature as those contained in Clause 6<sup>2</sup> "Disputes" of Standard Form 23A are jurisdictional<sup>3</sup> and thus would preclude review of a contracting officer's decision upon questions of fact arising under the contract unless an appeal is taken within the 30 days allowed for that purpose. This Board so held in *Bennett Industries, Inc.*<sup>4</sup> However, it is also stated there<sup>5</sup> that

neither the Board nor any administrative officer has authority to waive this limitation or otherwise extend the 30-day period of time.

It is correct that the Board "has no authority to waive this limitation or otherwise extend the 30-day period," particularly in view of the precise language of 43 CFR 4.16:

The Board may grant extensions of time except with respect to the filing of the notice of appeal.

However, before the appeal time has elapsed, contracting officers may validly extend the appeal period in the same manner as they have the power to enter into contracts, modify, and terminate them. This Board is in full agreement with the holding of the Armed Services Board of Contract Appeals in *Jeppesen and Company*.<sup>6</sup>

The cases cited on behalf of the Government in support of this contention [which is similar to the contention of the Department Counsel in the instant case quoted above], however, are cases wherein the Board and its predecessors have held that when the appeal period has in fact elapsed before an appeal is taken, neither the Secretary nor the Board as his authorized representative can waive the timeliness requirement and recognized the notice of appeal as a valid notice. The case of *Goldschmidt and Bethune Company*, BCA No. 856, 3 CCF 381 (1945), cited on behalf of the Government as holding that a Contracting Officer cannot validly grant a request for extension of time for taking an appeal,

<sup>2</sup> Paragraph 29 of the "General Conditions" adds the words "or is not supported by substantial evidence" to Standard Form 23A.

<sup>3</sup> *Bmsco Manufacturing Company*, IBCA-66, 63 I.D. 92, 96 (April 6, 1956).

<sup>4</sup> IBCA-102, 64 I.D. 113 (April 23, 1957).

<sup>5</sup> *Ibid.*, 115.

<sup>6</sup> ASBCA No. 1962 (December 9, 1955).

is in fact a case wherein the request for extension was made and purportedly granted by the Contracting Officer *after* the 30-day period had elapsed.

The ASBCA concluded:

*In the instant case the request was made and granted before the 30-day period had elapsed. Under the circumstances here disclosed the Board holds that the instant appeal was timely taken.* (Underscoring supplied.)

In the circumstances of the instant case, we consider the letter of the contracting officer of June 15, 1959, which was dispatched before the appeal period elapsed,<sup>7</sup> as extending the appeal period for a period of additional 30 days from the date of the receipt of the contracting officer's letter of June 15, 1959. Hence, the instant appeal was timely taken.

Additionally, it is doubtful whether the so-called letter decision of the contracting officer of May 28, 1959 constituted a formal decision which would require the start of the running of the appeal period under the "Disputes" clause. This Board held in *Central Wrecking Corporation*:<sup>8</sup>

In order for a decision to have that effect it must, at least, fairly and reasonably inform the contractor that a determination under the "disputes" clause is intended.

In the instant case, the letter of May 28, 1959 contained *no caveat* to put the appellant on notice that he must appeal in the event of disagreement.<sup>9</sup> The Court of Claims under the "peculiar facts" involved in *Keystone Coat & Apron Mfg. Corp. v. United States*<sup>10</sup> supports the rule arrived at by this Board, albeit in more colorful language than we are able to muster:

This hardly can be classed a dispute. We have always thought it takes two to make a dispute. But this was unilateral. \* \* \*

Plaintiff was not asked to explain. It was told to pay. The contracting officer did not ask for plaintiff's position so that a dispute might arise. He merely took a shillalah and struck him down. \* \* \*

As they say in the range country, he did not give plaintiff a chance to establish his brand. \* \* \*

In the instant case, the contracting officer did not use a shillalah, but validly gave the contractor-appellant a chance to establish "his brand."

In order to do this in a proper manner, the case is remanded to the contracting officer with the directive to set aside his letter decision of May 28, 1959, and the subsequent letter decision of June 15, 1959, and to issue a findings of fact and decision responsive to the allegations of the contractor-appellant, including the allegations that there may have

<sup>7</sup> The appeal period started to run from the date of the receipt of the contracting officer's letter of May 28, 1959.

<sup>8</sup> IBCA-69, 64 I.D. 145, 149 (March 29, 1957).

<sup>9</sup> *General Excavating Company*, IBCA-188 (September 21, 1960).

<sup>10</sup> Ct. Cl. No. 524-56 (June 8, 1960).

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been substantial compliance with the notice requirements of Clause 5(c) of Standard Form 23A. It is noted in that respect that the clause explicitly provides that the "Contracting Officer shall ascertain the facts and the extent of the delay \* \* \*," which clearly requires the issuance of a findings of facts. The issuance of a letter decision (without the ascertainment of facts) is deemed insufficient by the Board to dispose of the instant dispute under Clause 5(c).

On the other hand, the Government will not be barred from establishing by competent evidence that there was no substantial compliance with the contractual notice requirements, or that a consideration of the claim on its merits would be injurious to the Government's interest.<sup>11</sup>

The case is hereby remanded, and the appeal file returned to the Department Counsel for the use of the Contracting Officer.

PAUL H. GANTT, *Chairman.*

I concur:

I concur:

THOMAS M. DURSTON, *Member.*

JOHN J. HYNES, *Member.*

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<sup>11</sup> Cf. *Monarch Lumber Company*, IBCA-217, 67 I.D. 198, 203 (May 18, 1960).

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| 4. When a valid application for a homestead entry is filed and an amended application is later filed for the same and additional land, which amended application is invalid because it contains excess acreage, the applicant loses his priority over an intervening applicant as to land included in his original application and in the intervening application..... | 407 |
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| 5. When the last day for filing an application for a 5-year extension of a noncompetitive oil and gas lease falls on a day on which the land office is not open to the public for the filing of documents for all of the normal hours pursuant to an Executive order permitting Federal employees to be excused from duty for half a day, the application is timely filed if it is received in the land office on the next day the office is open to the public..... | 1   |
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| 7. Where a relinquishment of an entry is filed after an affidavit of contest has been filed against the same entry but before the entryman has been given actual or constructive notice of the contest, it is to be conclusively presumed that the relinquishment was caused by the contest unless it can be shown that the affidavit of contest was not good and sufficient, that the contest charge was not true, that the contestant was not a qualified applicant, or that the land is not subject to the contestant's application..... | 136 |
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8. A telegram filed in the land office stating that the entryman relinquishes his entry is a "written relinquishment" within the meaning of the section 1 of the act of May 14, 1880.....	136
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1. Where an order withdrawing a tract of unsurveyed land from entry gives the line of mean high tide of a branch of an inlet as one of the boundaries of the withdrawn area, the meander line which is run in surveying the area in accordance with the mean high water line is to be regarded as the equivalent of the line of mean high tide in establishing the littoral boundary of the withdrawn area...	237
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2. An occupant of public land who knows that title to the land is in the United States at the time he purchases the land cannot be regarded as holding the land in good faith under claim or color of title, within the meaning of the Color of Title Act.....	110

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1. Where a relinquishment of an entry is filed after an affidavit of contest has been filed against the same entry but before the entryman has been given actual or constructive notice of the contest, it is to be conclusively presumed that the relinquishment was caused by the contest unless it can be shown that the affidavit of contest was not good and sufficient, that the contest charge was not true, that the contestant was not a qualified applicant, or that the land is not subject to the contestant's application.....	136
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(See also *Labor, Delegation of Authority, Rules of Practice.*)



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2. A manufacturer of a shunt reactor which failed upon being energized after installation has the burden of proving that the failure was attributable to a fault of the Government which was the purchaser, when the preliminary tests of the reactor at the factory were not made entirely as required by the specifications, and final acceptance of the reactor was under the specifications subject to further testing and a period of satisfactory operation after installation. However, even if the Government has the burden of proving the probable cause of the failure of the reactor, this need be established only by a clear preponderance of the evidence, and the Government has succeeded in showing that the most probable cause of the reactor's failure was a defective weld..... 100
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| 40. A manufacturer of a shunt reactor which failed upon being energized after installation has the burden of proving that the failure was attributable to a fault, of the Government which was the purchaser, when the preliminary tests of the reactor at the factory were not made entirely as required by the specifications, and final acceptance of the reactor was under the specifications subject to further testing and a period of satisfactory operation after installation. However, even if the Government has the burden of proving the probable cause of the failure of the reactor, this need be established only by a clear preponderance of the evidence, and the Government has succeeded in showing that the most probable cause of the reactor's failure was a defective weld---- | 100 |
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| 45. A contractor engaged in clearing and grading a recreational area in Yellowstone National Park was not entitled to an extension of time for performance by reason of additional clearing and other work when it breached its contract by not completing all of the work in the scheduled construction season and hence, encountered other contractors which increased the difficulties of its work, and the contracting officer did allow a 30-days' extension of time which may have been intended to cover additional clearing work----- | 150 |
| 46. Where the required period for completion of the contract has expired, the contractor is not entitled to further extension of time for performance by reason of allegedly "unusually severe weather," occurring after expiration of the required period for completion-----  | 344 |
| 47. Where a contractor claims that, absent a strike, supplies would have been delivered to it on a certain date by its subcontractor or supplier, but no evidence is submitted showing that supplies could have been so delivered, the hypothetical delivery date alleged by the contractor will be disregarded for the purpose of establishing the commencement of the period of excusable delay caused by the strike-----   | 344 |

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| 58. When experience with the operations of a roadway contractor for a period of over a month showed that its equipment and methods of operation were hopelessly inadequate to work long stretches of roadway, and the specifications expressly permitted the construction engineer in charge of the work to restrain the contractor from undertaking new work to the prejudice of work already started, he did not exceed his authority by limiting the span of roadway on which the contractor might work to a designated number of feet. The imposition of this operational limitation cannot be successfully advanced by the contractor as an "act of Government," converting the termination for default into a termination for the convenience of the Government..... | 118 |

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| 59. A contractor engaged in clearing and grading a recreational area in the Yellowstone National Park was not entitled to additional compensation for alleged extra moves in connection with its operations when the evidence is conflicting as to the number of the moves; the circumstances under which they were made are not clear; the moves may have been necessary because of the failure of the contractor to coordinate his operations with those of other contractors; and the contractor failed to protest against the actions requiring the additional moves..... | 151 |
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| 63. A manufacturer of a shunt reactor which failed upon being energized after installation has the burden of proving that the failure was attributable to a fault of the Government which was the purchaser, when the preliminary tests of the reactor at the factory were not made entirely as required by the specifications, and final acceptance of the reactor was under the specifications subject to further testing and a period of satisfactory operation after installation. However, even if the Government has the burden of proving the probable cause of the failure of the reactor, this need be established only by a clear preponderance of the evidence, and the Government has succeeded in showing that the most probable cause of the reactor's failure was a defective weld..... | 100  |
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- 76. Contractor's inability to purchase steel pipe from its supplier due to a national steel strike in existence at the time of submission of bid and award is not considered an unforeseeable cause of delay, within the meaning of Clause 5(c) of U.S. Standard Form 23A, where the cause of the delay, that is the strike, was known to the contracting parties..... 380
- 77. A contractor who is directed to perform extra work after the completion date of the contract has passed is entitled to an extension of time equal to the number of days from the date the work was directed until the date when it is completed, provided the contractor has not delayed the extra work unnecessarily..... 290

**GRAZING PERMITS AND LICENSES**

**GENERALLY**

- 1. Where a party desiring to inspect departmental records neither follows the procedure set up in the applicable regulation nor requests the hearing examiner to issue a subpoena for them, it is proper for the hearing examiner to refuse to dismiss grazing trespass charges on the ground that the party was denied an opportunity to inspect the records..... 145

**APPEALS**

- 2. The provision of the general rules of practice of the Department, 43 CFR, 1958 Supp., 221.92(b), permitting a waiver of the late filing of a document required to be filed within a certain time provided the document is shown to have been transmitted within that period of time and received within 10 days after the filing was required, does not apply to appeals to the Director arising under the Federal Range Code for Grazing Districts..... 5

## GRAZING PERMITS AND LICENSES—Continued

## APPEALS—Continued

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| 3. An appeal to the Director of the Bureau of Land Management under the Federal Range Code for Grazing Districts is properly dismissed where the appeal is not filed in the Office of the Director within 30 days after service of the hearing examiner's decision on the appellant.....  | 4    |
| 4. Where, in an appeal to the Secretary of the Interior from the dismissal by the Director, Bureau of Land Management, or a grazing appeal under the Federal Range Code for the reason that the appellant failed to serve the State Supervisor and intervenors by registered or certified mail, the appellant alleges that he did in fact serve the State Supervisor and intervenors by registered or certified mail, the case will be remanded to the Bureau to allow the appellant an opportunity to submit proof of such service.... | 313  |
| 5. An appeal to a hearing examiner from a decision of a district manager under the Federal Range Code for Grazing Districts is properly dismissed where the appeal is not filed within 30 days after receipt of notice of the district manager's decision.....  | 300  |
| 6. An appeal to a hearing examiner from a decision of a district manager dismissing a request for a dependent property survey is properly dismissed where the issue raised have been previously adjudicated in a proceeding involving the same privileges, the same parties, and the same property.....   | 300  |
| 7. The Federal Range Code provides that an appellant in an appeal to the Director, Bureau of Land Management, must serve a copy of the appeal and any brief on each party, including the State Supervisor, either personally or by registered mail, and an appeal is subject to summary dismissal where this is not done.....   | 313  |

## CANCELLATION AND REDUCTIONS

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| 8. A grazing licensee who repeatedly and willfully grazes his cattle and horses in trespass upon the public domain is properly subjected to disciplinary action consisting of assessment of damages and suspension of the grazing privileges on his base property.....   | 116 |
| 9. The fact that a grazing licensee has repeatedly been assessed and has paid damages for prior grazing trespasses may be considered in determining whether the most recent trespass was willful.....  | 145 |
| 10. A grazing licensee who repeatedly and willfully grazes his cattle and horses in trespass upon the public domain is properly subjected to disciplinary action consisting of assessment of damages and reduction of the grazing privileges of his base property.....   | 145 |
| 11. Where grazing privileges are reduced for grazing trespass, the reduction attaches to the base property and not only to the trespasser's grazing privileges.....  | 145 |
| 12. An offer to pay monetary damages in lieu of a reduction of grazing privileges imposed for a willful trespass will be rejected because the Federal Range Code does not provide for monetary penalties and the reduction of grazing privileges is a more suitable punishment for the willful trespass committed..... | 145 |

GRAZING PERMITS AND LICENSES—Continued

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13. An appeal to the Director of the Bureau of Land Management under the Federal Range Code for Grazing Districts is properly dismissed where the appeal is not filed in the Office of the Director within 30 days after service of the hearing examiner's decision on the appellant.....

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HOMESTEADS (ORDINARY)

(See also *Additional Homesteads, Enlarged Homesteads, Reclamation Homesteads, Soldier's Additional Homesteads, Stock-raising Homesteads.*)

AMENDMENTS

1. When a valid application for a homestead entry is filed and an amended application is later filed for the same and additional land, which amended application is invalid because it contains excess acreage, the applicant loses his priority over an intervening applicant as to land included in his original application and in the intervening application.....

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APPLICATIONS

2. When a valid application for a homestead entry is filed and an amended application is later filed for the same and additional land, which amended application is invalid because it contains excess acreage, the applicant loses his priority over an intervening applicant as to land included in his original application and in the intervening application.....

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CANCELLATION OF ENTRY

3. Where an entryman fails to live on his entry for at least five months in each of the first three years of the entry, the entry must be canceled.....
4. Where an entryman fails to establish residence on his entry within 12 months from the allowance of his entry, the entry must be canceled.....

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CLASSIFICATION

5. Where a report of field examination does not contain information upon which a determination can be made as to the suitability for agricultural purposes of land applied for under the homestead laws, the case will be remanded for further field examination....

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LANDS SUBJECT TO

6. Land which is withdrawn from entry under the public land laws is not subject to settlement or to the initiation of any claim under the homestead laws even though other land in the same withdrawal may have erroneously been patented under the homestead law.....

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MINERAL LANDS

7. Where land is shown to contain minerals in such limited quantities that their extraction would not justify the cost thereof, the land is not mineral in character so as to remove it from the operation of the nonmineral land laws.....

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## HOMESTEADS (ORDINARY)—Continued

## RELINQUISHMENT

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8. Where a relinquishment of an entry is filed after an affidavit of contest has been filed against the same entry but before the entryman has been given actual or constructive notice of the contest, it is to be conclusively presumed that the relinquishment was caused by the contest unless it can be shown that the affidavit of contest was not good and sufficient, that the contest charge was not true, that the contestant was not a qualified applicant, or that the land is not subject to the contestant's application..... 136
9. A telegram filed in the land office stating that the entryman relinquishes his entry is a "written relinquishment" within the meaning of the section 1 of the act of May 14, 1880..... 136
10. Where a relinquishment of a homestead entry and an affidavit of contest against the same entry are filed simultaneously, the latter must be dismissed because the relinquishment takes effect immediately, extinguishes the entry, and leaves the contest nothing upon which to act..... 136

## RESIDENCE

11. The requirement of the homestead law that the entryman must establish residence on his entry within a maximum period of 12 months from the allowance of his entry is not satisfied by clearing and leveling the land and cultivating it, where the entryman has lived with his family in rented premises in the vicinity of the entry and has never eaten, slept, or kept any possessions on the entry..... 212
12. Where an entryman fails to live on his entry for at least five months in each of the first three years of the entry, the entry must be canceled..... 295

## SECOND ENTRY

13. Where an application for what appears to be an original homestead entry is allowed to an entryman who should have filed for a second entry for which he was qualified and who later satisfies the requirements for a second entry, the entry remains in effect as of the day it was allowed and his obligations under the homestead law are measured from that date..... 295
14. Where an entryman is qualified to make a second entry, the fact that his first entry is still of record does not deprive him of his right to a second entry..... 295

## INDIAN ALLOTMENTS ON PUBLIC DOMAIN

## GENERALLY

1. There is no requirement that an application for soldiers' additional homestead entry be rejected on the ground that an Alaskan Indian claimed the land under an allotment application which was filed after the soldiers' additional application was filed where it appears that when the soldiers' additional application was filed, the land was not occupied either by the allotment applicant or by other Alaskan Indians, Aleuts, or Eskimos; and a decision improperly rejecting a soldiers' additional application in such circumstances will be set aside..... 410

**INDIAN LANDS**

**CEDED LANDS**

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- 1. A statute which purports to ratify a cession agreement by which Indian tribes "\* \* \* hereby cede, convey, transfer, relinquish and surrender forever without any reservations, express or implied, \* \* \*" operates to extinguish completely the Indian title to the lands involved; and a subsequent reservation of a portion of those lands by the Secretary of the Interior for school and agency purposes for the benefit of the Indians does not revert title in the tribe..... 10

**LEASES AND PERMITS**

**Generally**

- 2. The fact that the Government over a long period of time accepted without objection lesser royalties than it later finds are due under the terms of a tribal mineral lease does not stop it from asserting a claim for additional royalties..... 78

**Minerals**

- 3. A provision in a tribal limestone lease permitting the lessee to deduct costs of "transportation and treatment" in determining the net value of its production is limited to those items and does not give operator of the lease the right to deduct all of its general mining or quarrying costs..... 78

**INDIAN REORGANIZATION ACT**

- 1. The authority provided by section 3 of the Indian Reorganization Act to restore lands to tribal ownership extends to former tribal lands of an Indian reservation where, by legislation enacted subsequent to the extinguishment of Indian title, a tribal interest has been created in the proceeds derived from the sale of such lands..... 11

**INDIAN TRIBES**

**ENROLLMENT**

- 1. The membership roll of the Osage Tribe approved in 1908 by the Secretary of the Interior pursuant to the act of June 28, 1906 (34 Stat. 539) constitutes the final roll of members of the Osage Tribe among whom the tribal estate was divided and thereafter persons cannot be added to that roll and, in the absence of enrollment, cannot share in the division of the tribal estate..... 89

**INDIANS**

**FISCAL AND FINANCIAL AFFAIRS**

- 1. Upon termination of the trust, which had transferred only the legal title to lands and the future income therefrom to a trustee, leaving the beneficial title in the Indian creator of the trust, the suspension of supervision by the Secretary of the Interior or his authorized representative over the trust property is lifted and such supervision resumes as though the trust had never been made.... 452
- 2. United States Savings Bonds purchased with the income accruing from restricted Indian lands during the term of a trust agreement continue under the supervision and control of the Secretary of the Interior or his authorized representative upon termination of the trust..... 452



## INDIANS—Continued

## FISCAL AND FINANCIAL AFFAIRS—Continued

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| 3. Pursuant to conveyances of restricted Indian lands approved conditionally by county courts in Oklahoma under a trust agreement, the Secretary of the Interior or his authorized representative can suspend temporarily, during the term of the trust, supervision over the collections made of income from the restricted lands..... | 452  |

## IRRIGATION CLAIMS

(See also *Bureau of Reclamation, Eminent Domain, Reclamation Lands, Torts.*)

## DAMAGES

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| 1. Where claimants are not represented by counsel, every opportunity should be afforded them to make whatever presentation they may deem appropriate..... | 9 |
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## WATER AND WATER RIGHTS

## Seepage

- |   |     |
|---|-----|
| 2. Where seepage water from sources other than Bureau of Reclamation facilities were sufficient alone to cause damage to property, the owner thereof cannot be reimbursed from funds made available under the Public Works Appropriation Act, 1960..... | 191 |
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## MINERAL LANDS

## DETERMINATION OF CHARACTER OF

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| 1. Where land is shown to contain minerals in such limited quantities that their extraction would not justify the cost thereof, the land is not mineral in character so as to remove it from the operation of the nonmineral land laws..... | 177 |
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## MINERAL LEASING ACT

## APPLICABILITY

- |  |     |
|--|-----|
| 1. The Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C., sec. 181 <i>et seq.</i> ), applies to lands within rights-of-way granted by the United States whether they be easements or "limited fees" granted with a reservation of the minerals to the United States, except to the extent that that act has been superseded by a special leasing law applicable to such rights-of-way..... | 225 |
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## MINING CLAIMS

(See also *Multiple Mineral Development Act and Surface Resources Act.*)

## GENERALLY

- |  |     |
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| 1. A mining location may be terminated by abandonment and if a valid mining claim is abandoned, the land reverts to the public domain..... | 160 |
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## COMMON VARIETIES OF MINERALS

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|---|----|
| 2. To satisfy the requirements for discovery on a placer mining claim located for a deposit of clay, it must be shown that the clay is not only marketable at a profit but that it is not a common clay suitable only for the manufacture of ordinary brick, tile, pottery, and similar products..... | 63 |
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MINING CLAIMS—Continued

COMMON VARIETIES OF MINERALS—Continued

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- 3. A deposit of clay which contains impurities useful as flux material in the manufacture of sewer pipe but which is not of an unusual or exceptional nature is a common clay where it is clear that all common clays possess the same substances and in more or less the same degree..... 63

CONTESTS

- 4. Mining claims may be declared null and void if the claimant, who received notice of adverse charges against his claims, fails to answer the charges as required and fails to appeal from a decision holding his claims null and void, and where the claimant takes no action with respect to the claims for 25 years, the decision declaring the claims null and void is conclusive and will not be reopened if the interest of other parties under oil and gas leases issued by the United States have intervened, in the absence of a legal or equitable basis warranting reconsideration..... 160
- 5. Under the Department's rules governing Government contests against mining claims, where an answer to a complaint is filed late the allegations of the complaint will be taken as admitted by the contestee and the case decided without a hearing by the manager, and the Secretary is without authority to waive the rules to permit the late filing of the answer..... 311
- 6. Upon appeal from a decision of a hearing examiner in a contest against a mining claim, the Director of the Bureau of Land Management, and in turn the Secretary, can make all findings of fact and law based upon the record just as though each were making the decision in the first instance..... 232

DETERMINATION OF VALIDITY

- 7. Mining claims whose invalidity is demonstrated by matters of record are to be declared null and void by the manager of the land office without the necessity of further proceedings..... 69
- 8. Where the Government brings charges against a millsite claim alleging that no present use or occupation of the claim for mining purposes is being made, and a *prima facie* case is established in support of the charge, the burden shifts to the claimant to show compliance with the provisions of the statute..... 142
- 9. Mining claims may be declared null and void if the claimant, who received notice of adverse charges against his claims, fails to answer the charges as required and fails to appeal from a decision holding his claims null and void, and where the claimant takes no action with respect to the claims for 25 years, the decision declaring the claims null and void is conclusive and will not be reopened if the interest of other parties under oil and gas leases issued by the United States have intervened, in the absence of a legal or equitable basis warranting reconsideration..... 160
- 10. Where in a contest brought on an application for a mining patent it is determined that no discovery has been made on the claim, the necessary result of this determination is that the mining claim is invalid, even though the Department purports only to reject the application for patent..... 417

## MINING CLAIMS—Continued

## DETERMINATION OF VALIDITY—Continued

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| 11. There is no reasonable or logical basis for the Department's practice in some mining contests involving applications for patent to reject the application for lack of discovery on the claim but to regard the claim as being valid-----  | 417  |
| 12. This Department may declare mining claims null and void after a determination that the claims are abandoned has become final, and if, at that time, an Executive Order attaches to the land covered by the abandoned claims withdrawing it from the operation of the public land laws, further assertions of property rights in such land, except in accordance with the withdrawal order, are precluded----- | 160  |

## DISCOVERY

- |   |     |
|---|-----|
| 13. To satisfy the requirements for discovery on a placer mining claim located for a deposit of clay, it must be shown that the clay is not only marketable at a profit but that it is not a common clay suitable only for the manufacture of ordinary brick, tile, pottery, and similar products-----              | 63  |
| 14. A deposit of clay which contains impurities useful as flux material in the manufacture of sewer pipe but which is not of an unusual or exceptional nature is a common clay where it is clear that all common clays possess the same substances and in more or less the same degree-----                         | 63  |
| 15. Where in a contest brought on an application for a mining patent it is determined that no discovery has been made on the claim, the necessary result of this determination is that the mining claim is invalid, even though the Department purports only to reject the application for patent-----              | 417 |
| 16. A discovery of appreciable mineral values in a small exposure which is unrelated to other mineralization is insufficient to constitute a valid discovery of a valuable mineral deposit where other exposures on the claim show no mineral values-----   | 417 |
| 17. A mining claim is properly held null and void in the absence of evidence showing the discovery of a valuable mineral deposit which would justify a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in an effort to develop a valuable mine----- | 232 |

## HEARINGS

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| 18. A hearing is not required by departmental practice or by the requirements of due process on the rejection of an application for a patent on mining claims which, 26 years before the application was filed, were declared null and void by a default decision after notice of charges against the claims, including a charge that the claims were abandoned, and an opportunity for a hearing thereon were given the record title owner of the claims----- | 160 |
| 19. Mining claimants who assert that placer claims within the boundaries of the Navajo reservations are not on Indian land because they are relocations of old locations which were excluded from the reservation will be afforded an opportunity to present evidence of the facts upon which they rely to exclude the claims from the reservation-----  | 182 |

MINING CLAIMS—Continued

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20. Mining claims are null and void where the claims are located after December 31, 1952, and prior to February 10, 1954, on lands then in outstanding oil and gas leases and the requirements of the act of August 13, 1954, under which the claims might have been validated, were not met.....	69
21. Land embraced in an oil and gas prospecting permit becomes subject to mineral location, all else being regular, as soon as the permit expires and not only when the notation of the expiration of the permit is made.....	69
22. In view of the Department's regulation that lands classified as suitable for disposition under the Small Tract Act shall be segregated from all appropriation, including locations under the mining laws, mining claims located on lands earlier classified as suitable for disposition as small tracts are invalid.....	259
23. Notices of the location of mining claims on lands covered by lease issued under the Recreation and Public Purposes Act are properly rejected because such lands are not subject to mining location until the Secretary of the Interior has adopted regulations permitting disposition of minerals under the mining laws on such lands.....	132
<b>MILL SITES</b>	
24. A vague intention to use or occupy land embraced in a millsite claim for mining or milling purposes at some time in the future is not sufficient to comply with the requirements of section 2337 of the Revised Statutes for obtaining a millsite.....	141
25. A millsite claim is properly declared invalid where the claim is not occupied or used for mining or milling purposes.....	141
26. Where the Government brings charges against a millsite claim alleging that no present use or occupation of the claim for mining purposes is being made, and a <i>prima facie</i> case is established in support of the charge, the burden shifts to the claimant to show compliance with the provisions of the statute.....	142
27. Where land located as a millsite is not being used for mining and milling purposes at the time a patent for it is applied for, the applicant must show occupation by improvement or otherwise sufficient to evidence an intended use of the claim in good faith for mining and milling purposes and where the only improvement on a claim is an excavation useful only if a projected mill is built on adjoining claim, the requirement of the statute has not been met.....	142
<b>PATENT</b>	
28. Where in a contest brought on an application for a mining patent it is determined that no discovery has been made on the claim, the necessary result of this determination is that the mining claim is invalid, even though the Department purports only to reject the application for patent.....	417

## MINING CLAIMS—Continued

## POSSESSORY RIGHT

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|--|------|
|  | Page |
| 29. After location of a mining claim but prior to discovery, a mining claimant has no rights as against the United States but is a mere licensee or tenant at will; he acquires a right of exclusive possession as against the United States, which is property in the fullest sense of the word, only after making a discovery----- | 417  |

## POWER SITE LANDS

- |   |     |
|---|-----|
| 30. A notice of location of a placer mining claim filed pursuant to section 4 of the Mining Claims Rights Restoration Act is not to be rejected because the person filing it has not submitted proof of ownership of the claim since neither the statute nor regulations require that such proof be submitted at the time of filing; but before the filing is accepted the person may be required to submit a showing that he is the owner of the claims or authorized to make the filing on behalf of the owner----- | 181 |
| 31. The Department accepts the decision of the United States District Court in <i>MacDonald v. Best</i> holding that the Mining Claims Rights Restoration Act of 1955 does not provide for, or authorize, the forfeiture of mining claims located on powersite lands for failure of the claimant to file a copy of his notice of location in the land office within the time specified in the set-----  | 366 |

## SPECIAL ACTS

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| 32. Mining claims are null and void where the claims are located after December 31, 1952, and prior to February 10, 1954, on lands then in outstanding oil and gas leases and the requirements of the act of August 13, 1954, under which the claims might have been validated, were not met-----  | 69  |
| 33. The Department accepts the decision of the United States District Court in <i>MacDonald v. Best</i> holding that the Mining Claims Rights Restoration Act of 1955 does not provide for, or authorize, the forfeiture of mining claims located on powersite lands for failure of the claimant to file a copy of his notice of location in the land office within the time specified in the act----- | 366 |

## SURFACE USES

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| 34. The statutory requirement for mailing by registered mail of a copy of the published notice described in section 5 of the act of July 23, 1955, to a mining claimant is met by the mailing of the notice by registered mail to his address of record and it is immaterial that he may not have personally received the notice because he did not live at the address----- | 289 |
| 35. A verified statement required under the act of July 23, 1955, is properly rejected and the use of the surface resources denied to a mining claimant who files such statement after the termination of the period of 150 days prescribed by the statute for such filing--   | 288 |

## TITLE

- |   |  |
|---|--|
| 36. An applicant for patent to mining claims can hardly claim to be a bona fide purchaser for value of the claims when prior to and at the time of his purchase the public records of the Department show that the claims had been declared null and void and the applicant's own abstract of title shows entries on the county |  |
|---|--|

**MINING CLAIMS—Continued**

**TITLE—Continued**

records of issuance by the United States of an oil and gas lease on part of the land in the claims and of a patent on another part of the land-----

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**WITHDRAWN LAND**

37. Mining claimants who assert that placer claims within the boundaries of the Navajo reservation are not on Indian land because they are relocations of old locations which were excluded from the reservation will be afforded an opportunity to present evidence of the facts upon which they rely to exclude the claims from the reservation-----

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38. This Department may declare mining claims null and void after a determination that the claims are abandoned has become final, and if, at that time, an Executive Order attaches to the land covered by the abandoned claims withdrawing it from the operation of the public land laws, further assertions of property rights in such land, except in accordance with the withdrawal order, are precluded-----

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**MULTIPLE MINERAL DEVELOPMENT ACT**

**VERIFIED STATEMENT**

1. Where a statement filed pursuant to section 7 of the act of August 13, 1954, does not on its face show that it was sworn to, yet in fact it was sworn to, the fact that the oath was administered may be shown by evidence outside the record-----

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2. The signature of a corporate officer to a verification of a statement filed pursuant to section 7 of the act of August 13, 1954, or the corporate seal stamped on each page of the statement is a sufficient signature to the statement, if a signature is necessary-----

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3. Where an officer of a corporation filing a statement pursuant to section 7 of the act of August 13, 1954, subscribes his signature to a statement that he is making the statement under oath and a notary public signs and seals an acknowledgement of the officer's signature, the statement is considered to have been made under oath and thus verified-----

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4. The verified statement filed by a mining claimant pursuant to section 7 of the act of August 13, 1954, must be under oath-----

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**NATIONAL PARK SERVICE AREAS**

**LAND**

**Use**

1. In determining the question of delay, or excuse for delay, by the City and County of San Francisco in its construction of the water power system permitted by the Raker Act in Yosemite National Park Stanislaus National Forest, the City's operations since the passage of the Act must be examined because the United States is not bound by laches or neglect of duty on the part of its officers and agents-----

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## NOTICE

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1. The statutory requirement for mailing by registered mail of a copy of the published notice described in section 5 of the act of July 23, 1955, to a mining claimant is met by the mailing of the notice by registered mail to his address of record and it is immaterial that he may not have personally received the notice because he did not live at the address----- 289
2. A junior offeror for an oil and gas lease is not entitled as a matter of right to notice of actions taken on a prior offer----- 298

## OIL AND GAS LEASES

## GENERALLY

1. A junior offeror for an oil and gas lease is not entitled as a matter of right to notice of actions taken on a prior offer----- 298
2. An applicant for an oil and gas lease has the duty of keeping the Department informed of an address at which communications from the Department concerning the offer will reach him and if he fails to do so, rendering it impossible for the Department to send him a lease, he will be considered to have abandoned his offer----- 305
3. Although the term "primary term" used in the Mineral Leasing Act to apply to a non-competitive oil and gas lease ordinarily means the initial term of years as set forth in the lease, the legislative history of section 4(d) of the Mineral Leasing Act Revision of 1960, is such as to require the conclusion that, as there used, it means all periods in the life of the lease prior to its extension by reason of the production of oil and gas in paying quantities----- 357

## ACQUIRED LANDS LEASES

4. Acquired lands oil and gas lease applications will not be rejected for failure to comply with a requirement added to the public land leasing regulations if it is doubtful whether the amendment of the public land leasing regulations which added the requirement also applied to acquired lands applications----- 203
5. An acquired lands lease offer for land in which the United States owns only a fractional interest in the minerals may be allowed where the acreage applied for exceeds 2,560 acres but the excess is not more than 10 percent over 2,560 acres----- 385
6. An acquired lands lease offer for land in which the United States owns only a fractional interest in the minerals is defective if it is not accompanied by a statement as to ownership of operating rights in the interest not owned by the United States, and the offer confers no priority upon the applicant until such time as the statement is filed----- 385
7. An offer to lease lands for oil and gas which covers lands in excess of 2,560 acres by less than 10 percent will not be rejected with loss of priority where the offeror mistakenly thought that his offer was within the acreage limitation because the United States owned only a 75 percent interest in the oil and gas----- 385
8. An application for an acquired lands oil and gas lease is improperly rejected where the applicant does not accompany his application with a statement as to whether he is the sole party in interest, as required for a public land lease offer----- 203

**OIL AND GAS LEASES—Continued**

**ACREAGE LIMITATIONS**

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- 9. An acquired lands lease offer for land in which the United States owns only a fractional interest in the minerals may be allowed where the acreage applied for exceeds 2,560 acres but the excess is not more than 10 percent over 2,560 acres----- 385
- 10. Under the former Departmental regulation governing acreage limitations, an offeror holding excess acreage at the time of filing an offer was entitled to 30 days within which to reduce his holdings and if he did so within that time his offer did not lose priority as of the time of filing----- 209

**APPLICATIONS**

- 11. An application for an acquired lands oil and gas lease is improperly rejected where the applicant does not accompany his application with a statement as to whether he is the sole party in interest, as required for a public land lease offer----- 203
- 12. An oil and gas lease offer is properly rejected where the land applied for is covered by outstanding leases even though such leases may have been improperly extended----- 139
- 13. A joint oil and gas lease offer signed by only one of the offerors is incomplete and must be rejected in its entirety; it cannot be considered as the individual offer of the one signing----- 223
- 14. The manager of a land office has no duty or authority to ignore any portion of an oil and gas lease offer in order to regard it as a valid offer----- 223
- 15. Where a lease is issued on unsurveyed land pursuant to an application which partially conflicted with a prior lease and the subsequent lease omitted part of the land applied for which did not conflict with the prior lease, thus creating a hiatus between the two leases, and where the hiatus can be closed by adding to the description in the subsequent lease a metes and bounds description of the land in the hiatus, the subsequent lease will be so amended. Where leases for unsurveyed land partially conflict with outstanding leases based upon prior offers and the conflict can be eliminated by excepting the areas in conflict from the descriptions in the subsequent leases, the subsequent leases are properly canceled as to the area in conflict by excepting that area from the lands included in the subsequent leases----- 241
- 16. The first applicant for an oil and gas lease acquires no vested right to have a lease issued to him but only a right to be preferred over other applicants if a lease is to be issued, and his offer is properly rejected if the land applied for is subsequently withdrawn from mineral leasing----- 315
- 17. An applicant for an oil and gas lease has the duty of keeping the Department informed of an address at which communications from the Department concerning the offer will reach him and if he fails to do so, rendering it impossible for the Department to send him a lease, he will be considered to have abandoned his offer----- 305
- 18. When an oil and gas lease offer is improperly excluded from a drawing to determine the priority of conflicting, simultaneously-filed offers, a new drawing must be held----- 209



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19. Under the former departmental regulation governing acreage limitations, an offeror holding excess acreage at the time of filing an offer was entitled to 30 days within which to reduce his holdings and if he did so within that time his offer did not lose priority as of the time of filing.....	209
20. An offeror who files less than the required 5 copies of his offer retains priority of filing if he files the requisite number of copies within 30 days.....	209
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49. The Department's supplemental decision in Franco-Western Oil Company et al., 65 I.D. 427, is adhered to.----- 362

50. Where the holder of an undivided interest in an oil and gas lease which is in its extended term by reason of production assigns his interest as to a portion of the leased land, the lease is not segregated into separate leases with the consequence that the lease as to the assigned portion is deemed terminated because it does not include a producing well.----- 404

51. An assignment of less than the whole interest in a portion of the acreage included in an oil and gas lease at one time is not a partial assignment of the lease within the meaning of section 30(a) of the Mineral Leasing Act and does not segregate the lease into separate leases.----- 404

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lation governing definitions of known geologic structures has never required the preparation of maps or diagrams of the undefined structures-----

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| 74. Where the holder of an undivided interest in an oil and gas lease which is in its extended term by reason of production assigns his interest as to a portion of the leased land, the lease is not segregated into separate leases with the consequence that the lease as to the assigned portion is deemed terminated because it does not include a producing well----- | 404 |

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| 3. An applicant for a potash permit is properly required to comply with requirements for paying rental and submitting a bond although the requirements were not in effect at the time he filed his application, and a permittee whose application was filed before the adoption of such requirements but who was issued a permit thereafter without compliance with the requirements is properly required to comply with the requirements or suffer cancellation of his permit..... | 448 |
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| 3. An appeal to the Director is properly dismissed where the statement of reasons needed to perfect the appeal was filed by one who is not authorized to practice before the Department.....  | 321 |

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3. When a regulatory provision governing public land oil and gas lease offers is amended by adding requirements in a new subsection to the provision, and the provision to which the subsection is added is not applicable to acquired lands oil and gas lease offers, but the additional requirements included in the amendment of the public land regulation are intended to be applicable to both public and acquired lands oil and gas lease offers, then not only the public land regulation, but also the corresponding acquired lands regulation should be expressly amended by adding the same requirements to the acquired lands regulation..... 203

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4. Oil and gas lease offers which do not comply with the mandatory requirements of the regulations must be rejected without priority, and in offeror's unfamiliarity with new requirements which are not referred to in the oil and gas lease offer form required to be used by applicants is no basis for allowing oil and gas lease offers which do not comply with a recently adopted regulation for filing an offer..... 400

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5. Under the Department's rules governing Government contests against mining claims, where an answer to a complaint is filed late the allegations of the complaint will be taken as admitted by the contestee and the case decided without a hearing by the manager, and the Secretary is without authority to waive the rules to permit the late filing of the answer..... 311

## RIGHTS-OF-WAY

(See also *Indian Lands, Outer Continental Shelf Lands Act, Reclamation Lands*)

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2. The Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C., sec. 181 *et seq.*), applies to lands within rights-of-way granted by the United States whether they be easements or "limited fees" granted with a reservation of the minerals to the United States, except to the extent that that act has been superseded by a special leasing law applicable to such rights-of-way.... 225

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| 1. Board of Contract Appeals decisions are final for the Department. Hence, request for reconsideration is unnecessary to exhaust administrative remedies.....   | 21 |
| 2. Where notice of a decision of the manager of a land office is sent by certified mail to the address of record of the party adversely affected by the decision and the notice is returned marked "Unknown," the party is considered to have been constructively served with notice of the decision where the address of record was a post office box and the Department is informed that the party was not known at that address or authorized by the renter of the box to receive mail therein..... | 40 |

## APPEALS

## Generally

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| 3. Upon appeal from a decision of a hearing examiner in a contest against a mining claim, the Director of the Bureau of Land Management, and in turn the Secretary, can make all findings of fact and law based upon the record just as though each were making the decision in the first instance..... | 232 |
| 4. There is no further right of appeal to the Secretary from a decision of the Solicitor or Deputy Solicitor issued pursuant to a delegation of authority from the Secretary to decide appeals to the Secretary.....  | 366 |

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| 5. An appeal to the Director of the Bureau of Land Management under the Federal Range Code for Grazing Districts is properly dismissed where the appeal is not filed in the Office of the Director within 30 days after service of the hearing examiner's decision on the appellant.....   | 4   |
| 6. Where a person who is not authorized to practice before the Department takes an appeal to the Secretary on behalf of another and both have been informed in the decision appealed from of the requirements for practice before the Department, the appeal will be dismissed.....  | 321 |
| 7. An appeal to the Director is properly dismissed where the statement of reasons needed to perfect the appeal was filed by one who is not authorized to practice before the Department.....   | 321 |
| 8. A motion by the Government for dismissal of an appeal on the grounds that the contractor failed to give timely written notices of protests as required by the contract, will be denied, where the appellant has raised issues of fact as to timeliness of such notices, and as to prior actual knowledge of the protested matters and partial action thereon by the contracting officer's representative..... | 396 |

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## APPEALS—Continued

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| 10. One who fails to appeal from the rejection of an oil and gas lease offer is not entitled to reinstatement of the application with priority over an intervening applicant, even though the rejection was erroneous.....  | 40   |

## Hearings

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| 11. Where the parties to an appeal agree to submit the matter in dispute for decision by the IBCA on depositions and without a hearing, the Board will normally grant an order permitting such submission with depositions, pursuant to Appendix A of the Rules of the Armed Services Board of Contract Appeals, since the IBCA does not have express formal rules on such matters.....   | 365 |
| 12. It is recommended that a hearing be held to ascertain all the facts in regard to delay, or excuse for any delay, by the City and County of San Francisco in constructing the system permitted by the Raker Act. Two questions to be considered at the hearing are whether any delay caused by (1) the fact of eight unsuccessful bond issues; or (2) by the events culminating in the decision of the United States Supreme Court in <i>United States v. San Francisco</i> , 310 U.S. 16 (1939), and in <i>City and County of San Francisco v. United States</i> , 223 F. 2d, 737 (9 Cir. 1955), can be considered as excusing, as the case may be, (a) cessation of construction of every integral and essential part of the system for three consecutive years—the “3 year rule,” or (b) delay in constructing any integral and essential part of the system—the “diligence rule.” The City and other participants in the hearing will be expected to direct themselves to these issues in their briefs or comments made after the hearing..... | 323 |

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| 16. An appeal to the Director of the Bureau of Land Management is properly dismissed when the statement of reasons for the appeal is not filed with the notice of appeal and is later filed in the land office within the extension of time granted by the Director, but is forwarded to the Director after the expiration of such time and is received in the office of the Director within the period allowed by the grace provision of the rules of practice since the deposit of the document in the manager's office cannot be construed as a transmission of the document to the Director..... | 220  |

## EVIDENCE

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| 17. When specifications for the construction of laterals and wasteways did not provide for the construction of the same by the so-called economic grade method and the Government has failed to bear the burden of proving by a preponderance of the evidence that the contractor voluntarily adopted this method as its own, the contractor is entitled to additional compensation to offset the increased costs of any reexcavation or lateral shoulder excavation which was involved in the construction of the laterals and wasteways by the economic grade method.....  | 44  |
| 18. A manufacturer of a shunt reactor which failed upon being energized after installation has the burden of proving that the failure was attributable to a fault of the Government which was the purchaser, when the preliminary tests of the reactor at the factory were not made entirely as required by the specifications, and final acceptance of the reactor was under the specifications subject to further testing and a period of satisfactory operation after installation. However, even if the Government has the burden of proving the probable cause of the failure of the reactor, this need be established only by a clear preponderance of the evidence, and the Government has succeeded in showing that the most probable cause of the reactor's failure was a defective weld..... | 100 |
| 19. Where a contractor claims that, absent a strike, supplies would have been delivered to it on a certain date by its subcontractor or supplier, but no evidence is submitted showing that supplies could have been so delivered, the hypothetical delivery date alleged by the contractor will be disregarded for the purpose of establishing the commencement of the period of excusable delay caused by the strike.....  | 344 |
| 20. Allegations of fact made by a contractor that are contrary to findings of fact made by the contracting officer cannot be accepted as proof of the facts thus put in dispute.....   | 267 |

## RULES OF PRACTICE—Continued

## EVIDENCE—Continued

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| 21. The fact that a grazing licensee has repeatedly been assessed and has paid damages for prior grazing trespasses may be considered in determining whether the most recent trespass was willful..... | 145 |
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## GOVERNMENT CONTESTS

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| 22. Upon appeal from a decision of a hearing examiner in a contest against a mining claim, the Director of the Bureau of Land Management, and in turn the Secretary, can make all findings of fact and law based upon the record just as though each were making the decision in the first instance.....   | 232 |
| 23. Under the Department's rules governing Government contests against mining claims, where an answer to a complaint is filed late the allegations of the complaint will be taken as admitted by the contestee and the case decided without a hearing by the manager, and the Secretary is without authority to waive the rules to permit the late filing of the answer..... | 311 |

## HEARINGS

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| 24. Where a party desiring to inspect departmental records neither follows the procedure set up in the applicable regulation nor requests the hearing examiner to issue a subpoena for them, it is proper for the hearing examiner to refuse to dismiss grazing trespass charges on the ground that the party was denied an opportunity to inspect the records..... | 145 |
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## PRIVATE CONTESTS

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| 25. Where a relinquishment of a homestead entry and an affidavit of contest against the same entry are filed simultaneously, the latter must be dismissed because the relinquishment takes effect immediately, extinguishes the entry, and leaves the contest nothing upon which to act.....   | 136 |
| 26. Where a relinquishment of an entry is filed after an affidavit of contest has been filed against the same entry but before the entryman has been given actual or constructive notice of the contest, it is to be conclusively presumed that the relinquishment was caused by the contest unless it can be shown that the affidavit of contest was not good and sufficient, that the contest charge was not true, that the contestant was not a qualified applicant, or that the land is not subject to the contestant's application..... | 136 |

## SUPERVISORY AUTHORITY OF SECRETARY

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| 27. In the exercise of his supervisory authority, the Secretary of the Interior may reopen any case affecting public lands so long as the land remains under his jurisdiction..... | 366 |
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## SCHOOL LANDS

## INDEMNITY SELECTIONS

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| 1. The authority conferred upon the Secretary of the Interior by section 7 of the Taylor Grazing Act to classify public lands as proper for disposition imposes upon him the responsibility of determining whether the public interest would be served by classifying certain land as suitable for disposition pursuant to a State school indemnity selection..... | 85 |
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**SCHOOL LANDS—Continued****INDEMNITY SELECTIONS—Continued**

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| 2. The filing by a State of a school indemnity selection does not vest in the State an interest in the selected lands which deprives the Secretary of his authority to classify the land as not suitable for State selection..... | 85   |

**SECRETARY OF THE INTERIOR**

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| 1. Section 6 of the act of February 28, 1958, did not diminish the authority of the Secretary of the Interior to withdraw public lands under his control and jurisdiction from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, for the benefit of the Department of Defense.....   | 195 |
| 2. Upon termination of the trust, which had transferred only the legal title to lands and the future income therefrom to a trustee, leaving the beneficial title in the Indian creator of the trust, the suspension of supervision by the Secretary of the Interior or his authorized representative over the trust property is lifted and such supervision resumes as though the trust had never been made..... | 452 |
| 3. United States Savings Bonds purchased with the income accruing from restricted Indian lands during the terms of a trust agreement continue under the supervision and control of the Secretary of the Interior or his authorized representative upon termination of the trust.....   | 452 |
| 4. Pursuant to conveyances of restricted Indian lands approved conditionally by county courts in Oklahoma under a trust agreement, the Secretary of the Interior or his authorized representative can suspend temporarily, during the term of the trust, supervision over the collections made of income from the restricted lands.....  | 452 |

**SMALL TRACT ACT****CLASSIFICATION**

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| 1. In view of the Department's regulation that lands classified as suitable for disposition under the Small Tract Act shall be segregated from all appropriation, including locations under the mining laws, mining claims located on lands earlier classified as suitable for disposition as small tracts are invalid..... | 259 |
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**SOLDIERS' ADDITIONAL HOMESTEADS****GENERALLY**

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| 1. There is no requirement that an application for soldiers' additional homestead entry be rejected on the ground that an Alaskan Indian claimed the land under an allotment application which was filed after the soldiers' additional application was filed where it appears that when the soldiers' additional application was filed, the land was not occupied either by the allotment applicant or by other Alaskan Indians, Aleuts, or Eskimos; and a decision improperly rejecting a soldiers' additional application in such circumstances will be set aside..... | 410 |
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## STATUTORY CONSTRUCTION

## GENERALLY

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1. Assuming, without deciding, that the Canyon Tunnel Aqueduct is an integral and essential part of the system, the fact that the City and County of San Francisco caused no work to be done on the aqueduct, and intended to do none for many years subsequent to passage of the Act, does not permit a declaration of forfeiture, by reason of the three year cessation rule, unless there was a cessation of construction on every integral and essential part of the system, at the same time, for a period of three consecutive years----- 323
2. A statute which purports to ratify a cession agreement by which Indian tribes "\* \* \* hereby cede, convey, transfer, relinquish and surrender forever without any reservation, express or implied \* \* \*" operates to extinguish completely the Indian title to the lands involved; and a subsequent reservation of a portion of those lands by the Secretary of the Interior for school and agency purposes for the benefit of the Indians does not revest title in the tribes----- 10
3. Assuming, without deciding, that the Canyon Tunnel Aqueduct is an integral and essential part of the system, section 5 of the Raker Act permits a declaration of forfeiture even if there has been no consecutive three-year break in the construction of the whole system, if the facts show that the delay in constructing a particular integral and essential part of the system is not reasonable under all the circumstances----- 323

## SURFACE RESOURCES ACT

## APPLICABILITY

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## VERIFIED STATEMENT

2. A verified statement required under the act of July 23, 1955, is properly rejected and the use of the surface resources denied to a mining claimant who files such statement after the termination of the period of 150 days prescribed by the statute for such filing-- 288
3. The statutory requirement for mailing by registered mail of a copy of the published notice described in section 5 of the act of July 23, 1955, to a mining claimant is met by the mailing of the notice by registered mail to his address of record and it is immaterial that he may not have personally received the notice because he did not live at the address----- 289

## SURVEYS OF PUBLIC LANDS

## GENERALLY

1. Where an order withdrawing a tract of unsurveyed land from entry gives the line of mean high tide of a branch of an inlet as one of the boundaries of the withdrawn area, the meander line which is run in surveying the area in accordance with the mean high water line is to be regarded as the equivalent of the line of mean high tide in establishing the littoral boundary of the withdrawn area... 237



**TAYLOR GRAZING ACT****CLASSIFICATION**

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| 1. The authority conferred upon the Secretary of the Interior by section 7 of the Taylor Grazing Act to classify public lands as proper for disposition imposes upon him the responsibility of determining whether the public interest would be served by classifying certain land as suitable for disposition pursuant to a State school indemnity selection..... | 85   |

**TIMBER SALES AND DISPOSALS**

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| 1. A corporation whose president is also the president of another corporation which has been found guilty of timber trespass is properly required to post the bond of the president and the trespassing corporation as a condition precedent to the execution by the United States of a contract for the sale of timber on Oregon and California Railroad lands to the first corporation..... | 245 |
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**TRESPASS****GENERALLY**

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| 2. Where grazing privileges are reduced for grazing trespass, the reduction attaches to the base property and not only to the trespasser's grazing privileges.....                                   | 145 |

**MEASURE OF DAMAGES**

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| 3. An offer to pay monetary damages in lieu of a reduction of grazing privileges imposed for a willful trespass will be rejected because the Federal Range Code does not provide for monetary penalties and the reduction of grazing privileges is a more suitable punishment for the willful trespass committed..... | 145 |
| 4. A grazing licensee who repeatedly and willfully grazes his cattle and horses in trespass upon the public domain is properly subjected to disciplinary action consisting of assessment of damages and reduction of the grazing privileges of his base property.....   | 145 |
| 5. A grazing licensee who repeatedly and willfully grazes his cattle and horses in trespass upon the public domain is properly subjected to disciplinary action consisting of assessment of damages and suspension of the grazing privileges of his base property.....  | 116 |

**WITHDRAWALS AND RESERVATIONS****AUTHORITY TO MAKE**

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| 1. The President of the United States has inherent authority to withdraw public lands for public purposes apart from the statutory authority vested in him by the act of June 25, 1910, and such inherent authority is not subject to the restrictions which attend his statutory authority..... | 217 |
| 2. The President of the United States has inherent authority to withdraw public land for public purposes apart from the statutory authority vested in him by the act of June 25, 1910.....   | 315 |

WITHDRAWALS AND RESERVATIONS—Continued

AUTHORITY TO MAKE—Continued

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- 3. Section 6 of the act of February 28, 1958, did not diminish the authority of the Secretary of the Interior to withdraw public lands under his control and jurisdiction from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, for the benefit of the Department of Defense----- 195

EFFECT OF

- 4. A statute which purports to ratify a cession agreement by which Indian tribes “\* \* \* hereby cede, convey, transfer, relinquish and surrender forever without any reservation, express or implied, \* \* \*” operates to extinguish completely the Indian title to the lands involved; and a subsequent reservation of a portion of those lands by the Secretary of the Interior for school and agency purposes for the benefit of the Indians does not revert title in the tribes----- 10
- 5. A withdrawal of public land made pursuant to the inherent authority vested in the President is a complete bar to mining location in the absence of express consent to mining location, whereas a withdrawal made pursuant to the authority bestowed upon the President by the act of June 25, 1910, is subject to mining location, entry, and patent for metalliferous minerals----- 217

RECLAMATION WITHDRAWALS

- 6. A petition for the restoration to mineral entry of land withdrawn for reclamation purposes and as a part of the Imperial National Wildlife Refuge is properly denied even though the Bureau of Reclamation has no objections to such restoration when mining operations would interfere with the purpose for which the wildlife refuge was established----- 217

REVOCATION AND RESTORATION

- 7. The authority provided by section 3 of the Indian Reorganization Act to restore lands to tribal ownership extends to former tribal lands of an Indian reservation where, by legislation enacted subsequent to the extinguishment of Indian title, a tribal interest has been created in the proceeds derived from the sale of such lands... 11
- 8. A petition for the restoration to mineral entry of land withdrawn for reclamation purposes and as a part of the Imperial National Wildlife Refuge is properly denied even though the Bureau of Reclamation has no objections to such restoration when mining operations would interfere with the purpose for which the wildlife refuge was established----- 217

WORDS AND PHRASES

- 1. *Occupied.* The word “occupied,” as used in the Alaskan Allotment Act granting a preference right of allotment of lands occupied in good faith by Alaskan Indians, Aleuts, or Eskimos, and also as used in the regulation (43 CFR 67.11) precluding entry on lands occupied in good faith by Alaskan Indians, Aleuts, or Eskimos, means actual possession and use of land in something more than a slight and sporadic manner----- 410